

KENDRA J. THIGPEN, Plaintiff-Appellant, v. CORAZON NGO, M.D., MARSHALL B. FRINK, M.D., NATIONAL EMERGENCY SERVICES, INC., EMERGENCY PHYSICIANS ASSOCIATION, INC., CP/NATIONAL, INC. a/k/a COMMUNITY PHYSICIANS/NATIONAL, INC., and ONSLOW COUNTY HOSPITAL AUTHORITY, Defendant-Appellees

No. COA00-410

(Filed 1 May 2001)

**Medical Malpractice--Rule 9(j) certification--Rule 56--dismissal improper--summary judgment improper**

The trial court erred in a medical malpractice action by dismissing plaintiff's initial complaint based on a lack of N.C.G.S. § 1A-1, Rule 9(j) certification and by granting summary judgment on plaintiff's amended complaint under N.C.G.S. § 1A-1, Rule 56.

Judge BIGGS dissenting.

Appeal by plaintiff from judgment entered 6 December 1999 by Judge Jay D. Hockenbury in Superior Court, Onslow County. Heard in the Court of Appeals 6 February 2001.

*Jimmy F. Gaylor for plaintiff-appellant.*

*Patterson, Dilthey, Clay & Bryson, L.L.P., by E.C. Bryson, Jr. and Christopher J. Derrenbacher, for defendant-appellees Marshall B. Frink, M.D., National Emergency Services, Inc., and CP/National, Inc., a/k/a Community Physicians/National, Inc.*

McGEE, Judge.

Plaintiff appeals the dismissal and entry of summary judgment in her medical malpractice suit as to defendants Marshall B. Frink, M.D. (Frink), National Emergency Services, Inc. (NES), and CP/National, Inc., a/k/a Community Physicians/National, Inc. (CP/N). For the reasons stated below and in companion case COA00-409, we reverse the trial court's dismissal and summary judgment.

Plaintiff alleges that defendants committed medical malpractice on 8 June 1996. On 8 June 1999, plaintiff secured an

extension of 120 days to the three-year statute of limitations for actions for medical malpractice pursuant to N.C. Gen. Stat. § 1A-1, Rule 9(j). On 6 October 1999, the final day of the extension, plaintiff filed a complaint which lacked the certification required by Rule 9(j). On 12 October 1999, before defendants had filed responsive pleadings, plaintiff amended her complaint as a matter of course pursuant to N.C. Gen. Stat. § 1A-1, Rule 15(a) to include the requisite Rule 9(j) certification.

In November 1999, defendants Frink, NES and CP/N moved for judgment on the pleadings and summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(c) and 56. On 6 December 1999, the trial court dismissed plaintiff's original complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 9(j) for lack of certification and granted summary judgment on plaintiff's amended complaint in favor of defendants Frink, NES and CP/N pursuant to Rule 56 insofar as the claims were barred by the statute of limitations for actions for medical malpractice. Plaintiff appeals the trial court's judgment.

Plaintiff assigns error to "[t]he court's granting of the defendants' motions under N.C.R.Civ.P. 12(b)(6)9(j)" [sic] and cites to an incorrect page in the record for the error, in violation of N.C.R. App. P. 10(c)(1). Defendants Frink, NES and CP/N made no Rule 12(b)(6) motion, and plaintiff assigns no error to the trial court's grant of summary judgment in favor of defendants Frink, NES and CP/N. In fact, plaintiff's assignments of error in the present case are identical to those in companion case COA00-409, plaintiff's appeal from a dismissal under Rules

9(j) and 12(b)(6). In our discretion we nonetheless consider the arguments of plaintiff pursuant to N.C.R. App. P. 2.

All other issues presented in the present case are considered and resolved in companion case COA00-409. The trial court erred in dismissing plaintiff's initial complaint and in granting summary judgment on plaintiff's amended complaint. Accordingly, we reverse the trial court's judgment.

Reversed.

Judge WYNN concurs.

Judge BIGGS dissents.

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BIGGS, Judge dissenting.

I respectfully dissent. Assuming I agreed with the majority in this case, that a plaintiff can avail himself of a Rule 15 amendment to cure defective medical malpractice complaints lacking 9(j) certification, the issue presented is whether, on the facts of this case, a denial of Rule 15 relief is an abuse of the trial court's discretion. I believe it is not.

The rules regarding statutory construction are well established.

[J]udicial construction is controlled by the intent of the General Assembly in enacting the statute. 'In seeking to discover this intent, the courts should consider the language of the statute, the spirit of the act, and what the act seeks to accomplish.' All statutes dealing with the same subject matter are to be construed *in pari materia* - i.e., in such a way as to give effect, if possible, to all provisions. Further, where one statute deals with certain subject matter in particular terms and another deals with the same subject matter in more general terms, the particular statute will be viewed as controlling in the

particular circumstances absent clear  
legislative intent to the contrary.

*State ex rel. Utilities Comm. v. Thornburg*, 84 N.C. App. 482, 485,  
353 S.E.2d 413, 415 (1987) (citations omitted).

We must first look to the language of the statute. The language used by the legislature in Rule 9(j) is explicit in its mandate that a complaint failing to comply with the directives of the applicable subsections "*shall be dismissed*." Rule 9(j) (emphasis added). The directive that is of critical concern in this case states that "[a]ny complaint alleging medical malpractice . . . 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." Rule 9(j) (emphasis added). It is clear that the legislature intended to treat 9(j) complaints differently than other special pleadings outlined in Rule 9. While the other subsections use the mandatory language "shall", none other goes so far as to declare that if a complaint fails to comply with the expressed provisions, it "shall be dismissed." Rule 9(j). I can not agree with the majority that the difference in the wording of 9(j) and other subsections involving special pleadings under Rule 9 is merely grammatical construction. However, nor am I prepared to say that the legislature intended to preclude Rule 15 relief under all circumstances where there is a defective 9(j) complaint. Thus we look to additional evidence of legislative intent for further guidance.

As argued in the Appellee's brief, Subsection (j) of Rule 9 was added by the North Carolina legislature in 1995 pursuant to

Chapter 309, 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* (the Act)." The Act of June 20, 1995, ch. 309, 1995 N.C. Sess. Laws 611 (emphasis added). One of the stated purposes of the Act was to attempt to "weed out lawsuits which are not meritorious *before they are filed.*" Minutes of Hearing on April 19, 1995 before the House Select Committee in Tort Reform, 1995 Session (emphasis added).<sup>1</sup>

Thus, in considering the plain language of 9(j), the name of the Act, and its stated purpose, what appears to be the clear intent of the legislature is that the review by an expert occur *prior* to the filing of the lawsuit. That being the case, to read Rule 9(j) and Rule 15 in *pari materia*, it must be clear that the review by an expert occurred *before* the filing of the original complaint to allow Rule 15 relief to cure a complaint which lacks 9(j) certification. To allow a Rule 15 amendment to cure a 9(j) complaint where the review by the expert occurred after the filing of the lawsuit completely abrogates the express language of the statute and intent of the legislature.

In addition, the rules of statutory construction as quoted above provide that, if any conflict or ambiguity results from the comparison of two rules addressing the same subject, the statute

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<sup>1</sup>Minutes not cited as authority, but provide guidance for legislative intent.

that deals with the subject matter with particularity will be viewed as controlling, absent clear legislative intent otherwise. *Thornburg*, 84 N.C. App. at 485, 353 S.E.2d at 415. Rule 9(j) specifically addresses complaints alleging medical malpractice, while Rule 15 is a general provision allowing for amendment to any variety of pleadings, where justice so requires. Accordingly, the specifically tailored mandates of Rule 9(j) must prevail.

Applying these principles to the case *sub judice*, the trial court did not abuse its discretion in dismissing plaintiff's complaint. On 8 June 1999, the very day that the three year statute of limitations was to expire, plaintiff filed a motion to extend the statute of limitations for alleged negligence that occurred 8 June 1996. The motion was allowed and plaintiff's deadline was extended to 6 October 1999 pursuant to 9(j) which states that a trial 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. . . ." Rule 9(j). Thereafter on 6 October 1999, the final date of the extended deadline, plaintiff filed her original complaint without the certification required by Rule 9(j). Plaintiff then filed an amended complaint on 12 October 1999 which stated in Paragraph 19 "[t]hat the Plaintiff's 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. . . ."

Plaintiff did not allege that the review occurred before the filing of the original complaint on 6 October, nor did she come forward with an affidavit as did the plaintiff in *Brisson v. Kathy*

A. Santoriello, M.D., P.A., 315 N.C. 589, 528 S.E.2d 568 (2000), which stated that the medical care had been reviewed prior to the filing of the original complaint. *Brisson*, 351 N.C. at 592, 528 S.E.2d at 569-70. The record is devoid of any evidence that plaintiff obtained such review prior to filing the lawsuit. The plaintiff in this case appears to be doing precisely what the legislature sought to prevent - the filing of a last minute medical malpractice suit without review by a qualified expert willing to testify in support of plaintiff's claim of negligence. While questions remain as to whether Rule 15 relief may be used to cure a defective complaint, there appears to be no disagreement over the legislature's intent to prevent the filing of frivolous medical malpractice lawsuits. See *Keith v. Northern Hosp. Dist. of Surry County*, 129 N.C. App. 402, 404-405, 499 S.E.2d 200, 202, *disc. review denied*, 348 N.C. 693, 511 S.E.2d 646 (1998); *Brisson*, 315 N.C. 589, 528 S.E.2d 568 (2000) (court declined to address relationship of Rule 9(j) and Rule 15). The plaintiff in this case is not entitled to further consideration. The trial court properly dismissed her complaint in that it did not comply with Rule 9(j).

While I am not prepared to accept the proposition that Rule 9(j) precludes Rule 15 relief as a matter of law; nor am I prepared to accept the majority's position in the present case that a plaintiff, pursuant to Rule 15, is entitled as a matter of course, to amend a defective 9(j) complaint. Absent legislative intervention to clarify whether it intended to preclude Rule 15 relief in all medical malpractice cases where there is a defective 9(j) complaint, I believe the decision of whether a plaintiff

should be granted Rule 15 relief to cure a defective 9(j) complaint should be decided on a case by case basis. Further, I will not second guess the trial court in its exercise of discretion where there is a reasonable basis for its decision.

The trial court did not abuse its discretion in dismissing plaintiff's original complaint for lack of 9(j) certification. Nor did it err in dismissing the plaintiff's amended complaint on the basis that it was filed outside the statute of limitations, and did not relate back to the original filing date pursuant to Rule 15(c).

I would affirm the trial court in this case.