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November 11, 2022

Presiding Justice Lee Smalley Edmon  
Associate Justice Luis A. Lavin  
Associate Justice Anne H. Egerton  
Court of Appeal of the State of California  
Second Appellate District, Division Three  
300 South Spring Street, Second Floor  
Los Angeles, California 90013

Re: ***Abelar v. Mora***

Court of Appeal Case No. B311451

*Request for Publication*

Opinion filed October 25, 2022

Dear Presiding Justice Edmon and Associate Justices Lavin and Egerton:

Pursuant to California Rules of Court, rule 8.1120(a), the Association of Southern California Defense Counsel (ASCDC) requests that the court certify its opinion in *Abelar v. Mora* (October 25, 2022, B311451) for publication. Specifically, as discussed below, section 2 of the court's decision merits publication under California Rules of Court, rule 8.1105(c)(2) and (8) because it illustrates when a party may take a limited deposition of an expert providing an opinion in support of or in opposition to summary judgment.

### ***Interest of ASCDC***

ASCDC is the nation's largest and preeminent regional organization of lawyers primarily devoted to defending civil actions in Southern and Central California. ASCDC has over 1,100 attorney members, among whom are some of the leading trial and appellate lawyers of California's civil defense bar. ASCDC is actively involved in assisting courts on

issues of interest to its members, the judiciary, the bar as a whole, and the public. It is dedicated to promoting the administration of justice, educating the public about the legal system, and enhancing the standards of civil litigation practice. ASCDC and its members have a direct interest in the summary adjudication procedure where expert opinions are ordinarily required, including medical malpractice cases.

A Court of Appeal opinion “should be certified for publication” if it satisfies any of the criteria enumerated in California Rules of Court, rule 8.1105(c), including if it applies an existing rule of law to “facts significantly different from those stated in published opinions” or if it “reaffirms a principle of law not applied in a recently reported decision.” This court’s opinion in *Abelar* satisfies both of these criteria.

This court applies the rule from *St. Mary Medical Center v. Superior Court* (1996) 50 Cal.App.4th 1531, 1540 (*St. Mary*), that a limited deposition of an expert before the parties’ designation of experts is permitted where there is a legitimate question regarding the foundation of the expert’s opinion provided in a declaration or affidavit in support of or in opposition to summary judgment. (Typed opn. 18–19.) Here, the court held that a limited deposition of plaintiffs’ expert was properly compelled because the foundation for her opinions was vague, broad, and conclusory. (Typed opn. 19–20.) Specifically, it was not clear that Dr. Rand-Luby’s experience provided a foundation for her opinions given that she is a general surgeon with no specialized experience in neurology, and she failed to specify which of plaintiff Dee Ann Abelar’s suffered conditions she has treated or reviewed in records. (Typed opn. 18–19.) And Dr. Rand-Luby’s opinions, such as “‘there were lab reports, CT and MRI reports which . . . indicated the presence of a post surgical infection,’” were not supported by specific facts. (Typed opn. 19.)

The reasons that this court affirmed a limited deposition of Dr. Rand-Luby involve significantly different facts than those in *St. Mary*. The court in *St. Mary* held that the defendants should have been permitted to depose an expert regarding the foundation of his opinion supporting the opposition to summary judgment because of two factual issues: (1) one of the doctors who the expert opined was negligent was not involved in the plaintiff’s surgery at issue, and (2) defendants provided other evidence suggesting the opinion was untenable. (*St. Mary, supra*, 50 Cal.App.4th at p. 1540.)

Publication of the court’s opinion is warranted. *St. Mary* is the only published opinion in California that applies the pre-expert-designation deposition procedure, and it was decided in 1996. No published opinion has applied *St. Mary* since its publication 26 years ago. The publication of this court’s opinion to

Presiding Justice Lee Smalley Edmon  
Associate Justice Luis A. Lavin  
Associate Justice Anne H. Egerton  
November 11, 2022

Page 3

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different facts will benefit both parties moving for summary judgment and trial courts ruling on such motions. It is the experience of counsel that trial judges are sometimes unfamiliar with the procedure permitted under *St. Mary*, which leads to inconsistent trial court rulings. A second published application of *St. Mary* will reinforce the availability of this procedure and prevent actions from proceeding to trial where there is no triable issue of fact but merely conflicting expert declarations. (See *St. Mary, supra*, 50 Cal.App.4th at p. 1538 [“it would defeat the concept of a summary procedure if the opposition party were to be allowed to defeat [a summary judgment] motion by less than candid declarations or affidavits in opposition”]; see also typed opn. 18 [the limited deposition procedure furthers the purpose of summary judgment].)

As the California Supreme Court has made clear, summary judgment is no longer a disfavored remedy. (*Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536, 542.) Publication of this court’s opinion will assist trial courts and parties in addressing procedural issues that often arise in connection with summary judgment or adjudication motions.

For the above reasons, this court’s opinion satisfies the criteria for publication and should therefore be published.

Respectfully submitted,

**ASSOCIATION OF SOUTHERN CALIFORNIA  
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By:   
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cc: See attached Proof of Service

**PROOF OF SERVICE**

***Abelar et al v. Mora***  
**Case No. B311451**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

On November 11, 2022, I served true copies of the following document(s) described as **REQUEST FOR PUBLICATION** on the interested parties in this action as follows:

**SEE ATTACHED SERVICE LIST**

**BY E-MAIL OR ELECTRONIC TRANSMISSION:** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list.

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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 November 11, 2022, at Burbank, California.

  
\_\_\_\_\_  
Millie Cowley

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**Case No. B311451**

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