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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-682

Filed: 17 March 2020

Orange County, No. 17 CVS 611

YING Y. ZHANG, Plaintiff,

v.

JANET E. RUBIN, M.D., Defendant.

Appeal by Plaintiff from order entered 1 February 2019 by Judge Carl R. Fox in Orange County Superior Court. Heard in the Court of Appeals 5 February 2020.

*Collins Law, P.A., by George L. Collins, for plaintiff-appellant.*

*Yates McLamb & Weyher, LLP, by Ryan M. Shuirman, for defendant-appellee.*

MURPHY, Judge.

Plaintiff Ying Y. Zhang (“Zhang”) sued Defendant Janet E. Rubin, M.D. (“Rubin”) for medical malpractice. For Zhang to survive summary judgment, she needed to establish the standard of medical care in the community by, at a minimum, forecasting evidence through a physician-expert-witness familiar with the experience and training of Rubin. Zhang failed to do so, and the trial court properly allowed Rubin’s motion.

**ANALYSIS**

We review a trial court's order granting summary judgment de novo, considering "the matter anew and freely substitut[ing our] judgment for that of the lower tribunal." *Craig ex rel. Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (internal marks and citation omitted). Summary judgment "is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (internal marks and citation omitted). "A trial court should grant a motion for summary judgment only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Lord v. Beerman*, 191 N.C. App. 290, 293, 664 S.E.2d 331, 334 (2008) (internal marks and citation omitted). "The moving party carries the burden of establishing the lack of any triable issue." *Id.*

"The movant may meet his or her burden 'by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim[.]'" *Id.* (quoting *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)). For a medical malpractice claim, we have held that "[t]o 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 (alterations omitted and emphasis added) (quoting *Ballenger v. Crowell*, 38 N.C. App. 50, 54, 247 S.E.2d 287, 291 (1978)).

“[T]he plaintiff must establish the relevant standard of care through expert testimony.” *Smith v. Whitmer*, 159 N.C. App. 192, 195, 582 S.E.2d 669, 671-72 (2003) (reasoning that expert testimony is needed “[b]ecause questions regarding the standard of care for health care professionals ordinarily require highly specialized knowledge”). The “expert witness must demonstrate that he [or she] is familiar with the standard of care in the community where the injury occurred, or the standard of care in similar communities.” *Purvis v. Moses H. Cone Mem’l Hosp. Serv. Corp.*, 175 N.C. App. 474, 478, 624 S.E.2d 380, 384 (2006). “In the absence of such a showing, summary judgment is properly granted.” *Id.*

A physician-expert-witness can only demonstrate familiarity with the applicable standard of care

when that *physician is familiar with the experience and training of the defendant and* either (1) the physician is familiar with the standard of care in the defendant's community, or (2) the physician is familiar with the medical resources available in the defendant's community and is familiar with the standard of care in other communities having access to similar resources.

*Barham v. Hawk*, 165 N.C. App. 708, 712, 600 S.E.2d 1, 4 (2004), *aff'd*, 360 N.C. 358, 625 S.E.2d 778 (2006) (emphasis added). The physician-witness must show he or she has knowledge of the “defendant[’s] training [and] experience . . . .” See *Whitmer* at 196-97, 582 S.E.2d at 672-673 (affirming summary judgment because, among other things, the “plaintiff’s expert witness failed to demonstrate that he was sufficiently familiar with the standard of care among members of the same health care profession with similar training and experience” under N.C.G.S. § 90-21.12) (quotation marks omitted). Our decision in *Day v. Brant* exemplifies types of evidence that can show a physician is familiar with a defendant’s experience and training:

Dr. Mele testified at trial that he reviewed defendants’ depositions to determine the standard of practice for emergency medicine at LNRMC in 2003. He confirmed that the way they practiced emergency medicine was no different than his practice and that their training and experience in emergency medicine was no different. Dr. Mele reviewed the website of the medical group employing [defendant] and Mr. Hales and “read through the qualifications and trainings of their doctors and PA’s.” He concluded that the physicians had similar academic backgrounds, training, and experience to his.

*Day v. Brant*, 218 N.C. App. 1, 6, 721 S.E.2d 238, 243 (2012).

The key issue in this case is whether—at the time Zhang was opposing the motion for summary judgment—a qualified expert witness had sufficient familiarity with Rubin’s experience and training.<sup>1</sup> See *Purvis*, 175 N.C. App. at 477-78, 624

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<sup>1</sup> Zhang argues that the trial court and Rubin improperly applied Rule 9(j), but summary judgment, not the Rule 9(j) certification, was at issue.

S.E.2d at 384. Rubin argues Zhang, unlike *Day*, did not forecast evidence that her sole expert witness, Dr. Henry Fein, M.D. (“Fein”), would be “qualified to comment on the standard of care applicable to . . . Rubin at trial.”

During his deposition, Fein was asked if he knew “anything about Dr. Rubin, her education, training, experience, those sorts of things?” He answered, “The only thing that I know is that she is an attending physician at the University of North Carolina Medical Center.” He admitted he did not “know where she attended medical school or did her training or anything like that[,]” “know how long she has been practicing since the completion of her training,” or “know anything about her practice area at all” except a “presumption on [his] part” “that her practice is generally restricted to endocrinology at the University of North Carolina[.]” He was asked if he knows “anyone who has practiced endocrinology at UNC hospitals” and answered,

I would like to tell you I remember names, but I don’t. But in my years of working – in my years of being a member of the Endocrine Society, which is the preeminent professional and scientific organization of endocrinology, I had some dealings with the chief of endocrinology at the University of North Carolina.

Fein also testified about knowledge unrelated to Rubin’s experience and training:

Q: And so do you know anything about Orange County generally, Orange County, North Carolina, in terms of its population, major employers, anything like that?

[Fein] No.

Q: And have you ever been to UNC hospitals?

[Fein] As a visitor.

Q: In what capacity?

[Fein] My son was a student at the University of North Carolina Dental School next door, so yes, I have been on the campus and walked through the hospital lobby, but that's about it.

...

Q: I should have asked you this earlier. How do you define standard of care?

[Fein] Never been asked that before. Standard of care is the appropriate actions that a physician or physicians, because usually it is a team effort, should take to diagnose and treat a ... particular patient.

...

Q: I assume that you have opinions in this case that Dr. Rubin was negligent. Is that true?

[Fein] Yes.

...

Q: ... But just let me ask it broadly, how did Dr. Rubin breach the standard of care in providing care to this patient?

[Fein] In a layman's sense she made a mistake. She was presented with a patient who had fairly obvious Graves' hyperthyroidism. She examined the patient, performed an appropriate physical examination of her thyroid gland, and found a midline structure. She assumed that it -- and I think it was either in the first or second visit where the

node appears. It states that the patient had a pyramidal lobe.

She did not perform an ultrasound examination, either herself or refer her to a competent radiologist to have an ultrasound to confirm that what she was feeling was a pyramidal lobe, which is rarely present but can be both in normals where it's very hard to feel or in people with either Graves' disease or thyroiditis where it can be enlarged and more easily palpable. But the question as to whether that's what she was feeling or whether she was feeling a thyroid nodule, she made a clinical decision that she was feeling a pyramidal lobe and unfortunately she was wrong. It was not a pyramidal lobe; it was a thyroid nodule.

...

Q: . . . How do you know that your expert opinion about what should have been done is the standard of care of what's done at UNC hospitals and in similar communities?

[Fein] I attend frequent national meetings at which treatment of thyroid disease and thyroid nodules is a frequent topic. And while I cannot give you the specifics of who and when, I will tell you that these issues are frequently discussed and it is from those discussions and my reading of the literature. The University of North Carolina is an outstanding medical center that follows national and international guidelines with regard to its care of patients with all conditions.

Fein is unlike the witness in *Day* who conducted baseline research and is more like the witness in *Smith*.

Unlike *Day*, there is no evidence Fein reviewed any deposition by Rubin, confirmed her training and experience in endocrinology was no different than his, reviewed the website of the medical group employing Rubin, or read through the

qualifications and trainings of Rubin's practice. *Day*, 218 N.C. App. at 6, 721 S.E.2d at 243. Like in *Smith*, none of his testimony shows any knowledge of Rubin's training or experience.

When opposing summary judgment, Zhang had no expert witness who could testify as to Rubin's experience and training. Therefore, Zhang did not forecast evidence demonstrating Rubin violated the accepted standard of medical care in the community. An essential element of Zhang's claim is nonexistent, and Rubin showed through discovery that Zhang could not produce evidence to support an essential element of her claim. The trial court properly allowed summary judgment.

### **CONCLUSION**

The trial court properly allowed summary judgment against Zhang and in favor of Rubin.

AFFIRMED.

Judges ZACHARY and ARROWOOD concur.

Report per Rule 30(e).