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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-812

Filed: 1 August 2017

Mecklenburg County, No. 11 CVS 18041

WILLIAM PATTON III and RENEE HAZLETON, Individually and as Guardians *Ad Litem* of LIAM PATTON, a Minor, Plaintiffs,

v.

THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY, Defendant.

Appeal by Plaintiffs from judgment entered 10 November 2015 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 March 2017.

Charles G. Monnett III & Associates, by Charles G. Monnett III, for Plaintiff-Appellants.

Lincoln Derr PLLC, by Tricia M. Derr and Beth A. Stanfield for Defendant-Appellee.

HUNTER, JR., Robert N., Judge.

William Patton III and Renee Hazelton (collectively “Plaintiffs”) appeal from a judgment based upon a jury’s verdict finding the Charlotte-Mecklenburg Hospital Authority (“Defendant”) did not act negligently in treating Plaintiffs’ minor child,

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Liam. On appeal, Plaintiffs contend the trial court erred in: (1) allowing Defendant's medical witness, Dr. Maxfield, to offer testimony outside his expert designation; (2) refusing to accept Plaintiffs' tender of Liam's treating physician as an expert witness; (3) restricting the testimony of two of Liam's treating physicians to matters contained in their medical records; and (4) instructing the jury using a misleading and incorrect statement of law. For the following reasons, we affirm.

I. Factual and Procedural Background

On 28 September 2011, Plaintiffs filed a complaint alleging Dr. Alice Mitchell, and her employer, the Charlotte-Mecklenburg Hospital Authority, acted negligently in the treatment of their son, Liam. Plaintiffs' complaint alleges the following narrative.

On 2 August 2010, Plaintiffs' sixteen-month old son, Liam, fell at home with a toothbrush in his mouth. When Liam's mother removed the toothbrush, she noticed it had blood and tissue on it, and placed it in a plastic bag. Plaintiffs rushed Liam and the toothbrush to Defendant's Levine Children's Hospital Emergency Department ("Emergency Department"). At the Emergency Department, Dr. Jennifer Zurosky assessed Liam and documented he acted "fussy" and had "blood streaked" drool. Thereafter, Dr. Mitchell examined Liam and told Plaintiffs that Liam had a small "hematoma" on his palate and some small palate "abrasions." Liam's mother offered to show Dr. Mitchell the toothbrush, but Dr. Mitchell replied

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it was not necessary. Dr. Mitchell did not order a neurological evaluation, perform any additional tests on Liam, or consult any other physician. Dr. Mitchell discharged Liam

The following day, Liam's mother noticed Liam "was lethargic." Additionally, Liam displayed facial drooping and did not use his left arm or leg "normally." She rushed Liam back to the Emergency Department, where another doctor evaluated Liam.¹ This new doctor determined Liam sustained, as a result of the toothbrush injury, trauma to his carotid artery and "an acute infarction in the middle cerebral artery (MCA) area of the brain" The doctor transferred Liam to the pediatric intensive care unit. There, doctors determined Liam had an "evolving brain infarction, left arm and leg weaknesses, speech and swallowing impairments, seizures and respiratory depression episodes."

On 9 August 2010, Liam left the pediatric intensive care unit and entered Levine Children's Rehabilitation Hospital, to obtain further care from specialists. Liam's treatments included "neurology, radiology, respiratory, rehabilitation medicine, physiatry, physical therapy, occupational therapy and speech therapy."

Plaintiffs alleged Dr. Mitchell acted negligently on 2 August 2010 by failing to, *inter alia*, either obtain a consultation from a Pediatric Ear, Nose, and Throat

¹ The record does not disclose the identity of the doctor who examined Liam on 3 August 2010.

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Specialist for Liam, or by failing to order a CT angiogram to look for injuries to the blood vessels in Liam's neck.

Plaintiffs also alleged at all times relevant to this action, Dr. Mitchell was an employee or agent of Defendant Charlotte-Mecklenburg Hospital Authority. Plaintiffs contended, under the doctrine of *respondeat superior*, Defendant was vicariously liable to Plaintiffs for the negligence and medical malpractice of its agent or employee, Dr. Mitchell.

On 5 December 2011, Defendant filed an answer. Defendant denied Dr. Mitchell's negligence and its own liability. The trial court set a peremptory trial date for 23 September 2013.

In preparation for trial, the trial court entered a Consent Discovery Scheduling Order ("DSO") on 19 April 2012. The trial court issued this DSO to schedule the parties' identification, designation, and discovery of witnesses, pursuant to Rule 26 (f1) of the North Carolina Rules of Civil Procedure. Under the DSO, the parties agreed the depositions of the individual parties would be completed no later than 1 June 2012.

The parties also agreed Plaintiffs "shall designate all expert witnesses who may be called to testify at the trial of this action . . ." no later than 1 August 2012. Each designation would consist of the following:

a summary of qualifications or a curriculum vitae along with a brief summary of the subject matter upon which the

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expert [witness] is expected to testify, the substance of facts and opinions to which the expert [witness] is expected to testify, and a summary of the grounds for each opinion.

As for treating physicians, the DSO specified:

Plaintiffs shall also designate treating physicians of [Liam] only if they are expected to give opinions at trial as to breach of standard of care, or with whom Plaintiff's counsel has consulted and are expected to give causation opinions not contained in the existing medical records. Treating physicians shall otherwise be treated as ordinary witnesses

In turn, under the DSO, Defendant would then designate all of its expert witnesses within sixty days (or by 15 December 2012) following Defendant's last deposition of Plaintiffs' expert witnesses. The trial court ordered Defendant to designate its expert witnesses within the same parameters which Plaintiffs utilized in designating their expert witnesses. The DSO further provided, "[t]he deadlines established . . . may be extended by consent of all parties, or upon Order of the court for good cause shown."

Pursuant to the DSO, Plaintiffs designated Dr. Alison St. Germaine Brent as an expert witness with an opinion on the standard of care in emergency medicine. Plaintiffs did not designate Dr. Brent to give opinions regarding causation or what a CT scan may have shown, if performed on Liam on 2 August 2010. Defendant designated Dr. Charles Maxfield as a causation expert. Defendant also designated

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Dr. William Boydston as an expert in whether Liam's symptoms warranted a CT scan on 2 August 2010, and what a CT scan would indicate if performed that night.

On 22 August 2013, Plaintiffs voluntarily dismissed their claims against Dr. Mitchell.² On 12 September 2013, the trial court granted Plaintiffs' motion to continue the hearing for Defendant's motion for summary judgment.³ Plaintiffs subsequently identified Dr. Lori Jordan as their causation expert. The case first came to trial on or about 7 April 2014 before the Honorable H. William Constangy. After two and a half weeks of trial, the jury began deliberating on 24 April 2014. **[R. 45,** On 29 April 2014, the jury foreperson informed the trial court the jury had reached a "stalemate[.]" and further deliberations would not be productive. The trial court subsequently entered an order for a mistrial.

After the mistrial, both parties filed motions *in limine* requesting the trial court to limit testimony to evidence obtained during discovery and included under the DSO. Judge Hugh B. Lewis heard the motions and restricted expert witnesses to their designations. The trial court also confined experts' testimony to their areas of expertise:

I'm going to limit all experts to their designations.
Therefore, I'm granting the motion at this time; however,

² The record lacks an explanation why Plaintiffs chose to voluntarily dismiss their claims against Dr. Mitchell.

³ The record only contains the trial court's order granting Plaintiffs' motion to continue the hearing of Defendant's motion for summary judgment. The record lacks a copy of Defendant's motion for summary judgment or a copy of Plaintiffs' motion for the continuance of the hearing of Defendant's motion for summary judgment.

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if there is any other information that someone wishes to elicit from an expert I'll be glad to hear it outside the purview of the jury at that time before making a specific ruling on any complete limitation, but just going along in open trial you're limited to their designations at this time.

On 21 September 2015, the case came to trial for the second time. Judge Lewis presided. Prior to the completion of jury selection, due to scheduling difficulties, Plaintiffs recorded the testimony of Dr. Sheila Natarajan, a physical medicine and rehabilitation specialist. Before the videographer recorded Dr. Natarajan's testimony, Plaintiffs informed the trial court that Dr. Natarajan would testify on the issues of prognosis, disability, future treatment, future life-care planning needs, and other alleged damages relating to Liam's injury. Defendant objected to the scope of Dr. Natarajan's proffered testimony, because Plaintiffs did not designate her as an expert witness and because her medical records concerning Liam did not address this anticipated testimony. The trial court limited Dr. Natarajan's testimony to her treatment of Liam and any future treatment she would provide. The trial court reasoned Dr. Natarajan could not testify as to all medical recommendations in Liam's life-care plan because Plaintiffs did not designate her to provide life-care planning opinions not falling under her treatment of Liam.

Plaintiffs introduced Dr. Natarajan as an expert witness. Defendant objected, and the parties held a bench conference. The trial court stated it would rely on North Carolina case law where "the opinions of treating physicians are similar to those of

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occurrence witnesses who testify . . . because they witnessed or participated in the transactions or events that are part of the subject matter of the litigation.” The trial court then concluded:

[Dr. Natarajan] is a treating physician, she is an occurrence witness, she will not be tendered or accepted or proffered as an expert or accepted as an expert by this Court. That is the Court’s ruling She will not be proffered and announced to this jury as an expert witness because she is not listed as one on the pretrial documents and to allow such would be against the rules.

Before the jury saw the video, Plaintiffs’ counsel stated, “I think [the videographer] also had a question about in terms of editing this whether we wanted to edit out the bench conferences to make it play faster or whether you want the tape to show us standing up there and the jury not knowing what we’re saying.” The trial court responded:

Any of the juror note stuff needs to come out, everything else can stay in. We probably should have -- for all of [our] edification if we had wanted it off, we should have probably asked for us to have a -- be heard outside the presence of the jury as opposed to bench conference, because [during a] bench conference everybody just comes up here and [the jury] sit[s] over there scratching their heads wonder[ing] if anything we’re deciding on what we’re going to have for lunch or not or whatever it might be. So I would think probably running it straight so they don’t have any thought if something was cut out they don’t know about it. That’s my feeling. Any preference from the Plaintiff’s table?

Plaintiffs’ counsel stated he preferred “to make it as short as possible for the jury’s benefit.” The trial court reasoned since the recorded bench conferences were short

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and inaudible, it was permissible for the jury to view an unedited version of the video. Plaintiffs later introduced the video into evidence and played the video for the jury.

Plaintiffs next called causation expert Dr. Jordan. Plaintiffs asked Dr. Jordan if “a CT angiogram [had] been ordered while Liam was in the emergency department that first time on the evening of August the 2nd [would it] have shown some type of injury to his artery?” Defendant raised no objection. In response, Dr. Jordan testified:

Yes, I think it would have shown an injury to his artery. The injury to that artery is very severe so the point that it occluded the artery I think -- I believe that you [would] have seen something, such as a lifting up of the artery or a little bit of a tear early on before the artery was completely blocked.

Plaintiffs also called pediatric ear, nose, and throat physician, Dr. Eric Mair, as a treating physician. Dr. Mair testified he treated Liam on three occasions. Plaintiffs’ counsel asked Dr. Mair whether “from time to time have you been asked to come to the emergency department [at Levine Children’s Hospital] and evaluate children who have had some kind of injury to their head and eyes, ear, nose and throat?” Defendant objected and argued the information was outside Dr. Mair’s treatment of Liam. The trial court sustained Defendant’s objection. Dr. Mair testified he saw Liam twice in 2010 when Liam had problems swallowing, and once in 2014 when Liam experienced dizziness.

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Plaintiffs later called their standard of care expert, Dr. Brent. Dr. Brent opined a CT angiogram would have allowed for the discovery of Liam's injury. Defendant did not object. Plaintiffs did not designate Dr. Brent to provide testimony about whether a CT scan would have shown an injury, had one been performed on 2 August 2010.

At the close of Plaintiffs' evidence, Defendant moved for a directed verdict. The trial court denied Defendant's motion, and Defendant proceeded with its evidence. Defendant called several witnesses, beginning with Dr. Mitchell, and leading up to one of its expert witnesses, Dr. Maxfield.

Prior to Defendant calling Dr. Maxfield to the stand, the trial court excused the jury to further address Plaintiffs' motion *in limine*. Plaintiffs argued the trial court should prohibit Dr. Maxfield from testifying that a CT scan would fail to show Liam sustained a stroke-inducing injury on 2 August 2010. Plaintiffs argued Defendant did not disclose Dr. Maxfield's opinions on this matter during discovery or in his designation. Defendant argued it had the right to respond to new opinions elicited from Dr. Brent and Dr. Jordan during Plaintiffs' case-in-chief, and to rebut those opinions through its expert witnesses. The trial court allowed Dr. Maxfield's rebuttal testimony. Dr. Maxfield testified a CT scan on 2 August 2010 would not have indicated a major injury to Liam's throat.

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Defendant then called another expert witness, Dr. Boydston. Dr. Boydston testified, *inter alia*, Liam's symptoms on the night of 2 August 2010 did not warrant further testing.

At the close of Defendant's evidence, Defendant renewed its motion for a directed verdict. The trial court denied Defendant's motion. During the charge conference, Plaintiffs objected to the "infallibility instruction." Plaintiffs specifically objected to the sentence: "The law only requires a healthcare provider to have used those standards of practice exercised by members of the same health care profession with similar training and experience situated in the same or similar communities." In support of their objection, Plaintiffs argued the instruction is "one of the most misused pattern instructions in the whole bunch" and would mislead the jury. The trial court overruled Plaintiffs' objection.

On 16 October 2015, the jury found Defendant did not act negligently. The trial court entered judgment on 10 November 2015. Plaintiffs timely filed notice of appeal on 7 December 2015.

II. Standard of Review

First, regarding the admissibility of Dr. Maxfield's expert testimony, we review under an abuse of discretion standard. *Lail ex rel. Lail v. Bowman Gray Sch. of Med.*, 196 N.C. App. 355, 365, 675 S.E.2d 370, 376 (2009) (citation omitted). "In determining relevant rebuttal evidence, we grant the trial court great deference, and

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we do not disturb its rulings absent an abuse of discretion and a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision.” *Id.* at 369, 675 S.E.2d at 378 (quotation marks and citation omitted).

Second, Plaintiffs’ contention that the trial court erred in refusing to accept Dr. Natarajan as an expert witness is reviewed *de novo*. *Cornett v. Watauga Surgical Grp., P.A.*, 194 N.C. App. 490, 493, 669 S.E.2d 805, 807 (2008) (citations omitted) (“Where the [appellant] contends the trial court’s decision is based on an incorrect reading and interpretation of the rule governing admissibility of expert testimony, the standard of review on appeal is *de novo*.”).

Third, we also utilize the abuse of discretion standard of review in reviewing Plaintiffs’ argument that the trial court erred in narrowing the scope of Dr. Natarajan’s and Dr. Mair’s testimony. *Lail*, 196 N.C. App. at 365, 675 S.E.2d at 376 (citation omitted).

Fourth, with regard to Plaintiffs’ contention that the trial court instructed the jury with a misleading and incorrect statement of law:

[i]t is a well-established principle in this jurisdiction that in reviewing jury instructions for error, they must be considered and reviewed in their entirety. Where the trial court adequately instructs the jury as to the law on every material aspect of the case arising from the evidence and applies the law fairly to variant factual situations presented by the evidence, the charge is sufficient.

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Murrow v. Daniels, 321 N.C. 494, 497, 364 S.E.2d 392, 395 (1988) (internal citations omitted). “Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.” *Hammel v. USF Dugan, Inc.*, 178 N.C. App. 344, 347, 631 S.E.2d 174, 177 (2006) (quotation marks and citation omitted).

III. Analysis

We review Plaintiffs’ contentions in four parts: (A) Dr. Maxfield’s testimony; (B) the trial court’s ruling to not tender Dr. Natarajan as an expert witness; (C) Dr. Natarajan’s and Dr. Muir’s testimony as treating physicians; and (D) jury instructions.

A. Dr. Maxfield’s Testimony

Plaintiffs first contend the trial court erred in allowing Dr. Maxfield to offer testimony outside his designation as an expert. We disagree.

“Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially.” *Lail*, 196 N.C. App. at 369, 675 S.E.2d at 378-79 (quoting *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981)).

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Plaintiffs complain of seven portions of Dr. Maxfield's testimony in their brief.⁴ However, at trial, Plaintiffs failed to object to four portions of this testimony (Parts C, E, F, and G). Accordingly, Plaintiffs have waived appellate review of these portions of testimony. N.C. R. App. P. 10(a)(1) (2016). Additionally, while Plaintiffs originally objected to Dr. Maxfield's testimony regarding medical literature on mouth trauma to children (Part D), Plaintiffs failed to object to Dr. Maxfield's subsequent testimony of the same subject matter. Accordingly, Plaintiffs have waived appellate review of that testimony. *Moore v. Reynolds*, 63 N.C. App. 160, 162, 303 S.E.2d 839, 840 (1983) (citations omitted) ("The admission of evidence without objection waives prior or

⁴ Plaintiffs point to the following portions of Dr. Maxfield's testimony:

A. His opinion that the damage to Liam's carotid artery would not have been visible or discovered had a CT angiogram been ordered by Dr. Mitchell and performed during Liam's first emergency department visit. (T Vol X, p 1786);

B. His opinion as to the radiological indications for performing a CT angiogram in a patient that has suffered oral or pharyngeal injury. (T Vol X, p 1800);

C. His opinion that there was no radiological indication for a CT angiogram based on Liam's presentation and history and that had he received a call from the emergency department he would have informed them there was no indication to perform a CT scan. (T Vol X, p 1801-02);

D. His interpretation of what the published medical literature on mouth trauma to children shows and how it supports his opinions in the case. (T Vol X, p 1803-08);

E. His opinion as to the future cancer risks associated with CT scans in children and whether the risks in performing the scan outweighed the potential benefit. (T Vol X, p 1780);

F. His opinion as to the risks associated with the administration of contrast during a CT angiogram. (T Vol X, p 1781); and

G. His opinion as to the associated risks if a child requires sedation during a CT angiogram. (T Vol X, p 1783)[.]

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subsequent objection to the admission of evidence of a similar character.”). Thus, our review is limited to Dr. Maxfield’s testimony regarding what a CT scan would have shown if performed on 2 August 2010 and radiological indications for performing a CT scan on patients suffering oral or pharyngeal injuries (Parts A and B).

Here, in Plaintiffs’ original DSO and Supplemental DSO, Plaintiffs designated Dr. Brent and Dr. Jordan as follows:

Dr. Brent will testify that she is familiar with the accepted standards of practice applicable to practitioners of pediatric emergency room care as they relate in Mecklenburg County, North Carolina and/or similar medical communities in August of 2010, for patients such as Liam Patton under the same or similar circumstances. Dr. Brent is also expected to testified that Dr. Alice Mitchell failed to exercise good, appropriate medical judgment, that portions of her diagnosis, management and treatment of Liam Patton were not within the applicable accepted standards of practice and did not represent the exercise of reasonable case and diligence in the care of patients.

.....

Dr. Jordan is expected to testify regarding causation issues and in particular that the injury to Liam Patton’s carotid artery caused him to suffer a stroke and that earlier admission to the hospital with appropriate observation and intervention could have reduced or eliminated the long term damage to his brain.

At trial, during Plaintiffs’ case in chief, Dr. Jordan gave an opinion regarding what a CT angiogram may have shown, if performed on Liam on 2 August 2010. Dr.

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Brent opined doctors would have discovered Liam's injury, had a CT angiogram been obtained on 2 August 2010.

In its DSO, Defendant designated Dr. Maxfield as follows:

Based on his knowledge, training, and experience, along with his review of the above-referenced documents and radiological films, Dr. Maxfield is expected to testify that Liam Patton did not sustain a penetrating injury on August 2, 2010. Dr. Maxfield is further expected to testify that the radiological films are consistent with a non-penetrating blunt force trauma sustained on August 2, 2010.

During Defendant's case in chief, but before calling Dr. Maxfield, the trial court excused the jury so the trial court and counsel could discuss the scope of Dr. Maxfield's testimony. The following discussion ensued:

[PLAINTIFFS' COUNSEL]: Well, I think we both -- both sides had motions in limine that experts be limited in the opinions contained in their disclosures or otherwise disclosed during Discovery. And Dr. Maxfield's expert disclosure says that based on his knowledge, training and experience along with his review of the above referenced documents and radiological films, Dr. Maxfield is expected to testify that Liam Patton did not sustain a penetrating injury on August 2, 2010. Dr. Maxfield is further expected to testify that the radiological films are consistent with a non-penetrating blunt force trauma sustained on August 2nd, 2010. Based on that disclosure we elected not to depose him and I'd just be asking he be limited to those opinions and that he not be allowed to give opinions such as whether a CT angiogram taken on the night of August the 2nd would have revealed this carotid artery injury, because that would be beyond the scope of his disclosure.

THE COURT: Response.

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[DEFENDANT'S COUNSEL]: First of all, your Honor, I don't believe that his opinions are beyond the scope of his disclosure. Second of all, if we look at the Plaintiff's designation of experts as well as their sworn testimony in deposition, Dr. Brent was designated to testify about the standard of care, that's it. In fact if you'll -- the Court recalls, Mr. Monnett [(Plaintiffs' Counsel)] got a continuance of the trial in order to find someone to testify on causation issues so that he wouldn't be subjected to summary judgment. He was not permitted to take the depositions of the other defense experts because he had not done so at the time of the prior trial -- the first trial, this is the third time it's been set. Dr. Brent, whom I did depose, testified that she wouldn't be giving any opinions about radiology, neuroradiology, what the films would have shown, et cetera, and in fact during the deposition Mr. Monnett said I don't think -- said to me and on the record, I don't believe anyone can testify about what the films would have shown.

My point, your Honor, is that we designate our rebuttal experts based on the information that the Plaintiffs give us and what we get in their deposition testimony. In this case Dr. Brent, an emergency room physician, and Dr. Jordan have both pulled the films up, showed the films, talked about the films, talked about -- Dr. Brent talked about aspirin, she talked about what the films would have shown. None of that was in the -- either one of those witness's depositions, in fact they both self limited and said I'm going to stick within my specialty and then came in here and did just the opposite and they've opened the door to a rebuttal response. We have the right to respond to the new opinions that they've issued from the stand that we hadn't previously heard and the opinions that have been shared are entitled -- or we're allowed, the defense is allowed to rebut those. They've opened the door to those issues that had not been previously raised and, your Honor, we need to be able to respond to them. They've testified about what a radiologist would have done, what the radiology team would have done, what the films would

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have shown, you know, all of those things.

And so we are going to have him testify about the films, explain the films and respond to in rebuttal the opinions of Dr. Brent and Dr. Jordan. And I've got the Plaintiff's designation here and they were not limited and I think what -- we can never anticipate everything that's going to happen during a trial or what opinions will be allowed and which ones won't. They certainly weren't limited and, you know, we'd ask for the same thing under rebuttal as well as them opening the door to these issues.

THE COURT: Response.

[PLAINTIFFS' COUNSEL]: First of all, if they chose not to object to something, I mean, I don't think that's -- you know, I'm not going to go back and debate what was in their depositions, what was in their disclosures and what was in their trial testimony last time and this time. Clearly we would argue it's all consistent. They knew Dr. Jordan and Dr. Brent's opinions from the last time. Dr. Maxfield did not testify at the last trial is my recollection. They could have supplemented their Discovery Responses in the one year. They've made a huge issue over my supposed failure to do that. They had an equal obligation under Rule 26E, in fact that's one of the few areas there's an affirmative obligation to supplement is if -- with an expert. They've designated him as they've designated him. I'm objecting, we had a motion in limine, I'd ask that he be restricted to the opinions that he was designated for.

THE COURT: Besides the opinions of whether or not it was a penetrating blunt force trauma, I'll also be allowing him to testify as to whether or not a CT would be appropriate, that type of situation. Motion is denied. Let's take a break. We'll return in about 10 minutes and move forward. Thank you.

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Plaintiffs argue the trial court's failure to limit Dr. Maxfield's testimony resulted in unfair prejudice to Plaintiffs "because they had no meaningful opportunity to prepare for cross-examination on these new issues or to obtain admissible rebuttal evidence."

We conclude the trial court did not abuse its discretion in allowing Dr. Maxfield's testimony. Based on our review of the trial transcript, reason supported the trial court's decision. The trial court allowed Plaintiffs' experts, Dr. Brent and Dr. Jordan, to testify regarding what a CT scan would have shown, if performed on 2 August 2010. However, neither Dr. Brent nor Dr. Jordan were designated in Plaintiffs' DSOs to assert said opinion. Accordingly, Defendant argued for allowance for Dr. Maxfield to testify regarding the same issue, what a CT scan would have shown, if performed on 2 August 2010. Even if we would make a different decision, we cannot say the trial court's decision is manifestly unsupported by reason.

Plaintiffs cite to several cases in which our Courts have awarded new trials when appellants were unfairly prejudiced by opposing parties not acting in good faith during discovery. *Prince v. Duke Univ.*, 326 N.C. 727, 392 S.E.2d 388 (1990); *Green v. Maness*, 69 N.C. App. 292, 316 S.E.2d 917 (1984); *Willoughby v. Wilkins*, 65 N.C. App. 626, 310 S.E.2d 90 (1983). Citing to these cases, Plaintiffs contend Defendant failed to comply with the rules of discovery, entitling Plaintiffs to a new trial.

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Our Court explained two of these seminal cases in *Paris v. Michael Kreitz, Jr.*, P.A., 75 N.C. App. 365, 331 S.E.2d 234 (1985):

In *Willoughby*, a medical malpractice action, counsel for defendants filed supplemental responses to discovery identifying their expert witnesses so close to the date of trial that plaintiffs were unable to depose them fully or to cross examine them effectively. There the discovery requests had been pending for more than a year and plaintiffs had filed several motions to compel discovery. The motions to compel were not acted on until after the trial court had peremptorily set the case for trial. We held that plaintiffs had been deprived of their right to effective cross examination and awarded them a new trial.

In *Green*, defendant produced a new expert witness with a new defense theory “virtually on the eve of trial.” The court denied plaintiffs’ motion for a continuance. Relying on *Willoughby*, the *Green* court held that plaintiffs were entitled to a new trial because the court’s refusal to allow the continuance had unfairly deprived plaintiffs of the opportunity to conduct effective cross examination.

75 N.C. App. at 379, 331 S.E.2d at 244. In *Prince*, our Supreme Court awarded a new trial when defendant listed a physician as a “fact witness”, not as an expert witness. 326 N.C. at 789-91, 392 S.E.2d at 388-90.

Prince, *Green*, and *Willoughby* do not demand a different result in this case. Here, Defendant listed Dr. Maxfield as an expert witness, unlike the defendant in *Prince*. *Id.* at 789-90, 392 S.E.2d at 389. Plaintiffs here, unlike in *Green*, did not move for a continuance and Dr. Maxfield did not introduce a new theory into trial. 69 N.C. App. at 301, 316 S.E.2d at 922-23. While Defendant’s DSO should have properly listed the scope of Dr. Maxfield’s proposed testimony, the trial court did not

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err in allowing this testimony. Furthermore, the prejudice allegedly resulting from the “surprise” of Dr. Maxfield’s testimony does not rise to the level encountered in prior decisions by this Court. *See Paris*, 75 N.C. App. at 380, 331 S.E.2d at 245. Dr. Maxfield did not present a completely new theory to the jury, Defendant did not incorrectly designate him as a fact witness when he was actually an expert witness, and Dr. Maxfield was not listed as a witness “virtually on the eve of trial.” *Id.* at 379, 331 S.E.2d at 244.

Moreover, assuming the trial court erred, Plaintiffs have failed to show prejudice entitling them to a new trial. Notably, Dr. Boydston, one of Defendant’s expert witnesses, also testified, without objection, regarding what a CT scan would have shown, if performed on 2 August 2010. *See Id.* at 380, 331 S.E.2d at 245 (holding testimony was not admitted in error when the substance of the complained of testimony was put before the jury by the testimony of another expert witness).

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For the reasons stated above, we hold the trial court did not abuse its discretion in allowing Dr. Maxfield's testimony, and hold this assignment of error is without merit.^{5, 6}

B. Dr. Natarajan

Plaintiffs contend the trial court erred in refusing to accept Plaintiffs' tender of Dr. Natarajan as an expert witness. We disagree.

Rule 702 of the North Carolina Rules of Evidence governs expert testimony and states, in pertinent part:

(a) If scientific, technical or otherwise specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all the following apply:

⁵ In their brief, Plaintiffs cite to cases and statutes governing the authority of the trial court to impose sanctions for Defendant's alleged failure to comply with the rules of discovery. However, Plaintiffs fail to actually argue the trial court erred in failing to impose sanctions. Instead, the brief presents arguments regarding the admissibility of Dr. Maxfield's testimony. Defendant asserts Plaintiffs failed to preserve any issue regarding sanctions because Plaintiffs did not move for sanctions at the trial court. Because of Plaintiffs' failure to properly argue this issue on appeal, we dismiss this assignment of error. N.C. R. App. P. 28 (a) (2016). Assuming *arguendo* that Plaintiffs properly asserted this issue for our appellate review, we hold the trial court did not abuse its discretion in abstaining from sanctioning Defendant.

⁶ As to Dr. Maxfield's testimony regarding radiological indications for obtaining a CT scan, we conclude this testimony was in the scope of his expert designation in Defendant's DSO. Defendant designated Dr. Maxfield to testify Liam did not sustain a penetrating injury on 2 August 2010. Defendant also designated him to testify that the radiological films were consistent with a non-penetrating blunt force trauma. At trial, Defendant asked Dr. Maxfield, "what are the indications from a radiology perspective for a CTA in a patient who's had an oral or pharyngeal injury of some sort?" This opinion was in the scope of Dr. Maxfield's expert designation. Assuming *arguendo*, the trial court erred in overruling Plaintiffs' first objection, Plaintiffs failed to later object to testimony to the same effect. Thus, the objection and appellate review were waived. Even further assuming *arguendo*, had this testimony been in error and Plaintiffs properly objected at trial, we hold the testimony did not result in reversible error.

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(1) The testimony is based upon sufficient facts or data.

(2) The testimony is the product of reliable principles and methods.

(3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. R. Evid. 702 (2016).

A treating physician does not qualify as an expert when the physician's opinions:

are similar to those of occurrence witnesses who testify, not because they were retained in the expectation they might develop and give a particular opinion on a disputed issue at trial, but because they witnessed or participated in the transactions or events that are part of the subject matter of the litigation.

Lail, 196 N.C. App. at 366-367, 675 S.E.2d at 377 (citation omitted).

Additionally, when making a ruling on the qualification of a witness to testify as an expert, “[i]t has never been the general practice in the courts of this State for the trial judge to excuse the jury from the courtroom when ruling upon the qualification of a witness to testify as an expert.” *State v. Frazier*, 280 N.C. 181, 197, 185 S.E.2d 652, 663 (1972), *vacated on other grounds*, *Frazier v. North Carolina*, 409 U.S. 1004, 34 L.Ed. 295 (1972) .

Here, there is no evidence in the record reflecting Dr. Natarajan possessed “specialized knowledge that [would] assist the [jury] to understand the evidence or to

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determine a fact in issue[.]” N.C. R. Evid. 702(a). The issue before the jury was whether Defendant acted negligently in its treatment of Liam on the night of 2 August 2010. The record on appeal shows Dr. Natarajan’s qualifications reflected her experience in treating Liam as to his diagnoses, prognosis, abilities, and future care. There is no evidence showing Dr. Natarajan had specialized knowledge relating to the issue of Defendant’s alleged negligence. The record illustrates Dr. Natarajan’s experience with Liam stems from her observations and conclusions resulting from her work in the capacity of Liam’s treating physician. Dr. Natarajan’s proffered testimony as to Liam’s diagnosis, prognosis, abilities, and future care was consistent with her role as such. Therefore, we conclude the trial court did not err in determining Dr. Natarajan did not qualify as an expert witness or in its identifying Dr. Natarajan as Liam’s treating physician.

Furthermore, we conclude the trial court did not err by stating, in front of the jury, it would not accept Plaintiffs’ tender of Dr. Natarajan as an expert witness. In support of their contention, Plaintiffs cite to *Galloway v. Lawrence*, 266 N.C. 245, 145 S.E.2d 861, 866 (1966) and *Sherrod v. Nash General Hospital, Inc.*, 348 N.C. 526, 500 S.E.2d 708 (1998). In those cases, our Supreme Court ruled trial courts erred in declaring defendant-physicians as expert witnesses in the juries’ presence. *Sherrod*, 348 N.C. at 533-34, 500 S.E.2d at 712-13; *Galloway*, 266 N.C. at 250-51, 145 S.E.2d at 865-66.

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However, the distinguishing factor in *Galloway* and *Sherrod* is each defendant-physician took the stand on his own behalf, and it was an issue for the jury to determine whether each defendant, in light of his professional skills and abilities, acted negligently. *Sherrod*, 348 N.C. at 533-34, 500 S.E.2d at 712-13; *Galloway*, 266 N.C. at 250-51, 145 S.E.2d at 865-66. Our Supreme Court concluded the trial courts' declarations of the defendant-physician as an expert was tantamount to the trial court expressing an opinion to the jury, and, thereby, could have influenced the jury. *Sherrod*, 348 N.C. at 533-34, 500 S.E.2d at 712-13; *Galloway*, 266 N.C. at 250-51, 145 S.E.2d at 865-66. Dr. Natarajan is not a party in the instant case, unlike the doctors in *Galloway* and *Sherrod*, and her qualifications as a doctor were not a critical or a central issue for the jury to determine.

Based on the nature of Dr. Natarajan's testimony, nothing in the record indicates the trial court's open refusal to identify Dr. Natarajan as an expert would influence the jury in rendering its verdict as to Defendant's negligence. *See In re Lee*, 69 N.C. App. 277, 289-91, 317 S.E.2d 75, 82-83 (1984); *Speizman Co. v. Williamson*, 12 N.C. App. 297, 304-05, 183 S.E.2d 248, 253 (1971) (holding the *Galloway* rule is inapplicable to a non-party expert witness). Therefore, the trial court did not err in ruling Dr. Natarajan was not an expert witness in the jury's presence.⁷

⁷ Plaintiffs also argue the trial court erred by playing part of Dr. Natarajan's video testimony to the jury, because the video included arguments regarding the designation of Dr. Natarajan as an expert witness. However, Plaintiffs failed to raise the issue of editing the video to omit these arguments at

C. Treating Physicians' Testimony

Plaintiffs contend the trial court erred in restricting Dr. Natarajan's and Dr. Mair's testimony to matters contained in Liam's medical records. We disagree.

Under Rule 701 of the North Carolina Rules of Evidence:

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C. R. Evid. 701 (2016).

At trial, the trial court stated:

The Court is going to stand on the case of Lail versus Bowman Gray under headnote 8, While treating physicians may give opinions at trial, those opinions are developed in the course of treating the patient and are completely apart from any litigation. Such an opinion is not formed in anticipation of a trial but is simply the product of a physician's observation while treating the patient which coincidentally may have value as evidence at trial. In this respect, the opinions of the treating physicians are similar to those of occurrence witnesses who testify, not because they were retained in expectation they might develop and give a particular opinion on a disputed issue at trial, because they witnessed or participated in the transactions

trial. In fact, when the trial court and trial counsel discussed the subject of editing the video for the jury, Plaintiffs failed to object on any grounds regarding their failed tender of Dr. Natarajan as an expert witness. Thus, we dismiss this assignment of error. N.C. R. App. P. 10(a)(1).

Additionally, Plaintiffs allude to error in the trial court's jury instructions regarding Dr. Natarajan. Plaintiffs argue the jury "was left with no guidance as to how to consider Dr. Natarajan's knowledge, education, training and experience when judging her credibility" However, during the charge conference and after the jury charge, Plaintiffs failed to object to these jury instructions. As such, Plaintiffs failed to preserve this issue for appellate review, and we dismiss the assignment of error. *Id.*

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or events that are part of the subject matter of the litigation.

[T. 269-70] *See Lail*, 196 N.C. App. at 366-367, 675 S.E.2d at 377 (citation omitted).

As a treating physician, the trial court ruled Dr. Natarajan could not give an opinion to the jury outside her treatment of Liam and outside her medical records documenting Liam's treatment. We conclude because Dr. Natarajan's opinions were "developed in the course of treating" Liam, the trial court correctly identified Dr. Natarajan as a treating physician. The trial court did not act so arbitrarily as to abuse its discretion in limiting Dr. Natarajan's testimony to the content of her medical records, which reflected her experience in treating Liam.⁸

Regarding Dr. Mair, Plaintiffs do not dispute he was Liam's treating physician whose testimony relates to "transactions or events that are part of the subject matter of the litigation." *Lail*, 196 N.C. App. at 367, 675 S.E.2d at 377 (citation omitted). Unlike an expert witness's testimony, Dr. Mair's testimony cannot extend beyond his treatment of Liam as to give "a particular opinion on a disputed issue at trial[.]" *Id.* at 366, 675 S.E.2d at 377 (citation omitted). Plaintiffs fail to demonstrate how the trial court abused its discretion in restricting Dr. Mair's testimony to his opinions

⁸ Plaintiffs make vague contentions in their brief that they suffered prejudice because the trial court limited Dr. Natarajan's testimony to her treatment of Liam. These contentions are without merit. Dr. Natarajan's evidence did not relate to Defendant's liability. Her testimony (regardless as an expert or as a treating physician) concerned the issue of damages. This is an issue the jury never reached. *See Wright v. Blue Bird Cab Co.*, 31 N.C. App. 525, 531, 230 S.E.2d 206, 210 (1976) (citation omitted) (where the jury finds in favor of the defendant on the liability issue, the exclusion of evidence relating to damages was not prejudicial to the plaintiff).

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based on his medical records concerning Liam’s treatment. Accordingly, we overrule this assignment of error.

D. Jury Instructions

Lastly, Plaintiffs contend the trial court erred in giving the jury a misleading and incorrect statement of the law when it read the “infallibility instruction,” and the error entitles Plaintiffs to a new trial. We disagree.

“[T]he preferred method of jury instruction is the use of the approved guidelines of the North Carolina Pattern Jury Instructions.” *Hammel*, 178 N.C. App. at 347, 631 S.E.2d at 178 (quoting *Caudill v. Smith*, 117 N.C. App. 64, 70 450 S.E.2d 8, 13 (1994)). “Jury instructions in accord with a previously approved pattern jury instruction provide the jury with an understandable explanation of the law.” *Carrington v. Emory*, 179 N.C. App. 827, 829, 635 S.E.2d 532, 534 (2006) (citation omitted).

North Carolina’s pattern jury instruction for “infallibility” is as follows:

The law does not require of a health care provider absolute accuracy, either in *his* practice or in *his* judgment. It does not hold *him* to a standard of infallibility, nor does it require of *him* the utmost degree of skill and learning known only to a few in *his* profession. The law only requires a health care provider to have used those standards of practice exercised by members of the same health care profession with similar training and experience situated in the same or similar communities at the time the health care is rendered.

N.C.P.I. – Civ. 809.00.

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Following Plaintiffs' objection during the charge conference, the trial court first instructed the jury:

As to the first thing that the Plaintiffs must prove, negligence refers to a person's failure to follow a duty of conduct imposed by law. Every health care provider is under a duty to use their best judgment in the treatment and care of their patient, to use reasonable care and diligence in the application of their knowledge and skill to their patient's care, to provide health care in accordance with the standards of practice among members of the same health care profession, the same training and experience, situated in the same or similar communities at the time the health care is rendered. A health care provider's violation of any one or more of these duties of care is negligence.

The trial court further instructed the jury on "infallibility":

The law does not require a health care provider absolute accuracy either in their practice or in their judgment. It does not hold them to a standard of infallibility, nor does it require them the utmost degree of skill and learning known only to a few in their profession. The law only requires a health care provider to use those standards of practice exercised by the members of the same health care profession with similar training and experience who were situated in the same or similar communities at the time the health care is rendered.

Plaintiffs argue the infallibility instruction contradicted other language in the jury instructions, misled and confused the jury, and is an incorrect statement of North Carolina law.

We first note the infallibility instruction given by the trial court was nearly identical to the pattern jury instruction, with only a change in pronoun, the addition of the word "of" in the first sentence, the change of "have used" to "use" in the third

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sentence, and the addition of “who were” in the third sentence. N.C.P.I. – Civ. 809.00. Viewing all the jury instructions as a whole, we observe the trial court further instructed the jury on Defendant’s duties under the laws of negligence. *See Hunt v. Bradshaw*, 242 N.C. 517, 521-22, 88 S.E.2d 762, 765 (1955) (citation omitted).

Moreover, while we understand Plaintiffs’ argument that the instruction seemingly sets a different standard to show negligence in a medical malpractice action, our Court recently decided this issue, albeit in an unpublished decision. *Wilson v. Ashley Women’s Ctr., P.A.*, No. COA16-1004, 2017 WL 1650129 (unpublished) (N.C. Ct. App. May 2, 2017). We find *Wilson* persuasive and conclude the trial court properly instructed the jury. Accordingly, we hold this assignment of error is without merit. Because we hold the trial court did not err in its jury instructions, we need not determine whether any alleged error affected the outcome of the case.

IV. Conclusion

For the reasons stated above, we hold Plaintiffs failed to demonstrate any error of law entitling them to a new trial.

DISMISSED IN PART; AFFIRMED IN PART.

Judges CALABRIA and BERGER concur.

Report per Rule 30(e).