

Clark R. Hudson, SBN 149329
David P. Burke, SBN 200120
Benjamin J. Howard, SBN 241122
NEIL, DYMOTT, FRANK,
MCFALL & TREXLER
A Professional Law Corporation
1010 Second Avenue, Suite 2500
San Diego, CA 92101-4959
P 619.238.2253/F 619.238.1562

Attorneys for Defendants
JAMES DAVIES, M.D., MELISSA KLEMAN, OD
AND DAVIES EYE CENTER

FILED
BUSINESS OFFICE 17
CENTRAL DIVISION

12 AUG -9 PM 3:38

CLERK-SUPERIOR COURT
SAN DIEGO COUNTY, CA

← ESA melissa Kelman
(MK)

SUPERIOR COURT, STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO - CENTRAL DIVISION

SUZON DELLINGER,
PLAINTIFF,

) CASE NO. 37-2012-00097995-CU-MM-
) CTL
) [Imaged Filed]

VS.

← ESA melissa Kelman
(MK)

DEFENDANTS, MELISSA KLEMAN,
DO, JAMES A. DAVIES, M.D. and
DAVIES EYE CENTER'S ANSWER TO
PLAINTIFF'S COMPLAINT

← ESA melissa Kelman
(MK)

MELISSA KLEMAN, an individual;
JAMES A DAVIES, an individual;
DAVIES EYE CENTER, a California
Business; and DOES 1 through 20,
Inclusive,

) Dept: C75
) Judge: Hon. Judge Richard Strauss

Defendants.

) Filed: 5/25/12
) Trial Date: Not yet filed.

← ESA melissa Kelman
(MK)

COME NOW, defendants, MELISSA KLEMAN, D.O., JAMES A. DAVIES, M.D. and
DAVIES EYE CENTER and answer the complaint on file herein as follows:

I.

GENERAL DENIAL

Pursuant to the provisions of Section 431.30 of the California Code of Civil Procedure, these
answering defendants deny generally and specifically each, every and all of the allegations in said
complaint, and the whole thereof, including each and every purported cause of action contained therein.
These answering defendants further deny that plaintiff has or will sustain damages in the amount
alleged or in any amount whatsoever.

1 II.

2 AFFIRMATIVE DEFENSES

3 **AS AND FOR A FIRST, SEPARATE AND AFFIRMATIVE**
4 **DEFENSE, THESE ANSWERING DEFENDANTS ARE INFORMED**
5 **AND BELIEVE AND THEREON ALLEGE AS FOLLOWS:**

6 That at all times and places set forth in the complaint, plaintiff failed to exercise ordinary
7 care on her own behalf, which negligence and carelessness was a legal cause of some portion, up to
8 and including the whole thereof, of the injuries and damages complained of in this action. Plaintiff's
9 recovery therefore against these answering defendants should be barred or reduced according to
10 principles of comparative negligence.

11 **AS AND FOR A SECOND, SEPARATE AND AFFIRMATIVE**
12 **DEFENSE, THESE ANSWERING DEFENDANTS ARE INFORMED**
13 **AND BELIEVE AND THEREON ALLEGE AS FOLLOWS:**

14 At all times and places set forth in the complaint, parties defendant, other than these answering
15 defendants, failed to exercise ordinary care on their own behalf, which negligence and carelessness was
16 a legal cause of some portion, up to and including the whole thereof, of the injuries and damages
17 complained of by plaintiff in this action. The fault, if any, of these answering defendants should be
18 compared with the fault of the other defendants and damages, if any, should be apportioned among the
19 defendants in direct relation to each defendant's comparative fault. These answering defendants should
20 be obligated to pay only such damages, if any, which are directly attributable to their percentage of
21 comparative fault. To require these answering defendants to pay any more than their percentage of
22 comparative fault violates the equal protection and due process clauses of the Constitution of the United
23 States and the Constitution of the State of California.

24 **AS AND FOR A THIRD, SEPARATE AND AFFIRMATIVE**
25 **DEFENSE, THESE ANSWERING DEFENDANTS ARE INFORMED**
26 **AND BELIEVE AND THEREON ALLEGE AS FOLLOWS:**

27 These answering defendants deny that they were negligent in any fashion with respect to the
28 damages, losses, injuries, and debts claimed by the plaintiff in her complaint on file herein. However, if
these answering defendants are found to have been negligent (which supposition is denied and merely
stated for the purpose of this affirmative defense), then these answering defendants provisionally allege
that their negligence is not the sole and legal cause of the resultant damages, losses and injuries alleged

1 by plaintiff and that the damages awarded to plaintiff, if any, are to be apportioned according to the
2 respective fault of the parties, persons, and entities, or their agents, servants, and employees who
3 contributed to and/or caused said resultant damages as alleged, according to proof presented at the time
4 of trial. That to assess any greater percentage of fault and damages against these answering defendants
5 in excess of their percentage of fault would be a denial of equal protection and due process which are
6 guaranteed by the constitutions of the State of California and the United States, respectively.

7 **AS AND FOR A FOURTH, SEPARATE AND AFFIRMATIVE**
8 **DEFENSE, THESE ANSWERING DEFENDANTS ARE INFORMED**
9 **AND BELIEVE AND THEREON ALLEGE AS FOLLOWS:**

10 That these answering defendants deny any wrongdoing, negligence, carelessness, fault or
11 liability on their part. However, should it be determined that these answering defendants are liable, then
12 these answering defendants further allege that plaintiff also contributed to her own alleged injuries,
13 losses and damages, and by virtue thereof, these answering defendants ask that any judgment entered
14 against them be proportionately reduced to the extent that plaintiff's negligence legally contributed to
15 the happening of the subject incident and to any injuries, losses or damages sustained by plaintiff, if any
16 there were. That to assess any greater percentage of fault and damages against these answering
17 defendants in excess of their percentage of fault would be a denial of equal protection and due process
18 which are guaranteed by the constitutions of the State of California and the United States, respectively.

19 **AS AND FOR A FIFTH, SEPARATE AND AFFIRMATIVE**
20 **DEFENSE, THESE ANSWERING DEFENDANTS ARE INFORMED**
21 **AND BELIEVE AND THEREON ALLEGE AS FOLLOWS:**

22 These answering defendants are not legally responsible for the acts and/or omissions of those
23 defendants named herein as DOES 1 to 20.

24 **AS AND FOR A SIXTH, SEPARATE AND AFFIRMATIVE**
25 **DEFENSE, THESE ANSWERING DEFENDANTS ARE INFORMED**
26 **AND BELIEVE AND THEREON ALLEGE AS FOLLOWS:**

27 That as against these answering defendants, plaintiff actions is barred by the provisions of
28 section 340.5 of the California Code of Civil Procedure. These answering defendants reserve the right,
and plaintiff is hereby put on notice, to ask the Court to bifurcate the trial of the statute of limitations.

///

///

1 **AS AND FOR A SEVENTH, SEPARATE AND AFFIRMATIVE**
2 **DEFENSE, THESE ANSWERING DEFENDANTS ARE INFORMED**
3 **AND BELIEVE AND THEREON ALLEGE AS FOLLOWS:**

4 That in the event these answering defendants are found to be negligent (which supposition is
5 denied and merely stated for the purpose of this affirmative defense,) these answering defendants may
6 elect to introduce evidence of any amounts paid or payable, if any, as a benefit to plaintiff pursuant to
7 Civil Code section 3333.1.

8 **AS AND FOR AN EIGHTH, SEPARATE AND AFFIRMATIVE**
9 **DEFENSE, THESE ANSWERING DEFENDANTS ARE INFORMED**
10 **AND BELIEVE AND THEREON ALLEGE AS FOLLOWS:**

11 That in the event these answering defendants are found to be negligent (which supposition is
12 denied and merely stated for the purpose of this affirmative defense), the damages for non-economic
13 losses shall not exceed the amount specified in Civil Code section 3333.2.

14 **AS AND FOR A NINTH, SEPARATE AND AFFIRMATIVE**
15 **DEFENSE, THESE ANSWERING DEFENDANTS ARE INFORMED**
16 **AND BELIEVE AND THEREON ALLEGE AS FOLLOWS:**

17 That in the event these answering defendants are found to be negligent (which supposition is
18 denied and merely stated for the purpose of this affirmative defense), these answering defendants may
19 elect to have future damages, if in excess of the amount specified in Code of Civil Procedure, Section
20 667.7, paid in whole or in part, as specified in Code of Civil Procedure, Section 667.7.

21 **AS AND FOR A TENTH, SEPARATE AND AFFIRMATIVE**
22 **DEFENSE, THESE ANSWERING DEFENDANTS ARE INFORMED**
23 **AND BELIEVE AND THEREON ALLEGE AS FOLLOWS:**

24 These answering defendants assert by way of affirmative defense the applicable provisions of
25 Business and Professions Code, Section 6146.

26 **AS AND FOR AN ELEVENTH, SEPARATE AND AFFIRMATIVE**
27 **DEFENSE, THESE ANSWERING DEFENDANTS ARE INFORMED**
28 **AND BELIEVE AND THEREON ALLEGE AS FOLLOWS:**

That plaintiff's action herein is barred by the provisions of California Civil Code section 1714.8
in that the injuries and damages complained of by the plaintiff herein, if any, were solely as the result of
the natural course of a disease or condition and/or expected result of reasonable treatment rendered for
the disease or condition by the defendants herein.

///

1 WHEREFORE, these answering defendants pray that plaintiff takes nothing by way of her
2 complaint on file herein, that judgment be entered in the within action in favor of these answering
3 defendants and against the plaintiff upon the issues of the complaint, together with an award to these
4 defendants of attorneys' fees and costs of suit herein incurred, and such other and further relief as the
5 Court deems just.

6
7
8
9 Dated: August 8, 2012

NEIL, DYMOTT, FRANK,
MCFALL & TREXLER
A Professional Law Corporation

10
11 By: 

Clark R. Hudson
David P. Burke
Benjamin J. Howard
Attorneys for Defendants
James Davies, M.D., Melissa Kleman, OD
and Davies Eye Center