No. 311287

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

DARLA KECK and RON JOSEPH GRAHAM, husband and wife, and DARLA KECK and RON JOSEPH GRAHAM as parents for the minor child, KELLEN MITCHELL GRAHAM, and KELLEN MITCHELL GRAHAM, individually,

Plaintiffs-Appellants,

vs.

CHAD P. COLLINS, DMD, PATRICK C. COLLINS, DDS; COLLINS ORAL & MAXILLOFACIAL SURGERY, P.S., a Washington corporation, and SACRED HEART MEDICAL CENTER, a Washington corporation,

Defendants-Respondents.

REPLY BRIEF OF APPELLANTS

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INTRODUCTION TO REPLY

Darla Keck and her family (Keck) submit this combined reply to the response brief filed by Dr. Patrick C. Collins, DDS (Patrick Collins), and the separate response brief filed by Dr. Chad Collins, DMD, and Collins Oral & Maxillofacial Surgery, P.S. (Chad Collins).

The issues in this appeal involve the evidentiary sufficiency and timeliness of affidavits submitted in opposition to the doctors' motions for summary judgment. As far as the sufficiency of the affidavits is concerned, Drs. Patrick and Chad Collins do not contest the fact that the testimony contained in the first (CP 41-43) and second (CP 46-48) affidavits of Keck's expert, Dr. Kasey Li, would be admissible at trial under ER 704-705, nor do they contest the fact that the testimony contained in these affidavits would be sufficient to support a verdict in Keck's favor at trial regarding the essential elements of her claim, i.e., breach of the standard of care and proximate causation of her injuries. Nonetheless, they contend that the testimony is insufficient to survive summary judgment. This contention should be rejected as incompatible with the purpose of summary judgment and the right to trial by jury.

As far as the timeliness of the affidavits is concerned, the doctors do not identify any prejudice resulting from the filing of Dr. Li's third affidavit (CP 79-84) shortly before the summary judgment hearing, or a

brief continuance pursuant to CR 56(f) to permit the third affidavit to be considered. They do not dispute that the summary judgment motion was unilaterally scheduled so that responsive affidavits were due while Keck's counsel, a sole practitioner, was in the middle of an out-of-town trial. At the time of summary judgment, no discovery had been completed and the discovery cutoff and dispositive motion deadlines had not yet passed. Under these circumstances, the trial court's decisions to strike the third affidavit and deny the requested continuance did not ensure that justice is done, which is the touchstone for rulings regarding the timeliness and continuance of summary judgment proceedings.

ARGUMENT IN REPLY

A. In Light Of *Folsom v. Burger King,* Respondents Properly Concede That The De Novo Standard Of Review Applies To The Evidentiary Sufficiency Of Summary Judgment Affidavits, But They Do Not Recognize The Full Effect Of *Folsom*, Which Provides That *All* Trial Court Rulings In Conjunction With Summary Judgment Are Subject To De Novo Review.

Drs. Patrick and Chad Collins both agree with Keck that the de novo standard of review applies to trial court rulings regarding the evidentiary sufficiency of summary judgment affidavits, consistent with the Supreme Court's decision in *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). *See* Patrick Collins Br., at 8; Chad Collins Br.,

at 14 n.2. It is therefore beyond dispute that the sufficiency of all affidavits submitted by Dr. Li should be reviewed de novo by this court.

With respect to the timeliness of summary judgment affidavits, Drs. Patrick and Chad Collins do not contest the trial court's authority to "permit affidavits to be supplemented or opposed by … further affidavits" under CR 56(e). (Ellipses added.) Nor do they contest the trial court's authority to "order a continuance to permit affidavits to be obtained" or "make such other order as is just" under CR 56(f). However, they disagree with Keck regarding the standard of review that applies to rulings regarding the timeliness of summary judgment affidavits and continuance of summary judgment proceedings. *See* Patrick Collins Br., at 7-8; Chad Collins Br., at 13-14 & n.2. This disagreement relates solely to the third declaration of Dr. Li (CP 79-84).

1. The Language And Rationales Of *Folsom* Require De Novo Review Of The Timeliness Of Summary Judgment Affidavits And The Continuance Of Summary Judgment Proceedings, To The Same Extent As Evidentiary Rulings.

In making their argument, the doctors fail to appreciate the full significance of the Supreme Court's decision in *Folsom*. The Court held that "[t]he de novo standard of review is used by an appellate court when reviewing *all* trial court rulings made in conjunction with a summary judgment motion." 135 Wn.2d at 663 (brackets & emphasis added). This

language is expansive and unequivocal, and the holding of *Folsom* has subsequently been described by the Court in similarly unqualified terms. *See Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 416, 150 P.3d 545 (2008) (citing *Folsom* for the proposition that "[t]rial court rulings in conjunction with a motion for summary judgment are reviewed de novo"). Under the plain language of *Folsom*, a trial court's rulings regarding the timeliness of summary judgment affidavits and continuance of summary judgment proceedings should be subject to de novo review.

Dr. Patrick Collins does not cite *Folsom*. Dr. Chad Collins attempts to distinguish *Folsom* and limit the case to its facts, involving the evidentiary sufficiency of summary judgment affidavits. *See* Chad Collins Br., at 14 n.2. However, the language of the decision and the Court's rationales are not tied to the facts in any respect, and the distinction made by Dr. Chad Collins is therefore immaterial. The Court knows how to limit a holding to the facts of a particular case, but it did not do so in *Folsom*, confirming the broad nature of the rule announced therein.[1]

[1] *See, e.g., State v. Cole*, 128 Wn.2d 262, 276-77, 906 P.2d 925 (1995) (noting the Court limited the scope of a prior opinion by stating "[t]his holding is limited to the facts of this case"; quotation omitted); *In re Detention of G.V.*, 124 Wn.2d 288, 297, 877 P.2d 680 (1994) (stating "[w]e take care to note … that our holding is limited to the facts of these cases"); *In re Esparza*, 118 Wn.2d 251, 265, 821 P.2d 1216 (1992) (stating "[w]e emphasize that our analysis and holding … are limited to the facts and questions certified and the arguments presented"); *Douchette v. Bethel Sch. Dist. No. 403*, 117 Wn.2d 805, 816 n.9, 818 P.2d 1362 (1991) (stating "[o]ur holding today is limited to the facts of the case"); *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 586, 599 P.2d 1289 (1979) (stating "[o]ur holding is limited necessarily to such narrow facts").

The rationales for the decision in *Folsom* support applying the de novo standard of review to the timeliness of summary judgment affidavits and continuance of summary judgment proceedings, no less than the evidentiary sufficiency of summary judgment affidavits. The Court explained its rationales as follows:

> An appellate court would not be properly accomplishing its charge if the appellate court did not examine *all* the evidence presented to the trial court, including evidence that had been redacted. The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion. This standard of review is consistent with the requirement that evidence and inferences are viewed in favor of the nonmoving party, and the standard of review is consistent with the requirement that the appellate court conduct the same inquiry as the trial court.

Folsom, 135 Wn.2d at 663 (emphasis in original; citations omitted). The rationales for de novo review based upon "examin[ing] *all* the evidence presented to the trial court" and "conduct[ing] the same inquiry as the trial court" necessarily entail de novo review of evidence excluded on grounds of timeliness. The appellate court is in just as good a position as the superior court to pass upon questions of timeliness or continuance as it is to pass upon the question of evidentiary sufficiency, when reviewing a summary judgment order and record. Moreover, the abbreviated nature of summary judgment proceedings and the potentially outcome determinative

consequences of a timeliness or continuance ruling, no less than an evidentiary ruling, justify de novo review.[2]

2. The Cases On Which Respondents Rely Are Traceable To Pre-*Folsom* Law.

Initially, both doctors cite *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 499, 183 P.3d 283 (2008), and cases cited therein. *See* Patrick Collins Br., at 9; Chad Collins Br., at 13. *Davies* does not acknowledge the impact of *Folsom* on review of the timeliness of summary judgment affidavits, but instead relies on *Brown v. Peoples Mortg. Co.*, 48 Wn. App. 554, 559, 739 P.2d 1188 (1987), which pre-dates *Folsom*.[3]

Davies also relies on *Idahosa v. King County*, 113 Wn.App. 930, 936-37, 55 P.3d 657 (2002), *rev. denied*, 149 Wn.2d 1011 (2003), which post-dates, but does not cite *Folsom*. Instead, *Idahosa* cites prior cases

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[2] Although the rationales for the *Folsom* decision were highlighted in Keck's opening brief, *see* Keck App. Br., at 17, neither Dr. Patrick Collins nor Dr. Chad Collins address them in their response briefs, *see* Patrick Collins Br., at 7-10 (discussing standard of review); Chad Collins Br., at 13-14 & n.2 (same). At one point, Dr. Patrick Collins states that "[t]he abuse of discretion standard acknowledges that deference is owed to the trial judge who is better positioned than an appellate court to decide the issue[,]" citing *Washington St. Phys. Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). *See* Patrick Collins Br., at 9 (brackets added). This deference has already been rejected in the summary judgment context in *Folsom*. In the sanctions context of *Fisons* the Court determined that a deferential standard of review was necessary to "reduce the reluctance of courts to impose sanctions" that a de novo standard of review would entail. *See* 122 Wn.2d at 339. No such concerns are implicated by summary judgment practice.

[3] In an earlier part of the opinion, *Davies* acknowledges that expert qualifications and opinions are supposed to be reviewed de novo in the summary judgment context following *Folsom*. *See Davies*, 144 Wn. App. at 494. It is not apparent from the text of the *Davies* opinion whether the parties ever raised the issue of *Folsom*'s application to the timeliness of summary judgment affidavits. *See id.* at 499.

applying the abuse of discretion standard of review to the evidentiary sufficiency of summary judgment affidavits, which have been overruled by *Folsom*. *See* 113 Wn. App. at 936-37.[4] If anything, *Idahosa's* reliance on cases involving the evidentiary sufficiency of summary judgment affidavits to establish the standard of review for the timeliness of such affidavits undercuts the significance of the distinction between evidentiary sufficiency and timeliness made by Dr. Chad Collins.

Dr. Patrick Collins additionally cites *Garza v. McCain Foods, Inc.*, 124 Wn.App. 908, 917, 103 P.3d 848 (2004), *rev. granted & remanded,* 160 Wn.2d 1004 (2007), and *Colwell v. Holy Family Hosp.*, 104 Wn.App. 606, 611, 15 P.3d 210, *rev. denied,* 144 Wn.2d 1016 (2001), in support of abuse of discretion review. *See* Patrick Collins Br. at 9. The grant of review and remand for further consideration in *Garza* renders the case non-precedential. Furthermore, neither *Garza* nor *Colwell* cites *Folsom*, even though they were decided afterward, and both decisions directly conflict with the holding of *Folsom*.[5]

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[4] *Idahosa* cites *King County Fire Prot. Dists. v. Housing Authority of King County,* 123 Wn.2d 819, 826, 872 P.2d 516 (1994), involving denial of a motion to strike declaration containing legal conclusions, and *Analytical Methods, Inc. v. Dep't of Revenue,* 84 Wn.App. 236, 244, 928 P.2d 1123 (1996), involving the grant of a motion to strike a declaration containing legal opinions by an unqualified expert.

[5] *See Garza,* 124 Wn. App. at 917-18 (stating "[t]he decision to admit or exclude evidence for consideration on summary judgment lies within the trial court's sound discretion"); *Colwell,* 104 Wn.App. at 613 (stating "[t]he trial court must routinely make evidentiary rulings during summary judgment proceedings. We review these decisions for abuse of discretion").

For his part, Dr. Chad Collins cites *McBride v. Walla Walla County*, 95 Wn. App. 33, 37, 975 P.2d 1029, *amended*, 990 P.2d 967, *rev. denied*, 138 Wn.2d 1015 (1999), and *O'Neill v. Farmers Ins. Co.*, 124 Wn. App. 516, 522, 125 P.3d 134 (2004). *See* Chad Collins Br., at 13-14. *McBride* pre-dates and is contrary to *Folsom*, and *O'Neill* does not cite *Folsom*, but rather relies on pre-*Folsom* case law.[6]

In sum, none of the cases cited by the doctors require or permit the Court to ignore the clear holding of *Folsom* that the de novo standard of review is used by an appellate court when reviewing *all* trial court rulings made in conjunction with a summary judgment motion. If anything, the cases discussed above appear to reflect resistance to the change in summary judgment practice occasioned by the *Folsom* decision. The court should take the opportunity presented by this case to confirm that the Supreme Court meant what it said in *Folsom* and review de novo the timeliness of Dr. Li's third affidavit.[7]

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[6] *See McBride*, 95 Wn. App. at 37 (stating "[t]he trial court was not required to consider the declaration because it was untimely. Furthermore, the court did not abuse its discretion by excluding the affidavit because it contained conclusory assertions rather than factual allegations"); *O'Neill,* 124 Wn. App. at 521-22 (citing *Brown, supra*).

[7] Dr. Chad Collins also cites *Pitzer v. Union Bank of Cal.*, 141 Wn.2d 539, 556, 9 P.3d 805 (2000), as reviewing a motion to continue summary judgment under CR 56(f) under the abuse of discretion standard of review. *See* Chad Collins Br., at 31 n.13. The *Pitzer* case arose before *Folsom* even though the opinion was issued afterward. The Court cited pre-*Folsom* law, and it does not appear that the parties contested the standard of review. The standard of review may well have been law of the case by the time the case reached the Supreme Court.

B. Even If The Timeliness Of Dr. Li's Third Affidavit Were Not Subject To De Novo Review, The Superior Court Abused Its Discretion In Striking The Affidavit And Denying A Brief Continuance To Consider It.

As pointed out in Keck's opening brief, the "primary consideration" in ruling on the timeliness of summary judgment affidavits or a continuance of summary judgment proceedings is justice. *See* Keck's Br., at 26 (citing *Butler v. Joy,* 116 Wn. App. 291, 299-300, 65 P.3d 671, *rev. denied,* 150 Wn.2d 1017 (2003), and *Coggle v. Snow,* 56 Wn. App. 499, 508, 784 P.2d 554 (1990)). Justice is served by accepting a filing or granting a continuance in the absence of prejudice to the opposing party. *See Butler,* 116 Wn. App. at 299-30; *Coggle,* 56 Wn. App. at 508. It is thwarted "'by a draconian application of time limitations' when a party is hobbled by legal representation that has had no time to prepare a response to a motion that cuts off any decision on the true merits of a case." *Butler,* at 300 (quoting *Coggle*).

Drs. Patrick and Chad Collins do not acknowledge the principle of justice, which must govern any ruling on the timeliness of summary judgment affidavits or continuance of summary judgment proceedings. They do not cite *Butler,* and they cite *Coggle* on different issues. *See* Patrick Collins Br., at 21; Chad Collins Br., at 27. They do not identify

any prejudice that they would have suffered from a brief continuance to consider Dr. Li's third affidavit.

Consideration of justice is likewise conspicuously absent from the trial court's ruling striking Dr. Li's affidavit as untimely, and denying a continuance to consider it. *See* CP 100-04. Failure to account for what is supposed to be the primary consideration is itself an abuse of discretion. *See State v. Sisouvanh,* 175 Wn.2d 607, 623, 290 P.3d 942 (2012) (indicating abuse of discretion occurs when trial court applies the wrong legal standard). The result is to elevate form over substance and exalt timelines for their own sake.

It is undisputed that the summary judgment motion was unilaterally scheduled by Dr. Patrick Collins so that responsive affidavits were due while Keck's counsel, a sole practitioner, was in the middle of an out-of-town trial. The original motion sought dismissal of Dr. Patrick Collins alone. CP 21. Dr. Chad Collins joined the motion only two days before the responsive affidavits were due. CP 35-36. Although the joinder did not specify whether he was seeking dismissal of Patrick Collins, himself, or both, he later filed a reply seeking dismissal of himself. CP 63-67.[8] When the summary judgment order was entered, no discovery had been completed, and the discovery cutoff and dispositive motion deadline

[8] Although the doctors claim that the joinder did not raise any new issues, it is difficult to imagine how dismissal of an additional defendant cannot be considered a new issue.

in the trial court's scheduling order had not yet passed. CP 32; RP 16:24-25. Under the circumstances, there could be no prejudice and justice required a brief continuance to consider Dr. Li's third affidavit.[9]

Rather than addressing the primary consideration of justice, Drs. Patrick and Chad Collins largely reiterate the reasoning of the trial court. *See* CP 103. Initially, they argue that Keck could have produced Dr. Li's third affidavit sooner because he had been retained as an expert for a considerable period of time before the summary judgment motion was filed. *See* Chad Collins Br., at 33. This argument seems to assume that there is a duty to anticipate and respond to a summary judgment motion before responsive affidavits are actually due. Lack of availability on the relevant due date should constitute grounds for extending the due date, not shortening it.

Next, the doctors argue that, because Keck produced the first two affidavits of Dr. Li in a timely fashion, she should be precluded her from filing the third affidavit containing additional detail. *See* Patrick Collins Br., at 21-22; Chad Collins Br., at 17 & 33. This ignores the undisputed evidence in the record that Keck's counsel "was unavailable to adequately work with" Dr. Li before the first two affidavits were due because he was

[9] Dr. Chad Collins notes that certain deadlines in prior scheduling order had passed, without acknowledging that the prior scheduling order had been superseded by a subsequent order. *See* Chad Collins Br., at 8 (citing CP 395).

in the midst of an out-of-town trial. CP 76. In this way, the doctors seem to be suggesting that Keck should be penalized for the extraordinary effort made to respond in a timely fashion despite counsel's unavailability.

Finally, they argue that Keck must satisfy the excusable neglect standard for an extension of time under CR 6(b). *See* Chad Collins Br., at 15 & 32. A showing of excusable neglect does not appear to be a prerequisite for "permit[ting] affidavits to be supplemented or opposed by … further affidavits" under CR 56(e), nor is it required for a continuance under CR 56(f). In any event, excusable neglect is present, based on the authority of *Butler* and *Coggle*, *supra*, where counsel has had insufficient time to prepare an adequate response to a dispositive motion.

C. As It Relates To The Evidentiary Sufficiency Of All Of Dr. Li's Affidavits, Respondents Do Not Meaningfully Address The Conflict Between *Guile v. Ballard Comm. Hosp.* And CR 56, ER 704-705, And The Right To Trial By Jury, Which Militate In Favor Of Overruling *Guile* And Denying Summary Judgment Where There Is Admissible Expert Testimony That Is Sufficient To Support A Verdict.

Drs. Patrick and Chad Collins do not quarrel with Dr. Li's qualifications. Indeed, Dr. Chad Collins attempted to retain Dr. Li as his own expert. *See* CP 195. Neither doctor contests the admissibility of Dr. Li's conclusions at trial or their sufficiency to support a verdict in Keck's favor on the issues of breach of the standard of care and causation of her injuries. Instead, they rely on the Court of Appeals decision in *Guile v.*

Ballard Comm. Hosp., 70 Wn. App. 18, 851 P.2d 689, *rev. denied sub nom. Guile v. Crealock*, 122 Wn.2d 1010 (1993), to argue that Dr. Li's affidavits do not contain sufficient facts to survive summary judgment.

Recognizing that *Guile* requires more factual detail than is necessary to establish admissibility of expert testimony or support a verdict, Keck urged in her opening brief that *Guile* should be overruled. *See* Keck App. Br., at 15 & 20-25. In response, Drs. Patrick and Chad Collins do not address the conflict between *Guile*, which requires greater specificity of expert testimony on summary judgment than trial, and the language of the summary judgment rule, which incorporates the trial standard for admissibility of evidence in connection with summary judgment proceedings. *See* Keck App. Br., at 21-22.

Nor do they address the conflict between *Guile* and the purpose of summary judgment or the right to trial by jury. *See id.* at 24. Summary judgment is constitutional only because it is limited to cases where there is a complete lack of evidence to support an element of the non-moving party's claim or defense, and hence no issue of fact to be resolved by the jury. *See LaMon v. Butler*, 112 Wn.2d 193, 199 n.5, 770 P.2d 1027 (1989) (discussing Wash. Const. Art. I, § 21). Because *Guile* permits a case to be dismissed even though it is supported by admissible evidence that would support a verdict, the decision runs afoul of this constitutional right.

Rather than dealing with these fundamental problems with *Guile,* the doctors argue that it has been elevated to the level of binding Supreme Court precedent by the mere citation of the decision in dicta in *Stewart-Graves v. Vaughn,* 162 Wn.2d 115, 138, 170 P.3d 1151 (2007). *See* Patrick Collins Br., at 18; Chad Collins Br., at 26-27. They try to bolster *Guile* by reinterpreting one of the two cases on which *Guile* relies, *Vant Leven v. Kretzler,* 56 Wn. App. 349, 783 P.2d 611 (1989). *See* Patrick Collins Br., at 13 n.1; Chad Collins Br., at 24-25 & n.10. They also cite several Court of Appeals cases similar to *Guile,* derived from the Court of Appeals' non-precedential decision in *Hash v. Children's Ortho. Hosp.*, 49 Wn. App. 130, 134-35, 741 P.2d 581 (1987), *aff'd on other grounds,* 110 Wn.2d 912, 757 P.2d 507 (1988). *See* Patrick Collins Br., at 19; Chad Collins Br., at 28. None of these responses has merit, nor do they resolve the basic problems with *Guile* that counsel in favor of overruling the decision.

1. The Mere Citation Of *Guile* By The Supreme Court Does Not Elevate The Decision To Binding Supreme Court Precedent.

Dr. Patrick Collins claims that the Supreme Court's citation of *Guile* in *Stewart-Graves* "affirmed" *Guile. See* Patrick Collins Br., at 18. Dr. Chad Collins claims that the Supreme Court "relied on *Guile*." *See* Chad Collins Br., at 26-27. Both doctors suggest that this court is required

to follow *Guile.* Neither doctor cites any authority for the implicit proposition that a mere citation of a Court of Appeals opinion elevates that opinion to the level of binding Supreme Court precedent, and there appears to be none.

When the Supreme Court does intend to approve and adopt a Court of Appeals holding as its own, it clearly knows how to do so. *See, e.g., Miller v. Kennedy,* 85 Wn.2d 151, 152, 530 P.2d 334 (1975) (stating "[w]e can add nothing constructive to the well considered opinion of that court and, accordingly, approve and adopt the reasoning thereof"). No such intention to approve and adopt *Guile* appears in the text of *Stewart-Graves.*

At most, the citation of *Guile* in *Stewart-Graves* is dicta. Dicta refers to language that is not necessary to the decision in a particular case. *See Pedersen v. Klinkert,* 56 Wn.2d 313, 317, 352 P.2d 1025 (1960). Citations to authority may be dicta.[10] Dicta is not controlling precedent and need not be followed. *See State v. Potter,* 68 Wn. App. 134, 149 n.7, 842 P.2d 481 (1992).

[10] *See, e.g., Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council,* 165 Wn.2d 275, 297 n.10, 197 P.3d 1153 (2008) (referring to citations of *North Bend Stage Line v. Department of Public Works,* 170 Wn.2d 217, 16 P.2d 206 (1932), in *Department of Highways v. King County Chapter,* 82 Wn.2d 280, 510 P.2d 216 (1973), as dicta); *State v. Bertrand,* 165 Wn. App. 393, 415 n.24, 267 P.3d 511 (2011) (describing citation of *Black's Law Dictionary* entry in *State v. O'Hara,* 167 Wn.2d 91, 100 n.1, 217 P.3d 756 (2009), as dicta).

In the context of *Stewart-Graves*, the citation to *Guile* is not necessary to the decision reached and therefore constitutes dicta. The plaintiffs in *Stewart-Graves* submitted medical expert testimony regarding the existence of an emergency that obviates the need to obtain informed consent, as well as the standard of care for stopping resuscitation efforts of a newborn infant and obtaining informed consent from the infant's parents to continue resuscitation, under circumstances where the infant is likely to be disabled if he or she survives. *See* 162 Wn.2d at 126-27 & 134. The Court held "we hold that a recognized health care emergency existed in this case, as a matter of law, until the resuscitation ended," *id.* at 127, and further held, "as a matter of law, we will not recognize a standard of care that requires a health care provider to withhold treatment of a newborn infant based on the likelihood that the infant will be severely disabled," *id.* at 134. The Court did not address the specificity or conclusory nature of the expert's testimony regarding the existence of an emergency or the standard of care, but only addressed whether that testimony was contrary to public policy. *See id.* at 126-27 & 134-38. In concluding its discussion, the Court stated:

> Dr. Bodenstein's conclusion regarding the standard of care rests on the premise that death is preferable to a severely disabled life as a matter of medical judgment. But that is a value judgment that may not be resolved by expert medical opinion. Just as Dr. Bodenstein's opinion was insufficient to raise an issue of material fact as to the

> existence of a medical emergency, it is insufficient to raise an issue of material fact as to the standard of care. *See Guile v. Ballard Cmty. Hosp.*, 70 Wash.App. 18, 25, 851 P.2d 689 (1993) (expert's unsupported assertion that a physician violated the standard of care held insufficient to raise a genuine issue of material fact).

Id. at 138. The citation of *Guile* is offered in support of the Court's holding that the emergency and standard of care testimony was insufficient because it incorporated "a value judgment that may not be resolved by expert medical opinion." The Court did not purport to address the specificity required by *Guile* in a summary judgment affidavit, and the explanatory parenthetical tacitly confirms that *Guile* stands for a different proposition than the holding in *Stewart-Graves*. Accordingly, the Supreme Court's citation of *Guile* is dicta, and does not prevent this court from overruling *Guile*.[11]

2. Respondents' Reinterpretation Of One Of The Cases On Which *Guile* Relied Is Incorrect, And Does Not Address The Problems With *Guile*.

In her opening brief, Keck pointed out that the authority on which *Guile* relied—consisting of *Vant Leven* and another case, *Ruffer v. St.*

[11] None of the other Supreme Court citations of *Guile* elevate it to the level of binding precedent either. *See Pacific Nw. Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 350-51, 144 P.3d 276 (2006) (citing *Guile* for the unrelated proposition that "[a] party may move for summary judgment by setting out its own version of the facts or by alleging that the nonmoving party failed to present sufficient evidence to support its case"); *Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 70, 170 P.3d 10 (2007) (noting *Pacific Nw. Shooting*'s citation of *Guile* in parenthetical); *Green v. American Pharm. Co.*, 136 Wn.2d 87, 98 n.5, 960 P.2d 912 (1998) (citing *Guile* in support of conclusion that expert affidavit did not address issue of whether injury was truly "separate and distinct" as required to invoke exception to traditional rule regarding accrual of a cause of action).

Frances Cabrini Hosp., 56 Wn. App. 625, 784 P.2d 1228, *rev. denied*, 114 Wn.2d 1023 (1990)—did not support the court's decision. In response, the doctors have not attempted to justify *Guile's* reliance on *Ruffer*. The doctors simply note that *Ruffer* is cited in *Guile* for the proposition that expert affidavits containing conclusion testimony are insufficient to avoid summary judgment, *see* Patrick Collins Br., at 13; Chad Collins Br., at 21; even though the plaintiff in *Ruffer* did not present any expert testimony, *see* 56 Wn. App. at 629.

With respect to the *Vant Leven* decision, the doctors isolate language from the conclusion stating that the plaintiff's expert "failed to identify any facts supporting" his conclusion in an effort to bolster *Guile*. *See* Patrick Collins Br., at 13 n.1 (quoting *Vant Leven*, 56 Wn. App. at 356); Chad Collins Br., at 25 n.10 (same). This language cannot be properly understood in isolation from the fact that the plaintiff's expert testified that he had not reviewed sufficient material to form an admissible conclusion in the first place.[12] Viewed in context, the problem with the

[12] *See* 56 Wn. App. at 351 (indicating plaintiff's expert "was willing to render an opinion as to whether Dr. Kretzler's treatment of Vant Leven had violated the standard of care, but that he 'would need to examine additional records and review deposition testimony of Dr. Kretzler'"); *id.* at 352 (quoting plaintiff's expert's declaration that "[b]efore I render my final opinion, it is necessary that I examine the balance of the medical records … and, particularly, Dr. Kretzler's sworn deposition testimony along with his post-operative notes and the explanations given by Dr. Kretzler concerning his course of treatment").

expert's testimony in *Vant Leven* was a lack of foundation rather than a lack of specificity, and to this extent it lends no support to *Guile*.

More importantly, the doctors do not address the conflict between *Guile* and CR 56, ER 704-705, and the right to trial by jury, all of which preponderate in favor of overruling the case. If *Vant Leven* were interpreted to support *Guile*, then it would suffer from the same defects, and should be subject to being overruled on the same grounds.

3. Respondents Improperly Rely On The Non-Precedential Court Of Appeals Decision In *Hash v. Children's Orthopedic Hosp.* And Two Court Of Appeals Decisions Citing *Hash*.

In her opening brief, Keck included an extended footnote addressing the Court of Appeals' non-precedential decision in *Hash*, which evinces a similar approach to summary judgment affidavits as *Guile*. *See* Keck Br., at 24-25 n.7. Unlike this case, *Hash* involved the sufficiency of the *moving* party's affidavits rather than the *non*-moving party's affidavits. *See* 49 Wn. App. at 131; 110 Wn.2d at 913-14. This distinction is significant because a denial of summary judgment, which leads to trial, does not implicate the right to trial by jury in the same way as a grant of summary judgment, which eliminates the possibility of trial.

The Court of Appeals decision in *Hash* is not precedential because it has been superseded by a Supreme Court decision that resolved the case

on different grounds. The Court of Appeals held that summary judgment should be reversed because the moving party's affidavits were conclusory and did not provide specific facts. *See* 49 Wn. App. at 134-35; *see also* 110 Wn. 2d at 914-15 (describing Court of Appeals holding). Although the Supreme Court likewise held that summary judgment should be reversed, it based its decision on the requirement that the evidence must be viewed in the light most favorable to the non-moving party on summary judgment. *See* 110 Wn.2d at 915-16. Viewing the moving party's affidavits under this standard, the Court determined that they supported an inference of negligence. *See id.* at 916.

Apart from its lack of precedential value, the Court of Appeals in *Hash* recognized the conflict between its decision and ER 705, which provides for the admissibility of expert testimony in conclusory form, without stating the factual basis for that opinion. *See* 49 Wn. App. at 134. In a problematic passage that seems to be completely at odds with the purpose of summary judgment and the right to trial by jury, the court justified requiring greater specificity because "[w]e have not yet discovered a means for cross-examining an affidavit" and "without knowledge of the factual basis for the opinion, the court may well be without any means of evaluating the merits of that opinion." *Id.* (brackets added).

The doctors do not address the factual distinction between this case and the Court of Appeals decision in *Hash*, the non-precedential nature of the decision, or the conflict between the decision and the purpose of summary judgment and right to trial by jury. Instead, they simply cite *Hash* and its progeny in the Court of Appeals for the proposition that expert testimony that is both admissible and sufficient to support a verdict is nonetheless insufficient to survive summary judgment. *See* Patrick Collins Br., at 19 (citing *Anderson Hay & Grain Co., Inc. v. United Dominion Indus., Inc.*, 119 Wn. App. 249, 259, 76 P.3d 1205 (2003), *rev. denied*, 151 Wn. 2d 1016 (2004), *Rothweiler v. Clark County*, 108 Wn.App. 91, 100-01, 29 P.3d 758 (2001), *rev. denied*, 145 Wn.2d 1029 (2002), and *Sunbreaker Condo. Ass'n v. Travelers Ins. Co.*, 79 Wn. App. 368, 374, 901 P.2d 1079 (1995), along with *Hash*); Chad Collins Br., at 28 (same citations). While two of the decisions, *Anderson* and *Rothweiler*, appear to support the proposition for which the doctors cite them, these decisions are no more precedential than *Hash.* The third decision, *Sunbreaker*, actually supports Keck's position.

Anderson affirmed summary judgment on grounds of a lack of evidence of an essential element of the plaintiff's claim, rather than the conclusory nature of its expert testimony. The plaintiff in *Anderson* filed several claims against the contractor who built a building that collapsed,

apparently from snow accumulation on the roof. In opposition to the contractor's motion for summary judgment on the plaintiff's defective construction claim, the plaintiff submitted a single page from the deposition of an expert witness calculating the snow load on the building roof. *See* 119 Wn.App. at 258. The contractor did not dispute the plaintiff's evidence of snow load, but argued there was no evidence that its workmanship caused the collapse. *See id.* at 258-59. The trial court accepted the plaintiff's evidence of snow load, agreeing with the contractor that there was no evidence of causation, and the Court of Appeals affirmed on this basis. *See id.*

There is no indication from the text of the *Anderson* opinion that the page from the expert witness's deposition containing the calculation of snow load was insufficiently specific or conclusory, or that it was stricken by the trial court. *See* 119 Wn. App. at 258-59. On appeal, the plaintiff cited ER 705 and contended that "the trial court improperly disregarded [the expert's] opinion." *Id.* at 259. Presumably, the plaintiff believed that the trial court failed to appreciate the significance of the opinion in establishing causation, although the nature of the assignment of error is not entirely clear. In responding to this contention, the Court of Appeals stated:

> [The plaintiff], citing ER 705, contends the trial court improperly disregarded [the expert's] opinion. However, ER 705 by its language, is limited to trial testimony, not declaration testimony. Washington courts have rejected the rule's application in summary judgment proceedings, finding instead that an expert's testimony for summary judgment must be supported by the specific facts underlying the opinion. *Rothweiler v. Clark County*, 108 Wash.App. 91, 100-01, 29 P.3d 758 (2001), *review denied*, 145 Wash.2d 1029, 42 P.3d 975 (2002); *Sunbreaker Condo. Ass'n v. Travelers Ins. Co.*, 79 Wash.App. 368, 374, 901 P.2d 1079 (1995); *Hash by Hash v. Children's Orthopedic Hosp.*, 49 Wash.App. 130, 134-35, 741 P.2d 584 (1987).

Id. at 259 (brackets added; citations in original[13]). In context, the requirement of "specific facts underlying the opinion" appears to be related to the complete absence of any evidence of causation. *See id.* at 258-59. To the extent that the reference is meant to eliminate consideration of admissible expert testimony that would support a verdict, it constitutes dicta and is subject to the same criticism as *Hash*.[14]

In the same vein, *Rothweiler* affirmed summary judgment on grounds of a lack of evidence of an essential element of the plaintiffs' claim, rather than the conclusory nature of their expert testimony. The

[13] The court omits any reference to the subsequent Supreme Court decision in *Hash*.

[14] The statement in *Anderson* that ER 705 is limited to trial testimony makes a distinction that is not evident from the text of the rule. ER 1101 indicates the evidence rules apply to all court proceedings. *See* 5C Wash. Prac., Evidence Law & Practice § 1101.2 (5th ed.) (stating "nothing in Rule 1101 makes the rules inapplicable to a hearing on a motion"). ER 802 permits hearsay evidence to be admitted as provided "by other court rules." CR 43(e) and 56(a) allow motions for summary judgment to be decided on either affidavits or live testimony, but, other than this aspect of the hearsay rule, do not dispense with the evidence rules. CR 56(e) specifically incorporates the evidence rules for summary judgment affidavits, when it requires them to "set forth such facts as would be admissible in evidence[.]" (Brackets added.)

plaintiffs in *Rothweiler* filed several claims against Clark County for flooding, allegedly caused by the county's failure to improve its stormwater drainage system. The county raised the common enemy doctrine as a defense, and the plaintiff claimed that the doctrine was inapplicable, in part because the drainage system collected and discharged water onto their property. *See* 108 Wn.App. at 99-01. In opposition to the county's motion for summary judgment, the plaintiff submitted affidavits from two expert witnesses. The first expert did not testify that the county's drainage system collected and discharged water onto the plaintiff's property. *See id.* at 100. On the contrary, he "stated that there is no record of the drainage system discharging water near the [plaintiffs'] property." *Id.* (brackets added). And, while the second expert initially stated that the system discharged water onto the plaintiffs' property, he "recanted that statement in a later declaration." *Id.* The court concluded:

> In the context of a summary judgment motion, an expert must support his opinion with specific facts, and a court will disregard expert opinions where the factual basis for the opinion is found to be inadequate. *Hash by Hash v. Children's Orthopedic Hosp.*, 49 Wash.App. 130, 135, 741 P.2d 584 (1987), *aff'd*, 110 Wash.2d 912, 757 P.2d 507 (1988). Because [the second expert] admitted that he had no factual basis for his first opinion, we disregard it.

Id. at 100-01 (citation in original; brackets added). In context, the reference to "specific facts" appears to be related to the complete absence of evidence that the county's drainage system discharged water onto the

plaintiffs' property, rather than the lack of specificity or conclusory nature of the expert testimony. As with *Anderson*, to the extent that the reference is meant to eliminate consideration of admissible expert testimony that would support a verdict, it constitutes dicta and is subject to the same criticism as *Hash*.

4. Respondents' Citation of *Sunbreaker Condo. Ass'n v. Travelers Ins. Co.*, Supports Keck's Position: While The Conclusory Nature Of Expert Testimony May Affect Its Weight, It Does Not Affect Its Admissibility, And Such Expert Testimony Is Therefore Sufficient To Withstand Summary Judgment.

In addition to *Hash* and its progeny, both doctors also cite *Sunbreaker Condo. Ass'n v. Travelers Ins. Co.*, 79 Wn. App. 368, 374, 901 P.2d 1079 (1995), for the proposition that expert testimony that is both admissible and sufficient to support a verdict is nonetheless insufficient to survive summary judgment. *See* Patrick Collins Br., at 19; Chad Collins Br., at 28. This citation of *Sunbreaker* is inaccurate, and the decision actually supports Keck's position in this case.

In *Sunbreaker*, the plaintiff sued its insurer for coverage of property damage to a condominium caused by wind-driven rain. *See* 79 Wn. App. at 370. The insurer moved for summary judgment, contending that the damage was not covered because it resulted from "routine rainfall" seeping through cracks and openings in the building. *See id.* In

opposition to the motion, the plaintiff submitted declarations from an expert witness describing the damage as resulting from two rain storms. *See id.* The insurer objected to the declarations in part because the expert "failed to indicate that either storm included southerly winds which would have driven rain into [the condominium's] south wall," where the damage occurred. *Id.* at 374 (brackets added). The trial court overruled these objections and refused to strike the declarations, and the Court of Appeals affirmed because the expert's "alleged lack of specificity reflects on the declaration[s'] probative value, not its admissibility." *Id.* at 374 (brackets added).[15] Ultimately, the court reversed summary judgment in favor of the insurer in light of the expert's testimony. *See id.* at 379-80 & n.16 (discussing expert's testimony as basis for finding genuine issue of material fact). This is exactly what should happen here.

D. Genuine Issues Of Material Fact Remain For Trial Because Respondents Rest Their Defense Of The Trial Court's Partial Summary Judgment Order On Their Objections To Dr. Li's Affidavits Based on *Guile,* And They Rest Their Defense Of The Trial Court's Final Summary Judgment Order On Disputed Facts.

Drs. Patrick and Chad Collins defend the trial court's order granting partial summary judgment on what it described as Keck's claim for negligent post-operative care solely on the authority of *Guile*, and its

[15] *Sunbreaker* pre-dated *Folsom,* and, as a result, the court reviewed the trial court's decision not to strike the expert's summary judgment declarations under the abuse of discretion standard of review.

requirement of greater factual specificity for summary judgment affidavits than is required to admit expert testimony at trial or support a verdict. To the extent that *Guile* should be overruled, or to the extent that any of Dr. Li's affidavits satisfies the requirements of *Guile*, the partial summary judgment order should be reversed and vacated.

With respect to what the trial court described as Keck's claim for negligent referral, the doctors rely on disputed facts, and to this extent the trial court's final summary judgment order should also be reversed and vacated. As pointed out in Keck's opening brief, the crux of the negligent referral claim is "whether Keck was, in fact, given a referral for follow up care; and, if so, whether the health care provider(s) to whom Keck was referred are qualified to provide such care." Keck Br., at 29. The doctors do not contest that these are the material facts.

As in the trial court, Dr. Patrick Collins claims that he had no obligation to make a referral for follow up care because he was not involved after the initial surgery. *See* Patrick Collins Br., at 24-25. The nature and extent of his involvement is directly contradicted by Keck, CP 266-68 (¶¶ 2-4), and the testimony of Dr. Li establishes that the standard of care obligated him to make an appropriate referral for follow up care based on his involvement, CP 261 (¶¶ 9-10). In his response brief, Dr. Patrick Collins simply ignores these disputed facts.

Dr. Chad Collins concedes that a referral to Keck's general dentist, Dr. Olsen, would have been inappropriate to deal with the infection and non-union of her jaw bones, CP 137, and so he claims that his referral to Dr. Olsen was for the limited purpose of evaluating her bite, CP 133. *See* Chad Collins Br., at 40. Keck submitted an affidavit stating his claim as to the limited nature of the referral is false. CP 268 (¶ 6). In his response brief, Dr. Chad Collins does not address this dispute.

Moreover, Dr. Chad Collins does not address his referral to Keck's ear, nose and throat specialist (ENT) in Montana, Dr. Haller. In the trial court, he stated:

> 20. As reflected in **Exhibit A**, my plan at this first postoperative visit was to refer the Ms. Keck [sic] back to Dr. Haller, her Ear, Nose, and Throat physician (ENG) from Montana to follow the wound healing ….
>
> 21. Dr. Haller is a surgeon who had previously provided care to Ms. Keck (and referred her to me) and was therefore unequivocally qualified to assess the wound healing, ensure resolution of the infection and alert me regarding any concerns.

CP 132 (formatting in original; ellipses added). According to Keck and Dr. Haller, no such referral occurred. CP 268 (¶ 5); CP 272 (¶¶ 4-5). Moreover, Dr. Haller testified that he is unfamiliar with and does not perform the surgical procedures performed on Keck, and, as a result, would not be comfortable providing follow up care. CP 272 (¶ 4). Now, Dr. Chad Collins claims that he retained responsibility for all care and did

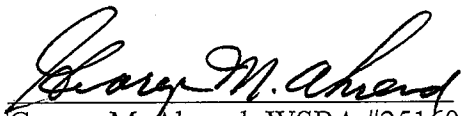
not make any referral to follow the healing of Keck's surgical wounds. *See* Chad Collins Br., at 40-42. This evidence creates a genuine issue of material fact for trial, regarding both the existence of a referral and whether it complied with the standard of care.

CONCLUSION

Keck respectfully asks the court to reverse the trial court, vacate the summary judgment orders, and remand this case for trial.

Submitted this 8th day of July, 2013.

AHREND ALBRECHT PLLC



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CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On July 8, 2013, I served the document to which this is annexed by email and First Class Mail, postage prepaid, as follows:

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