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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

OLIVIA SARINANAN, ET AL.,
Plaintiff and Petitioner,

v.

GLENN LEDESMA, M.D., ET AL.,
Defendants and Respondents.

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION TWO, CASE NO. B284452
HON. LAWRENCE P. RIFF, TRIAL JUDGE
LOS ANGELES COUNTY SUPERIOR COURT, CASE NO. BC519180

PETITION FOR REVIEW

LAW OFFICE OF
NEIL M. HOWARD
Neil M. Howard, SBN 110712
717 North Douglas Street
El Segundo, California 90245
Telephone: (310) 452-6800
Email: nmh1234@gmail.com

ESNER, CHANG & BOYER LLP
Stuart B. Esner, SBN 105666
234 East Colorado Boulevard, Suite 975
Pasadena, California 91101
Telephone: (626) 535-9860
Email: sesner@ecbappeal.com

Attorneys for Plaintiff and Petitioner
MARISOL LOPEZ

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1. Whether a physician's assistant, who treats a patient without any physician supervision in violation of controlling statutes and regulations, and is therefore engaged in the unlawful practice of medicine, is nevertheless entitled to invoke Civil Code section 3333.2, as the Court of Appeal Majority held, just because there is supposedly "nominal" compliance with the singular regulation calling for a "Designated Services Agreement" between the physician and the physician's assistant?

2. Whether a Designated Services Agreement between a Physician and a PA is legally effective when the trial court found that the physician who was supposed to provide supervision under that Agreement was "in fact disabled from the practice of medicine and not performing any supervisory function of his PAs. . ." or did that disability result in the termination of the Agreement under general principles of agency law?

INTRODUCTION: WHY REVIEW IS WARRANTED

Plaintiff seeks review of a published, two-to-one decision holding that the two defendant Physician Assistants ("PAs") are entitled to benefits of Civil Code § 3333.2 despite practicing independent of a supervising physician and outside the scope of services for which they were licensed.

The Majority reached its decision even though, as the trial court found, the PAs were treating plaintiff's infant daughter Olivia without any physician supervision as required under the applicable statutes and regulations and were instead acting autonomously. The Court of Appeal concluded that the PAs were nevertheless entitled to the benefits of Civil Code § 3333.2 solely based upon its determination that the treating PAs had a "nominally effective" Designated Services Agreement ("DSA") with a physician despite clear evidence that any such agreement was not in effect at the relevant times. Indeed, both alleged supervising physicians were disabled and not practicing medicine.

As explained, the Majority erred and did so in a manner that warrants review by this Court. By its terms, Civil Code section 3333.2's $250,000 limit on noneconomic damages does not apply if the health care provider is acting outside "the scope of services for which the provider is licensed" or is in violation of any "restriction imposed by the licensing agency. . . .: (Civ. Code § 3333.2, subd. (c).) Both of these exclusions apply to a PA who is treating a patient autonomously with no physician supervision. The Physician Assistant Practice Act specifically provides that "a physician assistant may perform those medical services as set forth by the regulations adopted under this chapter when the services are rendered under the supervision of a licensed physician . . . ." (Bus. & Prof. Code, §3502, subd. (a).)

Here, Olivia Sarinana died needlessly when she was just four-years-old from a malignant melanoma because she was never seen by a dermatologist despite being referred to a dermatologist by her primary care physician. Unfortunately, her malignant melanoma was not diagnosed until it was too late because, when she repeatedly went to a

dermatology clinic, she was examined by PAs who were acting autonomously with no physician supervision, and the PAs failed to properly diagnose her serious condition.

Following a bench trial, the court found that the two PAs (Ms. Freesemann and Mr. Hughes) chose to practice without a supervising physician and without adequate supervision by any physician. They were functioning autonomously and knew it. Neither of the allegedly supervising physicians were actively practicing medicine. Both of the alleged supervising-physicians were disabled.

Further, each physician assistant was found to have acted negligently and their negligence was a cause of Olivia's death. The Court found that plaintiff suffered $4,250,000 in non-economic damages. However, the Court reduced this award to $250,000 concluding that Section 3333.2 applied because absent illegal conduct a PA is entitled to benefits of 3333.2 despite violating restrictions imposed by the physician assistant board, including treating patients independent of a supervising physician. However, there can be no question that a PA who treats patients without a SP is guilty of illegal conduct.

Plaintiff appealed and a Majority affirmed, but not for the reasons the trial court used. Instead, the Majority held that because there was a "Designation of Services Agreement" nominally in effect between the two PAs and physicians, the caveat to Section 3333.2 did not apply regardless whether there was any actual supervision. The Majority failed to explain how a Delegation of Services Agreement can be in effect if the supervising physician is not actively practicing medical and is disabled.

In so ruling, as the dissent explained, the Majority (and the trial court before it) erred. Under the statutes and regulations governing physician assistants, a PA could perform certain of the medical services that could otherwise be performed by a licensed physician *provided that the PA is supervised by a physician*, has a valid delegation of services agreement, and has been provided with written protocols. If the PA performs any services without a supervising physician, the required supervision and without written protocols then the PA is subject to criminal prosecution for providing medical services outside the scope of his or her license.

There is no question that if these defendant PAs treated Olivia with absolutely no physician involvement, they would not be entitled to the benefits of section 3333.2. The issue therefore is whether the simple fact that there was allegedly a Designation of Services Agreement between these PAs and two physicians, makes a difference when there was absolutely no actual supervision.

As explained in this Petition, the DSA is simply one of the regulatory measures designed to ensure that the statutory requirement of physician supervision is complied with. It is not an end in and of itself. The "end" is actual physician-supervision as statutorily required. If there is no actual supervision, then the DSA offers no added protection to a patient being treated by PA. Whether the DSA may allow a patient to more easily prove that there is an agency between the PA and a physician for purposes of establishing that the physician is vicariously liable, is too little and too late. By the time that "added protection" comes to fruition the patient has already been treated by the PA without physician supervision and has already been harmed. Moreover, in many, if not most cases, vicarious liability would exist (such as here) because there is already an employment relationship between the PA and the physician. The DSA itself thus adds nothing.

Review by this Court is urgently required. The Majority opinion embodies a reflexive tendency by Courts to apply MICRA's limitations where they have no place. If a health care provider willfully violates the applicable statute and regulations which restrict his or her ability to engage in the practice of medicine, then that health care provider either is not "*within the scope of services for which the provider is licensed" or is within a "restriction imposed by the licensing agency. . . .":* (Civ. Code § 3333.2, subd. (c), emphasis added.) Either way, by its express terms section 3333.2's $250,000 cap has no application. Simply put, the PAs here cannot have it both ways: on the one hand utterly disregarding the condition that allows them to practice medicine in the first place and then claiming that they are nevertheless entitled to invoke the protections of a statute because they were practicing medicine.

Review by this Court is further needed to clarify *Waters v. Bourhis* (1985) 40 Cal.3d 424. There, the Court explained that MICRA's limitation on professional negligence was "intended to render MICRA inapplicable when a provider operates in a capacity for which he is not licensed - for example when a psychologist performs heart surgery." (*Id.* at p. 436.) As the Majority opinion in this case reflects, this passage is subject to differing interpretations warranting clarification by this Court. It is plaintiff's position that PA that unlawfully performs medical services without a supervising physician or without the required supervision of a physician, is no different than the hypothetical psychologist in *Waters*. However, the Majority concluded that "[a] rule that would exclude a physician assistant's conduct from the damages limitation in MICRA simply because a supervising physician violates some or all of the governing regulations would contravene our Supreme Court's decision in *Bourhis* that conduct is not outside the scope of a license merely because it violates professional standards." (Opn. 22.)

In short, the issue presented here is an important question of law under California Rules of Court rule 8.500(a) justifying this Court's attention.

STATEMENT OF FACTS AND PROCEEDINGS BELOW

This action arises from the tragic death of Olivia Sarinana when she was just four years old. Olivia died of malignant melanoma, a virulent and rare form of cancer. The plaintiff is Olivia's mother, Marisol Lopez. The defendants who are parties to this appeal are Dr. Glenn Ledesma, Dr. Bernard Koire, Physician Assistant Suzanne Freesemann and Physician Assistant Brian Hughes. The sole issue is whether MICRA's $250,000 limitation on the recovery of noneconomic damages applies when physician assistants (such as Ms. Freesemann and Mr. Hughes) independently practice medicine without a supervising physician, any required supervision or any protocols in violation of numerous restrictions imposed by the licensing agency (The Physician Assistant Board).

The trial court found that defendants were negligent in their failure to diagnose Olivia and that this failure was the cause of her death. Olivia was evaluated or treated on six occasions at Dr. Ledesma's dermatology clinics but was never seen by a physician. (AA-149.) Instead, she was seen by Ms. Freesemann and Mr. Hughes, who were both physician assistants. (AA-149.)

Dr. Ledesma testified that he became disabled and unable to practice medicine in 2010. While Dr. Ledesma had entered into a delegation of services agreement ("DSA") with Ms. Freesemann in 2009, he was adamant that he was not Ms. Freesemann's supervising physician ("SP") when Ms. Freesemann treated Olivia. Rather, according to Dr. Ledesma, Dr. Koire was Ms. Freesemann's and Mr. Hughes's SP. Ms. Freesemann on the other hand testified that Dr. Ledesma and not Dr. Koire was her SP. (AA-156.)

Mr. Hughes had entered into a signed but undated DSA with Dr. Koire which was legally inadequate. (AA-156.) Dr. Koire testified that he was a consulting contractor for California Dermatology Centers and that his work for Dr. Ledesma consisted solely of being Mr. Hughes SP. He denied being any other PA's SP and saw no patients at the Ledesma facility. (AA-156.)

The trial court described the evidence as to Olivia's multiple examinations at the Ledesma facility where she was examined and treated by Ms. Freesemann and Mr.

Hughes. As to Ms. Freesemann, the Court found that in her three clinical encounters with Olivia "Ms. Freesemann was in clear and plain violation of many regulatory requirements pertaining to her practice as a PA." (AA-168.)

1. The DSA between Dr. Goldberg and Ms. Freesemann had no application when Ms. Freesemann examined Olivia. By that point Dr. Goldberg was no longer involved with the Ledesma facilities. (AA-168.)
2. The January 1, 2009 DSA between Dr. Ledesma and Ms. Freesemann was nominally in effect when Olivia was examined. (AA-168-169.)
3. "Dr. Ledesma was no longer fulfilling any SP obligations under the January 1, 2009 DSA at the time Ms. Freesemann' s clinical encounters with Olivia." (AA-169.) "Ms. Freedman knew that Dr. Ledesma was not fulfilling his supervisory obligations." (AA-169.) He was not available in person or by electronic communications; he was not selecting for chat review cases which represented "diagnosis, problem treatment or procedure the most significant risk to the patient. . . .;" he was not within 30 days, reviewing countersigning and dating a minimum of 5% sample of medical records of patients treated by the PA. (AA-169.)
4. "[A]t the time of Ms. Freesemann clinical encounters with Olivia, [she] consulted with no physician affiliated with the Ledesma clinics on any topic at all" in violation of 16 CCR Section 1399.540(d)." (AA-170.) The Court concluded that she decided "to practice without an SP and without adequate consultation with any physicians. The Court finds it is a virtual certainty she knew she was doing so in obvious violation of the regulations. She was functioning autonomously and she knew it. This was a violation of 16 CCR 1399.545(f)." (AA-170.)
5. Ms. Freesemann was "not operating under required supervisory 'guidelines' as required supervision under 16 CCR 13999.545(e)." The Court found that no such guidelines existed. "The evidence is clear that at the time of Ms. Freesemann' s clinical encounters with Olivia Ms.

Freesemann was not consulting or seeking to consult with Dr. Ledesma 'as much as possible' or at all." (AA-172.)

6. Ms. Freesemann "consistently violated 16 CCR Section 1399.54" requiring that each time she provided care to Olivia she enter her name, signature, or computer code on the patient's records and also enter the name of the supervising physician responsible for the patient. "The Court finds the . . . likely explanation for Ms. Freesemann' s failure is that she knew that Dr. Ledesma was not in fact serving as her SP and that, in fact, she had no SP to identify." (AA-172.)

The Court then recounted how Ms. Freesemann' s conduct fell below the applicable standard of care on each of the three dates she examined Olivia. (AA-172-175.)

As to Mr. Hughes, the Court found that he "was aware of the existence of SP and PA regulations that governed his practice but he was unconcerned and nonchalant about compliance at the time of Mr. Hughes clinical encounters with Olivia." (AA-175.) The Court then recounted that:

1. The DSA signed by Mr. Hughes and Dr. Koire was undated in violation of 16 CCR Section 1399.540(b). The Court noted that this was more than a technical violation. "[T]he dating requirement is part of the overall accountability scheme. It sets forth a clear date by which both PA and SP know to whom they owe their corresponding responsibilities." (AA-175, fn 27.)
2. Dr. Koire was not available in person or by electronic communications at all times Mr. Hughes was caring for Olivia. (AA-175-176.)
3. "It is likely that Mr. Hughes knew that he was . . . functioning autonomously. Indeed, Dr. Koire had a stroke before even meeting Mr. Hughes and was no longer engaged in active practice." (AA-176.)
4. Mr. Hughes likely knew that Dr. Koire was not selecting appropriate cases for chart review. (AA-176.)

5. It is likely that Mr. Hughes knew that Dr. Koire was not countersigning the requisite sample of medical records. (AA-176.)
6. Mr. Hughes failed to adequately consult with Dr. Koire generally and with respect to Olivia in particular. (AA-177.)
7. When he examined Olivia, Mr. Hughes was not operating under the required supervisory guidelines. (AA-177.)
8. Mr. Hughes consistently violated 16 CCR 1399.54 requiring that when he treated Olivia that he sign or initial her record, chart or written order and to also enter the name of the supervising doctor. (AA-177.)

The Court then recounted how Mr. Hughes acted below the standard of care when he examined Olivia on January 3, 2011 and September 9, 2011 (the Court found that he acted within the standard of care on January 17, 2011). (AA-178-179.)

The Court next found the negligence of Freesemann and Hughes was an actual and proximate cause of Olivia's premature death. (AA-190 et seq.) The Court found that plaintiff suffered $11,200 in economic damages and $4,250,000 in non-economic damages. (AA-203-204.)

Finally, the Court reached the issue that is the subject of this petition. Over plaintiff's objection, the Court concluded that even though there were numerous violations of the governing statute and regulations imposed by the licensing agency the two defendant PAs were entitled to rely upon section 3333.2's cap on noneconomic damages because there was not a regulatory restriction imposed on these two PAs individually. Plaintiff appealed this determination and in a published 2-to-1 decision, the Court of Appeal affirmed, but not on the grounds relied upon by the trial court. Instead, the Majority concluded that because there was supposedly a "designated service agreement" between the two PAs and the supervising physicians, Section 3333.2 applied despite the fact that there was no actual supervision. (Opn. 20.)

Plaintiff petitioned for rehearing pointing out that even under the Majority's analysis, Section 3333.2 did not apply as to Ms. Freeseman. While the trial court found that "[n]either party formally revoked the DSA and it was nominally (but not effectively,

as set out below) in effect at the time of Ms. Freeseman's clinical encounters with Olivia." (AA-168.) However, among the later findings "below" which were referenced by the trial court in this passage was the following: "Dr. Ledesma contends *and the Court finds*, he was in fact disabled from the practice of medicine and not performing any supervisory function of his PAs. . . ." (AA-182-183, italics added [Court makes this finding in explaining why Dr. Ledesma has liability under ostensible authority doctrine].) This finding that Dr. Ledesma was disabled from the practice of medicine meant that there was no effective DSA between him and Ms. Freeseman. The Court of Appeal denied rehearing. (Attachment B.)

Plaintiff has timely filed this Petition. Due to the Second District Court of Appeal's emergency COVID order issued on April 15, 2020, the date of finality of the subject March 24, 2020, opinion was extended 30 days until May 23, 2020. Accordingly, pursuant to California Rules of Court, rule 8.500(e)(1), plaintiff had 10 days after finality (or June 2, 2020) within which to file this Petition.

ARGUMENT

I. PHYSICIAN ASSISTANTS WHO TREAT PATIENTS ABSENT ANY PHYSICIAN SUPERVISION ARE NOT ENTITLED TO THE BENEFIT OF MICRA'S LIMITATION ON THE RECOVERY OF NON-ECONOMIC DAMAGES.

The Majority framed the issue here as follows: "where . . . a physician assistant establishes a legal relationship with a supervising physician through a DSA, but in practice receives no supervision, is the physician assistant practicing outside the scope of licensed services or in violation of a 'restriction imposed by the licensing agency'? If so, any negligent medical care that the physician assistant provides is not 'professional negligence' under section 3333.2, subdivision (c)(2), and the limitation on noneconomic damages in that section does not apply." (Opn. 19.)

The Court then reasoned that "[o]ur Legislature has not provided an answer to this question, which raises policy issues that the Legislature is best equipped to consider. However, in the absence of clear legislative direction, we must do our best to apply the statute based upon the Legislature's probable intent. We must construe Section 3333.2 in this context in a manner that 'comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.'" (Opn. 20.)

The Majority resolved this issue by concluding that so long as a PA nominally complied with the singular regulatory requirement of having a DSA with a physician – even though no actual supervision occurs – then the PA is entitled to the benefits of section 3333.2. As explained, in so ruling, the Majority erred.

A. Section 3333.2 Applies Only To Claims For "Professional Negligence" Which In Turn Requires The Defendant To Be Acting Within The Scope Of Services For Which She Is Licensed And Not In Violation Of Any Restriction Imposed By The Licensing Agency.

MICRA's $250,000 cap on noneconomic damages for professional negligence against a heal care provider appears in Civil Code Section 3333.2. Subdivision (c) defines the terms "health care provider" and "professional negligence." The latter definition is relevant here. It provides: "'Professional negligence' means a negligent act or omission to act by a health care provider in the rendering of professional services ... *provided that such 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*." (Civ. Code § 3333.2, subd. (c), emphasis added.)

The issue here is whether, under the trial court's factual findings, the claims against these defendants are "professional negligence" under Section 3333.2. "[T]he scope and meaning of the phrases "arising from professional negligence" and "based on professional negligence" could vary depending upon the legislative history and "the purpose underlying each of the individual statutes." [Citations.]" (*Barris v. County of Los Angeles* (1999) 20 Cal.4th 101, 116.)

In *Waters v. Bourhis*, *supra*, 40 Cal.3d 424, this Court addressed the definition of "professional negligence" in the context of Business and Professions Code Section 6146's limitations on attorney's fees. In the underlying case, the plaintiff sued a psychiatrist for sexual misconduct and alleged both negligence and intentional torts. Following settlement of the case, the contingency fee collected by her attorney exceeded the limit set forth in Section 6146, and she brought suit, attempting to enforce the MICRA limitation on fees. (*Id*. at p. 427.) In attempting to justify the fee, the attorney defendant argued that he was entitled to the higher fee because sexual misconduct had "long been a basis for disciplinary action by the state licensing agency," and as such was

a "restriction" within the meaning of the definition of "professional negligence" found in Section 6146. (*Id*. at p. 436.)

The Court held that such contention "misconceives the purpose and scope of the proviso," stating that the language regarding "restrictions" by the licensing agency was "simply intended to render MICRA inapplicable when a provider operates in a capacity for which he is not licensed - for example when a psychologist performs heart surgery." (*Id.* at p. 436.) The Court concluded that the psychiatrist's conduct arose out of the course of the treatment he was licensed to provide. (*Ibid*.)

Next, in *Prince v. Sutter Health Central* (2008) 161 Cal.App.4th 971, the plaintiff sued an unlicensed social worker, who was registered with the Board of Behavioral Sciences as an associate clinical social worker working towards licensure, after the decedent, whom the social worker ordered released from the mental facility, committed suicide. (*Id*. at pp. 974-975.)

The Court concluded that the fact that the social worker was registered with the Board was the equivalent to "'being 'licensed or certified' under MICRA[.]" (*Id.* at p. 975.) The plaintiff nevertheless argued that the social worker was not "acting 'within the scope of services for which the provider is licensed *and which are not within any restriction imposed by the licensing agency*.'" (*Id.* at p. 977, original italics.) The plaintiff argued that the defendant social worker "allegedly violated a statute requiring that registrants 'shall inform each client or patient prior to performing any professional services that he or she is unlicensed and is under the supervision of a licensed professional.' (Bus. & Prof., § 4996.18, subd. (e).)" (*Id.* at p. 977.)

The Court rejected this argument because "the disclosure statute was not imposed by the Board" and in any event because the violation at issue there was equivalent to the conduct which the Supreme Court concluded fell within MICRA in *Waters*. (*Id.* at p. 977.)

As described above, the trial court concluded and the Majority agreed that Section 3333.2's limitation on the recovery of non-economic damages applied to plaintiff's claims based upon the Ms. Freesemann and Mr. Hughes which caused the tragic death of

Olivia even though these PA's were treating Olivia without any physician supervision and without any of the required regulatory protocols. As now explained, if the conduct of these PAs were not outside the scope of services for which they were licensed, it is difficult to fathom what conduct would be outside that scope.

B. Section 3333.2 Does Not Apply Because Defendants' Services Were Either (1) Outside The Scope Of Services For Which They Were Licensed Or (2) Are In Violation Of Restrictions Imposed By The Licensing Agency.

1. PAs – such as Freesemann and Hughes -- who have no supervising physician, who receive no supervision and who are not subject to the required protocols, cannot lawfully perform services that can otherwise be performed only by a physician.

Here, the statute and various regulations which the trial court concluded were violated constituted restrictions on the services that a PA could perform. Those sections and regulations go to the very heart of why a PA can perform services that were previously performed only by a licensed physician. It was those restrictions – requiring supervision and monitoring by a physician – that served to ensure that a licensed physician would be involved in the patient's treatment even if it was a PA who performed the direct examination. Without complying with these restrictions imposed by The Physician Assistant Board - Freeseman and Hughes were not lawfully permitted to provide care to the Olivia. Otherwise, any physician assistant would be entitled to open a clinic and see patients without any supervision by a licensed doctor.

"Licensing of physicians serves the public policy purpose of assuring patients of an established level of physician competence and training." (*Stevens v. Superior Court* (1986) 180 Cal.App.3d 605, 610.) Aiding another to engage in the unlicensed practice of medicine is grounds for discipline of the licensed health care provider. (*Thayer v. Board*

of Osteopathic Examiners (1958) 157 Cal.App.2d 4; Bus. & Prof. Code §§ 2264; 7114.) The Legislature has enacted very limited circumstances where a non-physicians could practice medicine. The Physician Assistant Practice Act is one of those narrow exceptions.

As part of that Act, the Legislature included Section 3502, setting forth the medical services that are authorized to be performed by a physician's assistant. The overarching theme of that section is that while practicing medicine, a physician's assistant must be under the supervision of a licensed physician. For instance, Section 3502, subdivision (a) provides: "Notwithstanding any other law, a physician assistant may perform those medical services as set forth by the regulations adopted under this chapter *when the services are rendered under the supervision of a licensed physician and surgeon* who is not subject to a disciplinary condition imposed by the Medical Board of California prohibiting that supervision or prohibiting the employment of a physician assistant." (Italics added.)

To ensure that the appropriate degree of supervision is performed, Section 3502, subdivision (c)(1) requires that "[a] physician assistant and his or her supervising physician and surgeon shall establish written guidelines for the adequate supervision of the physician assistant. This requirement may be satisfied by the supervising physician and surgeon adopting protocols for some or all of the tasks performed by the physician assistant." The section then goes on to specifically outline requirements for the protocols adopted pursuant to this subdivision.

Beyond these statutes, the regulations promulgated under the Act further define the nature of the supervision that is required. Title 16 of the California Code of Regulations contain the regulations of the Medical Board's Physician Assistant Committee regarding physician assistants (the "Regulations"). (See *Id*., at §§ 1399.545; 1388.541.)

Here the trial court expressly found and the Court of Appeal agreed that there was a wholesale violation of the statutes and regulations requiring physician supervision of physician's assistant so that both Ms. Freesemann and Mr. Hughes were acting

autonomously without any meaningful physician supervision. Since the right of these PAs to perform their examinations and treatment of Olivia was dependent upon having that physician supervision, their conduct was tantamount to the unlawful practice of medicine without a license.

If it is the case that the requisite physician supervision is not a restriction for purposes of determining whether the PA has engaged in professional negligence under 3333.2, then a PA could perform a surgery on an unsuspecting patient absent any supervision and enjoy the benefits of MICRA – including the $250,000 cap. Since, as this Court explained in *Waters*, a psychologist who performs heart surgery is not entitled to the protections of MICRA, then a PA that autonomously performs medical services that requires the supervision of a physician likewise does not get those protections. Each is acting outside the scope of the services authorized by his or her license.

2. A PA who performs services without the requisite physician-supervision is unlawfully practicing medicine. The Legislature should not be deemed to have rewarded such conduct through the application of Section 3333.2.

MICRA, including the $250,000 cap, applies only to individuals licensed to practice medicine. (*Lathrop v. Healthcare Partners Medical Group* (2004) 114 Cal.App.4th 1412, 1420.) While a PA would be such a licensed individual when acting under the supervision of a physician, that is not the case when the PA is acting without that required supervision. A PA that acts autonomously and without supervision – such as here – is potentially subject to prosecution for the unlawful practice of medicine. (See *People v. McCall* (2013) 214 Cal.App.4th 1006, 1015–1016; *Magit v. Board of Medical Examiners* (1961) 57 Cal.2d 74, 84.)

In view of the fact that statutes should be interpreted to further – and not thwart – public policy, Section 3333.2 should not be construed to allow PA's who engage in the unlawful practice of medicine to nevertheless reap the benefits of that section based on

the premise that they were nevertheless acting within the scope of services for which they were licensed. (*Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1162–1163.) The obvious purpose of Section 3333.2 is to provide a benefit to health care professionals who are lawfully acting within the scope of their license (purportedly to ease the then existing claimed medical malpractice insurance crisis). (See *Stinnett v. Tam* (2011) 198 Cal.App.4th 1412, 1429.)

The extraordinary nature of this benefit is starkly illustrated here where, under the trial court's ruling, Ms. Freesemann and Mr. Hughes, liability for non-economic damages is capped at $250,000 for negligently causing the death of four-year-old Olivia. No tortfeasor in any other setting would be entitled to such a benefit. However, it is equally clear that the Legislature, by including the subject provisos in Section 3333.2, intended that tortfeasors who are blatantly violating numerous restrictions limiting their rights to practice, not be entitled to that benefit. That is precisely the case here. Ms. Freesemann and Mr. Hughes violated virtually every restriction requiring physician oversight of their work and yet obtained the same benefit under Section 3333.2 as if they had acted lawfully.

This is far different than *Prince*, because the disclosure requirement at issue there had nothing to do with whether the acts of the practitioner were within the scope of the license (or registration) and were not a restriction imposed by the board. The statute which the plaintiff claimed was violated in *Prince* simply required that "A registrant shall inform each client or patient prior to performing any professional services that he or she is unlicensed and is under the supervision of a licensed professional." (Bus. & Prof. Code, § 4996.18, subd. (d).) Unlike the statutes and regulations which the trial court found were violated here, this was not a restriction on the ability of the registrant to perform any services.

Likewise, the tortious conduct here is distinct from the sexual misconduct in *Waters* that occurred during the course of the plaintiff's psychiatric treatment. While that conduct was unquestionably tortious in nature, its tortious nature was not because of limitations on the psychiatrists' license to practice medicine. Here, it is precisely because

of the limitations on the ability of Ms. Freesemann and Mr. Hughes to practice medicine that rendered their actions unlawful. Accordingly, these defendants were either acting outside the scope of services for which they were licensed or were in violation of any restriction imposed by the licensing agency. Either way, they are therefore not entitled to the benefits of Section 3333.2.

C. Even If There Were A DSA "Nominally In Effect" As The Majority Found, Then That Mere Fact Would Not Entitle Application Of Section 3333.2 Even Though The PAs Were Acting Without Any Supervision.

The Majority concluded that, even though Dr. Ledesma performed no supervision of PA Freeseman, as was required under the applicable regulations, Ms. Freeseman was nevertheless acting "within the scope of services for which the provider is licensed by the licensing agency or licensed hospital" under section 3333.2. The Court based this conclusion on its determination that there was a Designated Service Agreement ("DSA") at least nominally in effect between Dr. Ledesma and Ms. Freeseman, which had never been formally revoked. (See Opn., pp. 8, 19, 20-21, 26.)

The Majority's analysis does not withstand scrutiny. Initially, the Majority concludes that a nominally effective DSA was sufficient because "the presence of a legal agency relationship between a physician assistant and a supervising physician is the dispositive factor in determining whether the physician assistant was acting outside the scope of licensed services for purposes of section 3333.2, subdivision (c)(2). If an otherwise qualified physician assumes the legal responsibility of supervising a physician assistant, that physician assistant practices within the 'scope of services' covered by the supervising physician's license, even if the supervising physician violates his or her obligation to provide adequate supervision." (Opn. 20.)

But the mere fact that a physician has assumed legal responsibility for the acts of a PA, through a DSA or otherwise, does not mean that a PA acting with no supervision is

acting within the scope of her license or is otherwise not acting contrary to any regulatory restriction. Rather, at most that means that a patient injured by the PA's negligence may have another target defendant to sue. This would be true even without a DSA so long as the PA was an employee of the physician. Thus, under the Majority's analysis so long as there was an agency relationship between the PA and a physician – no matter whether there was a wholesale breach of every regulation regarding supervision – then the PA would be entitled to the benefits of MICRA. Nothing in logic or the law supports such a sweeping rule.

The patient's ability to assert a claim against the physician acting as the PAs principal does nothing to increase the likelihood that the patient will receive appropriate treatment to begin with and therefore will not have to sue in the first place. This is the obvious goal of the statutorily imposed supervision requirement and relevant regulations. The Majority's first reason for its conclusion not only does not further this goal, it is antithetical to it. It will reward PAs and physicians who willfully flout their statutory and regulatory obligations which were enacted to protect patients. They will know that no matter how egregious their conduct, at most they will be liable for $250,000. This case is a stark illustration. Even though the wholesale disregard of the supervision requirement resulted in the death of plaintiff's infant daughter, under the Majority's analysis, the $250,000 cap applies.

Next, the Majority reasons that "once a physician undertakes to supervise a physician assistant and forms an agency relationship with the assistant, the scope of the supervising physician's license (and any restrictions on it) define the tasks that the assistant may perform." (Opn. 21.) While the Majority is correct that the qualifications of the supervising physician provide a limitation the authority of a PA to perform that task, it does not necessarily follow that just because a physician is qualified so too is the PA – regardless whether there is any actual supervision. This limitation exists as a check to ensure that even if a physician provides supervision, then the PA still cannot perform a task the physician is not qualified to perform by his or herself. Thus, if the agency

relationship is formed with a qualified physician then there still must be actual supervision in order for the PA to be qualified to perform the task.

Next, the Majority states that "a standard for determining whether a physician assistant is acting outside the scope of his or her license that is based on the *adequacy* of supervision rather than the *legal responsibility* to supervise would make the MICRA damages limitation dependent on whether a supervising physician acts contrary to professional standards." (Opn. 21.) The Majority thus holds is that so long as there is nominal compliance with the singular regulation concerning DSAs, then the PA is entitled to the protections of MICRA regardless whether there was a wholesale violation of each and every one of the other regulations (and the controlling statute) requiring actual supervision. There is no basis to elevate the DSA regulation above all others in this manner.

The Majority next reasons that "a standard based on the adequacy of supervision would be difficult to define." (Opn. 23.) But as the trial court found and the Court of Appeal agreed, here there was no supervision. The fact that in some cases the line may be difficult to draw does not justify the refusal to recognize any line at all. This is particular true in view of the fact that the Legislature included caveats into section 3333.2. Further, this Court has not shied away from developing a standard as to when the violation of professional rules has significant impact and when it does not.

The Majority next posited that "a rule that treats a physician assistant's conduct as outside the scope of his or her license whenever supervision is inadequate would create inconsistencies in damages depending upon whether a patient sues the physician assistant or the supervising physician. Here, the trial court ruled that the supervising physicians were liable for the negligence of the physician assistants under agency principles. But supervising physicians who fail to supervise a physician assistant adequately might also be directly liable for their own negligence." (Opn. 24-25.) The Majority is confusing the potential direct liability of a physician based upon his or her own negligent supervision and the vicarious liability of a physician because his or her PA agent acted negligently. Even if MICRA applied to the former it would not apply to the latter. There would

therefore not be any disparate treatment. In any event, the premise of this point is that there was some supervision but that supervision was inadequate. Here of course there was no supervision.

Finally, the Majority references the general rule in favor of liberally construing MICRA, citing to *Preferred Risk Mutual Ins. Co. v. Reiswig* (1999) 21 Cal.4th 208, 215. There the Court construed the tolling provision of section 364 and did state that "MICRA provisions should be construed liberally in order to promote the legislative interest in negotiated resolution of medical malpractice disputes and to reduce malpractice insurance premiums." (Ibid.) But that does not mean that every time a health care provider articulates a position that would limit liability, he or she automatically wins. Indeed, due to its harsh consequences, MICRA's cap on non-economic damages should be construed narrowly. "If section 3333.2 is in fact the most significant limitation created by MICRA, it is also one of the most Draconian. When as a matter of legislative fiat the courts are required to reduce awards of noneconomic damages to $250,000 without regard to the result of a health care provider's negligence—notwithstanding brain damage, paralysis, and other equally devastating injury—the scope of that fiat must be limited to its terms." (*Perry v. Shaw* (2001) 88 Cal.App.4th 658, 668–669.)

In any event, even if the Majority's analysis were consistent with the purpose of MICRA generally, then that would still not justify its conclusion. "Only where the statutory language allows for more than one reasonable interpretation may courts consider other aids, such as the statute's purpose, legislative history, and public policy." (*Atempa v. Pedrazzani* (2018) 27 Cal.App.5th 809, 817–818.)

Here, regardless of whether the application of MICRA under the circumstances would further its goal of reducing the costs of providing medical services, that would not justify applying Section 3333.2 where the legislature expressly exempted its reach. (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 321.)

In short, the Majority's reasoning does not justify affording PAs who are acting autonomously and without any physician supervision the benefits of section 3333.2. As

now explained, even if the mere nominal existence of a DSA were sufficient to afford those benefits, the Majority opinion is still flawed.

D. Any DSA By A Physician Who Is Disabled And Not Competent To Practice Is Terminated.

The Majority reasons: "Freeseman also had a DSA with Ledesma dated January 1, 2009. The DSA was never revoked, and thus the trial court found that it was 'nominally' in effect during Freeseman's visits with Olivia. [Par.] Ledesma testified that he had become disabled and unable to practice medicine in 2010. He denied that he was Freeseman's supervising physician; he claimed that Dr. Koire performed that role. Freeseman and Koire disputed that claim and testified that Ledesma was Freeseman's supervising physician." (Opn., p. 8.)[1]

The trial court's factual finding which was referenced by the Majority in this passage was that "Neither party formally revoked the DSA and it was nominally (but not effectively, as set out below) in effect at the time of Ms. Freeseman's clinical encounters with Olivia." (AA-168.) However, among the later findings "below" which were referenced by the trial court in this passage was the following: "Dr. Ledesma contends *and the Court finds*, he was in fact disabled from the practice of medicine and not performing any supervisory function of his PAs. . . ." (AA-182-183, italics added [Court makes this finding in explaining why Dr. Ledesma has liability under ostensible authority doctrine].)

This finding was consistent with Dr. Ledesma's testimony that (1) in 2010 he was not working (RT 1211); (2) he was then on disability in 2010 (RT 1211-1212); (3) he filed a claim for disability (RT 1212-1213); (4) he invoked his Fifth Amendment rights to

[1] The analysis in this section applies equally to the alleged DSA between Dr. Koire and Mr. Hughes. As the trial court found: "It is likely that Mr. Hughes knew that he was . . . functioning autonomously. Indeed, Dr. Koire had a stroke before even meeting Mr. Hughes and was no longer engaged in active practice." (AA-176.)

the question whether he could be a supervising physician (RT 1213); and (5) Dr. Koire was Ms. Freeseman's supervising physician in 2010 (RT 1214-1215).

Thus, the trial court appears to have determined that the DSA between Dr. Ledesma and Ms. Freeseman was "nominally in effect" simply because there was no evidence that it was "formally revoked." But, as now explained, even if the DSA was not formally revoked that does not mean that it was nevertheless *legally* effective.

The Majority states:

> "*If an otherwise qualified physician* assumes the legal responsibility of supervising a physician assistant*, that physician assistant practices within the "scope of services" covered by the supervising physician's license*, even if the supervising physician violates his or her obligation to provide adequate supervision." (Opn., p. 20, emphasis added.)

Thus, the premise of the Majority's opinion is that the qualifications of a PA to treat a patient is based upon the qualifications of the supervising physician to perform that same treatment. It necessarily follows from this premise that if the supervising physician is not qualified to perform that treatment then the PA is similarly not qualified.

Here, the unchallenged factual finding of the trial court that, at the time Ms. Freeseman was treating Olivia, Dr. Ledesma was "disabled from the practice of medicine" necessarily means that Dr. Ledesma was then not "an otherwise qualified physician. . .," under the Majority's analysis. Simply put, a physician whose disability renders him or her unable to practice medicine is not competent to nevertheless practice medicine. The same is true as to Dr. Koire, the alleged supervisor of Mr. Hughes. As the trial court found: "It is likely that Mr. Hughes knew that he was . . . functioning autonomously. Indeed, Dr. Koire had a stroke before even meeting Mr. Hughes and was no longer engaged in active practice." (AA-176.)

"The general rule that an agency is always revocable*, and is revoked by operation of law* in the event of death *or incapacity of the principal*, is subject only to the exception that an agency or power coupled with an interest is not so terminated." (*Capital Nat. Bank of Sacramento v. Stoll* (1934) 220 Cal. 260, 264; see Civil Code section 2356, subdivision (a) ["Unless the power of an agent is coupled with an interest in the subject

of the agency, it is terminated by any of the following . . . (3) The incapacity of the principal to contract."].)

Here the agency between Dr. Ledesma and Ms. Freeseman was not coupled with an interest. As explained in *Pacific Landmark Hotel, Ltd. v. Marriott Hotels, Inc.* (1993) 19 Cal.App.4th 615, 626: "'The Restatement of Agency, section 138, page 339, sets forth the requirements for the creation of an agency or power coupled with an interest. They are (1) that the agency be held for the benefit of the agent not the principal, (2) that the agency is created to secure the performance of a duty to the agent or to protect a title in the agent, and (3) that the agency is created at the same time that the duty or title is created or is created for consideration.'" None of these considerations are present here.

The Restatement Second of Agency, further provides: "Except as stated in the caveat, the loss of capacity by the principal has the same effect upon the authority of the agent during the period of incapacity as has the principal's death." (Restatement (Second) of Agency § 122 (1958).) The referenced "caveat" provides: "The Institute expresses no opinion as to the effect of the principal's temporary incapacity due to a mental disease." (*Ibid*.)

In short, even if the existence of a legally effective DSA between Dr. Ledesma and Ms. Freeseman is dispositive of whether Ms. Freeseman was acting "within the scope of services" for which she was licensed under section 3333.2, then that section still does not apply to the claims against Ms. Freeseman. A physician who is "in fact disabled from the practice of medicine" lacks the capacity to nevertheless contract for the practice of medicine. This lack of capacity operated as a matter of law to revoke the DSA. Accordingly, the absence of a "formal" revocation did not establish that the DSA remained legally effective. For instance, if the supervising physician had died but the PA continued to practice, the PA would unquestionably not be entitled to the benefits of Section 3333.2 simply because the supervising physician had not "formally revoked" the DSA before he or she passed. The same is true as to a disability which prevents the principal physician from performing the services which are critical to the continued efficacy of the agency agreement.

E. It Is Not The Case, As The Trial Court Ruled, That Only Those Restrictions Imposed On A Particular PA Can Serve To Take A Matter Outside Of Section 3333.2.

The trial court ruled the proviso -- "within a restriction imposed by the licensing agency" -- applies only if the Board that licenses physician assistants issued a limitation preventing these particular defendants from performing the services that formed the basis for plaintiff's clams. (AA-210-211.) If that is what the Legislature in fact intended, then it must have intended the alternative proviso to apply when there is a general restriction which is imposed on the services the health care professional could perform.

Initially, there is nothing in the text or purpose of Section 3333.2 suggesting that "restrictions imposed by the licensing agency" are limited to only those restrictions that are imposed by a licensing agency on a particular practitioner – in contrast to all practitioners generally. If, as here, the licensing agency enacts regulations restricting all practitioners in a particular way then that is every bit as much a "restrictions imposed by the licensing agency" as if there was a restriction targeted to a particular practitioner.

The various statutes and regulations which the trial court concluded were violated constituted restrictions on the services that a PA could perform. Those sections and regulations go to the very heart of why a PA could perform services that were previously performed only by a licensed physician. It was those restrictions – requiring supervision and monitoring by a physician – that served to ensure that a licensed physician would be involved in the patient's treatment even if it was a PA who performed the direct examination. Without complying with these restrictions imposed by The Physician Assistant Board - Freeseman and Hughes were not lawfully permitted to provide care to Olivia. Otherwise, any physician assistant would be entitled to open a clinic and see patients without any supervision by a licensed doctor.

Section 3333.2 should not be construed to allow PAs who engage in the unlawful practice of medicine to nevertheless reap the benefits of that section based on the premise that they were nevertheless acting within the scope of services for which they were

licensed. (*Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1162–1163 ["If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy.'"].)

The obvious purpose of Section 3333.2 is to provide a benefit to health care professionals who are lawfully acting within the scope of their license (purportedly to ease the then existing claimed medical malpractice insurance crisis). (See *Stinnett v. Tam* (2011) 198 Cal.App.4th 1412, 1429.)

The extraordinary nature of this benefit is starkly illustrated here where, under the trial court's ruling, Ms. Freesemann and Mr. Hughes, liability for non-economic damages is capped at $250,000 for negligently causing the death of four-year-old Olivia. No tortfeasor in any other setting would be entitled to such a benefit. However, it is equally clear that the Legislature, by including the subject provisos in Section 3333.2, intended that tortfeasors who are blatantly violating numerous restrictions limiting their rights to practice, not be entitled to that benefit. That is precisely the case here. Ms. Freesemann and Mr. Hughes violated virtually every restriction requiring physician oversight of their work and yet obtained the same benefit under Section 3333.2 as if they had acted lawfully.

CONCLUSION

For the foregoing reasons, plaintiff urges this Court to grant review.

Dated: June 2, 2020

LAW OFFICE OF
NEIL M. HOWARD

ESNER, CHANG & BOYER

By: *s/ Stuart B. Esner*
Stuart B. Esner
Attorneys for Plaintiff and Appellant

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(1).)

The text of this brief consists of 8,312 words as counted by the word processing program used to generate the brief.

s/ Stuart B. Esner
Stuart B. Esner

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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MARISOL LOPEZ, Individually and as Successor in Interest, etc.,

Plaintiff and Appellant,

v.

GLENN LEDESMA et al.,

Defendants and Appellants;

BERNARD KOIRE,

Defendant and Respondent.

B284452

(Los Angeles County
Super. Ct. No. BC519180)

APPEALS from a judgment of the Superior Court of Los Angeles County. Lawrence P. Riff, Judge. Affirmed.

Esner, Chang & Boyer, Stuart Esner; Law Office of Neil M. Howard and Neil M. Howard for Plaintiff and Appellant.

Cole Pedroza, Kenneth R. Pedroza, Matthew S. Levinson and Zena Jacobsen for Defendants and Appellants Glenn Ledesma, Suzanne Freesemann and Brian Hughes.

Prindle, Goetz, Barnes & Reinholtz, Jack R. Reinholtz and Douglas S. de Heras for Defendant and Respondent.

Tucker Ellis and Traci L. Shafroth for California Medical Association, California Dental Association, California Hospital Association, California Academy of Physician Assistants and the American Medical Association as Amici Curiae on behalf of Defendants and Appellants and Defendant and Respondent.

Marisol Lopez (Lopez) appeals from a portion of a judgment in her favor that reduced the damages she was awarded for the wrongful death of her daughter, Olivia Sarinanan (Olivia).[1] Olivia died from malignant melanoma when she was about four years old. Lopez prevailed in her negligence claims against three doctors and two physician assistants. The trial court awarded noneconomic damages of $4.25 million, but reduced those damages to $250,000 pursuant to Civil Code section 3333.2, subdivision (b).[2]

Lopez argues that the reduction in damages was improper because the conduct of the two physician assistants who treated Olivia—Suzanne Freesemann and Brian Hughes—fell within a proviso excluding certain conduct from the statutory damages

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[1] Lopez originally filed this action before Olivia died. After Olivia's death, Lopez amended the complaint, asserting a wrongful death claim.

[2] Subsequent undesignated statutory references are to the Civil Code.

reduction. Lopez relies on section 3333.2, subdivision (c)(2), which provides that noneconomic damages against a health care provider for negligent professional services is limited to $250,000 "provided that such 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." Lopez argues that the negligence of the physician assistants is included within the scope of this proviso because the physician assistants acted without the supervision of a physician in violation of the governing statutes and regulations.

We reject the argument and affirm. Our Legislature has not given clear direction on how to apply section 3333.2, subdivision (c)(2) to physician assistants, whose situation is somewhat unique. The scope of a physician assistant's practice is defined, not by the physician assistant license itself, but by the scope of the practice of the physician who supervises them. In this case, the physician assistants had a nominal, but legally enforceable, agency relationship with supervising physicians, but received little to no *actual* supervision from those physicians.

In the absence of any clear legislative statement on the issue, we conclude that a physician assistant acts within the scope of his or her license for purposes of section 3333.2, subdivision (c)(2) if he or she has a legally enforceable agency agreement with a supervising physician, regardless of the quality of actual supervision. A contrary rule would make the damages reduction in section 3333.2 dependent on the adequacy of supervision. Such a rule would be uncertain and difficult to define, and would contravene the purpose of section 3333.2 to encourage predictability of damages to reduce insurance premiums.

BACKGROUND

1. Law Governing Physician Assistants

The Legislature established the position of physician assistant out of "concern with the growing shortage and geographic maldistribution of health care services in California." (Bus. & Prof. Code, § 3500.)[3] Its purpose in doing so was to encourage the "effective utilization of the skills" of physicians by enabling them to work with physician assistants. (*Ibid.*) A physician assistant must pass a licensing examination after completing an approved program and must practice under the supervision of a supervising physician. (Bus. & Prof. Code, §§ 3502, 3519.)[4] Under the governing regulations, the scope of

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[3] The Legislature enacted the current Physician Assistant's Practice Act in 1975 (the Act). (Stats. 1975, ch. 634, § 2, p. 1371.) It replaced the Physician's Assistant Law, which the Legislature enacted in 1970 with the same legislative purpose. (Stats. 1970, ch. 1327, § 2, p. 1327.)

[4] A number of relevant sections in the Business and Professions Code were amended effective January 1, 2020, pursuant to Senate Bill No. 697 (2019–2020 Reg. Sess.) (SB 697). (See Stats. 2019, ch. 707.) We apply the law as it existed at the time of the relevant events. Thus, citations in this opinion are to the prior versions of the relevant statutes, effective until January 1, 2020. To avoid confusion, we use the present tense in identifying the relevant provisions of law, even if those provisions have now been altered by amendment, and we note the changes made by those amendments where appropriate.

The source of SB 697 was the California Academy of Physician Assistants. (See Sen. Rules Com., Off. of Sen. Floor Analysis, 3d reading analysis of Sen. Bill No. 697 (2019–2020 Reg. Sess.) as amended Apr. 24, 2019, p. 1.) The legislative

services a physician assistant is permitted to provide is defined primarily through the physician assistant's relationship with his or her supervising physician. "A physician assistant may only provide those medical services which he or she is competent to perform and which are consistent with the physician assistant's education, training, and experience, and which are delegated in writing by a supervising physician who is responsible for the patients cared for by that physician assistant." (Cal. Code Regs.,

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history reflects that a primary purpose of the bill was to "align the supervisory and practice environments" between nurse practitioners and physician assistants to "create a level hiring field." (*Id.* at p. 6.) To that end, the bill "[r]evises the Act's Legislative intent to strike references to [physician assistants'] delegated authority and instead emphasizes coordinated care between healthcare professionals." (*Id.* at p. 2.) The bill also eliminated a number of mandated supervisory procedures, leaving the details of supervision to a practice agreement. (*Id.* at pp. 1–2.)

We need not, and do not, attempt to analyze the effect of the specific amendments that SB 697 implemented. However, we note that the bill does not affect the basic structure of the physician/physician assistant relationship as is relevant to this opinion. Under the amended statutes, a physician assistant is still required to render services "under the supervision of a licensed physician," and such supervision means that the licensed physician "accepts responsibility for" the medical services that a physician assistant provides. (Bus. & Prof. Code, §§ 3501, subd. (f), 3502, subd. (a)(1).)

The amendments in SB 697 further highlight the need for legislative guidance in understanding the relationship between the Act and the damage limitation in section 3333, subdivision (c)(2).

tit. 16, § 1399.540, subd. (a).) During the relevant time period, the formal writing defining the services a physician assistant may perform was called a "delegation of services agreement" (DSA). (Cal. Code Regs., tit. 16, § 1399.540, subd. (b).)[5]

2. Olivia's Disease and Treatment

No party disputes the trial court's factual findings, and we therefore rely on the trial court's statement of decision to summarize the pertinent facts.

Olivia was born in late 2009. When she was about seven or eight months old, she developed a spot on her scalp. Her primary care physician referred Olivia's mother, Lopez, to a dermatology clinic owned by Dr. Ledesma.

Freesemann worked as a physician assistant at the clinic. She saw Olivia on December 8, 2010, and after that visit requested approval from the insurer for an "excision and biopsy."

Hughes, who also worked at the clinic as a physician assistant, saw Olivia again on January 3, 2011, and performed a "shave biopsy" of the scalp lesion. The doctor who examined the biopsied tissue found no malignancy.[6] Hughes saw Olivia again

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[5] Under current law, the governing agreement is now called a "practice agreement." (Bus. & Prof. Code, § 3501, subd. (k).) However, references to a delegation of services agreement in any other law "shall have the same meaning as a practice agreement." (*Ibid.*) And a delegation of services agreement in effect prior to January 1, 2020, is deemed to satisfy the current requirements for a practice agreement. (Bus. & Prof. Code, § 3502.3, subd. (a)(3).)

[6] The court found for the examining doctor, Soeprono, on Lopez's negligence claim against him.

on January 17, 2011, noted that the biopsy wound was healing well, and told Lopez that there was nothing to worry about.

That spring and early summer Lopez noticed that the lesion was growing back. She returned to the Ledesma clinic in June and saw Freesemann. Freesemann assessed the new growth as "warts" and requested authorization to burn off the growth with liquid nitrogen. Lopez returned with Olivia on July 27 to have the growth removed.

Lopez returned to the clinic again on September 9 after observing that the lesion was "bigger, darker and not uniform in color." Hughes examined Olivia and concluded again that the growth was warts. He referred Lopez to a general surgeon to have the growth removed. Dr. Koire reviewed and countersigned the chart note from this visit several months later.

A general surgeon excised the lesion on December 23, 2011, and provided the tissue to a pathologist, Dr. Pocock. Pocock did not find any malignancy.[7]

In early 2013 Olivia developed a bump on her neck and began to complain of neck pain. The surgeon removed the neck mass and referred Lopez to an oncologist at Children's Hospital of Los Angeles. The oncologist diagnosed metastatic malignant melanoma. Olivia died in early 2014, when she was a little over four years old.

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[7] The trial court found that Pocock was negligent in this analysis.

3. The DSA's concerning Freesemann and Hughes

A. *Freesemann*

Prior to 2010, Marshall Goldberg, a dermatologist, practiced with Ledesma. Freesemann had an unsigned and undated DSA with Goldberg, but by the time of the relevant events Goldberg was no longer affiliated with any Ledesma facility and Freesemann knew that Goldberg was not her supervising physician. The trial court found that Freesemann's DSA with Goldberg "may never have been valid but certainly was not at the time of [Freesemann's] clinical encounters with Olivia."

Freesemann also had a DSA with Ledesma dated January 1, 2009. The DSA was never revoked, and thus the trial court found that it was "nominally" in effect during Freesemann's visits with Olivia.

Ledesma testified that he had become disabled and unable to practice medicine in 2010. He denied that he was Freesemann's supervising physician; he claimed that Dr. Koire performed that role. Freesemann and Koire disputed that claim and testified that Ledesma was Freesemann's supervising physician.

B. *Hughes*

Hughes had a signed DSA with Koire. Although the DSA was undated, the trial court found that the DSA created a physician assistant/supervising physician relationship between Hughes and Koire. Hughes and Koire both testified that they had such a relationship.

4. Lack of Supervision of Freesemann and Hughes

A. *Freesemann*

Despite his formal DSA with Freesemann, Ledesma was not actually fulfilling any supervisory responsibilities during the

relevant events. Ledesma had "removed himself from the practice of medicine." The court also found it "highly likely if not certain that Ms. Freesemann knew that Dr. Ledesma was not fulfilling his statutory obligations."

The court found that Ledesma breached his supervisory obligations imposed by the governing regulations by: (1) failing to be available in person or electronically for consultation; (2) failing to select for review charts on cases that presented the most significant risk to the patient; and (3) failing to review and countersign within 30 days a minimum 5 percent sample of medical records.

The court found that Freesemann breached her regulatory obligations by failing to operate under required supervisory guidelines, which the court found were likely not even in existence. Freesemann also failed to consult with a physician regarding tasks and problems that she determined exceeded her level of competence. Indeed, the court found that Freesemann "consulted with no physician affiliated with the Ledesma clinics on any topic at all." Freesemann was "acting autonomously and knew it."

B. *Hughes*

The court found that Koire was not available at all times for consultation when Hughes was seeing patients. The court also found it likely that Hughes knew Koire was not meeting his obligations to select difficult cases for chart review and reviewing a sample of at least 5 percent of cases within 30 days. In fact, Koire had had a stroke before meeting Hughes and was "no longer engaged in active practice."

Hughes also did not operate under required supervisory guidelines. The court concluded that Hughes "engaged in his

practice of dermatology without adequate . . . supervision." The court found it likely that Hughes knew he was "functioning autonomously."

5. Liability and Damages

The case was tried to the court over 14 days. The trial court found in favor of Lopez on her negligence claims against Freesemann and Hughes. The court found that their conduct fell below the standard of care in a number of respects concerning the failure to take adequate steps to diagnose Olivia's condition and to seek guidance from a physician.

The court found that Ledesma and Koire were derivatively liable for the physician assistants' negligence on an agency theory. The court based its finding on several grounds. First, the court concluded that the DSA's established a contractual agency relationship. The DSA's recited that their purpose was to "delegate the performance of certain medical services" to the physician assistants and identified the supervising physician as "responsible for the Patients cared for by" the physician assistant.[8]

Second, the court concluded that the governing regulations created an agency relationship. The court relied upon regulations, discussed further below, that explicitly state that a physician assistant acts as an agent of the supervising physician, and that the supervising physician has continued responsibility for patients that the physician assistant sees.

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[8] The parties did not include the DSA's themselves in the appellate record. The quoted language is cited in the trial court's statement of decision.

Finally, the court concluded that Ledesma was liable under an ostensible agency theory because he created the impression that Hughes and Freesemann were acting under his direction.

The court also found in favor of Lopez on her negligence claim against Pocock.[9]

The court awarded Lopez economic damages in the amount of $11,200, and noneconomic damages of $4.25 million. Pursuant to section 3333.2, subdivision (b), the trial court reduced the noneconomic damages to $250,000. The trial court concluded that Lopez's claims did not fall within the proviso in section 3333.2, subdivision (c)(2). The court rejected the argument that the physician assistants violated licensing restrictions by failing to comply with the governing regulations. The court concluded that the language in the proviso excluding conduct that violates a licensing restriction applies only to a "particularized restriction previously imposed" by the licensing agency.

DISCUSSION

1. Standard of Review

The sole issue on these appeals is whether the limitation on the amount of damages for noneconomic losses in medical malpractice actions under section 3333.2 applies to an action against a physician assistant who is only nominally supervised by a doctor. Because this is a purely legal issue, we review it

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[9] Lopez did not appeal from the judgment with regard to Pocock. However, Pocock filed a respondent's brief on September 6, 2018. Pursuant to Lopez's request, Pocock was dismissed from the appeal on October 9, 2019.

de novo. (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191.)[10]

2. The Limitation on Noneconomic Damages in Section 3333.2 Applies to an Action for Professional Negligence Against a Physician Assistant Who Has a Legally Enforceable Agency Relationship with a Supervising Physician

A. *The limitation on noneconomic damages under the Medical Injury Compensation Reform Act (MICRA)*

The Legislature enacted MICRA in 1975 (Stats. 1975, Second Ex. Sess. 1975–1976, chs. 1, 2, pp. 3949–4007) to address "serious problems that had arisen throughout the state as a result of a rapid increase in medical malpractice insurance premiums." (*American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359, 363.) The rapid increase in the cost of medical malpractice insurance was "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." (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 158 (*Fein*).) To meet this problem, the Legislature enacted a

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[10] Because of our resolution of this issue, we do not consider defendants' appeal. Defendants brought that appeal conditionally, to be considered only in the event we reverse the trial court's ruling that the damages limitation in section 3333.2 applies.

number of different provisions "affecting doctors, insurance companies and malpractice plaintiffs." (*Id.* at p. 159.)

One of those provisions is the limitation on noneconomic damages in section 3333.2. "One of the problems identified in the legislative hearings [preceding MICRA] was the unpredictability of the size of large noneconomic damage awards, resulting from the inherent difficulties in valuing such damages and the great disparity in the price tag which different juries placed on such losses." (*Fein, supra,* 38 Cal.3d at p. 163.) Section 3333.2 addressed that problem by imposing a cap on such damages.

Civil Code section 3333.2 states that, in any action for "injury against a health care provider based on professional negligence," the noneconomic damages that an injured plaintiff may recover are limited to $250,000. (Civ. Code, § 3333.2, subds. (a) & (b).) A "health care provider" includes any person who is licensed under division 2 of the Business and Professions Code (which includes physician assistants). (Bus. & Prof. Code, §§ 3500–3546.)

Section 3333.2 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* such 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." (§ 3333.2, subd. (c)(2), italics added.)

Our Supreme Court interpreted an identical proviso in *Waters v. Bourhis* (1985) 40 Cal.3d 424 (*Bourhis*). The plaintiff in that case (Waters), a former client of the defendant attorney, claimed that MICRA's limitation on the amount of contingent

attorney fees contained in Business and Professions Code section 6146 applied to the attorney's fee in a prior case in which the attorney had represented Waters. The prior case was an action against Waters's former psychiatrist based upon allegations that the psychiatrist had exploited his professional relationship with Waters to engage in sexual conduct with her. The case settled before trial, and the attorney retained a higher percentage of the settlement amount than he would have been entitled to retain if the action were covered by the MICRA contingent fee limitation. The trial court granted summary judgment in favor of the attorney, concluding that " 'most of the damage was outside the scope of professional negligence under which the attorney's fee is limited.' " (*Id.* at 431.)

One of the attorney's arguments on appeal was that the summary judgment could be sustained on the ground that the proviso in the definition of professional negligence in Business and Professions Code section 6146 (which is identical in substance to the definition in Civil Code section 3333.2) meant that the prior action was not for professional negligence. The attorney argued that the psychiatrist's misconduct was outside a " 'restriction imposed by the licensing agency' " because sexual misconduct was a basis for disciplinary action against the psychiatrist. (*Bourhis*, *supra*, 40 Cal.3d at pp. 435–436.)

The Supreme Court rejected the argument. The court explained that, "[i]n our view, this contention clearly misconceives the purpose and scope of the proviso which obviously was not intended to exclude an action from section 6146—or the rest of MICRA—simply because a health care provider acts contrary to professional standards or engages in one of the many specified instances of 'unprofessional conduct.'

Instead, it was simply intended to render MICRA inapplicable when a provider operates in a capacity for which he is not licensed—for example, when a psychologist performs heart surgery." (*Bourhis, supra,* 40 Cal.3d at p. 436.) The court concluded that the psychiatrist's conduct "arose out of the course of the psychiatric treatment he was licensed to provide." (*Ibid.*)[11]

The court in *Prince v. Sutter Health Central* (2008) 161 Cal.App.4th 971 (*Prince*) applied this interpretation of the proviso in concluding that a social worker did not act outside the scope of a "restriction imposed by the licensing agency" while working toward her licensure under supervision. The court held that the social worker was a "health care provider" under Civil Code section 3333.2 because she was lawfully practicing under a

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[11] The trial court here concluded that this discussion in *Bourhis* was dicta. We disagree. The court in *Bourhis* ultimately held that the MICRA limitation on contingent attorney fees did not apply to a recovery that "may be based on a non-MICRA theory" (such as the theory of intentional tortious conduct alleged against the psychiatrist) and remanded the case for the trial court to consider whether the attorney had received appropriate informed consent from Waters to file a hybrid MICRA/non-MICRA action. (*Bourhis, supra,* 40 Cal.3d at pp. 437–438.) There would have been no need to remand the case for that determination if the court had interpreted the proviso in the manner the defendant attorney urged. Thus, the court's holding on the scope of the proviso was a ground for its ultimate decision. In any event, even if the court's conclusion was dicta, our Supreme Court's dicta is "highly persuasive," and we will generally follow it unless there is a compelling reason not to do so. (See *Gonzalez v. Mathis* (2018) 20 Cal.App.5th 257, 272, fn. 1.) We see no such reason here.

registration permitting her to practice under supervision while working toward licensure. (*Id.* at pp. 974, 977.) The court rejected the argument that the social worker acted outside the scope of a "restriction" on her ability to practice because she violated an obligation to disclose that she was " 'unlicensed and . . . under the supervision of a licensed professional.' " (*Id.* at p. 977, quoting Bus. & Prof. Code, § 4996.18, subd. (h).) The court held that: (1) the disclosure statute was not "imposed by" the licensing agency as stated in the proviso; and (2) the Supreme Court rejected a similar claim in *Bourhis.* Thus, consistent with *Bourhis,* the court in *Prince* concluded that the social worker's violation of a statutory professional standard did not mean she was acting outside the scope of a licensing restriction for purposes of the damages limitation in Civil Code section 3333.2.[12] (*Prince*, at pp. 977–978.)

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[12] The court also rejected the argument that the social worker was not " 'receiving the supervision required by law.' " (*Prince, supra,* 161 Cal.App.4th at p. 977.) The argument was apparently based on evidence showing that she was receiving group rather than individual supervision. The court concluded that the type of supervision did not "change the nature of the services" that the social worker provided. (*Id.* at p. 978) The court did not explain that conclusion, and it is therefore unclear whether the court intended to address the issue that we face here, i.e., whether inadequate supervision means that a licensed professional required by law to act under supervision is practicing outside the scope of a licensing restriction.

B. *The damages limitation as applied to physician assistants*

1. *The nature of the problem*

Applying the limitation on damages in section 3333.2 to physician assistants presents a unique difficulty. Unlike, for example, the psychologist that our Supreme Court mentioned in *Bourhis,* who clearly is not licensed to perform heart surgery, a physician assistant's area of practice is not just defined by the license that he or she receives.[13] Rather, it is primarily defined by his or her supervising physician. A physician assistant is permitted to practice in the area in which the supervising physician practices, performing those tasks that the supervising physician delegates. (Cal. Code Regs., tit. 16, § 1399.545, subd. (b) ["A supervising physician shall delegate to a physician assistant only those tasks and procedures consistent with the

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[13] As counsel for amici pointed out at oral argument, the governing law does identify some situations in which a physician assistant would clearly act outside the "scope of services for which the provider is licensed." (Civ. Code, § 3333.2, subd. (c)(2).) For example, Business and Professions Code section 3502, subdivision (d) states that the law governing physician assistants does not authorize them to perform medical services in several fields, including dentistry and optometry. And California Code of Regulations, title 16, section 1399.541 lists many medical tasks that physician assistants may perform, but does not include in that list surgical procedures requiring general anesthesia performed outside the presence of a supervising physician. (Cal. Code Regs., tit. 16, § 1399.541, subd. (i)(1).) A physician assistant who performs such unauthorized tasks would be analogous to the psychologist who performs heart surgery.

supervising physician's specialty or usual and customary practice and with the patient's health and condition"].) Thus, a physician assistant's practice area is potentially as broad as that of any physician.

But, by the nature of his or her role as an *assistant*, a physician assistant's practice is limited in a way that a physician's is not. Clearly, a physician assistant is not permitted to practice without supervision. Business and Professions Code section 3502 permits physician assistants to perform medical services only when the services are rendered "under the supervision of a licensed physician and surgeon." (Bus. & Prof. Code, § 3502, former subd. (a), now subd. (a)(1).) The question for purposes of the damages limitation in Civil Code section 3333.2 is what "under the supervision of" means in this context.[14]

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[14] As the dissent points out, Business and Professions Code section 3501 states that, for purposes of the chapter governing physician assistants, the term "supervision" means that "a licensed physician and surgeon oversees the activities of, and accepts responsibility for, the medical services rendered by a physician assistant." (Bus. & Prof. Code, § 3501, former subd. (6), now subd. (f)(1).) As amended by SB 697, this definition is even more specific, requiring that the supervising physician be available by telephone or other electronic communication during a patient examination and requiring "[a]dherence to adequate supervision as agreed to in the practice agreement." (Bus. & Prof. Code, § 3501, subd. (f)(1)(A).) Thus, a supervising physician clearly undertakes the obligation to "oversee" the medical services provided by a physician assistant. However, for the reasons discussed below, we do not agree that the existence of this obligation means that a physician assistant acts outside the scope of his or her license whenever the obligation is not met.

It seems clear that a physician assistant who practices without any relationship at all with a supervising physician would be practicing "outside the scope of services for which the provider is licensed." (§ 3333.2, subd. (c)(2).) Without such a relationship, the physician assistant would have no delegated tasks that he or she is authorized to perform. (See Cal. Code Regs., tit. 16, § 1399.540, subd. (a).)

However, where, as here, a physician assistant establishes a legal relationship with a supervising physician through a DSA, but in practice receives no supervision, is the physician assistant practicing outside the scope of licensed services or in violation of a "restriction imposed by the licensing agency"? If so, any negligent medical care that the physician assistant provides is not "professional negligence" under section 3333.2, subdivision (c)(2), and the limitation on noneconomic damages in that section does not apply. If not, then the physician assistant's negligence is "professional negligence" to which the MICRA damages limitation applies.

Our Legislature has not provided an answer to this question, which raises policy issues that the Legislature is best equipped to consider. However, in the absence of clear legislative direction, we must do our best to apply the statute based upon the Legislature's probable intent. We must construe section 3333.2 in this context in a manner that "comports most closely with the apparent intent of the Legislature, with a view to

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Doing so would conflict with the purpose of section 3333.2 and would lead to results that the Legislature would not have intended.

promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." (*People v. Jenkins* (1995) 10 Cal.4th 234, 246.)

2. *The significance of an agency relationship*

For the reasons discussed below, we conclude that the presence of a legal agency relationship between a physician assistant and a supervising physician is the dispositive factor in determining whether the physician assistant was acting outside the scope of licensed services for purposes of section 3333.2, subdivision (c)(2). If an otherwise qualified physician assumes the legal responsibility of supervising a physician assistant, that physician assistant practices within the "scope of services" covered by the supervising physician's license, even if the supervising physician violates his or her obligation to provide adequate supervision.

First, the regulatory scheme suggests that the supervising physician, not the physician assistant, is the relevant "health care provider" for purposes of determining whether particular services are within the scope of a license under Civil Code section 3333.2. The supervisory physician is tasked with the responsibility to "delegate to a physician assistant only those tasks and procedures consistent with the supervising physician's specialty or usual and customary practice." (Cal. Code Regs., tit. 16, § 1399.545, subd. (b).) Moreover, once a supervisory relationship is established, the physician assistant acts as the

agent of the supervising physician.[15] The regulations go so far as to state that the acts of the physician assistant are deemed to be the acts of the supervising physician: "Because physician assistant practice is directed by a supervising physician, and a physician assistant acts as an agent for that physician, the orders given and tasks performed by a physician assistant shall be considered the same as if they had been given and performed by the supervising physician." (Cal. Code Regs., tit. 16, § 1399.541.) Thus, once a physician undertakes to supervise a physician assistant and forms an agency relationship with the assistant, the scope of the supervising physician's license (and any restrictions on it) define the tasks that the assistant may perform.

Second, a standard for determining whether a physician assistant is acting outside the scope of his or her license that is based on the *adequacy* of supervision rather than the *legal responsibility* to supervise would make the MICRA damages

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[15] At the time of the relevant events, former Business and Professions Code section 3501, subdivision (b) specifically stated that a physician assistant "acts as an agent of the supervising physician when performing any activity authorized by this chapter or regulations adopted under this chapter." Senate Bill No. 697 deleted that provision, and instead implemented a new section providing in part that "[a] practice agreement may designate a [physician assistant] as an agent of a supervising physician and surgeon." (Bus. & Prof. Code, § 3502.3, subd. (a)(4).) The intent of this change is unclear. Under the amended law, supervision still means that the supervising physician "accepts responsibility for" the medical services provided by a physician assistant. (Bus. & Prof. Code, § 3501, subd. (f).)

limitation dependent on whether a supervising physician acts contrary to professional standards. The regulations impose a variety of specific supervisory responsibilities on a supervising physician, including the responsibility to: (1) be available in person or electronically when the assistant is caring for patients; (2) determine the physician assistant's competence to perform the designated tasks; (3) establish written guidelines for supervision that address patient examination by the supervising physician, countersignature on medical records, and detailed protocols for medical tasks; (4) review a sample of medical records of patients that a physician assistant treats; and (5) follow the progress of patients and "make sure that the physician assistant does not function autonomously." (Cal. Code Regs., tit. 16, § 1399.545, subds. (a), (c), (e) & (f).) Violation of these regulations by a supervising physician can constitute unprofessional conduct leading to limitations on the right to supervise a physician assistant. (Bus. & Prof. Code, § 3527, subd. (c).)[16]

A rule that would exclude a physician assistant's conduct from the damages limitation in MICRA simply because a supervising physician violates some or all of the governing regulations would contravene our Supreme Court's decision in *Bourhis* that conduct is not outside the scope of a license merely because it violates professional standards. (See *Bourhis, supra,* 40 Cal.3d at p. 436.) As mentioned, the court in *Prince* similarly

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[16] We take no position as to whether or not this consequence or any other discipline for unprofessional conduct would be appropriate for the supervising physicians here. (See Bus. & Prof. Code, § 2234 [identifying unprofessional conduct, including gross negligence and "repeated negligent acts"].)

concluded that, under the analysis in *Bourhis*, a social worker's violation of a statute requiring her to disclose that she was unlicensed and acting under supervision did not mean she was acting outside the scope of a license restriction. (See *Prince, supra,* 161 Cal.App.4th at pp. 977–978.)[17]

Third, a standard based on the adequacy of supervision would be difficult to define. How much supervision must exist before it is more than merely nominal? And how would the decision concerning the adequacy of supervision be made?[18] This

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[17] The trial court here relied on the second clause of the proviso in section 3333.2, subdivision (c)(2). As mentioned, the court concluded that a "restriction imposed by the licensing agency or licensed hospital" applies only to a "particularized restriction" previously imposed on an individual physician assistant. In light of our ruling, we do not need to consider the specific meaning of this clause and whether it could apply in some circumstances to a "restriction" that applies more broadly than a specific limitation on a particular licensed provider. It is sufficient for our ruling to conclude that, consistent with our Supreme Court's decision in *Bourhis*, the "restriction" mentioned in this clause must be a limitation on the scope of a provider's practice beyond simply the obligation to adhere to standards of professional conduct. (See *Bourhis*, *supra*, 40 Cal.3d 424.)

[18] For example, would a special jury finding on whether supervision was merely nominal be necessary in a jury trial? Would an allegation of some conduct beyond mere negligence be necessary to support such a finding? If so, how would that conduct be defined, and would it require a finding of direct liability against the supervising physician(s)? Here, the operative form complaint alleged only medical malpractice (and wrongful death) with a single cause of action for "general

is an extreme case in which actual supervision was essentially nonexistent. But even here, there was some evidence that one of the supervising physicians reviewed and countersigned at least one chart note containing a treatment plan. Review of one chart may not be enough to constitute actual supervision, but presumably one failure to comply with a governing regulation would also not be enough to make supervision merely nominal. Requiring a fact finder to determine in each case whether a physician's supervision of a physician assistant was sufficient for purposes of applying the MICRA damages limitation risks creating the kind of uncertainty in predicting medical malpractice damage awards that the Legislature enacted MICRA in part to prevent. (See *Fein, supra,* 38 Cal.3d at p. 163.)[19]

Fourth, a rule that treats a physician assistant's conduct as outside the scope of his or her license whenever supervision is

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negligence." And, as mentioned, the trial court found the supervising physicians only derivatively liable by virtue of their responsibility for the physician assistants' conduct.

[19] Lopez argues that a physician assistant acting without the supervision required by law is "tantamount to the unlawful practice of medicine without a license." We find the comparison unhelpful. The physician assistants here *had* a license. They were required to demonstrate some level of training and proficiency to obtain that license. The issue is whether they acted outside the scope of that license in practicing without adequate supervision. Any licensed professional who practices medicine outside the scope of his or her license in some sense is engaged in the "unlawful practice of medicine without a license." But calling it that does not help in defining the scope of the relevant license for purposes of the MICRA damages limitation.

inadequate would create inconsistencies in damages depending upon whether a patient sues the physician assistant or the supervising physician. Here, the trial court ruled that the supervising physicians were liable for the negligence of the physician assistants under agency principles. But supervising physicians who fail to supervise a physician assistant adequately might also be directly liable for their own negligence. (*Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 815 (*Delfino*) ["Liability for negligent supervision and/or retention of an employee is one of direct liability for negligence, not vicarious liability"].[20] A supervising physician's negligence in supervising a physician assistant who commits malpractice would be within the scope of the supervising physician's "rendering of professional services." It would therefore be subject to the damages limitation in section 3333.2. (Cf. *Bell v. Sharp Cabrillo Hosp.* (1989) 212 Cal.App.3d 1034, 1048–1052 [the MICRA damages limitation applied to a hospital's alleged negligence in reviewing the competence of a staff surgeon].) Permitting an unlimited award of noneconomic damages against the physician assistant and only

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[20] In concluding that an employer may be liable for negligent hiring, the court in *Delfino* followed the rule described in section 213 of the Restatement Second of Agency. (*Delfino, supra,* 145 Cal.App.4th at p. 815.) That section explains that the principle of direct liability is based upon the principle/agent relationship: "A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless" "in the supervision of the activity." (Rest.2d Agency, § 213, subd. (c).) That principle applies to a supervising physician as it would to an employer.

a limited award against the supervising physician based upon the same harm would be both irrational and inconsistent with MICRA's goal of predictability in damage awards.

Finally, a bright-line rule that the limitation on noneconomic damages in section 3333.2 applies to actions for professional negligence against a physician assistant once he or she has formed a legal agency relationship with a supervising physician is consistent with the principle that "MICRA provisions should be construed liberally in order to promote the legislative interest in negotiated resolution of medical malpractice disputes and to reduce malpractice insurance premiums." (*Preferred Risk Mutual Ins. Co. v. Reiswig* (1999) 21 Cal.4th 208, 215.) As the trial court here correctly recognized, once an agency relationship is formed, both the supervising physician and the physician assistant are legally responsible for malpractice that the physician assistant commits during the relationship. The risk of such malpractice therefore presumably affects the malpractice premiums of the supervising physician as well as the physician assistant. The supervising physician's risk (and therefore his or her insurance premiums) would be increased if the MICRA damages limitation did not apply whenever there is a finding that his or her supervision of a physician assistant was inadequate.[21]

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[21] We do not intend to diminish the importance of the other policy at issue here of providing adequate compensation to injured parties. This case tragically illustrates how the imposition of the MICRA limits (unchanged since the 1970's) woefully fails to adequately compensate the plaintiff for the damages sustained by this professional negligence.

If the Legislature disagrees with the line that we draw here, it is of course free to establish a different rule. However, absent further legislative direction, the rule that we articulate in this opinion should best serve the goals of predictability of damage awards, consistency in the application of the damages limitation, and the liberal construction of MICRA's provisions.

DISPOSITION

The judgment is affirmed. Defendants are entitled to their costs on appeal.

CERTIFIED FOR PUBLICATION.

LUI, P. J.

I concur:

CHAVEZ, J.

Lopez v. Ledesma, B284452

ASHMANN-GERST, J.—Dissenting

I respectfully dissent.

Neither Suzanne Freesemann (Freesemann) nor Brian Hughes (Hughes) was supervised when they provided care to Olivia Sarinanan (Olivia). I conclude they were not providing services within the scope of services for which they were licensed for purposes of Civil Code section 3333.2, subdivision (c)(2) and MICRA[22] does not apply.

I. The Trial Court's Findings.

A. Background.

Freesemann and Hughes are physician assistants who must work under a supervising physician. Both a physician assistant and a supervising physician must sign and date a delegation of services agreement (DSA) and practice guidelines.

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[22] MICRA is an acronym for the Medical Injury Compensation Reform Act.

A supervising physician "must be available in person or by electronic communications at all times when the [physician assistant] is caring for patients. Retrospectively, the [supervising physician] is to perform a chart review of at least 5% of the medical records of patients treated by the [physician assistant] within 30 days of such treatment and which treatment, in the [supervising physician's] opinion, represents the most significant risk to the patient due to the diagnosis, problem, treatment or procedure."

B. Freesemann Functioned Autonomously.

Dr. Glenn Ledesma practiced in dermatology for over 28 years. "For some period before 2010, [Dr.] Marshall Goldberg, a dermatologist, practiced with Dr. Ledesma."

In 2010, Dr. Ledesma operated dermatology clinics and held himself out as the medical director. He testified that he became disabled and unable to practice medicine in 2010. Also, he testified that even though he was still involved in operating his clinics "in a business sense, he was no longer in active practice as a physician[.]"

Freesemann treated Olivia on December 8, 2010, June 11, 2011, and July 27, 2011. She claimed she had a DSA with Dr. Goldberg, but he was "no longer affiliated" with the practice in late 2010. "The DSA between Dr. Goldberg and [Freesemann] . . . had no application or continued force[.]" Freesemann had a DSA with Dr. Ledesma dated January 1, 2009. Their DSA was "nominally (but not effectively . . .) in effect" when she first saw Olivia. "Dr. Ledesma was no longer fulfilling any . . . supervisory obligations under the January 1, 2009 DSA. . . . He had removed himself from the practice of medicine." The trial court found that

it was highly likely that Freesemann knew that Dr. Ledesma was not fulfilling his statutory obligations. "The evidence shows (1) that he was not available in person or by electronic communications at all times when [Freesemann] was caring for Olivia, a violation of 16 CCR Section 1399.545(a); (2) that he was not selecting for chart review those cases in which she had rendered care and which represented in his judgment by diagnosis, problem, treatment or procedure the most significant risk to the patient, [in] violation of 16 CCR Section 1399.545(e)(3); and (3) that he was not within 30 days reviewing, countersigning and dating a minimum of [a] 5% sample of medical records of patients treated by [Freesemann] under protocols, a violation of 16 CCR Section 1399.545(e)(3)." Dr. Ledesma "testified that he was not doing so, and the [trial court] believes him."

The trial court found that Freesemann "violated 16 CCR Section 1399.540(d) which provides, '[a] physician assistant shall consult with a physician regarding any task, procedure or diagnostic problem which the physician assistant determines exceeds his or her level of competence or shall refer such cases to a physician.' [Freesemann], the evidence shows, at the time of [her] clinical encounters with Olivia, consulted with no physician affiliated with the Ledesma clinics on any topic at all. There are only two possible explanations for her not doing so. One is that she never once determined that anything she was encountering in her practice exceeded her level of competence. That explanation requires [Freesemann] to have had a remarkably generous subjective (and objectively unrealistic) belief in her competence. The other explanation is that there was simply no [supervising physician] available to her. The [trial court] finds

the second alternative to be highly likely. Dr. Goldberg was gone [and] Dr. Ledesma was absent and unavailable. . . . Evaluating her credibility, the [trial court] finds [Freesemann] a reality-based person possessed of common sense. The [trial court] does not think she actually believed in her own infallibility. . . . She did decide, however, to practice without [a supervising physician] and without adequate consultation with any physicians. The [trial court] finds it is a virtual certainty she knew she was doing so in obvious violation of the regulations. She was functioning autonomously and she knew it. This was a violation of 16 CCR Section 1399.545(f)." (Fn. omitted.) At the time of her clinical encounters with Olivia, Freesemann was not operating under required supervisory guidelines. "No witness produced any evidence of any such written guideline[s]. . . . The [trial court] finds, more likely than not, none were in existence."

C. Hughes Functioned Autonomously.

Dr. Bernard Koire was a plastic surgeon who entered a consulting contract with Dr. Ledesma's clinics and had a signed but undated DSA with Hughes. As of January 2011, Dr. Koire had had a stroke before ever meeting Hughes, and Hughes knew Dr. Koire was no longer in active practice.

Hughes treated Olivia on January 3, 2011, January 17, 2011, and September 9, 2011.

The evidence showed that Dr. Koire "was not available in person or by electronic communication[] at all times when [Hughes] was caring for patients during the intervals when he was treating Olivia, a violation of 16 CCR Section 1399.545(a)." The trial court found it "likely that [Hughes] knew that he was . . . functioning autonomously." Dr. Koire reviewed the chart note

for Hughes's September 9, 2011, encounter with Olivia, but that occurred 88 days later, not within the required 30 days. Hughes "was not operating under required supervisory 'guidelines' as required under 16 CCR Section 1399.545(e)."

II. Statutory Interpretation.

This appeal hinges on the meaning of "supervision" in former Business and Professions Code sections 3501 and 3502 and the regulations governing physician assistants as well as the phrase "services are within the scope of services for which the provider is licensed" in Civil Code section 3333.2, subdivision (c)(2).

When we are called upon to interpret a statute, our goal is to effectuate the intent of the Legislature. If the language used has a plain meaning such that it is clear and unambiguous, we must honor it. But if it is susceptible to more than one reasonable interpretation, we will construe its meaning bearing in mind the statute's purpose, the evils to be remedied, the legislative history, public policy, contemporaneous administrative constructions, and the consequences of that will flow from the different possible interpretations. (*California Ins. Guarantee Assn. v. Workers' Comp. Appeals Bd.* (2012) 203 Cal.App.4th 1328, 1338.) Statutory provisions should be harmonized to the extent possible. (*People v. Honig* (1996) 48 Cal.App.4th 289, 328.) A caveat to these rules is that courts "cannot, under the guise of statutory interpretation, rewrite [a] statute. [Citations.]" (*People v. Nettles* (2015) 240 Cal.App.4th 402, 408; Code Civ. Proc., § 1858 ["In the construction of a statute . . . , the office of the Judge is simply to ascertain and declare what is in terms or in

substance contained therein, not to insert what has been omitted, or to omit what has been inserted"].)

Where, as here, a reviewing court interprets a former statute that has been amended, I note the following. If a statute clarifies rather than changes existing law, "courts interpreting the statute must give the Legislature's views consideration. [Citation.]" (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 246.)

A. Supervision.

Given that Freesemann and Hughes were not supervised, the only way to conclude that they acted within the scope of their licenses and therefore are protected by MICRA is to equate the existence of their DSAs with the supervision required by former sections 3501 and 3502. I conclude that this interpretation would improperly eliminate the necessity of actual supervision and should be rejected.

The former version of Business and Professions Code section 3501, subdivision (f) operative in 2011 defined "supervision" to mean "that a licensed physician and surgeon oversees the activities of, and accepts responsibility for, the medical services rendered by a physician assistant." The current version retains the same definition and then adds: "Supervision . . . require[s] the following: [¶] (A) Adherence to adequate supervision as agreed to in the practice agreement.[23] [¶] (B)

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23 As the majority notes, a practice agreement and a DSA have the same meaning. (Bus. & Prof. Code, § 3501, subd. (k).)

The physician and surgeon being available by telephone or other electronic communication method at the time the [physician assistant] examines the patient." (Bus. & Prof. Code, § 3501 (f)(1).) This incorporates the regulatory law that existed since 2011. It required a DSA (Cal. Code Regs., tit. 16, § 1399.545, subd. (a)), and it also required the physician and surgeon to be available by telephone or other electronic means. (Cal. Code Regs., tit. 16, § 1399.540, subd. (b).)

In 2011, former Business and Professions Code section 3502, subdivision (a) provided that "a physician assistant may perform those medical services as set forth by the regulations of the board where the services are rendered under the supervision of a licensed physician[.]" The current version of the statute provides that a physician assistant may perform medical services if: (1) the physician assistant renders the services under the supervision of a licensed physician and surgeon; (2) the physician assistant renders the services pursuant to a practice agreement; (3) the physician assistant is competent to perform the services; and (4) the physician assistant's education, training and experience has prepared him or her to render the services. (Bus. & Prof. Code, § 3502, subd. (a)(1)-(4).) "A supervising physician and surgeon shall be available to the physician assistant for consultation when assistance is rendered[.]" (Bus. & Prof. Code, § 3502, subd. (b)(2).) It is apparent that the current version of the statute incorporates relevant regulations existing since 2011, which provided (1) a "physician assistant may only provide those medical services which he or she is competent to perform and which are consistent with the physician assistant's education, training, and experience, and which are delegated in writing by a supervising physician who is responsible for the patients cared

for by that physician assistant" (Cal. Code Regs., tit. 16, § 1399.540, subd. (a)), and (2) a "physician assistant shall consult with a physician regarding any task, procedure or diagnostic problem which the physician assistant determines his or her level of competence or shall refer such cases to a physician" (Cal. Code Regs., tit. 16, § 1399.540, subd. (d)).

The dictionary definition of "supervise" is "to oversee (a process, work, workers, etc.) during execution or performance; . . . ; have the oversight or direction of." (<https://dictionary.com/browse/supervise> [as of Mar. 17, 2020].) Former section 3501, subdivision (f) defined supervision to mean a physician both oversees the activities of, and accepts responsibility for, a physician assistant. There is no ambiguity. The plain meaning of "supervision" under the former statutory scheme included actual oversight by a physician separate from the acceptance of responsibility.

Also, by incorporating existing regulations into the current versions of sections 3501 and 3502, the Legislature has clarified that supervision in the prior versions required adherence to adequate supervision as agreed to in a practice agreement (or DSA), and that a physician assistant could perform services when, among other things, there was both supervision and an existing practice agreement (or DSA). Regardless, this is what the regulations have required since 2011.

Finally, the mere existence of a practice agreement (or a DSA) does not equate to supervision in the former versions of sections 3501 and 3502; if it did, the actual oversight component of supervision would have been illusory.

Looking forward, equating supervision with a practice agreement (or DSA) would render the actual oversight component of supervision in the current version of Business and Professions Code section 3501, subdivision (f) meaningless for new cases. Also, as to the current version of the statute, it would conflate Business and Professions Code section 3502, subdivision (a)(1) (requiring supervision) and subdivision (a)(2) (requiring a physician assistant to render services pursuant to a practice agreement) and essentially nullify subdivision (a)(1). Though the current versions of the statutes are not directly at issue, they are impacted because our interpretation will apply in future cases. For this reason, I note that "an interpretation which would render terms of a statute surplusage should be avoided, and every word should be given some significance, leaving no part useless or devoid of meaning. [Citation.]" (*California State Employees' Assn. v. State Personnel Bd.* (1986) 178 Cal.App.3d 372, 378.) I decline to nullify the requirement of actual supervision when a physician assistant is claiming MICRA protection.

My interpretation is consistent with the 2011 (and current) regulations requiring that a "supervising physician shall be available in person or by electronic communication at all times when the physician assistant is caring for patients" (Cal. Code Regs., tit. 16, § 1399.545, subd. (a)), and that the "supervising physician has continuing responsibility to follow the progress of the patient and to make sure that the physician assistant does not function autonomously" (Cal. Code Regs., tit. 16, § 1399.545, subd. (f)). These regulations contemplate actual oversight of a physician assistant.

B. Services Within the Scope of Services for which a Health Care Provider is Licensed.

Civil Code section 3333.2, subdivision (a) provides: "In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover noneconomic losses[.]" (Civ. Code, § 3333.2, subd. (a).) In such an action, noneconomic damages are capped at $250,000. (Civ. Code, § 3333.2, subd. (b).)

A health care provider is defined as any person licensed pursuant to Division 2 of the Business and Professions Code. Because physician assistants are governed by Chapter 7.7 of Division 2 of the Business and Professions Code, they squarely fall within the definition of a health care provider. (Civ. Code, § 3333.2, subd. (c)(1).) The statute goes on to define professional negligence to mean "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 such 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." (Civ. Code, § 3333.2, subd. (c)(2).)

Civil Code section 3333.2 applies to two broad categories of licensees: those who are licensed to act autonomously and those who are licensed to act under supervision. This last clause is straightforward when it relates to a person who is licensed to act

autonomously. But what does it mean for someone like a physician assistant?[24]

The common sense understanding of Civil Code section 3333.2, subdivision (c)(2) is that MICRA applies only if the physician assistant is supervised. After all, acting autonomously is not within the scope of the services for which he or she was licensed (former Bus. & Prof. Code, § 3502, subd. (a)), and the applicable regulation imposes an obligation on physicians to ensure that physician assistants do not function autonomously. (Cal. Code Regs., tit. 16, § 1399.545, subd. (f).) Moreover, it defies common sense to conclude that even though an unsupervised physician assistant was barred by former Business and Professions Code section 3502, subdivision (a) from providing medical services, any medical services he or she did in fact provide were nonetheless within the scope of services for which he or she was licensed.

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[24] *Waters v. Bourhis* (1985) 40 Cal.3d 424 and *Prince v. Sutter Health Central* (2008) 161 Cal.App.4th 971 do not help resolve this question. Neither case involved a medical provider who required supervision but acted autonomously.

III. Application of the Law to the Facts.

Freesemann operated without supervision and knew it. Further, she did not operate under guidelines. Because she was not permitted to provide care to patients unless she was supervised, she was not acting within the scope of her license. Her conduct was not professional negligence within the meaning of Civil Code section 3333.2, subdivision (c)(2), and the cap on noneconomic damages in subdivision (b) does not apply.

I reach the same conclusion as to Hughes. Though Dr. Koire reviewed one chart note from the last time Hughes saw Olivia, that was 88 days later, and that lone, deficient act did not constitute supervision. Hughes knew Dr. Koire was no longer in active practice, Dr. Koire was never available for consultation, Hughes operated autonomously, and Hughes did not operate under guidelines.

I conclude that the trial court erred when it reduced the $4.25 million award for noneconomic damages to $250,000.

_____, J.

ASHMANN-GERST

ATTACHMENT B

ORDER DENYING REHEARING

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MARISOL LOPEZ, Individually and as Successor-in Interest,

Plaintiff and Appellant,

v.

GLENN LEDESMA et al.,

Defendants and Appellants;

BERNARD KOIRE,

Defendant and Respondent.

B284452

(Super. Ct. No. BC519180)
Los Angeles County

O R D E R

The court has read and considered Appellant Marisol Lopez's petition for rehearing filed on April 8, 2020. The petition for rehearing is denied.

P.J. Lui

J. Chavez

I would grant rehearing.

J. Ashmann-Gerst

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 234 East Colorado Boulevard, Suite 975, Pasadena, California 91101.

On the date set forth below, I served the foregoing document(s) described as follows: **PETITION FOR REVIEW**, on the interested parties in this action by placing ___ the original/ X a true copy thereof enclosed in a sealed envelope(s) addressed as follows:

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☒ STATE I declare under penalty of perjury that the foregoing is true and correct.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on June 2, 2020, at Whittier, California.

s/ Marina Maynez
Marina Maynez

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Olivia Sarinanan, et al. v. Ledesma, M.D., et al.
(S_____ | B284452 | BC519180)

Kenneth R. Pedroza, Esq. Matthew S. Levinson, Esq. Zena Jacobsen, Esq. COLE PEDROZA LLP 2295 Huntington Drive San Marino, CA 91108 Telephone: (626) 431-2787 Email: kpedroza@colepedroza.com mlevinson@colepedroza.com zjacobsen@colepedroza.com	***Attorneys for Defendants, Respondents, Cross-Appellants*** Suzanne Freesemann, P.A., Brian Hughes, P.A., Glenn Ledesma, M.D.
Louis H. De Haas, Esq. Mark B. Guterman, Esq. LA FOLLETTE, JOHNSON, DE HAAS, FESLER & AMES 865 S. Figueroa Street, 32nd Floor Los Angeles, CA 90017 Email: ldehaas@ljdfa.com mguterman@ljdfa.com	***Attorneys for Defendant, Respondent, and Cross-Appellant*** Suzanne Freesemann, P.A.
Avi A. Burkwitz, Esq. PETERSON BRADFORD BURKWITZ, LLP 100 N. First Street, Ste. 300 Burbank, CA 91502 Email: aburkwitz@pb-llp.com	***Attorneys for Defendant, Respondent, and Cross-Appellant*** Brian Hughes, P.A.
Thomas F. McAndrews, Esq. REBACK, MCANDREWS, BLESSEY, LLP 1230 Rosecrans Ave., Ste. 450 Manhattan Beach, CA 90266 Email: tmcandrews@rmkws.com	***Attorneys for Defendant, Respondent, and Cross-Appellant*** Glenn Ledesma, M.D.
Jack R. Reinholtz, Esq. Douglas S. de Heras, Esq. PRINDLE, AMARO, GOETZ, HILLYARD, BARNES & REINHOLTZ, LLP 310 Golden Shore, Fourth Floor Long Beach, CA 90802 Email: ddeheras@prindlelaw.com jreinholtz@prindlelaw.com	***Attorneys for Defendant and Respondent*** Bernard Koire, M.D.

Gregory G. Lynch, Esq. Judith M. Tishkoff, Esq. LEWIS, BRISBOIS, BISGAARD & SMITH LLP 633 W. Fifth Street, Ste. 4000 Los Angeles, CA 90071 Email: gregory.lynch@lewisbrisbois.com Judith.tishkoff@lewisbrisbois.com	***Attorneys for Defendant and Respondent*** Eugene Pocock, M.D.
Jeffrey A. Miller, Esq. LEWIS, BRISBOIS, BISGAARD & SMITH LLP 701 B Street, Ste. 1900 San Diego, CA 92101 Email: jeff.miller@lewisbrisbois.com	***Attorneys for Defendant and Respondent*** Eugene Pocock, M.D.
Michael D. Gonzalez, Esq. LAW OFFICES OF MICHAEL D. GONZALEZ 101 N. Brand Blvd., Ste. 1880 Glendale, CA 91203 Email: mgonzalez@gonzalezandhulbert.com	***Attorneys for Defendant and Respondent*** Unilab Corporation (DE) dba Quest
Traci L. Shafroth, Esq. TUCKER ELLIS LLP 201 Mission Street, Ste. 2310 San Francisco, CA 94105 Telephone: (415) 617-2400 Email: traci.shafroth@tuckerellis.com	***Attorneys for Amici Curiae*** California Medical Association, California Dental Association, California Hospital Association, California Academy of PAs, and the American Medical Association
Neil M. Howard, Esq. LAW OFFICE OF NEIL M. HOWARD 717 N. Douglas Street El Segundo, CA 90245 Email: nmh1234@gmail.com	***Attorneys for Plaintiff and Appellant*** Marisol Lopez
California Court of Appeal SECOND APPELLATE DISTRICT, DIV. 2 300 S. Spring Street 2nd Floor, North Tower Los Angeles, CA 90013	***Appellate Court (Unbound Brief Via Mail)***

Hon. Lawrence P. Riff
LOS ANGELES SUPERIOR COURT
Stanley Mosk Courthouse, Dept. 22
111 N. Hill Street
Los Angeles, CA 90012

Trial Court
(*Unbound Brief Via Mail)*

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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Matthew S. Levinson 175191	mlevinson@colepedroza.com	e-Serve	6/2/2020 1:10:14 PM
Zena Jacobsen 295833	zjacobsen@colepedroza.com	e-Serve	6/2/2020 1:10:14 PM
Louis H. De Haas	ldehaas@ljdfa.com	e-Serve	6/2/2020 1:10:14 PM
Mark B. Guterman 137038	mguterman@ljdfa.com	e-Serve	6/2/2020 1:10:14 PM
Avi A. Burkwitz	aburkwitz@pb-llp.com	e-Serve	6/2/2020 1:10:14 PM
Thomas F. McAndrews	tmcandrews@rmkws.com	e-Serve	6/2/2020 1:10:14 PM
Jack R. Reinholtz	jreinholtz@prindlelaw.com	e-Serve	6/2/2020 1:10:14 PM
Douglas S. de Heras 190853	ddeheras@prindlelaw.com	e-Serve	6/2/2020 1:10:14 PM

Gregory G. Lynch	gregory.lynch@lewisbrisbois.com	e-Serve	6/2/2020 1:10:14 PM
Judith M. Tishkoff 138375	Judith.tishkoff@lewisbrisbois.com	e-Serve	6/2/2020 1:10:14 PM
Jeffrey A. Miller 126074	jeff.miller@lewisbrisbois.com	e-Serve	6/2/2020 1:10:14 PM
Michael D. Gonzalez	mgonzalez@gonzalezandhulbert.com	e-Serve	6/2/2020 1:10:14 PM
Traci L. Shafroth 251673	traci.shafroth@tuckerellis.com	e-Serve	6/2/2020 1:10:14 PM
Neil M. Howard	nmh1234@gmail.com	e-Serve	6/2/2020 1:10:14 PM

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6/2/2020

Date

/s/Marina Maynez

Signature

Esner, Stuart (105666)

Last Name, First Name (PNum)

Esner, Chang & Boyer

Law Firm