NO. 27367

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

MARY CRAWFORD, Plaintiff-Appellant, v.
KAUAI MEDICAL CLINIC; DONNA S. CHENG, M.D., BAY CLINIC, INC.;
MANGUESH G. VELINGKER, M.D., Defendants-Appellees

APPEAL FROM THE CIRCUIT COURT OF THE FIFTH CIRCUIT
(CIVIL NO. 02-1-0119)

SUMMARY DISPOSITION ORDER
(By: Foley, Presiding Judge, Fujise, Leonard, JJ.)

Plaintiff-Appellant Mary Crawford (**Crawford**) appeals from a Judgment filed on June 6, 2005, in the Circuit Court of the Fifth Circuit (**Circuit Court**).[1] The Circuit Court entered Judgment in favor of Defendants-Appellees healthcare providers Kauai Medical Clinic (**KMC**), Donna S. Cheng, M.D. (**Dr. Cheng**), Bay Clinic, Inc. (**Bay Clinic**), and Manguesh G. Velingker, M.D. (**Dr. Velingker**). The Court also taxed costs against Crawford in the total amount of $39,370.84. Crawford timely filed a notice of appeal on June 20, 2005.

On appeal, Crawford argues that the Circuit Court erred in: (1) finding Rick Williams, M.D. (**Dr. Williams**) was not qualified to testify as an expert witness and denying reconsideration of the exclusion of Dr. Williams' expert testimony; (2) denying Crawford's motion to add a critical witness; (3) granting summary judgment as to Crawford's medical malpractice claims alleging that defendants' negligence was the legal cause of injuries suffered by Crawford; and (4) granting summary judgment as to Crawford's informed consent claims.

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[1] The Honorable George M. Masuoka presided.

Upon careful review of the record, the applicable statutes, rules, and case law, and the briefs submitted by the parties, and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve Crawford's points of error as follows:[2]

(1) It is well settled that whether a witness qualifies as an expert is a matter addressed to the sound discretion of the trial court, and such determination will not be overturned unless there is a clear abuse of discretion. Larsen v. State Sav. & Loan Ass'n, 64 Haw. 302, 304, 640 P.2d 286, 288 (1982); see also State v. Wallace, 80 Hawai'i 382, 419 n.37, 910 P.2d 695, 732 n.37 (1996) (whether expert testimony should be admitted at trial rests within the sound discretion of the trial court and will not be overturned unless there is a clear abuse of discretion). We conclude that the Circuit Court did not abuse its discretion when it ruled that Dr. Williams would not be permitted to testify as an expert witness in this case because, although Dr. Williams was a Hawai'i licensed physician and had many years of experience as a gynecologist and primary health care provider: (a) Dr. Williams had never diagnosed a single patient as suffering from Vitamin B-12 deficiency; (b) Dr. Williams had only treated one patient for Vitamin B-12 deficiency; (c) at his deposition, Dr. Williams could not testify to the presenting symptoms of patients prior to diagnosis of Vitamin B-12 deficiency or as to the progression of symptoms while patients were on Vitamin B-12 treatments; (d) Dr. Williams had no specialized training or experience relevant to the causal link between defendants' alleged negligence and Crawford's alleged neurological problems; (e) all but one of the medical articles cited by Dr. Williams in his declaration were provided

[2] Although we have carefully reviewed, analyzed, and considered each of Crawford's nine points of error, we have consolidated related points for the purpose of informing the parties of our disposition of the appeal.

to him by Crawford's counsel and Dr. Williams' deposition testimony indicated a lack of familiarity with the medical literature he cited; (f) Dr. Williams never examined, tested, or treated Crawford or discussed Crawford's Vitamin B-12 deficiency with her prior to formulating and attesting in writing to his opinions (although he met her once, in a social setting, eight months after filing his declaration with the Court); and (g) numerous other grounds existed for the exclusion of Dr. Williams' testimony as an expert witness in this case. We also note that, although *assistance* of counsel in drafting an expert's declaration or report is not, by itself, ground for excluding an expert's testimony, in this case Dr. Williams adopted the research conducted by and the opinions of Crawford's attorney to such an extent that it appeared that Dr. Williams was little more than the alter ego of Crawford's attorney.[3] The Circuit Court did not abuse its discretion when it denied Crawford's motion for reconsideration.

(2) Circuit Court Rule 12(o) provides: "At any time after the time for Final Naming of Witnesses, upon showing of good cause and substantial need a party may move for the addition of a witness." Denial of a motion under Rule 12 is reviewed under the abuse of discretion standard. See Messier v. Ass'n of Apt. Owners of Mt. Terrace, 6 Haw. App. 525, 530, 735 P.2d 939, 944 (1987). We conclude that, under the circumstances of this case, the Circuit Court did not abuse its discretion when it denied Crawford's motion to add a critical witness because: (a) the trial date had been reset once already, trial was to have begun the day before Crawford filed the motion to add the critical witness, and Crawford was still not prepared to identify

[3] For example, in response to a question about his declaration testimony, Dr. Williams stated: "That's what is written, and those are [the attorney's] words. I am not sure, and he explained it to me, but I am not sure I right now understand what it means."

any particular additional critical witness to the defending parties and the court; (b) the substitution of a completely new expert witness would have been prejudicial to defendants at this point in the case (i.e., when discovery had been completed, all lay and expert witnesses had been named, expert reports and expert discovery had been completed, substantive and pretrial motions had been filed and, for the most part, disposed of, and the trial date had passed the day before the motion to add a critical witness was filed); and (c) notwithstanding the critical nature of expert testimony in a medical malpractice case, Crawford had made a strategic decision to rely exclusively on Dr. Williams to provide the necessary testimony.

(3) We review a circuit court's granting or denial of summary judgment de novo. Fong v. Oh, 116 Hawai'i 187, 194, 172 P.3d 499, 506 (2007). In this case, the Circuit Court properly granted summary judgment as to all of Crawford's negligence claims against the defendants. Under Hawai'i law, it is well-established that in medical malpractice actions, expert testimony is required to establish: (a) the appropriate standard of care; (b) whether a defendant's conduct fell below such standard; and (c) whether such conduct was the legal cause of plaintiff's injury. Craft v. Peebles, 78 Hawai'i 287, 299, 893 P.2d 138, 150 (1995); Bernard v. Char, 79 Hawai'i 371, 377, 903 P.2d 676, 682 (App. 1995). We reject Crawford's assertion that she need not produce expert testimony on certain of her theories because the "common knowledge" exception applies. The medical situation in this case does not present a routine or non-complex matter wherein a lay person is capable of supplanting the applicable standard of care from his or her "common knowledge" or ordinary experience. See Craft v. Peebles, 78 Hawai'i at 298, 893 P.2d at 149.

In addition, even if we were inclined to agree with Crawford's argument that the testimony of the adverse witnesses

in this case could raise a genuine issue of material fact as to the alleged negligence of any or all of the various defendants, the record demonstrates a complete lack of competent evidence on the issue of causation. We reject Crawford's argument that no additional expert testimony is necessary to create a genuine issue of material fact on the causation element of her claims. See Bernard v. Char, 79 Hawai'i at 377, 903 P.2d at 682. Even taken together, the admissions of Dr. Cheng and KMC that "it is possible" that certain conditions may manifest in a patient as a result of Vitamin B-12 deficiency and Dr. Ridge's report that "[w]hen deficiency states are allowed to go untreated, improvement may be slow and incomplete", did not satisfy Crawford's burden to bring forth evidence supporting a causal link between the defendants' alleged negligent conduct and Crawford's alleged injuries. See, e.g., Craft v. Peebles, 78 Hawai'i at 305, 893 P.2d at 156. In medical malpractice cases, the causal nexus between the physician's treatment or lack thereof and the plaintiff's injury must be grounded upon a reasonable medical probability as opposed to a mere possibility. Id.; see also Bernard v. Char, 79 Hawai'i at 377, 903 P.2d at 682.

(4) The Circuit Court properly granted summary judgment against Crawford on her informed consent claims. The doctrine of informed consent imposes an affirmative duty upon physicians to fully disclose to a patient the types of risks and alternatives to a proposed treatment or surgery. Ditto v. McCurdy, 86 Hawai'i 84, 90, 947 P.2d 952, 958 (1997). A physician is required to disclose "what a reasonable patient needs to hear from his or her physician in order to make an informed and intelligent decision regarding treatment." Carr v. Strode, 79 Hawai'i 475, 484, 904

P.2d 489, 498 (1995).[4] In Barcai v. Betwee, 98 Hawai'i 470, 483, 50 P.2d 946, 959 (2002), the Hawai'i Supreme Court stated:

> The elements of informed consent commonly consist of ensuring that the patient consents to the prescribed procedure only after being made aware of the: (1) condition being treated; (2) nature and character of the proposed treatment or surgical procedure; (3) anticipated results; (4) recognized possible alternative forms of treatment; and (5) recognized serious possible risks, complications, and anticipated benefits involved in the treatment or surgical procedure, as well as the recognized possible alternative forms of treatment, including non-treatment. . . . .
>
> Claims for negligent failure to obtain informed consent typically arise when a plaintiff alleges that the defendant physician failed to warn the patient of a particular risk associated with the procedure and the particular risk ultimately occurred.

Crawford maintains that Dr. Cheng and KMC are liable under the informed consent doctrine for misinforming Crawford

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[4] Hawaii Revised Statutes (HRS) § 671-3 (Supp. 2007) provides, in relevant part:

> (a) The board of medical examiners may establish standards for health care providers to follow in giving information to a patient, or to a patient's guardian or legal surrogate if the patient lacks the capacity to give an informed consent, to ensure that the patient's consent to treatment is an informed consent. The standards shall be consistent with subsection (b) and may include:
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> (1) The substantive content of the information to be given;
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> (2) The manner in which the information is to be given by the health care provider; and
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> (3) The manner in which consent is to be given by the patient or the patient's guardian or legal surrogate.
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> (b) The following information shall be supplied to the patient or the patient's guardian or legal surrogate prior to obtaining consent to a proposed medical or surgical treatment or a diagnostic or therapeutic procedure:
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> (1) The condition to be treated;
>
> (2) A description of the proposed treatment or procedure;
>
> (3) The intended and anticipated results of the proposed treatment or procedure;
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> (4) The recognized alternative treatments or procedures, including the option of not providing these treatments or procedures;
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> (5) The recognized material risks of serious complications or mortality associated with:
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> (A) The proposed treatment or procedure;
>
> (B) The recognized alternative treatments or procedures; and
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> (C) Not undergoing any treatment or procedure; and
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> (6) The recognized benefits of the recognized alternative treatments or procedures.

about the state of her Vitamin B-12 deficiency, and failing to inform her about the risks inherent in non-treatment of the deficiency. Crawford further contends Dr. Velingker and Bay Clinic are similarly liable because they failed to inform Crawford about the results of her Vitamin B-12 test and the risks inherent in non-treatment of the condition. The Circuit Court found, however, that Crawford's informed consent claims were not legally cognizable in this case. We agree. A physician's duty to obtain informed consent arises when the physician is contemplating administering a treatment or procedure, such as surgery or medication, to a patient. Here, the defendant healthcare providers are alleged to have been negligent by failing to diagnose and/or treat Crawford's Vitamin B-12 deficiency, not by administering treatment to Crawford without her consent. We decline to extend the doctrine of informed consent in the manner suggested by Crawford.

For the foregoing reasons, we affirm the Circuit Court's Judgment filed on June 6, 2005.

DATED: Honolulu, Hawaiʻi, March 25, 2008.

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Presiding Judge

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