IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA25-936

Filed 4 November 2026

Wake County, No. 22CVS015018-910

RYAN FURMAN and ARINA FURMAN, Plaintiffs,

v.

JEANETTE GEROULD, PA-C, and EMERGEORTHO, P.A., Defendants.

Appeal by plaintiffs from order entered 4 February 2025 by Judge James E. Hardin Jr. in Wake County Superior Court. Heard in the Court of Appeals 22 April 2026.

Morse Fritts PLLC, by Spencer S. Fritts and Jacob M. Morse, for plaintiffs-appellants.

Robinson, Bradshaw & Hinson, P.A., by Matthew W. Sawchak, Erik R. Zimmerman, and Caroline H. Reinwald, and Hall Booth Smith, P.C., by Elizabeth P. McCullough and Kelsey Heino, for defendants-appellees.

Ballew Puryear PLLC, by Zachary R. Kaplan and Matthew D. Ballew, for Amicus Curiae North Carolina Advocates for Justice.

GORE, Judge.

This appeal arises from the trial court's order striking plaintiffs' expert affidavit and dismissing plaintiffs' complaint under Rule 9(j). We reverse and remand.

Plaintiffs filed a medical malpractice action alleging defendants failed to

timely diagnose and treat plaintiff's condition. Plaintiffs included a Rule 9(j) certification based upon review by a retained expert. After defendants deposed the expert, plaintiffs submitted an affidavit supplementing the expert's opinion regarding the applicable community standard of care. The trial court struck the affidavit and dismissed the complaint under Rule 9(j).

North Carolina malpractice law requires proof of the applicable standard of care for a health care provider in the same or similar community. N.C.G.S. § 90-21.12(a) (2025). A medical expert must therefore demonstrate familiarity with that community standard. Our courts have recognized an expert who initially lacks familiarity with the relevant community may supplement that knowledge after further review. *See Miller v. Carolina Coast Emergency Physicians, LLC*, 277 N.C. App. 449, 473–74 (2021), *aff'd,* 382 N.C. 91 (2022) (citing *Roush v. Kennon*, 188 N.C. App. 570, 576 (2008)).

Accordingly, the relevant inquiry for purposes of Rule 9(j) is whether, based on the facts and circumstances known or reasonably available at the time of filing, it was reasonable for the plaintiff to expect the proffered expert would qualify to testify at trial under Rule 702. This inquiry may account for the expert's ability to supplement familiarity with the applicable community standard after further review. *Miller*, 277 N.C. App. at 473–74.

Defendants contend the expert's later affidavit should have been stricken under the sham-affidavit rule. It is true that a party may not create an issue of fact

by submitting an affidavit that contradicts prior sworn testimony. *See Estate of Dobson v. Sears*, 296 N.C. App. 452, 459 (2024). In *Dobson*, however, the affidavit contradicted the expert's earlier deposition testimony concerning the basis and timing of the expert's opinions. Here, by contrast, the affidavit reflects additional research undertaken after the deposition to evaluate the applicable Raleigh community standard of care and confirms that the expert's opinion remained unchanged after that review. The affidavit therefore supplements, rather than contradicts, the expert's prior testimony.

Because our courts have recognized an expert may supplement earlier testimony regarding familiarity with the relevant community after further review, *see Miller*, 277 N.C. App. at 473–74, the affidavit does not implicate the concerns underlying the sham-affidavit rule. The trial court therefore erred in striking the affidavit and dismissing plaintiffs' complaint under Rule 9(j). The order of the trial court is reversed, and the matter is remanded for further proceedings.

Because the admissibility of expert testimony under Rule 702 depends on the expert's testimony taken as a whole, *see Kearney v. Bolling*, 242 N.C. App. 67, 76 (2015), and the trial court did not consider the affidavit we hold was improperly stricken, we decline to address the parties' Rule 702 arguments.

REVERSED AND REMANDED.

Judges TYSON and COLLINS concur.