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Supreme Court of California
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Case No. S262487

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

MARISOL LOPEZ,
Plaintiff and Appellant,

vs.

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; LOS ANGLES COUNTY SUPERIOR COURT, CASE NO. BC519180, THE HONORABLE LAWRENCE P. RIFF, JUDGE.

***AMICUS CURIAE* BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF DEFENDANTS AND RESPONDENTS**

FRED J. HIESTAND (SBN 44241)
COUNSELOR AT LAW
fred@fjh-law.com
3418 Third Ave., Suite 1
Sacramento, CA 95817
Tel: (916) 448-5100

General Counsel for *Amicus Curiae*
The Civil Justice Association of California

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES 5

INTRODUCTION 10

A. Importance of Issue 10

B. Interest of Amicus 13

SUMMARY OF ARGUMENT 16

ARGUMENT 18

I. SUBSTANTIAL CASE LAW INSTRUCTS THAT SECTION 3333.2's CEILING ON RECOVERABLE NON-ECONOMIC DAMAGES APPLIES BROADLY, WHILE ITS PROVISO THAT HEALTH CARE PROVIDERS ACT WITHIN THEIR LICENSED SCOPE OF SERVICES AND COMPORT WITH RESTRICTIONS IMPOSED BY A LICENSING AGENCY ARE TO BE CONSTRUED AND APPLIED NARROWLY, SO AS NOT TO DEFEAT THE STATUTE'S PURPOSE. 18

A. The Purpose of MICRA and its Non-economic Damage Lid is to Reduce the Cost of Medical Malpractice Litigation and Restrain the Increase in Medical Malpractice Insurance Premiums. 19

B. Numerous Judicial Opinions Reject Attempts to Remove Health Care Providers from MICRA's Protections by Resort to the Statute's Proviso that they Act within the Scope of Services for which they are Licensed and within any Restriction Imposed by the Licensing Agency. 23

II. THE PHYSICIAN ASSISTANTS ARE COVERED BY MICRA'S NON-ECONOMIC DAMAGE CEILING. 31

A. The Physician Assistants are Licensed Health Care Providers who have Legal Agency Relationships with a Supervising Physician. 32

1. A "bright line" standard like the "agency relationship" rule is essential in applying MICRA and section 3333.2; otherwise, courts will be saddled with construing MICRA's "scope of license" requirement for every category of "health care provider" who is somehow involved in medical malpractice actions and a potential "deep pocket," inviting "open ended," increased and never-ending litigation. 34

2. The physician assistants are entitled to the damage cap under section 3333.2 because they acted as the agents of their employer, who is also their supervising physician; hence they cannot be liable for an amount greater than the MICRA cap that is applicable to their "health care provider" employer. 38

B. The Physician Assistants were Not in Violation of any Condition Placed on their Licenses by the Medical Board.. 42

CONCLUSION 44

CERTIFICATE OF WORD COUNT 45

PROOF OF SERVICE 46

TABLE OF AUTHORITIES

Page

Cases

American Bank & Trust Co. v. Community Hosp. of Los Gatos
(1985) 36 Cal. 3d 359 20

Camenisch v. Superior Court
(1996) 44 Cal.App.4th 1689 14

Canister v. Emergency Ambulance Service
(2008) 160 Cal.App.4th 388 31

Coe v. Superior Court
(1990) 220 Cal.App.3d 48 30

Fein v. Permanente Medical Group
(1985) 38 Cal.3d 137 . . . . 21, 36

Fetter v. United States
(S.D. Cal. 1986) 649 F. Supp. 1097. 31

Flores v. Presbyterian Intercommunity Hospital
(2016) 63 Cal.4th 75. . . . . 26, 27

Flowers v. Torrance Memorial Hospital Medical Center
(1994) 8 Cal.4th 992. 35

Gilman v. Beverly Calif. Corp.
(1991) 231 Cal.App.3d 121 41

Hedlund v. Superior Court
(1983) 34 Cal.3d 695 24-26

Holliday v. Jones
(1989) 215 Cal.App.3d 102 14

Lathrop v. HealthCare Partners Medical Group
(2004) 114 Cal.App.4th 1412 31

Lopez v. Ledesma
(2020) 46 Cal.App.5th 980 . . . . *passim*

Los Angeles County Metropolitan Transportation Authority v. Alameda Produce Market, LLC
(2011) 52 Cal.4th 1100 19

Mayes v. Bryan
(2006) 139 Cal.App.4th 1075 41

Murillo v. Good Samaritan Hospital
(1979) 99 Cal.App.3d 50 28

Popejoy v. Hannon
(1951) 37 Cal.2d 159 39

Prince v. Sutter Health Central
(2008) 161 Cal.App.4th 971 28-30

Smith v. Superior Court
(2006) 39 Cal.4th 77 32

Taylor v. United States
(9th Cir. 1987) 821 F.2d 1428 31

Waters v. Bourhis
(1985) 40 Cal.3d 424 . . . . 23, 24

Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital (1994) 8 Cal.4th 100. 21

Codes, Rules and Statutes

16 CCR § 1399.541 38

B & P Code §§ 3500-3546 32

B & P Code § 3502(d) 38

B & P Code § 3502.3(a)(3) 33

B & P Code § 3504.1 12

B & P Code § 3527(c). 37

B & P Code § 6146 . . . . 19, 24, 30

Civ. Code § 1431.2 41

Civ. Code § 3333.1 19

Civ. Code § 3333.2 . . . . 11, 19, 42

Code of Civ. Proc. § 340.5 19

Code of Civ. Proc. § 667.7 19

H & S Code § 1200 30

Articles, Texts, Treatises and Miscellaneous

Assembly Bill 1380 (Villaraigosa – 1999-2000) 15

BLACK'S LAW DICTIONARY (1979 ed.) 42

"Fairness for Injured Patients Act" 16

H.E. Frech III, William G. Hamm & C. Paul Wazzan, *An Economic Assessment of Damage Caps in Medical Malpractice Litigation Imposed by State Laws and the Implications for Federal Policy and Law* (2006) 16 *HEALTH MATRIX: THE JOURNAL OF LAW-MEDICINE* 693. . 22

Governor's Proclamation to Leg. (May 16, 1975) Stats. 1975 (Second Ex. Sess. 1975-1976) 20

https://calmatters.org/projects/californias-worsening-physician-shortage-doctors/ 38

https://www.bartonassociates.com/blog/the-rise-of-physician-assistant-programs-how-the-physician-shortage-affects-aspiring pas 37

Karl Llewllyn, *Remarks on the Theory of Appellate Decision and the Rules or Canon About How Statutes are to be Construed* (1950) 3 *VAND. L. REV*. 395. 18

Donald J. Palmisano, *Health Care in Crisis* (2005) 5 *YALE J. HEALTH POL'Y L. & ETHICS* 371 14

Proposition 46 (2014) 15

Rest.2d Agency, § 213(c) 36

Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps* (2005) 80 *N.Y.U. L. Rev.* 391 14

Stats. 1975, Second Ex. Sess. 1975-1976, ch. 2, § 12.5 . . . 20

Roger J. Traynor, *Reasoning in a Circle of Law* (1970) 56 *Va. L. Rev.* 739 31

IN THE SUPREME COURT
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MARISOL LOPEZ,
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Defendants and Respondents.

INTRODUCTION

A. Importance of Issue

The Civil Justice Association of California ("CJAC") welcomes the opportunity to address as *amicus curiae*[1] the issue this case presents:

> **Does the Medical Injury Compensation Reform Act's ceiling of $250,000 on recoverable non-economic damages in a medical malpractice action apply to professional negligence claims against physician assistants when they are only nominally supervised by a doctor?**

After a 14-day bench trial, the court answered "Yes" to this query in awarding plaintiff $11,200 for economic and $4.25 million in non-economic damages in her medical malpractice action for the death of her four-year-old

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[1] By separate accompanying application, CJAC asks the court to accept this brief for filing.

daughter. The defendants were a hospital, two licensed physician assistants and two doctors, each of whom had a written agreement with one of the assistants to supervise them. The court reduced the non-economic damage award to $250,000 pursuant to the Medical Injury Compensation Reform Act's ("MICRA") Civil Code § 3333.2 (c)(2). That decision animates the issue before this Court.

Plaintiff-petitioner ("petitioner") argued at trial that § 3333.2's damage cap does not apply because the two defendant "physician assistants violated licensing restrictions by failing to comply with governing regulations"; specifically, they were not supervised by a doctor. But the trial court rejected this position, explaining that the proviso in section 3333.2 upon which plaintiff relies,[2] excludes from its ambit certain, but not all, conduct that violates a licensing restriction. It applies, according to the trial court, "only to a particularized restriction imposed by the licensing agency." *Lopez v. Ledesma* (2020) 46 Cal.App.5th 980, 990 ("*Lopez*").

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[2] The language or proviso upon which petitioner relies in support of the argument that section 3333.2 does not cover physician assistants who are unsupervised by a physician, reads that it applies to "health care providers" acting "within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency." Civ. Code § 3333.2, subd. (c)(2).

Since the pertinent licensing agency here – the Physician Assistant Board of the Medical Board of California (B & P Code § 3504.1) – had not imposed an individual restriction on either defendant physician assistant, plaintiff's argument for exempting them from the damage cap does not, based on its own terms, hold water.

In a 2-1 majority opinion, the appellate court affirmed the judgment upholding the $250,000 non-economic damage component with emphasis on a different, but complementary reason from that of the trial court: if, as here, the court stated, a "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." *Lopez*, *supra*, 46 Cal.App.5th at 995. "[O]nce a supervisory relationship is established, the physician assistant acts as the agent of the supervising physician." *Id*. Accordingly, the opinion explains, excluding "a physician assistant's conduct from the damages limitation . . . simply because a supervising physician violates . . . the governing regulations . . . contravene[s] [the Court's] decisions . . . that conduct is *not* outside the scope of a license merely because it

violates professional standards." *Lopez*, *supra*, 46 Cal.App.5th at 996; emphasis added.

Petitioner now urges this Court to reverse the judgment, reject the reasoning of both lower courts and instead hold that defendants' unsupervised conduct falls outside the ambit of section 3333.2's non-economic damage limitation. But acceptance of petitioner's position would cleave a huge gap in the cap, swallowing the damage limitation and defeating its purpose. If heeded, petitioner's plea portends drastic consequences for the provision of affordable medical liability insurance and the delivery of health care services, a slide back to the bleak conditions that prompted MICRA's enactment. Slouching backward toward crises is the wrong way to go; the right way is to follow statutory language and judicial precedent, which lead to recognition that the $250,000 cap applies under the circumstances of this case – that physician assistants are not precluded from the cap on the ground that they are not supervised by a physician.

B. Interest of Amicus

CJAC is a nonprofit organization of businesses, professional associations, and financial institutions. We were established in the aftermath of the medical malpractice crisis of 1975 and enactment of MICRA that same year. From our inception we have defended MICRA against political and legal

attacks. We do so because we believe MICRA is a "model"[3] law containing legal reforms worthy of adoption for more kinds of personal injury litigation than medical malpractice. If, for instance, the $250,000 cap for "pain and suffering" were made applicable to attorneys who negligently inflict distress on their clients it would confer a substantial improvement from what clients can now recover for that loss—nothing. See, *e.g.*, *Camenisch v. Superior Court* (1996) 44 Cal.App.4th 1689, 1693 (emotional distress damages are not recoverable in cases of attorney malpractice related to litigation); *Holliday v. Jones* (1989) 215 Cal.App.3d 102, 112 (plaintiffs not entitled to recover pain and suffering damages inflicted on them by attorney's malpractice).[4]

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[3] See, *e.g.*, Donald J. Palmisano, *Health Care in Crisis* (2005) 5 *YALE J. HEALTH POL'Y L. & ETHICS* 371, 379 (strongly endorsing California's MICRA legislation as the "model" to pursue to fix the medical liability crisis); and Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps* (2005) 80 *N.Y.U. L. REV*. 391, 394 ("MICRA has served as a model for other states' adoption of damages caps as part of successive tort reform waves in the 1970s, 1980s, and 2000s . . ..").

[4] The organized contingency fee bar remains unperturbed that clients of attorneys subjected to legal malpractice are barred from recovering *any* damages for their pain and suffering, preferring instead to focus their efforts on getting rid of, increasing the dollar size of, or creating "end-

(continued...)

Our support for MICRA and extension of its liability reforms to other personal injury litigation serves CJAC's primary purpose of promoting "fairness, efficiency, uniformity and certainty" in our civil justice system. In seeking this goal, we are mindful of the complementary roles our coequal and coordinate branches of government occupy under the California Constitution. Accordingly, CJAC does not expect the Court to cure the absence of non-economic damages for legal malpractice plaintiffs, no more than we think it would strike-down the $250,000 "cap" or rewrite and curtail its scope and application. Those steps are, as the Court has consistently remarked, a job for the Legislature or voters, not the judiciary. Notably, it's a job the Legislature and voters have repeatedly decided by stating in numerous ways, "leave MICRA, especially the broad reach of its non-economic damage cap, well-enough alone."[5] It would be folly for the

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[4](…continued)
runs" around the $250,000 cap that negligent health care providers are liable to pay for their patients "pain and suffering."

[5] See, *e.g.*, Assembly Bill 1380 (Villaraigosa – 1999-2000), which failed passage in the Legislature and would have adjusted the $250,000 cap annually to reflect the cumulative percentage change in the CPI for all items; Proposition 46 (2014), which the voters rejected, would have raised the cap to more than $1,000,000; and the "Fairness for Injured
(continued…)

Court, the least dangerous branch of government, to step into a legislative, law-making role and, as petitioner urges it to do, rewrite section 3333.2 in contravention of its text, purpose, and controlling judicial precedent.

SUMMARY OF ARGUMENT

MICRA's provisions should be construed liberally in order to promote its purpose of reducing malpractice insurance premiums and efficiently resolving medical malpractice disputes. Numerous judicial opinions have done this by rejecting reliance on MICRA's common proviso that "health care providers" should, if they are to come within that law's protective ambit, act within the scope of services for which they are licensed and not outside any restriction imposed by the appropriate licensing agency.

The purpose and scope of that proviso was not intended to exclude an action from MICRA's liability restrictions simply because a health care provider acts contrary to professional standards or engages in one of the many specified instances of "unprofessional conduct." MICRA's liability protections encompass a broad range of defendants who do not literally fall within the definition of "health care provider;" and the

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[5](…continued)
Patients Act", another ballot initiative proposed for 2022 that would raise the cap to $1.2 million.

common proviso to MICRA's protections about the "scope of the license" and "restrictions of the licensing agency" are interpreted narrowly so as not to defeat MICRA's primary purpose of tamping down medical liability insurance costs.

The two physician assistant defendants here were fully licensed "health care providers." Moreover, both had a legal "agency relationship" with a supervising physician through a written agreement defining the services they may perform. This written agreement should be sufficient to bring them within MICRA's non-economic damage cap.

For this Court to hold to the contrary and sanction examination of whether a health care provider has – by practicing outside of a license and its governing regulations – waived MICRA's non-economic damage ceiling, will produce much mischief. First, it will require a fact finder to determine in each case whether a physician's supervision of a physician assistant was adequate for applying MICRA's damages limitation. This will invite a flurry of new medical liability cases alleging there is "no" or "inadequate" supervision.

Second, it will saddle inadequately supervised physician assistants with potential liability greater than that of the supervising physician, whose liability is capped at MICRA's $250,000 ceiling. This is irrational and inconsistent with MICRA's goal of achieving some semblance of uniformity and

predictability in damage awards.

Third, it conflicts with the rule that in a wrongful death action (such as this) petitioner is limited to a maximum $250,000 non-economic damage recovery from all the health care provider defendants collectively.

Fourth and finally, it will effectively kill the cap because whatever vicarious liability an employer/supervising physician has for the acts of employee physician assistants that is greater than the employer physician's own $250,000 maximum can be recouped through an indemnification action against the employee physician assistants.

ARGUMENT

I. SUBSTANTIAL CASE LAW INSTRUCTS THAT SECTION 3333.2's CEILING ON RECOVERABLE NON-ECONOMIC DAMAGES APPLIES BROADLY, WHILE ITS PROVISO THAT HEALTH CARE PROVIDERS ACT WITHIN THEIR LICENSED SCOPE OF SERVICES AND COMPORT WITH RESTRICTIONS IMPOSED BY A LICENSING AGENCY ARE TO BE CONSTRUED AND APPLIED NARROWLY, SO AS NOT TO DEFEAT THE STATUTE'S PURPOSE.

For any statute "to make sense, it must be read in the light of some assumed *purpose*. A statute merely declaring a rule, with no purpose or objective, is nonsense." Karl Llewllyn, *Remarks on the Theory of Appellate Decision and the Rules or Canon About How Statutes are to be Construed* (1950)

3 *VAND. L. REV.* 395, 400; emphasis added. "As in any case involving statutory interpretation, our fundamental task . . . is to determine the Legislature's intent so as to effectuate the law's purpose." *Los Angeles County Metropolitan Transportation Authority v. Alameda Produce Market, LLC* (2011) 52 Cal.4th 1100, 1106.

A. The Purpose of MICRA and its Non-economic Damage Lid is to Reduce the Cost of Medical Malpractice Litigation and Restrain the Increase in Medical Malpractice Insurance Premiums.

The purpose of MICRA's liability reforms[6], especially section 3333.2, is free from doubt. In calling the special session of the Legislature to address the medical liability insurance crisis of 1975, Governor Edmund G. Brown, Jr., stated that "the cost of medical malpractice insurance has risen to levels which many physicians and surgeons find intolerable. The inability of doctors to obtain such insurance at reasonable rates is endangering the health of the people of

[6] MICRA's liability reforms include limiting the time for filing malpractice actions (Code of Civ. Proc. § 340.5); limiting attorneys' fees recoverable under contingency fee contracts (Bus. & Prof. Code § 6146); structuring payment of future damage awards in excess of $50,000 over an extended period of time (Code of Civ. Proc. § 667.7); allowing juries to consider collateral sources of benefits available to plaintiffs (Civ. Code § 3333.1); and capping recovery of non-economic damages at $250,000 (Civ. Code § 3333.2).

this State, and threatens the closing of many hospitals."[7]

The "findings" accompanying the legislative bill (AB 1xx) that became MICRA underscore this same objective:[8]

> [T]here is a major health care crisis in the State of California *attributable to skyrocketing malpractice premium costs* and resulting in a potential breakdown of the health delivery system, severe hardships for the medically indigent, a denial of access for the economically marginal, and depletion of physicians such as to substantially worsen the quality of health care available to citizens of this state.

Courts have consistently affirmed the purpose of MICRA and its non-economic damage ceiling:

> The legislative history of MICRA . . . demonstrates . . . that the Legislature hoped to reduce the cost of medical malpractice insurance, so that doctors would obtain insurance for all medical procedures and would resume full practice; indeed, *in this respect [available] statistics suggest that MICRA was in fact successful.*

American Bank & Trust Co. v. Community Hosp. of Los Gatos (1985) 36 Cal. 3d 359, 373; emphasis added.

The considered judgment of the Legislature and the

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[7] Governor's Proclamation to Leg. (May 16, 1975) Stats. 1975 (Second Ex. Sess. 1975-1976) p. 3947.

[8] Stats. 1975, Second Ex. Sess. 1975-1976, ch. 2, § 12.5, p. 4007; emphasis added.

Governor that limiting recovery for non-economic damages to $250,000 would help dampen the skyrocketing cost of medical malpractice insurance has proven correct.

> The continuing availability of adequate medical care depends directly on the availability of adequate insurance coverage, which in turn operates as a function of costs associated with medical malpractice litigation. Accordingly, MICRA includes a variety of provisions, *all of which are calculated to reduce the cost of insurance by limiting the amount and timing of recovery in cases of professional negligence.* [¶] MICRA thus reflects a strong public policy to contain the costs of malpractice insurance by controlling or redistributing liability for damages, thereby maximizing the availability of medical services to meet the state's health care needs. With specific reference to section 3333.2, this court has also observed that "[o]ne of the problems identified in the legislative hearings was the *unpredictability of the size of large noneconomic damage awards, resulting from the inherent difficulties in valuing such damages and the great disparity in the price tag . . . different juries place on such losses. The Legislature . . . reasonably . . . determined that an across-the-board limit would provide a more stable base on which to calculate insurance rates.*"

Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital (1994) 8 Cal.4th 100, 112, citing and quoting from *Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137,163, which holds that the "cap"' is "rationally related" to the "legitimate state interest" in alleviating the pressure on malpractice

insurance rates (emphasis added).

A scholarly article that studied the effect of tort reforms from various states on medical malpractice insurance premiums confirmed then what common sense tells us remains true today.[9]

> Widely accepted economic principles and the dominance of many medical malpractice insurance markets by non-profit carriers, together with the results of empirical research, indicate that caps on noneconomic damage awards are effective in reducing medical liability insurance costs, thereby reducing health care costs. Limits on noneconomic damage awards reduce the incentive to litigate weak claims and reduce the average size of malpractice awards (*i.e.*, severity)—all important determinants of medical costs. By reducing the cost of medical services – and consequently making health insurance more affordable – such limits increase the public's access to health care.

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[9] H.E. Frech III, William G. Hamm & C. Paul Wazzan, *An Economic Assessment of Damage Caps in Medical Malpractice Litigation Imposed by State Laws and the Implications for Federal Policy and Law* (2006) 16 *HEALTH MATRIX: THE JOURNAL OF LAW-MEDICINE* 693, 696.

B. Numerous Judicial Opinions Reject Attempts to Remove Health Care Providers from MICRA's Protections by Resort to the Statute's Proviso that they Act within the Scope of Services for which they are Licensed and within any Restriction Imposed by the Licensing Agency.

Petitioner's gambit to end-run MICRA's cap and evade its damage restriction is nothing new. As the appellate court's majority opinion remarked, *Waters v. Bourhis* (1985) 40 Cal.3d 424 ("*Bourhis*") interpreted an *identical proviso* to the one upon which petitioner relies here in her argument that the physician assistants forfeited the protection of the damage cap because they were not supervised. The requirement that they be supervised is, so the argument goes, a necessary condition of their licenses. Petitioner contends that without a physician's supervision, and in violation of other licensing regulations, the assistants are acting outside their authorized scope of practice and in violation of other administrative restrictions. Ergo, the non-economic damage lid does not apply to them because they are not acting as bona fide "health care professionals" for whom section 3333.2 extends its protective sweep.

Bourhis, however, illustrates the weakness of petitioner's argument. There the plaintiff, Waters, sued his former attorney, Bourhis, for having taken a contingency fee amount greater than the sliding scale that MICRA's B & P

Code § 6146 permits. Bourhis countered that though in the previous action he sued Water's psychiatrist, a "health care provider," the suit was for the intentional tort of sexual assault and battery, which was outside of the "scope of services" for which the "health care provider" was licensed and hence not subject to the MICRA attorney fee limitation. Bourhis specifically argued, similar to what is argued here, that the psychiatrist's misconduct was also outside a "restriction imposed by the licensing agency" because sexual misconduct was a basis for disciplinary action against the psychiatrist. *Bourhis, supra*, 40 Cal.3d at 435-436.

But the Court rejected this argument, explaining:

> [T]his 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.

Id. at 436; emphasis added.

Before *Bourhis*, *Hedlund v. Superior Court* (1983) 34 Cal.3d 695 ("*Hedlund*") also informed courts and counsel on how to determine whether an act of negligence is within the

scope of services for which a health care provider is licensed, and hence "professional negligence" to which MICRA applies. In that case, plaintiff was physically attacked by a patient of defendant psychologists. Plaintiff sued the defendants for professional negligence, alleging that the patient had informed them of his intent to attack plaintiff and that defendants breached their duty to her by failing to properly diagnose the patient's violent condition and warn plaintiff of the danger. *Id.* at 700. Defendants demurred, arguing that the alleged breach of duty constituted ordinary, not professional negligence, and was time barred by the then one-year statute of limitations for ordinary negligence. *Id.* at 699. The trial court denied the demurrer, and defendants petitioned for a writ of mandate to vacate the court's decision. *Ibid.*

Defendants argued that while the duty to recognize dangerousness in a patient arises in their administering of professional psychology services, the duty to warn a third person of the dangerousness does not involve the rendering of "professional services" governed by MICRA. Thus, defendants asserted that professional negligence "involves only acts in the course of diagnosis or treatment resulting in injury to the patient. An injury to a third person resulting from a failure to warn is 'ordinary negligence' governed by [Code of Civ Proc.]

section 340[, and not MICRA's section 340.5 three year statute of limitations for professional negligence]." *Hedlund*, *supra*, 34 Cal.3d at 702. This Court rejected that argument, finding that "[d]iagnosis of 'psychological problems and emotional and mental disorders' is a professional service for which a psychologist is licensed, and a negligent failure in this regard is therefore 'professional negligence.' . . . This diagnosis and prediction is an essential element of a cause of action for failure to warn . . . [t]he decision to warn and the manner in which the warning is given may also involve professional judgment." *Id.* at 703. Thus, the court held that the "warning aspect of this duty . . . is inextricably interwoven with the diagnostic function." *Id.*

Similarly, *Flores v. Presbyterian Intercommunity Hospital* (2016) 63 Cal.4th 75 ("*Flores*") holds that MICRA's one-year from the time of discovery statute of limitations rather than the two-year limitation period for ordinary negligence applies when negligence occurs in the use or maintenance of medical equipment or premises while medical care is being provided to the plaintiff.

After evaluating the plaintiff's medical condition, her doctor ordered that her bedrail be raised. *Ibid.* The latch on the bedrail failed and the rail collapsed, causing the plaintiff to fall to the floor. *Ibid.* Less than two years later, the plaintiff

sued the defendant hospital for general negligence and premises liability. *Id.* at 79-80. The trial court sustained the defendant hospital's demurrer, finding that the plaintiff's action was not filed within the one-year "from time of discovery" limitations period for professional negligence actions pursuant to section 340.5. *Flores, supra*, at 80. The Court of Appeal reversed, concluding the defendant hospital's "alleged failure to use reasonable care in maintaining its premises and its alleged failure to take reasonable precautions to make a dangerous condition safe 'sounds in ordinary negligence because the negligence did not occur in the rendering of professional services.' " *Ibid.*

But this Court granted review and reversed the appellate court, explaining that

> A hospital's negligent failure to maintain equipment that is necessary or otherwise *integrally related to the medical treatment and diagnosis of the patient* implicates a duty that the *hospital owes to a patient by virtue of being a health care provider*. Thus, if the act or omission that led to the plaintiff's injuries was negligence in the maintenance of equipment that, under the prevailing standard of care, was reasonably required to treat or accommodate a physical or mental condition of the patient, the plaintiff's claim is one of professional negligence under [Code of Civ. Proc.] section 340.5.

Id. at 88.

Murillo v. Good Samaritan Hospital (1979) 99 Cal.App.3d 50, 56-58 ("*Murillo*") used similar reasoning to conclude that the scope of MICRA's coverage of "professional negligence" actions against health care providers is broad. In that case, the plaintiff – a hospital patient – fell out of the hospital bed because, she claimed, the hospital staff had "negligently and recklessly left the rails of the hospital bed down," allowing her fall. *Id*. at 52. She sued, but the trial court granted the defendant hospital summary judgment on the basis that the (then) one-year statute of limitations (it is now two years) for ordinary negligence had run. The appellate court reversed, based on MICRA's three-year provision in the statute of limitations for professional negligence claims against a health care provider. *Murillo* explained that the test for whether an action sounds in professional negligence against a health care provider depends on "*whether the negligent act occurred in the rendering of services for which the health care provider is licensed*." *Id*. at 57; emphasis added.

Prince v. Sutter Health Central (2008) 161 Cal.App.4th 971, 975-977 ("*Prince*") exemplifies the trend of court opinions holding that MICRA's provisions, including its non-economic damage cap, are to be applied broadly. This means spreading its protective umbrella to encompass defendants as "health care providers" even when they appear to run afoul of the

statute's proviso that they should be acting "within the scope of their license" and not in violation of a licensing agency "restriction." In this case, the family of a mental patient sued an unlicensed social worker for the suicide of decedent James Prince. Plaintiffs argued that the social worker who made the decision to release decedent was negligent, but not entitled to MICRA's protections because of the same statutory proviso at play here: she was *unlicensed* and violated the legal requirement that she inform each client or patient of that fact and tell them she is under the supervision of a licensed professional. *Id.* at 977.

Plaintiffs settled with Kaiser for their economic damages and for the maximum amount of $250,000 in non-economic damages allowable by MICRA, but continued the suit against Sutter Hospital, with whom Kaiser had subcontracted to provide mental health services, and the social worker as Sutter's employee. The trial court granted summary judgment for defendants and the appellate court affirmed. As for the contention that the social worker was practicing outside the scope of her license, the opinion explained that although defendant was not "licensed," she was "registered" to complete training and get a license, and this would suffice. And in regards to plaintiffs' argument that defendant did not disclose to them she was unlicensed, the opinion stated, "But

that does not mean [she] was not a health care provider, nor change the fact that she performed a mental health evaluation." *Prince, supra*, 161 Cal.App.4th at 977.

In reaching the conclusion that MICRA applied to the unlicensed social worker who failed to disclose this fact to her plaintiff clients, *Prince* buttressed its reasoning by discussing *Bourhis* (see discussion *ante* at pp. 23-24), stating that the opinion there "rejected a similar claim in a case involving the identical language in a different MICRA statute (B & P Code § 6146, subd. (c)(3))." In response to plaintiffs' argument that defendant social worker did not, as petitioner also asserts here, receive the required individual supervision, *Prince* replied "that does not change the nature of the services she provided." *Id.* at 978.

Additional opinions demonstrate that MICRA's liability protections are to be applied broadly to encompass a broad range of defendants who do not literally fall within the definition of "health care provider;" and that the common proviso to MICRA's protections about the "scope of the license" and "restrictions of the licensing agency" should be interpreted narrowly so as not to defeat MICRA's primary purpose. See, *e.g.*, *Coe v. Superior Court* (1990) 220 Cal.App.3d 48, 53 (although not literally licensed as "clinics, health dispensaries or health facilities" under H & S Code

§ 1200 et seq., blood banks are logically covered by the term "health dispensary" since a "blood bank dispenses a product and provides a service inextricably identified with the health of humans."); *Fetter v. United States* (S.D. Cal. 1986) 649 F. Supp. 1097, 1101 and *Taylor v. United States* (9th Cir. 1987) 821 F.2d 1428, 1431-1432 (MICRA limitations apply to federal health care facilities sued in California for professional negligence even though such facilities are *not licensed* by the State); *Canister v. Emergency Ambulance Service* (2008) 160 Cal.App.4th 388, 404-407 (ambulance drivers certified as emergency medical technicians (EMTs) or trainees are covered by MICRA when a vehicle accident injures a person in the ambulance who is accompanying a patient, since transporting a patient to or from a medical facility is "professional negligence"); and *Lathrop v. HealthCare Partners Medical Group* (2004) 114 Cal.App.4th 1412, 1416 (medical group that is not a "health care provider" is still subject to MICRA's non-economic damage cap as an employer held vicariously liable for the negligent acts of its licensed physician employees).

II. THE PHYSICIAN ASSISTANTS ARE COVERED BY MICRA'S NON-ECONOMIC DAMAGE CEILING.

As Justice Traynor said, we need "literate, not literal" judges when it comes to reading and applying statutes. Roger J. Traynor, *Reasoning in a Circle of Law* (1970) 56 VA. L. REV.

739, 749. A "literate" judge begins, of course, with the statute's language, construing it "as a whole and with the overall statutory scheme," and "harmonizing" it with "reference to the entire scheme of law of which it is a part." *Smith v. Superior Court* (2006) 39 Cal.4th 77, 83. The end goal of this analytical exercise is to arrive at a construction "that comports most closely with Legislature's apparent intent, endeavoring to *promote rather than defeat the statute's general purpose and avoiding a construction that would lead to absurd consequences.*" *Id.*; emphasis added. Both the trial and appellate court here have done this, reaching the same sound conclusion that the lid on recoverable non-economic damages in section 3333.2 applies to the physician assistant defendants. Here's why that judgment is correct and should be affirmed.

A. The Physician Assistants are Licensed Health Care Providers who have Legal Agency Relationships with a Supervising Physician.

The physician assistant defendants were fully licensed at all relevant times in this litigation. They were required to demonstrate some level of training and proficiency to obtain their licenses. They were, therefore, "health care providers," a category that includes any person licensed under division 2 of the Business and Professions Code. B & P Code §§ 3500-3546. The scope of their duties are primarily defined by those

of each physician assistant's supervising physician. As the appellate opinion states, "[A] physician assistant's practice area is potentially as broad as that of any [supervising] physician." *Lopez, supra*, 46 Cal.App.5th at 994.

While it is clear that physician assistants who have *no relationship* with a supervising physician would be practicing "outside the scope of services for which they are licensed," that is not the case here. Both physician assistants had "a legal relationship with a supervising physician through a [delegation of services agreement] DSA." *Id*. at 995. This is a "formal writing defining the services a physician assistant may perform." *Lopez, supra*, 46 Cal.App.5th at 986. The content of a DSA requirement was statutorily fleshed out effective January 1, 2020, and practice agreements "in effect prior to [that date] were deemed to meet the requirements" of the new law. B & P Code § 3502.3(a)(3).

But petitioner protests, saying the written DSA means nothing if the supervising physician does not comply with it. "No supervision" means, does it not, that the physician assistants were practicing outside the "scope of their licenses" and are, therefore, not entitled to the protection of section 3333.2's non-economic damage lid? Therein lies the rub. The appellate opinion "literately" resolves this problem by examining the statutes and regulations governing physician

assistants, finding 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." *Lopez*, *supra*, 46 Cal.App.5th at 996; emphasis added. Accordingly, the majority opinion concluded that the formation of an "agency relationship" between the physician assistants and a supervising physician by a DSA was a necessary and sufficient condition to bring the physician assistants within MICRA's non-economic damage cap.

That the appellate opinion's "harmonization" of the "scope of license" proviso with the rest of section 3333.2, MICRA and agency law is correct, can best be understood by examining the consequences of a contrary conclusion.

1. A "bright line" standard like the "agency relationship" rule is essential in applying MICRA and section 3333.2; otherwise, courts will be saddled with construing MICRA's "scope of license" requirement for every category of "health care provider" who is somehow involved in medical malpractice actions and a potential "deep pocket," inviting "open ended," increased and never-ending litigation.

While this is, as the appellate opinion acknowledged, "an extreme case in which actual supervision was essentially

nonexistent," there was still some supervision. "[O]ne of the supervising physicians reviewed and countersigned a least one chart note containing a treatment plan." *Lopez, supra*, 46 Cal.App.5th at 997. That may or may not be enough to tip the scale in favor of MICRA protections for the physician assistants, but without the bright line "agency rule" courts are left with the difficult task of distinguishing between "no" and "inadequate" supervision, both of which are species of "negligence." "[N]egligence is, after all, simply conduct which falls below the standard established by law for the protection of others against the unreasonable risk of harm." *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 997.

Once this Court holds that section 3333.2 or any other MICRA provision does not apply if a licensed health care provider defendant is practicing outside the scope of his or her license, that averment will understandably find its way into new and countless pleadings. If the health care provider is required to be "supervised" there will be, as happened here, discovery as to the extent of that supervision. Assuming some factual dispute over the extent or adequacy of supervision is found, courts are then confronted with this problem:

> Requiring a fact finder to determine in each case whether a physician's supervision of a physician

> assistant was sufficient for purposes of applying the MICRA damages limitation[,] risks creating the kind of uncertainty in predicting medical malpractice damage awards that the legislature enacted MICRA in part to prevent.

Lopez, *supra*, Cal.App.5th at 997, citing *Fein, supra*, 38 Cal.3d at 163.

Indeed, removing the damage ceiling for physician assistants when they practice without actual supervision by a physician, practically assures – if they were in any way involved with the plaintiff's medical care – they will now be named in a complaint for malpractice. That is because the negligence of a physician in failing to supervise (or failing to *adequately* supervise) the physician assistant who commits malpractice, is "within the scope of the supervising physicians's 'rendering of professional services.'" *Lopez*, *supra*, 46 Cal.App.5th at 998. This means that MICRA and its non-economic damage cap apply, consistent with agency law, to the supervising physician: "A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless . . . in the supervision of the activity." Rest.2d Agency, § 213(c).

According to petitioner, though, the non-economic damage lid should not apply to physician assistants who lack

actual supervision by a physician. But this contention conflicts with a fundamental legal reality:

> 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.

Lopez, *supra*, 46 Cal.App.5th at 995.

This does not mean, of course that either supervising physicians or physician assistants are "off the hook" for their unsupervised conduct. A supervising physician who does not comply with regulatory requirements is subject to discipline for unprofessional conduct leading to limitations, including prohibition, on the right to supervise a physician assistant. B & P Code § 3527(c). This disciplinary authority is of critical importance to California doctors and patients because, "as the physician shortage worsens, the demand [for physician assistants] is only predicted to grow . . . to meet patient needs."[10] California's shortage of primary care physicians (only 28,644 in 2018) is already afflicting rural areas and low-income inner cities, and is forecast to impact millions of

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[10] https://www.bartonassociates.com/blog/the-rise-of-physician-assistant-programs-how-the-physician-shortage-affects-aspiring pas. Accessed February 27, 2021.

people within 10 years.[11] A physician stripped of the ability to supervise and work with physician assistants – and the law currently allows a physician to supervise up to four physician assistants – will be competitively disadvantaged in the number of patients able to be treated compared with physicians who are not so restricted.

And as for physician assistants, they are exempted from MICRA's protections when they clearly operate outside the "scope of services" for which they are licensed. This would include the provision of medical services in several fields, including dentistry and optometry (B & P Code § 3502(d)), as well as surgical procedures requiring general anesthesia performed outside the presence of a supervising physician and surgeon (16 CCR § 1399.541).

2. The physician assistants are entitled to the damage cap under section 3333.2 because they acted as the agents of their employer, who is also their supervising physician; hence they cannot be liable for an amount greater than the MICRA cap that is applicable to their "health care provider" employer.

The acts of the physician assistants here were an

[11] https://calmatters.org/projects/californias-worsening-physician-shortage-doctors/. Accessed February 27, 2021.

extension of the acts of Dr. Ledesma as their employer. And since Dr. Ledesma's liability for recoverable non-economic damages due to his own professional negligence in failing to supervise the physician assistants is cabined at $250,000, so is that the maximum liability that may be imposed on his employee physician assistant. To hold otherwise, would make employees of licensed health care providers the new deep pocket target of medical malpractice litigation. Assuming the two physician assistant employees have professional liability insurance or can pay on their own for the $4 million non-economic damages assessed without regard to the cap, the employer Ledesma, who is held vicariously liable under respondeat superior for the acts of his employees, is entitled to equitable indemnity from his employee physician assistants. *Popejoy v. Hannon* (1951) 37 Cal.2d 159, 173. The result of indemnification to their employer by physician assistants hit with a judgment for non-economic damages that are not capped, would effectively gut it:

> Permitting an unlimited award of noneconomic damages against the physician assistant and only a limited award against the supervising physician based upon the same harm would be both irrational and inconsistent with MICRA's goal of predictability in damage awards.
>
> * * *
>
> [O]nce an agency relationship is formed, both the

> supervising physician and the physician assistant are legally responsible for malpractice that the physician assistant commits during the relationship. The risk of such malpractice therefore presumably affects the malpractice premiums of the supervising physician as well as the physician assistant. The supervising physician's risk (and therefore his or her insurance premiums) would be increased if the MICRA damages limitation did not apply whenever there is a finding that his or her supervision of a physician assistant was inadequate.

Lopez, *supra*, 46 Cal.App.5th at 998-999.

Indeed, when multiple health care provider defendants jointly contribute to a *single* medical malpractice injury – such as the wrongful death action here – the plaintiff is limited to a maximum $250,000 noneconomic damages recovery from all of the health care providers *collectively*. *Yates v. Pollock* (1987) 194 Cal.App.3d 195, 200-201 ("case precedent has consistently held only one action can be brought for the wrongful death of a person thereby preventing multiple actions by individual heirs and the personal representative and that the cause of action for wrongful death has been consistently characterized as a joint one, a single one and an indivisible one."). Thus, a wrongful death action is subject to the "one action rule" which applies in effecting the § 3333.2 cap.

Moreover, the MICRA cap must be applied to reduce the jury's verdict to $250,000 before factoring in Proposition 51 fault reductions (several liability according to fault for "non-economic" damages, Civ. C. § 1431.2). *Gilman v. Beverly Calif. Corp.* (1991) 231 Cal.App.3d 121; *Mayes v. Bryan* (2006) 139 Cal.App.4th 1075, 1097-1101. This approach ensures that each health care provider's non-economic damages liability will reflect only his or her personal share of fault without regard to whether the co-tortfeasors have paid or will pay their proportional share (as where they are insolvent, not named in the lawsuit, immune from liability or for some other reason beyond the court's jurisdiction). To apply the Proposition 51 reductions first "would effectively defeat the stated purpose of Proposition 51 . . ." *Gilman v. Beverly Calif. Corp., supra*, 231 Cal.App.3d at 128-129; *Mayes v. Bryan, supra*, 139 Cal.App.4th at 1100.

Of course, if a plaintiff settles with one MICRA defendant and then obtains a judgment against a MICRA co-defendant who failed to establish any other defendant's degree of fault, the MICRA co-defendant is not entitled to any settlement setoff against the non-economic damages portion of the judgment. The appellate opinion here indicates that petitioner dismissed her claim against the defendant pathologist, Dr. Pocock, on appeal after the trial court found

him negligent, suggesting a possible settlement not subject to set-off. *Lopez*, *supra*, 46 Cal.App.5th at 990, fn.9.

B. The Physician Assistants were Not in Violation of any Condition Placed on their Licenses by the Medical Board.

Section 3333.2 states that recoverable non-economic damages against a health care provider for negligent professional services are limited to $250,000 “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.” That conjunctive “and,” which falls between the clause about the “scope of services” and the clause “any restriction imposed by the licensing agency,” means that *both* criteria must be satisfied. The word “and” expresses “the idea that the latter is to be added to or taken along with first. Added to; together with; joined with; as well as; including.” *BLACK’S LAW DICTIONARY* (1979 ed.) 79.

Reasoning similar to that used to parse the meaning of the first clause applies in determining the correct meaning of the second. The lack of requisite supervision by a physician of a physician’s assistant is inextricably tied to the scope of the supervising physician’s license. Determining whether that supervision is inadequate essentially involves a negligence

analysis. That same kind of negligence analysis is required to determine if a physician's assistant is operating contrary to a "restriction" "imposed" by the licensing agency. The majority opinion suggests as much, but notes that:

> In light of our ruling, we do not need to consider the specific meaning of the [second] clause and whether it could apply in some circumstances to a "restriction" that applies more broadly than a specific limitation on a particular licensed provider. It is sufficient . . . to conclude that, consistent with our Supreme Court's decision in *Bourhis*, the "restriction" mentioned in this clause must be a limitation on the scope of a provider's practice beyond simply the obligation to adhere to standards of professional conduct.

Lopez, *supra*, 46 Cal.App.5th at 997, fn. 17.

Determining the meaning of the second clause in the proviso accompanying section 3333.2's (and all MICRA liability limiting sections') definition of "professional negligence" by a "health care provider" by reference to the regulatory duties a "physician assistant" owes a patient, gets courts into the same negligence analysis quagmire that the "agency relationship" solution avoids for the first clause.

However, basing the meaning of the second clause on whether an individual physician assistant has had a particular "restriction" placed on his or her license by the governing administrative agency, avoids the fact finder having

to quarry from a bevy of regulations whether the physician assistant was sufficiently negligent in violation of one or more of those regulations to satisfy the second clause. Violation of a specific, individualized restriction on one's license is essentially a more objective "second strike," indicating a greater degree of culpability by the physician assistant that may warrant exemption from MICRA's liability protections.

CONCLUSION

For all the aforementioned reasons, the Court should affirm the judgment and hold that a physician assistant acts within the scope of licensure for purposes of section 3333.2 if there is a legally enforceable agency agreement with a supervising physician, regardless of the quality of actual supervision.

Dated: March 1, 2021

/s/ Fred J. Hiestand

Fred J. Hiestand
CJAC General Counsel

CERTIFICATE OF WORD COUNT

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Dated: March 1, 2021

/s/ Fred J. Hiestand
Fred J. Hiestand
CJAC General Counsel

PROOF OF SERVICE

I, David Cooper, am employed in the city and county of Sacramento, State of California. I am over the age of 18 years and not a party to the within action. My business address is 3418 Third Avenue, Suite 1, Sacramento, CA 95817.

On March 1, 2021, I served the foregoing document(s) described as: AMICUS BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF DEFENDANTS AND RESPONDENTS in *Marisol Lopez v. Glenn Ledesma, M.D., et al.*, S262487 on all interested parties in this action electronically as follows:

Neil M. Howard
Law Office of Neil M. Howard
717 North Douglas Street
El Segundo, CA 90245
nmh1234@gmail.com
Attorneys for Plaintiff/Appellant

Stuart B. Esner
Esner, Chang & Boyer LLP
234 East Colorado Blvd., Suite 975
Pasadena, CA 91101
sesner@ecbappeal.com
Attorneys for Plaintiff/Appellant

Kenneth R. Pedroza
Matthew S. Levinson
Zena Jacobsen
Cole Pedroza LLP
2295 Huntington Drive
San Marino, CA 91108
kpedroza@colepedroza.com
mlevinson@colepedroza.com
zjacobsen@colepedroza.com
Attorneys for Defendants/Respondents

Louis H. De Haas
Mark B. Guterman
La Follette Johnson De Haas Fesler & Ames
865 South Figueroa Street, #3200
Los Angeles, CA 90017
ldehaas@ljdfa.com
mguterman@ljdfa.com
Attorneys for Defendant/Respondent

Avi A. Burkwitz
Peterson Bradford Burkwitz LLP
100 North First Street, Suite 300
Burbank, CA 91502
aburkwitz@pb-llp.com
Attorneys for Defendant/Respondent

Thomas F. McAndrews
Reback McAndrews, Blessey, LLP
1230 Rosecrans Ave., Suite 450
Manhattan Beach, CA 90266
tmcandrews@rmkws.com
Attorneys for Defendant/Respondent

Jack R. Reinholtz
Douglas S. de Heras
Prindle, Goetz, Barnes &
Reinholtz, LLP
310 Golden Shore, 4th Floor
Long Beach, CA 90802
jreinholtz@prindlelaw.com
ddeheras@prindlelaw.com
Attorneys for
Defendant/Respondent

Clerk, California Court of Appeal
Second Appellate District, Div. 2
300 S. Spring Street
Floor 2, N. Tower
Los Angeles, CA 90013
Appellate Court

Clerk, Los Angeles Superior Court
c/o Hon. Lawrence P. Tiff
Stanley Mosk Courthouse
Department 2
111 North Hill Street
Los Angeles, CA 90012
(Via U.S.P.S.)

[X](VIA E-SERVICE) I electronically served the foregoing documents via the TrueFiling website.

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

Executed this 1st day of March 2021 at Sacramento, California.

/s/David Cooper
David Cooper