1st Civil No. A113318

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

EVE CHOSAK,

Plaintiff and Appellant,

vs.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,

Defendants and Respondents.

Appeal from the Superior Court of Alameda County
Superior Court Case No. RG05202379
Honorable Gordon Baranco, Judge

RESPONDENTS' BRIEF

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Court of Appeal
State of California
First Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: A113318 Division: One

Case Name: Chosak v. Regents of the University of California, et al.

Please check the applicable box:

[X] There are no interested entities or persons to list in this Certificate per California Rules of Court, rule 14.5(d)(3).

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1.	
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4.	

Please attach additional sheets with Entity or Person information if necessary.

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INTRODUCTION

An optometry intern is statutorily exempt from having to obtain a license to practice medicine during her internship and is, therefore, legally practicing medicine without a license during that time. Is such an intern a "health care provider" within the meaning of MICRA, and, thus, subject to the protections MICRA affords all other individuals and entities that are lawfully practicing medicine? Or is such an individual outside the MICRA protections because, as plaintiff argues, she was not "licensed"?

Here, plaintiff and appellant sued Dr. Lynn Valdez, her supervisor, Dr. Glen Ozawa, and her employer, the Regents of the University of California, for injuries sustained during a medical examination conducted by Dr. Valdez while she was an intern. Plaintiff concedes her action is time-barred under Code of Civil Procedure section 340.5 – the MICRA statute of limitations – with respect to the Regents and Dr. Ozawa, whose potential liability is necessarily based on Dr. Valdez's conduct. Nevertheless, she contends Dr. Valdez was not a "health care provider" at the time of the injury because she was not "licensed" under the Business and Professions Code, and, therefore, section 340.5 does not apply to her.

As we will explain, plaintiff's contention too narrowly construes the statute and must be rejected. Dr. Valdez's exemption from licensing gave her the right to enjoy the privileges of being licensed without the license. Those privileges include the protection of the MICRA statutes. Accordingly, the trial court properly granted summary judgment in favor of Dr. Valdez on the ground that plaintiff's action is time-barred by section 340.5.

STATEMENT OF THE CASE

Plaintiff and appellant Eve Chosak sued the Regents of the University of California, Lynn Valdez, and Glen Ozawa, claiming they negligently caused injuries to her ankle during an eye examination. Plaintiff contends her foot became "crushed between the chair and the eye examination machine" that was operated by Dr. Valdez – an intern at the time. (1 Clerk's Transcript ["CT"] 4.)[1/]

The injury occurred on June 5, 2003 (1 CT 4), but the lawsuit was not filed until March 10, 2005 (1 CT 1) – almost two years later. The Regents and Drs. Valdez and Ozawa demurred to the complaint on the ground that the action was barred under Code of Civil Procedure section 340.5, the one-year statute of limitations applicable to professional negligence actions against health care providers. (1 CT 10, 58.) The demurrer was sustained with leave to amend to give plaintiff an opportunity "to allege facts showing that the claim [was] not barred" by section 340.5. (1 CT 141.)

Plaintiff filed a first amended complaint on September 26, 2005. (1 CT 162.) Although the first amended complaint alleged that Dr. Valdez was "acting within the course and scope" of the Regents' optometry program, it further alleged that Dr. Valdez was "not a licensed professional" for purposes of the statute. (1 CT 163.) Defendants again demurred on the ground that the action was untimely, arguing that because Dr. Valdez was exempt from health care professional licensing requirements, she was

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1/ The complaint also alleged claims against defendant and respondent Michelle Dhanak, M.D., who treated plaintiff for her foot injuries after the incident with Dr. Valdez. The court entered judgment for Dr. Dhanak after sustaining her demurrer to plaintiff's second amended complaint. (2 CT 254, 464, 466.) Plaintiff has appealed that judgment as well. (2 CT 470-471.) The present brief does not address any of the issues raised as to Dr. Dhanak.

entitled to all the rights and privileges of a licensed optometrist, including the protection of section 340.5. (1 CT 215-217.) The trial court agreed, sustained the demurrer without leave to amend, and dismissed the action with respect to the Regents, Dr. Valdez and Dr. Ozawa. (2 CT 407, 446.) Plaintiff has appealed and, with respect to these three defendants, challenges the judgment in favor of Dr. Valdez only. (2 CT 470; Appellant's Opening Brief ["AOB"] 27.)[2/]

2/ The court also granted defendants' motion to strike certain causes of action from the first amended complaint. (1 CT 231; 2 CT 403.) Plaintiff has not challenged that decision in her opening brief, thus waiving any error in that decision. (See AOB 15-31; *In re Ricky H.* (1992) 10 Cal.App.4th 552, 562 [appellate court will not consider issues not raised in the opening brief].)

LEGAL DISCUSSION

THE JUDGMENT IN FAVOR OF THE REGENTS, DR. OZAWA AND DR. VALDEZ MUST BE AFFIRMED BECAUSE THE ACTION IS TIME-BARRED AS TO EACH OF THEM: PLAINTIFF DOES NOT CHALLENGE THE TRIAL COURT'S RULING AS TO THE REGENTS AND DR. OZAWA, AND THE TRIAL COURT CORRECTLY CONCLUDED DR. VALDEZ WAS ENTITLED TO THE PROTECTION OF CODE OF CIVIL PROCEDURE SECTION 340.5.

The action was dismissed on the ground that it was time-barred by Code of Civil Procedure section 340.5 (hereinafter, "section 340.5"). That statute provides that actions against a health care provider for professional negligence must be commenced within three years after the injury manifests or within one year after the plaintiff discovers, or should have discovered, the injury and its negligent cause, whichever is earlier. (*Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 896.)

Plaintiff does not challenge this decision with respect to the Regents or Dr. Ozawa; indeed, she expressly concedes the judgment was proper as to them. (AOB 27.) Accordingly, the judgment as to them must be summarily affirmed. (See *Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99 [issues not raised are waived]; cf. *Baker v. Children's Hospital Medical Center* (1989) 209 Cal.App.3d 1057, 1060 [as to issues not raised, judgment will be deemed correct].)

The only issue raised on appeal with respect to Dr. Valdez is whether section 340.5 applies to her. Plaintiff contends Dr. Valdez is not entitled to the protection of section 340.5 because she was not a "health care provider"

within the meaning of the statute. Specifically, she contends section 340.5 applies only to "licensed" providers, and Dr. Valdez was an unlicensed intern at the time of the injury. (See AOB 24-31.)

Plaintiff's focus on the word "licensed" will not bear scrutiny. In interpreting statutes, the court's "function is not to examine words in isolation, but to consider all of the statutory language and construe that language as a unified whole." (*Shaddox v. Bertani* (2003) 110 Cal.App.4th 1406, 1414.) Statutes should be given "'"a reasonable and commonsense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which . . . will result in wise policy rather than mischief or absurdity."'" (*Id*. at p. 1413.) Courts will not interpret a statute literally if to do so would violate the statute's purpose or have "absurd consequences." (*B. W. v. Board of Medical Quality Assurance* (1985) 169 Cal.App.3d 219, 230.)

As we now explain, plaintiff's interpretation of section 340.5 does not square with the legislative purpose behind the statute. We begin with some background on the statute.

A. MICRA Protects Health Care Providers By Keeping Down Malpractice Insurance Rates.

Section 340.5 was amended in 1975 as part of the Medical Injury Compensation Reform Act, or MICRA, in response to a perceived "medical crisis," brought on by skyrocketing medical malpractice premiums for health care providers. The discovery rule, which delays accrual of a cause of action until the plaintiff discovers the injury and its negligent cause, has the potential of postponing accrual of claims indefinitely. The uncertainty associated with these so-called "long tail" claims made it difficult for insurance companies to set premiums. (*Young v. Haines* (1986) 41 Cal.3d

883, 900.) This difficulty, coupled with soaring jury verdicts in medical malpractice actions, threatened to cripple the medical industry and, thereby, endanger public health. In light of these threats, then-Governor Edmund G. Brown, Jr., urged the Legislature to "'enact laws which will change the relationship between the people and the medical profession, the legal profession and the insurance industry, and thereby reduce the costs which underlie those high insurance premiums.'" (*Hathaway v. Baldwin Park Community Hospital* (1986) 186 Cal.App.3d 1247, 1250 [quoting Governor's Proclamation to Leg. (May 16, 1975) Stats. 1975 (Second Ex. Sess. 1975-1976) p. 3947].)

MICRA was the result. MICRA statutes place caps on recoverable noneconomic damages (Civ. Code, § 3333.2, subd. (b)) and on attorneys' contingency fees (Bus. & Prof. Code, § 6146), permit evidence of collateral sources at trial (Civ. Code, § 3333.1) and periodic payments of judgments (Code Civ. Proc., § 667.7), and limit the time during which a lawsuit may be filed against a health care provider (Code Civ. Proc., § 340.5).

B. Contrary To Plaintiff's Argument That Section 340.5 Must Be Interpreted Literally, The Term "Health Care Provider" Has Repeatedly Been Interpreted To Include Unlicensed Individuals And Entities.

As pertinent here, section 340.5 defines "health care provider" as "any person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code." Seizing on the word "licensed," plaintiff contends that Dr. Valdez was not a "health care provider" as defined by section 340.5 because she was not "licensed" at the time of the injury. (AOB 27-28.)

In construing the MICRA statutes, the courts have consistently kept in mind the legislative goal of controlling malpractice insurance rates. In particular, the term "health care provider" has been construed to effect this purpose by encompassing anyone legally providing medical care, if (as here) literal construction would defeat the statutory purpose of controlling health care provider premium rates.

For example, the plaintiff in *Taylor v. United States* (9th Cir. 1987) 821 F.2d 1428 argued that the defendant hospital, which was owned and operated by the federal government, was not a health care provider within the meaning of MICRA because it was not licensed pursuant to any California statute. The Ninth Circuit rejected this argument, noting that the only reason the hospital was not licensed by California was because it was a federal hospital – California had no power to license it. (*Id*. at p. 1432.) Nevertheless, recognizing that MICRA would apply if plaintiff had "suffered identical injuries while under the care of a private institution in California" (*id*. at p. 1431) and that Congress intended the United States to be liable "'in the same manner and to the same extent as a private individual under like circumstances'" (*id*. at p. 1432), the court held that a federal hospital in California is a "health care provider" entitled to the protection of MICRA.

Plaintiff contends *Taylor* is inapposite because the decision was based on principles of federalism rather than statutory interpretation. (AOB 30-31.) It doesn't really matter. The point is that the court in *Taylor* found that the hospital was a "health care provider" covered by MICRA, notwithstanding the fact that it was not licensed as a "health care provider" as defined in the statute – thus, demonstrating that plaintiff's argument here that the statute must be strictly construed to apply *only* to those actually "licensed" pursuant to the statute is not accurate.

Plaintiff also attempts to distinguish *Taylor* on the ground that "the action was only against the hospital" (AOB 31) – as opposed to the individual who purportedly caused the injury. Again, it doesn't matter. In *Taylor*, as well as this case, it is a named defendant – the hospital there, Dr. Valdez here – who is not technically "licensed." Plaintiff also contends *Taylor* involved "the professional negligence versus ordinary negligence dichotomy" which plaintiff argues is "irrelevant in this context." (AOB 31.) It's unclear what this means or how it is "irrelevant" to the instant case. To the extent plaintiff is conceding there is no question of ordinary-versus-professional negligence here, she is right: The operative complaint clearly alleges an action for *professional* negligence. (2 CT 310, 311; see also discussion below in section C.) The only question is whether Dr. Valdez's status as "exempt" rather than licensed means she is not entitled to the protection of section 340.5.

The appellate court faced a similar question in *Palmer v. Superior Court* (2002) 103 Cal.App.4th 953, where the defendant was a medical group. The plaintiff argued the group was not a "health care provider" because it did not have its own license, even though all its physician-members were licensed.[3/] The court rejected this argument. Noting that "[t]he statutory scheme does not contemplate that an additional license need be obtained for the medical group itself" (*id*. at p. 967), the court concluded the group was a "health care provider" for purposes of MICRA, even without a separate license. The court stressed that the critical issue was not strict licensing; rather the court "must look more broadly to the *nature of*

3/ *Palmer* involved interpretation of Code of Civil Procedure section 425.13; but sections 340.5 and 425.13 employ the same definition of "health care provider." (See Code Civ. Proc., § 340.5, subd. (1) and § 425.13, subd. (b).)

the conduct that allegedly gave rise to the injury." (*Id*. at p. 965, emphasis added.)

Other jurisdictions, when faced with similar questions, have come to the same conclusion. In *Scholz v. Metropolitan Pathologists* (Colo. 1993) 851 P.2d 901 (hereinafter, "*Scholz*"), for example, the negligence of an unlicensed lab technician was at issue. The Colorado Supreme Court concluded that while the technician did not technically fit the definition of a "health care provider" because of the lack of a license, the HCAA (Colorado's analog of MICRA) applied because the negligent conduct of even unlicensed employees contributes to the cost of malpractice insurance:

> [T]he negligent conduct of unlicensed employees . . . 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.

(*Id*. at p. 905.)

Plaintiff contends *Scholz*, *supra*, is distinguishable from this case because the Colorado statutes have a "catch-all provision" not present in the California statutes. Specifically, she contends the Colorado definition of health care provider includes "'any professional corporation or other professional entity comprised of such health care providers as permitted by the law of this state.'" (AOB 29.) But this is a distinction without a difference: The negligent act in *Scholz* was the conduct of an *unlicensed* lab technician, not a professional corporation or entity, and the Colorado court held that the statutes applied to a lawsuit based on the conduct of that unlicensed individual.

To the extent plaintiff means to suggest that the HCAA would not apply to the unlicensed lab technician if sued individually in Colorado, the

Colorado Supreme Court would disagree. Indeed, the court already rejected this argument in *Scholz*, explaining:

> [I]t is safe to assume that the legislature sought to prevent a plaintiff from *naming some unlicensed employee* whose conduct may have contributed to plaintiff's injuries as a defendant . . . and thereby avoid application of the HCAA [Colorado's equivalent of MICRA].

(851 P.2d at p. 904, emphasis added.)

These cases demonstrate that the definition of "health care provider" as someone who is "licensed or certified" is meant to protect people who are legally practicing medicine, whether pursuant to a license or because they are exempt from licensing by California, or for some other reason: Any other rule would permit plaintiffs to circumvent MICRA in a wide category of cases where the Legislature plainly intended it to apply, but where some unlicensed individual or entity was part of the health care team. As we explain below, the facts of the instant case require a similar application here.

C. Section 340.5 Must Apply To Dr. Valdez Because She Was Legally Providing Health Care Services At The Time Of The Injury.

Negligence is conduct that falls below a standard of care established by law. A person "'is required to exercise the care that a person of ordinary prudence would exercise under the circumstances.'" (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 997.) Health care professionals are, therefore, required to exercise the same prudence that other health care professionals under the same circumstances would

exercise. Health care professionals are not held to a higher standard of care – it is still measured by ordinary prudence – but the ordinary prudence of others with the same skills and education.

However, "'the test is not whether the situation calls for a high or a low level of skill, or whether a high or low level of skill was actually employed,'" but rather whether it is "an integral part of the professional service being rendered." (*Bellamy v. Appellate Department* (1996) 50 Cal.App.4th 797, 806, 808.) Thus, it is professional negligence to allow a patient to fall off an X-ray table (*id.* at p. 806), or "to leave the bedrails down during the night while plaintiff was asleep" (*Murillo v. Good Samaritan Hospital* (1979) 99 Cal.App.3d 50, 56), or to cause the plaintiff to be disconnected from his ventilator, "regardless of whether separation was caused by the ill-considered decision of a physician or the accidental bump of a janitor's broom" (*Taylor v. United States*, *supra*, 821 F.2d at p. 1432).

Here, the allegations of the operative complaint leave no real dispute as to the true nature of the action: The injury allegedly occurred during an eye examination, while the examiner (Dr. Valdez) was operating the examination chair – i.e., while she was providing health care services. (1 CT 4; see *Olsen v. Richards* (1989) 232 Neb. 298, 302 ["when the alleged act of negligence occurred, [defendant] was positioning [plaintiff in the examination chair] for the purpose of rendering her a service in his role as her physician"].) The complaint also specifically alleged that Dr. Valdez was an intern at the optometry school and was "at all times . . . acting within the course and scope of that program" (2 CT 310, 311) – again, necessarily implying that she was providing health care services to plaintiff.

Nevertheless, plaintiff contends that Dr. Valdez was not a "licensed" health care provider and, therefore, is not protected by section 340.5. (AOB 27-28.) As we now explain, because Dr. Valdez was *exempt* from

licensing, she enjoys all the privileges of being licensed – including taking advantage of the MICRA statutes generally and section 340.5 specifically.

D. Because Dr. Valdez Was "Exempt" From Licensing By Statute, She Enjoys The Same Protection As A Licensed Health Care Provider.

There is no question that optometrists, who are licensed pursuant to Chapter 7 of Division 2 of the Business and Professions Code, are "health care providers" within the meaning of section 340.5. (Code Civ. Proc., § 340.5, subd (1) ["health care provider" is "any person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code"].) However, Business and Professions Code section 3042.5, subdivision (a), expressly exempts optometry students from such licensing requirements, as follows:

> The practice of persons actually enrolled as undergraduate or graduate students of optometry in the clinical departments of schools or colleges of optometry accredited by the board shall be exempt from the provisions of this chapter; provided, however, that such practice shall be entirely confined to the operations of the clinical department of the accredited school or college of optometry and shall be carried on only in pursuing the study of optometry.

Plaintiff concedes Dr. Valdez was exempt from licensing under this statute, but continues to focus on the word *licensed*, arguing that exempt is not the same as "licensed" and that the statute only refers to "licensed" persons or entities. (AOB 27-28.) However, as explained above, the court must not examine words in isolation, but should interpret the statute as a whole, reasonably and with common sense, consistent with the purpose of

the statute and the intent of the Legislature. (*Shaddox v. Bertani, supra*, 110 Cal.App.4th at pp. 1413-1414.) In order to properly effectuate MICRA's purpose, section 340.5 must be interpreted to include exempt providers in the class of "licensed" providers who are protected by that section, as we now explain.

To be exempt means to be "[f]ree or released from a duty or liability to which others are held." (Black's Law Dict. (7th ed. 1999) p. 593.) Thus, to be exempt from having to obtain a medical license means having the privileges of practicing medicine without first having to obtain the license. Someone, like Dr. Valdez, who is exempt from medical licensing is, nonetheless, practicing medicine lawfully. The Legislature enables students to practice without a license under certain circumstances so they can learn the skills they need to get a license. It is, perhaps, during this time of learning that they most need the protection of MICRA; at the very least, they do not need it any less than their fully licensed colleagues. The Legislature undoubtedly intended for students to enjoy the same protections while they are learning that they would enjoy after they obtained a valid license. Thus, for purposes of the statute, a person who is exempt is, in effect, and within the parameters of the exemption, the same as one who is licensed.

Moreover, a contrary rule would not serve the purpose of the statute. Eliminating exempt providers from the MICRA umbrella would have a direct and adverse effect on malpractice insurance rates. Students who are exempt from licensing are still practicing medicine, and they are covered by *someone's* malpractice insurance. And the Regents, as a public entity, is generally required by statute to indemnify its employees in any action against them in the scope of their employment. (See Gov. Code, §§ 825, 825.2; *Chambi v. Regents of University of California* (2002) 95 Cal.App.4th 822, 827.) That means that any judgment against a Regents' optometry

student for injuries sustained as a result of his or her optometry practice will have an adverse effect on the cost of malpractice insurance for the Regents. Since MICRA was intended to control such costs, plaintiff's literal interpretation of the statute as applying only to those who are "licensed" and not to those who are "exempt" from licensing would seem to offend, rather than effectuate, the statute's purpose.

Plaintiff has not cited a single case that directly, or indirectly, supports her position. She cites *People v. Cole* (2006) 38 Cal.4th 964, 974-975, and other cases for the general proposition that statutes should be interpreted "'to effectuate the law's purpose'" (AOB 26-27); but she has not explained how interpreting section 340.5 so narrowly that it would not apply to exempt students would effectuate the statute's purpose. In fact, as just shown, the opposite is true. Moreover, *People v. Cole* emphasizes that the court will not "consider the statutory language in isolation," but rather "construe the words in question in context, keeping in mind the statutes' nature and obvious purposes." (*Id.* at p. 975; AOB 26.) Thus, even *People v. Cole* supports the conclusion that Dr. Valdez is protected by section 340.5.

Plaintiff's reliance on *Lathrop v. Healthcare Partners Medical Group* (2004) 114 Cal.App.4th 1412 is also misplaced. (AOB 27-28.) The question there was whether the defendant medical group was a health care provider. But the issue there was not, as here, whether the medical group was effectively "licensed." Rather, the only question before the court was whether the group was a "person" within the meaning of the statute. (114 Cal.App.4th at pp. 1419-1420.) More critically, notwithstanding the court's conclusion that the medical group was not a licensed "person" and, therefore, not a "health care provider" within the meaning of the statute, the court nevertheless found the group was entitled to MICRA protection based on its status as *employer* of licensed persons under the doctrine of

respondeat superior. (*Id*. at p. 1423.) Thus, *Lathrop* demonstrates again that the MICRA statutes are construed to effectuate their legislative purpose. Here, the legislative purpose behind MICRA is effectuated *only* by applying section 340.5 to Dr. Valdez.

CONCLUSION

As explained above, there is no serious question that the "nature of the conduct" in this case was professional negligence: Plaintiff was in the examining chair for the sole purpose of having her eyes examined by Dr. Valdez. If Dr. Valdez had been licensed rather than exempt from licensing, there would be no argument that the action was not time-barred. Dr. Valdez was legally practicing medicine at the time of the injury, even though she

did not have technically have a license. Accordingly, she was entitled to the protection of the statute of limitations for medical malpractice actions, and plaintiff may not circumvent that statute because Dr. Valdez was exempt from licensing rather than licensed. Accordingly, the trial court properly ruled that section 340.5 applies to bar plaintiff's action against Dr. Valdez.

Dated: November 1, 2006

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