IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-30

Filed: 3 December 2019

Cabarrus County, No. 16 CVS 508

CHARITY MANGAN, Plaintiff

v.

JAMES S. HUNTER, DDS, JAMES S. HUNTER, DDS, P.A., JENNIFER WELLS, DDS, AND JENNIFER L. WELLS, DDS, P.A. d/b/a FIRST IMPRESSIONS FAMILY DENTISTRY, Defendants

Appeal by Plaintiff from Order entered 23 July 2018 by Judge Beecher R. Gray in Cabarrus County Superior Court. Heard in the Court of Appeals 21 August 2019.

Lanier Law Group, P.A., by Donald S. Higley, II, and Lancaster and St. Louis, PLLC, by Hilary A. St. Louis, for plaintiff-appellant.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones and Luke Sbarra, for defendants-appellees.

HAMPSON, Judge.

Factual and Procedural Background

Charity Mangan (Plaintiff) appeals from an Order entered 23 July 2018 granting summary judgment in favor of Defendants James S. Hunter, DDS (Dr. Hunter) and James S. Hunter, DDS, P.A. (collectively, Defendants) in this medical malpractice action. The Record before us on appeal tends to establish the following:

Plaintiff began visiting Dr. Hunter for dental treatment in 1986 and continued to be a regular patient until Dr. Hunter's retirement in 2013. During the twenty-

seven years that Plaintiff saw Dr. Hunter for dental care, Plaintiff developed temporomandibular joint disorder, migraines, and fibromyalgia. She also developed bruxism (teeth grinding). Plaintiff's last appointment with Dr. Hunter was on 17 April 2013. At that time, Dr. Hunter reported no dental caries.[1] Dr. Hunter did recommend a crown along with continued use of Plaintiff's dental guard.

Seven months later, in November 2013, Plaintiff visited a new dentist, Dr. Sherrill Jordan, for routine dental care. Dr. Jordan reported tooth erosion on nearly all of Plaintiff's teeth and twelve cavities. Plaintiff received a second opinion from Dr. Wells, whose opinion was very similar to Dr. Jordan's. Plaintiff received treatment for thirteen cavities in December 2013 by Dr. Wells. In February 2014, Plaintiff visited another new dentist, Dr. Jason Baker, and received additional dental treatments in March 2014. Dr. Baker referred Plaintiff to Dr. Napenas in May 2014, and Dr. Napenas subsequently diagnosed her with atypical odontalgia. Dr. Napenas informed Plaintiff that "treatment [for atypical odontalgia] would include a life-long management for the pain with similar medications as what she was already taking for fibromyalgia." He prescribed Plaintiff an antidepressant for nerve pain and stress management. Plaintiff also alleged her primary care physician prescribed her blood

[1] The transcript and Record use the terms dental caries and cavities interchangeably. *See Dental caries*, THE AMERICAN HERITAGE COLLEGE DICTIONARY (3d ed. 1993) (defining dental caries as "[t]he formation of cavities in the teeth by the action of bacteria").

pressure medication as a result of the stress of the situation. At the time of the filing of the Complaint, Plaintiff was still seeing Drs. Baker and Napenas for treatment.

In March 2015, Sharon Szeszycki, DDS (Dr. Szeszycki) was contacted by Plaintiff's counsel about the present action. Dr. Szeszycki, a dentist in the Chicago area, has been working as an expert witness in the area of dental malpractice since 2007. Around 10 March 2015, counsel for Plaintiff mailed a letter to Dr. Szeszycki that indicated it included a USB drive with Plaintiff's records. On 20 March 2015, Dr. Szeszycki reported, in her Affidavit Letter to Plaintiff's counsel, "[a] reasonable and meritorious cause for action exists with respect to James Hunter DDS[.]" Dr. Szeszycki's Affidavit Letter stated, in forming her opinion, she reviewed: "Mangan timeline of events[,] Dr. Baker letter[,] Demand letter to Luke Sbarra March 2015[,] Baker treatment plan[,] Perio charting[, and] Mangan teeth pics." She continued to find "Dr. Hunter failed to document any concerns he might have had regarding the erosion issues during the Patient's time as a patient in his practice for the purposes of quantifying and analyzing the origin and progression of this disease process."

On 18 February 2016, Plaintiff filed her Complaint alleging medical malpractice against Defendants in Cabarrus County Superior Court. In accordance with Rule 9(j) of the North Carolina Rules of Civil Procedure, Plaintiff's Complaint alleged:

> [A]ll medical records pertaining to Defendants' negligence . . . have been reviewed by a person or persons reasonably expected

> to qualify as an expert witness under Rule 702 of the North Carolina Rules of Evidence and who is/are willing to testify that the medical care did not comply with the applicable standard of care.

Defendants accepted service on 13 April 2016 and submitted their Answer to Plaintiff's Complaint on 13 June 2016. The parties began discovery. On 27 April 2018, Plaintiff voluntarily dismissed her claims against Jennifer Wells, DDS and Jennifer Wells, DDS, P.A. d/b/a First Impressions Family Dentistry without prejudice.

On 29 August 2016, Dr. Szeszycki responded to Defendants' Rule 9(j) interrogatories. The relevant responses are as follows:

> 4. Specifically identify all documents you reviewed to form your opinion about the medical care rendered by any Defendants.
>
> **RESPONSE [Dr. Szeszycki]**
>
> **I reviewed the following materials:**
> **Mangan timeline of events**
> **Dr. Baker letter**
> **Demand letter to Luke Sbarra March 2015**
> **Baker treatment plan**
> **Perio charting**
> **Mangan teeth pics**
>
> 5. State with specificity the date you received the medical records regarding Plaintiff, the date you actually reviewed the medical care rendered, when and to whom you expressed your opinions regarding the medical care Defendants provided to Plaintiff, and whether you provided anyone a written, verbal, or other report regarding your conclusions.
>
> **RESPONSE**

> **I received the materials on or about March 15, 2015 and began my review on that date. I continued my review on March 17, 2015 and then prepared a written Affidavit on March 20, 2015 expressing my opinions. (R p. 48).**

On 2 April 2018, Plaintiff designated Dr. Szeszycki as an expert witness. Plaintiff submitted "Dr. Szeszycki is expected to testify that Defendants breached the standard of care in their care and treatment of [Plaintiff]" and that "Dr. Szeszycki bases her opinions on her education and training as well as her review of [Plaintiff's] medical records."

Defendants deposed Dr. Szeszycki on 10 May 2018. Dr. Szeszycki's deposition revealed the following exchanges:

> [Counsel for Defendants:] [W]hat information do you have that you relied on that you do not have with you printed out . . . ?
>
> [Dr. Szeszycki:] Okay. There is a Baker treatment plan, Baker updated treatment plan. There was a demand letter to you. There's Dr. Baker X-ray, Dr. Baker letter. There's a file that says Gawthrop-Wells-Mangan. Another one that's Hunter-Mangan, which I think is what I have with me because that's his clinical notes, Dr. Hunter's clinical notes, and then there is a Hunter, DDS, James condensed version, which is his dep. Jordan DDS. Mangan timeline of events. . . .
>
> . . . .
>
> [Counsel for Defendants:] This is, I believe, your responses to the 9(j) discovery responses. Do you recall making these responses?
>
> [Dr. Szeszycki:] Yes.

[Counsel for Defendants:] And in number 4, do you recall the question specifically identify all documents you reviewed to form your opinion about the medical care rendered by the Defendants?

. . . .

[Dr. Szeszycki:] Yes.

[Counsel for Defendants:] And your response was I reviewed the following materials, and you have a list of the materials that you listed -- that you reviewed?

[Dr. Szeszycki:] Yes.

[Counsel for Defendants:] That is the material you reviewed, correct?

[Dr. Szeszycki:] At the time, yes.

. . . .

[Counsel for Defendants:] And those were the only documents provided to you when you did your review in March of 2015, correct?

[Dr. Szeszycki:] Yes.

. . . .

[Counsel for Defendants:] And prior to the filing of the lawsuit, the documents that you reviewed would have been those listed on interrogatory number 4 . . . correct?

[Dr. Szeszycki:] Correct.

[Counsel for Defendants:] And no other documents, correct?

[Dr. Szeszycki:] Correct.

. . . .

> [Counsel for Defendants:] And those documents mentioned in [Interrogatory] answer number 4, that's the complete universe of information you considered in March of 2015, correct?
>
> [Dr. Szeszycki:] I'm going to say I would like to have said that I looked at Dr. Hunter's notes, so I can't answer that.
>
> [Counsel for Defendants:] Did you?
>
> [Dr. Szeszycki:] I'd have to look -- let's see here.
>
> [Counsel for Defendants:] It's not on the list?
>
> [Dr. Szeszycki:] It's not on the list. I know. That's a surprise to me.
>
> [Counsel for Defendants:] So because it's not on the list, can you say under oath today that you looked at his notes?
>
> [Dr. Szeszycki:] I -- because it is not on the list, I cannot say that I looked at his notes, correct. . . . I would find it unusual for me to have given an opinion without looking at the notes. . . .

When asked specifically about Defendants' alleged malpractice, Dr. Szeszycki testified that "[her] feelings about [Dr. Hunter's] shortcomings have to do with what's not contained in his note taking . . . [a]nd also what is contained in his note taking."

On examination by Plaintiff's counsel, Dr. Szeszycki stated: "I would never base my opinion on someone's report, for instance, the timeline of events that was written by the patient. I would always have looked at the records." Defendants' counsel then inquired: "Can you testify under oath in this case that you reviewed Dr. Hunter's records pertaining to the care Miss Mangan received at Dr. Hunter's office?"

At that time, Dr. Szeszycki responded: "I'm going to testify under oath that I would have looked at Dr. Hunter's clinical notes in making my -- in making my decision. It is not listed on the affidavit."

At the conclusion of the deposition, Defendants revisited the question of whether Dr. Szeszycki reviewed Plaintiff's medical records.

> [Counsel for Defendants:] [Y]ou've stated two different things. You've stated under oath in your 9(j) responses that you did not have Dr. Hunter's records. . . . Now, you're stating that you have no reason to doubt you received them and that you normally would do it. So I'm asking you can you now under oath change what you previously said under oath, which is that you did not have those records. I want you to be able to tell me why under oath you can say today that you reviewed Dr. Hunter's records in March of 2015.
>
> [Dr. Szeszycki:] I'm going to make a statement here. You asked me under oath could I see, given what I wrote down in the affidavit, is information that's written there, did I see Dr. Hunter's notes in that list of materials? And the answer is no. Under oath, I will say no, but it is unlikely that I would not have looked at Dr. Hunter's notes in making my opinion.
>
> . . . .
>
> [Counsel for Defendants:] . . . I'm asking right now as you sit here and testify under oath, the best you can say is consistent with what you've previously said under oath is that you cannot say under oath that you reviewed Dr. Hunter's medical records prior to the time that the lawsuit was filed, correct?
>
> [Dr. Szeszycki]. I cannot say under oath and based on my affidavit letter that I saw Dr. Hunter's clinical notes. I can say -- I can say that when I -- in completing the file, I asked for more information . . . and when I received Dr. Hunter's notes, I went,

> oh, yes, I've seen these, and, yet, they're not listed here. I will agree with you. They are not listed here on my affidavit letter.

On 30 May 2018, Defendants filed a Motion for Summary Judgment pursuant to Rules 9(j) and 56 of the North Carolina Rules of Civil Procedure. Defendants' Motion for Summary Judgment alleged:

> The Rule 9(j) discovery responses of Dr. Sharon Szeszycki . . . and the deposition transcript of Dr. Sharon Szeszycki . . . disclose her failure to review the medical and dental records Rule 9(j) requires prior to Plaintiff's filing of this civil action. Consequently, in light of this Rule 9(j) failure, no genuine issue of material fact exists and Defendants are entitled to judgment as a matter of law.

In response, on 5 July 2018, Plaintiff's counsel filed an Affidavit of Attorney for Plaintiff, averring "Dr. [Szeszycki] acknowledged receipt of his records and reviewed them." Dr. Szeszycki also filed an affidavit on 5 July 2018, averring: "Since the deposition and refreshing my memory as to my notes and research, I can say that I am certain I reviewed Defendant Hunter's dental records prior to rendering my opinion in this matter and prior to the filing of this lawsuit."

On 12 July 2018, the trial court entered "Order Granting Defendant James S. Hunter, DDS and James S. Hunter, DDS, P.A. Summary Judgment" (Order). The Order was served on Plaintiff after entry on 23 July 2018. In the Order, the trial court made what it termed "undisputed findings of fact and conclusions of law." The trial court, however, also found "[t]he totality of the evidence before the Court indicates Dr. Szeszycki failed to review all medical records pertaining to Defendants'

alleged negligence that were available . . . ." Plaintiff timely appealed this Order on 15 August 2018.

Issue

The issue in this appeal is whether the trial court erred by granting summary judgment in favor of Defendants on the basis of its finding Plaintiff's expert did not review Plaintiff's medical records as required by Rule 9(j).

Analysis

I. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation and quotation marks omitted). "Since summary judgment is proper only where there is no genuine issue of material fact, summary judgment orders should not include findings of fact." *Raymond v. Raymond*, ___ N.C. App. ___, ___, 811 S.E.2d 168, 173 (2018). "We review *de novo* a trial court's dismissal of a medical malpractice complaint for substantive Rule 9(j) noncompliance." *Preston v. Movahed*, ___ N.C. App. ___, ___, 825 S.E.2d 657, 661, *disc. rev. allowed* ___ N.C. ___, 830 S.E.2d 818 (2019).

II. Summary Judgment and Rule 9(j)

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2017). "Upon a motion for summary judgment, the moving party carries the burden of establishing the lack of any triable issue and may meet his or her burden by proving that an essential element of the opposing party's claim is nonexistent." *Hawkins v. Emergency Med. Physicians of Craven Cnty., PLLC*, 240 N.C. App. 337, 341, 770 S.E.2d 159, 162 (2015) (alterations, citations, and quotation marks omitted).

Summary judgment is a procedural way in which parties can ensure compliance with Rule 9(j) in medical malpractice actions. *See Barringer v. Wake Forest Univ. Baptist Med. Ctr.*, 197 N.C. App. 238, 255, 677 S.E.2d 465, 477, *disc. review denied*, 363 N.C. 651, 684 S.E.2d 290 (2009) ("The Rules of Civil Procedure provide other methods by which a defendant may file a motion alleging a violation of Rule 9(j). *E.g.*, N.C. Gen. Stat. § 1A-1, Rules 12, 41, and 56 (2005). Rule 9(j) itself, however, does not provide such a method."). Rule 9(j), in relevant part, requires:

> Any complaint alleging medical malpractice by a health care provider pursuant to G.S. 90-21.11(2)a. 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 and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have 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;
>
> (2) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint[.]

N.C. Gen. Stat. § 1A-1, Rule 9(j) (2017). In sum, Rule 9(j) requires the person a plaintiff seeks to have qualified as an expert review "all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry" prior to the filing of the complaint. *See id.*

Rule 9(j) was added to the North Carolina Rules of Civil Procedure in 1995. *See Vaughan v. Mashburn*, 371 N.C. 428, 434, 817 S.E.2d 370, 375 (2018). "Rule 9(j) serves as a gatekeeper, enacted by the legislature, to prevent frivolous malpractice claims by requiring expert review before filing of the action." *Moore v. Proper*, 366 N.C. 25, 31, 726 S.E.2d 812, 818 (2012) (emphasis in original omitted) (citation omitted). "[T]he rule averts frivolous actions by precluding any filing in the first place by a plaintiff who is unable to procure an expert who both meets the appropriate qualifications and, after reviewing the medical care and available records, is willing to testify that the medical care at issue fell below the standard of care." *Vaughan*,

371 N.C. at 435, 817 S.E.2d at 375. Thus, compliance with Rule 9(j) is determined at the time the complaint is filed. *Moore*, 366 N.C. at 31, 726 S.E.2d at 817 (citation omitted). However, "a complaint facially valid under Rule 9(j) may be dismissed if subsequent discovery establishes that the certification is not supported by the facts[.]" *Id.* (citation omitted).

A. The Trial Court's Order

Turning to the case *sub judice*, Defendants' Motion for Summary Judgment alleged Dr. Szeszycki "fail[ed] to review the medical and dental records Rule 9(j) requires prior to Plaintiff's filing of this civil action." After considering the parties' arguments, the trial court granted summary judgment in favor of Defendants. In its Order, the trial court purported to make "undisputed findings of fact and conclusions of law in connection with [the] Judgment[.]" Plaintiff contends that the trial court erred in Findings of Fact 8, 13, and 14, ultimately arguing that Dr. Szeszycki did, in fact, review Plaintiff's medical records in compliance with Rule 9(j) prior to the filing of the Complaint.

Summary judgment is proper where there "is no genuine issue as to any material fact[.]" N.C. Gen. Stat. § 1A-1, Rule 56(c). Here, necessarily, the issue of whether Dr. Szeszycki reviewed the medical records in question prior to the filing of Plaintiff's Complaint is a material fact; the answer to that question determines whether Plaintiff's lawsuit may proceed on the merits. Upon our de novo review of

the Record, we conclude the trial court's Findings of Fact are not, as it claims, "undisputed" and therefore that summary judgment was improper.

The trial court's Order cites our Supreme Court's decision in *Moore v. Proper* in support of its decision to make findings of fact at the summary judgment phase.[2] *Moore* was decided by our Supreme Court in 2012 and affirmed a divided Court of Appeals decision to reverse the trial court's grant of summary judgment in favor of the defendants. 366 N.C. 25, 25, 26, 28, 726 S.E.2d 812, 815 (2012). The trial court granted the defendants' motion for summary judgment on the basis that the plaintiff's expert was not reasonably expected to qualify under North Carolina Rule of Evidence 702. *Id.* at 28, 726 S.E.2d at 815.

The Supreme Court's decision in *Moore* cautions lower courts against conflating the requirements of Rule 9(j) with those of Rule 702 of the North Carolina Rules of Evidence. *Id.* at 31, 726 S.E.2d at 817 (citing N.C. Gen. Stat. § 1A-1, Rule 9(j)(1)) ("[T]he preliminary, gatekeeping question of whether a proffered expert witness is 'reasonably expected to qualify as an expert witness under Rule 702' is a different inquiry from whether the expert *will actually* qualify under Rule 702."). The

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[2] The trial court's Order, in footnote one, stated:

> The Court makes findings of fact and conclusions of law consistent with Moore v. Proper, 366 N.C. 25, 32, 726 S.E.2d 812, 818 (2012) (stating, "when a trial court determines a Rule 9(j) certification is not supported by the facts, the Court must make written findings of facts to allow a reviewing appellate court to determine whether those findings are supported by competent evidence, whether the conclusions of law are supported by those findings, and in turn, whether those conclusions support the trial court's ultimate determination.").

Court emphasized that “the trial court is not generally permitted to make factual findings at the summary judgment stage[ ]” and cautioned lower courts “a finding [of fact] that reliance on a fact or inference is not reasonable will occur only in the *rare* case in which no reasonable person would so rely.” *Id.* at 32, 726 S.E.2d at 818 (emphasis added) (citation omitted).

This Court has recognized that although findings of fact are not proper at summary judgment, “[i]t is not uncommon for trial judges to recite uncontested facts upon which they base their summary judgment order, however when this is done any findings should clearly be denominated as uncontested facts and not as a resolution of contested facts.” *Raymond*, ___ N.C. App. at ___, 811 S.E.2d at 174 (citation and quotation marks omitted). This reasoning aligns with our Supreme Court’s holding in *Moore* instructing trial courts to grant summary judgment only under the rare circumstance when there could be no other finding but that “no reasonable person would so rely” on the forecasted or disputed evidence as to whether a party reasonably expected a proffered expert to qualify under Rule 702. *Moore*, 366 N.C. at 32, 726 S.E.2d at 818.

Here, we conclude the trial court erroneously applied *Moore*’s instruction by making “undisputed findings of fact” at summary judgment in light of the evidence in the case *sub judice*. The Record reflects, in multiple instances, that the issue before the trial court is one of disputed and material fact rendering summary judgment

wholly improper and, further, does not fall into the rare case described in *Moore*. *See id.* Instead, the trial court's Findings serve to resolve contested facts, inconsistent with this Court's prior opinion in *Raymond*. *See* ___ N.C. App. at ___, 811 S.E.2d at 174.

First, in Finding 8, the trial court includes select citations to portions of Dr. Szeszycki's deposition testimony supporting summary judgment in favor of Defendants as "undisputed facts." However, Finding 8 omits important portions of Dr. Szeszycki's deposition that flag the factual question of whether she reviewed Plaintiff's medical records before the filing of the Complaint. During examination by Defendants' counsel, Dr. Szeszycki testified her answer to Interrogatory 4 included all the materials that she reviewed. She reiterated her "Affidavit Letter" similarly included the correct list of materials she reviewed. However, when asked later in the deposition if her response to Interrogatory 4 is "the complete universe of information [she] considered in March of 2015[,]" she responded: "I'm going to say I would like to have said that I looked at Dr. Hunter's notes, so I can't answer that." She continued: "I would find it unusual for me to have given an opinion without looking at the notes." The issue was revisited at the conclusion of the deposition. Dr. Szeszycki emphasized she "would never base [her] opinion on someone's report, for instance, the timeline of events that was written by the patient. [She] would always have looked at the records." Moreover, Dr. Szeszycki stated: "I'm going to testify under oath that I would

have looked at Dr. Hunter's clinical notes in making my -- in making my decision. It is not listed on the affidavit." Dr. Szeszycki conceded: "You asked me under oath could I see, given what I wrote down in the affidavit, . . . did I see Dr. Hunter's notes in that list of materials? And the answer is no. Under oath, I will say no[.]" However, she continued, "but it is unlikely that I would not have looked at Dr. Hunter's notes in making my opinion."

Defendants contend that it is clear from Dr. Szeszycki's deposition that she did not review Plaintiff's medical records as required by Rule 9(j); we disagree. During a line of questioning, Defendants' counsel inquired: "And your feelings about [Dr. Hunter's] shortcomings have to do with what's not contained in his note taking, correct?", to which Dr. Szeszycki responded, "[a]nd also what is contained in his note taking." At another point, Defendants' counsel asked Dr. Szeszycki: "there's no clinical evidence that you are aware of indicating that decay existed as of April 2013, correct?" Dr. Szeszycki answered, "Correct. According to Dr. Hunter's notes, there is no indication." In both instances, it appears from our review of the deposition that Dr. Szeszycki was testifying that a portion of the opinions she formed were based on the contents of Dr. Hunter's notes.

In short, the gist of Dr. Szeszycki's deposition testimony is apparent. Even though the list of materials she provided did not state that it included Plaintiff's medical records, Dr. Szeszycki believed she reviewed the records prior to rendering

her opinion on the matter. Whether her belief is accurate or not, however, is a genuine issue of material fact to be resolved.

Second, in Finding 13, the trial court purported to find "[t]he totality of the evidence before the Court indicates Dr. Szeszycki failed to review all medical records . . ." Finding 13 indicates the trial court engaged in weighing "[t]he totality of the evidence" before it. Similarly, in Finding 14, the trial court stated "the Affidavits do not satisfy the Court[.]" These Findings, weighing the evidence, are inconsistent with our summary judgment standard. Thus, we conclude it was error for the trial court to make "undisputed findings of fact" at summary judgment in this case because the trial court's Findings actually resolved a genuine issue of material fact as to whether Dr. Szeszycki reviewed Plaintiff's medical records prior to the filing of Plaintiff's Complaint.

Our own review of the Record reveals additional facts further supporting our conclusion there are factual questions present that are not "undisputed," as the trial court found. In her initial Affidavit Letter to Plaintiff's counsel, Dr. Szeszycki found "Dr. Hunter failed to *document* any concerns he might have had regarding the erosion issues during the Patient's time as a patient in his practice for the purposes of quantifying and analyzing the origin and progress of this disease process [,]" signaling Dr. Szeszycki may have reviewed records or clinical notes not listed in the "Materials Reviewed" section. Although counsel for Plaintiff concedes that Dr. Szeszycki's

response to Interrogatory 4 omits Plaintiff's medical records, counsel has repeatedly averred it was purely a typographical omission. Moreover, Dr. Szeszycki's response to Interrogatory 5 raises a factual question of whether or not she reviewed the medical records. Specifically, Interrogatory 5 asked for the date Dr. Szeszycki "received the medical records" and "the date [she] actually reviewed the medical care rendered[.]" Thus, when asked when she received and reviewed the records, Dr. Szeszycki answered that she received and reviewed "the materials" on 15 March 2015. As such, we conclude the trial court erred in granting summary judgment in favor of Defendants.

B. The Crocker *Framework*

Although Rule 9(j) compliance is a conclusion of law reviewed de novo, *Preston*, ___ N.C. App. at ___, 825 S.E.2d at 661, we are unable to review the trial court's conclusion Plaintiff failed to comply with Rule 9(j) when a genuine issue of material fact persists. We further recognize, in preliminary matters such as 9(j) compliance, it is not practical for the jury to be the ultimate fact finder. As such, when factual questions like the one before us arise, we are guided by our Supreme Court's decision in *Crocker v. Roethling*, which this Court followed in *Barringer*. *See Crocker v. Roethling*, 363 N.C. 140, 140, 675 S.E.2d 625, 625 (2009); *Barringer*, 197 N.C. App. at 250-51, 677 S.E.2d at 474.

In *Crocker*, our Supreme Court reversed and remanded this Court's affirmation of the trial court's grant of summary judgment in a medical malpractice action. 363 N.C. at 142, 675 S.E.2d at 628. The majority held "that in a medical malpractice case: [ ] gaps in the testimony of the plaintiff's expert during the defendant's discovery deposition may not properly form the basis of summary judgment for the defendant[.]" *Id.* at 149, 675 S.E.2d at 632. Justice (later Chief Justice) Martin, in his concurrence, elaborated on the way in which trial courts could properly exercise their discretion. He ultimately concluded the trial court should consider conducting voir dire on proffered experts in cases where "the admissibility decision may be outcome-determinative[.]" *Id.* at 152, 675 S.E.2d at 634 (Martin, J., concurring). He emphasized "the expense of voir dire examination and its possible inconvenience to the parties and the expert are justified in order to ensure a fair and just adjudication."[3] *Id.* We agree.

"[T]he voir dire procedure provides a more reliable assessment mechanism than discovery depositions or conclusory affidavits, protecting the jury from unreliable expert testimony yet preserving the jury's role in weighing the credibility of expert testimony when appropriate." *Id.* at 153, 675 S.E.2d at 634-35. By

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[3] Justice Martin's concurrence in *Crocker* is the controlling opinion. *See id.* at 154 n. 1, 675 S.E.2d at 635 n. 1 (Newby, J., dissenting); *see also Barringer*, 197 N.C. App. at 251 n. 4, 677 S.E.2d at 474 n. 4 ("Justice Martin's concurring opinion, having the narrower directive, is the controlling opinion . . . and requires the trial court to conduct a voir dire examination of the proffered expert witness." (citations and quotation marks omitted)).

conducting voir dire in close cases, the trial court is provided with "an informed basis to guide the exercise of its discretion" *Id.* at 152, 675 S.E.2d at 634.

Indeed, in *Barringer*, this Court reversed and remanded the trial court's grant of summary judgment in favor of the defendant on the question of whether the plaintiff's expert was "sufficiently familiar with the applicable standard of care." 197 N.C. App. at 247, 261, 677 S.E.2d at 472, 474. In *Barringer*, it was unclear from the proffered expert's affidavit and subsequent deposition testimony whether he applied a national or local standard of care in forming his opinion. *Id.* at 250, 677 S.E.2d at 474. This Court, in looking at the expert's initial affidavit and subsequent deposition testimony, concluded it "present[ed] a close question" and was "undeveloped." *Id.* at 247, 250, 677 S.E.2d at 472, 474 (citing *Crocker*, 363 N.C. at 147, 675 S.E.2d at 631). Therefore, this Court remanded the case to the trial court "with instructions to conduct a voir dire examination of [the expert] in order to 'determine the admissibility of the proposed expert testimony.' " *Id.* at 251, 677 S.E.2d at 474 (citing *Crocker*, 363 N.C. at 153, 675 S.E.2d at 634 (Martin, J., concurring)). Defendants cite *Barringer* in support of their argument for summary judgment. However, this Court concluded there "the [expert's] affidavit is plainly inconsistent with [the expert in question's] prior sworn testimony and does not create a genuine issue of fact . . . ." *Id.* at 257-58, 677 S.E.2d at 478. We conclude, in the case *sub judice*, there is a genuine issue of

material fact, notwithstanding the existence of an allegedly inconsistent subsequent affidavit.

Here, the trial court granted Defendants' Motion for Summary Judgment, finding it was "undisputed" Plaintiff's expert "failed to review all medical records pertaining to Defendants' alleged negligence that were available to Plaintiff after reasonable inquiry prior to Plaintiffs' [sic] filing of her civil action." As we have noted, however, that fact is disputed by the parties and, further, the resolution of that fact is outcome determinative. Dr. Szeszycki's deposition testimony does not unequivocally establish she did or did not review Plaintiff's medical records as Defendants contend. Therefore, we conclude, as this Court did in *Barringer*, it is a "close call" whether the Record and evidence to date shows Dr. Szeszycki did or did not review Plaintiff's medical records prior to the filing of the Complaint, rendering summary judgment improper. Thus, we hold, consistent with *Crocker* and *Barringer*, the trial court should conduct a voir dire of Plaintiff's expert to "provide[ ] a more reliable assessment mechanism than discovery depositions or conclusory affidavits[.]" *Crocker*, 363 N.C. at 153, 675 S.E.2d at 634-35.

Conclusion

Based on the foregoing reasons, we vacate the trial court's 23 July 2018 Order and remand this matter to the trial court to hold a voir dire examination of Dr.

Szeszycki to resolve the issue of whether Dr. Szeszycki reviewed Plaintiff's medical records in compliance with Rule 9(j) prior to the filing of the Complaint.

VACATED and REMANDED.

Judges INMAN and BROOK concur.