# S262487

## IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

OLIVIA SARINANAN, ET AL.,
*Plaintiff and Appellant*,

v.

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

AFTER A DECISION BY THE CALIFORNIA 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 REPLY BRIEF ON THE MERITS

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As described in plaintiff's Opening Brief on the Merits, the central issue here is whether the Legislature intended that a Physician's Assistant ("PA") who practices medicine autonomously and without any physician supervision, should receive the benefits of MICRA's limitation on noneconomic damages under Civil Code section 3333.2 even though (1) under Business and Professions Code Section 3502 the Legislature authorized a PA to "perform those medical services as set forth by the regulations adopted under this chapter" *only* "when the services are rendered under the supervision of a licensed physician and surgeon . . . ." and (2) the Legislature further provided that a PA 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." (Bus, & Prof., Section 3532.)

As further explained in the Opening Brief, a PA who acts in such a criminal manner by treating patients with absolutely no supervision is either not practicing within the scope of services for which the provider is licensed or is practicing in violation of a restriction imposed by the licensing agency. Either way, by its express terms, section 3333.2 does not apply. (Civ. Code § 3333.2, sub. (c).) Otherwise, a PA who is acting illegally would be entitled to the benefits of MICRA's $250,000 cap.

In their Answer Brief, defendants first argue that they are health care providers rendering professional services. (AB 42-44.) This begs the question of whether either of the two the caveats in section 3333.2, applies. As now explained, defendants fail to negate the application of either (let alone both) of section 3333.2's caveats due to the unchallenged findings of fact made by the trial court. Accordingly, defendants are not entitled to the benefits of section 3333.2's $250,000 cap on noneconomic damages.

### A. Nothing Defendants Argue Justifies the Trial Court's Ruling (Not Relied Upon by the Court of Appeal) That Only Those Restrictions Imposed Upon A Particular PA Can Serve To Render Section 3333.2 Inapplicable.

Defendants initially argue that the limitation for "any restriction imposed by the licensing agency or licensed hospital" does not apply here by going back to the trial court's original ruling (and avoiding the Court of Appeal's analysis). According to defendants, this limitation "applies only to restrictions on individual licenses." (AB 45.) The thrust of defendants' response brief is that, by using the phrase "restriction imposed by the licensing agency," the Legislature intended to limit the application of that proviso to only those restrictions specifically targeted to individual health care practitioners and did not intend it to apply where there was a restriction of general applicability to a class of practitioners. In other words, according to defendants, this proviso would apply here only if the governing licensing agency had specifically limited the individual rights of these particular defendants to act as a PA.

The question is therefore whether a PA who performs services in violation of the restrictions of general application which are imposed on the right to practice medicine, should be treated differently (and more

favorably) than a PA who performs services contrary to a specific restriction directly upon him or her. Nothing in the language, history or purpose of section 3333.2 requires the recognition of such an artificial distinction. If defendants were correct, then a LVN, as a licensed health care provider, would equally be entitled to the benefits of MICRA if he or she opened up a medical office and unlawfully treated patients with no physician supervision. That is not what the Legislature intended.

### 1. The language used in section 3333.2 does not support defendants' position.

Defendants first argue that their restrictive interpretation of section 3333.2's caveat is supported by the language the Legislature used. Initially, defendants claim that the Legislature's use of the word "'imposed' connotes an individual-based restriction." (AB 47.) Defendants are mistaken. Administrative regulatory bodies are often characterized as having "imposed" restrictions as to requirements having general applicability. Indeed, in *Prince v. Sutter Health Central* (2008) 161 Cal.App.4th 971, one of the principal cases on which defendants rely, the Court concluded that MICRA applied to the social worker defendant in that case even though the defendant "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, sub. (e).)" (Id. at p. 977.) The Court reasoned: "the disclosure statute [(which was a restriction of general applicability)] was not *imposed* by the Board" and in any event the violation at issue was equivalent to the conduct which the Supreme Court concluded fell within MICRA in *Waters*. (*Id*., emphasis added; see also *Philip Chang & Sons Associates v. La Casa Novato* (1986)

177 Cal.App.3d 159, 168–169 ["The federal regulations *impose* upon every insured mortgage, multi-family housing project many restrictions." Emphasis added.]; *Evard v. Southern California Edison* (2007) 153 Cal.App.4th 137, 146 ["*Privette* did not abolish liability for breach of a nondelegable duty *imposed* by statute or regulation. (See *Felmlee v. Falcon Cable TV*, supra, 36 Cal.App.4th at p. 1038, 43 Cal.Rptr.2d 158; *Park v. Burlington Northern Santa Fe Railway Co.* (2003) 108 Cal.App.4th 595, 610, 133 Cal.Rptr.2d 757.)" Italics added.].)

This use of the verb "impose" as signaling a restriction of any nature, whether or not that restriction is of general applicability, is consistent with the dictionary definition of that word. Webster defines "impose" "to establish or apply by authority." Similarly, the very first definition of "impose" in the Oxford English Dictionary suggests an origination of a burden ("To lay on or set on; to place or set in a position; to put, place or deposit") as does the definition given with specific reference to taxation ("To put or levy (a tax, price, etc.) on or upon (goods, etc.)"). (7 Oxford English Dict. (2d ed.1989) at pp. 730–731, italics omitted.) These definitions are not limited to restrictions targeted to only one particular person.

Defendants, however, argue that because Black's law dictionary defines "impose" as meaning "[t]o levy or exact"" that suggests a discrete initiating event. (AB 47.) That is not the case. There is nothing about the words "levy" or "exact" (terms used in the context of taxation) that suggests an intention to narrowly apply the law to one targeted individual rather than an entire category of people.

Certainly, nothing in *Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Com.* (2012) 209 Cal.App.4th 1182, 1194, on which defendants rely, supports defendants' argument. While *Citizens Assn*. has the language defendants extract from that opinion, it is evident

that the Court there did not intend that language to mean what defendants contend. In *Citizens Assn*., the issue was whether, under Proposition 13, a vote of the electorate was necessary before the residents of an area that is annexed by a City could be subjected to taxes under the City's existing laws. In concluding that no vote was necessary, the Court reasoned that "[t]he word "impose" usually refers to the first enactment of a tax, as distinct from an extension through operation of a process such as annexation." (*Id*. at 1194.) Thus, the issue is *Citizens Assn*. had nothing to do with whether the taxes in question were generally applied to the population or were targeted to discrete individuals. To the contrary, the taxes "imposed" there were generally applicable to all residents. The issue was whether the application of that tax to the newly annexed city would constitute "imposing" a tax under Proposition 13 since the tax in question already existed.

There is therefore nothing about the dictionary definition of the word "imposed" which even arguably supports defendants' contention that when the Legislature used the term "restriction imposed by the licensing agency" it meant to limit it to restrictions that are targeted to individual health care providers and not to a particular category of such providers.

Defendants next argue that the entire paragraph of section 3333.2 in question is phrased in the singular which supposedly further supports their position. (AB 47.) This argument is difficult to follow. The Legislature's use of the singular in no way suggests that it intended what defendants argue. Rather, the singular was obviously used because it concerns a limitation to recover in an action against a particular health care provider.

Next, defendants point to the fact that the paragraph of section 3333.2 in question also refers to restriction imposed by a "licensed hospital." According to defendants, since hospitals impose restrictions on

individual health care providers only, that must be what the Legislature meant when it referenced licensing agencies as well. (AB 47.) Defendants fail to understand plaintiff's argument. Plaintiff is not claiming that, under the phrase in question, it is *only* those restrictions that are generally imposed that serve to render the $250,000 inapplicable and that restrictions that are imposed on a particular health care provider do not render the $250,000 cap inapplicable. Rather, it is plaintiff's position that both general restrictions which are imposed on all licensees as well as restrictions which are imposed on only an individual licensee could serve to render the $250,000 inapplicable. If defendants' position were accepted that would mean that a restriction which the authorized regulatory body found to be sufficiently important to be of general application would not trigger the exemption while an individual restriction imposed by a hospital with no government authority would be sufficient. There is no rational basis to support such an arbitrary distinction.

**2. Contrary to defendants' argument, decisional authority does not support limiting section 3333.2's exception to the $250,000 cap to only those restrictions on individual licensees.**

Defendants next argue that decisional authority (notably *Waters v. Bourhis* (1985) 40 Cal.3d 424 and *Prince v. Sutter Health Central* (2008) 161 Cal.App.4th 971) support their limited interpretation of section 3333.2. (AB 49.) Defendants are wrong.

First, in *Waters* this Court concluded that the MICRA provision there in question (Business and Professions Code section 6146) applied at least in part to the plaintiff's claim against a psychiatrist for sexual misconduct because: (1) the allegations in the underlying complaint arose

from both negligent and intentional conduct. Since the action was settled, the allegations were never resolved (*Waters*, 40 Cal.3d at 433); (2) many cases have concluded that sexual misconduct by a psychologist is medical malpractice (*Id*. at 433-434); and (3) a psychiatrist's intentional abuse of the therapist-patient relationship for his own sexual desires can give rise to both intentional tort and medical negligence claims. Therefore, the Court found that the settlement recovery in that case was at least in part attributable to negligence. (*Id*. at 434-435.)

With respect to the subject proviso, this Court stated: "In our view, this contention clearly misconceives the purpose and scope of the proviso which obviously was not intended to exclude an action from section 6146 - or the rest of MICRA - simply because a health care provider acts contrary to professional standards or engages in one of the many specified instances of 'unprofessional conduct.' Instead, it was simply intended to render MICRA inapplicable when a provider operates in a capacity for which he is not licensed - for example, when a psychologist performs heart surgery. On the basis of the record in this case, we think it is clear that the psychiatrist's conduct arose out of the course of the psychiatric treatment he was licensed to provide." (*Id*. at 436.)

The Court then reversed the summary judgment that had been granted to the defendant-lawyer in that case and remanded the matter for a determination of whether the lawyer had adequately advised the client as to the consequences of pursuing both a negligence claim (governed by MICRA's cap on fees) and an intentional tort claim (which may not be within the MICRA cap).

At no point in the opinion did the Court reference any specific regulation governing the power of the psychiatrist in the underlying action to treat patients. Rather, the Court simply generally referenced the professional standards under which "unprofessional conduct" could be

evaluated. Therefore, *Waters* should not be read as standing for the principle that regulations controlling when and under what circumstances a health care provider could treat a patient are not "restrictions imposed by the licensing agency. . . ."

"It is well settled that language contained in a judicial opinion is '"to be understood in the light of the facts and issue then before the court, and an opinion is not authority for a proposition not there considered. [Citation.]"' [Citations.]" (*People v. Banks* (1993) 6 Cal.4th 926, 945.) "'Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.' [Citation.]" (*Canales v. City of Alviso* (1970) 3 Cal.3d 118, 128, fn 2; see *People v. Myers* (1987) 43 Cal.3d 250, 273-274 [even though the court in an earlier opinion retroactively applied a new principle of law, that case did not stand for the proposition that such retroactive application was appropriate since that was not an issue raised or resolved]; *McAdory v. Rogers* (1989) 215 Cal.App.3d 1273, 1277 [manner in which the Court of Appeal earlier calculated maximum recovery under MICRA was not controlling since in that case there was no consideration of whether the method of calculation was proper].)

Next, as to *Prince*, 161 Cal.App.4th 971, defendants continue to ignore that the plaintiff's argument in that case, that MICRA was inapplicable to the defendant social worker, was based on the fact that the defendant "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, sub. (e).)" (*Id*. at 977.)

The Court of Appeal 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 977, italics added.)

Of course, if it were the case that the language of the proviso in question meant that it didn't apply because the plaintiff alleged the violation of a restriction of general applicability, there would have been no need for the *Prince* Court to have based its ruling on the fact that the disclosure requirement was not imposed by the Board. In any event, the fact that the Court analogized that requirement to the professional standards involved in *Waters* does not apply here.

In short, these PAs were clearly violating a restriction imposed by the licensing agency when they treated Olivia without a physician who was even capable of providing the necessary supervision. These PAs were therefore no longer acting as a Physician's Assistant but rather were acting as autonomous health care providers who were criminally treating patients. Under these circumstances, they are not entitled to the benefits of section 3333.2. As now explained, contrary to the Court of Appeal Majority's analysis, the mere fact that there was a Delegated Services Agreement, which was not effective and not followed in the least, was not sufficient to alter this fact.

### B. Nothing defendants argue establishes that Freesemann and Hughes were providing services for which they were licensed while treating Olivia with no supervision.

As explained in the opening brief, the Court of Appeal Majority incorrectly 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*. Unless there was actual physician supervision of a PA, then the PA who is acting autonomously is acting outside of the scope of services for which he or she was licensed within the meaning of section 3333.2's first caveat.

In response, defendants first argue that "[t]he term 'scope of services for which the provider is licensed' refers to the general nature or area of the provider's practice" (AB 54) According to defendants, physicians assistants are no different than other licensees, such as physicians who are authorized to engage in particular services such as exanimating a patient and a host of other services (AB 54) and therefore "scope of services" should be read broadly to include each of these services regardless whether the PA is acting without any supervision. (AB 56.)

In other words, defendants argue that for purposes of a determining the range of services which a PA could perform with physician supervision only – a PA is no different from a physician as to the scope of services for which the PA is licensed. But that is not what the Legislature intended. Rather, at the time of the events in question (1) under Business and Professions Code Section 3502 the Legislature authorized a PA to "perform those medical services as set forth by the regulations adopted under this chapter" only "when the services are rendered under the supervision of a licensed physician and surgeon . . . ." and (2) the Legislature further provided a PA 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." (Bus, & Prof., Section 3532.)

Next, defendants attempt to support the Court of Appeal majority's reasoning, arguing: "The appropriate interpretation of Section 3502 – which expressly requires physician supervision -- is that 'under the

supervision of a supervising physician' means that there is a DSA in place between the physician assistant and the physician." (AB 57)

However, Business and Professions Code section 3501, on which defendants rely, undermines rather than supports their argument. First, nowhere in the text of that section, did the Legislature equate supervision to simply having a DSA. Rather, that section provides:

> "'Supervision' means that a licensed physician and surgeon oversees the activities of, and accepts responsibility for, the medical services rendered by a physician assistant. Supervision, as defined in this subdivision, shall not be construed to require the physical presence of the physician and surgeon, but does require the following:
>
> "(A) Adherence to adequate supervision as agreed to in the practice agreement.
>
> "(B) The physician and surgeon being available by telephone or other electronic communication method at the time the PA examines the patient."

(Bus. & Prof., Section 3501, sub. (f)(1).)

Therefore, under the first portion of this section, "supervision" requires *both* that a physician oversee the activities of a PA *and* that a physician accept responsibility for the PA. The first requirement underscores the need for actual supervision. Only the second portion even arguably concerns acceptance of responsibility through a DSA (or other means). If the Legislature intended that the acceptance of responsibility was alone sufficient, then it would stopped right there and not have also included the requirement of actual supervision.

Similarly, the second portion of this subdivision serves to make clear that physical presence is not required. But that portion goes on to explain that actual adherence with the practice agreement is necessary. In other

words, the mere existence of that practice agreement (such as a DSA) is not enough. There must also be adherence. And that provision goes on to make clear that even when there is such adherence then that may not be alone sufficient. The physician must also be "available by telephone or other electronic communication method at the time the PA examines the patient."

Moreover, contrary to defendants' argument, plaintiff is not just claiming that supervision provided here "fell below the standard of care." (AB 57.) Rather, under the unchallenged findings of the trial court, there was no supervision at all provided.

In nevertheless arguing that a DSA alone is sufficient, defendants attach great weight to the fact that, once a DSA is entered into, the regulations and statutes purportedly impose vicarious liability on the Physician for the PAs negligence. (AB 57-58.) For instance, Cal. Code Regs., tit. 16, § 1399.541 provides: "Because physician assistant practice is directed by a supervising physician, and a physician assistant acts as an agent for that physician, the orders given and tasks performed by a physician assistant shall be considered the same as if they had been given and performed by the supervising physician. Unless otherwise specified in these regulations or in the delegation or protocols, these orders may be initiated without the prior patient specific order of the supervising physician."

But again, this proves just the opposite of what defendants argue. The focus of the regulations and statutes is on the actual supervision by the physician and not just the fact that there may supposedly be a nominally effective DSA. Nowhere do the statutes or regulations suggest that a DSA is alone sufficient.

Further, it is of course the case that the existence of an ordinary agency relationship would give rise to vicarious liability, even absent a

DSA. Here, (and no doubt in many cases) the PAs are employees of physicians, giving rise to vicarious liability for that reason.

Defendants do not explain why, simply because a physician may be vicariously liable for the negligence of a PA due to the existence of an agency relationship, it necessarily follows that a PA acting with no actual supervision, is entitled to the benefits of section 3333.2. If a PA is acting outside the scope of his or her license or is acting in violations of a limitation imposed by the licensing agency, the fact that a physician may be vicariously liable for that unlawful conduct does not bring the PA within the scope of section 3333.2.

Next, defendants argue that its narrow reading of "supervision" as used in section 3501 is supported by the fact that there are other statutes that also contain a requirement that the PA be supervised by a physician. (AB 60.) According to defendants, the requirement of a supervision in these other statutes would be rendered superfluous if plaintiff's interpretation of supervision (as meaning actual supervision) were accepted. Not true.

Rather, those sections simply reinforce plaintiff's argument. For instance, Section 2259.8, provides that, before a cosmetic surgery is performed, the patient must receive an appropriate physical examination and describes that the examination may be performed by "[a] licensed physician assistant, in accordance with a licensed physician assistant's scope of practice, unless limited by protocols or a delegation agreement." (Section 2259.8, sub. (A)(4).) This section does not require supervision beyond what is otherwise required of a PA performing a physical examination for any other reason. Rather, it simply reinforces that a physical examination by a PA prior to cosmetic surgery must be conducted with the level of supervision otherwise required.

The same is true as to Labor Code section 4309.10 which concerns medical treatment of work-related injuries. That section allows the treatment to be performed by "a state licensed physician assistant . . . . under the review or supervision of a physician and surgeon pursuant to standardized procedures or protocols within their lawfully authorized scope of practice." Again, this section simply reinforces that the PA is qualified to perform the task in question only if he or she is acting on accordance with the supervision requirements that otherwise exist for performing those tasks generally.

### C. It should not be presumed that the Legislature intended to extend the benefits of section 3333.2 because a PA engaged in conduct which the Legislature has concluded was criminal in nature.

As explained in the Opening Brief, it is highly probative that the Legislature expressly found that the failure to comply with section 3502 – requiring supervision -- is subject to criminal prosecution under section 3532. (OB 25.) Defendants do not challenge that the PAs were acting illegally when they practiced medicine with absolutely no physician supervision. Rather, defendants argue that illegality doesn't make a difference as "this Court has held that MICRA applies to the misconduct of a health care provider even if it would serve as the basis for professional discipline." (AB 62.)

The unlawful conduct taking place in the cases on which defendants rely is far different in nature than the conduct here. In the cases referenced by defendants, the health care provider was lawfully providing services to the plaintiff which without question triggered the application of MICRA.

At the same time, the health care provider also engaged in unlawful conduct during the course of that treatment that the plaintiff claimed caused injury. For instance, in *Waters* the psychiatrist was treating the plaintiff, triggering the application of MICRA, and during the course of treatment engaged in an inappropriate personal relationship with the plaintiff. The issue was whether the unlawful conduct served to render MICRA inapplicable despite the fact that the health care provider was providing the lawful medical services. In contrast here, the conduct on which defendants rely to claim they are entitled to the benefits of MICRA is the very conduct the Legislature also determined to be criminal. This is far more egregious than a violation of an applicable ethical rule which could have subjected these PAs to discipline. By treating patients without any physician supervision, these PAs not only acted criminally, they ceased even being physician *assistants*. They purported to assume the role of the physician.

Thus, in order to accept defendants' position, the Court must conclude that the Legislature intended that precisely the same conduct is both (1) criminal and (2) justifies protection under MICRA. As explained in the Opening Brief, it should not be presumed that the Legislature intended any such thing.

### D. The existence of an agency relationship does not require application of MICRA.

Defendants next argue that "[t]o effectuate the legislative purpose of MICRA, Section 3333.2 must be read to include within its ambit the agents of licensed physicians." (AB 63.) This argument has several flaws.

First, under settled principles of statutory construction, the Court should not resort to the purpose of a statute in derogation of its express terms.

"Under settled principles of statutory construction, we "'look to the statute's words and give them "their usual and ordinary meaning"'" in order to effectuate the purpose of the law. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 527, 113 Cal.Rptr.3d 327, 235 P.3d 988.) "'"The statute's plain meaning controls the court's interpretation unless its words are ambiguous."'" (Ibid.; accord, *Martinez v. Combs* (2010) 49 Cal.4th 35, 51, 109 Cal.Rptr.3d 514, 231 P.3d 259 (Martinez) ["If the words themselves are not ambiguous, we presume the Legislature meant what it said, and the statute's plain meaning governs"].) A "'statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect.'" (*Elk Hills Power, LLC v. Board of Equalization* (2013) 57 Cal.4th 593, 610, 160 Cal.Rptr.3d 387, 304 P.3d 1052.) 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. (*Reid*, at p. 527, 113 Cal.Rptr.3d 327, 235 P.3d 988; *Martinez*, at p. 51, 109 Cal.Rptr.3d 514, 231 P.3d 259.)" (*Atempa v. Pedrazzani* (2018) 27 Cal.App.5th 809, 817–818.)

Regardless of whether the application of MICRA under the circumstances here would further MICRA's goal of reducing the costs of providing medical services, would not justify applying section 3333.2 where the legislature expressly limited its reach. "A court must determine whether MICRA is triggered based on the specific cause of action and MICRA provision at issue. (*Id.* at p. 353, 76 Cal.Rptr.3d 146; see *Barris, supra*, 20 Cal.4th at p. 116, 83 Cal.Rptr.2d 145, 972 P.2d 966.)" (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 321.)

Second, the focus of this argument if off-target. In determining whether the policies behind MICRA would be satisfied, the focus should be on the conduct of the individual who directly injured the plaintiff, here the

PAs. If the simple fact that the potential vicarious liability of a physician were sufficient to implicate MICRA, then the tortious conduct of any agent of a health care provider would be sufficient to trigger MICRA. However, such a conclusion would be contrary to the analysis this Court employed in *Flores v. Presbyterian Intercommunity Hospital* (2016) 63 Cal.4th 75, 87. There, this Court addressed the issue "whether negligence in the use or maintenance of hospital equipment or premises qualifies as professional negligence . . ." (*Flores*, *supra*, 63 Cal.4th at 84.) The plaintiff, a patient at the defendant hospital, fell to the floor from her hospital bed when the latch on the bedrail failed, causing her personal injury. (*Id.* pp. 79–80.) The plaintiff alleged general negligence and premises liability against the hospital. (*Ibid.*) The hospital demurred contending that the plaintiff's complaint was subject to MICRA's one-year statute of limitations because the complaint actually alleged "professional negligence" by the hospital. (*Id.* p. 80.)

This Court explained that "[t]he text and purposes underlying section 340.5 instead require us to draw a distinction between the professional obligations of hospitals in the rendering of medical care to their patients and the obligations hospitals have, simply by virtue of operating facilities open to the public, to maintain their premises in a manner that preserves the well-being and safety of all users." (*Id* at p. 87.) In that case, the Court concluded that because the plaintiff's claim was premised upon "a medical assessment of [the plaintiff's] condition, that the rails on her bed be raised" (*Id* at p. 89), section 340.5 applied to that claim. However, if it were the case that MICRA applies whenever an agency relationship exists between the tortfeasor who directly injured the plaintiff and a health care provider, the analysis this Court employed in *Flores* would have been unnecessary.

*Chosak v. Alameda County Medical Center* (2007) 153 Cal.App.4th 549, 559, on which defendants rely (AB 63), only serves to prove plaintiff's

point. There, the plaintiff was injured during an eye examination by an unlicensed optometry student. The issue was whether MICRA's statute of limitation applied to the plaintiff's claim. The Court was clear that, even though the defendant was not licensed, she "was not practicing unlawfully . . . because an express exemption from the licensing requirements authorizes optometry students to practice as part of their education. (Bus. & Prof. Code, § 3042.5, sub. (a).)" (*Id* at p. 559.)

The Court then reasoned:

> Certainly the meaning proposed by plaintiff, restricting "health care provider" to persons who actually hold a license or certificate from the state, is reasonable. It is, in fact, the most obvious meaning of the words used by the Legislature, which restrict "health care provider" to "persons licensed or certified" under state statute.
>
> Yet we conclude that the meaning proposed by Valdez—that subdivision (1) of section 340.5 includes persons who are lawfully practicing pursuant to an exception to a licensing or certification requirement —is also reasonable. As well as referring to an actual licensing process, the words "person licensed or certified" can carry a more general implication of "person legally authorized." While Webster's dictionary lists "to issue a license to" as the initial definition for the verb "license," it also includes two other more general definitions: "to permit or authorize especially by formal license" and "to give permission or consent to." (Merriam–Webster's Collegiate Dict. (11th ed.2003) p. 717.) *Exempting a person from licensing requirements gives him or her "permission or consent" to practice on a par with an actual license.*

(*Id* at pp. 561–562, italics added.)

Here, of course, there is no exemption such as that recognized *Chosak.* The defendant PAs were not legally authorized to examine and treat Olivia without any physician supervision. They were unquestionably acting unlawfully.

In the portion of the *Chosak* opinion on which defendants rely, the Court, based upon the fact that the optometry student was lawfully treating the plaintiff at the time of the injury, concluded that the purpose of MICRA

would be furthered by application to that case. The Court reasoned: "Because Valdez was practicing lawfully under an express exemption from the licensing and certification requirements of Division 2, we conclude that she was within the definition of "health care provider" of section 340.5, subdivision (1)." (*Id* at p. 567.) Once again, just the opposite was the case here. These PAs were not acting lawfully when they treated Olivia with absolutely no physician supervision. Rather, they were committing a crime. Under *Chosak*'s reasoning they should therefore not be entitled to the benefits of MICRA.

### E. No matter whether section 3333.2 should be "liberally construed," as defendants argue, it should not be construed to apply beyond its terms.

Defendants next double down on their public policy argument, relying on cases containing general language suggesting that MICRA should be construed liberally to effectuate its purpose. (AB 64.) None of these cases, however, negate the point just discussed: it is the language of the statute that controls and only when the Court finds "the statutory language ambiguous or subject to more than one interpretation, we may look to extrinsic aids, including legislative history or purpose to inform our views." (*John v. Superior Court* (2016) 63 Cal.4th 91, 95–96.)

Thus, for the reasons already explained, the language of section 3333.2 controls so that it does not apply when a PA is unlawfully practicing medicine with no physician supervision. Further, to the extent the Court does consider the purpose of MICRA, that consideration should be tempered by the "draconian" nature of section 3333.2's cap so that it is limited to its terms. (*Perry v. Shaw* (2001) 88 Cal.App.4th 658, 668–669.)

Defendants effort to limit *Perry's* observation as to the harsh nature of section 3333.2 should be rejected. In *Perry*, the plaintiff sued for medical battery because the physician performed an unauthorized cosmetic procedure. The application of a $250,000 cap to plaintiff's claims against these defendants for the wrongful death of plaintiff's infant daughter is every bit as "draconian," as its application to the medical battery in *Perry*.

Next, defendants' reliance on the purpose of the Physician Assistant Practices Act to argue for liberal construction (AB 67), collapses upon itself. While that Act has the goal of addressing a "shortage and geographic maldistribution of health care services in California" as defendants argue, the Legislature clearly conditioned addressing that goal by imposing very specific restraints on the ability of PAs to practice. The central condition imposed was requiring physician supervision, so much so that the Legislature made the violation of that requirement a crime. Defendants ask this Court to simply view one-half of the legislative intent story, which of course this Court should not do.

Finally, to the extent the Legislature lessened the supervisory requirements in its recent enactment as defendants argue (which is debatable), is irrelevant. (AB 68.) That amendment does nothing to alter the fact that defendants intentionally violated the very clear requirements which prohibited the defendant PAs from autonomously treating Olivia, leading to her death.

## II. Nothing defendants argue negate that, even if a valid DSA standing alone justifies application of MICRA, the trial court's unchallenged findings here establish that there was no valid DSA.

As explained in the Opening Brief, the Majority erred by elevating one of the applicable regulatory requirements (mandating a DSA) and concluding that so long as the PA even nominally complied with that requirement, then the wholesale violation of each other applicable regulation requiring supervision would still not avoid application of section 3333.2. The requirement of a DSA was simply one means to ensure there would be actual supervision. If there is no actual supervision, then the existence of the DSA does not serve to protect patients such as Olivia in the least. Although this was the central holding of the Majority opinion, defendants avoid directly dealing with plaintiff's arguments as to why the Majority was wrong on the merits. Instead, defendants spend the final section of their brief attacking plaintiff's analysis as to why, under the trial court's unchallenged findings, there was not an effective DSA here. (AB 69.)

Plaintiff explained that there was no effective DSA as a matter of law due to trial court findings that (1) "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) and (2) "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.)

These findings meant that each of the physicians who were purportedly supervising the PAs were incompetent to do so. Nothing defendants argue establishes to the contrary.

Initially, defendants argue that this assertion has been waived because it was raised for the first time in plaintiff's petition for rehearing in the Court of Appeal. According to defendants, plaintiff was required to raise it below. (AB 69.) Defendants ignore the fact that the mere existence of the DSA was not the basis for the trial court's ruling. Instead, the trial court found that section 3333.2 applied because it was only those restrictions that were imposed on individual physicians that served to prevent application of that section. (AA 204-211.)

Thus, there was no reason for plaintiff to have made this argument in the trial court or in their initial appellate briefs. It was only when the Court of Appeal concluded that the mere existence of the DSA standing alone was sufficient, that plaintiff had cause to argue that under the unchallenged factual findings of the trial court, the DSA was legally ineffective.

Moreover, plaintiff is simply asking the Court to draw a legal conclusion based on the facts already found by the trial court. There is nothing left to litigate. This was not a jury trial and plaintiff is not asking the Court to infer certain facts as a result of the jury's verdict. Rather, the trial court clearly and unambiguously made findings that triggered application of the legal doctrine on which plaintiff relies. Defendants effort to argue that there were unresolved factual issues such as the nature of Dr. Ledesma, fails. It was the fact that he was disabled from practicing medicine that mattered, and that is precisely what the trial court found. Under these circumstances, the Court has discretion to consider a legal issue not raised below: As explained in *In re Rebecca S.* (2010) 181 Cal.App.4th 1310, 1313–1314:

> "[A] reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court. [Citation.] The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected. [Citation.]" (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, 13 Cal.Rptr.3d 786, 90 P.3d 746, fn. omitted.) However, "application of the forfeiture rule is not automatic." (*Ibid.*) An issue may be raised on appeal if "'it raises only a question of law and can be decided based on undisputed facts.' [Citations.]" (*In re V.F.* (2007) 157 Cal.App.4th 962, 968, 69 Cal.Rptr.3d 159.) *Where, as here, "the facts are not disputed, the effect or legal significance of those facts is a question of law," which "is not automatically subject to the doctrine of forfeiture."* (*Ibid.*)

(*Ibid*, italics added.)

Next, it is not the case that plaintiff first raised Dr. Koire's disability in her Opening Brief in this Court, as defendants argue. (AB 71.) Dr. Koire's disability was raised in plaintiff's Petition for Review. (Petition for Review 27, fn 1.)

Defendants next argue that plaintiff misconstrues basic agency principles. (AB 72.) According to defendants, there is no authority for the proposition that a physician disabled from practicing medicine lacks the capacity to act as a Supervising Physician qualified to enter into a DSA. Rather, according to defendants, the only issue is whether the Supervising Physicians continued to have the capacity to enter into a contract generally. Defendants' argument is thus based on the false premise that a DSA is no different than any other contract.

Plaintiff is not claiming that the DSA was not effective because the SPs lacked the capacity to contract generally. Rather, plaintiff is claiming that in order to be a Supervising Physician, the individual must be a

practicing physician. Simply having the capacity to contract is not enough. Indeed, as explained in the Opening Brief (and ignored by defendants) that is the premise of the Majority Opinion. 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 Majority's opined that the qualifications of a PA to treat a patient are dependent upon the qualifications of the supervising physician to perform that same treatment. It necessarily follows that, if the supervising physician is not qualified to perform that treatment, the PA is similarly not qualified.

Defendants reliance on cases drawing a distinction between a party's capacity to contract and a party's capacity to recover under a contract, proves plaintiff's point. In *Judicial Council of California v. Jacobs Facilities, Inc.* (2015) 239 Cal.App.4th 882, 916, the Court explained this distinction in a case concerning the ability of a contractor to enforce a contract when that contractor was unlicensed. The Court explained: "Capacity to contract refers to a party's power to enter into a binding contract, and it ordinarily depends upon an individual's age and mental soundness. (Rest.2d Contracts, § 12, p. 30; Civ.Code, §§ 38, 39, 1556, 1557.) Defendants suggest no reason why a contractor lacking a license is legally unable to contract. While, as a result of section 7031, the contractor cannot use the courts to enforce payment if performance of its contract requires a license, the contract itself is not void or voidable for lack of capacity."

As applied here, this analysis defeats application of section 3333.2. While the subject physicians may have had the legal capacity to contract

generally, they were nevertheless not entitled to the legal benefits of a DSA because they lacked the capacity to practice medicine. Under defendants' logic, so long as an individual had the capacity to contract generally, then so long as he or she entered into a DSA with a physician, he or she would be entitled to the benefits of MICRA, regardless of whether the alleged PA lacked any other qualification to treat the plaintiff.

In nevertheless arguing that a SP who is entirely disabled from practicing medicine can act as a SP, defendants rely on *Hoffert v. Commercial Ins. Co. of Newark, NJ* (S.D.N.Y. 1990) 739 F.Supp. 201, 203. There a surgeon injured his shoulder and was unable to perform surgery. He claimed that he was totally disabled under a disability insurance policy. The defendant-insurer argued that because the plaintiff would be able to perform other tasks (such as teaching), there was no total disability. The Court agreed with the plaintiff and concluded that under the circumstances there, the plaintiff was totally disabled. It is difficult to understand how this case applies here.

In order for a physician to be qualified to perform as a SP he or she must be qualified to perform the task which is being delegated to the PA. If the SP is not qualified to perform that task because of a disability, then that physician is not qualified to be a SP. The fact that the physician may have been able to perform other tasks (such as teaching) does not mean that he or she was qualified to supervise physician assistants.

As explained in the Opening Brief, if, after an agency relationship is created, one of the parties develops a lack capacity to perform under that agency contract, then the agency is terminated. (OB 32.) The focus of this analysis is on the nature of the agency relationship and not simply on the capacity to contract generally. Here, due to the disability of both Dr. Ledesma and Dr. Koire, as found by the trial court, they lacked the capacity to continue to act as supervising physicians. This is starkly illustrated by

the fact that they both ceased performing any supervision whatsoever. Accordingly, even if it were the case that an effective DSA were alone sufficient to justify application of section 3333.2, then plaintiff urges this Court to conclude that, under the trial court's unchallenged findings, there was no legally effective DSA here.

## CONCLUSION

For the foregoing reasons and for the reasons explained in the Opening Brief, plaintiff urges this Court to agree that the Legislature did not intend to reward a PA who committed a crime by practicing medicine autonomously and without any physician supervision, by affording that PA the benefits of a $250,000 cap on noneconomic damages. 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: January 28, 2021

**LAW OFFICE OF**
**NEIL M. HOWARD**

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By: *s/ Stuart B. Esner*
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**CERTIFICATE OF WORD COUNT**
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*s/ Stuart B. Esner*
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