No. 93312-0

FILED

MAY 0 4 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

No. 339939

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

RUDY FRAUSTO

Plaintiff/Appellant,

vs.

YAKIMA HMA, LLC
A WASHINGTON CORPORATION,

Defendant/Respondent

RESPONDENT'S BRIEF

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I. INTRODUCTION

As Appellant's brief states, the issue before the Court is a simple and concise one: whether a nurse may express an opinion on proximate cause in a medical malpractice case.

Appellant is seeking this appeal because he is unable to meet his burden of showing that the actions or inactions of the Respondent was the proximate cause of Appellant's alleged injuries. The trial court properly granted summary judgment in favor of YRMC after the Appellant was unable to produce competent expert testimony on the issues of violation of the standard of care and causation, and thus was unable to establish his prima facie case.

Appellant's proposed expert was Karen Wilkinson, a nurse practitioner. Her expertise is in pediatrics, not adults or adult hospitalized patients. Ms. Wilkinson testified that she believed the alleged violations of the standard of care by YRMC staff proximately caused the Appellant's alleged injuries. However, the Trial Court ruled that since Ms. Wilkinson was a nurse, she was unable to testify as to causation in a medical malpractice case.

Appellant now alleges that the Trial Court erred when it followed the well-established rulings from both this Court, as well as from other jurisdictions in regards to whether a nurse may testify as to causation in medical malpractice lawsuit. However, Appellant is unable to offer any argument that the Trial Court did not already consider in reaching its decision, and the trial court's summary dismissal of all of Appellant's claims should be affirmed.

II. RESPONSE TO ASSIGNMENT OF ERROR

1. The trial court properly granted summary judgment on Defendant/Respondent's claims, as the Appellant was unable to meet its burden of proving causation.

III. COUNTER STATEMENT OF THE CASE

Respondent Yakima Regional Medical Center, d/b/a Yakima HMA, LLC (hereinafter "YRMC") is a regional medical center that provides a variety of medical services. Appellant, who is a quadriplegic, was admitted to YRMC on January 5, 2014. Appellant claimed that during his stay at YRMC he developed pressure ulcers as a result of inappropriate medical treatment.

Appellant initially submitted a declaration by Ms. Karen Wilkinson when the matter first came for hearing on July 21, 2015 which alleged that Respondent's medical staff provided inappropriate medical care. At that time, the Court held that the Declaration of Ms. Wilkinson was insufficient to defeat Defendant's Motion for Summary Judgment. However, due to Appellant's difficulties obtaining a complete set of his medical records within the discovery deadlines, the proceedings were continued for another 60 days.

Following this 60-day continuance, the Respondent again moved for summary judgment, at which point Appellant produced a new declaration from Ms. Wilkinson, despite the fact that the deficiencies in the initial declaration (*i.e.*, that a nurse is not competent to testify as to medical causation) remained. As a result, the Court granted summary judgment in Respondent's favor, finding that there are no material issues of fact related to the Plaintiff's claims asserted against the Respondent, and dismissing all claims against the Respondent with prejudice and without costs.

IV. ARGUMENT

A. STANDARD OF REVIEW

The appropriate standard of review for an order granting or denying summary judgment is *de novo*, and the appellate court performs the same inquiry as the trial court. Aba Sheikh v. Choe, 156 Wn.2d 441, 447, 128 P.3d 574 (2006). Additionally, constitutional questions are issues of law and are also reviewed *de novo*. City of Redmond v. Moore, 151 Wn.2d 664, 668, 91 P.3d 875 (2004).

In general, the qualifications of an expert are judged by the trial court and the trial court's determination will not be overturned absent an abuse of discretion. Seybold v. Neu, 105 Wn. App. 666, 678, 19 P.3d 1068 (2001) (quoting McKee v. Am. Home Prods. Corp., 113 Wn.2d 701, 706, 782 P.2d 1045 (1989)); see also General Electric Co. v. Joiner, 522 U.S. 136, 139 (1997).

B. CASE LAW FROM WASHINGTON AND OTHER JURISDICTIONS HOLDS THAT A NURSE IS NOT COMPETENT TO TESTIFY AS TO MEDICAL CAUSATION

A defendant may move for summary judgment in cases of medical negligence when the plaintiff lacks the required competent medical evidence to establish his or her prima facie case. Young v.

Key Pharmaceuticals, Inc., 112 Wn.2d 216, 226, 770 P.2d 182 (1989). A prima facie case of medical negligence requires a showing of duty, breach, causation, and damages. Pedroza v. Bryant, 101 Wn. 2d 226, 228, 677 P.2d 166 (1984). However, the standard of care and proximate cause must be established by medical expert testimony. McLaughlin v. Cooke, 112 Wn.2d 829, 836-37, 774 P.2d 1171 (1989).

While a nurse may possess the education and skill necessary to testify as to the standard of care for treating nurses, the testimony of a medical doctor is required to connect the plaintiff's alleged injures to the alleged nursing deficiencies, *i.e.,* to show causation. Colwell v. Holy Family Hosp., 104 Wn. App. 606, 613, 15 P.3d 210 (2001). As a result, a nurse is not competent to testify as to medical causation. Id. at 613, 15 P.3d 210.[1]

[1] While it is true that the decision in Colwell regarding the inability of a nurse to testify as to causation was called into question by Hill v. Sacred Heart Medical Center, 143 Wn. App. 438, 447, 177 P.3d 1152 (2008), where the court held that "[t]he scope of an expert's knowledge, nor his or her professional title, should govern the threshold question of admissibility of expert medical testimony in a malpractice case" (internal citations omitted). The court further stated that it "fail[ed] to see why a nurse could not offer opinions that the nursing failures resulted in a given injury." Id., at 446, 117 P.3d 1152. However, the court stopped short of overturning the opinion in Colwell, because it considered the affidavit of a medical doctor, and not the plaintiff's proffered nurse expert, in evaluating proximate cause. Further, it should be noted that no reported or unreported cases in Washington cite Hill for the proposition that a nurse is qualified to testify on the issue of causation. Moreover, this Court rendered its opinion in Davies after Hill. The Davies opinion is discussed herein.

The Division Three Court of Appeals again reiterated this principle in Davies v. Holy Family Hosp., 144 Wn. App. 483, 500-501, 183 P.3d 283 (2008) and emphasized that "[e]xpert medical testimony is required to show causation." This testimony must be from a medical doctor. For example, in Davies, Division Three held that the declaration of a nurse opining as to causation was insufficient to defeat Holy Family's motion for partial summary judgment. Id. at 500. Division Three unequivocally stated:

> While a registered nurse may possess the education and skill necessary to testify as to the standard of care of a patient's treating nurses, a nurse is not competent to testify as to the patient's cause of death. Consequently, 'a medical doctor must still generally connect [the patient's] death to the alleged nursing deficiencies.'

Id. at 500-01 (quoting Colwell, 104 Wn. App. at 613) (emphasis added).

The Court's ruling in Davies follows the majority rule in the United States that in general a nurse is not competent to express

medical causation opinions.[2] See Vaughn v. Mississippi Baptist Medical Center, 20 So. 3d 645 (Miss. 2009) (holding that a nurse was not qualified to render an opinion about the signs, symptoms, development, and progression of a plaintiff's staph infection). The Vaughn Court held that:

> [s]ince medical diagnosis is outside a nurse's scope of practice, logically it would follow that a nurse should not be permitted to testify as to his/her diagnostic impressions or as to the cause of a particular infection disease or illness. This is in keeping with the majority rule that nursing experts cannot opine as to medical causation and are unable to establish the necessary elements of proximate cause.

Vaughn, 20 So. 3d at 652. See also Long v. Methodist Hosp. of Indiana, Inc., 699 N.E. 2d 1164, 1169 (Ind.Ct.App. 1998)("[W]e now hold that nurses are not qualified to offer expert testimony as to the medical cause of injuries."); Phillips v. Alamed Co., Inc., 588 So.2d

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[2] It should additionally be noted that while Appellant attempts to argue that the testimony of a nurse should be sufficient to establish causation, Appellant's Brief also appears to imply that causation in medical malpractice cases could be determined by a layperson. *See Appellant's Opening Brief, p.9, ¶ 2*:

> Once it is established that the nurses breached their standard of care in turning [the Plaintiff] and providing him with a 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.

Id. (emphasis added). This is simply incorrect.

463, 465 (Ala.1991) ("[W]e cannot say that the trial judge abused his discretion by requiring the testimony of a physician and, implicitly, holding that a registered nurse was not competent to testify as an expert on the issue of proximate cause."); Zak v. Brookhaven Memorial Hosp. Medical Center, 863 N.Y.S. 2d 821 (2008) (holding that the plaintiff's expert witness, a registered nurse was not qualified whether the administration of a medication was a "substantial factor in causing" an injury).

In a Texas case featuring substantially similar facts, Esquival v. El Paso Healthcare Systems, Ltd., 225 S.W.3d 83 (Texas 2005), a Texas Court of Appeals held that a nursing expert was not competent to testify that bed sores were caused by a violation of the standard of care. Esquival, 225 S.W.3d at 90. The Esquival Court noted that the nurse's:

> [R]eport and CV do not establish that she has any training, education, skill or clinical nursing experience relevant to diagnosing the causes of decubitus ulcers [*i.e.*, bedsores] or any injuries resulting from decubitus ulcers and their treatment. The [plaintiffs] failed to show that the [nurse expert] possess the expertise which would qualify her to express an opinion as to the causal link between the nurses' alleged failure to observe and document skin integrity and breakdown of tissue and

> the development of the decubitus ulcers or any other resulting injuries.

Id. at 91. It is therefore clear that the Vaughn Court was correct when it stated that the majority of courts hold that nurses are not qualified, no matter their education, training, or experience, to present medical causation opinions. Vaughn, 20 So. 3d at 652.

C. THE TRIAL COURT PROPERLY DISMISSED APPELLANT'S CLAIM BECAUSE A NURSE MAY NOT TESTIFY AS TO CAUSATION

"If the plaintiff in a medical negligence suit lacks competent expert testimony, the defendant is entitled to summary judgment." Colwell, 104 Wn. App. at 611 (citing Morinaga v. Vue, 85 Wn. App. 822, 32, 935 P.2d 637 (1997)). Here, the Appellant lacked competent expert testimony as he had a nurse practitioner testify to causation. As a result, the Respondent was entitled to summary judgment, and the Trial Court's decision to grant Respondent's Motion for Summary Judgment was not in error.

As a general rule, a practitioner of one school of medicine is not competent to serve as an expert in a malpractice action against a practitioner of another school of medicine. Miller v. Peterson, 42 Wn.App. 822, 831, 714 P.2d 695 (1986). An expert's affidavit in

opposition to summary judgment is insufficient where it does not "affirmatively" show the expert is competent with regard to the applicable standard of care. Davies, 144 Wn. App. at 495.

Appellant submitted declarations from Ms. Winston on two occasions: at the first hearing in this matter on July 21, 2015, and again after Respondent submitted its Motion for Summary Judgment. In both times, Ms. Wilkinson testified as to the whether the alleged violations of the standard of care by the Respondent's staff, which consisted of both nurses and doctors, caused the Appellant's alleged injuries.

The declaration that Appellant submitted attempted to opine that the medical doctors who provided care to the Appellant at YRMC failed to comply with the standard of care. However, Ms. Wilkinson was not a medical doctor, and was therefore not qualified to offer such an opinion. As a result, granting summary judgment in favor of the Respondents was proper.

The Appellant cites to Pennsylvania and Oklahoma cases where Courts in these jurisdictions, which it argues hold that "a registered nurse can testify as to medical causation." *Appellant's*

Opening Brief, p. 11 ¶ 2 (citing Freed v. Geisinger Med. Ctr., 971 A.2d 1202, 1206 (Pa. 2009); Gaines v. Comanche Co. Med. Hop., 143 P.3d 203 Okla. 2006)). Plaintiff attempts to argue that:

> the line of cases of other supreme courts across the country have acknowledged that nurse [sic] 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.

Appellant's Opening Brief, p. 16 ¶ 2. However, as the Gaines Court stated:

> Today's decision cannot be determined to have 'opened the floodgates' for nurses to testify as experts in malpractice cases brought against physicians. It is limited to its facts and expresses no opinion on whether the patient should prevail.

Gaines, 143 P.3d.

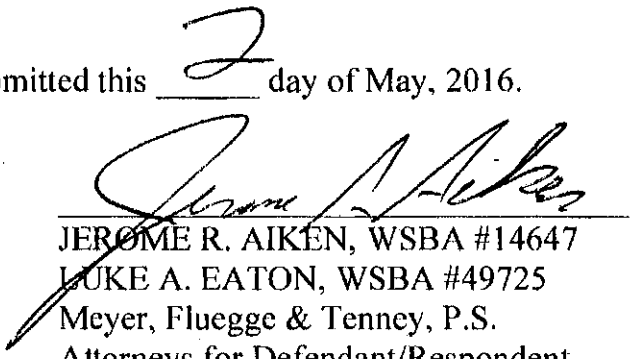
Appellant attempts to expand these limited exceptions to the general rule that is followed throughout the country that a nurse with the requisite experience and credentials may testify generally as to causation. This ignores the fact that Washington courts have held that a nurse may not testify as to causation, while at the same time ignoring the fact that well established Washington case law does not allow a practitioner of one school of medicine serve as an expert in a

malpractice action against a practitioner in another school of medicine.

V. CONCLUSION

Based on the foregoing analysis, the trial court's judgment should be affirmed.

Respectfully submitted this 2 day of May, 2016.



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CERTIFICATE OF TRANSMITTAL

I certify under penalty of perjury under the laws of the state of Washington that the undersigned caused a copy of this document to be sent to the attorney(s) of record listed below as follows:

For Plaintiffs: Mr. Favian Valencia Sunlight Law, PLLC 402 E. Yakima, Avenue, Suite 730 Yakima, WA 98901	✓ via U.S. Mail ___ via fax ✓ via e-mail ___ via hand delivery

DATED this 2nd day of May, 2016 at Yakima, Washington.

SHERYL A. JONES