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# A Win for Physician Assistants: California Court of Appeal Rules That The MICRA Limitation On Damages For Non-Economic Damages Applies to Physician Assistants – Even Where They Are Only Nominally Supervised by A Doctor

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As many are aware, the California Legislature enacted the Medical Injury Compensation Reform Act ("MICRA") in 1975 to address "serious problems that have arisen throughout the state as a result of a rapid increase in medical malpractice insurance premiums." American Bank & Trust Company v. Community Hospital (1984) 36 Cal.3d 359, 363. In that regard, the California Legislature enacted a number of different provisions, including limitations of non-economic damages as set forth in California Civil Code § 3333.2. Civil Code § 3333.2 states that, in any action for "injury against a healthcare provider based on professional negligence," the non-economic damages that an injured plaintiff may recover are limited to $250,000. Civil Code § 3333.2 defines professional negligence as, "a negligent act or omission to act by a healthcare provider in the rendering of professional services." Since that time, the California Legislature has also enacted legislation which permits physician assistants to practice under the supervision of a medical doctor. *See*, Business and Professions Code § 3500, et seq.

One issue that has not been resolved is whether a physician assistant, who has entered into a delegation of services agreement ("DSA") with a medical doctor, but is not properly supervised by a medical doctor, would enjoy or come within the MICRA limitation (with the same question for the doctor).

That question was addressed in the case of Marisol Lopez v. Glen Ledesma (2020) Westlaw 1429672 ("Lopez case"). In the Lopez case, Marisol Lopez appealed from a portion of a judgment in her favor that reduced damages she was awarded from the wrongful death of her daughter, Olivia Sarananan ("Olivia"). Olivia was born in 2009. Shortly after birth, Olivia's mother brought her to a dermatology clinic owned by Dr. Glenn Ledesma. Dr. Ledesma had Physician Assistants Suzanne Freesemann and Brian Hughes on staff and they gave care to Olivia. Olivia was diagnosed as having "warts," without any malignancy. Later on, in early 2013, Olivia developed a bump on her neck and began to complain of neck pain. A surgeon removed the neck mass and referred Lopez to an oncologist at Children's Hospital in Los Angeles. The oncologist diagnosed metastatic malignant melanoma, and Olivia died from malignant melanoma in 2014 when she was a little over four years old. Her mother filed suit against Dr. Marshall Goldberg, a dermatologist who practiced with Dr. Ledesma, a Dr. Koire, as well as Dr. Ledesma, Freesemann, and Hughes.

The evidence showed there was little supervision of either Freesemann or Hughes.

As for Freesemann, Dr. Goldberg practiced with Dr. Ledesma and Freesemann had an unsigned and undated DSA with Dr. Goldberg. However, by the time of the relevant events, Dr. Goldberg was no longer affiliated with any Ledesma facility and Freesemann knew that Dr. Goldberg was not her supervising physician. The trial court found that Freesemann's DSA with Goldberg "may never have been valid but certainly was not at the time of [Freesemann's] clinical encounters with Olivia." Freesemann also had a DSA with Ledesma dated January 1, 2009. The DSA was never revoked, but Dr. Ledesma testified that he had become disabled and unable to practice medicine in 2010. In fact, Dr. Ledesma denied that he was Freesemann's supervising physician, claiming that Dr. Koire performed that role. Freesemann and Dr. Koire disputed that claim and testified that Ledesma was Freesemann's supervising physician.

As for Hughes, he had a signed DSA with Dr. Koire. Although the DSA was undated, the trial court found that the DSA created a physician assistant/supervising physician relationship between Hughes and Koire. Hughes and Koire both testified that they had such a relationship. At trial, however, the Court found that Koire was not available at all times for consultation when Hughes was seeing patients and also found it likely that Hughes knew Koire was not meeting his obligations to select difficult cases for chart review and reviewing a sample of at least 5 percent of cases within 30 days. In fact, Koire had had a stroke before meeting Hughes and was "no longer engaged in active practice."

It was determined at trial that, despite the DSAs, no doctor was actually fulfilling required supervisory responsibilities during the relevant events as to either Freesemann or Hughes. The Court also found that Freesemann breached a regulatory obligation by failing to operate under required supervisory guidelines. The Court also found that Hughes did not operate under the required supervisory guidelines. At the end of a 14-day trial, Lopez was awarded $11,200 in economic damages, and non-economic damages of $4,250,000; which was then reduced to $250,000 based on MICRA. Lopez appealed the reduction of the award for non-economic damages.

On appeal, the Court of Appeal noted that the sole issue before it was whether the limitation in the amount of damage for non-economic losses in medical malpractice actions under Civil Code § 3333.2 applied to an action against a physician assistant who is only nominally supervised by a doctor. The Court ruled in favor of the doctors and the physician assistants. Quoting the Majority of the Court (in a split decision):

> If an otherwise qualified physician assumes the legal responsibility of supervising a physician assistant, that physician assistant practices within the "scope of services" covered by the supervising physician's license, even if the supervising physician violates his or her obligation to provide adequate supervision.

Based upon that, the Court affirmed the Trial Court's reduction of non-economic damages to $250,000.

The Lopez case is important in that it provides the MICRA protections if at least there is some doctor relationship.

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