

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM CARNES,
Appellant,

vs.

KATHLEEN WAIRIMU, M.D. AND
RONALD SHOCKLEY, M.D.,
Respondents.

No. 54860

WILLIAM CARNES,
Appellant,

vs.

KATHLEEN WAIRIMU, M.D. AND
RONALD SHOCKLEY, M.D.,
Respondents.

No. 55118

FILED

MAY 27 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

These are consolidated appeals from a district court summary judgment in a medical malpractice action and a post-judgment order awarding costs. Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge.

Appellant William Carnes underwent triple coronary artery bypass surgery. Shortly after the surgery, Carnes developed complications and was examined by respondents Kathleen Wairimu, M.D., and Ronald Shockley, M.D., infectious disease consultants. Because of these complications, Carnes brought a medical malpractice action against Wairimu and Shockley, alleging that they were negligent in failing to diagnose a post-surgical sternal wound infection and in failing to take measures to avoid further complications as a result of the infection. Carnes designated Simone Russo, M.D., as his medical expert, and Wairimu and Shockley filed a motion in limine seeking to preclude Russo from testifying on the ground that he was insufficiently qualified to render

standard-of-care testimony. The district court granted the motion, disqualifying Russo under the standard set forth in Staccato v. Valley Hospital, 123 Nev. 526, 170 P.3d 503 (2007). The district court then granted summary judgment because Carnes no longer had an expert medical witness who could establish that Wairimu and Shockley breached the standard of care and caused a legally cognizable injury to Carnes. The district court also entered a post-judgment order awarding costs to Wairimu and Shockley. Carnes now appeals.

The primary issue on appeal is whether the district court abused its discretion in disqualifying Carnes' medical expert witness. We conclude that it did not. We therefore affirm the district court's order granting summary judgment and its post-judgment order awarding costs.¹ As the parties are familiar with the facts, we do not recount them further except as necessary to our disposition.

DISCUSSION

The district court did not abuse its discretion in disqualifying Carnes' medical expert witness

Carnes argues that the district court abused its discretion in disqualifying Russo as an expert medical witness. He asserts that Russo

¹Carnes appealed the district court's post-judgment order awarding costs to Wairimu and Shockley. Carnes, however, makes no argument regarding the award of costs, even after Wairimu and Shockley pointed that out in their answering brief. As a result, we affirm the post-judgment order awarding costs. See Edwards v. Emperor's Garden Rest., 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (if an appellant neglects to fulfill his or her responsibility to cogently argue and present relevant authority in support of his or her appellate concerns, this court will not consider the claims); NRAP 28(a)(8).

did not have to practice as an infectious disease specialist in order to provide expert testimony on whether Wairimu and Shockley breached the applicable standard of care. Rather, Carnes contends that Russo simply needed to demonstrate that he had sufficient skill, knowledge, or experience in the area of post-surgical wound treatment so that his opinion would aid the jury. Carnes contends that the present case falls within the standard announced in Staccato.²

We review “a district court’s grant of summary judgment de novo, without deference to the findings of the lower court.” Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate “when the pleadings and other evidence on file demonstrate that no ‘genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.” Id. (alteration in original) (quoting NRCP 56(c)). Further, “the district court

²Carnes also relies on Borger v. Dist. Ct., 120 Nev. 1021, 102 P.3d 600 (2004), and Fernandez v. Admirand, 108 Nev. 963, 843 P.2d 354 (1992), in support of his argument. Both cases, however, are distinguishable. Borger is inapplicable because it dealt with the requirements for expert medical witness affidavits under NRS 41A.071, which is a separate and distinct issue from whether an expert medical witness is qualified to offer standard-of-care testimony under NRS 50.275. Compare Borger, 120 Nev. at 1026-28, 102 P.3d at 604-05, with Staccato, 123 Nev. 530-33, 170 P.3d at 505-08. Fernandez is distinguishable because it did not deal with whether a witness was qualified as a medical expert under NRS 50.275 but, instead, addressed whether the expert medical testimony sufficiently established the standard of care in order to make a prima facie case and avoid involuntary dismissal under NRCP 41(b). Fernandez, 108 Nev. at 969-71, 843 P.2d at 358-59. Also, both cases were decided pre-Staccato and are distinguishable on that ground as well.

has discretion in determining whether a witness is qualified as an expert and whether the witness's testimony is admissible"; as such, we review the district court's decision to disqualify an expert witness for an abuse of discretion. Staccato, 123 Nev. at 530, 170 P.3d at 506.

NRS 50.275, which governs expert witness testimony, provides:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge.

In Staccato, the plaintiff brought a medical malpractice action against a nurse who administered an injection while he was standing upright. 123 Nev. at 528, 170 P.3d at 504. The plaintiff had warned the nurse that he had a fear of needles and would "pass out" if given the injection. Id. But, to no avail, the nurse administered the injection and "then left him unattended, in a standing position, at which time he lost consciousness and struck his head, resulting in a laceration and a brain injury." Id. During litigation, the plaintiff designated an emergency room physician as a standard-of-care expert witness, whom the defendant moved to disqualify on the grounds that the physician could not render standard-of-care testimony in relation to a nurse. Id. at 528, 170 P.3d 504-05. The district court granted the motion, and the plaintiff appealed. Id. at 529, 170 P.3d at 505.

On appeal, the primary issue was "whether a physician is qualified to testify as to the proper standard of care in a malpractice action against a nurse when the allegedly negligent act implicates the physician's realm of expertise." Id. at 527, 170 P.3d at 504. In resolving this

question, we noted that, in Nevada, expert qualification does not hinge on the specialty or license of the medical caregiver but, instead, turns on “whether the proposed witness’s special knowledge, skill, experience, training, or education will assist the jury.” Id. at 531, 170 P.3d at 506; see NRS 50.275. Thus, “a physician or other medical provider is not automatically disqualified from testifying against a defendant who specializes in a different area of medicine or who practices in a different medical discipline.” Id. at 531-32, 170 P.3d at 506-07. Consequently, we emphasized that “the proper measure for evaluating whether a witness can testify as an expert is whether that witness possesses the skill, knowledge, or experience necessary to perform or render the medical procedure or treatment being challenged as negligent, and whether that witness’s opinion will assist the jury.” Id. at 527, 170 P.3d at 504. Because the emergency room physician in Staccato was qualified to administer injections—the medical procedure or treatment at issue—we reversed the lower court, concluding that the physician was qualified as an expert and could offer standard-of-care testimony in relation to the nurse. Id. at 533, 170 P.3d at 508.

The instant case is distinguishable from Staccato. In Staccato, it was clear that the nurse’s alleged negligent act implicated the physician’s realm of expertise and that the physician was qualified to perform or render the medical procedure or treatment being challenged as negligent—the administration of the injection. In contrast, here, it is not. Russo is not an infectious disease specialist and has not received any training in that area of medicine. Of course, Russo did complete a two-year surgical residency over 30 years ago. But, since 1975 Russo has been a general practitioner and although he has done “[h]undreds” of “[f]irst

assists” in general surgery, he has never been the primary surgeon. Critically, out of all of the surgeries Russo has assisted on, he has only participated in the diagnosis and treatment of one post-surgical sternal wound infection, which was in the 1980’s, and even then the primary surgeon made all of the decisions relating to the diagnosis and treatment of the wound. Unlike the physician in Staccato who was qualified to administer injections and whose realm of expertise necessarily implicated that of the nurse’s, here, Russo does not possess the skill, knowledge, or experience necessary to diagnose and treat a post-surgical sternal wound infection—the medical procedure or treatment being challenged as negligent. We therefore conclude that the district court did not abuse its discretion when it determined that Russo was not qualified as an expert to render standard-of-care testimony concerning Wairimu’s and Shockley’s diagnosis and treatment of Carnes’ post-surgical wound infection.


Because of this disqualification, Carnes did not have an expert who could establish that Wairimu and Shockley breached the standard of care and caused a legal injury. Wairimu and Shockley’s medical expert, Jerrold S. Dreyer, M.D., a board certified physician in internal medicine and infectious disease, opined that neither physician violated the standard of care or caused a legal injury. Based on these uncontroverted facts, summary judgment was appropriate as no genuine issues of fact remained and Wairimu and Shockley were entitled to judgment as a matter of law.³

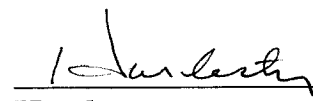
³Carnes also asserts that Wairimu and Shockley engaged in “legal wrangling” and that the timing of their motion in limine was “calculated to hamstring” his case from being heard on its merits. Carnes, however, has not cited to any relevant caselaw or statutory authority demonstrating, let alone suggesting, that Wairimu and Shockley’s actions were improper. As


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See Staccato, 123 Nev. at 530, 170 P.3d at 506 (“[A] plaintiff must present expert medical testimony to establish medical malpractice.”); NRS 41A.100(1). We therefore

ORDER the judgment of the district court AFFIRMED.


_____, J.
Saitta


_____, J.
Hardesty


_____, J.
Parraguirre

cc: Hon. Linda Marie Bell, District Court Judge
Hon. Douglas W. Herndon, District Judge
Stephen E. Haberfeld, Settlement Judge
Christensen Law Offices, LLC
John H. Cotton & Associates, Ltd.
Eighth District Court Clerk

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such, we decline to further address that argument. See Edwards, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38; NRAP 28(a)(8).