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SUPREME COURT OF THE STATE OF WASHINGTON

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

Respondents / Cross-Petitioners,

v.

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

Petitioners

PETITIONERS' JOINT SUPPLEMENTAL BRIEF

Geana M. Van Dessel,
WSBA No. 35969
Lee & Hayes, PLLC
601 West Riverside
Suite 1400
Spokane, WA 99201
(509) 944-4639

Stephen M. Lamberson,
WSBA No. 12985
Courtney A. Garcea,
WSBA No. 41734
Etter, McMahon, Lamberson, Clary
& Oreskovich, P.C.
618 W. Riverside, Suite 210
Spokane, WA 99201
(509) 744-9100

*Attorneys for Petitioners
Chad P. Collins and Collins Oral
& Maxillofacial Surgery*

*Attorneys for Petitioner
Patrick C. Collins*

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I. IDENTITY OF PETITIONERS

The Petitioners, Dr. Chad P. Collins, Dr. Patrick C. Collins, and Collins Oral & Maxillofacial Surgery (collectively, “the Doctors”), were the defendants in the trial court, where they were awarded summary judgment dismissal of all medical negligence claims brought by Mrs. Keck and her family (collectively “Keck”). The Doctors were respondents on appeal to Division III of the Court of Appeals. This Court granted both the Doctors’ petition and Keck’s conditional cross-petition. The Doctors submit this supplemental briefing pursuant to the Court’s Letter Order.

II. ISSUES ON REVIEW

1. The Court of Appeals erred in holding that the de novo review standard applies to trial court rulings concerning the timeliness of evidence presented on summary judgment when that holding misconstrues this Court’s holding in *Folsom v. Burger King* and relies on dictum.
2. *Guile v. Ballard Community Hospital* accurately applied CR 56(e)’s requirement and is consistent with this Court’s precedent holding that speculative, conclusory expert opinions are insufficient both under CR 56(e) to defeat summary judgment and under the Evidence Rules to take to trial. It should not be overruled.

III. ARGUMENT

A. **The Court Of Appeals' Extension Of De Novo Review To Trial Court Decisions On Timeliness And Scheduling Eliminates The Authority Of The Trial Court To Manage Its Own Courtroom and Reduces Judicial Economy On Appeal.**

The Court of Appeals adoption of dicta from *Folsom v. Burger King* as the basis to apply de novo review to trial court rulings involving timeliness and scheduling inappropriately extends appellate court de novo oversight. As acknowledged by Judge Korsmo in his concurring opinion, a trial court's calendar management authority has traditionally been left to the discretion of the trial court, and those types of decisions should not be overturned absent an abuse of that discretion.¹ Respect for that discretion has even greater warrant where, as here, the trial court had authority under CR56(f) and CR 6, both of which contain specific rules governing requests for enlargement of time, neither of which Keck even attempted to satisfy.

If the Court of Appeals' decision applying the de novo standard of review to a trial court's ruling concerning the timeliness of evidence presented on summary judgment is allowed to stand, it will substantially undermine the authority of all trial courts to enforce their order and court rules, and in turn will magnify costs and delay for all parties. It will enable litigants to appeal every exercise of discretion by trial courts to decline to

¹ *Keck v. Collins*, 181 Wn. App. 67, 94, 325 P.3d 306 (2014) (Korsmo, J., concurring).

enlarge the time for filing untimely materials; opening the floodgates to the court of appeals, which will be obliged to review each decision de novo (without necessarily having the full flavor of the case that the trial court had before it). It will strip trial courts of their power to manage their dockets, compromise the intended efficiencies behind the summary judgment process, and ensure an increase in the number of appeals, thereby increasing expense and delay in civil proceedings. The costs to litigants and the judiciary will be increased, with no off-setting benefit other than rewarding failure to comply with court rules.² This Court should not extend *Folsom v. Burger King* in the way the Court of Appeals did.

It has long been recognized under Washington law that “[t]he trial judge has discretionary authority to manage his or her courtroom so as to achieve the orderly and expeditious disposition of cases, to assure compliance with the court’s rulings and observance of hearing and trial

² “Judges understandably sympathize with both lawyers, for they are of that profession, and clients, for they have served them. However, their primary responsibility is to the court and the people. An inescapable part of that responsibility is to secure justice *expeditiously*. That duty should not be sacrificed, neglected, or impaired by inordinate tolerance of sloppy legal practices or by sympathy for clients abandoned by attorneys who so practice. Those attorneys should be made accountable for their wrongs. Loose rules induce loose practices which, in turn, cause delays and increase the costs of justice.” *Oliva v. Sullivan*, 958 F.2d 272, 275 (9th Cir. 1992) (Judge Sneed, dissenting).

settings.” *Peluso v. Barton Auto Dealerships, Inc.*, 138 Wn. App. 65, 71, 155 P.3d 978 (2007) (citation omitted). Likewise, CR 1 vests the trial court with authority to enforce the Court Rules, and to administer the rules to “secure a just, speedy, and inexpensive determination of every action.”

Practical policy considerations exist supporting the trial court’s authority to manage its own calendar without the risk having every decision regarding timeliness and scheduling reviewed de novo. Specifically, trial courts are in a better position than appellate courts to make determinations regarding the orderly and expeditious disposition of cases. *See State v. Sisouvahn*, 175 Wn.2d 607, 621, 290 P.3d 942 (2012). Trial courts are aware of facts and other procedural history that may and should be properly considered on summary judgment, including whether the rules have been followed and court orders complied with. *Id.* Additionally, trial courts have more experience making determinations regarding timeliness and scheduling, and understand how these decisions affect the day-to-day management of their courtroom. *Id.* Important to this case, trial courts are better suited to determine whether a timely filed motion to continue should be granted pursuant to CR 56(f). When a motion to continue under CR 56(f) is sought after the filing deadline contained in CR 56(c), the trial court is best suited to determine if the failure to meet the deadline constitutes excusable neglect. *Colorado*

Structures, Inc. v. Blue Mountain Plaza, LLC, 159 Wn. App. 654, 660, 246 P.3d 835 (2011). The requirement to show excusable neglect is in addition to the requirements under CR 56(f). *See Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 499-500, 183 P.3d 283 (2008).

Here, the Court of Appeals' recitation of the facts and procedural history of the case contains errors which reveal a misunderstanding of the situation confronted by the trial court. That in turn underscores the importance of a trial court's discretionary authority to manage timeliness and case scheduling issues because it is inevitably going to be true that an appellate court will have a less detailed picture than the trial court had of the circumstances in which the discretionary ruling was made. Here, the following facts (overlooked by Division 3) are critical to understanding the appropriateness of the trial court's discretionary decision.

Dr. Patrick Collins first filed a motion for summary judgment of Keck's claims based on the lack of competent medical testimony to establish a prima facie case of medical negligence on December 20, 2011. CP 21-31. The original hearing date was set for January 20, 2012. CP 162, 100. The motion was filed over a year after the lawsuit was initiated, more than one year after Keck retained Dr. Kasey Li as medical expert, and after the discovery cutoff had expired. CP 1, 3, 194, 195, 395.

The very same day the motion for summary judgment was filed, Ms. Keck's counsel conferred with Dr. Patrick Collins' counsel and Dr. Patrick Collins agreed to re-note his motion for summary judgment subject to amendment of the case scheduling order. CP 173-174. Following the conversation with Ms. Keck's counsel, Dr. Patrick Collins' counsel struck the hearing date, but made it clear that the motion for summary judgment would be re-noted. CP 162, 174. There was no surprise to Keck.³

On February 16, 2012, Dr. Patrick Collins re-noted his motion for summary judgment. CP 162. The hearing was set for March 30, 2012. *Id.* This time, Keck's counsel did not contact the Doctors' counsel or otherwise advise that he had concerns about the hearing date. By the date of the second hearing on summary judgment, Keck had known for 101 days that Dr. Patrick Collins was seeking summary judgment based on Keck's lack of competent medical testimony to establish a prima facie case of medical negligence. *Cf.* CP 21-31 & CP 162.

On March 14, 2012, Dr. Chad Collins filed a joinder in the motion for summary judgment, adopting – but not adding to – the arguments previously made by Dr. Patrick Collins. CP 101.

³ In a letter dated January 3, 2012, Dr. Patrick Collins' counsel informed Ms. Keck's attorney, "...I will strike the motion for summary judgment, reserving the right to re-note it, once the new scheduling order is entered. At that time, I do intend to present a motion for summary judgment for Dr. Pat Collins." CP 174.

Keck timely responded to the Doctor's motion for summary judgment on March 16, 2012 with a first declaration from Dr. Li. CP 41-43, 101. At that time, Keck did not indicate any objection to the hearing date or allege that she needed more time to obtain the appropriate expert testimony. *Id.* On March 22, 2012, Keck unilaterally filed a second affidavit of Dr. Li. CP 46-48, *cf.* CP 41-43. Again, Keck did not object to the hearing date with this filing or otherwise claim that more time was needed to obtain sufficient expert testimony. CP 41-43.

The Doctors' reply briefs showed that both the first and second affidavits were insufficient and did not supply the competent evidence necessary to establish a prima facie case of medical negligence. CP 55-67.

In response, Keck filed a third affidavit of Dr. Li, one day before the summary judgment hearing, without seeking leave of court as required by CR 56(f) (and without showing any of the grounds prescribed for a request for additional time under that rule). CP 79-84. Keck also filed an affidavit, asserting that while Dr. Li's first two affidavits were adequate to defeat summary judgment, the third affidavit was obtained in case the trial court determined otherwise. CP 76. Without making any effort to meet the requirements of CR56(f) to obtain additional time, Keck's counsel asked the court to consider the affidavit or continue the summary judgment hearing to some later date. This last-ditch effort was made without an

accompanying motion showing excusable neglect⁴ for the late filing, or the necessary requirements under CR 56(f).

At oral argument the next day, Keck counsel again asked the court to accept the untimely third affidavit of Dr. Li but argued that the second affidavit of Dr. Li was “sufficient to withstand any claim of summary judgment.” RP 13. During oral argument, the trial court asked Keck about CR 56(f)’s requirements, RP 15, and the trial court correctly acknowledged that CR 56(f) only provides a “remedy for parties who know of the existence of a material witness and show good reason why they cannot obtain the witness’ affidavits in time for the summary judgment proceeding.” *Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474 (1989).

When Keck’s deadline to timely respond to the summary judgment (or ask for a continuance under CR 56(f)) had elapsed, she was required to demonstrate any late filing was the result of excusable neglect under CR 6(b)(2). This showing was required in addition to the requirements under CR 56(f). *Davies*, 144 Wn. App. at 500, 183 P.2d 283. However, Keck did not offer *any* justification for why she was unable to develop the opinions

⁴ As previously held by Div. III, “Both CR 56(c) and Spokane County Local Rule 56(a), require the adverse (nonmoving) party to file any responding documents at least 11 calendar days prior to the hearing on the motion for summary judgment.” *Davies*, 144 Wn. App. at 499-500, 183 P.3d 283. Once a party opposing the motion for summary judgment misses the original deadline set forth in CR 56 (c), a showing of excusable neglect is also required under CR 6(b)(2), in addition to the requirements justifying a continuance under CR 56(f). *Id.*

necessary in time for the summary judgment, especially given the fact that she timely responded with two affidavits. CP 15-17. Keck never objected to the hearing date or otherwise said she needed more time to obtain adequate expert testimony. CP 19. To the contrary, Keck did file a timely response; however, the response was insufficient to overcome summary judgment. *Id.*

Here, the trial court was in the best position to understand that Keck's counsel had 101 days to work with Dr. Li to fashion an appropriate response to the Doctors' summary judgment motion. The trial court was familiar with Keck's counsel, known to be a seasoned medical malpractice plaintiff's attorney well aware of the requirements necessary to rebut a motion for summary judgment based upon on the lack of competent medical testimony. Additionally, the trial court understood the progression of this case, recognizing that it had been filed over one year earlier and that Dr. Li was retained as Keck's expert shortly after the suit was filed. The trial court also understood that Keck's counsel did, in fact, timely respond to the motion for summary judgment and offered no adequate reason as to why the opinions contained in Dr. Li's untimely third affidavit could not be obtained at an earlier date. Additionally, Keck's counsel never objected to the hearing date and never communicated he was having difficulty obtaining evidence essential to Keck's opposition. Lastly, the trial court recognized that Keck disregarded the rules, filing untimely documents

without leave of court and without establishing excusable neglect or good reason for the delay.

The Court of Appeals' decision inappropriately extends de novo review to "all trial court rulings made in conjunction with a summary judgment motion." *Folsom v. Burger King*, 135 Wn.2d 658, 668, 958 P.2d 301 (1998). This adoption of dicta has been misconstrued by the Court of Appeals to apply to rulings regarding timeliness and scheduling; a result that will strip trial courts of the ability to manage their own courtrooms and calendars. Parties will have no incentive to follow court rules and orders, getting a second bite at the apple on de novo review, which in turn will amplify costs and delay for all parties. This unfortunate policy decision by the Court of Appeals will lead to a complete break-down of summary judgment procedure, subverting trial courts of authority to manage their own docket in the process. Therefore, this Court should reverse the Court of Appeals' decision and apply the abuse of discretion standard to trial court timeliness rulings in summary judgment proceedings just as so many courts have before and after *Folsom*.⁵

⁵ *E.g. Colo. Structures, Inc.*, 159 Wn. App. at 660, 246 P.3d 835; *Davies*, 144 Wn. App. at 500, 183 P.3d 283; *Garza v. McCain Foods, Inc.*, 124 Wn. App. 908, 917, 103 P.3d 848 (2004); *O'Neill v. Farmers Ins. Co. of Wash.*, 124 Wn. Ap. 516, 521-22, 125 P.3d 134 (2004); *Idahosa v. King Cnty.*, 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 Cnty*, 95 Wn. App. 33, 37, 975, P.2d 1029 (1999); *Browns v. People Mortg. Co.*, 48 Wn. App. 554, 559-60, 739 P.2d 1188 (1987).

B. Guile Does Not Impact The Constitutional Right To A Trial And It Is Consistent With This Court's Precedent.

The fundamental argument advanced by Keck – that *Guile* is unconstitutional because it requires greater specificity in a summary judgment affidavit than is necessary under the rules of evidence to be admissible and support a verdict at trial – is based on a false premise. Keck's argument ignores the evidence rules governing opinion testimony, which would preclude the speculative, conclusory opinions of Keck's expert at trial. *Guile* does not allow a case to be dismissed on summary judgment with evidence that would sustain a verdict at trial. On the contrary, the evidentiary threshold for the admissibility of opinion evidence *in any context, be it trial or motion*, is not low, and *Guile* is fully consistent with this Court's prior decisions governing the admissibility of expert testimony in both the trial and CR 56 contexts.

1. *Guile* accurately applied CR 56(e) and this Court's precedent.

The U.S. Supreme Court and this Court both hold that on motion for summary judgment, a defendant can meet his burden of showing the absence of a genuine issue of material fact by showing the plaintiff lacks evidence to support her case. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225 and n.1, 770 P.2d 182, 187 (1989) (affirming the trial court's grant of summary judgment for medical malpractice defendants on the basis that

the plaintiff had not produced competent evidence of malpractice to raise an issue of material fact) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). This standard comports with the purpose behind the summary judgment motion: “to examine the sufficiency of the evidence behind the plaintiff’s formal allegations in the hope of avoiding unnecessary trials where no genuine issue as to a material fact exists. Thus, a defendant may move for summary judgment on the ground the plaintiff lacks competent medical evidence to make out a prima facie case of medical malpractice.” *Young*, 112 Wn.2d at 226, 770 P.2d at 188. Then the burden of production shifts to the plaintiff to present admissible evidence showing a genuine issue of material fact. *Id.*; CR 56(e).

In making this responsive showing, CR 56(e) states that a plaintiff “may not rest upon the mere allegations...of his pleading, but his response ... must set forth specific facts showing that there is a genuine issue for trial.” CR 56(e); *Young*, 112 Wn.2d at 225-226, 770 P.2d at 187-88. *Guile v. Ballard Community Hospital* does not conflict with or heighten the requirements of CR 56(e), which this Court has already examined in *Young*. Rather *Guile* applies the standard set forth by this Court in *Young* and simply confirms that expert opinions containing conclusory statements without adequate factual support are no more admissible on summary

judgment than at trial, and are insufficient to defeat a motion for summary judgment. 70 Wn. App. 18, 851 P.2d 689 (1993).

In addition to *Guile*, Washington appellate courts have consistently affirmed trial court decisions granting summary judgment where the case turned on the admissibility of an expert opinion. This Court and the appellate courts have affirmed trial court orders disregarding the opinion of an expert witness when the expert's opinion was speculative or a mere conclusion without adequate factual support. *See e.g., Parkin v. Colocousis*, 53 Wn. App. 649 (1989), *review denied*, 122 Wn.2d 1010 (1993); *Hash v. Children's Orthopedic Hosp.*, 49 Wn. App. 130, 135, 741 P.2d 584 (Div. 1, 1987), *aff'd* 110 Wn.2d 912 (1988); *Theonnes v. Hazen*, 37 Wn. App. 644, 681 P.2d 1284 (Div. 1, 1984). In order to be admissible at trial or to defeat a motion for summary judgment, the expert testimony must be based on facts in the case, not speculation or conjecture. *Seybold v. Neu*, 105 Wn. App. 666, 677 (2001) (citing *Melville v. State*, 115 Wn.2d 34, 41, 793 P.2d 952 (1990)). When an affidavit in opposition to a motion for summary judgment injects the opinion of an expert, the affidavit must satisfy the criteria for summary judgment. *Doe v. Puget Sound Blood Cntr.*, 117 Wn.2d 772, 787, 788, 819 P.2d 370, 378 (1991).

2. *Guile* does not run afoul of the constitutional right to a trial by jury because speculative, conclusory assumptions by an expert are not sufficient to take a case to a jury at trial.

Guile does not run afoul of the constitutional right to a trial by jury because it does not require more factual detail at summary judgment than at trial. Keck's constitutional argument is based on a false premise; it assumes that the admissibility of Dr. Li's conclusions and their sufficiency to support a verdict are foregone conclusions. But Dr. Li's affidavits would not be sufficient to support a verdict at trial and would have to be excluded for lack of adequate foundation and lack of proper qualification under the Rules of Evidence.

"Before allowing an expert to render an opinion, the trial court must find that there is an adequate foundation so that an opinion is not mere speculation, conjecture, or misleading." *Johnston-Forbes v. Matsunaga*, 333 P.3d 388, 394 (Wash. 2014). It is an abuse of discretion to admit expert testimony if it lacks adequate foundation." *Walker v. State*, 121 Wash.2d 214, 218, 848 P.2d 721, 723 (1993); *Moore v. Hagge*, 158 Wn. App. 137, 155-156, 241 P.3d 787, 796 (2010) (affirming trial court order striking paragraphs from expert declaration as speculative and lacking factual basis).

There are four main Evidence Rules regarding the use of expert witnesses: 702 – 705. None of these Evidence Rules allow speculative,

conclusory testimony to be presented to the jury. Expert testimony is admissible under ER 702 if (1) the witness qualifies as an expert and (2) the expert's testimony would be helpful to the trier of fact. But ER 702 does not allow admission of speculative or conclusion evidence. *See e.g., State v. Lewis*, 141 Wn. App. 367, 389, 166 P.3d 786, 796-797 (Div. 2, 2007). “[S]peculative testimony is not rendered less speculative or of more consequence to the jury's determination simply because it comes from an expert.” *Id.* “The opinion of an expert must be based on facts. An opinion of an expert which is simply a conclusion or is based on an assumption is not evidence which will take a case to the jury.” *Theonnes*, 37 Wn. App. at 648, 681 P.2d 1281; *Hash*, 49 Wn. App. at 135. “The law demands that verdicts rest upon testimony, and not upon conjecture and speculation.” *Theonnes*, 37 Wn. App. at 649 (citing *Anton v. Chicago, M. & St. P.R. Co.*, 92 Wash. 305, 159 Pac. 115). Expert opinions must be based on the facts of the case and will be disregarded entirely when the factual basis for the opinion is inadequate. *Hash*, 49 Wn. App. at 135 (citing *Prentice Packing & Storage Co., v. United Pac. Ins. Co.*, 5 Wn.2d 144, 106 P.2d 314 (1940)).

“ER 703 allows an expert to base his or her opinion on evidence not admissible in evidence and to base his or her opinion on facts or data perceived by or made known to the expert at or before the hearing.”

Johnston-Forbes, 333 P.3d at 392. ER 703 does *not* mean that an expert need not have a factual basis. *Riccobono v. Pierce County*, 92 Wn. App. 254, 267, 966 P.2d 327, 334 (Div. 2, 1998). When an expert desires to apply scientific knowledge to the facts of the particular case, his or her opinion must also, of course, rest on appropriate case-related facts. *Id.* at 267–68, 966 P.2d at 334.

ER 704 allows an expert to testify on an ultimate issue. Testimony by an expert regarding the ultimate issue is allowed, but the trial court always has discretion to reject the expert testimony in whole or in part. *Group Health Coop. of Puget Sound, Inc. v. Dep't of Revenue*, 106 Wn.2d 391, 399, 722 P.2d 787 (1986). “[O]pinions of expert witness are of no weight unless founded upon facts in the case. The law demands that verdicts rest upon testimony, and not upon conjecture and speculation.” *Id.* at 400, 722 P.2d at 792 (citing *Prentice Packing & Storage Co. v. United Pac. Ins. Co.*, 5 Wn.2d 144, 106 P.2d 314 (1967)).

ER 705 says an expert need not disclose the facts on which his or her opinion is based, although the court may require their disclosure and the expert will be subject to cross-examination on them. ER 705 relates only to in-court presentations of expert opinions; once the expert is *qualified* his opinions can be presented to the jury without detailing all of

the facts bearing on the opinion. Contrary to Keck's contentions, this rule does *not* indicate that an expert need not *have* a factual basis.

The Advisory Committee Notes to FRE 705 explain the presumption that an expert must have a factual basis for his opinion even though those facts are not required to be shared in open court before sharing the expert's opinion.⁶

The elimination of the requirement of preliminary disclosure at the trial of underlying facts or data has a long background of support. Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form, and the witness may state his opinion and reasons without first specifying the data upon which it is based. Upon cross-examination, he may be required to specify the data. ... If the objection is made that leaving it to the cross-examiner to bring out the supporting data is essentially unfair, the answer is that he is under no compulsion to bring out any facts or data except those unfavorable to the opinion. The answer assumes that the cross-examiner has the advance knowledge which is essential for effective cross-examination. This advance knowledge has been afforded, though imperfectly by the traditional foundation requirement. Rule 26(b)(4) of the Rules of Civil Procedure, as revised, provides for substantial discovery in this area, obviating in large measure the obstacles which have been raised in some instances to discovery of findings, underlying data, and even the identity of the experts. These safeguards are reinforced by the discretionary power of the judge to require preliminary disclosure in any event (internal citations and quotations omitted).

⁶ "Where a state rule parallels a federal rule, analysis of the federal rule may be looked to for guidance, though such analysis will be followed only if the reasoning is found to be persuasive." *Beal for Martinez v. City of Seattle*, 134 Wn.2d 769, 777, 954 P.2d 237, 241 (1998).

Keck has not explained how a trial court would evaluate the merit and admissibility of Dr. Li's opinions at trial without the factual basis for the opinions. *See supra*. Even if the trial court could assess the admissibility of Dr. Li's opinions without requiring disclosures of the facts supporting those opinions, the opinions would separately be challenged. At trial, the Doctors would resist admission because of the conclusory statement and missing facts underlying his opinions in his affidavits, just like they pointed out in summary judgment. Dr. Li would is not permitted to render opinions without connecting them to some facts in the case at trial or at summary judgment. His opinions would not be sufficient to support admissibility at trial just like they are insufficient to survive summary judgment.

Here, Dr. Li's conclusory affidavits would be precluded for lack of foundation and his opinions on the ultimate issue of medical negligence are inadmissible under the Evidence Rules where the opinions are not supported with specific facts. Dr. Li's conclusions are inadmissible both at trial and on motion for summary judgment because they lack the necessary facts upon which a conclusion can be made.

For example, in his second declaration (CP 41-43), Dr. Li opines:

I looked at the procedures performed by Drs. Chad and Patrick Collins (the surgeons) as well as the problems experienced by the plaintiff Darla Keck. In doing so, I have

identified standard of care violations that resulted in infection and in non-union of Ms. Keck's jaw. This, in turn, has resulted in a prolonged course of recovery with numerous additional procedures to repair ongoing problems I understand have still not resolved.

CP 47; 263. Dr. Li does not identify which "procedures" were allegedly negligent or any specific "problems" identified by Keck. Dr. Li does not identify what standard of care violations exist or how the Doctors violated the standard of care. He does not identify which "additional procedures" were problematic or arguably unnecessary. Nor does he identify the allegedly unresolved "ongoing problems". Dr. Li alleges the Doctors "performed multiple operations without really addressing the problem of non-union and infection within the standard of care" (CP 48, 264) but Dr. Li never says what the standard of care is for the operations, how the problems would have or could have been addressed differently to fall within the standard of care, or what actions the Doctors took that allegedly fell outside the standard of care. It is impossible to discern from Dr. Li's affidavit what the Doctors did or did not do that constituted a standard of care violation because the affidavit omits any applicable facts supporting Dr. Li's opinion. The Court of Appeals agreed that the trial court correctly concluded that Dr. Li's first and second affidavits⁷ lacked the required

⁷ CP41-43 and 46-48; 262-264.

specificity because they do not state what facts support his opinion that the postoperative care fell below the accepted standard of care. *Keck v. Collins*, 181 Wn. App. 67, 92, 325 P.3d 306, 318 (2014) review granted, (Wash. Oct. 8, 2014).

The trial court never made any determination of the admissibility of Dr. Li's third affidavit because it correctly determined it was untimely and that CR 56(f) was not complied with. That determination should have been accorded deference. The suggestion by the Court of Appeals that a continuance might have been appropriate is *obiter dicta* – no continuance would have been involved had the trial court admitted the declaration as the Court of Appeals said it should.

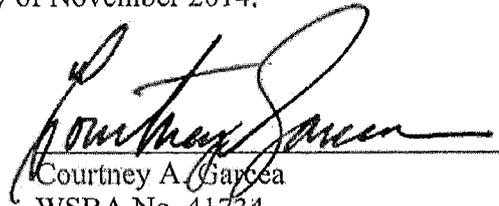
IV. CONCLUSION

The Doctors urge this Court to hold that (1) trial court orders striking evidence as untimely in the context of summary judgment motions are reviewed for abuse of discretion and the trial court did not abuse its discretion in refusing to enlarge the time to consider Dr. Li's third untimely affidavit; and (2) *Guile* accurately applied CR 56(e) and this Court's precedent, and does not run afoul of the constitutional right to a trial by jury.

Respectfully submitted this 7th day of November 2014.



Geana M. Van Dessel
WSBA No. 35969
Lee & Hayes, PLLC
601 West Riverside, Suite 1400
Spokane, Washington 99201



Courtney A. Garcea
WSBA No. 41734
Stephen M. Lamberson
WSBA No. 12985
Etter, McMahon, Lamberson,
Clary & Oreskovich, P.C.
618 W. Riverside, Suite 210
Spokane, WA 99201

*Attorneys for Petitioner Chad P. Collins
Collins Oral & Maxillofacial Surgery*

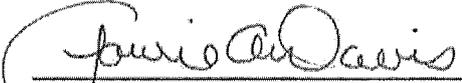
*Attorneys for Petitioner
Patrick C. Collins*

CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 7th day of November 2014, the foregoing PETITIONERS' SUPPLEMENTAL BRIEFING was filed with the Washington Supreme Court by emailing the foregoing to 'supreme@courts.wa.gov' and served on the following persons by the method indicated below:

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Suite 1060	<input checked="" type="checkbox"/>	Email:
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Thank you.

Laurie A. Davis
Litigation Assistant to
Leslie R. Weatherhead
Geana M. Van Dessel
lauried@LeeHayes.com | www.LeeHayes.com

P 509.944.4627 F 509.323.8979
601 West Riverside Avenue, Suite 1400
Spokane, Washington 99201

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