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Nurses: Their Expanding Role As Expert Witnesses



By Joan O. Ford, Esq.

Key Points:

- Nurses are competent to offer expert causation testimony in a medical malpractice case.
- The Supreme Court overruled Flanagan v. Labe.
- Freed opens the door for nursing experts to testify in medical negligence actions as to medical diagnoses, which their professional license and scope of practice clearly prohibits.

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The qualifications and scope of competency of nurses as expert witnesses are commonly contested. However, considering the Pennsylvania Supreme Court's most recent opinion in *Freed v. Geisinger Medical Center, and HealthSouth Corporation, Formerly known as HealthSouth Rehabilitation Corporation, and HealthSouth of Nittany Value, Inc., T/D/B/A HealthSouth Nittany Valley Rehabilitation Hospital*, 5 A.3d 212; 2010 Pa. LEXIS 2167, decided September 29, 2010, the likelihood of success may be waning. In *Freed*, the Pennsylvania Supreme Court rendered a novel and far-reaching decision that is in sharp contrast to well-settled Pennsylvania law. The Court held for the first time that a nurse is competent to offer expert causation testimony in a medical malpractice case. This decision is inconsistent with the Court's decision in *Flanagan v. Labe*, 666 A.2d 333, 336 (Pa. Super. 1995), *aff'd*, 690 A.2d 183 (Pa. 1997), which held that a nurse cannot testify as an expert on "either medical causation or diagnosis." The *Freed* opinion illustrates the uncertainties and inconsistencies that the defense faces in challenging an expert's qualifications and exemplifies the Court's increasingly liberal standards.

The *Freed* case involved issues of nursing care and the development of pressure wounds in an immobilized patient. The plaintiff, Roger Freed, was hospitalized at Geisinger for injuries he sustained in a motor vehicle accident and subsequently was transferred to HealthSouth for rehabilitation. During his stay, he developed pressure wounds that ultimately became infected and required surgical debridement. Freed instituted a negligence action alleging that the nursing staff failed to meet accepted nursing standards of care with regard to the treatment and prevention of pressure wounds. At trial, Freed presented the expert testimony of Linda Pershall, a registered nurse. On direct examination, in addition to addressing nursing standards of care, plaintiff's counsel attempted to elicit Pershall's opinions as to the cause of the pressure sores. The trial court sustained the defendant's objection and held that Pershall was not a medical doctor and, therefore, not qualified to give a medical diagnosis. The defendant later moved for a non-suit. The trial court, citing *Flanagan v. Labe*, held that Pershall was not qualified to offer an opinion as to the cause of the pressure ulcers as that would constitute a medical diagnosis, which a nurse is prohibited from making by the Professional Nursing Law, and entered a non-suit. Freed appealed the trial court's grant of non-suit.

The Superior Court reversed the trial court and held that Pershall was competent to provide expert testimony on both the standards of nursing care and the issue of causation. The defendants filed an appeal to the Pennsylvania Supreme Court because the Superior Court's holding was in direct conflict with the Supreme Court's holding in *Flanagan*.

In its first opinion, *Freed v. Geisinger Medical Center and HealthSouth Corporation*, 601 Pa. 223, 971 A.2d 1202 (2009), the Supreme Court affirmed the Superior Court but on a different basis. The Supreme Court found that the Superior Court distinguished *Flanagan* on the basis that Pershall's testimony did not constitute a medical diagnosis. Nurse Pershall was not called upon to render a medical diagnosis because the plaintiff's condition - pressure wounds - was undisputed. Instead, the Superior Court found that the issue in dispute was causation, whether a breach of the standards of nursing care for an immobilized patient proximately caused unrelieved pressure that, in turn, caused the plaintiff's pressure wounds to develop and/or worsen. The Superior Court concluded that the trial court erroneously relied on *Flanagan* to preclude Nurse Pershall's testimony.

The Supreme Court found that the Superior Court's decision was in conflict with *Flanagan* but then overruled *Flanagan*, sua sponte. The Court concluded that *Flanagan* was inherently flawed

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and rejected that the restrictions in the Professional Nursing Law apply in a court of law or operate to limit the well-established liberal standard for expert witness testimony. The Supreme Court reasoned that, to the extent Flanagan "prohibits an otherwise competent and properly qualified nurse from giving expert opinion testimony regarding medical causation," it must be overruled and held that the court should assess the competency of any expert witness under the standards previously set forth in Miller v. Brass Rail Tavern, Inc., 541 Pa. 474, 664 A.2d 525(1995) (In order to qualify as an expert witness, a witness need only possess more expertise than is within the ordinary range of training, knowledge, intelligence or experience. The test to be applied is whether the witness has "any reasonable pretension to specialized knowledge on the subject under investigation") or under the Mcare Act.

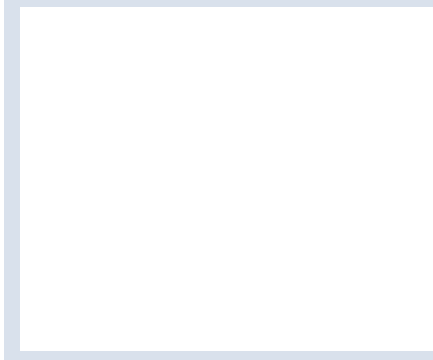
The defendants sought, and the Supreme Court granted, reargument to allow the parties to address the continued viability of Flanagan. After reargument, the Court determined that there were no arguments offered that the Court had not already considered in reaching its decision in the original opinion and reaffirmed its prior decision.

Freed has opened the door for nursing experts to testify in medical negligence actions as to medical diagnoses, which their professional license and scope of practice clearly prohibits. Despite the Court's acknowledgment of the "stringent requirements for expert testimony established by the Mcare Act," the Court has undermined the Act's usefulness by its emphasis on a liberal standard with experts. The defense must be prepared with meticulous cross-examination to expose any and all deficiencies in the education, training and experience of these "experts." How far will the courts go in the application of this decision in other matters?

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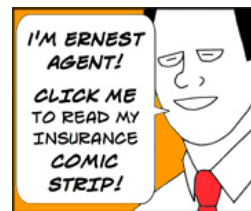
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