S262487

IN THE

Supreme Court

OF THE STATE OF CALIFORNIA

MARISOL LOPEZ,
Plaintiff and Appellant,

v.

GLENN LEDESMA, *et al.*,
Defendants and Appellants;

BERNARD KOIRE,
Defendant and Respondent.

After a Decision by the Court of Appeal
Second Appellate District, Division Two, Case No. B284452
Hon. Lawrence P. Riff, Trial Judge
Los Angeles County Superior Court No. BC519180

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

INTRODUCTION

This matter does not pose an important question of law necessitating settling by this Court, nor does it raise any other ground for review. Instead of establishing a basis for review, plaintiff's petition instead reflects only that plaintiff is dissatisfied with the Court of Appeal's decision. But that is not a ground for review.

The issues presented in the petition do not have any import beyond this case. Indeed, plaintiff has not sought to demonstrate, empirically or otherwise, that the issues will arise with any significant frequency in the future. Additionally, the statement of the issues presented is unduly argumentative. Furthermore, it poses an issue regarding disability of a physician that plaintiff did not even assert in the trial court or her appellate briefs.

What is more, plaintiff's assertion that review is warranted by a need to clarify this Court's decision in *Waters v. Bourhis* (1985) 40 Cal.3d 424, is unfounded. *Waters* is clear. It explains that the limiting statutory language used in Civil Code section 3333.2 and other similar provisions of the Medical Injury Compensation Reform Act ("MICRA") is "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." (*Waters v. Bourhis, supra,* 40 Cal.4th at 436.) Plaintiff does not explain or establish her claim that this is subject to differing interpretations. In fact, the subsequent decisional authority issued by this Court and the Courts of Appeal does not reflect conflicting interpretations.

In any event, review would be undesirable now because the Physician Assistant Practice Act (Bus. & Prof. Code, § 3500, *et seq*.) has recently been amended, subsequent to the underlying events and to the trial. This action was tried under a different set of statutes than will be applicable going forward.

In short, review is not warranted.

SUMMARY OF WHY REVIEW SHOULD BE DENIED

Review should be denied for several reasons.

First, the case does not present an important question of law that necessitates settling by the Court. In the decades since both the Physician Assistant Practice Act and MICRA were enacted, the questions that plaintiff presents have not percolated to the appellate courts, nor is this any suggestion that the questions have been evading appellate consideration.

The subject provision of MICRA is clear. It provides that MICRA applies to claims "based on" a "negligent act or omission to act by a health care provider in the rendering of professional services . . . provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital." (Civ. Code, § 3333.2, subd. (c)(2).)

"Scope of services for which the provider is licensed" refers to the nature or type of services, not whether the licensed provider complies with regulations. And, "restriction imposed by the licensing agency" refers to licensee specific limitations. It would be senseless to

conclude that the scope of services for which a physician assistant is licensed could vary from instant to instant and patient to patient depending on whether he or she was being adequately supervised at the moment.

Second, *Waters v. Bourhis, supra,* 40 Cal.3d 424, cited by plaintiff as calling out for clarification, is clear. The decisions by this Court and the Court of Appeals citing *Waters* do not reflect that the case is subject to conflicting interpretations.

Third, the questions presented by plaintiff are unduly fact specific and are argumentative. Question 1 presumes that which plaintiff seeks to prove – that that the physician assistants were practicing medicine illegally. What is more, the Court of Appeal found that the physician assistants had "legally enforceable" agreements (Opinion, p. 3 [Attachment to Petition, p. 37], emphasis added; see also Opinion, p. 12 [Attachment to Petition, p. 46], at Heading 2.) Plaintiff does not dispute that. Nor does she dispute that the physician assistants held valid licenses.

Question 2 presumes that a disability to practice medicine implies a disability to enter into a delegation of services agreement or other agency relationship. That presumption is false, and plaintiff does not attempt to

suggest the contrary. In fact, plaintiff did not make this argument to the trial court or raise it in her appellate briefs. Plaintiff first raised the question in her petition for rehearing.

Finally, review would be improvident now because subsequent to the trial and its underlying events, the Physician Assistant Practice Act has been amended. The amendments affect statutory provisions and related regulations on which plaintiff's case and the trial court's statement of decision were based. It would be improvident to review a decision to settle an important question of law based on statutes that are no longer in effect and companion regulations that are mooted by, or otherwise likely to be amended in light of, the statutory amendments.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff filed the underlying medical malpractice action against defendants, which was amended to a wrongful death claim after Olivia Sarinana died. (Appellant's Appendix ("AA") 6-9.) The action did not allege any intentional tort, but rather was limited to negligence claims. (*Ibid*.)

The case was tried to a judge. (AA 140; 2 Reporter's Transcript ("RT") 2:13-3:25.) The trial court found that the physician assistant defendants, Suzanne Freesemann and Brian Hughes, had acted negligently, which was a substantial factor in causing Sarinana's death. (AA 140, 167-179, 190-198.) It awarded economic and noneconomic damages against defendants. (AA 203-204.)

The trial court ruled that Civil Code section 3333.2 applied to limit plaintiff's noneconomic damages to $250,000. (AA 204-211; Civ. Code, § 3333.2.)[1] Judgment was entered accordingly. (AA 219-221.)

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[1] Civil Code section 3333.2 provides:

(a) In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover noneconomic losses to compensate for

Plaintiff appealed, challenging the application of Section 3333.2. The Court of Appeal, in a split decision,

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pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage.

(b) In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars ($250,000).

(c) For the purposes of this section:

(1) "Health care provider" means any person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code; and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code. "Health care provider" includes the legal representatives of a health care provider;

(2) "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.*

(Civ. Code, § 3333.2, emphasis added.)

affirmed the judgment, holding that Section 3333.2 applied. (Opinion, Attachment to Petition, pp. 35-73.)

Plaintiff's petition for rehearing was denied. (Order, Attachment to Petition, p. 75.)

LEGAL DISCUSSION

I. There Is No Compelling Ground That Warrants Review

There is no compelling ground that warrants review. The issues stated by plaintiff are not important questions of law that need to be settled by this Court. What is more, the Court's decision in *Waters v. Bourhis, supra,* 40 Cal.3d 424, does not need clarification. Plaintiff's argument is unsubstantiated and merely makeweight.

A. The Matter Does Not Pose An Important Question Of Law Necessitating Settling By This Court

The matter does not pose an important question of law necessitating settling by this Court. Plaintiff has not demonstrated, empirically or otherwise, that the issues have any import beyond this case or will give rise to the same issues in the future. Physician assistants have been practicing under the Physician Assistant Practice Act since it was adopted in 1975, more than four decades ago. (See Bus. & Prof. Code, §§ 3500 and 3500.5, added by Stats. 1975, ch. 634, § 2.) Civil Code section 3333.2 and the related

provisions of the Medical Injury Compensation Reform Act have been in effect since the same year. (See Civ. Code, § 3333.2, added by Stats. 1975, 2nd Ex. sess., ch. 1, § 24.6.) In all that time, the issues that plaintiff present have not arisen, nor is there any suggestion that they have evaded review. No other appellate court decisions have addressed them.

What is more, the issues presented are ill-defined.

Plaintiff's Issue 1:

Plaintiff's first issue is unduly freighted with facts unique to this case and with argument. It also mischaracterizes the Opinion.

A predicate of the issue stated is that the subject delegation of services agreements were "nominal." That is argumentative and mischaracterizes the Opinion. The Opinion recognized that although the delegation of services agreements may have been "nominal," the Opinion also recognized that they were legally enforceable. It stated that the physician assistants "had a nominal, *but legally enforceable agency relationship with the supervising physicians*." (Opinion, p. 3 [Attachment to Petition, p. 37],

emphasis added; see also Opinion, p. 12 [Attachment to Petition, p. 47], at Heading 2.)

Another predicate of the issue presented is that the physician assistants were engaged in the unlawful practice of medicine, and therefore cannot invoke Section 3333.2. But this presumes what plaintiff ultimately seeks to prove.

Plaintiff's Issue 2:

Plaintiff's second issue is not grounded in law. It assumes, without establishing, that a disability for purposes of a disability insurance policy equates to lack of capacity to enter into a legally enforceable contract or create an agency. The two do not equate. What is more, even assuming the issue were raised in plaintiff's opening and reply briefs, which it was not, it is unique to this case, and there is no suggestion that it has arisen before or is likely to arise again in the foreseeable future.

B. The Court's *Waters* Decision Does Not Need Clarification

Plaintiff asserts that "[r]eview by this Court is further needed to clarify *Waters v. Bourhis* (1985) 40 Cal.3d 424." (Petition, p. 10.) That assertion is unfound. *Waters* is clear.

Plaintiff's explanation for her argument is unpersuasive. Citing *Waters,* she says that "the Court explained that MICRA's limitation on professional negligence was 'intended to render MICRA inapplicable when a provider operates in a capacity for which he is not licensed – for example when a psychologist performs heart surgery.'" (Petition, p. 10, citing *Waters, supra,* 40 Cal.3d at p. 436.) The passage to which plaintiff refers is found in the following paragraph:

> Defendant argues that because sexual misconduct by a psychiatrist toward a patient has long been a basis for disciplinary action by the state's licensing agency (see, e.g., *Cooper v. Board of Medical Examiners* (1975) 49 Cal.App.3d 931, 949 [123 Cal.Rptr. 563]), any cause of action which is based on such misconduct falls within the proviso, as a "restriction imposed by the licensing agency." In our view, this contention clearly misconceives the purpose and scope of the proviso which obviously was not intended to exclude an action from [Business and Professions Code] 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.

(*Waters v. Bourhis, supra,* 40 Cal.3d at 436, fn. omitted, emphasis added.)

Plaintiff reasons that, "[a]s the Majority opinion in this case reflects, this passage is subject to differing interpretations warranting clarification by this Court." (Petition, p. 10.) But the Majority opinion does not reflect that the passage is subject to differing interpretations, nor does the Petition specify what those interpretations would be or how each would be reasonable. (Opinion, pp. 13-15 [Attachment to Petition, pp. 47-49].) At most, plaintiff's explanation shows that she disagrees with *Waters* and the

Opinion, not that any court has identified different, reasonable interpretations thereof. It does not show a lack of clarity, let alone an important question of law necessitating settlement now by this Court. The "scope" means the nature of service that may be provided under license, not the regulatory or other standards governing how that service is provided.

The limit on application of Section 3333.2 to the rendering of professional services "provided that such services are within the scope of services for which the provider is licensed" is explained to refer to the capacity in which the provider is licensed to act. (*Waters v. Bourhis, supra,* 40 Cal.3d at 432, 436.) Plaintiff has not pointed, nor can she point, to any decisions demonstrating her assertion that *Waters* is confusing.

To the contrary, the decisional authority citing *Waters* with regard to its discussion of a health care provider's capacity does not identify or reflect a lack of clarity. Capacity means the type of services they were providing or the role in which they were acting, not the manner – consistent with or in contravention of governing standards – in which they provided those services or performed that role. (See, *e.g.*, *Central Pathology Service Medical Clinic, Inc. v.*

Superior Court (1992) 3 Cal.4th 181, 189, 192; *Delaney v. Baker* (1999) 20 Cal.4th 23, 38-41; *Prince v. Sutter Health Central* (2008) 161 Cal.App.4th 971, 977-978; *Smith v. Ben Bennett, Inc.* (2005) 133 Cal.App.4th 1507, 1514-1515, 1519, 1522.)

Plaintiff's reliance on *Waters* in the trial court comports with an understanding that it is clear. She argued that: "The California Supreme Court in *Waters v. Bourhis* (1985) 40 Cal. 3d 424 held that MICRA does not apply when a health care provider operates in a capacity for which he is not licensed." (AA 99:22-24.) Plaintiff similarly argued in the Court of Appeal that:

> There is no question that a health care provider is not entitled to the benefits of the limitation of general damages when he/she provides medical services outside their scope of services. In *Waters v. Bourhis* (1985) 40 Cal.3d 424, the Supreme Court explained that MICRA's limitation on professional negligence was "intended to render MICRA inapplicable when a provider operates in a capacity for which he is not licensed - for example when a psychologist performs heart surgery." (*Id.* at p. 436.)

(Appellant's Opening Brief, p. 10; see also *id.* at pp. 32-33.)

Plaintiff's contention that the Court needs to clarify *Waters* is unfounded.

II. Even If Plaintiff's Stated Issues Were Important Questions Of Law Needing Settling, Review Would Still Be Unwarranted

Even if the case presented an important question of law, this matter is not appropriate for review. Recent statutory amendments subsequent to the underlying events and to the trial make review undesirable now.

The underling events occurred in 2011 through 2013. (AA 148-149.) The trial took place and judgment was entered in 2017. (AA 219, 256-257.) The following year, the Legislature amended the Physician Assistant Practice Act, effective January 1, 2020. (Stats. 2019, ch. 707 (S.B. 697), § 1.) What is more, in light of the amendments, it is probable that the Physician Assistant Board will modify its regulations. (Bus. & Prof. Code, § 3510 ["All regulations shall be in accordance with, and not inconsistent with, the provisions of this chapter"].)

Several of the statutory amendments are noteworthy here.

First, the requirement of a Delegation of Services Agreement has been eliminated. (Compare Bus. & Prof. Code, § 3502.3 with former Bus. & Prof. Code, § 3502.3, amended by Stats. 2019, ch. 707 (S.B. 697), § 5.) The Opinion, relies, in part, on the fact that there were legally enforceable Delegation of Services Agreements in place between Dr. Ledesma and Ms. Freesemann, and between Dr. Koire and Mr. Hughes. The Delegation of Services Agreement is replaced by a Practice Agreement.

Note that:

a) The Practice Agreement must be signed by the physician assistant but need not be signed by each physician who might supervise the physician assistant. Rather, it must be signed by a physician authorized to do so on behalf of an "organized health care system," which includes a licensed clinic, an outpatient setting, a health facility, an accountable care organization, a home health agency, a physician's office, a professional medical corporation, a medical partnership, a medical foundation, and any other entity that lawfully provides medical services. (Bus. & Prof. Code, § 3501, subd. (j).) One or more physicians on the staff

of the organized health care system may then supervise the physician assistant.

b) The Practice Agreement defines the types of medical services that the physician assistant is authorized to perform pursuant to the licensing statute, Section 3502 of the Business and Professions Code. (Bus. & Prof. Code, § 3502.3, subd. (a)(1)(A).) To be sure, a physician assistant may perform *those medical services authorized* by Chapter 7.7 of Division 2 of the Business and Professions Code if four requirements are met. (Bus. & Prof. Code, § 3502, subd. (a).) These are that the physician assistant renders the services under the supervision of a licensed physician who is not subject to a disciplinary condition imposed by the Medical Board; the services are rendered pursuant to a practice agreement, as defined in Section 3502.3; the physician assistant is competent to perform the services; and the physician assistant's education, training, and experience have prepared the physician assistant to render the services.

Note that this distinguishes the scope of services for which the physician assistant is authorized from the requirements on the manner in which they must be performed.

c) The practice agreement must also address the policies and procedures to ensure adequate supervision of the physician assistant and the methods for continuing evaluation of the competency and qualifications of the physician assistant. (Bus. & Prof. Code, § 3502.3, subd. (a)(1)(B), (C).)

Second, the amendments eliminated the statutory provision that a physician assistant is an agent of the supervising physician with whom a Delegation of Services Agreement was in place. (Compare Bus. & Prof. Code, 3502.3, subd. (a)(4), as amended by Stats. 2019, ch. 707 (S.B. 697), § 5 ["A practice agreement may designate a PA as an agent of a supervising physician and surgeon"], with former Bus. & Prof. Code, § 3501, subd. (b), amended by Stats. 2019, ch. 707 (S.B. 697), § 2 ["A physician assistant acts as an agent of the supervising physician when performing any activity authorized by this chapter or regulations adopted under this chapter"].)

Third, the amendments eliminated the requirement that the physician assistant and the supervising physician establish written guidelines or protocols. (See former Bus. & Prof. Code, § 3502, subd. (c), amended by Stats. 2019, ch. 707 (S.B. 697), § 3.) The amendments also eliminated the

requirement that a physician and surgeon review, countersign, and date a sample of medical records of patients treated by a physician assistant. (See former Bus. & Prof. Code, § 3502, subd. (i), amended by Stats. 2019, ch. 707 (S.B. 697), § 3.) In fact, as amended, Section 3502, subd. (c), now provides: "Nothing in regulations shall require that a physician and surgeon review or countersign a medical record of a patient treated by a physician assistant, unless required by the practice agreement. The board may, as a condition of probation or reinstatement of a licensee, require the review or countersignature of records of patients treated by a physician assistant for a specified duration." (Bus. & Prof. Code, § 3502, subd. (c).)

Fourth, the supervision requirement was narrowed. Supervision 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. Code, § 3501, subd. (f)(1).)

These statutory amendments are significant because the Opinion relied, in part, on the existence of a Delegation

of Services Agreement and an agency relationship between the physician assistant and the supervising physician. (Of course, these are not the only rationales for the Opinion, nor the only grounds advanced by defendants for affirmance of the judgment.) The case was litigated under the prior statutory scheme, including the supervision requirements then in effect, so review of this case would be based on a factual record, upon which the Court of Appeal relied, that does not address the current law.

For instance, the trial court findings of causation were based on its finding of violations of California Code of Regulations, title 16, sections 1399.540(d), 1399.545(e), and 1399.545(f). These regulations are affected by the statutory amendments. In particular, Section 1399.545(e) provides:

> A physician assistant and his or her supervising physician shall establish in writing guidelines for the adequate supervision of the physician assistant which shall include one or more of the following mechanisms:
>
> (1) Examination of the patient by a supervising physician the same day as care is given by the physician assistant;

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

(3) The supervising physician may adopt protocols to govern the performance of a physician assistant for some or all tasks . . . .

(Cal. Code Regs., tit. 16, § 1399.545(e).)

This regulation is now inconsistent with the amendments to the Physician Assistant Practice Act, Business and Professions Code section 3502, subd. (c), in particular, which eliminates the need to adopt written guidelines or protocols. (Bus. & Prof. Code, § 3502, subd. (c).)

California Code of Regulations, title 16, section 1399.545(f), provides:

The supervising physician has continuing responsibility to follow the progress of the patient and to make sure that the physician assistant does not function autonomously. The supervising physician shall be responsible for all medical services provided by a physician assistant under his or her supervision.

(Cal. Code Regs., tit. 16, § 1399.545(f).)

This does not impose a duty on the physician assistant, but rather upon the supervising physician.

California Code of Regulations, title 16, section 1399.540(d), provides:

> A physician assistant shall consult with a physician regarding any task, procedure or diagnostic problem which the physician assistant determines exceeds his or her level of competence or shall refer such cases to a physician.

(Cal. Code Regs., tit. 16, § 1399.540(d).)

Although not directly impacted by the statutory amendments, it is noteworthy that the licensing state does not impose such a requirement.

In sum, there have been material changes to the Physician Assistant Practice Act, several of which pertain to the statutes and regulations on which the factual record in the underlying case was built, the case was tried, and the appeal was decided. It would not be sagacious to review a decision to settle an important question of law that is no longer in effect.

III. The Petition, In Large Part, Reargues The Merits Of The Appeal, But The Court Of Appeal Was Correct To Affirm The Judgment

Although it is irrelevant to the question of whether review should be granted, the petition resorts to a recapitulation of plaintiff's arguments on the merits of the appeal. Suffice it to say that the Court of Appeal's decision was correct, as reflected in the Majority Opinion and discussed in Respondents' Brief. That discussion need not be repeated here. In short, MICRA applies to licensed health care providers in actions based on professional negligence. The physician assistant defendants were properly licensed and the action against them was based on professional negligence. They were providing health care services. That they were found to be negligent – whether or not related to negligence pertaining to their supervision – does not remove them from MICRA's ambit. Indeed, by its very terms, MICRA applies when a health care provider is alleged to have been negligent.

CONCLUSION

The matter does not warrant this Court's attention. The issues presented are not important questions of law that need settling by this Court presently. Even if they were, granting review in this case would be improvident. It would be provident to permit them to percolate in the lower courts, particularly in light of the statutory amendments to the Physician Assistant Practice Act, which went into effect in January of this year.

Accordingly, defendants request that the Court deny review.

DATED: June 22, 2020 COLE PEDROZA LLP

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CERTIFICATION

Appellate counsel certifies that this document contains 4,118 words. Counsel relies on the word count of the computer program used to prepare the document.

DATED: June 22, 2020 COLE PEDROZA LLP

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PROOF OF SERVICE

I am a resident of or employed in the County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 2295 Huntington Drive, San Marino, California 91108.

On this date, I served the ANSWER TO PETITION FOR REVIEW on all persons interested in said action in the manner described below and as indicated on the service list:

See Attached Service List

By United States Postal Service – I am readily familiar with the business's practice for collecting and processing of correspondence for mailing with the United States Postal Service. In that practice correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business, with the postage thereon fully prepaid, in San Marino, California. The envelope was placed for collection and mailing on this date following ordinary business practice.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed June 22, 2020.

/s/ Sara Mazzeo
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Supreme Court of California

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Supreme Court of California

Case Name: **LOPEZ v. LEDESMA (KOIRE)**
Case Number: **S262487**
Lower Court Case Number: **B284452**

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