No. 324869

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

LORI A. SWEENEY, and JEROLD L. SWEENEY, husband and wife,

Plaintiffs-Appellants,

vs.

ADAMS COUNTY PUBLIC HOSPITAL DISTRICT NO. 2, d/b/a EAST ADAMS RURAL HOSPITAL; and ALLEN D. NOBLE, PA-C and JANE DOES NOBLE, husband and wife and the marital community composed thereof; and JAMES N. DUNLAP, M.D. and JANE DOE DUNLAP, husband and wife and the marital community composed thereof; and PROVIDENCE HEALTH SERVICES, d/b/a PROVIDENCE ORTHOPEDIC SPECIALTIES, a Washington corporation,

Defendants-Respondents.

APPELLANTS' REPLY TO NOBLE

George M. Ahrend, WSBA #25160
Ahrend Law Firm PLLC
16 Basin St. SW
Ephrata, WA 98823
(509) 764-9000

Kyle C. Olive, WSBA #35552
William A. Gilbert, WSBA #30592
Olive|Bearb Grelish & Gilbert, PLLC
1218 Third Ave., Ste. 1000
Seattle, WA 98101
(206) 629-9909

Co-Attorneys for Appellants

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Appellants Lori Sweeney and her husband, Jerold (collectively Sweeney), submit this reply to the response brief submitted on behalf of Respondents Allen D. Noble, PA-C, et ux., and his employer, Adams County Public Hospital District No. 2, doing business as East Adams Rural Hospital (EARH) (collectively Noble).

I. REPLY TO NOBLE'S COUNTER-STATEMENT OF THE CASE

Noble's counter-statement of the case makes a number of factual claims that are not material to the superior court's summary judgment order dismissing Sweeney's complaint on grounds of causation, and they should have no bearing on the resolution of this appeal. Noble begins by emphasizing that EARH is a rural hospital. *See* Noble Resp. Br., at 1-2. This fact is immaterial because Washington law requires health care providers to comply with a standard of care based on the nature of their practice and licensing rather than their location within the state.[1] The law does not permit

[1] *See* RCW 7.70.040(1) (imposing duty "to exercise that degree of care, skill, and learning expected of a reasonably prudent provider at that time in the profession or class to which he or she belongs, in the state of Washington, acting in the same or similar circumstances"); *see also Adams v. Richland Clinic, Inc.*, 37 Wn. App. 650, 655, 681 P.2d 1305 (1984) (noting that RCW 7.70.040(1) imposes a statewide standard of care). As it happens in this case, the Washington state standard of care for certified physician assistants such as Noble is the same as the nationwide standard of care under the circumstances. *See* CP 277, 354-55.

a health care provider to engage in sub-standard practice, simply because he or she lives in a rural area.

Next, Noble claims that EARH does not have an orthopedic surgeon physically present or available on-site. *See* Noble Resp. Br., at 2. (He acknowledges that EARH has arranged for orthopedic surgeons from Spokane to consult as needed.) This fact is immaterial because Sweeney is not seeking to hold Noble to the standard of care of an orthopedic surgeon. Instead, she relies on his violations of the standard of care as a certified physician assistant (PA-C). *See* CP 282, 354-55. The absence of an orthopedic surgeon on-site does not excuse Noble's violations of his own standard of care.

Noble also claims that EARH does not have MRI imaging technology available on-site. *See* Noble Resp. Br., at 2. (He does not deny that patients can be transported to Spokane when MRI imaging is necessary.) This fact is immaterial because Noble's violations of the standard of care do not hinge upon the presence or absence of MRI technology at the hospital. *See* CP 282-83, 354-55. He is subject to liability for failure to comply with the applicable standard of care under the circumstances.

Lastly, Noble claims that he consulted with Dunlap before attempting to reduce Sweeney's shoulder. *See* Noble Resp. Br., at 2-3. The implicit argument seems to be that Noble should not be subject to liability to the extent he was merely following Dunlap's instructions. This is immaterial to the superior court's summary judgment order, which was based on causation rather than fault. In any event, Noble's consultation with Dunlap does not excuse his independent violations of the standard of care.

Apart from the foregoing, Noble's counter-statement of the case merely highlights the conflicting expert testimony regarding his breaches of the applicable standard of care and causation of Sweeney's injuries. *See* Noble Resp. Br., at 3-5.

II. REPLY TO NOBLE'S ARGUMENT

Noble does not dispute that it is his burden to show that there is no dispute regarding any genuine issue of material fact. *See* Noble Resp. Br., at 6. In order to meet this burden, he argues that the expert testimony regarding causation of Sweeney's injuries is too "conclusory," and therefore insufficient to create a genuine issue of material fact. *See id.* at 6-8. In making this argument, he relies on the non-precedential Court of Appeals decision in *Hash v. Children's Orthopedic Hosp.*, 49 Wn. App. 130, 133-34, 741 P.2d

584 (1987), *aff'd*, 110 Wn. 2d 912 (1988). *See* Noble Resp. Br., at 7. He also relies on *Guile v. Ballard Community Hosp.*, 70 Wn. App. 8, 25, 851 P.2d 689, *rev. denied sub nom. Guile v. Crealock*, 122 Wn. 2d 1010 (1993), which, as pointed out in Sweeney's opening brief, should be overruled as incorrectly decided and harmful. *See* Sweeney App. Br., at 21 n.11. Regardless of whether *Guile* is overruled, however, the expert testimony submitted by Sweeney is sufficiently specific to withstand summary judgment.

A.) Noble improperly relies on the non-precedential Court of Appeals decision in *Hash* as a basis for declining to consider Sweeney's expert testimony regarding causation of her injuries.

Hash predates the approach to summary judgment adopted in *Young v. Key Pharms., Inc.*, 112 Wn. 2d 216, 770 P.2d 182 (1989). In evaluating the sufficiency of a moving party's affidavit to establish an absence of any issue of material fact regarding causation in a medical negligence case, the Court of Appeals in *Hash* held that a conclusory affidavit by an expert is insufficient. *See* 49 Wn. App. at 133-35. The court explained its reasoning as follows:

> Under ER 705, an expert witness can testify at trial to an opinion without first stating the factual basis for that opinion. *Group Health Cooperative of Puget Sound, Inc. v. Department of Revenue*, 106 Wash.2d 391, 399, 722 P.2d 787 (1986). One can argue,

therefore, that the opinion of an expert should be given effect in summary judgment proceedings, even though no supporting facts are included in the expert's affidavit.

We reject that argument for two reasons. First, ER 705 contemplates and makes provision for the opposing party to explore the factual basis for an expert's opinion on cross examination. We have not yet discovered a means for cross-examining an affidavit. Furthermore, without knowledge of the factual basis for the opinion, the court may well be without any means of evaluating the merits of that opinion.

Another reason ER 705 should not be applied literally to affidavits in summary judgment proceedings is the requirement of CR 56(e) that supporting and opposing affidavits set forth admissible facts. While CR 56(e) does not expressly address affidavits of expert witnesses, it does specifically require that:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial....

If the adverse party must set forth "specific facts" in order to defeat a motion for summary judgment, elemental fairness compels an interpretation of the rule which places the same burden on the moving party if it is to succeed in making the initial showing that there is no material factual issue for trial. One cannot show there is no genuine factual issue without presenting the court with the facts surrounding the critical issues.

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

This reasoning is flawed on several levels. First, CR 56(e) incorporates the evidence rules and merely requires affidavits to "set forth such facts as would be admissible in evidence[.]" (Brackets added.) As the *Hash* court recognized, under the evidence rules, "the opinion of an expert should be given effect in summary judgment proceedings, even though no supporting facts are included in the expert's affidavit." 49 Wn. App. at 134; *see also* ER 704-705. The expert testimony submitted by Sweeney satisfies the requirements of the evidence rules, and is properly considered. *See* Sweeney App. Br., Appendix.[2]

Second, *Hash* takes the "specific facts" language of CR 56(e) out of context. In context, "specific facts" is contrasted with "mere allegations or denials" in a pleading, and is modified by the concept of materiality, by which a genuine issue of fact for trial is determined. Materiality, in turn, is based on the governing substantive law. *See Rossiter v. Moore,* 59 Wn. 2d 722, 724, 370 P.2d 250 (1962) (indicating "material facts" are determined "under principles of substantive law"; quotation omitted); *Morris v.*

[2] Defendants have the ability to conduct discovery before a summary judgment motion is filed to inquire into "the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion[.]" CR 26(b)(5)(A)(i)-(ii). Even in the context of a summary judgment motion, defendants could ask for an evidentiary hearing pursuant to CR 43(e)(1) to conduct cross-examination of experts or otherwise obtain disclosure of the underlying facts or data for their opinions as contemplated by ER 705.

McNicol, 83 Wn. 2d 491, 494, 519 P.2d 7 (1974) (indicating "a 'material fact' is a fact upon which the outcome of the litigation depends"). In a medical negligence case, the only material facts are violation of the applicable standard of care and proximate cause of the plaintiff's injuries. *See* RCW 7.40.040(1)-(2). The expert testimony submitted by Sweeney attests to these facts with the requisite degree of specificity.[3]

Third, the reasoning of *Hash* is contrary to the purpose of summary judgment and risks violating the constitutional right to trial by jury. With due respect to the *Hash* court, it is not supposed to be performing a function akin to cross-examination or otherwise "evaluating the merits" of an expert's opinions in the course of summary judgment proceedings. Summary judgment is consistent with the right to trial by jury under Wash. Const. Art. I, § 21, only because it reserves questions of fact for the jury. *See LaMon v. Butler*, 112 Wn. 2d 193, 199 n.5, 770 P.2d 1027 (1989).

In any event, the Court of Appeals decision in *Hash* has been rendered a nullity by the Supreme Court's grant of review and

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[3] *Hash* seems to equate the "specific facts" language of CR 56(e) with the "underlying facts or data" for an expert's conclusion under ER 705. However, the underlying facts or data need not even be admissible, so long as they are reasonably relied upon by other experts in the field. *See* ER 703.

subsequent decision in the case.[4] The Supreme Court did not adopt or otherwise approve the reasoning of Division I, but rather held that summary judgment was properly denied based on the requirement to view the evidence in the light most favorable to the non-moving party. *See* 110 Wn. 2d at 915-16. Accordingly, *Hash* cannot be relied upon to require more specificity from Sweeney's experts than is necessary for their testimony to be admissible and sufficient under the evidence rules.[5]

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[4] Noble does not acknowledge the Supreme Court's decision in its citation of *Hash*. *See* Noble Resp. Br., at 7.

[5] Inexplicably, the Court of Appeals decision in *Hash* has been cited as authoritative or persuasive on this point in a number of cases. *See Rothweiler v. Clark County*, 108 Wn. App. 91, 100-01, 29 P.3d 758 (2001) (citing *Hash* for the proposition that "[i]n the context of a summary judgment motion, an expert must support his opinion with specific facts"; brackets added), *rev. denied*, 145 Wn. 2d 1029 (2002); *Sunbreaker Condo. Ass'n v. Travelers Ins. Co.*, 79 Wn. App. 368, 374, 901 P.2d 1079 (1995), *rev. denied*, 129 Wn. 2d 1020 (1996); *Anderson Hay & Grain Co. v. United Dominion Indus., Inc.*, 119 Wn. App. 249, 259, 76 P.3d 1205 (2003) (citing *Hash* for the propositions that ER 705 does not apply to summary judgment and "an expert's testimony for summary judgment must be supported by the specific facts underlying the opinion"), *rev. denied*, 151 Wn. 2d 1016 (2004); *Doty-Fielding v. Town of South Prairie*, 143 Wn. App. 559, 566, 178 P.3d 1054 (2008) (citing *Hash* for the proposition that "an expert's testimony for summary judgment must be supported by the specific facts underlying the opinion"), *rev. denied*, 165 Wn. 2d 1004 (2008); *Keck v. Collins*, 181 Wn. App. 67, 91, 325 P.3d 306 (2014) (citing *Hash* in support of *Guile*), *rev. granted*, 181 Wn. 2d 1007 (2014). *Hash* does not need to be overruled since it is not precedential, but these cases should be disapproved or overruled to the extent they rely on *Hash*, for the same reasons that the reasoning of the Court of Appeals decision in *Hash* is flawed plus the additional reason that they rely on a non-precedential opinion. *See In re Stranger Creek*, 77 Wn. 2d 649, 653, 466 P.2d 508 (1970) (stating incorrect and harmful test for overruling precedent); *International Ass'n of Fire Fighters v. Everett*, 146 Wn. 2d 29, 37 n.9, 42 P.3d 1265 (2002) (indicating Court of Appeals can overrule one of its own decisions if incorrect and harmful).

B. Because *Guile* requires greater specificity from an expert affidavit submitted in opposition to summary judgment than is necessary for the expert's testimony to be admissible or to support a verdict at trial, the case should be overruled as incorrect and harmful; nonetheless, the expert affidavits submitted by Sweeney satisfy the *Guile* standard.

In *Guile*, the court dismissed a medical negligence claim arising from a gynecological surgery on summary judgment, notwithstanding the following testimony from a medical expert:

> Mrs. Guile suffered an unusual amount of post-operative pain, developed a painful perineal abscess, and was then unable to engage in coitus because her vagina was closed too tight. All of this was caused by faulty technique on the part of the first surgeon, Dr. Crealock. In my opinion he failed to exercise that degree of care, skill, and learning expected of a reasonably prudent surgeon at that time in the State of Washington, acting in the same or similar circumstances.

70 Wn. App. at 26. The court found this testimony was too conclusory to create a genuine issue of material fact for trial, relying on *Young, supra*, two other Court of Appeals decisions, and the "specific facts" language of CR 56(e). *Guile* was incorrectly decided and has harmful effects and should be overruled. *See Everett,* 146 Wn. 2d at 37 n.9 (indicating Court of Appeals can overrule one of its own decisions if incorrect and harmful). It suffers from the same flaws as *Hash*, discussed above, and is based on a misreading of *Young* and the Court of Appeals decisions on which it relies.

Guile initially cites *Young* for the proposition that the plaintiff must "produce an affidavit from a qualified expert witness that alleges specific facts establishing a cause of action" in order to withstand summary judgment. *Guile*, 70 Wn. App. at 25 (citing *Young*, 112 Wn. 2d at 226-27). In *Young*, the sole challenge to a medical expert affidavit was the competency of a pharmacist to testify regarding a physician's standard of care. *See Young*, at 227-28. The Court did *not* address the degree of specificity required in an expert affidavit. *See id.* To the extent *Guile* reads *Young* as imposing a specificity requirement, it is incorrectly decided.

Guile also cites the Court of Appeals decisions in *Ruffer v. St. Frances Cabrini Hosp.*, 56 Wn. App. 625, 628, 784 P.2d 1288, *rev. denied*, 114 Wn. 2d 1023 (1990), and *Vant Leven v. Kretzler*, 56 Wn. App. 349, 356, 783 P.2d 611 (1989), for the proposition that "[a]ffidavits containing conclusory statements without adequate factual support are insufficient to defeat a motion for summary judgment." *See Guile*, at 25-26 (brackets added). These decisions do not preclude conclusory testimony by expert witnesses, especially in light of ER 704-705, which expressly authorize it.[6] Instead, they

[6] ER 702-705, governing the admissibility of expert testimony, are reproduced in the Appendix.

merely stand for the unremarkable proposition that expert opinions must be based on an adequate foundation.

The *Ruffer* decision does not address the sufficiency of an expert's affidavit, as the plaintiff in that case did not present any expert testimony whatsoever in support of an informed consent claim against her physician. *See* 56 Wn. App. at 629. Instead, she merely argued that the undisclosed risk of a medical procedure was material, notwithstanding undisputed evidence in the record to the contrary. *See id.*

In *Vant Leven*, the foundation was lacking because the expert admittedly had "incomplete files and records" on which to base his opinion in a medical negligence case, and he testified that he could not render a "final opinion" until he received all of the relevant records. *See* 56 Wn. App. at 351-52 (quoting expert declaration). On this basis, the expert's testimony that "it appears more probable than not" that the defendant breached the standard of care was properly deemed to be insufficient. *See id.* at 355-56.

Unlike *Ruffer* and *Vant Leven,* Sweeney has supported her claims against Noble with competent expert testimony and the experts have reviewed sufficient records to establish an adequate foundation for their opinions. However, in addition to these

distinctions, neither *Ruffer* nor *Vant Leven* supports *Guile's* specificity requirement.

Ultimately, the *Guile* decision must rest on its interpretation of the "specific facts" language of CR 56(e). However, this interpretation suffers from the same flaws as the Court of Appeals decision in *Hash*, discussed above. In sum, it ignores the fact that CR 56(e) incorporates the evidence rules, including ER 705, which permits experts to testify in conclusory form without prior disclosure of the underlying facts or data; it isolates the "specific facts" language from its context and divorces it from the concept of materiality; and it has the effect of excluding evidence on summary judgment that would be admissible and sufficient to support a verdict at trial, creating the potential for violation of the constitutional right to trial by jury. For all of these reasons, *Guile* is incorrectly decided and has harmful effects and should be overruled.[7]

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[7] Citations of *Guile* by the Supreme Court have not elevated its specificity requirement to the level of binding precedent. The Supreme Court has cited *Guile* with approval on five occasions. *See Green v. A.P.C.*, 136 Wn.2d 87, 960 P.2d 912 (1998); *Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 144 P.3d 276 (2006); *Indoor Billboard/Wash v. Integra*, 162 Wn.2d 59, 170 P.3d 10 (2007); *Stewart-Graves v. Vaughn*, 162 Wn.2d 115, 170 P.3d 1151 (2007); *SentinelC3, Inc., v. Hunt*, 181 Wn.2d 127, 331 P.3d 40 (2014). In none of these cases does the Court assess the correctness of the *Guile* requirement that an expert affidavit must set forth the underlying facts supporting the opinion, nor does any of these cases discuss the interplay between CR 56(e) and ER 705. While *Green* cites *Guile* and its holding, this reference is seemingly dicta because it is not relevant

Nonetheless, even if *Guile* is good law, the expert testimony submitted by Sweeney regarding causation should be deemed to satisfy its requirements.[8] As attested by the experts, Noble "reduced" and "manipulated" Sweeney's shoulder on three separate occasions, until he heard or felt a pop. The imaging of the shoulder before the attempted reductions/manipulations showed that it was dislocated with a single fracture, and the imaging afterward showed that it was still dislocated, but the top of the arm bone (humeral head) was now completely broken off and "severely comminuted" (i.e., pulverized), and the shoulder joint and humeral head "were completely fractured and destroyed." CP 280-81. The sequence of events, the nature of the manipulation, and the before-and-after

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to the Court's criticism of an expert declaration that the Court found unhelpful because the opinion was lacking foundation. *See* 136 Wn.2d at 98 n.5. Both *Shooting Park Ass'n*, 158 Wn.2d at 350-51, and *Indoor Billboard/Wash.*, 162 Wn.2d at 70, only cite *Guile* in describing the two different methods by which a moving party may meets its initial burden of proof under CR 56. In *Stewart-Graves*, the Court cites the challenged holding in *Guile*, but again this appears to be dicta as it is unrelated to the Court's rejection of expert medical testimony because it violated public policy. See 162 Wn.2d at 138. Lastly, *SentinelC3* only cites *Guile* as recognizing that the non-moving party in a summary judgment proceeding may move for a continuance under CR 56(f). See 181 Wn.2d at 137 n.1. None of this Supreme Court precedent citing *Guile* should render this opinion subject to an incorrect and harmful analysis under the doctrine of stare decisis. *See In re Stranger Creek*, *supra*, 77 Wn.2d at 653. This Court recently declined an invitation to overrule *Guile*, but the issue is currently on review before the Supreme Court. *See Keck*, 181 Wn. App., at 91 & nn.9-10.

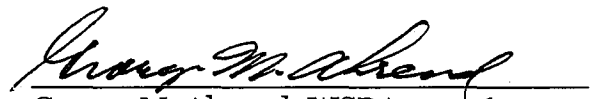
[8] The degree of specificity required is not quantified and the nature of the requirement remains unclear. *Cf. Keck*, 181 Wn. App. at 92-93 (summarizing testimony found to be sufficient under *Guile*).

imaging provide more than enough facts to support the conclusion that Noble caused Sweeney to be injured.

III. CONCLUSION

Summary judgment in favor of Noble should be reversed, the summary judgment order should be vacated, and this case should be remanded for trial.

Respectfully submitted this 29th day of January, 2015.



George M. Ahrend, WSBA #25160
Co-Attorneys for Appellants
Ahrend Law Firm PLLC
16 Basin St. SW
Ephrata, WA 98823
(509) 764-9000

CERTIFICATE OF SERVICE

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

On January 29, 2015, I served the document to which this is annexed by email and First Class Mail, postage prepaid, as follows:

Robert F. Sestero, Jr., Christopher J. Kerley & Mark W. Louvier
Evans, Craven & Lackie, P.S.
818 W. Riverside, Ste. 250
Spokane, WA 99201-0910
rsestero@ecl-law.com
ckerley@wcl-law.com
mlouvier@ecl-law.com

Ryan M. Beaudoin, Robin L. Haynes & Matthew W. Daley
Witherspoon Kelley, P.S.
422 W. Riverside Ave., Ste. 1100
Spokane, WA 99201-0300
rmb@witherspoonkelley.com
mwd@witherspoonkelley.com
rlh@witherspoonkelley.com

and upon Appellants' co-counsel, Kyle Olive and William A. Gilbert, via email pursuant to prior agreement for electronic service, as follows:

Kyle C. Olive at kyle@olivebearb.com; erin@olivebearb.com
William A. Gilbert at bill@olivebearb.com; suzette@olivebearb.com

Signed on January 29, 2015 at Ephrata, Washington.

Shari M. Canet

Shari M. Canet, Paralegal

APPENDIX

West's Revised Code of Washington Annotated
Part I Rules of General Application
Washington Rules of Evidence (ER)
Title VII. Opinions and Expert Testimony

Washington Rules of Evidence, ER 702

RULE 702. TESTIMONY BY EXPERTS

Currentness

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Notes of Decisions (307)

ER 702, WA R REV ER 702
Current with amendments received through 11/1/14

End of Document

West's Revised Code of Washington Annotated
Part I Rules of General Application
Washington Rules of Evidence (ER)
Title VII. Opinions and Expert Testimony

Washington Rules of Evidence, ER 703

RULE 703. BASES OF OPINION TESTIMONY BY EXPERTS

Currentness

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Credits

[Amended effective September 1, 1992.]

Notes of Decisions (85)

ER 703, WA R REV ER 703
Current with amendments received through 11/1/14

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West's Revised Code of Washington Annotated
Part I Rules of General Application
Washington Rules of Evidence (ER)
Title VII. Opinions and Expert Testimony

Washington Rules of Evidence, ER 704

RULE 704. OPINION ON ULTIMATE ISSUE

Currentness

Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Notes of Decisions (42)

ER 704, WA R REV ER 704
Current with amendments received through 11/1/14

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West's Revised Code of Washington Annotated
Part I Rules of General Application
Washington Rules of Evidence (ER)
Title VII. Opinions and Expert Testimony

Washington Rules of Evidence, ER 705

RULE 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

Currentness

The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross examination.

Credits

[Amended effective September 1, 1992.]

Notes of Decisions (22)

ER 705, WA R REV ER 705
Current with amendments received through 11/1/14

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