Benjamin T. Ikuta
Ben@ih-llp.com

August 31, 2022

Honorable Justices of the Court of Appeal
First Appellate District, Division Four
350 McAllister Street
San Francisco, CA 94102

Re: Request for Publication in *Kernan v. Regents* (A162750)

Dear Honorable Justices:

Pursuant to California Rule of Court, rule 8.1120, we are writing to respectfully request publication of the above-titled case that was filed on August 29, 2022. Under California Rule of Court, rule 8.1120(a)(2), we are not counsel for any party in this action. Our small two-person firm practices almost exclusively in medical malpractice actions. Despite practicing on the plaintiff-side, both members of our firm have also spent years defending medical malpractice actions.

Publication of this opinion would be invaluable to trial courts and litigants in medical malpractice actions in relation to the "delayed discovery rule" and the one-year prong of Code of Civil Procedure section 340.5. While *Brewer v. Remington* (2020) 46 Cal.App.5th 14, 24 also dealt with the one-year prong and the delayed discovery rule, this Court explained in far more detail the subjective and objective tests for triggering the statute of limitations. (See Cal. Rules of Court, 8.1105(c)(4).) Moreover, the facts of this case involving the death of a full-term fetus are significantly different from the facts in *Brewer*. (See Cal. Rules of Court, 8.1105(c)(2).)

Here, the trial court granted summary judgment based primarily on the fact that Appellant knew that she had lost her baby on November 5, 2016. While she delivered a stillborn on November 6, 2016, Appellant waited until November 6, 2017 to send a letter under Code of Civil Procedure section 364. Accordingly, Respondent argued that her case was one day late.

While this matter involved a stillborn, the facts of this case would also be directly relevant to newborn death cases. Given the new changes in MICRA's Civil Code section 3333.2 as to the general damage caps under AB-35 that will go in effect in 2023, there may be a small uptick in cases involving stillborn and newborn death cases. It would be extremely helpful to litigants moving forward to have some clarity as to the statute of limitations.

The trial court relied on the horrifying event and outcome to find that Appellant's clock started on November 5, 2016. As stated at the subject hearing, the trial court remarked: "So it

seemed to me, on this record, that the tragic death of a child in child birth . . . was sufficient to put the Plaintiff on inquiry notice as to the cause of that death absent some other reason, such as a preexisting medical condition that the mother may have been aware of prior to the birth." (See 2 RT 11; Respondent's Brief at p. 16.)

Likewise, on appeal Respondent vigorously argued that the trial court correctly granted summary judgment on the date that Appellant learned of her child's demise: "Here, plaintiff's 'knowledge of the fact of death' on November 5, 2016, coincides with the time that a reasonable person would have suspected the death was caused by wrongdoing." (Respondent's Brief at p. 28.)

As this Court aptly explained, under the objective test, a bad result does not automatically put a reasonable person on notice that there was negligence. Indeed, even as of November 7, 2016 following delivery, it was still unclear as to what caused the baby's heart to stop beating. At a minimum, there was a triable issue of fact as to whether a reasonable person would have suspected negligence as of November 5, 2016.

As for the subjective test, this Court noted that there was a factual dispute about whether Appellant requested an autopsy at all. Even if she had requested an autopsy, that is not conclusive evidence that she was aware of the negligence on November 5, 2016. Instead, a juror could conclude that Appellant was seeking closure.[1] This Court also noted the continued care that Plaintiff received, which was evidence that Appellant continued to trust Respondent.

In short, this case meets the requirements for publication given the clarity it provides in relation to the one-year prong and the delayed discovery rule.

Very truly yours,

IKUTA HEMESATH, LLP

BENJAMIN T. IKUTA

BTI/bti

[1] The undersigned was particularly moved by this Court's explanation. The undersigned lost his first child after 3 days of life on June 13, 2018. The undersigned had an autopsy performed on his child not because of any suspicion of negligence or wrongdoing. Rather, the autopsy was performed both for closure as well as to address similar potential problems in future pregnancies.