90357-3

No. 311287

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

DARLA KECK and RON JOSEPH GRAHAM, husband and wife, and DARLA KECK and RON JOSEPH GRAHAM as parents of the minor child KELLEN MITCHELL GRAHAM, and KELLEN MITCHELL GRAHAM, individually,

Plaintiffs-Appellants,

vs.

CHAD P. COLLINS, DMD, PATRICK C. COLLINS, DDS; COLLINS ORAL & MAXILLOFACIAL SURGERY, P.S., a Washington corporation

Defendants-Respondents.

BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

I. TABLE OF AUTHORITIES.....iv

II. INTRODUCTION.....1

III. ASSIGNMENTS OF ERROR.....1

IV. STATEMENT OF THE CASE.....3

V. ARGUMENT.....7

A. The trial court's orders granting summary judgment are subject to de novo review; however, the court's rulings to strike the untimely affidavit of Dr. Li, to deny Keck's CR 56(f) Motion for Continuance and to deny Keck's Motion for Reconsideration are reviewed for abuse of discretion.....7

B. The trial court properly granted partial summary judgment on Keck's post-operative negligence claims.....10

a. The trial court properly granted Drs. Patrick and Chad Collins' Motion for Summary Judgment regarding post-operative care finding that the affidavits of Dr. Li provided in response to the motion lacked adequate factual support necessary to overcome the summary judgment burden.....12

b. Keck's claim that Dr. Li's declaration and affidavit should be judged under ER 704 & 705 is in contradiction to clearly established Washington case law 19

c. The trial court acted within its discretion by denying Keck's motion of continuance under CR 56(f) and striking Dr. Li's untimely filed third affidavit.....20

C. The trial court properly exercised its discretion in denying Keck's Motion for Reconsideration regarding her post-operative care claims.....24

D. The trial court correctly granted summary judgment of dismissal on Keck's remaining negligent-referral claim.....24

VI. CONCLUSION.....26

TABLE OF AUTHORITIES

Cases

Anderson Hay & Grain Co., Inc. v. United Dominion Indus., 119 Wn. App. 249, 254, 76 P.3d 1205 (Div. 3 2003).....8, 19

Brown v. Peoples Mortg. Co., 48 Wn. App. 554, 559, 639 P.2d 1188 (Div. 1 1987).....9, 20

Coggle v. Snow, 56 Wn. App. 499, 504, 784 P.2d 554 (Div. 1 1990).....21

Colwell v. Holy Family Hospital, 104 Wn. App. 606, 611, 15 P.3d 210..... 8, 9, 21

Davies v. Holy Family Hospital, 144 Wn. App. 483, 491, 183 P.3d 283 (Div. 3 2008).....8, 16, 17, 18, 20

Garza v. McCain Foods, Inc., 124 Wn. App. 908, 917, 103 P.3d 848 (Div. 3 2004).....9, 20

Guile v. Ballard Cmty. Hosp., 70 Wn. App. 18, 22 851 P.2d 689 (Div. 1 1993).....passim

Harris v. Groth, 99 Wn.2d 438, 499, 663 P.2d 113 (1983).....11, 16

Hash by Hash v. Children's Orthopedic Hosp., 49 Wn. App. 130, 134-35, 741 P.2d 584 (Div. 1 1987).....19

Idahosa v. King Cnty., 113 Wn. App. 930, 936-37, 55 P.3d 657 (2002).....9

Kahn v. Salerno, 90 Wn. App. 110, 117, 951 P.2d 321 (Div. 1 1998).....8

Lewis v. Bell, 45 Wn. App. 192, 196, 724 P.2d 425 (Div. 3 1986).....21

McKee v. American Home Prods. Corp., 113 Wn.2d 701, 706-07, 782 P.2d 1045 (1989).....12

McLaughlin v. Cook, 112 Wn.2d 829, 836, 774 P.2d 1171 (1989).....17

O'Neill v. Farmers Ins. Co. of Wash., 124 Wn. App. 516, 521, 125 P.3d 134 (Div. 1 2004).....20

Rothweiler v. Clark Ctny., 108 Wn. App. 91, 100-01, 29 P.3d 758 (2001), *review denied*, 145 Wn.2d 1029, 42 P.3d 975 (Div. 2 2002).....19

Ruffer v. St. Frances Cabrini Hosp., 56 Wn. App. 625, 628, 784 P.2d 1288, review denied, 114 Wn.2d 1023, 792 P.2d 535 (1990).....13

Schaaf v. Highfield, 127 Wn.2d 17, 896, P.2d 665 (1995).....16

Security State Bank v. Burk, 100 Wn. App. 94, 103, 995 P.2d 1272 (2000).....20

Senn v. Nw. Underwriters, Inc., 74 Wn. App. 408, 419, 875 P.2d 637 (Div. 1 1994).....11

Seybold v. Neu, 105 Wn. App. 666, 676, 19 P.3d 1068 (Div. 1 2001).....8, 11, 16

Sternoff Metals Corp. v. Vertecs Corp., 39 Wn. App. 333, 341-42, 693 P.2d 175 (1984).....21

Stewart-Graves v. Vaughn, 162 Wn.2d 115, 170 P.3d 1151 (2007).....18

Sunbreaker Condo Ass'n v. Travelers Ins. Co., 79 Wn. App. 368, 374, 901 P.2d 1079 (Div. 1 1995).....19

Vant Leven v. Kretzler, 56 Wn. App. 349, 356, 783 P.2d 611 (1989).....13

Wagner Development, Inc. v. Fidelity and Deposit Co. of Maryland, 95 Wn. App. 896, 906, 977 P.2d 639 (Div. 2 1999).....10, 23, 24

Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).....9

Young v. Key Pharmaceuticals, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).....10, 11, 13

Statutes and Rules

CR 6.....9, 23

CR 56(c).....8, 20, 22

CR 56(e).....passim

CR 56(f).....2, 6, 7, 9, 20, 21

ER 704.....19

ER 705.....19

LCR 56.....20, 22

RCW 7.70.040.....12

Other Authorities

6 J. Moore, *Federal Practice* ¶ 56.24, at 56-817 (2d ed. 1988).....21

I. INTRODUCTION

On November 26, 2007, Darla Keck underwent surgery performed by Drs. Chad and Patrick Collins in effort to address her sleep apnea issues. Following surgery, Keck allegedly began to experience various complications. Keck, along with her husband and children, filed a lawsuit against Drs. Chad and Patrick Collins alleging medical negligence, negligent referral, and failure to obtain informed consent.

Drs. Chad and Patrick Collins brought successive motions for summary judgment against all of Keck's claims. The trial court granted the doctors' motions, finding that Keck failed to provide competent medical evidence necessary to overcome the summary judgment burden. Keck and her family now appeal.

This brief is filed on behalf of Dr. Patrick Collins represented by Stephen M. Lamberson and Courtney A. Garcea of Etter, McMahon, Lamberson, Clary & Oreskovich, P.C.

II. ASSIGNMENTS OF ERROR

A. The trial court properly granted partial summary judgment dismissing Keck's post-operative negligence claims finding that the expert affidavit(s) provided in response to Drs. Collins' Motion for Summary Judgment were insufficient to raise genuine issues of

material fact. CP 96-99 (April 6, 2012 order), CP 100-04 (April 11, 2012 letter decision), CP 108-10 (April 24, 2012 order).

B. The trial court acted within its discretion by striking the late-filed supplemental affidavit of Dr. Kasey Li in response to Drs. Collins' Motion for Summary Judgment. CP 102-04 (April 11, 2012 letter decision), CP 108-10 (April 24, 2012 order).

C. The trial court acted within its discretion by denying Keck's CR 56(f) motion for continuance in response to Drs. Collins' Motion for Summary Judgment. CP 102-04 (April 11, 2012 letter decision), CP 108-10 (April 24, 2012 order).

D. The trial court acted within its discretion by denying Keck's motion for reconsideration of partial summary judgment. CP 247-49 (June 11, 2012 letter decision), CP 308-10 (June 22, 2012 order).

E. The trial court properly granted summary judgment of dismissal finding that Keck failed to raise a genuine issue of material fact regarding her single remaining claim for negligent referral. CP 350-53 (July 25, 202 letter decision), CP 354-61 (Aug. 27, 2012 order).

III. STATEMENT OF THE CASE

Background Facts. Ms. Darla Keck is a resident of Missoula, Montana who had been diagnosed with obstructive sleep apnea. CP 312. She was referred to Dr. Chad Collins by her Ear, Nose and Throat (ENT) physician, Dr. Jeffrey Haller, for the purpose of seeking an opinion on treatment options. *Id.*

On November 26, 2007, Darla Keck underwent surgery performed by Drs. Chad and Patrick Collins in an effort to address her sleep apnea issues. CP 132. Dr. Chad Collins was the lead surgeon and Dr. Patrick Collins assisted in the procedure. *Id.* After surgery, Dr. Chad Collins was in charge of the management of Keck's post-operative care and referrals. *Id.*

Dr. Chad Collins' first post-operative visit with Ms. Keck was on December 6, 2007, approximately one and one half weeks after surgery. CP 315. On this first post-operative visit, Keck presented with exudate (pus) coming from a surgical incision on her chin. *Id.* Exudate is not uncommon from a surgical incision, but needs to be assessed and treated to prevent possible infection. *Id.* Dr. Chad Collins' plan at the first post-operative visit was to refer Keck to Dr. Haller to follow wound healing and he also started her on antibiotics to address the pus coming from her

chin. *Id.* at 316. At this same visit, Dr. Collins directed Keck to see her general dentist to assess her bite. *Id.* at 317.

Prior to a scheduled appointment with her ENT, Keck went to the emergency room on December 8, 2007 as a result of jaw pain and swelling. *Id.*, *see also* CP 351. Dr. Chad Collins was informed of Keck's problems that same day. CP 319. Dr. Collins scheduled an appointment to see Keck on December 13, 2007, however, Keck cancelled the appointment reporting that she felt better. *Id.*

Keck then saw her general dentist on December 17, 2007 to assess her bite. Keck's dentist provided care addressing various issues including pain medication, antibiotics, and a referral to an endodontist. CP 134 at ¶ 31.

On January 22, 2008, Dr. Chad Collins spoke with Keck's dentist on the phone and was informed for the first time about Keck's pain and swelling in the lower areas of her jaw. *Id.* at ¶ 34. Immediately after that phone call, Dr. Chad Collins spoke with Keck and scheduled an appointment with her the very next day. *Id* at ¶ 35.

At her appointment on January 23, 2008, Dr. Chad Collins determined that the plates and screws used during the initial surgery were loosening and an infection was present. *Id.* at ¶ 36. Over the following

months, Dr. Collins performed numerous surgeries to address infection and non-union of Keck's jaw bones. *Id.* at ¶¶ 36-52.

Procedural Background. On November 23, 2010, Keck filed this lawsuit against Drs. Chad and Patrick Collins as a result of the alleged complications she experienced after her November 26, 2007 surgery. CP 3-13. In December of 2010, Keck retained Dr. Kasey Li to review her medical records in this case. CP 195.

On December 20, 2011, Dr. Patrick Collins attorneys filed a Motion for Summary Judgment arguing that Keck did not have a medical expert to establish a prima facie case of medical negligence. CP 162. At the time the motion was initially filed, the hearing date was noted for January 20, 2012. *Id.* However, following a conversation with Keck's counsel, Dr. Patrick Collins struck the hearing date, making it clear that the motion would be re-noted. CP 173.

On February 16, 2012, Dr. Patrick Collins re-noted his original Motion for Summary Judgment for March 30, 2012. CP 162. On March 14, 2012, Dr. Chad Collins joined Defendant Patrick Collins' motion. *Id.* No additional issues were raised or added by Dr. Chad Collins' joinder. *Id.*

Keck responded to the doctors' Motion for Summary Judgment on March 16, 2012 and submitted a declaration from Dr. Kasey Li (signed March 14, 2012). CP 41-3. This declaration solely addressed Dr. Chad

Collins' care of Keck. *Id.* On March 21, 2012, Keck filed an untimely supplemental affidavit of Dr. Kasey Li (signed on March 19, 2012) which addressed both Drs. Chad and Patrick Collins' care. CP 46-8.

Drs. Patrick and Chad Collins filed their reply briefing on March 26 & 27, 2012. CP 55-72. On March 29, 2012, one day prior to the hearing, Keck filed a second untimely supplemental affidavit of Dr. Li. CP 73-84.

By order entered April 6, 2012, the trial court dismissed Keck's claims of professional negligence against Drs. Patrick and Chad Collins concerning the initial surgery on November 26, 2007 along with her informed consent claims, with prejudice. CP 96-9. On April 24, 2012, the Court entered an order granting the doctors' motion to strike Dr. Li's untimely filed March 29, 2012 supplemental affidavit and denying Keck's motion for a CR 56(f) continuance. CP 109. Additionally, the court dismissed, with prejudice, Keck's claims for negligent post-operative treatment, except for the negligent referral claim. *Id.* In dismissing Keck's post-operative negligence claims, the court determined that Keck failed to provide competent medical evidence establishing a prima facie case of medical negligence. CP 100-04.

Keck moved for reconsideration of the court's orders. CP 111-25. The court denied Keck's motion. CP 308-10.

On May 11, 2012, Drs. Patrick and Chad Collins moved separately for summary judgment on Keck's sole remaining claim for negligent referral. CP 126-27, 197-99. Keck's negligent referral claim was based upon Dr. Li's opinion expressed in his March 14, 2012 declaration that the doctors were negligent in the referral of Keck's post-operative treatment of non-union of jaw and hardware infection. CP 351. The court ultimately determined that the referrals made in this case were to Keck's ENT for follow up care on wound healing and to her general dentist to assess her bite/occlusion. CP 352. Because Keck's issues of non-union and infection were not present at the time those referrals were made, the court determined that Keck failed to establish a prima facie case of negligent-referral and dismissed her lawsuit. CP 350-61. Keck now appeals the dismissal of her case.

IV. ARGUMENT

A. The trial court's orders granting summary judgment are subject to de novo review; however, the court's rulings to strike the untimely affidavit of Dr. Li, to deny Keck's CR 56(f) Motion for Continuance and to deny Keck's Motion for Reconsideration are reviewed for abuse of discretion.

Keck raises numerous issues on appeal involving various standards of review. First, Keck assigns error to the trial court's orders granting summary judgment as to Keck's post-operative negligence and negligent

referral claims. Review of the trial court's grant of summary judgment is subject to de novo review.

It is a well settled principle under Washington law that an appellate court reviews a grant of summary judgment de novo, engaging in the same inquiry as the trial court. *Davies v. Holy Family Hospital*, 144 Wn. App. 483, 491, 183 P.3d 283 (Div. 3 2008); *Seybold v. Neu*, 105 Wn. App. 666, 676, 19 P.3d 1068 (Div. 1 2001); *Colwell v. Holy Family Hospital*, 104 Wn. App. 606, 611, 15 P.3d 210. Specifically, when an expert opinion is challenged as part of a summary judgment proceeding, the trial court's determination regarding the sufficiency of the expert's opinion is reviewed de novo. *Davies*, 144 Wn. App. at 494, 184 P.3d 283.

In reviewing a trial court's determination on summary judgment, an appellate court is to consider "all facts and reasonable inferences in the light most favorable to the nonmoving party." *Davies*, 144 Wn. App. at 491, 183 P.3d 283 (citing *Kahn v. Salerno*, 90 Wn. App. 110, 117, 951 P.2d 321 (Div. 1 1998)). Summary judgment is appropriate when "there are no issues of material fact and the moving party is entitled to judgment as a matter of law." CR 56(c); *Anderson Hay & Grain Co., Inc. v. United Dominion Indus.*, 119 Wn. App. 249, 254, 76 P.3d 1205 (Div. 3 2003). "An appellate court may affirm a trial court's disposition of a summary judgment motion on any basis supported by the record.

Second, Keck challenges the trial court's determination to strike Dr. Li's untimely filed March 29, 2012 affidavit and the court's denial of Keck's request for a CR 56(f) continuance. A trial court's determination as to whether to accept an untimely affidavit in response to a summary judgment motion is reviewed for abuse of discretion. *Id.* at 499 (citing CR 6(b), *Brown v. Peoples Mortg. Co.*, 48 Wn. App. 554, 559, 639 P.2d 1188 (Div. 1 1987); *Idahosa v. King Cnty.*, 113 Wn. App. 930, 936-37, 55 P.3d 657 (2002)); *see also Garza v. McCain Foods, Inc.*, 124 Wn. App. 908, 917, 103 P.3d 848 (Div. 3 2004). A trial court's decision to grant additional time to respond to a motion for summary judgment by ordering "a continuance to permit affidavits to be obtained" pursuant to CR 56(f) is likewise reviewed for abuse of discretion. *Colwell*, 104 Wn. App. at 615, 15 P.3d 210.

The abuse of discretion standard acknowledges that deference is owed to the trial judge who is better positioned than an appellate court to decide the issue. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). A trial court's determination will not be disturbed under the abuse of discretion standard unless its decision is "manifestly unreasonable or based on untenable reasons." *Id.*

Third, Keck claims that the trial court erred in denying reconsideration of its order granting partial summary judgment regarding the post-operative negligence claims. As Keck acknowledges in her opening brief, orders on reconsideration are evaluated using the deferential abuse of discretion standard of review. *See Wagner Development, Inc. v. Fidelity and Deposit Co. of Maryland*, 95 Wn. App. 896, 906, 977 P.2d 639 (Div. 2 1999).

B. The trial court properly granted partial summary judgment on Keck's post-operative negligence claims.

In a motion for summary judgment, the moving party bears the initial burden of showing the absence of any genuine issue of material fact. *Young v. Key Pharm.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). "A party moving for summary judgment can meet its burden by pointing out to the trial court that the nonmoving party lacks sufficient evidence to support its case." *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 22 851 P.2d 689 (Div. 1 1993). Once the moving party meets this initial burden, the non-moving party must respond by setting forth specific facts showing that there is a genuine issue for trial. *Young,* 112 Wn.2d at 225, 770 P.2d 182. The non-moving party "may not rest upon the mere allegations or denials of his pleading." CR 56(e).

An appellate court reviewing a grant of summary judgment must place itself in the same position as the trial court by considering the evidence and reasonable inferences therefrom in a light most favorable to the non-moving party. *Young,* 112 Wn.2d at 226, 770 P.2d 182. Summary judgment is appropriate if, based upon all the evidence, reasonable minds could reach only one conclusion. *Senn v. Nw. Underwriters, Inc.*, 74 Wn. App. 408, 419, 875 P.2d 637 (Div. 1 1994).

In order to make out a prima facie case for medical negligence overcoming a motion for summary judgment, a plaintiff must present competent medical evidence to rebut a defendant's initial showing of the absence of a material issue of fact. *Young*, 112 Wn.2d at 226-27. Expert testimony is required in cases where "an essential element of the claim is best established by an opinion that is beyond the expertise of a lay person." *Seybold*, 105 Wn. App. at 676, 19 P.3d 1068 (citing *Harris v. Groth*, 99 Wn.2d 438, 499, 663 P.2d 113 (1983)). Accordingly, expert testimony is required to establish the standard of care and causation in a medical negligence case. *Id.* (citing *Young*, 112 Wn.2d at 228, 770 P.2d 182). Therefore, to defeat summary judgment in almost all medical negligence cases, the plaintiff must produce an affidavit from a competent medical expert setting forth specific facts showing that the injury complained of was proximately caused by a failure to comply with the

applicable standard of care. *Id.* (*citing* RCW 7.70.040; *McKee v. American Home Prods. Corp.*, 113 Wn.2d 701, 706-07, 782 P.2d 1045 (1989)); *see also Davis*, 144 Wn. App. at 492,183 P.3d 283.

In this case, Keck failed to present expert testimony setting forth specific facts showing that claims based on post-operative care of the infection and non-union of her jaw bones were proximately caused by Drs. Patrick and Chad Collins' failure to comply with the standard of care. The trial court properly granted summary judgment in favor of the doctors because the March 14, 2012 declaration and March 19, 2012 affidavit of Dr. Li provided by Keck in response to the motion for summary judgment contained nothing more than conclusory statements. The trial court appropriately determined that "[t]he information contained in these two sworn statements was insufficient to connect Dr. Li's opinions to specific identified facts which would support the contention that the defendants' actions fell below the requisite standard of care." CP 102.

a. The trial court properly granted Drs. Patrick and Chad Collins' Motion for Summary Judgment regarding post-operative care finding that the affidavits of Dr. Li provided in response to the motion lacked adequate factual support necessary to overcome the summary judgment burden.

Under CR 56(e), when a motion for summary judgment is made, "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this

rule, must set forth *specific facts* showing that there is a genuine issue for trial." (emphasis added). Affidavits must contain more than conclusory statements. *Guile*, 70 Wn. App. at 25, 851 P.2d 689 (citing CR 56(e), *Ruffer v. St. Frances Cabrini Hosp.*, 56 Wn. App. 625, 628, 784 P.2d 1288, *review denied*, 114 Wn.2d 1023, 792 P.2d 535 (1990); *Vant Leven v. Kretzler*, 56 Wn. App. 349, 356, 783 P.2d 611 (1989)[1]). In a medical negligence action, affidavits must be presented from a qualified expert witness setting forth adequate factual support establishing the plaintiff's claim. *Id.*; *see also Young*, 112 Wn.2d 216, 226-27, 770 P.2d 182.

Guile v. Ballard Cmty. Hosp. is the controlling case on this issue in Washington. In *Guile*, the plaintiff submitted an affidavit of her medical expert in response to the defendant-health care provider's motion for summary judgment. *Guile*, 70 Wn. App. at 21. However, the affidavit "failed to identify specific facts supporting" the expert's conclusion that the doctor negligently performed the plaintiff's surgery. *Id.* at 26, 851 P.2d 689. Instead, the expert's affidavit summarized his qualifications, stated

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[1] Keck takes issue with *Guile's* reliance on *Vant Leven* arguing that the court properly decided that case because the expert's declaration was deemed insufficient due to the expert's incomplete review of the files and records. Regardless of whether the expert in that case had complete files and records, the Court's decision in *Vant Leven* was based upon the expert's "failure to identify any facts supporting" his conclusions. *Vant Leven*, 56 Wn. App. at 356, 783 P.2d 611. The *Vant Leven* decision is in accord with *Guile.*

that he reviewed the hospital records, gave a conclusory statement summarizing the plaintiff's post-surgical complications, and concluded that the complications were due to doctor's "faulty technique." *Id.* The Court of Appeals, Division 1 determined that the affidavit did "little more than reiterate the claims made in [the plaintiff's] complaint." *Id.* (citing CR 56(e)). The court went on to explain that the plaintiff was "required to rebut the showing [of lack of competent medical evidence] by producing an affidavit from a competent expert that alleged specific facts establishing a cause of action." *Id.* at 27, 851 P.2d 689. Due to the conclusory nature and lack of factual support in the affidavit, the court granted the defendant's motion for summary judgment. *Id.*

The situation in *Guile* is analogous to the one presented here. The opinions expressed in Dr. Li's March 14, 2012 declaration (CP 41-3) and March 19, 2012 affidavit (CP 46-8) are conclusory in nature and are without the necessary factual support needed to have defeated the doctors' motion for summary judgment. Dr. Li's March 19, 2012 affidavit merely states:

> I have reviewed medical records from Drs. Chad and Patrick Collins...As part of my review, I looked at the procedures performed by Drs. Chad and Patrick Collins (the surgeons) as well as the problems experienced by the Plaintiff Darla Keck. In doing so, I have identified standard of care

> violations that resulted in infection and in non-union of Ms. Keck's jaw. This, in turn, has resulted in a prolonged course of recovery with numerous additional procedures to repair the ongoing problems which I understand are still not resolved.
>
> . . .
>
> The surgeons performed multiple operations without really addressing the problems of non-union and infection within the standard of care.

CP 47-8. Dr. Li does not expand upon this statement or provide any factual support as to what specific actions of the doctors' violated the standard of care for Keck's post-operative care. *Id.* Instead, he simply states that he found "standard of care violations." *Id.*

Just as in *Guile*, Dr. Li's affidavit "failed to identify specific facts supporting" his conclusions. Instead, Dr. Li's affidavit did little more than reiterate the claims made in Keck's complaint. CP 3-10. Like the expert affidavit in *Guile*, Dr. Li's affidavit is limited to a summarization of his qualifications, a statement that he reviewed the medical records, a conclusory statement summarizing the plaintiff's post-operative complications, and a conclusion that "surgeons performed multiple operations without really addressing the problems." CP 47-8. These conclusory statements, completely deficient of factual support, failed to establish "specific facts showing that there is a genuine issue for trial." CR

56(e). Therefore, the trial court properly determined that Keck failed to provide competent evidence to rebut Drs. Patrick and Chad Collins' initial showing of the absence of a material issue of fact as to her medical negligence claim. CP 102 (citing *Guile*, 70 Wn. App. at 25, 851 P.2d 689, *Harris*, 99 Wn.2d at 449, 663 P.2d 113, *Schaaf v. Highfield*, 127 Wn.2d 17, 896, P.2d 665 (1995), CR 56(e)).

Despite Keck's argument that this Court is not required to follow *Guile* as a decision of a coordinate division of the Court of Appeals, Keck fails to acknowledge that both Division 3 Court of Appeals and the Washington State Supreme Court have previously affirmed the *Guile* holding. In *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 183 P.3d 283, Division 3 Court of Appeals stated:

> If the defendant shows that the plaintiff lacks sufficient evidence to support his or her case, the burden shifts to the plaintiff to produce evidence that supports a reasonable inference that the defendant was negligent. *Seybold*, 105 Wn. App. at 676, 19 P.3d 1068. Importantly, the plaintiff must respond with affidavits or other documents setting forth specific facts showing that there is a genuine issue for trial. *Id.*
>
> ...
>
> Importantly, CR 56(e) provides that affidavits made in support of, or in opposition to, a motion for summary judgment must be based on personal

> knowledge, set forth admissible evidentiary facts, and affirmatively show that the affiant is competent to testify to the matters therein. Expert testimony must be based on the facts of the case and not on speculation or conjecture. *Id.* at 677, 19 P.3d 1068. Such testimony must also be based upon a reasonable degree of medical certainty. *McLaughlin v. Cook*, 112 Wn.2d 829, 836, 774 P.2d 1171 (1989). *'Affidavits containing conclusory statements without adequate factual support are insufficient to defeat a motion for summary judgment.' Guile,* 70 Wn. App. at 25, 851 P.2d 689.

Davies, 144 Wn. App. at 492-93, 183 P.3d 283 (emphasis added).

Keck argues that *Davies* is not applicable to this case because the Court based its decision upon the qualifications of the expert. (Appellant's Brief at 25 n. 7). This argument, however, is in error. One of the questions specifically addressed by this Court in *Davies* was "whether [the plaintiff's expert's] declarations were sufficient to support a prima facie case of medical negligence against the hospital." *Davies*, 144 Wn .App. at 494, 183 P.3d 283. In addition to the expert's failure to establish that he was competent to render an opinion as to the standard of care required in that case, the declarations also contained conclusory statements failing to causally link the breach of the standard of care to the specific facts and injury complained of in the case. *Id.* at 496, 183 P.3d 283. Again, this Court cited *Guile* explaining that "[u]nder CR 56(e), declaration which

contain conclusory statements unsupported by facts are insufficient for purposes of summary judgment." *Id.*

In *Stewart-Graves v. Vaughn*, 162 Wn.2d 115, 170 P.3d 1151 (2007), the Washington State Supreme Court also cited *Guile* in its holding that the expert opinion proffered by the plaintiff was insufficient to raise an issue of material fact as to the standard of care applicable in the case. The Court cited *Guile* for the proposition that an "expert's unsupported assertion that a physician violated the standard of care [is] insufficient to raise a genuine issue of material fact." *Id.* at 138, 170 P.3d 1151.

In this case, the trial court was properly guided by *Guile*, finding that Dr. Li's affidavits were conclusory. Relying on *Guile,* the court appropriately determined that "[t]he information contained in these two sworn statements was insufficient to connect Dr. Li's opinions to specific identified facts which would support the contention that the defendants' action fell below the requisite standard of care. The first two affidavits, therefore, fail to raise genuine issues of material fact." CR 102 (internal citations omitted.) Therefore, this Court should follow the precedent promulgated in *Guile* as it has previously done in *Davies*, and as affirmed by the Washington State Supreme Court's decision in *Stewart-Graves.*

b. Keck's claim that Dr. Li's declaration and affidavit should be judged under ER 704 & 705 is in contradiction to clearly established Washington case law.

Keck argues that *Guile's* so-called "restrictive reading" of CR 56(e) requiring a showing of specific facts should be disregarded and that the test for admissibility should be that of ER 704 & 705. This argument is in error and is unsupported by Washington law. In *Anderson Hay & Grain Co, Inc. v. United Dominion Indus.*, this Court explicitly explained that "ER 705 by its language, is limited to trial testimony, not declaration testimony. Washington courts have rejected the rules application in summary judgment proceedings, finding instead that an expert's testimony for summary judgment must be supported by specific facts underlying the opinion." *Anderson Hay & Grain*, 119 Wn. App. at 259, 76 P.3d 1205 (citing *Rothweiler v. Clark Ctny.*, 108 Wn. App. 91, 100-01, 29 P.3d 758 (Div. 2 2001), *review denied*, 145 Wn.2d 1029, 42 P.3d 975 (2002); *Sunbreaker Condo Ass'n v. Travelers Ins. Co.*, 79 Wn. App. 368, 374, 901 P.2d 1079 (Div. 1 1995); *Hash by Hash v. Children's Orthopedic Hosp.*, 49 Wn. App. 130, 134-35, 741 P.2d 584 (Div. 1 1987)). This holding is in accord with *Guile* and is the proper standard to be used by this court when addressing the sufficiency of Dr. Li's declaration and affidavit.

c. The trial court acted within its discretion by denying Kecks motion of continuance under CR 56(f) and striking Dr. Li's untimely filed third affidavit.

CR 56(c) sets out the timetable for a nonmoving party to file affidavits in response to a motion for summary judgment. *Davies*, 144 Wn. App. at 498, 183 P.3d 283. Under 56(c), "[t]he adverse party may file and serve opposing affidavits, [...] not later than 11 calendar days before the hearing." *See also* LCR 56. "Whether to accept or reject untimely filed affidavits is within the trial court's discretion." *O'Neill v. Farmers Ins. Co. of Wash.*, 124 Wn. App. 516, 521, 125 P.3d 134 (Div. 1 2004) (citing *Brown*, 48 Wn. App. at 559-60, 739 P.2d 1188); *see also Garza*, 124 Wn. App. at 917, 103 P.3d 848; *Security State Bank v. Burk,* 100 Wn. App. 94, 103, 995 P.2d 1272 (2000).

Alternatively, when a party cannot obtain an affidavit within the timetable set out in CR 56(c), a continuance may be sought under paragraph (f) of that same rule. A party may move for a continuance in order to obtain an affidavit in response to a motion for summary judgment when it can show "good reason why they cannot obtain the witness' affidavits in time for the summary judgment proceeding." *Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474 (Div. 1 1989). However, a trial court may deny the motion for continuance where: "(1) the requesting

party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be would be established through additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact." *Id.* (citing *Lewis v. Bell*, 45 Wn. App. 192, 196, 724 P.2d 425 (Div. 3 1986); *Sternoff Metals Corp. v. Vertecs Corp.*, 39 Wn. App. 333, 341-42, 693 P.2d 175 (1984); *see also* 6 J. Moore, *Federal Practice* ¶ 56.24, at 56-817 (2d ed. 1988); *see also Colwell*, 104 Wn. App. at 615, 15 P.3d 210. A ruling on a motion for continuance under CR 56(f) is within the discretion of the trial court and is only reversible on appeal for a manifest abuse of discretion. *Coggle v. Snow*, 56 Wn. App. 499, 504, 784 P.2d 554 (Div. 1 1990).

In this case, the trial court properly exercised its discretion in denying Keck's motion for continuance under CR 56(f) and striking the untimely filed third affidavit of Dr. Li. In reaching its determination, the trial court considered the reasons proffered by Keck explaining why the untimely affidavit should be submitted. CP 102. The court summarized these reasons as "a busy trial schedule, failure of defense counsel to inquire about plaintiff counsel's availability – and arbitrarily taking advantage of that fact, and the policy rationale that summary judgment should be reserved for those instances where a trial would be a useless exercise." *Id.* However, the court also noted that in this particular

circumstance, Keck's initial response and filing was not late. *Id.* The untimely filed third affidavit was merely "intended to bolster and correct the information of the first two [timely] affidavits." *Id.* Thus, Keck actually complied with the requirements of CR 56(c) in filing her initial response. The third affidavit was filed untimely under both CR 56 and LCR 56 and therefore denied the doctors that ability to file a meaningful response. *Id*

The trial court went on to find that "[t]his is a situation where plaintiff could readily have obtained the same information contained in the third affidavit much earlier than the day before the summary judgment hearing." *Id.* at 103. Dr. Li had been retained as plaintiffs' expert since late December 2010. CP 188, 194-95. Additionally, Keck had been put on notice of Dr. Patrick Collins' Motion for Summary Judgment since December 11, 2011. CP 183. On January 3, 2012, Keck received confirmation that the hearing date previously set for the Motion for Summary Judgment was going to be stricken and re-noted. *Id.*, *see also* CP 196. Dr. Patrick Collin's motion was then re-noted on February 16, 2012 and scheduled for hearing on March 30, 2012. *Id.* After the motion

was noted for hearing, Keck's counsel never raised any issue regarding the date of the hearing nor was any attempt made to move the hearing date.[2]

In considering these surrounding circumstances, the court observed that when "evidence was available but not offered until after that opportunity passes, the parties are not entitled to another opportunity to submit that evidence." CP 103 (citing *Wagner Development Inc.*, 95 Wn. App. at 907, 977 P.2d 639). Finding that the evidence could have been easily obtainable prior to the day before the summary judgment hearing, the court appropriately concluded that the "reasons offered by plaintiff to support the untimely offering of the third affidavit are not tenable." CP 103.

Under the same rationale, the Court also properly concluded that Keck failed to provide any good reason justifying a continuance under CR (f). Specifically, the court determined that Keck failed to offer a good reason for the delay in obtaining Dr. Li's third affidavit and that Keck also failed to identify what evidence would be established through the additional discovery. CP 103-4.

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[2] Keck argues that good cause existed justifying a continuance, namely, that Keck's counsel was out of town in another trial when responsive materials were due. Keck ignores the fact that Dr. Chad Collins' counsel was also out of town during this same time period in the same trial. It is important to note that at no time did Keck's counsel seek to move the hearing date for the summary judgment motion or make a motion to the court for a continuance under CR 6.

C. The trial court properly exercised its discretion in denying Keck's Motion for Reconsideration regarding her post-operative care claims.

"Motions for reconsideration are addressed to the sound discretion of the trial court; a reviewing court will not reverse a trial court's ruling absent a showing of manifest abuse of discretion." *Wagner Development Inc*, 95 Wn. App. at 906, 977 P.2d 639. Keck has not offered any reason establishing that the trial court's denial of her motion for reconsideration was "manifestly unreasonable" or based upon "untenable grounds or reasons." *Id.* For the reasons stated above, the Court acted within its discretion in finding that Dr. Li's March 14, 2012 declaration and March 19, 2012 affidavit were insufficient to overcome summary judgment regarding Keck's post-operative care claims and striking Dr. Li's untimely filed third affidavit. Therefore, the trial court's denial of Keck's Motion for Reconsideration should not be reversed by this Court.

D. The trial court correctly granted summary judgment of dismissal on Keck's remaining negligent-referral claim.

Keck also assigns error to the trial court's grant of summary judgment regarding the negligent-referral claim. In regard to Dr. Patrick Collins, Keck's claim is based upon the allegation that he was involved in her post-operative care, thus, in a position to make a referral. However, it is undisputed that Dr. Chad Collins was in charge of Keck's follow up

care and referrals, not Patrick Collins. CP 132 at ¶ 18, *see also* CP 200-201 at ¶¶ 2 & 3, CP 339.

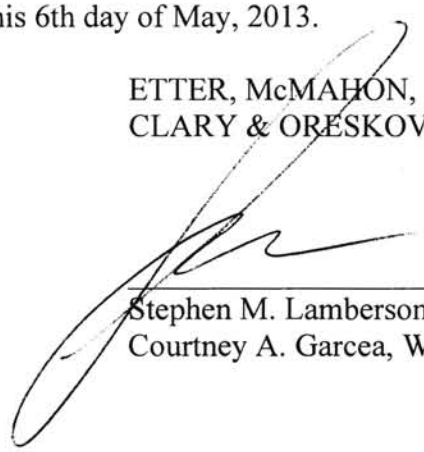
Additionally, Keck failed to raise any issue of material fact establishing that the alleged negligent-referral resulted in the non-union and infection in her jaw bone. While referrals were made to ENT physician and Keck's general dentist, those referrals "were not for the purpose of having other experts become involved with non-union or infection." CP 352. Instead, the referral to Keck's DDS was for the purpose of assessing Keck's bite/occlusion, while the referral to the ENT was solely for follow up on wound healing. *Id.* In other words, Dr. Chad Collins never made a referral to any other health-care provider for the purpose of addressing her non-union or infection. That issue arose after the time Dr. Collins made the referrals to the DDS and ENT. RP 40, 46. Once the non-union and infection issues arose, Dr. Chad Collins maintained care over Keck. Therefore, the trial court properly dismissed Keck's lawsuit, finding that she failed to raise a genuine issue of material fact regarding her sole remaining claim for negligent referral.

V. CONCLUSION

Based upon the foregoing argument and authority, Dr. Patrick Collins respectfully requests the Court to affirm the trial court's summary judgment orders.

Submitted this 6th day of May, 2013.

ETTER, McMAHON, LAMBERSON
CLARY & OREŠKOVICH, P.C.



Stephen M. Lamberson, WSBA 12985
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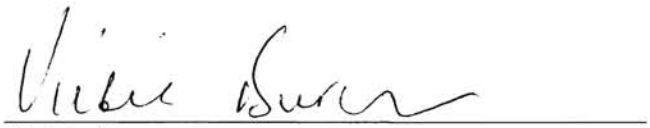
DECLARATION OF SERVICE

I declare that I sent a true and correct copy of the foregoing by the method indicated below and addressed to counsel for the Appellants:

Mark Kamitomo The Markam Group, Inc. P.S. 421 West Riverside, Suite 1060 Spokane, WA 99201	✓ U.S. Mail ____ Hand-Delivered ____ Overnight Mail ____ Facsimile 747-1993 ____ Email
George M. Ahrend Ahrend Albrecht PLLC 16 Basis Street S.W. Ephrata, WA 98823	____ U.S. Mail ____ Hand-Delivered ____ Overnight Mail ✓ Facsimile (509) 464-6290 ✓ Email scanet@trialappeallaw.com (by agreement of the parties)

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 6 day of May 2013, in Spokane, Washington.



Vickie Burch