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NO. 56338-6-I

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.

BRIEF OF RESPONDENTS STEVEN and JANE DOE GARY

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I. BRIEF SUMMARY OF CASE

Siobhan Ricci sued her former mental health counselors, Steven Gary and Alma Stanford, alleging negligent treatment and violation of confidentiality laws. Both defendants moved for summary judgment arguing that plaintiff had no expert evidence of negligence and that their communications were permissible under RCW 70.02.050. Ricci responded with an unsworn forensic report and curriculum vitae (CV) of Dr. Stuart Greenberg. Defendants moved to strike the report because there was no evidence that Dr. Greenberg, a forensic psychologist, was familiar with the standard of care for licensed mental health counselors. Dr. Greenberg's report referenced statutes and regulations applicable to psychologists, and not applicable to counselors.

In responding to defendant's motion to strike, Ricci did not demonstrate that the materials she submitted in opposition to Mr. Gary's summary judgment motion were sufficient. Instead, Ricci responded by submitting new testimony via Dr. Greenberg's deposition. The court refused to consider the deposition on the motion for summary judgment because it was untimely and Ricci had no explanation for originally failing to provide an adequate declaration from her own expert. The court then struck the report for lack of foundation and granted the summary judgment motion.

Ricci moved to reconsider, arguing that the deposition adequately established Dr. Greenberg's familiarity with the applicable standard of care. The motion to reconsider was denied because the deposition did not constitute new evidence. Further, the deposition itself does not establish a foundation for Dr. Greenberg's testimony. This appeal follows.

II. COUNTERSTATEMENT OF THE CASE

A. Ricci's Counseling With Steven Gary

Siobhan Ricci ("Ricci") and her husband originally contacted Steven Gary for marital counseling. Steven Gary provides both individual and couples counseling, utilizing Family Systems therapy. Mr. Gary is not a psychologist or a psychiatrist. He has a masters degree in Applied Behavioral Science and is a licensed mental health counselor (LMHC) as defined in RCW 18.19.020. CP 91.

Ricci began seeing Mr. Gary for individual counseling in October 2000. Mr. Gary's disclosure form, which Ricci signed, provides in part: "I abide by the Department of Health regulations on confidentiality and professional conduct" and "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." CP 31-32.

Ricci believes, even now, that Mr. Gary's therapy sessions were helpful to her, particularly in dealing with flashbacks and trauma resulting

from unresolved issues arising from a rape she had suffered in college. CP 87. She had not previously been able to discuss the rape with anyone, although she had been in counseling for years prior to seeing Mr. Gary. Although Ricci had seen numerous counselors and therapists, she testified that Steven Gary “was more reassuring and more comforting to me than any other person I had ever seen.” CP 48. However, Ricci’s husband objected to her seeing a male therapist and Ricci came to believe she was becoming too emotionally attached to Steven Gary. CP 53. Ricci admits that Mr. Gary did not do anything to encourage her attachment to him. CP 44.

Ricci specifically asked Mr. Gary to transfer her care to Alma Stanford in July 2001 due to her belief that she was overly attached to him. CP 44. Ricci does not believe Steven Gary encouraged her attachment. She admits that he did not discourage her from transferring her care to Alma Stanford when she requested the transfer. CP 44. Ricci does not think it was wrong of Mr. Gary to transfer her care, nor is she critical of him for effectuating the transfer. CP 44.

B. Facts Relating To Confidentiality Claim

Steven Gary and Alma Stanford discussed Ricci only in the context of transferring her care from Mr. Gary to Ms. Stanford. They discussed the transfer of care before Ricci began seeing Ms. Stanford for therapy in

August 2001. CP 102. Several weeks after she began therapy with Ms. Stanford, Ricci decided she wanted to return for a single session with Steven Gary “because I wanted to close that chapter of my life and move on.” CP 103; 125. Mr. Gary told Ricci that he wanted to speak to Ms. Stanford, her current therapist, to “clear” the appointment with her before he saw Ricci. CP 24. Ricci understood that Mr. Gary would be speaking to Ms. Stanford, and provided her oral consent for him to do so. CP 83-84. Ms. Stanford testified that she and Mr. Gary then discussed the purpose of Ms. Ricci’s return visit, and the transfer of her care. CP 105. During this return visit, Ricci claims Mr. Gary told her “I love you, too. I bet you didn’t know that.” Ricci understood that this was not a declaration of romantic love, but she was in disbelief that Mr. Gary could care about her. CP 49.

Ricci requested another appointment with Mr. Gary in October of 2001 after her cat died because “I just felt that Steven was the only one who ever understood me in my life.” CP 57; 72. At the end of this session, which was the last time Ricci and Steven Gary saw one another, they hugged goodbye at Ricci’s request, and Mr. Gary was surprised by the manner in which Ricci hugged him. CP58. Ricci did not believe there was anything inappropriate about the hug and testified that nothing about the hug forms a basis for her claims in this suit. CP 62.

Ricci continued to telephone Mr. Gary long after transferring to Ms. Stanford. CP 64-65. In one of these conversations, she asked Mr. Gary about his reaction to her hug. At first, Mr. Gary attempted to avoid discussion of Ricci's behavior during their goodbye hug, but Ricci persisted in asking him how he felt about her hug. Because he believed Ricci needed to understand boundaries and the natural consequences of her behavior toward men, he told her he had been aroused by the hug. CP 94-95. Ricci testified that she felt that Mr. Gary was annoyed with her for continuing to contact him after her care had been transferred to another counselor. At one point, in November, Ricci left Mr. Gary a voicemail message asking him to put a "call block" on his telephone, so that he would be unable to receive her calls. CP 119. Mr. Gary responded in writing that he would not put a call block on his phone, but he would not return her phone calls. CP 197.

Mr. Gary consults with another therapist, June Gabriel, on therapy issues. CP 96. On her advice, he wrote Ricci a letter formally memorializing the termination of their professional relationship and transfer of her care to Alma Stanford, and asking Ms. Ricci not to continue to telephone him. CP 96. Ricci knew before the letter was sent that the plan was to completely terminate her therapy relationship with Mr. Gary.

CP 80. She testified that the decision to terminate the therapeutic relationship was her choice. CP 82.

C. Procedural History

Ricci filed suit against Mr. Gary and Ms. Stanford alleging negligence and breach of client confidentiality. CP 1-2. Ricci identified three bases for her complaint against Mr. Gary: (1) he breached her right of confidentiality by speaking to Ms. Stanford regarding her care, CP 43; (2) he told her at the end of the therapeutic relationship, in response to her questioning, that he had been “aroused” during their last in-person visit when she hugged him in what he believed was an inappropriate manner, CP 78; and (3) he sent her a formal letter terminating their relationship and asking her not to contact him, CP 78.

Mr. Gary moved for summary judgment, contending that there was no breach of confidentiality because the communications between Mr. Gary and Ms. Stanford were permitted by statute as part of the transfer of care, that Ricci lacked expert evidence that the alleged conduct was a breach of the standard of care for licensed mental health professionals, or that the alleged breach was the proximate cause of damages. The motion was set for April 22, 2005, only three weeks before trial. Co-defendant Stanford also moved for summary judgment. CP 109.

Under CR 56, Ricci's response was due on April 11. She filed an opposing brief accompanied by a report and CV by her expert, Dr. Stuart Greenberg, a forensic clinical psychologist. CP 219. The materials were not in declaration form and did not comply with the requirements of CR 56. Further, nothing in the materials filed in opposition to the motion indicated that Dr. Greenberg, a forensic psychologist with a Ph.D. in psychology, was familiar with the standard of care for a LMHC. In fact, Dr. Greenberg's report specifically referred to regulations applicable only to clinical psychologists. CP 247-48.

Mr. Gary filed a timely motion to strike Dr. Greenberg's report and CV as inadmissible hearsay and for lack of foundation. CP 277-84. Ricci responded to that motion with a handwritten declaration by Dr. Greenberg authenticating his report and CV. CP 364-65. The court accepted the belated declaration as sufficient for purposes of CR 56 and declined to strike the materials on that basis. CP 453. However, the court granted the motion to strike for lack of foundation, stating:

The source of Dr. Greenberg's knowledge as to the standard of care required of mental health counselors is not stated in his report. A review of his curriculum vitae does not indicate any particular experience in regards to the training required of mental health counselors or any familiarity with administrative or statutory provisions applicable to counselors licensed pursuant to RCW 18.225. 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. This makes it particularly difficult to determine the basis of his opinion that the defendants should have been aware of Ms. Ricci's particular vulnerability and that their lack of awareness breached the applicable standard of care. As a result, Dr. Greenberg's opinions are naked conclusions without a mooring in the applicable standard of care. The motion to strike is granted.

CP 453-54. The court declined striking the excerpts of the deposition of Judy Roberts, but stated that "It simply is irrelevant to issues of the standard of care. Ms. Roberts specifically declined to serve as an expert and her deposition testimony regarding confidentiality was not provided in the context of standard of practice." CP 454.

In response to the motion to strike, Ricci filed virtually the entire transcript of Dr. Greenberg's deposition on April 20, 2005.¹ Her response to the motion to strike was due on April 20, 2005 and was timely filed. However, her response to the summary judgment motion was due April 11, nine days earlier. Dr. Greenberg's deposition was not submitted in time for the summary judgment motion, which was scheduled for hearing only two days after Ricci filed her response to the motion to strike.

¹ Careful examination of the transcript, which was submitted in "minuscrit" format with four pages to a page, establishes that the page containing pages 25-28 and 5 pages containing pages 21-59 were not included in the transcript submitted by plaintiff. However, it takes a careful page by page examination to determine that it is not in fact, the entire transcript that was submitted. Though all but 6 of the minuscrit pages were submitted, most of these pages were not referenced in the accompanying brief. CP 369-97.

The court refused to consider the untimely submission of Dr. Greenberg's deposition testimony in deciding the summary judgment motion and granted summary judgment for both defendants. CP 561, 567.

Ricci moved for reconsideration, arguing that Dr. Greenberg's deposition was not available when she responded to the motion for summary judgment and that his deposition testimony adequately established a foundation for his testimony. CP 455-462. She claimed that the deposition transcript was timely filed in response to the motion to strike and therefore should have been considered on the motion for summary judgment. CP 457. Defendants opposed the motion arguing that, even if the court considered the untimely materials submitted by Ricci, there was insufficient foundation for Dr. Greenberg's testimony. CP 472-85. Dr. Greenberg testified that "I want to be really clear I'm guessing. . . ." about the training involved in a Master's degree in Applied Behavioral Sciences. CP 380. He was not familiar with the program Mr. Gary took at City University and couldn't say "one way or another" whether his training was similar to that of Mr. Gary. CP 380. He was not even familiar with the differences between registered counselors and LMHCs. CP 380. Dr. Greenberg's testimony established he has never been licensed or practiced as an LMHC, and that his experience is primarily as a forensic psychologist. CP 380. Plaintiff failed to present

any evidence that the standard of care for a forensic psychologist and an LMHC are or should be the same.

The court properly denied the motion to reconsider the order granting the motion to strike and summary judgment. The court stated in its order:

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. *Eng v. Klein*, ___ Wn. App. ___, 110 P.3d 844 (2005), is inapposite.

CP 564-65. The court rejected plaintiff's argument that Dr. Greenberg's deposition should be considered even though it was untimely filed because the transcript was not available when the response to the summary judgment motion was due, stating that Ricci failed to provide any explanation justifying her failure to provide an adequate declaration from her own expert at the time she filed her opposition to the summary judgment motion. CP 565. The Court observed that "The court rules do not contemplate a procedure whereby a party who fails to provide an appropriate declaration in response to summary judgment can supplement the record in response to a motion to strike. CP 565.

The court reviewed Ricci's legal memorandum in support of the motion to strike which had inadvertently not been considered at the time

of the original ruling and reaffirmed the original orders, denying the motion for reconsideration. CP 565. The court specifically noted that the

late submission of Dr. Greenberg's deposition is particularly troublesome because in his deposition, Dr. Greenberg['s] opinion was 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. This has resulted in defendants filing responses to the motion for reconsideration that discuss substantive issues not previously addressed. It is the endless spiraling of litigation that the rule prohibiting new evidence on motion for reconsideration was designed to control.

CP 565, fn. 1. Plaintiff filed a notice of appeal from the orders granting the motion to strike, the summary judgments and the denial of the motion to reconsider. The only assignment of error, however, is to the orders granting summary judgment to defendants. Appellant's brief at 1.

D. Standard Of Review

When reviewing an order for summary judgment, the Court of Appeals engages in the same inquiry as the trial court, and will affirm the summary judgment if there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *Wilson Court Ltd. Partnership v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 698, 952 P.2d 590 (1998); *see also* CR 56(c).

When reviewing evidentiary rulings made as part of the summary judgment proceedings, however, the deferential “abuse of discretion” standard applies:

The trial court must routinely make evidentiary rulings during summary judgment proceedings. We review these decisions for abuse of discretion.’ *Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000).

Colwell v. Holy Family Hosp., 104 Wn. App. 606, 613, 15 P.3d 210 (2001). See also *Sunbreaker Condo. Ass’n v. Travelers Ins. Co.*, 79 Wn. App. 368, 372, 901 P.2d 1079 (1995), *rev. denied*, 129 Wn.2d 1020, 919 P.2d 600 (1996); *Eagle Group, Inc. v. Pullen*, 114 Wn. App. 409, 416, 58 P.3d 292 (2002). “A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds.” *Washington State Physicians Ins. Exchange & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054, 1075-76 (1993).

The abuse of discretion standard applies to rulings on admissibility of expert testimony:

The decision whether to admit expert testimony under ER 702 is within the discretion of the trial court and will not be disturbed absent a showing of an abuse of that discretion. *State v. Swan*, 114 Wn.2d 613, 655, 790 P.2d 610 (1990); *State v. Mak*, *supra* 105 Wn.2d at 715, 718 P.2d 407. It is an abuse of discretion to admit such testimony if it lacks an adequate foundation. *Safeco Ins. Co. v. McGrath*, 63 Wn. App. 170, 179, 817 P.2d 861 (1991).

Walker v. State, 121 Wn.2d 214, 218, 848 P.2d 721, 723 (1993).

The abuse of discretion standard applies to the Court's ruling on the admissibility of the untimely filed deposition testimony of Dr. Greenberg and on striking his report for lack of foundation. Assuming that this Court affirms the trial court's evidentiary rulings under the abuse of discretion standard, the Court then reviews the grant of the summary judgment de novo based solely on the materials considered by the trial judge. Only if this Court finds that the trial court abused her discretion in excluding Dr. Greenberg's opinions for lack of foundation and/or in excluding the untimely filed deposition transcript, can these materials be considered on appeal.

The abuse of discretion standard also applies to review of the Court's ruling on the motion for reconsideration. *Wagner Development, Inc. v. Fidelity and Deposit Co. of Maryland*, 95 Wn. App. 896, 977 P.2d 639, *rev. denied*, 139 Wn.2d 1005 (1999).

III. LIST OF ISSUES PRESENTED

ISSUE ONE: The trial court properly refused to consider Dr. Greenberg's report submitted in opposition to the summary judgment motion for lack of foundation because there was no evidence that Dr. Greenberg was familiar with the applicable standard of care.

ISSUE TWO: The trial court did not abuse its discretion in excluding Dr. Greenberg's deposition because it was filed nine days late

and only two days before the summary judgment hearing, Ricci did not have any reason for failing to provide an adequate declaration from her own expert, and the deposition did not constitute newly discovered evidence for purposes of the motion to reconsider.

ISSUE THREE: Even if this Court holds that Dr. Greenberg's deposition should have been considered in deciding the motion, the summary judgment on negligence should be affirmed because Dr. Greenberg's own testimony establishes that he lacks sufficient familiarity with the applicable standard of care.

ISSUE FOUR: The summary judgment on confidentiality should be affirmed because any communications involving Ricci were made in the context of transferring her care and were permitted under RCW 70.02.050.

IV. LEGAL ARGUMENT

ISSUE ONE: The trial court properly refused to consider Dr. Greenberg's report submitted in opposition to the summary judgment motion for lack of foundation because there was no evidence that Dr. Greenberg was familiar with the applicable standard of care

A. Introduction

Ricci's brief does not discuss each phase of the proceedings below or analyze the Court's actions and the admissibility of the report, CV and deposition separately. Instead, she appears to argue generally that the materials submitted in total adequately establish Dr. Greenberg's

familiarity with the standard of care, or that he is qualified as an expert solely on the basis of his job title of forensic clinical psychologist. This brief will not follow that format. Instead, the Court's actions will be analyzed separately for each motion. Careful evaluation of the Court's decisions at each point establishes that the rulings were correct and should be affirmed.

The first issue is whether the report and CV, alone, establish adequate foundation for Dr. Greenberg's opinions. The second is whether the deposition was correctly excluded. Third, is whether all of the documents together established an adequate foundation, creating a question of fact for summary judgment. This Court need reach the third question only if it is determined that the trial court abused its discretion in excluding the report and CV for lack of foundation, in refusing to consider the late filed deposition, or in denying the motion to reconsider for lack of new evidence. Because the Court acted within its discretion at each point, the trial court should be affirmed.

B. Ricci Was Required To Submit Admissible Evidence On The Standard Of Care

It is well established that expert testimony is required under RCW § 7.70.040 to establish both the standard of care and the breach thereof in medical malpractice cases. *Harris v. Groth*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983). Under chapter 7.70, a "health care provider" includes a

licensed mental health counselor as a “person licensed by this state to provide health care or related services.” RCW 7.70.020. The plaintiff is also required to present competent expert testimony that the alleged breach of the standard of care caused the alleged injuries. *Reese v. Stroh*, 128 Wn.2d 300, 308, 907 P.2d 282 (1995); *Harris*, at 449.

Defendant Gary filed a motion for summary judgment on March 25, 2005, noting the motion for April 22, 2005, only 3 weeks before trial. At that point, Ricci had been deposed and identified specific conduct which she claimed was the basis of her negligence claim.² Mr. Gary contended that this conduct was not a breach of the standard of care and that plaintiff did not have the requisite expert testimony on the standard of care and proximate cause. CP 9-24.

Dr. Greenberg’s “independent medical examination” report was the sole expert testimony filed with Ricci’s response to the motion. It was not an abuse of discretion to exclude Dr. Greenberg’s report because there was no foundation establishing his familiarity with the applicable standard of care.

The court could have stricken the report and CV because they were unsworn and did not comply with CR 57. However, the court accepted the belated declaration authenticating the materials and considered them on

² Ricci also claimed breach of confidentiality which is discussed separately below.

the motion for summary judgment. Careful examination of those documents reveals that the trial judge correctly held that they do not establish a foundation for Dr. Greenberg's testimony. There is no evidence that he is familiar with the standard of care for an LMHC, or that he is applying that standard in his report. Further, his report does not state that there was a breach of the standard of care for an LMHC, only 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." CP 241. The report is not clear on whether Dr. Greenberg is referring to "competent practitioners" who are clinical psychologists, "competent practitioners who are licensed mental health counselors" or even whether he makes any distinction between the type of "competent practitioner" involved. Further, Dr. Greenberg's report indicated he reached his opinions without consideration of the depositions of Mr. Gary and Ms. Stanford, (CP 222)³ and in spite of his own statement that Ricci "had difficulty recalling, reporting, chronologizing events" and that there were "numerous factual inaccuracies" in her report. CP 220.

³ "In spite of repeated requests on the part of this office, the following were the only documents made available to us. We were informed that Alma Stanford produced no notes or other information. The File of Steve D. Gary, MA, LMHC, The File of Judy Roberts, MA, LMHC, Various Legal Documents." Dr. Greenberg's report at CP 222.

No witness is automatically qualified to give opinion testimony in any action. It is the burden of the party seeking to introduce the testimony to lay an adequate foundation to allow admission of the testimony. See *Germain v. Pullman Baptist Church*, 96 Wn. App. 826, 980 P.2d 809 (1999) (trial court properly refused to consider affidavit from unqualified expert). Where it does not affirmatively appear from the record that the witness is qualified to testify, the testimony is properly excluded. It is an abuse of discretion to admit expert testimony if it lacks an adequate foundation. *Safeco v. McGrath*, 63 Wn. App. 170, 179, 812 P.2d 861 (1991). As explained in 15A Washington Practice § 69.7 at 418:

When presenting expert opinion in an affidavit or declaration, counsel should take care to include a statement of the expert's qualifications, and any other foundational facts that would be necessary if the expert were testifying at trial. *Lilly v. Lynch*, 88 Wn. App. 306, 945 P.2d 727 (1997) (portion of affidavit properly refused because expert's qualifications were not sufficiently established); *Doherty v. Municipality of Metropolitan Seattle*, 83 Wn. App. 464, 921 P.2d 1098 (1996) (same).

In *Lilly v. Lynch*, 88 Wn. App. 306, 945 P.2d 727 (1997), this court affirmed the trial court's order striking portions of an expert's declaration where the declaration did not establish a foundation that the witness was qualified to testify on that topic. In *Doherty v. Municipality of Metropolitan Seattle*, 83 Wn. App. 464, 468-69, 921 P.2d 1098, 1101

(1996), the court excluded a witness' declaration for lack of foundation stating:

We observe that the affidavit does not explain how her background in engineering qualified her to give an opinion in the anatomical, physiological, or medical sciences. A trial court's determination of an expert's qualifications will be upheld absent an abuse of discretion. See *Bernal v. American Honda Motor Co.*, 87 Wn.2d 406, 413, 553 P.2d 107 (1976). We therefore uphold the order striking Dr. Ward's affidavit.

Similarly, Dr. Greenberg's report and CV do not explain how he is qualified to give an opinion on the standard of care for an LMHC. Defendants are not arguing, as Ricci asserts, that a forensic psychologist such as Dr Greenberg can *never* testify on the standard of care for a licensed mental health counselor, only that it must affirmatively appear from the materials filed in opposition to the motion that he is familiar with the applicable standard of care. Dr. Greenberg is not so qualified merely by virtue of having a doctorate in clinical psychology. It was incumbent on plaintiff to lay an adequate foundation for the admissibility of Dr. Greenberg's opinions. This she did not do.

C. Dr. Greenberg's Title As A Psychologist Does Not Automatically Qualify Him As An Expert In This Case

Ricci appears to argue that identifying Dr. Greenberg as a clinical psychologist automatically qualifies him as an expert on the standard of

care for all mental health care professionals, including LMHCs. This argument should be soundly rejected.

Ricci asserts, without any evidentiary support, that “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.” Appellant’s brief at 12. This 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 a myriad of approaches and techniques that can be used in counseling. It was incumbent on plaintiff to lay a foundation that Dr. Greenberg was sufficiently familiar with the methods and techniques used by Mr. Gary as an LMHC to testify on this topic.

In *Germain*, 96 Wn. App. at 838, the Court of Appeals upheld the trial court ruling striking the declaration of psychologist Laura Brown, opining on the standard of care for pastoral counseling, stating:

We cannot say that the court’s distinction between pastoral counseling and secular counseling is one no reasonable person would make. There is no abuse of discretion.

Similarly, here, the trial court’s distinction between an LMHC and a clinical psychologist was not one “no reasonable person would make.” There was, therefore, no abuse of discretion in excluding Dr. Greenberg’s testimony.

Plaintiff's reliance on the recent case, *Eng v. Klein*, 127 Wn. App. 171, 110 P.3d 844 (2005), is misplaced. As explained in *Eng*:

The general rule is that a practitioner of one school of medicine is incompetent to testify as an expert in a malpractice action against a practitioner of another school. However, there are several well-established exceptions to this rule. These exceptions include circumstances where:

'(1) the methods of treatment in the defendant's school and the school of the witness are the same; (2) the method of treatment in the defendant's school and the school of the witness should be the same; or (3) the testimony of a witness is based on knowledge of the defendant's own school.'

(emphasis added, footnotes omitted). *Eng* at 171 (quoting *Miller v. Peterson*, 42 Wn. App. 822, 831, 714 P.2d 695 (1986)). *Eng* confirms that an expert in a medical malpractice case generally must practice in the same area as the defendant in order to give expert opinion testimony. Under that "general rule," a forensic clinical psychologist is not competent to testify as to the standard of care for an LMHC. It is therefore necessary to determine whether Dr. Greenberg's report and CV establish his qualifications under one of the three exceptions.

Reviewing the report and CV establishes that none of the exceptions applies here. The report and CV did not establish that the methods of treatment for an LMHC and a forensic clinical psychologist are or should be the same, or that Dr. Greenberg's testimony is based on

knowledge of Mr. Gary's "own school." The report and CV did not even state that Dr. Greenberg was familiar with the applicable standard of care, much less establish a foundation for that familiarity.

Dr. Greenberg did not even know the administrative and statutory provisions applicable to LMHCs. His report references Washington Administrative Code section 246-924-363 and the Ethical Principles of Psychologists and Code of Conduct as resources he consulted in forming his standard of care opinions. Dr. Greenberg included WAC 246-924-363 in the appendix of his report, along with the portion of the Uniform Health Care Information Act regarding exceptions to consent requirements, RCW 70.02.050. WAC 246-924 applies to psychologists, not LMHCs, who are regulated under a different code chapter, WAC 246-809. Dr. Greenberg's reliance on codes and statutes applicable to clinical psychologists highlights his ignorance about LMHCs and his application of the wrong standard of care. Mr. Gary is not a licensed clinical psychologist, but a licensed mental health counselor, subject to different regulations and a different standard of care.

D. The Statutory Definitions For Counselor And Psychologist Show That These Are Different Areas Of Practice Subject To Different Standards Of Care

A forensic clinical psychologist such as Dr. Greenberg, who has not maintained a clinical practice in over a decade, and an LMHC have

substantially different licenses. Dr. Greenberg is regulated under RCW

18.83.010 which defines the practice of psychology:

(1) The “practice of psychology” means the observation, evaluation, interpretation, and modification of human behavior by the application of psychological principles, methods, and procedures for the purposes of preventing or eliminating symptomatic or maladaptive behavior and promoting mental and behavioral health. It includes, but is not limited to, providing the following services to individuals, families, groups, organizations, and the public, whether or not payment is received for services rendered:

(a) Psychological measurement, assessment, and evaluation by means of psychological, neuropsychological, and psychoeducational testing;

(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.

In contrast, the work of an LMHC is defined as

(2) “Counseling” means employing any therapeutic techniques, including but not limited to social work, mental health counseling, marriage and family therapy, and hypnotherapy, 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, and includes therapeutic techniques to achieve sensitivity and awareness of self and others and the development of human potential. For the purposes of this chapter, nothing may be construed to imply that the practice of hypnotherapy is necessarily limited to counseling.

RCWA 18.19.020. LMHCs are not licensed to diagnose and treat mental and behavioral disorders or to administer psychological testing. Counseling provides a different option and service for clients and is licensed, regulated, and practiced under a different standard.

Ricci initially sought marital counseling from Mr. Gary, which he is licensed and qualified to provide. He utilized family systems therapy with her, again, a technique he is licensed to provide. Dr. Greenberg should not be allowed to eliminate LMHCs as mental health care providers by opining, without empirical support, that they violate the standard of care by failing to offer a particular form of therapy or in failing to diagnose and treat a mental disorder, when such diagnosis and treatment falls outside their licensure. The legislature has set up a licensing scheme which provides for both counselors and psychologists. It is not the role of Dr. Greenberg, as an expert or otherwise, to dismantle that system by proclaiming that LMHCs are negligent for undertaking to provide the type of treatment they are licensed to provide and failing to provide treatment that they are not licensed to provide.

Ricci's argument on appeal that counselors and psychologists are licensed to "do the same thing" and therefore have coequal and coextensive standards of care ignores the statutory scheme set up by the Legislature. Counselors and psychologists are licensed under different

statutory schemes and the scope of services they can provide under their separate licenses differs. A licensed counselor is not licensed to provide all of the services offered by a licensed psychologist. Holding a counselor to the standard of care of a psychologist imposes a standard that encompasses a duty to perform services beyond those for which the counselor is licensed. For example, an LMHC is not licensed to perform psychological testing such as Dr. Greenberg did as part of his evaluation. It would be improper and unfair to allow Dr. Greenberg to give a standard of care opinion that the LMHC was negligent for not administering tests. It is just as unfair to allow him to opine that the LMHC has the same role and duties as a clinical psychologist. This cannot be the law.

Ricci consistently misstates the defense position. Mr. Gary is not claiming, as Ricci asserts, that “only a counselor whose title and credentials are identical to theirs may offer an opinion concerning the standard of care applicable to them”. Appellant’s brief at 16. Mr. Gary is contending that the materials submitted in opposition to a motion for summary judgment must affirmatively establish a foundation for standard of care testimony demonstrating that the proposed witness has sufficient knowledge of the applicable standard to give an opinion. Mr. Gary is also contending that simply identifying the witness as a psychologist does not automatically qualify him to testify as an expert on LMHCs. It is not

impossible that a psychologist could be qualified by training or experience to testify on the standard of care for a counselor. This must be shown in the declaration filed in opposition to the motion, however, and cannot be assumed. This is what the trial court meant by phrasing the question as whether Dr. Greenberg's opinion was given "in a manner that is cognizable in the law." Dr. Greenberg's report and CV simply failed to meet the requirements of CR 56 and ER 702 and 703, and therefore could not be considered in opposition to the motion for summary judgment.

Counselors and psychologists are licensed to do different tasks, both important, but subject to different standards. Dr. Greenberg's report did not state that the standard of care is or should be the same for both forensic psychologists and LMHCs, or that the method of treatment is the same, as required to meet one of the *Eng* exceptions. The general rule that experts must be practitioners in the same field was therefore applicable and Dr. Greenberg's declaration and CV properly excluded. Without admissible expert testimony, the summary judgment was properly granted.

ISSUE TWO: The trial court did not abuse its discretion in excluding the deposition testimony of Dr. Greenberg because it was filed nine days late and only two days before the summary judgment hearing, Ricci did not have any reason for failing to provide an adequate declaration from her own expert, and the deposition did not constitute newly discovered evidence for purposes of the motion to reconsider

A. Introduction

Ricci failed to assign error to the orders striking Dr. Greenberg's testimony and the denial of the motion to reconsider in violation of RAP 10.3. Her brief does not consider the issues separately. Instead, she appears to contend that the court should have considered Dr. Greenberg's deposition on the summary judgment and the motion to reconsider because the court "may" consider new materials until the final order is entered. Ricci relies solely on Dr. Greenberg's deposition to establish his supposed familiarity with the standard of care for LMHCs.⁴ If this Court affirms the trial court's evidentiary ruling excluding Dr. Greenberg's deposition testimony as untimely, and the court's denial of the motion to reconsider because the deposition did not qualify as newly discovered evidence, both reviewed under the abuse of discretion standard, the trial court decision below must be affirmed.

Ricci contends that the trial court's reasons for "disregarding" Dr. Greenberg's deposition testimony are not "entirely clear." Appellant's Brief at 18. In reality, the trial judge made her reasons crystal clear: she refused to consider Dr. Greenberg's deposition testimony on summary judgment because it was untimely and plaintiff offered no explanation for failing to provide an adequate affidavit or declaration in her initial

⁴ Even if the deposition testimony is considered, there is insufficient foundation for Dr. Greenberg's testimony as established below.

response. CP 565. The Court refused to consider the deposition testimony on the motion to reconsider because it did not constitute newly discovered evidence. CP 565. Both rulings were correct and should be affirmed.

B. Motion for Summary Judgment

Dr. Greenberg's deposition was not submitted until April 20, 2005, nine days after the due date for Ricci's response to the summary judgment motion and only two days before oral argument. The deposition was submitted after defendants' deadline for filing a reply on the summary judgment, thus giving them no opportunity to respond to the untimely filing other than in the rebuttal filed in connection with the motion to strike. It clearly would be prejudicial to defendants to allow Ricci to file a deposition transcript containing opinions never disclosed in discovery or in the complaint only two days before the hearing, when defendants would have no opportunity to file any kind of response.

Ricci offered no explanation to the trial court for her failure to provide an adequate declaration from her own expert in response to defendant's original motion, other than her statement—repeated on appeal—that she could not produce the deposition earlier because defendants did not take the deposition until after her responsive materials were due. The trial court rejected this argument in her order on the motion to reconsider, as should this Court, stating:

This argument is not convincing. No explanation has been provided why an adequate declaration could not have been prepared at the time plaintiff filed her opposition to defendants' motions for summary judgment. *Adams v. Western Host, Inc.* 55 Wn. App 601, 608, 779 P.2d 281 (1989) ("The realization that [the] first declaration was insufficient does not qualify the second declaration as newly discovered evidence.") The court rules do not contemplate a procedure whereby a party who fails to provide an appropriate declaration in response to summary judgment can supplement the record in response to a motion to strike.

CP 565 (footnote omitted). Dr. Greenberg was Ricci's own expert, retained specifically for this litigation. She did not have to wait for defendants to take his deposition in order to discover whether he was familiar with the standard of care. She had two weeks from the time the motion was filed to prepare an adequate response, including a declaration laying the foundation for Dr. Greenberg's opinions and setting out those opinions on the standard of care. Indeed, she should have known her expert's opinions long before the motion was filed, given that the summary judgment hearing date was just three weeks before trial. However, Ricci chose not to file an adequate declaration, instead simply filing a report and a CV, neither of which laid an adequate foundation.

Ricci argues, weakly, that defendants did not raise the issue of the adequacy of Dr. Greenberg's qualifications in their summary judgment motion, and therefore could not attack those qualifications in their reply, or in the motion to strike. Appellant's brief at 18-19. This argument is

completely without merit and unsupported by any relevant case authority. Of course defendants could not challenge the foundation for Dr. Greenberg's opinions until those opinions were offered.

CR 56(c) provides "[t]he adverse party may file and serve opposing affidavits, not later than 11 calendar days before the hearing." Whether to accept or reject untimely filed affidavits is within the trial court's discretion. *Brown v. Peoples Mortgage Co.*, 48 Wn. App. 554, 559-60, 739 P.2d 1188 (1987) (no abuse of discretion when a trial court struck a supplemental affidavit filed on the same day as a scheduled summary judgment proceeding); *see also, Jobe v. Weyerhaeuser Co.*, 37 Wn. App. 718, 684 P.2d 719 (1984). The trial court properly exercised its discretion in rejecting the deposition transcript filed two days before the hearing and nine days after the filing deadline.

Owen v. Burlington N. Santa Fe R.R., Inc., 114 Wn. App. 227, 240, 56 P.3d 1006 (2002), relied on by plaintiff, is inapposite. In *Owen*, the opening brief argued that the City owed no duty to negligent motorists and that it could not be found negligent for failing to install traffic control devices not required by law. In rebuttal, the City attempted to add the argument that plaintiff had failed to show the crossing was inherently dangerous. The court found that this was a new issue, not raised in any way in the opening brief, and therefore could not be the basis for summary

judgment. *Owen* at 245. Nothing in *Owen* precludes the moving party from challenging the adequacy of the declarations filed in opposition to the motion.

Here, in contrast, Mr. Gary did not try to interject a new issue in his reply. The issue was properly framed in the opening brief as whether plaintiff had competent expert testimony on the standard of care. It was then incumbent on plaintiff to present admissible expert testimony on her theories of the case. CR 56; *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). The rules relating to evidence admissible on summary judgment are clear. Ricci should have known that an unsworn report and CV were not admissible under CR 56, and that she was required to lay a foundation for any expert opinions offered in opposition to the summary judgment motion.

Obviously defendants could not challenge the foundation for any expert testimony offered by plaintiff until plaintiff offered that testimony! Ricci is essentially arguing that the moving party must anticipate the deficiencies in the opposing party's response and attack those deficiencies in the opening brief, or waive the right to challenge the response. This argument is nonsensical. As explained in 4 Washington Practice, CR 56, "When affidavits containing improper material are tendered, the party seeking to exclude the material should move to strike." *See also, Atherton*

Condominium Apartment-Owners Ass'n Board of Directors v. Blume Development Co., 115 Wn.2d 506, 799 P.2d 250 (1990).

The deposition transcript was untimely under CR 56(c) and the court was within its discretion in excluding it. The materials that were timely submitted did not establish a foundation for Dr. Greenberg's testimony. The summary judgment was therefore properly granted.

C. Motion to Reconsider

Ricci did not assign error to the denial of the motion to reconsider, but nonetheless argues that the court "may accept additional materials any time up to issuing its final order" and therefore erred in not accepting the untimely deposition transcript. *See, e.g.*, Appellant's brief at 19.

What Ricci ignores is the meaning of the word "may" and the case law, cited by the Court in her order, that new evidence will be accepted on a motion for reconsideration only if it is newly discovered evidence. CR 59(a); *Adams v. Western Host*, 55 Wn. App. 601, 779 P.2d 281 (1989).

The Court *may* choose to exercise its discretion and accept materials even if untimely. However, the Court is not *obligated* to do so and may equally choose to exercise its discretion and enforce the time limitations set out in the Civil Rules. Ricci has cited no authority establishing that the word "may" is to be interpreted as "shall" in this

situation, or that it is an abuse of discretion to refuse to consider untimely submissions absent a compelling reason to do so.

Rainier Nat. Bank v. Inland Machinery Co., 29 Wn. App. 275, 631 P.2d 389 (1981), relied on by Ricci, simply states even though an affidavit was “belatedly filed,” the affidavit was considered by the trial court and would thus be considered on appeal. Nothing in *Rainier* requires the trial judge to accept late filed materials. Similarly, in *Felsman v. Kessler*, 2 Wn. App 493, 468 P.2d 691 (1970), cited in *Rainier* and in Ricci’s brief, the appellate court simply held that it was not reversible error to consider materials filed after the hearing on the summary judgment because a final opinion had not yet entered. In *Felsman*, the non-moving party filed an affidavit about a conversation that occurred two days after the oral argument on a motion for summary judgment. Clearly, that information was not available before the motion. Further, *Felsman* does not anywhere state that the trial court was required to accept the affidavit.

The trial court correctly declined to consider the deposition transcript on the motion for reconsideration. As the Court pointed out in her order, the transcript was not new evidence and thus not admissible on a motion for reconsideration. A motion to reconsider may be filed under CR 59(a) based on newly discovered evidence. However, as explained by the court in *Adams v. Western Host*, *supra* at 608, “The realization that

[the] first declaration was insufficient does not qualify the second declaration as newly discovered evidence.” Washington courts accept new evidence on a motion for reconsideration of an order granting summary judgment only when the evidence was not reasonably available at the time of the original response. *Wagner Dev. Inc. v. Fidelity & Deposit Co. of Maryland*, 95 Wn. App. 896, 907, 977 P.2d 639, *rev. denied*, 139 Wn.2d 1005 (1999). As explained in *Wagner*:

Both a trial and a summary judgment hearing afford the parties ample opportunity to present evidence. **If the evidence was available but not offered until after that opportunity passes, the parties are not entitled to another opportunity to submit that evidence.** *Meridian Minerals Co. v. King County*, 61 Wn. App. 195, 203, 810 P.2d 31 (1991); *Adams v. Western Host, Inc.*, 55 Wn. App. 601, 608, 779 P.2d 281 (1989) (“The realization that [the] first declaration was insufficient does not qualify the second declaration as newly discovered evidence.”). Here, the additional evidence *Wagner* presented to the court in its motion for reconsideration was available when the parties filed their motions for summary judgment. The trial court did not abuse its discretion in rejecting the motion for reconsideration.

Wagner at 645. The fact that the deposition transcript was not available at the time Ricci’s response was due does not mean that the *evidence* was unavailable. Ricci could have obtained necessary information about her own expert’s qualifications at any time.

The Court noted that the late submission of the deposition “is particularly troublesome” because Dr. Greenberg gave opinions in his

deposition that were not previously disclosed in the complaint, in discovery, or in plaintiff's declaration. CP 564, fn. 1. Because Dr. Greenberg's deposition raised new issues and gave new opinions never made available to defendants, the defendants had to file responses to the motion for reconsideration discussing "substantive issues not previously addressed." CP 564. Allowing the untimely deposition testimony would have been unduly prejudicial to defendants. Given that Ricci has never offered any explanation for failing to provide an adequate declaration in opposition to the motion, there was no reason for the Court to allow her to ignore the Civil Rules to defendant's detriment.

The trial court did not abuse her discretion in refusing to consider the deposition transcript on the motion to reconsider.

ISSUE THREE: Even if this Court holds that Dr. Greenberg's deposition should have been considered in deciding the motion, the summary judgment on negligence should be affirmed because Dr. Greenberg's own testimony establishes that he lacks sufficient familiarity with the applicable standard of care

Trial court decisions on the admissibility of expert testimony are entitled to great deference and are reviewed under the abuse of discretion standard. *Harris v. Groth*, 99 Wn.2d 438, 450, 663 P.2d 113 (1983); *Breit v. St. Luke's Memorial Hosp.*, 49 Wn. App. 461, 465, 743 P.2d 1254, 1257 (1987). As argued above, Ricci has presented nothing establishing that it was a manifest abuse of discretion to exclude the untimely deposition

testimony, deny the motion for reconsideration, or to strike Dr. Greenberg's report which, absent the deposition testimony, did not establish familiarity with the standard of care. Even if this court were to reverse and somehow find a manifest abuse of discretion, however, the trial court ruling should be affirmed because the deposition testimony coupled with the report and CV still fails to establish a sufficient foundation for Dr Greenberg's opinion testimony.

Ricci relies on Dr. Greenberg's deposition testimony in claiming that he is qualified under one of the three exceptions set out in *Eng*. However, closer examination of Dr. Greenberg's *actual* testimony shows that he has not practiced as a licensed mental health care counselor, is not familiar with the standard of training generally or for Mr. Gary in particular, is not familiar with the different statutes and licensing provisions, and lacks an adequate basis for testifying as an expert in this case.

A. Dr. Greenberg Does Not Know What Educational Program Defendant Gary Followed In Training To Be A Licensed Mental Health Counselor

As the Court noted in the order on the motion to strike, Dr. Greenberg was not provided with the defendants' curricula vitae making it "particularly difficult to determine the basis of his opinion that the defendants should have been aware of Ms. Ricci's particular vulnerability

and that their lack of awareness breached the applicable standard of care.” CP 453. The deposition testimony does not fill this gap, showing rather that Dr. Greenberg was merely “guessing” about Mr. Gary’s education and training. Dr. Greenberg specifically testified that he didn’t know what Mr. Gary meant when he said he had a master’s degree in Applied Behavioral Sciences, and therefore could not answer whether he had similar training. CP 380.

Dr. Greenberg confused Mr. Gary’s Master’s degree in Applied Behavioral Studies with the courses he himself took in “applied behavioral analysis and science of human behavior,” and admitted that he *could only guess* at the content of defendant Gary’s education. CP 380. Dr. Greenberg attended a combined master’s doctoral program and studied applied behavioral analysis, but emphasized that he did not really know how that compared to Mr. Gary’s course of study, stating

Q So is it your position that you have the equivalent training of Mr. Gary but that you just went further?

A To the extent that’s what “applied behavioral sciences” means, and **I want to be really clear I’m guessing at a lot just from the title**, I would say probably yes, but I’m not sure at anything except what those words are here. **“Applied behavioral sciences” can mean a lot of things.**

CP 380 (emphasis added).

Contrary to Ricci's claims below and on appeal, there is no evidence that Dr. Greenberg's training or practice "overlaps" with that of Defendant Gary. Dr. Greenberg is completely unfamiliar with Defendant Gary's course of study, and cannot say that his own training is comparable:

Q So are you familiar with the program at City University?

A No, I'm not.

Q **Is it fair to say that you don't know one way or another whether you've had comparable training to Mr. Gary?**

A **Because I don't know exactly what his training was other than what he has called it here.**

CP 380 (emphasis added).

Dr. Greenberg was not even aware of the difference between registered counselors and Licensed Mental Health Counselors:

Q And you've never practiced as a licensed mental health counselor?

A Practiced. **My understanding is that mental health counselors are registered, not licensed**, but I'm not meaning to be picky here.

CP 394. As is explained above, different statutory schemes regulate counselors registered under RCW Chapter 18.19 and LMHCs under RCW Chapter 18.225. Dr. Greenberg's failure to recognize the differences

between the two simply points to his lack of knowledge of the practice of LMHCs necessary to form standard of care opinions for that profession.

Further, Dr. Greenberg's report referenced standards applicable to psychologists, not to LMHCs. His reliance on codes and statutes applicable to clinical psychologists further illustrates the absence of any evidence presented to the Court establishing that Dr. Greenberg was applying the standard of an LMHC, not of a clinical psychologist, in giving his opinions.

Neither Dr. Greenberg's declaration nor his deposition establishes that he is familiar with the standard for an LMHC in Washington. His student experience as a psychologist in California over a decade ago does not qualify him as an expert on the standard of care for an LMHC in Washington in 2000-2001. Even if Dr. Greenberg's deposition testimony is considered along with his report and CV, Ricci failed to establish a sufficient foundation for his testimony. Dr. Greenberg simply lacks the knowledge of the scope of work and regulations applicable to LMHCs necessary to allow him to testify to the standard of care for Mr. Gary.

ISSUE FOUR: The summary judgment on confidentiality should be affirmed because any communications involving Ricci were made in the context of transferring her care and were permitted under RCW 70.02.050

Dismissal of the breach of confidentiality claim must be affirmed even if this Court finds some basis for reversing the summary judgment on

the negligence claim. The only communications identified by plaintiff as violating confidentiality were authorized under RCW 70.02.050 as part of the transfer of care from Mr. Gary to Ms. Stanford. As Mr. Gary explained in his supplemental declaration:

After my initial attempt to transfer Siobhan Ricci's therapeutic care to Alma Stanford as she requested, in July of 2001, Ms. Ricci continued to contact me. She seemed to be having a difficult time adjusting to the transfer of care. She asked for a follow up appointment to see me, and I agreed to do so only with her new therapist's (i.e., Alma Stanford's) consent. It was and remains my view that any interaction that I had with Alma Stanford after Ms. Ricci began seeing her was all part of the process of transferring her care. Consequently, I believed Alma Stanford needed to know about the on-going contact Ms. Ricci was continuing to have with me, and the difficulty that Ms. Ricci was having with the transfer of care, in order to maximize Ms. Stanford's ability to successfully treat Ms. Ricci.

CP 551-52.

The Uniform Health Care Information Act ("the Act") allows disclosure without consent where the disclosure of "health care information" about the patient is "to a person reasonably believed to be providing health care" and "to the extent a recipient needs to know the information." RCW 70.02.050. Health care information is information that "directly relates to the patient's health care." RCW 70.02.010(6).

Ricci identified three occasions in which she alleges Mr. Gary and Ms. Stanford breached her confidentiality by discussing her "without [her]

knowledge or consent”: during a June 25, 2001 conversation prior to her request for a referral; in September 2001, when Ricci requested a return visit with Mr. Gary; and in late October 2001, when she alleges Ms. Stanford told her of a conversation she had with Mr. Gary earlier in the month.

Ricci was not present during any of these alleged conversations, and has no direct knowledge or evidence of what was discussed. In the first instance, the only evidence of a disclosure is Mr. Gary’s testimony that he discussed referring Ricci to Ms. Stanford, *without identifying her*. CP 327. Plaintiff thought this was appropriate. CP 324.

Ricci next alleges that Mr. Gary breached her right of confidentiality in September 2001, when he talked to Ms. Stanford about Ricci’s request for another visit with him. However, Ricci testified that she consented in advance to this contact. Further, contact between treating health care providers is specifically permitted by the Act. CP 137.

In the final instance, Ricci claims that Mr. Gary and Ms. Stanford’s conversation following her final appointment with Mr. Gary breached her right to confidentiality; however, according to her own testimony, that discussion centered on Mr. Gary’s *own feelings* following their last meeting, and not Ricci’s confidential health care information. CP 181; 176.

The Uniform Health Care Information Act was designed to protect confidential information obtained from the patient/client during treatment, and does not prevent a therapist from discussing his own personal feelings with another therapist. Dr. Corey Fagan testified in her declaration that the communications between Mr. Gary and Ms. Stanford were permissible under the Act as part of the transfer of care. CP 107-08. As Dr. Fagan explained:

When a patient is transferring care to another therapist, communications between the two therapists is necessary to facilitate the transfer. It is common and accepted practice for a patient's therapists to speak to each other when transferring care, so that the patient's therapy is not compromised. The new therapist needs to know the context and history of the patient's treatment, in order to continue that therapy.

The Uniform Health Care Information Act allows a therapist to disclose information without advance consent of the patient where the information is necessary to ongoing treatment of the patient and the disclosure is to another health care provider treating the patient. The contacts between Steven Gary and Alma Stanford clearly fall within the standard of care followed by mental health providers, guided by the Uniform Health Care Information Act, and do not constitute a breach of a therapist's duty of confidentiality.

CP 107-08. Plaintiff's own witness, Dr. Greenberg, stated in his report that the Act authorized communications as part of the transfer of care and he found "nothing contrary to the relevant codes in conducting these consultations. . . ." CP 242. Ricci presented no expert evidence that the

alleged communications violated the standard of care or any applicable statute or regulation.

Ricci argued below that RCW 70.02.050 does not apply to LMHCs because the Act applies to “medical records concerning health care information about patients” and that defendants “did not provide health care to Siobhan Ricci,” “she was their client not their patient” and the disclosed information “did not concern her health care.” CP 252. However, a reading of the Act clearly shows that “health care” includes treatment of a mental condition. RCW 70.02.010(4)(a)-(b). Further, the Act specifically identifies LMHCs as among those regulated by the Act: “Mental health counselors, marriage and family therapists, and social workers licensed under chapter 18.225 RCW are subject to this chapter.” RCW 70.02.180. The Legislature has made it clear that the Act applies to LMHCs.

A. RCW Chapters 18.19 And 18.225, Cited By Plaintiff, Are Not Applicable To Mr. Gary Under These Facts

RCW Chapter 18.225, effective July 22, 2001, was enacted to create and regulate a new category of mental health professionals called *licensed* mental health counselors, Steven Gary’s profession. When RCW 18.225 was enacted, the legislature repealed all sections of RCW Chapter 18.19, including RCW 18.19.180, relating to the now-defunct *certified* mental health counselor. The new Chapter 18.225 contained no provisions

on disclosure of client information. RCW 18.225.105 (relied on by Ricci) was enacted in July 2003. When the events Ricci complains of occurred in September and October 2001, the only applicable statute regulating confidentiality was the Uniform Health Care Information Act.⁵

Ricci's argument on appeal that RCW 18.225.100 controls over the Act is irrelevant because RCW 18.225.100 was not in effect at the time the alleged disclosures were made. As an LMHC, Mr. Gary was not subject to RCW 18.19.060, which applies to registered counselors. In 2001, LMHCs were regulated only by the Uniform Health Act regarding confidentiality. As established above, the disclosures were permissible under the Act as part of the transfer of care.

Further, Ricci did not raise this argument below and is precluded from making it for the first time on appeal. *Seattle First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 588 P.2d 1308 (1978). Ricci argued below that the Act did not apply to mental health care professionals. CP 252. She did not argue below that the more specific statute controlled the more general statute, and thus cannot use that as a basis for reversal here. However, because the statute on which Ricci relies was not in effect at the time of the alleged conduct, it cannot be argued to have superseded the Uniform Health Care Act.

⁵ See Legislative History included in the Clerk's Papers at CP 292-314.

B. Ricci Cannot Establish A Medical Negligence Claim For Breach Of Confidentiality Without Expert Testimony

Berger v. Sonneland, 144 Wn. 2d 91, 109-10, 26 P.3d 257 (2001), relied on by Ricci on appeal, holds that the only cause of action for unauthorized disclosure of confidential patient information, apart from the Uniform Health Care Information Act, is under RCW Chapter 7.70. To bring a claim under RCW Chapter 7.70, Ricci must establish both the standard of care and its breach by expert testimony. RCW 7.70.040, *Harris v. Groth*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983).

Ricci did not present any expert testimony that the alleged communications breached the standard of care. To the contrary, Dr. Greenberg's report stated that he saw *nothing contrary to the established confidentiality statutes*. CP 242. Without competent expert testimony establishing the standard of care and its breach, the claim for breach of confidentiality must be dismissed under RCW 7.70.030(1) and 7.70.040. *Berger, supra*.

Even if Ricci had presented expert testimony, the court should rule as a matter of law that the conduct is not negligent because the communications were specifically authorized by the Act. When a health care provider consults another care provider as authorized by the statute, he or she is acting under specific statutory authority and the conduct should not be the basis for a later tort claim.

Ricci cannot rely on appeal on the testimony of Judy Roberts. Ms. Roberts is an LMHC who began seeing Ricci for “support” during the litigation, not for therapy. Mr. Gary moved to strike or disregard any standard of care testimony by Ms. Roberts because she was not identified as an expert, was not provided with any information about the case other than what she learned from Ricci herself, and made it clear in her deposition that she was not testifying to the standard of care. CP 283-84; 263-64.

The trial court ruled that Ms. Roberts’ testimony was “simply irrelevant to issues of the standard of care. Ms. Roberts specifically declined to serve as an expert and her deposition testimony regarding confidentiality was not provided in the context of standard of practice.” CP 454. Ricci has not assigned error to this ruling or provided an issue statement or argument indicating that she intended to appeal the Court’s refusal to consider Roberts’ testimony on standard of care. She may not raise this issue on appeal absent some form of compliance with RAP 10.3.

C. The Breach Of Contract Claim Was Not Pled In The Complaint And Could Not Therefore Be A Basis For A Confidentiality Claim

Ricci’s opposition to Mr. Gary’s summary judgment motion asserted a breach of contract claim, never before pled or disclosed in discovery, based on the section of Mr. Gary’s treatment disclosure form

addressing confidentiality. Ricci characterizes this as a promise that confidential information would be released only with her written consent, ignoring the statement in the disclosure form: “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.” CP 184. Mr. Gary’s communications with Ms. Stanford clearly fall under this language.

Ricci’s breach of contract claim was not included in the complaint. Nothing in the discovery responses raised a breach of contract claim. CP 409-16. The claim therefore could not properly be raised for the first time in response to a motion for summary judgment three weeks before trial.

Ricci argued on the motion for reconsideration below that paragraph 9 of her complaint adequately raised the breach of contract claim. CP 559. Paragraph 9 of the amended complaint states, “Stanford and Gary breached plaintiff’s right of privacy and confidentiality by sharing information about plaintiff with each other without plaintiff’s consent.” CP 29.

The Amended Complaint does not refer to the patient disclosure form, use the word contract, or in any way raise a traditional breach of contract claim. Paragraph 9 cannot fairly be read as making a claim based on breach of the client information form which is not mentioned in the

complaint, particularly as it refers to *both* Stanford and Gary as breaching plaintiff's right of privacy. There was no evidence below that Stanford had a written disclosure about confidentiality, or that she was a signatory on Mr. Gary's disclosure form. Further, the form was not written as a contract, but as a document satisfying the state requirement that "counselors disclose information to prospective clients so that the agreement to begin a therapeutic relationship is preceded by informed consent." CP 31. Both Ricci and Mr. Gary signed the disclosure, not as a contract, but to "acknowledge that you understand this document. . . ." CP 32.

Even if the disclosure document could be viewed as a "contract," there was no consideration for the "contract" which would render the agreement void. Consideration is an essential element of a contract and the burden was on Ricci to establish the elements of a contract:

The burden of proving a contract, whether express or implied, is on the party asserting it, and he must prove each essential fact, including the existence of a mutual intention.' "The essential elements of a contract are 'the subject matter of the contract, the parties, the promise, the terms and conditions, and . . . the price or consideration.' "

Bogle & Gates, P.L.L.C. v. Zapel, 121 Wn. App. 444, 448-49, 90 P.3d 703, 705 (2004). The trial court properly disallowed the contract claim which was not pled or disclosed in discovery prior to the motion for summary judgment.

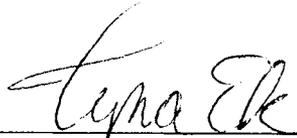
V. CONCLUSION

Ricci made specific, limited claims of negligence and breach of confidentiality in her complaint and deposition. Defendants moved to dismiss for lack of expert evidence supporting those claims. Ricci had the opportunity to counter with competent expert testimony, but failed to do so. The trial court properly excluded Dr. Greenberg's report for lack of foundation. The Court correctly refused to consider the deposition testimony which was filed long after the deadline for Ricci's response to the summary judgment motion. Ricci offered no justification for failing to provide a competent declaration in opposition to the motion and was not entitled to file additional responsive materials only two days before the hearing date, particularly as those materials raised new issues and opinions not previously disclosed in discovery. The motion to reconsider was properly denied because the deposition did not constitute newly discovered evidence as required by CR 59. Finally, the dismissal of the alleged breach of confidentiality claim was proper. The disclosures were permitted under the Uniform Health Care Act and Ricci failed to present expert testimony on the breach of confidentiality issue as required by case law. The trial court should be affirmed in all respects.

DATED this 21st day of October, 2005.

Respectfully submitted,

MERRICK, HOFSTEDT & LINDSEY, P.S.

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L:\405\200\PLDGS\APPEAL

COURT OF APPEALS, DIVISION I
OF THE STATE WASHINGTON

SIOBHAN RICCI,)
)
Appellant,) No. 56338-6-I
)
v.) CERTIFICATE OF SERVICE
)
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.)
_____)

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2005 OCT 21 PM 4:42

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served by hand delivery, facsimile or via U.S. Mail a copy of the following documents listed to all of the parties listed below:

1. Brief of Respondents Steven and Jane Doe Gary; and
2. Certificate of Service.

Sylvia Luppert Reaugh Oettinger & Luppert 1601 - 5th Ave., Suite 2200 Seattle, WA 98101-1651 Attorneys for Appellant	<input checked="" type="checkbox"/> (X) <input type="checkbox"/> () <input type="checkbox"/> ()	Legal Messenger Facsimile Mailed/Federal Express
Matthew D. Taylor Lee Smart Cook Martin & Patterson 1800 One Convention Place 701 Pike Street Seattle, WA 98101-3929 Attorney for Respondent Stanford	<input checked="" type="checkbox"/> (X) <input type="checkbox"/> () <input type="checkbox"/> ()	Legal Messenger Facsimile Mailed/Federal Express

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 21st day of October, 2005, at Seattle, Washington.



 Denise Bryant

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