

56338-6

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7/9/06-6

No. 56338-6-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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.

APPELLANT'S REPLY BRIEF

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2006 DEC -9 PM 3:06
FILED
CLERK OF COURT
JANUARY 11

TABLE OF CONTENTS

1. THE STANDARD OF REVIEW OF A RULING ON THE ISSUE OF
EXPERT QUALIFICATIONS IS DE NOVO. 1

2. ISSUES FIRST RAISED AFTER THE MOVING PARTY’S
ORIGINAL BRIEF SHOULD NOT BE CONSIDERED IN RULING
ON A SUMMARY JUDGMENT MOTION. 4

3. RICCI’S EXPERT’S REPORT AND C.V. ARE SUFFICIENT TO
DEFEAT SUMMARY JUDGMENT 7

4. REPLY TO MISSTATEMENT OF PROCEDURAL FACTS 15

5. REPLY TO STANFORD’S ARGUMENT THAT GREENBERG’S
OPINIONS ARE INADMISSIBLE BECAUSE BASED UPON A
NOVEL AND NOT ACCEPTED SCIENTIFIC THEORY 17

6. RICCI STATED AND SUPPORTED A CLAIM FOR BREACH OF
CONFIDENTIALITY 20

7. CONCLUSION 25

APPENDIX

Confidentiality provisions of Chapters 18.19 and 18.225 RCW

TABLE OF AUTHORITIES

Table of Cases

| | |
|---|--------|
| <i>Berger v. Sonneland</i> , 144 Wash.2d 91, 106, 26 P.3d 257 (2001) | 20 |
| <i>Breit v. St. Luke's Memorial Hosp.</i> , 49 Wn.App. 461, 743 P.2d 1254 (1987) | 2 |
| <i>In re Detention of Campbell</i> , 139 Wn2d 341, 986 P2d 771 (1999) | 18 |
| <i>Colwell v. Holy Family Hosp.</i> , 104 Wn.App 606, 15 P3d 210 (2001) | 2 |
| <i>Cotton v. Kronenberg</i> , 111 Wn.App. 258, 44 P.3d 878, reconsideration denied, review denied, 148 Wn.2d 1011, 62 P.3d 890 (2002) | 20 |
| <i>Cox v. Spangler</i> , 141 Wn.2d 431, 5 P3d 1265 (2000) | 2 |
| <i>Doherty v. Municipality of Metro. Seattle</i> , 83 Wn. App. 464, 921 P2d 1098 (1996) | 2,14 |
| <i>Eagle Group, Inc. v. Pullen</i> , 114 Wn. App. 409, 58 P3d 292 (2002) | 2 |
| <i>Eng v. Klein</i> , 127 Wn. App. 171, 110 P.3d 844 (2005) | 3,4,13 |
| <i>In re F.D. Processing, Inc.</i> , 119 Wn.2d 452, 832 P.2d 1303 (1992) | 22 |
| <i>Folsom v. Burger King</i> , 135 Wn.2d 658, 958 P.2d 301 (1998) | 1 |
| <i>Frye v. United States</i> , 54 U.S. App. D.C. 46, 54 App.D.C. 46, 293 F. 1013, 34 A.L.R. 145 (D.C. Cir. 1923) | 18 |

| | |
|---|-----|
| <i>Germain v. Pullman Baptist Church,</i> 96 Wn.App 826, 980 P2d 809 (1999) | 14 |
| <i>Harris v. Groth,</i> 99 Wn.2d 438, 663 P.2d 113 (1983) | 2 |
| <i>Havens v. C&D Plastics, Inc.,</i> 124 Wn.2d 158, 876 P2d 435 (1994) | 24 |
| <i>International Ultimate, Inc. v. St. Paul Fire,</i> 122 Wn.App. 736, 87 P3d 774 (2004) | 8 |
| <i>Johnson v Continental West Inc.,</i> 99 Wn.2d 555, 663 P.2d 482 (1983) | 22 |
| <i>Kelly v. Carroll,</i> 36 Wn.2d 482, 219 P.2d 79 (1950) | 12 |
| <i>Lilly v. Lynch,</i> 88 Wn.App 306, 945 P2d 727 (1997) | 14 |
| <i>McKee v. American Home Products Corp.,</i> 113 Wn.2d 701, 706, 782 P.2d 1045 (1989) | 1 |
| <i>Morton v. McFall,</i> 128 Wn.App. 245, 115 P3d 1023 (2005) | 3,4 |
| <i>Preston v. Duncan,</i> 55 Wn.2d 678, 349 P2d 605 (1960) | 6 |
| <i>R.D. Merrill Co. v. Pollution Control Hearings Bd.,</i> 137 Wn.2d 118, 969 P2d 458 (1999) | 5 |
| <i>Reese v. Stroh,</i> 128 Wn.2d 300, 907 P2d 282 (1995) | 18 |
| <i>Ruff v. King County,</i> 125 Wn.2d 697, 887 P2d 886 (1995) | 15 |

| | |
|---|------------|
| <i>Seybold v. Neu,</i> 105 Wn. App. 666, 19 P.3d 1068 (2001) | 1,3 |
| <i>State v. Cochran,</i> 102 Wn.App. 480, 8 P.3d 313, <i>review denied</i> 143 Wn.2d 1004, 20 P.3d 944 (2000) | 19 |
| <i>Sunbreaker Condo. Ass'n v. Travelers Ins. Co.,</i> 79 Wn. App. 368, 372, 901 P.2d 1079 (1995), <i>review denied</i> , 129 Wn.2d 1020, 919 P.2d 600 (1996), | 2 |
| <i>Universal C.I.T. Credit Corp. v. DeLisle,</i> 47 Wn.2d 318, 287 P.2d 302 (1955) | 24 |
| <i>Wagner Dev. Inc. V. Fid. & Deposit Co. Of Maryland,</i> 95 Wn.App. 896, 977 P2d 639 (1999) | 16 |
| <i>Walker v. State,</i> 121 Wn.2d 214, 848 P.2d 721 (1993) | 2 |
| <i>White v. Kent Medical Ctr., Inc.,</i> 61 Wn. App. 163, 810 P.2d 4 (1991) | 1,3,5,6,9, |
| <i>Wilson v. Steinbach,</i> 98 Wn.2d 434, 437, 656 P.2d 1030 (1982) | 25 |
| <i>Young v. Key Pharms., Inc.,</i> 112 Wn.2d 216, 770 P.2d 182 (1989) | 3,13,25 |

Statutes

| | |
|--------------------------|----------|
| Chapter 18.19 RCW | 23 |
| Chapter 18.225 RCW | 21,22,23 |
| Chapter 70.02 RCW | 20,21 |
| Chapter 7.70 RCW | 20 |
| RCW 18.19.020 | 11,13,14 |

| | |
|----------------------|----------|
| RCW 18.19.060 | 20,21,23 |
| RCW 18.19.180 | 21,22 |
| RCW 18.83.010 | 11,13,14 |
| RCW 18.225.010 | 13,14 |
| RCW 18.225.100 | 20,23 |
| RCW 18.225.105 | 21,22,23 |

Regulations and Rules

| | |
|--------------|------|
| CR 56 | 5,13 |
| ER 703 | 19 |

Other Authorities

| | |
|--|-------|
| 5A K. Tegland, Wash. Prac., <i>Evidence</i> (1989) | 9 |
| Restatement (Second) of Contracts § 2(1) | 24,25 |

1. THE STANDARD OF REVIEW OF A RULING ON THE ISSUE OF EXPERT QUALIFICATIONS IS DE NOVO.

This Division of the Court of Appeals employs the de novo standard on all rulings for summary judgment, including evidentiary rulings.

Ordinarily, “[t]he qualifications of an expert are to be judged by the trial court, and its determination will not be set aside in the absence of a showing of abuse of discretion.” But we review the trial court's evidentiary rulings made for summary judgments de novo. “The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion.”

Seybold v. Neu, 105 Wn. App. 666, 678, 19 P.3d 1068 (2001), quoting *McKee v. American Home Prods. Corp.*, 113 Wn.2d 701, 706, 782 P.2d 1045 (1989); and *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). *Seybold* and *White v. Kent Medical Ctr., Inc.*, 61 Wn. App. 163, 171, 810 P.2d 4 (1991), concern summary judgment rulings concerning the qualifications of an expert in a medical malpractice claim. *White* also holds that the nonmoving party's factual showing in a motion for summary judgment is reviewed de novo and in the light most favorable to that party.

The standard of review for evidentiary rulings in conjunction with summary judgments is not consistent among the other divisions of the Courts of Appeal and in some decisions of this division. It appears, however, that whether appellate courts use a de novo or an abuse of discretion standard for evidentiary rulings depends upon whether the ruling reviewed favors the

nonmoving party. Gary's citations to *Harris v. Groth*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983); *Eagle Group, Inc. v. Pullen*, 114 Wn. App. 409, 416, 58 P3d 292 (2002); and *Walker v. State*, 121 Wn.2d 214, 218, 848 P.2d 721 (1993), are inapposite because they concern rulings regarding admission of evidence at trial rather than in the context of summary judgment motions. *Sunbreaker Condo. Ass'n v. Travelers Ins. Co.*, 79 Wn. App. 368, 372, 901 P.2d 1079 (1995), *review denied*, 129 Wn.2d 1020, 919 P.2d 600 (1996), and *Breit v. St. Lukes Memorial Hosp.*, 49 Wn.App. 461, 465, 743 P.2d 1254 (1987), use an abuse of discretion standard for evidentiary rulings in conjunction with summary judgment, but both decisions favor the nonmoving party. *Doherty v. Municipality of Metro. Seattle*, 83 Wn.App. 464, 468-69, 921 P2d 1098 (1996), first states that issue of whether the trial court properly struck an expert's affidavit is reviewed de novo, and then upholds the trial court stating the ruling was reviewed for abuse of discretion. This seeming contradiction may be explained by the Court's stating that even without the affidavit, the plaintiff set forth sufficient evidence to overcome the motion for summary judgment." The evidentiary ruling and, hence, the standard of review employed by *Doherty* was not actually material to the decision. *Colwell v. Holy Family Hosp.*, 104 Wn.App 606, 613, 15 P3d 210 (2001), cites *Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P3d 1265 (2000) for the proposition that an abuse of discretion standard is used. *Cox* does not,

however, support the proposition because *Cox* reviews the trial court's ruling on a motion in limine regarding admission of evidence at trial. In addition, *Colwell* explains that the declarations were submitted in connection with another defendant's separate motion, and not the motion at issue on appeal.

Whether a de novo or an abuse of discretion standard is employed in ruling on a trial court's evidentiary rulings in summary judgment proceedings should depend upon whether the ruling conforms to the requirement that trial and appellate courts resolve all reasonable inferences in the light most favorable to the nonmoving party. *See e.g., Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989). Employing the abuse of discretion standard to evidentiary rulings which favor the nonmoving party or are inconsequential to the result, is not inconsistent with resolving reasonable inferences in the light most favorable to the nonmoving party. When an evidentiary ruling in conjunction with a motion for summary judgment is adverse to the nonmoving party, however, only the de novo standard of review is consistent with resolving inferences in the light most favorable to the nonmoving party.

Division I consistently employs the de novo standard to evidentiary rulings in conjunction summary judgment when the issue is an expert's qualifications, as *White*, *Seybold*, and two other recent cases confirm. *Morton v. McFall*, 128 Wn. App. 245, 115 P.3d 1023 (2005) and *Eng v.*

Klein, 127 Wn. App. 171, 110 P.3d 844 (2005), involved summary judgments in which the qualifications of a medical expert determined the outcome. *Morton*, which reversed the trial court's ruling that the plaintiff's expert was not qualified, states at 252, "This court reviews summary judgment orders de novo." *Eng* did not specifically identify the standard of review employed, but in reversing the trial court's ruling that the plaintiff's expert was not qualified, *Eng* clearly engaged in a de novo review. Here, the trial court's ruling striking the nonmoving party's expert evidence determined the summary judgment outcome and should be reviewed de novo.

2. ISSUES FIRST RAISED AFTER THE MOVING PARTIES' ORIGINAL BRIEF SHOULD NOT BE CONSIDERED IN RULING ON A SUMMARY JUDGMENT MOTION.

The issue of whether Greenberg was qualified as an expert was not raised in defendants' summary judgment motions. CP 9-24, 163-72. Instead, Gary raised the issue of Greenberg's qualifications in a motion to strike after Ricci filed her answer to the summary judgment motions. CP 277-84. Stanford joined in the motion in her summary judgment reply. CP 602-07. Stanford did not raise the issue of whether Greenberg's opinion is inadmissible because it is based upon a novel scientific theory until Stanford answered Ricci's motion for reconsideration. CP 608-14.

Issues not raised in the moving party's original motion for summary judgment will not be considered in ruling on the motion for summary

judgment. *White v. Kent Medical Center*, 61 Wn. App. 163, 168, 810 P.2d 4 (1991). “[N]othing in CR 56(c) allows the raising of additional issues other than in the motion and memorandum in support of the motion.” *R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 147, 969 P2d 458 (1999).

While raising the issue of Greenberg’s qualifications in a motion to strike did allow Ricci an abbreviated time to respond, the effect was the same as allowing Ricci no opportunity to respond. The trial court did not consider Ricci’s answer to the motion to strike before granting it. CP 470-71. When Ricci moved for reconsideration, the trial court adhered to her previous ruling. CP 561-63, 567-69.

In the circumstances here, Gary’s argument that he could not challenge Greenberg’s qualifications before Ricci answered the motion is specious. Before they brought their motions, defendants knew that Greenberg had been identified as plaintiff’s expert on the standard of care, and could have taken Greenberg’s deposition and inquired into his qualifications months before. Sub no 36, 37.¹ Even though the trial court amended the case schedule to allow defendants additional time to move for

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Ricci recently supplemented her designation of clerk’s papers to include the documents referenced in this section. When the Superior Court Clerk assigns clerk’s papers page numbers, Ricci will submit an amended reply substituting the superior court clerk’s sub numbers with clerk’s papers numbers.

summary judgment, Sub no 38, the defendants did not schedule Greenberg's deposition until plaintiff's answer to their motions for summary judgment was due. Ricci's answer to the summary judgment motions generally addressed Greenberg's qualifications through his curriculum vitae. The defendants' motion to strike attacked specific areas of Greenberg's qualifications with respect to counselors which defendants impliedly anticipated would not be addressed because they did not raise the issue in their summary judgment motions. Although defendants apparently planned to put Greenberg's qualifications in issue in the summary judgment proceeding, they did not do so in their opening papers.

[I]t is incumbent upon the moving party to determine what issues are susceptible to resolution by summary judgment, and to clearly state in its opening papers those issues upon which summary judgment is sought. If the moving party fails to do so, it may either strike and refile its motion or raise the new issues in another hearing at a later date.

White, at 169 (footnote omitted).

Stanford waited until she answered Ricci's motion for reconsideration to raise the issue of whether Greenberg's opinion was based upon a novel scientific theory. Although the order denying Ricci's motion for reconsideration does not appear to be based upon the grounds that Greenberg's opinion is based upon a novel scientific theory, CP 564-66, if as Stanford argues, the trial court refused to consider Greenberg's opinions

because they are based upon a novel theory, the trial court should not have considered the issue raised for the first time in an answer to Ricci's motion for reconsideration, particularly when the trial court allowed only one business day to Ricci to reply to Stanford's answer to the motion to reconsider. CP 470-71.

The procedural strategy and timing employed by Gary and Stanford, and endorsed by the trial court, were designed to deprive Ricci of a fair opportunity to demonstrate that she had real evidence to offer at trial, contrary to the purpose of summary judgment.

Summary judgment procedure is not a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial. It is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists.

Preston v. Duncan, 55 Wn.2d 678, 683, 349 P.2d 605 (1960). Ricci asks the Court to reverse the trial court's summary judgment because she did present questions of fact entitling her to a trial.

3. RICCI'S EXPERT'S REPORT AND C.V. ARE SUFFICIENT TO DEFEAT SUMMARY JUDGMENT.

Stuart Greenberg's report and curriculum vitae (c.v.) are sufficient by themselves to defeat defendants' motions for summary judgment.

The trial court accepted Greenberg's report and c.v. as a declaration.

CP 452-53, 564-65. Nonetheless, Gary continues to insist that the report and c.v. were unsworn, and additional grounds to strike them. *International Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.* 122 Wn.App. 736, 749-50, 87 P.3d 774 (2004), states expert reports are sufficient for purposes of summary judgment when they are authenticated by the attorney to whom the reports were addressed stating that the attorney engaged the expert, and the report arose from the engagement. The trial court properly accepted Greenberg's report as a declaration which was submitted under the sworn declaration of Ricci's attorney. CP 188-89.

Greenberg's report addresses Gary's and Stanford's conduct in their roles as counselors, and opines that their conduct as Ricci's counselors fell below the standard of care of counselors. Greenberg, Gary, and Stanford are all licensed to provide counseling for emotional and mental problems. Gary and Stanford have pointed out nothing so specialized about their counseling practices that would not permit any other licensed counselor, including a psychologist, to express an opinion about the standard of care for counselors.

By analogy to the standards applicable to medical experts, Greenberg's qualifications as a psychologist with a counseling practice and education qualify him to express an opinion regarding the standard of care of counselors.

So long as a physician with a medical degree has sufficient

expertise to demonstrate familiarity with the procedure or medical problem at issue, “[o]rdinarily [he or she] will be considered qualified to express an opinion on any sort of medical question, including questions in areas in which the physician is not a specialist.”

White v. Kent Medical Center, 61 Wn. App. 163, 173, 810 P.2d 4 (1994), quoting 5A K. Teglund, *Wash. Prac., Evidence* 290[2], at 386 (3d ed. 1989). The requirements for demonstrating an expert’s qualifications for summary judgment purposes are not as stringent as might be necessary for trial. “As long the standard of care expressed is more than mere personal opinion it is sufficient to establish, at least for summary judgment purposes, the expert’s knowledge of the applicable standard of care.” *White*, 174.

Greenberg’s qualifications as stated in his c.v. include that he is a practicing clinical psychologist and Assistant Professor in the Department of Psychiatry and Behavioral Sciences at the University of Washington. CP 220-233. (Gary’s assertion at page 20 of his Answer that Greenberg has not had a clinical practice for more than a decade is unsupported and simply wrong.) Greenberg’s c.v. and his report demonstrate that he is familiar with the emotional problems of persons with the emotional profile of Siobhan Ricci and qualified to treat those emotional problems. His opinions, being more than mere personal opinions, qualify him to express his opinions regarding the standard of care for Gary and Stanford in their common roles as counselors.

Greenberg's opinions in this case are limited to the context of the standard of care of practitioners providing counseling for emotional health problems. 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, and that Gary and Stanford "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." CP 592. He also states, 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." These actions include the counselors' "sexually loaded comments and questionable discretion regarding Ricci's confidentiality." CP 592.

Significantly, Gary and Stanford do not claim that the standard of care applicable to counselors permits them to fail to assess their client's emotional makeup and status. Nor do they claim that the standard of care applicable to counselors permits making sexually loaded comments to their clients and breaching their clients' confidentiality. Indeed, they produced no evidence of any standard of care applicable to them but not applicable to psychologists when treating clients with Siobhan Ricci's emotional makeup.

Gary and Stanford rely solely upon their attorneys' arguments, rather than any actual evidence, that the standards of care applicable to Greenberg,

Gary, and Stanford in their common roles as counselors have some meaningful, but unarticulated, differences. For example, Gary asserts, at page 20 of his brief, that Ricci “completely ignores the differences in training, licensing, and approach between different schools of psychology, much less the differences between a clinical psychologist and an LMHC. There are myriad of approaches and techniques that can be used in counseling.” Another example, occurs at page 24 of Gary’s brief, in which he claims, “Counseling provides a different option and service for clients and is licensed, regulated, and practiced under a different standard.” Significantly, however, Gary produced no evidence of any material differences in the training, approaches, techniques, or standards of psychologists and LMHCs in their common roles as counselors.

Gary attempts to draw a distinction between psychologists who are licensed to provide “diagnosis and treatment of mental, emotional, and behavioral disorders,” and counselors who are licensed to “assist . . . in the amelioration or adjustment of mental, emotional or behavioral problems.” RCW 18.83.010(b) and 19.18.020(2). Gary presumes there is an undefined difference between “treatment” and “amelioration or adjustment,” and between “disorders” and “problems.” By stating, at page 24 of his brief, that “LMHCs are not licensed to diagnose and treat mental and behavioral disorders,” Gary is effectively conceding that Greenberg is correct that Gary

either failed to assess Ricci's emotional makeup or ignored his assessment when he treated a person he is not licensed to treat.

Gary's argument that he should not be held to the standard of care of a psychologist when he treats a person who he is not licensed or qualified to treat was long ago rejected by *Kelly v. Carroll*, 36 Wn.2d 482, 219 P.2d 79 (1950). There a licensed drugless healer continued treating a patient who was suffering from appendicitis without referring the patient to a physician until after the patient's condition became terminal. *Kelly* rejects the drugless healer's argument that he should not be held to a standard of care of a physician, stating at 492:

Treatment of the sick by unskilled persons may be injurious. A knowledge of what *not* to do may, in some instances, be indispensable to the patient's safety. . . .

The legislature required drugless healers to pursue certain studies in order that they would know enough *not* to injure patients, and to recognize cases where their limited methods are inefficacious and the services of a doctor are required. . . . The appellant's theory that a drugless healer is licensed to treat all human maladies, and must be exonerated from all liability on his part, if he resorts only to the particular methods of his cult for determining the nature of diseases and the remedies therefor, no matter how serious the consequences, cannot be entertained. That proposition, if accepted as true, would contravene a sound public policy. 21 R.C.L. 383. It would render the legislature's exercise of the police power meaningless and ineffectual in requiring licenses for the treatment of human maladies. The essence of its purpose is to eliminate incompetent persons from holding themselves out to treat the public. A rule of *caveat patiens* would defeat such a purpose.

If Gary failed to assess Ricci's emotional status to determine whether he is licensed and qualified to treat her, he is not permitted to argue that he cannot be held to the standards of a psychologist who is qualified to treat her.

The initial burden under CR 56(c) is on the moving party to prove that no issue is genuinely in dispute. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn. 2d 216, 225, 770 P.2d 182 (1989). In order to successfully attack the qualifications of Ricci's expert the defendants were required to produce evidence that fundamental methods of counseling are materially different for mental health counselors and psychologists. Gary and Stanford failed in their initial burden to demonstrate that their actions fell within the applicable standard of care. *Eng v. Klein*, 127 Wn. App. 171, 178-79, 110 P.3d 844 (2005), dismissed the defendant neurosurgeon's argument that an infectious disease specialist could not express an opinion regarding the defendant's conduct when the defendant produced no evidence to demonstrate that the diagnostic methods at issue are different for the two specialties. In addition, the defendant in *Eng* produced no evidence that his diagnostic failures are particularized to his specialty. Similarly, Gary and Stanford presented no evidence that the standard of care of counselors differs in any material way from psychologists in their respective counseling practices.

Because psychologists, licensed mental health counselors and registered counselors all provide counseling, *see*, RCW 18.83.010(c)

18.225.010(8), 18.19.020(2), it was incumbent upon Gary and Stanford to produce some evidence that the standards of care with regard to their conduct is different from the standards of psychologists. Without any evidence that there are any material differences between the standards applicable to Greenberg, Gary, and Stanford, Greenberg is qualified based on the facts stated in his report and c.v. alone to express an opinion regarding the standard of care applicable to any counselor.

Gary wrongly asserts that several cases control here in which courts found the nonmoving party's expert's qualifications inadequate. *Germain v. Pullman Baptist Church*, 96 Wn. App. 826, 837-838, 980 P2d 809 (1999); *Lilly v. Lynch*, 88 Wn. App. 306, 319-320, 945 P2d 727 (1997); and *Doherty, supra*, are distinguishable. *Germain* notes that the psychologist was not an expert in pastoral counseling and that reasonable persons could make distinctions between pastoral and secular counseling. In *Lilly*, the declarant provided no basis of expertise for the sentence struck from his declaration. Similarly, the engineer in *Doherty* did not explain her qualifications to give an opinion in the anatomical, physiological, or medical sciences. Here, however, Greenberg, Gary, and Stanford are all secular counselors, and some or many reasonable persons could not distinguish between counseling provided by a psychologist and a mental health counselor. Greenberg's qualifications to determine the standards of care of counselors is evident from

his license, education, and experience as a counselor. Because inferences are to be resolved in favor of the nonmoving party on summary judgment, *Ruff v. King County*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995), Ricci was entitled to the inference that the standards of care of all counselors, are the same, particularly in the absence of any evidence to the contrary.

In failing to resolve all inferences in the light most favorable to the nonmoving party, the trial court erred in striking Greenberg's report when his c.v. and report demonstrated that he and defendants are practitioners in the same general field and his opinion was more than a mere personal opinion.

4. REPLY TO MISSTATEMENTS OF PROCEDURAL FACTS.

Ricci did not file the excerpts from Greenberg's deposition nine days late. The excerpts were timely filed in answer to Gary's motion to strike. CP 345-58, 367-97. That they were served two days before the hearing on the motion for summary judgment is a consequence of the timing of Gary's motion to strike. Similarly, it is of no consequence that submission of Greenberg's deposition testimony was in a miniscript format, because Ricci's answer to the motion to strike cited specific pages of the deposition and did not ask the trial court to review any pages that were not specifically cited. CP 346-48, 352, 354.

The trial court made unfounded assumptions in her statement, "Dr. Greenberg apparently was not even provided with the curricula vitae of Ms.

Stanford and Mr. Gary, which presumably would have contained a summary of the claimed expertise of each defendant.” The trial court assumed that Gary and Stanford had curricula vitae, that they had provided their c.v.’s to Ricci’s attorney, and that these c.v.’s would have contained a summary of Gary’s and Stanford’s expertise, if they had any expertise. In fact, neither Gary nor Stanford submitted curricula vitae in connection with either of their motions, or submitted any evidence of any expertise which was not described by their titles and their deposition testimony.

Compounding the trial court’s incorrect assumption, Gary asserted that Greenberg had not reviewed Gary’s or Stanford’s depositions before writing his report. While Greenberg’s report is unclear regarding whether he reviewed the defendants’ depositions, CP 572, he testified at his deposition that he had reviewed the depositions before writing his report. CP 370-71.

The trial court’s order denying Ricci’s motion for reconsideration states, at CP 565, that the rules do not permit supplementation of the record in a response to a motion to strike, and cites *Wagner Dev. Inc. V. Fid. & Deposit Co. Of Maryland*, 95 Wn.App. 896, 907, 977 P2d 639 (1999) for the holding that evidence which was available at the time of summary judgment will not be considered on a motion for reconsideration. Ricci did not, however, submit new evidence with her motion for reconsideration, but instead asked the trial court to consider the materials submitted with her

earlier answer to the motion to strike.

5. REPLY TO STANFORD'S ARGUMENT THAT GREENBERG'S OPINIONS ARE INADMISSIBLE BECAUSE BASED UPON A NOVEL AND NOT ACCEPTED SCIENTIFIC THEORY.

The trial court's order striking Dr. Greenberg's report and the order denying reconsideration do not indicate, as Stanford argues, that the trial court struck Dr. Greenberg's report for the reason that Greenberg's opinions are based upon a theory which is not generally accepted or because he relied upon unfounded information in forming his opinions. CP 453-54, 564-66. Assuming that the trial court did strike the report on this basis, the issue is merely a strawman and wholly without substance.

Stanford makes a completely unsupported claim that Greenberg's opinion is that Standard and Gary were negligent for not referring Ricci for dialectical behavior therapy ("DBT"), that DBT is the only appropriate method of therapy, and that any other therapy falls below the standard of care. Greenberg's report, however, does not even mention DBT. Greenberg did not base his opinions stated in the report upon anything connected to the defendants failure to provide any specific therapy. Further, Greenberg did not testify that failure to provide DBT was negligent. The only two pages of Greenberg's testimony cited by Stanford, CP 378, pp 63 and 64, mentions DBT, but he does not state that his opinion regarding defendants negligence was based upon their not providing or referring Ricci for DBT or that DBT

is the only appropriate therapy.²

The standard on which Stanford's argument is based is the Frye standard set forth in *Frye v. United States*, 54 U.S. App. D.C. 46, 54 App.D.C. 46, 293 F. 1013, 1014, 34 A.L.R. 145 (D.C. Cir. 1923). Stanford relies on the dissenting opinion in *In re Detention of Campbell*, 139 Wn2d 341, 375, 986 P2d 771 (1999), in which the dissenters asserted that an expert's prediction of a sexual predator's future dangerousness should not have been admitted. The majority, however, rejected the application of the Frye standard, stating that the expert was subjected to cross-examination, that the jury was given the opportunity to hear countering testimony from plaintiff's own expert, and that the differences in opinion go to the weight of the evidence and not admissibility. *Id.*, at 358.

The Frye standard is generally inapplicable in civil cases, and particularly in malpractice cases where the expert's testimony is based on practical experience and acquired knowledge. *Reese v. Stroh*, 128 Wn.2d 300, 307-08, 907 P2d 282 (1995). *Reese* holds that medical expert testimony

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The trial court's footnote on her order denying reconsideration is mistaken. CP 565. Greenberg's opinion was not based "in substantial part, on a theory that had not previously been put forth by plaintiff in her complaint, her answers to interrogatories or in her original declaration." The trial court does not identify this theory. If the trial court was referring to Greenberg's testimony concerning DBT, she may have relied upon Stanford's inaccurate assertion that Greenberg testified that DBT is the only appropriate therapy. Greenberg's opinion that defendants were negligent was put forth by plaintiff in her complaint and her answers to interrogatories. Ricci could not appropriately put forth Greenberg's theories in her own declaration.

is admissible under ER 703 if it is based upon a reasonable degree of medical certainty. *Reese*, at 907.

Here, Stanford's submission of three articles on DBT, establish that it is not a novel theory, merely that its efficacy for some clients is debatable. Greenberg's brief testimony on the subject, indicates that he is familiar with the literature on DBT. If Greenberg testifies at trial that Ricci should have received or been referred for DBT, he will be required to establish that his opinion regarding DBT is based upon facts or data "of a type reasonably relied upon by experts in the particular field," and he will be subject to cross-examination.

Stanford's argument that Greenberg's opinions should be disregarded on the basis that his opinion is based upon a novel theory is based upon nonexistent facts and a misunderstanding of applicable law.

Contrary to Stanford's argument that Dr. Greenberg may not rely on information provided to him by Siobhan Ricci and her attorney, ER 703 allows an expert to base his opinion on facts or data which may not necessarily be admissible in evidence. Experts commonly refer to facts collected outside their presence in forming opinions, and the facts on which they base their opinions need not be admissible. *State v. Cochran*, 102 Wn.App. 480, 8 P.3d 313, *review denied* 143 Wn.2d 1004, 20 P.3d 944 (2000). Dr. Greenberg lists the sources of his information, which necessarily

include information he obtained from Siobhan Ricci. *Cotton v. Kronenberg*, 111 Wn.App. 258, 266-67, 44 P.3d 878, *reconsideration denied, review denied*, 148 Wn.2d 1011, 62 P.3d 890 (2002), affirms that among the facts and information that an expert may rely in forming an opinion are those provided to him by a party. Stanford's arguments that the history Ricci related to Dr. Greenberg is inaccurate may go to the weight of his testimony, but do not disqualify his opinions.

6. RICCI STATED A CLAIM FOR BREACH OF CONFIDENTIALITY.

Washington recognizes causes of action against physicians for unauthorized disclosure of privileged information, and does not make the Uniform Health Care Information Act, (UHCA) chapter 70.02 RCW, the sole or exclusive remedy for unauthorized disclosure. *Berger v. Sonneland*, 144 Wn.2d 91, 106, 26 P.3d 257 (2001). The only causes of action asserted, and thus the only causes of action discussed in *Berger* were those based upon UHCA and Chapter 7.70 RCW. The broad holding of *Berger* does not limit persons wronged by unauthorized disclosures to UHCA or to the provisions of Chapter 7.70 RCW. Ricci may pursue her claims for unauthorized disclosure under other statutes, contract, and common law.

RCW 18.19.060 and 18.225.100 both require counselors to provide written disclosures to clients which include the extent of confidentiality provided under the respective chapters. RCW 18.19.180 and RCW

18.225.105 both prohibit any disclosures without the client's written consent or exceptions inapplicable here. When Ricci began counseling with Gary, he complied with RCW 18.19.060 by providing a written disclosure and a Department of Health pamphlet referenced in the disclosure statement. CP 183-84, 185-86. When Gary became licensed under chapter 18.225 RCW, however, he did not provide a new disclosure statement to Ricci or, as he argues here, inform her that the prior disclosure statement and pamphlet had become inoperative. When Ricci began counseling with Stanford, Stanford provided no written disclosure statement to Ricci in violation of RCW 18.19.060. CP 180.

Stanford admits that she met with Gary on October 10, 2001 to discuss Ricci's treatment. CP 211. Gary denies that a meeting occurred, but argues that if it did, he disputes Stanford, saying the meeting was not about Ricci. RCW 18.19.180 unarguably applies to Stanford, a registered counselor. CP 207. She argues, without citation to authority, that the more general provisions of UCHA control over the specific and more restrictive provisions of RCW 18.19.180. (Gary is incorrect in asserting that Ricci did not argue below that the provisions of RCW 18.225.105 and 18.19.180 control over the provisions of chapter 70.02 RCW. She did, at CP 251-54.) Gary also argues that at the time of his October 2001 meeting with Stanford, only the UHCA could have applied to him because RCW 18.19.180 had been repealed and he

was then licensed under Chapter 18.225 RCW, and that RCW 18.225.105, which forbids unauthorized disclosures, had not yet been enacted.

RCW 18.19.180 was not repealed when Chapter 18.225 RCW was enacted, as the legislative history demonstrates. CP 293. Gary's argument that the prohibitions of RCW 18.19.180 did not apply to him after he was licensed under Chapter 18.225 RCW should be rejected because he informed Ricci in writing that he was subject to the provisions of RCW 18.19.180 and did not ever inform her otherwise. Ricci relied upon Gary's promises of confidentiality. CP 180.

If the Court determines that Gary did not continue to be bound by RCW 18.19.180, then RCW 18.225.105 should apply to Gary retroactively. The legislature's omission of a confidentiality section in the newly enacted Chapter 18.225 RCW appears to have been inadvertent, and the omission was later cured with the enactment of RCW 18.225.105. Generally, a legislative amendment applies prospectively only, however, an amendment may apply retroactively if it is curative or remedial and intended to clarify rather than change the law. *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 461, 832 P.2d 1303 (1992); *Johnson v Continental West Inc.*, 99 Wn.2d 555, 560-62, 663 P.2d 482 (1983). An amendment is curative if it clarifies or technically corrects an ambiguous, older statute, without changing prior case law. *Id.*

The enactment of RCW 18.225.105 corrects an ambiguous statute.

When Chapter 18.225 RCW was enacted, it contained the same general provisions regarding qualifications, discipline, powers of the secretary as Chapter 18.19 RCW. Significantly, both chapters require, in substantially similar language, that persons subject to the chapter provide a written disclosure statement to the client, and that the statement describe “the extent of confidentiality provided by this chapter.” RCW 18.19.060 and 18.225.100. Chapter 18.19 RCW contains RCW 18.19.180 which provides the extent of confidentiality in the chapter. Unlike Chapter 18.19 RCW, however, chapter 18.225 RCW, as initially enacted, contained no confidentiality provisions, making the references to confidentiality provisions in RCW 18.225.100 ambiguous. When RCW 18.225.105 was added in 2003, using materially similar language to RCW 18.19.180, the ambiguity was cured. Because the 2003 enactment of RCW 18.225.105 cured an ambiguity, it should be considered curative and retroactively applicable to Gary in October 2001. *Johnson*, at 562, adds that an enactment must be construed to effect its purpose. The purpose of protecting the confidentiality of counseling clients is served only if RCW 18.225.105 is construed to apply retroactively, rather than as leaving a time vacuum between the original enactment of Chapter 18.225 RCW and RCW 18.225.105's cure of the ambiguity.

Gary is incorrect in arguing that a contract theory is outside the complaint and was not disclosed in discovery. The complaint alleges that

defendants breached plaintiff's right of privacy and confidentiality. CP 2. The allegation encompasses breach of contract rights as well as statutory rights. Gary's claim that Ricci did not disclose her contract claim in discovery rings hollow because he points to no specific discovery inquiry that would have elicited a response from Ricci detailing her contract claim. Further belying this claim, Gary himself submitted with his summary judgment motion the disclosure statement on which Ricci's contract breach is premised, and stated that it had been provided in discovery. CP 31-32.

A promise is "a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 171-172, 876 P2d 435 (1994), quoting Restatement (Second) of Contracts § 2(1). The consideration supporting a contract arises out of an agreement between the parties. *Universal C.I.T. Credit Corp. v. DeLisle*, 47 Wn.2d 318, 287 P.2d 302 (1955). Gary's promise that he would maintain Ricci's confidentiality arose out of his disclosure statement and was supported by the consideration Ricci paid as fees for his services.

Ricci stated a claim for breach of confidentiality under statutes applicable to defendants and under contract. Her claim should not have been dismissed on summary judgment, and she asks the Court to reverse summary judgment and remand for trial.

7. CONCLUSION.

Appellate courts examine all the evidence submitted to the trial court, consider the facts and all reasonable inferences in the light most favorable to the nonmoving party, and review summary judgment rulings de novo. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Siobhan Ricci asks the Court to reverse the summary dismissal of her claims because she demonstrated that she has expert evidence to support her claims that her former counselors, Gary and Stanford, were negligent and breached her rights of confidentiality.

Respectfully submitted this December 9, 2005



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APPENDIX I
Confidentiality Provisions of Chapter 18.19 RCW and Chapter 18.225 RCW

RCW 18.19.060 Information disclosure to clients.

Persons registered under this chapter shall provide clients at the commencement of any program of treatment with accurate disclosure information concerning their practice, in accordance with guidelines developed by the department, that will inform clients of the purposes of and resources available under this chapter, including the right of clients to refuse treatment, the responsibility of clients for choosing the provider and treatment modality which best suits their needs, and the extent of confidentiality provided by this chapter. The disclosure information provided by the counselor, the receipt of which shall be acknowledged in writing by the counselor and client, shall include any relevant education and training, the therapeutic orientation of the practice, the proposed course of treatment where known, any financial requirements, and such other information as the department may require by rule. The disclosure information shall also include a statement that registration of an individual under this chapter does not include a recognition of any practice standards, nor necessarily imply the effectiveness of any treatment.

RCW 18.19.180

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

RCW 18.225.100. Disclosure information

A person licensed under this chapter must provide clients at the commencement of any program of treatment with accurate disclosure information concerning the practice, in accordance with rules adopted by the department, including the right of clients to refuse treatment, the responsibility of clients to choose the provider and treatment modality which best suits their needs, and the extent of confidentiality provided by this chapter. The disclosure information must also include the license holder's professional education and training, the therapeutic orientation of the practice, the proposed course of treatment where known, financial requirements, and such other information as required by rule. The disclosure must be acknowledged in writing by the client and license holder.

RCW 18.225.105

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

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;
- (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.

individual in a professional capacity when the information was necessary to enable the individual to render professional services to those persons except:

- (1) With the written authorization of that person or, in the case of death or disability, the person's personal representative;
- (2) If the person waives the privilege by bringing charges against the person licensed under this chapter;
- (3) In response to a subpoena from the secretary. The secretary may subpoena only records related to a complaint or report under RCW 18.130.050;
- (4) As required under chapter 26.44 or 74.34 RCW or RCW 71.05.250; or
- (5) To any individual if the person licensed under this chapter reasonably believes that disclosure will avoid or minimize an imminent danger to the health or safety of the individual or any other individual; however, there is no obligation on the part of the provider to so disclose.