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NO. COA05-300

NORTH CAROLINA COURT OF APPEALS

Filed: 20 June 2006

ROBERT V. PHILLIPS and
CECILIA R. PHILLIPS,
Plaintiffs,

v.

Mecklenburg County
No. 04 CVS 1182

THE CHARLOTTE-MECKLENBURG
HOSPITAL AUTHORITY, CAROLINAS
MEDICAL CENTER, A FACILITY OF
CHARLOTTE-MECKLENBURG HOSPITAL
AUTHORITY, THE SANGER CLINIC,
P.A., ROBERT MARK STIEGEL, M.D.,
WILLIAM M. MASSEY, M.D., and
WILLIAM HAYMOND COOK, M.D.,
Defendants.

Appeal by plaintiffs from order entered 1 December 2004 by
Judge Richard D. Boner in the Superior Court in Mecklenburg County.
Heard in the Court of Appeals 12 October 2005.

*Charles G. Monnett III & Associates, by Charles G. Monnett,
III, for plaintiff-appellants.*

*Parker, Poe, Adams and Bernstein, L.L.P., by Harvey L. Cospers,
Jr., and Richard J. Rivera, for defendant-appellees The Sanger
Clinic and Robert Mark Stiegel, M.D.*

*Shumaker, Loop & Kendrick, L.L.P., by Scott M. Stevenson and
John D. Kocher, for defendant-appellees Charlotte-Mecklenburg
Hospital Authority, Carolinas Medical Center, and William
Haymond Cook, M.D.*

BRYANT, Judge

In 2004, plaintiffs filed this medical malpractice suit
against defendant doctors and medical care facilities. On 1
December 2004, the trial court granted summary judgment to

defendants and dismissed plaintiffs' claims with prejudice, for failure to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure. Plaintiffs appeal. For the reasons discussed below, we affirm the trial court's dismissal.

The evidence tends to show the following. On 24 January 2001, Dr. William Massey, a cardiologist, admitted plaintiff Robert V. Phillips to Carolinas Medical Center for evaluation of coronary artery disease. The following day, Dr. Massey performed a cardiac catheterization on Mr. Phillips, which revealed multiple lesions in the coronary arteries. Dr. Robert Stiegel, a cardiothoracic surgeon, examined and evaluated Mr. Phillips and agreed to perform coronary artery bypass grafting (CABG) surgery. On 26 January 2001, Dr. Stiegel and Dr. William Cook, a resident in thoracic surgery, performed the CABG surgery.

In the months following the CABG surgery, Mr. Phillips saw Dr. Massey for recurrent chest pain. Mr. Phillips subsequently suffered a myocardial infarction and had a second CABG surgery in December 2001, performed by a different surgeon at a different hospital. Plaintiffs allege that Drs. Stiegel and Cook bypassed the wrong arteries: that they failed to bypass certain coronary arteries with lesions that either should have been or were intended to be bypassed and that they instead bypassed other healthy coronary arteries that should not have been and were not intended to be bypassed. Plaintiffs further allege that the second CABG surgery was necessary to correct these errors.

Prior to trial, pursuant to Rule 9(j) of the North Carolina Rules of Civil Procedure, plaintiffs had Dr. Bahij Khuri, an interventional cardiologist, review the medical care that Drs. Stiegel and Cook provided to Mr. Phillips. Dr. Khuri was willing to testify that the medical care did not comply with the applicable standard of care.

Plaintiffs argue that the trial court erroneously granted defendants' motions for summary judgment when it concluded that they had failed to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure. We disagree.

The trial court may grant summary judgment only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Barbour v. Little*, 37 N.C. App. 686, 692, 247 S.E.2d 252, 256, *disc. review denied*, 295 N.C. 733, 248 S.E.2d 862 (1978). The evidence must be viewed in the light most favorable to the plaintiff. *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). On appeal, we review the grant of summary judgment *de novo*. *Virginia Elec. & Power Co. v. Tillett*, 80 N.C. App. 383, 385, 343 S.E.2d 188, 191 (1986). Similarly, "a plaintiff's compliance with Rule 9(j) requirements clearly presents a question of law . . . [that] is reviewable by this Court *de novo*." *Phillips v. A Triangle Women's Health Clinic, Inc.*, 155 N.C. App. 372, 376, 573 S.E.2d 600, 603 (2002) (citations omitted), *aff'd per curiam*, 357 N.C. 576, 597 S.E.2d 669 (2003).

Rule 9(j) states, in pertinent part, that:

[a]ny complaint alleging medical malpractice by a health care provider as defined in G.S. 90-21.11 in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:

(1) The pleading specifically asserts that the medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care.

N.C. Gen. Stat. § 1A-1, Rule 9(j) (2005). Plaintiffs' complaint includes a section entitled "Rule 9(j) Certification," which states that:

[t]he medical care received by Plaintiff Robert V. Phillips and complained of herein and the medical records arising therefrom, have been reviewed by a person who is reasonably expected to qualify as an expert under Rule 702 . . . and who is willing to testify that the medical care did not comply with the applicable standard of care.

Thus, plaintiffs' complaint complies with the pleading requirements of Rule 9(j) (1).

Although the statute does not specify that Rule 9(j) has a substantive requirement, plaintiff concedes that there is a substantive requirement. This Court has interpreted Rule 9(j) as requiring not merely that plaintiffs assert that the medical care was reviewed by a person reasonably expected to qualify as an expert witness, but that the plaintiffs must have in fact *reasonably expected* the witness to qualify as an expert under Rule 702 of the North Carolina Rules of Evidence. See *Allen v. Carolina Permanente Med. Group, P.A.*, 139 N.C. App. 342, 533 S.E.2d 812 (2000); *Trapp*

v. Maccioli, 129 N.C. App. 237, 497 S.E.2d 708 (1998). Rule 702 states, in pertinent part, that:

(b) In a medical malpractice action as defined in G.S. 90-21.11, a person shall not give expert testimony on the appropriate standard of health care as defined in G.S. 90-21.12 unless the person is a licensed health care provider in this State or another state and meets the following criteria:

(1) If the party against whom or on whose behalf the testimony is offered is a specialist, the expert witness must:

a. Specialize in the same specialty as the party against whom or on whose behalf the testimony is offered; or

b. Specialize in a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients.

N.C. Gen. Stat. § 8C-1, Rule 702(b)(1) (2005). However, the question under Rule 9(j) is not whether the proposed expert would qualify under Rule 702, but rather,

whether it was "*reasonably expected*" that the witness would qualify under Rule 702. 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.

Trapp, 129 N.C. App. at 241, 497 S.E.2d at 711 (emphasis added) (citation omitted).

The *Trapp* case dealt with a procedure called a "central venous access," which involves the insertion of a plastic tube into a patient's vein. *Id.* at 238, 497 S.E.2d at 709. The *Trapp* facts show that "the defendant, an anesthesiologist, attempted central

venous access into Mrs. Trapp's internal jugular vein on the right side of her neck and was unsuccessful in that location[.] . . . [Then,] a hemotoma [sic] developed on Mrs. Trapp's neck and led to further complications which resulted in her death." *Id.* The witness whom the plaintiffs sought to qualify as a medical expert testified that although he was not board certified in either anesthesia or critical care and had no other anesthesia training, he was an emergency medicine specialist, had served as the "physician involved in inserting a central venous line" in the last year, and that emergency medicine specialists performed central venous accesses. *Id.*

In *Trapp*, the defendant argued the witness did "not satisfy the requirements of Rule 702(b)(1)(b) because the 'procedure that is the subject of the complaint' is a central venous access for the specific purpose of plasmapheresis" and the witness admitted that he did not know the standard of care for a central venous access for the specific purpose of plasmapheresis. *Id.* at 240, 497 S.E.2d at 710. However, although the central venous access was conducted in preparation for a plasmapheresis procedure, the witness testified "that a central venous access is a 'procedure' and . . . it 'is not driven by what is the treatment later on. The procedure is the same.'" *Id.* at 238, 497 S.E.2d at 709. Accordingly, this Court held that a reasonable person could believe the witness would qualify under Rule 702(b)(1)(b), which specifically requires that "the expert witness must . . . [s]pecialize in a similar specialty which includes within its specialty the performance of the procedure

that is the subject of the complaint and have prior experience treating similar patients." N.C.G.S. § 8C-1, Rule 702(b)(1)(b) (2005); *Trapp*, 129 N.C. App. at 241, 497 S.E.2d at 711. *Trapp*, however, is distinguishable from the instant case.

Here, Dr. Bahij Khuri, a board certified interventional cardiologist, reviewed the medical care received by Mr. Phillips and was willing to testify that the care provided did not comply with the applicable standard of care. Plaintiffs readily concede that Dr. Khuri is not a cardiothoracic surgeon, but argue that Dr. Khuri is nevertheless qualified to state opinions regarding deviation from the standards of practice for performance of CABG, because the alleged malpractice involved the incorrect identification of healthy and unhealthy arteries, not surgical procedure. In his affidavit, Dr. Khuri stated the following:

3. As an interventional cardiologist I routinely perform invasive procedures designed to restore normal blood flow to the heart in patients like Mr. Phillips in January 2001. The restoration of normal blood flow to the heart in a patient like Mr. Phillips can be accomplished surgically (coronary artery bypass grafting or "CABG"), invasively (percutaneous transluminal coronary angioplasty or "PTCA"), or medically (thrombolytic therapy). Both CABG and PTCA are procedures designed to restore normal blood flow to the heart.

4. . . . I believe that I am qualified to serve as an expert witness under the provisions of Rule 702 . . . because this case involves a procedure to restore normal blood flow to the heart

5. I believe I am qualified to state opinions with regard to deviations from the acceptable standards of practice for performance of [CABG] by the cardiothoracic surgeons in this case

because they relate to the proper identification of coronary arteries and the proper location of clinically significant lesions in the coronary arteries. When either CABG or PTCA procedures are utilized to restore normal blood flow to the heart, the standard of care requires proper identification of the coronary arteries and the location of any clinically significant lesions in those arteries. I frequently consult with cardiothoracic surgeons regarding the identification of clinically significant lesions after I have done the catheterization and in anticipation of CABG surgery in that same patient. Furthermore, I am frequently called upon to evaluate post-CABG patients who have complications such as continued symptoms of chest pain due to incomplete revascularization like Mr. Phillips.

(Emphasis added). The trial court concluded that because Dr. Khuri is not a cardiothoracic surgeon and had not performed CABG surgery, he would not qualify as an expert witness under Rule 702. Most importantly to this matter, however, is that the trial court concluded, and we agree, that Dr. Khuri could not have reasonably been expected to qualify as an expert witness pursuant to Rule 702.

The facts of the instant case would not lead a reasonable person to believe that Dr. Khuri would qualify as an expert under Rule 702. Dr. Khuri was not a cardiothoracic surgeon; rather, he was a board certified interventional cardiologist. There is no evidence of record that an interventional cardiologist operates within a "similar speciality" as a cardiothoracic surgeon. Conversely, Dr. Cook's affidavit reveals, "Cardiologists do not perform any surgical procedures, including coronary artery bypass, valve replacement, or aneurism repair. Cardiologists are not qualified to perform surgical procedures." Dr. Khuri also

specifically admits he has never performed a coronary artery bypass grafting. Moreover, although plaintiffs argue that Dr. Khuri was qualified to state medical opinions because the alleged malpractice involved the incorrect identification of arteries as opposed to surgical procedure, the pleadings reveal that the "procedure" at issue was not the identification of arteries but rather the coronary artery bypass grafting. In the pleadings, plaintiffs specifically alleged, in pertinent part:

35. In performing or supervising the CABG surgery on Mr. Phillips, Drs. Stiegel and Cook inserted a graft proximal to, rather than distal to, at least one lesion that should have been or was intended to be bypassed.

36. In performing or supervising the CABG surgery on Mr. Phillips, Drs. Steigel and Cook inserted a graft that, although distal to the lesion was improperly placed resulting in improper blood flow.

These allegations would lead a reasonable person to believe that Dr. Khuri, who was not a specialist in a "similar specialty which includes within its speciality the performance of [coronary artery bypass grafting,] the procedure that is the subject of the complaint[,]" and who has no "prior experience treating similar patients [with coronary artery bypass grafting]," would not qualify as an expert under Rule 702. See N.C.G.S. § 8C-1, Rule 702(b)(1)(b) (2005).

Plaintiffs also argue the trial court's grant of summary judgment in favor of defendants was improper because they should have been allowed to file a motion pursuant to Rule 702(e) to show that Dr. Khuri was qualified to testify as an expert under these

circumstances. Under Rule 702(e), the trial court may allow expert testimony on the appropriate standard of health care by an otherwise qualified expert "upon a showing . . . of extraordinary circumstances and a determination by the court that the motion should be allowed to serve the ends of justice." N.C. Gen. Stat. § 8C-1, Rule 702(e) (2005). However, Rule 9(j)(2) requires plaintiffs to "specifically assert[] that the medical care has been reviewed by a person that the [plaintiffs] will seek to have qualified as an expert witness by motion under Rule 702(e)" N.C. Gen. Stat. § 1A-1, Rule 9(j)(2) (2005). Here, plaintiffs did not specifically assert in their complaint that they were seeking to have this witness qualified as an expert by motion under Rule 702(e). This argument is without merit.

Affirmed.

Judge HUDSON concurs in the result only.

Judge CALABRIA concurs.

Report per Rule 30(e).