

---

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

---

SIOBHAN RICCI,

Plaintiff/Appellant,

vs.

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.

---

BRIEF OF AMICUS CURIAE  
WASHINGTON STATE TRIAL LAWYERS ASSOCIATION  
FOUNDATION

---

Bryan P. Harnetiaux  
WSBA No. 05169  
517 E. 17th Avenue  
Spokane, WA 99203  
(509) 624-3890

Patrick K. Fannin  
WSBA No. 28191  
1312 N. Monroe St.  
Spokane, WA 99201  
(509) 328-8204

On Behalf of  
Washington State Trial Lawyers Association Foundation

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
2001 SEP 24 P 12:45  
BY RONALD L. CARPENTER  
CLERK

## TABLE OF CONTENTS

	<u>Page</u>
I. IDENTITY AND INTEREST OF AMICUS CURIAE	1
II. INTRODUCTION AND STATEMENT OF THE CASE	1
III. ISSUES PRESENTED	4
IV. SUMMARY OF ARGUMENT	4
V. ARGUMENT	6
A. Overview Of The Law Governing Summary Judgment At The Superior Court And Appellate Court Levels, Which Is Designed To Preserve The Right To Trial By Jury.	7
B. Evidentiary Rulings Made By The Superior Court In The Course Of Resolving A Motion For Summary Judgment, Including Those Involving The Competency Of Expert Testimony, Are Subject To De Novo Review On Appeal.	9
C. Expert Testimony Submitted In Opposition To A Motion For Summary Judgment Is Viewed With Leniency, And Should Be Allowed, Based On The Documentary Record, Unless Admission At Trial Would Be An Abuse Of Discretion.	18
VI. CONCLUSION	20
APPENDIX	

## TABLE OF AUTHORITIES

Cases	<u>Page</u>
<u>Allen v. Asbestos Corp.</u> , 138 Wn.App. 564, 157 P.3d 406 (2007)	12
<u>Am. States v. Rancho San Marcos Props.</u> , 123 Wn.App. 205, 97 P.3d 775 (2004), <i>review denied</i> , 154 Wn.2d 1008 (2005)	12
<u>Anderson v. State Farm</u> , 101 Wn.App. 323, 2 P.3d 1029 (2000), <i>review denied</i> , 142 Wn.2d 1017 (2001)	13-14
<u>Barrie v. Hosts of America</u> , 94 Wn.2d 202, 618 P.2d 96 (1980)	8
<u>Bartlett v. Northern Pac. Ry. Co.</u> , 74 Wn.2d 881, 447 P.2d 735 (1968)	7
<u>Beers v. Ross</u> , 137 Wn.App. 566, 154 P.3d 277 (2007)	11
<u>Bernal v. American Honda Motor Co.</u> , 87 Wn.2d 406, 553 P.2d 107 (1976)	13
<u>Bloomster v. Nordstrom</u> , 103 Wn.App. 252, 11 P.3d 883 (2000)	11,12
<u>Burnet v. Spokane Ambulance</u> , 131 Wn.2d 484, 933 P.2d 1036 (1997)	16
<u>Byerly v. Madsen</u> , 41 Wn.App. 495, 704 P.2d 1236, <i>review denied</i> , 104 Wn.2d 1021 (1985)	7
<u>Chadwick v. Northwest Airlines</u> , 33 Wn.App. 297, 654 P.2d 1215 (1982), <i>aff'd</i> 100 Wn.2d 221, 667 P.2d 1004 (1983)	9
<u>Cofer v. County of Pierce</u> , 8 Wn.App. 258, 505 P.2d 476 (1973)	7,8

<u>Coggle v. Snow,</u> 56 Wn.App. 499, 784 P.2d 554 (1990)	18
<u>Colwell v. Holy Family Hosp.,</u> 104 Wn.App. 606, 15 P.3d 210, <i>review denied</i> , 144 Wn.2d 1016 (2001)	11-13
<u>Cotton v. Kronenberg,</u> 111 Wn.App. 258, 44 P.3d 878 (2002)	11
<u>Davis v. Baugh Indus. Contractors,</u> 159 Wn.2d 413, 150 P.3d 545 (2007)	passim
<u>Eagle Group, Inc. v. Pullen,</u> 114 Wn.App. 409, 58 P.3d 292 (2002), <i>review denied</i> , 149 Wn.2d 1034 (2003)	12
<u>Eng v. Klein,</u> 127 Wn.App. 171, 110 P.3d 844 (2005), <i>review denied</i> , 156 Wn.2d 1006 (2006)	19
<u>Folsom v. Burger King,</u> 135 Wn.2d 658, 958 P.2d 301 (1998)	passim
<u>Garza v. McCain Foods, Inc.,</u> 124 Wn.App. 908, 103 P.3d 848 (2004)	15
<u>Germain v. Pullman Baptist Church,</u> 96 Wn.App. 826, 980 P.2d 809 (1999), <i>review denied</i> , 139 Wn.2d 1026 (2000)	11
<u>Int'l Ultimate v. St. Paul Fire &amp; Marine,</u> 122 Wn.App. 736, 87 P.3d 774, <i>review denied</i> , 153 Wn.2d 1016 (2004)	12
<u>Lybbert v. Grant County,</u> 141 Wn.2d 29, 1 P.3d 1124 (2000)	16
<u>Meadows v. Grant's Auto Brokers, Inc.,</u> 71 Wn.2d 874, 431 P.2d 703 (1967)	5,19
<u>McKee v. American Home Prods.,</u> 113 Wn.2d 701, 782 P.2d 1045 (1989)	9

<u>Miller v. Peterson,</u> 42 Wn.App. 822, 714 P.2d 695, <i>review denied</i> , 106 Wn.2d 1006 (1986)	13
<u>Milligan v. Thompson,</u> 110 Wn.App. 628, 42 P.3d 418 (2002)	12
<u>Mt. Park Homeowners v. Tydings,</u> 125 Wn.2d 337, 883 P.2d 1383 (1994)	8
<u>Nordstrom v. White Metal Rolling and Stamping Corp.,</u> 75 Wn.2d 629, 453 P.2d 619 (1969)	13
<u>Oltman v. Holland Am. Line,</u> 136 Wn.App. 110, 148 P.3d 1050 (2006), <i>review granted</i> , 161 Wn.2d ____ (Sept. 5, 2007)	12
<u>Preston v. Duncan,</u> 55 Wn.2d 679, 349 P.2d 605 (1960)	7-8
<u>Ricci v. Gary,</u> <i>noted at</i> 134 Wn.App. 1002 (2006), <i>review granted</i> , 160 Wn.2d 1001 (2007)	passim
<u>Snohomish Fire Dist. v. Disability Bd.,</u> 128 Wn.App. 418, 115 P.3d 1057 (2005)	11
<u>State ex rel. Carroll v. Junker,</u> 79 Wn.2d 12, 482 P.2d 775 (1971)	6
<u>State v. Olson,</u> 126 Wn.2d 315, 893 P.2d 629 (1995)	16,18
<u>Seybold v. Neu,</u> 105 Wn.App. 666, 19 P.3d 1068 (2001)	11
<u>Stenger v. State,</u> 104 Wn.App. 393, 16 P.3d 655, <i>review denied</i> , 144 Wn.2d 1006 (2001)	11
<u>Sun Mountain Prods., Inc. v. Pierre,</u> 84 Wn.App. 608, 929 P.2d 494, <i>review denied</i> , 132 Wn.2d 1003 (1997)	9

<u>Terrell C. v. DSHS,</u> 120 Wn.App. 20, 84 P.3d 899, <i>review denied</i> , 152 Wn.2d 1018 (2004)	12
<u>Tortes v. King County,</u> 119 Wn.App. 1, 84 P.3d 252 (2003), <i>review denied</i> , 151 Wn.2d 1010 (2004)	12
<u>Warner v. Regent Assisted Living,</u> 132 Wn.App. 126, 130 P.3d 865 (2006)	11
<u>Washington State Physicians Ins. Exch. v. Fisons Corp.,</u> 122 Wn.2d 299, 858 P.2d 1054 (1993)	6
<u>White v. Kent Med. Center,</u> 61 Wn.App. 163, 810 P.2d 4 (1991)	19
<u>Wilson v. Steinbach,</u> 98 Wn.2d 434, 656 P.2d 1030 (1982)	8
<u>Young v. Key Pharmaceuticals,</u> 112 Wn.2d 216, 770 P.2d 182 (1989)	8,17,19,20

### **Rules, Statutes and Constitutional Provisions**

Ch. 7.70 RCW	2,11
CR 1	5,16-18
CR 6	17
CR 56	passim
RAP 1.2(a)	17
RCW 7.70.040	15
Washington Constitution, Art. I §21	4,8

### **Other Authorities**

<u>Kelly Kunsch, Standard of Review (State and Federal): A Primer,</u> 18 Seattle U. L. Rev. 11 (1994)	6,7,13,14
---	-----------

Paul W. Mollica, <u>Federal Summary Judgment at High Tide</u> , 84 Marq. L. Rev. 141 (2000/2001)	8
Martin H. Redish, <u>Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix</u> , 57 Stan. L. Rev. 1329 (2005)	8

## I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Trial Lawyers Association Foundation (WSTLA Foundation) is a not-for-profit corporation organized under the laws of Washington, and a supporting organization of the Washington State Trial Lawyers Association (WSTLA). WSTLA Foundation, which operates the amicus curiae program formerly operated by WSTLA, has an interest in the rights of injured persons seeking legal redress under the civil justice system, and an interest in proper application of the civil rules, including CR 56 governing summary judgment.

## II. INTRODUCTION AND STATEMENT OF THE CASE

This amicus curiae brief is primarily about the standard of appellate review of evidentiary rulings on summary judgment. The focus is review of a superior court ruling striking expert testimony submitted by a non-moving party in a summary judgment of dismissal. The basis for evaluating the admissibility of expert testimony on summary judgment is also addressed. These questions are discussed in general terms. It is for the Court to apply the law to the specific facts of this case.

The facts in this brief are drawn from the unpublished Court of Appeals opinion and the briefing of the parties. See *Ricci v. Gary*, noted at 134 Wn.App. 1002 (2006), review granted, 160 Wn.2d 1001 (2007); Ricci Pet. for Rev. at 1-4; Gary Ans. to Pet. for Rev. at 1-4; Ricci Br. at 1-11; Gary Br. at 1-11. For purposes of this brief, the following facts are relevant: Siobhan Ricci (Ricci) sued her mental health counselor, Steven

Gary (Gary), for negligence under Ch. 7.70 RCW. Gary moved for summary judgment, contending Ricci lacked expert testimony supporting her claim of negligence. Ricci responded by submitting a report and curriculum vitae (report/CV) of Dr. Stuart Greenberg, Ph.D. (Greenberg), a clinical psychologist. Greenberg testified that in his opinion Gary failed to act as a reasonably prudent and competent practitioner in providing Ricci counseling, and that Gary's actions caused or exacerbated her psychological problems. See Ricci Br. at 9-11; Ricci Pet. for Rev. at 2.

After Ricci responded to the summary judgment motion, Gary moved to strike Greenberg's report/CV, contending the report/CV did not qualify Greenberg to express an opinion on the standard of care of a mental health counselor. In her answer to the motion to strike, Ricci defended Greenberg's qualifications to offer an opinion on the standard of care of mental health counselors, and also provided excerpts from Greenberg's deposition expanding upon his competency to do so. See Ricci Pet. for Rev. at 2-3.

The superior court refused to consider Greenberg's deposition testimony on the basis that it was not timely submitted under CR 56, and that Ricci had no explanation for originally failing to provide an adequate declaration from Greenberg in response to the motion for summary judgment. See Gary Ans. to Pet. for Rev. at 2; Ricci Pet. for Rev. at 3. The court granted summary judgment of dismissal of Ricci's claim against

Gary, and denied a subsequent motion for reconsideration. See Gary Ans. to Pet. for Rev. at 2; Ricci Pet. for Rev. at 3-4.

The Court of Appeals affirmed. See Ricci Slip. Op. at 1. The court applied an abuse of discretion standard of review to the superior court's disposition of the motion to strike, asking only "whether tenable reasons were given in support of the trial court's ruling." Id. at 12. The Court of Appeals likewise reviewed, for abuse of discretion, the superior court's refusal to consider the Greenberg deposition excerpts in the course of ruling upon Gary's motion to strike and underlying summary judgment motion. See id. at 10-11. It concluded:

In this case, the trial court took the harsh position that it would not consider the late-filed deposition excerpts in ruling upon either the motion to strike or the underlying summary judgment motion. Certainly, another court might have viewed the situation differently. However, the test for abuse of discretion is not whether another court might have – or even would have – ruled differently. The test is whether the trial court based its decision on tenable grounds and reasons.

Id. at 11 (citation omitted). Upon concluding the superior court did not abuse its discretion in granting the motion to strike or in refusing to consider the deposition excerpts, the Court of Appeals affirmed the dismissal of Ricci's negligence claim for want of competent expert testimony regarding violation of the standard of care for mental health counselors. Id. at 15.

This Court granted Ricci's petition for review, which raises issues regarding the standard of review of evidentiary rulings on summary

judgment and the competency of a psychologist's opinion on the standard of care of mental health counselors. See Ricci Pet. for Rev. at 1.

### III. ISSUES PRESENTED

- 1.) Is the standard of review of a superior court evidentiary ruling, made in the course of resolving a motion for summary judgment, de novo or abuse of discretion?
- 2.) Is the competency of expert testimony submitted in conjunction with a motion for summary judgment viewed differently, depending upon whether the opinion evidence is offered by the moving or non-moving party?

### IV. SUMMARY OF ARGUMENT

#### *Re: Review of Summary Judgment Evidentiary Rulings*

The law is well-established that the de novo standard of appellate review applies to superior court summary judgment orders. This standard encompasses evidentiary rulings made in conjunction with summary judgment, including those regarding the competency of expert witness testimony. This Court's decisions in Folsom v. Burger King, 135 Wn.2d 658, 662-63, 958 P.2d 301 (1998) and Davis v. Baugh Indus. Contractors, 159 Wn.2d 413, 416-21, 150 P.3d 545 (2007) require this approach. De novo review is otherwise wholly justified because: (a) it safeguards the right to trial by jury under the Washington Constitution, Art. I §21; (b) the abbreviated nature of summary judgment proceedings and potential outcome-determinative consequences of related evidentiary rulings warrant rigorous review, as opposed to the highly deferential abuse of discretion review typically applied to rulings at trial; and (c) the appellate court is in as good a position as the superior court to pass on these

questions. Those Court of Appeals cases decided after Folsom incorrectly applying an abuse of discretion standard of review must be disapproved.

For the same reasons, appellate courts should review de novo a superior court rejection of an evidentiary submission as untimely under CR 56, to determine whether the submission would alter the result on summary judgment. If it would, then absent compelling reasons, the submission should be allowed. Where appropriate, terms may be imposed for any inconvenience to the court or actual prejudice to the opposing party caused by the late submission. This approach is in keeping with CR 1, the spirit of the civil rules, and the strong preference in the rules for disposition of claims on the merits.

***Re: Evaluation of Competency of Expert Testimony on Summary Judgment***

Courts must view testimonial submissions by a non-moving party, plaintiff or defendant, in a summary judgment proceeding with leniency. To do so is consistent with the “light most favorable” notion that is the hallmark of summary judgment review, and this Court’s holding in Meadows v. Grant’s Auto Brokers, Inc., 71 Wn.2d 874, 879, 431 P.2d 703 (1967). This leniency principle for testimonial submissions applies to expert opinion testimony. Under this approach, a court should err on the side of admissibility, unless it can be said under CR 56(e) that, based upon the documentary record, no court would admit the testimony at trial.

## V. ARGUMENT

### *Introduction*

This case is about the standard of review of evidentiary rulings made in conjunction with motions for summary judgment, particularly rulings involving the competency of expert testimony. Ricci urges a de novo standard, while Gary contends these rulings are reviewed for abuse of discretion only. See Ricci Pet. for Rev. at 4-9; Gary Ans. to Pet. for Rev. at 5-14. There can be a world of difference in the end result, when the ruling is based upon assessment of the facts.<sup>1</sup>

Under a de novo standard of review, the appellate court considers the record anew. See generally Kelly Kunsch, Standard of Review (State and Federal): A Primer, 18 Seattle U. L. Rev. 11, 37-38 (1994) (discussing standards of review in federal and state courts with emphasis on Washington case law). This Court's classic formulation of abuse of discretion review provides:

[w]here the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)

(citations omitted). Historically, Washington appellate courts have been

---

<sup>1</sup> When the superior court's decision involves a mistake of law, review is usually de novo. Generally, questions of law are reviewed de novo on appeal. Kelly Kunsch, Standard of Review (State and Federal): A Primer, 18 Seattle U. L. Rev. 11, 27 (1994). However, even when the standard of review is abuse of discretion, an abuse occurs when based upon an error of law. See Washington State Physicians Ins. Exch. v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) (holding a superior court necessarily abuses its discretion if its ruling is based on an erroneous view of the law).

extremely reluctant to find an abuse of discretion. See Kunsch, 18 Seattle U. L. Rev. at 36. Under this deferential standard, the lower court's decision will not be reversed unless no reasonable court could have reached this result. See Byerly v. Madsen, 41 Wn.App. 495, 499, 704 P.2d 1236, *review denied*, 104 Wn.2d 1021 (1985); Kunsch at 36.

The outcome of this appeal may well turn upon whether the review of the ruling on the motion to strike is *de novo* or abuse of discretion. See Ricci Slip. Op. at 11, 15 (recognizing ruling regarding deposition excerpts "harsh" but tenable, and absence of competent expert testimony fatal to claim).

**A. Overview Of The Law Governing Summary Judgment At The Superior Court And Appellate Court Levels, Which Is Designed To Preserve The Right To Trial By Jury.**

CR 56 provides a mechanism by which a litigant, plaintiff or defendant, may seek to avoid trial where there is no material dispute as to fact or law.<sup>2</sup> The rule authorizes the superior court to issue a final and binding determination based solely on a documentary record. CR 56 has been recognized as a valuable procedure for avoiding unnecessary trials. Bartlett v. Northern Pac. Ry. Co., 74 Wn.2d 881, 883, 447 P.2d 735 (1968); Cofer v. County of Pierce, 8 Wn.App. 258, 261, 505 P.2d 476 (1973). At the same time, Washington courts have also acknowledged the danger involved in its misapplication - depriving a litigant of the right to trial by jury. See Preston v. Duncan, 55 Wn.2d 678, 683, 349 P.2d 605

---

<sup>2</sup> The text of the current version of CR 56 is reproduced in the Appendix.

(1960); Cofer, 8 Wn.App. at 261; Washington Constitution, Art. I §21 (providing “the right to trial by jury shall remain inviolate”).<sup>3</sup>

The greatest threat to the right to trial by jury under CR 56 practice occurs when a court examines whether a genuine issue of material fact exists requiring trial. To minimize the danger of misapplying the rule, the Court has imposed two crucial procedural safeguards. First, the superior court is required to interpret all facts and inferences in the summary judgment record in “a light most favorable to the non-moving party.” See Young v. Key Pharmaceuticals, 112 Wn.2d 216, 226, 770 P.2d 182 (1989); Barrie v. Hosts of America, 94 Wn.2d 640, 642, 618 P.2d 96 (1980). If, using this lens, “reasonable persons could reach but one conclusion” the motion for summary judgment must be granted. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Otherwise, it must be denied.

The second safeguard against misuse of CR 56 involves the standard of review on appeal. The Court imposes the most searching, least deferential standard – de novo review. See Mt. Park Homeowners v. Tydings, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994) (confirming that when reviewing an order on summary judgment “the appellate court

---

<sup>3</sup> Recently, commentators have examined the marked drop in the number of civil trials, and traced this decline in part to the increase in summary judgment dispositions. See generally Paul W. Mollica, Federal Summary Judgment at High Tide, 84 Marq. L. Rev. 141 (2000/2001); Martin H. Redish, Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix, 57 Stan. L. Rev. 1329 (2005).

engages in the same inquiry as the trial court”). This is classic de novo review.

The principal question on appeal is whether this “same inquiry” review includes summary judgment evidentiary rulings.

**B. Evidentiary Rulings Made By The Superior Court In The Course Of Resolving A Motion For Summary Judgment, Including Those Involving The Competency Of Expert Testimony, Are Subject To De Novo Review On Appeal.**

*Re: Whether De Novo Review Should Apply*

In recent years, this Court has twice stated that evidentiary rulings rendered in conjunction with summary judgment proceedings are reviewed de novo on appeal. See Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998); Davis v. Baugh Indus. Contractors, 159 Wn.2d 413, 416, 150 P.3d 545 (2007). At the time this Court decided Folsom, case law on this issue was inconsistent. Compare McKee v. American Home Prods., 113 Wn.2d 701, 706, 782 P.2d 1045 (1989) (applying abuse of discretion standard to evidentiary ruling in summary judgment context); Sun Mountain Prods., Inc. v. Pierre, 84 Wn.App. 608, 616, 929 P.2d 494 (same), *review denied*, 132 Wn.2d 1003 (1997); with Chadwick v. Northwest Airlines, 33 Wn.App. 297, 304 n.4, 654 P.2d 1215 (1982), *aff'd* 100 Wn.2d 221, 222-23, 667 P.2d 1004 (1983) (adopting Court of Appeals’ dicta applying de novo review to summary judgment evidentiary ruling).

In Folsom, the Court reviewed the superior court’s evidentiary rulings on summary judgment regarding admissibility of expert opinion

testimony. See 135 Wn.2d at 662.<sup>4</sup> The superior court excluded evidence based on numerous objections - “legal conclusions, mixed statements of law and fact, invasion of the province of the jury, or opinions lacking proper foundation.” Id. at 662-63. The Court applied de novo review to the evidentiary challenges:

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. This standard of review is consistent with the requirement that evidence and inferences are viewed in favor of the nonmoving party . . . , and the standard of review is consistent with the requirement that the appellate court conduct the same inquiry as the trial court.

Id. at 663 (citations omitted). Upon review, the Court reached the same conclusion as the superior court. Id. at 664.

In early 2007, based on Folsom, the Court reconfirmed that superior court evidentiary rulings in conjunction with summary judgment are reviewed de novo. See Davis, 159 Wn.2d at 416. Davis involved a challenge to an evidentiary ruling striking portions of an expert’s opinion. Id. at 420. The Court concluded the opinion was admissible, and the lower court erred in finding it constituted an impermissible legal conclusion. Id.<sup>5</sup>

---

<sup>4</sup> WSTLA appeared as amicus curiae in Folsom, and addressed the existing confusion in case law on the standard of review of evidentiary rulings on summary judgment, advocating for de novo review on appeal. See Brief of Amicus Curiae Washington State Trial Lawyers Association (S.C. #64479-9).

<sup>5</sup> WSTLA Foundation appeared as amicus curiae in Davis, but did not address the standard of review on evidentiary rulings on summary judgment. See Brief of Amicus Curiae Washington State Trial Lawyers Association Foundation (S.C. #76696-7).

Since Folsom, a number of Court of Appeals cases have applied de novo review to evidentiary rulings made in conjunction with summary judgment. All of these cases cite Folsom. See Seybold v. Neu, 105 Wn.App. 666, 678, 19 P.3d 1068 (2001) (applying de novo review to evidentiary rulings on summary judgment); Cotton v. Kronenberg, 111 Wn.App. 258, 264 & n.8, 44 P.3d 878 (2002) (same)<sup>6</sup>; Snohomish Fire Dist. v. Disability Bd., 128 Wn.App. 418, 422-23 & n.1, 115 P.3d 1057 (2005) (same); Warner v. Regent Assisted Living, 132 Wn.App. 126, 135-36 & n.13, 130 P.3d 865 (2006) (same); Beers v. Ross, 137 Wn.App. 566, 570-71, 154 P.3d 277 (2007) (same; post-Davis).<sup>7</sup>

On the other hand, a number of Court of Appeals opinions since Folsom have applied an abuse of discretion standard of review to summary judgment evidentiary rulings. None of these cases cite Folsom. See Germain v. Pullman Baptist Church, 96 Wn.App. 826, 838, 980 P.2d 809 (1999) (applying abuse of discretion standard of review to evidentiary ruling on summary judgment; dicta), *review denied*, 139 Wn.2d 1026 (2000); Bloomster v. Nordstrom, 103 Wn.App. 252, 259, 11 P.3d 883 (2000) (same); Stenger v. State, 104 Wn.App. 393, 407-08, 16 P.3d 655 (same), *review denied*, 144 Wn.2d 1006 (2001); Colwell v. Holy Family Hosp., 104 Wn.App. 606, 611-13, 15 P.3d 210 (same), *review denied*, 144

---

<sup>6</sup> Inexplicably, the Cotton Washington Reports headnote 5 erroneously describes the court's holding as applying an abuse of discretion standard of review. See 111 Wn.App. at 259.

<sup>7</sup> Of these cases, Seybold applies de novo review to reverse a court ruling disallowing an expert opinion regarding the standard of care in a medical negligence action governed by Ch. 7.70 RCW. See 105 Wn.App. at 678-81. The superior court's summary judgment order dismissing the action was also reversed. Id. at 669-70, 681.

Wn.2d 1016 (2001); Milligan v. Thompson, 110 Wn.App. 628, 634, 42 P.3d 418 (2002) (same); Tortes v. King County, 119 Wn.App. 1, 12, 84 P.3d 252 (2003) (same), *review denied*, 151 Wn.2d 1010 (2004); Eagle Group, Inc. v. Pullen, 114 Wn.App. 409, 416, 58 P.3d 292 (2002) (noting abuse of discretion standard but not reaching issue), *review denied*, 149 Wn.2d 1034 (2003); Terrell C. v. DSHS, 120 Wn.App. 20, 30, 84 P.3d 899 (applying abuse of discretion standard), *review denied*, 152 Wn.2d 1018 (2004); Int'l Ultimate v. St. Paul Fire & Marine, 122 Wn.App. 736, 744, 87 P.3d 774 (same), *review denied*, 153 Wn.2d 1016 (2004); Am. States v. Rancho San Marcos Props., 123 Wn.App. 205, 214, 97 P.3d 775 (2004) (same; dicta), *review denied*, 154 Wn.2d 1008 (2005); Oltman v. Holland Am. Line, 136 Wn.App. 110, 117, 148 P.3d 1050 (2006) (same), *review granted*, 161 Wn.2d \_\_\_\_ (Sept. 5, 2007).<sup>8</sup> Also, within a month of the Court's decision in Davis one Court of Appeals opinion applied the abuse of discretion standard without citing Folsom or Davis. Allen v. Asbestos Corp., 138 Wn.App. 564, 570, 157 P.3d 406 (2007).

All of the Court of Appeals cases applying an abuse of discretion standard of review rely on pre-Folsom jurisprudence, which tended to import to the summary judgment context, without discussion, the abuse of discretion standard of review regarding evidentiary rulings *at trial*. See

---

<sup>8</sup> Of these cases, two involved rulings regarding expert testimony. Colwell involved the competency of expert opinion, with denial of admission of the testimony affirmed under the abuse of discretion standard of review. See 104 Wn.App. at 613-14. In Bloomster, the decision to strike an expert's declaration for lack of foundation was reversed under the abuse of discretion standard. See 103 Wn.App. at 261.

e.g. Bernal v. American Honda Motor Co., 87 Wn.2d 406, 412-13, 553 P.2d 107 (1976) (applying abuse of discretion standard on summary judgment based upon Nordstrom v. White Metal Rolling and Stamping Corp., 75 Wn.2d 629, 642, 453 P.2d 619 (1969), involving evidentiary rulings at trial); Colwell, 104 Wn.App. at 611-12 (relying upon Miller v. Peterson, 42 Wn.App. 822, 714 P.2d 695, *review denied*, 106 Wn.2d 1006 (1986), involving review of evidentiary rulings at trial).

Folsom and Davis should control here, and any doubt about the precedential effect of the rule announced in these cases should be put to rest.<sup>9</sup> Court of Appeals opinions to the contrary, issued after Folsom, should be disapproved. Considering *all* evidence presented to the superior court is wholly consistent with the general de novo standard applied on appeal. Folsom at 663. On the other hand, imposing abuse of discretion review effectively insulates what may be outcome-determinative rulings from any meaningful scrutiny. See Kunsch at 36. This is particularly true with regard to competency determinations involving expert witnesses, where 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. See Anderson v.

---

<sup>9</sup> Gary contends that Folsom is either dicta or that the scope of its holding is limited to the proposition that questions of law are subject to a de novo standard of review. See Gary Ans. to Pet. for Rev. at 8; Folsom, 135 Wn.2d at 663-64. Presumably, Gary would similarly seek to limit Davis to questions of law. See 159 Wn.2d at 420. Whether Folsom involves dicta is a fascinating question, but this issue need not be decided in light of the strong policy considerations requiring de novo review. In any event, Folsom was not limited to questions of law because one evidentiary challenge was based on "opinions lacking proper foundation." See 135 Wn.2d at 662-63.

State Farm, 101 Wn.App. 323, 338-39, 2 P.3d 1029 (2000) (affirming denial of motion to strike expert's declaration on summary judgment because challenges to the expert's qualifications went to the weight of testimony, not admissibility), *review denied*, 142 Wn.2d 1017 (2001).

Application of the abuse of discretion standard on summary judgment threatens plaintiffs' and defendants' constitutional right to trial by jury. See text, supra at 7-8 & n.3. Nonetheless, Gary contends that the abuse of discretion standard of review for evidentiary rulings at trial is appropriate at the summary judgment stage of proceedings, because the superior court is in a better position than the appellate court to judge such matters. See Gary Ans. to Pet. for Rev. at 13-14. This is not correct. The appellate court is equally capable of searching the documentary record for fact disputes and gauging whether the requirements for expert testimony are met under the applicable evidentiary standards. Abuse of discretion review of evidentiary rulings at trial is largely a function of judicial economy, as it is simply not practical to ask an appellate court to retrace the steps of the lower court, ruling by ruling. See Kunsch at 29. To some degree, this deferential standard also reflects respect for the sanctity of jury verdicts. See id. at 20. Neither of these considerations is present at the summary judgment stage of proceedings. Under CR 56, concerns about protecting a litigant's right to trial by jury prevail over notions of judicial economy.

*Re: Effect of De Novo Review*

If de novo review is applied here, then the Court must determine under CR 56(e) whether Greenberg's report/CV provides a sufficient foundation to warrant consideration of his opinion for summary judgment purposes. If sufficient, then it appears the summary judgment of dismissal must be reversed because competent expert testimony would exist to create an issue of fact on breach of the standard of care, as required under RCW 7.70.040. See Ricci Slip. Op. at 15.

If the Greenberg report/CV is not a sufficient foundation for his expert opinion, an additional question arises. Must this Court examine de novo the superior court's related ruling, refusing to consider the deposition excerpts submitted with Ricci's (timely) answer to the motion to strike? Once again this pits de novo review against the abuse of discretion standard, in a slightly different context. Compare Folsom at 663 (providing that de novo review "is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion"); with Garza v. McCain Foods, Inc., 124 Wn.App. 908, 917, 103 P.3d 848 (2004) (applying abuse of discretion review to superior court's refusal to consider belated submissions in summary judgment proceeding).

Under an abuse of discretion standard of review, the Court of Appeals below upheld the superior court's refusal to consider the deposition excerpts due to untimeliness because they expanded upon the

Ricci summary judgment response consisting of the Greenberg report/CV. See Ricci Slip. Op. at 7-11. While the Court of Appeals considered the superior court's determination "harsh," it concluded there was nothing it could do, given the deferential standard of review regarding determinations involving timelines for submission under CR 56(c). See id. at 11.

De novo review should apply regarding the deposition excerpts. The Court of Appeals' technical, formalistic approach is out of keeping with CR 1 and this Court's recent teachings in a number of different contexts that, absent compelling reasons, the law favors disposition of cases on the merits.<sup>10</sup> See Ricci Br. at 18-20; see also Davis v. Baugh Indus. Contractors, 159 Wn.2d at 420 (noting, in applying de novo review, "Washington law favors resolution of issues on the merits"); Lybbert v. Grant County, 141 Wn.2d 29, 39, 1 P.3d 1124 (2000) (recognizing, in finding waiver of a defense, that under CR 1 procedural rules exist to promote "the just, speedy, and inexpensive determination of every action"; quoting CR 1); Burnet v. Spokane Ambulance, 131 Wn.2d 484, 496-98, 933 P.2d 1036 (1997) (reversing sanction of dismissal of civil claim under an abuse of discretion standard, in the absence of finding of willfulness, because of severity of injury to plaintiff and preference under CR 1 for determination of cases on merits); cf. State v. Olson, 126 Wn.2d 315, 318-24, 893 P.2d 629 (1995) (reversing dismissal of appeal on

---

<sup>10</sup> The text of the current version of CR 1 is reproduced in the Appendix.

technical grounds for violation of appellate rules because RAP 1.2(a) requires compelling reasons to justify not reaching the merits); *id.* at 324 (Talmadge, J., concurring) (warning that while non-compliance with rules may not derail the appeal, sanctions may be imposed on counsel).<sup>11</sup>

The Court should review *de novo* the Greenberg deposition excerpts under the rule announced in Folsom and Davis, and in keeping with the spirit of CR 1. If these excerpts would provide the foundation necessary to render Greenberg's opinion competent, then they should be considered in resolving the underlying summary judgment motion, absent compelling reasons such as willful non-compliance with the rules.<sup>12</sup>

The alternative is to apply the abuse of discretion standard of review as the Court of Appeals did below, and recognize, as it did, that the result may have been different with another judge. See Ricci Slip. Op. at 11, 18-19. As that court indicates, such vagaries in result can only be avoided by *strict* compliance with the procedural rules. Id. at 19. Yet, this is not the modern day sensibility that generally governs civil practice and procedure, and it should have no place in interpretation and application of CR 56. This is especially true when the non-compliance that dooms the claim is likely the result of a lawyer's mistake or good faith failure to

---

<sup>11</sup> The text of the current version of RAP 1.2 is reproduced in the Appendix.

<sup>12</sup> The briefing does not indicate Ricci made a motion for continuance under CR 56(f), explaining why the deposition excerpts should be allowed to be filed beyond the customary timeline. This should not necessarily be fatal in these circumstances, where the motion to strike followed a timely response by Ricci to the motion for summary judgment that was otherwise in keeping with the burden-shifting requirements of Young v. Key Pharmaceuticals, 112 Wn.2d at 225-27. See Ricci Br. at 18-20. Ricci's timely answer to the motion to strike, liberally considered under CR 1, should be deemed in

appreciate the shortcomings of an otherwise timely submission, such as the Greenberg report/CV. The client should not have to pay the price of dismissal of the claim if de novo review reveals that the same submission, if timely, would have resulted in denial of summary judgment. Cf. Coggle v. Snow, 56 Wn.App. 499, 508-09, 784 P.2d 554 (1990) (holding superior court abused its discretion in not granting a continuance to supplement the summary judgment record, when the proposed supplement would have created a genuine issue of material fact and no prejudice would have resulted to the opposing party).<sup>13</sup> Any other result leaves summary judgment practice as an anachronism, at odds with the spirit of CR 1 and this Court's stated preference for disposition of cases on the merits.

**C. Expert Testimony Submitted In Opposition To A Motion For Summary Judgment Is Viewed With Leniency, And Should Be Allowed, Based On The Documentary Record, Unless Admission At Trial Would Be An Abuse Of Discretion.**

Whether the superior court properly granted Gary's motion for summary judgment appears to hinge upon the competency of Greenberg, as a psychologist, to render an opinion on the standard of care of a mental health counselor. See Ricci Slip. Op. at 15. As argued above, this Court reviews de novo Gary's motion to strike and decides for itself what evidence is deemed admissible for summary judgment purposes. See §B., supra.

---

keeping with the spirit of CR 56(f). See also CR 6(b), regarding enlargement of time. The current text of CR 6 is reproduced in the Appendix.

<sup>13</sup> If there is actual prejudice to the opposing party or significant inconvenience to the court, terms could be imposed. Cf. Olson, 126 Wn.2d at 324 (Talmadge, J., concurring).

Whether there is a sufficient foundation on summary judgment for an expert to render an opinion on the standard of care is often a fact-specific inquiry. See generally White v. Kent Med. Center, Inc., 61 Wn.App. 163, 169-73, 810 P.2d 4 (1991) (discussing criteria for admissibility of expert testimony); Eng v. Klein, 127 Wn.App. 171, 174-75, 180, 110 P.3d 844 (2005) (same), *review denied*, 156 Wn.2d 1006 (2006). In some instances, an expert in one field is per se disqualified from testifying on the standard of care of a practitioner in another field. See Young, 112 Wn.2d at 230-31 (concluding pharmacist not competent to testify on a physician's standard of care for prescribing medication). This does not appear to be the claim here. In this case, Gary's principal argument is that Ricci failed to establish Greenberg is *familiar* with the mental health counselor's standard of care. See Gary Ans. to Pet. for Rev. at 15-18; Gary Br. at 35-39; see also White, 61 Wn.App. at 173.

In considering de novo the admissibility of Greenberg's expert opinion, the Court should have in mind its prior teaching that, in keeping with the "light most favorable" notion that pervades summary judgment practice, evidence submitted by the non-moving party must be viewed with leniency. See Meadows v. Grant's Auto Brokers, Inc., 71 Wn.2d 874, 879, 431 P.2d 703 (1967) (recognizing on summary judgment court indulges in some leniency in reviewing non-moving party's affidavit); see also Young, 112 Wn.2d at 227 (ruling pharmacist incompetent to testify

on physician's standard of care "[e]ven granting the benefit of every leniency to the plaintiff as the nonmoving party").

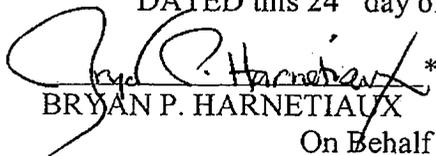
The leniency principle is particularly important in passing upon the competency of expert witness testimony, when, as in this case, the inadmissibility of such testimony is outcome-determinative on summary judgment. See Ricci Slip. Op. at 15. Yet, as previously discussed, there is often a fine line between whether any claimed deficiency in the expert's background and credentials bears on admissibility of the opinion or the weight that it should be accorded by the trier of fact. See text supra at 13-14.

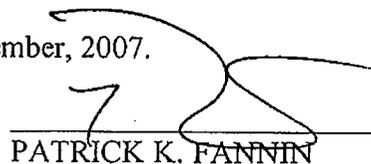
In resolving summary judgment motions, leniency requires that, especially in marginal cases, the court err on the side of admitting the non-moving party's expert testimony. It is in this instance where the right to trial by jury hangs in the balance. This should mean that unless the court on summary judgment can say that, based upon the documentary record, no court would admit the testimony at trial, the evidence should be considered for summary judgment purposes. See CR 56(e).

## VI. CONCLUSION

The Court should adopt the analysis advanced in this brief and resolve this appeal accordingly.

DATED this 24<sup>th</sup> day of September, 2007.

  
BRYAN P. HARNETIAUX  
On Behalf of WSTLA Foundation

  
PATRICK K. FANNIN

FILED AS ATTACHMENT  
TO E-MAIL

\*Brief transmitted for filing by e-mail; signed original retained by counsel.

# APPENDIX

**CR 1****Scope of Rules**

These rules govern the procedure in the superior court in all suits of a civil nature whether cognizable as cases at law or in equity with the exceptions stated in rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

## CR 6

### Time

(a) Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any superior court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, a Sunday nor a legal holiday. Legal holidays are prescribed in RCW 1.16.050. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion, (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or, (2) upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 50(b), 52(b), 59(b), 59(d), and 60(b).

(c) Proceeding Not To Fail for Want of Judge or Session of Court. No proceeding in a court of justice in any action, suit, or proceeding pending therein, is affected by a vacancy in the office of any or all of the judges or by the failure of a session of the court.

(d) For Motions--Affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

(e) Additional Time After Service by Mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

## CR 56

### Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross claim, or to obtain a declaratory judgment may, after the expiration of the period within which the defendant is required to appear, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross claim is asserted or a declaratory judgment is sought may move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings. The motion and any supporting affidavits, memoranda of law, or other documentation shall be filed and served not later than 28 calendar days before the hearing. 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 prior to the hearing. If the date for filing either the response or rebuttal falls on a Saturday, Sunday, or legal holiday, then it shall be filed and served not later than the next day nearer the hearing which is neither a Saturday, Sunday, or legal holiday. Summary judgment motions shall be heard more than 14 calendar days before the date set for trial unless leave of court is granted to allow otherwise. Confirmation of the hearing may be required by local rules. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under the rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the

action, the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. 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. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. 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 he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) Form of Order. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered.

## **RAP 1.2**

### **Interpretation and waiver of rules by court**

(a) Interpretation. These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands, subject to the restrictions in rule 18.8(b).

(b) Words of Command. Unless the context of the rule indicates otherwise: "Should" is used when referring to an act a party or counsel for a party is under an obligation to perform. The court will ordinarily impose sanctions if the act is not done within the time or in the manner specified. The word "must" is used in place of "should" if extending the time within which the act must be done is subject to the severe test under rule 18.8(b) or to emphasize failure to perform the act in a timely way may result in more severe than usual sanctions. The word "will" or "may" is used when referring to an act of the appellate court. The word "shall" is used when referring to an act that is to be done by an entity other than the appellate court, a party, or counsel for a party.

(c) Waiver. The appellate court may waive or alter the provisions of any of these rules in order to serve the ends of justice, subject to the restrictions in rule 18.8(b) and (c).