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March 20, 2025

Honorable Justices of the Court of Appeal
Fourth Appellate District, Division Three
601 W. Santa Ana Blvd.
Santa Ana, CA 92701

Re: Request for Publication in *Montoya v. Superior Court (Fowler)* (Case Number G064459)

Dear Honorable Justices:

On behalf of Consumer Attorneys of California ("CAOC"), 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 February 28, 2025.

If published, this opinion would apply an existing rule of law to a set of facts significantly different than those stated in published opinions. (See Cal. Rule of Court, rule 8.1105(c)(2).) Specifically, this would be the first case that applied burden-shifting as to causation in a medical malpractice case.[1] This case would provide critical guidance to litigants and trial courts when a tortfeasor's negligence renders it impossible to determine the exact nature and extent of a patient's harm. In addition, not only would this opinion be the first case to apply burden-shifting in medical malpractice cases, it would clarify and explain existing law. This is particularly important given the dearth of case law. (See Cal. Rule of Court, rules 8.1105(c)(3).)

In fact, the trial court in this case erred in part because there was not much guidance in the way of published cases. The trial court commented that "there aren't many . . . burden-shifting cases." Ultimately, the trial court

[1] In a footnote and in dicta, the Second District in *Thor v. Boska* (1974) 38 Cal.App.3d 558, 568 fn. 8 indicated that the burden-shifting instruction would be appropriate in medical malpractice cases where causation-related evidence was unavailable due to the defendant's wrongful conduct.

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agreed with Defendant that such an instruction was improper as it would require every medical malpractice case involving an omission to use a burden-shifting instruction.

This opinion explains that the floodgates would not open in every medical malpractice case involving a negligent omission. This opinion outlines the criteria that a plaintiff in a medical malpractice case must show before the instruction is given. First, the plaintiff must show that the defendant was negligent in the omission. Second, the plaintiff must show a prima facie case of causation in that there is reason to believe that the omission caused some level of harm. And third, the plaintiff must show that had the omission not occurred, evidence *would* have existed to show the extent of the plaintiff's harm.

As to the second element on the prima facie case of causation, this court explained that: "[t]he requirement to make a prima facie case of causation, though it must be tempered by the fact that the defendant's breach caused an absence of evidence, will prevent parties from taking mere 'shots in the dark.' There must be *some plausible* reason to believe that the defendant's negligence caused plaintiff's harm."

This opinion then states: "The third requirement, that the missing evidence be critical to proving causation, further serves to limit the cases to which burden shifting applies. In many instances, for example, the failure to perform a particular diagnostic test will not critically impair a plaintiff's ability to prove causation because causation can be determined by other evidence."

The opinion provided a hypothetical where if the negligent omission was the failure to perform a thrombectomy rather than ordering a CT scan, such an instruction would not be appropriate.

This guidance would be invaluable in medical malpractice cases for both trial courts and litigants. A plaintiff must still show a connection between the negligent omission and the harm. However, where the negligent omission makes it impossible to prove damages *with specificity* due to missing evidence, the defendant should bear the burden on causation. Otherwise, such medical

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malpractice cases would run afoul of Civil Code section 3517, which states: "No one can take advantage of their own wrong."

This opinion also correctly criticizes errant, incorrect, and confusing language in *Thomas v. Lusk* (1994) 27 Cal.App.4th 1709, 1718. It also addresses head-on the tension, if not outright conflict, between *Galanek v. Wismar* (1999) 68 Cal.App.4th 1417 and *Thomas v. Lusk* (1994) 27 Cal.App.4th 1709. (See Cal. Rule of Court, rules 8.1105(c)(3) & (c)(5).)

Thomas involved a legal malpractice case where the underlying case involved a case against a product manufacturer after an employee was injured due to an allegedly malfunctioning hammer. The non-party employer initially retained the hammer but, at some point, it became lost. (*Thomas, supra,* 27 Cal.App.4th at p. 1713.) The employee's former attorney failed to request the hammer on a timely basis when it could still be located. (*Ibid.*) In a confusing opinion, the First District Court of Appeal found that the trial court erred in providing a *Haft* instruction. (*Id.*at p. 717.) While the Court of Appeal admitted that proving causation was made more difficult by the loss of the hammer, the primary basis for the reversal appears to be that both the employee and the nonparty employer had access to the hammer before it was lost. (*Ibid.*) In doing so, the *Thomas* court stated: "The essential principle underlying this narrow exception to the usual allocation of proof is that the burden of proving an element of a case is more appropriately borne by the party with greater access to information." (*Ibid.*)

While *Thomas* is distinguishable on its facts, this Court articulated that the above passage in *Thomas* misstates the burden-shifting requirements. As this court aptly explained: "We question some of the rationale in *Thomas.* In particular, we disagree that the 'essential principle' in *Haft* was allocating the burden to the party with the best access to the evidence. In *Haft*, there was no evidence."

Instead, as this opinion held, the *Haft* and *Galanek* decisions explain that "when critical evidence of causation does not exist, *and the defendant breached a duty to create or preserve that evidence*, defendant should bear the

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burden of rebutting a presumption of causation. The defendant should suffer the consequences of his own breach, not benefit from it."

Galanek v. Wismar (1999) 68 Cal.App.4th 1417, 1422 was correctly decided and well-reasoned in holding that when a defendant's wrongful conduct causes critical causation evidence to not exist, the defendant should bear the burden of causation. As *Galanek* held, a defendant "cannot be insulated from personal liability by the very act of professional negligence that subjects him to liability." (*Ibid.*) However, *Galanek* did not directly address or criticize the contrary language and holding in *Thomas*, despite containing a relatively similar fact pattern.

In this case, Defendant relied heavily on *Thomas*. Both the language in *Thomas* and the dearth of case law in burden-shifting in causation cases will continue to cause errors and confusion. Publication of this opinion would be invaluable in providing assistance to litigants and trial courts in medical malpractice actions.

Statement of Interest: CAOC, founded in 1962, is a voluntary non-profit membership organization representing over 6,000 consumer attorneys practicing in California. Its members predominantly represent individuals subjected to consumer fraud, unlawful employment practices, personal injuries and insurance bad faith. CAOC has taken a leading role in advancing and protecting the rights of consumers, employees and injured victims in both the courts and the Legislature.

Very truly yours,

IKUTA HEMESATH, LLP

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BTI/bti

cc: All counsel in the underlying action through Truefiling

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