No. 36166-7-III

97768-2

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

KATHIE AND JOE BOYER, individual and the marital community composed thereof,

Petitioners,

v.

KAI MORIMOTO, M.D. individually and PLASTIC SURGERY NORTHWEST, a Washington Corporation,

Respondents.

PETITION FOR REVIEW OF KATHIE AND JOE BOYER

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A. INTRODUCTION

Division III's published opinion creates new technicalities for summary judgment procedure and for medical negligence claims.

First, Division III read a loophole into this Court's decision in *Keck v. Collins*, 184 Wn.2d 358, 57 P.3d 1080 (2015). In *Keck*, this Court extended *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997) to summary judgment proceedings. Despite *Keck*, Division III held that a trial court may skip the *Burnet* analysis for a late-filed declaration, unless the proponent files a motion showing good cause or requesting reconsideration. Op. at 34-35. But in *Jones v. City of Seattle*, 179 Wn.2d 322, 345, 314 P.3d 380 (2013), which Division III did not even cite, this Court held that requiring "'good cause' for the late disclosure" improperly "reversed the presumption of admissibility required under *Burnet*." The Court of Appeals has misconstrued *Burnet* many times, leading this Court to grant review many times to clarify when and how *Burnet* applies.[1]

Second, Division III addressed an increasingly common scenario in medical negligence cases as medicine becomes more and more specialized, and as Washington doctors become more and more reluctant to testify in

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[1] *See, e.g.*, *Keck*, 184 Wn.2d at 362, 368-69; *Jones*, 179 Wn.2d at 326-27, 338-55; *Teter v. Deck*, 174 Wn.2d 207, 218-22, 274 P.3d 336 (2012); *Blair v. TA–Seattle East No. 176*, 171 Wn.2d 342, 344, 349, 254 P.3d 797 (2011); *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 686-89, 132 P.3d 115 (2006).

support of injured parties. The plaintiffs opposed a summary judgment motion with an out-of-state expert's declaration stating that a nationwide standard of care applied. Division III acknowledged that "[o]ne might question if the standard of care in Washington ever differs from the standard of care throughout the nation." Op. at 14. Still, Division III applied a technical reading of RCW 7.70.040 and affirmed summary judgment. Division III faulted the plaintiff's expert for insufficiently explaining his familiarity with the standard of care in Washington. But this Court long ago rejected such a "locality rule" as an unworkable and unfair artifact of a bygone era when doctors practiced alone in isolated communities. *Pederson v. Dumouchel*, 72 Wn.2d 73, 431 P.2d 973 (1967). Review is warranted.

B. IDENTITY OF PETITIONERS

The petitioners are Kathie and Joe Boyer, the appellants below.

C. COURT OF APPEALS DECISION

Division III filed its published opinion in this case on September 10, 2019. The opinion is in the Appendix.

D. ISSUES PRESENTED FOR REVIEW

(1) Does the *Burnet* presumption that late-submitted evidence will be considered always apply to a declaration filed late but before a final order granting summary judgment? Or may a trial court instead skip a *Burnet* analysis and simply disregard the declaration if no party files a motion regarding the declaration?

(2) Does RCW 7.70.040 permit juries in medical negligence

cases to decide that society expects reasonably prudent doctors in Washington state to abide by the nationwide standard of care in a case's particular circumstances? Or must juries receive detailed expert testimony establishing that Washington doctors already follow the national standard?

E. STATEMENT OF THE CASE

(1) Factual History

Dr. Kai Morimoto recommended three surgeries to Kathie Boyer after a consultation. CP 115, 118-19. The three surgeries would take several hours and require Boyer to undergo general anesthesia. And Dr. Morimoto knew that Boyer lived in Montana in a small town over 300 miles away from Dr. Morimoto's clinic in Spokane. CP 59. Still, Dr. Morimoto decided to perform the surgeries on the same day on an outpatient basis.

On the appointed day, the clinic's staff knew Boyer was menstruating and brought tampons for her use. CP 128-131, 170. After Boyer awoke, Boyer went to the bathroom and did not see a string or any other indication of a tampon when she urinated. CP 127. Dr. Morimoto did not inform Boyer that a tampon remained in her body. CP 109. Dr. Morimoto discharged Boyer at 9:30 p.m. CP 77, 109.

Back home in Montana, Boyer suffered from toxic shock syndrome. CP 146, 222. At a regional hospital in Missoula, doctors discovered a tampon deep up against her cervix. CP 122-26. The tampon appeared to have been there for 10 days. CP 146. Boyer required nine surgeries to

address the aftermath, including the amputation of many of her toes.

(2) Procedural History

In this lawsuit that followed, the defendants moved for summary judgment on the medical negligence claims of Boyer and her husband. CP 18-19, 24-25. The Boyers timely submitted a declaration by Dr. John Shamoun in response. CP 106-10, 178-90, 290-303. Dr. Shamoun practiced in the same specialty as Dr. Morimoto; Dr. Shamoun was not licensed to practice medicine in Washington, but he had been licensed in six states, including California. CP 293. Dr. Shamoun was also board-certified, and he published several papers in medical journals. CP 297-300. He had testified as an expert in other cases involving the same surgeries. CP 106-07, 297.

Dr. Shamoun explained that the standard of care in this case "is not unique to the State of Washington and applies on a nationwide basis." CP 107. Dr. Shamoun stated that Dr. Morimoto had breached the standard of care by performing all three surgeries on the same day and discharging Kathie Boyer without further observation. CP 108. Dr. Shamoun further stated that Dr. Morimoto breached the standard of care by leaving the tampon in Boyer and not telling her about it. CP 109.

After the motion hearing, the trial court filed a memorandum decision criticizing the "foundation" for Dr. Shamoun's opinion that a national standard applied in Washington. CP 325. The court's memorandum

directed the defendants "to prepare an order granting summary judgment," and both parties to "submit a memorandum setting out their objections and providing facts and law supporting the objection." CP 326. The court set a presentment hearing "without oral argument." *Id.*

The Boyers then filed a supplemental declaration by Dr. Shamoun. CP 327-28. He detailed how he knew that surgeons in Washington follow the national standard of care. *Id.* The Boyers also filed a four-page memorandum objecting to the defendants' proposed order and asking the court to consider the supplemental declaration. CP 336-40. The Boyers argued that the trial court's memorandum decision was not a final order and thus the supplemental declaration was properly before the court. CP 338. They argued also that Dr. Shamoun's declarations each showed the standard of care in Washington was the national standard. CP 338-39.

A month after the Boyers filed the supplemental declaration, the trial court entered a final order granting summary judgment to the defendants. CP 353-55. Despite the Boyers' request, CP 336-37, the order did not list the supplemental declaration of Dr. Shamoun among the filings considered by the trial court. CP 353-54. The order did not cite *Burnet* or explain the grounds for refusing to consider the supplemental declaration. CP 353-55.

On appeal, Division III affirmed the dismissal of the Boyers' claims in a lengthy published opinion. Op. at 1-2, 36. Notwithstanding *Burnet*,

Division III held that a trial court may disregard a late-filed declaration opposing summary judgment if the declaration's proponent does not "file a motion for permission to file late" on a showing of "good cause for extension of the time for filing," or does not "file a motion for reconsideration after a ruling." Op. at 34. The court relied principally on two of its older opinions preceding *Burnet*; on *Keck v. Collins*, 181 Wn. App. 67, 325 P.3d 306 (2014), *aff'd on other grounds by* 184 Wn.2d 358, 357 P.3d 1080 (2015); and on CR 6(b). Op. at 23-35.

F. ARGUMENT WHY REVIEW SHOULD BE GRANTED

(1) This Court Should Review Division III's Ruling that Trial Courts Have No Duty to Apply *Burnet* Absent a Motion Showing Good Cause or Requesting Reconsideration

"[I]t has been clear since at least 2006 that trial courts must consider the *Burnet* factors before excluding witnesses." *Jones*, 179 Wn.2d at 340. *Every reason* that Division III gave for its new procedural rule conflicts with this Court's decisions and cries out for this Court's review.

(a) Division III's Opinion Conflicts with the *Burnet* Analysis as It Has Been Expanded in *Jones* and *Keck*

"*Burnet* and its progeny" have established a "presumption" that late-submitted evidence "will be admitted." *Jones*, 179 Wn.2d at 343. To depart from this presumption, *Burnet* requires a trial court to make three findings: a "lesser sanction" would be inadequate; the violation was "willful or deliberate;" and the violation "substantially prejudiced" the other party.

Burnet, 131 Wn.2d at 494 (quotations omitted). This *Burnet* analysis is mandatory before a trial court levies any "severe sanction," including "the exclusion of testimony." *Mayer v. Sto Indus., Inc.*, 156 Wn.2d at 690. Although *Burnet* first addressed discovery violations, *Keck* made clear that it applies also to "untimely evidence submitted in response to a summary judgment motion." *Keck*, 184 Wn.2d at 369.

Division III's decision conflicts with this Court's extension of *Burnet* in *Keck*. Division III perceived a loophole in *Keck*, believing that this Court had "found good cause for the late filing." Op. at 33. In this mistaken belief, Division III found support for its ruling that a late-filed declaration must be accompanied by a motion "complying with some test." Op. at 34. But *Keck* mentioned only briefly, in the statement of the case, that the plaintiffs had filed a motion asking the court to consider the late-filed declaration. 184 Wn.2d at 366. This Court's legal reasoning said nothing about that ancillary procedural fact. *See id.* at 368-69.

Instead, this Court concluded that the *Burnet* analysis was required because of the severe consequences of the trial court's action. The trial court disregarded a supplemental declaration opposing summary judgment. Then the trial court summarily dismissed the plaintiffs' claim because "the remaining affidavits were insufficient to support the contention that the [defendant doctors'] actions fell below the applicable standard of care." As

this Court explained, "[e]ssentially, the court dismissed the plaintiffs' claim because they filed their expert's affidavit late." *Id. Keck*, 184 Wn.2d at 369. This Court found an abuse of discretion, but not because the plaintiff had shown good cause for filing late, and not because this Court independently weighed the *Burnet* factors in the plaintiffs' favor. *Id.* Rather, "the trial court abused its discretion by not considering the *Burnet* factors." *Id.*

If *Keck* was not clear enough on that point, *Jones* conflicts even more plainly with Division III's new procedural rule. In *Jones*, the trial court applied local rules that "create[d] a presumption that late-disclosed witnesses will be excluded absent 'good cause.'" *Jones*, 179 Wn.2d at 343 (citing KCLR 4(j), 26(k)(4)). Like those local rules, Division III's ruling permits a trial court to skip a *Burnet* analysis if a late-filed declaration's proponent does not first bring forward a motion showing good cause. Op. at 34. In *Jones*, however, this Court criticized such rules as "inconsistent with the civil rules" and "subordinate to ... *Burnet*." *Id.* at 344. As in *Jones*, here "[t]he appellate court's ruling to the contrary is incorrect." *Id.*

Division III's ruling stemmed from a fundamental misunderstanding of *Burnet*. Division III conceived of *Burnet* as defining when a trial court is allowed to *consider* late-submitted evidence, op. at 34-35, instead of defining when a trial court is allowed to *disregard* it. If Division III's understanding of *Burnet* was correct, its ruling would make more sense. But

Division III has the rule exactly *backward*. It "reversed the presumption of admissibility required under *Burnet*," as in *Jones*, 179 Wn.2d at 345.

Division III's opinion conflicts with this Court's many decisions on the *Burnet* factors.[2] Review is warranted in order for this Court to reaffirm the principles it established in *Burnet/Keck/Jones*. RAP 13.4(b)(1).

(b) Division III's Reliance on CR 6(b) Conflicts with this Court's Decisions on the Consequences of Not Meeting a Deadline Under the Civil Rules

Division III construed CR 6(b) as supporting its ruling that a party must "file a motion for permission to file late" in order for a late-submitted declaration to go before the trial court for a *Burnet* analysis. Op. at 34. But CR 6(b) merely provides the procedure for requesting extensions. It might bear on whether a declaration was filed timely or untimely. But CR 6(b) says nothing about the discretion to sanction for untimeliness.

Division III's construction of CR 6(b) clashes with this Court's decisions on other deadlines in the Civil Rules. In *Loveless v. Yantis*, 82 Wn.2d 754, 513 P.2d 1023 (1973), this Court considered a motion served

[2] Division III faulted the Boyers for not briefing "why the *Burnet* factors apply in [their] favor." Op. at 35. But the Boyers would have been wrong to make such an argument. When an appellate court reviews a trial court's compliance with *Burnet*, the appellate court may not "consider the facts in the first instance as a substitute for the trial court findings that our precedent requires." *Blair*, 171 Wn.2d at 351. And this Court generally does not even remand for the trial court to apply the *Burnet* factors. *Teter*, 174 Wn.2d at 220-21. When reversing a summary judgment order that resulted from a *Burnet* violation, this Court simply remands for a new trial. *Id.*

fewer than five days before the hearing in violation of CR 6(d). Like here, this Court's opinion disclosed no motion for leave to file under CR 6(b). But this Court had little difficulty concluding that CR 6(d)'s deadline "is not jurisdictional." *Loveless*, 82 Wn.2d at 759. In *Oltman v. Holland America Line USA, Inc.*, 163 Wn.2d 236, 243-44, 178 P.3d 981, *cert. denied,* 554 U.S. 941 (2008), this Court considered an affirmative defense pleaded in an answer after the 20-day deadline set in CR 12(a)(1). Like the Boyers, the defendant appeared not to have filed a motion under CR 6(b). Still, this Court held that the affirmative defense was not waived. *Oltman*, 163 Wn.2d at 246-47. These decisions deepen the conflict between this Court's opinions and Division III's published opinion.

(c) Division III's Ruling Conflicts with this Court's Decisions on the Significance of a Trial Court's Memorandum Opinion

Perhaps Division III's new rule would be partially correct if a party submitted evidence after a final judgment or an order granting summary judgment. In that case, CR 59 would seem to require a motion for reconsideration, as Division III contemplated.

But "[a] memorandum opinion is not an order." *Nicacio v. Yakima Chief Ranches, Inc.*, 63 Wn.2d 945, 948, 389 P.2d 888 (1964). Rather, a memorandum decision is "an expression of the court's intention relative to the issue." *Id.* Until entry of a final order, "[t]he issue is not resolved." *Id.*

This distinction has been—and remains—the rule of this Court.[3]

The trial court's memorandum directed the defendants "to prepare an order granting summary judgment." CP 326. Thus, the memorandum was merely "the then opinion of the court," and it functioned "only as a direction to counsel in preparation of a final order." *Chandler v. Doran Co.*, 44 Wn.2d 396, 400, 267 P.2d 907 (1954). So the Boyers did not seek "reconsideration" or to "reopen the case." Op. at 32. Contrary to Division III's ruling, the case remained open. A motion for reconsideration of a trial court's memorandum decision was premature. *In re Marriage of Tahat*, 182 Wn. App. 655, 673, 334 P.3d 1131 (2014).

In any event, the Boyers filed a memorandum objecting to the defendants' proposed order and urging the court to consider the supplemental declaration. CP 353-55. It was the height of procedural formalism for Division III to insist on a formal motion for reconsideration.

(d) This Court's Guidance Is Necessary to Address Other Opinions Inconsistent with *Burnet* and to Balance the Competing Objectives of the Civil Rules

Review is warranted also because this case presents a recurring issue and thus "an issue of substantial public interest." RAP 13.4(b)(4). Several Court of Appeals decisions before *Keck* reached a conclusion similar to

[3] *See, e.g.*, *State v. Hawkins*, 181 Wn.2d 170, 184, 332 P.3d 408 (2014) (citing and applying *Nicacio*); *Dep't of Labor & Indus. v. City of Kennewick*, 99 Wn.2d 225, 229-30, 661 P.2d 133 (1983) (same).

Division III's, although Division III did not cite these cases.[4] The bench and bar would benefit from knowing whether these cases remain good law.

This issue "should be determined by the Supreme Court." RAP 13.4(b). This Court has construed the Civil Rules to "eliminate or at least to minimize technical miscarriages of justice," *Curtis Lumber Co. v. Sortor*, 83 Wn.2d 764, 767, 522 P.2d 822, 823 (1974), and "to make trials fairer and improve their truth-finding function." *In re Det. of West*, 171 Wn.2d 383, 404, 256 P.3d 302 (2011). Division III acknowledged that its procedural ruling might be "overly technical." Op. at 34. But in Division III's view, this formalism was necessary to "enforce rules in order to afford an orderly presentation of evidence and argument before the superior court." Op. at 35. Division III failed to realize that the rules may be enforced with a lesser sanction, such as fining the party's attorney, without applying the *Burnet* factors. *Mayer*, 156 Wn.2d at 690. Instead, the court effectively dismissed the Boyers' case. Division III acknowledged but ultimately rejected the countervailing interests "to further justice and reach the case's merits." Op. at 35. This Court should grant review to determine whether Division III's balancing was correct. RAP 13.4(b)(4).

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[4] *See, e.g.*, *Colorado Structures, Inc. v. Blue Mountain Plaza, LLC*, 159 Wn. App. 654, 660, 246 P.3d 835 (2011); *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 500, 183 P.3d 283 (2008), *abrogated on other grounds by Frausto v. Yakima HMA, LLC*, 188 Wn.2d 227, 393 P.3d 776 (2017); *Brown v. Peoples Mortgage Co.*, 48 Wn. App. 554, 559-60, 739 P.2d 1188 (1987).

(2) Review of Division III's Locality Rule Is Warranted Because It Upends the Law and Creates a Pointless and Costly Procedural Barrier to Meritorious Medical Negligence Claims

Under RCW 7.70.040(1), an injured patient claiming medical negligence must show the doctor "failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he or she belongs, in the state of Washington, acting in the same or similar circumstances." RCW 7.70.040(1). Division III held that medical experts may not testify simply that a national standard of care applies. Op. at 19. Instead, "the testifying expert must disclose the factual basis on which the expert purports to know the standard of care in Washington." Op. at 22. Division III's opinion clashes with this Court's rejection of the locality rule and with another published decision of the Court of Appeals. RAP 13.4(b)(1-2).

(a) Division III's Resurrection of the Locality Rule Conflicts with this Court's Decisions

Under the locality rule, doctors were held to the standard of care for other practitioners in their locale. *See generally, Douglas v. Bussabarger*, 73 Wn.2d 476, 488-90, 438 P.2d 829 (1968) (surveying the history of the locality rule); *Pederson*, 72 Wn.2d at 76-79 (same). But in *Pederson* and then *Douglas*, this Court sounded the death knell of the locality rule. The old doctrine's core assumption—that "a doctor in a small community did

not have the same opportunities ... to keep abreast of advances in his profession"—had eroded with the advent of medical journals and improved communications. *Pederson*, 72 Wn.2d at 77-78. Medicine had become nationalized, thanks to medical societies and board certifications. *Douglas*, 73 Wn.2d at 490 (citing a research paper reaching this conclusion). Thus, this Court held that "[n]o longer is it proper to limit the definition of the standard of care ... solely to the practice or custom of a particular locality, a similar locality, or a geographic area." *Pederson*, 72 Wn.2d at 79.

Pederson and *Douglas* have never been abrogated or overruled,[5] but Division III has given new life to the locality rule. In light of *Pederson* and *Douglas*, Division III should have recognized that Dr. Shamoun's first declaration was sufficient to defeat summary judgment. Dr. Shamoun explained that the standard of care was a *national standard*. CP 107. He was well qualified to give that opinion. He practiced in the same specialty, had been licensed in six states, was board-certified, published in medical journals, and had testified as an expert in other cases involving the same surgeries. CP 106-07, 293, 297-300. Based on this testimony, a jury could

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[5] In *McKee v. American Home Products, Corp.*, 113 Wn.2d 701, 707, 782 P.2d 1045, 1048 (1989), this Court held that an Arizona physician's declaration was insufficient to defeat summary judgment because, "[c]ontrary to the requirements of RCW 7.70.040 the affidavit does not assert the standard of care of a pharmacist in this state." *McKee*, 113 Wn.2d at 707. But *McKee* did not discuss *Pederson* or *Douglas*. Rather, *McKee* faulted the witness's lack of qualification to testify on the standard of care because he was not licensed in the defendant's specialty, which was pharmacy. 113 Wn.2d at 706-07.

reasonably infer that Dr. Morimoto had breached the standard for a "reasonably prudent" doctor in her specialty "in the state of Washington" in these circumstances, because any such doctor would be "expected" to meet the national standard. RCW 7.70.040(1).

Of course, under *Pederson*, Dr. Morimoto was free to produce rebuttal evidence that a reasonably prudent surgeon in her specialty was not expected to follow the national standard of care in Washington. While local practice does not set the standard of care, it "may be considered as one of the elements to determine the degree of care and skill which is to be expected." *Pederson*, 72 Wn.2d at 79. But Dr. Morimoto did not do so, and any such evidence would only have underscored the proper conclusion that this case presented a genuine dispute of material fact for trial. Division III's revival of the locality rule conflicted with *Pederson* and *Douglas*.[6]

Division III's reliance on *Reyes v. Yakima Health District*, 191 Wn.2d 79, 419 P.3d 819 (2018) did not resolve the conflict with this Court's decisions. In *Reyes*, for a medical expert's declaration to show a genuine

[6] It is no answer for the respondents to say that the parties did not cite *Pederson* and *Douglas* below. Division III was generally aware of the problem, noting that "[m]edical care holds constant throughout America, at least outside rural areas." Op. at 14. But Division III concluded "that the trier of fact must find and apply a state standard of care." Op. at 15. The Boyers also cited, and Division III extensively discussed and distinguished, several Court of Appeals decisions holding that an expert's declaration testimony on a national standard of care was sufficient to defeat summary judgment. *See, infra*, n.7. Review by this Court ensures consistency in Washington law. An incomplete table of authorities should not stand in the way of that objective.

dispute for trial under CR 56, this Court stated that "the affiant must state specific facts showing what the applicable standard of care was and how the defendant violated it." *Reyes*, 191 Wn.2d at 89. But *Reyes* did not concern the level of specificity required to tie a national standard of care to Washington. Here, Dr. Shamoun's declaration testimony that the standard "is not unique to the State of Washington and applies on a nationwide basis" was enough, given the nationwide breadth of Dr. Shamoun's training and experience. CP 107. Dr. Shamoun was familiar with the practice of doctors in his specialty in many states and had not encountered a local variation, supporting an inference that Washington too followed the national standard.

The text of RCW 7.70.040 only deepens the conflict between Division III's opinion and this Court's decisions. After *Pederson* and *Douglas*, the Legislature enacted RCW 7.70.040. Now, to establish medical negligence, an injured patient must show "[t]he health care provider failed to exercise that degree of care, skill, and learning *expected of a reasonably prudent* health care provider at that time in the profession or class to which he or she belongs, *in the state of Washington*, acting in the same or similar circumstances." RCW 7.70.040(1) (emphasis added).

The Legislature merely tweaked and codified common law clams; it did not abrogate this Court's precedents. For example, in *Harris v. Robert C. Groth, M.D., Inc., P.S.*, 99 Wn.2d 438, 445, 663 P.2d 113 (1983), this

Court concluded that "the Legislature intended to adopt a reasonable prudence standard of care," which was the common law standard first adopted in *Helling v. Carey*, 83 Wn.2d 514, 519 P.2d 981 (1974). The statutory standard did not restore doctors as the gatekeepers for the standard of care, as had been the case before *Helling*. The Legislature, by using the phrase "expected of" in RCW 7.70.040(1), intended for doctors to use the care, skill, and learning "'expected by society.'" *Harris*, 99 Wn.2d at 445. If this Court's construction of RCW 7.70.040(1) in *Harris* means anything, it must mean at least that the standard of care is for the jury to decide. Because "[i]t is society and their patients to whom physicians are responsible, not solely their fellow practitioners," *Harris*, 99 Wn.2d at 445, juries necessarily may infer that a "reasonably prudent" doctor in Washington state should follow the nationwide standard.

(b) Division III's Opinion Presents an Important Issue that Should Be Decided by this Court

By turning back the clock to the pre-*Pederson* era, Division III has raised a reviewable issue under RAP 13.4(b)(4). The Division III's analysis, though incorrect, is likely to be influential because it is detailed and unequivocal. And this issue is not confined to this dispute. Several other Court of Appeals published opinions have decided whether a medical expert's testimony on a national standard of care was sufficient to defeat

summary judgment.[7] Another pending Court of Appeals case presents the same issue.[8] This effort to cut off plaintiffs' access to expert witnesses who practice in other states is nothing more than procedural "gotcha." *See, e.g.*, *White v. Kent Med. Ctr., Inc., P.S.*, 61 Wn. App. 163, 172, 810 P.2d 4, 10 (1991) ("To require experts to testify in a particular format would elevate form over substance.").

The locality rule's revival brings back the "practical difficulties" which this Court had attempted to solve in *Pederson.* 72 Wn.2d at 78. With a locality rule, few doctors will be qualified as experts if the applicable community is defined too narrowly. *Id.* at 79. Although there are thousands of doctors in Washington, this Court limits testimony on the standard of care to experts with "sufficient expertise in the relevant specialty such that the expert is familiar with the procedure or medical problem at issue." *Frausto v. Yakima HMA, LLC*, 188 Wn.2d 227, 232, 393 P.3d 776, 779 (2017) (quotation omitted). Without access to doctors who are licensed in other states but know the national standard of care, injured patients with

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[7] *See Driggs v. Howlett*, 193 Wn. App. 875, 899-902, 371 P.3d 61, *review denied,* 186 Wn.2n 1007 (2016) (sufficient); *Winkler v. Giddings*, 146 Wn. App. 387, 389-92, 190 P.3d 117 (2008), *review denied,* 165 Wn.2d 1034 (2009) (insufficient); *Hill v. Sacred Heart Med. Ctr.*, 143 Wn. App. 438, 453, 177 P.3d 1152 (2008) (sufficient); *Eng v. Klein*, 127 Wn. App. 171, 179, 110 P.3d 844 (2005), *review denied,* 156 Wn.2d 1006 (2006) (sufficient).

[8] *Tillotson v. University of Washington*, No. 78939-2-I is set for oral argument on November 1.

meritorious claims will be stymied by the "'conspiracy of silence'" that this Court recognized in *Douglas*, 73 Wn.2d at 478-79.

Although *Pederson* and *Douglas* are 50 years old, they remain good law. Division III's opinion introduces new uncertainty about the interplay between the old locality rule and RCW 7.70.040. This Court should reaffirm the viability of *Pederson* and *Douglas*.

(c) Division III's Opinion Conflicts with Its Own Prior Decision

In *Elber v. Larson*, 142 Wn. App. 243, 173 P.3d 990 (2007), the trial court granted summary judgment dismissing a plaintiff's medical negligence claim. In the declaration opposing summary judgment, the plaintiff's medical expert "did not recite that he was familiar with the standard of care in the State of Washington." *Id.* at 245. The defendant doctor argued that the plaintiff's medical expert "was not competent as a matter of law to render any standard of care opinions because 'he has no background, training, education or experience in Washington.'" *Id.* The trial court seemed to agree. The Court of Appeals reversed, holding that the medical expert's declaration was sufficient to defeat summary judgment. *Elber*, 142 Wn. App. at 247, 249.

Here, Division III disavowed *Elber*. At first, Division III attempted to distinguish it, reasoning that *Elber* should not be given "a constricted

reading." Op. at 17. But then Division III acknowledged *Elber* can be read to "allow[] a nonresident physician to claim familiarity with the Washington standard of care without providing the basis of this familiarity." Op. at 20. Under that reading, Division III stated that *Elber* is "contrary to other Washington decisions." Op. at 20.

In *Elber*, the medical expert had attested familiarity with the standard of care for surgeons and that this it was a "national standard." *Id.* at 247. The court concluded that "the necessary inference from this is that he is familiar with the standard of care in Washington because the standard of care is a national standard of care and he is familiar with that standard." *Id.* Thus, under *Elber*, testimony establishing a national standard of care supports an inference that the same standard applies in Washington. More detailed testimony is not required. By rejecting *Elber*, Division III's opinion injected significant uncertainty into this area of the law, which this Court should resolve under RAP 13.4(b)(2).

G. CONCLUSION

For the forgoing reasons, this Court should grant review and reverse the trial court's dismissal of the Boyers' claims. They should have a chance for their day in court. Costs should be awarded to the Boyers.

DATED this 10th day of October, 2019.

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APPENDIX

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

KATHIE AND JOE BOYER, individual and the marital community composed thereof, Appellants, v. KAI MORIMOTO, M.D. individually and PLASTIC SURGERY NORTHWEST, a Washington Corporation, Respondents.	)	No. 36166-7-III PUBLISHED OPINION

FEARING, J. — Should the superior court consider a supplemental declaration filed after its memorandum decision granting a party summary judgment, but filed before the court enters its formal order on summary judgment? In this appeal, we answer this question in the negative because the declaration's protagonist did not file a motion for reconsideration or a motion for late filing and thus failed to present the superior court an opportunity to exercise discretion in determining the propriety of the late filing. Therefore, we affirm the superior court's summary judgment dismissal of appellant Kathie Boyer's suit for medical malpractice.

FACTS

Because the superior court granted summary judgment to defendants Dr. Kai Morimoto and Plastic Surgery Northwest (PSNW), we retell the facts in a light favorable to plaintiff Kathie Boyer. Kathie Boyer's husband Joe is also a plaintiff, but we generally refer to Kathie as the sole plaintiff.

Kathie and Joe Boyer reside in Anaconda, Montana, three hundred miles east of Spokane. On September 25, 2015, Kathie Boyer, after losing seventy pounds, consulted with Kai Morimoto, M.D., a plastic surgeon with Spokane's PSNW. Joe attended the consultation. Kathie expressed unhappiness with the appearance of her abdomen and expressed interest in cosmetic abdominoplasty, a surgical procedure to remove excess skin and fat.

Kathie Boyer received saline breast implants on two earlier occasions, most recently in 2006. She noted in the months prior to her appointment with Dr. Kai Morimoto that her right breast implant had reduced in size and had developed rippling. Therefore, she also requested that Dr. Morimoto replace her breast implants and lift her breasts.

During the September 25 consultation, Dr. Kai Morimoto recommended exchanging Kathie Boyer's saline breast implants for silicone implants, a procedure known as a bilateral mastopexy. Dr. Morimoto also recommended abdominoplasty and

liposuction on Boyer's back, hips, and breasts. The two confirmed October 26, 2015, as the date for the procedure.

Prior to driving to Spokane for Kathie's surgery, Joe Boyer telephoned PSNW to ask whether Kathie's surgery should be rescheduled because Kathie was due to begin menstruating. PSNW's receptionist informed Joe that the surgery could proceed. When preparing for surgery on the morning of October 26, Kathie and Joe Boyer informed the surgical nurse that Kathie was menstruating. The nurse confirmed that Kathie could wear a tampon before surgery.

The surgical procedure by Dr. Kai Morimoto proceeded on October 26, 2015 at PSNW's same day surgical suite in Spokane. Kathie Boyer received general anesthesia at 10:05 a.m. and remained anesthetized until 7:00 p.m. The surgical team noted no operative complications.

After surgery, Joe Boyer assisted Kathie to the restroom. Kathie urinated and inserted a tampon. She removed no tampon before urinating because Joe and she believed the surgical team removed the last one inserted before surgery. The couple saw no tampon string before Kathie urinated.

PSNW discharged Kathie Boyer from its surgical facility at 9:55 p.m. on October 26, the day of the surgery. PSNW staff then instructed Kathie Boyer to return to Spokane for an appointment with Dr. Kai Morimoto on November 13, 2015. Nevertheless, the Boyers lived many hours afar, so they wished to speak with Dr. Morimoto before

departing for Montana. The Boyers remained in Spokane and returned to PSNW on October 28. Dr. Morimoto examined Kathie Boyer and found the operative sites acceptable. Still Boyer suffered persistent pain and fatigue. Boyer requested a stronger form of pain medication, and Dr. Morimoto accommodated that request by prescribing oxycodone 5 mg tablets. Morimoto instructed Boyer to return in two weeks for suture removal.

On November 4, 2015, while recovering at home in Anaconda, Kathie Boyer alternatively felt extreme hot and cold in her toes. Joe removed Kathie's socks and the two saw blue toes. In the early afternoon, Joe drove Kathie to the Anaconda Community Hospital emergency room. Emergency room physicians diagnosed Boyer's feet as hypoxic with peripheral cyanosis and mottling of the toes. Hypoxia is a lack of oxygen; whereas, cyanosis is blue coloring. The doctors also diagnosed Boyer with acute renal failure and significant injury to the liver. Anaconda emergency room physicians transferred Boyer to St. Patrick Hospital in Missoula, Montana. Late that evening, Missoula's Dr. Stephen Hardy performed exploratory surgery in an attempt to ascertain the cause of Boyer's illness. Dr. Hardy explored and debrided the abdominoplasty flap. He found no necrotizing infection.

On November 5, 2015, an infectious disease physician, Dr. David Christensen, performed a pelvic examination on Kathie Boyer at the Missoula hospital and found a tampon in her vaginal vault that had been present for ten days. Dr. Christensen suspected

toxic shock syndrome. Christensen removed the tampon and administered antibiotics, after which Boyer improved dramatically.

St. Patrick's Hospital retained Kathie Boyer for observation in its intensive care unit until November 19. Boyer's discharge summary reads: "[n]o clear microbiologic diagnosis, but etiology most likely staphylococcal toxic shock syndrome, either related to surgical wounds or retained tampons." Clerk's Papers (CP) at 91. Montana physicians predicted future need of amputation of the distal part of Boyer's right foot toes. Boyer returned to Missoula one month later, when a surgeon removed most of the toes on her right foot. Boyer underwent additional surgeries for lingering injury.

PROCEDURE

Kathie Boyer filed suit against Dr. Kai Morimoto and PSNW. Boyer alleges that Dr. Morimoto failed to comply with the applicable standard of care for a plastic surgeon. Boyer also contends that nursing staff committed acts of negligence, for which PSNW is vicariously liable. Boyer claims that Morimoto and the PSNW nursing staff agreed to attend to her menstrual cycle during surgery. According to Boyer, PSNW and Dr. Morimoto affirmatively and falsely asserted that providers had removed any tampon utilized by her before the commencement of surgery and that the providers inserted no tampon or sanitary pad during or after surgery.

During discovery, Kathie Boyer disclosed two expert witnesses, Dr. Martin Siegel and Dr. John Shamoun. Dr. Kai Morimoto and PSNW thereafter filed a motion for

summary judgment, asserting that Boyer could not present admissible testimony from a qualified expert to establish the standard of care and to testify to a violation of the standard of care that caused injury.

In response to the defense's summary judgment motion, Kathie Boyer submitted a two-page declaration from Dr. Martin Siegel addressing causation. Boyer also submitted a five-page declaration from Dr. John Shamoun, a plastic surgeon, in order to support a violation of a standard of care.

In his declaration, Dr. John Shamoun testified concerning his background and his knowledge of a standard of care:

> 3. Throughout my career, I have studied, trained and practiced in a variety of locations throughout the country. I have been licensed to practice medicine in six states, with active licensure in two (Texas and California). I also maintain an active surgical license in the United Arab Emirates.
>
> 4. In addition to my professional experience, I have been qualified as a medical expert regarding the standard of care applicable to plastic surgeries like the one at issue in this litigation, in several jurisdictions.
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> 5. One facet of my role in this case was to offer opinions regarding the standard of care applicable to the October 26, 2015 surgery at the heart of this litigation, as well as whether defendants' conduct fell below the standard of care. The specific medical procedure in question consisted of the following: (1) bilateral breast implant exchange, with mastopexy; (2) liposuction; and (3) abdominoplasty. As a result of my education, training and experience, I am well-versed in the standard of care applicable to healthcare providers performing surgical procedures such as these.
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> 6. The standard of care in this case required defendants to exercise the same degree of skill, care and learning expected of other reasonably prudent healthcare providers attempting the surgical procedure described in the preceding paragraph. This standard is not unique to the State of Washington and applies on a nationwide basis.

CP at 106-07.

In his declaration, Dr. John Shamoun averred that Dr. Kai Morimoto repeatedly violated the standard of care. Dr. Shamoun opined that Kai Morimoto should not have performed the extensive surgery of breast augmentation with mastopexy, liposuction, and abdominoplasty on an out-patient basis knowing that the patient lived three hundred miles away in Montana and would be traveling home after the procedure. Shamoun criticized the health care providers for discharging Kathie Boyer from the surgical facility at 10 p.m., after her undergoing extensive general anesthesia and a nine-hour surgery, without follow-up care scheduled until eighteen days later. Given the extent of the surgeries and in light of Boyer remaining under the effects of general anesthesia and narcotic pain medication, Boyer should have remained at the surgical center under the care of Morimoto and PSNW throughout the night of October 26-27. Alternatively, Morimoto should not have attempted each of these procedures during a single, out-patient surgery. In short, PSNW and Dr. Morimoto did not provide adequate surgical aftercare.

Dr. John Shamoun faulted Dr. Kai Morimoto and PSNW for its informed consent form signed by Kathie Boyer. PSNW provided Boyer a boilerplate explanation of the risks and benefits of the surgery. PSNW and Dr. Morimoto never warned Boyer of the specific risks and benefits of the surgeries. Because Boyer faced extensive, elective surgeries, the standard of care required more than a standard, boilerplate informed consent form. In particular, the consent form should have identified the option of and

explain the benefits of electing to have the three surgeries on separate dates, rather than on the same day.

In his declaration, Dr. John Shamoun noted that Kathie and Joe Boyer repeatedly informed Dr. Kai Morimoto and PSNW that Kathie was menstruating. The couple asked if she could wear tampons during the surgery. In turn, Morimoto and the surgical staff informed her she could wear the tampon and that the staff would attend to her menstruation needs. Nevertheless, the surgical records fail to mention Kathie Boyer's menstruation, any removal of a tampon before or after surgery, or any warning to the Boyers that a tampon remained in the vaginal canal. Dr. Shamoun opined that a tampon should not remain in the vagina during a nine-hour surgery. After surgery, the health care providers should have warned Kathie that a tampon remained inside the vaginal canal assuming the providers did not remove the tampon before or during surgery.

Dr. John Shamoun criticized Dr. Kai Morimoto for her performance during the October 28 follow-up appointment. Kathie Boyer's persistent pain and fatigue should have alerted Dr. Morimoto to potential surgical complications. Morimoto should have explored the cause of the pain, rather than increasing the dosage of the pain medications. Morimoto should have also scheduled an earlier follow-up appointment. Finally, Dr. Shamoun opined that, but for Kai Morimoto's and PSNW's breaches of the standard of care, Boyer would not have suffered the devastating illness and injuries that later developed in Montana.

The superior court entertained oral argument in support of and in opposition to the summary judgment motion on April 27, 2018. During the summary judgment motion hearing, the superior court requested that Kathie Boyer promptly file a curriculum vitae for John Shamoun. On April 30, Boyer filed Dr. John Shamoun's curriculum vitae.

On May 9, 2018, the superior court issued a memorandum decision granting Kai Morimoto's and PSNW's summary judgment motions. The superior court noted that Dr. John Shamoun's "late arriving [curriculum vitae]" revealed active licensure in Texas and California and inactive licensure in Georgia, Florida, Mississippi and Alabama. CP at 323. The court concluded that Dr. Shamoun's declaration failed to present an adequate foundation that the applicable standard of care is national in scope and that Shamoun knew the standard of care in Washington State. Thus, the court held Dr. Shamoun's opinion to be inadmissible. The superior court also concluded that Boyer failed to provide any testimony that any of the nursing staff of PSNW violated a standard of care.

In its May 9 memorandum decision, the superior court directed the parties to prepare a summary judgment order. The closing sentences in the May 9 memorandum decision read:

> Presentment [of the order] is set for June 1, 2018 at 9:00 without oral argument. If plaintiffs contemplate *a motion for reconsideration*, please wait until after the order on summary judgment is entered.

CP at 326 (emphasis added) (boldface omitted).

On May 15, 2018, but before entry of a formal order on summary judgment,

Kathie Boyer filed a supplemental declaration of Dr. John Shamoun. Boyer did not accompany the declaration with a motion for reconsideration or a motion for late filing of the declaration. In the declaration, Dr. Shamoun clarified the foundation for his opinions. The declaration states, in pertinent part:

> In addition, throughout my career I have consulted with numerous plastic surgeons practicing within the State of Washington, including consultations involving the specific procedures at issue in this litigation: abdominoplasty, liposuction and mastopexy. As a consequence, I can confirm that Washington plastic surgeons adhere to the same standards of practice followed by plastic surgeons practicing throughout the rest of the nation.
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> . . . [T]hroughout my career I have personally been asked to consult on specific cases in the State of Washington, including cases involving liposuction, abdominoplasty and breast implant/mastopexy surgery. Again, as a result of my personal involvement in these kinds of cases, I can confirm that the standard of care for surgical procedure such as those at issue in this case, is the same in Washington as the rest of the United States.

CP at 328.

On May 17, 2018, defendants filed a proposed summary judgment order. Kai Morimoto's and PSNW's proposed order omitted reference to Dr. John Shamoun's supplemental declaration. On May 24, 2018, Kathie Boyer submitted objections to the defense's proposed summary judgment order. Boyer objected, in part, to her opposition's summary judgment order because the order failed to list Shamoun's supplemental declaration. Boyer argued that, because the superior court had yet to enter a final order, she was permitted to file the supplemental declaration. Boyer submitted her own proposed summary judgment order, which order listed the supplemental declaration of

Dr. John Shamoun as a pleading reviewed by the trial court.

On June 15, 2018, the superior court penned "Denied" on Kathie Boyer's proposed summary judgment order. CP at 350. On the same day, the court entered an order granting defendants' motion for summary judgment, which order did not mention whether it considered the supplemental declaration of Dr. John Shamoun. In the order, the trial court handwrote additional instructions:

> It is further ordered that any *motion for reconsideration* shall be served, filed and noted for hearing without oral argument, as directed in the Court's Memorandum Decision . . . The Court may request oral argument, depending on the content of any written submissions.

CP at 354 (emphasis added). Kathie Boyer did not move for reconsideration.

LAW AND ANALYSIS

This appeal poses the following questions. First, did John Shamoun's first declaration provide a sufficient background to conclude that he was qualified to testify to a Washington standard of care? Second, should the superior court have considered John Shamoun's second declaration before entering a summary judgment order? Third, did Kathie Boyer need to move for reconsideration in order for the trial court to consider Dr. John Shamoun's second declaration? Fourth, did John Shamoun's second declaration provide a sufficient background to conclude that he was qualified to testify to a Washington standard of care? Fifth, did Kathie Boyer's experts provide sufficient testimony to raise a question of fact as to whether any violation of the standard of care

caused Boyer's postsurgery illness and injury? Sixth, did John Shamoun's testimony present a question of fact as to a violation of the standard of care of PSNW? The second and third issues are closely related and will be addressed together. We only answer the first, second, and third questions, which answers render unimportant the other questions.

Shamoun's First Declaration

If we concluded that Dr. John Shamoun's first declaration sufficed to defeat Dr. Kai Morimoto's and PSNW's summary judgment motion, we could avoid asking if the superior court should have reviewed John Shamoun's second declaration. The defendants assert the superior court correctly rejected the first declaration because Shamoun offered only a conclusory statement concerning his familiarity with the standard of care in Washington State. We agree.

In his first declaration, Dr. John Shamoun testified that, throughout his career, he studied, trained and practiced in a variety of locations throughout the United States. He had active medical licensure in Texas, California, and the United Arab Emirates. Shamoun added that he had qualified as an expert witness regarding the standard of care applicable to plastic surgeons in several jurisdictions, but he did not mention Washington State. He knew much about the standard of care for a mastopexy, liposuction, and abdominoplasty. Shamoun concluded that the standard of care for such procedures is not unique to the state of Washington and applies on a nationwide basis. He did not disclose how he knew the state of Washington followed the national standard of care. We must

determine if the background disclosed and the testimony in this first declaration provides a sufficient basis for Dr. Shamoun to testify to the standard of care of plastic surgeons in the Evergreen State.

Summary judgment in medical malpractice cases may be brought in one of two ways. *Guile v. Ballard Community Hospital*, 70 Wn. App. 18, 851 P.2d 689 (1993). The defendant can attempt to establish through affidavits that no material factual issue exists or, alternatively, the defendant can inform the trial court that the plaintiff lacks competent evidence to support an essential element of her case. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989); *Guile v. Ballard Community Hospital*, 70 Wn. App. at 23. In this latter situation, the moving party need not support its summary judgment motion with affidavits. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d at 226. Defendants PSNW and Kai Morimoto employed the second strategy for their summary judgment motions.

In a medical malpractice claim, a plaintiff must show that the health care provider violated the relevant standard of care. A plaintiff must prove the relevant standard of care through the presentation of expert testimony, unless a limited exception applies. *Volk v. Demeerleer*, 184 Wn. App. 389, 430-31, 337 P.3d 372 (2014), *aff'd in part, rev'd in part*, 187 Wn.2d 241, 386 P.3d 254 (2016). Kathie Boyer does not contend that a jury may, without expert testimony, find a physician negligent for releasing a patient to travel three hundred miles to home immediately after a nine-hour surgery with general

anesthesia or leaving a tampon in a patient without informing the patient of its presence.

A defendant moving for summary judgment in a health care professional malpractice suit can meet its initial burden by showing the plaintiff lacks competent expert testimony to sustain a prima facie case of medical malpractice. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d at 226. The burden then shifts to the plaintiff to provide an affidavit from a qualified medical expert witness that alleges specific facts establishing a cause of action. *Guile v. Ballard Community Hospital*, 70 Wn. App. at 25. Affidavits containing conclusory statements without adequate factual support are insufficient to defeat a motion for summary judgment. *Guile v. Ballard Community Hospital*, 70 Wn. App. at 25; CR 56(e).

By Washington statute, the standard of care is the degree of "care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he/she belongs, *in the state of Washington*, acting in the same or similar circumstances." RCW 7.70.040 (emphasis added). One might question if the standard of care in Washington ever differs from the standard of care throughout the nation. Law changes from state to state, but medical care holds constant throughout America, at least outside rural areas. Increasingly, medical experts testify that Washington follows a national standard of care. We only know of one recent decision wherein an expert testified that varying geographical locations maintained different

standards. We remain bound, however, by our legislature's declaration that the trier of fact must find and apply a state standard of care.

We discern two discrete questions with regard to Dr. John Shamoun's first declaration. First, whether Dr. Shamoun's declaration testimony referenced a standard of care in Washington? Second, whether John Shamoun's declaration testimony showed that he was qualified to testify to the standard of care in the state of Washington? Shamoun testified that the standard of care is not unique to the state of Washington and applies on a nationwide basis. This statement necessarily implies that Shamoun opines to a Washington standard consistent with a national standard. Did he disclose sufficient qualifications and background to do so?

The superior court must make a preliminary finding of fact under ER 104(a) as to whether an expert qualifies to express an opinion on the standard of care in Washington. *Winkler v. Giddings*, 146 Wn. App. 387, 392, 190 P.3d 117 (2008). Usually, the trial court possesses discretion when determining the qualifications of an expert to express opinions pertinent to a lawsuit. *Elber v. Larson*, 142 Wn. App. 243, 247, 173 P.3d 990 (2007). Nevertheless, this court addresses the trial court's ruling concerning qualifications of an expert who renders opinions in response to a summary judgment motion. *Elber v. Larson*, 142 Wn. App. at 247.

When determining whether an expert qualifies to defeat a motion for summary judgment in a medical malpractice action, the court examines the record to determine the

relevant specialty and whether the expert and the defendant practice in the same field. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 229 (1989); *Seybold v. Neu*, 105 Wn. App. 666, 679, 19 P.3d 1068 (2001). A physician licensed in another state may provide admissible testimony that a national standard of care exists in this state and that the defendant physician violated that standard. *Elber v. Larson*, 142 Wn. App. at 248; *Pon Kwock Eng v. Klein*, 127 Wn. App. 171, 179, 110 P.3d 844 (2005).

We now review Washington decisions in order to discern the background an expert physician must identify in order to claim the Washington standard of care echoes the national standard. Kathie Boyer argues that at least three decisions posit a rule that an out-of-state expert may testify to the Washington standard of care matching the national standard of care without disclosing a basis for his or her knowledge of this conclusion: *Elber v. Larson*, 142 Wn. App. 243 (2007); *Hill v. Sacred Heart Medical Center*, 143 Wn. App. 438, 177 P.3d 1152 (2008); and *Pon Kwock Eng v. Klein*, 127 Wn. App. 171 (2005).

In *Elber v. Larson*, the physician in a medical malpractice suit moved for summary judgment. In response to the physician's summary judgment motion, Dr. Daniel Meub submitted a declaration that the physician violated the standard of care, but the declaration did not recite any facts to show that Meub knew the standard of care in Washington State. The physician contended that plaintiff's witness was not qualified as an expert because Meub lacked background, training, or experience in Washington. The

trial court granted summary judgment. The patient moved for summary judgment and submitted a supplemental declaration from Dr. Meub, in which the expert averred that he contacted medical colleagues in the state of Washington to confirm that the practices of the state are no different from the national standard of the American Board of Neurological Surgery.

This court, in *Elber v. Larson*, reversed and held that a medical expert is qualified to testify to the Washington standard of care if he offers uncontradicted testimony that he is familiar with the standard of care and that the standard is a national standard. During the opinion, this court wrote:

> And Dr. Meub is familiar with the standard of care in Washington because it is the same everywhere in this country.

142 Wn. App. at 249. A constricted reading of this sentence may suggest that an out-of-state expert may supply an opinion by the bald statement that the state standard of care mirrors the nationwide standard.

In *Hill v. Sacred Heart Medical* Center, 143 Wn. App. 438 (2008), John Hill presented testimony from two physicians. One physician testified that the national standard of care controlled the conduct of the health care providers, but did not expressly state that he knew the Washington standard of care to coincide with the national standard. A second physician testified that she knew the Washington standard to parallel the national standard. The second expert had performed her residency in Washington State

and practiced in this state for twenty years before moving her practice to Wisconsin. This court relied on both physicians' testimony when reversing a summary judgment dismissal of the medical malpractice suit. The decision implies that the testimony of the first physician by itself would not have sufficed to defeat the summary judgment motion.

In *Pon Kwock Eng v. Klein*, 127 Wn. App. 171 (2005), in opposition to a summary judgment motion, plaintiff Pon Kwock Eng presented the declaration and deposition of Dr. Vincent Quagliarello, a Connecticut specialist in infectious diseases. The defending physician was a neurosurgeon. Dr. Quagliarello testified that the neurosurgeon should have ordered a spinal tap on the patient in order to test for meningitis, but the expert admitted that his opinions were based on a national standard of care and conceded to lacking experience with neurosurgeons in Washington. At the same time, the physician's own experts concurred that, among infectious disease doctors, the standard of care of the diagnosis and treatment of meningitis was a national one. The defendant physician argued that Dr. Quagliarello was not qualified to testify as an expert regarding whether the defendant breached the standard of care of a Washington neurosurgeon. The trial court granted summary judgment.

This court, in *Pon Kwock Eng v. Klein*, reversed after adjudging Dr. Vincent Quagliarello's testimony sufficient. The opinion dealt more with whether a physician in one specialty could testify to the standard of care of a physician practicing in another specialty. The court noted that the defending physician's own experts testified to a

national standard of care.

In *Winkler v. Giddings*, plaintiff's expert testified to an "educated assumption that the standard of care was the same across the country." 146 Wn. App. at 392 (2008). Plaintiff presented no other evidence that the Washington standard of care followed the national standard. Dr. Neil Giddings presented testimony that the relevant standard of care differed depending on the area of the country. This court affirmed the trial court's preclusion of plaintiff's expert from testifying and the granting of a directed verdict for the defendant physician.

We conclude that John Shamoun's first declaration did not qualify him to testify to the standard of care in Washington State. Shamoun and Kai Morimoto practice in the same specialty, plastic surgery. Shamoun testified that the standard of care in Washington is identical to the nationwide standard. Nevertheless, Shamoun failed to disclose how he knew Washington's standard to equate to a national standard. He did not suggest he had any exposure to the practice of plastic surgery in Washington State. He did not indicate he spoke with any Washington physician or studied any literature concerning Washington standards.

To a limited extent, *Elber v. Larson*, 142 Wn. App. 243 (2007) confirms our conclusion rather than assisting Kathie Boyer. In *Elber v. Larson*, this court considered the expert testimony of an out-of-state physician because the physician declared that he knew the standard of care in Washington State. Dr. John Shamoun's first declaration

suggested no familiarity with a Washington standard. Assuming *Elber v. Larson* allows a nonresident physician to claim familiarity with the Washington standard of care without providing the basis of this familiarity, we deem *Elber* contrary to other Washington decisions. We hold that the expert must provide some underlying support for his opinion that the state standard follows the national standard.

Cases involving the need for an expert physician to testify to the underpinning facts supporting an opinion of a violation of the standard of care bolster our conclusion that the patient's expert must also provide underlying facts identifying a background that substantiates that he or she gained knowledge in order to declare the state standard to equate with the national standard. Under Washington decisions, the expert, in the declaration contravening a summary judgment motion, must declare what a reasonable doctor would or would not have done, that the defendant failed to act in that manner, and that this failure caused the injuries. *Reyes v. Yakima Health District*, 191 Wn.2d 79, 86, 419 P.3d 819 (2018). The expert may not merely proclaim that the defendant physician was negligent, but must instead establish the applicable standard and detail the facts on how the defendant acted negligently by breaching that standard. *Reyes v. Yakima Health District*, 191 Wn.2d 79, 86-87 (2018). Furthermore, the expert must link his conclusions to a factual basis. *Reyes v. Yakima Health District*, 191 Wn.2d at 87.

In three decisions, Washington courts affirmed summary judgment dismissals in favor of the defending physician because the plaintiff's expert, although testifying that

the defendant violated the standard of care, failed to particularize the conduct or inaction of the physician that constituted negligence. *Reyes v. Yakima Health District*, 191 Wn.2d 79 (2018); *Guile v. Ballard Community Hospital*, 70 Wn. App. 18 (1993); *Vant Leven v. Kretzler*, 56 Wn. App. 349, 783 P.2d 611 (1989). In *Guile v. Ballard Community Hospital*, Angelina Guile's expert declared that Guile suffered an unusual amount of post-operative pain, developed a painful perineal abscess, and was then unable to engage in coitus because her vagina was closed too tight. The expert further opined that the faulty technique of the surgeon caused all of these symptoms. The expert surgeon concluded that the defendant surgeon failed to exercise that degree of care, skill, and learning expected of a reasonably prudent surgeon at that time in the state of Washington, acting in the same or similar circumstances. This court characterized the expert's testimony as a mere summarization of Guile's postsurgical complications, coupled with the unsupported conclusion that the complications resulted from the surgeon's faulty technique. The opinions simply reiterated the claims asserted in Guile's complaint.

In *Vant Leven v. Kretzler*, the expert testified that, more probably than not, the care and treatment afforded by the defendant physician fell below the standard of care in the medical community. This court affirmed summary judgment in favor of the physician because the expert failed to identify any facts supporting this conclusion.

The expert's qualification to render medical opinions on the standard of care in Washington State is as important an element in a medical malpractice case as the factual

basis on which the expert supports his opinion. For this reason, we hold that the testifying expert must disclose the factual basis on which the expert purports to know the standard of care in Washington.

Our ruling may conflict with ER 705. This evidence rule reads:

> The 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. The expert may in any event be required to disclose the underlying facts or data on cross examination.

If an expert at trial may render opinions without factual support, an expert should be free to present a declaration in opposition to a summary judgment motion without explaining how he became aware of the Washington standard of care for a health care field or explaining the basis of his knowledge for the state standard of care being commensurate with the national standard. Nevertheless, based on Washington decisional law, we decline to enforce ER 705 in this setting. The law bestows unreciprocated respect and unreturned privileges to the medical profession.

Consideration of Supplemental Shamoun Declaration

Now we must decide whether the superior court should have considered Dr. John Shamoun's supplemental declaration before entering the summary judgment order. The superior court issued its memorandum decision on May 9, 2018. Kathie Boyer filed Dr. Shamoun's supplemental declaration on May 15. The trial court entered its order

granting defendants' motion for summary judgment on June 15. Boyer never sought reconsideration of the order or permission to file a late declaration.

In advocating reversal, Kathie Boyer relies on language in CR 56 that directs the superior court to list, in the summary judgment order, the evidence presented to the court before entering the order. We assume she wants more than a listing of the supplemental declaration in the order and cites the language of the civil rule in order to argue that a listing of the declaration should include a consideration of the declaration's contents when determining whether to grant the motion. Boyer also emphasizes this court's ruling in *Keck v. Collins*, 181 Wn. App. 67, 325 P.3d 306 (2014), *aff'd*, 184 Wn.2d 358, 357 P.3d 1080 (2015) to the effect that a party can continue to present evidence in opposition to a motion before the court signs a formal order. Finally, Boyer contends that the superior court abused its discretion when refusing to consider John Shamoun's supplemental declaration without first applying the *Burnet* factors. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997). Conversely, Dr. Kai Morimoto and PSNW contend that Boyer waived her right to consideration of the supplemental declaration because she did not file a motion for reconsideration.

Some principles of summary judgment encourage reversal of the superior court's summary judgment order. A summary judgment is a valuable procedure for ending sham claims and defenses. *Cofer v. Pierce County*, 8 Wn. App. 258, 261, 505 P.2d 476 (1973). Nevertheless, the procedure may not encroach on a litigant's right to place her evidence

before a jury of her peers. *Cofer v. Pierce County*, 8 Wn. App. at 261. A reviewing court should reverse a summary judgment order when evidence supports the nonmoving party's allegations. *Preston v. Duncan*, 55 Wn.2d 678, 683, 349 P.2d 605 (1960). Our overriding responsibility is to interpret the rules to advance their underlying purpose of a just determination in every action. *Keck v. Collins*, 184 Wn.2d 358, 369 (2015).

CR 56(h) reads:

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

(Emphasis added.) Note that the rule requires the superior court to list all declarations presented to it, but not necessarily to consider all declarations. A reciprocal appellate rule, RAP 9.12, also demands listing of the evidence "called to the attention" of the trial court before entry of the summary judgment order.

Other sections of CR 56 bear importance. CR 56(c) reads, in part:

> The adverse party may file and serve opposing affidavits, memorandum of law or other documentation *not later than 11 calendar days* before the hearing.

(Emphasis added.) Of course, CR 6(b)(1) allows the superior court to enlarge the period of time in which to file a pleading on request of a party and for good cause. In turn, CR 56(e) declares, in relevant part:

> Supporting and opposing affidavits 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 to the matters stated therein. . . . The court may permit affidavits *to be supplemented* or opposed by depositions, answers to interrogatories, or further affidavits.

(Emphasis added.)

Kathie Boyer filed the supplemental declaration of Dr. John Shamoun after the superior court issued a memorandum decision, but before the court entered a formal order. A memorandum opinion is not an order or a final disposition. *Felsman v. Kessler*, 2 Wn. App. 493, 498, 468 P.2d 691 (1970). Until a formal order has been entered, the superior court may change its mind. *Felsman v. Kessler*, 2 Wn. App. at 498.

The parties cite numerous Washington decisions, whose procedures include a late filing of a summary judgment affidavit. We review these cases in detail.

We begin with *Keck v. Collins*, the Washington Supreme Court's latest pronouncement on the subject matter and which case also warranted a Court of Appeals published decision. In *Keck v. Collins*, 181 Wn. App. 67 (2014), Darla Keck sued two oral surgeons, Chad Collins and Patrick Collins, who practiced together. Dr. Patrick Collins moved for summary judgment on the ground that Keck lacked expert testimony to show that he violated the standard of care. Collins scheduled the motion hearing for March 30, without consulting Keck's counsel as to counsel's availability. From March 7 to March 20, Keck's counsel, a sole practitioner, was in trial in an unrelated case. Dr. Chad Collins joined in the summary judgment motion on March 14. On March 16, Keck

filed a first affidavit of her medical expert, Kasey Li, M.D., that stated Chad violated the standard of care. On March 22, Keck filed a second affidavit of Li, which addressed purported negligence of both oral surgeons. In reply, the surgeons argued that the first and second affidavits lacked specificity as to negligent care. On March 29, ten days after the CR 56 deadline for filing responding affidavits and the day before the summary judgment hearing, Keck filed a third affidavit of Dr. Li that added the facts that supported his opinions concerning the surgeons' violation of the standard of care. In addition, Keck's counsel filed an affidavit explaining the reasons for the late filing of the third affidavit, including his inability to attend to the minutiae of the affidavits while in trial. Keck's counsel requested that the court either forgive the late filing of the third affidavit or grant a continuance of the summary judgment motion hearing. Defendant surgeons moved to strike Dr. Li's third affidavit as untimely. The trial court issued a memorandum opinion granting defendants' motion to strike the third affidavit as untimely and granting the oral surgeons' summary judgment motion. Keck unsuccessfully moved for reconsideration.

On appeal to the Court of Appeals, in *Keck v. Collins*, this court reversed both the superior court's ruling striking Kasey Li's third affidavit and the ruling granting the summary judgment motion. We summarized CR 56. The nonmoving party must file and serve opposing affidavits not later than eleven calendar days before the summary

judgment hearing. CR 56(c). But, the trial court may permit affidavits to be supplemented or opposed by further affidavits. CR 56(e). This court wrote:

> Thus, [u]ntil a formal order granting or denying the motion for summary judgment is entered, a party may file affidavits to assist the court in determining the existence of an issue of material fact.

Keck v. Collins, 181 Wn. App. at 83.

This appeals court, in *Keck v. Collins*, did not hold that the trial court must always consider any affidavit, no matter how late, filed before a formal order. Instead, we added that the superior court may strike a late affidavit unless the filer shows good cause for the tardy filing or that justice requires the extension of time. We listed eight factors for the superior court to review:

> (1) The prejudice to the opponent; (2) the length of the delay and its potential impact on the course of judicial proceedings; (3) the cause for the delay, and whether those causes were within the reasonable control of the moving party; (4) the moving party's good faith; (5) whether the omission reflected professional incompetence, such as an ignorance of the procedural rules; (6) whether the omission reflected an easily manufactured excuse that the court could not verify; (7) whether the moving party had failed to provide for a consequence that was readily foreseeable; and (8) whether the omission constituted a complete lack of diligence.

15 KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE § 48:9, at 346 (2d ed. 2009) (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship,* 507 U.S. 380, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993)).

Keck v. Collins, 181 Wn. App. at 84. One might expect the Court of Appeals to have remanded to the superior court to exercise its discretion in reviewing the factors. Instead, after reviewing the factors on our own, this court held that the superior court erred when not allowing late filing of the affidavit. Because the trial date was months away, the oral surgeons suffered no prejudice by a short delay of the hearing. Darla Keck possessed good cause for the late filing, because of her counsel being in trial during the time that he needed to prepare the affidavits. Defense counsel had failed to coordinate the summary judgment hearing date with plaintiff's counsel. Keck informed the superior court, during the summary judgment hearing, of the specificity in Dr. Li's third affidavit that created a genuine issue of material fact.

The Washington Supreme Court, in *Keck v. Collins*, 184 Wn.2d 358 (2015), affirmed this court's ruling, but disagreed with our analysis. The Supreme Court rejected the eight factors embraced by this court and instead adopted three factors the court previously announced in *Burnet v. Spokane Ambulance*, 131 Wn.2d 484 (1997) with regard to whether an untimely disclosed witness should be permitted to testify at trial. The superior court should on the record, when asked to strike a late affidavit, consider whether a lesser sanction would suffice, whether the violation by the proponent of the evidence was willful or deliberate, and whether the violation substantially prejudiced the opposing party. One might expect the Supreme Court to have remanded to the superior court to assess the three factors, but the court rendered a decision on its own.

This court's *Keck* decision relied in part on its ruling in *Cofer v. Pierce County*, 8 Wn. App. 258 (1973). In *Cofer*, Pierce County sought to dismiss, on summary judgment, Margaret Cofer's suit based on her slip and fall on a wet floor in a county building. During the first summary judgment motion hearing, Cofer's counsel stated that Cofer hired a witness from whom he lacked sufficient time to procure a responding affidavit. According to counsel, the expert witness would testify that the county maintained the floor in a dangerous manner and contrary to instructions given by the contractor who supplied the floor materials. The court granted a continuance of the hearing, but only to allow Cofer to file legal authority opposing the motion. The superior court stated it would not entertain any new affidavits. Two days later, Cofer's counsel filed an affidavit stating that he had contacted the witness, but the witness was hospitalized and unable to assist in preparing and signing the affidavit. Three weeks after the first hearing, the superior court conducted a second summary judgment motion hearing. During the second hearing, the superior court stated that it had considered counsel's affidavit, although it deemed the law precluded it from reviewing an affidavit filed after argument commenced during the first hearing. The superior court still denied the application for a continuance of the summary judgment hearing.

On appeal, this court, in *Cofer v. Pierce County*, addressed whether the superior court should have entertained counsel's affidavit in support of a motion to continue the hearing, not whether the court should have considered any declaration of the expert

witness. The court held that the superior court correctly considered the affidavit. In so doing, the court wrote:

> Under normal circumstances it is not desirable to file affidavits after argument is heard on the motion, but it is a party's right to do so. Until a formal order granting or denying the motion for summary judgment is entered, a party may file affidavits to assist the court in determining the existence of an issue of material fact.

Cofer v. Pierce County, 8 Wn. App. at 261. The court later intoned:

> [A]n affidavit should be considered at any time prior to entering a final order on the summary judgment.

Cofer v. Pierce County, 8 Wn. App. at 263.

This court then held, in *Cofer v. Pierce County*, that the trial court abused its discretion when not affording Margaret Cofer a continuance in order to secure the affidavit of her expert witness. When a party shows the trial court a good reason why an affidavit cannot be obtained in time for a summary judgment proceeding, the court holds a duty to accord the party a reasonable opportunity to make the record complete before ruling on a motion for summary judgment.

Cofer v. Pierce County, in turn, relied on *Felsman v. Kessler*, 2 Wn. App. 493 (1970). In *Felsman v. Kessler*, this court held that the superior court should have considered affidavits filed after the superior court issued a memorandum decision granting John and Juanita Kessler summary judgment dismissal of Shirley Felsman's suit. Felsman sued as the result of the shooting death of her husband on the Kessler land.

Felsman claimed that John Kessler and Kessler's employee, Don Keys, conspired to kill the husband because he trespassed while hunting. Both Kesslers signed affidavits in support of the motion, in which they denied that they employed Keys or that either promoted the killing of the husband. In response, Felsman's counsel filed an affidavit stating that witnesses had told him that John Kessler hired Keys to keep unauthorized hunters from Kessler's land. Thereafter, on the day of the summary judgment hearing, Felsman's attorney conducted the deposition of both John and Juanita Kessler. Both Kesslers refused to answer questions on the basis of the Fifth Amendment to the United States Constitution. During the summary judgment hearing later that day, Felsman's counsel commented about the Kesslers' refusal to answer questions and added that John Kessler also refused to answer questions during a coroner's inquest. Three days later the superior court issued a memorandum decision granting the motion. Four days after the issuance of the decision, Shirley Felsman filed a motion to extend time to file additional affidavits. The superior court tentatively granted the motion with the caveat that it would later decide the admissibility of late affidavits. Thereafter, Felsman filed the depositions of John and Juanita Kessler and an affidavit of a witness who stated John Kessler told him that Don Keys was his employee and that Keys and Kessler had agreed, after the shooting, that Keys should disappear. The superior court later refused to consider the depositions and the affidavit, and the court entered a formal order granting the Kesslers' dismissal of the suit.

This reviewing court, in *Felsman v. Kessler*, first noted the rule that a summary judgment motion should not be granted when critical facts lie solely in the possession of the moving party. Application of this rule could have resulted in an automatic reversal and an end to the opinion. Nevertheless, the court added that, because of the witness' affidavit, the coroner's inquest testimony, and the Kesslers' refusal to be cross-examined with regard to their affidavit testimony, the court should have considered the late evidence before signing the summary judgment order. The court wrote:

> While we do not encourage or condone plaintiff's awaiting the court's ruling on the motion and then scurrying around to get affidavits and other matters before it in an attempt to change the court's mind, the fact remains that until an order is entered formally denying the motion, this avenue is available.

Felsman v. Kessler, 2 Wn. App. at 498 (1970). The court reversed for a trial.

By filing the supplemental declaration of Dr. John Shamoun after the superior court's ruling, Kathie Boyer in essence sought to reopen the case for further evidence. At the least, Boyer sought reconsideration of the summary judgment ruling. Nevertheless, Boyer failed to file any motion to reopen or for reconsideration. The superior court had twice hinted that Boyer may wish to file a motion for reconsideration. Boyer never earlier filed a motion for a continuance of the summary judgment hearing in order to procure needed testimony.

In *Keck v. Collins*, Darla Keck at least filed the late supplemental declaration one day before the summary judgment hearing. Keck then requested late filing or a

continuance. Keck's counsel filed an affidavit explaining the need for the late filing. This court and the Supreme Court found good cause for the late filing of the supplemental declaration under two distinct tests. Keck moved for reconsideration after the granting of the summary judgment motion.

A literal reading of *Cofer v. Pierce County* strongly supports Kathie Boyer's contention that she was entitled to file affidavits at any time before the superior court signed the summary judgment order on June 15, 2018. Nevertheless, Margaret Cofer's counsel filed an affidavit for a continuance. Cofer's attorney showed that a delay in procuring an expert's affidavit resulted from the hospitalization of the expert witness.

Felsman v. Kessler holds unique facts. Defendants signed an affidavit supporting their motion for summary judgment, but then refused to be cross-examined about the same facts during a deposition. After the issuance of the memorandum decision, Shirley Felsman asked the court for late filing of affidavits in part because of the refusal of the defendants to answer questions during their depositions.

In this appeal, Kathie Boyer filed the supplemental declaration after the superior court's memorandum decision. Boyer never asked the superior court to exercise its discretion in determining whether to review the supplemental declaration of Dr. John Shamoun. Boyer never presented good cause for the late filing. Boyer never argued to the superior court that the supplemental declaration presented a question of fact sufficient to deny the defense's summary judgment motion.

One might characterize as overly technical a requirement that the party filing a late affidavit also file a motion for permission to file late or file a motion for reconsideration after a ruling. After all the superior court should have recognized when it presumably saw the supplemental declaration of John Shamoun that Kathie Boyer wanted to file the affidavit late and gain reconsideration of its memorandum decision. Nevertheless, requiring one or more motions to accompany the supplemental declaration serves legitimate purposes. With the motion for late filing, Kathie Boyer would have or at least should have included an affidavit or other support to show good cause for extension of the time for filing. The superior court could then have also determined the applicability of the *Burnet v. Spokane Ambulance* factors. With the motion for reconsideration, Kathie Boyer would have or at least should have presented argument as to why the supplemental declaration defeated the defendants' summary judgment motion. Without these motions and the motions' support, the superior court lacked a basis on which to determine whether to review the declaration and assess whether the declaration should change the court's decision.

On appeal, Kathie Boyer complains that the superior court never applied the *Burnet v. Spokane Ambulance* factors. Nevertheless, Boyer never identified the factors for the superior court, nor asked for their application. The superior court deserved an opportunity to hear this request from Boyer before any appeal. PSNW and Kai Morimoto deserved an opportunity to address the *Burnet* factors and argue against the merits of the

supplemental declaration before any appeal. Even on appeal, Boyer has not analyzed why the *Burnet* factors apply in her favor.

We do not review new arguments on appeal. RAP 2.5(a); *State v. Nitsch*, 100 Wn. App. 512, 519, 997 P.2d 1000 (2000). The prerequisite affords the trial court an opportunity to rule correctly on a matter before it can be presented on appeal. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). The rule serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and facilitates appellate review by ensuring that a complete record of the issues will be available. *State v. Strine*, 176 Wn.2d 742, 749-50 (2013); *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988).

No Washington case obligates the superior court to accept summary judgment affidavits after the hearing or a memorandum decision without the proponent complying with some test. All Washington decisions involve the nonmoving party initiating some action for the court to review the affidavit other than simply filing the affidavit.

When filing the supplemental declaration of Dr. John Shamoun, Kathie Boyer ignored the provisions of CR 6(b)(1). The rule allows the superior court to enlarge the period of time in which to file a pleading on request of a party and for good cause. We should bend the rules to further justice and to reach the case's merits, but we should also enforce rules in order to afford an orderly presentation of evidence and argument before the superior court.

PSNW and Dr. Kai Morimoto also ask for affirmation of the summary judgment order because Dr. John Shamoun's testimony did not establish causation. PSNW further contends that Shamoun raised no issue as to the negligence of any of its employees. Because we affirm the trial court's ruling that Dr. Shamoun failed to confirm his knowledge of the Washington standard of care, we do not address these additional arguments.

CONCLUSION

We affirm the summary judgment dismissal of Kathie Boyer's claims against Dr. Kai Morimoto and PSNW.

Fearing, J.

WE CONCUR:

Korsmo, J.

Lawrence-Berrey, C.J.

APPENDIX

Washington may alone follow a formulaic test when deciding whether a party may file affidavits after the trial court's memorandum decision. The foreign courts issuing these decisions follow civil rules similar, if not identical, to Washington's CR 6 and CR 56.

Alabama

Rule 6(d) allows the trial court discretion to permit the service of affidavits that might otherwise be untimely, and its decision to accept such affidavits will not be reversed absent an abuse of discretion. *Weldon v. Cotney*, 811 So. 2d 530 (Ala. 2001).

Arizona

The trial court holds discretion as to whether to allow filing of affidavits after a hearing on a motion for summary judgment. *7-G Ranching Co. v. Stites*, 4 Ariz. App. 228, 419 P.2d 358 (1966).

Arkansas

Trial court need not consider affidavits filed one week after the hearing. *Graham v. Underwood*, 2017 Ark. App. 498, 7, 532 S.W.3d 88, 93-94.

Colorado

A supplemental affidavit of an expert medical witness filed by a medical malpractice plaintiff after motion for summary judgment in favor of defendant physician was granted could not be considered in motion to reconsider when the plaintiff neither asserted nor established that evidence could not have been discovered in exercise of reasonable diligence before summary judgment hearing. *Conrad v. Imatani*, 724 P.2d 89 (Colo. App. 1986).

Connecticut

Trial court did not abuse discretion when granting party summary judgment while refusing to consider nonmoving party's late affidavits. *Cornelius v. Rosario*, 138 Conn. App. 1, 51 A.3d 1144 (2012).

Florida

The Florida Court of Appeals reversed the grant of a summary judgment because an affidavit filed in support of the motion was filed two days after the summary judgment hearing. The court ruled that, if a reviewing court is to consider a late filed affidavit, the trial court record must show that the trial court granted permission for late filing. *Kendel v. City of Miami*, 281 So. 2d 566 (Fla. Dist. Ct. App. 1973).

Georgia

Party filed summary judgment affidavits after the hearing. The party requested permission for late filing, but failed to attempt to show excusable neglect. The trial court did not abuse its discretion in denying late filing. *Harrell v. Federal National Payables, Inc.*, 264 Ga. App. 501, 591 S.E.2d 374 (2003).

The Georgia Court of Appeals ruled that the trial court holds discretion in whether to consider a late filed summary judgment affidavit. In the absence of a record to the contrary, the court will assume the court exercised its discretion in denying late filing. *U.S. Enterprises, Inc. v. Mikado Custom Tailors*, 163 Ga. App. 306, 293 S.E.2d 533, *rev'd on other grounds*, 250 Ga. 415, 297 S.E.2d 290 (1982).

Idaho

A party may not submit summary judgment affidavits after the summary judgment motion hearing. *Jarman v. Hale*, 122 Idaho 952, 842 P.2d 288 (Ct. App. 1992), *abrogated on other grounds by Puckett v. Verska*, 144 Idaho 161, 158 P.3d 937 (2007).

Illinois

Affidavits may not be added by either party as a matter of right after a hearing and decision on a motion for summary judgment, but rather the allowance of affidavits presented for the first time in connection with a motion to vacate is within the discretion of the trial court. *Kaplan v. Disera*, 199 Ill. App. 3d 1093, 557 N.E.2d 924, 145 Ill. Dec. 945 (1990).

Indiana

Trial court did not abuse its discretion in rejecting filing of summary judgment affidavits submitted after the hearing and the court's ruling. *Keesling v. Beegle*, 858

N.E.2d 980 (Ind. Ct. App. 2006), *aff'd in part, vacated in part*, 880 N.E.2d 1202 (Ind. 2008).

Adverse party must file summary judgment affidavits before the summary judgment hearing, even if the trial court extends the hearing to another date. This deadline will be enforced despite a court rule that reads: all pleadings "shall be so construed as to do substantial justice, lead to disposition on the merits, and avoid litigation of procedural points." The adverse party requested late filing of expert affidavits. The trial court could have granted the request, but the court's denial of the request was not an abuse of discretion because the party had ample time to timely file the affidavits. *Winbush v. Memorial Health System, Inc.*, 581 N.E.2d 1239 (Ind. 1991).

Kentucky

Adverse party may not file contravening affidavit after the summary judgment hearing. *Skaggs v. Vaughn*, 550 S.W.2d 574 (Ky. Ct. App. 1977).

Louisiana

Trial court should not have considered plaintiffs' affidavits on defendants' motions for summary judgment filed several months after hearing on motions. *Vardaman v. Baker Center, Inc.*, 98 2611 (La. App. 1 Cir. 3/13/98), 711 So. 2d 727.

Maine

Although parties must ordinarily submit facts in advance of the hearing, trial court may exercise discretion in permitting late affidavits that provide additional foundational support for facts previously offered, not additional facts. *City of Augusta v. Attorney General*, 2008 ME 51, 943 A.2d 582.

Michigan

Trial court need only consider affidavits in front of it at the time of the summary judgment hearing. *Apfelblat v. National Bank Wyandotte-Taylor*, 158 Mich. App. 258, 404 N.W.2d 725 (1987).

Minnesota

Party submitted an affidavit after the date of the hearing without submitting an

additional affidavit or any other explanation why the first affidavit was untimely. The trial court was within its discretion in refusing to consider the affidavit. *American Warehousing & Distributing, Inc. v. Michael Ede Management, Inc.*, 414 N.W.2d 554, 557 (Minn. Ct. App. 1987).

Mississippi

Trial court correctly struck a summary judgment affidavit filed after the rule's deadline. *Luvene v. Waldrup*, 905 So. 2d 697 (Miss. Ct. App. 2004), *aff'd in part, rev'd in part,* 903 So. 2d 745 (Miss. 2005).

Missouri

The adverse party must file an affidavit before the summary judgment hearing. A party may file a late affidavit only with leave of the court. *Richardson v. Rohrbaugh*, 857 S.W.2d 415, 418 (Mo. Ct. App. 1993).

Montana

The trial court did not abuse its discretion in striking, as untimely, additional affidavits prepared two days after hearing. *Konitz v. Claver*, 1998 MT 27, 287 Mont. 301, 954 P.2d 1138.

New Jersey

When plaintiffs' affidavit in opposition to motion for summary judgment was served the day before the hearing, the trial court was free to disregard the affidavit as it failed to comply with rule requiring adverse party to serve opposing affidavits not later than two days prior to date of hearing. *Ash v. Frazee*, 37 N.J. Super. 542, 117 A.2d 634 (Ct. App. Div. 1955)

New York

Trial court properly denied review of a summary judgment affidavit filed after the hearing. The proponent failed to show good cause for leave to serve the affidavit late. *Gnozzo v. Marine Trust Co. of Buffalo*, 258 A.D. 298, 17 N.Y.S.2d 168 (1939), *aff'd*, 284 N.Y. 617, 29 N.E.2d 933 (1940).

Ohio

Trial court need not entertain summary judgment affidavits filed after the hearing date. *Carlton v. Davisson*, 104 Ohio App. 3d 636, 662 N.E.2d 1112 (1995).

Tennessee

Trial court erred when granting defendant a summary judgment motion when defendant filed affidavits after the hearing. *Baker v. Lederle Laboratories*, 696 S.W.2d 890 (Tenn. Ct. App. 1985).

Texas

The affidavits must be before the court at the time of the summary judgment hearing. Otherwise, summary judgment evidence may be filed late, but only with leave of court. *RDG Partnership v. Long*, 350 S.W.3d 262 (Tex. App. 2011).

Trial court not required to consider an affidavit filed after the summary judgment hearing. Any late filing must be done with permission of the court. *Aztec Pipe & Supply Co. v. Sundance Oil Co.*, 568 S.W.2d 401, 403 (Tex. Civ. App. 1978).

Utah

Trial court held discretion in determining whether to review a late filed affidavit. *G. Adams Limited Partnership v. Durbano*, 782 P.2d 962 (Utah Ct. App. 1989).

Wisconsin

Wisconsin Court of Appeals held that the trial court need not have entertained a late filing of a summary judgment affidavit because the proponent of the affidavit never sought to enlarge the time for filing. *David Christensen Trucking & Excavating, Inc. v. Mehdian*, 2006 WI App 254, 297 Wis. 2d 765, 726 N.W.2d 689.

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Honorable Raymond Clary

FILED
APR 16 2018
Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

SUPERIOR COURT OF WASHINGTON
IN AND FOR SPOKANE COUNTY

KATHIE AND JOE BOYER, individual and the marital community composed thereof,

Plaintiffs,

v.

KAI MORIMOTO, M.D., individually and PLASTIC SURGERY NORTHWEST, a Washington Corporation,

Defendants.

No. 17-2-00533-3

DECLARATION OF JOHN M. SHAMOUN, M.D., F.A.C.S.

I, Dr. John M. Shamoun, declare under the penalty of perjury, that the following is true and correct:

1. I am over eighteen years of age and make this declaration based upon my personal knowledge.

2. I was retained by plaintiffs' counsel as a medical expert in the above-captioned lawsuit. A thorough explanation of my education, training and experience can be found on my C.V., attached to this declaration as **Exhibit 1**.

3. Throughout my career, I have studied, trained and practiced in a variety of locations throughout the country. I have been licensed to practice medicine in six states, with

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active licensure in two (Texas and California). I also maintain an active surgical license in the United Arab Emirates.

4. In addition to my professional experience, I have been qualified as a medical expert regarding the standard of care applicable to plastic surgeries like the one at issue in this litigation, in several jurisdictions.

5. One facet of my role in this case was to offer opinions regarding the standard of care applicable to the October 26, 2015 surgery at the heart of this litigation, as well as whether defendants' conduct fell below the standard of care. The specific medical procedure in question consisted of the following: (1) bilateral breast implant exchange, with mastopexy; (2) liposuction; and (3) abdominoplasty. As a result of my education, training and experience, I am well-versed in the standard of care applicable to healthcare providers performing surgical procedures such as these.

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

7. As a part of formulating my opinions in this case, I reviewed the medical records of Mrs. Boyer produced by Defendant Morimoto and Defendant Plastic Surgery Northwest. In addition, I have reviewed the record of the emergent care received by Mrs. Boyer at various facilities throughout the State of Montana in the days following her surgery with defendants.

8. In addition to Mrs. Boyer's medical records, I have reviewed written discovery exchanged in this case as well as the depositions of Mr. and Mrs. Boyer. I have also asked to review the depositions of defendants once they are completed and may rely upon any additional information disclosed during the course of discovery in refining my opinions.

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9. Based upon my review, I have identified several areas where defendants' conduct fell below the standard of care. All of the opinions offered in this declaration are provided on a more probable than not basis, based upon a reasonable-degree of medical certainty.

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

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

12. The informed consent relating to this surgery was likewise defective. Defendants' records reflect that Mrs. Boyer was provided with a mere "boilerplate" explanation of the risks and benefits of the surgery. Defendants' records do not show that Mrs. Boyer was informed of the *specific* risks and benefits of the surgery she was to receive on October 26, 2015. Considering that Mrs. Boyer was facing extensive, elective surgery, much more was required than having Mrs. Boyer sign a standard, boilerplate informed consent form, such as an

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explanation regarding the potential benefits of performing the surgery in stages, rather than all at once. This did not occur. In fact, the decision to perform these three procedures during a single surgery was made upon recommendation of Defendant Morimoto.

13. In addition, plaintiffs have testified that they repeatedly informed defendants that Mrs. Boyer was menstruating prior to the surgery. Plaintiffs also asked defendants if Mrs. Boyer was permitted to utilize tampons during the surgery. Defendants assured plaintiffs that tampons were acceptable and that her menstrual care needs would be addressed by defendants during surgery.

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

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

13. Rather than determine the cause of Mrs. Boyer's symptoms, Defendant Morimoto merely increased the strength of Mrs. Boyer's pain medication (oxycodone) and again discharged plaintiffs to return to their home in Montana with no scheduled follow-up for several

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weeks. Considering that severe pain is an indication of potential serious surgical complication, Defendant Morimoto had a duty to investigate further in order to rule out serious surgical complications before discharging plaintiffs and permitting them to drive several hours to their home in Montana. Her failure to do anything other than a cursory examination was a serious breach of the standard of care.

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

Signed on April 13, 2018 at Newport Beach, California.

John M. Shamoun, M.D., F.A.C.S.

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SUPERIOR COURT OF WASHINGTON
IN AND FOR SPOKANE COUNTY

KATHIE AND JOE BOYER, individual and the marital community composed thereof,

Plaintiffs,

v.

KAI MORIMOTO, M.D., individually and PLASTIC SURGERY NORTHWEST, a Washington Corporation,

Defendants.

No. 17-2-00533-3

ERRATA IN SUPPORT OF PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I, Martin D. McLean, declare under the penalty of perjury, that the following is true and correct:

1. Attached hereto as **Exhibit** 1 is the C.V. of Dr. John Shamoun. This document was referenced in the Declaration of John Shamoun filed in opposition to Defendant's Motion for Summary Judgment, but was inadvertently omitted.

2. Attached hereto as Exhibit 2 is a true and correct copy of Plaintiffs' Disclosure of Lay and Expert Witnesses, served on December 15, 2017. Exhibit 1 was attached to Plaintiff's Disclosure of Lay and Expert Witnesses.

003162-11 1029792 V1

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Signed on April 30th, 2018 at Seattle, Washington.

Martin D. McLean

ERRATA - 2

003162-11 1029792 V1

HAGENS BERMAN
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EXHIBIT 1

CURRICULUM VITAE

JOHN MILAM SHAMOUN, M.D., F.A.C.S.

OFFICE ADDRESS 360 San Miguel Dr., Suite 406
Newport Beach, CA 92660
(949) 759-3077
(949) 759-5458 -fax

DATE OF BIRTH April 1, 1960

PLACE OF BIRTH Greenville, Mississippi

LICENSURE

United States of America, USA

Texas	#H9713	Active
Georgia	#037683	Inactive
California	#A52955	Active
Florida	#ME0064802	Inactive
Mississippi	#11422	Inactive
Alabama	#13700	Inactive
D.E.A.	#BS3909580	Expires 2/28/18

United Arab Emirates, UAE

Health Authority – Abu Dhabi #GD17413	Active
Health Care City – Dubai #MS1285-16	Active

EDUCATION

High School	ST. JOSEPH HIGH SCHOOL Greenville, Mississippi	1974 – 1978
College	UNIVERSITY OF DALLAS Irving, Texas	1978 – 1979
	UNIVERSITY OF DALLAS/SMU Rome, Italy	1979 – 1980
	UNIVERSITY OF MISSISSIPPI Oxford, Mississippi *B.A. Biological Sciences*	1980 – 1982
Medical School	UNIVERSITY OF MISSISSIPPI SCHOOL OF MEDICINE	1982 – 1986
Internship	UNIVERSITY OF SOUTH ALABAMA SCHOOL OF MEDICINE (Internship PGY I) Mobile, Alabama – *General Surgery*	1986 – 1987
Residency	UNIVERSITY OF SOUTH ALABAMA SCHOOL OF MEDICINE (Residency, PGY II-V) Mobile, Alabama – *General Surgery* *Chairman - William Currert, M.D.*	1987 – 1991
	UNIVERSITY OF SOUTH ALABAMA SCHOOL OF MEDICINE (Chief Resident) Mobile, Alabama – *General Surgery*	1990 – 1991
	SOUTHWESTERN MEDICAL SCHOOL (PGY VI-VII, Parkland Hospital) UTHSC Dallas, Texas *Plastic and Reconstructive Surgery* *Chairman - Fritz Barton, M.D., Rod Rohrich, M.D.*	1991 – 1993

FELLOWSHIPS

LAWRENCE B. ROBBINS, M.D.
Aesthetic (Cosmetic) Surgery of the Face, Breast, and Body
MT. SINAI MEDICAL CENTER — Aug 1993 – Jan 1994
Miami, Florida

CARL R. HARTRAMPF, JR., M.D.
Aesthetic and Restorative Surgery of the Breast
RECONSTRUCTIVE SURGERY FOUNDATION, ST. JOSEPH HOSPITAL — Jan 1994 – July 1994
Atlanta, Georgia

BRUCE F. CONNELL, M.D. — July 1994 – Jan 1995
Aesthetic (Cosmetic) Surgery of the Face
CONNELL AESTHETIC SURGERY NETWORK
Santa Ana, California

ROBERT S. FLOWERS, M.D. — Sept 1994 – Nov 1994
Aesthetic Plastic Surgery of the Asian Face
PLASTIC SURGERY CENTER OF THE PACIFIC
Honolulu, Hawaii

AWARDS/ORGANIZATIONS

College

Academic Scholarship, UNIVERSITY OF DALLAS	1978
UNIVERSITY OF DALLAS Tennis Team	1978
International Study, Rome, Italy	1979
Genetics/Laboratory Instructor	1979
Beta Beta Beta Biological Honor Society	1980
Alpha Epsilon Delta Pre-Medical Honor Society	1980
Magna Cum Laude Graduate	1982

Medical School

American Medical Association	1993
American Academy of Family Physician	1985
American Medical Student Association	1983
A.O.A. Medical Honor Society	1986

AWARDS/ORGANIZATIONS (Past & Present)	American College of Surgeons (So.CA.Chapter)	1997
	American College of Surgeons (Fellow)	1995
	American Medical Association	1995
	A.O.A. Alumnus	1986
	Southern Medical Association	1991
	Society of Amer. G.I. Endoscopic Surgeons (SAGES)	1991
	Smithsonian National Associates	1991
	A.S.P.R.S.	1991
	Orange County Medical Association	1996
	California Medical Association	1996
	California Society of Plastic Surgeons	1996
	International Society of Cosmetic Laser Surgery	1996
	American College of Forensic Examiners	1997
	Association of American Physicians and Surgeons	1997
	Life Extensions Foundation	1997
	American Academy of Anti-Aging Medicine	1997
	New York Academy of Sciences	1997
	The Academy of Aesthetic Restorative Surgery	1997
	Los Angeles Society of Plastic Surgeons	1999
	American Society of Cosmetic Surgery	1999
	California Academy of Cosmetic Surgery	1999
	California Assoc. of American Physicians & Surgeons	1998
	Orange County Society of Plastic Surgeons	1999
	Lipoplasty Society of North America	1998
	American Society of Bariatric Plastic Surgeons	2009
	A.S.A.P.S.	1991
	International Association of Plastic Surgeons	2016
	The California Society of Facial Plastic Surgery	2013

WORK EXPERIENCE

Residency	Clinical Instructor, Department of Surgery UNIVERSITY OF SOUTH ALABAMA SCHOOL OF MEDICINE	1987 – 1991
Fellowship	Kaiser Permanente, Surgical Urgent Care Southern California Permanente, A Medical Group, Los Angeles, California	Jul - Dec 1994
Specialist Plastic Surgery	THE AMERICAN SURGECENTER P.O. Box 93880 26th. Street, Villa 408, Al Rawdah Area Abu Dhabi, United Arab Emirates	2014

CERTIFICATIONS/ QUALIFICATIONS

AMERICAN BOARD OF SURGERY
Certificate #37048
February 11, 1992
Expiration Date: July 1, 2002

AMERICAN BOARD OF SURGERY
Re-Certification #37048
October 19, 2001
Expiration Date: July 1, 2012

AMERICAN BOARD OF SURGERY
Re-Certification #37048
December 8, 2009
Expiration Date: July 1, 2022

AMERICAN BOARD OF PLASTIC SURGERY
Certificate #5093
November 23, 1995
Expiration Date: December 31, 2006

AMERICAN BOARD OF PLASTIC SURGERY
Re-Certification #5093
April 1, 2004
Expiration Date: December 31, 2016

AMERICAN BOARD OF PLASTIC SURGERY
Re-Certification #5093
April 1, 2014
Expiration Date: December 31, 2026

AMERICAN BOARD OF FORENSIC MEDICINE
Certificate #10795
January 1997

AMERICAN BOARD OF FACIAL PLASTIC AND RECONSTRUCTIVE SURGERY
July 1997

Advanced Trauma Life Support (ATLS) - 13 Dec 2009 active
Advanced Cardiac Life Support (ACLS) - 18 Jul 2009 active
Basic Life Support (BLS) - 18 July 2009 active

RESEARCH/ PUBLICATIONS

"Influence of Alar Cartilage and Septum on Nasal Tip Support" SOUTHWESTERN MEDICAL SCHOOL (UTMSC – Dallas) Department of Plastic Surgery	1993
"Guanethidine Infusion in the Treatment of Reflex Sympathetic Dystrophy UNIVERSITY OF MISSISSIPPI SCHOOL OF MEDICINE Department of Orthopaedic Surgery	1984
"Somatostatin vs Placebo in the Treatment of Gastrointestinal Fistulas." Ferring Laboratories UNIVERSITY OF SOUTH ALABAMA SCHOOL OF MEDICINE	1989
Shamoun, J. et al.: "Brain Abscess Following Multiple Esophageal Dilations: A Case Report." *Clinical Imaging*	June 1989
Shamoun, J. et. al.: "Stapled Cardiorraphy in the Treatment in Penetrating Cardiac Injuries," A new Technique and Review of Literature. *The Journal of Trauma*	Nov 1989
Shamoun, J. et. al.: "Factors Affecting Mortality in Patients Operated Upon for Complications of Peptic Ulcer Disease." *The American Surgeon*	Feb 1989
Shamoun, J. et. al.: Atlanto – Occipital Subluxation/ Dislocation: "A Survivable Injury?" *The American Surgeon*	April 1997
Shamoun, J. et. al.: "Expanding the Versatility of the Serratus Anterior Myo – Osseous Flap in Reconstructive Upper Extremity Defects. Submitted for Publication *Plastic & Reconstructive Surgery*	April 1996
Shamoun, J et. al.: The Omohyid Muscle Flap." *Journal of Clinical Anatomy*	Nov 1992

RESEARCH/ PUBLICATIONS
(continued)

Shamoun, J. et. al.: "Alternatives In Total Glandular Mastectomy. " Submitted for publication *Plastic & Reconstructive Surgery*	May 1993
Connell, B.F., M.D., Shamoun, J.M., M.D. "The Significance of Digastric Muscle Contouring for Rejuvenation of the Submental Area of the Face." *Plastic & Reconstructive Surgery*	May 1997
Shamoun, J. M., et. al.: and Elliott, Franklyn, M.D.: "Lateral Transverse Thigh Flap and Deep Circumflex Iliac Soft Tissue Flap (Rubens Flap)" *Microvascular Reconstruction of The Cancer Patient.* The First Edition Schustermann. Lippincott – Raven, Philadelphia	1997
Shamoun, J.M., M.D., Hartrampf, C.R., M.D.: "A Crucial adjunct in Breast Reconstruction; Mastectomy Specimen Weight and Skin Dimensions." *Annals of Plastic Surgery*	March 1996
Shamoun, J.M., M.D., Ellenbogen, R., M.D.: "Blepharoplasty, Browlift, and Forehead Lift." *Textbook of Plastic Maxillofacial and Reconstructive Surgery* - Third Edition, Chapter 51	1996
Shamoun, J.M., M.D., Elliott, Franklyn, M.D.: "Rubens's Peri-Iliac Soft Tissue Free Flap." *Atlas of Microvascular Flaps, Schustermann,*	1995
Hartrampf, C.R., M.D., Shamoun, J.M., M.D. et al: "Classification and Reconstruction of the Breast and Chest Wall in Polands Syndrome." Submitted for publication *Plastic & Reconstructive Surgery*	2000

RESEARCH/ PUBLICATIONS
(continued)

Shamoun, J.M., M.D., Hartrampf, C.R., M.D., et. al.: "Imaging of Fat Necrosis and Recurrent Breast Cancer after Autogenous Breast Reconstruction." Submitted for publication *Annals of Plastic Surgery*	March 1995
Shamoun, J.M., M.D., Hartrampf, C.R., M.D.: "The TRAM Hernia." Submitted for publication *Plastic & Reconstructive Surgery*, and presented at 13th. Annual Breast Surgery Symposium, Atlanta, Georgia, January 1997	February 1995

PRESENTATIONS

Surgical Grand Rounds, "Maxillofacial Trauma A Review and Management	January 1989
Surgical Grand Rounds, "Regional vs. General Anesthesia for the High Risk Cardiac Patient,"	April 1989
Surgical Grand Rounds, "Gastrinomas: A Case Report -- Review of Literature and Management,"	November 1989
Surgical grand Rounds, "Breast Reconstruction Post Mastectomy,"	December 1990
Surgical Grand Rounds, "Abdominal Wall Reconstruction,"	March 1991
P.S.B.F, *Senior Plastic Surgery Residents Conference*, "The Influence of the Lower Lateral Cartilage on Nasal Tip Projection.	May 22-23, 1993
"Factors Affecting Mortality in Patients Operated Upon for Complications of Peptic Ulcer Disease." Presented, *Southwestern Surgical Congress*	February 1988
10th. Annual Breast Surgery Symposium, Atlanta, Georgia Live Surgery -- Assistant Surgeon to Dr. Carl Hartrampf	January 1994
Assistant Surgeon to Frank Elliott, M.D. in performing Rubens's Flap for *ASPRS Meeting*.	September 1994

PRESENTATIONS (continued)

"Significance of Digastric Muscle in Submental Contouring of the Neck." 3rd *Annual Symposium on Aesthetic Plastic Surgery of the Face, Eyes, Nose, Scalp, and Neck.* *Four Seasons Hotel, Newport Beach, California*	July 3-6, 1995
Hoag Cancer Center, "Alternatives in Breast Reconstruction for Mastectomy Patients."	May 1995

ELECTIVES

Plastic and Reconstructive Surgery. EMORY UNIVERSITY	August 1990
Plastic and Reconstructive Surgery UNIVERSITY OF PITTSBURGH	November 1998
General Surgery, Laser Laparoscopic Workshop	April 1991
Basic and Advanced Techniques Dallas Rhinoplasty Symposium	March 1992--1998
Dallas Vascular Malformation Symposium	Sept 1991- 1995

REFERENCES

Sam T. Hamra, M.D.
9703 Gaston Avenue
Suite 810
Dallas, Texas 75246

Arnold Luterman, M.D.
University of South Alabama, College of Medicine
Department of Surgery
2541 Fillingim St.
Mobile, Alabama 36617

Jack P. Gunter, M.D.
8144 Walnut Hill Lane
Suite170
Dallas, Texas 75231

Robert S. Flowers, M.D.
The Flowers Clinic
Suite 1011 677 Ala Moana Blvd.
Honolulu, Hawaii

REFERENCES (continued)

Carl R. Hartrampf, M.D.
7 Vernon Road, N.W.
Atlanta, GA 30305

Henry S. Byrd, M.D.
411 N Washington Ave.
Suite 600
Dallas, Texas 75246

Elliott Franklyn, M.D.
975 Johnson Ferry Rd. NE
Atlanta, Georgia 30342

Wylie A. Aitken
MacArthur Place
3 MacArthur Place
Suite 800
P.O. Box 2555
Santa Ana, CA 92707

C. Gregory Shamoun Esq.
1755 Wittington Place
Suite 200
Dallas, Texas 75234

ADDITIONAL ACTIVITIES

Talk Radio 76 KGU, Honolulu, Hawaii Guest *"More Than Skin Deep"*	September, 1994
Talk Radio 76 KGU, Honolulu, Hawaii Guest "Faces, Figures, and Feelings"	October, 1994

HOSPITAL PRIVILEGES	Hoag Memorial Hospital, Newport Beach, CA September 14, 1995	Active Status
	Irvine Medical Center, Irvine, CA October 1995	Inactive Status
	Mission Hospital, Mission Viejo, CA November 1995	Inactive Status
	South Coast Medical Center, Laguna Beach, CA January 1996	Provisional Status
	Desert Hospital, Palm Springs, CA November 1998	Courtesy Status
	Newport Institute of Surgery, Newport Beach, CA August 1996	Active Status
	St. Joseph Hospital, Orange, CA August 1998	Inactive Status
	Orange Coast Memorial Medical Center, F.V., CA August 1998	Active Status

EXHIBIT 2

Honorable Raymond Clary

SUPERIOR COURT OF WASHINGTON
IN AND FOR SPOKANE COUNTY

KATHIE AND JOE BOYER, individual and the marital community composed thereof,

Plaintiffs,

v.

KAI MORIMOTO, M.D., individually and PLASTIC SURGERY NORTHWEST, a Washington Corporation,

Defendants.

No. 17-2-00533-3

PLAINTIFFS' DISLCOSURE OF LAY AND EXPERT WITNESSES

TO: KAI MORIMOTO, M.D., AND PLASTIC SURGERY NORTHWEST

Defendants;

AND TO: JAMES KING, of EVANS, CRAVEN & LACKEY, their attorney of record

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Pursuant to Civil Rule 26 ANTHONY D. SHAPIRO and MARTIN McLEAN, as attorneys of record for plaintiffs hereby discloses the following persons as having relevant factual or expert knowledge for whom plaintiffs reserve the option to call as witnesses at the trial of the above-entitled matter.

I. LAY WITNESSES

A. Plaintiffs

1. Joe Boyer
   c/o Hagens Berman

Mr. Boyer may testify regarding his wife's medical care relating to defendants, as well as the treatment that Mrs. Boyer received after her care with defendants. Mr. Boyer may also testify regarding the impact of his wife's injuries.

2. Kathie Boyer
   c/o Hagens Berman

Mrs. Boyer may testify regarding her medical care relating to defendants, as well as the treatment she received after her care with defendants. Mrs. Boyer may also testify regarding the impact of her injuries on she and her husband.

B. Defendants

3. Dr. Kai Morimoto
   c/o Evans, Craven & Lackey

Dr. Morimoto may be called to testify regarding her care of Mrs. Boyer during the fall of 2015.

4. Plastic Surgery Northwest

The employees, staff and independent contractors of Defendant Plastic Surgery Northwest may be called to testify regarding the care provided to Mrs. Boyer during November 2015. The specific employees, staff and/or contractors is still being determined through plaintiffs' written discovery.

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C. **Miscellaneous Medical Providers**

5. Community Hospital of Anaconda
401 West Pennsylvania Street,
Anaconda, Montana 59711

The doctors and nurses who treated Mrs. Boyer on or about November 4, 2015 may be called to testify regarding the care they provided. The specific personnel whom may be called to testify will be determined as discovery continues.

6. Anaconda Fire Department
401 West Pennsylvania Street,
Anaconda, Montana 59711

The technicians who treated Mrs. Boyer on or about November 4, 2015 may be called to testify regarding the care they provided. The specific personnel whom may be called to testify will be determined as discovery continues.

7. Life Flight Network (formerly Northwest Medstar)
22285 Yellow Gate Lane, Suite 102
Aurora, OR 97002

The technicians who treated Mrs. Boyer on or about November 4, 2015 may be called to testify regarding the care they provided. The specific personnel whom may be called to testify will be determined as discovery continues.

8. Providence St. Patrick's Hospital
500 West Broadway
Missoula, Montana 59802

The specific doctors and nurses who treated Mrs. Boyer on or about November 4, 2015 may be called to testify regarding the care they provided. To date, the physicians known to have provided direct care relevant to plaintiffs' claims are: Dr. Richard Selman, Dr. David C. Christensen, Dr. Stephen P. Hardy, Dr. Michael Harl, Dr. Claude Tonnetre and Dr. Phillip Schrumpf. The specific personnel whom may be called to testify will be determined as discovery continues.

9. Phillip Bornstein, PhD
125 Bank Street, Ste. 310
Missoula, Montana 59802

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Dr. Bornstein provided counseling services to plaintiffs relating to the impacts that Mrs. Boyer's surgical complications had on their lives and their marriage.

10. Dr. John "Jay" Murphy
2450 NE Mary Rose Place, Suite 220
Bend, OR 97701

Dr. Murphy may testify regarding his relationship with his sister, as well as his role in assisting in the diagnosis of the source of her illness in December 2015.

11. Heather Maddox
500 West Broadway, 6th Floor
Missoula, Montana 59802

Dr. Maddox is Mrs. Boyer's primary care physician and may be called to testify regarding her knowledge of Mrs. Boyer's health prior to and after, her injuries relating to defendants' surgery.

II. EXPERTS

1. **Dr. Martin Siegel**

Dr. Siegel is a board-certified physician with nearly 40 years of experience working as an infectious disease specialist. Dr. Siegel is expected to testify regarding the cause of Mrs. Boyer's injuries relating to her October 2015 surgery with defendants. A copy of Dr. Siegel's C.V. is attached hereto.

2. **Dr. John M. Shamoun, F.A.C.S.**

Dr. Shamoun is a plastic surgery with extensive experience performing the kinds of procedures undertaken by defendants on or about October 26, 2015. Dr. Shamoun is board certified in numerous areas of medicine. A copy of Dr. Shamoun's CV is attached hereto.

Dr. Shamoun is expected to testify regarding the applicable standard of care, defendants' course of treatment of Mrs. Boyer in the fall 2015 and that defendants' course of treatment breached the applicable standard of care. In addition, Dr. Shamoun may testify regarding all of plaintiffs' injuries and/or damages caused by defendants' breach of the standard of care.

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Plaintiffs reserve the right to identify and call as an expert witness any person whose name is identified through additional discovery or in documents made available to the parties.

Plaintiff further reserves the right to rebuttal experts.

Dated this 15th Day of December, 2017

HAGENS BERMAN SOBOL SHAPIRO LLP

By /s/ Martin D. McLean
Anthony D. Shapiro, WSBA No. 12824
Martin D. McLean, WSBA No. 33269
1918 Eighth Avenue, Ste. 3300
Seattle, WA 98101
(206) 623-7292 Tel
(206) 623-0594 Fax

HAGENS BERMAN
1918 EIGHTH AVENUE, SUITE 3300 · SEATTLE, WA 98101
(206) 623-7292 · FAX (206) 623-0594

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above-referenced document was served upon the attorneys of record listed below by facsimile and U.S. Mail on this 15 day of December, 2017:

James King
Evans Craven & Lackey
818 W Riverside Ave # 250
Spokane, WA 99201

/s/ Martin D. McLean
Martin D. McLean (WSBA #33269)

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CN: 201702005333
SN: 31
PC: 9

FILED
MAY 09 2018
Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

SUPERIOR COURT OF WASHINGTON FOR SPOKANE COUNTY

Kathie and Joe Boyer, individually and their marital community,

Plaintiffs,

vs.

Kai Morimoto, M.D., individually and Plastic Surgery Northwest, a Washington Corporation,

Defendants.

No. 17-2-00533-3

Memorandum Decision on Defense Motion for Summary Judgment

I. BASIS

Plaintiffs Kathie and Joe Boyer plead two legal theories against Defendants. (Clerk's Documents Side Number 1, page 7 lines 2 through 22, hereafter abbreviated "SN"). First, they submit that Dr. Morimoto failed to comply with the applicable standard of care for a plastic surgeon, (sometimes abbreviated "SOC"). *Id* at page 7, lines 2 through 13. Second, they submit that Plastic Surgery Northwest is vicariously liable "as the employer of the nursing staff responsible for Mrs. Boyer's surgical care . . ." *Id* at lines 14 through 22.

Defendants Kai Morimoto, M.D. and Plastic Surgery Northwest moved the court to dismiss the Boyers' claims under CR 56. (SNs 11 and 12). In part, defendants submitted that plaintiffs had not provided responses to written discovery "concerning the specific opinions held by their disclosed experts and the foundational basis for those opinions. The failure to

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provide competent and admissible expert testimony to substantiate the allegations of medical malpractice . . . warrant summary judgment of dismissal." (SN 12, page 2 lines 22 through 27).

The hearing on defendants' motion for summary judgment was heard on Friday, April 27, 2018. Plaintiffs' standard of care expert is John M. Shamoun, M.D. F.A.C.S. Their causation expert is Martin S. Siegel, M.D.[1] Plaintiffs did not provide *curriculum vitaes* for their experts prior to the hearing. (SNs 16 and 17). The court requested that they be promptly provided. As of this writing, plaintiffs have only provided the *curriculum vitae* for Dr. Shamoun.

II. DECISION

Summary Judgment Standards: CR 56 allows a party to move for summary judgment with or without supporting affidavits, "as to all or any part" of a plaintiff's complaint. CR 56 (b). Pursuant to CR 56 (b), a "defendant can move for summary judgment by (1) pointing out to the trial court that the plaintiff lacks competent evidence to support his or her case, or (2) establishing through affidavits that no genuine issue of material fact exists." *Guile v. Ballard Community Hosp.*, 70 Wn. App. 18, 21, 23, 27 (Div. 1 1983) citing *Young v. Key Pharmaceuticals, Inc.*, 112 Wn. 2d 216, 225 n. 1 (1989); *White v. Kent Medical Center, Inc.*, 61 Wn. App. 163, 170 (Div. 1 1991).

"When a motion for summary judgment is made and supported as provided in [CR 56], an adverse party may not rest upon the mere allegations or denials of a pleading, but a response, by affidavits or otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial." CR 56 (e); *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn. 2d 355, 359 (1988) (citation omitted). "If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." CR 56 (e). In this case, defendants opted to point out that plaintiffs lacked competent evidence to satisfy the elements for the standard of care and causation. (SN 12, page 2 lines 22 through 27).

[1] Dr. Shamoun also opines on causation.

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"The 'facts' required by CR 56(e) to defeat a summary judgment motion are evidentiary in nature. *Ultimate facts or conclusions of fact are insufficient*." *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn. 2d at 359 (italics and underline added; citation omitted). Similarly, "conclusory statements of fact will not suffice." *Id* at 360.

Negligence requires a showing of duty, breach of duty, causation and damages. *Hartley v. State*, 103 Wn. 2d 768, 777 (1985). It must be demonstrated by "substantial evidence." *Johnson v. Aluminum Precision Products, Inc.*, 135 Wn App. 204, 208 (2006). "A scintilla of evidence is insufficient to carry this burden." *Id* at 208-09. "A verdict cannot be founded on mere theory or speculation." *Id* at 209 (citation omitted).

RCW 7.70.030: Washington courts recognize three causes of action for injuries resulting from healthcare. RCW 7.70.030 (1) through (3). The first is failure to follow the accepted standard of care. *Id* at (1). This is the only cause of action alleged in this case. (SN 1, page 7 lines 2 through 22). As noted, plaintiffs allege that Dr. Morimoto violated the standard of care for a plastic surgeon. *Id.* They allege that Plastic Surgery Northwest violated the standard of care because of "*Respondeat Superior*" and act(s) or inaction(s) by its "nursing staff." (SC 1, page 7, lines 15-18).

RCW 7.70.040 (1); Violation of SOC by Dr. Morimoto: A patient seeking damages for injury resulting from negligent healthcare must prove "her injury resulted from the failure of a healthcare provider to follow the accepted standard of care." *Keck v. Collins*, 184 Wn. 2d 358, 371 (*En Banc* 2015) citing RCW 7.70.030(1).

> The standard of care means 'that degree of care, skill and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he or she belongs, in the state of Washington, acting in the same or similar circumstances' (reasonable doctor).

Keck at 371citing RCW 7.70.040(1) (underline added).

Generally, the plaintiff must establish both violation of the standard of care and proximate cause through a medical expert. *Id* at 370. Dr. Morimoto is a Washington State plastic surgeon. At issue in the instant case is whether plaintiffs' standard of care expert, Dr.

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Shamoun, provided sufficient foundation to meet the statutory standard for the applicable standard of care in Washington.

The *Keck* Court compared the quality of evidence offered by Ms. Keck with the quality of evidence offered by the patient in *Guile*. *Keck* affirmed that the foundation offered in *Guile* was insufficient. *Id* at 373. ("The affidavit summarized plaintiff's postsurgical injuries and opined that the injuries were caused by the surgeon's 'faulty technique,' which fell below the applicable standard of care. To say that a reasonable doctor would not use a faulty technique essentially states that a reasonable doctor would not act negligently. This testimony fails to establish the applicable standard of care … Additionally, we note that the expert in *Guile* failed to link his conclusions to any factual basis, including his review of the medical records).

In contrast to the expert in *Guile*, the expert in *Keck* demonstrated that he had firsthand knowledge of the standard of care in Washington. He explained why the standard of care was the same as the national standard and he explained the basis of his opinions on the standard of care and causation by connecting them to Ms. Keck's medical records.

The expert in *Keck* (Dr. Li) testified:

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

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. . .

Keck 184 Wn. 2d at 364-66. (underline added).

The *Guile* Court summarized the standard of care expert testimony at issue in *Guile* as follows:

> In the present case, Dr. Meyer's affidavit likewise failed to identify specific facts supporting his conclusion that Crealock negligently performed Guile's surgery. Dr. Meyer's affidavit summarizes his qualifications, states that he has reviewed the hospital records, and then gives the following opinion:
>
> > Mrs. Guile suffered an unusual amount of post-operative pain, developed a painful perineal abscess, and was then unable to engage in coitus because her vagina was closed too tight. All of this was caused by faulty technique on the part of the first surgeon, Dr. Crealock. In my opinion he failed to exercise that degree of care, skill, and learning expected of a reasonably prudent surgeon at that time in the State of Washington, acting in the same or similar circumstances.
>
> This statement is merely a summarization of Guile's postsurgical complications, coupled with the unsupported conclusion that the complications were caused by Crealock's "faulty technique". It does little more than reiterate the claims made in Guile's complaint. *See* CR 56(e). In addition, negligence cannot be inferred from the mere fact that Guile suffered from complications following her surgery. *See Watson v. Hockett,* 107 Wash.2d 158, 161, 727 P.2d 669 (1986) ("[A] doctor will not normally be held liable under a fault based system simply because the patient suffered a bad result."(Footnote omitted.)). For these reasons, we conclude that Dr. Meyer's affidavit was insufficient to defeat the defendants' motions for summary judgment. (underline added).

Guile 70 Wn. App. at 26-7.

In the instant case, plaintiffs submitted a five-page declaration from Dr. Shamoun in support of their claim the standard of care was breached. Dr. Shamoun states that he attached his "C.V." and *it* shows he has "studied, trained and practiced in a variety of locations throughout the country." (SN 17, page 1). No C.V. was attached to his declaration or the infectious disease expert that plaintiffs proffered to opine on causation. The court had to

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request copies of the C.V.s at the time of hearing. The only one that was provided was the C.V. for Dr. Shamoun.

In his declaration, Dr. Shamoun testified he has been licensed to practice medicine in six states, with active licensure in two (Texas and California). He does not identify the six states in his declaration. *Id* at pages 1 through 5.

His late arriving C.V. reveals he is actively licensed in Texas and California. He is inactive in Georgia, Florida, Mississippi and Alabama. Contrary to the expert in *Keck*, there is not a single entry for work or exposure to the Washington State standard or how Dr. Shamoun arrived at his conclusion that there is a national standard and Washington follows it; other than his review of Mrs. Boyer's medical records. *All that is provided is a single sentence that the standard of care applicable to Mrs. Boyer's surgery "is not unique to the State of Washington and applies on a nationwide basis."* (SN 17 page 2, lines 15-16).

Plaintiffs' summarize Dr. Shamoun's knowledge of the Washington statutory standard of care as follows:

> 1. One facet of my role in this case was to offer opinions regarding the standard of care applicable to the October 26, 2015 surgery at the heart of this litigation, as well as whether defendants' conduct fell below the standard of care. The specific medical procedure in question consisted of the following: (1) bilateral breast implant exchange, with mastopexy; (2) liposuction; and (3) abdominoplasty. As a result of my education, training and experience, I am well-versed in the standard of care applicable to healthcare providers performing surgical procedures such as these.
>
> 2. The standard of care in this case required defendants to exercise the same degree of skill, care and learning expected of other reasonably prudent healthcare providers attempting the surgical procedure described in the preceding paragraph. This standard is not unique to the State of Washington and applies on a nationwide basis. (underline added).

Dr. Shamoun's foundation for his opinion that the national standard of care is the same as the Washington standard of care is far short of the foundation provided by the expert in *Keck*. Dr. Shamoun does not provide one scintilla of corroborative evidence. He simply asserts an unsupported conclusion. Conclusory statements of fact or argumentative assertions

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are insufficient to raise a genuine issue of material fact. *E.g., Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn. 2d at 359-60.

In oral argument, (and without any briefing), plaintiffs' advocate referred to *Hill v. Sacred Heart Med. Ctr.*, 143 Wn App. 438 (Div 3 2008). After the hearing, this court reviewed *Hill*, as well as *Elber v. Larson*, 142 Wn. App. 243 (Div. 3 2007) and *Eng v. Klein*, 127 Wn. App. 171 (Div. 1 2005). Each of these cases is distinguishable from the foundation proffered in the instant case, and each case describes a foundation beyond what was provided by Dr. Shamoun.

In *Hill*, the plaintiff had knee surgery and subsequently suffered from permanent paralysis on the right side of his body. The paralysis was the result of treatment with "heparin." 143 Wn. App. at 443. Two experts testified that there was a national standard of care for internal medicine physicians, in respect to administering heparin. One of the two had done her residency in Washington and practiced in Washington for 20 years before she moved her practice to Wisconsin. *Id* at 444. By training, practice and continuing medical education she was "aware that the Washington standard of care in 2004 was the same as the national standard." *Id.* In a light most favorable to the plaintiff, her foundation for the Washington standard of care supported her opinion as well as a second expert who taught at Harvard Medical School and had privileges at Beth Israel Deaconess Medical Center in Massachusetts. The two experts combined to provide a foundation that the national standard of care was the same as the Washington standard of care

In *Elber*, the patient developed paralysis after undergoing spine surgery. Regrettably, he later passed away from complications from his paralysis. The plaintiff's expert (Dr. Meub) was a neurosurgeon. He practiced in California and Vermont. With his second declaration, Dr. Meub explained that he "contacted medical colleagues in the State of Washington to confirm that the practices of the state are not different from the national standards of the American Board of Neurological surgery." 142 Wn. App. at 246.

The *Elber* Court (Division 3 of the Court of Appeals) referred to the decision in *Eng v. Klein*, 127 Wn. App. 171 (Div. 1 2005), as "helpful." *Elber* at 248. The patient in *Eng* sadly

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died from meningitis after undergoing spinal surgery. *Eng* at 174. The plaintiff retained a Connecticut infectious disease specialist to opine on the standard of care for a neurosurgeon in Washington. Most of the analysis focuses on the propriety of a physician from one specialty opining on the standard of care for a physician from another specialty, i.e., infectious disease versus neurosurgery. The *Eng* Court did find that there was a national standard of care for a differential diagnosis and conducting a spinal tap to rule out meningitis. The national standard was described as having been corroborated by "evidence." *Id* at 175 ("There also was evidence that the standard of care for diagnosing and treating meningitis is not unique to Washington, but is a national standard, and that physicians learn how to do a spinal tap typically during the third year of medical school"); and 180 ("In fact, Dr. Klein's experts concur that at least among infectious disease doctors, the standard of care for the diagnosis and treatment of meningitis is a national one.").

In summary, RCW 7.70.040(1) legislates that the standard of care that must be shown is the standard of care in Washington for like classifications of providers at the time and in circumstances like the ones at issue in each healthcare negligence case. No cases have been cited to this court that a putative expert can opine there is a national standard without a minimal foundation for the conclusion. A plethora of cases hold that argumentative assertions, assertions of ultimate facts and ultimate conclusions are insufficient to raise a genuine issue of material fact. Dr. Shamoun's declaration provides no foundation for his conclusion, i.e. "[t]his standard is not unique to the State of Washington and applies on a nationwide basis." (SN 17, page lines 16-17). Consequently, Dr. Shamoun's opinions are not admissible. To hold otherwise would require this court to disregard of the express elements of RCW 7.70.040(1).

Vicarious Liability for Plastic Surgery Northwest: As described above, plaintiffs' complaint premises vicarious liability on the claim that "as the employer of the nursing staff responsible for Mrs. Boyer's surgical care, [Plastic Surgery Northwest] is responsible for their negligence under the doctrine of Respondeat Superior." (SN 1, page 7, lines 14 through 22). During oral argument, plaintiffs' advocate submitted that Plastic Surgery Northwest is also

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vicariously liable based on the conduct of Dr. Morimoto. However, as shown, this was not plead and Plastic Surgery Northwest has done nothing to impliedly allow an amendment.

Plaintiffs have not met their burden to show breach of a standard of care by any nursing provider on Plastic Surgery Northwest's nursing staff, as alleged in their complaint. At most, plaintiffs sought to make a case against Dr. Morimoto. As with Dr. Morimoto, qualified expert testimony on the Washington nursing standard of care is required; and it was not provided.

In oral argument, (and without any briefing), plaintiffs raised *Grove v. PeaceHealth St. Joseph Hosp*, 182 Wn.2d 136 (2014). Review of *Grove* shows that the *Grove* Court identified physicians (e.g. Dr. Zech and Dr. Douglas) who covered for Dr. Leone and whose failure to detect the patient's compartment syndrome supported vicarious liability against the hospital; and the jury's verdict in favor of the patient. *Id* at 146-47.

In summary, plaintiffs failed to meet the standards to defeat a motion for summary judgment. Consequently, the defense motion for summary judgment must be granted.

III. CONCLUSION

Defendants are requested to prepare an order granting summary judgment. Please follow CR 56(h). The court considered all memoranda and documents submitted by the parties, as well as the complaint. If the parties are not able to agree on a CR 56 (h) form of order, plaintiffs may submit a memorandum setting out their objections and provide facts and law supporting the objection, as well as alternative proposed language. If plaintiffs do file an objection, defendants may respond in a similar manner. There shall be no reply. **Presentment is set for June 1, 2018 at 9:00 without oral argument**. If plaintiffs contemplate a motion for reconsideration, please wait until after the order on summary judgment is entered.

Dated: May 9, 2018.

Raymond F. Clary
Superior Court Judge

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Spokane County Superior Court
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FILED
MAY 15 2018
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SUPERIOR COURT OF WASHINGTON
IN AND FOR SPOKANE COUNTY

KATHIE AND JOE BOYER, individual and the marital community composed thereof,

Plaintiffs,

v.

KAI MORIMOTO, M.D., individually and PLASTIC SURGERY NORTHWEST, a Washington Corporation,

Defendants.

No. 17-2-00533-3

SUPPLEMENTAL DECLARATION OF JOHN M. SHAMOUN, M.D., F.A.C.S.

I, Dr. John M. Shamoun, declare under the penalty of perjury, that the following is true and correct:

1. I am over eighteen years of age and make this declaration based upon my personal knowledge.

2. In my prior declaration, I stated that the standard of care in Washington pertaining to the medical care at issue in this case is the same as the national standard of care.

3. My understanding is that Court has questioned the factual basis for my prior testimony regarding the standard of care.

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4. As reflected in my prior declaration, I have studied and practiced medicine throughout the United States. In addition, throughout my career I have consulted with numerous plastic surgeons practicing within the State of Washington, including consultations involving the specific procedures at issue in this litigation: abdominoplasty, liposuction and mastopexy. As a consequence, I can confirm that Washington plastic surgeons adhere to the same standards of practice followed by plastic surgeons practicing throughout the rest of the nation.

5. In addition, throughout my career I have personally been asked to consult on specific cases in the State of Washington, including cases involving liposuction, abdominoplasty and breast implant/mastopexy surgery. Again, as a result of my personal involvement in these kinds of cases, I can confirm that the standard of care for surgical procedure such as those at issue in this case, is the same in Washington as the rest of the United States.

Signed on May 14, 2018 at Newport Beach, California.

John M. Shamoun, M.D., F.A.C.S.

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MAY 24 2018

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SUPERIOR COURT OF WASHINGTON
IN AND FOR SPOKANE COUNTY

KATHIE AND JOE BOYER, individual and the marital community composed thereof,

Plaintiffs,

v.

KAI MORIMOTO, M.D., individually and PLASTIC SURGERY NORTHWEST, a Washington Corporation,

Defendants.

No. 17-2-00533-3

PLAINTIFFS' OBJECTIONS TO PROPOSED ORDER GRANTING DEENDANTS' MOTION FOR SUMMARY JUDGMENT

HEARING DATE:

June 1, 2018, at 9:00 a.m.

Without Oral Argument

I. STATEMENT OF FACTS

On May 9, 2018, this Court issued a Memorandum Decision on Defendant's Motion for Summary Judgment. The Memorandum indicated that the Defendants' motion was granted. The Court set June 1, 2018 as the date for presentation entry of an Order reflecting it ruling contained within its Memorandum.

On May 16, 2018 the parties conferred to address the Proposed Order provided by counsel for Defendants. Plaintiffs' sought the following modifications to the Order to include the following evidence:

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1. The Errata in Support of Plaintiffs' Response to Defendants' Motion for Summary Judgment, including the attachments thereto; and

2. Supplemental Declaration of Dr. John Shamoun further highlighting the bases for his opinions.

In addition, within their briefing and during oral argument, plaintiffs' indicated that the evidence supporting their Resposne included the pleadings and papers on file with the Court, ***specifically Defendants' Answer.***

Because this evidence is ***not*** reflected in Defendants' Proposed Order, plaintiffs object to the entry of Defendants' Order and offer the proposed alternative language.

II. LEGAL AUTHORITY

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

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

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

The Errata attaching the *curriculum vitae* of Dr. John Shamoun was submitted, at the Court's request, prior to the issuance of its Memorandum. Pursuant to CR 56(h), this evidence cannot be omitted from the Order.

Similarly, Defendants' Answer was on file many months prior to the hearing and to the issuance of the Court's Memorandum Decision. This evidence would be "other evidence called to the attention of the trial court before the order on summary judgment was entered," considering it was referenced during oral argument and more generally in plaintiffs' Response brief. While Defendants have included Plaintiffs' Complaint, their proposed Order omits their Answer. On this basis, plaintiffs object.

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The Supplemental Declaration of John S. Shamoun was filed and served after the Court issued its Memorandum Decision. However, "[u]ntil a formal order granting or denying the motion for summary judgment is ***entered***, a party may file affidavits to assist the court in determining the existence of an issue of material fact." *See Keck v. Collins*, 180 Wn. App. 67, 83 (2014); *aff'd but criticized*, 184 Wash. 2d 358, 357 P.3d 1080 (2015) *quoting Cofer v. Pierce County*, 8 Wn. App. 258, 261 (1973) (citing *Felsman v. Kessler*, 2 Wn.App. 493, 498, (1970)). (Emphasis supplied).

The Court has yet to enter a formal Order. Consequently, plaintiffs were permitted to file the Supplemental Declaration of John S. Shamoun to further highlight the impropriety of entering summary judgment. The case of *Elber v. Larson*, 142 Wn. App. 243 (2007 Div. III), is instructive. In *Elber*, the defendant moved for summary judgment dismissal of claimant's claims. In response, the claimant submitted a Declaration from Dr. Daniel Meub, an expert in neurosurgery. Dr. Meub's declaration did not explicitly state that he was familiar with the standard of care for neurosurgeons practicing in the State of Washington. The trial court granted summary judgment on that basis. *Id.* at 245-246.

The claimant filed a motion for reconsideration, including a supplemental Declaration from Dr. Meub, further expounding upon his knowledge of the standard of care. The supplemental declaration from Dr. Meub reflected that Washington neurosurgeons follow the "national" standard of care and that Dr. Meub had contact with Washington physicians confirming the same. *Id.* at 246

O this evidence, the Court of Appeals ruled that:

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

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> **a national standard of care and he is familiar with that standard**. And his assertion is not contradicted. Dr. Larson does not suggest that the standard here in Washington is different.

Id. at 247.

The Declaration of John Shamoun, even when considered in the *absence* of his Supplemental Declaration, makes clear that summary judgment was not appropriate under the Court of Appeal's holding in *Elber*. However, Both *Keck* and *Elber* make clear that his Supplemental Declaration needs to be included in any Order pertaining to Defendants' Motion for Summary Judgment. Consequently, plaintiffs object to the omission of the Supplemental Declaration of John S. Shamoun from Defendants' Proposed Order Granting Defendants' Motion for Summary Judgment.

Plaintiffs continue to believe summary judgment was improperly decided. However, plaintiffs have prepared an alternate Order reflecting this Court's Memorandum Decision that includes the above-described evidence improperly omitted from Defendants' Proposed Order.

DATED this 24th day of May, 2018.

HAGENS BERMAN SOBOL SHAPIRO LLP

By /s/ Anthony D. Shapiro
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the law offices of Hagens Berman Sobol Shapiro LLP, and is a person of such age and discretion as to be competent to serve papers.

I hereby certify that on May 24, 2018, I caused to be filed the foregoing document with the Clerk of the Court and served on the parties in the manner indicated:

James King

Evans, Craven & Lackey
818 W Riverside Ave # 250
Spokane, WA 99201
Attorneys for Defendants

VIA FACSIMILE FOLLOWED BY Process Server

DATED: May 24, 2018

HAGENS BERMAN SOBOL SHAPIRO LLP

/s/ Melina Lara
Melina Lara, Paralegal
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FILED
JUN 15 2018
Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

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

KATHIE AND JOE BOYER, individual and the marital community composed thereof, **Vs.** **KAI MORIMOTO, M.D., individual and PLASTIC SURGERY NORTHWEST, a Washington corporation,** Defendants.	**No. 17-2-00533-3** **ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

THIS MATTER CAME on for hearing on the 27th day of April, 2018, Defendants' Motion for Summary Judgment.

The Court considered the following:

1. Notice of Hearing re Defendants' Motion for Summary Judgment;
2. Defendants' Motion for Summary Judgment;
3. Defendants' Memorandum of Authorities in Support of Motion for Summary Judgment;
4. Declaration of James B. King in Support of Defendants' Motion for Summary

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Judgment with referenced exhibits;

5. Plaintiffs' Response in Opposition to Defendants' Motion for Summary Judgment;

6. Declaration of Anthony Shapiro in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment with exhibits;

7. Declaration of John M. Shamoun, M.D., F.A.C.S. (no exhibit was attached); The exhibit was Dr Shamoun's C.V. It was delivered the following week. R. Clark

8. Declaration of Martin S. Siegel, M.D. (no exhibit was attached);

9. Reply Memorandum of Authorities in Support of Defendants' Motion for Summary Judgment filed by defendants;

10. Reply Declaration of James B. King in Support of Defendants' Motion for Summary Judgment with exhibits thereto;

The Court also considered the arguments of counsel on the date of the hearing. The Court finds that there is no genuine issue of material fact and for the reasons set forth in the Court's oral opinion on the date of argument and its Memorandum Decision on Defense Motion for Summary Judgment. The Court further finds that the defendants are entitled to summary judgment of dismissal as a matter of law.

IT IS THEREFORE,

ORDERED, ADJUDGED AND DECREED that Defendants' Motion for Summary Judgment be and the same is hereby GRANTED and this case is dismissed with prejudice.

It is further Ordered that any motion for reconsideration shall be served, filed and Noted for Hearing without oral argument, as directed in the Court's Memorandum Decision (5/31) The Court may request oral argument, depending on the content of any written submissions.

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DONE IN OPEN COURT this 15th day of ~~May~~ June, 2018.

Judge Raymond F. Clary

Presented by:

EVANS, CRAVEN & LACKIE, P.S.

By: _____
James B. King, WSBA #8723
Attorneys for Defendants

Copy Received, Approved as to Form
And Notice of Presentment Waived:

HAGENS BERMAN SOBOL SHAPIRO LLP

By: _____
Anthony D. Shapiro, WSBA #12824
Martin D. McLean, WSBA #33269
Attorneys for Plaintiffs

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DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Petition for Review of Kathie and Joe Boyer*** in Court of Appeals, Division III Cause No. 36166-7-III to the following:

James B. King, WSBA #8723
Markus W. Louvier, WSBA #39319
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Anthony D. Shapiro, WSBA #12824
Marty D. McLean, WSBA #33269
Hagens Berman Sobol Shapiro LLP
1301 Second Avenue, Suite 2000
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Original electronically served to:
Court of Appeals, Division III
Clerk's Office
Spokane, WA 99260

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

DATED: October 10, 2019, at Seattle, Washington.

Sarah Yelle, Legal Assistant
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

October 10, 2019 - 3:26 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	36166-7
Appellate Court Case Title:	Kathie and Joe Boyer v. Kai Morimoto, MD and Plastic Surgery Northwest
Superior Court Case Number:	17-2-00533-3

The following documents have been uploaded:

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Comments:

Petition for Review of Kathie and Joe Boyer

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Filing on Behalf of: Gary Manca - Email: gary@tal-fitzlaw.com (Alternate Email: matt@tal-fitzlaw.com)

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