THE HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

KYLE W. STEPHENSON, and MICHAEL K. STEPHENSON, his son,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

NO. C03-0113P

PLAINTIFFS' REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AGAINST THE DEFENDANT UNITED STATES OF AMERICA

ORAL ARGUMENT REQUESTED

I. RELIEF REQUESTED

COME NOW the plaintiffs, by and through their attorneys of record, Morrow & Otorowski, and respectfully request that the Court grant Plaintiffs' Motion For Summary Judgment against the defendant, United States of America.

II. ARGUMENT

A. LIABILITY

1. **The defendant's Opposition completely ignored the three chart reviews done in 1987 and 1989 by the defendant's health care providers where no one notified Mr. Stephenson or took any steps to address his two previously identified colorectal masses or the various studies that were ordered and not carried out.**

MORROW & OTOROWSKI, LLP
ATTORNEYS AT LAW
298 WINSLOW WAY WEST
BAINBRIDGE ISLAND, WASHINGTON 98110
(206) 842-1000; (206) 842-0797 FAX

When Kyle Stephenson presented to the VA health care provider on May 25, 1989, the health care provider had a duty to find out Mr. Stephenson's medical status and to discuss the two colorectal masses previously identified in his medical records. That health care provider had a duty to read the patient's chart to find out why the previously ordered flexible sigmoidoscopy, the endoscopy, the biopsy, and the gastrointestinal consultation did not occur. The health care provider failed to do these required, basic steps. There was no communication between the health care provider and Kyle Stephenson with respect to any of these critical issues contained in the medical chart. The defendant has offered no response to these failures. There is no reasonable response. The defendant was negligent. There is no dispute. There is no question of fact.

In addition, the defendant's Opposition either ignores or minimizes all of its previous failures to communicate with Kyle Stephenson and its failures to deliver reasonably prudent health care to Kyle Stephenson, while asserting, incredibly, that the June 29, 1989 missed clinic visit prevented the defendant from telling Kyle Stephenson of the two previously identified abnormal colorectal masses. The defendant continues to omit from the discussion that on June 29, 1989, the medical records state Kyle Stephenson's chart was reviewed. Again, nothing was done to communicate, to take any reasonably prudent action, to notify Kyle Stephenson of his two documented colorectal abnormalities or to find out why the various studies that were ordered were not carried out. The defendant has no reasonable answer to these assertions, nor was any offered in the defendant's Opposition. The defendant is negligent.

In addition, all three of the chart reviews occurred after the January 23, 1987 discovery and documentation of Kyle Stephenson's abnormal rectal mass and the February 5, 1987 barium enema discovery and documentation of Kyle Stephenson's abnormal colon polyp. All three reviews of Mr. Stephenson's medical records occurred when the medical records contained the ordered studies that

MORROW & OTOROWSKI, LLP
ATTORNEYS AT LAW
298 WINSLOW WAY WEST
BAINBRIDGE ISLAND, WASHINGTON 98110
(206) 842-1000; (206) 842-0797 FAX

were not carried out and where no one had provided treatment or follow up care with respect to either abnormal colorectal mass.

The May 25, 1989 and June 29, 1989 chart reviews were more than four years before Kyle Stephenson was diagnosed with colorectal cancer. If Kyle Stephenson had undergone the required sigmoidoscopy, the colorectal polyps would have been identified and removed. Following the removal of the polyps, tissue specimens would have been sent to pathology for microscopic evaluation. The pathology would have revealed that Mr. Stephenson's polyps were pre-cancerous. Most important, once all polyps were removed and pathologically evaluated, Kyle Stephenson would have been given the vital information relative to the significance of the polyps and then appropriately followed in the future with timely colonoscopies. (*See* DECLARATIONS OF DR. WINAWER, DR. BIGGERS, DR. SHARMA, AND DR. DAVIS PREVIOUSLY FILED WITH THE COURT.)

Had the defendant's agents acted in a reasonably prudent manner on any one of the three different chart reviews, to a high degree of probability, his pre-cancerous polyps would not have progressed and transformed into cancer (*See* DECLARATION OF DR. WINAWER, AT PG. 27, LNS. 9-20). These three negligent chart reviews were primary issues raised in Plaintiffs' Motion for Summary Judgment. The defendant failed to respond in any manner to these three acts of negligence.

2. <u>The defense is not based on the facts of this case</u>.

In response to the strongest of undisputed facts, where the medical records indicate multiple failures, and where **<u>none</u>** of the physicians have any recollection of the events, all of the defendant's health care providers have come to the unanimous conclusion that they were not negligent based solely on the repeated assertion that "I would have followed my customary and usual practice, and that customary and usual practice is to conform to the standard of care, so I could not have been negligent in this case."

MORROW & OTOROWSKI, LLP
ATTORNEYS AT LAW
298 WINSLOW WAY WEST
BAINBRIDGE ISLAND, WASHINGTON 98110
(206) 842-1000; (206) 842-0797 FAX

This specious defense is based purely on non-factual, hearsay, and conclusory assumptions that are not based on the evidence or the facts in this case. The defendant's approach also relies on the premise that Dr. Teefey and Dr. Radke were actually present at the time of the events and participated in Kyle Stephenson's care, under circumstances where the most logical conclusion based on the medical records is that neither physician was present and neither participated in Kyle Stephenson's care.

3. <u>All of the credible evidence overwhelmingly supports Kyle Stephenson's unequivocal assertion that the defendant's health care providers failed to tell him about either one of his abnormal colorectal masses</u>.

There is no documentation in the medical records that supports or corroborates the defendant health care providers' assertions that Kyle Stephenson was notified about his two colorectal masses. The defendant's assertions are made for the first time, in litigation, 16 years after the events, by the same individuals whose conduct is now in question. While every physician who participated has no recollection about any of the events, Kyle Stephenson has personal knowledge that no one at the VA ever told him that he had any abnormal colorectal masses.

Plaintiff sent out Interrogatories to the defendant asking the defendant if it claims that any of its health care providers ever notified or informed Kyle Stephenson about his abnormal colorectal mass and if so, what was said, and by whom. The defendant responded that it could not reasonably provide the requested underlying information without resorting to speculation and therefore, the defendant was without sufficient knowledge or information to reasonably answer the Interrogatories stating the following:

> Any attempt to answer Interrogatory 8 either "yes" or "no" <u>would involve speculation</u> because of the length of time which has elapsed since February 5, 1987. As stated above, the Defendant do not have the means to reasonably reconstruct, at this time, what the providers did or did not say to Mr. Stephenson on February 5, 1987. The February 5, 1987 event, which Plaintiff has raised in Interrogatory No. 10 occurred

MORROW & OTOROWSKI, LLP
ATTORNEYS AT LAW
298 WINSLOW WAY WEST
BAINBRIDGE ISLAND, WASHINGTON 98110
(206) 842-1000; (206) 842-0797 FAX

> more than 16 years ago, and the health care providers who witnessed the event are no longer employees at VA Puget Sound Health Care System. Accordingly, the Defendant is without sufficient knowledge or information to reasonably answer Interrogatory No. 10

See EXHIBIT 25, AT PG. 5, LN. 10-17, TO MORROW DECLARATION, DEFENDANT'S ANSWER TO INTERROGATORY NO. 10, *emphasis added.*

> The Defendant is without sufficient knowledge or information to answer either "yes" or "no" to Interrogatory No. 4 because of the passage of time. The occurrence cited in Interrogatory No. 4 occurred on or about February 5, 1987, more than 16 years ago and the health care providers who witnessed the event are no longer employees at VA Puget Sound Health Care System, so Defendant could only speculate on what the providers discussed with Mr. Stephenson during and immediately after his barium enema.

See EXHIBIT 25, AT PG. 2, LN. 19-24, TO MORROW DECLARATION, DEFENDANT'S ANSWER TO INTERROGATORY NO. 4, *emphasis added.* After repeatedly answering that the defendant could not respond to plaintiffs' specific, pointed Interrogatories without resorting to speculation, the defendant has now come forward asserting that Dr. Nevitt and Dr. Teefey both notified and informed Kyle Stephenson of his abnormal colorectal masses and of their "potential seriousness."

In addition, contrary to Radke's claim that he "personally examined" Kyle Stephenson, Kyle has an independent, unequivocal recollection that no one was in the room with him on May 25, 1989 other than a young, inexperienced health care provider. Mr. Stephenson's specific recollection as stated in his Declaration was that he was only examined by a very young, inexperienced health care provider, and that no one approaching the age of Dr. Radke, almost 60 years old at the time, was ever present in the room. Dr. Radke has no independent recollection of May 25, 1989. Kyle Stephenson's specific, independent recollections are uncontroverted.

Douglas v. Freeman, 117 Wash.2d 242, 814 P.2d 1160 (1991) is directly on point. The Douglas court held that the patient's unequivocal testimony that no one else came into the room with

MORROW & OTOROWSKI, LLP
ATTORNEYS AT LAW
298 WINSLOW WAY WEST
BAINBRIDGE ISLAND, WASHINGTON 98110
(206) 842-1000; (206) 842-0797 FAX

her during her treatment other than the resident was sufficient to establish that the health care provider breached its duty to supervise the resident, despite contrary testimony by the health care provider's supervisor that she was "fairly certain" and "confident" she had been present at the time, but did not have an independent recollection.

Under Douglas, *supra*, Kyle Stephenson's unequivocal testimony that no one other than the young, inexperienced health care provider came into the room during his examination should be sufficient to establish this fact, despite contrary testimony by Dr. Radke that he "personally examined" Kyle under circumstances where the progress note is written in the handwriting of the medical student, reflecting the inexperienced technique of using positions from the face of the clock, instead of referring to the patient's anatomy, and where Dr. Radke has no independent recollection of the events. Under Douglas, *supra*, Kyle Stephenson's unequivocal testimony that none of the defendant's health care providers told him about either one of the identified abnormal colorectal masses should be sufficient to establish this breach, especially when none of the defendant's health care providers have any recollection of the events, and the medical records directly support Kyle Stephenson's uncontroverted, specific recollections.

Absent from the medical records is any documentation that Kyle Stephenson had been informed or had any awareness of the two colorectal masses that had been identified. Absent from the medical records is any documentation that any VA health care provider was going to assume responsibility and follow through by treating Mr. Stephenson's pre-cancerous polyps.

The medical records reflect a total disconnect in the continuity of care with respect to the colorectal masses that had been identified on two separate occasions. No health care provider ever took the necessary steps to follow through and make sure that the ordered flexible sigmoidoscopy, the gastrointestinal consultation, the requested endoscopy and the biopsy were carried out. The

MORROW & OTOROWSKI, LLP
ATTORNEYS AT LAW
298 WINSLOW WAY WEST
BAINBRIDGE ISLAND, WASHINGTON 98110
(206) 842-1000; (206) 842-0797 FAX

defendant's Opposition ignored the issues raised by the Plaintiff in his original Motion that the flexible sigmoidoscopy, the gastrointestinal consultation, the air contrast barium enema, the endoscopy and the biopsy were ordered and not carried out.

Contrary to the defendant's biased, unsupported statements that Mr. Stephenson was notified about both of his two colorectal masses and told of the "potential seriousness" of these two masses, the medical records demonstrate a repeated, consistent concern and follow-up **only** for **hemorrhoids** and **hemorrhoid therapy**.

The medical records document that when Kyle Stephenson first saw Dr. Nevitt in January of 1987, Dr. Nevitt stated, "Most likely, he has hemorrhoids" and told Kyle Stephenson the same. The same is true with his last visit on May 25, 1989 when the third year medical student, H. Miller, examined Kyle Stephenson. Even prior to the visit on May 25, 1989, the request for treatment form dated May 22, 1987 states, "worsening hemorrhoids." On May 25, 1989 Mr. Stephenson again reported a history of hemorrhoids. At the conclusion of the visit, the medical student diagnosed Mr. Stephenson as having "1 large internal hemorrhoid at 4 o'clock." Even on the missed clinic visit in June of 1989, the medical record states, "Hemorrhoids under treatment." (*See* EXHIBIT 3 TO KYLE STEPHENSON'S DECLARATION, PREVIOUSLY FILED WITH THE COURT, REPRESENTING ALL OF THE VA MEDICAL RECORDS, WHICH EITHER SHOW THE VA HEALTH CARE PROVIDERS CHARTED KYLE STEPHENSON HAD HEMORRHOIDS OR KYLE STEPHENSON REPORTED THAT HE HAD HEMORRHOIDS.)

Remarkably, while the defendant's Opposition insists that because the VA physicians' usual and customary practice conforms to the standard of care, Drs. Teefey and Nevitt must have informed Mr. Stephenson of both of the identified abnormal colorectal masses and told Kyle Stephenson the significance of these potentially serious discoveries, the defendant completely omitted any reference or acknowledgment that the medical records only refer to "hemorrhoids" and "hemorrhoid

MORROW & OTOROWSKI, LLP
ATTORNEYS AT LAW
298 WINSLOW WAY WEST
BAINBRIDGE ISLAND, WASHINGTON 98110
(206) 842-1000; (206) 842-0797 FAX

treatment." There is not one statement in any of the VA medical records that any of the health care providers told Kyle Stephenson about either of his abnormal colorectal polyps or had any intent to make sure that Kyle Stephenson was made aware that he had colorectal polyps or of the need to follow through with Kyle Stephenson to treat his polyps or to provide polyp therapy. All of the records refer to an ongoing focus for hemorrhoids and hemorrhoid therapy. None of the records deal with polyps or polyp therapy.

The VA medical records indicate that Mr. Stephenson's only awareness of his ongoing ano-rectal problems was a result of hemorrhoids. His records subsequent to the VA also corroborate his lack of awareness of any abnormal colorectal masses, including any polyps. The letter written by Mr. Stephenson's vocational rehabilitation counselor, Ms. Barbara Williams (*See* EXHIBIT 16 TO MORROW DECLARATION, PREVIOUSLY FILED WITH THE COURT), indicates that Kyle Stephenson learned for the first time that the VA had found an abnormal rectal mass when Ms. Williams showed him a page from his Compensation and Pension Exam. Ms. Williams stated that the record she saw revealed a finding that seemed suspiciously related to Mr. Stephenson's later diagnosis of colon cancer. The letter also states that Ms. Williams gave a copy of the record to Mr. Stephenson, who then immediately scheduled an appointment to see his surgeon, Dr. Joe Jack Davis. Dr. Davis' September 7, 2000 record (*See* EXHIBIT 17 TO MORROW DECLARATION PREVIOUSLY FILED WITH THE COURT) further reveals that Mr. Stephenson made an appointment to discuss **"new revelations"** related to his cancer. The entire sequence of events fully supports Mr. Stephenson's assertion that he was never told of any abnormal, "potentially serious", colorectal mass or polyp that had the potential to be cancer by any VA health care provider.

In direct contradiction to the contemporaneous facts contained in the medical records, the defense is based entirely on the VA health care providers comments that they were good, practicing

MORROW & OTOROWSKI, LLP
ATTORNEYS AT LAW
298 WINSLOW WAY WEST
BAINBRIDGE ISLAND, WASHINGTON 98110
(206) 842-1000; (206) 842-0797 FAX

physicians and based on their usual and customary practice they could not have been negligent. These non-factual, conclusory statements are the theme of the defense.

The defendant's assertions are illogical from another standpoint. No reasonable person, including Kyle Stephenson, would have ignored the alarming information that two physicians had each identified a different abnormal colorectal mass that had the potential to be cancer, while proceeding to responsibly and diligently submit himself to every single examination and procedure that he was asked to undertake, a total of ten (*see* EXHIBIT 37 TO MORROW DECLARATION PREVIOUSLY FILED WITH THE COURT) in order to determine if he was entitled to service-related disabilities. The undisputed fact is that Mr. Stephenson submitted to every single procedure he was required to undertake from January 29, 1987 to February 18, 1987, which covered the same time frame that his two colorectal masses were identified.

The defendant also attempts to gain support by experts who have come forward stating inadmissible, hearsay, conclusory statements. For example, in support of the notion that Dr. Radke was not negligent, Dr. Billingham states, "There is no doubt in my mind that he personally performed a thorough examination as described in his declaration..." (*See* DEFENDANT'S EXHIBIT E, DECLARATION OF RICHARD P. BILLINGHAM, MD, AT PG. 4.)

There are no issues of material fact on liability or causation in this case. The facts as they exist in the medical records overwhelmingly establish the defendant's repeated negligent conduct.

4. Dr. Nevitt failed to discharge her duty to notify Mr. Stephenson of the rectal mass she discovered and it's significance.

Plaintiff does not disagree with the case law cited by defendant as to the limited duty of a physician during a pre-employment examination. However, the cited precedents are not applicable under these facts. First, even under the limited duty to notify the patient of material abnormalities, Dr. Nevitt failed to discharge her duty. Dr. Nevitt has no independent recollection of the events. She

MORROW & OTOROWSKI, LLP
ATTORNEYS AT LAW
298 WINSLOW WAY WEST
BAINBRIDGE ISLAND, WASHINGTON 98110
(206) 842-1000; (206) 842-0797 FAX

has resorted to the defense, as every VA health care provider has done, by making the self-serving, biased statements that she is a good doctor and according to her usual and customary practice she would have told Kyle Stephenson that he had an abnormal rectal mass, and that such a mass could be "potentially serious."

Dr. Nevitt's medical record is the most revealing piece of evidence as to what Kyle Stephenson was told. Dr. Nevitt's medical records indicate Kyle Stephenson went to Dr. Nevitt seeking particular attention for hemorrhoids, hearing loss, and low back pain. Her records further state that Kyle had always assumed he had hemorrhoids, but had never been diagnosed with hemorrhoids. As discussed in Plaintiffs' original Motion, on the two pages representing the day Dr. Nevitt examined Kyle Stephenson, Dr. Nevitt charted "Most likely, he has hemorrhoids." This statement is what Kyle Stephenson was told and confirmed for Kyle Stephenson that he did indeed have hemorrhoids.

Following Mr. Stephenson's examination by Dr. Nevitt, he underwent specific studies to determine whether or not he was entitled to compensation for any of his claimed service related disabilities. For example, in order to determine whether his low back pain was service related, Mr. Stephenson underwent an orthopedic examination, which included cervical and lumbar x-rays. In order to determine if his hearing loss was service related, he underwent an audiology examination. In order to determine whether he had Post Traumatic Stress Disorder from Vietnam, he underwent a psychiatric evaluation. Similarly, he underwent a barium enema in order to determine if his hemorrhoids were service-related. All of the procedures and evaluations Mr. Stephenson submitted to, including the barium enema, were consistent with the specific medical condition that he was aware of and for which he was seeking service-related benefits.

As to his knowledge following his barium enema, the medical record is again instructive.

MORROW & OTOROWSKI, LLP
ATTORNEYS AT LAW
298 WINSLOW WAY WEST
BAINBRIDGE ISLAND, WASHINGTON 98110
(206) 842-1000; (206) 842-0797 FAX

The May 25, 1989 medical record, under the subjective portion of the examination, states that Kyle Stephenson reported a history of an internal hemorrhoid. Following the examination, he was diagnosed with "1 large internal hemorrhoid at 4 o'clock."

A critical piece of information that is also missing from the defendant's Opposition brief and from the defense experts' declarations is the fact that Dr. Nevitt charted on March 6, 1987, six weeks after her examination of Kyle Stephenson, that the rectal mass "probably represents a polyp." The defendant did not mention this fact to the Court. Since Dr. Nevitt charted "probably represents a polyp" for the first time, six weeks after examining Kyle Stephenson, he did not have the benefit of Dr. Nevitt's modified, re-dictated version of her January 23, 1987 examination.

Furthermore, although Dr. Nevitt ordered a flexible sigmoidoscopy, she did so on a separate request form. The words flexible sigmoidoscopy do not appear anywhere in her five-page dictation, including the "Plan" section of her exam where the gastrointestinal consult, the air contrast barium enema, the CBC, the audiology exam, and the Agent Orange exam were all charted.

Finally, whatever limited duty the defendant asserts Dr. Nevitt should be accorded based on her carrying out a Compensation and Pension Exam, that duty was expanded when Dr. Nevitt took it upon herself to order therapeutic studies, i.e., a flexible sigmoidoscopy, an air contrast barium enema, and requested a gastrointestinal consultation for Kyle Stephenson based on his abnormal rectal examination. *See* Judy v. Hanford Environmental Health Foundation, 106 Wash.App. 26, 22 P.3d 810 (2001), *review denied* 144 Wash.2d 1020, 32 P.3d 284 (2001). After ordering the flexible sigmoidoscopy, the air contrast barium enema, and the gastrointestinal consult, neither Dr. Nevitt, nor any other VA health care provider followed through to make sure that the critical studies ordered were carried out.

MORROW & OTOROWSKI, LLP
ATTORNEYS AT LAW
298 WINSLOW WAY WEST
BAINBRIDGE ISLAND, WASHINGTON 98110
(206) 842-1000; (206) 842-0797 FAX

5. <u>In addition to the negligent chart review of May 25, 1989. Kyle Stephenson received negligent health care on May 25, 1989</u>.

<u>The Textbook of Gastroenterology</u> by Yamada, 2nd ed. (1995), states at pg. 1920:

> **Rectal bleeding, especially in patients older than 40 years of age or those with other risk factors, should never be ascribed solely to co-existing hemorrhoids without a thorough evaluation of the colorectum. (emphasis added)**

Kyle Stephenson presented to the VA Medical Center on May 25, 1989 with an ongoing history of rectal bleeding. Reasonably prudent medical care required that a colonoscopy be carried out in order to adequately visualize the entire colorectal tract. Rectal bleeding is cancer until ruled out by appropriate studies. (*See* DECLARATIONS OF DR. WINAWER, DR. BIGGERS, DR. SHARMA, AND DR. DAVIS, PREVIOUSLY FILED WITH THE COURT.) Negligent health care was rendered to Kyle Stephenson on May 25, 1989 when the health care provider failed to take any steps to appropriately visualize the patient's colorectal tract to determine the source of the bleeding. The health care provider was negligent by defaulting to the explanation of a hemorrhoid as the basis for the patient's colorectal symptoms. This basic failure to act as a reasonably prudent health care provider is more consistent with care provided by a medical student than an experienced Chief of Surgery.

6. <u>Dr. Teefey's biased statements contained in her Declaration, 16 years after the events, of which she has no recollection, that she "personally" performed the barium enema examination and specifically told Kyle Stephenson he had a polyp in his colon and informed him of the "potential seriousness" of the polyp contradicts the medical records and common sense.</u>

Similar to Dr. Radke's Declaration, in an attempt to place herself as the physician who personally performed the examination, Dr. Teefey has alerted the plaintiffs to an issue not previously known to the plaintiffs. After reviewing Dr. Teefey's Declaration and the barium enema report, every indication is that the barium enema was actually performed by a resident named Patty Hughes.

It seemed unusual for Dr. Teefey to go to great lengths, absent any allegations by the

MORROW & OTOROWSKI, LLP
ATTORNEYS AT LAW
298 WINSLOW WAY WEST
BAINBRIDGE ISLAND, WASHINGTON 98110
(206) 842-1000; (206) 842-0797 FAX

plaintiffs, to justify and explain why the resident did not perform the exam, explaining that the resident would probably not have been able to find the polyp, and would not have been good at carrying out the most basic barium enema, the single contrast study.

After Dr. Teefey explained all of the reasons why she performed the barium enema, and not the resident, it became clear after closely reviewing the barium enema report why it was that Dr. Teefey went to such lengths to justify herself. Dr. Teefey did not inform the Court that the only signature appearing on the bottom of the barium enema report is the signature of the resident, Patty Hughes. Dr. Teefey did not sign off on the report. Based on the medical record, there is no indication that Dr. Teefey was present for the barium enema.

In addition, Dr. Teefey's Declaration is not based on any facts, personal knowledge, or independent recollection. Instead, her Declaration is based, as Drs. Nevitt and Radke were based, on her "usual and customary practice", not facts. However, Dr. Teefey would probably agree that it is not her usual and customary practice to fail to correctly read why a particular study has been requested. However, regardless of her usual or customary practice, she did make this obvious error. Plaintiff specifically refers the Court to Dr. Teefey's Declaration, ¶ 5, where Dr. Teefey states,

> **The radiology report form does not contain any information in the space labeled "specific reason for request".** Based on my usual practice, I am reasonably certain that if I did not see any information filled in there, I would have asked the patient if he knew why he was there for the study.

See DEFENDANT'S EXHIBIT B, DECLARATION OF SHARLENE A. TEEFEY, M.D., AT ¶ 5, *emphasis added.*

Dr. Teefey, in her zeal to defend the VA's conduct, erroneously stated she did not know the reason Mr. Stephenson was there for the study when the radiology report form in the space labeled "specific reason for request" clearly states "? Rectal polyp vs. hemorrhoid." Dr. Teefey's statement

MORROW & OTOROWSKI, LLP
ATTORNEYS AT LAW
298 WINSLOW WAY WEST
BAINBRIDGE ISLAND, WASHINGTON 98110
(206) 842-1000; (206) 842-0797 FAX

that the "radiology report form does not contain any information in the space labeled 'specific reason for request' is obviously wrong. More puzzling is the fact that Dr. Teefey attached the radiology report to her declaration and all one has to do is look at the space labeled "specific reason for request" to see that it does contain the reason for the requested study. This is just one example of why the defendant's repeated defensive posture that they did everything the way it should have been done based on the vague, non-factual assertion "I followed my usual and customary practice", is ill founded.

Also, the defendant claims for the first time in the litigation that Dr. Teefey should be accorded the same limited duty as Dr. Nevitt, stating specifically,

> ...Dr. Teefey performed the barium enema requested by Dr. Nevitt, and, in accordance with her usual practice, informed Mr. Stephenson of the polyp in his colon and of the need for follow up. This advice fulfilled her limited duty to Mr. Stephenson to advise him of the abnormal finding and reinforced Dr. Nevitt's advice concerning the potential seriousness of the finding. While additional work-up was recommended and apparently did not take place, the limited standard of care applicable to a nontherapeutic compensation and pension evaluation was not violated by the failure, as Mr. Stephenson was notified by both Dr. Nevitt and Dr. Teefey of their abnormal findings and concerns.

See DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, PG. 6, LNS. 9-17.

The defendant now attempts to improperly avoid its numerous previous admissions, including Plaintiffs' Request for Admission No. 26, which specifically states,

> **REQUEST FOR ADMISSION NO. 26: Admit that the defendant's health care providers at the VA hospital in Seattle, Washington had a doctor/patient relationship with Kyle Stephenson as of February 5, 1987.**
>
> **RESPONSE: Denied with respect to the Compensation and Pension Examination performed by VA Psychology Service on February 5, 1987. Admitted with respect to the barium enema study performed by VA Radiology Service on February 5, 1987.**

MORROW & OTOROWSKI, LLP
ATTORNEYS AT LAW
298 WINSLOW WAY WEST
BAINBRIDGE ISLAND, WASHINGTON 98110
(206) 842-1000; (206) 842-0797 FAX

See EXHIBIT 26, AT PG. 7, TO MORROW DECLARATION, PREVIOUSLY FILED WITH THE COURT.

Dr. Teefey and the defendant also ignored the Plaintiffs' Motion concerning the defendant's negligent failure to perform the air contrast barium enema study that was ordered, but was inexplicably crossed out on the barium enema report. Instead of the ordered air contrast barium enema study, the defendant carried out a single contrast barium enema. (*See* EXHIBIT 1, AT PG. 5, and EXHIBIT 3, AT PG. 1, TO MORROW DECLARATION, PREVIOUSLY FILED WITH THE COURT.) The single contrast barium enema is not adequate for visualizing and examining the rectum for small rectal lesions. The single contrast study failed to find the rectal lesion, and the report acknowledges the limitation of the single contrast barium enema's ability to identify small rectal lesions. (*See* DECLARATION OF DR. WINAWER AT PG. 24, LN. 14-19.)

One of the most authoritative textbooks on gastroenterology, entitled "Gastrointestinal Disease", by Sleisenger, 4th Edition, page 1492, states,

> If a barium enema examination is chosen, the air-contrast rather than the single-contrast technique should be used to maximize the detection of small polyps. A properly performed air-contrast barium enema examination can have a sensitivity of 85 to 95 per cent for detecting colorectal polyps.

Finally, the last sentence of the barium enema report states, "The G.I. resident has been informed of this finding." This sentence lacks any meaningful description as to how the resident was informed or what plan of action was going to be carried out to ensure that Mr. Stephenson would receive timely and proper treatment. Who was the resident that was informed? In what way was the resident informed? Was a message left? Was a phone call made? Did the resident get the message? Who was supposed to assume responsibility for the patient? None of these questions can be answered in a meaningful, factual way from the ambiguous statement "The G.I. resident has been informed of this finding." No one can come forward and explain what specifically happened with

MORROW & OTOROWSKI, LLP
ATTORNEYS AT LAW
298 WINSLOW WAY WEST
BAINBRIDGE ISLAND, WASHINGTON 98110
(206) 842-1000; (206) 842-0797 FAX

respect to this communication failure based on someone's "usual and customary" practice. However, based on the medical record and the sequence of events, all of the credible evidence establishes the communication breakdown at the defendant's VA facility.

B. CAUSATION

1. <u>If the defendant's agents had acted as reasonably prudent health care providers with respect to the pre-cancerous colon polyp identified on the February 5, 1987 barium enema, Mr. Stephenson would not have developed rectal cancer</u>.

A pre-cancerous colon polyp was identified by barium enema. Had the defendant acted as a reasonably prudent health care provider with respect to the required care and treatment of Mr. Stephenson's identified colon polyp, to a high degree of probability, Mr. Stephenson would not have developed a 5 cm. rectal cancer from another pre-cancerous polyp.

The defendant's statement that, "Plaintiff may argue that Dr. Radke should have addressed the polyp in Mr. Stephenson's colon; however, by failing to return for his scheduled appointment, Mr. Stephenson deprived Dr. Radke of the opportunity to do so" is an outrageous statement in view of the defendant's repeated negligent conduct.

Dr. Radke, in claiming that he reviewed Kyle Stephenson's chart on May 25, 1989, had every opportunity to discover and address the colon polyp that was described in the barium enema report, along with the VA's failure to carry out the ordered flexible sigmoidoscopy, the biopsy, and the gastrointestinal consultation. Had the health care provider carried out a sigmoidoscopy or a colonoscopy, which was required for a patient with rectal bleeding, he also would have found the previously identified colon polyp and the rectal polyp.

There is no dispute in the world medical literature regarding the superior diagnostic accuracy of the colonoscope to detect colorectal lesions over every other clinical method. Gastroenterology Clinics of North America, March 1997, entitled <u>Colorectal Polyps and Their Relationship to Cancer</u>,

MORROW & OTOROWSKI, LLP
ATTORNEYS AT LAW
298 WINSLOW WAY WEST
BAINBRIDGE ISLAND, WASHINGTON 98110
(206) 842-1000; (206) 842-0797 FAX

pg. 11, states,

> Colonoscopy is the most accurate clinical method for detection of polyps. In a controlled, single-blinded study, the sensitivity for polyp detection by colonoscopy and air-contrast enema was 94% and 67% respectively.

Dr. Billingham's statement regarding the colon polyp found by the barium enema demonstrates substandard medical knowledge. He stated,

> When Mr. Stephenson did have colonoscopy in August of 1993, a 1 cm polyp was seen in the distal descending colon corresponding to the polyp seen on the barium enema done in 1987. When this polyp was ultimately removed, it proved to be a benign lesion with no suggestion of malignant degeneration, so the delay in removal of this polyp had no adverse effect on Mr. Stephenson.

See DEFENDANT'S EXHIBIT E, DECLARATION OF RICHARD P. BILLINGHAM, MD., AT PG. 4.

Such a statement fails to appreciate the most fundamental aspect of colorectal cancer and its prevention. When Mr. Stephenson's colon polyp was ultimately removed and pathologically evaluated in 1993, it was characterized as an "adenovillous" polyp. Once a patient is known to have had one or more pre-cancerous polyps, that patient requires ongoing surveillance by colonoscopy to identify and remove any subsequent polyps.

In this case, not only was the colon polyp pre-cancerous, it also had a villous component, which has the highest risk potential for cancer. "Gastrointestinal Disease", by Sleisenger, 4th Edition, page 1487, states,

> For example, although only 1.3 per cent of all adenomas under 1 cm may harbor a malignancy, if these small lesions have a predominant villous component or contain a focus of severe dysplasia, the malignancy rate rises to 10 per cent or 27 per cent, respectively.

In addition, the following three medical issues are significant to this case: 1) It is undisputed that the cancer began as a pre-cancerous polyp; 2) The world medical literature states that it takes 10-12 years for a pre-cancerous polyp to develop, grow, and transform into cancer; and 3) When one

MORROW & OTOROWSKI, LLP
ATTORNEYS AT LAW
298 WINSLOW WAY WEST
BAINBRIDGE ISLAND, WASHINGTON 98110
(206) 842-1000; (206) 842-0797 FAX

polyp is found there is a high probability that the colon is harboring another, synchronous polyp elsewhere. "Gastrointestinal Disease", by Sleisenger, 4th Edition, page 1490, states,

> The adenomatous polyp itself is often regarded as a marker of a neoplasm-prone colon. Indeed, 30 to 50 per cent of colons with one adenoma will contain at least one other synchronous adenoma.

Mr. Stephenson's colonoscopy report dated September 1, 1993 identified three polyps, a finding entirely consistent with the widely accepted medical knowledge regarding synchronous polyps. The first polyp was the colon polyp, which was pathologically evaluated and determined to be a pre-cancerous polyp with a villous component. The second polyp was described as small and adjacent to the cancer and was surgically resected along with the cancer. The third polyp was the 5-cm. cancer that began from a "pre-existing villous adenoma" or pre-cancerous polyp. Dr. Sharma recommended repeat colonoscopy in six months followed by yearly colonoscopies to identify, remove, and prevent any other pre-cancerous polyps from developing into cancer.

The overwhelming medical evidence favors the fact that the large rectal mass palpated by all of the physicians was the rectal polyp that transformed into cancer.

For the defendant to claim that there is no relationship or significance between the pre-cancerous colon polyp and the pre-cancerous rectal polyp that transformed into rectal cancer demonstrates substandard medical knowledge in terms of treatment, surveillance, and colorectal cancer prevention.

Once Mr. Stephenson's colorectal polyps were removed, he would have undergone regular monitoring for future polyps by timely colonoscopy. Had these reasonably prudent steps occurred as they should have occurred, Mr. Stephenson would not have developed cancer and his subsequent colostomy, impotence, and hernia would have been avoided. (*See* DECLARATIONS OF DR. WINAWER, DR. SHARMA, DR. BIGGERS, DR. DAVIS, DR. KONIKOW, DR. HOLLENBECK, AND DR. DLIN,

MORROW & OTOROWSKI, LLP
ATTORNEYS AT LAW
298 WINSLOW WAY WEST
BAINBRIDGE ISLAND, WASHINGTON 98110
(206) 842-1000; (206) 842-0797 FAX

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2. **The defendant's claim that the rectal mass palpated in 1987 and again in 1989 was the same anterior internal hemorrhoid, and not the rectal polyp that was identified as rectal cancer in 1993 is based on untenable grounds from a medical and logical standpoint.**

a. The defendant relies on Dr. Nevitt, an unreliable witness based on her medical record and her deposition, to make the distinction as to whether or not the rectal mass she felt with her finger was positioned anteriorly or posteriorly. Dr. Nevitt, in describing the mass, failed to describe the mass in relation to any other anatomical structures such as the dentate line, or the anorectal verge. The defendant attempts to rely on Dr. Nevitt when Dr. Nevitt's medical record is unreliable. Her medical record for Kyle Stephenson's exam consists of five discombobulated pages. Two of the pages have no date. Two pages are dated January 23, 1987, and one page is dated March 6, 1987. On the page that represents the actual date of the examination, she stated the rectal mass was "most likely" a hemorrhoid. Six weeks later, on March 6, 1987, she stated the rectal mass "probably represents a polyp." Dr. Nevitt also testified that she kept some of her patient's medical records in her office separate from her patients' medical charts. Dr. Nevitt has demonstrated that she cannot reasonably be relied upon as to whether or not the mass she palpated was located anteriorly or posteriorly.

b. The mass that was described on May 25, 1989 by the third year medical student as a "large internal hemorrhoid at 4 o'clock" was never given an appropriate anatomical orientation. As noted in Plaintiffs' original Motion, it is poor practice to reference any colorectal lesion to the face of a clock. The medical student's description of placing the lesion at 4 o'clock without specifying the anatomical location means that the mass, depending on the orientation of the body at the time of the examination, could have originated from the anterior or posterior wall.

Predictably, the defendant would like to turn the medical student's poor description into a

MORROW & OTOROWSKI, LLP
ATTORNEYS AT LAW
298 WINSLOW WAY WEST
BAINBRIDGE ISLAND, WASHINGTON 98110
(206) 842-1000; (206) 842-0797 FAX

positive in order to be consistent with Dr. Nevitt's medical record. For the defendant to come forward now and attempt to position Mr. Stephenson's body in such a way so that his digital rectal examination would correspond with the 4 o'clock description as an anterior position is transparent.

Dr. Nevitt testified in her deposition at pg. 132, lines 4-10 (*see* EXHIBIT 14 TO MORROW DECLARATION, PREVIOUSLY FILED WITH THE COURT), that 4 o'clock is a **posterior** position.

Q: Well, back to – can you tell me where 4:00 is?

A: Well, I would imagine it's to the patient's right and inferiorly and caudally.

Q: Caudally meaning on the posterior –

A: Yeah, posterior side.

Q: Okay.

A: That's what I would say.

Given the location of the cancer in 1993, the credible medical evidence is that the mass at 4 o'clock was located posteriorly and was the same mass that transformed into cancer.

c. Every single health care provider who palpated Mr. Stephenson's rectal mass, including Dr. Nevitt, H. Miller, the third year medical student, Dr. Hogan, and Dr. Davis all felt the same mass at the **same distance** with their finger. The defendant's distinction as to whether the mass was located anteriorly or posteriorly is unreliable, when it is undisputed that every single doctor felt the mass at the same distance with their finger on digital examination.

d. The defendant also challenges the medically accepted time frame of 10-12 years for a polyp to develop, grow, and transform into cancer. (*See* DECLARATION OF DR. WINAWER AT PG. 33, LN. 16-17, Principal Investigator of the National Polyp Study.) Dr. Nevitt testified on pg. 109, lines 8-11, pg. 112, lines 2-4, (*see* EXHIBIT 14 TO MORROW DECLARATION, PREVIOUSLY FILED WITH THE COURT), it takes 10 years for a polyp to transform into cancer and she tells her patients it takes

MORROW & OTOROWSKI, LLP
ATTORNEYS AT LAW
298 WINSLOW WAY WEST
BAINBRIDGE ISLAND, WASHINGTON 98110
(206) 842-1000; (206) 842-0797 FAX

10 years for a polyp to transform into cancer.

Q: And what's the significance of finding an adenomatous polyp?

A: Well, over a period of 10 years it can, there is a chance that a polyp can grow and become cancer.

Q: Okay. Your best information is about 10 years for the transformation?

A: That's what I tell patients.

Given the 6-year time frame from 1987 to 1993, (4 years from the 1989 medical student examination), it is highly probable and consistent with the natural history of colorectal cancer, that the rectal mass palpated by Dr. Nevitt in 1987 was the rectal polyp or adenoma that subsequently transformed into the large 5 cm rectal cancer that was diagnosed in 1993. Not only was the rectal polyp present in 1987 when Dr. Nevitt palpated the rectal polyp during her examination, it would have been present for years prior to 1987. (*See* DECLARATION OF DR. WINAWER AT PG. 33, LN. 16-21.)

e. In order to for the defendant to make the argument that the rectal mass was consistently an internal hemorrhoid and not a polyp, the defendant must change the facts and contradict the medicine. The defendant's position is that the rectal polyp was not present in 1987 or 1989. The defendant asserts that the rectal mass palpated in 1987 and again in 1989 was the same internal hemorrhoid located anteriorly. In addition, the same internal hemorrhoid grew in size from a small 1 cm x 1 cm mass in January 1987 into a "large" mass by May 1989. In 1993, the growing anterior mass, which the defendant insists was an internal hemorrhoid had miraculously disappeared, and the only mass that was now present was the large, 5 cm. rectal polyp that had transformed into cancer, at the very same distance in the rectum where every physician had previously identified the rectal mass with their finger. Such sleight of hand happens in magic, not medicine.

f. The pre-surgical colonoscopy carried out by Dr. Sharma was the very first time that

MORROW & OTOROWSKI, LLP
ATTORNEYS AT LAW
298 WINSLOW WAY WEST
BAINBRIDGE ISLAND, WASHINGTON 98110
(206) 842-1000; (206) 842-0797 FAX

any health care provider used the correct, superior procedure, as opposed to the finger or limited anoscope to visualize Mr. Stephenson's entire colon. Dr. Sharma accurately reported what he visualized, which consisted of three polyps, one of which had transformed into rectal cancer.

The defendant's repeated assertion is that the cancerous polyp originated from the posterior wall of the rectum, and not the anterior wall of the rectum where the "large internal hemorrhoid" is claimed to have been located. However, Dr. Sharma is the only physician, using a colonoscope for the first time, who had a clear view of the anterior portion of the rectum on the wall directly opposite the cancer, at the same distance where the internal hemorrhoid "consistently" was felt according to Drs. Nevitt and Radke. Dr. Sharma did not visualize any abnormality, mass, or hemorrhoid originating from the anterior wall of the rectum. There was no mass on the anterior wall. The rectal polyp, which was the only mass that every health care provider consistently palpated with their finger, did not mysteriously move from one location to another. It is Dr. Nevitt who mischaracterized the location. As for the 4 o'clock description in 1989, this description is consistent with a posterior mass when the patient's body is oriented accordingly.

The only explanation that is reasonable and conforms to the accepted natural progression of the adenoma/carcinoma sequence is that the rectal mass was a rectal polyp, which slowly grew over time until it transformed into a large rectal cancer.

C. PROCEDURAL ARGUMENT

1. The Defendant failed to timely disclose the identity of its expert witnesses as required under FRCP 26(a)(1) and FRCP 26(2)(A).

Disregard of a court order without reasonable excuse or justification is deemed willful. Allied Financial Servs. v. Mangum, 72 Wash.App. 164, 168, 864 P.2d 1, 871 P.2d 1075 (1993) (*citing* Lampard v. Roth, 38 Wash.App. 198, 202, 684 P.2d 1353 (1984)). No showing of prejudice to the opposing party is required in order for the sanction to be imposed. Allied Financial Servs., *supra*, at

MORROW & OTOROWSKI, LLP
ATTORNEYS AT LAW
298 WINSLOW WAY WEST
BAINBRIDGE ISLAND, WASHINGTON 98110
(206) 842-1000; (206) 842-0797 FAX

168, 169.

Fed.R.Civ.P. 26(2)(A) states,

> *Disclosure of Expert Testimony:*
> In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

The defendant disclosed its experts six months past the Court's April 25, 2003 deadline for disclosing the identity of expert witnesses and did so without any reasonable excuse.

Plaintiff respectfully requests that the defendant's disclosure of expert witnesses at this stage of the litigation be stricken as untimely and defendant's expert witnesses be excluded.

2. The Defendant failed to submit an expert report for Dr. Billingham as required by the Court's scheduling deadline.

The defendant failed to submit any timely report for Dr. Billingham. The defendant submitted his report as an attachment to its Opposition, six weeks after the deadline under the Court's Order. Demonstrating prejudice is not required when the conduct is deemed willful. Likewise, the defendant provides no authority for its assertion that substantial compliance is the legal requirement for expert reports. In fact, the defendant did not substantially comply. The defendant's disclosure for Dr. Billingham consisted of two, vague, uninformative paragraphs that did not fairly meet the requirements under Fed.R.Civ.P. 26(2)(a) for expert reports.

The case cited by the defendant, In Re Exxon Valdez, 102 F.3d 429 (9th Cir. 1996) is misplaced. The Court in Exxon, *supra*, only addressed the sanction of dismissal of the party's entire case, as opposed to excluding a single expert witness.

For six months, defense counsel ignored plaintiffs' repeated requests stating the defendant would be submitting expert reports as required by the due date of October 22, 2003 pursuant to the Court's Order. The defendant then failed to furnish plaintiffs with the required signed expert report

MORROW & OTOROWSKI, LLP
ATTORNEYS AT LAW
298 WINSLOW WAY WEST
BAINBRIDGE ISLAND, WASHINGTON 98110
(206) 842-1000; (206) 842-0797 FAX

of Dr. Billingham without any reasonable excuse, an act deemed willful under Washington law. Plaintiffs respectfully request that the defendant be precluded from using Dr. Billingham as an expert witness.

3. Dr. Billingham's Declaration should be deemed stricken for failure to state any of his opinions on a more probable than not basis.

Dr. Billingham's Declaration should be deemed stricken and inadmissible not only because the defendant failed to timely submit a signed report and also failed to meet the requirements of the substantive data required under Fed.R.Civ.P. 26(2)(a), but also, Dr. Billingham's opinions are not stated to the required degree of medical probability. Dr. Billingham states at the top of page 3 of his Declaration, "All of my opinions are based on the standard of reasonable prudence under the circumstances." None of his opinions are admissible in evidence without having stated them on a more probable than not basis.

III. CONCLUSION

Plaintiffs respectfully request the Court grant Plaintiffs' Motion for Summary Judgment against the Defendant. There are no genuine issues of material fact regarding the Defendant's repeated, ongoing failures over several years, to carry out the required gastrointestinal consultation, flexible sigmoidoscopy, air contrast barium enema, endoscopy, and biopsy as ordered by the defendant. These ordered studies and the gastrointestinal consult were required in order to appropriately evaluate, treat, and monitor Kyle Stephenson's pre-cancerous rectal and colon polyps in a reasonably prudent manner. Had the defendant communicated to Kyle Stephenson their findings with respect to the two abnormal colorectal masses, and carried out the studies that were ordered, Kyle Stephenson would have avoided the development of rectal cancer from a pre-cancerous rectal polyp.

MORROW & OTOROWSKI, LLP
ATTORNEYS AT LAW
298 WINSLOW WAY WEST
BAINBRIDGE ISLAND, WASHINGTON 98110
(206) 842-1000; (206) 842-0797 FAX

RESPECTFULLY SUBMITTED this 4th day of December 2003.

MORROW & OTOROWSKI, LLP

By _____

Albert Morrow, WSBA # 5880
Adam Morrow, WSBA # 27568
Attorneys for the Plaintiffs

MORROW & OTOROWSKI, LLP
ATTORNEYS AT LAW
298 WINSLOW WAY WEST
BAINBRIDGE ISLAND, WASHINGTON 98110
(206) 842-1000; (206) 842-0797 FAX

THE HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

KYLE W. STEPHENSON, and MICHAEL K. STEPHENSON, his son, Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	NO. CV03-0113P CERTIFICATE OF SERVICE

I, Lorraine F. Wojcik, certify that at all times mentioned herein I was and now am a resident of the State of Washington, over the age of eighteen years, not a party to the proceeding or interested therein, and competent to be a witness therein. My business address is that of Morrow & Otorowski, LLP, 298 Winslow Way W., Bainbridge Island, WA 98110.

On December 4, 2003, I caused true and correct copies of the following documents:

1. **PLAINTIFFS' REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AGAINST THE DEFENDANT UNITED STATES OF AMERICA; and**

2. **CERTIFICATE OF SERVICE**

ORIGINAL

MORROW & OTOROWSKI, LLP
ATTORNEYS AT LAW
298 WINSLOW WAY WEST
BAINBRIDGE ISLAND, WASHINGTON 98110
(206) 842-1000; (206) 842-0797 FAX

to be served on the following parties, in the manner indicated:

Robert M. Taylor
Assistant US Attorney
US Attorneys Office
601 Union Street, Suite 5100
Seattle, WA 98101

ABC Legal Messenger Service

Dated this 4TH day of December, 2003, at Bainbridge Island, Washington.

Lorraine F. Wojcik, Legal Secretary

MORROW & OTOROWSKI, LLP
ATTORNEYS AT LAW
298 WINSLOW WAY WEST
BAINBRIDGE ISLAND, WASHINGTON 98110
(206) 842-1000; (206) 842-0797 FAX