ORIGINAL

No. 45834-9-II

COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON

FAIRUZA M. STEVENSON

Plaintiff / Appellant
v.

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

Defendant / Respondent

APPELLANT'S REPLY TO RESPONDENT'S RESPONSE BRIEF

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pm 8/22/14

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1. INTRODUCTION

Appellant's Reply does not seek to waste the Court's time repeating most of the references to testimony, statutory authority, and WAC's previously cited, and will restrict recitation of authorities to a couple of specific issues raised in Respondent's Response Brief.

The primary thrust of the Reply is to question the Trial Court's Conclusion under RCW 34.05.574(3)(d) that the Agency correctly interpreted or applied the law, and (e) the DOH Order was supported by evidence that is substantial when viewed in light of the whole record before the Court, which includes the Agency's record for judicial review.

Also challenged is the trial court's holding that it must give some deference to the standard of care holding of the Board. In that light, Appellant's argument is this is a very subjective area meaning how much deference should be allowed given the weight of testimony by both sides.

Appellant also feels the court should have focused more distinctly on the burden of proof issue and dealing with the question of standard of care, secondly, Appellant feels the Appeal's Court has an equal right to decide when too much deference is given to allow the DOH Board to make a decision in the absence of substantial expert evidence or other substantial evidence that could have been presented to create a persuasive burden of proof for the Board's decision.

2. ARGUMENT

Appellant vigorously argued to the trial court that DOH failed to provide the Board with substantial evidence that Appellant committed an act which created an unreasonable risk of harm to patient "A" under RCW 18.130.180(4) or she violated a State or Federal Statute or Administrative Rule regulating the profession in question, including the Rule that defines established standards of patient care or professional conduct, RCW 18.13.180(7) or, practice beyond the scope of practice as defined by Law or Rule, RCW 18.130.180(12).

The Department also alleged that it is a violation of WAC 246-840-710(2)(d) because Mrs. Stevenson did not comply with WAC 246-840-700 and "*willfully or repeatedly failed to administer medications in accordance with nursing standards (emphasis added)*" (ROP 004).

Appellant argued to the trial court that the Department erroneously failed to consider that WAC 246-840-700 was the correct rule setting forth the standard of nursing conduct or practice. She further urges that the standards of practice under section (2) of WAC 246-840-700(d) and in the left column, concerning registered nurses, allowed some latitude for implementations of nursing interventions, presumably when unusual circumstances prevailed. This is argued because the use of the word intervention logically indicates something out of the ordinary requiring a nurse to intervene in some unusual way. When one reads the balance of the standards of nursing under the registered nurse section, there is nothing prohibiting withholding medications under unusual

circumstances such as existed in this case and section (d) of WAC 246-840-710 specifically uses the word "willfully".

Mrs. Stevenson's opening brief clearly documents the difficult circumstances she found herself under. Contrary to DOH's argument, she immediately analyzed an unusual situation being the prescription of what she knew from her experience was more likely than not a dangerous blood thinning drug to the patient in question and immediately initiated attempts to contact the primary care physician, Dr. Grudzien (ROP 183). Also it is conceded the date on the fax is incorrect. This is substantiated by ROP 433 in which the doctor's office faxed a discontinuance order dated November 29, 2007 but it was misdated as per the testimony of Ms. Tichrob (ROP 183).

Another argument urged in the Responsive Brief mentions Dr. Grudzien's comment at ROP 412, which suggests that when confusion exists such as in this case, the patient be sent to the ER. While the doctor obviously said that, it makes no sense. There was no event occurring in patient "A's" life at that moment that an ER

facility would normally be concerned with treating. The same can be said with the reply reference to testimony of Jodi Tichrob. She did testify that if they have a concern about a patient and the physician cannot be reached they would send the patient to an ER, ROP 448, 11-12. Here there was no concern about an acute event with the patient. The only concern was about the prescription of Dr. Hu and the arbitrary conclusion that one finding herself in the position of Mrs. Stevenson can always go to the prescribing physician seems to have no support in terms of authority or anything in the testimony of Mrs. Stevenson's witnesses.

In fact, in going back to the issue of the standard of care, it is clear that one of the Findings which is printed verbatim on page 13 of Respondent's Reply Brief which refers to ROP 292 Finding of Fact 1.11 is a mere conclusion by the Board that the standard as set forth on page 13 of the Reply Brief is without reference to any Rule, Statute or WAC that justifies such a Finding.

At the risk of restating a point taken in the opening brief, it should be fair to Mrs. Stevenson to emphasize what may seem like a brash conclusion about the credibility of Dr. Hu.

Upon cross-examination she frankly admitted that she had herself committed a serious breach of a physician's duty. Upon her being assigned the primary care of patient "A" she did nothing to read what must have been very recent entries into patient "A's" chart about bleeding, ROP 338, 12-16. Her creditability is also called into question in that she announced in her telephone testimony that it was the hospital's protocol and hers to give the drug in question as a matter of policy, ROP 347, 6-18. However the fact is the chart notes for the admission in August and discharge orders did not include a prescription for what Mrs. Stevenson concluded to be a very dangerous drug as did her experts, ROP 163, 164, 165, 166. It was certainly a reasonable argument that once this information became clear to the doctor, she must have realized she had overlooked a significant issue in her medical practice and was not about to back

down on insisting that the drug was more important to this patient than other medical information would have indicated.

The Department's Reply also raises the question about a concept whereby the Superior Court reviewing an Agency action should give substantial deference to the Agency determination, citing *HILLIS v. DEPARTMENT OF ECOLOGY, 131 Wn.2d 373, 932 P.2d 139 (1997).* The trial court however recognized that judicial review is there to make sure the process is properly followed and the law is properly applied by DOH (VRP 36, 1-6) and Judge Gregerson goes on to also correctly state that the review court has to give some deference to the board below.

The question here becomes however arbitrary and unsupported by the evidence can an Agency proceeding be before the review court or this court for that matter, should choose not to give deference to the Agency's actions.

The review court in this case had the entire record of proceedings which included all the testimony of Dr. Hu and the experts presented by Mrs. Stevenson. In many cases, the question of

giving deference to the fact finder below is based on their ability to observe actions, demeanor and creditability of various witnesses. In this case, the Board had no opportunity to observe the Department's only witness on the propriety of giving or not giving the drug in question because she testified by phone. One would have to assume the Board simply ignored all testimony of Mrs. Stevenson's witnesses somehow concluding their credibility, demeanor, and other actions were for some reason unsuitable. There is nothing mentioned in the Findings to indicate there is anything to question in the testimony of Mrs. Stevenson's witnesses or to indicate their credentials were less than superb on the primary issue in question.

4. CONCLUSION

It should be recognized by this Court that this is a very unusual situation for Mrs. Stevenson. Rarely would an RN be confronted with the situation where a patient is returned to her care over a weekend with a prescription that had not been filled by a hospital pharmacy and little or no ability to contact the primary care

physician and admittedly the primary care physician indicated he was hard to see from time to time.

Mrs. Stevenson's exercise of a difficult discretionary medical choice was a correct one. This is evidenced thoroughly by the record in that patient "A" had been non-ambulatory for quite some time prior to entering the hospital in November and was not suffering from stroke symptoms when she did. The evidence further establishes that on prior admissions she did not display any of those conditions and was not given the drug in question. Furthermore it is clear that the primary care physician attending to patient "A" on prior admission in August did not believe the hospital protocol was to prescribe the drug, Exonorin, and apparently had no personal policy of doing so when a patient was not suffering from a stroke or being admitted for a history of strokes.

The Department has not given this Court any hard and fast rule other than their subjective standard imposed by accepting the slimmest amount of testimony available concerning whether or not the drug in question was appropriate and did so in the face of

substantial evidence contrary to Mrs. Stevenson's reasoned and medically sound choice to withhold giving the drug for a short time.

Finally, there is obviously no indication that Mrs. Stevenson intended to simply disregard the doctor's order and never give the drug. She made substantial efforts to sort out the conflicted situation and as in many cases facts differ significantly from case to case and in this case the facts indicate the Agency's action should be reversed and Mrs. Stevenson's record tarnished with a Finding of Unprofessional Conduct should be cleared. She should not be precluded after 20 years of good work from seeking clinical or hospital work which this Broad's decision will certainly result in.

Respectfully submitted this 21st day of August, 2014 by:

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PROOF OF SERVICE

STATE OF WASHINGTON)
ss.
COUNTY OF CLARK)

I state under penalty of perjury under the laws of the State of Washington that I mailed via US Postal Service an Original and one true copy of the Appellant's Reply Brief to the Washington State Court of Appeals Division II at 950 Broadway, #300 Tacoma, WA 98402-4454 and placed a true copy in the US

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