HODES • MILMAN, LLP

December 24, 2020

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

Re: Request for Publication in *Filosa v. Avagappan et al.* (No. A156412)

Dear Honorable Justices:

We respectfully request publication of the above-titled case that was filed on December 21, 2020 under California Rule of Court, rule 8.1120. Pursuant to California Rule of Court, rule 8.1120(a)(2), we are not counsel for any party in this action. We are not a special-interest group and we are not a large organization. We are a small law firm consisting of 5 attorneys and one of the few in California that specializes in medical malpractice on the plaintiff-side. Despite practicing on the plaintiff-side, the undersigned and other members of our law firm also has spent years practicing with various medical malpractice defense firms.

We contend that the Court's well-reasoned 15-page opinion meets the standards for publication under California Rule of Court, rule 8.1105(c).

The opinion should be published because: 1) It explains with reasons given an existing rule of law (Cal. Rules of Court, 8.1105(c)(3)); and 2) It advances a clarification of the provisions of existing rules (Cal. Rules of Court, 8.1105(c)(4)). Particularly as to the three-year prong of Code of Civil Procedure section 340.5, this opinion helps clarifies the statute of limitations issues as to medical malpractice issues. Moreover, as the procedural history of this case shows, significant attorney and trial court time is spent arguing and deciding over timeliness issues in medical malpractice cases and can lead to the trial court error committed here.

As this Court noted, Code of Civil Procedure section 340.5 of the Medical Injury Compensation Reform Act of 1975 ("MICRA") involves two separate but related statutes of limitations. The first is that a plaintiff must file suit within a year after the plaintiff first suffered appreciable harm and suspected, or a reasonable person would have suspected, that the defendant healthcare provider acted wrongfully. (See *Rose v. Fife* (1989) 207 Cal.App.3d 760, 768; *Artal v. Allen* (2003) 111 Cal.App.4th 273, 279.) The second is that the action must be brought within three years after the plaintiff first suffered appreciable harm. (*Marriage & Family Center v. Superior Court* (1991) 228 Cal.App.3d 1647, 1652-1655.)

Admittedly, the facts of this case are similar to the facts in the Second District holding in *Drexler v. Petersen* (2016) 4 Cal.App.5th 1181, 1196. Indeed, we often encounter medical

malpractice cases (particularly in failure-to-diagnose cancer matters) where there is an opportunity to diagnose a medical condition prior to that disease's progression into a more serious condition or stage. The factual scenario and the delay between the opportunity to diagnose and the appreciable harm in this case is similar to many medical malpractice matters.

Despite the factual similarity in *Drexler v. Petersen* (2016) 4 Cal.App.5th 1181, 1196, defendants in medical malpractice defense firms have been successful in convincing trial courts that *Drexler* is distinguishable and somehow limited only to the one-year statute. Indeed, this was the exact argument advanced by the Respondent's brief. (See Respondent's Brief at p. 30 ["The Second District's analysis in Drexler was limited to the one-year provision."].) *Drexler* briefly explained that "[t]he injury commences both the three-year and the one-year limitations periods." (*Drexler, supra,* 4 Cal.App.5th at p. 1189.) *Drexler* then went on to explain that the "injury" occurred when the "preexisting condition ha[d] developed into a more serious condition." (*Id.* at p. 1183.)

However, this Court went into detail and explained that the *Drexler* opinion was not limited to the one-year prong. Rather, as articulated by this Court, the development of a preexisting condition to a more serious condition is the "injury" for the purposes of ***both*** provisions under section 340.5. The factual scenario presented here is not uncommon in medical malpractice cases and publication of this case would greatly assist in the clarification of the existing law.[1]

Very truly yours,

HODES MILMAN, LLP

BENJAMIN T. IKUTA

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cc: Michael A. Kelly, Esq. & Tiffany J. Gates, Esq. (Appellant's Counsel)
Vanessa Efremsky, Esq. & Kenneth Pedroza, Esq. (Respondent's Counsel)

[1] It should be noted that this is not the first time that a Court of Appeal has reversed a trial court in a medical malpractice action based on a misapplication of *Drexler*. In *Shannon-Yeganhe v. Cedars-Sinai Medical Center* (Cal. Ct. App., Apr. 12, 2018, No. B266199) 2018 WL 1755492, at *11, Cal. Supreme Court review denied (June 27, 2018), the Second District reversed the granting of Summary Judgment after the trial court misinterpreted the term "injury" as used in section 340.5. Notably, appellate counsel for the respondent in that case is the same appellate counsel for Respondent in this case. That *Shannon-Yeganhe* case was not published.