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 BRIEF ON THE MERITS

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INTRODUCTION

The Court of Appeal's majority decision was correct in limiting plaintiff's noneconomic damages to $250,000, pursuant to Civil Code section 3333.2. The statute applies to personal injury claims against health care providers that are based on "professional negligence." This is such a case.

It is undisputed that the defendant physician assistants were licensed health care providers. It is also undisputed that they were providing health care services. Although plaintiff agrees that a physician assistant's negligent services would qualify as "professional negligence" if the physician assistant were properly supervised, she contends the same services no longer constitute "professional negligence" if the physician assistant were not sufficiently supervised. Plaintiff's argument relies upon the requirement of Section 3333.2 that the services be "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).)

Plaintiff's assertions are inconsistent with the plain meaning of the statute, with the decisional authorities interpreting it, and with the legislative and regulatory

scheme in effect at the time of the underlying events, which deems a physician assistant to have been an agent of a supervising physician when the two enter a delegation of services agreement. Plaintiff's proposed interpretation of the statute would defeat the legislative intent of Section 3333.2.

The language "within any restriction imposed by the licensing agency" is properly construed as referring to limits placed on a specific, individual licensee. Additionally, the statutory limitation that services must be "within the scope of services for which the provider is licensed" is properly interpreted as referring to the general practice area of each professional license or certification.

Here, the defendant physician assistants were providing services within their licensed area, not within a different licensure. What is more, their licenses were free from any limitation imposed by the Physician Assistant Board.

The trial court found that delegation of service agreements had been entered and, therefore, the physician assistants were agents of the physicians by nature of the agreements and state regulations establishing a supervisory relationship. To be sure, such agreements establish that the

conduct of a physician assistant is deemed to be the conduct of the physician, regardless of negligence on either's part. The Court of Appeal's majority agreed. There is no ground to overturn that judgment.

Now, before this Court, plaintiff raises a new argument. She contends that even if Section 3333.2 were otherwise applicable, it should not apply in this case to defendant Physician Assistant Suzanne Freesemann who entered into a delegation of services agreement with defendant Glenn Ledesma, M.D., or to defendant Physician Assistant Brian Hughes who entered into a delegation of services agreement with defendant Bernard Koire, M.D. She contends that the service agreements should be voided because Dr. Ledesma and Dr. Koire were "disabled," and, therefore, lacked capacity to enter the agreements. That contention was forfeited because it was not presented in the trial court. What is more, it is based on the false conflation of physical disability and legal incapacity to enter a contract.

Finally, any doubt about the interpretation of Section 3333.2 should be resolved in favor of its application. The statute is a component of the Medical Injury Compensation Reform Act, commonly referred to as "MICRA." This Court

has directed that MICRA should be construed liberally to effect its purpose.

The Court of Appeal was correct to affirm the trial court's application of Section 3333.2's limit on plaintiff's noneconomic damages. The Court should affirm the judgment of the Court of Appeal holding that Section 3333.2 applies to the judgment against Dr. Ledesma, Freesemann, and Hughes.

STATEMENT OF THE CASE

FACTUAL BACKGROUND

A. Olivia Sarinana Received Medical Treatment For A Lesion That Developed On Her Scalp

Plaintiff's decedent, Olivia Sarinana, was born on December 10, 2009. (11 Reporter's Transcript ("RT") 2883:20-22.) When she was about four or five months old, her mother, plaintiff Marisol Lopez ("plaintiff" or "Ms. Lopez"), noticed a lesion on her scalp. (11 RT 2887:1-2888:6.) Defendant Yunchul Pak, M.D., a pediatrician, examined her when she was six or seven months old, and told plaintiff that he could not feel the lesion, but would "monitor it." (11 RT 2888:16-2889:20.)

Ms. Lopez took Sarinana back to Dr. Pak in December 2010. (11 RT 2889:18-2890:12.) The lesion had grown bigger, was raised, and was a little darker than the rest of the skin on Sarinana's scalp. (*Ibid*.) Dr. Pak referred Sarinana to a dermatologist. (*Ibid*.)

On December 8, 2010, Sarinana visited defendant Glenn Ledesma, M.D.'s dermatology clinic. (9 RT 2198:15-16; 11 RT 2890:28-2891:3, 2895:1-3.) Sarinana was

examined by defendant Physician Assistant Suzanne Freesemann. (9 RT 2198:15-16; 11 RT 2893:9-2894:17.)

Plaintiff told Freesemann that Sarinana had seen Dr. Pak in December 2010, and that the lesion on Sarinana's scalp was getting bigger. (11 RT 2893:19-27.) Freesemann told plaintiff that the lesion would be biopsied. (11 RT 2894:12-28.) Freesemann did not specify the type of biopsy. (*Ibid*.)

On January 3, 2011, Sarinana returned to the clinic for a biopsy of her scalp lesion. (11 RT 2895:4-12.) Sarinana was treated by Physician Assistant Brian Hughes. (11 RT 2897:4-2898:24.)

Hughes performed a shave biopsy of the lesion on Sarinana's scalp.[1] (11 RT 2765:25-2768:8, 2897:4-2898:24.)

The tissue from the shave biopsy was reviewed by pathologist defendant Fred Soeprono, M.D. on January 3, 2011. (AA 148, 159; 7 RT 1507:15-23, 1524:11-22.) He

[1] A shave biopsy is generally performed at the dermis level, while an excisional biopsy is generally deeper. (7 RT 1542:11-26; Appellant's Appendix ("AA") 146-147.)

diagnosed the lesion as a "compound nevus with congenital features, extending to the surgical base." (AA 148, 159.)[2]

Hughes examined Sarinana again on January 17, 2011. He noted that the wound was healing well, and that the biopsy results showed a "benign lesion." (AA 159.)

In spring or early summer 2011, plaintiff noticed that the lesion on Sarinana's scalp was growing back. (AA 160.) On June 21, 2011, Sarinana returned to the clinic and was examined by Freesemann. (See 5 RT 992:17-19, 1114:6-11; 14 RT 3690:22-28.) Freesemann diagnosed a bumpy growth "at the areas" where the January 3, 2011 biopsy was performed. (5 RT 1114:6-11, 1126:20-27.) On July 27, 2011, a liquid nitrogen treatment was applied to the lesion. (14 RT 3692:1-3693:18.)

On September 9, 2011, Sarinana returned to the clinic and was seen by Hughes. (AA 161-162.) Hughes assessed the scalp lesion as "warts." (AA 161-162.) Plaintiff inquired about alternate treatments for the lesion. (AA 161-162.) In response, Hughes contacted Dr. Pak, Sarinana's pediatrician, asking him to seek authorization for a referral to a general surgeon. (AA 161-162.) Sarinana's pediatrician

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[2] The trial court found that Dr. Soeprono was not negligent. (AA 186.)

did not seek authorization for the referral for about two months. (AA 161-162.)

On December 23, 2011, Neil Sherman, M.D., a general surgeon, excised Sarinana's scalp lesion. (AA 162.) The tissue was reviewed that day by pathologist defendant Eugene Pocock, M.D. (AA 162.) Dr. Pocock's pathology report noted that "[t]he lesion appears to be completely excised." (AA 162-163.) Sarinana's lesion was diagnosed at that time as a "benign pigmented intradermal intermediate congenital nevus." (AA 162-163.)

The pathology report contained no language to suggest that the lesion was a malignant melanoma. (11 RT 2772:18-2775:18.)

On July 3, 2013, Dr. Pocock re-reviewed the biopsy slides and added an addendum to his pathology report. (14 RT 3745:12-3747:17.) He wrote that the lesion was a markedly atypical compound congenital nevus. (14 RT 3745:12-17.) He also wrote that this type of lesion rarely can occur or even metastasize. (14 RT 3747:4-9.)[3]

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[3] The trial court found that Dr. Pocock's conduct fell below the standard of care in failing to diagnose Sarinana's melanoma and for concluding that her lesion had been completely excised. (AA 189-190.) Judgment was entered

B. Sarinana Developed Malignant Melanoma That Metastasized, Which Caused Her Death

In July 2013, Sarinana was seen at Children's Hospital of Los Angeles after a mass had developed in her neck. (AA 148, 163.) She was diagnosed with metastatic malignant melanoma. (AA 148, 163.) A pathologist, Raymond Barnhill, M.D., reviewed the tissue that had been excised on December 23, 2011, and from her neck mass. (AA 163-164.) Dr. Barnhill diagnosed Sarinana with a "cutaneous melanoma, invasive, pediatric subtype" and concluded his report stating, "[m]any thanks for referring this *difficult material*." (AA 164, emphasis added.)

As of July 2013, Sarinana's melanoma had metastasized. (AA 163-164.) On February 27, 2014, Sarinana passed away. (AA 9; 11 RT 2883:16-17.)

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against him. (AA 220.) Neither plaintiff nor Dr. Pocock appealed therefrom.

C. Two Of Sarinana's Health Care Providers, Freesemann And Hughes, Were Physician Assistants Who Had Entered Delegation Of Services Agreements With Supervising Physicians

At the time Freesemann treated Sarinana, she was a licensed physician assistant in the State of California. (See 9 RT 2251:1-2252:3, 2261:11-24.) Her license had never been investigated, suspended or revoked. (9 RT 2261:11-24.) There were no limitations imposed on it by the Physician Assistant Board.

Freesemann entered into a Delegation of Services Agreement ("DSA") with Dr. Ledesma. (10 RT 2416:6-2417:28.) Dr. Ledesma became her supervising physician under the DSA in January 2009 and remained her supervising physician until August 2011. (9 RT 2260:8-18; 10 RT 2416:6-2417:28.)

Freesemann identified a four-page document as a DSA between herself and Dr. Ledesma. (10 RT 2415:26-2421:2; see also AA 155.) The DSA bears both her and Dr. Ledesma's signatures and indicates that both parties signed the DSA on January 1, 2009. (10 RT 2417:9-28.) The

DSA identified Dr. Ledesma as her supervising physician. (10 RT 2416:27-2417:8.) Freesemann testified that her "understanding is that this service agreement was between [herself and Dr. Ledesma]." (10 RT 2418:20-25.) She testified that, "[h]e was my supervising physician" and that she understood the DSA to be valid "[i]ndefinitely, until [she] left the company." (10 RT 2418:23-2419:10.)

Hughes was also a licensed physician assistant in California. (See 11 RT 2723:24-28, 2786:17-26.) He began working as a physician assistant in 2002. (AA 156.) Hughes and Dr. Koire were parties to a written and signed, albeit undated, DSA. (AA 156; see also 11 RT 2715:1-17, 2859 [Trial Exhibit 14].) Hughes could not recall when he and Dr. Koire signed the DSA. (11 RT 2716:11-2717:17.) Hughes testified that the DSA between him and Dr. Koire did not identify any limitation on the services that he could provide. (11 RT 2786:13-16.)

PROCEDURAL HISTORY

A. Plaintiff Filed A Medical Malpractice Action Against Defendants, Which Was Amended To A Wrongful Death Action After Sarinana Passed Away

On August 21, 2013, plaintiff filed a medical malpractice action on behalf of Sarinana. (AA 256.) After Sarinana's death, the action was amended and proceeded as a wrongful death case based on "medical malpractice." (AA 8.) Plaintiff did not assert a survival action. (See AA 140, fn. 3.)

Plaintiff asserted her claim against defendants Dr. Pak, Dr. Ledesma, Dr. Koire, Dr. Sherman, Dr. Pocock, Dr. Soeprono, Mr. Hughes, Ms. Freesemann, and Quest Diagnostics. (AA 6, 164, 242-243.)[4]

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[4] The only defendants that are party to these appellate proceedings are defendants and respondents Dr. Ledesma, Freesemann, and Hughes (on whose behalf this brief is filed), and respondent Dr. Koire. While the appeal was pending, Dr. Koire's counsel advised the Court of Appeal that Dr. Koire had passed away and moved to dismiss the appeal against him. The Court of Appeal denied the motion.

Plaintiff claimed that Physician Assistants Hughes and Freesemann were negligent and violated statutes and regulations governing physician assistants and supervising physicians. (AA 164.) She argued that such violations constituted negligence and were a substantial factor in causing Sarinana's death. (AA 164.) She claimed that Dr. Ledesma was vicariously liable for the violations of Hughes and Freesemann. (AA 164-165.)

B. The Case Was Tried To A Judge

In January 2017, the case proceeded to a bench trial. (2 RT 2:13-3:25.) Plaintiff argued at trial that Freesemann and Hughes were negligent, which was a substantial factor in causing Sarinana's death, and that Dr. Ledesma (and Dr. Koire) were vicariously responsible for this negligence.

C. The Trial Court Found That Freesemann And Hughes Acted Negligently, Which Was A Substantial Factor In Causing Sarinana's Death

The trial court issued a Statement of Decision on May 8, 2017. (AA 140.) It found that Freesemann and Hughes

were negligent, and that their negligence was a substantial factor in causing Sarinana's death.

1. Negligence

With regards to Freesemann's clinical treatment of Sarinana, the trial court found that she fell below the standard of care on December 8, 2010 in her charting of Sarinana's history and in her physical examination of Sarinana. (AA 172.) The trial court found that Freesemann failed to adequately describe the lesion, and that she failed to investigate its rate of growth. (AA 172.) The trial court also found that had Sarinana's pediatrician been contacted, Freesemann would have learned the lesion had tripled in size over the course of a month. (AA 172.) Additionally, it found that had Freesemann learned of the growth rate, she would have "concluded that obtaining the consultation of a dermatologist was in order." (AA 172.)

The trial court also found the following: Freesemann fell below the standard of care on June 21, 2011, by failing to "adequately…work up" the new presentation of the lesion on Sarinana and rule out melanoma (AA 173); Freesemann failed to credit the history provided by plaintiff, *i.e.*, that the

lesion was recurring at the identical spot where the lesion had been biopsied on January 3, 2011 (AA 173); Freesemann was negligent in determining that the lesion "was warts," for failing to rule out melanoma, and failing to order a biopsy (AA 174); and she was negligent in failing to consult with a dermatologist or to refer Sarinana to a dermatologist (AA 174). The trial court also found that Freesemann was negligent in her care of Sarinana on July 27, 2011, for the same principal reasons, *i.e.*, "[s]he negligently proceeded to treat the uncharacterized lesion with liquid nitrogen," and failed to consult a physician, to order a biopsy, and "to appreciate her own limitations." (AA 175.)

The trial court determined: at the time of Freesemann's clinical encounters with Sarinana, she was not working under proper supervision by a supervising physician (AA 168); Dr. Ledesma was not fulfilling his supervisory obligations in compliance with the California Code of Regulations because he was not available in person or by electronic communication and because he was not selecting nor timely reviewing a 5% sample of medical records of patients treated by Freesemann during the time Freesemann was treating Sarinana (AA 169); and, these failures violated California Code of Regulations, title 16,

section 1399.545, subdivisions (a) and (e)(3) (AA 169). The trial court also found that Freesemann failed to consult with a supervising physician regarding "any task, procedure or diagnostic problem" exceeding her level of competence, and that she was functioning autonomously. (AA 170.) Furthermore, it determined that this conduct violated Sections 1399.540, subdivision (d), and 1399.545, subdivision (f).

Additionally, the trial court determined that Freesemann was in violation of Section 1399.545, subdivision (e), which required her to operate under written guidelines and protocols. (AA 170-171.) It also ruled that compliant written guidelines and protocols were not produced at trial. (AA 171.) According to the trial court, Freesemann violated reporting requirements contained in Section 1399.546 by failing to enter her name, signature, initials, or computer code on patient records, as well as by failing to enter the name of her supervising physician on patient records. (AA 172.)

With regards to Hughes' clinical treatment of Sarinana, the trial court found that Hughes did not fall below the standard of care on January 17, 2011, given that pathologist Dr. Soeprono ruled out a "dysplastic nevus" and

opined in his pathology report that the lesion was a "compound nevus with congenital features." (AA 179.)

The trial court found, however: Hughes fell below the standard of care on January 3, 2011 by failing to obtain an adequate history from plaintiff (AA 178), and that had he obtained an adequate history he would have learned of the lesion's growth rate, "which likely would have triggered a consultation with a dermatologist or at least his supervising physician" (AA 178). Although the trial court ruled that Hughes did not fall below the standard of care in performing a shave biopsy rather than an excisional biopsy, it did note that had Hughes obtained an adequate history, it may have triggered a discussion of whether a shave or excisional biopsy should be performed. (AA 178.) The trial court also found that Hughes fell below the standard of care by failing to chart the lesion's history and its description. (AA 178.)

The trial court determined that Hughes fell below the standard of care on September 9, 2011 by failing to chart the lesion's history and description (AA 179); that Hughes failed to consult with a dermatologist or his supervising physician, especially given that the lesion was continuing to grow and did not respond to the liquid nitrogen treatment (AA 179); and that Hughes failed to alert other providers, including

Sarinana's pediatrician, that a follow-up biopsy should be performed promptly (AA 179).

The trial court found that Hughes was not in compliance with several sections of the California Code of Regulations during his treatment of Sarinana. Specifically, that Hughes was in violation of California Code of Regulations, title 16, section 1399.540, subdivision (b), because the delegation of services agreement between him and his supervising physician, Dr. Koire, was undated. (AA 175.) The trial court also determined that Dr. Koire was not available in person or by electronic communications as required by Section 1399.545, subdivision (a) (AA 175-176); that Hughes was "functioning autonomously" in violation of Section 1399.545, subdivision (f) (AA 176); and that Hughes likely knew that Dr. Koire was not selecting nor timely reviewing a 5% sample of medical records of patients treated by Hughes in compliance with Section 1399.545, subdivision (e)(3) (AA 176).

The trial court also found that Hughes failed to consult with a supervising physician "as much as possible" and regarding "any task, procedure or diagnostic problem" exceeding his level of competence (AA 177), and that he violated Section 1399.540, subdivision (d).

Hughes was found to be in violation of Section 1399.545, subdivision (e), which required him to operate under written guidelines and protocols (AA 177), and that a reference in the DSA between Dr. Koire and Hughes to three textbooks did not comply with the regulations. (AA 177). The trial court also found Hughes violated reporting requirements contained in Section 1399.546, by failing to enter his name, signature, initials, or computer code, as well as the name of his supervising physician, on patient records. (AA 177.)

2. Causation

With respect to causation, the trial court ruled that, more likely than not, "a proper and timely diagnosis and treatment before 2012 would have saved [Sarinana's] life" (AA 191), and that, in the face of conflicting evidence, plaintiff had carried her burden of proof on "but for" causation (AA 193). The court stated, "the Court finds that on a more likely than not basis, [Sarinana] did not have metastatic disease at the time of her birth which destined her to die irrespective of the acts or omissions of the defendants," and that as of December 23, 2011, her

melanoma was not metastatic. (AA 193, 195.) It explained that Jinah Kim, M.D. testified that Sarinana's melanoma did not metastasize until after 2012, and Dr. Sherman failed to remove all the tumor and Dr. Pocock failed to catch it. (AA 192-193.) It concluded that, more likely than not, Sarinana "was not destined to die irrespective of Dr. Pocock's negligence." (AA 195.)

With respect to Freesemann and Hughes, the trial court stated:

> A. Ms. Freeseman[n]'s negligence
>
> The Court finds as a matter of fact that each of the following of Ms. Freeseman[n]'s failures to comply with B&P Code and CCRs, as set out above, was a substantial factor that contributed in a non-remote and non-trivial fashion to bringing about [Sarinana]'s death: 16 CCR Sections 1399.540(d), 1399.545(e) and 1399.545(f). The Court further finds that each of Ms. Freeseman[n]'s multiple departures from the standard of care, as set out above, except as [*sic*] her negligent charting, was a substantial factor

that contributed in a non-remote and non-trivial fashion to bringing about [Sarinana]'s death.

B. Mr. Hughes's negligence

The Court finds as a matter of fact that each of the following of Mr. Hughes's failures to comply with B&P Code and CCRs, as set out above, was a substantial factor that contributed in a non-remote and non-trivial fashion to bringing about [Sarinana]'s death: 16 CCR Sections 1399.540 (d), 1399.545 (e) and 1399.545(f). The Court further finds that each of Mr. Hughes's multiple departures from the standard of care, as set out above, except for his negligent charting, was a substantial factor that contributed in a non-remote and non-trivial fashion to bringing about [Sarinana]'s death.

(AA 197-198.)

Dr. Pocock's negligence, according to the trial court, was not a superseding cause of Sarinana's death because "other pathologists at [Dr. Pocock's] facility evaluated tissue on a rotating basis." (AA 201-202.) Thus, had Dr. Pocock or another pathologist "reviewed [material biopsied in

December 2011] at another time," "no one knows, and the evidence does not show, what the results of a different pathological evaluation, by him or others, would have been nor what events would have flowed from them." (AA 202.) It concluded that it was the defense's burden to establish superseding causation, and that the evidence presented by the defense was "at best speculative." (AA 201-202, & fn. 41.)

3. Allocation Of Responsibility And Vicarious Liability

The trial court allocated fault among Freesemann, Hughes and Dr. Pocock as follows: 40% to Freesemann, 20% to Hughes, and 40% to Dr. Pocock.

The trial court further determined that Dr. Ledesma was vicariously liable for the acts of Hughes and Freeseman[n]. (AA 180-184.) It found that Dr. Koire was vicariously responsible for the acts of Hughes. (AA 184.) The vicarious liability determinations were based on multiple grounds, including Business and Professions Code section 3501, subdivision (b), and California Code of Regulations, title 16 , sections 1399.541 and 1399.542. (AA

183-184.) In fact, the Statement of Decision states that: "Dr. Ledesma is also vicariously liable for the negligent acts of Ms. Freesemann by virtue of B&P Section 3501(b) and 16 CCR Sections 1399.541 and 139.542. The PAC [Physician's Assistant Examining Committee, now called the Physician Assistant Board], acting under delegated authority of California Medical Board and, separately, the Legislature, chose to create an explicit form of principal-agent relationship for PAs operating under the supervision of his or her SP." (AA 183.)

These statutes and regulations establish an agency relationship between a physician assistant and the supervising physician, and provide that conduct by the physician assistant is deemed to be that of the supervising physician.

At the time of the underlying events, Business and Professions Code section 3501, subdivision (b), provided that: "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." (Bus. & Prof. Code, 3501, subd. (b).)

Section 3501 provides that: "'Supervision' means that a licensed physician and surgeon oversees the activities of, and

accepts responsibility for, the medical services rendered by a physician assistant."

Title 16, section 1399.541, of the California Code of Regulations provides:

> Because physician assistant practice is directed by a supervising physician, and a physician assistant acts as an agent for that physician, the orders given and tasks performed by a physician assistant shall be considered the same as if they had been given and performed by the supervising physician.

(Cal. Code Regs, tit. 16, § 1399.541.)

Section 1399.542 provides: "The delegation of procedures to a physician assistant under Section 1399.541, subsections (b) and (c) shall not relieve the supervising physician of primary continued responsibility for the welfare of the patient." (Cal. Code Regs, tit. 16, § 1399.542.)

D. The Trial Court Applied Civil Code Section 3333.2 To Reduce Plaintiff's Noneconomic Damages To $250,000

The trial court awarded plaintiff $11,200.00 in economic damages, and $4,250,000.00 in noneconomic damages. (AA 203-204, 220.) The trial court applied Civil Code section 3333.2 to reduce plaintiff's noneconomic damages to $250,000. (AA 211, 220.)

Plaintiff argued that Section 3333.2, subdivision (b), should not apply to Freesemann, Hughes, Dr. Ledesma, or Dr. Koire because the conduct of Freesemann and Hughes did not fall within the term "professional negligence" as defined by Section 3333.2, subdivision (b). (AA 204-205.)

The court rejected plaintiff's argument. It explained that the limiting language in Section 3333.2 which states, "within any restriction imposed by the licensing agency [or licensed hospital]," means "a particularized restriction previously imposed by the [Physician Assistant Committee] on an individual [physician assistant]." (AA 210.) The trial court decided that "none of the [physician assistants] or [supervising physicians] here had such restrictions," thus, "the $250,000.00 damages cap applies." (AA 211, fn.

omitted.) The trial court based its statutory interpretation on "the structure of the statute and the overall legislative intent reflected in the cases, namely to lower malpractice insurance premiums by limiting non-economic damage awards." (AA 211.)

Plaintiff did not argue in the trial court that the delegation of service agreements were not legally enforceable on the theory that the physicians were disabled.

E. Judgment Was Entered And The Pending Appeal Followed

Judgment was entered on June 20, 2017. (AA 219, 259.) On August 15, 2017, plaintiff filed notice of appeal. (AA 224.)

F. The Court Of Appeal Affirmed The Judgment

The Court of Appeal affirmed the judgment applying Section 3333.2 to the noneconomic damage award. The majority opinion, like the trial court, rejected plaintiff's arguments that a physician assistant who acts unsupervised does not engage in "professional negligence" because such action is not within the scope of services for which the

physician assistant is licensed and because such action is within a limitation imposed by the Physician Assistant Board.

The majority opinion stated the issue on appeal: "The sole issue on these appeals is whether the limitation on the amount of damages for noneconomic losses in medical malpractice actions under section 3333.2 applies to an action against a physician assistant who is only nominally supervised by a doctor." (Slip Opn., p. 11.) It held that the limitation on noneconomic damages in Section 3333.2 applies to an action for professional negligence against a physician assistant who has a legally enforceable agency relationship with a supervising physician.

The majority explained that a physician assistant must pass a licensing examination after completing an approved program and must practice under a supervising physician pursuant to a written practice agreement (Bus. & Prof. Code, §§ 3501, 3502, 3519). A physician assistant acts within the scope of his or her license, and hence is subject to the $250,000 MICRA cap applicable to "professional negligence," so long as he or she has a legally enforceable agency agreement with a supervising physician. This is so regardless of the quality of supervision, or even if there is no

actual supervision. Making the applicability of the MICRA cap dependent on the adequacy of supervision would be uncertain and difficult to define and would contravene the purpose of Section 3333.2 to encourage predictability of damages in order to reduce insurance premiums. (Slip Opn, pp. 3, 4, 12-16, 24.)

Further, the opinion held that a rule which would exclude a physician assistant's conduct from the damages limitation in MICRA simply because a supervising physician violates some or all of the governing regulations would contravene this Court's decision in *Waters v. Bourhis* (1985) 40 Cal.3d 424, that conduct is not outside the scope of a license merely because it violates professional standards. (See *Bourhis*, *supra*, 40 Cal.3d at 436.) What is more, the opinion explained that the limitation in the statutory definition of professional negligence "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." (Slip Opn., pp. 15, 17, quoting *Bourhis, supra,* 40 Cal.3d at 436.)

The opinion also relied on *Prince v. Sutter Health* (2008) 161 Cal.App.4th 971, in which the Court of Appeal similarly concluded that, under the analysis in *Bourhis*, a

social worker's violation of a statute requiring her to disclose that she was unlicensed and acting under supervision did not mean she was acting outside the scope of a licensure. (See *Prince*, *supra*, 161 Cal.App.4th at 977-978.)

The dissenting opinion here concluded that the physician assistants were operating outside of the scope of services for which they had been licensed because they were unsupervised and were functioning autonomously. It further concluded that this was the "common sense" understanding of MICRA's statutory definition of "professional negligence." (Slip Opn., p. 38.)

G. Plaintiff's Petition For Rehearing Was Denied

Plaintiff petitioned for rehearing. In the petition she raised a new argument that she had not made in the trial court or in her briefs on appeal. The new contention was that the DSA between Freesemann and Dr. Ledesma was ineffective at the time of the underlying events because the supervising physicians were "disabled."

The Court of Appeal denied the petition for rehearing.

STANDARDS OF REVIEW

Statutory interpretation is reviewed *de novo.* (*Roberts v. City of Los Angeles* (2009) 175 Cal.App.4th 474, 479.)[5]

Factual determinations underlying that statutory determination are reviewed under the substantial evidence standard. (*Community Youth Athletic Center v. City of National City* (2013) 220 Cal.App.4th 1385, 1428.)

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[5] Plaintiff asserted in the Court of Appeal that defendants bear the burden of proving the applicability of Section 3333.2 as an "affirmative defense." (Appellant's Opening Brief ("AOB") 23.) The authority that plaintiff cited for that assertion does not so hold. *Pressler v. Irvine Drugs, Inc.* (1985) 169 Cal.App.3d 1244, merely states that Section 3333.2 had been raised as an affirmative defense by the defendant in that case. (*Id.* at 1247.) Plaintiff does not pursue this argument before this Court.

DISCUSSION

I. The Court of Appeal Correctly Determined That Section 3333.2 Applied To The Judgment

Section 3333.2 applies to the judgment against Dr. Ledesma, Freesemann, and Hughes. The defendants are health care providers, and the action is based upon professional negligence, as those terms are defined in the statute. What is more, Section 3333.2 should apply to Freesemann and Hughes, in any event, because they were found to be the agents of Dr. Ledesma and Dr. Koire, respectively. Finally, any doubt about the construction of Section 3333.2 should be resolved in favor of applying it to accomplish its purpose.

Section 3333.2 provides that in no action "against a health care provider based on professional negligence . . . shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars ($250,000)." (Civ. Code, § 3333.2, subd. (a) & (b).)

The statute defines "health care provider," in pertinent part, as "any person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business

and Professions Code . . . ." (Civ. Code, § 3333.2, subd. (c)(1).)

It defines "professional negligence" as including four elements. It states:

> "Professional negligence" means [1] a negligent act or omission to act by a health care provider in the rendering of professional services, [2] which act or omission is the proximate cause of a personal injury or wrongful death, provided that [3] such services are within the scope of services for which the provider is licensed and [4] which are not within any restriction imposed by the licensing agency or licensed hospital.

(Civ. Code, § 3333.2, subd. (c)(2), internal numbering added.)

A. Dr. Ledesma, Freesemann, And Hughes Are "Health Care Providers"

Dr. Ledesma, Freesemann, and Hughes are health care providers within the meaning of Section 3333.2. At the time of the underlying incidents, Dr. Ledesma was a board eligible dermatologist. (AA 154.) Freesemann was licensed pursuant to Business and Professions Code section 3500, et

seq. (9 RT 2251:1-2252:3.) Hughes was also so licensed. (See 11 RT 2723:24-28, 2786:17-26.) In fact, plaintiff does not dispute that each is a health care provider for purposes of Section 3333.2.

B. The Alleged Negligence Occurred In The Rendering Of Professional Services

Plaintiff sued Dr. Ledesma, Freesemann, and Hughes for medical malpractice.

Claims are "based on professional negligence" where they allege an injury suffered as a result of negligence "in rendering the professional services that hospitals and others provide by virtue of being health care professionals: that is, the provision of medical care to patients." (*Flores v. Presbyterian Intercommunity Hospital* (2016) 63 Cal.4th 75, 88.) Here, that requirement is satisfied. First, Sarinana's death is alleged to have resulted due to Freesemann's and Hughes' negligent provision of medical care to her. In fact, plaintiff has characterized this action as one of "medical malpractice." (AA 6.)

Her claim with respect to Freesemann and Hughes, who were added as Doe defendants, is based on the alleged

injuries caused by their alleged negligent care and treatment of Sarinana, in their capacity as physician assistants while providing dermatology services. (See AA 9, 242.)

Second, Freesemann and Hughes' breaches, both clinical and regulatory, are directly related to their work as physician assistants rendering medical services. For instance, Freesemann and Hughes' clinical breaches, including their respective failures to appropriately investigate, examine, and treat Sarinana's scalp lesion during her visits to the dermatology clinics, consist of breaches of professional standards of care. (See AA 167-179.) With respect to regulatory violations, all breaches pertain to Freesemann and Hughes' professional practice as physician assistants when practicing medicine. (See AA 167-179.) Consequently, Freesemann and Hughes are parties to the instant suit, in their capacity as physician assistants and solely as a result of the professional medical services they rendered to Sarinana.

C. Freesemann's And Hughes' Services Were Not Within Any Restriction Imposed By Their Licensing Agency Or Licensed Hospital

Plaintiff contends that if a physician assistant fails to satisfy a regulation promulgated by the Physician Assistant Board then Section 3333.2 is inapplicable. Plaintiff argues that the trial court's determination that Freesemann and Hughes' violated state regulations in their provision of services to Sarinana means that they were acting within a restriction imposed by the Physician Assistant Board. Plaintiff's contention is erroneous.

The limiting language in MICRA's definition of professional negligence applies to restrictions on individual licensees, not conduct that violates the California Code of Regulations.

1. The Limiting Language In Section 3333.2 Applies Only To Restrictions On Individual Licenses

To ascertain and effect the legislative intent of the definition of "professional negligence," the statutory language must be given its "plain and common sense

meaning." (*Chosak v. Alameda County Medical Center* (2007) 153 Cal.App.4th 549, 558.) The language must also be considered in context, and not in isolation, to determine its scope and purpose. (*Ibid*.) The "meaning of words used in the statute" are to be interpreted "according to the usual import of the language in framing them" and "a court cannot insert qualifying provisions not included or rewrite the statute to conform to an assumed intention which does not appear from its language." (*Loney v. Superior Court* (1984) 160 Cal.App.3d 719, 722.)

The plain language of Section 3333.2, subdivision (c)(2), instructs that the limitation in the definition of "professional negligence" refers to services outside of a particularized restriction imposed by the licensing agency or licensed hospital on a provider's individual license. It does not apply to regulations of general applicability. The statute provides: "Professional negligence means a negligent act or omission to act by a health care provider in the rendering of professional services, . . . provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital."

First, the Legislature's use of the word "imposed" connotes an individual-based restriction. In the common sense, regulations are "adopted," not "imposed." For example, section 3527 of the Physician Assistant Practice Act permits the Physician Assistant Board to "impos[e] probationary conditions upon a physician assistant license after a hearing" for violations of the Physician Assistant Practice Act, Medical Practice Act or "regulations adopted by" the Medical Board of California or Physician Assistant Board. (See Bus. & Prof. Code, §§ 3500.5 and 3527.)

Similarly, Black's Law Dictionary defines "impose" as meaning "[t]o levy or exact," which suggests a discrete, initiating event, rather than a restriction on all classes of licenses. (See *Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Com.* (2012) 209 Cal.App.4th 1182, 1194, fn. 15.) Moreover, the entire paragraph is phrased in the singular, which further suggests that the restrictive language applies only to a particularized restriction on a specific provider's license, rather than a general regulation on an entire class of health care providers.

Second, an interpretation of the language "restriction imposed" within the context of the entire subdivision

corroborates the interpretation that it is based on licensee-specific limitations. Statutory language must be interpreted in the context of the language with which it is framed and in light of the entire statute's nature. (*Loney*, *supra*, 160 Cal.App.3d at 722.) Here, the language regarding restrictions imposed by the licensing agency must be read in context in which it appears. It is included along with language addressing restrictions imposed by hospitals. Hospitals do not impose restrictions on all physicians, and generally do not impose restrictions on all physicians with privileges, but instead impose particular restrictions on physicians with different levels of training, those being proctored, those who have been subject to staff privilege discipline, and so forth. This is indicia that the "restriction" language does not apply to general statewide government regulations.

Third, the absence of plain language evidencing legislative intent that the limiting language in Section 3333.2 be applied to any provider's conduct which violates licensing regulations shows that such a construction is contrary to the Legislature's intent. If the Legislature intended such a broad application – it would have made it clear within the statutory language itself.

2. Decisional Authorities Including *Waters* and *Prince* Instruct That The Limiting Language In Section 3333.2 Applies To Restrictions On Individual Licensees Only

Plaintiff's interpretation of Section 3333.2 is also inconsistent with this Court's holding in *Waters, supra,* 40 Cal.3d 424, which took up the statutory definition of "professional negligence" and interpreted the language "restriction imposed by the licensing agency." In *Waters*, a psychiatry patient sued her psychiatrist for negligence, breach of duty of good faith, and intentional or reckless infliction of emotional distress. (*Id*. at 429.) Her claims arose from allegations that the psychiatrist had engaged in sexual misconduct with the plaintiff. (*Id*. at 428.)

The Court rejected the argument that the language "restriction imposed by the licensing agency," excludes from MICRA's ambit any conduct that was the ground for professional discipline by the state's licensing agency. (*Waters, supra,* at 436.) The Court explained that, "[i]n our view, this contention clearly misperceives the purpose and scope of the proviso which obviously was not intended to exclude an action from . . . MICRA . . . simply because a

health care provider acts contrary to professional standards or engages in one of the many specified instances of 'unprofessional conduct.'" (*Ibid.*) The Court further explained that the limiting language instead "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." (*Ibid.*)

Without regard to whether the psychiatrist's alleged sexual misconduct was grounds for disciplinary action by the state's licensing agency, the Court held it "clear" that "the psychiatrist's conduct arose out of the course of the psychiatric treatment he was licensed to provide" under MICRA. (*Waters, supra,* 40 Cal.3d at 436.)

The Court's reasoning in *Waters* is directly applicable here, where two physician assistants have been found to have violated the general statutes and regulations governing physician assistants during their course and treatment of Sarinana.

In treating and caring for Sarinana's dermatologic manifestations, even without proper supervision by a physician, Freesemann and Hughes cannot be said to be akin to "a psychologist [who] perform[s] a heart surgery."

Rather, they were working within their practice area when treating Sarinana and working without any particularized restrictions placed on their respective and individual licenses.

The Court of Appeal's decision in *Prince, supra,* 161 Cal.App.4th 971, also supports a reading of the restriction as applicable only to a particularized restriction on a specific licensee. In *Prince*, the Court rejected plaintiffs' argument that their claim against an unlicensed, but registered social worker was exempt from MICRA because the provider was practicing unlawfully, having violated a disclosure statute, and was not receiving the proper supervision per the governing business and professional codes. (*Id*. at 974, 978.)

Much like plaintiff is contending in the instant appeal, the plaintiff in *Prince* argued that the social worker's violation of the disclosure statute codified in the business and professional codes "equates to a 'restriction' on [the provider's] ability to practice," and "therefore she was not acting 'within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency." (*Prince, supra,* 161 Cal.App.4th at 977.) The court rejected this argument, both because the disclosure statute "was not imposed by the Board," and

because the argument was inconsistent with this Court's decision in *Waters*, *supra*, 40 Cal.3d 424.

Accordingly, the court held that the unlicensed social worker's violation of the disclosure statute did not exclude the action from MICRA. (*Prince*, *supra*, 161 Cal.App.4th at 978.) The scope of services for which the provider was licensed was the same regardless of the alleged violation. Furthermore, the court held that even though the unlicensed social worker was not receiving supervision as required by statute, "this does not change the nature of the services she provided." (*Ibid*.) Therefore, her conduct, and plaintiff's claim, was subject to MICRA. (*Ibid*.)

The Court of Appeal's interpretation of the licensing language in Section 3333.2 is directly applicable to this case and the conduct of Freesemann and Hughes, who were found by the trial court to have violated the Business and Professions Code and California Code of Regulations governing the general practice of physician assistants in their course and treatment of Sarinana. (AA 197-198.) Like the unlicensed social worker in *Prince*, Freesemann and Hughes were found to be practicing without statutorily-mandated supervision. Such conduct does not fall outside of MICRA. (See *Prince*, *supra*, 161 Cal.App.4th at 978.) There

is no meaningful distinction between these cases, including the codes and regulation Hughes and Freesemann were found to have violated.

Notably, plaintiff fails to identify any decisional authority stating that MICRA does not apply when, and because, a licensed health care provider violates a statute or regulation.

D. Freesemann's And Hughes' Services Provided To Sarinana Were Not Outside The Scope Of Services For Which They Were Licensed

1. Freesemann And Hughes Were Undisputedly Licensed

There is no dispute that Freesemann and Hughes held physician assistant licenses from the Physician Assistant Board. However, despite their licenses, plaintiff argues that Freesemann and Hughes were working outside of the scope of services for which they were licensed because they were not properly supervised and monitored by supervising physicians, and they were not in compliance with the regulations adopted by the Physician Assistant Board.

2. The Term "Scope Of Services For Which The Provider Is Licensed" Refers To The General Nature Or Area Of The License

The term "scope of services for which the provider is licensed" refers to the general nature or area of the provider's practice. This Court explained this in *Waters, supra,* 40 Cal.3d 424, by distinguishing the scope of services provided by a psychologist and the scope of services provided by a cardiac surgeon. (*Id.* at 436.) This is discussed in Section I.C.2, above.

A physician assistant is licensed to provide a scope of services, just as are other licensees, including, for example, physicians, clinical psychologists, pharmacists, hospitals, paramedics, and veterinarians. These services include, but are not limited to, the following: taking health histories; performing physical examinations and making assessments and diagnoses therefrom; ordering x-rays and laboratory tests; ordering respiratory, occupational, or physical therapy treatments; responding to life threatening emergencies; instructing and counseling patients regarding matters pertaining to their physical and mental health; initiating arrangements for admissions; initiating and facilitating

referral of patients to the appropriate health facilities, agencies, and resources of the community; administering or providing medication, or issuing or transmitting drug orders in certain circumstances; performing surgical procedures without the personal presence of the supervising physician which are customarily performed under local anesthesia; and acting as the first or second assistant in surgery under the supervision of a supervising physician, and acting as such assistant without the personal presence of the supervising physician if the supervising physician is physically accessible and able to return to the patient without delay up[on the request of the physician assistant. (See Cal. Code Regs., tit. 16, § 1399.541.)

Physician assistants, may not, however, perform medical services in the following areas: determination of the refractive states of the human eye, or the fitting or adaptation of lenses or frames for the aid thereof; the prescribing or directing the use of, or using, any optical device in connection with ocular exercises, or orthoptics; the prescribing of contact lenses, for, or the fitting or adaption of contact lenses to, the human eye; or the practice of dentistry or dental hygiene or the work of a dental auxiliary. (Bus. & Prof. Code, § 3502, subd. (c); see Slip. Opn., p. 17, fn. 13.)

Conditions may apply to when and how such services may and must be rendered, but such conditions do not change the "scope of services" for which the PA is licensed and for which they are authorized under the Delegation of Services Agreement(s) to which the PA is a party.

In the context of the statute, "scope of services" should be read generally and broadly, consistent with the plain, general meaning of the word "scope." It is commonly defined as "the extent of the area or subject matter that something deals with or to which it is relevant."[6]

The services provided by defendants were within the scope of services for which they were licensed.

3. Inadequate Supervision Does Not Remove The Provider From Section 3333.2's Ambit

Plaintiff contends that inadequate supervision removes a physician assistant from the scope of Section 3333.2. She reasons that the scope of services for which the physician

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[6] Oxford Languages < https://www.google.com/search?q=definition+of+scope&rlz=1C1GCEA_enUS795US795&oq=definition+of+scope&aqs=chrome.0.69i59j0l4j69i60l3.5944j1j9&sourceid=chrome&ie=UTF-8 > (as of Dec. 9, 2020).

assistant is licensed only includes those services performed under the supervision of a licensed physician. (Appellant's Opening Brief on the Merits ("AOBM") 22.) She rests this argument on Business and Professions Code section 3502, subdivision (a), which, from 2008 to 2012, including the time of the underlying events, provided that, "a physician assistant may perform those medical services as set forth by the 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." (Former Bus. & Prof. Code, § 3502, subd. (a); Stats. 2012, c. 332 (S.B. 1236); Stats. 2015, c. 536 (S.B. 337), § 2; Stats. 2019, c. 707 (S.B. 697), § 3 [amending Bus. & Prof. Code, § 3502].)

Supervision that falls below the standard of care does not remove a physician assistant's services from the "scope of services for which the provider is licensed." The appropriate interpretation of Section 3502 is that "under the supervision of a supervising physician" means that there is a DSA in place between the physician assistant and the physician.

When a physician enters a DSA with a physician assistant, the regulations and the statutes impose liability

on a physician for the physician assistant's conduct. (Bus. & Prof. Code, § 3501, subd. (b), and Cal. Code Regs., tit. 16, §§ 1399.541 & 1399.542.) Indeed, "the orders given and tasks performed by a physician assistant shall be considered the same as if they had been given and performed by the supervising physician." (Cal. Code Regs., tit. 16, § 1399.541.) And, the physician assistant acts as an agent of the supervising physician. (Bus. & Prof. Code, § 3501, subd. (b).) This establishes an obligation to supervise. Once that is established, a failure or shortcoming in that supervision could expose both the physician assistant and supervising physician to liability for negligence, but it does not remove the services from the scope of those for which the physician assistant has been licensed.

Here, an agency relationship existed between Freesemann and Dr. Ledesma, and between Hughes and Dr. Koire, such that each physician was responsible for his respective physician assistant.

First, the evidence established a DSA between Freesemann and Dr. Ledesma. (10 RT 2415:26-2421:2; AA 155; Trial Exhibit 116.) And, it established a DSA between Hughes and Dr. Koire. (11 RT 2715:1-17; see also AA 156; Trial Exhibit 14.)

Second, the trial court found the existence of such a relationship in ruling that the physicians were vicariously responsible for the physician assistant with whom the physician had entered a DSA. (AA 180.)

Third, plaintiff relied on California Code of Regulations, title 16, section 1399.541 in arguing that the physicians were vicariously liable for the physician assistants. (AA 180; 17 RT 4557:14- 4560:28.) She prevailed in making this argument in her motion to amend the complaint to assert a vicarious liability theory against Dr. Ledesma for the acts of Freesemann and against Dr. Koire for the acts of Hughes. (See 17 RT 4560:13-28.) More importantly, she prevailed in the argument in obtaining a vicarious liability determination against Dr. Ledesma and Dr. Koire based on the DSAs. (AA 183-184.) Plaintiff should be estopped to now argue otherwise. (*Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 943.)

4. The Narrow Meaning Of The Supervision Requirement In Business And Professions Code Section 3501 Is Corroborated By Comparison To Other Statutes

The narrow meaning of the supervision requirement in Business and Professions Code section 3501 is corroborated by comparison to other statutes, which provide certain express particular supervision requirements. Plaintiff's interpretation would render such supervision requirements superfluous. For example, Business and Professions Code section 2259.8 requires a physical exam and written clearance before elective cosmetic surgery. In particular, it provides that the exam and clearance may be provided by "[a] licensed physician assistant, in accordance with a licensed physician assistant's scope of practice, unless limited by protocols or a delegation agreement." (Bus. & Prof. Code, § 2259.8 subd. (a)(4).)

Additionally, Labor Code section 3209.10 permits "a state licensed physician assistant" to administer medical treatment for work-related injuries provided that the physician assistant is "acting under the review or supervision of a physician and surgeon pursuant to

standardized procedures or protocols within their lawfully authorized scope of practice." (Lab. Code, § 3209.10, subd. (a); see also Cal. Code Regs., tit. 4, § 424, subd. (c)(4) [defining "Board-certified physician" to include physician assistants "in good standing and authorized to practice under state law, and practicing consistent with the laws governing their respective scope of practice in the state in which they are licensed"].)

Finally, plaintiff's reliance on *California Society of Anesthesiologists v. Superior Court* (2012) 204 Cal.App.4th 390, is unavailing. It does not hold that a health care provider who violates statutes or regulations is providing services outside the scope of those for which he or she is licensed.

5. Potential Professional Discipline Or Criminal Proceeding Does Not Remove A Provider's Conduct From The Ambit Of "Professional Negligence"

Similarly, plaintiff asserts that Freesemann's and Hughes' regulatory violations could subject them to professional and/or criminal liability. This has no bearing on

whether their conduct constitutes professional negligence pursuant to Section 3333.2. Notably, plaintiff has not identified authority that such conduct necessarily renders MICRA, and Section 3333.2 inapplicable. To the contrary this Court has held that MICRA applies to the misconduct of a health care provider even if it could serve as the basis for professional discipline. (See *Waters, supra,* 40 Cal.3d at 436; see also *Larson v. UHS of Rancho Springs, Inc.* (2014) 230 Cal.App.4th 336, 352 [holding MICRA applicable to claims that an anesthesiologist punched a patient while conducting a preoperative check-up]; *David M. v. Beverly Hospital* (2005) 131 Cal.App.4th 1272, 1278 [holding that MICRA applies even though the health care provider's conduct violated the mandatory reporting requirements of Penal Code section 11165.7 because the "defendant doctor's mandated duty to report suspected child abuse arose when he was acting within the course and scope of the performance of his professional duties"].) Likewise, MICRA should apply to the conduct of Freesemann and Hughes in providing medical care and treatment to Sarinana.

E. Section 3333.2 Should Also Apply To Freesemann And Hughes Because They Were Found To Be Agents Of Licensed Physicians

To effectuate the legislative purposes of MICRA, Section 3333.2 must be read to include within its ambit the agents of licensed physicians. Health care is commonly administered by a team of actors, including agents of licensed health care providers. MICRA would be rendered ineffective if the medical care administered by agents of physicians for whom the physicians are vicarious liable, were left unprotected by the statute. Here, the trial court made a finding that Freesemann and Hughes were agents of Dr. Ledesma and Dr. Koire, respectively. (AA 181-184.)

In *Chosak, supra,* 153 Cal.App.4th at 567, the Court of Appeal cited with approval the sister-state decision of *Sholtz v. Metropolitan Pathologists, P.C.* (Colo. 1993) 851 P.2d 901, 905. The court stated: "In seeking to curb the increasing costs of malpractice insurance in this state, there is nothing in the [statute limiting non-economic damages] which suggests the legislature sought to do so only by limiting recoveries for actions brought against licensed professionals or professional corporations and entities whose liability results solely from the conduct of those professionals. The

reason that no such suggestion exists is clear: the negligent conduct of unlicensed employees, such as [the laboratory technician], who contribute to providing health care services affects the insurance premiums that health care providers pay, just as the conduct of professionals within those entities does." (*Chosak, supra,* at 567, citing *Sholtz, supra,* 851 P.2d at 905.)

Furthermore, the Ninth Circuit has also interpreted MICRA as applying to conduct of an unlicensed employee of a health care provider. (*Taylor v. United States* (9th Cir. 1987) 821 F.2d 1428, 1432 [MICRA applied where hospital patient became disconnected from ventilator for unknown reason, even if the disconnection was caused by the "accidental bump of a janitor's broom"].)

F. Section 3333.2 Must Be Construed Liberally To Effectuate Its Purpose

In consideration of the language, history, and public policy goals behind MICRA, its reach must be applied comprehensively and liberally to best effectuate its legislative purpose. (*Preferred Risk Mutual Ins. Co. v. Reiswig* (1999) 21 Cal.4th 208, 215; *Reigelsperger v. Siller*

(2007) 40 Cal.4th 574, 578; *Chosak, supra,* 153 Cal.App.4th at 565-566.)

This Court has held that MICRA is to be construed liberally to effectuate its purpose. In *Preferred Risk Mutual Ins. Co., supra,* 21 Cal.4th at 215, the Court held: "The cases agree that MICRA provisions should be construed liberally in order to promote the legislative interest in negotiated resolution of medical malpractice disputes and to reduce malpractice insurance premiums." (*Id.* at 215.)

Section 3333.2 is a "key component" of MICRA's goal of "reducing the cost of medical malpractice insurance." (*Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 114.) The $250,000 limit on noneconomic damages set forth in Section 3333.2 was intended to cure the problem of "unpredictability of the size of large noneconomic damage awards" by providing "a more stable base on which to calculate insurance rates." (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 163.)

Contrary to these well-established principles and approaches to construing MICRA, plaintiff argues that MICRA's cap on noneconomic damages should be construed narrowly. (AOBM 17, 31.) None of the authorities in which she relies, supports her contention.

The Court in *Herrera v. Superior Court* (1984) 158 Cal.App.3d 255, expressly rejected plaintiff's argument to limit the application of MICRA's arbitration statute, holding instead that the "Legislature intended arbitration of disputes over medical services to extend beyond negligence." (*Id*. at 261-262.) Similarly, the Court in *Hedlund v. Superior Court* (1983) 34 Cal.3d 695, declined to limit the term "professional negligence" as used in MICRA. (*Id*. at 704.) The Court instead held that "a failure to warn third persons" is encompassed within the term "professional negligence." (*Ibid*.) The Court further held that its construction "is consistent with and furthers the legislative purpose in adopting M.I.C.R.A." in part by limiting "recovery for noneconomic losses" pursuant to Section 3333.2. (*Ibid*.)

Plaintiff's reliance on *Perry v. Shaw* (2001) 88 Cal.App.4th 658, is also misplaced. Contrary to plaintiff's assertion (AOBM 31), it does not state that MICRA's cap on non-economic damages "should be construed narrowly." (AOBM 31, citing *Perry, supra,* 88 Cal.App.4th at 668-669.) The court's refusal in that case to apply MICRA's limit on noneconomic damages to a battery claim has no application here, where plaintiff has not pled any intentional torts, but instead advanced claims solely for wrongful death based on

medical negligence. (See *id*. at 668-669; AA 6-9.) In fact, *Perry* was expressly limited to the type of battery that occurred in that case. (*Perry, supra,* 88 Cal.App.4th at 668, fn. 4.)

The case entailed a surgeon who, during a procedure to remove excess skin from the patient's arms, back, thighs, and stomach, had "performed a breast enlargement procedure by moving tissue flaps from the sides of her chest into her breasts" where she had told the surgeon that she had definitely decided not to have breast surgery. (*Perry, supra,* 88 Cal.App.4th at 661-662.)

What is more, a liberal construction of MICRA and the Physician Assistant Practice Act is further supported by the legislative intent of the Physician Assistant Practice Act. The express purpose was to address the Legislature's "concern with the growing shortage and geographic maldistribution of health care services in California." (Bus. Prof. Code, § 3500.) It is intended to "encourage the utilization of physician assistants by physician." (*Ibid.*) Adopting defendants' interpretation of the statutes fosters these legislative goals by providing a certainty to when MICRA would apply. Physicians and medical practice groups would be less likely to marshal the services of

physician assistants if MICRA protection were rendered uncertain due to allegations and disputes over adequacy of supervision.

Furthermore, the recent amendments to the Physician Assistant Practice Act weigh in favor of the defense in this case. They eliminate or reduce express supervisory requirements, and, instead, leave more of the construction of a supervisory framework between physician assistant and supervising physician to the DSA (now called a "Practice Agreement" between them). (Senate Bill No. 697 (2019-2020 Reg. Sess.; see Slip. Opn., pp. 4-5, fn. 4.) The regulations pertaining to the practice of physician assistants have not yet correspondingly been amended. (See Cal. Code Regs., tit. 16, § 1399.540, et seq.)[7]

[7] In June 2020, the Physician Assistant Board stated that "[t]he Board anticipates that many regulations may need to be updated in compliance with SB 697." (Physician Assistant Board, Laws & Regulations Relating to the Practice of Physician Assistants (June 2020), p. iv < https://www.pab.ca.gov/about_us/lawsregs/pab_laws_regs_booklet.pdf > (as of Dec. 9, 2020).)

II. Plaintiff's Contention Regarding Termination Of The Delegation Of Services Agreements Is Uncompelling

Plaintiff contends that the DSAs are of no effect because they were terminated due to "disability" of the supervising physicians. (AOBM 32-34.) That contention is uncompelling.

A. The Court Should Not Consider Plaintiff's Argument Regarding A Purported Termination Of The DSA Agreements Because It Is Based On Factual Issues And Was Neither Asserted In The Trial Court Nor The Court Of Appeal

The Court should not consider plaintiff's argument regarding purported termination of Delegation of Services Agreements because it is factually based and it was not asserted in the trial court. It also does not present a question of widespread public importance that would warrant deviating from the general policy of not considering issues that were not first raised in the trial court or timely in the Court of Appeal briefs. (Cal. Rules of Court, rule 8.500, subd. (c); *Humphrey v. Appellate Div.* (2002) 29 Cal.4th 569, 575, fn. 5; *Flannery v. Prentice* (2001) 26 Cal.4th 572, 590-

591; see also *Midland Pacific Bldg. Corp. v. King* (2007) 157 Cal.App.4th 264, 276 ["[i]t is much too late to raise an issue for the first time in a petition for rehearing"].)

Plaintiff did not present the argument that the DSAs had terminated in her briefs in the Court of Appeal. More importantly, she did not present the argument in the trial court. Furthermore, the argument presents factual issues that were not addressed. For example, what disability did Dr. Ledesma claim to have in 2010? To what extent did it render him disabled? Most importantly, what impact, if any, did his claimed disability have on his capacity to contract and on his ability to supervise a physician assistant? Because the argument was not presented in the trial court, the defendants did not present evidence thereon.

While the trial court noted that Dr. Ledesma's pain from a back injury precluded his in-person participation in the trial in February 2017 (see AA 154; 6 RT 1201-1275), there is no information to glean from the record about the severity of Dr. Ledesma's claimed 2010 disability, and whether it constructively terminated the Delegation of Services Agreement.

Plaintiff asserts that "Dr. Ledesma testified that he became disabled and unable to practice medicine in 2010."

(AOBM 32.) In fact, however, the testimony she cites does not establish the proposition that Dr. Ledesma was wholly unable to practice medicine or was otherwise disabled from performing supervisory functions. (AOBM 32.) Plaintiff may not properly rely on the absence of a challenge to the trial court's finding because plaintiff had not presented in the trial court the issue she now asserts.

Additionally, given the unique set of facts, there is no important public policy concerns that would be appropriately addressed by consideration of plaintiff's theory, which would warrant departure from this Court's general policy against review of issues not presented appropriately in the lower courts.

Finally, even if it were timely for plaintiff to raise the argument initially in her Petition for Rehearing or Petition for Review, the petitions addressed only the DSA between Freesemann and Dr. Ledesma. They did not present an assertion regarding the DSA between Hughes and Dr. Koire, which plaintiff did not raise until presenting it to this Court in a footnote in her Appellant's Opening Brief on the Merits. (AOBM 32, fn. 4.)

In short, the Court should not consider plaintiff's argument that the DSAs were terminated because she did

not timely present it either in the trial court or in the Court of Appeal.

B. The Argument Is Uncompelling Because It Misconstrues Basic Agency Principles By Incorrectly Assuming That A Physician's Physical Disability Renders The Physician Incapacitated To Contract

Plaintiff's argument is uncompelling for the additional reason that it conflates disability with an incapacity to contract.

Plaintiff contends, without supportive authority, that "[a] physician who is 'in fact disabled from the practice of medicine' lacks the capacity to nevertheless contract for the practice of medicine," and thus, a DSA is revoked as a matter of law. (AOBM 34.) Plaintiff is wrong. She cites no authority for that proposition. Whether the DSAs between Drs. Ledesma and Koire and their physician assistants were revoked as a matter of law depends entirely on the disabilities at issue and whether those disabilities rendered either physician incapacitated to contract. (See, *e.g.*, *Judicial Council of California v. Jacobs Facilities, Inc.*

(2015) 239 Cal.App.4th 882, 916 [rejecting a party's argument conflating the concepts of "capacity to contract and capacity to recover" and explaining that the "[c]apacity to contract refers to a party's power to enter into a binding contract, and it ordinarily depends upon an individual's age and mental soundness," internal citations omitted]; see also *Cundick v. Broadbent* (10th Cir. 1967) 383 F.2d 157, 160 ["In recognition of different degrees of mental competency the weight of authority seems to hold that mental capacity to contract depends upon whether the allegedly disabled person possessed sufficient reason to enable him to understand the nature and effect of the act in issue."].) Put simply, plaintiff has not established on appeal, and did not prove at trial, that either physician lacked the capacity to contract during the relevant years.

In support of her argument, plaintiff notes that neither Dr. Ledesma nor Dr. Koire was actively practicing medicine in 2010. (AOBM 32.) She relies on Dr. Ledesma's trial testimony, and the trial court's findings based on that testimony that Dr. Ledesma had filed a claim for disability and was collecting disability payments. (*Ibid.*) She also notes that Dr. Koire had suffered a stroke before he met P.A. Hughes. (*Id.,* at fn. 4.) None of these facts establishes that

Drs. Ledesma and Koire lacked capacity to contract (or act as a supervising physician to one or more physician assistants). Notably, the trial court recognized that Dr. Ledesma was "involved in operating the clinic facilities in a business sense" during the period of Sarinana's treatment, which suggests that Dr. Ledesma did not lack his mental capacity to contract during the relevant time. (AA 155-156.)

Plaintiff's argument ignores the variances within any given disability, and ignores the reality that a disabled physician, depending on the severity and nature of the disability, could still direct, instruct, teach, support and otherwise supervise others, including physician assistants. (See, *e.g.*, *Hoffert v. Commercial Ins. Co. of Newark, NJ* (S.D.N.Y. 1990) 739 F.Supp. 201, 203, 206 [recognizing that while a shoulder injury had rendered a general and vascular surgeon totally disabled under his disability insurance policy, his injury did not preclude him from "performing various [other] medical/surgical occupations"].)

What is more, Business and Professions Code section 3501, subdivision (e), defines a "[s]upervising physician" and "supervising physician and surgeon" to mean "a physician and surgeon licensed by the Medical Board of California or

by the Osteopathic Medical Board of California who supervises one or more physician assistants, who possesses a current valid license to practice medicine, and who is not currently on disciplinary probation prohibiting the employment or supervision of a physician assistant." (Bus. & Prof. Code, § 3501, subd. (e).) There is nothing in the language to suggest a physician is precluded from assuming a supervisory position if they have a disability, or if the physician is currently claiming disability benefits. Similarly, the active practice of medicine is not a requirement of the definition.

Plaintiff's reliance on *Capital Nat. Bank of Sacramento v. Stroll* (1934) 220 Cal. 260, *Pacific Landmark Hotel, Ltd. v. Marriott Hotels, Inc.* (1993) 19 Cal.App.4th 615, Civil Code section 2356, subdivision (a), and the Restatement of Agency is misplaced. (AOBM 33-34.) These authorities set forth basic principles of agency, but they have no bearing on the issues in this case given that the physicians (the principals) here were not found to lack capacity to contract, nor did they revoke the DSAs.

In *Capital Nat. Bank of Sacramento, supra,* 220 Cal. 260, this Court considered whether an employment contract between a father and son was terminated once the father

"was adjudged incompetent." (*Id.* at 262-266.) The son argued that the agreement was irrevocable, claiming that he had "an agency or power coupled with an interest." (*Ibid.*) This Court found that the father's incapacity indeed terminated the son's agency relationship and that the employment agreement was not irrevocable. (*Id.* at 266.)

Here, in contrast to the father in *Capital Nat. Bank of Sacramento*, neither Dr. Ledesma, nor Dr. Koire, were "adjudged incompetent." Plaintiff has no facts to conclude that either physicians' disability rendered him incapacitated to contract such that the agency relationships between the supervising physicians and their respective PAs terminated.

Notably, *Pacific Landmark Hotel, Ltd., supra,* 19 Cal.App.4th 615, does not even take up the question of capacity to contract, but rather evaluates whether hotel management contracts were irrevocable, or whether there was a power coupled with an interest. There was not such a coupled interest in these circumstances. (*Id.* at 619.)

Defendants have never contended that the DSAs are irrevocable, thus plaintiff's consideration of whether the agency of physician assistants here was coupled with an interest makes no sense in this context.

There is no question that the physicians could have terminated the agency relationship with physician assistants Freesemann and Hughes if they had chosen to, but, as the trial court correctly found, they did not. Accordingly, the DSAs were not terminated.

CONCLUSION

For the foregoing reasons, the Court of Appeal's judgment that Civil Code section 3333.2 applies to defendants Dr. Ledesma, Freesemann, and Hughes should be affirmed.

DATED: December 10, 2020

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CERTIFICATION

Appellate counsel certifies that this document contains 11,453 words. Counsel relies on the word count of the computer program used to prepare the document.

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