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Honorable Justices of the Court of Appeal
Fifth Appellate District
2424 Ventura Street
Fresno, CA 93721

Re: Request for Publication in *John Doe v. Good Samaritan Hospital* (F073934)

Dear Honorable Justices:

Pursuant to California Rule of Court, rule 8.1120, we are writing to respectfully request publication of the above-titled case that was published on May 4, 2018. Under California Rule of Court, rule 8.1120(a)(2), we are not counsel for any party in this action. However, our firm practices primarily medical malpractice on the plaintiff-side and we contend that the Court's well-reasoned opinion meets the standards for publication under California Rule of Court, rule 8.1105(c). Despite practicing on the plaintiff-side, the undersigned and other members of our law firm also has spent years practicing with various medical malpractice defense firms.

The opinion should be published based on the following:

- It 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));
- It explains with reasons given an existing rule of law (Cal. Rules of Court, 8.1105(c)(3));
- It advances a clarification of the provisions of existing rules (Cal. Rules of Court, 8.1105(c)(4)); and
- It involves a legal issue of continuing public interest (Cal. Rules of Court, 8.1105(c)(6));

Specifically, the opinion states that a moving party's expert's declaration must set forth the specific standards of care that would apply to different factual scenarios that are at issue in the complaint. In other words, the opinion holds: "[w]ithout any elaboration regarding the applicable standard of care and what conduct was required to meet it, the expert declaration is legally insufficient." The decisions in *Kelley v. Trunk* (1998) 66 Cal.App.4th 519 and *Johnson v. Superior Court* (2006) 143 Cal.App.4th 297 imply that an expert must explain what the standard of care requires and the factual basis for the opinion. Nevertheless, based on our review of case law, there does not appear to be any case that explicitly states that an expert declaration must set forth the facts defining the applicable standard of care as to each allegation at issue in the complaint.

Even more importantly, the opinion would provide much-needed guidance to trial courts and litigants in relation to conclusory declarations without adequate explanation or evidentiary support. Both the *Kelley* and *Johnson* cases have relatively short discussion sections and do not go into the same level of detail and analysis as this Court's well-reasoned opinion. As the procedural history of this case shows, it would save substantial court and attorney time in relation to summary judgment motions in medical malpractice cases.

Indeed, only a few months ago on January 31, 2018, the Second District (Division 3) Court of Appeal decided *Pazienti v. Whiteman* (Cal. Ct. App., Jan. 31, 2018, No. B270035) 2018 WL 636217. That opinion was not published. Our firm had no direct interest in that case and did not represent any party in that case.

Nevertheless, much like this case, the underlying case involved medical malpractice where the trial court granted a motion for summary judgment. On causation, the moving party's expert opined that "no act or omission on [the doctor's] part was a substantial factor in any injury. . ." (*Id.* at p. 2.) However, just like in this case, there was no explanation to support the conclusory opinion that there was no causation. (*Id.* at p. 8.) Specifically, the Court noted that "[t]here [was] no explanation why, if the standard of care was in fact breached, causation is nonetheless absent." (*Ibid.*) As such, the Court of Appeal found that the moving party had not met its initial burden and reversed the trial court. (*Ibid.*)

As shown by the history in this case and the *Pazienti* matter, substantial attorney and court time would be saved if this Court's astute opinion was published.

Lastly, 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. There is a strategic reason for doing so. 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.

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."].) Publication of this case would

hopefully dissuade defense counsel from offering conclusory expert declarations like the 3-page one in this case.

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

Very truly yours,

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