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MEMORANDUM

March 26, 2014

TO: Brent Andrews

RE: Nambrosi v. Alliance Hospital

FACTS: Terry Nambrosi brought suit against Alliance Hospital for damages arising from her daughter Abby's anoxic brain injury, which Abby sustained at the defendant hospital during a CT scan when she was just sixteen months old. Further factual details are set forth in Plaintiff's Complaint.

ISSUES: I. Under Nevada law, is a violation of hospital policy evidence of negligence? (E.g., in Massachusetts, jurors are instructed that if they find the defendant(s) to have violated a company (hospital) policy, they may consider the violation evidence of negligence.)

II. Under Nevada law, must a plaintiff's medical malpractice expert be of the same specialty as the defendant against whom the expert is offering his or her expert opinions? (E.g., in the Nambrosi matter, the defendants are pediatricians and a nurse. Plaintiffs' expert has education, training, and experience in pediatric medicine and nursing, but is not Board Certified, nor does he hold himself out as a pediatrician or a nurse.)

III. What are the Nevada medical malpractice verdicts and settlements involving children with brain injuries?

DISCUSSION

I. VIOLATION OF A HOSPITAL POLICY MAY BE EVIDENCE OF NEGLIGENCE.

In *Wickliffe v. Sunrise Hospital, Inc.*, 766 P.2d 1322 (Nev. 1989), the Nevada Supreme Court held that the trial court committed reversible error in refusing to give a jury instruction requested by the plaintiff that would have permitted the jury to consider whether the hospital conformed to its own standards in caring for a patient after surgery. In the *Wickliffe* case, a mother sued the hospital for the wrongful death of her teenage daughter, who suffered respiratory arrest while recovering from an otherwise uneventful surgical procedure at the defendant hospital. Sunrise's postoperative procedures required the taking of a patient's vital signs every fifteen minutes for the first hour after surgery, but this procedure was not followed in Wickliffe's daughter's case; her vitals were checked only once during the relevant time period.

At the first trial of the matter,[1] the district court gave the following instruction to the jury: "In determining the adequacy of the care rendered to its patient, you may consider the defendant's own standards and whether or not the defendant conformed to its own standards." *Id.* at 1325. The jury returned a verdict for Sunrise, and the plaintiff appealed. The appellate court reversed and remanded for a new trial. At the second trial, the court refused the very same instruction when proffered by the plaintiff. Wickliffe again appealed, arguing that the omitted instruction was fundamental to her argument that the violation of Sunrise's procedures could be evidence of negligence. She argued that the court's refusal to give the instruction was reversible error. *Id.*

The appellate court agreed. "Each party to a lawsuit is entitled to have the jury instructed on all of his theories of the case that are supported by the pleadings and the evidence." *Id.* at 1325-26 (quoting *Rocky Mt. Produce v. Johnson*, 369 P.2d 198, 202 (Nev. 1962)). Not only was the subject policy part of

[1] For additional factual background on this case, see *Wickliffe v. Sunrise Hospital, Inc.*, 706 P.2d 1383 (Nev. 1985) ("*Wickliffe I*").

Sunrise's standard operating procedures, it was also a national standard of nursing care. Sunrise was accredited by the Joint Commission on Accreditation of Hospitals, which institutes national standards to which all hospitals seeking accreditation must conform. *Id.* at 1326. A rolodex containing the postoperative care procedures at Sunrise, which was available to the nursing staff, included the requirement of taking vitals every fifteen minutes after surgery. But in this case, Wickliffe's daughter's vitals were taken only once during her first hour after leaving the recovery room, so the nurses involved failed to meet the applicable standard. *Id.*

Thus, the evidence in *Wickliffe* indicated that Sunrise's procedures for postoperative care conformed to the national standard, but hospital personnel did not perform consistently with that standard. Therefore, Wickliffe was entitled to a jury instruction stating that the jurors could consider whether Sunrise conformed to its own standards, and the district court erred by refusing to give that instruction. *Id.*

II. EXPERT WITNESSES NEED NOT BE FROM THE SAME SPECIALTY AS THE DEFENDANT.

There is no requirement in Nevada that an expert medical witness be from the same specialty as the defendant; the issue is simply one of the witness's actual knowledge. *Staccato v. Valley Hosp.*, 170 P.3d 503, 506 (Nev. 2007). "Indeed, an expert witness need not be licensed to practice in a given field to be considered qualified to testify as an expert." *Id.* at 530-31; *see also Freeman v. Davidson*, 768 P.2d 885, 886-87 (Nev. 1989) (rejecting a *per se* disqualification rule based on lack of licensure, and noting that an expert witness need not be licensed to testify as an expert as long as he or she has specialized knowledge, training, and education to provide a standard-of-care opinion; also holding that the fact that the expert offered on the issue of malpractice was not licensed to practice medicine until after the date of the alleged malpractice did not preclude her from testifying in that case).

In the *Staccato* case, the court held that an ER physician was not disqualified from testifying as an expert about the appropriate standard of care for administering intramuscular injections simply because the person who administered the injection to the patient in that case was a nurse. This is because in Nevada, expert witness assessments turn on whether the proposed witness's special knowledge, skill, experience, training, or education will assist the jury. *Staccato*, 170 P.3d at 506 (citing Nev. Rev. Stat. § 50.275). In states like Nevada, the focus of expert witness qualifications is on the scope of the witness's practical knowledge in light of the particular circumstances of the case. *Id.* at 507.

Accordingly, courts have routinely allowed doctors to testify against nurses with respect to accepted standards of care.[2] The *Staccato* court pointed to an Indiana case as an example. In that case, the court held that a physician was qualified to give an opinion that a nurse inappropriately administered an injection to the plaintiff subcutaneously rather than intramuscularly. *Id.* (citing *Justice v. Clark Mem. Hosp.*, 718 N.E.2d 1217 (Ind. Ct. App. 1999)). Because the physician demonstrated that he knew the difference between subcutaneous and intramuscular injections, evidencing his qualifications to give his expert opinion on that question, he was qualified to testify against the nurse who allegedly administered the injection in a negligent manner. *Id.*

The Indiana court in *Justice v. Clark Mem. Hosp.* explained that the relevant inquiries for deciding whether an expert is qualified are: (1) whether the subject matter is distinctly related to some scientific field or profession beyond the average person's knowledge; and (2) whether the witness has sufficient skill, knowledge, or experience in the area at issue such that the opinion will aid the jury. 718 N.E.2d 1217, 1221 (Ind. Ct. App. 1999). Because Nevada's statutes provide requirements similar to Indiana's evidentiary rules with respect to the admissibility of expert testimony, the *Staccato* court adopted the Indiana approach as a means for evaluating whether a witness qualifies as an expert in

[2] Nurses, likewise, are qualified to testify against doctors if they can demonstrate the requisite skill or knowledge to do so. 170 P.3d at 506 n.13 (citing non-Nevada cases).

medical malpractice cases. In *Staccato*, the witness demonstrated that he had sufficient skill, knowledge, experience, and training to qualify him as an expert in administering intramuscular injections, so the district court erred in refusing to allow him to offer standard-of-care testimony. The fact that the expert's testimony was offered against a nurse was wholly irrelevant to the doctor's qualifications. *Staccato*, 170 P.3d at 507.

Other Nevada decisions support the general principle that a medical expert witness need not practice or be licensed in the same area as the defendant. In *Rees v. Roderiques*, 701 P.2d 1017 (Nev. 1985), for instance, the court held that the plaintiff's expert witnesses, who were vascular surgeons, established the appropriate standard of care for *any* physician, whether a specialist or general practitioner, when faced with a seventy-five-year-old woman in the patient's condition in that case. The plaintiff presented with severe pain, difficulty walking, one foot turned in and dragging, and one leg swollen. All the defendant doctor—a general practitioner—did was prescribe an elastic stocking, and the plaintiff ended up needing to have her leg amputated. Because the expert witnesses testified that the doctor did not comply with the standard of care required—in fact, the elastic stocking was the worst course of treatment—and that the plaintiff's leg could have been saved if she had received proper care, yet the jury reached a defense verdict, the jury must have misconstrued the law or the facts and the plaintiff was therefore entitled to a new trial.

In *Jain v. McFarland*, 851 P.2d 450 (Nev. 1993), the court held that a board certified urologist was competent to testify as to the standard of care required of a board certified gynecologist, specifically as to the timing of surgeries to repair a vesicovaginal fistula. Although the witness himself said he was not qualified to render an opinion as to the gynecological standard of care for the surgery, the court emphasized that an expert witness need only be qualified to render an expert opinion with respect to the exact issue on which he is testifying. *Id.* at 456. The *timing* of the surgeries was within the expert witness's area of expertise in *Jain*, so he could testify as an expert with regard to that specific issue. *Id.*

In fact, there are some areas of medical expertise that are common to all, or at least most, physicians. *Id.* (citing *Fernandez v. Admirand*, 843 P.2d 354 (Nev. 1992)).

III. NEVADA VERDICTS AND SETTLEMENTS

An online search of Nevada Jury Verdict and Settlement reports retrieved the following relevant cases (presented in descending order as to amount of damages).

- *Rivera v. Valley Hosp. Med. Ctr. Inc.*, JVR No. 500181 (Nev. Aug. 2007): A female minor suffered hypoxic brain damage during her delivery at the defendant hospital. The plaintiff's mother alleged that the defendants failed to detect that the baby was suffering from fetal distress and failed to adhere to the proper standard of care. The jury reached a verdict of just over **$5 million** in the plaintiff's favor.
- *Nitta v. Valley Hosp. Med. Ctr.*, JVR No. 474599 (Nev. Feb. 2000): The parties settled for **$3.2 million** in a case involving a female infant who suffered cardiac arrest resulting in permanent brain damage, microcephaly, and cerebral palsy while in the care of the defendant physician at the defendant hospital. The plaintiff contended that the defendant failed to promptly diagnose a bowel obstruction, negligently interpreted a renal ultrasound, failed to order appropriate diagnostic tests, failed to consult with a neonatologist or pediatric surgeon prior to discharge, and failed to provide the proper standard of care, resulting in the child's permanent injuries.
- *O'Neill v. Watson*, 2011 WL 2783523 (Nev. Jan. 13, 2011): A male infant was deprived of oxygen when his mother's uterus ruptured during labor. She had previously delivered one child by C-section and one child vaginally. The child's injuries include a seizure disorder, developmental delays, and spastic quadriplegia. The defendants' insurers agreed to pay **$900,000** to settle the plaintiff's claims.

- *Jagodzinski v. Sunrise Hosp.*, JVR No. 467628 (Nev. June 1995): A female infant suffered a brain injury resulting in cerebral palsy and a language deficiency when she was delivered at the defendant hospital by the defendant nurses. The parties settled for **$250,000**.
- *Tillman v. Wright*, JVR No. 1112210005 (Nev. Dec. 14, 2006). A **$200,000** settlement was reached in a case involving a brachial plexus injury to an infant female during delivery that resulted in Erb's palsy, mild brain damage, and permanent impairment of the child's arm. The settlement agreement included $112,354 for attorney's fees and $14,000 for loss of services to the plaintiff's parents.
- *Gyger v. Sunrise Hosp. & Med. Ctr. LLC*, 2011 WL 2355232 (Nev. 2011): A two-year-old boy endured a prolonged anoxic period during an intubation at the defendant hospital, resulting in brain injury. The defendants contended that the boy's injuries were related to his underlying Acute Lymphocytic Leukemia. At the time of trial, only the hospital and two doctors remained as defendants; the doctors entered into a confidential high-low settlement agreement in February 2011, but at the March 2011 trial the jury reached a **defense verdict**. The court entered judgment in the hospital's favor in April 2011.
- *Hennagan v. Zak*, JVR No. 1107180081 (Nev. May 2002): The jury reached a **defense verdict** in a case involving a hypoxic ischemic event during childbirth, resulting in brain damage to the male infant. The plaintiff argued that the defendant, who assisted the child's birth at the codefendant hospital, negligently performed a vacuum extraction and used excessive force, but the defendants denied liability.