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NO. 56338-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

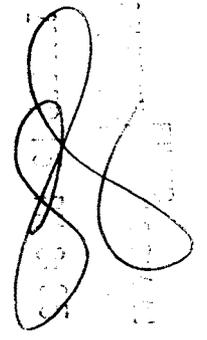
SIOBHAN RICCI,

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,

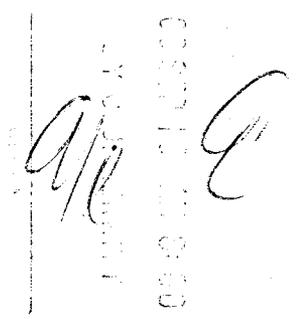
Respondents.



**RESPONDENT'S OPPOSITION TO PETITION FOR
DISCRETIONARY REVIEW BY SUPREME COURT**

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ORIGINAL

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I. IDENTITY OF RESPONDENTS

Steven and Jane Doe Gary were defendants at the trial court level and respondents in the Court of Appeals, Division I.

II. RESPONSE TO ISSUES PRESENTED FOR REVIEW

1. Evidentiary rulings are reviewed under the abuse of discretion standard while the ruling on summary judgment is reviewed de novo.

2. The trial court followed the well established general rule that a practitioner of one school cannot testify about the standard of care for a practitioner in another school and properly held that Ricci failed to establish Dr. Greenberg's qualifications to testify on the standard of care for a LMHC.

III. ADDITIONAL STATEMENT OF THE CASE

Siobhan Ricci sued her former mental health counselors, Steven Gary and Alma Stanford¹, alleging negligent treatment and violation of confidentiality laws. Both defendants moved for summary judgment arguing that plaintiff had no expert evidence of negligence and that their communications were permissible under RCW 70.02.050. Ricci responded with an unsworn forensic report and curriculum vitae (CV) of Dr. Stuart Greenberg. Defendants moved to strike the report because there

was no evidence that Dr. Greenberg, a forensic psychologist, was familiar with the standard of care for a licensed mental health counselor (LMHC). This was highlighted by Dr. Greenberg's use of statutes applicable to psychologists, but not to an LMHC, in formulating his opinions.

Ricci did not argue that the materials she submitted in opposition to the summary judgment motion were sufficient. Instead, she submitted new testimony via Dr. Greenberg's deposition. The court refused to consider the deposition on the motion for summary judgment because it was untimely and Ricci had no explanation for originally failing to provide an adequate declaration from her own expert. The court then struck the report originally filed in opposition to the motion for summary judgment for lack of foundation and granted the summary judgment motion for lack of admissible expert medical testimony.

Ricci moved for reconsideration of the grant of summary judgment, which was denied. She did not assign error on appeal to denial of the motion for reconsideration and the Court of Appeals held that she was therefore precluded from seeking relief on that basis. Decision at 17.

The Court of Appeals affirmed the trial court's refusal to consider the late filed materials, stating that Ricci was obligated, under CR 56(c), to file materials by the deadline and that the trial court is not required to

¹ Ms. Stanford settled the claims against her after summary judgment and before the

consider an untimely affidavit under *McBride v. Walla Walla County*, 95 Wn. App. 33, 37, 975 P.2d 1029, 990 P.2d 967 (1989). The Court noted that Ricci failed to meet her CR 56(e) obligation to establish the witness' competency to testify at the time his report was filed with the Court. The trial court had "tenable grounds and reasons" supporting the decision and therefore did not abuse her discretion in deciding not to consider the untimely evidence. Decision at 11.

The Court of Appeals also affirmed the ruling on the motion to strike Dr. Greenberg's testimony for lack of foundation, citing the general rule that "A practitioner of one school of medicine is incompetent to testify as an expert in a malpractice action against a practitioner of another school." Decision at 12 (citing) *Eng v. Klein*, 127 Wn. App. 171, 176, 110 P.3d 844 (2005). The Court noted the exceptions to the rule but found that Ricci failed to meet her burden of establishing that Dr. Greenberg was familiar with the standard of care applicable to Mr. Gary as an LMHC and thus failed to show that any of the exceptions applied. Decision at 13.

Ricci now seeks review by the Supreme Court, again without complying with procedural requirements. She has not identified any basis for review as required by RAP 13.4(c) and focuses her argument on the merits of the underlying case rather than on the criteria for review set out

appeal was decided.

in 13.4(b). As established by the argument below, the petition for discretionary review does not meet any of the criteria for review and should be denied.

IV. ARGUMENT

1. **Evidentiary rulings are reviewed under the abuse of discretion standard while the ruling on summary judgment is reviewed de novo.**

RAP 13.4(b) sets out the four criteria under which review will be accepted:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court, or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Ricci does not identify which, if any, of these criteria is the basis for her petition for review. She appears to argue that the Court of Appeals applied the wrong standard of review for the trial court's evidentiary rulings, and that there is a conflict among the Courts of Appeal, and between the Courts of Appeal and the Supreme Court, on the appropriate standard of review for an evidentiary ruling on a summary judgment motion. Because the court of appeals in this case followed the overwhelming majority of cases explicitly considering this issue in

correctly applying the abuse of discretion standard to evidentiary rulings on summary judgment, and the de novo standard of review to whether the summary judgment motion itself should be granted, discretionary review of this case is not necessary or appropriate.

Ricci correctly states that the standard of review for determining whether a summary judgment motion was properly decided is de novo, but incorrectly concludes that evidentiary rulings made on a motion to strike or in conjunction with the summary judgment motion are also subject to the de novo standard. This analysis would lead to inconsistent results at summary judgment and trial and would seriously affect the power of trial courts to deal with evidentiary objections.

Washington courts in all three Divisions of the Washington State Court of Appeals have held that abuse of discretion is the proper standard of review for evidentiary rulings made by the trial court in the course of ruling on a summary judgment motion. The Supreme Court has consistently denied petitions for review in these cases. In holding that an abuse of discretion standard applies to its review of a trial court's decision concerning whether to strike portions of expert declarations submitted on summary judgment, Division I has explained:

In the course of summary judgment proceedings, the trial court must frequently make evidentiary decisions. The trial court's summary judgment order should reflect these

decisions. CR 56(h) (designating documents considered by the trial court); RAP 9.12. *The standard of review for trial court evidentiary decisions, including those made in the course of summary judgment proceedings, is abuse of discretion.*

Our review of the trial court's evidentiary decision will define the scope of the record. We then review the summary judgment order de novo.

Sunbreaker Condo. Ass'n v. Travelers Ins. Co., 79 Wn. App. 368, 372, 901 P.2d 1079 (1995), *rev. denied*, 129 Wn.2d 1020, 919 P.2d 600 (1996). *See also Miller v. Peterson*, 42 Wn. App. 822, 832, 714 P.2d 695 (1986) (“Whether an expert is qualified to testify is a determination within the discretion of the trial court and will not be reversed absent manifest abuse.”).

Division II has uniformly ruled that “[w]e review evidentiary decisions, including those related to summary judgment, for abuse of discretion.” *Eagle Group, Inc. v. Pullen*, 114 Wn. App. 409, 416, 58 P.3d 292 (2002); *Milligan v. Thompson*, 110 Wn. App. 628, 634, 42 P.3d 418 (2002).

Division III held, in a case in which the issue was whether or not a medical expert (nurse) was competent to testify in a medical negligence case, that

The trial court must routinely make evidentiary rulings during summary judgment proceedings. *We review these decisions for abuse of discretion.*

(emphasis added) *Colwell v. Holy Family Hosp.*, 104 Wn. App. 606, 613, 15 P.3d 210, *rev. denied*, 144 Wn.2d 1016, 32 P.3d 283 (2001), *citing Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000). *See Germain v. Pullman Baptist Church*, 96 Wn. App. 826, 838, 980 P.2d 809 (1999) (expert declaration stricken for lack of foundation under abuse of discretion standard).

Ricci primarily relies on *Seybold v. Neu*, 105 Wn. App. 666, 678, 19 P.3d 1068 (2001) in claiming that there is a conflict among the courts on the correct standard of review of evidentiary rulings made as part of a summary judgment proceeding. *Seybold* was decided not long after this Court's opinion in *Folsom v. Burger King*, 135 Wn.2d 658, 64, 958 P.2d 301 (1998) where the Court stated:

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, *Lamon*, 91 Wn.2d at 349 (citing *Morris*, 83 Wn.2d at 494-95), and the standard of review is consistent with the requirement that the appellate court conduct the same inquiry as the trial court. *Mountain Park Homeowners Ass'n*, 125 Wn.2d at 341.

The Court went on to affirm the trial court's exclusion of expert opinion testimony.

The correct standard of review was not at issue in *Burger King*, and the trial court's decision to exclude the expert testimony could have been affirmed under either a de novo or abuse of discretion standard. Statements not essential to the holding in a case constitute dicta and lack precedential value. *Plankel v. Plankel*, 68 Wn. App. 89, 841 P.2d 1309 (1992); *Pac. N.W. Transp. v. Utils. & Transp.*, 91 Wn. App. 589, 959 P.2d 160 (1998). The statements on standard of review were not essential to the decision in *Burger King*, making the court's comments on this topic dicta.

It also appears that the *Burger King* court was actually referring to the standard of review for questions of law, not for evidentiary rulings, in talking about the de novo standard. In *Mountain Park Homeowners Association*, cited in *Burger King*, *supra* in support of its comments on the standard of review, the Supreme Court specifically stated that “*all questions of law* are reviewed de novo” citing *Syrovoy v. Alpine Res.*, 122 Wn.2d 544, 548, 859 P.2d 51 (1993). The *Syrovoy* Court also held that “On summary judgment, *all questions of law* are reviewed de novo. See *Hoffer v. State*, 110 Wash. 2d 415, 755 P.2d 781 (1988), *aff'd on rehearing*, 113 Wn. 2d 148, 776 P.2d 963 (1989).” None of these opinions even suggest that evidentiary rulings are reviewed de novo on summary judgment, restricting their comments to the standard for review of questions of law.

Other Supreme Court opinions have used the abuse of discretion standard on review. See, e.g., *McKee v. Am. Home Prods. Corp.*, 113 Wn.2d 701, 706, 782 P.2d 1045 (1989) (“[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.” *Bernal*, at 413, quoting *Nordstrom v. White Metal Rolling & Stamping Corp.*, 75 Wn.2d 629, 642, 453 P.2d 619 (1969)).

Subsequent Supreme Court opinions cite *Burger King* on the standard of review as stating that questions of law are reviewed de novo. See, e.g., *Babcock v. Mason County Fire Dist.*, 144 Wn.2d 774, 784 30 P.3d 1261 (2001) (“All questions of law are reviewed de novo.” citing *Burger King*); *Benjamin v. Washington State Bar Ass'n*, 138 Wn.2d 506, 515 980 P.2d 742 (1999) (“A dismissal under this rule involves a question of law which is reviewed de novo by an appellate court”).

There is a long string of Supreme Court opinions holding that *questions of law* are reviewed de novo on summary judgment. These opinions do *not* state that *evidentiary* rulings are also reviewed de novo, and there is no supportable reason for adopting a different standard for review of evidentiary rulings on summary judgment versus evidentiary rulings made at trial. CR 56 requires that evidence submitted in support of a motion for summary judgment be evidence that would be admissible at

trial. It is undisputed that evidentiary rulings at trial, such as the admissibility of expert testimony, are reviewed under the abuse of discretion standard. It is only logical to utilize the same standard for rulings on evidentiary issues at summary judgment and trial to avoid creating situations where the trial judge is forced to deny summary judgment based on testimony from an expert later found at trial to be unqualified to testify and therefore excluded.

Aside from *Seybold*, other Division I decisions after *Burger King* have continued to apply the long-established abuse of discretion standard to evidentiary rulings on summary judgment. *See, e.g., Blomster v. Nordstrom, Inc.*, 103 Wn. App. 252, 259, 11 P.3d 883 (2000). There does not appear to be significant confusion among the courts on the proper standard.

Ricci claims that several Court of Appeals decisions about expert qualifications “implicitly apply a de novo standard,” attempting to rely on these “implied standards” as evidence that a de novo standard should be applied in this case. This argument should be rejected. It cannot be “implied” from the result what standard a Court was applying in a particular case as a trial court could be reversed or affirmed under either standard of review. Reversal does not “imply” a de novo standard any more than affirming implies an abuse of discretion standard. Unless the

court states the applicable standard, it cannot be determined with certainty what standard was used. Further, without discussion and analysis of the standard of review, an opinion lacks precedential authority on the issue and does not create a “conflict” among appellate court decisions on this issue.

In *Morton v. McFall*, 128 Wn. App. 245, 115 P.3d 1023 (2005) cited by Ricci, for example, the court affirmed summary judgment dismissing the surgeon but reversed summary judgment dismissing the pulmonologist. Presumably the court used the same standard of review for both these evidentiary rulings. Assuming or implying that the standard was de novo review is unwarranted and unsupported by the opinion itself.

Similarly, none of the cases relied on by Ricci state that the standard of review for evidentiary rulings depends on whether the ruling being reviewed favors the nonmoving party as Ricci now urges. Further, closer analysis of the case law establishes that the standard of review is not geared towards favoring the nonmoving party. In *Colwell*, supra at 613, for example, the court did not “favor” the plaintiff/nonmoving party by using the de novo standard of review, but applied the abuse of discretion standard to the evidentiary ruling excluding expert testimony and affirming the trial court’s grant of summary judgment in favor of defendant. In *Doherty v. Municipality of Metro Seattle*, 83 Wn. App. 464,

921 P.2d 1098 (1996), also cited by Ricci, the court affirmed the trial court's striking of expert testimony for lack of foundation under an abuse of discretion standard, again, not "favoring" the nonmoving party.

Applying a de novo standard of review to evidentiary rulings made in conjunction with a summary judgment motion, but an abuse of discretion standard to evidentiary rulings made during trial, is not consistent with "the purposes and practices in reviewing summary judgment" as Ricci urges. The purpose of summary judgment, as Ricci acknowledges, is to avoid a useless trial. Petition at 8. Under Ricci's system, a trial judge would have to deny a motion for summary judgment when, giving all inferences and benefit of doubt to the nonmoving party, a reasonable person could say that an expert might possibly have sufficient foundation to express an opinion. When the matter proceeded to trial, the judge would then exclude the expert testimony for lack of foundation under the abuse of discretion standard, which should have occurred at the summary judgment stage to avoid an unnecessary trial. Ricci's system promotes needless trials, the very thing that summary judgment is intended to prevent.

CR 56 does not say that all inferences on foundation and qualifications of witnesses are to be made in favor of the nonmoving party. The rule does state that:

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

(emphasis added). As the Court of Appeals said in this case, CR 56 creates an affirmative obligation to establish a foundation for the expert's testimony. It is inconsistent with the rule governing summary judgment motions to allow the nonmoving party to oppose a summary judgment motion with affidavits that do not adequately establish a foundation for the expert's testimony. If the plaintiff does not have admissible evidence establishing the standard of care and proximate cause in a medical malpractice case, there is no value in allowing that case to go to trial where it will be dismissed on directed verdict.

Policy and judicial economy favor enforcing CR 56 as written and dismissing claims not supported by admissible evidence. The trial court is expected to exercise an important role as a "gatekeeper," insuring that all scientific evidence admitted is both relevant and reliable. *Reese v. Stroh*, 74 Wn. App. 550, 559, 874 P.2d 200, *aff'd*, 128 Wn.2d 300, 907 P.2d 282 (1995). The trial court is better situated than a reviewing court to decide whether a medical expert is qualified by education, training and experience to testify on the applicable standard of care.

The trial court has a much greater opportunity to grasp the complex medical issues that may bear upon a medical expert's competence to testify. In King County where this case was venued, the trial judge typically handles the case from beginning to end and thus has ample opportunity to become familiar with the issues in the case, including medical issues. Further, if the trial court does not have sufficient information to determine whether a medical expert is competent to testify, the court can order an evidentiary hearing or postpone ruling on the admissibility of the expert's testimony until trial. An appellate court does not typically have these options available, and is neither designed nor adequately equipped to substitute its judgment for that of the trial court on issues relating to the admissibility of evidence. Removing this traditional function from the trial court by adopting a de novo review of all evidentiary rulings is neither practical nor desirable. The court should decline Ricci's invitation to create a new standard of review for summary judgment, and deny the petition for review.

2. The trial court followed the well established general rule that a practitioner of one school cannot testify about the standard of care for a practitioner in another school and properly held that Ricci failed to establish Dr. Greenberg's qualifications to testify on the standard of care for a LMHC.

Ricci made no attempt, implicit or otherwise, to identify or argue a RAP 13.4(b) basis for accepting review of her second issue, which is

whether and when an expert in one area may testify on the standard of care for a practitioner in another area. Review of this issue is unnecessary because the law is well-established, and was properly applied by the trial court in this case. None of the RAP 13.4(b) criteria are met here.

The trial court, and the Court of Appeals, followed the law as set out in *Miller v. Peterson*, 42 Wn. App. 822, 831, 714 P.2d 695 (1986) and numerous other cases, 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.” There are several well-established exceptions to this rule, as noted by the Court of Appeals, including:

(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 at 831. As explained by the Court of Appeals here,

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).

Decision at 13. The proponent of the expert testimony has the burden of establishing testimonial competency. CR 56(e); *Doherty, supra* at 469. Ricci was therefore required to establish that Dr. Greenberg, a licensed forensic psychologist, was qualified to testify on the standard of care for a LMHC. As the Court of Appeals succinctly observed, “Ricci failed to meet this obligation.” Decision at 13.

The only information provided to the trial court on the motion for summary judgment was Dr. Greenberg’s report and CV. Neither established that the methods of treatment for an LMHC and a forensic clinical psychologist are or should be the same, that Dr. Greenberg’s testimony was based on knowledge of Gary’s “school,” or that Dr. Greenberg was familiar with the standard of care applicable to LMHCs. In fact, Dr. Greenberg’s *lack* of familiarity with the standard of care for LMHCs was highlighted by his reference in his report to WAC 246-924-363 and the Ethical Principles of Psychologists and Code of Conduct as sources he relied on in reaching his opinions. All of these references apply to psychologists, not to LMHCs, who are regulated under WAC 246-809 *et. seq.*

Ricci essentially flips the actual position of the parties, arguing that Gary and the Court based their analysis on “the bare assumption that Gary’s and Greenberg’s respective licenses...are analogous to different

schools of medicine.” Petition at 10. In reality, it is Ricci who relies exclusively on the “bare fact” of licensure to establish that Dr. Greenberg was qualified to testify on the standard of care for a LMHC. The fact that the areas covered by the licensing statute overlap, or that Dr. Greenberg’s licensure includes as a subset the areas covered by Mr. Gary’s license, does not establish Dr. Greenberg’s familiarity with the standard of care for Mr. Gary’s practice any more than it establishes Mr. Gary’s qualifications to opine about Dr. Greenberg’s work.

Nothing in Dr. Greenberg’s CV or report establishes familiarity with the standard of care for a LMHC. It cannot be assumed from the bare fact of the language of the licensing statute that Dr. Greenberg is familiar with the standard of care for a mental health counselor. It is possible, for example, to be a licensed psychologist who does only psychological testing, has never done any counseling, and admits not being familiar with the standard of care for counseling. The proponent of the proffered testimony is required to lay an adequate foundation for admissibility. Ricci did not comply with CR 56 or with the Evidence Rules regarding admissibility of expert testimony, and the testimony was therefore not admissible.

There is no presumption that a witness is qualified to testify, regardless of his license or education, without affirmative evidence of

familiarity with the standard of care. An expert is not *disqualified* from testifying merely because his or her license or specialty differs from that of the defendant. Equally, however, an expert is not *qualified* to testify merely by virtue of a specific license or educational decree. In all circumstances, actual familiarity with the standard of care must be established. It is this fact-specific inquiry that is left to the discretion of the trial court.

Ricci failed to lay an adequate foundation for Dr. Greenberg's testimony as required by the express language of CR 56 and by ER 702. Without something beyond the fact of his license as a clinical psychologist as foundation, there was an insufficient basis to determine whether Dr. Greenberg was "qualified as an expert by knowledge, skill, experience, training or education" as required by ER 702. Regardless of the standard of review, the trial court correctly excluded the testimony.

The Court of Appeals did not announce a new principle of law in this case or deviate from established case law. There are no constitutional issues or issues of substantial public interest. The Court simply followed longstanding authority requiring that an adequate foundation be laid before allowing expert opinion testimony. There is no basis for discretionary review. Ricci's petition for review should be denied.

V. CONCLUSION

Ricci has not established a RAP 13(4) basis for accepting review, requiring that her petition be denied. The trial court and the Court of Appeals followed well-established precedent in holding that Ricci failed to establish that Dr. Greenberg was qualified by training or experience to testify on the standard of care for a LMHC. There is no merit in Ricci's claim that a bifurcated evidentiary standard be applied to summary judgment motions, with the abuse of discretion standard applying when the ruling favors the non-moving party, and the de novo standard applying when the ruling favors the moving party. The trial court has, and should retain, the authority to make evidentiary rulings at both the summary judgment and trial phases of a case. Trial court discretion is a well established and valuable right. Ricci has not demonstrated any basis for limiting the trial court's ability to act in its own courtroom or for granting this petition for review.

DATED this 15th day of September, 2006

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