No. 311287
COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

DARLA KECK and RON JOSEPH GRAHAM, husband and wife, and DARLA KECK and RON JOSEPH GRAHAM as parents of the minor Child KELLEN MITCHELL GRAHAM, and KELLEN MITCHELL GRAHAM, individually,

Plaintiffs-Appellants,

vs.

CHAD P. COLLINS, DMD, PATRICK C. COLLINS, DDS; COLLINS ORAL & MAXILLOFACIAL SURGERY, P.S., a Washington Corporation

Defendants-Respondents.

BRIEF OF RESPONDENTS CHAD P. COLLINS, DMD, AND COLLINS ORAL & MAXILLOFACIAL SURGERY, P.S.

Geana M. Van Dessel, WSBA No. 35969
Brian T. Rekofke, WSBA No. 13260
Witherspoon • Kelley
422 West Riverside, Suite 1100
Spokane, WA 99201
Telephone: (509) 624-5265
Facsimile: (509) 458-2728
gmv@witherspoonkelley.com
btr@witherspoonkelley.com

Attorneys for Defendants Chad P. Collins, DMD and Collins Oral & Maxillofacial Surgery, P.S.

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btr@witherspoonkelley.com

Attorneys for Defendants Chad P. Collins, DMD and Collins Oral & Maxillofacial Surgery, P.S.

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I. INTRODUCTION

On November 26, 2007, Drs. Chad and Patrick Collins performed surgery on Darla Keck to address her sleep apnea. Following surgery, Ms. Keck experienced complications. Dr. Chad Collins treated Ms. Keck's complications. Ms. Keck, along with her husband and children, filed a lawsuit against Drs. Chad and Patrick Collins alleging medical negligence, negligent referral and failure to obtain informed consent.

More than a year after the lawsuit was filed and more than a year after Ms. Keck had obtained an expert, Drs. Chad and Patrick Collins filed successive motions for summary judgment dismissal of Ms. Keck's claims. The trial court granted summary judgment dismissal of Ms. Keck's claims, finding that Ms. Keck failed to provide competent medical evidence necessary to overcome the summary judgment burden. Ms. Keck and her family now appeal.

This brief is filed on behalf of Dr. Chad Collins, represented by Brian T. Rekofke and Geana M. Van Dessel of Witherspoon Kelley.

II. RESTATEMENT OF ISSUES RE: APPELLANTS' ASSIGNMENTS OF ERROR

1. Whether Dr. Li's first, second, third and fourth affidavits were sufficient to defeat summary judgment where they did not set forth specific facts, as required by CR 56(e), showing that the injury complained of by Ms. Keck was proximately caused by a failure to comply with the applicable standard of care.

2. Whether ER 704 and ER 705 (a) permit a party to offer conclusory expert opinions that do not identify specific standards of care and are not supported by specific facts, and (b) override CR 56(e)'s requirements for summary judgment and allow any expert to testify generally to conclusions unsupported by specific facts.

3. Whether the trial court abused its discretion in declining to accept a plaintiff's untimely expert affidavit filed the day before a summary judgment hearing where the plaintiff had more than three months to respond to the summary judgment motion, where the plaintiff had hired her expert more than a year before the summary judgment hearing and where it is undisputed that the information in the untimely affidavit was known at the time the response to the summary judgment was due and the first affidavit was filed.

4. Whether the trial court abused its discretion by denying an oral motion for continuance made the day of the hearing on a motion for summary judgment, when the motion met none of the criteria of CR 56(f), and was made solely to facilitate the last-minute filing of a third affidavit from an expert witness from whom two affidavits had already been obtained and filed, and where no showing was made that the late affidavit added anything essential or that had not been previously known to the expert.

III. STATEMENT OF THE CASE

Background. In November 2007, Darla Keck received care and treatment from Drs. Chad and Patrick Collins to address her sleep apnea issues. CP 5. Dr. Chad Collins first provided care to Ms. Keck on November 19, 2007 at a pre-surgery appointment. CP 131. Ms. Keck had been diagnosed with obstructive sleep apnea and was referred to Dr. Chad Collins by Ms. Keck's Montana Ear Nose and Throat ("ENT") physician, Dr. Jeffrey Haller. CP 131. After reviewing several treatment options, Ms. Keck chose to have surgery. CP 131.

On November 26, 2007, Dr. Chad Collins was the lead surgeon on Ms. Keck's jaw advancement procedure to treat her obstructive sleep apnea. CP 132. The surgery makes bone cuts to advance the jaw, thus increasing the size of the airway. CP 131. After advancement, the jaw has to be held in place with plates and screws to stabilize the jaw while the new bone fills the gaps created by the jaw advancement. CP 131. That is called "union" of the jaw. CP 131. Because the jaw advancement may impact the bite, braces called arch bars are wired on the teeth for four to six weeks to help ensure a normal bite. CP 131. The bite has to be assessed regularly during that period; after the initial post-operative visit, Dr. Chad Collins' routine is to see the patient every one or two weeks for about six weeks, at which point the arch bar/braces are removed if the bite is appropriate. CP 131-132.

Following surgery, Dr. Collins' first post-operative visit occurred on December 6, 2007; at that visit Dr. Chad Collins noticed pus coming from a surgical incision on Ms. Keck's chin. CP 132. He prescribed antibiotics and since Ms. Keck lived in Missoula, Montana, referred Ms. Keck to Dr. Haller, her Ear, Nose and Throat physician (ENT) from Montana who had referred Ms. Keck to Dr. Chad Collins to follow the wound healing in between the appointments with Dr. Chad Collins. CP 132; CP 140-141. At the same pre-operative visit on December 6, 2007, Dr. Chad Collins also assessed Ms. Keck's bite. CP 133. Dr. Chad Collins also referred Ms. Keck to her long-time dentist, Dr. Olsen to do bite assessments in between her trips to see Dr. Chad Collins in Spokane to save her from making the long trips just to have her bite assessed. CP 133.

Two days later, before Mrs. Keck had made any follow appointments with the Montana doctors to whom Dr. Collins had referred her, she went to the emergency department in Missoula on December 8, 2007, complaining of jaw pain and swelling. CP 133. The emergency department contacted Dr. Haller, Ms. Keck's ENT doctor. CP 133. Dr. Haller admitted Ms. Keck to the hospital and consulted Dr. Chad Collins by phone that day; following the consultation Dr. Haller drained the abscess and packed the wound. CP 133; CP 142, 143.

Dr. Chad Collins scheduled an appointment with Ms. Keck for December 13, 2007. CP 133. Ms. Keck canceled that appointment, however, because she reported that she felt better. CP 134.

Dr. Olsen saw Ms. Keck on December 17, 2007 and assessed her bite. CP 134.

On December 26, 2007, Dr. Chad Collins had his second, in-person post-operative visit with Ms. Keck. CP 134. There was no issue regarding the wound incision problem that had been handled in the Montana emergency room by Dr. Haller; her bite was "excellent" and Dr. Chad Collins decided to remove the arch bars; Dr. Olsen also approved removal of the arch bar. CP 134. At this point, the surgery appeared successful and Ms. Keck was instructed to return to Dr. Chad Collins' care "prn", which means as needed. CP 134; CP 147.

In a follow-up call on December 27, 2007, the patient reported to Dr. Collins' office that she was "doing good." CP 147.

Unknown to Dr. Chad Collins, after assessing Ms. Keck's bite on December 17, 2007, Dr. Olsen's records reflect that he embarked on a course of providing other care on various issues and referrals. CP 134; 145, 146.

On January 22, 2008, Dr. Chad Collins spoke to Dr. Olsen on the phone; that was the first time he was informed by anyone that Ms. Keck had pain and swelling in her jaw. CP 134; CP 148. Immediately thereafter, Dr. Chad Collins

spoke to Ms. Keck and scheduled an appointment for the very next day, January 23, 2008. CP 134; CP 148. At the visit on January 23, 2008, Dr. Chad Collins determined the plates and screws were loosening and infection was present so he recommended removing the hardware and cleaning the infected part of the jaw. CP 135; CP 148. Dr. Olsen's records reflect that Ms. Keck called his office and left a voice mail in which she "thanked Dr. O very much for making her follow up with Dr. Collins." CP 135.

On January 24, 2008, Dr. Chad Collins performed surgery on Ms. Keck, removing the loose hardware and closing reduction of the non-union (wiring jaws shut). CP 135. Ms. Keck was discharged on January 26, 2008. CP 135. She was seen at the emergency department in Missoula for swelling the next day. CP 135. On that day, Dr. Chad Collins spoke with ENT specialist Dr. Philip Gardner and an infectious disease specialist, and advised on treatment. CP 135; 149-155. Dr. Chad Collins spoke with Ms. Keck on January 28, 2008 and she told him she was being seen by an ENT and infectious disease physician. CP 135; 149-155. On the following day, January 29, 2008, Dr. Chad Collins again spoke with Ms. Keck after her discharge from the hospital; Ms. Keck was pleased with her progress and she liked her infectious disease specialist, Dr. David Christiansen. CP 136; 156.

Dr. Chad Collins had follow up visits personally with Ms. Keck on February 11, March 3, and March 18, 2008. CP 136. On March 18, 2008, Dr.

Chad Collins performed surgery on Ms. Keck to clean the infected jaw bone. CP 136. Her jaw had not yet formed healthy new bone (non-union) so Dr. Chad Collins placed more hardware to allow the jaw to set and heal properly. CP 136.

On March 19, 2008, Dr. Chad Collins sent Dr. Christiansen a letter regarding the surgery and status. CP 136; 157. On April 3, 2008, Dr. Olsen was copied on Dr. Chad Collins' notes indicating that Ms. Keck was instructed to follow up with Dr. Olsen only about her bite and teeth cleaning. CP 136; 158. On May 29, 2008, Dr. Chad Collins again spoke to Dr. Christiansen, the infectious disease specialist. CP 136. On June 4, 2008, Dr. Chad Collins spoke to Dr. Olsen; he reported that he had seen Ms. Keck two to three weeks prior and that she was returning for a bite adjustment. CP 136; 159.

On June 11, 2008, Dr. Chad Collins personally saw Ms. Keck again and noted she had loose hardware. CP 136. On July 18, 2008, Dr. Chad Collins did bone grafts and installed new plates to the upper jaw to correct the non-union in Ms. Keck's jaw. CP 137. July 23, 2008 was Dr. Chad Collins' last personal visit with Ms. Keck; the chart notes reflect she was doing well and she was pleased with her progress. CP 137; 160.

Procedural History. Three years later, on November 23, 2010, Darla Keck filed this lawsuit alleging medical malpractice claims against Dr. Chad Collins, Dr. Patrick Collins and Collins Oral & Maxillofacial Surgery and Sacred

Heart Medical Center. CP 1, 3. The trial court issued a scheduling order setting a discovery cut-off of December 16, 2011, and a February 6, 2012, deadline for hearing dispositive motions. CP 395.

By December 2010, within a month of filing her lawsuit, Kasey Li, M.D. had been asked to serve as Ms. Keck's medical expert and to review her medical records. CP 194, 195. The following year, Dr. Li was listed as a medical expert on Ms. Keck's witness list filed in August 2011. CP 101.

On December 20, 2011--more than a year after the lawsuit was filed, more than a year after Ms. Keck had obtained an expert, and after the discovery cut-off had expired--Dr. Patrick Collins filed a motion for summary judgment dismissal of Ms. Keck's claims for medical negligence on the grounds that Ms. Keck lacked competent medical expert testimony to make a prima facie case of medical negligence. CP 21-31. That motion was originally set for hearing on January 20, 2012. CP 162; 100. On February 16, 2010, at Ms. Keck's request after the case scheduling order was amended, CP 100, Dr. Patrick Collins agreed to re-note his motion for summary judgment and continue the hearing two months to March 30, 2012. CP 173, 174. Ms. Keck never objected to the new date for the summary judgment hearing. On March 14, 2012, Dr. Chad Collins filed a joinder in the motion for summary judgment, adopting the arguments made by Dr. Patrick Collins; no additional issues were raised or added by the joinder. CP 101.

On March 16, 2012 (over three months after the motion for summary judgment had been filed), Ms. Keck timely responded to the defendants' motion for summary judgment with attached (first) declaration from Dr. Kasey Li dated March 14, 2012, which only talked about Chad Collins; it did not mention Patrick Collins. CP 41-43, 101. When Ms. Keck responded to the summary judgment motions, she did not assert any objection to the date of the hearing or allege that she was prejudiced in her ability to respond. *Id.* Rather, she timely filed a response. On March 22, 2012, Ms. Keck unilaterally filed a second affidavit of Dr. Li dated March 19, 2012. CP 46-48, 101. The second affidavit applied to both defendant doctors, Dr. Chad Collins and Dr. Patrick Collins, in recognition that Dr. Chad Collins had joined Dr. Patrick Collins' motion for summary judgment. CP 46-48, *cf.* CP 41-43. Dr. Patrick Collins filed a reply brief on March 26, 2012 and Dr. Chad Collins replied on March 27, 2012. CP 55-67. Both reply briefs outlined why the first declaration and second affidavit of Dr. Li were insufficient to defeat summary judgment where they did not establish a *prima facie* case of medical negligence. *Id.*

On March 29, 2012, the day before the summary judgment hearing, Ms. Keck filed a third affidavit of Dr. Li; this untimely affidavit was filed without leave of the court and there was no motion for enlargement of time. CP 79-84. The third affidavit added only a recitation of the treatment history of Ms. Keck.

Id. It did not contain any specific facts showing that Dr. Chad Collins' actions fell below the requisite standard of care. *Id.*

The Court heard oral argument on March 30, 2012. CP 100. During oral argument, Ms. Keck's counsel conceded that she had not pleaded and was not asserting any claim that the initial surgeries by the doctors were negligent. RP 18, 25. During oral argument, Ms. Keck asked the trial court to accept the untimely third affidavit of Dr. Li but argued that the second affidavit of Dr. Li was "sufficient to withstand any claim of summary judgment." RP 13.

At the hearing, the trial court issued an oral ruling that was memorialized in a written order dated April 6, 2012. RP 26; CP 96-99. The trial court accepted Dr. Chad Collins' joinder in Dr. Patrick Collins' motion for summary judgment, finding that the joinder added no information and did no more than join the previously, timely filed motion of Patrick Collins. CP 104. The trial court dismissed the informed consent claim[1] and the claim, if any, for medical negligence/negligent surgery on November 26, 2007. RP 26; CP9 6-99. The trial court denied the motion for summary judgment as to Ms. Keck's negligent referral claim. *Id.* And the trial court took under advisement three issues (1) the motion to strike Dr. Li's third declaration untimely filed on March 29, 2012; (2) Ms. Keck's

[1] Ms. Keck does not appeal the trial court's dismissal of her informed consent claim. *See* Appellants' Opening Brief.

oral motion for continuance; and (3) the motion for summary judgment dismissal of Ms. Keck's claims for negligent post-operative treatment (aside from the negligent referral claim). *Id.*

By letter dated April 11, 2012, the trial court granted the motion to strike Dr. Li's third affidavit, denied the oral motion to continue the summary judgment, and granted summary judgment dismissal of Ms. Keck's claims for negligent post-operative care (except for negligent referral). CP 100-104. The trial court concluded that Dr. Li's two affidavits were "conclusory" and "failed to raise genuine issues of material fact" because the information contained in the affidavits was "insufficient to connect Dr. Li's opinions to specific identified facts which would support the contention that the defendants' actions fell below the requisite standard of care." CP 102. A written order memorializing the trial court's letter opinion was filed on April 24, 2012. CP 108-110.

On May 2, 2012, Ms. Keck filed a motion for reconsideration. CP 111-125. The trial court denied the motion by letter ruling dated June 11, 2012. CP 247-248. It was memorialized in written order filed June 22, 2012. CP 308-310.

On May 11, 2012, Dr. Chad Collins moved for summary judgment dismissal of Ms. Keck's remaining claim for negligent referral on the basis that Ms. Keck could not establish a *prima facie* case of negligent referral where it was undisputed that there was no referral. CP 126-128. The motion was supported by

the Affidavit of Dr. Chad Collins. CP 129-160. Dr. Patrick Collins also filed a separate motion for summary judgment dismissal of Ms. Keck's negligent referral claim. CP 197-217; 239-246. In response, Ms. Keck submitted Dr. Li's fourth affidavit, an affidavit from Ms. Keck and the affidavit of Dr. Jeffrey Haller. CP 249-278. In reply, Dr. Chad Collins submitted a separate statement of undisputed facts. CP 311-329.

The trial court heard oral argument on June 29, 2012. CP 350. Ms. Keck filed a sur-reply, which the trial court considered. CP 345-348. In a letter opinion dated July 25, 2012, the trial court granted summary judgment dismissal of Ms. Keck's remaining claim for negligent referral against Dr. Chad Collins and Dr. Patrick Collins, concluding that there were "no genuine issues of material fact". CP 350-353. An order of dismissal was filed on August 27, 2012. CP 354-361.

IV. ARGUMENT

A. The Trial Court Did Not Abuse Its Discretion By Striking Dr. Li's Third, Untimely Affidavit When There Was No Excuse For Failing To Include The Information In The First, Timely Filed Affidavit And Where Ms. Keck Had Ample Notice And Time To Prepare For The Summary Judgment.

1. The trial court's decision to reject Dr. Li's untimely, third affidavit should be affirmed where there was no abuse of discretion.

A trial court is not required to consider an affidavit that has been untimely filed in response to a summary judgment motion. *McBride v. Walla Walla County*, 95 Wn. App. 33, 37, 975 P.2d 1029, 1031 (Div. 3, 1999) amended, 990 P.2d 967 (Div. 3, 1999) (holding trial court properly refused to consider affidavits filed by non-moving party 4 days before summary judgment hearing). The question of whether to accept or reject untimely filed affidavits lies strictly within the trial court's sound discretion. *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 499, 183 P.3d 283, 291-92 (Div. 3, 2008) (citing CR 6(b) and *Brown v. Peoples Mortgage Co.*, 48 Wn. App. 554, 559-560, 739 P.2d 1188, 1191-92 (Div. 1, 1987) (finding no abuse of discretion where trial court struck plaintiff's supplemental declaration filed on the same day as the summary judgment hearing)). Accordingly, the trial court's decision to reject Dr. Li's third, untimely affidavit is reviewed for an abuse of discretion. *Id.*; *O'Neill v. Farmers Ins. Co. of Wash.*, 124 Wn. App. 516, 522, 125 P.3d 134, 136 (Div. 1, 2004) (finding it was

within the trial court's discretion to refuse to consider supplemental declarations filed three days prior to the summary judgment hearing).[2]

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[2] Ms. Keck contends that all of the trial court's decisions, including its decision to strike Dr. Li's untimely affidavit, are reviewed *de novo*. As support for that position, Ms. Keck cites to a Division 1 opinion from the Court of Appeals and *Folsom v. Burger King*, 135 Wn.2d 658, 958 P.2d 301 (1998). *Appellants Brief at p. 17.* Ms. Keck's reliance on *Folsom* is misplaced. *Folsom* did not address a trial court's decision to strike an affidavit as untimely. Rather, *Folsom* discussed the standard of review to be used when reviewing a trial court's evidentiary rulings regarding the contents of or portions of affidavits on grounds of admissibility (i.e., on grounds of hearsay, foundation, relevancy or lack of competency). Further, Ms. Keck ignores each of this Court's decisions, decided after *Folsom*, cited in this brief at Argument Section A. 1, holding that a trial court's order granting or denying a motion to strike an affidavit as untimely is reviewed for an abuse of discretion. *See e.g., Davies*, 144 Wn. App. at 499, 183 P.3d at 291-92.

2. The trial court did not abuse its discretion by declining to accept Dr. Li's untimely, third affidavit in response to summary judgment when there was no excuse for failing to include the information in the earlier two affidavits timely filed in opposition to summary judgment and where Ms. Keck had ample notice to prepare for and respond to summary judgment.

It is undisputed that Dr. Li's third affidavit was not timely; it was filed one day before the hearing and it allowed no time for a meaningful response by the defendant doctors. CP 102. Once a deadline has passed courts can accept late filings only if a motion is filed explaining why the failure to act constituted excusable neglect. *Colorado Structures, Inc. v. Blue Mountain Plaza, LLC*, 159 Wn. App. 654, 660, 246 P.3d 835, 838 (Div. 3, 2011), *citing* CR 6(b)(2) and *Davies*, 144 Wn. App. at 500, 183 P.3d 283 (Div. 3, 2008) (affirming Spokane County Superior Court order denying motion to submit untimely response to summary judgment). Late-filed affidavits are properly excluded where the proponent has "no excuse for failing to address the issues in prior materials submitted to the court." *Brown*, 48 Wn. App. at 560.

Dr. Li's first affidavit was timely filed with Ms. Keck's responsive briefing. Dr. Li's second affidavit, which was filed without a motion for enlargement of time, was considered by the trial court because it concluded the defendant doctors had ample time to respond to it before the summary judgment hearing and because it addressed Dr. Chad Collins' joinder in the summary

judgment. The trial court granted a motion to strike Dr. Li's third affidavit, however, as untimely where it was filed one day before the hearing and where was filed to bolster and correct the information of the first two affidavits. CP 102. The third affidavit was a concession of the insufficiencies of the first two affidavits.[3] In rejecting Ms. Keck's reasons for the untimely affidavit (busy trial schedule, failure of defense counsel to inquire about plaintiff's counsel's availability and policy assertions about reserving summary judgment for rare instances)[4] the trial court correctly noted that the case law does not discuss any of these excuses as a basis for allowing consideration of late-filed declarations opposing summary judgment. *See e.g., Davies, supra*; *Garza v. McCain Foods, Inc.*, 124 Wn. App. 908, 103 P.3d 848 (Div. 3, 2004); *Idahosa v. King County*, 113 Wn. App. 930, 55 P.3d 657 (Div. 2, 2002). Further, Ms. Keck's excuses cannot be squared with the record.

Notably, Ms. Keck does not argue she could even satisfy the required excusable neglect standard;[5] and she cannot. She offers no explanation for why

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[3] During oral argument, Ms. Keck asked the trial court to accept the untimely third affidavit of Dr. Li but argued that the second affidavit of Dr. Li was "sufficient to withstand any claim of summary judgment." RP 13.

[4] CP 75-77; CP 102.

[5] Ms. Keck did not discuss the excusable neglect standard at the trial court level prior to the hearing on summary judgment, although Ms. Keck's counsel filed an affidavit asking the trial court to continue the summary judgment hearing, if the

she did not secure the necessary opinions to support liability from Dr. Li in the year or more since he had been identified as an expert, or why these opinions could not have been included in an affidavit plaintiffs had over three months to prepare after the motion for summary judgment was filed.

Ms. Keck argued she should be excused from filing a timely affidavit because her counsel was in trial from March 7, 2012 to March 20, 2012, but within that time Ms. Keck never filed a motion for a continuance stating she could not respond to the summary judgment motion. Rather, during that time, Dr. Li filed two different affidavits; both, however, were insufficient to defeat summary judgment. Ms. Keck offers no explanation for why the information in the third declaration of Dr. Li was not included in the first or second affidavit when there is no dispute that the evidence in Dr. Li's third affidavit was available when Dr. Li's first affidavit was filed and when Dr. Li made his second affidavit. "If the evidence was available but not offered until after that opportunity passes, the parties are not entitled to another opportunity to submit that evidence." *Wagner Dev., Inc. v. Fid. & Deposit Co.*, 95 Wn. App. 896, 907, 977 P.2d 639 (1999). This is not a case where Ms. Keck was deprived of an opportunity to respond to summary judgment. Rather, in this case, Ms. Keck had two opportunities to

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trial court was inclined to grant summary judgment. CP 75-77. Ms. Keck does not address the excusable neglect standard in her opening appeal brief.

respond to summary judgment, but for whatever reason did not include information until the eve of the hearing, when defendants could not address it.

Accepting Ms. Keck's argument requires a finding that the timeframe provided in CR 56 is really just a "guideline" and requires this Court to reject its own precedent clearly explaining that the trial court has considerable discretion in managing its schedule and whether to accept or reject untimely filed affidavits. The trial court acted within its discretion by applying the Civil Rules and this Court's precedence in striking Dr. Li's untimely, third affidavit. Consequently, Dr. Li's third affidavit is not within the scope of this record on review.

B. The Trial Court Did Not Err In Granting Partial Summary Judgment Dismissal Of Ms. Keck's Post-Operative Medical Negligence Claim Because She Failed To Submit Competent Medical Expert Testimony Establishing A *Prima Facie* Case Where the Expert Affidavits Lacked Specific Facts Supporting The Conclusions.

1. The trial court's grant of summary judgment may be affirmed on any basis supported by the record.

An appellate court may affirm a trial court's disposition of a summary judgment motion on any basis supported by the record. *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 491, 183 P.3d 283, 287 (Div. 3, 2008) (citing *Redding v. Virginia Mason Med. Ctr.*, 75 Wn. App. 424, 426, 878 P.2d 483 (Div. 1, 1994)). Questions of fact may be determined on summary judgment as a matter

of law where reasonable minds could reach but one conclusion. *Swinehart v. City of Spokane*, 145 Wn. App. 836, 844, 187 P.3d 345, 349-50 (2008).

2. A plaintiff's claims must be dismissed on summary judgment when the plaintiff lacks competent medical expert testimony to prove a prima facie case.

The purpose of a summary judgment motion is to avoid an unnecessary trial where no genuine issue as to a material fact exists. *Eakins v. Huber*, 154 Wn. App. 592, 598, 225 P.3d 1041, 1043 (Div. 3, 2010) (citation omitted). In a medical negligence case, a defendant may move for summary judgment based on absence of competent medical evidence to establish a prima facie case. *Colwell v. Holy Family Hosp.*, 104 Wn. App. 606, 611-12, 15 P.3d 210, 213 (Div. 3, 2001) (citing *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989)). To make a prima facie case for medical negligence under RCW 7.70.010, the plaintiff must show duty, breach, causation, and damages. *Colwell*, 104 Wn. App. At 611-12 (citation omitted). Generally, expert medical testimony is required to establish the standard of care and causation; medical expert testimony is always required in medical negligence cases to show proximate cause. *Id.; Berger v. Sonneland*, 144 Wn. 2d 91, 110-11, 26 P.3d 257, 267 (2001); *Davies*, 143 Wn. App. at 1012. When a defendant moves for summary judgment of a medical negligence claim by showing the plaintiff lacks competent medical evidence to make out a *prima facie* case of medical malpractice, the burden then

shifts to the plaintiff to produce an affidavit from a qualified medical expert setting forth specific facts showing that the injury complained of was proximately caused by a failure to comply with the applicable standard of care; otherwise the defendant is entitled to summary judgment. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn. 2d 216, 226-27, 770 P.2d 182, 188 (1989), *overruled on other grounds*, 130 Wn.2d 160, 922 P.2d 69 (1996); *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App.18, 851 P.2d 689 (Div. 1, 1993); *Seybold v. Neu*, 105 Wn. App. 666, 676, 19 P.3d 1068, 1074 (Div. 1, 2001) (citing RCW 7.70.040 and *McKee v. Am. Home Prods. Corp.*, 113 Wn.2d 701, 706-07, 782 P.2d 1045 (1989)).

3. Dr. Chad Collins is entitled to summary judgment dismissal of Ms. Keck's claims for post-operative medical negligence because the affidavits of Dr. Li provided in response to the summary judgment motion lacked adequate factual support necessary to overcome the summary judgment burden.

CR 56(e) provides that affidavits made in support of, or in opposition to, a motion for summary judgment must be based on personal knowledge, set forth admissible evidentiary facts, and affirmatively show that the affiant is competent to testify to the matters therein. *McKee v. Am. Home Prods. Corp.*, 113 Wn.2d 701, 706, 782 P.2d 1045 (1989); *Davies*, 144 Wn. App. at 493, 183 P.3d at 288. Under CR 56(e), in response to a summary judgment motion, "an adverse party may not rest upon the mere allegations or denials of his pleading, but this

response, by affidavits or as otherwise provided in this rule, must set forth *specific facts* showing that there is a genuine issue for trial." (emphasis added).

Expert affidavits must be based on the facts of the case and not on speculation or conjecture; "[a]ffidavits containing conclusory statements without adequate factual support are insufficient to defeat a motion for summary judgment." *Guile*, 70 Wn. App. at 25, 851 P.2d 689 (citing CR 56(e); *Seybold v. Neu*, 105 Wn. App. 666, 677, 19 P.3d 1068, 1074 (Div. 1, 2001) (citing *Melville v. State,* 115 Wn.2d 34, 41, 793 P.2d 952 (1990), (quoting *Theonnes v. Hazen,* 37 Wn. App. 644, 648, 681 P.2d 1284 (1984) and *Davies*, 144 Wn. App. at 493, 183 P.3d at 288); *Ruffer v. St. Frances Cabrini Hosp. of Seattle*, 56 Wn. App. 625, 628, 784 P.2d 1288, *review denied*, 114 Wn.2d 1023, 792 P.2d 535 (1990); *Van Leven v. Krestzler*, 56 Wn. App. 349, 356, 783 P.2d 611 (Div. 1, 1989).

The only affidavits offered by Ms. Keck to defeat the doctors' first motion for summary judgment were those of Dr. Li. Ms. Keck now concedes that the first declaration of Dr. Li did not satisfy the formal requirements required of an affidavit in opposition to summary judgment, so a second affidavit was filed.[6] The trial court accepted Mr. Li's second affidavit but correctly concluded it was insufficient to defeat summary judgment because "[t]he information contained in these two sworn statements was insufficient to connect Dr. Li's opinions to

[6] Appellants' Opening Brief at p. 7 n.2.

specific identified facts which would support the contention that the defendants' actions fell below the requisite standard of care." CP 102[7].

Now, on appeal, Ms. Keck focuses her entire argument on the assertion that the trial court erred in applying *Guile v. Ballard Community Hospital*, 70 Wn. App. 18, 851 P.2d 689, *rev. denied sub nom., Guile v. Crealock*, 122 Wn.2d 1010 (1993). In *Guile*, the plaintiff submitted an affidavit of her medical expert in response to the defendant health care provider's motion for summary judgment. 70 Wn. App. at 21, 851 P.2d at 691. The affidavit "failed to identify specific facts supporting" the expert's opinions that the defendant negligently performed surgery. *Id.* at 26, 851 P.2d at 693. Instead the expert affidavit gave a conclusory statement summarizing the plaintiff's post-surgical complications and concluded that the complications were due to the doctor's "faulty technique." *Id.* Due to the conclusory nature of and lack of factual support in the affidavit, the appellate court affirmed the trial court's summary judgment dismissal of the plaintiffs' claims. *Id.* at 27, 851 P.2d at 694.

The situation in *Guile* is analogous. Ms. Keck argues merely that "Dr. Li reviewed Keck's medical records and concluded that Chad and Patrick Collins had

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[7] After receiving the doctors' reply briefs in support of their motion for summary judgment (which argued that Dr. Li's second affidavit was insufficient to defeat summary judgment), Dr. Li submitted a third untimely affidavit, one day before the hearing on summary judgment. That affidavit can only be seen as a concession that the second affidavit was insufficient to defeat summary judgment.

violated the standard of care by failing to adequately respond to the infection and non-union of Keck's jaw bones, and they had thereby caused Keck to suffer injury."[8] In support of that broad, conclusory statement, Appellants cite generally to the Appendix. Upon inspection, however, Dr. Dr. Li's second affidavit does not point to any specific facts to support his general conclusions. With regard to the alleged standard of care violations by Dr. Chad Collins, Dr. Li's second affidavit[9] said only that:

> As part of my review, I looked at the procedures performed by Drs. Chad and Patrick Collins (the surgeons) as well as the problems experienced by Plaintiff Darla Keck. In doing so, I have identified standard of care violations that resulted in infection and in non-union of Ms. Keck's jaw. This, in turn, has resulted in a prolonged course of recovery with numerous additional procedures to repair the ongoing problems which I understand have still not resolved.
> ***
> The surgeons performed multiple operations without really addressing the problem of non-union and infection within the standard of care.
> ***
> The standard of care violations as outlined herein were the proximate cause of Ms. Keck's injuries and/or ongoing problems.

CP 47-48.

These statements are conclusory, make only general references to facts in medical records, and do not raise issues of material fact regarding either standard

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[8] Appellants' Opening Brief at p. 20.

[9] Dr. Li's second affidavit is silent as to informed consent, and on that basis the trial court granted summary judgment dismissal of Ms. Keck's informed consent claim. Ms. Keck does not appeal that decision.

of care or causation. Dr. Li does not state how he came to this conclusion and what facts it is based on. Dr. Li's second affidavit claims he has "identified standard of care violations" yet he does not set forth a single fact of a standard of care violation which allegedly "resulted in infection and in non-union." These conclusory statements, lacking in any factual support, fail to establish "specific facts showing that there is a genuine issue for trial. *See e.g., Van Leven v. Kretzler*, 56 Wn. App. 349, 56 Wn. App. 349 (Div. 1, 1989). In *Van Leven*, the plaintiff's expert's standard of care opinion concluded:

> From reviewing the incomplete files and records that have been supplied to me, it appears more probable than not that the care and treatment provided by [defendant] fell below the standard of care in this medical community for the treatment....

56 Wn. App. at 351, 783 P.2d at 613. The trial court granted summary judgment on the basis that the plaintiff's expert failed to discuss the defendant's detailed factual account of surgery. On appeal, the *Van Leven* Court affirmed summary judgment on the basis that the plaintiff failed to raise a material factual issue because the plaintiff's expert failed to identify any facts supporting the expert's general conclusion.[10] *Id.*, at 356.

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[10] Ms. Keck's attempt to distinguish *Van Leven* is based on an inaccurate summary of the holding. *See* Appellants' Opening Brief at 23. The summary conclusion of the plaintiff's expert in *Van Leven*, which was rejected by the trial court and the appellate court, is nearly identical to the summary conclusions of Dr. Li rejected

Dr. Li's second affidavit is insufficient to deny summary judgment because it does not state what the multiple operations were, why they were not within the standard of care and what was deficient in these procedures relative to the problem of non-union and infection. Notably, Ms. Keck fails to point this Court to any specific factual support in Dr. Li's second affidavit that is arguably sufficient to defeat summary judgment. Instead, Ms. Keck asks this Court to conclude that in every medical negligence case it is sufficient to defeat summary judgment be submitting an affidavit that says generally that the defendant doctor did not address the problem and that there is a standard of care violation, without stating what violation or how or why the facts support that allegation. Without more, that cannot be sufficient to defeat summary judgment under any evidentiary standard. *See e.g., Doe v. Puget Sound Blood Ctr.*, 117 Wash.2d 772, 787, 819 P.2d 370, 378 (1991) ("The opinion of an expert which is only a conclusion or which is based on assumptions is not evidence which satisfies the summary judgment standards because it is not evidence which will take a case to the jury."); *Sewell v. King County Hosp. Dist. No. 2*, 121 Wn. App. 1036 (2004) (finding

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by the trial court in this case. Ms. Keck concedes that factual support of the expert's opinion was missing in *Van Leven*. *Id.* Ms. Keck argues that they rejected the affidavit because the expert had incomplete files. Regardless, the *Van Leven* Court's decision affirmed summary judgment dismissal because the plaintiff's expert "failed to identify any facts supporting" his conclusions. *Van Leven*, 56 Wn. App. at 356, 783 P.2d at 615.

conclusory affidavit insufficient to establish causation because it failed to explain what remedial action would have been taken and how it would have prevented the later consequences; and finding expert doctor testimony that if he had been involved he "would have done something" too vague to establish a basis for the inference of a causal connection) (citing *Guile v. Ballard Community Hospital*, 70 Wn. App. 18, 26, 851 P.2d 689 (1993)). The trial court appropriately determined that "[t]he information contained in these two sworn statements was insufficient to connect Dr. Li's opinions to specific identified facts which would support the contention that the defendants' actions fell below the requisite standard of care." CP 102.

Contrary to Ms. Keck's argument that this Court is not required to follow *Guile*, Ms. Keck fails to address the fact that this Court and the Washington Supreme Court have previously relied on *Guile*. *See e.g. Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 183 P.3d 283 (Div. 3, 2008) (noting that the plaintiff's expert declarations contained conclusory statements failing to causally link the alleged breach of the standard of care to the specific facts and injury complained of and stating that "[a]ffidavits containing conclusory statements without adequate factual support are insufficient to defeat a motion for summary judgment."), *citing Guile*, 70 Wn. App. at 25, 851 P.2d 689; and *Stewart-Graves v. Vaughn*, 162 Wn.2d 115, 170 P.3d 1151 (2007) (holding that expert opinion

proffered by plaintiff was insufficient to raise an issue of material fact as to standard of care and citing *Guile's* holding that an unsupported assertion that a physician violated the standard of care is insufficient to raise a genuine issue of material fact).

4. Ms. Keck's claim that ER 704 and ER 705 are inconsistent with CR 56 is wrong and contradicts established Washington case law.

Ms. Keck seems to argue that experts can rattle off unsupported conclusions in connection with summary judgment proceeding under the guise of ER 704 and ER 704 because experts can opine as to the ultimate issue, but that is contrary to established law and that position is not supported by the authority cited by Ms. Keck.

The cases cited by Ms. Keck to support her argument that ER 704 and ER 705 are inconsistent with and or trump CR 56(e) are not on point. *See* Appellants' Opening Brief at 20. For example, the Court of Appeals' decision in *Guile* is not at odds with the same court's decision in *Coggle v. Snow*, 56 Wn. App. 499, 511, 784 P.2d 554 (1990). In *Coggle*, the expert's affidavits submitted on reconsideration identified specific facts and specific courses of action that allegedly resulted in specific standard of care violations. Dr. Li's affidavits do not establish either. Further, *Group Health Co-op. of Puget Sound, Inc. v. State Department of Revenue*, 106 Wn.2d 391, 397-401, 722 P.2d 787 (1986) is

inapplicable because the testimony of the plaintiff's expert in that case was detailed and specific, unlike Dr. Li's affidavits.

Second, Ms. Keck's argument is not supported by Washington case law. "ER 705 by its language, is limited to trial testimony, not declaration testimony. Washington courts have rejected the rule's application in summary judgment proceedings, finding instead that an expert's testimony for summary judgment must be supported by the specific facts underlying the opinion." *Anderson Hay & Grain Co., Inc. v. United Dominion Indus., Inc.*, 119 Wn. App. 249, 259, 76 P.3d 1205, 1209 (2003) (citing *Rothweiler v. Clark County*, 108 Wn. App. 91, 100-01, 29 P.3d 758 (2001), *review denied*, 145 Wn.2d 1029, 42 P.3d 975 (2002); *Sunbreaker Condo. Ass'n v. Travelers Ins. Co.*, 79 Wn. App. 368, 374, 901 P.2d 1079 (1995); *Hash by Hash v. Children's Orthopedic Hosp.*, 49 Wn. App. 130, 134-135, 741 P.2d 584 (1987).

Ms. Keck fails to show how Dr. Li's second affidavit is sufficient to defeat summary judgment under any evidentiary standard. The trial court properly dismissed the post-operative negligence claims against Dr. Chad Collins.

5. Even if the trial court had considered Dr. Li's third, untimely declaration filed the day before the summary judgment hearing, it would not be sufficient to defeat summary judgment.

Although Ms. Keck argues that the trial court should have considered the third, untimely affidavit of Dr. Li, Ms. Keck fails to how anything in Dr. Li's third affidavit would have been sufficient to defeat summary judgment. Instead of presenting a clear, reasoned argument showing how Dr. Li's third affidavit would, had it been admitted, have been sufficient and competent to prove a prima facie case of negligence, Ms. Keck indulges a sophistry: she argues that the defendant doctors "did not complain that the third affidavit lacked sufficient detail."[11] That is true, of course because the doctors had no opportunity to respond to Dr. Li's third affidavit which was untimely, having been filed the day before the oral hearing on the motion for summary judgment and because the trial court did not consider the affidavit in ruling on summary judgment. Even in her motion for reconsideration, Ms. Keck declined to explain how Dr. Li's third declaration might succeed with specific, fact-based opinions where his first two declarations failed. CP 114-123. She could not.

[11] Appellants' Opening Brief at p. 19.

Dr. Li's third affidavit does not offer anything other than a recitation of Ms. Keck's medical treatment by Dr. Chad Collins[12], a general conclusion that the "multiple operations failed to address the problem of the non-union infection" and the "multiple operations as outlined herein were done without Defendants addressing the problem of non-union infection." CP 80, 82. Again, there is no factual basis to support this conclusion. Dr. Li does not ever state why those surgeries were not within the standard of care or what was deficient in these procedures relative to the problem of non-union and infection.

C. The Trial Court Did Not Abuse Its Discretion In Denying Ms. Keck's CR 56(f) Motion To Continue Where She Did Not Identify Any Discovery She Needed To Respond To Summary Judgment And Where She Failed To Offer Any Good Reason For The Delay.

1. The trial court's order denying Ms. Keck's CR 56(f) motion is reviewed for abuse of discretion.

A party does not have an absolute right to a continuance. *See Willapa Trading Co. v. Muscanto, Inc.*, 45 Wn. App. 779, 785, 727 P.2d 687 (1986). CR 56(f) provides that "the court ... *may* order a continuance" to permit further discovery. (emphasis added). Where the decision of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion. *Farmer v. Davis*, 161 Wn. App. 420, 430, 250 P.3d 138, 143 (Div.

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[12] Dr. Li's third affidavit is undisputedly factually inaccurate in several regards as discussed, *infra*, Argument, Section E (discussing summary judgment dismissal of the negligent referral claim).

3, 2011). The trial court's denial of Ms. Keck's CR 56(f) motion cannot be disturbed absent a manifest abuse of discretion.[13] *Tellevik v. Real Property*, 120 Wn.2d 68, 90, 838 P.2d 111 (1992); *Lewis v. Bell*, 45 Wn. App. 192, 196, 724 P.2d 425, 428 (Div. 3, 1986) (affirming trial court's denial of CR 56(f) continuance where no explanation was given for plaintiff's failure to depose witnesses in 16 months the action was pending and failed to explain what evidence could be obtained). Discretion is abused when it is based on untenable grounds or is manifestly unreasonable. *Farmer*, *supra.* 38.

2. The trial court did not abuse its discretion by denying Ms. Keck's CR 56(f) motion because she did not identify the need for any specific discovery and she did not offer a good reason for the delay in obtaining the information needed to respond to summary judgment.

Denial of a CR 56(f) motion is proper when (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

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[13] Relying again on *Folsom v. Burger King*, 135 Wn.2d 658, 968 P.2d 301 (1998), Ms. Keck appears to argue that the trial court's denial of the CR 56(f) motion is reviewed *de novo*. *See* Appellants' Opening Brief at 16-17. But Ms. Keck's reliance on *Folsom* for that assertion is misplaced and ignores Washington State Supreme Court authority decided after *Folsom*. *Pitzer v. Union Bank of Cal.*, 141 Wn.2d 539, 556, 9 P.3d 805, 814 (2000) (reviewing a trial court's denial of a CR 56(f) motion for abuse of discretion even though the motion was denied in connection with a summary judgment).

material fact. *Pelton v. Tri-State Mem'l Hosp., Inc.*, 66 Wn. App. 350, 356, 831 P.2d 1147, 1151 (Div. 3, 1992) (citing *Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474, 476-77 (Div. 1, 1989). Denial is proper if grounded on any one of these three prongs. *Id.* Denial of Ms. Keck's motion was proper because the trial court grounded it in both prongs 1 and 2[14].

CR 56(f) permits the trial court to order a continuance to present "facts" that Ms. Keck was unable to present before the hearing. But Ms. Keck was not seeking additional discovery of facts and she did not identify any evidence that allegedly would have been established through additional discovery. All of the facts that Ms. Keck wanted to present at summary judgment were already known; there is no dispute that the contents of Dr. Li's third affidavit were known at the time he submitted his timely, first affidavit and his second affidavit. Rather, she sought a continuance as a creative means of trying to convince the court to avoid denying the motion to strike Dr. Li's third, untimely affidavit where she was unable to show excusable neglect for filing the affidavit one day before the summary judgment hearing. CR 56(f) was not an appropriate vehicle of relief for Ms. Keck under these circumstances where she did not seek further discovery.

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[14] The trial court did not consider the third affidavit of Dr. Li, but it if had, it could have grounded its denial of the CR 56(f) motion in prong 3 also because the third affidavit of Dr. Li did not raise a genuine issue of material fact sufficient to defeat summary judgment.

The trial court did not abuse its discretion in denying Ms. Keck's CR 56(f) motion under the second prong of the test.

Denial is proper under the first prong too because Ms. Keck did not offer any good reason for the delay in obtaining the information in Dr. Li's third affidavit. Ms. Keck argued only that a continuance was necessary because her lawyer had been in trial from March 7 through March 20, 2012. CP 76. But that argument failed to address all of the facts. For example, that argument does not explain why the first affidavit or the second affidavit of Dr. Li, which were filed during that timeframe, did not include the information that was found in the third, untimely affidavit (information that was known at the time the earlier affidavits were signed and filed). And Ms. Keck does not explain why she timely responded to the summary judgment motion instead of moving for a continuance. The CR 56(f) motion ignored the fact that the defendants first filed their motion for summary judgment in December 2011, more than a year after Ms. Keck filed her lawsuit, a full year after she consulted Dr. Li as her expert, four months after she identified Dr. Li as her expert, and after the first discovery cut-off had expired. CP 194, 195. At Ms. Keck's request, the summary judgment motion had already been continued three months (from December 2011 to March 2012), but no explanation was offered as to why those four months were insufficient to

complete Dr. Li's affidavit. Under those circumstances, the trial court did not abuse its discretion by denying Ms. Kecks' CR 56(f) motion for continuance.

D. The Trial Court Did Not Abuse Its Discretion In Denying Ms. Keck's Motion For Reconsideration Where It Is Undisputed That No New Evidence Was Presented And Where No Legal Errors Were Made.

1. The trial court's order denying the motion for reconsideration may not be reversed absent a showing of manifest abuse of discretion.

Motions for reconsideration are within the sound discretion of the trial court and will not be reversed absent a showing of a manifest abuse of discretion. *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wash.2d 674, 685, 41 P.3d 1175, 1180 (2002); *Hook v. Lincoln Cnty. Noxious Weed Control Bd.*, 166 Wn. App. 145, 158, 269 P.3d 1056, 1063 (Div. 3, 2012). A trial court abuses its discretion only if its decision is manifestly unreasonable or rests upon untenable grounds or reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). "An abuse of discretion exists only if no reasonable person would have taken the view adopted by the trial court." *Holaday v. Merceri*, 49 Wn. App. 321, 324, 742 P.2d 127, 129 (Div. 1, 1987).

2. The trial court did not abuse its discretion in denying Ms. Keck's motion for reconsideration because Dr. Li's third affidavit does not qualify as "new" evidence and it is undisputed that the information in the third affidavit was known at the time the first, timely affidavit was filed.

Ms. Keck contends reconsideration is warranted pursuant to CR 59(a)(7) - (9) "based upon legal error or substantial justice."[15] Specifically, Ms. Keck argues that the trial court abused its discretion by failing to grant reconsideration based on Dr. Li's third affidavit.[16] Ms. Keck relies solely on *Schoening v. Grays Harbor Community Hospital*, 40 Wn. App. 331, 333 n. 1, 698 P.2d 593 (Div. 2, 1985) to support her argument that the trial court committed a "legal error" in failing to grant reconsideration based on the third affidavit of Dr. Li. *Schoening* does not support Ms. Keck's argument. In *Schoening*, the trial court filed a memorandum decision indicating it intended to dismiss the plaintiff's claims on summary judgment; then the plaintiffs moved for reconsideration and filed an affidavit of a medical expert; and the trial court considered that affidavit, even though it was filed after the memorandum decision but adhered to its earlier decision and granted summary judgment. Notably, in *Schoening*, there was no objection to the late-filed affidavit. On appeal, Division 2 did not hold that the

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[15] Ms. Keck cites CR 59(a)(7) but does not explain how or why reconsideration was warranted under that rule. Based on her arguments, it appears Ms. Keck is relying on CR 59(a)(8) and (9).

[16] Appellants' Opening Brief, at p. 28.

trial court was required to consider the new affidavit on reconsideration and Division 2 did not discuss the applicable rules or the case law governing the acceptance of untimely affidavits. Those issues were not before the *Schoening* Court; it simply noted that the trial court had considered the affidavit and so it too considered the affidavit on appeal where there was no objection. *Schoening* is applicable only to the extent it recognizes the trial court's discretion in deciding whether to accept a late affidavit.

"[A] summary judgment hearing afford[s] the parties ample opportunity to present evidence, and if the evidence was available but not offered until after that opportunity passes, the parties are not entitled to another opportunity to submit that evidence." *Wagner Dev., Inc. v. Fid. & Deposit Co. of Maryland*, 95 Wn. App. 896, 907, 977 P.2d 639, 645 (Div. 2, 1999) (citing *Meridian Minerals Co. v. King County*, 61 Wn. App. 195, 203, 810 P.2d 31 (1991)). Ms. Keck's "realization that [the] first [and second] declaration [from Dr. Li] was insufficient does not qualify the [third] declaration as newly discovered evidence. The motion for reconsideration was properly rejected by the trial court." *Adams v. W. Host, Inc.*, 55 Wn. App. 601, 608, 779 P.2d 281, 285 (Div. 1, 1989) (rejecting plaintiff's contention that she was unable to obtain her expert's second declaration in the time between receipt by her attorney of the brief and the date of the hearing does not satisfy the definition of "newly discovered" evidence where the testimony in

the second declaration was available at the time the first declaration was presented to the court). Here, the additional evidence Ms. Keck presented on reconsideration through the third affidavit of Dr. Li was available when the motion for summary judgment was filed (and it was available when the first and second affidavits were submitted).

Moreover, Ms. Keck's motion for reconsideration did not attempt to show how the third affidavit would have been sufficient to defeat summary judgment; it was not. The trial court did not abuse its discretion in denying the motion for reconsideration.

E. The Trial Court Did Not Err In Granting Dr. Chad Collins' Motion For Summary Judgment Dismissal Of The Remaining Negligent Referral Claim.

1. Summary judgment standard

In a medical negligence case, a defendant may move for summary judgment based on absence of competent medical evidence to establish a prima facie case. *Colwell*, 104 Wn. App. at 611-12, 15 P.3d at 213 (Div. 3, 2001) (citing *Young*, 112 Wn.2d at 226, 770 P.2d 182 (1989)). A plaintiff must present material issues of fact to defeat summary judgment. Not all disputed issues of fact are sufficient to defeat a motion for summary judgment; only a "genuine issue of material fact" can defeat a motion for summary judgment. "A material fact is one

upon which the outcome of the litigation depends in whole or in part." *Samis Land Co. v. City of Soap Lake*, 143 Wn. 2d 798, 803, 23 P.3d 477, 481 (2001).

A trial court's summary judgment order may be affirmed on any basis supported by the record. *Davies*, 144 Wn. App. at 491, 183 P.3d at 287 (Div. 3, 2008) (citing *Redding v. Virginia Mason Med. Ctr.*, 75 Wn. App. 424, 426, 878 P.2d 483 (Div. 1, 1994)). Questions of fact may be determined on summary judgment as a matter of law where reasonable minds could reach but one conclusion. *Swinehart*, 145 Wn. App. at 844, 187 P.3d at 349-50.

2. There are no material issues of fact related to Ms. Keck's negligent referral claim against Dr. Chad Collins where it is undisputed he was the sole care provider for the infection and non-union of the jaw and made no referral to any other physician for those issues.

a. The material facts set forth in the Affidavit of Dr. Chad Collins were undisputed in connection with his motion for summary judgment dismissal of Ms. Keck's negligent referral claim.

In connection with his motion for summary judgment, Dr. Chad Collins submitted a Statement of Undisputed Material Facts, which consisted of 54 separate factual statements concerning the doctors' care, as well as 13 exhibits taken from Dr. Chad Collins' affidavit. Of the 54 facts on which Dr. Chad Collins relied to support his summary judgment, 45 of those facts were not disputed by

Ms. Keck. None of the 9 facts arguably disputed by Ms. Keck create a triable issue of material fact. CP 311--329 and 129-160.

b. Dr. Li's fourth affidavit was not competent to create a triable issue of fact where it was based upon assumptions that the records show were untrue.

Ms. Keck's negligent referral claim alleged that Dr. Chad Collins negligently referred post-operative issues of infection and non-union of the jaw to Ms. Keck's general dentist, Dr. Olsen. The undisputed facts show that there never was such a referral, much less a negligent referral. While Ms. Keck did have a non-union of her jaw and infection post-operatively, Dr. Chad Collins never turned over management of these problems.

The author of Ms. Keck's negligent referral claim was Dr. Li, through his fourth affidavit. CP 258-261. That was the only medical expert testimony offered by Ms. Keck to establish standard of care and proximate cause for her claim. Regarding the claim for negligent referral against Dr. Chad Collins, Dr. Li concluded:

> It continues to be my opinion that Defendants were negligent in failing to refer Mrs. Keck to an oral surgeon, plastic surgeon or an Ear, Nose and Throat (ENT) doctor as opposed to a general dentist such as Dr. Olsen who would not have sufficient training or knowledge to deal with Mrs. Keck's non-union and the developing infection/osteomyelitis.
> ***
> To the extent it is not clear, it was and continues to be my opinion that Drs. Chad and Patrick Collins were negligent in failing to refer

> Mrs. Keck to an oral surgeon, plastic surgeon or ENT who was competent to address her non-union and ongoing infection. Referring Mrs. Keck a general dentist such as Dr. Olsen was negligent in that Dr. Olsen or other general dentists would not have sufficient training or knowledge to deal with Mrs. Keck's problems following her first surgery.

CP 259, ¶3 and CP 261, ¶10.

Dr. Li's suggestion that there was a standard of care violation in failing to refer Ms. Keck to an oral surgeon is a *non sequitur*. Dr. Collins *is* an oral surgeon and he was the treating physician for the non-union and ongoing infection issues from January 22, 2008 (the point the occurred), forward. The undisputed records revealed that Dr. Olsen was never asked to do anything other than assess Ms. Keck's bite, and there are no records of any referral to Dr. Olsen to handle the non-union and infection issues. The requested assistance by general dentist Dr. Olsen to assess Ms. Keck's bite was completed on December 17, 2007. CP 134. On December 26, 2007, Dr. Chad Collins examined Ms. Keck in a follow up visit at which point the surgery appeared successful and Ms. Keck was instructed to return only as needed. CP 134. The undisputed records also demonstrated that whatever Dr. Olsen did regarding infection after that was without Dr. Collins' request, input or direction. CP 134. After December 26, 2007, no problems were reported until Dr. Olsen called Dr. Chad Collins on January 22, 2008. CP 134. Dr. Collins scheduled Ms. Keck for an appointment the very next day, at which

time he diagnosed the hardware infection and non-union problem and took Ms. Keck to surgery to treat the non-union and infection the next day, January 23, 2008.[17] CP 134-135. The non-union occurred sometime between December 26, 2007 and January 22, 2008, and Dr. Chad Collins was unaware of any problems until January 22, 2008. CP 134-135.

The undisputed facts revealed that Dr. Chad Collins personally treated the infection surgically and that he was the sole care provider for the non-union issue. Dr. Collins had office visits with Ms. Keck on the non-union and infection issues on January 23, 2008, February 11, 2008, March 3, 2008, March 18, 2008, June 11, 2008 and July 23, 2008. CP 133-137. Dr. Chad Collins performed surgical procedures on January 24, 2008, March 18, 2008 and July 18, 208 to treat the non-union and infection issues. *Id.* There was no relinquishment of the non-union and hardware infection issues until after September 15, 2008, when Ms. Keck

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[17] In opposition to summary judgment, Ms. Keck submitted the affidavit of Dr. Haller in an attempt to create an issue of fact. Dr. Haller's Affidavit, however, does not present any material issues. He states there was never a referral to him for non-union or infection. On December 8, 2008, Ms. Keck presented to the emergency department and she was diagnosed with a wound infection. The emergency department doctor consulted with Dr. Haller, who in turn, consulted with Dr. Collins and treated the wound infection and referred Ms. Keck back to Dr. Collins. Dr. Haller provided no treatment to Ms. Keck after December 12, 2007, and it is undisputed that he was not asked to do so. As of the date of Dr. Haller's involvement, the non-union and hardware infection did not exist, so there could be no referral of those issues to Dr. Haller.

decided to transfer care. *Id.* Summary judgment dismissal of Ms. Keck's negligent referral claim should be affirmed.

VI. CONCLUSION

This Court should affirm the trial court's summary judgment dismissal of Ms. Keck's claims.

RESPECTFULLY SUBMITTED this 10th day of May, 2013.

WITHERSPOON • KELLEY

By: _____
Geana M. Van Dessel, WSBA No. 35969
Brian T. Rekofke, WSBA No. 13260

Attorneys for Defendants Chad P. Collins, DMD, and Collins Oral & Maxillofacial Surgery, P.S.

DECLARATION OF SERVICE

I declare that I sent a true and correct copy of the foregoing by the method indicated below and addressed to counsel for the Appellants:

Mark Kamitomo The Markam Group, Inc. P.S. 421 West Riverside, Suite 1060 Spokane, WA 99201	__X_ U.S. Mail _____ Hand-Delivered _____ Overnight Mail _____ Facsimile 747-1993 __X__ Email: mark@markamgrp.com
George M. Ahrend Ahrend Albrecht PLLC 16 Basis Street S.W. Ephrata, WA 98823	__X_ U.S. Mail _____ Hand-Delivered _____ Overnight Mail _____ Facsimile (509) 464-6290 ___X_ Email: gahrend@trialappeallaw.com scanet@trialappeallaw.com (by agreement of the parties)

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 6th day of May 2013, in Spokane, Washington.

Lennie Rasmussen