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No. 56338-6-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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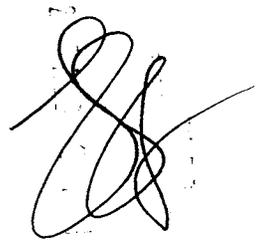
SIOBHAN RICCI,

Appellant,

v.

STEVEN GARY and JANE DOE GARY, and the marital community  
composed thereof; ALMA STANFORD and JOHN DOE STANFORD,  
and the marital community composed thereof,

Respondents.



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APPELLANT'S BRIEF

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**A. ASSIGNMENTS OF ERROR**

*Assignments of Error*

The trial court erred in granting summary judgment dismissing plaintiff Siobhan Ricci's claims.

*Issues Pertaining to Assignments of Error*

1. May a psychologist whose license, training, and scope of practice encompasses the same methods applied to the same kinds of patients as a mental health counselor state an opinion regarding the standard of care of a mental health counselor?

2. Does a counselor who agrees in writing to make no disclosures without his patient's consent violate his patient's confidence by making a disclosure to which the patient has not consented notwithstanding a statute which may permit but does not require the disclosure?

3. Does a counselor who is prohibited from disclosing patient information without the patient's consent by a statute specific to that counselor's license violate the patient's confidences by making a disclosure without the patient's consent when the disclosure may be permitted but is not required by a general statute?

**B. STATEMENT OF THE CASE.**

**1. PROCEDURAL BACKGROUND.**

Siobhan Ricci claims that her two former mental health counselors,

Steven Gary and Alma Stanford, were negligent in their treatment of her. She also claims that Gary's and Stanford's unauthorized discussions with each other about her violated her right to confidentiality. CP 1-2.

Gary and Stanford moved for summary judgment of dismissal of Ricci's claims, asserting that plaintiff lacked expert opinion testimony that they breached the standard of care, and that they were authorized by RCW 70.02.050 to disclose information about her to each other. CP 9-24, 163-72. With Ricci's answer to the motions for summary judgment, she submitted the report and curriculum vitae of Stuart Greenberg, PhD, a licensed psychologist, who expressed his opinions regarding the defendants' failure to follow the standard of care. CP 243-260.

Before replying to Ricci's answer, defendants filed a separate motion to strike Greenberg's report asserting that he was not qualified to express an opinion regarding the standard of care of mental health counselors because he is not a mental health counselor. CP 277-284. Greenberg's qualifications had not been attacked in the defendants' motions for summary judgment, which asserted only that Ricci had no expert opinion to support her claim. Defendants had not taken Greenberg's deposition at the time they filed their summary judgment motions. CP 367. Greenberg's deposition testimony expanded upon his qualifications and specifically addressed his knowledge regarding the training of and standards of care of mental health counselors.

Ricci submitted excerpts from Greenberg's deposition testimony with her answer to the motions to strike. CP 367-384. The trial court, the Honorable Helen Halpert, granted the motion to strike Greenberg's report, which she stated resolved the case. CP 452-54.

The trial court's order indicated that she did not review Ricci's answer to the motion to strike. In footnote 1 of the order, CP 452, the trial court indicated that Ricci submitted the entire 85 page deposition of Greenberg without drawing the court's attention to specific portions. In fact, the entire deposition was not submitted, but more importantly, Ricci's answer to the motion to strike specifically referenced the portions of the deposition testimony which were submitted. CP 346, 347, 348, 354, 355.

Because the trial court's order suggested that she did not consider Ricci's answer to the motion to strike, and in light of this Court's decision filed on the same day as the trial court's order, *Eng v. Klein*, 127 Wn. App. 171, 110 P.3d 844 (April 25, 2005), Ricci moved for reconsideration. CP 455-69. The trial court denied Ricci's motion for reconsideration, CP 564-66, and entered judgments for both defendants. CP 567-69, 561-63. The trial court did not address Ricci's breach of confidentiality claim in either the original order or the order denying reconsideration. Ricci appeals the dismissal of her claims.

## 2. BACKGROUND OF CLAIMS.

In August 2000, Siobhan and Larry Ricci sought joint counseling from Steven Gary for marital problems. CP 173. Gary was then registered as a counselor under Chapter 18.19 RCW.<sup>1</sup> After a few joint sessions, Larry Ricci stopped seeing Gary beginning in September or October 2000, but Siobhan Ricci continued individual counseling with him in order to address longstanding emotional issues arising from a date rape when she was in college. CP 173.

In their first individual counseling session, Mr. Gary noted “Siobhan is going through PTSD.” CP 197. Gary noted no other specific assessments or diagnosis of Ricci during the remainder of his counseling relationship with her. CP 197-205.

Gary asked Ricci to sign an agreement describing the counseling relationship. With the agreement, he also gave her a brochure published by the Department of Health for counseling clients. CP 180. The agreement promises confidentiality absent the client’s written consent to disclosure. CP 183-84. The paragraph entitled “Confidentiality” states:

I abide by the Department of Health regulations on confidentiality and professional conduct. . . . All information

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Chapter 18.225 RCW was enacted in July 2001, creating the designation of Licenced Mental Health Counselor. Washington Laws, chapter 251 (2001). Gary applied for and was grandfathered into the new license designation. CP 191-92.

between you and me is kept confidential unless there is potential suicide behavior, threatened harm to another person, suspected child abuse or court subpoena. Any release of information would be discussed with you in advance. All other information would only be released with your written consent. I do consult with other professionals on a regular basis. Information discussed during these consults is for purposes of treatment planning and will remain confidential.

The Department of Health brochure also provides for complete confidentiality absent either the client's consent to disclosure or specific circumstances not present here. CP 185-86. The section titled "Confidentiality" states, "Your counselor or hypnotherapist cannot disclose any information you've told them during a counseling session except as authorized by RCW 18.19.180: (1) With the written consent of that person . . ." The provisions then lists exceptions, such as the client's committing or being a victim of a crime, the client's bringing charges, or in response to a court subpoena. CP 186.

Ricci developed a strong attachment to Gary, which she likened to love, but without a romantic or sexual aspect. CP 174. Since being date raped in college, Ricci looked upon romantic love as fearful and shameful. She was, however, disturbed about having a strong attachment to a man who was not her husband. When she expressed to Gary her distress over her strong attachment, Gary initially told her that her feelings were inappropriate. Then, at the end of a subsequent session, he told her if she asked him for sex

he would say no. She had never considered asking him for sex, did not have any sexual feelings for him, and found the idea of having sex outside of marriage completely repugnant. She was deeply ashamed that she might have sent such a signal to him and her attachment to him became more troubling. CP 174.

In July 2001, Ricci asked Gary for a referral in order to break her attachment to Gary, and he referred her to Alma Stanford, who she began seeing that month. CP 175.

Stanford provided no written materials to Ricci and did not discuss Stanford's policies or obligations of confidentiality. CP 180.

The principle subject of her sessions with Stanford was Ricci's attachment to Gary, and initially Ricci believed she was making progress. CP 175. Ricci felt, however, that she needed closure after leaving Gary so abruptly, and requested a final session with him, with Stanford's approval. At the end of the closure session with Gary, in early September 2001, he told her that he loved his wife and that he loved Ricci, too. Gary then asked Ricci for a hug even though he had told Ricci in an earlier session when she requested a hug that it would be inappropriate. Gary's equation of love for his wife and love for Ricci threw her back into great turmoil. CP 175.

A month later, on October 3, 2001, Ricci requested another session with Gary in which she asked him about his statement that he loved her. He

implied to her that his feelings were sexual by saying, “I love you but I don’t have to have you.” CP 176.

Ricci had not told Stanford about the October 3 session either in advance or afterwards. Instead, on October 29, Stanford raised the subject of that session with Gary. CP 176. Stanford told Ricci that Stanford and Gary had met to discuss her. Stanford testified in her deposition that her meeting with Gary occurred on October 10. CP 211. Gary, however, denied meeting with Stanford after Ricci began counseling with Stanford. CP 194-95.

Ricci was greatly distressed that Gary and Stanford met to discuss her without her knowledge or consent. RP 176. When Ricci asked what Stanford and Gary discussed, Stanford related that Gary felt unappreciated, that he had decided to look for appreciation elsewhere, and that he had renewed his marriage vows with his wife Ellie. Stanford told Ricci that if she had any further questions, Ricci should ask Gary. CP 176-77.

Ricci telephoned Gary to ask why Stanford and Gary met, Gary told Ricci that he had been “aroused” by Ricci in their last session, adding, “Men have issues with their sexuality too.” Ricci blamed herself for his becoming aroused although she knew of nothing she had done to cause it. She felt that she was floundering in an abyss. CP 177.

Upon telling Stanford of her turmoil, Stanford likened Ricci’s feelings to “matters of the heart.” Stanford told Ricci that Gary’s feelings of arousal

were a natural response to closeness, and that Gary was in touch with his feelings and Ricci was not. Through the remainder of Ricci's relationship with Stanford, Stanford insisted that Gary's feelings were normal and Ricci's feelings were wrong. CP 177-78.

Ricci was distraught both because of Gary's sexual remarks to her, compounded by Stanford's reaction to them, and by the two therapists' breach of her expectation of confidentiality in having a meeting without first obtaining Ricci's consent. Over the next two weeks, Ricci had multiple sessions with Stanford on the telephone and in person. Ricci describes herself as "rambling," "dazed, disoriented, and confused." At one point, Stanford asked Ricci whether she was suicidal. Ricci also made and canceled another appointment with Gary, and then to break what Ricci calls "my evil attachment," she left a voicemail message for Gary asking him to block her calls. CP 178.

After spending the weekend crying and being "at the lowest point in my life," Ricci received a letter from Gary stating, "Do not contact me again ever. I am ending my relationship with you as your therapist." CP 179. Ricci became hysterical, and irrationally believed that the letter was evidence that she was such an evil person that it could be used to take her children from her. Stanford was abrupt with Ricci and told Ricci that Gary had no alternative to sending the letter. Ricci's and Stanford's counseling

relationship ended soon after. CP 179-80.

Since her relationships with Gary and Stanford, Ricci has been depressed, frequently sleepless and tearful, and her marriage has suffered. Although Ricci has been advised to seek counseling, she is terrified of the prospect and distrustful of anyone in the profession. At her lawyer's insistence, she has seen a counselor, Judy Roberts, not for the purpose of therapy, but to support her in litigation. CP 180.

### **3. OPINION REGARDING STANDARD OF CARE.**

Ricci retained Stuart Greenberg, PhD as an expert witness regarding the defendants' breach of the standard of care and damages. She submitted Greenberg's report and his curriculum vitae with her answer to defendants' motions for summary judgment. CP 571-600. Greenberg's report describes his interview with Ricci and the results of tests he asked her to perform.

Greenberg assess Ricci as a person who has had a lifelong history of serious psychological problems which have waxed and waned. CP 592. Although acknowledging that Ricci would have been a difficult patient, Greenberg opines that her psychological makeup should have been apparent to a reasonably prudent and competent practitioner who treats patients with the emotional manifestations of Ricci. CP 592. At the least, he states, Gary and Stanford failed to adequately assess her problems. He further opines, "It is also my opinion that reasonably prudent and competent practitioners would

not have engaged in the behaviors and actions described above by Ms. Ricci.” Although acknowledging that a “normally constituted person would not be substantially harmed by the counselors’ sexually loaded comments and questionable discretion regarding Ricci’s confidentiality,” Greenberg states that Ricci’s status as a therapy patient, her personality makeup, and the situational stress she was under indicated she was not a “normally constituted person.” He continues, “Reasonably prudent and competent therapists should have been aware that she needed care and discretion that was more thoughtful, cautious, and respectful of her psychological makeup and the state of her life situation.” Greenberg adds,

It is my opinion, therefore, that the prevailing professional judgment of competent practitioners in similar circumstances would have been to not engage in the actions allegedly engaged in by the defendants in this matter. Their alleged behavior in these regards was professionally inappropriate, ill-suited to their patient, and ill-timed given her fragile state. Their actions were lacking in adequate forethought and were inconsiderate of and discrepant with concerns for her well-being. It is my opinion that they either failed to adequately assess her makeup and her status, or they disregarded what they knew in their manner of dealing with her, or both.

In addition to the foregoing opinions regarding Gary’s and Stanford’s breach of the standard of care, he expresses his opinion regarding Ricci’s damages stemming from their breach:

It is my opinion that, on a more probably than not basis, the failure to provide her adequate assessment and treatment combined with the inadequate thoughtfulness, prudence,

judgment, and discretion that is reflected in their actions, either caused or exacerbated her psychological problems rather than helping to treat them. While she certainly was a very difficult patient, having agreed to provide her care, that care needed to be of better quality.

Ricci also submitted Greenberg's curriculum vitae with her answer to defendant's motions for summary judgement. CP 220-233. The curriculum vitae reveals that he obtained a PhD in 1972, has been a licensed clinical psychologist in Washington since 1981, and has been certified by the American Board of Professional Psychology since 1989. He is a practicing clinical psychologist and Assistant Professor in the Department of Psychiatry and Behavioral Sciences. He has taught many courses and been extensively published in the field.

Alma Stanford also testified regarding the standards of care of counselors. She stated that there are clear rules regarding patient confidentiality and that a counselor's injection of the counselor's personal issues into therapy would be "really inappropriate." CP 217-18. When the defendants deposed Judy Roberts and asked her about client confidentiality, she answered that she instructs counselors in the ethics classes she teaches that given the sensitivity of information in mental health care, they should obtain the client's consent prior to any discussion with another clinician. CP 237-38.

**C. ARGUMENT.**

**1. STUART GREENBERG IS QUALIFIED TO EXPRESS AN OPINION REGARDING THE STANDARD OF CARE FOR MENTAL HEALTH COUNSELORS.**

ER 702 provides, “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” Stuart Greenberg is indisputably an expert in the field of psychology. His qualifications as a psychologist qualify him to testify regarding the standard of care applicable to mental health counselors whose methods are or should be the same as a psychologist’s within their more limited fields of practice.

“It is the scope of a witness's knowledge and not artificial classification by professional title that governs the threshold question of admissibility of expert medical testimony in a malpractice case. A practitioner of one school of medicine may testify regarding the practice in another school of medicine when the methods of treatment of the two are or should be the same.” *Eng v. Klein*, 127 Wn. App. 171, 172, 110 P.3d 844 (2005).

The methods of treatment of counselors, though more limited than psychologist’s, are or should be the same as psychologists when treating the same patients. The licensing statutes applicable to Greenberg, Gary, and

Stanford demonstrate that Greenberg’s authorized areas of practice as a psychologist completely overlap those of Gary, a licensed mental health counselor, and Stanford, a registered mental health counselor. Specifically, RCW 18.83.020(1) defines the “practice of psychology” as including the provision of services for:

- (b) Diagnosis and treatment of mental, emotional, and behavioral disorders, and psychological aspects of illness, injury, and disability; and
- (c) Counseling and guidance, psychotherapeutic techniques, remediation, health promotion, and consultation within the context of established psychological principles and theories.

Steven Gary’s area of practice as a licensed mental health counselor, is defined in RCW 18.225.010(8) as, “the application of principles of . . . psychotherapy, . . . and etiology of mental illness and dysfunctional behavior to individuals, couples, families, groups, and organizations, for the purpose of treatment of mental disorders and promoting optimal mental health and functionality. Mental health counseling also includes, but is not limited to, the assessment, diagnosis, and treatment of mental and emotional disorders . . .” RCW 18.19.020(2), which defines the practice of “counseling” applicable to Stanford as, “employing any therapeutic techniques, including but not limited to . . . mental health counseling, . . . for a fee that offer, assist or attempt to assist an individual or individuals in the amelioration or adjustment of mental, emotional, or behavioral problems . . .” All three statutory descriptions of

Greenberg's, Gary's, and Stanford's authorized practices encompass the treatment of an individual's emotional and mental health. Greenberg's opinion is founded upon the common areas of practice of his, Gary's, and Stanford's professions.

Greenberg also testified that his training overlaps with that received by Gary, including taking courses in family systems therapy, the defendants' field of practice. CP 375-76 (pp 32-33)<sup>2</sup>. He stated that Gary's degree in applied clinical psychology encompasses a major part of his own training although his degree is a doctor of philosophy, whereas Mr. Gary's is a masters degree. CP 380 (pp 69-70). Greenberg also testified that like defendants, he has used family systems therapy in his clinical practice. CP 375-76 (pp 32-33). Greenberg has read the practice and ethics codes and the regulations applicable to mental health counselors. He is familiar with Gary's and Stanford's training "because what counselors are trained to do is part of the same thing that psychologists and psychiatrists are trained to do." CP 380-81 (pp 72-73).

The Courts of Washington do not require that an expert's title conform to the defendant's title as long as the witness is qualified by knowledge, skill, experience, training or education to form an opinion. For

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The deposition testimony is printed with four pages per sheet. The deposition page numbers are added to narrow the references to the record.

example, courts have approved the expert testimony of a of a physician regarding standards of care for nurses, *Hall v. Sacred Heart Medical Center*, 100 Wn.App. 53, 995 P.2d 621, *as amended, review denied*, 141 Wn.2d 1022, 10 P.3d 1073 (2000); and of an agricultural engineer regarding an electrical engineering issue, *Esparza v. Skyreach Equipment, Inc.*, 103 Wn.App. 916, 926, 15 P.3d 188 (2000). Although Washington appellate courts have not addressed the issue of the qualifications of a psychologist to opine on the standard of care employed by mental health counselors, many appellate decisions address the issue with regard to the analogous situation involving physicians.

Most recently, in *Morton v. McFall*, 2005 Lexis 1566, NO. 54642-2-I, (July 5, 2005) this Court addressed the issue of whether an infectious disease specialist could testify regarding the standard of care of a pulmonologist. There, at pages 11-12, the Court observes that although the standard of care must be established by practitioners “in the same field” as the defendant, “the same field” is the same general field of knowledge. The Court explains:

However, to practice “in the same field” means that a pharmacist may not define the standard of care for a physician (*Young* [*Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 229, 770 P.2d 182 (1989)]); and that a physician may not do so for a pharmacist (*McKee* [*McKee v. American Home Products Corp.*, 113 Wn.2d 701, 706, 782 P.2d 1045 (1989)]). There is no general rule that prohibits a specialist from testifying regarding the standard of care applicable to a general practitioner; or a specialist in one area from testifying about

another area. *White v. Kent Medical Ctr., Inc.*, 61 Wn. App. 163, 173, 810 P.2d 4 (1991); *Eng v. Klein*, 127 Wn. App. 171, 110 P.3d 844, 845 (Wash. Ct. App. April 25, 2005)(“It is the scope of a witness's knowledge and not artificial classification by professional title that governs the threshold question of admissibility of expert medical testimony in a malpractice case.”)

(Bracketed citations added.)

The defendant in *Eng* moved for summary judgment asserting that the plaintiff's expert, an infectious disease doctor specializing in the diagnosis and treatment of meningitis, was not qualified to express an opinion regarding the standard of care of a neurosurgeon who did not diagnosis meningitis following neurosurgery. This Court disagreed, stating at 178,

According to his [the plaintiff's expert's] deposition testimony, he would have testified that a patient presenting symptoms like Ping should have raised a high enough suspicion of meningitis in Dr. Klein's mind to warrant ordering a spinal tap. His knowledge of the medical problem at issue in this case, diagnosing a patient presenting symptoms like Ping's, is uncontested. Therefore, he is competent to testify as to the medical problem in this case.

Instead of contesting Greenberg's knowledge of the mental health problem presented by Ricci, Gary and Stanford contend that only a counselor whose title and credentials are identical to theirs may offer an opinion concerning the standard of care applicable to them. They do not explain why a psychologist is not qualified even though psychologists and counselors treat the same patients for the same emotional conditions.

*Eng* makes it incumbent on the moving party to demonstrate some difference in the methods of practice between the expert's and the defendant's fields which would disqualify the former. *Eng*, at 178, points out "Furthermore, there is no evidence showing that Dr. Klein's failure to continue a differential diagnosis and ultimate failure to order a spinal tap are omissions particularized to his neurosurgical specialty." At 179, the Court states, "On the other hand, Dr. Klein has produced no evidence to demonstrate that the diagnostic methods at issue are different for neurosurgeons than for infectious disease specialists." At 180, *Eng* states, "Nor has Dr. Klein shown that the standard of care varies with geographic location." Here, defendants have not made any demonstration of any material differences in the standard of care between psychologists and mental health counselors with respect to treatment of a patient presenting the profile of Ricci.

*White v. Kent Medical Center*, 61 Wn. App. 163, 175, 810 P.2d 4 (1991), held that for summary judgment purposes, "as long as the alleged standard of care is more than mere personal opinion" it is sufficient to establish the applicable standard of care. Greenberg's curriculum vitae, as well as his deposition testimony, demonstrate that his knowledge of the standard of care for mental health counselors is more than his personal opinion, and is sufficient for purposes of summary judgment.

The trial court's reasons for striking Greenberg's report and

disregarding his deposition testimony are not, however, entirely clear. The order denying Ricci's motion for reconsideration states, at CP 564-65, "As pointed out by counsel for defendant Stanford, the issue before the court is not whether Dr. Greenberg, or some other psychologist, could have properly rendered an opinion regarding breach of the standard of care on behalf of the defendants. Rather, the issue is whether in his original report (which the court accepted as a declaration) he did so in a manner that is cognizable in the law." In the final paragraph of the order, the trial court states that the deposition testimony of Greenberg will not be considered in ruling on the motion for summary judgment. Perhaps the trial court explains what is meant by "in a manner that is cognizable in the law" in her next paragraph in which she criticizes plaintiff for not offering Greenberg's deposition testimony with her answer to the motion for summary judgment rather than in her answer to defendants' motion to strike Greenberg's report. If this is the trial court's reason for denying reconsideration, she overlooks that Greenberg's qualifications were not challenged in the motion for summary judgment in which defendants argued that plaintiff had no expert at all. His qualifications were first challenged in the motion to strike, and his deposition testimony was properly offered with the answer to the motion to strike.

The moving party must raise all issues in its motion for summary judgment, and a non-moving party is not required to address issues that are

not raised until the moving party files a rebuttal. *Owen v. Burlington N. Santa Fe R.R., Inc.*, 114 Wn. App. 227, 240 56 P3d 1006 (2002), citing *White*, at 168. Here, the moving parties did not challenge Greenberg's qualifications in their motions for summary judgment. Rather than raising the issue of Greenberg's qualifications in their motions for summary judgment, the moving defendants raised the issue in a separate motion to strike Greenberg's opinions, thus affording plaintiff an opportunity to respond with excerpts of Greenberg's deposition.

Assuming *arguendo*, that plaintiff should have anticipated that Greenberg's report and curriculum vitae were inadequate to respond to defendants' contention that she had no expert to establish standard of care, the trial court should nonetheless have considered the materials submitted in answer to the motion to strike. The Court may accept additional materials any time up to issuing its final order. *Rainier Nat. Bank v. Inland Machinery Co.* 29 Wn.App. 725, 731, 631 P.2d 389, 393 (1981), citing *Felsman v. Kessler*, 2 Wn.App. 493, 468 P.2d 691 (1970).

CR 1 provides that the rules of civil procedure "shall be construed to secure the just, speedy, and inexpensive determination of every action." KCLR 1 similarly provides that the local rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." Pragmatic, rather than technical, consideration of the rules better fulfills the objective of

the rules.

CR 1 accordingly provides: “They shall be construed to secure the just, speedy, and inexpensive determination of every action.’ See also ROA I-63; CAROA 63. Pragmatic considerations govern in reaching the overall objective stated in CR 1. See *La Hue v. Keystone Inv. Co.*, 6 Wn.App. 765, 776, 496 P.2d 343 (1972). Accordingly, a practical solution should be preferred to a technical one whose use might result in frustrating the purpose of the superior court rules.

*Kohl v. Zemiller*, 12 Wn.App. 370, 372, 529 P.2d 861 (1974). CR 1 “promotes a policy to decide cases on their merits. Indeed, ‘[m]odern rules of procedure are intended to allow the court to reach the merits, as opposed to disposition on technical niceties.’” *Sheldon v. Fettig*, 129 Wn.2d 601, 609, 919 P.2d 1209 (1996) (citations omitted). As an example of preferring a practical solution to a technical one, the trial court here earlier moved the trial date in order to permit the defendants to file their summary judgment motions within the timing restrictions of CR 56. The trial court’s refusal to consider Greenberg’s deposition testimony, particularly on a dispositive motion, is contrary to the objectives of the civil rules.

Stuart Greenberg, a licensed psychologist, possesses the basic requirements to testify to his opinion regarding defendants’ treatment of Siobhan Ricci. When the basic requirements of an expert are met, any deficiencies in the expert’s qualifications with respect to the expert’s opinion go to the weight of the evidence, not the admissibility of the expert’s opinion.

*Keegan v. Grant County Public Utility Dist. No. 2*, 34 Wn.App. 274, 283-84, 661 P.2d 146 (1983).

## **2. BREACH OF CONFIDENTIALITY**

The exceptions to the prohibitions against disclosure of medical information in the Medical Records–Health Care Information Access and Disclosure Act, (“HCIA”), RCW 70.02.050 are inapplicable to Gary’s and Stanford’s disclosures concerning Ricci for several reasons. First, Gary made a written promise to Ricci that he would not disclose any information about her without her written consent. Second, the statutes governing Stanford’s practice as a counselor similarly require written consent prior to any disclosures except in circumstances not present in this case. Third, the confidentiality of a person in treatment for emotional problems warrants more stringent safeguards than other health care recipients.

“The Uniform Health Care Information Act, chapter 70.02 RCW, is not the sole or exclusive remedy for unauthorized disclosure of a patient’s confidential information.” *Berger v. Sonneland*, 144 Wn.2d 91, 106, 26 P.3d 257 (2001). In support, *Berger* quoted *Smith v. Driscoll*, 94 Wash. 441, 442, 162 P. 572 (1917), “Neither is it necessary to pursue at length the inquiry of whether a cause of action lies in favor of a patient against a physician for wrongfully divulging confidential communications. For the purposes of what we shall say, it will be assumed that, for so palpable a wrong, the law provides

a remedy.”

Gary breached the written promise he provided to Ms. Ricci when he began seeing her. CP 183-86. His written materials, quoted above, unequivocally promise to maintain her confidentiality unless she expressly agreed in writing to disclosure. In addition, Gary reinforced Ricci’s belief in Gary’s promise of confidentiality when he obtained a signed release from Ricci before he sent her to another counselor during his vacation. CP 180. Ricci believed that Gary would not discuss her with anyone without her prior written consent. CP 180.

Alma Stanford, as a registered counselor, is subject to the provisions of Chapter 18.19 RCW. RCW 18.19.180 forbids disclosures of information about a patient with exceptions not applicable here. Specifically, RCW 18.19.180 provides:

*An individual registered under this chapter shall not disclose the written acknowledgment of the disclosure statement pursuant to RCW 18.19.060 nor any information acquired from persons consulting the individual in a professional capacity when that information was necessary to enable the individual to render professional services to those persons except:*

(1) *With the written consent of that person or, in the case of death or disability, the person's personal representative, other person authorized to sue, or the beneficiary of an insurance policy on the person's life, health, or physical condition;*

(Emphasis added).<sup>3</sup> The referenced “disclosure statement pursuant to RCW 18.19.060” is required written information which counselors must provide to a patient at the beginning of therapy, and it must include “the extent of confidentiality provided by this chapter.” While Gary provided such a disclosure statement, Stanford violated RCW 18.19.060 by providing nothing to Ricci at any time during their relationship. CP 180.

In July 2001, when Gary was designated a licensed mental health counselor he became subject to the provisions of Chapter 18.225 RCW. RCW 18.225.100 requires licensed mental health counselors to provide a disclosure statement similar to that required by RCW 18.19.060. In addition, the confidentiality provisions of RCW 18.225.105 effectively mirror those of RCW 18.19.180. Specifically, RCW 18.225.105 provides:

*A person licensed under this chapter shall not disclose the written acknowledgment of the disclosure statement pursuant to RCW 18.225.100, nor any information acquired from persons consulting the individual in a professional capacity when the information was necessary to enable the individual to render professional services to those persons except:*

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The additional exceptions of RCW 18.19.180 are: (2) That a person registered under this chapter is not required to treat as confidential a communication that reveals the contemplation or commission of a crime or harmful act; (3) If the person is a minor, and the information acquired by the person registered under this chapter indicates that the minor was the victim or subject of a crime, the person registered may testify fully upon any examination, trial, or other proceeding in which the commission of the crime is the subject of the inquiry; (4) If the person waives the privilege by bringing charges against the person registered under this chapter; (5) In response to a subpoena from a court of law or the secretary. The secretary may subpoena only records related to a complaint or report under chapter 18.130 RCW; or (6) As required under chapter 26.44 RCW.

(1) *With the written authorization of that person or, in the case of death or disability, the person's personal representative;*

(Emphasis added.)

Defendants argue that exceptions in RCW 70.02.050 relieve them of any liability for unauthorized disclosures. RCW 70.02.020 provides, “Except as authorized in RCW 70.02.050, a health care provider . . . may not disclose health care information about a patient to any other person without the patient's written authorization.” The exceptions argued by defendants as applicable are RCW 70.02.050 (1)(a) and (c), which provide:

(1) A health care provider *may* disclose health care information about a patient without the patient's authorization *to the extent a recipient needs to know* the information, if the disclosure is:

(a) To a person who the provider reasonably believes is providing health care to the patient; . . .

(c) To any other health care provider reasonably believed to have previously provided health care to the patient, *to the extent necessary* to provide health care to the patient, unless the patient has instructed the health care provider in writing not to make the disclosure;

(Emphasis added). The health care provider *may* but is not required to disclose information, and is limited to disclosures “to the extent necessary.”

Defendants are mistaken that RCW 70.02.050 controls over the prohibitions against disclosure in RCW 18.19.180 and RCW 18.225.105 and Gary’s written agreement that he would make no disclosures without Ricci’s

prior written consent.

First, RCW 70.02.050 is part of a general statute applicable to all health care providers generally. A health care provider is any “person who is licensed, certified, registered, or otherwise authorized by the law of this state to provide health care in the ordinary course of business or practice of a profession.” RCW 70.02.010(6). RCW 18.19.180 and RCW 18.225.105, on the other hand, are specifically applicable to Stanford’s and Gary’s licenses, and as such, supercede the general statute with regard to patient information disclosures.

Statutes relating to the same subject are construed together and, in “ascertaining legislative purpose . . . are to be read together as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves.” *Hallauer v. Spectrum Props., Inc.*, 143 Wn.2d 126, 146, 18 P.3d 540 (2001) (quoting *State v. Wright*, 84 Wn.2d 645, 650, 529 P.2d 453 (1974)). When more than one statute applies, the specific statute will supersede the general statute. *See Hallauer*, 143 Wn.2d at 146 (stating that when statutes conflict the specific statute supersedes the general statute); *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm’n*, 123 Wn.2d 621, 630, 869 P.2d 1034 (1994).

*Carlton v. Black (In re Estate of Black)*, 153 Wn.2d 152, 164 102 P.3d 796 (2004). The specific prohibitions of RCW 18.19.180 and RCW 18.225.105 supercede the general provisions of RCW 70.02.050.

Second, with respect to Gary, his written agreement that he would make no disclosures without Ricci’s prior written consent removes him from

the exceptions of RCW 70.02.050. He may make a disclosure under RCW 70.02.050(1)(c) to any other health care provider reasonably believed to have previously provided health care, “unless the patient has instructed the health care provider in writing not to make the disclosure.” Ricci’s and Gary’s signatures on his office policy statement that he would make no disclosures without her written consent should be read to be an instruction not to make a disclosure without her written consent.

Maintenance of confidential client information is perhaps more important in the context of psychological counseling than would be the situation with physician and patient or chiropractor and patient because the breach of trust is more damaging. Judy Roberts, a licensed mental health counselor who Ricci is now seeing for support through the litigation, (but not for therapy) warned of a loss of trust which occurs when a therapist makes disclosures without the client’s consent:

I would assume, and I think this would be true for most clients, that if they were to find out that I had a conversation about them with somebody else without their knowledge or consent, that they would lose some trust in me. Well, if I do that, what else would I do, and why didn't I tell them, that this is not supposed to be a relationship where the adults get together to talk and they don't tell the kids, and so I think as a therapist how I -- part of the significance I think in not talking to the client first is that they feel disempowered and not considered and not in charge of their own information, or a lot of things that I think potentially certainly threatens the client's ability to trust the therapist, and if they can't trust the therapist, I have concerns about the quality of work they are going to be able to

do.

CP 241-42.

Gary's motion to strike also raised another new issue with respect to his disclosure of confidential information. On page 2 of Gary's motion to strike, CP 278, he asserts, "Mr. Gary moved for summary judgment dismissing all claims against him because his communications either fell under the exception in the Uniform Health Care Act *or were not about Ricci* and because plaintiff had no expert testimony that he violated the standard of care for a licenses mental health care professional." (Emphasis added.) The apparent concession that there was a meeting between Gary and Stanford in October is contrary to his deposition testimony that he had no meeting with Stanford in October. This new assertion also contradicts Stanford's testimony that the October meeting was about Ricci. CP 212. Whatever the truth, in answer to this new contention, Ricci directed the trial court's attention to the portion of Greenberg's deposition where he points out the fallacy of this new argument:

Q If I'm a therapist and I go to another therapist and disclose to that other therapist my feelings about a client, is that in any way breaching the client's confidentiality?

A If that patient-client is identifiable in that discussion, it could be, yes.

Q What confidential information of the patient's am I revealing if what I'm talking about is my personal feelings?

A If I in your hypothetical go to my hypothetical therapist and say, "I have this patient, Tyna Ek, and she is absolutely obnoxious and I hate her guts and she's not paying her bill and she's perhaps abusing" -- I could go on and on and on, I may be talking about my feelings, but I'm disclosing information about this hypothetical person in the process of my doing it.

Q Well, if you tell that therapist that you hate my guts, what confidential information of mine are you disclosing?

A Just that piece. It would be what you're doing that's causing me to hate your guts.

CP 373 (p 20).

If the meeting between Stanford and Gary was limited to Gary's personal issues with Ricci as his attorney lately contends, RCW 70.02.050 would not apply for yet another reason. The exemptions of the statute apply only "to the extent the recipient needs to know the information," and are limited "to the extent necessary to provide health care to the patient." A meeting to discuss Gary's personal issues with Ricci, with not being sufficiently appreciated or being aroused by Ricci are not reasonably likely to be necessary to provide health care to Ricci. Because issues of fact surround the fact of the meeting and the communications, summary judgment is inappropriate. CR 56.

Because the communications about Siobhan Ricci between Steven Gary and Alma Stanford violated statutes particularly intended to regulate the relationship between counselor and client, RCW 18.19.190 and RCW

18.225.105, and because the communications breached the written agreement between Gary and Ricci, Ricci's claim based upon breach of her rights of privacy and confidentiality should not have been dismissed.

**D. CONCLUSION.**

Ricci's submission of Greenberg's report and curriculum vitae was sufficient for purposes of summary judgment to deny Stanford's and Gary's motions to dismiss Ricci's negligence claims. Because the issue of Greenberg's qualifications were not raised in the motions for summary judgment, but instead in a separate motion to strike filed after Ricci answered the motions for summary judgment, his deposition testimony concerning his qualifications should have been considered by the trial court in ruling. Although the trial court did not discuss the reasons for dismissing Ricci's claims for breach of her confidentiality, those claims should not have been dismissed either. Stanford and Gary were prohibited by statutes governing their practices from making any disclosures without Ricci's written consent, and Gary was additionally prohibited by his written promise of confidentiality. In addition, issues of material fact exist regarding the unauthorized disclosures.

The purpose of summary judgment is to avoid useless trials when the undisputed evidence does not support a claim, CR 56(b). However, when there is a genuine issue as to any material fact, a trial is not useless, but is

absolutely necessary. *Balise v. Underwood*, 62 Wn.2d 195, 381 P.2d 966 (1963). Summary judgment must be denied “if the record shows any reasonable hypothesis which entitles the nonmoving party to relief.” *White*, at 175, quoting *Mostrom v. Pettibon*, 25 Wn. App. 158, 162, 607 P.2d 864 (1980). Siobhan Ricci asks the Court to reverse the trial court’s granting summary judgment.

Respectfully submitted this August 19, 2005

  
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**STATE OF WASHINGTON COURT OF APPEALS  
DIVISION 1**

**SIOBHAN RICCI,**  
  
**Plaintiff,**  
  
**v.**  
  
**STEVEN GARY and JANE DOE  
GARY, and the marital community  
composed thereof: ALMA STANFORD  
and JOHN DOE STANFORD and the  
marital community composed thereof;**  
  
**Respondents**

**No. 56338-6-1**  
  
**CERTIFICATE OF SERVICE  
OF APPELLANT'S BRIEF**

*[Handwritten signature]*  
2005 AUG 19 11:23

I certify that on August 19, 2005, I caused the original of the Appellant's Brief and one copy to be delivered by United States mail, postage paid, to the Court of Appeals.

On the same day I caused a copy of the same document to be delivered by United States mail, postage paid, to Tyna Ek of Merrick Hofstedt & Lindsey and to Matthew Taylor of Lee Smart Cook Martin and Patterson.

DATED at Seattle, Washington this day, 19<sup>th</sup> August, 2005.

**REAUGH OETTINGER & LUPPERT, P.S.**

*[Handwritten signature: Sylvia Luppert]*  
Sylvia Luppert