IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-370

No. COA20-378

Filed 20 July 2021

Edgecombe County, No. 17 CVS 491

The Estate of KELVIN DERRICK JACOBS, Deceased, by and through CHARLES JACOBS, Jr., Administrator of the Estate, Plaintiff

v.

CHRISTIAN MANN, MD; SOUTHERN SURGICAL ASSOCIATES, P.A.; ATLANTIC GASTROENTEROLOGY ENDOSCOPY CENTER, P.A.; and, JOHN & JANE DOES, Defendants

Appeal by Plaintiff from Orders entered 29 April 2019 by Judge Wayland J. Sermons, Jr., and 6 January 2020 by Judge Thomas H. Lock in Edgecombe County Superior Court. Heard in the Court of Appeals 14 April 2021.

Michael R. Nash for plaintiff-appellant.

Walker, Allen, Grice, Ammons, Foy & Klick, LLP, by Louis F. Foy III, Jerry A. Allen, Jr., and Norman F. Klick, Jr., for defendants-appellees.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Charles Jacobs, Jr. (Plaintiff), as Administrator of the Estate of Kelvin Derricks Jacobs (Decedent), appeals from Orders granting Summary Judgment in favor of Defendants Dr. Christian Mann (Dr. Mann) and Southern Surgical Associates, P.A. (Southern Surgical) (collectively Defendants) after granting Defendants' Motions to exclude Plaintiff's expert witnesses in this medical malpractice suit. The Record tends to show the following:

¶ 2 On 26 October 2017, Plaintiff filed a Complaint alleging Decedent died in Defendants' and Atlantic Gastroenterology Endoscopy Center, P.A.'s (AGEC) care as a result of Defendants' and AGEC's negligence. The Complaint alleged that on 17 July 2015, Dr. Mann, a partner in Southern Surgical's practice, conducted an upper endoscopy on Decedent in preparation for a bariatric surgery at AGEC's outpatient surgical center. Plaintiff alleged that in April 2015, Decedent consulted with Defendants for bariatric surgery. Decedent, at that time, was a thirty-six-year-old man who stood six-feet tall, weighed 501 pounds, and had a body mass index (BMI) of 67.9 putting him in what Dr. Mann classified as the "super morbidly obese" category.

¶ 3 As part of Decedent's pre-surgery workup, a Southern Surgical physician's assistant assessed Decedent and noted his serious health issues, including his weight, BMI, bilateral leg edema, and obstructive sleep apnea. Southern Surgical's physician's assistant referred Decedent to AGEC's surgical center for an upper

endoscopy, under sedation, as a routine part of the pre-surgery workup. The physician's assistant also referred Decedent to a Dr. Surkin, in a separate medical practice, for "a cardiac and pulmonary workup" as part of the pre-surgery workup.

¶ 4 On 23 June 2015, one of Dr. Surkin's nurse practitioners assessed Decedent and noted he had obstructive sleep apnea and an "abnormal" electrocardiogram; the nurse practitioner scheduled Decedent for a sleep study on 15 July 2015, an echocardiogram with a cardiologist on 30 June 2015, and a follow up with Dr. Surkin 29 July 2015. Dr. Surkin performed the sleep study on Decedent on 15 July 2015. Dr. Surkin noted Decedent had "Obstructive Sleep Apnea," "Hypersomnia," and "Morbid Obesity[.]" Dr. Mann was not aware of this study and of Decedent's schedule with Dr. Surkin's office prior to the upper endoscopy.

¶ 5 Dr. Mann first met Decedent on the morning of 17 July 2015, just prior to Decedent's upper endoscopy. Decedent's upper endoscopy was scheduled for 9 a.m. that morning at AGEC's surgical center; however, Dr. Mann did not see Decedent until 10:30 a.m. Notes from Decedent's 17 July 2015 procedure indicate Decedent had no "past surgical history." Decedent's medical records, however, indicate, in July 2013, he was operated on at Vidant Medical Center in Greenville, North Carolina, to set a broken leg. Decedent was given Propofol as part of his conscious sedation before a doctor inserted a pin into Decedent's tibia, and Decedent experienced respiratory complications after the procedure. According to Dr. Mann, he likely asked Decedent

about Decedent's prior surgical history and that Decedent "probably" told Dr. Mann there was no history; Dr. Mann clarified he may have only asked if Decedent specifically had ever had surgery on his abdomen. When Dr. Mann examined Decedent just before the upper endoscopy, Dr. Mann noted "lots of tissue around" Decedent's neck making it "challenging for sure" but "not impossible" to intubate Decedent. Dr. Mann also noted Decedent "definitely had edema" in his legs.

¶ 6 Decedent's sedation for the upper endoscopy began at 10:32 a.m. Decedent was given 200 micrograms of Fentanyl and 10 milligrams of Midazolam between 10:32 and 10:40 a.m. Dr. Mann inserted the endoscope at 10:37 a.m. and removed the endoscope at 10:42 a.m. Dr. Mann had to give Decedent more sedation because Decedent was "somewhat agitated" during the procedure. Just after the procedure, as Decedent was being transported to the recovery room, an attending nurse heard Decedent begin to snore. Shortly thereafter, someone came to tell Dr. Mann Decedent was "not beathing very well[.]" When Dr. Mann arrived at the recovery room to check on Decedent, a nurse and an anesthetist were already "looking at [Decedent]." At 10:54 a.m., Narcan was given to Decedent to reverse the effects of the sedatives, but Decedent's oxygen saturation was still decreasing. Resuscitative measures, including "positive pressure ventilation," continued and Decedent's "heart rate failed[.]" By the time EMS arrived to assist Decedent, nurses had inserted "an oral and nasal airway." Decedent's heart rate recovered before EMS began to transport him to the hospital.

Decedent's size and unresponsiveness "did cause a delay" in getting Decedent into the ambulance.

¶ 7 While EMS transported Decedent to Vidant Medical Center, Decedent "began to gag and coughed out his oral airway." Decedent's breathing began to slow and eventually stopped. As Decedent arrived at the emergency department, his "heart rate dropped suddenly to 30." Then Decedent had no pulse at all. EMS began CPR before Decedent made it into the hospital building. Health care providers were unable to resuscitate Decedent. Decedent was pronounced dead at 12:30 p.m. According to Decedent's autopsy report:

> The stress of the [upper endoscopy] and the conscious sedation produced strains [which] could not be tolerated by the enlarged heart and led to respiratory compromise as well. Loss of the airway as the patient was being transferred to the Emergency Department led to sufficient hypoxia to trigger cardiac arrest from which the patient could not be resuscitated.

¶ 8 In his Complaint, Plaintiff asserted Dr. Mann "failed to act in accordance with the standards of practice for a surgeon, of similar training and experience; practicing in the Pitt community or similar communities, with respect to the care and treatment of a patient" like Decedent because Dr. Mann:

> a. failed to await the completion of the testing ordered by [Dr. Mann's] consultant, Dr. Surkin;
>
> b. failed to schedule the upper endoscopy in the hospital;
>
> c. failed to consult with an anesthesiologist;

> d. failed to utilize the services of an anesthesiologist;
>
> e. failed to consult with a CRNA;
>
> f. failed to utilize the services of a CRNA;
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> g. failed to perform adequate anesthesia care;
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> h. failed to properly manage anesthesia care;
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> i. failed to perform adequate anesthesia supervision;
>
> j. failed to monitor [Decedent] properly during the July 17, 2015 upper endoscopy;
>
> k. failed to act upon signs and symptoms exhibited by [Decedent] during the course of the upper endoscopy with respect to signs and symptoms of inadequate ventilation;
>
> l. failed to act upon signs and symptoms exhibited by [Decedent] after the upper endoscopy with respect to signs and symptoms of inadequate ventilation; [and]
>
> m. failed to perform adequate resuscitation[.]

¶ 9 Plaintiff asserted it was below the minimum standard of care for Defendants to perform Decedent's upper endoscopy at a freestanding facility like AGEC; that Defendants' anesthesia management fell below the minimum standard; and that Defendants' resuscitation management of Decedent fell below the minimum standard. Plaintiff also asserted claims against AGEC; however, the trial court dismissed those claims and Plaintiff does not challenge the trial court's dismissal of AGEC on appeal.

¶ 10 Plaintiff designated four anesthesiologists as standard of care expert witnesses: Stuart Lowson, M.D.; Gerard R. Manecke, Jr., M.D.; Konstantine Balonov, M.D.; and Tong J. Gan, M.D. Plaintiff also designated two surgeons as expert witnesses: James F. Calland, M.D. (Dr. Calland), a general surgeon with the University of Virginia; and John Paul Gonzalvo, M.D. (Dr. Gonzalvo), a general and bariatric surgeon with the University of South Florida College of Medicine. Plaintiff asserted each of his physician experts were "familiar with the standards of practice for healthcare providers of similar education, training, and experience as the defendants . . . practicing in the same or similar community . . . in the time frame 2015 with respect to the care of patients such as [Decedent]" undergoing an upper endoscopy under the same or similar circumstances. Plaintiff expected each physician to testify that Decedent was "a high-risk" patient and that Defendants should not have referred Decedent to AGEC or performed the upper endoscopy at AGEC, especially given AGEC's policy proscribing such procedures at its facility for high-risk patients like Decedent and that Decedent's respiratory complications during and after the procedure were foreseeable. Plaintiff also expected the expert witnesses to testify that Decedent's status as a high-risk patient required, under the applicable standard of care, Defendants to consult with an anesthesiologist before performing the upper endoscopy. Plaintiff asserted the experts would testify that

these factors, to a reasonable degree of medical certainty, led to Decedent's death which could "have been prevented."

¶ 11 On 6 March 2019, Defendants filed a Motion to Preclude Plaintiff's Anesthesiology Experts "pursuant to Rule 9(j) of the North Carolina Rules of Civil Procedure and Rule 702 of the North Carolina Rules of Evidence[.]" On 29 April 2019, the trial court entered an Order Precluding Plaintiff's Anesthesiology Experts concluding, "pursuant to Rule 702(b)(1) and (2) of the North Carolina Rules of Evidence and related case law, the Anesthesiologists do not qualify to render" standard of care opinions "as a matter of law, against any of the Defendants[.]"

¶ 12 On 12 November 2019, Defendants filed a Motion to Exclude Dr. Calland and Dr. Gonzalvo "pursuant to Rule 9(j) of the North Carolina Rules of Civil Procedure, Rule 702 of the North Carolina Rules of Evidence, N.C.G.S. §90-21.12, and other applicable statutes and case law[.]" Defendants also filed a Motion to Dismiss Pursuant to Rule 9(j) requesting the trial court dismiss Plaintiff's suit, "with prejudice pursuant to Rule 9, Rule 12, Rule 37, Rule 41, and Rule 56 of the North Carolina Rules of Civil Procedure[.]" On 6 January 2020, the trial court entered an Order Denying Defendants' Motion Pursuant to Rule 9(j).

¶ 13 However, the same day, the trial court entered an Order granting Defendants' Motion to Exclude Dr. Calland and Dr. Gonzalvo. The trial court made numerous Findings of Fact before concluding Dr. Calland failed "to qualify and should be

excluded pursuant to Rule 702 of the North Carolina Rules of Evidence," and Dr. Gonzalvo failed "to qualify and should be excluded pursuant to N.C.G.S. § 90-21.12[.]" The trial court also entered an Order granting Defendants' "Motion for Summary Judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure" as the trial court had excluded all of Plaintiff's expert standard of care witnesses.

¶ 14 On 24 January 2020, Plaintiff filed written Notice of Appeal to this Court from the trial court's Orders: precluding Plaintiff's anesthesiology experts; excluding Dr. Calland and Dr. Gonzalvo; and granting Defendants Summary Judgment.

Issues

¶ 15 The issues on appeal are whether the trial court erred in: (I) excluding: (A) Plaintiff's expert anesthesiologists pursuant to Rule of Evidence 702; (B) Plaintiff's expert witness Dr. Calland pursuant to Rule of Evidence 702; (C) Plaintiff's expert witness Dr. Gonzalvo under N.C. Gen. Stat. § 90-21.12; and, if so, (II) granting Defendants Summary Judgment.[1]

Analysis

I. Exclusion of Plaintiff's Expert Witnesses

[1] Plaintiff originally appealed the trial court's Order excluding all expert witnesses against AGEC and dismissing Plaintiff's claims against AGEC; however, Plaintiff withdrew that portion of the appeal.

¶ 16 Plaintiff argues the trial court erred as a matter of law in excluding his: (A) anesthesiology experts under Rule 702; (B) Dr. Calland, also under Rule 702; and (C) Dr. Gonzalvo under N.C. Gen. Stat. § 90-21.12. Generally, we review a trial court's ruling on a motion to exclude expert testimony for an abuse of discretion. *Crocker v. Roethling*, 363 N.C. 140, 143, 675 S.E.2d 625, 628-29 (2009). Here, however, Plaintiff contends, in each instance, the trial court misinterpreted N.C. Gen. Stat. § 8C-1, Rule 702 and N.C. Gen. Stat. § 90-21.12 by excluding all of Plaintiff's expert witnesses. "[W]here an appeal presents questions of statutory interpretation, full review is appropriate, and a trial court's conclusions of law are reviewable *de novo*." *FormyDuval v. Bunn*, 138 N.C. App. 381, 385, 530 S.E.2d 96, 99 (2000) (citation omitted); *Da Silva v. WakeMed*, 375 N.C. 1, 5, 846 S.E.2d 634, 638 (2020). "Accordingly, this Court must determine[:] '(1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence.' " *FormyDuval*, 138 N.C. App. at 385, 530 S.E.2d at 100 (citation omitted). We address each of Plaintiff's contentions in turn.

A. Anesthesiologists

¶ 17 On 29 April 2019, the trial court granted Defendants' Motion to Exclude Plaintiff's anesthesiologist witnesses. The trial court concluded, "as a matter of law," the anesthesiologist witnesses did not "qualify to render" standard of care opinions

under "Rule 702(b)(1) and (2) of the North Carolina Rules of Evidence[.]" The trial court's Order did not preclude these witnesses "from testifying as to causation or damages, upon proper foundation and testimony being elicited during trial as to [Defendants] . . . ." Although the trial court's Order does not include findings of fact or expressly explain precisely why it reached this conclusion, Defendants' Motion specifically alleged the anesthesiologists did not practice in the same or similar specialty as Dr. Mann.[2] Plaintiff argues the trial court misinterpreted Rule 702(b) and, thus, erred in excluding his anesthesiologist experts as standard of care witnesses.

¶ 18 Rule 702(b) provides:

> In a medical malpractice action as defined in G.S. 90-21.11, a person shall not give expert testimony on the appropriate standard of health care as defined in G.S. 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

[2] Plaintiff does not argue the trial court erred by not including findings of fact as required in other contexts. *See Kennedy v. DeAngelo*, 264 N.C. App. 65, 68-69, 825 S.E.2d 15, 18 (2019) (In the Rule 9j motion to dismiss context, "the court must make written findings of fact to allow a reviewing appellate court to determine whether those findings are supported by competent evidence, whether the conclusions of law are supported by those findings, and, in turn, whether those conclusions support the trial court's ultimate determination." (citation and quotation marks omitted)).

> 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.

N.C. Gen. Stat. 8C-1, Rule 702(b) (2019). Thus, under Rule 702(b)(1)(a), an expert witness may provide standard of care opinions if the expert practices in the same specialty as the party against whom the expert is testifying. Dr. Mann is a general surgeon specializing in bariatric surgery; he is not an anesthesiologist. Plaintiff concedes his anesthesiologist expert witnesses do not share the same specialty as Dr. Mann and, therefore, could not qualify under Rule 702(b)(1)(a).

¶ 19 However, Plaintiff also contends, because the issue "is sedation," and that his anesthesiologist expert witnesses perform the same sedation procedure in their practices used by Dr. Mann such that these witnesses should qualify under Rule 702(b)(1)(b) as specializing "in a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint[.]" N.C. Gen. Stat. 8C-1, Rule 702(b)(1)(b) (2019). But, at least based on Plaintiff's briefing on appeal and the allegations in the Complaint, the issue is not whether the precise sedation procedure Dr. Mann used caused Decedent's death; rather, Plaintiff alleges Defendants' failure to properly assess Decedent's risks for anesthesia and the decision to perform the initial upper endoscopy at a freestanding surgical center without anesthesiologists, certified nurse anesthetists, and the resident resuscitative capabilities a hospital setting would offer caused Decedent's death. Specifically, Plaintiff alleged Defendants "failed to act in accordance with the standards of practice for a surgeon, of similar training and experience . . . with respect to the care and treatment of a patient like [Decedent], undergoing upper endoscopy or similar procedure . . . ."

¶ 20 The Record—including testimony from Plaintiff's anesthesiologist experts—supports the conclusion these anesthesiologists did not practice in a similar specialty and perform the same procedure as Dr. Mann in this case. All of the anesthesiologists

testified they went through different training than a surgeon would. All of the anesthesiologists testified they do not perform upper endoscopies.

¶ 21 Moreover, even if the alleged medical negligence in this case is viewed solely through the lens of administering anesthesia and "managing the anesthesia," the Record reflects Dr. Mann's administration and management of the anesthesia in this case occurred "in a different context" than the one in which the anesthesiologists at issue in this case administer and manage anesthesia.[3] *Kennedy v. DeAngelo*, 264 N.C. App. 65, 70, 825 S.E.2d 15, 19 (2019) (holding the record could have supported findings the plaintiff's expert oral surgeon and periodontist witnesses—although both holding dentistry licenses and providing some of the same care as a general dentist—did not qualify to provide standard of care opinions against a general dentist under Rule 702(b)(1)(b), if the trial court had made such findings). As Plaintiff's

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[3] Plaintiff cites our decisions in *Trapp v. Maccioli*, 129 N.C. App. 237, 497 S.E.2d 708 (1998), *Sweatt v. Wong*, 145 N.C. App. 33, 549 S.E.2d 222 (2001), *Edwards v. Wall*, 142 N.C. App. 111, 542 S.E.2d 258 (2001), and *Braden v. Lowe*, 223 N.C. App. 213, 734 S.E.2d 591 (2012), to support his contention the anesthesiologists practiced in a similar specialty and performed the same procedure as Dr. Mann. However, these cases are inapposite here. In *Trapp* and *Braden*, we determined the trial court erred in concluding the plaintiffs could not have reasonably expected the experts to qualify as witnesses under Rule 9(j); we did not rule on whether the witnesses would have actually qualified. *Trapp*, 129 N.C. App. at 241, 497 S.E.2d at 711; *Braden*, 223 N.C. App. at 222, 734 S.E.2d at 598. In *Sweatt* and *Edwards*, although the defendants and witnesses practiced in different subspecialties, they all practiced in the same general specialties. *Sweatt*, 145 N.C. App. at 36, 549 S.E.2d at 224 (holding an expert who practiced as an emergency room doctor could testify against a surgeon because the expert was also a surgeon and performed the exact same diagnostic procedures as the defendant); *Edwards*, 142 N.C. App. at 119, 542 S.E.2d at 265 (holding an expert pediatric gastroenterologist could testify against a pediatrician because both were pediatricians and treated children with abdominal issues). Here, Plaintiff's anesthesiologists are not a part of the same general specialty and they perform sedation in a different context than Dr. Mann.

anesthesiologist experts testified, they all practiced in a hospital setting and did not evaluate a patient's risk factors for conscious sedation in a freestanding surgical center. Further, Dr. Balonov testified surgeons are not allowed to use the sedative he would have used—Propofol—on Decedent because "only anesthesiologists are allowed to use propofol." Thus, the differing contexts in which these anesthesiologists assessed patient risk and managed sedation from that in which Dr. Mann performed similar functions "raises legitimate concerns that the standard of care these experts apply in their . . . practices would differ from the standard applicable to" Dr. Mann. *Id.* Therefore, on this Record, the trial court did not err in concluding Plaintiff's anesthesiologist experts did not qualify under "Rule 702(b)(1) and (2) of the North Carolina Rules of Evidence[.]"

B. Dr. Calland

¶ 22 The trial court excluded Plaintiff's witness Dr. Calland because, as a general surgeon who did not specialize in bariatric surgery and did not devote a majority of his time performing such surgeries in the year prior, Dr. Calland also could not satisfy North Carolina Rules of Evidence 702(b)(1) and 702(b)(2). Plaintiff argues the trial court erred in excluding Dr. Calland because, as a general surgeon, Dr. Calland qualifies as a doctor in the same specialty as Dr. Mann under Rule 702(b)(1)(a); or, in the alternative, as a doctor with a similar specialty performing the same procedure as Dr. Mann under Rule 702(b)(1)(b).

¶ 23 Assuming, without deciding, Dr. Calland qualifies under Rule 702(b)(1)(a) or (b) as a general surgeon performing the same procedure as Dr. Mann, the trial court did not err in excluding Dr. Calland because the trial court's Conclusion Dr. Calland did not meet Rule 702(b)(2)'s requirements was supported by the trial court's Findings, which were, in turn, supported by evidence in the Record. The trial court found "Dr. Calland did not devote a majority of his professional time to the active clinical practice of bariatric surgery or general surgery" because "60% of Dr. Calland's professional practice was spent in clinical care; and of that 60%, only half of his time was spent in general surgery." In his deposition, when asked "what made up that 60 percent of your clinical care[,]" Dr. Calland responded, "[s]o approximately 50/50 split between care of patients with injuries and those with general surgery problems." Thus, Dr. Calland's testimony supports the trial court's Finding Dr. Calland did not devote a majority of his professional time to the active clinical practice of general surgery, and that Finding supports the trial court's Conclusion Dr. Calland did not meet the requirements of Rule 702(b)(2).

¶ 24 Although it appears Plaintiff challenges this Finding generally, Plaintiff only argues Dr. Calland spent a majority of his professional time engaged in "patient care." However, again, the proper context for analyzing whether Dr. Calland was engaged in the same specialty, or a similar specialty and performing the same procedure, is within Dr. Calland's practice as a general surgeon. Thus, at most, Dr. Calland only

spent thirty percent of his professional time in clinical practice as a general surgeon assessing patient risk for procedures. Therefore, the trial court did not err in excluding Dr. Calland as a standard of care witness under Rule 702(b)(2).

C. Dr. Gonzalvo

¶ 25 The trial court granted Defendants' Motion to Exclude Dr. Gonzalvo concluding Dr. Gonzalvo failed to qualify "pursuant to N.C.G.S. § 90-21.12[.]" Plaintiff argues the trial court misapplied N.C. Gen. Stat. § 90-21.12 and erred in excluding Dr. Gonzalvo when Dr. Gonzalvo had sufficiently familiarized himself with the Greenville-Pitt community and standard of care.

¶ 26 N.C. Gen. Stat. § 90-21.12(a) provides:

> [I]n any medical malpractice action as defined in G.S. 90-21.11(2)(a), the defendant health care provider shall not be liable for the payment of damages unless *the trier of fact* finds 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* under the same or similar circumstances at the time of the alleged act giving rise to the cause of action[.]

N.C. Gen. Stat. § 90-21.12(a) (2019)(emphases added).

¶ 27 First, by its language, N.C. Gen. Stat. § 90-21.12 requires the *trier of fact* to find defendants breached the standard of care in the same or similar communities under the same or similar circumstances at the time of the alleged negligent act. As long as plaintiffs' experts demonstrate "specific familiarity with and expressed

unequivocal opinions regarding the standard of care" in the relevant community, the trial court should not exclude those experts' testimony. *Crocker*, 363 N.C. at 146, 675 S.E.2d at 630. "[O]nce the plaintiff raises a genuine issue as to whether the defendant's conduct breached the relevant standard of care, the resolution of that issue is for the trier of fact, usually the jury, per N.C.G.S. § 90-21.12." *Id.* at 149, 675 S.E.2d at 632. "Any question as to the credibility of [the expert's] testimony on the standard of care is a matter for the jury." *Id.* at 148, 675 S.E.2d at 632 (citation omitted).

¶ 28 " 'Our statutes and case law do not require an expert to have actually practiced in the community in which the alleged malpractice occurred, or even to have practiced in a similar community.' " *Grantham v. Crawford*, 204 N.C. App. 115, 119, 693 S.E.2d 245, 248 (2010) (quoting *Crocker*, 363 N.C. at 150, 675 S.E.2d at 633 (Martin, J., concurring)). "[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." *Id.*, 693 S.E.2d at 248-49 (citation and quotation marks omitted). "The 'critical inquiry' . . . is 'whether the doctor's testimony, taken as a whole' establishes that he 'is familiar with a community . . . in regard to physician skill and training, facilities, equipment, funding, and also the physical and financial environment of [that] community.' " *Kearney v. Bolling*,

242 N.C. App. 67, 76, 774 S.E.2d 841, 848 (2015) (quoting *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)).

¶ 29 In its Order excluding Dr. Gonzalvo, the trial court found:

> Based on testimony from a deposition dated March 12, 2019, Dr. Gonzalvo:
>
> a. was not in a private practice setting like Dr. Mann, and he was not practicing in a private surgical practice like SSA.
>
> b. had no experience performing upper endoscopies in freestanding, non-hospital affiliated surgical centers like AGEC. He was performing all his upper endoscopies "within the walls" of the hospital. He did not determine who was an appropriate candidate to undergo procedures in a freestanding, non-hospital affiliated outpatient center like AGEC.
>
> c. did not order sedation during upper endoscopies in a freestanding, non-hospital affiliated surgical center like AGEC. In his practice, an anesthesiologist or CRNA was selecting and administering the sedative agents used; and further, the anesthesiologist or CRNA was determining the dosages and timing of the dosages given.
>
> d. was "never in the shoes" of Dr. Mann, in that he did not directly administer, nor did he directly supervise, the administration of conscious sedation medications during an upper endoscopy.
>
> e. did not direct an RN in the administration of conscious sedation.
>
> f. did not know if other surgeons in the Defendant's medical community perform upper endoscopies on similar patients to Mr. Jacobs in freestanding facilities like AGEC.

> g. did not know if all other pre-operative bariatric work-up consults and tests were being completed prior to the upper endoscopy in the Defendant's medical community.
>
> h. did not know what specific sedative agents were used for endoscopy patients in the Defendant's medical community.
>
> i. did not research any of the other freestanding facilities like AGEC in Defendant's medical community.
>
> j. did not know the standard of care applicable to Greenville, NC, and he applied a standard of care applicable to two Florida ambulatory care centers from 2013 (or before) to form his opinion in this case. He further failed to take any steps to determine if the way things were done in Tampa, Florida in January of 2013 or before were similar to the way things were done in the Defendant's medical community.

¶ 30 The trial court further found Dr. Gonzalvo: "admittedly does not know anything about" centers like AGEC in the Greenville-Pitt County community; "further admits he does not know anything in particular about the standard of care" in the community "because [he] does not know how upper endoscopies are done there in freestanding ambulatory centers"; "was not doing what Dr. Mann was doing in terms of administering, selecting, or titrating conscious sedation agents" while performing upper endoscopies at two Florida outpatient facilities; did not review information about the Greenville-Pitt County community sufficient to determine that community and the Tampa community in which he practiced "were similar"; did not have sufficiently similar experiences and was not situated in the same or similar

communities as Defendants; and, ultimately, lacked "the requisite knowledge about the applicable standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities . . . to offer standard of care criticisms under NCGS §90-21.12."[4] Consequently, the trial court concluded: "The Court Finds as Fact and Concludes as Law, that Dr. Gonzalvo fails to qualify and should be excluded pursuant to N.C.G.S. § 90-21.12 and applicable case law."

¶ 31 Several of the trial court's Findings, however, are not supported by the Record. Dr. Gonzalvo testified that he reviewed "Exhibit 5," a notebook with fifteen tabs of information, before his discovery deposition. The Record indicates that notebook—among many other sources of information—contained: Dr. Mann's curriculum vitae; printouts of Southern Surgical's website explaining the practice; printouts of AGEC's website explaining the practice; AGEC's 2015 license information; printouts of the Greenville-Pitt County Chamber of Commerce's website, including a 2015 U.S. Census Bureau population estimate for Greenville of 90,597; and U.S. Census Bureau data including a July 2015 population estimate for Pitt County of 177,220 and gender and racial compositions of the community, as well as 2015 data regarding health and education statistics and household and per capita income. Dr. Gonzalvo also testified

[4] We note the Order contained several additional, duplicative Findings the trial court adopted from Defendants' proposed order.

he reviewed Vidant Medical Center's 2015 "Community Health Needs Assessment" containing information about the medical resources, number of doctors, and health needs for the Greenville-Pitt County community.

¶ 32 Dr. Gonzalvo further stated he was familiar with AGEC's freestanding surgical center and Southern Surgical's practice. Dr. Gonzalvo also asserted he was familiar with AGEC's limitations as a freestanding surgical center. Moreover, Dr. Gonzalvo stated, based on his review of the information, Vidant Medical Center in Greenville was a "Level I trauma center" with 900 beds and was similar in size and resources to Tampa General Hospital, in Dr. Gonzalvo's practice community, which was also a "Level I trauma center" with 1000 beds. Therefore, the information Dr. Gonzalvo reviewed was sufficient to establish Dr. Gonzalvo had familiarized himself with Dr. Mann's training and experience, and the "facilities, equipment, funding, and also the physical and financial environment" of the Greenville-Pitt County community and that the Greenville-Pitt County community was similar to the community in which he practiced and for which he knew the standard of care. *Kearney*, 242 N.C. App. at 76, 774 S.E.2d at 848 (citation and quotation marks omitted); *see also Crocker*, 363 N.C. at 151, 675 S.E.2d at 633 ("Dr. Elliott stated that after reviewing various materials, he was familiar with 'the training, education and experience of Dr. Peter Roethling,' 'the size of the population [of Goldsboro], the level of care available at the hospital, the facilities and the number of health care providers for obstetrics,' and 'the

prevailing standard of care for handling shoulder dystocia in the same or similar community to Goldsboro.' " (alteration in original)). Furthermore, Dr. Gonzalvo's testimony and his review of materials concerning the Greenville-Pitt County medical community showed that he was once in a private practice setting similar to Dr. Mann and that he was familiar with the physician skill and training, facilities, equipment, funding, and also the physical and financial environment of communities comparable to Greenville-Pitt County.

¶ 33 Moreover, it is true, Dr. Gonzalvo admitted he did not "know anything about the freestanding centers like AGEC in Greenville, Pitt County," did not "know anything in particular about the standard of care in Greenville, Pitt County," and did not know "to what degree the standards of care" in the Greenville-Pitt community varied as "compared to where [Dr. Gonzalvo] practice[d] in Tampa[.]" However, these narrow admissions focused specifically on the "Greenville-Pitt community" and the trial court's Findings which do not account for Dr. Gonzalvo's own review of materials relevant to the Greenville-Pitt community, his prior experience in a similar practice, and his knowledge of a similar community, do not support the ultimate Finding Dr. Gonzalvo, based on his testimony "taken as a whole," was not sufficiently familiar with the Greenville-Pitt community and the standard of care in a *similar community* under N.C. Gen. Stat. § 90-21.12. *Kearney*, 242 N.C. App. at 76, 774 S.E.2d at 848 (citation and quotation marks omitted). These Findings based on Dr. Gonzalvo's

"admissions," thus, do not support the trial court's ultimate Finding "Dr. Gonzalvo lacks the requisite knowledge about the applicable standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities as Greenville, Pitt County, North Carolina." In turn, then, these Findings also cannot support the Conclusion Dr. Gonzalvo should be excluded as an expert witness under N.C. Gen. Stat. § 90-21.12 as a matter of law. We therefore vacate the portion of the trial court's Order excluding Dr. Gonzalvo's expert testimony under N.C. Gen. Stat. § 90-21.12.

¶ 34 Nevertheless, under an abuse of discretion standard, the trial court also made Findings which are unchallenged or are supported by evidence in the Record, including particularly as to Dr. Gonzalvo's familiarity with the relevant standard of practice or care related to free-standing centers like AGEC at the time of the alleged malpractice or as to Dr. Gonzalvo's experience or knowledge as to the particular clinical decisions being made by Dr. Mann. It is unclear on this Record what weight, if any, the trial court gave these Findings and how the remaining Findings impacted the trial court's ruling. Consequently, we remand this matter to the trial court to make findings supported by the evidence and, in its discretion and properly applying N.C. Gen. Stat. § 90-21.12, to determine whether Dr. Gonzalvo is qualified to provide expert testimony as to "the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar

communities under the same or similar circumstances at the time of the alleged act giving rise to the cause of action[.]" N.C. Gen. Stat. § 90-21.12(a) (2019).

II. Summary Judgment

¶ 35 On 6 January 2020, the trial court entered its Order granting Defendants' Motion for Summary Judgment "following the Courts' exclusion of standard of care testimony from plaintiff's only two[5] standard of care witnesses[.]" Because we vacate the portion of the trial court's Order excluding Dr. Gonzalvo's testimony against Defendants, we also vacate the trial court's Summary Judgment Order. *Crocker*, 363 N.C. at 149, 675 S.E.2d at 632. We remand this matter to the trial court for additional proceedings, including any further consideration of Defendants' Motion for Summary Judgment deemed necessary in light of the trial court's ruling on the Motion to Exclude Dr. Gonzalvo's expert testimony.

Conclusion

¶ 36 Accordingly, for the foregoing reasons, the trial court did not err in excluding the anesthesiology experts or Dr. Calland under Rule 702. Therefore, we affirm the trial court's Orders as such. However, the trial court did err in excluding Dr. Gonzalvo's expert testimony under N.C. Gen. Stat. § 90-21.12 based on Findings which are not supported by the Record. Therefore, we vacate the trial court's Order

[5] As the trial court had previously excluded Plaintiff's anesthesiologist experts' standard of care testimony, only Dr. Calland and Dr. Gonzalvo remained as Plaintiff's standard of care witnesses.

excluding Dr. Gonzalvo. Consequently, we also vacate the trial court's Order granting Defendants Summary Judgment and remand this matter to the trial court for further proceedings including consideration of the Motions to Exclude Dr. Gonzalvo and for Summary Judgment.

AFFIRMED IN PART; VACATED IN PART AND REMANDED.

Judges DIETZ and ZACHARY concur.

Report per Rule 30(e).