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Washington State Supreme Court

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NO. 91857-1

SUPREME COURT OF THE STATE OF WASHINGTON

FAIRUZA STEVENSON,

Petitioner,

v.

DEPARTMENT OF HEALTH AND NURSING CARE QUALITY
ASSURANCE COMMISSION,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

It is a fundamental tenet of medical practice that nurses must follow physicians' orders. If a nurse has concerns about those orders, the nurse must address and resolve those concerns with a physician. Petitioner Fairuza Stevenson, a registered nurse, was disciplined by the Nursing Care Quality Assurance Commission (Commission) for failing to abide by this fundamental tenet. Despite her concerns about a drug that had been prescribed for a patient under her care, she failed to contact a physician to resolve her concerns. Instead, Ms. Stevenson waited eight days to administer the prescribed medication.

The Court of Appeals correctly rejected each argument Ms. Stevenson now raises in her Petition For Discretionary Review, holding that the Commission's findings were supported by substantial evidence, that the Commission properly interpreted and applied the Uniform Disciplinary Act (UDA), and that the Commission's action was not precluded by a prior action taken by the Department of Social and Health Services (DSHS) against Ms. Stevenson's adult family home license.

Ms. Stevenson contends this Court's review is appropriate because this case presents an issue of substantial public interest. RAP 13.4(b)(4). It does not. It is an ordinary professional disciplinary case in which the

Commission and the Court of Appeals applied well-settled law. The Court should decline Ms. Stevenson's petition.

II. COUNTER-STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

If this Court were to grant review, the issues would be:

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 by failing to either discuss her concerns about the prescription with a 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 even though the same conduct forms the basis for both charges?

III. STATEMENT OF THE CASE

A. Factual Background¹

For eight days, Ms. Stevenson failed to administer the blood thinner Enoxaparin which had been prescribed by a physician for an elderly patient in her adult family home. She believed that administering Enoxaparin would harm the patient. During the eight days, Ms. Stevenson failed to contact the prescribing physician and discuss her concerns, failed

¹ The Court of Appeals recited a detailed, accurate version of the relevant facts. See Slip Opinion, attached to Petition For Discretionary Review at 2-6. This factual background summarizes the Court of Appeals' factual recitation.

to follow up with any other physician, and did not administer the prescribed medication as ordered. Ms. Stevenson finally administered the Enoxaparin after eight days, just hours before receiving a physician's order cancelling the prescription. Although the patient was unharmed, the Commission ultimately determined that Ms. Stevenson's conduct constituted negligence resulting in an unreasonable risk of harm to Ms. Stevenson's patient, that she practiced beyond the scope of her credential, and that she committed a willful failure to administer medication according to nursing standards of practice.

B. Procedural Background

On December 6, 2007, DSHS issued a Statement of Deficiencies related to Ms. Stevenson's adult family home license and WAC 388-76-620. It required Ms. Stevenson to submit a plan of correction within 10 days, which she did. AR 213-19; Slip Opinion at 3. 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 fine. AR 217-19.

On April 2, 2010, the Commission issued a Statement of Charges alleging Ms. Stevenson committed unprofessional conduct under the Uniform Disciplinary Act (UDA), RCW 18.130, related to her failure to

administer Enoxaparin. AR 1-14. Specifically, the Commission charged

Ms. Stevenson with violating the following UDA 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.”

AR 1-14.

Ms. Stevenson asked the Presiding Officer in this case to dismiss on the ground that the prior DSHS order legally precluded Commission action. AR 209. The Presiding Officer denied the motion, finding that neither collateral estoppel nor res judicata applied. AR 267.

The Commission conducted an adjudicative hearing (AR 299-544) after which it determined that Ms. Stevenson committed each of the charged violations.² AR 288-98. 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 each of the terms of her probation. CP 160-62.

² The hearing was conducted and the order issued by a panel comprised of three Commission members, as authorized in RCW 18.130.050(18).

The superior court affirmed the Commission's decision. CP 168. Without oral argument, the Court of Appeals upheld the Commission's Final Order in an unpublished Opinion on May 27, 2015.

IV. ARGUMENT WHY REVIEW SHOULD NOT BE GRANTED

Ms. Stevenson contends that she is entitled to review based on RAP 13.4(b)(4). Pet. at 6-7. She fails to identify any issue of substantial public interest that should be determined by this Court. The Court of Appeals properly determined that substantial evidence supported the Commission's findings that Ms. Stevenson practiced below the standard of care and beyond the scope of a registered nurse when she failed to follow up with a physician and thereby placed her patient at an unreasonable risk of harm. Following well-settled precedent, the Court of Appeals properly found that neither collateral estoppel nor res judicata barred the Commission from issuing a Statement of Charges against Ms. Stevenson's nursing license. Her Petition should be denied.

A. 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

Substantial evidence supports the Commission's finding of fact that Ms. Stevenson practiced below the standard of care and outside the appropriate scope of practice. The Commission panel members

appropriately used their professional expertise in evaluating the evidentiary record and concluding that Ms. Stevenson's actions constituted professional misconduct. AR 288; 293. The Commission findings were properly upheld by the Court of Appeals.

Ms. Stevenson's primary argument is that the prosecutor did not present expert testimony on the standard of care. Pet. at 10. However, as this Court has already concluded, a Commission comprised of health professionals regulating a profession is entitled to rely on its members' own expertise to determine the standard of care. See Slip Opinion at 9 (citing *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))).

In *Ames*, the Medical Quality Assurance Commission (MQAC) disciplined a physician for practicing below the standard of care and for use of an "inefficacious device." 166 Wn.2d at 257-58. In that case, Dr. Ames used a biofeedback device, claiming that he could detect and treat patient allergies using a computer program and a brass probe. 166 Wn.2d at 258-59. Although Dr. Ames argued that MQAC was required to present evidence related to the standard of care regarding his techniques or the efficacy of his device, this Court held that the law does not require that

expert testimony be provided to a medical disciplinary board; rather, such a board may “draw its own conclusions as to the acceptable standard of care.” 166 Wn.2d at 261-62.

The question of the appropriate standard of care in this case is well within the Nursing Commission’s expertise and “expert” testimony is unnecessary. The Commission appropriately utilized its own “experience, competency, and specialized knowledge to evaluate the evidence.” AR 293.

Moreover, other substantial evidence in the record supports the Commission’s findings. The physician who discharged Ms. Stevenson’s patient from the hospital testified that she expected her orders to be followed, and when a nurse has a concern about one of her orders, she expects that they will contact her. AR 340. She also testified that nurses do not have the authority to alter prescriptions. AR 340. Ms. Stevenson’s own expert witness testified that the nurse 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. Even Ms. Stevenson conceded 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. Significantly, the Court of Appeals noted that

Hu [the prescribing physician] testified that she expected Stevenson to implement her discharge orders, although she stated that Stevenson could question that order by speaking with her. Hu also testified that Stevenson, as a registered nurse, lacked the authority to alter the prescriptions that were part of the discharge orders, which Stevenson did by failing to give the enoxaparin. One of Stevenson’s own experts testified that any nurse who refused to fulfill a physician order based on concerns about the order had 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 at 379. A reasonable inference from this testimony is that nurses have a duty to follow the orders given by a doctor unless they raise concerns about the order with the doctor. Stevenson refused to follow Hu’s orders and failed to contact Hu or a covering physician to explain why she was declining to do so. The Commission could readily find that Stevenson failed to comply with nursing standards from those facts.

Slip Opinion at 8.

Ms. Stevenson contends that, because she believed the prescription of Enoxaparin was contraindicated for her Patient, the fundamental standard of care requirement that nurses comply with a physician’s order is somehow altered. *See, e.g.*, Pet. at 6, 9. Her contention lacks merit. Determining the appropriateness of the prescription speaks to the standard of care of the physician³, not the registered nurse. The standard of care

³ Other healthcare providers with appropriate training, such as an Advanced Registered Nurse Practitioner (ARNP), also may prescribe medication in the state of Washington. RCW 18.79.250. However, Ms. Stevenson is not licensed as an ARNP.

relevant to the practice of nursing requires that when a nurse has a concern about a prescribed medication, the nurse must speak with the prescribing physician to consult and address the concern. AR 340-41. To purposefully withhold a medication that has been prescribed, as Ms. Stevenson did for eight days, is to effectively alter a physician's prescription.

The public appropriately 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 whether Ms. Stevenson had a legitimate concern for the welfare of her patient, but rather, that she did not take the proper action to contact the prescribing physician, the patient's primary care physician, or any of the patient's other physicians, to address and resolve her concern. Both the Superior Court and Court of Appeals correctly applied existing law in determining that the Commission's findings were supported by substantial evidence. Ms. Stevenson fails to show that the Court of Appeals' routine resolution of this issue is of substantial public interest that warrants this Court's review.

B. The Commission Did Not Commit Legal Error When It Concluded That Ms. Stevenson Had Violated The UDA

The Commission concluded that Ms. Stevenson: 1) acted negligently, thus creating an unreasonable risk of harm; 2) acted outside her scope of practice; and 3) willfully failed to administer medication or treatment. AR 4. When findings of fact are supported by substantial evidence, as they are here, 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). The Commission’s findings of fact support its conclusion that Ms. Stevenson violated the UDA.

The conclusion that Ms. Stevenson acted negligently was directly supported by the Commission’s findings that Ms. Stevenson did not follow the accepted standard of care, failed to follow up with a physician about the prescription and its impact on her patient, and thereby placed her patient at an unreasonable risk of harm. AR 290-93. Similarly, the Commission found that “the scope of practice of a registered nurse does not include the authority to unilaterally fail to follow physician orders.” AR 292. This finding directly supports the Commission’s conclusion that Ms. Stevenson acted outside the appropriate scope of her practice when

she withheld medication, effectively altering her patient's prescription. AR 293. Finally, the Commission properly concluded that Ms. Stevenson willfully failed to administer medications in accordance with nursing standards under WAC 246-840-710(2)(d). AR 293-94. This conclusion is supported by the finding that Ms. Stevenson practiced below the standard of care when she repeatedly failed to follow up with a physician over an eight-day period.

The Court of Appeals followed this Court's precedent when it determined that the Commission's legal conclusions were supported by its findings of fact. *See* Slip Opinion at 11-13. Ms. Stevenson's challenge on this issue does not present an issue of substantial public interest that should be reviewed by this Court.

C. The Commission Panel Was Appropriately Constituted

Without identifying error in her petition or in the Court of Appeals, Ms. Stevenson argues that the Commission panel that adjudicated her case was not qualified to do so. Pet. at 7. However, Ms. Stevenson fails to explain either how the makeup of the panel was contrary to law, or, deprived the panel of the expertise necessary to adjudicate her case.

As the Court of Appeals correctly explained, RCW 18.79.070(2) defines which professionals are to serve on the Commission, but does not require adjudicative panels to be made up of a particular number of

professionals from each credential. *See* Slip Opinion at 9-10, n. 4. As the Court of Appeals further noted, this Court recognized in *Ames* that “medical discipline Boards like the Commission do not need expert testimony about any possible breach of the standard of care, because such testimony is not helpful when the fact finder, as here, includes experts.” *See* Slip Opinion at 9; *see also Ames*, 166 Wn.2d at 261-62.

Moreover, Ms. Stevenson fails to argue, much less demonstrate, that the panel was not qualified to make the determinations applied to the facts of her case. The Commission panel was appropriately constituted of one registered nurse and two licensed practical nurses. Both registered nurses and licensed practical nurses have expertise with respect to the issues in Ms. Stevenson’s case. The specific practice violation charged, WAC 246-840-710(2)(d), applies to both licensed practical nurses and registered nurses. Additionally, the requirement that nurses adequately communicate with the health care team applies to both credentials. WAC 246-840-700(3)(a).

Ms. Stevenson’s argument that the hearing panel was without sufficient expertise is improperly raised and without merit. It does not raise an issue of substantial public interest warranting this Court’s review.

D. The Commission's Action Was Not Precluded By Res Judicata Or Collateral Estoppel

The Commission's action here specifically targeted Ms. Stevenson's nursing license; it is not related to her license to operate an adult family home. Therefore, it is not precluded or barred by the prior DSHS action based on any of the theories advanced by Ms. Stevenson. The DSHS case was not adjudicated on the merits, and it involved different interests, different parties, and different causes of action. The Court of Appeals properly held that the prior DSHS action did not preclude the Commission's action against Ms. Stevenson's nursing license. *See Slip Opinion at 13-16.*

For res judicata, "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). Similarly, collateral estoppel requires "(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 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).

Both doctrines require a final judgment on the merits and concurrence of identity between issues/cause of action and parties. Ms. Stevenson cannot demonstrate any of the above requirements. As a threshold matter, the DSHS case was settled short of a hearing on the merits. It ended when Ms. Stevenson withdrew her request for a hearing and paid the civil penalty. AR 217-19. On this basis alone, Ms. Stevenson's preclusion arguments fail.

Moreover, the issues that were adjudicated in the two cases were entirely different. Although Ms. Stevenson's misconduct was the impetus for both the DSHS and Commission actions, the legal and factual issues in each action were distinct. The Commission's 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 1. The DSHS action, in contrast, was aimed at whether Ms. Stevenson's actions breached the standards of conduct applicable to an adult family home owner and RCW 70.128. 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 possesses no legal authority to prevent Ms. Stevenson from practicing nursing in another setting, such as a hospital. Put simply, the two actions and their underlying issues are sufficiently different to render the preclusion doctrine inapplicable.

Finally, the Court of Appeals correctly noted that Ms. Stevenson's arguments fail for a lack of concurrence of identity between the parties. *See Slip Opinion at 14.* The Court pointed out that Ms. Stevenson was not a party to the DSHS case. Rather, her company, Stevenson Group, Inc. was the subject of the complaint and payment for the agreed-to DSHS fine was paid from the corporation's account. *See Slip Opinion at 3, 14.* Because Ms. Stevenson cannot demonstrate concurrence of identity of parties and issues, and cannot demonstrate a final judgment on the merits, her contention that preclusion barred the Commission's action fails.

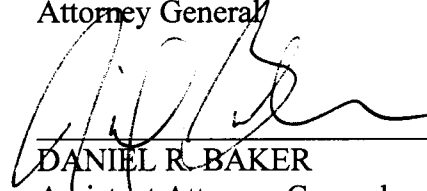
V. CONCLUSION

Ms. Stevenson committed professional misconduct when she failed to administer a prescription to her Patient for eight days without contacting the prescribing physician or any other physician. She fails to demonstrate any error in the Commission's Order or the Court of Appeals decision affirming that Order, and she has identified no issue of substantial

public interest that warrants this Court's review. Her Petition For Discretionary Review should be denied.

RESPECTFULLY SUBMITTED this 29th day of July, 2015.

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