NO. 45834-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

FAIRUZA STEVENSON,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF HEALTH, NURSING CARE QUALITY ASSURANCE COMMISSION,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

It is a fundamental principle of nursing practice that "physician orders must be carried out as ordered in order to ensure patient safety." Clerk's Papers (CP) at 12. This case is about a nurse who failed to do so. From November 26 to December 3, 2007, Appellant Fairuza Stevenson, a registered nurse, failed to administer a prescription issued by a physician to an elderly patient with limited mobility. Ms. Stevenson's only reason for her failure to comply with the physician's direction was that she disagreed with the physician's decision to prescribe the drug. For eight days, Ms. Stevenson failed to contact the prescribing physician and discuss her concerns, or administer the medication as ordered.

Although the patient was unharmed, the Nursing Care Quality Assurance Commission (Commission) ultimately determined that Ms. Stevenson's conduct constituted negligence resulting in an unreasonable risk of harm to Ms. Stevenson's patient, practice beyond the scope of her credential, and a willful failure to administer medication according to nursing standards of practice.

Although these circumstances also gave rise to regulatory action by the Department of Social and Health Services (DSHS) against Ms. Stevenson's license to run an adult family home, that action has no preclusive effect on the Commission's action against Ms. Stevenson's

nursing license. The Commission's Findings of Fact, Conclusions of Law, and Final Order (Order) are fully supported by substantial evidence, and should be affirmed by this Court.

II. STATEMENT OF THE ISSUES

1. Is the Commission's determination that Ms. Stevenson practiced below the standard of care and outside the scope of her nursing credential supported by substantial evidence?

2. Is the Commission's conclusion that Ms. Stevenson committed unprofessional conduct in failing to either discuss her concerns about the prescription with the physician or administer the drug as prescribed consistent with the law and the Commission's Findings of Fact?

3. Is the resolution of a DSHS action against Ms. Stevenson's adult family home license irrelevant to the Commission's regulatory action against Ms. Stevenson's nursing license where the charged misconduct is the same?

III. STATEMENT OF THE CASE

A. The Prescription

The Commission granted Ms. Stevenson a license to practice as a registered nurse in the state of Washington on October 30, 2000. CP 19[1]; AR 546. In 2007, Ms. Stevenson operated an adult family home, Better Options AFH, and provided nursing services to Patient A. AR 491. At the time relevant to the proceedings, Patient A was a 94-year old female with a history of stroke, dementia, peripheral vascular disease, an amputated leg, and high blood pressure. AR 330; 606-09. Patient A had resided at Ms. Stevenson's adult family home since 2005. AR 491.

On November 16, 2007, Patient A was admitted to the hospital, complaining of abdominal pain and fever. AR 633. Upon admission, Patient A was prescribed Enoxaparin, a blood thinner, for the purpose of preventing deep vein thrombosis. AR 331. During her hospitalization, Patient A was treated for various conditions including cellulitis, erythema, dementia with delirium, and complications related to a prior hip-replacement. AR 603-04. November 24, 2007, Patient A was discharged from the hospital (AR 599) and returned to Better Options AFH. AR 638.

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[1]The Certified Appeal Board Record, including the Transcript of Proceedings is contained at CP 19. Subsequent citations to the record will cite directly to the Administrative Record (AR).

Upon her discharge, the hospital physician, Dr. Meituck Hu, prescribed Patient A Enoxaparin for an additional 30 days. AR 335-38; 638. Dr. Hu issued the prescription because she believed Patient A to be at a high risk of deep vein thrombosis:

> [w]hen patients are immobile you could have stasis of the blood in the lower extremities, and that – when blood is stagnant it tends to clot, so you can easily form a clot, and that's not such a big deal, but the big problem associated with that is if you have a clot in the lower extremities, there's a high risk of it for – if you massage it, if you move it, if it becomes dislodged, it goes into the pulmonary arteries, these huge arteries coming off the heart into the lungs. When it gets stuck there it can be fatal within the hour, or even less....

AR 365. Dr. Hu wrote a 30-day supply of the medication because she wanted Patient A's primary care provider to follow up with Patient A within that time and reassess whether Enoxaparin was necessary. AR 338. Ms. Stevenson documented the order for Enoxaparin on Patient A's medication log, but decided to withhold the medication. AR 496-97; 612-14. Ms. Stevenson stated she was concerned about administering the medication because Patient A had a history of "bleeding in her eye," so that in her opinion, Patient A should not have been prescribed a blood thinner. AR 638. In contrast, Dr. Hu testified that the prior eye bleed did not change her opinion that the medication should be administered and that the bleed was related to a different blood thinner, Coumadin. AR 338.

Given all of the facts before her, including an analysis of the patient's blood thickness, Dr. Hu opined that Patient A "would definitely benefit from [Enoxaparin] as a prophylactic dose." AR 339.

Between November 24 and December 3, 2007, Ms. Stevenson did not attempt to call Dr. Hu to address her concerns regarding the Enoxaparin prescription. AR 340-42. She failed to contact Dr. Hu even though the hospital had physicians on-call "24/7" to address concerns such as these, and to receive calls from nurses with medication concerns is a common practice. AR 340-42. Instead, Ms. Stevenson and her staff attempted to call Patient A's primary care provider, Dr. Zbigniew Grudzien, to have the order discontinued. AR 638-40. Although Ms. Stevenson testified that she first attempted to call Dr. Grudzien on November 24, 2007 and daily thereafter (AR 498), her documentation only reflects contact with Dr. Grudzien's office on three dates beginning on November 26, 2007. AR 638-639. After withholding the medication for eight days, and because she had not received an answer from the primary care provider, Ms. Stevenson finally administered the Enoxaparin on December 3, 2007. AR 496-97.

B. The Nursing Commission

Under RCW 18.79 and RCW 18.130, the Commission is charged with the regulation and discipline of the nursing profession. This grant of

authority includes a directive to develop consistent standards of care for the practice of nursing (RCW 18.79.010), as well as the discretion to investigate and prosecute alleged misconduct. RCW 18.79.120. Additionally, the Uniform Disciplinary Act (UDA), defines misconduct with respect to healthcare professionals. RCW 18.130.

The Commission is composed primarily of members of the nursing profession, including Licensed Practical Nurses (LPNs), Registered Nurses (RNs), and Advanced Registered Nurse Practitioners (ARNPs), but also includes three public members. RCW 18.79.070. All disciplinary and investigative action is subject to the UDA. RCW 18.130.050; RCW 18.130.010.

Nursing misconduct complaints are received and investigated by Commission investigators. RCW 18.130.080(1)(a). Complaints are reviewed and approved for investigation by a panel of commissioners. RCW 18.130.180(2); RCW 18.130.050(18). Following investigation, if the panel determines that misconduct has occurred, a Statement of Charges is filed and served on the respondent nurse. RCW 18.130.090. A respondent is entitled to a hearing under the Administrative Procedure Act (APA), RCW 34.05. RCW 18.130.100.

C. Department of Social and Health Services Licensing Matter

On December 3, 2007, DSHS investigated a complaint against Ms. Stevenson's adult family home license involving an allegation of the failure to administer Enoxaparin to a resident. AR 213-19. On December 6, 2007, DSHS issued a Statement of Deficiencies outlining the investigation findings and requiring Ms. Stevenson to submit a plan of correction within 10 days, which Ms. Stevenson did. AR 213-19. In her plan of correction for the failure to administer Enoxaparin, Ms. Stevenson stated:

- I won't wait or tried (sic) to contact primary care physician;
- I will start to fulfill orders from hospital the same day after residents return from hospital;
- I will make sure to talk to MD or RN while resident in hospital to discuss potential problems, instead of waiting for primary doctor. I will be responsible for fixing this problem.

AR 215. DSHS then issued formal notice of a civil fine. CP 35-37. Ms. Stevenson initially appealed the fine, but subsequently withdrew her request for a hearing, opting instead to pay the penalty. AR 217-19.

D. Commission Charges Against Ms. Stevenson

The Commission issued a Statement of Charges charging Ms. Stevenson with unprofessional conduct on April 2, 2010. AR 1-14.

Specifically, the Commission charged Ms. Stevenson with violating the following provisions:

- RCW 18.130.180(4) which prohibits a nurse from committing "incompetence, negligence, or malpractice which results in injury to a patient or which creates an unreasonable risk that a patient may be harmed."
- RCW 18.130.180(12) which prohibits "practice beyond the scope of practice as defined by law or rule."
- RCW 18.130.180(7) which relates to the specific violation of practice rule WAC 246-840-710(2)(d), "willfully or repeatedly failing to administer medications and/or treatments in accordance with nursing standards."

In her answer to the charges, Ms. Stevenson admitted four of the Commission's five factual allegations. AR 19. The remaining allegation she admitted in part and denied in part. AR 19. Ms. Stevenson denied (1) that the alleged facts constituted misconduct; and (2) that such misconduct could be sanctioned. AR 19. Prior to the Commission's adjudicative hearing, Ms. Stevenson asked the Presiding Officer to dismiss the case on the grounds that the DSHS decision legally precluded Commission action. AR 209. The Presiding Officer denied the motion, finding that neither collateral estoppel nor res judicata was applicable. AR 267.

The Commission conducted an adjudicative hearing on September 24, 2010. AR 299-544. Following the hearing, the Commission panel determined that Ms. Stevenson committed each of the charged violations. AR 288-98. Accordingly, the Commission ordered Ms. Stevenson to be

placed on 24 months probation, to complete 24 hours of continuing education, and to pay a fine of $2,000. AR 288-97. Ms. Stevenson has completed the terms of her probation. CP 160-62.

Ms. Stevenson petitioned in Clark County Superior Court for judicial review of the Commission's decision on January 7, 2011. CP 1. The superior court affirmed the Commission's decision on December 30, 2013. CP 168. Ms. Stevenson timely appealed this matter. CP 170.

IV. ARGUMENT

On appeal, the Court is faced with both procedural and substantive issues. First, Ms. Stevenson challenges the sufficiency of the evidence supporting the Commission's Order in general. Br. of App. at 5. Although Ms. Stevenson does not identify specific findings as allegedly erroneous[2], her briefing obliquely attacks the Commission's finding that she practiced below the standard of care and its conclusion that she committed incompetence, negligence, or malpractice under

[2] The appellant must argue why specific findings are not supported by the evidence and cite the record. *Brown v. State Dep't of Health, Dental Disciplinary Bd.*, 94 Wn. App. 7, 13, 972 P.2d 101 (1998). It is not enough that an appellant generally challenge administrative findings by arguing her own version of the facts. *See In re Disciplinary Proceeding Against Kronenberg*, 155 Wn.2d 184, 191, 117 P.3d 1134 (2005) (quoting *In re Disciplinary Proceeding Against Kagele*, 149 Wn.2d 793, 814, 72 P.3d 1067 (2003).

RCW 18.130.180(4). Br. of App. at 5-6. Second, Ms. Stevenson argues that the Commission's action was precluded by the DSHS litigation and that the Presiding Officer should have granted her motion to dismiss. Br. of App. at 4; 7-8. Because the Commission's findings of fact are supported by substantial evidence, the findings support the conclusions of law, and the Commission action was not precluded, the Court should reject each of Ms. Stevenson's challenges and affirm the Commission's Order.

A. Standard Of Review Under The Administrative Procedure Act

The Court's review of the Commission's Order is governed by the Administrative Procedure Act (APA), RCW 34.05.570. Under the APA, a party challenging the validity of agency action bears the burden of demonstrating its invalidity. RCW 34.05.570(1)(a); *Lang v. State Dep't of Health*, 138 Wn. App. 235, 243, 156 P.3d 919 (2007), *review denied*, 162 Wn.2d 1021 (2008). When reviewing an adjudicative order, a court acts in a limited appellate capacity and may reverse only if the person challenging the agency order establishes that the order is invalid for one of the reasons specifically enumerated in RCW 34.05.570(3). RCW 34.05.570(1), (3); *Brown v. State Dep't of Health, Dental Disciplinary Bd.*, 94 Wn. App. 7, 11, 972 P.2d 101 (1998), *review denied*, 138 Wn.2d 1010 (1999). Here, Ms. Stevenson asserts errors of both fact and law.

The Court reviews the Commission's legal conclusions de novo under an error of law standard. *Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 728, 818 P.2d 1062 (1991), *Lang,* 138 Wn. App. at 243. While the Court may substitute its view of the law for that of the agency, substantial weight must be given to the agency's interpretation of a law within its expertise and to the agency's interpretation of rules it adopted. *Verizon Nw., Inc. v. Empl. Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008).

The Commission's findings of fact must be upheld if they are supported by substantial evidence in the record. RCW 34.05.570(3)(e). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the finding. *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 607, 903 P.2d 433 (1995). This test is highly deferential to the administrative fact-finder. *ARCO Products Co. v. Washington Utilities & Transp. Comm'n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995); *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 72, 110 P.3d 812 (2005), *review denied*, 156 Wn.2d 1004 (2006). Reviewing courts will not overturn an agency decision even where the opposing party reasonably disputes the issues and introduces conflicting evidence of equal dignity. *Ferry Cnty. v. Concerned Friends of Ferry Cnty.*, 121 Wn. App. 850, 856, 90 P.3d 698 (2004), *aff'd*, 155 Wn.2d 824, 123 P.3d 102 (2005). Courts give

substantial deference to an agency determination based heavily on factual matters, especially factual matters that are complex, technical, and close to the heart of the agency's expertise. *Hillis v. State, Dep't of Ecology*, 131 Wn.2d 373, 396, 932 P.2d 139 (1997). Unchallenged findings are treated as verities on appeal. *Fuller v. Dep't of Empl. Sec.*, 52 Wn. App. 603, 606, 762 P.2d 367 (1988).

B. The Commission's Findings That Ms. Stevenson Practiced Below The Standard Of Care And Outside The Scope Of Practice Are Supported By Substantial Evidence In The Record.

On appeal, Ms. Stevenson does not assign error to a particular factual finding. Further, the findings in paragraphs 1.1 through 1.10, and 1.13 are not challenged or addressed in Ms. Stevenson's briefing and are therefore verities on appeal under *Fuller*. Although she failed to assign error to particular findings, she appears to challenge findings 1.11 and 1.12 relating to the standard of care and scope of practice of a registered nurse. Br. of App. at 4-8. Despite this apparent challenge, Commission findings 1.11 and 1.12 are supported by substantial evidence.

1. Under a Registered Nurse's standard of care, Ms. Stevenson was required to contact the prescribing physician about her concerns.

While the nature of the standard of care is a question of law[3], whether a Respondent has fallen below the standard of care is a question of fact. *Ames v. Washington State Health Dep't Med. Quality Health Assurance Comm'n*, 166 Wn.2d 255, 261-62, 208 P.3d 549 (2009) (citing *Med. Disciplinary Bd. v. Johnston*, 99 Wn.2d 466, 482, 663 P.2d 457 (1983)); *Schooley v. Pinch's Deli Mkt., Inc.*, 80 Wn. App. 862, 874, 912 P.2d 1044 (1996), *aff'd*, 134 Wn. 2d 468, 951 P.2d 749 (1998). In finding 1.11, the Commission specifically explained how Ms. Stevenson's conduct deviated from the standard of care and the appropriate scope of practice for nurses in Ms. Stevenson's position at the time she decided not to administer Enoxaparin:

> Physician medication orders must be carried out as ordered in order to ensure patient safety. The scope of practice of a registered nurse does not include the authority to unilaterally fail to follow physician orders. Nor does the standard of care for a registered nurse permit a nurse to engage in such action. The nursing standard of care requires that in circumstances where a registered nurse has concerns about a physician order, the nurse should attempt to contact the physician as soon as possible to discuss her concerns.

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[3] In Washington, the standard of care for healthcare providers is that of a reasonably prudent practitioner. *Harris v. Robert C. Groth, M.D., Inc.*, P.S., 99 Wn.2d 438, 447, 663 P.2d 113 (1983); RCW 7.70.040(1).

AR 292. Nurses are expected to follow a physician's order. This is a fundamental requirement in the practice of nursing. When a nurse has concerns or issues with a physician's order, the standard of care articulated by the Commission requires that the nurse communicate these concerns to the prescribing physician. The Commission's construction of the relevant standard of care and scope of practice was substantially supported by the evidence.

First, the Commission appropriately relied on its own expertise in determining the standard of care. Although Ms. Stevenson argues that the Commission did not present expert testimony, the Commission was not required to do so. Members of the Commission are permitted the use of their own expertise to evaluate various factual questions before them. Our Supreme Court has held it appropriate for a board or commission to make its own determination as to the acceptable standard of care. *Ames*, 166 Wn.2d at 261-62. Moreover, the Commission is specifically charged with the responsibility of developing the rules and guidelines that articulate the standard of care. RCW 18.79.010; RCW 18.130.050(14). The question of the appropriate standard of care is well within the Commission's expertise and "expert" testimony is unnecessary. Therefore, the Commission appropriately utilized its own "experience, competency, and specialized knowledge to evaluate the evidence." AR 293.

Even without expert testimony, finding 1.11 is substantially supported by the evidence. The Commission also relied on the testimony of Dr. Hu; Ms. Stevenson's expert witness, Lee Paton, RN, PhD[4]; and even Ms. Stevenson's own testimony to make the determination that Ms. Stevenson's conduct fell below the standard of care.

Dr. Hu was asked whether she expected her order to be followed, and she answered "definitely." AR 340. Dr. Hu was also asked what she expected from a nurse with a concern about a medication she ordered and she replied, "what happens hundreds and hundreds of times on a daily basis, and that is they call me on one of three pagers that I carry." AR 340.

Even Ms. Stevenson's expert witness, Ms. Paton, did not state specifically that Ms. Stevenson could withhold medication for eight days or refrain from resolving the issue with a physician. AR 374. While Ms. Paton testified that a nurse in Ms. Stevenson's position has a duty to *question* the discharge order (AR 376), she also clarified that the nurse also has a duty "to convey to the doctor that she is not fulfilling that order and she is not giving that medication because of these concerns." AR 379. Moreover, she acknowledged that it was "possible" Ms. Stevenson had a

[4] Ms. Paton was not and is not currently licensed to practice nursing in the state of Washington. AR 375. Ms. Paton's PhD is in nursing.

duty to contact Dr. Hu when she could not speak with the primary care provider. AR 377. Even Ms. Stevenson herself acknowledged that she cannot unilaterally withhold medication, acknowledging that she finally administered the Enoxaparin because "it was so many days, and I -- I do understand I have to follow the doctor's orders, so I decided to administer these injections." AR 496-97. As such, Ms. Stevenson clearly understood what the standard of care required of her, and that she ultimately took the action that she should have taken in the first place—she administered the injections.

Ms. Stevenson seems to argue that because she believed the prescription of Enoxaparin was contraindicated for Patient A, the fundamental standard of care requirement that nurses comply with a physician's order, is somehow altered. *See, e.g.,* Br. of App. at 31, 34. However, the appropriateness of the prescription speaks to the standard of care of the physician[5], not the registered nurse. The standard of care relevant to the practice of nursing requires the nurse, when she has a concern about a medication, to speak with the prescribing physician to consult and address the concern. AR 340-41. To purposefully withhold the medication is to effectively alter a prescription.

[5] Other healthcare providers, such as an ARNP, may prescribe medication in the state of Washington. RCW 18.79.250. However, Ms. Stevenson is not licensed as an ARNP.

Ms. Stevenson also argues that she should be alleviated from this standard of care, because she and her assistant at the adult family home made "repeated" efforts to contact the primary care provider. Br. of App. at 27. However, Ms. Stevenson is wrong. Ms. Stevenson had an obligation to contact the prescribing physician to resolve any concern she had immediately. AR 340-41. She was not simply authorized to withhold the medication because of her own concern. Even Dr. Grudzien, Patient A's primary care provider who testified on behalf of Ms. Stevenson, acknowledged the immediacy requirement (AR 399) and that he would recommend patients go to the emergency room in situations where he cannot be reached. AR 412. Indeed, Ms. Jody Tichrob, Ms. Stevenson's assistant at the adult family home, testified that their facility procedure was to send patients to the emergency room if they have a concern about a patient and the physician cannot be reached. AR 448. Finally, Dr. Hu testified that the hospital provides cross-over coverage among hospitalists so that they are always available to respond to concerns. AR 341-42.

2. The nursing rules outlining the nursing standard of care and scope of practice do not permit Ms. Stevenson's conduct.

Ms. Stevenson also appears to argue that as a matter of law, her actions were within the scope of registered nursing practice and the

standard of care, citing WAC 246-840-700. Br. of App. at 25-26. Ms. Stevenson ignores, however, that WAC 246-840-700(3)(a) requires that

> [t]he registered nurse and licensed practical nurse shall communicate significant changes in the client's status to appropriate members of the health care team. This communication shall take place in a time period consistent with the client's need for care.

And yet in contradiction of the requirements of the standard of care and WAC 246-840-700(3)(a), Ms. Stevenson failed to adequately communicate Patient A's status to any member of the healthcare team involved in the underlying prescription, including Dr. Hu, the prescribing physician.

Moreover, the scope of practice rule, WAC 246-840-705(3), clarifies that a registered nurse functions in an "independent role when utilizing the nursing process as defined in WAC 246-840-700." In other words, when delivering "nursing care," the registered nurse may act independently. Of course, nothing in WAC 246-840-705 allows the nurse to fail or refuse to follow a physician's order or relieves her of the communication requirements of WAC 246-840-700(3)(a). Furthermore, the registered nurse "functions in an *interdependent* role when executing a medical regimen under the direction of an advanced registered nurse practitioner, *licensed physician and/or surgeon*, dentist, osteopathic

physician and/or surgeon...." *Id.* (emphasis added). When Ms. Stevenson was faced with an order for patient medication, her duty was to execute a medical regimen at the direction of a physician. Under WAC 246-840-705, her scope of practice was one of interdependence. She could not act unilaterally and needed to adequately communicate under WAC 246-840-700(3)(a).

Undoubtedly, the public expects nurses to exercise good judgment and discretion. Nurses should not unquestioningly carry out physicians' orders that contain obvious errors or that will harm a patient because the physician had incomplete information when issuing the order. However, the problem here is not that Ms. Stevenson had a legitimate concern for the welfare of her patient, but that she did not take the proper action to see that her concern was resolved. Ms. Stevenson could have, and should have, done so by contacting Dr. Hu or the hospital. Instead, she decided to wait eight days while trying to contact Patient A's primary care provider before administering the prescribed medication. When she was unable to reach him, she failed to expand her search. Because of this, her patient went without important blood-thinning medication for eight days. AR 365; 613-14.

3. Ms. Stevenson's refusal to administer Enoxaparin as prescribed, combined with her failure to contact Dr. Hu, placed Patient A at an unreasonable risk of harm.

The Commission properly acknowledged that Patient A did not suffer any apparent harm from Ms. Stevenson's misconduct. AR 292; Finding of Fact 1.12. The Commission nevertheless appropriately concluded that Ms. Stevenson's misconduct placed Patient A at an *unreasonable risk* of harm:

> As a result of Respondent's failure to follow the physician medication order and failure to attempt to contact the treating physician about her concerns, Patient A was placed at an unreasonable risk of harm. Although Patient A suffered no apparent harm from the missing medication, Patient A could have suffered significant harm including death as a result of the Respondent's actions.

AR 292. This finding is supported by substantial evidence.

Patient A was admitted to the hospital and started on Enoxaparin to prevent a deep vein thrombosis. AR 331. The danger of this condition was that Patient A could have developed a blood clot which could be fatal within the hour, even less. AR 365. Dr. Hu administered the Enoxaparin to Patient A throughout her hospital stay to prevent such an occurrence and with no complications. AR 336. Because she knew that Patient A would likely continue to be immobile and therefore continue to be at risk of deep vein thrombosis, Dr. Hu continued the Enoxaparin prescription at

discharge. AR 335-37. By failing to administer the blood thinner according to the physician's order without communicating with a physician to have the order changed, Ms. Stevenson put Patient A at serious risk. AR 365.

The risk to Patient A is two-fold. First, Ms. Stevenson's conduct created direct risk by her exposure of Patient A to the possibility of deep vein thrombosis /pulmonary embolism. Second, Ms. Stevenson's failure to communicate meant that a physician was not able to immediately weigh the risks of deep vein thrombosis and those of a bleed and thereupon determine the best course of treatment. Again, as a registered nurse, it is not within Ms. Stevenson's authority to decide whether a medication should be prescribed. That scope of practice is reserved for physicians and other advanced practice healthcare professionals who have the expertise and training to properly weigh the risks and benefits and make decisions regarding what medication to administer. *See e.g.*, RCW 18.71.011.

Although Ms. Stevenson's witnesses, Dr. Douglas Harroun and Dr. Zbigniew Grudzien disagreed with Dr. Hu's order for Enoxaparin, the fact that physicians disagree on whether Enoxaparin was the right prescription in this case only magnifies Ms. Stevenson's error in withholding Patient A's medication for eight days. She lacks their expertise. Ms. Stevenson

failed to ensure that her concerns were raised with a person with the proper knowledge and expertise to make the best decision for the patient. Failing to do so put Patient A at an unreasonable risk and exceeded Ms. Stevenson's scope of practice.

C. The Findings Of Fact Support The Conclusions Of Law.

In addition to her apparent challenge to two Commission findings, Ms. Stevenson also claims that the findings do not support the Commission's conclusions of law. Br. of App. at 4-5. When findings of fact are supported by substantial evidence, the courts next turn to "whether the findings in turn support the conclusions of law and judgment." *Nguyen v. State, Dep't of Health Med. Quality Assurance Comm'n*, 144 Wn.2d 516, 530, 29 P.3d 689 (2001), *cert. denied*, 535 U.S. 904 (2002). Here, the Commission concluded that Ms. Stevenson committed three violations: she acted negligently creating unreasonable risk of harm, she acted outside her scope of practice, and she willfully failed to administer medication or treatment. AR 4. The findings of fact support these legal conclusions.

1. Ms. Stevenson negligently failed to administer Patient A's prescription for eight days.

Based on its findings about her conduct, the Commission concluded by clear and convincing evidence[6] that Ms. Stevenson committed incompetence, negligence, or malpractice, and created an unreasonable risk of patient harm under RCW 18.130.180(4). AR 293. In Washington, a provider's failure to follow the accepted standard of care gives rise to a claim of unprofessional conduct under the UDA, specifically RCW 18.130.180(4). *Brown*, 94 Wn. App. at 15.

The Commission's conclusion is supported by Finding of Fact 1.11, which sets out the standard of care requirement that orders be carried out as directed, and if there is a concern, the nurse should attempt to contact the prescribing physician as soon as possible to discuss concerns. AR 292. The breach of this standard of care is also supported by Finding of Fact 1.6 (Ms. Stevenson was ordered to administer Enoxaparin); Finding of Fact 1.9 (Ms. Stevenson failed to administer the drug for eight days); and Finding of Fact 1.10 (Ms. Stevenson failed to contact the

[6] At the time of the Commission's order, clear and convincing evidence was the required burden of proof for all professional disciplinary hearings; however, subsequent case law has called the uniformity of that burden into question. *See Ongom v. State, Dep't of Health, Office of Prof'l Standards*, 159 Wn.2d 132, 148 P.3d 1029 (2006), *overruled by Hardee v. State, Dep't of Soc. & Health Servs.*, 172 Wn. 2d 1, 256 P.3d 339 (2011). Thus, clear and convincing evidence may not have been required in this case and the lower preponderance of evidence standard sufficient to provide adequate due process protection.

hospital despite the availability of 24 hour physician consultation). Simply put, Ms. Stevenson's failure to meet the relevant standard of care constituted incompetence, negligence, or malpractice.

Finally, the Commission's Finding of Fact 1.12 determined that Ms. Stevenson's conduct placed Patient A at risk of significant harm, or even death. AR 292. As a result, the Commission's findings support the conclusion that Ms. Stevenson violated RCW 18.130.180(4).

2. Ms. Stevenson's unilateral modification of a physician's prescription constitutes practicing beyond the scope of her nursing license.

Second, the Commission determined by clear and convincing evidence that Ms. Stevenson practiced beyond the scope of a nurse's practice as defined by law or rule under RCW 18.130.180(12). This conclusion is supported by the finding that the registered nurse scope of practice does not include the authority to unilaterally decide not to follow a physician's order. AR 292 (Finding of Fact 1.11). It is also supported by the uncontroverted finding that Ms. Stevenson failed to follow Dr. Hu's order for eight days. AR 292 (Finding of Fact 1.10). The findings, therefore, support the conclusion that Ms. Stevenson acted outside the scope of her practice as a registered nurse. The legal conclusion that Ms. Stevenson thereby exceeded her scope of practice is a sound one.

3. Ms. Stevenson willfully failed to administer prescribed medications.

Finally, the Commission determined by clear and convincing evidence that Ms. Stevenson violated RCW 18.130.180(7)[7] and WAC 246-840-710(2)(d). AR 293. WAC 246-840-710(2)(d) prohibits a registered nurse from "willfully or repeatedly failing to administer medications and/or treatments in accordance with nursing standards." Again, the findings support the Commission's conclusion that Ms. Stevenson breached her standard of care by failing to administer the Enoxaparin. This conclusion is supported by Finding of Fact 1.10 and 1.11. AR 292. The Commission specifically concluded that her admitted failure to administer the Enoxaparin was below the standard of care and willful. Therefore, the willful failure was not in accordance with nursing standards and the conclusion that she violated the applicable law is not in error.

Because Ms. Stevenson cannot demonstrate that the findings of fact are unsupported, and because those findings of fact support the Commission's conclusions of law, Ms. Stevenson cannot prevail under the APA. This Court should uphold the Commission's Order.

[7] The Commission concluded that Ms. Stevenson violated RCW 18.130.180(7), which is a reference to the violation of a standard of practice rule. By concluding that Ms. Stevenson violated WAC 246-840-710(2)(d), they necessarily concluded that she violated this subsection of the UDA.

D. The Commission Properly Denied Ms. Stevenson's Motion to Dismiss Based On Her Assertions Of Collateral Estoppel And Res Judicata

Proceedings against Ms. Stevenson's nursing license are not barred because the Department of Social and Health Services took action against her adult family home license based on the same conduct. Ms. Stevenson argues that the Commission's disciplinary action should be barred by prior settlement or under either collateral estoppel or res judicata because DSHS had already taken action against Ms. Stevenson's license to operate an adult family home. Her argument is flawed and must fail.

As a preliminary matter, the Commission's Order in this case is not susceptible to attack as a settlement under Civil Rule 2A. Rule 2A provides:

> No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same.

Ms. Stevenson argues briefly that Rule 2A bars the Commission action against her. Br. of App. at 38. However, Rule 2A stipulations, by their very terms, are agreements between parties. Ultimately, DSHS asked Ms. Stevenson to pay a civil penalty, and she paid it. Even so, the parties

to any alleged agreement[8] concerning her adult family home license were Ms. Stevenson and DSHS, not the Commission. CP 35-37; AR 217-19. While Ms. Stevenson argues the sound policy of upholding settlements (Br. of App. at 38), she cites to no evidence in the record that the Commission action interfered with her purported settlement with DSHS, nor can she cite to a settlement agreement that is subscribed to by an attorney representing the Commission. Ms. Stevenson's argument that the Commission was barred by settlement must fail. Likewise, each of Ms. Stevenson's other preclusion claims must fail because neither applies to Ms. Stevenson's circumstances.

1. The doctrine of collateral estoppel does not apply to Ms. Stevenson's circumstances.

The doctrine of collateral estoppel or issue preclusion is designed to "prevent relitigation of an issue after the party estopped has already had a full and fair opportunity to present its case." *Hanson v. City of Snohomish,* 121 Wn.2d 552, 561, 852 P.2d 295, (1993). To establish collateral estoppel, the asserting party must satisfy the well-known four-part test: "(1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the

[8] The record is absent of a written settlement agreement of any kind.

doctrine must not work an injustice on the party against whom the doctrine is to be applied." *Reninger v. State Dep't of Corr.*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998). Ms. Stevenson cannot establish any of these elements and the Court should reject her argument.[9]

First, the issues presented in Ms. Stevenson's DSHS case are not identical to the issues presented in this disciplinary licensing action. "Proving the identity of issues . . . requires that the party seeking to have the doctrine applied must specifically identify the issues and the underlying legal principles litigated in the prior proceeding." *Lemond v. State, Dep't of Licensing*, 143 Wn. App. 797, 803, 180 P.3d 829 (2008). Here, Ms. Stevenson fails to identify any particular issue of fact or law that should have been given preclusive effect. Br. of App. at 36-38. Although Ms. Stevenson's misconduct is the impetus for both the DSHS and Commission's actions, the legal and factual issues are distinct. The Commission action involved her nursing license and was intended to determine (1) whether Ms. Stevenson exceeded the scope of her license to practice nursing; and (2) whether such conduct is a breach of the relevant standard of care. AR 001. The DSHS action, in contrast, was aimed at whether Ms. Stevenson's actions breached the standards of conduct

[9] The Presiding Officer's ruling on the issue of collateral estoppel is contained in Prehearing Order No. 2 (AR 267).

applicable to an adult family home owner and RCW 70.128 and WAC 388-76. These are wholly separate legal issues. Based on her DSHS plan of correction, which acknowledged that Ms. Stevenson would contact the prescribing physician in similar situations, it would appear that factual issues, if precluded, could only be precluded in favor of the Commission.

Second, Ms. Stevenson never fully litigated the DSHS case. It ended when Ms. Stevenson withdrew her request for a hearing and paid the civil penalty. AR 217-219. Ms. Stevenson argues that this constitutes a settlement agreement. However, settlement cannot be used to support a claim of collateral estoppel because the "parties could settle for myriad reasons not related to the resolution of the issues they are litigating." *Pederson v. Potter*, 103 Wn. App. 62, 68, 11 P.3d 833 (2000). Because DSHS never heard arguments on the merits of DSHS's claims against her, there is no final judgment on the merits in the DSHS matter. Therefore, the issues contained in the DSHS action cannot be given preclusive effect.

Third, the Commission did not participate in, or have a right to participate in, the DSHS proceeding. The Commission and DSHS are independent governmental entities with independent jurisdictions and areas of authority. While the subject matter of their respective authority may overlap in the healthcare arena, the public interests that they serve are distinct and advanced by separate regulatory processes. RCW 18.130

gives the Commission authority over the individual professional license, while RCW 70.128 gives DSHS authority over the adult family home licensee. Neither statute grants the Commission concurrent jurisdiction or the power to intervene in a DSHS adjudication. The posture of the Commission's relationship with DSHS is analogous to the Department of Licensing's relationship to criminal courts in a case of driving under the influence. *See, e.g.,* RCW 46.20.308; .3101. In those cases, the prosecution and settlement of the criminal case does not preclude the Department of Licensing from taking action against the defendant's license to drive. *Id.* Ms. Stevenson argues here that the Commission's analogy fails because of a "regulation in DUI cases where the driver consents to the rules and procedures as a condition of the right to receive a driver's license." Br. of App. at 7. Ms. Stevenson does not provide a cite to the specific regulation she purports to reference. Even so, she overlooks the independent jurisdiction of the Commission. By applying for and receiving a nursing license, Ms. Stevenson agreed to practice in accordance with the UDA and with all of the UDA's attendant procedures.

Finally, applying the doctrine of collateral estoppel under these circumstances would work an injustice. The Commission is charged with regulating the competency and quality of the nursing profession and promoting "the delivery of quality health care to the residents of

Washington." RCW 18.79.010. Barring the Commission from taking action against an individual license holder any time a facility in which that individual worked was also cited by DSHS would contravene the clear public interest in ensuring that all licensed health care providers are safe to practice. The Commission cannot fully perform its statutory direction to protect the public and provide safe and competent health care to the citizens of Washington if it is bound by settlements in unrelated actions taken by other state agencies.

Ms. Stevenson fails, again, to establish the remaining elements required to prevail on a claim of collateral estoppel. Even if the Court were to determine that an issue of fact or law could be precluded, she has failed to identify that issue and to explain how it would have been precluded in her favor in this case. This Commission's Order rejecting collateral estoppel should be affirmed.

2. The doctrine of res judicata does not apply to Ms. Stevenson's circumstances.

Ms. Stevenson also asserts that the Commission's action against her nursing license was precluded by res judicata. Similar to collateral estoppel, the doctrine prevents a party from relitigating claims "that were litigated, or could have been litigated, in a prior action." *Pederson*, 103 Wn. App. at 67. For res judicata to be given preclusive effect, "a prior

final judgment must have a concurrence of identity with that claim in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) quality of the persons for or against whom the claim is made." *Richert v. Tacoma Power Util.*, 179 Wn. App. 694, 704, 319 P.3d 882 (2014) (citing *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 99, 117 P.3d 1117 (2005)). To apply the doctrine of res judicata, Ms. Stevenson bears the burden of proof to establish all four elements. *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 93 P.3d 108 (2004). Once again, Ms. Stevenson fails to meet her burden.

As argued above with respect to collateral estoppel, Ms. Stevenson cannot establish identity of subject matter. Although the two actions against Ms. Stevenson may have arisen from the same incident, "the same subject matter is not necessarily implicated in cases involving the same facts." *Hisle*, 151 Wn.2d at 866. The subject matter in the DSHS case concerned Ms. Stevenson's ability and competency to own and operate an adult family home under the rules and standards promulgated by DSHS. The subject matter of the Commission action concerns Ms. Stevenson's safety and competency to practice as a registered nurse and involved consideration of the scope of practice of a registered nurse and a generalized nursing standard of care.

Likewise, Ms. Stevenson cannot establish the identity of parties element. For the purposes of res judicata, privity "is construed strictly." *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 764, 887 P.2d 898 (1995). Privity is established in cases where "a person is in actual control of the litigation, or substantially participates in it even though not in actual control. Mere awareness of proceedings is not sufficient to place a person in privity with a party to the prior proceeding." *Id.* The Commission had no control over the DSHS's action against Ms. Stevenson's facility license, and did not participate in the DSHS action. Therefore, Ms. Stevenson cannot establish the identity element.

Finally, the causes of action here are plainly different. Four criteria are considered when determining whether the cause of action is the same for purpose of res judicata:

> (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action;
> (2) whether substantially the same evidence is presented in the two actions;
> (3) whether the two suits involve infringement of the same right; and
> (4) whether the two suits arise out of the same transactional nucleus of facts.

Rains v. State, 100 Wn.2d 660, 664, 674 P.2d 165 (1983). Here, the Court should focus on the rights at stake between the two actions – factors (1) and (3). In the DSHS case, Ms. Stevenson's right turned on her interest in

the licensure and operation of an adult family home. The resolution of the DSHS case had no effect on Ms. Stevenson's nursing license because DSHS has no authority or jurisdiction to take such action. Although DSHS could revoke an adult family home license, DSHS has no power to prevent Ms. Stevenson from practicing nursing in another setting, such as a hospital.

Likewise, the Commission has jurisdiction over Ms. Stevenson's license to practice nursing, but the Legislature directs DSHS to determine whether a person should be licensed to operate an adult family home. Thus, the Commission's Order against Ms. Stevenson's professional license could not destroy or impair any interest established when she agreed to withdraw her appeal of the DSHS case. Again, the Commission's case involved Ms. Stevenson's interest in practicing as a registered nurse and whether she met nursing standards of conduct. Ms. Stevenson cannot meet elements (1) and (3) under *Rains* and fails to establish identity of cause of action. Therefore, Ms. Stevenson cannot prevail under a theory of res judicata.

E. The Commission Panel That Considered Ms. Stevenson's Case Was Properly Constituted and Competent to Adjudicate the Proceeding

Although not assigned as error, Ms. Stevenson implies that the hearing panel constituted of only one registered nurse and two licensed

practical nurses (LPNs) and was therefore incompetent to decide the case. Br. of App. at 39. However, the UDA authorizes the Commission to establish hearing panels without regard to the panel member's particular expertise. RCW 18.130.180(18). Thus, it is common that professionals with dissimilar credentials sit on hearing panels alongside doctors or registered nurses. *See, e.g., Ames*, 166 Wn. 2d at 260. Even if the panel included a non-nurse public member of the commission, the legislature has clearly stated the importance of these commissioners to the function of healthcare boards and commissions, "addition of public members on all health care commissions and boards can give both the state and the public, which it has a statutory responsibility to protect, assurances of accountability and confidence in the various practices of health care." RCW 18.130.010.

Even if a certain level of expertise were required, LPNs would have had sufficient expertise with respect to the charges levied against Ms. Stevenson. WAC 246-840-700(3)(a), cited above, specifically applies to both LPNs and RNs. LPNs are well situated to adjudicate the primary question of whether Ms. Stevenson adequately communicated with the healthcare team and thus whether she committed negligence or malpractice.

V. CONCLUSION

Ms. Stevenson committed a significant error when she failed to administer a prescription to Patient A for eight days without any guidance from either the prescribing physician or any other physician. Her misconduct warranted action by the Commission and the Order should be affirmed. Ms. Stevenson fails to meet her burden of demonstrating that the Commission's Order is invalid or defective in any way, that the Commission action was legally precluded, or that the Order is not based on substantial evidence in the record as a whole. The Commission respectfully requests that its Order be affirmed.

RESPECTFULLY SUBMITTED this 24th day of July, 2014.

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

FAIRUZA STEVENSON,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF HEALTH, NURSING CARE QUALITY ASSURANCE COMMISSION,

Respondent.

CERTIFICATE OF SERVICE

I, hereby certify that on July 24, 2014, I caused the Respondent's Brief and this Certificate of Service to be served, via U.S. mail, upon the parties herein, as indicated below:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 24th day of July, 2014.

ROSE JOHNSON
Legal Assistant