

**COURT OF APPEALS, DIVISION II OF THE STATE OF  
WASHINGTON**

**FEARGHAL MCCARTHY; CONOR MCCARTHY, CORMAC  
MCCARTHY,**

Plaintiffs and Appellants

vs.

**COUNTY OF CLARK, CITY OF VANCOUVER, DEPARTMENT OF  
SOCIAL AND HEALTH SERVICE,**

Defendants and Respondents

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Appeal from the Superior Court of Clark County

Case No. 08-2-04895-4

COA No. 46347-4-II

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**APPELLANTS' CONOR AND CORMAC'S SUPPLEMENTAL BRIEFING**

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**A. The trial court abused its discretion when it rejected Patricia's correction sheet because it did not conduct a *Burnet* analysis on the record**

*Keck v. Collins*, No. 90357-3 (Sept. 24, 2015) contains broad principles of evidentiary issues. Specifically, under *Keck*, the trial court must consider the factors from *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), on the record before striking on procedural grounds evidence submitted in response to a summary judgment motion. *Keck*, No. 903573 at 2. Failure to do so is an abuse of discretion and is reversible error. Appellants specifically assigned error to the order to suppress under argument 5 on page 46 of their opening brief.

Before excluding evidence on procedural grounds, the court must consider the following three *Burnet* factors: 1) whether a lesser sanction would probably suffice; 2) whether the violation was willful or deliberate; and 3) whether the violation substantially prejudiced the opposing party. *Keck*, No. 903573 at 10 citing *Jones v. City of Seattle*, 179 Wn.2d 322, 338, 314 P.3d 380 (2013).

Although Judge Nichols admitted Patricia's correction pages as a declaration, he struck them as correction pages to her deposition testimony on procedural grounds without conducting a *Burnet* analysis on the record. A *Burnet* analysis was required because the court's "overriding

responsibility is to interpret the rules in a way that advances the underlying purpose of the rules, which is to reach a just determination in every action.” *Keck*, No. 903573 at 10 citing *Burnet*, 131 Wn.2d at 498 (citing CR 1). There are two reasons why the trial court’s exclusion of Patricia’s correction pages as corrected testimony is reversible error.

First, admitting the evidence as a declaration allowed the uncorrected testimony to stand, thus bifurcating Patricia’s testimony into competing fact sets. This has implications beyond summary judgment and beyond this case. If this case is remanded for trial, it will allow the respondents to impeach Patricia with phantom testimony that she corrected and that no longer exists. Beyond this case, striking corrections to deposition testimony but allowing them as a declaration creates problematic evidentiary issues for trial and impeachment.

Second, Judge Nichols found that the correction sheets were not submitted in compliance with CR 30(e), which is essentially a timeliness argument. See Vol. I RP 29; CP 912-28. Judge Nichols did not make a finding regarding willfulness, the propriety of a lesser sanction or any prejudice. No trial date was scheduled. CR 30(e) also requires a witness’s signature unless waived. Judge Nicols rejected the correction pages because there was a factual dispute over whether her signature was waived and whether the corrections were timely. See CP 815-19, 1030-42.

Most importantly, those correction pages contained evidence sufficient to overcome the City's motion for summary judgment, discussed at length in Appellants' previous briefing. If the trial court had admitted that evidence as corrections to her deposition testimony then the City could not have relied on her phantom, uncorrected testimony to argue prosecutorial immunity. Admitting the correction pages as a declaration did not fulfill the court's overriding responsibility to interpret the rules in a way that reached a just determination. Instead, the trial court allowed Patricia's uncorrected phantom testimony to stand so that Patricia may be impeached with it at trial. By doing so, the trial court allowed the City to rely on Patricia's uncorrected testimony that should have been superseded by correction pages that should have been properly admitted as corrections to her deposition testimony. This is a severe sanction, which required a *Burnet* analysis. Failure to do so was reversible error under *Keck*.

And "whether the court accepts or rejects [Patricia's] 'correction sheets' does not matter for purposes of the City." City Resp. Br. at 45.

Respectfully submitted this 29<sup>th</sup> day of October, 2015

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**DECLARATION OF SERVICE**

I hereby declare that on October 29, 2015, I served the foregoing APPELLANTS CONOR AND CORMAC MCCARTHY’S SUPPLEMENTAL BRIEFING:

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By the following indicated method or methods:

**by transmitting via electronic mail in accordance with the agreement of the persons served**, a full, true and correct copy thereof to the attorney at the email address shown above, which is the last known email address for the attorney’s office, on the date set forth below.

DATED this 29<sup>th</sup> day of October, 2015

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