MEDICAL MALPRACTICE
RECENT DEVELOPMENTS: MAY 2013 – MAY 2014

By Matthew D. Ballew
Zaytoun Law Firm, PLLC
3130 Fairhill Drive, Suite 100
Raleigh, NC 27612
Tel: (919) 832-6690
Fax: (919) 831-4793
mballew@zaytounlaw.com

DISCLAIMER: All of the cases reported in this manuscript represent North Carolina medical malpractice law as interpreted and applied by the courts ***before*** the effects of the 2011 radical tort reforms bills, Senate Bill 33 and House Bill 542. The sweeping changes brought on by these two bills may strip portions of these cases of their precedential value. The author has not undertaken any analysis on whether these decisions will survive after SB33 or HB542, and makes no representations to that effect in this manuscript.

TABLE OF CONTENTS

INTRODUCTION

This manuscript provides an analysis of all **published** medical malpractice opinions reported from the North Carolina Court of Appeals and the North Carolina Supreme Court from May 2013 to May 2014. For each case, I have provided a grey box snapshot of all the background data on the case in (e.g. county of origin, plaintiff/defense attorneys involved, and author of opinion), as well as a analysis of the case according to a classic law school style framework (e.g. procedural history, factual background, rules/controlling authority, analysis and arguments, and impact of the case on our practice.) No unpublished medical malpractice opinions have been analyzed in this manuscript.

Many of these cases were litigated by fellow members of the NCAJ, and most received discussion on the NCAJ listservs. Please note that I have only analyzed the facts and law contained in each written opinion. Out of fairness, I have refrained from including any facts/arguments learned about the case through listserv discussion that do not already appear in the text of each opinion (although to learn the "whole story" behind several of these cases the reader will be well-served to examine the appellate record/briefs, and any listserv discussions.)

Britt v. Cusick, et. al.,
___ N.C. App. ___, 753 S.E.2d 351, 2014 N.C. App. LEXIS 4 (2014)

Prior History: Mecklenburg County, 11 CVS 18262	**NCCOA Filed Date:** January 7, 2014
Plaintiff Attorney(s): Bill Trosch (Conrad, Trosch...) Kenneth M. Suggs (Janet, Jenner...)	**Defense Attorney(s):** Harvey Cosper (Parker Poe) John Branson (Parker Poe)
Judge (Author of opinion): Geer, Martha	**Judges (Concurring / Dissenting):** Martin, John C. (concur) Stroud, Donna S. (concur)
Type of Medical Care Involved: N/A, procedural, discovery issues	**Decision for Plaintiff or Defense Bar?** Plaintiff

Procedural History:
Appeal by Defendants from trial court's order granting Plaintiff's motion to quash notice of deposition and for protective order.

Background Facts:
This was a medical malpractice, wrongful death case filed as a result of decedent's death following an emergency cesarean section. Before suit was filed, Plaintiff's counsel repeatedly requested complete copies of decedent's medical records from Defendant hospital, Charlotte Mecklenburg Hospital Authority. A paralegal working for Plaintiff's counsel had several conversations with defendant hospital requesting records. Despite these repeated attempts,

defendant never produced certain records. Plaintiffs filed a complaint alleging wrongful death and also stated a claim for spoliation / failure to produce medical records.

Key Case Facts:
After suit was filed, defendants served a notice of deposition on Plaintiff's counsel's paralegal. Plaintiff's counsel filed a motion to quash the notice and for protective order, arguing that an oral deposition of the paralegal would "inevitably lead to discovery of plaintiff's counsel's mental impressions and thought process," and would thus violate attorney-client and work-product privileges. The trial court granted plaintiff's motion, but entered an order that allowed defendants certain discovery of the paralegal, specifically, the defendant was allowed to take the paralegal's deposition upon written questions, and afterwards, the court could modify the order if required "in the interest of justice." ***Before*** going forward with the written deposition, the defendants appealed the trial court's order.

Issue(s):
Was the trial court's order here an interlocutory order to which there is no right of immediate appeal?

Holding:
Yes. Under the current case posture, the trial court's order did not yet affect a substantial right.

Rules / Controlling Authority:
"Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). "Immediate appeal is available from an interlocutory order or judgment which affects a 'substantial right.'" *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (quoting N.C. Gen. Stat. § 1-277(a) (1996)). A substantial right is "'one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment.'" *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 142, 526 S.E.2d 666, 670 (2000)

Generally, "orders denying or allowing discovery are not appealable since they are interlocutory and do not affect a substantial right which would be lost if the ruling were not reviewed before final judgment." *Dworsky v. Travelers Ins. Co.*, 49 N.C. App. 446, 447, 271 S.E.2d 522, 523 (1980).

"Our appellate courts have recognized very limited exceptions to this general rule, holding that an order compelling discovery might affect a substantial right, and thus allow immediate appeal, if it either imposes sanctions on the party contesting the discovery, or requires the production of materials protected by a recognized privilege." *Arnold v. City of Asheville*, 169 N.C. App. 451, 453, 610 S.E.2d 280, 282 (2005).

An order denying an overly broad request for discovery does not affect a substantial right under *Tennessee-Carolina Transportation* when the record does not specifically show what 'relevant and material information' the appellant was barred from obtaining as a result of the discovery order. *Dworsky*, 49 N.C. App. at 448, 271 S.E.2d at 524.

Analysis & Arguments:
The COA found that neither of the exceptions noted in the *Arnold* case above applied here. However, defendant argued that their appeal still affected a substantial right pursuant to the holding in *Tennessee-Carolina Transp., Inc. v. Strick Corp.*, 291 N.C. 618, 231 S.E.2d 597 (1977), since the trial court's order "effectively precluded them from discovering highly material

evidence through the oral deposition of the only witness with personal knowledge of the relevant matters."

In *Tennessee-Carolina*, the court entered a discovery order prohibiting defendant from taking the deposition of plaintiff's expert witness whose opinions amounted to evidence that was "highly material to the determination of the critical question to be resolved at trial." *Id*. at 625, 231 S.E.2d at 601.

The COA distinguished this case from the holding in *Tennessee-Carolina* by pointing out that the trial court's order here did ***not*** preclude defendants from discovering the paralegal's testimony. To the contrary, the trial court's discovery order explicitly provided for such discovery via written deposition, with the option of applying for a modification of the order if the answers proved inadequate for use at trial.

The COA further found that "[b]ecause defendants have not pursued the discovery authorized by the trial court, they cannot show that this order regulating the manner of discovery, but not prohibiting it, 'effectively preclude[d] the defendant[s] from introducing evidence' that was 'highly material to the determination of the critical question to be resolved' at trial."\

The COA cited the *Dworsky* case in holding that the *Tennessee-Carolina* case was inapplicable to these facts, saying: "Here, similarly, defendants have not shown what relevant and material information they would obtain in an oral deposition that they cannot obtain using the procedure adopted by the trial court. While such a showing might be possible after completing the discovery allowed by the trial court, defendants cannot yet make that showing. Accordingly, as in *Dworsky*, *Tennessee-Carolina Transportation* does not apply here. We, therefore, dismiss defendants' appeal as interlocutory."

Impact of Decision on Plaintiff's Practice:
This case is a good reminder that simply because a discovery order curtails the defendant's right to obtain certain types of discovery, such an order is not, *per se*, immediately appealable.

Hammond v. Saini, et. al.,
___ N.C. App. ___, 748 S.E.2d 585, 2013 N.C. App. LEXIS 934 (2013)

Prior History:
Cumberland County, 11 CVS 8281

NCCOA Filed Date:
September 3, 2013

Plaintiff Attorney(s):
Mark Sternlicht (Beaver, Holt, Sternlicht)
Burton Craige (Patterson Harkavy)
Narendra Ghosh (Patterson Harkavy)

Defense Attorney(s):
Patrick Meacham (McGuireWoods)
Monica Webb (McGuireWoods)

Judge (Author of opinion):
Davis, Mark

Judges (Concurring / Dissenting):
Martin, John C. (concur)
Bryant, Wanda G. (concur)

Type of Medical Care Involved:
N/A, procedural, discovery issues

Decision for Plaintiff or Defense Bar?
Plaintiff

Procedural History:
Appeal from trial court's order compelling defendant to produce certain documents and divulge certain information in discovery allegedly protected by various privileges

Background Facts:
Plaintiff suffered serious injuries from an operating room fire due to alleged anesthesia-related negligence. Plaintiff filed suit and sought discovery of documents and information in defendants' possession related to the fire incident. Defendants objected and refused to produce any of the requested discovery based upon assertions of the medical review privilege, work-product doctrine, and attorney-client privilege[1]. Plaintiff filed motions to compel and in opposition defendants filed (i) an affidavit by the defendant-hospital's risk manager (the "Maynard affidavit"), (ii) a copy of the hospital's Root Cause Analysis policy ("RCA Policy"), (iii) a report entitled "Fire in Operating Room RCA" ("RCA Report"), and (iv) reports entitled "Risk Management Worksheets" ("RMWs"). After an *in camera* inspection, the trial court entered orders granting plaintiff's motions to compel.

Key Case Facts:

1. **Medical Review Privilege**

Defendant contended that three categories of documents were shielded by the medical review privilege:

> **(i) RCA Report:** This was a multi-page document consisting of a "Brief Overview" of the fire incident, a description of the post-fire review process by the Root Cause Analysis Team ("RCA Team"), and the RCA Team's ultimate recommendations based on that review process.
>
> **(ii) RMW's:** These were computer-generated reports containing multiple data sections, one of which was a "Comments" field providing a general description of the events surrounding the operating room fire.
>
> **(iii) Notes made by Maynard after the fire incident:** Maynard's affidavit described them as notes he made in direct anticipation of litigation, and after meetings with the providers and family members to investigate the incident.

2. **Work-Product Doctrine**

Defendant also argued that Maynard's notes were shielded by the work-product doctrine. Maynard's affidavit submitted to the trial court explained in detail that the notes were made by Maynard in direct anticipation of litigation and following key witness interviews he conducted with the providers and family members involved in the incident.

Plaintiff claimed that, despite this affidavit, the record remained unclear whether Maynard actually prepared his notes in the ordinary course of business pursuant to defendant's hospital policies regarding "Quality Care Reports," "Reportable Incidents," and the "Patient Safety Response Team." Notably, the plaintiff requested production of these policies multiple times during discovery and defendant never produced them, and never made them available to the trial court, or the COA, for inspection.

Issue(s):

[1] Because defendant failed to advance any specific arguments regarding the attorney-client privilege in their brief, the COA held that defendant's waived this issue entirely.

1) Did the defendant meet its burden of proving that the information withheld in discovery was protected by the medical review privilege?

2) Did the defendant meets its burden of showing the information withheld in discovery was protected by the work-product doctrine?

Holding:
1) No.
2) Remand, further inquiry is needed by trial court.

Rules / Controlling Authority:

1. Medical Review Privilege

"By its plain language, N.C. Gen. Stat. § 131E-95 creates three categories of information protected from discovery and admissibility at trial in a civil action: (1) proceedings of a medical review committee, (2) records and materials produced by a medical review committee, and (3) materials considered by a medical review committee." *Woods*, 198 N.C. App. at 126, 678 S.E.2d at 791-92.

However, "information, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee." N.C. Gen. Stat. § 131E-95(b).

The prongs of § 131E-95 “are substantive, not formal, requirements. Thus, in order to determine whether the peer review privilege applies, a court must consider the circumstances surrounding the actual preparation and use of the disputed documents involved in each particular case. The title, description, or stated purpose attached to a document by its creator is not dispositive, nor can a party shield an otherwise available document from discovery merely by having it presented to or considered by a quality review committee.” *Hayes*, 181 N.C. App. at 752, 641 S.E.2d at 319.

N.C. Gen. Stat. § 131E-76 defines the term "[m]edical review committee" as “any of the following committees formed for the purpose of evaluating the quality, cost of, or necessity for hospitalization or health care, including medical staff credentialing:

a. A committee of a state or local professional society.
b. A committee of a medical staff of a hospital.
c. A committee of a hospital or hospital system, if created by the governing board or medical staff of the hospital or system or operating under written procedures adopted by the governing board or medical staff of the hospital or system.
d. A committee of a peer review corporation or organization.”

The parties objecting to the disclosure of the materials on the basis of this privilege bear the burden of establishing that plaintiff's discovery requests fall within the scope of the privilege. *Hayes v. Premier Living, Inc.*, 181 N.C. App. 747, 751, 641 S.E.2d 316, 318 (2007)

2. Work-Product Doctrine

The work product doctrine prohibits an adverse party from compelling "the discovery of documents and other tangible things that are 'prepared in anticipation of litigation' unless the party has a substantial need for those materials and cannot 'without undue hardship . . . obtain the substantial equivalent of the materials by other means.'" *Long v. Joyner*, 155 N.C. App. 129,

136, 574 S.E.2d 171, 176 (2002) (quoting N.C. R. Civ. P. 26(b)(3)), *disc. review denied*, 356 N.C. 673, 577 S.E.2d 624 (2003).

The party asserting the work product doctrine "bears the burden of showing (1) that the material consists of documents or tangible things, (2) which were prepared in anticipation of litigation or for trial, and (3) by or for another party or its representatives which may include an attorney, consultant, surety, indemnitor, insurer or agent." *Evans*, 142 N.C. App. at 29, 541 S.E.2d at 789

"Our Supreme Court has made clear, however, that "[m]aterials prepared in the ordinary course of business are not protected, nor does the protection extend to facts known by any party." *Willis v. Duke Power Co.*, 291 N.C. 19, 35, 229 S.E.2d 191, 201 (1976) (citing C. Wright & A. Miller, Federal Practice and Procedure § 2024, at 197 (1970)).

There is no work-product protection for hospital accident reports that have been "compiled, pursuant to the hospital's [risk management] policy, regardless of whether [plaintiff] intimated a desire to sue the hospital or whether litigation was ever anticipated by the hospital"). *Cook v. Wake County Hosp. Sys., Inc.*, 125 N.C. App. 618, 625, 482 S.E.2d 546, 551-52 (1997).

"It is well established that the work product doctrine only applies to documents or other tangible things. *See Long*, 155 N.C. App. at 136-37, 574 S.E.2d at 176 (holding that "plaintiff's interrogatories did not violate Rule 26(b)(3)" because they "did not ask defendants for documents or tangible things")."

Analysis & Arguments:

1. **Medical Review Privilege**

Defendant contended that the RCA Report, the RMWs, and the notes by Maynard were all "connected with the investigation of the operating room fire by the RCA Team," and that the "RCA Team is, in fact, a medical review committee" under 131E-76(5). Thus, the COA stated that if the RCA Team does not constitute a medical review committee under the statute, "then defendant's entire argument premised on the medical review privilege fails."

Defendant argued that the RCA Team would qualify as a medical review committee **under either** subsection (b) or (c) of § 131E-76(5).

Analysis of 131E-76(5), subsection (b) argument:

The COA reasoned: "In order to fall within § 131E-76(5)(b), defendants must show that (1) the RCA Team was comprised of the "medical staff of a hospital"; and (2) it was "formed for the purpose of evaluating the quality, cost of, or necessity for hospitalization or health care, including medical staff credentialing[.]" N.C. Gen. Stat. § 131E-76(5)(b). "

"Defendants have failed to meet even the first of these two prongs. Neither the RCA Report itself nor any other document presented by defendants identifies the members of the RCA Team as being part of the "medical staff of [CCHS]," as required by the statute. N.C. Gen. Stat. § 131E-76(5)(b). This omission is fatal to defendants' attempt to avail themselves of this provision of § 131E-76(5). Therefore, we conclude that defendants have not shown that the RCA Team constitutes a medical review committee under § 131E-76(5)(b)."

Analysis of 131E-76(5), subsection (c) argument:

"In order to qualify as a medical review committee under § 131E-76(5)(c), the RCA Team must have been "created by the governing board or medical staff of the hospital or system or operating under written procedures adopted by the governing board or medical staff of the hospital or system." N.C. Gen. Stat. § 131E-76(5)(c)."

"Maynard, in his affidavit, stated that *"[i]n general*, the peer review committees established to . . . prepare a root cause analysis are created by the medical staff and governing board of CCHS and operate under the [RCA Policy] . . . ." (Emphasis added.) The inherent ambiguity of the phrase "in general" leaves open the possibility that this sequence of events does not occur in every case."

"Notably absent from Maynard's affidavit is any statement that the RCA Team established in this specific case to review the operating room fire was created by the governing board or medical staff of CCHS or that the RCA Team operated under the RCA Policy. Nor does the RCA Report itself provide these details."

"Similarly, defendants have also failed to establish that the RCA Policy was, in fact, "adopted by the governing board or medical staff of the hospital or system." N.C. Gen. Stat. § 131E-76(5)(c). The policy contains a notation that it was "approved by MN" - yet nothing in the record, including Maynard's affidavit, identifies who "MN" is. For all of these reasons, we believe that defendants failed to satisfy their burden of proving that the RCA Team constitutes a medical review committee for purposes of § 131E-76(5)(c)."

The COA further reasoned: "Even assuming arguendo that the RCA Team did qualify as a medical review committee, defendants would still have been required to "present . . . evidence tending to show that the disputed [documents] were (1) part of the [RCA Team]'s proceedings, (2) produced by the [RCA Team], or (3) considered by the [RCA Team] as required by" § 131E-95."

Analysis of 131E-95 arguendo issue:

(i) RCA Report: "With respect to the RCA Report, defendants failed to submit any evidence revealing who produced or prepared it. While the document, on its cover page, identifies the event that is the subject of the report and the members of the team, it does not list its author. Defendants assert - pointing to Maynard's affidavit - that the RCA Team produced the report. Maynard's affidavit, however, states only that "[a] Root Cause Analysis Report was prepared. . . ." (Emphasis added.) It neither identifies the RCA Team members - individually or collectively - as the author of the RCA Report nor otherwise reveals the document's author."

(ii) RMSs: "With respect to the computer-generated RMWs, defendants refer to these documents not as RMWs - the title provided on the face of the printouts - but rather as Quality Care Control Reports. Defendants maintain that these documents were prepared by Bax and Stephanie Emanuel ("Emanuel"), another nurse present in the operating room during the fire, as part of the review process outlined in the RCA Policy. Although the RCA Policy does, in fact, identify Quality Care Control Reports as a "means" for initiating a review, the RCA Policy nowhere refers to RMWs, and nothing on the face of the RMWs indicates they actually are the Quality Care Control Reports contemplated by the RCA Policy.

Nor is it clear who prepared the RMWs. Both RMWs indicate on their face that the information contained in the comments section was entered by someone with the initials "RDE" - without any further indication of that person's identity. However, other sections of the RMWs suggest that they may have been completed by Emanuel and Bax - although it is not clear that this is, in fact, what occurred. Thus, the source of the information contained in the RMWs is unclear."

(iii) Maynard's notes: The COA reasoned that, ***despite*** the Maynard affidavit submitted by defendants, they had failed to meet their burden of establishing that these documents come within the purview of the medical review privilege. Relying on the holding in Relying on the holding in a *Bryson v. Haywood Reg'l Med. Ctr.*, 204 N.C. App. 532, 694 S.E.2d 416 for guidance, the COA concluded that the affidavit was insufficient to satisfy their burden of proving that the RCA Report, the RMWs, and Maynard's meeting notes are privileged under § 131E-95. ***"The mere submission of affidavits by the party asserting the medical review privilege does not automatically mean that the privilege applies. Rather, such affidavits must demonstrate that each of the statutory requirements concerning the existence of the privilege have been met."***

2. Work-Product Doctrine

Because the defendant never produced the hospital bylaws and policies regarding event reporting and procedures related to reporting on operating fire incidents, the COA concluded: "We are unable to determine on the record currently before us whether the trial court abused its discretion in compelling the production of Maynard's notes in the face of defendants' work product objection. Nor do we believe that the trial court was capable of making a determination of whether these notes were made in the ordinary course of the hospital's business without first examining the policies requested by plaintiff and determining whether the notes were made pursuant to hospital policy."

Accordingly, the COA remanded the case to the trial court, ordered the defendant produced all such policies under a deadline, and for the trial court to determine whether Maynard's notes were withheld pursuant to a hospital policy, and whether such practice was the ordinary course of hospital business.

Finally, the COA rejected the defendant's argument that the work-product doctrine prevented defendant from having to answer plaintiff's interrogatories, since the doctrine only protects protection of tangible things and not facts known to the opposing party.

Impact of Decision on Plaintiff's Practice:

Currently, this is a great decision for plaintiffs as it (i) provides an excellent analysis and breakdown of the medical review privilege, and (ii) serves as a clear message that defendants must actually meet their burden of proving every element of the privilege exists before it will be applied. However, the NCSC granted discretionary review and the case is being briefed and argued with NCAJ appellate assistance. Stay tuned.

Medlin v. N.C. Specialty Hospital, LLC, et. al.,
___ N.C. App. ___, 756 S.E.2d 812, 2014 N.C. App. LEXIS 309 (2014)

Prior History: Durham County, 11 CVS 1525	**NCCOA Filed Date:** April 1, 2014
Plaintiff Attorney(s): Bill Faison	**Defense Attorney(s):** Gregory Brown (Brown Law) Amy Hopkins (Brown Law)
Judge (Author of opinion): Stroud, Donna	**Judges (Concurring / Dissenting):** Hunter Jr. Robert N. (concur) Dillon, Chris. (concur)
Type of Medical Care Involved: N/A, procedural, discovery issues	**Decision for Plaintiff or Defense Bar?** Plaintiff

Procedural History:
Appeal from multiple trial court orders granting plaintiffs' discovery motions to compel and for sanctions.

Background Facts:
Plaintiff had cataract surgery and suffered serious injury as a result of defendants' negligent use of Methylene Blue in his eye, rather than the non-toxic VisionBlue. Plaintiff filed suit and attempted to conduct discovery regarding the defendants' internal investigation of the eye injury incident. Defendant hospital had a policy requiring such reports be prepared when medication errors occurred. Accordingly, plaintiff served written discovery requesting copies of any "incident reports" generated by the hospital, and, if any such items were being withheld on the basis of alleged peer review privilege, the discovery requested defendants to produce a privilege log. Defendants refused to answer either discovery request on the basis of peer review privilege, refused to provide a privilege log, and defense counsel never produced any incident reports despite repeated verbal promises during the litigation to check and see if any were ever created.

A month before trial, plaintiff took the deposition of a circulating nurse involved in the surgery who testified that an incident report ***was***, in fact, generated following plaintiff's eye surgery. Shortly thereafter, plaintiff filed a motion to compel this report and related answers to its prior written discovery. Plaintiff also noticed the depositions of certain hospital employees who could speak to the formation of the incident report, including: Joy Boyd, the hospital's Director of Surgical Services who was the supervisor of the circulating nurses and scrub tech involved in this medication error; and Cathy Pruitt, another circulating nurse involved in this medication error.

Defendant hospital filed a motion for protective order, seeking to prevent the depositions on the basis of peer review. The following day, plaintiff's counsel noticed defendant's motion for hearing and filed a motion to shorten time for said hearing, both set for March 6, 2013.

Key Facts: Notice of Hearing issue

Defense counsel received notice of these motions and notices of hearing, and sent emails to the trial court indicating that the hearing date was inconvenient because they had already scheduled experts witness preparation sessions (in another case) for that day. The trial judge (The Hon. Paul G. Gessner) ordered that the hearing would go forward on March 6 as noticed. Despite having multiple attorneys who had worked on the instant case, defense counsel for the hospital chose not to attend the hearing. At the conclusion of the hearing, Judge Gessner ordered (i) that the depositions requested by plaintiff move forward as noticed, and (ii) the remaining motion to compel issues surrounding plaintiff's written discovery be decided at a subsequent hearing on March 11, 2013.

Key Facts: Depositions / Peer Review issue

On March 8, 2013, the depositions of Joy Boyd and Cathy Pruitt went forward, during which defense counsel repeatedly instructed each witness not to answer plaintiff's questions regarding the procedural steps surrounding the formation of any incident reports, each time on the basis of peer review privilege. The questions were as follows[2]:

- "Did you prepare a report as a result of your investigation?"
- "Tell me what you did. When you say you and she worked together what are you trying to describe to me?"
- "Well, tell me how it works. How did you work together, what did you do? You're - that's what I want to understand. If - If I were sitting there watching the two of you, tell me what I see you doing."
- "Tell me what I see the two of you doing."
- "Now when you say we prepare a document, who - who dictates it?"
- "Did you do that in this instance?"
- "What part of it did you prepare?"
- "In this instance did you make notes?"
- "Have you preserved those notes, the one made in this instance?"
- "Where do you keep those notes if you have preserved them in this instance?"
- "In this instance was the report that you prepared for this instance kept in risk management?"
- "[D]id you appear before a peer review committee to discuss this incident?"
- "Did you appear before the peer review committee in this instance?"
- "Did you investigate why Vision Blue was not in the Pyxis?"
- "So what mentoring did risk management do for you in this - in the interview process for this incident?"
- "Other than gathering factual information from the nurses did the report you generated do anything other than - anything else?"
- "Do you maintain a copy of the document you prepared in your offices or in the offices under your supervision and control?"
- "Did Joy Boyd interview you about this matter?"
- "Did you talk with Joy Boyd after this event occurred?"
- "At any time have you given a written statement to anyone regarding your interaction with Ms. Whitt relating to the removal of methylene blue from the Pyxis machine on May 19, 2008?"
- "Have you had an opportunity to review any statement that you might have — well, let [sic] see, have you had an opportunity to review any statements you might have given?"

[2] Actual list of questions taken from COA opinion in *Medlin* case.

Key Facts: *In Camera* Inspection issue:
Following the depositions, plaintiff filed a new motion to compel answers to the these depositions questions, and this matter was set for hearing on March 11, to be heard at the same time as plaintiff's pending motion to compel production of incident reports. At the hearing, defense counsel claimed that no incident reports, in fact, ever existed, and that the nurse witnesses were incorrect in testifying to the contrary.

Defense counsel brought to the hearing a report created by a "Root Cause Analysis" committee at the hospital regarding the incident, and claimed that although an incident would normally have been completed for any medication error like this one, the process was bypassed in this case, and instead the investigation went straight to the RCA group, a peer review committee as the hospital. Judge Gessner ordered defense counsel to produce the RCA report for his inspection *in camera* at the hearing. After inspection, Judge Gessner ordered the RCA report protected by the peer review privilege. However, he also concluded that "someone is not acting reasonably," here, and granted the plaintiff's motion to compel, ordering Joy Boyd and Cathy Pruitt to provide sworn interrogatory answers to all of the questions defense counsel instructed them not to answer during their depositions.

Defendants appealed all of the following orders by the trial court: (i) the order moving forward with the March 6 hearing despite defense counsel's stated unavailability; (ii) compelling Joy Boyd and Cathy Pruitt to answer the list of questions in the form of sworn interrogatories; and (iii) requiring defense counsel to produce the RCA report for *in camera* inspection.

Issues:
1) Was it a violation of due process for the March 6 hearing to move forward despite defense counsel's stated unavailability?

2) Did the trial court err in compelling deposition answers of Boyd and Pruitt in light of defendant's peer review objections?

3) Did the trial court err in requiring defendant to produce the RCA report for *in camera* inspection?

Holdings:
1) No.

2) No.

3) No.

Rules & Controlling Authority – Issue 1 (Notice of Hearing):
"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *State v. Poole*, __ N.C. App. __, __, 745 S.E.2d 26, 34, *disc. review denied and appeal dismissed*, __ N.C. App. __, 749 S.E.2d 885 (2013) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902 (1976)).

Analysis and Arguments – Issue 1 (Notice of Hearing):
Defendant contended that erred by holding what amounted to an *ex parte* hearing on March 6 without affording it "adequate notice" and a "meaningful opportunity to be heard." The COA roundly rejected this argument pointing out that (i) the hearing was properly noticed under the Rules of Civil Procedure, including the trial court's decision to shorten the time under the Rules;

(ii) defense counsel admitted being notified of the hearing days in advance; (iii) defense counsel's only reason for choosing not to attend was a scheduled prep session with expert witnesses in another case; and (iv) defense counsel admits it had multiple lawyers working on the instant case, any of whom could have covered the March 6 hearing.

The COA explained: "Defendant's counsel made the decision that not even one member of the "team" could attend the hearing on 6 March 2013, and that is their prerogative, but it does not entitle them to relief. Defendant Hospital had both notice of the hearing and an opportunity to be heard; defendant Hospital just chose not to exercise the opportunity. The fact that defendant Hospital chose not to attend without filing any motion requesting a continuance or other relief, and according to its own letter instead chose to interview expert witnesses, in no way indicates a due process violation on the part of the trial court."

Rules & Controlling Authority – Issue 2 (Depositions / Peer Review):
"By its plain language, N.C. Gen. Stat. § 131E-95 creates three categories of information protected from discovery and admissibility at trial in a civil action: (1) proceedings of a medical review committee, (2) records and materials produced by a medical review committee, and (3) materials considered by a medical review committee." *Woods v. Moses Cone Health Sys.*, 198 N.C. App. 120, 126, 678 S.E.2d 787, 791-92 (2009) (citation and quotation marks omitted), *disc. review denied*, 363 N.C. 813, 693 S.E.2d 353 (2010).

"Additionally, N.C.G.S. § 131E-95 states: However, information, documents, or other records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee." *Id*.

The "provisions [in North Carolina General Statute § 131E-95] mean that information, in whatever form available, from original sources other than the medical review committee is not immune from discovery or use at trial merely because it was presented during medical review committee proceedings; neither should one who is a member of a medical review committee be prevented from testifying regarding information he learned from sources other than the committee itself, even though that information might have been shared by the committee." *Shelton v. Morehead Memorial Hospital*, 318 N.C. 76, 83-84, 347 S.E.2d 824, 829 (1986) (citation omitted).

"The statute is designed to encourage candor and objectivity in the internal workings of medical review committees. Permitting access to information not generated by the committee itself but merely presented to it does not impinge on this statutory purpose. These kinds of materials may be discovered and used in evidence even though they were considered by the medical review committee. This part of the statute creates an exception to materials which would otherwise be immune under the third category of items as set out above." *Id*.

Analysis and Arguments – Issue 2 (Depositions / Peer Review):
In arguing that the deposition questions of Boyd and Pruitt violated § 131E-95, Defendants admitted that neither Boyd and Pruitt were members of a peer review committee, but they instead argued that each person gathered data at the direction of a peer review committee, and they prepared documents for the same committee after the data was gathered. However, citing the quoted portion from *Shelton* above, the COA pointed out that "'preparing things' for a peer review committee does not necessarily mean that the information gathered is privileged."

The COA went on to list and review each deposition question that was objected to by defense counsel, and concluded that ***none*** of the questions violated § 131E-95. Citing *Woods* and

Shelton, the COA found: “The questions are not regarding the (1) proceedings of a medical review committee [or] (2) records and materials produced by a medical review committee[.]”

“While the questions may implicate "materials considered by a medical review committee[;]" *id.*, there is "an exception to materials which would otherwise be immune under the third category of items" for "information not generated by the committee itself but merely presented to it[.]" *Shelton*, 318 N.C. at 83-84, 347 S.E.2d at 829. To the extent that any questions Joy Boyd and Cathy Pruitt were ordered to answer were regarding information that is protected by North Carolina General Statute § 131E-95, the questions most certainly fall into the exception of the third category.”

Of note, the COA also found that by requiring the witnesses to answer the questions in the form of interrogatories, this provided added protection to the defendant by giving “defendant's counsel the opportunity to ensure that a witness does not inadvertently disclose information which may go beyond the scope of the question asked.”

Rules & Controlling Authority – Issue 3 (*In Camera* Inspection):
Whether a document is privileged pursuant to North Carolina General Statute § 131E—95 is a question of law. *See Bryson*, 204 N.C. App. at 535, 694 S.E.2d at 419.

The COA here cited *In re Investigation of Death of Eric Miller*, 357 N.C. 316, 336-37, 584 S.E.2d 772, 787 (2003) to show that both the N.C. Supreme Court and the U.S. Supreme Court have approved *in camera* inspections for determining whether several forms of privilege apply. As *Miller* explains:

> More than a century ago, this Court held that the responsibility of determining whether the attorney-client privilege applies belongs to the trial court, not to the attorney asserting the privilege. Thus, a trial court is not required to rely solely on an attorney's assertion that a particular communication falls within the scope of the attorney-client privilege. In cases where the party seeking the information has, in good faith, come forward with a nonfrivolous assertion that the privilege does not apply, the trial court may conduct an *in camera* inquiry of the substance of the communication. *See State v. Buckner*, 351 N.C. 401, 411-12, 527 S.E.2d 307, 314 (2000) (trial court must conduct *in camera* review when there is a dispute as to the scope of a defendant's waiver of the attorney-client privilege, such as would be the case when a defendant has asserted an ineffective assistance of counsel claim); *State v. Taylor*, 327 N.C. at 155, 393 S.E.2d at 807 (same); *see also Willis v. Duke Power Co.*, 291 N.C. 19, 36, 229 S.E.2d 191, 201 (1976) (trial court may require *in camera* inspection of documents to determine if they are work-product).
>
> We note that the United States Supreme Court has also placed its imprimatur on the need for *in camera* inspections in circumstances where application of the privilege is contested. *Zolin*, 491 U.S. 554, 109 S. Ct. 2619, 105 L.Ed. 2d 469 (*in camera* review to determine whether the crime-fraud exception to attorney-client privilege applies); *United States v. Nixon*, 418 U.S. 683, 94 S. Ct. 3090, 41 L.Ed. 2d 1039 (1974) (*in camera* review to determine whether communications are subject to the executive privilege).

Analysis and Arguments – Issue 3 (*In Camera* Inspection):
The defendant contended that trial court should have accepted its claim of peer review privilege based solely on the affidavits presented, and that reviewing the RCA report “unmistakably

prejudiced" the trial court against it, as evidenced by its statement that "someone is not acting right."[3] The COA pointed out that the defendant "cited no authority" for its assertion that an *in camera* inspection was improper. To the contrary, the COA looked to the clear line of precedent as cited in the *Miller* case to conclude that *in camera* inspections were absolutely proper for claims of peer review privilege.

The COA was visibly offended by defendant's argument that the trial court was unable to maintain its impartiality by conducting an *in camera* inspection of the RCA report. By way of examples, the COA stated:

- When pointing out that the defendant chose not to include the RCA report in the record on appeal: "Presumably, defendant Hospital feared that we, like the trial court, would be unable to maintain our impartiality if we were to review these records."
- In characterizing defendant's argument: "Defendant Hospital 'doth protest too much, methinks.'" (quoting William Shakespeare, Hamlet act 3, sc. 2.)
- In summing up its reasoning: "Were we to accept defendant Hospital's argument, a trial judge would need to be recused after any in camera consideration of seriously damaging evidence, even if the judge determines that the evidence is protected by privilege, upon the theory that the trial judge may then be prejudiced against the party who sought to protect the evidence. There is simply no legal basis for such a claim, nor any factual basis to think that such a thing happened in this case."

Interesting Point of Note:
In the last paragraph of this opinion, the COA grants plaintiff's motion to sanction defendant for a frivolous appeal, explaining: "We agree that most of defendant Hospital's arguments lack legal or factual basis and believe it is appropriate to sanction defendant Hospital the cost of plaintiff's attorney's fees regarding this appeal. '[W]e therefore tax [defendant Hospital] personally with the costs of this appeal and the attorney fees incurred in this appeal by [plaintiff]. Pursuant to Rule 34(c), we remand this case to the trial court for a determination of the reasonable amount of attorney fees incurred by [plaintiff] in responding to this appeal.'" (quoting *Ritter v. Ritter*, 176 N.C. App. 181, 185, 625 S.E.2d 886, 888-89, disc. review denied and appeal dismissed, 360 N.C. 483, 632 S.E.2d 490 (2006)).

Impact of Decision on Plaintiff's Practice:
This is another good example of how the appellate courts in North Carolina will (should) not blindly accept a defendant's claim of peer review of privilege. This case illustrates the power of the exception in § 131E-95 for materials generated outside of the committee being discoverable, even if they were reviewed and considered by the committee. This case is also very helpful at revealing the line between **proper** deposition and discovery questions that in no way violate the prongs of § 131E-95 that should be strictly construed by the court. In fact, this case literally gives a bulleted list of deposition questions regarding the formation of incident reports that are *per se* proper.

[3] Curiously, the defendant makes this assertion in spite of the fact that Judge Gessner ***ruled it its favor*** when he concluded the RCA report was peer review protected.

Robinson v. Duke Univ. Health Sys., et. al.,
___ N.C. App. ___, 747 S.E.2d 321, 2013 N.C. App. LEXIS 885 (2014), *review denied by, Robinson v. Duke Univ. Health Sys.*, 2014 N.C. LEXIS 215 (N.C. Mar. 6, 2014)

Prior History: Durham County, 11 CVS 002315	**NCCOA Filed Date:** August 20, 2013
Plaintiff Attorney(s): Reynolds Williams (Willcox, Buyck & Williams, P.A.), *pro hac vice* Albert Thomas (Thomas & Farris) Allen Thomas, Jr. (Thomas & Farris)	**Defense Attorney(s):** Mark Anderson (McGuireWoods) Heather Wilson (McGuireWoods) Monica Webb (McGuireWoods)
Judge (Author of opinion): McCullough, J. Douglas	**Judges (Concurring / Dissenting):** Calabria, Anne Marie (concur in result only) Steelman, Sanford (concur in result with separate opinion)
Type of Medical Care Involved: Colectomy surgery; intraoperative	**Decision for Plaintiff or Defense Bar?** Plaintiff

Procedural History:
Plaintiffs appeal from various orders by several trial court judges. Namely, for purposes of this manuscript those orders include: orders entered by Judge Orlando Hudson (i) granting summary judgment in favor of defendants on plaintiff's compliance with Rule 9(j) and (ii) granting summary judgment in favor of Dr. Mantyh, Dr. Huang, and DUHS, as well as an order entered by Judge Robert Hobgood's dismissing plaintiff's claim for punitive damages.

Background Medical Facts:
Plaintiff was referred to Duke and the individual defendants for severe constipation and irritable bowel syndrome. Defendants recommended she undergo a subtotal/abdominal colectomy, a surgical procedure wherein a portion of the intestine is removed and the new end is reattached to the rectum using a surgical stapler. Drs. Mantyh and Huang performed the surgery. The following day, the plaintiff reported blood and stool passing from her vagina overnight. Upon evaluation, defendants discovered that plaintiff's intestine had been connected to her vagina, rather than her rectum, during the surgery. Defendants had to perform a second surgery to correct the misconnection. The terrible ordeal led to numerous complications for the plaintiff, including eventually being diagnosed with conversion disorder, a psychiatric disorder related to the stress from her recent surgical experiences.

Plaintiff filed a complaint for medical negligence against all defendants. The complaint did not contain an expert witness certification. Instead, plaintiff alleged medical malpractice based upon *res ipsa loquitur*. Plaintiff's complaint also sought punitive damages. Before filing answers, defendants moved to dismiss pursuant to Rules 9(j) and 12(b)(6). Judge Robert Hobgood denied all said motions (except as to a single defendant, a discussion of which is not material to this reported case.)

The parties then proceeded to discovery, during which plaintiff identified Dr. Joshua Braveman, an experienced colorectal surgeon from Ohio as an expert witness on the issues of standard of

care and causation. Following Dr. Braveman's deposition, defendants moved for summary judgment. Judge Orlando Hudson granted defendants' motions and dismissed plaintiff's case.[4]

Key Facts – "MTD vs. MSJ" issue:
Before Judge Hobgood, defendants moved to dismiss plaintiff's complaint on the basis of Rule 9(j) and 12(b)(6), contending that plaintiff had failed to meet the "well-established" pleading requirements of *res ipsa* for medical malpractice cases. In their supporting brief, they raised four basic arguments: (i) plaintiff failed to allege either that a surgical instrument was left in plaintiff's body or that her injury was to an area far away from the surgery site; (ii) plaintiff did allege the proximate cause of her injury, rather than alleging no proof of the direct cause was available; (iii) laypersons lack the knowledge to infer negligence from these surgical circumstances without expert testimony; and (iv) plaintiff failed to allege instrumentality was in defendants' exclusive control.

Judge Hobgood entered an order denying the motion to dismiss. The order contained the following Conclusions of Law:

> Applying the applicable law to the allegations in the Complaint, the Complaint alleges facts giving notice of negligence under the existing common law doctrine of res ipsa loquitur. As a result[,] the Defendants' Motion to Dismiss on the basis of Rules 9(j), 12(b)(6), and 41(b) of the North Carolina Rules of Civil Procedure must be denied.

Before Judge Hudson, defendant moved for summary judgment, again arguing that plaintiff's complaint failed to comply with Rule 9(j) because the doctrine of *res ipsa* was inapplicable to these facts. Judge Hudson granted defendants' MSJ, but stated in his order that he was "not reviewing or attempting to overrule the findings and/or order entered by Judge Hobgood," citing the different standards for a Rule 12(b)(6) motion to dismiss and a Rule 56 motion for summary judgment. However, Judge Hudson's written order made the following Conclusions of Law:

> 31. The doctrine of *res ipsa loquitur* is not applicable to this case, where the evidence shows: a) this is a medical malpractice case; b) this case does not involve retained surgical instruments or foreign bodies; c) the alleged injury did not occur in an area that was far away from and completely unrelated to the zone of surgery; d) Plaintiffs offered proof of the cause of the injuries complained of; e) Plaintiff's injury is the type that can and does occur in the absence of negligence.
> . . . .
> 33. Plaintiffs' Complaint should be dismissed as to all Defendants pursuant to Rule 9(j) because: a) this is a medical malpractice case which requires a pre-filing expert review; b) the Complaint lacks the required Rule 9(j) certification; c) Plaintiffs did not obtain the required Rule 9(j) expert review prior to filing the Complaint; d) the applicable statute of [limitations] expired on March 12, 2011; and e) Plaintiffs did not file a Complaint that complied with Rule 9(j) prior to the expiration of the statute of limitations.

Key Facts – *Res Ipsa* Applicability issue:
Plaintiff's complaint was void of any expert witness certification. However, the complaint did assert the following (paraphrased):

---

[4] Following this dismissal and plaintiff's notice of appeal, a stay of the appellate proceedings was entered to allow Judge Hudson hold and evidentiary hearing and thereafter enter a "Supplemental Order and/or Advisory Opinion" making findings of fact and conclusions of law in support of his order granting summary judgment.

- The Defendants connected Linda Robinson's small intestine to her vagina rather than to her anus during a surgery, thereby injuring her;
- Such acts, by their very nature, raise a presumption of negligence on the part of the Defendants;
- All adult persons know the elementary anatomy of the body, and its common knowledge and experience that intestines are meant to connect with the anus, not the vagina, even following a surgical procedure to correct a bowel problem;
- It does not require expert testimony to understand that feces are not meant to be excreted from the vagina and that such an injury does not ordinarily occur in the absence of a negligent act or omission during a surgical procedure;
- The "botched colectomy is a proximate cause of the plaintiff's injury"
- "Defendants were negligent by attaching [plaintiff's] colon to her vagina"

Plaintiff's expert, Dr. Braveman, opined during his deposition to all of the following:

- Defendants breached the standard of care by committing a specific surgical error: they inserted a stapler through the vagina instead of the rectum
- Admitted that a "rectovaginal fistula" can occur in the absence of negligence following a colectomy
- But, 95% of the time, an injury like this doesn't occur unless surgeon was negligent
- This condition following surgery is rare, although it can occur, and raises the strong suspicion that the surgery was done improperly
- This injury/condition is never a risk of a colectomy procedure

Key Facts – Sufficient Expert Evidence for Medical Malpractice issue:
Dr. Braveman testified during his deposition to the following:

- He knew nothing about Dr. Mantyh's education, training, or experience at that time
- He had never visited Duke University Health System or any of its facilities and knew nothing about their surgical facilities
- He had not reviewed the website or read any materials about Duke
- All he knew about Duke was that it had "a great reputation."
- He knew Duke was "a tertiary care facility and takes care of all aspects of medical problems."
- The only information he had about Duke was that "it's a university health system and it's got a national reputation[.]"
- He believed there existed a national standard of care with respect to colorectal surgeons
- The standard of care prevalent at Duke University "should not be different" from the standard of care prevalent at the three medical centers with which he was familiar

Subsequent to his deposition, Dr. Braveman submitted an affidavit stating the following:

- He was "familiar with the standard of care for physicians such as Dr. Mantyh practicing in Durham, North Carolina, the Research Triangle area, and similar communities such as Worcester, Massachusetts[;] Cleveland, Ohio[;] and Columbus, Ohio in 2008 with respect to the type of procedure Dr. Mantyh performed on Linda Robinson on or about March 12, 2008."
- "At the time of [his] testimony, [he] had specific familiarity with the standard of care in the three communities in which [he had] practiced and was of the opinion then that the standard of care was similar across those communities and Durham, North Carolina."

- Since giving his deposition testimony, "[he had] confirmed [his] opinion with Internet research regarding Duke University Hospital and [had] confirmed that it is a sophisticated training hospital such as the other ones with which [he had] personal familiarity."

Key Facts – DUHS Apparent Agency issue:
It was undisputed that Dr. Mantyh was not an actual employee or agent of Defendant DUHS. However, the plaintiff's evidence showed the following:

- Dr. Mantyh was the Chief of Gastrointestinal and Colorectal Surgery at the hospital and was an assistant professor with tenure in surgery at Duke University, from which he receives a paycheck
- DUHS lists Dr. Mantyh as one of its physicians on its website
- Plaintiff was referred by another physician to DUHS and/or Dr. Mantyh for evaluation of her colonic inertia problems. Thus, there is no evidence in the record tending to show that Robinson specifically sought out Dr. Mantyh to perform her surgical treatment

Issues:
1. Did Judge Hudson correctly grant summary judgment in light of Judge Hobgood's ruling on the same substantive issue?
2. Did the plaintiff's complaint sufficiently allege, and did its forecast of evidence sufficiently demonstrate, that no bar exists to application of the *res ipsa* doctrine here?
3. Did the plaintiff present sufficient expert qualifications and evidence of breach in the SOC to survive summary judgment on its medical malpractice claims?
4. Did the plaintiff forecast sufficient evidence of apparent agency to hold DUHS vicariously liable for Dr. Mantyh's negligence?

Holdings:
1. **No.**
2. **Yes.**
3. **Yes.**
4. **Yes.**

Rules / Controlling Authority – "MTD vs. MSJ" issue:
"Our case law is clear that 'one judge may not reconsider the legal conclusions of another judge.'" *Adkins v. Stanly Cnty. Bd. of Educ.*, 203 N.C. App. 642, 646, 692 S.E.2d 470, 473 (2010). The only limited exception to this rule is for 'interlocutory orders addressed to the discretion of the trial court[.]'" *Id*.

"While we recognize that '[t]he trial court's standards for a Rule 12(b)(6) motion to dismiss and a motion for summary judgment are different and present separate legal questions[,]' *Adkins*, 203 N.C. App. at 647, 692 S.E.2d at 473, one trial court judge is nonetheless powerless to make a contrary ruling on an issue of law already resolved by a prior trial court judge's ruling, despite the denomination of the order as one denying a motion to dismiss or granting summary judgment.' *See id*. at 647-52, 692 S.E.2d at 473-76 (vacating order granting summary judgment in favor of defendants on legal issue of whether plaintiff's complaint touched on a matter of public concern where previous ruling by another trial court judge denied defendants' motion to dismiss after considering same legal question and reaching contradictory conclusion)."

"In considering whether a plaintiff's Rule 9(j) statement is supported by the facts, a court must consider the facts relevant to Rule 9(j) and apply the law to them . . . Rather, our review of Rule 9(j) compliance is *de novo, because such compliance clearly presents a question of law*." *Barringer v. Wake Forest Univ. Baptist Med. Ctr.*, 197 N.C. App. 238, 255-56, 677 S.E.2d 465, 477 (2009) (emphasis added).

Rules / Controlling Authority – *Res Ipsa* Applicability issue:

1. **Fundamental Theory of *Res Ipsa*:**
    a. "*Res ipsa loquitur* is a doctrine addressed to those situations where the facts or circumstances accompanying an injury by their very nature raise a presumption of negligence on the part of [the] defendant." *Bowlin v. Duke Univ.*, 108 N.C. App. 145, 149, 423 S.E.2d 320, 322 (1992).

    b. "The doctrine of *res ipsa loquitur*, 'in its distinctive sense, permits negligence to be inferred from the physical cause of an [injury], without the aid of circumstances pointing to the responsible human cause. Where this rule applies, evidence of the physical cause or causes of the [injury] is sufficient to carry the case to the jury on the bare question of negligence.'" *Diehl v. Koffer*, 140 N.C. App. 375, 377-78, 536 S.E.2d 359, 362 (2000) (quoting *Harris v. Mangum*, 183 N.C. 235, 237, 111 S.E. 177, 178 (1922)).

2. **Elements of *Res Ipsa*:**
    a. "The doctrine of *res ipsa loquitur* applies when '(1) direct proof of the cause of an injury is not available, (2) the instrumentality involved in the accident [was] under the defendant's control, and (3) the injury is of a type that does not ordinarily occur in the absence of some negligent act or omission.'" *Alston v. Granville Health System*, N.C. App. , , 727 S.E.2d 877, 879 (quoting *Grigg v. Lester*, 102 N.C. App. 332, 333, 401 S.E.2d 657, 657—58 (1991)), *disc. review dismissed*, N.C. , 731 S.E.2d 421 (2012)).

3. **Special Requirements for *Res Ipsa* in Medical Malpractice Claims:**
    a. ***Elaboration on Element 1 (direct proof)***
        i. "[W]here evidence constituting direct proof of the cause of injury is presented, 'the doctrine of *res ipsa loquitur* [is] not applicable.'" *Alston*, N.C. App. at , 727 S.E.2d at 880 (alteration in original) (quoting *Yorke*, 192 N.C. App. at 353, 666 S.E.2d at 136)).

        ii. Where a patient is awake and is able to offer direct evidence of the negligence that led to his injury, "the doctrine of res ipsa loquitur is inapplicable." *Yorke*, 192 N.C. App. at 353, 666 S.E.2d at 136.

        iii. Where a patient is under general anesthesia during surgery he/she cannot present direct evidence as to the precise cause of injury. *Id*.

    b. ***Elaboration of Element 3 (injury usually occurs by negligence)***
        i. "[W]hen evaluating whether the injury is of a type that does not ordinarily occur in the absence of negligence, our Court has applied a twofold test in medical malpractice cases: '(1) the injurious result must rarely occur standing alone and (2) the result must not be an inherent risk of the operation.' *Parks*, 68 N.C. App. at 206, 314 S.E.2d at 290.

ii. "For the doctrine to apply in a medical malpractice claim, a plaintiff must allege facts from which a layperson could infer negligence by the defendant based on common knowledge and ordinary human experience." *Smith v. Axelbank*, N.C. App. , , 730 S.E.2d 840, 843 (2012).

iii. "In order for the doctrine to apply, an average juror must be able to infer, through his common knowledge and experience and without the assistance of expert testimony, whether negligence occurred." *Hayes v. Peters*, 184 N.C. App. 285, 287-88, 645 S.E.2d 846, 848 (2007).

4. **Apparent Limitations of *Res Ipsa* in Medical Malpractice Claims:**
   a. "[T]he doctrine of *res ipsa loquitur* is approved in two limited circumstances: (1) injuries resulting from surgical instruments or other foreign objects left in the body following surgery; and (2) injuries to a part of the patient's anatomy outside of the surgical field." *Hayes*, 184 N.C. App. at 288, 645 S.E.2d at 848 (citing *Grigg*, 102 N.C. App. at 335, 401 S.E.2d at 659).

   b. "In *Hayes*, we noted that '[t]his Court has encouraged trial courts to remain vigilant and cautious about providing *res ipsa loquitur* as an option for liability in medical malpractice cases other than in those cases where it has been expressly approved.'" *Id.* at 288, 645 S.E.2d at 848 (quoting *Howie*, 168 N.C. App. at 699, 609 S.E.2d at 252).

   c. "Our Courts have consistently found that '*res ipsa loquitur* is inappropriate in the usual medical malpractice case, where the question of injury and the facts in evidence are peculiarly in the province of expert opinion." *Bowlin*, 108 N.C. App. at 149-50, 423 S.E.2d at 323; *see also Rowell*, 197 N.C. App. at 696, 678 S.E.2d at 751 ("Normally, in [medical malpractice] actions, both the standard of care and its breach must be established by expert testimony."))

   d. "The precautions in applying *res ipsa* to a medical malpractice action stem from an awareness that the majority of medical treatment involves inherent risks which even adherence to the appropriate standard of care cannot eliminate. This, coupled with the scientific and technical nature of medical treatment, renders the average juror unfit to determine whether [a] plaintiff's injury would rarely occur in the absence of negligence." *Schaffner v. Cumberland County Hosp. System*, 77 N.C. App. 689, 692, 336 S.E.2d 116, 118 (1985) (internal quotation marks and citations omitted).

   e. "The reason given for the doctrine's limited availability is the principle that a health care provider is not an insurer of results[.]" *Parks v. Perry*, 68 N.C. App. 202, 206, 314 S.E.2d 287, 289 (1984).

5. **Signs that *Res Ipsa* Should Be Available in Other Med Mal Claims**
   a. "The common knowledge, experience and sense of laymen qualifies them to conclude that some medical injuries are not likely to occur if proper care and skill is used; included, *inter alia*, are injuries resulting from surgical instruments or other foreign objects left in the body following surgery and injuries to a part of

the patient's anatomy outside of the surgical field." *Grigg*, 102 N.C. App. at 335, 401 S.E.2d at 659.

b. "[O]ur Supreme Court has long recognized that 'where proper inferences may be drawn by ordinary men from proved facts which give rise to *res ipsa loquitur* without infringing this principle, there should be no reasonable argument against the availability of the doctrine in medical and surgical cases involving negligence, just as in other negligence cases, where the thing which caused the injury does not happen in the ordinary course of things, where proper care is exercised. *Mitchell v. Saunders*, 219 N.C. 178, 182, 13 S.E.2d 242, 245 (1941);

c. "Once plaintiff's proof has addressed these concerns, . . . no bar to application of res ipsa in medical malpractice actions exists." *Schaffner*, 77 N.C. App. at 692, 336 S.E.2d at 118.

6. ***Res Ipsa* and Rule 9(j):**
   a. A complaint for medical malpractice without an expert witness certification can survive Rule 9(j) if it "alleges facts establishing negligence under the existing common-law doctrine of *res ipsa loquitur*." N.C. Gen. Stat. § 1A-1, Rule 9(j)(3) (2011).

   b. "[E]ven when a complaint facially complies with Rule 9(j) by including a statement pursuant to Rule 9(j), if discovery subsequently establishes that the statement is not supported by the facts, then dismissal is likewise appropriate.'" *Id*.

7. ***Res Ipsa* at Summary Judgment Phase**
   a. "The inference created by *res ipsa* will defeat a motion for summary judgment even though the defendant presents evidence tending to establish absence of negligence." *Schaffner*, 77 N.C. App. at 691-92, 336 S.E.2d at 118.

8. **Resorting to Proof Other than *Res Ipsa***
   a. "[*Res ipsa*] must not be supposed to require that plaintiff . . . must rely altogether upon this prima facie showing . . . of negligence, for [s]he may resort to other proof for the purpose of particularizing the negligent act and informing the jury as to the special cause of [her] injury." *Schaffner*, 77 N.C. App. at 694, 336 S.E.2d at 119.

Rules / Controlling Authority – Sufficient Expert Evidence for Medical Malpractice issue:

1. **National SOC:**

"Where summary judgment is granted on the basis that a doctor's testimony was to a national rather than a community standard of care, 'the critical inquiry is whether the doctor's testimony, taken as a whole, meets the requirements of N.C. Gen. Stat. § 90-21.12. In making such a determination, a court should consider whether an expert is familiar with a community that is similar to a defendant's community in regard to physician skill and training, facilities, equipment, funding, and also the physical and financial environment of a particular medical community.'" *Pitts v. Nash Day Hosp., Inc.*, 167 N.C. App. 194, 197, 605 S.E.2d 154, 156 (2004), *aff'd per curiam*, 359 N.C. 626, 614 S.E.2d 267 (2005).

“In our recent opinion in *Higginbotham v. D'Amico*, N.C. App. , 741 S.E.2d 668 (N.C. Ct. App. 2013), we explained: ‘The mere use of the phrase "national standard of care" is not fatal to an expert's testimony if the expert's testimony otherwise meets the demands of section 90-21.12.”

“In the alternative, [w]here the standard of care is the same across the country, an expert witness familiar with that standard may testify despite his lack of familiarity with the defendant's community.” *Id.* at , 741 S.E.2d at 671.

"[O]ur law does not prescribe any particular method by which a medical doctor must become familiar with a given community. Book or Internet research may be a perfectly acceptable method of educating oneself regarding the standard of medical care applicable in a particular community." *Grantham v. Crawford*, 204 N.C. App. 115, 119, 693 S.E.2d 245, 248-49 (2010)

2. **Supplemental Expert Affidavit:**

“[A] party opposing a motion for summary judgment cannot create a genuine issue of material fact by filing an affidavit contradicting his prior sworn testimony." *Pinczkowski v. Norfolk S. Ry. Co.*, 153 N.C. App. 435, 440, 571 S.E.2d 4, 7 (2002); *Barringer*, 197 N.C. App. at 257-58, 677 S.E.2d at 478.

3. **“Common Knowledge” Exception to Proving Breach/SOC**

“Expert testimony is not required . . . to establish the standard of care, failure to comply with the standard of care, or proximate cause, in situations where a jury, based on its common knowledge and experience, is able to decide those issues. The application of this ‘common knowledge’ exception to the requirement of expert testimony in medical malpractice cases has been reserved for those situations in which a physician's conduct is so grossly negligent *or the treatment is of such a nature that the common knowledge of laypersons is sufficient to find the standard of care required, a departure therefrom, or proximate causation*.” *Bailey v. Jones*, 112 N.C. App. 380, 387, 435 S.E.2d 787, 792 (1993) (emphasis added).

Rules / Controlling Authority – DUHS Apparent Agency issue:

“Apparent agency would be applicable to hold the hospital liable for the acts of an independent contractor if the hospital held itself out as providing [the] services and care." *Diggs v. Novant Health, Inc.*, 177 N.C. App. 290, 305, 628 S.E.2d 851, 861 (2006).

“Under this approach, a plaintiff must prove that (1) the hospital has held itself out as providing medical services, (2) the plaintiff looked to the hospital rather than the individual medical provider to perform those services, and (3) the patient accepted those services in the reasonable belief that the services were being rendered by the hospital or by its employees. A hospital may avoid liability by providing meaningful notice to a patient that care is being provided by an independent contractor.” *Id.* at 307, 628 S.E.2d at 862.

Analysis & Argument – “MTD vs. MSJ” issue:

The COA cited *Barringer* to conclude that “Judge Hobgood's order determining that plaintiffs' complaint properly complied with Rule 9(j)(3) was not a ruling addressed to his discretion. Rather, it was a ruling as a matter of law.”

Despite Judge Hudson’s statement in his order that the was not overruling the 12(b)(6) decision of Judge Hodgood, the COA concluded that Hudson “did precisely the opposite.”

The COA found that "In granting summary judgment in favor of defendants in the present case, Judge Hudson ruled contrary to Judge Hobgood's prior ruling on the same legal issue to dismiss: whether plaintiffs' complaint properly complied with the pertinent provisions of Rule 9(j)." The COA explained:

> In comparing the two orders side by side in the present case, as well as defendants' arguments on the issue in both instances, it is clear that Judge Hudson granted summary judgment in favor of defendants in light of his conclusion that the doctrine of *res ipsa loquitur* was not applicable to the facts alleged and evidence presented by plaintiffs and therefore plaintiffs' complaint failed to comply with the pertinent provisions of Rule 9(j) — the opposite conclusion reached by Judge Hobgood in his prior order denying defendants' motion to dismiss on the same legal issue. Accordingly, we must vacate Judge Hudson's order granting summary judgment in favor of defendants on the legal question of plaintiffs' compliance with the pertinent provisions of Rule 9(j). See id.

Analysis & Argument – *Res Ipsa* Applicability issue:
The COA addressed three basic arguments raised by defendants at the trial court level: **(1)** based on holdings in *Grigg* and *Hayes*, urging the court to restrict application of *res ipsa* to injuries either from foreign objects left after surgery or to an area of the body far away from surgery site; **(2)** a colectomy is a complex operation and average jurors don't know sufficient common knowledge to understand the complicated anatomy, medical devices, and mechanism of injury here without expert testimony; and **(3)** plaintiffs offered direct proof of the injury – both in the complaint and from their own expert's deposition – so the doctrine is inapplicable here. The COA methodically rejected all three arguments.

1. **Limitation of Circumstances in Which Doctrine Applies**:

Despite the language from *Grigg* and *Hayes* that appears to support defendants' position at first blush, the COA here explained that "any limitation of the application of *res ipsa loquitur* to only these two types of medical malpractice cases is not supported by the plain language of our case law. Although *Hayes* cautions trial courts in applying *res ipsa loquitur* in medical malpractice actions involving injuries other than those two categories, *Hayes* does not hold that these two types of cases are the only ones in which *res ipsa loquitur* can apply. To the contrary, the plain language of Grigg, cited by Hayes, states:

> The common knowledge, experience and sense of laymen qualifies them to conclude that some medical injuries are not likely to occur if proper care and skill is used; included, ***inter alia***, are injuries resulting from surgical instruments or other foreign objects left in the body following surgery and injuries to a part of the patient's anatomy outside of the surgical field. *Grigg*, 102 N.C. App. at 335, 401 S.E.2d at 659 (emphasis added). Indeed, our Supreme Court has long held that "where proper inferences may be drawn by ordinary men from proved facts which give rise to *res ipsa loquitur* . . . , there should be no reasonable argument against the availability of the doctrine in medical and surgical cases involving negligence[.]" *Mitchell*, 219 N.C. at 182, 13 S.E.2d at 245. Thus, defendants' argument that res ipsa is inapplicable in the present case because it does not involve either a foreign object left in the body following surgery or an injury to an area far away from and completely unrelated to the zone of surgery is without merit.

2. **Requirement of Expert Testimony**

    a. **Defendant Argument #1:**

Defendants contended “[a]verage jurors do not have knowledge to enable them to identify and distinguish internal anatomy such as the vaginal cuff, colon, small intestines, adhesions and rectum as it would appear through a laparoscope . . . [l]aymen have no experience in dissecting adhesions, removal of the colon, or creating an anastomosis (connection) between the small bowel and rectum[,]" and that they “are not familiar with using a surgical stapler (EEA), including knowledge of how to properly insert, align, and/or use it to create a connection between body tissues."

In response, the COA pointed out that plaintiff’s complaint plainly alleged that “it is common knowledge and experience that intestines are meant to connect with the anus, not the vagina, even following a surgical procedure to correct a bowel problem.” Importantly, the COA concluded that “Despite defendants' attempts to employ medical terminology to the issue, the simple fact is that following her surgical procedure, Robinson's intestine was left connected to her vagina, causing her to excrete feces through her vagina.” Using this basic fact, the COA went on to distinguish this case from four prior cases where the appellate courts found that expert testimony was required: *Hayes*, *Howie*, *Bowlin* and *Grigg*.[5]

Whereas in each of those four cases “an understanding of the procedures involved and the proper techniques to be employed during those procedures was necessary for a determination by the jury as to whether the injury at issue in each case could have occurred in the absence of some negligence by the defendant health care provider,” here a similar understanding is simply not required for a layman to determine that plaintiff’s intestine shouldn’t have been connected to her vagina in the absence of some negligence.

a. **Defendant Argument #2:**

Defendants also pointed to testimony by Dr. Braveman, plaintiff’s expert surgeon, to show the jury needed expert opinion (e.g. he testified that he relied upon medical records and his expertise to form opinion of negligence here; that this injury can occur sometimes in the absence of negligence; etc.)

However, the COA also pointed out Dr. Braveman’s testimony that supported application of *res ipsa* (e.g. 95% of the time injury occurs due to negligence; this injury is rare; it is never an inherent risk of the procedure; etc.)

Despite bringing an expert in to testify, the COA concluded that “[t]he fact that plaintiffs' proffer of expert testimony describes Robinson's procedure, the anatomy involved, and the injurious result does not detract from the fact that a layperson can understand, without the assistance of such expert testimony, that following a procedure to remove a portion of the intestine or colon, a patient's intestine should not be reattached to her vagina, resulting in the passing of feces through the vagina, if the procedure was done properly. Indeed, Dr. Braveman agreed that a layperson needs no special expertise to understand that the small intestine being connected to the vagina is not anatomically correct.”

---

[5] *Hayes*, 184 N.C. App. at 288, 645 S.E.2d at 848 (determination whether a stroke from air emboli during an esophagastroduodenoscopy surgical procedure was an injury that would not normally occur in the absence of negligence); *Howie*, 168 N.C. App. at 698-99, 609 S.E.2d at 252 (determination whether the defendant dentist used excessive or improper force in employing a "Cryers elevator" instrument during a wisdom tooth extraction resulting in nerve damage and a fractured jaw); *Bowlin*, 108 N.C. App. at 149, 423 S.E.2d at 322-23 (determination whether defendant was negligent in causing injury to plaintiff's sciatic nerve while extracting marrow during a bone marrow harvest procedure); *Grigg*, 102 N.C. App. at 335, 401 S.E.2d at 659 (determination whether the force exerted by the defendant obstetrician during cesarean section child delivery was either improper or excessive so as to cause a uterine tear).

3. **Direct Proof of Cause of Injury**

Defendants argued that *res ipsa* was inapplicable because plaintiffs offered direct proof of plaintiff's injury in two ways: (i) plaintiffs' complaint contends that "'the botched colectomy is a proximate cause of the Plaintiffs' injury," and that Defendants were negligent by attaching 'Linda Robinson's colon to her vagina in such a way that feces came through her vagina;" and (ii) Dr. Braveman's testimony opining that the surgical error occurred by inserting a stapler through the vagina instead of the rectum.

The COA explained that "defendants' argument conflates proffered evidence of the 'cause' of Robinson's injury with the injurious condition itself." Plaintiff's use of the phrase "botched colectomy" only referred to the cause of her resultant condition. It did ***not*** identify the precise human cause of why or how the intestine was wrongly connected to the vagina.

Moreover, "Plaintiffs' proffer of Dr. Braveman's testimony in no way establishes direct proof of the precise cause of Robinson's injury. Rather, such testimony constitutes plaintiffs' proffer of evidence as to how the injury might have occurred." The COA found that "plaintiffs' proffer of expert testimony provides only ***a theory*** of the attendant circumstances that resulted in Robinson's injury during her surgical procedure. Plaintiffs have neither alleged nor presented direct evidence of the precise human cause of Robinson's injury." (emphasis added).

Finally, the COA noted that plaintiff was unconscious under general anesthesia at the time of the injury, so she is unable to personally present direct proof of the negligence that led to her injury.

Despite plaintiff's proffer of an expert who offered a theory of how the negligence might have occurred, the COA found that the jury was still free to infer negligence simply from the facts of plaintiff's physical injury alone. Thus, Dr. Braveman's testimony did not preclude application of *res ipsa*.

Analysis & Argument – Sufficient Expert Evidence for Medical Malpractice issue:

1 and 2. National SOC and Supplemental Affidavit issues:

The COA disagreed with defendants that Dr. Braveman's affidavit was inadmissible because it contradicted his deposition testimony. To the contray, the COA found that "rather than contradicting his testimony, Dr. Braveman's affidavit actually supplements it. In his affidavit, Dr. Braveman reaffirms his belief that the applicable standard of care is similar to that of the medical facilities with which he was familiar and that he had confirmed his beliefs through Internet research . . . Although Dr. Braveman testified as to his opinion regarding a national standard of care for colorectal surgeons, Dr. Braveman reinforced his opinion through his affidavit, pointing to particular research he had conducted on Duke University and Dr. Mantyh. We fail to see how Dr. Braveman's affidavit contradicted his testimony. Considered as a whole, Dr. Braveman's testimony satisfied the requirements of N.C. Gen. Stat. § 90-21.12."

3. "Common Knowledge" Exception:

Defendants argued that the medical malpractice claims against Dr. Huang should be dismissed because plaintiff's expert never testified to a single breach in the SOC by Dr. Huang. However, despite this being true, the COA relied upon a 1993 case to conclude that plaintiff's claims against Dr. Huang could move forward.

The COA cited the *Bailey v. Jones* case for the "common knowledge" exception to proving breach in the SOC when "the treatment is of such a nature that the common knowledge of laypersons is sufficient to find the standard of care required, a departure therefrom, or proximate causation." *Id*., 112 N.C. App. 380, 387, 435 S.E.2d 787, 792 (1993).[6]

Applying this exception, the COA reasoned: "Here, plaintiffs' proffer of evidence tends to show that Dr. Huang breached the applicable standard of care in incorrectly placing the surgical stapler into Robinson's vagina and failing to ensure its proper anatomical [**45] placement. A jury, based on its common knowledge, could decide from this evidence that Dr. Huang breached the standard of care owed to Robinson."

Analysis & Argument – DUHS Actual and Apparent Agency issue:
Without much analysis, the COA cited the Key Facts (see above) on the apparent agency issue and simply concluded that summary judgment was improper here because "[A] jury could reasonably find [that these facts] indicated to the public that [DUHS] was providing [surgical] services to its patients."

Interesting Point of Note – Punitive Damages issue:
Of note here, despite the way the COA described and dealt with the defendants' level of negligence in committing this terrible surgical mistake, the COA still concluded that none of the plaintiff's allegations or evidence raised any facts that could support an award of punitive damages (i.e. no evidence of willful, wanton, malicious or fraudulent conduct by defendants).

Impact of Decision on Plaintiff's Practice:
This decision is a veritable treatise on the application of *res ipsa* in the medical malpractice context, and suggests that the doctrine is available in far more situations than prior case law would suggest. This decision also highlights the important point of law/procedure: one judge at summary judgment has no power to overrule a prior judge during a Rule 9(j) or 12(b)(6) motion to dismiss if, in substance, the "same legal issue" is being decided in both contexts.

[6] Of particular note is that the *Bailey* case was issued in 1993, two years **prior** to the 1995 tort reform statutes that introduced G.S. 90-21.11 and 12, as well as Rule 702(b). Here, the COA confirmed that the "common knowledge" exception survived these tort reform measures and can still have applicability today.

Schmidt v. Petty,
___ N.C. App.___, 752 S.E.2d 690, 2013 N.C. App. LEXIS 1306 (2013),

Prior History: Macon County, 11 CVS 589	**NCCOA Filed Date:** December 17, 2013
Plaintiff Attorney(s): Fred D. Smith, Jr. Ron L. Moore	**Defense Attorney(s):** Isaac Northup, Jr. (Northup, McConnell) Katherine M. Bulfer(Northup, McConnell)
Judge (Author of opinion): Davis, Mark	**Judges (Concurring / Dissenting):** Calabria, Anne Maria (concur) Stroud, Donna (concur)
Type of Medical Care Involved: Radiology; Failure to diagnose lesion	**Decision for Plaintiff or Defense?** Defense

Procedural History:
Appeal by plaintiff from Judge Sharon T. Barrett's grant of defendant's motion *in limine*.

Background Facts (Timing Important):

- **5/12/06:** Plaintiff presented to hospital with upper respiratory systems and has chest x-ray performed. X-ray is read by defendant Petty. He did not note in his report the presence of a cancerous lesion in plaintiff's upper left lung field.
- **5/27/07:** Plaintiff presented to hospital complaining of pain in her neck and chest. Another x-ray is performed and read by Petty. Again, he fails to note the same lesion.
- **5/27/08:** Plaintiff sought care for pneumonia and had another chest x-ray performed and ready by Petty. Again, he fails to note the same lesion.
- **6/16/08:** Plaintiff sought care again, this time for chest and abdominal pain. A CT scan was performed and another doctor spotted the lesion. The lesion was diagnosed as lung cancer.
- **2/12/09:** Plaintiff died of lung cancer.

Plaintiff filed a wrongful death medical malpractice action against Petty for failure to diagnose the cancerous lesion and proceeded to trial.

Key Facts:
Though Plaintiff's experts did opine that Petty breached the SOC by failure to diagnose the lesion on the 5/27/08 x-ray, plaintiff had no expert testimony that this failure was a proximate cause of plaintiff's death. Instead, plaintiff's experts admitted that a diagnosis of the lesion on 5/27/08 would not have caused plaintiff to survive her cancer.

At trial, defendant filed a motion *in limine* seeking to prohibit any evidence that Petty breached the standard of care with regard to the 5/27/08 x-ray. The trial court granted this motion pursuant to Rule 403, finding that because plaintiff had no evidence that this breach was a proximate cause of plaintiff's death, then inclusion of breach evidence would be confusing and unfairly prejudicial to the defendant.

Issue:
Did the trial court abuse its discretion in granting defendant's motion *in limine*?

Holding:
No.

Rules / Controlling Authority:
"Rule 403 states, in pertinent part, that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." N.C. R. Evid. 403.

The "application of the Rule 403 balancing test remains entirely within the inherent authority of the trial court." *Warren v. Jackson*, 125 N.C. App. 96, 98, 479 S.E.2d 278, 280, *disc. review denied*, 345 N.C. 760, 485 S.E.2d 310, 485 S.E.2d 311 (1997).

"Hence, the trial court's determination as a result of this balancing test will not be disturbed on appeal absent a clear showing that the court abused its discretion." *Id.*

A jury is likely to attach great significance to expert testimony that a party violated the applicable standard of care. *See U.S. v. Dorsey*, 45 F.3d 809, 815 (4th Cir. 1995) ("[E]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the [Rules of Evidence] exercises more control over experts than over lay witnesses." (citations omitted)).

"Expert opinion testimony can be excluded when the trial court determines . . . the chance of misleading the jury outweighs the probative value of the evidence." *Horne v. Roadway Package Sys., Inc.*, 129 N.C. App. 242, 244, 497 S.E.2d 436, 438 (1998).

Analysis & Argument:
"Plaintiff argues that: (1) the trial court committed error by failing to find the opinion testimony of Plaintiff's expert witnesses regarding Dr. Petty's allegedly negligent interpretation of the 27 May 2008 x-ray relevant under Rule 401 of the North Carolina Rules of Evidence; (2) the trial court abused its discretion by ruling that the probative value of this testimony was substantially outweighed by its prejudicial effect on Defendants and the likelihood of confusion of the issues in the minds of the jurors pursuant to Rule 403; and (3) the error prejudiced Plaintiff because a different result would likely have ensued had the error not occurred."

The COA disagreed, and concluded it was reasonable for the trial court to find that had the jury been permitted to hear evidence of the 5/27/08 breach, then the effect would have been confusion of the real issues on trial, resulting in prejudice to the defendant.

Because plaintiff's own experts could not testify that the 5/27/08 breach was a proximate cause, the COA explained that "[t]he key issues to be resolved by the jury in this case were whether (1) Dr. Petty violated the applicable standard of care in his reading of the 2006 and 2007 x-rays; and (2) whether these acts of alleged negligence by Dr. Petty proximately caused Mrs. Schmidt's death.

Accordingly, "[w]e cannot say that the trial court abused its discretion in determining that the potential for harm stemming from the admission of expert testimony regarding a standard of care violation by Dr. Petty on a separate occasion substantially outweighed any limited probative

value of this evidence — given the parties' agreement that any such violation did not proximately cause Mrs. Schmidt's death."

Webb v. Wake Forest Univ. Baptist Med. Ctr.,
___ N.C. App.___, 756 S.E.2d 741, 2014 N.C. App. LEXIS 170 (2014)

Prior History: Forsyth County, 10 CVS 1990	**NCCOA Filed Date:** February 18, 2014
Plaintiff Attorney(s): Harold L. Kennedy III Harvey L Kennedy	**Defense Attorney(s):** Tamura Coffey (Coffey Bomar) J. Rebekah Biggerstaff (Coffey Bomar) Kenneth L. Jones (Carruthers & Roth) Michael E. Yarborough (Carruthers & Roth)
Judge (Author of opinion): McGree, Linda M.	**Judges (Concurring / Dissenting):** McCullough, J. Douglas (concur) Dillon, Chris (dissent, with separate opinion)
Type of Medical Care Involved: Dental surgery; Anesthesia	**Decision for Plaintiff or Defense?** Plaintiff

Procedural History:
Plaintiff appealed from Judge John O. Craig's grant of summary judgment in favor of defendants on the basis of expert opinion admissibility issues regarding causation.

Background Facts:
Decedent underwent general anesthesia for oral surgery, teeth cleaning, and extraction of four teeth. The surgery last 8 hours, approximately four times longer than it should have. Decedent was under anesthesia for the entire 8 hours. The anesthesia team defendants, in consultation with the anesthesia defendants, made decision to discharge decedent home without consultation by the attending physician in charge. Decedent become unresponsive following day, presented to the ER, and died. An autopsy was performed and cause of the death was found to be bronchopneumonia following the surgery and general anesthesia.

Plaintiffs filed a wrongful death medical malpractice action and proceeded through discovery with several expert witnesses. Defendants filed motions for summary judgment, arguing plaintiff's failed to forecast sufficient evidence of proximate cause. The trial court agreed and granted summary judgment.

Key Facts:
On the issue of causation, Plaintiffs relied upon a "two-tiered" approach and presented the expert testimony of a retained expert Dr. Behrman, a doctor of dental medicine, and the testimony of the fact-witness Dr. Gaffney-Kraft, the doctor who performed the autopsy.

First: Dr. Behrman opined that defendant's breached the standard of care in discharging decedent home without a proper consultation by the attending physician. He also testified that

this breach was a proximate contributing cause of decedent's bronchopneumonia. Specifically, when asked by plaintiff's counsel whether defendant's breach was a proximate cause of decedent's bronchopneumonia, Dr. Behrman responded: "Within my knowledge as an oral and maxillofacial surgeon, yes."

Second: Dr. Gaffney-Kraft created an autopsy report that concluded, and signed an affidavit that likewise concluded, that to a reasonable degree of medical certainty decedent's bronchopneumonia was the cause of his death.

Defendants did not challenge Dr. Gaffney-Kraft's qualifications or causation opinion that bronchopneumonia caused decedent's death. However, they did challenge Dr. Behrman's causation opinion as inadmissible under Rule 702(a).[7] Defendants did not file a motion to exclude expert testimony. Instead, they filed for summary judgment on the basis that plaintiff's forecast of causation expert testimony was insufficient and incompetent under Rule 702(a).

Dr. Behrman had the following training and experience in dentistry and oral surgery:

- Earned a Doctor of Dental Medicine degree
- Completed an internship in anesthesia and a residency in oral and maxillofacial surgery,
- Licensed by the New York Board of Dentistry
- Has been certified by the American Board of Oral and Maxillofacial Surgeons since 1986.
- As Chief of the Division of Dentistry, Oral and Maxillofacial Surgery since June 1996, Dr. Behrman oversees residency programs that provide over 10,000 patient visits each year
- He is the Chair of the Institutional Review Board of a medical center in New York
- In the past, he has held appointments with the University of Pennsylvania School of Dental Medicine and Memorial Sloan-Kettering Cancer Center and Hospital.

Issue:
Did the trial court correctly grant summary judgment to defendants based on a finding that plaintiff did not forecast sufficient expert testimony on the causal link between defendant's beach and the condition causing decedent's death?

- ***NOTE:*** Defendants only challenged Dr. Behrman's opinion on the first two of the three grounds under the *Goode/Howerton* 3-part test (see "Rules" below): reliability and qualifications. Defendants did not challenge the relevance of Dr. Behrman's proposed testimony. Accordingly, reliability and qualifications are the only two issues of admissibility under Rule 702(a) discussed in the COA's opinion.

Holding:
No.

Rules / Controlling Authority:
"To survive a motion for summary judgment in a medical malpractice action, a plaintiff must forecast evidence demonstrating that the treatment administered by [the] defendant was in negligent violation of the accepted standard of medical care in the community[,] and that [the] defendant's treatment proximately caused the injury." *Lord*, 191 N.C. App. at 293-94, 664 S.E.2d at 334.

[7] Given that this cause of action arose before October 1, 2011, the former version of Rule 702(a) applied and not the so-called "Daubert" version.

“Despite the fact that this matter is before us on appeal from the grant of summary judgment, we address the admissibility of expert testimony because of our Supreme Court's analysis in *Crocker v. Roethling*, 363 N.C. 140, 675 S.E.2d 625 (2009) . . . Because our Supreme Court in *Crocker* analyzed the admissibility of expert testimony even in the absence of a motion to exclude expert testimony, we analyze the admissibility of expert testimony in the present case.”

"The trial court must decide the preliminary question of the admissibility of expert testimony under the three-step approach adopted in *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995)." *Crocker*, 363 N.C. at 144, 675 S.E.2d at 629. "The trial court thereunder must assess: 1) the reliability of the expert's methodology, 2) the qualifications of the proposed expert, and 3) the relevance of the expert's testimony." *Id.*

- ***Elaboration on Element 1 (Reliability):*** “When testimony on medical causation "is based merely upon speculation and conjecture, however, it is no different than a layman's opinion, and as such, is not sufficiently reliable to be considered competent evidence on issues of medical causation." *Azar v. Presbyterian Hosp.*, 191 N.C. App. 367, 371, 663 S.E.2d 450, 453 (2008).

- ***Elaboration on Element 2 (Qualifications):*** “If scientific, technical or other 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." N.C.G.S. § 8C-1, Rule 702(a) (2010).

  "[T]he opinion testimony of an expert witness is competent if there is evidence to show that, through study or experience, or both, the witness has acquired such skill that he is better qualified than the jury to form an opinion on the particular subject of his testimony." *Terry v. PPG Indus., Inc.*, 156 N.C. App. 512, 518, 577 S.E.2d 326, 332 (2003) [*747] (licensed clinical psychologist was qualified to testify regarding the cause of depression).

  "The essential question in determining the admissibility of opinion evidence is whether the witness, through study or experience, has acquired such skill that he was better qualified than the jury to form an opinion on the subject matter to which his testimony applies." *Diggs*, 177 N.C. App. at 297, 628 S.E.2d at 856 (holding that a nurse qualified to opine as to causation of injury arising from gallbladder surgery).

Analysis & Arguments:

1. **Reliability of Expert’s Methodology**

The COA reasoned that “the opinions of Dr. Behrman and Dr. Gaffney-Kraft were not based merely upon speculation or conjecture” for several reasons:

- Neither Dr. Behrman nor Dr. Gaffney-Kraft used the words "probably" or "possibly" or otherwise indicated that their opinions were speculative or conjectural
- Rather, Dr. Behrman answered the question as to his opinion on causation in the affirmative
- Similarly, Dr. Gaffney-Kraft stated that "it is [her] opinion within reasonable medical certainty that the cause of death of [the Decedent] was bronchopneumonia[.]"

Importantly, the COA concluded that "the fact that Plaintiff's causation testimony is presented in two steps, (1) that the dental care caused Decedent's bronchopneumonia and (2) that the bronchopneumonia caused Decedent's death, does not affect this analysis. Defendants cite no case holding that causation evidence may not be presented in sequential steps, and our research reveals none."

2. Qualifications of the Proposed Expert

Defendants argued that because Behrman was not a medical doctor, he was not qualified to comment on whether the alleged breach caused the development of decedent's bronchopneumonia. Defendants pointed out Behrman's deposition testimony where he testified he would defer to a medical doctor on this point.

"Defendants cited *Martin v. Benson*, 125 N.C. App. 330, 481 S.E.2d 292 (1997), *rev'd on other grounds*, 348 N.C. 684, 500 S.E.2d 664 (1998), in support of their contention that only a medical doctor would be qualified to opine as to causation of bronchopneumonia. In *Martin*, this Court held the trial court erred in allowing a neuropsychologist to opine as to a closed head injury. Id. at 334-37, 481 S.E.2d at 294-96."

However, the COA went on to distinguish *Martin* from the facts of this case, explaining: "This Court in *Martin* considered 'Rule 702 in light of this State's statutes defining the practice of 'psychology.' *Martin*, 125 N.C. App. at 336, 481 S.E.2d at 295. This Court noted that N.C. Gen. Stat. § 90-270.3 (1993) required licensed psychologists to assist clients in obtaining professional help for problems that fall outside the bounds of the psychologist's competence, including 'the diagnosis and treatment of relevant medical' problems. *Id*. at 337, 481 S.E.2d at 296. From this statute, this Court concluded it was evident 'that the practice of psychology does not include the diagnosis of medical causation.' *Id*. By contrast, in the present case, no statute requires dentists to assist their clients in obtaining professional help for problems outside the boundaries of the dentist's competence. *Martin* is thus distinguishable from the present case."

The COA cited Dr. Behrman's impressive background and training (see "Key Facts" above), and concluded: "Focusing on the qualifications of Dr. Behrman in particular, as opposed to the qualifications of licensed dentists in general, Dr. Behrman's knowledge, skill, experience, training, and education qualify him to opine as to the causation of bronchopneumonia. Dr. Behrman has 'acquired such skill that he was better qualified than the jury to form an opinion' on the causation of bronchopneumonia.' (quoting *Diggs*, 177 N.C. App. at 297, 628 S.E.2d at 856; see also Terry, 156 N.C. App. at 518, 577 S.E.2d at 332)).

Dissent by Judge Dillon:

Judge Dillon filed a dissent, the most salient points of which are captured in the following excerpt:

> The majority cites the three-pronged analysis set out by our Supreme Court in *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995), which the trial court must use in determining the preliminary issue of the admissibility of expert testimony.
>
> I disagree with the majority's conclusion with respect to the first prong of the analysis, that the methodology employed by Drs. David and Behrman in determining the cause of Decedent's bronchopneumonia was reliable. Plaintiff does not point to any testimony where either dentist discussed the methodology by which he determined the cause of Decedent's bronchopneumonia.

> Further, I disagree with the majority's conclusion regarding the second prong of the analysis, that Drs. David and Behrman were qualified to offer expert opinions as to the cause of Decedent's bronchopneumonia. Plaintiff does not point to any testimony indicating that either dentist possessed the requisite "knowledge, skill, experience, training or education" to state an opinion with any degree of certainty that it was Defendants' conduct that caused Decedent's bronchopneumonia.
>
> In other words, I do not believe that a trial court abuses its discretion as gatekeeper in excluding the opinion testimony of a witness concerning the cause of bronchopneumonia in a patient with a complex medical history simply because the witness testified that he has worked in the health care profession and has extensive experience in dental surgery, but otherwise provided no testimony indicating that he has any expertise in determining the cause of bronchopneumonia. Accordingly, I would vote to affirm the trial court's decision to exclude this testimony.

Impact of Decision on Plaintiff's Practice:
This is a very helpful opinion on the creative ways in which plaintiffs can meet their burden of establishing proximate cause in medical malpractice cases. The COA specially endorsed plaintiff's "two-tiered" approach here, wherein plaintiff relied first on one expert to opine that defendant's breach caused plaintiff to suffer from a certain medical condition, and then second on another expert to opine that this medical condition is what caused plaintiff's injury/death. The opinion is also helpful in analyzing admissibility of causation testimony under the old Rule 702(a) and the 3-part *Goode/Howerton* test. As the dissent points out, despite (i) not citing or explaining any of the actual methodology employed by Dr. Behrman in reaching his opinion, or (ii) really explaining how Behrman's training and experience provided him the requisite knowledge to give a bronchopneumonia causation opinion in a way that assisted the trier of fact, the COA majority still concluded that it was an abuse of the trial court's discretion in finding plaintiff's proximate cause evidence insufficient. This case will be seen by some as an illustration as to the relatively low bar for admissibility under the old Rule 702(a).