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No. 93312-0

SUPREME COURT OF THE STATE OF WASHINGTON

RUDY FRAUSTO,

Appellant,

v.

YAKIMA HMA, LLC, et al.,

Respondents.

ON APPEAL FROM YAKIMA COUNTY SUPERIOR COURT
(Hon. Susan L. Hahn)

BRIEF OF *AMICI CURIAE* WASHINGTON STATE MEDICAL ASSOCIATION, WASHINGTON ACADEMY OF FAMILY PHYSICIANS, WASHINGTON CHAPTER—AMERICAN COLLEGE OF EMERGENCY PHYSICIANS, AND THE AMERICAN MEDICAL ASSOCIATION

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I. IDENTITY AND INTEREST OF *AMICUS CURIAE*

Medical Association Amici[1] are national and state-wide non-profit organizations that represent Washington state medical and osteopathic physicians, emergency physicians, and family physicians, as described in the motion to file this brief. They wish to educate the Court regarding the significant difference in education, clinical training, and scope of practice between physicians and other providers with a narrower scope of practice because these differences determine the substantive ability to testify as an expert in a medical malpractice action.

Due to these differences, Washington courts have effectively limited the ability to testify to the standard of care in a medical malpractice action to an expert witness from the "class and profession" to which the defendant belongs.[2] Medical Association Amici's experience is that this rule correctly reflects the ability of the expert witness to provide accurate and informative testimony regarding the truly applicable standard of care. Because an advanced registered nurse practitioner ("ARNP") must obtain

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[1] Medical Association Amici are: Washington State Medical Association; Washington State Academy of Family Physicians; Washington Chapter—American College of Emergency Physicians; American Medical Association. The AMA and WSMA join this brief on their own behalf and as representatives of the Litigation Center of the AMA and the State Medical Societies.

[2] While this Court declined the adoption of a "per se" rule disqualifying nonphysicians from testifying as medical experts in medical malpractice actions, *Harris v. Groth*, 99Wn.2d 438, 450-51, 663 P.2d 113 (1983), it later rejected "a rule that would allow a nonphysician to testify as an expert regarding the proper standard of care for a physician practicing a medical specialty." *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 230-31, 770 P.2d 182 (1989).

licensure as a registered nurse (“RN”) before getting ARNP licensure, an ARNP may appropriately provide expert testimony regarding the standard of care for both an ARNP and as well as an RN. However, neither an RN nor an ARNP possess the education or clinical training and experience necessary to testify as to a ***physician’s*** standard of care.

It is also the collective experience of Medical Association Amici that the ability to testify accurately regarding causation is dependent upon the ability to render a medical diagnosis identifying the etiology of a condition or injury. In Washington, ARNPs are licensed to practice independently within a limited scope of practice. As such, Medical Association Amici agree that an ARNP may testify regarding causation in a malpractice suit against an ARNP or an RN, but only when the medical procedure or care at issue falls within the area in which the ARNP is certified to practice independently. Based on their experience, Medical Association Amici point out that only a physician can provide accurate expert testimony regarding ***medical*** causation in a medical malpractice suit against a physician, given the significant differences in education, clinical training and experience, and scope of practice between physicians and ARNPs.

II. ISSUE OF CONCERN TO MEDICAL ASSOCIATION *AMICI*

Whether an advanced registered nurse practitioner is qualified to opine on the alleged medical causation of a plaintiff-patient's injuries by the claimed malpractice of nurses and physicians, or whether the expert testimony as to alleged medical causation by a physician must be made by a physician?

III. LEGAL DISCUSSION

A. The Ability to Testify Regarding Medical Causation Requires the Ability to Independently Render a Medical Diagnosis.

While Appellant only assigns error to the trial court's ruling that an ARNP was not qualified to testify as to the causal connection between the ***nursing*** standard of care and plaintiff's medical injury (Appellant's Brief at 5), the record shows that the nursing expert offered by Appellant opined on the standard of care of the nursing staff ***and*** medical doctors who provided care to plaintiff, and concluded the breach of ***both*** standards was the proximate cause of Appellant's pressure ulcers.[3] Given this factual background, Medical Association Amici want to clarify that, with some limited

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[3] "[I]t is my professional objective medical opinion…that the nurses **and/or medical doctors** that provided health care to Mr. Frausto…failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in registered nurse **and medical doctor profession** in the state of Washington, acting in the same or similar circumstances….and this failure…was a proximate cause of the pressure ulcers suffered by Mr. Frausto. CP 103-104 (emphasis added).

exceptions not applicable here, only a physician will have the appropriate diagnostic training and clinical experience necessary to opine on whether a physician's breach of the standard of care has caused the medical injury in question.

Unlike a nursing diagnosis, which focuses on the patient's response to an illness in an effort to provide the most appropriate nursing care, a medical diagnosis involves the identification of the ultimate cause of a patient's illness. A determination of medical causation on a "more likely than not" basis will generally require a provider who is "trained to provide a complex differential diagnosis."[4] Amicus curiae Washington Defense Trial Lawyers ("WDTL") provides an accurate, in-depth explanation of the difference between a nursing diagnosis and a medical diagnosis which further illustrates the relationship between the ability to render an independent medical diagnosis and the ability to determine the cause of an injury or illness. *See* WDTL Amicus Brief, pp. 2-4.

In Washington, the legislature has given ARNPs a limited ability to practice independently. As a result, ARNPs may render certain diagnoses independently, but only within the scope of their certification as an ARNP. RCW 18.79.050; WAC 246-840-300. While there may be some circumstances where an ARNP is qualified

[4] *Primary Care for the 21st Century*, American Academy of Family Physicians, September 18, 2012, p. 8, *available at* http://www.aafp.org/dam/AAFP/documents/advocacy/workforce/scope/Restricted/ES-statescopeofpracticekit-051513.pdf

to testify regarding medical causation resulting from a breach of the ***nursing*** standard of care,[5] these situations should be limited to those medical procedures or issues within the scope of that ARNP's certification and ability to practice, and consequently, diagnose independently.

In the instant case, Ms. Wilkinson's ability to practice independently is limited to her certification as a Pediatric ARNP. CP 11. Since there is no evidence that this ARNP's experience with the medical issue suffered by the adult plaintiff arose within her limited scope of independent practice in pediatrics, there is not a proper basis under this ARNP's training and licensure to allow her to opine on the medical causation at issue here.[6] The Medical Association Amici thus agree with the WDTL's amicus position that the trial court should be affirmed on its decision to disregard her opinion regarding causation for the reasons just given and for those stated in the WDTL brief at pp. 9-13.

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[5] As discussed *infra*, *Amici* believe the Court should limit an ARNP's ability to testify regarding causation to those injuries arising from an alleged breach of the ***nursing*** standard of care.

[6] Indeed, the evidence suggests that Ms. Wilkinson's experience with pressure ulcers arose from her "**nursing** experience…caring for adult quadriplegic patients" rather than her board certification as a pediatric ARNP. CP 127 (emphasis added). The WDTL amicus brief shows why nursing experience is an insufficient basis to opine on medical causation. *See* WDTL Brief, pp. 1-4.

B. If An ARNP Testifies As to Medical Causation, Such Testimony Must Be Limited to Medical Conditions For Which The ARNP Is Currently Licensed to Diagnose Independently.

Washington courts have not required a physician to be board certified or a recognized specialist on the procedure or care at issue in order to provide expert testimony, provided she demonstrates "sufficient expertise in the relevant specialty." *Morton v. McFall*, 128 Wn. App. 245, 253, 115 P.3d 1023, 1027 (2005).[7] However, a different approach is necessary for ARNPs testifying regarding causation arising from a breach of the nursing standard of care, given their more narrow education and training, their limited scope of practice, and the nature of their licensure.

The Washington State Nursing Care Quality Assurance Commission recognizes four types of ARNP designations: the Nurse Practitioner; Certified Nurse-Midwife; Certified Registered Nurse Anesthetist; and Certified Nurse Specialist. WAC 246-840-302. Within these designations, an ARNP ***must*** obtain additional certification from a certifying body approved by the Commission

[7] *See also White v. Kent Medical Center, Inc., P.S.*, 61 Wn. App. 163, 173, 810 P.2d 4 (1991) citing 5A K. Tegland, Wash. Prac., Evidence § 290[2], at 386 (3d ed. 1989) ("So long as a physician with a medical degree has sufficient expertise to demonstrate familiarity with the procedure or medical problem at issue, ordinarily he or she will be considered qualified to express an opinion on any sort of medical question, including questions in areas in which the physician is not a specialist."); *Swanson v. Hood*, 99 Wash. 506, 514-15, 170 Pac. 135 (1918)(osteopath competent to testify in suit against allopath); *Miller v. Peterson*, 42 Wn. App. 822, 830, 714 P.2d 695, review denied, 106 Wn. 2d 1006 (1986) (orthopedic surgeon could testify about podiatrists' standard of care so long as the surgeon and podiatrist used the same methods of treatment).

e.g. the Pediatric Nursing Certification Board, the American Association of Critical Care Nurses or the National Board of Certification and Recertification for Nurse Anesthetists. *Id.*

A physician's license allows the physician to engage in a full scope of practice upon completion of a post-graduate residency. *See* WAC 246-919-422. In contrast, an ARNP's state license is dependent upon maintaining his or her national certification. *Id.* And unlike a physician's license, ARNPs may only practice independently within their "educational preparation and certification scope of practice."[8]

The necessity of these restrictions on scope of practice is apparent when the more limited education and clinical training and experience necessary to obtain licensure as an ARNP is contrasted with the far more extensive nature of the medical education and residency completed by a physician, discussed *infra*.

C. The Ability of ARNPs to Provide Expert Testimony Regarding Medical Causation Resulting From A Breach of The Nursing Standard of Care Should Be Limited to Licensed ARNPs In Their Role As Independent Practitioners and Should Not Be Extended to Registered Nurses.

The exceptionally spare nature of and general statements in the Appellant's briefing raises the potential he is seeking to allow

[8] Washington State Department of Health, *Advanced Registered Nurse Practitioners (ARNPs) in Washington State: Frequently Asked Questions*, March 2009, *available at* http://www.doh.wa.gov/portals/1/Documents/6000/ARNPFAQs.pdf

expert testimony on medical causation by registered nurses as well as ARNP's. Because the ability to determine medical causation requires the ability to make an independent diagnosis, any decision by the Court needs to recognize the significant difference in scope of training and practice between an RN and an ARNP.

Unlike an RN, an ARNP is "qualified to assume primary responsibility and accountability for the care of patients." WAC 246-840-300.

> 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; (g) Refer patients to other health care practitioners, services, or facilities; and (h) Perform procedures or provide care services that are within the ARNP's scope of practice according to the commission approved certifying body as defined in WAC 246-840-302.

WAC 246-840-260(5). In contrast, a RN may only function in an independent role "when utilizing the nursing process." WAC 246-840-705 (3); 246-840-700 (2). Even then, the RN is not licensed to diagnose a medical condition and determine its cause, nor may he do so when exercising his independent nursing skills. *See* WDTL Amicus Brief, pp. 1-4.

An ARNP may have sufficient expertise and experience necessary to testify to the issue of medical causation in a given case if the medical procedure at issue is within the area of his certification in which he is allowed to make an independent diagnosis. However, while an ARNP's general nursing background may give him experience with certain procedures, he should only be able to testify regarding medical causation in those areas where he is licensed to practice independently.

D. This Court Has Recognized That Only a Physician May Provide Expert Testimony as to Whether Another Physician Has Met the Standard of Care And Should Extend This Limitation to the Element of Causation When Allegedly Arising From The Breach of A Physician's Standard of Care.

1. If an expert witness is considered unqualified to testify as to the standard which was breached, RCW 7.70.040 precludes their ability to testify regarding whether the same claimed breach caused the injury.

It is well established that only a physician may provide expert testimony regarding the standard of care for another physician. *Young v. Key Pharmaceuticals, Inc*., 112 Wn.2d 216, 227, 770 P.2d 182 (1989)("This court has never accepted…a rule that would allow a nonphysician to testify as an expert regarding the proper standard of care for a physician practicing a medical specialty*"); Morton v. McFall*, 128 Wn. App. 245, 253, 115 P.3d 1023, 1027 (2005). This rule conforms to the statutory language of the medical malpractice

statute, which requires a plaintiff to show that "the health care provider failed to exercise the degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in ***the profession or class*** to which he or she belongs…" (emphasis added). RCW 7.70.040 (1). Appellant does not challenge this principle of law and Medical Association Amici do not believe there is any reason to reverse course on this issue.

Although Appellant does not identify as an issue an expert RN/ARNP's ability to opine on the causation of an injury resulting from a physician's breach, Appellant's expert witness opined that the medical doctors' breach of the physicians' standard of care was the proximate cause of plaintiff's injury. *See* CP 103-104, quoted *supra*, fn. 3.

Given this assertion in this record, Medical Association Amici urge the Court to extend the established rule in *Young* and *Morton* and hold that where the plaintiff's medical injury was allegedly caused by a ***physician's*** breach, only a physician can knowledgeably testify as to the causal link between the alleged breach and the plaintiff's injury as required by RCW 7.70.040 (1) & (2). To hold otherwise would result in a situation where an ARNP or a pharmacist who is unable to testify regarding a standard of care, would nevertheless be allowed to testify as to whether a physician's breach of that standard (as established by physician expert testimony) caused plaintiff's injury without having sufficient

knowledge, education and clinical training and experience to opine on the care leading up to diagnosis.[9]

2. An ARNP's training and education is not comparable to the medical training and education received by a physician.

The vast difference in education and training between an ARNP and a physician also requires this Court to limit the ability to testify regarding causation of an injury arising from a physician's alleged breach of the standard of care to another physician. While an ARNP may independently treat less complicated conditions, they simply do not receive the same breadth of education, training and clinical experience required of physicians.

The chart below which compares the education and training received by family physicians and ARNPs[10] amply illustrates this point:

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[9] While the Court of Appeals has previously held that a physician may testify to the standard of care of a critical care nurse, this holding is limited to circumstances where the physician has extensive experience supervisory experience with critical care nursing. *Compare, e.g., Hall v. Sacred Heart Medical Center*, 100 Wn. App. 53, 60, 995 P.2d 621 (2000) and *Davies v. Holy Family Hosp.,* 144 Wn. App. 483, 495, 183 P.3d 283 (2008) (physician expert witness did not have sufficient experience or knowledge regarding nursing standard of care for claim to survive summary judgment on that issue).

[10] *Scope of Practice Kit: The Bottom Line*, American Academy of Family Physicians, February 20, 2013, *available at* http://www.aafp.org/dam/AAFP/documents/advocacy/workforce/scope/Restricted/ES-statescopeofpracticekit-051513.pdf

Provider	Post-undergraduate training	Residency Training	Total time before independence	Patient encounters before independence	Total training before independence
Family Physician (MD, DO)	4 years, doctoral program	REQUIRED 3 years minimum	11 years	1,650 patients minimum	20,700 – 21,700 hours
Advanced Practice Nurse (NP, CRNA, CNM)	1.5 to 3 years, master's program (MSN	NOT REQUIRED	5.5 – 7 years	NOT REQUIRED	2,800 – 5,350 hours

As is readily seen, a family practice physician receives almost twice the amount of general education and over three times the amount of clinical experience obtained by an ARNP. The difference in experience and training has been shown to have an effect on the quality and nature of diagnoses and referral patterns.[11] While the training and certification received by ARNPs is "appropriate for dealing with patients who need basic preventive care or treatment of straight-forward acute illnesses and previously diagnosed, uncomplicated chronic conditions…patients with complex problems, multiple diagnoses, or difficult management challenges" still need the expertise of a physician.[12]

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[11] Lohr et al., *Comparison of the quality of patient referrals physicians, physician assistants, and nurse practitioners*, Mayo Clinic Proceedings, Vol. 88, Issue 11 (2013), pp. 1266-1271, *available a*t http://www.mag.org/sites/default/files/downloads/mayo-clinic-study.pdf:

> Patients who require referral to a tertiary medical center are typically more complex and undifferentiated in terms of a diagnosis. Although there is evidence that NPs and PAs can deliver effective primary care, there is little research on their abilities to independently manage patients with undifferentiated and complex problems… [o]ur assessment of the quality of [ARNP] referrals to an academic general internal medicine practice revealed that the overall quality of referrals was suboptimal.

[12] *Primary Care for the 21st Century*, n. 5 *supra*.

Consequently, while the Court may find it appropriate for an ARNP to testify regarding causation related to a breach of the nursing standard of care, it should not allow an ARNP to testify regarding medical causation related to a breach of the physician standard of care.

3. The established rules that only physicians may testify as to a physician's standard of care or as to medical causation should not be changed.

The rule that only physicians may testify as to the applicable standard of care of physicians for medical care rendered is long-established. Nothing in this case nor in the Appellant's briefing justify changing that rule. Moreover, that rule was effectively confirmed by the legislature when it pre-empted and set out the requirements for recovering for injuries from health care by adopting ch. 7.70 RCW, and specifically RCW 7.70.040. This Court cannot change the statute, and should not change the rule without "a clear showing the rule is incorrect and harmful," the criteria for overruling prior decisions.[13]

Rather, the Court should take the opportunity to confirm the position of Washington decisions to date: that physicians may

[13] *State v. Trey M.*, 186 Wn.2d 884, 383 P.3d 474, ("This court 'will not abandon precedent unless it is determined to be incorrect and harmful.'"); *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970) (announcing the test for overruling precedent is "a clear showing that an established rule is incorrect and harmful"). *Accord, Fergen v. Sestero*, 182 Wn.2d 794, 809-812, 346 P.3d 708 (2015) (refusing to overrule precedent and approving continued use of the exercise of judgment instruction in appropriate medical malpractice cases).

testify as to medical causation of an alleged injury due to their medical education, training, and experience in independent diagnosis and etiology of medical conditions, so long as the physician can also demonstrate "sufficient familiarity with the procedure or medical problem at issue,"[14] and that this is the minimum basis for such expert testimony in medical malpractice suits.

Consistent with this rule, and with state licensure laws, to the extent that a practitioner such as an ARNP is licensed to make independent diagnoses of the specified medical condition at issue, and can likewise show "sufficient expertise" as to the medical problem at issue, that practitioner would be presumptively qualified to testify as to the medical causation of an injury allegedly caused by a similarly licensed individual acting within their legally defined scope of practice, subject to otherwise qualifying as an expert witness.

4. The Court should adopt a rule that expert testimony as to medical causation is limited to an alleged medical injury within the area for which a proposed expert is licensed to independently diagnose and treat.

Washington prides itself in being at the forefront of providing medical care to its citizens. Over the years the legislature has expanded the number and range of practitioners, providing for the careful granting or limiting of their authority to provide health care

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[14] *See e.g., Young v. Key Pharmaceuticals, Inc., supra,* 112 Wn. 2d at 230-31; *White v. Kent Medical Center, supra*, 61 Wn. App. at 173.

based on their education, clinical training, and experience. The State carefully guards its citizens by maintaining high standards for practitioners to get licensed. It then polices its licensees and, when necessary, disciplines, suspends, or removes their licenses. The limited licensure of ARNPs to specific areas cannot be confused with the general medical license earned by physicians, both medical doctors and osteopathic doctors.

By its choices in medical care licensure, the legislature has limited who may make an independent determination of medical causation by diagnosis in Washington. Generally, it requires a physician's license. That limitation specified by the legislature has been respected by Washington courts in medical malpractice cases by limiting expert testimony as to medical causation to physicians. That respect should continue.

The legislature has also granted very limited expansion of diagnostic authority for ARNPs in their specified areas of education and national certification. The limits of that diagnostic authority of ARNPs should also be respected by the Court and their ability to testify as to medical causation in medical malpractice trials limited accordingly.

IV. CONCLUSION

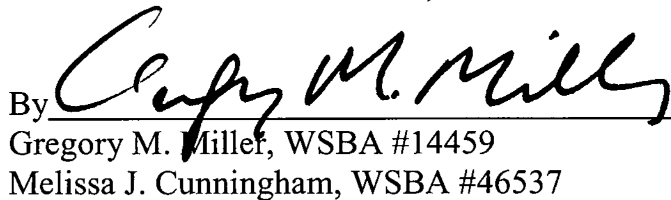
The Medical Association Amici respectfully suggest that the Court should confirm the long-standing rule that only physicians may testify as to the standard of care of another physician and its

alleged breach. Appellants have not offered a principled basis for changing that rule, which is premised on the detailed education and training for physicians.

The Medical Association Amici also respectfully suggest that, as to expert testimony on medical causation, the Court can take into account the changes in licensure granted by the legislature and confirm that the ability to testify as an expert as to medical causation is limited to those licensed to independently diagnose and treat, which includes all physicians, and also ARNPs within the scope of their license. Accordingly, the rule should be plainly stated that to be admissible, expert testimony by an ARNP as to medical causation is strictly limited to the medical area in which the ARNP is licensed to diagnose and treat independently.

Respectfully submitted this 12th day of January, 2017.

CARNEY BADLEY SPELLMAN, P.S.

By 

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. I electronically filed a true and accurate copy of the *Motion of Medical Association Applicants for Leave to File Brief of Amici Curiae* with the Washington Supreme Court and that I caused to be served a true and correct copy of the foregoing document on the below-listed attorneys of record by the methods noted below:

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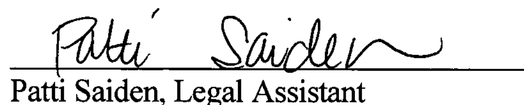
DATED this 12th day of January 2017.



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