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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-468

No. COA19-859

Filed 7 September 2021

Forsyth County, Nos. 16 CVS 5181–82

CELESTE EVELYN SMITH, Plaintiff,

v.

NOVANT HEALTH, INC., and MEDICAL PARK HOSPITAL, INC., d/b/a NOVANT HEALTH MEDICAL PARK HOSPITAL; HAWTHORNE OB/GYN ASSOCIATES, P.A. and ANTHONY L. MASCIELLO, M.D.; and PIEDMONT TRIAD ANESTHESIA, P.A., Defendants.

Appeal by plaintiff from judgment entered 8 November 2016 by Judge David L. Hall in Forsyth County Superior Court. Heard in the Court of Appeals 10 June 2021.

*Jerome P. Trehy, Jr., for plaintiff-appellant.*

*Coffey Law, PLLC, by Tamara D. Coffey, Dennis W. Dorsey, and Elizabeth Horton, for defendants-appellees Novant Health, Inc., Medical Park Hospital, Inc., d/b/a Novant Health Medical Park Hospital, and Piedmont Triad Anesthesia, P.A.*

*Nelson Mullins Riley & Scarborough LLP, by Linda L. Helms and G. Gray Wilson, for defendant-appellee Anthony L. Masciello, M.D.*

DIETZ, Judge.

medical malpractice claims against a group of hospital defendants. Smith contends that the trial court improperly excluded the expert testimony of a hospital administrator and improperly ruled that Smith could not prosecute her administrative negligence claims in the same action as her medical malpractice claims. Smith also challenges the exclusion of evidence concerning hospital policies in a similar medical procedure that uses robotic technology.

¶ 2 As explained below, we cannot engage in meaningful appellate review of the trial court's exclusion of Smith's expert witness and therefore remand for further proceedings in the trial court on that issue. We hold that the trial court's exclusion of the robotic surgery evidence was within the court's sound discretion and therefore reject Smith's arguments on this issue.

### **Facts and Procedural History**

¶ 3 Plaintiff Celeste Smith was injured while undergoing a laparoscopic hysterectomy. Smith brought legal claims against members of the surgical team as well as Novant Health, Inc. and related corporate defendants (collectively, "Novant"). Among other claims, Smith alleged that her healthcare providers violated the standard of care when they positioned her on the operating table at an angle and, in the midst of surgery, used a shoulder brace to secure her.

¶ 4 During the surgery, Smith was on an operating table in the "Trendelenburg" position, in which the table is inclined with the patient's head at the lower end. At

some point, Smith slid downward on the table and a member of the surgical team had to catch and support Smith's head while attempting to level the table. Given the stage of the procedure, the surgical team did not want to "reprep and drape in order to completely recheck positioning." Ultimately, members of the team proposed using "the horseshoe style shoulder braces that are used in the robot room" to perform robotic surgery on similarly positioned patients. A member of the surgical team retrieved the shoulder brace and the team used it to secure Smith until the surgery was complete. The surgery "lasted far longer than the scheduled time."

¶ 5 After her surgery, Smith experienced significant pain in her right shoulder area. The shoulder problems persisted and, ultimately, Smith's treating physician diagnosed her with complex regional pain syndrome due to an injury sustained in the surgery.

¶ 6 Smith brought a number of claims against her medical providers including administrative negligence claims against Novant concerning the training, procedures, and protocols for the use of a shoulder brace in this type of surgery. The only expert witness Smith presented on the administrative negligence claims was Kevin J. Moore, a lawyer with experience in hospital administration.

¶ 7 Novant moved to exclude Moore's expert testimony under Rule 702 of the Rules of Evidence and the trial court ultimately granted that motion and later entered a directed verdict against Smith on the administrative negligence claims. The trial

court also excluded evidence about the policies and procedures for the use of a shoulder brace in robotic surgeries under Rule 403 of the Rules of Evidence, reasoning that, because the shoulder brace was used in every robotic surgery but not typically used in non-robotic laparoscopic surgery like the procedure in this case, the risk of confusion and unfair prejudice substantially outweighed any probative value.

¶ 8 The jury returned a verdict in favor of Novant on the remaining claims but was unable reach a unanimous verdict in the medical malpractice claims against members of the surgical team. Smith then appealed the judgment in favor of Novant.

### **Analysis**

#### **I. Administrative negligence claims**

¶ 9 We begin with the trial court’s exclusion of Moore’s expert testimony, which Smith offered in support of her administrative claims. The parties’ arguments on this issue resemble proverbial ships passing in the night, to each other merely a signal and a distant voice in the darkness. Smith argues that the trial court fundamentally misunderstood the concept of administrative negligence. She contends that the trial court did *not* determine that she “failed to make out a proper claim of corporate negligence” against Novant, but instead determined that her administrative claims could not be pursued together with her medical negligence claims and “simply disallowed the corporate negligence claim in a consolidated trial with a medical negligence claim.”

¶ 10 Novant, by contrast, argues that trial court correctly understood the legal distinction between administrative negligence and medical negligence. But, Novant contends, the trial court examined the “mislabeled” administrative negligence claims at trial and determined that, although characterized by Smith as administrative negligence, those claims were ones “based upon clinical care and clinical decision-making.” Thus, Novant argues, the trial court properly ruled that Smith’s only expert on those claims—an attorney with no medical training—could not testify to the standard of care and that, in turn, meant a directed verdict was appropriate.

¶ 11 Our review of this issue is complicated because, to support their arguments, the parties point to scattered references in the trial transcript spread out over many volumes, often involving a few isolated statements by the trial court. The most relevant statements come last, when the trial court excludes Moore’s testimony, resulting in the directed verdict dismissing the administrative claims. At that point, the trial court explained that it had reviewed case law from our State’s appellate courts and laid out the following reasoning:

This passage I find to be as instructive as anything I have read “A plaintiff in a medical malpractice action may proceed against a hospital (defined by statute as a “healthcare provider,” citing of course 90-91.11)], “under two separate and distinct,” not overlapping, not concurrent, “two separate and distinct theories”. . . . I can find no authority that would allow the claims against the institution to go for ordinary negligence and claims to go for medical malpractice. They are disjunctive. To the extent

I am wrong, some appellate court needs to squarely delineate this for the future. So I've done the best I can. I have spent an enormous amount of time with this consulting with a variety of resources. So I sustain the Defendant's motion in limine with respect to the testimony of Mr. Moore. I will exclude his testimony. Note the Plaintiff's objection. Preserve it for the record, and I encourage appellate review.

¶ 12 This statement can be interpreted as the trial court accurately stating the law—that is, explaining that a litigant cannot transform a medical or clinical negligence claim into an administrative negligence claim by labeling it as one. *Gause v. New Hanover Reg'l Med. Ctr.*, 251 N.C. App. 413, 418, 795 S.E.2d 411, 415 (2016). The claims are indeed distinct as the court explained. This means a claim that concerns clinical care and clinical decision-making requires expert testimony from a medical professional to establish a breach of the applicable standard of care, even if it is characterized as an “administrative” or “corporate” claim against a hospital. *Id.* at 421–22, 795 S.E.2d at 417.

¶ 13 To be fair, though, Smith's competing argument about the trial court's ruling is plausible. And, more importantly, after reviewing the entire transcript of this lengthy trial, we are unable to locate the point at which the trial court examined each of Smith's proposed administrative claims, determined that each of those claims involved clinical care and clinical decision-making, and then determined that Moore was not qualified to offer expert testimony as to those claims.

¶ 14 But, again to be fair, we cannot fault the trial court for this. Smith’s theories of administrative negligence evolved over time and it is difficult to identify in this lengthy trial transcript which particular theories of administrative negligence Smith intended to pursue at trial. Ultimately, in light of the record before us, we are unable to engage in meaningful appellate review of the trial court’s gatekeeping role with respect to Moore’s testimony. We therefore remand this matter with instructions for the trial court to conduct a hearing at which Smith identifies on the record the particular administrative claims she seeks to pursue and the trial court determines whether each claim concerns clinical care or clinical decision-making—thus requiring expert testimony from a medical professional—or instead concerns only administrative matters suited for expert testimony from a hospital administrator. The court can then assess whether Moore is qualified under Rule 702 to offer expert testimony with respect to any of those claims.

¶ 15 If the trial court determines that Moore is not qualified under Rule 702 to testify to the standard of care for any of Smith’s purported administrative claims, the court’s existing judgment on these claims can stand. If the court determines that Moore is qualified to testify with respect to any of these claims, the court should set aside its judgment with respect to those claims under Rule 54(b) and conduct further proceedings.

## II. Exclusion of robotic surgery evidence

¶ 16 Smith next argues that the trial court erred by excluding under Rule 403 of the Rules of Evidence proposed testimony and various other evidence concerning Novant’s policies and practices for the use of the shoulder supports during robotic surgery.

¶ 17 Rule 403 permits a trial court to exclude evidence “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” *State v. Triplett*, 368 N.C. 172, 178, 775 S.E.2d 805, 808–09 (2015). We review a trial court’s Rule 403 analysis for abuse of discretion. *Id.* at 178, 775 S.E.2d at 809. “An abuse of discretion results when the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *Id.* We are without authority to substitute our judgment for that of the trial court. *Little v. Penn Ventilator Co.*, 317 N.C. 206, 218, 345 S.E.2d 204, 218 (1986).

¶ 18 Here, the trial court excluded the robotics evidence under Rule 403 after expressly applying the appropriate balancing test and determining that the evidence was “confusing and also unfairly prejudicial.” This determination was well within the court’s sound discretion. The policies and practices concerning the use of shoulder supports in robotic surgeries differ from those concerning laparoscopic procedures not involving robotics. Undisputed evidence established that robotic surgery poses a

greater risk of a patient sliding during the procedure and, thus, the initial patient positioning in robotic surgery includes the placement of shoulder braces before beginning the surgery. By contrast, in non-robotic laparoscopic surgery, shoulder supports are not used by default. Here, the surgical team resorted to them during the surgery only after Smith unexpectedly began sliding off the operating table. In light of these facts, the trial court's determination that the probative value of the excluded evidence was substantially outweighed by the risk of confusion and unfair prejudice was not an abuse of discretion.

### **Conclusion**

¶ 19 For the reasons discussed above, we affirm the trial court's judgment in part and remand for further proceedings in part.

AFFIRMED IN PART, REMANDED IN PART.

Judges DILLON and INMAN concur.

Report per Rule 30(e).