NO. 46347-4-II

IN THE COURT OF APPEALS, DIVISION TWO

OF THE STATE OF WASHINGTON

FEARGHAL MCCARTHY; CONOR MCCARTHY, a minor, by and through Fearghal McCarthy, his father; and CORMAC MCCARTHY, a minor, by and through Fearghal McCarthy, his father,

Appellants,

vs.

COUNTY OF CLARK, CITY OF VANCOUVER, DEPARTMENT OF SOCIAL & HEALTH SERVICES, CHILDREN'S PROTECTIVE SERVICES,

Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENT CITY OF VANCOUVER

Daniel G. Lloyd, WSBA No. 34221
Assistant City Attorney
Attorney for Defendant/Respondent
City of Vancouver
P.O. Box 1995
Vancouver, WA 98668-1995
(360) 487-8500 / (360) 487-8501 (fax)

On October 19, 2015, this Court entered an order permitting, at the request of Appellants Conor and Cormac McCarthy, supplemental briefing addressing the effect, if any, the Supreme Court's recent decision in *Keck v. Collins*, No. 90357-3, *available at* 2015 WL 5612829 (Wash. Sept. 24, 2015), has on this appeal. It has none.

The primary issue in *Keck* was what "standard of review [applies to] a challenged ruling to strike untimely filed evidence submitted in response to a summary judgment motion." *Keck*, 2015 WL 5612829, ¶ 5. The Court held that *Folsom v. Burger King*, 135 Wn.2d 658, 958 P.2d 301 (1998), did not require a *de novo* review on appeal, but rather a district court retains the discretion to strike untimely filed materials and that decision would be reviewed on appeal for abuse of discretion. *Keck*, 2015 WL 5612829, ¶ 24. However, the trial court is obligated, when considering a motion to strike materials that were filed less than 11 days before a summary judgment hearing in violation of CR 56(c), to engage in an analysis contemplated by *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997). This requires the trial court to consider: "whether a lesser sanction would probably suffice, whether the violation was willful or deliberate, and whether the violation substantially prejudiced the opposing party." *Keck*, 2015 WL 5612829, ¶ 24. This decision comports with other opinions applying the *Burnet* factors to excluding untimely disclosed witnesses. *E.g.*, *Jones v. City of Seattle*, 179 Wn.2d 322, 338, 314 P.3d 380 (2013).

Keck has no application here. The only material that *might* be subject to the *Keck* rule was the trial court's exclusion of the May 21, 2010, Declaration of Gregory Price, CP 627-48, which was filed over a month after the trial court orally granted the City of Vancouver motion for summary judgment as it related to the conduct of Officers Kortney Langston, Carole Boswell, and Tyson Taylor. *See* CP 2108; I VRP 27 (Apr. 16, 2010). But given that *Keck* considered only material filed untimely but still *in advance* of the summary judgment hearing, *see Keck*, 2015 WL 5612829, ¶¶ 24-26, it left undisturbed precedent from the Court of Appeals that vests trial courts with the discretion to disregard materials filed *after an oral ruling* but before a formal order is entered. *E.g.*, *Brown v. Peoples Mortg. Co.*, 48 Wn. App. 554, 559-60, 739 P.2d 1188 (1987); *Jobe v. Weyerhaeuser*, 37 Wn. App. 718, 727, 684 P.2d 719 (1984). Notably, none of the Appellants have assigned error to the trial court's decision to disregard Mr. Price's May 21, 2010, meaning any argument in support of that position has been waived. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *Bender v. City of Seattle*, 99 Wn.2d 582, 599, 664 P.2d 492 (1983). In any event, as argued in the City's response brief, Mr. Price's declaration failed to adequately lay foundation for his ability to authenticate the documents, meaning it would be error to consider them even if *Keck* mandated their consideration. *Burmeister v. State Farm Co.*, 92 Wn. App. 359, 365-66, 966 P.2d 921 (1998).

Nevertheless, the children appear to take the position that *Keck* mandates reversal of the trial court's order suppressing the correction pages to Patricia's deposition. This argument is misguided, mostly because the trial court *did* consider the correction pages as a declaration for purposes of summary judgment. CP 1096-98. The order of suppression was made exclusively in the context of CR 30 and CR 32. In essence, had the case proceeded past summary judgment, the correction pages could not have been used as part of the deposition at trial. CR 30(e); CR 32(d)(4). *Keck* had nothing to do with deposition correction pages filed in violation of CR 30 and CR 32. But because summary judgment was granted, and because the trial court *did* consider the "correction pages" as a declaration for purposes of CR 56, it would be pointless to use *Keck* to consider whether the trial court mistakenly *refused to consider a document it already considered*. And for the reasons previously expressed, the correction pages do nothing to overcome Jill Petty's and the City's entitlement to prosecutorial immunity and dismissal.

In short, *Keck* does nothing to change the outcome of this case. The trial court should be affirmed in all respects.

RESPECTFULLY SUBMITTED this 29th day of October, 2015.

Daniel G. Lloyd, WSBA No. 34221
Assistant City Attorney
Attorney for Respondent City of Vancouver

CERTIFICATE OF SERVICE

Pursuant to RAP 18.5 and 18.6(b), I certify that on October 29, 2015, I served via U.S. mail first class, postage prepaid, a copy of the foregoing document on all pro se parties and counsel of record at their last known address as listed below:

Mr. Fearghal McCarthy
17508 NE 38th Way
Vancouver, WA 98682

Ms. Erin Sperger
Erin Sperger PLLC
1617 Boylston Ave.
Seattle, WA 98122

Mr. Taylor Hallvik
Clark County Prosecuting Attorney's Office
PO Box 5000
Vancouver, WA 98666-5000

Ms. Allison Croft
Wash. Attorney General's Office
PO Box 40126
Olympia, WA 98504

DATED on October 29, 2015.

Daniel G. Lloyd, WSBA No. 34221
Assistant City Attorney
Attorney for Respondent City of Vancouver

VANCOUVER CITY ATTORNEY

October 29, 2015 - 8:27 AM

Transmittal Letter

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Court of Appeals Case Number: 46347-4

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