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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-464

Filed 05 July 2023

Forsyth County, Nos. 16CVS5181-82

CELESTE EVELYN SMITH, Plaintiff,

v.

PIEDMONT TRIAD ANESTHESIA, P.A., Defendant.

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CELESTE EVELYN SMITH, Plaintiff

v.

NOVANT HEALTH, INC. and MEDICAL PARK HOSPITAL, INC., d/b/a NOVANT HEALTH MEDICAL PARK HOSPITAL; HAWTHORNE OB/GYN ASSOCIATES, P.A. and ANTHONY L. MASCIELLO, MD, Defendants.

Appeal by Plaintiff from Judgment entered 6 January 2022 by Judge David L. Hall in Forsyth County Superior Court. Heard in the Court of Appeals 30 November 2022.

*Trehy Safety Law, by Jerome P. Trehy, Jr., for Plaintiff-Appellant.*

*Coffey Law PLLC, by Tamara D. Coffey, for Defendants-Appellees Novant Health, Inc., Medical Park Hospital, Inc., d/b/a Novant Health Medical Park Hospital, and Piedmont Triad Anesthesia, P.A.*

*Nelson Mullins Riley & Scarborough LLP, by Linda L. Helms and G. Gray Wilson, for Defendant-Appellee Anthony L. Masciello, M.D.*

HAMPSON, Judge.

**Factual and Procedural Background**

Celeste Evelyn Smith (Plaintiff) appeals from a Judgment entered 6 January 2022 in favor of Novant Health, Inc. and Medical Park Hospital, Inc. d/b/a Novant Health Medical Park Hospital (Novant Defendants) on Plaintiff's medical negligence claims. This is Plaintiff's second appeal in this matter. In the first appeal, Plaintiff argued, in relevant part, the trial court erred in excluding expert testimony from a hospital administrator concerning claims of administrative negligence allegedly pleaded against the Novant Defendants. *Smith v. Novant Health, Inc.*, 279 N.C. App. 258, 2021-NCCOA-468 (unpublished).

This appeal requires us to determine whether the trial court properly complied with our mandate from the first appeal. However, the Record before us in this appeal leaves out much of the prior procedural history of the case along with omitting the prior trial testimony and evidence. Indeed, both parties include references in their briefs to material which is beyond the content of the Record before us on appeal.<sup>1</sup>

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<sup>1</sup> Plaintiff has filed a Motion for Sanctions against the Novant Defendants challenging—and seeking to strike—a number of such statements Plaintiff contends are not fully supported by the Record. The Novant Defendants counter these statements are generally supported by our prior Opinion even if not

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Recognizing the gaps in the Record, Plaintiff and the Novant Defendants, in some fashion, both request we take judicial notice of all or part of the record in the first appeal. However, “we will not take judicial notice of a document outside the record when no effort has been made to include it.”<sup>2</sup> *Horton v. New S. Ins. Co.*, 122 N.C. App. 265, 268, 468 S.E.2d 856, 858 (1996). We are constrained to draw upon the Record that is before us, including our prior Opinion. As a result, the Record before us tends to reflect the following:

Plaintiff . . . was injured while undergoing a laparoscopic hysterectomy. [Plaintiff] brought legal claims against members of the surgical team as well as Novant Health, Inc. and related corporate defendants . . . . Among other claims, [Plaintiff] alleged that her healthcare providers violated the standard of care when they positioned her on the operating table at an angle and, in the midst of surgery, used a shoulder brace to secure her.

During the surgery, [Plaintiff] was on an operating table in the “Trendelenburg” position, in which the table is inclined with the patient’s head at the lower end. At some point, [Plaintiff] slid downward on the table and a member of the surgical team had to catch and support [Plaintiff’s] head while attempting to level the table. Given the stage of the procedure, the surgical team did not want to “reprep and drape in order to completely recheck positioning.” Ultimately, members of the team proposed using “the horseshoe style shoulder braces that are used in the robot room” to perform robotic surgery on similarly positioned

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specifically supported. Both parties rely extensively on the summary version of the procedural and factual history of the case set forth in our prior Opinion—perhaps overly so. In our discretion, we deny Plaintiff’s Motion. Nevertheless, we also undertake to rely on only what appears before us on the Record.

<sup>2</sup> Plaintiff, specifically, filed a Motion for this Court to take Judicial Notice of a portion of the prior record consisting of five isolated pages of the prior trial transcript. That Motion is denied.

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patients. A member of the surgical team retrieved the shoulder brace and the team used it to secure [Plaintiff] until the surgery was complete. The surgery “lasted far longer than the scheduled time.”

After her surgery, [Plaintiff] experienced significant pain in her right shoulder area. The shoulder problems persisted and, ultimately, [Plaintiff]’s treating physician diagnosed her with complex regional pain syndrome due to an injury sustained in the surgery.

*Smith*, 279 N.C. App. 258, 2021-NCCOA-468, ¶¶ 3-5.

On or about 24 September 2013, Plaintiff filed a Complaint against Piedmont Triad Anesthesia, P.A. (Triad) in Rockingham County Superior Court in file number 13 CVS 1603 alleging negligence on the part of Triad employees who comprised the anesthesia team during Plaintiff’s surgery.<sup>3</sup> [On 13 March 2014, Plaintiff filed a separate action in Rockingham County Superior Court file number 14 CVS 407 alleging negligence claims against the Novant Defendants, Hawthorne OB/GYN Associates, P.A., and Anthony L. Masciello, M.D. also arising from Plaintiff’s surgery.

The parties agree that at some point the two matters were transferred to Forsyth County Superior Court and consolidated for trial—apparently, leading to the new file numbers 16 CVS 5181 and 16 CVS 5182, which are now the subject of this appeal.<sup>4</sup> Our prior Opinion reflects the Novant Defendants moved to exclude the

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<sup>3</sup> The date of filing is illegible in the Record and the version of the Complaint in the Record appears incomplete and, among other things, omits any signature page(s).

<sup>4</sup> No order transferring venue or consolidating the matters for trial is in the Record. Nor is there any indication of the docketing of this case in Forsyth County.

testimony of Kevin J. Moore (Moore), a lawyer with experience in hospital administration—Plaintiff’s sole expert witness tendered in support of Plaintiff’s alleged administrative negligence claims. *Smith*, ¶¶ 6-7. We observed that the trial court granted this motion and subsequently entered directed verdict against Plaintiff on her administrative negligence claims.<sup>5</sup> *Id.* ¶ 7.

The parties also agree that following a jury trial in Forsyth County, the jury returned a verdict in favor of the Novant Defendants on the remaining claims and the trial court declared a mistrial as to the other defendants.<sup>6</sup> The parties then stipulate the trial court entered a final judgment as to the Novant Defendants on 8 November 2016, from which Plaintiff appealed to this Court.<sup>7</sup>

In the first appeal, Plaintiff argued the trial court erred in excluding Moore’s testimony as to her purported administrative negligence claims. *Id.* ¶ 9. Novant Defendants contended all of Plaintiff’s claims sounded not in administrative negligence, but rather in negligence arising from alleged breaches of clinical duties requiring expert testimony from a qualified medical professional. *Id.* ¶ 12. We observed, however, “we are unable to locate the point at which the trial court examined each of [Plaintiff]’s proposed administrative claims, determined that each

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<sup>5</sup> Despite the fact the exclusion of this expert witness testimony is the key underlying issue in this appeal, no party included the motion or the trial court’s ruling in the Record. Nor did the parties include the directed verdict.

<sup>6</sup> The trial proceedings, jury verdicts, and mistrials are not contained in the Record.

<sup>7</sup> This final judgment—which gave rise to the first appeal—is also not included in the Record.

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of those claims involved clinical care and decision-making, and then determined that Moore was not qualified to offer expert testimony as to those claims.” *Id.* ¶ 13. We acknowledged, however: “But, again to be fair, we cannot fault the trial court for this. [Plaintiff]’s theories of administrative negligence evolved over time and it is difficult to identify . . . which particular theories of administrative negligence [Plaintiff] intended to pursue at trial.” *Id.* ¶ 14.

We determined “we are unable to engage in meaningful appellate review of the trial court’s gatekeeping role with respect” to the proffered expert testimony. *Id.* We remanded this matter with specific instructions:

for the trial court to conduct a hearing at which [Plaintiff] identifies on the record the particular administrative claims she seeks to pursue and the trial court determines whether each claim concerns clinical care or clinical decision-making—thus requiring expert testimony from a medical professional—or instead concerns only administrative matters suited for expert testimony from a hospital administrator. The court can then assess whether [Plaintiff’s expert] is qualified under Rule 702 to offer expert testimony with respect to any of those claims.

*Id.*

On remand, Plaintiff filed a document captioned “Plaintiff’s Offer of Proof”. This “Offer of Proof” consists of 25 pages of mainly single-spaced legal arguments concerning the admissibility of Moore’s proffered testimony on various topics, including citations to statutory and regulatory authorities, as well as prior testimony and proceedings. Plaintiff also filed an extensive Appendix, including statutes,

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regulatory authorities, and various documentary exhibits. Additionally, Plaintiff filed a Motion for New Trial against the Novant Defendants, which included requested Findings of Fact on topics Plaintiff asserted Moore should be permitted to testify. The Novant Defendants and Defendant Anthony L. Masciello, M.D. each filed Motions to Strike Plaintiff's Motion for New Trial. Additionally, these Defendants also filed objections to Plaintiff's Offer of Proof on the grounds Plaintiff's Offer of Proof failed to comply with this Court's instructions in that Plaintiff offered no list of the administrative negligence claims Plaintiff intended to pursue at trial.

The trial court conducted a hearing on 6 October 2021. From the transcript of this hearing, it appears there had been some earlier communication between the parties and the trial court, which is not reflected in the Record. Nevertheless, at this hearing, Plaintiff's counsel did not identify any specific claims or theories alleged in the Complaint that counsel contended was an administrative negligence claim. The trial court was not asked, and did not make, any determinations as to individual claims of administrative negligence. Rather, the trial court forecasted its view, having considered Plaintiff's Offer of Proof and Motion for New Trial, that all of Plaintiff's claims arose from clinical duties owed to Plaintiff arising from the performance of the laparoscopic surgery. While Plaintiff's counsel suggested claims related to policies and procedures might potentially be classed as administrative negligence claims, counsel, however, identified no particular claim.

On 6 January 2022, the trial court entered a Final Judgment as to the Novant

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Defendants. In its Judgment, the trial court expressly rejected Plaintiff's proposed findings, and instead concluded:

each of [P]laintiff's alleged administrative claims described in the Complaint, and as further described and set forth in [P]laintiff's Offer of Proof, arise out of an intra-operative re-positioning of the [P]laintiff during a laparoscopic surgical procedure. The evidence adduced at trial, as well as [P]laintiff's showing to this Court, demonstrates that each of these claims, however denominated, is in actuality, a claim predicated *exclusively* upon the provision of clinical care and clinical decision-making. As such, each of these claims requires expert testimony from a medical professional. Witness Moore is not a medical professional, and thus was not and is not competent to offer expert testimony with regard to any of these claims.

The trial court denied Plaintiff's Motion for New Trial, sustained Defendants' objections to Plaintiff's Offer of Proof, and denied Defendants' Motions to Strike. The trial court certified its Final Judgment for immediate appeal under Rule 54(b) of the North Carolina Rules of Civil Procedure as a final judgment with regard to the Novant Defendants and there being no just reason to delay Plaintiff's appeal from this Judgment. Plaintiff timely filed Notice of Appeal from this Final Judgment on 25 January 2022.

**Issues**

The dispositive issues are whether the trial court: (I) complied with this Court's prior mandate; and (II) abused its discretion in concluding Plaintiff's proffered expert was not qualified to testify regarding Plaintiff's medical negligence claims.

**Analysis**



I. Prior Mandate

Plaintiff does not expressly contend on appeal that the trial court failed to follow this Court's prior mandate. Plaintiff, however, implies the trial court failed to follow the mandate by not holding an *evidentiary* hearing and by failing to recognize Plaintiff's proffered expert testimony related to administrative duties preceding Plaintiff's surgery and not clinical decision-making during the surgery. For their part, the Novant Defendants argue it was Plaintiff who failed to follow this Court's instructions by failing to specifically delineate her alleged administrative claims to the trial court.

As a general proposition:

A mandate of an appellate court "is binding upon [the trial court] and must be strictly followed without variation or departure. No judgment other than that directed or permitted by the appellate court may be entered. We have held judgments of Superior [C]ourt which were inconsistent and at variance with, contrary to, and modified, corrected, altered or reversed prior mandates of the Supreme Court . . . to be unauthorized and *void*."

*McKinney v. McKinney*, 228 N.C. App. 300, 302, 745 S.E.2d 356, 358 (2013) (alterations in original) (quoting *Lea Co. v. N.C. Bd. of Transp.*, 323 N.C. 697, 699, 374 S.E.2d 866, 868 (1989)).

In this case, our prior decision remanded this matter to the trial court with specific instructions:

for the trial court to conduct a hearing at which [Plaintiff] identifies on the record the particular administrative

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claims she seeks to pursue and the trial court determines whether each claim concerns clinical care or clinical decision-making—thus requiring expert testimony from a medical professional—or instead concerns only administrative matters suited for expert testimony from a hospital administrator. The court can then assess whether Moore is qualified under Rule 702 to offer expert testimony with respect to any of those claims.

*Smith*, ¶ 14.

First, nothing in this mandate required the trial court to conduct an evidentiary hearing. To the contrary, the mandate plainly supposes a non-evidentiary hearing instructing: Plaintiff to simply outline exactly which legal claims she contends constitute administrative claims; and the trial court to make the legal determination as to whether those claims constituted administrative matters. After that, the trial court could then determine whether Moore was qualified to offer expert testimony. Whether to conduct an evidentiary hearing on this aspect of the mandate was in the discretion of the trial court. *See Hicks v. Alford*, 156 N.C. App. 384, 389, 576 S.E.2d 410, 413 (2003). However, here, it is apparent the trial court relied on the prior proceedings and evidence presented at trial and voir dire. Indeed, Plaintiff relied on these prior proceedings in the Offer of Proof she submitted to the trial court. Plaintiff now claims the trial court “missed the opportunity to question Moore, to allow cross-examination by the defendants’ counsel, and to allow Plaintiff’s counsel to flesh out the distinctions between [the claims].” The Record is, however, devoid of any indication Plaintiff ever requested this opportunity from the trial court. *See*

*generally* N.C.R. App. P. 10(a)(1) (“In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion . . .”).

Second, the Novant Defendants are correct that, on remand, Plaintiff failed to provide the trial court with any coherent or cohesive list of claims or theories Plaintiff contended arose from the breach of any administrative duty. Plaintiff’s Offer of Proof contains no such listing—instead operating as a legal brief on the issue of why Moore should be permitted to testify and summarizing law and evidence without articulating specific claims or theories of the case. Further, the proposed findings in Plaintiff’s Motion for New Trial do not, as Plaintiff contends, cure this failure. Instead, these proposed findings merely summarize the generalized areas in which Plaintiff contends Moore is qualified to provide expert testimony. Nowhere in these proposed findings or Plaintiff’s Motion is there any listing of Plaintiff’s actual claims or theories or any effort to tie Moore’s proffered opinions to any such claims or theories.

Indeed, it appears the trial court took and considered Plaintiff’s submissions at face value and attempted to divine Plaintiff’s claims of administrative negligence. The trial court concluded each of Plaintiff’s claims was “predicated *exclusively* upon the provision of clinical care and clinical decision-making.” As such, the trial court further concluded Moore was not qualified to testify about any of Plaintiff’s claims. This is entirely consistent with our instructions to the trial court to conduct a hearing,

provide Plaintiff the opportunity to identify the particular administrative claims she sought to pursue at trial, determine whether those claims were, in fact, concerning administrative matters, and to assess whether Moore was qualified to offer testimony. *Smith*, ¶ 14. Thus, the trial court complied with this Court’s prior mandate.

II. Exclusion of Expert Testimony

Plaintiff contends the trial court erred in excluding the testimony of Moore, Plaintiff’s proffered hospital administration expert, regarding claims against the Novant Defendants arising from Plaintiff’s surgery and the use of the shoulder braces during the procedure. Plaintiff argues she pleaded claims for administrative negligence and the trial court failed to understand the difference between claims involving administrative duties and clinical duties. Plaintiff posits the trial court “should have realized that some of Plaintiff’s proffered expert testimony—the opinions related to medical equipment, required policies and procedures for their use, and the required education, training, and supervision for their use—did not involve clinical duties.”

“Generally, we review a trial court’s ruling on a motion to exclude expert testimony for an abuse of discretion.” *Miller v. Carolina Coast Emergency Physicians, LLC*, 277 N.C. App. 449, 474, 860 S.E.2d 238, 256 (2021), *aff’d*, 382 N.C. 91, 876 S.E.2d 436 (2022) (citing *Crocker v. Roethling*, 363 N.C. 140, 143, 675 S.E.2d 625, 628-29 (2009)). “However, when the pertinent inquiry on appeal is based on a

question of law—such as whether the trial court properly interpreted and applied the language of a statute—we conduct de novo review.” *Da Silva v. WakeMed*, 375 N.C. 1, 5, 846 S.E.2d 634, 638 (2020). “Additionally, an error of law is an abuse of discretion.” *Id.* at 5 n.2, 646 S.E.2d at 638 n.2.

At the outset, it bears mentioning that even on appeal, Plaintiff still fails to identify the purported administrative claims or theories she intended to pursue at trial. While Plaintiff contends the trial court should have realized “some” of Plaintiff’s proffered expert testimony as not involving clinical duties, Plaintiff does not identify any specific opinions or provide citations to the record or to any legal authority for this claim.

Rather, Plaintiff contends our Supreme Court’s decision in *Estate of Savino v. Charlotte-Mecklenburg Hosp. Auth.*, 375 N.C. 288, 847 S.E.2d 677 (2020), required the trial court to allow Plaintiff to proceed on her administrative claims—whatever those may be—and allow the opinions of Moore on hospital administration. In *Savino*, our Supreme Court held: “We agree with the Court of Appeals that plaintiff did not plead a separate claim for administrative negligence. But plaintiff was not required to do so. Rather, plaintiff used multiple theories, including some administrative failures, to argue a single cause of action: medical negligence.” *Savino*, 375 N.C. at 300, 847 S.E.2d at 685 (citation omitted).

While the Court in *Savino* was focused on whether the plaintiff properly plead administrative negligence theories, here, this Court and the trial court were focused

on whether Plaintiff's expert witness was qualified to offer opinions to support those administrative negligence theories to allow them to proceed to trial. The procedural posture of this case made differentiating Plaintiff's "multiple theories" of medical negligence imperative because a jury has now already determined the Novant Defendants were not liable under theories of breaches of the clinical standard of care. Without such differentiation of these theories or claims, Plaintiff may be able to simply re-label and re-try claims of breach of clinical duties as claims of breach of administrative duties:<sup>8</sup> a concept this Court expressly rejected in the prior appeal. *Smith*, ¶ 12 ("a litigant cannot transform a medical or clinical negligence claim into an administrative negligence claim by labeling it as one." (citing *Gause v. New Hanover Reg'l Med. Ctr.*, 251 N.C. App. 413, 418, 795 S.E.2d 411, 415 (2016))). In the absence of any delineation by Plaintiff of the administrative negligence theories Plaintiff intended to pursue at trial, the trial court here—when evaluating the proffered testimony of Plaintiff's expert—was left to view Plaintiff's claims as they were presented in light of the surgical context in which they arose. The trial court ultimately determined: "each of [P]laintiff's alleged administrative claims described in the Complaint, and as further described and set forth in [P]laintiff's Offer of Proof, arise out of an intra-operative re-positioning of the [P]laintiff during a laparoscopic

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<sup>8</sup> Plaintiff's own Offer of Proof underscores this point: "At trial, the plaintiff seeks to present the misuse of the product and to allow a jury to determine how it came to be misused: Was the negligent misuse of medical equipment . . . a breach of the clinical duties of . . . a health-care worker, or a breach of the institutional, corporate, administrative duties of practice for a hospital?"

surgical procedure.” We cannot conclude the trial court abused its discretion in so doing on the Record before us.

Moreover, in evaluating Plaintiff’s claims and proffered expert testimony, the trial court expressly noted in its Final Judgment it relied upon “[t]he evidence adduced at trial, as well as [P]laintiff’s showing to this Court[.]” However, none of the evidence adduced at trial is before this Court, and Plaintiff makes no argument the trial court erred in considering this evidence or that the evidence does not support the trial court’s ruling. *See Pharr v. Worley*, 125 N.C. App. 136, 139, 479 S.E.2d 32, 34 (1997) (“ ‘An appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court.’ ” (quoting *State v. Williams*, 274 N.C. 328, 333, 163 S.E.2d 353, 357 (1968))).

As noted above, Plaintiff also contends the trial court abused its discretion by failing to conduct an evidentiary hearing in which Moore could explain the distinction between the administrative claims and clinical claims. Plaintiff suggests the trial court “missed the opportunity” to allow Moore to explain “how the administrative claims he was supporting were just like the administrative claims in *Savino*[.]” But Plaintiff never asked the trial court to conduct such a hearing and offers no further offer of proof as to what Moore might have offered beyond what already exists in the Record. Again, we cannot presume the trial court erred in this regard. *Id.*

Thus, on the Record before us, we cannot conclude the trial court erred in determining “each of [P]laintiff’s alleged administrative claims described in the

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Complaint, and as further described and set forth in [P]laintiff's Offer of Proof, arise out of an intra-operative re-positioning of the [P]laintiff during a laparoscopic surgical procedure." Therefore, the trial court did not err in further concluding each of Plaintiff's claims was "predicated *exclusively* upon the provision of clinical care and clinical decision-making" on which Moore—as an expert in hospital administration—was not qualified to testify. Consequently, the trial court did not abuse its discretion in excluding Moore's testimony in this case.

**Conclusion**

Accordingly, for the foregoing reasons, we affirm the trial court's Final Judgment in favor of the Novant Defendants. The trial court should proceed with the remaining claims.

AFFIRMED.

Judges DILLON and MURPHY concur.

Report per Rule 30(e).