No. 324869

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

LORI A. SWEENEY, and JEROLD L. SWEENEY, husband and wife,

Plaintiffs-Appellants,

vs.

ADAMS COUNTY PUBLIC HOSPITAL DISTRICT NO. 2, d/b/a EAST ADAMS RURAL HOSPITAL; and ALLEN D. NOBLE, PA-C and JANE DOES NOBLE, husband and wife and the marital community composed thereof; and JAMES N. DUNLAP, M.D. and JANE DOE DUNLAP, husband and wife and the marital community composed thereof; and PROVIDENCE HEALTH SERVICES, d/b/a PROVIDENCE ORTHOPEDIC SPECIALTIES, a Washington corporation,

Defendants-Respondents.

APPELLANTS' SUPPLEMENTAL BRIEF

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Appellants Lori Sweeney and her husband, Jerold (collectively Sweeney), submit this supplemental brief regarding the application of *Keck v. Collins*, 184 Wn. 2d 358, 357 P.3d 1080 (2015), pursuant to the letter from the Clerk dated November 16, 2015.[1]

I. INTRODUCTION

As it pertains to this case, *Keck* addresses the sufficiency of expert affidavits submitted in opposition to summary judgment in a medical negligence action. Under the rule of law stated in *Keck,* and by comparison with the underlying facts in *Keck*, the expert testimony submitted by Sweeney is sufficient to create genuine issues of material fact for trial regarding breaches of the standard of care and causation of Sweeney's injuries by Allen D. Noble, PA-C, for which his marital community and employer are liable (collectively Noble).

Keck does not have any bearing on resolution of Sweeney's appeal involving Respondents James N. Dunlap, M.D., his marital community, and his employer (collectively Dunlap). The appeal as to Dunlap raises issues regarding accrual under the applicable

[1] A copy of the Clerk's letter and the *Keck* decision are reproduced in the Appendix.

statute of limitations, and relation back of party amendments for purposes of the statute of limitations, neither of which is addressed in *Keck*.

II. SUPPLEMENTAL ARGUMENT

A. Under *Keck*, an expert affidavit is sufficient to avoid summary judgment in a medical negligence action if, when viewed in the light most favorable to the plaintiff-patient, it states what a reasonable doctor would or would not have done, that the defendant-doctor failed to act in that manner, and that such failure caused the plaintiff-patient's injuries.

In *Keck*, the Court delineated what is required of an expert affidavit:

> A plaintiff seeking damages for medical malpractice must prove his or her "injury resulted from the failure of a health care provider to follow the accepted standard of care." RCW 7.70.030(1). The standard of care means "that degree of care, skill, and learning expected of a reasonably prudent health care provider at 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" (reasonable doctor). RCW 7.70.040(1). *To sustain a verdict, Keck needs an expert to say what a reasonable doctor would or would not have done, that the Doctors failed to act in that manner, and that this failure caused her injuries.*

184 Wn.2d at 371 (emphasis added). It is not necessary for the expert to detail all of the alleged injuries caused by breach of the standard of care. *See id.* at 372 n.9. On summary judgment, the

sufficiency of an expert affidavit evaluated in the light most favorable to the non-moving party. *See id.* at 372.[2]

Applying this standard to the facts of *Keck*, the Supreme Court found the following expert testimony regarding the standard of care sufficient:

> The surgeons performed multiple operations without really addressing the problem of non-union and infection [of the plaintiff-patient's jaw] within the standard of care.

Id. at 365 & 371 (quoting ¶ 5 of the second affidavit of Dr. Li).

> 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 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 infection/osteomyelitis.

Id. at 365 & 371 (quoting ¶ 6 of the second affidavit of Dr. Li); *accord id.* at 372 (stating "[w]hen taken in the light most favorable to the nonmoving party, Dr. Li's affidavit establishes the applicable standard of care and that the defendants breached it").

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[2] The Court rejected a more stringent standard based on *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), and distinguished *Guile* on several grounds: (1) the affidavit in *Guile* failed to establish the applicable standard of care, i.e., how the defendant acted negligently; (2) the expert in *Guile* failed to link his conclusions to any factual basis, including his review of the medical records; and (3) the expert in *Guile* may have been unqualified to testify about the standard of care. *See Keck*, 184 Wn. 2d at 372-73 & nn.10-11. In any event, statements regarding the sufficiency of expert affidavits in *Guile* have been superseded by the Court's pronouncement in *Keck*.

The Court in *Keck* also found the following expert testimony regarding proximate cause sufficient:

> The standard of care violations as outlined herein were the proximate cause of Ms. Keck's injuries and/or ongoing problems.

Id. at 365 (quoting ¶ 7 of the second affidavit of Dr. Li); *accord id.* at 372 (stating "Dr. Li stated that these violations proximately caused Keck's injuries" and "provided the necessary testimony to establish a prima facie case of medical malpractice").[3]

B. The expert testimony submitted by Sweeney satisfies the requirements of *Keck*, and summary judgment in favor of Noble should be reversed on this basis.

Steven R. Graboff, M.D., an orthopedic surgeon with experience supervising physician assistants, testified that Noble "departed from the reasonable and accepted standards of medical care" as follows:

- "Mr. Noble fell below the standard of care by failing to call an orthopedic surgeon to come to the emergency department and to treat the condition with conscious sedation or anesthesia." CP 282 (Graboff declaration, ¶ 19(B)).
- "Mr. Noble fell below the standard of care by failing to diagnose a pre-reduction potential anatomic neck fracture[.]" CP 282 (Graboff declaration, ¶ 19(C); brackets added).

---

[3] The second affidavit of Dr. Li is quoted at length in the *Keck* opinion. *See* 184 Wn. 2d at 364-65. A complete copy of the affidavit is reproduced in the Appendix.

- "Mr. Noble fell below the standard of care by failing to perform ancillary studies in the presence of greater tuberosity fracture such as MRI scan or CT scan to delineate the damage and pathology to the shoulder prior to attempting a reduction maneuver." CP 282 (Graboff declaration, ¶ 19(D)).

- "Mr. Noble was negligent in attempting a reduction ... in the emergency room without anesthesia in the presence of a fracture dislocation." CP 282-83 (Graboff declaration, ¶ 19(E); ellipses added).[4]

Similarly, Jeffrey Nicholson, who is a certified physician assistant, testified that "Mr. Noble fell below the applicable standard of care" in the following ways:

- "Mr. Noble should not have attempted to reduce this fracture dislocation without the direction and leadership of an orthopedist present or a supervising physician present and taking charge[,]" and "attempting to do so autonomously breached the standard of care." CP 354 (Nicholson declaration, ¶ 6(a) & (b); brackets added); *see also* CP 353 (¶ 5(a)-(c), noting Noble's lack of experience and training to provide the treatment he rendered to Sweeney).

- "After having attempt[ed] unsuccessfully to perform a closed reduction, Mr. Noble's second and third attempts fell below the standard of care." CP 354 (Nicholson declaration, ¶ 6(c)).[5]

Both Dr. Graboff and Mr. Nicholson also attested to the causal relationship between the foregoing breaches of the standard of care and Sweeney's injuries. Dr. Graboff testified:

---

[4] Dr. Graboff's complete declaration is reproduced in the Appendix.
[5] Mr. Nicholson's complete declaration is reproduced in the Appendix.

> As a direct and proximate cause of conduct described above, which fell below the standard of care, Ms. Sweeney sustained the following injuries on a more probable than not basis and to a reasonable degree of medical certainty:
>
> A. An at least 3-part comminuted fracture dislocation of the right shoulder and proximal humerus and humeral head.
>
> B. The need for total shoulder replacement surgery on 4/28/10.
>
> C. The need for subsequent rotator cuff repair ....
>
> D. The need for reverse total shoulder replacement in June of 2013 ....
>
> E. Chronic pain and dysfunction of the right upper extremity.

CP 283-84 (Graboff declaration, ¶ 20(A)-(E); ellipses added). For his part, Mr. Nicholson testified:

> As a proximate cause of the breach of the standard of care for emergency physician assistants, Mrs. Sweeney sustained what is likely a permanent injury to her right upper extremity.

CP 354 (Nicholson declaration, ¶ 7); *see also* CP 287 (declaration of radiologist Randall M. Patten, M.D., ¶¶ 5-6, confirming absence of fracture before manipulation attempted by Nobel).

The foregoing testimony satisfies the requirements of *Keck* and compares favorably to the affidavit found to be sufficient by the

Supreme Court in that case.[6] As a result, this Court should reverse summary judgment in favor of Noble and remand this case for trial.

Respectfully submitted this 16th day of December, 2015.

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[6] None of the grounds on which the Court in *Keck* distinguished *Guile* are present here. As the quoted testimony reveals, both Dr. Graboff and Mr. Nicholson identified the standard of care and the factual basis for their opinions that Noble violated the standard of care in their declarations. Both of them are also unquestionably qualified to render their opinions.

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 December 16, 2015, I served the document to which this is annexed by email and First Class Mail, postage prepaid, as follows:

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and upon Appellants' co-counsel, Kyle Olive and William A. Gilbert, via email pursuant to prior agreement for electronic service, as follows:

William A. Gilbert at bill@wagilbert.com; suzette@wagilbert.com

Signed on December 16, 2015 at Ephrata, Washington.

Shari M. Canet, Paralegal

APPENDIX

Renee S. Townsley
Clerk/Administrator

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November 16, 2015

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CASE # 324869
Lori Sweeney, et vir v. Adams County Public Hospital District, et al
ADAMS COUNTY SUPERIOR COURT No. 132001261

Counsel:

The following notation ruling was entered:

November 16, 2015
The Washington State Supreme Court has decided and mandated Darla Keck, et ux, etl al v. Chad P. Collins, D.M.D., et al, #903573. Therefore, the stay of these proceedings is lifted.
Renee S. Townsley
Clerk

Both appellant and respondents counsel may file a supplemental brief regarding the application of Darla Keck, et ux, etl al v. Chad P. Collins, D.M.D., et al within 30 days from the date of this letter, by **December 16, 2015**. However, if you do not intend to file a supplemental brief, please notify this court in writing within 10-days, by **November 30, 2015**.

Sincerely,

RENEE S. TOWNSLEY
Clerk/Administrator

Joyce A. Roberts, Senior Case Manager

RST:jr

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

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

Plaintiffs,

vs.

CHAD P. COLLINS, D.M.D., PATRICK C. COLLINS, D.D.S., COLLINS ORAL & MAXILLOFACIAL SURGERY, P.S., a Washington Corporation, and SACRED HEART MEDICAL CENTER, a Washington Corporation,

Defendants.

No. 10-2-04960-1

AFFIDAVIT OF KASEY LI, M.D.

I, KASEY LI, M.D., state as follows:

1. I am Physician Board Certified in Otolaryngology and Oral Surgery. I practice both Otolaryngology and Plastic Reconstructive Surgery at Stanford Hospital in Stanford, California and am on the faculty of the hospital. Additionally, I am the founder of the Sleep Apnea Surgery Center, also located at Stanford. Among other things, I am a specialist in the diagnosis, surgery and

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treatment of sleep apnea. Furthermore, I am licensed to practice in the State of Washington and have consulting privileges at Virginia Mason.

2. I am familiar with the standard of care in Washington State as it relates to the treatment of sleep apnea and the procedures involved in Ms. Keck's case. In addition to being involved in another case in Spokane and having discussed that case with an Otolaryngologist at the University of Washington, I lecture in Washington State on many issues which include those involved in this case and, as part of that, interact with the participants and have discussions that confirm that the standard of care in Washington State is the same as a national standard of care. Additionally in my position, I interact with oral surgeons from the State of Washington which include former students from Stanford University. Given my knowledge, it is my opinion that the standard of care involved in Ms. Keck's case in Washington State is a national standard of care.

3. I have reviewed medical records from Drs. Chad and Patrick Collins, Western Mountain Clinic, Dr. Higuchi, Deaconess Medical Center, Dr. Read, Dr. Ramien, St Patrick's Hospital, Sacred Heart Hospital, imaging photos and disks, and medical records from Cosmetic Surgical Arts Center and Dr. George M. Olsen, D.D.S. 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 the 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.

4. According to the medical records, on November 26, 2007, Darla Keck was seen by the surgeons to address sleep apnea which was moderate to severe with a sleep score of 20. From the records, it appears that Ms. Keck was intolerant of CPAP.

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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 infection/osteomyelitis.

7. The standard of care violations as outlined herein were the proximate cause of Ms. Keck's injuries and/or ongoing problems. The opinions I express in this declaration are intended to be rendered to a reasonable degree of medical probability or certainty or on a more probable than not basis both as it relates to standard of care as well as causation and damages. To the extent it is raised by the Defendants, I am familiar with the standard of care required in the State of Washington for Oral Maxillofacial Surgery such as the surgeons actions in the same or similar circumstances related to the provision of care provided to Ms. Keck.

Signed in East Palo Alto, California on March 19 2012.

KASEY LI, M.D.

SUBSCRIBED AND SWORN to before me this 19 day of March 2012.

SUSAN D. POLITO
Commission # 1959301
Notary Public - California
Santa Clara County
My Comm. Expires Dec 2, 2015

Susan D. Polito
NOTARY PUBLIC in and for California
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184 Wash.2d 358
Supreme Court of Washington,
En Banc.

Darla KECK and Ron Joseph Graham, wife and husband; Keck and Ron Joseph Graham, as parents for the minor child, Kellen Mitchell Graham; and Kellen Mitchell Graham, individually, Respondents,
v.
Chad P. COLLINS, DMD; Patrick C. Collins, DDS; and Collins Oral & Maxillofacial Surgery, PS, a Washington corporation, Petitioners,
Sacred Heart Medical Center, a Washington corporation, Defendant.

No. 90357–3. | Argued Feb. 12, 2015. | Decided Sept. 24, 2015.

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. The Court of Appeals, 181 Wash.App. 67, 325 P.3d 306, reversed. Surgeons appealed.

Holdings: The Supreme Court, Madsen, C.J., held that:

[1] order striking untimely evidence submitted in response to summary judgment motion as severe discovery sanction, requires a *Burnet* analysis and is reviewed for abuse of discretion;

[2] court abused its discretion in striking untimely expert affidavit; and

[3] genuine issues of material fact regarding standard of care and causation precluded summary judgment.

Affirmed.

Gonzalez, J., concurred and filed opinion, in which Gordon McCloud, and Yu, JJ., concurred.

West Headnotes (9)

[1] Appeal and Error
Judgment

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k934 Judgment
30k934(1) In general

When appellate court reviews a summary judgment order, the court must consider all evidence in favor of the nonmoving party.

Cases that cite this headnote

[2] Pretrial Procedure
Failure to Disclose; Sanctions

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak44 Failure to Disclose; Sanctions
307Ak44.1 In general

Order excluding untimely evidence submitted in response to summary judgment motion as severe discovery sanction, requires a *Burnet* analysis and is reviewed for abuse of discretion; before imposing such a severe sanction the court must consider whether a lesser sanction would probably suffice, whether the violation was willful or deliberate, and whether the violation substantially prejudiced the opposing party. CR 56(c).

1 Cases that cite this headnote

[3] Judgment
Nature of summary judgment

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

The purpose of summary judgment 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

[4] Pretrial Procedure

Failure to Disclose; Sanctions

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak44 Failure to Disclose; Sanctions
307Ak44.1 In general

Trial court abused its discretion in striking, as discovery sanction, untimely expert affidavit submitted by medical malpractice plaintiff in response to physicians' summary judgment motion without considering *Burnet* factors; aside from noting that the trial date was several months away, which tended to reduce the prejudice to the physicians, the court made no finding regarding willfulness or the propriety of a lesser sanction.

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

The Supreme Court reviews summary judgment orders de novo, considering the evidence and all reasonable inferences from the evidence in the light most favorable to the nonmoving party.

Cases that cite this headnote

[6] Judgment

Absence of issue of fact

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(2) Absence of issue of fact

Summary judgment is appropriate only when no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law.

Cases that cite this headnote

[7] Health

Standard of practice and departure therefrom

Health

Proximate cause

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
198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(G) Actions and Proceedings
198Hk815 Evidence
198Hk821 Necessity of Expert Testimony
198Hk821(3) Proximate cause

Applicable standard of care and proximate causation in medical malpractice case generally must be established through medical expert testimony. West's RCWA 7.70.040.

Cases that cite this headnote

[8] Judgment

Absence of issue of fact

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(2) Absence of issue of fact

An issue of material fact is genuine, for purposes of summary judgment, if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party.

Cases that cite this headnote

[9] 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 existed as to 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, precluding summary judgment on patient's claim against surgeons for medical malpractice due to allegedly negligent post-operative care. West's RCWA 7.70.040.

Cases that cite this headnote

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Gregory Mann Miller, Carney Badley Spellman PS, Justin Price Wade, Carney Badley Spellman, Seattle, WA, amicus counsel for Washington State Medical Association.

Opinion

MADSEN, C.J.

***361** ¶ 1 Darla Keck filed a medical malpractice case against doctors Chad Collins, DMD, and Patrick Collins, DDS (collectively the Doctors) after she experienced complications following sleep apnea surgery. Her claim focuses on the quality of treatment that she received postsurgery, which she alleges fell below the applicable standard of care. Generally in a medical malpractice claim, a plaintiff needs testimony from a medical expert to establish two required elements—standard of care and causation. RCW 7.70. 040; *Grove v. PeaceHealth St. Joseph Hosp.,* 182 Wash.2d 136, 144, 341 P.3d 261 (2014).

¶ 2 The Doctors moved for summary judgment, arguing she lacked a qualified medical expert who could provide testimony to establish her claim. In response to the motion, her counsel filed two timely affidavits and one untimely affidavit from her medical expert. The trial court granted a motion to strike the untimely affidavit. Considering the remaining affidavits, the court ruled that the expert did not connect his opinions to specific facts to support the contention that the Doctors' treatment fell below the standard ****1082** of care. Therefore, the court granted summary judgment for the Doctors.

¶ 3 The Court of Appeals reversed. Although it agreed that the two timely affidavits lacked sufficient factual support to defeat summary judgment, it held, under de novo review, that the trial court should have denied the motion to strike and should have considered the third affidavit. This affidavit, the court held, contained sufficient factual support to defeat summary judgment.

¶ 4 This case raises two issues.

***362** ¶ 5 First, we must decide the standard of review for a challenged ruling to strike untimely filed evidence submitted in response to a summary judgment motion. We hold that the trial court must consider the factors from *Burnet v. Spokane Ambulance,* 131 Wash.2d 484, 933 P.2d 1036 (1997), on the record before striking the evidence. The court's decision is then reviewed for an abuse of discretion. In this case, the trial court abused its discretion because it failed to consider the *Burnet* factors.

¶ 6 Second, we consider whether the expert's timely second affidavit [1] showed a genuine issue for trial—that a reasonable jury could return a verdict for the plaintiff—to defeat summary judgment. We conclude it did. On this basis, we affirm the Court of Appeals.

1 The substance of the two timely affidavits remained the same, but the first omitted reference to Dr. Patrick Collins. To avoid being duplicative, our analysis will discuss only the second affidavit because it refers to both doctors.

FACTS

¶ 7 On November 26, 2007, Dr. Chad and Dr. Patrick,[2] performed sleep apnea[3] surgery on Darla Keck. The surgery involved cutting bone on the upper and lower jaws to advance them, thereby opening airway space to improve her breathing.

2 For the sake of clarity, Dr. Chad Collins will be referred to as "Dr. Chad" and Dr. Patrick Collins will be referred to as "Dr. Patrick."

3 "Sleep apnea" refers to "brief periods of recurrent cessation of breathing during sleep that is caused esp[ecially] by obstruction of the airway or a disturbance in the brain's respiratory center and is associated esp[ecially] with excessive daytime sleepiness." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 130a (2002).

¶ 8 Following the surgery, Keck suffered complications.[4] On December 6, she went to a follow-up appointment with the Doctors, experiencing pain and exuding green pus from one of her surgical wounds. Over the next several months, ***363** she continued to experience pain and swelling and developed an infection in her jawbone.

4 For a more detailed recitation of the postsurgical facts and the problems experienced by Keck, see the Facts section in *Keck v. Collins,* 181 Wash.App. 67, 73–76, 325 P.3d 306 (2014).

¶ 9 One or both doctors treated her after the initial surgery.[5] At follow-up appointments on December 6 and 17, Dr. Chad prescribed an antibiotic. On January 24, 2008, Dr. Chad surgically removed loose plates and screws left in place from the surgery, cleaned out infected parts of the jawbone, and wired Keck's jaw shut. Keck went to the emergency room three days later experiencing facial swelling. On March 18, Dr. Chad performed another surgery to clean the infected jawbone and install "more stout hardware" because her jaw had not yet formed healthy bone, a condition called "nonunion." Clerk's Papers (CP) at 136. At a follow-up visit on June 11, Keck had loose bone and hardware that moved with finger manipulation. On July 18, Dr. Chad surgically grafted bone and installed new hardware. Still experiencing problems, Keck went to another oral surgeon, who surgically removed old hardware and installed new hardware.

5 The parties dispute the specific involvement each doctor had in the postsurgery care.

¶ 10 Keck alleges that she now suffers from chronic pain, swelling, fatigue, nerve sensations in her eye, an acrid taste in her mouth, and numbness in her cheek and chin.

¶ 11 On November 23, 2010, Keck, along with her husband and son, filed a medical malpractice action against the Doctors. Dr. Patrick moved for summary judgment on December 20, 2011, arguing that plaintiffs lacked competent medical testimony that ****1083** could establish a prima facie medical negligence claim.

¶ 12 Counsel for Dr. Patrick originally scheduled the hearing on the motion for January 20, 2012. After conversation with plaintiffs' counsel, counsel for Dr. Patrick agreed to withdraw the summary judgment motion and renote it on a later date after the court issued an amended trial schedule order. After the amended schedule order ***364** issued, Dr. Patrick renoted his motion, with a hearing date scheduled for March 30. Counsel for Dr. Chad filed a joinder in the motion.

¶ 13 Civil Rule 56(c) requires that the nonmoving party submit supporting affidavits, memoranda, or law no later than 11 days before the hearing. Plaintiffs' counsel timely submitted an affidavit of plaintiffs' medical expert, Dr. Kasey Li, on March 16. This affidavit, however, referred only to Dr. Chad. On March 22, plaintiffs filed a second affidavit of Dr. Li that referred to both doctors. In all other respects, the second affidavit remained unchanged from the first. Although plaintiffs filed the second affidavit after the 11 day limit imposed by CR 56(c), the Doctors did not object on the basis of timeliness.[6]

6 Counsel for Dr. Patrick did object to the timeliness of the second affidavit in a reply memorandum. But counsel did not renew this objection at the summary judgment hearing or on appeal.

¶ 14 In the second affidavit, Dr. Li stated:

> 1. I am Physician Board Certified in Otolaryngology and Oral Surgery. I practice both Otolaryngology and Plastic Reconstructive Surgery at Stanford Hospital in Stanford, California and am on the faculty of the hospital. Additionally, I am the founder of the Sleep Apnea Surgery Center, also located at Stanford. Among other things, I am a specialist in the diagnosis, surgery and treatment of sleep apnea. Furthermore, I am licensed to practice in the State of Washington and have consulting privileges at Virginia Mason.

2. I am familiar with the standard of care in Washington State as it relates to the treatment of sleep apnea and the procedures involved in Ms. Keck's case. In addition to being involved in another case in Spokane and having discussed that case with an Otolaryngologist at the University of Washington, I lecture in Washington State on many issues which include those involved in this case and, as part of that, interact with the participants and have discussions that confirm that the standard of care in Washington State is the same as a national standard of care. Additionally in my position, I interact with oral surgeons from the State of Washington which include ***365** former students from Stanford University. Given my knowledge, it is my opinion that the standard of care involved in Ms. Keck's case in Washington State is a national standard of care.

3. I have reviewed medical records from Drs. Chad and Patrick Collins, Western Mountain Clinic, Dr. Higuchi, Deaconess Medical Center, Dr. Read, Dr. Ramien, St. Patrick's Hospital, Sacred Heart Hospital, imaging photos and disks, and medical records from Cosmetic Surgical Arts Center and Dr. George M. Olsen, D.D.S. 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 the 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.

4. According to the medical records, on November 26, 2007, Darla Keck was seen by the surgeons to address sleep apnea which was moderate to severe with a sleep score of 20. From the records, it appears that Ms. Keck was intolerant of CPAP.

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 ****1084** did not meet 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 infection/osteomyelitis.

7. The standard of care violations as outlined herein were the proximate cause of Ms. Keck's injuries and/or ongoing problems. The opinions I express in this declaration are intended to be rendered to a reasonable degree of medical probability or certainty or on a more probable than not basis both as it relates to standard of care as well as causation and damages. To the extent it is raised by the defendants, I am familiar with the standard of care required in the State of Washington for Oral ***366** Maxillofacial Surgery such as the surgeons[,] actions in the same or similar circumstances related to the provision of care provided to Ms. Keck.

CP at 46–48.

¶ 15 In reply to Dr. Li's second affidavit, the Doctors argued that the plaintiffs failed to raise a genuine issue of material fact because Dr. Li's affidavit contained only conclusory statements without adequate factual support. They did not, however, argue that Dr. Li was unqualified to give an opinion in the case.

¶ 16 Prompted by the argument that Dr. Li's second affidavit lacked sufficient detail, the plaintiffs submitted an untimely, third affidavit of Dr. Li on March 29, the day before the summary judgment hearing and 10 days after the filing deadline imposed by CR 56(c).

¶ 17 Plaintiffs' counsel explained the untimeliness of Dr. Li's third affidavit. He contended that Dr. Patrick's counsel filed the motion without verifying his availability, which was limited during the period for submitting affidavits. From March 7 until March 20, 2012, he participated in a medical malpractice trial. During the ongoing trial, he worked with Dr. Li to obtain an affidavit that responded to the motion. Although he believed the second affidavit would defeat summary judgment, he submitted the third affidavit in the event that the court found the second one insufficient. He requested that the court excuse the late filing and consider the supplemental affidavit at the March 30 hearing or, alternatively, that the court continue the motion hearing pursuant to CR 56(f) so that the court could evaluate it.

¶ 18 The Doctors moved to strike the third affidavit as untimely. While the court noted plaintiffs' counsel's explanation and that trial was several months away, which reduced the prejudice to the Doctors, it ultimately granted the motion to strike and denied the motion for a continuance.

Considering only the first and second affidavits, the ***367** trial court granted summary judgment in favor of the Doctors on the negligent postoperative care claim. The trial court concluded, under *Guile v. Ballard Community Hospital*, 70 Wash.App. 18, 851 P.2d 689, *review denied*, 122 Wash.2d 1010, 863 P.2d 72 (1993), that the affidavits lacked "specific identified facts which would support the contention that the defendants' actions fell below the requisite standard of care." CP at 102.

¶ 19 The Court of Appeals reversed. *Keck v. Collins*, 181 Wash.App. 67, 73, 325 P.3d 306 (2014). Reviewing the ruling on the motion to strike, the court concluded that it should apply a de novo rather than an abuse of discretion standard of review because the ruling was made in conjunction with a summary judgment motion. *Id.* at 79, 325 P.3d 306. The majority determined de novo review appropriate based on a passage in *Folsom* that states de novo review applies to " 'all trial court rulings made in conjunction with a summary judgment motion.' " *Id.* (quoting *Folsom v. Burger King*, 135 Wash.2d 658, 663, 958 P.2d 301 (1998)).

¶ 20 Under de novo review, the Court of Appeals determined that the trial court should have excused the late filing or granted a continuance to consider the third affidavit. *Id.* at 89, 325 P.3d 306. The Court of Appeals then reversed the summary judgment order, holding the third affidavit showed a genuine issue for trial. *Id.* at 92–93, 325 P.3d 306. However, the court affirmed the trial court's conclusion that the second affidavit lacked specific facts under *Guile* to defeat summary judgment. *Id.* at 91–92, 325 P.3d 306.

****1085** ¶ 21 Before this court, the Doctors argue that the Court of Appeals erred by reviewing de novo the trial court's decision to exclude the third affidavit and by reversing that decision. The Keck family raises a second issue, arguing that the Court of Appeals erred by holding the second affidavit insufficient to defeat summary judgment.

***368 ANALYSIS**

1. An order striking untimely evidence at summary judgment requires a Burnet analysis and is reviewed for abuse of discretion

[1] ¶ 22 When we review a summary judgment order, we must consider all evidence in favor of the nonmoving party. *Young v. Key Pharm., Inc.*, 112 Wash.2d 216, 226, 770 P.2d 182 (1989). Before we can consider the evidence in this case, however, we need to determine what evidence is before us. The trial court struck one possible piece of evidence—Dr. Li's third affidavit—as untimely. To determine the propriety of this decision, we must first settle which standard of review applies.

¶ 23 Relying on a statement in *Folsom* that says the de novo standard applies to " 'all trial court rulings made in conjunction with a summary judgment motion,' " the Court of Appeals reviewed de novo the trial court's ruling striking the third affidavit as untimely. *Keck*, 181 Wash.App. at 79, 325 P.3d 306 (quoting *Folsom*, 135 Wash.2d at 663, 958 P.2d 301). The quoted phrase from *Folsom*, however, referred to the trial court's evidentiary rulings on admissibility. *See* 135 Wash.2d at 662–63, 958 P.2d 301. It did not address rulings on timeliness under our civil rules. *See id.*

[2] ¶ 24 Our precedent establishes that trial courts must consider the factors from *Burnet*, 131 Wash.2d 484, 933 P.2d 1036, before excluding untimely disclosed evidence; rather than de novo review under *Folsom*, we then review a decision to exclude for an abuse of discretion. *See, e.g., Blair v. Ta–Seattle E. No. 176*, 171 Wash.2d 342, 348, 254 P.3d 797 (2011) (holding trial court abused its discretion by not applying *Burnet* factors before excluding witnesses disclosed after court's deadline). We have said that the decision to exclude evidence that would affect a party's ability to present its case amounts to a severe sanction. *Id.* And before imposing a severe sanction, the court must consider the three *Burnet* ***369** factors on the record: whether a lesser sanction would probably suffice, whether the violation was willful or deliberate, and whether the violation substantially prejudiced the opposing party. *Jones v. City of Seattle*, 179 Wash.2d 322, 338, 314 P.3d 380 (2013).

[3] ¶ 25 While our cases have required the *Burnet* analysis only when severe sanctions are imposed for discovery violations, we conclude that the analysis is equally appropriate when the trial court excludes untimely evidence submitted in response to a summary judgment motion. Here, after striking the untimely filed expert affidavit, the trial court determined that the remaining affidavits were insufficient to support the contention that the Doctors' actions fell below the applicable standard of care. Essentially, the court dismissed the plaintiffs' claim because they filed their expert's affidavit late.[7] But "our overriding responsibility is to interpret the rules in a way that advances the underlying purpose of the rules, which is to reach a just determination in every action." *Burnet*, 131 Wash.2d at 498, 933 P.2d 1036 (citing CR 1).

The " 'purpose [of summary judgment] 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 exist.*' " *Preston v. Duncan,* 55 Wash.2d 678, 683, 349 P.2d 605 (1960) (quoting *Whitaker v. Coleman,* 115 F.2d 305, 307 (5th Cir.1940)).

7 Although the trial court did not evaluate the merits of the third affidavit, the parties appear to agree that this affidavit would have created a genuine issue of material fact to defeat summary judgment. The Doctors, for example, did not challenge the Court of Appeals' holding that the third affidavit was sufficient.

[4] ¶ 26 In this case, the trial court abused its discretion by not considering the *Burnet* factors before striking the third affidavit. Aside from noting that the trial date ****1086** was several months away, which tended to reduce the prejudice to the defendants, the court made no finding regarding willfulness or the propriety of a lesser sanction. We reverse the order striking the third affidavit.

370** ***2. The second affidavit created a genuine issue of material fact

[5] **[6]** ¶ 27 We review summary judgment orders de novo, considering the evidence and all reasonable inferences from the evidence in the light most favorable to the nonmoving party. *Folsom,* 135 Wash.2d at 663, 958 P.2d 301. Summary judgment is appropriate only when no genuine issue exists as to any material fact [8] and the moving party is entitled to judgment as a matter of law. *Scrivener v. Clark Coll.,* 181 Wash.2d 439, 444, 334 P.3d 541 (2014).

8 "A material fact is one that affects the outcome of the litigation." *Owen v. Burlington N. Santa Fe R.R.,* 153 Wash.2d 780, 789, 108 P.3d 1220 (2005).

[7] ¶ 28 To establish medical malpractice, Keck must prove that the Doctors' treatment fell below the applicable standard of care and proximately caused her injuries. *See* RCW 7.70.040. Generally, the plaintiff must establish these elements through medical expert testimony. *Grove,* 182 Wash.2d at 144, 341 P.3d 261. The Doctors moved for summary judgment on the ground that Keck had not presented any qualified expert who could reasonably establish a breach of the standard of care and proximate cause. In other words, they argued that no genuine issue of material fact remained for trial because she could not establish two essential elements of her malpractice claim. *See Young,* 112 Wash.2d at 225–26, 770 P.2d 182 (holding moving party carries initial burden of showing no genuine issue by arguing nonmoving party has a failure of proof concerning a necessary element of nonmoving party's claim).

[8] **[9]** ¶ 29 An issue of material fact is genuine if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Herron v. KING Broad. Co.,* 112 Wash.2d 762, 768, 776 P.2d 98 (1989). Our analysis, then, asks whether Dr. Li's testimony could sustain a verdict in Keck's favor on her malpractice claim.

***371** ¶ 30 A plaintiff seeking damages for medical malpractice must prove his or her "injury resulted from the failure of a health care provider to follow the accepted standard of care." RCW 7.70.030(1). The standard of care means "that degree of care, skill, and learning expected of a reasonably prudent health care provider at 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" (reasonable doctor). RCW 7.70.040(1). To sustain a verdict, Keck needs an expert to say what a reasonable doctor would or would not have done, that the Doctors failed to act in that manner, and that this failure caused her injuries.

¶ 31 The Doctors argued and the Court of Appeals agreed that the second affidavit is insufficient regarding the standard of care because Dr. Li did not provide any details about what standard applied. We disagree. We conclude that paragraphs 5 and 6 speak to the standard of care and the Doctors' breach of that standard.

¶ 32 Paragraph 5 states, "The surgeons performed multiple operations without really addressing the problem of non-union and infection within the standard of care." CP at 48. Viewed in the light most favorable to the plaintiffs, this sentence avers that a reasonable doctor would have addressed Keck's problems of nonunion and infection—the standard of care. The Doctors did not actually treat these underlying problems, even though they performed multiple surgeries on her—breach.

¶ 33 Paragraph 6 states:

> 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 the standard of care as the general dentist would not have had sufficient training or knowledge to deal with Ms. ****1087** Keck's non-union and the developing infection/osteomyelitis.

Id.

***372** ¶ 34 Reading this paragraph in conjunction with paragraph 5, a jury could conclude that a reasonable doctor would have referred Keck to another qualified doctor for treatment—the standard of care—and that the Doctors did not treat her issues or make an appropriate referral—breach.

¶ 35 When taken in the light most favorable to the nonmoving party, Dr. Li's affidavit establishes the applicable standard of care and that the defendants breached it. Additionally, Dr. Li stated that these violations proximately caused Keck's injuries within a reasonable degree of medical certainty. [9] *Id.* Dr. Li provided the necessary testimony to establish a prima facie case of medical malpractice. [10] *See* RCW 7.70.040. We therefore conclude that a jury could return a verdict for the plaintiffs, which means that genuine issues of material fact regarding the standard of care and causation remain for trial. Accordingly, the trial court erred in granting summary judgment.

9 The Doctors suggest that Dr. Li's conclusion regarding proximate cause is deficient because he failed to identify the specific " 'problems' " Keck has experienced. Pet'rs' Joint Suppl. Br. at 19. However, paragraph 6 refers to Keck's developing infection. CP at 48. Moreover, while Dr. Li must establish proximate cause for Keck's injuries through his testimony, he need not detail all of her alleged injuries.

10 Keck argues for a less stringent summary judgment standard for experts, citing ER 705, which allows an expert to give an opinion without first disclosing the underlying facts unless the court requires otherwise. The proposed standard would allow a qualified expert to only state that "the defendant breached the standard of care and caused the plaintiff's injuries," without providing more, to defeat summary judgment. However, to survive summary judgment in any case, there must be a question of material fact. We reject Keck's invitation to adopt a less stringent summary judgment standard for experts. We also reject the Doctors' suggestion for a more stringent standard. They challenge the factual foundation of Dr. Li's opinions, even though he stated that he relied on various medical records to reach his conclusions. CP at 47 (para. 3). ER 705 would allow an expert's testimony without prior disclosure of the underlying facts, unless the trial court required disclosure. As long as the expert's affidavit testimony, if believed, could sustain a verdict, the trial court should give the plaintiff an opportunity to supply more detail if the court determines more detail would be desirable. *See Bulthuis v. Rexall Corp.*, 789 F.2d 1315, 1317 (1985).

¶ 36 The Doctors also argue that we should rely on *Guile*, as the Court of Appeals did, and hold Dr. Li's second affidavit insufficient. But *Guile* is distinguishable.

***373** ¶ 37 In *Guile*, the defendants moved for summary judgment of plaintiff's malpractice claim on the ground that the plaintiff lacked competent medical evidence to establish her claim. 70 Wash.App. at 21, 23–24, 851 P.2d 689. The plaintiff submitted an affidavit from her medical expert. *iD.* at 26, 851 P.2D 689. tHe cOurt of aPpeals held the affidavit insufficient to defeat summary judgment because it failed to identify specific facts supporting the expert's conclusion that the defendant surgeon negligently performed surgery. *Id.* The affidavit summarized plaintiff's postsurgical injuries and opined that the injuries were caused by the surgeon's " 'faulty technique,' " which fell below the applicable standard of care. *Id.*

¶ 38 To say that a reasonable doctor would not use a faulty technique essentially states that a reasonable doctor would not act negligently. This testimony fails to establish the applicable standard of care—how the defendant acted negligently—and therefore could not sustain a verdict for the plaintiff. Conversely, Dr. Li stated the applicable standard of care and how the Doctors breached that standard: a reasonable doctor would have actually treated Keck's developing infection and nonunion or made an appropriate referral to another doctor for treatment, but here, the Doctors did neither.

¶ 39 Additionally, we note that the expert in *Guile* failed to link his conclusions to any factual basis, including his review of the medical records. [11] *See id.* In contrast to the expert in *Guile*, Dr. Li connected his opinions about the standard of care and causation ****1088** to a factual basis: the medical records. Dr. Li stated that he reviewed medical records in the case and the procedures performed by the defendants,

and within that factual review, he identified standard of care violations. CP at 47 (para. 3).

11 It also appears that the expert—an osteopath licensed in Arizona opining about the care owed by an obstetrician/gynecologist in Washington—may have been unqualified to testify about the applicable standard of care. *See Guile*, 70 Wash.App. at 21, 27, 851 P.2d 689 n. 7

***374 CONCLUSION**

¶ 40 Before excluding untimely evidence submitted in response to a summary judgment motion, the trial court must consider the *Burnet* factors on the record. On appeal, a ruling to exclude is reviewed for an abuse of discretion. Applying this standard, we conclude the trial court abused its discretion because it failed to consider the *Burnet* factors before striking the third affidavit.

¶ 41 We also conclude the Court of Appeals erred when it held the second affidavit lacked adequate factual support for the opinion that the Doctors' treatment fell below the standard of care. Because the testimony could sustain a verdict for the nonmoving party, it was sufficient. For this reason, we affirm the Court of Appeals' decision reversing the summary judgment order.

WE CONCUR: JOHNSON, OWENS, FAIRHURST, STEPHENS, and WIGGINS, Justices.

GONZÁLEZ, J. (concurring).

¶ 42 I concur with the majority. I write separately, though, for several reasons. First, while I am sympathetic to the argument that a trial court should apply the *Burnet v. Spokane Ambulance*, 131 Wash.2d 484, 933 P.2d 1036 (1997), analysis before striking an expert declaration submitted in relation to summary judgment motions as a discovery sanction, that does not appear to be what happened here. Instead, the plaintiff untimely submitted an expert declaration, the defendant moved to strike it on the grounds of untimeliness, and the trial court granted the motion. It is highly questionable whether that is in fact a discovery sanction.

¶ 43 Second, I write separately to stress that while it is an abuse of discretion for the trial court to impose harsh discovery sanctions without finding the three *Burnet* factors ***375** , it is not per se reversible error. *See Jones v. City of Seattle*, 179 Wash.2d 322, 338, 360, 314 P.3d 380 (2013) (holding *Burnet* error can be harmless); *see also Blair v. Ta–Seattle E. No. 176*, 171 Wash.2d 342, 351, 254 P.3d 797 (2011) (declining to do the *Burnet* analysis on appeal for the first time). Reversal is strong medicine and will not be administered when it is plain from the record that the error was harmless. *See Jones*, 179 Wash.2d at 360, 314 P.3d 380 (citing *Holmes v. Raffo*, 60 Wash.2d 421, 424, 374 P.2d 536 (1962)). Given, of course, that there is an independent grounds to vacate the summary judgment order in this case, such an analysis would be extraneous. It will not be in many cases.

¶ 44 I concur with the majority that trial court decisions to strike untimely declarations submitted in relation to summary judgment are properly reviewed for abuse of discretion. I recognize our case law is split on this, but I conclude that whether to accept an untimely filed affidavit is the sort of case management decision best left in the trial court's hands. *See Pitzer v. Union Bank of Cal.*, 141 Wash.2d 539, 556, 9 P.3d 805 (2000). I also agree that the second declaration was sufficient to defeat summary judgment. With these observations, I concur with the majority.

GORDON McCLOUD, and YU, Justices.

All Citations

184 Wash.2d 358, 357 P.3d 1080

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF ADAMS

LORI A. SWEENEY, and JEROLD L. SWEENEY, husband and wife, Plaintiffs, vs. ADAMS COUNTY PUBLIC HOSPITAL DISTRICT NO. 2, d/b/a EAST ADAMS RURAL HOSPITAL; and ALLEN D. NOBLE, PA-C and JANE DOE NOBLE husband and wife and the marital community thereof; and JAMES N. DUNLAP, M.D. and JANE DOE DUNLAP, husband and wife and the marital community thereof; and PROVIDENCE HEALTH SERVICES, d/b/a PROVIDENCE ORTHOPEDIC SPECIALTIES, A Washington Corporation Defendants.	NO. 13-2-00126-1 DECLARATION OF STEVEN R. GRABOFF, M.D.

I, STEVEN R. GRABOFF, M.D., declare under penalty of perjury under the laws of the State of Washington and the State of California that the following is true and correct:

1. I am over the age of eighteen. I am competent to testify to the opinions expressed below and all of the opinions expressed in this report, unless otherwise noted, are made on a more probable than not basis and to a reasonable degree of medical certainty. I make this declaration based on my own personal knowledge.

2. I am a medical doctor licensed to practice medicine in the State of California. I specialize in orthopedic surgery and am board certified by the American Board of Orthopaedic Surgery. Following receiving my medical degree from the University of California Irvine School of Medicine in 1980, I did an internship in general surgery at the University of California Irvine Medical Center from 1980-1981 and a residency in Orthopaedic Surgery at Harbor-UCLA Medical Center and Affiliated Hospitals from 1981-1985. I am currently a member of the American Board of Orthopaedic Surgery; the American College of Forensic Examiners; the American Medical Association; the Association of University Professors; the California Faculty Association; the California Orthopaedic Association; the Orange County Medical Association; and the Medical Reserve Corps, Orange County, California. I did orthopaedic surgery in Huntington Beach, Westminster, Fountain Valley, Newport Beach, and Los Alamitos, California between 1985 and 2005. Since 2005, I have had a non-surgical orthopaedic practice in Huntington Beach California.

3. In my clinical practice, I have evaluated and treated shoulder dislocations and have supervised physician assistants doing the same. Based on my training and experience, I am familiar with the standard of care relating to the diagnosis and treatment of fracture dislocations of the humerus. This standard of care is a national standard as applicable in the State of Washington as it is in the State of California, where most of my training and experience has taken place.

4. I have been retained by the plaintiffs in this case to provide a summary of my expert opinions as of the date of this report regarding the treatment received by plaintiff Lori A. Sweeney by defendants East Adams Rural Hospital ("EARH"), Allen D. Noble, PA-C and James N. Dunlap, MD.

5. For purposes of this declaration, I evaluated the following radiological studies:

a. April 25, 2010 pre-reduction x-ray at EARH of right shoulder showing acute anterior-inferior subcoracoid dislocation of the right glenohumeral joint with a fracture of the greater tuberosity that is displaced and widely separated from the humeral head and shaft.

b. April 25, 2010 post reduction x-ray showing that the shaft of humerus has been reduced back to the vicinity of the glenohumeral joint; however, there is now at least a 3-part fracture where the humeral head has been fractured off the distal shaft and neck area of the humerus and is widely displaced left in the subcoracoid anterior-inferior displaced position as well as the greater tuberosity fracture fragment remaining widely displaced

c. April 27, 2010 CT scan of the right shoulder, comminuted in at least a 3-part proximal humeral fracture

d. April 29, 2010 x-ray of the right shoulder, post-operative x-ray with staples in the skin and well-placed cemented hemiarthroplasty

e. July 23, 2010, x-ray of right shoulder, again noted is a well-placed humeral cemented hemiarthroplasty.

f. October 19, 2010, x-ray of right shoulder, the cemented right hemiarthroplasty is again noted. The humeral head component appears to be more high riding that on previously noted films.

g. January 3, 2012, x-ray of right shoulder, again noted is a cemented right hemiarthroplasty. Clearly, there is now evidence of rotator cuff arthropathy with impingement of the superior prosthetic humeral head against the undersurface of the acromion. The prosthetic humeral head is clearly high riding in the glenoid fossa.

h. August 28, 2012, x-ray of right shoulder, again noted is the cemented right humeral hemiarthroplasty. There is rotator cuff arthropathy noted. The humeral head is at least 50% superiorly subluxed abutting underneath the acromion and impinging against the acromion with only 50% contact of the inferior portion of the prosthetic humeral head in the superior portion of the glenoid fossa.

6. For purposes of this declaration, I have reviewed the following medical records:

a. Medical records and bills for treatment of Ms. Lori Sweeney from EARH from April 25, 2010

b. Medical Records and bills from Sacred Heart Medical Center from admission of Ms. Lori Sweeney on 4/25/10 through discharge on May 1, 2010; April 4, 2012;

c. Audit trail of x-rays

7. For purposes of this declaration, I have also reviewed:

a. Declaration of Dr. James Nania

b. Declaration of Dr. John Staeheli

c. Declaration of Dr. Michael Peters

8. I made the factual findings described below based on my review of this information listed above, which allowed me to form the opinions and draw the conclusions I have set forth below. All such opinions and conclusions, unless otherwise noted, are made on a more probable than not basis and to a reasonable degree of medical certainty.

9. On April 25, 2010, Lori Sweeney was a 58-year-old female that fell at a gas station on her extended right upper extremity, resulting in a fracture dislocation of the right shoulder.

10. Following the fall, she presented to the East Adams Rural Hospital, where a physician assistant, Allen Noble, PA-C, evaluated her. Mr. Noble found that Ms. Sweeney had an anterior-inferior subacromial acute fracture dislocated shoulder. At that time, the fracture fragment consisted only of the greater tuberosity. At that time, there was no evidence of any fracture of the humeral neck or head area. Ms. Sweeney was found to be neurologically and vascularly intact with no abnormality at that time.

11. Mr. Noble consulted with orthopedic surgeon, James N. Dunlap, MD, by telephone only. Dr. Dunlap reviewed x-ray film on Stentor, which showed fracture dislocation of the greater tuberosity and the anterior-inferior dislocated humeral head and proximal humerus. On the advice of Dr. Dunlap, an orthopedic surgeon, Mr. Noble attempted in the emergency department to reduce the fracture dislocated right shoulder.

12. Prior to engaging in attempts to at reducing the shoulder, Mr. Noble did not use conscious sedation or anesthesia. He only used narcotic pain medication.

13. Ms. Sweeney underwent three attempts by Mr. Noble to reduce the right shoulder. The culmination of these three attempts caused a severely comminuted fracture in at least 3-parts of the right shoulder. Thus, as a result of the three reduction maneuvers by Mr. Noble at the

instruction of Dr. Dunlap, Ms. Sweeney's right shoulder glenohumeral joint and humeral head were completely fractured and destroyed with loss of the joint surfaces and articulation and persistent anterior-inferior dislocation of the large humeral head fragment.

14. Dr. Dunlap then recommended to Mr. Noble that Ms. Sweeney be transferred to Sacred Heart Hospital in Spokane where she was admitted into the emergency department on April 25, 2010.

15. After admission to Sacred Heart, Dr. Dunlap again advised emergency room personnel to try to reduce the shoulder. Such a recommendation breached the standard of care for a treating orthopedic surgeon given that at least a 3 part fracture dislocation is not a reducible situation and always requires surgical intervention. Such a reduction was attempted again but not successful.

16. Because of the severity of the injury, on April 28, 2010, Dr. Dunlap performed a right cemented shoulder hemiarthroplasty. No inspection appears to have been made during this procedure that the rotator cuff was intact and had not suffered any damage either at the time of the initial fall or in the failed reduction attempts that led to a comminuted fracture. It is well known that rotator cuff tears are commonly associated with these kinds of injuries and conditions of the shoulder.

17. It appears that by April 4, 2012, Ms. Sweeney's right shoulder hemiarthroplasty was failing from a radiological standpoint. She developed a high riding humeral head prosthesis that was impinging in the subacromial space consistent with a rotator cuff arthropathy essentially meaning the rotator cuff was no longer functioning and nonexistent.

18. On April 4, 2012, she was taken to surgery at Sacred Heart by Dr. Dunlap, where he attempted to perform a rotator cuff repair noting that the tissues were rather thin. Based on

this information and from the other materials I have reviewed in this case, Ms. Sweeney underwent a reverse total shoulder replacement on June 11, 2013. Such a procedure was the likely consequence of a failure in 2012 of Dr. Dunlap to take appropriate care during his attempt to perform rotator cuff repair as a consequence of his improper instructions to reduce the shoulder in April of 2010.

19. Based on my review of the materials summarized above and on the factual findings and assumptions made above, it is my opinion that Dr. Dunlap and physician assistant, Allen Noble, departed from the reasonable and accepted standards of medical care as follows:

A. Dr. Dunlap fell below the standard of care by instructing Mr. Noble to reduce a fracture dislocation in the emergency department after Dr. Dunlap had seen the x-rays made available to him via Stentor.

B. Mr. Noble fell below the standard of care by failing to call an orthopedic surgeon to come to the emergency department and to treat the condition with conscious sedation or anesthesia.

C. Dr. Dunlap and Mr. Noble fell below the standard of care by failing to diagnose a pre-reduction potential anatomic neck fracture, though I disagree that such a fracture existed prior to the attempts at reduction.

D. Dr. Dunlap and Mr. Noble fell below the standard of care by failing to perform ancillary studies in the presence of greater tuberosity fracture such as MRI scan or CT scan to delineate the damage and pathology to the shoulder prior to attempting a reduction maneuver.

E. Dr. Dunlap was negligent in instructing and Mr. Noble was negligent in attempting a reduction by the physician assistant in the emergency room without

anesthesia in the presence of a fracture dislocation. This is an orthopedic condition that requires the treatment and expertise of an orthopedic surgeon because there was an associated fracture of the greater tuberosity associated with the anterior dislocation. There was also an associated risk statistically based on literature of a proximal humerus neck fracture that required evaluation, consideration and treatment by a qualified orthopedic surgeon. This condition not only needed to be personally seen and evaluated by an orthopedic surgeon, but needed to be personally treated by the orthopedic surgeon and the treatment rendered by the physician assistant at the request of the orthopedic surgeon was a breach in the standard of care.

F. Negligent request by Dr. Dunlap once the patient was transferred to Sacred Heart Emergency Room to again try and reduce the right shoulder, which already had been attempted to be reduced 3 times resulting in at least a 3-part comminuted fracture dislocation of the proximal humerus and humeral head, and was in need of surgical treatment.

G. Failure by Dr. Dunlap to inspect and repair a torn rotator cuff during the April 28, 2010 surgical procedure for right total shoulder replacement or during follow up care in 2012.

20. As a direct and proximate cause of conduct described above, which fell below the standard of care, Ms. Sweeney sustained the following injuries on a more probable than not basis and to a reasonable degree of medical certainty:

A. An at least 3-part comminuted fracture dislocation of the right shoulder and proximal humerus and humeral head.

B. The need for total shoulder replacement surgery on 4/28/10.

C. The need for subsequent rotator cuff repair, which more likely than not was associated with the fracture of the greater tuberosity and should have been repaired at the time of shoulder replacement or repair of April 4, 2012.

D. The need for reverse total shoulder replacement in June of 2013 as a result of the development of right shoulder failed arthroplasty and rotator cuff arthropathy and failure to repair rotator cuff.

E. Chronic pain and dysfunction of the right upper extremity.

21. I reserve the right to augment, amend or modify any of the statements above upon receipt of additional treatment records or other discovery in this matter.

SIGNED at Huntington Beach, California this 7 day of April, 2014.

Steven R. Graboff, M.D.

ADAMS COUNTY
FILED
APR 24 2014
SUSAN K. KIRKENDALL, Clerk
BY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF ADAMS

LORI A. SWEENEY, and JEROLD L. SWEENEY, husband and wife,

Plaintiffs,

vs.

ADAMS COUNTY PUBLIC HOSPITAL DISTRICT NO. 2, d/b/a EAST ADAMS RURAL HOSPITAL; and

ALLEN D. NOBLE, PA-C and JANE DOE NOBLE husband and wife and the marital community thereof; and

JAMES N. DUNLAP, M.D. and JANE DOE DUNLAP, husband and wife and the marital community thereof; and

PROVIDENCE HEALTH SERVICES, d/b/a PROVIDENCE ORTHOPEDIC SPECIALTIES,
A Washington Corporation

Defendants.

NO. 13-2-00126-1

DECLARATION OF JEFFREY NICHOLSON, PA-C, PhD

I, JEFFREY NICHOLSON, PhD, PA-C, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

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Seattle, WA 98101
T: (206) 629-9909
F: (206) 971-5081

1. I am over the age of eighteen; I am competent to testify and all of the opinions expressed in this report are based on a reasonable degree of medical certainty; and I make this declaration of my own personal knowledge.

2. I am a physician assistant licensed to practice medicine in the state of Wisconsin. I graduated in 1984 from Boston College with a Bachelor of Science, double majoring in biology and philosophy. After my education at Boston College, I attended Harvard University at Cambridge, MA and earned a Master of Education with a concentration in International Development and Education Administration –I graduated from Harvard in 1989. Following my tenure at Harvard, I attended the University of Wisconsin-Madison and graduated in 1992 with a Bachelor of Science in Physician Assistant studies. I have been certified by the National Commission on Accreditation of Certified Physician Assistants since 1993. I later received from the University of Nebraska-Omaha in 2005 a Master of Physician Assistant Studies. Finally, I attended the University of Wisconsin-Madison and in 2008, I graduated with a Doctor of Philosophy in Educational Leadership and Policy Analysis. I have been continuously employed on a part time or full time basis in emergency medicine, urgent care, family practice, and internal medicine for the past twenty-two years. I currently practice clinically full-time in emergency medicine and urgent care and part time in family practice and primary care settings in Milwaukee, WI. I have been a PA educator all my life, and full time PA program faculty for twelve years. I have been the Director of the University of Wisconsin-Madison Physician Assistant Program.

3. I have been retained to provide a summary of my expert opinions as of the date of this report regarding the standard of care provided to Lori A. Sweeney by Allen Noble, PA-C on 4/25/2010.

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4. For purposes of my initial review, I evaluated the following documents:

a. Deposition of Allen Noble, PA-C (with exhibits)

b. Deposition of James Dunlap, M.D. (with exhibits)

c. Deposition of Charles Sackmann, M.D. (with exhibits)

d. Declaration of Steven Graboff, M.D.

e. Declaration of Randall Patten, M.D.

5. The facts of this incident involving Mr. Noble as I understand them are as follows:

a. Mr. Noble failed to consult with his supervising physician prior to attempting to reduce Mrs. Sweeney's shoulder. This injury was potentially an orthopedic emergency, however, and Mr. Noble exercised poor discretion in attempting to treat (reduce) the injury, which caused serious harm to Mrs. Sweeney.

b. Mr. Noble attempted a closed reduction of an orthopedic injury without orthopedic coverage available at the hospital. Mr. Noble consulted with an orthopedic surgeon by telephone who was over 40 miles away and not available to supervise the reduction in the event of a medical emergency arising out of the reduction.

c. Mr. Noble provided treatment for an injury for which Mr. Noble had insufficient experience or training. This is evident through his testimony and through the multiple attempts at reduction of the injury, which caused further harm to Mrs. Sweeney.

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6. It is my opinion, based upon my education, training, and expertise in the treatment of patients as a physician assistant in the emergency and urgent care settings, that Allen Noble PA-C breached the standard of care in his care of Mrs. Sweeney on 4/25/2010. Mr. Noble fell below the applicable standard of care in the following ways:

a. Mr. Noble should not have attempted to reduce this fracture dislocation without the direction and leadership of an orthopedist present or a supervising physician present and taking charge who was comfortable and experienced with reducing such a fracture dislocation.

b. Even if Mr. Noble consulted with an orthopedic specialist who instructed him to attempt a closed reduction, he had a duty to exercise independent judgment before attempting such a procedure. The fact that he ordered a second set of x-rays evidenced his knowledge that he should not have attempted a closed reduction. Given Mr. Nobles' lack of experience in reducing dislocated shoulders and specifically fracture dislocations, attempting to do so autonomously breached the standard of care.

c. After having attempting unsuccessfully to perform a closed reduction, Mr. Noble's second and third attempts fell below the standard of care.

7. As a proximate cause of the breach of the standard of care for emergency physician assistants, Mrs. Sweeney sustained what is likely a permanent injury to her right upper extremity.

8. The standard of care for a physician assistant performing an orthopedic procedure, as was the case here, is a national standard. It does not vary from state to state, nor from region to region. I know this because of my training and experience as an educator of physician

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assistants. I have consulted with a physician assistant in the State of Washington to determine that the standard of care is the same in Washington as it is where I currently practice in the State of Wisconsin. The accreditation standards for the training of physician assistants are national standards and physician assistants that receive such training are taught the same standards. Physician assistants take a single national certifying examination based on a single national standard.

9. My opinions in this declaration is based on the information I have reviewed to date, as well as my education, training, knowledge, and direct experience, in the evaluation and diagnosis of patients with conditions the same as, or similar to those of, Mrs. Sweeney.

10. I have reviewed these documents independently and am basing my opinions on information currently available to me. I reserve the right to alter and/or amend opinions if additional information becomes available.

SIGNED at Milwaukee, Wisconsin this 23rd day of April, 2014.

Jeffrey Nicholson, PA-C

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that on the date below, I caused to be served a true and correct copy of the foregoing document to:

Adams County Superior Court 210 W. Broadway Ave. Ritzville, WA 99169	☒ ☐ ☐ ☐	**HAND DELIVERY** **U.S. FIRST CLASS MAIL** **OVERNIGHT MAIL** **FACSIMILE TRANSMISSION**
Mr. Robert F. Sestero, Jr. Evans, Craven & Lackie, P.S. 818 W. Riverside Ave., Ste. 250 Spokane, WA 99201	☒ ☐ ☐ ☒	**HAND DELIVERY** **U.S. FIRST CLASS MAIL** **OVERNIGHT MAIL** **FACSIMILE TRANSMISSION**
Ryan Beaudoin Witherspoon Kelley 422 W. Riverside Ave., Ste. 1100 Spokane, WA 99201-0300	☒ ☐ ☐ ☒	**HAND DELIVERY** **U.S. FIRST CLASS MAIL** **OVERNIGHT MAIL** **FACSIMILE TRANSMISSION**

DATED this 24th day of April, 2014.

Erin Clune, Legal Assistant

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