

## ***Rasor & Miller v. Northwest Hospital***

**Citation:** No. CV-16-0134-PR, 2017 WL 4655183 (Ariz. Oct. 18, 2017).

**Date Filed:** October 18, 2017

**Author:** Justice Bolick

**Joined by:** Chief Justice Bales, Vice Chief Justice Pelander, and Justices Brutinel, Timmer, Gould, and Lopez.

**Facts:** Plaintiff Rasor underwent surgery at Northwest Medical Center (“NWMC”). After the operation, she was placed in a medically induced coma. During this time, Rasor developed a pressure ulcer over her tailbone that ultimately caused permanent residual damage. Rasor filed this medical malpractice claim against NWMC, alleging the ICU nursing staff caused her injuries.

Rasor certified an expert was needed to prove medical negligence pursuant to A.R.S. § 12-2603(A). Rasor designated expert Julie Ho, R.N., as a specialist in wound care. Ho was a certified wound care nurse who worked at a long-term acute care facility performing assessments and care planning during the year preceding Rasor’s injury.

After the close of discovery, Northwest Hospital moved for summary judgment pursuant to Arizona Rule of Civil Procedure 56. It asserted Nurse Ho was not qualified to testify as an expert about the standard of care for intensive care unit nurses under § 12-2604.

**Procedural history:** The case is currently before the Arizona Supreme Court. At the trial level, Rasor requested time to secure a new qualifying expert pursuant to A.R.S. § 12-2603(F) if Ho’s qualifications were found wanting, but the superior court denied that request and granted judgment in favor of NWMC.<sup>1</sup>

Rasor appealed. The Court of Appeals concluded that Ho was not qualified as a standard-of-care expert, holding that a certified ICU specialist rather than a wound-care expert was required under § 12-2604(A) and *Baker v. Univ. Physicians Healthcare*,<sup>2</sup> and, alternatively, if ICU nurses are considered generalists, Ho was not a practicing generalist in the year prior to Rasor’s injury.<sup>3</sup>

The Court of Appeals ruled, however, that Rasor should have been allowed to find a different expert.<sup>4</sup> Citing *Preston v. Amadei*,<sup>5</sup> the court noted that when a defendant in a malpractice case challenges a plaintiff’s preliminary disclosures of expert opinions, the plaintiff must be allowed to correct any deficiency pursuant to § 12-2603(F).<sup>6</sup> The court noted that, as in *Preston*, the defendant did not challenge the sufficiency of the preliminary expert affidavit,

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<sup>1</sup> Rasor v. Nw. Hosp., No. CV-16-0134-PR, 2017 WL 4655183, at \*1, \*2 (Ariz. Oct. 18, 2017) (*Rasor II*).

<sup>2</sup> 231 Ariz. 379 (2013).

<sup>3</sup> Rasor v. Nw. Hosp., LLC, 373 P.3d 563 (Ariz. Ct. App. 2016) (*Rasor I*).

<sup>4</sup> *Id.* at 570.

<sup>5</sup> 238 Ariz. 124 (Ariz. Ct. App. 2015).

<sup>6</sup> *Rasor I*, 373 P.3d at 570.

but rather challenged the expert's qualifications in a summary judgment motion after the expert disclosure deadline had passed.<sup>7</sup> For the reasons expressed in *Preston*, and because the trial court had previously "strongly indicated Ho's opinions would be admitted at trial," the Court of Appeals held that the trial court erred by denying Rasor's request to substitute a new expert.<sup>8</sup>

Both parties sought review in the Arizona Supreme Court and certiorari was granted.

### Issues:

1. A.R.S. § 12-2604 sets forth the requisite expert qualifications to testify on standard of care. In this case, NWMC did not challenge the plaintiff's preliminary expert affidavit but instead filed a motion for summary judgment. Does this statute require that a defendant in a medical malpractice action file a motion challenging a plaintiff's preliminary expert affidavit before filing a motion for summary judgment?
2. In this case, the plaintiff requested the chance to substitute a new expert if the Court determined Ho's expert qualifications were not sufficient. The trial court denied that request. When a plaintiff fails to provide the requisite expert testimony in response to a motion for summary judgment challenging the qualifications of a plaintiff's standard of care expert, does A.R.S. § 12-2603 dictate that a trial court abuses its discretion by granting summary judgment instead of giving the plaintiff another chance to come up with the requisite evidence?
3. A.R.S. § 12-2604 states the requisite qualifications for standard-of-care experts, three of which the Court found pertinent to this case: The expert must specialize at the time of the occurrence in the same specialty, must be board certified in that specialty, and must have devoted a majority of the person's professional time to the active clinical practice of the same health profession in the same specialty. Was Nurse Ho qualified to serve as an expert in this case?

### Holdings:

1. No. Challenging an expert's affidavit under § 12-2603 is not a prerequisite for filing a summary judgment motion for lack of requisite expert qualifications under § 12-2604.<sup>9</sup> Rather, the proper recourse for a plaintiff whose expert's qualifications are challenged for the first time in a summary judgment motion is to seek relief under Ariz. R. Civ. P. 56(d).<sup>10</sup>
2. No, a plaintiff is not automatically entitled to substitute a new expert.<sup>11</sup> When a defendant moves for summary judgment, the plaintiff may file a Rule 56(d) affidavit and corresponding motion for relief.<sup>12</sup> The judge has discretion to grant the summary

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Rasor II*, No. CV-16-0134-PR, 2017 WL 4655183, at \*4 (Ariz. Oct. 18, 2017).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at \*5.

<sup>12</sup> *Id.*

judgment motion or defer considering the summary judgment motion and allow time to obtain the evidence, deny the requested relief, or issue any other appropriate order.<sup>13</sup> The court may consider the good faith or lack thereof of the plaintiff in proposing the expert as well as the defendant's waiting to challenge the proposed expert until this later stage of litigation.<sup>14</sup>

3. No. Nurse Ho was not qualified to serve as an expert because she did not spend a majority of her professional time in the year preceding the injury practicing clinical treatment.<sup>15</sup>

**Disposition:** Paragraphs 17–19 and 38 of the Court of Appeals' opinion, stating that the Rasors should have received additional time to obtain qualifying expert testimony, are vacated. The case is remanded to the Court of Appeals for further proceedings consistent with the opinion.<sup>16</sup>

**Rule:** In appropriate circumstances, a defendant may file a motion for summary judgment instead of challenging a plaintiff's preliminary expert affidavit. The plaintiff may then seek relief under Ariz. R. Civ. P. 56(d), at which point the judge may defer considering the summary judgment motion and determine whether the plaintiff is entitled the opportunity to substitute a new expert.

### **Reasoning:**

- **Establishing and Challenging Expert Qualifications:** The court began its discussion section with an overview of Arizona medical malpractice statutes. A.R.S. § 12-2603 sets forth the requirements for preliminary expert affidavits, while § 12-2604 sets forth the requisite expert qualifications to testify on standard of care.<sup>17</sup> When an expert is deemed necessary, a plaintiff must file with her initial disclosure statement a preliminary expert opinion affidavit setting forth the expert's qualifications.<sup>18</sup> Section 12-2604 states the requisite qualifications for standard-of-care experts, three of which the Court found pertinent to this case: The expert must specialize at the time of the occurrence in the same specialty, must be board certified in that specialty, and must have devoted a majority of the person's professional time to the active clinical practice of the same health profession in the same specialty.<sup>19</sup> The plaintiff asserts that by failing to challenge the preliminary expert affidavit, NWMC effectively waived its opportunity to challenge Ho's qualifications.<sup>20</sup> The Court disagrees with this assertion and states that the proper recourse for a plaintiff whose expert's qualifications are challenged for the first time in a summary judgment

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at \*6.

<sup>16</sup> *Id.* at \*7.

<sup>17</sup> *Id.* at \*3.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

motion is to seek relief under Rule 56(d).<sup>21</sup> The judge may defer considering the summary judgment motion to determine whether the plaintiff should have an opportunity to consider a new expert.<sup>22</sup>

- **Nurse Ho's Expert Qualifications:** The Court agrees with the Court of Appeals that Nurse Ho is unqualified to provide expert standard-of-care testimony, regardless of whether the care at issue involved a specialty as opposed to general practice.<sup>23</sup> Nurse Ho did not spend a majority of her professional time in the year preceding the injury in the active clinical practice of the same health profession because she is a wound-care specialist who worked at a long-term care facility as a wound care coordinator and did not work as an ICU nurse.<sup>24</sup>

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<sup>21</sup> *Id.* at \*4.

<sup>22</sup> *Id.* at \*5.

<sup>23</sup> *Id.* at \*6

<sup>24</sup> *Id.*