2014 WL 4470922 (Or.Cir.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Oregon.
Multnomah County

Recardo MEREZ and Carol Merez, Plaintiffs,
v.
Wan-Jui CHEN, MD, Defendant.

No. 1212-16439.
June 10, 2014.

Defendant Wan-Jui Chen, MD'S Motion to Exclude Exhibits 52 and 53

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MOTION

Motion to Exclude Exhibits 52, 53

Tuality Stroke Program Statements/Guidelines

Defendant moves this Court for an order prohibiting introduction of plaintiffs' Exhibit 52 (September 2010 Tuality Healthcare Goal and Mission Statement with guidelines) and 53 (2012 Tuality Healthcare Goal and Mission Statement with guidelines) because (a) such materials are irrelevant to the issues pled in this medical negligence action, (b) admission of such evidence would be unfairly prejudicial to defendant, (c) the admission of such evidence would confuse and mislead the jury, (d) 2012 goals further are irrelevant as they have no bearing on the December 2010 conduct.

Defendent further moves to exclude policies and procedures from other institutions for the reasons noted below and based on the court's ruling on Defendant's Motion in Limine No. 24, excluding references to policies, procedures or algorithms from any source. (Including plaintiffs' exhibits 25, 26, 32, and 41.) Defendant Dr. Chen also incorporates the rulings made by the court regarding the SAMMPRIS study, confirming that medical literature (and for the same reasons goals, missions statements and guidelines) are not substantive evidence and should not be read from or given to the jury. The prejudice is the same - the jury would be mislead and likely give improper weight to medically or scientific based information when such information does not set the standard of care and would be given undue weight by our jury.

I. Tuality HealthCare Stroke Program Mission Statement is Irrelevant:

Plaintiffs in this case assert numerous claims of negligence against Dr. Chen based on the care he provided to plaintiff Mr. Merez December 24-28, 2010. In essence, plaintiffs allege that Dr. Chen failed to recognize that Mr. Merez had an unstable, symptomatic lesion and Dr. Chen failed to offer interventional/endovascular treatment options for this lesion. Tuality's Stroke Program is not alleged to have been violated, nor does it set the standard of care for Dr. Chen's conduct.

The only issue in this case is whether Dr. Chen's treatment of Mr. Merez met the applicable standard of care. The standard of care in a medical malpractice action is set by statute: a physician “has the duty to use that degree of care, skill and diligence that is used by ordinarily careful physicians or podiatric physicians and surgeons in the same or similar circumstances in the

community of the physician or podiatric physician and surgeon or a similar community." ORS 677.095(1). That standard is objective, not subjective. *Macy v. Blatchford,* 330 Or 444, 449-50, 8 P3d 204 (2000); *see also Creasey v. Hogan,* 292 Or 154, 159-60, 637 P2d 114 (1981) (noting that a physician's treatment is judged by "the rules and principles of the school of medicine to which he belongs * * * and if he performs a treatment with ordinary skill and care in accordance with his system, he is not answerable for bad results" (quoting *Wemett v. Mount,* 134 Or 305, 313 (1930)). In almost every case, a plaintiff must present expert testimony to identify the standard of care. *See Getchell v. Mansfield,* 260 Or 174, 179, 489 P2d 953 (1971) ("In most charges of negligence against professional persons, expert testimony is required to establish what the reasonable practice is in the community. The conduct of the defendant professional is adjudged by this standard. Without such expert testimony a plaintiff cannot prove negligence"). The standard of care, therefore, is not set by Goals, Missions Statements nor internal hospital guidelines, particularly when they cover nurses, technicians and a host of providers whose care is not at issue.

In this case, plaintiffs do not assert any claims against Tuality Healthcare. Therefore, internal Tuality program statements, goals, or guidelines are not relevant whether Dr. Chen's treatment of Mr. Merez met the standard of care. See OEC 402. On the contrary, such materials are merely the aspirational goals of an organization used to assist in its management and function. This is true even if Dr. Chen was aware of the goals and guidelines, and when neurology suggestions were contained within the appendix guidelines - particularly when, as the documents states, "It is the responsibility of the clinician to make the final decision regarding the most appropriate care for the individual patient."

In addition to being irrelevant, evidence of internal Tuality programs would only confuse the jury as to the appropriate standard of care. Should these materials be admitted into evidence, they would be the only documents given to the jury discussing the guidelines and recommendations of caring for patients. As the Court is well aware from the SAMMPRIS Study briefing, Oregon law is clear that such documents should not be received by the jury. Otherwise, the jury would believe that these written suggestions must carry greater weight than the expert's opinions, studies or other recommendations they do not receive. The substantial danger involved in allowing such materials to the jury substantially outweighs any potential probative value. See OEC 403.

Likewise, from a practical standpoint, admitting these materials into evidence would require a significant amount of time to go through and explain what the mission statement is, the goals, and the like. This would be a substantial strain on the parties, the Court and the jury in an already complex medical malpractice case involving significant medical issues. For example, in the 26 pages of aspirational goals are the following irrelevant comments:
- Minimize injury to brain tissue.

- Increase community awareness of stroke risk factors ***.

- Encourage activation of EMS services as soon as possible ***

- Obtain Joint Commission accreditation as a Primary Stroke Center

There are many, many more examples, including substantial and irrelevant details as to the roles of laboratory staff, nurses, technicians, radiologists and others. These goals have nothing to do with Dr. Chen's care and the jury's consideration of the standard of care. In *Flinchum v. INOVA Health Sys.,* 84 Va. Cir. 530 (2012) the court explained:

> There is no disagreement, however, that internal policies, procedures, and protocols may not be admitted at trial to prove the standard of care. *Pullen v. Nickens,* 226 Va. 342, 310 S.E.2d 452 (1983), *Virginia Ry and Power Co. v. Godsey,* 117 Va. 167, 83 S.E. 1072 (1915).

See also Perry v. Gilotra-Mallik, 314 Ga. App. 764, 767, 726 S.E.2d 81, 84 (2012)(holding dismissed hospital's nursing policy was irrelevant and would inject prejudice regarding collateral issues); *Patterson v. Torrance Mem'l Med. Ctr.,* B191276, 2008

WL 867436 (Cal. Ct. App. Apr. 2, 2008)("excluding evidence that the hospital's policies and procedures breached the standard of care. It explained that the only issue relevant to plaintiffs' negligence and **elder abuse** claims was whether the hospital's conduct met the standard of care. The hospital's policies and procedures were irrelevant to that inquiry***.")

Defendant also moves to prohibit any Tuality guidelines or goals on the grounds that plaintiffs may attempt to raise issues not pled in their complaint. For instance, the Tuality guidelines and goals discuss recommended timing of care, staffing, and suggested actions to take. As these issues have not been pled by plaintiffs, their introduction at trial would be wholly improper. See *Navas v. Springfield,* 122 Or App 196, 201 (1993) (Holding that trial courts have no authority to render a decision on an issue not framed by the pleadings unless the parties expressly or impliedly consent.) As a result, permitting plaintiffs to introduce any Tuality guidelines or goals would be an inappropriate attempt to inject additional claims against Dr. Chen not pled in their complaint.

Although defendant is not aware of Oregon medical cases directly on point, as cited above other jurisdictions have considered these issues and have excluded similar evidence. In *Karel v. Nebraska Health Systems,* 738 NW2d 831 (Neb 2007), the case involved the examination, diagnosis and treatment of a patient that presented to the emergency room. Initially, the patient was diagnosed with an allergic reaction to medication and anxiety. *Id.* at 834-835. She was discharged from the ER but returned later that night with new symptoms, including a heart murmur. *Id.* at 835. The ER physician again examined her and concluded she needed transfer to another facility for further care and treatment. *Id* The patient was transferred, but died a few hours later from an aortic dissection. *Id.* In the ensuing medical malpractice action, the plaintiff attempted to offer into evidence marketing materials that emphasized the capabilities and comprehensive care of defendant's medical facility and physicians from the time leading up to the decedent's death. *Id* at 835-836. The defendants moved in limine to exclude such materials as irrelevant to the medical malpractice action and the court agreed. *Id.* at 836.

On appeal, the plaintiff argued the materials were relevant to the standard of care to which the defendant should be held. The appellate court affirmed the trial court ruling excluding the evidence, stating:
The marketing materials would add or subtract nothing with respect to the nature of the facility for purposes of defining the applicable standard of care. And, as one court has recently noted in concluding that a hospital's marketing materials were not even discoverable, *the standard of care 'in a medical malpractice action is measured against local, statewide, or nationwide standards and the 'superior knowledge and skill' that a provider actually possesses, ... not against the knowledge and skill that the provider claims to possess in its advertising.*

Id. at 837-38. (citations omitted)(emphasis added)

In a similar case, *McCullough v. University of Rochester Strong Memorial Hosp.,* 794 NYS2d 236 (NYAD 4 Dept, 2005) the court denied plaintiffs' motion to compel certain of defendant's materials that advertised defendant's facility and/or the services it provided. The plaintiff contended that the defendant's advertising was relevant and necessary because it pertained to the standard of care to which the defendant would be held at trial. *Id.* at 237. The appellate court affirmed denial of the plaintiffs' Motion to Compel stating:

> [T]he standard of care in a medical malpractice action is measured against local, statewide, or nationwide standards and the "superior knowledge and skill" that a provider actually possesses, not against the knowledge and skill that the provider claims to possess in its advertising.

McCullough v. University of Rochester Strong Memorial Hosp., 794 NYS2d at 237.

Here, plaintiffs should be precluded from offering any program statements, guidelines, goals, or similar evidence from Tuality Healthcare for the same rationale set forth in *Karel* and *McCullough* because such material has no bearing on whether Dr. Chen

met the standard of care. In addition, the Tuality materials should be excluded because they would confuse or mislead the jury and may be an inappropriate attempt by plaintiffs to raise issues not pled in the complaint.

DATED this 9th day of June, 2014.

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