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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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

Cause No. 361667

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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 F. CLARY

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RESPONDENTS' BRIEF

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## I. INTRODUCTION

This is a medical negligence case. Plaintiffs Kathy and Joe Boyer (“the Boyers”) appeal the trial court’s decision granting summary judgment in favor of Defendants Dr. Kai Morimoto, M.D. and Plastic Surgery Northwest (“PSNW”). The Boyers contend that the trial court did not consider the testimony of their expert witness because such testimony was not timely disclosed. They are incorrect. Defendants’ Motion for Summary Judgment was not based upon the absence of disclosure; it was a challenge to the Boyers to come forward with admissible expert witness testimony establishing the elements of their claims.

Regardless, the trial court *did* consider the expert witness testimony called to its attention by the Boyers at the time of the summary judgment hearing. The trial court determined that the proffered testimony was insufficient to satisfy the Boyers’ burden of proof under RCW 7.70.040. Critically, had the Court’s analysis continued, it is clear from the record that the Boyers failed to prove that any alleged standard of care violation was a proximate cause of injury or damage to Mrs. Boyer. That is, the Boyers failed to produce sufficient evidence that the Defendants violated the standard of care *or* that such standard of care violations were a proximate cause of injury or damage to Mrs. Boyer. Either deficiency in proof required dismissal.

After the summary judgment hearing, and after Judge Raymond F. Clary issued a written opinion granting Defendants' Motion for Summary Judgment, the Boyers submitted a supplemental declaration from Dr. Shamoun. They did *not* file a motion for reconsideration or any other post-ruling motion asking the Court to consider Dr. Shamoun's Declaration. In fact, Plaintiffs' only filing was a proposed order *granting* Defendants' Motion for Summary Judgment and a corresponding brief.

Plaintiffs now appear to contend that the trial court was obligated to *sua sponte* review the record after it had made a decision and reconsider its summary judgment ruling. The trial court's ruling should be affirmed where Plaintiffs' failed to come forward with sufficient expert witness testimony, regardless of Dr. Shamoun's supplemental declaration.<sup>1</sup>

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<sup>1</sup> The Boyers likewise asserted an informed consent theory of liability which was dismissed on summary judgment. The claim was not pled and was unsupported by sufficient evidence. CP 204-211 The Boyers have not appealed that determination. *See*, CP 356-353; *Appellant's [sic] Opening Brief*.

## **II. ASSIGNMENTS OF ERROR**

Defendants do not assign error to any decision by the trial court.

## **III. STATEMENT OF THE CASE**

### **A. Medical care provided to Mrs. Boyer.**

Plaintiff Kathie Boyer came to Plastic Surgery Northwest (“PSNW”) after having lost approximately 70 pounds. CP 43. She was unhappy with the appearance of her abdomen and desired to have excess skin and fat removed surgically (an abdominoplasty). *Id.* She likewise wanted liposuction in her back, hips, and breasts. CP 46. Historically, she had received saline breast implants placed on two prior occasions, most recently in 2006. CP 43. She noted in the few months prior to her appointment at PSNW that her right implant had gradually reduced in size and was more prominent. *Id.* Therefore, she was interested in replacement of her breast implants and a breast lift (mastopexy). *Id.*

The procedure by Dr. Morimoto took place on October 26, 2015. CP 48-50. No intraoperative complications were noted. CP 49. On October 30, 2015, Mrs. Boyer checked in with PSNW (“She lives out of town and wanted to check in before going home”). CP 41. She requested a stronger form of pain medication and her request was accommodated. *Id.* She was examined and determined to be doing very well, although she was somewhat fatigued. *Id.* at 41.

Mrs. Boyer would later claim that PSNW agreed to manage her tampon use intraoperatively. CP 1-5. PSNW and Dr. Morimoto deny they agreed to manage Mrs. Boyer's menstruation intra-operatively or post-operatively. CP 6. Rather, Defendants affirmatively asserted that any tampon utilized by Mrs. Boyer was removed prior to the commencement of the subject surgery and that no tampon was inserted by the Defendants during the procedure. CP 15 at 6. As set forth in the Boyers' opening brief, Mr. Boyer assisted in Mrs. Boyer's tampon management.

Mrs. Boyer later developed complications due to either surgical wounds<sup>2</sup> or a retained tampon. *See*, CP 203-204. Contrary to the Boyers' assertions, two tampons were removed from the vaginal vault on November 5, 2015. CP 203. However, no percipient witness determined when the tampons were applied. *Id.* Mrs. Boyer stopped menstruating just a few days prior to November 5, 2015, long after the October 26, 2015 surgery. *Id.* While Plaintiffs assert that Mrs. Boyer was diagnosed with toxic shock syndrome secondary to retained tampons, the infectious disease physician who treated her was unable to determine whether her symptoms were due to typical surgical wounds *or* retained tampons. *Id.* at 203-204.

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<sup>2</sup> The Boyers do not allege that surgical wounds caused her damage or that surgical wounds were violative of the standard of care.

**B. Summary judgment procedure.**

Defendants filed a Motion for Summary Judgment, asserting that “absent plaintiffs presenting admissible testimony to establish elements of a prima facie case under RCW 7.70 from a competent medical expert, [defendants were] entitled to dismissal of all claims as a matter of law.” CP 24; 18-19.

**C. Summary judgment ruling and submission of orders.**

The hearing on Defendants’ Motion for Summary Judgment took place on April 27, 2018. CP 353. On May 9, 2018 the trial court issued a Memorandum Decision on Defense Motion for Summary Judgment. CP 318-326. The trial court concluded that: Dr. Shamoun was not familiar with the standard of care for a plastic surgeon in the State of Washington and Plaintiffs did not show any violation of the standard of care by any nursing staff or other employees of PSNW. Id.

The trial court noted that the plaintiffs initially failed to provide a copy of Dr. Shamoun’s curriculum vitae which allegedly provided a basis for his assertion that he was familiar with the standard of care in Washington. CP 322-323, 325 (“Dr. Shamoun states that he attached his ‘C.V.’ and *it* shows he has “studied, trained, and practiced in a variety of locations throughout the country...No C.V. was attached.”). Then, when Dr. Shamoun’s Curriculum Vitae arrived *after* the summary judgment

hearing, it contained no reference to training, education, or experience in Washington. CP 323.

Finally, on May 15, 2018, several weeks after the summary judgment hearing, the Supplemental Declaration of John M. Shamoun, M.D., F.A.C.S. was filed. CP 327-329. Dr. Shamoun's Supplemental Declaration did not address causation and did not address non-physician healthcare providers.

On June 15, 2018 the trial court entered an Order Granting Defendants' Motion for Summary Judgment ("Summary Judgment Order"). CP 353-355. In the Summary Judgment Order, the Court hand-wrote additional instructions concerning motions for reconsideration: "It is further ordered that any motion for reconsideration shall be served, filed and noted for hearing without oral argument, as directed in the Court's Memorandum Decision...The Court may request oral argument, depending on the content of any written submissions." CP 354. The Boyers did not make a Motion for Reconsideration and instead filed a Notice of Appeal. CP 356-363.

#### **IV. ARGUMENT**

##### **A. Standard of review.**

On appeal of a summary judgment order, the proper standard of review is *de novo*, and thus, the appellate court performs the same inquiry

as the trial court. *Lybbert v. Grant County, State of Wash.*, 141 Wash.2d 29, 34, 1 P.3d 1124, 1127 (2000). “A court may grant summary judgment if the pleadings, affidavits, and depositions establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *Id.*

**B. Summary judgment law in malpractice cases.**

All claims alleging injury resulting from a failure of a health care provider to follow the accepted standard of care are controlled by RCW 7.70 et. seq. Summary judgment in medical malpractice cases may be brought in one of two ways. *Guile v. Ballard Community Hosp.*, 70 Wn. App. 18, 851 P.2d 689 (1993). In *Guile*, the Court of Appeals noted:

A defendant can move for summary judgment in one of two ways. First, the defendant can set out its version of the facts and allege that there is no genuine issue as to the facts as set out. *Hash v. Children's Orthopedic Hosp & Med. Cntr.*, 110 Wn.2d 912, 916, 757 P.2d 507 (1988). **Alternatively, a party moving for summary judgment can meet its burden by pointing out to the trial court that the non-moving party lack sufficient evidence to support its case.** *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L.Ed.2d 265, 106 S.Ct. 2548 (1986)). In this latter situation, the moving party is not required to support its summary judgment motion with affidavits. *Young*, at 226. However, the moving party must identify those portions of the record, together with the affidavits, if any, which he or she believes demonstrate the absence of a genuine issue of material fact. *White v. Kent Med. Cntr., Inc., P.S.*, 61 Wn. App. 163, 170, 810 P.2d 4 (1991) (citing *Celotex Corp. v. Catrett*, 477 U.S. at 323;

*Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989).

*Guile* at 21-22 (emphasis added).

The Court further stated as to the standard for the motions for summary judgment as follows at page 25:

In a medical malpractice case, expert testimony is generally required to establish the standard of care and to prove causation. *Harris v. Groth*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983). Thus, a defendant moving for summary judgment can meet its initial burden by showing that the plaintiff lacks competent expert testimony. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 226-27, 770 P.2d 182 (1989). The burden then shifts to the plaintiff to produce an affidavit from a qualified expert witness that alleges specific facts establishing a cause of action. *Young* at 226-27.

*Guile* at 25.

In the present case, Defendants challenged the Boyers to come forward with admissible evidence establishing: (1) a violation of the applicable standard of care by each named defendant and (2) a causal relationship between the alleged standard of care violation(s) and injury or damage to the plaintiffs. Regardless of whether the Supplemental Declaration of Dr. Shamoun was considered, summary judgment was appropriately granted.

**C. Plaintiffs lacked sufficient standard of care proof and any alleged error was waived by plaintiffs failure to move for affirmative relief.**

As described above, RCW 7.70.040 sets out the requisite components of a standard of care claim in a medical negligence case. The statute specifies these elements as follows:

(1) the health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider in the profession or class to which he belongs, **in the State of Washington**, acting in the same or similar circumstances; (2) such failure was the proximate cause of the injury complained of.

(emphasis added). It is well settled in the State of Washington that expert testimony is essential in malpractice cases where the plaintiff alleges the defendant violated the standard of care. *Stone v. Sisters of Charity*, 2 Wn. App. 607, 469 P.2d 229 (1970).

In *Harris v. Groth*, 99 Wn.2d 438, 663 P.2d 113 (1983) the Washington Supreme Court emphasized that RCW 7.70.040 sets a state standard of care:

The legislative history does, however, indicate an intent to alter existing law in one respect – **by limiting those who set the standard of care to healthcare providers within the State of Washington**. See, Legislative Report of the 44<sup>th</sup> 2<sup>nd</sup> Extraordinary Session 23 (1976). Thus, in attributing to the reasonably prudent healthcare provider the skills and training possessed by members of the same class or profession (See,

RCW 4.24.290; W.Prosser §32, at 162), **the trier of fact must consider only those providers within the State of Washington.** See, RCW 7.70.040. (emphasis added).

99 Wn.2d at 447, footnote 4 (emphasis added).

In *Adams v. Richland Clinic*, 37 Wn.App. 650, 655, 681 P.2d 1305 (1984) the Court characterized the standard of care under RCW 7.70.040(1) as being a “statewide determination,” and noted that, to establish a claim for violation of the standard of care, the plaintiff “must present evidence of a statewide standard of care.” *Id.* Consistent with the above, the only type of expert competent to testify as to the standard of care required of a practitioner in the State of Washington is an expert who knows the practice and standard of care in Washington. *McKee v. American Home Products*, 113 Wn.2d 701, 706-07, 782 P.2d 1045 (1989).

In *Winkler v. Giddings*, 146 Wash.App. 387, 190 P.3d 117 (Div.3, 2008) *review denied*, 165 Wash.2d 1034, 203 P.3d 382 (2009), the trial court refused to permit the plaintiff’s standard of care expert witness to testify at trial where the expert witness “made an educated assumption” that the standard of care in the State of Washington was the same across the country. The court found that assumption insufficient. The absence of expert witness testimony resulted in a directed verdict for the defense, which was affirmed on appeal.

Initially, Dr. Shamoun offered only a conclusory statement concerning his familiarity with the standard of care: that it “is not unique to the State of Washington and applies on a nationwide basis.” The trial court found that Dr. Shamoun had offered no foundation for this conclusion. CP 325. Critically, Dr. Shamoun neither provided an explanation for how it was that he knew the standard of care applicable to plastic surgeons practicing in Washington, nor did he submit a copy of his curriculum vitae to the Court explaining his training, education, or experience. CP 322-323, 325 (“Dr. Shamoun states that he attached his ‘C.V.’ and *it* shows he has “studied, trained, and practiced in a variety of locations throughout the country...No C.V. was attached.”). Then, when Dr. Shamoun’s Curriculum Vitae arrived *after* the summary judgment hearing, it contained no reference to training, education, or experience in Washington. CP 323.

After the Court determined that Dr. Shamoun’s testimony lacked sufficient foundation to defeat summary judgment, the Supplemental Declaration of Dr. Shamoun was filed. Dr. Shamoun stated that he had consulted with “numerous” unnamed plastic surgeons and that he “can” confirm that “Washington plastic surgeons adhere to the same standards of practice followed by plastic surgeons” who practice “throughout the rest of the nation.” CP 328.

The Boyers chose not to file a Motion for Reconsideration which was *twice* invited by the trial court. CP 326; 354. They did not file any motion bringing Dr. Shamoun's Supplemental Declaration to the attention of the trial court. Instead, the Boyers filed an objection to Defendants' Proposed Order Granting Defendants' Motion for Summary Judgment. CP 336-341. Plaintiffs did not request any affirmative relief, but rather, asked that the order be modified to include the Errata in Support of Plaintiffs' Response to Defendants' Motion for Summary Judgment and the Supplemental Declaration of Dr. Shamoun. CP 336-337. Plaintiffs submitted a proposed order *granting* Defendants' Motion for Summary Judgment. CP 350-352. No competing Order Denying Defendants' Motion for Summary Judgment was presented.

In failing to act, Plaintiffs waived any contention that the trial court failed to consider Dr. Shamoun's Supplemental Declaration. *See, Guile v.*, 70 Wn.App. 18, 24–25, 851 P.2d 689 (1993) (because trial court has discretion to dismiss case that fails to raise genuine issues for trial, failure to request continuance under CR 56(f) waives issue on appeal); *Jones v. Hogan*, 56 Wash. 2d 23, 27, 351 P.2d 153, 156 (1960) (“Accepting appellants' contentions at face value, we must, none the less conclude that appellants' failure to request appropriate relief by the trial court waived any error as to either or both references”).

**D. Dr. Shamoun failed to establish medical negligence on the part of non-physician providers.**

Civil Rule 56(e) requires that an expert witness declaration offered in opposition to a summary judgment motion must: “[1] be made on personal knowledge, [2] shall set forth such facts as would be admissible in evidence, and [3] shall show affirmatively that the affiant is competent to testify to the matters stated therein.” CR 56(e); *McKee*, 113 Wn.2d at 706.

In medical malpractice actions, an expert witness must demonstrate that he or she “has sufficient expertise in the relevant specialty.” *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 229, 770 P.2d 182 (1989). The standard of care required of a particular healthcare provider “must be established by the testimony of experts who practice in the same field.” *McKee*, 113 Wn.2d at 706. Accordingly, when determining whether an expert is sufficiently qualified to render an opinion and defeat a motion for summary judgment in a medical malpractice action, the Court should “examine the record to determine the ‘relevant specialty’ and whether [the expert and the defendant] practice in the ‘same field.’ ” *Seybold v. Neu*, 105 Wash. App. 666, 679, 19 P.3d 1068 (2001) (quoting *Young*, 112 Wash.2d at 229, and *McKee*, 113 Wn.2d at 706).

Physicians are not categorically prohibited from offering standard of care testimony against non-physician providers. However, to do so, a physician must offer testimony establishing familiarity with the standard of care applicable to the specific type of provider at issue. In *Hall v. Sacred Heart Med. Center*, 100 Wash. App. 53, 995 P.2d 621 (2000) a physician was permitted to offer standard of care testimony concerning nurses only after providing a foundation concerning his medical training and supervisory experience with nurses.

Dr. Shamoun demonstrated no such familiarity with the standard of care for non-physician providers. Nor did he identify which provider or providers he contended violated the standard of care. Absent such testimony, all claims against non-physician providers were properly dismissed.

**1. Dr. Shamoun did not identify the health care providers who he summarily criticized, the standard of care applicable to each health care provider and how each health care provider violated the alleged standard of care.**

Other than his opinions concerning Dr. Morimoto, Dr. Shamoun offered opinions generally concerning “healthcare providers.” He did not identify such providers by name or specialty. He did not identify any pre-operative nurse, operating room nurse, or post-operative nurse or any other non-physician provider who violated the standard of care. Dr. Shamoun

did not indicate that he is familiar with the standard of care for a nurse working in the pre-operative phase, anesthesia personnel, operating room nurses, or post-operative nurses. His testimony was plainly deficient to establish claims against the non-physician providers in this case.

A medical negligence plaintiff must prove a violation of the standard of care by each individual whom they allege violated the standard of care. *Grove v. PeaceHealth St. Joseph Hospital*, 182 Wn.2d 136, 341 P.3d 261 (2014). This includes the standard of care for the professional at issue (whether preoperative nurse, operating room nurse, post-operative nurse or anesthesia personnel), prove its violation, and the damages caused by the same. As set forth, *infra*, under *Guile* and *Keck* mere conclusory statements are insufficient to meet their burden of proof.

Dr. Shamoun did not correct this deficiency in his Supplemental Declaration. There, he simply stated that plastic surgeons adhere to the same standard of care in Washington as they do “throughout the rest of the nation.” CP 329.

**2. PSNW could not be held liable for the conduct of its unidentified non-physician providers.**

Based upon the analysis described above, any claims against PSNW based upon the conduct of such non-physicians had to be

dismissed, as the Boyers failed to show that PSNW was liable for negligent conduct of non-physician providers.

Presumably, plaintiffs' theory of liability as to PSNW was that it should be vicariously liable for the conduct of its employees and/or agents. Vicarious liability is liability for the negligence of an actor under the defendant's control. *Van Hook v. Anderson*, 64 Wash.App. 353, 363, 824 P.2d 509 (1992). An employer cannot be vicariously liable if its employees are not negligent. *Doremus v. Root*, 23 Wash. 710, 716, 63 P. 572 (1901); *Orwick v. Fox*, 65 Wash.App. 71, 88, 828 P.2d 12 (1992). As set forth above, there is no evidence that non-physician providers were negligent and therefore, no liability could attach to PSNW.

**E. The Boyers lacked sufficient testimony concerning causation.**

The trial court did not reach the issue of causation in its memorandum opinion. Yet, had it evaluated the causation aspects of the case, it is clear that summary judgment would have been granted.

"A judgment appealed from may be affirmed upon any theory established by the pleadings and proof even if on a ground different from that expressly relied on below." *Stratton v. U.S. Bulk Carriers, Inc.*, 3 Wn.App. 790, 796-797, 478 P.2d 253, 257 (Div.1, 1970). *See Also, Herron Northwest, Inc. v. Danskin*, 78 Wn.2d 500, 501, 476 P.2d 702, 703

(1971) ("It is the rule, of course, that the trial court can be sustained on any theory within the pleadings and the proof").

Plaintiffs assert that under *Keck v. Collins*, 184 Wash.2d 358, 357 P.3d 1080 (2015), "nothing more" than the declarations of Dr. Shamoun and Dr. Siegel were required to defeat summary judgment. They rely upon the mistaken belief that *Keck* altered decades of medical negligence law under *Guile*. Plaintiffs' reading of *Keck* is misplaced. In fact, in *Keck*, the plaintiffs asked the Supreme Court to dispense with the requirement that the plaintiff be required to disclose the underlying facts providing the foundation of their expert opinions (e.g., *Guile*). The *Keck* Court wrote:

Keck argues for a less stringent summary judgment standard for experts, citing ER 705, which allows an expert to give an opinion without first disclosing the underlying facts unless the court requires otherwise. The proposed standard would allow a qualified expert to only state that "the defendant breached the standard of care and caused the plaintiff's injuries," without providing more, to defeat summary judgment. However, to survive summary judgment in any case, there must be a question of material fact.

*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.<sup>3</sup> But that does not mean an expert declaration in opposition to a motion for summary judgment can be speculative or conclusory. Indeed, expert testimony that is speculative or 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.

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<sup>3</sup> 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.

Under *Guile* and *Keck* the Boyers were required to show not only that the defendants breached the standard of care, but how those violations caused injury or damage to Mrs. Boyer. They could not rely upon offer vague, conclusory statements. This is especially so where the plaintiffs have lodged multiple criticisms of the defendants.

The Boyers' expert witness on the standard of care, Dr. Shamoun offered four (4) criticisms of the Defendants:

- (1) Dr. Morimoto should not have performed "such an extensive surgery" on an out-patient basis.
- (2) Mrs. Boyer should have stayed at the surgical center overnight with continued nursing care or an earlier post-operative appointment should have been scheduled.<sup>4</sup>
- (3) The defendants allowed a tampon to remain in Mrs. Boyer's vagina throughout the surgery and failed "to alert Mrs. Boyer" that a tampon remained in her vagina after the surgery was completed.
- (4) Mrs. Boyer reported "red flag" symptoms suggestive of "potential surgical complications," and Dr. Morimoto should have done more than examine the patient and prescribe medication.

CP 106-110 (*Shamoun Decl., Paragraphs 10, 11, 14, 12 (sic, actually 15), and 13 (sic, actually 16)*).

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<sup>4</sup> In fact, Dr. Morimoto saw and examined the patient on 10/28/2015, two days after the surgery in question. *See, CP 41, King Declaration, Exhibit C.*

**1. Criticisms 1, 2, and 4 clearly lack causation testimony.**

There was no evidence presented suggesting that the duration of the procedure on an out-patient basis caused Mrs. Boyer to develop toxic shock syndrome.

There was no evidence presented suggesting that staying at the surgery center overnight would have prevented Mrs. Boyer from developing toxic shock syndrome.

No witness testified that any surgical complication occurred. Where no surgical complication was identified, Dr. Shamoun's fourth criticism was properly dismissed. No witness explained how standard of care compliance would have prevented Toxic Shock Syndrome. Neither Dr. Shamoun or Dr. Siegel can show how any conduct beyond an examination and the prescription of medication on October 28, 2015, would have either diagnosed or prevented the patient from developing Toxic Shock Syndrome. Dr. Shamoun did not say that a pelvic exam was required under the standard of care on October 28, 2015.

**2. Criticism 3 misstates the record and does not satisfy Guile or Keck.**

Both Dr. Shamoun and Dr. Martin Siegel generally addressed causation. Dr. Shamoun claimed that but for "defendants' breaches...plaintiffs would not have suffered the devastating injuries they

experienced in the weeks and months following [the procedure].” CP 110, *Shamoun Decl.*, at 14 (*sic*, actually 17). Dr. Shamoun did not explain how this was so. Dr. Shamoun failed to specify what, if any, injuries were caused by the healthcare he criticized.

Dr. Siegel claimed that “Mrs. Boyer [sic] injuries were complications caused by Toxic Shock Syndrome, including multi-system organ failure, vascular impairment and eventual toe amputations.” Dr. Siegel contended that his opinions are “consistent with the treating physicians who provided emergent care to Mrs. Boyer in Missoula, Montana.” Dr. Siegel stated: “Furthermore, the cause of Mrs. Boyer’s Toxic Shock Syndrome was a retained tampon removed on or about November 5, 2015 and which her treating providers described as having remained in Mrs. Boyer’s vagina for approximately 10 days prior to being discovered and removed.” CP 104, *Siegel Decl.* at 7.

First, Dr. Siegel was incorrect on three critical points which formed the foundation of his opinions: (1) no percipient witness identified the tampon as having been in Mrs. Boyer’s vagina for 10 days prior to discovery, (2) the physicians in Montana did *not* conclude that Mrs. Boyer’s injuries were caused by Toxic Shock Syndrome secondary to a retained tampon, and (3) there were two retained tampons recovered in Montana.

The Boyers' claim that a tampon had been retained for 10 days is incorrect. Plaintiffs' citation on that issue is to a note written by Dr. Richard Sellman. *See*, CP 146, *Plaintiffs' Response, Exhibit 7* ("Infectious disease colleague did additional history and found she had retained tampons in her vaginal vault for the last 10 days..."). But the only percipient witnesses to the removal of the two tampons were Dr. David Christianson (who removed them) along with a member of the nursing staff. CP 243, *Murphy Depo.*, pg. 104, lines 9-24; CP 257, *King Decl., Exhibit B*, pg. 34. Dr. Christianson did not define or state how long the tampons had been in Mrs. Boyer's vagina. CP 232, *Murphy Depo.*, pg. 50. The distinction is significant: Mrs. Boyer stopped menstruating "a few days" prior to her visit to St. Patrick's Hospital where two tampons were discovered and removed on November 5, 2015. CP 232-234, *Murphy Depo.*, pg. 50, pg. 51, lines 1-20; pg. 52, lines 1-15. The surgery by Dr. Morimoto took place on October 26, 2015, Mrs. Boyer did not arrive at St. Patrick's until November 4, 2015. Her menstrual cycle ended "a few days" prior to November 5, 2015.

Dr. Siegel's contention that the Montana physicians determined that Mrs. Boyer's symptoms were caused by Toxic Shock Syndrome secondary to a retained tampon was flatly incorrect. An infectious disease physician, Dr. Christianson, was asked to evaluate Mrs. Boyer because of

possible sepsis or a wound infection. CP 257, *King Decl., Exhibit B, pg. 33*. He described Mrs. Boyer's presentation as "unusual," indicating that she did appear to have septic shock and that staphylococcal toxic shock was a possibility as well. CP 257-261, *King Decl., Exhibit B, pgs. 33-37*. Dr. Christianson subsequently wrote: "concern for...toxic shock syndrome, either related to surgical wounds or retained tampons." CP 263, *King Decl., Exhibit B, pg. 140*. On the date of her discharge from St. Patrick's, the reason for Mrs. Boyer's hospitalization was determined to be septic shock "***either*** related to surgical wounds **or** retained **tampons**." CP 248, 252, *King Decl., Exhibit B, pgs. 17, 21*.

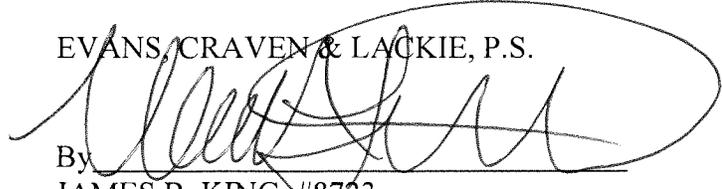
There is no evidence – offered on a more probable than not basis – that Mrs. Boyer suffered from Toxic Shock Syndrome secondary to a retained tampon. At most, there is testimony regarding two potential, competing, possible diagnoses. This evidence was manifestly insufficient to sustain the Boyers' burden of proof.

## V. CONCLUSION

Based upon the foregoing, this Court should affirm the dismissal of the Boyers' claims.

RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of October, 2018.

EVANS, CRAVEN & LACKIE, P.S.

A large, stylized handwritten signature in black ink, enclosed within a hand-drawn oval. The signature is highly cursive and difficult to decipher, but it appears to be the name of one of the attorneys listed below.

By

JAMES B. KING, #8723

MARKUS W. LOUVIER, #39319

Attorneys for Respondents/Defendants

**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 16 day of October 2018, the foregoing was delivered to the following persons in the manner indicated:

Martin D. McLean  
Anthony D. Shapiro  
Hagens Berman Sobol Shapiro  
1301 2<sup>nd</sup> Avenue, Suite 2000  
Seattle, WA 98101

VIA REGULAR MAIL [ ]  
VIA CERTIFIED MAIL [ ]  
VIA FACSIMILE [ ]  
HAND DELIVERED [x]

10-16-18 Spokane, WA  
(Date/Place)

