IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

DIANE C. STEVENS, individually and as Executrix of the Estate of ROBERT G. STEVENS, Plaintiffs, v. PARKSIDE VILLA, *et al.*, Defendants.	)	CASE NO. CV 13 810340 JUDGE BRENDAN J. SHEEHAN **OPINION AND JUDGMENT ENTRY**

I. FACTS AND ISSUES PRESENTED.

This matter is before the Court on a Motion for Reconsideration filed by Defendants Parkside Villa, Middleburg-Legacy Place LLC, Legacy Health Services dba DMD Management, Inc. and Stafford Services, Inc. (collectively "Defendants"). The issues have been fully briefed to the Court.

Plaintiff Diane C. Stevens brought this action individually and as the Executrix of the Estate of Robert G. Stevens, her late husband. In her Complaint, Plaintiff alleges that Mr. Stevens, 69 years of age, was admitted to Parkside Villa on February 2, 2012 after being treated at Southwest General Health Center ("Southwest") for aphagia, leg weakness, altered mental status and suspected stroke or CVA. Plaintiff alleges that Mr. Stevens was assessed as a risk alert for seizures and falls upon discharge from Southwest and admission to Parkside Villa. Plaintiff further alleges that Mr. Stevens was assessed by Parkside Villa as, among other conditions, at a high risk for falls.

On or about February 4, 2012, Mr. Stevens was found on the floor with his head against the wall after having lost his balance walking to the bathroom. He was subsequently confused and agitated. Later that day, he was again found on the floor of his bathroom on both knees. In the evening of the same day, Mr. Stevens fell to the floor again, holding his ribs and grimacing in pain.

Mr. Stevens continued to exhibit agitation and confusion over the next few days and on February 8, 2012, he fell onto the floor face down, striking his head on the floor. Mr. Stevens was taken by ambulance to Southwest where he underwent surgery for ruptured major arteries in his head and multiple skull fractures. Mr. Stevens was pronounced dead later that day. The cause of death was blunt force impact to the head, with skull and brain injuries.

Plaintiff filed this action on July 10, 2013 alleging, among other claims, a claim for medical malpractice. Along with her Complaint, Plaintiff filed the affidavit of Marlene S. Blackford, MSN, RN, C pursuant to Civ.R. 10(D)(2). Defendants moved to dismiss Plaintiff's Complaint on the grounds that the affidavit of merit failed to comply with Civ. R. 10(D)(2). The Court denied Defendants' motion and they now seek reconsideration.

II. LAW AND ANALYSIS.

Civ.R. 10(D)(2) provides:

> (2) Affidavit of merit; medical liability claim.
>
> (a) Except as provided in division (D)(2)(b) of this rule, a complaint that contains a medical claim, dental claim, optometric claim, or chiropractic claim, as defined in section 2305.113 of the Revised Code, shall include one or more affidavits of merit relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability. Affidavits of merit shall be provided by an expert witness pursuant to Rules 601(D) and 702 of the Ohio Rules of Evidence. Affidavits of merit shall include all of the following:

> (i) A statement that the affiant has reviewed all medical records reasonably available to the plaintiff concerning the allegations contained in the complaint;
>
> (ii) A statement that the affiant is familiar with the applicable standard of care;
>
> (iii) The opinion of the affiant that the standard of care was breached by one or more of the defendants to the action and that the breach caused injury to the plaintiff.
>
> * * *
>
> (d) An affidavit of merit is required to establish the adequacy of the complaint and shall not otherwise be admissible as evidence or used for purposes of impeachment. Any dismissal for the failure to comply with this rule shall operate as a failure otherwise than on the merits.

The purpose of Civ.R. 10(D) is "is to establish the adequacy of the complaint and thus deter the filing of frivolous medical-malpractice claims." *Troyer v. Janis*, 132 Ohio St. 3d 229, 230, 2012-Ohio-2406, 971 N.E.2d 862, quoting *Fletcher v. Univ. Hosps. of Cleveland*, 120 Ohio St.3d 167, 2008 Ohio 5379, 897 N.E.2d 147, ¶ 10. The affidavit is not intended to prove the case, conclusively establish liability or serve any other purpose than offer an independent, informed opinion that the case has adequate grounds and is not frivolous. It operates as the lowest threshold below which a medical claim will not lie, nothing more. Indeed, Civ.R. 10(D)(2)(d) expressly bars use of the affidavit for other purposes.

Plaintiff submitted the affidavit of Marlene S. Blackford who stated in relevant part:

> 2. Affiant further states that she is a duly licensed nurse in the State of Ohio, certified as a Gerontological Nurse by the American Nurses Credentialing Center, and she devotes in excess of three-fourths of her professional time to the active clinical practice of nursing in her field of licensure. Affiant has over thirty-seven years of experience as a registered nurse, and she has been employed as an RN charge Nurse and Director of Nursing at

> several nursing homes and care centers providing care of older adults.
> 3. Affiant further states that she has reviewed all records reasonably available to Plaintiff, concerning the care and treatment of decent Robert G. Stevens at the Parkside Villa, and she has also reviewed Southwest General records of January 20, 2012 to February 2, 2012, death certificate and Cuyahoga County Medical Examiners Verdict.
> 4. Affiant further states that she is familiar with the applicable nursing standards of care for the care and treatment issues in this case, or as otherwise are applicable to the care and treatment provided by [Defendants].
> 5. Affiant further states to a reasonable degree of nursing probability that the standards of care were breached by the aforesaid Defendants, and the breaches in the applicable standards of nursing care by the Defendants proximately caused Plaintiff to fall, resulting in injury, death and damages to Plaintiffs.

Affidavit of Merit, Plaintiff's Complaint.

It is clear from Ms. Blackford's affidavit that she is competent to testify about the standards of nursing care applicable to elderly patients in nursing homes and care centers based upon her education, training and experience as required by Civ R. 10(D)(2)(a)(ii). It is clear from the affidavit that relevant medical records, including the Cuyahoga County Medical Examiners Verdict, were reviewed prior to preparing the affidavit as required by Civ R. 10(D)(2)(a)(i).

Ms. Blackford's affidavit comports with Evid. R. 601(D), as required by Civ.R. 10(D)(2), that states:

> (D) A person giving expert testimony on the issue of liability in any claim asserted in any civil action against a physician, podiatrist, or hospital arising out of the diagnosis, care, or treatment of any person by a physician or podiatrist, unless the person testifying is licensed to practice medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery by the state medical board or by the licensing authority of any state, and unless the person devotes at least one-half of his or her professional time to the active clinical practice in his or her field of licensure, or to its instruction in an accredited school. **This**

> **division shall not prohibit other medical professionals who otherwise are competent to testify under these rules from giving expert testimony on the appropriate standard of care in their own profession** in any claim asserted in any civil action against a physician, podiatrist, medical professional, or hospital arising out of the diagnosis, care, or treatment of any person.

Ohio Evid. R. 601 (emphasis supplied).

There can be no doubt that nurses may be qualified as experts to testify about nursing standards under Evid.R. 601(D). The notes accompanying Evid. R. 601(D) specifically provide: "The amendment limits the rule to claims involving care by a physician or podiatrist, and does not prohibit other medical professionals, including nurses, from testifying as to the appropriate standard of professional care in their field."

Ms. Blackford's affidavit also complies with Evid.R. 702, as required by Civ.R. 10(D)(2), which states in pertinent part:

> A witness may testify as an expert if all of the following apply:
>
> (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;
>
> (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

Ohio Evid. R. 702.

Defendants' contention that they employ nurse practitioners and that Ms. Blackford is not competent to testify to the standard of care applicable to them fails for several reasons. First, Ms. Blackford's role is to review the standard of care applicable to nursing care provided by nursing facilities, regardless of who individually provided that care. The affidavit of merit is

submitted before the case has developed and discovery has proceeded. While Defendants' argument may have some merit at trial, it is not well taken at the onset of a case.

Secondly, the standards applicable to nurse practitioners are logically a higher degree of care based upon their advanced training but they necessarily subsume basic nursing care. It may very well be that Plaintiff may be able to prove more substantial breaches of the standard of care provided by nurse practitioners as discovery progresses and upon retaining experts for trial. At this stage, Plaintiff is merely required to demonstrate an adequate claim that is not frivolous.

Finally, Defendants maintain that a nurse may not testify as to proximate causation. This proposition would be applicable if, for example, Mr. Stevens was diagnosed with an intestinal obstruction allegedly caused by the falls. The nexus between the falls and abdominal symptoms would likely require specialized medical knowledge. However, those are not the facts presented in this matter. Mr. Stevens fell on the floor four times in less than a week, striking his head on at least two of those occasions. The fact that falls may result in head injuries is common knowledge in our society. Helmets are regularly worn during activities that have a higher risk of falling such as biking, inline skating, and skateboarding to prevent impact to individuals' heads. Many playground surfaces are being replaced with cushioned surfaces to lessen injuries associated with falls, including head injuries.

As one court explained under similar circumstances:

> Although expert testimony is generally necessary to establish the applicable standard of care in a malpractice claim, "matters of common knowledge and experience, subjects that are within the ordinary, common and general knowledge and experience of mankind, need not be established by expert opinion testimony." It has been held, for example, that when a patient's fall is caused by the inattentiveness of a nurse, the plaintiff need not produce expert testimony to establish that injuries were caused by the nurse's negligence

> Here, even if expert testimony was required to establish the standard of care, the element of causation was within the common knowledge of the trial court. [The nurse] had reviewed the hospital's records and averred that the nurses had breached the applicable standard of care in causing [the patient] to fall. Once [the nurse] had expressed the opinion that the nurses' negligence had caused the fall, no additional expert testimony was required to support the allegation that the fall had caused injuries to [the patient].
>
> Although [the nurse] was arguably not competent to establish that the injuries had caused [the patient]'s death more than one year after the fall, she was qualified to express the opinion that the nurses' alleged breach of duty had "caused injury to the plaintiff" within the meaning of Civ.R. 10(D)(2)(a)(iii).
>
> In holding that [the nurse's] affidavit complied with Civ.R. 10, we emphasize that, under the language of Civ.R. 10(D)(2)(c), the purpose of the affidavit is "solely to establish the adequacy of the complaint and shall not otherwise be admissible as evidence or used for purposes of impeachment." The requirement of the affidavit, then, is to winnow out utterly frivolous claims; its purpose is not to test the sufficiency of the plaintiff's evidence on the ultimate issue of the defendant's liability. Under that standard, [the nurse's] affidavit was sufficient to withstand a challenge under Civ.R. 10(D)(2).

Tranter v. Mercy Franciscan Hosp. W. Hills, 1st Dist. Case No. C-061039, 2007-Ohio-5132, NaN-P12 (footnotes omitted).

This Court finds the reasoning in *Tranter* to be persuasive. Requiring an expert to testify that repeated falls, at least two of which implicated impact to the head, proximately caused injury to a 69 year old patient solely to demonstrate that the current claim is not frivolous would result in needless expense, time, and resources of the court, the parties and the healthcare system. The affidavit of merit, which identifies the proximate cause of the falls to the breach in the standard of care, is sufficient under Civ.R. 10(D)(2) as this Court previously held.

FOR THE FOREGOING REASONS, DEFENDANTS' MOTION FOR RECONSIDERATION IS DENIED.

JUDGE BRENDAN J. SHEEHAN

Dated: 11.8.13

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed to the following this 8th day of November, 2013:

Jeffrey D. Lojewski
614 West Superior Avenue, Suite 1425
Cleveland, OH 44113

Bret C. Perry
Jason A. Paskan
1300 East 9th Street, Suite 1950
Cleveland, OH 44114