

No. 339939

**FILED**

MAR 28 2016

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

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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Rudy Frausto,

Appellants/Plaintiffs,

v.

Yakima HMA, LLC, et al.,

Respondents/Defendants.

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APPELLANT'S BRIEF

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## I. INTRODUCTION

Rudy Frausto (hereinafter “Rudy”) is a 70-year old quadriplegic resident of Yakima County who checked in to Yakima Regional Medical Center, AKA Yakima HMA, LLC (Hereinafter “HMA”) with symptoms of Pneumonia and the flu. During his stay, the HMA’s nurses failed to provide proper care to the patient in the form of moving the patient, turning him, or providing a proper bed type. As a result of not receiving this basic care, Rudy developed serious bedsores.

Rudy submitted affidavits by an expert advanced registered nurse practitioner (hereinafter “ARNP”) with 26 years of experience practicing and teaching. The ARNP explained that the HMA’s nurses breached their standard of care and that the breach caused the bedsores. The trial court found that the expert’s testimony was sufficient to survive summary judgment on the issue of whether the defendant nurse’s breached their standard of care. However, the trial court held that the expert ARNP’s testimony was not sufficient to overcome HMA’s summary judgment motion on the issue of whether the defendant nurse’s breach of the standard of care caused the bedsore. The court justified its decision by explaining that the issue of whether a nurse can testify as to causation is an issue of first impression in the state of Washington.

## II. ASSIGNMENTS OF ERROR

**Assignments of Error No. 1:** The Trial Court Erred in Granting HMA's Motion for Summary Judgment

### III. Issues Pertaining to Assignments of Error

**Issue 1.** Whether the trial court erred in ruling that an expert nurse (ARNP) was not qualified to testify as to the causal connection between the nurse's breach of their standard of care and Rudy's bedsore?

## IV. 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. Court Papers (CP) at 126-27. 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. *Id.* During his time at the hospital, Rudy developed a Stage II coccyx decub and buttocks with bruising pressure ulcers. According to the expert ARNP, 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." *Id.*

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 34:22. However, the trial court granted

HMA'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 this state. *Id.* at 35:1.

## V. ARGUMENT

### A. The Trial Court Erred in Granting HMA's Motion for Summary Judgment

#### 1. Standard of Review

The standard of review of an order of summary judgment is *de novo*. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 301, 45 P.3d 1068 (2002). The appellate court performs the same inquiry as the trial court. *Ski Acres, Inc. v. Kittitas County*, 118 Wn.2d 852, 854, 827 P.2d 1000 (1992). The evidence and reasonable inferences from the evidence are construed by the Court in favor of the nonmoving party. *Miller v. Likins*, 109 Wn. App. 140, 144, 34 P.3d 835 (2001); *see Ruff v. King County*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995).

Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Miller v. Likins*, 109 Wn. App. at 144. A material fact is one that affects the outcome of the litigation. *Ruff v. King County*, 125 Wn.2d at 703; *see Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993). "A material fact is one upon

which the outcome of the litigation depends in whole or in part.” *Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v. Blume Development Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990), citing *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974). Generally, questions of fact are properly left for the jury and may be determined as matters of law only when reasonable minds could reach but one conclusion. *Jenson v. Scribner*, 57 Wn. App. 478, 480, 789 P.2d 306 (1990).

The moving party bears the initial burden to prove by uncontroverted facts that there is no genuine issue of material fact. *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). If it carries this burden, the burden then shifts to the nonmoving party, to show a *prima facie* case based on the facts and “reasonable inference” from the facts. *Pelton v. Tri-State Memorial Hosp., Inc.*, 66 Wn. App. 350, 354, 831 P.2d 1147 (1992). An inference is a “process of reasoning by which a fact or proposition sought to be established is deduced as a *logical sequence* from other facts, or a state of facts, already proven or admitted.” *Wojcik v. Chrysler Corp.*, 50 Wn. App. 849, 853, 751 P.2d 854 (1988), quoting *Dickinson v. Edwards*, 105 Wn.2d 457, 461, 716 P.2d 814 (1986) (emphasis in original).

The nonmoving party bears the burden, not to prove facts, but to produce evidence that discloses the existence of a genuine issue of

material fact. *See Meyer v. University of Washington*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986).

Summary judgment should be granted only when the responding party “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989); *Miller v. Likins*, 109 Wn. App at 145.

2. The Trial Court Erred in Ruling that an Expert ARNP is Not Qualified to Testify as to Causal Connection Between the Nurse’s Breach of their Standard of Care and Rudy’s bedsores

The trial court found that Ms. Wilkinson’s affidavit was enough to establish that the Defendant’s breached their standard of care. This fulfills the first prong of RCW 7.70.040. Rudy relied on Ms. Wilkinson’s affidavit to fulfill the second prong as well, but the court declined to accept her qualifications. Therefore, the only issue before this Court is whether an ARNP can testify as to the causal connection between a nurse’s breach of the standard of care and the injury—in this case bedsores or pressure ulcers. The trial court accurately emphasized that this Appellate Court has addressed this issue in dicta, but that the issue remains an issue of first impression in the State of Washington.

**(a) Can a Reasonable Person Make the Causal Connection Between A Nurse's Breach of The Standard of Care and a Bed sore?**

ER 702 establishes that “[i]f scientific, technical, or other

specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” Furthermore, the simple definition of bedsore according to Merriam-Webster dictionary is “a sore that people get from lying in bed for a very long time when they are sick or injured.” The full definition is “an ulceration of tissue deprived of adequate blood supply by prolonged pressure —called also *decubitus ulcer*.” The plain meaning of bedsore implies its cause. Ordinary jurors do not need experts to explain the obvious.

Once it is established that the nurses breached their standard of care in turning Rudy and providing him with the proper bed type, a juror would be able to determine what caused the bedsore. Expert testimony to establish the causation of a bedsore was not necessary.

**(b) Other State Supreme Courts Have Recently Chimed in On the Issue of Whether a Nurse Can Testify as to Causation**

The supreme court of Oklahoma reversed and remanded a trial court that declined to accept a nurse’s testimony as to causation. *Gaines v. Comanche Co. Med. Hop.*, 143 P.3d 203 (Ockla. 2006). *Gaines* involved a plaintiff who was admitted to the emergency room after suffering multiple gunshot wounds. *Id.* at 205. After being left in hospital bed and the doctors instructed the patient to not be moved from his bed, he developed bedsores on his sacral area, feet, heels and head. *Id.* at 206. The defendants in that

case were successful in dismissing the charges against the medical doctors, but not against the nurse. *Id.* at 205. The trial court granted defendant's subsequent motion to dismiss based on the fact that the plaintiffs submitted a nurse's, and not a medical doctor's, testimony to establish the defendant's breach of the standard of care and causation. *Id.* The supreme court of Oklahoma reversed and remanded holding that a registered nurse "may offer expert testimony concerning the practices of other nurses and the standard of care in the avoidance, care and cause of bedsores." *Id.* The court did qualify its precedent by emphasizing "that this case does not present the issue of whether a nurse would be an appropriate expert witness in a malpractice cause filed against a physician." *Id.* at 208.

There have been courts that have taken a contrary stance. The Mississippi Supreme Court held that a nurse was not qualified to testify as to the causation. In *Vaughn v. Mississippi*, the plaintiff was admitted to the hospital for double artery bypass surgery and repair of two heart valves. 20 So.3d 645, 647 (Miss. 2009). The plaintiff also had arteries removed from her upper thighs that left open wounds. *Id.* at 647-48. As a result of these procedures, she was unable to move to go to the bathroom and after involuntarily urinating and defecating on herself, she developed a staph infection. *Id.* The plaintiff attempted to use a registered nurse to testify that the staph infection was caused by the defendant nurse's negligence. *Id.* at 648. The court held that the nurse is not permitted to testify as to diagnostic impressions "because nurses are not qualified to make medical

diagnoses or attest to the cause of illness.” The Mississippi Supreme Court relied on its state’s Professional Nursing Law does not allow nurses to make diagnosis. *Id.* at 652 n.2.

In a case that is more similar to the case at bar the Pennsylvania Supreme Court overturned its own precedent in and established that a registered nurse was competent to testify as to whether nurse’s negligence caused bedsores. *Freed v. Geisinger Med. Ctr.*, 971 A.2d 1202, 1206 (Pa. 2009) (overturning *Flanagan v. Labe*, 690 A.2d 183 (Pa. 1997)). In *Freed*, the plaintiff suffered a car accident and severe spinal cord injuries resulting in paraplegia. *Id.* at 1204. He developed bedsores on his buttocks and sacrum when he was hospitalized. *Id.* at 1204-05. The plaintiff alleged that the nursing staff negligently failed to prevent and treat his bedsores. *Id.* The *Freed* trial court sustained defendant’s objection to the testimony of a nurse expert because she was not a “medical doctor and, therefore, was not qualified to give a medical diagnosis.” *Id.* at 1205. Despite the fact that the Pennsylvania Professional Nursing Law, like the Mississippi Nursing law, prevents nurses from making medical diagnosis, the *Freed* court held that a registered nurse can testify as to medical causation. *Id.* at 1212. The *Freed* court emphasized that its rules of evidence trump its Professional Nursing Laws and that its evidence rules only require that a witness possess greater expertise than is within the ordinary range of training, knowledge, intelligence or experience in order to be qualified as an expert. *Id.* at 1208.

There are several other appellate courts that have established that

nurses can testify as to causation on medical conditions that are more complex than a bed sore: See, e.g. *Maloney v. Wake Hosp. Sys., Inc.*, 262 S.E.2d 680 (N.C. Ct. App. 1980) (holding that the trial court erred in excluding a nurse's opinion that the burn suffered by the plaintiff was caused by an undiluted bolus of potassium chloride that was administered into the tissue of the plaintiff's hand); *State v. Tyler*, 485 S.E.2d 599 (N.C. 1997) upholding the admission of a nurse's trail testimony regarding the cause of the victim's death and the effects of the sedative medication Versed, which was administered to the victim); *Diggs v. Novant Health, Inc.*, 628 S.E.2d 851 (N.C. Ct. App. 2006)(holding that the burse was improperly precluded from testifying that the defendant nursing staff's failure to report the plaintiff's troubled breathing and sharp throat pain following gall bladder surgery would have led to an earlier identification of the plaintiff's punctured esophagus and would have lessened the seriousness of the plaintiff's injuries resulting from the perforation).

**(c) This Court Has Already Established that Nurse Experts May Testify As To Causation of The Breach of The Standard of Care of a Nurse**

Our Supreme Court has given some guidance to this issue with words of wisdom from Aristotle: "As a physician ought to be judged by the physician, so ought men to be judged by their peers." *Young v. Key Pharmaceuticals, Inc.*, 770 P.2d 182, 112 Wn.2d 216, 227 (Wash. 1989). The *Young* Court established that in a medical malpractice case the plaintiff bears the burden to establish only the essential elements of its

case through affidavits. *Id.* at 225. The Supreme Court also held that a pharmacist was not competent to testify as to causation where the defendant was a medical doctor namely because these are distinct professions. *Id.* at 227.

This Appellate Court, in a series of cases, has shed more light on this issue, but has still not defined it fully. In *Colwell v. Holly Family Hosp.*, 15 P.3d 210, 104 Wn.App. 606 (Wash.App. Div. 3 2001) the plaintiff was given blood thinners by her physician and she later died of internal bleeding. *Id.* at 609. The plaintiff's expert nurse (who was merely an RN, not an ARNP) testified that the defendant nurses breached their standard of care and that this breach proximately caused plaintiff's death. *Id.* at 610. This Court correctly ruled that the expert nurse was not competent to testify as cause of death because it is not a nurse's responsibility, but a doctor's, to opine as the cause of death. *Id.* at 613.

Thereafter, in *Hill v. Sacred Heart Medical Center* this Court gave even more specific guidance and established a precedent as to whether nurses can testify as to causation. 177 P.3d 1152, 143 Wn.App. 438, (Wash.App. Div. 3 2008). In *Hill* the defendant's moved for summary judgment, in part, because plaintiff offered a nurse's medical testimony to establish the standard of care of a nurse and that the breach of the standard of care contributed to the plaintiff's injuries. *Id.* at 445. The plaintiff alleged that the doctor and nurse's negligent application of Lovenox caused him to suffer a stroke, a pulmonary embolism, and deep vein thrombosis. *Id.* at 443. This Court established that:

“there is nothing in the statutory scheme that suggests that a nurse should be categorically denied the right to express opinions on the proximal relationship between a breach of a duty of care and injury. See ch. 7.70 RCW. Certainly, if the failure to meet the standard of care is the physician’s, then a physician will most likely be required to pass on whether the breach of the standard of care caused a particular injury. RCW 7.70.040(1). But 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. RCW 7.70.040(1). In deed, expert testimony is not even required if a reasonable person can infer a causal connection from the facts and circumstances and the medical testimony given.” *Id.* at 446-447.

It is important to note that the *Hill* Court acknowledged that *Colwell* had established that nurses cannot testify as to causation in regards to the cause of death of a patient and still took it upon itself to clarify that nurse’s can testify as to whether a breach of the standard of care of a nurse caused the injury. *Id.* at 446.

**(a) Washington State Legislature Has Authorized Our ARNPs To Diagnose and Treat, It Is Only Fair to Allow Them To Testify**

RCW 18.79.040 states that:

“Registered nursing practice” means the performance of acts requiring substantial

specialized knowledge, judgment, and skill based on the principles of the biological, physiological, behavioral, and sociological sciences in either:

(a) The observation, assessment, *diagnosis*, care or counsel, and health teaching of individuals with illnesses, injuries, or disabilities, or in the maintenance of health or prevention of illness of others.” (Emphasis added).

ARNPs are acknowledged to “prepared in a formal educational program to assume primary responsibility for continuous and comprehensive management of a broad range of patient care, concerns and problems.” WAC 246-840-300. ARNP may conduct the following:

“(6) Performing within the scope of the ARNP's knowledge, experience and practice, the licensed ARNP may perform the following:

(a) *Examine patients and establish diagnoses by patient history, physical examination and other methods of assessment;*

(b) Admit, manage and discharge patients to and from health care facilities;

(c) Order, collect, perform and interpret diagnostic tests;

(d) Manage health care by identifying, developing, implementing and evaluating a plan of care and treatment for patients;

(e) Prescribe therapies and medical equipment;

(f) Prescribe medications when granted authority under this chapter;

(g) Refer patients to other health care practitioners, services or facilities; and

(h) Perform procedures or provide care services that are within the scope of practice according to the commission approved certification program.” *Id.* (Emphasis added).

Our legislature has granted nurses broad authority over taking care of patients to the extent that they can diagnose and even prescribe. It only makes sense that our courts allow them the right to express their opinion as to medical causation, which is the equivalent of making a diagnosis.

**(b) Ms. Wilkinson is Qualified to Testify as To Causation of Rudy's Bedsore.**

Ms. Wilkinson is very qualified to offer her expert opinion as an ARNP. CP at 136-141. She has practiced and thought our up and coming nurses as an ARNP for over 26 years. *Id.* Although her specialties are in pediatrics, she has extensive experience as a staff nurse. *Id.* The trial court acknowledged that Ms. Wilkinson was “extremely well qualified...she’s been teaching all over the place...She’s been a nurse for a long time, she’s board certified, and so forth, that she may in fact possess the necessary experience to allow her to do that [referring to testifying as to causation].” Transcript of October 21, 2015 at 16:6-8. The only reason that the trial court declined to allow Ms. Wilkinson to testify as to causation was because it was “confused about the facts” and misinterpreted *Hill* as not having addressed the exact issue that is subject to this case. *Id.* at 26:19-20.

Rudy asks this Court to find and re-establish that a nurse can testify as to medical causation to fulfill the second prong of RCW 7.71.040. First, *Hill* has established that a nurse can in fact testify. Second, the line of cases of other supreme courts across the country have acknowledged that nurse do have the requisite credentials and that as long as they have the requisite experience and knowledge they should be able to testify as to causation. Lastly, bedsores are very basic injury that nurses are trained to diagnose and even treat. Our Legislature has given nurses the authority to diagnose and treat, therefore our Courts should give them the ability to express their opinion.

**III. CONCLUSION**

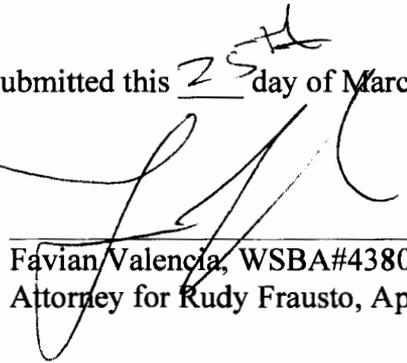
For the foregoing reasons, Appellant respectfully asks this Court to reverse and remand the trial courts grant of summary judgment.

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Respectfully submitted this 25<sup>th</sup> day of March, 2016.



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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:

<b>Jerome Aiken</b> <b>Meyer, Fluegge &amp; Tenney</b> 230 S. 2nd Street, #101 Yakima, WA 98901	<input type="checkbox"/> Electronic mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> U.S. mail <input type="checkbox"/> Other: hand delivered
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<b>The Court of Appeals of the State of Washington Division III</b> <b>500 N Cedar St</b> <b>Spokane, WA 99201-1905</b> <b>Fax (509)456-4288</b>	<input type="checkbox"/> Electronic mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> U.S. first class 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 25<sup>th</sup> day of March 2016, at Yakima, Washington.

  
Erica Valencia  
Paralegal