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Court of Appeals
Division I
State of Washington

NO. 74816-5

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

(Whatcom County Cause No. 13-2-01078-6)

ANDREA ERICKSON,

Appellant,

vs.

JAMES HOLSTINE, D.O.; JAMES D. HOLSTINE D.O. P.L.L.C., a Washington Corporation; and PEACEHEALTH dba PEACEHEALTH MEDICAL GROUP, a Washington Non-profit Corporation,

Respondents.

APPELLANT ERICKSON'S OPENING BRIEF

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I – INTRODUCTION

Andrea Erickson (Erickson) challenges the procedural and substantive errors that allowed PeaceHealth Medical Group and Dr. Holstine (collectively "PeaceHealth") to introduce late and improper expert opinion testimony by Dr. Kirby. Dr. Kirby's opinion being that in the State of Washington, an orthopedic surgeon does not have to diagnose or treat a broken bone in order to comply with the standards of care. This Court should reverse and remand.

Erickson was PeaceHealth's surgical and post-surgical patient. On April 27, 2010, Dr. Holstine operated on Erickson's left shoulder, intending to restore or repair a condition that caused significant pain and prevented her from continuing working as a dental hygienist. In May 2010, following surgery, Erickson presented in Dr. Holstine's office at PeaceHealth complaining of severe left shoulder pain. Erickson reported she believed she broke her shoulder while reaching for a pair of scissors. Erickson was correct. She fractured the acromion (bone) upon which Dr. Holstine operated. The break was not diagnosed or treated by PeaceHealth's physicians or staff.

Between May 2010 and September 2010, PeaceHealth's physicians/staff failed to even consider the possibility of a broken bone. PeaceHealth's health care providers further failed to take the expected steps required by a differential diagnosis to rule out a broken bone, i.e., including ordering appropriate imaging. Instead, Dr. Holstine prescribed physical therapy and administered cortisone injections. Dr. Holstine admitted physical therapy and cortisone injections were not appropriate treatments for a broken acromion.

On October 29, 2010, seven (7) months post-surgery and frustrated with her course of recovery, Erickson consulted with Dr. Oates for a second opinion regarding her continuing left shoulder pain and lack of improvement. Dr. Oates suspected Erickson's left acromion was fractured and ordered an x-ray and CT scan. With the assistance of the imaging, Dr. Oates diagnosed a broken acromion, concluding it was likely the result of aggressive surgery by Dr. Holstine. Dr. Oates concluded additional surgery was necessary. Due to the passage of time, the second surgery was defined a "salvage operation." RP 194-95.

II – ERICKSON'S ASSIGNMENTS OF ERROR

No. 1. On October 12, 2015, the trial court erred when it withdrew and struck its Order Striking the Declaration of Richard Kirby, MD. CP 482.

No. 2. On October 27, 2015, without a timely PeaceHealth motion or affidavit disclosing excusable neglect, the trial court erred in applying *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 357 P.3d 1080 (1997), and in admitting Dr. Kirby's late declaration into evidence. CP 539.

No. 3. On October 27, 2015, the trial court erred when it entered its Order Denying Plaintiff's Motion for Partial Summary Judgment Re: Negligence. CP 539.

No. 4. On October 27, 2015, the trial court erred in entering finding of fact No. 1, to wit: "Defendants' have excusable neglect for the delay (in filing and serving Dr. Kirby's declaration)." CP 541.

No. 5. On October 27, 2015, the trial court erred in entering finding of fact No. 2, to wit: "Defendants' have a reasonable justification for the delay . . ." *Id.*

No. 6. On October 27, 2015, the trial court erred in entering finding of fact No. 3, to wit: "There is no substantial prejudice to the Plaintiff due to the timing of Dr. Kirby's declaration . . ." *Id.*

No. 7. On October 27, 2015, the trial court erred in entering finding of fact No. 4, to wit: "The defendants did not act willfully or intentionally . . ." *Id.*

No. 8. On November 9, 2015, the trial court erred when it denied Erickson's motion for judgment on defendants' negligence as a matter of law. RP 1236-37.

No. 9. The trial court erred in giving jury instruction number 13. CP 1096.

No. 10. On February 1, 2016, the trial court erred when it entered its Order Denying Plaintiff's Motion for Judgment as a Matter of Law (JNOV). CP 1182.

No. 11. On February 1, 2016, the trial court erred when it entered its Order Denying Plaintiff's Motion for New Trial. CP 1180.

III – ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did PeaceHealth provide the required evidence of excusable neglect, which would then require the trial court to apply the *Burnet* factors to Dr. Kirby's late filed declaration? [No.]

2. Would a proper application of *Keck v. Collins*, 184 Wn.2d 358 (2015), allow the trial court to consider Dr. Kirby's late filed declaration in determining the summary judgment motion? [No.] CP 313.

3. Were the trial court's findings regarding the *Burnet* factors supported by substantial evidence? [No.] CP 539-42.

4. Did Dr. Kirby's declaration set forth specific facts or opinions which sufficiently rebutted Erickson's motion for summary judgment regarding negligence? [No.] CP 320.

5. Was Dr. Kirby's trial testimony on the standard of care appropriately grounded in methods and procedures of science? [No.] CP 1130; Trial Exhibit 78, 54, 56, 58.

6. Did the trial court err in its gatekeeper role by failing to ensure that Dr. Kirby's expert opinion testimony was both relevant and reliable? [Yes.]

7. Did PeaceHealth dispute the standard of care applicable to its care of Erickson required a differential diagnosis? [No.]

8. Did PeaceHealth's providers, at any of the many opportunities, attempt a differential diagnosis to rule out a broken bone? [No.]

9. Is the jury's verdict supported by substantial evidence? [No.]

IV – STATEMENT OF THE CASE

A. Surgical and post-surgical treatment.

In March of 2010, Erickson was a patient of PeaceHealth, and was being treated for work-related left shoulder pain. Erickson was referred to Dr. Oates and Dr. Holstine for orthopedic consultations, who both recommended that Erickson consider subacromial decompression surgery on her left shoulder. Trial Exhibit 5.

On April 27, 2010, Erickson's acromion (bone) in her left shoulder was operated on by Dr. Holstine at PeaceHealth. Trial Exhibit 6. The purpose of the surgery was to remove a portion of Erickson's acromion, in order to relieve a shoulder impingement.

Erickson's left shoulder condition was causing problems and pain with movement, associated with her work as a dental hygienist. RP 170. Normally, such surgery required removal of one-third of the bone leaving two-thirds thickness remaining. RP 242.

On May 8, 2010, Erickson phoned PeaceHealth and spoke with an unknown person. In that phone call, Erickson described a "pop", sounding as though a gun went off in her left shoulder, followed immediately by severe pain. CP 65. On May 11, 2010, Erickson saw Dr. Geist. Erickson reported hearing a sudden snap and believed she had broken a bone in her left shoulder. Trial Exhibit 7. Erickson complained of severe pain, and the need to take 8 to 9 pain pills a day. *Id.* Dr. Geist referred her back to Dr. Holstine. *Id.*

In a phone call on May 11, 2010, before he saw Erickson, Dr. Holstine told Dr. Geist he did not think Erickson broke her acromion and she was likely complaining of bursitis. Trial Exhibit 7. On May 12, 2010, Erickson saw Dr. Holstine, and complained of pain in her left shoulder being at 9 on the 10 pain scale with any movement. Trial Exhibit 8. Dr. Holstine performed a physical

exam of Erickson's shoulder but ordered no imaging. *Id.* Without any imaging, Dr. Holstine incorrectly concluded the pop and pain was from inflammation and prescribed physical therapy. *Id.;* CP 64-5.

On June 24, 2010, Erickson was again seen at PeaceHealth, by a Physician Assistant, Judson Moore. Trial Exhibit 9. Erickson remained concerned about her severe left shoulder pain. She advised PA Moore that Dr. Amos recommended an x-ray to rule out a broken bone. *Id.* Again, no x-ray was ordered. Erickson was again prescribed and administered a cortisone injection. *Id.*

On August 5, 2010, PeaceHealth's staff administered a second cortisone injection to Erickson. RP 294. At trial, Dr. Holstine admitted that physical therapy and/or cortisone injections are not appropriate treatments for a broken acromion. RP 295. In August of 2010, when Erickson was last seen at PeaceHealth, she was three months post-surgery, and continuing to complain about an undiagnosed broken left shoulder. She reported nightly pain levels of 7 on a scale of 10. Trial Exhibit 10. Again, no imaging

was ordered. Dr. Holstine advised Erickson to return to his office for follow up in a couple of months. *Id.*; RP 293.

On October 29, 2010, Erickson saw Dr. Oates for a second opinion regarding the five (5) months of severe pain she had experienced in her left shoulder. Trial Exhibit 11. At that appointment, Dr. Oates took an x-ray. Based on his exam and imaging, Dr. Oates diagnosed a "potential acromial fracture." *Id.* Dr. Oates ordered a CT scan, concluding Erickson likely had a post-op acromial fracture due to "aggressive" acromioplasty (surgery) by Dr. Holstine. *Id.* The CT scan disclosed the loud pop and pain was the result of a definite acromial fracture. Trial Exhibit 12.

B. Discovery.

On April 23, 2013, Erickson filed her Complaint against PeaceHealth alleging medical negligence. CP 1. On May 23, 2014, Erickson served PeaceHealth with interrogatories, which included the following interrogatories:

> **INTERROGATORY NO. 44:** Pursuant to Civil Rule 26, identify each person whom you expect to call as an expert witness at trial.

> YOUR FAILURE TO FULLY ANSWER THESE INTERROGATORIES WILL RESULT IN PLAINTIFF OBJECTING TO THE USE OF SUCH EXPERT AT TIME OF TRIAL.
>
> **INTERROGATORY NO. 45:** With regard to Interrogatory No. 44 state the subject matter on which the expert is expected to testify.
>
> **INTERROGATORY NO. 46:** With regard to Interrogatory No. 44, state the substance of the facts and opinions to which the expert is expected to testify.
>
> **INTERROGATORY NO. 47:** With regard to Interrogatory No. 46, state the summary of grounds for each such opinion.

CP 337. On June 27, 2014, PeaceHealth answered the above discovery as follows:

> **INTERROGATORY NO. 44:** Pursuant to Civil Rule 26, identify each person whom you expect to call as an expert witness at trial.
>
> YOUR FAILURE TO FULLY ANSWER THESE INTERROGATORIES WILL RESULT IN PLAINTIFF OBJECTING TO THE USE OF SUCH EXPERT AT TIME OF TRIAL.
>
> **Answer:**
> See objection to Interrogatory No. 41. Testifying experts have not been determined, and the plaintiff's notice of objection is improper where no witness disclosure deadlines have passed. Testifying experts will be disclosed when determined.

> **INTERROGATORY NO. 45:** With regard to Interrogatory No. 44 state the subject matter on which the expert is expected to testify.
>
> **Answer:**
> See objection to Interrogatory No. 41.
>
> **INTERROGATORY NO. 46:** With regard to interrogatory No. 44, state the substance of the facts and opinions to which the expert is expected to testify.
>
> **Answer:**
> See objection to Interrogatory No. 41.
>
> **INTERROGATORY NO. 47:** With regard to Interrogatory No. 46, state the summary of grounds for each such opinion.
>
> **Answer:**
> See objection to Interrogatory No. 41.

CP 339.

By Order of the trial court, all interrogatories were required to be answered or supplemented on or before July 23, 2015. CP 30. PeaceHealth did not supplement the above answers to Erickson's interrogatories. CP 340.

The trial court Discovery Order required PeaceHealth to disclose retained expert witnesses by June 12, 2015. CP 30. On January 9, 2015, the trial court set this matter for trial beginning

October 27, 2015. CP 30. On June 12, 2015, the afternoon of the deadline for PeaceHealth's expert witness disclosure, PeaceHealth provided the following information regarding Dr. Kirby:

> He is expected to testify that Dr. Holstine's pre-operative, surgical and post-operative care met the standard of care. He is also expected to rebut issues raised by the plaintiff's expert(s) and to address causation issues as appropriate.

CP 376.

C. Summary judgment.

On October 14, 2015, five (5) weeks before trial, having received no further information or report regarding PeaceHealth's testifying experts, Erickson moved for partial summary judgment asking the trial court to determine PeaceHealth was negligent as a matter of law. CP 47. In support of her motion, Erickson filed the Declaration of Steven R. Graboff, M.D. CP 67. After describing his background, education, experience, expertise, and substantial medical records reviewed, Dr. Graboff expressed the following expert opinions in support of Erickson's summary judgment motion:

> 12. Chart notes indicate that on May 12, 2010, Ms. Erickson saw Dr. Holstine. That chart note contains the language: "This past Saturday, she felt a pop while

she was reaching up for some scissors and this scared her, caused a fair amount of pain. Since then, she feels she is on backwards in her recovery, has generalized discomfort present and is very hesitant to do anything more." . . . . "Postop arthroscopy, subacromia decompression and Mumford procedure postop two weeks with exacerbation pain with a pop." . . . . "The pop was mostly likely caused from her inflammation from the procedure. I am doubtful that any other significant pathology as a result of reaching for the scissors."

13. Ms. Erickson was given a prescription and sent to physical therapy, and Dr. Holstine advised her to return for reevaluation in six to eight weeks. Dr. Holstine did not take or order any imaging studies on May 12, 2010.

14. It is undisputed in the records that on May 12, 2010, Ms. Erickson presented to Dr. Holstine with a fractured acromion, that Dr. Holstine failed to diagnose the fractured acromion, and that Dr. Holstine failed to order or take any diagnostic or imaging studies to determine the cause of her pain.

15. Ms. Erickson saw Dr. Oates in October of 2010 for another opinion. Dr. Oates performed x-rays and his chart note states: "Interpreted by me today. These include an AP of the clavicle, an outlet view and axillary view. There appears to be a calcified mass above the coracoids as noted on the MRI. There has been substantial distal clavicle excision, as well as a significant acromioplasty and potentially an acromial fracture." Dr. Oates also recommended a CT scan.

16. After her CT scan in November of 2010, Ms. Erickson saw Dr. Oates for another follow-up evaluation, wherein he noted: "There is definitely an acromial fracture. . . . The patient has a postoperative acromial fracture after arthroscopic subacromial decompression done elsewhere."

17. In February of 2011, Ms. Erickson underwent an open reduction internal fixation with iliac crest bone graft of the left acromion by Dr. Oates. This surgery was done to repair Ms. Erickson's shoulder as a result of the undiagnosed, untreated fracture.

18. On a more probable than not basis, Dr. Holstine's care between May of 2010 and post-operative period fell below the standard of care when he failed to diagnose, work up and evaluate Ms. Erickson's fractured acromion.

19. On a more probable than not basis, Dr. Holstine's failure to timely treat Ms. Erickson's left acromial fracture resulted in a left acromial nonunion.

20. On a more probable that not basis, Dr. Holstine performed too aggressive of acromioplasty with resection of too much bone from the left acromion during the surgical procedure on April 27, 2010, causing Ms. Erickson to be more susceptible to an acromial fracture post-surgery.

21. Dr. Holstine had a duty to suspect and rule out an acromial fracture based upon Ms. Erickson's reported complaints on and after May 12, 2010. Dr. Holstine violated this duty, which violation was a breach of the standard of care.

22. On a more probable than not basis, and with a reasonable degree of medical certainty, Dr. Holstine's failure to diagnose and treat Ms. Erickson's acromial fracture post-surgery resulted in the following:

a. Delay in proper surgical treatment for left acromial fracture;

b. Development of left acromial fracture nonunion;

c. The need for additional operations/procedures;

d. Chronic left should pain and dysfunction;

e. Chronic left hip pain and dysfunction;

f. Significant and overall impairment, dysfunction and limitations.

> 23. On a more probable than not basis, and with a reasonable degree of medical certainty, had Dr. Holstine properly worked up, evaluated and diagnosed Ms. Erickson's complaints on May 12, 2010, Ms. Erickson would not have the impairment, dysfunction and limitations to the extent she presently has today.
>
> 24. I am familiar with the standard of care expected of a reasonably prudent orthopaedic surgeon providing medical care similar to that provided to Ms. Erickson on 2010. Upon review of the information available to me at this time, I believe that there is a reasonable degree of medical certainty that Dr. Holstine did not follow the accepted standard of care required to be exercised in his surgical and post-surgical care of Ms. Erickson.
>
> 25. Dr. Holstine, while Ms. Erickson was his surgical and post-surgical patient, failed to exercise the degree of care, skill and learning expected from a reasonably prudent orthopaedic surgeon at the time and in the class to which he belonged, in the state of Washington, acting under the same or similar circumstances at the time of the care or treatment in question. Dr. Holstine's failures were a proximate cause of Ms. Erickson's subsequent treatment, pain, impairment, dysfunction and limitations.

CP 69-72. The summary judgment hearing was noted for, and heard on, October 12, 2015, fifteen (15) days before trial. CP 115.

In opposition to Erickson's motion for partial summary judgment regarding negligence, PeaceHealth filed a response and the declaration of attorney Waters. CP 158; CP 172. PeaceHealth did not file or serve any expert declarations in response to the

summary judgment motion. Erickson's reply to these defective pleadings correctly pointed out that PeaceHealth's arguments were advanced without filing or serving any contrary expert opinion under penalty of perjury. CP 308.

On October 8, 2015, four (4) days before the summary judgment hearing, without motion or explanation, PeaceHealth filed and served the Declaration of Dr. Kirby. CP 313. Dr. Kirby's late filed declaration contained the following opinion(s) on standard of care:

> Dr. Holstine's pre-operative care, surgery, and postoperative care met the standard of care. . . . Pain and popping sensations in the early postoperative period are common for this procedure and do not, by themselves, call for additional imaging in the early post-operative period.

CP 314.

On October 9, 2015, Erickson moved to strike Dr. Kirby's late filed declaration. CP 320. Erickson, in this motion, raised the procedural issue (untimely, without motion, and without excuse) and substantive (does not properly rebut Dr. Graboff's opinions) issues argued herein. CP 322. PeaceHealth filed no responsive

pleadings to Erickson's motion to strike the Kirby declaration. On October 12, the trial court entered an Order striking Dr. Kirby's declaration. CP 482. After further argument, the trial court allowed Dr. Kirby's declaration to be considered. *Id.* The day before trial began, the trial court entered an order denying summary judgment on standard of care violation (negligence) and entered *Burnet* findings. CP 539.

D. *Burnet* factors.

On October 27, 2015, the trial court made the following findings of fact in ruling that the late filed declaration of Dr. Kirby was timely and should be considered in response to Erickson's summary judgment motion on negligence.

> 1. Defendants' (sic) have excusable neglect for the delay;
> 2. Defendants' (sic) have a reasonable justification for the delay;
> 3. There is no substantial prejudice to the Plaintiff due to the timing of Dr. Kirby's declaration or discovery deposition;
> 4. The Defendants did not act willfully or intentionally; and
> 5. There are lesser sanctions, as outlined below, available than striking the declaration and/or proposed testimony of Dr. Kirby, in all respects.

CP 541.

PeaceHealth offered no declaration or other evidence to support these findings. PeaceHealth provided no reason, under oath, which attempted to explain the late filed declaration.

E. Testimony of Dr. Holstine.

On May 12, 2010, Dr. Holstine understood he saw Erickson because Erickson's recovery from surgery was not going well. RP 287. Dr. Holstine was asked to see her to "make sure everything was okay." *Id.* Dr. Holstine was advised by Dr. Geist, before the "examination," that Erickson had reported the following to Dr. Geist on May 11:

> [S]he was reaching out with her arm and felt a sudden snapping, popping sensation in her arm. It felt 'like a sudden snap, like a bone breaking.' It was quite severe pain, and since then, she has been in tears.

Trial Exhibit 7. Dr. Holstine ordered no imaging at this visit. *Id.* at 288; Trial Exhibit 8. At trial, Dr. Holstine agreed that Erickson presented with a broken left acromion on May 12, 2010. *Id.* at 289. At no time was Erickson's broken shoulder diagnosed or treated by Dr. Holstine. Dr. Holstine admitted

that Erickson's complaints required him to do a differential diagnosis. RP 296, l. 22.

On June 24, Erickson again went to Dr. Holstine's office complaining of pain, and continued "troubles" with her left shoulder. Trial Exhibit 9; RP 290. Dr. Holstine was advised that his Physician's Assistant was "concerned" about Erickson. *Id.* At this visit, Dr. Holstine again failed to diagnose or treat the broken acromion. After learning that he had failed during that second opportunity to diagnose or treat the broken acromion, Dr. Holstine never talked to his Physician Assistant about the care they provided. *Id.*

On August 5, 2010, Erickson returned to Dr. Holstine for follow up on her painful left shoulder. Trial Exhibit 10. On that date, Dr. Holstine still had not ordered an x-ray or CT scan. RP 292. Again, Dr. Holstine failed to diagnose or treat a broken acromion. His instructions to Erickson, three months into an undiagnosed and untreated broken bone, after Erickson continued to complain of severe pain, was to come back in a couple of months. RP 293.

F. Dr. Kirby deposition testimony.

The trial court concluded that any harm caused by PeaceHealth's delay or defects in disclosing Dr. Kirby, could be cured by denying summary judgment and allowing Erickson to take Dr. Kirby's deposition, so the trial court allowed for Erickson to take Dr. Kirby's deposition a week before trial. CP 569; CP 542.

In his deposition, PeaceHealth's retained expert, Dr. Kirby admitted that the standard of care in Washington required a differential diagnosis. CP 569, p.29. Dr. Kirby admitted that a differential diagnosis required PeaceHealth's physicians/staff to rule out a broken bone. *Id.* Finally, Dr. Kirby admitted that to do a differential diagnosis to rule out a broken bone, an X-ray should have been ordered. *Id.* 20-21. Dr. Kirby was not aware of why an x-ray was not taken. *Id.* 20.

G. Dr. Kirby trial testimony.

Defendant's expert, Dr. Kirby, agreed on cross examination with the following advertisement from his website:

> Most of us take for granted the ability to do the things we love, until we can't do them. The Mariners and Seahawks rely on the physicians of OPA Ortho to help

> their athletes recover. Even if you aren't a million-dollar athlete, you can too.

Trial Exhibit 52. Erickson's broken acromion, eleven months after Dr. Holstine's surgery at PeaceHealth, was non-union. Non-union means the fracture did not heal after it broke. RP 552-53.

Dr. Graboff testified the standard of care, on all three post-surgical visits to PeaceHealth, included an x-ray to rule out a break. RP 160. Dr. Kirby knew PeaceHealth's staff did not order any x-rays of the shoulder during Erickson's three month post-surgical treatment. Dr. Kirby agreed that in most cases, x-rays were required to properly evaluate and measure a patient's post-surgical progress. *Id.* at 557-58. Dr. Kirby did not review any imaging prior to signing his declaration. *Id.* at 552.

Dr. Kirby's practice was to take post-surgical x-rays at three weeks and three months, even without ongoing complaints. RP 557-58.[1] Dr. Kirby admitted that the standard of care required Dr. Holstine to take the time needed "to accurately pinpoint the source

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[1] Dr. Kirby was aware that after finding the non-union and undertaking corrective surgery, Dr. Oates took an x-ray of Erickson's shoulder every time Erickson was in his office. 11/02 RP 558.

of [Erickson's] complaint(s) [of ongoing pain.]" *Id.* Dr. Kirby admitted a "fractured acromion is a recognized potential complication of the procedure that Dr. Holstine did." RP 559.

Dr. Kirby was not aware of a prior situation where an orthopedic doctor treated an athlete with a broken bone for months without diagnosing the break. RP 561. Dr. Kirby admitted the standard of care for Erickson was the same standard of care to be provided to a professional athlete. *Id.* at 562. Dr. Kirby further admitted if he was going to rule out a break, he would take an x-ray. *Id.* at 569.

H. Trial evidence on standard of care.

Dr. Graboff described the role of a retained expert as reviewing the case, determining what happened, understanding what happened, and determining if reasonable care was provided or whether there were violations of the standard of care. RP 120. Dr. Graboff requested, received and reviewed Erickson's entire medical record. *Id.* at 123-31; RP 122. He reviewed all radiological studies or images, including, trial exhibits 6, 7, 8, 9 10, 11 and 12. RP 131-33.

Erickson definitely had a broken acromion bone when she went to Dr. Geist on May 11 and Dr. Holstine on May 12, 2010. RP 141-42. Dr. Graboff testified that the standard of care required Dr. Holstine, given the history in May, to do a physical examination and perform radiologic studies to rule out a fracture of her left shoulder. RP 143. The same standard applied to the visit of June 24, 2010. Dr. Kirby, at trial, held the same opinions. RP 569-74.

Dr. Graboff, was very critical of Dr. Holstine's prescription of physical therapy and use of cortisone as a treatment, expressing the following opinion on the standard of care:

> (Prescribing physical therapy is) something that you would never do. You wouldn't send somebody to physical therapy and move the broken bone. . . . You wouldn't want to take the chance of causing further damage to the broken area. . . . (Cortisone) is not indicated either. Number one, cortisone will inhibit bone healing, it will lead to something called a nonunion because it turns off the bone's response to the healing inflammation, would never do that . . . . And . . . cortisone injections is not an accepted treatment for a broken bone. Treatment of the broken bone is the accepted treatment for the broken bone.

RP 145. This medical testimony was not contradicted.

On cross examination, Dr. Graboff provided the jury the following testimony on why the standard of care required x-ray or CT scan imaging:

> Q. You testified before that MRI would not show a fracture of a bone; did I state that correctly?
> A. Correct.
> Q. Is that really true, aren't there times where MRI can show fracture?
> A. Well, it's kind of a technical answer so let me – if I can explain it. An MRI will show the reaction of a bone if it breaks. It won't show the fracture, but it will show the bleeding in the bone, the hemorrhage in the bone, the swelling in the bone, and the inflammation in the bone. But that could also be caused by an infection, that could also be caused by a tumor, not necessarily a fracture. But it will not show you the fracture itself, the only thing that would show you the fracture itself is an x-ray or a CT scan.

RP 345.

Erickson had no role or responsibility, whatsoever, in Dr. Holstine's failure to diagnose or treat her broken acromion. RP 148-49. This testimony was not contradicted. After surgery, without unexpected complications, Erickson's shoulder should have fully healed and she should have returned to work in ten (10) weeks. RP 149. This testimony was not contradicted.

On October 29, 2010, when Erickson saw Dr. Oates for a second opinion, Dr. Oates suspected a broken acromion. He immediately ordered the imaging studies described by Dr. Graboff as the standard of care, which imaging was not ordered or taken by PeaceHealth's staff. Exhibit 11; RP 158-59. The results were:

> Dr. Oates is now seeing her after Dr. Holstine has done his surgery, after she experienced this severe pain and popping in her shoulder, after she has gone through all that she's gone through with this undiagnosed fracture. It's important because Dr. Oates indeed takes x-rays; indeed, sends her for additional studies; and indeed comes to find that she had a fracture that failed to be diagnosed, failed to be treated, and wound up becoming a nonunion, and that's what this document shows.

RP 155.

Dr. Graboff, provided the following expert opinions for the jury. First, Dr. Holstine failed to diagnose or evaluate correctly the cause of Erickson's complaints beginning on May 12, 2010. RP 174-75. Second, Dr. Holstine failed to timely treat the left acromial fracture, which was a result of the April surgery, and which resulted in a left acromial non-union. *Id.* Third, Dr. Holstine's surgery was aggressive and removed too much bone from the left acromion. *Id.*

I. Authoritative publications or treatises.

On October 20, 2016, the deposition of Dr. Kirby was taken. CP 569. Dr. Kirby testified, at his deposition, he relied upon literature to support his opinions: "I was trying to see if I could find any literature to support any of those assertions." CP 621; Trial Exhibit 78.

At his deposition, the literature relied upon by Dr. Kirby to support his opinions was discussed. Said literature was discussed or identified at pages 9, 30, 32, 33, 37, 49, 51, and 52 of Dr. Kirby's deposition. CP 577, 598, 600, 601, 605, 617, 619 and 620. During his deposition, Dr. Kirby admitted that the literature upon which he relied provided the following science:[2]

- "Many fractures are painful and may prevent you from moving the injured area."
- A common symptom of a break is swelling and tenderness.
- "Physicians in the exercise of due care need to take the time necessary to accurately pinpoint the source of an ailment."
- "The most common way to evaluate the fracture is with x-rays, which provide clear images of bone. Your

[2] The publications, pamphlets, or treatises were identified as Exhibits 2, 7, 9, and 10 to Dr. Kirby's Deposition. They are also trial Exhibits 52, 54, 55, 56 and 57.

> doctor will likely use an x-ray to verify the diagnosis. X-rays can show whether bone is intact or broken."

At his deposition, Dr. Kirby apparently believed the literature marked and discussed provided support for the position that the break did not need to be diagnosed or treated. CP 617. At trial, Erickson offered the learned treatises into evidence and PeaceHealth objected. RP 1047. They were admitted for illustrative purposes. *Id;* Trial Exhibits 54, 55, 56, and 57.

The first publication, Trial Exhibit 54, concluded that Erickson's stress fracture to her acromion should be expected to fail non-operative therapy. Trial Exhibit 54 reads as follows:

> Stress fractures were discussed separately and were not included in the classification system for two reasons. First, the mechanism of injury is markedly different for stress fractures, occurring without acute trauma and instead arising from repetitive microtrauma with subsequent fatigue. . . . **All patients with stress fractures failed a trial of nonoperative therapy and developed painful non-unions.**

Trial Exhibit 54; pp. 12-13. (Emphasis added.) Dr. Graboff testified that the publications relied upon by Dr. Kirby did not support Dr. Kirby's medical testimony. RP 1124-34.

At trial, Dr. Kirby admitted he had only read abstracts or summaries of the Articles. RP 833-834. Basically, Dr. Kirby had only read a paragraph which outlined what each publication supposedly contained prior to forming his expert medical opinion. *Id.*

V – SUMMARY OF ARGUMENT

Under clear Washington court rules and case law, a party cannot fail to timely respond to a summary judgment motion, without a motion and evidence establishing excusable neglect for its failure. PeaceHealth failed to provide evidence or reason for the delay, which evidence might excuse the delay. CP 313.

Even if timely, Dr. Kirby's declaration lacked sufficient factual information to support his conclusory statements regarding the applicable standard of care and should have been stricken.

The trial court failed in its duty to act as the gatekeeper to insure that Dr. Kirby's "opinions" at trial were relevant, reliable and well-grounded in the methods and procedures of science. In failing in this regard, the jury was erroneously allowed to hear junk

science, unsupported by the very literature upon which Dr. Kirby testified he relied.

The jury's verdict on negligence was not supported by substantial evidence or reasonable inferences. No fair minded rationale person could conclude that an orthopedic surgeon, in Washington, over a three month period, does not have to diagnose or treat a broken shoulder.

Even though it was not disputed that the standard of care included a need for PeaceHealth to do a differential diagnoses ruling out a broken bone, in Jury Instruction No. 13, the jury was instructed to the contrary.

VI – ARGUMENT

A. Standards of review.

The standard of review challenging the trial court's ruling on the motion to strike untimely filed evidence is abuse of discretion. *Keck v. Collins*, 184 Wn.2d 358, 362, 357 P.3d 1080 (2015). "The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion." *Folsom v. Burger King*, 135 Wn.2d 658, 663,

958 P.2d 301 (1998). Findings of fact in both legal and equitable proceedings require substantial evidence to support the finding of fact. *Coy v. Raabe*, 77 Wn.2d 322, 462 P.2d 214 (1969). "Substantial evidence is said to exist if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise." *Brown v. Superior Underwriters*, 30 Wn.App. 303, 306, 632 P.2d 887 (Div. 1, 1980).

> Again, the trial court, in its gate keeping role, must decide if evidence is admissible. ER 102; ER 104(a). To satisfy the pursuit of truth, evidence must meet certain criteria. Evidence must be probative, relevant, and meet the appropriate standard of probability. ER 102; ER 401; ER 402; ER 403; *see, e.g., State v. Riker,* 123 Wash.2d 351, 359, 869 P.2d 43 (1994). Expert testimony, in addition, must be helpful. ER 702. Evidentiary rules provide significant protection against unreliable, untested, or junk science. 5B TEGLAND, *supra,* § 702.18, at 81.

Anderson v. Akzo Nobel Coatings, Inc., 172 Wn.2d 593, 606, 260 P.3d 857 (2011). Questions of admissibility under Frye are reviewed de novo. *Id.* at 600.

"Granting a motion for judgment as a matter of law is appropriate when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is

no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party." *Sing v. John L. Scott, Inc.,* 134 Wn.2d 24, 29, 948 P.2d 816 (1997).

B. PeaceHealth provided no evidence of excusable neglect for its failure to timely respond to summary judgment.

Trial courts have authority to enlarge time deadlines when the request is made before the period has expired. However, once a deadline has passed, courts can accept late filings only if a motion is filed explaining why the failure to act constituted excusable neglect.

> (b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion:
> (1) with or without motion or notice, order the period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by a previous order; or
> (2) upon motion made after the expiration of the specified period, permit the act to be done where
> e failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 50(b), 52(b), 59(b), 59(d), and 60(b).

CR 6(b).

> In addition, under CR 6(b) the trial court, for cause shown, may at any time in its discretion, enlarge a time period set by court rule or court order. Importantly, however, once the adverse party misses the original deadline set forth in CR 56(c), a showing of excusable neglect is required under CR 6(b)(2).

CP 323; *Davies v. Holy Family Hosp.,* 144 Wn.App. 483, 500, 183 P.3d 283 (Div. 3, 2008). "Both a trial and a summary judgment hearing afford the parties ample opportunity to present evidence. If the evidence was available but not offered until after that opportunity passes, the parties are not entitled to another opportunity to submit that evidence." *Wagner Dev., Inc. v. Fid. & Deposit Co.,* 95 Wn.App. 896, 907, 977 P.2d 639 (Div. 2, 1999).

"[O]nce the adverse party misses the original deadline set forth in CR 56(c), a showing of excusable neglect is required under CR 6(b)(2)." *Davies v. Holy Family Hosp.*, 144 Wn.App. at 500; *Colorado Structures Inc. v. Blue Mountain Plaza, LLC*, 159 Wn.App. 654, 660, 246 P.2d 835 (Div. 3, 2011).

PeaceHealth, at its peril, completely ignored CR 6(b). PeaceHealth neither made a motion for enlargement of time nor attempted to make a showing of excusable neglect. Argument of

counsel is not evidence. *Strandberg v. Northern Pac. Ry. Co.*, 59 Wn.2d 259, 265, 367 P.2d 137 (1961).

C. *Keck v. Collins* does not supersede the requirements of a motion and finding of excusable neglect under Civil Rule 6.

In *Keck v. Collins,* 184 Wn.2d 358, the issue of the failure to move for additional time, or the failure to support the timely motion by affidavit was not before the Court. The issue decided by the *Keck* Court was whether, once CR 6(b)(2) is complied with, did the Court of Appeals abuse its discretion by failing to consider the *Burnet* factors.

Plaintiff, in *Keck*, timely moved for additional time, filed an affidavit of counsel explaining the need for additional time to get additional declarations, timely filed two responsive affidavits, and asked for a continuance. Plaintiff, in *Keck*, complied with CR 6(b)(2).

Keck, supra, does not remove the requirements imposed by CR 6(b)(2). This case is distinguishable from Keck. In *Keck*, there was little prejudice because the trial was months off. In this

matter, Dr. Kirby was not disclosed in response to clear discovery requests or in accordance with court orders. CP 29. Dr. Kirby was identified on the afternoon of the expert disclosure deadline; however, until a month before trial, his opinions were never disclosed. His declaration was not filed until Erickson, in reply to PeaceHealth's response to summary judgment, correctly advised the trial court that PeaceHealth filed no evidence in response to Erickson's motion.

PeaceHealth provided no evidence of excusable neglect, therefore *Keck's* requirement of a *Burnet* analysis prior to witness exclusions does not apply. To hold the failure of PeaceHealth to comply with CR 56, and thereafter, to fail to comply with CR 6(b), under the facts in this matter, invites chaos in the management of complex civil litigation, a situation this Court should avoid. *Aguirre v. AT & T Wireless Services*, 109 Wn.App 80, 86, 33 P.3d 110 (Div. 1, 2001).

/ / / /

D. The Court's October 27, 2015, Order regarding Dr. Kirby's declaration was not supported by substantial evidence.

Erickson appeals the trial court's findings in its October 27, 2015, Order regarding Dr. Kirby's declaration. The trial court's findings regarding the *Burnet* factors are not supported by substantial evidence. CP 320; CP 541. Unsupported findings of fact cannot stand on appeal. *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 345, 858 P.2d 1054 (1993).

E. Dr. Kirby's declaration lacked sufficient factual information and foundation to support his conclusory statements.

If *Keck* provides any guidance to this Court in this matter, it is, in *Keck*, the first two expert declarations filed by plaintiff lacked sufficient foundation, thus the need for a third. And, the first two declarations in *Keck* contained far more substance than Dr. Kirby's declaration. CP 313. Conclusory or speculative expert opinions

lacking an adequate foundation will not be admitted. *Miller v. Likins*, 109 Wn.App. 140, 148, 34 P.3d 835 (Div. 1, 2001).

> Importantly, CR 56(e) provides that affidavits made in support of, or in opposition to, a motion for summary judgment must be based on personal knowledge, set forth admissible evidentiary facts, and affirmatively show that the affiant is competent to testify to the matters therein. Expert testimony must be based on the facts of the case and not on speculation or conjecture. *Seybold,* 105 Wash.App. at 677, 19 P.3d 1068. Such testimony must also be based upon a reasonable degree of medical certainty. *McLaughlin v. Cooke,* 112 Wash.2d 829, 836, 774 P.2d 1171 (1989). 'Affidavits containing conclusory statements without adequate factual support are insufficient to defeat a motion for summary judgment.' *Guile,* 70 Wash.App. at 25, 851 P.2d 689.

Davies, 144 Wn.App. at 493.

F. Dr. Kirby's trial testimony lacked sufficient factual information and foundation to support his opinions.

To be admissible, expert witness testimony must be relevant and helpful to the trier of fact. *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d at 606.

> The courts, however, will not tolerate an opinion that seems to lack any basis whatsoever. Despite the indistinct line between helpful testimony and conjecture, and despite the liberal rules about the facts and date upon which an expert opinion may be based (see Rule

> 703), the courts have said repeatedly that the expert must have some basis for his or her opinion.
>
> To state the same rule negatively, an expert's opinion is inadmissible if it amounts to nothing more than conjecture or speculation, or if it based upon unwarranted assumptions. . . .

Courtroom Handbook on Washington Evidence, Karl B. Tegland, § 702:7.

"If the expert's opinion assumes the existence of conditions or circumstances not of record, its validity dissolves and the answer must be stricken." *Tokarz v. Ford Motor Co.*, 8 Wn.App. 645, 653, 508 P.2d 1370 (Div. 2, 1973). PeaceHealth initially claimed its expert's opinions were supported and/or based upon articles and publications that, upon further examination, Dr. Kirby did not read, did not apply, and did not support his testimony. Dr. Kirby's testimony, contrary to the articles and publications, which were the basis of his opinions at his deposition, should not have been allowed the issue of negligence to go to the jury.

/ / / /

G. The trial Court failed in its gatekeeping function by allowing Dr. Kirby to testify based on junk science.

When it comes to expert opinions, trial judges must act as gatekeepers, ensuring that all scientific evidence submitted to a jury is based off of scientifically valid principles. *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579, 597, 113 S.Ct. 2786 (1993).

As we recently summarized, under *Frye:*

> The primary goal is to determine 'whether the evidence offered is based on established scientific methodology.' *State v. Gore,* 143 Wash.2d 288, 302, 21 P.3d 262 (2001). Both the scientific theory underlying the evidence and the technique or methodology used to implement it must be generally accepted in the scientific community for evidence to be admissible under *Frye.* *Id.*

Anderson, Inc., 172 Wn.2d at 603. It cannot be seriously "argued" that medical science believes it is acceptable to fail to diagnose a broken bone. It cannot be seriously "argued" that the failure to treat a broken bone is an acceptable scientific technique or methodology. It cannot be seriously "argued" that not taking an x-ray when the patient reports severe pain, describes a loud pop and reports that she believes she has a broken bone is an "established

scientific method." In this matter, the trial court erroneously allowed Dr. Kirby to argue PeaceHealth's case. It was not appropriate expert testimony. Not only did the testimony fail to pass the smell test, it was allowed in violation of ER 702.

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ER 702.

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

ER 703.

These rules of evidence "provide significant protection against unreliable, untested, or junk science." *Anderson,* 172 Wn.2d at 863. PeaceHealth made no attempt to provide any evidence, any facts, or any data made known to Dr. Kirby.

PeaceHealth made no attempt provide the trial court or the jury with any medical facts or data supporting Dr. Kirby's "arguments."

The trial court failed in its "duty to act as a gatekeeper, to admit techniques accepted in the relevant scientific community even when they are novel to the court, **but to exclude techniques that are novel both to the court and the relevant scientific community**." *Moore v. Harley-Davidson Motor Co. Group, Inc.*, 158 Wn.App. 407, 418, 241 P.3d 808 (Div. 3, 2010); (Emphasis added); *See also Reese v. Stroh*, 128 Wn.2d 300, 315, 907 P.2d 282 (1995).

H. The jury's verdict is not supported by substantial evidence.

If a verdict in favor of defendant is not supported by substantial evidence is must be reversed. *Canron, Inc. v. Federal Ins. Co.,* 82 Wn.App. 480, 486, 918 P.2d 937 (Div. 1, 1996), *rev. denied* 131 Wn.2d 1002 (1997). In *Canron* the appellate court reversed the decision of the trial court, granting a new trial for the plaintiffs, concluding that there was insufficient evidence to support the jury's verdict. It held: "[i]n the absence of such evidence, the

jury's verdict was not supported by substantial evidence, and **must** be reversed." *Id.* at 492 (emphasis added).

I. Jury Instruction No. 13, misstates the standard of care as defined by PeaceHealth's expert and Washington law.

The Court gave the following instruction to the jury:

> An orthopedic surgeon is not liable for selecting one of two or more alternative courses of treatment or diagnoses, if, in arriving at the judgment to follow the particular course of treatment or make the particular diagnosis, the orthopedic surgeon exercised reasonable care and skill within the standard of care the orthopedic surgeon was obliged to follow.

CP 1096.

Dr. Kirby admitted that differential diagnoses are part of the standard of care for an orthopedic surgeon in Washington, meaning Dr. Holstine should have at least ruled out that Erickson's shoulder was not broken. This opinion is consistent with Washington law:

> Many medical opinions on causation are based upon differential diagnoses. A physician or other qualified expert may base a conclusion about causation through a process of ruling out potential causes with due consideration to temporal factors, such as events and the onset of symptoms. E.g. Reese, 128 Wash.2d at

> 307, 309, 907 P.2d 282; Marsh v. Valyou, 977 So.2d 543, 548 (Fla.2007).

Anderson v. Akzo Nobel Coatings, Inc., 172 Wn.2d at 610. PeaceHealth was not entitled to the above instruction. PeaceHealth did not offer any evidence to support the instruction. *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996). The verdict demonstrates the instruction was prejudicial. *Id.*

> Granting a motion for judgment as a matter of law is appropriate when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party. Such a motion can be granted only when it can be said, as a matter of law, that there is no competent and substantial evidence upon which the verdict can rest. Substantial evidence is said to exist if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise.

Guijosa v. Wal-Mart Stores, Inc., 144 Wn.2d 907, 915, 32 P.3d 250 (2001) (citations omitted).

VII – CONCLUSION

The trial judge is the gatekeeper of admissible evidence, both at summary judgment and trial. A court must not allow a

party to walk through court rules and walk through rules of evidence to survive summary judgment or prevail at trial.

Court rules must have meaning. Rules of evidence must have meaning. Erickson was denied a just action and a fair trial.

For the above reasons, the Court should reverse the trial concluding that PeaceHealth was negligent as a matter of fact and law, and remand for a new trial on damages.

Respectfully submitted this 23rd day of September 2016.

SHEPHERD AND ALLEN

By Douglas R. Shepherd

Douglas R. Shepherd, WSBA # 9514
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Of Attorneys for Appellant Erickson

DECLARATION OF SERVICE

I, Jen Petersen, declare that on September 23, 2016, I caused to be served a copy of the following document: **Appellant Erickson's Opening Brief;** and a copy of this **Declaration of Service**, in the above matter, on the following person, at the following addresses, in the manner described:

Heath Fox, Esq. Johnson, Graffe, Keay, Moniz & Wick, LLP 925 Fourth Avenue Suite 2300 Seattle, WA 98104 heath@jgkmw.com sandra@jgkmw.com	( ) U.S. Mail ( ) Certified Mail ( ) Fax ( ) Personal Service (X) E-Mail*

* Pursuant to the parties' CR 5(b)(7) Agreement dated May 16, 2013, regarding electronic service.

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

DATED this 23rd day of September 2016.

Jen Petersen

APPENDIX A

CIVIL RULE 6

TIME

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion:

(1) with or without motion or notice, order the period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by a previous order; or

(2) upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 50(b), 52(b), 59(b), 59(d), and 60(b).

APPENDIX B

CIVIL RULE 56

SUMMARY JUDGMENT

(c) Motion and Proceedings. The motion and any supporting affidavits, memoranda of law, or other documentation shall be filed and served not later than 28 calendar days before the hearing. The adverse party may file and serve opposing affidavits, memoranda of law or other documentation not later than 11 calendar days before the hearing. The moving party may file and serve any rebuttal documents not later than 5 calendar days prior to the hearing. If the date for filing either the response or rebuttal falls on a Saturday, Sunday, or legal holiday, then it shall be filed and served not later than the next day nearer the hearing which is neither a Saturday, Sunday, or legal holiday. Summary judgment motions shall be heard more than 14 calendar days before the date set for trial unless leave of court is granted to allow otherwise. Confirmation of the hearing may be required by local rules. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

. . .

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of a pleading, but a response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.