

No. 558PA07

TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

KENNETH WAYNE WEAVER and)
ANN WEAVER)

v)

From Wake

CHARLES MICHAEL SHEPPA,)
M.D., LESLIE PATRICIA)
MARSHALL, M.D., AND)
RALEIGH EMERGENCY MEDICINE)
ASSOCIATES, INC.)

PETITION FOR DISCRETIONARY REVIEW
UNDER G.S. 7A-31

(Filed 19 November 2007)
(Allowed 24 January 2008)

INDEX

STATEMENT OF THE CASE.....2
STATEMENT OF THE FACTS.....3
REASON WHY CERTIFICATION SHOULD ISSUE.....6
I. Physicians Who Specialize in Emergency
Medicine Or Neurology May Not Testify as
to What a Neurosurgeon Would Have Done,
If Consulted, Nor May They Testify to
the Effects of Neurosurgery, When the
Subject Matter of That Testimony is
Outside the Scope of the Witness's
Expertise.....6
II. The Opinion in This Case Contradicts
Prior Decisions of the Court of Appeals
Which Held That Proximate Cause is Not
Established in a Case of Alleged Medical
Negligence By a Mere Showing That
Different Treatment Would Likely Have
Improved the Outcome For the Patient.....13
CONCLUSION.....16
ISSUES TO BE BRIEFED.....16
I. Whether a Physician Who Specializes in
Emergency Medicine or Neurology May
Testify as to What a Neurosurgeon Would
Have Done, If Consulted, and the Effects
of Neurosurgery, When the Subject Matter
of That Testimony is Outside the Scope
of the Witness's Expertise.....16
II. Whether Proximate Cause is Established
in a Case of Alleged Medical Negligence
By A Showing That Different Treatment
Would Have Likely Improved the Patient's
Outcome.....16
CERTIFICATE OF SERVICE.....18
APPENDIX.....APP. 1

TABLE OF CASES AND AUTHORITIES

Cases

Ballenger v. Burris Industries, Inc., 66 N.C. App. 556, 311 S.E.2d 881 (1984) 10

Ballenger v. Crowell, 38 N.C. App. 50, 247 S.E.2d 287 (1978) 9

Evans v. Appert, 91 N.C. App. 362, 372 S.E.2d 94, 1988) 9

Johnson v. Piggly Wiggly of Pinetops, Inc., 156 N.C. App. 42, 575 S.E.2d 797 (2003) 7

Miller v. Forsyth Memorial Hosp., Inc., 173 N.C.App. 385, 618 S.E.2d 838 (2005) 9

Norman v. Branner, 171 N.C. App. 515, 615 S.E.2d 738, 2005 WL 1669128 15

State v. Fuller, 166 N.C.App. 548, 603 S.E.2d 569 (2004) 9

Weaver v. Sheppa, ___ N.C. App. ___, 651 S.E.2d 395 (2007) 7, 10

Statutes

N.C. Gen. Stat. §8C-1, Rule 702..... 8

No. 528A07

TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

KENNETH WAYNE WEAVER & ANN WEAVER,
Plaintiffs-Respondents,

vs.

CHARLES MICHAEL SHEPPA, M.D.,
LESLIE PATRICIA MARSHALL, M.D.,
AND RALEIGH EMERGENCY MEDICINE
ASSOCIATES, INC.,
Defendants-Petitioners.

From Wake County
COA 07-52

CHARLES MICHAEL SHEPPA, M.D., ET AL.'S
PETITION FOR DISCRETIONARY REVIEW
UNDER G.S. §7A-31

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Defendants Charles Michael Sheppa, M.D., et al. respectfully petition the Supreme Court of North Carolina to certify for discretionary review the judgment of the North Carolina Court of Appeals, filed on October 16, 2007, reversing the trial court's entry of Judgment Not Withstanding the Verdict in favor of Charles Michael Sheppa, M.D., et al.

Defendants petition this Court on the grounds that the decision of the Court of Appeals involves legal principles of major significance to the jurisprudence of this State. Petitioners recognize that it is rare that this Court selects civil cases for discretionary review. However, when the ruling of

the Court of Appeals contradicts existing case law which establishes the standards by which an expert witness may provide testimony in medical malpractice litigation and the standards for demonstrating proximate cause, Petitioners submit this Court should review this case and clearly establish the law on this matter.

In support of this petition, Defendants show the following:

STATEMENT OF THE CASE

Plaintiffs-Respondents Kenneth Wayne Weaver (hereinafter "Mr. Weaver") and Ann Weaver filed an Amended Complaint in this action alleging medical malpractice on July 2, 2003, against Defendants-Petitioners Charles Michael Sheppa, M.D., Leslie Patricia Marshall, M.D., and Raleigh Emergency Medicine Associates, Inc. ("Defendants"). Other Defendants were originally included in this action, but they were later dismissed.

In the Amended Complaint the plaintiffs alleged negligent delay in ordering an MRI and/or obtaining a consult with a neurosurgeon. (R. pp. 8-27). The case was tried at the April 3, 2006, session of Civil Superior Court in Wake County before a jury and before the Honorable A. Leon Stanback, Jr., Judge Presiding. (R. p. 1). On April 18, 2006, the jury was discharged after failing to reach a unanimous verdict. On April 26, 2006, Defendants filed a Motion for Judgment Notwithstanding the

Verdict/Renewal of Motion for Directed Verdict, pursuant to Rule 50(b)(1) of the North Carolina Rules of Civil Procedure. (R. pp. 64-71). Plaintiffs filed a Reply to said motion on July 10, 2006. (R. pp. 72-100). On July 24, 2006, an Order and Judgment granting a JNOV was entered by the Court. (R. pp. 101-02).

Plaintiffs filed a Notice of Appeal on July 28, 2006 (R. pp. 103-04), and designated their transcript portions on August 11, 2006 (R. pp. 105-07). The Court of Appeals heard the plaintiffs' appeal on August 27, 2007. The Court of Appeals in a 3-0 decision reversed the trial court's Order and Judgment granting a JNOV on October 16, 2007. The Court of Appeals mandate was issued on November 5, 2007. Defendants-Petitioners now respectfully file their Petition for Discretionary Review.

STATEMENT OF THE FACTS

Mr. Weaver was 52 years old (R. p. 8) when he presented to Dr. Sheppa at Rex Hospital's emergency room ("ER") on Friday, September 29, 2000, with complaints of back soreness which had begun the preceding day and had significantly worsened overnight. (R. p. 22). Dr. Sheppa examined Mr. Weaver and noted that he had normal muscle strength in his arms and legs. Dr. Sheppa found motor and sensory function to be intact. However, when Dr. Sheppa observed Mr. Weaver walk, he noted that he had a "wobbly gait" because of the pain in his back. (R. pp. 14, 36-37).

Dr. Sheppa ordered lab work and radiographic studies, including a cervical spine film. (R. p. 36). These tests, along with clinical data, allowed Dr. Sheppa to rule out the possibility that Mr. Weaver was suffering from a myocardial infarction or a thoracic aortic aneurysm, but those tests did not definitively diagnose or rule out a herniated cervical disc. (R. p. 36). Cervical disc disease was included in Dr. Sheppa's differential diagnosis, but he did not believe that Mr. Weaver's condition required an MRI at that time because there was no evidence of motor weakness. Since Mr. Weaver's symptoms were pain and some limited numbness, Dr. Sheppa felt that it would be appropriate to discharge Mr. Weaver with instructions to follow up with his family physician on the following Monday. (R. p. 16). Dr. Sheppa prescribed pain medication and fitted Mr. Weaver with a soft cervical collar. (R. p. 16). Dr. Sheppa advised Mr. Weaver to return to the ER if his symptoms worsened. (T. Vol. VI, p. 78, lines 1-10).

On the following day, Saturday, September 30, 2000, at 11:06 a.m., Mr. Weaver returned to the ER with continuing complaints of numbness and pain. (R. p. 17). At that time he was seen by Dr. Leslie Marshall, who performed a complete physical examination and ordered a CT scan. (R. pp. 36). After observing Mr. Weaver for approximately four hours, Dr. Marshall decided to discharge him with instructions to keep the appointment which Dr. Sheppa had ordered the previous day. (T. Vol. VI, p. 79, line

19 through p. 80, line 15). However, when Mr. Weaver went to the bathroom before going home, he found that he was unable to support himself with his left leg. Because of this dramatic change in his neurological condition (R. p. 41), Dr. Marshall immediately arranged for Mr. Weaver to be admitted to the hospital and to be seen by Dr. Bowman, a neurologist. (T. Vol. VI, p. 82, lines 8-19). Dr. Bowman concluded that Mr. Weaver had suffered a spinal cord stroke, which proved to be an incorrect diagnosis, and ordered an MRI to be performed on the following Monday. (T. Vol. III, p. 121 line 10 through p. 125, line 2; R. p. 20). This is the very test that Plaintiffs contend that Dr. Sheppa and Dr. Marshall should have ordered on an emergent basis. (R. p. 14, 16, 19).

Mr. Weaver's neurologic status deteriorated on Sunday, October 1, 2000, and an emergent MRI was obtained on that day. The MRI revealed a cervical disc which was pressing on the spinal cord, and spinal cord decompression surgery was performed that evening. (R. p. 21). Mr. Weaver had very little function of his extremities after the surgery, but as time went by he slowly regained significant function. He is now able to walk, drive a car, cook, do chores around the house, and take care of his personal needs. However, there is no dispute that he continues to have impairment of his motor skills, and suffers from pain. (T. Vol. V, p. 99, line 21 through p. 102, line 8; R. p. 26).

REASON WHY CERTIFICATION SHOULD ISSUE

The decision of the Court of Appeals involves legal principles of major significance to the jurisprudence of the State in that it conflicts with the North Carolina Rules of Evidence and other decisions of the Court of Appeals.

I. Physicians Who Specialize in Emergency Medicine Or Neurology May Not Testify as to What a Neurosurgeon Would Have Done, If Consulted, Nor May They Testify to the Effects of Neurosurgery, When the Subject Matter of That Testimony is Outside the Scope of the Witness's Expertise.

In the case at bar, the Court of Appeals concluded that two emergency medicine physicians, Dr. Jackson Allison, and Dr. Gregory Henry and a neurologist, Dr. Bruce Dobkin, who testified on behalf of the plaintiffs, could properly give testimony as to what a neurosurgeon would have done, if consulted earlier, as well as to what impact earlier neurosurgery would have had on Mr. Weaver. In support of that conclusion the Court of Appeals stated:

However, when the challenged expert testimony relates to causation such admitted testimony is competent "as long as the testimony is helpful to the jury and based sufficiently on information reasonably relied upon under Rule 703[.]

Weaver v. Sheppa, __ N.C. App. __, 651 S.E.2d 395, 399 (2007) (quoting Johnson v. Piggly Wiggly of Pinetops, Inc., 156 N.C. App. 42, 49, 575 S.E. 2d 797, 802 (2003)).

While the Court of Appeals relied heavily on Johnson to form its opinion, the issue in that case differs substantially from

the issue in the present action. 156 N.C. App. at 44, 575 S.E.2d at 799.

In Johnson, the question regarding causation dealt with whether stress triggered the plaintiff's outbreak of shingles. The expert witness offering the opinion was a general practitioner who actually treated the plaintiff's shingles. Id. Additionally, there was no dispute concerning the physician's qualifications to testify as to causation. Rather, the issue was whether the language used by the witness demonstrated enough certainty to be helpful to the jury's determination of causation. Id. at 47, 575 S.E.2d at 801. This differs significantly from the issue addressed by the Court of Appeals in the present action.

In the case at bar, the plaintiffs' experts testified as to the steps a neurosurgeon would have taken had one been consulted by the treating physicians. However, the plaintiffs' experts were not neurosurgeons and had never practiced neurosurgery. (T. Vol. II, p. 126, lines 8-23; T. Vol. I, p. 105, lines 5-18). The testimony of these witnesses on the issue of proximate cause fell outside the scope of their qualified expertise.

Rule 702(b) of the North Carolina Rules of Evidence specifically addresses those circumstances in which a physician may offer standard of care opinions in medical malpractice actions. N.C. Gen. Stat § 8C-1, Rule 702(b). Of particular importance is section 702(b)(1)(b), which requires an expert

witness to "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." N.C. Gen. Stat. §8C-1, Rule 702(b)(1). The rationale for requiring medical experts to possess certain expertise in order to testify as to standard of care under 702(b) is equally applicable to Rule 702(a). If an emergency medicine physician would be barred by Rule 702(b) from testifying as to what the standard of care required that a neurosurgeon should have done under certain circumstances, can the same witness nevertheless be allowed to testify under Rule 702(a) as to what a neurosurgeon would have done under the same circumstances?

"The essential question in determining the admissibility of opinion evidence [under Rule 702(a)] is whether the witness, through study and experience, has acquired such skill that he is better qualified than the jury to form an opinion as to the subject matter to which his testimony applies." " Miller v. Forsyth Memorial Hosp., Inc., 173 N.C.App. 385, 389, 618 S.E.2d 838, 842 (2005) (upholding a trial court's decision to exclude testimony of an expert in anesthesiology and pain management as to the cause of plaintiff's nerve injury) (quoting State v. Fuller, 166 N.C.App. 548, 560, 603 S.E.2d 569, 578 (2004)). In the context of medical malpractice cases, to ensure the adequacy of expertise and to promote consistency in applying the Rules of Evidence, an expert witness testifying to what a specialist would

do should have expertise equal to that of an expert offering testimony regarding standard of care. The Court of Appeals appears to demonstrate its concurrence with this rationale in Evans v. Appert, 91 N.C. App. 362, 365, 372 S.E.2d 94, 96, rev. denied, 323 N.C. 623, 374 S.E.2d 584 (1988) (citing Ballenger v. Crowell, 38 N.C. App. 50, 54, 247 S.E.2d 287, 291 (1978)).

In Evans, the Courts of Appeals held that a plaintiff in a medical malpractice action must prove by qualified expert testimony that (1) a violation of the applicable standard of care has occurred and (2) the defendant's treatment was a proximate cause of the injury. 91 N.C.App. at 365, 372 S.E.2d at 96 (Emphasis added). If plaintiffs fail to produce evidence of the proper standard of care, that it was breached, and that damages suffered by them were proximately caused by the defendants through a qualified expert, then judgment for the defendants is appropriate. Even in the present action, the Court of Appeals stated "[e]xpert medical witnesses are called to testify on issues of causation in disease or illness for the purpose of giving their expert opinions as to the reasonable scientific certainty of a casual relation or the lack thereof." Weaver, ___ N.C. App. ___, 651 S.E.2d 395, 398 (2007) (citing Ballenger v. Burris Industries, Inc., 66 N.C. App. 556, 557, 311 S.E.2d 881, 887 (1984)). Despite articulating the language in Burris Industries, Inc., and despite its decision in Evans, the Court of Appeals went on to allow emergency medicine expert witnesses to

testify regarding neurosurgical issues, matters that were clearly beyond the scope of their expertise.

In the case at bar, Plaintiffs argued that they had met the burden of establishing proximate cause by offering the testimony of two emergency room physicians and a neurologist, none of whom have ever performed spinal surgery. (T. Vol. II, p. 126, lines 8-23; T. Vol. I, p. 105, lines 5-18). Dr. Gregory L. Henry, an emergency medicine expert for the plaintiffs, properly acknowledged his limited qualifications to offer an opinion as to what a neurosurgeon would or would not have done. He testified only to the applicable standard of care for emergency department physicians, and not to the issue of proximate cause. Dr. Henry said that there was "no deviation in the standard of care on the part of Dr. Marshall that caused harm to Mr. Weaver" (T. Vol. I, p. 97, line 23 through p. 98, line 1) and that his "only criticism of Dr. Sheppa is that he didn't order an MRI." (T. Vol. I, p. 98, lines 16-18). Plaintiffs argued that Dr. Henry's testimony helped them establish the element of proximate cause because he said that on Friday morning, September 29, 2000, Mr. Weaver's symptoms required an immediate MRI evaluation. (T. Vol. I, p. 62, line 21 through p. 63, line 12). However, Dr. Henry did not testify that if an MRI had been done at that time it would have caused a neurosurgeon to operate immediately. In fact, he said that he is not a neurosurgeon (T. Vol. I, p. 105, line 6) and that he would defer to a neurosurgeon about

decisions to perform neurosurgery, and would "not speak to operative timing or technique." (T. Vol. I, p. 105, lines 8-18). Dr. Henry's testimony does not establish proximate cause.

Dr. Bruce Dobkin, a neurologist who testified for the plaintiffs, said that the timing of neurosurgical procedures is in the realm of surgeons rather than that of neurologists. He testified that, "I'm also a neurologist, and . . . this is a neurosurgical emergency, people like this generally get to the orthopedic or neurosurgeon. If they get to me first, it's in an ER situation." (T. Vol. II, p. 125, line 23 through p. 126, line 2). Acknowledging his lack of expertise in neurosurgical matters, Dr. Dobkin further testified that, "neurosurgery and orthopedic surgery" would make the decision to operate in a situation like Mr. Weaver's (T. Vol. II, p. 126, lines 11-14), and that a neurologist's role is limited to "getting the surgeon and saying, you know, I think we need surgery." (T. Vol. II, p. 126, lines 20-22). Dr. Dobkin does not perform surgery and admits that a surgeon rather than a neurologist makes the decision to operate. As with the testimony of Dr. Henry, Dr. Dobkin failed to provide competent evidence that if an MRI had been performed sooner, the result would have been earlier surgery that would have changed the outcome for Mr. Weaver.

Lastly, the plaintiffs offered the testimony of Dr. Earl Jackson Allison, a specialist in emergency medicine. Dr. Allison attempted to testify that if an MRI had been done, "the

neurosurgeon would have come in, patient would have been admitted, gone to immediate surgery." (T. Vol. III, p. 65, lines 19-22). However, this testimony and all attempts by Dr. Allison to testify as to what a neurosurgeon would have done were objected to by defense counsel, and those objections were sustained by Judge Stanback. (T. Vol. III, p. 65, lines 15-24; p. 67, line 9 through p. 68, line 1; p. 68, line 8 through p. 69, line 2; p. 76, lines 11-18). Plaintiffs relied most heavily on Dr. Allison to establish proximate cause by quoting in their Court of Appeals brief the following testimony from Dr. Allison: "This is one where the neurosurgeon would come in, look at the MRI, call the team together, take the patient to the operating suite and decompress his spinal cord. That's the answer." (T. Vol. III, p. 39, lines 18-22). What plaintiffs failed to include was the very next question put to Dr. Allison by plaintiffs' counsel:

Q. If, in fact, an MRI had been ordered when Dr. Sheppa wrote his initial hand written notes cervical disk question mark, do you have an opinion as to whether or not Mr. Weaver would have had surgery that day, sometime that day?

A. Yes, I have an opinion.

MR. DANIELL: Objection, your honor.

THE COURT: Well, objection sustained.

(T. Vol. III, p. 39, line 23 through p. 40, line 5).

If the decision of the Court of Appeals in this action stands, any medical expert witness, regardless of whether or not he or she has expertise in the medical specialty involved in the case, can offer opinions as to what an entirely different medical specialist would or would not have done. This reasoning goes directly against the Court of Appeals language in Evans and Miller. Furthermore, the opinion in this action allows parties to circumvent the North Carolina Rules of Evidence by permitting medical expert witnesses to testify beyond the scope of their expertise. Allowing the holding of the Court of Appeals to stand would erode the limitations on expert witness testimony in medical malpractice cases under Rule 702.

II. The Opinion in This Case Contradicts Prior Decisions of the Court of Appeals Which Held That Proximate Cause is Not Established in a Case of Alleged Medical Negligence By a Mere Showing That Different Treatment Would Likely Have Improved the Outcome For the Patient.

The Court Appeals has confused two separate and distinct aspects of the proximate cause issue in this case. The first portion of the proximate cause issue is whether an MRI, if performed sooner, would have resulted in the diagnosis of a cervical disc which was pressing on the Mr. Weaver's spinal cord. The second portion of the proximate cause issue is whether surgical intervention would have occurred sooner if an MRI had been performed at an earlier point, and would such intervention have altered the outcome of this case. The plaintiffs presented evidence to support the first aspect of the proximate cause issue

but failed to present competent evidence that a neurosurgeon would have operated more quickly.

In support of its holding that the plaintiffs met their burden on the issue of proximate cause, the Court of Appeals cited three portions of the trial testimony in its opinion. The first quoted testimony is that of Dr. Bruce Dobkin, a neurologist who stated that if surgery had been performed on September 29, Mr. Weaver would have had virtually no neurological impairment. Weaver, __ N.C. App. __, 651 S.E.2d at 399. This testimony does not establish that surgery should have been performed on the 29th, but only addresses what would have happened if it had been performed on that date. The second portion of the trial transcript cited by the Court of Appeals is the testimony of Dr. Jackson Allison, an emergency medicine physician who stated that the sooner you perform neurosurgery on a patient such as Mr. Weaver, the better the outcome. Id. He then went on to say that you get a neurosurgical consult and "go to surgery immediately..." Id. However, the decision to take the patient to surgery is not made by an emergency medicine physician but by a "neurosurgical consultant." An emergency medicine physician does not perform neurosurgery and never makes the decision to perform such surgery. If a physician who specializes in emergency medicine could make that decision himself and perform the necessary surgery, he would not need a neurosurgical consultation in the first place. The plaintiffs offered no testimony from a

neurosurgeon to support their contention that surgery would have been performed sooner. The only neurosurgeon who testified at trial was called by the defense, and he stated that he would not have performed surgery on the 29th. (T. Vol. VI, p. 117, line 13 through p. 118, line 21). Lastly, the Court of Appeals cited the testimony of another emergency medicine physician called by the plaintiffs, Dr. Gregory Henry, who stated that if Mr. Weaver's condition had been diagnosed earlier, "he would more likely than not have had a better neurological outcome." Id. However, the Court of Appeals' reliance on this language flies in the face of its previous opinion in Norman v. Branner, 171 N.C. App. 515, 615 S.E.2d 738, 2005 WL 1669128 at *3.

In Norman, the issue was whether the failure to order a CT scan was a proximate cause of the plaintiff's injuries. Id. at *2 The plaintiff's expert testified that a CT scan should have been ordered and that the object in the plaintiff's eye was "more likely to be picked up on a CT scan." Id. The Court of Appeals affirmed a directed verdict for the defendants and stated:

The dispositive issue in the present case is whether Dr. Branner's actions were the proximate cause of the plaintiff's injury, and "proof of proximate cause in a malpractice case requires more than a showing that different treatment would have improved the patient's chances of recovery."

Id. at *3 (Emphasis added).

In the case at bar, the testimony of Dr. Henry, an emergency medicine physician, was identical to that of the expert in Norman, and yet the Court of Appeals reached the opposite result.

At a minimum, Dr. Henry needed to provide testimony as to what impact the different treatment would have had on the outcome for Mr. Weaver.

CONCLUSION

The Court of Appeals improperly held that Plaintiffs' expert witnesses, none of whom were neurosurgeons or had ever performed neurosurgery, could properly testify as to what a neurosurgeon would have done, if consulted by the defendants, and that those same experts could also testify as to the likely outcome of neurosurgery, if such surgery had been performed at an earlier time. For this reason, it is respectfully requested that the Supreme Court should grant this Petition for Discretionary Review in order to reverse and remand the decision of the Court of Appeals for entry of judgment in favor of defendants.

ISSUES TO BE BRIEFED

- I. Whether a Physician Who Specializes in Emergency Medicine or Neurology May Testify as to What a Neurosurgeon Would Have Done, If Consulted, and the Effects of Neurosurgery, When the Subject Matter of That Testimony is Outside the Scope of the Witness's Expertise.

- II. Whether Proximate Cause is Established in a Case of Alleged Medical Negligence By A Showing That Different Treatment Would Have Likely Improved the Patient's Outcome.

Respectfully submitted, this 19th day of November, 2007.

YOUNG MOORE AND HENDERSON P.A.

By: William P. Daniell

WILLIAM P. DANIELL

N.C. State Bar # 7680

JAMES L. JANSEN

N.C. State Bar # 36845

Attorneys for Defendants-Petitioners

Charles Michael Sheppa, M.D., et al.

Post Office Box 31627

Raleigh, North Carolina 27622

(919) 782-6860

ELLIS & WINTERS, LLP

By: Leslie C. O'Toole

LESLIE C. O'TOOLE

NC State Bar #13640

Attorney for Defendants-Petitioners

Charles Michael Sheppa, M.D., et al.

P.O. Drawer 33550

Raleigh, NC 27636

(919) 865-7000

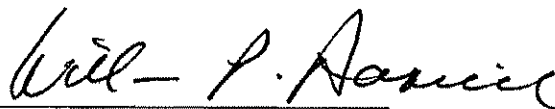
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he served the foregoing Petition for Discretionary Review upon the attorneys shown below by depositing a copy of the same in the United States mail, postage prepaid, addressed to said attorneys.

This the 19th day of November, 2007.

YOUNG MOORE AND HENDERSON P.A.

By:



WILLIAM P. DANIELL

N.C. State Bar # 7680

Attorney for Defendants-Petitioners

Dr. Charles Michael Sheppa, M.D., et al.

3101 Glenwood Avenue

Post Office Box 31627

Raleigh, North Carolina 27622

(919)782-6860

Served on:

Joe T. Knott, III
Knott & Berger, L.L.P.
4800 Six Forks Road, Suite 100
Raleigh, NC 27609
Phone: (919)783-5900
Fax: (919)783-9650