

STATE OF VERMONT

SUPERIOR COURT
ADDISON UNIT

CIVIL DIVISION
Docket No. 74-5-18 Ancv

ARTHUR G. WATROUS as
ADMINISTRATOR of the
ESTATE OF ARTHUR H. WATROUS
Plaintiff,

v.

PORTER MEDICAL CENTER, INC.,
Defendant

DECISION
Defendant's Motion for Summary Judgment

From May 9, 2016 to May 11, 2016, Arthur H. Watrous was a patient admitted for care at Porter Medical Center (Defendant). On May 11, 2016, Mr. Watrous was transferred to the University of Vermont Medical Center, where he died. The Estate of Arthur H. Watrous (Plaintiff) subsequently brought this wrongful death action against Defendant, alleging that Defendant breached its duty of care to Mr. Watrous, resulting in Mr. Watrous' death. Following depositions of Plaintiff's two expert witnesses, Dr. Vishal Vaghela and nurse practitioner Debra Ebersole, Defendant moved for summary judgment as a matter of law.

"To prevail on a motion for summary judgment, the moving party must show there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law." V.R.C.P. 56. In a medical malpractice action, the plaintiff has the burden to prove "both that the defendant physician was negligent and that the plaintiff's injuries were proximately caused by that negligent conduct. ... Normally this burden is only satisfied when the plaintiff produces expert medical testimony setting forth: (1) the proper standard of medical skill and care; (2) that the defendant's conduct departed from that standard; and (3) that this conduct was the proximate cause of the harm complained of." *Senesac v. Assocs. in Obstetrics & Gynecology*, 141 Vt. 310, 313 (1982); see also 12 V.S.A. § 1908. "Summary judgment is improper where the evidence is subject to conflicting interpretations, regardless of a judge's perceptions of the comparative plausibility of facts offered by either party or the likelihood that a party might prevail at trial. In other words, summary judgment is not warranted simply because the movant offers facts that appear more plausible than those tendered in opposition, or because it appears that the adversary is unlikely to prevail at trial." *Provost v. Fletcher Allen Health Care*, 2005 VT 115, ¶ 15, 179 Vt. 545 (2005) (mem.) (quotation omitted).

Plaintiff's theory of the case is that Porter Hospital deviated from the standard of care by ordering Zyprexa as a scheduled dose, rather than as a one-time physical restraint, and that this

deviation proximately caused the decedent's death. Defendant argues that Plaintiff's expert, in his deposition, failed to provide testimony that Mr. Watrous' injury was caused by Defendant's negligence. Defendant also argues that neither of Plaintiff's experts adequately articulated the relevant standard of care. Although there are moments in both depositions that may raise questions as to the plausibility or credibility of both experts' opinions, Dr. Vaghela did articulate an opinion as to causation that supports Plaintiff's theory, and both Dr. Vaghela and Ms. Ebersole articulated opinions as to the standard of care. Thus, giving the nonmoving party "the benefit of all reasonable doubts and inferences," *Provost*, 2005 VT 115, ¶ 9, Plaintiff has met the obligation to provide a basis for each of the challenged elements sufficient to survive summary judgment.

Causation

At the deposition, Dr. Vaghela gave only one clearly stated opinion as to causation, but later in the same deposition, he made additional statements that contradict and undermine that opinion. First, Dr. Vaghela stated that Porter deviated from the standard of care by ordering Zyprexa as a scheduled dose and by not evaluating the decedent prior to administering the second dose, and that the second dose of Zyprexa led to oversedation, which led to aspiration, which led to the decedent's acute respiratory failure. Vaghela Dep at 73:7–73:20. But as the deposition was about to end, Dr. Vaghela expressed a contradictory opinion, stating that in his opinion, the decedent aspirated between the first and second doses of Zyprexa.

Dr. Vaghela's initial causation opinion was as follows:

- Q. Doctor, do you have any opinion that the violation of the chemical restraint policy led to harm to Mr. Watrous?
- A. Yes.
- Q. What is your opinion in that regard?
- A. My opinion is, that the violation of the chemical restraint policy in which it was violated, that the medication was scheduled and that there was no evaluation done by Miss Griffith before the second dose of the Zyprexa led to the patient being oversedated which subsequently led to the aspiration which subsequently led to the acute respiratory failure.

Vaghela Dep. at 73:7–73:20.

Dr. Vaghela's second, contradictory opinion was as follows:

It is my opinion that the aspiration occurred sometime between the first and second doses of Zyprexa, and it is my opinion that the second dose of Zyprexa was given inappropriately based on what I have read in the medical documentation.

Vaghela Dep. at 95:10–95:15.

There are also two somewhat ambiguous moments in the deposition where Dr. Vaghela seems to have been trying to articulate that even if the decedent was awake and in medical distress before the second dose of Zyprexa was administered, he was still harmed by the failure to adequately monitor or evaluate him prior to the second dose of Zyprexa:

- Q. Is it your opinion that Mr. Watrous could not have aspirated due to Zyprexa unless he was oversedated related to the Zyprexa?
- A. It is my opinion that the second dose of Zyprexa that was given, that Mr. Watrous was not evaluated medically to see if he needed that dose of Zyprexa. The patient was documented as being asleep during the second time of Zyprexa. And during the conversation that you gave during—about the nurse’s report, if the patient was truly agitated [in other words, if he was truly not asleep], the patient could have been agitated because he, he was having trouble breathing or in respiratory distress in which the treatment would not have been Zyprexa.

Vaghela Dep. at 87:17–88:6. A little later in the deposition, Dr. Vaghela articulated the same thought a little more clearly:

- Q. Doctor, what do you believe could have prevented Mr. Waldrous’ death in this case?
- A. I don’t, I don’t—I think that’s a very hard question to answer. What I can, what I can tell you is, my belief that. Mr. Watrous should have been evaluated before the second dose of Zyprexa was given to see if there was a need for that dose and also to see if the patient was in any other type of distress.

Vaghela Dep. at 94:22–95:5.

Dr. Vaghela’s inconsistent testimony certainly raises a credibility issue, but that is for the jury to decide, not the court. *Clarke v. Abate*, 2013 VT 52, ¶¶ 15–17, 194 Vt. 294 (2013) (when plaintiff’s deposition testimony was “equivocating and ambiguous,” it was “the jury’s prerogative to make any inferences” regarding plaintiff’s credibility); see also *Provost*, 2005 VT 115, ¶¶ 16–17 (reversing grant of summary judgment when expert affidavit contained little detail exploring expert’s reasoning, but “[did] more than make bare allegations” and “la[id] out a theory of the case to be developed at trial”). Dr. Vaghela articulated a clear theory of causation that supports Plaintiff’s claim; the fact that he also provided additional testimony that undercuts that theory is not enough for the court to grant summary judgment on that basis.

Standard of Care

Dr. Vaghela

Dr. Vaghela discussed the use of Zyprexa as a chemical restraint, and testified that the standard of care is to order chemical restraints only as a one-time dose. Vaghela Dep. at 51–57. Dr. Vaghela clearly stated the standard of care for administering a chemical restraint at least two different times during the deposition:

- Q. And, so, it's your opinion that Nurse Griffith not following the Porter chemical restraint policy was a deviation from the standard of care?
- A. That is correct.
- Q. And what is the basis for your opinion that a violation of the chemical restraint policy was a deviation from the standard of care?
- A. Standard of care for giving chemical restraints for most physicians in regular practice is to order a one-time dose and before giving another dose to make sure that the patients are evaluated to see if they need that chemical restraint.

Vaghela Dep. at 68:4–68:17. Dr. Vaghela reiterated the same opinion later in the deposition, when he discussed the fact that the medication was scheduled to be given every four hours:

- Q. And it's your opinion that that was a deviation from the standard of care?
- A. Yes.
- Q. And what's the basis for your opinion?
- A. One, the chemical restraint policy from the hospital which was based on CMS guideline states that only a one-time dose of a chemical restraint to be ordered. Two, it is standard of care for most physicians to order a chemical restraint as a one-time dose.

Vaghela Dep. 71:16–71:25.

Despite his clear articulation of the standard of care, Dr. Vaghela sometimes seemed uncertain about what he wanted to say; at one point, he framed his opinion that chemical restraints should be ordered only as a single dose as a “personal opinion,” and noted that he could not say for sure whether “all” doctors shared his views. Vaghela Dep. at 46:4–46:7, 46:25–47:10. But Dr. Vaghela's statements as to the standard of care for chemical restraints are clearly “more than ... bare allegations:” at various times throughout the deposition, Dr. Vaghela discussed his opinion in the context of his own practice, conversations he has had with other doctors, and the academic training he provides for medical residents. 41:18–46:7. *Provost*, 2005 VT 115, ¶ 16.

Dr. Vaghela also testified that Porter deviated from the standard of care by not evaluating the decedent before he received a second dose of Zyprexa. Vaghela Dep. 69:4–69:6. Dr. Vaghela explained what such an evaluation would have looked like:

- Q. Can you tell me what constitutes a[n] evaluation with respect to a chemical restraint administration?
- A. Sure. So, seeing the patient; looking at the vital signs; determining if there are any other causes for the patient's state and really to see if the patient actually is agitated, delirious, or a harm to himself or other staff members. I would say to also evaluate if there are any other causes if that is present.

- Q. And if, if Nurse Sanders had performed that evaluation and then administered the Zyprexa, you would not think that that was a deviation from the standard of care?
- A. I want to clarify, that the ordering provider was Nurse Griffith and that the evaluation needed to be done by the ordering provider.
- Q. Okay. So, each time a chemical restraint is administered it needs to be – that patient needs to be evaluated by the ordering provider?
- A. Correct.
- Q. And is that how the chemical restraint administration is handled by the VA in Maryland?
- A. Yes.

Vaghela Dep 70:8–71:9. To be clear, although Dr. Vaghela was asked about the Maryland VA’s chemical restraint policy, he did not express the standard of care in terms of that policy.

Dr. Vaghela’s sometimes uncertain testimony may raise questions about his overall credibility. But Dr. Vaghela’s statements about the standard of care for chemical restraints are unambiguous and sufficient to survive summary judgment.

Nurse Ebersole

Dr. Vaghela’s testimony alone is sufficient for Plaintiff to survive summary judgment. Nurse Ebersole also gave several opinions as to Porter’s deviations from the standard of care. Some of these opinions are problematic: at a few points in the deposition, Nurse Ebersole explicitly agreed that she was basing her opinion on Porter’s chemical restraint policy.

- Q. Are you familiar with the national standard of care for administration of chemical restraints?
- A. No.
- Q. So, is it fair to say, that your opinion regarding the deviation related to Nurse Griffith’s order of Zyprexa is based upon the fact that it did not comply with the Porter chemical restraint policy?
- A. Yes, that’s true.

Ebersole Dep. at 70:8–70:17. Similarly, when explaining that the contemporaneous notes made on decedent’s chart did not justify use of a chemical restraint, Nurse Ebersole had the following exchange with defense counsel:

- A. So, part of the policy states that the patient has to be an immediate threat to himself or to staff or to others for a chemical restraint to be utilized. So, there’s no evidence in this chart that supports that he was an immediate threat to himself or to others or to the staff. So, that fell below the standard of care when administering that second dose in addition to not following a proper order.
- Q. And your—the basis for your opinion that it fell below the standard of care is the Porter chemical restraint policy, correct?
- A. Yes.

Q. All right.

A. And the lack of documentation regarding, you know, the criteria that needed to be met to administer a chemical restraint.

Ebersole Dep. at 94:19–95:10.

To the extent that Nurse Ebersole merely describes the Porter chemical restraint policy, she cannot be understood to be giving an opinion on the standard of care. Porter's internal policies are not necessarily coextensive with the ordinary standard of care. See *Senesac*, 141 Vt. at 314–15 (a health care provider's failure to live up to her own personal standard of care and skill does not necessarily amount to a departure from "the standards of care and skill *ordinarily* exercised by [providers] in similar cases"). But at times, it is genuinely ambiguous whether Nurse Ebersole is reciting the policy, or speaking more generally about the ordinary standard of care. For example, Nurse Ebersole does not state the basis for her opinion in the following exchange, where she opines that the Zyprexa should only have been administered a second time if the patient was evaluated by a nurse practitioner or a doctor prior to the second administration of the drug:

Q. Do you have any criticism of the interval of administration of that medication [Zyprexa]?

A. There should never have been an interval. So, in that sense, yes. I'm critical of it because there shouldn't, there shouldn't have been an interval.

Q. Well, what –

A. Because of the use—I'm sorry, the use of the—the use of the medication was being used as a chemical restraint.

Q. Okay.

A. It wasn't a prn order. It wasn't a scheduled med. It was, it was a restraint which meant that it needed to be ordered once.

Q. Okay. If, if the patient had been evaluated by a nurse practitioner or a doctor at 0558 and given another 2.5 milligrams of Zyprexa, would you have a criticism at that point?
[...]

A. If, if the vital signs were stable and a face-to-face assessment of the patient had been done by the provider at that time and it was deemed that he was well enough to have a second dose and it was ordered properly as a one-time order, I would not have a criticism of that.

Ebersole Dep. at 72:11–73:11. Examining the evidence in the light most favorable to the nonmoving party, this may be understood as an expression of the standard of care, not a recitation of Porter's policy.

Furthermore, several of Nurse Ebersole's statements about the Porter policy make it clear that even when Nurse Ebersole criticizes various individuals for failure to comply with Porter's policies, she is doing more than conflating the ordinary standard of care with hospital policy. Rather, it seems to be Nurse Ebersole's opinion that it goes against the ordinary standard of care for nurses (and nurse practitioners) to disregard (1) hospital policies and (2) doctors' orders. For

example, addressing the possibility that a computer glitch caused Nurse Griffith to order Zyprexa as a scheduled dose, Nurse Ebersole stated that Nurse Griffith did not mitigate the error appropriately, and that her choice to give verbal instructions rather than adding a written, contemporaneous note to clarify her order was a deviation from the standard of care. The following exchange occurred:

- Q. Okay. And it—go ahead. Is it your opinion that that was a deviation from the standard of care?
- A. Yes.
- Q. Based upon your experience as a nurse practitioner?
- A. Based upon policy of the hospital which everybody has to follow.
- Q. Okay.
- A. And my, my experience as a nurse practitioner, you still have [to] order things within the scope of what the policy of the organization that you work for. Those are safety measures that are put in place, so.

Ebersole Dep. at 68:14–70:7. In other words, according to Nurse Ebersole, it is the standard of care for nurse practitioners to apprise themselves of safety measures at the hospitals in which they practice, and to “order things within the scope” of the hospital’s rules.

Nurse Ebersole also clearly stated that the failure to monitor the decedent after the administration of Ativan was a departure from the standard of care, because “there is a synergistic effect between Ativan and Zyprexa” and “the sum of the both is, is much worse than each individually taken.” Ebersole Dep. at 74:7–74:21. When asked if that “play[ed] a role in your opinions that you’re expected to give in this case,” Nurse Ebersole responded:

Only in the sense that it really drives home the fact that there’s a reason that these policies are in place with regard to chemical restraints and that it is for patient safety and that’s why it is a one-time order as opposed to a scheduled order or a prn order and, so, with regard to that, yes.

Ebersole Dep. at 74:22–75:5. Here, Nurse Ebersole seems to indicate a standard of care that goes beyond any single hospital policy: “there’s a reason that these policies are in place with regard to chemical restraints and that it is for patient safety.” Still addressing the failure to monitor after administering Ativan—which Nurse Ebersole clearly discussed in terms of the ordinary standard of care, not just hospital policy—Nurse Ebersole elaborated as follows:

[E]ven as a nurse, you have to look at the complete picture, okay? You have to see what a patient has gotten over the last X amount of time. You have to consider the patient’s comorbidities, the age, that type of thing, what’s going on with the patient, and you have to look at the drugs that you’re giving with the cumulative effects that they may have.

Ebersole Dep. 75:13–75:21.

Nurse Ebersole also gave an opinion that when the nurses on duty saw the order to administer Zyprexa as a scheduled dose, they should have been familiar enough with hospital policy to question that order:

- Q. [Y]ou said the nurses followed improper orders for a chemical restraint?
A. Yes.
Q. All right.
A. They followed this improper order. So, there's a couple points I would like to make about this, okay? So, neither Nurse Benton or Nurse Sanders questioned the order. They were both travelers[.] [...] They should have either made themselves aware of the policies or the hospital itself should have made sure that they knew the policy or had access. [...] [P]articularly because Mr. Sanders was the one administering the medication, if he was not familiar with the policy, he needed to pull that policy out; look at it before he administered it. At that point he, he would have noticed, hey, this isn't even ordered right. This isn't even ordered correctly.
Q. Okay.
A. And that—you know, that may have prevented his getting the second dose.

Ebersole Def. at 76:25–78:5. Following up, Defense counsel clarified that Nurse Ebersole's opinion was specifically about Nurses Benton and Sanders, and asked:

- Q. All right. Is there any other basis for that particular opinion?
A. So, you know, this—this can also indicate a lack of training. Now, I understand they were both travelers ... but, certainly, the hospital can provide a resource to the travelers to facilitate their access to any policies that they need such as the nursing supervisor. Because anyone who is a, who is an employee of the hospital has to follow policy, okay, even contractors such as traveling nurses.

Ebersol Dep. at 78:14–79:2. This is not an opinion about the content of Porter's chemical restraint policy. It is an opinion that Porter should have ensured its traveling nurses were aware of its policies (whatever they were), and that the traveling nurses should have familiarized themselves with relevant policies either ahead of time, or as needed. Nurse Ebersole's statements give the strong impression that familiarizing oneself with relevant policies prior to administering care to patients is the ordinary standard of care for a nurse.

Finally, Nurse Ebersole gave several highly specific opinions that clearly articulate a standard of care with respect to monitoring and reporting a patient's vital signs and symptoms. First, Nurse Ebersole opined that Nurses Benton and Sanders violated the standard of care by not following a written doctor's order in the patient's chart to "titrate oxygen to keep Mr. Watrous' sat greater than 92." Ebersole Dep. at 79:5–80:16. Second, Nurse Ebersole noted that the nurses failed to report that Mr. Watrous was "hypoxic," or had a low level of oxygen in the blood: "So, if you're not going to titrate, you need to at least let the provider know that, you know, he's

hypoxic at this point.” Ebersole Dep. 83:18–83:20. Third, Nurse Ebersole clarified that “the standard of care requires that after an IV medication such as Ativan you need to check the blood pressure and the vitals, a full set of vital signs, between 15 minutes and 30 minutes after administration and that’s to make sure that the patient is still say—stable, excuse me, after receiving that medication.” Ebersole Dep. at 86:14–88:1. Fourth, Nurse Ebersole noted that the decedent “was ordered to have telemetry monitoring continuously,” and that “[t]he standard of care for telemetry monitoring is to run a strip every four hours,” which was not done. Ebersole Dep. at 96:6–97:4.

Nurse Ebersole also had an opinion about “fail[ure] to report and document” tachypnea and hypertension by nurses Benton and Sanders, identifying a “duty to report” certain information to a doctor or nurse practitioner. Ebersole Dep. at 97:23–98:18. Finally, also relating to the failure to report and document information in the patient’s chart, Nurse Ebersole criticized a note written by Nurse Sanders at 2:45 A.M, which according to Nurse Ebersole contained incomplete or possibly inaccurate information. According to Nurse Ebersole, even if extenuating circumstances prevent members of a nursing staff from reporting a patient’s vital signs at the required interval, the standard of care is violated unless “there’s a note entered into the chart as a reason for the lack of the vital sign written.” Ebersole Dep. at 104.

Summary

Both Dr. Vaghela and Nurse Ebersole articulated opinions as to the standard of care to which Defendant should have adhered, including a duty to monitor and evaluate the decedent prior to administering a second dose of Zyprexa.

Dr. Vaghela articulated an opinion—despite the fact that he also testified inconsistently with his own testimony—that Defendant’s failure to evaluate the decedent prior to administering the second dose of Zyprexa caused the decedent’s death.

For these reasons, Plaintiff has produced evidence sufficient to meet the required elements of the claim.

Defendant’s motion for summary judgment is *denied*.

A pretrial status conference will be scheduled.

Electronically signed pursuant to V.R.E.F. 9(d) on August 17, 2021 at 9:15 AM.



Mary Miles Teachout
Superior Court Judge