

**MEDICAL MALPRACTICE
RECENT DEVELOPMENTS: MARCH 2010 – MARCH 2011**

**By Matthew D. Ballew
Zaytoun Law Firm, PLLC
3130 Fairhill Drive, Suite 100
Raleigh, NC 27612
Tel: (919) 832-6690
Fax: (919) 831-4793
mballew@zaytounlaw.com**

DISCLAIMER: With the radical medical malpractice bill (Senate Bill 33, Fifth Edition) and general tort reform bill (House Bill 542, First Edition) currently working their way through the General Assembly, it is fair to question how many of the recent medical malpractice cases handed down by our appellate courts will continue to be good law in the coming months. Based on this author's view of the reform bills as currently written, **all** of the case law reported in this manuscript will continue to be controlling and/or instructive on the medical malpractice issues we face every day in our practice, even if the current language of the bills are codified into law. That being said, it is entirely possible that the legislative landscape could undergo a dramatic change subsequent to the publication of this manuscript. As a result, please continue to monitor the legislative updates on SB 33, HB 542 and other tort reform measures yet to be introduced, and consider what effect, if any, these proposed statutes will have on the issues and decisions reported in this manuscript.

TABLE OF CONTENTS

<u>Hawkins v. SSC Hendersonville Operating Company,</u> ___ N.C. App. ___, 690 S.E.2d 840, 2010 N.C. App. LEXIS 361 (2010) <i>Rule 702(b); G.S. § 90-21.12</i>	p.5
<u>Campbell v. Duke University Health System, Inc.,</u> ___ N.C. App. ___, 691 S.E.2d 31, 2010 N.C. App. LEXIS 496 (2010), <i>disc.</i> <i>review denied</i> , 364 N.C. 434, 702 S.E.2d 220 (2010) <i>Rule 9(j); Rule 702(b)</i>	p.8
<u>Allen v. County of Granville, Granville Medical Center, et. al.,</u> ___ N.C. App. ___, 691 S.E.2d 124, 2010 N.C. App. LEXIS 535 (2010) <i>Rule 9(j); G.S. § 90-21.11</i>	p.11
<u>Langwell v. Albemarle Family Practice,</u> ___ N.C. App. ___, 692 S.E.2d 476; 2010 N.C. App. LEXIS 725 <i>Rule 59 Motion for New Trial; Judges' Order and Findings of Fact</i>	p.14
<u>Grantham v. Crawford,</u> ___ N.C. App. ___, 693 S.E.2d 245, 2010 N.C. App. LEXIS 800 (2010), <i>disc. review denied</i> , 364 N.C. 325, 700 S.E.2d 752, 2010 N.C. LEXIS 621 <i>Rule 702(b); G.S. § 90-21.12; Rule 9(j)</i>	p.17
<u>Bryson v. Haywood Regional Medical Center,</u> ___ N.C. App. ___, 694 S.E.2d 416, 2010 N.C. App. LEXIS 1059, <i>disc. review denied</i> , 703 S.E.2d 158, 2010 N.C. LEXIS 971 (2010) <i>Peer Review Privilege – N.C.G.S. § 131E-95(b)</i>	p.21

Day v. Brant, p.24
___ N.C. App. ___, 697 S.E.2d 345; 2010 N.C. App. LEXIS 1267
Rule 702(b); G.S. § 90-21.12

Cummings v. Ortega, p.30
___ N.C. App. ___, 697 S.E.2d 513; 2010 N.C. App. LEXIS 1554
Rule 59 Motion for New Trial; Juror misconduct

Munn v. Haymount Rehabilitation & Nursing Center, Inc., p.33
___ N.C. App. ___, 704 S.E.2d 290; 2010 N.C. App. LEXIS 2414
Hospital; Arbitration Agreements

Perry v. The Presbyterian Hospital, p.36
___ N.C. App. ___, 703 S.E.2d 850; 2011 N.C. App. LEXIS 1
Breach; Causation; Agency relationship of Hospital and Doctors

Brown v. Kindred Nursing Centers East, LLC., p.39
364 N.C. 76; 692 S.E.2d 87
Rule 9(j)

APPENDIX

Foundational Medical Malpractice Cases:

Crocker v. Roethling, 363 N.C. 140, 150, 675 S.E.2d 625, 633 (2009) (Martin, J., concurring) p. 42

Pitts v. Nash Day Hosp., Inc., 167 N.C. App. 194, 605 S.E.2d 154 (2004); p. 55

Henry v. Southeastern Ob-Gyn Assocs., P.A., 145 N.C. App. 208, 211, 550 S.E.2d 245, 247, aff'd 354 N.C. 570, 557 S.E.2d 530 (2001) p. 62

Current Medical Malpractice Statutes:

N.C.G.S. § 90-21.11: Definition of Health Care Provider p. 70

N.C.G.S. § 90-21.12: Definition of Standard of Care p. 71

N.C.G.S § 1A-1 Rule 9(j): Medical Malpractice Pleading Requirements p. 72

N.C.G.S. § 8C-1, Rule of Evidence 702(a): Causation Testimony by Medical Malpractice Experts p. 74

N.C.G.S. § 8C-1, Rule of Evidence 702(b): Standard of Care Testimony by Medical Malpractice Experts p. 74

Proposed Med Mal / Tort Reform Bills Pending in N.C.G.A.

Senate Bill 33 (Fifth Edition) p. 76

House Bill 542 (First Edition) p. 82

INTRODUCTION

This manuscript provides an analysis of all reported, published medical malpractice opinions from the North Carolina Court of Appeals and the North Carolina Supreme Court since March 2010 to the present (March 15, 2011). The cases are arranged in chronological order according to their appellate opinion filing date. For each case, I have provided a grey box snapshot of all the background data on the case in (e.g. county of origin, plaintiff/defense attorneys involved, and author of opinion), as well as a analysis of the case according to a classic law school style framework (e.g. procedural history, factual background, rules/controllering authority, analysis and arguments, and impact of the case on our practice.) No unpublished opinions have been analyzed in this manuscript, though several medical malpractice unpublished opinions have been handed down since March 2010.

Each case also contains a brief section explaining why I believe the opinion will continue to be controlling and/or instructive law even if the current versions of Senate Bill 33 and House Bill 542 are enacted into law.

Many of these cases were litigated by fellow members of the NCAJ, and most received discussion on the NCAJ listservs. Please note that I have only analyzed the facts and law contained in each written, published opinion. Out of fairness, I have refrained from including any facts/arguments learned about the case through listserv discussion that do not already appear in the text of each opinion.

To better appreciate the impact of the cases reported in this manuscript, the Appendix contains selected statutes and prior case law that provides the legal backdrop upon which these current cases were decided. The Appendix also contains the most current editions of both Senate Bill 33 and House Bill 542 (as of May 3, 2011) for your reference.

Hawkins v. SSC Hendersonville Operating Company,

____ N.C. App.____, 690 S.E.2d 840, 2010 N.C. App. LEXIS 361 (2010)

(Case now pending before N.C. Sup. Ct.)

County of Origin & File No.:

Henderson County, 06 CVS 35

NCCOA Filed Date:

March 2, 2010

Plaintiff Attorney(s):

Gary Poliakoff and Raymond Mullman, Jr.
(Poliakoff and Associates, P.A.)
Adam Stein (for appeal to N.C. Sup. Ct.)

Defense Attorney(s):

Leslie O'Toole (Ellis & Winters, LLP)
Malcom J. Harkins, III (Proskauer Rose, LLP)
Lori Proctor (Proctor & Ervin, P.C.)

Judge (Author of opinion):

Bryant, Wanda G.

Judges (Concurring / Dissenting):

Chief Judge Martin, John C. (concur)
Hunter, Robert C. (concur)

Type of Medical Care Involved:

Nursing Home; Wrongful death

Decision for Plaintiff or Defense Bar?

Defense

Procedural History:

Appeal by defendant of the trial court's denial of defendant's (1) a Rule 50 motion for directed verdict at the close of plaintiff's evidence, and (2) a Rule 50 motion for judgment notwithstanding the verdict after the jury returned a verdict in favor of plaintiff.

Background Facts:

Decedent Hawkins, an 86 year old dementia patient suffering from multiple co-morbidities, was admitted to defendant Brian Center Health and Rehabilitation in 2004 as a pneumonia and high fall risk patient. As a result, "Hawkins' comprehensive care plan provided nine care measures to mitigate his risk of falling." Over a six month span at defendant nursing home, Hawkins fell four times and eventually fractured his left hip. Shortly after surgery, Hawkins contracted a MRSA infection that developed into pneumonia and caused him to die. A nursing malpractice wrongful death action was initiated by Hawkins' estate in January 2006, and the trial commenced in November 2007.

Key Case Facts:

Plaintiff tendered three, out-of-state nursing home experts at trial: (1) Dr. Jonathan Klein (licensed in Virginia, expert in internal medicine, geriatric medicine, and a nursing home medical director); (2) Katherine Johnson, R.N. (licensed in Florida, nursing expert); and (3) Janet White, R.N. (licensed in Virginia, expert in nursing home administration).

Each expert witness testified the federal Omnibus Reconciliation Act ("OBRA") created a uniform, national standard of care for all nursing homes across the country, and as such this national standard applied to defendant Brian Center in Hendersonville, NC. Plaintiff's experts then testified that defendant breached this uniform, national standard of care in various ways, including by willful violations of policies and procedures, lack of training and competence, and intentional falsification of clinical records by defendant nursing home staff.

On *voir dire* and cross examination it was pointed out that none of the plaintiff's three experts had any specific familiarity with available resources, level of training and experience, funding, or local standards of practice for either defendant Brian Center or the greater Hendersonville, NC

nursing home community. Defendant moved for directed verdict and JNOV arguing that plaintiff had failed to establish, through any of its three experts, the standard of care that applied to the “same or a similar community” as defendant Brian Center as required by N.C.G.S. § 90-21.12.

Issue(s):

Did plaintiff satisfy the “same or similar community” requirement by offering evidence of a national standard of care, established by federal OBRA regulations, applicable to actions by defendant nursing home staff such as willful violations of policies and procedures, lack of training and competence, and intentional falsification of clinical records?

Holding:

No. The trial court erred by denying defendant’s motions for directed verdict and JNOV.

Rules / Controlling Authority:

“To meet their burden of proving the applicable standard of care, plaintiffs must satisfy the requirements of N.C.G.S. § 90-21.12 . . .” *Hawkins*, 690 S.E.2d at 38 (quoting *Crocker v. Roethling*, 363 N.C. 140, 142, 675 S.E.2d 625, 628 (2009) (citations omitted)).

“We interpreted this statute in *Henry*, 145 N.C. App. 208, 550 S.E.2d 245, as requiring more from a plaintiff than testimony merely establishing a national standard of care.” *Id.*

Here, the *Hawkins* court recognized a past trend in the NCCOA holding that “[w]here the standard of care is the same across the country, an expert witness familiar with that standard may testify despite his lack of familiarity with the defendant's community.” *Id.* at 38 (quoting *Haney v. Alexander*, 71 N.C. App. 731, 736, 323 S.E.2d 430, 434 (1984), *disc. review denied*, 313 N.C. 329, 327 S.E.2d 889 (1985)). However, the *Hawkins* court pointed out that “[t]his Court, however, has recognized very few ‘uniform procedures’ to which a national standard may apply, and to which an expert may testify.” *Id.* at 39 (quoting *Henry*, 145 N.C. App. at 211, 550 S.E.2d at 247).

The court here considered the *Pitts* case to be controlling authority on the national standard of care issue, saying that N.C.G.S. § 90-21.12 “requires some level of familiarity with a defendant’s community even if an expert testifies the standard is the same across the country . . . In making such a determination, a court should consider whether an expert is familiar with a community that is similar to a defendant's community in regard to physician skill and training, facilities, equipment, funding, and also the physical and financial environment of a particular medical community.” *Id.* (quoting *Pitts v. Nash Day Hosp., Inc.*, 167 N.C. App. at 197, 605 S.E.2d at 156 (2004)).

Analysis & Arguments:

The Plaintiff argued on appeal that despite their experts’ lack of specific familiarity with defendant’s nursing home community and resources, “[t]he type of care rendered in nursing homes is precisely the type of care that the Court in *Henry* suggested would support a national standard of care.” *Id.* at FN 5.

The NCCOA here dodged this argument by offering the following conclusory analysis: “On the contrary, the only procedures that *Henry* explicitly mentions as subject to a national standard are ‘the taking of vital signs or the placement of bedpans.’ *Henry*, 145 N.C. App. at 211, 550 S.E.2d at 247. We do not consider plaintiff's allegations of defendants' ‘reckless conduct, willful violation of policies and procedures, lack of training and competence, and intentional

falsification of [Hawkins'] clinical record' to be analogous to the misplacement of bedpans." *Id.* at FN 5.

The court here concluded by reasoning that even though the plaintiff's experts testified that a national standard applied to the defendant Brian Center, they "did not testify to any familiarity with the Brian Center or the community in which it is located," and they "did not testify regarding whether its standards of practice were in fact the same or different from the national standard." *Id.* at 40.

Thus, the plaintiffs failed to meet their burden under G.S. § 90-21.12 "same or similar community" requirement as interpreted by *Henry* and *Pitts*.

Interesting Points of Note:

In Footnote 6, the NCCOA recognized the logical inconsistency of holding that an expert was unfamiliar with the standard applicable to the defendant community when the same expert testified that a national standard applies to all communities across the country, saying, "We nonetheless further recognize that this issue is ripe for a definitive ruling by our Supreme Court and therefore urge our Supreme Court to grant discretionary review." *Id.* at FN 6.

Impact of Decision on Plaintiff's Practice:

This case exemplifies the difficulty of establishing the N.C.G.S. 90-21.12 "same or similar community" requirement when a national standard of care truly applies to the defendant provider. The familiar lesson from this case is that, ***even if a national standard actually applies***, you must arm your standard of care expert with enough research data for him/her to be able to demonstrate a baseline level of familiarity with defendant's local medical community, or similar medical communities, in terms of standards of practice, physician skill, training, facilities, equipment, funding, and/or demographics of the surrounding environment.

As a last resort at trial, you can always attempt to get the defense standard of care experts to admit on cross or *voir dire* that (1) they are familiar with the local standards that apply to defendant provider's community, and (2) that they are the same as the national standard of care previously testified to by plaintiff's expert. Good luck with that.

Effect of SB 33/HB 542 on Decision:

The "same or similar community" standard of care for nursing home negligence is preserved in both proposed bills. Therefore, this case will be continue to be good law on what level of "same or similar community" familiarity your witness must demonstrate in order to qualify as a standard of care expert.

Campbell v. Duke University Health System, Inc.,
____ N.C. App.____, 691 S.E.2d 31, 2010 N.C. App. LEXIS 496 (2010),
disc. review denied, 364 N.C. 434, 702 S.E.2d 220 (2010)

County of Origin & File No.:

Wake County, 07 CVS 11243

NCCOA Filed Date:

March 16, 2010

Plaintiff Attorney(s):

James M. Johnson (Law Office of)
Brent D. Adams (Brent Adams & Assoc.)

Defense Attorney(s):

Mark E. Anderson (Mcguire Woods)
Monica E. Webb (Mcguire Woods)
Renee B. Crawford (Crawford & Crawford)
Robert O. Crawford (Crawford & Crawford)

Judge (Author of opinion):

Hunter, Robert N.

Judges (Concurring / Dissenting):

Elmore, Rick (concur)
Steelman, Sanford (concur)

Type of Medical Care Involved:

Orthopedic Surgery; Anesthesiology

Decision for Plaintiff or Defense?

Defense

Procedural History:

Appeal by plaintiff from trial court's grant of summary of judgment for defendants based on plaintiff's alleged failure to demonstrate compliance with Rule 9(j) through discovery.

Background Facts:

Plaintiff tore his shoulder rotator cuff while working as a plumber, and decided to undergo orthopedic repair surgery. Defendant orthopedic surgeon, Dr. Kevin P. Speer, performed the operation and co-defendant Dr. Donald A. Edmonson served as the attending anesthesiologist. Defendants placed plaintiff in the "beach chair position" during surgery, a standard shoulder surgery position with the plaintiff's arms resting at either side. After the surgery, plaintiff developed left arm ulnar neuropathy (nerve pain and inflammation in the arm and hand), a condition which he had never experienced before the surgery. Plaintiff filed a direct evidence medical negligence complaint alleging that defendants improperly padded, positioned and monitored his arm during the surgery causing him injury. Plaintiff certified the complaint under Rule 9(j), and later designated a Florida anesthesiologist, Dr. Jeffrey Cocozzo, as his expert witness who would testify to defendants' breach and causation.

Key Case Facts:

Plaintiff did **not** state a *res ipsa loquitur* claim for medical negligence here. Instead, plaintiff alleged, and argued in his summary judgment brief, a case for direct evidence medical negligence.

Plaintiff's expert, Dr. Cocozzo, was questioned at his deposition about what specific acts or omissions of defendants he believed constituted a breach in the standard of care. In response, Dr. Cocozzo admitted the following key facts to the defense:

- (1) Because the plaintiff developed the ulnar neuropathy for the first time directly following the surgery, he is presuming the defendants caused this injury during the surgery;

- (2) He could not point to any specific incidents that happened during the surgery that caused plaintiff's ulnar neuropathy; and
- (3) The basis for his opinion that improper positioning caused plaintiff's injury is simply that the plaintiff did not have this injury before he underwent the arm positioning during the defendants' surgery.

Based on the above deposition testimony, defendants moved for summary judgment on two grounds that plaintiff could forecast no evidence of (1) any acts or omissions by defendants constituting a breach in the standard of care, and (2) any acts or omissions by defendants that proximately caused plaintiff's injury.

The trial court granted defendants' motions for summary judgment, citing *Kenyon v. Gehrig*, 183 N.C. App. 455, 459, 645 S.E.2d 125, 128 (2007), *disc. review denied*, 362 N.C. 176, 658 S.E.2d 272 (2008).

Issue(s):

Did plaintiff's testimony raise a genuine issue of fact as to defendants' breach and causation?

Holding:

No. The trial court properly granted defendants' motions for summary judgment.

Rules / Controlling Authority:

In order to survive summary judgment in a medical negligence case, the plaintiff must forecast some evidence of causation through expert testimony. *Click v. Pilot Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980).

"The evidence of causation in a medical negligence case 'must be probable, not merely a remote possibility.'" *Campbell*, 691 S.E.2d at 36 (quoting *White v. Hunsinger*, 88 N.C. App. 382, 387, 363 S.E.2d 203, 206 (1988)).

In medical negligence cases, "where 'plaintiff's expert witnesses based their opinions only on the fact of the injury itself; their assignation of negligence on defendants' part constituted mere speculation' and is insufficient to withstand a motion for summary judgment." *Id.* at 35 (quoting *Kenyon v. Gehrig*, 183 N.C. App. 455, 459, 645 S.E.2d 125, 128 (2007), *disc. review denied*, 362 N.C. 176, 658 S.E.2d 272 (2008)).

Analysis & Arguments:

Because plaintiff's sole expert was "unable to point to any specific incident or action of any defendant during plaintiff's 9 February 2004 surgery that would have caused plaintiff's injuries," and because he admitted "that he presumes defendants were negligent because plaintiff sustained an injury," plaintiff did not forecast any competent evidence of medical causation. *Id.* at 37

Even though plaintiff certified under Rule 9(j) that his expert would testify that the defendant improperly positioned, padded and monitored plaintiff's arm during surgery, "plaintiff's expert does not connect any action or inaction of defendants' to the injuries sustained." *Id.*

Interesting Points of Note:

The court went out of its way in dicta to remind us about the pitfalls of *res ipsa loquitur* to medical negligence cases, saying "our Courts are reluctant to apply the doctrine in medical

malpractice cases,” and “to allow the jury to infer negligence merely from an unfavorable response to treatment would be tantamount to imposing strict liability on health care providers.” *Id.* at 36 (quoting *Kenyon*, 183 N.C. App. at 460, 645 S.E.2d at 128-29).

Impact of Decision on Plaintiff’s Practice:

When in the initial review process of case, do not be satisfied if an expert tells you that he/she believes there was a breach because the plaintiff received “just the type of injury you would expect from this kind of operation/event.” You must force the expert to “connect some action or inaction” of the defendant provider to your client’s injuries. Remember, the expert does not have to be certain of what actions or inactions caused your client’s injury. All that’s required is that your expert must be able to point to a specific action or inaction by the defendant and say, “in my opinion, the defendant **more likely than not** acted (or failed to act) in the following ways, and these actions (or inactions) **more likely than not** caused your client’s injury.”

Effect of SB 33/HB 542 on Decision:

The current version of HB 542 attempts to replace Rule 702(a) with the *Daubert* test of admissibility used in federal courts (See HB 542, First Edition, Section 1.4). Although there will be a higher bar of admissibility for causation testimony by experts under the *Daubert* rules, nothing about the *Daubert* criteria will change the basic, common law rule that causation opinions in a medical malpractice case must stated to a “more likely than not” degree of certainty. Even though both SB 33 and HB 542 attempt to change this standard for Emergency Room negligence claims (See SB 33, Section 6; HB 542, Section 2.2(b)), this case is not an ER negligence case.

Allen v. County of Granville, Granville Medical Center, et. al.,
___ N.C. App. ___, 691 S.E.2d 124, 2010 N.C. App. LEXIS 535 (2010)

County of Origin & File No.:

Granville County, 08 CVS 875

NCCOA Filed Date:

April 6, 2010

Plaintiff Attorney(s):

Glen D. Bachman (Bachman & Swanson)

Defense Attorney(s):

C. Houston Foppiano (Cranfill, Sumner)
Meredith Taylor Berard (Cranfill, Sumner)

Judge (Author of opinion):

Chief Judge Martin, John C.

Judges (Concurring / Dissenting):

Calabria, Ann Marie (concur)
Geer, Martha (concur)

Type of Medical Care Involved:

Hosp. Emergency Dept.; Discharge patients

Decision for Plaintiff or Defense?

Plaintiff

Procedural History:

Appeal by plaintiff from trial court's grant of defendants' motions to dismiss for plaintiff's lack of a Rule 9(j) certification in the complaint.

Background Facts:

The plaintiff's son, the decedent, was transported by ambulance to the defendant Emergency Department for seizures. Later that day, the plaintiff was contacted and told his son was ready to be discharged. The plaintiff informed the defendant E.D. that his son was disabled, had a history of seizures, and could not be released on his own. The plaintiff asked that his son be held in the defendant E.D. until plaintiff could arrive and take him home in a few hours. When the plaintiff arrived at the defendant E.D. the decedent had been released and was no where to be found. Months later, the decedent's remains were found at the bottom of a nearby ravine.

Key Case Facts:

Plaintiff filed suit and alleged ordinary negligence of the defendants in releasing the decedent without supervision. The plaintiff did not allege medical negligence, and as such did not include a Rule 9(j) certification in the complaint.

All defendants moved for dismissal based on the fact that defendants' alleged conduct constituted the furnishing of medical care pursuant to G.S. § 90-21.11, and therefore a Rule 9(j) certification was required.

Issue(s):

Did plaintiff's allegations of ordinary negligence against the defendant Emergency Department regarding the discharge of her decedent-son actually describe a medical malpractice action for failure to furnish professional medical services?

Holding:

No. The trial court improperly granted defendants' motion to dismiss under Rule 9(j).

Rules / Controlling Authority:

A medical malpractice action is defined by statute in G.S. 90-21.11 as any “civil action for damages . . . arising out of the furnishing or failure to furnish professional services in the performance of . . . health care by a health care provider.” *Allen*, 691 S.E.2d at 126 (quoting N.C. Gen. Stat. 90-21.11 (2007)).

“Professional services has been defined by this Court to mean an act or service arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor [or] skill involved is predominantly mental or intellectual, rather than physical or manual.” *Id.* (quoting *Lewis v. Setty*, 130 N.C. App. 606, 608, 503 S.E.2d 673, 674 (1998)).

“This Court has determined that when a negligence claim ‘arises out of policy, management or administrative decisions,’ it is ‘derived from ordinary negligence principles.’” *Id.* (quoting *Estate of Waters v. Jarman*, 144 N.C. App. 98, 103, 547 S.E.2d 142, 145, *disc. review denied*, 354 N.C. 68, 553 S.E.2d 213 (2001)).

“In addition, this Court has found that failing to supervise a mentally and physically infirm patient while she smoked was ordinary negligence.” *Id.* (quoting *Taylor v. Vencor, Inc.*, 136 N.C. App. 528, 529, 530, 525 S.E.2d 201, 202, 203, *disc. review denied*, 351 N.C. 646, 543 S.E.2d 884, *disc. review denied*, 351 N.C. 646, 543 S.E.2d 889 (2000)).

Analysis & Arguments:

In regards to the specific language of the plaintiff’s negligence allegations in her complaint, the court pointed out that the plaintiff never made any claim regarding the failure to furnish any professional services, any unsound medical decision-making or professional judgment by hospital employees, or any claim for “medical malpractice” or breach in any medical standard of care.

The court analogized to the *Taylor* case, *supra*, and found that “failing to supervise a patient recently treated with seizures until a responsible adult was able to care for him would be a claim for ordinary negligence.”

Impact of Decision on Plaintiff’s Practice:

For those who wish to state a claim for ordinary negligence against a medical provider, this case is instructive on how to not cross the line into medical negligence allegations. The court here basically outlines all the ways in which the plaintiff could have crossed that line here, but managed to avoid it.

Effect of SB 33/HB 542 on Decision:

The current reform bills may have a large impact on this case, but that is a matter for debate. The court here found that the actions of the hospital in failing to supervise were not a “failure to furnish professional services” under G.S. 90-21.11, and therefore the plaintiff did not bring a medical malpractice action requiring a Rule 9(j) certification. Both SB 33 and HB 542 attempt to make negligent supervision claims by hospitals claims for medical malpractice by express statutory language (See SB 33, Section 5; HB 542, Section 2.2(a)).

However, both bills say that a civil action against a hospital for negligent monitoring will be a medical malpractice action under 90-21.11 **only if** the claim “arises from the same facts or circumstances as a claim under sub-subdivision a. of this subdivision.” Subdivision a here is referring to 90-21.11(a), which remains unchanged in both proposed bills, and states that an action for personal injury will deemed a medical malpractice action where it arises “out of the

furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider.”

Since the Allen court here found that the hospital’s actions did not amount to the “furnishing of professional services,” there is no way the plaintiff’s claim could satisfy the proposed SB 33/HB 542 prong that the claim against the hospital “arises from the same facts or circumstances as a claim under” G.S. 90-21.11(a). Given that all statutes in derivation of the common law must be construed strictly, this author believes that a strong argument exists that the Allen case will still be good law on the issues decided.

Langwell v. Albemarle Family Practice,

___ N.C. App. ___, 692 S.E.2d 476; 2010 N.C. App. LEXIS 725

County of Origin & File No.:

Camden County, 08 CVS 875

NCCOA Filed Date:

May 4, 2010

Plaintiff Attorney(s):

C. Everett Thompson, II
Roswald B. Daly, Jr. (Baker, Jones, Daly...)

Defense Attorney(s):

Jerry A. Allen (Walker Allen)
O. Drew Grice, Jr. (Walker Allen)

Judge (Author of opinion):

Stephens, Linda

Judges (Concurring / Dissenting):

Calabria, Ann Marie (concur)
Geer, Martha (concur)

Type of Medical Care Involved:

Family practice nursing; Differential Dx

Decision for Plaintiff or Defense?

Defense

Procedural History:

Appeal by defendants from trial court's grant of plaintiff's Rule 59 motion for a new trial.

Background Facts:

Decedent presented to defendant Albemarle Family Practice and was seen by defendant Tamely Tyson, a family nurse practitioner. Decedent reported to nurse Tyson that he had been dizzy and vomiting early in the week, and presently he was coughing up yellowish, blood-tinged phlegm, and was experiencing mild shortness of breath. Decedent had a history of diabetes, hypertension and high cholesterol. Defendant Tyson diagnosed decedent with pneumonia, administered and prescribed him antibiotics, and discharged him home after ordering him to the local hospital for a chest x-ray to confirm the pneumonia diagnosis. Decedent went for the x-ray and then went home to rest. By 11:00 p.m. that night, decedent experienced increased difficulty in breathing and a decline in his mental status. Decedent died in the car while his wife was driving him to the local emergency room. An autopsy revealed that decedent suffered from not only pneumonia, but also significant coronary artery disease.

Key Case Facts:

At the trial presided over by Judge Milton F. Fitch, the defense introduced three experts on standard of care, a family nurse practitioner, and two family practice doctors. The two physicians were admitted as experts at trial without any objection from plaintiff. The plaintiff objected to the qualifications of defense's family practice nurse, but after the plaintiff's *voir dire* Judge Fitch overruled plaintiff's objection and allowed her to testify as an expert. All three experts testified that defendant Nurse Tyson did not breach the standard of care.

At the end of the trial, the jury returned a verdict for the defense and the plaintiff thereafter filed a Rule 59 motion for new trial. At the hearing on said motion, plaintiff argued that the jury's verdict was "against the weight of the evidence" of defendant's negligence and was due to prejudice or passion. Without elaborating any reasons behind his decision, Judge Fitch ruled "in his discretion" that plaintiff should be awarded a new trial.

Defendants responded by filing a Rule 52 motion requesting specific findings of fact and conclusions of law from Judge Fitch in support of his order. Plaintiff drafted a proposed order which included a set of findings of fact and conclusions of law. Defendants objected to plaintiff's

proposed order on two grounds: (1) plaintiff's findings of fact totally omitted any mention of the trial testimony of defense's family nursing expert, which was found admissible at trial, and (2) plaintiff's conclusion of law incorrectly stated that they jury had been misled by "unreliable testimony" from the defense. Defendants filed a revised proposed set of facts, but Judge Fitch rejected this submission and entered the order drafted by plaintiffs.

Issue(s):

Did Judge Fitch err by entering its order for a new trial based on plaintiff's findings of fact and conclusions of law as written?

Holding:

Yes. The trial court abused its discretion in granting a new trial by entering plaintiff's proposed order.

Rules / Controlling Authority:

"Pursuant to Rule 59(a)(7) of the North Carolina Rules of Civil Procedure, a judge may grant a new trial if there is insufficient evidence to justify the verdict or if the verdict is contrary to law." *Langwell*, 692 S.E.2d at 480.

"Appellate review of the trial court's ruling on a Rule 59 motion 'is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge.'" *Id.* (quoting *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982)).

"The jury's function as trier of fact must be given the utmost consideration and deference before a jury's decision is to be set aside." *Id.* (quoting *Di Frega v. Pugliese*, 164 N.C. App. 499, 510, 596 S.E.2d 456, 464 (2004)).

Analysis & Arguments:

The court focused its ruling on the same two bases that led defendants to object to plaintiff's proposed order.

First, Judge Fitch's order made no mention whatsoever of the trial testimony of defense's family nursing expert. Judge Fitch himself allowed this expert to testify at trial on the standard of care over the objection and *voir dire* of plaintiff. The NCCOA here found the testimony of defense's family nursing expert to be "essential" to the case given that it was the care provided by a family nurse practitioner that was being questioned. Thus, the court here concluded the following: "Although neglecting to mention a witness's testimony in the court's findings of fact is not an abuse of discretion per se, by omitting any reference to Nurse Waldrop's critical expert testimony, the order on its face reveals that the trial court failed to consider all the competent and relevant evidence presented at trial." *Id.* at 482.

Second, the NCCOA took issue with the conclusion of law in Judge Fitch's order stating that the jury had been "misled by unreliable testimony on the part of the defense," and therefore had "returned an erroneous verdict." *Id.* The court here pointed out the Judge Fitch's order fails to identify any specific testimony that he found was "unreliable," and moreover any testimony that was actually unreliable would have been excluded from trial (i.e. all opinion testimony that was allowed in at trial by Judge Fitch was necessarily reliable evidence.) "For these reasons, we find no support for the trial court's Rule 59 order in its 'finding' that the jury was 'misled' by 'unreliable testimony on the part of the defense[.]'" *Id.*

Thus, these glaring omissions from Judge Fitch's order caused the NCCOA here to be "reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Id.*

Impact of Decision on Plaintiff's Practice:

This case highlights the importance of understanding and keeping mind judicial standards when drafting proposed orders. The standard for granting a Rule 59 new trial is "insufficiency of the evidence" (i.e. ***after all the competent evidence presented at trial is considered***, they jury's verdict was against the greater weight of that evidence.) By drafting a one-sided order that editorialized and omitted key testimony of the defense, the judge's order was found to have been abuse of discretion because, on its face, it failed to consider all the competent evidence at trial. The lesson here is to not get lulled into a false sense of security when you have a judge who agrees with your motion and arguments whole-heartedly. It's great when that happens, but you have to protect that judge by laying the proper foundation for a valid proposed order.

Effect of SB 33/HB 542 on Decision:

The current reform bills do not deal in any way with Rule 59, and thus will have no effect on the precedential value of this case and the issues decided.

Grantham v. Crawford,

____ N.C. App.____, 693 S.E.2d 245, 2010 N.C. App. LEXIS 800 (2010),
disc. review denied, 364 N.C. 325, 700 S.E.2d 752, 2010 N.C. LEXIS 621 (2010)

County of Origin & File No.:

Guilford County, 07 CVS 607

NCCOA Filed Date:

May 18, 2010

Plaintiff Attorney(s):

Adam Stein (Ferguson, Stein...)
William Simpson (Ferguson, Stein...)
James E. Ferguson (Ferguson, Stein...)

Defense Attorney(s):

Samuel G. Thompson (Smith, Anderson...)
Robert E. Desmond (Smith, Anderson...)
Elizabeth Horton (Smith, Anderson...)
Pamela A. Robertson (Carruthers & Bailey)

Judge (Author of opinion):

Jackson, Barbara

Judges (Concurring / Dissenting):

Chief Judge Martin, John C. (concur)
Ervin, Sam (concur)

Type of Medical Care Involved:

OB-GYN, Labor and Delivery

Decision for Plaintiff or Defense?

Plaintiff

Procedural History:

Appeal by plaintiff from trial court's order of summary judgment in favor of defendants pursuant to Rule 9(j).

Background Facts:

In 1997, Plaintiff was delivered at defendant High Point Regional Hospital, a Level II community hospital. Plaintiffs filed a complaint alleging that defendants negligently delivered plaintiff causing him subsequent neurological injuries.

Key Case Facts:

Plaintiff offered two 9(j) experts, Dr. Gurewitsch, a New York OB-GYN, and CNM Kelly, a registered nurse certified in midwifery that previously practiced in N.C. but was practicing in Florida at the time of the alleged negligence.

- **Background information on Dr. Gurewitsch includes:** did her OB-GYN residency at LaGuardia Hospital, a small community hospital in New York with four labor rooms, one OB operating room, and an anesthesiologist whom doctors had to call from home; in the year immediately preceding the incident, Dr. Gurewitsch was a licensed OB-GYN physician and practicing fellow in maternal and fetal medicine at New York Hospital, Cornell University.
- **Deposition and subsequent affidavit of Dr. Gurewitsch:** In deposition, Dr. Gurewitsch "generally had been lacking such specific information" regarding the local medical community of High Point, N.C. or the standards of practice applicable to a hospital such as defendant High Point Regional. In a subsequent affidavit, however, Dr. Gurewitsch cured this deficiency and recited knowledge of the High Point community, the population, per capita income, the number of beds at defendant High Point Regional Hospital OB unit, said she had reviewed the Policies and Procedures of defendant High Point Regional, and stated she had

- **Background information on CNM Kelly includes:** registered nurse and certified in midwifery in 1980; practicing in Raleigh from 1980 through 1990, but did not perform deliveries from 1985 to 1990; did not maintain her NC license after 1990; from 1990 to 2000 (including the year in question) she practiced and delivered babies at Bethesda Memorial Hospital in Florida, a Level 2 hospital with six labor rooms.
- **Deposition and subsequent affidavit of CNM Kelly:** In deposition, CNM Kelly also “generally had been lacking such specific information” regarding the local medical community of High Point, N.C., but demonstrated more familiarity than did Dr. Gurewitsch in her deposition. For example, CNM Kelly stated she had reviewed the defendant Hospital’s Policies and Procedures or the standards of practice applicable to a hospital such as defendant High Point Regional, and that her current hospital in Florida was also a Level II facility where the staff had to call in separate C-section operating teams, as they did at defendant High Point Regional. In her subsequent affidavit, CNM Kelly attempted to cure any deficiencies by reciting knowledge of the High Point community, the population, per capita income, the number of beds at defendant High Point Regional Hospital OB unit, and by stating she had experience practicing in a community hospital with similar equipment to defendant High Point Regional.

Subsequent to the above depositions and affidavits, Defendants moved for summary judgment on the basis of plaintiff’s alleged non-compliance with Rule 702(b), Rule 9(j) and G.S. 90-21.12.

Issue(s):

- 1) Could plaintiff have reasonably expected his expert witnesses to qualify under Rule 702(b), thereby satisfying the Rule 9(j) pleading requirement?
- 2) Did plaintiff’s expert demonstrate enough familiarity with the “same or similar community” standard of G.S. 90-21.12 during discovery to withstand summary judgment?

Holding:

Yes on both issues. The trial court improperly granted defendants’ motions for summary judgment, and this “close case” should be remanded to the trial court for *voir dire* by the trial court as to plaintiff experts’ familiarity with the “same or similar community” standard pursuant to the mandates of Justice Martin’s dissent in *Crocker v. Roethling*, 363 N.C. 140, 150, 675 S.E.2d 625, 633 (2009) (Martin, J., concurring).

Rules / Controlling Authority – Issue No.1 (see above):

“This Court inquires as to whether plaintiff reasonably expected Dr. Gurewitsch and CNM Kelly to qualify as expert witnesses pursuant to Rule 702, not whether they ultimately will qualify. . . In other words, were the facts and circumstances known or those which should have been known to the pleader such as to cause a reasonable person to believe that the witness would qualify as an expert under Rule 702.” *Grantham*, 693 S.E.2d at 248 (citing *Trapp v. Maccioli*, 129 N.C. App. 237, 241, 497 S.E.2d 708, 711 (1998)).

“Our statutes and case law do not require an expert to have actually practiced in the community in which the alleged malpractice occurred, or even to have practiced in a similar community . . .

[O]ur law does not prescribe any particular method by which a medical doctor must become familiar with a given community. Book or Internet research may be a perfectly acceptable method of educating oneself regarding the standard of medical care applicable in a particular community.” *Id.* at 248-249 ((quoting *Crocker*, *Id.* at 151, 675 S.E.2d at 633 (Martin, J., concurring)).

Analysis & Arguments – Issue No.1 (see above):

“In the instant case, Dr. Gurewitsch was a licensed physician -- she had received her license in 1992, five years before the incident in question; she worked in the same speciality as Dr. Crawford -- both specialized in obstetrics; and in the year prior to the incident, she spent a majority of her time in either clinical practice or teaching -- she spent all of her time as a medical fellow, practicing obstetrics and gynecology and teaching residents. Therefore, she satisfies the three basic elements of Rule 702(b).” *Id.* at 249.

“We agree with plaintiff that defendants' arguments concerning Dr. Gurewitsch's being supervised during the year in question and her lack of board certification at the time go to the weight of her testimony, rather than to her initial qualification.” *Id.*

Rules / Controlling Authority – Issue No.2 (see above):

The Grantham court cited *Crocker* and *Barringer* as controlling law on the issue of G.S. 90-21.12 compliance. The *Barringer* case explained the rule in *Crocker* saying:

“Our Supreme Court has instructed that ‘[w]hen the proffered expert's familiarity with the relevant standard of care is unclear from the paper record, our trial courts should consider requiring the production of the expert for purposes of voir dire examination . . . [P]articularly when the admissibility decision may be outcome-determinative, the expense of voir dire examination and its possible inconvenience to the parties and the expert are justified in order to ensure a fair and just adjudication.” *Barringer v. Wake Forest Univ. Baptist Med. Ctr.*, 677 S.E.2d 465, 474 (2009) (quoting *Crocker*, 363 N.C. at 146, 675 S.E.2d at 631) (Martin, J., concurring)).

Analysis & Arguments – Issue No.2 (see above):

The court here found, as in *Crocker* case, that “a discrepancy appeared between the knowledge to which the expert testified in his deposition and the knowledge included in his subsequent affidavit.” *Grantham*, 693 S.E.2d at 249.

Thus, the court concluded that this was a *Crocker/Barringer* “close case,” stating, “[t]he paper record, therefore, may be ambiguous -- i.e. a close case -- with respect to the extent of these experts' bases of knowledge.”

Interesting Points of Note:

The court here placed emphasis on the fact that the one of the plaintiff's experts had reviewed defendant High Point Regional's Policies and Procedures prior to deposition: “Of particular relevance is CNM Kelly's reference to the policies and procedures of High Point Regional during her deposition. CNM Kelly specifically quoted the applicable policies of High Point Regional and explained that the nurses did not follow these policies and procedures during plaintiff's delivery. Clearly, the policies of the specific hospital at issue are relevant evidence of that hospital's local standard of care.” *Id.* at 250.

Impact of Decision on Plaintiff's Practice:

You must arm your standard of care expert with enough research data for him/her to be able to demonstrate – at deposition – a baseline level of familiarity with defendant’s local medical community, or similar medical communities, in terms of standards of practice, physician skill, training, facilities, equipment, funding, and/or demographics of the surrounding environment. Don’t wait until after the deposition and try to cure with an affidavit. To be safe, give your expert up front far more local-defendant data than appears necessary to establish this baseline familiarity. If you don’t, you run the risk of the court considering the paper record to be a *Crocker* “close case” and ordering your expert to *voir dire*.

Effect of SB 33/HB 542 on Decision:

The “same or similar community” standard of care for non-emergency room negligence is preserved in both proposed bills. Therefore, this case will be continue to be good law on what level of “same or similar community” familiarity your witness must demonstrate in order to qualify as a standard of care expert.

Bryson v. Haywood Regional Medical Center,
____ N.C. App.____, 694 S.E.2d 416, 2010 N.C. App. LEXIS 1059,
disc. review denied, 703 S.E.2d 158, 2010 N.C. LEXIS 971 (2010)

County of Origin & File No.:

Haywood County, 08 CVS 309

NCCOA Filed Date:

June 15, 2010

Plaintiff Attorney(s):

Robert M. Elliot (Elliot Pishko Morgan, PA)

Defense Attorney(s):

Allan R. Tarleton (Van Winkle, Buck, Wall...)

Judge (Author of opinion):

Geer, Martha

Judges (Concurring / Dissenting):

Stroud, Donna (concur)

Ervin, Sam (concur)

Type of Medical Care Involved:

NOTE: *This is not a medical malpractice case, but it contains relevant analysis of peer review privilege per G.S. 131E-95(b)*

Decision for Plaintiff or Defense?

Plaintiff

Procedural History:

Appeal by defendant Haywood Regional Medical Center from trial court's grant of plaintiff's motion to compel discovery of certain hospital documents alleged to be peer review privileged.

Background Facts:

Plaintiff was an internist who worked for defendant hospital. Plaintiff noticed several patient safety issues at the hospital ICU and DOCU, including drug dosing/administration mistakes, failure to adequately follow doctors' orders, and nurses texting and making cell phone calls while on duty. Plaintiff made several complaints through Risk Management per hospital policy. Subsequently, plaintiff contends she was wrongfully terminated in retaliation for her actions. Plaintiffs sought discovery of certain documents and the hospital refused to produce them on the basis of peer review privilege.

Key Case Facts:

Plaintiff sought discovery of two categories of documents from defendant hospital: (1) internal emails and memorandums, and (2) documents transmitted between defendant hospital and an outside company called "MDReview."

- **First Category documents included:** 12/17/07 Email from defendant hospital's director of Risk Management to a person named Janet Ledford, with the subject "Peer Review Request," which summarizes six instances of patient care at defendant hospital; 12/18/07 memorandum that indicated the hospital's director of Clinical Services had requested a "peer review," contained summaries of six instances of patient care and failed to mention the memo's author or purpose or recipients; 12/19/07 memorandum authored by chairman of hospital's ICU, addressed to the director of Clinical Services, containing summaries of six instances of patient care, and written at the request of the "Hospital Board for information concerning allegations" raised by the plaintiff.

- **Second Category documents included:** Letter from a company called “MDReview” to the chairman of hospital’s ICU regarding assistance with “peer review needs;” six documents entitled “Peer Review Report” authored by a hospital physician; and a hospital physician’s CV. All of these documents had a disclaimer statement saying “CONFIDENTIAL PEER REVIEW” that was “prepared at the hospital’s request in order to provide an independent professional opinion on the care rendered” by defendant hospital.

Defendant hospital never offered any evidence of affidavits supporting its claim of privilege or why the elements of G.S. 131E-95(b) were met for any of the above documents. Accordingly, the court was forced to consider the documents on their face.

Defendant hospital argued that it was clear from the face of the emails and memos that they related to internal peer review investigations of patient charts at the request of Risk Management, and therefore the court should assume they were generated by of for a “medical review committee.”

Issue(s):

Did the information contained on the face of these documents support the defendant hospital’s claims of G.S. 131E-95(b) privilege?

Holding:

No. The defendant failed to meet its burden of proving peer review privilege and the trial court’s order to compel discovery is affirmed

Rules / Controlling Authority:

“By its plain language, N.C. Gen. Stat. § 131E-95 creates three categories of information protected from discovery and admissibility at trial in a civil action: (1) proceedings of a medical review committee, (2) records and materials produced by a medical review committee, and (3) materials considered by a medical review committee.” *Bryson*, 694 S.E.2d at 420 (quoting *Woods v. Moses Cone Health Sys.*, ___ N.C. App. ___, 678 S.E.2d 787, 791-92 (2009), *disc. review denied*, 363 N.C. 813, 693 S.E.2d 353 (2010)).

Medical review committee is defined in G.S. 131E-76(5).

HOWEVER: “Permitting access to information not generated by the committee itself but merely presented to it does not impinge on this statutory purpose. These kinds of materials may be discovered and used in evidence even though they were considered by the medical review committee.” *Id.* (quoting *Shelton v. Morehead Mem’l Hosp.*, 318 N.C. 76, 83-84, 347 S.E.2d 824, 829 (1986)).

“In *Hayes*, 181 N.C. App. at 752, 641 S.E.2d at 319, this Court stressed that mere assertions that documents constitute peer review materials and meet the requirements of *Shelton* are insufficient . . . The title, description, or stated purpose attached to a document by its creator is not dispositive, nor can a party shield an otherwise available document from discovery merely by having it presented to or considered by a quality review committee.” *Id.* at 421 (quoting *Hayes*).

Analysis & Arguments:

- **Regarding the First Category of documents (see “Key Facts” above):** Defendant presented no evidence that either the author or recipient of the 12/17/07 email were members of a “medical review committee” under G.S. 131E-76(5); the author and recipients of the 12/18/07 were never even identified; and neither documents explicitly states it was generated for review or consideration by a medical review committee; the 12/19/07 memo may have indicated it was authored for the “Hospital Board,” but the memo never explains what the Hospital Board actually is and defendant presented no evidence that the Hospital Board was a medical review committee. Thus, the defendant completely failed to carry its burden of proving peer review privilege under 131E-95(b).
- **Regarding the Second Category of documents (see “Key Facts” above):** Defendant failed to show any evidence that “MDReview” is a “peer review organization or corporation” under G.S. 131E-76(5)(d), or that the MDReview authored the documents for a peer review purpose. Even though the title of the documents say peer review, the title, description or stated purpose is not dispositive under *Hayes, supra*.

Interesting Point of Note:

Normally, an order to compel discovery is interlocutory and no immediate right of appeal is available. However, this case points out that when a claim of statutory privilege is involved, this affects a substantial right such that the ruling is immediately appealable under N.C.G.S. §§ 1-277(a) and 7A-27(d)(1).

Impact of Decision on Plaintiff’s Practice:

This case is a good re-affirmation of the fact that defendant healthcare providers cannot merely assert that a document is peer-review privileged, or title it “peer reviewed.” They bear the full burden of proving some prong of the privilege applies pursuant to the *Hayes* case.

Effect of SB 33/HB 542 on Decision:

The current reform bills do not deal in any way with peer review privilege under N.C. Gen. Stat. § 131E-95, and thus will have no effect on the precedential value of this case and the issues decided.

Day v. Brant,

____ N.C. App.____, 697 S.E.2d 345; 2010 N.C. App. LEXIS 1267
(Defendant's request for re-hearing granted by NCCOA)

County of Origin & File No.:

Iredell County, 04 CVS 2917

NCCOA Filed Date:

July 20, 2010

Plaintiff Attorney(s):

John J. Korzen
David A. Manzi

Defense Attorney(s):

Norman F. Klick, Jr. (Carruthers & Roth)
Robert N. Young (Carruthers & Roth)
Kevin A. Rust (Carruthers & Roth)

Judge (Author of opinion):

Geer, Martha

Judges (Concurring / Dissenting):

Hunter, Robert C. (concur)
Calabria, Ann Marie (concur)

Type of Medical Care Involved:

Emergency Room; DDX after MVA Trauma

Decision for Plaintiff or Defense?

Plaintiff

Procedural History:

Appeal by plaintiffs from trial court's (Judge Christopher Collier) grant of directed verdict to defendants.

Background Facts:

Decedent was injured in a motor vehicle accident and brought to defendant Lake Norman Regional Medical Center's Emergency Department. He presented with a seatbelt abrasion from his left shoulder to his right upper abdomen, bruises on his arms and legs, and reporting chest and neck pain. Multiple x-rays, CT scans and blood work was taken, however the defendant ER physicians never took ultrasound or CT of decedent's abdomen. Decedent was discharged home with pain medications. Later that night, decedent was found dead in his home from a liver rupture and internal bleeding.

Key Case Facts:

At trial, plaintiff called one standard of care expert and one causation expert.

- **Plaintiff's standard of Care expert.** Plaintiff called Dr. Paul Mele, a board certified emergency medicine physician with 20 years of experience, who opined that defendants breached the standard of care by failing to properly consider abdominal trauma based on decedent's signs and symptoms. Dr. Mele testified, *inter alia*, that the liver and spleen are most commonly injured after blunt force trauma to the abdomen; a seatbelt alone can injure these organs; and defendant ER doctors should have considered an abdominal injury despite the fact that decedent was reporting no abdominal pain or broken ribs.
- **Plaintiff's causation expert.** Plaintiff called Dr. James O. Wyatt, III, an expert trauma surgeon, who testified that had decedent been given proper initial and subsequent management after presentation to the ED, he would have more likely than not survived. Specifically, Dr. Wyatt testified that had defendants performed a CT of decedent's abdomen or pelvis they would have been able to

At the close of plaintiff's evidence, defendants moved for a directed verdict on two general bases: (1) plaintiff's standard of care expert was not qualified, and (2) plaintiff's causation expert had not shown proximate cause.

Specifically, defendant made a multitude of arguments :

- **Defendant Argument 1:** Plaintiff's standard of care opinion should have been excluded because expert never testified that he was a licensed physician;
- **Defendant Argument 2:** Plaintiff's standard of care opinion should have been excluded because expert failed to show he was familiar with the defendant's medical community at the time of the alleged breach;
- **Defendant Argument 3:** Plaintiff's standard of care opinion should have been excluded because expert acquired most of his information regarding the defendant's medical community after reaching his opinion and having his deposition taken;
- **Defendant Argument 4:** Plaintiff's standard of care opinion should have been excluded because expert never testified to the specific things he learned about defendant's medical community, and did not give any specific testimony regarding the physician skill, training, facilities, equipment, funding or physical and financial environment of the defendant medical community;
- **Defendant Argument 5:** Plaintiff's standard of care opinion should have been excluded because expert incorrectly applied a national standard of care to defendants;
- **Defendant Argument 6:** Plaintiff's causation opinion should have been excluded because expert's opinions regarding the decedent's chance of survival had he been admitted to the hospital amounted to mere speculation;
- **Defendant Argument 7:** Plaintiff's causation opinion should have been excluded because expert himself admitted that his opinion was "speculation;"
- **Defendant Argument 8:** Plaintiff's causation opinion should have been excluded because expert merely testified that decedent would have "had a better chance of survival" had he been properly treated by defendants.

Issue(s):

Was plaintiff's testimony on standard of care and causation sufficient to go to the jury in the face of all the above arguments?

Holding:

Yes. The trial court improperly granted defendant's motion for directed verdict on both grounds.

Rules / Controlling Authority – Defendant Argument 1:

Rule 702(b) requires an expert giving medical standard of care testimony to be a "licensed health care provider in this State or another state."

Analysis & Arguments – Defendant Argument 1:

Even though expert never specifically stated he was a licensed physician in any state, and even though he was never asked this question, “he testified that he was an emergency medicine physician, that he was board certified, that he used to have emergency room privileges at Rex Hospital in Raleigh, North Carolina, and that he now had other hospital privileges at Rex Hospital. A jury could reasonably infer from this testimony that Dr. Mele did in fact have a medical license.” *Day*, 697 S.E.2d at 349.

Rules / Controlling Authority – Defendant Argument 2:

Pursuant to G.S. 90-21.12, “[i]f a plaintiff’s standard of care expert witness ‘fail[s] to demonstrate that he [is] sufficiently familiar with the standard of care ‘among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action,’ then the ‘plaintiff [is] unable to establish an essential element of his claim, namely, the applicable standard of care,’ and the trial court properly enters judgment on behalf of the defendant.” *Id.* (quoting *Smith*, 159 N.C. App. at 197, 582 S.E.2d at 673)).

Analysis & Arguments – Defendant Argument 2:

The court pointed out all that plaintiff’s expert had done to familiarize himself with the standards of practice of defendants and similar medical communities, including: he had reviewed defendants’ deposition transcripts; he had reviewed information on defendant’s medical community including population, number of hospital beds, facilities in hospital, kinds of patients seen, and diagnostic services available – all of which were similar to hospitals in which he had worked; he had done internet research demographic information on defendant’s community and determined it to be similar to Wake County where he practiced; during his career he had the opportunity to consult with physicians working in communities similar to that of defendants’ and determined the standard of care to be the same as his own community; and finally, he had reviewed the defendants’ medical group website to learn about their qualifications, training and experience, which he concluded was comparable to his own.

Based on the above, the court concluded that the expert was sufficiently familiar under G.S. 90-21.12 by analogizing to four seminal cases where similar actions by the expert were enough to qualify him: *Billings v. Rosenstein*, 174 N.C. App. 191, 194, 619 S.E.2d 922, 924 (2005); *Pitts v. Nash Day Hosp., Inc.*, 167 N.C. App. 194, 199, 605 S.E.2d 154, 157 (2004), *aff’d per curiam*, 359 N.C. 626, 614 S.E.2d 267 (2005); *Coffman v. Roberson*, 153 N.C. App. 618, 624, 571 S.E.2d 255, 259 (2002), *disc. review denied*, 356 N.C. 668, 577 S.E.2d 111 (2003); *Leatherwood v. Ehlinger*, 151 N.C. App. 15, 22-23, 564 S.E.2d 883, 888 (2002), *disc. review denied*, 357 N.C. 164, 580 S.E.2d 368 (2003).

Rules / Controlling Authority – Defendant Argument 3:

The court cited *Roush v. Kennon*, 188 N.C. App. 570, 576, 656 S.E.2d 603, 607, *disc. review denied*, 362 N.C. 361, 664 S.E.2d 309 (2008) as controlling authority where NCCOA rejected the argument that an expert who “supplemented his understanding of the applicable standard of care” after his deposition by researching the defendant medical community automatically disqualified his opinion testimony at trial.

Analysis & Arguments – Defendant Argument 3:

The court here concluded that there was “no meaningful distinction between this case and *Roush*,” and therefore the plaintiff’s expert opinion could not be disqualified on this basis. *Day*, 697 S.E.2d at 350.

Rules / Controlling Authority – Defendant Argument 4:

“[A]n expert witness cannot simply assert that he is familiar with the applicable standard of care without also providing an explanation of the basis for his familiarity.” *Id.* at 351 (citing *Smith*, 159 N.C. App. at 196, 582 S.E.2d at 672).

Analysis & Arguments – Defendant Argument 4:

The court reasoned that because “Dr. Mele established in his testimony that he had done research and had personal knowledge that supplied the information that the expert in *Smith* lacked . . . his testimony provided a basis -- his research and personal knowledge -- for his claim of familiarity. This case does not involve a bare statement of familiarity such as that present in *Smith*.” *Id.*

Rules / Controlling Authority – Defendant Argument 5:

“It is, however, established that mere mention of a national standard is not sufficient to warrant disregard of an expert's testimony if the expert has testified regarding his or her familiarity with the standard of care in the same or similar communities.” *Id.* (citing *Roush*, 188 N.C. App. at 576, 656 S.E.2d at 607-08; *Pitts*, 167 N.C. App. at 197, 605 S.E.2d at 156; *Cox v. Steffes*, 161 N.C. App. 237, 244, 246, 587 S.E.2d 908, 913, 914 (2003), *disc. review denied*, 358 N.C. 233, 595 S.E.2d 148 (2004)).

Analysis & Arguments – Defendant Argument 5:

Even though plaintiff's expert stated several times that the standard of care for emergency room physicians in this situation would be “the same in any city in America,” he “repeatedly rejected defense counsel's attempt to extend [his] opinion to all cities and limited his opinion, as our courts require, to those cities having the same facilities, resources, and training available. In any event . . . he specifically testified that the standard of care he was applying was the standard of care for defendants' community, just like the experts in *Roush*, *Pitts*, and *Cox*.” *Id.* at 352.

Rules / Controlling Authority – Defendant Argument 6:

Where a causation expert testifies that it's “possible” a plaintiff's injury could have been prevented had defendants admitted plaintiff to the hospital, but also gives “a detailed explanation of how admission to a hospital . . . could have prevented plaintiff's [injury],” then the testimony raises “more than a ‘mere possibility or conjecture’ and [is] sufficient to withstand a directed verdict.” *Id.* (quoting *Felts v. Liberty Emergency Serv., P.A.*, 97 N.C. App. 381, 388-89, 388 S.E.2d 619, 623 (1990)).

Analysis & Arguments – Defendant Argument 6:

Here, on top of plaintiff's causation expert testimony that plaintiff would have “had a greater than 50 percent chance of surviving” had he been admitted to defendant hospital, he “explicitly set out how, if the laceration had been discovered, a rupture and internal bleeding could have been prevented or stopped. Under *Felts*, this was sufficient evidence of proximate cause.” *Id.* at 354.

The court dismissed defendants' reliance on three cases regarding speculative causation opinions. First, the court distinguished *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000), and *Azar v. Presbyterian Hosp.*, 191 N.C. App. 367, 371, 663 S.E.2d 450, 453 (2008), *cert. denied*, 363 N.C. 372, 678 S.E.2d 232 (2009), by pointing out that the decedent's cause of death was not in dispute here like it was in *Young* and *Azar*. Second, the court distinguished *Campbell v. Duke Univ. Health Sys., Inc.*, ___ N.C. App. ___, 691 S.E.2d 31, 37 (2010) because here, unlike in *Campbell*, plaintiff's expert is able to point to defendants' failure to diagnose decedent's rupture liver as a specific omission causing the death.

Rules / Controlling Authority – Defendant Argument 7:

If expert causation testimony “is based merely upon speculation and conjecture . . . it is no different than a layman's opinion, and as such, is not sufficiently reliable to be considered competent evidence on issues of medical causation.” *Day*, 697 S.E.2d at 352 (quoting *Azar*, 191 N.C. App. at 371, 663 S.E.2d at 453).

Analysis & Arguments – Defendant Argument 7:

“Although Dr. Wyatt used the word ‘speculation’ in portions of his testimony, our review of the entirety of his testimony indicates that Dr. Wyatt was not labeling as speculation his opinion that if Duncan's liver laceration had been diagnosed and treated, he would have had a 51% chance of survival. Rather, we read his testimony as acknowledging that the practice of putting a specific percentage on Duncan's chance of survival is inherently speculative.” *Id.* at 355.

“Dr. Wyatt, however, ultimately testified that ‘most’ patients with Duncan's injury who are treated in accordance with the standard of care will survive and that he believes Duncan would have survived.’ This opinion is sufficient to establish a probability of survival regardless of the precise numerical percentage used.” *Id.*

Rules / Controlling Authority – Defendant Argument 8:

“[P]roof of proximate cause in a malpractice case requires more than a showing that a different treatment would have improved the patient's chances of recovery . . . The connection or causation between the negligence and death must be probable, not merely a remote possibility.” *Id.* at 356 (quoting *White v. Hunsinger*, 88 N.C. App. 382, 387, 363 S.E.2d 203, 206 (1988)).

Analysis & Arguments – Defendant Argument 8:

“Dr. Wyatt specifically testified that when patients with liver lacerations like that suffered by Duncan are hospitalized, monitored, and treated, ‘most’ of them survive. He further testified that if the defendants had followed the standard of care, Duncan would have had a better than 51% chance of survival and that he believes Duncan would have survived. In sum, Dr. Wyatt's testimony established that Duncan's survival was not merely possible but rather was probable if defendants had complied with the standard of care.” *Id.*

“Although defendants point out that Dr. Wyatt could not say to an absolute certainty that Duncan would have survived, absolute certainty is not required.” *Id.*

Impact of Decision on Plaintiff's Practice:

This case is a practically a miniature legal treatise on how to overcome all the common defense objections to **both** standard of care and causation opinions. All of the rulings and analysis used here to find the plaintiff's expert opinions admissible could later be used to prop up your own experts, or serve as a roadmap for ideas on how to attack the defense's experts. This is especially true for the court's analysis of the law on “mere speculation or conjecture” causation opinions. It would be wise to store a copy of this case in your brief bank just to have all of this law in one place.

In regard to **Defendant Argument 3** above, be wary of defense attorneys who attempt to get your consent to a discovery scheduling order that prevents your expert witnesses from reviewing materials or doing any research after his or her deposition. This is emerging as a trend with some defense DSO's, and when in place it totally cripples your witness from curing before trial any 90-21.12 deficiencies that may pop up during his or her deposition.

Effect of SB 33/HB 542 on Decision:

Both of the current reform bills attempt to alter the burden of proof for emergency room medical malpractice (See SB 33, Section 6, “clear and convincing” standard’ HB 542, Section 2.2(b), “gross negligence” standard). Therefore, all portions of this case dealing with the admissibility of causation opinions stated in terms of “more likely than not,” “greater than 50% chance of survival,” etc., will not be considered controlling case law if the current bills are enacted as written. However, given that both reform bills retain the “same or similar community” standard from G.S. 90-21.12, all portions of this case dealing with the qualifications of the plaintiff’s standard of care opinions will continue to be good, controlling law even if the bills are enacted as currently written.

Cummings v. Ortega,

___ N.C. App. ___, 697 S.E.2d 513; 2010 N.C. App. LEXIS 1554

County of Origin & File No.:

Harnett County, 05 CVS 894

NCCOA Filed Date:

August 17, 2010

Plaintiff Attorney(s):

Patrick E. Neighbors (Neighbors Law Firm)

Defense Attorney(s):

Renee B. Crawford (Crawford & Crawford)
Robert O. Crawford (Crawford & Crawford)
Arienne P. Blandina (Crawford & Crawford)

Judge (Author of opinion):

Hunter, Robert N.

Judges (Concurring / Dissenting):

McGee, Linda M. (concur)
Stroud, Donna S. (concur)

Type of Medical Care Involved:

OB-GYN; Laparoscopy; Laceration of artery

Decision for Plaintiff or Defense?

Plaintiff

Procedural History:

Appeal by defendants from trial court's grant of plaintiff's Rule 59(a) motion to set aside the jury verdict for the defense, and from trial court's denial of defendant's Rule 60 motion for reconsideration.

Background Facts:

Plaintiff underwent a diagnostic laparoscopy for infertility by defendant OB-GYN. During the surgical procedure, plaintiff's right external iliac artery was lacerated. Subsequently, plaintiff began suffering from pain and other ailments in her right leg. Plaintiff filed a medical malpractice complaint against defendants based on the inadvertent laceration. At trial, the jury returned a verdict for the defense finding no negligence. Shortly thereafter, plaintiff filed a Rule 59(a) motion for a new trial based on alleged juror misconduct involved discussions on the merits of the case occurring between jurors before jury deliberations that went unreported to the trial judge.

Key Case Facts:

Before jury selection, during every jury selection recess, after the final twelve jurors were impaneled, before all sixty recesses that occurred during the three week trial, and before jury deliberations commenced, trial judge Steve Balog instructed the jury pursuant to N.C.P.I. Civ. 100.200 that they were to have no discussions regarding the case of any kind, with any persons, until the court instructed them to do so in the deliberation room at the end of the case.

Two days after the jury returned a unanimous verdict in favor of defendants, plaintiff was contacted by juror Rachel Simmons, who later submitted an affidavit to the court averring the following facts regarding juror misconduct of Mr. Githens, juror 8: prior to any evidence by the plaintiff, Githens made comments while in the deliberation room that his mind was already made up, and he wished the plaintiff had died so they wouldn't have to sit through the trial; Githens also attempted to discuss the case on its merits with other jurors prior to deliberations.

Less than a month later, a corroborating affidavit was submitted to the court by juror Joel Murphy averring the following facts: prior to actual juror deliberations, juror Githens made comments to other jurors that his mind was made up, and no evidence was going to change it;

Githens was extremely discourteous to the female jurors; several jurors did not engage in full deliberations due, in part, due to Githens' comments.

Plaintiff filed a Rule 59(a) motion for a new trial based on the above affidavits, and argued that (1) because juror Githens violated the judge's clear instructions by making comments on the case before deliberations had officially begun, and (2) no other jurors reported this misconduct to the judge as instructed, a new trial should be granted.

In granting the plaintiff's motion, the trial court stated that it had only considered the admissible, competent portions of the juror affidavits (i.e. those portions that discuss misconduct occurring before any sacred juror deliberations actually began), and found any matters in the affidavits relating to comments or feelings after deliberations had begun were found inadmissible and not considered.

Four months later, defendants submitted a rebuttal affidavit of juror Githens that averred, *inter alia*, the following: he did not recall making any of the alleged comments; but if he did make the comments the other jurors they "were not meant to be taken literally" by the other jurors, or "intended to sway, intimidate or persuade" them; and he cared deeply about serving as a juror in the case. Based on this affidavit, defendants file a Rule 60 motion for reconsideration of the court's grant of a new trial.

Defendants argued in their Rule 60 motion that the trial court (1) erred by considering juror affidavits to impeach the verdict of the jury, and (2) the trial court considered inadmissible evidence contained in the juror affidavits and thereby committed legal error in granting a new trial.

Issue(s):

Did the trial court abuse his discretion by basing his award of a new trial on portions of the juror affidavits?

Holding:

No. The trial court did not manifest an abuse of discretion by considering certain portions of the juror affidavits it deemed admissible evidence, and the grant of a new trial is affirmed.

Rules / Controlling Authority:

N.C. Rule of Evidenec 606(b): "Inquiry into validity of verdict or indictment. – Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes."

"With regard to the trial court's review of the jurors' affidavits to grant plaintiff a new trial, we note that the trial judge is presumed to be capable of distinguishing competent evidence from incompetent evidence." *Cummings*, 697 S.E.2d at 520 (citing *Blackwell v. Hatley*, ___ N.C. App. ___, 688 S.E.2d 742, 745-46 (2010)).

“Not every violation of a judge's instruction merits a new trial; however, this conduct is placed on a sliding scale which is balanced by the trial judge's discretion and duty to ensure a fair trial . . . We believe the trial judge understood the substantial costs to the parties and the courts in overturning a jury verdict. However, where the trial judge finds that the fairness of the judicial process has been breached under Rule 59(a), he has the broad discretion to balance these competing concerns to achieve a just result, and our case law does not allow us to vacate this decision absent manifest abuse.” *Id.* at 521-22. (citing *Davis*, 360 N.C. at 523, 631 S.E.2d at 118).

Analysis & Arguments:

“Upon review, all the affidavits evince that some jurors began discussing the merits of the case before deliberations began, against the repeated instructions of the court. This fact appears uncontested. Furthermore, it appears from all affidavits that after such discussions had taken place, that no juror reported to the trial judge, any misconduct which was against the repeated instructions of the court . . . the factual inference that remains is that some jurors discussed the case before deliberations and no juror reported these discussions to the trial judge. For purposes of Rule 59(a) these acts would qualify as competent evidence to show a trial irregularity, misconduct of the jury, or manifest disregard by the jury of the instructions of the court.” *Id.* at 521.

“While the preliminary discussions of evidence by one or more jurors is improper, the failure of any of the twelve jurors to bring it to the attention of the judge is more serious, because it creates an impression that the jurors cannot understand what the judge is repeatedly telling them and cannot conform their conduct to the repeated instructions.” *Id.* at 521.

Impact of Decision on Plaintiff's Practice:

This case does a good job of explaining the various types of juror misconduct that (1) are bad enough to warrant a new trial under the “sliding scale” analysis, and (2) is admissible evidence under Rule 606(b) for the judge to consider. Decisions like these really underscore the importance of contacting and speaking with jurors as soon as possible after the conclusion of the case. You never know what they may tell you, and how it may affect what seems like a closed matter.

Effect of SB 33/HB 542 on Decision:

The current reform bills do not deal in any way with peer review privilege under Rule 606(b), and thus will have no effect on the precedential value of this case and the issues decided.

Munn v. Haymount Rehabilitation & Nursing Center, Inc.,
____ N.C. App.____, 704 S.E.2d 290; 2010 N.C. App. LEXIS 2414

County of Origin & File No.:
Cumberland County, 05 CVS 894

NCCOA Filed Date:
December 21, 2010

Plaintiff Attorney(s):
Adam Stein (Ferguson, Stein...)
Anne Duvoisin (Ferguson, Stein...)

Defense Attorney(s):
Barry S. Cobb (Yates, McLamb & Weyher)

Judge (Author of opinion):
Stroud, Donna S.

Judges (Concurring / Dissenting):
Chief Judge Martin, John C. (concur)
Ervin, Sam (concur)

Type of Medical Care Involved:
Nursing Home; Arbitration; Agency

Decision for Plaintiff or Defense?
Plaintiff

Procedural History:

Appeal by defendants from trial court's (1) denial of defendant's motion to compel arbitration and (2) grant of plaintiff's motion dismiss defendant's claim for arbitration.

Background Facts:

Plaintiff-mother filed medical malpractice / wrongful death complaint on behalf of decedent-adult daughter against defendant nursing home, and defendant responded by filing a motion to compel arbitration pursuant to an alleged arbitration agreement between plaintiff, on behalf of decedent, and defendant nursing home. Plaintiff then moved to dismiss defendant's motion to compel on the basis that no valid arbitration agreement existed between decedent and defendant.

Key Case Facts:

Decedent was admitted to defendant nursing home unresponsive and unable to communicate in any way. Defendant had no prior experience or dealings with decedent or decedent's family. Plaintiff was distracted at the time of admission by how bad the conditions were in defendant nursing home and was not paying attention to the paperwork being given to her, and as such she signed a "Mandatory Arbitration" agreement between the defendant nursing and decedent, with plaintiff listed as the "Responsible Party" for her decedent-adult daughter. Plaintiff did not ask any questions regarding this provision when she signed. The decedent herself never signed the agreement. At the time of signature, Plaintiff had no power of attorney or guardianship over her decedent-adult daughter, and defendant never required any proof of Plaintiff's legal authority to sign on her adult daughter's behalf. Based on these facts, the trial court concluded that no valid arbitration agreement existed between decedent and defendant nursing home.

Defendants appealed arguing an agreement existed under the following agency and equitable principles

Issue(s):

Did an agency relationship, either actual or apparent, exist between plaintiff and decedent such that plaintiff bound decedent's estate to the arbitration agreement upon signature?

Holding:

No. The trial court properly concluded no agency relationship existed between decedent and plaintiff, and thus no valid arbitration agreement existed between decedent.

Rules / Controlling Authority:

“A principal is liable upon a contract duly made by its agent with a third person in three instances: when the agent acts within the scope of his or her actual authority; when a contract, although unauthorized, has been ratified; or when the agent acts within the scope of his or her apparent authority, unless the third person has notice that the agent is exceeding actual authority.” *Munn*, 704 S.E.2d 294-95 (quoting *First Union Nat'l Bank v. Brown*, 166 N.C. App. 519, 527, 603 S.E.2d 808, 815 (2004)).

“Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.” *Id.* (quoting *Colony Assocs. v. Fred L. Clapp & Co.*, 60 N.C. App. 634, 637-38, 300 S.E.2d 37, 39 (1983)).

- **Actual Authority.** “[I]n establishing the existence of an actual agency relationship, the evidence must show that a principal actually consents to an agent acting on its behalf.” *Id.* at 295 (quoting *Phillips v. Rest. Mgmt. of Carolina, L.P.*, 146 N.C. App. 203, 217, 552 S.E.2d 686, 695 (2001) (emphasis added), *disc. review denied*, 355 N.C. 214, 560 S.E.2d 132 (2002)).
- **Apparent Authority.** “The scope of an agent's apparent authority is determined not by the agent's own representations but by the manifestations of authority which the principal accords to him.” *Id.* (quoting *McGarity v. Craighill, Rendleman, Ingle & Blythe, P.A.*, 83 N.C. App. 106, 109, 349 S.E.2d 311, 313 (1986), *disc. review denied*, 319 N.C. 105, 353 S.E.2d 112 (1987)).

Analysis & Arguments:

- **Actual Authority.** “The fact that [plaintiff] identified ‘her mother [as] her next of kin and primary contact’ and that in periods when she could communicate, [decedent] ‘never asked to change any of the decisions made by her mother’ does not demonstrate that [plaintiff] had actual authority as [decedent]’s agent. Neither [decedent]’s ‘words and actions’ nor the ‘facts and circumstances[,]’ *Harris* at 830, 534 S.E.2d at 655, establish that [decedent] ‘actually consent[ed] to . . . [plaintiff] acting on [her] behalf.’” *Id.*
- **Apparent Authority.** “All of the evidence indicated that [plaintiff] was consulted about and made decisions regarding her daughter's medical treatment, but it does not indicate that [plaintiff] was authorized as or acted as if she were authorized to be [decedent]’s general agent in matters such as arbitration agreements. Defendants also argue that ‘[decedent] deferred to [plaintiff] as having authority to sign the paperwork[;]’” defendants do not argue that [decedent] made any manifestation of [plaintiff]’s authority at the time of the signing of the paperwork as at that time she was ‘not responsive’ and unable ‘to speak or communicate . . . However, consent for medical care for another person who is unable to consent is a completely different issue than being an agent who has the authority to enter into a contract such as an arbitration agreement.’” *Id.* at 296.

Impact of Decision on Plaintiff's Practice:

This case provides an excellent analysis of the ways in which to get out of a standard arbitration agreement in cases where a "responsible party" signs on behalf of an unresponsive patient who is admitted to a hospital/nursing home. In those instances, you should build your case for getting out of the arbitration agreement around agency principles as outlined in the opinion above. This case also gives a concise and helpful discussion of why hospitals/nursing homes cannot really state any legitimate public policy concerns behind the court finding arbitration agreements invalid in these situations.

Effect of SB 33/HB 542 on Decision:

The current reform bills do not deal in any way with common law agency principles, or arbitration agreements, and thus will have no effect on the precedential value of this case and the issues decided.

Perry v. The Presbyterian Hospital,

___ N.C. App. ___, 703 S.E.2d 850; 2011 N.C. App. LEXIS 1

County of Origin & File No.:

Mecklenburg County, 08 CVS 3763

NCCOA Filed Date:

January 4, 2011

Plaintiff Attorney(s):

James E. Ferguson (Ferguson, Stein...)
C. Margaret Errington (Ferguson, Stein...)
Lareena Jones Phillips (Ferguson, Stein...)

Defense Attorney(s):

Scott M. Stevenson (Shumaker Loop & Kendrick)

Judge (Author of opinion):

Elmore, Rick.

Judges (Concurring / Dissenting):

Jackson, Barbara (concur prior to 12.31.10)
Stephens, Linda (concur)

Type of Medical Care Involved:

Compartment syndrome; Post-op mgmt

Decision for Plaintiff or Defense?

Plaintiff

Procedural History:

Appeal by plaintiff from trial court's grant of summary judgment to defendants.

Background Facts:

Plaintiff was admitted to defendant hospital for mitral valve repair surgery. During surgery, the defendant doctor (who was not an employee of defendant hospital) inserted cannulas into plaintiff's femoral artery. A well-documented risk of using cannulas is the prolonged reduced blood supply to the patient's leg, which could result in compartment syndrome. After surgery, plaintiff was admitted to hospital Cardiovascular Critical Care Unit (CVRU), where he was sedated and unable to speak for several days. Two days after the surgery his sedation was lifted and he began showing signs of pain in his leg. His calf was "harder than a normal leg," and his foot turned cold and bluish-purple in color. The nurse on duty told the patient and his family that this was "normal" after heart surgery. Three and half days after the surgery, a nurse on duty noticed that plaintiff had no pulse in his right foot and contacted defendant doctor. Defendant doctor determined that plaintiff had compartment syndrome and performed an emergency fasciotomy to relieve the pressure. Despite this procedure, plaintiff suffered irreparable damage to his leg and foot.

Key Case Facts:

During discovery, four of plaintiff's experts were deposed: two thoracic surgery experts, Dr. Nevin M. Katz and Robert M. Bojar, and two nursing experts, and Frances R. Eason, R.N. and Rosemarie Ameen, BSN, CCRN, CINC.

- **Deposition testimony of Dr. Katz:** Defendant doctor breached standard of care by: (1) failing to create a heightened awareness for compartment syndrome in his notes and orders to the nursing staff; (2) not lightening plaintiff's anesthesia so he could communicate his pain concerns; and (3) not properly monitoring plaintiff's creatinine levels which is an indicator of compartment syndrome. Had defendant doctor done these things it "could have allowed an early fasciotomy . . . Whether it would have prevented most of the damage, I don't know, but I suspect it would have made an important difference."

- **Deposition testimony of Dr. Bojar:** Dr. Bojar gave relatively the same standard of care opinions as Dr. Katz above. Regarding causation, Dr. Bojar testified that compartment syndrome was a “progressive phenomenon, that is, the earlier you intervene, you have less damage;” “it’s irreversible if it’s treated too late;” if defendant doctor “had intervened on the 14th or 15th or even early on the 16th, the amount of damage would have been less, but there would be damage.”
- **Deposition testimony of Nurse Eason:** She testified that the hospital nurses breached the standard of care, but could not say that it proximately caused plaintiff’s injuries.
- **Deposition testimony of Nurse Ameen:** She testified that the defendant hospital nurses’ failure to inform defendant doctor of plaintiff’s signs and symptoms contributed to his injury. “[H]ad a doctor been notified of the change in pulse from three to one at three a.m. on August 15th . . . the outcome for [plaintiff] more likely than not would have been different.”

Defendant hospital then moved for summary judgment on the basis that plaintiff’s evidence was insufficient to establish that defendant hospital liability or causation on plaintiff’s injuries.

Issue(s):

Taken together, did plaintiff’s expert testimony regarding the actions of the attending doctors and nurses establish breach and causation attributable to defendant hospital?

Holding:

Yes. The trial court improperly granted summary judgment to defendant hospital and the case should be remanded for further proceedings.

Rules / Controlling Authority:

“[U]nder the doctrine of *respondeat superior*, a hospital is liable for the negligence of a physician or surgeon acting as its agent. There will generally be no vicarious liability on an employer for the negligent acts of an independent contractor. This Court has established that the vital test in determining whether an agency relationship exists is to be found in the fact that the employer has or has not retained the right of control or superintendence over the contractor or employee as to details. Specifically, the principal must have the right to control both the means and the details of the process by which the agent is to accomplish his task in order for an agency relationship to exist.” *Perry*, 703 S.E.2d at 855 (quoting *Diggs v. Novant Health, Inc.*, 177 N.C. App. 290, 299, 628 S.E.2d 851, 857 (2006)).

Analysis & Arguments:

The court quickly determined that plaintiff had not presented sufficient evidence to establish an agency relationship between defendant doctors and defendant hospital. Therefore, the plaintiff’s expert testimony regarding the breach and causation of the defendant doctors alone is not enough to establish liability of the defendant hospital. *Id.* at 855.

However, plaintiff’s case does not fail because: “Plaintiffs’ nursing experts opined that the nurses, defendant’s employees, deviated from the standard of care. Although Eason testified that she could not state that these breaches caused Mr. Perry’s injuries, Ameen did testify that the nurses’ breaches caused Mr. Perry’s ‘adverse outcome.’ ***She also testified that, in her opinion, if the nurses had notified Dr. Andrews of the drop in pulse quality on 15 August 2006, it is ‘more likely than not’ that Mr. Perry’s outcome would have been different. Dr. Bojar and Dr. Katz both testified that Dr. Andrews’s earlier***

intervention would have changed Mr. Perry's outcome. *Id.* at 857-58 (emphasis added).

Impact of Decision on Plaintiff's Practice:

This case is an example of how creative we must be at times to convince the court that once ***all*** the evidence is considered / taken in the light most favorable to plaintiff, then we have met our burden on breach, causation and damages. Here, the defendant hospital was found not to be in an agency relationship with the defendant doctor. Yet, the plaintiff still was able to state a prima facie case of liability against the defendant hospital based on (1) the nurses' failure to inform the defendant doctor, (2) which would have in turn triggered the defendant doctor to intervene in plaintiff's care, and (3) which would have in turn caused plaintiff to suffer less of an injury.

Effect of SB 33/HB 542 on Decision:

Given that both reform bills retain the "more likely than not" burden of proof for all non-emergency room malpractice claims, this case should continue to be considered good law on the issues decided.

Brown v. Kindred Nursing Centers East, LLC,
364 N.C. 76; 692 S.E.2d 87

County of Origin & File No.:
Hertford County, 08 CVS 3763

NCSC Filed Date:
April 15, 2011

Plaintiff Attorney(s):
Stephen J. Gugenheim (Gugenheim Law...)

Defense Attorney(s):
Thomas E. Harris (Harris, Creech, Ward...)
W. Gregory Merritt (Harris, Creech, Ward...)
Jay C. Salsman (Harris, Creech, Ward...)

Justice (Author of opinion):
Brady, Edward Thomas (ret)

Justices (Concurring / Dissenting):
Hudson, Robin E. (dissent)
Chief Justice Parker (join in Hudson dissent)
Justice Timmons-Goodson (join in Hudson dissent)

Type of Medical Care Involved:
Nursing home

Decision for Plaintiff or Defense?
Defense

Procedural History:

Appeal by defendant of NCCOA's reversal of trial court's order dismissing plaintiff's complaint for failure to comply with Rule 9(j).

Key Facts:

Almost two years after his father's death, plaintiff filed a *pro se* complaint for medical malpractice and wrongful death against certain defendants. This complaint did not contain a Rule 9(j) certification. Two days after filing the complaint, plaintiff filed a "Motion for 9J Extension" in which he requested a "120 day extension on filing a 9J statement." In the motion, plaintiff admitted that he had been unable to locate any experts willing to testify ("go on the record") as to defendants' breach. The trial court granted plaintiff's motion, and thereafter he filed an amended complaint, this time through retained counsel. The amended complaint not only contained a 9(j) certification, but it also added new defendants. The defendants moved for dismissal of plaintiff's amended complaint on the basis that plaintiff had failed to comply with Rule 9(j).

The trial court granted defendants' motion to dismiss, and later a divided panel at the NCCOA reversed the trial court's order.

Issue(s):

Under the circumstances, did the trial court grant a valid 9(j) extension of the statute of limitations to plaintiff?

Holding:

No. A trial court cannot grant an extension of the statute of limitations under Rule 9(j) to file an expert certification to an existing complaint, or to add new defendants to an existing complaint.

Rules / Controlling Authority:

Court cited *Thigpen v. Ngo*, 335 N.C. 198, 558 S.E.2d 162 as the controlling authority on this issue, quoting, "[a]llowing a plaintiff to file a medical malpractice complaint and to then wait

until after the filing to have the allegations reviewed by an expert would pervert the purpose of Rule 9(j).” *Brown*, 364 N.C. at 77, 692 S.E.2d at 88 (quoting *Thigpen*, 335 N.C. at 204, 558 S.E.2d at 166-67).

“Rule 9(j) expert review must take place before the filing of the complaint.” *Id.* (quoting *Thigpen*, 335 N.C. at 205, 558 S.E.2d at 167).

“Rule 9(j) only permits an extension of the statute of limitations ‘to file a complaint’ . . . Rule 9(j) makes no mention of a ‘9J statement’ or any other document outside of a complaint that can be submitted to demonstrate expert certification.” *Brown*, 364 N.C. at 80, 692 S.E.2d at 90.

“Rather than questioning whether certification occurred before plaintiff added individual defendants to the suit, [Rule 9(j)] requires us to determine whether certification occurred before plaintiff challenged the overall medical care at issue. Litigants cannot circumvent the requirements of Rule 9(j) by adding new names to the same claims.” *Id.* at 81, 692 S.E.2d at 90.

Analysis & Arguments:

“Here, plaintiff did not move for a 120-day extension to locate a certifying expert before filing his complaint. Rather, plaintiff alleged malpractice first and then sought to secure a certifying expert. This is the exact course of conduct the legislature sought to avoid in enacting Rule 9(j).” *Id.*

Even though Plaintiff’s claim added new defendants with a contemporaneous Rule 9(j) certification, the Court concluded that the plaintiff was precluded from adding defendants to the original complaint here because the original complaint should be dismissed as a matter of law, saying, “while it may be true that the amended complaint named [new defendants] for the first time, the amended complaint challenged the same medical care as the original complaint. According to Rule 9(j)(1), the complaint ‘shall be dismissed’ unless ‘[t]he pleading specifically asserts that the medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness.’” *Id.*

Dissenting Opinion:

The Dissent reasoned that the Majority’s opinion ran completely counter to the plain language and legislative intent behind Rule 9(j), and that plaintiff did exactly what the Rule envisioned in this case.

Regarding the timing of plaintiff’s 9(j) certification occurring after the original complaint was filed, the Dissent pointed out the following: “Significantly, Rule 9(j) contains no language addressing *when* the expert must conduct the review of the medical care. Further, Rule 9(j) does not require that the expert certification be contained in the original complaint, nor does it address in any way the existing Rules of Civil Procedure regarding amendments to pleadings, such as Rule 15(a).” *Id.* at 86, 692 S.E.2d at 93 (emphasis added).

Furthermore, “Nothing in Rule 9(j) indicates that, by enacting that rule, the legislature intended to prevent a plaintiff in a medical malpractice case from filing an original complaint before requesting a Rule 9(j) extension to locate a certifying expert who will testify on the record. In fact, Rule 9(j)’s plain language speaks of ‘a’ complaint, not an original or initial complaint.” *Id.* at 87, 692 S.E.2d at 94 (quoting N.C.G.S. § 1A-1, Rule 9(j)).

Regarding the purpose behind Rule 9(j), the Dissent stated that the 120 day extension is “for a plaintiff ‘to file a complaint in a medical malpractice action in order *to comply with this Rule.*” *Id.*

Regarding plaintiff’s *pro se* “Motion for a 9J Extension” the Dissent stated, “In essence, when plaintiff filed his *pro se* motion requesting an extension of time to obtain and include a Rule 9(j) certification, typically included in the complaint, he was requesting time to file a complaint that complied with Rule 9(j). Despite the imprecise language, it appears that plaintiff’s *pro se* motion could only mean that he was seeking additional time to file a complaint that complied with Rule 9(j). Thus, by extending the statute of limitations so that plaintiff could file a Rule 9(j) certification, the trial court was extending the time in which plaintiff could file a complaint.” *Id.*

Concluding that *Thigpen* was not applicable to this case, the Dissent pointed out, “Here plaintiff filed the original, defective complaint before the statute of limitations ran, obtained a valid extension of the statute of limitations under Rule 9(j), and filed an amended complaint that complied with Rule 9(j) within the extended limitations period . . . In contrast to *Thigpen*, plaintiff here filed a complaint that complied with Rule 9(j)’s expert certification requirement before exhausting the extended limitations period. Furthermore, the expert review occurred before plaintiff filed the amended complaint, following a course of action that is not addressed by our holding in *Thigpen.*” *Id.* at 88-89, 692 S.E.2d at 94-95.

The Dissent pointed out how the Majority’s holding is a “legislative act” that “runs exactly contrary to the plain meaning of Rule 9(j),” saying, “Rule 9(j) permits the plaintiff to file a motion before the expiration of the statute of limitations which, if allowed, can extend the statute of limitations for up to 120 days ‘in order to comply with this Rule.’ To say that plaintiff has to have complied with the Rule before the extension period renders the extension meaningless. Such a conclusion would mean that, in order to get an extension of the statute of limitations ‘to comply with’ the Rule, plaintiff would have to not need the extension.” *Id.*

Impact of Decision on Plaintiff’s Practice:

Whether we like it or not, this case stands for the proposition that for every civil action alleging medical malpractice, the very first complaint filed had better comply fully with Rule 9(j) or it will be dismissed. In other words, the Majority’s holding here means that plaintiffs can no longer use Rule 9(j) to cure a defective original complaint that failed to comply with Rule 9(j) by later filing an amended complaint within the 120 day extension period that contains a proper 9(j) certification. An unaddressed question is whether the plaintiff here could have been granted his 9(j) motion for 120 day extension, dismissed his original complaint without prejudice, and then re-filed his revised, valid 9(j) complaint.

Effect of SB 33/HB 542 on Decision:

Neither reform bill currently alters the Rule 9(j) provisions that (1) a “pleading specifically asserts” the care in question has been properly reviewed, or (2) that the court “may allow a motion to extend the statute of limitations for a period not to exceed 120 days to file a complaint in a medical malpractice action in order to comply with this Rule” (See SB 33, Section 3; HB 542, Section 2.1). Therefore this case will continue to be good law on all issues decided even if the bills are enacted as currently written.