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NO. COA05-1234

NORTH CAROLINA COURT OF APPEALS

Filed: 5 September 2006

TRACI M. TREAT as Guardian
ad Litem for NADIA AIT
M'BAREK, a minor,

Plaintiff-Appellant,

v.

Wake County
No. 01-CVS-10393

KAREN ROANE, VEDA L. WATSON,
and WAKE MEDICAL
CENTER a/k/a WAKEMED,

Defendants-Appellees.

Appeal by Plaintiff from orders entered 25 April and 27 April 2005 by Judge Howard E. Manning in Wake County Superior Court. Appellees cross-assigned as error an order entered 28 March 2002 by Judge David Q. LaBarre in Wake County Superior Court. Heard in the Court of Appeals 29 March 2006.

Law Office of Charles M. Putterman, by Charles M. Putterman, for Plaintiff-Appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Samuel G. Thompson and Christopher G. Smith, for Defendant-Appellee Karen Roane.

Yates, McLamb, & Weyher, L.L.P., by Dan J. McLamb, for Defendants-Appellees Veda L. Watson and Wake Medical Center.

STEPHENS, Judge.

In this medical malpractice lawsuit, Traci M. Treat ("Plaintiff"), as guardian *ad litem* for Nadia Ait M'Barek

("Nadia"), appeals from the trial court's 25 April 2005 order granting Defendants' motions *in limine* to exclude the testimony of Plaintiff's experts, Julie Shocksneider, R.N. ("Shocksneider"), Betty J. Edwards, M.D. ("Edwards"), and Amos Grunebaum, M.D. ("Grunebaum"); and from the trial court's 27 April 2005 order granting Defendants' motion for summary judgment and dismissing the case with prejudice. Defendants cross-assign as error the trial court's 28 March 2002 order denying Defendants' motions to dismiss on grounds that Plaintiff failed to file her complaint within the time frame established by Rule 41 of the North Carolina Rules of Civil Procedure. For the reasons which follow, we affirm the April 2005 orders of Judge Manning.

I. FACTUAL AND PROCEDURAL BACKGROUND

On 15 January 1998, Plaintiff was appointed guardian *ad litem* for her daughter, Nadia, "for the purpose of bringing" a lawsuit for a brachial plexus injury suffered during Nadia's birth on 24 February 1995. Plaintiff then, on 15 January 1998, filed a complaint against Dr. Karen Roane ("Roane") and Wake Medical Center ("WakeMed"). On 2 March 2000, pursuant to Rule 41(a) of the North Carolina Rules of Civil Procedure, Plaintiff voluntarily dismissed this complaint without prejudice.

On 23 August 2001, Plaintiff filed a complaint against Defendants Roane, WakeMed, and Veda L. Watson, R.N. ("Watson"). The complaint alleged that (1) for some time prior to Nadia's delivery on 24 February 1995, Plaintiff was a patient under the care of, and received prenatal care from, WakeMed; (2) on 24

February 1995, Plaintiff was a patient under the care of WakeMed and gave birth to Nadia; (3) Defendants were negligent, reckless and careless in the treatment they rendered, and deviated from acceptable medical standards, resulting in significant and permanent injuries to Nadia, diminished earning capacity, emotional distress, and prospective lost wages; and (4) Defendants failed to disclose to Plaintiff necessary information that would have enabled her to consider, weigh and choose the options available to her.

In their answers and motions to dismiss dated 25 October and 26 November 2001, Defendants moved to dismiss the complaint on grounds that it was not timely filed under Rule 41 of the North Carolina Rules of Civil Procedure. The trial court, on 28 March 2002, denied Defendants' motions to dismiss. The case thus proceeded to trial and on 25 April 2005, the trial court, in response to Defendants' motions *in limine*, excluded the testimony of Plaintiff's experts, Shocksneider, Edwards, and Grunebaum, because they did not qualify under N.C. Gen. Stat. § 90-21.12 to testify as to standard of care. On 27 April 2005, the trial court granted Defendants' motion for summary judgment. Plaintiff appeals.

II. QUESTIONS PRESENTED

First, we must address violations of the North Carolina Rules of Appellate Procedure that Defendants assert warrant dismissal of this appeal. North Carolina law provides that the Record on Appeal must contain "so much of the evidence . . . as is necessary for an understanding of all errors assigned, or a statement specifying

that the verbatim transcript of proceedings is being filed with the record[.]" N.C. R. App. P. 9(a)(1)e. "'It is incumbent upon the appellant to see that the record on appeal is properly made up and transmitted to the appellate court. The Rules of Appellate Procedure are mandatory and failure to follow the rules subjects [the] appeal to dismissal.'" *Global Circuits of N.C., Inc. v. Chandak*, ___ N.C. App. ___, ___, 622 S.E.2d 643, 645 (2005)(quoting *Fortis Corp. v. Northeast Forest Products*, 68 N.C. App. 752, 754, 315 S.E.2d 537, 538-39 (1984)(internal citations omitted)). However, the Rules of Appellate Procedure also allow this Court to suspend the rules and reach the merits of an appeal. N.C. R. App. P. 2. Although Plaintiff failed to include in the Record on Appeal a verbatim transcript of the motions *in limine* hearing, thus violating Rule 9, and also committed other technical violations of the rules, we choose to invoke Rule 2 and reach the merits of this appeal.

By her first assignment of error, Plaintiff argues that the trial court erred in granting Defendants' motions *in limine* to exclude Plaintiff's expert witnesses because Plaintiff was never given the opportunity at trial to qualify her expert witnesses under N.C. Gen. Stat. § 90-21.12.

North Carolina law provides that

> [i]n any action for damages for personal injury . . . arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the

> trier of the facts is satisfied . . . that the care of such health care provider was not in accordance with the standards of practice 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.

N.C. Gen. Stat. § 90-21.12 (2005). In medical malpractice litigation in North Carolina, it is well settled that a physician may

> testify regarding the applicable standard of care . . . when that physician is familiar with the experience and training of the defendant and either (1) the physician is familiar with the standard of care in the defendant's community, or (2) the physician is familiar with the medical resources available in the defendant's community and is familiar with the standard of care in other communities having access to similar resources.

Henry v. Southeastern OB-GYN Associates, P.A., 145 N.C. App. 208, 213-14, 550 S.E.2d 245, 248-49 (Greene, J., concurring), *aff'd*, 354 N.C. 570, 557 S.E.2d 530 (2001). The burden is on the plaintiff to establish the standard of care through expert testimony. *Smith v. Whitmer*, 159 N.C. App. 192, 582 S.E.2d 669 (2003).

The trial judge must make preliminary determinations regarding the qualifications of potential expert witnesses or the admissibility of the expert testimony. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 597 S.E.2d 674 (2004). Although this determination may occur at trial during *voir dire*, a trial court may also disqualify a potential expert witness upon a motion *in limine* before the trial begins. *See, e.g., Southern Furniture*

Hardware, Inc. v. Branch Banking and Trust Co., 136 N.C. App. 695, 526 S.E.2d 197 (2000)(recognizing the use of motions *in limine* to exclude potential expert witnesses).

"'[T]he competency of a witness to testify as an expert in the particular matter at issue is addressed primarily to the sound discretion of the trial court, and its determination is not ordinarily disturbed by the reviewing court.'" *Brooks v. Wal-Mart Stores, Inc.*, 139 N.C. App. 637, 653, 535 S.E.2d 55, 65 (2000), *disc. review denied*, 353 N.C. 370, 547 S.E.2d 2 (2001)(quoting *Food Town Stores, Inc. v. City of Salisbury*, 300 N.C. 21, 37, 265 S.E.2d 123, 133 (1980)(citations omitted)). A trial court abuses its discretion only when its ruling is "manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998)(citations omitted).

During pre-trial depositions, Plaintiff's experts testified regarding their qualifications and the standard of care they applied in this case.

Shocksneider, designated by Plaintiff as a registered nurse specializing in labor and delivery care, was expected to testify regarding Watson's participation in Nadia's delivery. During her deposition, she testified that anything she knew about WakeMed came from the hospital record. However, she did not know the total number of beds or the number of labor and delivery beds in the hospital, the number of deliveries performed a year, or anything about the nurse staffing for labor and delivery. Furthermore,

Shocksneider said that she did not know the size of Raleigh, or how many hospitals there were in Raleigh. Additionally, she stated that she could not compare WakeMed to any of the hospitals in which she had been employed. Finally, in the portions of Shocksneider's deposition submitted for our review, Shocksneider did not testify regarding any familiarity with the standard of care in Watson's community or any similar community. Therefore, she was not qualified under N.C. Gen. Stat. § 90-21.12.

Edwards, designated by Plaintiff as a board-certified expert in obstetrics and gynecology, was expected to testify regarding Roane's and Watson's participation in Nadia's delivery. At her deposition, Edwards testified that she had never practiced medicine in Wake County, North Carolina and had never been there. Additionally, she testified that she was not "familiar at all with the standards of practice and professionalism for Wake County," but that she applied a "national standard of care to [her] review[.]" Once again, in the portions of the deposition submitted for our review, Plaintiff did not make any effort to qualify Edwards as an expert witness under N.C. Gen. Stat. § 90-21.12 or to establish that, in this instance, the national standard of care is the "same standard of care practiced in [D]efendants' community." *Smith*, 159 N.C. App. at 197, 582 S.E.2d at 673.

Grunebaum, also designated by Plaintiff as a board-certified expert in obstetrics and gynecology, was likewise expected to testify regarding Roane's and Watson's participation in Nadia's delivery. During his deposition, Grunebaum testified that standard

of care referred to "something that a responsible care provider would do[,]" and that "a responsible physician or . . . medical practitioner, . . . would do something similar under the circumstances." Grunebaum further testified that he was "talking about what every obstetrician across the Country ought to do under the circumstances[,]" and that, although he had never been to North Carolina, he did not believe that "there is a particular standard of care that applies to obstetricians in Wake County, [North Carolina][.]" Plaintiff, however, failed to support her assertion that the national standard relied upon by Grunebaum is the same standard of care practiced in Wake County, and therefore, should be applied in this case. Without a showing that Grunebaum had any knowledge of the subject community upon which to base his opinion, Grunebaum's statement that he did not believe that a "particular standard of care . . . applies to obstetricians in Wake County[]" is simply not sufficient to qualify him under N.C. Gen. Stat. § 90-21.12. *Id.* at 196-97, 582 S.E.2d at 672 (expert must provide support for his assertion that a particular standard of care applies in a subject community).

It is clear from the deposition testimony given by Shocksneider, Edwards, and Grunebaum that neither witness was familiar with the standard of care or the medical resources available in Wake County, and consequently, they were not qualified to provide expert testimony under N.C. Gen. Stat. § 90-21.12. Plaintiff contends that because the national standard applied by Edwards and Grunebaum is the same standard applied in Wake County,

these witnesses were qualified. However, Plaintiff's experts did not provide adequate support for their contention that the standard of care they applied in this case is applicable in Wake County, and therefore, this argument is not persuasive. *Id.* at 196, 582 S.E.2d at 672 (expert's assertion "that he was familiar with the applicable standard of care[]" was rejected because "his testimony [was] devoid of support for his assertion").

We find it important to note that applying a national standard does not, in and of itself, disqualify a potential expert witness. In *Pitts v. Nash Day Hosp., Inc.*, 167 N.C. App. 194, 197, 605 S.E.2d 154, 156 (2004), *aff'd*, 359 N.C. 626, 614 S.E.2d 267 (2005), this Court determined that an expert's testimony that a national standard should be applied does not "inexorably require[] that his testimony be excluded. Rather, the critical inquiry is whether the doctor's testimony, taken as a whole, meets the requirements of N.C. Gen. Stat. § 90-21.12." In reversing the trial court's determination that the expert qualified under N.C. Gen. Stat. § 90-21.12, the *Pitts* Court (1) compared the expert's training and experience to that of the defendant, (2) noted the comparison the expert made between the physical and financial environment of communities in which he practiced medicine to that of the subject community, and (3) noted the comparisons the expert made between the hospitals in which he had practiced medicine to that of the subject hospital. *Id.* Therefore, it is not the use of a national standard that is problematic for Plaintiff. Rather, Plaintiff's experts are not qualified because, although their training and

experience are similar to that of Defendants, Plaintiff's experts failed to demonstrate that either (1) they were familiar with the standard of care practiced in Defendants' community, or (2) they were familiar with the medical resources available in Wake County and were familiar with the standard of care in other communities with similar resources. In fact, Plaintiff's experts demonstrated that they knew little about Wake County or WakeMed in order to make this comparison.

Additionally, Plaintiff incorrectly attempts to shift the burden of proof on this issue when she argues that "since Defendants have failed to offer any evidence that the plaintiff's experts were not familiar with the standards of practice in a community similar to Wake County, it would . . . be error to exclude their testimony as to standard of care on the basis that they embrace a national standard." It is axiomatic that in order to provide expert testimony at trial, a witness must be qualified; witnesses are not, as Plaintiff argues, capable of providing expert testimony until they are shown to be unqualified. N.C. Gen. Stat. § 8C-1, Rule 702 (2005). Since Plaintiff failed to properly qualify her experts, this argument is without merit.

Next, Plaintiff argues that because her experts concurred with the applicable standard of care established by Defendants, the trial court erred in granting the motions *in limine*. We disagree.

To support her contention, Plaintiff directs the attention of the Court to *Marley v. Graper*, 135 N.C. App. 423, 521 S.E.2d 129 (1999), *cert. denied*, 351 N.C. 358, 542 S.E.2d 214 (2000), and *Cox*

v. Steffes, 161 N.C. App. 237, 587 S.E.2d 908 (2003), *disc. review denied*, 358 N.C. 233, 595 S.E.2d 148 (2004). Since both of these cases are easily distinguishable from the current case, Plaintiff's argument fails. In *Marley*, this Court determined that "[a]lthough the witness did not testify that he was familiar with the standard of care [in the subject community], . . . testimony . . . that . . . [defendant] met the highest standard of care found anywhere in the United States . . . [was] sufficient to meet the requirements of section 90-21.12." *Marley*, 135 N.C. App. at 430, 521 S.E.2d at 134. The Court reasoned that if the standard of care for the subject community matched the highest standard in the country, then the defendant's treatment met that standard; and if the standard of care in the subject community was lower, then the defendant's treatment exceeded the local standard. In this case, however, there was no such testimony. On the contrary, Plaintiff's experts testified that Defendants *did not* meet what they perceived to be the national standard, but Plaintiff failed to establish that the national standard utilized by her experts was applicable to Defendants' community. Accordingly, *Marley* is not on point.

Similarly, in *Cox*, this Court determined 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.'" *Cox*, 161 N.C. App. at 245, 587 S.E.2d at 913 (quoting *Haney v. Alexander*, 71 N.C. App. 731, 736, 323 S.E.2d 430, 434 (1984), *cert. denied*, 313 N.C. 329, 327 S.E.2d 889 (1985)(citations omitted)). In *Cox*, the expert

testified that it was "universally accepted" that the standard of care "would be the same . . . for any board certified surgeon[]" across the country. *Cox*, 161 N.C. App. at 246, 587 S.E.2d at 914. It is clear from *Cox* that the expert's opinion regarding the standard of care was based upon the defendant's status as a board-certified surgeon. In the case currently before this Court, Plaintiff did not adequately establish that the national standard used by her experts applies to Defendants. Edwards stated that she applied a "national standard of care[.]" Grunebaum, also applying a national standard, was only able to opine that he did not believe "a particular standard of care . . . applies to obstetricians in Wake County[,]" and that therefore, his national standard must apply. Since Plaintiff's experts offered no more than a belief that the national standard applied to Defendants and there was no other evidence linking Defendants to Plaintiff's proposed standard of care, *Cox* does not control. Since Plaintiff's argument is not supported by law, this assignment of error is overruled.

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By her second assignment of error, Plaintiff contends that the trial court erred in granting summary judgment for Defendants because, even without the testimony of Plaintiff's expert witnesses, there remained a genuine issue of material fact as to whether Defendants had violated the applicable standard of care, "and other issues[.]" Plaintiff argues that even if her expert witnesses were not qualified to testify to the applicable standard of care, they were still able to testify regarding breach of the

standard of care and causation. This assignment of error lacks any merit and is likewise overruled.

When reviewing a trial court's order granting summary judgment, this Court must determine "whether there is any genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998) (citation omitted). In a medical malpractice case, summary judgment is proper when the plaintiff fails to produce sufficient evidence regarding the standard of care, breach of that standard, and causation resulting in the damages suffered. *Weatherford v. Glassman*, 129 N.C. App. 618, 500 S.E.2d 466 (1998). For an expert witness to testify regarding the standard of care, or breach of that standard, the witness must qualify under N.C. Gen. Stat. § 90-21.12. *Tucker v. Meis*, 127 N.C. App. 197, 487 S.E.2d 827 (1997). When an expert witness is "unfamiliar with the relevant standard of care, [the expert's] opinion as to whether defendants met that standard is unfounded and irrelevant[.]" *Henry*, 145 N.C. App. at 213, 550 S.E.2d at 248.

In this case, since we have held that the trial court did not abuse its discretion in determining that Plaintiff's experts were not qualified under N.C. Gen. Stat. § 90-21.12 to establish the applicable standard of care, it follows that they were equally unqualified to testify regarding breach of that standard. Consequently, summary judgment was proper.

In conclusion, we find no error committed by the trial court. Given our determination, we need not address Defendants' cross-assignment of error. The 25 April and 27 April 2005 orders of Judge Manning are

AFFIRMED.

Judges McGEE and HUNTER concur.

Report per Rule 30(e).