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N.C.R. Civ. Proc. 9(j)

The Role of Expert Review in Medical Malpractice Litigation

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What Is Rule 9(j)?

N.C.R. Civ. Proc. Rule 9 sets out some special pleading rules, including part (j) requiring review of medical malpractice actions by a medical expert.



What Does Rule 9(j) Say?

Medical Malpractice – Any complaint alleging medical malpractice by a health care provider as defined in G.S. 90-21.11 in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:

(1) The pleading specifically asserts that the medical care has 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 has 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; or

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



What Does Rule 9(j) Require?

- If you are filing a claim against a healthcare provider for medical negligence, you must get an expert that you reasonably expect would be able to testify at trial to review the claim and to certify that there has been medical malpractice.

9(j) is only a pleading requirement under the Rules of Civil Procedure and it has no effect whatsoever on Plaintiff's burden of proof. See *Thigpen v. Ngo*, 143 N.C. App. 209, 545 S.E.2d 477 (2001). Therefore simply complying with 9(j) does not make a case against dismissal or summary judgment any stronger than it did before 9(j) existed.



Why Do We Have 9(j)?

Public Policy and
Legislative Purpose Behind
the Rule



Why Do We Have 9(j)?

- The legislature specifically drafted Rule 9(j) to govern the initiation of medical malpractice actions and to require physician review as a condition for filing the action. The 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.
- See *Thigpen v. Ngo*, 355 N.C. at 203-04, 558 S.E.2d at 166.



When Does Rule 9(j) Apply?

ALL Medical Malpractice Actions
That Are Not Res Ipsa



When Does Rule 9(j) Apply?

In the Complaint

- Rule 9(j) should be found in the complaint (the first document filed to start a case) and if it isn't the case will be dismissed.
 - The rule must be complied with at the time the complaint is filed. See *Sharpe v. Worland*, 147 N.C. App. 782, 557 S.E.2d 110 (2001).



- The expert review required in 9(j) must be done before the complaint is filed. Even if the complaint appears to comply with 9(j), if later discovery turns up facts that show that the review was not done before the complaint was filed, the action will be dismissed. See *Ford v. McCain*, 666 S.E.2d 153 (2008).



What Does A 9(j) Allegation Look Like?

“The medical care in this action has been reviewed by persons reasonably expected to qualify as expert witnesses pursuant to Rule 702 of the North Carolina Rules of Evidence and who are willing to testify that the medical care did not comply with the applicable standard of care.”



When Does Rule 9(j) Apply?

Medical Malpractice Action?

- A medical malpractice action is defined in N.C.G.S. § 91-21.11 as “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.”



- So what we are looking for is action that required some type of medical knowledge and not just usual reasonable care of an individual or administrative mishaps of a hospital or organization.

When Does Rule 9(j) NOT Apply?

- Res Ipsa Medical Malpractice.
- Claims Against Healthcare Providers That Are Not Medical Malpractice.

When Does Rule 9(j) Apply?

Res Ipsa Medical Malpractice Does Not Have to Comply with 9(j)

- “Res ipsa loquitur is a doctrine addressed to those situations where the facts or circumstances accompanying an injury by their very nature raise a presumption of negligence on the part of defendant. It is applicable when no proof of the cause of an injury is available, the instrument involved in the injury is in the exclusive control of defendant, and the injury is of a type that would not normally occur in the absence of negligence.” *Hayes v. Peters*, 184 N.C. App. 285, 287, 645 S.E.2d 846, 848 (2007)(quoting *Bowlin v. Duke University*, 108 N.C. App. 145, 149, 423 S.E.2d 320, 322 (1992)).



- In medical malpractice actions, res ipsa is not favored by the courts. In fact, the doctrine has only been approved in two limited circumstances:
 - 1) injuries resulting from surgical instruments or other foreign objects left in the body following surgery; and
 - 2) injuries to a part of the patient's anatomy outside of the surgical field). *Grigg v. Lester*, 102 N.C.App. 332, 335, 401 S.E.2d 657, 659 (1991).



When Does 9(j) Apply?

Claims Against Healthcare Providers That Are Not Medical Malpractice The Individual Healthcare Provider (Doctors)

- Actions that are NOT medical malpractice:
 - Accidents at doctors offices, such as a patient falling from a bed, or an equipment failure, and failure to supervise a patient in a nonmedical situation, such as when the patient was smoking. See Angela Holder, *Medical Malpractice Law* 175 (1975) (“actions involving falls from beds or examining tables, equipment failures, or other types of accidents in a doctor’s office” are not medical malpractice); *Norris v. Rowan Memorial Hospital*, 21 N.C. App. 623, 626-27, 205 S.E.2d 345, 348 (1974) (action for damages resulting from a fall that occurred when nurses did not raise the bed rails or instruct patient that she needed assistance in getting out of bed was a claim for ordinary negligence, not malpractice); *Lewis*, 130 N.C. App. 606, 503 S.E.2d 673 (1998) (plaintiff’s negligence claim against physician for failing to lower examination table prior to transferring plaintiff to his wheelchair was not medical malpractice); and



When Does 9(j) Apply?

Claims Against Healthcare Providers That Are
Not Medical Malpractice

The Individual Healthcare Provider (Doctors)

- When the claim is against a hospital or healthcare entity, determining whether the claim is one of medical malpractice turns on the question of whether the claim is regarding an administrative function of the facility.



- Examples of administrative claims are negligent grant of privileges to a physician, failure to adequately monitor and oversee physicians, negligent selection and supervision of physicians, and failure to adequately assess the credentials of the physicians prior to granting privileges. See *Estate of Waters*, 547 S.E.2d at 145-146, 144 N.C. App. 98 at 102-104.



- Examples of claims that are found to be medical malpractice claims are: claims against a hospital for failing to obtain informed consent prior to performing a blood transfusion, failure to promptly report test results, failure of an emergency room doctor to see a patient despite requests from the patient's daughter. Id.

Rule 9(j) and the Statute of Limitations

120 Day Extension of the Statute of Limitations

- Rule 9(j) provides that Plaintiffs can move the court to extend the statute of limitations for up to 120 days in order to comply with this rule.
- To allow such motion, “the court must make a determination that good cause exists for the granting of the motion and that the ends of justice would be served by an extension.”



Rule 9(j) and the Statute of Limitations

Rule 41 and Rule 15:

How 9(j) Pre-empts Other Rules of Civil Procedure
Rule 41

- Rule 41 allows for a voluntary dismissal as a matter of right to plaintiffs. The rule then allows plaintiffs to refile within 1 year after their dismissal. Even if the statute of limitations runs during that time, plaintiffs still have 1 year after their dismissal to refile under Rule 41.



- Here again, however, 9(j) pre-empts this rule. Rule 41 will not save a claim that when originally filed did not comply with Rule 9(j). The Supreme Court of NC has been very clear on this point, unlike with Rule 15. *Thigpen* (Supreme Court case not COA)



- Rule 15 allows for the amendment of pleadings (in this case the complaint) to add facts or similar claim either before the responsive pleading as a matter of right or if after the responsive pleading, as allowed by the court. Rule 15 also allows for “relation-back” which means that the claims amended will be deemed to be pled on the date of the original filing. This means that Plaintiffs can amend a complaint, after the statute of limitations has run, and the claim will relate back and not violate the statute.



- Rule 15 has been pre-empted in some respects by 9(j). It appears that Amendments through Rule 15 can satisfy 9(j) and relate back as long as (1) the expert was consulted before the suit was filed and (2) the expert does or it is reasonably believed the expert will be qualified under rule 702 at trial. If either (a) the statute has run or (b) the expert was not consulted until after the suit or (c) the expert could not reasonably be expected to qualify then amendment cannot save the claim from Rule 9(j) dismissal. See *Thigpen v. Ngo*, 355 N.C. 198, 558 S.E.2d 162.



An Expert Must Be Reasonably Expected to Qualify

- Rule 9(j) requires that the expert be one that either will or is reasonably expected to qualify.

What Does Reasonably Expected to Qualify Mean?

- Important Points from Rule 702 are the following:
 - 1) The expert must be a licensed healthcare provider.
 - 2) The expert must match the defendant who he is testifying against by practicing in the same area geographically and in the same type of medicine or else must be familiar with that information as a professor or through serious study has become familiar with that information.



Consequence of Non-Compliance

- Forcing Plaintiffs to Use a Voluntary Dismissal
- The Possibility of a Dismissal With Prejudice

Consequence of Non- Compliance

Forcing Plaintiffs to Use a Voluntary Dismissal

- 9(j) is clear on this point. If Plaintiff does not comply, the action must be dismissed.
- Plaintiffs can, within the statute of limitations, amend or take a voluntary dismissal without prejudice and refile with the appropriate review prior to the court hearing the motion to dismiss. However, if it arrives at a hearing at the court house, the judge has no discretion and must dismiss the complaint.



The Consequence of Non-Compliance

The Possibility of a Dismissal With Prejudice

- If the court gets to rule on the motion to dismiss, it is within the trial court's discretion whether to dismiss with or without prejudice. See *Allen v. Carolina Permanente Medical*, 533 S.E.2d 812, 817 (N.C. App. 2000).



Rule 9(j) and the Constitution

Is 9(j) Constitutional if it
Requires Plaintiffs to Prove Their Case
Through an Expert Before
Discovery or Trial?



Rule 9(j) Discovery

- Interrogatories
- 9(j) Depositions

Rule 9(j) Discovery

Interrogatories

- 9(j) provides that “Plaintiff shall provide, at the request of the defendant, proof of compliance with this subsection through up to ten written interrogatories, the answers to which shall be verified by the expert required under this subsection. These interrogatories do not count against the interrogatory limit under Rule 33.”



Rule 9(j) Discovery

Depositions

- Defendants can request in addition to the interrogatories to do 9(j) depositions. This is a less clear area of law and some care must be taken that it is clear this is only for 9(j) purposes so that Plaintiffs cannot reject a second deposition of that same person if the 9(j) expert turns out to be the trial expert as well.



Final Review of Important Points

- 9(j) is important to get rid of frivolous medical malpractice claims.
- It must be in the complaint as the review must have happened before the complaint was filed.

- It does not apply to simple negligence or administrative claims, but only those claims involving actual medical science.
- If a plaintiff does not comply, the claim must be dismissed by the court or the plaintiff can take a voluntary dismissal.
- Defendants do have some rights to discovery regarding the 9(j) expert in order to ensure Plaintiffs did actually comply with the rule.

