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No. 52404-0

IN THE COURT OF APPEALS FOR  
THE STATE OF WASHINGTON  
DIVISION II

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ESTATE OF HUNG NGUYEN  
By and through PHUOC NHU, P.R.  
Appellant/Plaintiff

v.

FRANCISCAN HEALTH SYSTEM,  
GILBERT JOHNSTON, M.D., et. al  
Respondents.

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BRIEF OF RESPONDENT  
GILBERT JOHNSTON, MD

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## I. INTRODUCTION

“You are entitled to your own opinion.  
But you are *not* entitled to your own facts.”<sup>1</sup>

The above quote illustrates the need for adherence to RAP 10.3(a)(5)’s mandate that “references to the record must be included for each factual statement.” This rule exists so that the appellate court can verify the accuracy of the statements. It further serves as a self-check for appellate lawyers by ensuring that the statement of facts and the facts underlying legal arguments reflect what actually occurred in the trial court. Appellant’s opening brief is what happens when one party simply chooses to ignore RAP 10.3(a)(5) and instead makes up their own facts. In his misplaced zeal to overturn the jury’s unanimous verdict, appellate counsel not only weaves an unsupported narrative, but he also litters the opening brief with derogatory and inappropriate attacks on the professionalism of the learned trial judge.

This appeal should be summarily dismissed. A valid notice of appeal has never been filed. The arguments allegedly supporting reversal are based on false factual premises. Finally, given the Estate’s and appellate counsel’s total failure to follow the Rules of Appellate Procedure

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<sup>1</sup> Senator Daniel Patrick Moynihan, quoted in:  
<https://www.nationalreview.com/2003/09/facts-are-facts-timothy-j-penny/>

and the gratuitous attacks on the judiciary, significant sanctions should be imposed pursuant to RAP 18.9.

## **II. RESPONSE TO ASSIGNMENT OF ERROR**

In the context of a case that had been pending for five and a half years with multiple attorneys appearing and withdrawing without materially advancing the case towards trial, the trial court did not err in exercising her discretion to deny the motion for a continuance which would have resulted in another ten month trial delay.

## **III. COUNTERSTATEMENT OF ISSUES**

1. Should this appeal be summarily dismissed because a proper notice of appeal was not filed by someone authorized to represent the Estate?
2. Did the trial court abuse her discretion in denying last minute motions for continuance?
3. Should appellate counsel be sanctioned for egregious violation of the Rules of Appellate Procedure and unconscionable delay in perfecting this appeal?

## **IV. COUNTERSTATEMENT OF THE CASE**

**A. The Estate's statement of the medical issues in this case is unsupported by the record and contains multiple errors regarding Mr. Nguyen's medical course.**

Without any citation to the record, appellate counsel crafts a description of the "Personal Injury Case Facts" that bears little relationship

to reality. The following narrative, supported by the medical records available to the jury, is the correct statement of what occurred.

In August 2008, Mr. Hung Nguyen's family physician referred him to Dr. Timothy Chung, a cardiologist, for work up of suspected cardiac disease. Ex. 116, p. 1. Mr. Nguyen, who had smoked at least a pack of cigarettes a day for forty years, reported that he had given up all exercise due to increasing dyspnea (shortness of breath) on exertion. *Id.*

Dr. Chung ordered an echocardiogram, followed by a myocardial perfusion gated spect study (stress test) and a cardiac catheterization/angiogram. Ex. 116, pp. 1-12. The angiogram, done on December 2, 2008, revealed that Mr. Nguyen had multi-vessel cardiac disease, including "very severe high grade stenosis of 90-95% involving the origin of the left anterior descending from the left main" and "total occlusion of the proximal right," as well as less severe occlusion of other vessels. Ex. 116, p. 11. Dr. Chung reviewed the findings with Mr. Nguyen and another cardiologist. *Id.* Both cardiologists agreed that the location of the stenosis in the left anterior descending from the left main made balloon-based intervention (stenting) "not a good idea." Ex. 116, p. 12. Stenting "was too dangerous and likely to kill him" particularly "given the fact that his only collateral blood flow to the septum was also compromised." 6/17/18 RP 110; Ex. 115, p. 27. Consequently,

Dr. Chung called cardiac surgeon Dr. Gilbert Johnston to the catheterization laboratory for a surgical consult. Ex. 116, p. 12.

Dr. Johnston reviewed the coronary study and agreed with Dr. Chung's assessment that revascularization was best done surgically. Ex. 115, p. 5. He discussed the risks and benefits of surgery, including the risk of death and major complications with Mr. Nguyen. *Id.* Mr. Nguyen stated that he was going to consider the options. *Id.* Thereafter, Mr. Nguyen opted for the surgery. Ex. 115, p. 16. The preoperative work up revealed slightly abnormal liver function values. *Id.* Dr. Johnston discussed this issue with Mr. Nguyen explaining that the "anatomy was compelling." Ex. 115, p. 31. The anesthesiologist, aware of the abnormal liver laboratory values, specifically advised Mr. Nguyen of the risk of worsening liver function following surgery. Ex. 107, p. 25.

Dr. Johnston performed a triple bypass on December 15, 2008. Ex. 115, p. 26. A post-operative echocardiogram showed good left ventricular function demonstrating that the surgery was a success. Ex. 115, p. 28. Despite the successful surgery, Mr. Nguyen unfortunately developed other severe post-operative complications, including refractory acidosis and hyperkalemia, secondary to hepatorenal<sup>2</sup> failure. Ex. 115,

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<sup>2</sup> A type of progressive kidney failure seen in people with severe liver damage, most often caused by cirrhosis. <https://www.healthline.com/health/hepatorenal-syndrome>.

p. 29. These complications, not a “life threatening infection”<sup>3</sup> caused his death on December 30, 2008. *Id.*<sup>4</sup>

Mr. Nguyen was survived by his wife, Phuoc Nhu; daughters, Tram Nguyen, Gabrielle Nguyen-Aluskar, Trang Cao; and sons, Darren Nguyen and Cuong Nguyen. Johnston Second Supplemental Designation CP<sup>5</sup> \_\_\_\_ (Budigan July 9, 2018 Notice of Attorney’s Intent to Withdraw and Proof of Mailing, p. 2). Only Phuoc Nhu, Tram Nguyen and Gabrielle Nguyen-Aluskar participated in these proceedings.<sup>6</sup>

**B. The Estate’s statements regarding the procedural events in this case are similarly flawed.**

**1. The Estate, not the defendants, was responsible for the age of the case leading up to the date of trial.**

At various places in the opening brief,<sup>7</sup> the Estate argues that defendants, not the Estate, were responsible for the delays in this case.

This claim is incorrect.

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Acute damage to the liver is also a rare, but known complication of cardiac surgery. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5094419/>.

<sup>3</sup> Appellant’s Brief at 3.

<sup>4</sup> *See also*, testimony of the Estate’s expert, Dr. Adams. “A hundred percent certainty, the patient died from liver failure, hepatorenal syndrome.” RP 6/7/18, p. 95.

<sup>5</sup> Hereafter “JSS CP”

<sup>6</sup> A constant issue in the case was notice to the remaining heirs. RP 5/14/18, p. 18; RP 6/4/18, p. 74.

<sup>7</sup> *See, e.g.*, Appellant’s Brief at p.5 (defendants had asked for most continuances-at least 5 of them), p. 11 (In 2017 there were multiple continuance requests by the Defendants); p. 11 (virtually everything that happened was not the plaintiff’s fault), and p. 15 (litigation was initially caused by the objections of the defense counsel. They, not the plaintiff, caused that delay.)

First, the Estate waited four years to file the original lawsuit. CP 8, 14.

Second, the delay associated with the prior appeal originated with the misconduct of the same daughter who the Estate now refers to as an “expert paralegal.”<sup>8</sup> As previously recognized by this court on a prior appeal, this daughter engaged in “fraudulent conduct” when she represented that she had been lawfully appointed personal representative of her father’s Estate. CP 12-25.<sup>9</sup>

Third, following the remand, the Estate failed to engage in discovery and otherwise move the case forward for almost two full years. On January 22, 2016, an experienced but elderly<sup>10</sup> lawyer, John Messina, appeared for the Estate. CP 27-28. At that point, four years after filing, Dr. Johnston had yet to be served. CP 60. The lack of service on Dr. Johnston resulted in the trial court holding periodic status conferences. *Id.* Frustrated by the Estate’s inaction, Dr. Johnston’s counsel agreed to accept service on his behalf. *Id.*

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<sup>8</sup> Appellant’s Brief at 9.

<sup>9</sup> See CP 24 for appellate court’s statement that conduct was fraudulent.

<sup>10</sup> Mr. Messina was eighty years old at the time of trial and had been an active member of the bar since 1969.

[https://www.mywsba.org/PersonifyEbusiness/LegalDirectory/LegalProfile.aspx?Usr\\_ID=00000004440](https://www.mywsba.org/PersonifyEbusiness/LegalDirectory/LegalProfile.aspx?Usr_ID=00000004440) Consequently, it was never likely, with or without having been involved in an accident, that Mr. Messina would do a solo trial.

After the service issue was resolved, the only action Mr. Messina took to move the case forward was to associate another firm. *Id.* On June 8, 2017, attorneys Jonathan Nolley and Justin Dale of the Emerald Law Firm, filed a notice of association. CP 664-665. Until late 2017, the only activity was the defense deposition of the Estate's liability expert, Dr. Carl Adams. CP 60-61, 421-64.

Dr. Johnston has never moved for a continuance. In 2017, FHS made one motion for continuance. JSS CP \_\_\_\_ (Defendant FHS' September 5, 2017 Motion to Adjust Trial Date), resulting in an early April 2018 trial date.

Mr. Nolley and Mr. Dale filed a notice of intent to withdraw effective February 8, 2018 and requested that the trial date be adjusted to accommodate the schedule of Sadler Ladenburg, Mr. Messina's firm. JSS CP \_\_\_\_ (Estate's February 6, 2018 Motion to Adjust Trial Date). Jeffrey Sadler filed a declaration stating that the law firm of Sadler Ladenburg, "with the assistance of John Messina, has agreed to represent the plaintiffs so long as a continuance is granted." CP 45-46. The declaration stated that "Sadler Ladenburg would need the trial date to be moved to at least mid-April or later" so that they would have the time to get up to speed on the case and "get the case ready for trial." CP 46.

In early February, two months before the April trial date, Mr. Messina was in a bad car accident. CP 228. Nonetheless, he believed he would be able to do the deposition of the defense expert and Dr. Johnston as scheduled. *Id.* However, as the Estate's motion to adjust the trial date had never been noted for hearing and the matter remained unresolved, *defense* counsel filed a motion seeking a firm trial date of June 4, 2018, a date more than four months after the withdrawal of Mr. Dale and Mr. Nolley. JSS CP \_\_\_\_ (Johnston March 8, 2018 Motion to Set Firm Trial Date of June 4, 2018). The parties subsequently agreed to continue the case to June 4, 2018. CP 48-49.

**2. The Estate failed to act promptly to replace Mr. Messina and the Sadler firm following their withdrawal.**

On April 3, 2018, *sixty* days before the June trial date, Mr. Messina and all attorneys associated with the Sadler Ladenburg firm, filed a Notice of Intent to Withdraw. CP 50-51. Contrary to the assertion contained in the opening brief,<sup>11</sup> neither Mr. Messina or his firm noted a motion for permission to withdraw.

On April 6, Ms. Nguyen-Aluskar, again purporting to act on behalf of the Estate, sent the court an email objecting to Mr. Messina's withdrawal and demanding deposition dates for Dr. Johnston and the

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<sup>11</sup> Appellant's Brief at 4.

defense expert. CP 55. Although Ms. Nguyen-Aluskar had no authority to act on behalf of the Estate,<sup>12</sup> defense counsel took this email as a signal that the Estate was objecting to the withdrawal. That same day, Dr. Johnston's counsel offered to accept, on shortened time, a motion for permission to withdraw so that the matter could be resolved on the next motion docket. CP 68. There was no response to this offer. CP 63.

On April 9, 2018, Ms. Nhu sent an email to the trial court objecting to the withdrawal. CP 54. Once this formal objection was made by the one person with authority to act on behalf of the Estate, pursuant to CR 71(c)(4), Mr. Messina could only withdraw with permission of the trial court. On April 10, 2018, defense counsel again requested that opposing counsel note a motion for permission to withdraw. CP 63. No motion was filed. *Id.*

With an out-of-state client, and the need to reserve the defense expert's time for trial testimony, defense counsel sought resolution of the issue by filing a "Motion for Pretrial Status Conference-Confirmation of Withdrawal of Plaintiff's Counsel and for Sanctions for Failure to Comply with Discovery." CP 74-80. Counsel noted it for the first available date, April 20, 2018. *Id.* Mr. Messina and his firm joined in that portion of the

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<sup>12</sup> See RP 4/20/18, p. 8 (Statement by Mr. Sadler "not sure how valid the objection is, initially because it wasn't filed by anybody with standing, originally. . . .").

defense motion relating to withdrawal, noting that “the reasons for withdrawal have been expressly explained to the Estate” and that “Plaintiff has ample opportunity to find new counsel should they so choose.” CP 82.

At the hearing, both Mr. Messina and Mr. Sadler appeared.

RP 4/20/18, p. 8. Mr. Messina requested permission to withdraw.

RP 4/20/18, p. 6. Mr. Sadler also appeared as the firm representative for Mr. Messina, and for his firm, Sadler Ladenburg. RP 4/20/18, p. 8. He explained that the reason for the withdrawal was not limited to Mr. Messina’s medical issues but other reasons that he could not disclose.

The Court: And that’s why I stopped and go to the letter because your firm is not able to step in is what I’m trying to figure out.

Mr. Sadler: That is correct for a variety of reasons, Your Honor, and I believe with the ethical rules, I cannot explain—  
Court: Right.

Mr. Sadler: --and disclose those reasons.

The Court: But I take it, it’s *beyond* just medical—

Mr. Sadler: It is.

The Court: ---which is why I was trying to get to that record that you just made there. It’s *not* just medical, there are other things that you are prohibited from disclosing because of your attorney-client—

Mr. Sadler: Correct, Your Honor.

The Court: --confidentiality requirements.

Mr. Sadler: Correct, Your Honor.

The Court: Okay.

RP 4/20/18, pp. 11-12 (Emphasis added). The trial court then granted the motion to withdraw. *Id.* Because Ms. Nhu was not available on the date

of that hearing, the trial court put over the pretrial conference and the motion for sanctions. RP 4/20/18, p. 20. The trial court specifically ruled that “Plaintiff Estate must be represented by an attorney at trial and the June 4, 2018 trial date will not be continued.” CP 125.

**3. The trial court fully and fairly considered all the pertinent facts prior to denying the May 14, 2018 oral motion for continuance.**

The Appellant’s Brief contains various misstatements regarding what occurred subsequent to Mr. Messina’s withdrawal. The May 14, 2018 hearing was not just a pretrial hearing, it was also a hearing on the defendants’ motion for sanctions for the Estate’s complete failure to comply with discovery requests. RP 5/14/18, pp. 6-9. At this hearing, Mr. William Budigan made a special appearance for the Estate. RP 5/14/18, p. 5. He informed the court that “I was contacted just last week” and that he would accept the case if a continuance were granted. *Id.*; RP 5/14/18, pp. 9-11.

Mr. Budigan accused the prior attorneys of not having properly prepared the case and reported that the family had told him that the other attorneys working with them “were not telling us what was going on.” RP 5/14/18, p. 13. The court disagreed and pointed out that the information provided by the family was “not the history of the case.” RP 5/14/18, p. 14. The trial court identified the failure to provide

discovery as well as the “inappropriate filings being made by the mother and daughter” as among the reasons for a potential CR 11 sanction for perceived abuse of process. RP 5/14/18, p. 12.

Appellant’s Brief asserts that the defense identified only impacts on insurance as the reason that the motion should be denied and then repeatedly asserts that the Estate should have been granted “a short” continuance.<sup>13</sup> In fact, a “short” continuance was not possible given the upcoming trial schedules for both defense counsel. RP 5/14/18, p. 15-16. If a continuance were to be granted, both defense counsel could only be available in April 2019. *Id.*

Finally, the defense objected to the continuance because the case was already so stale that necessary medical records no longer existed and other providers had died or retired. RP 5/14/18, pp. 15-18; 21.

The court denied the motion to continue. RP 5/14/18, p. 21. In reaching this conclusion, the court observed that the Estate had had since April 3, 2018 to obtain new counsel, that the case was six years old, that this was not the first trial date and that it was not the first time that counsel had appeared indicating an intent to assist the family in presenting the case. RP 5/14/18, pp. 11, 21. The court also found that:

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<sup>13</sup> Appellant’s Brief at, *inter alia*, pp. 5, 14; 17; 18; 20; 21.

[T]here is substantial prejudice to the Defense to prepare for trial and a trial date that has been continued numerous times. I am not finding any lesser type of remedy for a circumstance that would warrant this Court continuing the trial date given the scheduling issues, the expense that the Defense and, I believe even the family in this case, the Estate has incurred up to this point. . .

The Court has concerns that medical records are no longer in existence, and the Court has to balance both sides, fairness to both sides and to have a claim continuing six years now for Dr. Johnston where the Defense is not the one requesting the continuance, which is what you would expect but it's the Estate with the numerous issues that came up, I don't believe that that would be fair to that individual with a lengthy continuance of this case; so, the June 4, 2018, trial date remains.

RP 5/14/2018, p. 22.

Despite the denial of the continuance, Mr. Budigan decided to accept the case, apparently at a time when he was negotiating the terms of his own suspension with the Washington State Bar Association.<sup>14</sup>

4. **The trial judge reserved ruling on the Estate's first day of trial motion to continue until other issues regarding the Estate's new witnesses, retained by Mr. Budigan, were resolved.**

On June 4, 2018, all parties appeared for trial. Mr. Budigan had prepared a motion in limine which was, in reality, a renewed motion for a continuance. RP 6/4/18, p. 26. One of the primary reasons given for the continuance was his recent hiring of three new experts, economist John Berg, Nurse Karen Wilkenson and cardiac surgeon Dr. Deborah

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<sup>14</sup> <https://www.mywsba.org/WebFiles/CusDocs/000000013443-0/017.pdf>

McMenamin. RP 6/4/18, pp. 28; 31. Alerted to the retention of these experts just prior to trial, defendants responded with a motion to exclude the new experts, based on the late disclosure *and* the lack of qualifications for the liability witnesses. CP 288-299; 342-351; RP 6/4/18, pp. 125-130.

The court reserved ruling on the motion for continuance until it could evaluate whether the additional witnesses would be permitted. RP 6/4/18, pp. 35-36. The trial court initially ruled that the cardiac surgeon, Dr. McMenamin, would be permitted to testify. RP 6/4/18, p. 65.<sup>15</sup> The court revisited that ruling, however, after the defense produced evidence that Dr. McMenamin had lost her medical license in 2002 after pleading guilty to multiple felonies. RP 6/4/18, p. 127. Noting that the doctor had not practiced medicine for 16 years, the court excluded her testimony based on her lack of qualifications. RP 6/4/18, pp. 128-29.

After resolving the remaining motions in limine, the trial court noted that the case had been streamlined and its concerns about proceeding “had been minimized tremendously.” RP 6/4/18, p. 182. The motion to continue was denied. *Id.*

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<sup>15</sup> This prompted an outburst of “Yes!” by Ms. Gabrielle Nguyen-Aluskar. *Id.*

**5. At trial, the only issue before the jury was the alleged negligence of Dr. Johnston.**

Multiple places in Appellant's Brief, make bold claims of prejudice relating to the exclusion of Nurse Wilkinson. The following paragraph found on page six is typical:

The Plaintiff's former attorney had hired the nurse expert to show how the hospital contributed to Nguyen's death because of how the hospital's staff failed to properly coordinate Nguyen's care, thus exacerbating the likelihood that he would have post-operative problems, like the infection that killed him, especially with his elevated liver function problems. Because Mr. Budigan was not part of hiring this expert, he did not have a good handle on the purpose for this expert's testimony, this led to an exclusion of this witness and a detrimental loss of the theory Mr. Messina had formulated to show the milieu of problems that plagued Nguyen's recovery from heart surgery. See RP 5-60 from the 6-4-18 trial date.

Literally, there is not a single accurate fact in this paragraph.

Mr. Budigan, not Mr. Messina, hired Nurse Wilkinson.<sup>16</sup>

Mr. Nguyen died of refractory acidosis and hyperkalemia secondary to hepatorenal failure, not an infection. Ex. 115, p. 29.

Most importantly, there were no independent claims against the hospital. The parties had *stipulated* that all claims, other than vicarious

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<sup>16</sup> RP 6/4/18, p. 18 (Referring to prior attorneys: "bottom line...was they had one expert"); RP 6/4/18, pp. 18-19 ("I pulled in as many chips as I can and got people to do as many reports as they could. . ."); RP 6/4/18, p. 31 (Arguing continuance: "And if you won't give me more time, then I need at least my experts that I did find, did pay---).

liability, against the hospital would be dismissed months before the first day of trial. CP 38-39.

Finally, the erroneous assumption regarding claims against the hospital leads to an incorrect understanding of why the nurse's testimony was excluded. Given the stipulation, only Dr. Johnston's care was at issue. The court noted this fact in ruling on the motion:

Ms. Wilkinson cannot testify or provide any testimony regarding any of the dismissed providers, so the only healthcare provider before the Court, for this trial, is Dr. Johnston, and the question becomes: Does Ms. Wilkinson, based on her education and her work experience, qualify to testify regarding the standard of care of the defendant as to whether or not his actions were negligent?

RP 6/4/18, p. 51.

**6. The trial court allowed both sides to fully and fairly litigate their cases.**

At trial, the Estate called its expert, Dr. Carl Adams, Ms. Nhu, Ms. Nguyen-Aluskar and her sister, Ms. Tram Nguyen. RP 6/4/18, p. 84. When Ms. Nhu testified, the court discovered that she was referring to handwriting on her hand. CP 608; Ex. 150.

Mr. Budigan presented the Estate's expert on the fourth day of trial. RP 6/7/18. Mr. Budigan had Dr. Adams explain the medicine and he explored fully Dr. Adams' opinion that Dr. Johnston had breached the standard of care by taking Mr. Nguyen to surgery. *See, e.g.*, RP 6/7/18, pp. 5-42.

Contrary to the assertion that Mr. Budigan did not know the family or the culture,<sup>17</sup> Mr. Budigan's closing included a detailed description of the family dynamics and included damage amounts for the Estate, loss of income for Tram Nguyen, loss of her income as a doctor,<sup>18</sup> the cost of a house for Gabrielle Nguyen-Aluskar and amounts that she believed her father would have provided as support.<sup>19</sup>

However, the jury never reached the issue of damages. On June 19, 2018, it found Dr. Johnston was not negligent. CP 381.

**7. The Estate's conduct on appeal has resulted in an improper notice of appeal and further delays.**

On June 25, 2018, Ms. Nhu and her two daughters filed a document entitled "Termination of Plaintiff Attorney." CP 465. That document indicated that the "Estate terminate (sic) the egregious practice of law (sic) on attorney William C. Budigan. . . . effective immediately." *Id.*

Ms. Nhu subsequently signed a durable power of attorney purporting to give Ms. Gabrielle Nguyen-Aluskar legal authority to perform all legal matters pertaining to the decedent. CP 503. Later that month, Ms. Nguyen-Aluskar appeared on the superior court

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<sup>17</sup> Appellant's Brief at 8.

<sup>18</sup> Ms. Tram Nguyen contended that she would have become a doctor if her father had not died. JSS CP \_\_\_\_ (Plaintiff attorney's documents used in closing, filed June 20, 2018).

<sup>19</sup> *Id.*

commissioner's docket and obtained the commissioner's signature on a waiver of court fees form that she had modified so as to allow waiver of the fees associated with the trial transcripts. CP 609. A week later, Presiding Judge Elizabeth Martin vacated that order per "CR 60 due to mistake, irregularity, inadvertence or fraud." CP 621.

Ms. Nhu signed the notice of appeal as the personal representative of the Estate. CP 511. Dr. Johnston responded by bringing a motion to strike the notice of appeal before the trial court based on the fact that the notice had not been signed by an attorney. CP 633. The trial court determined that it was unclear whether or not she had authority to strike the notice. CP 636. She did, however, enter extensive findings concerning the misconduct of both Ms. Nhu and the paralegal daughter. CP 634-636.

The subsequent delays in perfecting this appeal have been described in the prior motion to dismiss. On October 30, 2019, fourteen and a half months after the filing of the notice of appeal, the Estate eventually filed its brief.

## **V. SUMMARY OF ARGUMENT**

This appeal should be summarily dismissed because the notice of appeal does not comply with CR 11's requirement that all pleadings be properly signed by an attorney. If a pleading is not so signed, it "shall be

stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.” Ms. Nhu and Ms. Nguyen-Aluskar were well aware of the requirement that the Estate be represented by an attorney. Moreover, appellate counsel also refused to address the deficiency. Dismissal is thus warranted.

The present appeal also fails on the merits. This case is about the simple proposition that “[a]t some point a trial must proceed.” *Harris v. Drake*, 152 Wn.2d 480, 493, 99 P.3d 872 (2004). Hung Nguyen died on December 30, 2008. From the date of his death to April 20, 2018, attorneys Jack Connelly, Carl Lopez, Elena Garella, John Messina, Jonathan Nolley, Justin Dale, and Jeff Sadler, attempted to assist the three<sup>20</sup> beneficiaries of the Estate who drove the litigation. CP 59.

Almost ten years after Mr. Nguyen’s death, the trial court properly exercised its discretion in denying the motion for continuance when yet another lawyer appeared three weeks before trial promising to try the case if only he was granted a “short” continuance. RP 5/14/18, p.5. The “short” continuance he sought, however, was not a possibility. RP 5/14/18, pp. 15-16. Faced with delaying a five and a half year old case

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<sup>20</sup> There is no evidence in the record that the other three beneficiaries were ever even notified of the litigation.

out another ten months, the trial court correctly exercised its discretion to deny the motion.

The Estate did not establish good cause for a continuance on the day of trial or prejudice in having to try the case as scheduled. The alleged prejudice identified in Appellant's Brief rests on incorrect facts, improper assumptions and untrue allegations of bias against a trial judge who carefully considered the various arguments and concluded it was time for the case to be tried. The jury's unanimous defense verdict should be affirmed and sanctions imposed for gross violation of the appellate rules.

## VI. ARGUMENT

### **A. Pursuant to CR 11, the notice of appeal should be stricken and the appeal dismissed because the Estate was required to have legal counsel.**

CR 11 provides that "every pleading, motion, and legal memorandum of a party represented by an attorney shall be dated and signed by at least one attorney of record in the attorney's individual name. . . ." Where a party is not represented by an attorney, an individual can appear pro se and individually sign the pleading. CR 11 (a). "If a pleading, motion, or legal memorandum is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant." *Id.*

Here, the only party to this action is the Estate of Hung Nguyen.

CP 1. Unlike individuals, organizations or other legal entities must be represented by an attorney. *Advocates for Responsible Dev. v. W. Wash. Growth Mgmt. Hearings Bd.*, 155 Wn. App. 479, 230 P.3d 608 (Div. II 2010), *reversed as to sanctions only*, 170 Wn.2d 577, 245 P.3d 764 (2010); *Wash. State Bar Assn. v. Great W. Union Fed. Sav. & Loan Assn.*, 91 Wn.2d 48, 586 P.2d 870 (1978); *Dutch Vill. Mall, LLC v. Pelletti*, 162 Wn. App. 531, 256 P.3d 1251 (Div. I 2011). This rule is specifically applicable to Estates. *See Bozgoz v. Essakhi*, 2018 Wash. App. LEXIS 1165 (Div. II, May 15, 2018) (unpublished).

The *Bozgoz* court quoted *No on I-502 v. Wash. Norml*, 193 Wn. App. 368, 373, 372 P.3d 160 (Div. II 2016), *review denied*, 186 Wn.2d 1025 (2016), noting that the pro se exception is strictly limited:

There is a recognized “pro se exception” to these general rules where a person may appear and act in any court as his own attorney without threat of sanction for unauthorized practice. But this pro se exception is limited, applying only if the layperson is acting *solely on his own behalf* with respect to his own legal rights and obligations.

*Id.* at \*5.

The individual beneficiaries were well aware of this rule, as they had been notified of it at multiple motions and by orders of the trial court

entered on April 20, 2018, August 17, 2018<sup>21</sup> and September 4, 2018. CP 125; 633-637. Nonetheless, in direct disregard of the rule, Ms. Nhu and Ms. Nguyen-Aluskar continued to file documents and appear in court. *Id.* Despite being alerted to the irregularities in the notice of appeal, current counsel has failed to correct the deficiency. Dismissal is thus warranted.

**B. The trial court properly exercised its discretion in denying the last minute motions to continue.**

**1. Standard of Review & Legal Standards**

Pursuant to CR 40(d), a party seeking a continuance on the day of trial carries the burden of establishing good cause: That rule states:

*(d) Trials.* When a cause is set and called for trial, it shall be tried or dismissed, unless good cause is shown for a continuance. The court may in a proper case, and upon terms, reset the same.

CR 40(d).<sup>22</sup>

The decision to grant or deny a continuance is at the discretion of the trial court and the decision will be upheld absent an abuse of discretion. *Harris*, 152 Wn.2d at 493 (citing *Podrebarac v. G.V.*, 124 Wn.2d 288, 295, 877 P.2d 680 (1994)). “A trial court abuses its discretion if its decision is manifestly unreasonable, exercised on untenable grounds,

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<sup>21</sup> JSS CP \_\_\_ (Notice of Non-Action on Motion for Reconsideration signed by presiding Judge Elizabeth Martin on August 17, 2018).

<sup>22</sup> Appellant’s Brief never refers to this rule or to the good cause standard it contains.

or is arbitrary.” *Id.* at 493 (citing *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 683, 15 P.3d 115 (2000)). A decision is manifestly unreasonable if it is “outside the range of acceptable choices, given the facts and the applicable legal standard.” *Teter v. Deck*, 174 Wn.2d 207, 215, 274 P.3d 336 (2012) (quoting *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)).

In exercising its discretion a trial court may consider 1) the necessity of reasonably prompt disposition of the litigation; 2) the needs of the moving party; 3) the possible prejudice to the adverse party; 4) the prior history of the litigation, including prior continuances granted the moving party; 5) any conditions imposed on the continuances previously granted; and 6) any other matters that have a material bearing upon the exercise of the discretion vested in the trial court. *Balandzich v. Demeroto*, 10 Wn. App. 718, 720, 519 P.2d 994 (Div. I 1974).

2. **The trial court fairly assessed the need for prompt resolution of the case, given its age, the loss of witnesses that already had occurred and the delays attributable to the Estate.**

The Estate first argues that the motion should have been granted because the defendants, not the Estate, were responsible for the staleness of the case. Ignoring the fact that the defense lawyers were unavailable until the following year, the Estate argues that defendants would not have

been prejudiced by a “short continuance.” These arguments grossly misstate the record. The staleness of this case was directly attributable to the Estate.

First, the Estate waited almost four years from the date of Mr. Nguyen’s death to bring suit. CP 8-10.

Second, as established by an even cursory review of the prior appellate decision, the legal issues associated with that appeal were the result of Ms. Nguyen-Aluskar filing a lawsuit on behalf of the Estate without a legally appointed personal representative. CP 12-26.

Ms. Nguyen-Aluskar represented that she had been appointed personal representative when the case was filed in December 2012. CP 14. Both she and her mother knew that this was not true because in November 2013, they came before a different court and tried again to have first Ms. Nguyen and then Ms. Nhu be appointed. CP 16. The court declined to have either appointed without the filing of a motion and notice to the other heirs<sup>23</sup> of the Estate. P 16-17.

Third, during 2016, the case was further delayed by the Estate’s failure to serve Dr. Johnston for nine months following remand. CP 60. This situation might never have been corrected if the defense hadn’t

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<sup>23</sup> There is no evidence that Ms. Nhu or her attorneys ever provided notice to the three other heirs.

simply agreed to accept service in lieu of periodic, nonproductive status conferences. *Id.*

Fourth, the Estate did nothing to prosecute the case. The Estate took no steps to depose either Dr. Johnston or his expert, until late 2017. *Id.* The first formal request for these depositions came in December 2017. CP 61. Defendant made these witnesses available for depositions to take place on February 20 and 26 respectively. *Id.* Neither deposition took place because associated counsel withdrew from the case and Mr. Messina was not available. *Id.*

Fifth, the Estate caused further delay by moving to adjust the trial date specifically so that Mr. Messina and his firm, Sadler Ladenburg, could be prepared and available for trial. *Id. See also, CP 45-46.*

Sixth, the case was so old that, as established by the Estate's own witness list, a key witness had already died.<sup>24</sup> Some medical records were also no longer available. RP 5/14/18, p. 22.

Finally, the Estate's argument ignores the fact that the trial court was faced with a choice of either the June 4, 2018 date or a date in *April 2019*. RP 5/14/18, pp. 15-16, 20. A sixty or ninety day continuance was simply impossible. *Id.*

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<sup>24</sup> "Dr. Stephen Hillis, deceased PCP 25+ years." JSS CP \_\_\_\_ (Plaintiff's Witness List).

The trial court properly weighed the need for prompt resolution of the case and found that proceeding with trial was the fairest resolution to all parties. RP 5/14/18, p. 22.

**3. The trial court properly considered all relevant factors in denying the motion to continue.**

The Estate makes an impassioned argument that there was little, if any, prejudice to the defendants in granting another continuance, while there was substantial prejudice to the Estate. These arguments are, again, based on incorrect facts.

To begin with, the Estate grossly misstates the amount of time the Estate had to obtain another attorney and prepare for trial. The Estate actually had two months, not nine days, to obtain another attorney and to have that attorney prepared for trial. As noted above, Mr. Messina and the Sadler Ladenburg firm filed their notice of withdrawal sixty days before trial.<sup>25</sup> CP 50-51. The Estate's decision to wait until the week before the May 14, 2018 pretrial conference to retain Mr. Budigan caused the loss of the additional preparation time. RP 5/14/18, p.5.

The Estate's assertion of prejudice also fails because it is based on the incorrect assumption that Mr. Messina was the strategist and the only

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<sup>25</sup> Even if the Estate wrongly believed that because Ms. Nhu objected, the trial court would force Mr. Messina to try the case, that belief was affirmatively dispelled on April 20, 2018, when the court granted the motion to withdraw. CP 124-125.

one with knowledge of the relevance of the Estate's nurse expert. Appellate counsel cites RP 6/4/18, pp. 41-49 to support this argument. Counsel did not read the transcript. On page 28 of that same transcript, Mr. Budigan explains that the prior attorneys only had *one* expert, Dr. Adams, and that *he* (Mr. Budigan) hired the nurse, the economist and the other cardiac expert. RP 6/4/28, p. 28.

More importantly, this argument is based on the false statement that there were independent claims against the hospital. There were none. CP 38-39. It also ignores the fact that, given the stipulation dismissing the claims against the hospital, the nursing administrator could *never* have testified. A plaintiff must prove the standard of care and breach thereof through the testimony of professional equals of the health care provider she alleges were negligent. WPI 105.02; RCW 7.70.040; *McKee v. American Home Products*, 113 Wn.2d 701, 706, 782 P.2d 1045 (1989). "...[N]ot even a medical degree bestows the right to testify on the technical standard of care; a physician must demonstrate that he or she has sufficient expertise in the relevant specialty." *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 229, 770 P.2d 1982 (1989).

Here, the trial court properly ruled that nurse Wilkinson was "not qualified to testify regarding the standard of care Dr. Johnston gave in this case." RP 6/4/18, p. 53. No amount of preparation time was going to

change the fact that a nurse administrator cannot offer standard of care or causation opinions regarding a cardiac surgeon. *McKee, supra, Young, supra.*

The Estate asserts that “the loss of their original counsel also caused them to lose their primary strategist in the case, the one who knew the case from its inception.”<sup>26</sup> Again, this argument is based on incorrect facts. The “original attorney” was Jack Connelly, who handled the case before it was filed. CP 59. The next attorney, Carl Lopez, filed the original complaint and continued on the case until he withdrew on July 28, 2014. *Id.* After the appeal, Mr. Messina appeared and then associated attorneys, Justin Dale and Jonathan Nolley. That firm, not Mr. Messina, appeared for the deposition of the Estate’s expert, Dr. Carl Adams, prepared discovery requests, requested depositions, and prepared pleadings. CP 423; 61-62.

The Estate claims prejudice because the “new attorney also knew very little about the case, which obviously meant that he would have difficulty telling the plaintiff’s story to the jury, making the jury naturally surmise that the Plaintiff’s case was weak and unfounded.” This latter

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<sup>26</sup> Appellant’s Brief at 16.

argument is pure speculation and conflicts with the detailed economic claim Mr. Budigan put forward in closing.<sup>27</sup>

In sum, there is no evidence that the Estate was prejudiced by the denial of the motions to continue. The trial attorney competently presented the Estate's best liability case through the testimony of Dr. Adams. The jury simply rejected his conclusion that stenting, rather than surgery, was appropriate. RP 6/7/18, pp. 90-92. Given the evidence that the treating interventional cardiologists believed stenting was "too dangerous and likely to kill him"<sup>28</sup> no amount of preparation would have changed the jury's verdict.

**4. The Estate's cited authority does not support the conclusion that the trial judge abused her discretion in denying the motion to continue.**

Citing *State v. Chichester*, 141 Wn. App. 446, 170 P.3d 585 (Div. I 2007) as an example of a case that "dovetails with this case perfectly", the Estate argues that the denial of the continuance prejudiced the Estate's presentation of its case. Appellant's Brief at 19. *Chichester* was a criminal case wherein the prosecutor had conflicting trials. The prosecutor raised the issue only after the cases had been set for trial. *Id.* at 449-50. The court warned that the prosecutor's office would have to work

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<sup>27</sup> See JSS CP \_\_\_\_\_ (Plaintiff Attorney documents used during closing statements).

<sup>28</sup> Ex. 115, p. 27.

out the conflict. *Id.* On the day of trial, the defendant and his attorney showed up ready for trial. The prosecutor's office sent the trial deputy and his supervisor to court to ask for a continuance. The defendant opposed the continuance, in part because he was missing work in order to be present for the trial. The trial court denied the motion to continue and dismissed the case when the supervising prosecutor declined the court's invitation to try the case herself. In affirming the dismissal, the Court of Appeals observed that in exercising its discretion, "trial courts may consider many factors, including surprise, diligence, redundancy, due process, materiality and maintenance of orderly procedures." *Id.* at 454.

None of these factors<sup>29</sup> support the argument that the trial court abused her discretion. The Estate had sixty days' notice that it needed a new attorney. CP 50. The Estate was aware no later than April 20, 2018, that objection to the withdrawal had failed, that the Estate needed a lawyer and that the "trial date will not be continued." CP 125. Yet the Estate failed to address the situation until a week before the May 14, 2018 hearing. RP 5/14/18, p. 5. Like the prosecutor's office, the Estate failed to use diligence to find a timely remedy to the problem it created.

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<sup>29</sup> It should be noted that the Estate's counsel cited no legal authority to the trial court in support of his motions for continuance. *See*, RP 5/14/18, pp. 5-14; RP 6/4/18, pp. 26-32; JSS CP \_\_\_\_\_ (The Estate's "Motion in Limine," which was actually a motion to continue).

As to the motion made on the day of trial, the Estate ignores the rationale of *Chichester*. Like the defendant therein, Dr. Johnston had come to court, taking time away from his work. In fact, Dr. Johnston had flown over thirteen time zones to attend this trial. RP 6/4/18, p. 33. The trial court carefully analyzed and considered the motion to continue, initially reserving ruling until it was understood how complex the case would be in terms of the number of experts that would be allowed to testify, noting that those rulings would “drive this Court’s decision as to whether or not a continuance is needed.” RP 6/4/18, pp. 35-36. When the trial court determined that the two additional liability experts were unqualified, it correctly noted that the trial had been streamlined. RP 6/4/18, p. 182.

Finally, this trial was not that complex. It involved the issue of whether Dr. Johnston should have delayed surgery. The Estate’s expert testified that Dr. Johnston should not have taken Mr. Nguyen to surgery and that fact was rebutted by Dr. Johnston, his experts and the medical records of the treating cardiologists. The first week all the Estate’s counsel had to do was present the testimony of his clients and his standard of care expert. As to the defense experts, their testimony did not take place until the following week, giving Mr. Budigan additional time to prepare.

Similarly, the argument that he was denied the help of the expert paralegal is without merit. Both daughters were present in the courtroom and actively assisted Mr. Budigan.<sup>30</sup> But more importantly, any of the limited restrictions<sup>31</sup> placed on the paralegal daughter were the result of her multiple instances of misconduct, including the fraudulent conduct identified in the prior appeal, CP 24; her outbursts in open court during motions in limine, RP 6/4/18, pp. 65, 201; and her improper attempts to act on behalf of the Estate, CP 106-107; RP 8/31/18, p. 7.

The Estate also cites *Chamberlin v. Chamberlin*, 44 Wn.2d 222, 266 P.2d 786 (1954). That divorce case involved the trial judge denying a continuance to the wife, who resided in the family home in Illinois. The opinion focuses on the right of a party to be present at their own trial. This case has no application here as all parties were present.

Finally, relying on *Coggle v. Snow*, 56 Wn. App. 499, 784 P.2d 554 (Div. I 1990) and *Butler v. Joy*, 116 Wn. App. 291, 65 P.3d 671 (Div. III 2003), the Estate argues that a “short” continuance should have been granted in order to allow Mr. Budigan time to prepare. There was no “short continuance” option available. Further, these cases rest on

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<sup>30</sup> Because the appellant did not order the entire transcript, documentation regarding this fact can only be demonstrated by citing examples. See RP 6/4/18, p. 78; 80; 84.

<sup>31</sup> Appellant’s claim that the daughter was prevented from helping the trial lawyer with the case is not supported by any reference to the record.

interpretation of CR 56(f), not CR 40(d). Finally, both cases stand for the proposition that justice is not served by denying a plaintiff their day in court just because a new attorney has appeared in the case. Here, the Estate had its day in court. Attempts to blame the defense verdict on a lack of preparation simply flies in the face of the record.

In sum, none of the cited cases establish that the trial court abused its discretion. The Estate's chosen lawyer tried the case on the merits. There is no evidence that a jury would reach any other conclusion on these facts no matter how much preparation time were permitted.

**C. Significant terms are appropriate given counsel's complete disregard for the Rules of Appellate Procedure and false claims of judicial bias and/or misconduct.**

RAP 10.3(a)(5) requires a statement of the case to be "a fair statement of the facts and procedure, without argument." The rule further provides that "references to the record must be included for each factual statement." *Id.* RAP 10.3(a)(6) also requires citations to the applicable record to support the legal arguments. The Opening Brief fails to even attempt to follow these rules. More fundamentally, neither the statement of the case, nor the facts asserted in the argument section, meet the "fair statement of the facts and procedure without argument" requirement of RAP 10.3(a)(5).

Nowhere is counsel's flaunting of the rules more evident than in the multiple, personal attacks on the trial judge. For example, on page nine of the brief, the author writes: "It was almost as if the judge intentionally tied the Plaintiff's hands at every turn, leaving her with an attorney who knew little about the case, and no trusted family member to help her with this legal process, again, especially when all this was not her fault."<sup>32</sup>

At the bottom of that same page, the author asserts: "The importance of that restriction shows how the trial judge wanted to control the Plaintiff's every move in this case."<sup>33</sup> Counsel's diatribe continues with claims that the "judge simply did not care" that she forced the Estate into presenting the case "in a manner she felt was appropriate, even if it meant that she [plaintiff] would have ineffective assistance of counsel, it did not matter."<sup>34</sup>

Warming up to his topic, counsel claims that the court further hampered the case by excluding the nurse administrator, and concludes "Somehow in excluding the nursing expert the judge seemed to forget

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<sup>32</sup> Appellant's Brief at 9. Note there are no citations to the record on this entire page even though it is in the "Statement of the Case" section. Pages 1, 2, and 4 also contain no citations to the record. The other pages of this section have one or two citations, some of which refer to 12 or even 45 pages of transcript, without identifying the specific page or pertinent passage.

<sup>33</sup> Appellant's Brief at 9-10.

<sup>34</sup> Appellant's Brief at 10.

who the defendants were in the case, and that the case was also about a health care system or group.”<sup>35</sup> Ironically, had counsel chosen to review his own clerk’s papers, he could have easily discovered that there was *no independent claim* against the hospital system and therefore his attack on the trial judge was totally without factual foundation. CP 38-39.

On page 13, counsel claims that the judge’s ruling regarding the requirement that the Estate be represented by an attorney, “became so restrictive and personal that the trial judge, without proper authority, even entered an order attempting to strike the Estate’s Notice of Appeal.”<sup>36</sup>

Again, counsel ignores the record. The trial court *explicitly* recognized the limits of her authority:

While it is *unclear* that this court has the authority to actually strike the Notice of Appeal, to the extent that the trial court has such authority, the pleading is struck. The court *defers* final determination of the issue of authority to strike/and or the validity of the appeal to the Court of Appeals.

CP 636 (emphasis added).

Again ignoring the impossibility of a short continuance, appellate counsel argues that “it seems confusing why the judge would not even allow a short continuance to help their new attorney get up to speed in the

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<sup>35</sup> *Id.*

<sup>36</sup> Appellant’s Brief at 13.

case, other than she wanted the case to go away personally and/or did not like the Plaintiff's (sic) for some reason."<sup>37</sup>

These and other slams on the trial judge's fairness and impartiality have no place in an appellate brief. RAP 18.9 authorizes an award of sanctions against a party who uses the rules of appellate procedure for purposes of delay, files a frivolous appeal *or fails to comply* with the Rules of Appellate Procedure. *Schorno v. Kannada*, 167 Wn. App. 895, 904, 276 P.3d 319 (Div. II 2012), *review denied*, 175 Wn.2d 1018 (2012). Given the delay in perfecting the appeal, the improper argument in the statement of the case, the lack of citations to the record to support the statements and the inflammatory personal attacks on the trial court, the Estate and the author of the opening brief have demonstrated a wholesale disregard of RAP 10.3(a)(5) and (6) making sanctions appropriate.

## VII. CONCLUSION

A litigant is not entitled to make up their own facts and then use those false facts to impugn the integrity of a trial judge. The Estate's arguments on appeal have no factual basis. The trial court, faced with a case of this age, the history of misconduct which delayed the case, and the repeated withdrawal of attorneys, properly balanced the needs of the

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<sup>37</sup> Appellant's Brief at 18.

parties and determined that the trial should go forward on the date set.

The defense verdict should be affirmed.

Further, sanctions should be imposed to deter attorneys from simply making up facts, improperly impugning the integrity of the courts and to prevent them from ignoring the Rules of Appellate Procedure.

Respectfully submitted this 9<sup>th</sup> day of January, 2020.



Bertha Baranko Fitzer, WSB#12184  
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Attorneys for Respondent Dr. Gilbert  
Johnston

## CERTIFICATE OF SERVICE

I certify under penalty of perjury of the laws of the State of Washington that on the date set forth below, I caused a true and correct copy of the foregoing document be served on the following in the manner indicated below:

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SIGNED at Tacoma, Washington this 9th day of January, 2020.

*s/Karen Becker*

Karen Becker, Legal Assistant  
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FITZER VEAL LAW, P.S.

**FITZER FITZER VEAL MCAMIS, P.S.**

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