SUPREME COURT OF THE STATE OF WASHINGTON

Supreme Court No. 97768-2
Division III Cause No. 361667

KATHIE and JOE BOYER,

Petitioners,

v.

KAI MORIMOTO, M.D., and
PLASTIC SURGERY NORTHWEST

Respondents.

RESPONDENTS' BRIEF

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I. INTRODUCTION

Petitioners argue both the trial court and Court of Appeals have made two errors which support discretionary review:

(1) An alleged failure to abide by *Keck v. Collins*, 184 Wn.2d 358, 357 P.3d 1080, 1080 (2015), concerning an affidavit submitted after a summary judgment ruling had been issued.

(2) An alleged resurrection of the so-called "locality rule."

Both arguments hinge upon radical distortions of the facts and procedure below.

The first issue involves consideration of a declaration which was filed ***after*** the trial court issued a written summary judgment decision. Petitioners did not move for reconsideration of the trial court's summary judgment decision and never asked the trial court to consider the new materials. No Washington appellate decision imposes a requirement that a trial court must *sua sponte* re-examine its own decisions without a request for affirmative relief. Setting aside their failure to request relief, the second, late-arriving declaration likewise failed to generate a jury question.

Second, the statutory requirement that a practicing physician must demonstrate familiarity with the standard of care in the State of Washington is the law of the State of Washington. Contrary to Petitioners' suggestion,

the plain meaning of RCW 7.70.040 which has been recognized in scores of appellate decision.

Finally, the Court of Appeals did not reach the issue of whether Dr. Shamoun's second declaration would have generated an issue of fact for jury determination ("Because we affirm the trial court's ruling that Dr. Shamoun failed to confirm his knowledge of the Washington standard of care, we do not address these additional arguments"). *Boyer v. Morimoto*, 449 P.3d 285, 300–01 (Wash. Ct. App. 2019). Dr. Shamoun's second declaration would not have changed the result in this case where it failed to satisfy RCW 7.70.030.

II. IDENTITY OF RESPONDENTS

Respondents (and Defendants below) are Dr. Kai Morimoto, M.D. and Plastic Surgery Northwest ("PSNW").

III. COURT OF APPEALS DECISION

Petitioners seek review of Division III of the Court of Appeals' opinion: *Boyer v. Morimoto*, 449 P.3d 285 (Wash. Ct. App. 2019).

IV. ISSUES PRESENTED FOR REVIEW

Respondents disagree with Petitioners' recitation of the issues before this Court, and assert that the issues are more accurately presented as follows:

1. Must a litigant request relief from a trial court, or is a trial court required to *sua sponte* re-examine its own written decisions?
2. Has RCW 7.70.040 been judicially invalidated?
3. Were Dr. Shamoun's declarations sufficient to generate issues of material fact?

V. STATEMENT OF THE CASE

A. Medical care provided to Mrs. Boyer.

Plaintiff Kathie Boyer came to Plastic Surgery Northwest ("PSNW") after having lost approximately 70 pounds. CP 43. She was unhappy with the appearance of her abdomen and desired to have excess skin and fat removed surgically (a procedure known as an abdominoplasty). *Id.* She likewise wanted liposuction in her back, hips, and breasts. CP 46. Historically, she had received saline breast implants placed on two prior occasions, most recently in 2006. CP 43. She noted in the few months prior to her appointment at PSNW that her right implant had gradually reduced in size and was more prominent. *Id.* Therefore, she was interested in replacement of her breast implants and a breast lift (a procedure known as a mastopexy). *Id.*

The procedure by Dr. Morimoto took place on October 26, 2015. CP 48-50. No intraoperative complications were noted. CP 49. On October 30, 2015, Mrs. Boyer checked in with PSNW ("She lives out of town and

wanted to check in before going home"). CP 41. She requested a stronger form of pain medication and her request was accommodated. *Id.* She was examined and determined to be doing very well, although she was somewhat fatigued. *Id.*

Mrs. Boyer would later claim that PSNW agreed to manage her tampon use intraoperatively. CP 1-5. PSNW and Dr. Morimoto deny they agreed to manage Mrs. Boyer's menstruation intra-operatively or post-operatively. CP 6. Rather, Defendants affirmatively asserted that any tampon utilized by Mrs. Boyer was removed prior to the commencement of the subject surgery and that no tampon was inserted by the Defendants during the procedure. CP 15 at 6. As set forth in the Boyers' opening brief, Mr. Boyer assisted in Mrs. Boyer's tampon management.

Mrs. Boyer later developed complications due to either surgical wounds[1] or a retained tampon. *See,* CP 203-204. Contrary to the Boyers' assertions, two tampons were removed from the vaginal vault on November 5, 2015. CP 203. However, no percipient witness determined when the tampons were applied. *Id.* Mrs. Boyer stopped menstruating just a few days prior to November 5, 2015, long after the October 26, 2015 surgery. *Id.* While Plaintiffs assert that Mrs. Boyer was diagnosed with toxic shock

[1] The Boyers do not allege that surgical wounds caused her damage or that surgical wounds were violative of the standard of care.

syndrome secondary to retained tampons, the infectious disease physician who treated her was unable to determine whether her symptoms were due to typical surgical wounds *or* retained tampons. *Id.* at 203-204.

B. Summary judgment procedure.

Defendants filed a Motion for Summary Judgment, asserting that "absent plaintiffs presenting admissible testimony to establish elements of a prima facie case under RCW 7.70 from a competent medical expert, [defendants were] entitled to dismissal of all claims as a matter of law." CP 24; 18-19.

C. Summary judgment ruling and submission of orders.

The hearing on Defendants' Motion for Summary Judgment took place on April 27, 2018. CP 353. On May 9, 2018 the trial court issued a Memorandum Decision on Defense Motion for Summary Judgment. CP 318-326. The trial court concluded that: Dr. Shamoun was not familiar with the standard of care for a plastic surgeon in the State of Washington and Plaintiffs did not show any violation of the standard of care by any nursing staff or other employees of PSNW. *Id.*

The trial court noted that the Plaintiffs initially failed to provide a copy of Dr. Shamoun's curriculum vitae which allegedly provided a basis for his assertion that he was familiar with the standard of care in Washington. CP 322-323, 325 ("Dr. Shamoun states that he attached his

'C.V.' and *it* shows he has "studied, trained, and practiced in a variety of locations throughout the country…No C.V. was attached."). Then, when Dr. Shamoun's Curriculum Vitae arrived *after* the summary judgment hearing, it contained no reference to training, education, or experience in Washington. CP 323.

Finally, on May 15, 2018, several weeks after the summary judgment hearing, the Supplemental Declaration of John M. Shamoun, M.D., F.A.C.S. was filed. CP 327-329. Dr. Shamoun's Supplemental Declaration did not address causation and did not address non-physician healthcare providers.

On June 15, 2018 the trial court entered an Order Granting Defendants' Motion for Summary Judgment ("Summary Judgment Order"). CP 353-355. In the Summary Judgment Order, the Court hand-wrote additional instructions concerning motions for reconsideration: "It is further ordered that any motion for reconsideration shall be served, filed and noted for hearing without oral argument, as directed in the Court's Memorandum Decision…The Court may request oral argument, depending on the content of any written submissions." CP 354. The Boyers did not make a Motion for Reconsideration and instead filed a Notice of Appeal. CP 356-363.

VI. ARGUMENT

A. Standard of review.

On appeal of a summary judgment order, the proper standard of review is *de novo*, and thus, the appellate court performs the same inquiry as the trial court. *Lybbert v. Grant Cty., State of Wash.*, 141 Wn.2d 29, 34, 1 P.3d 1124, 1127 (2000). "A court may grant summary judgment if the pleadings, affidavits, and depositions establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.*

B. Dr. Shamoun's Declaration was untimely and no request was made to consider its contents.

Petitioners argue that the trial court and Court of Appeals failed to follow the *Burnet* factors when it signed the written order granting defendants' motion for summary judgment. First, Petitioners failed to make or preserve any argument concerning the application of *Burnet.* Second, Petitioners wrongly assume that the trial court struck or refused to consider Dr. Shamoun's supplemental declaration. To the contrary, the record is clear that Petitioners ***never requested*** relief from the trial court. Despite two invitations from the trial court to do so, Petitioners never moved for reconsideration of the Court's summary judgment decision. CP 326, 354.

The trial court was not asked – nor did it – exclude the supplemental Shamoun declaration. *Burnet,* therefore, is inapplicable.

1. Petitioners failed to preserve their *Burnet* arguments.

The first time Petitioners asserted that the trial court had run afoul of *Burnet* was before the Court of Appeals. In keeping with RAP 2.5(a), the court declined to consider Petitioners' arguments concerning the application of the *Burnet* factors:

> On appeal, Kathie Boyer complains that the superior court never applied the *Burnet v. Spokane Ambulance* factors. Nevertheless, Boyer never identified the factors for the superior court, nor asked for their application. The superior court deserved an opportunity to hear this request from Boyer before any appeal. PSNW and Kai Morimoto deserved an opportunity to address the *Burnet* factors and argue against the merits of the supplemental declaration before any appeal. Even on appeal, Boyer has not analyzed why the *Burnet* factors apply in her favor.
>
> We do not review new arguments on appeal. RAP 2.5(a); *State v. Nitsch, 100 Wn. App. 512, 519, 997 P.2d 1000 (2000)*. The prerequisite affords the trial court an opportunity to rule correctly on a matter before it can be presented on appeal. *State v. Strine, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013)*. The rule serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and facilitates appellate review by ensuring that a complete record of the issues will be available. *Strine*, 176 Wn.2d at 749–50; *State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)*.

Boyer, 449 P.3d at 300.

Respectfully, this Court should decline to consider Petitioners' arguments where Petitioners failed to adequately develop a record at the trail court level allowing for complete review.

2. Petitioners failed to request relief from the trial court and waived any argument concerning the supplemental declaration of Dr. Shamoun.

In contrast to the procedure here, in *Keck*, the plaintiff filed a supplemental declaration *prior to* the summary judgment hearing, and requested permission to file the late document or a continuance. Here, the Boyers did not seek a continuance, did not ask the trial court to alter the filing requirements of CR 56, did not ask the trial court to re-open the summary judgment record, and did not ask for affirmative relief concerning the supplemental declaration. Petitioners cite no case which requires a trial court to grant relief that is not requested.[2] Rather, Petitioners simply asked that the trial court's order be modified to include the Errata in Support of Plaintiffs' Response to Defendants' Motion for Summary Judgment and the Supplemental Declaration of Dr. Shamoun as matters the court had considered at the April 27, 2018 hearing. CP 336-337. Plaintiffs submitted

[2] Petitioners generally suggest their objection to Defendants' proposed order "ask[ed] the court to consider the supplemental declaration." *Petition for Review, pg. 5.* Yet, such a request is not contained in their objection. CP 336-340.

a proposed order ***granting*** Defendants' Motion for Summary Judgment. CP 350-352. No competing Order Denying Defendants' Motion for Summary Judgment was presented.

The Court of Appeals rejected the notion – advanced by Petitioners – that a trial court is required to grant relief which has not been requested:

> One might characterize as overly technical a requirement that the party filing a late affidavit also file a motion for permission to file late or file a motion for reconsideration after a ruling. After all the superior court should have recognized when it presumably saw the supplemental declaration of John Shamoun that Kathie Boyer wanted to file the affidavit late and gain reconsideration of its memorandum decision. Nevertheless, requiring one or more motions to accompany the supplemental declaration serves legitimate purposes. With the motion for late filing, Kathie Boyer would have or at least should have included an affidavit or other support to show good cause for extension of the time for filing. The superior court could then have also determined the applicability of the *Burnet v. Spokane Ambulance* factors. With the motion for reconsideration, Kathie Boyer would have or at least should have presented argument as to why the supplemental declaration defeated the defendants' summary judgment motion. Without these motions and the motions' support, the superior court lacked a basis on which to determine whether to review the declaration and assess whether the declaration should change the court's decision.

Boyer, 449 P.3d at 300.

In failing to act, Plaintiffs waived any contention that the trial court failed to consider Dr. Shamoun's supplemental declaration. *See, Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 24–25, 851 P.2d 689 (1993) (because trial court has discretion to dismiss case that fails to raise genuine issues for trial, failure to request continuance under CR 56(f) waives issue on appeal); *Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153, 156 (1960) ("Accepting appellants' contentions at face value, we must, nonetheless conclude that appellants' failure to request appropriate relief by the trial court waived any error as to either or both references").

For all of the foregoing reasons, the *Burnet* factors are inapplicable to this case.

C. Division III's application of RCW 7.70.040(1) is in harmony with other divisions and Supreme Court precedent.

RCW 7.70.040 sets out the requisite components of a standard of care claim in a medical negligence case. The statute specifies these elements as follows:

> (1) the health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider in the profession or class to which he belongs, **in the State of Washington**, acting in the same or similar circumstances; (2) such failure was the proximate cause of the injury complained of.

(emphasis added). It is well settled in the State of Washington that expert testimony is essential in malpractice cases where the plaintiff alleges the defendant violated the standard of care. *Stone v. Sisters of Charity of House of Providence*, 2 Wn. App. 607, 469 P.2d 229 (1970).

1. **The statute requires proof of the standard of care in the State of Washington.**

Petitioners assert that the so-called "locality rule" was dispensed with by *Douglas v. Bussabarger*, 73 Wn.2d 476, 488–490, 438 P.2d 829 (1968) and/or *Pederson v. Dumouchel*, 72 Wn.2d 73, 431 P.2d 973 (1967). Petitioners' reliance upon two cases from the 1960's is telling. The Medical Malpractice Act (RCW 7.70.010, et seq.) was adopted during the 1975-1976 session. Thus, any precedential value of *Douglas* and *Pederson* was legislatively modified. Scores of appellate and Supreme Court opinions since *Pederson* have recognized that statutory statewide standard of care is alive and well. For example, in *Harris v. Robert C. Groth, M.D., Inc., P.S.*, 99 Wn.2d 438, 663 P.2d 113 (1983), the Washington Supreme Court emphasized that RCW 7.70.040 sets a state standard of care:

> The legislative history does, however, indicate an intent to alter existing law in one respect – **by limiting those who set the standard of care to healthcare providers within the State of Washington**. See, Legislative Report of the 44th 2nd Extraordinary Session 23 (1976). Thus, in attributing to the reasonably prudent healthcare provider the skills and training possessed by

> members of the same class or profession (See, RCW 4.24.290; W.Prosser §32, at 162), **the trier of fact must consider only those providers within the State of Washington.** See, RCW 7.70.040. (emphasis added).

99 Wn.2d at 447, footnote 4 (emphasis added).

In *Adams v. Richland Clinic, Inc., P.S.*, 37 Wn. App. 650, 655, 681 P.2d 1305 (1984), the court characterized the standard of care under RCW 7.70.040(1) as being a "statewide determination," and noted that, to establish a claim for violation of the standard of care, the plaintiff "must present evidence of a statewide standard of care." *Id.* Consistent with the above, the only type of expert competent to testify as to the standard of care required of a practitioner in the State of Washington is an expert who knows the practice and standard of care in Washington. *McKee v. Am. Home Products, Corp.*, 113 Wn.2d 701, 706–07, 782 P.2d 1045 (1989).

In *Winkler v. Giddings,* 146 Wn. App. 387, 190 P.3d 117 (Div. 3 2008) *review denied,* 165 Wn.2d 1034, 203 P.3d 382 (2009), the trial court refused to permit the plaintiff's standard of care expert witness to testify at trial where the expert witness "made an educated assumption" that the standard of care in the State of Washington was the same across the country. The court found that assumption insufficient. The absence of expert witness testimony resulted in a directed verdict for the defense, which was affirmed on appeal.

The Legislature required, in no uncertain terms, that expert witness testimony in medical negligence cases must be based upon the standard of care practiced in Washington.

Left without a legal basis to overturn RCW 7.70.040, Petitioners recite the reasoning of *Pederson* insofar as it discusses "practical difficulties" of the locality rule as it existed prior to the adoption of RCW 7.70.040. What Petitioners ignore is the fact that *Pederson* abrogated a common law rule which was much more strict than RCW 7.70.040. The prior common law rule went community to community or city by city. Thus, the "standard of care" in Tumwater, Washington might be markedly different than the standard of care practiced in Seattle, Washington. Under present day RCW 7.70.040, litigants have the benefit of consulting with expert witnesses statewide, and, assuming an adequate foundation is presented, nationwide.

2. Petitioners failed to provide foundation for Dr. Shamoun's opinions.

Respondents do not dispute the fact that physicians from outside the State of Washington can testify in medical negligence actions. However, as with other requirements, the expert must provide an adequate factual foundation to establish she or he is familiar with the standard of care in the State of Washington. *See,* ER 104(a); *Reyes v. Yakima Health Dist.*, 191

Wn.2d 79, 86–87, 419 P.3d 819 (2018); *Winkler*, 146 Wn. App. at 392; *Elber v. Larson, 142 Wn. App. 243, 247, 173 P.3d 990 (2007).*

Petitioners suggest that *Winkler* cannot be read harmoniously with *Elber.* The Court of Appeals recognized that Petitioners read an isolated sentence in *Elber* and extrapolated its meaning. The court wrote: "And Dr. Meub is familiar with the standard of care in Washington because it is the same everywhere in this country." *Boyer*, 449 P.3d at 293, *quoting Elber*, 142 Wn. App. at 249.

Further, to the extent that *Elber* could be read to be inconsistent with prior precedent, the Court of Appeals cleared up any confusion: "Assuming *Elber v. Larson* allows a nonresident physician to claim familiarity with the Washington standard of care without providing the basis of this familiarity, we deem *Elber* contrary to other Washington decisions. We hold that the expert must provide some underlying support for his opinion that the state standard follows the national standard." *Boyer*, 449 P.3d at 294.

Division III's ruling in this case is consistent with this Court's ruling in *Reyes, supra*, insofar as it requires a plaintiff to particularize the conduct at issue to survive summary judgment. Or, in the words of Justice Owens: "An issue of material fact is genuine if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. Reyes, 191

Wn.2d at 86. That inquiry requires more than a summary statement and instead, conclusions must be linked to a factual basis. *Id. at* 87.

In this case, initially, Dr. Shamoun offered only a conclusory statement concerning his familiarity with the standard of care: that it "is not unique to the State of Washington and applies on a nationwide basis." The trial court found that Dr. Shamoun had offered no foundation for this conclusion. CP 325. Critically, Dr. Shamoun provided no explanation in his declaration for how he knew the standard of care for plastic surgeons in Washington, nor did he provide a copy of his curriculum vitae to the trial court explaining his training, education, or experience. CP 322-323, 325 ("Dr. Shamoun states that he attached his 'C.V.' and *it* shows he has "studied, trained, and practiced in a variety of locations throughout the country...No C.V. was attached."). Then, when Dr. Shamoun's Curriculum Vitae arrived *after* the summary judgment hearing, it contained no reference to training, education, or experience in Washington. CP 323.

D. Dr. Shamoun failed to establish medical negligence on the part of non-physician providers.

Finally, The Court of Appeals did not reach the issue of whether Dr. Shamoun's declarations, if taken together, generated an issue of fact. This Court likewise need not decide that issue unless it adopts new law as requested by Petitioners.

Civil Rule 56(e) requires that an expert witness declaration offered in opposition to a summary judgment motion must: "[1] be made on personal knowledge, [2] shall set forth such facts as would be admissible in evidence, and [3] shall show affirmatively that the affiant is competent to testify to the matters stated therein." CR 56(e); *McKee*, 113 Wn.2d at 706.

In medical malpractice actions, an expert witness must demonstrate that he or she "has sufficient expertise in the relevant specialty." *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 229, 770 P.2d 182 (1989). The standard of care required of a particular healthcare provider "must be established by the testimony of experts who practice in the same field." *McKee*, 113 Wn.2d at 706. Accordingly, when determining whether an expert is sufficiently qualified to render an opinion and defeat a motion for summary judgment in a medical malpractice action, the court should "examine the record to determine the 'relevant specialty' and whether [the expert and the defendant] practice in the 'same field.' " *Seybold v. Neu*, 105 Wn. App. 666, 679, 19 P.3d 1068 (2001) (quoting *Young*, 112 Wn.2d at 229, and *McKee*, 113 Wn.2d at 706).

Physicians are not categorically prohibited from offering standard of care testimony against non-physician providers. But a physician must offer testimony establishing familiarity with the standard of care applicable to the specific type of provider at issue. In *Hall v. Sacred Heart Med. Ctr.*,

100 Wn. App. 53, 995 P.2d 621 (2000), *as amended* (Apr. 6, 2000) a physician was permitted to offer standard of care testimony concerning nurses only after providing a foundation concerning his medical training and supervisory experience with nurses.

Dr. Shamoun demonstrated no such familiarity with the standard of care for non-physician providers. Nor did he identify which provider or providers he contended violated the standard of care. Absent such testimony, all claims against non-physician providers were properly dismissed.

1. **Dr. Shamoun did not identify the health care providers who he summarily criticized, the standard of care applicable to each health care provider and how each health care provider violated the alleged standard of care.**

Other than his opinions concerning Dr. Morimoto, Dr. Shamoun offered opinions generally concerning "healthcare providers." He did not identify such providers by name or specialty, any pre-operative nurse, operating room nurse, anesthetist, or post-operative nurse or any other non-physician provider who violated the standard of care. Dr. Shamoun did not indicate that he is familiar with the standard of care for a nurse working in the pre-operative phase, anesthesia personnel, operating room nurses, or post-operative nurses. His testimony was plainly deficient to establish claims against the non-physician providers in this case.

A medical negligence plaintiff must prove a violation of the standard of care by each individual whom they allege violated the standard of care. *Grove v. PeaceHealth St. Joseph Hosp.*, 182 Wn.2d 136, 341 P.3d 261 (2014). This includes the standard of care for the professional at issue, whether a pre-operative nurse, operating room nurse, post-operative nurse, or anesthesia personnel. A plaintiff must prove the alleged violation of the standard of care by the professional at issue and the damages caused by the same. As set forth, *infra,* under *Guile* and *Keck* mere conclusory statements are insufficient to meet their burden of proof.

Dr. Shamoun did not correct this deficiency in his Supplemental Declaration. There, he simply stated that plastic surgeons adhere to the same standard of care in Washington as they do "throughout the rest of the nation." CP 329.

2. PSNW could not be held liable for the conduct of its unidentified non-physician providers.

Based upon the analysis described above, any claims against PSNW based upon the conduct of such non-physicians had to be dismissed, as the Boyers failed to show that PSNW was liable for negligent conduct of non-physician providers.

Presumably, plaintiffs' theory of liability as to PSNW was that it should be vicariously liable for the conduct of its employees and/or agents.

Vicarious liability is liability for the negligence of an actor under the defendant's control. *Van Hook v. Anderson*, 64 Wn. App. 353, 363, 824 P.2d 509 (1992). An employer cannot be vicariously liable if its employees are not negligent. *Doremus v. Root*, 23 Wash. 710, 716, 63 P. 572 (1901); *Orwick v. Fox*, 65 Wn. App. 71, 88, 828 P.2d 12 (1992). As set forth above, there is no evidence that non-physician providers were negligent and therefore, no liability could attach to PSNW.

VII. CONCLUSION

Based upon the foregoing, this Court should deny review.

RESPECTFULLY SUBMITTED this 11th day of November, 2019.

EVANS, CRAVEN & LACKIE, P.S.

By _____
JAMES B. KING, #8723
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Attorneys for Respondents/Defendants

CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 15 day of November 2019, the foregoing was delivered to the following persons in the manner indicated:

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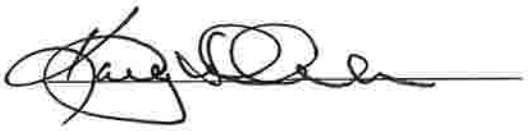

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