

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA10-800
NORTH CAROLINA COURT OF APPEALS

Filed: 20 September 2011

O. DENNIS WRIGHT and
M. LOLITA WRIGHT,
Plaintiffs,

v.

Davidson County
No. 09 CVS 01402

SARAH E. FRYE,
Defendant.

Appeal by plaintiffs from orders entered 7 January 2010 and 5 April 2010 by Judge Kevin M. Bridges in Superior Court, Davidson County. Heard in the Court of Appeals 12 January 2011.

Guy B. Oldaker III, for plaintiffs-appellants.

Carruthers & Roth, P.A., by Kenneth L. Jones, for defendant-appellee.

STROUD, Judge.

O. Dennis Wright and M. Lolita Wright (referred to collectively as "plaintiffs") appeal from a trial court's order granting Sarah E. Frye's ("defendant") motion to strike Thomas David, D.D.S., as plaintiffs' expert witness as to the standard of care; denying defendant's motion to strike Dr. David's affidavit; and granting defendant's motion to dismiss

plaintiffs' complaint with prejudice. Plaintiffs also appeal from the trial court's denial of their motion to reconsider. For the following reasons, we affirm the trial court's orders.

I. Background

On 15 April 2009, plaintiffs filed suit against defendant alleging one claim of "dental malpractice" arising from defendant's extraction of plaintiff Dennis Wright's tooth, subsequent post-operative care, failure to obtain informed consent, or to refer, and a second claim on behalf of plaintiff Lolita Wright for "Loss of Consortium[.]" On 27 April 2009, defendant filed an answer to plaintiffs' complaint, denying plaintiffs' claims, raising several affirmative defenses, and moving for dismissal because the complaint did "not comply with the provisions of Rule 9(j) of the North Carolina Rules of Civil Procedure." On 5 June 2009, the trial court entered a discovery scheduling order, requiring that plaintiffs designate all expert witnesses on or before 1 July 2009; "[e]xperts not designated and made available for deposition in accordance with this Order shall not be permitted to testify at trial[;]" and "[t]he schedule and deadline dates set forth herein may be modified only by the written consent of counsel for all parties or by order of the Court for good cause shown." On or about 13 June

2009, plaintiff filed its responses to defendant's Rule 9 interrogatories, naming Thomas J. David, D.D.S. as their only designated qualified standard of care witness, and included a copy of Dr. David's curriculum vitae. On or about 23 June 2009, plaintiffs filed its responses to defendant's first set of interrogatories and request for production of documents. On 25 September 2009, defense counsel conducted a deposition of Dr. David. On 4 November 2009, defendant moved to strike expert witness Dr. David as plaintiffs' designated expert witness and to dismiss plaintiffs' action with prejudice. On 9 December 2009, plaintiffs filed the "affidavit of Thomas David, DDS" stating that "during the yearly period preceding the period" of defendant's treatment of plaintiff Dennis Wright "the majority of [his] active clinical practice involved general dentistry[,] and defendant's care of plaintiff Dennis Wright was "not in accordance with the standards of practice for dentists with similar training and experience situated in the same or similar communities at the time her care was provided." On 10 December 2009, defendant moved to strike the affidavit of Thomas David, D.D.S., arguing that this affidavit contradicted with or was inconsistent with his sworn deposition testimony given on 25 September 2009. On 7 January 2010, the trial court ruled on

defendants' motion by written order, denying defendant's motion to strike Dr. David's affidavit "because it supplements, rather than contradicts, his deposition testimony[;]" granting defendant's motion to strike Dr. David as plaintiffs' expert witness because he was "not qualified to serve as a standard of care expert witness" as "he did not devote a majority of his professional time to the active clinical practice of dentistry or the instruction of students during the year immediately preceding the date of the occurrence that is the basis for this action[;]" and dismissing plaintiffs' complaint with prejudice for not having a designated qualified standard of care witness. On 15 January 2010, plaintiffs filed a "motion to reconsider" its 7 January 2010 order, which was denied by written order on 5 April 2010. Plaintiffs gave timely written notice of appeal from the 7 January 2010 and 5 April 2010 orders.

II. Standard of Review

Plaintiffs argue on appeal that the trial court erred in striking Dr. David as their standard of care expert witness and dismissing its complaint. Plaintiffs contend that this Court applies a *de novo* review to appeals from a trial court's order granting a motion to strike an expert witness but admits that "[t]he appellate courts have not clearly set forth the standard

of review.” Defendant makes no argument as to the proper standard of review. Here, defendant raised her motion to strike plaintiffs’ expert witness and dismiss on the pleadings “pursuant to the provisions of Rule 9(j) and Rule 41 of the North Carolina Rules of Civil Procedure, Rule 702 of the North Carolina Rules of Evidence, and G.S. §§ 90-21.11 and 90-21.12[.]” In its order striking plaintiffs’ expert and dismissing plaintiffs’ complaint, the trial court made the following findings of fact and conclusions of law:

2. Dr. David is not qualified to serve as a standard of care expert witness under Rule 702 of the North Carolina Rules of Evidence because he did not devote a majority of his professional time to the active clinical practice of dentistry or the instruction of students during the year immediately preceding the date of the occurrence that is the basis for this action, and therefore should be stricken as a standard of care expert witness.

3. This action should be dismissed because plaintiffs have not designated a qualified standard of care expert witness and may not proceed without one.

4. In the alternative, this action should be dismissed because Plaintiffs did not reasonably expect that Dr. David would qualify as a standard of care expert witness under Rule 702 of the North Carolina Rules of Evidence.

First, we note that the trial court granted defendant's motion to strike based on Dr. David's failure to qualify "as a standard of care expert witness under Rule 702 of the North Carolina Rules of Evidence[.]" We further note that the designation of a "qualified standard of care expert witness" and whether plaintiffs' "reasonably expect[ed]" Dr. David to qualify are requirements of Rule 9(j). See N.C. Gen. Stat. § 1A-1, Rule 9(j) (2009). Accordingly, the trial court granted defendant's motion to dismiss based on both Rule 702 and Rule 9(j). Generally, whether a witness qualifies as an expert is exclusively within the discretion of the trial court. *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984). However, because the issue presented here on appeal regarding admissibility of plaintiff's expert requires an interpretation of the meaning of specific statutory phrases in Rule 702, making it a question of law, we apply a *de novo* standard of review. See *Edwards v. Wall*, 142 N.C. App. 111, 115, 542 S.E.2d 258, 262 (2001) (applying a *de novo* review to an issue of interpretation of Rule 702); *FormyDuval v. Bunn*, 138 N.C. App. 381, 385, 530 S.E.2d 96, 99 (stating that "[d]e novo review is appropriate in the instant case, as plaintiff contends the trial court's decision was based on an incorrect reading and construction of

Rule 702[.]” (quotation marks omitted)), *disc. review denied*, 353 N.C. 262, 546 S.E.2d 93 (2000). Further, when ruling on a motion to dismiss pursuant to Rule 9(j)

a court must consider the facts relevant to Rule 9(j) and apply the law to them. Thus, a plaintiff’s compliance with Rule 9(j) requirements clearly presents a question of law to be decided by a court, not a jury. A question of law is reviewable by this Court *de novo*.

Phillips v. 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). In *Cornett v. Watauga Surgical Group*, 194 N.C. App. 490, 493, 669 S.E.2d 805, 807 (2008), this Court also considered whether the trial court’s findings of fact were supported by sufficient evidence and whether the conclusions of law were supported by the findings. Here, the trial court made a finding of fact as to Dr. David’s “professional time.” We have further stated that “even when a complaint facially complies with Rule 9(j) by including a statement pursuant to Rule 9(j), if discovery subsequently establishes that the statement is not supported by the facts, then dismissal is likewise appropriate.” *Ford v. McCain*, 192 N.C. App. 667, 672, 666 S.E.2d 153, 157 (2008); *See McGuire v. Riedle*, 190 N.C. App. 785, 787-88, 661 S.E.2d 754, 757 (2008).

Accordingly, we consider whether the evidence supports the trial court's findings of fact as to Dr. David's qualifications and will apply a *de novo* standard of review as to plaintiffs' arguments that the trial court's decision to grant defendant's motion to strike Dr. David as plaintiffs' expert witness was error, and *de novo* review of the trial court's decision to dismiss plaintiffs' complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 9(j). See *Phillips*, 155 N.C. App. at 376, 573 S.E.2d at 603.

III. Striking Plaintiffs' Expert Witness

Plaintiffs contend that the "salient question is whether Dr. David, during the year immediately preceding the date of the occurrence that is the basis for th[is] action" devoted a majority of his professional time to the active clinical practice of general dentistry as required by N.C. Gen. Stat. § 8C-1, Rule 702. (Quotation marks omitted.) Plaintiffs argue that the term "professional time" in Rule 702(c) should not include the time Dr. David spent in forensic dentistry; therefore, he actually spent 50% of his time in administrative duties and 50% of his time in clinical dentistry; and the time he spent filling in for other dentists at the clinic "'tips the balance' to a majority[,]" as required by N.C. Gen. Stat. § 8C-

1, Rule 702. Defendant counters that Dr. David does not meet the qualification of Rule 702(c) to give expert witness testimony in a medical malpractice claim, and plaintiffs' argument that Dr. David's time in forensic dentistry "should not be included in the definition of 'professional time' defies logic and is not supported by any authority."

Rule 702(b) and (c) of the North Carolina Rules of Evidence provide the qualifications for an expert to testify in a medical malpractice case:

(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:

. . . .

(2) During the year immediately preceding the date of the occurrence that is the basis for the action, the expert witness must have devoted a majority of his or her professional time to either or both of the following:

a. The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that

party is a specialist, the active clinical practice of the same specialty or 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; or

b. The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

(c) Notwithstanding subsection (b) of this section, if the party against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness, during the year immediately preceding the date of the occurrence that is the basis for the action, must have devoted a majority of his or her professional time to either or both of the following:

(1) Active clinical practice as a

general practitioner; or

(2) Instruction of students in an accredited health professional school or accredited residency or clinical research program in the general practice of medicine.

N.C. Gen. Stat. § 8C-1, Rule 702 (2009). It is not clear whether plaintiffs are alleging that Dr. David is a specialist in dentistry pursuant to Rule 702(b) or whether he is a "general practitioner" practicing "general dentistry" pursuant to Rule 702(c), but it does not matter as the requirements relevant to our analysis are the same: Dr. David must have "devoted a majority of his or her professional time to either or both of the following[:]" (1) active clinical practice or (2) teaching students. *See id.* Plaintiffs allege that defendant's care for plaintiff Dennis Wright from 12 January 2005 until 8 June 2005 amounted to malpractice. Therefore, according to N.C. Gen. Stat. § 8C-1, Rule 702, plaintiffs had to show that during the year prior to defendant's treatment of plaintiff, a majority of Dr. David's "professional time" was spent in the "active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered[.]" *See id.*¹

¹ As there was no evidence that Dr. David was teaching during

At his deposition on 25 September 2009, defense counsel questioned plaintiffs' expert witness Dr. Thomas J. David, D.D.S. about his "professional time" "[d]uring the year immediately preceding the date of the occurrence[.]" See *id.* In response to defense counsel's questioning, Dr. David testified that in 1990, he merged his private dental practice with Nanston Dental Group in Georgia and was employed "there until the end of 2007." Dr. David said that from 1992 to 2000, part of his practice consisted of (1) "facial pain and lesion management" which was characterized as "oral medicine[.]" and (2) "splitting time doing regular . . . general dentistry[.]" However, "after June of 2000," Dr. David "stopped doing the traditional general dental work and substituted that with administrative duties at the Nanston clinic[.]" which meant "nonclinical work[.]" in addition "to filling in for dentists who were sick, on vacation, maternity leave, et cetera." To clarify, defense counsel asked Dr. David whether from June 2000 until 2007, "[t]he clinical part of [his] professional time after June of 2000 was spent doing the oral medicine work, that is, facial-pain and lesion-management work?" Dr. David responded, "That, plus the fill-in work that I did when doctors

the relevant period during 2004, that portion of N.C. Gen. Stat. § 8C-1, Rule 702(b) or (c) is inapplicable.

were out for illness or maternity leave or vacation[.]” Dr. David confirmed that this “fill in” work consisted of general clinical dentistry.

Dr. David stated that his administrative duties included “[c]hart reviews, internal audits of various offices, OSHA compliance training, [and] other training duties.” Defense counsel then questioned Dr. David regarding his forensic dentistry work. Dr. David stated that in the criminal forensic setting this practice involved “[i]dentification of individuals through dental remains, bite-mark analysis, [and] age estimation” and, in that context, he had been a consultant for the State of Georgia medical examiner and retained by local jurisdictions. In the civil forensic context, his forensic dentistry work consisted of “consulting [as an] expert witness in malpractice cases and personal injury cases[.]” For civil matters, Dr. David estimated that over the previous five years, he had been deposed around six times a year and had testified in trial three or four times a year.

As to the proportion of his “professional time” in 2004 and 2005 that each of his areas of practice involved, including his administrative duties, clinical work, and forensic dental work, defense counsel asked Dr. David, if it was “10 percent doing

forensic work, 45 percent doing administrative, and 45 percent doing clinical dentistry?" Dr. David answered "on an average, that's reasonably accurate." To clarify Dr. David's classification of his work at Nanston during the relevant period, defense counsel concluded the deposition of Dr. David by asking him how much of his practice was devoted to "seeing and treating patients" in the following exchange:

[Defense Counsel:] Bear with me just a minute, Doctor. Doctor, let me ask you a question that I asked you at that trial down in Pitt County and see if you still agree with this, that in any given year since mid-2000, if we had a pie chart that had all of your hours as a professional, less than half of that pie chart would represent the time that you spent actually seeing and treating patients, in any given year.

[Dr. David:] Less than half of it?

[Defense Counsel:] Yes. If we had a pie chart that had all of the hours of your professional time in it—

You've got a pie chart and that's your professional time that you spent consulting as an expert—this is since mid-2000—administrative work, mid-2000 until the end of '07 when you left Naston, if we had that pie chart that has all your professional hours on it, that in any given year, less than half of that pie chart would represent the time that you spent actually seeing and treating patients.

[Plaintiffs' Counsel:] Objection to form.

[Dr. David:] About 45 percent.

[Defense Counsel:] Doctor, that's all I have. Thank you.

[Plaintiffs' counsel:] None for me. Thank you.

Dr. David affirms twice that during the relevant period the percentage of his profession time devoted to clinical practice was around 45% and this falls short of the majority requirement of Rule 702.

In his subsequent 9 December 2009 affidavit, Dr. David further explains his clinical practice during the relevant period:

3. Dr. Frye treated Mr. Wright from 12 January 2005 to 8 June 2005; during the yearly period preceding the period of Dr. Frye's treatment of Mr. Wright (in other words, from 12 January 2004 to 8 June 2004), the majority of my active clinical practice involved general dentistry.
4. During the period from 12 January 2004 to 8 June 2004 my general dentistry practice involved tooth extractions, which is a part of general dentistry. During that period I extracted more than 20 teeth. (In my 32+ years of practicing dentistry, I have extracted more than 1000 teeth.)
5. Also during the period from 12 January 2004 to 8 June 2004, I did forensic dentistry on the side. Forensic dentistry has never been a part of my clinical practice of general dentistry.

Although Dr. David's affidavit states that during the relevant period "the majority of my active clinical practice involved general dentistry[,] " he never specifically denies that the percentage of his clinical time was greater than 45% of his "professional time" as N.C. Gen. Stat. § 8C-1, Rule 702 requires. His clinical practice could have still been 45% of his professional time, as he testified on deposition, but a majority of the 45% could have still been devoted to tooth extraction, as the affidavit claims.

In addressing plaintiffs' arguments, we note that although Dr. David explained that during the relevant period of time his "clinical time" was split doing oral medicine and general clinical dentistry, when he was filling in for other dentists at Nanston, either activity would involve "seeing and treating patients." Accordingly, when asked the percentage of his "professional hours" that was devoted to "seeing and treating patients[,] " Dr. David answered that it was "[a]bout 45 percent[.]" This testimony shows that Dr. David considered the time that he was filling in for his colleagues at Nanston as part of the 45% that he devoted to "clinical dentistry" or "seeing and treating patients[.]" Therefore, contrary to

plaintiffs' argument, adding in the time that Dr. David filled in would not "'tip[] the balance' to a majority[.]"

We agree with defendant that plaintiffs' argument "that the term 'professional time' in Rule 702c should not include the time Dr. David spent in forensic dentistry" is flawed. Essentially plaintiffs' argument is that despite the obvious utilization of Dr. David's professional dental skills in performing his criminal and civil forensic dentistry activities, Dr. David's activities in forensic dentistry should not be considered "professional time" because they do not include seeing patients in a dental office. Plaintiffs' argument would eviscerate N.C. Gen. Stat. § 8C-1, Rule 702's majority requirement and create an absurdity: Just exclude the portion of the expert's "professional time" which is not devoted to relevant clinical practice and the portion of the expert witness' "professional time" which is devoted to clinical practice will always be a majority. For example, an expert who spends 95% of his professional time doing forensic work and only 5% of his professional time in clinical practice would still be considered as spending the majority of his "professional time" in clinical practice; actually, he would be spending 100% of his "professional time" in clinical practice, since his forensic

work is excluded from the equation. Rule 702 is clearly intended to limit testifying experts to those who spend a majority of all of their professional time working or teaching in the area in which expertise is needed for the case in question. As N.C. Gen. Stat. § 8C-1, Rule 702 requires work in "active clinical practice[,]” it obviously contemplates that the medical provider is spending most of his professional time, over 50%, in treatment of patients or teaching, although there is no requirement of a particular number of working hours per week. See *Cornett*, 194 N.C. App. at 495, 669 S.E.2d at 808 (noting that "Dr. Litwin testified he spent significant time performing administrative duties such as attending committee meetings. Even considering all of his teaching time, it does not amount to more than half of his professional time. The trial court did not err in determining that Dr. Litwin did not meet the requirements of Rule 702(b), since, in a sixty-hour work week, at the most, Dr. Litwin spent five hours a week in clinical surgery and instructing surgery. This was less than half of his professional time.”).

Dr. David did not qualify as an expert witness pursuant to N.C. Gen. Stat. § 8C-1, Rule 702 because he did not devote a majority of his "professional time" during the relevant period

to the active clinical practice. Accordingly, the trial court's finding that Dr. David did not spend the majority of his professional time in active clinical practice was supported by the evidence and the trial court did not err in granting defendant's motion to strike Dr. David as plaintiffs' expert witness.

III. Dismissal of Plaintiffs' Complaint

Plaintiffs argue next that "that trial court erred by striking plaintiffs' expert witness because the evidence showed that plaintiffs reasonably believed Dr. David would qualify." As noted above, the trial court dismissed plaintiffs' case pursuant to Rule 9(j). Pursuant to the trial court's 5 June 2009 discovery scheduling order, plaintiffs were to designate all expert witnesses on or before 1 July 2009; that "[e]xperts not designated and made available for deposition in accordance with this Order shall not be permitted to testify at trial[;]" and that "[t]he schedule and deadline dates set forth herein may be modified only by the written consent of counsel for all parties or by order of the Court for good cause shown." Dr. David was plaintiffs' only designated expert witness. According to the 5 June 2009 order, after 1 July 2009, plaintiffs could not designate anyone else to testify as their expert witness.

There is no indication in the record that plaintiffs attempted to modify any of the deadlines in the 5 June 2009 discovery order to add any other potential expert witnesses who could testify as to the standard of care. Therefore, even if plaintiffs could have "reasonably expected" Dr. David "to qualify as an expert witness under Rule 702[,]" see N.C. Gen. Stat. § 1A-1, Rule 9(j), the trial court ultimately determined that he was not qualified, and plaintiffs could not designate anyone else to testify.

IV. Striking Plaintiffs' Affidavit

Finally, plaintiffs argue that "the trial court did not err by denying defendant's motion to strike the affidavit of Dr. David." As defendant has filed no cross-appeal as to the trial court's denial of her motion to strike the affidavit, we need not address this issue. As the trial court did not err in striking Dr. David as plaintiffs' expert witness or err in dismissing plaintiffs' claims, the trial court correctly denied plaintiffs' motion to reconsider. For the foregoing reasons, we affirm the trial court's order granting defendant's motion to strike plaintiffs' expert witness, dismissing plaintiffs' complaint with prejudice, and denying plaintiffs' motion to reconsider.

AFFIRMED.

Judges CALABRIA and HUNTER, JR., Robert N. concur.

Report per Rule 30(e).