

NO. 46347-4-II

IN THE COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON

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FEARGHAL MCCARTHY; CONOR MCCARTHY, a minor, by and  
through Fearghal McCarthy, his father; and CORMAC MCCARTHY, a  
minor, by and through Fearghal McCarthy, his father,

Appellants,

vs.

COUNTY OF CLARK, CITY OF VANCOUVER, DEPARTMENT OF  
SOCIAL & HEALTH SERVICES, CHILDREN'S PROTECTIVE  
SERVICES,

Respondents.

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SUPPLEMENTAL BRIEF OF RESPONDENT  
CLARK COUNTY RE: *KECK V. COLLINS*

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Taylor R. Hallvik, WSBA No. 44963  
Deputy Prosecuting Attorney  
Attorney for Defendant/Respondent  
Clark County  
P.O. Box 5000  
Vancouver, WA 98668-1995  
(360) 397-2478 / (360) 397-2184 (fax)

On October 19, 2015, this Court authorized supplemental briefing to address Appellants' contention that the Washington Supreme Court's recent decision in *Keck v. Collins*, No. 90357-3, available at 2015 WL 5612829 (Wash. Sept. 24, 2015) implicates this appeal. Contrary to Appellants' suggestion, *Keck* is inapplicable to this case. However, even if *Keck* were remotely applicable to some aspect of this case, it does not undermine Clark County's entitlement to summary judgment.

The *Keck* Court clarified the standard of review applicable to "a challenged ruling to strike untimely filed evidence submitted in response to a summary judgment motion." *Keck*, at ¶ 5. The *Keck* Court held that an abuse of discretion standard applied to such rulings, but that in making this determination the trial court should engage in the analysis contemplated by *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997). In particular, as in *Burnet*, the *Keck* Court held that the trial court should consider "whether a lesser sanction would probably suffice, whether the violation was willful or deliberate, and whether the violation substantially prejudiced the opposing party." *Keck*, at ¶ 24.

Clark County Joins the argument and authority set forth by Respondent City of Vancouver regarding the general inapplicability of *Keck* to this appeal. (See Supp. Brief of Respondent City of Vancouver).

Even if *Keck* did somehow implicate some of the trial court's summary judgment rulings involving stricken evidence, none of this undermines Clark County's entitlement to summary judgment. In particular, *the trial court did not grant Clark County's motion to strike evidence.*<sup>1</sup> Additionally, the evidence stricken by the trial at the request of the State of Washington and the City of Vancouver was not relevant or material to Appellants' opposition to Clark County's motions for summary judgment<sup>2</sup>. CP 1267-1272; 1293-1295; 2072-2074. Additionally, it is noteworthy that, unlike in *Keck*, the trial court did not strike any evidence relied upon in opposition to Clark County or the State of Washington's motions for summary judgment on the basis that it was untimely filed. CP 627-631; 2115; Report of Proceedings Vol I p. 76:3-83:17; *Id* at 166:5-183:10.

To the extent that Appellants' contend that *Keck* is somehow relevant to the suppressed correction pages of Patricia McCarthy's

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<sup>1</sup> The trial court *denied* Clark County's motion to strike the Declaration of Bruce Hall (CP 1249-1255), (Report of Proceedings Vol I p. 76:3-83:17 (Judge: "Again it's his opinion, he's allowed to express an opinion") *Id* at 83:14-15.

<sup>2</sup> The trial court *granted* the State of Washington's motion to strike the Declaration of James Boehnlein M.D. and ¶ 4,5,7,11, and 12 of the Declaration of Fearghal McCarthy on the basis that they contained unsupported medical opinions regarding Patricia McCarthy (CP 2062-2067; Report of Proceedings Vol II. 166:5-183:10). However, Appellants' joint brief in opposition to the State of Washington and Clark County's motions for summary judgment documents that this stricken evidence was cited almost exclusively in opposition to the State of Washington's motions for summary judgment. With the possible exception of a cite to ¶ 11 of Mr. McCarthy's declaration (CP 1775), Appellants do not appear to have relied upon this stricken evidence in opposing Clark County's motions for summary judgment. (CP 1740-1777).

deposition, they are mistaken. Unlike in *Keck*, the trial court explicitly ordered that the suppressed deposition correction pages were accepted as a declaration of Patricia McCarthy. CP 1098. Pursuant to this ruling, these correction pages *were subsequently considered* in opposition to Clark County's motions for summary judgment. (CP 1742-1743; 1855- 1872).

Unlike the Plaintiffs in *Keck*, Appellants have not assigned error to any trial court decision to strike or suppress evidence relied upon in opposition to Clark County's motions for summary judgment. Moreover, unlike the Plaintiffs in *Keck*, Appellants have not argued on appeal that any contested evidence creates a genuine issue of material fact that precludes summary judgment for Clark County. Accordingly, Appellants have waived these arguments. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *Bender v. City of Seattle*, 99 Wn.2d 582, 599, 664 P.2d 492 (1983).

Ultimately, *Keck* is inapplicable to this case and the trial court's grant of summary judgment to Clark County should be affirmed.

RESPECTFULLY SUBMITTED this 29th day of October, 2015.



Taylor R. Halfvik, WSBA No. 44963  
Deputy Prosecuting Attorney  
Attorney for Respondent Clark County

**CERTIFICATE OF SERVICE**

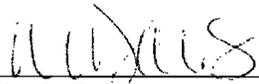
I, Nicole Davis, hereby certify that on this 29<sup>th</sup> day of October, 2015, I served by email (per all parties' written consent) a copy of the foregoing *Supplemental Brief of Respondent Clark County*, to Plaintiff, Pro Se, and all counsel of record as follows:

Mr. Fearghal McCarthy  
[fearghalmccarthy001@gmail.com](mailto:fearghalmccarthy001@gmail.com)

Erin Sperger  
[erin@legalwellspring.com](mailto:erin@legalwellspring.com)

Daniel G. Lloyd  
[Dan.lloyd@cityofvancouver.us](mailto:Dan.lloyd@cityofvancouver.us)

Matthew Rice  
[matthew.rice@atg.wa.gov](mailto:matthew.rice@atg.wa.gov)

  
\_\_\_\_\_  
Nicole Davis

## CLARK COUNTY PROSECUTOR

**October 29, 2015 - 4:04 PM**

### Transmittal Letter

Document Uploaded: 6-463474-Supplemental Respondent's Brief~2.pdf

Case Name: Fearghal McCarthy et al. v. County of Clark et al.

Court of Appeals Case Number: 46347-4

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### The document being Filed is:

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Answer/Reply to Motion: \_\_\_\_\_

Brief: Supplemental Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

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Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

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Sender Name: Nicole J Drews - Email: [nicole.davis@clark.wa.gov](mailto:nicole.davis@clark.wa.gov)

A copy of this document has been emailed to the following addresses:

[nicole.davis@clark.wa.gov](mailto:nicole.davis@clark.wa.gov)

[taylor.hallvik@clark.wa.gov](mailto:taylor.hallvik@clark.wa.gov)

[matthew.rice@atg.wa.gov](mailto:matthew.rice@atg.wa.gov)

[erin@legalwellspring.com](mailto:erin@legalwellspring.com)

[fearghalmccarthy001@gmail.com](mailto:fearghalmccarthy001@gmail.com)

[Dan.lloyd@cityofvancouver.us](mailto:Dan.lloyd@cityofvancouver.us)