No. 97768-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

KATHIE and JOE BOYER,

Petitioners,

vs.

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

Respondents.

WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION AMICUS CURIAE MEMORANDUM IN SUPPORT OF PETITION FOR REVIEW

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On behalf of
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I. IDENTITY AND INTEREST OF AMICUS

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice (WSAJ). WSAJ Foundation operates an amicus curiae program and has an interest in the rights of persons seeking redress under the civil justice system, including an interest in the procedural and substantive requisites for an expert's declaration opposing summary judgment in a medical malpractice action.

II. BACKGROUND

This case arises out of the summary judgment dismissal of a medical malpractice cause of action. The facts are drawn from the Court of Appeals opinion and the briefing of the parties. *See Boyer v. Morimoto,* __ Wn. App. 2d __, 449 P.3d 285 (2019), *review pending*; Boyer Pet. for Rev. at 3-6; Morimoto Resp. Br. at 3-6. Kathie Boyer filed suit alleging that Dr. Morimoto failed to comply with the applicable standard of care and that nurses employed by Plastic Surgery Northwest were negligent, which proximately caused Boyer's injuries and need for additional surgeries.

In response to the defendants' summary judgment motion, Boyer filed a declaration from an out-of-state plastic surgeon expert opining that the defendant physician had not complied with the applicable standard of care. The expert stated that he had studied, trained and practiced in various locations throughout the country, he had been licensed to practice medicine

in six states, he had been qualified as an expert in several jurisdictions to testify regarding surgeries similar to Boyer's surgeries, he was well-versed in the applicable standard of care, and "the standard of care in this case required defendants to exercise the same degree of skill, care and learning expected of other reasonably prudent healthcare providers attempting the [described] surgical procedure... [t]he standard is not unique to the State of Washington and applies on a nationwide basis." *Boyer*, 449 P.3d at 289 (brackets added).

The trial court issued a memorandum decision granting summary judgment, finding the plaintiffs' expert's opinion inadmissible because he failed to adequately support his statements that he was familiar with the applicable standard of care in Washington and that the standard of care is national in scope. Before entry of the summary judgment order, Boyer submitted a supplemental declaration, unaccompanied by a motion. In his supplemental declaration, the expert stated that he has consulted with plastic surgeons in Washington and discussed the specific procedures at issue in this case, he has consulted on cases in Washington concerning the procedures at issue in this case, and he can confirm that Washington plastic surgeons adhere to the same standards of practice followed by plastic surgeons throughout the nation. Boyer filed an objection to the proposed summary judgment order, arguing that the order should include the expert's supplemental declaration as evidence considered by the trial court, and providing authorities stating that a party may file affidavits to assist the trial

court in determining the existence of a material fact until a formal summary judgment order is entered. The trial court judge entered an order granting summary judgment, and did not include the expert's supplemental declaration in the list of evidence considered by the court. Boyer appealed.

The Court of Appeals affirmed, holding: 1) the trial court correctly rejected the expert's initial declaration because the expert failed to disclose how he knew Washington's standard was the same as a national standard and offered only a conclusory statement concerning his familiarity with the standard of care in Washington; 2) the trial court did not err in failing to consider the supplemental declaration, because the supplemental declaration was unaccompanied by any motion requesting reconsideration or permission to file a late declaration, and failed to provide any reason for the late filing; 3) the appellate court would not consider whether the trial court should have applied the analysis from *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), to determine the admissibility of the supplemental declaration, because that argument was not raised below.

III. ISSUES PRESENTED

1. Does the *Burnet* presumption that late-submitted evidence will be considered always apply to a declaration filed late but before a final order granting summary judgment? Or may a trial court instead skip a *Burnet* analysis and simply disregard the declaration if no party files a motion regarding the declaration?

2. Does RCW 7.70.040 permit juries in medical negligence cases to decide that society expects reasonably prudent doctors in Washington state to abide by the nationwide standard of care in a case's particular circumstances? Or must juries receive detailed expert testimony establishing that Washington doctors already follow the national standard?

See Boyer Pet. for Rev. at 2-3.

IV. ARGUMENT IN SUPPORT OF REVIEW

A. Review is warranted under RAP 13.4(b)(1) because the failure to apply the *Burnet* factors to the plaintiffs' expert's supplemental declaration in *Boyer* conflicts with this Court's decisions in *Burnet*, *Jones v. City of Seattle*, and *Keck v. Collins*.

Boyer's supplemental declaration was filed after the trial court's memorandum decision but before the trial court entered a summary judgment. "Until a formal order granting or denying the motion for summary judgment is entered, a party may file affidavits to assist the court in determining the existence of an issue of material fact." *Keck v. Collins*, 181 Wn. App. 67, 83, 325 P.3d 306 (2014), *affirmed*, 184 Wn.2d 358, 357 P.3d 1080 (2015) (citations omitted).

In *Burnet*, the Court held that before excluding untimely disclosed evidence, a court must consider three factors on the record: whether a lesser sanction would suffice; whether the violation was willful or deliberate; and whether the violation substantially prejudiced the opposing party. 131 Wn.2d at 494. The Court stated: "While we are not unmindful of the need for efficiency in the administration of justice, 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." *Id.* at 498.

Subsequent Supreme Court cases have held that it is an abuse of trial court discretion to fail to apply the *Burnet* factors to exclude a witness. *See, e.g.*, *Jones v. City of Seattle*, 179 Wn.2d 322, 338, 314 P.3d 380 (2013).

Burnet and its progeny require a *presumption* "that late-disclosed testimony will be admitted absent a willful violation, substantial prejudice to the non-violating party, and the insufficiency of sanctions less drastic than exclusion." *Jones*, 179 Wn.2d at 343. Failure to show "good cause" for a late disclosure does not establish willfulness. *See id.* at 345, 348, 353-54.

In *Keck v. Collins*, 184 Wn.2d 358, 374, 357 P.3d 1080 (2015), the Court held that the *Burnet* factors must be applied when a trial court excludes untimely evidence submitted in response to a summary judgment motion. In discussing summary judgment, the Court noted:

> 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*."

Keck, 184 Wn.2d at 369 (citation omitted).

Washington law favors resolution of issues on the merits. *See Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 420, 150 P.3d 545 (2007). In *Boyer*, the trial court's failure to consider the late-filed supplemental declaration resulted in summary judgment dismissal. The trial court's failure to acknowledge the supplemental declaration conflicts with this Court's analysis that a late-filed declaration opposing summary judgment is presumed admissible absent a willful violation, substantial prejudice to the non-violating party and the insufficiency of sanctions less drastic than holding the declaration inadmissible. *See Burnet*, 131 Wn.2d at 494; *Jones*, 179 Wn.2d at 343; *Keck*, 184 Wn.2d at 374.

Citing RAP 2.5(a), the Court of Appeals in *Boyer* refused to consider the *Burnet* factors on the basis that Boyer failed to raise that argument in the trial court. *See Boyer*, 449 P.3d at 300. RAP 2.5(a) "does not apply when the question raised affects the right to maintain the action.... Furthermore, RAP 2.5(a) is permissive in nature and does not automatically preclude the introduction of an issue at the appellate level." *Pulcino v. Federal Express*, 141 Wn.2d 629, 649, 9 P.3d 787 (2000) (citation omitted). Because the *Burnet* factors affect the Boyers' right to maintain their claim, this Court should grant review to address this issue.

B. Review is warranted under RAP 13.4(b)(1) because *Boyer*'s requirement that a medical expert's declaration show how the witness knows the standard of care in Washington conflicts with this Court's decision in *Harris v. Groth*.

Boyer held that the plaintiffs' expert's first declaration was inadmissible because the expert failed to disclose the factual basis for how he knows the standard of care in Washington. *See Boyer*, 449 P.3d at 294-95. This conflicts with the analysis in *Harris v. Groth*, 99 Wn.2d 438, 663 P.2d 113 (1983). In *Harris*, this Court considered the standard of care to be applied in actions against a physician for professional negligence following the enactment of Laws of 1975, 2d Ex.Sess., ch. 56, § 9, codified as RCW 7.70.040, and Laws of 1975, 1st Ex.Sess., ch. 35, § 1, codified as RCW 4.24.290.[1] *See Harris*, 99 Wn.2d at 443-45. Based upon the language in

[1] RCW 7.70.040 currently provides: "The following shall be necessary elements of proof that injury resulted from the failure of the health care provider to follow the accepted standard of care: (1) The health care provider failed to exercise 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

these statutes, the Court concluded that the Legislature intended to adopt a reasonable prudence standard of care. *Id.* at 445. The Court held that the term "expected" in RCW 7.70.040(1) ("that degree of care, skill, and learning *expected* of a reasonably prudent health care provider in the profession or class to which he or she belongs, in the state of Washington, acting in the same or similar circumstances") refers to "expected by society." *Id.* "It is society and their patients to whom physicians are responsible, not solely their fellow practitioners." *Id.*

The Court held that the enactment of RCW 7.70.040 and RCW 2.24.290 did not overrule *Helling v. Carey*, 83 Wn.2d 514, 519 P.2d 981 (1974), and *Gates v. Jensen*, 92 Wn.2d 246, 595 P.2d 919 (1979). *See Harris*, 99 Wn.2d at 443-46. In *Helling*, the Court held that the standard of care was reasonable prudence, "regardless of customary medical practice." *Harris*, 99 Wn.2d at 443.[2] In *Gates*, the Court held that a physician is subject to a reasonable prudence standard of care, which may require a higher standard than the applicable standard of care followed by a particular class of physicians. *See Gates*, 92 Wn.2d at 247, 253.

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same or similar circumstances; (2) Such failure was a proximate cause of the injury complained of."
RCW 4.24.290 currently provides: "In any civil action for damages based on professional negligence against... a physician licensed under chapter 18.71 RCW... the plaintiff in order to prevail shall be required to prove by a preponderance of the evidence that the defendant or defendants failed to exercise that degree of skill, care, and learning possessed at that time by other persons in the same profession, and that as a proximate result of such failure to the plaintiff suffered damages..."

[2] In *Helling*, the Court quoted Justice Holmes in support of its adoption of a reasonable prudence standard: "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not." *Helling*, 83 Wn.2d at 518-19 (quoting *Texas & P. Ry. v. Behymer*, 189 U.S. 468, 470, 23 S. Ct. 622, 47 L. Ed. 905 (1903)).

Consistent with *Harris*, the Washington Pattern Jury Instruction setting forth the standard of care for a health care provider includes the following final paragraph: "The degree of care actually practiced by members of the medical profession is evidence of what is reasonably prudent. However, this evidence alone is not conclusive on the issue and should be considered by you along with any other evidence bearing on the question." 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 105.01 (7th ed.) (July 2019 Update).

In *Boyer*, plaintiffs' expert's initial declaration set forth evidence that 1) he studied, trained and practiced in a variety of locations in the United States, 2) he has been licensed to practice in six states, 3) he has been qualified as a medical expert to testify regarding the standard of care for surgeries like the surgery involved in *Boyer*, and 4) he reviewed the particular surgeries involved in *Boyer*. He stated that as a result of his education, training and experience, he is well-versed in the applicable standard of care, and the standard of care required was a reasonably prudent standard which is not unique to the State of Washington and applies nationwide. *See Boyer*, 449 P.3d at 289. As stated in WPI 105.01, the standard of care for a health care provider in Washington is reasonable prudence, and "the degree of care actually practiced by members of the medical profession" is evidence, but is not conclusive on the issue of what is reasonably prudent. Under that standard, a proffered medical expert witness should be required to set forth an adequate foundation for his or her

opinion that a health care provider did not exercise reasonable prudence; the witness should not be required to set forth facts to establish the standard of care actually practiced in Washington, as that Washington standard is not conclusive on the issue of reasonable prudence. In *Boyer*, the plaintiffs' expert's first declaration set forth adequate qualifications for providing an opinion on whether the health care providers exercised reasonable prudence, and that declaration should not have been found inadmissible resulting in the summary judgment dismissal of the plaintiffs' action.

Harris also refers to the general requirement that expert testimony is necessary to establish the standard of care in a medical negligence case. *See* 99 Wn.2d at 449. CR 56(e) governs the form of affidavits opposing summary judgment, and provides those affidavits "shall set forth such facts *as would be admissible in evidence*." ER 705 governs expert opinions, and provides that an expert may "testify in terms of opinion... and give reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise." Here, the Boyers' expert should have been permitted to provide an initial opinion on the standard of care without setting forth specific underlying facts supporting that opinion, and should have been given the opportunity to supplement that opinion with the underlying facts if the judge so required.[3]

C. Review is warranted under RAP 13.4(b)(2) because *Boyer* conflicts with other decisions of the Court of Appeals.

[3] In *Boyer*, the appellate court noted its ruling "may conflict with ER 705." 449 P.3d at 295.

Review is warranted if the decision in *Boyer* is in conflict with a published decision of the Court of Appeals. See RAP 13.4(b)(2). In *Boyer*, the court acknowledged that other court of appeals decisions deemed testimony sufficient to avoid summary judgment where a physician licensed in another state declared that a national standard of care exists in Washington, without providing facts establishing how the physician knew the standard of care exercised by health care providers in Washington. *See Boyer*, 449 P.3d at 293-94 (citing *Elber v. Larson*, 142 Wn. App. 243, 173 P.3d 990 (2007); *Pon Kwock Eng v. Klein*, 127 Wn. App. 171, 110 P.3d 844 (2005), *review denied*, 156 Wn.2d 1006 (2006)). The court in *Boyer* stated that to the extent *Elber* found such testimony admissible, it is "contrary to other Washington decisions." *Id.* at 294 (citing *Winkler v. Giddings*, 146 Wn. App. 387, 190 P.3d 117 (2008), *review denied*, 165 Wn.2d 1034 (2009)).[4] Given the conflicting Court of Appeals decisions, review is warranted under RAP 13.4(b)(2).

V. CONCLUSION

The Court should grant the Petition for Review.

DATED this 3rd day of December, 2019.

Daniel E. Huntington for Valerie D. McOmie

On behalf of WSAJ Foundation

[4] In *Winkler*, the court described the holding in *Eng*, in which the court reversed a summary dismissal where the excluded medical witness testified to a "national standard of care," but not the standard of care in Washington. *Winkler*, 146 Wn. App. at 393. The court distinguished *Eng*, because in *Winkler* the defendant showed that the standard of care differed depending upon the area of the country and a surgeon's training. *Id.* Apparently, no such contradictory evidence was presented in *Eng*. Similarly, there is no mention of any such contradictory evidence presented in *Boyer*.

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of December, 2019, I electronically filed with the Clerk of the Court using the Washington State Appellate Courts Portal and also served via email the foregoing document to the following:

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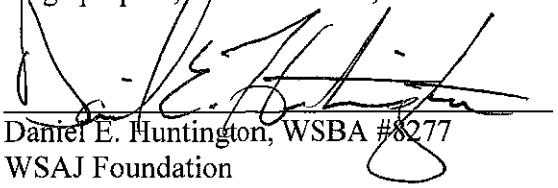
In addition, I also certify that I mailed a copy of the foregoing document to Counsel for Respondents Morimoto and Plastic Surgery Northwest, at the above listed office address, postage prepaid, on December 3, 2019.



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