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Court of Appeals
Division II
State of Washington
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NO. 50662-9
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

DENISE REAGAN,

Appellant,

vs.

ST. ELMO NEWTON, III. M.D.,

Respondent.

APPEAL FROM THE SUPERIOR COURT

HONORABLE DEREK VANDERWOOD

REPLY BRIEF OF APPELLANT

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Table of Contents

Reply to Brief of Respondent.....	1
I. Respondent’s Contention That Any Claim Against a Health Care Provider Falls Within the Scope of RCW 7.70 is Incorrect.....	1
II. When Performing an Independent Medical Examination, Respondent is Not Providing Health Care as a Health Care Provider for the Benefit of a Patient.....	2
III. Rules of Construction Support the Fact Respondent Did Not Provide Health Care to Appellant.....	4
A. “Health Care” is for the Benefit of the Patient.....	4
B. Respondent and Dr. Chong’s Testimony Contradict Respondent’s Claim that He Provided Health Care to Appellant.....	6
IV. The Supreme Court Has Recognized that Medical Malpractice Liability is Premised on a Physician’s Duty to a Patient.....	7
V. Eelbode is Not Controlling.....	9
VI. The Issue of Medical Battery Was Presented to the Trial Court.....	10
A. The Claim for Battery Was Timely Filed	10
B. The Claim of Medical Battery Was Presented to the Trial Court Without Objection.....	11
C. The Elements of Medical Battery Were Established.....	12
1. Intent.....	12

2. Appellant’s Lack of Consent.....	15
VII. Appellant Provided Medical Evidence Her Injuries Were Caused by Respondent.....	17
Conclusion.....	18

Table of Authorities

Cases:

<i>Beggs v. Dept. of Social & Health Services</i> , 171 Wn.App. 69, 79, 247 P.3d 421 (2011).....	5
<i>Berger v. Sonneland</i> , 144 Wn.App. 91, 109, 26 P.3d 257 (2001).....	5
<i>Branom v. State</i> , 94 Wn.App. 464, 469-70, 974 P.2d 335 (1999).....	2
<i>Bundrick v. Stewart</i> , 128 Wn.App 11, 17, 114 P.3d 1204 (2005).....	15, 16
<i>Daly v. United States</i> , 946 F.2d 1467, 1469-70(1991).....	3
<i>Del Guzzi Construction Company v. Global Northwest Ltd.</i> , 105 Wn. 2d 878, 882, 719 P.2d 120 (1986).....	15
<i>Eelbode v. Chec. Med Ctrs.</i> , 97 Wn.App. 462, 984 P.2d 436 (1999).....	8, 9, 10
<i>Egan v. Cauble</i> , 92 Wn.App. 372, 377-78, 966 P.2d 362 (1998).....	15
<i>Estate of Sly v. Linville</i> , 75 Wn.App. 431, 439, 878 P.2d 1241 (1994).....	2, 5
<i>In re Arnold</i> , 2018 Wash. LEXIS 148, pgs. 14-23 (filed February 15, 2018).....	10

<i>King v. Garfield County Pub. Hosp. Dist. No. 1</i> , 17 F.Supp. 3d 1060, 1071, (2014), reversed on other grounds, 641 Fed. Appx., 696, 2015 U.S. LEXIS 22618 (2015).....	9
<i>Kumar v. Gate Gourmet, Inc.</i> , 180 Wn.2d 481, 504, 325 P.3d 193 (2014).....	13
<i>Lodis v. Corbis Holdings, Inc.</i> , 172 Wn.App. 835, 859, 292 P.3d 779 (2013).....	14
<i>McKinney v. City of Tukwila</i> , 103 Wn. App. 391, 408, 13 P.3d 631 (2000)	13, 14
<i>Paetsch v. Spokane Dermatology Clinic, PS</i> , 182 Wn.2d 842, 854, 348 P.3d 389 (2015).....	7, 9, 10
<i>Reed v. AMN Health Care</i> , 148 Wn.App. 264, 269, 225 P.3d 1012 (2008).....	4, 6
<i>Sherman v. Kissinger</i> , 146 Wn.App 855, 855-56, 195 P.3d 539 (2008).....	17
<i>Smith, Inc. v. City of Walla Walla</i> , 148 Wn.2d. 835, 842-43, 64 P.3d 15 (2003).....	5
<i>State v. Rice</i> , 116 Wn.App. 96, 100, 64 P.3d 651 (2003).....	4
<i>State v. Terrovona</i> , 105 Wn.2d 632, 637, 716 P.2d 295 (1986).....	14
<i>Tighe v. Ginsberg</i> , 146 A.D. 268, 271, 540 N.Y.S. 99 (1989).....	5
<i>Volk v. DeMeerler</i> , 187 Wn.2d 241, 254, 386 P. 3d 254 (2016).....	1, 7, 8

Washington Statutes:

RCW 7.70.....	1, 4, 6
---------------	---------

RCW 7.70.020.....	3
RCW 7.70.020(1).....	2, 3, 8
RCW 7.70.030.....	3
RCW 7.70.030(1).....	8, 9
RCW 70.02.010(31).....	5

Rules

RAP 9.12.....	12
---------------	----

Secondary Sources

Dobbs, The Law of Torts § 104 at 244 (2000).....	16
Dobbs' Law of Torts § 108 (2d ed. 2011).....	16
Prosser and Keeton on Torts § 9, at 39 (5 th ed. 1984).....	13
Restatement (Second) of Torts §13 (1965).....	13
Restatement (Second) of Torts § 892A(5) (1979).....	16
The American Heritage Dictionary 833 (3d ed. 1992)).....	5
Webster's Third New International Dictionary 1655 (2002).....	5
Webster's Third New International Dictionary 1827 (2002).....	3
Webster's Third International Dictionary 2075 (2002).....	3

REPLY TO BRIEF OF RESPONDENT

I. Respondent's Contention That Any Claim Against a Health Care

Provider Falls Within the Scope of RCW 7.70 Is Incorrect

Respondent argues that regardless of the context, any action against any medical provider is governed by RCW 7.70. The contention is incorrect. "Statutes such as the medical malpractice act that are in derogation of the common law must be construed narrowly." *Sherman v. Kissinger*, 146 Wn.App. 855, 865-66, 195 P.3d 539 (2008). The Supreme Court has recently reaffirmed the point that a physician's duty under the medical malpractice statute is one that is owed to his patient. *Volk v. DeMeerler*, 187 Wn.2d 241, 254, 386 P.3d 254 (2016) (under the medical malpractice statute, "the duty is owed to the medical professional's patient.") (citations omitted) (emphasis in original). In addition, the Supreme Court reaffirmed that Washington still recognizes a common-law action for medical negligence for injuries sustained when there is no physician-patient relationship. *Id.* There is no question that a physician-patient relationship did not exist between the parties in this case. CP 91-92, CP 105-106.

This is not a new concept. The judicial definition of health care in this state has steadfastly contained the words "as his patient" in the nearly

25 years since the definition was adopted in *Estate of Sly v. Linville*, 75 Wn.App. 431, 439, 878 P.2d 1241 (1994). Respondent recognized this when he conveyed to the trial court in his reply brief that health care is defined as “the process in which a physician is utilizing the skills which he had been taught in examining, diagnosing, treating or caring for the plaintiff.” CP 149-50. Respondent would be correct if the definition of health care did not contain the phrase “as his patient”. However, no Washington decision has adopted a definition of health care that does not contain the phrase.

**II. When Performing an Independent Medical Examination,
Respondent is Not Providing Health Care as a Health Care Provider
for the Benefit of a Patient.**

In determining the scope of the phrase “health care,” Washington courts have construed it to mean “the process in which [a physician is] utilizing the skills which he had been taught in examining, diagnosing, treating or caring for the plaintiff as his patient.” *Branom v. State*, 94 Wn.App. 464, 469-70, 974 P.2d 335 (1999).

RCW 7.70.020(1) lists the types of health care providers covered by the medical malpractice statute. This “broad definition” is evidence of the “legislature’s intent to impose liability beyond the context of a

physician-patient relationship.” *Daly v. United States*, 946 F.2d. 1467, 1469-70 (1991). Each of those providers must be a person “licensed by this state to *provide health care or related services . . .*” (emphasis added). The dictionary definition of provide in this context is “supply something for sustenance or support.” Webster’s Third New International Dictionary 1827 (2002). The dictionary definition of service or services in this context is “an act done for the benefit . . . of another.” Webster’s Third International Dictionary 2075 (2002). These are commonsense definitions in the context of medical care. They are consistent with a health care provider-health care recipient relationship.

Discussions of “health care providers” under RCW 7.70.020 in cases such as *Daly* suggest the statute is intended to include all individuals who might come into a patient/health care recipient’s network of care, including those providers who traditionally are not considered to have patients. *Daly*, 946 F.2d at 1469-70. The statute contemplates a health care relationship between the provider and the patient/recipient of services. Those providers are charged with the responsibility of not violating the standard of care for the specific services they provide to the people they serve. RCW 7.70.020(1); RCW 7.70.030.

Division I has recognized that regardless of a health care provider’s area of practice, health care is something that is provided for

the benefit of the patient. “When the conduct complained of is part of the *health care provider’s efforts to treat and care for a patient’s needs*, the injury occurs as a result of health care and the claim falls under chapter 7.70 RCW.” *Reed v. AMN Health Care*, 148 Wn.App. 264, 269, 225 P.3d 1012 (2008). (emphasis added). A health care provider’s area of practice does not change what constitutes “health care”. Whether or not the person to whom the health care provider is attending is a patient does not change the definition of “health care”. Health care is provided for the benefit of the health care recipient, to address the needs of that recipient. The evidence in the record contains nothing to suggest Respondent provided health care to Appellant.

**III. Rules of Construction Support the Fact Respondent Did Not
Provide Health Care to Appellant.**

A. “Health Care” is for the Benefit of the Patient.

The words of a statute must be construed in accordance with their ordinary and common meaning unless they have acquired technical meaning or unless a definite meaning is apparent or indicated by the context of the words. *State v. Rice*, 116 Wn.App. 96, 100, 64 P.3d 651 (2003).

When no statutory definition is provided, words in a statute should be given their common meaning, which may be determined by referring to a dictionary. *Smith, Inc. v. City of Walla Walla*, 148 Wn.2d. 835, 842-43, 64 P.3d 15 (2003). (citations omitted).

The accepted definition of “health care” has remained unchanged since *Estate of Sly, supra*:

The Court of Appeals has defined the term to mean “ ‘the process in which [the physician] was utilizing the skills which he had been taught in examining, diagnosing, treating or caring for the plaintiff as his patient.’ ” *Estate of Sly v. Linville*, 75 Wn.App. 431, 439, 878 P.2d 1241 (1994) (quoting *Tighe v. Ginsberg*, 146 A.D. 268, 271, 540 N.Y.S. 99 (1989)). This is consistent with a common dictionary definition. *Berger v. Sonneland*, 144 Wn.2d 91, 109, 26 P.3d 257 (2001) (quoting The American Heritage Dictionary 833 (3d ed. 1992)).

Beggs v. Dept. of Social & Health Services, 171 Wn.App. 69, 79, 247 P.3d 421 (2011); see also, *Beggs*, 171 Wn.App. at 87 (Justice Alexander dissent, concurring with majority’s citation to health care definition in *Sly* and *Tighe*).

Health care is provided for the benefit of a patient. RCW 70.02.010(31). The statutory definition is consistent with that found in the dictionary: “A sick individual, esp. when awaiting or under the care and treatment of physician or surgeon.” Webster’s Third New International Dictionary 1655 (2002). Respondent presented no evidence that he

provided “health care” to Appellant. The injury sustained by Appellant did not occur as part of Respondent’s “efforts to treat and care for a patient’s needs”. *See, Reed, supra*, 148 Wn.2d at 269. Appellant’s claim therefore does not fall under RCW 7.70. *Id.* At a minimum, an issue of fact exists as to whether Respondent was providing health care when Appellant was injured, and for that reason, the trial court’s ruling must be reversed.

B. Respondent and Dr. Chong’s Testimony Contradict Respondent’s

Claim That He Provided Health Care to Appellant.

Respondent has provided no authority for the proposition that a physician hired by a state administrative agency that (a) requires a worker to attend and (b) sets the parameters of the examination for the physician is in that position to “provide” “health care” or “related [health care] services”. Respondent has cited no authority showing the legislature intended to include forensic examiners as health care providers or that such examiners provide health care. To the contrary, Respondent’s own witnesses repudiated the notion they provide health care, health care services or have any kind of health care relationship with an examinee. In fact, Dr. Chong testified that an IME is not even a “general medical examination”. CP 105.

In an attempt to get around Dr. Chong and Respondent's testimony to the contrary, Respondent relies upon the language of Labor and Industries' publications to establish that he provided Appellant health care. The materials lack foundation because there is no indication they were written by anyone with medical training or experience. Moreover, the materials are contradicted by the testimony of Respondent and Dr. Chong.

IV. The Supreme Court Has Recognized that Medical Malpractice Liability is Premised on a Physician's Duty to a Patient.

In *Volk v. DeMeerler*, the Supreme Court held that medical malpractice liability imposes a duty on the medical professional "to act consistently with the standards of the medical profession, and the duty is owed to the medical professional's *patient*." 187 Wn.2d 241, 254, 386 P.3d 254 (2016), citing *Paetsch v. Spokane Dermatology Clinic, PS*, 182 Wn.2d 842, 854, 348 P.3d 389 (2015) (emphasis in original). At common law, Washington does not recognize a cause of action for medical malpractice absent a physician/patient relationship. *Id.* Appellant recognizes the factual differences in this case and those in *Volk* and *Paetsch*. In *Volk*, the estate of a slain mother and child sued the mental health provider of the man who committed the homicides. In *Paetsch*, the plaintiff sued the physician owner of a dermatology clinic in

the physician's individual capacity, despite having never been treated in clinic by the physician. The Supreme Court upheld the trial court's CR 50 dismissal of the physician in his individual capacity.

However, both *Paetsch* and *Volk* raise issues relevant to Appellant's argument. *Volk* points out the difference between claims based upon medical negligence and medical malpractice. More importantly, it restates a long-established but perhaps overlooked rule that Washington does not recognize a cause of action absent a physician/patient relationship. That reminder contradicts Respondent's claim that all actions arising out of health care are to be brought pursuant to the medical malpractice statute.

Paetsch raises questions that bear directly on issues before the Court in this case. First is whether a plaintiff in a medical malpractice action must prove a physician-patient relationship. Appellant submits this question goes to the issue of whether an action against a health care provider brought pursuant to RCW 7.70.020(1) and RCW 7.70.030(1) is more properly characterized as a medical negligence claim and not cognizable as medical malpractice. More specifically, the court in *Paetsch* questions the holdings in cases such as *Eelbode v. Chec. Med Ctrs.*, 97 Wn.App 462, 467, 984 P.2d 436 (1999) that a physician-patient relationship is no longer required in order to bring a medical malpractice

action. *Paetsch, supra*, 182 Wn.2d at 850, fn. 6. Appellant submits these cases illustrate that is a question of fact as well as of law as to whether her claims fall under the medical malpractice statute.

V. Eelbode is Not Controlling.

Respondent argues that the holding in *Eelbode v. Chec. Med Ctrs.*, *supra*, 97 Wn.App. 462, 984 P.2d 436 (1999) controls in this case. Response Brief of Respondent, pgs. 30-32. That contention is incorrect. The issue in *Eelbode* was whether the lack of a physician-patient relationship negated the duty of the health care provider to follow the standard of care. That case focused on the nature of the relationship between the health care provider and the prospective employee who, at the employer's request, underwent a physical examination and was injured. The plaintiff in that case prevailed in reversing summary judgment based upon the argument that the absence of a physician-patient relationship did not prevent him from bringing a cognizable claim under RCW 7.70.030(1).

In *Eelbode*, the question centered on the relationship between the health care provider and the plaintiff; the provision of "health care" in that case "did not appear to be in dispute." *King v. Garfield County Pub.*

Hosp. Dist. No. 1, 17 F.Supp. 3d 1060, 1071, (2014), reversed on other grounds, 641 Fed. Appx., 696, 2015 U.S. LEXIS 22618 (2015).

Respondent argues that a decision by this Court that Respondent was not providing health care would “undermine the Court of Appeals’ holding in *Eelbode*.” That is also incorrect. Division III was not given the opportunity to decide the issue of whether the physical therapist who examined the plaintiff was providing health care. A holding different from that in *Eelbode* would mean this court decided an issue the *Eelbode* court did not.

Furthermore, this Court is not obligated to follow the *Eelbode* holding. One division of the Court of Appeals should not apply stare decisis to the decision of another division. *In re Arnold*, 2018 Wash. LEXIS 148, pgs. 14-23 (filed February 15, 2018).

Finally, as will be pointed out later in this brief, the Supreme Court has yet to decide the issue of whether a medical malpractice claim can be brought when no physician-patient relationship exists. In doing so, the Court noted the Court of Appeals decision in *Eelbode*. *Paetsch v. Spokane Dermatology Clinic, PS*, 182 Wn.2d 842, 850, fn. 6, 348 P.3d 389 (2015).

VI. The Issue of Medical Battery Was Presented to the Trial Court.

A. The Claim for Battery Was Timely Filed.

Battery is an intentional tort. The statute of limitations for the claim is two years. Appellant's Complaint was filed on December 14, 2015. The act alleged occurred on May 13, 2014. The action was timely. Even if not pled initially, an amendment to the complaint to add a claim relates back to the date of the original filing. CR 15(c).

B. The Claim of Medical Battery Was Presented to the Trial Court

Without Objection.

The facts alleged in Plaintiff's complaint are consistent with negligence as well as with battery. CP 1-2. At the hearing before the trial court, it was Respondent who first raised the issue of medical battery. Verbatim Report of Proceedings (hereinafter "VRP"), pg. 8, l. 10 – pg. 9, l. 19. The issue was addressed by Appellant in her argument. VRP, pg. 21, l. 9-19; pg. 23, l. 1-13. Respondent revisited the issue in his reply to Appellant's argument. VRP, pg. 27, l. 10-19. The issue was addressed in Appellant's Response to Respondent's Motion for Summary Judgment. CP 79-80. Even if the issue was not raised in the pleadings, it was argued by express or implied consent of the parties. Accordingly the issue shall be treated in all respects as if it had been raised in the pleadings. CR 15(b).

In considering summary judgment, a trial court evaluates the “pleadings, depositions, answers to interrogatories . . . [and] . . . affidavits . . .” CR 56(c). The materials presented to the trial court included excerpts from Appellant’s deposition transcript (CP 109-100), the Declaration of Appellant (CP 115-16) and that of Lisa Wilson (CP 111-114). Appellant informed Respondent on multiple occasions she had a prior left hip injury, prior left hip surgery and was limited in her range of motion in her left hip. Both women stated Appellant informed Respondent as he moved her leg into position that “that was as far” as her hip could go. Ms. Wilson stated that immediately before Respondent performed the maneuver that injured her, Appellant expressly told him he was “hurting” her. All of these facts establish an intentional and unpermitted contact.

This court, on appeal of a summary judgment, will consider evidence and issues called to the attention of the trial court. RAP 9.12. Issues and evidence related to medical battery were clearly brought to the attention of the trial court.

C. The Elements of Medical Battery Were Established

1. Intent

A battery is an intentional and unpermitted contact with the plaintiff's person. Battery requires “harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer such a contact, or apprehension that such a contact is imminent.” *McKinney v. City of Tukwila*, 103 Wn. App. 391, 408, 13 P.3d 631 (2000) (quoting Prosser and Keeton on Torts § 9, at 39 (5th ed. 1984)). A defendant is liable for battery if (a) “he acts [or she] intending to cause a harmful or offensive contact with the [plaintiff or a third party], or an imminent apprehension of such contact, and (b) a harmful or offensive contact with the [plaintiff] directly or indirectly results.” *Kumar v. Gate Gourmet, Inc.*, 180 Wn.2d 481, 504, 325 P.3d 193 (2014), quoting Restatement (Second) of Torts §13 (1965). “A bodily contact is offensive if it offends a reasonable sense of personal dignity.” *Id.*, quoting Restatement (Second) of Torts § 19. Respondent’s intent was established by two facts. First, Appellant told Respondent he was hurting her before he “yanked” on her leg and injured her. Respondent did not stop at that point. Any continued touching from that point forward was “offensive” at a minimum. Given his training and experience, Respondent had every reason to know that continued contact and pressure after Appellant told him he was hurting her would be harmful.

The second fact was Respondent's statement immediately after injuring Appellant and hearing her cry out in pain: "That's the response I was looking for." CP 110 and CP 114. The statement establishes Respondent "intended to cause [Appellant] . . . to suffer such a [harmful or offensive] contact." *McKinney, supra*. Respondent advances the curious and unsupported argument that the testimony "contains hearsay statements that do not fall within the exceptions of ER 801(2)(d)." Response Brief of Respondent, pg. 21. First of all, ER 801(2)(d) addresses non-hearsay statements of a party, and contains no "exceptions" with respect to hearsay rules. Second, precisely because it is a statement of a party, it is not hearsay and therefore admissible to prove the truth of the matter asserted. An admission by a party opponent that is the "party's own statement" is exempt from exclusion as hearsay. ER 801(d)(i). *Lodis v. Corbis Holdings, Inc.*, 172 Wn.App. 835, 859, 292 P.3d 779 (2013).

More to the point, even if the statement is hearsay, it is admissible under ER 803(a)(3) if it bears on the declarant's state of mind and if that state of mind is an issue in the case. *State v. Terrovona*, 105 Wn.2d 632, 637, 716 P.2d 295 (1986). (citations omitted). Intent is inarguably an issue in a case of battery. Respondent's statement is admissible substantively to prove the truth of the statement, as well as to establish his intent to cause harmful or offensive contact. Viewed in the light most favorable to

Appellant, the evidence establishes Respondent's intent to commit battery. *Del Guzzi Construction Company v. Global Northwest Ltd.*, 105 Wn.2d 878, 882, 719 P.2d 120 (1986).

2. Appellant's Lack of Consent

Common law battery protects an individual's right to privacy and bodily integrity. *Bundrick v. Stewart*, 128 Wn.App 11, 17, 114 P.3d 1204 (2005) (citations omitted). To show that a defendant intended to and did cause harm or offense ordinarily requires the plaintiff to show the defendant's touching was not apparently consented to. *Bundrick*, 128 Wn.App at 18, citing Dan B. Dobbs, *The Law of Torts* § 29, at 57 (2000). Appellant's statement that Respondent was hurting her made it more than apparent that any further and more forceful touching was not consented to. Consent is an issue of fact for the jury except when reasonable minds could not differ. *See, e.g., Egan v. Cauble*, 92 Wn.App. 372, 377-78, 966 P.2d 362 (1998). Under these facts, it cannot be established as a matter of law that Appellant consented to the touching that caused her injury.

Respondent argued at the hearing at the summary judgment hearing that Appellant consented to everything that occurred at the examination because she consented to "having her IME done." VRP, pg. 27, l. 18-19). On appeal, he argues that she "must communication (*sic*) the limitation of her consent." Response Brief of Respondent, pg. 36,

quoting, *Bundrick*, 128 Wn.App. at 13. In both instances, Respondent takes an overly expansive view of the scope of a person's consent and its later limitation or withdrawal.

As to Respondent's first argument, "a plaintiff who gives consent may terminate or revoke it at any time by communicating the revocation to those who may act upon the consent." Dobbs' Law of Torts § 108 (2d ed. 2011); *See also*, Restatement (Second) of Torts § 892A(5)(1979). Appellant communicated to Respondent that he was hurting her. Respondent was the person who could "act upon the consent." Accordingly, Respondent's "unrevocable" consent argument fails.

As to Respondent's second argument concerning limitation of consent, his quote from *Bundrick* is from the first sentence of the opinion. However, when one reads the rest of the opinion, it is evident the first sentence is a potentially misleading statement of the law. The Court went on to state that "where consent is given, limitations upon it will be effective *if communicated*." *Bundrick*, 128 Wn.App. at 18, citing Dobbs, The Law of Torts § 104 at 244 (2000) (emphasis in original). The Court's opening sentence could convey the impression that a plaintiff must specify the limits of the revocation of her consent. An accurate statement of the law is that limitation or revocation of consent is effective if

communicated. Here there is an issue of fact whether a limitation or revocation was communicated. There is no requirement Appellant describe the scope or extent of her limitation of consent.

VII. Appellant Provided Medical Evidence Her Injuries Were Caused by Respondent

Contrary to the assertion in Respondent's brief, Appellant provided medical evidence her injuries were caused by Respondent. The Declaration of Bruce Blackstone, MD, established that his attached examination report dated January 21, 2015 was a true and accurate copy of the original. CP 120. Among other things in the report, Dr. Blackstone stated he agreed with Appellant's treating physicians that her acute onset of left hip pain occurred during the IME with Respondent, and was an aggravation of her pre-existing arthritis (CP 127); that the condition required further treatment (CP 128-29) and that the aggravation of her arthritis was permanent (CP 130).

The Declaration of Mark Colville, MD, and the report of his treatment of Ms. Reagan on August 22, 2014 (CP 141-42) stated essentially the same opinions as Dr. Blackstone. Dr. Colville was one of Appellant's treating physician's with whom Dr. Blackstone concurred. He wrote "the acute onset of Appellant's left hip pain in March was due to the

manipulation during her independent medical exam”, and that it
“aggravated her preexisting osteoarthritic condition of the left hip.” CP
142.

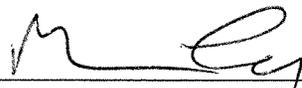
The declarations of each doctor is sufficient medical evidence to
establish that Respondent caused Appellant’s injuries.

CONCLUSION

For the reasons stated in this Brief, Appellant respectfully requests
this court to reverse the trial court’s granting of summary judgment to
Respondent, as well as the dismissal of her claims against him. Appellant
also respectfully requests the case be remanded back to the trial court for
further proceedings.

Dated this 7th day of March, 2018.

Respectfully submitted,



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CARON, COLVEN, ROBISON & SHAFTON PS

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