MEDICAL NEGLIGENCE TRIAL: A DRAMATIZATION
By Beverly T. Beal

The following is an annotated dramatization of portions of a medical negligence trial. It is intended to provide a framework for reviewing recent procedural, evidentiary and substantive law changes. It is hoped that this method is helpful. The presentation was originally made at the summer, 2003 meeting of the Conference of Superior Court Judges at Asheville. The cast members are shown below. Some changes have been made to add subject matter, and provide resources to address the discussion points that appear throughout the presentation.

BOYLE N. MADD,
Plaintiff,

vs.

PULLEN T. PLUGG, M.D.,
RHODHISS MEMORIAL HOSPITAL, INC.
Defendants

SUMMARY

Plaintiff entered the hospital for a heart catheterization. He had a history of heart trouble. While a patient at Rhodhiss Memorial Hospital CNA's, employees of the hospital, were transferring plaintiff from a hospital bed to a wheelchair to go to the x-ray department. He was dropped, hit his head and was unconscious for ten minutes. He was treated for a concussion, free of charge. In preparation for the procedure he was taken off Coumadin therapy. The procedure was delayed, and no order was issued to resume Coumadin. He suffered a stroke. He sues the hospital and the treating physician, seeking actual and punitive damages. He presents expert witnesses on the standard of care, and an expert in the field of neuropsychology, and economic impact. "A day in the life" video is shown to the jury. During the trial, before the plaintiff rests, the claim with the hospital is settled. An issue in regard to that claim is whether it is professional negligence or ordinary negligence as a standard. The defense presents evidence of standard of care and raises an issue as to which of two doctors, defendant and another treating physician, was responsible for monitoring the Coumadin therapy. The defendant testified as an expert witness.

CAST OF CHARACTERS

Judge. . . . . James Morgan/
Edwards, plaintiff's attorney . . . . . .Penn Dameron
Boyle N. Madd, plaintiff . . . . . Robert Hobgood

Silk, defendant Plugg's attorney . . . .Nathan Poovey
Golden, defendant hospital's attorney, Phillip Ginn
Maynard Fountain, witness . . . . . Andy Cromer
Ella Fife Eswan, witness (female) . . . Yvonne Mims Evans
Mortimer Main, witness . . . . . .Ripley Rand
Dr. Plugg . . . . . .Bobby Ervin
P. I. Closet, witness . . . . . .David Cayer
Bailiff……Jay Hockenbury

I. INTRODUCTION

SENIOR RESIDENT JUDGE IS SUPPOSED TO KEEP A DOCKET OF MEDICAL NEGLIGENCE CASES. 1. GS 1A-1, Rules 3 and 16 (b), SRRSCJ receives notice of filing of medical malpractice action; reviews consent calendaring order in malpractice cases and schedules case for trial.

SCENE ONE

JUDGE: The Court calls for trial the case of Boyle N. Madd versus Pullen D. Plugg, M.D. Counsel, announce your appearances.

EDWARDS: Jason Edwards for the Plaintiff. (putting hand on shoulder of Madd, sympathetically)This is my client, poor unfortunate Mr. Madd.

SILK: Leon Silk, for the Defendant Dr. Plugg. (points to Plugg) This is my client, Dr. Plugg.

GOLDEN: Amadeus Golden for the Defendant, Rhodhiss Memorial Hospital.

JUDGE: I see that defendant Rhodhiss Memorial Hospital has filed a motion to dismiss for failure to comply with rule 9(j).

GOLDEN: Yes, your honor. We contend that the complaint clearly shows that no qualified expert has reviewed the complaint and is prepared to testify as to the standard of care.

EDWARDS: Will defense counsel stipulate that the facts set out in the verified complaint are correct, in that the plaintiff was a patient at Rhodhiss Memorial Hospital and was injured when attendants dropped him while transferring him from the hospital bed to a wheelchair?

GOLDEN: Well, for the purposes of this hearing we will do so, but for no other purpose.

EDWARDS: In that case, it is correct, your honor, that no expert reviewed the medical care or is reasonably expected to qualify as an expert witness or testify about compliance with the applicable standard of care. However, a careful

examination of the complaint will reveal that this claim is not about standard of care of a professional.

Discussion: What standard applies to the negligence claim against the hospital?

In negligence cases, a directed verdict is seldom appropriate in view of the fact that the issue of whether a defendant breached the applicable standard of care is normally a factual question which the jury must answer. See Barber v. Presbyterian Hosp., 147 N.C. App. 86, 88, 555 S.E.2d 303, 305 (2001). As our Supreme Court has aptly stated, "Where the question of granting a directed verdict is a close one, the better practice is for the trial judge to reserve his decision on the motion and allow the case to be submitted to the jury." Manganello v. Permastone, Inc., 291 N.C. 666, 669-70, 231 S.E.2d 678, 680 (1977). Nevertheless, where there is an absence of evidence indicating that a defendant's failure to conform with the applicable standard of care proximately caused a plaintiff's injury, a directed verdict is proper. See Weatherford v. Glassman, 129 N.C. App. 618, 621, 500 S.E.2d 466, 468 (1998)(citing Lowery v. Newton, 52 N.C. App. 234, 237, 278 S.E.2d 566, 570, disc. rev. denied, 303 N.C. 711 (1981)(outlining the elements a plaintiff must show in a medical malpractice action)).

RULE 9 …

(j) Medical malpractice. - Any complaint alleging medical malpractice by a health care provider as defined in G.S. 90-21.11 in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:

(1) The pleading specifically asserts that the medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care;

(2) The pleading specifically asserts that the medical care has been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; or

(3) The pleading alleges facts establishing negligence under the existing common-law doctrine of res ipsa loquitur.

ANDERSON vs ASSIMOS, ET AL,
No. 621A01, SUPREME COURT OF NORTH CAROLINA, 2002 N.C. LEXIS 1117, November 22, 2002.

Appeal pursuant to N. C. G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 146 N.C. App. 339, 553 S.E.2d 63 (2001), reversing and remanding an order of dismissal entered 14 December 1999 … in Superior Court, Guilford County.

COUNSEL [OMITTED]

OPINION

PER CURIAM.

The Court of Appeals concluded that Rule 9(j) of the North Carolina Rules of Civil Procedure violates Article I, Section 18 of the North Carolina Constitution and the

Equal Protection Clauses of the North Carolina and United States Constitutions. Anderson v. Assimos, 146 N.C. App. 339, 553 S.E.2d 63 (2001).

A constitutional issue not raised at trial will generally not be considered for the first time on appeal. State v. Nobles, 350 N.C. 483, 495, 515 S.E.2d 885, 893 (1999); Porter v. Suburban Sanitation Serv., Inc., 283 N.C. 479, 490, 196 S.E.2d 760, 767 (1973). Furthermore, the courts of this State will avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds. State v. Crabtree, 286 N.C. 541, 543, 212 S.E.2d 103, 105 (1975); see Rice v. Rigsby, 259 N.C. 506, 512, 131 S.E.2d 469, 473 (1963).

This Court may exercise its supervisory power to consider constitutional questions not properly raised in the trial court, but only in exceptional circumstances. (Citations omitted). Even so, constitutional analysis always requires thorough examination of all relevant facts. (Citations omitted) Thus, a constitutional question is addressed "only when the issue is squarely presented upon an adequate factual record and only when resolution of the issue is necessary."….

Plaintiff's complaint asserts res ipsa loquitur as the sole basis for the negligence claim. Because the pertinent allegations have not been withdrawn or amended, the pleadings have a binding effect as to the underlying theory of plaintiff's negligence claim. See Davis v. Rigsby, 261 N.C. 684, 686, 136 S.E.2d 33, 34 (1964); Bratton v. Oliver, 141 N.C. App. 121, 125, 539 S.E.2d 40, 43, (2000), disc. rev. denied, 353 N.C. 369, 547 S.E.2d 808 (2001). Moreover, our review of the record shows that at the hearing in this matter plaintiff represented to the trial court that her negligence claim was based solely on res ipsa loquitur . This judicial admission is "binding in every respect." Estrada v. Burnham, 316 N.C. 318, 324, 341 S.E.2d 538, 543 (1986). Having made this representation, plaintiff cannot now assert a contradictory position, Davis, 261 N.C. at 686, 136 S.E.2d at 34, or "'swap horses between courts in order to get a better mount,'" State v. Sharpe, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (quoting Weil v. Herring, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)). Therefore, for purposes of this action, plaintiff's negligence claim is based solely on res ipsa loquitur.

Res ipsa loquitur claims are normally based on facts that permit an inference of defendant's negligence. See, e.g., Kekelis v. Whitin Mach. Works, 273 N.C. 439, 443, 160 S.E.2d 320, 322-23 (1968). The certification requirements of Rule 9(j) apply only to medical malpractice cases where the plaintiff seeks to prove that the defendant's conduct breached the requisite standard of care -- not to res ipsa loquitur claims. N. C.G.S. § 1A-1, Rule 9(j) (2001). As plaintiff in this case asserts only a res ipsa loquitur claim, the certification requirements of Rule 9(j) are not implicated. Thus, the Court of Appeals erred in addressing the constitutionality of Rule 9(j) under these circumstances.

Accordingly, the decision of the Court of Appeals is vacated to the extent it concluded that Rule 9(j) violates Article I, Section 18 of the North Carolina Constitution and the Equal Protection Clauses of the North Carolina and United States Constitutions, and defendants' appeal is dismissed.

VACATED IN PART AND APPEAL DISMISSED.

SHARPE vs. WORLAND, ET AL
NO. COA00-1471, COURT OF APPEALS OF NORTH CAROLINA
147 N.C. App. 782, 557 S.E.2d 110, 2001 N.C. App. LEXIS 1252

Appeal by plaintiff from order entered 13 July 1999 … in Superior Court, Guilford County. COUNSEL [OMITTED]

JUDGES WYNN, Judge. Judges WALKER and THOMAS concur.
AUTHOR: WYNN

OPINION

{*782} WYNN, Judge.

We recited the facts of this matter in Sharpe v. Worland, 137 N.C. App. 82, 527 S.E.2d 75 (2000). In brief, Lassie M. Sharpe brought claims against Wesley Long Community Hospital and others for{*783} alleged injuries arising from the negligent provision of medical care to her.

On 15 November 1993, an anesthesiologist gave Ms. Sharpe an epidural for post-surgery pain management. The anesthesiologist and his practice group had the exclusive contractual right to provide anesthesia services at the Wesley Long Community Hospital. While administering the epidural, the anesthesiologist injured Ms. Sharpe's spinal cord resulting in injury to her including an inability to walk.

On 21 May 1999, Wesley Long Community Hospital filed a Motion to Dismiss, citing plaintiff's failure to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure. On 13 July 1999, the trial court dismissed all of plaintiff's claims including her common law corporate negligence claims, res ipsa liquitor claims, and respondent/vicarious liability claims against Wesley Long Community Hospital.1

Recently in Anderson v. Assimos, 146 N.C. App. 339, 553 S.E.2d 63 (2001), a different panel of this Court held that the pre-filing certification of Rule 9 (j) of the North Carolina Rules of Civil Procedure was unconstitutional and void. Thus, we must reverse the trial court's dismissal of this matter on the basis of Rule 9(j). Nonetheless, we hold that even if Rule 9(j) was a constitutionally affirmed law, it would not control the outcome of plaintiff's claim of corporate negligence because it was based on ordinary negligence rather than medical malpractice.

In its brief, Wesley Long Community Hospital argued that since plaintiff's corporate negligence claims involved hospital staff, the trial court properly dismissed her action for failure to comply with Rule 9(j). It further contended that an action against a hospital arising out of furnishing or failure to furnish professional services in the performance of medical care is a "medical malpractice action" action. See N.C. Gen. Stat. § 90-21.11 (2001).

Rule 9(j) requires that, at the time a plaintiff files a complaint, the plaintiff must certify that the medical care at issue has been reviewed by a witness reasonably expected to qualify as an expert under Rule 702 of the Rules of Evidence, and who is willing to testify that the{*784} medical care did not comply with the applicable standard of care. See N.C. Gen. Stat. § 1A-1, Rule 9 (j) (1999). Compliance with Rule 9(j) must be made at the time the complaint is filed. See Keith v. North Hosp. District of Surry County, 129 N.C. App. 402, 499 S.E.2d 200, disc. review denied, 348 N.C. 693, 511 S.E.2d 646 (1998).

However, nowhere in Ms. Sharpe's allegations does she claim that the Wesley Long Community Hospital committed medical malpractice, breached applicable standard

of care or provided medical care to Ms. Sharpe. Instead, the Complaint alleged that Wesley Long Community Hospital violated direct duties owed to plaintiff. Rule 9(j) certification is not necessary for ordinary negligence claims, even if defendant is a health care provider. See Lewis v. Setty, 130 N.C. App. 606, 608, 503 S.E.2d 673, 674 (1998). We find ample authority that Wesley Long Community Hospital's independent duties owed to Ms. Sharpe can be judged by a "reasonable person standard" which does not require expert testimony at trial. See Muse v. Charter Hosp. of Winston Salem, Inc., 117 N.C. App. 468, 452 S.E.2d 589, review on add'l issues denied, 340 N.C. 114, 455 S.E.2d 663, decision affirmed, 342 N.C. 403, 464 S.E.2d 44 (1995); Blanton v. Moses H. Cone Hosp., Inc., 319 N.C. 372, 354 S.E.2d 455 (1987); Burns v. Forsyth County Memorial Hosp. Auth., Inc., 81 N.C. App. 556, 344 S.E.2d 839 (1986).

Finally, we note that since this Court's decision in Anderson remains on appeal to our Supreme Court as a matter of right, we summarily hold that if Rule 9(j) was indeed constitutionally sound, then our decision on the remaining issues in this appeal would be: (1) No expert was needed to support plaintiff's claim based on res ipsa loquitor; (2) Plaintiff did not satisfy the requirements of Rule 9(j) with respect to the claims based on nursing care; and, (3) Plaintiff's notice of appeal to this Court was timely filed.

Reversed.

Judges WALKER and THOMAS concur.

SCENE TWO

Bifurcation of trial:

SILK: Your honor, there is another motion I wish to make at this time: a motion for a bifurcated trial on the issues of actual damages and punitive damages.

EDWARDS: Your honor, the motion is not timely. Bifurcation will cause the trial to last an additional week. Our witnesses on that subject have made plans to be here only for two days next week.

Discussion: What ruling should be made on the motion? Is there a time before the trial at which the motion must be made?

G.S. § 1D-30. Bifurcated trial:

Upon the motion of a defendant, the issues of liability for compensatory damages and the amount of compensatory damages, if any, shall be tried separately from the issues of liability for punitive damages and the amount of punitive damages, if any. Evidence relating solely to punitive damages shall not be admissible until the trier of fact has determined that the defendant is liable for compensatory damages and has determined the amount of compensatory damages. The same trier of fact that tried the issues relating to compensatory damages shall try the issues relating to punitive damages.

Ward v. Beaton, 141 N.C. App. 44, 539 S.E.2d 30 (2000), cert denied, 353 N.C. 398, 547 S.E.2d 431 (2001):

Defendant next contends the court erred in admitting evidence of defendant's assets before the trier of fact determined that compensatory damages were warranted. Defendant argues this premature admission of evidence tainted the jury's verdict for compensatory damages. Plaintiff, on the other hand, maintains that defendant's failure to request a bifurcated trial on the issue of punitive damages under N.C. Gen. Stat. § 1D-30 rendered this evidence admissible at any time during plaintiff's case-in-chief. We agree.

It is clear that evidence of a defendant's net worth may be considered by the jury in determining the amount of a punitive damages {*52} award. N.C. Gen. Stat. § 1D-35(i) (listing as a permissible factor to be considered "the defendant's ability to pay punitive damages, as evidenced by its revenues or net worth") N.C. Gen. Stat. § 1D-30 sets forth the procedural safeguard of bifurcation, stating:

Upon the motion of a defendant, the issues of liability for compensatory damages and the amount of compensatory damages, if any, shall be tried separately from the issues of liability for punitive damages and the amount of punitive damages, if any. Evidence relating solely to punitive damages shall not be admissible until the trier of fact has determined that the defendant is liable for compensatory damages and has determined the amount of compensatory damages. The same trier of fact that tried the issues relating to compensatory damages shall try the issues relating to punitive damages. (Emphasis added.) The language of G.S. 1D-30 makes clear that the defendant is not entitled to bifurcation until the defendant files such a motion. See also N.C.R. Civ. P. 42(b) ("The court may in furtherance of convenience or to avoid prejudice and shall for considerations of venue upon timely motion order a separate trial of any claim, cross claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross claims, counterclaims, third-party claims, or issues.") (Emphasis added). Because the defendant here failed to move for a bifurcated trial under the provisions of G.S. 1D-30, evidence regarding her net worth was admissible at any time during plaintiff's case-in-chief.

II. Opening statements.

SCENE THREE

JUDGE: Members of the jury, at this time counsel will make opening statements. the purpose of an opening statement is narrow and limited; it is a forecast of what attorney's believe the evidence will be. these opening statements are not evidence and are not to be taken by you as evidence. (Addressing plaintiff's counsel) Mr. Helms?

EDWARDS: That's Edwards, your honor.

JUDGE: Oops, sorry.

EDWARDS: Members of the jury, our evidence will show that plaintiff entered the hospital for a heart catheterization. He had a history of heart trouble. While a patient at Rhodhiss Memorial Hospital, certified nurses' assistants, employees of the hospital, were transferring plaintiff from a hospital bed to a wheelchair to go to the x-ray department. He was dropped by the assistants, hit his head and was unconscious for ten minutes. A concussion was diagnosed. Immediately thereafter he exhibited signs of weakness in his left arm and hand, and confused speech. In preparation for the procedure he was taken off Coumadin therapy. The procedure was delayed, and Dr. Plugg failed to order that my client resume taking Coumadin. Mr. Madd suffered a stroke. As a result my client suffered pain and still suffers pain. He went through weeks of physical therapy. He now is almost blind and walks with difficulty. He has permanent injury. The evidence will show that the hospital and the treating physician were negligent. Expert witnesses will testify as to the standard of care and the economic impact of these injuries on my client. A video will be shown to depict a day in the life of the plaintiff. The judge will explain the law on this at the end of the trial. The evidence will convince you that the defendants were negligent. We will be asking you to award substantial money damages to my client. Thank you.

JUDGE: (addressing doctor's counsel): Mr. Silk?

SILK: May it please the court, lovely ladies and distinguished gentlemen of the jury, do not be confused by Mr. Edwards. Our evidence will show that the stroke suffered by Mr. Madd was caused entirely by his fall in the hospital, and had nothing to do with the care given by my client Dr. Plugg. What you will see is that the Plaintiff is here before you (raises voice), seeking only a payday, to squeeze my client for money in spite of excellent care…

EDWARDS: Objection.

JUDGE: Sustained. Mr. Sisk, the Court will terminate your presentation of an opening statement at this time. Mr. Golden, do you wish to make an opening statement?

GOLDEN: Ladies and gentlemen, I represent Rhodhiss Memorial Hospital. I believe the evidence will show that Mr. Madd had recovered fully from the fall when Dr. Plugg made decisions about medical management of his patient. The Plaintiff suffered only slight injury from his fall. Further, the evidence will show that the hospital's employees were in no way negligent. Please listen to all the evidence. Thank you.

(Discussion: What are the limits on proper opening statements? What are the proper responses to violations?

See Civil Bench Book Chapter 17, part IV, OPENING STATEMENTS BY COUNSEL. See N.C.G.S. Annotated Rules, General Rules of Practice for the Superior and District Courts, Rule 9.

A. Counsel may **not** argue case.

B. Defendant's counsel can reserve statement until plaintiff rests.

C. Judge may limit length and scope of statement.

SCENE FOUR

Plaintiff's evidence:

EDWARDS: Your honor, as our first witness, the plaintiff calls Maynard Fountain, MD. (Fountain comes to the witness stand)

EDWARDS: Doctor, will you please identify yourself?

FOUNTAIN: I am Maynard Fountain. I am a medical doctor, licensed in North Carolina. I am board certified in internal medicine with a subspecialty in cardiovascular disease. I have the same board certification as Dr. Plugg. I attended Emory University and received my medical degree at the University of Tennessee in Memphis. I interned and did further training at the University of Colorado and began practice in 1974.

EDWARDS: Doctor, at the time Mr. Madd was rendered the care that is in question here, 1996, were you in private practice?

FOUNTAIN: Yes. Then I was 95% in private practice and 5% of my time I was teaching. I saw patients in the hospital and in the office. I performed about 8 catheterizations a week and saw about 75 patients each week.

EDWARDS: Doctor, have you had a chance to study the records of the plaintiff, Mr. Madd?

FOUNTAIN: Yes.

EDWARDS: What do they show as the plaintiff's medical history?

FOUNTAIN: Mr. Madd has a long standing chronic rheumatic heart disease condition. The mitral valve of the heart is most affected. He had two prior minor

strokes. Mr. Madd was prescribed Coumadin, a common medication for this problem, taken by mouth. It sometimes is called a "clot buster". It is sometimes called a blood thinner, but actually it has the effect of reducing the platelets in the blood, and means the patient bleeds more freely. It must be regulated and monitored. It is used to reduce stroke susceptibility. Mr. Madd was admitted to the hospital with signs of atrial fibrillation, which is when the heart is out of rhythm. This condition can seriously weaken the heart.

EDWARDS: Who were Mr. Madd's attending physicians?

FOUNTAIN: Well, there were two, Dr. Wilfong and Dr. Plugg.

EDWARDS: What do the hospital records show as to the time Mr. Madd was there?

FOUNTAIN: Mr. Madd was admitted on Friday the thirteenth; later that day he was to go to the x-ray department. He reported that he was a bit dizzy and weak. The certified nurses' assistants got him out of bed, and as they were trying to put him in a wheelchair, he fell and hit his head on the edge of the bed. He was unconscious for a time. A doctor on the floor, Dr. Tile, came in immediately and found he had stopped breathing. He was intubated and put on a ventilator. He regained consciousness the next day, and came off the ventilator two days later.

EDWARDS: Was a heart catheterization ordered?

FOUNTAIN: Yes, Dr. Plugg had ordered a catheterization to be performed by Dr. Clone. Dr. Plugg ordered that Mr. Madd stop taking the Coumadin in preparation for Clone's catheterization, but Dr. Clone found from a blood test that Mr. Madd was anemic, possibly bleeding internally, and he ordered the cath delayed. Mr. Madd was not returned to Coumadin therapy. On Friday, the 25th he suffered a stroke, which paralyzed his speech and his legs. He was in the hospital in intensive care for twenty days.

EDWARDS: Dr. Fountain, in July 1996, were you familiar with the standard of medical care in Rhodhiss or other similar communities?

FOUNTAIN: Yes, I visited here many times to buy furniture, visit, and when I was going through the state. My license is active in North Carolina. I have worked with the American Indian population here. I have practiced in Knoxville and Lowden, Tennessee. I am licensed in Tennessee, North Carolina, and Virginia. Rhodhiss Memorial Hospital has 322 beds. My hospital is similar in size. I have many patients from North Carolina.

EDWARDS: I tender Dr. Fountain as an expert in the field of internal medicine and cardiology.

SILK: Objection.

Discussion: Question of familiarity with standard of care, same specialty.

See Bench Book, Chapter 29: Evidence Issues: Expert Witnesses

§90-21.12. Standard of Heath Care.

In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of the facts is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.

Leatherwood v. Ehlinger, N.C. App Lexis 678 (2002)

In support of this argument, defendant cites Henry v. Southeastern OB-GYN Associates, PA, 145 N.C. App. 208, 550 S.E. 2D 245 Aff'd, 354 N.C. 570, 557 S.E. 2D 530 (2001).

What language would trial judge use in response to the tender? See Bench Book: A. **note:** It is not necessarily error to state that the court finds the witness an "expert" in his or her field of expertise, *e.g., State v. Frazier*, 280 N.C. 181 (1971), *judgment vacated on other grounds*, 409 U.S. 1004 (1972), but it is the **better practice** simply to rule that the party's tender of its witness as an expert is "allowed" or "denied" or to state that "witness is accepted as tendered."

SCENE FIVE

EDWARDS: What do the medical records of Mr. Madd show as to the medical problem experienced on the 20th?

FOUNTAIN: He had an atrial fibrillation in the upper heart resulting in a blood clot. The ineffective contractions of the heart caused stagnation of the blood in the heart, which led to clotting. He was suffering from mitral valve stenosis. This means the mitral valve was diseased, causing it to get smaller, thickened, and scarred, thus narrowed. The parts of it stick together. The combination of mitral valve stenosis and atrial fibrillation

resulted in a transient ischemic attack. This creates a known risk of clotting, leading to stroke. There is a seven times greater chance of stroke than in a normal heart. The clot often goes to the brain, blocks the artery, and blood is not supplied to the brain. A portion of the brain dies, leading to lost bodily function of some sort, depending on where the clot blocks the artery.

EDWARDS: What is the function of Coumadin for patients with mitral valve stenosis?

FOUNTAIN: It reduces the chance of stroke.

EDWARDS: Do you have a medical opinion, satisfactory to yourself, and to *any* degree of medical certainty, as to whether or not Mr. Madd was at a heightened risk of stroke if not taking Coumadin?

SILK: Objection

Discussion: Form of the question: "Any degree of medical certainty**".** See Young vs. Hickory Bus. Furniture, 353 NC 227, 538 S.E. 2d 912 (2000); Shoemaker vs. Creative Builders, 150 NCAPP 523, 562 S.E. 2d 622 (2000). See Heatherly vs. Industrial Health Council, 130 N.C. App. 616, 504 S.E.2d, (1998).

JUDGE: Overruled.

FOUNTAIN: Yes.

EDWARDS: What is your opinion?

FOUNTAIN: On Coumadin, his risk of stroke was two percent. Without Coumadin, his risk was thirty five to sixty percent.

EDWARDS: What do the records show as to why Mr. Madd was not taking Coumadin?

FOUNTAIN: Dr. Plugg examined Mr. Madd on the 10th, and decided that he needed to have a catheterization, to examine the present condition of the mitral valve. He ordered the procedure, and instructed Mr. Madd to stop taking Coumadin. The catheterization cannot be performed while the patient is on Coumadin. The catheterization was supposed to be done on the 14th. That would allow time for the Coumadin to be completely out of the system. When the stroke occurred, Mr. Madd had been off of Coumadin for 15 days.

EDWARDS: Could another drug have been used to replace the Coumadin safely?

FOUNTAIN: Yes, Heparin.

EDWARDS: Doctor Fountain, do you have an opinion satisfactory to yourself, and to a reasonable degree of medical certainty as to whether a physician with training and experience similar to yours would have stopped the Coumadin, scheduled catheterization, and failed to put the plaintiff on some medication when the catheterization was postponed.

SILK: Objection.

Discussion: Discuss form of the question. See Heatherly vs. Industrial Health Council, 130 N.C. App. 616, 504 S.E.2d, (1998).

EDWARDS: Doctor, do you have an opinion, satisfactory to yourself and to *any* degree of medical certainty, as to whether stopping the Coumadin, canceling the scheduled catheterization, and not putting Mr. Madd back on anti-coagulants is violating standard of care for doctors specializing in cardiology in Rhodhiss, North Carolina and similar communities?

SILK: Objection.

FOUNTAIN: Yes.

EDWARDS: What is that opinion?

FOUNTAIN: It violated the standard of care.

EDWARDS: No further questions.

Cross examination by Silk:

SILK: Doctor, does it meet the standard of care for Dr. Plugg to stop the Coumadin on July 10th?

FOUNTAIN: Yes, it must be stopped to perform the catheterization. But the standard of care requires that the unprotected time be limited.

SILK: If the catheterization had been performed on the 14th, would this have been consistent with the standard of care for Coumadin management?

FOUNTAIN: Yes, but by stopping Coumadin and canceling the catheterization, and not treating with some anti coagulant, this is outside the standard of care and contributed to the stroke.

EDWARDS: Is there any record that Dr. Plugg knew that Mr. Madd suffered a head injury in the hospital?

FOUNTAIN: I did not find any such record.

SILK: No further questions.

GOLDEN: No questions.

EDWARDS: The plaintiff calls Dr. Ella Fife Eswan.

SCENE SIX

(Dr. Eswan comes to the witness stand.)

EDWARDS: Doctor, please state your name and your profession.

ESWAN: I am Dr. Ella Fife Eswan. I am a medical doctor, specializing in treatment of cardiovascular disease.

EDWARDS: Doctor, please tell us about your education and experience in this field.

ESWAN: I received my medical degree from the Medical College of Charleston in 1966. I was an intern at the University of Georgia Research Hospital and did my residency at the Baptist Hospital of South Dakota. I began practice in Spartanburg, South Carolina in 1970. And I am licensed in South Carolina and Georgia. I have testified as an expert in Alabama, New Mexico and Colorado.

EDWARDS: Doctor, what information do you have about the medical community in which defendant Dr. Plugg practices at Rhodhiss Memorial Hospital?

ESWAN: The only information I have about the medical community in which defendant practiced was the fact that it is located in the United States of America.

EDWARDS: Doctor, did you make a comparison of this community with any other community with which you were then familiar?

ESWAN: No.

EDWARDS: Are you familiar with the standard of care for board certified cardiology practicing in Rhodhiss, North Carolina, or similar communities in July 1996?

ESWAN: Yes sir. You see, the standard of care in Rhodhiss, North Carolina in 1996 for the type of cardiovascular care at issue is the same as that in any other

location in the United States. This standard does not vary depending upon the community. I am familiar with the applicable national standard of care.

EDWARDS: Are you familiar with the standard of care in Spartanburg, South Carolina?

ESWAN: Yes. It's the same standard, which applies everywhere.

EDWARDS: All right. In terms of 1996, do you have an opinion as to whether or not the standards of practice for board certified physicians in Rhodhiss, or similar communities would have been the same in not only Rhodhiss, but throughout North Carolina?

ESWAN: Yes sir. The standards of practice would have been the same.

EDWARDS: Doctor, do you have an opinion as to whether or not the standards of practice for board certified cardiovascular physicians practicing in Rhodhiss, North Carolina would be the same as that of a board certified physician practicing at Duke or Chapel Hill, or anywhere in North Carolina in 1996?

ESWAN: Yes, I do.

EDWARDS: What is that opinion?

ESWAN: They would be the same.

EDWARDS: Doctor, would those standards be the same as the standards of board certified physicians practicing in Spartanburg or in Georgia in 1996?

ESWAN: Yes, it would be.

EDWARDS: Doctor, state whether or not the standards of practice for the board certified cardiologists in Currituck County would have been the same at Rhodhiss in 1996, to the best of your knowledge?

ESWAN: Yes, they would be.

EDWARDS: Based on your knowledge of those standards, would those standards, in your opinion, be applicable to Rhodhiss, North Carolina in 1996?

SILK: Objection.

JUDGE: Sustained. She's already testified she doesn't know a thing about Rhodhiss.

SILK: Your honor, I object and wish to be heard outside the presence of the jury.

JUDGE: Members of the jury, please go to the jury room.

JUDGE: Mr. Silk, do you wish to ask questions on voir dire?

SILK: Yes sir. Dr. Eswan, how can you say you're familiar with the standards of care in Rhodhiss or similar communities if you have not done a comparison with any communities that you're familiar with versus Rhodhiss?

ESWAN: The reason is because, the thing I found that was lacking in the care, or below the standard of care, is so fundamental it's applicable everywhere. These are simple guidelines, which everyone should follow across the country.

SILK: I move to strike the testimony of Dr. Eswan and move that she not be allowed to testify as an expert in this case.

Discuss the "National Standard" controversy and the cases. See Henry vs. Southeastern OB-GYN Assocs., P.A., 145 N.C. App. 208, 550 S.E. 2d 245 (2001), Leatherwood v. Ehlinger, N.C. App Lexis 678 (2002). NO. COA01-728, Filed: 18 June 2002.

SCENE SEVEN

EDWARDS: Your honor, the plaintiff rests.

JUDGE: Members of the jury, please go to the jury room. Do not discus the case in any way.

EDWARDS: Your honor, counsel for defendant Rhodhiss Memorial Hospital, and I want to inform the Court that we have compromised and settled the claim by Plaintiff against the hospital. Therefore, the plaintiff at this time enters a voluntary dismissal, with prejudice.

JUDGE: You what?

Discussion: How does the judge handle this situation with the jury? The jury has been led to believe that the hospital's defense will assert the negligence of the hospital. The hospital's opening statement forecasted a defense based on the lack of significant injury in the fall. How will the jury respond to the absence of the hospital.

SCENE EIGHT

Defendant's evidence:

SILK: We call Dr. Pullen T. Plugg.

(Witness is sworn.)

SILK: Please state your name and occupation.

PLUGG: Pullen Theodore Plugg. I am a medical doctor practicing in Rhodhiss, North Carolina.

SILK: Doctor, tell us about your education and experience.

PLUGG: I received my undergraduate degree from North Carolina Central University, and my medical degree from Duke. I was an intern for 2 years at Memorial Hospital in Chapel Hill, and was resident at Bowman Gray School of Medicine at Wake Forest University. I have been in practice 15 years and am Board certified in cardiovascular care.

SILK: Did you have a patient named Boyle N. Madd?

PLUGG: Yes. Mr. Madd was referred to me by the hospital. Actually he was assigned to me. I work for the hospital.

(Note: several hints are given that the plaintiff missed an opportunity to sue the hospital on the basis of agency. See Blanton vs. Moses H. Cone Memorial Hosp., 319 N.C. 372, 354S.E.2d 455 (1987); Estate of Waters vs. Jarman, 144 N.C. App. 98, 547S.E.2d 201, disc. Review denied 351 N.C. 646, 543S.E.2d 884 (2000)**)**

SILK: In attending Mr. Madd, what did you find on examination?

PLUGG: I found a 75 year old male in very poor health, with a history of strokes. He was on Coumadin. He was disoriented. He had fallen at the hospital the first time I saw him.

SILK: What diagnosis did you make?

PLUGG: Mitral valve stenosis with atrial fibrillation.

SILK: What treatment did you determine to be necessary?

PLUGG: I was considering surgery to install a stint to improve blood flow through the mitral valve and keep it open, thus improving heart function. To do this, I first needed a good idea of the current condition of the heart.

SILK: How did you go about finding out the condition of the heart?

PLUGG: I asked Dr. Clone, a cardiac surgeon, to perform a heart catheterization. The images of the heart and the valve would clearly show the nature and extent of the problem.

SILK: Tell us the steps in preparing for the procedure.

PLUGG: Certain routine blood tests were performed. I took Mr. Madd off the Coumadin. The catheterization cannot be performed for at least 4 days after Coumadin is stopped. Otherwise there is a great chance of bleeding which would be dangerous and clotting would be reduced. I scheduled the surgery for 5 days after Coumadin was stopped.

SILK: Was the procedure performed?

PLUGG: No. I received a note on the 15th from Dr. Clone stating that tests revealed the patient was anemic and he wanted to find out why before performing the procedure. He was delaying it to have Dr. Monteen German, a gastroenterologist, look for a bleeding ulcer. Then Mr. Madd had a stroke so, of course, no procedure was possible.

SILK: Was Mr. Madd put back on Coumadin?

PLUGG: Evidently not. I did not know how long the catheterization would be delayed. I thought Dr. Clone would have Mr. Madd return to Coumadin if there ware an unacceptable delay. I received a note that the catheterization was rescheduled for 10 days from the date the Coumadin was stopped. That was acceptable. But, it was delayed further and I didn't know it. I didn't check with Dr. German about the bleeding cause. I waited for the others to contact me. It's a matter of management. The stroke occurred 15 days after the Coumadin was stopped.

SILK: Doctor, how many people have you treated with mitral valve stenosis?

PLUGG: Hundreds. We see them all the time. It's the biggest part of my practice.

SILK: Did you receive any special training in this field?

PLUGG: Yes, I did a 2 year research project at Baptist Hospital in Memphis on the subject. Especially on the various medications to prevent stroke.

SILK: Your honor, we tender Dr. Plugg as an expert in the field of cardiology with a sub-specialty in the treatment of mitral valve stenosis.

The Court cannot tell the jury that the defendant is an expert. How can the Court deal with this problem now? (See Bench Book, Chapter 29, 1.D.3. and Sherrod vs. Nash General Hosp., 348 N.C. 526, 500S.E.2d 708 (1998))

SILK: Doctor, do you have an opinion, satisfactory to yourself, and to a reasonable degree of medical certainty, as to whether or not it was your responsibility to

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SCENE NINE

Surveillance video evidence:

SILK: At this time, your honor, the defense wished to call Mr. P.I. Closet.

EDWARDS: Your honor, we object and wish to be heard outside the presence of the jury.

JUDGE: Members of the jury, please adjourn to the jury room. Do not discuss the case.

EDWARDS: Your honor, we have just been given a video tape which was not produced in discovery, which purports to show plaintiff going about some of his daily activities over the period of the past 4 months. The tape is only 40 minutes long.

JUDGE: Mr. Silk?

SILK: Your honor, we feel it is only fair to present another view of the affect, or lack of affect, on plaintiff's injury on his ability to live a normal life. We can call the witness on Voir Dire if you wish.

JUDGE: I wish.

(Mr. Closet is sworn.)

SILK: What is your name and occupation?

CLOSET: P.I. Closet. I am a private investigator and specialist in video surveillance.

SILK: Were you employed in this case?

CLOSET: Yes. We got into the plaintiff's gated community 4 months ago in a service van and watched his activities outside his condo about every day.

We videotaped him as walked around and talked to people and worked in his garden and other things. He never knew we were there. On 2 occasions my assistant, the lovely Miss Allison Davis, talked to him and walked with him.

SILK: Is the video tape representative of what you yourself saw of the plaintiff?

CLOSET: Yes, sir.

SILK: No further questions.

Cross examination:

EDWARDS: Mr. Closet, who hired you?

CLOSET: Mr. Silk. Well, not himself, but one of his associates.

EDWARDS: Who paid you?

CLOSET: Mr. Silk's law firm.

EDWARDS: Where is the rest of the video tape?

CLOSET: Well, it is in our production facility, all over the place, on various tape cassettes.

EDWARDS: Did you ever contact my office for permission to talk to or watch my client?

CLOSET: Oh heavens no.

EDWARDS: Did you ever tell my client who you were or who you were working for?

CLOSET: No.

EDWARDS: No further questions.

(What should the judge consider in ruling on the admissibility of the testimony and the tape? The North Carolina State Bar has previously issued a reprimand for this conduct. Attached is a facsimile of a reprimand which sates the basic action taken by the Bar. Fictitious names have been substituted, and the facts changed slightly. See also N.C. State Bar Proposed 2003 Formal Ethics Opinion 4. **)**

SILK: Your honor, we call Dr. Mortimer Main.

(Witness is sworn)

SILK: Doctor, please identify yourself.

MAIN: I am Doctor Mortimer Main. Most people call me Mort. I am a board certified neuropsychologist. I have been a witness in law suits on 10 occasions. I received a bachelor's degree in psychology, obtained a doctorate degree in psychology and completed a post-doctoral year of training in neuropsychology. At the time, I was working as a neuropsychologist in a brain injury unit at a rehab hospital.

SILK: Did you examine Mr. Madd at the request of the Defense?

MAIN: Yes. I looked at all the medical records and performed a psychological evaluation of Mr. Madd at my office in Wentworth. I studied Mr. Madd's medical records also.

SILK: Now, you had an occasion to perform--well, not only perform but review certain tests of Mr. Madd. As a result of your review of the records, both psychiatric and medical, and as a result of your independent testing did you form certain conclusions concerning a neurological state?

EDWARDS: Objection.

JUDGE: Overruled.

MAIN Yes.

SILK: And what were those conclusions?

MAIN: My conclusions were that the records and his presentation and his test results on all of the times he was tested are consistent with a diagnosis of cognitive impairments due to a closed head injury. I believe that a closed head injury is present. I do believe that he has memory problems. I think those memory problems are very real.

SILK: Do you have an opinion, Dr. Main, based on your review of all the records and of your seeing Mr. Madd, and the tests you administered to whether or not Mr. Madd suffered a closed head injury in the fall in the hospital on Friday, July 13th 1996?

MAIN: Yes.

SILK: What is your opinion?

MAIN: That he did.

SILK: Based on your research and examination and the test results, do you have an opinion, to a reasonable degree of medical certainty as to the cause of the stroke suffered by Mr. Madd on July 25th, 1996?

EDWARDS: Objection.

DISCUSSION: Can a neuropsychologist testify as to causation of a closed head injury? See N.C. G.S. 90-270.2, as amended, and the case of Martin v. Benson, 125 N.C. App. 330, 481 S.E. 2d 292 (1997). Also, consider Daubert, briefly.

JUDGE: Overruled.

MAIN: Yes.

SILK: What is that opinion?

MAIN: The fall suffered by Mr. Madd, coupled with an underlying vulnerable heart due to pre-existing scarring, predisposed him to a cardiac arrhythmia which in fact occurred, and caused the stroke.

SILK: Did the failure to maintain Coumadin administration have any role in the stroke?

MAIN: I do not believe so, and if it did have a role, it was very small.

SILK: Did Dr. German deviate from the standard of care in failing to place the plaintiff back on Coumadin, or in the alternative, Heparin?

MAIN: Yes. At least she failed to contact Dr. Plugg and confer on the proper action to take.

SILK: No further questions.

Cross examination:

EDWARDS: Doctor, at your deposition you testified that you did not talk to the certified nurses' assistants who were caring for the plaintiff at the time of the fall. Is that correct?

MAIN: Yes.

EDWARDS: Have you talked to them since the deposition?

MAIN: No.

EDWARDS: So, you don't know anything first hand about how the fall occurred or the condition of the plaintiff after the fall, do you?

MAIN: No.

EDWARDS: No further questions.

SILK: Your honor, that is the evidence for the defendant, Dr. Plugg.

CHARGE CONFERENCE

Note well: The electronic version of the PJI and the written version contain a note that Chapter 11, "Medical Malpractice" has been deleted from the Civil Pattern Instructions. Chapter 11A is applicable to medical negligence actions arising after 1976.

At this point we want to make a general presentation of the Pattern Instructions and how to locate them. Is there any instruction on "known risk"? Discuss damages, permanent injury, mortality table and judicial notice.

Discussion: Should the Court instruct on intervening negligence?

BARBER V. CONSTIEN, 130 NC APP 380, 502 S.E. 2d 912 (1998)
Medical Malpractice—instructions—intervening negligence.
The trial court erred in a medical malpractice action because the North Carolina Pattern Jury Instruction used by the court to instruct on intervening negligence lacked any reference to foreseeability. The test for determining when one actor's negligent conduct is insulated as a matter of law by the independent negligent act of another is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resulting injury. Except in cases so clear that there can be no two opinions among fair minded people, it ordinarily should be left to the jury to determine whether the intervening act and resulting injury were such that the original wrongdoer could reasonable have expected them to occur as a RESULT.