

FILED

No. 339939

MAY 31 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON

Rudy Frausto,

Appellants/Plaintiffs,

vs.

Yakima HMA, LLC, et al.,

Respondents/Defendants.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

This Court has established that “if the breach of the standard of care is the standard of a reasonable nurse, we fail to see why a nurse could not offer opinion that the nursing failures resulted in a given injury.” *Hill v. Sacred Heart Medical Center*, 177 P.3d 1152, 143 Wn.App. 438 (Wash.App. Div. 3 2008). Appellant’s (hereinafter “Rudy”) complaint was for the breach of the standard of care by the Respondent *nurses*, not physicians, that treated him from January 5 – 15, 2014. Therefore, Rudy enlisted the help of an expert advanced registered nurse (ARNP), Karen Wilkinson, to help determine whether the Respondent nurses had met their standard of care and, if they had not, to determine if the breach of the standard of care caused his injuries. Respondent’s argument could only be valid if Rudy’s expert nurse was testifying as to the standard of care and causation of a physician or doctor. This is simply not the case and for this reason Rudy petitions this Court to reverse and remand the trial court’s decision.

II. ASSIGNMENTS OF ERROR

Assignments of Error

No. 1 Rudy maintains that the trial court erred in granting defendant's motion for summary judgment.

Issues Pertaining to Assignments of Error

No. 1 Whether the trial court erred in ruling that a expert nurse was not qualified to testify as to causal connection between the nurses' breach of their standard of care and plaintiff's bedsore?

(Assignment of Error No. 1, 2)

III. STATEMENT OF THE CASE

On January 5, 2014 at 8:19pm, Rudy presented himself at HMA's emergency room with symptoms of generalized body weakness and respiratory/flu symptoms. From the day that he presented himself at the emergency room until January 15, 2014, Rudy remained at the hospital receiving treatment for flu symptoms and pneumonia. During his time at the hospital, Rudy developed a Stage II coccyx decub and buttocks with bruising pressure ulcers. According to Ms. Wilkinson, these pressure ulcers were caused by "registered nurse[s] and medical doctor[s]...[by] failing to provide Mr. Frausto with proper bedding, skin assessment, and care to Mr. Frausto considering that he is a quadriplegic patient."

The trial court found that Ms. Wilkinson's affidavit was sufficient to establish that appellant's breached their standard of care for purpose of overcoming a summary judgment motion as required in RCW 7.70.040(1). Transcript of October 21, 2015 at 16:6-8. However, the trial court granted defendant's motion for summary judgment because it found that the second element of RCW 7.70.040(1) was not fulfilled because whether a nurse can testify as to causation is an issue of first impression in our state.

IV. REPLY TO RESENDENTS' ARGUMENT

A. Standard of Review

Respondents argue that the standard of review should be for abuse of discretion. This is inaccurate. Respondent's cite to *Seybold v. Neu* to support their proposed standard. 105 Wn. App. 666, 19 P.3d 1068 (2001). This is an improper citation because in *Seybold* the appeal dealt with whether a plastic surgeon expert was qualified and/or had experience in removing and/or treating cutaneous malignancies growing next to the bone that have not invaded the bone to testify as to the standard of care of a orthopedic surgeon defendant. *Id.* at 678. The appellate court, division 1, applied the abuse of discretion standard for that question because the issue was whether or not the expert was qualified. *Id.* The *Seybold* court still used the *de novo* standard for the trial court's evidentiary rulings made for summary judgment. *Id.*

In the case at bar, the trial court has already decided that Rudy's expert is "extremely well qualified...she's been teaching all over the place...She's been a nurse for a long time, she's board certified." Transcript of October 21, 2015 at 16:6-8. Therefore the question that is being posed to this Court is whether this Court's precedent allows a nurse expert to testify as to causation of the breach of the standard of care of a defendant nurse, which is a question of law that should be decided *de novo*. Besides the cases that were cited in Rudy's opening brief to establish that this appeal should be decided *de novo*, Rudy is also invoking *Williamson, Inc. v. Calibre Homes, Inc.*, 54 P.3d 1186, 147 Wn.2d 394,

398 (Wash. 2002) (citing *Marquis v. City of Spokane*, 130 Wash.2d 97, 105, 922 P.2d 43 (1996)), which establish that questions of law are heard *de novo*.

B. This Court's Case Law Has Established That A Nurse May Testify as To Medical Causation on The Breach of The Standard of Care of Another Nurse

Respondent relies on cases that involve negligence by a physician to establish that an expert physician is necessary to testify as to causation. Respondent cites *McLaughlin v. Cooke*, which involves a medical negligence allegation against a physician that performed a vasectomy that resulted in necrosis and the removal of the right testicle. 774 P.2d 1171, 112 Wn.2d 829, 838 (Wash. 1989). Due to the nature of the procedure and the fact that physicians, and not nurses conduct these procedures, it makes sense for that Court to have required the testimony of an expert physician. The case at bar involves the breach of the standard of care by Respondent nurses for failing to turn Rudy and provide him with a proper bed type, which ultimately resulted in the development of bedsores.

Similarly, Respondent cites *Colwell v. Holy Family Hosp.*, which involved the prescription of blood thinners by plaintiff's physician that allegedly caused her death. 104 Wn. App. 606, 613, 15 P.3d 210 (2001). In that case it also makes sense to require a doctor to opine on the cause of death. It does not make sense to compare a bedsore to dying from misapplication of blood thinner medications.

In *Davies v. Holy Family Hosp.*, it was also prudent to require a physician medical expert to determine what caused the plaintiff's death

following a kidney surgery. 183 P.3d 283, 144 Wn.App. 483 (Wash.App. Div. 3 2008).

Respondent also relies on *Vaughn v. Mississippi* and a string of related cases from other states, which did not allow a nurse to testify as to the causation of the plaintiff's staph infection because the Mississippi state nursing laws, and the other respective states, do not allow nurses to make diagnosis. 20 So.3d 645, 652 n.2 (Miss. 2009). This goes against what our State's nursing laws, which do allow nurses to diagnose and even prescribe. See Wac 246-840-300 and RCW 18.79.040.

C. This Court Should Reverse and Remand Because Rudy's Expert Nurse Testimony Was Used To Establish the Causation Of The Breach Of The Standard Of Care Of Defendant Nurses

Respondent argues that Rudy is attempting to use his expert Nurse's testimony against the nurses *and* doctors that were employed by Respondent to establish causation. This is not the case. Rudy's claim is against the nurses that breached the standard of care as accepted by the trial court pursuant to the affidavit of Karen Wilkinson. If this Court prefers, it would be appropriate to reverse and remand holding that Rudy's expert testimony establishes a prima facie case under RCW 7.70.040 against the Respondent's nurses only.

V. CONCLUSION

For the foregoing reasons, Appellant respectfully asks this Court to reverse and remand the trial courts grant of summary judgment.

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Respectfully submitted this 26th day of May, 2016.



Favian Valencia, WSBA#43802
Attorney for Rudy Frausto, Appellant

CERTIFICATE OF SERVICE

The undersigned makes the following declaration certified to be true under penalty of perjury pursuant to RCW 9A.72.085:

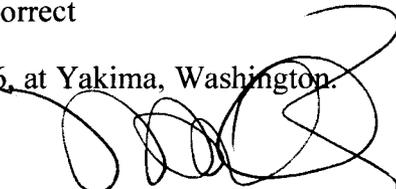
On the date given below, I hereby certify that the Appellant's Opening Brief was served on the following in the manner indicated:

Jerome Aiken Meyer, Fluegge & Tenney 230 S. 2nd Street, #101 Yakima, WA 98901	<input type="checkbox"/> Electronic mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> U.S. mail <input type="checkbox"/> Other: hand delivered
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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

Executed this 26 day of May 2016, at Yakima, Washington.


Martha Marquez
Paralegal