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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-71

Filed: 18 December 2018

Mecklenburg County, No. 08 CVS 13045

JOHN KEELY HOWARD and wife, CYNTHIA HICKLIN HAMMOND, Plaintiffs,

v.

ORTHOCAROLINA, P.A.; ALFRED L. RHYNE, III, M.D.; FAISAL A. SIDDIQUI, M.D.; THEODORE A. BELANGER, M.D., Defendants.

Appeal by Plaintiffs from Order entered 13 May 2014 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 6 September 2018.

McKaig & McKaig, P.A., by Heather McKaig, for Plaintiffs-Appellants.

CARRUTHERS & ROTH, P.A., by Norman F. Klick, Jr. and Brandon K. Jones, for Defendants-Appellees.

INMAN, Judge.

Plaintiffs-Appellants John Keely Howard (“Howard”) and Cynthia Hicklin Hammond (“Hammond,” together with Howard as “Plaintiffs”) appeal the dismissal of their medical malpractice action for their failure to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure and on statute of limitations grounds.

Plaintiffs contend the trial court erred in declaring void a 120-day extension of the statute of limitations after, within that time period, Plaintiffs: (1) obtained the extension pursuant to Rule 9(j) under one file number; (2) filed a complaint without a 9(j) certification asserting *res ipsa loquitur* and common-law negligence claims arising out of medical care provided to Howard under a different file number; (3) voluntarily dismissed that initial complaint; and (4) filed a new complaint under the 9(j) extension's file number alleging the same causes of action with a 9(j) certification. After careful review of the record and governing law, we affirm the order of the trial court.

I. FACTUAL AND PROCEDURAL HISTORY

The record below discloses the following allegations:

In early 2000, Howard sought treatment from an orthopedist in Charlotte, North Carolina, for neck pain and arm numbness following an automobile accident. The orthopedist ordered an MRI and, based on the results, gave Howard a trigger point injection to treat his symptoms. Howard sought no further treatment until the pain and numbness returned five years later. The same orthopedist, now with Defendant OrthoCarolina, P.A. ("OrthoCarolina"), ordered an x-ray and a second MRI before transferring Howard to Defendant Dr. Alfred Rhyne ("Dr. Rhyne"), a spine specialist and surgeon at OrthoCarolina.

Dr. Rhyne reviewed of the 2000 MRI and, in a meeting with Howard in May of 2005, recommend spinal surgery called a laminoforaminotomy. In arriving at that recommendation, Dr. Rhyne either did not consider or disregarded the more recent 2005 MRI, and he reached different conclusions from his review of the 2000 MRI than those made by the radiologist. Howard agreed to undergo the surgery at Dr. Rhyne's recommendation on the understanding that an electronic monitoring device would be tracking the status and health of his spinal cord throughout the operation.

Howard underwent the laminoforaminotomy on 14 June 2005, with Dr. Rhyne and Defendant Dr. Faisal Siddiqui ("Dr. Siddiqui") performing the operation. At some point during the surgery, the technician observing the spinal cord monitoring device alerted Dr. Rhyne that he was no longer receiving signals from Howard's legs and arms; Dr. Rhyne telephoned another doctor for assistance given the loss of signal. At some point, Dr. Rhyne turned off the monitoring device completely and summoned Defendant Dr. Thomas Belanger ("Dr. Belanger," together with OrthoCarolina and Drs. Rhyne and Siddiqui as "Defendants") to the operating room to mitigate damage to Howard's spinal cord. The doctors continued and completed the surgery. When Howard awoke, he could not move his legs, had limited movement in his arms, could not smile, and had difficulty opening his eyes. Later that day, Dr. Rhyne disclosed to Hammond that he had struck her husband's spinal cord during the surgery with a

“scope” and that Howard was now a “C-6 quadriplegic” in danger of losing his life. Howard was eventually discharged from the hospital later that month.

In 2006 and 2008, Plaintiffs requested medical documents from OrthoCarolina and the hospital where Howard received treatment. The records appeared incomplete and irregular, evincing numerous deletions, additions, omissions, and other alterations. Believing that they were unable to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure without more, Plaintiffs filed a petition to depose Dr. Rhyne about Howard’s surgery and spinal cord injury on 1 May 2008. That petition was denied on 6 June 2008. Five days later, on 12 June 2008, Plaintiffs filed orders: (1) extending the time to file a complaint in file number 08-CVS-13044, pursuant to Rule 3 of the North Carolina Rules of Civil Procedure; and (2) extending the time to file a medical malpractice complaint in file number 08-CVS-13045, pursuant to Rule 9(j).

Pursuant to the Rule 3 extension, Plaintiffs filed their first complaint against Dr. Rhyne, OrthoCarolina, Presbyterian Orthopaedic Hospital, LLC, and Presbyterian Hospital on 2 July 2008 in file number 08-CVS-13044 (the “First Complaint”). The First Complaint did not contain a Rule 9(j) certification and expressly alleged that “[a] Rule 9(j) certification is not required.” But the First Complaint also recognized that “[t]he claims for relief contained in this Complaint arise from and relate to a surgical procedure and medical activities and records

arising from and relating to the procedure performed by [Dr.] Rhyne and others on Howard . . . on June 14, 2005.” The First Complaint included claims for *res ipsa loquitur* and negligence, asserting Dr. Rhyne breached his legal duty to Howard “by failing to exercise proper care and failing to use ordinary care and skill in the performance of his legal duty to Howard by bumping the microscope into Howard’s spinal cord causing the spinal injury,” as well as by using the 2000 MRI instead of the 2005 MRI in recommending the surgery and by turning off the spinal monitoring device during the operation. The First Complaint also alleged battery, corporate negligence, civil conspiracy, obstruction of justice, constructive fraud, fraudulent concealment, fraud, negligent infliction of emotional distress, intentional infliction of emotional distress, and loss of consortium.

Dr. Rhyne and OrthoCarolina filed a motion to dismiss the First Complaint on 14 August 2008, asserting that Plaintiffs’ allegations sounded in medical malpractice and the case should be dismissed for failure to obtain a Rule 9(j) certification. Rather than oppose the motion to dismiss, Plaintiffs on 22 August 2008 filed a voluntary dismissal of the First Complaint without prejudice.

Less than two months later, on 9 October 2008, Plaintiffs filed their second complaint in file number 08-CVS-13045 (the “Second Complaint”) pursuant to the Rule 9(j) extension. The Second Complaint re-alleged all of the causes of action

contained in the First Complaint, except for battery, added fourteen new defendants, and contained a Rule 9(j) certification.

Defendants filed a joint answer and motion to dismiss on 17 December 2008, asserting, among other things, that the Second Complaint violated Rule 9(j) and was filed outside the statute of limitations. Dr. Rhyne also served Plaintiffs with interrogatories concerning their 9(j) certification. In response, Plaintiffs disclosed during discovery that they had obtained the certification on 7 October 2008.

On 15 October 2009, Superior Court Judge Richard D. Boner entered an order denying Defendants' motion to dismiss the Second Complaint's medical malpractice claims on Rule 9(j) grounds. Defendants sought to appeal that order immediately following certification from Judge Boner pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. This Court, in an unpublished opinion, dismissed that appeal as interlocutory. *Howard v. OrthoCarolina, P.A.*, No. COA10-108 (N.C. Ct. App. Dec. 7, 2010).

Five years after the filing of the Second Complaint, four years after the denial of Defendants' motion to dismiss, and three years after this Court dismissed Defendants' appeal, Plaintiffs' case was still pending. On 29 November 2013, Defendants filed a motion to reconsider Judge Boner's denial of their motion to dismiss, arguing that numerous decisions by North Carolina's appellate courts had addressed issues surrounding the application of Rule 9(j) since that initial ruling.

Following a hearing on the motion, Judge Boner entered an order on 13 May 2014 granting in part and denying in part Defendants’ motion to dismiss (the “Dismissal Order”). Judge Boner concluded in his order the following: (1) the First Complaint sounded in medical malpractice so that a 9(j) certification was required; (2) because Plaintiffs had secured an extension under 9(j) to obtain the necessary certification, but then filed a medical malpractice action asserting that no 9(j) certification was necessary, their extension violated the Rule and was void as to the Second Complaint. As a result, Judge Boner dismissed Plaintiffs’ claims for negligence, *res ipsa loquitur*, negligent infliction of emotional distress, and loss of consortium. Judge Boner once more certified his decision for immediate appeal pursuant to Rule 54(b), and this Court again dismissed the subsequent appeal as interlocutory. *Howard v. OrthoCarolina, P.A.*, No. COA14-1075 (N.C. Ct. App. April 6, 2015).

Plaintiffs proceeded to trial on their remaining claims for fraud, civil conspiracy, obstruction of justice, and intentional infliction of emotional distress. When the case came on for trial, however, Plaintiffs took a voluntary dismissal of those claims in open court and filed a written voluntary dismissal on 1 August 2017. Plaintiffs filed timely notice of appeal.

II. ANALYSIS

A. Standard of Review

We review an order determining a party's compliance with Rule 9(j) *de novo*. *Fintchre v. Duke Univ.*, 241 N.C. App. 232, 240, 773 S.E.2d 318, 323 (2015). This standard of review applies both to whether the complaint sounds in medical malpractice such that a 9(j) certification is required, *Allen v. Cnty. of Granville*, 203 N.C. App. 365, 366, 691 S.E.2d 124, 126 (2010), and whether the complaint satisfies the Rule's pleading requirements, *McGuire v. Riedle*, 190 N.C. App. 785, 787, 661 S.E.2d 754, 757 (2008). Dismissal based on statute of limitations grounds is likewise subject to *de novo* review. *Goetz v. N.C. Dep't of Health & Human Servs.*, 203 N.C. App. 421, 425, 692 S.E.2d 395, 398 (2010).

B. The First Complaint Sounded in Medical Malpractice

Plaintiffs appeal the Dismissal Order by arguing that the First Complaint did not allege any causes of action for medical malpractice and, as a result, was unrelated to the acquisition of the 9(j) extension for the Second Complaint. Without such a connection, Plaintiffs reason, the trial court's determinations that the 9(j) extension was void and the filing of the Second Complaint violated the statute of limitations fail. Reviewing the relevant law, we agree with the trial court and overrule Plaintiffs' argument.

When Plaintiffs filed their First Complaint, Rule 9(j) applied to "[a]ny complaint alleging medical malpractice by a healthcare provider as defined in [N.C. Gen. Stat. §] 90-21.11 in failing to comply with the applicable standard of care under

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[N.C. Gen. Stat. §] 90-21.12.” N.C. Gen. Stat. § 1A-1, Rule 9(j) (2009). Those statutes, by the language then in effect, defined “medical malpractice action” as a lawsuit “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.” N.C. Gen. Stat. § 90-21.11 (2009); *see also* N.C. Gen. Stat. § 90-21.12 (2009) (employing identical language).¹ “[This Court] has defined ‘professional services’ as an act or service ‘arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor [or] skill involved is predominantly mental or intellectual, rather than physical or manual.’ ” *Goodman v. Living Centers-Southeast, Inc.*, 234 N.C. App. 330, 332, 759 S.E.2d 676, 678 (2014) (quoting *Lewis v. Setty*, 130 N.C. App. 606, 608, 503 S.E.2d 673, 674 (1998)). Thus, a party may bring an action against a healthcare provider and avoid application of Rule 9(j) if the complaint alleges ordinary negligence falling outside these definitional statutes. *See, e.g., Setty*, 130 N.C. App. 606, 503 S.E.2d 673 (1998) (holding that negligently moving a patient from an examination table to a wheelchair did not sound in medical malpractice for purposes of Rule 9(j)).

¹ These statutes have been amended since Plaintiffs filed their First Complaint; however, the current iterations of both statutes include this language or incorporate it by reference. N.C. Gen. Stat. §§ 90-21.11(2)(a) and 90-21.12(a) (2017).

Plaintiffs' First Complaint plainly alleges medical malpractice under our case law.² It asserts injuries “aris[ing] from and relat[ing] to a surgical procedure and medical activities and records relating to the [spinal surgery] performed by [Dr.] Rhyne and others.” The First Complaint specifically alleges Dr. Rhyne was negligent in: (1) “[r]ecommending spinal surgery for Howard based upon an MRI which was five (5) years old, and overlooking or disregarding a[second, more recent] MRI[;]” (2) “[b]umping the microscope into Howard’s spinal cord causing the spinal injury;” and (3) “[o]rdering that the Monitoring Device be turned off during the Surgical Procedure[.]” At a minimum, Dr. Rhyne’s decision to recommend spinal surgery—a laminoforaminotomy—based on an older MRI rather than a more recent one, and his later decision to turn off the monitoring device during that surgery, “involv[ed] specialized knowledge . . . and . . . is predominantly mental or intellectual.” *Setty*, 130 N.C. App. at 608, 503 S.E.2d at 674.

The First Complaint also alleges that Dr. Rhyne negligently breached “a direct legal duty to Howard to exercise due care and use ordinary care and skill in

² Plaintiffs’ trial counsel conceded before the trial court that: (1) surgery falls within the meaning of “professional services” contained in Section 90-21.11; and (2) under revisions to Section 90-21.11 in 2011, the First Complaint would have constituted a medical malpractice action requiring a Rule 9(j) certification insofar as it alleged negligent treatment or care by Dr. Rhyne in the course of the surgery. Plaintiffs argued from this concession that the First Complaint was not a medical malpractice action under the unrevised versions of the statutes governing at the time the First Complaint was filed. But those revisions expanded the definition of medical malpractice to include certain civil actions against hospitals, nursing homes, and adult care homes, while leaving substantially unchanged the definition pertinent to “furnishing or failure to furnish professional services in the performance of . . . health care by a health care provider.” *Compare* N.C. Gen. Stat. §§ 90-21.11 (2009), *with* 90-21.11(2) (2013).

performing the Surgical Procedure” and in reviewing the various MRIs. Although Plaintiffs alleged these breaches were negligent based on the doctrine of *res ipsa loquitur*, and therefore not subject to Rule 9(j), that allegation squarely conflicts with long established authority. *See Setty*, 130 N.C. App. at 608, 503 S.E.2d at 674 (holding that a negligence claim based on a procedure that requires “specialized knowledge, labor, or skill” is necessarily beyond the scope of ordinary negligence); *see also Bowlin v. Duke Univ.*, 108 N.C. App. 145, 149, 423 S.E.2d 320, 323 (1992) (holding *res ipsa loquitur* did not apply because “injury to the sciatic nerve during a bone marrow harvest procedure is peculiarly the subject of expert opinion, and a layman would have no basis for concluding that defendant was negligent in extracting the marrow”); *Smith v. Axelbank*, 222 N.C. App. 555, 559, 730 S.E.2d 840, 843 (2012) (holding *res ipsa loquitur* did not apply because expert opinion was required to show whether a doctor negligently prescribed a particular drug and whether the drug caused the injuries alleged). Following decades of precedent, we hold the trial court properly concluded that the First Complaint constituted a medical malpractice action.³

C. Plaintiffs’ Rule 9(j) Extension

³ Plaintiffs note throughout their briefs that this Court, in dismissing the first interlocutory appeal filed in this action, described the First Complaint as alleging “non-medical malpractice” claims. We are not bound by that characterization, as it did not become the law of the case. *See Goetz*, 203 N.C. App. at 443, 692 S.E.2d at 403 (“Since the other appeal to this Court was interlocutory [and dismissed on that ground], there were no rulings of law which could become the law of the case.”).

Having determined that Plaintiffs' First Complaint alleged claims for medical malpractice, we turn to whether the trial court properly determined that the filing of that complaint rendered void the 9(j) extension obtained under the Second Complaint's file number. Defendant's filing of the First Complaint, coupled with the assertion therein that no 9(j) certification was required, discloses that the 9(j) extension was not obtained for the reasons represented in their application for the extension under Rule 9(j); as a result, we affirm the trial court's order.

"Rule 9(j) serves as a gatekeeper, enacted by the legislature, to prevent frivolous malpractice claims by requiring expert review *before* filing of the action." *Moore v. Proper*, 366 N.C. 25, 31, 726 S.E.2d 812, 817 (2012) (citing *Thigpen v. Ngo*, 355 N.C. 198, 203-04, 558 S.E.2d 162, 166 (2002)). In light of that purpose, the Supreme Court of North Carolina has made it clear that "[a]llowing a plaintiff to file a medical malpractice complaint and to then wait until after the filing to have the allegations reviewed by an expert would pervert the purpose of Rule 9(j)." *Thigpen*, 355 N.C. at 204, 558 S.E.2d at 166-67. Earlier this year, our Supreme Court "again emphasize[d] that in a medical malpractice action the expert review required by Rule 9(j) must occur before the filing of the original complaint." *Vaughan v. Mashburn*, ___ N.C. ___, ___, 817 S.E.2d 370, 379 (2018). This straightforward temporal necessity applies in virtually every context. *See Vaughan*, ___ N.C. at ___, 817 S.E.2d at 378-79 (holding that 9(j) expert review must occur before the filing of the original

complaint for an amended complaint to relate back under Rule 15(c)); *Boyd v. Rekuc*, 246 N.C. App. 227, 234, 782 S.E.2d 916, 920 (2016) (observing that, under *Brown v. Kindred Nursing Centers East, L.L.C.*, 364 N.C. 76, 82-83, 692 S.E.2d 87, 91 (2010), a refiled complaint following an earlier voluntary dismissal will relate back under Rule 41 where “(1) the refiled complaint is filed within one year of the dismissal of the first complaint *and* (2) the refiled complaint states that the Rule 9(j) expert review took place *prior to* the filing of the *original* action” (emphasis in original)).

As for the 120-day extension of the statute of limitations available under 9(j) “to file a complaint in a medical malpractice action in order to comply with th[at] Rule,” N.C. Gen. Stat. § 1A-1, Rule 9(j), it exists “to allow additional time to find an expert to review the medical records so that they may be reviewed *prior to filing the complaint* to meet the standard of Rule 9(j).” *Alston v. Hueske*, 244 N.C. App. 546, 551, 781 S.E.2d 305, 309 (2016) (citing *Brown*, 364 N.C. at 80, 692 S.E.2d at 90). As a result, a party cannot use the 9(j) extension to: (1) file a medical malpractice complaint that does not comply with Rule 9(j); (2) voluntarily dismiss that complaint; (3) secure expert review under 9(j) after that dismissal; and (4) refile the same causes of action with the Rule 9(j) certification. *Cf. Brown*, 364 N.C. at 80, 692 S.E.2d at 90 (“[P]laintiff’s sole reason for requesting an extension of the statute of limitations is inconsistent with the General Assembly’s purpose behind enacting Rule 9(j). Here, plaintiff did not move for a 120-day extension to locate a certifying expert before filing

his complaint. Rather, plaintiff alleged malpractice first and then sought to secure a certifying expert. This is the exact course of conduct the legislature sought to avoid in enacting Rule 9(j).”).

Here, Plaintiffs first secured Rule 9(j) and Rule 3 extensions and then filed the First Complaint alleging both medical malpractice and ordinary common-law causes of action. Despite representing that the 9(j) extension was necessary in order to secure “additional time to have the relevant medical records reviewed by a physician in order to comply with [Rule] 9(j),” Plaintiffs’ First Complaint alleged medical negligence with the express assertion that “[a] Rule 9(j) certification is not required.” When Defendants challenged the First Complaint by a motion to dismiss for failure to comply with Rule 9(j), Plaintiffs filed a voluntary dismissal without prejudice, then procured 9(j) review, and then refiled those claims in the Second Complaint while naming additional defendants. Following the principles explained in prior decisions, this procedural shell game was precluded by Rule 9(j) and its underlying purposes. A plaintiff cannot file a medical malpractice complaint without a 9(j) certification on the basis that no certification is required and, when challenged on that omission, seek subsequent 9(j) review through a 120-day extension as a curative measure. *Cf. Brown*, 364 N.C. at 80, 692 S.E.2d at 90. Mischaracterizing a medical malpractice case as one sounding in ordinary negligence does not change the rule of law.

In their sole argument concerning Judge Boner’s authority to consider the First Complaint in dismissing the Second Complaint, Plaintiffs assert that voiding the Rule 9(j) extension was improper because the First Complaint was filed under a different file number and action that was extinguished by voluntary dismissal. Plaintiffs, however, imply in their briefs that the Rule 3 extension and subsequent Rule 41 dismissal of the First Complaint served to extend the statute of limitations pertinent to the common law claims realleged in the Second Complaint. Plaintiffs cannot have it both ways—either the claims in the Second Complaint can relate back to the First Complaint across file numbers under the Rules of Civil Procedure or they cannot. Because Plaintiffs alleged medical malpractice and common-law claims in the First Complaint that were dismissed and realleged, albeit with greater detail, in the Second Complaint,⁴ we reject Plaintiffs’ argument that the Rule 3 extension and Rule 41 dismissal of the First Complaint could be considered and applied across file numbers regarding the common law claims, but that the Rule 9(j) extension and medical malpractice claims could not. We hold that the trial court properly

⁴ For example, the First Complaint alleged that Dr. Rhyne was generally negligent in recommending the surgery based on the 2000 MRI, bumping into a microscope causing injury during the surgery, and in turning off the monitoring device. The Second Complaint alleges, in pertinent part, that Dr. Rhyne was negligent in “performing the laminoforaminotomy; . . . relying on the results of Howard’s 2000 MRI in ordering the laminoforaminotomy in June, 2005; . . . injuring Howard’s spinal cord during the laminoforaminotomy; . . . [and] turning off the spinal monitoring device during the surgery.”

considered the 9(j) extension void and dismissed the medical malpractice claims in the Second Complaint under Rule 9(j) and the applicable statute of limitations.

D. Equitable Estoppel

In their final argument, Plaintiffs posit that the Defendants should be equitably estopped from asserting the Second Complaint violated Rule 9(j) and the statute of limitations because Defendants' frustrated and delayed Plaintiffs' expert review by tampering with relevant medical records. This argument is unavailing, however, because despite any spoliation or tampering with medical records, Plaintiffs actually obtained Rule 9(j) review of the relevant medical records needed to file the Second Complaint within the time allowed by the Rule 9(j) extension—albeit *after* filing and subsequently dismissing the First Complaint. Thus, Plaintiffs cannot demonstrate prejudice. *See, e.g., Blizzard Bldg. Supply, Inc. v. Smith*, 77 N.C. App. 594, 595, 335 S.E.2d 762, 763 (1985) (noting that equitable estoppel of the statute of limitations requires showing the plaintiff “relied upon the conduct of the party sought to be estopped to his prejudice” (citation omitted)).

III. CONCLUSION

For the reasons set forth above, we affirm the trial court's order dismissing Plaintiffs' complaint under Rule 9(j) and the applicable statute of limitations.

AFFIRMED.

Judges TYSON and BERGER concur.

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Report per Rule 30(e).