

**COURT OF APPEALS,
DIVISION III
OF THE STATE OF WASHINGTON**

NO. III-324869

LORI A. SWEENEY and JEROLD L. SWEENEY,
Appellants

v.

ADAMS COUNTY PUBLIC HOSPITAL DISTRICT NO. 2,
ET AL.
Respondents

**SUPPLEMENTAL BRIEF OF RESPONDENTS ADAMS
COUNTY PUBLIC HOSPITAL DISTRICT NO. 2 AND
ALLEN D. NOBLE, PA-C**

EVANS, CRAVEN & LACKIE, P.S.
Robert F. Sestero, WSBA #23274
Christopher J. Kerley, WSBA #16489
818 W. Riverside, Suite 250
Spokane, WA 99201-0910
(509) 455-5200
ATTORNEYS FOR RESPONDENTS
ADAMS COUNTY PUBLIC
HOSPITAL DISTRICT NO. 2 and
ALLEN D. NOBLE, ET UX.

TABLE OF CONTENTS

Brief 1

TABLE OF AUTHORITIES

Page(s)

Cases

Davies v. Holy Family Hospital,
114 Wn. App. 483, 193 P.3d 283 (2008).....1

Guile v. Ballard Community Hospital,
17 Wn. App. 18, 851 P.2d 689 (1993).....1, 2

Keck v. Collins,
___ Wn.2d ___, 357 P.2d 1080 (September 2015).....1, 2

O’Donoghue v. Riggs,
73 Wn.2d 814, 440 P.2d 823 (1968).....2

Pursuant to the Court's November 16, 2015 letter to counsel, Respondents East Adams Rural Hospital District No. 2 and Alan D. Noble, PA-C, submit the following supplemental brief on the application of the Washington State Supreme Court's opinion in *Keck v. Collins*, ___ Wn.2d ____, 357 P.2d 1080 (September 2015).

First, and fundamentally, *Keck* did not overrule *Guile v. Ballard Community Hospital*, 17 Wn. App. 18, 851 P.2d 689 (1993) or *Davies v. Holy Family Hospital*, 114 Wn. App. 483, 193 P.3d 283 (2008). Those cases stand for the proposition that, in a medical negligence case, when a defendant moves for summary judgment, the burden shifts, and where the plaintiff files a medical expert affidavit or declaration opposing summary judgment, the affidavit or declaration must set forth specific facts supporting the expert's opinions, not conclusory statements without adequate factual support. *Guile, supra.* at 25.

In *Keck*, the court held that, in a medical negligence case, the testimony of a plaintiff's expert in a declaration or affidavit is

sufficient to defeat a motion for summary judgment if the testimony would be sufficient to support a verdict in favor of the plaintiff at trial. 357 P.3d at 1086.¹ But that does not mean an expert declaration on opposition to a motion for summary judgment can be speculative or conclusory. Indeed, expert testimony that is speculative and conclusory is not enough to sustain a verdict in favor of the plaintiff. *See, e.g., O'Donoghue v. Riggs*, 73 Wn.2d 814, 440 P.2d 823 (1968). In short, whether analyzed under the rubric of materiality, as in *Keck*, or the requirement that expert declarations/affidavits not be speculative or conclusory, as in *Guile*, the standard of proof is the same.

¹ In *Keck*, the court held that the plaintiff's expert's testimony was sufficient to raise a material issue of fact on whether the defendant breached the standard of care because the expert testified the surgeons performed "multiple operations without really addressing the problem of non-union and infection within the standard of care" and that, with regard to defendants' referrals of the patient to a general dentist for follow-up care, that "did not meet the standard of care as the general dentist would not have sufficient training or knowledge to deal with Ms. Keck's non-union and the developing infection/osteomyelitis." 357 P.3d at 1083.

In the instant case, plaintiff's expert, Dr. Graboff, stated in his declaration that Mr. Noble's reduction attempts caused additional fracturing of Ms. Sweeney's shoulder. However, he provided absolutely no explanation of how the maneuvers employed by Mr. Noble caused the alleged additional fracturing. And he made no effort to address Dr. Nania's testimony that the standard maneuvers employed by Mr. Noble simply do not produce enough torque or force to fracture bone. And plaintiff's physician assistant expert, Mr. Nicholson, simply made the conclusory statement that Mr. Noble's failure to comply with the standard of care proximately caused an injury to Ms. Sweeney's shoulder. Because these opinions on causation were conclusory and unsupported by sufficient facts, and did not address how the alleged increased fracturing occurred, they were not sufficient to support a verdict in favor of the plaintiff on causation. Accordingly, the trial court properly found this testimony insufficient to defeat summary judgment.

Based on the foregoing, and the argument an authorities set forth in their initial brief, Respondents East Adams Rural Hospital District No. 2 and Alan D. Noble, PA-C, respectfully request that summary judgment in their favor be affirmed.

Respectfully submitted on November 20, 2015.

EVANS, CRAVEN & LACKIE, P.S.

By 
ROBERT F. SESTERO, JR., #23274
CHRISTOPHER J. KERLEY, #16489
Attorneys for Respondents
Adams County Public Hospital
District No. 2 and Allen D. Noble,
PA-C

CERTIFICATE OF SERVICE

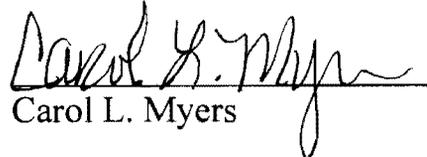
Pursuant to RCW 9A.72.085, the undersigned certifies under penalty of perjury under the laws of the State of Washington, that on the below date, I caused to be hand-delivered locally and mailed via U.S.P.S. to out of town recipients to the address(es) below a true and correct copy of **SUPPLEMENTAL BRIEF OF RESPONDENTS ADAMS COUNTY PUBLIC HOSPITAL DISTRICT NO. 2 AND ALLEN D. NOBLE, PA-C:**

Kyle C. Olive
William Gilbert
Olive Bearb & Grelish, & Gilbert, PLLC
1218 Third Avenue, Suite 1000
Seattle, WA 98101

Ryan Beaudoin
Matthew W. Daley
Robin L. Haynes
Witherspoon, Kelley, Davenport & Toole
1100 U.S. Bank Building
422 West Riverside Ave.
Spokane, WA 99201-0302

George M. Ahrend,
Ahrend Albrecht, PLLC
16 Basin Street, SW
Ephrata, WA 98823

DATED this 20 day of November, 2015.


Carol L. Myers