Supreme Court number 262487
Court of Appeal number B284452
Los Angeles County Superior Court number BC519180

The Supreme Court
State of California

Marisol Lopez,

***Plaintiff-Appellant*,**

versus.

Glenn Ledesma, M.D., et al.,

Defendants-Respondents.

After a Decision by the Court of Appeal,
Second Appellate District, Division Two,
and Hon. Lawrence P. Riff,
Judge of the Los Angeles County Superior Court

Application for Leave to File Amicus Curiae Brief;

Amicus Curiae Brief of Consumer Attorneys of California in Support of Plaintiff-Appellant

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

A.
Application

Consumer Attorneys of California requests an order granting leave to file an amicus curiae brief in this matter. The amicus curiae brief is in support of the plaintiff-appellant Marisol Lopez. The proposed brief is attached to this application.

Counsel is familiar with the briefing filed in this action. The concurrently-filed amicus brief addresses policy issues, including application of the law as advocated by the parties to this matter. Consumer Attorneys of California believes the brief will assist this Court in its consideration of the issues presented.

This application is timely. Marisol Lopez filed her reply brief on January 28, 2021. An application to file an amicus curiae brief is due within thirty days of all briefs on the merits that the parties may file. Cal.R.Ct. 8.520(f). This application is filed and served on February 10, 2020.

No party to this action has provided support in any form with regard to the authorship, production or filing of this brief.

B.
Statement of Interest

The Consumer Attorneys of California is a voluntary membership organization representing approximately 6,000

associated attorneys practicing throughout California. The organization was founded in 1962. Its membership consists primarily of attorneys who represent plaintiffs in personal injury, including medical negligence, actions.

Consumer Attorneys has taken a leading role in advancing and protecting the rights of injured Californians, including those injured through the negligence of health care providers, in the courts and in the Legislature. Mr. Stevens, author of this amicus curiae brief, is a certified specialist in medical negligence law (American Board of Professional Liability Attorneys) and in appellate advocacy (State Bar of California Board of Legal Specialization). He is a member of Consumer Attorney's Amicus Curiae Committee.

Consumer Attorneys of California requests an order granting it leave to file an amicus curiae brief in this matter.

Respectfully submitted,

Steven B. Stevens, A Prof. Corp.

/s/ Steven B. Stevens

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I.

SUMMARY OF ARGUMENT

Physician assistants cannot treat patients on their own initiative. The scope of their license requires them to be supervised by physicians. Treating patients without physician oversight is outside the scope of the physician assistant license. It is practicing medicine without a license. That is a crime. Extending protections against civil liability to physician assistants — or any health care providers — who disregard the scope of their licenses undermines public policy and is contrary to the MICRA statutes and contrary to the Physician Assistant Practice Act. The MICRA statutes are inapplicable to physician assistants who diagnose and treat patients without any physician oversight.

II.

PHYSICIAN ASSISTANTS ACTING ON THEIR OWN INITIATIVE, WITHOUT ACTUAL SUPERVISION OF PHYSICIANS, ARE ACTING OUTSIDE OF THE SCOPE OF THEIR LICENSE

A.

The Physician Assistant Practice Act Limits the Practitioner's Scope of License to Services Supervised by a Doctor

Ever since the Legislature created the profession of physician assistant in California in 1970, the authorized activities of a licensee

have been tied to, and depend upon, the supervision by a physician. In 2011, Business & Professions Code section 3501(f) mandated that "[s]upervision means that a licensed physician and surgeon *oversees the activities* of, and accepts responsibility for, the medical services rendered by a physician assistant."[1] The current version retains this definition. In the current version, the Legislature retained this definition and added that "Supervision" requires *adherence* to a "practice agreement." Bus. & Prof.Code § 3501(f)(1)(a) (2020).

The 2011 version also incorporated the regulatory requirement of a "delegation of services agreement" between the physician and the assistant that specifies the medical services that the assistant can perform. Bus. & Prof. Code § 3501(k) (2011); 16 Cal.Code Reg. 1399.540. The Legislature kept that requirement as well, now codified in Section 3502.3(a)(1)(A). The current statutes refer to the writing as a "practice agreement," but it still a writing that defines the "medical services" that the assistant is authorized to perform. Bus. & Prof.Code § 3501(k) (2020), 3502.3(a)(1)(A).

Also in 2011, Section 3502(a) limited a physician assistant medical services to only those performed under supervision of a licensed physician:

> Notwithstanding any other provision of law, a physician assistant may perform those medical services as set forth by the

[1]All further references to "Sections" are for the Business & Professions Code, unless otherwise stated.

> regulations of the board *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 board prohibiting that supervision or prohibiting the employment of a physician assistant.

Although Section 3502 has been revised, the Legislature retained its core mandate:

> Notwithstanding any other law, a PA may perform medical services as authorized by this chapter if the following requirements are met: (1) The PA renders the services under the supervision of a licensed physician and surgeon . . .. (2) The PA renders the services pursuant to a practice agreement that meets the requirements of Section 3502.3.

Bus. & Prof.Code § 3502(a)(1), (2) (2020). Violation of that provision has been a crime punishable as a misdemeanor since 1975. Bus. & Prof.Code § 3532.

In 2011, the supervising physician had to be physically available to the assistant. Section 3502(b)[2nd ¶] (2011). The Legislature later relaxed that requirement. It now mandates that

the physician be "available," but not "physically." Section 3502(b)(2) (2020).

Similarly, in 2011 a physician assistant, "while under the supervision of a licensed physician and surgeon . . ., may administer or provide medication to a patient, or transmit orally, or in writing on a patient's record or in a drug order, an order to a person who may lawfully furnish the medication . . .." Bus. & Prof. Code § 3502.1(a) (2011).

Section 3502.1(c) (2020) still permits a physician assistant to "furnish or order drugs or devices under physician and surgeon supervision." This statute still mandates "[a]dherence to adequate supervision as agreed to in the practice agreement," but it does not require physical presence of the physician. The practice agreement, in short, is the contract between the assistant and the physician, but the assistant's activities are lawful only if assistant *adheres* to the physician's supervision.

These limitations on the scope of the physician assistant's license are for the benefit and protection of the public, particularly those patients who might be lured into believing that the physician assistant is a doctor or, at least, being supervised by one. Despite all of the revisions of the Physician Assistant Practice Act, there is a constant: The physician assistant *must* be supervised by a physician. Not just on paper. Actual oversight of patient care.

B.
MICRA, by Its Terms, Makes its Benefits Unavailable to Practitioners who Render Treatment Beyond the Scope of Their Licenses

The physician assistants here advocate a position that cannot be reconciled with the statutes, enabling regulations, and case law. From its inception, MICRA has been tied to the legal and regulatory framework of the various health care professions. All of the MICRA statutes have the same definition of "professional negligence." Civil Code section 3333.2(c)(2), for example, states:

> "Professional negligence" means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, *provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.*

The Court of Appeal here noted that physician assistants are unique professionals. The scope of their practice "is defined, not by the license itself, but by the scope of practice of the physician who

supervises them." *Lopez v. Ledesma*, Slip Opinion at 3, 46 Cal.App.5th 980, 985, 260 Cal.Rptr.3d 386, 388 (2020).

The appellate court conflated supervision with an agreement to supervise. The first is real oversight, which protects patients. The second is a document, which defines what the assistant can do, but by itself does nothing to protect patients. The appellate court rested its decision on the existence of a "Delegation of Services Agreement," even though the physician assistants routinely failed to adhere to it. They were acting on their own initiative and, thus, practicing medicine without a license. And, they knew it. *Lopez*, slip op. at 9-10, 46 Cal.App.5th at 989, 260 Cal.Rptr.3d at 391.

A holding that physician assistants who act autonomously are entitled to the protections of MICRA would be contrary to settled law and undermine the Legislature's intent. In *Fein v. Permanente Medical Group*, 38 Cal.3d 137, 211 Cal.Rptr. 368 (1985), the patient went to the defendant's medical office because he was having chest pains. A nurse practitioner, not a physician, took a history and examined the patient. She concluded the patient was having muscle spasms and, after consulting with her supervising physician, sent the patient home with medication. Her diagnosis and treatment were wrong; the patient was having a heart attack.

This Court held that it was error for the trial court to instruct the jury that "the standard of care required of a nurse practitioner was that of a physician . . . when the nurse practitioner is examining a patient or making a diagnosis." *Fein*, 38 Cal.3d at 149, 211 Cal.Rptr. at 376-377. This Court studied Business & Professions Code section 2725 which described the practice of

nursing. In particular, nursing includes "[o]bservation of signs and symptoms of illness, reactions to treatment, general behavior, or general physical condition, and (A) determination of whether the signs, symptoms, reactions, behavior, or general appearance exhibit abnormal characteristics, and (B) implementation, based on observed abnormalities, of appropriate reporting, or referral, or standardized procedures, or changes in treatment regimen in accordance with standardized procedures, or the initiation of emergency procedures." Bus. & Prof.Code § 2725(b)(4).

In light of this description of the scope of nursing practice, this Court reasoned that "the 'examination' and 'diagnosis' of a patient cannot in all circumstances be said — as a matter of law — to be a function reserved to physicians." *Fein*, 38 Cal.3d at 150, 211 Cal.Rptr. at 377. The patient would have been entitled to have the jury determine "whether [the nurse practitioner] met the standard of care of a reasonably prudent nurse practitioner in conducting the examination and prescribing treatment *in conjunction with her supervising physician . . .*." *Ibid* (emphasis added).

As long as the nurse practitioner was acting in conjunction with her supervising physician, the standard of care expected of her was that of a reasonably prudent nurse practitioner. This Court recognized, however, that the nurse practitioner did perform a physician's function — taking history, performing examination, and recommending treatment. What if the nurse practitioner in *Fein* routinely ignored the obligation to consult the supervising physician? Under *Fein*, the standard of care would not be that of the reasonably prudent nurse practitioner. By making diagnoses

and prescribing treatments, while routinely bypassing the supervising physician, she would have been acting as a physician but without that license. The standard of care in such a case would be, appropriately, that of the reasonably prudent physician.

Applying *Fein* exposes the fallacy and danger of the physician assistants' position here. They would no doubt urge that a lower standard of care is applicable because the physician assistant, like the nurse practitioner in *Fein*, does not have the extensive education and more intensive training of a physician. It would be unfair, they no doubt would argue, to hold them to the higher standards applicable to physicians.

Yet without actual supervision — more than mere supervision on paper — the physician assistant is practicing medicine without that greater medical training: The physician assistants here were taking histories, performing examinations, making diagnoses, and prescribing and performing treatments, including an in-office surgical procedure (a shave biopsy), and even changing treatment plans.[2] *Lopez*, slip op. at 6; 46 Cal.App.5th at 987, 260 Cal.Rptr.3d

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[2]To perform a shave biopsy, the physician numbs the skin and then uses a small blade to remove all or part of the skin lesion. The skin is not sutured afterwards. To perform an excisional biopsy, a surgeon uses a scalpel to remove the entire lesion and the skin must be sutured closed afterwards. Whether to perform a shave biopsy or a more involved procedure (punch biopsy or excisional biopsy) depends on the location, size, and type of lesion. "Skin Lesion Biopsy," National Institutes of Health, U.S. National Library of Medicine, MedlinePlus, available at https://medlineplus.gov/ency/article/003840.htm, as of Feb. 10, 2021.

The type of biopsy a patient requires, thus, is itself a medical decision. Physician Assistant Freesemann requested approval from

at 390. In short, they were practicing medicine, but without a physician's training; without a physician's license; and outside the scope of a license that requires actual physician oversight as a prerequisite to performing those services.

The dichotomy is irreconcilable: A lower standard of care applied to a physician assistant who is practicing medicine without a license; yet a demand for the protections of a statute that the Legislature intended only for those practitioners who are acting within the scope of their license. An unsupervised physician assistant — taking unsupervised histories; conducting unsupervised examinations; performing unsupervised tests; making unsupervised diagnoses; and providing unsupervised treatment — is not acting "within the scope of service for which the [physician assistant] is licensed." Civ.Code § 3333.2(c)(2).

The unsupervised physician assistant is in no different position than the "psychologist [who] performs heart surgery." *Waters v. Bourhis*, 40 Cal.3d 424, 436, 220 Cal.Rptr. 666, 674 (1985). Both are "operat[ing] in a capacity for which he is not licensed" and, thus, MICRA statutes are inapplicable. *Ibid.*

There is nothing in any of the MICRA statutes that state or suggest that practitioners who exceed the scope of their license are entitled to the protections of a statute that, by its plain language, is limited to those who practice within the scope of their license and, thus, within the law. The physician assistant who is being

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an insurer to perform an "excision and biopsy" but, a month later, Physician Assistant Hughes instead performed a shave biopsy. *Lopez*, slip op. at 6, 46 Cal.App.5th at 987, 260 Cal.Rptr.3d at 390.

supervised is practicing within the scope of the license and lawfully; the one who is acting without supervision is outside the scope of the license and committing a crime. Bus. & Prof. Code § 3532.

C.
Public Policy Mitigates Against Extending MICRA Protections to Negligent Practitioners Who Disregard the Statutory Limits On the Scope of Their Licenses

The statutory and regulatory restrictions on the scope of a physician assistant's license exist to protect the public. When a physician assistant violates those statutes and regulations — the most basic violation of all, practicing medicine without supervision — he or she has not merely committed a crime. He or she has endangered the public in general and each patient diagnosed without oversight by a physician.

The notion that the Legislature intended to extend protections against civil liability to a physician assistant — who committed a crime by treating the patient-plaintiff — is untenable. In *Hedlund v. Sutter Med. Serv. Co.*, 51 Cal.App.2d 327, 124 P.2d 878 (1942), the hospital tried to avoid liability for the negligence of physicians it assigned to treat the patient, asserting that it was not licensed to practice medicine. The appellate court rejected the ploy. The hospital contracted to provide medical care, regardless of

whether it was licensed to do so, and had to be accountable for their negligence.

> The maxim "No one can take advantage of his own wrong" (Civ.Code, § 3517) would seem to be more applicable. The restriction upon the practice of medicine is for the protection of the public, including plaintiff in this case, and not at all for the protection of one who wrongfully engages in its practice.

Hedlund, 51 Cal.App.2d at 333, 124 P.2d at 882.

"[T]ort law is primarily designed to vindicate social policy." *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 683, 254 Cal.Rptr. 211, 227 (1988) (internal quotations omitted). It is social policy to promote safety and deter unreasonable conduct. "One of the purposes of tort law is to deter future harm." *Burgess v. Superior Court*, 2 Cal.4th 1064, 1081, 9 Cal.Rptr.2d 615, 624 (1992).

The parties here debate whether the MICRA statutes should be broadly or narrowly interpreted to limit liability of negligent providers. The Legislature has resolved the debate: Public safety is controlling. "Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount." Bus. & Prof.Code § 3504.1.

Conferring civil liability protections upon health care practitioners who disregard the scope of their licenses undermines

the paramount goals of tort law in general and the specific public policy of protecting patients against unlicensed health care practitioners.

III.

CONCLUSION

The limited scope of the physician assistant's license is for the protection of the public. It is not enough for a physician assistant to complain that he or she was not getting enough supervision from a doctor. The doctor may have liability too, but that is not the issue before the Court.

The issue is whether the physician assistant is entitled to the benefits of MICRA despite committing acts — practicing medicine without supervision and without a license — that endangered the public at large and harmed the patient particular. A decision extending such protections is contrary to the limits of MICRA as enacted by the Legislature, rewards wrongdoing, and undermines public policy.

Respectfully submitted,
Steven B. Stevens, A Prof. Corp.

/s/ Steven B. Stevens

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CERTIFICATE OF WORD COUNT

This brief (excluding the caption, tables, application, proof of service and this certificate) contains 2,585 words, as calculated by WordPerfect 20, the word processing program used to generate the brief. The typeface is Century Schoolbook, 13 points.

/s/ Steven B. Stevens
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PROOF OF SERVICE

State of California, County of Los Angeles:

I am employed in the County of Los Angeles, State of California. I am over 18 years old and am not a party to this action. My business address is Steven B. Stevens, A Professional Corporation, 2934½ Beverly Glen Circle, Suite 477, Los Angeles, California 90077. On February 10, 2021, I served the following documents: **Application for Leave to File Amicus Curiae Brief; Amicus Curiae Brief of Consumer Attorneys of California in Support of Plaintiff** on the interested parties or counsel in this action by:

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/s/ Steven B. Stevens

Lopez v. Ledesma
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Supreme Court of California

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2/10/2021

Date

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Signature

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Law Firm