No. 443A11 TWENTY-FOURTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
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Janet E. Moore, Plaintiff-Appellee, v. Daniel H. Proper, Shaun O'Hearn, Dr. Shaun O'Hearn, DDS, P.A., and Affordable Care, Inc., Defendant-Appellants.	)	From Madison County No. 09 CVS 93 No. COA10-1475

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BRIEF OF AMICUS CURIAE
NORTH CAROLINA ADVOCATES FOR JUSTICE

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INTEREST OF THE AMICUS

North Carolina Advocates for Justice ("NCAJ") respectfully submits this brief as *amicus curiae*. NCAJ is a nonprofit, nonpartisan, voluntary bar association whose members regularly represent plaintiffs in civil actions. NCAJ frequently participates as *amicus curiae* before the North Carolina Court of Appeals and North Carolina Supreme Court in cases of importance to NCAJ members, the bar, and the public.

During the relevant time period from 2005 to 2006, Dr. Dunn maintained a valid dental license, spent all of his professional time in the field of dentistry actively seeing and treating dental patients, and was not engaged in any purely administrative activities outside of the clinical setting. Accordingly, Ms. Moore and her lawyers could have reasonably concluded that Dr. Dunn was qualified to testify under the extant law. In determining whether plaintiff was, in fact, reasonable in reaching this conclusion it should be considered dispositive that two esteemed judges from the North Carolina Court of Appeals, the Honorable Robert N. Hunter, Jr. and the Honorable Sanford Steelman agreed below that "[f]rom the testimony provided and our interpretations of the Rule, we cannot agree with the trial court that 'no reasonable person would have expected Dr. Joseph Dunn to qualify as an expert witness.'" *Moore v. Proper*, ___ N.C. App. ___, 715 S.E.2d 586, 592 (2011).

I. THE COURT OF APPEALS CORRECTLY FOUND THAT A REASONABLE PERSON COULD HAVE EXPECTED DR. JOE DUNN TO QUALIFY AS AN EXPERT WITNESS UNDER RULE 702, AND THUS THE TRIAL COURT'S DISMISSAL PURSUANT TO N.C. R. CIV. P. 9(J)(1) WAS IMPROPER.

A. Plaintiff's application of Rule 9(j) to the qualifications of Dr. Joe Dunn is in harmony with the plain language in Rule 702(b)(2) and the case law on point

i. The plain language of Rule 702(b)(2) clearly concerns *only* the composition of an expert's "professional time" as a licensed health care provider

In her dissent below, Judge Stephens bases her argument upon a logical and grammatical error in basic statutory construction. Judge Stephens concludes that the "clear and unambiguous language of Rule 702 requires that a proposed expert's clinical practice not only must constitute the majority of that expert's professional time, but also that the clinical practice must be 'active,'" and, therefore, "this interpretation of an *active* clinical practice necessarily is the creation of a baseline level of proposed expert's 'activeness'" required under Rule 702(b). *Moore*, ___ N.C. App. ___, 715 S.E.2d at 594-95.

Yet, as is explained above, this construction defeats the plain reading of Rule 702(b)(2). Even though the word "majority" clearly modifies the phrase "professional time" under the statute, Judge Stephens construes the phrase "active clinical practice" to mean that the statute is actually concerned with the percentage of an expert's **overall time** spent in active clinical practice. Judge Stephens' construction renders the phrase "majority of his or her professional time" meaningless as an expert who spends over 51% of his or her professional time in active clinical practice could still be found unqualified if the raw amount of this clinical practice failed to meet Judge Stephens' amorphous "baseline level of activeness" requirement.

Dunn's time on the Asheville City Council or running for Mayor do not require a health care license and are therefore not included within his "professional time."

A medical malpractice expert's "professional time" under Rule 702(b) refers only to the time a licensed health care provider spends in activities actually related to his or her particular medical field; i.e. activities that necessarily require the application of the expert's specialized knowledge in various clinical, educational, legal, consulting, forensic or administrative contexts, as well as the expert's medical skill or technique developed through years of long and intensive academic preparation and experience in the field.

This result is consistent with the relevant case law. *See*, *Morris v. Southeastern Orthopedics Sports Med.*, 199 N.C. App. 425, 681 S.E.2d 840 (2009), *rev. denied*, 363 N.C. 745, 688 S.E.2d 456, 2009 N.C. LEXIS 1304 (N.C., Dec. 10, 2009) (reasoning that the "professional time" of an orthopedic surgeon under Rule 702(b)(2) included not only time spent performing surgeries, but also teaching as assistant professor of surgery at the university level); *Cornett v. Watauga Surgical Group, P.A.*, 194 N.C. App. 490, 669 S.E.2d 805 (2008) (holding that the "professional time" of a general surgeon under Rule 702(b)(2) included the time spent "performing administrative functions, attending conferences and participating in committee meetings" as a university-based professor of surgery); *Diggs v. Novant Health, Inc.*, 177 N.C. App. 290, 628 S.E.2d

participating in committee meetings" could not be included within his "active clinical practice" under Rule 702(b)(2)); *Diggs*, 177 N.C. App. 290, 628 S.E.2d 851 (reasoning a registered nurse's time spent as a legal nurse consultant could not be included within her "active clinical practice" under Rule 702(b)(2)); *Formyduval*, 138 N.C. App. at 391, 530 S.E.2d at 103 (holding the time spent by the Chief of Emergency Medicine at Scotland Memorial Hospital in "administrative" duties outside of the clinical setting could not be included within his "active clinical practice" under Rule 702(c)(1)(a)).

B. Whether it was reasonable for an attorney to expect that an expert would qualify under Rule 702 must be determined in light of the law at the time of the Rule 9(j) certification.

Rule 9(j)(1) of the North Carolina Rules of Civil Procedure requires the plaintiff to determine whether a proposed expert in a "medical malpractice action" under N.C.G.S. §§ 90-21.11 and 20.12 can be "reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence," which includes Rule 702(b), the specific subsection of the rule governing expert witness qualifications in any statutory "medical malpractice action." In 1995, the General Assembly enacted both Rule 9(j) and Rule 702(b) as part of the same reform legislation. *See*, 1995 N.C. Sess. Laws ch. 309, §§ 1 and 2. The stated purpose behind this reform was "to provide a more specialized and stringent procedure for plaintiffs in

Moore, ___ N.C. App. ___, 715 S.E.2d at 591. Issues of Rule 9(j)(1) compliance necessarily involve "reasonable expectations" based on "a reasonable person armed with the knowledge of the plaintiff at the time the pleading was filed." *Trapp*, 129 N.C. App. at 241, 497 S.E.2d at 711.

C. Until Judge Stephens' dissent below, no appellate judge had ever interpreted Rule 702's requirement that the expert must have devoted a "majority of his or her professional time" to "active clinical practice" as mandating a particular minimum level of clinical activity.

The proper inquiry regarding Plaintiff Moore's Rule 9(j)(1) compliance in concluding Dr. Dunn could reasonably be expected to qualify as an expert, must involve an analysis of the law surrounding Rule 702 as it existed on March 5, 2009, the date Ms. Moore filed her complaint. The Defendants and the NCADA *amicus* base their arguments to this court in large part[1] on Judge Stephens' dissenting conclusion below that "an *active* clinical practice necessarily is the creation of a baseline level of [a] proposed expert's 'activeness,' below which a proposed expert's clinical practice is not sufficiently active to satisfy the requirements of Rule 702(b)[2]." *Moore*, ___ N.C. App. ___, 715 S.E.2d at 595 (Stephens, J, dissenting). In determining whether the Plaintiff here could have reasonably expected Dr. Dunn to qualify as an expert, one could start by asking

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[1] *See*, Def. Brief, pp 25, 28-29, NCADA *Amicus* Brief, pp 4-7.

[2] *See*, Sec. A(iv), *supra*, for a discussion of the logical and precedential impropriety of Judge Stephens' interpretation of phrase "active clinical practice."

Division of Orthopedic Surgery at Duke University Medical Center); *Jones v. Dalton*, 2008 N.C. App. LEXIS 699 (N.C. Ct. App. Apr. 15, 2008) (unpublished)[3] (holding the expert disqualified under Rule 702(b)(2), in relevant part, because the majority of his professional time was spent as a professional witness and not seeing patients in the clinical setting); *Cornett*, 194 N.C. App. at 495, 669 S.E.2d at 808 (holding a full-time professor of general surgery at Tulane Medical School disqualified as an expert under Rule 702(b)(2) because he was "not devoting a majority of his professional time to clinical surgery or instructing general surgery in the year prior to March 2004," and "[e]ven considering all of his teaching time, it does not amount to more than half of his professional time." *Id.* at 495, 669 S.E.2d at 808); *Diggs*, 177 N.C. App. 290, 628 S.E.2d 851 (holding there to be sufficient evidence to find an expert nurse qualified under Rule 702(b)(2) where the evidence suggested that even though she spent some part of her professional time as a legal consultant, the expert spent the majority her professional time practicing clinically as a registered nurse); *Leatherwood v. Ehlinger*, 151 N.C. App. 15, 564 S.E.2d 883 (2002) (holding an expert perinatologist qualified under Rule 702(b)(2) because he spent the majority of his time practicing medicine "'to the clinical practice of obstetrics and gynecology' including 'the performance of

[3] Pursuant to Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure, this unpublished opinion "does not constitute controlling legal authority." However, this *amicus* is including it here because it is one of the few decisions applying the "majority of his or her professional time" and "active clinical practice" phrases from Rule 702.

The above cases send a clear message to any reasonable person in the position of Ms. Moore when considering a proposed expert's qualifications. The General Assembly has provided a simple formula, which all of us – plaintiff, attorneys, courts – are constrained to follow: the phrases "majority of his or her professional time" in the "active clinical practice" or "instruction of students" in Rule 702(b)(2) mean simply that an expert who spends at least 51% of his or her time in the field of medicine either seeing and treating patients and/or instructing students will be qualified. Stated differently, since no case had ever held an expert must exhibit some baseline level of overall clinical activeness or instruction, a reasonable plaintiff in the position of Ms. Moore and her attorneys were entitled to rely on the formulaic approach explained and argued by the Plaintiff in her brief to this Court.[4]

Of particular significance, a reasonable plaintiff considering the qualifications of Dr. Joe Dunn on March 9, 2005 would have read the *Coffman* decision and observed that a retired physician whose activities as a volunteer professor in OB/GYN medicine "didn't take up a great deal" of his overall time was still qualified under Rule 702(b)(2)(b), because under the same mechanical

[4] *See*, Pl. Brief, § B, pp 3-12, discussion of the "formulaic methodology" in construing Rule 702(b)(2) to require a simple "numerator" of active clinical practice and a "denominator" of total professional time.

professional time to the active clinical practice of nursing as a registered nurse[.]'" *Diggs*, 177 N.C. App. at 296, 628 S.E.2d at 856. (emphasis added). Furthermore, a plaintiff such as Ms. Moore would have appreciated that "differences between [the expert's] work experiences and the work experience of the hospital nursing staff go to the weight, but not the admissibility, of [the expert's] evidence." *Id.* (citing *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 461, 597 S.E.2d 674, 688 (2004)).

A reasonable plaintiff on March 5, 2009 would have certainly taken note of the expressly mathematical approach taken in the *FormyDuval* decision to the phrase "active clinical practice" in Rule 702(c)(1)(a), wherein the court held the expert disqualified because his time actually seeing and treating patients "amount[ed] to at most thirteen hours per week out of what plaintiff admits is Dr. McCaskill's forty-five to sixty hour work week" as Chief of Emergency Medicine. *Id.* at 391, 530 S.E.2d at 103.

Judge Stephens in her dissent below, and the Defendants in their brief to this Court, contend that no reasonable Plaintiff should have relied on the holding or reasoning in *Coffman* to help formulate an understanding of whether it was reasonable to expect Dr. Dunn to qualify as an expert witness because the decision applied the "instruction of students" prong of Rule 702(b)(2)(b) rather than "active clinical practice" prong of Rule 702(b)(2)(a). On the contrary, given the dearth of

controlling inquiry will be purely whether those activities make up the majority of his or her professional time. Moreover, the courts had never indicated they would inquire whether the expert spent enough of his or her overall time in the active clinical practice.

E. Based on the plain language of Rule 702(b)(2) and the relevant case law, plaintiff reasonably expected Dr. Dunn to qualify as an expert because he spent all of his "professional time" during the relevant year engaged in the "active clinical practice" of general dentistry.

The Plaintiff in her brief to this Court describes the evidence of record as it pertained to the amount of Dr. Dunn's professional time spent in the active clinical practice of general dentistry from 2005 to 2006.[5] The key is that Dr. Dunn clearly testified that he spent one-hundred percent of his "professional time" (time practicing in the medical field for which he was trained and skilled) engaged in activities directly related to the observation and treatment of general dentistry patients, such as performing tooth extractions, tooth fillings, tooth cleanings and making dental diagnoses. (Dunn Deposition page 26, line 21; *See also*, Dunn Affidavit, R p 66-67).

Based on the law surrounding Rule 702(b)(2) at the time Ms. Moore filed her complaint on March 5, 2009, this ends the inquiry. This evidence demonstrates that Dunn offered precisely the testimony required under the existing case law in

[5] *See*, Pl. Brief, § C, pp 13-17.

after conducting various forms of discovery she later deemed it necessary to bring a Rule 702(e) motion in order to qualify Dr. Dunn for trial purposes. The Rule does **not** say that a Rule 702(e) motion cannot be filed unless the pleader previously certified the complaint under Rule 9(j)(3). Because Plaintiff had properly certified under one of the prongs of Rule 9(j) she should have been allowed to bring her Rule 702(e) motion before the trial court.

CONCLUSION

For the reasons stated herein and for the reasons stated in Plaintiff's brief, this Court should affirm the Court of Appeals decision overruling the trial court's dismissal of Plaintiff's complaint.

Respectfully submitted, this 8th day of February, 2012.

NORTH CAROLINA ADVOCATES FOR JUSTICE

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Pursuant to Rule 33(b) of the N.C. Rules of Appellate Procedure, I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing BRIEF OF AMICUS CURIAE NORTH CAROLINA ADVOCATES FOR JUSTICE on all parties by depositing a copy, contained in a first-class postage-paid wrapper, into a depository under the exclusive care and custody of the United States Postal Service, addressed as follows:

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