Case No. S283128

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FRANCISCO GUTIERREZ,
Plaintiff and Petitioner,

v.

URIEL TOSTADO, et al.,
Defendants and Respondents.

(Santa Clara County
Super. Ct. No. 20CV361400)

After a Decision by the Court of Appeal, Sixth Appellate District,
Case No. H049983

APPLICATION OF CONSUMER ATTORNEYS OF CALIFORNIA FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER; AMICUS CURIAE BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rule of Court, rule 8.208, the Consumer Attorneys of California and its counsel certify that they know of no other entity or person that has a financial or other interest in the outcome of the proceeding.

Dated: September 17, 2024

By: _____

Benjamin T. Ikuta
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APPLICATION FOR PERMISSION TO FILE

Pursuant to California Rules of Court, rule 8.520, Amicus curiae Consumer Attorneys of California (CAOC) seeks permission to file the attached amicus brief in support of Petitioner Francisco Gutierrez.

The primary purpose of this application is to assert that even if this Court determines that the outcomes in *Lopez v. American Medical Response West* (2023) 89 Cal.App.5th 336 and *Canister v. Emergency Ambulance Service, Inc.* (2008) 160 Cal.App.4th 388 were correct, that the factual scenarios in those cases are distinguishable from the facts underlying this case.

In both *Lopez* and *Canister*, the non-patient plaintiffs were in the ambulance when the negligence and harm occurred. Therefore, the facts of those cases are materially different than the issue presented by this Court, which is whether MICRA applies to a personal injury claim when the plaintiff's vehicle is struck by a negligently driven ambulance.

While CAOC agrees with Petitioner's arguments and position, neither Petitioner nor Respondents addressed this alternative scenario in their briefing.

As for CAOC's interest in this matter, CAOC is a voluntary non-profit membership organization representing over 6,000 consumer attorneys practicing in California. CAOC's members represent individuals and small businesses in various types of cases including class actions and individual

matters affecting such individuals and entities such as claims for personal injuries and property damage. CAOC has taken a leading role in advancing and protecting the rights of injured victims in both the courts and the Legislature. CAOC has participated as amicus curiae in precedent setting decisions shaping California law. (See, e.g., *Regents of University of California. v. Superior Court* (2018) 4 Cal.5th 607, *T.H. v. Novartis Pharmaceuticals Corp*. (2017) 4 Cal.5th 145, *Kesner v. Superior Court* (2016) 1 Cal.5th 1132, *Horiike v. Coldwell Banker Residential Brokerage* Co. (2016) 1 Cal.5th 1024, and *Cabral v. Ralphs Grocery Co*. (2011) 51 Cal.4th 764.)

CAOC is familiar with the issues before this Court and the scope of their presentation in the parties' briefing. CAOC seeks to assist the Court by "broadening its perspective" on the context of the issues presented. (See *Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1177.)

Respectfully submitted,

Dated: September 17, 2024

By: _____

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BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

Introduction

An ambulance transports a patient from one medical facility to another on a non-emergent basis with its siren and emergency lights off. The ambulance negligently rear-ends another car on the freeway, causing that driver harm. The driver has no way of knowing whether the ambulance is transporting a patient. It is unclear if the driver even knew he was hit by an ambulance at the moment of impact. Under these facts, both the trial court and Court of Appeal found that the provisions of the Medical Injury Compensation Reform Act (MICRA) applied to the driver's claims. This included MICRA's one-year statute of limitations under Code of Civil Procedure section 340.5, rendering the case untimely.

In doing so, the Court of Appeal did exactly what this high Court cautioned against in *Flores v. Presbyterian Intercommunity Hospital* (2016) 63 Cal.4th 75, 86, which was to "transform section 340.5's special rule for professional negligence-i.e., negligence in the rendering of medical care to patients-into an all purpose rule covering essentially every form of ordinary negligence" committed by a healthcare provider.

CAOC agrees completely with petitioner in this action. Nowhere did *Flores* criticize, distinguish, or "soften" *Lee v. Hanley* (2015) 61 Cal.4th 1225. To the contrary, *Flores* fully embraced the holding of *Lee* and the

nearly identical statute involved in that case. As *Lee* held, the general negligence statute of limitations should apply in factual scenario where "professional obligations overlap with generally applicable obligations . . ." (*Lee, supra,* 61 Cal.4th at p. 1238.)

Nonetheless, CAOC does not wish to rehash or repeat petitioner's well-founded arguments. Instead, CAOC seeks to emphasize that ***even if*** the outcomes of *Lopez v. American Medical Response West* (2023) 89 Cal.App.5th 336 and *Canister v. Emergency Ambulance Service, Inc.* (2008) 160 Cal.App.4th 388 were correct in applying MICRA, that those cases are distinguishable.

This Court presented the issue as follows: "Does the one-year statute of limitations in the Medical Injury Compensation Reform Act (MICRA; Code Civ. Proc., § 340.5) apply to a personal injury claim alleging that the plaintiff's vehicle was struck by a negligently driven ambulance?"

While *Lopez* and *Canister* involved non-patient plaintiffs, in both cases the plaintiff was harmed while in the ambulance. The plaintiff knew at the time of impact that the ambulance was transporting a patient. In both cases, the factual scenarios suggest that the patient was being transported emergently.

While CAOC agrees with Petitioner that *Lopez* and especially *Canister* do not comport with *Flores'* analysis, those cases are nonetheless readily distinguishable from the issue presented by this Court.

Argument

I. Flores Cautioned that Not Every Injury Caused by a Healthcare's Negligence is Automatically Covered by MICRA.

In *Flores*, a hospital patient fell out of her bed when the latch on a bedrail failed and the rail collapsed. (*Id.* at p. 80.) After suing for premises liability and general negligence over a year from the fall, this Court deemed the lawsuit untimely pursuant to MICRA's one-year statute of limitations. (*Id.* at p. 89.)

In doing so, this Court rejected the plaintiff's argument that "professional services" as defined in the MICRA statutes only involves those that required a high degree of professional skill. (*Id.* at p. 84) Likewise, this Court also rejected the lower court's view that MICRA only applied when there was an active rendering of professional services. (*Ibid.*)

However, *Flores* also rejected the hospital's argument that MICRA automatically covered every conceivable injury that occurs under the hospital's roof. This would be contrary to the intent of the legislature as MICRA would become "an all-purpose rule covering essentially every form of ordinary negligence that happens to occur on hospital property." (*Id.* at p. 87.) This Court went on to explain:

> Even those parts of a hospital dedicated primarily to patient care typically contain

> numerous items of furniture and equipment—tables, televisions, toilets, and so on—that are provided primarily for the comfort and convenience of patients and visitors, but generally play no part in the patient's medical diagnosis or treatment. Although a defect in such equipment may injure patients as well as visitors or staff, a hospital's general duty to keep such items in good repair generally overlaps with the obligations that all persons subject to California's laws have, and thus will not give rise to a claim for professional negligence. If, for example, a chair in a waiting room collapses, injuring the person sitting in it, the hospital's duty with respect to that chair is no different from that of any other home or business with chairs in which visitors may sit. Section 340.5's special statute of limitations does not apply to a suit arising out of such an injury.

(*Id.*at p. 88-89.) This Court summed up its holding as follows: "[W]e conclude that whether negligence in maintaining hospital equipment or premises qualifies as professional negligence depends on the nature of the relationship between the equipment or premises in question and the provision of medical care to the plaintiff." (*Id.* at p. 88.)

II. Post-Flores Decisions, including *Johnson v. Open Doors,* Also Establish that MICRA Should Not Apply to this Action. The Fact that the Ambulance was Transporting a Patient is No Different than a Van Transporting Cargo.

Shortly after the *Flores* decision, Courts of Appeal in cases involving falls followed the guidance in *Flores* in determining whether MICRA

applied.

In *Mitchell v. Los Robles Regional Medical Center* (2021) 71 Cal.App.5th 291, 294, a depressed patient took 60 prescription pills. After being taken to the hospital, the patient was allowed to walk unassisted to the bathroom even though the hospital was aware of her tremors and other side effects from taking the medication. (*Id.*) On the way to the bathroom, the patient fell and seriously injured her knee. (*Id.* at p. 295.) The floor was not slippery or wet, but the patient contended that she should not have been allowed to walk unassisted given her condition. (*Ibid.*) The patient filed a premises liability claim after the expiration of the one-year MICRA statute.

The Second District Court of Appeal affirmed the trial court's decision in finding the case untimely. The court acknowledged that "accompanying someone to the restroom is not a sophisticated procedure." (*Id* at p. 295.) However, as established by *Flores*, the level of skill is not the test and allowing the patient to walk unassisted was a claim of professional negligence. (*Ibid.*; see also *Nava v. Saddleback Memorial Medical Center* (2016) 4 Cal.App.5th 285, 292 [relying on *Flores,* finding that MICRA applied when employees allowed a patient to fall off a gurney].)

Contrary to *Mitchell* and *Nava,* the First District Court of Appeal in *Johnson v. Open Door Community Health Centers* (2017) 15 Cal.App.5th 153, 156 found that a fall at a healthcare provider's facility was not governed by MICRA. In *Johnson*, a patient was at a medical clinic to review her test

results with a Nurse Practitioner. (*Id.* at p. 156.) Before the consult and prior to entering the treatment room, the patient had her vital signs taken and was weighed on a scale without incident. (*Ibid.*) After the consultation and examination was over, the patient left the treatment room and tripped on the same scale. (*Ibid.*) However, the scale was moved during the consult and was partially obstructing the path from the room to the hall. (*Ibid.*) The patient suffered injury but waited over a year to file her premises liability lawsuit. (*Ibid.*) The trial court granted summary judgment, finding the patient's case untimely under MICRA. (*Id.* at p. 157.)

The Court of Appeal reversed, finding that MICRA did not apply and thus the patient's case was timely. (*Id.* at p. 158.) The Court of Appeal explained that although the patient tripped on medical equipment coincidentally used as part of her earlier medical treatment, the wrongful obstruction of the hallway by equipment constituted ordinary, not professional, negligence. (*Ibid.*) Relying on *Flores*, the court explained: "Had [the patient] alleged the improper placement of the scale caused her to fall off the scale and injure herself, MICRA might apply. Had she alleged that Open Door's failure to properly calibrate the scale resulted in inaccurate information and inappropriate medical care, any resulting claim would almost certainly be subject to MICRA. However, she alleges that Open Door's placement of the scale posed a tripping hazard, implicating Open Door's duty to *all users* of its facility, including patients, employees, and

other invitees, to maintain safe premises." (*Id.* at p. 160.)

The Court of Appeal explained in *Johnson* that under those facts, the nature of the object did not matter – "the scale could have just as easily been a broom or a box of medical supplies." (*Ibid.*) Rather, what was important was that the medical clinic "left a hazardous object in her path." (*Ibid.*)

Despite the contrary results, *Mitchell, Nava,* and *Johnson* all correctly applied this Court's holding in *Flores.* In *Mitchell*, the allegations would be nonsensical if the unaccompanied patient fell while walking to the bathroom at a non-medical establishment such as a hotel or a restaurant rather than a hospital. By contrast, in *Johnson,* the allegations would still make sense if a hotel or a restaurant carelessly left a tripping hazard that partially obstructed a lobby hallway.

This case is a simple garden-variety rear-ender involving an ambulance driving between hospitals. Admittedly, the ambulance was driving a patient. But the patient, much like the scale in *Johnson*, is immaterial. The patient could have easily been cargo, such as "a broom or a box of medical supplies." (See *Johnson*, *supra*, 15 Cal.App.5th at p. 160.) For the purposes of safely driving, this case is no different than a gardener driving between two job sites while transporting gardening tools or a truck driver carrying freight to his employer.

This is particularly true in this case, where the transport was non-emergent between two facilities where the ambulance did not have its

emergency lights or sirens on. In such a scenario, the patient's existence in the ambulance does not impact the EMT's driving. *Even if* an ambulance is transporting a patient when the collision occurs, the act of driving that ambulance is no different than driving a van or truck.

III. *Canister* and *Lopez* Involved a Non-Patient Plaintiff who Voluntarily Entered an Ambulance to Accompany a Patient.

Both the Court of Appeal and Respondents in their brief rely heavily on *Canister* and *Lopez* in arguing that MICRA should apply to this action.

In *Canister*, decided eight years before *Flores*, a non-patient police officer was injured due to an EMT's poor driving while accompanying an arrestee patient in the back of an ambulance. (*Canister, supra,* 160 Cal.App. at p. 405.) The police officer also alleged that the EMTs did not inform him that the ambulance had seatbelts for use in the rear of the ambulance. (*Ibid.*) The Court of Appeal held that MICRA applied. (*Ibid.*) In doing so, the *Canister* court focused heavily on the licensure and certifications of paramedics to provide emergency care under the Emergency Medical Services System and the Prehospital Emergency Medical Care Personnel Act. (*Id.* at pp. 396-397.)

Two cases after *Flores* contained critical language of *Canister* and correctly found it did not comport with this Court's analysis in *Flores.* The first was *Johnson, supra,* Cal.App.5th at p.162, discussed above. *Johnson* noted that "the court's rationale, in *Canister*, does not comport with

Flores's analysis" though "the outcome is arguably correct." (*Ibid.*)

The second was the Second District in *Aldana v. Stillwagon* (2016) 2 Cal.App.5th 1, 4, which has some facts similar to the subject *Gutierrez* case. In *Aldana*, a third-party driver was injured by the negligent driving of a paramedic supervisor who was en route to an injured victim in his employer's pickup truck to supervise EMTs and potentially provide emergency assistance. (*Ibid.*) The Second District found that even though the driver was a medical professional who was responding to a call about an injured person, "the automobile collision remains a 'garden-variety' accident not resulting from the violation of a professional obligation but from a failure to exercise reasonable care in the operation of a motor vehicle." (*Id.* at p. 5.) In other words, "[d]riving to an accident victim is not the same as providing medical care to the victim." (*Id.* at p. 8) As such, MICRA did not apply. (*Ibid.*)

When discussing *Canister*, the *Aldana* court explained: "In light of *Flores*, it is questionable whether [*Canister's* holding] was correct." (*Id.* at p. 6.) Nonetheless, *Aldana* noted that "[e]ven if *Canister* was correctly decided, it is distinguishable." (*Ibid.*)

Notwithstanding the concerns articulated by the *Johnson* and *Aldana* Courts, the Court of Appeal, Second District, Division 5 in *Lopez v. American Medical Response West* (2023) 89 Cal.App.5th 336, 341 embraced *Canister* and its holding. In *Lopez*, the Court of Appeal found

that an action brought by a family member accompanying the patient in an ambulance following a crash was subject to MICRA. (*Ibid.*)

In the subject *Gutierrez* case, the Court of Appeal relied heavily on both *Canister* and on *Lopez* in finding that the action was covered by MICRA and its one-year statute. The majority in *Gutierrez* stated: "we must agree with *Canister* and *Lopez* and conclude that MICRA is not limited to suits by patients or to recipients of medical services as long as the plaintiff is injured due to negligence in the rendering of professional services and his injuries were foreseeable." (*Gutierrez v. Tostado* (2023) 97 Cal.App.5th 786, 794.)

The difference is that in both *Canister* and *Lopez*, the non-patient plaintiff voluntarily entered the ambulance and consented to being driven. The plaintiff knew that the ambulance was driving a patient. Lastly, the facts of each of those cases imply that EMTs were driving the ambulance on an emergent basis.

Indeed, both *Canister* and *Lopez* more closely mirror the factual hypothetical asserted by the *Gutierrez* Court of Appeal. The Court of Appeal offered the scenario of a patient being wheeled on a gurney down the hallway of the hospital "at a high speed" and hitting a visitor, causing harm to both the patient and the visitor.

In such a hypothetical, the visitor purposely availed himself or herself of the hospital property, much like the *Lopez* and *Canister* plaintiffs

purposely entering the ambulance. The visitor knew at the time of injury that the harm occurred when transporting a patient, just like the plaintiffs in *Lopez* and *Canister*. The "high rate of speed" also indicates the patient is being transported on that gurney in an emergent scenario.

While comparable to the factual scenarios in *Canister* and *Lopez*, none of those facts are present when a plaintiff is rear-ended by the negligent driving of an ambulance. The *Gutierrez* Court of Appeal's own hypothetical illustrates why *Lopez* and *Canister* are distinguishable.

IV. Applying MICRA would Result in an Unpredictable and Arbitrary Standard.

As Justice Bromberg articulated in his dissent, there is no possible way for a member of the public to know whether an ambulance is transporting a patient. That is particularly true when that ambulance has its siren off. Under such a scenario, it would be unfair, unpredictable, and arbitrary to apply a different statute of limitations (Code Civ. Proc., § 340.5), different available remedies (Civ. Code, § 3333.2, Code Civ. Proc., § 667.7[1]), different evidentiary rules (Civ. Code, § 3333.1(a) [2]), different

[1] These MICRA sections put a cap on general damages and allows a defendant to demand periodic payments of future damages.

[2] Section 3333.1(a) allows the defendant in a medical malpractice action to introduce evidence of collateral source benefits.

subrogation rights (Civ. Code, § 3333.1(b)[3]), different pleading standards (Code Civ. Proc., § 425.13[4]), and different potential forums (Code Civ. Proc., § 1295[5]).

There are numerous other factual scenarios that would provide only more ambiguity. For example, would MICRA apply if the collision occurred after a patient's time of death is called en route in the ambulance? Would MICRA apply if the private ambulance company transported a corpse to the morgue? Would MICRA apply if the ambulance was transporting an injured pet?

The *Gutierrez* majority's concern about a separate statute of limitations applying to different people involved in the same incident does not warrant automatically applying MICRA to the entire case. Indeed, it is very common to have different statute of limitations when one incident is

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[3] Section 3333.1(b) disallows subrogation by specified collateral sources who provided payments for the harm.

[4] Section 425.13 disallows asserting a punitive damage claim in a complaint without first filing a motion. While not technically a part of MICRA, section 425.13 still applies in actions "arising out of the professional negligence of a health care provider." (See *Johnson v. Superior Court* (2002) 101 Cal.App.4th 869.)

[5] Heirs are bound to arbitration agreements signed by deceased patients in wrongful death cases based on allegations of medical malpractice but not in other actions. (See *Ruiz v. Podolsky* (2010) 50 Cal.4th 838, 845; *Hearden v. Windsor Redding Care Center, LLC* (2024) 103 Cal.App.5th 1010.) Admittedly, it is unlikely that such an arbitration agreement would exist in this factual scenario, though still possible.

involved, such as when both a minor and an adult are harmed in the same collision or when other tolling provisions apply. And in such a scenario, at least each harmed party and her attorney has knowledge of the applicable statute of limitations rather than engaging in pure guesswork.

V. An EMT Being Licensed or Certified Does Not Result in an Automatic Application of MICRA.

Lastly, Respondents in their brief argue that the ambulance's driver was licensed as an EMT and certified by the Department of Motor Vehicles to drive an ambulance. Similar to the faulty reasoning in *Canister,* Respondents imply that this licensure/certification subjects Respondents to MICRA.

However, this nearly identical argument was made, and rejected, in *Flores*. In *Flores,* the hospital attempted to argue that any injury on the premises was covered by MICRA since there were licensing requirements under Title 22 of the California Code of Regulations that the hospital maintain the premises in "good repair." (*Flores, supra,* 63 Cal.4th at p. 86.) *Flores* explained that such an approach "would thus sweep in not only negligence in performing the duties that hospitals owe to their patients in the rendering of medical diagnosis and treatment, but negligence in performing the duties that hospitals owe to all users—including personnel and visitors—simply by virtue of operating a facility that is open to the public." (*Ibid.*)

Not only does this support that overlapping duties should apply the non-MICRA statute of limitations per *Lee*, but that simply owning a license/certificate does not automatically entitle one to MICRA.

Here, an EMT's driving of a patient between two facilities on a non-emergent basis constitutes a nonprofessional duty of care no different than any other driver on the road. As held by *Flores*, the fact that the EMT is licensed is irrelevant.

Conclusion

CAOC agrees with Petitioner that overlapping duties that involve a general, nonprofessional duty should not involve MICRA per the holdings in *Flores* and *Lee*. Even if, however, *Canister* and *Lopez* came to the correct result, this case is readily distinguishable. Here, unlike in *Canister* and *Lopez*, Petitioner did not know that the ambulance that hit him was driving a passenger at the time of the collision. Unlike in those cases, he did not purposely enter the ambulance to accompany a patient. It would be unfair and arbitrary to apply MICRA when an ambulance negligently rear-ends another driver.

Dated: September 17, 2024 By: _____

Benjamin T. Ikuta
Attorneys for Amicus Curiae, Consumer Attorneys of California

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.520(c), according to Microsoft Word, the computer program used to prepare this brief, this brief contains 3,245 words, excluding the cover, tables, signature block, and this certificate.

Dated: September 17, 2024

By: _____

Benjamin T. Ikuta
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PROOF OF SERVICE

I am over the age of 18, employed in the County of Orange, State of California, and not a party to the within action. My business address is 1327 North Broadway, Santa Ana, CA, 92706.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 17, 2024 in Santa Ana, California.

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **GUTIERREZ v. TOSTADO**
Case Number: **S283128**
Lower Court Case Number: **H049983**

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