**Superior Court of Washington**

**County of Snohomish**

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| **In re the Marriage of:**JANE D. SMITH **Petitioner,****and**JOHN D. SMITH**Respondent.** | **No.** 55-5-55555-55**Respondent’s Declaration in Support of Motion for CR 35 Exam and Fees** |

**I. INTRODUCTION**

I, John Smith, the Respondent/Husband, submit this declaration in support of my motion for a CR 35 independent medical examination (“IME”) of my wife, Jane Smith, the Petitioner. I also ask for $1,500 in attorney fees due to her bad faith efforts to contest an independent medical examination. There is ample reason for an IME. The issue in dispute is quite large. Jane is requesting lifetime maintenance based on her supposed disability, a claim potentially worth hundreds of thousands of dollars. The claim is also disputed. Even our only child, who is an adult, says Jane is faking her disability. Yet Jane refused to submit to an IME despite my offer to pay the costs and to allow her to choose the doctor.

**II. FACTS**

I am 55. My wife, Stephany Smith, is also 55. We were married for 24 years.

 Jane historically worked at a computer desk. She used to make more than me.

 In 2006 she applied for disability on the basis she had fibromyalgia, defined as pain without detectable inflammation, body damage, or deformation (i.e., pain without any means of confirming the pain or its source). As I recall, the federal government initially denied her disability application, but she re-applied with statements from her doctor and family members attesting to the pain she appeared to feel. The federal government approved her reapplication, and she began receiving monthly fulltime disability checks.

 That was when it became apparent she was faking. She had alleged she could not work at a computer because of hand and wrist pain, but then she undertook numerous activities that involved more finger strain than typing would. For example, she took up quilting. Quilting became a passion for her, and she worked her fingers for hours a day in the same pinched position. Attached as **Exhibit A** is a picture of a first-prize winning quilt she submitted to the Cashmere Quilt Festival.

 She also took up creative cake making, which involved hours of hand-squeezing frosting through small tubes. Attached as **Exhibit B** are a couple pictures of advanced pastries she made. She tried starting an advanced pastry-making business.

 Beyond her hands, it became apparent she was not suffering pain in other parts of her body either. After receiving disability, she began doing extensive work around the house. She painted the house, scrubbed the floors, and even helped me re-do our backyard. Most surprisingly, she helped create raised beds by lifting and carrying 24 lb. retaining wall blocks. Attached as **Exhibit C** is a printout confirming the blocks weighed 24 lbs. She sometimes carried two blocks, for a total of 48 lbs. at a time!

 This went on and on, with Jane continuing to receive disability payments, continuing to tell her doctor she was in pain, but living as a healthy person.

 I had a seizure in 2017. Jane filed for divorce less than a month after my seizure. She asked for $3,000 per month in spousal support indefinitely. She reasserted she had fibromyalgia and that it constituted a permanent and fulltime disability, though she provided no medical documentation of her condition.

 Attached as **Exhibit D** is a declaration from our only child – our 35-year old daughter – about Jane’s ability to work. Our daughter’s declaration explained:

Jane Smith is capable of working and moving around. She does yard work, clean[s] the house, climb[s] the stairs, [and] paints the house. She also wanted to start her own business [making] cake and cupcakes . . . . She is a really good baker and quilter.

 Based on the evidence, I asked that she be Court ordered to provide a note from her doctor – a seemingly small request from someone who might be ordered to pay hundreds of thousands of dollars in disability-related maintenance. Her angry reply declaration was confirmation I had touched upon a dirty secret of hers. Her reply to my request for a doctor’s note read as follows:

I find it incredibly insulting that John requested a doctor’s note to prove my disability because I am physically able to have hobbies. Must I be bedridden to satisfy his definition of disabled? For him to include an incoherent statement from our daughter adds insult to injury. Apparently I can’t be disabled because once I had a dream I could be a professional baker, and another time I participated in a quilt contest. I do suffer severe pain doing detailed work with my fingers, but I would rather suffer than give up all my hobbies. Is that what John wants? My illnesses are documented, and I have good days and bad days. It seems John is demanding that I return to work but I have been declared disabled. **I ask the Court to deny this callous request**.

*Declaration of Jane Smith in Strict Reply, p. 3*.

 Later that month (July 2017) I propounded discovery requests for Jane’s medical records, including requests for records relating to her disability benefit applications. In September 2017 Jane delivered her responses. A true and correct copy of the most relevant pages of requests and Jane’s responses are attached as **Exhibit E**. She stated she suffers from fibromyalgia, severe anxiety, depression, and is recovering from alcoholism. Although she supplied approximately 150 pages of medical records, she claimed to have no records from her disability application in 2006 – 2007, and she supplied no evidence of ever submitting to an independent medical examination (an examination by someone who is not her doctor). Over and over again, her medical records state she appears to be “in no acute distress”. I am supplying sealed copies of at least ten instances in which her doctors’ notes say this.

 The next month (October 2017) I offered to jointly hire an independent medical examiner. By jointly hiring an independent medical expert, the opposing party would have a say in who the doctor is, and we could keep costs down. Jane, through her counsel, refused adamantly. Attached as **Exhibit F** is the email chain, which reads as follows:

**October 23, 2017 Email to Opposing Counsel**

I write regarding the possibility of jointly hiring an independent medical examiner in the Smith matter. If we jointly hire an IME, we can hopefully do away with having dueling experts regarding Ms. Smith’s ability to work. That could substantially reduce costs, including decreasing the cost of medical reports, depositions, expert testimony at trial, and attorney time.

**November 1, 2017 Response from Opposing Counsel (underlining added)**

There is no way I would agree to co-IME my client. Also, I will fight any attempt for you to get her to an IME.

**November 2, 2017 Email to Opposing Counsel**

You said you’d fight any attempt to get your client to an IME. What basis would there be to fight getting your client to an IME in a case where her supposed disability is a six-figure issue? The only bases I can think of are sanctionable, such as the desire to increase Mr. Smith’s attorney fees, cause delay, limit our ability to defend, or make the case difficult enough that Mr. Smith will in some way fold.

I ask you to reconsider whether you’d “fight” getting an IME. If you do fight and don’t offer a valid explanation in your responsive email, I’m going to seek fees. I sincerely hope that won’t be necessary. Please also keep in mind, we’ll be able to force your client to submit to an IME, push come to shove. Why should both parties spend thousands of dollars on attorney fees on a foregone conclusion? Obviously this isn’t an issue we’ll fold on. We’re going to push forward with an IME.

 Neither Jane nor her attorney responded with a good faith explanation for why they would fight an IME, despite our warning to them.

 My attorney then scheduled and conducted a CR 26(i) phone conference (which opposing counsel evaded for as long as he could). This time I offered to allow Jane to choose who would perform the IME with no say from me or my attorney and at my cost alone. My proposal was that Jane could select anyone she wanted so long as it was not one of her doctors. By definition, an IME must be performed by someone other than the subject’s own doctor(s) to avoid bias. Jane, through her counsel, nonetheless refused. Attached as **Exhibit G** is a true and correct copy of the confirmation email I had my attorney send opposing counsel immediately after the CR 26(i) conference. The email read:

This is to confirm the outcome of our CR 26(i) conference. I explained that you could choose the doctor who would perform the exam, and that he or she simply needed to be someone who is not your client’s doctor. Your position is that we are “doctor shopping” and that you suspect someone performed an independent medical examination when your client applied for disability benefits. You are unwilling to allow your client to submit to an independent medical examination (IME).

As you are aware, our requests for production included a request for all your client’s disability benefit applications and associated records. There was no record of an IME, only records from your client’s doctor(s).

As we discussed, our firm will now proceed with our motions to compel an IME (CR 35 exam) and for fees.

Thank you for your time this afternoon.

 Neither Jane nor her attorney responded to this email. Presumably they agreed with my attorney’s description of the CR 26(i) conference.

**III. RELIEF REQUESTED**

 A. Order Jane to submit to an IME. I propose that she provide me with a list of three doctors (who are not hers), and I will select one of them.

 B. Order Jane to pay $1,500 in attorney fees for unreasonably fighting my request for an IME.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, [City] \_\_\_\_\_\_\_\_\_\_ [State] on \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ [Date].

JOHN SMITH

Signature of Declarant