

FILED

DEC 02 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COA No. 324869

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

LORI A. SWEENEY and JEROLD L. SWEENEY, husband and wife,
Plaintiffs - Appellants

v.

ADAMS COUNTY PUBLIC HOSPITAL DISTRICT NO. 2, d/b/a EAST
ADAMS RURAL HOSPITAL, et al.,
Defendants-Respondents

SUPPLEMENTAL BRIEF OF RESPONDENTS JAMES N. DUNLAP, M.D. and
JANE DOE DUNLAP & PROVIDENCE HOSPITAL SERVICES, d/b/a
PROVIDENCE ORTHOPEDIC SPECIALITIES

RYAN M. BEAUDOIN, WSBA # 30598
MATTHEW W. DALEY, WSBA # 36711
ROBIN L. HAYNES, WSBA # 38116
WITHERSPOON · KELLEY, P.S.
422 West Riverside Avenue, Suite 1100
Spokane, Washington 99201-0300
Phone: (509) 624-5265

Counsel for Respondents James N. Dunlap, M.D.,
Jane Doe Dunlap, and Providence Hospital
Services, d/b/a Providence Orthopedic Specialities

TABLE OF CONTENTS

I.	INTRODUCTION & RELIEF REQUESTED	1
II.	ANALYSIS OF <i>KECK V. COLLINS</i>	2
	A. IN A MEDICAL NEGLIGENCE CASE, THE TRIAL COURT: STRUCK AN UNTIMELY EXPERT AFFIDAVIT, DETERMINED THAT THE REMAINING RECORD WAS TOO CONCLUSORY TO DEFEAT SUMMARY JUDGMENT, AND ENTERED A SUMMARY JUDGMENT OF DISMISSAL	2
	B. THE WASHINGTON STATE COURT OF APPEALS REVERSED THE TRIAL COURT'S ORDER, HOLDING THAT THE TRIAL COURT ERRED IN STRIKING THE UNTIMELY EXPERT AFFIDAVIT.....	3
	C. THE WASHINGTON STATE SUPREME COURT AFFIRMED THE COURT OF APPEALS' DECISION, HOLDING THAT THE TRIAL COURT ERRED IN STRIKING THE UNTIMELY EXPERT AFFIDAVIT AND HOLDING THAT THE TIMELY AFFIDAVITS WERE SUFFICIENT TO DEFEAT SUMMARY JUDGMENT.....	4
	1. The State Supreme Court Held that the Court of Appeals Applied the Incorrect Standard to Determine Whether Untimely Materials Presented at Summary Judgment Should be Stricken.....	4
	2. The State Supreme Court Went on to Hold that Ms. Keck's Timely Affidavits Were Sufficient to Defeat Summary Judgment.....	5
	D. NONE OF THE ISSUES DISCUSSED IN KECK RELATE TO THE ISSUES BEFORE THE COURT.....	6
III.	CONCLUSION.....	7

TABLE OF AUTHORITIES

Cases

<i>Burnet v. Spokane Ambulance</i> , 131 Wn.2d 484 (1997)	5
<i>Folsom v. Burger King</i> , 135 Wn.2d 658 (1998)	4
<i>Guile v. Ballard Comm. Hosp.</i> , 70 Wn. App. 18, 26 (1993)	6
<i>Keck v. Collins</i> , ___ Wn.2d ___, 357 P.3d 1080 (2015).....	passim
<i>Sagline v. State Department of Labor & Industries</i> , 169 Wn.2d 467 (2010)	2, 6
<i>Wood v. Gibbons</i> , 38 Wn. App. 343, 346 (1984).....	2, 6

I. INTRODUCTION & RELIEF REQUESTED

This supplemental brief is respectfully submitted by Dr. James Dunlap and Providence Health Services (collectively "Dr. Dunlap") and pursuant to the Court of Appeals' November 16, 2015 letter request for supplemental briefing regarding the State Supreme Court's recent decision in *Keck v. Collins*, ___ Wn.2d ___, 357 P.3d 1080 (2015). The recent *Keck* decision does not have any impact on this matter, insofar as it pertains to Dr. Dunlap.

Though *Keck* addresses important issues in medical negligence law, none of those issues are implicated by the Plaintiffs', Lori and Jerold Sweeney (collectively "Ms. Sweeney") medical negligence claim against Dr. Dunlap. The State Supreme Court's analysis in *Keck* focuses on the procedural standards for consideration of untimely materials submitted at summary judgment and the evidentiary standard required of substantive expert testimony offered at summary judgment on the issues of whether the defendant physician breached the applicable standard of care and whether such a breach was a proximate cause of the plaintiff's claimed injury, loss or damage. *See generally Keck*, 357 P.3d 1080.

As it pertains to Dr. Dunlap, this is a statute of limitations case. The sole issues before the Court are: (i) whether Ms. Sweeney's claim against Dr. Dunlap accrued more than three years before its filing; and (ii) whether relation back principles ought to pull the otherwise time-barred claim from the precipice.

While *Keck* will surely garner more than its fair share of citations in future medical negligence cases and future medical negligence opinions, *Keck* has no impact on Ms. Sweeney's claim against Dr. Dunlap. The Court's resolution of the claims against Dr. Dunlap should be primarily guided by the decisions in *Wood v. Gibbons*, 38 Wn. App. 343, 346 (1984) (holding that a claim accrues even where the plaintiff affirmatively believes that no valid claim exists against the putative defendant) and *Sagline v. State Department of Labor & Industries*, 169 Wn.2d 467 (2010) (holding that a plaintiff's conscious decision not to sue any given defendant cannot support relation back under Rule 15). The recent decision in *Keck v. Collins* simply does not apply to Ms. Sweeney's claim against Dr. Dunlap.

II. ANALYSIS OF *KECK V. COLLINS*

A. IN A MEDICAL NEGLIGENCE CASE, THE TRIAL COURT: STRUCK AN UNTIMELY EXPERT AFFIDAVIT, DETERMINED THAT THE REMAINING RECORD WAS TOO CONCLUSORY TO DEFEAT SUMMARY JUDGMENT, AND ENTERED A SUMMARY JUDGMENT OF DISMISSAL.

Darla Keck filed a medical negligence claim against Dr. Collins¹ based upon post-surgical complications. *Keck*, 357 P.3d at 1081. Ms. Keck alleged that Dr. Collins' post-surgical treatment was negligent and that such negligence proximately caused her to suffer facial swelling, numbness, and pain. *Id.* at 1081-82. Dr. Collins denied that his care fell below the standard of care, and Dr.

¹ There were two defendants, both named Collins. For ease of discussion, the singular "Dr. Collins" is used herein. See *Keck*, 357 P.3d at 1081.

Collins denied that Ms. Keck's post-surgical complications were proximately caused by his treatment. *Id.*

Dr. Collins moved for a summary judgment of dismissal; he argued that Ms. Keck lacked expert testimony to support her allegations of negligence and of proximate cause. *Id.* at 1081. Ms. Collins responded with three affidavits from an expert witness – two were timely (in accord with the Court Rules) and one was not. *Id.* On Dr. Collins' motion, the untimely affidavit was stricken (as untimely), and the trial court considered the motion based upon the affidavits that were timely filed. *Id.* at 1081-82. The trial court held that the timely affidavits were too conclusory to meet Ms. Keck's burden at summary judgment; the trial court, therefore, granted the defense motion for summary judgment. *Id.*

B. THE WASHINGTON STATE COURT OF APPEALS REVERSED THE TRIAL COURT'S ORDER, HOLDING THAT THE TRIAL COURT ERRED IN STRIKING THE UNTIMELY EXPERT AFFIDAVIT.

Ms. Keck appealed the trial court's summary judgment order. *See id.* at 1082. The Court of Appeals agreed that Ms. Keck's timely expert affidavits were not sufficiently specific to defeat Dr. Collins' motion for summary judgment. *Id.* However, the Court of Appeals held that the trial court erred in striking the untimely affidavit. *Id.* On that basis, the Court of Appeals reversed the trial court's summary judgment order. *Id.*

C. THE WASHINGTON STATE SUPREME COURT AFFIRMED THE COURT OF APPEALS' DECISION, HOLDING THAT THE TRIAL COURT ERRED IN STRIKING THE UNTIMELY EXPERT AFFIDAVIT AND HOLDING THAT THE TIMELY AFFIDAVITS WERE SUFFICIENT TO DEFEAT SUMMARY JUDGMENT.

Dr. Collins appealed the Court of Appeals' decision. *See id.* at 1085. Dr. Collins argued that the Court of Appeals erred in applying a *de novo* standard (rather than an abuse of discretion standard) to determine whether the trial court erred in striking the untimely affidavit. *Id.* Ms. Keck raised a second issue: whether the Court of Appeals erred in holding that the timely affidavits were insufficient to defeat summary judgment. *Id.* The State Supreme Court considered both issues.

1. *The State Supreme Court Held that the Court of Appeals Applied the Incorrect Standard to Determine Whether Untimely Materials Presented at Summary Judgment Should be Stricken.*

In reversing the trial court's order striking Ms. Keck's untimely affidavits, the Court of Appeals applied *Folsom v. Burger King*, 135 Wn.2d 658 (1998), which holds that trial court decisions made in the context of a summary judgment hearing are reviewed *de novo* by the Courts of Appeal. *Keck*, 357 P.3d at 1084. The State Supreme Court disagreed. *Id.* at 1085.

The State Supreme Court held that decisions to strike materials at summary judgment must be evaluated in the same manner as discovery sanctions

– that is, under the test enunciated by *Burnet v. Spokane Ambulance*, 131 Wn.2d 484 (1997). *Keck*, 357 P.3d at 1085. The *Burnet* test requires three factors to be considered on the record before a severe sanction (like striking evidence) can be imposed. *Keck*, 357 P.3d at 1085 (citations omitted. Those factors are: "whether a lesser sanction would probably suffice, whether the violation was willful or deliberate, and whether the violation substantially prejudiced the opposing party." *Keck*, 357 P.3d at 1085 (citing *Jones v. City of Seattle*, 179 Wn.2d 322 (2013))). The trial court's decision is then reviewed for abuse of discretion. *Keck*, 357 P.3d at 1085-86.

The State Supreme Court held that the trial court abused its discretion by striking Ms. Keck's untimely affidavits without first considering the *Burnet* factors on the record. *Keck*, 357 P.3d at 1085-86. The Court, thus, affirmed the Court of Appeals' decision to reverse the summary judgment order. *Id.*

2. *The State Supreme Court Went on to Hold that Ms. Keck's Timely Affidavits Were Sufficient to Defeat Summary Judgment.*

The Court then considered Ms. Keck's timely affidavits. *Id.* at 1086-87. The Court held that the timely affidavits were sufficient to create genuine issues of material fact and to thereby defeat summary judgment. *Id.*

The Court reaffirmed the long-established rule that affidavits submitted in response to a motion for summary judgment must "identify specific facts

supporting the expert's conclusion . . ." *Keck*, 357 P.3d at 1087 (citing *Guile v. Ballard Comm. Hosp.*, 70 Wn. App. 18, 26 (1993)). The *Keck* Court reaffirmed that standard, and held that Ms. Keck's timely affidavits properly "stated the applicable standard of care and how the Doctors breached that standard." 357 P.3d at 1087. The *Keck* Court also held that Ms. Keck's timely affidavits "connected [the expert's] opinions about the standard of care and causation to a factual basis: the medical records." *Id.* at 1087-88. The Court then held that Ms. Keck's timely affidavits were sufficient to defeat summary judgment. *Id.*

D. NONE OF THE ISSUES DISCUSSED IN *KECK* RELATE TO THE ISSUES BEFORE THE COURT.

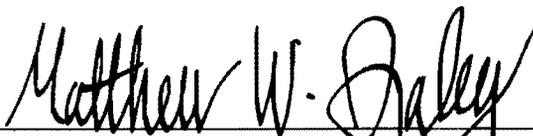
As explained above, the issues in *Keck* relate to the procedural and evidentiary requirements for expert submission in response to motions for summary judgment in medical negligence cases. The appeal between Ms. Sweeney and Dr. Dunlap, however, relates solely to the limitations period that applies in medical negligence actions. The Supreme Court's recent decision in *Keck* simply does not have any bearing on the issues between Ms. Sweeney and Dr. Dunlap. The Court's resolution of the claims against Dr. Dunlap should be primarily guided by the decisions in *Wood v. Gibbons*, 38 Wn. App. 343, 346 (1984), *Sagline v. State Department of Labor & Industries*, 169 Wn.2d 467 (2010), and the other authorities discussed in Dr. Dunlap's brief to the Court.

III. CONCLUSION

Based upon the foregoing, the Court file, and the pleadings therein, Dr. Dunlap respectfully asks the Court to render a decision in this case based upon the existing authorities that relate to the applicable limitations period. The issues discussed in *Keck v. Collins* do not apply to the issues on appeal between Ms. Sweeney and Dr. Dunlap.

RESPECTFULLY SUBMITTED, this second (2d) day of December,
2015.

WITHERSPOON · KELLEY, P.S.



RYAN M. BEAUDOIN, WSBA #30598

MATTHEW W. DALEY, WSBA #36711

ROBIN L. HAYNES, WSBA # 38116

Counsel for Respondents James N. Dunlap, M.D.,
Jane Doe Dunlap, and Providence Health Services,
d/b/a Providence Orthopedic Specialties

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 second (2d) day of December, 2015, the foregoing was delivered to the following persons in the manner indicated:

<p><i>Counsel for Appellants</i> William A. Gilbert 421 W. Riverside Avenue, Suite 353 Spokane, WA 99201</p>	<p><input type="checkbox"/> By Hand Delivery <input checked="" type="checkbox"/> By U.S. Mail <input type="checkbox"/> By Overnight Mail <input type="checkbox"/> By Facsimile Transmission</p>
<p><i>Co-Counsel for Appellants</i> George M. Ahrend Ahrend Law Firm PLLC 16 Basin St. SW Ephrata, WA 98823</p>	<p><input type="checkbox"/> By Hand Delivery <input checked="" type="checkbox"/> By U.S. Mail <input type="checkbox"/> By Overnight Mail <input type="checkbox"/> By Facsimile Transmission</p>
<p><i>Counsel for Respondents Adams County Hospital and Noble</i> Robert F. Sestero Markus W. Louvier Evans, Craven & Lackie, P.S. 818 W. Riverside, Suite 250 Spokane, WA 99201</p>	<p><input type="checkbox"/> By Hand Delivery <input checked="" type="checkbox"/> By U.S. Mail <input type="checkbox"/> By Overnight Mail <input type="checkbox"/> By Facsimile Transmission</p>



 Mary Ferrera, Legal Assistant