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NO. 79106-6

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SIOBHAN RICCI,

Plaintiff/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,

Defendants/Respondents.

RESPONDENTS' ANSWER TO BRIEF OF AMICUS CURIAE

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I. INTRODUCTION

Washington State Trial Lawyers Foundation (“Amicus”) argues in its *amicus curiae* brief that adhering to the long-established rule that evidentiary rulings are reviewed under the abuse of discretion standard violates the constitutional right to a jury trial. This argument is meritless because a judge, not a jury, *always* decides evidentiary rulings whether the decision is made on summary judgment or at trial.

Amicus also argues that different evidentiary standards should apply at summary judgment than those that apply at trial in spite of the clear mandate of CR 56(e) that evidence presented on summary judgment must be evidence that would be admissible at trial. Adopting Amicus’ position would negate the trial court’s ability to dispose of meritless claims not supported by admissible evidence, and further burden our already overcrowded courts.

Finally, Amicus seeks to undermine the trial judge’s authority to control courtroom proceedings, arguing it is reversible error for a trial judge to enforce the time limits set out in the Civil Rules. Washington trial judges have always had the power and responsibility of managing proceedings in their courtrooms. Requiring litigants to comply with the court rules established by the Supreme Court should not be a basis for reversal. Adopting the position advocated by Amicus would prevent the

trial judge from attempting to enforce any time limits, rules, or scheduling orders because it would be reversible error to exclude any evidence if that evidence could potentially be of assistance to the non-moving party. Contrary to Amicus' argument, this is not the "spirit" of the court rules, nor is this approach favored by public policy. Where, as here, there was no motion for a CR 56(f) continuance, and no reason proffered for failing to comply with the time limits set out in CR 56, the late filing was properly excluded. To hold otherwise would be to eradicate scheduling orders and filing deadlines to the detriment of both individual litigants and the courts. This Court should affirm the Court of Appeals and the trial court, and decline the invitation to create a different standard of review for evidentiary rulings made at summary judgment than the standard applicable to all other evidentiary rulings.

II. LEGAL ANALYSIS

A. The same standard of review should apply to evidentiary rulings whether made on summary judgment or at trial

In its discretion, the trial court accepted a late-filed declaration from plaintiff Ricci authenticating the original submission of Dr. Greenberg's report filed in opposition to defendants' summary judgment motion, but refused to consider a deposition filed two days before the hearing. There was insufficient foundation in the original submission to

establish that Dr. Greenberg, a forensic psychologist who referenced statutes and regulations in his report that apply to psychologists but not to counselors, was familiar with and was applying the standard of care for a licensed mental health counselor. Because CR 56 requires that evidence presented on summary judgment be evidence that would be admissible at trial, the trial court granted Gary's motion to strike Dr. Greenberg's report. Whether reviewed under the *de novo* or the abuse of discretion standard, the trial court ruling striking the Greenberg report should be affirmed because the court correctly interpreted and applied the law.

However, the appropriate standard of review for the trial court's decision limiting Dr. Greenberg's testimony is the abuse of discretion standard. The abuse of discretion standard is indisputably applied in appellate review of all evidentiary rulings made during trial. See, e.g., *Havens v. C&D Plastics, Inc.*, 124 Wn. 2d 158, 168, 876 P.2d 435 (1994); *Brouillet v. Cowles Publ'g Co.*, 114 Wn. 2d 788, 801, 791 P.2d 526 (1990); *Orion Corp. v. State*, 103 Wn. 2d 441, 462, 693 P.2d 1369 (1985) (Whether expert sufficiently qualified is within the trial court's discretion.). As explained in the law review article relied on by Amicus:

Courts ignore the fact/law distinction in determining the standard of review for procedural and evidentiary questions....reviewing courts have not attempted to characterize such decisions as law or fact. **Instead, they classify them simply as matters of discretion.**

Kelly Kunsch, Standard of Review (State and Federal): A Primer, 18 Seattle Univ. L. R. 11, 24 (1994) (emphasis added).

If Dr. Greenberg's testimony had been excluded for lack of foundation at trial, the standard of review on appeal would be abuse of discretion. There is no principled basis for applying a different standard of review simply because the testimony was excluded for lack of foundation in a summary judgment proceeding that was heard less than three weeks before trial. If different standards of review are applied to the same evidentiary ruling depending on whether the ruling is made in the context of a summary judgment motion or at trial, anomalous results could occur. The Court of Appeals could reverse a trial court's order excluding testimonial evidence for lack of foundation under the *de novo* standard and remand for trial. When the exact same testimony was proffered at trial, the trial judge could again exclude the testimony for lack of foundation, which could be affirmed on appeal under the abuse of discretion standard! The admissibility of evidence has always been within the sound discretion of the trial court, and a trial court's evidentiary rulings should be evaluated under a consistent standard--abuse of discretion--whether the ruling is made on summary judgment or at trial.

B. The abuse of discretion standard for evidentiary rulings does not violate the constitutional right to trial by jury

The constitutional right of trial by jury is not affected by applying the abuse of discretion standard to evidentiary rulings made on summary judgment. Because the admissibility of evidence is never decided by a jury, applying the abuse of discretion standard on appeal from a summary judgment motion does not impact the right to a jury trial as claimed by Amicus. Whether it is on summary judgment or at trial, it is the role of the court to determine whether evidence is admissible before it is ever presented to a jury. Regardless of the standard of review applied, the admissibility of evidence is never a jury question.

The cases cited by Amicus do not support its argument that an abuse of discretion standard for evidentiary rulings violates the constitutional right to a jury trial. The court in *Preston v. Duncan*, 55 Wn.2d 678, 349 P.2d 605 (1960), does not even discuss the constitutional right to a jury trial. Similarly, there is no discussion of the appropriate standard of review, nor were there any questions about evidentiary rulings. The *Preston* court simply held that plaintiff's allegations in the complaint were sufficient to avoid summary judgment because defendant failed to establish the absence of an issue of fact on an essential element of the claim.

Cofer v. Pierce County, 8 Wn. App. 258, 505 P.2d 476 (1973), the only other case cited by Amicus in support of its jury trial argument, similarly does not hold that the abuse of discretion standard for evidentiary rulings violates the right to a jury trial. The *Cofer* court, like the *Preston* court, was not considering which standard of review applies to evidentiary rulings on summary judgment or any other question at issue in the instant appeal. The *Cofer* court held it was an abuse of discretion to deny a CR 56(f) motion to continue a summary judgment hearing when the motion was properly supported by counsel's affidavit explaining why essential testimony from a material witness was not available in time for the hearing. *Cofer*, 8 Wn. App. at 262-3. Of course, no such motion or affidavit was filed in this case, making *Cofer* inapplicable.

The trial court rules on the admissibility of evidence, including the qualifications of an expert to testify, in a jury trial. Typically, such rulings concerning an expert's qualifications to testify at trial are made in the context of a pretrial motion in *limine*.¹ If the court determines that proffered evidence is inadmissible, it is never presented to the jury. That determination is reviewed under the abuse of discretion standard. Similarly, if the court determines that proffered evidence is inadmissible

¹ In accordance with the position Amicus urges this Court to adopt, the trial court's April 25, 2005 decision to strike Dr. Greenberg's testimony should be reviewed *de novo*; yet the same decision by the same trial judge two weeks later in a motion *in limine* on the first day of trial, May 9, 2005, would be given broad discretion.

on summary judgment, the evidence is not considered in deciding the motion. That decision, like all evidentiary rulings, should be reviewed under the same abuse of discretion standard.

CR 56 requires that all evidence submitted in support of a motion for summary judgment be evidence that would be admissible at trial. *Barrie v. Hosts of Am.*, 94 Wn.2d 640, 618 P.2d 96 (1980) (supporting and opposing affidavits shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence.”) The right to a trial by jury is not a right to a trial absent admissible evidence. There is no right to a jury trial on meritless or unsubstantiated claims. Applying the same standard of review for evidentiary rulings on summary judgment and at trial avoids conflicting results, promotes judicial economy, and fulfills the purpose underlying summary judgment: eliminating claims lacking a factual basis.

C. **Prior Supreme Court cases do not require *de novo* review of evidentiary rulings**

Amicus claims that *Folsom v. Burger King*, 135 Wn.2d 658, 958 P.2d 301 (1998) and *Davis v. Baugh Indus. Contractors*, 159 Wn.2d 413, 150 P.3d 545 (2007) have established *de novo* review as the appropriate standard of review for evidentiary rulings made in the course of ruling on a summary judgment motion. Neither of these cases indicates an intent

to overrule long-standing precedent to the contrary, neither sets forth a rationale for using different standards of review for evidentiary rulings on summary judgment, and it is not necessary to read the cases as so holding.

The *Folsom* court affirmed the trial court's exclusion of portions of an expert's declaration after reviewing the material excluded by the trial court, stating:

An appellate court would not be properly accomplishing its charge if the appellate court did not examine all the evidence presented to the trial court, including evidence that had been redacted. The *de novo* standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion.

We examined the expert's affidavits regarding the ability of police to respond to a telephone call to the sheriff's office and regarding the duties of the defendants to meet certain security standards. However, we agree with the trial court and affirm the decision to exclude portions of the expert testimony.

Folsom, 135 Wn.2d at 663. The *Folsom* court appeared to be using the term "de novo review" to indicate that it would review all of the materials presented to the trial court, including those which the trial court had stricken. The dispute in *Folsom* did not appear to be whether a discretionary standard should be applied to the review, but whether the redacted portions of the declaration should be reviewed at all. The court emphasized that review of all materials was necessary in order to "engage

in the same inquiry as the trial court.” *Id.* The *Folsom* court did not indicate or even imply that it was intending to overrule long-standing case law which held that a discretionary standard of review applies to a trial court’s evidentiary rulings.

Respondent Gary agrees that the reviewing court needs to review all of the materials submitted to the trial court in order to determine whether the excluded materials were properly excluded, even under the abuse of discretion standard. But reviewing all of the materials presented to the trial court does preclude application of the abuse of discretion standard that has always applied to evidentiary rulings.

Prior Supreme Court opinions specifically stated that the abuse of discretion standard applies to review of evidentiary rulings made in the context of deciding a summary judgment motion. See, e.g. *King County Fire Prot. Dist. No. 16 v. Hous. Auth.*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994) (“A ruling on a motion to strike is discretionary with the trial court.”); *McKee v. Am. Home Prods. Corp.*, 113 Wn.2d 701, 706, 782 P.2d 1045 (1989) (“The qualifications of an expert are to be judged by the trial court, and its determination will not be set aside in the absence of a showing of abuse of discretion.”); *Bernal v. Am. Honda Motor Co.*, 87 Wn.2d 406, 413, 553 P.2d 107 (1976) (trial court determines expert’s qualifications to testify in the context of ruling on a summary judgment

motion, and “its determination will not be set aside in the absence of a showing of abuse of discretion.”) The *Folsom* court did not express any intent to overrule this consistent line of Supreme Court decisions or the dozens of Court of Appeal decisions that followed them; nor did the *Folsom* court affirmatively state that the abuse of discretion standard no longer applied.

In addition, the Supreme Court has applied the abuse of discretion standard of review to evidentiary rulings made in the context of ruling on a motion for summary judgment since the *Folsom* decision. See e.g., *W.R. Grace & Co. v. Dep't of Revenue*, 137 Wn.2d 580, 973 P.2d 1011 (1999) (the admissibility of an affidavit submitted on summary judgment was “within the discretion of the trial court.”). As set forth in Respondents’ Brief, a myriad of Courts of Appeal have continued to follow this same long-standing principle that all evidentiary rulings are reviewed on an abuse of discretion standard, even when those evidentiary rulings are made in the context of ruling on a motion for summary judgment. And this Court has routinely denied review of these appellate decisions that have applied an abuse of discretion standard. See e.g., *Am. States Ins. Co. v. Rancho San Marcos Props., L.L.C.*, 123 Wn. App. 205, 214, 97 P.3d 775 (2004), *review denied* 154 Wn.2d 1008 (2005) (“We review the trial court’s ruling on evidentiary matters before it on summary judgment for

abuse of discretion.”); *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 744, 87 P.3d 774 (2004), *review denied*, 153 Wn.2d 1016 (2005). (In the context of reviewing a summary judgment, “[w]e will not overturn evidentiary rulings unless the trial court has manifestly abused its discretion.”); *Tortes v. King County*, 119 Wn.App. 1, 12, 84 P.3d 252 (2003) *review denied*, 151 Wn.2d. 1010 (2004); *Colwell v. Holy Family Hospital*, 104 Wn. App. 606, 15 P.3d 210 (2001), *review denied* 144 Wn. 2d 1016 (2001); *Stenger v. State*, 104 Wn.App. 252, 259, 11 P.3d 883 (2000), *review denied*, 144 Wn.2d 1006 (2001).

Unfortunately, the use of the phrase “de novo review” by the *Folsom* court, even though the Court appeared to be saying only that all material presented to the trial court should be reviewed, was repeated in the recent *Davis* decision. The *Davis* court did not discuss the abuse of discretion standard or flesh out the single sentence in *Folsom* that it merely repeated: “Trial court rulings in conjunction with a motion for summary judgment are reviewed de novo” in prelude to rendering its decision. *Davis* 159 Wn.2d at 416, citing *Folsom, supra*. As in *Folsom*, there was no discussion of the long-standing precedent that all evidentiary rulings are reviewed for an abuse of discretion, and there was no expressed intent to overrule prior Supreme Court authority and the many dozens of Court of Appeals decisions that have followed this precedent.

Amicus urges this court to “disapprove” the numerous cases applying the abuse of discretion standard and adopt a two-tier approach to review of evidentiary rulings, stating that “[c]onsidering all evidence presented to the superior court is wholly consistent with the general *de novo* standard applied on appeal.” Amicus Brief at 13. However, Amicus appears to have fallen prey to the misunderstanding that originated from the *Folsom* court’s unfortunate choice of words. For whether the review is *de novo* or abuse of discretion, Respondents agree that the reviewing court should review all of the evidence presented to the trial court. The abuse of discretion standard does not mean that the reviewing court does not look at the excluded material, or that the trial court has carte blanche to ignore admissible evidence. The abuse standard simply recognizes that the trial court is familiar with the litigants and issues in the case, makes hundreds of evidentiary rulings both pretrial and at trial, and should be granted broad discretion to decide evidentiary issues rather than tasking an appellate court with *de novo* review of each evidentiary ruling. The appellate court still reviews evidentiary decisions for abuse of discretion and rulings that clearly do not comply with the law still will be reversed. Prior appellate law of this state does not mandate a new standard of review. On the contrary, adopting a *de novo* standard of review for evidentiary rulings would be an abandonment of decades of *stare decisis*.

D. The trial court has, and needs, broad authority to control the procedural requirements that must be followed in its courtroom, and this authority will be severely impaired if the trial court is not allowed to enforce the Civil Rules of Procedure

It is a longstanding principle that the trial court has the inherent power to manage proceedings in the courtroom. *Blanchard v. Golden Age Brewing Co.*, 188 Wash. 396, 63 P.2d 397 (1936). “A trial court has the authority to administer its affairs to achieve the orderly and expeditious disposition of its docket.” *Woodhead v. Discount Waterbeds, Inc.*, 78 Wn. App. 125, 129, 896 P.2d 66 (1995). See also, *Winston v. Dep't of Corr.*, 130 Wn. App. 61 (2005); *In re Sealed Affidavit(s) to Search Warrants*, 600 F.2d 1256 (9th Cir: 1979); *Cowles Pub. Co. v. Murphy*, 96 Wn.2d 584 (1981). Whether the trial court has abused that power is reviewed under the abuse of discretion standard. *Winston, supra*.

Amicus refers to CR 1, which provides that the rules “shall be construed and administered to secure the just, speedy, and inexpensive determination of every action,” in arguing that it is somehow unfair to require a party opposing summary judgment to follow the rules. To the contrary: summary judgment epitomizes the “just, speedy and inexpensive determination” of an action and is specifically designed to avoid unnecessary trials. . Applying the Civil Rules as written is the best way to achieve the goals of CR 1. Allowing one party to circumvent the

rules by filing inadmissible evidence and ignoring the deadlines is contrary to the goal of speedy and just resolution of lawsuits and is prejudicial to the opposing party who has followed the rules and often has no opportunity to reply to late-filed materials.

CR 56 sets out the requirements for summary judgment motions, including precisely when supporting and opposing documents are to be filed. The rule provides in part that:

The adverse party may file and serve opposing affidavits, memoranda of law or other documentation **not later than 11 calendar days before the hearing**. The moving party may file and serve any rebuttal documents not later than 5 calendar days before the hearing...

CR 56(c) (emphasis added). The rule goes on to provide that:

Supporting and opposing affidavits **shall** be made on personal knowledge, **shall** set forth such facts as would be admissible in evidence, and **shall** show affirmatively that the affiant is competent to testify to the matters stated therein.

CR 56(e) (emphasis added). Defendant complied with these requirements in moving for summary judgment. Plaintiff did not do so. In spite of the mandatory language “shall”² in CR 56(e), plaintiff filed a declaration that did not “show affirmatively that the affiant is competent to testify...” The declaration lacked sufficient foundation to be admissible. Plaintiff tried to

² “[S]hall’ clearly is unambiguous and presumptively creates an imperative obligation” *Clark v. Horse Racing Comm’n*, 106 Wn.2d 84, 91, 720 P.2d 831 (1986); *Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wn.2d 439, 446, 842 P.2d 956 (1993).

fix the problem by filing a belated declaration and her expert's deposition two days before the scheduled hearing date. There was no motion for a CR 56(f) continuance and no showing that the expert's testimony was previously unavailable "for good cause" as required for a CR 56(f) continuance. The trial judge followed CR 56, promulgated by this Court, and struck the deposition that was filed two days before the summary judgment hearing.

Amicus now urges this Court to adopt a rule that would *require* the trial court to disregard CR 56--and any other scheduling rules--and consider untimely evidence even when no explanation is offered for the failure to comply with the timelines set out in the applicable rule. Amicus contends that untimely evidence should always be considered if it could change the result of the motion. Amicus Brief at 17-18.

Amicus' argument would undermine the trial court's authority to control the litigation within its courtroom. If this Court finds that it was reversible error to enforce the mandatory requirements of CR 56, then this Court is thereby announcing that trial courts may not require adherence to the Civil Rules and no longer have the inherent authority to control the conduct of litigation. Would the trial court be permitted to strike a motion if counsel failed to appear for argument? To enter a default judgment when an answer was not timely filed? Would the trial judge be compelled

to accept briefs and evidence filed after the hearing date or risk reversal? All of this is unfair to the party who complies with the rules and acts in a timely manner, and is particularly unfair to the trial court who has the fortitude to enforce the rules. Allowing the trial court to enforce the rules as written without fear of reversal for doing so treats all litigants equally. Nothing in the Constitution or the Court Rules requires that the dilatory be rewarded for flagrant disregard of the rules. Reviewing the trial court's decision under the abuse of discretion standard leaves the trial court with the authority to relax the rules when the circumstances justify doing so, but also the authority to require that attorneys and parties appearing before the court comply with the rules. This discretion benefits the judicial system by minimizing unnecessary continuances, multiple appearances on motions, and other time consuming practices created by failure to comply with the rules.

Amicus states that "vagaries in result can only be avoided by *strict* compliance with the rules," but contends that requiring parties to strictly follow the rules "is not the modern day sensibility that generally governs civil practice." Amicus Brief at 17. There is no evidence to support Amicus' suggestion that it is the "modern day sensibility" for litigants to ignore the Civil Rules and disregard deadlines with impunity. And if this were the "modern" state of practice, this would not be a salutary state of

affairs or a practice to be encouraged by this Court. Trial judges should not be required to concede to this type of “modern day sensibility,” but rather should retain the inherent power to regulate courtroom proceedings. This inherent power would be seriously undermined if this Court were to hold that enforcing the Civil Rules promulgated by the Supreme Court is reversible error. Opposing parties are prejudiced, and trial judges cannot be properly prepared for proceedings, when litigants ignore deadlines and file documents late.³ The Court of Appeals may have characterized the trial court ruling here as “harsh,” but it is harsh only for those who believe themselves entitled to disregard the rules without good cause.

Further, enforcing CR 56 as written is not unduly severe because there is a mechanism for relief when appropriate: a CR 56(f) motion for a continuance to obtain necessary evidence. CR 56 is not a draconian trap for the unwary. The deadlines and requirements are clearly spelled out and are, or should be, known to all attorneys.⁴ In the instances where there is a genuine need for a continuance, that relief is available. It is not necessary to eliminate the deadlines in the rule, or to ignore the

³ Here, plaintiff filed an expert’s deposition transcript just two days before the hearing.

⁴ The argument by Amicus that CR 56 deadlines and requirements should not be enforced because the “non-compliance that dooms the claim is likely the result of a lawyer’s mistake or good faith failure to appreciate the shortcomings of an otherwise timely submission...” (Amicus Brief at 17-18) is not a reason to disregard the requirements of CR 56. When a lawyer’s failure to follow the rules leads to dismissal of a meritorious claim, there is a remedy for the client in a legal malpractice action. Cases are not allowed to proceed in spite of failure to file by the statute of limitations, for example, simply to protect the attorney.

requirement of admissible testimony, to avoid unfairly penalizing a litigant. The moving party has interests and rights at stake as well as the opposing party. A level playing field is achieved only by enforcing the rules equally on both sides of the motion. Here, for example, plaintiff filed supplemental materials two days before the hearing, nine days after the deadline, leaving defendant no chance to meaningful reply and the trial court insufficient opportunity to read an entire deposition transcript. A trial court has discretion to accept a late-filed pleading. But *requiring* a trial court to consider such untimely filings is unfair to the trial court and the party who complied with the Civil Rules, rewards the dilatory by limiting the opposing party's opportunity for rebuttal, and strips the trial judge of the only effective means of enforcing time deadlines critical to the efficient management of the courtroom.

III. CONCLUSION

Stare decisis mitigates against wholesale reversal of the hundreds of cases applying the abuse standard for evidentiary rulings. Amicus is correct, however, that this case presents an opportunity to clarify *Folsom* and *Davis*; to make clear that the abuse of discretion standard applies to all evidentiary rulings. The trial judge is the gatekeeper tasked with assuring the reliability and admissibility of all evidence. Amicus' argument that it is necessary to apply *de novo* review because "there is often a fine line

between considerations that support the existence of a proper foundation for the opinion, and those that bear on the weight to be given the opinion by the trier of fact” (Amicus Brief at 13) is not a reason to change the standard of review. The trial court makes that same decision in pretrial motions *in limine*, yet Amicus does not claim that the *de novo* standard applies to that determination. If the trial court “crosses the line” and excludes evidence that should be considered, that error can be rectified under the abuse standard of review.

Amicus claims “strong policy considerations” require adopting a *de novo* review standard. To the contrary: policy considerations of judicial economy, fair treatment to litigants, and *stare decisis* requires that the abuse of discretion standard for the review of all evidentiary rulings be retained. The trial court should be affirmed.

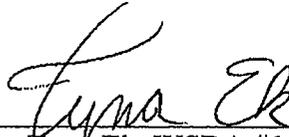
Similarly, the trial court must be given broad discretion to enforce the Civil Rules in its courtroom. Requiring a trial court to consider all materials filed late, without excuse, would severely impair the inherent power of the trial court to regulate proceedings. Such a rule would likely encourage more litigants to disregard the court’s rules in the future, for litigants would know that the trial court was powerless to disregard their materials no matter how inexcusably late they were filed. Is this the “modern day sensibility” that this Court desires to foster? The trial court

needs the power to enforce the procedural rules that control day-to-day litigation practices. The trial court here should be affirmed in all respects.

Respectfully submitted, this 08th day of October, 2007.

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FILED AS ATTACHMENT
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