

NO. 46347-4

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

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,

v.

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

Respondents.

**SUPPLEMENTAL BRIEF OF RESPONDENT STATE OF
WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH
SERVICES, RE: *KECK v. COLLINS***

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The recent decision in *Keck v. Collins*, No. 90357-3, 2015 WL 5612829, by the Supreme Court of Washington, does not affect the arguments made by the Respondent, State of Washington, in its brief on appeal, nor should it affect this Court's consideration of the evidence presented before it. Appellants contend that the *Keck* decision should change the Court's consideration of the correction sheets submitted by Ms. McCarthy, which were the subject of a suppression motion in the trial court. These correction sheets were not stricken and were instead considered as a declaration. However, neither party relied upon Ms. McCarthy's testimony in arguing the State's motion for summary judgment, thus the issue regarding the correction sheets is irrelevant. Because the correction sheets were converted to a declaration and considered by the trial court the *Keck* decision is not applicable. In addition to these arguments, the State also incorporates arguments on this issue made by both the City of Vancouver and Clark County.

A. Respondent State Did Not Rely on the Deposition Testimony of Ms. McCarthy to Prevail in Its Motion for Summary Judgment

In its motion for summary judgment, the State referred only two times to the deposition testimony of Ms. McCarthy. The first reference to this testimony is: "According to Patricia, the marriage was marked from its inception by Fearghal's volatility including name calling and physical

aggression.” CP 1297.¹ This seems to be a broad summary of Ms. McCarthy’s testimony over several pages of deposition, which she attempted to later change through her correction sheets. CP 1856-57. The second reference indicates: “She then filed for divorce on August 9, 2005.” CP 1300. This testimony was not disputed. CP 1860. These are the only two references to Ms. McCarthy’s deposition testimony. Clearly, the State’s brief and the legal theories argued therein are in no way dependent upon those two statements. The Appellants did not rely on Ms. McCarthy’s deposition testimony in responding to the State’s summary judgment motion at the trial court level. CP 1759-66, 1771-73, 1775-77.² As such, whether or not the correction sheets were admitted into evidence, either as correction sheets themselves, or as a declaration, is irrelevant to the trial court’s decision on the State’s motion for summary judgment. Thus, if there was error in the handling of those correction sheets, it was harmless error as to the State’s position.

B. *Keck v. Collins* Is Not Relevant As the Correction Pages Were Not Excluded

The *Keck* decision relates to the analysis that must be done by the Court when excluding untimely disclosed evidence in response to a

¹ This references the Declaration of Thomas R. Knoll. Exs. 1 and 2 to this declaration are both excerpts of Ms. McCarthy’s Declaration. *See* CP 1327-40.

² Ms. McCarthy’s correction sheets were attached to the Plaintiff’s Opposition to Defendants’ Motions for Summary Judgment through the Declaration of Megan Holley at Ex. 3, and a table describing those changes at Ex. 4. CP 1855-1931. Neither exhibit is cited in the various argument sections cited above.

summary judgment motion. *Keck*, 2015 WL 5612829, at *5. In that case, the trial court completely excluded a late-submitted expert declaration. *Id.* at *6. However, the evidence at issue here, Ms. McCarthy's correction sheets, was not excluded by the trial court. Instead, the court held that "[t]he 'correction pages' are accepted as a declaration of Patricia McCarthy." CP 1098. Appellants submitted these corrections pages as an exhibit to a declaration attached to their response to the motion on summary judgment. CP 1855-1931. As such, they were considered by the court when it was ruling on the State's motion for summary judgment, although they were not relied on by either party in arguing that motion. CP 2072-74.³ Thus, the recent ruling in *Keck* is inapposite.

The ruling in *Keck* is not relevant to the State's original arguments on appeal and thus the ruling granting the State's motion for summary judgment should be affirmed.

RESPECTFULLY SUBMITTED this 29th day of October, 2015.

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³ The Court's Order on the Respondent State's Motion for Summary Judgment specifically indicates that it considered the Plaintiff's Response. CP 2073. RAP 9.12.

DECLARATION OF SERVICE

I declare that on or before the date referenced below I served by e-mail (per all parties' written consent) a copy of the foregoing document to all counsel of record and the plaintiffs as listed below:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 29th day of October, 2015, at Tumwater,
Washington.

/s/ Jodi Elliott
JODI ELLIOTT, Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

October 29, 2015 - 1:12 PM

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