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COURT OF APPEALS
STATE OF WASHINGTON
JUDICIAL CENTER

No. 311287

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

DARLA KECK and RON JOSEPH GRAHAM, husband and wife, and
DARLA KECK and RON JOSEPH GRAHAM as parents for 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, and SACRED HEART MEDICAL CENTER, a Washington
corporation,

Defendants-Respondents.

BRIEF OF APPELLANTS

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INTRODUCTION

Darla Keck (Keck), who lives in Missoula, Montana, came to Spokane to receive treatment for her sleep apnea from Drs. Chad P. Collins and his son Patrick C. Collins (doctors). Sleep apnea refers to abnormal pauses in breathing or abnormally low breathing while sleeping. The doctors performed a number of surgical procedures intended to improve Keck's sleep apnea by enlarging her breathing airway: a Le Fort I osteotomy, which involves cutting the upper jaw into sections so that it can be repositioned; a bilateral sagittal split osteotomy, which involves cutting the lower jaw on both sides so that it can be repositioned; and a genioglossus insertion advancement, which involves repositioning the muscle running from the chin to the tongue. *See* CP 131 (¶¶ 9-13, describing surgery).

After surgery, it became apparent that at least one of the surgical wounds was infected and the upper and lower jaw bones were not healing back together. CP 80 (¶ 4). Over the course of the next seven months, Keck underwent four more surgeries. CP 80-82 (¶¶ 4-14). Throughout their course of treatment, the doctors failed to adequately address her problems with infection and non-union of the bones. CP 80, 82 (¶¶ 3, 15). As a result, Keck continues to experience problems from pain, swelling,

fatigue, acrid taste in her mouth, nerve sensations in her eye, and numbness in her cheek and chin. CP 82 (¶ 14).

Along with her husband and children, Keck filed suit against the doctors and their employer for negligence. CP 3-10. The trial court dismissed the suit on successive motions for summary judgment, and Keck and her family now appeal. CP 362-94.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by granting partial summary judgment. CP 96-99 (Apr. 6, 2012, order); CP 100-04 (Apr. 11, 2012, letter ruling); CP 108-10 (Apr. 24, 2012, order¹).

2. The trial court erred by striking the supplemental declaration of Kasey Li, M.D., in connection with its grant of partial summary judgment CP 104 (Apr. 11, 2012, letter ruling); CP 109 (Apr. 24, 2012, order).

3. The trial court erred by denying Keck's motion for continuance pursuant to CR 56(f) in connection with its grant of partial summary judgment. CP 104 (Apr. 11, 2012, letter ruling); CP 109 (Apr. 24, 2012, order).

¹ The signature block is erroneously dated 2011, but the clerk's stamp accurately reflects 2012. CP 108-09.

4. The trial court erred by denying Keck's motion for reconsideration of partial summary judgment. CP 247-48 (June 11, 2012, letter ruling); CP 308-10 (June 22, 2012, order).

5. The trial court erred by granting summary judgment of dismissal. CP 350-53 (July 25, 2012, letter ruling); CP 354-61 (Aug. 27, 2012, order).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. What degree of specificity is required in an expert affidavit regarding breach of the standard of care and causation to avoid summary judgment in a medical negligence action? In particular, is it greater than the degree of specificity required for the expert testimony to be admissible under ER 704-705 or support a verdict at trial? (Assignments of error 1 & 4.)

2. What circumstances warrant a continuance of summary judgment proceedings pursuant to CR 56(f) to consider a responsive affidavit? Specifically, where a summary judgment hearing is unilaterally scheduled so that responsive affidavits are due while counsel, a sole practitioner, is in the middle of an out-of-town trial, yet counsel attempts to procure a sufficient affidavit on a timely basis, but is not able to do so until the day before the summary judgment hearing, and there is no

prejudice to the moving parties, should a brief CR 56(f) continuance be granted? (Assignments of error 1-4.)

3. Is there a genuine issue of material fact for trial, precluding summary judgment, regarding any of Keck's claims against either of the doctors? (Assignments of error 1 & 5.)

IV. STATEMENT OF THE CASE

A. Background facts.

On November 26, 2007, Drs. Chad and Patrick Collins operated on Keck for her sleep apnea. At a follow up appointment on December 6, 2007, she was oozing green pus from one of her surgical wounds and experiencing pain and total numbness of her chin. The doctors did not make any appreciable attempt to evaluate these problems. CP 80 (¶ 4); CP 132 (¶¶ 17, 19).

On January 22, 2008, the doctors learned from Keck's treating dentist that she was having pain and swelling on the left side of her jaw, and relapse of her bite. Rather than referring Keck to an appropriate specialist, they indicated that they would simply follow her on a limited basis due to the fact that she lived in Missoula. CP 80 (¶ 5).

On January 23, 2008, the doctors saw Keck, and noted that she had bad bite, infection, swelling, loose hardware from the surgery, and improper alignment of the teeth (malocclusion). The next day, January 24,

2008, they performed a second surgery, which removed some of the hardware inserted during the first operation, among other things. Removal of the hardware left Keck with further instability as there was nothing in the affected area to support her broken jaw. CP 80-81 (¶¶ 6-7).

Following the second surgery, Keck continued to have problems. CP 81 (¶ 8). After a number of follow up visits with the doctors, they performed a third surgery on March 18, 2008, to clean out the infection in the bone and place “more stout” hardware in Keck’s jaw. The surgery confirmed that Keck was not healing from the first and second surgeries, but the doctors did nothing further to evaluate the problems themselves, nor did they refer Keck to a specialist who would be properly trained to address the infection and non-union of the jaw bones and infection. CP 81 (¶¶ 9-10); CP 136 (¶¶ 44-45).

On June 11, 2008, Keck was experiencing pain and visited the doctors again. Upon examination, the doctors discovered that the bones and hardware in Keck’s upper jaw could be moved around with their fingers. CP 81 (¶ 11). On July 18, 2008, they performed a fourth surgery to try and fix the bones in place, involving a bone graft from her pelvis and the removal of a tooth. CP 81-82 (¶ 12); CP 137 (¶ 52).

Thereafter, Keck received treatment from an oral surgeon in Montana, who had to perform a fifth surgery and implant new hardware to

correct Keck's problems. CP 82 (¶ 13). The treatment she previously received from Drs. Collins did not comply with the standard of care, and, as a result, Keck continues to suffer from pain, swelling, fatigue, acrid taste in her mouth, nerve sensations in her eye, and numbness in her cheek and chin. CP 82 (¶ 14).

B. First summary judgment.

On December 20, 2012, Patrick Collins (but not his father) filed a motion for summary judgment. CP 21-22. He did not submit any evidence in support of the motion, but rather relied upon *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989), to compel Keck to produce expert testimony establishing breach of the standard of care and causation. CP 23-31. The hearing on the motion was initially scheduled for a date when Keck's counsel was unavailable and had to be stricken. RP 12:19-22; CP 115.

On February 16, 2012, Patrick Collins (again without his father) re-noted the motion for March 30, 2012, again without checking the availability of Keck's counsel. CP 33-34 & 115; RP 12:24-13:2. Under CR 56 and Spokane County Superior Court Local Civil Rule (LCR) 56, the deadline for responding to the motion was March 16, 2012, 14 days before the hearing.

On March 7, 2012, Keck's counsel began a medical malpractice trial in Grant County, Washington, which lasted until March 20, 2007. CP 76; RP 13:3-5.

On March 14, 2012, Chad Collins joined his son's motion for summary judgment. CP 35-36. The joinder document does not specify whether he was seeking dismissal of his son, himself, or both. *Id.* The record does not reflect any attempt to determine the availability of Keck's counsel beforehand, nor to seek any agreement to alter the timelines for summary judgment motions under CR 56 and LCR 56.

On March 16, 2012, while still in the middle of the out-of-town trial, Keck's counsel attempted to respond to the summary judgment motion filed by Patrick Collins in a timely fashion, submitting a 4-sentence response and attaching a brief declaration from her previously disclosed medical expert, Kasey Li, M.D. CP CP 38-43; RP 13:6-13.² Dr. Li is a board-certified physician in the areas of otolaryngology and oral surgery. CP 41. He practices and is on the faculty at Stanford Hospital in Stanford, California. CP 41. He is the founder of the Sleep Apnea Surgery Center, also located in Stanford. CP 41. Chad Collins had previously tried

² Although CR 56 is phrased in terms of "affidavits," a declaration signed in accordance with RCW 9A.72.085 is deemed to be equivalent. The first declaration of Dr. Li does not appear to satisfy all of the formal requirements of RCW 9A.72.085, but there was no objection to the form in the trial court, and the deficiency was remedied by his second affidavit filed shortly thereafter. CP 44-48.

to retain Dr. Li as an expert witness for the defense of Keck's lawsuit. CP 195.

Dr. Li is familiar with the standard of care applicable to the treatment of sleep apnea in the State of Washington. CP 42-43. He reviewed Keck's medical records, and concluded that the doctors had violated the applicable standard of care, causing a prolonged course of recovery, additional surgical procedures, and ongoing problems for Keck. CP 42-43.

Presumably because of the haste in which the declaration had to be prepared while counsel was in the middle of another trial, it was phrased in solely terms of *Chad* Collins. Specifically, the declaration stated that Chad Collins "performed multiple operations without really addressing the problem of non-union [of Keck's jaw bones] and infection within the standard of care," and did not properly refer Keck for follow up care after surgery. CP 43.

On March 22, 2012, Keck's counsel filed a second brief affidavit from Dr. Li, essentially an erratum, confirming that his opinions applied to *Patrick* Collins as well as his father, based on the information contained in the medical records. CP 44-48. Keck's counsel also filed an objection to the timeliness of the joinder of Chad Collins in the motion for summary judgment filed by his son. CP 49-51.

On March 26, 2012, Patrick Collins filed a reply brief. CP 55-62. The next day, March 27, 2012, Chad Collins also filed a “reply” in support of his joinder, making it clear that he expected to be dismissed as well as his son. CP 63-67. Both reply briefs argued that Dr. Li’s testimony regarding breach of the standard of care was not specific enough to avoid summary judgment. CP 57-59 & 65-66.

On March 29, 2012, Keck’s counsel submitted a third supplemental affidavit from Dr. Li. CP 79-84. The third affidavit reiterated the opinion “that the multiple operations failed to address the problem of the non-union infection as stated in [the prior declaration and affidavit],” and provided additional detail. CP 80 (quoting ¶ 3, brackets added).

While indicating his belief that the first two affidavits were sufficient, Keck’s counsel explained that the third affidavit was submitted to address Drs. Collins’ complaints about the sufficiency of the prior testimony. CP 76; RP 13:14-19. To the extent necessary, Keck’s counsel requested a continuance pursuant to CR 56(f) for consideration of the third affidavit. CP 76; RP 14:15-19. He explained that he did not have sufficient time to obtain the more detailed testimony while in the middle of trial. CP 76-77; RP 14:22-15:22.

At the summary judgment hearing, counsel for the doctors objected to the timeliness of Dr. Li's third affidavit. RP 5:24-6:5, 11:16-12:6. The trial court took under advisement questions regarding the sufficiency of the first two affidavits filed by Dr. Li, and the timeliness of his third affidavit. RP 26:17-24, 28:20-25. The court noted the parties' agreement that Keck's negligence claim was not based on the initial surgery, and that there was no failure to obtain informed consent. RP 26:3-16. The court further ruled that there was a genuine issue of material fact regarding what he described as the "negligent referral" claim, distinguished from the negligence of the doctors in the course of their own post-operative care of Keck. *Id.* These rulings were incorporated into a written order. CP 96-99. The court did not address the timeliness of Chad Collins' joinder or his reply.

Following the summary judgment hearing, the trial court issued a letter ruling that the first and second affidavits were not specific enough to withstand summary judgment. CP 102. The court denied Keck's motion for a CR 56(f) continuance and struck the third affidavit as untimely. CP 102-04. On this basis, the court granted partial summary judgment in favor of both doctors, dismissing "claims for negligent post-operative treatment, except for negligent referral." CP 108-09.

When the summary judgment order was entered, no discovery had been completed, and the discovery cutoff and the dispositive motion deadline had not yet passed. CP 32; RP 16:24-25. The trial court did not find that there would be any prejudice suffered by the doctors from a brief CR 56(f) continuance to consider the third supplemental affidavit of Dr. Li. On the contrary, the court stated that the fact that the deadlines specified in the scheduling order had not lapsed reduced any prejudicial impact. RP 103.

Keck filed a motion for reconsideration, but it was denied. CP 111-23, 247-48, 308-10.

C. Second summary judgment.

Following the grant of partial summary judgment, the remaining “negligent referral” claim, separate from any claim against Chad or Patrick Collins for negligence in the course of their own post-operative care, was described by Dr. Li as follows:

Defendants [i.e., Chad and Patrick Collins] were negligent in failing to refer Mrs. Keck to an oral surgeon, plastic surgeon or an Ear, Nose and Throat (ENT) doctor as opposed to a general dentist ... who would not have sufficient training or knowledge to deal with Mrs. Keck’s non-union and the developing infection/osteomyelitis.

CP 259 (¶ 3, ellipses added).³ The negligent referral was a cause of Keck’s injuries and ongoing problems. CP 264 (¶ 7).

On May 11, 2012, Chad Collins moved for summary judgment regarding the negligent referral claim. CP 126-27. The motion was primarily based upon an affidavit of Chad Collins himself. CP 127. In the affidavit, he claims that management of Keck’s problems with non-union of her jaws and infection were “never referred by me to her dentist, Dr. Olsen.” CP 130 (¶ 7); *accord* CP 137 (¶ 58, stating “I never turned care over to Dr. Olsen”). Instead, he says that he referred Keck to her dentist for the limited purpose of evaluating Keck’s bite. CP 133 (¶¶ 22-24). He does not say that he informed Keck of the purpose of the referral. He admits “that a general dentist such as Dr. Olsen would not have sufficient training to deal with Ms. Keck’s non-union and infection and that is the very reason I never referred that care to Dr. Olsen.” CP 137 (¶ 60).

Rather than referring Keck to her dentist, Chad Collins claims that his “plan” was to refer her to her Ear, Nose and Throat physician (ENT), Dr. Haller. CP 132 (¶ 20). He states “Dr. Haller is a surgeon who had previously provided care to Ms. Keck (and referred her to me) and was therefore unequivocally qualified to assess the wound healing, ensure

³ *Accord* CP 43 (first Li affidavit, ¶ 6); CP 48 & 264 (second Li affidavit, ¶ 6); CP 81-82 (third Li affidavit, ¶¶ 10, 15). The Affidavits of Dr. Li, CP 41-43, 46-48, 79-84, 258-64 are reproduced in the Appendix to this brief for the convenience of the Court.

resolution of the infection and alert me regarding any concerns.” CP 132 (¶ 21).⁴

With respect to the question of referral, Chad Collins’ chart note for Keck states in pertinent part: “Plan – ENT Dr. Follow wound healing. DDS to follow bite Dr. Chad to send a letter to each Dr. Pt will schedule appt for 2 weeks from today w/ both Drs.” CP 141 (ellipses added). Despite the statement in the chart note indicating “Dr. Chad to send a letter to each Dr.,” no such letters are part of the record. Chad Collins does not say that he sent any such letters in his affidavit. The ENT, Dr. Haller, denies receiving any referral. CP 272 (¶ 5).

Chad Collins does claim that “Keck was instructed to schedule appointments with Dr. Haller and Dr. Olsen” as indicated in the chart note. CP 133 (¶ 25). He does not say that he personally instructed Keck to schedule the appointments, nor that he explained the purpose of the referrals. For her part, Keck denies receiving any such instructions. CP 268 (¶ 5). She understood that her dentist, Dr. Olsen, was providing follow up care. CP 268 (¶ 6). She only happened to see the ENT, Dr. Haller, after she went to the emergency room for ongoing problems with her jaw. CP 259 (¶ 5); CP 268 (¶ 5); CP 272 (¶ 4).

⁴ As noted below, Dr. Haller disclaims the qualifications attributed to him by Chad Collins. CP 272 (¶ 4).

The standard of care required Chad Collins to make a referral to a physician who is familiar with the type of surgical procedures performed on Keck. CP 259-60 (¶ 6). The ENT, Dr. Haller, was not familiar with these procedures, and was not comfortable providing care. CP 272 (¶ 4).⁵

On the same day as his father, May 11, 2012, Patrick Collins separately moved for summary judgment regarding the negligent referral claim. CP 197-99. The motion was principally based on an affidavit from Patrick Collins himself. CP 197, 200-01. In the affidavit, Patrick Collins states “after the first surgery ... I was not responsible nor was I involved in the management of the post-operative care of Ms. Keck.” CP 200-01 (¶ 2, ellipses added). He further states “[m]y role did not place me in a position to make a referral to another health care provider for Ms. Keck.” CP 201 (¶ 3). These statements were directly contradicted by Keck. CP 266-678 (¶¶ 2-4). According to Dr. Li, “his role placed him in a position to make a referral to an appropriate health care provider ... and his failure to do so was a violation of the standard of care.” CP 261 (¶¶ 9-10, ellipses added).

Based on the foregoing evidence, the superior court granted summary judgment in favor of both doctors on the negligent referral claim. CP 354-61. In doing so, the court seemed to credit the chart note

⁵ As noted above, Chad Collins concedes that a referral to the dentist, Dr. Olsen, would not have been appropriate. CP 137 (¶ 60).

reference to “Pt will schedule appt for 2 weeks from today w/ both Drs.” rather than Keck’s testimony that she received no such instructions. The court characterized the chart note as “undisputed,” and did not account for the evidence regarding the lack of a referral to the ENT or the ENT’s lack of qualifications. CP 352 & 361. With respect to Patrick Collins, the court seemed to credit his testimony regarding the nature of his involvement in Keck’s care, rather than Keck’s contrary testimony. CP 353 & 362.

V. SUMMARY OF ARGUMENT

The trial court erred in granting partial summary judgment on Keck's claims for negligent post-operative care, based on its rulings that the first two affidavits filed by Dr. Li were not specific enough, and that no continuance should be granted pursuant to CR 56(f) to consider his third affidavit. The first two affidavits are admissible under ER 704-705 and sufficient to support a verdict in Keck's favor, and, as a result, should also be sufficient to withstand summary judgment. The Court of Appeals decision in *Guile v. Ballard Comm. Hosp.*, 70 Wn. App. 18, 851 P.2d 689, *rev. denied sub nom. Guile v. Crealock*, 122 Wn.2d 1010 (1993), requiring greater specificity from expert testimony in connection with summary judgment proceedings than at trial, is incorrectly decided and harmful, and should not be followed in this case. In any event, a brief continuance should have been granted to consider Dr. Li's more detailed third affidavit

given counsel's unavailability and the lack of prejudice resulting from a continuance.

The trial court also erroneously granted summary judgment on Keck's claims for negligent referral because there are disputed issues of material fact whether a referral was made and whether the health care providers to whom Keck was referred are qualified.

VI. ARGUMENT

A. **The trial court's rulings on summary judgment are subject to de novo review.**

An order granting summary judgment is subject to review de novo, and the appellate court engages in the same inquiry as the trial. *See Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). Summary judgment is only warranted when “there is no genuine issue as to any material fact” and “the moving party is entitled to judgment as a matter of law.” CR 56(c). The burden is on the party seeking summary judgment to demonstrate the absence of a genuine issue of material fact. *Folsom*, 135 Wn.2d at 663. All of the facts and reasonable inferences must be viewed in the light most favorable to the nonmoving party. *See Ruvalcaba v. Kwang Ho Baek*, 175 Wn.2d 1, 6, 282 P.3d 1083 (2012). Even where the evidentiary facts are undisputed, if reasonable minds could draw different inferences from those facts, then summary judgment

is not warranted. See *Chelan County Deputy Sheriffs Ass'n v. Chelan County*, 109 Wn.2d 282, 294-95, 745 P.2d 1 (1987).

The de novo standard of review encompasses “all trial court rulings made in conjunction with a summary judgment motion.” *Folsom*, at 663. This specifically includes rulings regarding evidence and the timeliness of submissions. See *Southwick v. Seattle Police Officer John Does #s 1-5*, 145 Wn. App. 292, 297 & n.8, 186 P.3d 1089 (2008) (citing *Folsom*). This is consistent with the requirements that the appellate court conduct the same inquiry as the trial court, and view the facts and inferences in the light most favorable to the nonmoving party. See *Folsom*, at 663.

B. The trial court erred in granting partial summary judgment on Keck’s claims based on the doctors’ negligent post-operative care of the infection and non-union of her jaw bones.

For purposes of determining whether there is a genuine issue of material fact for trial, materiality is based on the governing substantive law. See *Rossiter v. Moore*, 59 Wn.2d 722, 724, 370 P.2d 250 (1962) (indicating “material facts” are determined “under applicable principles of substantive law”; quotation omitted); *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974) (indicating “a ‘material fact’ is a fact upon which the outcome of the litigation depends”). In a medical negligence claim, the material facts that the plaintiff-patient is obligated to prove are that the

defendant-health care provider failed to comply with the applicable standard of care, and that such failure proximately caused the plaintiff-patient to suffer injury. *See* RCW 7.70.040(1)-(2). Expert medical testimony is generally required to establish the applicable standard of care and causation. *See Harris v. Robert C. Groth, M.D., Inc., P.S.*, 99 Wn. 2d 438, 449, 663 P.2d 113 (1983).

In this case, Keck submitted expert medical testimony on both issues. Dr. Li testified that Chad and Patrick Collins failed to comply with the standard of care, and that their failures caused injury to Keck. *See* Appendix. Nonetheless, the trial court granted summary judgment against Keck, reasoning that the first and second affidavits of Dr. Li did not contain enough detail regarding the doctors' violations of the standard of care, and that the third affidavit was not timely and no continuance should be granted under CR 56(f) to consider it.

With respect to the first two affidavits, the court erred by imposing a standard of sufficiency for purposes of summary judgment proceedings that exceeds the standard required for expert testimony to be admissible under ER 704-705 or support a verdict at trial. Because the first two affidavits should be deemed sufficient to withstand summary judgment, this error warrants reversal.

In addition, with respect to the third affidavit—about which there has been no complaint that it lacks sufficient detail—the trial court erred in striking it from the record and denying a brief continuance pursuant to CR 56(f) under the circumstances of this case. Thus, even if the first two affidavits are not deemed sufficient to withstand summary judgment, the trial court’s partial summary judgment order should still be reversed.

- 1. The trial court improperly required a greater degree of specificity of Dr. Li’s first and second affidavits in connection with summary judgment proceedings than is required for admissibility or to support a verdict at trial.**

In response to a motion for summary judgment “an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or otherwise ... must set forth specific facts showing that there is a genuine issue for trial.” CR 56(e) (ellipses added). “[A]ffidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify as to the matters stated therein.” *Id.* (brackets added). The first and second affidavits of Dr. Li satisfy these requirements.

Dr. Li is eminently qualified as a specialist in the surgical treatment of sleep apnea, founder of the Sleep Apnea Surgery Center, member of the faculty at Stanford Hospital, and the expert to whom at

least one of the defendants (Chad Collins) turned in connection with the defense of this case. Dr. Li reviewed Keck's medical records, and concluded that Chad and Patrick Collins had violated the standard of care by failing to adequately respond to the infection and non-union of Keck's jaw bones, and that they had thereby caused Keck to suffer injury. *See* Appendix. This testimony would be admissible at trial, and it would be sufficient to support a verdict in Keck's favor. *See* ER 704 (providing "[t]estimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact"); ER 705 (providing "[t]he expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise"); *Group Health Co-op. of Puget Sound, Inc. v. State Dep't of Revenue*, 106 Wn. 2d 391, 397-401, 722 P.2d 787 (1986) (finding expert testimony admissible under ER 704 and 705, and upholding verdict based thereon); *Davis v. Baugh Indus. Contractors, Inc.*, 59 Wn. 2d 413, 420-21, 150 P.3d 545 (2007) (holding conclusory portions of expert declaration admissible under ER 704 and that trial court erred in striking them on summary judgment).

However, in reliance on the Court of Appeals decision in *Guile v. Ballard Comm. Hosp.*, 70 Wn. App. 18, 851 P.2d 689, *rev. denied sub*

nom. Guile v. Crealock, 122 Wn.2d 1010 (1993), the trial court below ruled that Dr. Li's opinions were not sufficiently specific to withstand summary judgment. CP 102. In *Guile*, Division I of the Court held that an expert affidavit concluding that a defendant-health care provider employed faulty surgical technique and thereby violated the standard of care was insufficient in the absence of more elaborate factual detail. *See* 70 Wn. App. at 26 (quoting affidavit). As a decision of a coordinate division of the Court of Appeals, this Court is not required to follow *Guile*, and the decision should not be given stare decisis effect because it is both incorrectly decided and harmful. *See In re Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970) (stating incorrect and harmful test for overruling precedent); *International Ass'n of Fire Fighters v. Everett*, 146 Wn.2d 29, 37 n.9, 42 P.3d 1265 (2002) (stating "[t]he Court of Appeals can overrule a previous decision if it is 'demonstrably incorrect or harmful'"; quotation omitted).

Initially, *Guile* is incorrect to the extent that it relies on an unduly restrictive reading of the language of CR 56(e) referring to "specific facts." *See* 70 Wn. App. at 25 & n.5 (citing & quoting rule). As it appears in CR 56(e), the phrase "specific facts" is modified by the phrase "showing ... a genuine issue for trial." In a medical negligence action, the material facts are, as noted above, breach of the standard of care and

causation. Dr. Li's first two affidavits specifically attest to these facts. CR 56(e) should not be interpreted to require more specificity than the governing law.

In the context of CR 56(e), the phrase "specific facts" is juxtaposed with "such facts as would be admissible in evidence" and it is contrasted with "mere allegations or denials of [a] pleading." CR 56(e) (brackets added). Dr. Li's first two affidavits satisfy the requirements for admissibility and they go beyond the allegations of Keck's complaint because they are attested by a qualified expert who reviewed the relevant records. CR 56(e) should not be construed so as to preclude consideration of such admissible evidence.

Guile's restrictive reading of CR 56(e) is at odds with Supreme Court decisions interpreting the rule as applied to expert testimony. *See, e.g., Young*, 112 Wn.2d at 242 (discussing CR 56(e), not imposing any specificity requirement); *accord Bernal v. American Honda Motor Co.*, 87 Wn.2d 406, 412, 553 P.2d 107 (1976). It also appears to be at odds with the Court of Appeals decision in *Coggle v. Snow*, 56 Wn. App. 499, 511, 784 P.2d 554 (1990), which held expert testimony that a defendant-health care provider breached the standard of care sufficient to withstand summary judgment.

Next, *Guile* is incorrect to the extent it relies on cases that do not support its holding. *Guile* principally relies on *Vant Leven v. Kretzler*, 56 Wn. App. 349, 356, 783 P.2d 611 (1989), and *Ruffer v. St. Frances Cabrini Hosp.*, 56 Wn. App. 625, 628, 784 P.2d 1228, *rev. denied*, 114 Wn.2d 1023 (1990), citing them for the proposition that “[a]ffidavits containing conclusory statements without adequate factual support are insufficient to defeat a motion for summary judgment.” *Guile*, 70 Wn. App. at 25. The cited cases do not preclude conclusion testimony (i.e., “conclusory statements”) by expert witnesses, especially in light of ER 704 and 705. Instead, they merely require “adequate factual support” to withstand summary judgment.

In *Vant Leven*, such factual support was lacking because the medical expert in question admittedly had “incomplete files and records,” and he testified that he could not render a “final opinion” until he received all the relevant records. *See* 56 Wn. App. at 351-52 (quoting expert declaration). Under these circumstances, the expert’s testimony that “it appears more probable than not” that the defendant breached the standard of care was properly deemed to be insufficient. *See id.* at 355-56.

Ruffer does not address the sufficiency of an expert’s affidavit, as the plaintiff in that case did not present any expert testimony whatsoever in support of an informed consent claim against her physician. *See* 56 Wn.

App. at 629. Instead, she merely argued that the undisclosed risk of a medical procedure was material, notwithstanding the undisputed evidence in the record to the contrary. *See id.* Thus, *Vant Leven* and *Ruffer* do not preclude testimony in the form of conclusions by expert witnesses, nor do they support *Guile*'s interpretation of CR 56 that would require more specificity to withstand summary judgment than to be admissible or support a verdict at trial.⁶

Finally, *Guile* is incorrect to the extent that it is contrary to the purpose of summary judgment. The purpose of summary judgment is to avoid a useless trial where there are no genuine issues of material fact to be decided. *See Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 262, 956 P.2d 312 (1998). The purpose is not to avoid trial by eliminating consideration of material facts.

The harm resulting from the *Guile* approach to expert testimony in connection with summary judgment proceedings is that it will prevent admissible evidence that would support a verdict from ever reaching the jury.⁷ *Guile* should not be followed in this case.⁸

⁶ Adequate factual support exists for Dr. Li's opinion based on his review of Keck's medical records. *See* 5B Karl B. Tegland, Wash. Prac., Evidence Law & Practice § 703.6 & n. 3.50 (5th ed. June 1012) (stating "[u]nder this rule [ER 703], it has become fairly common for a physician to express an opinion on a medical issue, based only upon a review of medical records"; collecting cases).

⁷ The Court of Appeals decision in *Hash v. Children's Ortho. Hosp.*, 49 Wn. App. 130, 134-35, 741 P.2d 581 (1987), *aff'd*, 110 Wn. 2d 912, 757 P.2d 507 (1988), is similar to *Guile*, although it involved the sufficiency of the moving party's affidavits rather than the

nonmoving party's affidavits. In *Hash*, the Court of Appeals acknowledged the conflict between its interpretation of the "specific facts" language of CR 56(e) and ER 705. See 49 Wn. App. at 134. The Court of Appeals decision has been superseded by the Supreme Court's decision in the case, which reached the same result in reliance on the light-most-favorable-to-the-nonmoving-party standard for summary judgment rather than the "specific facts" language of CR 56(e). See 110 Wn.2d at 915-16. *Hash* has subsequently been limited to res ipsa loquitur-type cases. See *Coggle v. Snow*, 56 Wn.App. 499, 510, 784 P.2d 554 (1990); *Turner v. Kohler*, 54 Wn. App. 688, 692, n.2, 775 P.2d 474 (1989).

Nonetheless, the Court of Appeals decision in *Hash* illustrates the danger from the *Guile* approach to expert testimony on summary judgment. For example, among other things, the court justified a greater degree of specificity on summary judgment because "[w]e have not yet discovered a means for cross-examining an affidavit[.]" and "without knowledge of the factual basis for the opinion, the court may well be without any means of evaluating the merits of that opinion." See 49 Wn. App. at 134. With due respect to Division I, the Court is not supposed to be performing a function akin to cross examination or otherwise evaluating the merits of a case on summary judgment. See *No Ka Oi Corp. v. Nat'l 60 Minute Tune, Inc.*, 71 Wn. App. 844, 854 n.11, 863 P.2d 79 (1993) (stating "it is axiomatic that on a motion for summary judgment the trial court has no authority to weigh evidence or testimonial credibility, nor may we do so on appeal"), *rev. denied*, 124 Wn.2d 1002 (1994).

⁸ It appears that none of the cases citing *Guile* for its specificity requirement needs to be disapproved. One involves an evident lack of factual basis for expert testimony. See *Tiger Oil Corp. v. Yakima County*, 158 Wn. App. 553, 574, 242 P.3d 936 (2010) (finding expert declaration and appraisal of environmentally contaminated property insufficient based on speculative assumptions). Two cases cite *Guile*, but base the decisions on other grounds. See *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 493, 183 P.3d 283 (2008) (resolving case based on the qualifications of the expert, and citing *Guile* in dicta); *Lane v. Harborview Med. Ctr.*, 154 Wn.2d 279, 227 P.3d 297 (2010) (citing *Guile*, but resolving case on grounds that affiant was not competent to offer testimony). The remaining cases distinguish *Guile*. See *Morton v. McFall*, 128 Wn. App. 245, 254-55, 115 P.3d 1023 (2005) (distinguishing *Guile*, and reversing summary judgment); *Bowers v. Marzano*, 170 Wn. App. 498, 511, 290 P.3d 134 (2012) (distinguishing *Guile*, and reversing summary judgment); *In re Young*, 120 Wn. App. 753, 762, n.18, 86 P.3d 810 (2004) (distinguishing *Guile*).

2. The trial court improperly struck Dr. Li's third affidavit as untimely under the circumstances of this case.

In response to a motion for summary judgment, “[t]he court may permit affidavits to be supplemented or opposed by ... further affidavits.” CR 56(e) (brackets & ellipses added). When affidavits are unavailable within the timelines for a summary judgment motion, the court “may order a continuance to permit affidavits to be obtained ... or may make such other order as is just.” CR 56(f) (ellipses added). The court has a “duty” to give the party opposing summary judgment “a reasonable opportunity to complete the record before ruling on the case.” *Mannington Carpets, Inc. v. Hazelrigg*, 94 Wn. App. 899, 902-03 & n.5, 973 P.2d 1103, *rev. denied*, 139 Wn.2d 1003 (1999); *accord Coggle*, 56 Wn. App. at 507.

The “primary consideration” on a motion for continuance under CR 56(f) is to ensure that justice is done. *Butler v. Joy*, 116 Wn. App. 291, 299-300, 65 P.3d 671 (2003) (quoting *Coggle*, at 508). Justice is served when there is no prejudice to the moving party, and the schedule of the nonmoving party’s counsel would not otherwise allow sufficient time to prepare an adequate response. *Butler*, 116 Wn. App. at 299-300 (involving substitution of counsel); *Coggle*, at 508 (same). Justice is undermined by “draconian application of time limitations” when a party is hobbled by legal representation that has no time to prepare a response to a motion that

cuts off any decision on the true merits of a case.” *Butler*, at 300 (quoting *Coggle*, at 508).

The court may only deny a continuance under CR 56(f) when:

(1) the requesting party does not have a good reason for the delay in obtaining the evidence; (2) the requesting party does not indicate what evidence would be established by further discovery; or (3) the new evidence would not raise a genuine issue of fact.

Butler, at 299. None of the circumstances justifying denial of a continuance are present in this case. *See* CP 75-77. The summary judgment motion in question had been scheduled without coordinating schedules among counsel. Keck’s counsel, a sole practitioner at the time, was out of town, in another trial, when the responsive materials were due. Although he endeavored to respond in a timely fashion, he did not have sufficient time to obtain a detailed affidavit from Keck’s expert. Thus, he had a good reason for not obtaining the more detailed affidavit until he could complete the trial, return to his office and confer with the expert at greater length.⁹ The relatively more detailed affidavit was provided before the summary judgment hearing occurred. To the extent the first two affidavits were insufficient, the third affidavit contained the evidence

⁹ The fact that Dr. Li had previously been identified as an expert did not mean that Keck’s counsel could anticipate what testimony would be required to respond to the summary judgment motion.

necessary to raise a genuine issue of fact for trial, justifying both a continuance and denial of summary judgment.

For their part, Chad and Patrick Collins identified no prejudice, and the trial court found that there was none resulting from a brief continuance of summary judgment proceedings. CP 103. Under these circumstances, the trial court erred in denying the requested continuance and striking the third affidavit of Dr. Li.

C. The trial court erred in denying Keck's motion for reconsideration of partial summary judgment.

Reconsideration is warranted based upon legal error or substantial justice. CR 59(a)(7)-(9). For the same reasons that the trial court erred in granting partial summary judgment, it likewise erred in denying Keck's motion for reconsideration, although Keck acknowledges the more deferential abuse of discretion standard of review that applies to orders on reconsideration.

However, even if the trial court did not err in finding the first two affidavits of Dr. Li insufficient and in striking his third affidavit in connection with summary judgment proceedings, the court nonetheless erred in failing to grant reconsideration on the basis of the third affidavit. In *Schoening v. Grays Harbor Comm. Hosp.*, 40 Wn. App. 331, 333 & n.1, 698 P.2d 593, *rev. denied*, 104 Wn.2d 1008 (1985), the appellate court

reversed summary judgment in favor of a defendant-hospital based upon the affidavit of medical expert filed after summary judgment, in support of a motion for reconsideration. The court should do likewise in this case, and reverse the trial court's grant of partial summary judgment.

D. The trial court erred in granting summary judgment of dismissal of Keck's remaining claim for negligent referral.

Given the nature of the negligent referral claim, the material facts are whether Keck was, in fact, given a referral for follow up care; and, if so, whether the health care provider(s) to whom Keck was referred are qualified to provide such care. *See* CP 259. Both of these material facts were disputed below, but the trial court appears to have credited the testimony of the doctors and disregarded the contrary testimony submitted by Keck. CP 350-53.

For his part, Chad Collins concedes that a referral to Keck's general dentist, Dr. Olsen, would have been inappropriate to deal with the infection and non-union of her jaw bones. CP 137 (¶ 60). He says that he made a referral to the general dentist for the limited purpose of evaluating her bite. CP 133 (¶¶ 22-24). According to Keck, this is false, and she did not understand any such limitation on the referral. CP 268 (¶ 6).

Chad Collins further claims that he referred Keck to her ENT, Dr. Haller, and that the ENT was "unequivocally qualified." CP 132 (¶¶ 20-

21). According to both Keck and the ENT, there was no referral. CP 268 (¶ 5); CP 272 (¶¶ 4-5). According to the ENT, he is unfamiliar with and does not perform the surgical procedures performed on Keck, and, as a result, would not be comfortable providing follow up care. CP 272 (¶ 4).

Chad Collins' claims about the referrals are based on his notations in Keck's medical chart. CP 132-33 (¶¶ 20, 25). He does not say that he spoke with either Keck or her other health care providers about the referrals, or the purpose of the referrals. The chart note states that "Dr. Chad will send a letter to each Dr." CP 141. In context, the reference to "each Dr." is the dentist and the ENT. *See id.* However, no such letters are contained in the record, and Chad Collins does not say that he ever sent them.

On the other hand, Patrick Collins claims that he had no obligation to make any referral for follow up care because he was not involved in Keck's care after the initial surgery. CP 200-01. The extent of his involvement was directly contradicted by Keck. CP 266-68 (¶¶ 2-4). Based on the extent of his involvement, Keck's expert, Dr. Li, opined that the applicable standard of care obligated him to make an appropriate referral for follow up care. CP 261 (¶¶ 9-10). Based on these disputed material facts, summary judgment in favor of Drs. Collins should be reversed.

VII. CONCLUSION

Based on the foregoing argument and authority, Keck respectfully asks the Court to reverse the trial court, vacate the summary judgment orders, and remand this case for trial.

Submitted this 6th day of February, 2013.

AHREND ALBRECHT PLLC

By: Matthew Albrecht
George M. Ahrend WSBA #36801

George M. Ahrend, WSBA #25160
Attorneys for Plaintiffs-Appellants

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 February 6, 2013, I served the document to which this is annexed **via hand delivery**, as follows:

Jeffrey R. Galloway, Stephen M. Lamberson & Courtney A. Garcea
Etter McMahon Lamberson Clary & Oreskovich PC
618 W. Riverside Ave., Ste. 200
Spokane, WA 99201-5048

Brian Rekofke, Leslie Weatherhead & Geana Van Dessel
Witherspoon Kelly Davenport & Toole, P.S.
1100 US Bank Bldg.
422 W. Riverside Ave.
Spokane, WA 99201-0369

Signed at Spokane, Washington on February 6, 2013.


Matthew C. Albrecht, WSBA No. 36801

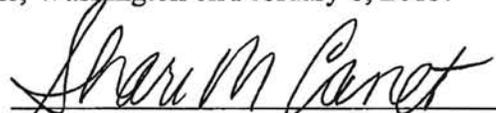
CERTIFICATE OF SERVICE

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

On February 6, 2013, I served the document to which this is annexed **via email**, as follows:

Mark D. Kamitomo at mark@markamgrp.com
Jeffrey R. Galloway at jgalloway@ettermcmahon.com
Brian Rekofke at btr@witherspoonkelley.com
Leslie Weatherhead at lrw@witherspoonkelley.com
Geana Van Dessel at atgmv@witherspoonkelley.com

Signed at Moses Lake, Washington on February 6, 2013.



Shari M. Canet, Paralegal

APPENDIX

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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

DARLA KECK and RON JOSEPH GRAHAM,
Husband and Wife, and DARLA KECK and
RON JOSEPH GRAHAM as parents for the
minor child, KELLEN MITCHELL GRAHAM,
and KELLEN MITCHELL GRAHAM,
individually

Plaintiffs,

vs.

CHAD F. COLLINS, D.M.D., PATRICK C.
COLLINS, D.D.S., COLLINS ORAL &
MAXILLOFACIAL SURGERY, P.S., a
Washington Corporation, and SACRED
HEART MEDICAL CENTER, a Washington
Corporation,

Defendants.

No. 10-2-04960-1

DECLARATION OF KASEY LI,
M.D.

I, KASEY LI, M.D., state as follows:

1. I am a Physician Board Certified in Otolaryngology and Oral Surgery. I practice both
Otolaryngology and Plastic Reconstructive Surgery at Stanford Hospital in Stanford, California and
am on the faculty of the hospital. Additionally, I am the founder of the Sleep Apnea Surgery Center,
also located at Stanford. Among other things, I am a specialist in the diagnosis, surgery and

Declaration of Kasey Li, M.D. - 1

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1 treatment of sleep apnea. Furthermore, I am licensed to practice in the State of Washington and have
2 consulting privileges at Virginia Mason.

3 2. I am familiar with the standard of care in Washington State as it relates to the
4 treatment of sleep apnea and the procedures involved in Mrs. Keck's case. In addition to being
5 involved in another case in Spokane and having discussed that case with an Otolaryngologist at the
6 University of Washington. I lecture in Washington State on many issues which include those
7 involved in this case and as part of that interact with the participants and have discussions that
8 confirm that the standard of care in Washington State is the same as a national standard of care.
9 Additionally, in my position, I interact with oral surgeons from the State of Washington which
10 include former students from Stanford University. Given my knowledge, it is my opinion that the
11 standard of care involved in Mrs. Keck's case in Washington State is a national standard of care.

13 3. I have reviewed medical records from Dr. Chad Collins, Western Mountain Clinic,
14 Dr. Higuchi, Deaconess Medical Center, Dr. Read, Dr. Ramien, St Patrick's Hospital, Sacred Heart
15 Hospital, imaging photos and disks, and medical records from Cosmetic Surgical Arts Center and Dr.
16 George M. Olsen, D.D.S. As part of my review, I looked at the procedures performed by Dr. Chad
17 Collins as well as the problems experienced by the Plaintiff Darla Keck. In doing so, I have
18 identified standard of care violations that resulted in infection and in non-union of Ms. Keck's jaw.
19 This, in turn, has resulted in a prolonged course of recovery with numerous additional procedures to
20 repair the ongoing problems which I understand have still not resolved.
21

23 4. According to the medical records, on November 26, 2007, Darla Keck was seen by
24 Dr. Chad Collins to address sleep apnea which was moderate to severe with a sleep score of 20.
25 From the records, it appears that Mrs. Keck was intolerant of CPAP.
26

27
28 *Declaration of Casey Li, M.D. - 2*

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5. Dr. Collins performed multiple operations without really addressing the problem of non-union and infection within the standard of care.

6. With regards to referring Mrs. Keck for follow up care, the records establish that Dr. Chad Collins was sending Mrs. Keck to a general dentist as opposed to an oral surgeon or even a plastic surgeon or Ear, Nose and Throat doctor. Again, this did not meet with the standard of care as the general dentist would not have had sufficient training or knowledge to deal with Ms. Keck's non-union and the developing infection/osteomyelitis.

7. The standard of care violations as outlined herein were the proximate cause of Mrs. Keck's injuries and/or ongoing problems. The opinions I express in this declaration are intended to be rendered to a reasonable degree of medical probability or certainty or on a more probable than not basis both as it relates to standard of care as well as causation and damages. To the extent it is raised by the Defendants, I am familiar with the standard of care required in the State of Washington for Oral Maxillofacial Surgery such as Dr. Chad Collins acting in the same or similar circumstances related to the provision of care provided to Ms. Keck.

Signed in East Palo Alto, California on March 14 2012.


KASEY LI, M.D.

Declaration of Kasey Li, M.D. - 3

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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

DARLA KECK and RON JOSEPH GRAHAM,
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RON JOSEPH GRAHAM as parents for the
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and KELLEN MITCHELL GRAHAM,
individually

Plaintiffs,

vs.

CHAD P. COLLINS, D.M.D., PATRICK C.
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No. 10-2-04960-1

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Affidavit of Kasey Li, M.D. - 1

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28 *Affidavit of Kasey Li, M.D. - 2*

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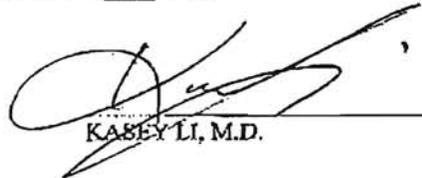
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5. The surgeons performed multiple operations without really addressing the problem of non-union and infection within the standard of care.

6. With regards to referring Ms. Keck for follow up care, the records establish that the surgeons were sending Ms. Keck to a general dentist as opposed to an oral surgeon or even a plastic surgeon or an Ear, Nose and Throat doctor. Again, this did not meet with the standard of care as the general dentist would not have had sufficient training or knowledge to deal with Ms. Keck's non-union and the developing infection/osteomyelitis.

7. The standard of care violations as outlined herein were the proximate cause of Ms. Keck's injuries and/or ongoing problems. The opinions I express in this declaration are intended to be rendered to a reasonable degree of medical probability or certainty or on a more probable than not basis both as it relates to standard of care as well as causation and damages. To the extent it is raised by the Defendants, I am familiar with the standard of care required in the State of Washington for Oral Maxillofacial Surgery such as the surgeons actions in the same or similar circumstances related to the provision of care provided to Ms. Keck.

Signed in East Palo Alto, California on March 19 2012.


KASEY LI, M.D.

SUBSCRIBED AND SWORN to before me this 19 day of March 2012.




NOTARY PUBLIC in and for California
Residing at San Jose, CA
My Commission Expires: Dec. 2, 2015
SUSAN D. POLITO

Affidavit of Kasey Li, M.D. - 3

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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

DARLA KECK and RON JOSEPH GRAHAM,
Husband and Wife, and DARLA KECK and
RON JOSEPH GRAHAM as parents for the
minor child, KELLEN MITCHELL GRAHAM,
and KELLEN MITCHELL GRAHAM,
individually

Plaintiffs,

vs.

CHAD P. COLLINS, D.M.D., PATRICK C.
COLLINS, D.D.S., COLLINS ORAL &
MAXILLOFACIAL SURGERY, P.S., a
Washington Corporation, and SACRED
HEART MEDICAL CENTER, a Washington
Corporation,

Defendants.

No. 10-2-04960-1

**SUPPLEMENTAL AFFIDAVIT OF
KASEY LI, M.D.**

I, KASEY LI, M.D., state as follows:

1. I am a Physician Board Certified in Otolaryngology and Oral Surgery, am competent
to testify as to the matters herein, and have personal knowledge of the same.

2. I make this affidavit as a supplement to the one I signed on March 19, 2012 in the
above entitled case.

Affidavit of Kasey Li, M.D. - 1

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1
2 3. It is my understanding that Dr. Patrick Collins is contending that I have not provided
3 specifics as to the standard of care violations that resulted in the infection and non-union of Ms.
4 Keck's jaw. It is my belief that to the contrary, I do so by stating that the multiple operations failed
5 to address the problem of the non-union infection as stated in paragraph 5. Nonetheless, to the extent
6 it is necessary, I will add the following.

7
8 4. With respect to the surgery which occurred on November 26, 2007 at Sacred Heart
9 Medical Center, Ms. Keck underwent a LeForte I osteotomy, Bilateral Sagittal Split Osteotomies,
10 and Genioglossus Insertion Advancement. On December 6, 2007 at a follow up appointment with
11 Defendants, the records demonstrate exudate coming from the anterior incision and chin pain with
12 total numbness of the chin yet, the records do not demonstrate that Defendants made any attempt to
13 evaluate the problems.

14
15 5. Thereafter, the records indicate that Dr. Collins removed the arch bar supporting the
16 hardware that he had placed in Ms. Keck's jaw and apparently was aware that Ms. Keck was being
17 followed by Dr. George Olson, who is a dentist in Missoula, Montana. According to a January 22,
18 2008 office note authored by Defendants, they received a call from Dr. Olson about concerns
19 regarding Ms. Keck having pain and swelling on the left side of her jaw, including some relapse
20 noted on Ms. Keck's bite. Rather than referring Ms. Keck to an Otolaryngologist or Oral Surgeon,
21 Defendants' note indicated they would follow on a limited basis due to the 250 mile proximity
22 between Missoula and Spokane.

23
24 6. On January 24, 2008, Ms. Keck was seen by Defendants who noted she had a bad bite
25 and infection with loose hardware and malocclusion. The records indicate that Ms. Keck was on her
26

27
28 *Affidavit of Kasey Li, M.D. - 2*

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1 third round of antibiotics for the left side which was still swollen along with her tongue. Because of
2 the loose hardware, Defendants scheduled Ms. Keck for another surgery.

3 7. On January 24, 2008, Ms. Keck underwent another surgery with Defendants at Sacred
4 Heart Medical Center with an admit diagnosis of non-union mandible fracture and an infection of the
5 mandible. The operation confirmed that Ms. Keck's hardware was loose with infection and
6 malocclusion. According to the records, the hardware was removed but not replaced. This allowed
7 for further instability as there was nothing to support the jaw.

8 8. The records following this surgery reflect again that Ms. Keck was continuing to have
9 problem with drainage and pain.

10 9. On March 18, 2008, another operation was performed at Sacred Heart Medical Center
11 by Drs. Collins and Collins for Osteomyelitis (bone infection) of the left mandible and bilateral non-
12 union of the mandibular osteotomy. In short, the operation revealed that Ms. Keck was not healing
13 from the first surgeries performed which were known to Defendants.

14 10. Again following this surgery, it is apparent from Defendants' notes that they knew
15 Ms. Keck was continuing to have problems and were being followed by a general dentist, however,
16 there was no attempt made by Defendants to further evaluate Ms. Keck or have Ms. Keck followed
17 by an Oral Surgeon or Ear, Nose and Throat Specialist who would be properly trained to address the
18 non-union and subsequent infection.

19 11. On June 11, 2008, Ms. Keck again saw Defendants with complaints of severe pain.
20 According to the records, Defendants noted slight mobility of the maxilla with finger manipulation
21 and loose screws which resulted in the removal of the loose hardware.

22 12. On July 18, 2008, Defendants again performed surgery on Ms. Keck at Deaconess
23 Medical Center for non-union of the maxilla, non-union of the genioglossus insertion strut (chin),
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28 *Affidavit of Kasey Li, M.D. - 3*

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1 severe periodontal disease – tooth number 15, and malocclusion. This resulted in ORIF non-union
2 LeForte I, ORIF non-union chin, harvesting of the right iliac crest bone graft and basic extraction of
3 tooth number 15.

4 13. Thereafter, Ms. Keck continued to have a problem with non-union and infection
5 which resulted in her undergoing procedures in Missoula, Montana. The oral surgeon, Dr. Clark
6 Taylor, performed procedures to remove the old hardware and replace the current hardware to the
7 best of his ability.

8 14. Unfortunately, the records demonstrate that despite Dr. Taylor's best efforts, Ms.
9 Keck continued to have problems indicative of the surgical non-union negligently followed by
10 Defendants. These problems include fatigue, acrid taste in her mouth, pain, swelling, nerve
11 sensations in her eye and numbness in her cheek and chin.

12 15. The multiple operations as outlined herein were done without Defendants addressing
13 the problem of non-union and infection. Given her problems immediately following the first
14 surgery, Ms. Keck should either have been followed closely by Defendants or Defendants should
15 have ensured that Ms. Keck was followed by an Otolaryngologist, plastic surgeon or an oral surgeon
16 in Missoula with regard to the infection and determining why Ms. Keck's non-union was occurring.
17 Instead, Ms. Keck was followed by general dentists who did not have sufficient training or
18 knowledge to deal with Ms. Keck's non-union and the developing infection/osteomyelitis.

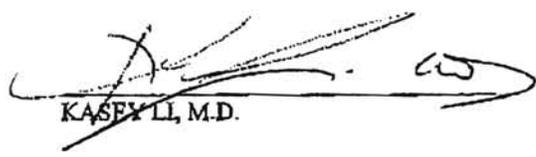
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28 16. The standard of care violations I have identified herein were the proximate cause of
Ms. Keck's injuries and/or ongoing problems. Had Ms. Keck been appropriately followed initially
following the first surgery, it is my opinion that she would not have experienced the non-union and
infection (osteomyelitis) that developed in her jaw. This, in turn, would have led to the appropriate
healing of her jaw in the first instance and would have avoided the subsequent problems she

Affidavit of Kasey Li, M.D. - 4

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1 experienced. The events I have outlined in this affidavit are some but not all of the problems that are
 2 evident in Ms. Keck's records regarding the negligent care and treatment rendered to her by
 3 Defendants. To the extent it is not clear, the opinions I have expressed in this affidavit are intended
 4 to be written to a reasonable degree of medical probability or certainty, or on a more probable than
 5 not basis as it relates to standard of care as well as causation and damages. Again, to the extent it is
 6 raised by Defendants, I am familiar with the standard of care required in the State of Washington for
 7 Oral Maxillofacial Surgery, such as the surgeons' actions in the same or similar circumstances as
 8 related to the provision of care provided to Ms. Keck. My familiarity is outlined in my first affidavit
 9 which I incorporate by reference therein.
 10

11 Signed in East Palo Alto, California on March 29, 2012.

12
 13 
 14 KASEY LI, M.D.

15
16 SUBSCRIBED AND SWORN to before me this 29 day of March 2012.

17
 18 NOTARY PUBLIC in and for California
 19 Residing at Santa Clara County
 20 My Commission Expires: Dec. 2, 2015

CALIFORNIA JURAT WITH AFFIANT STATEMENT

- See Attached Document (Notary to cross out lines 1-6 below)
- See Statement Below (Lines 1-5 to be completed only by document signer[s], not Notary)

 Signature of Document Signer No. 1

 Signature of Document Signer No. 2 (if any)

 Signature of Document Signer No. 3 (if any)

State of California

County of Santa Clara

Subscribed and sworn to (or affirmed) before me on this 29th day of March, 2012, by

(1) Rosay Li, M.D.
Name of Signer

proved to me on the basis of satisfactory evidence to be the person who appeared before me (.) (,)

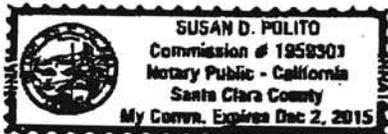
(and

(2) _____
Name of Signer

proved to me on the basis of satisfactory evidence to be the person who appeared before me.)

Signature Susan D. Polito
Signature of Notary Public

Susan D. Polito
My Commission Expires Dec 2, 2015



Place Notary Seal Above

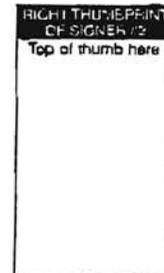
OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Further Description of Any Attached Document

Title or Type of Document: Supplemental Affidavit of Rosay Li, M.D.
 Document Date: March 29, 2012 Number of Pages: 5

Signer(s) Other Than Named Above: _____



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1 qualifications and/or my ability to testify with respect to the standard of care in Washington are
2 questioned or challenged, I incorporate by reference my Supplemental Affidavit dated March 29,
3 2012 which is attached as *Exhibit 1*.

4 3. It continues to be my opinion that Defendants were negligent in failing to refer
5 Mrs. Keck to an oral surgeon, plastic surgeon or an Ear, Nose and Throat (ENT) doctor as
6 opposed to a general dentist such as Dr. Olsen who would not have sufficient training or
7 knowledge to deal with Mrs. Keck's non-union and the developing infection/osteomyelitis.

8 4. It is my understanding that the Defendants now claim that Darla Keck was
9 referred to Dr. Jeffrey R. Haller, MD and thus, that referral was sufficient and summary
10 judgment should be granted.

11 5. Defendants' contention is incorrect. The medical records for Dr. Haller following
12 Darla Keck's first surgery dated December 8, 2007 indicate that Dr. Haller saw Mrs. Keck at St.
13 Patrick's Hospital when she went to the emergency room for ongoing problems related to her
14 jaw. According to the records, the emergency room physician Dr. Kremkau called Dr. Haller for
15 a consultation and not that Dr. Chad Collins referred Mrs. Keck to Dr. Haller. Thus, Defendants
16 are incorrect that Dr. Collins referred Mrs. Keck to Dr. Haller. Dr. Haller's Affidavit dated June
17 14, 2012 confirms that the referral did not occur.

18 6. Moreover, a referral to an ENT doctor as I have stated would require a referral to
19 someone that is familiar with the type of oral surgical procedures that Drs. Collins and Collins
20 performed on Mrs. Keck. In this regard, it is my understanding that Mrs. Keck was told by Dr.
21 Haller that he was uncomfortable with treating her as he did not perform maxillomandibular jaw
22 advancement (MMA) surgery and thus was not comfortable with dealing with Mrs. Keck's non-
23 union and ongoing infection. The records for December 8, 2007 authored by Dr. Haller support
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28 *Affidavit of Kasey Li, MD - 2*

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this insofar as he contacted Dr. Collins, opened the incision, removed an abscess and packed the regions in accordance with Dr. Collins's direction as opposed to providing treatment independently. Following this visit, it is my understanding that Dr. Haller referred Mrs. Keck back to Dr. Collins. Since Dr. Haller was not familiar with MMA procedures, he was not appropriate to handle Mrs. Keck's oral surgical problems. To the extent there is any question about the records, Dr. Haller's Affidavit dated June 14, 2012 confirms that he did not perform the type of oral surgical procedures that Mrs. Keck underwent and further that he did not feel comfortable or appropriate to handle Mrs. Keck's continuing problems and thus referred her back to Dr. Collins.

7. It is my further understanding that Dr. Patrick Collins is moving to be dismissed from the case arguing that after the first surgery on November 26, 2007 he was not responsible for nor was he involved in the management of the postoperative care of Mrs. Keck. Further, it is my understanding that Dr. Collins maintains that his role did not place him in a position to make a referral to another health care provider for Mrs. Keck.

8. Contrary to Dr. Collins's statement, it is my understanding from Mrs. Keck that Dr. Collins was involved in Mrs. Keck's care at the first postoperative visit. At that time, Dr. Collins evaluated an x-ray taken of Mrs. Keck's surgical area and failed to recognize a fracture in Mrs. Keck's chin, as well as failing to recognize the significance of an infection in Mrs. Keck's chin which presented with green pus/exudate oozing out of her chin. Finally, it is again my understanding from Mrs. Keck that Dr. Patrick Collins followed Mrs. Keck in the hospital after her last surgery and was responsible for her ongoing care at that time. Mrs. Keck's Affidavit dated June 13, 2012 confirms the same.

9. Consequently, contrary to Dr. Patrick Collins' statement, the information I am

Affidavit of Kasey Li, MD - 3

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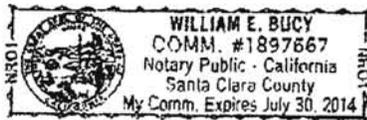
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aware of establishes that Dr. Collins was responsible for and involved in the management of the postoperative care of Mrs. Keck during the first postop visit as well as the hospitalization following her last surgery. In either circumstance, his role placed him in a position to make a referral to an appropriate health care provider as I have outlined and his failure to do so was a violation of the standard of care.

10. To the extent it is not clear, it was and continues to be my opinion that Drs. Chad and Patrick Collins were negligent in failing to refer Mrs. Keck to an oral surgeon, plastic surgeon or ENT who was competent to address her non-union and ongoing infection. Referring Mrs. Keck to a general dentist such as Dr. Olsen was negligent in that Dr. Olsen or other general dentists would not have sufficient training or knowledge to deal with Mrs. Keck's problems following her first surgery. Finally, it is my opinion that Dr. Patrick Collins continued to remain involved in the care and management of Mrs. Keck following her first surgery and thus was negligent in failing to provide her with an appropriate referral as stated herein. The opinions I have rendered in this Affidavit are intended to be rendered to a reasonable degree of medical probability or certainty or on a more probable than not basis.

Kasey Li
KASEY LI, MD

SUBSCRIBED AND SWORN to before me this 18 day of June, 2012.



William E. Bucy
NOTARY PUBLIC in and for California
Residing at Yale Ave, GA
My Commission Expires: July 30, 2014

Affidavit of Kasey Li, MD - 4

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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

DARLA KECK and RON JOSEPH GRAHAM,
Husband and Wife, and DARLA KECK and
RON JOSEPH GRAHAM as parents for the
minor child, KELLEN MITCHELL GRAHAM,
and KELLEN MITCHELL GRAHAM,
individually

Plaintiffs,

vs.

CHAD P. COLLINS, D.M.D., PATRICK C.
COLLINS, D.D.S., COLLINS ORAL &
MAXILLOFACIAL SURGERY, P.S., a
Washington Corporation, and SACRED
HEART MEDICAL CENTER, a Washington
Corporation,

Defendants.

No. 10-2-04960-1

AFFIDAVIT OF KASEY LI, M.D.

I, KASEY LI, M.D., state as follows:

1. I am Physician Board Certified in Otolaryngology and Oral Surgery. I practice both
Otolaryngology and Plastic Reconstructive Surgery at Stanford Hospital in Stanford, California and
am on the faculty of the hospital. Additionally, I am the founder of the Sleep Apnea Surgery Center,
also located at Stanford. Among other things, I am a specialist in the diagnosis, surgery and

Affidavit of Kasey Li, M.D. - 1

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1 treatment of sleep apnea. Furthermore, I am licensed to practice in the State of Washington and have
2 consulting privileges at Virginia Mason.

3 2. I am familiar with the standard of care in Washington State as it relates to the
4 treatment of sleep apnea and the procedures involved in Ms. Keck's case. In addition to being
5 involved in another case in Spokane and having discussed that case with an Otolaryngologist at the
6 University of Washington, I lecture in Washington State on many issues which include those
7 involved in this case and, as part of that, interact with the participants and have discussions that
8 confirm that the standard of care in Washington State is the same as a national standard of care.
9 Additionally in my position, I interact with oral surgeons from the State of Washington which
10 include former students from Stanford University. Given my knowledge, it is my opinion that the
11 standard of care involved in Ms. Keck's case in Washington State is a national standard of care.

13 3. I have reviewed medical records from Drs. Chad and Patrick Collins, Western
14 Mountain Clinic, Dr. Higuchi, Deaconess Medical Center, Dr. Read, Dr. Ramien, St Patrick's
15 Hospital, Sacred Heart Hospital, imaging photos and disks, and medical records from Cosmetic
16 Surgical Arts Center and Dr. George M. Olsen, D.D.S. As part of my review, I looked at the
17 procedures performed by Drs. Chad and Patrick Collins (the surgeons) as well as the problems
18 experienced by the Plaintiff Darla Keck. In doing so, I have identified standard of care violations
19 that resulted in infection and in non-union of Ms. Keck's jaw. This, in turn, has resulted in a
20 prolonged course of recovery with numerous additional procedures to repair the ongoing problems
21 which I understand have still not resolved.

24 4. According to the medical records, on November 26, 2007, Darla Keck was seen by
25 the surgeons to address sleep apnea which was moderate to severe with a sleep score of 20. From the
26 records, it appears that Ms. Keck was intolerant of CPAP.

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28 *Affidavit of Kasey Li, M.D. - 3*

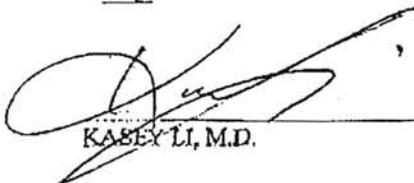
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1 5. The surgeons performed multiple operations without really addressing the problem of
2 non-union and infection within the standard of care.

3 6. With regards to referring Ms. Keck for follow up care, the records establish that the
4 surgeons were sending Ms. Keck to a general dentist as opposed to an oral surgeon or even a plastic
5 surgeon or an Ear, Nose and Throat doctor. Again, this did not meet with the standard of care as the
6 general dentist would not have had sufficient training or knowledge to deal with Ms. Keck's non-
7 union and the developing infection/osteomyelitis.

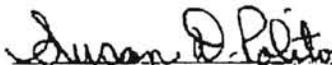
8 7. The standard of care violations as outlined herein were the proximate cause of Ms.
9 Keck's injuries and/or ongoing problems. The opinions I express in this declaration are intended to
10 be rendered to a reasonable degree of medical probability or certainty or on a more probable than not
11 basis both as it relates to standard of care as well as causation and damages. To the extent it is raised
12 by the Defendants, I am familiar with the standard of care required in the State of Washington for
13 Oral Maxillofacial Surgery such as the surgeons actions in the same or similar circumstances related
14 to the provision of care provided to Ms. Keck.
15

16 Signed in East Palo Alto, California on March 19 2012.

17
18 
19
20 KASEY LI, M.D.

21 SUBSCRIBED AND SWORN to before me this 19 day of March 2012.



24 
25 NOTARY PUBLIC in and for California
26 Residing at San Jose, CA
27 My Commission Expires: Dec 2, 2015
28 SUSAN D. POLITO

Affidavit of Kasey Li, M.D. - 3

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