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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

KRISTINA GAVELLO, et al.,
Plaintiffs and Appellants,
v.
BERNARD MILLMAN, M.D.,
Defendant and Appellant.

A132291

(San Francisco County
Super. Ct. No. CGC-09-485616)

I. INTRODUCTION

Gary Gavello, a 63-year-old father of three young children, died a few days after undergoing surgery. A jury determined that Gavello's anesthesiologist, Dr. Bernard Millman, was negligent and 20 percent responsible for Gavello's death. The jury also determined that Gavello's wife and children (plaintiffs) suffered \$2,977,830.50 in economic damages and \$1 million in non-economic damages. The trial court capped non-economic damages at \$250,000, pursuant to Civil Code section 3333.2 (section 3333.2), a provision of the Medical Injury Compensation Reform Act (MICRA), and it also reduced the economic damages award to account for a prior settlement with Gavello's surgeon. The resulting judgment awarded plaintiffs \$2,105,330.50, plus costs and prejudgment interest.

On appeal, Millman contends that the trial court committed reversible error by refusing to instruct the jury to consider whether intentional or criminal conduct by the nurse who provided Gavello's post-operative care was a superseding cause of Gavello's

death.¹ Pursuant to a cross-appeal, plaintiffs contend that section 3333.2 is unconstitutional and, even if the MICRA cap on non-economic damages is lawful, the trial court miscalculated the amount of damages that plaintiffs may recover from Millman. We reject all of these contentions and affirm the judgment.

II. STATEMENT OF FACTS

A. *Gary Gavello's Surgery and Death*

On August 18, 2008, Gary Gavello underwent cosmetic surgery to obtain a face lift. Dr. Donald Brown performed Gavello's surgery at Brown's ambulatory surgery facility, which is located in a medical building adjacent to California Pacific Medical Center. Dr. Brown anticipated that the procedure would take nine hours, and the plan was for Gavello to spend the night recovering at the facility under the supervision of Brown's overnight staff, a registered nurse named Tina Engle, and a nursing assistant named Carina Flores. Dr. Millman, who often worked with Dr. Brown and Nurse Engle, was the anesthesiologist for Gavello's surgery.

On the morning of the surgery, Dr. Millman met Gavello, obtained his consent to administer anesthesia medications, and performed a physical examination. Gavello was in good physical health. Prior to the surgery, Gavello obtained a cardiac clearance from his cardiologist, who reported that he had a bradycardia, a slow heart rate due to his athletic condition. He also had low normal blood pressure.

At 9:15 a.m., Dr. Millman began to administer medications; he gave Gavello Valium and Clonidine by mouth. At 9:40, a sedative medication called Versed was administered intravenously. At 10:00, Millman administered a set of general anesthesia medications (Lidocaine, Propofol and Fentanyl) that rendered Gavello unconscious, after which he was placed on an inhaled anesthetic called Isoflorane. During the course of the surgery, Millman administered Ephedrine two or three different times when Gavello's blood pressure dropped too low. Because of ongoing concern about the low blood

¹ Millman filed two other appeals from post-judgment orders in this case, which we consolidated with this appeal. However, he subsequently dismissed them both.

pressure, Millman did not give Gavello any narcotics for pain. Near the end of the surgery, Millman administered Droperidol and Metoclopramide to prevent nausea. Dr. Brown completed the surgery shortly after 6:00 p.m., without encountering any complications.

At 6:30 p.m., Millman removed Gavello's breathing tube and replaced it with oral and nasal "airways" to assist the breathing process because Gavello was still not conscious. By that time, Nurse Engle had arrived for her overnight shift and was assisting with Gavello's care. While she was in the operating room, Engle reviewed Gavello's chart which contained a standard set of the post-op orders that Brown and Millman had created for the care of Brown's plastic surgery patients. The orders consisted of a list of potential symptoms, including nausea, pain, high blood pressure and restlessness, each accompanied by options for medications and dosages to address those symptoms.² Engle asked Millman about his preferences for medications for Gavello and Millman told her to give Demerol for pain and Thorazine for restlessness.

At 6:55 p.m., Gavello was transferred to the recovery room. He was not talking or opening his eyes, but he became agitated and was moving too much for a person who had just undergone facial surgery. Millman and Engle could not calm Gavello with their touch or words of assurance. By 7:15, Gavello was so combative that Millman had to hold him down. Gavello may have been in pain, but there was no way to know since he was not talking or opening his eyes. Although this was not a minor development, it was not unheard of in Millman's experience. He instructed Engle to give Gavello an intramuscular injection of Thorazine. In his 30 years of practice, Millman has prescribed

² The function of the post-op orders was to provide the anesthesiologist's authorizations for the administration of post-operative recovery medications. The orders did not include information, warnings or directions about the consequences of mixing medications. The nurse was instructed that if she had questions about medications or the patient's care, she should contact Dr. Millman first and then Dr. Brown. The reason that Millman was listed as the first contact was because the anesthesiologist was primarily responsible for supervising the giving of medication during the post-op recovery period.

Thorazine post-operatively to less than 1 percent of his patients.³ Millman expected the medication to start working in 5 to 10 minutes, to reach peak effect in 30-40 minutes, and to last three to four hours.

At 7:35 p.m., Dr. Millman went home. Although Gavello's restlessness had subsided, his respiratory rate had not returned to normal, he had not been able to talk and he had not yet opened his eyes. In Millman's view, Gavello had emerged from the anesthesia in the sense that he had been moving around. Engle testified at trial, however, that Gavello was still unconscious when Millman left the facility; he had not opened his eyes or spoken any words and, although he had moved, she had not observed any purposeful movement or purposeful response to questions or commands.

Before Millman left the facility, he did not discuss Gavello's status or condition with Dr. Brown or Carina Flores. At trial, Millman testified that he did not give Engle any verbal instructions regarding Gavello's care, other than to note that Gavello had a bradycardia due to his athletic condition. Engle testified that, before Millman left the facility, he reiterated his prior instructions to give Gavello Demerol for pain and Thorazine for restlessness.

At 8:00 p.m., Dr. Brown went home. Before his departure, Brown had been told that Gavello had been restless, agitated and thrashing about. In Brown's experience, post-op restlessness was uncommon, but not unheard of. Brown testified at trial that, when he checked on Gavello before he left the facility, Gavello was coming out of the anesthesia. However, Brown admitted that Gavello did not speak, and Brown could not recall Gavello making any movements at all.

At 8:10 p.m., Gavello had become restless again. He was moving around, turning toward his side, scrunching down in the bed and moving his head from side to side, which was "not good as far as bleeding control." Engle then administered another dose

³ Thorazine is not a narcotic; it does not treat pain. It is an antipsychotic drug that was developed to treat schizophrenia. Thorazine can cause respiratory depression which cannot then be reversed with some other medication. Thorazine also prolongs and intensifies the actions of central nervous system depressants, anesthetics and narcotics.

of Thorazine by an I.V. push. Initially, Gavello appeared to become more comfortable. But then he started to pull on the tubes again, turned toward his side and scrunched even further down in the bed. When Engle asked if Gavello was in pain, she felt as though he may have squeezed her hand. At 8:20, Engle gave Gavello Demerol because the Thorazine had not helped the restlessness and it appeared that Gavello was experiencing pain.

During the following hour, Gavello appeared to be fairly comfortable. There were brief periods of minor restlessness, but it appeared to Engle that the Demerol was working. Although there were a couple of instances of moaning or grimacing, Gavello did not speak or open his eyes. In Engle's opinion, Gavello remained unconscious for this entire period. At trial, Engle testified that Millman had left her to care for an unconscious patient in the past, but she was impeached with prior deposition testimony during which she admitted that she could not recall any specific occasion when Millman left her with an unconscious patient other than Mr. Gavello.

At around 9:20 p.m., both doctors called the facility to check on Gavello's condition; while Engle was talking to Millman on one line, Brown called and Flores answered the other line. Engle told Millman that Gavello had become restless earlier and was experiencing pain and that she gave him Thorazine and Demerol. She then put Millman on hold while she talked to Dr. Brown. Engle updated Brown and also told him that she had administered Thorazine and Demerol. After talking with Brown, Engle finished up her conversation with Millman and, right after she hung up the phone, the monitor in the recovery room began to beep.

Engle and Flores rushed to the recovery room where Gavello looked pale. Engle checked for signs of breathing and started to shake Gavello but there was no response. The pulse oximeter showed two blank lines and the blood pressure monitor was not giving a reading. Engle commenced CPR and instructed Flores to call 911. She tried to administer oxygen, but the tanks were either empty or not functioning. Engle also tried to use an "Ambu Bag" to assist with rescue breathing, but she testified that she could not

get the bag to “provide a good seal” and she was never able to resuscitate Gavello.⁴ Flores took over CPR and Engle called the hospital response team. Paramedics and the hospital response team arrived within minutes. Gavello was successfully intubated and transported next door to the hospital ICU.⁵

Gavello’s long time friend and cardiologist, Dr. Richard Francoz, examined Gavello in the hospital on the night of August 18 and continued to care for him during the following several days. Francoz concluded that Gavello did not have a heart attack or a stroke, but that the drugs administered in connection with the surgery caused him to suffer a respiratory arrest. Although Gavello was revived from that initial respiratory event, he died a few days later, on August 21, 2008.

B. *The Autopsy and Medical Examiner’s Investigation*

On August 25, 2008, an autopsy was performed by Dr. Judy Melinek, the Assistant Medical Examiner for the City and County of San Francisco.⁶ The autopsy did not reveal any physical evidence of a heart attack or stroke. The fact that the “code team” resuscitated Gavello so quickly was another indication that he did not suffer a heart attack. Melinek suspected that Gavello suffered a respiratory arrest caused by the surgery medications but concluded that additional investigation was necessary to determine the cause and manner of death. Therefore, the death certificate that was issued on the day of the autopsy listed the cause and manner of death as “pending.”

⁴ At trial, Millman admitted that, when he left Gavello in Engle’s care, he was aware of previous episodes when Engle had failed to properly respond to a patient who suffered a respiratory arrest. He also admitted knowing that Engel “was unable to use an Ambu Bag in real life.”

⁵ At some point later that evening, the pulse oximeter went missing. At trial, outside the presence of the jury, Engel exercised her Fifth Amendment right to not answer questions about the missing monitor. However, the jury heard about the incident from other witnesses including Dr. Brown who testified that he believed Engle took the monitor. Brown testified that building security tapes for the time period after Gavello was transported to the hospital ICU showed Engle returning to Brown’s facility and then leaving again with a black bag over her shoulder.

⁶ On appeal, Millman repeatedly mischaracterizes Dr. Melinek as the plaintiffs’ expert witness.

During the following two years, Melinek conducted an extensive investigation into the circumstances surrounding Gavello's surgery and death which included reviewing medical records, interviewing doctors and witnesses, and conducting toxicology screens of blood taken from Gavello prior to his death. The Medical Examiner's toxicologists tested Gavello's "code blood," which was drawn by the hospital response team before he was moved to the hospital, and they also tested blood drawn by hospital staff two hours later when Gavello was admitted.

In December 2009, Melinek issued a First Amended Death Certificate which stated that Gavello's cause of death was "anoxic ischemic encephalopathy" (i.e., brain damage from lack of oxygen) due to "probable" respiratory arrest caused by a combination of medications surrounding the surgery. The three drugs that were identified in Gavello's blood as combining to cause the respiratory arrest were Demoral, Thorazine and Versed.⁷ The "manner of death" was still listed undetermined.

To formulate her conclusions regarding both the cause and manner of death, Dr. Melinek compared the results of the toxicology screens to the medical records pertaining to Gavello's surgery. Melinek concluded, among other things, that all three of the drugs that contributed to the respiratory arrest were accounted for by the medical orders; the level of each drug found in blood drawn after the respiratory arrest was consistent with the ordered doses, when taking into account Gavello's metabolism. Melinek also concluded that when evaluated independently, the level of each drug that contributed to the respiratory arrest was within an acceptable "therapeutic range," although it was not medically possible to correlate those levels to a particular dosage or a particular time course. However, Melinek concluded, it was the effect of these three drugs acting

⁷ At trial, Melinek testified that other medications that Millman administered may have played a causal role but that blood samples taken after Gavello's initial respiratory arrest were not tested for those other drugs.

The First Amended Death Certificate also identified three conditions which did not cause death but may have contributed to it. Those conditions were mild sleep apnea syndrome, arteriosclerotic cardiovascular disease (normal age related changes to the heart), and sinus bradycardia.

together in Gavello's body which caused the central nervous system depression that resulted in a respiratory arrest.

In December 2010, Melinek issued a Second Amended Death Certificate, which made two changes to the prior certificate. First Melinek removed the word "probable" from the cause of death; the cause of death was reported as "Anoxic ischemic encephalopathy due to respiratory arrest." Second, the manner of death was changed from undetermined to homicide, which meant that Melinek had conclusively determined that Gavello died because of the action or inaction of other people.

C. *The Present Action*

Plaintiffs initiated this lawsuit in March 2009, by filing a complaint for medical negligence and wrongful death against Brown, Millman, and Engle, alleging that all three defendants negligently caused Gavello's death. Although the appellate record contains very little information about the procedural history of this litigation, according to Millman's Appellant's Opening Brief, the claims against both Brown and Engle were sent to contractual arbitration. The claims against Millman were resolved by a jury trial in January 2011.

1. *Trial Theories*

Plaintiffs argued that Millman's negligent conduct was a substantial factor causing Gavello's death. They claimed that Millman breached several standards of care by, among other things, selecting the types and dosages of medication administered during the surgery, administering Thorazine to treat restlessness after the surgery, leaving Gavello before he was conscious, failing to provide Engle with a clear plan for recovery medication, and leaving Gavello in Engle's care when he knew that she had past trouble resuscitating patients.

Millman's defense was that he did not breach any standard of care while treating Gavello, and that even if he was negligent in some way, his negligence did not cause Gavello's death. Millman's primary theory was that Gavello died solely because of the actions of Nurse Engle; he argued that Gavello died because Engle (1) administered

medications without a written order authorizing her to do so; and (2) failed to properly resuscitate Gavello once he experienced a respiratory arrest.

In addition to this primary defense, Millman pursued theories designed to limit his liability in the event the jury determined that his negligence was a cause of plaintiff's injuries. In this regard, Millman advanced two claims. First, he argued that the medical negligence of Brown, Flores and Engle also contributed to the death of Gary Gavello. Millman also claimed that the plaintiffs' harm was caused in whole or in part by Gavello's negligence in failing to provide necessary information to his physicians.

2. *Expert Evidence*

At trial, both parties offered expert opinions regarding the cause of Gavello's death, the relative effects of the medications found in Gavello's system, and the standards of care for the three health care providers. Although there were conflicting opinions among those experts, they all agreed with the ultimate conclusion of the Medical Examiner, Dr. Melinek, that Gavello's respiratory arrest was caused by the combination of medications administered in connection with his surgery.

Thus, plaintiffs' expert anesthesiologist, Dr. Bruce Halperin, testified that Gavello's respiratory arrest was caused by a "polypharmacy overdose," which he defined as "[m]ultiple drugs working in concert with each other" to "depress[] the central nervous system"⁸ Similarly, Millman's anesthesiology expert, Dr. William Spina, testified that "a number of the medications [Gavello] received in the pre-op, intra-op and post-op treatment led to a respiratory arrest" and that "all the medications" "had an additive effect."

Dr. Neal Benowitz, Millman's expert toxicologist, also testified that Gavello's respiratory arrest was caused by "the drugs he received," namely Versed, Demerol,

⁸ Halperin testified that several of the medications that Millman administered or ordered were either an inappropriate choice or given in an excessive amount. Halperin also testified that Millman did not meet his standard of care in his treatment of Gavello, including his decision to leave the facility before Gavello had recovered and stabilized from the anesthesia.

Thorazine, and the Isoflurane that Millman used to keep Gavello unconscious during the surgery. However, Benowitz opined that the level of Versed in Gavello's blood after his respiratory arrest could not be explained by the dose of Versed that Millman administered on the morning of the surgery; according to Benowitz, that dose would have been gone from the patient's system within 12 hours. Therefore, Benowitz opined that another dose of this medication was administered "within 20-30 minutes of the time [Gavello] stopped breathing." Furthermore, Benowitz opined that Gavello's respiratory arrest would not have occurred if not for the second dose of Versed.⁹

Dr. Halperin, plaintiffs' expert anesthesiologist, testified that the level of Versed in Gavello's system was consistent with the one dose administered by Dr. Millman on the morning of the surgery, that there was no reason to believe a second dose of Versed was administered, and that "from what we know about the clinical effects of this drug, we can say that there was no second dose of Versed just prior to the [respiratory] arrest." The Medical Examiner, Dr. Melinek, also concluded that the level of Versed in the toxicology screens indicated that the dose administered by Millman on the morning of the surgery had not properly metabolized.

3. *The Jury Verdict and Judgment*

The jury made findings and entered its verdict on a four-page special verdict form. It found, among other things, that Millman was negligent in his medical care and treatment of Gavello; that Millman's negligence was a substantial factor in causing Gavello's death; that both Engle and Brown were also negligent; and the negligence of these other two individuals were also substantial factors in causing Gavello's death. The jury assigned responsibility for Gavello's death 20 percent to Millman, 25 percent to

⁹ The defense elicited testimony from a different defense expert that administering Versed is one method of treating delirium in a patient who is emerging from anesthesia. However, none of the healthcare providers who treated Gavello in this case testified that he was given Versed after his surgery. Indeed, Dr. Brown testified that he inventoried and accounted for all of the medications kept at his facility, including the Versed.

Brown and 55 percent to Engle. The jury also found that plaintiffs suffered economic damages totaling \$2,977,830.50 and \$1 million in noneconomic damages.

The trial court reduced the noneconomic damages award to \$250,000 pursuant to section 3333.2 of MICRA, apportioned 20 percent of the liability for that noneconomic damages award to Millman pursuant to the jury's finding, and also reduced the economic damages to reflect the plaintiffs prior settlement with Dr. Brown. The resulting judgment held Millman liable for \$2,105,330.50, consisting of \$50,000 in noneconomic damages and \$2,055,330.50 in economic damages.

III. MILLMAN'S APPEAL

A. *Issue Presented and Standard of Review*

Millman's sole contention on appeal is that the trial court committed reversible error by refusing to instruct the jury to consider whether Nurse Engle's intentional and/or criminal conduct was the superseding cause of Gavello's death. Millman argues he had a right to this instruction because there was substantial evidence that Engle committed an illegal act by giving Gavello Versed after Millman went home, and that the administration of this second dose of Versed caused Gavello's death.

"Upon request, a party is entitled to correct, non-argumentative instructions on every theory of the case advanced by the party that is supported by substantial evidence. [Citation.]" (*Alcala v. Vazmar Corp.* (2008) 167 Cal.App.4th 747, 754.) Thus, when reviewing a claim that the trial court improperly refused an instruction, "we view the evidence in the light most favorable to the appellant. In such cases, we assume that the jury might have believed the evidence upon which the instruction favorable to the appellant was predicated. [Citations.]" (*Ibid.*) However, "[a] judgment may not be reversed on appeal, even for error involving "misdirection of the jury," unless "after an examination of the entire cause, including the evidence," it appears the error caused a "miscarriage of justice." [Citation.] [Citation.]" (*Id.* at p. 755.)

B. *The Defense of Superseding Cause*

" "A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent

negligence is a substantial factor in bringing about.” [Citation.]’ ” (*Perez v. VAS S.p.A.* (2010) 188 Cal.App.4th 658, 680 (*Perez*).

Thus, the defense of “ ‘superseding cause’ . . . absolves a tortfeasor, even though his conduct *was* a substantial contributing factor, when an independent event intervenes in the chain of causation, producing harm of a kind and degree so far beyond the risk the original tortfeasor should have foreseen that the law deems it unfair to hold him responsible. [Citations.]’ ” (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 573, fn. 9.)

“ ‘ “In California the doctrine requires more than mere negligence on the part of the intervening actor.” ’ ” (*Perez, supra*, 188 Cal.App.4th at p. 680.) Third party negligence may constitute a superseding cause of harm only if (1) it is the immediate cause of the injury; and (2) it is “ ‘so highly extraordinary as to be unforeseeable.’ ” (*Id.* at p. 681.) “ ‘ “The foreseeability required is of the *risk of harm*, not of the particular intervening act. In other words, the defendant may be liable if his conduct was ‘a substantial factor’ in bringing about the harm, though he neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred.” [Citation.] It must appear that the intervening act has produced “harm of a kind and degree so far beyond the risk the original tortfeasor should have foreseen that the law deems it unfair to hold him responsible.” [Citation.]’ [Citation.]” (*Ibid.*)

An intervening intentional tort or criminal act by a third party which is a direct cause of the plaintiffs’ harm may be, but is not necessarily, a superseding cause of the injury. (*Kane v. Hartford Accident & Indemnity Co.* (1979) 98 Cal.App.3d 350, 360 (*Kane*)). In this regard, California follows the Restatement Second of Torts, section 448, which states: “The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor’s negligent conduct created a situation which afforded an opportunity to the third person to commit such tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.”

There are two standard CACI jury instructions which address the superseding cause defense. CACI No. 432 tells the jury to consider whether the negligent conduct of a third party was a superseding cause of the plaintiff's harm. CACI No. 433 instructs the jury to determine whether a third party's intervening criminal act or intentional tort was a superseding cause of the plaintiff's harm.

C. *Analysis*

In the trial court, Millman filed a request to instruct the jury with versions of both CACI No. 432 and CACI No. 433. On appeal, however, Millman focuses exclusively on the second of these instructions, arguing that the trial court committed reversible error by refusing to give his version of CACI No. 433, which was tailored to characterize Nurse Engle's conduct as intentional and/or criminal acts which directly caused Gavello's death. Millman's proposed instruction stated:

“Bernard Millman, M.D. claims that he is not responsible for [plaintiffs'] harm because of the later criminal and/or intentional conduct of Tina Engle. Dr. Millman is not responsible for [plaintiffs] harm if Dr. Millman proves both of the following: [¶] 1. That the intentional and/or criminal conduct of Tina Engle, R.N. happened after the conduct of Bernard Millman, M.D.; and [¶] 2. That Dr. Millman did not know and could not have reasonably foreseen that another person would be likely to take advantage of the situation created by Bernard Millman, M.D.'s conduct to commit this type of act.”

Millman maintains that he was entitled to this instruction because substantial evidence supported his theory that Nurse Engle committed an “illegal” act by administering a second unordered dose of Versed to Gavello after Millman went home on the night of the surgery, and that this allegedly illegal act was the superseding cause of Gavello's death.

The first problem with this argument is that Millman did not use his second dose of Versed theory to support his request for a superseding cause instruction. At the hearing on jury instructions, Millman's trial counsel argued that the defense was entitled to superseding cause instructions because Engle committed an illegal act by

administering Thorazine for restlessness. According to this defense theory, Engle admitted that she administered Thorazine to Gavello for restlessness, but the written post-op orders authorized her to administer Thorazine only for hypertension, not for restlessness. Therefore, the defense argued that Engle not only breached her standard of care but also committed an unauthorized and illegal act by giving Gavello Thorazine for restlessness when she did not have a written order authorizing her to take that action.

At an earlier stage in the trial, Millman had argued that Engle's failure to properly resuscitate Gavello was a superseding cause of plaintiffs' harm. In response to this theory, plaintiffs attempted to introduce evidence of a different incident when Engle was accused of negligent failure to resuscitate a patient and Millman acted as her expert witness. Plaintiffs argued this prior incident was relevant to show that Millman was aware of Engle's shortcomings as a nurse and should have anticipated her conduct in this case. The trial court granted Millman's request to exclude this evidence but cautioned the defense not to attempt to take unfair advantage of this ruling by requesting a superseding cause instruction based on the theory that Millman could not have anticipated that Engle did not know how to properly resuscitate a patient.

However, the appellate record does not establish that Millman argued that he was entitled to a superseding cause instruction based on his theory that Gavello died as a result of a second unauthorized dose of Versed. The defense did use this theory to argue that Millman's actions were not a cause of Gavello's death. But Millman's citations to those portions of the trial record are no substitute for record evidence that he used this theory to support a request for a superseding cause instruction.

A second independent problem with this claim of error is that, under the circumstances of the present case, the third party intentional tort/criminal act superseding cause instruction that Millman proposed was patently argumentative. Millman's proposed instruction *told the jury* that Engle committed an "intentional and/or criminal" act which *was* a direct cause of Gavello's death. However there was no evidence that Engle had been held liable for an intentional tort or found guilty of a criminal act. Furthermore, third party causation and comparative fault were hotly disputed issues at

this trial. Indeed, although plaintiffs had the burden of proof with respect to their negligence claim against Millman, Millman had the burden of proving his defense that there were concurrent causes of plaintiffs' harm. (*Stewart v. Union Carbide Corp.* (2010) 190 Cal.App.4th 23, 33.)

“[T]he requesting party's right is to *nonargumentative* instructions. [Citations.] ‘The court should state rules of law in general terms, and avoid reciting matters of evidence. If the instruction embodies detailed recitals of fact drawn from the evidence, in such a manner as to constitute an argument to the jury in the guise of a statement of the law, it is improper. The matter may be entirely legitimate as argument by counsel, for when so used, the jury knows that it comes from an interested source and may weigh and consider it accordingly. But it is seriously objectionable to have the same matter injected into the court's charge, which, as the jurors are informed, is binding upon them. [Citations.]’ [Citation.]” (*Munoz v. City of Union City* (2004) 120 Cal.App.4th 1077, 1108.)

On appeal, Millman repeatedly argues that there is substantial evidence that Engle committed an illegal act by administering a lethal dose of Versed and that this court must accept that evidence as fact when evaluating whether Millman was entitled to the instruction he requested. First, as best we can determine from this record, there was *no* actual evidence that Engle gave Gavello any Versed. Indeed, Brown testified that all of the Versed in his office was accounted for and Millman's trial counsel never even asked Engle if she administered this medication to Gavello. Instead, Millman relied solely on his expert's opinion regarding the amount of Versed in Gavello's system *to argue* that Engle must have administered Versed to Gavello after he left the facility.

Second, even if there was substantial evidence to support this factual theory, the instruction that Millman proposed in this case did not ask the jury to determine whether Engle committed an illegal act, it told them that she did. And it also implicitly instructed the jury that Engle's conduct was a direct cause of the plaintiffs' harm. We raised this second point with Millman's appellate counsel during oral argument in this case. Millman's counsel forcefully maintained that the proposed instruction did tell the jury

that Millman had the burden of proving both that Engle committed a criminal act and that her conduct was a superseding cause of the plaintiffs' harm. However, the instruction, which we have quoted above, speaks for itself. It assumes that Engle's actions were a direct cause of injury and it expressly characterizes those actions as "intentional and/or criminal."

We recognize that Millman's proposed instruction incorporated standard language from CACI No. 433. However, both of the CACI superseding cause instructions presume that predicate facts regarding third party causation have already been established or are undisputed. CACI No. 433, the criminal act/intentional tort superseding cause instruction, incorporates the additional presumption that the third party conduct was intentional or criminal. These instructions may be perfectly appropriate in cases in which there is no dispute regarding predicate facts establishing a third party cause of injury. (See, e.g., *Richardson v. Ham* (1955) 44 Cal.2d 772, 777 [negligence action for personal injuries and property damages arising out of use of defendant's bulldozer by third parties]; *Kane v. Hartford Accident & Indemnity Co.*, *supra*, 98 Cal.App.3d 350 [negligence action against defendant insurance company that bonded the third party who raped the plaintiff].) However, Millman provides neither authority nor sound reasoning for his assumption that either of the CACI superseding cause instructions may properly be given *without appropriate modification* in a case like this, where the predicate conditions for invoking the superseding cause doctrine are disputed.

Martinez v. Vintage Petroleum, Inc. (1998) 68 Cal.App.4th 695 (*Martinez*) helps illustrate our point. In that case, the plaintiff was working for an independent contractor at an oil field operated by the defendant when he was injured by a burst natural gas pipe. The jury found that the defendant's negligence was a substantial factor causing the plaintiff's injury but that the negligence of a coworker who cut into the pipe was a superseding cause of harm that relieved the defendant of liability. (*Id.* at p. 697.) In affirming the judgment, the *Martinez* court found that there was substantial evidence to support the defendant's superseding cause theory and also expressly approved the superseding cause instruction that was given in that case, a modified version of a pattern

BAJI instruction, which required the jury to find (1) that the defendant's negligence was a substantial factor causing the plaintiff's injury, and (2) that the immediate cause of plaintiff's injury was the negligent conduct of the coworker, before it considered (3) whether the coworker's conduct was a superseding cause of the plaintiff's harm which relieved the defendant of liability for its negligence. (*Id.* at pp. 699-700.)¹⁰

Unlike the superseding cause instruction approved in *Martinez, supra*, 68 Cal.App.4th 695, Millman's proposed instruction did not ask the jury to determine whether the conduct of a third party was the direct cause of the plaintiffs' harm, but instead erroneously told them that it was. In this way the proposed instruction was patently argumentative. The instruction was also highly inflammatory because characterizing Engle's conduct as both intentional and criminal would almost certainly have affected the jury's resolution of the causation issues at the center of this lawsuit.

A third independent problem with Millman's claim of error was supplied by the trial court when it rejected the request for this instruction. The trial court agreed with the plaintiffs that there was insufficient evidence to support the defense because Nurse Engle's conduct was foreseeable.

¹⁰ The unmodified BAJI pattern instruction on superseding cause, BAJI No. 3.79, also expressly required the jury to make predicate findings before considering whether third party conduct was a superseding cause of the plaintiff's harm. That instruction stated: "If you find that defendant [(first actor)] was negligent and that this negligence was a substantial factor in bringing about an injury to the plaintiff but that the immediate cause of the injury was the negligent conduct of [a third person] [defendant (second actor)], the defendant is not relieved of liability for that injury if one or more of the following is proved: [¶] 1. [The defendant at the time of [his] [her] negligent conduct [(first actor)] realized or reasonably should have realized that [a third person] [defendant (second actor)] might so act [;] [or] [[The] [the] risk of harm suffered was reasonably foreseeable]; or [¶] 2. A reasonable person knowing the situation existing at the time of the conduct of the [third person] [defendant (second actor)] would not have regarded it as highly extra-ordinary that the [third person] [defendant (second actor)] had so acted; or [¶] 3. The conduct of the [third person] [defendant (second actor)] was a normal consequence of a situation created by defendant's conduct, and the manner in which it was done was not extraordinarily negligent." (BAJI No. 3.79)

“[T]he intervening act of a third person does not relieve the original wrongdoer of liability if the intervening act was a reasonably foreseeable result of the original actor’s wrongdoing.” (*Davis v. Erickson* (1960) 53 Cal.2d 860, 863.) As noted at the outset of our analysis, this requirement focuses on the foreseeability of the “risk of harm, not of the particular intervening act.” (*Perez, supra*, 188 Cal.App.4th at p. 681.)

Case law suggests that criminal conduct which causes direct injury is more likely to be deemed unforeseeable and, therefore, a superseding cause of injury. (*Kane, supra*, 98 Cal.App.3d 350; but see *Collins v. Navistar, Inc.* (2013) 214 Cal.App.4th 1486, 1508-1509 [trial court erred by giving CACI 433 in a strict liability case because it focused the jury’s attention on the criminal nature of the intervening act rather than on determining whether the risk of harm was reasonably foreseeable].) Nevertheless, “ ‘if the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious or criminal does not prevent the actor from being liable for harm caused thereby.’ [Citations.]” (*Koepke v. Loo* (1993) 18 Cal.App.4th 1444, 1449; see also *Richardson v. Ham, supra*, 44 Cal.2d at p. 777.) Here, the actions that Engle allegedly took, administering the wrong medication and/or failing to properly resuscitate the patient, were by their very nature foreseeable consequences of Millman’s conduct. Indeed, these alleged acts were classic examples of the types of hazards that made Millman’s conduct negligent.

On appeal, Millman argues that foreseeability is a question of fact for the jury. (Citing *Lombardo v. Huysentruyt* (2001) 91 Cal.App.4th 656, 666.) However, when undisputed facts leave no room for a reasonable difference of opinion, there is no issue for the jury to resolve. (*Lawson v. Safeway Inc.* (2010) 191 Cal.App.4th 400, 417; *Brewer v. Teano* (1995) 40 Cal.App.4th 1024, 1035.) Under the circumstances of this case, we agree with the trial court that the superseding cause doctrine does not apply because the foreseeability issue must be resolved against Millman as a matter of law.

II. THE CROSS-APPEAL

A. *Civil Code Section 3333.2*

1. *Issues Presented*

The jury determined that plaintiffs suffered \$1 million in noneconomic damages. However, the trial court capped plaintiffs' noneconomic damages at \$250,000, pursuant to section 3333.2 of MICRA, which states:

“(a) In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage. [¶] (b) In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars (\$250,000).”

Plaintiffs contend that section 3333.2 violates the state constitutional guarantees of equal protection and the right to a jury trial.

2. *Background*

MICRA is a comprehensive statutory scheme enacted by the Legislature to address “serious problems” associated with the rapid increase in medical malpractice insurance premiums throughout the state. (*American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359, 363 (*American Bank*)). “In broad outline, the act (1) attempted to reduce the incidence and severity of medical malpractice injuries by strengthening governmental oversight of the education, licensing and discipline of physicians and health care providers, (2) sought to curtail unwarranted insurance premium increases by authorizing alternative insurance coverage programs and by establishing new procedures to review substantial rate increases, and (3) attempted to reduce the cost and increase the efficiency of medical malpractice litigation by revising a number of legal rules applicable to such litigation.” (*Id.* at pp. 363-364.)

“[I]n enacting MICRA the Legislature was acting in a situation in which it had found that the rising cost of medical malpractice insurance was posing serious problems for the health care system in California, threatening to curtail the availability of medical

care in some parts of the state and creating the very real possibility that many doctors would practice without insurance, leaving patients who might be injured by such doctors with the prospect of uncollectible judgments. In attempting to reduce the cost of medical malpractice insurance in MICRA, the Legislature enacted a variety of provisions affecting doctors, insurance companies and malpractice plaintiffs.” (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 158-159 (*Fein*.)

In the years since MICRA was enacted, our Supreme Court has uniformly rejected constitutional challenges to various provisions of this comprehensive statutory scheme. (See *American Bank, supra*, 36 Cal.3d 359 [Civil Code section 667.7, which regulates payment of future damages awards, does not violate due process, equal protection or the right to a jury trial]; *Barme v. Wood* (1984) 37 Cal.3d 174 [Civil Code section 3333.1, limiting collateral source recovery from malpractice defendants, does not violate due process]; *Roa v Lodi Medical Group, Inc.* (1985) 37 Cal.3d 920 [Business and Professions Code section 6146, which caps attorney fee recovery in malpractice cases, does not violate due process].)

Indeed, in *Fein, supra*, 38 Cal.3d 137, the court held that the provision at issue in this case, section 3333.2, does not violate due process or equal protection. Nevertheless, plaintiffs contend that this binding precedent does not defeat the constitutional claims they raise in this appeal.

3. Equal Protection

Our state constitution guarantees that “A person may not be . . . denied equal protection of the laws.” (Cal. Const., art. I, § 7(a).) Plaintiffs contend that section 3333.2 violates this constitutional guarantee because it treats seriously injured victims of medical malpractice differently from two similarly situated classes: (1) medical malpractice victims whose noneconomic damages do not exceed the \$250,000 cap and, therefore, are afforded a full recovery; and (2) other tort victims, who are not subject to section 3333.2 at all.

“ “[I]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be

upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. [Citations.] Where there are ‘plausible reasons’ for [the classification] ‘our inquiry is at an end.’ ” [Citations.] Past decisions also establish that, under the rational relationship test, the state may recognize that different categories or classes of persons within a larger classification may pose varying degrees of risk of harm, and properly may limit a regulation to those classes of persons as to whom the need for regulation is thought to be more crucial or imperative. [Citations.]’ ” (*Kasler v. Lockyer* (2000) 23 Cal.4th 472, 481-482, italics omitted.)

In *Fein, supra*, 38 Cal.3d 137, our Supreme Court applied this rational basis inquiry, and concluded that the statutory classifications created by section 3333.2 are rationally related to the legislative purposes of MICRA. First, the distinction between malpractice plaintiffs and other tort victims is rationally related to the legislative purpose of responding to an insurance crisis in that particular area. (*Id.* at p. 162.) Second, the differential impact of the \$250,000 cap among sub-classes of malpractice plaintiffs is also rationally related to the objective of reducing the costs of malpractice defendants and their insurers. (*Ibid.*) In this regard, the court underscored that “the Legislature clearly had a reasonable basis for drawing a distinction between economic and noneconomic damages, providing that the desired cost savings should be obtained only by limiting the recovery of noneconomic damages.” (*Ibid.*) There are inherent difficulties in placing a monetary value on losses for such intangible injuries, such damages are generally passed on to and borne by innocent consumers, and the right to recover damages for noneconomic injuries is not “constitutionally immune from legislative limitation or revision.” (*Id.* at pp. 159-160.)

Fein expressly holds that the statutory classifications created by section 3333.2 “are rationally related to the ‘realistically conceivable legislative [purposes]’ [citation] of MICRA.” (*Fein, supra*, 38 Cal.3d at p. 163.) This finding requires us to reject plaintiffs’ equal protection challenge for two separate reasons. First, it ends our constitutional inquiry. As the *Fein* court cautioned, we may not “properly strike down a statute simply because we disagree with the wisdom of the law or because we believe that there is a

fairer method for dealing with the problem. [Citation.] . . . ‘[A] court cannot eliminate measures which do not happen to suit its tastes if it seeks to maintain a democratic system. The forum for the correction of ill-considered legislation is a responsive legislature.’” (*Id.* at pp. 163-164.)

Second, decisions of the California Supreme Court “are binding upon and must be followed by all the state courts of California.” (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Plaintiffs’ constitutional argument was rejected in *Fein* and that decision is binding on this court.

4. *The Right to Trial By Jury*

Plaintiffs’ second claim of constitutional error is that section 3333.2 violates article I, section 16, of the California Constitution, which provides that “Trial by jury is an inviolate right and shall be secured to all”

“ ‘The guarantee of jury trial in the California Constitution operates at the time of the trial to require submission of certain issues to the jury. Once a verdict has been returned, however, the effect of the constitutional provision is to prohibit *improper interference* with the jury’s decision.’ [Citation.]” (*American Bank, supra*, 36 Cal.3d. at p. 376.)

In *American Bank, supra*, 36 Cal.3d 359, our Supreme Court rejected multiple constitutional challenges to Civil Code section 667.7, a MICRA provision which regulates payment of future damages awards in medical negligence actions. The *American Bank* court found, among other things, that, once the jury has designated the amount of future damages, the trial court’s authority to fashion the details of the payment of that amount does not “infringe the constitutional right to jury trial.” (*Id.* at p. 376.) The court reasoned that section 667.7 and MICRA in general are rationally related to the Legislature’s legitimate objective of reducing insurance costs in the medical malpractice area. (*Id.* at pp. 372-373.) The court also noted that similar exercises of limited judicial authority over the disbursement of proceeds of a judgment had been approved in the past. (*Id.* at pp. 376-377.)

When the *Fein* court upheld the constitutionality of section 3333.2, it did not specifically address the constitutional right to a jury. However, the court adopted and extended its reasoning in *American Bank* to find that section 3333.2 is also supported by a rational basis. (*Fein, supra*, 38 Cal.3d at pp. 158-159.) The *Fein* court also observed that “no California case of which we are aware ‘has ever suggested that the right to recover for such noneconomic injuries is constitutionally immune from legislative limitation or revision. [Citations.]’ [Citation.]” (*Id.* at pp. 159-160.)

American Bank and *Fein* compel the conclusion that section 3333.2 does not violate the state constitutional right to a jury trial. Like the damages provision at issue in *American Bank*, section 3333.2 does not interfere with the jury’s role in finding the fact and amount of a plaintiff’s damages. Instead, this statute limits the amount of noneconomic damages that a medical malpractice plaintiff may recover from a defendant. (See *Salgado v. County of Los Angeles* (1998) 19 Cal.4th 629, 640 [section 3333.2 “places no limit on the amount of injury sustained by the plaintiff, as assessed by the trier of fact, but only on the amount of the defendant’s liability therefore”].) Furthermore, as the *Fein* court found, the Legislature had both the authority to regulate the recovery of noneconomic damages and a rational basis for doing so by enacting MICRA. (*Fein, supra*, 38 Cal.3d at pp. 158-169.)

Other courts who have addressed this issue have reached the same conclusion we do and for the same reasons. (See *Yates v. Pollock* (1987) 194 Cal.App.3d 195, 200; *Stinnett v. Tam* (2011) 198 Cal.App.4th 1412, 1433-1434 (*Stinnett*)). Thus, we hold that section 3333.2 does not violate the state constitutional right to a jury trial.

5. Proposition 103

Plaintiffs acknowledge that their constitutional claims have been rejected in the past, but they contend that all of the precedent against them is dependent on the continuing viability of *Fein* and, plaintiffs argue, that case is no longer controlling. According to plaintiffs, the rational basis for the differential treatment of medical malpractice plaintiffs that existed when *Fein* was decided was “eliminated” in November 1988, when California voters passed Proposition 103.

Proposition 103 led to the enactment of legislation which authorizes the California Commissioner of Insurance to protect consumers from arbitrary and excessive insurance rates and practices. (See Ins. Code, § 1861.05.) Therefore, plaintiffs argue, “[i]t follows that, because Proposition 103 comprehensively protects healthcare providers from ‘excessive’ rates, section 3333.2 is no longer needed to curb the abuses that occurred in 1975, and so no longer has a rational basis.”

Plaintiffs’ changed circumstances theory is based on *Brown v. Merlo* (1973) 8 Cal.3d 855 (*Brown*). The *Brown* court found that a former provision of the Vehicle Code which precluded an automobile guest from recovering damages for driver negligence violated equal protection guarantees. In reaching its decision, the court rejected the contention that the “protection of hospitality” (*ibid.*) constituted a rational basis for the differential treatment of automobile guests, reasoning that such a rationale had become “completely eroded by the development of almost universal automobile liability insurance coverage in recent years.” (*Id.* at p. 868.) Reasoning that a “classification which once was rational because of a given set of circumstances may lose its rationality if the relevant factual premise is totally altered,” the court concluded that “if the guest statute’s operation could originally be justified as rationally related to an interest in protecting hosts from ingratitude, this purpose can no longer support the provision’s constitutionality in light of present liability insurance coverage.” (*Id.* at p. 869.)

Attempting to analogize this case to *Brown*, plaintiffs argue that section 3333.2 has lost its rationality because its relevant factual premise has been totally altered by Proposition 103. According to plaintiffs, there is no longer an insurance-related healthcare crisis because insurance rates are now regulated under Proposition 103. Therefore, plaintiffs contend, the differential treatment of severally injured malpractice plaintiffs is no longer justified as rationally related to the objective of reducing the costs of malpractice insurance. We reject plaintiffs’ changed circumstances theory for several reasons.

First, judicial precedent upholding the constitutionality of section 3333.2 does not depend on one discreet factual premise as plaintiffs erroneously presume. Rather, section

3333.2 is part of a “comprehensive, multifaceted scheme designed to address a perceived threat to our state’s health care system by reducing the cost of medical malpractice insurance.” (*Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 114.) In other words, section 3333.2 cannot be challenged in a vacuum; it is only one of many interrelated provisions that have been consistently upheld against constitutional attack. In enacting MICRA, the Legislature made a policy decision based on its own thorough investigation of an extremely complex and politically charged matter.

Second, it is simply not the proper function of the judiciary to “reweigh the legislative facts underlying MICRA” (*Stinnett, supra*, 198 Cal.App.4th at p. 1429.) Our Supreme Court has expressly cautioned that plaintiffs may not circumvent our rational basis standard of review by challenging the factual findings of the legislative body that enacted MICRA. (*American Bank, supra*, 36 Cal.3d 374; *Fein, supra*, 38 Cal.3d at p. 163.) As the *American Bank* court explained: “the constitutionality of a measure under the equal protection clause does not depend on a court’s assessment of the empirical success or failure of the measure’s provisions. . . . ‘Whether *in fact* the Act will promote [the legislative objectives] is not the question: the Equal Protection Clause is satisfied by our conclusion that the [state] Legislature *could rationally have decided* that [it] . . . might [do so]’ ” (*Id.* at p. 374.)

Third, plaintiffs’ exact argument was rejected in *Stinnett, supra*, 198 Cal.App.4th 1412.¹¹ The *Stinnett* court recognized that, in rare situations, a change of conditions may justify the constitutional invalidation of a once valid law by rendering the application of that law arbitrary or irrational. However, the court concluded that this changed circumstance theory cannot be properly used to circumvent our rational basis standard of

¹¹ The *Stinnett* plaintiff, who was represented by the same appellate counsel who represents plaintiffs here, attempted an end run around *Fein* by arguing that “changed circumstances have so undermined the rationality of section 3333.2’s classification that it no longer passes constitutional muster.” (*Stinnett, supra*, 198 Cal.App.4th at p. 1427.)

review or to undermine *Fein*. We agree with the reasoning and holding of *Stinnett* and adopt them here.

Alternatively, even if a changed circumstances theory can be properly employed to relitigate the constitutionality of section 3333.2, these plaintiffs have not properly raised or supported that theory in the present case. Although plaintiffs did make a constitutional challenge in the trial court, their argument was that section 3333.2 has never been constitutional, not that changed circumstances have left this statute without a rational basis. Thus, the trial court record does not contain *any* evidence regarding the impact of Proposition 103 or any other allegedly relevant change of circumstance.

Plaintiffs filed a Request for Judicial Notice in this court, asking us to take judicial notice of evidence pertaining to a smattering of regulatory activities by the California Department of Insurance (CDI) since Proposition 103 was enacted. Plaintiffs would have us find that this evidence conclusively proves that Proposition 103 has been effective at keeping medical malpractice insurance at an affordable rate. We granted the Request for Judicial Notice before this appeal was fully briefed based on plaintiffs' representation that this evidence was essential to a fair disposition of their constitutional claims. However, plaintiffs failed to advise this court that their evidence was not produced in the trial court or indeed that they did not even make a changed circumstance argument below.

The constitutionality of legislation is subject to independent appellate review. (*Zubarau v. City of Palmdale* (2011) 192 Cal.App.4th 289, 307-308; *Mercury Casualty Co. v. Scottsdale Indemnity Co.* (2007) 156 Cal.App.4th 1212, 1218.) However, statutes are presumed valid and we will not strike down a legislative enactment unless its invalidity is clearly established. (*Ibid.*) Here, plaintiffs' constitutional claims are all premised on the notion that the facts have changed, but those factual changes were not established or even alleged in the lower court. Furthermore, the documents attached to the Request for Judicial Notice do not prove plaintiffs' factual claims, but instead only fuel ongoing factual and political disputes which have surrounded MICRA for many years. Indeed, plaintiffs' factual assertions and assumptions are seriously disputed by

both Millman and the Amicus Curiae who filed briefs in this case. As an appellate court, we are not inclined or equipped to address in the first instance the factual disputes these plaintiffs attempt to pursue by advancing their changed circumstances theory for the first time on appeal.

B. *Calculation of Damages Award Against Millman*

Plaintiffs contend that, even if section 3333.2 is constitutional, the trial court miscalculated Millman’s liability for plaintiffs’ damages.

1. *Background*

After the trial court applied section 3333.2 to cap noneconomic damages at \$250,000, it apportioned liability for plaintiffs’ noneconomic damages among the three negligent health care providers in order to comply with Proposition 51 which was codified in Civil Code section 1431.2 (section 1431.2).¹² Thus, the judgment holds Millman liable for \$50,000 in noneconomic damages, which is 20 percent of the capped \$250,000 noneconomic damages award.

The trial court also used the capped \$250,000 figure to calculate Millman’s credit for plaintiffs’ \$1 million settlement with Dr. Brown. The court calculated the total damages award as \$3,227,830.50 (\$2,977,830.50 in economic damages plus \$250,000 in noneconomic damages). It then calculated the ratio of economic to total damages as 92.25 percent and determined that Millman was entitled to a benefit setoff of \$922,500 for the economic portion of the Brown settlement (92.25 percent times \$1 million). Thus, the judgment holds Millman liable for \$2,055,330.50 in economic damages (\$2,977,830.50 minus \$922,500).

¹² Section 1431.2 states, in part: “In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant’s percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.” (§ 1431.2, subd. (a).)

2. *Analysis*

Plaintiffs contend that the trial court erred by applying the section 3333.2 cap before it applied Proposition 51. According to plaintiffs, the court should have reversed this process, applied Proposition 51 first to calculate Millman's several liability for noneconomic damages as \$200,000, and then made the determination that Millman's liability for noneconomic damages did not exceed the section 3333.2 MICRA cap at all.

Relevant authority establishes that the trial court correctly calculated Millman's liability for noneconomic damages by reducing the jury's verdict to the MICRA cap before calculating Millman's share of fault pursuant to Proposition 51. (*Gilman v. Beverly California Corp.* (1991) 231 Cal.App.3d 121, 128 (*Gilman*); *Mayes v. Bryan* (2006) 139 Cal.App.4th 1075, 1098-1104 (*Mayes*).

Plaintiffs' alternative approach has been disapproved because it undermines the purpose of Proposition 51 which is "to limit the potential liability of an individual defendant for noneconomic damages to a proportion commensurate with that defendant's personal share of fault." (*Gilman, supra*, 231 Cal.App.3d at p. 128.) Plaintiffs' proposed calculation is also inconsistent with the plain language of MICRA because it would allow plaintiffs to recover up to \$250,000 from each of the defendants in a situation like this. However, section 3333.2 expressly states that the \$250,000 cap on noneconomic damages applies to "the action," not to each individual defendant in an action.

Plaintiffs contend that courts disagree about the proper order of applying MICRA and Proposition 51, and that authority supporting their position is more persuasive. However, the cases upon which plaintiffs rely involve the calculation of noneconomic damages to account for a plaintiff's comparative negligence. (See *McAdory v. Rogers* (1989) 215 Cal.App.3d 1273, 1279; *Atkins v. Strayhorn* (1990) 223 Cal.App.3d 1380, 1391.) These cases are inapposite because they do not involve the interplay between Proposition 51 and the MICRA cap. (*Gilman, supra*, 231 Cal.App.3d at p. 126; *Mayes, supra*, 139 Cal.App.4th at pp. 1101-1102.)

For similar reasons, we reject plaintiffs' separate contention that the trial court erred by using the capped noneconomic damages figure to calculate the percentage of

economic to noneconomic damages for purposes of the settlement credit. The trial court's approach effectuates the purpose of both section 3333.2 and Proposition 51 and it was expressly approved in *Mayes, supra*, 139 Cal.App.4th at pages 1098-1104. Plaintiffs do not cite any authority which even suggests that the trial court erred.

IV. DISPOSITION

The judgment is affirmed.

Haerle, J.

I concur:

Lambden, J.

Concurring Opinion of Kline, P.J.

With respect to defendant Millman's appeal, I fully concur in the conclusion that the doctrine of superseding cause does not apply in this case because, as a matter of law, the issue of foreseeability must be resolved against Dr. Millman. With respect to plaintiffs' cross-appeal, I concur in the majority opinion primarily because, as the majority opinion explains (maj. opn. at pp. 26-27), plaintiffs introduced no evidence in the trial court bearing upon any of the asserted changed circumstances they rely upon in this court.

Kline, P.J.