

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Feb 23, 2016, 2:19 pm
BY RONALD R. CARPENTER
CLERK

No. 92353-1

SUPREME COURT
OF THE STATE OF WASHINGTON

E WHA
RECEIVED BY E-MAIL

OLIVER L. WUTH, a minor,
by and through his Guardian
Ad Litem KEITH L.
KESSLER; and BROCK M.
WUTH and RHEA K. WUTH,
husband and wife,

Respondents,

v.

LABORATORY
CORPORATION OF
AMERICA, a foreign
corporation; DYNACARE
LABORATORIES, INC., a
foreign corporation;
DYNACARE NORTHWEST,
INC., a domestic corporation,
d/b/a/ DYNACARE
LABORATORIES, INC., a
domestic corporation,

Petitioner,

KING COUNTY PUBLIC
HOSPITAL DISTRICT NO. 1,
d/b/a/ VALLEY MEDICAL
CENTER; JAMES A.
HARDING, M.D.; and
OBSTETRIX MEDICAL
GROUP OF WASHINGTON,
INC., P.S., a domestic
corporation,

Defendants.

REPLY IN SUPPORT OF
MOTION TO STRIKE
LABCORP'S STATEMENT
OF ADDITIONAL
AUTHORITIES

The Court should strike LabCorp's Statement of Additional Authority, discussing *Keck v. Collins*, 184 Wn.2d 358, 357 P.3d 1080 (2015). RAP 10.8, by its terms, requires that a party cite "additional authority," not the same authority that has previously been cited to the Court. LabCorp previously cited *Keck* when it was pending to support its argument that the Court should review de novo the trial court's order in limine striking the expert testimony of Dr. London as unqualified and lacking foundation. (Petition 2, see Petition 16-19) In their Answer, the Wuths pointed out that this Court's decision in *Keck* limited the trial court's authority to strike an expert's untimely declaration on summary judgment *as a discovery sanction*, and did not address the trial court's gatekeeper function in screening the qualifications of an expert and the factual basis for expert opinion before allowing that expert to testify before the jury *at trial*. (Answer to Petition 18)¹

¹ LabCorp's mischaracterization of the trial court's order as a "summary judgment ruling" ignores that the Wuths' motion in limine on Dr. London's lack of qualifications was already pending when the trial court heard the motion for summary judgment. (CP 2459) LabCorp further ignores that the trial court largely *denied* Dr. Harding's summary judgment motion. (CP 3141) See *Adcox v. Children's Orthopedic Hosp.*, 123 Wn.2d 15, 35, n.9, 864 P.2d 921 (1993) (appellate court does not review denial of summary judgment after trial). And LabCorp also fails to mention that the *Keck* Court unanimously *rejected* de novo review of a trial court's order striking an untimely declaration on summary judgment. *Keck*, 184 Wn.2d at 368, ¶124, 374 ¶140 and 184 Wn.2d at 375, ¶144 (Gonzalez, J., concurring).

LabCorp did not argue in its petition that the trial court struck Dr. London's testimony on the ground that LabCorp did not timely disclose him as an expert, as it now argues in its Statement of Additional Authority at 2. LabCorp's current assertion – that RAP 10.8 allows it to recharacterize its argument in reliance on a case previously cited to the Court in an answer to a petition for review – transforms a statement of additional authorities into an unauthorized reply to an answer to a petition for review. *See* RAP 13.4(d).

LabCorp's reliance on *Keck* to reargue its position that the trial court's order in limine was in the nature of a summary judgment ruling is equally unavailing. LabCorp's citation to the parallel federal provision, FRAP 28(j), ignores that federal courts prohibit a party from "rearguing identical points from briefing already submitted based on authority already fully cited," under the guise of "a statement of supplemental authorities" under FRAP 28(j). *Hall v. Shineski*, 717 F.3d 1369, 1373, n.4 (Fed. Cir. 2013).

The Court should strike LabCorp's Statement of Additional Authority.

Dated this 23rd day of February, 2016.

SMITH GOODFRIEND, P.S.

By: 

Howard M. Goodfriend

WSBA No. 14355

Catherine W. Smith

WSBA No. 9542

1619 8th Avenue North

Seattle, WA 98109

(206) 624-0974

Attorneys for Respondents

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on February 23, 2016, I arranged for service of the foregoing Reply in Support of Motion to Strike Labcorp's Statement of Additional Authorities, to the Court and to the parties to this action as follows:

Office of Clerk Washington Supreme Court Temple of Justice P.O. Box 40929 Olympia, WA 98504-0929	<input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Deliver <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Todd W. Gardner Peter Meyers Swanson Gardner 4512 Talbot Road South Renton, WA 98055-6216 todd@swansongardner.com peter@swansongardner.com (denise@swansongardner.com)	<input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Deliver <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Anthony Todaro Corr Cronin Michelson Baumgardner & Preece LLP 1001 4th Avenue, Suite 3900 Seattle, WA 98154-1051 atodaro@correronin.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Deliver <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Melissa White Megan K. Kirk Kevin A. Michael Cozen O'Connor 999 Third Avenue, Suite 1900 Seattle, WA 98104 MWhite@cozen.com mkirk@cozen.com kmichael@cozen.com (dbowzer@cozen.com)	<input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Deliver <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

<p>Sherry Rogers Craig McIvor Melinda Drogseth Lee Smart, P.S. 701 Pike St Ste 1800 Seattle WA 98101 shr@leesmart.com clmc@leesmart.com mrd@leesmart.com (jlm@leesmart.com) (ttc@leesmart.com)</p>	<p><input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Deliver <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail</p>
<p>Barbara A. Shickich Brett Durbin Riddell Williams, P.S. 1001 Fourth Avenue, Suite 4500 Seattle WA 98154 bshickich@riddellwilliams.com bdurbin@riddellwilliams.com (vmagda@riddellwilliams.com)</p>	<p><input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Deliver <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail</p>

DATED at Seattle, Washington this 23rd day of February, 2016.



Jenna L. Sanders

OFFICE RECEPTIONIST, CLERK

To: Jenna Sanders
Cc: todd@swansongardner.com; peter@swansongardner.com; denise@swansongardner.com; atodaro@corrcronin.com; MWhite@cozen.com; mkirk@cozen.com; kmichael@cozen.com; dbowzer@cozen.com; shr@leesmart.com; clmc@leesmart.com; mrd@leesmart.com; jlm@leesmart.com; ttc@leesmart.com; bshickich@riddellwilliams.com; bdurbin@riddellwilliams.com; vmagda@riddellwilliams.com; Howard Goodfriend
Subject: RE: Case # 92341-8 - Oliver L. Wuth, et al., v. Laboratory Corporation of America, et al.

Received on 02-23-2016

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Jenna Sanders [mailto:jenna@washingtontappeals.com]
Sent: Tuesday, February 23, 2016 2:15 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: todd@swansongardner.com; peter@swansongardner.com; denise@swansongardner.com; atodaro@corrcronin.com; MWhite@cozen.com; mkirk@cozen.com; kmichael@cozen.com; dbowzer@cozen.com; shr@leesmart.com; clmc@leesmart.com; mrd@leesmart.com; jlm@leesmart.com; ttc@leesmart.com; bshickich@riddellwilliams.com; bdurbin@riddellwilliams.com; vmagda@riddellwilliams.com; Howard Goodfriend <howard@washingtontappeals.com>
Subject: Case # 92341-8 - Oliver L. Wuth, et al., v. Laboratory Corporation of America, et al.

Attached for filing is the Reply in Support of Motion to Strike LabCorp's Statement of Additional Authorities, in Oliver L. Wuth, et al. v. LabCorp of America, et al., Cause No. 92353-1. The attorney filing this document is Howard Goodfriend, WSBA No. 14355, e-mail address: howard@washingtontappeals.com.

Jenna Sanders
Paralegal
Smith Goodfriend, P.S.
1619 8th Ave. N
Seattle, WA 98109
(206) 624-0974
jenna@washingtontappeals.com