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 for the minor child, KELLEN MITCHELL GRAHAM, and KELLEN MITCHELL GRAHAM, individually,

Respondents/Conditional Cross-Petitioners,

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,

Petitioners.

ANSWER TO PETITION FOR REVIEW AND CONDITIONAL CROSS-PETITION FOR REVIEW

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I.) IDENTITY OF RESPONDENTS/CONDITIONAL CROSS-PETITIONERS

Darla Keck, her husband, Ron Joseph Graham, and her son, Kellen Mitchell Graham (collectively Keck), submit this answer and conditional cross-petition in response to the petition for review filed on behalf of Chad P. Collins, DMD, Patrick C. Collins, DDS, and Collins Oral & Maxillofacial Surgery, P.S. (collectively Collins or doctors).[1]

II.) COURT OF APPEALS DECISION

Keck conditionally seeks cross-review of that portion of the Court of Appeals decision reviewing summary judgment affidavits under the standard set forth 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). *See Keck v. Collins*, — Wn. App. —, 325 P.3d 306, 318 (2014).[2]

III.) ISSUES PRESENTED FOR REVIEW

1.) The issues raised in the petition for review can be summarized as follows:

> What is the standard of review that applies to rulings regarding the timeliness of evidence presented to the superior court before the hearing of a summary judgment motion? *See* Collins Pet. for Rev., at 2.

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[1] This answer and conditional cross-petition was originally due on July 7, 2014; the Court granted an extension of time until Aug. 6, 2014. *See* Appendix.

[2] A copy of the Court of Appeals decision is reproduced in the Appendix.

2.) Keck conditionally raises the following additional issue on cross-review, if the petition for review is granted:

> Should an expert affidavit that is admissible and sufficient to support a verdict also suffice to defeat a motion for summary judgment? Specifically, should the Court disapprove of *Guile, supra,* which requires greater specificity in expert affidavits submitted in opposition to a summary judgment motion in a medical negligence case than is necessary to admit the expert's testimony at trial or support a verdict?

IV.) STATEMENT OF THE CASE

Darla Keck, who lives in Missoula, Montana, came to Spokane to receive treatment for her sleep apnea from Drs. Chad P. Collins and his son, Patrick C. Collins. Sleep apnea refers to abnormal pauses in breathing or abnormally low breathing while sleeping. The doctors performed a number of surgical procedures intended to improve Keck's sleep apnea by enlarging her breathing airway: a Le Fort I osteotomy, which involves cutting the upper jaw into sections so that it can be repositioned; a bilateral sagittal split osteotomy, which involves cutting the lower jaw on both sides so that it can be repositioned; and a genioglossus insertion advancement, which involves repositioning the muscle running from the chin to the tongue. *See* CP 131 (¶¶ 9-13, describing surgery).

After surgery, it became apparent that at least one of the surgical wounds was infected and the upper and lower jaw bones were not healing back together. CP 80 (¶ 4). Over the course of the next seven months, she

underwent four more surgeries. CP 80-82 (¶¶ 4-14). Throughout their course treatment, the doctors failed to adequately address Keck's problems with infection and non-union of the bones. CP 80, 82 (¶¶ 3, 15). As a result, Keck continues to experience problems from pain, swelling, fatigue, acrid taste in her mouth, nerve sensations in her eye, and numbness in her cheek and chin. CP 82 (¶ 14).

Along with her husband and son, Keck filed suit against the doctors and their employer for negligence. CP 3-10. The superior court dismissed the suit on successive motions for summary judgment, and the Court of Appeals reversed and remanded the case for trial. From this decision, the doctors seek review.

A.) Chronology of treatment.

On November 26, 2007, the doctors first operated on Keck. At a follow up appointment on December 6, 2007, she was oozing green pus from one of her surgical wounds and experiencing pain and total numbness of her chin. The doctors did not make any appreciable attempt to evaluate these problems. CP 80 (¶ 4); CP 132 (¶¶ 17, 19).

On January 22, 2008, the doctors learned from Keck's treating dentist that she was having pain and swelling on the left side of her jaw, and relapse of her bite. Rather than referring Keck to an appropriate

specialist, they indicated that they would simply follow her on a limited basis due to the fact that she lived in Missoula. CP 80 (¶ 5).

On January 23, 2008, the doctors saw Keck, and noted that she had "bad bite," infection, swelling, loose hardware from the surgery, and improper alignment of the teeth (malocclusion). The next day, January 24, 2008, they performed a second surgery, which removed some of the hardware inserted during the first operation, among other things. Removal of the hardware left Keck with further instability as there was nothing in the affected area to support her broken jaw. CP 80-81 (¶¶ 6-7).

Following the second surgery, Keck continued to have problems. CP 81 (¶ 8). After a number of follow up visits with the doctors, they performed a third surgery on March 18, 2008, to clean out the infection in the bone and place "more stout" hardware in Keck's jaw. The surgery confirmed that Keck was not healing from the first and second surgeries, but the doctors did nothing further to evaluate the problems themselves, nor did they refer Keck to a specialist who would be properly trained to address the non-union of the jaw bones and infection. CP 81 (¶¶ 9-10); CP 136 (¶¶ 44-45).

On June 11, 2008, Keck was experiencing pain and visited the doctors again. Upon examination, the doctors discovered that the bones and hardware in Keck's upper jaw could be moved around with their

fingers. CP 81 (¶ 11). On July 18, 2008, they performed a fourth surgery to try and fix the bones in place, involving a bone graft from her pelvis and the removal of a tooth. CP 81-82 (¶ 12); CP 137 (¶ 52).

Thereafter, Keck received treatment from an oral surgeon in Montana, who had to perform a fifth surgery and implant new hardware to correct Keck's problems. CP 82 (¶ 13). The treatment she previously received from Drs. Collins did not comply with the standard of care, and, as a result, Keck continues to suffer from pain, swelling, fatigue, acrid taste in her mouth, nerve sensations in her eye, and numbness in her cheek and chin. CP 82 (¶ 14).

B.) Superior court proceedings.

On December 20, 2012, Patrick Collins (but not Chad Collins) filed a motion for summary judgment. CP 21-22. He did not submit any evidence in support of the motion, but rather relied upon *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989), to compel Keck to produce expert testimony establishing breach of the standard of care and causation. CP 23-31. The hearing on the motion was initially scheduled for a date when Keck's counsel was unavailable and had to be stricken. RP 12:19-22; CP 115.

On February 16, 2012, Patrick Collins re-noted the motion for March 30, 2012, again without checking the availability of Keck's

counsel. CP 33-34 & 115; RP 12:24-13:2. Under CR 56 and Spokane County Superior Court Local Civil Rule (LCR) 56, the deadline for responding to the motion was March 16, 2012, 14 days before the hearing.

On March 7, 2012, Keck's counsel began a medical malpractice trial in Grant County, Washington, which lasted until March 20, 2007. CP 76; RP 13:3-5.

On March 14, 2012, Chad Collins joined Patrick Collins' motion for summary judgment. CP 35-36. The joinder document does not specify whether he was seeking dismissal of Patrick Collins, himself, or both. *Id.* The record does not reflect any attempt to determine the availability of Keck's counsel beforehand, nor to seek any agreement to alter the timelines for summary judgment motions under CR 56 and LCR 56.

On March 16, 2012, while still in the middle of the out-of-town trial, Keck's counsel attempted to respond to the summary judgment motion filed by Patrick Collins in a timely fashion, submitting a 4-sentence response and attaching a brief responsive declaration from her previously disclosed medical expert, Kasey Li, M.D. CP 38-43; RP 13:6-13.[3] Dr. Li is a board-certified physician in the areas of otolaryngology

[3] Although CR 56 is phrased in terms of "affidavits," a declaration signed in accordance with RCW 9A.72.085 is deemed to be equivalent. The first declaration/affidavit of Dr. Li does not appear to satisfy all of the formal requirements of RCW 9A.72.085, but there was no objection to the form in the superior court, and the deficiency was remedied by his second affidavit filed shortly thereafter. CP 44-48.

and oral surgery. CP 41. He practices and is on the faculty at Stanford Hospital in Stanford, California. CP 41. He is the founder of the Sleep Apnea Surgery Center, also located in Stanford. CP 41. Chad Collins had previously tried to retain Dr. Li as an expert witness for the defense of Keck's lawsuit. CP 195.

Dr. Li is familiar with the standard of care applicable to the treatment of sleep apnea in the State of Washington. CP 42-43. He reviewed Keck's medical records, and concluded that the doctors had violated the applicable standard of care, causing a prolonged course of recovery, additional surgical procedures, and ongoing problems for Keck. CP 42-43.

Presumably because of the haste in which the declaration had to be prepared while counsel was in the middle of another trial, it was phrased solely in terms of *Chad* Collins. Specifically, the declaration stated that Chad Collins "performed multiple operations without really addressing the problem of non-union [of Keck's jaw bones] and infection within the standard of care," and did not properly refer Keck for follow up care after surgery. CP 43.

On March 22, 2012, Keck's counsel filed a second brief affidavit from Dr. Li, essentially an erratum, confirming that his opinions applied to *Patrick* Collins as well as Chad Collins, based on the information

contained in the medical records. CP 44-48. He also filed an objection to the timeliness of the joinder of Chad Collins in the motion for summary judgment filed by his son. CP 49-51.

On March 26, 2012, Patrick Collins filed a reply brief. CP 55-62. The next day, March 27, 2012, Chad Collins filed a "reply" in support of his joinder, making it clear that he expected to be dismissed as well. CP 63-67. Both reply briefs argued that Dr. Li's testimony regarding breach of the standard of care was not specific enough to avoid summary judgment. CP 57-59 & 65-66.

On March 29, 2012, Keck's counsel submitted a third supplemental affidavit from Dr. Li. CP 79-84. The third affidavit reiterated the opinion "that the multiple operations failed to address the problem of the non-union infection as stated in [the prior declaration and affidavit]," and provided additional detail. CP 80 (¶ 3).

While indicating his belief that the first two affidavits were sufficient, Keck's counsel explained that the third affidavit was submitted to address Drs. Collins' complaints about the sufficiency of the prior testimony. CP 76; RP 13:14-19. To the extent necessary, Keck's counsel requested a continuance pursuant to CR 56(f) for consideration of the third affidavit. CP 76; RP 14:15-19. He explained that he did not have sufficient

time to obtain the more detailed testimony while in the middle of trial. CP 76-77; RP 14:22-15:22.

At the summary judgment hearing, counsel for the doctors objected to the timeliness of Dr. Li's third affidavit. The superior court took under advisement questions regarding the sufficiency of the first two affidavits filed by Dr. Li, and the timeliness of his third affidavit. The court noted the parties' agreement that Keck's negligence claim was not based on the initial surgery, and that there was no failure to obtain informed consent. The court further ruled that there was a genuine issue of material fact regarding what he described as the "negligent referral" claim, as distinguished from the negligence of the doctors in the course of their own post-operative care of Keck. These rulings were incorporated into an order. CP 96-99.

Following the summary judgment hearing, the superior court issued a letter ruling that the first and second affidavits were not specific enough to withstand summary judgment. CP 102. The court denied Keck's motion for a CR 56(f) continuance and struck the third affidavit as untimely. CP 102-04. On this basis, the court granted partial summary judgment in favor of both doctors, dismissing "claims for negligent post-operative treatment, except for negligent referral." CP 108-09.

When the summary judgment order was entered, no discovery had been completed, and the discovery cutoff and the dispositive motion deadline had not yet passed. CP 32; RP 16:24-25. The superior court did not find that there would be any prejudice suffered by the doctors from a brief CR 56(f) continuance to consider the third supplemental affidavit of Dr. Li. On the contrary, the court stated that the fact that the deadlines specified in the scheduling order had not lapsed reduced any prejudicial impact. RP 103.

The superior court denied a motion for reconsideration of its decision, and then later dismissed what it characterized as the "negligent referral" claim after a second round of summary judgment motions. CP 308-10, 354-61.

C.) Appellate court proceedings.

Keck appealed, and the Court of Appeals reversed and remanded. The court initially held that the de novo standard of review applies to motions to strike summary judgment affidavits as untimely, in reliance on this Court's decision in *Folsom v. Burger King,* 135 Wn. 2d 658, 663, 958 P.2d 301 (1998). *See Keck,* 325 P.3d at 312-14. Under this standard of review, the court determined that the superior court erred in striking the third affidavit of Dr. Li. *See id.* at 314-16.

Independently, the Court of Appeals held that the superior court erred in denying Keck's motion to continue the summary judgment proceedings pursuant to CR 56(f), under an abuse of discretion standard of review. *See Keck,* at 316-17.

The Court of Appeals ultimately concluded that the superior court erred in dismissing Keck's claims on summary judgment, and denying her motion for reconsideration. *See Keck*, at 317-19.

In the course of its decision, the court declined Keck's invitation to overrule the *Guile* standard for summary judgment affidavits. *See id.* at 318; *see also* Keck App. Br., at 19-25; Keck Reply Br., at 12-26.

IV.) ARGUMENT

A.) The Court should deny the petition because the narrow issue presented does not satisfy the criteria for review under RAP 13.4(b)(1) or (2).

The petition for review raises a single issue, although it is repeated twice in slightly different terms: What is the standard of review applied to the timeliness of evidence presented to the trial court before the hearing of a summary judgment motion? *See* Collins Pet. for Rev., at 2. This issue is limited to the Court of Appeals' reversal of the superior court's decision to strike the third affidavit of Dr. Li. It does not involve the appellate court's decision regarding the continuance of summary judgment proceedings

pursuant to CR 56(f), nor does it involve the denial of summary judgment on that basis.[4]

The doctors argue that this narrow issue warrants review under RAP 13.4(b)(1) and/or (2). *See* Collins Pet. for Rev., at 8-9. However, neither ground for review is applicable, and the petition for review should be denied.[5]

In order to justify review, RAP 13.4(b)(1) requires a conflict between a decision of the Court of Appeals and a decision of the Supreme Court. The doctors argue that the Court of Appeals decision in this case conflicts with *Folsom, supra. See* Collins Pet. for Rev., at 8-11. In *Folsom,* this Court stated 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. The Court of Appeals below agreed that this Court meant what it said, and that "*all* trial court rulings made in conjunction with a summary judgment motion" includes rulings involving the timeliness of evidence submitted before the hearing of a summary judgment motion. *See Keck,* 325 P.3d at 311-14. In

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[4] Failure to raise the CR 56(f) issue should preclude further review by this Court. *See* RAP 13.7(b) (providing scope of review is limited to questions raised in the petition for review); *Garth Parberry Equip. Repairs, Inc. v. James,* 101 Wn. 2d 220, 225 n.2, 676 P.2d 470 (1984) (holding failure to raise issues in petition for review results in waiver).

[5] The doctors cite RAP 13.4(b)(4), regarding issues of substantial public interest that should be determined by this Court, but it appears to be a typographical error, based on the fact that this subsection of RAP 13.4 is not listed in the table of authorities and there is no argument corresponding to this criterion for review. *See* Collins Pet. for Rev., at 8.

this way, the court's decision applies the rule of *Folsom* (involving evidentiary sufficiency of summary judgment affidavits) to a slightly different but analogous factual context (involving the timeliness of summary judgment affidavits). This is exactly what intermediate appellate courts are supposed to do, and it does not amount to a conflict.

RAP 13.4(b)(2) requires a conflict between decisions of the Court of Appeals. The Court of Appeals below recognized that it "has inconsistently applied the de novo and abuse of discretion standards to trial court rulings concerning the timeliness of evidence presented on summary judgment." *Keck*, 325 P.3d at 312 & n.3. However, as the court also noted, the majority of these opinions "applied the abuse of discretion standard without acknowledging *Folsom*[,]" *id.* at 312, and they can be traced to pre-*Folsom* law, *see* Keck Reply Br., at 6-8. Now that the court has made the proper interpretation and application of *Folsom* explicit, it cannot be anticipated or assumed that there will be a conflict.

Moreover, the existence of a prior inconsistency regarding the standard of review that is applicable to the timeliness of summary judgment affidavits should be tempered by the fact that the doctors have not raised any issue regarding the CR 56(f) continuance. Under an abuse of discretion standard of review, both the majority and concurring opinions of the Court of Appeals below concluded that a continuance

should have been granted and that summary judgment should have been denied on that basis. *See Keck*, 325 P.3d at 316-19 (majority op.); *id.* at 319 (concurring op., stating "the majority correctly reverses and remands this case because plaintiff's counsel was entitled to more time to prepare his response to the summary judgment motions"). Under these circumstances, further consideration of the standard of review applicable to the timeliness of summary judgment affidavits by this Court would be merely academic.

B.) If the Court grants review, it should also determine whether the *Guile* standard for affidavits submitted by experts in opposition to summary judgment in medical negligence cases should be disapproved.

In *Guile*, the Court of Appeals held that an expert affidavit concluding that a defendant-health care provider employed faulty surgical technique and thereby violated the standard of care was insufficient in the absence of more elaborate factual detail. *See* 70 Wn. App. at 26. The superior court and Court of Appeals below relied on *Guile* in scrutinizing the affidavits of Dr. Li. *See* CP 102; *Keck,* 325 P.3d at 318. The Court of Appeals specifically declined Keck's request to overrule *Guile* as incorrect and harmful. *See Keck*, at 318.

There are numerous problems with the *Guile* standard. It is based on flawed reasoning and a misreading of case law and CR 56(e)'s specific

facts requirement, and it demands greater specificity in a summary judgment affidavit than is necessary under ER 704 and 704 to be admissible or support a verdict at trial. *See* Keck App. Br., at 19-25; Keck Reply Br., at 12-26; *Keck,* 325 P.3d at 318 (acknowledging Keck's arguments).

Ultimately, the *Guile* standard has the potential to prevent meritorious claims from ever reaching the jury. *See* Keck App. Br., at 24; Keck Reply Br., at 13. Summary judgment procedure 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 justify a verdict, the decision runs afoul of this constitutional right.

This is "a significant question of law under the Constitution of the State of Washington" and "an issue of substantial public interest that should be determined by the Supreme Court," warranting review under RAP 13.4(b)(3) and (4).[6]

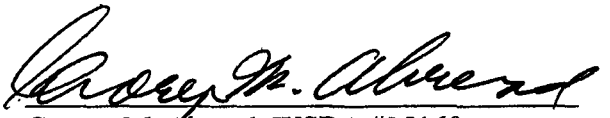
[6] Although this Court has cited *Guile* on several occasions, none of the citations is precedential on this issue. *See* Keck Reply Br., at 14-17.

V.) CONCLUSION

The Keck family respectfully asks the Court to deny the petition for review. However, if the Court grants the petition, then they ask the Court to review the issue raised by their conditional cross-petition.

Submitted this 5th day of August, 2014.

AHREND ALBRECHT PLLC



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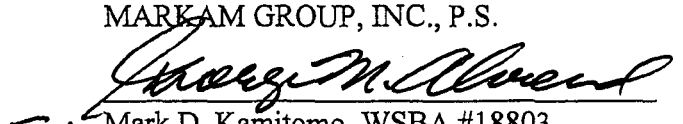

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CERTIFICATE OF SERVICE

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

On August 5, 2014, I served the document to which this is annexed by email and/or First Class Mail, postage prepaid, as follows:

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Signed at Ephrata, Washington this 5th day of August, 2014.

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APPENDIX

325 P.3d 306
Court of Appeals of Washington,
Division 3.

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, Appellants,
v.
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, Respondents.

No. 31128–7–III. | May 6, 2014.

Synopsis

Background: Patient filed suit for medical malpractice against oral surgeons who performed surgery to correct obstructive sleep apnea, based on claims of negligent referrals and post-operative care. The Superior Court, Spokane County, Gregory D. Sypolt, J., dismissed complaint on summary judgment, and patient appealed.

Holdings: The Court of Appeals, Brown, J., held that:

[1] trial court's ruling striking patient's medical expert's affidavit from consideration on summary judgment as untimely filed was subject to de novo review;

[2] denial of motion to continue summary judgment was reviewed for abuse of discretion;

[3] patient demonstrated good cause for filing medical expert's third affidavit ten days after deadline for summary judgment submissions and one day before hearing on motion;

[4] justice warranted continuance of summary judgment on claims against oral surgeons for medical malpractice to allow full consideration of third affidavit;

[5] fact issues precluded summary judgment on claims for negligent referral; and

[6] fact issues precluded summary judgment on claim for negligent post-operative care.

Reversed.

Korsmo, J., filed concurring opinion.

West Headnotes (17)

[1] Appeal and Error
Cases Triable in Appellate Court

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) In general
An appellate court reviews a summary judgment order de novo, engaging in the same inquiry as the trial court.

Cases that cite this headnote

[2] Appeal and Error
Judgment

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k934 Judgment
30k934(1) In general
In reviewing on order on summary judgment, the appellate court, like the trial court, construes all evidence and reasonable inferences in the light most favorable to the nonmoving party.

Cases that cite this headnote

[3] Appeal and Error
Cases Triable in Appellate Court

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) In general
An appellate court cannot properly review a summary judgment order de novo without

independently examining all the evidence presented to the trial court on summary judgment.

Cases that cite this headnote

[4] **Appeal and Error**

Extent of Review Dependent on Nature of Decision Appealed from

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k863 In general

An appellate court cannot fully engage in the same inquiry as the trial court on summary judgment, or construe all evidence and reasonable inferences in the light most favorable to the nonmoving party, unless the appellate court evaluates anew all evidence available to the trial court for potential consideration on summary judgment.

Cases that cite this headnote

[5] **Appeal and Error**

Cases Triable in Appellate Court

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) In general

Regarding availability of all evidence to the trial court for consideration on summary judgment, for the purposes of appellate review of the summary judgment ruling, the determining factor is whether the evidence was on file with the trial court, and called to the attention of the trial court on summary judgment, and if it was, the appellate court reviews de novo the trial court ruling striking the evidence from consideration on summary judgment. CR 56(c); RAP 9.12.

Cases that cite this headnote

[6] **Appeal and Error**

Cases Triable in Appellate Court

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) In general

Proffered medical expert's third affidavit on applicable standard of care was on file with trial court on oral surgeons' motion for summary judgment, in medical malpractice action, and thus, trial court's ruling striking evidence from consideration on summary judgment as untimely filed was subject to de novo review, where, even though affidavit was untimely filed, clerk accepted filing. CR 5(e), 56(c); RAP 9.12.

Cases that cite this headnote

[7] **Appeal and Error**

Allowance of remedy and matters of procedure in general

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k949 Allowance of remedy and matters of procedure in general

Denial of motion to continue summary judgment was subject to appellate review for abuse of discretion.

Cases that cite this headnote

[8] **Judgment**

Affidavits, Form, Requisites and Execution of

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.1 Affidavits, Form, Requisites and Execution of
228k185.1(1) In general

Until a formal order granting or denying the motion for summary judgment is entered, a party may file affidavits to assist the court in determining the existence of an issue of material fact. CR 56(e).

Cases that cite this headnote

[9] **Judgment**

Affidavits, Form, Requisites and Execution of

Judgment

Torts

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.1 Affidavits, Form, Requisites and Execution of
228k185.1(1) In general
228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.3 Evidence and Affidavits in Particular Cases
228k185.3(21) Torts

Patient demonstrated good cause for filing medical expert's third affidavit ten days after deadline for summary judgment submissions and one day before hearing on motion, in medical malpractice action against oral surgeons; oral surgeon filed motion and arbitrarily selected hearing date without considering availability of patient's counsel, patient's counsel was in another unrelated medical malpractice trial, surgeon's counsel was also involved in other trial and therefore knew that patient's counsel was involved in trial at time filing was due, third affidavit stated no new opinions, delay in filing third affidavit reflected no professional incompetence or complete lack of diligence by patient's counsel, demands of other trial were outside reasonable control of patient's counsel, and third affidavit was sufficiently specific as to demonstrate issues of fact as to surgeons' negligence.

Cases that cite this headnote

[10] **Judgment**

Nature of summary judgment

228 Judgment
228V On Motion or Summary Proceeding
228k178 Nature of summary judgment

Summary judgment procedure is a liberal measure, liberally designed for arriving at the truth; its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists.

Cases that cite this headnote

[11] **Judgment**

Hearing and determination

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k186 Hearing and determination

The trial court may deny motion for continuance of summary judgment in order to permit additional discovery and to obtain evidence to oppose summary judgment solely if (1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact. CR 56(f).

Cases that cite this headnote

[12] **Judgment**

Hearing and determination

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k186 Hearing and determination

The trial court must make justice its primary consideration in ruling on a motion for continuance of summary judgment in order to permit the requesting party to obtain evidence necessary to oppose summary judgment, even an informal one. CR 56(f).

Cases that cite this headnote

[13] **Judgment**

Hearing and determination

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k186 Hearing and determination

Absent prejudice to the moving party on summary judgment, the trial court should grant

a motion for continuance of summary judgment in order to allow the party seeking a continuance to obtain evidence necessary to oppose summary judgment. CR 56(f).

Cases that cite this headnote

[14] **Judgment**

Hearing and determination

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k186 Hearing and determination

Justice warranted continuance of summary judgment on claims against oral surgeons for medical malpractice to allow full consideration of third affidavit submitted by patient's medical expert to cure deficiencies of first and second affidavits, which was filed on day before summary judgment hearing; patient was hobbled by counsel who, due to extenuating circumstances beyond his control, lacked time and attention needed to ensure that expert's first and second affidavits provided enough specificity to show genuine issues of material fact, surgeons would not have suffered any prejudice from continuance, since trial date was still three and one-half months out and deadline for dispositive motions was three months out, and continuance would have allowed trial court to consider third affidavit, which stated no new opinions, and would have given surgeons opportunity to respond. CR 56(f).

Cases that cite this headnote

[15] **Health**

Standard of practice and departure therefrom

198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(G) Actions and Proceedings
198Hk815 Evidence
198Hk821 Necessity of Expert Testimony
198Hk821(2) Standard of practice and departure therefrom

In an action for injury resulting from health care, the plaintiff must usually present medical expert testimony to prove the defendant was negligent.

Cases that cite this headnote

[16] **Judgment**

Tort cases in general

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(33) Tort cases in general

Genuine issues of material fact remained whether oral surgeons should have referred patient to ear, nose, and throat specialist, plastic surgeon, or other oral surgeon, whether such referrals were made, and whether referrals to dentist were adequate to address patient's continuing problems, thus precluding summary judgment on claims against oral surgeons for negligent referral, in context of medical malpractice action.

Cases that cite this headnote

[17] **Judgment**

Tort cases in general

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(33) Tort cases in general

Genuine issue of material fact remained whether oral surgeons breached standard of post-operative care for patient who had green pus oozing from incision, who developed infections, and whose bite was not aligning properly, following surgery to address obstructive sleep apnea, thus precluding summary judgment on patient's claim against surgeons for medical malpractice due to allegedly negligent post-operative care.

Cases that cite this headnote

Attorneys and Law Firms

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Opinion

BROWN, J.

¶ 1 Darla Keck and Ron Joseph Graham (collectively appellants) appeal the trial court's summary dismissal of their medical negligence suit against Chad P. Collins, DMD, Patrick C. Collins, DDS, and Collins Oral & Maxillofacial Surgery PS (collectively respondents). [1] Appellants contend the trial court erred in:

1 To avoid confusion, we refer to Chad P. Collins, DMD as "Dr. Chad" and Patrick C. Collins, DDS as "Dr. Patrick."

(1) concluding their first and second medical expert affidavits lack required specificity on negligent postoperative care,

(2) striking their third medical expert affidavit as untimely,

(3) denying a continuance of the summary judgment hearing on negligent postoperative care,

(4) concluding no genuine issue of material fact exists on negligent referral, and

(5) denying reconsideration of the summary judgment order on negligent postoperative care.

¶ 2 After concluding our standard of review is de novo, we hold the trial court erred in striking the third affidavit. We then hold the trial court erred in denying the continuance, granting summary dismissal, and denying reconsideration. Accordingly, we reverse and remand for further proceedings.

FACTS

¶ 3 On November 26, 2007, Drs. Chad and Patrick performed surgery in Spokane on Ms. Keck, a Missoula resident, to correct her obstructive sleep apnea. The surgery involves cutting the patient's jawbones, advancing them to open breathing space, and stabilizing them with plates and screws while new bone bonds them together by filling the gaps left between them. During the healing process, arch bars help align the patient's bite.

¶ 4 Ms. Keck had her first follow-up visit in Spokane on December 6, 2007. She had green pus oozing from her surgical incision as well as pain and total numbness in her chin. Dr. Patrick said the pus was nothing more than a superficial infection. Thus, Dr. Chad prescribed her clindamycin, an antibiotic. Dr. Chad then consulted Dr. Patrick regarding an x-ray of her chin. While Dr. Chad said he thought a particular shadow in the x-ray might evidence a fracture, Dr. Patrick said the shadow was nothing. Finally, Dr. Patrick dismissed her concerns about discoloration in a tooth, saying the November 26 surgery did not affect that area.

¶ 5 Drs. Chad and Patrick made no other attempt to evaluate Ms. Keck's problems. Dr. Chad planned to send letters delegating the task of monitoring Ms. Keck's wound healing to Jeffrey R. Haller, MD (her ear, nose, and throat specialist in Missoula), and delegating the task of monitoring her bite alignment to George M. Olsen, DDS (her general dentist in Missoula). The record does not show that the delegation letters were sent, which may be partly explained by Ms. Keck's need for emergency care two days later, resulting in immediate consultation between Dr. Chad and Dr. Haller. At that time, Ms. Keck visited a Missoula emergency room with an infected, painful, and swollen jaw abscess. The emergency physician consulted Dr. Haller, who consulted Dr. Chad. At Dr. Chad's direction, Dr. Haller *310 removed the abscess, packed the wound, and administered clindamycin intravenously. Dr. Haller referred Ms. Keck back to Dr. Chad for further care.

¶ 6 On December 17, Dr. Olsen noted Ms. Keck had "some major bite issues" and her "[b]ite may not be correct for 6 months or until after ortho [dontics]." Clerk's Papers (CP) at 144. However, at her December 26 follow-up visit in Spokane, Dr. Chad noted she had "excellent" bite alignment. CP at 134, 147. He then removed her arch bars, claiming Dr. Olsen had approved doing so. Dr. Chad instructed Ms.

Keck to return to him for further care solely as necessary. On January 22, 2008, Dr. Olsen spoke with Dr. Chad by telephone, expressing concerns about infection, pain, and swelling in Ms. Keck's jaw and relapse in her bite alignment. The next day, Dr. Chad discovered her plates and screws were loose, infection had spread into her bone, and her jaw was not uniting. He again prescribed her clindamycin.

¶ 7 On January 24, Dr. Chad surgically removed the loose plates and screws, cleaned the bone infection, and wired her jaw shut. During surgery, he confirmed her plates and screws were "completely loose." CP at 148. Dr. Chad planned to track Ms. Keck's condition on a limited basis in Spokane, rather than refer her to a Missoula ear, nose, and throat specialist; plastic surgeon; or oral surgeon. Three days later, Ms. Keck visited a Missoula emergency room with significant swelling in her jaw. An ear, nose, and throat specialist, Phillip A. Gardner, MD, consulted Dr. Chad. At Dr. Chad's direction, Dr. Gardner administered clindamycin intravenously and consulted an infectious disease specialist, Michael B. Curtis, MD. Dr. Curtis wrote, "Clearly she is failing clindamycin and I would advocate abandoning this drug." CP at 154. Another infectious disease specialist, David Christensen, MD, soon began treating her.

¶ 8 At her February 11 follow-up visit in Spokane, Ms. Keck felt constant pain and said "something is going on" in her jaw. CP at 156. On March 18, Dr. Chad surgically cleaned the bone infection and installed "more stout hardware" in her jaw because it was still not uniting. CP at 136. Dr. Chad continued tracking Ms. Keck's condition on a limited basis in Spokane.

¶ 9 At her June 11 follow-up visit in Spokane, Ms. Keck had severe pain as well as loose bone and hardware that moved with finger manipulation. On July 18, Dr. Chad surgically grafted bone, removed a tooth, and installed new hardware in her jaw. Ms. Keck had her last follow-up visit in Spokane on July 23, 2008. Dr. Chad instructed Ms. Keck to return to him for further care solely as necessary. She instead sought the care of an oral surgeon, Clark Taylor, MD, in Missoula. Dr. Clark surgically installed new hardware. Despite this effort, Ms. Keck still suffers continual "fatigue, acrid taste in her mouth, pain, swelling, nerve sensations in her eye and numbness in her cheek and chin." CP at 282.

¶ 10 Appellants sued respondents for medical negligence, partly alleging their follow-up care fell below the accepted standard of care. In August 2011, appellants disclosed Kasey Li, MD, as a medical expert witness. On December 20, 2011, Dr. Patrick moved for summary judgment, partly arguing no genuine issue of material fact exists because appellants lacked medical expert testimony establishing negligence. In February 2012, Dr. Patrick's counsel re-noted the summary judgment hearing for March 30, 2012 without consulting appellants' counsel, a sole practitioner, regarding his availability.

¶ 11 From March 7 through 20, appellants' counsel was in Ephrata representing plaintiffs in a jury trial on a different medical negligence suit. Because Dr. Chad's counsel was representing a defendant in the Ephrata trial, Ms. Keck argues he knew appellants' counsel had no time to prepare a sufficient response to Dr. Patrick's summary judgment motion. Even so, Dr. Chad joined in Dr. Patrick's summary judgment motion on March 14. Appellants' counsel attempted, through his assistant, to collaborate with Dr. Li during the Ephrata trial.

¶ 12 On March 16, appellants filed a first responsive affidavit from Dr. Li, discussing solely Dr. Chad. Dr. Li opined, "I have identified standard of care violations that resulted in infection and in non-union of Ms. ***311** Keck's jaw." CP at 42. On March 22, appellants filed a second responsive affidavit from Dr. Li, discussing both Drs. Chad and Patrick. Dr. Li repeated his first affidavit, saying,

> I have identified standard of care violations that resulted in infection and in non-union of Ms. Keck's jaw....
>
> ....
>
> 5. The surgeons performed multiple operations without really addressing the problem of non-union and infection within the standard of care.
>
> 6. With regards to referring Ms. Keck for follow up care, the records establish that the surgeons were sending Ms. Keck to a general dentist as opposed to an oral surgeon or even a plastic surgeon or an Ear, Nose, and Throat doctor. Again, this did not meet with the standard of care as the general dentist would not have had sufficient training or knowledge to deal with Ms. Keck's non-union and the developing [bone] infection/osteomyelitis.

CP at 47–48.

¶ 13 In reply, respondents argued Dr. Li's first and second affidavits lacked required specificity on negligent postoperative care. On March 29, 10 days after the deadline and the day before the summary judgment hearing, appellants filed a third responsive affidavit from Dr. Li providing

additional, more specific detail regarding his previously stated opinion by outlining the facts surrounding each alleged standard of care violation. Appellants' counsel submitted his affidavit noting Dr. Chad's reply was late and explaining the combined reasons for the delay. Ms. Keck's counsel requested the trial court either forgive the late filing or continue the summary judgment hearing to allow full evaluation of the late filing's contents.

¶ 14 Respondents moved to strike Dr. Li's third affidavit as untimely, arguing the late filing was inexcusable and prejudiced them because they lacked sufficient time to file a reply before the summary judgment hearing. Additionally, Dr. Patrick requested permission to file a reply after the summary judgment hearing if the trial court chose to forgive the late filing.

¶ 15 The trial court issued a memorandum opinion granting respondents' motion to strike Dr. Li's third affidavit as untimely, denying appellants' motion to continue the summary judgment hearing, and granting respondents' summary judgment motions on negligent postoperative care. The trial court incorporated its memorandum opinion into its final order. Appellants moved unsuccessfully for reconsideration.

¶ 16 Respondents each moved for summary judgment on negligent referral, arguing no genuine issue of material fact exists because their evidence was undisputed. Dr. Chad said he referred Ms. Keck to Dr. Olsen solely to monitor her bite alignment, something he was qualified to do. Dr. Patrick said he had no duty to Ms. Keck because he was never involved in her postoperative care. Ms. Keck contradicted Dr. Patrick's claimed non-involvement.

¶ 17 The trial court issued another memorandum opinion granting respondents' summary judgment motions on negligent referral. Again, the trial court incorporated its memorandum opinion into its final order. Ms. Keck and Mr. Graham appealed.

ANALYSIS

A. Standard of Review

¶ 18 Before reaching the parties' substantive arguments, we must decide what review standard applies. Appellants argue the de novo review standard applies to all trial court rulings made in conjunction with respondents' summary judgment motions. Respondents argue the abuse of discretion review standard applies to the trial court rulings granting respondents' motion to strike and denying appellants' motion for continuance, while the de novo review standard applies solely to the orders granting respondents' summary judgment motions.

[1] **[2]** ¶ 19 We review a summary judgment order de novo, engaging in the same inquiry as the trial court. *Highline Sch. Dist. No. 401 v. Port of Seattle*, 87 Wash.2d 6, 15, 548 P.2d 1085 (1976); *Mahoney v. Shinpoch*, 107 Wash.2d 679, 683, 732 P.2d 510 (1987). Summary judgment is proper if ***312** the records on file with the trial court show "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." CR 56(c). We, like the trial court, construe all evidence and reasonable inferences in the light most favorable to the nonmoving party. *Barber v. Bankers Life & Cas. Co.*, 81 Wash.2d 140, 142, 500 P.2d 88 (1972); *Wilson v. Steinbach*, 98 Wash.2d 434, 437, 656 P.2d 1030 (1982). And, we consider solely evidence and issues the parties called to the trial court's attention. RAP 9.12.

¶ 20 In *Folsom v. Burger King*, 135 Wash.2d 658, 663, 958 P.2d 301 (1998), our Supreme Court said the de novo review standard applies to "all trial court rulings made in conjunction with a summary judgment motion." Appellants argue "all trial court rulings" literally includes rulings concerning evidence timeliness. Respondents argue "all trial court rulings" contextually means rulings on evidence contents solely. Based on the below analysis, we agree with appellants.

¶ 21 *Folsom* involved a trial court ruling on a motion to strike expert affidavits from consideration on summary judgment because they contained inadmissible legal conclusions invading the jury's province or lacking proper foundation. *Id.* at 662–63, 958 P.2d 301. The ruling concerned the admissibility of evidence contents under the evidence rules, not evidence timeliness under the civil rules. *Id.* Two years later, our Supreme Court applied the abuse of discretion review standard to a trial court ruling on a motion to continue the summary judgment hearing. *Pitzer v. Union Bank of Cal.*, 141 Wash.2d 539, 556, 9 P.3d 805 (2000) (citing *Tellevik v. Real Property Known as 31641 West Rutherford Street*, 120 Wash.2d 68, 90, 838 P.2d 111 (1992), without acknowledging *Folsom*). Then, seven years later, our Supreme Court again applied the de novo review standard to a trial court ruling on a motion to strike evidence from consideration on

summary judgment because it contained inadmissible legal conclusions. *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wash.2d 413, 416, 420–21, 150 P.3d 545 (2007) (citing *Folsom*, 135 Wash.2d 658, 958 P.2d 301). And again, the ruling concerned the admissibility of evidence contents under the evidence rules, not evidence timeliness under the civil rules. *Id.*

¶ 22 Meanwhile, this court has consistently applied the de novo review standard to trial court rulings concerning the contents of evidence presented on summary judgment.[2] But this court has inconsistently applied the de novo and abuse of discretion review standards to trial court rulings concerning the timeliness of evidence presented on summary judgment. The majority of judicial opinions applied the abuse of discretion review standard without acknowledging *Folsom* in this context.[3] However, two judicial opinions followed ***313** *Folsom* in this context. *See Southwick v. Seattle Police Officer John Doe Nos. 1–5*, 145 Wash.App. 292, 297, 301–02, 186 P.3d 1089 (2008) (reviewing de novo a ruling striking untimely evidence filed *before* the summary judgment hearing (citing *Folsom*, 135 Wash.2d at 663, 958 P.2d 301)); *Davies v. Holy Family Hosp.*, 144 Wash.App. 483, 490–91, 494, 499–500, 183 P.3d 283 (2008) (reviewing for abuse of discretion a ruling striking untimely evidence filed *after* the summary judgment hearing (citing *Folsom*, 135 Wash.2d at 663, 958 P.2d 301, regarding a different issue)). The review standard apparently depended on whether the untimely evidence was filed with the trial court before or after the summary judgment hearing.

2 *See, e.g., Kenco Enters. Nw., LLC v. Wiese*, 172 Wash.App. 607, 614–15, 291 P.3d 261 (hearsay), *review denied*, 177 Wash.2d 1011, 302 P.3d 180 (2013); *Kellar v. Estate of Kellar*, 172 Wash.App. 562, 576–79, 291 P.3d 906 (2012) (dead man's statute), *review denied*, 178 Wash.2d 1025, 312 P.3d 652 (2013); *Rice v. Offshore Sys., Inc.*, 167 Wash.App. 77, 85–87, 272 P.3d 865 (authentication, hearsay, personal knowledge, speculation), *review denied*, 174 Wash.2d 1016, 281 P.3d 687 (2012); *Renfro v. Kaur*, 156 Wash.App. 655, 666, 235 P.3d 800 (2010) (extrinsic, subjective intent); *Ensley v. Mollmann*, 155 Wash.App. 744, 751–55, 230 P.3d 599 (2010) (hearsay); *Lane v. Harborview Med. Ctr.*, 154 Wash.App. 279, 286–88, 227 P.3d 297 (2010) (competence, relevance); *Ross v. Bennett*, 148 Wash.App. 40, 45, 48–49, 203 P.3d 383 (2008) (extrinsic, subjective intent, context of formation, authentication, legal conclusion, relevance, undue prejudice, hearsay); *Momah v. Bharti*, 144 Wash.App. 731, 749–52, 182 P.3d 455 (2008) (hearsay); *Cotton v. Kronenberg*, 111 Wash.App. 258, 264, 266–67, 44 P.3d 878 (2002) (legal conclusion).

3 *See, e.g., Colo. Structures, Inc. v. Blue Mountain Plaza, LLC*, 159 Wash.App. 654, 660, 246 P.3d 835 (2011) (reviewing for abuse of discretion a ruling on untimely evidence filed before the summary judgment hearing (overlooking *Folsom* and citing *O'Neill v. Farmers Ins. Co. of Wash.*, 124 Wash.App. 516, 521, 125 P.3d 134 (2004) (similarly overlooking *Folsom*))); *Garza v. McCain Foods, Inc.*, 124 Wash.App. 908, 917–18, 103 P.3d 848 (2004) (reviewing for abuse of discretion a ruling on untimely evidence filed before the summary judgment hearing (overlooking *Folsom* and citing *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wash.App. 736, 744, 87 P.3d 774 (2004) (similarly overlooking *Folsom*))); *O'Neill*, 124 Wash.App. at 521–22, 125 P.3d 134 (reviewing for abuse of discretion a ruling on untimely evidence filed before the summary judgment hearing (overlooking *Folsom* and citing *Brown v. Peoples Mortg. Co.*, 48 Wash.App. 554, 558–60, 739 P.2d 1188 (1987) (decided before *Folsom*))); *Idahosa v. King County*, 113 Wash.App. 930, 935–37, 55 P.3d 657 (2002) (reviewing for abuse of discretion a ruling on an untimely response filed before the summary judgment hearing (overlooking *Folsom* and citing a former local rule providing untimely materials were, by default, unavailable to the trial court for consideration on summary judgment unless the trial court made a contrary discretionary ruling)); *Colwell v. Holy Family Hosp.*, 104 Wash.App. 606, 610, 613–14, 15 P.3d 210 (2001) (reviewing for abuse of discretion a ruling on untimely evidence filed after the summary judgment hearing (overlooking *Folsom* and citing *Cox v. Spangler*, 141 Wash.2d 431, 439, 5 P.3d 1265 (2000) (considering evidence admissibility outside the summary judgment context))); *Sec. State Bank v. Burk*, 100 Wash.App. 94, 102–03, 995 P.2d 1272 (2000) (reviewing for abuse of discretion a ruling on untimely evidence filed before the summary judgment hearing (overlooking *Folsom* and citing *Brown*, 48 Wash.App. at 559, 739 P.2d 1188 (decided before *Folsom*))); *McBride v. Walla Walla County*, 95 Wash.App. 33, 36–37, 975 P.2d 1029 (1999) (reviewing for abuse of discretion a ruling on untimely evidence filed before the summary judgment hearing (overlooking *Folsom* and citing no authority)).

[3] **[4]** ¶ 23 Under *Folsom*, an appellate court cannot properly review a summary judgment order de novo without independently "examin[ing] *all* the evidence presented to the trial court" on summary judgment. 135 Wash.2d at 663, 958 P.2d 301. Division One of this court followed *Folsom* 's precedential reasoning. *See Southwick*, 145 Wash.App. at

297, 301–02, 186 P.3d 1089. Thus, we agree with appellants and conclude that under *Folsom*, an appellate court cannot fully engage in the same inquiry as the trial court, or construe all evidence and reasonable inferences in the light most favorable to the nonmoving party, unless the appellate court evaluates anew all evidence available to the trial court for potential consideration on summary judgment.

[5] **[6]** ¶ 24 Regarding availability, the determining factor is whether the evidence was "on file" with the trial court, CR 56(c), and "called to the attention of the trial court" on summary judgment, RAP 9.12; *see Colwell*, 104 Wash.App. at 615, 15 P.3d 210 (citing *Mithoug v. Apollo Radio of Spokane*, 128 Wash.2d 460, 462, 909 P.2d 291 (1996)). If it was, like here, we review de novo the trial court ruling striking the evidence from consideration on summary judgment. *See Folsom*, 135 Wash.2d at 663, 958 P.2d 301. While Dr. Li's third affidavit was untimely under CR 56(c), the clerk accepted the filing. *See* CR 5(e). Under these circumstances, the evidence was available to the trial court for potential consideration on summary judgment.[4] Striking the evidence does not change our conclusion that the third affidavit was "on file" with the trial court, CR 56(c), and "called to the attention of the trial court" on summary judgment, RAP 9.12; *see Cameron v. Murray*, 151 Wash.App. 646, 658, 214 P.3d 150 (2009) ("[M]aterials submitted to the trial court in connection with a motion for summary judgment cannot actually be stricken from consideration as is true of evidence that is removed from consideration by a jury; they remain in the record to be considered on appeal."); *accord Ensley*, 155 Wash.App. at 751 n. 7, 230 P.3d 599.

4 Spokane County Local Rules do not change this presumption because they do not provide otherwise. *Contra Idahosa*, 113 Wash.App. at 935–37, 55 P.3d 657 (quoting former Pierce County Local Civil Rule 56(c)(3)); *Brown*, 48 Wash.App. at 559 & n. 1, 739 P.2d 1188 (quoting former King County Local Civil Rule 56(c)(1)(B)).

[7] ¶ 25 Therefore, *Folsom* 's reasoning extends to the trial court's motion-to-strike ruling as well as its summary judgment orders. But considering other directly controlling authority, *Folsom* 's reasoning does not extend to the trial court's motion-for-continuance ruling discussed below. *See Pitzer*, 141 Wash.2d at 556, 9 P.3d 805 (citing *Tellevik*, 120 Wash.2d at 90, 838 P.2d 111) (reviewing ***314** for abuse of discretion a ruling on a motion to continue the summary judgment hearing); *see also State v. Gore*, 101 Wash.2d 481, 487, 681 P.2d 227 (1984) (citing *Godefroy v. Reilly*, 146 Wash. 257, 259, 262 P. 639 (1928)) (stating our Supreme Court's pronouncement of state law binds all lower courts until overruled).

¶ 26 In sum, we review the trial court's motion-to-strike ruling de novo, *see Folsom*, 135 Wash.2d at 663, 958 P.2d 301; *Davis*, 159 Wash.2d at 416, 420–21, 150 P.3d 545, review its motion-for-continuance ruling for abuse of discretion, *see Pitzer*, 141 Wash.2d at 556, 9 P.3d 805 (citing *Tellevik*, 120 Wash.2d at 90, 838 P.2d 111), and review its summary judgment orders de novo, *see Highline*, 87 Wash.2d at 15, 548 P.2d 1085; *Mahoney*, 107 Wash.2d at 683, 732 P.2d 510.

B. Ruling to Strike Third Affidavit

¶ 27 The issue is whether the trial court erred in granting respondents' motion to strike Dr. Li's third affidavit as untimely. In light of our standard-of-review discussion, we choose to consider Dr. Li's third affidavit in reviewing the summary judgment order de novo. *See Southwick*, 145 Wash.App. at 297, 301, 186 P.3d 1089.

[8] ¶ 28 The civil rules set a specific timeline for summary judgment procedure. The nonmoving party must "file and serve opposing affidavits ... not later than 11 calendar days before the hearing." CR 56(c). But the trial court "may permit affidavits to be supplemented or opposed by ... further affidavits." CR 56(e). Thus, "Until a formal order granting or denying the motion for summary judgment is entered, a party may file affidavits to assist the court in determining the existence of an issue of material fact."[5] *Cofer v. Pierce County*, 8 Wash.App. 258, 261, 505 P.2d 476 (1973) (citing *Felsman v. Kessler*, 2 Wash.App. 493, 498, 468 P.2d 691 (1970)).

5 Respondents dispute this basic principle, citing judicial opinions stating evidence is not newly discovered, within the meaning of CR 59(a)(4) and CR 60(b)(3), if it was reasonably available before the opportunity to present it to the trial court passed. *See Wagner Dev., Inc. v. Fid. & Deposit Co. of Md.*, 95 Wash.App. 896, 907, 977 P.2d 639 (1999); *Adams v. W. Host, Inc.*, 55 Wash.App. 601, 608, 779 P.2d 281 (1989). Those judicial opinions are irrelevant to respondents' motion to strike, which involves CR 5(d)(2) and CR 6(b)(2).

¶ 29 Upon motion, the trial court may strike a late filing "unless good cause is shown for, or justice requires, the granting of an extension of time." CR 5(d)(2). Alternatively,

upon motion, the trial court may forgive a late filing "for cause shown ... where the failure to act was the result of excusable neglect." CR 6(b)(2).[6] These considerations are essential to fulfilling the civil rules' purpose of ensuring the trial court justly, speedily, and inexpensively determines every action, preferably on the merits rather than technicalities. *See* CR 1, 56(c), (e)-(f); *Hessler Constr. Co. v. Looney*, 52 Wash.App. 110, 112, 757 P.2d 988 (1988) (citing *Rinke v. Johns–Manville Corp.*, 47 Wash.App. 222, 227, 734 P.2d 533 (1987)); *Fox v. Sackman*, 22 Wash.App. 707, 709, 591 P.2d 855 (1979).

6 Though appellants did not cite CR 6(b)(2) to the trial court, they nonetheless invoked this rule by stating the reasons for the delay and formally "request[ing] ... this Court permit the supplemental filing of Dr. Li's [third] affidavit in response to the current Motion for Summary Judgment." CP at 76. Appellants invoked this rule by thoroughly briefing excusable neglect in their motion for reconsideration. *See Nail v. Consol. Res. Health Care Fund I*, 155 Wash.App. 227, 232, 229 P.3d 885 (2010) ("[N]ew issues may be raised for the first time in a motion for reconsideration, thereby preserving them for review, where ... they are not dependent upon new facts and are closely related to and part of the original theory."). And, respondents' motion to strike necessarily implicates both CR 5(d)(2) and CR 6(b)(2) because these rules are inextricably intertwined in the trial court's decision on whether to consider or not consider Dr. Li's third affidavit on summary judgment.

¶ 30 Eight factors assist us in determining whether a delay resulted from excusable neglect:

> (1) The prejudice to the opponent; (2) the length of the delay and its potential impact on the course of judicial proceedings; (3) the cause for the delay, and whether those causes were within the reasonable control of the moving party; (4) the moving party's good faith; (5) whether the omission reflected professional incompetence, such as an ignorance of the procedural rules; ***315** (6) whether the omission reflected an easily manufactured excuse that the court could not verify; (7) whether the moving party had failed to provide for a consequence that was readily foreseeable; and (8) whether the omission constituted a complete lack of diligence.

15 KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE § 48:9, at 346 (2d ed.2009) (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993)).

[9] ¶ 31 Appellants filed Dr. Li's third affidavit 10 days after the deadline and the day before the summary judgment hearing. Respondents lacked sufficient time to file a reply before the summary judgment hearing. But with the trial date still three and one-half months away and the dispositive motions deadline still three months away, respondents would suffer no prejudice by a short delay for them to respond to the third affidavit and for the trial court to consider all relevant materials, with or without further argument.

¶ 32 Appellants' counsel swore "the delay ... was due to Defendants' arbitrarily selecting a summary judgment date during which Plaintiffs' counsel was unavailable to *adequately work with* Plaintiffs' expert Dr. Kasey Li." CP at 76 (emphasis added). Appellants' counsel elaborated,

> 2. Defendant Patrick Collins filed his Motion for Summary Judgment without seeking the availability of Plaintiffs' counsel.
>
> 3. During the time that Plaintiffs' counsel's response was due to Defendants' Motion for Summary Judgment, Plaintiffs' counsel was in another medical malpractice trial in Ephrata, Washington. That trial began March 7, 2012 with the jury rendering its verdict in favor of the Plaintiff on March 20, 2012. Dr. Chad Collins' attorney ... was in the Ephrata trial and thus, was aware that Plaintiffs' counsel was unavailable to provide a response to Defendants' Motion for Summary Judgment.
>
> 4. Nonetheless, even though trial was ongoing Plaintiffs' counsel *attempted to work with* Plaintiffs' expert Dr. Kasey Li in obtaining an affidavit in response to Defendants' Motion for Summary Judgment.[7]

7 Respondents do not dispute these facts. Instead, they argue appellants had over three months to file a summary judgment response and over a year to obtain Dr. Li's medical expert opinion. But under respondents' stipulated continuance, appellants had no obligation to file affidavits until March 19, 2012. *See Cofer*, 8 Wash.App. at 261, 505 P.2d 476. Respondents unduly

> emphasize that appellants' counsel managed to obtain Dr. Li's first and second affidavits before the deadline. But we reason appellants' counsel, acting in good faith, lacked the time and attention needed to ensure the affidavits provided enough specificity to show a genuine issue of material fact exists on negligence.

CP at 75–76 (emphasis added).

¶ 33 Appellants' counsel acted in good faith when obtaining Dr. Li's first and second affidavits before the deadline, even though appellants' counsel lacked the time and attention needed to ensure the affidavits provided enough specificity to show a genuine issue of material fact exists on negligence. Although appellants' counsel believed the affidavits supplied sufficient facts, he ultimately needed Dr. Li's third affidavit to substantiate his previously stated opinions with more specific facts. The third affidavit stated no new opinions. We accept that the demands of the Ephrata trial were outside the reasonable control of appellants' counsel. And, the delay in filing the third affidavit reflects no professional incompetence or complete lack of diligence by appellants' counsel. Appellants' counsel gave verifiable, not easily manufactured reasons for the delay. The situation was not readily foreseeable because (1) respondents' counsel did not coordinate the summary judgment hearing with appellants' counsel, even though Dr. Chad's counsel was in trial with appellants' counsel, and (2) once appellants' counsel obtained Dr. Li's first and second affidavits, he had a reasonably debatable legal reason for thinking they were sufficient to defeat respondents' summary judgment motion, an argument he vigorously maintains on appeal.

[10] ¶ 34 Appellants' counsel called to the trial court's attention that Dr. Li's third affidavit provides enough specificity to show a ***316** genuine issue of material fact exists on negligence. In a seminal case, our Supreme Court held, "We feel impelled to set aside the summary judgment, lest there be evidence available that will support the plaintiffs allegations." *Preston v. Duncan,* 55 Wash.2d 678, 683, 349 P.2d 605 (1960). After all,

> "Summary judgment procedure ... is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury *if they really have evidence which they will offer on a trial,* it is to carefully test this out, in advance of trial *by inquiring and determining whether such evidence exists.*"

Id. (quoting *Whitaker v. Coleman,* 115 F.2d 305, 307 (5th Cir.1940)); *see also Barber,* 81 Wash.2d at 144, 500 P.2d 88 ("The object and function of summary judgment procedure is to avoid a useless trial. A trial is not useless, but is absolutely necessary where there is a genuine issue as to any material fact."); *Babcock v. State,* 116 Wash.2d 596, 599, 809 P.2d 143 (1991) ("Summary judgment exists to examine the sufficiency of legal claims and narrow issues, not as an unfair substitute for trial.").

¶ 35 Considering all, we conclude appellants have justly shown good cause for a time extension to file Dr. Li's third affidavit. The delay resulted from excusable neglect. *See* CR 5(d)(2), 6(b)(2). Therefore, we reverse the trial court's motion-to-strike ruling.

C. Continuance Ruling

¶ 36 The issue is whether the trial court erred in denying appellants' motion to continue the summary judgment hearing. Appellants contend the trial court had a duty to grant a continuance because they met all necessary criteria.

[11] ¶ 37 If, by affidavit, the nonmoving party states reasons why he or she cannot currently present evidence opposing summary judgment, the trial court "may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." CR 56(f). The trial court may deny the motion for continuance solely if " '(1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact.' "[8] *Tellevik,* 120 Wash.2d at 90, 838 P.2d 111 (quoting *Turner v. Kohler,* 54 Wash.App. 688, 693, 775 P.2d 474 (1989)). This court previously explained,

8 A trial court abuses its discretion if its decision is "manifestly unreasonable," based on "untenable grounds," or made for "untenable reasons." *State ex rel. Carroll v. Junker,* 79 Wash.2d 12, 26, 482 P.2d 775 (1971); *see also In re Marriage of Littlefield,* 133 Wash.2d 39, 47, 940 P.2d 1362 (1997) ("A court's decision is manifestly unreasonable if it is outside

> the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.").

> [W]hen a trial court has been shown a good reason why an affidavit of a material witness cannot be obtained in time for a summary judgment proceeding the court has a duty to accord the parties a reasonable opportunity to make their record complete before ruling on a motion for a summary judgment, especially where the continuance of the motion would not result in a further delay of the trial.
> *Cofer*, 8 Wash.App. at 262–63, 505 P.2d 476; *see also Coggle v. Snow*, 56 Wash.App. 499, 507, 784 P.2d 554 (1990).

[12] **[13]** ¶ 38 The trial court must make justice its primary consideration in ruling on a motion for continuance, even an informal one. *Coggle*, 56 Wash.App. at 508, 784 P.2d 554; *Butler v. Joy*, 116 Wash.App. 291, 299, 65 P.3d 671 (2003). And "it is hard to see 'how justice is served by a draconian application of time limitations' when [the nonmoving] party is hobbled by legal representation that has had no time to prepare a [sufficient] response to a motion that cuts off any decision on the true merits of a case." *Butler*, 116 Wash.App. at 300, 65 P.3d 671 (quoting *Coggle*, 56 Wash.App. at 508, 784 P.2d 554). Absent prejudice to the moving party, the trial court should grant a motion for continuance ***317** under such circumstances. *Id.* at 299–300, 784 P.2d 554.

[14] ¶ 39 Here, justice required continuing the summary judgment hearing to allow full consideration of Dr. Li's third affidavit. As noted above, appellants were hobbled by counsel who, due to extenuating circumstances, lacked the time and attention needed to ensure Dr. Li's first and second affidavits provided enough specificity to show a genuine issue of material fact exists on negligence. Appellants' counsel needed to file Dr. Li's third affidavit to substantiate his previously stated opinions. But the third affidavit stated no new opinions. With the trial date still three and one-half months away and the dispositive motions deadline still three months away, respondents would suffer no prejudice if the trial court continued the summary judgment hearing and considered the third affidavit.

¶ 40 The trial court denied a continuance after deciding appellants' counsel did not offer a good enough reason for the delay in filing Dr. Li's third affidavit or state what evidence a continuance would yield. The trial court's decision to deny a continuance or enlarge the time for filing was manifestly unreasonable, considering the unrefuted reasons given by appellants' counsel. Considering the strength of the factors outlined above, we conclude it was outside the range of acceptable choices for the trial court to say those reasons were not good enough. A continuance would have allowed the trial court to fully evaluate the third affidavit and given respondents time to respond to the specific facts raising a genuine issue of material fact on negligence. Denying a continuance under these circumstances would untenably elevate deadlines over justice and technicalities over the merits, and thus, deny appellants an opportunity to try their case to a jury. Therefore, we conclude the trial court abused its discretion and erred in denying appellants' motion to continue the summary judgment hearing.

D. Summary Judgment

¶ 41 The issue is whether the trial court erred in granting respondents' summary judgment motions on negligent postoperative care and negligent referral. Appellants argue genuine issues of material fact exist on negligence. We agree.

¶ 42 Summary judgment is proper if the records on file with the trial court show "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." CR 56(c). A genuine issue is one upon which reasonable people may disagree; a material fact is one controlling the litigation's outcome. *Morris v. McNicol*, 83 Wash.2d 491, 494, 519 P.2d 7 (1974); *Ranger Ins., Co. v. Pierce County*, 164 Wash.2d 545, 552, 192 P.3d 886 (2008).

¶ 43 Initially, the moving party bears the burden of proving no genuine issue of material fact exists. *LaPlante v. State*, 85 Wash.2d 154, 158, 531 P.2d 299 (1975). A defendant may meet this burden by showing the plaintiff lacks evidence supporting his or her case. *Young v. Key Pharms., Inc.*, 112 Wash.2d 216, 225 n. 1, 770 P.2d 182 (1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). Then, the burden shifts and the plaintiff must present admissible evidence showing a genuine issue of material fact exists. *Id.* at 225, 770 P.2d 182; *see* CR 56(e). The 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 also Young*, 112 Wash.2d at 225–26, 770 P.2d 182. Summary judgment is required if the plaintiff " 'fails to make a showing sufficient to establish ... an element essential to that party's

case, and on which that party will bear the burden of proof at trial.' " *Young*, 112 Wash.2d at 225, 770 P.2d 182 (quoting *Celotex Corp.*, 477 U.S. at 322, 106 S.Ct. 2548).

[15] ¶ 44 In an action for injury resulting from health care, the plaintiff must usually present medical expert testimony to prove the defendant was negligent. *See Harris v. Robert C. Groth, MD, Inc.*, 99 Wash.2d 438, 449, 663 P.2d 113 (1983); *see also* RCW 7.70.040(1) (stating a health care provider is negligent if he or she "fail[s] to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at ***318** that time in the profession or class to which he or she belongs, in the state of Washington, acting in the same or similar circumstances"). In *Guile v. Ballard Community Hospital*, 70 Wash.App. 18, 25, 851 P.2d 689 (1993), Division One explained 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."

¶ 45 Appellants invite us to overrule *Guile*, arguing it is incorrect and harmful because it reads CR 56(e)'s specific facts requirement too restrictively,[9] demands more specificity on summary judgment than ER 704 and 705 would demand at trial,[10] contradicts or lacks support from other judicial opinions, and generally undermines summary judgment's purpose. We decline appellants' invitation because *Guile* is well established as a correct and helpful interpretation of CR 56(e)'s specific facts requirement. *See, e.g., Stewart–Graves v. Vaughn*, 162 Wash.2d 115, 138, 170 P.3d 1151 (2007) (citing *Guile*, 70 Wash.App. at 25, 851 P.2d 689, with approval); *Green v. Am. Pharm. Co.*, 136 Wash.2d 87, 98 n. 5, 960 P.2d 912 (1998) (same); *Davies*, 144 Wash.App. at 493, 496, 183 P.3d 283 (same); *see also Doe v. Puget Sound Blood Ctr.*, 117 Wash.2d 772, 787, 819 P.2d 370 (1991); *Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 49 Wash.App. 130, 134–35, 741 P.2d 584 (1987), *aff'd*, 110 Wash.2d 912, 757 P.2d 507 (1988).

9 *See* CR 56(e) ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.").

10 *See* ER 704 ("Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."); ER 705 ("The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise.").

[16] ¶ 46 Unlike the trial court, we reason at the outset that the so-called "negligent referral" claim is inseparable from appellants' general claim of negligent postoperative care. Appellants' complaint states a single medical negligence cause of action. Whether referrals were required or not, made or not, or were adequate or not, are factual issues bearing on whether respondents' follow-up care fell below the accepted standard of care. The parties genuinely dispute all these factual issues. And, Ms. Keck asserts Dr. Patrick was involved in her postoperative care, while he denies it. Considering the record, these factual issues are all debatable and best left for trial as part of appellants' general claim of negligent postoperative care.

[17] ¶ 47 As to negligent postoperative care, respondents met their initial burden of proving no genuine issue of material fact exists by showing appellants lacked medical expert testimony establishing negligence. Thus, the burden shifted and appellants had to present medical expert testimony showing a genuine issue of material fact exists by setting forth specific facts establishing negligence. Dr. Li's first and second affidavits lack required specificity because they do not state what facts support his opinion that respondents' postoperative care fell below the accepted standard of care. But Dr. Li's third affidavit provides this specificity by stating Ms. Keck's medical records show:

- During and after her December 6, 2007 follow-up visit, respondents made no appreciable attempt to evaluate the green pus oozing from Ms. Keck's surgical incision or the pain and total numbness in her chin.
- Following Dr. Olsen's January 22, 2008 telephone call expressing concerns about infection, pain, and swelling in Ms. Keck's jaw and relapse in her bite alignment, respondents did not closely track Ms. Keck's condition in Spokane or refer her to a Missoula ear, nose, and throat specialist; plastic surgeon; or oral surgeon.
- Respondents allowed further instability in Ms. Keck's jaw by removing but not ***319** replacing loose plates and screws during her January 24, 2008 surgery.

- Though respondents knew Ms. Keck continued suffering nonunion, infection, and pain in her jaw, they did not address these problems during or after her surgeries of January 24, 2008, March 18, 2008, June 11, 2008, or July 18, 2008. The accepted standard of care required respondents to either closely track Ms. Keck's condition in Spokane or else refer her to a Missoula ear, nose, and throat specialist; plastic surgeon; or oral surgeon. But respondents did neither.

- Respondents' negligence proximately caused Ms. Keck's ongoing problems because her jaw probably would have healed properly if, shortly after her initial November 26, 2007 surgery, respondents had either closely tracked her condition in Spokane or else referred her to a Missoula ear, nose, and throat specialist; plastic surgeon; or oral surgeon.

¶ 48 Dr. Li's third affidavit shows a genuine issue of material fact exists by setting forth specific facts establishing negligence. *Cf. Shellenbarger v. Brigman,* 101 Wash.App. 339, 346–48, 3 P.3d 211 (2000). Nonetheless, Dr. Chad argues Dr. Li's third affidavit is still insufficient to raise any genuine issue of material fact. Dr. Chad's arguments underscore how, considering Dr. Li's third affidavit, reasonable people may disagree on the facts surrounding respondents' postoperative care in relation to the accepted standard of care. Thus, a genuine issue exists on the facts allegedly constituting negligent postoperative care. These facts are material because they control the litigation's outcome. Viewing all evidence and reasonable inferences in the light most favorable to appellants, a genuine issue of material fact exists on negligent postoperative care. Therefore, the trial court erred in granting respondents' summary judgment motions on negligent postoperative care and, inclusively, negligent referral.

E. Reconsideration Ruling

¶ 49 The assigned error claims the trial court erred in denying appellants' motion to reconsider the summary judgment order on negligent postoperative care. Appellants contend the trial court should have, for the reasons discussed in the sections above, granted reconsideration on the basis of Dr. Li's third affidavit.

¶ 50 We review a reconsideration ruling for abuse of discretion. *Rivers v. Wash. State Conference of Mason Contractors,* 145 Wash.2d 674, 685, 41 P.3d 1175 (2002). The trial court may, upon motion, reconsider its summary judgment order if "there is no evidence or reasonable inference from the evidence to justify ... the decision, or [the decision] is contrary to law," or "substantial justice has not been done." CR 59(a)(7), (9). Because we have concluded the trial court erred in granting respondents' motion to strike, denying appellants' motion for continuance, and granting respondents' summary judgment motions on negligent postoperative care, it abused its discretion and erred in denying appellants' motion for reconsideration. *See Bank of N.Y. v. Hooper,* 164 Wash.App. 295, 305, 263 P.3d 1263 (2011).

¶ 51 Reversed.

I CONCUR: FEARING, A.C.J.

KORSMO, J., (concurring).

¶ 52 Although the majority correctly reverses and remands this case because plaintiff's counsel was entitled to more time to prepare his response to the summary judgment motions, I do not concur in the extension of the language from *Folsom v. Burger King,* 135 Wash.2d 658, 663, 958 P.2d 301 (1998), into appellate court de novo oversight of the trial court's calendar management authority. That subject has traditionally been left to the discretion of the trial court [1] and we should not overturn those types of decisions absent abuse of that discretion. The *Folsom* language only applies to a trial court's summary judgment evidentiary rulings rather than to related matters such as ***320** continuances and the consideration of untimely filings.

1 *E.g., State ex rel. Sperry v. Superior Court for Walla Walla County,* 41 Wash.2d 670, 671, 251 P.2d 164 (1952).

¶ 53 In addition to being an imprudent policy choice, the elevation of the *Folsom* language fails for several additional reasons. First, as applied to this context, the language is dicta. At issue in *Folsom* was the standard of review of a trial court decision to strike portions of an expert's affidavits due to varied deficiencies. *Id.* at 662–63, 958 P.2d 301. The court concluded, unsurprisingly, that the appropriate standard was de novo review of the reasons for striking the excised portions of the affidavits. *Id.* at 663, 958 P.2d 301. Not only were the trial judge's rulings based on legal grounds, but to leave such rulings to the discretion of the trial court would not

ensure that the summary judgment was based on the evidence most favorable to the defending party. *Id.* The trial judge, after all, does not find facts or resolve disputes concerning material facts at summary judgment. Those matters are left for the trial process. The record must be reviewed most favorably to the responding party and that can only be done if all of the admissible evidence can be considered. As that presents a nondiscretionary legal question, the appellate court necessarily applies de novo review.

¶ 54 Unfortunately, *Folsom* stated its resolution of the argument about striking the evidence universally, indicating that de novo review extended to "all trial court rulings made in conjunction with a summary judgment motion." *Id.* The *Folsom* court, of course, was not reviewing *all* potential rulings made in conjunction with a summary judgment motion. It was dealing with a ruling striking evidence. There was no discretionary aspect to that ruling—the trial judge was either right on the law or he was not. Either way, it presented a legal question rather than a discretionary ruling. *Folsom* did not speak to, and should not be read to address, additional types of rulings arising from a summary judgment motion.

¶ 55 A second problem with reading *Folsom* as the majority does is that it necessarily overrules, *sub silentio,* a large number of cases without applying the standards for doing so articulated in *In re Rights to Waters of Stranger Creek,* 77 Wash.2d 649, 466 P.2d 508 (1970).[2] *E.g., King County Fire Prot. Dist. No. 16 v. Hous. Auth. of King County,* 123 Wash.2d 819, 826, 872 P.2d 516 (1994); *McKee v. Am. Home Prod., Corp.,* 113 Wash.2d 701, 706, 782 P.2d 1045 (1989); *Bernal v. Am. Honda Motor Co., Inc.,* 87 Wash.2d 406, 413, 553 P.2d 107 (1976).[3] Both before and after *Folsom,* the court has continued to treat a trial court's decision on scheduling summary judgment hearings as a matter left to the trial court's discretion.[4] *See, e.g., Pitzer v. Union Bank of Cal.,* 141 Wash.2d 539, 556, 9 P.3d 805 (2000); *Tellevik v. 31641 Rutherford St.,* 120 Wash.2d 68, 90, 838 P.2d 111 (1992). The fact that the Supreme Court forgot this statement just two years later when it decided *Pitzer* suggests that it did not intend *Folsom* to have such a sweeping impact.

2 Stare decisis "requires a clear showing that an established rule is incorrect and harmful before it is abandoned." *Stranger Creek,* 77 Wash.2d at 653, 466 P.2d 508.

3 The noted cases do conflict with the *Folsom* statement in that all of them reviewed summary judgment motions to strike under the abuse of discretion standard.

4 Similarly, the decision to continue a civil or a criminal trial is left to the discretion of the trial court. *State v. Downing,* 151 Wash.2d 265, 272, 87 P.3d 1169 (2004).

¶ 56 The two cases cited by the majority as following *Folsom* do not support that reading. In *Davies v. Holy Family Hospital,* 144 Wash.App. 483, 183 P.3d 283 (2008), this court faced issues concerning an expert's qualifications and whether his declarations of negligence were sufficient to defeat summary judgment. *Id.* at 494, 183 P.3d 283. This court cited the *Folsom* language and conducted an appropriate legal analysis of the issues. *Id.* at 494–96, 183 P.3d 283. However, the court then turned to plaintiff's argument that the court had erred in denying reconsideration because he was unrepresented, needed more time to file an affidavit from his expert, and deserved the opportunity to file an untimely response. This court ultimately concluded that the trial court had not abused its discretion in these rulings. ***321** *Id.* at 498–01, 183 P.3d 283. *Davies* strongly suggests that the *Folsom* rule is limited solely to summary judgment evidentiary rulings rather than issues of timeliness, scheduling, and reconsideration.

¶ 57 The other case relied upon by the majority is *Southwick v. Seattle Police Officer John Doe Nos. 1–5,* 145 Wash.App. 292, 186 P.3d 1089 (2008). *Southwick* also does not aid the majority's reading of *Folsom.* There the court, in its standard of review section, cited *Folsom* for the proposition that an otherwise discretionary motion to strike is reviewed de novo when "made in conjunction with a motion for summary judgment." *Id.* at 297, 186 P.3d 1089. However, in its analysis of the trial court's ruling striking an untimely declaration in opposition to summary judgment, the *Southwick* court applied the abuse of discretion standard rather than the *Folsom* de novo legal standard.[5] *Id.* at 301–02, 186 P.3d 1089.

5 Before and after *Folsom,* this court consistently has applied the abuse of discretion standard to trial court timeliness rulings in summary judgment proceedings. *E.g., Colo. Structures, Inc. v. Blue Mountain Plaza, LLC,* 159 Wash.App. 654, 660, 246 P.3d 835 (2011); *Davies,* 144 Wash.App. at 500, 183 P.3d 283; *Garza v. McCain Foods, Inc.,* 124 Wash.App. 908, 917, 103 P.3d 848 (2004); *O'Neill v. Farmers Ins. Co. of Wash.,* 124 Wash.App. 516, 521–22, 125 P.3d 134 (2004); *Idahosa v. King County,* 113 Wash.App. 930, 936–37, 55 P.3d 657 (2002); *Security State Bank v. Burk,* 100 Wash.App. 94, 102–03, 995 P.2d 1272 (2000); *McBride v. Walla Walla County,* 95 Wash.App. 33, 37, 975 P.2d 1029

(1999); *Brown v. Peoples Mortg. Co.*, 48 Wash.App. 554, 559–60, 739 P.2d 1188 (1987).

¶ 58 Since these cases do not support the broad reading of *Folsom*, the majority is left with nothing but the language of that opinion itself. As noted previously, the statement arose in the context of reviewing the legal grounds for the trial court's ruling striking some of the proffered evidence and the court justified its decision on the basis of the need to ensure that all admissible evidence was considered. That rationale has little relation to a court's scheduling authority or local motion practice deadlines.

¶ 59 The Washington Supreme Court recently provided some guidance on what to consider when fashioning an appropriate standard of review:

> An abuse of discretion standard often is appropriate when (1) the trial court is generally in a better position than the appellate court to make a given determination; (2) a determination is fact intensive and involves numerous factors to be weighed on a case-by-case basis; (3) the trial court has more experience making a given type of determination and a greater understanding of the issues involved; (4) the determination is one for which no rule of general applicability could be effectively constructed; and/or (5) there is a strong interest in finality and avoiding appeals.

State v. Sisouvanh, 175 Wash.2d 607, 621, 290 P.3d 942 (2012) (citations and quotations omitted).

¶ 60 These factors support reading the *Folsom* language narrowly. Enforceability of local rules and decisions on whether to grant continuances should be left to the discretion of the trial judge who has the most experience with those matters as well as with the counsel involved. An appellate court is seldom in the position where it can legitimately tell a trial court that it erred in enforcing its own local rales. We should review any such challenges for abuse of discretion.

¶ 61 The *Folsom* language will have to be explained and applied by the Washington Supreme Court at some point. However, this court does not have the authority to overturn a Supreme Court and neither should we unnecessarily interpret a case in a manner that puts it in conflict with other cases. The majority reading of *Folsom* puts that case at odds with even more decisions than *Folsom* itself implicitly did. Since I don't think the *Folsom* language should be applied outside of summary judgment evidentiary rulings, I respectfully concur only in the result of the majority opinion.

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June 26, 2014

LETTER SENT BY E-MAIL ONLY

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Re: Supreme Court No. 90357-3 - Darla Keck, et ux., et al. v. Chad P. Collins, D.M.D., et al.
Court of Appeals No. 31128-7-III

Counsel:

The following notation ruling was entered by the Supreme Court Deputy Clerk on June 25, 2014, in the above referenced case:

MOTION FOR EXTENSION OF TIME TO FILE RESPONDENTS' ANSWER TO PETITION FOR REVIEW

"Motion granted. Respondents' answer should be served and filed by August 6, 2014."

Sincerely,

Susan L. Carlson
Supreme Court Deputy Clerk

SLC:alb

Faulk, Camilla

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, August 05, 2014 12:10 PM
To: Shari Canet
Cc: Faulk, Camilla
Subject: RE: Keck v. Collins (#90357-3)

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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.

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Sent: Tuesday, August 05, 2014 12:05 PM
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Cc: Jeffrey Galloway; Courtney Garcea; Brian Rekofke; Leslie Weatherhead; Geana Van Dessel; Mark D. Kamitomo; Collin M. Harper; Mary Rua; George Ahrend
Subject: Keck v. Collins (#90357-3)

Please accept the attached Answer to Petition for Review and Conditional Cross-Petition for Review (with annexed Appendix) for filing.

Thank you.

--
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