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SUPREME COURT 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
KENNEN MITCHELL GRAHAM, AND KELLEN
MITCHELL GRAHAM, individually,

Respondents/Cross-Petitioners,

v.

CHAD P. COLLINS, DMD; PATRICK C. COLLINS,
DDS; AND COLLINS ORAL & MAXILLOFACIAL
SURGERY, P.S.,

Petitioners.

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Washington State Supreme Court
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BRIEF OF *AMICUS CURIAE*
WASHINGTON STATE MEDICAL ASSOCIATION

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	iv
I. IDENTITY AND INTEREST OF <i>AMICUS CURIAE</i>	1
II. DISCUSSION	4
A. <i>Guile v. Ballard Community Hospital</i> Properly Implements the “Specific Facts” Requirement of CR 56(e) and <i>Young v. Key Pharmaceuticals, Inc.</i>	4
B. Requiring Experts to Support Conclusory Statements with Specific Facts Prevents Trial Courts from Denying Summary Judgment Based on Testimony that Would Not Be Admissible at Trial and Would Not Support a Verdict.	6
C. Useless Trials Would Result if a Party Opposing Summary Judgment Can Defeat such a Motion with Expert Affidavits Lacking Specific Factual Support for the Expert’s Conclusions.	8
D. Applying CR 56(e) Does Not Result in a Stricter Standard for Summary Judgment than Would Apply at Trial under ER 702-705.....	9
E. The <i>Guile</i> Standard Is Consistent with then-Existing Case Law and Has Already Been Endorsed by This Court.....	10
F. The Requirement that Experts Identify Specific Facts to Support Their Conclusions Has Not Been Applied in an Overly Stringent Manner in Medical Malpractice Cases.	11
G. The <i>Guile</i> Standard Has Been Widely and Fairly Applied Outside of the Medical Malpractice Context.	14

H.	A Trial Court’s Exclusion of Late-Disclosed Evidence Is Reviewed for Abuse of Discretion in Complying with the <i>Burnet</i> Balancing Requirements.	15
III.	CONCLUSION	19

TABLE OF AUTHORITIES

Washington Cases	<u>Page(s)</u>
<i>Anderson Hay & Grain Co. v. United Dominion Industries, Inc.</i> , 119 Wn. App. 249, 76 P.3d 1205 (2003)	9
<i>Blair v. TA-Seattle E. No. 176</i> , 171 Wn.2d 342, 254 P.3d 797 (2011)	18, 19
<i>Burnet v. Spokane Ambulance</i> , 131 Wn.2d 484, 933 P.2d 1036 (1997)	2, 17, 18, 19, 20
<i>Davidson v. Municipality of Metropolitan Seattle</i> , 43 Wn. App. 569, 719 P.2d 569 (1986)	8, 9
<i>Davies v. Holy Family Hospital</i> , 144 Wn. App. 483, 183 P.3d 283 (2008).....	12
<i>Doe v. Puget Sound Blood Center</i> , 117 Wn.2d 772, 819 P.2d 370 (1991)	10
<i>Doty-Fielding v. Town of South Prairie</i> , 143 Wn. App. 559, 178 P.3d 1054 (2008).....	14
<i>Folsom v. Burger King</i> , 135 Wn.2d 658, 958 P.2d 301 (1998)	16
<i>Guile v. Ballard Community Hospital</i> , 70 Wn. App. 18, 851 P.2d 689, <i>review denied sub nom Guile v. Crealock</i> , 122 Wn.2d 1010 (1993).....	<i>passim</i>
<i>Harris v. Robert C. Groth, M.D., Inc.</i> , 99 Wn.2d 438, 663 P.2d 113 (1983)	2, 12
<i>Hash by Hash v. Children's Orthopedic Hospital</i> , 49 Wn. App. 130, 741 P.2d 584 (1987), <i>aff'd</i> , 110 Wn.2d 912 (1988)	10
<i>Hegre v. Simpson Dura-Vent Co.</i> , 50 Wn. App. 388, 748 P.2d 1131 (1988).....	15

	<u>Page(s)</u>
<i>Hiskey v. City of Seattle</i> , 44 Wn. App. 110, 720 P.2d 867 (1986)	11
<i>Johnston-Forbes v. Matsunaga</i> , 181 Wn.2d 346, 333 P.3d 388 (2014)	6, 8
<i>Jones v. City of Seattle</i> , 179 Wn.2d 322, 314 P.3d 380 (2013)	17, 18
<i>Katare v. Katare</i> , 175 Wn.2d 23, 283 P.3d 546 (2012)	7, 8
<i>Keck v. Collins</i> , 181 Wn. App. 67, 325 P.3d 306 (2014)	1, 3, 16, 17
<i>McBride v. Walla Walla County</i> , 95 Wn. App. 33, 975 P.2d 1029 (1999)	14
<i>Melville v. State</i> , 115 Wn.2d 34, 793 P.2d 952 (1990)	10
<i>Morton v. McFall</i> , 128 Wn. App. 245, 115 P.3d 1023 (2005)	13
<i>Prentice Packing & Storage Co. v. United Pacific Insurance Co.</i> , 5 Wn.2d 144, 106 P.2d 314 (1940)	6
<i>Preston v. Duncan</i> , 55 Wn.2d 678, 349 P.2d 605 (1960)	3
<i>Riccobono v. Pierce County</i> , 92 Wn. App. 254, 966 P.2d 327 (1998)	8, 9
<i>Rivers v. Washington State Conference of Mason Contractors</i> , 145 Wn.2d 674, 41 P.3d 1175 (2002)	18, 19
<i>Rothweiler v. Clark County</i> , 108 Wn. App. 91, 29 P.3d 758 (2001)	14

	<u>Page(s)</u>
<i>Safeco Ins. Co. v. McGrath</i> , 63 Wn. App. 170, 817 P.2d 861 (1991)	14
<i>State v. Njonge</i> , __ Wn.2d __, 334 P.3d 1068 (Sept. 25, 2014).....	11
<i>Stewart-Graves v. Vaughn</i> , 162 Wn.2d 115, 170 P.3d 1151 (2007)	11
<i>Sunbreaker Condominium Association v.</i> <i>Travelers Insurance Co.</i> , 79 Wn. App. 368, 901 P.2d 1079 (1995).....	7
<i>Teter v. Deck</i> , 174 Wn.2d 207, 274 P.3d 336 (2012)	18
<i>Theonnes v. Hazen</i> , 37 Wn. App. 644, 681 P.2d 1284 (1984).....	10
<i>Walker v. State</i> , 121 Wn.2d 214, 848 P.2d 7221 (1993)	7, 8
<i>Weyerhaeuser Co. v. Commercial Union Insurance Co.</i> , 142 Wn.2d 654, 15 P.3d 115 (2001)	7, 8
<i>Young v. Key Pharmaceuticals, Inc.</i> , 112 Wn.2d 216, 770 P.2d 182 (1989)	4, 5

Federal Cases

<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986).....	4
---------------------------------------------------------------	---

Constitutional Provisions, Statutes and Court Rules

RCW 7.70.040	12
CR 1	19, 20
CR 56	14
CR 56(e)	<i>passim</i>

	<u>Page(s)</u>
ER 102.....	19
ER 602.....	7
ER 702.....	9, 11
ER 703.....	7, 9, 11
ER 704.....	9, 11
ER 705.....	9, 11

I. IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Washington State Medical Association (“WSMA”) is the state-wide non-profit organization that represents the medical and osteopathic physicians and surgeons and physicians assistants in Washington, as described in the motion for permission to file this brief. The WSMA and its counsel have appeared before this Court as *amicus curiae* many times and are well known to the Court.

WSMA closely follows the law that affects its members, patients, and the health care system, including this case, *Keck v. Collins*, 181 Wn. App. 67, 325 P.3d 306 (2014), *rev. granted*, 181 Wn.2d 1007 (2014) (“*Keck*”). The first issue is whether parties opposing summary judgment in a medical malpractice action, or any action requiring expert testimony, may defeat such a motion through submission of an expert affidavit that does *not* provide specific factual support for the expert’s opinions. The Court’s issues list describes that issue as follows:

Whether the standard explicated in *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 25, 851 P.2d 689 (1993), under which expert affidavits containing conclusory statements without setting forth specific factual support are inadequate to defeat a motion for summary judgment in a medical malpractice action, should be overruled as overly stringent.

The second issue asks what is the correct standard of review and test for reviewing the exclusion of “late-filed” evidence on summary judgment? *Amicus* suggests it is intertwined with the first issue and

that the established *Burnet*¹ test for excluding “late” evidence reinforces the correctness of *Guile*’s and CR 56(e)’s specific facts requirement.

The *Guile* standard should be affirmed because that well-established standard implements the “specific facts” requirement in CR 56(e) and furthers the rule’s purpose of preventing unnecessary trials. *Guile*’s requirement that an expert state the factual basis for his or her opinion ensures that cases relying on unfounded opinions do not survive summary judgment only to fall apart when scrutinized for sufficient foundation for admissibility at trial or on appeal.

WSMA submits this brief because expert testimony is both uniquely powerful in, and essential to, virtually every medical malpractice action. *See, e.g., Harris v. Robert C. Groth, M.D., Inc.*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983). WSMA agrees those cases should be decided on their merits. Unsupported cases should be dismissed as early as possible because of the costs they otherwise impose on physicians, the health care system and the courts, while cases with a genuine factual basis should rarely be dismissed solely because a fact disclosure was “untimely.” Overturning *Guile* and the many, many related decisions that follow it on the sufficiency of expert affidavits during summary judgment would dramatically change medical malpractice litigation while neutering the basic

¹ *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997).

summary judgment procedure. It would also change *all other* cases in which expert testimony is an essential element of a party's case.

If an expert cannot offer a well-founded opinion that would support a jury verdict, summary judgment is the time to make that determination, as the Court of Appeals correctly noted below:

Summary judgment procedure . . . is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury *if they really have evidence which they will offer on a trial*, it is to carefully test this out, in advance of trial *by inquiring and determining whether such evidence exists*.

Keck, 181 Wn. App. at 86-87 (emphasis in original), quoting *Preston v. Duncan*, 55 Wn.2d 678, 683, 349 P.2d 605 (1960). This Court should preserve the *Guile* standard to test out, in advance of trial, whether factual support exists for an expert's opinions.

The "specific facts" requirement is not overly stringent. It does not require more from an expert during summary judgment than would be required to determine admissibility at trial, or to support a jury's verdict. Nor has the rule been applied unfairly, either in medical malpractice actions or in other matters in which expert testimony is essential to a party's case. WSMA therefore respectfully requests that this Court confirm the long-settled standard applying CR 56(e) stated in *Guile*.

While the WSMA takes no position on how that standard applies to this case before the Court, it agrees that cases should be decided on the merits. To that end the Court should insure trial

courts do not refuse “late filed” relevant evidence based on timeliness alone, but employ the *Burnet* test before excluding it.

II. DISCUSSION

A. *Guile v. Ballard Community Hospital Properly Implements the “Specific Facts” Requirement of CR 56(e) and Young v. Key Pharmaceuticals, Inc.*

Where a party moving for summary judgment meets its burden under *Young v. Key Pharmaceuticals, Inc.*, of showing that the nonmoving party lacks evidence to support an essential element of his or her case, the nonmoving party must then present admissible evidence showing a genuine issue of material fact. 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) (the moving defendant may meet the initial burden by showing “that there is an absence of evidence to support the nonmoving party’s case.”). In *Young*, the medical malpractice defendants were entitled to summary judgment because the plaintiff failed to offer competent evidence to support a prima facie case of medical malpractice. 112 Wn.2d at 226-27.² This Court held that it “is unjust to subject defendants to a trial in the absence of a showing that the plaintiff can make out a prima facie case.” *Id.* at 230. This concept of justice has not changed since *Young* was decided in 1989.

² *Young* held that the plaintiff failed to offer evidence rebutting the defendant’s initial showing of the absence of a material issue of fact because the standard of care expert, a pharmacist, was not competent to testify on the standard of care for the defendant physician. 112 Wn.2d at 227-28, 230.

Rule 56(e) requires the nonmoving party to “set forth *specific facts* showing that there is a genuine issue for trial.” CR 56(e) (emphasis added); *Young*, 112 Wn.2d at 225-26. Only those facts that “would be admissible in evidence” are sufficient for such a showing. CR 56(e). The requirements of the rule further the purpose of summary judgment, which is to “examine the sufficiency of the evidence behind the plaintiff’s formal allegations in the hope of avoiding unnecessary trials where no genuine issue as to a material fact exists.” *Young*, 112 Wn.2d at 226.

Guile implements the requirements of *Young* and CR 56(e) by holding that “Affidavits containing conclusory statements without factual support are insufficient to defeat a motion for summary judgment.” *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 25, 851 P.2d 689, 693 (citing CR 56(e)), *review denied sub nom, Guile v. Crealock*, 122 Wn.2d 1010 (1993). In *Guile*, the expert affidavit failed to satisfy CR 56(e) because the expert did not identify specific facts to support his conclusion that the defendant doctor negligently performed the surgery. Judge Coleman described the deficient affidavit as “merely a summarization of [the plaintiff]’s postsurgical complications, coupled with the unsupported conclusion that the complications were caused by [the defendant doctor]’s ‘faulty technique.’” *Id.* at 26.

B. Requiring Experts to Support Conclusory Statements with Specific Facts Prevents Trial Courts from Denying Summary Judgment Based on Testimony that Would Not Be Admissible at Trial and Would Not Support a Verdict.

This Court has long held that the “opinions of an expert witness are of *no weight* unless founded upon the facts of the case.” *Prentice Packing & Storage Co. v. United Pac. Ins. Co.*, 5 Wn.2d 144, 164, 106 P.2d 314 (1940) (emphasis added). That is because a verdict may not “rest upon conjecture and speculation.” *Id.* Where an unsupported conclusion cannot sustain the jury’s verdict, allowing such opinions to defeat summary judgment would result in useless and unnecessary trials.

This Court recently re-affirmed those principals, holding that the “the trial court must find that there is an adequate foundation so that an opinion is not mere speculation, conjecture, or misleading[.]” before allowing an expert to render an opinion. *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 394, 333 P.3d 388 (2014). The function of the trial court is to “*scrutinize the expert’s underlying information* and determine whether it is sufficient to form an opinion on the relevant issue.” *Id.* (emphasis added). The trial court’s duty to scrutinize the specific facts underlying an expert’s opinion before allowing such testimony at trial is critical to CR 56(e) and *Guile*’s requirement that the trial court grant summary judgment where the expert fails to identify the specific factual support for his or her conclusions. Under a less stringent standard, a claim could

survive summary judgment based on the unsupported opinion of an expert only to have the trial court later rule that the expert lacks the factual support to render that opinion. In a medical malpractice action, with expert testimony central to virtually every case, proceeding with such a trial would be a waste.

Further, under this Court's cases, a trial court abuses its discretion by admitting expert testimony lacking foundation. *See Katare v. Katare*, 175 Wn.2d 23, 39, 283 P.3d 546 (2012), *cert. denied*, 133 S. Ct. 189 (2013) (foundation was established when the expert testified based on information made known to him, since personal familiarity is not a foundational requirement for experts under ER 703); *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 683-84, 15 P.3d 115 (2001) (no abuse of discretion to admit expert testimony where evidence supported the expert's assumptions and the expert made the evidentiary basis for her opinion clear); *Walker v. State*, 121 Wn.2d 214, 218, 848 P.2d 7221 (1993) (expert's testimony properly admitted because the opinion was based on the facts of the accident at issue).³

The above cases show that the requirements of an adequate foundation for expert testimony can be met. There is no reason a

³ For expert opinion testimony, ER 602's foundational requirements are subject to ER 703, which states that the expert may base his opinions on the facts or data in the particular case which were either perceived by the expert or which were made known to him or her. *See Sunbreaker Condo. Ass'n v. Travelers Ins. Co.*, 79 Wn. App. 368, 374, 901 P.2d 1079 (1995).

case should proceed past summary judgment when the plaintiff's expert *cannot* demonstrate that their opinion has sufficient factual support to meet foundation requirements. Since a trial judge must exclude opinion testimony unsupported by specific facts, unsupported affidavits are insufficient as a matter of law under CR 56(e) for failure to create a genuine issue for trial.

C. Useless Trials Would Result if a Party Opposing Summary Judgment Can Defeat such a Motion with Expert Affidavits Lacking Specific Factual Support for the Expert's Conclusions.

If specific facts support an expert's opinion, summary judgment is the time to disclose them so that the foundation for the expert testimony is scrutinized *before* trial. Otherwise, the factual basis will be scrutinized at trial under *Johnston-Forbes* and the trial court would have to exclude the unsupported opinion testimony under *Katare*, *Weyerhaeuser*, and *Walker*.

Cases from the Court of Appeals provide examples of the type of unnecessary trials that result when an expert fails to provide factual support for his or her opinions. In *Riccobono v. Pierce County*, 92 Wn. App. 254, 268, 966 P.2d 327 (1998), Division II reversed the jury's award for future economic losses because the expert's trial testimony was based on assumptions for which there was no factual basis. Another example is *Davidson v. Municipality of Metropolitan Seattle*, 43 Wn. App. 569, 575-78, 719 P.2d 569 (1986). In *Davidson* Division I held the trial court erred by allowing

the testimony of an accident reconstructionist due to insufficient foundation to support the expert's opinion. "Liberalizing" (*i.e.*, discarding) the *Guile* standard would result in more useless trials like *Riccobono* and *Davidson* and increase social and judicial costs.

D. Applying CR 56(e) Does Not Result in a Stricter Standard for Summary Judgment than Would Apply at Trial under ER 702-705.

This Court should adopt Judge Morgan's well-reasoned rationale in *Riccobono v. Pierce County* that, while ER 705 "indicates that an expert need not *disclose* his or her factual basis unless otherwise ordered by the court[,]" nothing in that rule or ER 703 indicates "that an expert need not *have* a factual basis." 92 Wn. App. at 268 (emphasis in original). Requiring the expert to disclose that factual basis at summary judgment as part to the scrutiny needed to rule on admissibility does not conflict with, but helps properly implement ER 703 and 705.

Anderson Hay & Grain Co. v. United Dominion Industries, Inc., confirms that ER 705's provision allowing opinion testimony without disclosure of the underlying facts or data does not apply to summary judgment proceedings. 119 Wn. App. 249, 259, 76 P.3d 1205 (2003), *review denied*, 151 Wn.2d 1016 (2004). The text of ER 705 supports *Anderson Hay*'s interpretation that ER 705 applies only during trial. Otherwise it would make no sense for the rule to use the terms "testify" or "cross-examination[,]" actions that only

take place during trial.⁴ Useless trials would result if plaintiffs could defeat summary judgment by obtaining a conclusory opinion untethered from the facts of the case.

E. The *Guile* Standard Is Consistent with then-Existing Case Law and Has Already Been Endorsed by This Court.

Pre-*Guile* cases adopting similar rules show that *Guile*'s holding was neither an outlier nor incorrect. In addition to the cases cited in *Guile*, *Theonnes v. Hazen*, 37 Wn. App. 644, 648, 681 P.2d 1284 (1984), held summary judgment was properly granted since the opinions of the plaintiff's traffic accident reconstruction expert were mere conclusions, unsupported by the evidence. This Court endorsed *Theonnes* in *Melville v. State*, 115 Wn.2d 34, 41, 793 P.2d 952 (1990). There is no basis for this Court to overrule its statement in *Melville* that the "opinion of an expert must be based on facts," 115 Wn.2d at 41 (quoting *Theonnes*, 37 Wn. App. at 648), which would have to do if it discards *Guile*. This is also true for *Doe v. Puget Sound Blood Center*, 117 Wn.2d 772, 787, 819 P.2d 370 (1991) ("The opinion of an expert which is only a conclusion or which is based on assumptions is not evidence which satisfies the summary judgment standards because it is not evidence which will take a case to the jury," citing *Theonnes*, 37 Wn. App. at 648).

⁴ *Accord, Hash by Hash v. Children's Orthopedic Hosp.*, 49 Wn. App. 130, 134-35, 741 P.2d 584 (1987) (while the factual support for an opinion may be discovered through cross-examination at trial it must be set forth in the affidavit during summary judgment proceedings because an affidavit cannot be cross-examined to get at that basis), *aff'd*, 110 Wn.2d 912 (1988).

Nor is there any good basis to determine that the Court of Appeals wrongly decided pre-*Guile* cases. See, e.g., *Hiskey v. City of Seattle*, 44 Wn. App. 110, 113, 720 P.2d 867 (1986) (summary judgment affirmed where plaintiff’s expert made only conclusory allegations as to breach of the standard of care and causation and failed to set the forth specific facts required by CR 56(e) to preclude summary judgment), *review denied*, 107 Wn.2d 1001 (1986).

This Court then adopted *Guile’s* holding in *Stewart-Graves v. Vaughn*, citing *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.” 162 Wn.2d 115, 138, 170 P.3d 1151 (2007). This Court does not overrule precedent except “upon a showing that it is both incorrect and harmful.” *State v. Njonge*, __ Wn.2d __, 334 P.3d 1068, 1074 (Sept. 25, 2014). *Guile’s* requirement that an expert’s affidavit contain factual support for his or her opinions is correct under CR 56(e) and ER 702-705, is not harmful, and is consistent with CR 56’s purpose of avoiding useless trials. There is no basis to overrule *Guile*.

F. The Requirement that Experts Identify Specific Facts to Support Their Conclusions Has Not Been Applied in an Overly Stringent Manner in Medical Malpractice Cases.

The factual support for an expert’s opinion is especially important to, and well-established in, medical malpractice actions. That is because the essential elements in a medical malpractice case

are typically beyond the experience of a layperson. *See* RCW 7.70.040 (providing the elements must be proven to prevail on a claim that a health care provider did not follow the accepted standard of care). Expert testimony is normally required to establish the standard of care and to prove causation in medical malpractice actions. *Harris*, 99 Wn.2d at 449 (medical facts must be proven by expert testimony unless they are observable by a layperson’s senses and discernable without medical training).

Davies v. Holy Family Hospital, 144 Wn. App. 483, 495-96, 183 P.3d 283 (2008), is an example of a medical malpractice action where summary judgment was appropriately granted. *Davies* holds that the affidavit of the plaintiff’s expert was insufficient to defeat summary judgment where the expert failed to provide any basis for his claimed familiarity with the standards of care. Division III cited *Guile* for the proposition that “declarations which contain conclusory statements unsupported by facts are insufficient for purposes of summary judgment.” *Id.* To overrule *Guile* (and the many related cases) would mean that cases like *Davies* would proceed to trial even though the expert whose testimony was necessary to prove the essential elements of malpractice could not demonstrate competence to establish the standard of care or a breach of that standard. Allowing such unfounded cases to proceed would impose large, unnecessary costs on our already overburdened and

expensive health care system, as well as on the courts. The current, settled standard is an appropriate gatekeeper to weed out bad cases.

Guile itself provides another example of the consistent and even application of the specific facts requirement by the Court of Appeals in medical malpractice cases. There, the defendant's expert opined that the defendant doctor's "faulty technique" caused the plaintiff's complications, but failed to identify the specific facts supporting that conclusion. Summary judgment dismissal was appropriate because the trial court would have abused its discretion to allow such unsupported testimony at trial. Had the case gone to trial, a jury verdict based on that evidence of negligent surgical performance would have been unsustainable because such opinion testimony was not based on the facts of the case. "Relaxing" the *Guile* standard would have the effect of allowing the non-moving party to proceed to trial based on no more than an expert's bare conclusion that the defendant failed to meet the standard of care.

On the other hand, *Morton v. McFall*, 128 Wn. App. 245, 255, 115 P.3d 1023, 1028 (2005), shows that the *Guile* standard is not impossible to meet in medical malpractice actions. *Morton*, reversed the summary judgment dismissing the claims against one of the two defendant doctors, rejecting the *Guile*-based argument that the plaintiff's expert's opinion was conclusory. Judge Becker described how the expert identified facts that supported her opinion that it was a breach of the standard of care to recommend or perform

the lobectomy without first obtaining the results of a sputum test, which would have showed that surgical intervention was not necessary, while affirming the other dismissal. 128 Wn. App. at 255. *Morton* is a good illustration that *Guile* has not been applied by the Court of Appeals to affirm dismissals of cases that need to be tried.

G. The *Guile* Standard Has Been Widely and Fairly Applied Outside of the Medical Malpractice Context.

Guile applies universally to expert-dependent actions; it is *not* a medical malpractice exception to otherwise more lenient CR 56 standards. For example, in an appeal arising from an insurance declaratory judgment action, Division I held there was inadequate foundation for an expert opinion about a person’s ability to form an intent to injure. *See Safeco Ins. Co. v. McGrath* 63 Wn. App. 170, 177, 817 P.2d 861 (1991) (it is “well established that conclusory or speculative expert opinions lacking an adequate foundation will not be admitted[.]”), *review denied*, 118 Wn.2d 1010 (1992). Other cases are in accord.⁵

⁵ *See Rothweiler v. Clark County*, 108 Wn. App. 91, 101-02, 29 P.3d 758 (2001) (water drainage expert’s opinion disregarded because the expert admitted he had no factual basis for the opinion); *McBride v. Walla Walla County*, 95 Wn. App. 33, 37, 975 P.2d 1029 (1999) (declaration of use of force expert was insufficient because it contained conclusory assertions rather than factual allegations); *Doty-Fielding v. Town of South Prairie*, 143 Wn. App. 559, 567, 178 P.3d 1054 (2008) (summary judgment affirmed because the record was “devoid of evidence regarding what training [the volunteer firefighter plaintiff] should have been provided and only includes [the expert]’s conclusory statements that [firefighter plaintiff] was inadequately trained.”).

Hegre v. Simpson Dura-Vent Co., exemplifies that the rule has not been applied in an overly stringent manner by the Court of Appeals. 50 Wn. App. 388, 748 P.2d 1131 (1988) (reversing summary judgment and rejecting *Theonnes*-based argument). In *Hegre*, material issues of fact precluded summary judgment on a negligence claim against a wood burning stove manufacturer where the expert's affidavit concluded that the design was defective because the subject fire could have been prevented by installation of a catalytic afterburner in the stove. The expert explained how the catalytic afterburner would have removed flammable and corrosive creosote from the wood exhaust and that corrosion was found in the chimney pipe of the stove, supporting the plaintiff's theory that the fire resulted from creosote accumulating in and corroding the chimney pipe. *Id.*, at 390-96. Thus, where an expert's affidavit sets forth the basis factual basis for his conclusion, genuine issues of material fact require a trial by jury.

H. A Trial Court's Exclusion of Late-Disclosed Evidence Is Reviewed for Abuse of Discretion in Complying with the *Burnet* Balancing Requirements.

The second issue on the Court's issues statements addresses the standard of review following the trial court's striking the plaintiff's expert's third affidavit as untimely, where that affidavit was necessary to establish liability: "whether . . . the Court of

Appeals erroneously reviewed the trial court's order striking the affidavit *de novo*."

The Court of Appeals decision details the circumstances before the March 30 hearing. The plaintiff's expert, Dr. Li, submitted declarations on March 16 and 22. *Keck*, 181 Wn. App. at 76-77. Both appear to be conclusory based on the court's summary and, for the sake of this analysis, that characterization is accepted. Plaintiff submitted a third affidavit of Dr. Li the day before the summary judgment hearing and, for the sake of this analysis, that affidavit contained sufficient specific facts supporting the opinion to survive summary judgment, as the panel below determined.

The genuine issue is whether the third declaration of Dr. Li submitted March 29, the day before the hearing (along with a motion to forgive the late-filing or to continue the hearing to permit defendants to fully respond) was properly evaluated by the Court of Appeals under a *de novo* standard and, ultimately, whether it was properly excluded, whatever the standard of review. It was this issue that divided the panel, with the majority declaring that language in *Folsom v. Burger King*, 135 Wn.2d 658, 958 P.2d 301 (1998), meant that the *de novo* standard applied to all summary judgment related orders including motions to strike an untimely filing, but not to continuance motions. *Keck*, 181 Wn. App. at 82-83. Judge Korsmo agreed a continuance was warranted to respond to the summary judgment motion and that denial was an abuse of discretion, but

disagreed with the standard of review applied to the motion to strike untimely evidence. *Id.* at 94-98. He likened that ruling to enforcement of local rules and granting continuances, which normally are reviewed under an abuse of discretion. *Id.*, at 98. Both the majority and Judge Korsmo have well-developed arguments with many cases on their sides.

Amicus WSMA suggests there is a simple resolution to insure consistent decision-making on whether to exclude late-submitted evidence or witnesses while making sure the underlying purpose of the rules to decide cases on the merits is met. The courts should apply the well-developed and established case law on the exclusion of late-disclosed evidence under the abuse of discretion standard that has been addressed in a series of recent cases by this Court, but which was inexplicably not focused on by the parties or Division III. Those cases provide a clear and logical solution to the issue before the Court.

Beginning with *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997) (“*Burnet*”), the Court has required trial courts to engage in a specific balancing analysis before excluding evidence, then applies an abuse of discretion standard of review.⁶

⁶ The *Burnet* balancing analysis was recently summarized:

. . . the trial court must explicitly consider whether a lesser sanction would probably suffice, whether the violation at issue was willful or deliberate, and whether the violation substantially prejudiced the opponent’s ability to prepare for trial. *Burnet*, 131 Wn.2d at 494.

Jones v. City of Seattle, 179 Wn.2d 322, 314 P.3d 380 (2013).

The Court has reversed trial courts for failing to do the required *Burnet* balancing for rulings excluding evidence or claims in the context of failing to meet local case schedule orders (and thus being “untimely”);⁷ for excluding expert declarations for experts who were not disclosed within local rule witness disclosure deadlines (and thus were “untimely”), including where a scheduled expert withdrew and a new expert had to be obtained shortly before trial.⁸ Most recently the Court reversed trial court rulings during trial that excluded witnesses for late disclosures under the local rules, although it held the exclusion was harmless.⁹ These cases emphasize that even late disclosure of witnesses beyond local rule deadlines cannot simply be excluded just for failing to meet the deadline, since the goal is to have a proper trial with all meaningful information before the fact finder. *See Jones supra*, 179 Wn.2d at 338-342 (issue background), 343-45 (analysis of the error in that case). These principles should apply no less in the summary judgment context.

The test is established. It is consistent with the “underlying purpose of the rules, which is to reach a just determination in every

⁷ *See Burnet*, 131 Wn.2d at 489-91, 497-99 (reversing dismissal of claim dismissed for failure to meet discovery scheduling order); *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 683, 694, 41 P.3d 1175 (2002) (reversing dismissal based on non-compliance with case schedule).

⁸ *See Blair v. TA-Seattle E. No. 176*, 171 Wn.2d 342, 254 P.3d 797 (2011) (exclusion of witnesses led to dismissal of plaintiff’s case on summary judgment); *Teter v. Deck*, 174 Wn.2d 207, 274 P.3d 336 (2012) (withdrawal of expert required finding new expert shortly before trial; defendant successfully moved to strike in lieu of taking depositions).

⁹ *See Jones v. City of Seattle*, 179 Wn.2d 322, 314 P.3d 380 (2013).

action. *See* CR 1,” and avoid injustice, the long-established premise of our legal system. *See Burnet*, 131 Wn.2d at 498.¹⁰ There is no logical reason why it should not also apply in the context of an “untimely” summary judgment affidavit, just as it has in the context of an “untimely” compliance with a scheduling order in *Rivers*, or the “untimely” disclosure of experts in *Blair*. Indeed, the reasons for the balancing test and abuse of discretion review fits comfortably in the circumstances of excluding “late-filed” affidavits or other evidence. Whether such evidence should be excluded will normally be a fact-intensive determination which will in many cases involve assessment of the diligence of the late party and assessing fault, matters reviewed on a discretionary basis.

III. CONCLUSION

The underlying principles of the civil rules include insuring decisions on the merits and avoiding useless trials. These principles reinforce the legitimacy of the legal system in settling society’s disputes. They counsel, if not require, both application of the now-settled law of considering late-filed evidence absent proper exclusion under the *Burnet* procedure and standards, *and* application of the settled *Guile* and CR 56(e) “specific facts” requirement on summary judgment. In deciding cases that require application of

¹⁰ These basic principles begin and underlie our civil and evidence rules, in CR 1 (the rules are to be construed to secure the “just . . . determination of every action”) and in ER 102 (“These rules shall be construed . . . to the end that the truth may be ascertained and proceedings justly determined”).

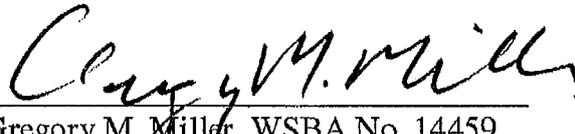
specific civil rules to individual cases, the rules as a whole and a just legal system also require balancing *all* the requirements of the rules as a coherent whole with the goal stated in CR 1 and this Court's cases: just decisions on the merits, without undue delay.

Under these principles, the WSMA respectfully suggests that the Court should reaffirm the fundamental rule in *Guile v. Ballard Community Hospital* that is based on the purpose and text of the rules, particularly CR 56(e), and also affirm that the exclusion of evidence on summary judgment without engaging in the *Burnet* analysis is an abuse of discretion, and is reviewed for such.

Dated this 24th day of December, 2014.

CARNEY BADLEY SPELLMAN, P.S.

By


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CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On December 23rd 2014, the foregoing BRIEF OF *AMICUS CURIAE* WASHINGTON STATE MEDICAL ASSOCIATION was filed with the Washington Supreme Court by emailing the foregoing to "supreme@courts.wa.gov" and served on the following persons by email and First Class Mail, postage prepaid:

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DATED at Seattle, Washington, this ^{27th} ~~27~~ day of December, 2014.


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To Clerk of Court:

Documents attached:

1. Motion of Washington State Medical Association for Leave to File Brief as *Amicus Curiae*, and
2. Brief of *Amicus Curiae* Washington State Medical Association
3. Certificates of Service attached to backs of pleadings

Case Name: Darla Keck, et al. (Respondents/Cross-Petitioners) v. Chad Collins, et al. (Petitioners)

Case No. 90357-3

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