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**Court of Appeals**  
**Division III**  
**State of Washington**  
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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

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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

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**APPELLANT'S OPENING BRIEF**

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**A. INTRODUCTION**

Appellants (Hereinafter “Mr. and/or Mrs. Boyer”) suffered serious injuries in connection with a surgical procedure performed by Respondents (Hereinafter “Dr. Morimoto” and/or “Plastic Surgery Northwest”).

In September 2015, Mr. and Mrs. Boyer consulted with Dr. Morimoto and her staff after discovering that a prior breast implant had ruptured and deflated. In addition to recommending the removal and replacement of the ruptured implant, Dr. Morimoto recommended abdominoplasty and extensive liposuction. Mr. and Mrs. Boyer travelled 300 miles from their home in Montana for the surgery occurring on October 26, 2015.

Mrs. Boyer suffered seriously, life-threatening complications following surgery. The Boyers’ standard of care expert, Dr. John Shamoun, testified that the manner in which this October 26, 2015 surgery was performed, as well as the failure to provide appropriate aftercare, breached the applicable standard of care and directly caused plaintiff’s injuries.

In his initial declaration filed in opposition to Dr. Morimoto’s and Plastic Surgery Northwest’s joint Motion for Summary Judgment, Dr. Shamoun explained that he has extensive experience in the surgical

procedures at issue. Dr. Shamoun explained that the standard of care for these three procedures “is not unique to the State of Washington and applies on a nationwide basis.” CP at 107.<sup>1</sup> Dr. Shamoun’s testimony on summary judgment was uncontested.

At the urging of Dr. Morimoto and Plastic Surgery Northwest, the trial court entered a “memorandum” opinion concluding that Dr. Shamoun’s testimony lacked adequate foundation regarding the applicable standard of care in the State of Washington. CP 325. The Court also opined that Dr. Shamoun was not qualified to offer opinions regarding the nursing care provided to Mrs. and Mrs. Boyer in connection with these surgical procedures. CP 326.

Prior to the entry of judgment, Mr. and Mrs. Boyer submitted a Supplemental Declaration from Dr. Shamoun clarifying, to the extent necessary, his factual basis for his testimony regarding the standard of care applying in the State of Washington, including that: (1) he has consulted with numerous plastic surgeons practicing in the State of Washington on the specific procedures at issue in this case; and (2) he has previously consulted on Washington cases involving the same three procedures at issue in this case. Consequently, Dr. Shamoun has extensive and uncontested knowledge of the applicable standard of care.

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<sup>1</sup> The term “CP” refers to the Clerk’s Papers in this action.

Weeks after receiving Dr. Shamoun's supplemental declaration, the trial court entered its Order Granting Defendant's Motion for Summary Judgment. CP 353-355. The Order shows that the trial court refused to consider the supplemental declaration of Dr. Shamoun. No analysis of the trial court's decision is reflected in the record.

Mr. and Mrs. Boyer seek reversal of the trial Court's Order Granting Defendant's Motion for Summary Judgment.

## **B. ASSIGNMENTS OF ERROR**

### **1. Assignments of Error**

- I. The trial court erred by excluding Dr. Shamoun's uncontested testimony regarding the applicable standard of care and granting summary judgment.
- II. The trial court erred by refusing to consider Dr. Shamoun's uncontested supplemental declaration clarifying his initial testimony.
- III. The trial court erred by holding that Dr. Shamoun was not qualified to offer testimony regarding the standard of care applicable to the employees of Plastic Surgery Northwest.

### **2. Issues Pertaining to Assignments of Error**

- I. Dr. Shamoun provided uncontested testimony that he is familiar with the standard of care in Washington and that it is national in scope. This Court has previously held that an expert is qualified if "he is familiar with the standard of care and that the standard is a national standard." *Driggs v. Howlett*, 193 Wn. App. 875, 901 (Div. III 2016), citing *Elber v. Larson*, 142 Wn. App. 243 (Div. III 2007) Did the trial court err in excluding Dr. Shamoun's testimony? (**Assignment of Error I**)

- II. The trial court excluded the supplemental declaration of Dr. Shamoun which offered additional evidence that the applicable standard of care is national in scope. It is an abuse of discretion to exclude expert medical testimony absent application of the “*Burnet*” factors. Did the trial court err in excluding plaintiff’s expert testimony without first applying the *Burnet* test? **(Assignment of Error II)**
- III. Dr. Shamoun’s testimony concludes that both Dr. Morimoto and the staff of Plastic Surgery Northwest breached the standard of care. Washington law permits a physician to offer standard of care criticisms of practitioners in other fields so long as the physician is familiar with the medical question at issue. Did the trial court err in concluding that Dr. Shamoun’s testimony regarding the negligence of the staff of Plastic Surgery Northwest was deficient? **(Assignment of Error III)**

**C. STATEMENT OF THE CASE**

**1. Pertinent Medical Care**

On September 25, 2015, plaintiffs consulted with Defendant Morimoto, a Spokane-area plastic surgeon, because one of Mrs. Boyer's prior breast implant had potentially ruptured. CP 115. During the consultation, Dr. Morimoto recommended exchanging the existing implants with silicone implants. CP 118. Defendant Morimoto also recommended an abdominoplasty (tummy tuck) as well as liposuction on Mrs. Boyer's back, hips and breasts. CP 118-119.

During this same consultation, plaintiffs informed Defendant Morimoto that they lived in Anaconda, Montana—a small town in southwest Montana located approximately 300 miles from Spokane. CP 59. October 26, 2015 was the date selected for the surgery.

Prior to driving to Spokane for the surgery, plaintiffs realized that Mrs. Boyer was about to begin menstruating. Consequently, they phoned Defendant Morimoto's office to determine whether the surgery would need to be rescheduled. CP 131. Defendants said that surgery could proceed. CP 131.

Mrs. Boyer uses tampons when menstruating. However, because plaintiffs were uncertain whether tampons were permitted during surgery, they purchased both tampons and sanitary pads on their drive to Spokane

from Montana. CP 129. The nursing staff of Plastic Surgery Northwest were told, on several occasions, that Mrs. Boyer was menstruating and that she brought both tampons and sanitary pads to utilize whichever the nursing staff felt to be more appropriate during the surgery. CP 129.

**a. Mrs. Boyer is anesthetized for nine hours.**

On October 26, 2015, plaintiffs arrived at the surgery center at approximately 6:30 a.m., as directed. CP 129. Plaintiffs repeatedly reminded defendants that Mrs. Boyer was menstruating and that she was using a tampon. CP 128-131; 170. Defendant Morimoto was several hours late arriving for the surgery. CP 129. While waiting for her to arrive, Mrs. Boyer used the restroom approximately three times. CP 127; 170. Each time, she removed and replaced her tampon. CP 127. During the final trip to the restroom, Mrs. Boyer was accompanied by one of defendants' nursing staff due the fact that an IV line had been placed in Mrs. Boyer's arm. CP 127. The nurse was with Mrs. Boyer in the restroom while a tampon was removed and a new one inserted. CP 127.

When Defendant Morimoto arrived, she met with both plaintiffs, was told that Mrs. Boyer was menstruating and that she was presently using a tampon. CP 130. Defendant Morimoto assured plaintiffs that using a tampon was acceptable and that defendants' staff would take care of Mrs. Boyer's menstrual needs during surgery. CP 130.

According to the nurse anesthetist's records, Mrs. Boyer first received general anesthesia at 10:05 a.m. CP 74. Mrs. Boyer remained anesthetized until nearly 7:00 p.m.—for a total of *nine hours*. CP 74. Then, Mrs. Boyer was awakened and taken to a recovery area at the surgery center. CP 77.

**b. Mrs. Boyer is discharged without instructions for tampon removal.**

Mr. Boyer was permitted to join his wife in the recovery room. CP 77. At about 9:00 p.m., Mrs. Boyer indicated that she needed to use the restroom and Mr. Boyer agreed to assist her. CP 77. Because he was aware that his wife was menstruating, Mr. Boyer asked if they could use a tampon. CP 128. The discharge nurse affirmed that tampons were permitted. CP 128.

As Mr. Boyer assisted his wife out of bed, he pulled back the blankets exposing her lower body. CP 128. Due to the liposuction and abdominoplasty, Mrs. Boyer was fitted with a “compression garment.” CP 128. This undergarment had opening that allowed Mrs. Boyer to use the restroom and attend to her menstrual needs without removing it. CP 128. Because of this opening, Mr. Boyer was able to visualize his wife's vagina and that there was nothing visible, such as a string, indicating that a tampon remained inside. CP 128. In addition, there was some type of

surgical pad beneath Mrs. Boyer's bottom that appeared to have blood on it. CP 128.

Mr. Boyer physically assisted his wife into the restroom and lowered her onto the toilet. He testified that no tampon was removed because plaintiffs did not believe that one remained in place. CP 127.<sup>2</sup> Mr. Boyer then handed his wife a tampon from her purse, observed that it was inserted and assisted her back into the recovery room. CP 127-128.

Defendants admit that there is no mention in Mrs. Boyer's records that she was menstruating. CP 135-138. Likewise, there is no mention that defendants took any steps to address her menstrual care needs, as agreed, including by removing a tampon prior to, or during, the surgical procedure. CP 137. In addition, there is no record that that plaintiffs were alerted that a tampon might be in place after the surgery despite defendants' staff being informed that plaintiffs were planning to insert one immediately prior to discharge. CP 135-138.

Mrs. Boyer was discharged from defendants' facility at 9:55 p.m. She and her husband were instructed to return for her a follow up appointment with Defendant Morimoto on November 13, 2015—18 days later. CP 77; 144.

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<sup>2</sup> While recovering from the general anesthesia administered over the course of the prior 9 hours, Mrs. Boyer was given several types of strong pain medication during this time-period, including Fentanyl and Hydrocodone. Consequently, her memory of this time-period is understandably hazy. CP 77.

Plaintiffs did not immediately attempt to drive back to their home in Montana. Instead, they chose to spend the night in a hotel in Spokane in order to permit Mrs. Boyer to recover somewhat. The day following surgery, plaintiffs grew concerned with Mrs. Boyer's recovery. Consequently, they asked to be seen by Dr. Morimoto before returning home. CP 109.

**c. Mrs. Boyer arrives for a follow-up visit where no steps were taken to determine the source of her ongoing intense pain.**

This follow up visit occurred on October 28, 2015. CP 143-144. Dr. Morimoto's chart notes reflect that Mrs. Boyer was in considerable pain, having "no pain relief" despite taking hydrocodone, as directed. CP 109; 143. Mrs. Boyer was also described as appearing "fatigued." CP 143. However, after a cursory physical examination, Defendant Morimoto simply prescribed stronger narcotic pain medication and again discharged plaintiffs to return to their home in Montana with no scheduled follow up for more than ten days. CP 144. Plaintiffs departed Spokane on October 31, 2015 and returned home.

Mr. Boyer took time off from work in order to care for his wife during her recovery. Just as he had in Spokane, Mr. Boyer assisted his wife with her self-care after they had returned to Montana. Due to her pain and difficulty balancing, Mr. Boyer needed physical lift his wife

whenever she needed to get out of bed or use the toilet. Because Mrs. Boyer's practice was to replace her tampons whenever she used the restroom, Mr. Boyer was present and observed each tampon change starting from the time he and his wife left Defendants' surgical center. At no time was a tampon inserted without the older tampon being removed and discarded.

**d. Doctors discovery that Mrs. Boyer is suffering from toxic shock syndrome.**

In the early days of November 2015, Mrs. Boyer began complaining of intermittent fevers and chills. On or about November 3, 2015, Mr. Boyer covered his wife's feet with heavy wool socks after she complained that they were freezing. On the morning of November 4, 2015, Mrs. Boyer complained that her feet were now burning up and asked that he remove the socks. When Mr. Boyer removed his wife's socks, he discovered that her toes had turned black. CP 122:



Mr. Boyer immediately attempted to phone Defendant Morimoto, but her staff were unable to locate her. Mr. Boyer sent photographs to defendants reflecting the discoloration of his wife's feet. CP 122. While waiting to hear back from Defendant Morimoto, Mr. Boyer drove his wife to his local hospital's emergency room. CP 122.

The staff at Anaconda Community Hospital determined that Mrs. Boyer was likely suffering from an infection relating to defendants' surgery that was causing multi-system organ failure. Consequently, the decision was made to emergently air transport Mrs. Boyer to a regional facility in Missoula, Montana.

Mrs. Boyer's condition continued to deteriorate throughout her transfer. By the time she arrived in Missoula, her nose, ears and fingertips started to show signs of discoloration. Mrs. Boyer was given a broad spectrum of powerful antibiotics to try to address whatever might be causing her symptoms.

Fortunately, a local plastic surgeon, Dr. Stephen Hardy, was present at St. Patrick's hospital on the day of transport and agreed to perform emergency exploratory surgery to try to ascertain the cause of Mrs. Boyer's illness. However, following this surgery there was still no clear understanding what was causing Mrs. Boyer's illness.

The next day—November 5, 2015—Mrs. Boyer's brother, Dr. Jay Murphy arrived in Missoula to be with his sister. Dr. Murphy is a

practicing OB-GYN in Bend, Oregon. CP 124. After reviewing her symptoms, lab reports, and after discussing the timeline events dating back to Mrs. Boyer's surgery with defendants, Dr. Murphy became concerned that she was suffering from toxic shock syndrome. Consequently, he suggested that Mrs. Boyer's treating providers perform a pelvic exam. CP 124.

**e. Two tampons are removed, and Mrs. Boyer begins to recover.**

The attending infectious disease physician, Dr. David Christensen, performed the pelvic exam and discovered two tampons in Mrs. Boyer. CP 124; 146. One tampon was found in the expected position in the vagina. This is logical considering that plaintiffs continued to use tampons after they returned to Montana. CP 124-125.

However, a second tampon was also discovered deeper in Mrs. Boyer's vagina pressed up against her cervix. CP 124-126. Mrs. Boyer's doctors estimated that the tampon was in place for the past ten days. CP 146.

Both tampons were removed and Mrs. Boyer began to recover. However, the injuries from this experience were substantial. Mrs. Boyer spent almost two weeks in ICU in Missoula recovering from her illness. One month later, Mrs. Boyer had to return to Missoula in order to have most of the toes on her right foot amputated. Throughout 2016, Mr. and Mrs. Boyer frequently returned to Missoula for follow up surgeries needed

to address the lingering injuries from her illness. In total, plaintiffs had approximately nine separate surgical procedures after the October 26, 2015 procedure with defendants.

**A. Expert Disclosures and Discovery**

Defendants' Motion for Summary Judgment claimed, incorrectly, that plaintiffs failed to disclose the opinions of their expert witnesses prior to the filing of their brief. CP 22.

This Court ordered disclosure of expert witnesses to occur no later than December 15, 2017. CP 22. Plaintiffs timely disclosed two experts, Drs. Shamoun and Siegel, produced the resumes of both providers, identified the topics upon which they would offer opinions and provided a summary of those opinions.

In mid-January 2018, defendants attempted to serve a pleading entitled "Request for Supplemental of Answers to First Set of Interrogatories to Plaintiffs seeking supplemental information regarding plaintiffs' expert witnesses. Plaintiffs did not receive these materials, as defense counsel sent them to another law firm that has no involvement in this litigation. CP 148; 149-151. Eventually, the pleading was forwarded to plaintiffs' counsel.

On March 8, 2018, the parties convened a discovery conference to discuss several issues, including plaintiffs' supplementation of expert witness opinions. During the conference, plaintiffs' counsel agreed to provide additional detail regarding their experts' opinions no later than March 16, 2018. On March 16, 2018, plaintiffs served the

supplementation, as agreed. CP 153-176. This supplementation included the precise information regarding the opinions of Mr. and Mrs. Boyers' experts that defendants' motion contends had not been provided. CP 166-168. Despite having received this supplementation well before its brief had been filed, defendants represented that "Plaintiffs still have not provided any answers to interrogatories concerning the specific opinions held by their disclosed experts and the foundational opinions for those opinions." CP 22. This inaccurate claim was the central basis put forth by defendant in seeking summary judgment. CP 25.

The memorandum filed in support of defendants' Motion for Summary Judgment totaled six pages and consisted of vague assertions that Mr. and Mrs. Boyer had not disclosed experts in support of their claims. CP 20-26. Mr. and Mrs. Boyer filed a Response highlighting that, notwithstanding defendants' representations, they had provided extensive disclosure of the expected opinions of their retained experts. CP 178-191.

For the first time in their Reply Brief, defendants raised the specific criticisms of the Boyer's retained experts. CP 193-211. Remarkably, defendants' Reply Brief is 19 pages, or three times the length of its original motion and included dozens of pages of evidence not previously submitted. CP 193-211; 213-288.

The trial court's memorandum opinion repeatedly criticizes plaintiffs' counsel for citing to cases "without any briefing." CP 324; 326. Yet, the trial court overlooked that the cases cited were made in response to arguments raised by defendants for the first time in their Reply. The

Boyers had no opportunity to address these issues in their Response Brief as defendants had not yet made them.

## **2. Opinions of Dr. Shamoun**

The opinions of Dr. Shamoun were highlighted extensively in Mr. and Mrs. Boyer's Response Brief. Dr. Shamoun testimony is as follows:

Dr. Shamoun testifies that:

*One facet of my role in this case was to offer opinions regarding the standard of care applicable to the October 26, 2015 surgery at the heart of this litigation, as well as whether defendants' conduct fell below the standard of care. The specific medical procedure in question consisted of the following: (1) bilateral breast implant exchange, with mastopexy; (2) liposuction; and (3) abdominoplasty. 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. CP 107 (Emphasis Supplied).*

*The standard of care in this case required defendants to exercise the same degree of skill, care and learning expected of other reasonably prudent healthcare providers attempting the surgical procedure described in the preceding paragraph. **This standard is not unique to the State of Washington and applies on a nationwide basis.** CP 107.*

*[I]t was wholly unreasonable for Defendant Morimoto to perform*

*such an extensive surgery (breast augmentation with mastopexy, liposuction and abdominoplasty) on an out-patient basis knowing that the patient lived several hundreds of miles away in Montana and would be traveling home shortly after the procedure. Defendants' records reflect that the surgical procedure lasted nine (9) hours and involved extensive general anesthesia. Mrs. Boyer was not discharged from the surgery center until nearly 10:00 p.m. with no follow up visit scheduled until November 13, 2015—18 days later. Defendants' conduct was unreasonable and showed a total disregard for their duty to provide appropriate care to plaintiff. CP 108.*

*Given the extent of surgical attention involved, and in light of the fact that Mrs. Boyer remained under the effects of general anesthesia and narcotic pain medication, Mrs. Boyer should have remained at the surgical center under the care of defendants throughout the remainder of the night following her surgery. Alternately, Dr. Morimoto should not have attempted each of these procedures during a single, out-patient surgery considering that plaintiffs would be leaving the area shortly after the surgery and returning to their home in Montana several hundred miles away. These facts, coupled with the fact that no follow up appointment would occur for another 18 days after discharge, meant that defendants would have no way to provide effective aftercare, including to address*

*potential surgical complications. CP 108*

*Plaintiffs were entitled to rely upon defendants' assurance that Mrs. Boyer's menstrual care needs would be addressed during surgery. However, defendants records do not mention that Mrs. Boyer was menstruating or that a tampon was removed prior to or during the surgery. Defendants' records also do not reflect any effort on the part of defendants to alert Mr. or Mrs. Boyer that a tampon remained in place after the surgery concluded. Allowing a tampon to remain in Mrs. Boyer's vagina throughout the duration of the nine-hour surgery, and failing to alert Mrs. Boyer—a woman still experiencing the effects of general anesthesia and narcotic pain medication—that a tampon remained inside her vagina, was a clear breach of the standard of care. CP 109. (Emphasis supplied).*

*Before returning home, Mr. and Mrs. Boyer requested an unscheduled follow-up appointment with Dr. Morimoto regarding concerns they had with Mrs. Boyer's recovery. During this follow-up appointment, Mrs. Boyer was documented to be fatigued and experiencing persistent pain despite taking her pain medication as scheduled (hydrocodone). These symptoms—particularly Mrs. Boyer's reports of persistent pain—are serious red-flags of potential surgical complications.*

*Rather than determine the cause of Mrs. Boyer's symptoms,*

*Defendant Morimoto merely increased the strength of Mrs. Boyer's pain medication (oxycodone) and again discharged plaintiffs to return to their home in Montana with no scheduled follow-up for several weeks. Considering that severe pain is an indication of potential serious surgical complication, Defendant Morimoto had a duty to investigate further in order to rule out serious surgical complications before discharging plaintiffs and permitting them to drive several hours to their home in Montana. Her failure to do anything other than a cursory examination was a serious breach of the standard of care. CP 109-110*

In addition to his standard of care opinions, Dr. Shamoun offered testimony regarding causation:

*It is my opinion that but for **defendants' breaches** of the standard of care described in this declaration, plaintiffs would not have suffered the devastating injuries they experienced in the weeks and months following the October 26, 2015 surgery at issue in this case. CP 110. (Emphasis supplied).*

On May 9, 2018, the trial court issued its Memorandum Opinion on Defense Motion for Summary Judgment. CP 318-228. Ultimately, the trial court concluded that there was inadequate foundation for Dr. Shamoun's testimony that the applicable standard of care is national in scope. CP 323. The trial court set a deadline of June 1, 2018 for the

parties to present an Order reflecting its ruling. CP 326.

On May 15, 2018, Mr. and Mrs. Boyer submitted a Supplemental Declaration of Dr. John M. Shamoun. M.D., F.A.C.S. CP 327-328. In it, Dr. Shamoun provides clarification regarding the foundation for his opinions, including that he has consulted with numerous plastic surgeons working in the State of Washington regarding the precise procedures at issue in this case:

*[T]hroughout my career I have consulted with numerous plastic surgeons practicing within the State of Washington, including consultations involving the specific procedures at issue in this litigation: abdominoplasty, liposuction and mastopexy. As a consequence, I can confirm that Washington plastic surgeons adhere to the same standards of practice followed by plastic surgeons throughout the rest of the nation.*

CP 328.

Dr. Shamoun also confirmed that he has personal experience consulting on cases involving these three procedures in the State of Washington. CP 328. As a result of his personal involvement consulting on these kinds of cases, Dr. Shamoun demonstrates his familiarity with the standard of care applicable in Washington. CP 328.

The parties submitted dueling Orders regarding the Court's Memorandum opinion. The version submitted by Mr. and Mrs. Boyer

included the Supplemental Declaration of Dr. Shamoun.<sup>3</sup> CP 350-352. The version submitted by Dr. Morimoto and Plastic Surgery Northwest omitted the Supplemental Declaration. CP 353-355. The unsigned version of the Plaintiff's Order bears the notation "Denied." The trial court signed defendants' order which did not reference that it had considered the supplemental declaration of Dr. Shamoun. The Court signed and entered its Order Granting Summary Judgment on June 15, 2018—one month after receiving Dr. Shamoun's supplemental declaration. CP 353-355.

#### **D. LEGAL ARGUMENT**

##### **1. The trial court erred in excluding the uncontested testimony from Dr. Shamoun regarding the applicable standard of care.**

Appellate review of a trial court's decision on summary judgment is *de novo* with all facts and inferences construed in the light most favorable to the non-moving party. *See Castro v. Stanwood Sch. Dist No. 401*, 151 Wn.2d 221, 224 (2004). Usually, the qualifications of an expert to express opinions pertinent to a lawsuit are matters addressed to the discretion of a trial judge. *Seybold v. Neu*, 105 Wash.App. 666, 678 (2001). However, that is not the case when those qualifications and opinions are part and parcel of a summary judgment proceeding. In this context, review is *de novo*. *See Folsom v. Burger King*, 135 Wash.2d 658,

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<sup>3</sup> Boyer's also submitted an Objection to the Entry of the Order. CP 336-339.

663 (1998).

Under RCW 7.70.040(1), a claimant can establish a breach of the applicable standard of care by showing that:

The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he or she belongs, in the state of Washington, acting in the same or similar circumstances.

This Court has previously decided whether a claimant has satisfied the statute's evidentiary requirements regarding the standard of care applicable in Washington under closely analogous circumstances. In *Elber v. Larson*, 142 Wn. App. 243 (Div. III, 2007), this Court addressed the question of whether "the plaintiff failed to show that the standard of care applied by the plaintiff's expert physician was local to the state of Washington." *Id.* at 244. Like Dr. Shamoun, the proffered expert in *Elber* practiced outside the State of Washington and submitted a declaration in opposition to summary judgment contending that the applicable standard of care had been breached. *Id.* at 246. However, unlike Dr. Shamoun, the declaration of the claimant's expert in *Elber* (Dr. Meub) did *not* initially express familiarity with the standard of care in Washington or that it applied nationally.

*After* the trial court granted summary judgment in favor of the defendants, Dr. Meub submitted a supplemental declaration indicating that the applicable standard of care was national in scope based upon his

education, training and experience, as well as conversations with other providers working in Washington. *Id.* at 246. The trial court denied the claimants motion for reconsideration supported by this supplemental declaration. *Id.*

This Court reversed the trial court indicating that:

Dr. Meub’s supplemental declaration says two things pertinent to the locality requirement here. First, it says that he is familiar with the standard of care for neurosurgeons. Second, it states that standard is the national standard. In other words, the standard for a neurosurgeon doing this work in Washington is not any different than the standard for a neurosurgeon doing this work in California, Vermont, or anyplace else in the United States. *Now, the necessary inference from this is that he is familiar with the standard of care in Washington because the standard of care is a national standard of care and he is familiar with that standard.* And his assertion is not contradicted. Dr. Larson does not suggest that the standard here in Washington is different.

*Elbers*, 142 Wn App. at 247 (emphasis supplied). This Court concluded that Dr. Meub’s undisputed testimony establishes that he “is familiar with the standard of care in Washington because it is the same everywhere in this country.” *Id.* at 249.

This Court reached the same result in *Hill v. Sacred Heart Med. Ctr.*, 143 Wn.App. 438 (2008). In *Hill*, the claimant provided an uncontested expert declaration reflecting that the applicable standard of

care was national in scope. *Id.* at 453. This Court concluded that claimant’s experts’ unchallenged declarations were sufficient to establish that:

[t]he applicable standard of care is the national standard. The standard of care in Washington is, then, the same standard as in their states. The same standard that applies to Dr. Willard in Wisconsin and to Dr. Bauer in Massachusetts applies to physicians here in Washington.

*Hill*, 143 Wn.App at 453.

Division I has also held that unchallenged testimony regarding the national scope of the applicable standard of care is sufficient for meeting a claimant’s burden of production under RCW 7.70 *et seq.* In *Eng v. Klein*, the Court of Appeals deemed adequate the claimant’s expert’s testimony as to “what would be [the] national standards of care for diagnosing and treating meningitis.” *Id.* at 179. Again, the Court deemed significant that the defendant-provider in *Eng* offered no testimony challenging the nationwide scope of the standard of care. *Id.*

Here, Dr. Shamoun’s initial declaration made clear that he is familiar with the standard of care in the State of Washington and that it applies on a nationwide basis. Defendants did not submit any testimony challenging Dr. Shamoun’s declaration. As recognized in *Elbers*, *Hill* and *Eng*, the trial court erred in concluding that Dr. Shamoun did not provide adequate foundation for describing the applicable standard of care warranting reversal.

**2. The trial court erred in refusing to consider Dr. Shamoun's supplemental declaration.**

Out of an abundance of caution, and a full month before entry of its Order Granting Defendants' Motion for Summary Judgment, Mr. and Mrs. Boyer submitted a supplemental declaration from Dr. Shamoun. The supplemental declaration gives additional clarity regarding Dr. Shamoun's knowledge of the applicable standard of care based on his personal experience working in Washington and his consultations with other Washington plastic surgeons, regarding the precise procedures at issue. CP 327-328. Because of this additional testimony, the foundation for Dr. Shamoun's opinions regarding the applicable standard of care cannot seriously be contested.

Civil Rule 56 states, in relevant part, that the form of an order granting or denying summary judgment shall designate all evidence called to the attention of the Court *prior to the entry of the Order*:

Form of Order. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered.

Wash. Super. Ct. Civ. R. 56(h).

In this instance, there is no dispute that the trial court was provided with Dr. Shamoun's supplemental declaration well before it entered

judgment, but did not consider it. The trial court did not indicate, on the record, the basis for its refusal to consider Dr. Shamoun's supplemental declaration.

Under binding Supreme Court precedent, the trial court abused its discretion in refusing to consider Dr. Shamoun's declaration. In *Keck v. Collins*, 184 Wash. 2d 358 (2015), the Supreme Court held, under nearly identical circumstances, that:

Before excluding untimely evidence submitted in response to a summary judgment motion, the trial court must consider the Burnet factors on the record. On appeal, a ruling to exclude is reviewed for an abuse of discretion. Applying this standard, we conclude the trial court abused its discretion because it failed to consider the Burnet factors before striking the third affidavit.

*Id.* at 374.

Here, there is no dispute that the "Burnet"<sup>4</sup> factors were not applied on the record by the trial court. The only indication relating to the trial court's consideration of Dr. Shamoun's supplemental declaration is reflected in the fact that he signed defendants' Order that omitted that document as having been considered and with the word "denied" written on plaintiff's completing order asking that it be considered. Under *Keck*,

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<sup>4</sup> See *Burnet v. Spokane Ambulance*, 131 Wn.2d 484 (1997).

the trial court's refusal to consider Dr. Shamoun's supplemental declaration without first applying the *Burnet* factors was an abuse of discretion and an independent basis for reversal.

**3. The trial court erred in concluding that Dr. Shamoun was not permitted to testify that the staff of Plastic Surgery Northwest violated the standard of care.**

The trial court granted summary judgment on behalf of Plastic Surgery Northwest, concluding that "Plaintiff has not met their burden to show breach of a standard of care by any nursing provider of Plastic Surgery Northwest." CP 326. The Court continued that "At most, plaintiffs sought to make a case against Dr. Morimoto." CP 326. The trial court concluded that Mr. and Mrs. Boyer had not provided qualified expert testimony regarding whether the defendant nursing staff violated the standard of care. CP 326.

Certainly Dr. Shamoun provided ample testimony both that he has ample experience with the surgical procedures at issue in this case (CP 107) and offered testimony that all of the defendants breached the applicable standard of care (CP 106-110).

For example, the evidence reflects that Dr. Morimoto *and her staff* repeatedly assured Mr. and Mrs. Boyer that her menstrual care needs would be addressed throughout the surgical procedure. CP 109. Viewing the evidence in the light most favorable to the Boyers, defendants

breached the standard of care by leaving a tampon in Mrs. Boyer's vagina throughout the entirety of her 9 hour surgery and thereafter failing to alert the Boyer that they had done so. CP 109. In fact, at the time of Mrs. Boyer's discharge, her care was being managed entirely by the staff of Plastic Surgery Northwest. CP 77.

This Court has previously held 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). A physician with a medical degree is qualified to express an opinion on any sort of 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 (2005).

Dr. Shamoun testified that he has extensive experience with the surgical care at issue in the present case. To the extent that the trial court concluded that he was unqualified to offer standard of care opinions regarding the nursing staff involved in Mrs. Boyer's care, it committed reversible error.

#### **E. CONCLUSION**

The trial court erred in refusing to consider Dr. Shamoun's uncontested testimony that he is familiar with the applicable Washington

standard of care and that the standard applies nationwide. Washington law makes clear that Dr. Shamoun's testimony was adequate under RCW 7.70 *et seq.*

The trial court abused its discretion in refusing to consider Dr. Shamoun's supplemental declaration without performing any type of Burnet analysis. Because Dr. Shamoun's supplemental declaration further establishes the foundation for his testimony, reversal is necessary.

Finally, the trial court erred when concluding that Dr. Shamoun was unqualified to offer opinions that the staff of Plastic Surgery Northwest breached the standard of care. The threshold question turns on the proffered expert's expertise in the medical care at issue, not the provider's title.

The Boyer's respectfully request that this Court reverse the trial court and permit their claims to proceed to trial.

RESPECTFULLY SUBMITTED this 17th day of September, 2018.

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