No. 90357-3

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 for the minor child, KELLEN MITCHELL GRAHAM, and KELLEN MITCHELL GRAHAM, individually,

Respondents/Conditional Cross-Petitioners,

vs.

CHAD P. COLLINS, DMD, PATRICK C. COLLINS, DDS; COLLINS ORAL & MAXILLOFACIAL SURGERY, P.S., a Washington corporation, and SACRED HEART MEDICAL CENTER, a Washington corporation,

Petitioners.

RESPONDENTS'/CROSS PETITIONERS' ANSWER TO AMICI CURIAE

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Darla Keck, her husband, Ron Joseph Graham, and her son, Kellen Mitchell Graham (collectively Keck), submit this answer to the amicus curiae briefs filed on behalf of the Washington State Medical Association (WSMA), Washington Defense Trial Lawyers (WDTL), and Washington State Association for Justice Foundation (WSAJF).

I.) INTRODUCTION

A.) Scope and significance of issues addressed by amici.

The issues before the Court are limited to the standard of review regarding the timeliness of summary judgment affidavits and the standard for evaluating the sufficiency of expert affidavits submitted in opposition to summary judgment. *See* Collins Pet. for Rev., at 2 (issues presented for review); Keck Ans. to Pet. for Rev., at 1-2 (issues presented for review); Order Granting Review, Oct. 8, 2014; *see also* RAP 13.7 (stating "the Supreme Court will review only the questions raised in ... the petition for review and the answer, unless the Supreme Court orders otherwise upon the granting of the motion or petition"; ellipses added).

Petitioners have not sought review of, and amici curiae do not address, the Court of Appeals holdings that:

- The superior court abused its discretion in denying Keck's motion for a continuance of the first summary judgment motion hearing pursuant to CR 56(f), *see Keck v. Collins*, 181 Wn. App. 67, 87-

89, 325 P.3d 306, *rev. granted*, 181 Wn. 2d 1007 (2014);

- The superior court abused its discretion in denying Keck's motion for reconsideration of the first summary judgment order, *see id.*, 181 Wn. App. at 93-94; and
- The superior court erred in entering the second summary judgment order dismissing Keck's complaint because there are genuine issues of material fact for trial regarding her medical negligence claim, *see id.* at 91-93.

Amici properly steer clear of these unchallenged holdings, which constitute the law of the case and are independently sufficient to require reversal of the superior court's summary judgment orders and remand of Keck's claims for trial, regardless of how the issues discussed by amici are ultimately resolved. *See* Keck Ans. To Pet. For Rev., at 11-12 & n.4; Keck Supp. Br., at 2-9.

B.) Factual record relevant to issues addressed by amici.

Patrick Collins filed a summary judgment motion seeking dismissal of Keck's complaint alleging claims for medical negligence. CP 21-22. He did not submit any evidence in support of the motion, but instead relied upon *Young v. Key Pharms., Inc.*, 112 Wn. 2d 216, 770 P.2d 182 (1989), to compel Keck to produce expert testimony establishing breach of the standard of care and causation. CP 23-31. At the time, no discovery had occurred. RP 16:24-25.

Patrick Collins noted the hearing for his summary judgment motion—without checking the availability of Keck's lawyer—on a date when the lawyer was unavailable, and the hearing had to be stricken. RP 12:19-22; CP 115. Patrick Collins subsequently re-noted the hearing—again without checking the availability of Keck's lawyer—so that responsive materials were due when the lawyer, a sole practitioner at the time, was in the middle of an out-of-town trial.[1]

Two days before Keck's response to the motion was due, Chad Collins "joined" the motion for summary judgment. CP 35-36. The joinder document does not specify whether he was seeking dismissal of Patrick Collins, or himself, or both by means of the joinder. *See id.* Even though Chad Collins' lawyer was involved in the same out-of-town trial as Keck's lawyer, the record does not reflect any attempt to determine the availability of Keck's lawyer beforehand, nor to seek any agreement to alter the timelines for summary judgment motions under CR 56 or local rule.

Keck's lawyer timely responded to the summary judgment motion filed by Patrick Collins and the joinder filed by Chad Collins, including a

[1] WDTL is simply wrong when it states (twice) that the second hearing date was scheduled with the agreement of Keck's lawyer. *See* WDTL Am. Br., at 3 & 5; *see also Keck*, 181 Wn. App. at 76 (stating "Dr. Patrick's counsel re-noted the summary judgment hearing ... without consulting appellants' counsel, a sole practitioner, regarding his availability"; ellipses added).

declaration from Keck's previously disclosed medical expert, Kasey Li, M.D. CP 38-43; RP 13:6-13. Chad Collins had initially tried to retain Dr. Li as an expert witness for the defense in this case. CP 195.

A few days later, Keck's lawyer filed a second document from Dr. Li, an affidavit that corrected a deficiency in the form of the initial declaration[2] and clarified that his opinions related to both Patrick and Chad Collins. CP 46-48. Although Dr. Li attested to the fact that both doctors breached the standard of care and caused injury to Keck, the doctors argued in reply that his testimony was too "conclusory and without factual support" to withstand summary judgment. CP 57-59 (Patrick Collins' reply); *accord* CP 65-66 (Chad Collins' reply).

While maintaining that the substance of the first declaration and the second affidavit were sufficient, Keck's lawyer filed a third document from Dr. Li before the summary judgment hearing, a supplemental affidavit that reiterated his prior opinions and provided additional factual detail. CP 79-83. At the same time, Keck's lawyer filed a motion for a brief CR 56(f) continuance to consider the supplemental affidavit from Dr. Li, along with a declaration explaining that he had been in trial when the responsive materials were due, and did not have enough time to obtain a more detailed affidavit from Dr. Li previously.

[2] The declaration lacked certain language required by RCW 9A.72.085 to be deemed equivalent to an affidavit.

The superior court found the first declaration and the second affidavit from Dr. Li were insufficient, struck the third affidavit as untimely, and granted partial summary judgment on that basis. When the summary judgment order was entered, not only had no discovery occurred, the discovery cutoff and dispositive motion deadlines had not passed either. CP 32. On this basis, the superior court and the Court of Appeals both found that Patrick and Chad Collins would not be prejudiced by consideration of Dr. Li's supplemental affidavit. *See* CP 102; *Keck*, at 85 & 89. The superior court did not find any bad faith on the part of Keck's lawyer, and the Court of Appeals found that that he acted in good faith. *See Keck*, at 86.[3]

II.) ANSWER TO AMICI

A.) The amicus briefing highlights a lack of clarity regarding the time for filing supplemental affidavits under CR 56(e), and the Court should confirm that such an affidavit is timely if it is filed before the superior court rules on the summary judgment motion and there is no prejudice to the opposing party.

CR 56(c) states that initial affidavits, if any, must be filed and served at least 28 days before a summary judgment hearing; that responsive affidavits must be served at least 11 days before the hearing; and that reply affidavits must be served at least 5 days before the hearing.

[3] In light of this factual record, WDTL's insinuations that Keck manipulated the summary judgment procedure to obtain an advantage seem unfair. *See, e.g.*, WDTL Am. Br., at 2, 13.

In addition, CR 56(e) provides that "[t]he court may permit affidavits to be supplemented or opposed by ... further affidavits." (Brackets & ellipses added.) CR 56 does not specify the time for supplemental affidavits to be filed and served, although it would appear to be implicit in the rule that such affidavits must be received before the court decides the summary judgment motion.

The superior court below seemed to treat *any* supplemental affidavit as untimely, subject to the requirements of CR 5(d)(2) (regarding acceptance of untimely filings) and/or CR 6(b) (regarding enlargements of time) before the affidavit may be considered by the court. *See* CP 102. Patrick and Chad Collins appear to have adopted this approach, and WDTL expressly advocates for it. *See* Patrick Collins Resp. Br., at 20; Chad Collins Resp. Br., at 15; Collins Joint Supp. Br., at 8; WDTL Am. Br., at 8-10.

WSMA likewise appears to consider *any* supplemental affidavit as untimely, but suggests that the decision whether to consider the affidavit should hinge upon the analysis of *Burnet v. Spokane Ambulance*, 131 Wn. 2d 484, 933 P.2d 1036 (1997), and *Jones v. Seattle*, 179 Wn. 2d 322, 314 P.3d 380 (2014), regarding exclusion of late-disclosed evidence. *See* WSMA Am. Br., at 15-19. However, neither the superior court, nor the

Collinses, nor their aligned amici acknowledge the provision of CR 56(e) authorizing the filing of supplemental affidavits.

WSAJF recognizes that CR 56(e) does not impose an explicit deadline for submitting supplemental affidavits, and suggests that, if the affidavit is submitted before the hearing and would change the outcome of the motion, then it should be considered by the court unless there are compelling reasons for not doing so. *See* WSAJF Am. Br., at 19. This is consistent with Keck's argument, also based on CR 56(e), that supplemental affidavits should be considered timely if submitted before the court rules on summary judgment and there is no prejudice to the opposing party. *See* Keck App. Br., at 26; Keck Reply Br., at 3 & 12.

The Court of Appeals initially approved a similar approach to the one proposed by WSAJF and Keck, acknowledging the supplemental-affidavit provision of CR 56(e) and stating that affidavits may be supplemented at any time before a formal order granting or denying summary judgment is entered. *See Keck*, at 83 (quoting *Cofer v. Pierce County*, 8 Wn. App. 258, 261, 505 P.2d 476 (1973)). However, the court went on to analyze the timeliness of Dr. Li's supplemental affidavit under CR 5(d)(2) and CR 6(b), making it unclear whether the court believed that it was necessary to satisfy the requirements of CR 5(d)(2) and CR 6(b), or

whether the court was simply addressing the Collinses' arguments in the alternative. *See Keck*, at 83-86.

Apart from the standard of review regarding the timeliness of summary judgment affidavits, discussed below, this Court should clarify that a supplemental affidavit is timely as long as it is submitted before a summary judgment motion is decided and there is no prejudice to the opposing party. The Court should also confirm that CR 5(d)(2), CR 6(b) and the *Burnet/Jones* analysis do not apply to supplemental affidavits because there is no time limit for such affidavits specified in CR 56(e).

This approach is consistent with the purpose of summary judgment to screen only non-meritorious claims and thereby avoid a useless trial. Allowing consideration of a supplemental affidavit that addresses an actual or perceived problem in a timely-filed responsive affidavit will minimize the potential for meritorious claims to be dismissed. Disallowing supplemental affidavits under these circumstances, especially in the absence of any prejudice to the opposing party or parties, creates a procedural trap that can only hinder resolution of cases on the merits.

B.) Neither WDTL nor WSMA address the *Folsom* rationales for applying the de novo standard of review to rulings regarding the evidentiary sufficiency of summary judgment affidavits, and Keck agrees with WSJAF that these rationales militate in favor of applying the de novo standard of review to rulings regarding the timeliness of supplemental summary judgment affidavits under CR 56(e).

WSAJF and WDTL appear to agree with the parties and the Court of Appeals that this case presents the issue of whether the de novo standard of review for evidentiary rulings made in connection with a summary judgment motion under this Court's decision in *Folsom v. Burger King*, 135 Wn. 2d 658, 958 P.2d 301 (1998), should (as urged by WSAJF) or should not (as urged by WDTL) be applied to rulings regarding the timeliness of summary judgment affidavits. *See* WSAJF Am. Br., at 5 & 15-20; WDTL Am. Br., at 10-12.

Keck agrees with WSAJF that the nature of summary judgment and the rationales of *Folsom* support application of the de novo standard of review, especially with respect to a supplemental affidavit that is submitted before the summary judgment motion is heard, addressing an actual or perceived problem in a timely filed responsive affidavit. *See* Keck Supp. Br., at 11-13; WSAJF Am. Br., at 15-20. *Folsom*'s application of the de novo standard of review is grounded in the requirements to view the summary judgment record in the light most favorable to the nonmoving party and to conduct the same inquiry as the superior court on

review. *See* Keck Supp. Br., at 11; WSAJF Am. Br., at 16 (quoting *Folsom*). The abuse of discretion standard of review is incompatible with these requirements because the deference given to the trial court under this standard is tantamount to viewing the record in the light most favorable to the lower court's decision rather than the nonmoving party. Furthermore, the appellate court does not perform the same inquiry as the lower, and cannot reverse simply because it disagrees with the lower court's decision. *See* Keck Supp. Br., at 11; WSAJF Am. Br., at 16-17.

While WDTL points out that *Folsom* is distinguishable on the facts, it does not address the rationales of *Folsom*. *See* WDTL Am. Br., at 10-12. Instead, WDTL argues that applying the de novo standard of review to rulings regarding the timeliness of summary judgment affidavits will "eviscerate" CR 56 by allowing parties to file untimely affidavits. *See id.* at 12-13. This argument appears to be a criticism of the provision of CR 56(e) authorizing supplemental affidavits, rather than an argument relating to the standard of review. Nonetheless, WDTL's argument is counter-intuitive because the de novo standard of review is less deferential to superior courts than the abuse of discretion standard of review, giving appellate courts greater latitude to reign in abuses and promote uniformity of practice.

WSMA frames the issue differently, urging the Court to apply the *Burnet/Jones* analysis, which is reviewed for abuse of discretion, to the timeliness of summary judgment affidavits. *See* WSMA Am. Br., at 15-19. While the sensibilities underlying the *Burnet/Jones* analysis are apt, in particular the tendency to promote resolution of cases on the merits, the required on-the-record balancing seems both unnecessary and unduly cumbersome in the summary judgment context. *See Jones,* 179 Wn. 2d at 338-41 (discussing the *Burnet* analysis). More importantly, the abuse of discretion standard of review applied under the *Burnet/Jones* analysis does not account for the rationales for applying the de novo standard of review in the summary judgment context, as stated in *Folsom*. This Court should confirm that *Folsom* requires application of the de novo standard of review here.

C.) With respect to the sufficiency of expert affidavits submitted in opposition to summary judgment, WSMA and WDTL improperly equate the "specific facts" language of CR 56(e) with the underlying facts or data for an expert opinion rather than the material facts creating a genuine issue for trial.

CR 56(e) provides that a party opposing summary judgment "may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth *specific facts* showing that there is a genuine issue for trial." WSMA and WDTL argue that *Guile v. Ballard Comm. Hosp.,* 70 Wn. App. 18, 85

P.2d 689, *rev. denied sub nom. Guile v. Crealock*, 122 Wn. 2d 1010 (1993), "implements" (per WSMA) and merely "restates" (per WDTL) the specific facts language of CR 56(e) by excluding conclusory expert affidavits submitted in opposition to summary judgment. WSMA Am. Br., at 5; WDTL Am. Br., at 16. In the context of amici's argument, it appears that they are equating the specific facts required to withstand summary judgment with the underlying facts or data for an expert opinion rather than the material facts creating a genuine issue for trial. *See* WSMA Am. Br., at 6-8; WDTL Am. Br., at 16-17. Thus, WSMA includes an extended discussion of the uncontroversial proposition that an expert's opinions must be grounded in the facts of the case and based on an adequate foundation. *See* WSMA Am. Br., at 6-8.[4] Recognizing that ER 705 permits the expert to testify as to his or her conclusions without first disclosing the underlying facts or data, WSMA ultimately has to argue that ER 705 has no application in summary judgment proceedings. *See id.* at 9-10.

In the course of making this argument, WSMA relies on the Court of Appeals decision in *Hash by Hash v. Children's Orthopedic Hosp.*, 49 Wn. App. 130, 134-35, 741 P.2d 584 (1987), *aff'd*, 110 Wn. 2d 912

[4] In this case, Dr. Li based his opinions on Keck's medical records, and there is no suggestion that his opinions are not grounded in the facts of the case or that they are lacking in foundation, merely that they are conclusory.

(1988), and another decision that also relies on *Hash*. *See* WSMA Am. Br., at 9-10 & n.4 (citing *Anderson Hay & Grain Co. v. United Dominion Indus., Inc.*, 119 Wn. App. 249, 259, 76 P.3d 1205 (2003), *rev. denied,* 151 Wn. 2d 1016 (2004), and *Hash*). As pointed out by Keck previously, *Hash* is similar to *Guile,* although it involved the sufficiency of the moving party's affidavits rather than the nonmoving party's affidavits. *See* Keck. App. Br., at 24-25 n.7; Keck Reply Br., at 19-25. The court held that the defendant's expert affidavit was too conclusory to require the plaintiff to come forward with evidence showing a genuine issue of fact for trial. *See Hash*, 49 Wn. App. at 133-35. Recognizing the conflict that this created with the evidence rules, the court explained its reasoning as follows:

> Under ER 705, an expert witness can testify at trial to an opinion without first stating the factual basis for that opinion. *Group Health Cooperative of Puget Sound, Inc. v. Department of Revenue,* 106 Wash.2d 391, 399, 722 P.2d 787 (1986). One can argue, therefore, that the opinion of an expert should be given effect in summary judgment proceedings, even though no supporting facts are included in the expert's affidavit.
>
> We reject that argument for two reasons. First, ER 705 contemplates and makes provision for the opposing party to explore the factual basis for an expert's opinion on cross examination. *We have not yet discovered a means for cross-examining an affidavit. Furthermore, without knowledge of the factual basis for the opinion, the court may well be without any means of evaluating the merits of that opinion.*

> Another reason ER 705 should not be applied literally to affidavits in summary judgment proceedings is the requirement of CR 56(e) that supporting and opposing affidavits set forth admissible facts. While CR 56(e) does not expressly address affidavits of expert witnesses, it does specifically require that:
>
> > When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial....
>
> *If the adverse party must set forth "specific facts" in order to defeat a motion for summary judgment, elemental fairness compels an interpretation of the rule which places the same burden on the moving party if it is to succeed in making the initial showing that there is no material factual issue for trial. One cannot show there is no genuine factual issue without presenting the court with the facts surrounding the critical issues.*

Hash, 49 Wn. App. at 134-35 (formatting & ellipses in original; emphasis added).

As is true of *Guile, Hash* (and WSMA's argument based on *Hash*) is contrary to the provision of CR 56(e) that incorporates the evidence rules and merely requires affidavits to "set forth such facts as would be admissible in evidence[.]" (Brackets added). As the *Hash* court recognized, the evidence rules permit an expert to testify in conclusory form. *See also* ER 704-705.

Also as is true of *Guile, Hash* and WSMA also take the "specific facts" language in CR 56(e) out of context. In context, the phrase "specific facts" is contrasted with "mere allegations or denials" and explained in terms of material facts creating "a genuine issue for trial." The phrase cannot reasonably be read as referring to the underlying facts or data supporting an expert opinion, which need not even be admissible as long as they are reasonably relied upon by other experts in the field. *See* ER 703. The only material facts in a medical negligence action are breach of the standard of care and causation of the plaintiff's injuries, and Dr. Li has attested to these facts with the requisite degree of specificity. *See* RCW 7.70.040.

Lastly, *Hash* and WSMA illustrate the danger of requiring more detailed factual disclosures in response to a summary judgment motion. With due respect to the *Hash* court, the court is not supposed to be performing a function akin to cross-examination or otherwise "evaluating the merits" of an expert's opinions on summary judgment. This Court should confirm that an expert affidavit admissible under ER 705 and otherwise establishing a genuine issue of material fact for trial is sufficient to withstand summary judgment.[5]

[5] In any event, the Court of Appeals decision in *Hash* has been rendered a nullity by this Court's grant of review and its subsequent decision in the case, holding that summary judgment was properly denied based on the requirement to view the evidence in the light

D.) Only by ignoring the availability of discovery and other methods to determine whether expert witnesses have adequate foundation for their opinions can WSMA imagine a risk of what it describes as "useless trials."

WSMA contends that "useless trials" would result if plaintiffs could defeat summary judgment with a conclusory expert opinion. WSMA Am. Br., at 8 & 10. This contention is based on the unwarranted premise that defendants have no way to uncover or test the foundation for expert opinions, other than by means of a summary judgment motion. As WSAJF correctly notes, defendants have the ability to conduct discovery before a summary judgment motion is filed. *See* WSAJF Am. Br., at 13 (citing CR 26(b)(5)). This specifically includes interrogatories and depositions to inquire into "the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion[.]" CR 26(b)(5)(A)(i)-(ii). Even in the context of a summary judgment motion, defendants could ask for an evidentiary hearing pursuant to CR 43(e)(1) to conduct cross-examination of experts or otherwise obtain disclosure of the underlying facts or data for their opinions. There is no plausible reason to believe that defendants will be subjected to useless trials simply because

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most favorable to the non-moving party rather than the "specific facts" language of CR 56(e). *See* 110 Wn.2d at 915-16. Both decision have likely been superseded by the approach to summary judgment adopted in *Young, supra.*

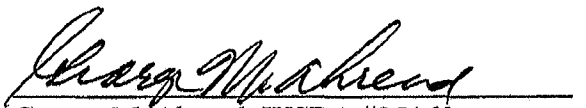
expert affidavits submitted in opposition to a summary judgment motion may be conclusory, as authorized by ER 704-705.[6]

E.) Keck agrees with WSAJF that *Guile* should be disapproved as erroneously decided.

WSAJF correctly points out that *Guile* has not been elevated to the level of binding precedent by this Court. *See* WSAJF Am. Br., at 13-14; *see also* Keck Reply Br., at 14-17 & n.11. In addition to the reasons why *Guile* was erroneously decided discussed in Keck's briefing, WSAJF also correctly points out that *Guile* misreads this Court's decision in *Young, supra*. *See* WSAJF Am. Br., at 10-11; *see also* Keck App. Br., at 20-25; Keck Ans. to Pet. for Rev., at 14-15; Keck Supp. Br., at 18-19.

Submitted this 28th day of January, 2015.

AHREND LAW FIRM PLLC



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[6] The more realistic risk stems from the fact that summary judgment motions are often filed, as in this case, before any discovery has occurred. *See* WSAJF Am. Br., at 14 n.10; *cf. Putman v. Wenatchee Valley Med. Ctr., P.S.*, 166 Wn. 2d 974, 979, 216 P.3d 374 (2009) (recognizing that the discovery process allows medical negligence plaintiffs to uncover evidence necessary to pursue their claims). This risk might be best addressed in the Court's rule-making capacity, limiting defendants' ability to file the type of summary judgment motion authorized by *Young, supra*—requiring a plaintiff to come forward with admissible evidence of every essential element of his or her claim—before any discovery has occurred.

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CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On January 28, 2015, I served the document to which this is annexed by email and/or First Class Mail, postage prepaid, as follows:

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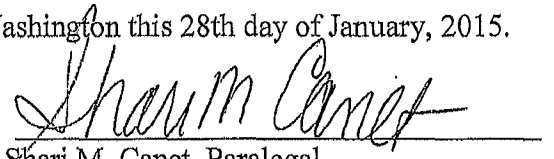
Signed at Ephrata, Washington this 28th day of January, 2015.



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Subject: Keck v. Collins (#903673)

Please accept the attached Respondents'/Cross Petitioners' Answer to Amici Curiae for filing. Thank you.

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