S262487

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

REPLY IN SUPPORT OF PETITION FOR REVIEW

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INTRODUCTION

In their answer to Plaintiff's Petition for Review, Defendants strive mightily to argue "nothing to see here" with respect to the two-to-one published decision in this case holding that physician assistants who act independently, with absolutely no physician supervision are nevertheless entitled to the benefit of Civil Code section 3333.2. But, as now explained, the more defendants feign to yawn at the issues presented, the more evident it is that review is warranted. If the present Majority Opinion is allowed to stand, then the Courts will have done what the Legislature has declined to do: Physician Assistants will be able to practice medicine with absolutely no physician supervision and still receive the benefits of MICRA.

ARGUMENT

I. THE STATUTES AND REGULATIONS REQUIRING PHYSICIAN SUPERVISION OF PHYSICIAN ASSISTANTS ("PA") CONCERN THEIR *CAPACITY TO PRACTICE MEDICINE*. ACCORDINGLY, A PA WHO ACTS INDEPENDENTLY AND WITHOUT ANY PHYSICIAN SUPERVISION IS NOT ENTITLED TO THE BENEFITS OF MICRA.

Initially, defendants argue that these PAs were acting within the "scope of services for which [they were] licensed" under the terms of section 3333.2 because that provision "refers to the nature or type of services, not whether the licensed provider complies with regulations." (Answer 8, 19.)

In other words, defendants argue that even though statutes and regulations clearly dictate that a PA can only practice medicine if he or she is under the supervision of a physician, a PA that utterly disregards these requirements and practices independently is nevertheless acting within the scope of his or her license. Thus, under the facts of this case, a patient such as plaintiff who entrusts her infant to the care of a PA believing that the PA is being supervised by a physician, when such PA is in fact acting independently of the physician, is limited to recovering $250,000.

Even the Court of Appeal Majority in this case did not go quite this far. The Majority concluded that, because there was supposedly a Designated of Services Agreement ("DSA") in place here, the PAs were acting within their license even though they did not comply with any of the other regulations which specified the actual manner of physician supervision. The Majority thus elevated the one regulation relating to the DSA above all others (which as explained in the Petition was not in effect at the time PAs saw Olivia). As explained in the Petition for Review, this was in error.[1]

[1] Defendants do not attempt to justify this conclusion and as explained in the next section of this reply, the fact that the Legislature has now replaced DSAs with "practice agreements" does not lessen the need for review.

But, under defendants' analysis, it would not be necessary for there to even be a nominal DSA (or a "practice agreement" under present law). A PA could simply hang his or her own shingle and open a medical practice absent any physician supervision whatsoever and, so long as the PA is performing the same services which would have been appropriate if there had been supervision, the PA is entitled to the benefit of MICRA.

There is no support for defendants' position. According to defendants, "decisional authority citing *Waters* with regard to its discussion of a health care provider's capacity does not identify or reflect a lack of clarity. Capacity means the type of services they were providing or the role in which they were acting, not the manner – consistent with or in contravention of governing standards – in which they provided those services." (Answer 19.)

This argument demonstrates why review by this Court is so warranted. The premise of this argument is that a PA who is acting independently while performing services that could only be performed with physician-supervision, is still providing both (1) "type of services" they were licensed to provide and (2) is acting in "the role in which they were" licensed. In turn, defendants stake this position on (1) the fact that a PA who acts independently and treats a patient without physician supervision violates certain governing regulations and (2) there are cases that hold that the violation of other regulations governing other conduct, does not preclude application of MICRA. This position (which the Court of Appeal Majority also employed) therefore evinces a "one size fits all" treatment to regulations. So long as the plaintiff is claiming a health care provider's conduct is negligent because it violates a governing regulation, MICRA necessarily applies.

This reasoning does not withstand analysis. A health care provider that fails to comply with a statute or regulation that contains conditions to the health care provider's competency to perform the services in question, is not entitled to the protections of MICRA. These regulations and statutes define both the type of services the health care provider can perform and the role for which they were licensed. As explained in the

Petition for Review, a PA acting without any physician supervision is unlawfully practicing medicine. (Petition 21-22.) A fraudulent deception is being perpetrated on the PA's patients who reasonably expect that the PA examining them (or their children) is being supervised by someone licensed to perform the examination. The fact that the Majority (and defendants) rely on this Court's opinion in clarify *Waters v. Bourhis* (1985) 40 Cal.3d 424, to conclude that MICRA nevertheless applies, demonstrates why this Court's intervention is needed.

In *Waters*, this 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.) The Majority in this case 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 [*Waters v.*] *Bourhis* that conduct is not outside the scope of a license merely because it violates professional standards." (Opinion 22.) But this analysis overlooks that certain regulations (or governing statutes) serve to define the scope of a health care provider's license.

The psychiatrist in *Waters* engaged in sexual misconduct with a patient in violation of a regulation which defined "unprofessional conduct" as including "gross immorality" and "commission of any act involving moral turpitude." (*Id.* at p. 436, fn. 12.) There was no question but that the psychiatrist there was acting within the scope of his license while treating the patient. The issue was whether the fact that, while otherwise lawfully treating the patient, he engaged in an act of "unprofessional conduct" while engaged in that treatment took the matter outside of MICRA. It was in this context that the *Waters* Majority concluded that MICRA applied because the health care provider was performing services for which he was licensed.

The *Waters* Majority did not hold that all regulations should be treated identically and that MICRA applies regardless of which regulations are violated. Nor did any of this Court's cases following *Waters*, on which defendants rely, hold that this is the case. In

each of those cases, there was no question that the medical services being performed by the defendants were within the scope of their license. The issue was whether the intentionally tortious conduct they also committed, was governed by the particular MICRA provisions in question.

For instance, in *Central Pathology Service Medical Clinic, Inc. v. Superior Court* (1992) 3 Cal.4th 181, 192–193, this Court considered whether the fraudulent conduct of the defendant medical clinic lying to the plaintiff about the identity of the laboratory to which plaintiff's test was sent, was within the manner professional services were provided under Code of Civil Procedure section 425.13. That section contains the requirements for pleading punitive damages in MICRA cases.

This Court reasoned: "Plaintiffs' cause of action for fraud in this case is directly related to the manner in which defendants provided professional services. The claim emanates from the manner in which defendants performed and communicated the results of medical tests, a matter that is an ordinary and usual part of medical professional services. It is therefore governed by section 425.13(a)." (*Id.* at pp. 192-193.)

This analysis has no application here. These defendant PAs did not simply violate a regulation concerning the manner of treatment while they were otherwise lawfully treating Olivia. Because they received no supervision by a physician whatsoever when they treated Olivia, they were not performing professional services for which they were licensed. In other words, plaintiff's claim against these defendants was not based solely on the manner in which these PA defendants treated Olivia. Rather, those claims concerned whether these PAs had the capacity to treat Olivia at all.

Next, *Delaney v. Baker* (1999) 20 Cal.4th 23, 40–42, cited by defendants, actually serves to demonstrate why defendants are mistaken. There, this Court clarified that "*Central Pathology* court did not purport to universally define the phrase 'arising out of professional negligence' much less the phrase 'based on professional negligence.' It rejected the contention that the language of the phrase itself yielded a single, definitive, meaning.[Fn.] Rather, the court recognized that the scope and meaning of these phrases could vary depending upon 'the purpose underlying each of the individual statutes.' To

claim that the *Central Pathology* definition extended beyond section 425.13(a) is to ignore the limitations that this court put on its own opinion. Moreover, after its statement that "the scope of conduct afforded protection under MICRA (actions 'based on professional negligence') must be determined after consideration of the purpose underlying each of the individual statutes" (*Central Pathology*, *supra*, 3 Cal.4th at p. 192), the *Central Pathology* court cited with approval *Waters v. Bourhis* (1985) 40 Cal.3d 424, 435-436 [220 Cal.Rptr. 666, 709 P.2d 469], which suggested a different interpretation of the phrase "based on professional negligence" within the context of Business and Professions Code section 6146." (*Ibid*.)

Thus, far from supporting defendants' position, *Delaney* underscores this Court's resistance to a one-size-fits-all approach even when the issue concerns the interpretation of the same or similar phrase in different MICRA statutes. *Delaney* teaches the phrase in question must be read in the context of the particular statute at issue. This approach has particular application here since the issue concerns application of Section 3333.2. As explained in the Petition for Review, 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, italics added.)

Here, contrary to *Delaney*, defendants ask this Court to interpret the scope of Section 3333.2 identically to other MICRA provisions and, even further, defendants argue that all regulations governing health care providers should be treated identically even though the regulation here is far different from the regulation involved in *Waters*. According to defendants, a claim against a health care provider based on the violation of any regulation is always within MICRA.

Defendants argue that "Plaintiff has not pointed, nor can she point, to any decisions demonstrating her assertion that *Waters* is confusing." (Answer 19.) But the

fact that the Majority in this case concluded that its decision was mandated by this Court's opinion in *Waters*, serves to illustrate why review by this Court is needed. In resisting this point, defendants curiously argue that plaintiff's reliance on *Waters* below actually demonstrates that no clarification of that opinion is now needed. Defendants rely on the fact that plaintiff has taken the position that *Waters* holds that "'MICRA does not apply when a health care provider operates in a capacity for which he is not licensed.'" (Answer 20.) That was and is plaintiff's position. However, defendants fail to appreciate plaintiff's full position. The issue here is whether the applicable statutes and regulations requiring physician supervision of PAs *define the capacity for which the PA is licensed*. As plaintiff has explained, they do define that capacity. A PA who acts independently without any physician supervision, is acting beyond the capacity for which he or she was licensed. Defendants on the other hand take the blunt position that all regulations should be treated identically and that the violation of any or all applicable regulations have nothing to do with the capacity for which a health care provider is licensed. Intervention is therefore required by this Court to resolve the meaning of *Waters*.

Finally, even if this Court agrees that a PA who practices independently is nevertheless still within "the scope of services for which the provider is licensed," then it should still grant review to explain that this same PA is not entitled to the benefits of Section 3333.2 because he or she "is in violation of any "restriction imposed by the licensing agency. . . ."" (Civ. Code § 3333.2, subd. (c).)

As explained in the Petition, this proviso to Section 3333.2 is (1) not limited to restrictions imposed on individual health care providers (Petition 30-31) and (2) is not satisfied by the mere fact that there is supposedly a DSA nominally in effect. Nothing defendants argue in their Answer demonstrates that a PA acting independently is violating "restrictions imposed by the licensing agency" and therefore is still not entitled to rely upon Section 3333.2's cap on noneconomic damages. This supplies another reason why review is warranted.

II. RECENT AMENDMENTS TO THE LAWS GOVERNING PAS ONLY HIGHLIGHT WHY REVIEW BY THIS COURT IS NEEDED.

Next, defendants engage in an extended analysis of the recent changes to the laws regarding PAs and urge that because of these changes, review is not warranted. (Answer 21.) These recent changes simplified but did *not* eliminate the requirement that there be physician supervision of PAs. (See https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB697; https://www.jdsupra.com/legalnews/happy-new-year-pas-and-supervising-33725)

Defendants simply ignore that the Legislature did not dispense with the requirements that there be physician supervision of PAs as a condition to their practice of medicine. Physician supervision is still very much a key condition to PAs being able to lawfully practice medicine.

Thus, just because there have been changes to the applicable regulations so that it is now the law that there must be a "practices agreement" instead of a DSA and there have been certain other changes to the requirements for supervision, does nothing to alter the fundamental question presented here: If a PA acts independently and without any physician supervision, is the PA nevertheless entitled to rely on MICRA's $250,000 cap of noneconomic damages under Section 3333.2?

Nor does it matter, as defendants argue, whether the wholesale violation of the applicable regulations and statutes would have all been unlawful under the recently enacted statutes. As the Majority recognized: "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).)" (Opinion p. 6, fn. 5.)

Defendants ignore that physician supervision is at the heart of the applicable statutory and regulatory scheme, both before and after the subject amendments. The issue before this Court is therefore not impacted in the least by those changes. It remains true that if a PA has no supervising physician and is acting autonomously then that PA is either (1) acting outside the scope of his or her license or (2) is in violation of a "restriction imposed by the licensing agency. . . ." Either way, the PA is not entitled to the benefits of Section 3333.2.

Finally, just because the Court of Appeal Majority concluded that Section 3333.2 applied because, according to the Majority, there was a legally effective DSA does not undermine why review is warranted. As explained in the Petition, the reason why the Majority was wrong is that the former regulation requiring a DSA (now called a "practice agreement") was simply one means to ensure that the necessary physician supervision was provided. Even if there was a legally effective DSA (as explained in the Petition there wasn't), then that would have been meaningless from the patient's perspective if there was no actual supervision. The facts of this case are stark testament to why this was true. According to the Majority there was a legally effective DSA, yet these defendants PAs still treated Olivia independently, without any actual physician supervision. As a result of their negligence, Olivia died. For Olivia, the supposedly effective DSAs were absolutely useless.

CONCLUSION

For the foregoing reasons and for the reasons explained in the Petition for Review, plaintiff urges this Court to grant review.

Dated: July 1, 2020

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s/ Stuart B. Esner
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Supreme Court of California

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