NO. 90357-3

SUPREME COURT OF THE STATE OF WASHINGTON

DARLA KECK AND RON JOSEPH GRAHAM, husband and wife, and DARLA KECK and RON JOSEPH GRAHAM AS PARENTS OF THE MINOR CHILD KENNEN MITCHELL GRAHAM, AND KELLEN MITCHELL GRAHAM, individually

Respondents / Conditional Cross-Petitioners,

v.

CHAD P. COLLINS, DMD; PATRICK C. COLLINS, DDS; AND COLLINS ORAL & MAXILLOFACIAL SURGERY, P.S.

Petitioners

ANSWER TO CROSS-PETITION FOR REVIEW

Reply to ans.

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I. IDENTITY OF PETITIONERS

The Petitioners are Dr. Chad P. Collins, Dr. Patrick C. Collins, and Collins Oral & Maxillofacial Surgery (collectively, "the Doctors"). They were the defendants in the superior court, where they were awarded summary judgment dismissal of all of the medical negligence claims brought by Mrs. Keck and her family (collectively "Keck"), and they were also the respondents on appeal to Division III of the Washington State Court of Appeals. The Doctors filed a petition to this Court seeking review of portions of the Court of Appeals' decision. Keck filed a conditional cross-petition. Pursuant to RAP 13.4(d), the Doctors file this Answer to Keck's cross-petition for review.

II. CROSS-ISSUE PRESENTED FOR REVIEW

1. Should this Court decline to exercise discretion to consider the cross-issue conditionally raised on review by Keck where that issue was never preserved for appeal because Keck failed to raise it at the trial court?

2. Should this Court decline to review the *Guile* decision where it does not present any question of law under the Constitution of the State of Washington and it does not raise an issue of substantial public interest.

III. ARGUMENT

A. The Court should deny the cross-petition for review because Keck never preserved the issue: Keck failed to raise a challenge to *Guile* to the trial court.

Generally, this Court does not consider an issue that was not raised at the trial court. *Harris v. State, Dep't of Labor & Indus.*, 120 Wn.2d 461, 468, 843 P.2d 1056, 1060 (1993). An issue not presented to the trial court and raised for the first time during the appellate process will not be considered on appeal. *Pappas v. Hershberger*, 85 Wn.2d 152, 530 P.2d 642 (1975).

Keck never argued to the trial court that *Guile* was the wrong standard for reviewing Dr. Li's expert affidavit or that *Guile* reads CR 56(e)'s specific facts requirement too restrictively. *Guile v. Ballard Community Hospital,* 70 Wn. App. 18, 851 P.2d 689 (1993). This Court should decline the invitation to review *Guile* where it was never raised to the trial court.

B. Review under RAP 13.4(b)(3) or (4) is not warranted because this case does not present any question of law under the Constitution of the State of Washington, nor an issue of substantial public interest.

Summary judgment proceedings do not violate the Constitution and this Court has applied and restated the long standing rule of CR 56(e). *See e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Young v. Key*

Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182, 187 (1989). To survive summary judgment, a plaintiff "may not rest upon the mere allegations or denials of his pleading, but ... must set forth specific facts showing that there is a genuine issue for trial." CR 56(e); *see id.* The summary judgment standard announced in *Young* comports with the purpose behind the summary judgment motion: "to examine the sufficiency of the evidence behind the plaintiff's formal allegations in the hope of avoiding unnecessary trials where no genuine issue as to a material fact exists. Thus, a defendant may move for summary judgment on the ground the plaintiff lacks competent medical evidence to make out a prima facie case of medical malpractice." *Young*, 112 Wn.2d at 226, 770 P.2d at 188. The *Guile* Court did not alter that standard or make any material change to a plaintiff's burden on summary judgment.

The *Guile* Court explained that when the burden shifts and the plaintiff files medical expert affidavits opposing summary judgment, those affidavits must set forth "specific facts establishing a cause of action," not "conclusory statements without adequate factual support." 70 Wn. App. 18, 25, 851 P.2d 689. Contrary to Keck's argument, *Guile* does not permit a case to be dismissed even though it is supported by admissible evidence that would justify a verdict. Keck provides no support for this assertion, and those are not the facts of this case. *Guile* does not require more

evidence than a plaintiff would need to get past a directed verdict. *Guile* does not impose any higher burden on summary judgment than would exist at trial. Therefore, *Guile* does not raise any question of law under the Constitution of the State of Washington. Review under RAP 13.4(b)(3) should be denied.

The *Guile* issue, and its application to this case, does not raise an issue of substantial public interest, particularly since the *Guile* issue, like the continuance issue, is moot if this Court reverses the Court of Appeals' ruling overturning the trial court's decision to strike the third, untimely declaration of Keck's expert. Keck failed to show how the first and second expert declarations from Dr. Li were sufficient to defeat summary judgment under any standard. Those affidavits cannot defeat summary judgment under any standard. Keck's focus on the third untimely expert declaration effectively concedes that the first two expert declarations are insufficient under any standard. This appeal was entirely about the third declaration—the Court of Appeals applied the wrong standard to the trial court's proper decision to disregard it as untimely and should be reversed (which renders the remaining issues moot, where the *Guile* issue related only to the untimely declaration and where the Court of Appeals' dictum that a continuance should have been allowed related only to the same

untimely declaration that was properly stricken). Review under RAP 13.4(b)(4) should be denied.

IV. CONCLUSION

The Court should deny the cross-petition for review because the *Guile* issue was not preserved at the trial court. Even if the Court was inclined to exercise its discretion to consider an issue not preserved at trial, the Court should deny review because it is not warranted under RAP 13.4(b)(3) or (4).

Respectfully submitted this 15th day of September 2014.

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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 15th day of September, 2014, the foregoing ANSWER TO CROSS-PETITION FOR REVIEW was caused to be served to the following by the method indicated below:

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Subject: Supreme Court of the State of Washington - Keck v. Collins - No. 90357-3

Dear Court Staff:

Please find attached to this email Petitioner's Answer to Cross-Petition for Review in the above-referenced matter.

Respectfully submitted,

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