GORDON STONESIFER,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 01-01,577
	:	
MANORCARE HEALTH SERVICES,	:	
MANOR HEALTH CARE CORP.,	:	
MANORCARE HEALTH SERVICES,	:	
INC.,	:	
Defendants	:	MOTION FOR SUMMARY JUDGMENT

Date: December 11, 2002

OPINION and ORDER

The motion before the Court is Defendant, Manorcare Health Services *et al*'s, Motion for Summary Judgment filed October 11, 2002. The following are the relevant and undisputed facts with regard to the Motion for Summary Judgment.[1] Plaintiff, Grover Stonesifer, has been a paraplegic since 1976 after suffering a back injury at work. On September 27, 1999, Plaintiff fell at his home resulting in a fracture of his left femur. The Plaintiff underwent surgery to repair the fracture. On October 5, 1999, Plaintiff was discharged to Defendant's nursing home. Plaintiff had his left leg placed in a removable immobilizer so that the fracture could heal. On November 6, 1999, a number of pressure sores were identified on the Plaintiff's lower left leg. Plaintiff received treatment for these sores while at Defendant's nursing home. When Plaintiff left Defendant's care on January 12, 2000, there was no indication that the sores were infected.

[1] The record used by the Court to decide the Motion for Summary Judgment consists of the following: Plaintiff's Compliant filed December 31, 2001; Defendant's Answer filed January 22, 2002; Defendant's Motion for Summary Judgement with attached exhibits filed October 11, 2002; Plaintiff's Answer to Defendant's Motion for Summary Judgment filed November 6, 2002; Defendant's Brief in Support of Motion for Summary Judgement filed November 7, 2002; and Plaintiff's Brief in Opposition to Motion for Summary Judgment with attached exhibits filed November 20, 2002.

After a two-week stay at home, Plaintiff was admitted to Nittany Valley Rehabilitation Hospital on January 26, 2000. While there, Plaintiff received treatment for an ulceration on his left calf. On March 3, 2000, Plaintiff was discharged from Nittany Valley Rehabilitation Hospital. On March 13, 2000, Plaintiff was examined by Richard Shatz, M.D., who decided to admit Plaintiff to the Williamsport Hospital for a skin graft procedure because the ulcerated area on the left calf had worsened. Plaintiff underwent the graft and was discharged to Valley View Nursing Center on March 28, 2000.

It was during Plaintiff's stay at the Valley View Nursing Center that it was determined that he had a methicillin resistant staphylococcus aureus infection. On April 3, 2000, Plaintiff was admitted to the Williamsport Hospital. Plaintiff underwent further skin graft procedures while in the Hospital. On May 18, 2000, Plaintiff was discharged to his daughter's home with care provided by Sun Home Health. Despite all these efforts, the infection could not be treated and became worse. It was determined that Plaintiff's left leg would have to be amputated above the knee. On July 25, 2000, the Plaintiff underwent the procedure.

Defendant contends that Plaintiff has failed to produce evidence that could establish a *prima facie* case of medical negligence. Defendant's Brief, 4. Defendant argues that Plaintiff has failed to provide expert medical testimony that the alleged negligent nursing care was the legal or proximate cause of the claimed injuries. ***Id***. at 5. Defendant believes the inadequacy arises because the only expert opinion submitted by Plaintiffs is that of a registered nurse, nurse Sharon, which cannot be used to establish proximate cause under ***Flanagan v. Labe***, 690 A.2d 183 (Pa. 1997). ***Ibid***.

In response, Plaintiff contends that he has provided evidence that could establish his *prima facie* case of medical negligernce. Plaintiff argues that nurse Sharon's testimony is not being offered to prove proximate cause, but is being offered as an expert opinion regarding the standard of nursing care and the deviation from it. Plaintiff's Brief, 3. According to Plaintiff, the expert testimony as to proximate cause comes in the form of Plaintiff's treating physicians' notes and records. Plaintiff argues that these notes and records provide the required expert testimony as to proximate cause, since these physicians have "identified the condition in question (ulceration) the cause (the cast), and the result (amputation because the wounds would not heal)." ***Id***. at 4.

Defendant counters the reports only establish that at some point long after Plaintiff had left Defendant's care the ulceration became infected and eventually the leg had to be amputated because the infection was never cured. Defendant asserts there is no proof or medical opinion as to the cause of the infection. Defendant's position is that notes and records of the treating physicians did not express any opinion as to the proximate causal link between the ulceration and the amputation and certainly do not establish any such link in terms expressing the opinion to a reasonable degree of medical certainty.

Thus, the issue before the Court is whether Plaintiff has proffered expert medical testimony that the alleged negligent nursing care rendered by Defendant was the proximate cause of the infection that resulted in the amputation of the Plaintiff's left leg above the knee. This Court finds Plaintiff has failed to meet his burden of providing expert testimony that the alleged negligent nursing care rendered by Defendant was the proximate cause of the infection. Plaintiff has also failed to provide expert testimony that the alleged negligent

nursing care rendered by Defendant increased the risk that Plaintiff would suffer the infection. Thus, Plaintiff has not provided evidence that could establish his *prima facie* case and the Defendant's Motion for Summary Judgement must be granted.

A party may move for summary judgment after the pleadings are closed. *See*, Pa. R.C.P. 1035.2 . Summary judgment may be properly granted "when the uncontraverted allegations in the pleadings, depositions, answers to interrogatories, admissions of record, and submitted affidavits demonstrate that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law." ***Rauch v. Mike-Mayer***, 783 A.2d 815, 821 (Pa. Super. 2001); ***Godlewski v. Pars Mfg. Co.***, 597 A.2d 106, 107 (Pa. Super. 1991). The party making the motion has the burden of proving that there are no genuine issues of material fact. ***Rauch***, 783 A.2d at 821. In determining a motion for summary judgment, the court must examine the record " 'in the light most favorable to the non-moving party accepting as true all well pleaded facts in its pleading and giving that party the benefit of all reasonable inferences.'" ***Godlewski***, 597 A.2d at 107 (quoting ***Hower v. Whitmak Assoc.***, 538 A.2d 524 (Pa. Super. 1988)). Summary judgment will only be entered in cases that "are free and clear from doubt" and any "doubt must be resolved against the moving party." ***Garcia v. Savage***, 586 A.2d 1375, 1377 (Pa. Super. 1991).

It is clear that "summary judgment is precluded where the moving party relies exclusively upon testimonial affidavits or depositions to establish the absence of a genuine issue of material fact." ***Ack v. Carrol Township***, 661 A.2d 514, 516 (Pa. Cmwlth. 1995). "Therefore, testimonial affidavits of the moving party or its witnesses, even if uncontradicted, will not afford sufficient basis for the entry of summary judgment, since the credibility of the

testimony is still a matter for the jury." ***Ibid***. However, a determination as to "whether a plaintiff has alleged facts sufficient to establish a prima facie case" must first be made. ***Ibid***. "If a plaintiff has failed to establish a prima facie case, then as a matter of law, summary judgment is proper, because at this stage there are no material issues of fact to be decided." ***Ibid.*** (citing ***Dudley v. USX Corp.***, 606 A.2d 916 (Pa. Super. 1992) appeal denied, 616 A.2d 985 (1992)).

In order to establish a medical negligence claim, a plaintiff must prove (1) that the defendant owed the plaintiff a duty; (2) the defendant breached that duty; (3) the breach of duty was the proximate cause in bringing about the harm suffered; and (4) the damages suffered by the plaintiff resulted directly from that harm. ***Mitzelfelt v. Hamrin***, 584 A.2d 888, 891 (Pa. 1990); ***Rauch v. Mike-Mayer***, 783 A.2d 815, 824 (Pa. Super. 2001); ***Gregorio v. Zeluck***, 678 A.2d 810, 813 (Pa. Super. 1996). In a medical malpractice case, a plaintiff is generally required to provide expert testimony to "establish, to a reasonable degree of medical certainty, that the acts of [the defendant] deviated from acceptable medical standards and such deviation was a proximate cause of the harm suffered." ***Mitzelfelt***, 584 A.2d at 891; ***Yacoub v. Lehigh Valley Med. Assocs., P.C.***, 805 A.2d 579, 591 (Pa. Super 2002). This is because " 'the complexities of the human body place questions as to the cause of pain or injury beyond the knowledge of the average lay person.'" ***Bitterman v. Saylor***, 761 A.2d 1208, 1212 (Pa. Super. 2000) (quoting ***Miller v. Sacred Heart Hospital***, 753 A.2d 829, 833 (Pa. Super. 2000)). If the plaintiff fails to proffer an expert witness, then "summary judgment may be properly granted." ***Id***. at 1212. However, expert medical testimony is not required where the "matter is so simple or the lack of skill or care is so obvious as to be within a lay person's range of experience and

comprehension." ***Hightower-Warren v. Silk***, 698 A.2d 52, 54 n.1 (Pa. 1997); ***Rauch***, 783 A.2d at 824 n. 8.

In Pennsylvania, "the standard for qualification of an expert witness is a liberal one." ***Rauch***, 783 A.2d at 821. "The test to be applied when qualifying an expert witness is whether the witness [has] any reasonable pretension to specialized knowledge on the subject under investigation." ***Ibid***. To qualify "as an expert in a given field, a witness must posses more expertise then is within the ordinary range of training, knowledge, intelligence, or experience." ***Yacoub***, 805 A.2d at 591. A nurse can provide expert testimony as to the standard of care for nursing and if the care provided deviated from said standard. ***Flanagan v. Labe***, 690 A.2d 183, 185 (Pa. 1997); ***Taylor v. Spencer Hospital***, 292 A.2d 449, 453 (A qualified practical nurse can provide expert testimony regarding the proper standard of care for a practical nurse.). However, a registered nurse cannot provide expert medical testimony as to "the identity and cause of [the] medical condition." ***Flanagan***, 690 A.2d at 185.

Proximate cause is defined as "a wrongful act which was a substantial factor in bringing about the plaintiff's harm." ***Dudley v. USX Corp.***, 606 A.2d 916, 923 (Pa. Super. 1992). In a medical malpractice claim, the plaintiff can establish proximate cause through expert medical testimony opining that, to a reasonable degree of medical certainty, the conduct of the defendant was a substantial factor in causing the injury the plaintiff suffered. ***Mitzefelt***, 584 A.2d at 892. However, there are situations in medical malpractice claims where this is not possible. ***Ibid***.

In these situations, a plaintiff can still meet the proximate cause requirement by providing expert medical testimony opining that, to a reasonable degree of medical certainty,

the defendant's acts increased the risk of harm. ***Mitzefelt***; 584 A.2d at 892; ***Jones v. Montefiore Hospital***, 431 A.2d 920, 924 (Pa. 1980). Once a plaintiff has introduced that a defendant's negligent act or omission increased the risk of harm to a person in the plaintiff's position, and that the harm was in fact sustained, it becomes a question for the jury as to whether or not that increased risk was a substantial factor in producing the harm. ***Mitzefelt***, 584 A.2d at 892; ***Hamil v. Bashline,*** 392 A.2d 1280, 1286 (Pa. 1978*).* The medical expert is not "required to use the 'magic words' of 'increased the risk' so long as the opinion is expressed to the requisite degree of medical certainty." ***Billman v. Saylor***, 761 A.2d 1208, 1213 (Pa. Super 2000). The expert testimony will be "viewed in its entirety to determine whether it has expressed the appropriate standard of certainty." ***Ibid***. "That an expert may have used less definitive language does not render his entire opinion speculative if at some time during his testimony he expressed his opinion with reasonable certainty." ***Montgomery v. South Philadelphia Medical Group***, 665 A.2d 1385, 1390 (Pa. Super. 1994)

In ***Cruz v. Northeastern Hospital***, 801 A.2d 602, 606 (Pa. Super. 2002), and ***Montgomery v. South Philadelphia Medical Group, Inc.***, 656 A.2d 1385 (Pa. Super. 1994) the Superior Court applied the foregoing standards to Plaintiff's proffered expert medical testimony and reached opposite conclusions as to the sufficiency of the testimony. The analysis of the Superior Court in those cases and the contrast between the proffered medical expert testimony in these cases is helpful here in determining if Plaintiff has met his burden of providing the expert testimony necessary to establish a *prima facie* case of medical malpractice.

In ***Cruz v. Northeastern Hospital,*** *supra*, the parents of a child brought a malpractice claim on behalf of themselves and their son against a hospital alleging that the

nursing care she received was negligent and caused the injuries suffered by her son. The hospital eventually admitted the mother after she experienced contractions. Upon admission, she was placed on a fetal monitor. ***Ibid***. The mother gave birth to her son, who began to suffer seizures. It was determined that the child suffered brain damage and was "developmentally delayed physically and cognitively." ***Ibid***.

The Superior Court held that the plaintiffs did present evidence that could establish causation since they did provide expert medical testimony opining that the nursing care increased the risk of harm to the child. ***Cruz***, 801 A.2d at 610. The plaintiffs' expert stated that there was evidence that the fetus was in distress (abnormal slowing of the heart). The expert also stated that there was evidence of an infection in the mother because of her elevated temperature. ***Id***. at 609. The doctor then stated that the more prolonged the exposure in the womb to these conditions the greater the injury that occurs to the brain. ***Ibid***. The expert medical witness believed that it was the failure of the nurses to maintain the vital signs of mother and child and inform the doctors about the fetal distress that created the prolonged exposure. It was this prolonged exposure that lead to the increased risk of harm to the child. ***Ibid***. The expert medical witness concluded that "within a reasonable degree of medical certainty that [the child's] prolonged exposure to these various factors in the womb increased his risk of injury." ***Ibid***.

In ***Montgomery v. South Philadelphia Medical Group, Inc.***, *supra*, the plaintiff had been diagnosed with breast cancer that had spread to one lymph node. 656 A.2d at 1387. To treat the cancer, the plaintiff had to undergo a radical mastectomy and chemotherapy. The plaintiff filed suit against the medical group alleging that the physician's assistant who had seen

her a year earlier was negligent in not referring the plaintiff to a physician after she complained of pain in her left breast. ***Ibid***. According to the plaintiff, the failure to refer her to a physician increased the risk that the cancer would not be detected early and that increased the risk that the cancer would have to be treated with a mastectomy and chemotherapy.

To establish causation, the plaintiff presented Dr. Karp. Dr. Karp testified that "it was 'very possible' that the failure to refer her to a physician 'may have increased her chance of having a positive lymph node' when the cancer was eventually diagnosed and that it 'may have increased her risk for requiring a mastectomy with chemotherapy.'" ***Montgomery***, 656 A.2d at 1393. Dr. Karp further opined, "'Had the tumor been diagnosed one year earlier, it is indeed possible that if it were small enough, the breast could have been conserved and treated by lumpectomy/radiation therapy alone.'" ***Ibid***. The Superior Court held that Dr. Karp's testimony did not establish that the failure to refer increased the risk of harm to the plaintiff. The speculative nature of Dr. Karp's opinion provided no link between the failure to refer and the later detection of the cancer that could demonstrate an increased risk. ***Ibid***. Thus, even with the statement of a physician that it was "very possible" that a negligent act was the proximate cause or a source of increased risk of harm such as insufficient (?)

Applying the foregoing standards and reasoning to our case it is clear Plaintiff has also failed to meet his burden as he only shows it is possible the negligently caused ulceration was the proximate cause of the ulceration. Plaintiff has not proffered expert medical testimony that could establish legal causation. Plaintiff has not provided expert medical testimony that opines, to a reasonable degree of medical certainty, that the alleged negligent nursing care was a substantial factor in causing the infection that necessitated the amputation.

Nor has Plaintiff provided expert medical testimony that opines, to a reasonable degree of medical certainty, that the alleged negligent nursing care increased the risk of the infection that necessitated the amputation. Plaintiff cannot offer the opinion of Nurse Sharon that the nursing care caused the infection or increased the risk of infection, since ***Flanagan***, *supra*, prohibits a nurse from testifying as to the identity or cause of the illness. The notes and records of Plaintiff's physicians do not make up for the deficiency in expert testimony.

At most, the treating physicians notes and records state that Plaintiff suffered from pressure ulcers following his operation for the leg fracture. Dr. Freedman states that Plaintiff was admitted to Nittany Valley Rehabilitation center to "address left calf wound status post pressure from cast." Plaintiff's Brief, Exhibit 3. Dr. Jones stated that Plaintiff "had a cast which rubbed on his leg subsequently causing an ulceration" while he was at Defendants' nursing home. ***Id***., Exhibit 4. Dr. Roman that Plaintiff had "developed [an] ulceration on his lower extremity, apparently secondary to the cast applied after his fracture." ***Id***., Exhibit 5. There is no indication in these notes and records as to what caused the infection. The notes and reports do not state that there is a link between the alleged negligent nursing care and the infection that necessitated the amputation. Also, the records provide no indication that the alleged negligent nursing care made Plaintiff more susceptible to the infection, thereby increasing the risk of harm to Plaintiff.

The closest Plaintiff comes to offering expert testimony to causation is Dr. Shatz. Dr Shatz stated:

> This unfortunate gentlemen had what appeared to be probable pressure ulceration on the lateral aspect of the left leg and has undergone a number of procedures in an attempt to salvage the leg and foot, however, all procedures performed failed to result in a

> healed wound of the left leg. The left lower extremity has gone on to become more ishemic making healing of this wound virtually impossible. In addition, osteomyelitis has developed in the fibula.

Plaintiff's Brief, Exhibit 6. This merely states the fact that once the sores originated they did not heal. Plaintiff has acknowledged at argument that the amputation did not occur because of the open sore, but because of the infection. It was this uncured infection that caused the decay of tissue, to such an extent, that amputation was necessary. The notes and records of the treating physicians are devoid of an expression as to the source of the infection and an opinion that the infection was the inevitable result because the alleged negligent nursing care increased the risk of infection.

While it might be argued that without the sore there would have been no site to become infected, this is only a "but for" argument which is insufficient to establish causation in a medical malpractice case as it does not establish to a reasonable degree of medical certainty that the onset of the ulceration increased the risk of amputation. Such an opinion is necessary for Plaintiff to establish a *prima facie* case of medical negligence. Plaintiff would have the fact finder rely upon a common sense or layperson's assumption that it is very possible that a negligently caused ulcer will become infected and the infection will not be cured and the ulcerated sites will need to be amputated. The law does not permit such likelihood to be used as the legal cause of the injury. The causal link between the sore and the infection that resulted in the amputation must be established by expert medical testimony. Here, Plaintiff has failed to make such a link.

Thus, Defendant's Motion for Summary Judgment must be granted. Plaintiff has failed to provide evidence that could establish a prima facie case of medical negligence. There was no expert testimony that indicated the nursing care was a substantial factor in causing the infection or that the nursing care increased the risk of infection. Therefore, Plaintiff has failed to provide evidence that the nursing care rendered was the proximate cause of the infection necessitating the amputation.

O R D E R

It is HEREBY ***ORDERED*** that Defendant's, Manor Care *et al*, Motion for Summary Judgment filed October 11, 2002 is granted.

BY THE COURT:

William S. Kieser, Judge

cc: Jeffrey Dohrmann, Esquire
David B. Lingenfelter, Esquire
Judges
Christian J. Kalaus, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)