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February 1, 2025

Honorable Justices of the Court of Appeal
First Appellate District, Division Four
350 McAllister Street
San Francisco, CA 94102

Re: Request for Publication in *Zaragoza v. Adam* (A168100)

Dear Honorable Justices:

On behalf of the Orange County Trial Lawyers Association ("OCTLA"), pursuant to California Rule of Court, rule 8.1120, we are writing to respectfully request publication of the above-titled case that was filed on December 30, 2024.

The opinion should be published because it applies an existing rule of law to a set of facts significantly different from those stated in published opinions and explains with reasons given an existing rule of law. The publication of this case would be extremely helpful to litigants and trial courts in relation to the "recognized risk" defense at the summary judgment stage. Specifically, the opinion states that a moving party's expert's declaration in support of a motion for summary judgment must contain the requisite detail for that party to meet its initial burden.

In surgical cases, time and time again, defendants use laconic and conclusory expert declarations in support of the motion. This is particularly true when a so-called "recognized risk/complication" of the surgery purportedly occurs. Defendants will often simply, in a conclusory fashion, simply state that ***because*** the result is a known complication, that that ***automatically*** means that the defendant met the standard of care.

Often times, similar to here but not similar to the very short declarations in *Good Samaritan* and *McAlpine*, the declarations will be detailed as to: 1) the expert's qualifications; and 2) the reasons why, in general, such a complication is a recognized risk of that surgery. However, the declaration will lack in detail as to the actual performance, technique, and method used during that particular surgery. This gives the illusion that the moving party's declaration contains the requisite detail when it does not.

Both the trial court and Respondent in this case relied heavily on *Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493. Respondent argues that the holdings in *McAlpine v. Norman* (2020) 51 Cal.App.5th 933 and *Doe v. Good Samaritan Hospital* (2018) 23 Cal.App.5th

653 were inconsistent with *Bushling* and required "an unrealistic level of explanation to be sufficient." (Respondent's brief at p. 14.)

Neither *Good Samaritan* nor *McAlpine* addressed (or even cited) *Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493. While *Bushling* also involved the performance of a cholecystectomy, the expert declaration in that case actually addressed the specific performance used by the defendant surgeon. The declaration also included an excerpt from the defendant physician's deposition, outlining the steps and technique performed. By contrast, as this Court aptly explained, "Dr. Morse offered a conclusory declaration without identifying what he perceived as the relevant facts reflected in the medical records or otherwise elucidating the factual bases for his conclusions."

Contrary to Respondent's arguments, *Bushling* is not at odds with *Good Samaritan* or *Doe*. Publication of this opinion would greatly assist trial courts and litigants as to articulating exactly what is required in a moving party's declaration in a surgical mishap case.

Indeed, Respondent admits that the "*Good Samaritan* and *McAlpine* cases . . . are distinguishable from our case. They are inapposite to the facts of this case . . ." (Respondent's brief at p. 14.)[1] Thus, by Respondent's own admission, publication of this case would be helpful given that "[t]t applies an existing rule of law to a set of facts significantly different from those stated in published opinions." (Cal. Rules of Court, 8.1105(c)(2));

As here, defendants will often support such a contention with a consent form signed by the plaintiff to "prove" that even the most catastrophic outcomes (such as paralysis, brain damage, or death) are known "risks" of the procedure and that therefore the standard of care could not possibly have been violated. (Respondent's Brief at pp.4-5.) Such consent forms are utilized even though they are inadmissible hearsay and irrelevant as the patient's state of mind is not in question when there is no pending cause of action for lack of informed consent.

Lastly, again, it should not be ignored that it is common for medical malpractice defense firms to offer bare-boned expert declarations void of adequate reasoning in support of motions for summary judgment. Indeed, there is a strategic reason for doing so and the undersigned is personally aware that defense lawyers are often trained to use such short declarations. The shorter and more conclusory a moving declaration, the less it can be used as impeachment against that same expert at deposition or trial once that expert is designated under Code of Civil Procedure section 2034.210 et seq. This is particularly true in surgical cases, such as this one, where a so-called recognized risk of surgery occurs.

[1] Respectfully, this Court's explanation as to the failure of the physician defendant to meet the initial burden on summary judgment is also more detailed and thorough than these two decisions.

On the other hand, for a plaintiff, "a summary judgment is a drastic measure which deprives the losing party of trial on the merits." (*Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 395.) Accordingly, due to the grave potential consequences, the plaintiff's attorney is often forced to put forth an expert declaration with strong and thorough reasoning to ensure that the motion is defeated. (See *Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510.) This is true even when the moving papers and declarations are lacking.

Accordingly, by filing a conclusory declaration (such as the one in this case), the defendant often is successful in flushing out the entirety of plaintiff's evidence, theories, and expert opinions long before expert designation. This one-sided advantage is not only unrelated to the purpose of summary judgment motions, but it is particularly harmful to the plaintiff in medical malpractice cases where every element is established by expert testimony. (See *Borrayo v. Avery* (2016) 2 Cal.App.5th 304, 310 ["Opinion testimony from a properly qualified witness is generally necessary to demonstrate the elements for medical malpractice claims."].) In a surgical case, like this one, a plaintiff is often forced to prepare lengthy (and expensive) expert declarations to oppose summary judgment with detailed explanations as to why the standard of care was violated. Publication of this case would hopefully dissuade defense counsel from offering conclusory expert declarations like the laconic one in this case.

Based on the foregoing, we respectfully request that this Honorable Court publish the above-referenced opinion.

Statement of Interest: Pursuant to California Rule of Court, rule 8.1120(a)(2), OCTLA is a non-profit organization that was formed in 1963. OCTLA has over 600 members that represent individuals subject to consumer fraud, unlawful employment practices, personal injuries, and insurance bad faith. OCTLA is also heavily involved in charitable activities, and selects a local non-profit organization to benefit from its annual Top Gun Event.

Very truly yours,

IKUTA HEMESATH, LLP

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BTI/bti

cc: All counsel in the underlying action through Truefiling