**No. S211793**

# In the Supreme Court

**OF THE**

# State of California

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KATHLEEN A. WINN, *et al.,*

*Plaintiffs and Appellants,*

v.

PIONEER MEDICAL GROUP, INC., *et al.,*

*Defendants and Respondents.*

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After a Published Decision by the Court of Appeal
Second Appellate District, Division Eight
Case No. B237712

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## APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL IN SUPPORT OF RESPONDENTS

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**TO THE HONORABLE CHIEF JUSTICE OF CALIFORNIA:**

Pursuant to Rule 8.520(f) of the California Rules of Court, the Association of Southern California Defense Counsel (hereafter ASCDC or association) submits this application for leave to file the accompanying amicus curiae brief in support of Respondents Pioneer Medical Group, Inc., Emerico Csepanyl, M.D., James Chinuk Lee, D.P.M. and Stanley Lowe, D.P.M., and respectfully urges this court to reverse the Court of Appeal's published opinion in *Winn v. Pioneer Medical Group, Inc.* (May 24, 2013, B237712) 216 Cal.App.4th 875 (*Winn*).

The case presents important issues of statutory interpretation in civil actions against health care providers—essentially, whether a physician who allegedly commits professional negligence while treating a noncustodial patient who is over 65 years of age in an outpatient setting may be liable for "abuse of an elder person" or "neglect" and attendant "enhanced remedies" under the Elder Abuse and Dependent Adult Civil Protection Act (Welf. & Inst. Code, §§ 15600, et seq.) (hereafter Elder Abuse Act or Act)?

ASCDC is a voluntary membership association comprised of approximately 1,100 attorney-members, among whom are some of the leading trial lawyers of California's civil defense bar. ASCDC's members primarily represent parties involved in legal disputes from the business community, professionals, including attorneys, accountants and financial professionals, health care providers, religious and civic institutions who provide the goods and services vital to our nation's economic health and growth. Founded in 1959, the Association is dedicated to promoting the administration of justice, providing education to the public about the legal system, and enhancing the standards of civil litigation practice in this state.

The association and its member-attorneys are often called upon to represent and defend health care providers in professional negligence cases, as well as nursing homes, and custodial care facilities charged with "elder abuse" and "neglect" within the meaning of the Elder Abuse Act. With growing frequency, ASCDC members recently have seen claims (like those alleged in the present case) attempting invoke the "enhanced remedies" of the Act in garden-variety medical negligence cases. This court has made clear that the standard of "reckless abuse" "or "neglect" in a custodial care setting must be proven by clear and convincing proof in order to establish a defendant's liability under the Act; a standard that is separate and distinct from "professional negligence" claims governed by MICRA.

Presiding Justice Bigelow, in her cogent and forceful dissent from the majority opinion in *Winn*, stated:

> I believe the majority has blurred the line between the Elder Abuse and Dependent Adult Civil Protection Act and professional negligence, despite the fact that the California Supreme Court has repeatedly noted the distinct and mutually exclusive nature of the two.
>
> The majority extends liability under the Act in a manner that is unwarranted by the facts alleged in the case and prohibited by the Act itself.
>
> (Dis. opn. by Bigelow, P.J. at p. 1.)

ASCDC shares Justice Bigelow's concerns. In the more than two decades since the Legislature enacted enhanced civil remedies for elder abuse and neglect under sections 1561.27 and 15756 of the Elder Abuse Act, this court and others have made clear that "elder abuse" involves egregious acts of neglect and abuse committed by the dependent victim's care provider that would typically arise in a custodial care setting. (See *Covenant Care v. Delaney v. Baker* (1999) 20 Cal.4th 23 (*Delaney*) and *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771 (*Covenant Care*).) Indeed, in reaching those conclusions, *Delaney* and *Covenant Care* painstakingly digested the Act's language and Legislative History; noting the clear intent to exempt "acts of simple professional negligence" and that by its statutory terms, are explicitly intended to "protect providers of care [such as the respondent-physicians in this case] from acts of simple negligence, or even gross negligence" being transformed into claims for elder abuse. (See *Delaney*, *supra*, 20 Cal.4th at pp. 32-35 [digesting the Legislative History of the Act]; *Covenant Care*, *supra*, 32 Cal.4th at pp. 784-788 [same].)

Nothing in the landscape underlying the purposes of the Act has radically changed during the intervening years since *Delaney* and *Covenant Care* addressed similar questions (including the Legislature's explicit intent to exempt "professional negligence"); during that time, the Courts of Appeal followed this court's teachings that the enhanced remedies available under the Act are limited to *egregious misconduct* by caretakers committed while caring for dependent victims in custodial settings. The *Winn* majority's published opinion dismisses that precedent as mere dicta. The Court of Appeal reads into the statutory scheme an intent to broaden the remedies of the Act, encompassing negligence committed by health care providers during their treatment of non-dependent elderly patients on an outpatient basis as those providers would perform the same professional services for the benefit of any other class of patients regardless of age or dependency.

As discussed in ASCDC's brief at greater length, the majority's untenable interpretation cannot be found in the language of the Act. The "support" for this interpretation offered by appellants and their amici cannot be reconciled with the documented legislative history articulating the purposes of the Act's enhanced civil remedies (contained in the request for judicial notice submitted by Respondents with their Opening Brief on the Merits), and directly conflicts with controlling precedents by this court and better reasoned decisions of other California appellate courts.

ASCDC believes this court's prior interpretations of the Act correctly construed the scope of and the proper standards for the imposition of liability for "neglect" of a "care provider" as defined under the Elder Abuse Act's enhanced civil remedies—a form of civil liability that is separate and distinct from "professional negligence" committed by health care providers in an outpatient setting governed by MICRA. *Winn*'s significant departure from controlling precedent underscores the need for

this court to conclusively resolve the issue of proper statutory interpretation, secure uniformity of decision and settle these important questions of California law. The case therefore involves matters of substantial interest and concern to ASCDC members, and the health care and custodial care providers they regularly represent across the State.

Counsel for ASCDC certifies pursuant to Rule 8.520(f)(4) that no person or entity, other than the association or its members, authored any portion of the accompanying brief and that no one other than the association or its members has made any financial contribution toward the preparation and submission of ASCDC's amicus curiae brief.

Accordingly, the association and its members have substantial interests in seeking resolution of these issues consistent with controlling statutory law and precedent, and ASCDC respectfully requests leave to file its brief in support of Respondents.

DATED: March 31, 2014

Respectfully submitted,

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## AMICUS CURIAE BRIEF OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL IN SUPPORT OF RESPONDENTS

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## ISSUE PRESENTED

According to the summary provided on the court's docket, this case presents the following issue:

Does "neglect" within the meaning of the Elder Abuse and Dependent Adult Civil Protection Act (Welf. & Inst. Code, § 15657) include a health care provider's failure to refer an elder patient to a specialist if the care took place on an outpatient basis, or must an action for neglect under the Act allege that the defendant health care provider had a custodial relationship with the elder patient?

## BACKGROUND AND PROCEDURAL HISTORY

After the death of their 83-year old mother, Elizabeth Cox ("decedent" or Mrs. Cox), Plaintiffs (the decedent's heirs) brought two separate actions against her health care providers arising from the same facts—one for professional negligence governed by MICRA and the other under the Elder Abuse Act The decedent was an independently-living adult who was treated by defendants at their private offices for several years on an outpatient basis for "painful onychomycosis [fungal infection of the nails of her foot], a condition 'well known to limit mobility and indirectly impair peripheral circulation.'" (Slip opn., p. 3.) In the course of treating decedent, defendants allegedly failed to recognize the need for a vascular specialist to evaluate the patient's foot. This failure led to the amputation of her leg and, ultimately, to her death. (See slip opn., pp. 6, 16-17.)

The trial court sustained a demurrer to the Elder Abuse Act lawsuit without leave to amend. In a 2-1 published opinion, the majority reversed and remanded the dismissal. The majority opinion characterized plaintiffs' Elder Abuse Act claims as involving defendants' repeated failure to refer the decedent to a vascular specialist which amounted to recklessly withholding "the only proper medical treatment and utterly disregarded the excessive risk to which they exposed Ms. Cox for two years[.]" (Slip opn., p. 18.)

In so doing, the majority rejected as mere *dicta* this court's prior interpretations of the Elder Abuse in *Delaney v. Baker* (1999) 20 Cal.4th 23 (*Delaney*) and *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771 (*Covenant Care*); precedents that historically focused on the limited purpose of enhanced civil remedies available under the Act to

ameliorate the kind of aggravated misconduct committed by a caretaker of elder and dependent adults amounting to "custodial neglect" in the performance of "custodial obligations" and the "failure to fulfill custodial duties." (See slip opn., pp. 14-15.)

Instead, relying principally upon *Mack v. Soung* (2006) 80 Cal.App.4th 966 (a custodial care case), the majority impermissibly expanded liability for "elder abuse" to the outpatient care context based upon medical errors in failing to recognize the need for "specialized" medical care. (Slip opn., pp. 10-14; Petition, pp. 1, 7-17.)

## ARGUMENT

### A. The *Winn* Majority Opinion is Contrary to the Plain Meaning of the Elder Abuse Act as Definitively Interpreted by This Court

The *Winn* majority's analysis is neither persuasive nor supported by the plain language and legislative purposes underlying the Elder Abuse Act. Justice Bigelow's dissent accurately placed this court's *Delaney* and *Covenant Care* decisions in proper perspective as definitive interpretations of the Legislature's statutory intent, construing the "reckless abuse" standard of the Act in the following terms:

> [In *Delaney* and *Covenant Care*,] the court distinguished neglect that qualifies for heightened remedies under section 15657 [of the Elder Abuse Act}, from the professional negligence referenced in section 15657.2, and from professional negligence as referenced in Code of Civil Procedure section 425.13, subdivision (a) [MICRA]. According to our high court, the conduct rendering a

> health care provider liable under section 15657 for neglect is of a wholly different nature from conduct constituting professional negligence. Section 15657 neglect is "neglect performed with some state of culpability greater than mere negligence" (*Delaney*, *supra*, 20 Cal.4th at p. 32); it is '"acts of egregious abuse against elder and dependent adults'" (*Id.* at p. 35); it is abuse that "is at most incidentally related to the provider's professional health care services." (*Covenant Care*, *supra*, 32 Cal.4th at p. 786.)
>
> (Dis. opn., pp. 1-2.)

The Elder Abuse Act was written with an eye toward specifically remedying "egregious" conduct in the custodial care of "elderly and dependent" adults—as contrasted with allegations of professional negligence which are explicitly exempted from liability under the Act. (Slip opn., pp. 12-13; cf. dis. opn, pp. 4-5.)

In the Act's 1991 civil remedies amendments at issue here, the focus shifted from criminal and administrative actions to private, civil enforcement of laws against elder abuse and neglect: "[T]he Legislature declared that 'infirm elderly persons and dependent adults are a disadvantaged class, that cases of abuse of these persons are seldom prosecuted as criminal matters, and few civil cases are brought in connection with this abuse due to problems of proof, court delays, and the lack of incentives to prosecute these suits.' (§ 15600, subd. (h), added by Stats. 1991, ch. 774, § 2.) It stated the legislative intent to 'enable interested persons to engage attorneys to take up the cause of abused elderly persons and dependent adults.' (*Id*., subd. (j))" [Citation omitted.]

(*Delaney*, *supra*, 20 Cal.4th at p. 33.) The Senate Rules Committee's analysis of Senate Bill No. 679 stated, "in practice, the death of the victim and the difficulty in finding an attorney to handle an abuse case where attorneys fees may not be awarded, impedes many victims from suing successfully. [¶] This bill would address the problem by: ... authorizing the court to award attorney's fees in specified cases; [and by] allowing pain and suffering damages to be awarded when a verdict of intentional and reckless abuse was handed down after the abused elder dies." (*Ibid*, citing Sen. Rules Com., Analysis of Sen. Bill No. 679 (1991-1992 Reg. Sess.) as amended May 8, 1991, p. 3; see also OBM at pp. 10-11.)

MICRA has a different focus and equally relevant legislative purpose. The impetus for MICRA was the rapidly rising costs of medical malpractice insurance in the 1970's. "'The inability of doctors to obtain such insurance and reasonable rates is endangering the health of the people of this State, and threatens the closing of many hospitals.' (Governor's Proclamation to Leg. (May 16, 1975) Stats. 1975 (Second Ex. Sess. 1975-1976) p. 3947, and quoted in *American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal. 3d 359, 363, fn. 1[.]) The response was to pass the various statutes that comprise MICRA to limit damages for lawsuits against a health care provider based on professional negligence. (Civ. Code, §§ 3333.1, 3333.2; Code Civ. Proc., § 667; Bus. & Prof. Code, § 6146.)" (*Delaney*, *supra*, 20 Cal.4th at pp. 33-34.)

Although appellants and their amici apparently wish that the law were otherwise, the Act by its plain language requires clear and convincing proof of aggravated misconduct by a "care custodian" amounting to "abuse of an elder." (*Delaney*, *supra*, 20 Cal.4th at p. 35; *Covenant Care, supra*, 32 Cal.4th at p. 779; CANHR amicus brief at p.

21 [acknowledging that *Delaney* and *Covenant Care* recognized those elements].) Now, 23 years after enactment of the Act's civil remedies, they claim to have discovered the "apparent" "error" of this court's prior interpretations of the custodial requirements of the statutory scheme. (*Id*. at pp. 21, 27-28; Consumer Attorneys amicus brief at pp. 3-5; ABM at pp. 27-32, 43.) They are mistaken.

Contrary to appellants' position and the *Winn* majority's approach, "elder abuse by a health care provider is not the same as even gross professional negligence." (Dis. opn., p.. 6; *Covenant Care, supra*, 32 Cal.4th at p. 785; contra CANHR amicus brief at pp. 25-28 [arguing that this court "erred" in holding that conduct amounting to "neglect" and "professional negligence" are mutually exclusive].) The standard of egregiousness required to show "reckless neglect" under the Elder Abuse Act tantamount to intentional conduct, and such conduct must be present in a custodial setting. These requirements cannot be simply ignored as *dicta*. In both *Delaney* and *Covenant Care*, "the court supported its analysis with references to the Legislature's intent to protect *elders and dependent adults in custodial settings*, and to *eliminate institutional abuse*. (*Delaney*, at pp. 33, 36-37; *Covenant Care*, at p. 787.)" (Dis. opn., p. 7, emphasis added.)[1]

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[1] *Delaney*, *supra*, 20 Cal.4th at p. 35, emphasized the point: "This difference in focus can be clarified by considering the differing types of conduct with which section 15657 and MICRA are concerned[;] … 'neglect' does not refer to the performance of medical services … but rather to *the failure of those responsible for attending to the basic need*s and comforts of elderly or dependent adults, regardless of their professional standing, ***to carry out their custodial obligations***." (Emphasis added.)

Respondents and Justice Bigelow aptly describe the predictable consequences of the majority's unwarranted departure from the established interpretation of the Elder Abuse Act provided by this court's controlling precedents, unduly expanding the scope of liability under the Act for outpatient medical treatment. Medical providers treating patients outside of the custodial care context will be faced with the additional complexity and expense of defending claims of aggravated misconduct. The statutory protections otherwise available to members of the medical profession under MICRA would be frustrated, and the cost of care (to account for the additional risks of practice, malpractice insurance, etc.) are bound to increase as a result. (Petition, pp. 20-24; OBM at pp. 27-28, 37-41; dis. opn. at pp. 5-8.)

For example, if the *Winn* majority's opinion is allowed to stand, it will be easy enough to circumvent MICRA in many garden-variety misdiagnosis or "failure to refer" cases by artfully pleading that the physicians acted with deliberate or reckless disregard of the patient's welfare; particularly where, as in this case, the health care provider is treating a chronic and acute condition—all without the procedural protections ordinarily afforded to doctors in "screening" claims of intentional misconduct, and the limitations on financial liability that apply under MICRA. (Petition, pp. 21-23; OBM at pp. 38-41.) "Despite plaintiffs' remarkably careful pleading, it remains clear the theory advanced in the complaint is that defendants did not do the *right* thing to treat Cox's condition, as judged by medical standards. This is classic professional negligence." (Dis. opn., p. 5.) Nothing more.

Notwithstanding the revisionist history urged by appellants, the artful pleading of "neglect" under the Act by coloring the facts of Mrs. Cox's outpatient treatment cannot validate their disregard of the Act's

fundamental requirements that in order to state a cause of action the denial of medical treatment must arise from "custodial obligations" of a "care custodian." (See RBM at pp. 14-15.)

As in other contexts, the court should reject the transparent attempt to create new categories of "intentional" tort liability as a means of circumventing the protections afforded to health care providers under MICRA. (See, e.g., *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 9-10) [declining to recognize a tort cause of action for first-party intentional spoliation of evidence as an exception to MICRA]; *Temple Community Hospital v. Superior Court* (1999) 20 Cal.4th 464, 466 [no exception for third-party spoliation].)

The gravamen of the cause of action and not the "label" placed upon it by the plaintiff that determines the availability of the statutory remedies and defenses afforded to the parties. (See generally *Rubin v. Green* (1993) 4 Cal.4th 1187, 1202; *Covenant Care*, *supra*, 32 Cal.4th at p. 786; see also dis. opn. at p. 5.) Determining whether the gravamen of *this* lawsuit states a cause of action for "neglect" under the Act, or involves an exempt claim for professional negligence, is fundamentally a judicial function. (*Delaney*, *supra*, 20 Cal.4th at pp. 33-37; *Covenant Care*, *supra*, at pp. 786-787.) Not a matter for juries to parse based upon plaintiffs' characterization of the labels they place on those "mutually exclusive" claims. (*Ibid*; OBM at p. 25; RBM at pp. 15-16; cf. ABM at p. 39; Consumer Attorneys amicus brief at p. 3, fn. 1.)

### B. In Applying the Civil Remedies of the Elder Abuse Act to Alleged Negligent Treatment in the Context of Outpatient Medical Services, *Winn* Cannot be Reconciled with the Legislature's Intent to Exempt Claims of "Professional Negligence" Outside of the Custodial Care Setting

Both sides agree that where the language of the statute is clear in relation to its stated purposes (as it is in this context), the inquiry ends there. (ABM at p. 22; OBM at pp. 13-14, citing *Lungren v.Deukmejian* (1988) 45 Cal.3d 727, 735.) Even if that were not the case, however, the legislative history of the Act and later amendments (some of which were judicially noticed by *Delaney*, *supra*, at pp. 33-37) conclusively resolves the issue of whether the Legislature intended to exempt professional negligence claims against health care providers, such as Respondents, arising from services outside of a custodial care setting. Clearly, it did.

As originally enacted, and in later amendments, those adopting the Act emphasized the nature of the *custodial obligations* imposed upon any "care provider" subject to its purview. *Delaney* observed: "From this legislative history, it appears clear that both the Legislature that enacted Senate Bill No. 679 and the opponents of Senate Bill No. 679 understood that *one of the major objectives of this legislation was the protection of residents of nursing homes and other health care facilities*. It is contrary to this objective to then read the phrase 'based on ... professional negligence' found in section 15657.2 to mean that nursing homes or other health facilities are largely exempt from liability under section 15657 *for the heightened remedies* ***to which custodians*** *who are not health care professionals are subject*." (*Delaney*, *supra*, 20 Cal.4th at pp. 36-37,

emphasis added.)

When the California Medical Association objected to subsequent amendments of the Act in the 1998 Session that imposed greater reporting obligations on medical providers to report elder abuse, the Assembly Republican Caucus reemphasized the underlying intent of the Act to exempt *non-custodial* health care providers from its scope: "[T]he only doctors who will be liable under this law will be either those with direct *supervision of the elder or doctors in charge of facilities or others with supervision over the elder*." (Assem., Republican Caucus, Analysis of Sen. Bill No. 2199 (1997-1998 Reg. Sess.) as amended Apr. 28, 1998 (June 26, 1998) p. 1 (emphasis added); Respondents' RJN Ex. **; OBM at p. 13; RBM at pp. 27-28; see also Welf. & Inst. Code, § 15657.2; *Delaney*, *supra*, 20 Cal.4th at pp. 35-37 [discussing legislative history of the exemption].)

Ignoring the purposes and context of the Act, appellants read the language of the statute out of context, adding and subtracting words when it suits their arguments that the law was intended to apply more broadly to health care practitioners "wherever" and "whenever" they may be performing professional services for a patient over the age of 65. (See RMB at pp. 23-26; cf. ABM at pp. 29-32, 43.)

By stretching to apply the "enhanced remedies" of the Elder Abuse Act to professional negligence committed during the course of providing outpatient medical care to a competent adult (the decedent Mrs. Cox), appellants and the *Winn* majority disregard the fundamental (and fundamentally different) purposes and intent that underlie both the Act and MICRA. "The legislative history shows that the Court of Appeal's interpretation is not plausible" in light of the specific evils to be remedied by the Act; it should be rejected. (*Delaney*, *supra*, 20 Cal.4th at pp. 30.)

### C. *Winn* Conflicts With Better-Reasoned Decisions by Other Courts of Appeal That Follow *Delaney* and *Covenant Care*

The majority opinion not only conflicts with *Delaney* and *Covenant Care*, but also cannot be squared with the numerous subsequent Court of Appeal decisions that have faithfully followed this court's precedent. *Winn* unnecessarily exacerbates this conflict in attempting to extend factually specific applications of the Elder Abuse Act in *Mack* and other *custodial care* cases far beyond the rationale of those decisions. (Slip opn. at pp. 10-12; cf. petition, pp. 15-20; dis. opn. at pp. 4-6.)

In contrast, Justice Bigelow's dissent harmonizes the pertinent authority, applying the Act in logical fashion consistent with the articulated purposes and explicit limitations of the legislation. Justice Bigelow painstakingly examined this court's analysis in *Delaney* and *Covenant Care*, and their progeny "distilling several factors … that render conduct [reckless] neglect under the Act" as opposed to professional negligence. (Dis. opn., p. 5, citing *Carter v. Prime Health care Paradise Valley* LLC (2011) 198 Cal.App.4th 396, 406-407 (*Carter*).)

The dissent fittingly observed that each of the cases relied upon by the majority—ostensibly supporting a broader application of the Act's enhanced civil remedies against providers of medical services—had actually involved the deprivation of basic medical treatment from elderly, dependent and vulnerable patients who were receiving such treatment in a *custodial* care setting under far more egregious circumstances than presented by this record. (See dis. opn., p. 5, citing *Mack, supra,* 80 Cal.App.4th at p. 969 [decedent was resident in nursing and rehabilitation facility, had deteriorating mental faculties; defendant-doctor concealed decedent's injury, abandoned care and

opposed hospitalization]; *Sababin v. Superior Court* (2006) 144 Cal.App.4th 81, 85 [dependent adult had disorder that caused loss of cognitive and mental functions; neglected in rehabilitation facility]; *Benun v. Superior Court* (2004) 123 Cal.App.4th 113, 116 [blind nursing home resident suffering from Alzheimer's disease]; *Smith v. Ben Bennett, Inc.* (2005) 133 Cal.App.4th 1507, 1512 [decedent was abused, beaten, denied medical treatment in skilled nursing facility].)

This court should correct *Winn's* glaring misinterpretation of the statutory language, and misapplication of the Elder Abuse Act's true intent, by reaffirming its prior interpretations in *Delaney* and *Covenant Care* regarding the scope and purpose of the Act's civil remedies provisions. Other appellate courts have prudently followed and applied that binding precedent over the years as the last word of our Supreme Court on the meaning of the Act. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) This court should emphasize that its prior holdings in in *Delaney* and *Covenant Care*, including recognition of the legislative admonitions against characterizing medical negligence as "elder abuse" or "neglect" under the Act, were more than more than just *dicta*. And, in the process, the court will restore much needed guidance to counsel and the courts in future similar cases where questions of statutory interpretation have long been settled by California's highest judicial authority without subsequent, or contrary, legislative intervention.

## CONCLUSION

Under appellants' misguided view of the Elder Abuse Act, the line between professional negligence and elder abuse would be "blurred to the point of extinction." (Dis. opn. at p. 8.) The majority opinion below surprisingly embraced their untenable arguments in a manner that would

permit garden-variety medical malpractice claims against physicians and other California health care providers to proceed in the guise of "elder abuse" actions subject to enhanced civil remedies, including punitive damages. That result is wholly inconsistent with the language and underlying purposes of the Act, and with this court's controlling precedents that have consistently interpreted the Legislature's clear intent to exempt "professional negligence" claims (like this one) from its purview.

If the Legislature someday determines that it would be wise to depart from the sound policies that, up until now, have compelled the kind of reasoned statutory distinctions being made between "neglect" under the Act, and "professional negligence" under MICRA, the people's elected representatives doubtlessly know how to do that. Meanwhile, neither the language of the Act nor the history of its underlying purposes remotely justify the interpretation urged by appellants.

The decision of the Court of Appeal should be reversed.

DATED: March 31, 2013

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**WORD COUNT CERTIFICATION [CRC 8.204(c)]**

Counsel for Amicus Curiae Association of Southern California Defense Counsel certifies that the Application for Leave to File Amicus Curiae Brief contains 1,115 words and that ASCDC's Amicus Curiae Brief in Support of Respondents contains *** words, including footnotes, for a total of *** words as measured by the Word 2010 word processing software used in the preparation of the application and the brief.

DATED: March 31, 2014

Respectfully submitted,

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