

CAN A REGISTERED NURSE BE AN EXPERT WITNESS IN A LAWSUIT AGAINST A NURSE PRACTITIONER?

written by Nancy Brent | July 12, 2023

Avoiding Liability Bulletin - July 2023

You may have heard the saying that a professional negligence suit involving health care providers, including nurses, is a “battle of the experts.” This maxim is true.

A case alleging professional negligence requires each side to have an expert testify, either orally or in a written affidavit, as to the merits of a particular case before it can proceed to a trial.

In addition, an expert witness is required to testify at trial whether the nurse who was sued upheld his or her standard of care.

An expert witness may come from a nurse defendant’s own state or may come from another jurisdiction.

Generally, an [expert witness](#) is an individual who by training, education, and/or experience is determined to be qualified by a court as able to assist the jury in understanding health care and the role of health care providers, and are from the same profession (e.g., nursing). Most jurors have a limited understanding of both areas.

The American Association of Nurse Attorneys’ (TAANA) policy is that in any nursing lawsuit wherein the applicable standard of nursing care is established through expert testimony, that expert must be a nurse. You can download its entire position statement [here](#).

States have specific requirements for experts witnesses in professional negligence lawsuits. You can check your state’s requirements by clicking [here](#).

In a 2023 Georgia lawsuit, a professional negligence suit against a health care facility, a medical group, and a nurse practitioner (NP) illustrated the principles concerning expert witnesses when a former patient utilized a registered nurse (RN) as an expert about the nurse practitioner’s care.

Details

The patient, a 42-year-old male went to the ED after he experienced pain in a car accident. The NP saw the patient and ordered “basic vitals” (showing hypertension), prescribed pain medication, and ordered

X-rays.

Upon his return from the X-rays, his wife asked to speak to a nurse because she noticed her husband “began drooling, had slurred speech, the left side of his mouth drooped, and he was cold.”

The NP assessed his ability to speak and ordered that the patient be discharged. She did not notify a physician about his condition or her assessment.

The male’s symptoms got worse and he went to another hospital ED later that day and was diagnosed with a stroke.

The patient filed a medical malpractice, alleging that the NP deviated from the standard of care, that the deviation from her standard of care was “negligent and professionally negligent” and that as a direct and proximate result of her negligence, his stroke was not diagnosed until later that day.

In support of his lawsuit, the patient attached the affidavit of an RN. The RN opined that patient had exhibited “classic signs of a stroke”, and the NP had had violated the “standard of care for nurses” because she failed to perform a physical exam and report the results to a doctor.

The NP filed a [Motion to Dismiss](#) the complaint, stating that the RN was not qualified to provide an opinion regarding the standard of care applicable to NPs. She also argued that the RN did not meet the “same profession” requirement for such an affidavit.

The trial court granted the NP’s Motion to Dismiss. The patient appealed that decision.

The Appellate Court Decision

The Appellate Court carefully reviewed its prior case and statutory law on expert witnesses and reversed the trial court decision to grant the NP’s Motion to Dismiss.

The Court opined that both the RN and the NP were “of the same profession”, both being licensed nurses, and the trial court’s opinion that they were not of the same profession was in error.

It further held that the NP’s argument that the RN lacked the “actual knowledge and experience in the area of practice or specialty in which the opinion is to be given” required by the state’s statute on expert witnesses was not part of the trial court’s ruling so the Appellate Court could not rule on the issue not raised in the trial court.

Discussion About This Decision

This decision is an interesting one for many reasons. To begin with, keep in mind that the decision focuses on whether an RN’s affidavit was adequate to allow the case to proceed to trial, not whether the RN was qualified to testify as an expert witness.

It is not known what will occur once the case returns to the trial court, but the question of whether the RN can provide expert testimony against the NP may be raised by her attorneys.

A second factor in the case was the issue concerning exactly what the NP was assessing with this patient. The RN's affidavit stated that the patient had exhibited "classic signs of a stroke" and did not conform to the "standard of care for nurses" because the NP failed to perform a physical examination and report the results to a physician.

"Classic signs of a stroke" are not within the unique knowledge of an NP. In fact, an RN or an NP should know and recognize the specific symptoms of a possible stroke and take appropriate further nursing action.

So, the Court's reasoning on this issue, based on the state's case and statutory law, is somewhat understandable.

However, in my opinion, an RN should not act as an expert witness concerning the merits of a case (as was the situation here) or testify as an expert witness concerning a breach of the standard of care of an NP.

As an example, if this case involved the NP's prescribing a medication in error, the RN would not qualify as an expert witness since prescribing medications are not within his or her scope of practice.

A noteworthy aspect of the case appears in the opinion footnotes. The state statute that regulates expert witnesses allows certain exceptions for the requirement that an expert witness be a "member of the same profession" as a defendant."

Not surprisingly, the exception allows a physician to testify "about the negligence of other, non-physician medical professionals." It states that:

"An expert who is a physician and, as a result of having, during at least three of the last five years immediately preceding the time the act or omission is alleged to have occurred, supervised, taught, or instructed nurses, nurse practitioners, registered nurse anesthetists, nurse midwives, physician assistants...has knowledge of the standard of care of that health care provider under circumstances at issue shall be competent to testify as to the standard of care of the healthcare provider."

The section ends with the caveat that none of the nurses named or physician assistants "shall not be competent" to testify as to the standard of care of a physician.

The caveat is rooted in the clear and long-standing difference between nursing practice and the practice of medicine. Yet, as seen here, there are still states that may allow the clear and long-standing difference to be ignored when it comes to physicians testifying about nursing and nursing practice.

This information is for educational purposes only and is not to be taken as specific legal or other advice.

If legal or other advice is needed, the reader is encouraged to seek such advice from a nurse attorney, attorney, or other professional.