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SUPREME COURT OF THE STATE OF WASHINGTON

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DARLA KECK and RON JOSEPH GRAHAM, husband and wife, and  
DARLA KECK AND RON JOSEPH GRAHAM AS PARENTS OF  
THE MINOR CHILD KELLEN MITCHELL GRAHAM and  
KELLEN MITCHELL GRAHAM, individually,

Respondents/Cross-Petitioners,

v.

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

Petitioners/Cross-Respondents.

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BRIEF OF *AMICUS CURIAE*  
WASHINGTON DEFENSE TRIAL LAWYERS

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Daniel J. Gunter, WSBA No. 27491  
RIDDELL WILLIAMS P.S.  
1001 Fourth Ave. Plaza,  
Suite 4500  
Seattle, WA 98154  
(206) 624-3600

Attorney for Washington Defense Trial Lawyers

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Ronald R. Carpenter  
Clerk *bjh*



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## I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington Defense Trial Lawyers Association (WDTL), established in 1962, is composed of more than 750 Washington attorneys engaged in the defense of civil actions. The purpose of the WDTL is to promote the highest professional and ethical standards for Washington civil defense attorneys and to serve our members through education, recognition, collegiality, professional development, and advocacy. The WDTL represents its members in part by submitting amicus curiae briefs in cases that present issues of statewide concern to Washington civil defense attorneys and their clients. The WDTL prepares and submits these amicus curiae briefs on a pro bono basis.

The WDTL submits the following brief in support of the petitioners/cross-petitioners (collectively, “Collins”) and urges this Court to *reverse* the Court of Appeals.

## II. SUMMARY OF THE ARGUMENT

In its opinion in this matter,<sup>1</sup> the Court of Appeals held that the trial court erred as a matter of law by striking an untimely affidavit filed by the plaintiffs (collectively, “Kecks”) in opposition to the Collinses’ motion for summary judgment. This Court should reverse the decision of the Court of Appeals and sustain the trial court’s decision. The Court of Appeals’ opinion is fundamentally self-contradictory. Moreover, that opinion effectively nullifies the deadlines set out in Civil Rule 56(c), and it encourages parties opposing summary judgment motions to withhold their responses until the last moment—indeed, until after the movant has filed its reply.

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<sup>1</sup>*Keck v. Collins*, 181 Wn. App. 67, 325 P.3d 306 (2014).

This Court should not countenance this approach to litigation. The approach taken by the Court of Appeals encourages litigants to ignore the requirements of Civil Rule 56 and submit materials at any time before a trial court rules on a motion for summary judgment. Further, litigants taking advantage of this approach will understand that they have greater chances on appeal, as the opinion of the Court of Appeals mandates that both trial and appellate courts *must* consider the submitted material, no matter how egregiously the litigant violates the trial court's scheduling orders.

This approach eviscerates Civil Rule 56. It turns the orderly approach set out under the rules into a free-for-all, a melee that rewards the litigant who most adroitly times its submissions to prevent the other party—and the court—from giving them due consideration.

To avoid these obviously undesirable consequences, the WDTL asks this Court to reverse the Court of Appeals, thereby sustaining the trial court's decision not to consider the late-filed affidavit.

Further, the WDTL asks this Court to continue to adhere to the rule set out in *Guile v. Ballard Community Hospital*, 70 Wn. App. 18, 851 P.2d 689 (1993). *Guile* requires a plaintiff opposing a motion for summary judgment to offer an affidavit or declaration setting forth specific facts sufficient to create a genuine issue of material fact. That standard is fully consistent with CR 56 and with the prior decisions of this Court and the Court of Appeals. This Court should decline to alter that rule.

### III. ANALYSIS

#### A. **The Appellate Courts Should Continue to Review for an Abuse of Discretion a Trial Court's Orders Regarding the Timeliness of Filings**

The principal question before this Court is whether the Court of Appeals erred in holding that the appellate courts must review de novo a trial court's decision regarding untimely filed papers. As set out below, this Court should hold that such decisions must be reviewed for an abuse of discretion. And, applying that correct standard, the trial court did not abuse its discretion in striking the affidavit at issue.

##### 1. The Kecks Filed an Untimely Affidavit Without Good Cause to Do So and Without Showing Excusable Neglect

The procedural history in this case is not in dispute. Defendant Patrick Collins filed a motion for summary judgment on December 20, 2011.<sup>2</sup> Collins asked the trial court to dismiss the Kecks' claims against him because the Kecks did not have an expert who would testify to essential elements of their claims. The motion for summary judgment was set for hearing on January 20, 2012.<sup>3</sup> By agreement of counsel, the hearing was reset to March 30, 2012.<sup>4</sup>

On March 14, 2012, Dr. Chad Collins joined Dr. Patrick Collins's motion for summary judgment.<sup>5</sup>

Under Civil Rule 56(c), the Kecks were obligated to file by March 19 any affidavit in opposition to Dr. Patrick Collins's motion.<sup>6</sup> On March 16 the Kecks filed a timely response to Dr. Patrick Collins's motion.<sup>7</sup>

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<sup>2</sup>CP 100.

<sup>3</sup>*Id.*

<sup>4</sup>CP 100-01.

<sup>5</sup>CP 101.

<sup>6</sup>See CR 56(c) (requiring opposition to be filed no later than 11 days before the hearing); CP 100-01.

<sup>7</sup>CP 101.

The Kecks supported their response with an affidavit by their expert, Dr. Kasey Li.<sup>8</sup> The footer of the affidavit shows that it was prepared by plaintiffs' counsel, and the affidavit includes a transmittal message showing that it was faxed from counsel's office, presumably to Dr. Li.<sup>9</sup> The only reasonable inference from this evidence is that the Kecks' counsel prepared the affidavit.

In their response, the Kecks did not claim that any circumstances beyond their control prevented them from obtaining a sufficient affidavit.<sup>10</sup> Instead, the Kecks argued that Dr. Li's affidavit sufficed to defeat the motion for summary judgment: "Given Dr. Li's Declaration outlining the standard of care violations, causation and damages, Plaintiffs' [sic] respectfully request that Defendants' motion be denied."<sup>11</sup>

On March 22, the Kecks filed another affidavit by Dr. Li.<sup>12</sup> Once more, the Kecks did not assert that they lacked time to obtain a sufficient affidavit.<sup>13</sup> Instead, the Kecks once more argued that the new affidavit sufficed to defeat the motion for summary judgment. *Id.* And once more the affidavit itself confirms that plaintiffs' counsel prepared it and sent it to Dr. Li for his signature.<sup>14</sup>

On the same day, the Kecks filed a response to Dr. Chad Collins's joinder in Dr. Patrick Collins's motion for summary judgment.<sup>15</sup> Ironically, the Kecks argued that the Court should refuse to hear Dr. Chad Collins's

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<sup>8</sup>CP 41–43.

<sup>9</sup>*See id.*

<sup>10</sup>*See id.* at 38–39.

<sup>11</sup>*Id.* at 38

<sup>12</sup>*Id.* at 44–48.

<sup>13</sup>*See id.* at 44.

<sup>14</sup>*See id.* at 46–48.

<sup>15</sup>*Id.* at 49–51.

motion as it was allegedly untimely.<sup>16</sup> But the Kecks also argued that Dr. Li's affidavit sufficed to defeat Dr. Chad Collins's motion for summary judgment.<sup>17</sup>

On March 27, both of the Collins defendants filed replies in support of their motions for summary judgment.<sup>18</sup> Both replies demonstrated multiple deficiencies in Dr. Li's affidavits.<sup>19</sup>

On March 29, the Kecks filed an unauthorized sur-reply to the Collins's reply briefs, supported by affidavits by their counsel and Dr. Li.<sup>20</sup> In support of the sur-reply, the Kecks' counsel complained that "Patrick Collins filed his Motion for Summary Judgment without seeking the availability of Plaintiffs' counsel."<sup>21</sup> Of course, the Civil Rules do not require a party seeking summary judgment to determine whether the opposing party's counsel is available on any particular date. *See generally* CR 56. And the Kecks' counsel failed to note (a) that he had received the motion for summary judgment more than three months before the hearing date and (b) that he had agreed in February to the March 30 hearing.<sup>22</sup>

The Kecks' counsel also claimed that he was in another trial when the response was due and thus "was unavailable to provide a response to Defendants' Motion for Summary Judgment."<sup>23</sup> This claim ignores the fact that the Kecks' counsel in fact provided a response to the motion for summary judgment. Indeed, as set out above, the Kecks' submitted *two*

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<sup>16</sup>*Id.* at 49.

<sup>17</sup>*Id.*

<sup>18</sup>*Id.* at 55–72.

<sup>19</sup>*See id.*

<sup>20</sup>*Id.* at 73–84.

<sup>21</sup>*Id.* at 75:24–25; *see also id.* at 76:23–25.

<sup>22</sup>*Id.* at 100–01.

<sup>23</sup>*Id.* at 76:5–6.

responses to the motion. Further, it is obvious that the Kecks' counsel drafted both of Dr. Li's first two affidavits and claimed that these affidavits sufficed to defeat the motion for summary judgment.

The trial court heard the Collinses' motion for summary judgment on March 30. Further briefing ensued, resulting in entry of an April 6 order dismissing the Kecks' claims against the Collinses.<sup>24</sup>

The April 6 order left open the question whether the trial court would consider Dr. Li's late-filed affidavit.<sup>25</sup> On April 11, the trial court issued a letter opinion that considered at length the arguments raised by the Kecks' counsel in support of the untimely filing.<sup>26</sup> The trial court held that the Kecks had failed to offer a sufficient excuse for the late filing of the affidavit and had not established the prerequisites for obtaining a continuance under CR 56(f).<sup>27</sup> Accordingly, the trial court confirmed the entry of summary judgment in favor of the Collins defendants.<sup>28</sup>

The Kecks appealed, and the Court of Appeals reversed.

2. The Appellate Courts Have Long Reviewed for an Abuse of Discretion Trial Court Decisions Regarding the Filing of Untimely Pleadings and Papers

Given this history, the first issue before this Court concerns the standard of review to be applied to the trial court's decision not to consider the untimely filed affidavit.

As the *Keck* opinion itself recognizes, Washington appellate courts have long and routinely reviewed for an abuse of discretion decisions by

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<sup>24</sup>*Id.* at 96–99.

<sup>25</sup>*See id.*

<sup>26</sup>*Id.* at 100–04.

<sup>27</sup>*Id.* at 103–04.

<sup>28</sup>*Id.* at 104.

trial courts to reject untimely filings or requests.<sup>29</sup> The Court of Appeals claimed that two opinions stand for the proposition that such decisions are reviewed de novo. But neither of those cases actually stands for that proposition—a point established clearly by the concurrence in *Keck*.

The federal appellate courts, too, review such decisions for an abuse of discretion. “Appellate review of a district court’s case-management decisions is solely for abuse of discretion.”<sup>30</sup> As the First Circuit has observed, trial courts reasonably expect litigants to adhere to deadlines, and litigants cannot be allowed to ignore those deadlines at their pleasure:

Rules are rules—and the parties must play by them. In the final analysis, the judicial process depends heavily on the judge’s credibility. To ensure such credibility, a district judge must often be firm in managing crowded dockets and demanding adherence to announced deadlines. If he or she sets a reasonable due date, parties should not be allowed casually to flout it or painlessly to escape the foreseeable consequences of noncompliance.<sup>31</sup>

As one federal has noted, an attorney’s claim that he or she was too busy should never suffice to establish excusable neglect: “Most attorneys are busy most of the time and they must organize their work so as to be

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<sup>29</sup>See, e.g., *Pitzer v. Union Bank*, 141 Wn.2d 539, 556, 9 P.3d 805 (2000); *Tellevik v. 31641 Rutherford St.*, 120 Wn.2d 68, 90, 838 P.2d 111 (1992). *Colorado Structures, Inc. v. Blue Mountain Plaza, LLC*, 159 Wn. App. 654, 660, 246 P.3d 835 (2011); *Davies v. Holy Fam. Hosp.*, 144 Wn. App. 483, 498–501, 183 P.3d 283 (2008); *Garza v. McCain Foods, Inc.*, 124 Wn. App. 908, 917, 103 P.3d 848 (2004); *O’Neill v. Farmers Ins. Co.*, 124 Wn. App. 516, 521–22, 125 P.3d 134 (2004); *Idahosa v. King County*, 113 Wn. App. 930, 936–37, 55 P.3d 657 (2002); *Security State Bank v. Burk*, 100 Wn. App. 94, 102–03, 995 P.2d 1272 (2000); *McBride v. Walla Walla County*, 95 Wn. App. 33, 37, 975 P.2d 1029 (1999); *Brown v. Peoples Mortg. Co.*, 48 Wn. App. 554, 559–60, 739 P.2d 1188 (1987).

<sup>30</sup>*Velez v. Awning Windows, Inc.*, 375 F.3d 35, 41 (2004) (citing *Rosario-Diaz v. Gonzalez*, 140 F.3d 312, 315 (1st Cir. 1998); *C.B. Trucking, Inc. v. Waste Mgmt.*, 137 F.3d 41, 44 (1st Cir. 1998)).

<sup>31</sup>*Id.* (quoting *Mendez v. Banco Popular*, 900 F.2d 4, 7 (1st Cir. 1990)).

able to meet the time requirements of matters they are handling or suffer the consequences.”<sup>32</sup>

In short, the great weight of authority holds that a party cannot show excusable neglect simply by claiming that its counsel was busy.

### 3. The Court of Appeals Misapplied the Pertinent Rules

In its opinion, the Court of Appeals recognized that the great weight of authority supports the conclusion that an appellate court reviews for an abuse of discretion a trial court’s decision whether to consider untimely evidence.<sup>33</sup> And the Court of Appeals also recognized that the decision whether to grant a continuance under CR 56(f) must be reviewed for an abuse of discretion.<sup>34</sup> Nevertheless, the court held that a decision to strike a late-filed pleading must be reviewed de novo—not for an abuse of discretion.<sup>35</sup>

The Court of Appeals erred in making this decision. In analyzing this issue, the court considered CR 5(d)(2) and CR 6(b). The court’s analysis of both rules ignores the language of the rules themselves.

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<sup>32</sup>*Pinero Schroeder v. Federal Nat’l Mortgage Ass’n*, 574 F.2d 1117, 1118 (1st Cir. 1978) (per curiam). See also *United States v. Dumas*, 94 F.3d 286, 289 (7th Cir. 1996), (“‘Excusable neglect’ requires something more than a simple failure to meet the deadline due to a busy schedule.”); *Baker v. Raulie*, 879 F.2d 1396, 1399 (6th Cir. 1989) (fact that attorney was involved in another trial did not establish excusable neglect); *McLaughlin v. City of LaGrange*, 662 F.2d 1385, 1387 (11th Cir. 1981) (similar); *Maryland Cas. Co. v. Conner*, 382 F.2d 13, 17 (10th Cir. 1967) (similar); *Graham v. Pennsylvania R.R.*, 342 F.2d 914, 915 (D.C. Cir. 1964); *Airline Professionals Ass’n v. ABX Air, Inc.* 109 F. Supp. 2d 831, 833–34 (S.D. Ohio 2000) (citing numerous cases); *Walls v. International Paper Co.*, No. Civ. A. 99-2048-CM, 2000 WL 360115, \* 5 (D. Kan. Mar. 13, 2000) (“An attorney’s busy schedule rarely rises to the level of excusable neglect justifying a motion to file out of time.”).

<sup>33</sup>*Keck*, 181 Wn. App. at 80.

<sup>34</sup>*Id.*

<sup>35</sup>*Id.*

CR 5(d)(2) uses the term “may,” which confirms that the decision to strike a late-filed paper rests in the discretion of the trial court:

If a party fails to file any other pleading or paper under this rule, the court upon 5 days' notice of motion for sanctions *may . . .* strike the pleading or other paper and grant judgment against the defaulting party for costs and terms including a reasonable attorney fee unless good cause is shown for, or justice requires, the granting of an extension of time.<sup>36</sup>

CR 6(b) also uses the term “may,” once more demonstrating that the trial court exercises its discretion in deciding whether to admit a late-filed paper:

When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown *may* at any time *in its discretion*, (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or, (2) upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect . . . .<sup>37</sup>

In short, both rules vest the trial court with discretion in deciding whether to admit or strike late-filed materials. As because the trial court is vested with discretion in making these decisions, the appellate courts must review these decisions for an abuse of discretion—a point confirmed by the extensive authority discussed above.

In the face of the plain language of the rules and the great weight of authority, the Court of Appeals reached the perplexing conclusion that a ruling on a motion to strike must be reviewed *de novo* when the ruling is

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<sup>36</sup>Emphasis added.

<sup>37</sup>Emphasis added.

made in the context of a motion for summary judgment, whereas a motion for enlargement of time must be reviewed for an abuse of discretion—even when made in the same context.

This case itself demonstrates the irrationality of such an approach. The trial court’s decision can be understood as a ruling under both CR 5(d)(2) and CR 6(b): that is, the Collinses sought to strike the untimely affidavit, and the Kecks sought permission to file it. Given that the trial court’s decision implicates *both* rules, it makes no sense to apply separate standards of review. Further, because *both* rules vest the trial court with discretion, the appellate courts should respect that discretion and review any decision implicating either rule for an abuse of discretion.

4. The Court of Appeals Misunderstood This Court’s Decision in *Folsom*

The Court of Appeals did not ignore the abundant authority holding that appellate courts must review for an abuse of discretion a trial court’s decision about late-filed papers. Instead, that court believed that this Court’s decision in *Folsom* silently overruled the myriad prior cases and thus now requires the appellate courts to review de novo all decisions relating to summary judgment orders, including decisions relating to the timeliness of filing.<sup>38</sup>

But *Folsom* does not stand for that proposition. In *Folsom*, this Court spoke only to the question of what standard of review to apply to a trial court’s opinion to strike the *contents* of an affidavit that had been timely filed.<sup>39</sup> The facts set out in the opinion nowhere suggest that the affidavit at issue was filed late.<sup>40</sup> And the Court nowhere addressed the

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<sup>38</sup>*Keck*, 181 Wn. App. at 80–81 (citing *Folsom*, 135 Wn.2d at 663).

<sup>39</sup>*Folsom*, 135 Wn.2d at 662–63.

<sup>40</sup>*See id.*

question of what standard of review should apply to a trial court's decision either to strike late-filed papers or not to accept such papers for filing.<sup>41</sup>

Because this Court did not consider this question in *Folsom*, the opinion in that matter does not answer them. This Court has long held that its opinions cannot be read to stand for propositions not specifically considered by the Court: "In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised."<sup>42</sup>

This Court's prior rulings have been fully consistent. When the issue concerns the *content* of a filing, this Court reviews the trial court's decision de novo.<sup>43</sup> When the issue concerns the *timing* of a filing, this Court reviews the trial court's decision for an abuse of discretion.<sup>44</sup>

No other case supports the Court of Appeals' decision. The majority opinion claims that its approach is supported by *Southwick v. Seattle Police Officer John Doe Nos. 1–5*, 145 Wn. App. 292, 297, 301–02, 186 P.3d 1089 (2008). But *Southwick* manifestly does *not* support the *Keck* decision. Instead, in *Southwick* the court affirmed the trial court's decision to strike an affidavit offered in opposition to a motion for summary judgment because the witness had not been identified in accordance with the court's schedule.<sup>45</sup> And the court specifically held that "the trial court

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<sup>41</sup>*See id.*

<sup>42</sup>*Berschauer/Phillips Const. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 824–25, 881 P.2d 986 (1994) (citing, inter alia, *Anderson v. East Gate Temple Ass'n*, 189 Wn. 221, 223, 64 P.2d 510 (1937)).

<sup>43</sup>*Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 416, 420–21, 150 P.3d 545 (2007) (citing *Folsom*).

<sup>44</sup>*Pitzer v. Union Bank*, 141 Wn.2d 539, 556, 9 P.3d 805 (2000) (citation omitted).

<sup>45</sup>*Southwick*, 145 Wn. App. at 301.

has discretion whether to accept or reject an untimely declaration.”<sup>46</sup>

In short, the Court of Appeals’ decision is not supported by *any* published case. It is instead contrary to every published opinion that has directly addressed this issue. This Court should therefore reverse the Court of Appeals and hold that appellate courts must review for an abuse of discretion a trial court’s decisions regarding the timing of filings, even if those decisions are made in the context of a motion for summary judgment.

5. The New Rule Adopted by the Court of Appeals Eviscerates CR 56

The Court of Appeals’ opinion in this matter rests on an unwarranted expansion of *Folsom*. Further, that expansion of *Folsom* is unwise. In particular, it eviscerates CR 56(c), which sets out both *what* parties may file in support of or opposition to a motion for summary judgment and *when* they may file it.

CR 56(c) permits three filings in support of or opposition to a motion for summary judgment: an opening brief, an opposition brief, and a reply brief, each of which may be supported by affidavits. CR 56(c) also provides the timing for filing those materials.

CR 56(c) does not permit parties to file unlimited papers in support of or opposition to a summary judgment. Nor does it permit parties to file their papers at their whim. Instead, the rule requires litigants to file only the permitted papers at the permitted times.

But the Court of Appeals’ opinion now permits parties to file any number of briefs and any number of affidavits at any time before a hearing. Indeed, the Court of Appeals’ permits a party to file additional briefs or

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<sup>46</sup>*Id.* (citing *Brown v. Peoples Mortgage Co.*, 48 Wn. App. 554, 559, 739 P.2d 1188 (1987)).

affidavits at any time before the trial court issues its decision on a motion for summary judgment.

This approach creates a nightmare for litigants seeking summary judgment. It permits a nonmovant to file a sur-reply—indeed, any number of sur-replies—after it has had the opportunity to review the movant’s reply. Such an approach creates an incentive for a nonmovant to file a nominal opposition to a motion for summary judgment and then to file a sur-reply at some opportune time before or even *after* the summary judgment hearing.

This Court should not put its imprimatur on such an approach. It should instead reverse the Court of Appeals and hold that appellate courts must review for an abuse of discretion any trial court order concerning the late filing of papers, even if that order is made in the context of a summary judgment motion.

6. The Trial Court Did Not Abuse Its Discretion in Refusing to Consider the Late-Filed Affidavit

When the correct standard of review is applied, there can be no question that the trial court did not abuse its discretion in refusing to consider the late-filed affidavit.

In its letter opinion of April 11, the trial court carefully considered the procedural history leading to the late filing and the excuse offered by the Kecks’ counsel for the late filing.<sup>47</sup> The trial court noted that Dr. Patrick Collins’s motion for summary judgment was first filed on December 20, 2011, with a hearing set for January 20, 2012.<sup>48</sup> The court also noted that the Kecks’ counsel *agreed* to a new hearing date—that is,

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<sup>47</sup>CP 100–104.

<sup>48</sup>*Id.* at 100.

on March 30, 2012.<sup>49</sup> The court noted as well that the Kecks' counsel filed not one but *two* affidavits by Dr. Li before the Collinses filed their reply briefs.<sup>50</sup>

The trial court also considered the excuses offered by the Kecks' counsel: "a busy trial schedule, failure of defense counsel to inquire about plaintiff counsel's availability—and arbitrarily taking advantage of that fact, and the policy rationale that summary judgment should be reserved for those instances where a trial would be a useless exercise."<sup>51</sup> But in regard to those excuses, the trial court aptly noted that "the third affidavit is apparently intended to bolster and correct the information of the first two affidavits."<sup>52</sup> And it noted, too, that the late filing "allowed no time for a meaningful response by the defendants."<sup>53</sup>

The court also noted that the Kecks' counsel had access to the evidence before filing their response to the Collinses' motion for summary judgment.<sup>54</sup> After all, the Kecks had identified Dr. Li as their medical expert months before the summary judgment motion was originally filed.<sup>55</sup> And the trial court cited relevant authority holding that a party may not wait to offer available evidence: "If the evidence was available but not offered until after that opportunity passes, the parties are not entitled to

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<sup>49</sup>*Id.* at 100–01.

<sup>50</sup>*Id.* at 101.

<sup>51</sup>*Id.*

<sup>52</sup>*Id.* at 102. In this regard, the courts have not permitted a litigant to supplement an original declaration simply because it has at last dawned on the litigant that the first declaration was insufficient: "The realization that [the] first declaration was insufficient does not qualify the second declaration as newly discovered evidence." *Adams v. Western Host, Inc.*, 55 Wn. App. 601, 608, 779 P.2d 281 (1989).

<sup>53</sup>CP at 102.

<sup>54</sup>*Id.* at 103.

<sup>55</sup>*Id.*

another opportunity to submit that evidence.”<sup>56</sup>

The trial court also carefully considered the motion for continuance and denied that motion.<sup>57</sup> The court noted that the Kecks’ counsel did not “offer a good reason for the delay in obtaining the desired evidence” and did not “state what evidence would be established through the additional discovery.”<sup>58</sup> In regard to the latter point, no additional discovery was needed, as the Kecks’ counsel had access to all of the necessary information before the deadline for filing the opposition to the motion for summary judgment.

In short, the trial court carefully reviewed the relevant facts and authorities and made a decision consistent with both. Had the Court of Appeals applied the correct standard of review, it should have determined that the trial court did not abuse its discretion in striking the late-filed affidavit and refusing to continue the hearing on the motion for summary judgment. Instead, the Court of Appeals improperly substituted its own opinion for that of the trial court. In particular, the Court of Appeals held that a litigant may excuse its late filing or obtain a continuance simply by claiming that its counsel was busy,<sup>59</sup> despite the fact that no authority supports that proposition.

The decision of the trial court was *not* manifestly unreasonable. It is astonishing to think that a trial court must ignore the unambiguous provisions of CR 56(c) and permit a litigant to file any number of papers in support of or opposition to a motion for summary judgment, supporting

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<sup>56</sup>*Id.* (quoting *Wagner Dev., Inc. v. Fidelity & Deposit Co.*, 95 Wn. App. 896, 907, 977 P.2d 639 (1999)).

<sup>57</sup>CP at 103–04.

<sup>58</sup>CP at 103 (citation and internal quotation marks omitted).

<sup>59</sup>*Keck*, 181 Wn. App. at 85–89.

those filings only with the airy assertion that the litigant's attorney was busy. The Court of Appeals' rule

The Court of Appeals' decision apparently comes down to its belief that summary judgment should not be granted, no matter how vigorously a party tramples on the rules, so long as the party can somehow, at some time, demonstrate that there might be a genuine issue of material fact. This Court should reject such reasoning. It is poisonous. The policy principle behind that reasoning can be extended to excuse *any* failure to adhere to the rules. This Court should instead hold that the appellate courts must review for an abuse of discretion a trial court's decisions relating to untimely filings. And, applying that standard, this Court should hold that the trial court did not abuse its discretion in refusing to consider the untimely filed third affidavit of Dr. Li.

**B. The *Guile* Standard Is Fully Consistent with CR 56 and the Prior Cases Interpreting That Rule**

The second question before this Court is whether it should reject or revise the standard set out in *Guile v. Ballard Community Hospital*, 70 Wn. App. 18, 851 P.2d 689 (1993). It should not. The *Guile* standard is fully consistent with the requirements of CR 56 and this Court's precedents. The Court should therefore refuse to overrule *Guile*.

The case law on this issue is clear. To defeat a motion for summary judgment, the nonmovant must set forth admissible evidence that would be sufficient to create a genuine issue of material fact.<sup>60</sup> In particular, CR 56(e) requires the nonmovant to set forth "specific facts" that would be "admissible in evidence." *Guile* does not alter the requirements of CR 56(e), but merely restates them. Both this Court and the Court of Appeals

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<sup>60</sup>CR 56(c), (e).

have cited *Guile* with approval for this very proposition.<sup>61</sup>

In other cases, this Court has confirmed that a party opposing a motion for summary judgment

may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value [but] must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists.<sup>62</sup>

The *Guile* standard simply applies this standard to the issue of medical malpractice. This Court should decline to adopt a lesser standard for medical malpractice. It should instead confirm the standard set out in *Guile*. Further, applying that correct standard, this Court should *affirm* the trial court's conclusion that Dr. Li's first and second affidavits did not satisfy that standard.

#### IV. CONCLUSION

The Court of Appeals erred in holding that the appellate courts must review de novo a trial court's decisions relating to the timing of filings if such decisions are made in the context of a motion for summary judgment. That holding contravenes the prior holdings of this Court and the Court of Appeals itself; it contradicts the plain language of the applicable rules; and it eviscerates the requirements of CR 56 itself.

The Court of Appeals correctly ruled that the *Guile* standard is fully consistent with CR 56(e).

Accordingly, this Court should reverse the order of the Court of

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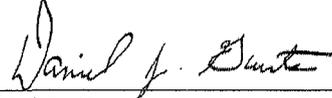
<sup>61</sup>See *Stewart-Graves v. Vaughn*, 162 Wn.2d 115, 138, 170 P.3d 1151 (2007) (citing *Guile* with approval); *Green v. American Pharm. Co.*, 136 Wn.2d 87, 98 n. 5, 960 P.2d 912 (1998) (same); *Davies*, 144 Wn. App. at 493, 496, 183 P.3d 283 (same).

<sup>62</sup>*Seven Gables Corp. v. MGM/UA Ent't Co.*, 106 Wn.2d 1, 13, 721, 721 P.2d 1 P.2d 1 (1986).

Appeals to the extent that it concerns the trial court's order relating to the filing of the untimely third affidavit of Dr. Li. Applying the correct standard of review, and applying the longstanding rules relating to the sufficiency of affidavits, the Court should therefore order the reinstatement of the trial court's order granting summary judgment in favor of the Collins defendants.

Respectfully submitted this 29th day of December, 2014.

RIDDELL WILLIAMS P.S.

By   
Daniel J. Gunter,  
WSBA No. 27491  
Attorneys for Amicus Curiae  
Washington Defense Trial  
Lawyers

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Dear Mr. Carpenter:

Pursuant to the Court's prior permission, please find attached WDTL's *Brief of Amicus Curiae* in the above matter.

I am hereby contemporaneously serving electronically, by copy of this message, counsel for the parties, and the Washington State Association for Justice Foundation, who by agreement have accepted this method of service.

Thank you,

Stew  
Chair, WDTL Amicus Committee

*STEWART A. ESTES*

Keating, Bucklin & McCormack, Inc., P.S.  
800 Fifth Avenue, Suite 4141  
Seattle, WA 98104-3175

<image003.jpg>

(206) 623-8861 desk  
(206) 719-6831 cell

Firm Website

Personal Bio

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