



# Swink v. Weintraub, 693 S.E.2d 352 (N.C. 2010)

Topics Covered: Professional Liability

## **Outcome: Unfavorable**

### **Issue**

The issue in this case was whether North Carolina physicians were required to exercise reasonable care and diligence according to generally prevailing “national standards” for physicians with similar training and experience or whether North Carolina physicians were required to exercise reasonable care and diligence according to prevailing norms in the same or similar communities for physicians with similar training and experience.

### **AMA Interest**

The AMA supports reasonable efforts to reduce medical malpractice liability for physicians.

### **Case Summary**

Dr. Richard Weintraub, a cardiologist, performed emergency surgery to replace Margaret Swink’s pacemaker. Unfortunately, there were complications and she died as a result. Mrs. Swink’s widower, who was also the administrator of her estate, sued Dr. Weintraub and the hospital for malpractice.

Swink’s experts testified, over objection, that Dr. Weintraub failed to use reasonable care and diligence and his best judgment while performing the surgery. However, the experts did not testify as to whether Dr. Weintraub violated the standard of care specific to his community or similar communities. The trial court ruled against the defendants.

The defendants appealed, arguing that the testimony from Swink’s experts should not have been admitted because it did not conform to the requirements of N.C. Gen. Stat. § 90-21.12 which states:

“In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of the facts is satisfied 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* at the time of the alleged act giving rise to the cause of action.” (Emphasis added).

However, the Court of Appeals affirmed, finding that the applicable precedent did not require adherence to a community standard of care. The defendants then asked the North Carolina Supreme Court for leave to appeal, but the Supreme Court declined to hear the case.

### **Litigation Center Involvement**

The Litigation Center and the North Carolina Medical Society advised the North Carolina Supreme Court that, if review were granted, they would file an amicus curiae brief to support the use of the community standard of care. However, the motion became moot when the Supreme Court declined to hear the case.