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Supreme Court No. 91374-9
King Co. Superior Court Cause No. 13-2-21191-2 SEA

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SUPREME COURT OF THE STATE OF WASHINGTON

DAVID DUNNINGTON and JANET WILSON,

Plaintiffs-Petitioners,

vs.

VIRGINIA MASON MEDICAL CENTER,

Defendants-Respondents.

REPLY IN SUPPORT OF DISCRETIONARY DIRECT REVIEW

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ORIGINAL

This reply is submitted on behalf of Petitioners David Dunnington and Janet Wilson (collectively Dunnington) in support of their Motion for Discretionary Review and Statement of Grounds for Direct Review, and in response to the Answer and Cross-Motion for Discretionary Review submitted on behalf of Respondent Virginia Mason Medical Center (VMMC):

The superior court has certified, and the parties agree, that discretionary review is warranted regarding the standard of causation to be applied in this medical negligence case involving loss of a less than 50% chance of a better outcome. *See* Dunnington's Appendix, at A-293 to A-296. The parties further agree that direct review is warranted of this issue. *See* Answer & Cross-Motion for Discretionary Review, at 1-2.

The superior court has also certified, and the parties agree, that discretionary direct review should be granted regarding VMMC's comparative fault defense as a matter of judicial economy. *See* Answer & Cross-Motion for Discretionary Review, at 10. Dunnington's view of the facts regarding this issue is summarized in VMMC's Appendix, at A-2 to A-6 and A-150 to A-156, copies of which are attached to this reply for the convenient reference of the Court. The balance of VMMC's cross-petition

addresses the merits of its contributory negligence defense, to which Dunnington will respond at the appropriate time, in his briefing on the merits.

The Court should grant discretionary direct review of both issues raised by the parties.

Respectfully submitted this 8th day of May, 2015.


George M. Ahrend, WSBA #25160
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CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

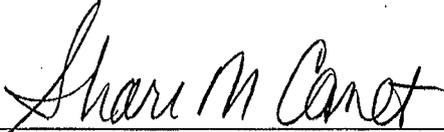
On May 8, 2015, I served the document to which this is annexed by email and First Class Mail, postage prepaid, as follows:

Steven F. Fitzer
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and via email to co-counsel for Plaintiffs/Petitioners pursuant to prior agreement to:

James L. Holman at jlh@theholmanlawfirm.com
Jessica F. Holman at jhd@theholmanlawfirm.com

Signed on May 8, 2015 at Ephrata, Washington.



Shari M. Canet, Paralegal

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II. OVERVIEW OF CASE

Plaintiffs David Dunnington and Janet Wilson are husband and wife at all times material to this lawsuit. They reside in Sammamish, Washington.

Defendant Alvin T. Ngan, DPM (Dr. Ngan) is a podiatrist located in King County, Washington at all times material hereto. Dr. Ngan is an employee of Virginia Mason Medical Center (VMMC) at all times material hereto.

Mr. Dunnington presented to Dr. Ngan's office on September 1, 2011. Mr. Dunnington was treated by Dr. Ngan on September 1, 2011 (Holman Decl., Exh. 1), September 15, 2011 (Holman Decl., Exh. 2), and December 27, 2011 (Holman Decl., Exh. 3). Dr. Ngan treated Mr. Dunnington for a lesion on the bottom of his left foot. Dr. Ngan believed this lesion, throughout his treatment, to be a pyogenic granuloma, a benign lesion.

On December 29, 2011 Mr. Dunnington saw Ryan Bierman, DPM for the first time. Dr. Bierman treated Mr. Dunnington on December 29, 2011, January 12 and January 30, 2012. Dr. Bierman believed this to be a benign lesion throughout his treatment. (Holman Decl., Exh. 4)

On January 31, 2012 Mr. Dunnington saw Alro J. Miller, M.D., a dermatologist. (Holman Decl., Exh. 5) Dr. Miller performed a biopsy on that visit which biopsy resulted in a diagnosis of an invasive melanoma. (Holman Decl., Exh. 6)

Plaintiffs filed this lawsuit against the Defendants herein on May 29, 2013. The matter is scheduled for trial on December 1, 2014. By this motion, Plaintiffs seek to

1 dismiss the affirmative defense of comparative fault asserted by Defendants VMMC and
2 Dr. Ngan in their Answer (Holman Decl., Exh. 7):¹

3 "That the plaintiffs' injuries and damages, if any, may be caused in
4 part by the conduct of David Dunnington, thus barring or
5 diminishing any right to recover."

6 **III. FACTS**

7 The significant facts associated with this lawsuit and Plaintiffs' motion to strike
8 and/or for partial summary judgment are as follows:

9 1. Mr. Dunnington first saw Dr. Ngan on September 1, 2011. Mr.
10 Dunnington saw Dr. Ngan for a lesion that arose on the bottom of his left foot. Dr. Ngan
11 diagnosed a "benign lesion of capillaries that can arise spontaneously, but more typically
12 after puncture wounds, esp in the foot." His assessment was a "pyogenic granuloma".
13 Conservative treatment was provided. An x-ray revealed no foreign bodies. (see Exh. 1)

14 Dr. Ngan testified that a picture taken on December 27, 2011 was similar to how
15 the lesion appeared on September 1, 2011. (Holman Decl., Exh. 8) Dr. Ngan testified as
16 follows regarding this picture:

17
18 131

19 2 Other than what you've described here, do you
20 3 have an independent recollection of what the lesion
21 4 looked like on September 1st?

22 5 A. Everything that I -- this is the way that I
23 6 would describe it.

24 7 Q. Okay. Looking at the picture, Exhibit 6, did
25 8 the lesion have any similar appearances to that
26 9 picture?

10 A. Yeah, it would appear similar.

11 Dr. Ngan saw Mr. Dunnington again on September 15, 2011. At that time, Dr.
12 Ngan's assessment again was "granuloma" ... "RTC, 2 WKS". (see Exh. 2) Dr. Ngan

¹ Ryan Bierman, DPM did not assert a similar contributory or comparative negligence affirmative defense.

1 testified that he recalls a conversation in which he requested Mr. Dunnington to return in
2 2 weeks. (Holman Decl., Exh. 9) Regarding a subsequent appointment following the
3 September 15th visit, Mr. Dunnington testified as follows:

4 . 64

5 14 Q Why did you wait three months to come back, when the note
6 15 on the 15th says "Return to clinic in two weeks"?

7 16 A The instructions for Dr. Ngan was to observe the -- the
8 17 wound -- the PG and to just -- that it should dry; that
9 18 it might be getting better as long as I off-load it and I
10 19 use the silver nitrate sticks to cauterize it.

11 20 So I did those things very, very carefully. So I
12 21 followed his orders, and it began to dry up. It looked
13 22 like it was improving. So I didn't return because it was
14 23 improving. I was able to stop using the Velcro shoe, and
15 24 I could wear a regular shoe.

16 25 And for those reasons, I felt like I didn't need to

17 65

18 1 see the doctor because it was behaving the way he
19 2 described it should behave when a PG begins to heal
20 3 itself.

21 4 Q That was a decision you made?

22 5 A Yes.

23 6 Q Okay.

24 7 A It was -- it was a decision I made, based on Dr. Ngan's
25 8 description of what to look for.

26 9 Q Did he tell you to come back in two weeks, on the 15th?

27 10 A I don't remember him specifically saying that.

28
29 (see Exh. 9)

30 In the deposition of Dr. Ngan, he was questioned regarding what he would have
31 done differently if he had seen Mr. Dunnington back in his office in October 2011. Dr.
32 Ngan testified as follows:

33 168

34 18 Q. (BY MR. HOLMAN) Okay. Let's assume that
35 19 David -- after your September 15th visit, let's assume
36 20 David came back to your office 10 days later or 15 days
37 21 later; so the end of September, the first part of
38 22 October.

39 23 Would you agree with me, based upon your

40 PLAINTIFFS' MOTION TO STRIKE, OR IN THE ALTERNATIVE,
41 MOTION FOR PARTIAL SUMMARY JUDGMENT - 4
42 Respondent's Appendix 004

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1 24 examination of David on December 27th, you would not
25 have considered, on October 1st or October 2nd or 3rd,

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1 on another visit, that David had melanoma in your
2 differential? Correct?

3 A. Can you repeat that, please?

4 Q. Sure.

5 I want you to assume that David comes back to
6 your office ten days after the 15th.

7 A. Okay.

8 Q. So he's in your office on October 1st. You --
9 you could even do an MRI. You do an exam.

10 Would you agree with me, based upon what
11 occurred on your December 27th visit, that if you saw
12 David on October 1st, you would not have included
13 melanoma in your differential diagnosis?

14 A. I never concluded malignant melanoma as a
15 differential -- in my differential diagnosis.

16 Q. All right. So if you saw David on October
17 1st, you would not have included -- you would not have
18 included melanoma in your differential diagnosis?

19 A. No, I would not have.

14 (Holman Decl., Exh. 10)

15 Dr. Ngan saw Mr. Dunnington for the last time on December 27, 2011. At that
16 time Dr. Ngan's assessment was "Presumed L foot pyogenic granulomas". (see Exh. 3)

17 As previously mentioned, Dr. Ngan took a picture of the lesion on December 27th.

18 (Holman Decl., Exh. 11)

19 Mr. Dunnington is presently under the care and treatment of John Thompson,
20 M.D. an oncologist at Seattle Cancer Care Alliance.

21
22 **IV. EXPERTS**

23 For purposes of identifying and clarifying the medicine in this matter, Plaintiffs
24 are submitting the declarations of Plaintiffs' experts, Frank Baron, M.D., a dermatologist
25 (Holman Decl., Exh. 12) and Brad Naylor, DPM, a podiatrist (Holman Decl., Exh. 13),
26

These declarations point out the violations of the standard of care of Dr. Ngan and Dr.

PLAINTIFFS' MOTION TO STRIKE, OR IN THE ALTERNATIVE,
MOTION FOR PARTIAL SUMMARY JUDGMENT - 5
Respondent's Appendix 005

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1 Ngan's failure to establish a differential diagnosis for Mr. Dunnington that would include
2 a melanoma.

3 The admitted and undisputed facts in this case are: (1) Dr. Ngan never considered
4 a melanoma, (2) never considered the lesion to be cancerous, (3) never took any steps to
5 rule out a malignancy, (4) did not perform a biopsy which is considered the gold standard
6 for determining the pathology of a lesion and (5) never provided Mr. Dunnington with
7 any type of warning or heightened concern that the lesion was anything other than
8 benign.
9

10 **V. STATEMENT OF ISSUE**

11 Should the affirmative defense:

12 "That the plaintiffs' injuries and damages, if any, may be caused
13 in part by the conduct of David Dunnington, thus barring or
14 diminishing any right to recover."

15 as asserted by Defendants Virginia Mason Medical Center and Alvin T. Ngan, DPM be
16 stricken as a matter of law?

17 **VI. EVIDENCE RELIED UPON**

- 18 1. Declaration of Frank Baron, M.D.;
- 19 2. Declaration of Brad Naylor, DPM;
- 20 3. Declaration of James L. Holman; and
- 21 4. The pleadings, files, medical records, and depositions in this case.

22 **VII. LEGAL AUTHORITY**

23 Defendants Virginia Mason Medical Center and Alvin T. Ngan, DPM seek to
24 hold Plaintiff David Dunnington comparatively at fault. Plaintiffs seek dismissal of this
25 affirmative defense.
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Honorable Barbara Linde
Hearing Date: October 10, 2014
Hearing Time: 11:00 a.m.

IN SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

DAVID DUNNINGTON and JANET
WILSON,

CAUSE NO. 13-2-21191-2 SEA

Plaintiffs,

PLAINTIFFS' REPLY TO
MOTION TO STRIKE
PURSUANT TO CR 12(f) OR, IN
THE ALTERNATIVE, MOTION
FOR PARTIAL SUMMARY
JUDGMENT ON THE ISSUE OF
COMPARATIVE FAULT
PURSUANT TO CR 56(a)

v.

VIRGINIA MASON MEDICAL CENTER;
ALVIN T. NGAN, DPM; RYAN BIERMAN,
DPM; ANKLE & FOOT SPECIALISTS OF
PUGET SOUND, P.S.; UNKNOWN JOHN
DOES AND JOHN DOE CLINICS,

Defendants.

I. INTRODUCTION

Plaintiff requests this Court enter an order granting Plaintiff's motion finding Plaintiff, David Dunnington, not contributorily negligent as a matter of law. Additionally, Plaintiff requests this Court strike the improper and self-serving declaration of Dr. Ngan submitted in Opposition to Plaintiff's motion.

II. ARGUMENT/AUTHORITY

A. Self-Serving Declarations are Improper in Responding to a Summary Judgment Motion.

PLAINTIFFS' REPLY TO MOTION TO STRIKE, OR IN THE
ALTERNATIVE, MOTION FOR PARTIAL SUMMARY JUDGMENT - 1

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1 Dr. Ngan has submitted an extremely self-serving declaration in response to
2 Plaintiff's motion. Washington courts have repeatedly recognized that self-serving
3 declarations, which seek to negate previously clear answers given in response to
4 unambiguous deposition questions, are improper in responding to a summary
5 judgment motion. *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 38 P.3d 322 (2002);
6 *McCormick v. Lake Wash. Sch. Dist.*, 99 Wn.App. 107, 992 P.2d 511 (1999) (emphasis
7 added). Similarly, declarations which seek to negate clear responses to unambiguous
8 interrogatories, are also improper in responding to a summary judgment motion.
9 *Department of Labor v. Kaiser Aluminum*, 111 Wn.App. 771, 48 P.3d 324 (2002).

11 Dr. Ngan's improper declaration fails to cite to facts and provides only vague and
12 contrary conclusions. While Dr. Ngan is a party defendant and a treating provider, he has
13 also provided testimony regarding the applicable standard of care for a podiatrist. As such,
14 the testimony of Dr. Ngan is that of both a fact witness and an expert. Affidavits or
15 declarations submitted by a qualified expert must include specific facts which create
16 a material issue of fact; the affidavit may not simply contain conclusory statements
17 without the required factual support. *Guile v. Ballard Community Hosp.*, 71 Wn.App.
18 18, 25, 852 P.2d 689 (1993), citing *Young v. Key Pharmaceuticals*, 112 Wn.3d 216, 225,
19 n.1, 770 P.3d 182 (1989). See also *Vant Leven v. Kretzler*, 56 Wn.App. 349, 344-45, 783
20 P.2d 611 (1989) (emphasis added). CR 56(e) also requires that the nonmoving party come
21 forward with affidavits or declarations containing specific facts sufficient to establish
22 material issue of fact.
23
24

25 Dr. Ngan was asked clear and unambiguous questions during his deposition, to
26 which he provided clear and unambiguous responses, as identified below:

1 **1. It is undisputed that Dr. Ngan never considered the lesion on Plaintiff's Foot**
2 **to be a Melanoma, never formed a differential other than a benign pyogenic**
3 **granuloma, and never saw the need for nor sought a biopsy for the lesion.**

4 **In September of 2011, Dr. Ngan never considered the lesion to be a melanoma:**

5 Q: Give me all the reasons again, sitting here today, with everything you know,
6 why you believed that this was not a melanoma.

7 A: There was no reason for me to believe it was a melanoma, because that is
8 extremely rare.

9 Q: Do you think you actually considered in your mind, either on the 1st or the
10 15th, is this a melanoma, and then consciously decided it wasn't?

11 A: I didn't consider that to be a melanoma at all.

12 Q: So you – is it fair to say that you never even considered melanoma; you just
13 thought granuloma?

14 A: I believed it was a granuloma.

15 Q: ...in your situation either on the 1st or the 15th of September, did melanoma
16 pop into your mind or come present in your mind, where you then rule it out
17 and said, no, that's not even possible; this is simply granuloma? Do you
18 see?

19 A: It didn't need to appear on the differential diagnosis because it would be, at
20 that time, nearly impossible.

21 Declaration of J. Holman, Ex. "1", pg. 157: 2-25, 158:1-3

22 Q: In your differential diagnosis on September 15th, did you consider that this
23 was a cancerous lesion or a melanoma?

24 A: No. It continued to appear as a granuloma.

25 Q: Did you consider in your differential that this was a melanoma?

26 A: Not at that time

27 Q: I take it, since you didn't, you would not have discussed melanoma with
28 Mr. Dunnington. Correct?

29 ...
30 Did you discuss that this could be a melanoma with Mr. Dunnington on
31 September 15th?

32 A: I did not.

33 Q: Did you discuss biopsy at all with -- or testing the histology of this lesion at
34 all with Mr. Dunnington on the 15th?

35 A: There was no reason to, because I assumed it was a granuloma still.

36 Q: You saw no suspicion that this was a melanoma at this time?

37 A: No.

38 Declaration of J. Holman, Ex. "1", pg. 146:22-25, 147:1-18

39 Q: Would you agree with me that on September 15th, you did nothing --
40 either procedure, histology, exam, biopsy, shave biopsy, anything like
41 that -- to rule out the presence of a melanoma?

42 A: There was no reason for me to biopsy, because I did not suspect
43 melanoma at that time.

44 ...
45 Q: Did you do anything to rule out melanoma in this case?

46 PLAINTIFFS' REPLY TO MOTION TO STRIKE, OR IN THE
47 ALTERNATIVE, MOTION FOR PARTIAL SUMMARY JUDGMENT - 3

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1 A: There was no reason to do anything to rule out melanoma. It looked like a
2 pyogenic granuloma.
3 ...
4 Q: You did not recommend, on September 15th, a biopsy, correct?
5 A: There's no reason to recommend a biopsy on September 15th.
6 Q: And the reason there's no reason to recommend a biopsy on September 15th
7 is, you did not even consider that this was a melanoma?
8 A: The reason why there was no recommendation for a biopsy is because
9 malignant melanoma was not on the differential, because based on his
10 history and his exam and his history of potential puncture wound, it was
11 most consistent with a common pyogenic granuloma.
12 ...
13 Q: Was there zero chance that this was a melanoma, in your opinion, on
14 September 15th?
15 A: I did not consider malignant melanoma to be on the differential.
16 Q: So does that mean that there was zero chance that - because it's not on the
17 differential, does that mean it's zero?
18 A: Just because it's not on the differential doesn't mean that there's a
19 possibility, but there wasn't a reason to consider that as a possibility.
20 Q: Was there a possibility, in your mind, that this was a melanoma?
21 A: No.

22 Declaration of J. Holman, Ex. "1", pg. 148:10-25, 149:1-25, 150:1-25, 151:1-5, (emphasis
23 added).

24 Thereafter, in December of 2011, Dr. Ngan still did not consider melanoma, still
25 did not include melanoma in a differential, and still did not see a reason to biopsy the
26 lesion:

27 Q: It was your assessment that presumed left foot pyogenic granuloma;
28 correct?
29 A: Correct.
30 ...
31 Q: At this time...on your visit of December 27th, did you consider melanoma in
32 your differential?
33 A: I considered the diagnosis could be something else other than a pyogenic
34 granuloma.
35 Q: Did you consider melanoma in your differential?
36 A: No.
37 ...
38 Q: Did you do anything on - any orders, any tests, anything to rule out
39 melanoma on December 27th?
40 A: There was no reason to at that time.
41 ...
42 Q: I take it because melanoma, again, was not within your differential, you did
43 not discuss melanoma with David?
44 Q: Is that accurate?
45 A: I did not consider melanoma as a differential at that time.

1 Q: ...In terms of December 27th, you did not ask David to do anything to rule
out melanoma; correct?

2 A: There was no reason for me to ask him to.

3 Declaration of J. Holman, Ex. "1", pg. 167:10-11, 13-23, 168:5-17

4 **2. It is Undisputed that Dr. Ngan preferred Conservative Treatment over More
Invasive Treatment for Treatment of the Misdiagnosed Lesion.**

5 Dr. Ngan testified that if he had a suspicion that the lesion was malignant, he
6 would have biopsied the lesion immediately. See Declaration of J. Holman, Ex. "1", pg.:
7 19:10-16. It remains undisputed that Dr. Ngan never considered or suspected
8 the lesion
9 to be a melanoma.

10 While Dr. Ngan now submits in his improper self serving declaration that he would
11 have excised the lesion and sent it for a biopsy, not once in Dr. Ngan's records for Mr.
12 Dunnington does the word biopsy appear, nor does Dr. Ngan ever say in his two part
13 deposition that he would have biopsied Mr. Dunnington's lesion or sent surgical samples
14 to pathology. It is undisputed that Dr. Ngan preferred more conservative treatment,
15 including repeating treatment which was not previously successful multiple times before
16 moving to different options. Dr. Ngan testified in that regard:
17

18 Q: Surgical treatment is usually required because PG [pyogenic granulomas]
19 rarely resolves spontaneously and often bleeds repeatedly and profusely. Do
you agree with that?

20 A: I disagree with that.

21 Declaration of J. Holman, Ex. "1", pg.:45:18-22

22 Q: We suggest surgical rather than nonsurgical treatment for most pyogenic
granulomas. Do you agree with that?

23 A: You can recommend surgical treatment for pyogenic granulomas, but I
typically do not, because in the foot, where you can have scar tissue, we
generally try to approach it conservatively at first.

24 ...

25 Q: ...This is a section that talks about various types of treatment for pyogenic
granulomas...do you use cryotherapy in your treatment?

26 A: I do.

Q: Did you use that with Mr. Dunnington?

A: I believe I did.

- 1 Q: Okay. Would you agree with the last sentence there, it says: "However, we
2 generally do not suggest cryotherapy because multiple treatments may be
3 necessary and cryotherapy does not permit histologic confirmation. DO you
4 agree with that statement?
5 A: That's a matter of opinions. I use cryotherapy because it's less invasive.
6 Even though it may take several treatments, it certainly is better than
7 excision, which can leave a scar and be painful, with a lengthy recovery.

8 Declaration of J. Holman, Ex. "1", pg.: 64:13-25, 65:1-18.

9 On September 1st, Dr. Ngan recommended conservative treatment:

- 10 Q: Okay, And it says: "This is a benign lesion of capillaries that can arise
11 spontaneously, but more typically after puncture wound, esp" -- I assume
12 that's "especially in the foot"?
13 A: Correct.
14 ...
15 Q: Conservative -- "TX" is treatment?
16 A: Correct.
17 Q: Options include chemical desiccation or thermal?
18 A: Correct.
19 Q: And then what's the rest of it?
20 A: Occasionally, there are -- they are refractory and may require more
21 aggressive treatment, such as surgical excision, although Bleomycin may be
22 worth a try, albeit painful.

23 Declaration of J. Holman, Ex. "1", pg.: 135:17-25, 136:1-11

24 When the September 1st treatment proved unsuccessful, Dr. Ngan did not excise or
25 biopsy the tissue, but proceeded with his practice of conservative treatment on September

26 15th:

- 18 Q: You discussed, again, all treatment options. Would those be treatment
19 options you discussed with Mr. Dunnington on your first visit, September
20 1st?
21 A: Yes.
22 Q: And then you wanted to retry cryotherapy?
23 A: Correct.
24 Q: What was the -- to the extent the cryotherapy hadn't worked on the 1st and
25 the lesion was unchanged, what was your belief that it would be successful
26 this time?
A: Sometimes, cryotherapy or even silver nitrate can take a couple of tries
before it is successful.

Declaration of J. Holman, Ex. "1", pg.: 145:8-20

Dr. Ngan's declaration is self-serving and improper in responding to summary
judgment. *Overton*, supra. Additionally, Dr. Ngan's improper declaration is not supported

PLAINTIFFS' REPLY TO MOTION TO STRIKE, OR IN THE
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1 by specific articulable facts but contains speculative and conclusory statements, such
2 as "...especially if Mr. Dunnington's lesion had not responded to conservative treatment. I
3 would have thus reached the conclusion that we should surgically excise the granuloma
4 and obtain a biopsy at an earlier date." Despite clear questions from Plaintiff's counsel, Dr.
5 Ngan not once stated that he would have biopsied the lesion on September 1st, September
6 15th, any time in October had Mr. Dunnington returned, or on December 27th. Exactly the
7 opposite, Dr. Ngan's deposition is very clear that he disagrees with surgical treatment over
8 non-surgical for treatment of PGs, that he never considered the lesion to be a melanoma,
9 that in the therapies he did try, he was not concerned about destroying tissue because there
10 was no reason to determine the histology, and there was never a reason to biopsy the
11 lesion, Dr. Ngan now attempts to create a genuine issue of material fact with his improper,
12 speculative, and conclusory declaration. Case law is clear Defendant cannot do so. This
13 Court should strike the self-serving declaration of Dr. Ngan.
14
15

16 **B. Defendant has Failed to Establish Contributory Negligence.**

17 Should the Court decide to consider the improper declaration of Dr. Ngan,

18 Defendant has still failed to establish the elements of contributory negligence to preclude
19 the Court from entering an order on granting Plaintiff's motion. A showing of negligence
20 requires proof of the following elements: (1) existence of a legal duty, (2) breach of that
21 duty, (3) an injury resulting from the breach and (4) proximate cause. *Christensen v.*
22 *Royal School Dist. No. 160*, 156 Wn.2d 62, 66, 124 P.3d 283 (2005).
23

24 **1. Defendant has Failed to Articulate a Legal Duty Owed by Mr.**
25 **Dunnington.**

26 The existence of a legal duty is a question of law and "depends on mixed
considerations of logic, common sense, justice, policy, and precedent." *Id.* at 67. The

OFFICE RECEPTIONIST, CLERK

To: Shari Canet
Cc: Bertha Fitzer; Steven Fitzer; James L. Holman; Jessica Holman; Dao Nguyen; Katie Burke; George Ahrend
Subject: RE: Dunnington v. Virginia Mason (#91374-9)

Rec'd 5/8/15

From: Shari Canet [mailto:scanet@ahrendlaw.com]
Sent: Friday, May 08, 2015 1:45 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Bertha Fitzer; Steven Fitzer; James L. Holman; Jessica Holman; Dao Nguyen; Katie Burke; George Ahrend
Subject: Dunnington v. Virginia Mason (#91374-9)

Please accept for filing the attached Reply in Support of Discretionary Direct Review. Thank you.

--

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