S262487

IN THE

Supreme Court

OF THE STATE OF CALIFORNIA

MARISOL LOPEZ,
Plaintiff and Appellant,

v.

GLENN LEDESMA, *et al.*,
Defendants and Appellants;

BERNARD KOIRE,
Defendant and Respondent.

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 No. BC519180

ANSWER TO AMICUS BRIEF

COLE PEDROZA LLP
Kenneth R. Pedroza, SBN 184906
kpedroza@colepedroza.com
Matthew S. Levinson, SBN 175191
mlevinson@colepedroza.com
Zena Jacobsen, SBN 295833
zjacobsen@colepedroza.com
2295 Huntington Drive
San Marino, California 91108
Tel: (626) 431-2787; Fax: (626) 431-2788

Attorneys for Defendants and Respondents
GLENN LEDESMA, M.D., SUZANNE FREESEMANN, P.A., and
BRIAN HUGHES, P.A.

REBACK, MCANDREWS & BLESSEY LLP
Thomas F. McAndrews, SBN 120014
tmcandrews@rmblawyer.com
1230 Rosecrans Avenue, Suite 450
Manhattan Beach, CA 90266
Tel: (310) 297-9900
Fax: (310) 297-9800

Attorneys for Defendant and Respondent
GLENN LEDESMA, M.D.

LAFOLLETTE JOHNSON DE HAAS FESLER & AMES
Louis DeHaas, SBN 39579
ldehaas@ljdfa.com
865 So. Figueroa Street, Suite 3200
Los Angeles, CA 90017
Tel: (213) 426-3600
Fax: (213) 426-3650

Attorneys for Defendant and Respondent
SUZANNE FREESEMANN, P.A.

PETERSON BRADFORD BURKWITZ, LLP
Avi A. Burkwitz, SBN 217225
aburkwitz@pbbllp.com
100 North First Street, Suite 300
Burbank, CA 91502
Tel: (818) 562-5800
Fax: (818) 562-5810

Attorneys for Defendant and Respondent
BRIAN HUGHES, P.A.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

California Code of Regulations

Title 16

OTHER

INTRODUCTION

This Court should reject the arguments presented by the Amicus Curiae Brief of Consumer Attorneys of California ("CAOC ACB"). In the first instance, it does not add to the dialogue. In any event, it proposes to unduly narrow the meaning of "professional negligence," as defined by the statutes enacted by the Medical Injury Compensation Reform Act ("MICRA"). What is more, its invocation of public policy is unsupported. In fact, to the extent that limiting language in the statutory definition is ambiguous, public policy militates for interpreting that language narrowly, to apply MICRA liberally to accomplish its purpose.

I. The Definition Of "Scope Of Services For Which The Provider Is Licensed" Is Not Restricted By The Physician Supervision Requirement

The definition of "scope of services for which the provider is licensed" is not restricted by the physician supervision requirement. Not only is CAOC's argument to the contrary inconsistent with the statute and decisional

authority, it would result in an impractical, undesirable standard of decision.

The limiting language – "provided that such services are within the scope of services for which the provider is licensed" – is properly interpreted as referring to the general nature or area of the license. This Court should reject CAOC's argument to the contrary.

First, this point is addressed in detail in defendants' Answer Brief on the Merits, Section D, at pages 53-62. Suffice it to say here, *Waters v. Bourhis* (1985) 40 Cal.3d 424, makes the point clear. The limiting language in Section 3333.2, subd. (c)'s definition of "professional negligence" 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." (*Waters v. Bourhis, supra,* 40 Cal.3d at 436.)

Second, failure to comply with a governing statute does not remove a licensee's services from within the scope of those that are licensed. For instance, in *David M. v. Beverly Hospital* (2005) 131 Cal.App.4th 1272, the Court of Appeal held that MICRA applies to a health care provider's negligence even though the health care provider's conduct violated the mandatory reporting requirement for suspected

child abuse imposed by Penal Code section 11165.7. (*David M. v. Beverly Hospital*, *supra,* 131 Cal.App.4th at 1278.)

Third, CAOC's reliance on *Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, is unhelpful to it. In that case, the Court held that MICRA's section 3333.2 properly applied to limit the judgment of noneconomic damages, which was based in part, on negligence of a nurse practitioner. It rejected plaintiffs' constitutional challenges to Section 3333.2.

In particular, the Court considered a claim against a medical group based on allegations that, *inter alia*, a nurse practitioner and two physicians were negligent in failing to timely give plaintiff an EKG to rule out a heart problem. (*Fein v. Permanente Medical Group, supra,* 38 Cal.3d at 144.) Following a verdict for the plaintiff, the Court considered the parties' appeal and cross-appeal. In pertinent part, the Court held that it was error to have instructed the jury that the standard of care required of a nurse practitioner, who is examining a patient or making a diagnosis, is the same as the standard required of a physician and surgeon. (*Id.* at 149.) The Court also held, however, that the error was not prejudicial. (*Id.* at 151.)

Additionally, the Court considered plaintiff's multi-pronged constitutional challenge to Section 3333.2. It rejected plaintiff's arguments and held that the statute was constitutional. (*Fein v. Permanente Medical Group, supra,* 38 Cal.3d at 157-165.) To be sure, it explained, *inter alia*, that in enacting MICRA, "the Legislature was acting in a situation in which it had found that the rising cost of medical malpractice insurance was posing serious problems for the health care system in California, threatening to curtail the availability of medical care in some parts of the state and creating the very real possibility that many doctors would practice without insurance, leaving patients who might be injured by such doctors with the prospect of uncollectible judgments." (*Id.* at 158.)

CAOC's discussion of *Fein* is uncompelling. The hypothetical scenario that CAOC posits – in which a physician assistant opposes being held to the standard of care of a physician – is not present here. What is more, where a physician assistant acts under a delegation of services agreement (now known as a "practice agreement"), a physician is liable not only for the conduct of the physician assistant (Cal. Code regs, tit. 16, §§ 1399.541, 1399.542; see also Bus. & Prof. Code, § 3501, subd. (b), in effect at the time

of the acts underlying this action), but also for his or her own negligence, which is governed by the standard of care appliable to a physician.

Not only is CAOC's position inconsistent with MICRA's statutory language and the related decisional authority, it also would result in an unfavorable standard of decision. That is, it renders application of MICRA subject to an evaluation of whether the degree of supervision of a physician assistant was satisfactory. That is unhelpful. It makes the determination of whether MICRA applies unpredictable.

In contrast, the bright-line rule described by the Court of Appeal (Slip Opn., p. 26), makes predictable the issue of whether MICRA applies to physician assistants conduct. Failure to adequately supervise, or be adequately supervised, in the face of a Delegation of Services Agreement is professional negligence. Professional negligence is the object of MICRA's application.

Here, defendants were found to have been negligent, including in their supervision obligations. On appeal they did not dispute that. But such negligent conduct did not fall outside of the scope of services for which they were licensed or within a restriction imposed by the Physician Assistant

Board. Accordingly, the judgment was properly subject to the limitation on noneconomic damages provided by Section 3333.2.

II. CAOC's Reliance On Public Policy Is Misplaced

CAOC's reliance on public policy is misplaced. Reference to public policy corroborates that the definitional language – "provided that such services are within the scope of services for which the provider is licensed" – is properly interpreted independently from the degree of supervision provided to a physician assistant. Indeed, CAOC's argument against applying MICRA to the judgment in this case falls short for several reasons.

First, while CAOC's brief is generally correct that tort law is designed to vindicate social policy (CAOC ACB, at 17), it is also correct that social policy entails fostering the intended policy of MICRA. That is, CAOC's argument regarding fostering social policy misses the mark because it ignores consideration of MICRA's purpose in promoting social welfare. Its purpose is to promote availability of healthcare to Californians. In connection with the enactment of MICRA, the governor stated that, "[t]he

inability of doctors to obtain [medical malpractice] insurance at reasonable rates is endangering the health of the people of this State." (Governor's Proclamation to Leg. (May 16, 1975) Stats. 1975 (Second Ex. Sess. 1975-1976) p. 3947.) The legislative findings accompanying MICRA explain that it was enacted in response to skyrocketing malpractice premium costs and a "potential breakdown of the health delivery system, severe hardships for the medically indigent, a denial of access for the economically marginal, and depletion of physicians such as to substantially worsen the quality of health care available to citizens of this state." (Stats. 1975 (Second Ex. Sess. 1975-1976) ch. 2, § 12.5, p. 4007.)

To that end, Section 3333.2 is a "key component" of the goal of "reducing the cost of medical malpractice insurance." (*Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 114.) It is intended to do so by, in part, curing the problem of "unpredictability of the size of large noneconomic damages awards" by providing "a more stable base on which to calculate insurance rates." (*Fein v. Permanente Medical Group, supra,* 38 Cal.3d 137 at 163.)

Courts have concluded that MICRA's provisions should be liberally interpreted to effect that end. (*Preferred Risk Mutual Ins. Co. v. Reiswig* (1999) 21 Cal.4th 208, 215 ["[t]he cases agree 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"]; *Reigelsperger v. Siller* (2007) 40 Cal.4th 574, 578.) To the extent that the limiting language in the definition of Section 3333.2, subdivision (c) is ambiguous, it should be liberally construed in favor of MICRA's application.

In fact, as the Court of Appeal has recognized, MICRA applies to conduct even when a licensee acts in violation of a statute or even when the conduct could serve as the basis for professional discipline. (*David M. v. Beverly Hospital, supra,* 131 Cal.App.4th at 1278; see also *Waters v. Bourhis, supra,* 40 Cal.3d at 436.)

Second, CAOC's reliance on Business and Professions Code section 3504.1 in support of their assertion that tort deterrence takes precedence here over conflicting social policies is unfounded. That statute applies to the priorities of the Physician Assistant Board in exercising its licensing, regulatory, and disciplinary functions, not to the priorities of

the Legislature in adopting statutes, or to the courts in interpreting those statutes. The statute provides: "Protection of the public shall be the highest priority *for the Physician Assistant Board in exercising its licensing, regulatory, and disciplinary functions*. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount." (Bus. & Prof. Code, 3504.1, emphasis added.) The Physician Assistant Board is not charged with interpreting the definition of "professional negligence" in MICRA's Civil Code section 3333.2, subd. (c).

Third, defendants do not seek immunity from tort liability in this action. Rather, they seek only an application of a statutory limit on damages for noneconomic damages.

Fourth, CAOC ignores that there is an involved and intricate statutory and regulatory process for disciplining physician assistants and supervising physicians who fail to comply with the applicable statutes. Application of MICRA does not conflict with or preclude enforcement of any statutory or regulatory provision to enforce the law or professional standards by disciplinary or criminal proceedings. (*E.g.,* Bus. & Prof. Code, §§ 3516, 3532; 16 Cal. Code regs, tit. 16, §§ 1399.523, 1399.571.)

Finally, although CAOC asserts that defendants have committed a crime, it is important to note that there is no evidence that any of them have been charged, let alone convicted, with unlicensed practice of medicine or any related crime.

CONCLUSION

The Court should reject CAOC's arguments. CAOC's interpretation of the statutory definition of "professional negligence" and its appeal to public policy are unfounded. The Court should affirm the Court of Appeal's decision.

DATED: April 9, 2020

COLE PEDROZA LLP

By /s/ Matthew S. Levinson
Kenneth R. Pedroza
Matthew S. Levinson
Zena Jacobsen
Attorneys for Defendants and Respondents
GLENN LEDESMA, M.D., SUZANNE FREESEMANN, P.A., and BRIAN HUGHES, P.A.

CERTIFICATION

Appellate counsel certifies that this document contains 1,760 words. Counsel relies on the word count of the computer program used to prepare the document.

DATED: April 9, 2021

COLE PEDROZA LLP

By /s/ Matthew S. Levinson
Kenneth R. Pedroza
Matthew S. Levinson
Zena Jacobsen
Attorneys for Defendants and Respondents
GLENN LEDESMA, M.D., SUZANNE FREESEMANN, P.A., and BRIAN HUGHES, P.A.

PROOF OF SERVICE

I am a resident of or employed in the County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 2295 Huntington Drive, San Marino, California 91108.

On this date, I served the ANSWER TO AMICUS BRIEF on all persons interested in said action in the manner described below and as indicated on the service list:

See Attached Service List

By United States Postal Service – I am readily familiar with the business's practice for collecting and processing of correspondence for mailing with the United States Postal Service. In that practice correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business, with the postage thereon fully prepaid, in San Marino, California. The envelope was placed for collection and mailing on this date following ordinary business practice.

By TrueFiling – I electronically transmitted the above-referenced documents by electronic notification through the TrueFiling electronic filing system.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed April 9, 2021.

/s/ Matthew S. Levinson
Matthew S. Levinson

SERVICE LIST

Neil M. Howard (SBN 110712) LAW OFFICE OF NEIL M. HOWARD 717 No. Douglas Street El Segundo, CA 90245 Tel: (310) 452-6800 Fax: (310) 452-6810 nmh1234@gmail.com	*Attorneys for Plaintiff and Appellant* MARISOL LOPEZ By TrueFiling
Stuart B. Esner (SBN 105666) ESNER, CHANG & BOYER 234 E. Colorado Boulevard Suite 975 Pasadena, CA 91101 Tel: (626) 535-9860 Fax: (626) 535-9859 sesner@ecbappeal.com	*Attorneys for Plaintiff and Appellant* MARISOL LOPEZ By TrueFiling
Douglas de Heras (SBN 190853) PRINDLE AMARO GOETZ HILLYARD BARNES & REINHOLTZ LLP 310 Golden Shore, 4th Floor Long Beach, CA 90802 Tel: (562) 436-3946 Fax: (866) 262-7784 ddeheras@prindlelaw.com	*Attorneys for Defendant and Respondent* BERNARD KOIRE By TrueFiling

Traci L. Shafroth
(SBN 251673)
TUCKER ELLIS LLP
201 Mission Street, Suite 2310
San Francisco, CA 94105
Tel: (415) 617-2400
Fax: (415) 617-2409
traci.shafroth@tuckerellis.com

Attorneys for Amici Curiae
CALIFORNIA MEDICAL ASSOCIATION, CALIFORNIA DENTAL ASSOCIATION, CALIFORNIA HOSPITAL ASSOCIATION, CALIFORNIA ACADEMY OF PHYSICIAN ASSISTANTS, and AMERICAN MEDICAL ASSOCAITION

By TrueFiling

Fred J. Hiestand
(SBN 44241)
Counselor at Law
3418 Third Ave., Suite 1
Sacramento, CA 95817
Tel: (916) 448-5100
fred@fjh-law.com

Attorney for Amicus Curiae
THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA

By TrueFiling

Steven B. Stevens
(SBN 106907)
STEVEN B. STEVENS, A PROF. CORP.
2934-1/2 Beverly Glen Cir.
Suite 477
Los Angeles, CA 90077
Tel: (310) 474-3474
Fax: (310) 470-6063
sbstevens@thestevensfirm.com

Attorney for Amicus Curiae
CONSUMER ATTORNEYS OF CALIFORNIA

By TrueFiling

Clerk California Court of Appeal Second Appellate District Division 2 300 South Spring Street Los Angeles, CA 90013	Case No. B284452 By U.S. Mail
Clerk Los Angeles County Superior Court 111 North Hill Street Los Angeles, CA 90012	Case No. BC519180 By U.S. Mail

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **LOPEZ v. LEDESMA (KOIRE)**
Case Number: **S262487**
Lower Court Case Number: **B284452**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **mlevinson@colepedroza.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	Ledesma - Answer to CAOC ACB

Service Recipients:

Person Served	Email Address	Type	Date / Time
Avi Burkwitz Peterson Bradford 217225	aburkwitz@pbbllp.com	e-Serve	4/9/2021 3:11:39 PM
Mark Guterman LaFollette Johnson De Haas Fesler & Ames 137038	mguterman@ljdfa.com	e-Serve	4/9/2021 3:11:39 PM
Marina Maynez Esner, Chang & Boyer	mmaynez@ecbappeal.com	e-Serve	4/9/2021 3:11:39 PM
Thomas Mcandrews Reback McAndrews Kjar Warford & Stockalper, LLP	tmcandrews@rmkws.com	e-Serve	4/9/2021 3:11:39 PM
Michael Gonzalez Gonzalez & Hulbert	mgonzalez@gonzalezandhulbert.com	e-Serve	4/9/2021 3:11:39 PM
Lauren Gafa Prindle, Goetz, Barnes & Reinholtz 316896	laurengafa@gmail.com	e-Serve	4/9/2021 3:11:39 PM
Steven Stevens Steven B. Stevens, A Prof. Corp. 106907	sbstevens@thestevensfirm.com	e-Serve	4/9/2021 3:11:39 PM
Douglas De Heras Prindle Amaro Goetz Hillyard Barnes & Reinholtz LLP 190853	ddeheras@prindlelaw.com	e-Serve	4/9/2021 3:11:39 PM
Steven Swanson Attorney at Law 308289	sswanson@ecbappeal.com	e-Serve	4/9/2021 3:11:39 PM

Stuart Esner Esner, Chang & Boyer 105666	sesner@ecbappeal.com	e-Serve	4/9/2021 3:11:39 PM
Kenneth Pedroza Cole Pedroza LLP 184906	kpedroza@colepedroza.com	e-Serve	4/9/2021 3:11:39 PM
Matthew Levinson Cole Pedroza LLP 175191	mlevinson@colepedroza.com	e-Serve	4/9/2021 3:11:39 PM
Traci Shafroth Tucker Ellis, LLP 251673	traci.shafroth@tuckerellis.com	e-Serve	4/9/2021 3:11:39 PM
Fred Hiestand Attorney at Law 44241	fred@fjh-law.com	e-Serve	4/9/2021 3:11:39 PM
Jeffry Miller Lewis Brisbois Bisgaard & Smith 126074	jeff.miller@lewisbrisbois.com	e-Serve	4/9/2021 3:11:39 PM
Avi Burkwitz Peterson Bradford	aburkwitz@pb-llp.com	e-Serve	4/9/2021 3:11:39 PM
Neil Howard Law Office of Neil M. Howard	nmh1234@gmail.com	e-Serve	4/9/2021 3:11:39 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

4/9/2021

Date

/s/Matthew Levinson

Signature

Levinson, Matthew (175191)

Last Name, First Name (PNum)

Cole Pedroza LLP

Law Firm