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

KATHIE and JOE BOYER,

Appellants,

v.

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

Respondents.

APPEAL FROM THE
SUPERIOR COURT FOR SPOKANE COUNTY, WASHINGTON
HONORABLE RAYMOND CLARY

APPELLANT'S REPLY BRIEF

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A. INTRODUCTION

Respondents (“Dr. Morimoto and “Plastic Surgery Northwest”) argue that the trial court’s Order granting summary judgment was proper because: (1) Mr. and Mrs. Boyer did not file a Motion for Reconsideration prior to filing their Notice of Appeal; (2) Dr. Shamoun failed to establish negligence on the part of non-physician employees of Plastic Surgery Northwest; and (3) Mr. and Mrs. Boyer did not provide evidence that defendants’ breaches of the standard of care caused their injuries.

B. LEGAL ARGUMENT

1. Dr. Shamoun initial declaration contained adequate foundation for his opinions.

The trial court granted summary judgment concluding that Dr. Shamoun’s initial declaration did not lay adequate foundation that the applicable standard of care is nationwide in scope. CP 325. In fact, this perceived defect was the *sole* basis for the trial court’s Order granting summary judgment.

In their Opening Brief, the Boyers cited to extensive Washington authority demonstrating that Dr. Shamoun’s uncontested testimony that the applicable standard of care is nationwide in scope is sufficient to meet their burden of production on summary judgment. *See Elber v. Larson*, 142 Wn. App. 243, 173 P.3d 990 (2007) (Claimant’s out-of-state expert’s uncontested testimony that the standard of care is nationwide in scope

sufficient to defeat summary judgment); *Hill v. Sacred Heart Med. Ctr.*, 143 Wn. App. 438, 177 P.3d 1152 (2008) (Uncontested testimony from two out-of-state experts that standard of care is nationwide in scope satisfied claimant's burden of production); *Eng v. Klein*, 127 Wn. App. 171, 179, 110 P.3d 844 (2005) (uncontested testimony from Connecticut expert that the standard of care applied nationwide sufficient to carry burden of production on summary judgment).

Dr. Shamoun's initial declaration was filed on April 16, 2018. Like the out-of-state experts in *Elber*, *Hill* and *Eng*, Dr. Shamoun's uncontested declaration states that he has extensive experience with the procedures at issue in this litigation and that he is therefore familiar with the applicable standard of care. CP 107. And, Dr. Shamoun's uncontroverted testimony is that this standard of care is not unique to Washington and applies on a nationwide basis. CP 107. Dr. Morimoto and Plastic Surgery Northwest offer no evidence that the applicable standard of care is somehow limited in geographic scope.¹

¹ Dr. Morimoto and Plastic Surgery Northwest criticize Dr. Shamoun's initial declaration because the copy filed with the Court did not initially include his CV, as indicated. However, they omit that Dr. Shamoun's CV had been provided months prior when plaintiffs disclosed Dr. Shamoun as an expert witness. Moreover, during oral argument, the Court noted the omission and invited plaintiffs' to file an errata attaching Dr. Shamoun's CV. Plaintiff's promptly complied. CP 290-310. Therefore, the Court had Dr. Shamoun's CV well before it issued its Memorandum Decision or Order Granting Summary Judgment.

Mr. and Mrs. Boyer's cited to *Elber, Hill, Eng* and their progeny in their Opening Brief given that those cases addressed a nearly identical issue. Yet, Dr. Morimoto and Plastic Surgery Northwest ignore this authority in their Response, do not address these cases whatsoever and offer no argument as to why this binding authority should not apply.

The only contemporary case cited by Dr. Morimoto and Plastic Surgery Northwest is *Winkler v. Giddings*, 146 Wn. App. 387, 190 P.3d 117 (2008). In fact, *Winkler* supports the Boyers' position. Though in *Winkler*, a claimant's expert was not permitted to testify *at trial* after indicating no familiarity with the standard of care applicable in Washington, *Id.* at 393, *Winkler* also held that uncontroverted testimony from an expert that Washington follows a national standard of care is sufficient for *purposes of summary judgment*—the precise issue before this court. *Id.* at 391-393.

2. Any defect in Dr. Shamoun's initial declaration was cured by his Supplemental Declaration

Prior to the entry of the Court's Order Granting Defendant's Motion for Summary Judgment, Dr. Shamoun submitted a supplemental declaration providing additional testimony regarding the applicable standard of care, both nationally and in Washington State. Dr. Shamoun's supplemental testimony reflects that he previously consulted with other

Washington plastic surgeons regarding the precise procedures at issue here. CP 328. Dr. Shamoun has also been asked to consult on Washington cases involving liposuction, abdominoplasty and mastopexy. CP 328. Considered along with his initial declaration, Dr. Shamoun's supplemental declaration lays ample foundation for his knowledge about the standard of care in Washington.

Dr. Morimoto and Plastic Surgery Northwest do not contend that Dr. Shamoun's two declarations, considered together, fail to lay sufficient foundation for his opinions. Rather, they contend that the Boyer's waived their right to have the supplemental declaration considered because they did not file a motion for reconsideration. *See* Respondent's Brief, p. 12. This argument ignores the plain language of Civil Rule 56 and this Court's interpretation of the Rule.

In *Keck v. Collins*, 181 Wn. App. 67, 83, 325 P.3d 306 (2014), this Court stated "Thus, '[u]ntil 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.'" *quoting Cofer v. Pierce Cty.*, 8 Wn. App. 258, 261 (1973) (*citing Felsman v. Kessler*, 2 Wn. App. 493, 498 (1970)). There is no dispute that Dr. Shamoun's supplemental declaration was filed a full month before the trial

court's order granting summary judgment was entered. CP 327-328; 353-355.

The Washington Supreme Court affirmed this Court's holding in *Keck* and provided additional guidance pertaining to expert witness evidence considered at the summary judgment stage. Namely, before disregarding even untimely evidence submitted at summary judgment, the trial court must perform the so-called "Burnet"² analysis, and do so on the record. *Keck v. Collins*, 184 Wn.2d 358, 368–69, 357 P.3d 1080 (2015). The Court explained, that "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 exist.*'" *Id.* at 369; quoting *Preston v. Duncan*, 55 Wn.2d 678, 683, 349 P.2d 605 (1960) (emphasis in original).

Here, there is no dispute that the trial court did not perform a *Burnet* analysis on the record, as required. On May 9, 2018, the trial court issued a "Memorandum" decision on defendants' motion for summary judgment. The trial court's memorandum indicated that it was granting defendant's motion. However, the memorandum also indicated that parties were to present the formal order granting summary judgment by

² So named after *Burnet v. Spokane Ambulance*, 131 Wn.2d 484 (1997)

June 1, 2018. CP 326. The trial court specifically invited the Boyers to file any objection they deemed necessary prior to its entry of the Order.

Id.

Pursuant to the trial court's invitation, the Boyers filed their objection. In it, the Boyers made clear that they believed the trial court's decision to grant summary judgment was not proper. CP 339. The Boyers pointed out that they were permitted to offer Dr. Shamoun's supplemental declaration, further clarifying the foundation for his testimony regarding the applicable standard of care, because no formal Order granting summary judgment had been entered. CP. 336-338. The Boyers also submitted a competing Order to the one proposed by Dr. Morimoto and Plastic Surgery Northwest reflecting that the trial court considered Dr. Shamoun's supplemental declaration before entering its summary judgment order. *Id.*

The trial court signed defendants' proposed Order Granting Summary Judgment which omitted Dr. Shamoun's supplemental declaration from the materials considered by the Court in reaching its decision. CP 353-355. No explanation or analysis was provided by the Court regarding why it had refused to consider Dr. Shamoun's supplemental declaration.

The Supreme Court in *Keck* held that failure to perform the *Burnet* analysis, on the record, is an abuse of discretion. *Keck*, 184 Wn.2d at 362. Here, the trial court abused its discretion because it failed to perform an on-the-record *Burnet* analysis as required by our Supreme Court.³

Either of Dr. Shamoun's declarations satisfied the Boyer's burden of production to defeat defendants' motion for summary judgment. The trial court committed error by concluding otherwise. And, the trial court abused its discretion by failing to consider Dr. Shamoun's supplemental declaration. Because the trial court's Order Granting Summary Judgment is based solely upon its criticisms of Dr. Shamoun's knowledge regarding the applicable standard of care, this Court should reverse and remand all claims for trial.

3. Dr. Shamoun established negligence on the part of Plastic Surgery Northwest

Dr. Morimoto and Plastic Surgery Northwest next argues that summary judgment in favor of Plastic Surgery Northwest was proper because "Dr. Shamoun demonstrated no such familiarity with the standard of care for non-physician providers." Respondents' Brief, at p. 14. This ignores that a physician is qualified to express an opinion on any sort of

³ Had a *Burnet* analysis been performed, it would be improper for the trial court to have excluded Dr. Shamoun's supplemental opinions. Prior to the trial court issuing its memorandum, Dr. Morimoto and Plastic Surgery Northwest sought an unspecified continuance of the trial. CP 312-313. The Boyers did not oppose this request. Certainly a brief stay of the summary judgment proceedings would not have been prejudicial to either Dr. Morimoto or Plastic Surgery Northwest.

medical question, including questions in areas in which the physician is not a specialist, so long as the physician has sufficient expertise to demonstrate familiarity with the procedure or medical problem at issue in the medical malpractice action. *Morton v. McFall*, 128 Wn. App. 245, 253, 115 P.3d 1023 (2005). In fact, this Court has made clear that, “The scope of the expert’s knowledge, not his or her professional title, should govern ‘the threshold question of admissibility of expert medical testimony in a malpractice case.’” *Hill*, 143 Wn. App at 447 quoting *Pon Kwock Eng v. Klein*, 127 Wn. App. 171, 172 (2005).

The undisputed testimony is that Dr. Shamoun has been a cosmetic surgeon for decades with extensive experience in the precise surgical procedures at issue. CP 107. Dr. Shamoun testified that “As a result of my education, training and experience, I am well-versed in the standard of care applicable to healthcare providers performing surgical procedures such as these.” *Id.* Again, this uncontroverted evidence is more than sufficient to meet the Boyers’ burden of production on summary judgment.

Defendants next argue that summary judgment was appropriate because Dr. Shamoun did not specifically identify each member of Plastic Surgery Northwest that breached the standard of care causing plaintiffs’ harm. Respondents’ Brief, p. 15. Defendants rely upon *Grove v.*

Peacehealth St. Joseph Hosp., 182 Wn.2d 136 (2014) in support of this claim. Respondents' Brief, p. 15.

Grove does not support defendants' position. In fact, in *Grove* the Supreme Court rejected the view that chapter 7.70 RCW "does not contemplate liability for groups of providers" *Id.* at 148. Specifically, the Supreme Court held that:

The statutory definition of "health care provider" is nonexclusive, extending to "[a]n entity" "employing one or more" individual health care providers. RCW 7.70.020(3). The hospital is specifically identified as one such entity, and it would logically seem that a hospital medical team collaborating in providing treatment to an individual patient in accordance with hospital policies could constitute yet another type of "entity."

Id. The *Groves* Court pointed out that the claimant's expert provided sufficient evidence to support a verdict by testifying that both the surgeon, and those supervised by the surgeon, did not provide monitoring required by the standard of care, without specifically identifying the culpable provider:

[E]xpert testimony identified the surgeons who oversaw Grove's recovery as responsible for such failure to monitor. Indeed, the evidence at trial established that the surgeons did not monitor for compartment syndrome, nor did they

direct the team members that they oversaw to so monitor. *Id.*

The claimants expert's testimony was sufficient because it permitted the jury to conclude that one or all of the providers involved breached the standard of care, regardless of whether the providers were individually identified, "The jury could have relied on that testimony to determine that one or all of the cardiovascular surgeons who acted as Grove's primary care physician during his postoperative recovery period breached the standard of care, resulting in the hospital's vicarious liability." *Id.* at 146.

There is no dispute that Plastic Surgery Northwest is liable for the negligence of Dr. Morimoto's nursing staff. It admitted this fact in its Answer. CP 14.

Dr. Shamoun testified that the manner in which Mrs. Boyer's menstrual needs were addressed during the October 26, 2015 surgery was a clear breach of the standard of care, including on the part of the nursing staff employed by Plastic Surgery Northwest. CP 108-109. Dr. Shamoun criticized both defendants for: (1) failing to document that Mrs. Boyer was menstruating despite several different team members being given this information; (2) for assuring plaintiffs that Mrs. Boyer's menstrual care needs would be taken care of during the nine-hour procedure; (3) leaving a

tampon in place for the entire 9-hour surgery; and (4) failing to alert Mr. Boyer that a tampon remained in place before discharging Mrs. Boyer at nearly 10:00 p.m.⁴ *Id.* As in *Grove*, a jury could conclude that either or both of the defendants, including the nursing staff participating in the October 26, 2015 surgery, breached the standard of care.

Because RCW 7.70.20(3) defines a healthcare provider to include a facility, entity or hospital, Plastic Surgery Northwest is a “healthcare provider” for purposes of the statute. And because Plastic Surgery Northwest concedes that it is liable for the negligence of its own nursing staff, Dr. Shamoun’s testimony is more than sufficient to defeat summary judgment regarding Plastic Surgery Northwest.

Notably, the trial court did *not* dismiss the Boyers’ claims due to any perceived lack of identification of the specific nursing staff involved in their care. Rather, the sole basis for dismissing plaintiffs’ claims was the trial court’s flawed conclusion that Dr. Shamoun did not provide adequate foundation for his opinions regarding the applicable standard of care. Because the Court’s finding regarding Dr. Shamoun’s foundation was erroneous, its order dismissing the Boyer’s claims Plastic Surgery Northwest must be reversed and remanded for trial.

⁴ Mr. Boyer was effectively placed in charge of his wife’s menstrual care needs considering that she was still under the effects of general anesthesia and narcotic pain medication when she was discharged. CP 108-109.

4. Causation is an issue of fact for the jury to decide

Dr. Morimoto and Plastic Surgery Northwest conclude by arguing that the Boyers lack sufficient evidence of causation. Respondents' Brief, p. 16-23. Defendants argue that the trial court did not evaluate causation during summary judgment proceedings, but would have granted summary judgment had it done so. *Id.* at 16.

This argument overlooks that Dr. Morimoto and Plastic Surgery Northwest made identical arguments regarding causation as a part of its summary judgment briefing to the trial court. CP 199-204. The fact that the trial court did not adopt these arguments does not mean that it failed to consider them. Rather, it reflects the weakness of these arguments.

Washington Courts have long held that causation is a question to be decided by the jury:

In most instances, the question of cause in fact is for the jury. It is only when the facts are undisputed and inferences therefrom are plain and incapable of reasonable doubt or difference of opinion that this court has held it becomes a question of law for the court.

See Tucker v. Fleming, 92 Wn. App. 1063 (1998); *quoting Daugert v. Pappas*, 104 Wn.2d 254, 257 (1985). Because Dr. Morimoto and Plastic Surgery Northwest have offered no expert testimony on the issue of causation, there is no evidentiary support for their arguments.

Defendants do not dispute that the Boyer’s medical experts, Drs. Shamoun and Siegel, both addressed causation in their respective declarations. However, defendants criticize this causation testimony—again without supporting expert medical testimony—as being “incorrect.” *See* Respondents’ Brief, p. 21. Forgiving the gaps in defendants’ evidence, these criticisms go to the *weight* to be given to the testimony of the Boyer’s experts. However, it is well-settled that it is improper to engage in the sort of credibility assessment sought by Dr. Morimoto and Plastic Surgery Northwest at summary judgment. *See Jones v. State, Dep’t of Health*, 170 Wn.2d 338, 354, 242 P.3d 825 (2010) (An appellate court does not weigh credibility in deciding a motion for summary judgment).

Dr. Morimoto and Plastic Surgery Northwest repeatedly suggest that the Boyer’s experts offered “conclusory statements without adequate factual support.” Respondents’ Brief, p. 18. However, both experts explain in detail the basis for their opinions as having been derived from reviewing all of Mrs. Boyer’s medical records. CP. 104; 107. In addition, the written discovery produced by the parties was reviewed. CP 107. After detailing the materials reviewed, Dr. Shamoun explained how each defendant breached the standard of care.⁵

⁵ Dr. Siegel was retained only to provide opinions on the issue of causation for Mrs. Boyer’s injuries.

Dr. Morimoto and Plastic Surgery Northwest contort the testimony of Drs. Shamoun and Siegel in furtherance of their argument that causation evidence has not been established. Respondents' Brief states, "There is no evidence—offered on a more probable than not basis—that Mrs. Boyer suffered from Toxic Shock Syndrome secondary to a retained tampon." Respondents' Brief, p. 23. However, Dr. Siegel, unequivocally testifies on a "more probable than not basis, based upon a reasonable degree of medical certainty"⁶ that "the cause of Mrs. Boyer's Toxic Shock Syndrome was a retained tampon removed on or about November 5, 2015..." CP 104. Defendants are entitled to disagree with Dr. Siegel's testimony; they are not entitled to change it.

Dr. Morimoto and Plastic Surgery Northwest also inaccurately contend that "no witness testified that any surgical complication occurred" in connection with Mrs. Boyer's October 26, 2015 surgery. That is false. It is undisputed that "surgical complications" resulted from the October 26, 2015 surgery; Mrs. Boyer very nearly died from these complications.

In fact, Dr. Shamoun's declaration states that when Mrs. Boyer presented for a follow up appointment on October 28, 2015, she was exhibiting "red flag" symptoms of surgical complications, including persistent pain and fatigue. CP 109-110. Dr. Shamoun's unchallenged

⁶ CP 104.

testimony is that the standard of care *required* Dr. Morimoto to investigate further to rule out serious surgical complications before discharging the Boyers from her care. CP 110. There is no dispute that Dr. Morimoto did *nothing* other than simply prescribe more powerful narcotic pain medication. CP 109.

As Dr. Shamoun explained, had Dr. Morimoto taken steps to determine the cause of Mrs. Boyer's symptoms, "plaintiffs would not have suffered the devastating injuries they experienced in the weeks and months following the October 26, 2015 surgery..." CP 110. The obvious inference being that had Dr. Morimoto addressed Mrs. Boyer's symptoms on October 28, 2015, as required, the life-threatening toxic shock syndrome could have been avoided or minimized.

Instead, a tampon remained in Mrs. Boyer's vagina from October 26, 2015, the date of the surgery, until it was discovered on November 5, 2015. Dr. Shamoun's testimony is dispositive considering that both he and Dr. Siegel testified that Mrs. Boyer's injuries resulted from "complications caused by toxic shock syndrome" specifically relating to this retained tampon. CP 104.

Respondents attempt to segregate Dr. Shamoun's standard of care criticisms into discrete parts in an attempt to sever any link between their misconduct and Mrs. Boyer's injuries is improper. Dr. Shamoun pointed

out, defendants' misconduct was interrelated, not discrete acts, including: (1) performing a 9-hour surgery, on an outpatient basis, on a patient they knew was menstruating. Defendants knew that Mrs. Boyer's ability to manage her menstrual care needs would be severely compromised when she was eventually discharged at 10:00 p.m. She was still under the effects of general anesthesia and had been given multiple does of narcotic pain medication, including fentanyl, in the minutes before she left the surgery center. CP 107; 141.

Consequently, defendants' actions placed *Mr. Boyer*, who had no experience with the use of tampons, in the position of having to manage his wife's menstrual care needs at the time of discharge. Mr. Boyer's unchallenged testimony is that, despite assisting his wife to the restroom before she was discharged, he did not observe any signs of a tampon, such as a string, and was never alerted that one remained in place. CP 127-128. And despite authorizing the use of tampons after discharge, defendants never alerted Mr. Boyer that a tampon was already in place and had remained in place throughout the course of the nine-hour surgery. *Id.* Instead, the Boyers were discharged to Montana and told to return for their next appointment on November 13, 2015—18 days later. CP 141.

Under Washington law, a claimant need only show that the negligence of a healthcare provider was a proximate cause of her injuries

in order to prove medical negligence. See WPI 105.03. Viewing all facts and reasonable inferences in the light most favorable to the Boyers, a jury certainly could conclude that defendants' conduct was at least a proximate cause of the injuries to the Boyers.

C. CONCLUSION

For the foregoing reasons, the Boyers respectfully request that the trial court's Order Granting Summary Judgment in Favor of Defendants be reversed and their claims remanded for trial.

RESPECTFULLY SUBMITTED this 16th day of November, 2018.

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