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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

BIANCA ROMERO, a Minor, etc., Plaintiff and Respondent, v. KAISER FOUNDATION HEALTH PLAN, INC. et al., Defendants; NATHANIEL J. FRIEDMAN, Appellant.	B277499 (Los Angeles County Super. Ct. No. BC559557)

APPEAL from an order of the Superior Court of Los Angeles County, Holly Fujie, Judge. Conditionally reversed and remanded with directions.

Nathaniel J. Friedman P.C. and Nathaniel J. Friedman for Appellant.

No appearance for Plaintiff and Respondent.

INTRODUCTION

Appellant Nathaniel Friedman appeals from an order granting Friedman's petition for an award of attorney fees made in connection with the approval of his minor client's compromise of a medical malpractice claim. According to Friedman, the trial court committed legal error when it applied a preempted local rule to reduce the amount of attorney fees awarded from the requested 33.33 percent of the minor's recovery to 25 percent. Because the record does not support Friedman's assertion that the trial court applied the wrong standard or otherwise abused its discretion in declining to designate a greater share of the minor's settlement award as attorney fees, we reject his claim.

We nevertheless conclude the order must be conditionally reversed and remanded to the trial court because the record before us suggests the fee award may be subject to the Medical Injury Compensation Reform Act of 1975 (MICRA), Business and Professions Code section 6146, in which case the attorney fee awarded to Friedman exceeded the limitations imposed by the statute.[1] On remand, the trial court is directed to reconsider the petition for an award of attorney fees to determine whether MICRA applies and, if necessary, order disgorgement of any fees paid in excess of the statutory limit.

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[1] Statutory references are to the Business and Professions Code, unless otherwise designated.

FACTS AND PROCEDURAL BACKGROUND

The plaintiff, Bianca Romero, was born six to seven weeks premature. She was diagnosed with cerebral palsy by her pediatric neurologist at six months of age. Bianca was nine years old when the trial court ruled on the petition to approve the compromise of her claim. Due to her disability, Bianca requires full-time assistance for all activities of daily living.

In September 2014, Luz Romero, Bianca's mother, retained Friedman to represent Bianca in a medical malpractice lawsuit. The contingency fee agreement Romero signed stated that if the action was "a 'pure' medical malpractice case (i.e., with no claim for common law battery, wilful [*sic*] misconduct or the like)," Friedman's fees would be limited by MICRA.

In October 2014, Bianca, through her guardian ad litem, Luz Romero (Plaintiff), filed a complaint against Kaiser Foundation Health Plan, Inc., Kaiser Foundation Hospitals, Inc., Southern California Permanente Medical Group, Rick Dean Murray, M.D., and Elaine Y. Pan, M.D.[2] The complaint asserted a claim for "Professional Negligence" against all Defendants, and a claim for "Wilful Misconduct" against the Physician Defendants. The latter "Wilful Misconduct" claim alleged the Physician Defendants "were aware of the possibility of severe neurological damage to Plaintiff if she were not delivered promptly," and "[n]otwithstanding this knowledge, none of [the Physician Defendants] took any steps to expedite a 'crash' cesarian [*sic*] section and allowed Plaintiff to linger in utero,

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[2] The complaint referred to Dr. Murray and Dr. Pan as "Physician Defendants" and to all defendants collectively as "Defendants." We use the same designations in this opinion.

developing hypoxic ischemic encephalopathy to the point it became irreversible."

In March 2016, Plaintiff and Defendants reached a settlement of the entire case. Thereafter, Friedman filed a petition to approve a minor's compromise. The original petition requested $833,333 in attorney fees to be paid from the $2.5 million settlement.

In support of the original petition, Friedman offered a declaration stating that he based the requested attorney fee amount on the " 'reasonable fee standard' " provided by California Rules of Court, rule 7.955. His declaration addressed each of the 14 factors set forth in the rule.[3] Friedman stated that he had

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[3] Rule 7.955 states, "[i]n all cases [involving the compromise of a pending action to which a minor, a person with a disability, or a conservatee is a party], unless the court has approved the fee agreement in advance, the court must use a *reasonable fee standard* when approving and allowing the amount of attorney's fees payable from money or property paid or to be paid for the benefit of a minor or a person with a disability." (Rule 7.955(a)(1), italics added.) The rule lists the following nonexclusive factors which the court may consider in determining a reasonable attorney fee: "(1) The fact that a minor or person with a disability is involved and the circumstances of that minor or person with a disability. [¶] (2) The amount of the fee in proportion to the value of the services performed. [¶] (3) The novelty and difficulty of the questions involved and the skill required to perform the legal services properly. [¶] (4) The amount involved and the results obtained. [¶] (5) The time limitations or constraints imposed by the representative of the minor or person with a disability or by the circumstances. [¶] (6) The nature and length of the professional relationship between the attorney and the representative of the minor or person with a disability. [¶] (7) The experience, reputation, and

spent a total of 65.5 hours on the case, and his associate, Barton A. Friedman, had spent an additional 105 hours. The declaration included a legal argument asserting MICRA was "obsolete" and "unconstitutional, as a denial of equal protection," but it did not disclose the amount of the maximum permissible fee under MICRA.[4] Friedman stated that the requested $833,333 in attorney fees amounted to 33.33 percent of Plaintiff's gross

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ability of the attorney or attorneys performing the legal services. [¶] (8) The time and labor required. [¶] (9) The informed consent of the representative of the minor or person with a disability to the fee. [¶] (10) The relative sophistication of the attorney and the representative of the minor or person with a disability. [¶] (11) The likelihood, if apparent to the representative of the minor or person with a disability when the representation agreement was made, that the attorney's acceptance of the particular employment would preclude other employment. [¶] (12) Whether the fee is fixed, hourly, or contingent. [¶] (13) If the fee is contingent: [¶] (A) The risk of loss borne by the attorney; [¶] (B) The amount of costs advanced by the attorney; and [¶] (C) The delay in payment of fees and reimbursement of costs paid by the attorney. [¶] (14) Statutory requirements for representation agreements applicable to particular cases or claims." (Rule 7.955(b).)

[4] Friedman also argued MICRA did not apply to the facts of the case, because Plaintiff's recovery was by "settlement dollars vs. judgment." That contention was plainly contrary to the controlling statute, which expressly provides that the limitations pertaining to attorney fee awards "shall apply regardless of whether the recovery is by settlement, arbitration, or judgment." (§ 6146, subd. (a); cf. *Rashidi v. Moser* (2014) 60 Cal.4th 718, 727 [holding MICRA cap on *noneconomic* damages (Civ. Code, § 3333.2, subd. (b)) applies "only to judgments awarding noneconomic damages"].)

recovery, and asserted this amount was "reasonable" and "proportionate to the value of the services performed, given the relevant considerations."

Prior to the hearing on the original petition, the trial court issued a tentative ruling indicating it intended to deny the petition without prejudice. With respect to the requested attorney fees, the tentative ruling stated: "The Court has reviewed the Petition and notes several defects. First, the requested attorney's fee amounts to 33 1/3% of the total settlement, above the typical 25% contingency fee. After reviewing Counsel's declaration, the Court remains unconvinced that the requested amount is fair and reasonable."

Friedman filed a supplemental declaration in response to the court's tentative ruling. Regarding the requested attorney fees, he stated, "while Declarant firmly believes one third would be appropriate, Declarant would be satisfied with 30% of the gross recovery." He continued, "[i]t is Declarant's firm opinion that by including a cause of action for wilful misconduct and demand for punitive damages of $10,000,000 to which, Defendants Kaiser, et al. neither demurred nor challenged in any fashion, Declarant increased the value of the ultimate settlement by $500,000." Friedman offered no evidence to support the assertion, and the declaration again made no mention of the limitations on attorney fees imposed by MICRA.

The trial court issued a second tentative ruling addressing Friedman's supplemental declaration. The court wrote: "Nothing in Counsel's declaration suggests that the action involved any particularly novel or difficult questions or extraordinary skill and time, and the time spent would result in an hourly rate of $4,3988 [*sic*] at the requested 30% fee. The Court remains

unconvinced that the amended requested fee of 30% of the total recovery is reasonable. Rather, the Court finds a 25% fee to be reasonable, for an award of $625,000.00 in attorney's fees."

In advance of the scheduled hearing on the original petition, Friedman filed an amended petition to approve the compromise of his minor client's claims. The amended petition requested $625,000 in attorney fees to be paid from the $2.5 million settlement, representing 25 percent of the gross settlement amount.[5] Friedman submitted a new declaration that largely mirrored his prior one, except it disclosed that he had spent an additional 4.5 hours on the case (bringing the total hours spent by Friedman and his associate to 175 hours) and it averred that the trial court had tentatively denied his former request for a 33.33 percent contingency fee based on a "discredited 'local rule.' "

On June 30, 2016, the trial court held a hearing on the amended petition. Without referring to the local rule, Friedman asked the court if it had "any reason, other than it's fair and reasonable, for having limited the attorney's fees?" The court replied: "Well, we looked -- we always do -- it's not an automatic . . . 5 percent [reduction]. . . . [F]rankly, in this case, we were looking at the amount of work that was involved. We looked at the situation. We looked at the underlying issues. We frankly don't give an awful lot of credibility to the concept of

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[5] The record does not disclose what prompted Friedman to file the amended petition requesting the lower 25 percent figure; however, Friedman states in his appellant's opening brief that it was based upon the amount "the trial court allowed as indicated in its prior ruling"—presumably a reference to the court's tentative ruling on the original petition.

because you put in the punitive damages allegation, that that's what caused the settlement to be what it was. However, we recognize it [is] a very good settlement . . . ." Friedman acknowledged the court's explanation, responding: "If that be the case, . . . based on your tentative that we got yesterday, this is the revised order. If your honor would sign it . . . we'll be on our way." With that, the hearing concluded.

On June 30, 2016, the trial court entered its order on the amended petition to approve the compromise of a minor. With respect to attorney fees, the order states: "The Court has reviewed the Petition and finds the requested attorney's fees to be fair and reasonable. Counsel asserts that a total of 175 hours were spent throughout the 18 months of litigation in this action. Nothing in Counsel's declaration suggests that the action involved any particularly novel or difficult questions or extraordinary skill and time. Even at the 25% fee, Counsel will receive an hourly rate of over $3,500.00."

DISCUSSION

1. *The Record Disproves Friedman's Contention that the Trial Court Applied a Preempted Local Rule in Setting the Amount of Attorney Fees*

We begin with Friedman's challenge to the $625,000 attorney fee award. We review an award of attorney fees for abuse of discretion, mindful of the principle that the " 'experienced trial judge is the best judge of the value of professional services rendered in [her] court, and while [her] judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong.' " (*Serrano v. Priest* (1977) 20 Cal.3d 25, 49.)

Friedman argues the trial court disregarded the factors established by rule 7.955 in reducing his attorney fees to 25 percent of the gross settlement amount, and instead applied a "discredited" local rule. The argument apparently refers to former Los Angeles County Superior Court, Local Rules, rule 10.79(c)(3), which had provided, " 'Except where good cause is shown, the attorney's fees shall not exceed an amount equal to twenty-five percent (25%) of the gross proceeds of settlement.' " (*Gonzalez v. Chen* (2011) 197 Cal.App.4th 881, 884, fn. 1 (*Gonzalez*).) In *Gonzalez*, the court recognized that rule 7.995 expressly " 'preempted all local rules relating to the determination of reasonable attorney's fees to be awarded from the proceeds of a [minor's] compromise, settlement, or judgment' " (*Gonzalez,* at pp. 884-885), and held that, following the promulgation of rule 7.955, trial courts were required to determine "the award of attorney fees under California Rules of Court, rule 7.955, not a local rule." (*Gonzalez*, at p. 888.)

The record does not support Friedman's assertion that the trial court applied the preempted local rule instead of rule 7.955. Friedman's declarations in support of the original and amended petitions both stated that the fee requests were made under rule 7.955, and both declarations discussed each of the factors set forth in the controlling rule. (See fn. 3, *ante*.) Although the trial court's initial tentative ruling made reference to the "typical 25% contingency fee," the court never mentioned, much less discussed, the preempted local rule, and the court ultimately stated that it was inclined to reject the original petition because, "[a]fter *reviewing Counsel's declaration*, the Court remains unconvinced that the requested amount is fair and reasonable." (Italics added.) Error is never presumed; we must therefore assume from

the trial court's reference to Friedman's declaration that the court was aware of and considered the factors set forth in rule 7.955 when it tentatively rejected Friedman's initial request for attorney fees totaling 33.33 percent of his client's gross recovery. (See *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296 [appellant must affirmatively demonstrate error on the face of the record].)

Moreover, during subsequent proceedings, the trial court explained its reasons for reducing the requested attorney fees in terms specific to the factors set forth in California Rules of Court, rule 7.955. For instance, at the hearing, the court explained that it had considered the "amount of work that was involved" (*id.,* (b)(8)), "the underlying issues" (*id.,* (b)(3)), and "what caused the settlement to be what it was" (*id.,* (b)(4)). In its final order, the court observed that Friedman's declaration did not suggest "the action involved any particularly novel or difficult questions or extraordinary skill and time" (*id.,* (b)(3)), counsel spent "a total of 175 hours [on the case] . . . throughout the 18 months of litigation" (*id.,* (b)(5), (b)(6) & (b)(8)), and that, "[e]ven at the 25% fee, Counsel [would] receive an hourly rate of over $3,500.00" (*id.,* (b)(2)). For his part, Friedman acknowledged these reasons at the hearing *without objection* and asked the court to enter an order on his amended petition for a 25 percent contingency fee. Although Friedman now quarrels with some of the court's findings, his arguments do not overcome our presumption of correctness or affirmatively establish an abuse of discretion as to the court's refusal to award one-third of the settlement amount as attorney fees.

2. *Remand Is Necessary to Determine Whether the Attorney Fee Award Violates MICRA*

Although we find no abuse of discretion in the trial court's decision not to award a greater proportion of the settlement amount as attorney fees, it appears from the record on appeal that MICRA may apply to Friedman's attorney fee recovery, in which case the court granted Friedman attorney fees *in excess of* the maximum allowable under MICRA (§ 6146, subd. (a)). It is not within a trial court's discretion to grant an attorney fee award that exceeds the statutory cap on such fees under MICRA. (*Nguyen v. Los Angeles County Harbor/UCLA Medical Center* (1995) 40 Cal.App.4th 1433, 1449 [although the trial court is not required to award the maximum attorney fee award under section 6146, "it cannot exceed it"]; *Hathaway v. Baldwin Park Community Hospital* (1986) 186 Cal.App.3d 1247, 1253 [where MICRA applies, "a trial court does not have the power to award extraordinary attorneys' fees" in excess of statutory maximum].)

a. *Whether the fee award exceeded the statutory maximum is squarely before this court*

Friedman argues this court should not address this issue because "there is no case or controversy between the parties."[6] However, Friedman raised the issue of the proper calculation of the attorney fee award, which necessarily requires consideration of the effect of MICRA. Moreover, Friedman's argument that we

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[6] Friedman took this position in a letter brief submitted in response to this court's request for supplemental briefing to address whether MICRA applies to this case and limits the amount of attorney fees Friedman was permitted to collect as a percentage of Plaintiff's recovery. Friedman did not himself raise this on appeal.

should not take up this issue underscores the precarious nature of his position in this appeal: Friedman represented the minor in the medical malpractice suit brought on her behalf that gave rise to the attorney fee award, but in the instant appeal Friedman's interests are adverse to those of the minor, who is not represented on appeal.

In contrast to fees awarded pursuant to a "prevailing party" provision, which are paid by the *other* side, "attorney fees in a minor's compromise come out of, and therefore reduce, the minor's recovery." (*Gonzalez, supra,* 197 Cal.App.4th at p. 887.) Thus, "[w]hen a minor's attorney plans to appeal an award of attorney fees or is likely to seek additional attorney fees on remand and a contingency fee agreement must be considered, 'a conflict of interest necessarily exists between the claimants and their attorneys who both seek to maximize their own percentage of an award.' [Citation.] 'The primary concern regarding contingency fees is that they create conflicts of interest between attorneys and clients which may affect an attorney's diligence and judgment.' " (*Id.* at p. 888; Rules Prof. Conduct, rule 3–300.) This concern is exacerbated in the context of a minor's compromise, where the defendant health care providers have no interest in how the settlement proceeds are allocated and "the minor's guardian ad litem, often a relative, is rarely skilled in the law and usually depends on the minor's attorney for advice." (*Gonzalez,* at p. 887.) It is an inevitable truth that "[i]f the minor's attorney argues . . . that he is entitled to additional attorney fees . . . , the guardian ad litem may not even question the argument." (*Ibid.*)

Given this dynamic, which necessarily creates a conflict wherein the attorney may put his interests ahead of his or her minor client's, "[t]he trial court *itself* must develop and resolve any counterarguments on behalf of the minor, lest the attorney receive *an excessive award of fees*." (*Gonzalez, supra,* 197 Cal.App.4th at p. 887, italics added.) Further, as is the case here, when the attorney files an appeal seeking additional attorney fees from a minor's compromise, the obligation to develop any counterarguments on behalf of the minor necessarily shifts to the appellate court, which has the same duty to ensure the attorney does not receive an award of fees in excess of that which the law permits. *Gonzalez* supplies the salient analysis: "In this appeal, one position has been presented—[the minor's attorney] Friedman's[7]—and one brief has been filed—his opening brief. . . . No one has opposed Friedman's arguments. To be blunt, a victory for Friedman would come at the expense of the minor. . . . Like the trial court, we must independently research Friedman's arguments to determine their validity. Otherwise, the interests of the minor may not be adequately represented and could be overlooked." (*Id.* at pp. 887-888.) Thus, we reject Friedman's contention that we should not address whether MICRA applies and limits his recoverable attorney fees. (See *id.* at p. 888 ["at oral argument, Friedman's colleague admitted that Friedman's interest in attorney fees was adverse to his client's interest in the settlement proceeds, arguing that we, as an appellate court, had no obligation to 'look out' for the minor. We disagree."]; see also *Hernandez v. Fujioka* (1974) 40 Cal.App.3d 294, 303 [remanding matter for trial court to

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7 Friedman confirms he was also the appellant in *Gonzalez.*

determine whether it should modify its order of distribution where record showed guardian ad litem and "[v]arious counsel ha[d] exhibited a deep concern over their respective fees[,] [b]ut virtually nothing was presented at trial on behalf of the minor children for whose protection the guardianship ad litem existed"].)

Finally, Luz Romero, the mother and guardian ad litem for the minor, appeared at oral argument and asserted the position that the minor needed to retain as much of the settlement proceeds as possible for her future medical expenses. Thus, the question whether the attorney fee award exceeded the maximum allowable under MICRA is squarely before us.

b. *MICRA limitations on attorney contingency fees*

Section 6146 was enacted as part of MICRA to reduce the costs and increase the efficiency of medical malpractice litigation. The statute provides: "An attorney shall not contract for or collect a contingency fee for representing any person seeking damages in connection with an action for injury or damage against a health care provider based upon such person's alleged professional negligence in excess of the following limits: [¶] (1) Forty percent of the first fifty thousand dollars ($50,000) recovered. [¶] (2) Thirty-three and one-third percent of the next fifty thousand dollars ($50,000) recovered. [¶] (3) Twenty-five percent of the next five hundred thousand dollars ($500,000) recovered. [¶] (4) Fifteen percent of any amount on which the recovery exceeds six hundred thousand dollars ($600,000)." (§ 6146, subd. (a).)

MICRA's attorney fee limitations apply to any action for damages "against a *health care provider* based upon such person's alleged *professional negligence*." (§ 6146, subd. (a),

italics added.) The statute defines the term "health care provider" to include any person licensed by the Medical Board of California or "any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code." (§ 6146, subd. (c)(2).) The definition also includes "the legal representatives of a health care provider." (*Ibid.*) There is no dispute that all Defendants in this case are "health care providers" as defined by MICRA.

MICRA defines "professional negligence" as "a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that the services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital." (§ 6146, subd. (c)(3); see *Larson v. UHS of Rancho Springs, Inc.* (2014) 230 Cal.App.4th 336, 346-347.)

MICRA's cap on fee awards applies "regardless of whether the recovery is by settlement, arbitration, or judgment, or whether the person for whom the recovery is made is a responsible adult, an infant, or a person of unsound mind." (§ 6146, subd. (a); see *Gonzalez, supra,* 197 Cal.App.4th at pp. 886-887 [on minor's compromise of medical malpractice claim, trial court must determine whether, within the limitations of MICRA, the requested fees are reasonable under rule 7.955].) Moreover, section 6146 "was intended to further a significant public policy and [therefore] its protection cannot be waived." (*Fineberg v. Harney & Moore* (1989) 207 Cal.App.3d 1049, 1050; see *Waters v. Bourhis* (1985) 40 Cal.3d 424, 438-439 & fn. 15 (*Waters*) [cap under MICRA limits attorney fee award

"notwithstanding plaintiff's consent to a higher fee"].) If a trial court has approved an award that exceeds the statutory maximum, the client is "entitled to recover any fees paid beyond the statutory limit." (*Schultz v. Harney* (1994) 27 Cal.App.4th 1611, 1619.)

Without accounting for applicable deductions for "any disbursements or costs incurred in connection with prosecution or settlement of the claim" (§ 6146, subd. (c)(1)), if MICRA applies to Plaintiff's claims, the total allowable contingency fee for Plaintiff's $2,500,000 gross recovery was $446,650. Thus, to the extent MICRA applied, the attorney fee Friedman collected exceeded the permissible amount by at least $178,350.[8]

c. *MICRA's limits on attorney contingency fees do not violate constitutional equal protection*

In his response to our request for supplemental briefing, Friedman argues "MICRA is obsolete and/or unconstitutional" and "has been so since at least 1988 when Prop. 103 was passed, giving the insurance commissioner the power to regulate insurance premiums, including medical malpractice premiums."[9] He contends this voter initiative has eliminated "the alleged

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[8] Any deductions that might be applied pursuant to section 6146, subdivision (c) would necessarily reduce the permissible amount of attorney fees by reducing the "recovery" upon which the contingency fee is calculated.

[9] "On November 8, 1988, the voters enacted the initiative measure designated Proposition 103 that, among other provisions, added article 10, entitled Reduction and Control of Insurance Rates, to chapter 9 of part 2, division 1, of the Insurance Code. (§ 1861.01 et seq.)." (*Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1248.)

'justification' for MICRA," and thus so undermined the rationality of section 6146's classification that the statute no longer passes constitutional muster under the Equal Protection Clause of the United States Constitution. We disagree.

"Where, as here, a disputed statutory disparity implicates no suspect class or fundamental right, 'equal protection of the law is denied only where there is no "rational relationship between the disparity of treatment and some legitimate governmental purpose." ' " (*Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 881.) "While parties challenging legislation under the equal protection clause may introduce evidence supporting their claim that the legislation is irrational, they cannot prevail if it is evident that ' "the question is at least debatable." ' " (*Stinnett v. Tam* (2011) 198 Cal.App.4th 1412, 1427 (*Stinnett*).) "Thus, '[t]o mount a successful rational basis challenge, a party must " '[negate] every conceivable basis' " that might support the disputed statutory disparity. [Citations.] If a plausible basis exists for the disparity, courts may not second-guess its " 'wisdom, fairness, or logic.' " ' " (*Chan v. Curran* (2015) 237 Cal.App.4th 601, 613 (*Chan*).)

In *Roa v. Lodi Medical Group, Inc.* (1985) 37 Cal.3d 920, the California Supreme Court rejected an equal protection challenge to section 6146. (*Id.* at p. 923.) The court noted that the Legislature enacted the various provisions of MICRA with the aim of reducing the high cost of medical premiums, which were "(1) threatening to curtail the availability of medical care in the state and (2) creating a situation in which patients, injured by medical malpractice, might well find that there was no liability insurance to cover the damages they had sustained." (*Id.* at p. 930.) The plaintiffs in *Roa* asserted the Legislature

acted arbitrarily in selectively imposing limits only on contingency fees collected by malpractice plaintiffs' attorneys because such limits would not affect the amounts charged by malpractice defense attorneys, which more directly affected the cost of malpractice insurance. (*Id.* at pp. 930-931.)

The court rejected the plaintiffs' argument, finding the limits imposed by section 6146 bore a rational relationship to MICRA's objectives. (*Roa, supra,* 37 Cal.3d at pp. 930-931.) The Legislature, the *Roa* court explained, could have determined the provision would reduce malpractice insurance costs (1) through the large number of malpractice cases that are resolved through settlement, and (2) as a means of deterring attorneys from instituting frivolous suits or encouraging their clients to hold out for unrealistically high settlements. (*Id.* at p. 931.) In addition, the court found the limits were rationally related to the larger statutory scheme because MICRA incorporated a number of provisions that might reduce a malpractice plaintiff's recovery, and the Legislature could reasonably have concluded that a limitation on contingency fees was an appropriate means of protecting the already diminished compensation of such plaintiffs from further reduction by high contingency fees. (*Id.* at p. 932.)

Because our Supreme Court has already rejected an equal protection challenge to section 6146's limits, Friedman necessarily relies upon the supposed "changed circumstances" brought about by the passage of Proposition 103 in 1988—three years after *Roa* was decided. Under the principle of changed circumstances, " 'the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.' " (*Brown v. Merlo* (1973) 8 Cal.3d 855, 869.) Friedman

claims Proposition 103 eliminated the "manufactured 'malpractice crisis,' " which he maintains was the sole basis for section 6146's disparate treatment of malpractice plaintiffs and their attorneys. Although he made essentially the same argument to the trial court, Friedman failed to submit evidence to show the effect that Proposition 103's enactment has had on malpractice insurance premiums. Instead he relies entirely upon the inference that there could no longer be a " 'malpractice [crisis],' real or manufactured," because Proposition 103 prohibits the Insurance Commissioner from approving rates that are excessive, inadequate, or unfairly discriminatory, and from allowing such rates to remain in effect. (See Ins. Code, § 1861.05.)

Friedman's claim fails in the first instance because it does not negate every rational basis identified by the Supreme Court in *Roa*, nor "every conceivable basis" that could plausibly justify section 6146's limits. (*Chan, supra,* 237 Cal.App.4th at p. 613.) Notably, the *Roa* court found "[t]he Legislature may reasonably have concluded that a limitation on contingency fees in this field was an 'appropriate means of protecting the already diminished compensation' of [malpractice] plaintiffs from further reduction by high contingency fees." (*Roa, supra,* 37 Cal.3d at p. 932.) The regulatory proscriptions on excessive insurance rates imposed by Proposition 103 in no way affect this rationale underlying section 6146. (See Ins. Code, § 1861.05; see also *Stinnett, supra,* 198 Cal.App.4th at pp. 1427–1431 [rejecting changed circumstances challenge to MICRA limitation on recovery of noneconomic damages notwithstanding passage of Proposition 103.)

Moreover, as the court explained in *Chan*, even after the passage of Proposition 103, the Legislature still could rationally conclude that MICRA's restrictions are necessary to ensure medical malpractice rates stay in check. (See *Chan, supra,* 237 Cal.App.4th at p. 617.) The plaintiff in *Chan* argued, as Friedman contends here, that "Proposition 103 insures there will never again be a malpractice insurance 'crisis.' " (*Ibid.*) The *Chan* court rejected the argument, emphasizing that Proposition 103 only "provides that insurance rates 'shall be maintained at fair levels by requiring insurers to justify all future increases.' " (*Ibid.*, quoting Ballot Pamp., Gen. Elec. (Nov. 8, 1988) text of Prop. 103 p. 99.) Thus, "[w]hile Proposition 103 may prevent insurers from unilaterally raising rates without administrative oversight, it does not prohibit rate increases that are fairly related to costs" and "there is nothing in the proposition, itself, that is a check on such costs." (*Chan,* at p. 617.) Accordingly, the *Chan* court explained, Proposition 103 "provides no assurance medical malpractice rates would stay in check should MICRA's noneconomic damages cap be removed." (*Id.* at pp. 617-618.) Insofar as MICRA's contingency fee limits on awards of economic damages likewise reduce malpractice insurance costs (see *Roa, supra,* 37 Cal.3d at p. 931), the same logic applies to section 6146.

Based on the foregoing, we conclude *Roa* remains the controlling authority regarding the constitutional validity of MICRA's limits on attorney contingency fees in medical malpractice cases, and reject Friedman's equal protection challenge to section 6146.

d. *As pled, the "Wilful Misconduct" claim does not remove the action from MICRA's purview*

As set forth above, MICRA's attorney fee cap applies to any action for damages "based upon [a health care provider's] alleged *professional negligence*." (§ 6146, subd. (a), italics added.) The operative complaint included one cause of action for "Professional Negligence" and a second cause of action styled as "Wilful Misconduct." The first cause of action plainly fell within the scope of MICRA. We now consider whether the inclusion of the second purported claim for "Wilful Misconduct" removed this action and settlement from MICRA's purview. (See *Waters, supra,* 40 Cal.3d at pp. 433-439.)

"It is settled that additional causes of action may arise out of the same facts as a medical malpractice action that do not trigger MICRA." (*Unruh-Haxton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 352; see *Perry v. Shaw* (2001) 88 Cal.App.4th 658, 668-669 [MICRA noneconomic damages cap applied to claim based on professional negligence but not to intentional tort claim for battery].) "Thus, when a cause of action is asserted against a health care provider on a legal theory other than medical malpractice, the courts must determine whether it is nevertheless based on the 'professional negligence' of the health care provider so as to trigger MICRA." (*Smith v. Ben Bennett, Inc.* (2005) 133 Cal.App.4th 1507, 1514.) In making this determination, the court must examine "the legal theory underlying the particular claim and the nature of the conduct challenged to determine whether, under California law, it would constitute 'professional negligence' subject to [MICRA]." (*Barris v. County of Los Angeles* (1999) 20 Cal.4th 101, 116 (*Barris*).)

Notwithstanding the "Wilful Misconduct" label, the conduct alleged against the Physician Defendants in the complaint's second cause of action plainly constitutes "professional negligence" as defined by MICRA. The complaint alleges Plaintiff's mother "employed Defendants . . . to diagnose and treat her high risk condition of pregnancy, and to take appropriate action for her care and the care of the fetus within her, including . . . pre-natal care, delivery and post-delivery care." The "Wilful Misconduct" cause of action alleges the Physician Defendants "were aware of the possibility of severe neurological damage to Plaintiff if she were not delivered promptly," and "[n]otwithstanding this knowledge, none of [the Physician Defendants] took any steps to expedite a 'crash' cesarian [*sic*] section and allowed Plaintiff to linger in utero, developing hypoxic ischemic encephalopathy to the point it became irreversible."

Under any fair and reasonable interpretation of the complaint's allegations, the alleged failure to expedite a crash cesarean section was an "omission to act by a health care provider in the rendering of professional services" and the alleged "proximate cause of [Plaintiff's] personal injury." (§ 6146, subd. (c)(3).) Thus, the claim as pled plainly constituted "an action for injury or damage against a health care provider based upon such person's alleged professional negligence." (*Id.*, subd. (a); see *Barris, supra,* 20 Cal.4th at pp. 113–114 [claim under federal Emergency Medical Treatment and Active Labor Act (EMTALA) was "based on professional negligence" of health care provider and subject to MICRA cap on damages, even though EMTALA required additional "proof that the hospital *actually determined*

that the patient was suffering from an emergency medical condition," italics added].)

Although we conclude the "Wilful Misconduct" claim, as pled, did not exempt the resulting recovery from the contingency fee limits of section 6146, we cannot determine on this record whether later developments might have supported an amended pleading to add a genuine non-MICRA claim that would have had a material effect on the settlement. (See *Waters, supra,* 40 Cal.3d at p. 437 [when a true hybrid proceeding is settled without specifying on what theory the recovery is based, it is "reasonable to assume that the possibility that the plaintiff might recover a judgment in excess of MICRA's limits will have had at least some effect on the amount of the settlement received" such that MICRA's attorney fee limit will not apply].) Nor can we determine on this record whether Friedman obtained the requisite consent from his client before settling a non-MICRA claim (assuming such a claim was viable at the time of settlement). (See *id.* at p. 438, italics added ["Because the amount of a client's attorney fee may be affected by whether an action is pursued on a MICRA or non-MICRA basis and because there may be a potential conflict of interest between the attorney and client on this matter, . . . an attorney who in such a case seeks to collect a larger fee than that authorized by section 6146 *must* specifically advise the client or potential client of the pros and cons of alternative litigation strategies, including potential attorney fees, and *obtain the client's consent* to pursue and settle a non-MICRA action as well as a MICRA claim"].)

On remand, the trial court is directed to hold a hearing, and receive evidence as necessary, to determine whether there is any basis, beyond the allegations discussed above, to find MICRA

does not apply to this action. If the court finds that a non-MICRA claim was asserted at the time of settlement, the court must determine whether Friedman complied with his obligations to obtain his client's informed consent to pursue the non-MICRA claim, despite the implications for the attorney fee award.

DISPOSITION

The order awarding attorney fees is conditionally reversed and vacated and the trial court is directed on remand to determine, consistent with the principles set forth in this opinion, whether MICRA applies to this case. If the court determines MICRA does not apply and that Friedman obtained the requisite informed consent to settle a non-MICRA claim, the court shall reinstate the order awarding Friedman $625,000 in attorney fees. If the court determines MICRA does apply, the court shall vacate the prior order, enter a new order awarding attorney fees consistent with MICRA's limitations, and order disgorgement of the fees paid to Friedman in excess of the statutory limit.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

STONE, J.*

We concur:

EDMON, P. J. LAVIN, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.