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CLERK SUPREME COURT

The Honorable Tani Cantil-Sakauye, Chief Justice
and Honorable Associate Justices
Supreme Court of California
350 McAllister Street, Fourth Floor
San Francisco, California 94102-4797

Re: Kathleen A. Winn, et al. v. Pioneer Medical Group, Inc., et al., Case No. S211793

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Amici Curiae California Medical Association (CMA), California Hospital Association (CHA), California Dental Association (CDA), and American Medical Association (AMA) urge the Court to grant defendant Pioneer Medical Group, et al.'s petition for review. The issue presented in this case is very important to California patients and health care providers.

I. Introduction

Professional negligence is governed by the Medical Injury Compensation Reform Act of 1975 (MICRA), and is defined as "a negligent act or omission to act by a health care provider in the rendering of professional services." (See, e.g., Civ. Code §§ 3333.1, subd. (c)(2).) The scenario alleged in this case—the alleged failure of healthcare providers to properly treat an outpatient's medical condition by referring her to an appropriate specialist—is a classic example of an "omission to act by a health care provider in the rendering of professional services."

Because the patient here was over 65, however, plaintiffs asserted a cause of action for reckless neglect under the Elder Abuse and Dependent Adult Civil Protection Act ("Elder Abuse Act"), Welfare & Institutions Code §§ 15600, et seq., which provides for increased penalties and attorneys' fees for a "*failure to provide medical care* for physical and mental health needs." The Elder Abuse Act expressly excludes claims for professional negligence, and this Court has held that reckless neglect and professional negligence are "mutually exclusive." (*Covenant Care v. Superior Court* (2004) 32 Cal.4th 771, 785 (*Covenant Care*).) Nevertheless, the *Winn* majority held that it is not "anomalous to allege...that the same facts may prove professional negligence and also elder abuse or neglect." (Op., 19.)

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The *Winn* decision fails to recognize the critical and necessary difference between reckless neglect and professional negligence, and as a result it interprets the Elder Abuse Act in a way that fundamentally conflicts with MICRA. As dissenting Justice Bigelow noted in the *Winn* opinion, under the majority's reasoning "the line between 'reckless neglect' and 'professional negligence' risks becoming blurred to the point of extinction." (Op. dissent, 8.) Review is necessary to clarify that an omission to act by a health care provider in rendering professional services to an outpatient, which falls squarely within MICRA's definition of professional negligence, may not be alleged as reckless neglect under the Elder Abuse Act simply because the patient is over the age of 65.

II. Interests of Amici.

CMA is a nonprofit, incorporated, professional association of more than 37,000 physicians practicing in California, in all specialties. CDA represents almost 24,000 California dentists, over 70 percent of the dentists engaged in the private practice of dentistry in California. CMA and CDA are the largest organizations representing physicians and dentists engaged in private practice in California. CHA is the statewide leader representing the interests of nearly 400 hospitals and health systems in California. CMA, CDA, and CHA are active in California's courts in cases involving issues of concern to the healthcare community, including submission of amici briefs and participation in oral argument for the instructive cases *Covenant Care, supra*, 32 Cal.4th 771 and *Delaney v. Baker* (1999) 20 Cal.4th 23, 30) (*Delaney*).)

AMA is the largest professional association of physicians, residents, and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all U.S. physicians, residents, and medical students are represented in the AMA's policy making process. The objectives of AMA are to promote the science and art of medicine and the betterment of public health.

AMA joins this brief on its own behalf and as a representative of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among AMA and the medical societies of each state, plus the District of Columbia, whose purpose is to represent the viewpoint of organized medicine in the courts.

Some funding for this letter brief was provided by organizations and entities that share amici's interests, including physician-owned and other medical and dental professional liability organizations and non-profit and governmental entities engaging physicians for the provision of medical services, specifically: Cooperative of American Physicians, Inc.; Kaiser Foundation Health Plan, Inc.; The Mutual; Medical Insurance

Exchange of California; The Dentists Insurance Company; NORCAL Mutual Insurance Company; and The Regents of the University of California.

III. The *Winn* majority erred in relegating the difference between professional negligence and reckless neglect elder abuse to a jury question.

The *Winn* decision is erroneous because it concludes that facts constituting a professional negligence claim can be deemed "reckless neglect" under the Elder Abuse Act if the patient is over 65. (Op., 19.) The harmful effect of this ruling is evident in the court's statement that failure to refer the patient to a specialist may not ultimately be reckless neglect "[b]ut we cannot say that as a matter of law; the question is one for a jury to decide." (Op. 16.) The court failed to acknowledge that the facts of this case unquestionably constitute an omission to act by a healthcare provider in the rendition of professional services. Thus, any application of the Elder Abuse Act would circumvent the protections of MICRA that apply to professional negligence actions. This decision contradicts statutes and existing case law, creating a conflict that should be resolved by this Court.

Professional negligence is addressed by MICRA, which defines professional negligence as follows:

> "Professional negligence" means 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.

(Civ. Code §§ 3333.1, subd. (c)(2); 3333.2, subd. (c)(2); Code Civ. Proc. § 1295, subd. (g)(2); Bus. & Prof. Code § 6146, subd. (c)(3) (emphasis added).) The allegations in this case involve "an omission to act" by health care providers in rendering professional services—several physicians, while treating the patient's symptoms on an outpatient basis, allegedly failed to refer the patent to a specialist.

"Neglect" under the Elder Abuse Act is defined in Welfare & Institutions Code section 15610.57, subdivision (b): "'Neglect' includes . . . [f]ailure to provide medical care for physical and mental health needs" (Welf. & Inst. Code § 15640.57, subd. (b)(2)) and "failure to protect from health and safety hazards" (Welf. & Inst. Code, § 15640.57, subd. (b)(3)). Heightened remedies are allowed for "reckless neglect" under the Elder Abuse Act "[w]here it is proven by clear and convincing evidence that a defendant is liable for physical abuse...or neglect as defined in Section 15610.57, and that the defendant has been guilty of

recklessness, oppression, fraud, or malice in the commission of this abuse." (Welf. & Inst. Code, § 15657.)

Importantly, the Elder Abuse Act explicitly *excludes* professional negligence, stating that "any cause of action for injury or damage against a health care provider...based on the health care provider's alleged professional negligence, shall be governed by those laws which specifically apply to those professional negligence causes of action." (Welf. & Inst. Code, § 15657.2.)

This Court has made clear that professional negligence under MICRA and neglect under the Elder Abuse Act are necessarily separate. The term "professional negligence... was *mutually exclusive* of the abuse and neglect specified in section 15657." (*Covenant Care*, *supra*, 32 Cal.4th 771, 785 (emphasis added), quoting *Delaney*, *supra*, 20 Cal.4th 23, 30.) "The Elder Abuse Act's goal was to provide heightened remedies for, as stated in the legislative history, 'acts of egregious abuse' against elder and dependent adults...while allowing acts of negligence in the rendition of medical services to elder and dependent adults to be governed by laws specifically applicable to such negligence." (*Delaney*, 23 Cal.4th at 35.) Thus "the statutory definition of 'neglect' speaks not of the *undertaking* of medical services, but of the failure to *provide* medical care." (*Covenant Care*, 32 Cal.4th at 783 (emphasis in original).) The unanimous *Delaney* opinion, in which the Court was "considering the differing types of conduct with which section 15657 and MICRA are concerned," states:

> "[N]eglect" as defined in former section 15610.57 and used in section 15657 does not refer to the performance of medical services in a manner inferior to "the knowledge, skill and care ordinarily possessed and employed by members of the profession in good standing" [citation], but rather to the failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations.

(*Delaney*, 23 Cal.4th at 34.) Here, by contrast, plaintiffs have alleged inferior performance of medical services in defendants' alleged failure to recognize the severity of a medical condition and refer the patient to a specialist; plaintiffs have not alleged the "failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults...to carry out their custodial obligations."

The *Winn* opinion from the Court of Appeal is the first to hold that an elder abuse cause of action may be alleged where physicians were providing a patient occasional medical care on an outpatient basis (rather than during custodial care). As dissenting Justice

Bigelow noted, "The only thing that distinguishes this case from a standard medical malpractice claim is that Cox was over 65 years old." (Op., dissent 4.) The facts of this case, as alleged, constitute professional negligence based on an omission to act in the rendition of medical services—not elder abuse based on a failure to provide basic needs in a custodial setting.

The Court of Appeal ostensibly recognized that reckless neglect under the Elder Abuse Act and professional negligence are mutually exclusive (Op. 12), but nonetheless determined that the complaint in this case properly states a claim for Elder Abuse. This decision is anomalous. Claims based on an omission to act by a health care provider in the rendering of professional services—even if that omission constitutes malice, fraud or oppression—are governed by MICRA. (See *infra,* p. 7.)

The determination of which of two mutually exclusive statutory schemes properly governs a plaintiff's claims is not a fact question for the jury. This Court should grant review to clarify the scope of the Elder Abuse Act in cases such as this, where an elderly outpatient, in the course of receiving medical care, allegedly received substandard care through healthcare providers' alleged omissions to act.

IV. The policies of the Elder Abuse Act and MICRA are undermined by the *Winn* decision.

Review is also warranted because the *Winn* majority opinion places the Elder Abuse Act at odds with MICRA, and this Court's guidance is needed to ensure that these two important statutory schemes continue to exist harmoniously, as the Legislature intended.

MICRA's goal is to ensure access to care by reducing costs in the resolution of malpractice claims and therefore reducing malpractice insurance premiums. (*Ruiz v. Podolsky* (2010) 50 Cal.4th 838, 844.) MICRA "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." (*Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 112.)

The specific provisions of MICRA serve to regulate professional negligence litigation in a number of ways before, during, and after trial, including imposing a one-year statute of limitations (Code Civ. Proc., § 340.5), requiring advance notice of a claim (Code Civ. Proc., §§ 364, 365), encouraging binding arbitration for disputes (Code Civ. Proc., § 1295), allowing evidence of collateral source payments (Civ. Code, § 3333.1), limiting noneconomic damages (Civ. Code, § 3333.2), and providing for periodic payments for future damages (Code Civ. Proc., § 667.7). These provisions and their collective goal could be seriously undermined if *Winn* is interpreted to mean that professional negligence and

elder abuse may be alleged simultaneously or in the alternative, and that the difference is simply a jury question. If the gravamen of a complaint cannot be determined until the case has already been tried, all of the MICRA provisions relevant in the pretrial and trial stages of a case would become irrelevant. The Legislature surely did not intend this result.

Litigation is costly for physicians and their insurers, even in cases in which the physician is not ultimately found to be at fault. The average defense cost in 2011 for claims that were dropped was $28,729; for claims that settled, defense costs averaged $68,147; and for tried claims resulting in a defense verdict, defense costs averaged $150,308. (See American Medical Association, "Medical Liability Reform NOW!: The facts you need to know to address the broken medical system," 2013 ed., p. 6, <http://www.ama-assn.org/resources/doc/arc/mlr-now.pdf>; see also Richard E. Anderson, M.D., *Effective Legal Reform and the Malpractice Insurance Crisis* (2005) 5 Yale J. Health Pol'y, L. & Ethics 341, 345-46.) MICRA has been extremely successful in lowering insurance costs. According to the National Association of Insurance Commissioners, while total premiums in the rest of the United States rose 890 percent between 1976 and 2011, the increase in California premiums was less than one-third of that amount (256 percent). (See "Medical Liability Reform NOW!" *supra*, p. 21.)

MICRA's goals of ensuring Californians continued access to medical care would be seriously undermined by allowing the threat of enhanced elder abuse remedies in cases such as this one, where plaintiffs question the medical judgment of physicians in outpatient treatment spanning several years. A recent report states, "The nation faces an impending health care crisis as the number of older patients with more complex health needs increasingly outpaces the number of health care providers with the knowledge and skills to adequately care for them." (Institute of Medicine of the National Academies, *Retooling for an Aging America: Building the Health Care Workforce*, Apr. 11, 2008, <http://www.iom.edu/Reports/2008/Retooling-for-an-Aging-America-Building-the-Health-Care-Workforce.aspx>.)

If physicians treating patients over the age of 65 are subjected to enhanced remedies every time a patient's family questions the physician's judgment, treating California's mature population could become a high-risk specialty with high insurance premiums, diminishing elderly patients' access to medical care. (See, e.g., Emily Chow, *Health Courts: An Extreme Makeover of Medical Malpractice with Potentially Fatal Complications* (2007) 7 Yale J. Health Pol'y, L. & Ethics 387, 388-89 (noting that medical insurance crises in many states have forced physicians to give up practicing in high-risk specialties, putting patients at risk for decreased availability of skilled medical providers).) Alternately, since insurers are not liable for willful acts (Ins. Code, § 533) the enhanced remedies under the Elder Abuse Act may not be covered by malpractice insurance at all, thus putting physicians' personal assets at risk and even further discouraging physicians from treating the very population the Elder

Abuse Act is intended to protect. Indeed, the national medical community is already taking note of the *Winn* decision with trepidation. (See American Medical News, *Elder abuse claim adds new liability risk for doctors*, July 22, 2013, http://www.amednews.com/article/20130722/profession/130729968/5/.) Review is needed to ensure such a result does not occur.

Furthermore, plaintiffs suffering from egregious professional negligence are not without remedy, even without the enhanced penalties of the Elder Abuse Act. Code of Civil Procedure section 425.13 sets out the procedure for claiming punitive damages in medical malpractice actions involving malice, fraud, or oppression. (See Code Civ. Proc., § 425.13; *Covenant Care, supra*, 32 Cal.4th 771.) The heightened remedies of the Elder Abuse Act are therefore unnecessary in cases that allege errors in non-custodial medical care of patients over the age of 65.

The *Winn* majority erred by failing to read the Elder Abuse Act in a manner that promotes its goals and allows it to coexist in harmony with MICRA. Statutory provisions "must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) In cases of uncertain statutory meaning, a court should "consider the consequences of a particular interpretation, including its impact on public policy." (*Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1190.)

Here, the potential public policy implications are vast. For any other patient, the alleged failure to adequately treat an ongoing medical condition falls squarely under the definition of professional negligence: "a negligent act or omission to act by a health care provider in the rendering of professional services." To allow juries to find that such allegations constitute reckless neglect elder abuse if the patient is over 65 undermines MICRA's goals of regulating professional negligence litigation to ensure access to quality care. It also undermines the Elder Abuse Act's goal "to enable interested persons to engage attorneys to take up the cause of abused elderly persons and dependent adults" (Welf. & Inst.Code, § 15600, subd. (j)) because it could impose MICRA restrictions on elder abuse cases. As this Court has already held, such a result undermines the purposes of the Elder Abuse Act: "To burden such causes with section 425.13's procedural requirements...would undermine the Legislature's intent to foster such actions by providing litigants and attorneys with incentives to bring them." (*Covenant Care,* 32 Cal.4th at 787 (addressing Code Civ. Proc., § 425.13, relating to punitive damages in professional negligence cases).)

V. Conclusion

Plaintiffs' allegations are not based on a *lack* of medical care, but instead on the alleged *inadequacy* of the medical care provided to an outpatient. As the *Winn* opinion

interprets these allegations, the Elder Abuse Act may provide enhanced remedies and MICRA may provide certain restrictions *for the exact same physician conduct* based on the age of the patient and a plaintiff's allegations.

Clarification by this Court is needed to make clear that reckless neglect elder abuse and professional negligence are indeed mutually exclusive, as this Court has held in other contexts. The *Winn* interpretation of reckless neglect puts the core goals of the Elder Abuse Act and MICRA at risk. The California Medical Association, California Dental Association, California Hospital Association, and American Medical Association respectfully request that review be granted in this case to ensure that the important goals and effects of MICRA and the Elder Abuse Act are not undermined by conflicting readings of these two statutory schemes.

Sincerely,

TUCKER ELLIS LLP

Rebecca A. Lefler

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PROOF OF SERVICE

Kathleen A. Winn, et al.
Plaintiffs and Appellants
v.
Pioneer Medical Group, Inc., et al.
Defendants and Respondents

California Supreme Court Case No. S211793

I, **Estella Licon,** declare as follows:

On July 31, 2013, I served the following: **Letter dated July 31, 2013 to the Honorable Tani Cantil-Sakauye, Chief Justice and Honorable Associate Justices in Support of Petition for Review on behalf of Amici Curiae California Medical Association, California Hospital Association, California Dental Association, and American Medical Association** on the interested parties in this action by:

__X__ **U. S. MAIL:** By placing a true copy thereof enclosed in a sealed envelope(s) addressed as above, and placing each for collection and mailing on that date following ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service in Los Angeles, California, in a sealed envelope with postage fully prepaid.

PLEASE SEE ATTACHED SERVICE LIST

__X__ **(STATE):** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Los Angeles, California on July 31, 2013.

Estella Licon

ESTELLA LICON

SERVICE LIST

Kathleen A. Winn, et al.
Plaintiffs and Appellants
v.
Pioneer Medical Group, Inc., et al.
Defendants and Respondents

California Supreme Court Case No. S211793

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