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Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 8, 2022 Session

**FRANCES P. OWENS v. VANDERBILT UNIVERSITY MEDICAL
CENTER**

**Appeal from the Circuit Court for Davidson County
No. 17C2737 Thomas W. Brothers, Judge**

No. M2021-01273-COA-R3-CV

A patient brought a health care liability action against a hospital after she developed a pressure wound during her hospital stay. The hospital moved for summary judgment on the ground that the patient's standard of care expert was not competent to testify under the Health Care Liability Act. Alternatively, it sought to narrow the remaining claims through a partial summary judgment. The trial court disqualified the expert witness and granted the hospital summary judgment on all claims. The court's decision was based, in part, on grounds not raised in the hospital's motion for summary judgment. Because we conclude that the expert was competent to testify and the trial court erred in ruling on additional grounds not raised by the movant, we vacate the judgment in part.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Vacated, in
Part, and Remanded**

W. NEAL MCBRAYER, J., delivered the opinion of the court, in which FRANK G. CLEMENT JR., P.J., M.S., and JEFFREY USMAN, J., joined.

Donald K. Vowell, Knoxville, Tennessee, Luvell L. Glanton, Nashville, Tennessee, and Erik W. Benton, Brentwood, Tennessee for the appellant, Frances P. Owens.

Steven E. Anderson and Ashley Tipton, Nashville, Tennessee, for the appellee, Vanderbilt University Medical Center.

OPINION

I.

On July 9, 2016, Frances Owens was admitted to Vanderbilt University Medical Center for surgical repair of a fractured ankle. Ms. Owens was 73 years old. After surgery, Ms. Owens remained in the hospital for the next eight days. She slept much of the time. And her mobility was severely compromised due to her ankle injury. Upon discharge, Ms. Owens had stage three pressure wounds.

Four days later, she was readmitted to Vanderbilt. During this second admission, Ms. Owens received daily wound care and antibiotic treatment for her pressure wounds. She also underwent a surgical debridement to remove infected and necrotic tissue at the site.

Ms. Owens filed a healthcare liability action against Vanderbilt. Among other things, she alleged that Vanderbilt's employees failed "to take reasonable steps to prevent [her] from developing pressure sores" and to "detect, document, and treat" her pressure wounds "promptly or adequately" once they developed. And she claimed that Vanderbilt's "systemic failure" to implement preventive measures and treatment plans caused her subsequent injuries.

During discovery, Ms. Owens disclosed Elizabeth Kambourian, a wound-care certified registered nurse in Virginia, as her sole standard of care expert. Ms. Kambourian purported to be familiar with the standard of care in Nashville, Tennessee, for the "prevention and treatment of wounds on patients admitted to a hospital" in July 2016. Ms. Kambourian opined that Vanderbilt's nurses deviated from the recognized standard of care when they failed to reposition or turn Ms. Owens to prevent the development of pressure sores after her ankle surgery. She also identified other alleged deviations from the standard of care by Vanderbilt's nursing staff, such as the failure to sufficiently inspect and detect Ms. Owens's skin condition and the failure to properly treat her pressure wounds once developed.

Ms. Kambourian maintained that she was qualified to opine on the standard of care based on her "education, training, and experience" as a wound care nurse. After completing her clinical rotations as part of her registered nurse training in 2011, Ms. Kambourian worked exclusively in skilled nursing and rehabilitation facilities. During the year preceding Ms. Owens's injury, Ms. Kambourian was the director of nursing at a nursing rehabilitation center and then a wound care nurse and data coordinator at another skilled nursing facility. Ms. Kambourian explained that in both of these roles she was actively involved in the prevention and treatment of pressure wounds in patients. And in 2017, she obtained additional certification in wound care.

Vanderbilt moved for summary judgment. For purposes of summary judgment, Vanderbilt conceded that Ms. Owens's pressure wounds developed because its employees failed to reposition her. But Vanderbilt argued that Ms. Kambourian was not qualified to testify under Tennessee Code Annotated § 29-26-115(b). Vanderbilt claimed that the proffered expert was "not familiar with the standard of care for hospital employees in caring for post surgical orthopedic repair patients during the statutorily relevant period." And, without Ms. Kambourian's testimony, Ms. Owens lacked sufficient evidence to establish her claims.

Alternatively, Vanderbilt argued that it was entitled to partial summary judgment on any claims against its physicians, physical therapists, occupational therapists, and dietitians because Ms. Kambourian was not familiar with the standard of care for these other health care professionals. It also asked the court to dismiss all negligence claims against its nursing staff other than the claim that failure to reposition Ms. Owens after surgery caused her to develop pressure sores. Vanderbilt pointed out that Ms. Owens was unable to prove that any other alleged deviations from the standard of care more likely than not caused her injuries.

The trial court granted Vanderbilt summary judgment and dismissed all claims with prejudice. The court disqualified Ms. Owens's expert witness on multiple grounds. It determined that "[Ms.] Kambourian's qualifications d[id] not meet the statutorily defined level of competency"; her testimony would not "substantially assist the trier of fact"; and the basis for her testimony "lack[ed] the substantial likelihood of trustworthiness" required for admissibility. *See* Tenn. Code Ann. § 29-26-115(b); TENN. R. EVID. 702 & 703. The court also referenced the locality rule.¹ Tenn. Code Ann. § 29-26-115(a). Acknowledging that the locality rule was not in dispute, the court reasoned that it was still "relevant to consider the locality rule analysis in determining the competency of a witness." And it agreed that Ms. Kambourian was not competent to testify about the standard of care applicable to Vanderbilt's physicians, physical therapists, occupational therapists, and dietitians.

¹ Under the locality rule, "a medical expert in a Tennessee court must demonstrate that he or she is familiar with either the standard [of care] in the community where the defendant practices or a 'similar community.'" *Shipley v. Williams*, 350 S.W.3d 527, 538 (Tenn. 2011) (quoting Tenn. Code Ann. § 29-26-115(a)(1)).

Ms. Owens moved to alter or amend the judgment. TENN. R. CIV. P. 59.04. She argued that the trial court improperly based its decision on additional grounds not raised in the summary judgment motion. And she filed a declaration from Ms. Kambourian purporting to address the court's concerns about the locality rule and the trustworthiness of her opinions.²

The trial court ruled that Ms. Owens's arguments were "partially well taken." And it issued an amended order granting summary judgment to Vanderbilt. The amended order clarified that the court's decision to disqualify Ms. Kambourian "was based solely upon a consideration of [Tennessee Code Annotated § 29-26-115(b)] and rules 702 and 703 of the Tennessee Rules of Evidence."

II.

Ms. Owens contends that the court erred in disqualifying her expert witness on grounds not raised in Vanderbilt's motion for summary judgment. She also argues that the court's determination that Ms. Kambourian was not competent to testify was an abuse of discretion. She asks this Court to reverse the grant of summary judgment and direct the trial court to allow reasonable discovery on any additional grounds for dismissal.

A.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." TENN. R. CIV. P. 56.04. A trial court's decision on summary judgment presents a question of law, which we review de novo, with no presumption of correctness. *Rye v. Women's Care Ctr. of Memphis, M PLLC*, 477 S.W.3d 235, 250 (Tenn. 2015).

The party moving for summary judgment has "the burden of persuading the court that no genuine and material factual issues exist and that it is, therefore, entitled to judgment as a matter of law." *Byrd v. Hall*, 847 S.W.2d 208, 211 (Tenn. 1993). If the moving party makes that showing, then the nonmoving party must demonstrate "that there is a genuine, material factual dispute to warrant a trial." *Id.*

Vanderbilt argued that Ms. Owens's sole standard of care expert was not competent to testify in a health care liability action. *See* Tenn. Code Ann. § 29-26-115(b). And,

² On appeal, Vanderbilt contends that we should disregard Ms. Kambourian's declaration as untimely. It is unclear from the record whether the trial court considered this declaration in its amended ruling. *See Stovall v. Clarke*, 113 S.W.3d 715, 721 (Tenn. 2003) (outlining the factors a trial court should consider when new evidence is submitted in support of a Rule 59.04 motion). And we find it unnecessary to consider the additional declaration in our analysis.

without expert proof, Ms. Owens could not establish an essential element of her health care liability claim. *See id.* § 29-26-115(a); *Rye*, 477 S.W.3d at 264.

We review the trial court’s decision to disqualify Ms. Owens’s expert witness using the abuse-of-discretion standard. *Harmon v. Hickman Cmty. Healthcare Servs., Inc.*, 594 S.W.3d 297, 307 (Tenn. 2020). “A trial court abuses its discretion when it disqualifies a witness who meets the competency requirements of [Tennessee Code Annotated] section 29-16-115(b).” *Shiple v. Williams*, 350 S.W.3d 527, 552 (Tenn. 2011).

B.

Vanderbilt moved for summary judgment solely on the basis that Ms. Kambourian was not competent to testify under Tennessee Code Annotated § 29-26-115(b). Yet, the trial court excluded her testimony on two grounds—the competency requirement in the Health Care Liability Act *and* the admissibility standards in Rules 702 and 703 of the Tennessee Rules of Evidence.

By granting summary judgment on grounds not raised by Vanderbilt, the court essentially acted *sua sponte*. But “[s]uch action should be taken only in rare cases and with meticulous care.” *Griffis v. Davidson Cnty. Metro. Gov’t*, 164 S.W.3d 267, 284 (Tenn. 2005); *Thomas v. Transp. Ins. Co.*, 532 S.W.2d 263, 266 (Tenn. 1976). The nonmoving party must be “given notice and a reasonable opportunity to respond to all issues to be considered by the court.” *Mar. Grp., Inc. v. Bellar*, 908 S.W.2d 956, 959 (Tenn. Ct. App. 1995).

Vanderbilt argues that Ms. Owens was on notice that Rules 702 and 703 were at issue because the requirements of those rules are interrelated with the competency requirement found in Tennessee Code Annotated § 29-26-115(b). But while the requirements may be related, the competency requirement is separate and distinct from the admissibility inquiry under Rules 702 and 703. *See Shiple*, 350 S.W.3d at 550; *Cox v. M.A. Primary & Urgent Care Clinic*, 313 S.W.3d 240, 261 n.25 (Tenn. 2010).

Vanderbilt also suggests that Ms. Owens had the opportunity to address the additional grounds in a motion to alter or amend. But the court had already granted summary judgment to Vanderbilt at that juncture. Besides, a party cannot raise new issues in a motion to alter or amend. *In re M.L.D.*, 182 S.W.3d 890, 895 (Tenn. Ct. App. 2005).

Ms. Owens had no notice and no opportunity to respond to an admissibility challenge to Ms. Kambourian’s testimony. So the trial court erred by granting summary judgment on that ground. *See Griffis*, 164 S.W.3d at 284; *Evans v. Piedmont Nat. Gas Co., Inc.*, No. M2014-01099-COA-R3-CV, 2015 WL 9946268, at *6-7 (Tenn. Ct. App. Aug. 18, 2015).

C.

The trial court also granted summary judgment based on its determination that Ms. Owens did not have a standard of care expert who satisfied the competency requirements in the Health Care Liability Act. *See* Tenn. Code Ann. § 29-26-115(b). Ms. Owens had the burden of proving “the applicable standard of care, a deviation from the standard of care, and an injury caused by the deviation from the standard of care.” *Young v. Frist Cardiology, PLLC*, 599 S.W.3d 568, 571 (Tenn. 2020) (citing Tenn. Code Ann. § 29-26-115(a)). Each element must be shown through the testimony of a competent expert witness. *Id.*

Tennessee Code Annotated § 29-26-115(b) “prescribes who is competent to testify” in a healthcare liability action. *Shiple*y, 350 S.W.3d at 550. There are just three requirements. Tenn. Code Ann. § 29-26-115(b). The first requirement, that the witness be licensed to practice in Tennessee or “a contiguous bordering state,” is not at issue here. *See id.* Ms. Kambourian is licensed in Virginia, a contiguous bordering state.

But the witness also must be licensed in “a profession or specialty which would make the person’s expert testimony relevant to the issues in the case,” and have “practiced this profession or specialty in [Tennessee or a contiguous bordering state] during the year preceding the date that the alleged injury or wrongful act occurred.” *Shiple*y, 350 S.W.3d at 550 (quoting Tenn. Code Ann. § 29-26-115(b)).

Vanderbilt argued that Ms. Kambourian did not practice a relevant profession or specialty during the year preceding Ms. Owens’s injury because she did not work in a hospital. The trial court agreed, finding no evidence that Ms. Kambourian “worked as a nurse in a hospital-type setting” during the relevant time frame and insufficient proof that the standard of care in skilled nursing and rehabilitation facilities was sufficiently similar to the standard in a hospital setting.

The particular issues presented in a health care liability action determine whether an expert’s practice or specialty is relevant. *Id.* at 556. The expert’s medical practice “must provide her with sufficient experience to make her knowledgeable about the issues which are the subject of her testimony.” *Cox*, 313 S.W.3d at 260.

Here, the issue is whether Vanderbilt’s nursing staff deviated from the standard of care when they failed to reposition Ms. Owens after her ankle surgery.³ Notably, Ms. Kambourian is licensed in, and practices, the same profession as Vanderbilt’s nursing

³ Ms. Owens agrees that this is the only failure at issue in this case. She does not challenge the trial court’s dismissal of her other claims against Vanderbilt’s nursing staff or her claims against Vanderbilt’s other health care professionals.

staff. She is a registered nurse with extensive experience in wound care. She often encountered pressure wound issues in her practice. One of her responsibilities as a wound care nurse was to ensure that preventive measures were implemented for patients who were at risk for developing pressure wounds.

Ms. Kambourian testified in her deposition that she had cared for more than 50 patients recovering from an orthopedic surgical repair, like Ms. Owens, in her career. Some patients were just 24 hours post-surgery. But she admitted that she never cared for a patient like Ms. Owens in a hospital. Vanderbilt contends that the standard of care for post-operative patients in a hospital setting is different than the standard of care for similarly-situated patients in a skilled nursing or rehabilitation facility. But there is no evidence in the record to support that claim. And it is Vanderbilt's burden to show that Ms. Kambourian "is not qualified to render an opinion." *Shipley*, 350 S.W.3d at 568 (J. Koch, concurring in part and dissenting in part).

Vanderbilt also argues Ms. Kambourian admitted that "the **only basis** for her opinions concerning the standard of care in a hospital setting" was her experience as a unit manager in a transitional step-down unit during the years 2017 to 2020. And this testimony "clearly demonstrate[d] that she did not practice in a relevant profession or specialty" during the year preceding Ms. Owens's injury. But we do not share Vanderbilt's view. Ms. Kambourian does not state that her experience as a unit manager was the **only** basis for her opinions. A fair reading of her testimony reveals that her opinions derived from ample experience with the prevention of pressure sores in post-surgical patients "at every place [she] ever worked." Her experience as a unit manager merely supplemented those opinions.

The trial court should not have disqualified Ms. Owens's expert based on Tennessee Code Annotated § 29-26-115(b). *Id.* at 552.⁴ To be competent to testify in a health care liability action, a medical expert must "demonstrate sufficient familiarity with the standard of care" to make the expert's testimony "probative of the issue involved." *Cardwell v. Bechtol*, 724 S.W.2d 739, 751 (Tenn. 1987). Ms. Kambourian satisfied that standard. The fact that Ms. Kambourian never practiced her profession in a hospital goes to the weight of her testimony, not to whether she is competent. *See Searle v. Bryant*, 713 S.W.2d 62, 64 (Tenn. 1986); *Bravo v. Sumner Reg'l Health Sys., Inc.*, 148 S.W.3d 357, 367-68 (Tenn. Ct. App. 2003).

⁴ Our disposition of this appeal makes it unnecessary to consider Ms. Owens's request for additional discovery on remand.

III.

We conclude that the trial court erred in finding that Ms. Kambourian was not competent to testify about the nursing standard of care for the prevention of pressure wounds in post-surgical patients like Ms. Owens. We also conclude that the court erred in ruling on the admissibility of Ms. Kambourian's testimony without providing the nonmovant sufficient notice and an opportunity to respond. So we vacate those portions of the court's amended order. This case is remanded for further proceedings consistent with this opinion.

s/ W. Neal McBrayer

W. NEAL MCBRAYER, JUDGE