

**MEDICAL MALPRACTICE
RECENT DEVELOPMENTS: MAY 2015 – MAY 2016**

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DISCLAIMER: For several years now, I have had the pleasure of writing and presenting the annual medical negligence case law update for the North Carolina Advocates for Justice at the summer NCAJ Convention. This year, some happy news caused me to miss the Convention: the birth of my son (our third child altogether) less than a week before the convention start date. I took some much-needed paternity leave after his birth, which meant that I was not able to attend Convention and give my yearly presentation. In the midst of new baby mania, I was able to author this year's manuscript; however, it is a truncated version of my normal work-product. In this edition, I have given a brief overview of the main holdings of each published opinion, and selected the most important quotes from each case of which readers should be aware.

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INTRODUCTION

This manuscript provides a brief analysis, and helpful case law quotes, from the **published** medical malpractice opinions reported from the North Carolina Court of Appeals and the North Carolina Supreme Court from May 2015 to May 2016. For each case, I have provided a grey box snapshot of all the background data on the case in (e.g. county of origin, plaintiff/defense attorneys involved, and author of opinion), as well as a analysis of the case according to a classic law school style framework (e.g. procedural history, factual background, rules/controlling authority, analysis and arguments, and impact of the case on our practice.) No unpublished medical malpractice opinions have been analyzed in this manuscript.

Many of these cases were litigated by fellow members of the NCAJ, and most received discussion on the NCAJ listservs. Please note that I have only analyzed the facts and law contained in each written opinion. Out of fairness, I have refrained from including any facts/arguments learned about the case through listserv discussion that do not already appear in the text of each opinion (although to learn the “whole story” behind several of these cases the reader will be well-served to examine the appellate record/briefs, and any listserv discussions.)

Alston v. Hueske,

___ N.C. App. ___, 781 S.E.2d 305 (2016)

Prior History:

Orange County, No. 13 CVS 2083

NCCOA Filed Date:

January 5, 2016

Plaintiff Attorney(s):

Law Offices of Alvin L. Pittman

Defense Attorney(s):

Samuel G. Thompson, Jr. (Yates McLamb)

Judge (Author of opinion):

Hunter, Jr., Robert N.

Judges (Concurring / Dissenting):

Dillon and Dietz (concur)

Type of Medical Care Involved:

Rule 9(j), Rule 15 amendments

Decision for Plaintiff or Defense Bar?

Defense

Brief Overview of Case:

A week before the SOL had run, Plaintiff filed a complaint against two healthcare providers alleging medical malpractice. In an attempt to comply with Rule 9(j), the complaint stated:

29. Prior to commencing this action, the medical records were reviewed and evaluated by a duly Board Certified who opined that the care rendered to Decedent was below the applicable standard of care.

30. . . . The medical care referred to in this complaint has been reviewed by person(s) who are reasonably expected to qualify as expert witnesses, or whom the plaintiff **[**10]** will seek to have qualified as expert witnesses under [Rule 702 of the Rules of Evidence](#), and who

is willing to testify that the medical [*310] care rendered plaintiff by the defendant(s) did not comply with the applicable standard of care.

The trial court granted Defendants' 12(b)(6) motion to dismiss for failure to comply with the strict pleading requirements of Rule 9(j). The trial court also denied Plaintiff's motion to amend the complaint under Rule 15.

Key Quotations Underlying Court's Analysis/Holding:

In 2011, the General Assembly further amended [Rule 9\(j\)](#) effective 1 October 2011. N.C. Sess. Law 2011-400. As it reads today, **HN4** [Rule 9\(j\)](#) requires any complaint alleging medical malpractice be dismissed unless:

(1) 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.

(2) 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 that the complainant will seek to have qualified as an expert witness by motion under [Rule 702\(e\) of the Rules of Evidence](#) and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; **[**7]** or

(3) The pleading alleges facts establishing negligence under the existing common-law doctrine of *res ipsa loquitur*.

[N.C. Gen. Stat. § 1A-1, Rule 9\(j\)](#) (2013) (emphasis added to reflect amendment). The Supreme Court of North Carolina decided a case under [Rule 9\(j\)](#) again in 2012, noting that although [Rule 9\(j\)](#) was amended, the requirements remain "substantially unchanged." **[*309]** [Moore v. Proper, 366 N.C. 25, 29 n.1, 726 S.E.2d 812, 816 n.1 \(2012\)](#).

In [Thigpen v. Ngo](#), the Supreme Court of North Carolina interpreted [Rule 9\(j\)](#) where the plaintiff failed to specify that the medical records had been reviewed by an expert before the plaintiff filed the complaint. [Thigpen v. Ngo, 355 N.C. 198, 199, 558 S.E.2d 162, 163-164 \(2002\)](#). In [Thigpen](#), before the expiration of the statute of limitations, plaintiff filed an amended complaint certifying the "medical care has been reviewed" by someone who would qualify as an expert." [Id., 558 S.E.2d at 163-164](#).

The Supreme Court reasoned that **HN3** the statute's language was clear and unambiguous in requiring dismissal if the requirements of [Rule 9\(j\)](#) were not met. [Id. at 202, 558 S.E.2d at 165](#). "[M]edical malpractice complaints have a distinct requirement **[**6]** of expert certification with which plaintiffs must comply. Such complaints will receive strict consideration by the trial judge. Failure to include the certification leads to dismissal." [Id., 558 S.E.2d at 165](#).

HN5 It is important for persons filing a complaint under [Rule 9\(j\)](#) to ensure compliance with the rule at the time of filing. Expert review "must take place before the filing of the complaint." [Thigpen, 355 N.C. at 205, 558 S.E.2d at 167](#). Our courts have strictly enforced this requirement because of the legislature's purpose in enacting [Rule 9\(j\)](#).

In addition, **HN6** [Rule 9\(j\)](#) requires the medical records and medical care be "reviewed by a person who is reasonably expected to qualify as an expert witness." [N.C. Gen. Stat. § 1A-1, Rule 9\(j\)\(1\)](#) (2013). To comply, the record and care reviewer must be reasonably expected to qualify under [Rule 702 of the North Carolina Rules of Evidence. Moore, 366 N.C. at 26, 726 S.E.2d at 814. Rule 702\(b\)](#) governs expert testimony in medical malpractice actions. An expert in a medical malpractice action must be a licensed health care provider, and if the party is a specialist, the expert must specialize in the same or a similar specialty as the party against whom the testimony is given. [N.C. Gen. Stat. § 8C-1, Rule 702\(b\)\(1\)](#) (2013). The Rule also requires either an active clinical practice or instructing students in a professional school. [N.C. Gen. Stat. § 8C-1, Rule 702\(b\)\(2\)](#) (2013).

The wording of the complaint renders compliance with 9(j) problematic. A plaintiff can avoid this result by using the statutory language. **HN9** [Rule 9\(j\)](#) requires "the medical care and all medical records" be reviewed by a person reasonably expected to qualify as an expert **[**11]** witness and who is willing to testify the applicable standard of care was not met. According to the complaint, the medical care was reviewed by someone reasonably expected to qualify as an expert witness who is willing to testify that defendants did not comply with the applicable standard of care. However, the complaint alleges medical records were reviewed by a "Board Certified" that said the care was below the applicable standard of care. Thus, the complaint does not properly allege the medical records were reviewed by a person *reasonably* expected to qualify as an expert witness.

This omission in the complaint unnecessarily raises questions about whether the witness being "reasonably expected" to qualify as an expert under [Rule 702](#). The only information we have is that the witness is "Board Certified." We do not know whether the witness is a certified doctor or nurse, or even another health care professional. We also cannot say whether the "Board Certified" person is of the same or similar specialty as would be required to testify Hueske violated a standard of care. Simply put, we do not have enough information to evaluate whether this witness could reasonably be expected to qualify as an **[**12]** expert in this case.

Because the legislature has required strict compliance with this rule, our courts have ruled that if a pleader fails to properly plead his case in his complaint, it is subject to dismissal without the opportunity for the plaintiff to amend his complaint under [Rule 15\(a\). N.C. Gen. Stat. § 1A-1, Rule 15\(a\)](#) (2013); [Keith v. Northern Hosp. Dist. Of Surry County, 129 N.C. App. 402, 405, 499 S.E.2d 200, 202 \(1998\)](#). "To read [Rule 15](#) in this manner would defeat the objective of [Rule 9\(j\)](#)

which . . . seeks to avoid the *filing* of frivolous medical malpractice claims." [Id.](#), [499 S.E.2d at 202](#) (emphasis in original).

Provided the original complaint was filed within the statutory period, [Rule 41](#) allows, in some situations, a 9(j) deficient complaint to be dismissed and then re-filed with a sufficient [*311] 9(j) statement within one year of dismissal. [Brisson v. Kathy A. Santoriello, M.D., P.A., 351 N.C. 589, 593, 528 S.E.2d 568, 570 \(2000\)](#). However, to re-file after a voluntary dismissal, the action must still be "commenced within the time prescribed therefor." [Bass v. Durham County Hosp. Corp., 158 N.C. App. 217, 224, 580 S.E.2d 738, 742 \(2003\)](#) (Tyson, J., dissenting), *rev'd*, [358 N.C. 144, 592 S.E.2d 687 \(2004\)](#) (adopting reasoning in dissenting opinion). An action is only "commenced" under [rule 9\(j\)](#) if it has been properly reviewed by an expert at the time of filing. *Id.*

Bennett v. Hospice,

____ N.C. App. ____, 783 S.E.2d 260 (2016)

Prior History:

Alamance County, No. 14 CVS 19630

NCCOA Filed Date:

March 15, 2016

Plaintiff Attorney(s):

Pro se

Defense Attorney(s):

Young Moore & Henderson
Yates McLamb
Carruthers & Roth

Judge (Author of opinion):

Dillon

Judges (Concurring / Dissenting):

McGee and Davis (concur)

Type of Medical Care Involved:

Rule 9(j); Ordinary v. Medical Negligence

Decision for Plaintiff or Defense Bar?

Plaintiff and Defense - Split

Brief Overview of Case:

A pro se plaintiff filed a complaint alleging a multitude of claims against Defendants arising out of the circumstances surrounding the death of plaintiff's mother. "The allegations in the complaint aver that Ms. Maynard had been living at a facility operated by Defendant Oaks of Alamance when she suffered a fall. She sustained injuries, but Plaintiff's sister, Pamela Roney, refused to authorize treatment for these injuries. Thereafter, Ms. Maynard's condition deteriorated, culminating eventually in her demise."

Many of the complaint's claims focused on the alleged acts or omissions of Defendants in causing the mother's wrongful death. Those claims centered upon allegations that Defendants' staff members failed to provide adequate medical care for mother once she sustained injuries from a fall, and that the staff provided certain medical care without the mother's informed consent.

Plaintiff did not include any Rule 9(j) certification in the complaint. Defendants moved for dismissal under 12(b)(6) for fail to comply with Rule 9(j). Plaintiff argued that Rule 9(j) did not apply to her claims because (i) the complaint did not plead a medical malpractice action, and (ii) many of the corporate defendants named did not have an actual physician-patient relationship with the decedent. The trial court and COA rejected these arguments by Plaintiff and dismissed the claims in the complaint that involved allegations about the failure of staff members to provide medical care to decedent.

Key Quotations Underlying Court’s Analysis/Holding:

Rule 9(j) states in relevant part as follows:

HN1 Any complaint alleging medical malpractice by a health care provider . . . shall be dismissed unless . . . [t]he 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 **[**5]** 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) (2014).

[*263] Each of the claims for acts which occurred prior to Plaintiff's mother's death fits within the definition of "medical malpractice action," as set out in subdivision (2) of the statute. Specifically, subdivision (2) provides:

HN4 (2) Medical malpractice action. — Either of the following:

- a. 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.
- b. A civil action against a hospital, a nursing home . . . , or an adult care home . . . for damages for personal injury or death, when the civil action (i) 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 (ii) arises from the same facts or circumstances as a claim under sub-subdivision a. of this subdivision.

Id. § 90-21.11(2).

Here, all of Plaintiff's claims stemming from actions leading up to the death of her mother concern the provision (or lack thereof) of health care to Plaintiff's mother. Plaintiff has not pleaded any facts which suggest that *res ipsa loquitur* applies. Accordingly, we hold that **[**7]** the trial court did not err in dismissing these claims for failure to include a certification pursuant to Rule 9(j).

We are not persuaded by Plaintiff's argument that [Rule 9\(j\)](#) does not apply where no patient-physician relationship existed between Defendants and Plaintiff's mother, or, alternately, where Defendants were not furnishing professional health care services to her mother. *HN5* As demonstrated by the language of [N.C. Gen. Stat. § 90-21.11](#) and our Supreme Court's holding in *Horton*, the definition of medical malpractice under North Carolina law is not so restrictive, encompassing "action[s] for damages for . . . death arising out of the furnishing of or failure to furnish professional services by a health care provider," see [344 N.C. at 137, 472 S.E.2d at 781](#), including the provision of such services by nursing homes, adult care homes, and those "legally responsible for the negligence of," or who "act[] at the direction or under the supervision of," these nursing homes and adult care homes, see [N.C. Gen. Stat. § 90-21.11\(1\)\(a\)-\(d\)](#) (2012). Furthermore, taking the allegations in Plaintiff's complaint as true, as we are required to do, see [Acosta v. Byrum, 180 N.C. App. 562, 566, 638 S.E.2d 246, 250 \(2006\)](#), Defendants were, indeed, furnishing professional health care services to her mother at the time she died, Plaintiff's arguments on appeal to the contrary notwithstanding. **[**8]** Therefore, we hold that the claims alleged in Plaintiff's complaint for certain acts of Defendants which occurred prior to her mother's death are medical malpractice claims. Accordingly, the trial court did not err in granting Defendants' motions to dismiss where Plaintiff failed to include the required certification under [Rule 9\(j\) of the Rules of Civil Procedure](#).

Boyd v. Rekuc,

____ N.C. App. ____, 782 S.E.2d 916 (2016)

Prior History:

Wake County, No. 14 CVS 9339.

NCCOA Filed Date:

March 15, 2016

Plaintiff Attorney(s):

Patricia P. Shields and Joshua D. Neighbors, and Daniel M. Gaylord
*NCAJ AMICUS

Defense Attorney(s):

Elizabeth McCullough (Young Moore)
*NCADA AMICUS

Judge (Author of opinion):

Dillon

Judges (Concurring / Dissenting):

McGee and Davis (concur)

Type of Medical Care Involved:

Rule 9(j), Rule 41 Dismissal

Decision for Plaintiff or Defense Bar?

Plaintiff

Brief Overview of Case:

Prior to the expiration of the 3-year SOL, Plaintiff filed a complaint alleging medical malpractice against Defendant without a Rule 9(j) certification. Specific event dates are critical to understanding the case at bar. Those dates are as follows:

“On 16 March 2011, Plaintiff was last seen by Defendants.

On 14 March 2014, Plaintiff filed a medical malpractice complaint against Defendants in a prior action, within the applicable three (3) year statute of limitations; however, his complaint did not comply with the [Rule 9\(j\)](#) certification requirements.

On 16 June 2014, Plaintiff voluntarily dismissed **[**3]** the prior action, pursuant to [Rule 41 of the Rules of Civil Procedure](#).

On 14 July 2014, Plaintiff commenced this present action, filing a complaint *with* the required [Rule 9\(j\)](#) certification. Specifically, the complaint asserted, not only that the [Rule 9\(j\)](#) expert review occurred, but also that the expert review occurred *prior to 14 March 2014* (when the first complaint was filed).

On 12 January 2015, the trial court granted Defendants' motion to dismiss Plaintiff's complaint, concluding that the second complaint was not filed within the applicable statute of limitations. Plaintiff timely appealed."

Key Quotations Underlying Court's Analysis/Holding:

HOLDING: "Specifically, *HNI* where a plaintiff voluntarily dismisses a medical malpractice complaint which was timely filed in good faith but which lacked a required [Rule 9\(j\)](#) certification, said plaintiff may re-file the action after the expiration of the applicable statute of limitations *provided that* (1) he files his second action within the time allowed under [Rule 41](#) and (2) the new complaint asserts that the [Rule 9\(j\)](#) expert review of the **[**4]** medical history and medical care occurred prior to the filing of the original timely-filed complaint."

Brisson Controls Our Case . . .

The relevant facts in the present case are essentially "on all fours" with our **[**5]** Supreme Court's 2000 opinion in [Brisson v. Santoriello, 351 N.C. 589, 528 S.E.2d 568 \(2000\)](#). In *Brisson*, the relevant timeline was as follows:

27 Jul 1994 — Alleged malpractice occurred (Three-year statute of limitations);

3 Jun 1997 — Complaint filed just within the applicable statute of limitations, *but without* the proper [Rule 9\(j\)](#) certification;

6 Oct 1997 — Plaintiff voluntarily dismisses the action pursuant to [Rule 41](#);

[*918] 9 Oct 1997 — A second action filed *with* [Rule 9\(j\)](#) certification. The certification asserted, not only that an expert review had occurred, but also that the review took place *prior to* the filing of the *original* complaint, though the certification was "inadvertently omitted from the [original complaint][.]" [Id. at 592, 528 S.E.2d at 569](#).

Based on these facts, our Supreme Court held that the second action was not time-barred since it was filed within one year of the [Rule 41\(a\)\(1\)](#) voluntary dismissal. [Id. at 597, 528 S.E.2d at 573](#).

The Court stated that *HN4* "[t]he only limitations are that the [voluntary] dismissal [of the first action] not be done in bad faith and that it be done prior to a trial court's ruling dismissing plaintiff's claim or otherwise ruling against plaintiff at any time prior to plaintiff resting his or her case at trial." *Id.* Therefore, *Brisson* essentially allows a plaintiff who has filed a defective medical malpractice **[**6]** complaint to voluntarily dismiss the action to gain a year to file a complaint which complies with [Rule 9\(j\)](#). Of note, the Court did not *expressly rely* in its holding on the fact that the second complaint asserted that the [Rule 9\(j\)](#) review had occurred prior to the filing of the original complaint.

The relevant facts in the present case are essentially "on all fours" with our **[**5]** Supreme Court's 2000 opinion in [Brisson v. Santoriello, 351 N.C. 589, 528 S.E.2d 568 \(2000\)](#). In *Brisson*, the relevant timeline was as follows:

27 Jul 1994 — Alleged malpractice occurred (Three-year statute of limitations);

3 Jun 1997 — Complaint filed just within the applicable statute of limitations, *but without* the proper [Rule 9\(j\)](#) certification;

6 Oct 1997 — Plaintiff voluntarily dismisses the action pursuant to [Rule 41](#);

[*918] 9 Oct 1997 — A second action filed *with* [Rule 9\(j\)](#) certification. The certification asserted, not only that an expert review had occurred, but also that the review took place *prior to* the filing of the *original* complaint, though the certification was "inadvertently omitted from the [original complaint][.]" [Id. at 592, 528 S.E.2d at 569](#).

Based on these facts, our Supreme Court held that the second action was not time-barred since it was filed within one year of the [Rule 41\(a\)\(1\)](#) voluntary dismissal. [Id. at 597, 528 S.E.2d at 573](#). The Court stated that *HN4* "[t]he only limitations are that the [voluntary] dismissal [of the first action] not be done in bad faith and that it be done prior to a trial court's ruling dismissing plaintiff's claim or otherwise ruling against plaintiff at any time prior to plaintiff resting his or her case at trial." *Id.* Therefore, *Brisson* essentially allows a plaintiff who has filed a defective medical malpractice **[**6]** complaint to voluntarily dismiss the action to gain a year to file a complaint which complies with [Rule 9\(j\)](#).

The Supreme Court has clarified *Brisson* on three separate occasions of note; however, that Court has never overruled *Brisson*. Our Court has also commented on *Brisson* and [Rule 9\(j\)](#) on a number of occasions. The key cases from the past sixteen (16) years are discussed below, with an emphasis on the Supreme Court's holdings.

Essentially, the Supreme Court cases stand for the following: *HN5* A medical malpractice complaint which fails to include the required [Rule 9\(j\)](#) certification is subject to dismissal with prejudice pursuant to [Rule 9\(j\)](#). Prior to any such dismissal, however, said plaintiff may amend or refile (pursuant to Rules 15 or 41, respectively) the complaint with the proper [Rule 9\(j\)](#) certification. Further, if such subsequent complaint is filed after the applicable statute of limitations has expired but which otherwise complies with Rule 15 or 41, the subsequent

complaint is not time-barred *if* it asserts that the [Rule 9\(j\)](#) expert review occurred *before the original complaint* [**7] was filed.

Based on our Supreme Court's holdings in *Brisson*, *Thigpen*, *Bass*, and *Brown*, we hold that the trial court erred in its order dismissing Plaintiff's complaint: Plaintiff filed his original complaint within the applicable statute of limitations. Though his original [**922] complaint was filed [**18] without the required [Rule 9\(j\)](#) certification and, therefore, subject to be dismissed with prejudice, *see N.C. Gen. Stat. § 1A-1, Rule 9(j)*, Plaintiff voluntarily dismissed his original complaint pursuant to [Rule 41\(a\)\(1\)](#) before any such dismissal with prejudice occurred. He, then, refiled his complaint within the one year time period allowed under [Rule 41](#), and asserted in said complaint that the expert review of his medical care and history had been conducted prior to the filing of the original complaint. Therefore, we reverse the order of the trial court dismissing Plaintiff's complaint and remand the matter for further proceedings not inconsistent with this opinion.

NOTE: The opinion also has the very interesting and important discussion of the 120 day extension provision of [Rule 9\(j\)](#), and the case law interpreting said rule:

Defendants make mention of [Rule 9\(j\)](#)'s provision allowing a plaintiff to seek from the trial court an order extending the statute of limitations by 120 days to allow the plaintiff additional time to comply with the requirements of the Rule. However, here, this provision does not come into play since Plaintiff never sought a 120-day extension of the statute of limitations. Further, though not relevant here, we point out that it is not entirely clear from case law whether a complaint is time-barred where it asserts that the expert review of the medical care and medical records occurred during a 120-day extension period granted by the trial court, rather than asserting that the review occurred before the running of the original statute of limitations.

It could be argued from the text of the rule that the purpose of the 120-day extension is to allow a plaintiff additional time, *not only* to draft the required [Rule 9\(j\)](#) pleading *but also* to locate an expert to conduct the medical review, since the [**16] drafting of a pleading itself should not take that long if the review has, otherwise, already taken place. The Supreme Court in *Thigpen* suggested that the 120-day statute of limitations extension allows for the actual review to take place during this 120-day extension period. [Thigpen, 355 N.C. at 203-04, 558 S.E.2d at 166](#) (stating that "[t]he legislature's intent was to provide a more specialized and stringent procedure for plaintiffs in medical malpractice claims through [Rule 9\(j\)](#)'s requirement of expert certification *prior to the filing of a complaint*" (emphasis added)).

However, the Supreme Court held in *Brown* by a 4-3 decision that **HN10** the 120-day extension allowed under [Rule 9\(j\)](#) can only be used "for the limited purpose of filing a complaint. [It cannot be used] . . . to locate a certifying expert, add new defendants, and amend a defective pleading." [364 N.C. at 84, 692 S.E.2d at 92](#). In *Brown*, the plaintiff filed a defective complaint and then obtained a 120-day extension, during which he

obtained a certifying expert and filed an amended complaint. *Id.* The dissent in *Brown* interpreted the majority's holding to apply to *any* situation where a 120-day extension was obtained, not just situations where the plaintiff has already filed a complaint prior to obtaining the 120-day extension [**17] to file an amended complaint. [Id. at 90, 692 S.E.2d at 95-96](#) (Hudson, J., dissenting) (questioning the majority's reasoning that the purpose of providing for a 120-day extension was to allow a plaintiff an additional four (4) months merely to draft an appropriate [Rule 9\(j\)](#) statement).

In 2016, though, our Court, in *Alston*, interpreted *Brown* much more narrowly than suggested by the *Brown* dissent. That is, our Court stated that *Brown* prevents a plaintiff from utilizing a 120-day extension to locate a certifying expert *only if* he has already filed a defective complaint prior to obtaining the extension. [Alston, N.C. App. at , 781 S.E.2d at 309](#) (stating that "[Rule 9\(j\)](#) also provides an avenue to extend the statute of limitations in order to provide additional time, if needed, to meet the expert review requirement," but that the extension "may not be used to amend a previously filed complaint").

We need not resolve this question in this appeal, however, since the issue is not before us.

Clarke v. Mikhail,

___ N.C. App. ___, 779 S.E.2d 150 (2015)

Prior History:

Onslow County, No. 11 CVS 3813

NCCOA Filed Date:

November 3, 2015

Plaintiff Attorney(s):

Gary K. Shipman and W. Cory Reiss

Defense Attorney(s):

John D. Martin, Colleen N. Shea, and Kara O. Gansmann (Cranfil Sumner)

Judge (Author of opinion):

Tyson

Judges (Concurring / Dissenting):

Bryant and Geer (concur)

Type of Medical Care Involved:

Superseding/Intervening Cause; Punitive Damages; Bifurcation

Decision for Plaintiff or Defense Bar?

Defense

Brief Overview of Case:

This case involves a very lengthy fact pattern describing the mental healthcare rendered to the decedent in the months leading up to her death. The crux of the complaint is that the decedent's providers improperly prescribed her the medication Lamictel, and that her downstream providers negligently failed to diagnose or timely treat the decedent's Stevens Johnson Syndrome caused by the Lamictel. The case went to trial where plaintiff and defendants put on multiple expert witnesses who testified about standard of care and causation. The facts are too numerous to briefly summarize the various points raised by the expert testimony in this case,

and this author encourages the reader to closely examine the written opinion for these operative facts.

The trial ended in a defense verdict, and plaintiff appealed arguing six types of error by the trial court: (1) submitting the issue of superseding and intervening negligence to the jury; (2) submitting a jury instruction on superseding and intervening negligence, which was unsupported by the evidence and misstated the law; (3) granting a directed verdict in favor of Defendants on the issue of punitive damages; (4) admitting irrelevant and unfairly prejudicial evidence of Ms. Bohn's [the decedent's] character; (5) denying Plaintiff's request to bifurcate; and (6) denying Plaintiff's motion for a new trial.

Key Quotations Underlying Court's Analysis/Holding:

The trial court incorporated the North Carolina Pattern Jury Instructions 102.28 and 102.65, and charged the jury in pertinent part as follows:

In this case, the defendants contend that if one or more of them was negligent, which the defendants deny, then such negligence was not a proximate cause of the plaintiff's injury because it was insulated by the negligence of Onslow Urgent Care. *You will consider this matter only if you have found that one of the defendants was negligent. . . .* If the negligence of Onslow Urgent Care was such as to have broken the causal connection or sequence between the defendants' negligence and the plaintiff's injury, thereby excluding the defendant's [sic] negligence as a proximate [*158] cause, the negligence of Onslow Urgent Care would thus become as between the negligence of the defendants and the Onslow Urgent Care as the sole proximate cause of the plaintiff's injury.

. . . .

The burden is not on the defendants to prove that their negligence [**16] in any way was insulated by the negligence of Onslow Urgent Care. Rather, the burden is on the plaintiff to prove by the greater weight of the evidence that the negligence of the defendants was a proximate cause of the plaintiff's injury.

(emphasis supplied).

Plaintiff argues the trial court erred by instructing the jury the burden was on Plaintiff to disprove the existence of a superseding, or insulating, cause of Ms. Bohn's injury and resulting death. Plaintiff contends this instruction misstates the law by placing the burden on Plaintiff to disprove the affirmative defense of superseding negligence. Plaintiff's argument misconstrues both the doctrine of insulating or superseding negligence and the instructions given to the jury.

HN4 As an established element of negligence, the burden rests upon a plaintiff to prove "by the greater weight of the evidence" that a defendant's conduct was the proximate cause of the injuries alleged in an action for negligence. [*Wall v. Stout*, 310 N.C. 184, 201, 311 S.E.2d 571, 581 \(1984\)](#). Long-established North Carolina case law and the Pattern Jury Instructions clearly state "[t]he doctrine of insulating negligence [is an elaboration of a phase of proximate cause." [*Childers v. Seay*, 270 N.C. 721, 726, 155 S.E.2d 259, 263 \(1967\)](#)]; N.C.P.I.—Civil 102.65. The burden of proof does not shift [**17] to the defendant when an instruction on superseding

negligence is requested. Superseding or insulating negligence is an extension of a plaintiff's burden of proof on proximate cause. See [Childers, 270 N.C. at 726, 155 S.E.2d at 263](#); [Barber v. Constien, 130 N.C. App. 380, 383, 502 S.E.2d 912, 914, disc. review denied, 349 N.C. 227, 515 S.E.2d 699 \(1998\)](#); see also N.C.P.I.—Civil 102.65 ("The burden is not on the defendant to prove that *his* negligence, if any, was insulated by the negligence of [another party]. Rather, the burden is on the plaintiff to prove, by the greater weight of the evidence, that the negligence of the defendant was a proximate cause of the plaintiff's [injury].") (emphasis in original); N.C.P.I.—Civil 102.28 n.1 ("Insulating negligence . . . is not a separate issue.").

The trial court's instruction to the jury did not require Plaintiff to *disprove* superseding or intervening negligence by Onslow Urgent Care. The trial court's jury instruction properly informed the jury of the following: (1) Plaintiff carries the burden "to prove by the greater weight of the evidence" that Defendants' negligence was a proximate cause of Ms. Bohn's injury and death; (2) Defendants did *not* carry the burden of proving their negligence, if any, was insulated by Onslow Urgent Care's negligence; and, (3) the issue of superseding negligence was to be addressed only if the jury first found Defendants were negligent in the course of Ms. Bohn's medical treatment.

The trial court's jury instruction on superseding negligence did not improperly shift the burden of proof to Plaintiff to disprove Defendants' "affirmative defense." Insulating [**20] or superseding negligence is "an elaboration of a phase of proximate cause." [Childers, 270 N.C. at 726, 155 S.E.2d at 263](#). The burden of proof remained with Plaintiff to prove Defendants' negligence, if any, was a proximate cause of Ms. Bohn's injury and death. The trial court's jury instruction did not improperly shift the burden of proof or misstate the law. This argument is overruled.

HN10 A jury instruction on punitive damages is warranted "when more than a *scintilla* of evidence exists from which the jury could find that defendant's tortious conduct was accompanied by a reckless disregard for plaintiff's rights." [Ellison v. Gambill Oil Co., Inc., 186 N.C. App. 167, 180, 650 S.E.2d 819, 827 \(2007\)](#) (citations and internal quotation marks omitted), *aff'd per curiam and disc. review improvidently allowed, 363 N.C. 364, 677 S.E.2d 452 (2009)*.

HN11 "Punitive damages may be awarded, in an appropriate case . . . to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts." [N.C. Gen. Stat. § 1D-1](#) (2013); see [Rhyne v. K-Mart Corp., 358 N.C. 160, 167, 594 S.E.2d 1, 7 \(2004\)](#).

HN12 Recovery of punitive damages requires a claimant to prove by clear and convincing evidence that the defendant is liable for compensatory damages, and the presence of one of the following aggravating factors: (1) fraud; (2) malice; or (3) willful or wanton conduct. [N.C. Gen. Stat. § 1D-15](#) (2013). Our General Assembly has statutorily defined [**160] "willful or wanton conduct" as "the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably [**22] likely to result in injury, damage, or other harm." [N.C. Gen. Stat. § 1D-5\(7\)](#) (2013). Willful or wanton conduct requires more than a showing of gross negligence. *Id.*

HNI3 In the medical context, a medical provider acts willfully and wantonly when she knowingly, consciously, and deliberately places a patient at risk of harm by acting contrary to known protocols and procedures. [*Chambliss v. Health Sciences Found., Inc.*, 176 N.C. App. 388, 393-94, 626 S.E.2d 791, 795](#), petition for disc. review withdrawn, [*360 N.C. 532, 633 S.E.2d 677 \(2006\)*](#).

Plaintiff argues he presented sufficient evidence to raise a genuine issue of whether Defendants acted with conscious and intentional disregard for Ms. Bohn's safety. Plaintiff asserts the evidence, taken as true and viewed in the light most favorable to him, supports an award of punitive damages. We disagree.

...

Plaintiff argues Ms. Hardin's titration or dosage of Lamictal at a higher rate than recommended by the manufacturer's guidelines constituted evidence of a "reckless indifference" for Ms. Bohn's safety and warranted the submission of punitive damages to the jury. All expert witnesses testified that the manufacturer's guidelines for a particular titration are recommendations and do not establish the standard of care, or a breach thereof. Plaintiff failed to present any evidence, outside of this assertion, **[**23]** that Ms. Hardin's prescribing and titration of Lamictal was "willful or wanton," as required by [*N.C. Gen. Stat. § 1D-15*](#).

The evidence presented showed Ms. Hardin used her clinical judgment to weigh the risks and benefits of prescribing and titrating Lamictal to Ms. Bohn. Ms. Bohn consistently reported depressive symptoms while being treated at CCNC. The medical expert testimony showed the prescribing and increased titration of Lamictal was appropriate for Ms. Bohn, in light of her symptoms, her history of failing other drugs, and her increased risk of suicide.

Ms. Hardin testified, and medical expert testimony confirmed, her decision to prescribe Lamictal at an increased titration was based on Ms. Bohn's conditions and medical history, and Ms. Hardin's clinical judgment, training, and experience. Ms. Hardin sought to reach a therapeutic dose sooner in order to benefit Ms. Bohn and her deteriorating condition. Experts in this case testified they had successfully titrated Lamictal at an increased rate.

The evidence also showed the label indicated any increased risk of rash with an increased titration was unproven. Ms. Hardin stated she believed the probability Ms. Bohn would develop a rash from Lamictal was much **[**24]** lower than Ms. Bohn's risk of suicide. Ms. Hardin testified she also knew from clinical experience that any rare rash would resolve by discontinuing the Lamictal. This experience was consistent with every testifying medical expert's experience with Lamictal.

Contrary to Plaintiff's argument, the manufacturer's recommended titration schedule does not constitute a "policy or protocol," which Ms. Hardin could have violated. The manufacturer's recommended titration schedule is a recommendation only, from which medical providers can and do deviate. Plaintiff did not present any evidence Ms. Hardin's decision violated CCNC's policies or procedures, or breached any established standard of care. See [*Chambliss*, 176 N.C.](#)

[App. at 393, 626 S.E.2d at 794-95](#) (holding *HN14* evidence defendant was aware of, but did not follow, safety protocols and procedures was sufficient evidence to submit issue of punitive damages to the jury). The trial court properly granted a directed verdict on the issue of punitive damages. Plaintiff's argument is overruled.

Plaintiff argues the trial court erroneously admitted into evidence the following: (1) Ms. Bohn's medical records; (2) certain Social Security and DSS records; and (3) Eddie's **[**25]** medical records (collectively, "prior records"). Plaintiff contends these records should not have been admitted because they **[*161]** were: (1) irrelevant to the issues of breach, standard of care, and causation; (2) unfairly prejudicial; and (3) not available to Defendants at the time Lamictal was prescribed.

...

Here, the information contained in the prior records was relevant to both the issues of damages and causation. This information *was* known to Defendants at the time they treated Ms. Bohn at CCNC. Ms. Bohn reported her medical history, symptoms, and **[*162]** "stressors" to both Dr. Mikhail during her initial intake at CCNC, and to Ms. Hardin during their subsequent appointments.

The prior records illustrated a complete picture of Ms. Bohn's mental health for the jury. The prior records showed Ms. Bohn's mental health affected her ability to work, attend school, and care for her mentally ill **[**28]** son and elderly parents. See [N.C. Gen. Stat. § 28A-18-2\(c\)](#) (2013) (*HN20* "All evidence which reasonably tends to establish any of the elements of damages . . . or otherwise reasonably tends to establish the present monetary value of the decedent to the persons entitled to receive the damages recovered, is admissible in an action for damages for death by wrongful act."); [Hales v. Thompson, 111 N.C. App. 350, 358, 432 S.E.2d 388, 393 \(1993\)](#) (holding mother's testimony about decedent son's leukemia and the effect it had on their relationship was relevant, as it had the tendency to prove the extent of damages in wrongful death by motor vehicle action). Even if Plaintiff had properly objected when this evidence was presented at trial, Plaintiff has failed to show these records were not relevant concerning causation and damages, or that the trial court's admission was "manifestly unsupported by reason." [Hyde, 352 N.C. at 55, 530 S.E.2d at 293](#). Plaintiff's argument is overruled.

Plaintiff argues for the first time on appeal that the prior records were admitted as improper propensity or character evidence. Plaintiff did **[**29]** not assert [Rules 403, 404, 405, or 608](#) as the basis for his objection to the admission of this evidence at trial. The North Carolina Rules of Appellate Procedure provide: *HN22* "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely . . . objection . . . stating the specific grounds for the ruling the party desired[.]" N.C.R. App. P. 10(a)(1).

Notwithstanding Plaintiff's failure to object to the admission of this evidence as "character evidence," this evidence was properly admitted because experts for both parties relied on it to

form their own opinions of the case, particularly with regard to the issues of proximate cause and damages. Ms. Bohn's prior records and Eddie's medical records were not admitted for any purposes to show "character evidence." See [N.C. Gen. Stat. § 8C-1, Rule 703](#) (2013); [State v. Golphin, 352 N.C. 364, 467-68, 533 S.E.2d 168, 235 \(2000\)](#) (holding report expert relied upon to support his conclusions relating to co-defendant's character and upbringing, his relationship with his parents, his prior experience with police, his demeanor, and influence defendant had over him was admissible), *cert. denied*, [532 U.S. 931, 121 S. Ct. 1379, 149 L. Ed. 2d 305; 532 U.S. 931, 121 S. Ct. 1380, 149 L. Ed. 2d 305 \(2001\)](#).

HN23 An expert witness's opinions do not constitute improper character evidence under [Rule 404](#). A party may present its own theory of the case by offering an expert. **[**30]** See [State v. Moss, 139 N.C. App. 106, 111-12, 532 S.E.2d 588, 593 \(2000\)](#) (concluding two experts' opinions were properly admitted and did not constitute evidence of bad character).

Plaintiff argues the trial court erred by denying his motion to bifurcate the trial into liability and damages phases. We disagree.

...
[N.C. Gen. Stat. § 1A-1, Rule 42\(b\)](#) provides: **HN27** "Upon a **[**32]** motion of any party in an action in tort . . . the court shall order separate trials for the issue of liability and the issue of damages, unless the court for good cause shown orders a single trial." [N.C. Gen. Stat. § 1A-1, Rule 42\(b\)\(3\)](#).

Plaintiff argues because the admission of Ms. Bohn's and her son's prior records was not relevant to the liability issues and was prejudicial against Plaintiff, the trial court should have granted his motion to bifurcate the trial. Our review confirms these records were both relevant and that the trial court did not abuse its discretion in determining that the records were not unfairly prejudicial to Plaintiff.

The trial court inquired of counsel about bifurcation on the first day of hearing pre-trial matters. Counsel for Plaintiff stated he had not filed a motion to bifurcate. The trial court raised the possibility of bifurcation on two other occasions. Each time, Plaintiff's counsel did not move for bifurcation.

During oral argument, Plaintiff's counsel stated his change in trial strategy and motion to bifurcate the trial were made in direct response to the trial court's decision to admit Ms. Bohn's prior medical and DSS records into evidence. The trial court denied Plaintiff's motion **[**33]** and ruled it would be improper to bifurcate on the eve of trial, after the parties' trial strategy, schedule of subpoenas, and the order of witnesses were dependent on the case proceeding as a consolidated trial.

Plaintiff has failed to carry his burden to show the trial court's "finding of good cause in this specific case was manifestly unsupported by reason . . . or so arbitrary that it could not have been

the result of a reasoned decision." [Atkins, 183 N.C. App. at 628, 644 S.E.2d at 628](#). This argument is overruled.

Plaintiff argues he should be granted a new trial due to the numerous errors, which occurred at trial. Plaintiff is not entitled to a new trial on any issue properly preserved and asserted, for the reasons discussed *supra*.

Fintchre v. Duke Univ.
____ N.C. App. ____, 773 S.E.2d 318 (2015)

Prior History:

Durham County, No. 13 CVS 5668.

NCCOA Filed Date:

June 2, 2015

Plaintiff Attorney(s):

Patricia P. Shields and Joshua D. Neighbors

Defense Attorney(s):

Mark Anderson (McGuire Woods)

Judge (Author of opinion):

McCullough

Judges (Concurring / Dissenting):

Steelman (concur)

Stephens (concur by separate opinion)

Type of Medical Care Involved:

Rule 9(j), Rule 15 amendment, Rule 41 Dismissal

Decision for Plaintiff or Defense Bar?

Defense

Brief Overview of Case:

"On 6 October 2011, plaintiff Brandie Fintchre filed a complaint against defendants Duke University, Duke University Health Systems, Jane Doe, R.N., and Hardee Klitzman, R.N. ("first complaint"). The first complaint set forth claims of medical negligence [**2] against Jane Doe, R.N. in her individual and official capacities; medical negligence against Hardee Klitzman, R.N. in her individual and official capacities; negligence against Duke University, Duke University Health Systems, and Duke University Medical Center; negligent and intentional infliction of emotional distress against all defendants; and punitive damages. The first complaint also contained a Rule 9(j) certification pursuant to [N.C. Gen. Stat. § 1A-1, Rule 9\(j\)](#) and provided that "the medical care provided to Plaintiff was reviewed by persons who Plaintiff reasonably expects to qualify as expert witnesses under [N.C. R. Evid. 702](#) who are willing to testify that the medical care at issue in this action failed to comply with the standard of care."

On 14 December 2011, defendants filed an "Answer and Defenses." Defendants argued, *inter alia*, that plaintiff had failed to comply with the requirements pursuant to Rule 9(j).

On 3 January 2013, plaintiff voluntarily dismissed her first action against defendants without prejudice

On 20 December 2013, plaintiff filed a complaint against defendants Duke University, Duke University Health Systems, Jane Doe, R.N., and Hardee Klitzman, R.N., in their individual and official capacities.

("second complaint"). Plaintiff's causes of action included the following: medical negligence against Jane Doe, R.N. and Hardee Klitzman, R.N., in their individual and official capacities and against Duke University and Duke University Health Systems; negligence against Duke University, Duke University Health Systems, and Duke University Medical Center; negligent infliction of emotional distress against defendants and Duke University Medical Center; intentional infliction of emotional distress against defendants and Duke University Medical Center; and, punitive damages. The second complaint contained the following Rule 9(j) certification:

82. Pursuant to North Carolina General Statute Section 1A-1, Rule 9(j), the medical care provided to Plaintiff was reviewed by persons who Plaintiff reasonably expects to qualify as expert witnesses under [N.C. R. Evid. 702](#) who are willing to testify that the medical care at issue in this action failed **[**4]** to comply with the standard of care.

Key Quotations Underlying Court's Analysis/Holding:

In its 16 June 2014 order, the trial court concluded that plaintiff had "failed to file a complaint containing the required Rule 9(j) certification within three years of the acts that caused her alleged injuries" based on plaintiff's failure to allege that all medical records pertaining to the alleged negligence were reviewed **[**13]** by a person who plaintiff reasonably expected to qualify as an expert witness. The trial court further concluded that plaintiff's motion to amend the 9(j) certification in her second complaint, filed 24 March 2014, was "futile because the statute of limitations elapsed."

On appeal, plaintiff concedes that her "counsel inadvertently failed to expressly state [that] this pre-filing evaluation included a review of 'all medical records pertaining to the alleged negligence.'" Nonetheless, plaintiff argues that although the language of her complaints was deficient, because she complied with the substantive requirements of Rule 9(j) before she filed her first action, filed her first action within the statute of limitations, and filed her second action within one year of taking a voluntary dismissal of her first action, the trial court should have granted her motion to amend the Rule 9(j) certification in her second complaint. Plaintiff's contentions are not convincing.

Plaintiff relies on the holding in [Brisson v. Santoriello, 351 N.C. 589, 528 S.E.2d 568 \(2000\)](#), for her argument. First, we note that *Brisson* was "overruled by the Supreme Court in *Bass* [*v. Durham County Hospital Corp., 358 N.C. 144, 592 S.E.2d 687 (2004)*]." [McKoy, 213 N.C. App. at 263, 712 S.E.2d at 716](#). Second, the circumstances in *Brisson* are distinguishable from those found in the case *sub judice*. In *Brisson* **[**14]**, the plaintiffs' first complaint failed to comply with Rule 9(j). [Brisson, 351 N.C. at 591-92, 528 S.E.2d at 569](#). The plaintiffs voluntarily dismissed their claims against the defendants pursuant **[*324]** to [Rule 41\(a\)\(1\)](#) and subsequently filed a second complaint that included the appropriate Rule 9(j) certification. [Id. at 592, 528 S.E.2d at 570](#). The second complaint was filed beyond the applicable three year statute of limitations. The trial court granted the defendants' motion for judgment on the pleadings, stating that the first complaint did not extend the statute of limitations because the first complaint did not comply with Rule 9(j). *Id.* Our Court reversed the trial court and reinstated the plaintiffs' action. [Id. at 593, 528 S.E.2d at 570](#). Upon review, the North Carolina Supreme Court stated that the only issue before it was whether the plaintiffs' voluntary dismissal pursuant to [Rule 41](#)

effectively extended the statute of limitations by allowing the plaintiffs to refile their complaint against the defendants within one year and concluded that it does. *Id.* The *Brisson* Court stated that the purpose of the one-year extension of [Rule 41](#) was to "provide a one-time opportunity where the plaintiff, for whatever reason, does not want to continue the suit." [Id. at 597, 528 S.E.2d at 573.](#)

Unlike in *Brisson*, plaintiff in the present case failed to file a proper Rule 9(j) certification [**15] in either of her two complaints. In addition, the issue before our Court is not whether [Rule 41](#) provided a one-year extension from the voluntary dismissal of the first complaint, but whether the trial court should have granted plaintiff's motion to amend the second complaint.

We find our holding in [McKoy v. Beasley, 213 N.C. App. 258, 712 S.E.2d 712 \(2011\)](#), to be instructive. In *McKoy*, the plaintiff filed a wrongful death action on 7 April 2007, within two years of the decedent's death on 30 April 2005. [Id. at 260, 712 S.E.2d at 713.](#) The trial court dismissed the plaintiff's action without prejudice, pursuant to [Rule 41\(b\)](#), for failure to comply with Rule 9(j). Our Court reasoned that the trial court's dismissal pursuant to [Rule 41\(b\)](#) was the functional equivalent of the plaintiff taking a voluntary dismissal under [Rule 41\(a\)\(1\)](#) for purposes of the analysis. [Id. at 263, 712 S.E.2d at 716.](#) The plaintiff then filed the second action on 20 December 2007 and an amended action on 20 March 2009. [Id. at 260, 712 S.E.2d at 714.](#) Our Court stated that [**16] because the second action was filed more than two years following the decedent's death, the plaintiff must rely on the 7 April 2007 action in order to have timely filed her action for wrongful death. [Id. at 263, 712 S.E.2d at 715.](#) "Since the original complaint, that was filed within the two year limitations period was defective, the subsequent complaint must be dismissed." *Id.* Our Court relied on the case of [Bass v. Durham Cty. Hosp. Corp., 158 N.C. App. 217, 580 S.E.2d 738 \(2003\)](#), *rev'd per curiam for reasons stated in the dissent, 358 N.C. 144, 592 S.E.2d 687 (2004), which held as follows:*

A [Rule 41\(a\)](#) voluntary dismissal would salvage the action and provide another year for re-filing had plaintiff filed a complaint complying with Rule 9(j) before the limitations period expired. Plaintiff's complaint was untimely filed beyond the expiration of the applicable statute of limitations and the Rule 9(j) extension.

[Id. at 263, 712 S.E.2d at 716](#) (citation omitted). Accordingly, our Court held that "the defective original complaint cannot be rectified by a dismissal followed by a new complaint complying with Rule 9(j), where the second complaint is filed outside of the applicable statute of limitations." *Id.*

In the present case, the alleged medical malpractice occurred in October 2008 and April 2010. The first complaint was filed on 6 October 2011, within the three year statute of limitations [**17]² Plaintiff subsequently filed a voluntary dismissal without prejudice on 3 January 2013 pursuant to [N.C. Gen. Stat. § 1A-1, Rule 41](#). The second complaint was filed on 20

² See [N.C. Gen. Stat. § 1-15](#) (2014).

December 2013. Both the first and second complaints included the following language in its 9(j) certification:

Pursuant to North Carolina General Statute Section 1A-1, Rule 9(j), the medical [*325] care provided to Plaintiff was reviewed by persons who Plaintiff reasonably expects to qualify as expert witnesses under [N.C. R. Evid. 702](#) who are willing to testify that the medical care at issue in this action failed to comply with the standard of care.

Both complaints failed to allege that a person reasonably expected to qualify as an expert had reviewed all available medical records pertaining to the alleged negligence. Because the second complaint was filed following the expiration of the statute of limitations, plaintiff must rely on the first complaint in order to have timely filed her medical malpractice action. We hold that where plaintiff failed to file a complaint including a valid Rule 9(j) certification within the statute of limitations, granting plaintiff's motion to amend her second complaint would have been futile, as the trial court found. Therefore, we affirm the order of the trial court, granting defendants' [**18] motion to dismiss pursuant to Rule 9(j).

Kearney v. Bolling,

___ N.C. App. ___, 774 S.E.2d 841 (2015)

Prior History:

Forsyth County, No. 11 CVS 6823

NCCOA Filed Date:

July 7, 2015

Plaintiff Attorney(s):

Harold L. Kennedy, III, and Harvey L. Kennedy

Defense Attorney(s):

Lisa M. Hoffman and Scott M. Stevenson

Judge (Author of opinion):

Dietz

Judges (Concurring / Dissenting):

McGee and McCullough (concur)

Type of Medical Care Involved:

Rule 702(b), same or similar community;
Expert cross examination; Rule 15
amendments mid-trial

Decision for Plaintiff or Defense Bar?

Defense

Brief Overview of Case:

“Plaintiff Hannah Marie Johnson Kearney appeals from a defense verdict in her medical malpractice action against Dr. Bruce R. Bolling. Kearney's lawsuit stems from serious complications she suffered following gallbladder surgery. She challenges a number of evidentiary rulings by the trial court, including the court's decision to permit testimony that Kearney's expert witness did not satisfy the criteria for expert testimony established by the American College of Surgeons, a voluntary organization to which the expert belonged. Kearney also challenges the trial court's determination that one of Dr. Bolling's expert witnesses was

familiar with the standard of care in a community of similar size to Winston-Salem. [**2] Finally, Kearney challenges the trial court's grant of a motion [*844] *in limine* and denial of a mid-trial motion to amend her complaint to add a new legal theory based on lack of informed consent.

Kearney's arguments present close questions. But this Court's review of evidentiary rulings and other mid-trial discretionary decisions by a trial court is severely limited. *HNI* These rulings are reviewed for abuse of discretion and this Court can reverse only if the trial court's rulings appear so arbitrary that they could not be the result of a reasoned decision. Although we may not agree with all of the trial court's rulings below, we cannot say that those rulings were so manifestly arbitrary that they constituted an abuse of discretion. Accordingly, we find no error in the trial court's judgment."

Regarding the issue of familiarity with the local standard of care, here the COA found no abuse of discretion in the trial court's decision to reject Plaintiff's argument that defense standard of care expert was not qualified because he did not show that he was familiar with the standard of care in Winston-Salem, as required by Rule 702(b). The expert testified that he was familiar with Beaumont, Texas, which he believed to be similar to Winston-Salem, and that he associated with surgeons from a hospital in Winston-Salem. The COA found no abuse of discretion by the trial court in finding this expert qualified.

The key facts surrounding the expert qualification battle are as follows:

Dr. Bolling also proffered another expert witness, Dr. William Nealon, a specialist in pancreaticobiliary and hepatic surgery at Vanderbilt University in Nashville, Tennessee. Dr. Nealon testified that he was familiar with the standard of care in communities similar to Winston-Salem, North Carolina—specifically "Beaumont, Texas, where they have a hospital that is almost identical in size to Forsyth Hospital, and the community itself is almost identical in size. . . . And just judging by the demographics for Winston-Salem and Forsyth Hospital, it seems almost identical." Dr. Nealon also testified that he was familiar with Wake Forest University and that he "associate[s] and speak[s] with general surgeons at Wake Forest University."

Plaintiff's counsel then questioned Dr. Nealon, through *voir dire*, about his familiarity with Winston-Salem or similar communities. When asked how he knew the size of Beaumont, Texas, Dr. Nealon responded that he "read it in the newspaper." Plaintiff's counsel then presented demographic information to Dr. Nealon [**7] indicating that Beaumont, Texas was significantly smaller than Winston-Salem. The demographic information showed that in 2013 Beaumont had a population of approximately 118,000 compared to Winston-Salem's 234,000; Beaumont's hospital had 456 beds to Forsyth Medical Center's 681; and Beaumont's hospital had 20,658 admissions where Forsyth Medical Center had 40,938. Dr. Nealon testified that he believed the discrepancy was the result of a population decrease caused by a severe hurricane that hit the Beaumont area sometime after 2009.

After plaintiff's counsel completed the *voir dire* of Dr. Nealon, defense counsel asked Dr. Nealon, "do you believe that regardless of what the population is today in those cities,

that you are familiar with the standard of care for Winston-Salem or similar communities as it existed in 2009?" Dr. Nealon replied, "Yes, I feel very comfortable about that."

Defense counsel then tendered Dr. Nealon for acceptance as an expert witness, arguing that Dr. Nealon "has certainly demonstrated for this court that he is familiar with the standard of care in 2009 for the same or similar communities." Plaintiff's counsel objected, arguing that Dr. Nealon was not qualified [**8] to testify as an expert because he failed to establish his familiarity with the standard of care in Winston-Salem or a similar community because Beaumont, Texas was not sufficiently similar to Winston-Salem. The trial court found that Dr. Nealon met the statutory requirements for expert testimony. Dr. Nealon then testified that, in his opinion, Dr. Bolling "[met] the standard of care," "used his best judgment," and "used reasonable care" "in all respects, in the care and treatment of [Kearney] from March 17, 2009, through March 27, 2009."

On 2 August 2013, the jury returned a verdict in favor of Dr. Bolling. The trial court entered a corresponding judgment on 22 August 2013. Kearney timely appealed.

Key Quotations Underlying Court's Analysis/Holding:

Kearney first argues that the trial court erred in allowing defense counsel to cross-examine Kearney's expert witness, Dr. Brickman, about the American College of Surgeons' policy statement on physicians acting as expert witnesses. Kearney contends that questions about the association's guidelines—which recommended that physicians in Dr. Brickman's position not testify as experts—undermined the trial court's ruling that Dr. Brickman was qualified [**9] to testify as an expert. We disagree.

[*846] **HN2** The trial court has "broad discretion in controlling the scope of cross-examination and a ruling by the trial court should not be disturbed absent an abuse of discretion and a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision." [Williams v. CSX Transp., Inc., 176 N.C. App. 330, 336, 626 S.E.2d 716, 723 \(2006\)](#).

HN3 A party may question an expert witness to establish inconsistencies and "attack his credibility." [State v. Gregory, 340 N.C. 365, 410, 459 S.E.2d 638, 663 \(1995\)](#). "The largest possible scope should be given, and almost any question may be put to test the value of [an expert's] testimony." *Id.* (internal quotation marks omitted). Likewise, "[c]ross examination is available to establish bias or interest as grounds of impeachment" because "[e]vidence of a witness' bias or interest is a circumstance that the jury may properly consider when determining the weight and credibility to give to a witness' testimony." [Willoughby v. Kenneth W. Wilkins, M.D., P.A., 65 N.C. App. 626, 638, 310 S.E.2d 90, 98 \(1983\)](#).

Here, Dr. Brickman testified that he belonged to the American College of Surgeons and that he considered it an honor to belong to the organization. The organization's guidelines state that doctors like Dr. Brickman, who are not actively practicing medicine in a clinical setting, should not testify as expert witnesses. Dr. Brickman chose to ignore [**10] those guidelines and testify

in this case. The trial court permitted defense counsel to question Dr. Brickman about his violation of the organization's guidelines in order to challenge his credibility. Under the narrow standard of review applicable to evidentiary issues, we cannot say that the trial court's decision to permit this line of questioning "was so arbitrary that it could not have been the result of a reasoned decision." [Williams, 176 N.C. App. at 336, 626 S.E.2d at 723](#). Accordingly, we must find no abuse of discretion.

Kearney responds by citing [Goudreault v. Kleeman, 158 N.H. 236, 965 A.2d 1040 \(N.H. 2009\)](#), a New Hampshire Supreme Court opinion affirming the exclusion of similar testimony regarding the American College of Surgeons' guidelines. But even if *Goudreault* were binding on this Court—and it is not—it does not hold that the American College of Surgeons' guidelines *never* are admissible for impeachment purposes. The *Goudreault* court held, as we do here, that the trial court's evidentiary ruling was not an abuse of discretion under the narrow standard of review for evidentiary rulings. [Id. at 1052](#). Nothing in *Goudreault* indicates that it would be an abuse of discretion to permit this line of questioning instead of excluding it; indeed, **HN4** the nature of discretionary rulings means that **[**11]** two trial judges could reach opposite decisions on the same facts and yet neither ruling is reversible error.

Kearney next argues that questioning Dr. Brickman about his compliance with the American College of Surgeons' guidelines contradicts [North Carolina Rule of Evidence 702\(b\)\(2\)](#), which expressly permits medical school professors to testify as expert witnesses in medical malpractice actions. Kearney argues that the effect of the trial court's ruling was to permit a private agreement (the American College of Surgeons' guidelines) to supersede a state statute (the Rules of Evidence).

But that is not what occurred at trial. Dr. Brickman described his qualifications and expertise at length during direct examination and the trial court accepted him as an expert witness in the presence of the jury. Later, during jury instructions, the trial court instructed the jury about what it meant to be an "expert witness" and stated that Dr. Brickman was "a medical expert witness." Thus, although Dr. Brickman's cross-examination concerning the American College of Surgeons' guidelines may have raised questions about credibility and motive to testify, it did not undermine the trial court's ruling that, as a matter of evidentiary law, Dr. **[**12]** Brickman was qualified to render expert testimony.

Finally, it must be noted that, following cross-examination, the trial court provided Kearney with the opportunity to rehabilitate Dr. Brickman through re-direct examination, and Kearney did just that. In sum, we hold that the trial court's decision to permit cross-examination **[*847]** concerning the American College of Surgeons' guidelines was within the trial court's sound discretion.

Kearney also argues that the trial court erred in permitting a line of cross-examination concerning Dr. Brickman's application to—and rejection from—medical schools in the United States. Kearney failed to object to these questions, and therefore this issue was not preserved for

appellate review.¹ See N.C. R. App. P. 10(a)(1) (2013). In any event, for the same reasons discussed above, these questions could aid the jury in assessing Dr. Brickman's credibility and thus the trial court did not abuse its broad discretion in permitting this line of questioning.

HN6 In a medical malpractice action, the standard of care is defined as "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." N.C. Gen. Stat. § 90-21.12(a) (2013) (emphasis added). An expert witness "testifying as to the standard of care" is not required "to have actually practiced in the same community as the defendant," but "the witness must demonstrate that he is familiar with the standard of care in the community where the injury occurred, or the standard of care in similar communities." Smith v. Whitmer, 159 N.C. App. 192, 196, 582 S.E.2d 669, 672 (2003) (citation omitted).

The "critical inquiry" in determining whether a medical expert's testimony is admissible under the requirements of N.C. Gen. Stat. § 90-21.12 is "whether the doctor's testimony, taken as a whole" establishes that he "is familiar with a community that is similar to a defendant's community in regard [**17] to physician skill and training, facilities, equipment, funding, and also the physical and financial environment of a particular medical community." Pitts v. Nash Day Hosp., Inc., 167 N.C. App. 194, 197, 605 S.E.2d 154, 156 (2004), *aff'd per curiam*, 359 N.C. 626, 614 S.E.2d 267 (2005).

Kearney contends that the demographic differences between Beaumont and Winston-Salem as of 2013 required the trial court to find that the two cities were not similar communities as a matter of law. Kearney supports this argument with analysis of two cases in which this Court held that the similar community requirement of N.C. Gen. Stat. § 90-21.12 was not satisfied.

First, in *Henry v. Southeastern OB-GYN Assocs., P.A.*, this Court held that the similar community requirement was not met where the proffered expert "failed to testify in any instance that he was familiar with the standard of care in Wilmington or similar communities." [*849] 145 N.C. App. 208, 210, 550 S.E.2d 245, 246, *aff'd per curiam*, 354 N.C. 570, 557 S.E.2d 530 (2001). The doctor at issue in that case testified that he was familiar with the national standard of care, but was not familiar with Wilmington, North Carolina. Id. at 209-10, 550 S.E.2d at 246-47. The doctor practiced in Spartanburg, South Carolina, which the plaintiffs argued was similar to Durham or Chapel Hill, but there was no evidence in [**19] the record that Wilmington and Durham or Chapel Hill were the "same or similar." *Id.*

Second, in *Smith v. Whitmer*, this Court held that the similar community requirement was not met where the doctor proffered as an expert "asserted that he was familiar with the applicable

¹Defense counsel asked Dr. Brickman questions about his rejection from U.S. medical schools repeatedly during cross-examination. The second time defense counsel asked the question, plaintiff's counsel objected stating "Objection. We've [**13] gone over the same thing." But Kearney did not object on the ground that this line of questioning was improper and the responses inadmissible.

standard of care," but "his testimony [was] devoid of support for this assertion." [159 N.C. App. 192, 196, 582 S.E.2d 669, 672 \(2003\)](#). The doctor in that case "stated that the sole information he received or reviewed concerning the relevant standard of care in Tarboro or Rocky Mount was verbal information from plaintiff's attorney," but he could not "remember what plaintiff's counsel had purportedly told him." [Id. at 196-97, 582 S.E.2d at 672](#). He "had never visited Tarboro or Rocky Mount, had never spoken to any health care practitioners in the area, and was not acquainted with the medical community." [Id. at 197, 582 S.E.2d at 672](#) (internal quotation marks omitted).

These cases are distinguishable. Here, Dr. Nealon testified that he was familiar with Beaumont, Texas; that he believed Beaumont was similar to Winston-Salem based on his knowledge of Beaumont and demographic statistics for Winston-Salem; that the demographic differences between Beaumont and Winston-Salem as of 2013 were the result of an intervening hurricane that [**20] displaced many Beaumont residents; that he has associated with surgeons from Wake Forest University Baptist Medical Center, another hospital in Winston-Salem; and that he felt "very comfortable" that he was "familiar with the standard of care for Winston-Salem or similar communities as it existed in 2009."

In light of this testimony, we cannot conclude that the trial court's ruling was "so arbitrary that it could not have been the result of a reasoned decision." [Williams, 176 N.C. App. at 336, 626 S.E.2d at 723](#). Thus, under the deferential standard of review applicable to a trial court's admission of expert testimony, we hold that the trial court did not abuse its discretion in concluding that Dr. Nealon was familiar with the standard of care in communities and hospitals similar to Winston-Salem and Forsyth Medical Center.

Lastly, Kearney argues that the trial court erred in granting Dr. Bolling's motion *in limine* and denying Kearney's motion to amend her complaint during trial, both of which had the effect of prohibiting Kearney from pursuing a claim based on lack of informed consent. As with Kearney's other arguments, we are constrained by the narrow standard of review applicable [**21] to these arguments.

But medical malpractice claims are different. Rule 9(j) contains additional requirements for medical malpractice complaints. Rule 9(j) requires a statement that the plaintiff's medical records 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. R. Civ. P. 9(j)(1). Claims based on lack of informed consent are medical malpractice claims requiring expert testimony and therefore must comply with the requirements of Rule 9(j). See [Estate of Waters v. Jarman, 144 N.C. App. 98, 101, 547 S.E.2d 142, 145 \(2001\)](#); see also [Clark v. Perry, 114 N.C. App. 297, 306, 442 S.E.2d 57, 62 \(1994\)](#); [Nelson v. Patrick, 58 N.C. App. 546, 548-49, 293 S.E.2d 829, 831 \(1982\)](#). When a medical malpractice complaint asserts multiple theories of negligence with different standards of care, the expert or experts satisfying the Rule 9(j) requirement must be willing to testify to each applicable standard of care. [N.C. R. Civ. P. 9\(j\)\(1\)](#).

That did not happen here. Dr. Brickman, the expert who provided Kearney's Rule 9(j) certification, testified during his deposition that he was not aware Kearney intended [**23] to assert an informed consent claim until the issue came up during depositions. He did not review that theory of negligence before the complaint was filed and his opinion forming the basis of Kearney's Rule 9(j) certification did not address that standard of care.

HN9 It is "well established that even when a complaint facially complies with Rule 9(j) by including a statement pursuant to Rule 9(j), if discovery subsequently establishes that the statement is not supported by the facts then dismissal is likewise appropriate." [*Ford v. McCain, 192 N.C. App. 667, 672, 666 S.E.2d 153, 157 \(2008\)*](#). Applying this legal principle here, we hold that the trial court did not err in concluding that the complaint "did not include the consent issue." That legal theory could be asserted only if, *before filing the complaint*, Kearney's expert had reviewed the underlying facts and was willing to testify that Dr. Bolling had not complied with the applicable standard of care concerning informed consent. We know for certain that this did not occur because Kearney's expert conceded that he was unaware of the informed consent issue until it first came up during discovery. As a result, the trial court did not abuse its discretion in granting the motion *in limine* excluding Kearney's informed consent evidence [**24] from trial.

Kearney also argues that, even if the trial court properly excluded the informed consent evidence initially, the court erred by denying her motion to amend during trial because defense counsel opened the door to this evidence by questioning Kearney about her consent to the medical procedure. As explained below, the trial court did not abuse its broad discretion in denying Kearney's motion.

Kearney contends that the following questioning by defense counsel opened the door on the issue of informed consent:

DEFENSE COUNSEL: Dr. Bolling came in, talked to you about the operation, and following the recommendation of the emergency department and Dr. Bolling, you consented to have your gallbladder taken out; correct?

KEARNEY: He came in. He did not discuss everything that was to be discussed. When the consent form was handed to me, sir, if you will look back on the first day and how much medication I was given, I was in and out.

DEFENSE COUNSEL: You did sign a consent form; correct?

[*851] KEARNEY: I had to be woken up to sign a consent form from all the medicine I was on, sir.

Shortly after this questioning ended, Kearney moved for leave to amend her complaint to add a claim based on lack [**25] of informed consent, and the trial court denied the motion. Kearney argues on appeal that her motion should have been granted and that, in any event, the questioning amounted to an amendment by implication under [*Rule 15\(b\)*](#) of the **HN10** [*Rules of Civil Procedure. Rule 15\(b\)*](#) states that "[w]hen issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been

raised in the pleadings." [*N.C. R. Civ. P. 15\(b\)*](#). The denial of a motion to amend under [*Rule 15\(a\)*](#) and the refusal to recognize a claim of an amendment by implication under [*Rule 15\(b\)*](#) both are reviewed for abuse of discretion. [*Tyson v. Ciba-Geigy Corp.*, 82 N.C. App. 626, 629-30, 347 S.E.2d 473, 476 \(1986\)](#).

We hold that the trial court did not abuse its discretion by refusing to permit Kearney to pursue her informed consent claim for the first time mid-trial. Our case law governing amendments by implication requires that the parties actually litigate the new claim without objection. For example, in [*Taylor v. Gillespie*](#), on which Kearney relies, this Court held that the pleadings were amended by implication to include a claim for resulting trust because the plaintiff introduced "evidence tending to establish the existence of a resulting trust" and the defendant did not object. [*66 N.C. App. 302, 305, 311 S.E.2d 362, 364 \(1984\)*](#).

Here, by contrast, the parties did not litigate **[**26]** a claim for lack of informed consent at trial. All the jury heard were two isolated questions concerning the consent form that Kearney signed. Notably, there was no expert testimony concerning the standard of care and no other testimony establishing the elements of a malpractice claim based on the lack of informed consent. Thus, once again, we must conclude that the trial court's ruling was not an abuse of discretion. The court's decision not to permit this new theory to enter the case mid-trial rested soundly within the court's discretion to control the course of trial proceedings. That decision certainly was not "so arbitrary that it could not have been the result of a reasoned decision." [*Williams*, 176 N.C. App. at 336, 626 S.E.2d at 723](#).