

No. 79106-6

THE SUPREME COURT
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 *AMICUS CURIAE* ON BEHALF OF WASHINGTON
DEFENSE TRIAL LAWYERS**

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I. STATEMENT OF THE IDENTITY, INTEREST AND SOURCE OF AUTHORITY OF AMICUS CURIAE

The Washington Defense Trial Lawyers (“WDTL”), is an organization of trial lawyers in the State of Washington who have appeared *pro bono* before this Court as *amicus curiae* on a number of occasions. The organization is devoted, among other things, to the advancement and protection of the interests of defendants in civil litigation in Washington.

WDTL has an interest in this case for two reasons.

First, the outcome of this appeal may have a significant impact on summary judgments brought under Washington Civil Rule 56. Washington, like virtually all other American jurisdictions, follows the basic rule that a trial court’s decision to admit or exclude evidence is reviewed only for an abuse of discretion. The appellant in this case has argued that evidentiary rulings made in connection with a motion for summary judgment should be subject to the heightened scrutiny of *de novo* review. WDTL strongly opposes the new rule the appellant has asked the Court to adopt, because that rule would limit our trial courts’ ability to use CR 56 for its basic purpose: to avoid an unnecessary trial when the nonmoving party has failed to submit any *admissible* evidence to support an essential element of her claim or defense. WDTL asks the Court to reaffirm the basic rule that the appellate court will apply an abuse of discretion standard of review and will not substitute its own judgment for the trial court’s own judgment on the

admissibility of evidence, including judgments on admissibility the trial court makes in connection with a motion for summary judgment.

Second, the appellant has argued that a clinical psychologist with a Ph.D., without demonstrating any familiarity with the education, practices and standard of care of a licensed mental health counselor (“LHMC”) who is a malpractice defendant, should be permitted to provide expert testimony on the standard of care to defeat summary judgment. WDTL strongly opposes the appellant’s effort to undermine this basic rule of witness competence: a practitioner of one school of medicine is incompetent to testify as an expert in a malpractice action against a practitioner of another school, subject to narrow exceptions that establish a proper foundation for an opinion that is grounded in the standard of care applicable to the defendant.

The Court has granted WDTL leave to file this *amicus* brief under RAP 10.6 by letter ruling dated September 20, 2007.

II. FACTS RELEVANT TO ISSUES ADDRESSED IN THIS AMICUS BRIEF

A. The trial court motions for summary judgment, to strike and for reconsideration

Steven Gary and Alma Stanford are licensed mental health counselors. Siobhan Ricci claims that Mr. Gary and Ms. Stanford violated applicable confidentiality laws and were negligent in providing care for her mental health disorder. The defendants moved for summary judgment on the grounds that (1) Ms. Ricci could not present admissible evidence to show

they breached the standard of care applicable to mental health professionals; and (2) their communications concerning Ms. Ricci's case did not violate Washington confidentiality laws and were, instead, authorized under RCW 70.02.050 in connection with the transfer of Ms. Ricci's case from Mr. Gary to Ms. Stanford.

In opposition to the motion, Ms. Ricci relied on the report of Dr. Stuart Greenberg and excerpts from the deposition testimony of Judy Roberts. The report did not comply with the requirements of CR 56(e) because (1) it was not signed or sworn; and (2) it did not affirmatively show that Dr. Greenberg, a forensic psychologist with a Ph.D. in psychology, was familiar with or had based his opinions on the standard of care applicable to a licensed mental health counselor.

When the defendants moved to strike the Greenberg report, Ms. Ricci submitted a declaration from Dr. Greenberg to authenticate the report. The trial court accepted that belated declaration, but struck the Greenberg report for lack of foundation, finding that Dr. Greenberg failed to show that he had expertise regarding the training or standard of care applicable to licensed mental health counselors. CP 453-454. The trial court also found Ms. Roberts' testimony "irrelevant to the issues of the standard of care." CP 454.

Two days before the summary judgment hearing, Ms. Ricci also submitted the transcribed deposition testimony of Dr. Greenberg. The trial court declined to consider the Greenberg deposition testimony as untimely

and granted summary judgment for both defendants, there being no admissible expert opinion testimony to support Ms. Ricci's claims. CP 561, 567.

Ms. Ricci moved for reconsideration, asserting that Dr. Greenberg's deposition testimony was "new evidence" that she could not have timely submitted in response to the original summary judgment motion; or that the court should have considered the testimony because it was timely filed in response to the defendants' motion to strike. CP 455-462. In opposition, the defendants argued that the Greenberg deposition testimony was not timely submitted and, even if considered on its merits, the testimony failed to support his conclusion that the defendants had breached the applicable standard of care. CP 472-485. In fact, Dr. Greenberg readily admitted he was unfamiliar with the defendants' training and with the standards governing the day to day practice of licensed mental health counselors. CP 380.

The trial court declined to consider the Greenberg testimony, opining that Ms. Ricci had been obligated to submit timely and admissible testimony from her own expert in response to the defendants' motions for summary judgment. Having failed to do so, Ms. Ricci was not entitled to supplement the record later, either in response to a motion to strike or a motion for reconsideration. CP 565.

B. Division I's decision affirming dismissal of Ms. Ricci's claims under CR 56.

Ms. Ricci filed a timely notice of appeal.

In its unreported decision to affirm, Division I held the trial court properly refused to consider the late-filed deposition testimony of Dr. Greenberg, noting that a trial court may properly exercise its discretion to disregard late-filed materials when, as here, there is no excuse for failure to address the issues in timely opposition to a motion for summary judgment. *Ricci v. Gary*, 134 Wn. App. 1002, 2006 WL 1980320 *4 (Wash. App. Div. 1), citing *McBride v. Walla Walla County*, 95 Wn. App. 33, 37, 975 P.2d 1029, 990 P.2d 967 (1999) and *Brown v. Park Place Homes Realty, Inc.*, 48 Wn. App. 554, 559–560, 739 P.2d 1188 (1987).

Division I also held that the trial court properly granted the motion to strike Dr. Greenberg's report. The Court applied the abuse of discretion standard of review to the trial court's evidentiary ruling, citing *Cotwell v. Holy Family Hosp.*, 104 Wn. App. 606, 613, 15 P.3d 210 (2001). The Court of Appeals also applied the "general rule" 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." *Ricci*, 2006 WL 1980320 at *6, citing *Eng v. Klein*, 127 Wn. App. 171, 176, 110 P.3d 844 (2005). Division I agreed that Dr. Greenberg's report failed to show he had any familiarity with the standards applicable to LMHCs or that the standards applicable to Dr. Greenberg as a clinical psychologist are or should also apply to an LHMC.

Thus, Division I concluded that the “general rule” applied to bar Dr. Greenberg’s opinion testimony because it lacked a proper foundation. *Ricci*, 2006 WL 1980320 at *6–7.

Finally, Division I noted that Ms. Ricci had failed to assign error to the denial of her motion for reconsideration, but addressed the issue on the merits anyway. The Court noted that only newly discovered evidence may be raised in a motion for reconsideration. The testimony of Dr. Greenberg was not “newly discovered,” because Ms. Ricci had ready access to her own expert and ample opportunity to present admissible expert testimony in timely opposition to the defendants’ motions for summary judgment. Thus, Division I concluded the trial court did not abuse its discretion by denying the motion for reconsideration. *Ricci*, 2006 WL 1980320 at *8.

III. ISSUES ADDRESSED BY AMICUS CURIAE WDTL

1. Should this Court reaffirm the long-standing rule that a trial court’s evidentiary rulings, including its decision to strike evidence that a party fails to timely submit for consideration and its decision to strike evidence that lacks a proper foundation, as required under CR 56(e), are reviewable only for an abuse of discretion?

2. Should this Court affirm the trial court's exclusion of opinion testimony on the standard of care, when the plaintiff failed to establish a proper foundation for the introduction of such testimony?

IV. ARGUMENT AND AUTHORITIES

- A. Division I properly used the abuse of discretion standard to review the trial court's decisions to admit or exclude evidence offered on a motion for summary judgment.
1. Washington authorities overwhelmingly support the abuse of discretion standard of review of trial court evidentiary rulings made in the context of a summary judgment motion.

The function of a summary judgment motion is to determine whether there is a genuine issue of material fact that must be resolved in a full and formal trial of the case. *Chase v. Daily Record, Inc.*, 83 Wn.2d 37, 42, 515 P.2d 154 (1973). “Summary judgment is a procedure for testing the existence of a party’s evidence.” *Cofer v. County of Pierce*, 8 Wn. App. 258, 261–62, 505 P.2d 476 (1973).

Thus, to determine whether a trial is necessary and to “test the existence of a party’s evidence,” the trial court must also decide whether a party has offered *admissible* evidence to support or oppose a motion under CR 56. If the only evidence a party is able to offer would not be admissible at trial, it cannot be used to demonstrate that the case cannot be resolved on summary judgment and will instead require a trial. Indeed, this Court has explained that on summary judgment, “the emphasis is upon *facts* to which the affiant could testify from personal knowledge and which would be *admissible in evidence*” when the case is brought to trial. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 753 P.2d 517, 519 (1988). For this reason, a trial court “may not consider inadmissible evidence when ruling on

a motion for summary judgment.” *Int’l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 744, 87 P.3d 774 (2004).

It would be difficult to identify a rule more basic and well-established than this: a trial court’s evidentiary rulings are reviewed on appeal for an abuse of discretion. This is the long-standing rule in Washington and, as far as we are aware, every other American jurisdiction that applies the common law. The trial court’s decision to admit or exclude evidence is a “judgment call.” Under the abuse of discretion standard of review, the appellate court will not substitute its own judgment for that of the trial judge. An abuse of discretion occurs only when the trial court’s decision is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

This Court and all three Divisions of the Washington Court of Appeals have applied this deferential standard of review in numerous reported decisions involving summary judgments under CR 56. Just months ago, Division I applied the abuse of discretion standard to evidentiary rulings on summary judgment in *Allen v. Asbestos Corp., Ltd.*, 138 Wn. App. 564, 570, 157 P.3d 406 (2007). Division II applied the same standard in *Milligan v. Thompson*, 110 Wn. App. 628, 634, 42 P.3d 418 (2002). Division III applies the same standard. *Am. States Ins. Co., v. Rancho San Marcos Props., LLC*, 123 Wn. App. 205, 214, 97 P.3d 775 (2004).

2. *Federal and other state authorities overwhelmingly support the abuse of discretion standard for evidentiary rulings made in connection with motions for summary judgment.*

Washington's CR 56, like the rule on summary judgment in many other states, is closely patterned after Fed. R. Civ. P. 56. Washington appellate courts therefore treat authorities interpreting the virtually identical Federal summary judgment rule as "persuasive authority." *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 227, 770 P.2d 182 (1989); *Turner v. Kohler*, 54 Wn. App. 688, 693–94, 775 P.2d 474 (1989).

The United States Supreme Court has unequivocally held that evidentiary rulings made in connection with motions for summary judgment under Rule 56 are to be reviewed for an abuse of discretion—and not subjected to heightened scrutiny because such rulings may also be "outcome determinative." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141–43, 188 S.Ct. 512 (1997).

The Ninth Circuit similarly applies an abuse of discretion standard to evidentiary rulings made in the context of summary judgment motions. *Ballen v. City of Redmond*, 466 F.3d 736, 744–45 (9th Cir. 2006). That Court will only reverse the district court's decision to admit or exclude evidence on summary judgment if the decision was both "manifestly erroneous and prejudicial." *Orr v. Bank of Am.*, 285 F.3d 764, 773 (9th Cir. 2002).

The same abuse of discretion standard is consistently applied in other states in the appellate review of trial court decisions to admit or exclude evidence on summary judgment. *See, e.g.:*

McDaniel v. Inland N.W. Renal Care Group-Idaho, LLC, 144 Id. 219, 159 P.3d 856, 858–59 (Idaho 2007) (affirming dismissal of medical malpractice claim predicated on trial court’s exclusion of standard of care testimony, applying abuse of discretion standard);

Powell v. Kleinman, 151 Cal. App. 4th 112, 122, 59 Cal. Rptr. 3d 618 (Cal. Ct. App. 2007) (although review of summary judgment is *de novo*, the appellate court reviews the trial court’s final rulings on evidentiary objections by applying an abuse of discretion standard);

Barlow v. Palmer, 96 Conn. App. 88, 91, 898 A.2d 835 (Conn. App. Ct. 2006) (trial court’s exclusion of deposition testimony on motion for summary judgment is reviewed for an abuse of discretion);

Blake v. Dorado, 211 S.W.3d 429, 431–32 (Tex. App. 2006) (“We review the exclusion of summary judgment evidence for an abuse of discretion.... The fact that a trial court may decide a matter within its discretion in a different manner than we would does not demonstrate that an abuse of discretion has occurred”);

HSI North Carolina, LLC v. Div. Fire Prot. of Wilmington, N.C., 169 N.C. App. 767, 773–74, 611 S.E.2d 224 (N.C. Ct. App. 2005) (decision to admit and consider evidence offered at a summary judgment hearing is committed to the trial court’s discretion, granting summary judgment for plaintiff);

Alakayak v. British Columbia Packers, Ltd., 48 P.3d 432, 448 (Alaska 2002) (“In the course of reviewing the grant of summary judgment, we must review evidentiary decisions made by the superior court; these decisions are reviewed for an abuse of discretion”).

The law throughout the country is consistent: evidentiary rulings made in connection with a motion for summary judgment are subject to an abuse of discretion standard of review. This has been the law in Washington; and it should remain our law. This Court should affirm.

3. *A de novo standard of review for evidentiary rulings on summary judgment is inconsistent with the overwhelming weight of authority and would be bad judicial policy.*

Ms. Ricci’s argument in favor of her proposal to review evidentiary rulings on summary judgment *de novo* evidences a fundamental misunderstanding of the nature of appellate review and the significance of the standard of review on appeal. For example, in her Petition for Review at 5–7, Ricci argues that *Morton v. McFall*, 128 Wn. App. 245, 115 P.3d 1023 (2005); *Eng v. Klein*, 127 Wn. App. 171, 110 P.3d 844 (2005); and *White v. Kent Medical Ctr., Inc.*, 61 Wn. App. 163, 171, 810 P.2d 4 (1991) “implicitly apply a *de novo* standard of review.” The basis for this argument is unclear, but it appears Ricci has drawn the conclusion that review must have been *de novo* because in each case the appellate court imposed limits on the trial court’s exercise of discretion and reversed an evidentiary ruling made below.

But review for an “abuse of discretion” *does not* mean the trial court may exercise its discretion without limits or regard to legal standards. A trial court always must exercise its discretion in a reasonable manner, consistent with standards for the exercise of discretion that are defined by the appellate courts. For example, Washington courts will review a trial court ruling on a motion to vacate a default judgment for an abuse of discretion. However, that discretion must be exercised through consideration of the factors described in *White v. Holm*, 73 Wn.2d 348, 438 P.2d 581 (1968).

Review for an “abuse of discretion” *does* mean that an appellate court will not substitute its judgment for the judgment of the trial court, so long as the trial court has exercised its judgment by considering the appropriate factors.¹ The key is that under an abuse of discretion standard, the appellate court will not substitute its judgment for the judgment of the trial judge. As the Texas Supreme Court has stated, “[t]he fact that a trial court may decide a matter within its discretion in a different manner than we would does not demonstrate that an abuse of discretion has occurred.” *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 242 (Tex. 1985).

However, under a *de novo* standard of review, the appellate court steps into the shoes of the trial court and reruns the entire race. This

¹ The Idaho Supreme Court’s ruling in *McDaniel v. Inland N.W. Renal Care*, 159 P.3d at 858–59, includes a useful formulation of the abuse of discretion standard of review of evidentiary rulings on summary judgment: “(1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason.”

heightened level of scrutiny is appropriate for appellate review of questions *of law*—such as the question whether summary judgment has been properly granted or denied, *as a matter of law*, based on the admissible evidence on the record on a motion for summary judgment.

Applying *de novo* review to evidentiary rulings made in connection with a motion for summary judgment would effectively render the trial court superfluous. In every case, every determination made by a trial judge in connection with a motion for summary judgment—including those which would without question be matters of judicial discretion at trial—would simply be revisited anew on appeal as though it involved a question of law.

This approach would also lead to anomalous results. For example, Ricci has not suggested that a trial court's decision to admit or exclude evidence as untimely should be reviewed *de novo*. Thus, a trial court might decide to consider late-filed evidence, but then determine the evidence was not admissible because it lacks foundation. Under the rule Ricci proposes, this evidentiary ruling would be subject to *de novo* review. However, if the trial court had chosen to exclude the very same evidence as untimely, her decision to do so would be reviewed solely for an abuse of discretion.

Division I's decision in *Seybold v. Neu*, 105 Wn. App. 666, 678, 19 P.3d 1068 (2001) appears to be the first plain statement in Washington that *de novo* review might apply to evidentiary rulings in connection with summary judgment. The second such statement appears in *Warner v. Regent*

Assisted Living, 132 Wn. App. 126, 130 P.3d 865, 871 (2006). *Warner* itself acknowledges that this Court and other panels of the Courts of Appeal have applied the abuse of discretion standard of review. *Warner*, 130 P.3d at 871, n.13.² However, the *Warner* decision goes on to suggest a finer distinction—evidentiary rulings made in an “evidentiary hearing” will be granted deference and reviewed for an abuse of discretion, but rulings based on “documentary evidence” will be reviewed *de novo*. *Warner*, 130 P.3d at 871. This distinction, not adopted in other reported Washington case law, would open a whole new can of worms. Are evidentiary rulings made on a cold record on motions *in limine* before a trial to be reviewed *de novo*? When the parties designate portions of transcribed deposition testimony for admission at trial, the judge also may make evidentiary rulings based on a cold record. Should such rulings also be reviewed *de novo*?

Evidentiary rulings are judgment calls trial judges are asked to make on a day to day basis. Appellate courts cannot subject such rulings to the same heightened scrutiny applied to questions of law under the *de novo* standard of review. If evidentiary rulings are to be reviewed *de novo*, appellate court dockets will grow and the finality of trial court evidentiary rulings will be substantially undermined.

There is no good reason to depart from the basic and well-settled rule that a trial court’s evidentiary rulings are reviewable for an abuse of

² Division I itself has not followed *Seybold* and *Warner*. See *Allen v. Asbestos Corp.*, 138 Wn. App. at 570 (decided in Division I a year after *Warner*, reviewing evidentiary rulings on motion for summary judgment for an abuse of discretion).

discretion, whether made at trial or in connection with a motion for summary judgment, and whether made in connection with live testimony or “documentary evidence.” This Court should reaffirm this basic rule by affirming the trial court and Division I.

B. The trial court properly declined to consider the opinions stated in Dr. Greenberg’s report, and Division I properly affirmed, because Ms. Ricci failed to establish his competency to offer testimony on the relevant standard of care or a proper factual foundation for his conclusions.

In Ms. Ricci’s malpractice action, the “necessary elements of proof” include evidence of “the accepted standard of care.” RCW 7.70.040. Thus, to rebut the defendants’ motions for summary judgment, Ms. Ricci was required to produce admissible evidence that:

The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, in the State of Washington, acting in the same or similar circumstances

RCW 7.70.040(1).

A malpractice plaintiff must generally establish the standard of care through expert testimony. “What is or is not the standard practice and treatment in a particular case, or whether the conduct of the physician measures up to the standard is a question for experts and can only be established by their testimony.” *Young v. Key Pharmaceuticals*, 112 Wn.2d at 228 (quoting *Hart v. Steele*, 416 S.W.2d 927, 932 (Mo. 1967)).

The issue presented here is whether a Ph.D. clinical psychologist may testify regarding the standard of care that applies to the practices of a registered mental health counselor, when the only foundation offered is the mere fact of the psychologist's licensure, and a reference to each practitioner's licensing requirements.

The proponent of evidence submitted in opposition to a motion for summary judgment has the burden of demonstrating testimonial competency. CR 56(e); *Doherty v. Mun. of Metro. Seattle*, 83 Wn. App. 464, 469, 921 P.2d 1098 (1996). Thus, the burden was on Ms. Ricci to establish that Dr. Greenberg's opinions on the standard of care of mental health counselors had an adequate foundation.³

The parties agree that 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." *Miller v. Petersen*, 42 Wn. App. 822, 831, 714 P.2d 695 (1986), cited in *Respondent's Opposition to Petition for Discretionary Review* at 15. See also, *Petition for Review* at 10 (referring to the same "general rule").⁴ There is an exception to the general rule "when the methods of treatment of the two schools are or should be the same." *Miller v. Petersen*, 42 Wn. App. at 832.

³ Ricci's suggestion that the defendants had the burden of showing that Dr. Greenberg was "disqualified" from offering opinion testimony on the standard of care for mental health counselors flies in the face of the fundamental burden imposed on the nonmoving party under CR 56(e) and is just plain wrong. *Petition for Review* at 12-13.

⁴ Ms. Ricci nevertheless contends that the general rule does not apply to Dr. Greenberg's testimony. *Id.*

Ms. Ricci argues that because a clinical psychologist and a mental health counselor may treat patients with the similar mental health issues, and because there may be some overlap in the areas of study for the two areas of specialty, any clinical psychologist should be permitted to offer an opinion concerning the standard of care of any mental health counselor. Indeed, Ricci specifically argues that the training of a mental health counselor is “part of” the training of a psychologist. *Appellant’s Brief* (Court of Appeals), at 14).⁵

However, Ms. Ricci’s analysis fails to address the fundamental, threshold rule—*no matter what “school” or specialty an expert witness may belong to, the witness must demonstrate personal professional knowledge of the standard of care that applies to the defendant.*

In fact, not even a medical degree bestows the right to testify on the technical standard of care; a physician must demonstrate that he or she has sufficient expertise in the relevant specialty.

Young v. Key Pharmaceuticals, 112 Wn.2d at 229.

The mere fact that Dr. Greenberg is licensed to practice clinical psychology in the State of Washington does not automatically establish his competence to testify on the standard of care. Under CR 56(e), Ms. Ricci had the obligation to establish a *foundation* for Dr. Greenberg’s opinion and

⁵ For this proposition, Ms. Ricci attempts to rely on the transcribed deposition testimony of Dr. Greenberg. However, the trial court properly declined to consider that testimony because it was not submitted in a timely response to the defendants’ motions for summary judgment. *Brown v. Park Place*, 48 Wn. App. at 559–560.

failed to do so. Ricci argues that “hypertechnical distinctions” based on “mere title” do not determine the competence of a witness to offer opinions on the standard of care, as though Dr. Greenberg’s title alone explains the decision of the trial court and of Division I to disregard the opinions stated in his report. *Petition for Review* at 11–12.

WDTL agrees that “mere title” does not govern admissibility. But that is beside the point. Dr. Greenberg’s opinion was not inadmissible because of his “mere title” of clinical psychologist. Rather, the trial court declined to consider Dr. Greenberg’s opinion, and Division I affirmed the trial court’s decision, because no matter what “title” Dr. Greenberg may have, his report did not state an opinion based on a foundation of relevant facts, knowledge and expertise. Greenberg did not establish that the methods, standards and practices of an LHMC and a clinical psychologist are or should be the same; or that his opinion was based on knowledge of the methods, standards and practices of LHMCs. In fact, his report was based in part on Washington regulations that apply to clinical psychologists and *not* to LHMCs. *Ricc*, 2006 WL 1980320 at *6–7.

Ricci attempts to analogize Dr. Greenberg’s opinion on the standard of care of an LHMC to the testimony of a physician concerning the standard of care of a nurse. *See, Appellant’s Brief* at 15, citing *Hall v. Sacred Heart Med’l Ctr.*, 100 Wn. App. 53, 995 P.2d 621, *as amended, review denied*, 141 Wn.2d 1022 (2000). However, the two situations are factually

distinguishable. Physicians work with and offer direction to nurses on a daily basis and are very familiar with the scope of, and standards that apply to, a nurse's work.

In contrast, clinical psychologists and mental health counselors do not typically practice together—and there is no evidence in the record that Dr. Greenberg had ever practiced with, supervised or otherwise become familiar with the standard of care of LHMCs practicing in Washington. By way of illustration, a licensed attorney practicing in the area of intellectual property would not necessarily be competent to offer an opinion as to the standard of care for a limited practice closing officer. (APR 12.) To offer such an opinion, the attorney would have to offer a foundation to demonstrate his knowledge and experience dealing with the standards and practices of closing officers. Similarly, the mere fact that Dr. Greenberg has a Ph.D. in clinical psychology does not, standing alone, qualify him to opine on the standard of care of an LHMC. Ms. Ricci was obligated to establish a foundation for Dr. Greenberg's opinion to show that he has actual knowledge of the standard of care applicable to an LHMC.

Ms. Ricci simply failed to establish any such foundation for Dr. Greenberg's testimony. This Court therefore should affirm the dismissal of her claims for want of competent expert testimony on the standard of care.

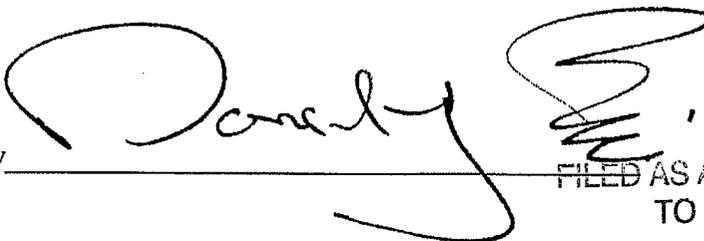
V. CONCLUSION

This appeal can and should be resolved by applying two well-settled rules of law. *First*, to rebut a motion for summary judgment, a malpractice plaintiff must submit timely, well-founded and admissible expert opinion evidence to show the defendants breached the standard of care. Absent such evidence, her claims should be dismissed, as a matter of law. *Second*, in reviewing a trial court's decision to admit or exclude evidence, whether on a motion for summary judgment, in pre-trial motions *in limine* or during the course of a trial, Washington appellate courts apply the abuse of discretion standard of review. An appellate court does not review such judgment calls *de novo* and will not substitute its own judgment for a reasoned judgment made by the trial court judge.

In this case, Ms. Ricci failed to submit timely, well-founded and admissible expert opinion evidence to support her malpractice claims. As a result, the trial court dismissed her claims on the defendants' motions for summary judgment. Division I properly affirmed the trial court by applying settled Washington law. This Court should apply the same settled law to affirm the result reached in both of the courts below.

DATED and respectfully submitted this 24th day of September 2007.

By _____



FILED AS ATTACHMENT
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