S262487

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MARISOL LOPEZ,
Plaintiff and Appellant,

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

APPELLANT'S OPENING BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

REGULATIONS

ISSUES PRESENTED

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

This matter calls on this Court to determine whether Physician Assistants ("PAs") – who by statute and regulation – can practice medicine only while under the supervision of a physician, are nevertheless entitled to the benefits of Civil Code section 3333.2 even though, as the trial court found, they were acting autonomously and without any physician supervision. The answer to this inquiry is "no." Allowing a PA to enjoy the benefits of Section 3333.2 under these circumstances subverts both the language and purpose of that section.

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).) Each of these caveats 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), italics added.) And pursuant to Business and Professions Code section 3532, "[a]ny person who violates Section 3502 . . . shall be guilty of a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding one thousand dollars ($1,000), or by both."

A PA acting without any physician supervision is thus guilty of a crime. As explained, the Legislature did not intend to reward such criminal conduct by affording PAs who treat patients with no physician supervision the benefit of the $250,000 cap on noneconomic damages under Civil Code section 3333.2.

Here, Olivia Sarinana died needlessly when she was just four-years-old from a malignant melanoma. This tragedy was entirely preventable. Olivia was referred to a dermatologist by her primary care physician. Unfortunately, during her repeated visits at

the dermatology clinic, Olivia was never seen by a dermatologist. Instead, she was examined exclusively by PAs who were receiving no physician supervision. These unsupervised PAs negligently failed to 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. Both of the alleged supervising physicians were disabled and were not even actively practicing medicine.

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. The trial court found that Section 3333.2 applied so long as the PA is not violating a restriction imposed by the licensing agency on the particular PA even if that PA is violating general restrictions imposed by the physician assistant board, including treating patients independent of a supervising physician.

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, Section 3333.2 applied *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 medicine 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 or 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 where there was absolutely no actual supervision.

As explained below, 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.

The Majority opinion embodies a 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 disregard the conditions that allows them to practice medicine in the first place and then claim that they are nevertheless entitled to invoke the protections of MICRA because they were supposedly practicing medicine.

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.

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 Court of Appeal Majority erred in its legal conclusion that defendants were entitled to the benefits of MICRA's limitation on the recovery of non-economic damages (Civil Code, § 3333.2) even though, as the trial court's unchallenged findings establish: Ms. Freesemann and Mr. Hughes examined Olivia without any actual physician supervision and were instead acting autonomously in violation of the statutes and regulations governing their practice. The Court of Appeal reached this conclusion even though, as described below, defendants' conduct was a crime.

Since plaintiff is not challenging the sufficiency of the evidence, the Court can and should accept the facts found by the trial court in its statement of decision and determine whether those factual findings support the judgment as a matter of law. (See *Emma Corp. v. Inglewood Unified School Dist*. (2004) 114 Cal.App.4th 1018, 1020-1021 ["The District does not challenge the sufficiency of the evidence. . . . As a result, we quote the facts and conclusions found by the trial court from its statement of decision."]; *Walker v. Physical Therapy Board of California* (2017) 16 Cal.App.5th 1219, 1227 ["As neither party asserts the factual findings of the trial court were not supported by substantial evidence, this court need not review those findings. Instead, our review is limited to the question of whether the relevant statutes permit the imposition of discipline based on the trial court's findings, if accepted as true. That is a question of law that we independently review. (*Green*, supra, 47 Cal.App.4th at p. 796, 55 Cal.Rptr.2d 140; *Marek*, *supra*, 16 Cal.App.4th at pp. 1095-1096, 20 Cal.Rptr.2d 474; see also *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799-801, 35 Cal.Rptr.2d 418, 883 P.2d 960 [questions of law, including statutory interpretation, are subject to de novo review].)"]; *In re Marriage of Fink* (1979) 25 Cal.3d 877, 887 ["The rule is well established that a reviewing court must presume

that the record contains evidence to support every finding of fact . . . ."].)

Where (as here) the issue requires interpretation of a statute, the appellate court conducts independent review and does not defer to the trial court's interpretation. (*People ex rel. Lockyer v. Shamrock Foods Co*. (2000) 24 Cal.4th 415, 432.) Moreover, where (as here) a statute is applied to undisputed facts, the appellate court's review is independent. (*International Engine Parts, Inc. v. Feddersen & Co.* (1995) 9 Cal.4th 606, 611.)

The rules of statutory interpretation were summarized and applied to Section 3333.2 in *Kotler v. Alma Lodge* (1998) 63 Cal.App.4th 1381, 1390-1391:

> The fundamental rule of statutory construction is to ascertain the intent of the Legislature in order to effectuate the purpose of the law. [Citation.] In doing so, we first look to the words of the statute and try to give effect to the usual, ordinary import of the language, at the same time not rendering any language mere surplusage. The words must be construed in context and in light of the nature and obvious purpose of the statute where they appear. [Citation.] The statute "'must be given a reasonable and commonsense interpretation consistent with the apparent purpose and intention of the Legislature, practice rather than technical in nature, and which, when applied, will result in wise policy rather than mischief or absurdity. [Citations.]' " [Citation.] If the language of a statute is clear, we should not add to or alter it to accomplish a purpose which does not appear on the face of the statute or from its legislative history. [Citation.]

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. By its plain language, the cap imposed by section 3333.2 applies only in actions "based on professional negligence," not (like Code of Civil Procedure section 425.13) to actions for "damages arising out of professional negligence." Whatever argument there may be to support a broad construction of "arising out of," we do not think it applies to a statute in which those words were not used. (See also *Herrera*

v. Superior Court (1984) 158 Cal.App.3d 255, 204 Cal.Rptr. 553; *Hedlund v. Superior Court* (1983) 34 Cal.3d 695, 194 Cal.Rptr. 805, 669 P.2d 41.)" (*Perry v. Shaw* (2001) 88 Cal.App.4th 658, 668–669.)

The issue here turns on what the Legislature meant when under the plain language of Section 3333.2 which affords the protections of that statute only for "services . . . 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."

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 Majority 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 health 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. 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 practicing per 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 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-physician could practice medicine. The Physician Assistant Practice Act is one of those narrow exceptions.

Business and Professions Code Section 3500 explains the reasons why the Physician Assistant Practice Act was enacted:

> In its concern with the growing shortage and geographic maldistribution of health care services in California, the Legislature intends to establish in this chapter a framework for development of a new category of health manpower--the physician assistant.
>
> The purpose of this chapter is to encourage the more effective utilization of the skills of physicians, and physicians and podiatrists practicing in the same medical group practice, by enabling them to delegate health care tasks to qualified physician assistants where this delegation is consistent with the patient's health and welfare and with the laws and regulations relating to physician assistants.

As part of that Act, the Legislature included Business and Professions Code 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.)[1]

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

[1] Recent amendments to the statutory scheme concerning PAs 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.) Under those amendments, a designated service agreement is now a practice agreement. (Bus. & Prof. Code, § 3502.3.) However, these amendments have no impact on the issues presently pending before this Court.

assistant." (Italics added.) 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.)[2] These Regulations could not be any clearer that physician supervision must be available at all times the PA is caring for patients.

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[2] Section 1399.541 provides:

"(a) A supervising physician shall be available in person or by electronic communication at all times when the physician assistant is caring for patients.

(b) A supervising physician shall delegate to a physician assistant only those tasks and procedures consistent with the supervising physician's specialty or usual and customary practice and with the patient's health and condition.

(c) A supervising physician shall observe or review evidence of the physician assistant's performance of all tasks and procedures to be delegated to the physician assistant until assured of competency.

(d) The physician assistant and the supervising physician shall establish in writing transport and back-up procedures for the immediate care of patients who are in need of emergency care beyond the physician assistant's scope of practice for such times when a supervising physician is not on the premises.

(e) A physician assistant and his or her supervising physician shall establish in writing guidelines for the adequate supervision of the physician assistant which shall include one or more of the following mechanisms:

(1) Examination of the patient by a supervising physician the same day as care is given by the physician assistant;

(2) Countersignature and dating of all medical records written by the physician assistant within thirty (30) days that the care was given by the physician assistant;

(3) The supervising physician may adopt protocols to govern the performance of a physician assistant for some or all tasks. The minimum content for a protocol governing diagnosis and management as referred to in this section shall include the presence or absence of symptoms, signs, and other data necessary to establish a diagnosis or assessment, any appropriate tests or studies to order, drugs to recommend to the patient, and education to be given to the patient. For protocols governing procedures, the protocol shall state the information to be given to the patient, the nature of the consent to

This required supervision is in contrast to other specialties where the Legislature has not required the same degree of supervision, such as a nurse anesthetist. (*California Soc. of Anesthesiologists v. Superior Court* (2012) 204 Cal.App.4th 390, 404 ["In enacting section 2725, subdivision (b)(2), if the Legislature had intended to restrict a nurse's ability to administer medications or therapeutic agents by making it subject to a physician supervision requirement, it could have easily so provided, as it has in so many other statutes. For example, physician assistants are permitted to "administer or provide medication to a patient" only "while under the supervision of a licensed physician." (§ 3502.1, subd. (a), italics added). Likewise, section 2746.51, subdivision (a)(4) states that the "furnishing or ordering of drugs or devices by a certified nurse-midwife occurs under physician and surgeon supervision." (Italics added.) Using similar wording, section 2836.1, subdivision (d) provides that the "furnishing or ordering of drugs or devices by a nurse practitioner occurs under physician and surgeon supervision.""].)

The fact that the statutes controlling PAs generally do not have similar language signifies that the Legislature intended to greater restrictions on the ability of PAs to practice medicine generally. (See *People v. Arriaga* (2014) 58 Cal.4th 950, 960 ["It is a settled principle of statutory interpretation that if a statute contains a provision regarding one subject, that provision's omission in the same or another statute regarding a related

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be obtained from the patient, the preparation and technique of the procedure, and the follow-up care. Protocols shall be developed by the physician, adopted from, or referenced to, texts or other sources. Protocols shall be signed and dated by the supervising physician and the physician assistant. The supervising physician shall review, countersign, and date a minimum of 5% sample of medical records of patients treated by the physician assistant functioning under these protocols within thirty (30) days. The physician shall select for review those cases which by diagnosis, problem, treatment or procedure represent, in his or her judgment, the most significant risk to the patient;

(4) Other mechanisms approved in advance by the board.

(f) 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. The supervising physician shall be responsible for all medical services provided by a physician assistant under his or her supervision.

subject is evidence of a different legislative intent."]; *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 725 ["If the Legislature had intended subdivision 3 [of Civ. Code, § 47] to apply to the news media as such or to communications on matters of public interest, the Legislature could have used the same clear language as in subdivisions 4 and 5 [of Civ. Code, § 47]."].)

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 because 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 still 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 guilty of a crime. 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

the supervision mandated under Business and Professions Code section 3502. The trial court's unquestioned findings firmly establish that the PAs here were in direct violation of that statute.

Importantly, by violating section 3502 defendants were actually guilty of a crime. Business and Professions Code section 3532 provides: "Any person who violates Section 3502, 3503, 3515, or 3516 *shall be guilty* of a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding one thousand dollars ($1,000), or by both." (Italics added.)[3]

It's noteworthy that section 3532 was first enacted during the regular session in 1975. (Added by Stats.1975, c. 634, p. 1370, § 2.) That was the same year as MICRA was later enacted as part of the Second Extraordinary session of the Legislature. (https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1975/75Vol2_SecondExtraSummary.pdf.) There should therefore be no doubt that the Legislature – which had just enacted the PA Act including section 3532 -- was well-aware of the criminal nature of the conduct involved here when it enacted MICRA. (*People v. Scott* (2014) 58 Cal.4th 1415, 1424 ["It is a settled principle of statutory construction that the Legislature " 'is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof. [Citation.]' [Citation.]" (*People v. Yartz* (2005) 37 Cal.4th 529, 538, 36 Cal.Rptr.3d 328, 123 P.3d 604.)"].)

Thus, to afford defendants the benefits of Section 3333.2 would mean that the Legislature intended to reward criminal conduct. This, the Court should not do. (See *People v. Northern* (1967) 256 Cal.App.2d 28, 32, fn 3 ["We feel that it is highly unlikely that the Legislature intended to reward the criminal by a lesser punishment if, after

[3] Further, 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.)

violating section 11501 or 11531 by making a sincere offer, he delivers a nonnarcotic substance."]; Civ. Code, § 4 ["No one can take advantage of his own wrong."].)

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 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. It is equally clear that the Legislature, by including the subject provisos in Section 3333.2, intended that tortfeasors who blatantly violate numerous restrictions limiting their rights to practice, also 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 v. Sutter Health Central, supra,* 61 Cal.App.4th 971, 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 v. Bourhis*, *supra*, 40 Cal.3d 424, 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 Was 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 without the required supervision under her license is nevertheless 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 knowing wholesale disregard of the supervision requirement resulted in the death of plaintiff's four-year-old 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 or that defendants crossed it. This is particularly 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. As already explained, due to its harsh consequences, MICRA's cap on non-economic damages should be construed narrowly. (*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.)[4]

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 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

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[4] 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.)

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. Under this reasoning, once a DSA is entered into, it remains effective forever unless it is formally revoked and this antiquated DSA entitles a PA to the benefits of Section 3333.2, even though there is no actual supervision and even though the alleged supervising physician does not even continue to practice medicine.

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. . .," undermines 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. The Trial Court Erred In Concluding 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.

For the reasons already explained, Section 3333.2 should not be construed to allow PAs who engage in criminal conduct under Business and Professions Code section 3532 and who further 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.'"].)

To recap: 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.) 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. Their liability for the $4,250,000 in non-economic damages the trial court found plaintiff suffered due to the death of four-year old Olivia was capped at $250,000. The Legislature should not be presumed to have rewarded tortfeasors who blatantly violated numerous restrictions limiting their rights to practice. But, under the Majority's analysis, that precisely the case.

CONCLUSION

In the final analysis, the issue before this Court is just what the Legislature intended when it provided that a health care professional would be entitled to the benefits of Section 3333.2 only for those "services . . . 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." Plaintiff urges this Court to agree that, by including these provisos, the Legislature signaled that it did not intend to afford those benefits to a PA who is acting illegally by practicing medicine autonomously and without any physician supervision.

For the foregoing reasons, plaintiff urges this Court to conclude that defendants are not entitled to the benefits of Civil Code section 3333.2.

Dated: September 25, 2020

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

9/25/2020

Date

/s/Marina Maynez

Signature

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