

**MEDICAL MALPRACTICE
RECENT DEVELOPMENTS: MARCH 2011 – MAY 2012**

**By Matthew D. Ballew
Zaytoun Law Firm, PLLC
3130 Fairhill Drive, Suite 100
Raleigh, NC 27612
Tel: (919) 832-6690
Fax: (919) 831-4793
mballew@zaytounlaw.com**

DISCLAIMER: All of the cases reported in this manuscript represent North Carolina medical malpractice law as interpreted and applied by the courts **before** the effects of the 2011 radical tort reforms bills, Senate Bill 33 and House Bill 542. The sweeping changes brought on by these two bills may strip portions of these cases of their precedential value. The author has not undertaken any analysis on whether these decisions will survive after SB33 or HB542, and makes no representations to that effect in this manuscript.

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INTRODUCTION

This manuscript provides an analysis of all **published** medical malpractice opinions reported from the North Carolina Court of Appeals and the North Carolina Supreme Court from March 2011 to May 2012. The cases are arranged in chronological order according to their appellate opinion filing date. 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 No unpublished medical malpractice opinions have been analyzed in this manuscript.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.)

Urquhart v. East Carolina School of Medicine,
____ N.C. App.____, 712 S.E.2d 200, 2011 N.C. App. LEXIS 737 (2011)

Prior History:

- Industrial Commission, I.C. TA-16672;

and

- *Urquhart v. Univ. Health Sys. Of E. Carolina, Inc.*, 151 N.C. App. 590, 566 S.E.2d 143 (2002)

NCCOA Filed Date:

April 19, 2011

Plaintiff Attorney(s):

Thomas M. Urquhart, Jr., Esq. (*pro se* plaintiff-appellant)

Defense Attorney(s):

Amar Majmundar, Special Deputy Attorney General, for the State

Judge (Author of opinion):

Ervin, Sam IV

Judges (Concurring / Dissenting):

Stephens, Linda (concur)
Hunter, Robert C. (concur)

Type of Medical Care Involved:

N/A (issues here are procedural)

Decision for Plaintiff or Defense Bar?

Defense

Procedural History:

Appeal by Plaintiff of the Full Commission's order granting summary judgment to Defendant based upon collateral estoppel.

Background Facts:

On September 27, 2000, Plaintiff filed a wrongful death suit in Pitt County Superior Court alleging medical negligence against Pitt County Memorial Hospital and several individual doctors and nurses.¹ The Plaintiff did not name ECU School of Medicine (the doctors' employer) in this superior court action. All defendants filed motions to disqualify each of Plaintiff's experts and for summary judgment. Judge Everett granted defendants' motions, finding that each of the Plaintiff's experts failed to qualify under Rule 702, and therefore the case should be dismissed with prejudice because Plaintiff could not forecast any competent evidence of medical negligence.

Key Case Facts:

At approximately the same time he filed the Pitt County action, Plaintiff filed a State Tort Claims Act action in the Industrial Commission against the ECU School of Medicine. This action involved the same underlying medical care at issue in the Pitt County case, but Plaintiff named ECU under a *respondeat superior* theory that it was liable for the underlying medical negligence of its employees.

¹ These defendants moved for summary judgment asserting sovereign immunity as employees of ECU School of Medicine, and were thus state employees sued in their official capacities. Although Judge Rusty Duke granted summary judgment, NCAJ members Adam Stein and William Simpson successfully argued in the N.C. Court of Appeals to reverse. *Urquhart v. Univ. Health Sys.*, 151 N.C. App. 590, 566 S.E.2d 142 (2002) (concluding individual defendants were not entitled to sovereign immunity because they were sued in their individual capacities).

Defendant ECU moved for summary judgment on the theory that Judge Everett's summary judgment order in the Pitt County action barred Plaintiff's current claim based on the doctrine of collateral estoppel. The Full Commission granted Defendant ECU's motion, concluding that collateral estoppel applied because Judge Everett's Pitt County summary judgment order was a "complete and final adjudication on the merits" of whether any of the healthcare providers at issue had committed medical negligence.

Issue(s):

Did the Full Commission correctly find that based on Judge Everett's Pitt County summary judgment order, collateral estoppel barred Plaintiff's *respondeat superior* claim against Defendant ECU?

Holding:

Yes. Collateral estoppel applies here to bar Plaintiff's *respondeat superior* claim against Defendant ECU.

Rules / Controlling Authority:

"The companion doctrines of *res judicata* (claim preclusion) and collateral estoppel (issue preclusion) have been developed by the courts for the dual purposes of protecting litigants from the burden of relitigating previously decided matters and promoting judicial economy by preventing needless litigation." *Urquhart*, 712 S.E.2d at 203-04 (quoting *Williams v. City of Jacksonville Police Dep't*, 165 N.C. App. 587, 591, 599 S.E.2d 422, 427 (2004)).

"Under the companion doctrine of collateral estoppel, also known as 'estoppel by judgment' or 'issue preclusion,' the determination of an issue in a prior judicial or administrative proceeding precludes the relitigation of that issue in a later action, provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding." *Id.* at 204 (quoting *Williams*, 165 N.C. App. at 591, 599 S.E.2d at 427).

"Collateral estoppel applies when the following requirements are met: (1) the issues to be concluded must be the same as those involved in the prior action; (2) in the prior action, the issues must have been raised and actually litigated; (3) the issues must have been material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action must have been necessary and essential to the resulting judgment." *Id.* (quoting *McCallum v. N. C. Coop. Extension Serv.*, 142 N.C. App. 48, 53-54, 542 S.E.2d 227, 232-233, *appeal dismissed and review denied*, 353 N.C. 452, 548 S.E.2d 527 (2001)).

"In general a cause of action determined by an order of summary judgment is a final judgment on the merits." *Id.* at 205 (quoting *Hill v. West*, 189 N.C. App. 194, 198, 657 S.E.2d 698, 700 (2008)).

"[I]n analyzing collateral estoppel, the North Carolina Courts have restricted its application to issues over which the prior court had jurisdiction.' Thus, '[w]here the [tribunal] adjudicating the prior proceeding lacked jurisdiction over an issue, the [actually litigated and necessary] element of collateral estoppel has not been met.'" *Id.* at 207 (quoting *Gregory v. Penland*, 179 N.C. App. 505, 514, 634 S.E.2d 625, 631 (2006)).

Analysis & Arguments:

Plaintiff made two basic arguments on appeal: (1) "Judge Everett never made a final determination of the type necessary to collaterally estop him from relitigating the negligence at

issue,” and (2) “even if Judge Everett made valid determination otherwise entitled to preclusive effect, he lacked jurisdiction to do so.” *Id.* at 203.

A. Collateral estoppel / final adjudication on the merits

The Court concluded that Judge Everett had made a final adjudication on the merits entitled to preclusive effect. The Court reasoned that “Plaintiff’s assertion of a right to recover compensation from Defendant [ECU] under the State Tort Claims Act was predicated on alleged deviations from the applicable standard of care committed by the same defendant physicians whose conduct was at issue in the Pitt County civil action . . . As a result, both the Pitt County civil action and the State Tort Claims Act proceeding rested on the same allegation - that the defendant physicians deviated from the applicable standard of care in connection with their treatment of Plaintiff’s decedent . . . the validity of both proceedings hinges on Plaintiff’s ability to establish that the same defendant physicians deviated from the applicable standard of care in connection with their treatment of Plaintiff’s decedent. Thus, a common issue is central to both proceedings.” *Id.* at 204-205.

Based on the *Hill* case (see “Rules / Controlling Authority,” *supra*), “the trial court’s decision to grant summary judgment in favor of the defendant physicians in the Pitt County civil action constituted an adjudication on the merits of the issue of the extent to which the defendant physicians deviated from the applicable standard of care . . . this issue was material and relevant to the disposition of the Pitt County civil action, and the manner in which the trial court decided this issue was necessary and essential to the resulting judgment. As a result, we conclude that each of the elements of a valid collateral estoppel is present in this instance.”

Plaintiff also argued that Judge Everett’s summary judgment order could not have finally decided the issue of whether the defendants acted negligently, because that is an ultimate issue of disputed fact for the jury. However, the Court reasoned that “rather than making an impermissible factual finding concerning the negligence of the defendant physicians, Judge Everett concluded as a matter of law that Plaintiff had failed to forecast competent and admissible evidence [of medical malpractice] . . . and that they were entitled to judgment as a matter of law for that reason. Such determinations resolve questions of law and are properly considered in evaluating the merits of a summary judgment motion.” *Id.* at 206.

Plaintiff finally argued that “the Pitt County summary judgment order does not constitute an adjudication on the merits because ‘neither side presented any evidence on the factual issue of negligence as to any of the defendants.’” *Id.* at 206. The Court found this argument unpersuasive, explaining that Plaintiff cited no authority for his “implied assertion” that presentation of testimony and resolution of factual disputes by a fact finder are necessary prerequisite for collateral estoppel. Instead, the Court relied on *Hill* (see *supra*) and the “well-established general rule that a summary judgment order constitutes a decision on the merits.” *Id.*

B. Jurisdiction issue

Plaintiff cited *Gregory* (see “Rules” *supra*) in arguing that since the Pitt County Superior Court lacked the jurisdiction to hear a medical negligence against Defendant ECU – a state entity subject to Tort Claims Act – then collateral estoppel could not be applied to preclude Plaintiff from litigating the issue in the Industrial Commission, the forum with jurisdiction over this claim.

The Court disagreed, and focused on collateral estoppel as a doctrine of issue preclusion. The Court explained: “The gist of our decision in *Gregory* was that a ruling by a tribunal on an issue over which it lacks jurisdiction does not collaterally estop relitigation of that issue in a proper forum. In this case, however, the Pitt County Superior Court clearly had jurisdiction over the issue of whether the defendant physicians deviated from the applicable standard of care in connection with their treatment of Defendant's decedent, rendering our decision in *Gregory* inapplicable to a proper resolution of the present case.” *Id.* at 207 (emphasis added). The Court added that the issue of the defendant physicians’ liability “must be established in order for Plaintiff to successfully assert his claim against Defendant under the State Tort Claims Act,” and had that issue was “properly and actually litigated before the Pitt County Superior Court.” *Id.* Thus, Plaintiff’s “absence of jurisdiction” argument is without merit.

Impact of Decision on Plaintiff’s Practice:

This case stands for the general proposition that where the issue of an employee’s negligence has been previously determined – even by a summary judgment motion based solely on the disqualification of medical experts, where no evidence of negligence was ever presented – a collateral estoppel will bar a future claim against the employer based on the same conduct under a *respondeat superior*.

Watson v. Price,	
____ N.C. App.____, 712 S.E.2d 154, 2011 N.C. App. LEXIS 743 (2011), <i>disc. review denied</i> , 718 S.E.2d 398, 2011 N.C. LEXIS 953 (N.C. Nov. 9, 2011)	
Prior History: Durham County, 09 CVS 6637	NCCOA Filed Date: April 19, 2011
Plaintiff Attorney(s): David O. Lewis (Bryant, Patterson, Covington, Lewis & Lindsley, P.A.)	Defense Attorney(s): William P. Daniell (Young Moore) Kelly E. Street (Young Moore)
Judge (Author of opinion): Stephens, Linda	Judges (Concurring / Dissenting): Ervin, Sam IV (concur) Hunter, Robert C. (concur, separate opinion)
Type of Medical Care Involved: N/A (issues here are procedural)	Decision for Plaintiff or Defense? Defense

Procedural History:

Appeal by plaintiff from Judge Orlando Hudson’s order dismissing case as time-barred under the statute of limitations.

Key Case Facts (chronology important here):

- **June 9, 2006:** The last date of continuing medical treatment rendered by Defendant to Plaintiff. The three year SOL for medical malpractice began running on this date.

- **May 18, 2009:** Plaintiff filed a motion with trial court for a Rule 9(j) 120 day extension to file her complaint. On this same day, Judge Orlando Hudson **signed an order** granting the 9(j) extension, extending the SOL to October 2, 2009. However, this 9(j) order was **never filed**.
- **September 29, 2009:** Plaintiff filed a complaint for medical malpractice against Defendants.
- **December 2009:** Defendants filed their Answer pleading statute of limitations as a defense, and asserted a 12(b)(6) motion to dismiss.
- **June 1, 2010:** Judge Hudson conducted hearing on Defendant’s motion to dismiss, and concluded that despite his signature granting the 9(j) extension, Plaintiff’s failed to comply with the statute of limitations because his 9(j) was never filed, and therefore the statute of limitations ran on June 9, 2009.

Issue(s):

Where a 9(j) extension order is granted and signed by the court, but the order is never filed, has the statute of limitations actually been extended?

Holding:

No. A 9(j) extension order must be filed to enforce the 120 day extension upon defendants.

Rules / Controlling Authority:

“[A] judgment is **entered** when it is reduced to writing, signed by the judge, **and filed** with the clerk of court.” N.C. Gen. Stat. § 1A-1, Rule 58 (2009) (emphasis added).

“Rule 58 applies to orders, as well as judgments, such that an *order* is **likewise entered** when it is reduced to writing, signed by the judge, **and filed** with the clerk of court.” *Watson*, 712 S.E.2d at 155 (citing *Abels v. Renfro Corp.*, 126 N.C. App. 800, 803, 486 S.E.2d 735, 737-38 (holding that an order is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court) , *disc. review denied*, 347 N.C. 263, 493 S.E.2d 450 (1997)) (emphasis added).

“[A] judgment that has merely been **rendered**, but which has not been **entered**, is not enforceable until entry.” *Searles v. Searles*, 100 N.C. App. 723, 726-27, 398 S.E.2d 55, 57 (1990) (emphasis added).

“Although Rule 58 specifically refers only to judgments, this Court has held that it applies to orders as well. It follows that an order rendered in open court is not enforceable until it is entered, i.e., until it is reduced to writing, signed by the judge, **and filed** with the clerk of court.” *West v. Marko*, 130 N.C. App. 751, 755-56, 504 S.E.2d 571, 573-74 (1998).

Analysis & Arguments:

The Court found the rule from *Searles* regarding the “rendition” vs. “entry” of judgments to be controlling on the issue of whether an un-filed 9(j) order was effective. The Court framed the issue as “whether that rule applicable to judgments is also applicable to the order in this case, i.e., whether the mere judicial act of issuance or rendition of the Rule 9(j) order effectively extended the statute of limitations, or whether the ministerial act of filing or entry was necessary to give the order force.” *Id.*

The Court recognized that the plain language of Rule 9(j) says nothing about the “filing” or “entry” of the order, and the “wording seems to indicate that it is the judicial act of ‘allowing’ the

motion, rather than the ministerial act of 'entering' the order, that extends the statute of limitations." *Id.* at 156.

However, despite this statutory language, the Court relied on *Webb v. Nash Hospitals, Inc.*, 133 N.C. App. 636, 516 S.E.2d 191, *disc. review denied*, 351 N.C. 122, 541 S.E.2d 471 (1999) as authority for the proposition that a Rule 9(j) extension is not enforceable until the order is filed. In *Webb*, the pertinent chronology is as follows: on September 12, 1997 the trial court **signed** an order granting plaintiff a Rule 9(j) extension²; on September 19, 1997 the plaintiff **filed** his 9(j) extension motion; on October 1, 1997 (before the expiration of the SOL) the trial court **filed** its prior order granting the 9(j) extension. The *Webb* defendants argued that extension was unenforceable, and therefore the SOL had run before the complaint was filed, because there was technically no motion filed and pending before the court on September 12, 1997, therefore the trial court was without jurisdiction to sign a 9(j) extension order. The Court of Appeals disagreed, however, and concluded that "because the order was not '**filed and entered**' until after the motion was '**filed and entered**,' the court had jurisdiction to grant the motion." *Id.* (citing *Webb*, 133 N.C. App. At 638-39).

Ultimately, the Court concluded that "in this case, pursuant to our holding in *Webb*, we must conclude that Judge Hudson's Rule 9(j) order did not extend the statute of limitations because the order was never filed." *Id.*

Interesting Points of Note:

The Court pointed out that neither Rule 58 nor Rule 5(d) (which states that "[a]ll orders issued by the court . . . shall be filed with the court") specifies a time limit when an order must be filed after it has been "rendered," or provide any sanction for not filing an order. Thus, the Court admitted that its decision "leaves unanswered questions regarding the effectiveness of a Rule 9(j) order **filed after the complaint is filed**, whether before or after the expiration of the original statute of limitations." *Id.* at 157 (emphasis added).

Judge Hunter's [Reluctant] Concurrence:

Judge Hunter concurred in this result on the basis that he, too, viewed *Webb* as controlling authority here when it held that a signed 9(j) extension order was not enforceable until it was "filed and entered." However, Judge Hunter went out of his way to explain that he disagreed with the interpretation and application of Rule 58 to Rule 9(j) extension order, and despite the fact that the case is now binding precedent he believes the Court simply got it wrong in *Webb*.

Hunter contends that the issue in *Webb* was narrow and only dealt with the trial court's authority to enter the order for a 9(j) extension. Hunter argues that the Court in *Webb* improperly "broadened the scope of Rule 58 to apply to an *ex parte* [Rule 9(j)] order entered *before an action is commenced*." *Id.* Given that the purpose behind Rule 58's filing requirement is to "make the time of entry of judgment easily identifiable, and to give fair notice to all parties that judgment has been entered." This rationale does not hold in the Rule 9(j) extension context because no complaint has been filed yet, and therefore there are not yet any "parties" who need any kind of notice. In support of this, Hunter cited *Timour v. Pitt County Memorial Hosp., Inc.*, 131 N.C. App. 548, 550, 508 S.E.2d 329, 330 (1998), *aff'd per curiam*, 351 N.C. 47, 519 S.E.2d 316 (1999) in which the "Court has clearly held that the order granting a Rule 9(j) extension of time to file the complaint does not have to be served on the potential defendants since a complaint has not been filed." *Id.*

² It appears from the record that plaintiff must have made an oral motion for a 9(j) extension on or before September 12, 1997, but had not yet filed a motion on that date.

Thus, Hunter believes that Rule 9(j) “is clear and without ambiguity,” and that 120 day extension motion should be “effective when the order is *allowed*.” *Id.* at 157.

Impact of Decision on Plaintiff’s Practice:

Make certain you file any 9(j) extension order before the SOL expires! Don’t rely on the judge or clerk to do it. Do it yourself. It’s that simple.

<u>Stinchcomb v. Presbyterian Medical</u> ____ N.C. App.____, 710 S.E.2d 320, 2011 N.C. App. LEXIS 827 (2011)	
Prior History: Mecklenburg County, 08 CVS 22786	NCCOA Filed Date: May 3, 2011
Plaintiff Attorney(s): Chuck Monnett (Monnet & Assoc.) Randall J. Phillips (Monnet & Assoc.) J. Donald Cowan, Jr. (Ellis & Winters)	Defense Attorney(s): Sara R. Lincoln (Lincoln Derr, PLLC) Shannon Sumerell Spainhour (Lincoln Derr) Scott M. Stevenson (Shumaker, Loop & Kendrick) John D. Kocher (Shumaker, Loop & Kendrick) Christian H. Staples (Shumaker, Loop & Kend.) Barry S. Cobb (Yates McLamb) Katherine E. Fisher (Yates McLamb) J. Dennis Bailey (Carruthers & Bailey) Jessica Harris Telligman (Carruthers & Bailey)
Judge (Author of opinion): Stephens, Linda	Judges (Concurring / Dissenting): Stroud (concur) Hunter, Jr. (concur)
Type of Medical Care Involved: N/A (issues are procedural)	Decision for Plaintiff or Defense? Defense

Procedural History:

Appeal by plaintiff from trial court’s grant of defendants’ motions to dismiss based on statute of limitations.

Key Case Facts (chronology important here):

- **October 18, 2005:** The last date of alleged negligence. The three year SOL for medical malpractice began running on this date and would have expired on October 18, 2008.
- **October 17, 2008:** Plaintiff obtained an Rule 9(j) order extending the SOL by 120 days, up to February 17, 2009. **Also on October 17, 2008**, the Plaintiff had summonses issued on various defendants. Neither the 9(j) order nor the summonses were served on defendants.
- **December 29, 2008:** Plaintiff had A&P summonses timely issued on all defendants.
- **February 16, 2009:** Plaintiff filed his complaint, and copies of the complaint and all A&P summonses were served on the various defendants

- **April 22-24, 2009:** Defendants file Answers and include motions to dismiss for expiration of the statute of limitations based on Plaintiff's failure to have issued and serve summonses after the complaint was filed.

Issue(s):

Under these facts, where no *new* summonses were issued *after* the complaint was filed, did the statute of limitations run because no action was timely "commenced" under the Rules of Civil Procedure?

Holding:

Yes, pursuant to Rule 4(a) the Plaintiff's failure to have new summonses issued within five days after filing the complaint meant that his action was legally deemed never to have commenced, and therefore the statute of limitations ran on February 17, 2009.

Rules / Controlling Authority:

"A civil action may be commenced by filing a complaint with the court." N.C.R.C.P. 3(a).

"Upon the filing of the complaint, summons shall be issued forthwith, and in any event within five days." N.C.R.C.P. 4(a)

Rule 4(a) "contemplates the continuance of the present practice of ordinarily having summons issue simultaneously with the filing of the complaint. The five-day period was inserted to mark the outer limits of tolerance in respect to delay in issuing the summons." *Stinchcomb*, 710 S.E.2d at 324 (quoting N.C. Gen. Stat. § 1A-1, Rule 4(a) cmts.)

"Where a complaint has been filed and a proper summons does not issue within the five days allowed under the rule, the action is deemed never to have commenced." *Id.* (quoting *Cnty. of Wayne ex rel. Williams v. Whitley*, 72 N.C. App. 155, 157, 323 S.E.2d 458, 461 (1984)).

"The purpose of a summons is to give notice to a person to appear at a certain place and time to answer a complaint against him . . . In order for a summons to serve as proper notification, it must be issued and served in the manner prescribed by statute." *Id.* at 325 (quoting *Latham v. Cherry*, 111 N.C. App. 871, 874, 433 S.E.2d 478, 481 (1993), *cert. denied*, 335 N.C. 556, 441 S.E.2d 116 (1994)).

Analysis & Arguments:

Plaintiff argued that by having the original summonses issued on October 17, 2008, this marked the date his "original action" was commenced, and that he "kept the lawsuit alive" by timely issuing A&P summonses on December 29, 2008. *Id.* at 325.

However, the Court reasoned that Rules of Civil Procedure 3 and 4 establish that there are only two ways in which a civil action can be commenced – either (1) file a complaint and subsequently cause a new summons to be issued in no later than five days [See Rule 4(a)]; or (2) apply to the court for the issuance of a "20 day summons" and subsequently file the complain within the allotted twenty days [See Rule 3].

The Court concluded that the summonses Plaintiff had issued before he filed his complaint "were insufficient to comply with the Rule 4(a) requirement that summons shall be issued 'forthwith, and in any event within five days,' '[u]pon the filing of the complaint[.]'" *Id.* at 325. Moreover, because the Plaintiff's original summonses were not "20 day summonses" under Rule

3, “[n]o ‘original action’ was commenced with the issuance of the summonses on 17 October 2008,” and “there was no lawsuit for the *alies and pluries* summonses to ‘keep alive.’” *Id.*

Because Plaintiff failed to issue new summonses within five days after filing his complaint, he failed to commence his action within the statute of limitations.

Impact of Decision on Plaintiff’s Practice:

This case is not so much a medical malpractice opinion as it is a Rules of Civil Procedure opinion. No matter what type of case you have, make sure you issue a summons for each defendant within five days of filing your complaint or else your action will be deemed to have never commenced for statute of limitation purposes.

McKoy v. Beasley, ____ N.C. App.____, 712 S.E.2d 712; 2011 N.C. App. LEXIS 1371	
Prior History: Bladen County, 07 CVS 970	NCCOA Filed Date: July 5, 2011
Plaintiff Attorney(s): Michael D. Barnes (Fuller & Barnes) Trevor M. Fuller (Fuller & Barnes)	Defense Attorney(s): John W. Minier (Yates McLamb) Heather R. Wilson (Yates McLamb)
Judge (Author of opinion): Steelman, Sanford	Judges (Concurring / Dissenting): Stephens, Linda (concur) Hunter, Jr., Robert N. (concur)
Type of Medical Care Involved: N/A (issues are procedural)	Decision for Plaintiff or Defense? Defense

Procedural History:

Appeal by Plaintiff from order by Judge Rusty Duke dismissing the complaint based on statute of limitations.

Key Case Facts (chronology important here):

- **April 20, 2005:** Decedent died from alleged medical malpractice, making the two year statute of limitations fall on April 20, 2007.
- **April 7, 2007:** Plaintiff filed a wrongful death complaint on April 7, 2007 but failed to include a Rule 9(j) certification. Defendants moved to dismiss. Judge Gregory Weeks granted defendants’ motion to dismiss for failure to include a 9(j) certification. However, he dismissed the case *without prejudice* pursuant to Rule 41(b), and specifically granted Plaintiff leave to re-file the action against defendants on or before December 26, 2007 ³.

³ Note: Judge Weeks stated in his order, “[t]he Court expresses no opinion as to whether any re-filed action would be timely or untimely.” *McKoy*, 712 S.E.2d at 714.

- **December 20, 2007:** Based on Judge Weeks’ ruling, Plaintiff re-filed the action on December 20, 2007 and this time included proper certification under Rule 9(j)(1) and 9(j)(2), and the complaint was accompanied by a Rule 702(e) motion to qualify Plaintiff’s 9(j) expert.
 - **Note:** This re-filing date not only occurred after the SOL date of April 20, 2007, but also well after the “120 day extension” date if plaintiff had requested a Rule 9(j) 120 day extension. This is a key fact – see “Analysis” section below.
- **May 19, 2008:** Defendants moved to again dismiss alleging failure to comply with Rule 9(j) certification and therefore the statute of limitations had now run on the claim. Judge Sasser entered an order denying defendants’ motion citing Judge Week’s prior dismissal order permitting plaintiff to re-file her complaint with an appropriate 9(j) certification even after the SOL had run.
- **May 2009:** After conducting extensive discovery, defendants filed a new motion to dismiss alleging plaintiff could not have reasonably expected her 9(j) expert to qualify. Judge Rusty Duke granted defendants’ motion in relevant part on the grounds that “plaintiff could not show an ‘appropriate pre-suit review,” and “the amended complaint does not allege that plaintiff complied with Rule 9(j) before filing.” *McKoy*, 712 S.E.2d at 715.

Issue(s):

Where Plaintiff’s original complaint failed to include any Rule 9(j) certification, could this defect be corrected by filing a second complaint after the SOL date, but within the time allotted following a Rule 41(b) dismissal without prejudice?

Holding:

No. Where the original complaint failed to include a 9(j) certification, a second complaint filed after expiration of the SOL period plus 120 days cannot save the action from being time barred.

Rules / Controlling Authority:

“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* . . . Accordingly, permitting amendment of a complaint to add the expert certification where the expert review occurred after the suit was filed would conflict directly with the clear intent of the legislature.” *Id.* (quoting *Thigpen v. Ngo*, 355 N.C. 198, 203-04, 558 S.E.2d 162, 166 (2002) (emphasis added).

“An amended complaint filed after the expiration of the statute of limitations cannot cure the omission if it does not specifically allege that the expert review occurred prior to the expiration of the statute of limitations.” *Ford v. McCain*, 192 N.C. App. 667, 671, 666 S.E.2d 153, 156 (2008).

“If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless the judge shall specify in his order a shorter time.” Rule 41(b).

A voluntary dismissal under Rule 41(a) will provide an extra year for re-filing only where “plaintiff filed a complaint complying with Rule 9(j) before the limitations period [including the 120 day extension period] expired.” *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).

- Otherwise, a Rule 41(a) voluntary dismissal will only provide 120 extra days beyond the SOL date to file a complaint that complies with Rule 9(j). *See, Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, 528 S.E.2d 568 (2000), as the holding in *Brisson* was limited by *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), *accord, Ford v. McCain*, n.1, 192 N.C. App. at 671, 666 S.E.2d at 157 (explaining how *Bass* limited the holding in *Brisson*).

Analysis & Arguments:

The Court here analyzed the Supreme Court holdings of *Brisson*, *Thigpen*, and *Bass* (see Appendix for all three cases) in an attempt to harmonize the three decisions and glean the controlling message from this body of Rule 9(j) case law. To appreciate this analysis, you must understand the operative facts of these three cases:

<u>Brisson, 351 N.C. 589</u>	<u>Thigpen, 355 N.C. 198</u>	<u>Bass, 358 N.C. 144</u>
<ul style="list-style-type: none"> • Before SOL ran, plaintiff filed complaint that contained no 9(j) cert. • Plaintiff then took a Rule 41(a) V.D.W/O.P. • After SOL date, but before the expiration of the SOL + 120 days, plaintiff filed second complaint that complied with Rule 9(j). • NCSC ruled this was proper and salvaged the action. 	<ul style="list-style-type: none"> • Plaintiff moved for and was granted a 9(j) 120 day extension. • Before expiration of 120 days filed a complaint that contained no 9(j) cert. • After expiration of 120 days, filed an amended complaint that did contain a 9(j) cert. • NCSC ruled no relation back on these facts, so case dismissed. 	<ul style="list-style-type: none"> • Plaintiff moved for and was granted a 9(j) 120 day extension. • Before expiration of 120 days filed a complaint that contained no 9(j) cert. • Plaintiff then took a Rule 41(a) V.D.W/O.P. • After expiration of 120 days, plaintiff filed second complaint that contained 9(j) cert. • NCSC ruled improper.

By analyzing these three cases together, we know the following:

- We know from *Brisson* that it isn't necessarily fatal if the first complaint filed by plaintiff fails to contain a 9(j) certification. In that event, *Brisson* tells us that as long as plaintiff takes a voluntary dismissal without prejudice before the court dismisses the case, then plaintiff is given time to re-file a new action that contains a 9(j) certification.⁴
- *Brisson* used to stand for the proposition that a plaintiff got a full year after a Rule 41(a) voluntary dismissal without prejudice to re-file. However, *Thigpen* and *Bass* changed that.
- *Thigpen* held that once the SOL **and** the plaintiff's 120 day extension is exhausted without the plaintiff ever filing a proper 9(j) complaint being filed, there is no way to subsequently file an amended complaint with a 9(j) cert and have it relate back under Rule 15
- *Bass* extended the holding in *Thigpen* to the Rule 41(a) context, and specifically limited the holding in *Brisson* to make clear that a V.D.W/O.P. does **not** give a plaintiff a full year to re-

⁴ Note: Last year, in *Brown v. Kindred Nursing Centers East, LLC*, 364 N.C. 76, 692 S.E.2d 87 (2010), the Supreme Court held that that once the plaintiff files a defective complaint, the trial court has no power to subsequently grant a motion for a Rule 9(j) 120 day extension to find a certifying expert. However, *Brown* says nothing about overruling *Brisson* which this author believes still allows a plaintiff to take a voluntary dismissal without prejudice before the trial court acts to dismiss the complaint and re-file in a limited circumstance.

file. Instead, it only gives the plaintiff a maximum of 120 days after the SOL date to file a proper 9(j) complaint (i.e. holding a medical malpractice action is not “commenced” for Rule 41 purposes unless a 9(j) complaint is filed before the expiration of the SOL plus the 120 day extension.)

- *Bass* explicitly stated that *Brisson* is still good law only in the limited scenario where the second complaint “was filed within 120 days after the statute of limitations expired, and would have been timely filed if plaintiffs had requested and received the 120-day extension.” *Bass*, 158 N.C. App. at 224, 580 S.E.2d at 743.

Based on these three cases, the Court here found *Bass* to be controlling. First, the Court concluded that “Judge Weeks’ order dismissing plaintiff’s claims against defendants without prejudice was pursuant to Rule 41(b), and was the functional equivalent of plaintiff taking a voluntary dismissal under Rule 41(a)(1) for purposes of our analysis under Rule 9(j).” *McKoy*, 712 S.E.2d at 716. Thus, “[u]nder the rationale of *Bass*, 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,” including the 120 day extension period. *Id.*

Interesting Point of Note:

The Court here states that “[b]ased upon the facts of the instant case, *Brisson* was overruled by the Supreme Court in *Bass*.” *Id.* This author disagrees that *Bass* “overruled” *Brisson*. It is more accurate to say that *Bass* limited the holding in *Brisson* as described above. In that limited scenario, *Brisson* is still good law from the N.C. Supreme Court.

Impact of Decision on Plaintiff’s Practice:

This case makes clear once and for all that there is no way – either through Rule 41 re-filing extensions or Rule 15 amended relation back doctrine – to effectively extend the medical malpractice statute of limitations beyond three years and 120 days. In the end, in order to avoid dismissal each plaintiff must file a proper Rule 9(j) complaint before the SOL, or before the expiration of a properly granted 9(j) 120 day extension.

Moore v. Proper,

____ N.C. App.____, 715 S.E.2d 586, 2011 N.C. App. LEXIS 1900 (2011),
Case currently pending before the N.C. Supreme Court ⁵

Prior History:

Madison County, 09 CVS 93

NCCOA Filed Date:

September 6, 2011

Plaintiff Attorney(s):

Steve Warren (Long, Parker, Warren)

Defense Attorney(s):

Jaye E. Bingham (Cranfill Sumner)
Scott M. Stevenson (Shumaker, Loop)
Scott A. Heffner (Shumaker, Loop)

Judge (Author of opinion):

Hunter, Jr., Robert, N.

Judges (Concurring / Dissenting):

Steelman, Sanford (concur)
Stephens, Linda (dissent)

Type of Medical Care Involved:

General Dentistry

Decision for Plaintiff or Defense?

Plaintiff

Procedural History:

Appeal by plaintiff from trial court's order of summary judgment in favor of defendants pursuant to Rule 9(j).

Background Facts:

In January 2006, Plaintiff sought treatment for a toothache and was treated by as defendant, a general dentist in Asheville, N.C. Plaintiff alleged that defendant fractured her jaw while extracting a tooth, and thereafter discharged her without notifying her of the fracture and providing the proper follow up care.

Key Case Facts:

Plaintiff timely filed a medical malpractice complaint containing a proper Rule 9(j)(1) certification. Plaintiff subsequently designated Dr. Joe Dunn, a retired general dentist, as her expert. The following are the pertinent facts regarding Dr. Dunn's expert qualifications under Rule 702 and his "active clinical practice":

- **From Plaintiff's Expert Designation:** Graduated from Louisville School of Dentistry in 1970, and practiced general dentistry specifically in Asheville, N.C. for nearly 25 years.
- **From 9(j) Interrogatory Responses:** Dunn practiced general dentistry for over 35 years before retiring in 1997. He maintained a valid license since his retirement. He did not engaged in any teaching activities.
- **From Dr. Dunn's Deposition:** During relevant time period from January 2005 to January 2006, Dunn worked approximately 30 days doing "fill-in work" for fellow dentists in the Asheville area. When asked what percentage of his time during this year was spent in the active clinical practice of dentistry, Dunn testified that "whenever you are looking at a patient you are practicing clinical dentistry . . . ***So I***

⁵ Based on Judge Stephens' dissent defendants appealed to the N.C. Supreme Court, where the case is pending decision after the Court heard oral argument in April. On behalf of NCAJ, Adam Stein and Matthew Ballew wrote an *amicus* brief in support of Plaintiff's position before the N.C.S.C.

would say when I am there it is 100 percent.” Dunn was retired during this year, spent time running for Asheville mayor, serving on city council, playing with his grandchildren, and golfing. When asked what percentage of the entire year he spent working in the active clinical practice of dentistry, Dunn testified that **“it’s got be less than five percent, I guess.”**

- **From Dr. Dunn’s Summary Judgment Affidavit:** Dunn clarified that during the year in question when he worked as a dentist he only treated patients in a clinical setting and engaged in no administrative duties. He reiterated that he spent **“100 percent of his professional time in the active clinical practice of dentistry and other activities were personal, not professional.”**

Based on this testimony, defendants filed a motion to dismiss for failure to comply with Rule 9(j) on the basis that no reasonable person could have expected Dr. Dunn to qualify as an expert under Rule 702.

Issue:

Based on the above did plaintiff comply with 9(j)?

Holding:

Yes. Based on Dunn’s total testimony and the controlling case law at the time the complaint was filed, a reasonable plaintiff could have expected Dr. Dunn to qualify under Rule 702.

Rules / Controlling Authority:

A medical malpractice complaint shall be dismissed unless “[t]he 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.” Rule 9(j)(1) (emphasis added).

An expert is not qualified to opine on the standard of care unless: “During the year immediately preceding the date of the occurrence that is the basis for the action, the expert witness must have devoted a **majority of his or her professional time** to either or both of the following:

- a. The **active clinical practice** of the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, the active clinical practice of the same specialty or a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients; or . . .” Rule 702(b)(2)(a) (emphasis added)

“This Court inquires as to whether Plaintiff reasonably expected Dr. Dunn to qualify as an expert witness pursuant to *Rule 702*, not whether he will ultimately qualify.” *Moore*, 715 S.E.2d at 590-91 (quoting *Smith v. Serro*, 185 N.C. App. 524, 527, 648 S.E.2d 566, 568 (2007)).

The operative inquiry here is “were the facts and circumstances known or those which should have been known to the pleader such as to cause a reasonable person to believe that the witness would qualify as an expert under *Rule 702*.” *Moore*, 715 S.E.2d at 591 (quoting *Trapp*, 129 N.C. App. at 241, 497 S.E.2d at 711).

Analysis & Arguments:

Here, the majority interpreted the plain language of Rule 702(b)(2)(a) to require an analysis into the percentage an expert’s “professional time individually” that is comprised of the “active clinical practice” at issue, as opposed to “the professional time of full-time clinicians.” *Id.*

“The language of the statute does not require a ‘standard’ workweek or give the courts any measure for the length of time a professional must work in order to compute the majority of an expert’s ‘professional time.’ The statutory language relies on a case by case analysis of the term. Thus, a professional workweek is a factual question which the trial court must determine in making its decision.” *Id.* at 592.

The Court relied on two cases to provide the controlling framework for this Rule 702(b)(2)(a) analysis in effect at the time plaintiff’s complaint was filed on March 5, 2009: *Coffman v. Roberson*, 153 N.C. App. 618, 571 S.E.2d 255 (2002) and *Cornett v. Watauga Surgical Grp.*, 194 N.C. App. 490, 669 S.E.2d 805 (2008), noting “[t]here is a tension between *Cornett* and *Coffman* as to what amount of time an expert witness works “professionally.” *Id.*

- “In *Coffman*, the expert was retired, but worked ‘professionally’ the requisite period of time and this Court found no error in his qualification as an expert. *Coffman*, 153 N.C. App. at 624, 571 S.E.2d at 258-59 (expert witness stated instruction in his field ‘didn’t take up a great deal of time,’ but that it was ‘all [he] did professionally during ‘that period of time’).” *Id.*
- “In *Cornett*, the expert was employed full time, according to the opinion, and worked a 60 hour workweek, occasionally performing minor surgery, instructing residents, attending rounds, and performing administrative duties at Tulane Medical School. *Cornett*, 194 N.C. App. at 494-95, 669 S.E.2d at 808. The administrative functions at Tulane Medical School composed a majority of his ‘professional time,’ and the physician was found to not meet the requirements of *Rule 702(b)*.” *Id.*

Based on the mechanical analysis of “professional time” in these two cases, the Court concluded that when the testimony regarding Dunn’s professional time is viewed in the light most favorable to plaintiff, “we cannot agree with the trial court that “no reasonable person would have expected Dr. Joseph Dunn to qualify as an expert witness.” *Id.*

Judge Stephens’ Dissent:

Here, Judge Stephens took a completely unprecedented view of Rule 702 in concluding that no reasonable person could have expected Dunn to qualify.

According to Stephens, “[t]he clear and unambiguous language of *Rule 702* requires that a proposed expert’s clinical practice not only must constitute the majority of that expert’s professional time, but also that that clinical practice must be ‘active.’ Thus, despite the fact that not a single case has ever held the same, Stephens interpreted the phrase “active clinical practice” in Rule 702 as creating a “baseline level of proposed experts’ ‘activeness,’ below which a proposed expert’s clinical practice is not sufficiently active to satisfy the requirements of Rule 702(b).” *Id.* at 595.

“Were it otherwise, a proposed expert who devoted 0.01 hours per year to the clinical practice of his health profession -- perhaps a general dentist who cleaned one tooth in a year and had no other professional activities -- would be eligible to testify under *Rule 702(b)* . . . Certainly there must be some level at which a proposed expert’s clinical practice cannot be considered active.” *Id.*

Once Stephens had reached this statutory interpretation result, the conclusion was obvious: “As discussed *supra*, the *Rule 702(b)* requirement of *active* clinical practices requires the proposed

expert to have an energetic and diligent practice. In my view, no reasonable person would conclude that 1.6 hours per week constitutes an active, energetic, and diligent health care practice. Rather, a reasonable person would consider such practice to be sporadic, quiescent, and sedentary, *i.e.*, inactive. Accordingly, I agree with the trial court that Moore's expectation that Dr. Dunn would qualify was unreasonable, and I conclude that the trial court did not err in granting summary judgment for Defendants based on Moore's failure to satisfy the certification requirements of *Rule 9(j)*." *Id.* at 596.

Impact of Decision on Plaintiff's Practice:

Given that this case is pending ultimate decision from the N.C. Supreme Court, the impact remains unclear. If the NSCS adopts Judge Stephens' unprecedented "baseline level of activeness" requirement then this will likely spawn another cottage industry for discovery and motions practice for defense counsel.

Crocker v. Roethling,

____ N.C. App. ____, 719 S.E.2d 83, 2011 N.C. App. LEXIS 2338

Prior History:

Johnston County, 04 CVS 2571
Crocker, 363 N.C. 140, 675 S.E.2d 625
(2009) (aka "Crocker II")

NCCOA Filed Date:

April 12, 2011

Plaintiff Attorney(s):

Wade Byrd

Defense Attorney(s):

Sammy Thompson (SmithAnderson)
Bill Moss (SmithAnderson)
Robbie Desmond (SmithAnderson)

Judge (Author of opinion):

Beasley, Cheri

Judges (Concurring / Dissenting):

McGee, Linda (concur)
Stroud, Donna (concur)

Type of Medical Care Involved:

Labor and Delivery, Shoulder Dystocia

Decision for Plaintiff or Defense?

Defense

Procedural History:

Appeal by Plaintiff from Judge Rusty Duke's order disqualifying Plaintiff's expert and granting summary judgment to defendants.

Background Facts:

Plaintiff-mother underwent an induction of labor at Wayne Memorial Hospital in Goldsboro (Wayne County), and delivery became complicated by should dystocia. Defendant obstetrician attempted several techniques to relieve the shoulder dystocia, but never attempted the Zavanelli maneuver where the fetus is pushed back into the uterus and the baby is delivered by c-section. Plaintiff's daughter died from injuries sustained during birth.

Plaintiffs filed suit against defendants alleging a failure to perform the Zavanelli maneuver, and designated Dr. John Elliot, an Ob/Gyn specializing in high risk obstetrics, as their sole expert. After taking Dr. Elliot's deposition, defendants moved for and were granted summary judgment on the basis that Dr. Elliot was not qualified to opine on the standard of care in Goldsboro. After a long appeals process, the N.C. Supreme Court took the case on discretionary review and, due to the "close call" and conflicting deposition/affidavit testimony from Dr. Elliot, voted to remand the case to the trial court to conduct an adversarial *voir dire* examination of Dr. Elliot to determine the admissibility of his standard of care opinions. *Crocker v. Roethling (Crocker II)*, 363 N.C. 140, 675 S.E.2d 625 (2009) (Martin, J. concur) (see Appendix).

Key Case Facts Regarding Dr. Elliot's Familiarity with SOC ⁶:

"On 23 February 2010, the trial court held the *voir dire* hearing. Dr. Elliott stated that for 27 years he had practiced high risk obstetrics in Maricopa County, Arizona, an area with a population of approximately 4.5 million. He further testified that he had neither performed nor witnessed a Zavanelli maneuver, and was unaware of any of the other 14 high risk obstetricians in his practice ever having performed this maneuver. He also did not know whether a Zavanelli maneuver had ever been performed either in Goldsboro, or anywhere else in the state of North Carolina. However, based on his practice, his experiences as an expert witness reviewing approximately 600 malpractice cases from 45 states, and his belief 'that there is a national standard of care for most things,' Dr. Elliott stated that he was familiar with the standards of practice of a physician practicing in a hospital such as Wayne Memorial." *Crocker*, 719 S.E.2d at 85.

Issue(s):

Based on the *voir dire* testimony, did Dr. Elliot demonstrate sufficient familiarity with the applicable standard of care?

Holding:

No.

Rules / Controlling Authority:

In order to be admissible, an expert's SOC/breach opinions must establish a sufficient knowledge of "the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action." N.C. Gen. Stat. § 90-21.12 (2009)

"Although it is not necessary for the witness testifying . . . to have actually practiced in the same community as the defendant, the witness must demonstrate that he is familiar with the standard of care in the community . . . or the standard of care of similar communities." *Crocker*, 719 S.E.2d at 86 (quoting *Smith v. Whitmer*, 159 N.C. App. 192, 196, 582 S.E.2d 669, 672 (2003)).

"This Court has stated that the 'similar community' standard with regards to the standard of care in medical malpractice cases 'encompasses more than mere physician skill and training[.] It also encompasses variations in facilities, equipment, funding, and also the physical and

⁶ Note: This opinion fails to identify or discuss the plethora of materials that plaintiff's counsel provided to Dr. Elliot to help educate him on the medical facilities, equipment, area statistics, demographics – all of which our courts have previously considered appropriate materials to assist an expert in familiarizing himself/herself with the applicable standard of care in defendant's community. This author encourages readers to examine the briefs on the NCCOA electronic filing site to see the true extent to which Dr. Elliot demonstrated a familiarity with the Goldsboro/Wayne County community.

financial environment of a particular community.” *Id.* at 86 (quoting *Pitts v. Nash Day Hosp., Inc.*, 167 N.C. App. 194, 201, 605 S.E.2d 154, 159 (2004)).

“When the standard of care for a given procedure is ‘the same across the country, an expert witness familiar with that standard may testify despite his lack of familiarity with the defendant's community.” *Id.* at 86 (quoting *Haney v. Alexander*, 71 N.C. App 731, 736, 323 S.E.2d 430, 434 (1984)).

“This Court, however, has recognized very few ‘uniform procedures’ to which a national standard may apply, and to which an expert may testify . . . This Court has been particularly reluctant to find a national standard for especially complex procedures.” *Id.* at 86-87 (citing *Henry v. Southeastern Ob-Gyn Assocs., P.A.*, 145 N.C. App. 208, 211, 550 S.E.2d 245, 247 (2001)).

Analysis & Arguments:

“Dr. Elliott practices mainly at larger hospitals, one of which performs more than 6,000 deliveries per year, and is located in a metropolitan area with a population of 4.5 million people served by some 200 obstetricians. That hospital hardly seems comparable to Wayne County, and Goldsboro, with a population of approximately 100,000. Wayne Memorial has six labor and delivery suites compared to 36 at Dr. Elliott's tertiary referral hospital. While Dr. Elliott did claim to have familiarity with smaller hospitals similar to Wayne Memorial based on outreach education and consulting privileges, he never practiced medicine at these hospitals.” *Id.* at 86.

“Further, Dr. Elliott has never performed a Zavanelli maneuver. He has never witnessed the maneuver. He was unaware of any of the other 14 high risk obstetricians with whom he practices ever having performed it. He did not know whether a Zavanelli maneuver had ever been performed either in Goldsboro or, for that matter, in the state of North Carolina. Quite simply, Dr. Elliott failed to demonstrate that this rarely-employed maneuver is the standard of care in Goldsboro, North Carolina.” *Id.*

“Dr. Elliott argued that there is a national standard of care for shoulder dystocia, but that argument is unavailing . . . A national standard of care cannot be applied to this case because ‘an infant suffering from shoulder dystocia . . . involves medical procedures considerably more complicated than the taking of vital signs or the placement of bedpans.’” *Id.* at 86-87 (quoting *Henry v. Southeastern Ob-Gyn Assocs., P.A.*, 145 N.C. App. 208, 211, 550 S.E.2d 245, 247 (2001)).

“We conclude that there is ample support in the record for a finding that Dr. Elliott was not qualified to testify in this case. The trial court, therefore, did not abuse its discretion in excluding his testimony.” *Id.* at 87.

Impact of Decision on Plaintiff's Practice:

As noted in the Footnote above, this opinion simply ignores the absolute wealth of information plaintiff's counsel provided to Dr. Elliot regarding the Goldsboro medical community, and the amount of that information that was absorbed and appreciated by Dr. Elliot during his *voir dire* testimony. This opinion highlights just how difficult it is to overturn the trial court on the abuse of discretion standard for these evidentiary decisions. Moreover, this opinion underscores the importance of getting your expert to not just spout a rote memorization of the facts and data he/she's learned about the subject community, but to take it a step further a demonstrate to the trial court **how** those facts and data helped them understand what standard of care actually applies.

Green v. Kearney,

____ N.C. App.____, 719 S.E.2d 137; 2011 N.C. App. LEXIS 2352
(Defendant's request for re-hearing granted by NCCOA)

Prior History:

Franklin County, 08 CVS 630
Green v. Kearney, 203 N.C. 260, 690
S.E.2d 755 (2010)

NCCOA Filed Date:

September 29, 2010

Plaintiff Attorney(s):

Judith M. Vincent-Pope (Bell & Vincent..)

Defense Attorney(s):

Gary S. Parsons (Troutman Sanders)
Whitney S. Waldenburg (Troutman Sanders)
David M. Duke (Young Moore)
Brian O. Beverly (Young Moore)
Michael S. Rainey (Young Moore)

Judge (Author of opinion):

Stroud, Donna

Judges (Concurring / Dissenting):

Geer, Martha (concur)
Thigpen, Cressie (concur)

Type of Medical Care Involved:

Volunteer EMS / First Responders

Decision for Plaintiff or Defense?

Defense

Procedural History:

Appeal by plaintiffs from Judge Henry Hight's order granting summary judgment to defendants based on immunity under G.S. § 90-21.14.

Key Case Facts:

Plaintiff Green was a pedestrian severely injured with an open head wound in a motor vehicle accident. Emergency services were dispatched to the scene, and the local Fire Department volunteers were first to arrive on scene. Defendant Kearney checked Green for vital signs and **determined he was dead**. He did not initiate efforts to resuscitate Green. Several minutes later, Franklin County EMS personnel arrived and Kearney asked them to verify Green's lack of vital signs but they declined, stating that Kearney's prior check was sufficient to determine death. Without checking for a pulse, defendants placed a white sheet over Green's body.

Approximately 30 minutes later the county medical examiner arrived and inspected Green's body. During this inspection, eight people saw Green's chest and abdomen move. The medical examiner explained he just believed it was **air escaping from Green's lifeless body, and Green should be taken to the morgue**.

Approximately 30 minutes later, Green was transported to the morgue where defendants examined him again, and all observed several twitches in Green's right eyelid. The medical examiner was directly asked by one defendant if Green was, in fact, dead, and the examiner responded that the eye twitch was **just a muscle spasm, and reinsured the other defendants that Green was dead**.

Green was then placed in a refrigeration unit. Approximately an hour later highway patrol personnel retrieved his body for another inspection and observed movement in Green's abdomen. They immediately summoned emergency services, and Green was rushed to the hospital.

where he was determined to be alive. Green suffered sever permanent brain damage as a result of this incident, but has survived.

Plaintiffs filed suit against defendants under G.S. § 90-21.14 for gross negligence, willful and wanton conduct, and punitive damages. The trial court granted summary judgment to defendants on issue of gross negligence / wanton conduct and dismissed plaintiff's case on the basis of 90-21.14 immunity.

Issue:

Does this evidence forecast negligence which rises to the level of "gross negligence, wanton conduct or intentional wrongdoing?"

Holding:

No, because there is no evidence that any defendant acted with the knowledge or belief that Green was actually alive.

Rules / Controlling Authority:

Volunteer emergency medicine personnel shall be immune from suit "unless it is established that the injuries were or the death was caused by gross negligence, wanton conduct or intentional wrongdoing on the part of the person rendering the treatment." *Green*, 719 S.E.2d at 141.

"In determining or defining gross negligence, this Court has often used the terms willful and wanton conduct and gross negligence interchangeably to describe conduct that falls somewhere between ordinary negligence and intentional conduct." *Id.* at 14 (quoting *Yancey v. Lea*, 354 N.C. 48, 52-53, 550 S.E.2d 155, 157-58 (2001)).

"Negligence, a failure to use due care, be it slight or extreme, connotes inadvertence. Wantonness, on the other hand, connotes intentional wrongdoing. Where malicious or wilful injury is not involved, wanton conduct must be alleged and shown to warrant the recovery of punitive damages. Conduct is wanton when in conscious and intentional disregard of and indifference to the rights and safety of others." *Id.* (emphasis added).

"Thus, the difference between the two is not in degree or magnitude of inadvertence or carelessness, but rather is ***intentional wrongdoing or deliberate misconduct affecting the safety of others. An act or conduct rises to the level of gross negligence when the act is done purposely and with knowledge that such act is a breach of duty to others***, i.e., a conscious disregard of the safety of others. An act or conduct moves beyond the realm of negligence when the injury or damage itself is intentional." *Id.* (emphasis added).

"The rule that an expert may not testify that such a particular legal conclusion or standard has or has not been met remains unchanged by the new Evidence Code . . . Opinion testimony may be received regarding the underlying factual premise, which the fact finder must consider in determining the legal conclusion to be drawn therefrom, ***but may not be offered as to whether the legal conclusion should be drawn.***" *Id.* at 144 (quoting *Norris v. Zambito*, 135 N.C. App. 288, 292, 520 S.E.2d 113, 115-16 (1999) (emphasis added)).

Analysis & Arguments:

"Plaintiff correctly notes that '[t]here is a lack of North Carolina case law on what constitutes gross negligence and willful and wanton conduct for EMS providers' and thus urge us to

consider Illinois law, as Illinois courts have dealt with these issues many times. In considering Illinois law, we find *Fagocki v. Algonquin Fire Protection Dist.*, 496 F.3d 623 (7th Cir. 2007), to be extremely instructive on the issue.” *Id.* at 142.

The Court cited *Fagocki* for three Illinois cases where EMS providers were found to have been grossly negligent:

1. Paramedics responded to a 911 call by a woman who ***told the 911 operator that she was having an asthmatic attack and thought she was dying.*** The paramedics arrived at the woman's apartment, knocked on the door, heard nothing, and left. The door was unlocked, but they had not bothered to turn the doorknob. She died.
2. ***The paramedics knew*** that the plaintiff's decedent, killed when the stretcher she was on collapsed was not secured to the stretcher, ***that the stretcher's legs were not locked,*** that the paramedics placed the stretcher on a pothole, making it highly unstable, and that, despite their knowledge of the instability of the stretcher, they did not maintain physical contact with the stretcher.
3. In the third case . . . the court ruled that a complaint was sufficient to state a claim against paramedics when it alleged that despite ***defendants' knowledge prior to their arrival on the scene that decedent was having difficulty breathing and her throat was closing*** due to an allergic reaction, and despite their training and standard operating procedures and accepted emergency practices, they waited between seven and eight minutes to administer two of the necessary medications and never administered the third.

(emphases added).

Using these cases a guideline, the Court concluded that “[t]here is no doubt that the acts or omissions of defendants which resulted in plaintiff's being erroneously declared dead and thus denied attempts at resuscitation could be characterized as ‘inadvertence or carelessness’ of a very high ‘degree or magnitude[,]’ but plaintiff has not forecast evidence of ‘intentional wrongdoing or deliberate misconduct[,]’ or what the Seventh Circuit referred to as ‘circumstances of aggravation.’” *Id.* at 144 (citing *Fagocki*, 496 F.3d at 628.)

“Here, the problem was defendants' lack of knowledge: they did not know that plaintiff was alive. Even if their lack of knowledge was caused by a negligent failure to conduct a sufficiently thorough examination to establish whether plaintiff was living or deceased, this is still ordinary negligence. Plaintiff has not forecast any “intentional wrongdoing or deliberate misconduct” as to these defendants.” *Id.* (citing *Yancey*, 354 N.C. at 53, 550 S.E.2d at 158).

Even though Plaintiff presented several affidavits from experts opining that defendant acted with gross negligence / wanton conduct, “[m]uch of the information contained in the excluded affidavits could properly be considered as to the issues of the standards of care applicable to each defendant and how defendants failed to meet those standards, but to the extent that any affiant states a legal conclusion, the affidavits were properly excluded.” *Id.* at 145 (citing *Norris*).

Impact of Decision on Plaintiff's Practice:

This case underscores the seeming impossibility of ever proving gross negligence or wanton conduct in the medical negligence context. However, the opinion seems to ignore that defendants had “knowledge” on multiple occasions that Green’s chest was moving and eyelids were twitching – isn’t this the type of “knowledge” pertaining to the potential safety of the plaintiff that was “consciously disregarded?” Clearly, the Court did not think so, and it makes one question whether gross negligence can ever been established short of surgeon walking into an operating room inebriated.

Jenkins v. Hearn Vascular,

___ N.C. App. ___, 719 S.E.2d 151; 2011 N.C. App. LEXIS 2346

Prior History:

Forsyth County, 10 CVS 7052

NCCOA Filed Date:

November 15, 2011

Plaintiff Attorney(s):

Richard Watson (Pulley Watson)
Burton Craig (NCAJ *amicus*)
Andrew J. Schwaba (NCAJ *amicus*)

Defense Attorney(s):

Gray Wilson (Wilson, Helms)
Linda Helms (Wilson, Helms)

Judge (Author of opinion):

Thigpen, Cressie

Judges (Concurring / Dissenting):

Hunter, Jr., Robert N. (concur)
Beasley, Cheri (concur)

Type of Medical Care Involved:

Surgery; Appendectomy; Pregnancy

Decision for Plaintiff or Defense?

Defense

Procedural History:

Appeal by defendants from trial court’s denial of their motions to change venue and to dismiss.

Background Facts:

The alleged malpractice occurred when Plaintiff-mother was 3 weeks pregnant, and underwent a laproscopic appendectomy by defendant surgeon. Twenty weeks later, the mother was septic and an open laparotomy at Forsyth Medial Center revealed that the defendant surgeon had left a four centimeter portion of the mother’s appendix in her body which caused her infection and sepsis. This sepsis caused the mother to go into premature labor, and the plaintiff-baby was delivered at one pound, eight ounces.

Key Case Facts:

The baby was hospitalized at Forsyth Medical Center immediately and remained there until after the Forsyth Clerk appointed a Guardian *ad litem* (from Forsyth County), and the complaint was filed in Forsyth County. The Plaintiff-parents resided in Alamance, and the defendants practice is located in Alamance. Defendants moved to change venue from Forsyth to Alamance County. Plaintiff countered arguing that Forsyth was proper due to the child’s “residence” in Forsyth at the time the Complaint was filed, and the GAL’s residence in Forsyth.

Issue(s):

Did the trial court correctly find that Forsyth was a proper venue under these facts?

Holding:

No. For minor children, residency for venue purposes is determined by county of parents' residence.

Rules / Controlling Authority:

"[T]he denial of a motion for change of venue, though interlocutory, affects a substantial right and is immediately appealable where the county designated in the complaint is not proper." *Jenkins*, 719 S.E.2d at 154 (quoting *Caldwell v. Smith*, 203 N.C. App. 725, 725, 692 S.E.2d 483, 484 (2010)).

"Generally, absent an applicable specific statutory provision, venue is proper in the county in which any party is a resident at the commencement of the action." *Id.* (citing N.C. Gen. Stat. § 1-82 (2009)).

"There is a 'common law presumption that a minor's domicile is the same as that of the minor's parents[.]'" *Id.* (quoting *Fain v. State Residence Comm. of the Univ. of N.C.*, 117 N.C. App. 541, 544, 451 S.E.2d 663, 665, *aff'd per curiam*, 342 N.C. 402, 464 S.E.2d 43 (1995)).

"Therefore, '[a]s a general rule, the domicile of every person at his birth is the domicile of the person on whom he is legally dependent . . . It is a settled principle that no man shall be without a domicile, and to secure this result the law attributes to every individual as soon as he is born the domicile of his father, if the child be legitimate, and the domicile of the mother if illegitimate.'" *Id.* (quoting *Thayer v. Thayer*, 187 N.C. 573, 574, 122 S.E. 307, 308 (1924)).

"[A] guardian *ad litem* . . . is appointed for the mere temporary duty of protecting the legal rights of an infant in a particular suit and his duties and his office end with that suit. He is not a party in interest in the suit, no property comes into his hands, and he has no powers nor duties either prior to the institution of the suit or after its termination . . . As such, 'a [guardian *ad litem*]'s county of residence is insufficient, standing alone, to establish venue.'" *Id.* at 154 (quoting *Roberts*, 703 S.E.2d at 787).

Analysis & Arguments:

"The fact that Miriam was a long-term patient at Forsyth Medical Center in Forsyth County after her birth does not affect her residence with her parents in Alamance County. As in *Thayer*, there is no suggestion in the present case that Asma or Jamal either reside or are domiciled in Forsyth County. Asma and Jamal do not dispute that they reside in Alamance County. Miriam has neither been emancipated nor abandoned by her mother and father. The question of Miriam's legitimacy is not at issue, and *Thayer* supports the proposition that Miriam's in-patient stay at Forsyth Medical Center does not affect her residence. We therefore conclude the residence of the infant, Miriam, is the residence of her parents, Asma and Jamal." *Id.* at 154.

After concluding the law compelled venue in Alamance, the Court concluded that the *Roberts* case was controlling on the guardian *ad litem* issue, and that the GAL standing alone was insufficient to make Forsyth a proper venue.

Interesting Point of Note:

The NCCOA completely punted on the substantive issues raised in the Defendants' motion to dismiss at the trial court. Defendants contended below that the physicians owed no duty to the

Plaintiff-fetus because at the time of the care in question the fetus was “non-viable.” Plaintiff and NCAJ as *amicus* argued strenuously that North Carolina recognizes a common law cause of action for a child born with injuries caused by negligence at any stage of pregnancy. The COA heard substantial oral argument on this issue, yet concluded succinctly in this opinion that the trial court’s denial of defendants’ 12(b)(6) motion was interlocutory and does not affect a substantial right. If this issue ever gets back to the appellate level then it will be an important (and good) issue for Plaintiffs and NCAJ to advocate.

Day v. Brant,

____ N.C. App.____, 721 S.E.2d 238; 2011 N.C. App. LEXIS 61

Prior History:

Iredell County, 04 CVS 2917
Day v. Brant, 205 N.C. App. 348, 697
S.E.2d 345 (2010)

NCCOA Filed Date:

July 20, 2010

Plaintiff Attorney(s):

John J. Korzen
David A. Manzi
Sam McGee (NCAJ *amicus*)
Adam Stein (NCAJ *amicus*)

Defense Attorney(s):

Norman F. Klick, Jr. (Carruthers & Roth)
Richard Vanore
Robert N. Young (Carruthers & Roth)
David Manzi (Peniston & Associates)

Judge (Author of opinion):

Geer, Martha

Judges (Concurring / Dissenting):

Hunter, Robert C. (concur)
Calabria, Ann Marie (concur)

Type of Medical Care Involved:

Emergency Room; DDX after MVA Trauma

Decision for Plaintiff or Defense?

Plaintiff

Procedural History:

Appeal by plaintiffs from Judge Christopher Collier’s grant of directed verdict to defendants. This appeal was originally heard before the NCCOA with opinion filed July 20, 2010. *See, Day v. Brant*, 205 N.C. App. 348, 697 S.E.2d 345 (2010). Defendants’ petition for rehearing was granted, and this new opinion supersedes and replaces the July 20, 2010 opinion.

Background Facts:

Decedent was injured in a motor vehicle accident and brought to defendant Lake Norman Regional Medical Center’s Emergency Department. He presented with a seatbelt abrasion from his left shoulder to his right upper abdomen, bruises on his arms and legs, and reporting chest and neck pain. Multiple x-rays, CT scans and blood work was taken, however the defendant ER physicians never took ultrasound or CT of decedent’s abdomen. Decedent was discharged home with pain medications. Later that night, decedent was found dead in his home from a liver rupture and internal bleeding.

Key Case Facts:

At trial, plaintiff called one standard of care expert and one causation expert.

- **Plaintiff's standard of Care expert.** Plaintiff called Dr. Paul Mele, a board certified emergency medicine physician with 20 years of experience, who opined that defendants breached the standard of care by failing to properly consider abdominal trauma based on decedent's signs and symptoms. Dr. Mele testified, *inter alia*, that the liver and spleen are most commonly injured after blunt force trauma to the abdomen; a seatbelt alone can injure these organs; and defendant ER doctors should have considered an abdominal injury despite the fact that decedent was reporting no abdominal pain or broken ribs.
- **Plaintiff's causation expert.** Plaintiff called Dr. James O. Wyatt, III, an expert trauma surgeon, who testified that had decedent been given proper initial and subsequent management after presentation to the ED, he would have more likely than not survived. Specifically, Dr. Wyatt testified that had defendants performed a CT of decedent's abdomen or pelvis they would have been able to make the diagnosis of a ruptured liver; if that diagnosis had been made the decedent would have been admitted to the hospital where the injury could have been treated; the survival rate of patients like decedent who are properly admitted and treated is "excellent (>51%);" and if decedent had been treated in the hospital properly "he would have survived" the liver rupture.

At the close of plaintiff's evidence, defendants moved for a directed verdict on two general bases: (1) plaintiff's standard of care expert was not qualified, and (2) plaintiff's causation expert had not shown proximate cause.

Specifically, defendant made a multitude of arguments :

- **Defendant Argument 1:** Plaintiff's standard of care opinion should have been excluded because expert never testified that he was a licensed physician;
- **Defendant Argument 2:** Plaintiff's standard of care opinion should have been excluded because expert failed to show he was familiar with the defendant's medical community at the time of the alleged breach;
- **Defendant Argument 3:** Plaintiff's standard of care opinion should have been excluded because expert acquired most of his information regarding the defendant's medical community after reaching his opinion and having his deposition taken;
- **Defendant Argument 4:** Plaintiff's standard of care opinion should have been excluded because expert never testified to the specific things he learned about defendant's medical community, and did not give any specific testimony regarding the physician skill, training, facilities, equipment, funding or physical and financial environment of the defendant medical community;
- **Defendant Argument 5:** Plaintiff's standard of care opinion should have been excluded because expert incorrectly applied a national standard of care to defendants;
- **Defendant Argument 6:** Plaintiff's causation opinion should have been excluded because expert's opinions regarding the decedent's chance of survival had he been admitted to the hospital amounted to mere speculation;
- **Defendant Argument 7:** Plaintiff's causation opinion should have been excluded because expert himself admitted that his opinion was "speculation;"

- **Defendant Argument 8:** Plaintiff's causation opinion should have been excluded because expert merely testified that decedent would have "had a better chance of survival" had he been properly treated by defendants.

Issue(s):

Was plaintiff's testimony on standard of care and causation sufficient to go to the jury in the face of all the above arguments?

Holding:

Yes. The trial court improperly granted defendant's motion for directed verdict on both grounds.

Rules / Controlling Authority – Defendant Argument 1:

Rule 702(b) requires an expert giving medical standard of care testimony to be a "licensed health care provider in this State or another state."

Analysis & Arguments – Defendant Argument 1:

Even though expert never specifically stated he was a licensed physician in any state, and even though he was never asked this question, he testified that he was an emergency medicine physician, that he was board certified, that he used to have emergency room privileges at Rex Hospital in Raleigh, North Carolina, and that he now had other hospital privileges at Rex Hospital. A jury could reasonably infer from this testimony that Dr. Mele did in fact have a medical license.

Rules / Controlling Authority – Defendant Argument 2:

Pursuant to G.S. 90-21.12, "[i]f a plaintiff's standard of care expert witness 'fail[s] to demonstrate that he [is] sufficiently familiar with the standard of care 'among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action,' then the 'plaintiff [is] unable to establish an essential element of his claim, namely, the applicable standard of care,' and the trial court properly enters judgment on behalf of the defendant." *Day* 721 S.E.2d at 243 (quoting *Smith*, 159 N.C. App. at 197, 582 S.E.2d at 673)).

"An expert witness may testify regarding this standard of care "when that physician is familiar with the experience and training of the defendant and either (1) the physician is familiar with the standard of care in the defendant's community, or (2) the physician is familiar with the medical resources available in the defendant's community and is familiar with the standard of care in other communities having access to similar resources." *Id.* (quoting *Purvis v. Moses H. Cone Mem'l Hosp. Serv. Corp.*, 175 N.C. App. 474, 478, 624 S.E.2d 380, 384 (2006)).

Analysis & Arguments – Defendant Argument 2:

The court pointed out all that plaintiff's expert had done to familiarize himself with the standards of practice of defendants and similar medical communities, including: he had reviewed defendants' deposition transcripts; he had reviewed information on defendant's medical community including population, number of hospital beds, facilities in hospital, kinds of patients seen, and diagnostic services available – all of which were similar to hospitals in which he had worked; he had done internet research demographic information on defendant's community and determined it to be similar to Wake County where he practiced; during his career he had the opportunity to consult with physicians working in communities similar to that of defendants' and determined the standard of care to be the same as his own community; and finally, he had reviewed the defendants' medical group website to learn about their qualifications, training and experience, which he concluded was comparable to his own.

Based on the above, the court concluded that the expert was sufficiently familiar under G.S. 90-21.12 by analogizing to four seminal cases where similar actions by the expert were enough to qualify him: *Billings v. Rosenstein*, 174 N.C. App. 191, 194, 619 S.E.2d 922, 924 (2005); *Pitts v. Nash Day Hosp., Inc.*, 167 N.C. App. 194, 199, 605 S.E.2d 154, 157 (2004), *aff'd per curiam*, 359 N.C. 626, 614 S.E.2d 267 (2005); *Coffman v. Roberson*, 153 N.C. App. 618, 624, 571 S.E.2d 255, 259 (2002), *disc. review denied*, 356 N.C. 668, 577 S.E.2d 111 (2003); *Leatherwood v. Ehlinger*, 151 N.C. App. 15, 22-23, 564 S.E.2d 883, 888 (2002), *disc. review denied*, 357 N.C. 164, 580 S.E.2d 368 (2003).

Rules / Controlling Authority – Defendant Argument 3:

The court cited *Roush v. Kennon*, 188 N.C. App. 570, 576, 656 S.E.2d 603, 607, *disc. review denied*, 362 N.C. 361, 664 S.E.2d 309 (2008) as controlling authority where NCCOA rejected the argument that an expert who “supplemented his understanding of the applicable standard of care” after his deposition by researching the defendant medical community automatically disqualified his opinion testimony at trial.

Analysis & Arguments – Defendant Argument 3:

The court here concluded that there was “no meaningful distinction between this case and *Roush*,” and therefore the plaintiff’s expert opinion could not be disqualified on this basis. *Day*, 721 S.E.2d at 244.

Rules / Controlling Authority – Defendant Argument 4:

“[A]n expert witness cannot simply assert that he is familiar with the applicable standard of care without also providing an explanation of the basis for his familiarity.” *Id.* (citing *Smith*, 159 N.C. App. at 196, 582 S.E.2d at 672).

However, “Defendants have cited no authority requiring that an expert witness testify ‘as to what he specifically learned,’ and we have found none.” *Id.*

Analysis & Arguments – Defendant Argument 4:

The court reasoned that because “Dr. Mele established in his testimony that he had done research and had personal knowledge that supplied the information that the expert in *Smith* lacked . . . his testimony provided a basis -- his research and personal knowledge -- for his claim of familiarity. This case does not involve a bare statement of familiarity such as that present in *Smith*.” *Id.*

Rules / Controlling Authority – Defendant Argument 5:

“It is, however, established that mere mention of a national standard is not sufficient to warrant disregard of an expert’s testimony if the expert has testified regarding his or her familiarity with the standard of care in the same or similar communities.” *Id.* (citing *Roush*, 188 N.C. App. at 576, 656 S.E.2d at 607-08; *Pitts*, 167 N.C. App. at 197, 605 S.E.2d at 156; *Cox v. Steffes*, 161 N.C. App. 237, 244, 246, 587 S.E.2d 908, 913, 914 (2003), *disc. review denied*, 358 N.C. 233, 595 S.E.2d 148 (2004)).

Analysis & Arguments – Defendant Argument 5:

Even though plaintiff’s expert stated several times that the standard of care for emergency room physicians in this situation would be “the same in any city in America,” he “repeatedly rejected defense counsel’s attempt to extend [his] opinion to all cities and limited his opinion, as our courts require, to those cities having the same facilities, resources, and training available. In any

event . . . he specifically testified that the standard of care he was applying was the standard of care for defendants' community, just like the experts in *Roush, Pitts, and Cox*.”

Rules / Controlling Authority – Defendant Argument 6:

Where a causation expert testifies that it’s “possible” a plaintiff’s injury could have been prevented had defendants admitted plaintiff to the hospital, but also gives “a detailed explanation of how admission to a hospital . . . could have prevented plaintiff’s [injury],” then the testimony raises “more than a ‘mere possibility or conjecture’ and [is] sufficient to withstand a directed verdict.” *Id.* at 249 (quoting *Felts v. Liberty Emergency Serv., P.A.*, 97 N.C. App. 381, 388-89, 388 S.E.2d 619, 623 (1990)).

“*Howerton* addresses the test applicable in determining the *admissibility* of expert testimony. In *Howerton*, our Supreme Court set out a ‘three-step inquiry for evaluating the admissibility of expert testimony: (1) Is the expert’s proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert’s testimony relevant?’ *Id.* at 247 (quoting *Howerton v. Arai Helmet Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004)).

“Our Supreme Court in *Holley v. ACTS, Inc.*, 357 N.C. 228, 232, 581 S.E.2d 750, 753 (2003), warned that ‘the standards for admissibility of expert opinion testimony have been confused with the standards for sufficiency of such testimony.’ Expert testimony as to causation ‘is admissible if helpful to the jury,’ although it may be ‘insufficient to prove causation, particularly when there is additional evidence or testimony showing the expert’s opinion to be a guess or mere speculation.’” *Id.*

“[W]hen the challenged expert testimony relates to *causation* such admitted testimony is competent ‘as long as the testimony is helpful to the jury and based sufficiently on information reasonably relied upon under Rule 703[.]’” *Id.* at 248 (quoting *Weaver v. Sheppa*, 186 N.C. App. 412, 651 S.E.2d 395 (2007), *aff’d per curiam by an equally divided court*, 362 N.C. 341, 661 S.E.2d 733 (2008), at 416-17, 651 S.E.2d at 399).

Analysis & Arguments – Defendant Argument 6:

Here, on top of plaintiff’s causation expert testimony that plaintiff would have “had a greater than 50 percent chance of surviving” had he been admitted to defendant hospital, he “explicitly set out how, if the laceration had been discovered, a rupture and internal bleeding could have been prevented or stopped. Under *Felts*, this was sufficient evidence of proximate cause.” *Id.*

The court dismissed defendants’ reliance on three cases regarding speculative causation opinions. First, the court distinguished *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000), and *Azar v. Presbyterian Hosp.*, 191 N.C. App. 367, 371, 663 S.E.2d 450, 453 (2008), *cert. denied*, 363 N.C. 372, 678 S.E.2d 232 (2009), by pointing out that the decedent’s cause of death was not in dispute here like it was in *Young* and *Azar*. Second, the court distinguished *Campbell v. Duke Univ. Health Sys., Inc.*, 691 S.E.2d 31, 37 (2010) because here, unlike in *Campbell*, plaintiff’s expert is able to point to defendants’ failure to diagnose decedent’s rupture liver as a specific omission causing the death.

Lastly, the Court favorably analogized this case to *Gaines v. Cumberland Cnty. Hosp. Sys., Inc.*, 195 N.C. App. 442, 446, 672 S.E.2d 713, 716 (2009), *reh’g granted*, 203 N.C. App. 213, 222-23, 692 S.E.2d 119, 124-25, *disc. review denied*, 364 N.C. 324, 700 S.E.2d 750 (2010), concluding that similar to *Gaines*, “Dr. Wyatt had experience treating patients with comparable liver lacerations, specifically listed what would have been done had the lacerations been diagnosed

and Duncan hospitalized, and testified that ‘most’ patients with Duncan's level of lacerations survive if hospitalized and properly managed. Under *Gaines*, this testimony was sufficient to take the case to the jury.” *Id.* at 251.

Rules / Controlling Authority – Defendant Argument 7:

If expert causation testimony “is based merely upon speculation and conjecture . . . it is no different than a layman's opinion, and as such, is not sufficiently reliable to be considered competent evidence on issues of medical causation.” *Day*, 697 S.E.2d at 352 (quoting *Azar*, 191 N.C. App. at 371, 663 S.E.2d at 453).

Analysis & Arguments – Defendant Argument 7:

“Although Dr. Wyatt used the word ‘speculation’ in portions of his testimony, our review of the entirety of his testimony indicates that Dr. Wyatt was not labeling as speculation his opinion that if Duncan's liver laceration had been diagnosed and treated, he would have had a 51% chance of survival. Rather, we read his testimony as acknowledging that the practice of putting a specific percentage on Duncan's chance of survival is inherently speculative.” *Id.*

“Dr. Wyatt, however, ultimately testified that ‘most’ patients with Duncan's injury who are treated in accordance with the standard of care will survive and that he believes Duncan would have survived.’ This opinion is sufficient to establish a probability of survival regardless of the precise numerical percentage used.” *Id.*

Rules / Controlling Authority – Defendant Argument 8:

“[P]roof of proximate cause in a malpractice case requires more than a showing that a different treatment would have improved the patient's chances of recovery . . . The connection or causation between the negligence and death must be probable, not merely a remote possibility.” *Id.* at 252 (quoting *White v. Hunsinger*, 88 N.C. App. 382, 387, 363 S.E.2d 203, 206 (1988)).

Analysis & Arguments – Defendant Argument 8:

“Dr. Wyatt specifically testified that when patients with liver lacerations like that suffered by Duncan are hospitalized, monitored, and treated, ‘most’ of them survive. He further testified that if the defendants had followed the standard of care, Duncan would have had a better than 51% chance of survival and that he believes Duncan would have survived. In sum, Dr. Wyatt's testimony established that Duncan's survival was not merely possible but rather was probable if defendants had complied with the standard of care.” *Id.*

“Although defendants point out that Dr. Wyatt could not say to an absolute certainty that Duncan would have survived, absolute certainty is not required.” *Id.*

Impact of Decision on Plaintiff's Practice:

This case is a practically a miniature legal treatise on how to overcome all the common defense objections to *both* standard of care and causation opinions. All of the rulings and analysis used here to find the plaintiff's expert opinions admissible could later be used to prop up your own experts, or serve as a roadmap for ideas on how to attack the defense's experts. This is especially true for the court's analysis of the law on “mere speculation or conjecture” causation opinions. It would be wise to store a copy of this case in your brief bank just to have all of this law in one place.

In regard to **Defendant Argument 3** above, be wary of defense attorneys who attempt to get your consent to a discovery scheduling order that prevents your expert witnesses from reviewing materials or doing any research after his or her deposition. This is emerging as a trend with

some defense DSO's, and when in place it totally cripples your witness from curing before trial any 90-21.12 deficiencies that may pop up during his or her deposition.

Horsley v. Halifax Regional Med. Ctr.
2011 N.C. App. LEXIS 600

Prior History:

Halifax County, 10 CVS 753

NCCOA Filed Date:

April 5, 2012

Plaintiff Attorney(s):

Richard E. Batts

Defense Attorney(s):

Bonnie J. Refinski-Knight (Harris, Creech)
Luke A. Donald (Harris, Creech)

Judge (Author of opinion):

Elmore, Rick

Judges (Concurring / Dissenting):

Geer, Martha (concur)
Thigpen, Cressie (concur)

Type of Medical Care Involved:

Nursing. Ordinary Negligence

Decision for Plaintiff or Defense?

Plaintiff

Procedural History:

Appeal by plaintiffs from Judge Quentin T. Sumner dismissing the complaint for failure to comply with Rule 9(j).

Key Case Facts:

Plaintiff was admitted to psychiatric unit of defendant hospital for a recurring nervous condition. Plaintiff had difficulty walking and standing at the time of her admission, the hospital was on notice that she may require a cane or a walker as a result. As plaintiff was preparing to walk to the cafeteria for her evening meal, she stood against the wall near the nurses' station and said aloud that she was going to fall. None of the nurses offered her a wheelchair, cane or walker, and plaintiff fell injuring herself.

Plaintiff filed suit against the defendant hospital alleging gross negligence, but not medical malpractice. Defendant moved to dismiss for failure to comply with Rule 9(j), arguing that the plaintiff's claim was actually for medical malpractice. The trial court granted defendant's motion to dismiss.

Issue(s):

Under these facts, was the failure to offer a walker/cane/wheelchair a claim for medical malpractice?

Holding:

No, plaintiff stated a claim for ordinary negligence.

Rules / Controlling Authority:

“A medical malpractice action . . . is defined as a civil action for damages for personal [*4] injury or death arising out of the furnishing or failure to furnish *professional services* . . . by a health care provider. *Professional services* has been defined by this Court to mean an act or service . . . involving specialized knowledge, labor, or skill[.]” *Lewis v. Setty*, 130 N.C. App. 606, 608, 503 S.E.2d 673, 674 (1998).

Analysis & Arguments:

The Court analyzed three cases as instructive on this issue: *Sturgill*, *Norris* and *Lewis*.

In *Sturgill v. Ashe Mem'l Hosp., Inc.*, 186 N.C. App. 624, 652 S.E.2d 302 (2007), the plaintiff brought a claim against the hospital for the death of her father where the nurses failed to apply restraints to the father and he fell out of his hospital bed and died. “This Court concluded that ***‘the decision to apply restraints is a medical decision requiring clinical judgment and intellectual skill*** and that ‘plaintiff’s complaint is a claim for medical malpractice . . . [i]t is undisputed in the record that the use of restraints is a medical decision that *normally requires an order written by a physician or physician’s assistant*. It is also undisputed in the record that [a] medical assessment for the use of restraints can be delicate and complex, and as such, requires the application of clinical judgment.” (emphasis added).

“In *Norris v. Rowan Memorial Hospital, Inc.*, 21 N.C. App. 623, 205 S.E.2d 345 (1974), the plaintiff sued the hospital for ***failure of its nurses to raise her bed side rails***, causing her to fall out of her bed and be injured. We held that the nurses’ actions ***‘did not involve the rendering or failure to render professional nursing or medical services requiring special skills***, [and that] expert testimony on behalf of the plaintiff as to the standard of due care prevailing among hospitals in like situations is not necessary to develop a case of negligence for the jury.” (emphasis added).

“[I]n *Lewis* the plaintiff sued a physician for failure to lower the examination table prior to transferring him from his wheelchair to the table. We held that ***‘the removal of the plaintiff from the examination table to the wheelchair did not involve an occupation involving specialized knowledge or skill***, as it was predominately a physical or manual activity. It thus follows that the alleged negligent acts of the defendant do not fall into the realm of professional medical services.” 130 N.C. App. at 608, 503 S.E.2d at 674 (emphasis added).

Based on these holdings, the Court concluded that the decision to offer a patient a cane under these facts did not require specialized skill or clinical judgment, saying, “the decision of whether to offer a cane to a patient who has trouble walking is not one that requires specialized skill. As a result, expert testimony on the matter is not necessary to develop a case of negligence for the jury.”

Impact of Decision on Plaintiff’s Practice:

Although the care at issue here was found not to need expert testimony, when in doubt the safest practice is to obtain a 9(j) expert and plead medical malpractice in the alternative.



LEXSEE 363 N.C. 140

**RONALD CROCKER and PAULETTE CROCKER as Co-Administrators of the
Estate of REAGAN ELIZABETH CROCKER v. H. PETER ROETHLING, M.D.
and WAYNE WOMEN'S CLINIC, P.A.**

No. 374PA07

SUPREME COURT OF NORTH CAROLINA

363 N.C. 140; 675 S.E.2d 625; 2009 N.C. LEXIS 350

**March 18, 2008, Heard in the Supreme Court
May 1, 2009, Filed**

SUBSEQUENT HISTORY: Rehearing denied by *Crocker v. Roethling*, 363 N.C. 381, 678 S.E.2d 236, 2009 N.C. LEXIS 525 (2009)

Mandamus dismissed by, Petition dismissed by *Crocker v. Roethling*, 2009 N.C. LEXIS 891 (N.C., Oct. 6, 2009)

PRIOR HISTORY: *Crocker v. Roethling*, 184 N.C. App. 377, 646 S.E.2d 442, 2007 N.C. App. LEXIS 1529 (2007)

DISPOSITION: [***1] REVERSED AND REMANDED.

COUNSEL: The McLeod Law Firm, P.A., by Joe McLeod; and Law Offices of Wade E. Byrd, P.A., by Wade E. Byrd, for plaintiff-appellants.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Samuel G. Thompson and William H. Moss, for defendant-appellees.

Patterson Harkavy LLP, by Burton Craige, for North Carolina Academy of Trial Lawyers, amicus curiae.

JUDGES: HUDSON, Justice. Justice MARTIN, concurring, with separate mandate. Justice EDMUNDS concurs in this opinion. Justice NEWBY dissenting. Chief Justice PARKER and Justice BRADY join in this dissenting opinion.

OPINION BY: HUDSON

OPINION

[*140] [**627] On discretionary review pursuant to *N.C.G.S. § 7A-31* of a unanimous, unpublished decision of the Court of Appeals, 184 N.C. App. 377, 646 S.E.2d 442 (2007), affirming an order granting summary judgment for defendants entered on 1 March 2006 by Judge W. Russell Duke, Jr., in Superior Court, Johnston County. Heard in the Supreme Court 18 March 2008.

[*141] HUDSON, Justice.

In this medical malpractice case, we consider whether the trial court properly excluded plaintiffs' expert and granted summary judgment for defendants when the expert's opinions of his familiarity with the community at issue and of defendants' breach [***2] of the standard of care satisfy the requirements of *N.C.G.S. § 90-21.12*. We conclude that here, the expert's deposition and affidavit demonstrate "sufficient familiarity" with the "same or similar" community and that the trial court erred by excluding his testimony. Because the expert's evidence also provides opinions that create a

genuine issue as to the material fact of defendants' breach of the standard of care, summary judgment should not have been granted.

Plaintiffs allege that their daughter, Reagan Elizabeth Crocker, was born to them in September 2001 in Goldsboro and died on 28 September 2003 due to severe, permanent birth-related injuries. Defendant H. Peter Roethling, M.D., an obstetrician with defendant Wayne Women's Clinic, delivered Reagan on 14 September 2001. During delivery, Reagan's shoulder became lodged against her mother's pelvis, preventing natural passage through the birth canal. This condition, called shoulder dystocia, delayed Reagan's birth and allegedly caused serious injuries. Plaintiffs contend that Dr. Roethling was negligent in failing to perform various maneuvers, including the Zavanelli maneuver, to dislodge Reagan's shoulder and hasten her delivery.

On [***3] 9 September 2004, plaintiffs, acting as co-administrators of Reagan's estate, filed a medical malpractice action in the superior court in Johnston County against Dr. Roethling, Wayne Women's Clinic, and other defendants later dismissed from the action. Plaintiffs sought damages for wrongful death, based on the alleged negligence of Dr. [**628] Roethling in delivering Reagan. On 1 March 2006, the trial court entered summary judgment for defendants after concluding that the testimony of plaintiffs' sole expert witness should be excluded. Plaintiffs appealed to the Court of Appeals, which filed a unanimous, unpublished opinion on 3 April 2007 affirming the trial court. The Court of Appeals granted a petition for rehearing on 6 June 2007 and reconsidered the case without additional briefs and without oral argument. The Court of Appeals filed a unanimous, unpublished superseding opinion on 3 July 2007, again affirming the trial court. That opinion stated that "the record before [the Court of Appeals] does not include sufficient facts tending to support [the expert's]" assertion in his 7 February 2006 affidavit "that he is 'familiar with the [*142] prevailing standard of care for handling shoulder dystocia [***4] in the same or similar community to Goldsboro, North Carolina in 2001.'" *Crocker v. Roethling*, 184 N.C. App. 377, 646 S.E.2d 442, 2007 WL 1928681, at *3 (2007) (unpublished). On 8 November 2007, this Court allowed plaintiffs' petition for discretionary review. As discussed below, we conclude that summary judgment for defendants was not proper on this record. We reverse and remand.

The standard for granting summary judgment is well established. Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *N.C.G.S. § 1A-1, Rule 56(c)* (2007). The trial court must consider the evidence in the light most favorable to the non-moving party. *E.g., McCutchen v. McCutchen*, [**629] 360 N.C. 280, 286, 624 S.E.2d 620, 625 (2006) (citing *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004)).

"One of the essential elements of a claim for medical negligence is that the defendant breached the applicable standard of medical care owed to the plaintiff." *Goins v. Puleo*, 350 N.C. 277, 281, 512 S.E.2d 748, 751 (1999). [***5] To meet their burden of proving the applicable standard of care, plaintiffs must satisfy the requirements of *N.C.G.S. § 90-21.12*, which states in full:

In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of the facts is satisfied by the greater weight of the evidence *that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities* at the time of the alleged act giving rise to the cause of action.

N.C.G.S. § 90-21.12 (2007) (emphasis added). Plaintiffs must establish the relevant standard of care through expert testimony. *Ballance v. Wentz*, 286 N.C. 294, 302, 210 S.E.2d 390, 395 (1974) (citation omitted); *Smith v. Whitmer*, 159 N.C. App. 192, 195, 582 S.E.2d 669, 671-72 (2003) (citations omitted). When plaintiffs have introduced evidence from an expert stating that the defendant doctor did not [*143] meet the accepted [***6] medical standard, "[t]he evidence forecast by the plaintiffs establishes a genuine issue of material fact as to whether the defendant doctor breached the applicable standard of care and thereby proximately caused the plaintiffs' injuries." *Mozingo v. Pitt Cty. Mem'l Hosp., Inc.*, 331 N.C. 182, 191, 415 S.E.2d 341, 346 (1992) (citing *Turner v. Duke Univ.*, 325 N.C. 152, 162, 381 S.E.2d 706, 712 (1989)). This issue is ordinarily a question for the jury, and in such case, it is error for the trial court to enter summary judgment for the defendant. *Id.*; see also *Rouse v. Pitt Cty. Mem'l Hosp., Inc.*, 343 N.C. 186, 197, 470 S.E.2d 44, 50 (1996).

Here, the trial court appears to have granted summary judgment to defendants on grounds that plaintiffs' only proposed medical expert, John P. Elliott, M.D., was insufficiently familiar with Goldsboro and was applying a national standard of care, thus requiring exclusion of his evidence. Having excluded the doctor from testifying, the court granted summary judgment for defendants. Ordinarily, we review the decision to exclude or admit expert testimony for an abuse of discretion. *DOT v. Haywood Cty.*, 360 N.C. 349, 351, 626 S.E.2d 645, 646 (2006); see [***7] also N.C.G.S. § 8C-1, Rule 104 (2007). "[T]his Court has uniformly held that the competency of a witness to testify as an expert is a question primarily addressed to the court, and his discretion is ordinarily conclusive, that is, unless there be no evidence to support the finding, or unless the judge abuse his discretion." *State v. Moore*, 245 N.C. 158, 164, 95 S.E.2d 548, 552 (1956). However, here, the pertinent inquiry is whether the trial court properly applied the statutory requirements of N.C.G.S. § 90-21.12 and the Rules of Evidence in considering Dr. Elliott's opinions at this stage of the proceedings. If we determine that the exclusion was erroneous, we then consider whether this testimony sufficiently forecast a genuine issue of material fact under *Mozingo*.

We note that the ruling at issue here occurred at the hearing solely calendared for the motion for summary judgment, not for a motion to exclude testimony. In fact, our review of the record reveals no motion to exclude, written or oral, nor was any motion to exclude listed on the calendar notice. Moreover, the reasons given in the transcript for the ruling (none appear in the order) include: that Dr. Elliott's information [***8] about Goldsboro showed that its hospital was different from the one in Phoenix where he practices; that all of the hospitals where Dr. Elliott has practiced are larger than the one in Goldsboro; and that "the Court finds that the [witness] was testifying . . . to a national standard of care and will exclude the evidence of [*144] that expert." We conclude that this ruling and the order based thereupon result from a misapplication of *Rule 702* and N.C.G.S. § 90-21.12.

The trial court must decide the preliminary question of the admissibility of expert testimony under the three-step approach adopted in *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995). The trial court thereunder must assess: 1) the reliability of the expert's methodology, 2) the qualifications of the proposed expert, and 3) the relevance of the expert's testimony. *Id.* at 527-29, 461 S.E.2d at 639-41). Applying *Goode* in the context of N.C.G.S. § 90-21.12, we note that North Carolina law has established a "workable" and "flexible system for assessing" the admissibility of expert testimony under *Rule 702*. *Id.* at 469, 597 S.E.2d at 692. Here, the first two steps of the *Goode* analysis are not at issue; there is no controversial or [***9] novel "proffered scientific or technical method of proof" which defendants challenge as unreliable, nor have they questioned Dr. Elliott's qualifications as a medical expert. 358 N.C. at 460-61, 597 S.E.2d at 687-88. Instead, defendants in essence dispute the relevance of Dr. Elliott's testimony, arguing that his testimony was not admissible because it did not address the relevant standard of care: that of Goldsboro or similar communities.

Dr. Elliott, plaintiffs' sole expert witness, practiced obstetrics in Phoenix, Arizona. In the hearing on the motion for summary judgment, counsel for defendants indicated he did not dispute Dr. Elliott's other qualifications, but that "the key issue" was whether he had "sufficient familiarity" with the standards of practice" in Goldsboro or similar communities. We note Dr. Elliott gave this testimony at a discovery deposition, conducted by the defense attorney, and not in response to direct examination by plaintiffs, who would later have the burden of tendering the qualifications of the expert. At such a discovery deposition, plaintiffs' attorney had no obligation to expand upon or clarify any of Dr. Elliott's qualifications or opinions; rather, [***10] the deposition was the defendants' opportunity to learn what they could about the other side's expert and his opinions. Even so, at his deposition on 30 August 2005, Dr. Elliott was able to accurately describe a number of features of the community at issue here, including the location and population of Goldsboro, and the number of obstetricians privileged at Wayne Memorial Hospital. He did testify that he believed a physician in either Phoenix or Goldsboro would have the "same" knowledge, but also correctly described the applicable standard of care as "that of a reasonably trained physician practicing in the same or similar circumstances."

[*145] On 10 February 2006, prior to the hearing on defendants' motion for summary judgment, plaintiffs filed Dr. Elliott's affidavit, which stated, in pertinent part:

[**630] 3. I am familiar with the training, education and experience of Dr. Peter Roethling and have reviewed the transcript of Dr. Roethling's deposition wherein he discusses his training, education and experience and his practice in Goldsboro, North Carolina. . . .

4. I have reviewed information about the community of Goldsboro, North Carolina, Wayne County and Wayne Memorial Hospital for the period [***11] 2001 and am familiar with the size of the population, the level of care available at the hospital, the facilities and the number of health care providers for obstetrics. I am familiar with the prevailing standard of care for handling shoulder dystocia in the same or similar community to Goldsboro, North Carolina in 2001 by a physician with the same or similar

training, education and experience as Dr. Roethling. The applicable standard in Goldsboro in 2001 for a board certified obstetrician such as Dr. Roethling who is also a clinical teacher required, among other things, that when progress is not made in delivery of a shoulder dystocia using standard maneuvers, the Zavenelli [sic] maneuver should be used.

The affidavit was discussed by plaintiffs' counsel at the argument on defendants' motion for summary judgment on 13 February 2006.

As noted above, the record does not reflect a written or oral motion to exclude the testimony of Dr. Elliott, but nevertheless defense counsel argued to the trial court, at the Court of Appeals, and again here that the doctor's testimony should be excluded because it was either based on a national standard or failed to "demonstrate that [Dr. Elliott] really [***12] [was] familiar with the standard of practice for similar communities," citing *Purvis v. Moses H. Cone Mem'l Hosp. Serv. Corp.*, 175 N.C. App. 474, 624 S.E.2d 380 (2006), *Smith v. Whitmer*, 159 N.C. App. 192, 582 S.E.2d 669, and *Henry v. Se. OB-GYN Assocs.*, 145 N.C. App. 208, 550 S.E.2d 245, *aff'd*, 354 N.C. 570, 557 S.E.2d 530 (2001). On the other hand, plaintiffs' counsel has argued at every level that Dr. Elliott's affidavit, particularly paragraphs three and four quoted above, should put the issue of familiarity with the same or similar community "to rest" if viewed according to the appropriate legal standard.

[*146] We agree with plaintiffs that the cases cited by defendants are distinguishable. In *Purvis*, the Court of Appeals held that an expert's testimony was properly excluded when his only stated knowledge of the community pertained to a period more than four years after the alleged injury occurred. 175 N.C. App. at 480-81, 624 S.E.2d at 385. Here, in contrast, Dr. Elliott specifically referred to the standard in effect at the time of the alleged negligence. In *Smith*, the expert "offered no testimony regarding defendants' training, experience, or the resources available in the defendants' [***13] medical community." 159 N.C. App. at 196, 582 S.E.2d at 672. The expert further testified that "the sole information he received or reviewed concerning the relevant standard of care in [the relevant community] was verbal information from plaintiff's attorney regarding 'the approximate size of the community and what goes on there'" and that he could not even recall what he had been told. *Id.* at 196-97, 582 S.E.2d at 672. He then stated that, in any event, there was a national standard of care. *Id.* *Henry* involved an expert who testified that he knew nothing about the community at issue, but gave an opinion that the standard of care for the particular procedure was the same across the nation. 145 N.C. App. at 210, 550 S.E.2d at 246-47. In none of these cases did the plaintiffs have a qualified expert like Dr. Elliott produce an affidavit clearly stating that he was familiar with the training and experience of the defendant physician and with the specific standard of care in the relevant community at the time of the alleged injury.

We conclude that, unlike the experts in *Purvis*, *Smith*, and *Henry*, Dr. Elliott demonstrated specific familiarity with and expressed unequivocal opinions regarding [***14] the standard of care in Goldsboro and similar communities, as well as in Dr. Roethling's own practice. While Dr. Elliott did state in his deposition that he expected "a physician in Phoenix [Arizona] to have the same knowledge as Dr. Roethling irrespective of their location," his subsequent affidavit expanded and clarified his familiarity with [***631] Dr. Roethling's obstetrical practice and with Goldsboro and Wayne County. The trial court may not automatically disqualify an expert witness simply because the witness indicates reliance on a national standard of care during a discovery deposition. Where, as here, the basis of the opinion and the expert's familiarity with the same or a similar community is undeveloped, the proponent must be given an opportunity to establish the witness's competency. However, the proponent does not have the duty to do so at the discovery deposition.

[*147] Dr. Elliott's sworn affidavit states that he had reviewed information about obstetrical care in Goldsboro and Wayne County and about Dr. Roethling's background and practice. Dr. Elliott also stated that he was familiar with the standard of care for handling shoulder dystocia in the community in 2001. Any questions as [***15] to whether Dr. Elliott had actually reviewed such information or whether he was truthful in stating that he was familiar with the relevant standard of care go to the credibility of the witness. Nothing in our statutes or case law suggests that a prospective medical expert must produce documentation of his research or attempt to explain to the trial judge how his knowledge about the community enabled him to ascertain the relevant standard of care. Nor do they prescribe any particular method by which a medical doctor must become "familiar" with a given community. Many methods are possible, and our jurisprudence indicates our desire to preserve flexibility in such proceedings. The witness must show only that "other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." N.C.G.S. § 8C-1, Rule 702(a).

Further, the dissent suggests that Dr. Elliott was required to explicate the basis for his opinion of the applicable standard of care before it could be admissible. Evidence *Rule 705*, "Disclosure of facts or data underlying expert opinion," provides in pertinent part:

The expert may testify in terms of opinion or inference and give his [***16] reasons therefor without prior disclosure of the underlying facts or data, unless an adverse party requests otherwise, in which event the expert will be required to disclose such underlying facts or data on direct examination or voir dire before stating the opinion.

N.C.G.S. § 8C-1, Rule 705 (2007). Here, defense counsel did not request the underlying basis for the opinion at the deposition. It appears that defense counsel began to ask about the basis, but then withdrew the question. After Dr. Elliott gave his opinion on the standard of care, defense counsel stated the following: "Q: And what is it that allows you - well, strike that." As such, Dr. Elliott was not required, under our Rules, to state the basis for his opinion prior to the court's ruling on its admission.

As noted in the dissent, matters of credibility are for the jury, not for the trial court. *Queen City Coach Co. v. Lee*, 218 N.C. 320, 323, 11 S.E.2d 341, 343 (1940). We have cautioned trial courts against "asserting sweeping pre-trial 'gatekeeping' authority . . . [which] may unnecessarily [*148] encroach upon the constitutionally-mandated function of the jury to decide issues of fact and to assess the weight of the evidence." [***17] *Howerton*, 358 N.C. at 468, 597 S.E.2d at 692 (citing, *inter alia*, *N.C. Const. art I, § 25* and *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)).

Here, the trial court exceeded its limited function under *Rule 104* by making a credibility determination about Dr. Elliott's testimony. Although the trial court's summary judgment order states that Dr. Elliott's affidavit was among the items reviewed, it appears from the transcript that the trial court did not properly consider the affidavit's content according to the requirements of *N.C.G.S. § 90-21.12* and our Rules of Evidence, as interpreted by this Court. In the transcript of the summary judgment hearing, the judge refers only to Dr. Elliott's deposition and never acknowledges the affidavit's substantive content. Specifically, he referred to parts of Dr. Elliott's deposition that led him to conclude that Dr. Elliott would be "testifying in affect [sic] to a national standard of care." In the affidavit, Dr. Elliott states that he has reviewed information about Goldsboro and the level of hospital care there. Dr. Elliott's affidavit further states that he is "familiar with the prevailing standard of care for handling [***18] shoulder dystocia [**632] in the same or similar community to Goldsboro, North Carolina in 2001 by a physician with the same or similar training, education and experience as Dr. Roethling." Dr. Elliott's affidavit and deposition comply with the requirements of *N.C.G.S. § 90-21.12* and demonstrate "sufficient familiarity" with the community at issue, rendering Dr. Elliott competent to testify on the relevant standard of care pursuant to *Rule 702*.

In his affidavit, Dr. Elliott stated: "Based on my review of the labor and delivery records . . . for Reagan Crocker, it is my opinion within a reasonable degree of medical certainty that Dr. Roethling breached the standard of care which caused Reagan to suffer hypoxic injury that ultimately led to her death." This statement, when considered in the light most favorable to plaintiffs, creates a genuine issue of material fact for the trier of fact under *N.C.G.S. § 90-21.12* and *Rule 56* regarding whether defendants breached the applicable standard of care, resulting in the injury to and death of Reagan Crocker. Summary judgment is not proper when a medical expert gives evidence tending to show that the defendant failed to meet the standard of care in the [***19] relevant community. *Mozingo*, 331 N.C. at 191, 415 S.E.2d at 346. Any question as to the credibility of Dr. Elliott's testimony on the standard of care is a matter for the jury. *See N.C.G.S. § 90-21.12* ("[T]he defendant [*149] shall not be liable for the payment of damages unless the trier of the facts is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities . . .") The trial court thus erred in granting summary judgment for defendants.

In sum, we hold that in a medical malpractice case: 1) gaps in the testimony of the plaintiff's expert during the defendant's discovery deposition may not properly form the basis of summary judgment for the defendant; 2) the trial court should consider affidavits submitted by the plaintiff or his witnesses in opposition to the defendant's motion for summary judgment in accordance with *Rule 56*; 3) to determine whether the plaintiff has presented evidence admissible to meet his burden under *N.C.G.S. § 90-21.12* and *Rule 702*, the trial court should [***20] apply the test set forth in *State v. Goode*; 4) to determine whether an expert's testimony satisfies the third prong under *Goode* of familiarity with

the "same or similar community" standard of care, the trial court should apply well-established principles of determining relevancy under Evidence Rules 401 and 701; and, 5) once the plaintiff raises a genuine issue as to whether the defendant's conduct breached the relevant standard of care, the resolution of that issue is for the trier of fact, usually the jury, per *N.C.G.S. § 90-21.12*. We reverse and remand to the Court of Appeals for further remand to the trial court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

CONCUR BY: MARTIN

CONCUR

Justice MARTIN, concurring, with separate mandate.

In *Howerton v. Arai Helmet, Ltd.*, this Court examined and explained the standard for "ruling on the admissibility of expert testimony" in North Carolina. 358 *N.C. 440, 455, 597 S.E.2d 674, 684 (2004)*. We acknowledged, on the one hand, that "trial courts must decide preliminary questions concerning the qualifications of experts to testify or the admissibility of expert testimony," and we reaffirmed that such decisions will generally be [***21] reviewed on appeal for abuse of discretion. *Id. at 458, 597 S.E.2d at 686*. We emphasized, on the other hand, that the trial court's preliminary assessment should not "go so far as to require the expert's testimony to be proven conclusively reliable or indisputably valid before it can be admitted into evidence." *Id. [*150] at 460, 597 S.E.2d at 687*. Evidence may be "shaky but admissible," and it is the role of the jury to make any final determination regarding the weight to be afforded to the evidence. *Id. at 460-61, 597 S.E.2d at 687-88* (quoting *Daubert v. Merrell Dow Pharms., 509 U.S. 579, 596, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*).

This Court took great care in *Howerton* to distinguish our approach to expert qualification and admissibility of expert testimony from the federal court procedures described [***633] in *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*. *Howerton, 358 N.C. at 469, 597 S.E.2d at 692-93*. We stated that "application of the North Carolina approach is decidedly less mechanistic and rigorous than the 'exacting standards of reliability' demanded by the federal approach." *Id. at 464, 597 S.E.2d at 690* (quoting *Weisgram v. Marley Co., 528 U.S. 440, 455, 120 S. Ct. 1011, 145 L. Ed. 2d 958 (2000)*). Our concern was that "trial [***22] courts asserting sweeping pre-trial 'gatekeeping' authority under *Daubert* may unnecessarily encroach upon the constitutionally-mandated function of the jury to decide issues of fact and to assess the weight of the evidence." *Id. at 468, 597 S.E.2d at 692*.

In the context of medical malpractice cases, our General Assembly has expressed a similar sentiment regarding the jury's function in weighing expert testimony. See *N.C.G.S. § 90-21.12 (2007)*. Assuming expert testimony is properly qualified and placed before the trier of fact, *section 90-21.12* reserves a role for the jury in determining whether an expert is sufficiently familiar with the prevailing standard of medical care in the community. See *id.* Under the statute, "the trier of the facts" must be "satisfied by the greater weight of the evidence that the care of [the] health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities." *Id.* In the instant case, the record before this Court appears to present a close question as to whether plaintiffs' proffered expert, Dr. Elliott, was sufficiently [***23] familiar with the standard of care in Goldsboro. Dr. Elliott's deposition testimony tended not to support the admission of his testimony at trial. For instance, he did not know the designation of Wayne Memorial Hospital (in which plaintiffs' daughter was born) or the number of labor and delivery suites it had. He demonstrated little familiarity with Goldsboro or Wayne County beyond a basic estimate of population and general location within the state. He testified that most of his obstetrics career was spent in Phoenix, a metro area he believed had more than twenty times the [*151] number of obstetricians than Goldsboro and a population exceeding that of Goldsboro by over four million people. Dr. Elliott himself had never performed the Zavanelli maneuver, nor had he ever observed it performed during his twenty-four years of practice in Phoenix. Moreover, at several points during his deposition, he appeared to be applying a national standard of care rather than the "same or similar community" standard required by our General Assembly in *section 90-21.12*. See § 90-21.12.

Dr. Elliott's affidavit, on the other hand, indicated that he had researched and was knowledgeable about the standard of care [***24] in Goldsboro. For example, Dr. Elliott stated that after reviewing various materials, he was familiar with "the training, education and experience of Dr. Peter Roethling," "the size of the population [of Goldsboro], the level of care available at the hospital, the facilities and the number of health care providers for obstetrics," and "the prevailing standard of care for handling shoulder dystocia in the same or similar community to Goldsboro."

Our statutes and case law do not require an expert to have actually practiced in the community in which the alleged malpractice occurred, or even to have practiced in a similar community. *See* § 90-21.12; *see also* N.C.G.S. § 8C-1, Rule 702(b) (2007) (indicating that an expert in a medical malpractice case need not be licensed in North Carolina so long as the expert is licensed in some other state). In this regard, I agree with Justice Hudson's opinion that our law does not "prescribe any particular method by which a medical doctor must become 'familiar' with a given community." Book or Internet research may be a perfectly acceptable method of educating oneself regarding the standard of medical care applicable in a particular community. *See, e.g.,* [***25] *Coffman v. Roberson*, 153 N.C. App. 618, 624, 571 S.E.2d 255, 259 (2002) (holding medical expert demonstrated sufficient familiarity with applicable standard of care when that familiarity was gained in part from "Internet research about the size of the hospital, the training program, and the AHEC (Area Health Education Center) program"), *disc. rev. denied*, 356 N.C. 668, 577 S.E.2d 111 (2003).

[**634] Although the trial court appropriately considered both Dr. Elliott's deposition testimony and his affidavit in determining whether to admit his expert opinion at trial, these discovery materials did not adequately convey a complete picture of Dr. Elliott's qualifications or the reliability of his proposed testimony. Defendants' [*152] deposition of plaintiffs' proposed expert suggested a lack of relevant knowledge about Goldsboro, while the expert's affidavit asserted his familiarity without explaining what materials he reviewed or the way in which those materials influenced his determination of the applicable standard of medical care. Moreover, the trial court based its decision to exclude Dr. Elliott primarily on a paper record, considering the video deposition transcript, the affidavit, and brief oral [***26] argument by counsel. Thus, the trial court was in no better position than this Court to review the record and to assess Dr. Elliott's qualifications and the reliability of his proposed testimony. *See In re Greene*, 306 N.C. 376, 380, 297 S.E.2d 379, 382 (1982) (explaining that "[t]his Court, unlike a trial court, is ill-equipped to resolve disputed questions of fact" because we "do not hear live testimony of sworn witnesses and are required to rely exclusively upon written records").

When the proffered expert's familiarity with the relevant standard of care is unclear from the paper record, our trial courts should consider requiring the production of the expert for purposes of voir dire examination. In such situations, particularly when the admissibility decision may be outcome-determinative, the expense of voir dire examination and its possible inconvenience to the parties and the expert are justified in order to ensure a fair and just adjudication. Voir dire examination provides the trial court with the opportunity to explore the foundation of the expert's familiarity with the community, the method by which the expert arrived at his conclusion regarding the applicable standard of care, [***27] and the link between this method and the expert's ultimate opinion. Moreover, unlike the nonadversarial discovery process, counsel for both parties may participate equally in a voir dire hearing and help elicit all information relevant to the expert's qualifications and the admissibility of the proposed testimony.

Perhaps most importantly, voir dire examination provides the trial court with an informed basis to guide the exercise of its discretion. It is precisely because the trial court "has the advantage of seeing and hearing the witnesses" that the trial court's discretionary decision is entitled to deference on appeal. *State v. Lasiter*, 361 N.C. 299, 305, 643 S.E.2d 909, 912 (2007) (quoting *State v. Little*, 270 N.C. 234, 240, 154 S.E.2d 61, 66 (1967)) (explaining further that the trial court's firsthand observations of jury voir dire enable it to "gain a "feel" of the case which a cold record denies to a reviewing court" (quoting *Little*, 270 N.C. at 240, 154 S.E.2d at 66)).

[*153] I do not suggest that voir dire examination is necessary in every case in which opposing counsel challenges a proffered expert's qualifications or proposed testimony. In light of the emphasis *Howerton* places [***28] on the jury's role in evaluating expert testimony, however, voir dire examination may be prudent in close cases. In *Howerton*, this Court expressed concern with "the case-dispositive nature of *Daubert* proceedings, whereby parties in civil actions may use pre-trial motions to exclude expert testimony under *Daubert* to bootstrap motions for summary judgment that otherwise would not likely succeed." *Howerton*, 358 N.C. at 467, 597 S.E.2d at 691 (stating further: "[A] party may use a [pre-trial] hearing to exclude an opponent's expert testimony on an essential element of the cause of action. With no other means of proving that element of the claim, the non-moving party would inevitably perish in the ensuing motion for summary judgment." *Id.* at 468, 597 S.E.2d at 692.).

The same concern is implicated in the instant case, in which defendants sought and received summary judgment immediately after the trial court's exclusion of plaintiffs' tendered expert. At the end of counsels' arguments, following discussion about Dr. Elliott's deposition testimony and affidavit, plaintiffs' counsel noted to the trial court that "[t]his [***29] is not the cross-examination of Dr. Elliott at a voir dire [examination]." As counsel's remark implies, here, and in similar cases, the voir dire procedure provides a more reliable assessment mechanism than [**635] discovery depositions or conclusory affidavits, protecting the jury from unreliable expert testimony yet preserving the jury's role in weighing the credibility of expert testimony when appropriate.

For the foregoing reasons, this case is reversed and remanded to the Court of Appeals for further remand to the trial court with instructions to conduct a voir dire examination of plaintiffs' proffered expert and, based on this evidentiary foundation, to determine the admissibility of the proposed expert testimony. *See Marks v. United States*, 430 U.S. 188, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977).

Justice EDMUNDS concurs in this opinion.

DISSENT BY: NEWBY

DISSENT

Justice NEWBY dissenting.

In my view, this case presents the issue of whether a tendered expert's unsubstantiated statements of familiarity with the applicable standard of care in a medical malpractice action mandate a voir dire examination to determine whether the expert is competent to testify [*154] at trial. ¹ While I agree that the trial court in its discretion could have conducted a voir [***30] dire of the proffered expert, under the facts of this case and the long-established deferential standard of review, I do not believe the trial court's decision not to do so was an abuse of discretion requiring this Court to intervene and direct the proceedings of the trial court. I therefore respectfully dissent.

1 The separate opinions of Justice Martin and Justice Hudson, when taken together, constitute a majority of the Court in favor of reversing and remanding. Justice Martin's opinion, having the narrower directive, is the controlling opinion, *cf. Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 993, 51 L. Ed. 2d 260, 266 (1977) ("When a fragmented [Supreme Court of the United States] decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . .'" (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15, 96 S. Ct. 2909, 2923, 49 L. Ed. 2d 859, 872 (1976) (opinion of Stewart, Powell, and Stevens, JJ.))), and requires the trial court to conduct a voir dire examination of the proffered expert witness. References [***31] in this dissenting opinion to "the majority" denote matters as to which the opinions of Justices Martin and Hudson seem to agree. When responding to one of those opinions separately, this dissenting opinion will refer to the authoring Justice by name.

Plaintiffs brought this action alleging that defendants committed medical malpractice during the delivery of plaintiffs' daughter Reagan at Wayne Memorial Hospital in Goldsboro. Plaintiffs sought to contend at trial that defendant H. Peter Roethling, M.D. breached the applicable standard of care while delivering Reagan by failing to perform what is known as the Zavanelli maneuver. The Zavanelli maneuver is a medical procedure by which a baby suffering shoulder dystocia is pushed back into the mother's uterus, relieving compression on the umbilical cord and enabling the baby to receive sufficient oxygen. Delivery is thus delayed until an emergency cesarean section can be performed.

Plaintiffs tendered John P. Elliott, M.D. as their only expert witness. He intended to testify that the Zavanelli maneuver was part of the standard of care applicable to a board-certified obstetrician in Goldsboro at the time of Reagan's birth and, therefore, [***32] that defendant Roethling breached the standard of care in failing to perform the maneuver. As will be detailed more fully below, Dr. Elliott had no experience practicing in Goldsboro or any similar community and, when he formed his opinion, had very little knowledge of defendant Roethling's training, of the Goldsboro community in general, or of the medical facilities at Wayne Memorial Hospital.

Defendants sought to exclude Dr. Elliott's testimony and, based upon the possible exclusion, moved for summary judgment on 1 February [*155] 2006. After a hearing on the motion, the trial court found that Dr. Elliott had impermissibly based his opinion on a national standard of care, and on 1 March 2006, the court entered an order excluding Dr. Elliott's testimony and granting summary judgment in favor of defendants. Plaintiffs appealed, and the Court of Appeals affirmed the trial court. This Court allowed discretionary review to determine whether it was proper for the trial court to exclude Dr. Elliott's testimony and grant defendants' motion for summary judgment.

Section 90-21.12 of the General Statutes, entitled "Standard of health care," provides:

[**636] In any action for damages for personal injury or death [***33] arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of the facts is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the

standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.

N.C.G.S. § 90-21.12 (2007). Under this statute, the plaintiff in a medical malpractice suit bears the burden of proving the defendant failed to comply with the applicable standard of care. To do so, the plaintiff must first establish the content of that standard by providing evidence of "the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action." *Id.* Due to the specialized nature of the standard of care in medical malpractice cases, the content and meaning of [***34] the standard must be demonstrated by expert testimony. *See id.* § 1A-1, Rule 9(j) (2007); *id.* § 8C-1, Rule 702(a) (2007); *Ballance v. Wentz*, 286 N.C. 294, 302, 210 S.E.2d 390, 395 (1974).

Regardless of context, the decision whether to admit expert testimony lies within the province of the trial court. *N.C.G.S. § 8C-1, Rule 104(a)* (2007).

"[A] trial court's ruling on the qualifications of an expert or the admissibility of an expert's opinion will not be reversed on appeal absent a showing of abuse of discretion." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 [*156] (2004). "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

N.C. Dep't of Transp. v. Haywood Cty., 360 N.C. 349, 351, 626 S.E.2d 645, 646 (2006) (alteration in original). The abuse of discretion standard is firmly entrenched in our caselaw for appellate review of trial courts' discretionary decisions, and the implication by a majority of this Court that abuse of discretion does not apply here [***35] thus represents a sharp departure from precedent. In stating that "the pertinent inquiry is whether the trial court properly applied the statutory requirements of *N.C.G.S. § 90-21.12* and the Rules of Evidence," moreover, Justice Hudson's opinion fails to set forth any real standard of review to fill the void. Justice Martin likewise neglects to state the standard under which he deems a voir dire examination necessary. The statutory provisions to which Justice Hudson refers do indeed contain standards that the trial court must apply, but those standards simply define inquiries and determinations that are left *to the discretion of the trial court*. Abuse of discretion therefore remains the proper standard for our review of the trial court's decision to exclude Dr. Elliott's testimony.

Although the jury is entrusted with weighing the credibility of expert testimony that has been deemed admissible, the abuse of discretion standard affords the trial court wide latitude in performing the preliminary function of evaluating whether the expert in question is competent to testify. *Queen City Coach Co. v. Lee*, 218 N.C. 320, 323, 11 S.E.2d 341, 343 (1940) ("The competency, admissibility, and sufficiency [***36] of the evidence is a matter for the court to determine. The credibility, probative force, and weight is a matter for the jury. This principle is so well settled we do not think it necessary to cite authorities."). In this case, prior to stating his opinions before a jury, Dr. Elliott was required to demonstrate to the trial court his competency to testify regarding the applicable standard of care.

As the General Statutes reflect, the trial court's traditional duty to determine the admissibility of expert testimony is particularly important in the medical malpractice context. In medical malpractice suits in which the plaintiff does not rely on the doctrine of *res ipsa loquitur*, our Rules of Civil Procedure require the trial court to determine whether the plaintiff's pleading asserts that an expert witness will "testify that the medical care did [***637] not comply with the applicable [*157] standard of care" and, if the pleading fails to do so, to dismiss the complaint. *N.C.G.S. § 1A-1, Rule 9(j)*; *id.* § 90-21.12. Similarly, a witness can testify to the "scientific, technical or other specialized knowledge" that is crucial in medical malpractice cases only after the trial court is satisfied that the [***37] witness is "qualified as an expert by knowledge, skill, experience, training, or education." *Id.* § 8C-1, Rule 702(a). This consistent interposition of the trial court between potential expert witnesses and the jury represents sound legislative policy, as lay jurors will naturally accord great weight to expert testimony. *Billips v. Commonwealth*, 274 Va. 805, 809, 652 S.E.2d 99, 101-02 (2007) ("Advancements in the sciences continually outpace the education of laymen, a category that includes judges, jurors and lawyers Consequently, there is a risk that those essential components of the judicial system may gravitate toward uncritical acceptance of any pronouncement that appears to be 'scientific,' . . .").

In determining whether an expert's testimony is sufficiently reliable for admission, the trial court must make "a preliminary, foundational inquiry into the basic methodological adequacy of [the] expert testimony." *Howerton*, 358 N.C. at 460, 597 S.E.2d at 687 (citing *Queen City Coach Co.*, 218 N.C. at 323, 11 S.E.2d at 343). Notwithstanding Justice Hudson's intimation to the contrary, an expert's methodology need not be especially "controversial or novel" for its reliability [***38] to come under scrutiny. Just as it must do in cases involving expert testimony derived from complex scientific methods, the trial court in a medical malpractice action must examine the process by which the expert arrived at the proffered opinion on the content of the applicable standard of care. The court must be able to determine which information the expert used in forming the opinion as well as how the expert used that information.

I agree with Justice Martin's view that when opposing counsel challenges an expert's competency to testify to the applicable standard of care, and it is a close case as to whether the expert is sufficiently familiar with that standard, the best practice is for the trial court to conduct a voir dire examination of the proffered expert witness. In fact, had the trial court elected to hold a voir dire hearing to determine Dr. Elliott's competency to testify, I would find no abuse of discretion in that decision. However, when the record alone demonstrates that the expert lacks the required familiarity, a voir dire hearing is not required as a matter of law. In the instant case, the record reveals that while Dr. Elliott asserted his familiarity with the applicable [***39] standard, he had minimal knowledge of Goldsboro or any similar [*158] communities and was simply applying a national standard of care when he formed his opinion. Moreover, despite his years of practice in a large metropolitan area, Dr. Elliott had no personal experience with the procedure about which he sought to testify and knew of no specific instances of its use. In such cases the trial court may properly deem the proffered expert witness incompetent to testify without the expense and inconvenience of a voir dire examination.

In challenging Dr. Elliott's familiarity with the applicable standard of care, defendants questioned not only the relevance of his opinions but also the reliability of the methods he used to formulate those opinions. In so doing, defendants disputed the accuracy, not the truthfulness, of Dr. Elliott's conclusion that he was familiar with the standard applicable to Goldsboro or a similar community. In other words, defendants challenged Dr. Elliott's competency, not his credibility. As noted by Justice Hudson, both the relevance of an expert's testimony and the reliability of the expert's methodology are questions of law to be determined by the court in its admissibility [***40] inquiry. *Id.* at 458, 597 S.E.2d at 686 (citing *State v. Goode*, 341 N.C. 513, 527-29, 461 S.E.2d 631, 639-41 (1995)). Questions of the relevance of Dr. Elliott's testimony and the reliability of his methods cannot simply be decided by Dr. Elliott. The court must look beyond his bare assertions and decide these issues for itself.

I do not dispute the majority's statement that there is no "particular method by which a medical doctor must become 'familiar' with a given community." I do believe, however, that in order for the trial court to properly decide Dr. Elliott was competent to testify to [**638] the standard of care applicable in Goldsboro or similar communities, Dr. Elliott was required to demonstrate to the court *some* acceptable method by which he arrived at his conclusion on the content of Goldsboro's standard of care. The evidence before the court failed to establish such a method. Dr. Elliott was a member of the same health care profession as defendant Roethling, both being board-certified obstetricians. He knew that defendant Roethling had completed a residency in obstetrics and gynecology, but he demonstrated no further knowledge of defendant Roethling's training and experience. Dr. [***41] Elliott knew the approximate population of the Goldsboro area and the number of obstetricians practicing there, but he had no personal experience practicing in Goldsboro or any similar community. He recited basic facts about defendant Roethling and about Goldsboro, but ultimately failed to clarify how those facts served to familiarize him with the applicable standard of care. As defense counsel stated [*159] at the motion hearing, Dr. Elliott simply failed to "connect the dots between Goldsboro or a similar community" and the personal knowledge and experience that resulted in the formulation of his opinion.

This Court has affirmed two Court of Appeals opinions that upheld the trial court's function of determining admissibility by requiring expert witnesses to elucidate both the facts underlying their proffered testimony and the logical link between those facts and the experts' opinions. In *Henry v. Southeastern OB-GYN Associates*, 145 N.C. App. 208, 550 S.E.2d 245, *aff'd per curiam*, 354 N.C. 570, 557 S.E.2d 530 (2001), the Court of Appeals held an expert was properly excluded because his assertion of familiarity with a national standard of care failed to demonstrate sufficient knowledge of [***42] the standard of care in Wilmington or a similar community. *Id.* at 212-13, 550 S.E.2d at 248. The court noted the lack of a meaningful connection between the facts the expert used and his conclusion on the applicable standard of care, stating there was no evidence that a national standard applied to Wilmington or that the community in which the expert practiced was similar to Wilmington. *Id.* at 210, 550 S.E.2d at 246-47. The Court of Appeals also upheld the trial court's refusal to allow the expert to testify at trial that he was familiar with the standard of care applicable to Wilmington or similar communities, because such testimony would have contradicted the expert's deposition testimony. *Id.* at 217-20, 550 S.E.2d at 251-52 (Hudson, J., dissenting).

In *Pitts v. Nash Day Hospital, Inc.*, 167 N.C. App. 194, 605 S.E.2d 154 (2004), *aff'd per curiam*, 359 N.C. 626, 614 S.E.2d 267 (2005), the Court of Appeals performed a similar analysis in holding that an expert was improperly excluded. The court found that a number of strong similarities between the personal experience of the expert and that of the defendant medical doctor represented a reliable method for the expert to use in drawing [***43] conclusions regarding the applicable standard of care. Specifically, the court noted the expert and the defendant doctor had comparable "skill, training, and experience," both having practiced extensively in North Carolina; the expert had practiced in communities throughout North Carolina and testified to their similarity to the community in question "in terms of population served, rural nature, depressed economy, and limitations on resources"; and the expert "was familiar with the equipment [used by the defendant doctor] because he used similar . . . equipment in other communities in his medical practice." *Id.* at 198, 605 S.E.2d at 156-57. The numerous similarities in the two doctors' backgrounds gave the court sufficient grounds upon which to conclude the expert's method [*160] of forming an opinion on the applicable standard of care was reliable. *Id.* at 199, 605 S.E.2d at 157.

These cases demonstrate that neither an expert's bald assertion of familiarity with the applicable standard of care nor mere superficial statements of fact about the community in question can give the trial court a sufficient basis to deem the expert's methods reliable or the resulting testimony relevant. When challenged, [***44] the expert must not only state with specificity the facts that contributed to the proffered opinion, but also make clear to the court how those facts enabled the expert to arrive at a conclusion. This latter step must be performed most explicitly when, as in the instant case, the expert has no [**639] personal experience in the community at issue or any similar community.

The record reflects that at the time of his testimony, Dr. Elliott was licensed to practice medicine in Arizona, California, and Colorado, but not in North Carolina. He gave his deposition testimony from Phoenix, Arizona via videoconference. His practice at the time was at Good Samaritan Regional Medical Center ("Good Samaritan") in Phoenix, and he had spent his career practicing in Phoenix and in various Army hospitals, none of which were located in North Carolina. According to Dr. Elliott, Good Samaritan services the Phoenix metropolitan area, the population of which he estimated at "about four and a half million," and also draws patients from across Arizona and throughout the country. In contrast, Dr. Elliott estimated the population of the Goldsboro area at "a little over 100,000 people." He further approximated that there [***45] were "in excess of 200" obstetricians practicing in the Phoenix metropolitan area, compared to a total of 8 obstetricians in the Goldsboro area. Dr. Elliott had never practiced in Goldsboro and admitted in his deposition that he had never even practiced in a community similar to Goldsboro.

Dr. Elliott's deposition is devoid of specific facts pertaining to defendant Roethling's training and experience, aside from the basic knowledge that defendant Roethling had completed a residency in obstetrics and gynecology. He also did not know how long defendant Roethling had been in practice. As discussed above, Dr. Elliott's deposition testimony does reveal some secondhand knowledge of the Goldsboro community. He had familiarized himself with the total population of the Goldsboro area and Wayne County's relative location in North Carolina. He also knew the number of obstetricians practicing in Goldsboro at the time of Reagan Crocker's birth. [*161] Nonetheless, his knowledge of the facilities available at Wayne Memorial Hospital was vague at best: he "believe[d] they [did] not have a neonatal intensive care unit," and he did not know how many labor and delivery suites they had. At no point in his deposition [***46] or his affidavit did Dr. Elliott explain how the basic facts he knew about defendant Roethling and the Goldsboro community enabled him to conclude that the standard of care applicable to an obstetrician in Goldsboro or any similar community required use of the Zavanelli maneuver in Reagan Crocker's case.

Dr. Elliott failed to articulate a proper basis for his conclusions even though defense counsel fully explored his familiarity with the community at issue, other similar communities, and the applicable standard of care. Defense counsel repeatedly asked Dr. Elliott about specific facts regarding Goldsboro that may have contributed to his testimony, for instance by inquiring into his familiarity with the exact medical facilities available at Wayne Memorial Hospital. Counsel also asked about Dr. Elliott's experience in similar communities and found he had none. Perhaps most importantly, counsel specifically requested that Dr. Elliott explain how he arrived at his conclusion on the content of Goldsboro's standard of care, asking, "Why is it that you think that the Zavanelli maneuver is something that a physician like Dr. Roethling should have considered doing as opposed to perhaps something [***47] that you would expect one of your colleagues in Phoenix to do?" Dr. Elliott responded:

Well, I expect Dr. Roethling reads the same literature that I would or my colleagues in Phoenix would. The textbooks are the same. They are not written for, you know, Goldsboro, North Carolina versus Cleveland, Ohio or Phoenix, Arizona. The information is really very general information. The articles

that are published are very general information. And the expected behaviors are very similar. So I would expect a physician in Phoenix to have the same knowledge as Dr. Roethling irrespective of their location.

Like the tendered expert in *Henry v. Southeastern OB-GYN Associates*, Dr. Elliott essentially testified to a belief in a national standard of care for obstetricians, yet failed to demonstrate how his minimal knowledge of Goldsboro led to his conclusion that such a standard applies to Goldsboro or any similar community.

Furthermore, it is not even clear that Dr. Elliott used reliable methods in concluding the Zavanelli maneuver is part of the standard [*162] of care applicable to Phoenix. Regarding [**640] his own experience in dealing with shoulder dystocia, Dr. Elliott testified that he had never himself performed [***48] or witnessed the Zavanelli maneuver and was unaware of any member of his own medical group, consisting of fifteen physicians who deliver babies, ever using the maneuver while practicing in Phoenix. Although Good Samaritan services a much larger population and has considerably more extensive facilities than Wayne Memorial Hospital, Dr. Elliott could not recall any specific case during his twenty-four years at Good Samaritan in which any obstetrician attempted the maneuver. The record also reflects that Dr. Elliott's opinion was based in part on a worldwide study that found only about one hundred reported cases in which the Zavanelli maneuver was used between 1985, when the maneuver was first mentioned in medical literature, and 1997, four years before Reagan's birth. If the reported usage of the Zavanelli maneuver is, on average, fewer than ten times per year throughout the world, it is unclear how Dr. Elliott could reliably conclude the maneuver is part of the standard of care in Phoenix, let alone Goldsboro.

The majority de-emphasizes the insufficiency of Dr. Elliott's deposition testimony by pointing to his affidavit. In so doing, I believe the majority places too much importance [***49] on the affidavit. Unlike a deposition, an affidavit gives the opposing party no opportunity to cross-examine the affiant. Thus, crediting the affidavit over the deposition fails to give due respect to the adversarial means by which our justice system seeks to ascertain truth. *See In re Miller*, 357 N.C. 316, 334, 584 S.E.2d 772, 785-86 (2003) (citations omitted). In my view, in deciding questions of reliability and relevance, courts should endeavor to determine which facts the expert actually used when forming the proffered opinion, rather than focusing on facts the expert subsequently learned. *Cf. Henry*, 145 N.C. App. at 217-20, 550 S.E.2d at 251-52 (Hudson, J., dissenting) (noting the court in that case refused to allow an expert to testify at trial in a manner that would have contradicted the expert's deposition testimony). To do otherwise is to admit testimony that lacks the foundation our General Assembly envisioned in enacting N.C.G.S. § 90-21.12.

Even if it were proper to ascribe greater worth to the affidavit than the deposition, Dr. Elliott's affidavit does not sufficiently demonstrate that he is familiar with the applicable standard of care. The relevant portions of that affidavit, [***50] quoted in full by Justice Hudson, baldly assert Dr. Elliott's familiarity with "the size of the population, the level of care available at the hospital, the facilities and the number [*163] of health care providers for obstetrics," and with the standard of care applicable to this case. The affidavit contains no specific information about the Goldsboro community or its medical facilities that would support these assertions. Our Rules of Evidence seek to prevent, as unhelpful to the trier of fact, testimony that simply speaks in the language of the applicable legal standard and thus "merely tell[s] the jury what result to reach." N.C.G.S. § 8C-1, Rule 704 official cmt. (2007). Similarly, Dr. Elliott should not be deemed competent to testify based solely on his ability to essentially parrot the standard of care language of section 90-21.12.

Neither Dr. Elliott's deposition nor his affidavit succeeded in demonstrating any nexus between, on the one hand, his experience and his minimal knowledge of Goldsboro and, on the other, the conclusion that a national standard of care including the Zavanelli maneuver was applicable in Goldsboro or any similar community. In short, any proper basis he may have [***51] had to offer an opinion that the Zavanelli maneuver was part of the standard of care applicable to Goldsboro was not clear to the court. As observed by the Court of Appeals, "neither Dr. Elliott's affidavit nor the record before this Court includes sufficient facts, as opposed to conclusions, to support Dr. Elliott's statements that he is familiar with the standard of care applicable in communities similar to Goldsboro, North Carolina." *Crocker v. Roethling*, 184 N.C. App. 377, 646 S.E.2d 442, 2007 WL 1928681, at *3 (2007) (unpublished). Because Dr. Elliott failed to sufficiently establish his familiarity with "the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities" as defendant Roethling at the time of Reagan's birth, *see N.C.G.S. § 90-21.12*, the [**641] trial court's ruling that he was incompetent to testify to those standards was not an abuse of discretion "'so arbitrary that it could not have been the result of a reasoned decision,'" *N.C. Dep't of Transp. v. Haywood Cty.*, 360 N.C. at 351, 626 S.E.2d at 646 (quoting *White*, 312 N.C. at 777, 324 S.E.2d at 833).

363 N.C. 140, *; 675 S.E.2d 625, **;
2009 N.C. LEXIS 350, ***

After reviewing the trial court's [***52] exclusion of Dr. Elliott's testimony for abuse of discretion, this Court must inquire separately into the trial court's grant of summary judgment in favor of defendants. Bearing in mind that Dr. Elliott's testimony was properly deemed inadmissible and thus cannot be considered for summary judgment purposes, any competent facts asserted by the nonmoving party must be "taken as true, and their inferences must be viewed in the light most favorable to that party." *E.g., Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (citations omitted).

[*164] Dr. Elliott's proffered testimony represented plaintiffs' only evidence of the applicable standard of care. Because Dr. Elliott was incompetent to testify on that matter, plaintiffs were unable to satisfy *N.C.G.S. § 90-21.12* by offering competent proof that defendants failed to comply with the standard of care. Plaintiffs contend that even if Dr. Elliott was incompetent to testify, defendant Roethling himself admitted in his deposition that the Zavanelli maneuver was part of the standard of care applicable to this case. My review of the deposition testimony reveals that while defendant Roethling acknowledged the existence of the Zavanelli [***53] maneuver, he never stated it was part of the applicable standard of care. When the plaintiff in a medical malpractice action lacks any competent means of proving the defendant breached the applicable standard of care, the governing statute dictates that "the defendant shall not be liable." *N.C.G.S. § 90-21.12*. Thus, even when viewed in the light most favorable to plaintiffs, the case presented "no genuine issue as to any material fact" and defendants were "entitled to a judgment as a matter of law." *Id. § 1A-1, Rule 56(c)* (2007). The trial court properly granted summary judgment in defendants' favor.

I believe the result reached by the majority of the Court fails to give proper deference to the trial court's reasonable decision not to conduct a voir dire examination of the tendered expert witness. While I do not contend that the trial court would have been in error had it decided to hold a voir dire hearing, the facts of this case are not such as to mandate voir dire as a matter of law. The trial court committed no abuse of discretion, and its ruling should remain intact. I would affirm the judgment of the Court of Appeals and therefore respectfully dissent.

Chief Justice PARKER and [***54] Justice BRADY join in this dissenting opinion.



**CHERYL S. BASS, Plaintiff, v. DURHAM COUNTY HOSPITAL CORPORATION
and REBECCA S. RICH, M.D., Defendants.**

NO. COA02-841

COURT OF APPEALS OF NORTH CAROLINA

158 N.C. App. 217; 580 S.E.2d 738; 2003 N.C. App. LEXIS 1044

**March 25, 2003, Heard in the Court of Appeals
June 3, 2003, Filed**

SUBSEQUENT HISTORY: Review denied by *Bass v. Durham County Hosp. Corp.*, 357 N.C. 457, 585 S.E.2d 382, 2003 N.C. LEXIS 871 (2003)
Review denied by *Bass v. Durham County Hosp. Corp.*, 357 N.C. 457, 585 S.E.2d 382, 2003 N.C. LEXIS 872 (2003)
Reversed by *Bass v. Durham County Hosp. Corp.*, 358 N.C. 144, 592 S.E.2d 687, 2004 N.C. LEXIS 172 (N.C., Mar. 5, 2004)

DISPOSITION: [***1] REVERSED AND REMANDED.

COUNSEL: Hollowell, Mitchell, Peacock & Von Hagen, PA, by Joseph T. Copeland and Donald R. Von Hagen, for plaintiff-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, LLP, by Timothy P. Lehan and Deanna Davis Anderson, for defendant-appellee, Durham County Hospital Corporation.

Patterson, Dilthey, Clay & Bryson, LLP, by E.C. Bryson, Jr., Christopher J. Derrenbacher and Heather R. Waddell, for defendant-appellee, Rebecca S. Rich, M.D.

JUDGES: STEELMAN, Judge. Judge WYNN concurs. Judge Tyson dissents.

OPINION BY: STEELMAN

OPINION

[*218] [**739] *Appeal by plaintiff from an order entered 26 October 2001 by Judge Narley L. Cashwell and from an order entered 10 May 2002 by Judge Henry P. Hight, Jr. in Durham County Superior Court. Heard in the Court of Appeals 25 March 2003.*

STEELMAN, Judge.

Plaintiff, Cheryl S. Bass, appeals an order of the trial court dismissing her negligence claims with prejudice and an order denying her motion to set aside the dismissal under Rule 60(b). For the reasons discussed [***2] herein, we reverse and remand.

On 2 December 1999, plaintiff filed a complaint alleging that she was injured as a result of medical negligence on the part of defendants Dr. Rebecca S. Rich and Durham County Hospital Corporation. The alleged injury occurred on 3 August 1996. Plaintiff further alleged that she suffers from reflex sympathetic dystrophy in her right arm resulting from the improper insertion of an intravenous line during her treatment.

Plaintiff's original complaint was filed on the last day of a 120-day extension granted pursuant to Rule 9(j) of the North Carolina Rules of Civil Procedure. [*219] The complaint did not contain a certification that plaintiff had a medical expert who: (a) was reasonably expected to qualify as an expert; (b) had reviewed plaintiff's medical care; and (c) was willing to testify that the medical care plaintiff received did not comply with the applicable standard of care, as required by Rule 9(j). On 13 December 1999, plaintiff filed an amended complaint under Rule 15(a) prior to the service of a responsive pleading. The amended complaint contained the certification required by Rule 9(j).

On 3 January 2000, Rich filed an answer, a motion for judgment [***3] on the pleadings, and a [**740] motion for summary judgment. These motions contended that plaintiff's claims were barred by the statute of limitations. The hospital answered on 20 January 2000 and filed a Rule 12(b)(6) motion to dismiss. On 24 May 2000, Judge Donald W. Stephens denied each of Rich's motions and held that plaintiff's amended complaint containing the Rule 9(j) certification related back to the 2 December 1999 filing of the original complaint. On 29 May 2001, plaintiff voluntarily dismissed her claims without prejudice pursuant to Rule 41(a) of the North Carolina Rules of Civil Procedure.

Plaintiff re-filed her complaint, which included a Rule 9(j) certification, on 12 June 2001. On 20 July 2001, Rich filed an answer and moved for judgment on the pleadings asserting that: (1) the original complaint was filed more than three years after the alleged events that gave rise to the suit; (2) the complaint failed to state a claim upon which relief could be granted; and (3) plaintiff did not comply with Rule 9(j). The hospital filed a similar motion for judgment on the pleadings on 10 August 2001.

Defendants' motions were heard and granted by Judge Narley L. Cashwell. An order was [***4] entered dismissing plaintiff's complaint with prejudice. Plaintiff filed a notice of appeal on 28 November 2001. On 20 February 2002, plaintiff filed a Rule 60(b) motion to set aside the prior order of dismissal. On 10 May 2002, plaintiff's motion was denied by Judge Henry P. Hight, Jr. On 23 May 2002, plaintiff filed a notice of appeal from the denial of the motion to set aside.

In her first assignment of error, plaintiff argues the trial court erred in granting defendants' motions for judgment on the pleadings. We agree.

A motion for judgment on the pleadings pursuant to Rule 12(c) should be granted when all material questions of fact are resolved in the pleadings, and only issues of law remain. *Mabrey v. Smith*, 144 N.C. App. 119, [*220] 548 S.E.2d 183, rev. denied, 354 N.C. 219, 554 S.E.2d 340 (2001) (citing *Cash v. State Farm Mut. Auto Ins. Co.*, 137 N.C. App. 192, 528 S.E.2d 372, *aff'd*, 353 N.C. 257, 538 S.E.2d 569 (2000)). This motion, disfavored by the courts, liberally construe the pleadings in the light most favorable to the nonmovant. *Id.* (Citing *Pipkin v. Lassiter*, 37 N.C. App. 36, 245 S.E.2d 105 (1978)). [***5] Therefore, when all factual issues are not resolved by the pleadings, judgment on the pleadings is inappropriate. *Id.*

The fundamental question in this case is whether the instant action is controlled by *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, 528 S.E.2d 568 (2000) or *Thigpen v. Ngo*, 355 N.C. 198, 558 S.E.2d 162 (2002).

In *Brisson*, the plaintiff timely filed a medical negligence complaint which lacked a Rule 9(j) certification. Subsequently, the plaintiff took a voluntary dismissal without prejudice pursuant to Rule 41(a). Upon the re-filing of the complaint, the trial court dismissed the second action because the original complaint did not contain the Rule 9(j) certification and the second complaint was thus filed outside the statute of limitations. The Supreme Court reversed, holding that the lack of the Rule 9(j) certification in the first action was not fatal to the second action.

In *Thigpen*, the plaintiff obtained a 120-day extension under Rule 9(j) in order to comply with the certification requirements. The plaintiff subsequently filed a complaint that did not contain the Rule 9(j) certification and later filed [***6] an amended complaint containing the certification. The trial court granted the defendants' motion to dismiss. Our Supreme Court affirmed, holding that once a plaintiff obtains a 120-day extension under Rule 9(j), the plaintiff cannot thereafter amend the complaint to add a Rule 9(j) certification. The dismissal of the plaintiff's complaint was mandated by Rule 9(j).

In the instant case, defendants argue that since plaintiff obtained a 120-day extension under Rule 9(j) in the original action and then filed a complaint without the Rule 9(j) certification, the subsequent action is barred by the statute of limitations. Defendants' argument requires this Court to look back at the original lawsuit and base its ruling on errors contained in the original complaint, which is contrary to the Supreme Court's holding in *Brisson*.

[**741] In that case, the Supreme Court, in broad and clear terms, affirmed the right of a plaintiff to take a voluntary dismissal under Rule 41(a) [*221] and held that the taking of a dismissal would serve to correct defects in the first action.

The Rule 41(a) voluntary dismissal "has salvaged more lawsuits than any other procedural device, giving the plaintiff a second chance [***7] to present a viable case at trial." 2 G. Gray Wilson, North Carolina Civil Procedure § 41-1, at 32 (2d ed. 1995) . . . The purpose of our long-standing rule allowing a plaintiff to take a voluntary dismissal and refile the claim within one year even though the statute of limitations has run subsequent to a plaintiff's filing of the original complaint is to provide a one-time opportunity where the plaintiff, for whatever reason, does not want to continue the suit. The range of reasons clearly includes those circumstances in which the plaintiff fears dismissal of the case for rule violations, shortcomings in the pleadings, evidentiary failures, or any other of the myriad reasons for which the cause of action might fail. The only limitations are that the dismissal 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.

Brisson, 351 N.C. at 597, 528 S.E.2d at 572-73.

The *Brisson* court further stated that "the plain language of Rule 9(j) does not give rise to an interpretation depriving plaintiffs of the one-year [***8] extension pursuant to their Rule 41(a) voluntary dismissal merely because they failed to attach a Rule 9(j) certification to the original complaint." *Id.* at 595, 528 S.E.2d at 571. Thus, the subsequent action was not subject to dismissal where a Rule 41(a) voluntary dismissal was taken, and the second complaint contained the Rule 9(j) certification.

In the instant case, as in *Brisson*, plaintiff filed a complaint in the first action which did not contain the mandatory Rule 9(j) certification. The fact that plaintiff obtained a 120-day extension under Rule 9(j) prior to filing the first complaint does not deprive her of the right to take a Rule 41(a) dismissal without prejudice.

Defendants contend that under *Thigpen*, plaintiff could not amend her complaint to add a Rule 9(j) certification where a 120-day extension had been obtained. However, defendants' reliance upon *Thigpen* is misplaced. *Thigpen* is not a Rule 41(a) case. The Supreme Court in *Brisson* made it clear that, in the context of a Rule 41(a) voluntary dismissal, motions to amend are irrelevant. It held that "we [*222] find that plaintiffs' motion to amend, which was denied, is neither dispositive [***9] nor relevant to the outcome of this case. Whether the proposed amended complaint related back to and superceded the original complaint has no bearing on this case once plaintiffs took their voluntary dismissal[.]" *Id.* at 593, 528 S.E.2d at 570.

The effect of a Rule 41(a) dismissal is to leave the plaintiff exactly as she was *before the action was commenced*. Defendant is thus "free from the taint of wrongful accusation or legal detriment," *Augur v. Augur*, 356 N.C. 582, 590, 573 S.E.2d 125, 131 (2002), which might have arisen as a result of failing to attach the Rule 9(j) certification to the original complaint.

The instant case is a Rule 41(a) case and is thus controlled by *Brisson* and not by *Thigpen*. Plaintiff's original complaint was timely filed. That action was properly dismissed without prejudice and properly re-filed within one year of the dismissal. Plaintiff's complaint, therefore, is not barred by the statute of limitations.

Because we reverse Judge Cashwell's order dismissing this case, plaintiff's appeal of Judge Hight's order is moot.

At the time Judge Cashwell granted defendants' motion for judgment on the pleadings [***10] and dismissed plaintiff's suit, Rule 9(j) had been declared unconstitutional in *Anderson v. Assimos*, 146 N.C. App. 339, 553 S.E.2d 63 (2001). This holding was expressly vacated by our Supreme Court. *Anderson v. Assimos*, 356 N.C. 415, 572 S.E.2d 101 (2002).

Defendant Rich asserts that this Court's decision in *Anderson* retroactively [**742] extinguished plaintiff's right to seek a 120-day extension to file her original complaint. However, in *Best v. Wayne Mem. Hosp., Inc.*, 147 N.C. App. 628, 556 S.E.2d 629 (2001), *appeal dismissed and disc. rev. denied*, 356 N.C. 433, 572 S.E.2d 426 (2002), this Court held that *Anderson* did not invalidate a 120-day extension granted under Rule 9(j). This assignment of error is without merit.

Rich attempts to cross-assign as error Judge Stephens's denial of her motions to dismiss and for summary judgment in the original action, which was voluntarily dismissed and which is not before us on appeal. *Brisson* held that after a

plaintiff takes a Rule 41(a) voluntary dismissal, "there is nothing the defendant can do to fan the ashes of that action into life[,] and the court has no [***11] role to play." *Id.* at 593, 528 S.E.2d at 570 (citing *Universidad Central Del Caribe, Inc. v. [**223] Liaison Comm. on Med. Educ.*, 760 F.2d 14, 18 n.4 (1st Cir. 1985)). Defendant Rich's cross-assignment of error as to Judge Stephens's order in the first lawsuit is thus without merit.

REVERSED AND REMANDED.

Judge WYNN concurs.

Judge Tyson dissents.

DISSENT BY: TYSON

DISSENT

TYSON, Judge, dissenting.

I respectfully dissent from the majority's opinion reversing Judge Cashwell's order. The majority's opinion relies heavily upon *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, 528 S.E.2d 568 (2000) to support its result. The Rule 9(j) 120-day extension that plaintiff at bar obtained and her failure to file a conforming complaint within that time factually and legally distinguishes this case from *Brisson*. The more recent Supreme Court opinion in *Thigpen v. Ngo*, 355 N.C. 198, 558 S.E.2d 162 (2002), controls the outcome at bar. Judge Cashwell's dismissal with prejudice of plaintiff's complaint should be affirmed.

I. Rule 41(a) The majority opinion's reliance upon and its application of *Brisson's* interpretation [***12] of Rule 41(a) to the facts at bar is misplaced. *Brisson* holds that "the effect of a judgment of voluntary dismissal is to leave the plaintiff exactly where he or she was before the action was commenced." *Brisson*, 351 N.C. at 593, 528 S.E.2d at 570.

The plain language of Rule 41(a) states that "if an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice," the claimant has one year from the time of the dismissal to bring a new action on that same claim. N.C.G.S. § 1A-1, Rule 41(a) (2001) (emphasis supplied). Plaintiff's original complaint was not "commenced within the time prescribed therefor" because plaintiff failed to comply with Rule 9(j) until after the original statute of limitations and the 120-day extension had expired. See *Thigpen v. Ngo*, 355 N.C. 198, 558 S.E.2d 162 (2002).

II. Effect of *Thigpen v. Ngo*

Our Supreme Court in *Thigpen v. Ngo* reviewed the applicability of Rule 9(j) to amendment of complaints. "We hold that once a [**224] party receives and exhausts the 120-day extension of time in order to comply with Rule 9(j)'s expert certification [***13] requirement, the party cannot amend a medical malpractice complaint to include expert certification." *Id.* at 205, 558 S.E.2d at 167 (emphasis supplied). The majority's opinion would allow plaintiff's amended complaint with the 9(j) certification, filed after the original statute of limitations period and the 120-day extension expired, to relate back and cure the defect. This result is precisely what our Supreme Court held plaintiff could not do. *Id.*

Relation back is unavailable where a plaintiff obtained an extension under Rule 9(j) to file the original complaint and failed to comply. *Id.* Under this rule, plaintiff's complaint was not "commenced within the time prescribed therefor." N.C.G.S. § 1A-1, Rule 41(a)(1) (2001). Plaintiff waited nearly the entire original limitations period and until the last day of the Rule 9(j) 120-day extension before filing a complaint that: (1) was facially defective, (2) did not contain the mandatory certification, and (3) could not be properly amended under Rule 15. *Thigpen*, 355 N.C. at 205, 558 S.E.2d at 167.

[**743] III. Reconciling *Brisson* and *Thigpen*

The majority's [***14] opinion reads *Brisson* to allow plaintiff to voluntarily dismiss without prejudice and refile. See *Brisson*, 351 N.C. at 600, 528 S.E.2d at 574 (Wainwright J., dissenting) (stating "the majority's analysis would effectively extend the medical malpractice statute of limitations from three years . . . to four years and 120 days."); See also, John Huske Anderson, Jr., *Brisson v. Santoriello and Rule 9(j): A Step Backward in the Pursuit to Prevent Frivolous Medical Malpractice Actions in North Carolina*, 79 N.C. L. Rev. 855, 867-70 (2001) (discussing the practical effects of

158 N.C. App. 217, *; 580 S.E.2d 738, **;
2003 N.C. App. LEXIS 1044, ***

Brisson including (1) curtailment of Rule 9(j) as a prerequisite to filing a medical malpractice action, (2) extension of the statute of limitations, and (3) reduction of the judicial control of trial judges).

The facts of *Brisson* are distinguishable when compared to the case at bar. Unlike plaintiff here, "the plaintiffs in *Brisson* did not request the 120-day extension provided by Rule 9(j)." *Thigpen*, 355 N.C. at 201, 558 S.E.2d at 164 (citing *Brisson*, 351 N.C. 589, 528 S.E.2d 568). The proposed amended complaint with 9(j) certification [***15] in *Brisson* was filed within 120 days after the statute of limitations expired, and would have been timely filed if plaintiffs had requested and received the 120-day extension. *Brisson*, 351 N.C. at 591-92, 528 S.E.2d at 569-70.

[*225] The 120-day extension of the statute of limitations available to medical malpractice plaintiffs by Rule 9(j) is for the purpose of complying with Rule 9(j). N.C.G.S. § 1A-1 Rule 9(j), (2001). "The title of Rule 9, 'Pleading special matters,' plainly signals the statute's tailoring to address distinct situations set out in the statute." *Thigpen*, 355 N.C. at 203, 558 S.E.2d at 165. Since relation back is not available through Rule 15(c) of the North Carolina Rules of Civil Procedure to comply with Rule 9(j), plaintiff's amended complaint did not toll the statute of limitations. *Id.* at 205, 558 S.E.2d at 167. Plaintiff was not entitled to the one-year extension under Rule 41(a) because her original action was not timely filed.

Rule 9(j) mandates that any complaint which fails to comply with the certification requirement, "'shall be dismissed.'" *Id.* at 201, 558 S.E.2d at 164-65 [***16] (quoting N.C.G.S. § 1A-1, Rule 9(j)). *Thigpen* reasons that although the plaintiffs in *Brisson* voluntarily dismissed their case without prejudice, a trial judge can dismiss with prejudice where a complaint does not contain the certification required by Rule 9(j) and the statute of limitations has expired. *Id.* "In *Brisson*, we stated 'Had the trial court involuntarily dismissed plaintiffs' motion *before* plaintiffs had taken the voluntary dismissal, the plaintiffs' claims set forth in the second complaint would be barred by the statute of limitations.'" *Id.* (quoting *Brisson*, 351 N.C. at 595, 528 S.E.2d at 572)(emphasis in original).

I would hold that, although plaintiff voluntarily dismissed her initial complaint without prejudice, Judge Cashwell correctly dismissed plaintiff's second complaint. 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. [***17] I would affirm Judge Cashwell's order dismissing plaintiff's action. I respectfully dissent.



**PAMELA BRISSON and DALLAS BRISSON v. KATHY A. SANTORIELLO,
M.D., P.A., and KATHY A. SANTORIELLO, M.D.**

No. 376PA99

SUPREME COURT OF NORTH CAROLINA

351 N.C. 589; 528 S.E.2d 568; 2000 N.C. LEXIS 354

**February 15, 2000, Heard in the Supreme Court
May 5, 2000, Filed**

PRIOR HISTORY: [***1] On discretionary review pursuant to *N.C.G.S. § 7A-31* of a unanimous decision of the *Court of Appeals, 134 N.C. App. 65, 516 S.E.2d 911 (1999)*, reversing and remanding a 9 February 1998 order for judgment on the pleadings entered by Hudson, J., in Superior Court, Cumberland County, and a 26 February 1998 order entered by Brewer, J., in Superior Court, Cumberland County, denying a motion for relief from the earlier order.

DISPOSITION: MODIFIED AND AFFIRMED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

COUNSEL: Patterson, Dilthey, Clay & Bryson, L.L.P., by Charles George, for plaintiff-appellees.

Yates, McLamb & Weyher, L.L.P., by Barry S. Cobb, for defendant-appellants.

Fuller, Becton, Slifkin & Bell, P.A., by Charles L. Becton and James C. Fuller, on behalf of North Carolina Academy of Trial Lawyers, amicus curiae.

Cranfill, Sumner & Hartzog, L.L.P., by Kari R. Johnson, on behalf of North Carolina Association of Defense Attorneys, amicus curiae.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by James D. Blount, Jr., Michael W. Mitchell, and James Y. Kerr, II, on behalf of North Carolina Medical Society; and Manning, Fulton & Skinner, [***2] P.A., by John B. McMillan, on behalf of North Carolina Citizens for Business and Industry, amici curiae.

JUDGES: ORR, Justice. Justice Wainwright dissenting.

OPINION BY: ORR

OPINION

[**569] [*590] ORR, Justice.

This case arises out of a medical malpractice action filed in Superior Court, Cumberland County, against Dr. Kathy A. Santoriello (Dr. Santoriello), an obstetrician-gynecologist (OB-GYN) practicing in Fayetteville, North Carolina. Plaintiffs Pamela Brisson and Dallas Brisson alleged negligence and loss of consortium, seeking damages in excess of \$ 10,000, plaintiffs' costs, and attorneys' fees.

The facts relevant to this action are as follows. On 27 July 1994, Dr. Santoriello performed an abdominal hysterectomy on plaintiff [*591] Pamela Brisson. Several months later, it was discovered that plaintiff had an obstruction of

her vaginal canal that prevented her from having sexual intercourse. Subsequently, on 3 June 1997, plaintiffs filed a complaint alleging negligence and loss of consortium against defendants Kathy A. Santoriello, M.D., P.A., and Kathy A. Santoriello, M.D., arising out of defendant Santoriello's performance of the 27 July 1994 abdominal hysterectomy. Plaintiffs alleged, "Defendant Physician, [***3] through Defendant P.A., performed said surgery negligently, in that Defendant failed to exercise or possess that degree of skill, care, and learning ordinarily exercised or possessed by the average obstetrician/gynecologist, taking into account the existing state of knowledge and practice in the profession." Plaintiffs then claimed that defendants' negligence proximately resulted in various severe and permanent physical injuries in addition to plaintiff Dallas Brisson's loss of consortium from the companionship of his wife, plaintiff Pamela Brisson.

On 22 August 1997, defendants filed a motion to dismiss the case pursuant to *Rules 9(j) and 12(b)(6) of the North Carolina Rules of Civil Procedure*, arguing that plaintiffs' complaint failed to meet the requirements set forth in *N.C. R. Civ. P. 9(j)* and also failed to state a claim upon which relief can be granted based on *N.C. R. Civ. P. 12(b)(6)*.

Rule 9(j) explicitly sets out several requirements that a party must meet when pleading a medical malpractice cause of action. In pertinent part, this rule provides as follows:

(j) *Medical malpractice.* -- Any complaint alleging medical malpractice by a health care provider as defined in [***4] *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[.]

N.C.G.S. § 1A-1, Rule 9(j)(1) (1999).

Defendants' motion to dismiss was based in part on plaintiffs' failure to include, pursuant to Rule 9(j), a certification in their complaint [*592] that plaintiffs had a medical expert who was reasonably expected to qualify as an expert, had reviewed plaintiff's medical care, and was willing to testify that the medical care plaintiff received from defendant Dr. Santoriello did not comply with the applicable standard of care. On 30 September 1997, plaintiffs filed a motion to amend their complaint, along with an attached copy of the proposed amended complaint, claiming that "a physician has reviewed the subject medical care, but it was inadvertently omitted from the pleading (see attached Affidavit of [**570] Counsel), and to not grant leave to [***5] amend would unduly prejudice plaintiffs, by subjecting her [sic] to a dismissal." Plaintiffs also moved, in the alternative, to voluntarily dismiss their complaint without prejudice pursuant to *N.C. R. Civ. P. 41(a)(1)*.

Following a hearing on defendants' motion to dismiss and plaintiffs' motion to amend the complaint, Judge D.B. Herring denied plaintiffs' motion to amend, but reserved ruling on defendants' motion to dismiss. As a result, on 6 October 1997, plaintiffs voluntarily dismissed their claims against defendants Dr. Santoriello and Kathy Santoriello, M.D., P.A., pursuant to Rule 41(a)(1).

Subsequently, on 9 October 1997, plaintiffs filed another complaint in Superior Court, Cumberland County, that contained essentially the same allegations as the original complaint, except that the new complaint included the appropriate certification required under Rule 9(j). On 20 October 1997, defendants filed an answer and moved for judgment on the pleadings, alleging that plaintiffs' claims were barred by the applicable statutes of limitations and repose pursuant to *N.C.G.S. § 1-15(c)*.

After a hearing in January 1998, Judge Orlando Hudson granted defendants' motion for judgment on [***6] the pleadings by order entered 9 February 1998, stating specifically that "the Court holds that the complaint filed on June 3, 1997 does not extend the statute of limitations in this case because it does not comply with *Rule 9(j) of the North Carolina Rules of Civil Procedure*. The instant complaint, filed on October 9, 1997, is barred by the statute of limitations"

Plaintiffs then filed two separate motions for relief under *N.C. R. Civ. P. 60(b)* requesting relief from Judge Herring's order denying plaintiffs' motion to amend their complaint and Judge Hudson's order allowing defendants' motion for judgment on the pleadings. On 26 February 1998, Judge Coy Brewer denied both motions for relief.

[*593] Plaintiffs filed notice of appeal with the Court of Appeals, seeking review of the 9 February 1998 order entered by Judge Hudson. The Court of Appeals unanimously reversed Judge Hudson's ruling allowing defendants' motion

for judgment on the pleadings and reinstated plaintiffs' causes of action. On 7 October 1999, this Court granted defendants' petition for discretionary review.

We note at the outset that the Court of Appeals, in its opinion, addressed at length the effects of plaintiffs' [***7] proposed amended complaint. We find that plaintiffs' motion to amend, which was denied, is neither dispositive nor relevant to the outcome of this case. Whether the proposed amended complaint related back to and superceded the original complaint has no bearing on this case once plaintiffs took their voluntary dismissal on 6 October 1997. It is well settled that "[a] Rule 41(a) dismissal strips the trial court of authority to enter further orders in the case, except as provided by Rule 41(d)[,] which authorizes the court to enter specific orders apportioning and taxing costs." *Walker Frames v. Shively*, 123 N.C. App. 643, 646, 473 S.E.2d 776, 778 (1996). "The effect of a judgment of voluntary [dismissal] is to leave the plaintiff exactly where he [or she] was before the action was commenced." *Gibbs v. Carolina Power & Light Co.*, 265 N.C. 459, 464, 144 S.E.2d 393, 398 (1965) (quoting 17 Am. Jur. *Dismissal, Discontinuance, & Nonsuit* § 89, at 161 (1938)). After a plaintiff takes a Rule 41(a) dismissal, "there is nothing the defendant can do to fan the ashes of that action [***8] into life[,] and the court has no role to play." *Universidad Central Del Caribe, Inc. v. Liaison Comm. on Med. Educ.*, 760 F.2d 14, 18 n.4 (1st Cir. 1985).

The only issue for us to review on appeal is whether plaintiffs' voluntary dismissal pursuant to *N.C. R. Civ. P. 41(a)(1)* effectively extended the statute of limitations by allowing plaintiffs to refile their complaint against defendants within one year, even though the original complaint lacked a Rule 9(j) certification. We hold that it does.

Rule 41(a) provides, in pertinent part:

An action or any claim therein may be dismissed by the plaintiff without order of court (I) by filing a notice of dismissal at any time before the plaintiff rests his case If an action commenced within the time prescribed therefor, or any claim [**571] therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal

[*594] *N.C.G.S. § 1A-1, Rule 41(a)(1)* (1999). "[A] party always has the time limit prescribed by the general statute of limitation and in addition thereto they get the one year provided in [***9] Rule 41(a)(1)." *Whitehurst v. Virginia Dare Transport. Co.*, 19 N.C. App. 352, 356, 198 S.E.2d 741, 743 (1973). "If the action was originally commenced within the period of the applicable statute of limitations, it may be recommenced within one year after the dismissal, even though the base period may have expired in the interim." 2 Thomas J. Wilson, II & Jane M. Wilson, *McIntosh North Carolina Practice and Procedure* § 1647, at 69 (Supp. 1970). Thus, it is important to note that under Rule 41, a plaintiff may "dismiss an action that originally was filed within the statute of limitations and then refile the action after the statute of limitations ordinarily would have expired." *Clark v. Visiting Health Prof'ls*, 136 N.C. App. 505, 508, 524 S.E.2d 605, 607 (2000).

Defendants argue that plaintiffs' claims were barred by the applicable statute of limitations set out in *N.C.G.S. § 1-15(c)*, which provide that medical malpractice causes of action must be brought within three years of the last allegedly negligent act of the physician. Based on the facts before us, the applicable statute of limitations began to run on 27 July 1994, the [***10] date Dr. Santoriello performed Pamela Brisson's abdominal hysterectomy. Plaintiffs filed their original complaint against defendants on 3 June 1997, safely within the time period prescribed by *N.C.G.S. § 1-15(c)*. However, on 6 October 1997, plaintiffs voluntarily dismissed this action and, thus, were granted one year within which to refile. Plaintiffs filed a second complaint on 9 October 1997. Defendants contend that the one-year "saving provision" allowed by Rule (41)(a)(1) did not apply to plaintiffs' claims because plaintiffs' first complaint failed to comply with the Rule 9 pleading requirements. Thus, defendants reason, plaintiffs' causes of action were barred by the statute of limitations.

The Court of Appeals held that "plaintiffs were entitled to the benefit of the Rule 41(a)(1) extension. Plaintiffs' second complaint, therefore, was not barred by the statute of limitations, and the trial court erred in entering judgment on the pleadings in favor of defendants." *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 134 N.C. App. 65, 72-73, 516 S.E.2d 911, 916 (1999). However, this decision rests on the erroneous reasoning discussed above that plaintiffs' proposed amended [***11] complaint related back to the original complaint. We agree with the Court of Appeals' holding but differ, in part, in our reasoning, finding it unnecessary to rely on the proposed amended complaint.

[*595] This Court has repeatedly stated that "statutes dealing with the same subject matter must be construed *in pari materia* and harmonized, if possible, to give effect to each." *Board of Adjust. v. Town of Swansboro*, 334 N.C. 421, 427, 432 S.E.2d 310, 313 (1993). On these facts, we must look to our Rules of Civil Procedure and construe Rule 9(j) along with Rule 41. Although Rule 9(j) clearly requires a complainant of a medical malpractice action to attach to the

complaint specific verifications regarding an expert witness, the rule does not expressly preclude such complainant's right to utilize a Rule 41(a)(1) voluntary dismissal. Had the legislature intended to prohibit plaintiffs in medical malpractice actions from taking voluntary dismissals where their complaint did not include a Rule 9(j) certification, then it could have made such intention explicit. In this case, the plain language of Rule 9(j) does not give rise to an interpretation [***12] depriving plaintiffs of the one-year extension pursuant to their Rule 41(a)(1) voluntary dismissal merely because they failed to attach a Rule 9(j) certification to the original complaint. "The absence of any express intent and the strained interpretation necessary to reach the result urged upon us by [defendants] indicate that such was not [the legislature's] intent." *Sheffield v. Consolidated Foods Corp.*, 302 N.C. 403, 425, 276 S.E.2d 422, 436 (1981).

Moreover, pursuant to Rule 41(b), a defendant may move for an involuntary dismissal of an action if the plaintiff's complaint fails [**572] "to prosecute or to comply with these rules or any order of court." N.C.G.S. § 1A-1, Rule 41(b). Thus, this evidences the legislature's intent, under a different subsection of Rule 41, to subject a plaintiff's claim to an involuntary dismissal based on a failure to comply with the applicable rules. Had the trial court involuntarily dismissed plaintiffs' complaint with prejudice pursuant to defendants' motion *before* plaintiffs had taken the voluntary dismissal, then plaintiffs' claims set forth in the second complaint would be barred by the statute [***13] of limitations. Such was not the case here, however.

Defendants rely primarily on *Estrada v. Burnham*, 316 N.C. 318, 341 S.E.2d 538 (1986), in arguing that Rule 41(a)(1) applies only to a timely filed complaint that conforms to the rules of pleading set forth in the North Carolina Rules of Civil Procedure. In their brief, defendants assert that this case was barred by the statute of limitations unless the "complaint in the first lawsuit complied with Rule 9(j) at the time of its dismissal."

The facts in *Estrada* are distinguishable from the facts of this case. In *Estrada*, the plaintiff filed a medical malpractice action the [*596] day before the expiration of the statute of limitation; however, the complaint lacked allegations describing the specific manner in which defendant was purportedly negligent. Two minutes after the plaintiff filed the original complaint, the plaintiff took a voluntary dismissal of the action under Rule 41(a)(1) and, almost one year later, filed a second complaint against the same defendant alleging medical malpractice arising out of the same surgery as the original complaint. The defendant then filed a motion to dismiss based, in part, on [***14] the grounds that the plaintiff's action was barred by the applicable statute of limitations. In *Estrada*, the plaintiff's counsel admitted in his briefs before the Court of Appeals and this Court that the original "lawsuit was filed with the intention of dismissing it in order to avoid the lapse of the statute of limitations." *Id.* at 322, 341 S.E.2d at 541. This Court determined the issue before it as follows:

The dispositive question is whether a plaintiff may file a complaint within the time permitted by the statute of limitations for the sole purpose of tolling the statute of limitations, but with no intention of pursuing the prosecution of the action, then voluntarily dismiss the complaint and thereby gain an additional year pursuant to Rule 41(a)(1).

Id. at 323, 341 S.E.2d at 542. We held that the plaintiff's complaint was filed in bad faith, in violation of Rule 11(a) of the North Carolina Rules of Civil Procedure, and thus, that the complaint could not be used to extend the statute of limitations pursuant to the one-year "saving provision" of Rule 41(a)(1). *Id.*

In the case at bar, defendants cite as support this Court's dicta [***15] in *Estrada* wherein we stated, "In order for a timely filed complaint to toll the statute of limitations and provide the basis for a one-year 'extension' by way of a Rule 41(a)(1) voluntary dismissal without prejudice, the complaint must conform in all respects to the rules of pleading." *Id.* However, defendants here admit that plaintiffs did not file their initial complaint in "bad faith." Nonetheless, they contend that the dicta in *Estrada* should extend to the facts of this case, and thus, defendants argue, plaintiffs' second complaint should be barred by the statute of limitations because of the initial complaint's failure to comply with the 9(j) pleading requirements. We find no merit to defendants' argument and hold that plaintiffs were entitled to voluntarily dismiss their action without prejudice.

We note that the language in *Estrada* upon which defendants rely is mere dicta and not controlling in the disposition of the case at bar. [*597] Further, *Estrada* cited no authority in support of the proposition that "the complaint must conform in all respects to the rules of pleading" in order to benefit from the one-year extension. The [***16] literal interpretation of such a comprehensive and unlimited statement could essentially eviscerate the legislature's intent in creating the long-standing benefit of a Rule 41(a)(1) voluntary dismissal one-year extension.

The Rule 41(a) voluntary dismissal "has salvaged more lawsuits than any other procedural device, giving the plaintiff a second chance to present a viable case at trial." 2 G. Gray Wilson, *North Carolina Civil Procedure* § 41-1, at 32 (2d ed. 1995). Many [**573] plaintiffs have used "this rule to cure an unforeseen defect in a claim that did not become

apparent until trial The rule also offers a safety net to plaintiff or his counsel who are either unprepared or unwilling to proceed with trial the first time the case is called." 2 G. Gray Wilson, *North Carolina Civil Procedure* § 41-1, at 33. The purpose of our long-standing rule allowing a plaintiff to take a voluntary dismissal and refile the claim within one year even though the statute of limitations has run subsequent to a plaintiff's filing of the original complaint is to provide a one-time opportunity where the plaintiff, for whatever reason, does not want to continue the suit. The range of reasons clearly includes those circumstances in which the plaintiff [***17] fears dismissal of the case for rule violations, shortcomings in the pleadings, evidentiary failures, or any other of the myriad reasons for which the cause of action might fail. The only limitations are that the dismissal 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.

Therefore, we conclude that plaintiffs properly filed their 9 October 1997 complaint within the statute of limitations pursuant to the Rule 41(a)(1) voluntary dismissal one-year extension. Accordingly, the decision of the Court of Appeals, as modified herein, is affirmed.

As to defendants' third issue on appeal, "Does an amended complaint which fails to allege that review of the medical care in a medical malpractice action took place before the filing of the original complaint satisfy the requirements of *Rule 9(j) of the North Carolina Rules of Civil Procedure*?" we hold that discretionary review was improvidently allowed.

The dissent categorizes this decision as "repugnant" and a "complete evisceration" of the malpractice statute of limitations. This [*598] greatly [***18] overstates the practical ramifications of the decision which merely harmonizes the provisions of Rules 9(j) and 41(a). A frivolous malpractice claim with no expert witness pursuant to Rule 9(j) still meets the ultimate fate of dismissal. Likewise, a meritorious complaint will not be summarily dismissed without benefit of Rule 41(a)(1), simply because of an error by plaintiffs' attorney in failing to attach the required certificate to the complaint pursuant to Rule 9(j).

MODIFIED AND AFFIRMED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

DISSENT BY: Wainwright

DISSENT

Justice Wainwright dissenting.

I respectfully dissent. I believe the majority's interpretation of Rule 9(j) and its relationship to a voluntary dismissal pursuant to Rule 41(a) misconstrues both the General Assembly's intent in enacting Rule 9(j) and our rules regarding statutory construction.

At the outset, a complete recitation of the provisions of Rule 9(j) is in order. It provides:

(j) *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. 20-21.12* shall be dismissed [***19] 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 loquitur*.

[*599] Upon motion by the complainant prior to the expiration of the applicable statute of limitations, a resident judge of the superior [**574] court of the county in which the cause of action arose may allow a motion to extend the statute of limitations for a period not to exceed 120 days to file a complaint in a medical malpractice action in order to comply with this Rule, upon a determination that [***20] good cause exists for the granting of the motion and that the

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ends of justice would be served by an extension. The 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.

N.C.G.S. § 1A-1, Rule 9(j) (1999) (emphasis added). The official commentary to Rule 9 explains the rule's general purpose: "This rule is designed to lay down some special rules for pleading in typically recurring contexts which have traditionally caused trouble when no codified directive existed." *N.C.G.S. § 1A-1, Rule 9* official commentary (1999). The General Assembly's purpose in amending Rule 9 by adding subsection (j) is gleaned from the title of that legislation: "An Act to Prevent Frivolous Medical Malpractice Actions by Requiring that Expert Witnesses in Medical Malpractice Actions have Appropriate Qualifications to Testify on the Standard of Care at Issue and to Require Expert Witness Review as a Condition of Filing a Medical Malpractice Action. [***21] " Act of June 20, 1995, ch. 309, 1995 N.C. Sess. Laws 611. It is apparent that Rule 9(j) was specifically drafted to govern the initiation of medical malpractice actions and to require physician review as a condition for filing the action. To aid in accomplishing these goals, the General Assembly included a means by which a plaintiff could obtain a 120-day extension of the three-year statute of limitations in order to comply with the pre-filing physician-review requirement. Thus, the General Assembly recognized the additional burden placed on prospective medical malpractice plaintiffs by the physician-review requirement and allowed them additional time to comply.

The General Assembly did not specifically address the effect of the Rule 41(a) one-year "savings" provision in relation to the 120-day extension of the statute of limitations. However, I believe that in taking the extraordinary step of providing for an extension of the statute of limitations in the rule, the General Assembly has implicitly revealed its intention for the 120-day extension to take the place of [*600] the one-year "savings" provision. Further evidence of the legislature's intent may be derived from its use of the phrase [***22] "shall be dismissed" for actions which do not comply with the requirements of the rule. *N.C.G.S. § 1A-1, Rule 9(j)*. The General Assembly, I think it reasonable to assume, did not contemplate a situation where a Rule 41(a) voluntary dismissal would be available in a case if the Rule 9(j) allegations had not been made, because the action was to have been mandatorily dismissed at its outset for failure to comply. This consequence of filing a noncompliant pleading prompted the legislature to provide an opportunity to extend the statute of limitations.

The majority's analysis would effectively extend the medical malpractice statute of limitations from three years, *see N.C.G.S. § 1-15(c)* (1999), to four years and 120 days. "The purpose of a statute of limitations is to afford security against stale demands, not to deprive anyone of his just rights by lapse of time." *Shearin v. Lloyd*, 246 N.C. 363, 371, 98 S.E.2d 508, 514 (1957). A defendant has the right to rely on the statute of limitations as an absolute bar against "stale" claims. *See id.*; *see also Wilkes County v. Forester*, 204 N.C. 163, 167 S.E. 691 (1933). With all due respect, I decline [***23] to join in a decision approving such an extension. The result of the majority's interpretation is a complete evisceration of the medical malpractice statute of limitations. I do not believe the General Assembly intended such a result when it set out to prevent "frivolous" medical malpractice actions.

In addition, a principle of statutory construction leads me to reach a different conclusion than the majority:

"Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and [**575] definitive way, the two should be read together and harmonized . . . ; but, to the extent of any necessary repugnancy between them, the special statute . . . will prevail over the general statute"

McIntyre v. McIntyre, 341 N.C. 629, 631, 461 S.E.2d 745, 747 (1995) (quoting *National Food Stores v. N.C. Bd. of Alcoholic Control*, 268 N.C. 624, 628-29, 151 S.E.2d 582, 586 (1966)); *accord Krauss v. Wayne County DSS*, 347 N.C. 371, 378, 493 S.E.2d 428, 433 (1997). In the instant case, the General Assembly has enacted a specific statute which provides for an extension [***24] of the statute of limitations in medical malpractice actions. Rule 41(a)(1) is a general statute affecting many types of civil actions. While I acknowledge the majority's attempt to harmonize the provisions as we are bound to do, I believe [*601] the result the majority has reached is "repugnant" because of its extension of the statute of limitations beyond that for which the General Assembly has already provided.

For the reasons stated, I dissent.

Justice LAKE joins in this dissenting opinion.



**KENDRA J. THIGPEN v. CORAZON NGO, M.D., MARSHALL B. FRINK, M.D.,
NATIONAL EMERGENCY SERVICES, INC., EMERGENCY PHYSICIANS AS-
SOCIATION, INC., CP/NATIONAL, INC. a/k/a COMMUNITY PHYSI-
CIANS/NATIONAL, INC., and ONSLOW COUNTY HOSPITAL AUTHORITY**

No. 292A01

SUPREME COURT OF NORTH CAROLINA

355 N.C. 198; 558 S.E.2d 162; 2002 N.C. LEXIS 17

**November 13, 2001, Heard In the Supreme Court
February 1, 2002, Filed**

PRIOR HISTORY: [***1] Appeal pursuant to *N.C.G.S. § 7A-30(2)* from the decision of a divided panel of the *Court of Appeals, 143 N.C. App. 209, 545 S.E.2d 477 (2001)*, reversing an order entered 17 November 1999 by Hockenbury, J., in Superior Court, Onslow County. On 19 July 2001, the Supreme Court granted defendant Corazon Ngo's and defendant Onslow County Hospital Authority's petitions for discretionary review of additional issues.

DISPOSITION: REVERSED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

HEADNOTES

1. Medical Malpractice-certification-interplay of Rules 9(j) and 15

It was not necessary to discuss the interplay between *N.C.G.S. § 1A-1, Rules 9(j) and 15* in an action involving the required certification for filing a medical malpractice action where the trial court dismissed the action for failure to comply with Rule 9(j) and did not base its ruling on the interaction of the two rules. *Brisson v. Kathy A. Santoriello, M.D., P.A., 351 N.C. 589, 528 S.E.2d 568*, is distinguished.

2. Medical Malpractice-certification-added to amended complaint-improper

The trial court correctly dismissed a medical malpractice complaint for failure to comply with *N.C.G.S. § 1A-1, Rule 9(j)* where plaintiff requested and received a 120-day extension to comply with the certification mandate on the day before the statute of limitations would have expired, filed her complaint without the certification, and filed an amended complaint which included the certification after the statute of limitations had expired. The specific mandate of Rule 9(j) prevails over other general rules; permitting amendment of a complaint to add the expert certification where the expert review occurred after the suit was filed would conflict with the clear intent of the legislature.

3. Medical Malpractice-certification-amended complaint--allegation that review occurred before original complaint-required

An amended medical malpractice complaint which failed to allege that review of the medical care took place before the filing of the original complaint did not satisfy the certification requirements of *N.C.G.S. § 1A-1, Rule 9(j)*. Allowing a plaintiff to file a medical malpractice complaint and then wait until after the filing to have the allegations reviewed by an expert would pervert the purpose of Rule 9(j).

COUNSEL: Jimmy F. Gaylor for plaintiff-appellee.

Harris, Creech, Ward and Blackerby, P.A., by C. David Creech and W. Gregory Merritt, for defendant-appellant Corazon Ngo, M.D.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, LLP, by John D. Madden and Deanna Davis Anderson, for defendant-appellant Onslow County Hospital Authority.

JUDGES: WAINWRIGHT, Justice.

OPINION BY: WAINWRIGHT

OPINION

[**163] [199] WAINWRIGHT, Justice.

This case arises from an order of the trial court dismissing plaintiff's complaint alleging medical malpractice because of plaintiff's failure to comply with *Rule 9(j) of the North Carolina Rules of Civil Procedure* and dismissing, pursuant to *Rule 12(b)(6) of the North Carolina Rules of Civil Procedure*, plaintiff's amendment to the complaint because it is barred by the applicable statute of limitations, *N.C.G.S. § 1-15(c)* (1999).

Kendra Thigpen (plaintiff) alleges defendants Dr. Corazon Ngo (Ngo) and Onslow County Hospital Authority (OCHA) committed medical malpractice in June 1996. On 8 June 1999, before the three-year statute of limitations was to expire, plaintiff filed a motion [**164] to extend the statute of limitations 120 days to file a medical malpractice complaint against defendants. In her motion, plaintiff stated she "needed additional time to comply with *Rule 9(j) of the North Carolina Rules of Civil Procedure*" and "moved to extend the statute of limitations for a period *not to exceed* 120 days." (Emphasis added.) The motion was signed by plaintiff's attorney. Pursuant to *Rule 9(j)*, the trial court granted plaintiff's motion. In the order extending the statute of limitations, the trial court determined that "good cause exists for granting [plaintiff's motion and that] the ends of justice will be served by an extension." The order specifically extended the statute of limitations through 6 October 1999.

[*200] On 6 October 1999, the [***3] final day of the extended deadline, plaintiff filed a medical malpractice complaint. The complaint did not contain the certification required by *Rule 9(j)*. See *N.C.G.S. § 1A-1, Rule 9(j)* (1999). Namely, the complaint did not specify that the medical care had been reviewed by an expert prior to filing. On 12 October 1999, six days after the statute of limitations expired, plaintiff filed an amended complaint including a certification that the "medical care has been reviewed" by someone who would qualify as an expert.

Defendants Ngo and OCHA filed motions to dismiss on 4 and 10 November 1999, respectively, because plaintiff's amended complaint was not filed prior to the court-extended statute of limitations. On 17 November 1999, the trial court granted both defendants' motions to dismiss pursuant to *Rules 9(j)* and *12(b)(6)*. The trial court dismissed plaintiff's complaint with prejudice, finding that "Plaintiff's original Complaint did not contain a certification that the care rendered by Defendants had been reviewed by an expert witness reasonably expected to testify that the care rendered to Plaintiff did not comply with the applicable standard of [***4] care as required by *Rule 9(j)*."

The Court of Appeals reversed the trial court and reinstated plaintiff's cause of action. *Thigpen v. Ngo*, 143 N.C. App. 209, 219, 545 S.E.2d 477, 483 (2001). The Court of Appeals held "plaintiff was entitled to amend her initial complaint to include the necessary *Rule 9(j)* certification." *Id.* We disagree.

At the outset, we note the Court of Appeals discussed the interplay between *Rule 9(j)* and *Rule 15 of the North Carolina Rules of Civil Procedure*. *Id.* at 211-19, 545 S.E.2d at 479-83. We find the relationship between these two rules to be neither dispositive nor relevant to this case. The trial court dismissed plaintiff's complaint with prejudice because it did not comply with *Rule 9(j)* and was therefore filed outside the statute of limitations. The trial court did not base its ruling on the interaction between *Rules 9(j)* and 15, and we find it unnecessary to address that relationship here.

The Court of Appeals also relied on this Court's decision in *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, 528 S.E.2d 568 (2000), to assist its analysis of the interaction between *Rules 9(j)* and [***5] 15. *Thigpen*, 143 N.C. App. at 213, 545 S.E.2d at 480. In *Brisson*, we held the plaintiffs in a medical malpractice case who failed to include the *9(j)* expert certification could take a voluntary dismissal pursuant to *Rule 41(a)(1) of the North Carolina Rules of Civil Procedure* [201] to effectively extend the statute of limitations. *Brisson*, 351 N.C. at 597, 528 S.E.2d at 573. We find the facts in *Brisson* distinguishable from those in the present case. Specifically, in *Brisson*, this Court noted the trial judge "reserved ruling on defendants' motion to dismiss," and plaintiffs subsequently took a voluntary dismissal. *Id.*

at 592, 528 S.E.2d at 570. Additionally, the plaintiffs in *Brisson* did not request the 120-day extension provided by Rule 9(j). *Brisson*, 351 N.C. 589, 528 S.E.2d 568. In *Brisson*, we stated, "Had the trial court involuntarily dismissed plaintiffs' complaint with prejudice pursuant to defendants' motion *before* plaintiffs had taken the voluntary dismissal, then plaintiffs' claims set forth in the second complaint would be barred by the statute of limitations." *Id.* at 595, 528 S.E.2d at 572. [***6] Any reliance by the Court of Appeals on our decision in *Brisson* was thus flawed.

Defendants first argue the trial court's dismissal of plaintiff's complaint was mandatory under Rule 9(j). We agree. The North Carolina Rules of Civil Procedure address pleadings in medical malpractice suits. Rule 9(j) mandates:

(j) *Medical malpractice.* -- Any complaint alleging medical malpractice by a [**165] health care provider . . . 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

N.C.G.S. § 1A-1, Rule 9(j), para. (1), (2) (emphasis added).

[***7] Further, Rule 9(j) allows a plaintiff to extend the filing time to comply with the expert certification requirement:

[*202] Upon motion by the complainant prior to the expiration of the applicable statute of limitations, a resident judge . . . may allow a motion to extend the statute of limitations for a period not to exceed 120 days to file a complaint in a medical malpractice action *in order to comply with this Rule*, upon a determination that good cause exists for the granting of the motion and that the ends of justice would be served by an extension.

Id., para. 2 (emphasis added).

"When the language of a statute is clear and unambiguous, it must be given effect and its clear meaning may not be evaded by an administrative body or a court under the guise of construction." *State ex rel. Util. Comm'n v. Edmisten*, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1977). Rule 9(j) clearly provides that "*any* complaint alleging medical malpractice . . . shall be dismissed" if it does not comply with the certification mandate. *N.C.G.S. § 1A-1, Rule 9(j)*, para. 1 (emphasis added). Contrary to the holding of [***8] the Court of Appeals, we find the inclusion of "shall be dismissed" in Rule 9(j) to be more than simply "a choice of grammatical construction." *Thigpen*, 143 N.C. App. at 215, 545 S.E.2d at 481. While other subsections of Rule 9 contain requirements for pleading special matters, no other subsection contains the mandatory language "shall be dismissed." This indicates that medical malpractice complaints have a distinct requirement of expert certification with which plaintiffs must comply. Such complaints will receive strict consideration by the trial judge. Failure to include the certification necessarily leads to dismissal.

Rule 9(j) grants a trial judge the discretion to permit a 120-day extension of the statute of limitations "*in order to comply with this Rule.*" *N.C.G.S. § 1A-1, Rule 9(j)*, para. 2 (emphasis added). The extension of the statute of limitations is not automatic. The trial judge may allow a motion to extend the statute of limitations only "upon a determination that good cause exists for the granting of the motion and that the ends of justice would be served by an extension." *Id.*

Additionally, the plain language [***9] of Rule 9(j) requires dismissal but does not specify whether the dismissal shall be with or without prejudice. "The trial court's authority to order an involuntary dismissal without prejudice is . . . in the broad discretion of the trial court. . . ." *Whedon v. Whedon*, 313 N.C. 200, 213, 328 S.E.2d 437, 445 (1985). When acting pursuant to Rule 9(j), trial judges, with their unique perspective, have the discretion to dismiss without prejudice if they see fit.

[*203] While our Rules of Civil Procedure contain many rules addressing pleadings generally, Rule 9(j) specifically addresses extensions of time to file a medical malpractice complaint where the complaint lacks expert certification. The title of Rule 9, "Pleading special matters," plainly signals the statute's tailoring to address distinct situations set out in the statute. We have stated:

"Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and [*166] definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but, to the extent of any necessary [***10] repugnancy between them, the special statute, or the one dealing with the common subject matter in a minute way, will prevail over the general statute, according to the authorities on the question, unless it appears that the legislature intended to make the general act controlling"

National Food Stores v. N.C. Bd. of Alcoholic Control, 268 N.C. 624, 628-29, 151 S.E.2d 582, 586 (1966) (quoting 82 C.J.S. Statutes § 369, at 839-43 (1953)), quoted in *McIntyre v. McIntyre*, 341 N.C. 629, 631, 461 S.E.2d 745, 747 (1995). Accordingly, the specific mandate of Rule 9(j) that a medical malpractice claim shall be dismissed if it does not contain the expert certification prevails over other general rules.

Furthermore, our analysis reveals the legislature intended Rule 9(j) to control pleadings in medical malpractice claims. Legislative intent is determined by examining the statute as a whole including the spirit of the act and the objectives the statute seeks to accomplish. *Brown v. Flowe*, 349 N.C. 520, 522, 507 S.E.2d 894, 895 (1998). "In the interpretation of statutes the legislative will is the controlling factor." *State v. Hart*, 287 N.C. 76, 80, 213 S.E.2d 291, 294 (1975). [***11]

The General Assembly added subsection (j) of Rule 9 in 1995 pursuant to chapter 309 of House Bill 730, entitled, "An Act to Prevent Frivolous Medical Malpractice Actions by Requiring that Expert Witnesses in Medical Malpractice Cases Have Appropriate Qualifications to Testify on the Standard of Care at Issue and to Require Expert Witness Review as a Condition of Filing a Medical Malpractice Action." Act of June 20, 1995, ch. 309, 1995 N.C. Sess. Laws 611. 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 [*204] medical malpractice claims through Rule 9(j)'s requirement of expert certification prior to the filing of a complaint. Accordingly, permitting amendment of a complaint to add the expert certification where the expert review occurred after the suit was filed would conflict directly with the clear intent of the legislature.

In the case at bar, in her original complaint, plaintiff failed to comply with the Rule 9(j) certification mandate. No party disputes that plaintiff [***12] requested and received the 120-day extension to comply with the certification mandate on the very day before the three-year statute of limitations would have expired. In spite of the lengthy extension, plaintiff still failed to include any certification in her complaint. In light of the specific, unambiguous, and plain language of Rule 9(j); the legislative intent of the statute; and the record and facts in this particular case, we hold the trial court correctly dismissed plaintiff's complaint.

This Court also granted discretionary review to determine if an amended complaint which fails to allege that review of the medical care in a medical malpractice action took place before the filing of the original complaint satisfies the requirements of Rule 9(j). We hold it does not. To survive dismissal, the pleading must "specifically assert[] that the medical care *has been reviewed*." *N.C.G.S. § 1A-1, Rule 9(j)*, para. (1), (2) (emphasis added). Significantly, the rule refers to this mandate twice (in subsections (1) and (2)), and in both instances uses the past tense. *Id.* In light of the plain language of the rule, the title of the act, and the legislative [***13] intent previously discussed, it appears review must occur *before* filing to withstand dismissal. Here, in her amended complaint, plaintiff simply alleged that "plaintiff's medical care *has been reviewed* by a person who is reasonably expected to qualify as an expert witness." (Emphasis added.) There is no evidence in the record that plaintiff alleged the review occurred before the filing of the original complaint. Specifically, there was no affirmative affidavit or date showing that the review took place before the statute of limitations expired. Allowing a plaintiff to file a medical malpractice complaint and to then wait until after the filing to have the [*167] allegations reviewed by an expert would pervert the purpose of Rule 9(j).

As a final matter, this Court allowed discretionary review of the issue of whether a plaintiff who files a complaint without expert certification pursuant to Rule 9(j) can cure that defect after the applicable statute of limitations expires by amending the complaint as a matter [*205] of right and having that amendment relate back to the date of the original complaint. In light of the particular facts and record before us, we hold discretionary review was [***14] improvidently allowed as to this issue.

In sum, based on this record, we hold that once a party receives and exhausts the 120-day extension of time in order to comply with Rule 9(j)'s expert certification requirement, the party cannot amend a medical malpractice complaint to include expert certification. Further, we hold that Rule 9(j) expert review must take place before the filing of the com-

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plaint. We therefore reverse the decision of the Court of Appeals with instructions for that court to reinstate the trial court's order dismissing plaintiff's complaint.

REVERSED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

Article 1B.

Medical Malpractice Actions.

§ 90-21.11. Definitions.

As used in this Article, the term "health care provider" means without limitation any person who pursuant to the provisions of Chapter 90 of the General Statutes is licensed, or is otherwise registered or certified to engage in the practice of or otherwise performs duties associated with any of the following: medicine, surgery, dentistry, pharmacy, optometry, midwifery, osteopathy, podiatry, chiropractic, radiology, nursing, physiotherapy, pathology, anesthesiology, anesthesia, laboratory analysis, rendering assistance to a physician, dental hygiene, psychiatry, psychology; or a hospital or a nursing home; or any other person who is legally responsible for the negligence of such person, hospital or nursing home; or any other person acting at the direction or under the supervision of any of the foregoing persons, hospital, or nursing home.

As used in this Article, the term "medical malpractice action" means 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. (1975, 2nd Sess., c. 977, s. 4; 1987, c. 859, s. 1; 1995, c. 509, s. 135.2(o).)

§ 90-21.12. Standard of health care.

In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of the facts is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action. (1975, 2nd Sess., c. 977, s. 4.)

Rule 9. Pleading special matters.

(a) Capacity. – Any party not a natural person shall make an affirmative averment showing its legal existence and capacity to sue. Any party suing in any representative capacity shall make an affirmative averment showing his capacity and authority to sue. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(b) Fraud, duress, mistake, condition of the mind. – In all averments of fraud, duress or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) Conditions precedent. – In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) Official document or act. – In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) Judgment. – In pleading a judgment, decision or ruling of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment, decision or ruling without setting forth matter showing jurisdiction to render it.

(f) Time and place. – For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) Special damage. – When items of special damage are claimed each shall be averred.

(h) Private statutes. In pleading a private statute or right derived therefrom it is sufficient to refer to the statute by its title or the day of its ratification if ratified before January 1, 1996, or the date it becomes law if it becomes law on or after January 1, 1996, and the court shall thereupon take judicial notice of it.

(i) Libel and slander. –

(1) In an action for libel or slander it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the claim for relief arose, but it is sufficient to state generally that the same was published or spoken concerning the plaintiff, and if such allegation is controverted, the plaintiff is bound to establish on trial that it was so published or spoken.

(2) The defendant may in his answer allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he proves the justification or not, he may give in evidence the mitigating circumstances.

(j) 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 loquitur*.

Upon motion by the complainant prior to the expiration of the applicable statute of limitations, a resident judge of the superior court for a judicial district in which venue for the cause of action is appropriate under G.S. 1-82 or, if no resident judge for that judicial district is physically present in that judicial district, otherwise available, or able or willing to consider the motion, then any presiding judge of the superior court for that judicial district may allow a motion to extend the statute of limitations for a period not to exceed 120 days to file a complaint in a medical malpractice action in order to comply with this Rule, upon a determination that good cause exists for the granting of the motion and that the ends of justice would be served by an extension. The 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.

(k) Punitive damages. – A demand for punitive damages shall be specifically stated, except for the amount, and the aggravating factor that supports the award of punitive damages shall be averred with particularity. The amount of damages shall be pled in accordance with Rule 8. (1967, c. 954, s. 1; 1995, c. 20, s. 10; c. 309, s. 2; c. 514, s. 3; 1998-217, s. 61; 2001-121, s. 1.)

Rule 702. Testimony by experts.

(a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

(a1) **(For change in effective date, see note)** A witness, qualified under subsection (a) of this section and with proper foundation, may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following:

- (1) The results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered by a person who has successfully completed training in HGN.
- (2) Whether a person was under the influence of one or more impairing substances, and the category of such impairing substance or substances. A witness who has received training and holds a current certification as a Drug Recognition Expert, issued by the State Department of Health and Human Services, shall be qualified to give the testimony under this subdivision.

(b) In a medical malpractice action as defined in G.S. 90-21.11, a person shall not give expert testimony on the appropriate standard of health care as defined in G.S. 90-21.12 unless the person is a licensed health care provider in this State or another state and meets the following criteria:

- (1) If the party against whom or on whose behalf the testimony is offered is a specialist, the expert witness must:
 - a. Specialize in the same specialty as the party against whom or on whose behalf the testimony is offered; or
 - b. Specialize in a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients.
- (2) During the year immediately preceding the date of the occurrence that is the basis for the action, the expert witness must have devoted a majority of his or her professional time to either or both of the following:
 - a. The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, the active clinical practice of the same specialty or a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients; or
 - b. The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

(c) Notwithstanding subsection (b) of this section, if the party against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness, during the year immediately preceding the date of the occurrence that is the basis for the action, must have devoted a majority of his or her professional time to either or both of the following:

- (1) Active clinical practice as a general practitioner; or

(2) Instruction of students in an accredited health professional school or accredited residency or clinical research program in the general practice of medicine.

(d) Notwithstanding subsection (b) of this section, a physician who qualifies as an expert under subsection (a) of this Rule and who by reason of active clinical practice or instruction of students has knowledge of the applicable standard of care for nurses, nurse practitioners, certified registered nurse anesthetists, certified registered nurse midwives, physician assistants, or other medical support staff may give expert testimony in a medical malpractice action with respect to the standard of care of which he is knowledgeable of nurses, nurse practitioners, certified registered nurse anesthetists, certified registered nurse midwives, physician assistants licensed under Chapter 90 of the General Statutes, or other medical support staff.

(e) Upon motion by either party, a resident judge of the superior court in the county or judicial district in which the action is pending may allow expert testimony on the appropriate standard of health care by a witness who does not meet the requirements of subsection (b) or (c) of this Rule, but who is otherwise qualified as an expert witness, upon a showing by the movant of extraordinary circumstances and a determination by the court that the motion should be allowed to serve the ends of justice.

(f) In an action alleging medical malpractice, an expert witness shall not testify on a contingency fee basis.

(g) This section does not limit the power of the trial court to disqualify an expert witness on grounds other than the qualifications set forth in this section.

(h) Notwithstanding subsection (b) of this section, in a medical malpractice action against a hospital, or other health care or medical facility, a person may give expert testimony on the appropriate standard of care as to administrative or other nonclinical issues if the person has substantial knowledge, by virtue of his or her training and experience, about the standard of care among hospitals, or health care or medical facilities, of the same type as the hospital, or health care or medical facility, whose actions or inactions are the subject of the testimony situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.

(i) **(For change in effective date, see note)** A witness qualified as an expert in accident reconstruction who has performed a reconstruction of a crash, or has reviewed the report of investigation, with proper foundation may give an opinion as to the speed of a vehicle even if the witness did not observe the vehicle moving. (1983, c. 701, s. 1; 1995, c. 309, s. 1; 2006-253, s. 6; 2007-493, s. 5.)

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2011

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SENATE BILL 33
Judiciary I Committee Substitute Adopted 3/1/11
Third Edition Engrossed 3/2/11
House Committee Substitute Favorable 4/19/11
Fifth Edition Engrossed 4/20/11

Short Title: Medical Liability Reforms.

(Public)

Sponsors:

Referred to:

February 3, 2011

1 A BILL TO BE ENTITLED
2 AN ACT TO REFORM THE LAWS RELATING TO MONEY JUDGMENT APPEAL
3 BONDS, BIFURCATION OF TRIALS IN CIVIL CASES, AND MEDICAL LIABILITY.

4 The General Assembly of North Carolina enacts:

5 SECTION 1. G.S. 1-289 reads as rewritten:

6 "§ 1-289. Undertaking to stay execution on money judgment.

7 (a) If the appeal is from a judgment directing the payment of money, it does not stay the
8 execution of the judgment unless a written undertaking is executed on the part of the appellant,
9 by one or more sureties, as set forth in this section.

10 (b) In an action where the judgment directs the payment of money, the court shall
11 specify the amount of the undertaking required to stay execution of the judgment pending
12 appeal as provided in subsection (c) of this section. The undertaking shall be to the effect that if
13 the judgment appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the
14 appellant will pay the amount directed to be paid by the judgment, or the part of such amount
15 as to which the judgment shall be affirmed, if affirmed only in part, and all damages which
16 shall be awarded against the appellant upon the appeal, except as provided in subsection (b) of
17 this section. Whenever it is satisfactorily made to appear to the court that since the execution of
18 the undertaking the sureties have become insolvent, the court may, by rule or order, require the
19 appellant to execute, file and serve a new undertaking, as above. In case of neglect to execute
20 such undertaking within twenty days after the service of a copy of the rule or order requiring it,
21 the appeal may, on motion to the court, be dismissed with costs. Whenever it is necessary for a
22 party to an action or proceeding to give a bond or an undertaking with surety or sureties, he
23 may, in lieu thereof, deposit with the officer into court money to the amount of the bond or
24 undertaking to be given. The court in which the action or proceeding is pending may direct
25 what disposition shall be made of such money pending the action or proceeding. In a case
26 where, by this section, the money is to be deposited with an officer, a judge of the court, upon
27 the application of either party, may, at any time before the deposit is made, order the money
28 deposited in court instead of with the officer; and a deposit made pursuant to such order is of
29 the same effect as if made with the officer. The perfecting of an appeal by giving the
30 undertaking mentioned in this section stays proceedings in the court below upon the judgment
31 appealed from; except when the sale of perishable property is directed, the court below may
32 order the property to be sold and the proceeds thereof to be deposited or invested, to abide the
33 judgment of the appellate court.



1 (c) The amount of the undertaking that shall be required by the court shall be an amount
2 determined by the court after notice and hearing proper and reasonable for the security of the
3 rights of the adverse party, considering relevant factors, including the following:

4 (1) The amount of the judgment.

5 (2) The amount of the limits of all applicable liability policies of the appellant
6 judgment debtor.

7 (3) The aggregate net worth of the appellant judgment debtor.

8 ~~(b)~~(d) If the appellee in a civil action brought under any legal theory obtains a judgment
9 directing the payment or expenditure of money in the amount of twenty five million dollars
10 (\$25,000,000) or more, and the appellant seeks a stay of execution of the judgment within the
11 period of time during which the appellant has the right to pursue appellate review, including
12 discretionary review and certiorari, the amount of the undertaking that the appellant is required
13 to execute to stay execution of the judgment during the entire period of the appeal shall be
14 twenty five million dollars (\$25,000,000).

15 ~~(e)~~(e) If the appellee proves by a preponderance of the evidence that the appellant for
16 whom the undertaking has been limited under subsection ~~(b)~~(d) of this section is, for the
17 purpose of evading the judgment, (i) dissipating its assets, (ii) secreting its assets, or (iii)
18 diverting its assets outside the jurisdiction of the courts of North Carolina or the federal courts
19 of the United States other than in the ordinary course of business, then the limitation in
20 subsection ~~(b)~~(d) of this section shall not apply and the appellant shall be required to make an
21 undertaking in the full amount otherwise required by this section."

22 **SECTION 2.** G.S. 1A-1, Rule 42(b), is amended by adding a new subdivision to
23 read:

24 "(b) Separate trials. –

25 (1) The court may in furtherance of convenience or to avoid prejudice and shall
26 for considerations of venue upon timely motion order a separate trial of any
27 claim, cross-claim, counterclaim, or third-party claim, or of any separate
28 issue or of any number of claims, cross-claims, counterclaims, third-party
29 claims, or issues.

30 (2) Upon motion of any party in an action that includes a claim commenced
31 under Article 1G of Chapter 90 of the General Statutes involving a managed
32 care entity as defined in G.S. 90-21.50, the court shall order separate
33 discovery and a separate trial of any claim, cross-claim, counterclaim, or
34 third-party claim against a physician or other medical provider.

35 (3) Upon motion of any party in an action in tort wherein the plaintiff seeks
36 damages exceeding one hundred fifty thousand dollars (\$150,000), the court
37 shall order separate trials for the issue of liability and the issue of damages,
38 unless the court for good cause shown orders a single trial. Evidence relating
39 solely to compensatory damages shall not be admissible until the trier of fact
40 has determined that the defendant is liable. The same trier of fact that tries
41 the issues relating to liability shall try the issues relating to damages."

42 **SECTION 3.** G.S. 1A-1, Rule 9(j), reads as rewritten:

43 "(j) Medical malpractice. – Any complaint alleging medical malpractice by a health care
44 provider ~~as defined in pursuant to G.S. 90-21.11~~G.S. 90-21.11(2)a. in failing to comply with
45 the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:

46 (1) The pleading specifically asserts that the medical care ~~has~~and all medical
47 records pertaining to the alleged negligence and resulting injuries that are
48 available to the plaintiff after reasonable inquiry have been reviewed by a
49 person who is reasonably expected to qualify as an expert witness under
50 Rule 702 of the Rules of Evidence and who is willing to testify that the
51 medical care did not comply with the applicable standard of care;

- 1 (2) The pleading specifically asserts that the medical care ~~has and all medical~~
 2 records pertaining to the alleged negligence and resulting injuries that are
 3 available to the plaintiff after reasonable inquiry have been reviewed by a
 4 person that the complainant will seek to have qualified as an expert witness
 5 by motion under Rule 702(e) of the Rules of Evidence and who is willing to
 6 testify that the medical care did not comply with the applicable standard of
 7 care, and the motion is filed with the complaint; or
- 8 (3) The pleading alleges facts establishing negligence under the existing
 9 common-law doctrine of res ipsa loquitur.

10 Upon motion by the complainant prior to the expiration of the applicable statute of
 11 limitations, a resident judge of the superior court for a judicial district in which venue for the
 12 cause of action is appropriate under G.S. 1-82 or, if no resident judge for that judicial district is
 13 physically present in that judicial district, otherwise available, or able or willing to consider the
 14 motion, then any presiding judge of the superior court for that judicial district may allow a
 15 motion to extend the statute of limitations for a period not to exceed 120 days to file a
 16 complaint in a medical malpractice action in order to comply with this Rule, upon a
 17 determination that good cause exists for the granting of the motion and that the ends of justice
 18 would be served by an extension. The plaintiff shall provide, at the request of the defendant,
 19 proof of compliance with this subsection through up to ten written interrogatories, the answers
 20 to which shall be verified by the expert required under this subsection. These interrogatories do
 21 not count against the interrogatory limit under Rule 33."

22 **SECTION 4.** G.S. 8C-702(h) reads as rewritten:

23 "(h) Notwithstanding subsection (b) of this section, in a medical malpractice action as
 24 defined in G.S. 90-21.11(2)b. against a hospital, or other health care or medical facility, a
 25 person ~~may shall not~~ give expert testimony on the appropriate standard of care as to
 26 administrative or other nonclinical issues ~~if unless~~ the person has substantial knowledge, by
 27 virtue of his or her training and experience, about the standard of care among hospitals, or
 28 health care or medical facilities, of the same type as the hospital, or health care or medical
 29 facility, whose actions or inactions are the subject of the testimony situated in the same or
 30 similar communities at the time of the alleged act giving rise to the cause of action."

31 **SECTION 5.** G.S. 90-21.11 reads as rewritten:

32 "**§ 90-21.11. Definitions.**

33 ~~As used~~ The following definitions apply in this Article, Article:

- 34 (1) ~~the term "health care provider" means~~ Health care provider. — without
 35 limitation ~~Without limitation, any of the following:~~
- 36 a. ~~any~~ A person who pursuant to the provisions of Chapter 90 of the
 37 General Statutes is licensed, or is otherwise registered or certified to
 38 engage in the practice of or otherwise performs duties associated
 39 with any of the following: medicine, surgery, dentistry, pharmacy,
 40 optometry, midwifery, osteopathy, podiatry, chiropractic, radiology,
 41 nursing, physiotherapy, pathology, anesthesiology, anesthesia,
 42 laboratory analysis, rendering assistance to a physician, dental
 43 hygiene, ~~psychiatry, psychology; psychiatry, or psychology.~~
- 44 b. ~~or a~~ A hospital ~~or hospital,~~ a nursing home; home licensed under
 45 Chapter 131E of the General Statutes, or an adult care home licensed
 46 under Chapter 131D of the General Statutes.
- 47 c. ~~or any~~ Any other person who is legally responsible for the negligence
 48 of ~~such person, hospital or nursing home;~~ a person described by
 49 sub-subdivision a. of this subdivision, a hospital, a nursing home
 50 licensed under Chapter 131E of the General Statutes, or an adult care
 51 home licensed under Chapter 131D of the General Statutes.

d. ~~or any~~Any other person acting at the direction or under the supervision of ~~any of the foregoing persons,~~ a person described by sub-subdivision a. of this subdivision, a hospital, or a nursing home licensed under Chapter 131E of the General Statutes, or an adult care home licensed under Chapter 131D of the General Statutes.

(2) ~~As used in this Article, the term "medical malpractice action" means~~ Medical malpractice action. – Either of the following:

a. ~~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 licensed under Chapter 131E of the General Statutes, or an adult care home licensed under Chapter 131D of the General Statutes 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."

SECTION 6. G.S. 90-21.12 reads as rewritten:

"§ 90-21.12. Standard of health care.

(a) ~~Except as provided in subsection (b) of this section, in~~any medical malpractice action as defined in G.S. 90-21.11(2)(a), action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant health care provider shall not be liable for the payment of damages unless the trier of the facts~~fact is satisfied~~finds by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time of the alleged act giving rise to the cause of action; or in the case of a medical malpractice action as defined in G.S. 90-21.11(2)(b), the defendant health care provider shall not be liable for the payment of damages unless the trier of fact finds by the greater weight of the evidence that the action or inaction of such health care provider was not in accordance with the standards of practice among similar health care providers 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.

(b) In any medical malpractice action arising out of the furnishing or the failure to furnish professional services in a hospital emergency room, the claimant must prove a violation of the standard of health care set forth in subsection (a) of this section by clear and convincing evidence."

SECTION 7. Article 1B of Chapter 90 of the General Statutes is amended by adding the following new section to read:

"§ 90-21.19. Liability limit for noneconomic damages.

(a) In any medical malpractice action in which the plaintiff is entitled to an award of noneconomic damages, the total amount of noneconomic damages for which judgment is entered against all defendants shall not exceed five hundred thousand dollars (\$500,000). On January 1 of every third year, beginning with January 1, 2014, the Administrative Office of the Courts shall reset the limitation on damages for noneconomic loss set forth in this subsection to be equal to five hundred thousand dollars (\$500,000) times the ratio of the Consumer Price

1 Index for November of the prior year to the Consumer Price Index for November 2011. In the
2 event that any verdict or award of noneconomic damages stated pursuant to G.S. 90-21.19B(1)
3 exceeds these limits, the court shall modify the judgment as necessary to conform to the
4 requirements of this subsection.

5 (b) The following definitions apply in this section:

6 (1) Consumer Price Index. – The Consumer Price Index – All Urban
7 Consumers, for the South urban area, as published by the Bureau of Labor
8 Statistics of the United States Department of Labor.

9 (2) Noneconomic damages. – Damages to compensate for pain, suffering,
10 emotional distress, loss of consortium, inconvenience, and any other
11 nonpecuniary compensatory damage other than damages to compensate for
12 disfigurement, loss of use of part of the body, permanent injury, or death.
13 "Noneconomic damages" does not include punitive damages as defined in
14 G.S. 1D-5.

15 (c) Any award of damages in a medical malpractice action shall be stated in accordance
16 with G.S. 90-21.19B. If a jury is determining the facts, the court shall not instruct the jury with
17 respect to the limit of noneconomic damages under subsection (a) of this section, and neither
18 the attorney for any party nor a witness shall inform the jury or potential members of the jury
19 panel of that limit."

20 **SECTION 8.** Article 1B of Chapter 90 of the General Statutes is amended by
21 adding the following new section to read:

22 **"§ 90-21.19B. Verdicts and awards of damages in medical malpractice actions; form.**

23 In any malpractice action, any verdict or award of damages, if supported by the evidence,
24 shall indicate specifically what amount, if any, is awarded for noneconomic damages. If
25 applicable, the court shall instruct the jury on the definition of noneconomic damages under
26 G.S. 90-21.19(b)."

27 **SECTION 9.** G.S. 1-17 reads as rewritten:

28 **"§ 1-17. Disabilities.**

29 (a) A person entitled to commence an action who is under a disability at the time the
30 cause of action accrued may bring his or her action within the time limited in this Subchapter,
31 after the disability is removed, except in an action for the recovery of real property, or to make
32 an entry or defense founded on the title to real property, or to rents and services out of the real
33 property, when the person must commence his or her action, or make the entry, within three
34 years next after the removal of the disability, and at no time thereafter.

35 For the purpose of this section, a person is under a disability if the person meets one or
36 more of the following conditions:

37 (1) The person is within the age of 18 years.

38 (2) The person is insane.

39 (3) The person is incompetent as defined in G.S. 35A-1101(7) or (8).

40 (a1) For those persons under a disability on January 1, 1976, as a result of being
41 imprisoned on a criminal charge, or in execution under sentence for a criminal offense, the
42 statute of limitations shall commence to run and no longer be tolled from January 1, 1976.

43 (b) Notwithstanding the provisions of subsection (a) of this section, and except as
44 otherwise provided in subsection (c) of this section, an action on behalf of a minor for
45 malpractice arising out of the performance of or failure to perform professional services shall
46 be commenced within the limitations of time specified in G.S. 1-15(c), except that if those time
47 limitations expire before the minor attains the full age of 19 years, the action may be brought
48 before the minor attains the full age of 19 years.

49 (c) Notwithstanding the provisions of subsection (a) and (b) of this section, an action on
50 behalf of a minor for injuries alleged to have resulted from malpractice arising out of a health

1 care provider's performance of or failure to perform professional services shall be commenced
2 within the limitations of time specified in G.S. 1-15(c), except as follows:

3 (1) If the time limitations specified in G.S. 1-15(c) expire before the minor
4 attains the full age of 10 years, the action may be brought any time before
5 the minor attains the full age of 10 years.

6 (2) If the time limitations in G.S. 1-15(c) have expired and before a minor
7 reaches the full age of 18 years a court has entered judgment or consent
8 order under the provisions of Chapter 7B of the General Statutes finding that
9 said minor is an abused or neglected juvenile as defined in G.S. 7B-101, the
10 medical malpractice action shall be commenced within three years from the
11 date of such judgment or consent order, or before the minor attains the full
12 age of 10 years, whichever is later.

13 (3) If the time limitations in G.S. 1-15(c) have expired and a minor is in legal
14 custody of the State, a county, or an approved child placing agency as
15 defined in G.S. 131D-10.2, the medical malpractice action shall be
16 commenced within one year after the minor is no longer in such legal
17 custody, or before the minor attains the full age of 10 years, whichever is
18 later."

19 **SECTION 10.** Severability. – If the provisions of Section 7 of this act are declared
20 to be unconstitutional or otherwise invalid by final decision of a court of competent
21 jurisdiction, then Section 8 and Section 9 of this act are repealed, but the invalidity does not
22 affect other provisions or applications of this act that can be given effect without the invalid
23 provisions. If any other provision of this act or its application to any person or circumstance is
24 held invalid, the remainder of this act or the application of the provision to other persons or
25 circumstances is not affected.

26 **SECTION 11.** Sections 5, 6 and 9 of this act become effective October 1, 2011,
27 and apply to causes of actions arising on or after that date. The remainder of this act becomes
28 effective October 1, 2011, and applies to actions commenced on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2011

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HOUSE BILL 542

Short Title: Tort Reform for Citizens and Businesses. (Public)

Sponsors: Representatives Rhyne, McComas, Brisson, and Crawford (Primary Sponsors).
For a complete list of Sponsors, see Bill Information on the NCGA Web Site.

Referred to: Judiciary.

March 31, 2011

1 A BILL TO BE ENTITLED
2 AN ACT TO PROVIDE TORT REFORM FOR NORTH CAROLINA CITIZENS AND
3 BUSINESSES.

4 The General Assembly of North Carolina enacts:

5 PART I. GENERAL REFORMS

6 SECTION 1.1. Article 4 of Chapter 8C of the General Statutes is amended by
7 adding a new section to read:

8 "**Rule 414. Evidence of medical expenses.**

9 Evidence offered to prove past medical expenses may include all bills reasonably paid and a
10 statement of the amounts actually necessary to satisfy the bills that have been incurred but not
11 yet paid. Evidence of source of payment and rights of subrogation related to the payment shall
12 be admissible."

13 SECTION 1.2. G.S. 1-289 reads as rewritten:

14 "**§ 1-289. Undertaking to stay execution on money judgment.**

15 (a) If the appeal is from a judgment directing the payment of money, it does not stay the
16 execution of the judgment unless a written undertaking is executed on the part of the appellant,
17 by one or more sureties, as set forth in this section.

18 (b) In an action where the judgment directs the payment of money, the court shall
19 specify the amount of the undertaking required to stay execution of the judgment pending
20 appeal as provided in subsection (c) of this section. The undertaking shall be to the effect that if
21 the judgment appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the
22 appellant will pay the amount directed to be paid by the judgment, or the part of such amount
23 as to which the judgment shall be affirmed, if affirmed only in part, and all damages which
24 shall be awarded against the appellant upon the appeal, except as provided in subsection (b) of
25 this section. Whenever it is satisfactorily made to appear to the court that since the execution of
26 the undertaking the sureties have become insolvent, the court may, by rule or order, require the
27 appellant to execute, file and serve a new undertaking, as above. In case of neglect to execute
28 such undertaking within twenty days after the service of a copy of the rule or order requiring it,
29 the appeal may, on motion to the court, be dismissed with costs. Whenever it is necessary for a
30 party to an action or proceeding to give a bond or an undertaking with surety or sureties, he
31 may, in lieu thereof, deposit with the officer into court money to the amount of the bond or
32 undertaking to be given. The court in which the action or proceeding is pending may direct
33 what disposition shall be made of such money pending the action or proceeding. In a case
34 where, by this section, the money is to be deposited with an officer, a judge of the court, upon
35 the application of either party, may, at any time before the deposit is made, order the money



1 deposited in court instead of with the officer; and a deposit made pursuant to such order is of
2 the same effect as if made with the officer. The perfecting of an appeal by giving the
3 undertaking mentioned in this section stays proceedings in the court below upon the judgment
4 appealed from; except when the sale of perishable property is directed, the court below may
5 order the property to be sold and the proceeds thereof to be deposited or invested, to abide the
6 judgment of the appellate court.

7 (c) The amount of the undertaking that shall be required by the court shall be an amount
8 determined by the court after notice and hearing proper and reasonable for the security of the
9 rights of the adverse party, considering relevant factors, including the following:

10 (1) The amount of the judgment.

11 (2) The amount of the limits of all applicable liability policies of the appellant
12 judgment debtor.

13 (3) The aggregate net worth of the appellant judgment debtor.

14 ~~(b) If the appellee in a civil action brought under any legal theory obtains a judgment~~
15 ~~directing the payment or expenditure of money in the amount of twenty five million dollars~~
16 ~~(\$25,000,000) or more, and the appellant seeks a stay of execution of the judgment within the~~
17 ~~period of time during which the appellant has the right to pursue appellate review, including~~
18 ~~discretionary review and certiorari, the amount of the undertaking that the appellant is required~~
19 ~~to execute to stay execution of the judgment during the entire period of the appeal shall be~~
20 ~~twenty five million dollars (\$25,000,000).~~

21 ~~(c) If the appellee proves by a preponderance of the evidence that the appellant for~~
22 ~~whom the undertaking has been limited under subsection (b) of this section is, for the purpose~~
23 ~~of evading the judgment, (i) dissipating its assets, (ii) secreting its assets, or (iii) diverting its~~
24 ~~assets outside the jurisdiction of the courts of North Carolina or the federal courts of the United~~
25 ~~States other than in the ordinary course of business, then the limitation in subsection (b) of this~~
26 ~~section shall not apply and the appellant shall be required to make an undertaking in the full~~
27 ~~amount otherwise required by this section."~~

28 **SECTION 1.3.** Chapter 8 of the General Statutes is amended by adding a new
29 Article to read:

30 "Article 7D.

31 "Admissibility of Collateral Source Payments.

32 **§ 8-58.25. Certain collateral source payments admissible as evidence.**

33 (a) As used in this section, "collateral source payments" means a payment for any of the
34 following damages for which recovery is permitted in a civil action that is made to or for the
35 benefit of a plaintiff or is otherwise available to the plaintiff:

36 (1) Medical expenses and disability payments under the federal Social Security
37 Act, any federal, State, or local income disability act, or any other public
38 program.

39 (2) Payments under any health, sickness, or income disability insurance or
40 automobile accident insurance that provides health benefits or income
41 disability coverage, and any other similar insurance benefits available to the
42 plaintiff, except life insurance.

43 (3) Payments under any contract or agreement of any person, group,
44 organization, partnership, or corporation to provide, pay for, or reimburse
45 the costs of hospital, medical, dental, or health care services.

46 (4) Payments under any contractual or voluntary wage continuation plan
47 provided by an employer or other system intended to provide wages during a
48 period of disability.

49 (5) From any other source.

50 A collateral source payment does not include gifts, gratuitous contributions or assistance, or
51 payments arising from assets of the plaintiff.

1 (b) In any action, the court shall allow into evidence, if requested by a defendant,
2 collateral source payments paid to or for the benefit of the plaintiff, or that are otherwise made
3 available to the plaintiff, related to the losses or damages alleged in the complaint. Any
4 amounts so allowed shall first be reduced by any payments made by the plaintiff to secure the
5 right to receive the collateral source payment. The court shall allow into evidence, if requested
6 by the plaintiff, rights of subrogation of any collateral source."

7 **SECTION 1.4.** G.S. 8C-702(a) reads as rewritten:

8 "(a) If scientific, technical or other specialized knowledge will assist the trier of fact to
9 understand the evidence or to determine a fact in issue, a witness qualified as an expert by
10 knowledge, skill, experience, training, or education, may testify thereto in the form of an
11 ~~opinion.~~ opinion, or otherwise if all of the following apply:

12 (1) The testimony is based upon sufficient facts or data.

13 (2) The testimony is the product of reliable principles and methods.

14 (3) The witness has applied the principles and methods reliably to the facts of
15 the case."

16 **SECTION 1.5.** G.S. 1A-1, Rule 42(b), reads as rewritten:

17 "(b) Separate trials. –

18 (1) The court may in furtherance of convenience or to avoid prejudice and shall
19 for considerations of venue upon timely motion order a separate trial of any
20 claim, cross-claim, counterclaim, or third-party claim, or of any separate
21 issue or of any number of claims, cross-claims, counterclaims, third-party
22 claims, or issues.

23 (2) Upon motion of any party in an action that includes a claim commenced
24 under Article 1G of Chapter 90 of the General Statutes involving a managed
25 care entity as defined in G.S. 90-21.50, the court shall order separate
26 discovery and a separate trial of any claim, cross-claim, counterclaim, or
27 third-party claim against a physician or other medical provider.

28 (3) Upon motion of any party in an action in tort wherein the plaintiff seeks
29 damages exceeding seventy-five thousand dollars (\$75,000), the court shall
30 order separate trials for the issue of liability and the issue of damages.
31 Evidence relating solely to compensatory damages shall not be admissible
32 until the trier of fact has determined that the defendant is liable. The same
33 trier of fact that tries the issues relating to liability shall try the issues
34 relating to damages."

35 **SECTION 1.6.** G.S. 1D-25 reads as rewritten:

36 "**§ 1D-25. Limitation of amount of recovery.**

37 (a) In all actions seeking an award of punitive damages, the trier of fact shall determine
38 the amount of punitive damages separately from the amount of compensation for all other
39 damages.

40 (b) Punitive damages awarded against a defendant shall not exceed three times the
41 amount of compensatory damages or two hundred fifty thousand dollars (\$250,000), whichever
42 is greater. If a trier of fact returns a verdict for punitive damages in excess of the maximum
43 amount specified under this subsection, the trial court shall reduce the award and enter
44 judgment for punitive damages in the maximum amount.

45 (c) The provisions of subsection (b) of this section shall not be made known to the trier
46 of fact through any means, including voir dire, the introduction into evidence, argument, or
47 instructions to the jury.

48 (d) Punitive damages awarded in excess of one hundred thousand dollars (\$100,000)
49 shall be awarded by the presiding judge as follows:

1 (1) Twenty-five percent (25%) of the amount over one hundred thousand dollars
 2 (\$100,000) shall be remitted to the plaintiff in accordance with applicable
 3 law.

4 (2) Seventy-five percent (75%) of the amount over one hundred thousand
 5 dollars (\$100,000) shall be remitted to the Civil Penalty and Forfeiture
 6 Fund."

7 PART II. REFORMS APPLICABLE TO MEDICAL MALPRACTICE ACTIONS

8 **SECTION 2.1.** G.S. 1A-1, Rule 9(j), reads as rewritten:

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

12 (1) The pleading specifically asserts that the medical care ~~has~~ and all medical
 13 records pertaining to the alleged injury then available to the plaintiff after
 14 reasonable inquiry, have been reviewed by a person who is reasonably
 15 expected to qualify as an expert witness under Rule 702 of the Rules of
 16 Evidence and who is willing to testify that the medical care did not comply
 17 with the applicable standard of care;

18 (2) The pleading specifically asserts that the medical care ~~has~~ and all medical
 19 records pertaining to the alleged injury then available to the plaintiff after
 20 reasonable inquiry, have been reviewed by a person that the complainant
 21 will seek to have qualified as an expert witness by motion under Rule 702(e)
 22 of the Rules of Evidence and who is willing to testify that the medical care
 23 did not comply with the applicable standard of care, and the motion is filed
 24 with the complaint; or

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

27 Upon motion by the complainant prior to the expiration of the applicable statute of
 28 limitations, a resident judge of the superior court for a judicial district in which venue for the
 29 cause of action is appropriate under G.S. 1-82 or, if no resident judge for that judicial district is
 30 physically present in that judicial district, otherwise available, or able or willing to consider the
 31 motion, then any presiding judge of the superior court for that judicial district may allow a
 32 motion to extend the statute of limitations for a period not to exceed 120 days to file a
 33 complaint in a medical malpractice action in order to comply with this Rule, upon a
 34 determination that good cause exists for the granting of the motion and that the ends of justice
 35 would be served by an extension. The plaintiff shall provide, at the request of the defendant,
 36 proof of compliance with this subsection through up to ten written interrogatories, the answers
 37 to which shall be verified by the expert required under this subsection. These interrogatories do
 38 not count against the interrogatory limit under Rule 33."

39 **SECTION 2.2.(a)** G.S. 90-21.11 reads as rewritten:

40 "**§ 90-21.11. Definitions.**

41 ~~As used~~ The following definitions apply in this Article, Article:

42 (1) ~~the term "health care provider" means~~ Health care provider. – without
 43 ~~limitation~~ Without limitation, any of the following:

44 a. ~~any~~ A person who pursuant to the provisions of Chapter 90 of the
 45 General Statutes is licensed, or is otherwise registered or certified to
 46 engage in the practice of or otherwise performs duties associated
 47 with any of the following: medicine, surgery, dentistry, pharmacy,
 48 optometry, midwifery, osteopathy, podiatry, chiropractic, radiology,
 49 nursing, physiotherapy, pathology, anesthesiology, anesthesia,
 50 laboratory analysis, rendering assistance to a physician, dental
 51 hygiene, ~~psychiatry, psychology;~~ psychiatry, or psychology.

- b. ~~or a~~ A hospital or hospital, a nursing home, home, or an adult care home licensed under Chapter 131D of the General Statutes.
- c. ~~or any~~ Any other person who is legally responsible for the negligence of such person, hospital or nursing home; a person described by sub-subdivision a. of this subdivision, a hospital, a nursing home, or an adult care home described by sub-subdivision b. of this subdivision.
- d. ~~or any~~ Any other person acting at the direction or under the supervision of any of the foregoing persons, a person described by sub-subdivision a. of this subdivision, a hospital, or a nursing home, home, or an adult care home described by sub-subdivision b. of this subdivision.

(2) ~~As used in this Article, the term "medical malpractice action" means~~ Medical malpractice action. – Either of the following:

- a. ~~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 licensed under Chapter 131D of the General Statutes 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."

SECTION 2.2.(b) G.S. 90-21.12 reads as rewritten:

"§ 90-21.12. Standard of health care.

(a) ~~Except as provided in subsection (b) of this section, in~~ any medical malpractice action, action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant health care provider shall not be liable for the payment of damages unless the trier of the facts ~~fact is satisfied~~ finds by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time of the alleged act giving rise to the cause of action.

(b) In any medical malpractice action arising out of the furnishing or the failure to furnish services pursuant to obligations imposed by 42 U.S.C. § 1395dd for an emergency medical condition as defined in 42 U.S.C. § 1395dd(e)(1), the defendant health care provider shall not be liable for the payment of damages unless the trier of fact finds by the greater weight of the evidence that the health care provider's deviation from the standard of care required under subsection (a) of this section constituted gross negligence, wanton conduct, or intentional wrongdoing. Nothing in this subsection shall be construed to change, alter, override, or otherwise affect the provisions of G.S. 90-21.14, 90-21.15, 90-21.16, or 20-166."

SECTION 2.3.(a) Article 1B of Chapter 90 of the General Statutes is amended by adding the following new section to read:

"§ 90-21.19. Liability limit for noneconomic damages.

(a) In any medical malpractice action in which the plaintiff is entitled to an award of noneconomic damages, the total amount of noneconomic damages for which judgment is entered against all defendants shall not exceed two hundred fifty thousand dollars (\$250,000)

1 per defendant. On January 1 of every third year, beginning with January 1, 2014, the
2 Administrative Office of the Courts shall reset the limitation on damages for noneconomic loss
3 set forth in this subsection to be equal to two hundred fifty thousand dollars (\$250,000) times
4 the ratio of the Consumer Price Index for November of the prior year to the Consumer Price
5 Index for November 2011. In the event that any verdict or award of noneconomic damages
6 stated pursuant to G.S. 90-21.19B(1) exceeds these limits, the court shall modify the judgment
7 as necessary to conform to the requirements of this subsection.

8 (b) The following definitions apply in this section:

9 (1) Consumer Price Index. – The Consumer Price Index – All Urban
10 Consumers, for the South urban area, as published by the Bureau of Labor
11 Statistics of the United States Department of Labor.

12 (2) Noneconomic damages. – Damages to compensate for pain, suffering,
13 emotional distress, loss of consortium, inconvenience, physical impairment,
14 disfigurement, and any other nonpecuniary, compensatory damage.
15 "Noneconomic damages" does not include punitive damages as defined in
16 G.S. 1D-5.

17 (c) Any award of damages in a medical malpractice action shall be stated in accordance
18 with G.S. 90-21.19B. If a jury is determining the facts, the court shall not instruct the jury with
19 respect to the limit of noneconomic damages under subsection (a) of this section, and neither
20 the attorney for any party nor a witness shall inform the jury or potential members of the jury
21 panel of that limit."

22 **SECTION 2.3.(b)** Article 1B of Chapter 90 of the General Statutes is amended by
23 adding the following new section to read:

24 **"§ 90-21.19A. Periodic payment of future economic damages in medical malpractice**
25 **actions.**

26 (a) The following definitions apply in this section:

27 (1) Future economic damages. – Damages for future expense for medical
28 treatment, care or custody, loss of future earnings, loss of future household
29 services, and any other future pecuniary damages of the plaintiff following
30 the date of the verdict or award.

31 (2) Periodic payments. – The payment of money or delivery of other property to
32 the plaintiff at regular intervals.

33 (b) In any medical malpractice action, the form of the fact finder's verdict or award of
34 damages, if supported by the evidence, shall indicate specifically what amount is awarded for
35 future economic damages, and what amount, if any, of the total amount awarded for future
36 economic damages represents damages awarded for loss of future earnings or loss of future
37 household services.

38 (c) Upon the award of future economic damages in any medical malpractice action, the
39 presiding judge shall, at the request of either party, enter a judgment ordering that the future
40 economic damages of the plaintiff be paid in whole or in part by periodic payments rather than
41 by a lump-sum payment if the present value of the future economic damages award is greater
42 than or equal to two hundred thousand dollars (\$200,000). In entering a judgment ordering the
43 payment of future economic damages by periodic payments, the court shall make a specific
44 finding as to the dollar amount of the present value of that portion of the future economic
45 damages for which the plaintiff is to be paid by periodic payments. In calculating the total
46 damages from which any attorney contingency fee for representing the plaintiff in connection
47 with the medical malpractice action is calculated, the present value of any portion of the award
48 representing future economic damages that are to be paid by periodic payments shall be used.

49 (d) A judgment authorizing periodic payments of future economic damages shall
50 require that such payments be made through the establishment of a trust fund or the purchase of
51 an annuity for the life of the plaintiff or during the continuance of the compensable injury or

1 disability of the plaintiff, in such form and under such terms as shall be approved by the court.
2 The establishment of a trust fund or the purchase of an annuity, as required and approved by the
3 court, shall constitute the satisfaction of the defendant's judgment for future economic damages.

4 (e) The judgment ordering the payment of future economic damages by periodic
5 payments shall specify the recipient of the payments, the schedule of the periodic payments,
6 and the dollar amount of each periodic payment to be made pursuant to the schedule. The death
7 of the plaintiff terminates liability for payment of future economic damages which by judgment
8 pursuant to this section are required to be paid in periodic payments not yet due, except that the
9 court that entered the original judgment may modify the judgment to provide that liability for
10 payment of future periodic payments compensating the plaintiff for loss of future earnings or
11 loss of future household services shall not be terminated by reason of the death of the plaintiff,
12 but shall continue to be paid to persons surviving the plaintiff to whom the plaintiff owed a
13 duty of support pursuant to law immediately prior to the plaintiff's death."

14 **SECTION 2.3.(c)** Article 1B of Chapter 90 of the General Statutes is amended by
15 adding the following new section to read:

16 **"§ 90-21.19B. Verdicts and awards of damages in medical malpractice actions; form.**

17 In any malpractice action, any verdict or award of damages, if supported by the evidence,
18 shall indicate specifically what amount is awarded for each of the following:

- 19 (1) Noneconomic damages.
- 20 (2) Present economic damages.
- 21 (3) Future economic damages.
- 22 (4) Loss of future earnings.
- 23 (5) Loss of future household services.

24 If applicable, the court shall instruct the jury on the definition of noneconomic damages
25 under G.S. 90-21.19(b) and the definition of future economic damages under
26 G.S. 90-21.19A(a). If applicable, the court shall instruct the jury that present economic
27 damages are those damages for medical treatment, care or custody, loss of earnings, loss of
28 household services, and any other pecuniary damages of the plaintiff up to the date of the
29 verdict or award."

30 **SECTION 2.4.** G.S. 1A-1, Rule 26(f1), reads as rewritten:

31 "(f1) Medical malpractice discovery conference. – In a medical malpractice action as
32 defined in G.S. 90-21.11, upon the case coming at issue or the filing of a responsive pleading or
33 motion requiring a determination by the court, the judge shall, within 30 days, direct the
34 attorneys for the parties to appear for a discovery conference. At the conference the court may
35 consider the matters set out in Rule 16, and shall:

- 36 ...
- 37 (2) Establish an appropriate schedule for designating expert witnesses,
38 consistent with a discovery schedule pursuant to subdivision (3), ~~to be~~
39 ~~complied with by all parties to the action such that there is a deadline for~~
40 ~~designating all expert witnesses within an appropriate time for all parties to~~
41 ~~implement discovery mechanisms with regard to the designated expert~~
42 ~~witnesses;~~(3) of this subsection. As to each expert designated, the
43 designation shall be accompanied by a written report prepared and signed by
44 the witness. The report shall contain a complete statement of all opinions to
45 be expressed and the basis and reasons therefor; the data or other
46 information considered by the witness in forming the opinions; the
47 qualifications of the witness, including a list of all publications authored by
48 the witness within the preceding 10 years; the compensation the witness is to
49 be paid for the study and testimony; and a listing of any other cases in which
50 the witness has testified as an expert at trial or by deposition within the
51 preceding four years. The party shall supplement the expert's report if the

1 party learns that in some material respect the report is incomplete or
2 incorrect. The expert's direct testimony shall not be inconsistent with or go
3 beyond the fair scope of the expert report as supplemented.

4"

5 PART III. REFORM APPLICABLE TO PRODUCTS LIABILITY ACTIONS

6 SECTION 3.1.(a) G.S. 99B-1 reads as rewritten:

7 "§ 99B-1. Definitions.

8 When used in this Chapter, unless the context otherwise requires:

- 9 (1) "Claimant" means a person or other entity asserting a claim and, if said
10 claim is asserted on behalf of an estate, an incompetent or a minor,
11 "claimant" includes plaintiff's decedent, guardian, or guardian ad litem.
12 (1a) "Government agency" means this State or the United States, or any agency
13 of this State or the United States, or any entity vested with the authority of
14 this State or of the United States to issue rules, regulations, orders, or
15 standards concerning the design, manufacture, packaging, labeling, or
16 advertising of a product or provision of a service.
17 (2) "Manufacturer" means a person or entity who designs, assembles, fabricates,
18 produces, constructs or otherwise prepares a product or component part of a
19 product prior to its sale to a user or consumer, including a seller owned in
20 whole or significant part by the manufacturer or a seller owning the
21 manufacturer in whole or significant part.
22 (3) "Product liability action" includes any action brought for or on account of
23 personal injury, death or property damage caused by or resulting from the
24 manufacture, construction, design, formulation, development of standards,
25 preparation, processing, assembly, testing, listing, certifying, warning,
26 instructing, marketing, selling, advertising, packaging, or labeling of any
27 product.
28 (4) "Seller" includes a retailer, wholesaler, or distributor, and means any
29 individual or entity engaged in the business of selling a product, whether
30 such sale is for resale or for use or consumption. "Seller" also includes a
31 lessor or bailor engaged in the business of leasing or bailment of a product."

32 SECTION 3.1.(b) Chapter 99B of the General Statutes is amended by adding the
33 following new section to read:

34 "§ 99B-12. Regulatory compliance.

35 (a) No manufacturer or seller shall be held liable in any product liability action if any
36 one of the following apply:

- 37 (1) The product alleged to have caused the harm was designed, manufactured,
38 packaged, labeled, sold, or represented in relevant and material respects in
39 accordance with the terms of an approval, license, or similar determination
40 of a government agency, where the approval, license, or similar
41 determination is relevant to the event or risk allegedly causing the harm.
42 (2) The product was in compliance with a statute of this State or the United
43 States, or a standard, rule, regulation, order, or other action of a government
44 agency pursuant to statutory authority, where the statute or agency action is
45 relevant to the event or risk allegedly causing the harm and the product was
46 in compliance at the time the product left the control of the manufacturer or
47 seller.
48 (3) The act or transaction forming the basis of the claim involves terms of
49 service, contract provisions, representations, or other practices authorized
50 by, or in compliance with, the rules, regulations, standards, or orders of, or a
51 statute administered by, a government agency.

1 Notwithstanding G.S. 38B-2, a possessor of land may be subject to liability for physical
2 injury or death to a trespasser in the following situations:

- 3 (1) Intentional harms. – A possessor may be subject to liability if the trespasser's
4 bodily injury or death resulted from the possessor's willful or wanton
5 conduct, or was intentionally caused by the possessor, except that a
6 possessor may use reasonable force to repel a trespasser who has entered the
7 land or a building with the intent to commit a crime.
- 8 (2) Harms to trespassing children caused by artificial condition. – A possessor
9 may be subject to liability for bodily injury or death to a child trespasser
10 resulting from an artificial condition on the land if all of the following apply:
- 11 a. The possessor knew or had reason to know that children were likely
12 to trespass at the location of the condition.
- 13 b. The condition is one the possessor knew or reasonably should have
14 known involved an unreasonable risk of bodily injury or death to
15 such children.
- 16 c. The injured child did not discover the condition or realize the risk
17 involved in the condition or in coming within the area made
18 dangerous by it.
- 19 d. The possessor failed to exercise reasonable care to eliminate the
20 danger or otherwise protect the injured child.

21 **"§ 38B-4. Definitions.**

22 The following definitions shall apply in this Chapter:

- 23 (1) Child trespasser. – A trespasser who is less than 14 years of age or who has
24 the level of mental development found in a person less than 14 years of age.
- 25 (2) Possessor. – A person in lawful possession of land, including an owner,
26 lessee, or other occupant, or a person acting on behalf of such a lawful
27 possessor of land.
- 28 (3) Trespasser. – A person who enters on the property of another without
29 permission and without an invitation, express or implied."

30 **PART V. MISCELLANEOUS PROVISIONS**

31 **SECTION 5.1.** Severability. – If the provisions of Section 2.3(a) of this act are
32 declared to be unconstitutional or otherwise invalid by final decision of a court of competent
33 jurisdiction, then Section 2.3(b) and Section 2.3(c) of this act are repealed, but the invalidity
34 does not affect other provisions or applications of this act that can be given effect without the
35 invalid provisions. If any other provision of this act or its application to any person or
36 circumstance is held invalid, the remainder of this act or the application of the provision to
37 other persons or circumstances is not affected.

38 **SECTION 5.2.** Sections 2.2, 2.3, 3.1, and 4.2 of this act become effective October
39 1, 2011, and apply to causes of actions arising on or after that date. The remainder of this act
40 becomes effective October 1, 2011, and applies to actions commenced on or after that date.