Selected Evidence Issues in Medical Negligence Cases

Source: Catherine Eagles, Senior Resident Superior Court Judge (August, 2009)

I. General Overview

In a medical negligence case, the plaintiff must prove 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." G.S. 90-21.12. "One of the essential elements of a claim for medical negligence is that the defendant breached the applicable standard of medical care owed to the plaintiff. Plaintiffs must establish the relevant standard of care through expert testimony." *Crocker v. Roethling*, 363 N.C. 140 (2009) (quotations and citations omitted).

Phrased another way, because questions regarding the standard of care for health care professionals ordinarily require highly specialized knowledge, the plaintiff must establish the relevant standard of care through expert testimony. *See Heatherly v. Industrial Health Council*, 130 N.C. App. 616, 625 (1998); *see also* N.C. R. Evid. 702. The standard of care must be established by other practitioners in the particular field of practice of the defendant health care provider or by other expert witnesses equally familiar and competent to testify as to that limited field of practice. *See* N.C. R. Evid. 702(b) & (d); *Heatherly*, 130 N.C. App. at 625. The witness must be familiar with the standard of care in the community where the injury occurred, or a similar community. *State v. Whitmer*, 159 N.C. App. 192 (2003).

North Carolina Rule of Evidence 702(b)-(h) provides the standard for admissibility of expert testimony in a medical negligence case. Have a copy available during the entire trial. The relevant portions of Rule 702 are reproduced at the end of this section.

II. Standard of Care Testimony

A. "Standard of Care" in the "Same or Similar Community"

As noted above, the witness must be familiar with the standard of care in the community where the injury occurred, or a similar community. *State v. Whitmer*, 159 N.C. App. 192 (2003). The law is generally summarized in *Crocker v. Roethling*, 363 N.C. 140 (2009), and *Barringer v. Wake Forest*, __ N.C. App. ___ (June 2 2009). Generally, Rule 702 has been interpreted to exclude testimony of a national or regional standard of care unless the testimony also establishes that this standard was applicable in the community at issue. The cases are a bit difficult to read consistently, but there appears to be a fair amount of deference given to the trial judge. Illustrative cases are annotated below.

> *Smith v. Whitmer*, 159 N.C. App. 192 (2003): "Although it is not necessary for the witness testifying as to the standard of care to have actually practiced in the same community as the defendant, the witness must demonstrate that he is familiar with the standard of care in the community where the injury occurred, or the standard of care of similar communities. The 'same or similar community' requirement was specifically adopted to avoid the imposition of a national or regional standard of care for health care providers." (citations omitted).

Haney v. Alexander, 71 N.C. App. 731 (1984): "Where 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")

Cox v. Steffes, 161 N.C. App. 237 (200): "[I]n this case defendants' expert witness confirmed that the standard of care was 'universally accepted' and 'would be the same across the US in 1994 for any board-certified surgeon,' so that the expert's testimony was admissible."

Roush v. Kennon, 188 N.C. App. 570 (2008): Even though expert wasn't familiar with the Charlotte area at the deposition, knowledge acquired after the deposition was sufficient to establish familiarity with standard of care in "similar" community.

B. Specialists and the Standard of Care

"[O]nly general practitioners are allowed to testify against general practitioners. Specialists . . . may testify only against other specialists" *Formyduval v. Bunn*, 138 N.C. App. 381 (2000) (explaining that "[t]his rule is designed to protect the defendant from being compared with the higher standard of care required from one who holds himself out as an expert in the field."); *see also Allen v. Carolina Permanente*, 139 N.C. App. 342 (2000) (a general surgeon could not testify as an expert against a physician who was board certified in family practice medicine).

The practice area of the testifying expert does not have to exactly match the defendant's practice area. *Sweatt v. Wong*, 145 N.C. App. 33 (2001) (emergency room physician could testify against defendant general surgeon in case involving diagnostic tests each used in clinical practice); *Roush v. Kennon*, 188 N.C. App. 570 (2008) (general dentist allowed to testify as to standard of care in case against oral surgeon where general dentist performed surgery at issue); *Edwards v. Wall*, 142 N.C. App. 111 (2001) (Rule 702 does not require "that the physician expert and the physician defendant work in exactly the same practice setting. . . . Rule 702 does not require that a physician . . . be prepared to prove the percentages of each type of ailment that he treats within his practice.").

C. Expert Testifying About Standard of Care Must Practice

Doctors who spend more time in administrative work rather than clinical practice cannot testify as to standard of care. *Formyduval v. Bunn*, 138 N.C. App. 381 (2000) (plaintiff's expert witness was properly excluded even though he specialized in the same field, where he did not engage in diagnostic work or in substantial clinical practice); *Cornett v. Watauga Surgical Group*, ___ N.C. App. ___, 669 S.E.2d 805 (2008) (where that expert did not work at the relevant time due to surgery, the expert's testimony about standard of care properly excluded).

III. Issues related to Designation and Disclosure of Experts

Upon request, parties in a medical negligence case are required to identify the experts who will testify at trial. "A plaintiff is entitled to a new trial if in response to a proper request he is not given 'the opportunity to depose [all testifying expert witnesses] prior to trial and adequately prepare for his cross-examination.'" *Lail v. Bowman Gray*, ___ N.C. App. ___, (April 21, 2009). If an expert is not appropriately designated, the court can exclude the witness's testimony, *Coffman v. Roberson*, 153 N.C. App. 618 (2002), or can continue the trial. *Green v. Maness*, 69 N.C. App. 292, 300 (1984).

This rule does not apply to an "expert whose information was not acquired in preparation for trial but rather because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit." *Turner v. Duke University*, 325 N.C. 152, 168 (1989); *Lail v. Bowman Gray*, ___ N.C. App. ___, (April 21, 2009). Thus, parties are not required to designate treating physicians as expert witnesses even if they testify about standard of care or its breach. *See id*.; *Prince v. Duke University*, 326 NC 787 (1990).

The expert's testimony at trial does not have to match his or her deposition testimony word for word. *Swank v. Weintraub*, ___ N.C. App. ___ (February 3, 2009) (where a comparison of the deposition and trial testimony reveals that the expert witnesses' critique of defendants' care did not substantially vary from the deposition to the trial, no error in admitting testimony even though trial testimony was slightly broader); *Suarez v. Wotring*, 155 N.C. App. 20, 31 (2002) (any error in admission of expert opinion not disclosed in discovery was harmless when the opinion was substantially similar to testimony given by another expert, and there was no showing that challenged opinion influenced jury's verdict); *Gray v. Allen,* __ N.C. App. ___ (June 2, 2009) (no error to allow testimony of expert where "[t]he discrepancies between the deposition and in-court testimonies of [experts] appear to be not so much discrepancies as differences in detail and elaboration such as are bound to occur in the two distinct settings.").

IV. Proximate Cause

Expert testimony is not always required to establish that the violation of the requisite standard of care was the proximate cause of injury. *McGill v. French*, 333 N.C. 209 (1993)(plaintiff's failure to keep medical appointments); see *Cobo v. Raba*, 347 N.C. 541 (1998). When it is, as will usually be the case, such testimony does not have to come from a doctor in the same field as the defendant. *Hamilton v. Thomasville Medical Associates*, 187 N.C. App. 789 (2007) (causation testimony can come from a doctor in another field); *Weaver v Sheppa*, 186 N.C. App. 412 (evidence about proximate causation in a case against a neurosurgeon can come from an appropriately qualified expert such as emergency medicine or neurology).

V. Procedural Issues Related to Expert Testimony at Summary Judgment or Trial

Defendants often move for summary judgment on the basis that the only standard of care evidence is inadmissible, or file motions in limine to exclude an expert's testimony on the same basis. Recent appellate decisions establish that in close cases, the trial judge should have a voir dire*. Crocker v. Roethling*, 363 N.C. 140 (2009). "When the proffered expert's familiarity with the relevant standard of care is unclear from the paper record, our trial courts should consider requiring the production of the expert for purposes of voir dire examination. . . . [P]articularly when the admissibility decision may be outcome-determinative, the expense of voir dire examination and its possible inconvenience to the parties and the expert are justified in order to ensure a fair and just adjudication." *Id.* (Martin, J., concurring). Citing this language, the Court of Appeals in *Barringer v. Wake Forest*, __ N.C. App. ___ (2009), held that in a "close case" where the expert's testimony is undeveloped, the trial court should not exclude an expert's testimony at summary judgment and should hold a hearing to receive live testimony on the admissibility of the expert's testimony. Presumably, if it is not a close case, the Court can make this decision based on affidavits and depositions at summary judgment and at trial can make the decision after hearing the witness's qualifications along with the jury.

VI. Miscellaneous Evidence Issues

A. Evidence of Expert's Personal Practices

Swink v. Weintraub, __ N.C. App __, 672 S.E. 2d 53 (2009) (defense contention "that evidence of an expert witness' personal practices is never admissible is not supportable. [citing cases from other jurisdictions]. We need not, however, resolve the question whether in North Carolina such evidence is always admissible.")

B. Other Medical Negligence Lawsuits

Gray v. Allen, __ N.C. App. __ (June 2 2009) (no abuse of discretion to exclude evidence defendant doctor had failed board certification exam several times and was no longer board eligible); *Gray v. Allen*, __ N.C. App. __ (June 2 2009) (no abuse of discretion to exclude evidence of prior medical negligence case against defendant doctor under Rule 404(b); "In North Carolina, evidence of prior lawsuits against a defendant in a medical malpractice action is not relevant to whether a physician was negligent in the current case."); *cf.*, *Willoughby v. Wilkins*, 65 N.C. App. 626, 637-38 (1983)(error to prohibit plaintiff from cross-examining defense expert about medical negligence lawsuits; "the jury should be allowed to consider that an expert witness in a medical negligence case has previously been sued for medical negligence, for the jury could find that this would lead the expert witness to have a bias or interest.")

C. Don't Find an Expert to Be an Expert in the Presence of the Jury

Sherrod v. Nash General Hospital, 348 N.C. 526, 534 (1998).

D. Habit

Habit evidence may be admitted to show that a party acted in conformity with the habit if the court finds the evidence concerning "(1) the similarity of the instances, (2) their number, and (3) their regularity" to be sufficient. *Crawford v. Fayez*, 112 N.C. App. 328 (1993)(Evidence from 5 of the 26 persons to whom defendant doctor had prescribed medicine that the warning was given to those 5 persons was sufficient to establish that the physician had the habit of warning his patients of the side effects of the drug in question.)

E. Learned Treatises

If a particular book, article, or other document is established by the testimony of any witness or by admission as a "reliable authority," it may be read into evidence if it is "relied upon" by the witness during direct testimony or if it is "called to the witness' attention" on cross-examination. NC Rule of Evidence 803(18); *Whisenhunt v. Zammit*, 86 N.C. App. 425 (1987)

F. Collateral Source Rule

The collateral source rule bars the defendants in a medical malpractice action from offering evidence demonstrating that plaintiffs can mitigate their damages by using future public benefits. *Cates v. Wilson*, 321 N.C. 1 (1987). The collateral source rule also bars evidence of gratuitous services and payments by a family member, which do not mitigate a plaintiff's damages. *Id*.

Rule 702. Testimony by experts

(a) 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.

(b) In a medical malpractice action as defined in GS 90-21.11, a person shall not give expert testimony on the appropriate standard of health care as defined in GS 90-21.12 unless the person is a licensed health care provider in this State or another state and meets the following criteria:

(1) If the party against whom or on whose behalf the testimony is offered is a specialist, the expert witness must:

a. Specialize in the same specialty as the party against whom or on whose behalf the testimony is offered; or

b. Specialize in a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients.

(2) During the year immediately preceding the date of the occurrence that is the basis for the action, the expert witness must have devoted a majority of his or her professional time to either or both of the following:

a. The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, the active clinical practice of the same specialty or a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients; or

b. The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

(c) Notwithstanding subsection (b) of this section, if the party against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness, during the year immediately preceding the date of the occurrence that is the basis for the action, must have devoted a majority of his or her professional time to either or both of the following:

(1) Active clinical practice as a general practitioner; or

(2) Instruction of students in an accredited health professional school or accredited residency or clinical research program in the general practice of medicine.

(d) Notwithstanding subsection (b) of this section, a physician who qualifies as an expert under subsection (a) of this Rule and who by reason of active clinical practice or instruction of students has knowledge of the applicable standard of care for nurses, nurse practitioners, certified registered nurse anesthetists, certified registered nurse midwives, physician assistants, or other medical support staff may give expert testimony in a medical malpractice action with respect to the standard of care of which he is knowledgeable of nurses, nurse practitioners, certified registered nurse anesthetists, certified registered nurse midwives, physician assistants licensed under Chapter 90 of the General Statutes, or other medical support staff.

(e) Upon motion by either party, a resident judge of the superior court in the county or judicial district in which the action is pending may allow expert testimony on the appropriate standard of health care by a witness who does not meet the requirements of subsection (b) or (c) of this Rule, but who is otherwise qualified as an expert witness, upon a showing by the movant of extraordinary circumstances and a determination by the court that the motion should be allowed to serve the ends of justice.

(f) In an action alleging medical malpractice, an expert witness shall not testify on a contingency fee basis.

(g) This section does not limit the power of the trial court to disqualify an expert witness on grounds other than the qualifications set forth in this section.

(h) Notwithstanding subsection (b) of this section, in a medical malpractice action against a hospital, or other health care or medical facility, a person may give expert testimony on the appropriate standard of care as to administrative or other nonclinical issues if the person has substantial knowledge, by virtue of his or her training and experience, about the standard of care among hospitals, or health care

or medical facilities, of the same type as the hospital, or health care or medical facility, whose actions or inactions are the subject of the testimony situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.