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AUG 24 2006  
CLERK OF SUPREME COURT  
STATE OF WASHINGTON

No. 56338-6-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

SIOBHAN RICCI,

Appellant,

v.

STEVEN GARY and JANE DOE GARY, and the marital community  
composed thereof; ALMA STANFORD and JOHN DOE STANFORD,  
and the marital community composed thereof,

Respondents.

PETITION FOR REVIEW  
BY WASHINGTON SUPREME COURT

Sylvia Luppert, WSBA 14802  
REAUGH OETTINGER & LUPPERT, P.S.  
1601 Fifth Avenue  
Suite 2200  
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COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON  
AUG 24 2006

ORIGINAL

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**I. IDENTITY OF PETITIONER.**

Siobhan Ricci is the petitioner to this Court, and was the plaintiff in the King County Superior Court and the appellant in the Court of Appeals, Division I.

**II. COURT OF APPEALS DECISION.**

Siobhan Ricci petitions this Court to review the Court of Appeals decision affirming the summary dismissal of her complaint. The decision was filed on July 17, 2006.

**III. ISSUES PRESENTED FOR REVIEW.**

1. Whether the standard of review of all trial court rulings in conjunction with summary judgment, including a determinative evidentiary ruling, should be de novo?

2. Whether a psychologist may express an opinion regarding the standard of care of a licensed mental health counselor when, notwithstanding the differences in their titles, the psychologist's training and experience completely overlaps that of the mental health counselor?

**IV. STATEMENT OF THE CASE.**

Siobhan Ricci claims that Steven Gary, her former mental health counselor, was negligent in his treatment of her. CP 1-2. Gary moved to

dismiss all of Ricci's claims on summary judgment, asserting that she lacked any expert opinion testimony to support her claims. CP 9-24, 163-72. Ricci answered the motion and submitted the report and the curriculum vitae of Stuart Greenberg, PhD, a licensed psychologist. Dr. Greenberg's report, CP 243-260, states his opinion that Gary's actions, which included Gary's making multiple sexually loaded comments to Ricci, and Gary's inadequate assessment and treatment of Ricci, caused or exacerbated Ricci's psychological problems. CP 592. Greenberg's curriculum vitae, CP 220-233, reveals that he obtained a PhD in 1972, has been a licensed clinical psychologist in Washington since 1981, and has been certified by the American Board of Professional Psychology since 1989. He is a practicing clinical psychologist and Assistant Professor at the University of Washington Department of Psychiatry and Behavioral Sciences. He has taught many courses and been extensively published.

Before replying to Ricci's answer, Gary filed a separate motion to strike Greenberg's report, asserting that Greenberg is not qualified to express an opinion regarding the standard of care of a mental health counselor. CP 277-284. The motion to strike asserted that the qualifications of mental health professionals are analogous to those of medical professionals, and that a psychologist may not testify against a mental health counselor unless the psychologist has specific training as a mental health counselor. The motion

did not, however, identify either any qualifications of a mental health counselor not possessed by a psychologist or any practices or techniques followed by mental health counselors which are not permitted or followed by psychologists.

Ricci answered the motion to strike by directing the trial court to the statutory licensing descriptions of mental health counselors and psychologists which demonstrate that the field of psychology completely overlaps the more limited field of mental health counselors. CP 351-53. Ricci also submitted excerpts from the deposition testimony of Dr. Greenberg in which he stated, among other things, “what counselors are trained to do is part of the same thing that psychologists and psychiatrists are trained to do.” CP 380-81.

The trial court, the Honorable Helen Halpert, expressly refused to consider the excerpts from Greenberg’s deposition testimony. In addition, she inadvertently did not consider Ricci’s answer to the motion to strike. Judge Halpert granted the motion to strike Greenberg’s report, which she stated resolved the case. CP 452-54.

Ricci moved for reconsideration asking the trial court to consider her overlooked answer to the motion to strike and to consider a Court of Appeals decision filed on the same day as the trial court’s order, *Eng v. Klein*, 127 Wn. App. 171, 110 P.3d 844 (April 25, 2005). CP 455-69. The trial court

denied Ricci's motion for reconsideration. CP 564-66.

The Court of Appeals applied an abuse of discretion standard to the trial court's order striking Greenberg's report, and affirmed.

**V. ARGUMENT.**

The Court of Appeal's decision conflicts with decisions of this Court and with other decisions of the Courts of Appeals with respect to the standard of review applicable to all rulings in conjunction with summary judgment including the required demonstration of an expert's qualification. Indeed, the decisions of the Courts of Appeals reflect conflicting standards of review with respect to evidentiary determinations in conjunction with summary judgments.

**A. THE STANDARD OF REVIEW OF ALL MATERIAL RULINGS IN CONJUNCTION WITH SUMMARY JUDGMENT MOTIONS IS DE NOVO.**

In other decisions the Court of Appeals has employed the de novo standard on all rulings for summary judgment, including evidentiary rulings regarding the qualifications of experts.

Ordinarily, “[t]he 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.” *McKee*, 113 Wn.2d at 706 (citing *Bernal v. American Honda Motor Co., Inc.*, 87 Wn.2d 406, 413, 553 P.2d 107 (1976), (quoting *Nordstrom v. White Metal Rolling & Stamping Corp.*, 75 Wn.2d 629, 642, 453 P.2d 619 (1969))). But we review the trial court's evidentiary rulings made for summary judgments

de novo. See *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) (“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.”).

*Seybold v. Neu*, 105 Wn. App. 666, 678, 19 P.3d 1068 (2001) (emphasis added). *Seybold* held that a plastic surgeon was competent to testify regarding the defendant orthopedic surgeon’s treatment of a skin cancer near the bone and reversed the trial court’s striking the plastic surgeon’s deposition testimony.

Three other Court of Appeals decisions which involve an examination of an expert’s qualifications also employ a de novo standard. *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), all involve summary judgments in which the qualifications of a medical expert determined the outcome. Without expressly stating the standard of review employed, all of these decisions implicitly apply a de novo standard in their reversals of summary judgments based upon a trial court’s evidentiary ruling that the plaintiffs’ medical experts lacked the requisite qualifications.

*Morton*, which reversed the trial court’s ruling that the plaintiff’s expert was not qualified, states at 247, “No hard and fast rule requires

testimony on the standard of care in a medical negligence action to come from a physician who has the same specialty as the defendant. The internist testified that Dr. Joseph, the lung specialist, should have done more to rule out tuberculosis before recommending surgery to diagnose cancer. Because the internist had sufficient expertise to demonstrate familiarity with the medical problem at issue, and gave an opinion rooted in the facts of the patient's treatment, we reverse the order granting summary judgment to Dr. Joseph.”

*Eng* did not specifically identify the standard of review employed, but in reversing the trial court's ruling that the plaintiff's expert, a specialist in infectious diseases was not qualified to testify regarding the treatment of a neurosurgeon, *Eng* clearly engaged in a de novo review. *Eng*, at 172, “A practitioner of one school of medicine may testify regarding the practice in another school of medicine when the methods of treatment of the two are or should be the same.”

*White* also holds that the nonmoving party's factual showing in a motion for summary judgment is reviewed de novo and in the light most favorable to that party. *White*, in considering whether an ear, nose, and throat specialist's testimony regarding the standard of care of a general practitioner could satisfy a plaintiff's summary judgment burden, reversed summary

judgment, stating that so long as a physician with a medical degree has sufficient expertise to demonstrate familiarity with the procedure or medical problem at issue, ordinarily the physician “will be considered qualified to express an opinion on any sort of medical question including questions in areas in which the physician is not a specialist.” *White*, at 173.

The standard of review for evidentiary rulings in conjunction with summary judgments is not consistently expressed among the Courts of Appeal. It appears, however, that whether appellate courts use a de novo or an abuse of discretion standard for evidentiary rulings depends upon whether the ruling reviewed favors the nonmoving party. *Sunbreaker Condo. Ass'n v. Travelers Ins. Co.*, 79 Wn. App. 368, 372, 901 P.2d 1079 (1995), review denied, 129 Wn.2d 1020, 919 P.2d 600 (1996), and *Breit v. St. Lukes Memorial Hosp.*, 49 Wn.App. 461, 465, 743 P.2d 1254 (1987), used an abuse of discretion standard for evidentiary rulings in conjunction with summary judgment, but both decisions favor the nonmoving party, making the review standard immaterial. *Doherty v. Municipality of Metro. Seattle*, 83 Wn.App. 464, 468-69, 921 P.2d 1098 (1996), first states that issue of whether the trial court properly struck an expert’s affidavit is reviewed de novo, and then upholds the trial court stating the ruling was reviewed for abuse of discretion. This seeming contradiction may be explained by the Court’s stating that even without the expert’s affidavit, the plaintiff set forth sufficient evidence to

overcome the motion for summary judgment, making the standard of review employed by *Doherty* immaterial to the decision. *Colwell v. Holy Family Hosp.*, 104 Wn.App 606, 613, 15 P3d 210 (2001), cites *Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P3d 1265 (2000) for the proposition that an abuse of discretion standard is used. *Cox* does not, however, support the proposition because *Cox* reviews the trial court's ruling on a motion in limine regarding admission of evidence at trial. More important, *Colwell* explains that the declarations at issue were submitted in connection with another defendant's separate motion, and not the motion at issue on appeal.

A de novo standard of review on all rulings made in conjunction with summary judgment is consistent with the purposes and practices in reviewing summary judgment. "The object and function of the summary judgment procedure is to avoid a useless trial; however, a trial is not useless, but is absolutely necessary where there is a genuine issue as to any material fact." *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 349 588 P.2d 1346 (1979); *see also, La Plante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). Summary judgment is appropriate only if there are no genuine issues of material fact. *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993). All inferences must be taken in favor of the nonmoving party. *Kent Farms, Inc. v. Zurich Ins. Co.*, 140 Wn.2d 396, 399, 998 P.2d 292 (2000); *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182

(1989). Summary judgment should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

Employing the abuse of discretion standard to evidentiary rulings which favor the nonmoving party or are inconsequential to the result, is not inconsistent with resolving reasonable inferences in the light most favorable to the nonmoving party. When, however, an evidentiary ruling in conjunction with a motion for summary judgment is adverse to the nonmoving party, only the de novo standard of review is consistent with summary judgment standards placing the burden of demonstrating the absence of material facts on the moving party and resolving inferences in the light most favorable to the nonmoving party.

**B. THE QUALIFICATIONS OF AN EXPERT FOR PURPOSES OF SUMMARY JUDGMENT SHOULD DEPEND UPON THE SCOPE OF THE EXPERT’S KNOWLEDGE AND RESOLVED IN FAVOR OF THE NONMOVING PARTY.**

“So long as a physician with a medical degree has sufficient expertise to demonstrate familiarity with the procedure or medical problem at issue, ‘[o]rdinarily [he or she] will be considered qualified to express an opinion on any sort of medical question, including questions in areas in which the physician is not a specialist.’” *White v. Kent Medical Center, Inc., P.S.*, 61 Wn. App. 163, 173, 810 P.2d 4 (1991) (citing 5A K. Tegland, Wash. Prac.,

Evidence § 290[2], at 386 (3d ed. 1989)). The requirements for demonstrating an expert’s qualifications for summary judgment purposes are not as stringent as required at trial. “As long as the standard of care expressed is more than mere personal opinion it is sufficient to establish, at least for summary judgment purposes, the expert’s knowledge of the applicable standard of care.” *White*, 174.

Gary’s argument, which prevailed with the trial court and Court of Appeals, is based upon the bare assumption that Gary’s and Greenberg’s respective licenses as a mental health counselor and a psychologist are analogous to different schools of medicine. This assumption led to application of the general rule that an expert of one school of medicine is not competent to testify as an expert in an action against a practitioner in another school. *Eng v. Klein*, 127 Wn.App. 171, 176, 110 P.3d 844 (2005). This assumption, however, is not well-founded here, and is entirely unsupported by evidence.

The licensing statutes applicable to Greenberg and Gary demonstrate that Greenberg’s authorized areas of practice as a psychologist completely overlap those of Gary, a licensed mental health counselor. Specifically, RCW 18.83.020(1) defines the “practice of psychology” as including the provision of services for:

(b) Diagnosis and treatment of mental, emotional, and behavioral disorders, and psychological aspects of illness, injury, and disability; and

(c) Counseling and guidance, psychotherapeutic techniques, remediation, health promotion, and consultation within the context of established psychological principles and theories.

Steven Gary's area of practice as a licensed mental health counselor is defined in RCW 18.225.010(8) as,

the application of principles of . . . psychotherapy, . . . and etiology of mental illness and dysfunctional behavior to individuals, couples, families, groups, and organizations, for the purpose of treatment of mental disorders and promoting optimal mental health and functionality. Mental health counseling also includes, but is not limited to, the assessment, diagnosis, and treatment of mental and emotional disorders .

..

Both statutory descriptions of Greenberg's and Gary's practices encompass the assessment and treatment of an individual's emotional and mental health. Greenberg's opinion is directed to Gary's assessment and treatment of Ricci's mental and emotional disorders and is founded upon the common areas of practice of his and Gary's professions. Greenberg's curriculum vitae and his report demonstrate that he is qualified to express an opinion regarding Gary's assessment and treatment notwithstanding the differences in their respective titles.

*Morton v. McFall*, 128 Wn. App. 245, 115 P.3d 1023 (2005), states that the differences between different fields or schools of medicine is not a

hypertechnical distinction based upon mere title. The Court states at 253,

However, to practice “in the same field” means that a pharmacist may not define the standard of care for a physician (*Young* [*Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 229, 770 P.2d 182 (1989)]); and that a physician may not do so for a pharmacist (*McKee* [*McKee v. American Home Products Corp.*, 113 Wn.2d 701, 706, 782 P.2d 1045 (1989)]). There is no general rule that prohibits a specialist from testifying regarding the standard of care applicable to a general practitioner; or a specialist in one area from testifying about another area. *White v. Kent Medical Ctr., Inc.*, 61 Wn. App. 163, 173, 810 P.2d 4 (1991); *Eng v. Klein*, 127 Wn. App. 171, 110 P.3d 844, 845 (Wash. Ct. App. April 25, 2005)(“It is the scope of a witness's knowledge and not artificial classification by professional title that governs the threshold question of admissibility of expert medical testimony in a malpractice case.”)

Nothing in the record supports Gary’s assertion that he and Greenberg practice in different “fields” or “schools.” The nearly identical statutory descriptions of their respective authorized practices should alone have required denial of Gary’s summary judgment motion because the statutes provide the reasonable inference that Greenberg is qualified. The inference is particularly appropriate given that Gary made no showing that treatment of a person presenting like Ricci is any different for a mental health counselor than a psychologist.

*Eng* makes it incumbent on the moving party to demonstrate some difference in the methods of practice between the expert’s and the defendant’s fields which would disqualify the former. *Eng*, at 178, points out

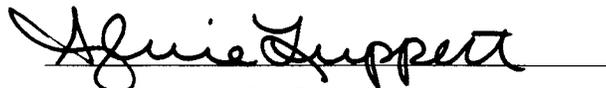
“Furthermore, there is no evidence showing that Dr. Klein's failure to continue a differential diagnosis and ultimate failure to order a spinal tap are omissions particularized to his neurosurgical specialty.” Similarly, Gary offered no evidence that his assessment and treatment of Ricci were particularized to mental health counselors. At 179, *Eng* states, “On the other hand, Dr. Klein has produced no evidence to demonstrate that the diagnostic methods at issue are different for neurosurgeons than for infectious disease specialists.” Here, Gary made no demonstration of any material differences in the standard of care between psychologists and mental health counselors with respect to treatment of a patient presenting the profile of Ricci.

In the summary judgment proceeding below, Ricci was entitled to the reasonable inference that Greenberg, whose training and experience are at least as broad as Gary's, is qualified to express an opinion on the standard of care of any mental health practitioner's treatment of persons like Ricci.

**VI. CONCLUSION.**

Siobhan Ricci asks this Court to review and reverse the Court of Appeals decision.

Respectfully submitted this August 16, 2006

A handwritten signature in black ink, appearing to read "Sylvia Luppert", written over a horizontal line.

Sylvia Luppert, WSBA 14802

Reaugh Oettinger & Luppert, P.S.

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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

SIOBHAN RICCI,

Appellant

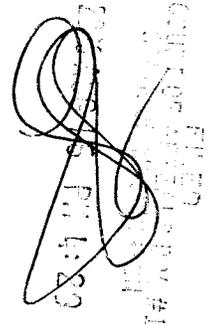
No. 56338-6-I

v.

CERTIFICATE OF SERVICE

STEVEN GARY and JANE DOE  
GARY, and the marital community  
composed thereof; ALMA  
STANFORD and JOHN DOE  
STANFORD, and the marital  
community composed thereof,

Respondents.



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

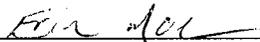
ORIGINAL

On the date given below, I caused to be served by ABC Legal  
Messenger a copy of the foregoing Petition for Review to this Court and  
to:

Tyna Ek  
Soha & Lang, P.S.  
701 Fifth Avenue, Ste 2400  
Seattle, WA 98104

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

DATED this 16<sup>th</sup> day of August, 2006, at Seattle, Washington.

  
\_\_\_\_\_  
Erin Moeur  
Legal Assistant

# APPENDIX

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REAUGH OETTINGER & LUPPERT, P.S.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SIOBHAN RICCI,	)	
	)	
Appellant,	)	
	)	No. 56338-6-1
v.	)	
	)	
STEVEN GARY and JANE DOE GARY,	)	DIVISION ONE
and the marital community composed	)	
thereof,	)	
	)	UNPUBLISHED OPINION
Respondents,	)	
	)	
ALMA STANFORD and JOHN DOE	)	
STANFORD, and the marital community	)	
composed thereof,	)	
	)	
Defendants.	)	FILED: July 17, 2006

**DWYER, J.** – Siobhan Ricci sued her former mental health counselor, Steven Gary, alleging negligent treatment and violation of confidentiality laws.<sup>1</sup> The trial court dismissed her claims on summary judgment. Ricci now appeals, contending that the trial court erred by not considering certain late-filed documents, by ruling that her professional negligence claim lacked the requisite expert testimony, and by ruling that her breach of confidentiality claim was unfounded. Finding no error, we affirm.

---

<sup>1</sup> Ricci also sued another counselor, Alma Stanford. The parties settled those claims while the case was on appeal.

**FACTS**

Facts underlying Ricci's claims<sup>2</sup>

Steven Gary provides individual and couples counseling. Gary has a master's degree in Applied Behavioral Science and is a licensed mental health counselor (LMHC). In September 2000, Ricci and her husband began seeing Gary for marital counseling. Ricci began seeing Gary for individual counseling in October 2000.

Ricci eventually came to believe that she was too emotionally attached to Gary. In July 2001, she asked him for a referral to another counselor. He referred her to Alma Stanford, a certified counselor.

Before Ricci began seeing Stanford for therapy in August 2001, Gary and Stanford discussed Ricci in the context of transferring her care.

Several weeks after she began therapy with Stanford, Ricci decided that she wanted to return for a single session with Gary. Gary told Ricci that he wanted to speak to Stanford before seeing Ricci. Ricci provided her verbal consent for him to do so. Stanford and Gary discussed the purpose of Ricci's return visit and the transfer of her care.

In early September 2001, Ricci had a session with Gary. At the end of this session, Gary told Ricci that he loved her, although Ricci described his manner as "nonchalant." Ricci states that this was problematic for her because of "the

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<sup>2</sup> The facts are set forth in the light most favorable to Ricci.

difficulty with my letting go of that attachment to him and not understanding why it would be important for him to say something like that just in casual passing.”

On October 3, 2001, Ricci had an additional session with Gary, during which she asked him about his statement that he loved her. In response, Gary told her, "I love you, but I don't have to have you."

At the end of this session, which was the last time Ricci and Gary saw one another, they embraced. Ricci testified in her deposition that there was nothing inappropriate about the embrace and that the embrace did not form a basis for her complaint.

Stanford stated that she met with Gary on October 10 to discuss Ricci and the transfer of her care.<sup>3</sup> Gary denied that this meeting occurred.

On October 29, Stanford told Ricci that she and Gary had met to discuss Ricci and that the discussion included details of Ricci's October 3 session with Gary. Ricci was surprised by this because she had not previously told Stanford about the October 3 session.

Stanford told Ricci that Gary felt "unappreciated" by Ricci, had renewed his wedding vows with his wife, and had decided to stay with his wife because he "had been trying to get appreciation from the wrong person." Stanford also told Ricci that Gary had admitted to being aroused by Ricci during their embrace. Ricci felt "exploited" by Gary discussing his feelings with Stanford.

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<sup>3</sup> Stanford testified in her deposition that she destroyed all of her notes regarding Ricci after receiving a telephone call from Ricci's husband that made her fear for her safety.

Ricci telephoned Gary to ask why he and Stanford had communicated about her. In this one-hour conversation, Gary told her that he had been "aroused" during their last session. Ricci testified that this disclosure was the most distressing action taken by Gary.

Subsequently, Ricci received a letter from Gary instructing her not to contact him again.

Facts pertaining to confidentiality laws

When Ricci began counseling with Gary, he was subject to the confidentiality provisions of RCW 18.19.180. On July 22, 2001, chapter 18.225 RCW became effective, creating and regulating the licensed mental health counselor (LMHC) profession. When chapter 18.225 RCW became effective, it did not contain confidentiality provisions comparable to those in RCW 18.19.180. The legislature added such confidentiality provisions to chapter 18.225 RCW in 2003. In 2000 and 2001, the confidentiality provisions of the Uniform Health Care Information Act (UHCIA), set forth in RCW 70.02.050, applied to Gary. RCW 70.02.010(4)(a), (b); RCW 70.02.180. In addition, Gary presented his clients with a written confidentiality policy based on RCW 18.19.180 on a form included with his intake paperwork. Ricci signed such a form on September 21, 2000.

Procedural history

Ricci sued Gary, alleging negligent treatment and violation of confidentiality laws.

Gary moved for summary judgment, asserting: (1) that Ricci lacked expert evidence that Gary had breached applicable standards of care; (2) that Ricci lacked evidence that Gary's actions had caused her injury; and (3) that Gary was authorized by the UHCIA to communicate with Stanford about Ricci. The motion was set for hearing on April 22, 2005, three weeks before the trial date.

With Ricci's response to the motion for summary judgment, she submitted the curriculum vitae of licensed psychologist Stuart Greenberg, Ph.D., and a report prepared by Dr. Greenberg, in which he expressed his opinions regarding Gary's failure to meet applicable standards of care.<sup>4</sup>

Dr. Greenberg's report also describes communications between Gary and Stanford.

Dr. Greenberg opined that "reasonably prudent and competent practitioners would not have engaged in the behaviors and actions described." He also opined that Ricci's psychological makeup should have been apparent to a reasonably prudent and competent practitioner. Although he acknowledged that a "normally constituted person would not be substantially harmed by the counselors' allegedly sexual comments and questionable discretion regarding Ricci's confidentiality," Dr. Greenberg stated that Ricci's status as a therapy patient, her personality makeup, and the situational stress she was under

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<sup>4</sup> In the report, Dr. Greenberg adds additional factual context about Ricci's counseling with Gary. For example, Ricci alleges that Gary asked her, during a session, whether she was attracted to him. Ricci also related that during a session with Gary, that Gary said to her, "If you asked me for sex, I would tell you no." Clerk's Papers (CP) at 580. Ricci reported that this comment seemed out of context.

indicated she was not a "normally constituted person." He continued:

"Reasonably prudent and competent therapists should have been aware that she needed care and discretion that was more thoughtful, cautious, and respectful of her psychological makeup and the state of her life situation." Dr. Greenberg added:

It is my opinion, therefore, that the prevailing professional judgment of competent practitioners in similar circumstances would have been to not engage in the actions allegedly engaged in by the defendants in this matter. Their alleged behavior in these regards was professionally inappropriate, ill-suited to their patient, and ill-timed given her fragile state. Their actions were lacking in adequate forethought and were inconsiderate of and discrepant with concerns for her well-being. It is my opinion that they either failed to adequately assess her makeup and her status, or they disregarded what they knew in their manner of dealing with her, or both.

Dr. Greenberg also expressed his opinion regarding the causation of

Ricci's injuries:

It is my opinion that, on a more probably than not basis, [Gary and Stanford's] failure to provide her adequate assessment and treatment combined with the inadequate thoughtfulness, prudence, judgment, and discretion that is reflected in their actions, either caused or exacerbated her psychological problems rather than helping to treat them.

Gary moved to strike the report, claiming that there was no evidence that

Dr. Greenberg was familiar with the standard of care for licensed mental health counselors.<sup>5</sup>

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<sup>5</sup> Gary also claimed that the report was not properly submitted, as it was unsworn. The trial court declined to grant the defendant's motion on this basis.

On April 12, 2005, the day after Ricci's answer to the motion for summary judgment was due and filed, Gary's counsel deposed Dr. Greenberg.

Dr. Greenberg expanded upon his qualifications and his knowledge of the training and standards of care of mental health counselors. Dr. Greenberg stated that, prior to the deposition, he had reviewed the Code of Ethics of the American Mental Health Counselors Association, conduct codes, practice codes, and regulations. He stated that he read the counselors' depositions before generating his report. He testified that there is "overlap" between a psychologist's training and a LMHC's training in general and a specific overlap between Dr. Greenberg's training and Gary's training, as both studied family systems therapy.

Ricci's answer to the motion to strike was filed on April 20, 2005. The answer included a declaration by Ricci's counsel which had the majority of the transcript of Dr. Greenberg's deposition attached as an exhibit.

On April 22, 2005, the trial court granted Gary's motion to strike Dr. Greenberg's report. The basis for this ruling was that a sufficient foundation had not been established to demonstrate Dr. Greenberg's competency to testify to the standards of care applicable to LMHCs. Specifically, the trial court stated:

The source of Dr. Greenberg's knowledge as to the standard of care required of mental health counselors is not stated in his report. A review of his curriculum vitae does not indicate any particular experience in regards to the training required of mental health counselors or any familiarity with administrative or statutory provisions applicable to counselors licensed pursuant to RCW 18.225. ... This makes it particularly difficult to determine the basis

of his opinion that the defendants should have been aware of Ms. Ricci's particular vulnerability and that their lack of awareness breached the applicable standard of care. As a result, Dr. Greenberg's opinions are naked conclusions without a mooring in the applicable standard of care. The motion to strike is granted.

The trial court refused to consider Dr. Greenberg's deposition testimony in ruling on the motion to strike and also refused to consider the deposition testimony as substantive evidence in ruling on the motion for summary judgment.

The trial court granted summary judgment to the defendant, dismissing Ricci's claims against Gary with prejudice.

The trial court denied Ricci's subsequent motion for reconsideration and entered judgment for Gary. Ricci appeals.

## **DISCUSSION**

### **I. Trial court's refusal to consider late-filed documents**

Ricci contends that the trial court erred by refusing to consider the excerpts from the deposition of Dr. Greenberg, which were filed with the court nine days after her summary judgment response was due and only two days before the hearing. The record is clear that the trial court refused to consider this evidence in resolving both the motion to strike Dr. Greenberg's report and the underlying summary judgment motion.

With regard to the summary judgment motion, Civil Rule 56 sets clear due dates for the filing of the parties' pleadings.<sup>6</sup> It was once the law that the trial

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<sup>6</sup> "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

court was charged with the responsibility of considering any affidavit filed prior to the entry of a formal order of summary judgment, even if an oral decision or memorandum decision had been rendered by the court. See, e.g., Cofer v. Pierce County, 8 Wn. App. 258, 505 P.2d 476 (1973); Felsman v. Kessler, 2 Wn. App. 493, 468 P.2d 691 (1970). This is no longer the law. Instead, the time provisions of CR 56(c) govern. The law is now that a trial court is not required to consider an affidavit that has been untimely filed in response to a summary judgment motion. McBride v. Walla Walla County, 95 Wn. App. 33, 37, 975 P.2d 1029, 990 P.2d 967 (1999) (trial court properly refused to consider affidavits filed by non-moving party 4 days before the hearing). “[W]hether to accept or reject untimely filed affidavits lies within the trial court’s discretion.” Brown v. Park Place Homes Realty, Inc., 48 Wn. App. 554, 559, 739 P.2d 1188 (1987). Late-filed affidavits are properly excluded where the proponent of the evidence “ha[s] no excuse for failing to address the issues in prior materials submitted to the court.” Id. at 560.

With regard to the motion to strike Dr. Greenberg’s report, three things must be noted. First, Ricci’s obligation to establish Dr. Greenberg’s testimonial

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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.” CR 56(c).

competency was required to be satisfied at the time the report was filed with the court. The applicable rule provides:

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). This obligation arises in the first instance, not merely in response to an adversary's motion to strike the evidence based on an asserted lack of testimonial competency.

Second, the law allows great latitude to the party bringing the motion to strike. Such a motion has been deemed timely so long as it was made prior to the trial court ruling on the motion for summary judgment. Lamon v. McDonnell Douglas Corp., 91 Wn.2d 345, 352, 588 P.2d 1346 (1979); Smith v. Showalter, 47 Wn. App. 245, 248, 734 P.2d 928 (1987); Greer v. Northwestern Nat'l Ins. Co., 36 Wn. App. 330, 674 P.2d 1257 (1984). "What is 'timely' is not defined in Washington cases, and apparently is up to the court's discretion." David A. Lowe, *Summary Judgment* in 3 CIVIL PROCEDURE DESKBOOK § 56.6(2)(c), 56-19, 56-20 (WASH. STATE BAR ASS'N, 2d ed. 2002).

Third, also within the trial court's discretion is the determination as to whether the motion to strike should be decided only on the pleadings submitted pursuant to CR 56(e) or whether additional evidentiary submissions should be allowed. Smyser v. Smyser, 19 Wn.2d 42, 50, 140 P.2d 959 (1943) (orderly conduct of proceeding is a matter wholly within the discretion of the trial judge).

Inasmuch as CR 56(e) requires that the witnesses' competency be set forth in the affidavit and CR 56(c) establishes the due date for filing the affidavit, the proponent of the affiant's testimony clearly has no right, absent the grace of the court, to correct errors or supplement the record through the submission of late-filed documents.

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. Coggle v. Snow, 56 Wn. App. 499, 506-07, 784 P.2d 554 (1990). As explained in that case, “the central idea of discretion is *choice*: the court has discretion in the sense that there are no “officially wrong” answers to the questions posed.” Id. at 505. On these facts, we conclude that there is no “officially wrong” answer to the question posed. There were tenable grounds and reasons supporting the trial court's decision. Therefore, we cannot and do not find an abuse of discretion in the trial court's decision not to consider the content of the late-filed evidentiary documents in resolving the motion to strike and the summary judgment motion.

II. Trial court's ruling on the motion to strike

Ricci next contends that the trial court erred by granting the motion to strike. We disagree.

A trial court's determination of a witness' competence to render an expert opinion in an action pursuant to RCW 7.70.030, even if made in the course of a summary judgment proceeding, is reviewed for abuse of discretion. Colwell v. Holy Family Hosp., 104 Wn. App. 606, 613, 15 P.3d 210 (2001). Thus, we must discern whether tenable reasons were given in support of the trial court's ruling.

A party alleging negligence by a health care provider is required to show 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). Expert testimony is required to establish the standard of care. Young v. Key Pharms., Inc., 112 Wn.2d 216, 228, 770 P.2d 182 (1989).

"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." Eng v. Klein, 127 Wn. App. 171, 176, 110 P.3d 844 (2005).

There are several well-established exceptions to this rule, which include circumstances where:

- (1) the methods of treatment in the defendant's school and the school of the witness are the same;
- (2) the method of treatment in the defendant's school and the school of the witness should be the

same; or (3) the testimony of a witness is based on knowledge of the defendant's own school.

Miller v. Peterson, 42 Wn. App. 822, 831, 714 P.2d 695 (1986). Essentially, this means that "a practitioner of one school of medicine may testify against a practitioner of another school of medicine when the methods of treatment of the two schools are or should be the same." Id. at 832. "It is the scope of the witness' knowledge and not the artificial classification by title that should govern the ... question of admissibility' of expert medical testimony in a malpractice case." White v. Kent Med. Ctr., Inc., 61 Wn. App. 163, 174, 810 P.2d 4 (1991) (quoting Fitzmaurice v. Flynn, 167 Conn. 609, 356 A.2d 887 (1975)).

The proponent of such testimony bears the burden of establishing testimonial competency. CR 56(e); Doherty v. Municipality of Metro. Seattle, 83 Wn. App. 464, 469, 921 P.2d 1098 (1996); Safeco Ins. Co. v. McGrath, 63 Wn. App. 170, 817 P.2d 861 (1991). Thus, it was incumbent upon Ricci to establish that Dr. Greenberg was familiar with the standard of care applicable to Gary as an LMHC. Ricci failed to meet this obligation.

The trial court had before it Dr. Greenberg's report and his curriculum vitae. Neither established: (1) that the methods of treatment for an LMHC and a forensic clinical psychologist are or should be the same; (2) that Dr. Greenberg's testimony was based on knowledge of Gary's "school"; or (3) either that Dr. Greenberg was familiar with the standard of care applicable to LMHCs or that a factual basis for such a familiarity existed. In addition, Dr. Greenberg's report refers to WAC 246-924-363 and the Ethical Principles of Psychologists and Code

of Conduct as resources he consulted in forming his opinions on the applicable standard of care. However, chapter 246-924 WAC applies to psychologists, not LMHCs, who are regulated under chapter 246-809 WAC.

Dr. Greenberg's ultimate opinion was expressed thusly: "the prevailing professional judgment of competent practitioners in similar circumstances would have been to not engage in the actions allegedly engaged in by the defendants in this matter." CP at 241. The reference to "competent practitioners" is not a clear reference to LMHCs, as opposed to psychologists. Dr. Greenberg's report does not clearly set forth any breach of a standard of care applicable to an LMHC.

The general rule mandates that Dr. Greenberg, a clinical psychologist, cannot opine as to the standard of care applicable to Gary, an LMHC. Taken together, Dr. Greenberg's report and his curriculum vitae fail to demonstrate the applicability of any of the exceptions to this rule, as set forth in Eng v. Klein, 127 Wn. App. at 176, or Miller v. Peterson, 42 Wn. App. at 831. The trial court did not abuse its discretion by granting the motion to strike the opinions expressed in Dr. Greenberg's report.

### III. Trial court's ruling on summary judgment

#### A. Standard of Review

In reviewing an order granting summary judgment, this court engages in the same inquiry as the trial court and considers the evidence and the reasonable inferences therefrom in the light most favorable to the non-moving party. Young v. Key Pharms., 112 Wn.2d at 226. Summary judgment is properly

granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); DeYoung v. Providence Med. Ctr., 136 Wn.2d 136, 140, 960 P.2d 919 (1998). Summary judgment “should be granted only if, from all the evidence, reasonable persons could reach but one conclusion.” Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

#### B. Health Care Negligence Claims

Expert testimony is required to establish both the applicable standard of care and the breach thereof in professional negligence cases involving the provision of health care. RCW 7.70.040; Harris v. Robert C. Groth, M.D., Inc., 99 Wn.2d 438, 449, 663 P.2d 113 (1983). The trial court struck from evidence those portions of Dr. Greenberg’s report in which he set forth his opinions on these subjects. This left Ricci with no evidence on the issues. Under these circumstances, reasonable minds could not differ. The trial court properly granted summary judgment dismissing these claims.

#### C. Confidentiality Claims

Similarly, the trial court did not err by dismissing Ricci’s breach of confidentiality claims. This is true for several reasons.

First, Ricci was without expert testimony to support a professional negligence claim on this basis. Her only expert, Dr. Greenberg, opined that Gary did not fail to treat within the standard of care in this regard.<sup>7</sup> Ricci proffered no

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<sup>7</sup> Gary provided the following explanation for his disclosure of Ricci’s information: “After my initial attempt to transfer Siobhan Ricci’s therapeutic care to Alma Stanford as she requested, in July of 2001, Ms. Ricci continued to contact me. She seemed to be having a difficult time

other expert opinion on the subject.<sup>8</sup> Thus, any claim pursuant to chapter 7.70 RCW fails. Berger v. Sonneland, 144 Wn.2d 91, 26 P.3d 257 (2001); Harris v. Robert C. Groth, M.D., Inc., 99 Wn.2d at 449.

Second, any claim by Ricci that Gary's behavior violated the confidentiality provisions of the UHCIA fails because the act allows for communication between counselors when there is a transfer of care. RCW 70.02.050.<sup>9</sup> Both the plaintiff's expert, Dr. Greenberg, and the defendant's expert, Dr. Corey Fagan, agreed that the UHCIA allowed for the communication which took place herein. Regardless of whether Dr. Greenberg's testimony on this issue was actually considered by the trial court, it is clear that all testimony admitted on the issue was to the effect that no violation of the confidentiality provisions of the UHCIA occurred.

Third, the acts Ricci complains of took place after RCW 18.19.180 ceased to apply to Gary. Thus, Ricci's reliance on this statutory provision is unavailing.

Fourth, chapter 18.225 RCW, which superseded chapter 18.19 RCW with regard to LMHCs in July 2001, does not afford Ricci a basis for relief. When adopted, chapter 18.225 RCW did not contain confidentiality provisions similar to

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

<sup>8</sup> LMHC Judy Roberts made clear in her deposition testimony that she was not testifying to "standard of care" issues.

<sup>9</sup> The UHCIA allows disclosure of health care information about the patient without consent "to the extent a recipient needs to know the information," where the disclosure is to a person reasonably believed to be providing health care to the patient. RCW 70.02.050.

those of RCW 18.19.180. Such provisions were later added by the 2003 legislature. During the intervening period, however, only the provisions of the UHCIA applied to LMHCs such as Gary. Thus, relief cannot be afforded Ricci based on the provisions of chapter 18.225 RCW in effect at the times relevant to this appeal.

Finally, Ricci's attempt to convert her claim to one of breach of contract is untenable.<sup>10</sup> Ricci did not plead a breach of contract claim in her complaint and the trial court did not grant a motion allowing for amendment of the complaint prior to ruling on the summary judgment motion. Because the breach of contract claim was not properly pleaded, it cannot provide a basis for relief.<sup>11</sup>

#### IV. Trial court's ruling denying reconsideration

Ricci did not assign error to the trial court's denial of her motion for reconsideration and, thus, is precluded from seeking relief on this basis. Painting & Decorating Contractors, Inc. v. Ellensberg Sch. Dist., 96 Wn.2d 806, 638 P.2d 1220 (1982). However, we choose to address the issue on its merits and find no error.

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<sup>10</sup> On appeal, Ricci contends that the intake paperwork she signed on September 21, 2000, constituted a written contract, the confidentiality provisions of which were breached by Gary.

<sup>11</sup> In her motion for reconsideration, Ricci argued that paragraph 9 of her complaint adequately alleged this claim. That paragraph provides: "Stanford and Gary breached plaintiff's right of privacy and confidentiality by sharing information about plaintiff with each other without plaintiff's consent." CP 29; 559. These words do not state a cause of action for breach of contract. Inasmuch as they refer to both Stanford and Gary as wrongdoers, they plainly do not refer to a contract between Gary and Ricci, to which Stanford was never a party.

Only newly discovered evidence may be raised in a motion for reconsideration. CR 59(a); Adams v. Western Host, Inc., 55 Wn. App. 601, 779 P.2d 281 (1989). “The realization that [a witness]’ first declaration was insufficient does not qualify the second declaration as newly discovered evidence.” Id. at 608.

Both a trial and a summary judgment hearing afford the parties ample opportunity to present evidence. If the evidence was available but not offered until after that opportunity passes, the parties are not entitled to another opportunity to submit that evidence.

Wagner Dev., Inc. v. Fidelity & Deposit Co., 95 Wn. App. 896, 907, 977 P.2d 639 (1999).

A motion pursuant to CR 59 “is directed to the sound discretion of the trial court.” Byerly v. Madsen, 41 Wn. App. 495, 499, 704 P.2d 1236 (1985). Here, in denying the motion to reconsider, the trial court correctly noted that Dr. Greenberg’s testimony was, at all relevant times, available to Ricci. There was no abuse of discretion.

### **CONCLUSION**

The resolution of this appeal rests upon, and highlights, the discretionary authority granted trial courts. Several important discretionary rulings were made, each of which operated to the detriment of Ricci. This is not, however, an indication of unfairness. Indeed, the applicable court rules and case law upon which this case is decided were well-known and developed before the trial court

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was called upon to rule. Had Ricci strictly complied with these requirements, the series of discretionary rulings of which she now complains might not have had to be made. By not so complying, Ricci put herself to the grace of the trial court – a grace which was not forthcoming. Such is the extent -- and power -- of trial court discretion.

Affirmed.

Dery, J.

We concur:

Appelwick, J.

Baker, J.

