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September 23, 2014

ELECTRONICALLY FILED

Honorable Richard M. Aronson, Presiding Justice
and Associate Justices Richard D. Fybel and Raymond J. Ikola
California Court of Appeal
Fourth Appellate District, Division Three
601 W. Santa Ana Blvd.
Santa Ana, CA 92702

Re: ***Larson v. UHS of Rancho Springs, Inc. et al.***
Case No. G050081
Opinion Date: September 3, 2014
Request for Publication

Dear Presiding Justice Aronson and Associate Justices:

We write on behalf of the Association of Southern California Defense Counsel (ASCDC or Association) to request publication of this court's decision filed on September 3, 2014.

ASCDC is the nation's largest and preeminent regional organization of lawyers devoted to defending civil actions, comprised of approximately 1,100 attorneys in Southern and Central California. ASCDC is actively involved in assisting courts and the trial bar in addressing legal issues of interest to its members and the public.

In addition to representation in appellate matters, the Association provides members with professional fellowship, specialized continuing legal education, representation in legislative matters, and multifaceted support, including a forum for the exchange of information and ideas focusing on the improvement of the administration of justice, trial, and litigation practice.

Association members routinely represent professional clients (e.g., attorneys, accountants, insurance, financial services, and health care providers) in the defense of civil actions alleging a variety of tort claims. ASCDC has been actively involved for many years assisting courts in the resolution of legal issues of interest to its members and the clients they represent, including appearance as amicus curiae in numerous cases, including, *Howell v. Hamilton Meats & Provisions* (2011) 52 Cal.4th 541, *Cassel v. Superior Court* (2011) 51 Cal.4th 113, *Reid v. Google* (2010) 50 Cal.4th 512, *Kibler v. Northern Inyo County Hospital District* (2006) 39 Cal.4th 192, *Viner v. Sweet* (2003) 30 Cal.4th 1232, and *Summit Financial Holdings v. Continental Lawyers Title* (2002) 27 Cal.4th 1160.

Consequently, the Association and its constituent members have a substantial interest in publication of decisions pertinent to the standards applicable to claims of professional malpractice, including the application of statutes of limitations. ASCDC asserts the *Larson* decision should be certified for publication because it "explains ... an existing rule of law," "[a]ddresses ... an apparent conflict in the law," "[i]nvolves a legal issue of continuing public interest," and "[m]akes a significant contribution to legal literature by reviewing ... judicial history of a provision of a ... statute." (Rule 8.1105(c)(3), (5)-(7), Cal. Rules of Court.)

DECISION SHOULD BE PUBLISHED BECAUSE OF ITS CONTEXTUAL EXPLANATION FOR THE APPLICATION OF MICRA

The *Larson* decision should be published because of its explanation that the Medical Injury Compensation Reform Act (MICRA) applies when the nature of the acts alleged form part of the professional health care services of a licensed health care provider. (Typed op., p. 17.)

Larson arose from application of the statute of limitations of Code of Civil Procedure section 340.5. (Typed op., p. 10.) As *Larson* observed, the explanation also guides the application of other MICRA "statutes that abolished the collateral source rule (Civ. Code, § 3333.1), limited noneconomic damages to $250,000 (Civ. Code, § 3333.2), authorized periodic payments of future damages without the plaintiff's consent (§ 667.7), limited the contingency fees attorneys could charge (Bus. & Prof. Code, § 6146), authorized arbitration agreements in medical services contracts (§ 1295), and required prior notice to health care providers before a malpractice action may be commenced (§ 364)." (Typed op., pp. 10-11.)

If published, the decision would provide needed guidance on application of MICRA based upon the "context" of a plaintiff's factual allegations, taking into account the principle of "*truthful pleading*" and "the nature or gravamen of the claim, not the label or form of action the plaintiff selects" to assess whether allegations of a complaint against a health care provider are "based upon such person's alleged professional negligence." (Typed op., pp. 8, 12.)

The *Larson* decision recognizes that the facts alleged by plaintiff demonstrated consent to medical services, such that the propriety of the acts or omissions of the defendant hinged on whether there was a "fail[ure] to meet the applicable standard of care in rendering ... services," with the court explaining: "Admittedly, punching a patient is not part of the professional services an anesthesiologist customarily provides, but none of the complaints in the Earlier Action alleged Shuman punched Larson in any manner. Instead, the complaints in the Earlier Action, and the allegations of the operative complaint, show Larson's claims are based on how Shuman performed his preoperative checkup and how he administered the anesthesia. Larson alleges Shuman performed some of the tasks "forcefully" and "violently," but those self-serving characterizations are merely attempts to avoid MICRA and the restrictions it imposes on all medical malpractice claims. Despite Larson's characterizations, the nature of the acts on which he bases his claims form part of the professional health care services Shuman rendered as an anesthesiologist. Larson simply claims Shuman performed his professional services in an unnecessarily harsh and forceful manner." (*Id.* at p. 17.)

Parties and trial courts regularly confront these issues in actions against health care providers. As acknowledged within *Larson*, there are important underlying social policies advanced by MICRA. (*Id.* at 14.) Those social policies have otherwise been emphasized by the Supreme Court in *Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, wherein the Supreme Court "recounted": "[T]he Legislature enacted MICRA in response to a medical malpractice insurance 'crisis,' which it perceived threatened the quality of the state's health care. [Citation.] In the view of the Legislature, 'the rising cost of medical malpractice insurance was imposing serious problems for the health care system in California, threatening to curtail the availability of medical care in some parts of the state and creating the very real possibility that many doctors would practice without insurance, leaving patients who might be injured by such doctors with the prospect of uncollectible judgments.' [Citations, including reference to "preamble to MICRA"].) The continuing availability of adequate medical care depends directly on the availability of adequate insurance coverage, which in turn

operates as a function of costs associated with medical malpractice litigation. [Citation.] Accordingly, MICRA includes a variety of provisions all of which are calculated to reduce the cost of insurance by limiting the amount and timing of recovery in cases of professional negligence." (*Western Steamship* at pp. 111-112.)

"MICRA thus reflects a strong public policy to contain the costs of malpractice insurance by controlling or redistributing liability for damages, thereby maximizing the availability of medical services to meet the state's health care needs." (*Id.* at p. 112.)

Relative to MICRA's shortening of the statute of limitations, accomplished by section 340.5, in *Young v. Haines* (1986) 41 Cal.3d 883, the Supreme Court instructed: "Commentators had observed that the delayed discovery rule and the resulting 'long tail' claims made it difficult to set premiums at an appropriate level. [Citations.] Presumably, the legislative goal in amending section 340.5 was to give insurers greater certainty about their liability for any given period of coverage, so that premiums could be set to cover costs." (*Id.* at 900.) Summarizing, *Photias v. Doerfler* (1996) 45 Cal.App.4th 1014 explained: "The Legislature's objective was to reduce the number of 'long tail' claims attributable to the tolling provisions formerly available in malpractice actions." (*Id.* at 1019-1020.)

Western Steamship instructed that application of the MICRA statutes to accomplish the Legislative purposes is a function "consonant with the role of the courts 'to aid in the familiar common law task of filling in the gaps in the [MICRA] statutory scheme.'" (*Id.* at 112-113; citing *American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359, 378.) Publication of *Larson* would advance the interest of "filling in the gaps."

Parties and trial courts would benefit from the guidance that *Larson* provides relative to the assessment of the factual context of allegations in assessing the potential applicability of MICRA.

The need for guidance and the appropriateness of publication is indicated by this Court's critical analysis and distinction of the decision in *So v. Shin* (2013) 212 Cal.App.4th 652, a relatively recent decision of the Second District, concluding wherein the actions of an anesthesiologist "engaged in conduct for her own benefit—for the purpose of persuading the plaintiff not to report that she awoke during the procedure," such that "the alleged negligence was not undertaken 'in the rendering of professional services.'" (Typed op., p. 20; quoting *So* at p. 20.)

Indeed, beyond *So*, the assessment of the applicability of MICRA to alleged wrongful conduct of health care providers is an issue that is presently being reviewed by the California Supreme Court in two cases, highlighting why this Court's decision should be published. First, in *Flores v. Presbyterian Intercommunity Hospital,* review is to assess whether "the injury in this case arise[s] out of 'professional negligence,' as that term is used in section 340.5, or ordinary negligence," following a decision by the Second District that MICRA did not apply to a patient's injury from "when the bed rail collapsed causing plaintiff to fall to the ground injuring her left knee and elbow." (Case No., S209836; Court of Appeal decision at 153 Cal.Rptr.3d 413, 422.) Second, in *Winn v. Pioneer Medical Group*, the Supreme Court is considering whether "'neglect' within the meaning of the Elder Abuse and Dependent Adult Civil Protection Act (Welf. & Inst. Code, § 15657) include[s] a health care provider's failure to refer an elder patient to a specialist if the care took place on an outpatient basis," following a Court of Appeal decision declining to apply MICRA. (Case No. S211793; Court of Appeal decision at 157 Cal.Rptr.3d 124, 135.)

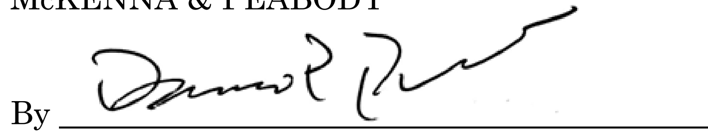
Finally, *Larson* points to an answer to the hypothetical posed in *Smith v. Ben Bennett, Inc.* (2005) 133 Cal.App.4th 1507 (and discussed by the Court of Appeal in *Winn*) of whether MICRA would apply to "the hypothetical of a surgeon who recklessly 'fails to wear his mask into the operating room and then sneezes into the [elder] patient's body cavity...." (*Smith* at 1525-26.) *Smith* "decline[d] to be horrified by the possibility that the sternutatious surgeon could not invoke MICRA.... The Legislature could reasonably view this [the hypothetical] as egregious conduct." (*Ibid.*) Under *Larson's* contextually driven rule, MICRA would apply to the hypothetical, with a sternutatious surgeon's conduct being evaluated to determine whether there was breach of the standard of care and any enhanced remedies for "egregious" sneezes would be addressed by Code of Civil Procedure section 425.13 (whether a claim for punitive damages could be asserted).

In these ways *Larson* addresses "apparent conflict in the law" and "[i]nvolves a legal issue of continuing public interest." (Rule 8.1105(c)(5)-(6).) Further, considering the issues pending in the Supreme Court, the *Larson* decision "[m]akes a significant contribution to legal literature by reviewing ... judicial history of a provision of a ... statute." (Rule 8.1105(c)(7).)

For these reasons, the Association respectfully requests that the court publish its decision in *Larson v. UHS of Rancho Springs, Inc., et al.*

Respectfully submitted,

CARROLL, KELLY, TROTTER, FRANZEN,
McKENNA & PEABODY



By ______________________________
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cc: See attached Service List

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STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 111 West Ocean Boulevard, 14th Floor, Long Beach, CA 90802-4646. On September 23, 2014, I served a true and correct copy of the following document(s) on the attached list of interested parties:

REQUEST FOR PUBLICATION

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(X) **By Overnight Delivery/Express Mail** (CCP §§1013(c)(d), et seq.): I enclosed said document(s) in a sealed envelope or package provided by an overnight delivery carrier to each addressee. I placed the envelope or package, delivery fees paid for, for collection and overnight delivery at an office or at a regularly utilized drop box maintained by the express service carrier at 111 West Ocean Boulevard, Long Beach, California.

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Executed on September 23, 2014, at Long Beach, California.

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