IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA25-542

Filed 4 November 2026

Randolph County, No. 19CVS000872-750

MAGAN NANCE KALE, Plaintiff,

v.

RAJESH GUPTA, MD, RANDOLPH GASTROENTEROLOGY CENTER, PA, and RANDOLPH HOSPITAL, INC. d/b/a RANDOLPH HOSPITAL, Defendants.

Appeal by Plaintiff from orders entered 31 May 2023 and 6 March 2025 by Judge Vance Bradford Long in Randolph County Superior Court. Heard in the Court of Appeals 10 February 2026.

Brown, Moore & Associates, PLLC, by Matthew Berthold, and Tin Fulton Walker & Owen, PLLC, by Lauren Newton, for Plaintiff-Appellant.

Hall Booth Smith, P.C., by Brenda S. McClearn and Katherine W. Dandy, for Defendant-Appellee Randolph Hospital.

Walker Allen, LLP, by Norman F. Klick, Jr. and Jacob R. Stump, for Defendants-Appellees Rajesh Gupta, M.D. and Randolph Gastroenterology Center, P.A.

CARPENTER, Judge.

Magan Nance Kale ("Plaintiff") appeals after a trial court entered a protective order as to her discovery request in favor of Rajesh Gupta, M.D., Randolph Gastroenterology Center, P.A., and Randolph Hospital, Inc. (collectively, "Defendants"), and granted summary judgment in favor of Defendant Hospital. On

appeal, Plaintiff argues that the trial court erred by: (1) granting the protective order; and (2) granting Defendant Hospital's summary judgment motion. Defendants filed two motions to dismiss the appeal ("MDAs"). After careful review, we affirm in part, reverse in part, and remand.

I. Factual & Procedural Background

This appeal concerns the direct and vicarious liability of medical centers after a doctor allegedly sexually assaulted a patient. On 18 October 2021 and 12 November 2021, Plaintiff served motions to compel documents from Defendant Hospital related to documents about Defendant Gupta, which were reviewed by its credentialing committee. On 29 November 2021, Defendants Gupta and Center filed a motion for a protective order, which the trial court granted in part and denied in part. On 23 February 2023, Defendant Hospital moved for summary judgment, which the trial court also granted. In the light most favorable to Plaintiff, the evidence tended to show the following.

Plaintiff is a nurse at Defendant Hospital, who occasionally worked with Defendant Gupta. On 20 June 2016, Defendant Gupta performed a colonoscopy on Plaintiff at Defendant Hospital. Defendant Hospital did not determine the anesthesia required for Plaintiff's colonoscopy, did not decide that Plaintiff needed a colonoscopy, did not prohibit Defendant Gupta from working in his own practice at Defendant Center, and did not pay Defendant Gupta a wage.

While alone in the recovery room after the colonoscopy, Defendant Gupta touched Plaintiff, who was waking up from anesthesia, with his fingers and mouth. Plaintiff told a nurse about the incident, and the nurse informed Defendant Hospital. The next day, Plaintiff met with Defendant Hospital and the Asheboro Police Department. The police department did not file any charges against Defendant Gupta. Later, Plaintiff began experiencing signs of Post-Traumatic Stress Disorder and sought treatment.

On 18 April 2019, Plaintiff filed a complaint alleging medical malpractice and other tort claims against Defendants. As to Defendant Gupta, Plaintiff asserted claims of negligence, battery, negligent infliction of emotional distress ("NIED"), and intentional infliction of emotional distress ("IIED"). Plaintiff also alleged that Defendant Center was vicariously liable for negligence and battery and directly liable for NIED, IIED, and negligent credentialing, supervision, and retention of Defendant Gupta. Plaintiff further alleged that Defendant Hospital was vicariously liable for negligence and battery and directly liable for negligence, NIED, IIED, and negligent credentialing, supervision, and retention of Defendant Gupta. Plaintiff claimed damages in excess of $25,000.

As to Plaintiff's medical malpractice claims, she included a Rule 9(j) certification as to anticipated Rule 702 issues. Plaintiff also clarified that not all of her claims "allege medical malpractice by a healthcare provider . . . in failing to comply with the applicable standard of care[.]" Rather, the complaint alleged claims

that fall "outside the requirements of Rule 9(j) of the Rules of Civil Procedure[.]" Defendants Gupta and Center answered jointly, denying the claims and pleading the affirmative defenses of contributory negligence, assumption of risk, and failure to mitigate damages. Defendant Hospital answered separately, denying the claims and pleading affirmative defenses, including contributory negligence.

In her response to Rule 9(j) interrogatories from Defendants, Plaintiff disclosed two proposed experts: a healthcare administration consultant who stated that "Dr. Gupta and Randolph Hospital, along with its agent, employees and servants, did not comply with the applicable standards of care[,]" and a medical doctor who opined that "Dr. Gupta did not comply with the applicable standards of care." The medical expert was a gastroenterologist from Florida. In the year prior to Plaintiff's complaint, the medical expert spent eighty-five percent of his time in clinical practice and fifteen percent of his time teaching. The healthcare administration consultant was not a licensed healthcare provider. Nevertheless, he held a graduate degree in hospital administration; had a decades-long career in hospital management and operations; held multiple academic appointments to teach healthcare administration; held various memberships, including with the American College of Healthcare Executives; and published and presented on issues related to healthcare management, including hospital negligence and sexual assault.

During depositions, defense counsel asked Plaintiff, "So you were aware that a lot of the physicians, including Dr. Gupta, were actually not employees of the hospital

at all." Plaintiff responded, "Yes they were not actual employees." Plaintiff further indicated that, as a nurse at Defendant Hospital, she knew that consent forms routinely stated that physicians are "independent" from the hospital.

Plaintiff also inquired about the medical review committee of Defendant Hospital, Defendant Gupta's credentialing, and Defendant Hospital's chaperone policy. An employee of Defendant Hospital stated that, when applying for hospital privileges around 2023, Defendant Gupta completed an application, and the medical staff office "validated his credentials, his experience, his education, references, got everything together, presented it to credentials committee and those physicians reviewed everything, and then they [made] the recommendation to the med exec committee." Additionally, Defendant Hospital re-evaluated Defendant Gupta every two years upon his biannual re-application for hospital privileges, including researching the National Practitioner Data Bank.

Further, Defendant Hospital's expert, a medical doctor, stated that Defendant Hospital did not have a chaperone policy requiring third parties to be present in rooms with patients and physicians and that having a third party present for sensitive exams "was a common practice" but not required. Defendant Hospital's administrative expert also testified that he recommended the presence of a chaperone during sensitive exams. Defendant Hospital's vice president of quality and accreditation testified that the presence of a third party in a patient room during a sensitive exam would likely reduce the chance of sexual misconduct. Plaintiff's

expert, a healthcare administration consultant, testified that hospitals have a duty to care for their patients through a chaperone policy.

Plaintiff served Defendant Hospital with requests for production of documents related to its medical review committee, including "incident reports concerning Dr. Gupta's treatment of patients, employment agreements, and complaints and direct allegations from any person regarding Dr. Gupta, as well as Dr. Gupta's personnel file, credentialing file, and documents relating to Dr. Gupta's training including tests, reports, and grades." When Defendants did not produce the medical review committee documents, Plaintiff filed two motions to compel. Later, Defendants Gupta and Center filed a motion for a protective order.

By an order filed 18 January 2022, the trial court denied Plaintiff's motion to compel in part, finding in relevant part that the credentialing committee was a medical review committee and Defendant Gupta's credentialing file was not discoverable from Defendant Hospital. On 13 January 2023, the trial court granted in part and denied in part Plaintiff's second motion to compel, finding that associated materials from the witness nurse were discoverable but the privilege log from Defendant Hospital was not. Finally, on 31 May 2023, the trial court granted the protective order in favor of Defendants Gupta and Center.

On 23 February 2023, Defendant Hospital moved for summary judgment. It argued that Defendant Gupta was not an agent or employee of Defendant Hospital and that it was not directly negligent. Plaintiff objected and moved to continue the

hearing, contending that the motion was "drastically premature with ongoing and pending discovery[.]"

After a new judge was assigned to the case, Defendant Hospital again moved for summary judgment. It stated that, although it had filed a motion earlier, "Plaintiff requested additional time for discovery, so the motion was never heard." On 6 March 2025, the trial court granted summary judgment as to Defendant Hospital, dismissing Plaintiff's claims against Defendant Hospital with prejudice. On 7 March 2025, Plaintiff timely appealed.

II. Jurisdiction

As an initial matter, we must determine whether we have jurisdiction to review the appeal. Plaintiff argues the trial court's rulings implicate a substantial right absent immediate review because it wrongfully withholds material discovery information and may lead to inconsistent verdicts.

"In most instances, a party has 'no right of immediate appeal from interlocutory orders and judgments.' " *Bartels v. Franklin Operations, LLC*, 288 N.C. App. 193, 195, 885 S.E.2d 357, 359 (2023) (quoting *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990)). "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950).

Interlocutory orders, however, are immediately appealable "when the challenged order affects a substantial right." *Denney v. Wardson Constr., Inc.*, 264 N.C. App. 15, 17, 824 S.E.2d 436, 438 (2019). "A substantial right is a legal right affecting or involving a matter of substance as distinguished from matters of form; a right materially affecting those interests which a [party] is entitled to have preserved and protected by law: a material right." *Pentecostal Pilgrims & Strangers Corp. v. Connor*, 202 N.C. App. 128, 132, 688 S.E.2d 81, 84 (2010) (internal quotation marks and citation omitted).

A. Discovery of Credentialing File

Plaintiff argues that the protective order affects a substantial right because the credentialing file contains highly material information. In an MDA filed 14 October 2025, Defendants Gupta and Center jointly moved to dismiss the appeal, contending that the trial court's grant of a protective order does not affect a substantial right. Plaintiff, however, asserts that this Court should deny the MDA and consider sanctions due to the failure of Defendants Gupta and Center to join Defendant Hospital's earlier MDA.

Interlocutory orders denying discovery can affect a substantial right "(1) 'if the information desired is highly material to a determination of the critical question to be resolved in the case,' and (2) if 'the desired discovery would not have delayed trial or have caused the opposing party any unreasonable annoyance, embarrassment, oppression or undue burden or expense.' " *James v. Bledsoe*, 198 N.C. App. 339, 345,

679 S.E.2d 494, 498 (2009) (quoting *Dworsky v. Travelers Ins. Co.*, 49 N.C. App. 446, 447–48, 271 S.E.2d 522, 523 (1980)). A party, however, is "not entitled to a fishing expedition" to locate the evidence it seeks, and the record must show cause as to "what relevant and material information, if indeed there is any, is sought." *Dworsky*, 49 N.C. App. at 448, 271 S.E.2d at 524.

Here, Defendant Gupta's credentialing file was highly material and would not be unduly burdensome to produce. *See James*, 198 N.C. App. at 343, 679 S.E.2d at 497. A critical issue in this case was whether Defendant Hospital negligently credentialed Defendant Gupta. Thus, Defendant Gupta's credentialing file, which the medical review committee of Defendant Hospital considered in its decision, was highly material. *See id.* at 343, 679 S.E.2d at 497. Further, Defendant Hospital could obtain the credentialing file from its own credentialing committee without undue burden, expense, or delay. *See id.* at 343, 679 S.E.2d at 497. Accordingly, the trial court's protective order denying Plaintiff access to Defendant Gupta's credentialing file affects a substantial right and is therefore immediately appealable. *See James*, 198 N.C. App. at 345, 679 S.E.2d at 498; *Sessions v. Sloane*, 248 N.C. App. 370, 380, 789 S.E.2d 844, 853 (2016). We, therefore, deny Defendants Gupta and Center's MDA.

B. Inconsistent Verdicts

Plaintiff argues that her appeal of the summary judgment order affects a substantial right because it may lead to inconsistent verdicts. On 6 June 2025,

Defendant Hospital filed an MDA asserting that the trial court's grant of summary judgment in favor of Defendant Hospital was not immediately appealable. Plaintiff, however, contends that this Court should deny Defendant Hospital's MDA for lack of proper service and failure to include a good-faith statement.

A challenged order or judgment that creates "a risk of 'inconsistent verdicts,' meaning 'a risk that different fact-finders would reach irreconcilable results when examining the same factual issues a second time[,]' " may entitle a party to immediate appellate review under a substantial right theory. *Doe v. City of Charlotte*, 273 N.C. 10, 21, 848 S.E.2d 1, 10 (2020) (quoting *Denney*, 264 N.C. App. at 19, 824 S.E.2d at 439). Yet, "a party's preference for having all related claims determined during the course of a single proceeding does not rise to the level of a substantial right." *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 79, 711 S.E.2d 185, 190 (2011).

While a party has " 'the substantial right to avoid two separate trials of the same issues . . . avoiding separate trials of different issues is not a substantial right.' " *Id.* at 79, 711 S.E.2d at 190 (quoting *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 7, 362 S.E.2d 812, 816 (1987)). "Issues are the 'same' if the facts relevant to their resolution overlap in such a way as to create a risk that separate litigation of those issues might result in inconsistent verdicts." *Id.* at 79, 711 S.E.2d at 190 (citation omitted). This Court "evaluate[s] the specific proof required to litigate each claim in order to determine whether inconsistent verdicts

might result in the event that we refrained from considering [a party's] appeal on the merits at this time." *Id.* at 81, 711 S.E.2d at 191.

In *Coastal Plains Utilities, Incorporated v. New Hanover County*, the plaintiff alleged several torts, including negligence, against five defendants after construction of a water system. 166 N.C. App. 333, 337–38, 601 S.E.2d 915, 919 (2004). The trial court granted summary judgment as to three defendants, which the plaintiff appealed. *Id.* at 338, 601 S.E.2d at 919. On appeal, we determined that "there [wa]s a potential for inconsistent verdicts[.]" *Id.* at 340, 601 S.E.2d at 920. "Because [the plaintiff] asserts claims based on direct liability as well as respondeat superior, subsequent trials would not be limited to the issue whether a master-servant or principal-agent relationship existed." *Id.* at 339, 601 S.E.2d at 920. "For example, in a trial against [one defendant], a jury could find that [the plaintiff's] damages resulted from [another defendant], while the jury in a second trial could find that the damages arose out of an unrelated deterioration to the [plaintiff's] system." *Id.* at 340, 601 S.E.2d at 920. Accordingly, this Court concluded that the appeal implicated a substantial right because of the possibility of inconsistent verdicts. *Id.* at 340, 601 S.E.2d at 920.

In this case, Plaintiff faces the possibility of inconsistent verdicts. *See Doe*, 273 N.C. at 21, 848 S.E.2d at 10. The factual issues underlying Plaintiff's claims against Defendants Gupta, Center, and Hospital substantially overlap. *See Hamilton*, 212 N.C. App. at 79, 711 S.E.2d at 190. Moreover, because Plaintiff's complaint includes

claims related to the direct and vicarious liability of Defendant Hospital, the jury in a second trial could find the issue of liability differently. *See Coastal Plains Utils., Inc.*, 166 N.C. App. at 340, 601 S.E.2d at 920. Thus, the summary judgment order implicates a substantial right. *See Denney*, 264 N.C. App. at 17, 824 S.E.2d at 438. We, therefore, deny Defendant Hospital's MDA.

III. Issues

The issues on appeal are whether the trial court erred by: (1) entering a protective order for Defendant Gupta's credentialing file; and (2) granting Defendant Hospital's summary judgment motion.

IV. Analysis

A. Protective Order

Plaintiff first argues that the trial court erred in concluding that Defendant Gupta's credentialing file was privileged because Defendant Gupta, not the credentialing committee of Defendant Hospital, created the file. We disagree.

"It is 'well established that orders regarding discovery matters are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of that discretion.' " *Windman v. Britthaven, Inc.*, 173 N.C. App. 630, 632, 619 S.E.2d 522, 524 (2005) (quoting *Velez v. Dick Keffer Pontiac-GMC Truck, Inc.*, 144 N.C. App. 589, 595, 551 S.E.2d 873, 877 (2001)). Yet, "on appeal from a trial court's discovery order implicating the medical review privilege, this Court reviews de novo whether

the requested documents are privileged under N.C. Gen. Stat. § 131E-95(b)." *Hammond v. Saini*, 229 N.C. App. 359, 365, 748 S.E.2d 585, 589 (2013) (cleaned up).

Under North Carolina law, a medical review committee is "formed for the purpose of evaluating the quality, cost of, or necessity for hospitalization or health care, including medical staff credentialing" and is "created by the governing board or medical staff of the hospital or system or operating under written procedures adopted by the governing board of medical staff of the hospital or system." N.C. Gen. Stat. § 131E-76(5)(c) (2025). Discovery of materials considered by a medical review committee is limited:

> The proceedings of a medical review committee, the records and materials it produces *and the materials it considers* shall be confidential . . . and shall not be subject to discovery or introduction into evidence in any civil action against a hospital . . . which results from matters which are the subject of evaluation and review by the committee.

Id. § 131E-95(b) (2025) (emphasis added). "However, information, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee." *Id.*

In *Shelton*, the trial court quashed the plaintiffs' subpoena to a credentialing committee for direct complaints and allegations of misbehavior against two doctors, disciplinary investigations, credential evaluations, incident reports, and the minutes taken from meetings of the executive committee and board of trustees about the doctors. *Shelton v. Morehead Mem'l Hosp.*, 318 N.C. 76, 88, 347 S.E.2d 824, 832

(1986). On one hand, this Court concluded that the trial court erred in "quashing the subpoena" commanding the production of documents related to complaints, incident reports, and meetings of the board of trustees. *Id.* at 88, 347 S.E.2d at 832. On the other hand, we determined that the credential evaluations and executive committee meeting minutes were not discoverable from the committee. *Id.* at 88, 347 S.E.2d at 832.

Here, Defendant Hospital's credentialing committee was a medical review committee. *See* N.C. Gen. Stat. § 131E-76(5)(c). Defendant Hospital created the committee for medical staff credentialing, and the committee adopted written procedures. *See id.* Accordingly, Defendant Hospital qualified for the medical review committee privilege. *See id.* § 131E-95(b).

Like *Shelton*, Defendant Gupta's credentialing file was not discoverable from Defendant Hospital in this civil action against Defendant Hospital. *See Shelton*, 318 N.C. at 83–84, 347 S.E.2d at 829. While the credentialing committee did not create Defendant Gupta's credentialing file, the file was created for the committee's consideration, and it was considered by the committee for credentialing purposes, which protected it from discovery. *See* N.C. Gen. Stat. § 131E-95(b). Indeed, when Defendant Gupta completed an application for hospital privileges, the medical staff office "validated his credentials, his experience, his education, references, got everything together, presented it to credentials committee and those physicians reviewed everything, and then they [made] the recommendation to the med exec

committee." The trial court, therefore, properly found that the credentialing file was privileged and not discoverable from Defendant Hospital. *See id.*

B. Summary Judgment

Plaintiff next asserts that the trial court erred by granting Defendant Hospital's motion for summary judgment because genuine disputes of material fact remain regarding Defendant Hospital's negligence and Defendant Hospital's vicarious liability for intentional torts outside the scope of Rule 9(j).[1] Defendant Hospital, however, responds that Plaintiff did not proffer a reasonably qualified Rule 9(j) witness to testify about its standards of care. We address each in turn.

1. Standard of Review

We review a trial court's order granting summary judgment de novo. *N.C. Farm Bureau Mut. Ins. Co. v. Simpson*, 198 N.C. App. 190, 191, 678 S.E.2d 753, 754 (2009). " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

Summary judgment is appropriate when "there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2025). In a motion for summary judgment, the trial

[1] We note Plaintiff's claims of emotional distress against Defendant Hospital are abandoned. *See* N.C. R. App. P. 28(b)(6) (2025).

court "must view the presented evidence in a light most favorable to the nonmoving party." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001). To raise a "genuine issue of material fact," the opposing party must forecast "substantial evidence" that a " 'reasonable mind might accept as adequate to support a conclusion' and means 'more than a scintilla or a permissible inference.' " *United Cmty. Bank (Georgia) v. Wolfe*, 369 N.C. 555, 558, 799 S.E.2d 269, 271 (2017) (quoting *Ussery v. Branch Banking & Tr.*, 368 N.C. 325, 335, 777 S.E.2d 272, 278–79 (2015)). Yet, evidence raising only "speculation or conjecture is insufficient as a matter of law to withstand summary judgment." *Curlee by & through Becerra v. Johnson*, 270 N.C. App. 657, 664, 842 S.E.2d 604, 609 (2020) (citing *Estate of Tipton v. Delta Sigma Phi*, 264 N.C. App. 313, 321–22, 826 S.E.2d 226, 233 (2019)).

2. Claims Subject to Rule 9(j)

Plaintiff contends her medical malpractice claims against Defendant Hospital are not subject to Rule 9(j) because they are corporate or administrative negligence claims. We disagree. In the alternative, Plaintiff argues her non-medical expert met her burden under Rule 9(j) as to her corporate and administrative negligence claims. We agree.

In 2011, the General Assembly amended Section 90-21.11 to expand the definition of medical malpractice to include corporate or administrative negligence claims against hospitals. *See Estate of Savino v. Charlotte-Mecklenburg Hosp. Authority*, 375 N.C. 288, 295–96, 847 S.E.2d 677, 683 (2020). Following the

amendment, there now exist two types of medical malpractice. First, section 90-21.11(2)(a) provides for a "civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider." N.C. Gen. Stat. § 90-21.11(2)(a) (2025). Second, section 90-21.11(2)(b) provides for corporate or administrative claims:

> A civil action against a hospital . . . for damages for personal injury or death, when the civil action . . . alleges a breach of administrative or corporate duties to the patient, including, but not limited to, allegations of negligent credentialing or negligent monitoring and supervision and . . . arises from the same facts or circumstances as a claim under [Section 90-21.11(2)(a)] . . . ."

Id. § 90-21.11(2)(b).

For both types of medical malpractice claims under sections 90-21.11(2)(a), (b), our General Assembly set forth the applicable standard of care:

> [I]n any medical malpractice action as defined in [section] 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; or in the case of a medical malpractice action as defined in [section] 90-21.11(2)(b), 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 action or inaction of such health care provider was not in accordance with the

> standards of practice among similar health care providers 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.

Id. § 90-21.12.

Under Rule 9(j) of the North Carolina Rules of Civil Procedure, "[a]ny complaint alleging medical malpractice by a health care provider [under section 90-21.11(2)(a)] in failing to comply with the applicable standard of care . . . shall be dismissed unless:"

> The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have 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.

N.C. Gen. Stat. § 1A-1, Rule 9(j)(1) (2025). Notwithstanding the text of Rule 9(j), our Supreme Court has concluded, "Since the 2011 amendment, claims of administrative negligence against hospitals . . . that arise from the same facts and circumstances as a claim for furnishing or failing to furnish professional health services have been classified as medical malpractice suits . . . ." *Estate of Savino*, 375 N.C. at 296, 847 S.E.2d at 683. Therefore, even those medical malpractice claims under section 90-21.11(2)(b) "are required to adhere to the much more detailed requirements of . . . Rule 9(j) . . . ." *Id.* at 296–97, 847 S.E.2d at 683. In other words, for all medical malpractice claims, "Rule 9(j) serves as a gatekeeper, enacted by the legislature, to

prevent frivolous malpractice claims by requiring expert review *before* filing of the action." *Moore v. Proper*, 366 N.C. 25, 31, 726 S.E.2d 812, 817 (2012) (citation omitted and emphasis in original).

Under Rule 702 of the Rules of Evidence, "[i]n a medical malpractice action as defined in [section] 90-21.11, a person shall not give expert testimony on the appropriate standard of health care . . . unless the person is a licensed health care provider in this State or another state and meets the following criteria:"

> 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 . . . [t]he active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony or offered . . .; or [t]he instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession . . . .

N.C. Gen. Stat. § 8C-1, Rule 702(b)(2) (2025). Nonetheless, Rule 702(h) further provides:

> Notwithstanding subsection (b) of this section, in a medical malpractice action as defined in [section 90-21.11(2)(b)] against a hospital, or other health care or medical facility, a person shall not give expert testimony on the appropriate standard of care as to administrative or other nonclinical issues unless 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.

Id. § 8C-1, Rule 702(h).

Here, Plaintiff's medical malpractice claims against Defendant Hospital, albeit corporate or administrative, were subject to Rule 9(j). *See Estate of Savino*, 375 N.C. at 296, 847 S.E.2d at 683. Nevertheless, Plaintiff reasonably expected her non-medical expert to qualify under Rule 702(h) for both of her corporate or administrative negligence claims, including negligent credentialing, supervision, and retention, and the failure to have a hospital chaperone policy. *See* N.C. Gen. Stat. §§ 1A-1, Rule 9(j)(1); 8C-1, Rule 702(h).

Plaintiff's non-medical expert was a healthcare administration consultant who testified about corporate and administrative duties of hospitals and their staff under section 90-21.11(2)(b). *See id.* § 8C-1, Rule 702(h). Further, Plaintiff's non-medical expert possessed substantial knowledge, by virtue of his training and experience of a similarly situated hospital's standard of care. *See id.* Specifically, Plaintiff's non-medical expert: held a graduate degree in hospital administration; had a decades-long career in hospital management and operations; held multiple academic appointments to teach healthcare administration; held various memberships, including with the American College of Healthcare Executives; and published and presented on issues related to healthcare management, including hospital negligence and sexual assault. Moreover, Plaintiff's non-medical expert had a lengthy career in hospital consulting, which included operational consulting, strategic planning, risk

prevention, managed care strategies, and hospital-physician relationships.

Defendant Hospital briefly asserts that Plaintiff's non-medical expert could not testify to Defendant Hospital's alleged negligence for its failure to have a chaperone policy. Defendant Hospital relies on *Deal v. Frye Reg'l Med. Cntr, Inc.*, 202 N.C. App. 584, 691 S.E.2d 132 (2010) (unpublished) for support. In *Deal*, this Court held that the implementation of a fall prevention policy was a clinical matter rather than a corporate or administrative one because the policy required nurses to assess patient fall risk based on a series of medical factors, such as vision impairment, disorientation, and neurological deficits. *See id.* at __, 691 S.E.2d at __.

Defendant Hospital's assertion is unavailing. The chaperone policy at issue in this case would simply require determination of whether a patient is sedated or undergoing a sensitive exam, both of which could be determined by observing a patient. Such a chaperone policy requires no clinical assessment or specialized medical knowledge. *See Lewis v. Setty*, 130 N.C. App. 606, 608, 503 S.E.2d 673, 674 (1998) (concluding that a physician's failure to properly lower a patient's bed when transferring the patient to a wheelchair required no clinical assessment or medical knowledge); *Norris v. Rowan Mem'l Hosp., Inc.*, 21 N.C. App. 623, 626, 205 S.E.2d 345, 347–48 (1974) (concluding that a nurse's failure to follow a hospital's mandatory fall prevention policy, requiring the bed rails of sedated patients over the age of sixty to be raised, required no clinical assessment). Thus, Plaintiff could reasonably expect her non-medical expert qualify and testify that Defendant Hospital was negligent for

its failure to have a chaperone policy.

Accordingly, Plaintiff's corporate and administrative negligence claims against Defendant Hospital were subject to Rule 9(j). *See Estate of Savino*, 375 N.C. at 296, 847 S.E.2d at 683. Plaintiff's non-medical expert met Rule 9(j) and Rule 702(h) requirements. *See* N.C. Gen. Stat. §§ 1A-1, Rule 9(j)(1), 8C-1, Rule 702(h). Thus, Plaintiff met her burden under Rule 9(j) to provide an expert witness as to her corporate or administrative negligence claims. *See id.*

a. Plaintiff's Direct Liability in Negligence Claims

Now, we turn specifically to Plaintiff's direct corporate and administrative negligence claims against Defendant Hospital. Plaintiff contends genuine issues of material fact existed as to whether Defendant Hospital was directly liable for negligent credentialing, supervision, and retention, and failing to follow the statutory standard of care in section 90-21.12 by not having in place a hospital chaperone policy. We agree in part.

i. Negligent Credentialing, Supervision, and Retention

Negligent credentialing, supervision, and retention is a corporate or administrative claim under section 90-21.11(2)(b). *See* N.C. Gen. Stat. § 90-21.11(2)(b). "[I]n certain limited situations an employer may be held liable for the negligence of its independent contractor. Such a claim is not based upon vicarious liability, but rather is a direct claim against the employer based upon the actionable

negligence of the employer in negligently hiring a third party." *Little v. Omega Meats I, Inc.*, 171 N.C. App. 583, 586, 615 S.E.2d 45, 48 (2005) (citations omitted). A plaintiff must prove five elements to prevail on a negligent credentialing, supervision, and retention claim against a hospital: (1) the hospital owes a legal duty to the injured party; (2) " 'the independent contractor acted negligently,' " (3) " 'he was incompetent at the time of hiring, as manifested either by inherent unfitness or previous specific acts of negligence,' " (4) " 'the [hospital] had notice, either actual or constructive, of this incompetence,' " and (5) " 'the plaintiff's injury was the proximate result of this incompetence.' " *See id.* at 586–87, 615 S.E.2d at 48 (quoting *Kinsey v. Spann*, 139 N.C. App. 370, 377, 533 S.E.2d 487, 493 (2000)).

Here, Plaintiff did not forecast substantial evidence, *see United Cmty. Bank (Georgia)*, 369 N.C. at 558–59, 799 S.E.2d at 271–72, that Defendant Hospital had constructive or actual notice of Defendant Gupta's alleged incompetence or previous acts of negligence, *see Kinsey*, 139 N.C. App. at 370, 533 S.E.2d at 493. The record reveals Defendant Hospital investigated Defendant Gupta's credentials and qualifications upon granting him hospital privileges in 1999. Defendant Hospital re-evaluated Defendant Gupta every two years upon his biannual re-application for hospital privileges. Defendant Hospital further researched the National Practitioner Data Bank biannually and found no reports of misconduct against Defendant Gupta. Furthermore, excluding Plaintiff's allegations, Defendant Hospital received no allegations of sexual misconduct or otherwise inappropriate behavior against

Defendant Gupta from patients. Moreover, Plaintiff's non-medical expert testified that, based on information available to him, there were no prior allegations of misconduct against Defendant Gupta, and Defendant Hospital did not have advance notice that Defendant Gupta could be a sexual predator.

Because Plaintiff did not forecast substantial evidence, *see United Cmty. Bank (Georgia)*, 369 N.C. at 558–59, 799 S.E.2d at 271–72, that Defendant Hospital had constructive or actual notice of Defendant Gupta's alleged incompetence or previous acts of negligence, *see Kinsey*, 139 N.C. App. at 370, 533 S.E.2d at 493, no genuine issue of material fact existed as to Defendant Hospital's credentialing, supervision, or retention of Defendant Gupta, *see* N.C. Gen. Stat. § 1A-1, Rule 56(c). Accordingly, the trial court did not err in granting summary judgment in favor of Defendant Hospital on Plaintiff's claim of negligent credentialing, supervision, or retention.

ii. Hospital Chaperone Policy

In a medical malpractice action, a plaintiff must prove the prima facie elements of negligence: "(1) the applicable standard of care; (2) a breach of such standard of care by the defendant; (3) the injuries suffered by the plaintiff were proximately caused by such breach; and (4) the damages resulting to the plaintiff." *Purvis v. Moses H. Cone Mem'l Hosp. Serv. Corp.*, 175 N.C. App. 474, 477, 624 S.E.2d 380, 383 (2006) (internal quotation marks and citation omitted). When a plaintiff alleges that a hospital breached its corporate or administrative duties under section 90-21.11(2)(b), the applicable standard of care provides that a:

> defendant [hospital] shall not be liable for the payment of damages unless the trier of fact finds by the greater weight of the evidence that the action or inaction of such health care provider was not in accordance with the standards of practice among similar health care providers 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).

Here, Plaintiff forecasted substantial evidence to survive summary judgment, *see United Cmty. Bank (Georgia)*, 369 N.C. at 558–59, 799 S.E.2d at 271–72, as to Defendant Hospital's negligence for failing to have in place a hospital chaperone policy, *see Purvis*,175 N.C. App. at 477, 624 S.E.2d at 383. First, Plaintiff's non-medical expert testified as to Defendant Hospital's legal duty to Plaintiff and other patients, for which the standard is set forth in Section 90-21.12. *See* N.C. Gen. Stat. § 90-21.12(a). Plaintiff's non-medical expert testified that it was common for hospitals to have sexual misconduct prevention policies, including chaperone policies. Furthermore, Plaintiff testified that Defendant Hospital used chaperones, at least sometimes, during sensitive examinations. Moreover, Defendant Hospital's administrative expert testified that he recommended the presence of a chaperone during sensitive exams.

Second, Plaintiff alleged Defendant Hospital breached the legal duty owed to her by failing to have a chaperone policy in place. Third, Plaintiff alleged Defendant Hospital's breach of duty proximately caused her injuries. Further, Defendant

Hospital's vice president of quality and accreditation testified that the presence of a third party in a patient room during a sensitive exam would likely reduce the chance of sexual misconduct. Fourth, Plaintiff alleged and submitted evidence of her damages, including expert testimony as to her mental and emotional damages.

Because Plaintiff forecasted substantial evidence, *see United Cmty. Bank (Georgia)*, 369 N.C. at 558–59, 799 S.E.2d at 271–72, that Defendant Hospital had a duty to implement a hospital chaperone policy for sensitive examinations, genuine issues of material fact remain as to the existence of a duty to have a chaperone policy and Defendant Hospital's breach of such duty, if it exists, *see* N.C. Gen. Stat. § 1A-1, Rule 56(c). Accordingly, the trial court erred in granting summary judgment in favor of Defendant Hospital on Plaintiff's claim of negligence for failure to have in place a chaperone policy during sensitive examinations.

b. Plaintiff's Vicarious Liability in Negligence Claim

As to Plaintiff's vicarious liability in negligence claim against Defendant Hospital, Plaintiff argues there was a genuine issue of material fact as to whether Defendant Gupta was an employee or agent of Defendant Hospital. We disagree.

A worker is an employee when the principal "has . . . retained the right of control of superintendence over the contractor or employee as to details . . ." of performance. *Hayes v. Bd. of Trs. of Elon Coll.*, 224 N.C. 11, 15, 29 S.E.2d 137, 140 (1944). For example, if a hospital has an agreement with the physician that it has no control over the methods of surgery, it cannot limit the physician from practicing

outside of the hospital, the physician does not receive compensation from the hospital, and the physician bills the patients separately from the hospital, then the hospital is not vicariously liable under respondeat superior. *See Hylton v. Koontz*, 138 N.C. App. 629, 636–37, 532 S.E.2d 252, 257–58 (2000).

Here, Defendant Hospital did not determine the anesthesia required for Plaintiff's colonoscopy, did not decide that Plaintiff needed a colonoscopy, did not prohibit Defendant Gupta from working in his own practice at Defendant Center, and did not pay Defendant Gupta a wage. *See id.* at 636–37, 532 S.E.2d at 257–58. Furthermore, Plaintiff conceded that she knew Defendant Gupta was not an employee of Defendant Hospital, but rather was "contracted." Thus, Defendant Gupta was not an employee of Defendant Hospital. *See McKenzie v. Charlton*, 262 N.C. App. 410, 412, 822 S.E.2d 159, 161 (2018).

Because Defendant Hospital and Defendant Gupta were not in an employer-employee relationship, the doctrine of respondeat superior does not apply, and Defendant Hospital could not be held vicariously liable on a theory of respondeat superior for Defendant Gupta's alleged negligence. *See McKenzie*, 262 N.C. App. at 412, 822 S.E.2d at 161 (applying respondeat superior only to employees, not independent contractors).

Even if an employer-employee relationship does not exist, a principal-hospital could nonetheless be vicariously liable for the torts of its independent contractor-provider on a theory of apparent agency. *See Peter v. Vullo*, 234 N.C. App. 150, 160,

758 S.E.2d 431, 438 (2014). In this regard, a plaintiff must demonstrate that: "(1) the hospital has held itself out as providing medical services, (2) the plaintiff looked to the hospital rather than the individual medical provider to perform those services, and (3) the [plaintiff] accepted those services in the reasonable belief that the services were being rendered by the hospital or by its employees." *Id.* at 160, 758 S.E.2d at 438.

Here, Plaintiff cannot satisfy the third element of apparent agency because Plaintiff could not "reasonabl[y] belie[ve] that the services were being rendered by [Defendant Hospital] or by its employees." *See id.* at 160, 758 S.E.2d at 438. On the contrary, Plaintiff admitted she knew Defendant Gupta was not an employee of Defendant Hospital. Moreover, Plaintiff admitted her work experience as a nurse at Defendant Hospital made her aware that consent forms routinely provided that physicians were independent from Defendant Hospital. Thus, Plaintiff could not establish she "reasonabl[y] belie[ved] services were being rendered by [Defendant Hospital] or by its employees." *See id.* at 160, 758 S.E.2d at 438.

Plaintiff's concessions that she knew Defendant Gupta was not an employee of Defendant Hospital and that consent forms routinely provided that physicians were independent from Defendant Hospital rendered her belief *unreasonable* as to apparent agency, *see id.* at 160, 758 S.E.2d at 438, such that Defendant Hospital could not be vicariously liable on a theory of apparent agency for Defendant Gupta's alleged negligence, *see id.* at 160, 758 S.E.2d at 438.

Accordingly, Plaintiff failed to establish that Defendant Hospital was liable on a theory of respondeat superior, *see McKenzie*, 262 N.C. App. at 412, 822 S.E.2d at 161, or apparent agency, *see Vullo*, 234 N.C. App. at 160, 758 S.E.2d at 438. Thus, the trial court did not err when it granted summary judgment in favor of Defendant Hospital on Plaintiff's vicarious liability in negligence claim.

3. Claims Not Subject to Rule 9(j)

Unlike Plaintiff's direct and vicarious liability in negligence claims against Defendant Hospital, Plaintiff's vicarious liability claim of battery against Defendant Hospital is not a medical malpractice action within the meaning of Section 90-21.11, and, thus, is not subject to Rule 9(j) requirements.

A battery exists where a defendant intentionally causes harmful or offensive contact with the person of the plaintiff. *See Wilson v. Bellamy*, 105 N.C. App. 446, 465, 414 S.E.2d 347, 357–58 (1992) (citation omitted). While section 90-21.11(b) defines medical malpractice against a hospital as "a breach of administrative or corporate duties to the patient . . . aris[ing] from the same facts or circumstances as a claim under [Section 90-21.11(2)(a)]," *see* N.C. Gen. Stat. § 90-21.11(2)(b), Defendant Gupta's alleged battery of Plaintiff could not have "arise[n] out of the furnishing or failure to furnish professional services in the performance of medical . . . care," *see id.* § 90-21.11(2)(a).

On the contrary, Defendant Gupta's alleged battery was not a "professional service." *See id.* § 90-21.11(2)(a). Although section 90-21.11 does not define

"professional services," "[o]ur courts have classified as medical malpractice those claims alleging injury resulting from activity that required clinical judgment and intellectual skill." *Gause v. New Hanover Reg'l Med. Ctr.*, 251 N.C. App. 413, 418, 795 S.E.2d 411, 415 (2016) (citing *Sturgill v. Ashe Mem'l Hosp., Inc.*, 186 N.C. App. 624, 630, 652 S.E.2d 302, 306 (2007); *Alston v. Granville Health Sys.*, 221 N.C. App. 416, 421, 727 S.E.2d 877, 881 (2012)). Defendant Gupta's purported nonconsensual, offensive, harmful, and sexual touching of Plaintiff required no clinical judgment or intellectual skill. *See id.* at 418, 795 S.E.2d at 415; *Bellamy*, 105 N.C. App. at 465, 414 S.E.2d at 57–58. Thus, Plaintiff's vicarious battery claim against Defendant Hospital could not have arisen from the same facts or circumstances as her claim under Section 90-21.11(2)(a). *See* N.C. Gen. Stat. § 90-21.11(2)(b). Therefore, Plaintiff's battery claim against Defendant Hospital on a theory of vicarious liability does not fall within the meaning of section 90-21.11, and Rule 9(j) does not apply.

We now turn to Plaintiff's final argument that the trial court erred in granting summary judgment in favor of Defendant Hospital on her battery claim because a genuine issue of material fact existed as to whether Defendant Gupta was an employee and/or agent of Defendant Hospital. For the same reasons already stated herein, Plaintiff cannot hold Defendant Hospital vicariously liable for Defendant Gupta's alleged battery on a theory of respondeat superior or apparent agency.

Accordingly, although Plaintiff's battery claim on a theory of vicarious liability against Defendant Hospital was outside the scope of Rule 9(j), *see id.* § 90-21.11,

Plaintiff nonetheless failed to establish that Defendant Hospital was vicariously liable on a theory of respondeat superior, *see McKenzie*, 262 N.C. App. at 412, 822 S.E.2d at 161, or apparent agency, *see Vullo*, 234 N.C. App. at 160, 758 S.E.2d at 438. Thus, the trial court did not err when it granted summary judgment in favor of Defendant Hospital on Plaintiff's vicarious liability battery claim.

V. Conclusion

In sum, we deny the MDAs because the summary judgment and protective orders affect a substantial right. For reasons stated herein, the trial court did not err in entering the protective order. We further conclude the trial court erred in part by granting summary judgment on Plaintiff's claim that Defendant Hospital was negligent by failing to have in place a hospital chaperone policy during sensitive examinations.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judge GORE concurs.

Judge ARROWOOD concurs by separate opinion.

No. COA25-542 – *Kale v. Gupta*

ARROWOOD, Judge, concurring.

I concur with denying the MDAs and affirming in part and reversing in part the trial court's order granting summary judgment to Defendant Hospital. Additionally, I concur with the decision to affirm the trial court's protective order. However, I write separately to emphasize that Defendant Gupta's credentialing file is discoverable through other means.

I agree that Defendant Hospital qualified for the medical review committee privilege under N.C.G.S. § 131E-95(b). I also agree that the privilege plainly applies to materials that a medical review committee produces and considers. Accordingly, under this Court's precedent, a plaintiff may not discover those materials from the committee itself. *See Estate of Ray v. Forgy*, 245 N.C. App. 430, 440–42, n.1 (2016). However, § 131E-95(b) has an exception stating that "information, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee."

In *Shelton*, our Supreme Court interpreted that exception to mean that "information, in whatever form available, from original sources other than the medical review committee is not immune from discovery or use at trial merely because it was presented during medical review committee proceedings." *Shelton v. Morehead Mem'l Hosp.*, 318 N.C. 76, 83 (1986). The Court further held that "[p]ermitting access to information not generated by the committee itself but merely presented to it does not impinge on [§ 131E-95(b)'s] purpose" of promoting "candor

and objectivity in the internal workings of medical review boards." *Id.* Thus, "[t]hese kinds of materials may be discovered and used in evidence even though they were considered by the medical review committee." *Id.* In delineating what documents were covered by the statute, the Court expressly held "[s]ection 95 offers no protection to the records and documents furnished by the individual physicians in their applications for hospital privileges." *Id.* at 87.

Here, plaintiff sought Defendant Gupta's entire credentialing file from the Defendant Hospital. The trial court was correct to conclude that because the credentialing file was considered by the Defendant Hospital's medical review committee, it was privileged and not discoverable through Defendant Hospital.

However, any materials within the credentialing file prepared by Defendant Gupta himself, or originating from any other source outside of the medical review committee, are discoverable through that original source and may be admissible at trial. The trial court recognized as much during the hearings on the protective order, stating that the materials may be discoverable from Dr. Gupta. The protective order issued by the trial court applied only to "Dr. Gupta's credentialing file at Randolph Hospital." Because the protective order was so limited and left room for plaintiff to obtain otherwise discoverable materials through other means, I agree that the trial court did not err in its discovery rulings.

In sum, I concur with the decision to affirm the trial court's orders denying plaintiff's motion to compel and issuing a protective order with respect to Dr. Gupta's

credentialing file at Defendant Hospital, and further concur in affirming in part and reversing in part the summary judgment order for the reasons stated by the majority. I only emphasize that the materials originating from sources outside of the medical review committee, including Dr. Gupta, are discoverable through those original sources.