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### Summary of Staccato v. Valley Hospital, 123 Nev. Adv. Op. No. 49

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*Nevada Law Journal*

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*Staccato v. Valley Hospital*, 123 Nev. Adv. Op. No. 49 (Nov. 8, 2007)<sup>1</sup>

**Tort – Medical Malpractice**

**Summary**

Plaintiff/Appellant appeals from a district court judgment on a directed verdict and an order denying a new trial motion in a medical malpractice action.

**Disposition/Outcome**

Reversed and remanded. The district court applied the incorrect legal standard in precluding Appellant's expert medical witness's testimony as to the proper standard of care to perform an intramuscular injection. A physician is qualified to testify to the proper standard of care for a procedure so long as (1) he or she has the experience, education, knowledge, or skill required to perform the procedure challenged as having been negligently performed, and (2) his or her testimony will assist the jury in determining whether the defendant fell below the standard of care in performance thereof. The district court's judgment was reversed, and the matter remanded to the district court to allow Appellant to proceed with his malpractice action.

**Factual and Procedural History**

The facts were set forth in appellant's complaint were as follows. Appellant was admitted to the emergency room at Valley Hospital to seek treatment for back pain. The attending physician had ordered a nurse to administer a pain reliever by injection. Although Appellant strongly protested to an injection, asserting that it would cause him to "pass out," the nurse administered the shot. The nurse then left Appellant unattended in a standing position. Appellant lost consciousness, fell, cut his head, and suffered brain damage.

Appellant filed a medical malpractice complaint against Valley Hospital and the attending physician, the latter of which was not a party to this appeal. Appellant designated Dr. Paul Fischer, an emergency room physician (who later acknowledged he was not a nursing expert) as a standard-of-care expert witness. Before trial, Dr. Fischer was deposed by Valley Hospital. He testified that the proper standard of care was for the patient to be in a supine position when receiving an intramuscular injection. He testified that the failure of the hospital to heed Appellant's warnings and the nurse's failure to monitor Appellant contributed to Appellant's injuries. He opined that it was the hospital's task to monitor nurses, and in this case, the nurse's actions fell below the acceptable standard of care.

The district court granted Respondent's motion in limine to preclude Dr. Fischer's testimony. Appellant conceded that Dr. Fischer's testimony was indispensable to carrying his burden of proof to prove negligence, and the district court subsequently granted a directed verdict for Respondent. Appellant's motion for a new trial, alleging improper preclusion of Dr. Fischer's testimony, was similarly denied.

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<sup>1</sup> By Joshua Gilmore.

## Discussion

The Court phrased the issue as follows: “whether a physician is qualified to testify as to the proper standard of care in a [medical] malpractice action against a nurse when the allegedly negligent act implicates the physician’s realm of expertise.”<sup>2</sup> On appeal, Appellant argued that Dr. Fischer had the knowledge, skill, experience, and education to perform the procedure, and therefore, was qualified as an expert witness and was able to testify as to the proper standard of care for performing the procedure. Respondent conceded that Appellant’s expert was qualified to perform the procedure; however, as a physician, he may not attest as to the proper standard of care for a nurse in performing the procedure. Respondent argued that an expert must be licensed in the same specialty as the defendant, whereas Appellant urged the Court that the expert does not need to specialize in the same area so long as he or she has sufficient expertise to perform the procedure at issue.

The Court applied a *de novo* standard of review in determining whether the district court was correct to preclude Dr. Fischer’s expert testimony because the issue centered on what was the proper legal standard for qualification of an expert medical witness. Qualification and admission of an expert witness is subject to the discretion of the district court.<sup>3</sup> It is an abuse of discretion to apply the wrong legal standard.<sup>4</sup> Nevada law does not require that an expert witness, produced to present testimony in a medical malpractice lawsuit,<sup>5</sup> be licensed in the same specialty as the defendant to qualify as an expert witness so long as the witness has the requisite expertise to testify as to the matter at issue.<sup>6</sup>

Respondent relied primarily on a decision by the Illinois Supreme Court<sup>7</sup> in asserting that a physician is not qualified to attest to the proper standard of care for a nurse because such testimony may impose a higher standard of care upon the defendant nurse.<sup>8</sup> However, the Nevada Supreme Court rejected this narrow approach for two reasons. First, a physician is not disqualified to testify against a defendant practicing in a different medical discipline.<sup>9</sup> Contrary to Illinois law, where an expert witness must be licensed in accord with the defendant,<sup>10</sup> Nevada law provides that a witness may testify to matters at issue to assist the jury when he or she is “qualified as an expert by special knowledge, skill, experience, training or education.”<sup>11</sup> Second, because both the nurse and the expert witness were qualified to administer the procedure at issue, public policy does not delineate separate standards of care governing said procedure when performed by either a nurse or physician.

The Court adopted an approach set forth by the Indiana Court of Appeals that was in line with Nevada law and similar to the present circumstances in determining whether a witness is

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<sup>2</sup> 123 Nev. Ad. Op. No. 49 (Nov. 8, 2007).

<sup>3</sup> NEV. REV. STAT. § 50.275 (2006).

<sup>4</sup> *See, e.g.*, Bergmann v. Boyce, 856 P.2d 560, 564 (Nev. 1993).

<sup>5</sup> NEV. REV. STAT. § 41A.100(1) (2006) requires a plaintiff to present expert medical testimony to show negligent misconduct by the defendant by failing to abide by the proper standard of care.

<sup>6</sup> *See, e.g.*, Rees v. Roderiques, 701 P.2d 1017, 1019 (Nev. 1985); Jain v. McFarland, 851 P.2d 450, 456 (Nev. 1993); Brown v. Capanna, 782 P.2d 1299, 1303 (Nev. 1989); NEV. REV. STAT. § 50.275.

<sup>7</sup> Sullivan v. Edward Hosp., 806 N.E.2d 645 (Ill. 2004).

<sup>8</sup> *Id.* at 659-60.

<sup>9</sup> *See* Freeman v. Davidson, 768 P.2d 885, 886-87 (Nev. 1989).

<sup>10</sup> *See* Sullivan, 806 N.E.2d at 659-60; Dolan v. Galluzzo, 396 N.E.2d 13, 16 (Ill. 1979).

<sup>11</sup> NEV. REV. STAT. § 50.275.

qualified to testify in a medical malpractice action.<sup>12</sup> The inquiry turned on whether “(1) the subject matter [is] distinctly related to some scientific field, business or profession beyond the knowledge of the average person and (2) the witness [has] sufficient skill, knowledge or experience in that area so that the opinion will aid the trier of fact.”<sup>13</sup> Given that Appellant satisfied these requirements by introducing Dr. Fischer as an expert witness, who had the expertise and qualification to perform the procedure at issue and could assist the jury in its findings, the Court held that the district court applied the wrong legal standard in precluding Dr. Fischer’s expert testimony as to the proper standard of care.

### **Concurring Opinion**

While concurring with the views set forth by the majority opinion, Senior Justice Shearing would opine that an expert witness was unnecessary to attest to the proper standard of care under these circumstances. Because the patient had warned the nurse that he would “pass out” if administered an injection, and because the nurse ignored his warning, the jury could find that the nurse acted negligently under the circumstances because the injury was foreseeable without requiring expert medical testimony.

### **Conclusion**

Nevada law does not require an expert witness presented to testify as to the proper standard of care for a procedure to have the same credentials or licensing as the defendant medical care provider. Rather, in accord with Nevada law and sound public policy, the witness is only required to possess the experience, education, knowledge, or skill necessary to perform the procedure in order to attest to its proper standard of care. In addition, the testimony must be helpful in assisting the jury in determining whether the defendant acted negligently in performing the procedure.

Because Dr. Fischer was qualified as an expert witness and had the expertise to administer an intramuscular injection, and his testimony would aid the jury in its determination of the defendant’s negligence, the district court incorrectly precluded his testimony as to the proper standard of care for the procedure at issue. The Nevada Supreme Court held this was an abuse of discretion and reversed the judgment directing a verdict against Appellant in favor of Respondent, and remanded the matter so that Appellant may proceed with litigation. Since the judgment was reversed, the portion of Appellant’s appeal from the denial of his motion for a new trial was dismissed as moot.

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<sup>12</sup> See *Justice v. Clark Mem’l Hosp.*, 718 N.E.2d 1217, 1221 (Ind. Ct. App. 1999) (holding that a physician was qualified to testify against a nurse who was negligent in administering an intramuscular injection).

<sup>13</sup> *Id.*