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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

DONA HIGGINS et al., Plaintiffs and Respondents, v. PROVIDENCE HEALTH SYSTEM – SOUTHERN CALIFORNIA, Defendant and Appellant.	B283488 (c/w B285121) (Los Angeles County Super. Ct. No. BC577302)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ross M. Klein, Judge. Reversed and remanded with instructions.

Horvitz & Levy, S. Thomas Todd, Robert H. Wright; Hester Law Group, Cecille L. Hester, and Christopher L. Smith for Defendant and Appellant.

Law Office of Martin N. Buchanan, Martin N. Buchanan; Moran Law, Michael F. Moran, Lisa T. Flint, and Alex H. Feldman for Plaintiffs and Respondents.

Defendant and appellant Providence Health System—Southern California (Providence) challenges a judgment entered following a jury trial in favor of plaintiffs and respondents Dona Higgins, the deceased patient, and her husband, Gary Higgins. The sole issue on appeal is whether the Medical Injury Compensation Reform Act of 1975 (MICRA) $250,000 cap on noneconomic damages applies.

We conclude that MICRA would cap plaintiffs' damages at $250,000 unless the jury found that Providence acted with recklessness. But the special verdict form was problematic in that it instructed the jury to skip the question asking whether Providence acted with recklessness, yet later asked the jury whether Providence's recklessness was a substantial factor in causing Mrs. Higgins's death. Because of these flaws in the special verdict, the judgment is reversed and the matter is remanded for a new trial.

FACTUAL AND PROCEDURAL BACKGROUND

Mrs. Higgins undergoes surgery and is admitted to Providence for rehabilitation after surgery

In December 2013, 73-year-old Mrs. Higgins was happily married to Mr. Higgins for nearly 52 years. They had two adult daughters. At that time, she worked for her husband's plumbing business nearly every day, doing the books and scheduling. The couple loved to golf and travel. She was in generally good health.

On December 19, 2013, 73-year-old Mrs. Higgins fell and hit her head. She was taken to Torrance Memorial Hospital, where she underwent cervical spinal surgery. She was discharged from the hospital on December 30, 2013, and admitted to Providence's acute rehabilitation unit to strengthen her legs and work on her mobility.

At the time she was admitted to Providence, Mrs. Higgins had no problems with her speech. She was eating a regular diet and was in good spirits. However, she had severe trunk and lower extremity weakness, and she needed assistance sitting up, standing, and walking.

During her stay at Providence, Mrs. Higgins was wearing a stiff plastic neck brace and could not turn her head to the side. Because of her neck injury and brace, she was at high risk of swallowing problems and "aspiration." "Aspiration" means inhaling food or other foreign material into the lungs. Providence frequently saw patients who were at high risk of aspiration.

The medical director of Providence's acute rehabilitation unit, Dr. Huong-Ahn Long, evaluated Mrs. Higgins upon admission and wrote numerous orders. Dr. Long documented in Mrs. Higgins's chart that she was at risk for aspiration. Thus, Dr. Long ordered a gluten-free regular diet, no oral feeding if Mrs. Higgins was lethargic or coughing, an upright position for all oral intake, and supervision with all meals.

The nursing staff also did its own assessments of Mrs. Higgins upon admission, and daily assessments thereafter. For each day that Mrs. Higgins was at Providence, the nursing staff determined that she needed "maximum assistance and supervision" with respect to her diet.

When Mrs. Higgins arrived at Providence, she had a peripherally inserted central catheter (PICC line) in place, instead of a traditional IV line. Dr. Long ordered that the PICC line remain in place because Mrs. Higgins would be continuing to receive IV steroid medication.

January 3, 2014

On January 3, Mrs. Higgins pulled out her PICC line. Dr. Long ordered it to be replaced because she still needed IV steroid medication. Dr. Long also ordered that Mrs. Higgins be seen by a respiratory therapist because her trunk was so weak that she could not cough properly.

January 4, 2014

After the PICC line was replaced, Mrs. Higgins's condition declined, and she began to exhibit signs of weakened swallowing ability (dysphagia). On January 4, her nurse noted that she was having a little difficulty breathing and her voice sounded "wet and gurgly." Her lungs were congested and she was "having trouble coughing secretions."

An hour later, a speech therapist[1] performed a bedside swallow evaluation. Mrs. Higgins was able to swallow regular food, but the speech therapist recommended a modified barium swallow study (MBSS).[2] The therapist also recommended that Mrs. Higgins's meals be changed from a regular diet to finely chopped.

Forty-five minutes later, Dr. Payandeh Abadee saw Mrs. Higgins. Dr. Abadee noted that Mrs. Higgins had "some swallowing problem." She ordered that Mrs. Higgins's food be

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[1] Among other things, speech therapists evaluate patients for swallowing problems.

[2] The MBSS is a test using barium dye and x-rays to visualize a patient's swallowing ability. It is the "gold standard" for evaluating swallowing problems. It is the only way to visualize the pharyngeal phase of swallowing or to determine whether the patient is silently aspirating.

finely chopped. She also ordered an MBSS, which was scheduled for Monday (two days later).[3]

Also on January 4, a respiratory therapist saw Mrs. Higgins three times. The first two times, her lungs were clear. But the third time, at 3:40 p.m., they were not. The respiratory therapist suctioned a small amount of thick, yellow, and brown sputum (phlegm) from the back of Mrs. Higgins's throat. This was "not a good thing;" it was a sign of infection. The therapist had to use a suction tool to suction the sputum out to prevent Mrs. Higgins from aspirating. In other words, Mrs. Higgins was aspirating, and could not expectorate the secretion on her own.

Dr. Abadee then phoned in an order for blood tests.

January 5, 2014

The blood test results came in on January 5. Mrs. Higgins's white blood cell count (WBC) was critically high, showing a sign of infection.

Dr. Abadee saw Mrs. Higgins again on Sunday morning. Dr. Abadee was unaware of the critically high WBC results. According to Dr. Abadee, Mrs. Higgins's nurse should have, but did not, tell Dr. Abadee about the blood test results. "Consequently, on Sunday, nothing was done about the patient's infection."

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[3] An MBSS was not available on weekends unless the doctor wanted it performed right away (stat), in which case the hospital staff would obtain the approval of Providence's chief executive officer. Dr. Abadee did not order that Mrs. Higgins's MBSS be stat.

Dr. Abadee noted that Mrs. Higgins was having "swallowing difficulty" and losing her voice.[4] Thus, she issued new orders downgrading her diet again to "pureed" foods and directing that she be "watch[ed] frequently with feeding." She explained that she intended a nurse, speech therapist, or trained family member to "watch her when she's eating and be with her, supervise."

The respiratory therapist saw Mrs. Higgins again later on Sunday morning. Her breathing was still coarse, and she still had thick, yellow, and brown sputum in her lungs. The therapist suctioned the sputum out of her lungs again.

Mr. Higgins assists Mrs. Higgins with meals

Mr. Higgins visited Mrs. Higgins every day. He was at her bedside for virtually every meal during her entire stay.

Mrs. Higgins required assistance eating because she was wearing a neck brace and could not see the tray of food in front of her. The hospital staff did not provide supervision or assistance to Mrs. Higgins during meals. Mr. Higgins always fed her himself. He would put food on a fork or spoon, which she would then bring to her mouth on her own.

According to Mr. Higgins, Mrs. Higgins always received regular food to eat; her food was never finely chopped or pureed. Moreover, no one ever told Mrs. Higgins's family members that her diet had been changed to finely chopped then to a pureed diet over the weekend of January 4 and 5. Because the family did not

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[4] By Sunday, Mrs. Higgins had completely lost her voice. Loss of voice is a risk factor for aspiration.

know about the diet change orders, they continued to feed her the regular meals delivered by the staff

January 6, 2014; Mrs. Higgins suffers a code blue

At around 8:30 a.m., Mrs. Higgins received a breakfast tray with scrambled eggs, hot cereal, and juice. The food was not finely chopped or pureed. Mr. Higgins tried to feed Mrs. Higgins. She ate no more than a spoonful of oatmeal and a couple bits of egg.

Shortly thereafter, at around 9:00 a.m., a speech therapist came and performed another bedside swallow evaluation. According to Mr. Higgins, the speech therapist fed Mrs. Higgins a little scrambled egg, a little oatmeal, and a nectar-thick liquid, and his wife appeared to have no difficulty swallowing. The speech therapist noted that Mrs. Higgins "showed no obvious signs of distress or aspiration." The therapist also noted that Mrs. Higgins was completely aphonic, i.e., had no audible voice. The speech therapist left the room at around 9:15 a.m.

At around 10:00 a.m., Mrs. Higgins's daughters came to visit. They did not like the way their mother looked and immediately summoned a nurse. The nurse checked Mrs. Higgins's vital signs: her blood pressure was only 44 over 24, her oxygen saturation was only 82 percent, and her pulse was only 48. The nurse called a code blue. Mrs. Higgins went into cardiorespiratory arrest; chest compressions were performed, and Mrs. Higgins was intubated.

Mrs. Higgins was transferred to intensive care. It was determined that she had aspiration pneumonia with sepsis. Antibiotics were administered through her PICC line and she was placed on a ventilator.

Mrs. Higgins is transferred to Kindred Hospital and passes away

Mrs. Higgins was transferred from Providence to Kindred Hospital, which specializes in patients on ventilators. While hospitalized, Mrs. Higgins contracted a serious intestinal infection as the result of a prolonged use of potent antibiotics to treat recurrent episodes of pneumonia and urinary tract infection.

She passed away from the intestinal infection April 4, 2014.

Complaint, trial, and special verdict

This lawsuit was filed in 2015. The first amended complaint, the operative pleading, alleges three causes of action: elder abuse, negligence, and wrongful death.[5]

A jury trial commenced on April 3, 2017. Plaintiffs' experts testified that Mrs. Higgins's code blue was the result of food aspiration. According to those experts, the standard of care applicable to Providence's nurses and speech therapists required: (1) that the MBSS take place on January 4; (2) that Mrs. Higgins receive nothing by mouth from the time the MBSS was scheduled until it occurred; (3) that Mrs. Higgins's food be pureed; (4) that Mrs. Higgins be supervised while eating; (5) that Mrs. Higgins's family be educated on aspiration and informed of her dietary changes from regular food to finely chopped to pureed; and (6) that Mrs. Higgins's PICC line not be replaced once removed.

Providence's experts testified that the code blue was the result of sepsis from an infection introduced when Mrs. Higgins's PICC line was replaced. The chest compressions that she received during the code blue caused her to aspirate stomach

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[5] The pleading originally also set forth a cause of action for willful misconduct, but plaintiffs withdrew this claim.

contents. According to Providence's experts, the nurses and speech therapists did not violate the standard of care.

The jury returned a verdict in plaintiffs' favor. The special verdict form was divided into three sections:

Section 1 of the special verdict form

In response to all of the questions in section 1 (negligence), the jury answered "Yes" and awarded Mrs. Higgins (through Mr. Higgins, her successor-in-interest) $239,005.63 in past medical expenses. The jury attributed 70 percent of the responsibility to Providence and 30 percent of the responsibility to physicians or other health care providers.

Section 2 of the special verdict form

As is relevant to the issues raised in this appeal, in section 2 (elder abuse), Question No. 9 asked if Mrs. Higgins proved that any employee who committed the acts was an officer, director, or managing agent of Providence, or if an officer, director, or managing agent authorized the conduct of the employee who committed the acts, or if an officer, director, or managing agent of Providence knew of the acts and adopted or approved the conduct after it occurred.[6] The jury answered "No." Because the jury answered no, it was instructed not to answer (and it did not answer) Question No. 10, which asked: "Did Dona Higgins prove by clear and convincing evidence that Providence . . . employee(s) acted with recklessness."

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[6] Under the Elder Abuse Act, an employer cannot be held liable for the act or omission of an employee unless a managing agent of the employer was directly involved, or a managing agent authorized or ratified the act or omission. (Welf. & Inst. Code, § 15657, subd. (c); Civ. Code, § 3294, subd. (a).)

Section 3 of the special verdict form

In section 3 (wrongful death), Question No. 13 asked: "Was Providence['s] . . . recklessness a substantial factor in causing [Mrs.] Higgins'[s] death?" The jury answered "Yes," and awarded Mr. Higgins $4,889.02 in economic damages and $1.5 million in noneconomic damages.

Providence seeks to reduce damages pursuant to MICRA

Providence invoked MICRA's $250,000 cap on noneconomic damages and sought to reduce the wrongful death verdict from $1.5 million to $175,000 (70 percent of $250,000).

The trial court determined that the MICRA cap did not apply, noting "the jury's finding of Elder Abuse Neglect, and the fact that the reckless conduct was a substantial factor leading to [Mrs. Higgins's] death."

Judgment and appeal

Judgment was entered in favor of plaintiffs, and this timely appeal ensued.

DISCUSSION

Providence argues that "the jury's $1.5 million verdict for noneconomic damages should have been reduced to $250,000, and then, because more than one health care provider was found to be at fault, Providence's 70 percent share of fault should have been applied to the $250,000, reducing it to $175,000." Plaintiffs defend the judgment and the trial court's determination that the MICRA cap does not apply because the judgment against Providence "was based on reckless neglect of an elder in Providence's care or custody, a more culpable form of conduct not covered by MICRA."

Mr. Higgins asserted a claim for wrongful death against Providence. Code of Civil Procedure section 377.60 provides that

"[a] cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by. . . . [¶] (a) [t]he decedent's surviving spouse." Based upon the evidence presented at trial, the jury found in favor of Mr. Higgins on his wrongful death cause of action and awarded him economic damages ($4,889.02) and noneconomic damages ($1.5 million).

Providence does not seem to challenge the jury's finding in favor of Mr. Higgins on the cause of action. Rather, as set forth above, it only asks that the amount of damages be reduced pursuant to MICRA. To resolve this issue, we first turn to the relevant statute and case law.

Civil Code section 3333.2 limits the recovery of noneconomic damages to $250,000 "[i]n any action for injury against a health care provider based on professional negligence." (Civ. Code, § 3333.2, subds. (a) & (b).) "The statute defines professional negligence as 'a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.' [Citations.]" (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 320.)

But, "there is nothing in the legislative history generally, or with regard to [Civil Code] section 3333.2 specifically, to suggest that the Legislature intended to extend the $250,000 limitation to intentional torts." (*Perry v. Shaw* (2001) 88 Cal.App.4th 658, 668.)

Applying these legal principles, we conclude, as Providence seems to concede, that recklessness takes a case outside of

MICRA. (See, e.g., *Delaney v. Baker* (1999) 20 Cal.4th 23, 31–32 (*Delaney*); *Smith v. Ben Bennett, Inc.* (2005) 133 Cal.App.4th 1507, 1522 ["Under *Delaney*, an elder abuse claim involves reckless neglect (or intentional abuse) by the custodian of an elder. Thus, it is simply not encompassed with 'professional negligence.' Moreover, the legislative history of the Elder Abuse Act, as discussed in *Delaney*, indicates that it was intended to apply to acts of egregious abuse, while leaving acts of professional negligence not involving such egregious abuse to be dealt with under other law. Finally, *Delaney* emphasized that the purposes of the Elder Abuse Act were different from the purposes of MICRA"]; *Benun v. Superior Court* (2004) 123 Cal.App.4th 113, 126.) Thus, we next turn to the question of whether the jury here found that Providence committed recklessness.[7] To do that, we examine the special verdict.

"'[A] special verdict's correctness must be analyzed as a matter of law.'" (*City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 678.)

Here, the jury was provided with a problematic special verdict form. While it asked the jury in Question No. 10 whether

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[7] The fact that plaintiffs recovered nothing on their elder abuse claim does not alter our conclusion. The jury only reached that decision because it found that no officer, director, or managing agent either committed the wrongful acts, authorized the misconduct, or adopted or approved the conduct after it occurred. We are left to wonder if Question No. 9 and Question No. 10 had been flipped what the jury would have determined in response to the query of whether Providence acted with recklessness.

Providence acted with recklessness, the jury never got to answer that question because once it answered "No" to Question No. 9, it skipped ahead to Question No. 12, as instructed on the special verdict form. The jury's answer of "Yes" to Question No. 13 does not provide any clarity. As plaintiffs assert, the jury may have found that Providence committed recklessness, and, Providence's argument notwithstanding, there is ample evidence to support such a finding. But, as Providence points out, the jury may have just assumed (but not found) recklessness. (*Trejo v. Johnson & Johnson* (2017) 13 Cal.App.5th 110, 137–138, 139.) As a result of the format of the special verdict form, it is hopelessly uncertain.

That conclusion begs the question of what to do with the judgment that arose from the defective special verdict form. Equating the uncertain special verdict here with unenforceable inconsistent special verdicts (see, e.g., *Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1092 [if a special verdict is "'hopelessly ambiguous,' the judgment must be reversed"]), and in light of our public policy favoring trial on the merits, we opt to remand the matter for a new trial. (*Stillwell v. The Salvation Army* (2008) 167 Cal.App.4th 360, 375–376 [holding that the remedy for inconsistent verdicts is not to grant judgment but to order a new trial].)[8]

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[8] We reject Providence's argument that retrial is unwarranted because there is insufficient evidence of neglect.

DISPOSITION

The judgment is reversed, and the matter is remanded for a new trial. Parties to bear their own costs on appeal.

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_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT