

**RULE 9(j) OF THE RULES OF CIVIL PROCEDURE:
SPECIAL PLEADING IN MEDICAL MALPRACTICE CLAIMS**

Ann M. Anderson, School of Government (March 2014)

- I. Introduction to Rule 9(j) 1
 - A. Text of Rule 9(j) 1
 - B. Challenges to Rule 9(j) Compliance: “Facial” and Factual; Interrogatories Allowed 2
 - C. Trial Court Review and Findings of Fact 3
- II. Medical Malpractice Defined..... 3
 - A. Statutory Definitions..... 3
 - B. “Medical Malpractice” vs. Ordinary Negligence 4
- III. Res Ipsa Loquitur 6
- IV. Timing Issues 8
 - A. The 120-day Extension 8
 - B. Attempts to “Correct” a Missing Rule 9(j) Certification 9
 - C. Rule 9(j)(2) Motion and Statute of Limitations 11
- V. Specific Certification Requirements 11
 - A. “Review.” 11
 - B. “Willing to Testify.” 12
 - C. “Reasonably Expected to Qualify.” 12
- VI. Constitutionality 16
- VII. Claims Filed in Federal Court 16
- Appendix: North Carolina Rule of Evidence 702..... 17

I. Introduction to Rule 9(j). In 1995, the North Carolina General Assembly created Rule 9(j) of the North Carolina Rules of Civil Procedure to require medical malpractice complaints to include an assertion that the “medical care” was reviewed by a qualified professional willing to testify that the acts or omissions fell below the standard of care. Closely tied to this requirement, North Carolina Rule of Evidence 702 was also amended to include various qualifications for experts testifying in North Carolina courts. The pre-filing certification requirement of Rule 9(j) was designed to prevent frivolous medical malpractice litigation. Since its effective date of October 1, 1996, however, it has been the source of over 100 published and unpublished opinions attempting to interpret its undefined provisions, reconcile it with other civil procedure rules, and address other questions of applicability. This paper summarizes the key decisions. In 2011, as part of a larger tort reform effort, the newly-reconstituted General Assembly made Rule 9(j) even more exacting, now requiring prior review of both the “medical care” and “all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry.” S.L. 2011-400. This amendment applies to cases commenced on or after October 1, 2011. No appellate cases have been issued related to the amended language.

A. Text of Rule 9(j). (The underlined portions reflect amendments made in S.L. 2011-400.)

[9](j) Medical malpractice. – Any complaint alleging medical malpractice by a health care provider pursuant to G.S. 90-21.11(2)a. 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 and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence¹ and who is willing to testify that the medical care did not comply with the applicable standard of care;

(2) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; 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.

- B. Challenges to Rule 9(j) Compliance: “Facial” and Factual; Interrogatories Allowed.** Simply put, if a claim meets the statutory definition of “medical malpractice,” the claimant must comply with Rule 9(j). Failure to do so subjects the claim to dismissal. The court does not have discretion to excuse a failure to include the required certification. *Thigpen v. Ngo*, 355 N.C. 198, 202 (2002) (“Such complaints will receive strict consideration by the trial judge. Failure to include the certification necessarily leads to dismissal.”) But the certification requirement is not merely a “facial” requirement: the statement must also be true—a factual requirement. It is “well established” that even when a complaint complies on its face with Rule 9(j), if “discovery subsequently establishes that the statement is not supported by the facts, then dismissal is likewise appropriate.” *Morris v. Southeastern Orthopedics Sports Med. & Shoulder Ctr.*, 199 N.C. App. 425, 437 (2009) (quotation omitted); *Moore v. Proper*, 366 N.C. 25, 31-32 (2012). Rule 9(j) provides a specific discovery mechanism by which a defendant may determine the factual basis for a Rule 9(j) certification:

¹ The full text of Rule of Evidence 702 is in Appendix A.

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.

Defendants have, for example, successfully challenged Rule 9(j) certifications after discovery revealed that the witness's review did not occur until *after* the case was filed, *Winebarger v. Peterson*, 182 N.C. App. 510, 514 (2007); the witness never expressed willingness to testify prior to filing, *McGuire v. Riedle*, 190 N.C. App. 785, 786 (2008); and that there was no reasonable basis in fact to expect the witness to qualify under Rule 702, *Robinson v. Entwistle*, 132 N.C. App. 519, 523 (1999). Such factual challenges are addressed further in section V below.

- C. Trial Court Review and Findings of Fact.** Whether a party has complied with Rule 9(j) is a question of law, and the appellate courts review the matter de novo. *McKoy v. Beasley*, 213 N.C. App. 258, 262 (2011); *Morris*, 199 N.C. App. at 437; *Phillips v. A Triangle Women's Health Clinic, Inc.*, 155 N.C. App. 372, 376 (2002). In 2012, however, the Court of Appeals stated that,

When a trial court determines a Rule 9(j) certification is not supported by the facts, “the court must make written findings of fact to allow a reviewing appellate court to determine whether those findings are supported by competent evidence, whether the conclusions of law are supported by those findings, and, in turn, whether those conclusions support the trial court’s ultimate determination.”

Estate of Wooden v. Hillcrest Convalescent Center, ___ N.C. App. ___, 731 S.E.2d 500, 506 (2012) (quoting *Moore*, 366 N.C. at 32, in which the Supreme Court stated the rule in the narrower context of determining that a plaintiff was unreasonable in expecting an expert to qualify under Rule 702). Based on the language of *Wooden*, the trial court should include written findings of fact when ruling that a Rule 9(j) certification is not supported by the facts in the record.

II. Medical Malpractice Defined.

- A. Statutory Definitions.** The underlined portions of these definitions reflect amendments made in S.L. 2011-400, which apply to causes of action arising on or after October 1, 2011.

1. **“Medical malpractice action.”** G.S. 90-21.11(2) defines a “medical malpractice action” as “[e]ither of the following”:

a. A civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider.

b. A civil action against a hospital, a nursing home 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.

2. “Health care provider.” G.S. 90-21.11(1) defines “health care provider” to include, “without limitation,” any of the following:

a. A 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, or psychology.

b. 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.

c. Any other person who is legally responsible for the negligence of a person described by sub-subdivision a. of this subdivision, 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.

d. Any other person acting at the direction or under the supervision of a person described by sub-subdivision a. of this subdivision, 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.

B. “Medical Malpractice” vs. Ordinary Negligence. A number of cases have focused on whether the complaint alleges medical malpractice or ordinary negligence. Even where a defendant is a “health care provider,” if the claim arises out of ordinary negligence, no Rule 9(j) certification is required. Note, however, that the 2011 amendments broadened the definition of “medical malpractice action” to include breaches of “administrative or corporate duties to the patient” (such as negligent credentialing and negligent monitoring or supervision) that arise from the same set of facts as a traditional (“professional services”) medical malpractice claim. G.S. 90-21.11(2)b. Prior to this amendment, such corporate negligence claims typically have been treated as ordinary negligence claims. See, e.g., *Estate of Ray v. Forgy*, ___ N.C. App. ___, 744 S.E.2d 468, 471-72 (2013) (hospital’s failure to monitor and oversee credentialing of treating physician treated as ordinary negligence); *Estate of Waters v. Jarman*, 144 N.C. App. 98, 103 (2001) (common law corporate negligence treated as ordinary negligence).

For purposes of defining “medical malpractice action”, the term “professional services,” means “an act or service...involving specialized knowledge, labor, or skill[.]” *Horsley v. Halifax Regional Med. Ctr.*, ___ N.C. App.

___, 725 S.E.2d 420, 421 (2012) (quotation omitted). These services “aris[e] 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.” Taylor v. Vencor, 136 N.C. App. 528, 530 (2000) (quotation omitted). In determining the nature of a claim, “the North Carolina Supreme Court has held that pleadings have a binding effect as to the underlying theory of plaintiff’s negligence claim.” Sturgill v. Ashe Memorial Hospital, Inc., 186 N.C. App. 624, 628 (2007) (internal quotation omitted); Allen v. County of Granville, 203 N.C. App. 365, 367 (2010). The tables below briefly summarize the cases that have analyzed the question of “professional services” in the context of Rule 9(j) compliance. All were decided prior to applicability of the 2011 amendments to G.S. 90-21.11(2).

Medical malpractice (Rule 9(j) certification required)	
Case	Alleged negligence
Sturgill v. Ashe Memorial Hospital, Inc., 186 N.C. App. 624 (2007).	Failure to provide restraints to patient with dementia after assessing him as a fall risk, resulting in a fall that caused head injuries and shoulder fracture (where decision to provide restraints required medical order by physician or physician’s assistant)
Smith v. Serro, 185 N.C. App. 524 (2007)	Approving patient participation in a bowling outing during rehabilitative treatment
Deal v. Frye Regional Medical Center, 202 N.C. App. 584 (2010) (unpub’d).	Failure to conduct a “Fall Risk Screen Assessment” (which included various medical factors) on a patient who subsequently fell and fractured his hip
Moore v. Pitt County Memorial Hosp., 139 F.Supp.2d 712 (E.D.N.C. 2001)	Blood transfusion using Hepatitis C infected blood
Littlepaige v. US, 528 Fed Appx 289 (4th Cir. 2013) (unpub’d)	Failure to prevent fall from hospital bed (and alleged failure to treat injury) after patient was placed on “falls precaution”
Wilkes v. Lee County Nursing and Rehabilitation Center, LLC, 2010 WL 703111 (M.D.N.C 2010) (unpub’d)	Failure to provide and implement a care plan for a patient who threatened to leave the Center and who was later injured after climbing out of her room window.

Ordinary negligence (No Rule 9(j) certification required) ²	
Case	Alleged negligence
Horsley v. Halifax Regional Med. Ctr., 725 S.E.2d 420 (2012).	Failure to provide cane or other support to psychiatric patient in the hallway who fell and was injured (where no allegation that providing a cane required an order by a medical provider)
Allen v. County of Granville, 203 N.C. App. 365 (2010).	Release of patient with history of seizures from the emergency room and discharge from the hospital without ensuring he had transportation home, after which patient was found deceased in a ravine.
Acosta v. Byrum, 180 N.C. App. 562 (2006).	Physician's provision of medical access code to a staff member, after which the staff member accessed and shared private medical information of the plaintiff.
Taylor v. Vencor, 136 N.C. App. 528 (2000).	Failure to adequately supervise a smoking patient who suffered severe burns after setting her nightgown on fire while smoking a cigarette
Lewis v. Setty, 130 N.C.App. 606 (1998).	Failure to lower an examination table to the proper level when moving a patient from the table to a wheelchair
Alston v. Granville Health System, 207 N.C. App. 264 (2010) (unpub'd)	Failure to restrain plaintiff after which she fell from a gurney and was injured (where there was no allegation that the decision to restrain the patient involved medical judgment)

III. **Res Ipsa Loquitur.** No Rule 9(j) certification is required if “[t]he pleading alleges facts establishing negligence under the existing common-law doctrine of *res ipsa loquitur*.” The doctrine of *res ipsa loquitur* applies when “(1) direct proof of the cause of an injury is not available, (2) the instrumentality involved in the accident [was] under the defendant's control, and (3) the injury is of a type that does not ordinarily occur in the absence of some negligent act or omission.” *Grigg v. Lester*, 102 N.C. App. 332, 333 (1991). For the doctrine to apply, “an average juror must be able to infer, through his common knowledge and experience and without the assistance of expert testimony, whether negligence occurred.” *Hayes v. Peters*, 184 N.C. App. 285, 287–88 (2007).

Because “most medical treatment involves inherent risk and is of a scientific nature,” the doctrine has had very limited application to medical malpractice actions. *Id.* at 288. The Court of Appeals has encouraged courts to “remain vigilant and cautious about providing *res ipsa loquitur* as an option for liability in medical malpractice cases other than in those cases where it has been expressly approved.” *Id.* (quotation omitted). Prior to 2013, case language seemed to limit the doctrine to two limited circumstances: (1) injuries resulting from surgical instruments or other foreign objects left in the body following surgery; and (2) injuries to a part of the patient's anatomy outside of the surgical field. *Id.* In *Robinson v. Duke University Health Systems, Inc.*, however,

² Each of these cases was decided prior to the amendment to G.S. 90-21.11(2) expanding the definition of “medical malpractice action” to include certain “administrative or corporate duties to the patient.” This paper does not discuss whether any of these cases would be analyzed differently under the new definition.

the Court of Appeals stated that the doctrine can apply in other situations as well. ___ N.C. App. ___, 747 S.E.2d 321, 331 (2013). In a lengthy opinion, the court held that the doctrine was appropriately invoked in a case of a surgical colectomy during which the small intestine was mistakenly reattached to the vagina rather than the rectum. *Id.* at ___, 747 S.E.2d at 334. The court determined that no “understanding of the requisite techniques” was necessary for the jury to determine that negligence occurred. *Id.* at ___, 747 S.E.2d at 332. The court was unpersuaded by arguments regarding the complexities of surgical procedures and the lack of expertise of the average juror in assessing the details of human anatomy in a surgical field. *Id.* at ___, 747 S.E.2d at 332–333. *But see* *Cartrette v. Duke University Med. Ctr.*, 189 N.C. App. 403 (2008) (unpublished) (noting that “a layperson would have no common knowledge or experience to determine that [defendants were] negligent in the way a complicated, technical neurosurgery was initiated, performed, or completed”). *Robinson* generally appears to expand the reach of the *res ipsa* doctrine in medical malpractice actions. It is, however, the only published case thus far in which the doctrine of *res ipsa* has been held to apply in the context of Rule 9(j) compliance.³ Numerous prior published and unpublished cases from the Court of Appeals and North Carolina federal district courts have rejected the use of *res ipsa* to substitute for compliance with Rule 9(j)’s certification requirement:

Case	Injury to which <i>res ipsa loquitur</i> did not apply (thus Rule 9(j) certification was required)
<i>Stevenson v. North Carolina Department of Correction</i> , 210 N.C. App. 473, 477 (2011)	Skin condition after alleged “cursory” glance of infected area rather than thorough review
<i>Rowell v. Bowling</i> , 197 N.C. App. 691, 697 (2009)	Incisions in opposite knee during arthroscopic surgery (where direct cause was alleged)
<i>McGuire v. Riedle</i> , 190 N.C. App. 785, 788-90 (2008).	A fragment of a surgical screwdriver was damaged and remained in a screw during arthroscopic-assisted ACL reconstruction in a knee
<i>Hayes v. Peters</i> , 184 N.C. App. 285, 288 (2007)	Stroke occurring after air emboli entered nervous system during esophagastroduodenoscopy.
<i>Anderson v. Assimos</i> , 146 N.C. App. 339, 342-43 (2001), rev’d in part on other grounds, 356 N.C. 415 (2002)	Equilibrium problems, nausea, and dizziness caused by drug after alleged failure to warn of side effects and to monitor patient
<i>Cartrette v. Duke University Medical Center</i> , 189 N.C.App. 403, *3-4 (2008) (unpub’d)	Pain in head after neurosurgery started on incorrect side of head but was performed and completed on correct side.

³ In the unpublished case of *Alston v. Granville Health System*, 207 N.C. App. 264 (2010) (reported in table), the court determined that the doctrine applied where a patient was injured falling from a gurney while unconscious in an operating room. The court also held, however, that the case was an ordinary negligence case rather than a medical malpractice case, and therefore a Rule 9(j) certification was not required.

Moore v. Gaston Memorial Hospital, Inc., 172 N.C. App. 592, *3 (2005) (unpub'd)	Perforation of esophagus during endoscopic examination and dilation procedure
Frazier v. Angel Medical Center, 308 F.Supp.2d 671, 677 (M.D.N.C. 2004)	Pain in ankle after orthopedic treatment and consultation for car crash injury
Moore v. Pitt County, 139 F.Supp.2d 712, 713 (E.D.N.C. 2001)	Hepatitis contraction after blood transfusion (where no allegation of exclusive control)
Littlepaige v. United States, 528 Fed. Appx. 289, 296 (4 th Cir. 2013) (unpub'd)	Injury upon falling to the floor after a "falls precaution" and alleged failure to diagnose thereafter.
Jenkins-Bey v. Land, 2010 WL 3672285, *6-7 (E.D.N.C.) (unpub'd)	Gastric ulcer resulting from alleged indifferent treatment of STD
Hairston v. Gonzalez, 2008 WL 2761315, *5 (E.D.N.C. 2008) (unpub'd)	Back pain and injury after alleged delayed examination and intervention

IV. Timing Issues.

- A. The 120-day Extension.** Rule 9(j) allows a trial court to extend the statute of limitations applicable to the medical malpractice claims for up to 120 days to allow a plaintiff additional time to comply with the certification requirement. The rule reads

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.

1. **Filing, Service, and Hearing.** The motion for extension must be filed with the court to be valid. *Watson v. Price*, 211 N.C. App. 369, 372-73 (2011). Lack of service of the motion upon the potential defendants is not, however, a basis for dismissal of the complaint. *Webb v. Nash Hospitals, Inc.*, 133 N.C. App. 636, 638-39 (1999); *Timour v. Pitt Cty Mem. Hosp.*, 131 N.C. App. 548, 550 (1998). The motion may be heard *ex parte*. *Webb*, 133 N.C. App. at 639; *Timour*, 131 N.C. App. at 550. Failure to

name all of the defendants to the action at the time the motion is filed is not a basis for dismissal of the complaint. *Stewart v. Southeastern Reg. Med. Ctr.*, 142 N.C. App. 456, 463 (2001).

2. **Discretionary.** An extension under Rule 9(j) is “not automatic” and is in the judge’s discretion. *Thigpen v. Ngo*, 355 N.C. 198, 202 (2002).
 3. **No Extension in Existing Case.** Once a complaint is filed that does not include a valid Rule 9(j) certification, the court has no authority to grant a 120-day extension in that case to obtain the proper certification: “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).” *Brown v. Kindred*, 364 N.C. 76, 84 (2010) (quotation omitted).
 4. **Interaction with Rule 3.** Once a statute of limitations has been extended for up to 120 days per Rule 9(j), it cannot be further extended by 20 days pursuant to Rule 3. *Carlton v. Melvin*, 205 N.C. App. 690, 695–96 (2010) (rejecting the possibility of a combined “140-day” extension).
 5. **Applicability to *Res Ipsa* Claims.** In *Cartrette v. Duke University Medical Center*, the plaintiff had obtained a 120-day extension of the statute of limitations in order to obtain an expert witness certification. When she filed her complaint, however, she alleged only a *res ipsa loquitur* theory and therefore did not include a Rule 9(j) certification. The trial court dismissed her complaint for failure to file her claim within the statute of limitations. In an unpublished opinion, the Court of Appeals affirmed, holding that the 120-day extension by its very nature does not extend time to file a claim based on *res ipsa*. 189 N.C. App. 403, *2-3 (2008) (unpublished) (“If Ms. Cartrette’s theory of her claim was always *res ipsa loquitur*, then she had no need for an extension of the statute of limitations; further, the motion was granted on the basis of allowing time to secure Rule 9(j) certification, not to present a claim based on *res ipsa loquitur*.”) However, in a footnote in *Smith v. Axelbank*, ___ N.C. App. ___, 730 S.E.2d 840 (2012), the Court of Appeals stated in *dicta* that a plaintiff “may seek, in good faith, an extension of the statute of limitations in order to retain an expert and yet be unable to do so. Such plaintiff should not be penalized for failing to obtain an expert witness certification and should be able to then file a claim under the doctrine of *res ipsa loquitur*.” *Id.* at ___, 730 S.E.2d at 844, n.1. The court makes no reference to the contradictory holding of *Cartrette*.
 6. **Extension of Loss of Consortium Claim.** A 120-day extension of the statute of limitations for a medical malpractice claim also operated to extend a related loss of consortium claim. *Webb*, 133 N.C. App. at 640.
- B. Attempts to “Correct” a Missing Rule 9(j) Certification.** If a complaint alleging medical malpractice lacks the required Rule 9(j) certification, it is subject to dismissal. Failure to include the certification puts the claim in imminent peril, because the avenues to correct the deficiency are narrow and become unavailable once the statute of limitations on the underlying claim has expired.
1. **Before Statute of Limitations Expires.**
 - a. **Rule 15 Amendment.** A plaintiff may not amend a complaint pursuant to Rule of Civil Procedure 15 to add a Rule 9(j) certification, even where the underlying statute of limitations has

not expired. In *Keith v. Northern Hospital District of Surry County*, 129 N.C. App. 402 (1998), the Court of Appeals stated that [W]e reject the argument of the plaintiff that any Rule 9(j) deficiency in the complaint can be corrected by subsequently amending the complaint, pursuant to Rule 15(a), by adding the Rule 9(j) certification and having that amendment relate back, pursuant to Rule 15(c), to the date of the filing of the complaint. To read Rule 15 in this manner would defeat the objective of Rule 9(j) which, as revealed in the title of the legislation, seeks to avoid the filing of frivolous medical malpractice claims.

Id. at 405 (citations omitted).

- b. Rule 41 Dismissal Without Prejudice.** Where the underlying statute of limitations has not yet expired on a complaint, it appears that the procedure for presenting a missing Rule 9(j) certification is to dismiss the original claim without prejudice pursuant to Rule of Civil Procedure 41 and—*prior to the expiration of the original statute of limitations*—refile the complaint with a proper certification. See *Clark v. Visiting Health Professionals, Inc.*, 136 N.C. App. 505, 508 (2000) (allowing Rule 41 refiling where there was no allegation that the original statute of limitations had expired). Parties and practitioners are strongly cautioned, however, to take every measure to include a proper Rule 9(j) certification in the initial filing to avoid procedural pitfalls.
- 2. After Statute of Limitations Expires.** The Rule 9(j) certification must be made prior to the running of the statute of limitations (or 120-day extension) applicable to the underlying claim. If it has not been, the complaint is subject to dismissal with prejudice, and the deficiency cannot be corrected with a Rule 15 amendment or dismissal and refiling pursuant to Rule 41.
 - a. Rule 15 Amendment.** Amendment pursuant to Rule 15 cannot correct the plaintiff's failure to include a Rule 9(j) certification prior to expiration of the statute of limitations. In *Thigpen v. Ngo*, 355 N.C. 198 (2002), the plaintiff filed a complaint on the last day of a 120-day extension of the statute of limitations. The complaint did not contain a Rule 9(j) certification. Six days later, the plaintiff filed an amended complaint including the required certification. *Id.* at 200. The Supreme Court held that, "[o]nce 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." *Id.* at 205.
 - b. Rule 41 Voluntary Dismissal.** A dismissal without prejudice pursuant to Rule 41 does not extend the time for Rule 9(j) certification past the expiration of the applicable statute of limitations (or 120-day extension).
 - i.** *Bass v. Durham Cty. Hosp. Corp.*, 158 N.C. App. 217 (2003), *reversed per curiam for reasons stated in dissent*, 358 N.C. 144 (2004). Plaintiff filed a complaint on the last day of a 120-day extension granted pursuant to Rule 9(j).

It contained no Rule 9(j) certification. Eleven days later, plaintiff filed an amended complaint containing a Rule 9(j) certification. *Id.* at 219. Plaintiff later dismissed her complaint and re-filed pursuant to Rule 41(a), this time including a Rule 9(j) certification. The trial court dismissed her complaint for failure to timely comply with the certification requirement. *Id.* at 219. The Supreme Court affirmed the dismissal based on the dissenting opinion from the Court of Appeals, which concluded that “[p]laintiff’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.” *Id.* at 223 (citing *Thigpen v. Ngo*, 355 N.C. 198 (2002)).

- ii. *McKoy v. Beasley*, 213 N.C. App. 258 (2011). A wrongful death claim based on medical malpractice was filed on April 7, 2007 with no Rule 9(j) certification. *Id.* at 260. The trial court dismissed the complaint on February 18, 2008 for failure to comply with Rule 9(j). The dismissal was without prejudice, but the trial court expressed “no opinion as to whether any re-filed action would be timely or untimely.” *Id.* The plaintiff refiled the action on December 20, 2007, months after the original two-year statute of limitations has run. The new complaint contained a Rule 9(j) certification. *Id.* The Court of Appeals held that the action was untimely because there had been no Rule 9(j) certification filed prior to the expiration of the statute of limitations. *Id.* at 262-64 (citing *Bass* as the Supreme Court’s prior overruling of *Brisson v. Santoriello*, 351 N.C. 589 (2000)). The court stated that “the defective original complaint cannot be rectified by a dismissal followed by a new complaint complying with Rule 9(j), where the second complaint is filed outside of the applicable statute of limitations.” *Id.* at 263.

- C. **Rule 9(j)(2) Motion and Statute of Limitations.** Where a plaintiff timely includes a Rule 9(j)(2) certification, but does not obtain a ruling on his or her motion under Rule 9(j)(2) and Rule of Evidence 702(e) prior to dismissing the complaint under Rule 41, the plaintiff may still re-file the complaint. *Ford v. McCain*, 192 N.C. App. 667, 675-76 (2008) (“Requiring a plaintiff to obtain a ruling on a Rule 9(j)(2) motion prior to taking a voluntary dismissal would impose an additional limitation...not supported by the plain language of 9(j) or any authority.”)

V. Specific Certification Requirements.

- A. **“Review.”** Prior to the 2011 amendments, plaintiffs were required to allege that the reviewing expert had reviewed the plaintiff’s relevant “medical care.” In *Hylton v. Koontz*, 138 N.C. App. 511 (2000), discovery revealed that plaintiff’s expert had not in fact reviewed the plaintiff’s actual medical records prior to the filing of the complaint, but had instead “responded to questions posted by Plaintiff’s attorney that were based on a summary of the ‘facts’ regarding

Decedent's medical care." *Id.* at 515. The Court of Appeals held that this type of review was sufficient to satisfy the review requirement. *Id.* at 515–516. The holding of *Hylton* clearly does *not* apply to cases subject to the 2011 amendment to Rule 9(j): the review requirement has become considerably more stringent, now mandating review of “the medical care *and all medical records* pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry.” N.C. R. CIV. P. 9(j) (emphasis added). No case yet addresses what constitutes an adequate “review” of medical records. Other possible sources of future case law are the phrases “pertaining to the alleged negligence,” “available to the plaintiff,” and “reasonable inquiry.”

- B. “Willing to Testify.”** The Rule 9(j) certification must allege review by a person “willing to testify that the medical care did not comply with the applicable standard of care.” N.C. R. CIV. P. 9(j). The expert must form that willingness by the time the case is filed. In *McGuire v. Riedle*, 190 N.C. App. 785 (2008), plaintiff’s complaint included a Rule 9(j) certification that his treating surgeon was willing to testify regarding care the plaintiff has received in a prior surgery. Later, during discovery, the surgeon “stated that he never reviewed plaintiff’s prior care and was never willing to testify as to any alleged breach of the standard of care.” *Id.* at 786. The Court of Appeals affirmed the dismissal of the case, noting that “medical malpractice complaints have a distinct requirement of expert certification with which plaintiffs must comply.” *Id.* at 788 (quotation omitted). The plaintiff’s alleged “good faith” belief regarding the expert’s willingness to testify would not satisfy the requirement. Because the plaintiff “did not present the trial court with an expert who was ‘willing to testify that the medical care did not comply with the applicable standard of care,’” the case was properly dismissed. *Id.*

A complaint should not, however, be dismissed on this basis unless the record is clear. In *Phillips v. A Triangle Women’s Health Clinic, Inc.*, 155 N.C. App. 372 (2002), the plaintiff’s expert stated in his deposition that, “[w]ell, I probably would have given [plaintiff’s attorney] an idea of whether I thought I should see the case or not. That’s about as far as I could go over the telephone.” *Id.* at 374. In a later affidavit, the expert stated:

From [counsel’s] prior experience with me, he is aware that I am willing to serve as an expert witness at trial on any case that I review, and at [plaintiff’s] trial I would be willing to testify regarding my opinion of the appropriateness of the medical care rendered....My recollection is that in his discussion with me in May 1997, [counsel] read information to me verbatim from the patient’s medical records, as well as gave me a factual outline of the medical care rendered according to [plaintiff’s] medical records....Based upon the information outlined to me ... I gave [counsel] my opinion that the [injuries to plaintiff were], in my professional opinion, to a reasonable degree of medical certainty, clearly outside the applicable standard of care.

Id. at 374–75. The Court of Appeals held that the expert had never “affirmatively denied” giving his opinion over the phone, and that his later affidavit reflected “no clear contradiction” of his earlier testimony. *Id.* at 377. Thus the trial court erred in dismissing plaintiff’s claim based on failure to satisfy Rule 9(j). *Id.*

- C. “Reasonably Expected to Qualify.”** Unless a plaintiff proceeds under Rule 702(e), the Rule 9(j) certification must allege review by a person “who is

reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence.” N.C. R. Civ. P. 9(j) (See Appendix A for text of Rule 702). This certification must occur prior to the running of the statute of limitations (or extension pursuant to Rule 9(j)), or the complaint is subject to dismissal with prejudice. *Thigpen v. Ngo*, 355 N.C. 198, 205 (2002) (“Rule 9(j) expert review must take place before the filing of the complaint.”); *Robinson v. Entwistle*, 132 N.C. App. 519, 523 (1999) (affirming dismissal where plaintiff admitted in discovery that designated expert did not meet qualifications).

1. **Trial Court’s Review Standard.** The question for the court under Rule 9(j) is not whether the expert *ultimately will* qualify, but whether the plaintiff, at the time the pleading was filed, *reasonably expected* the witness to qualify: “In other words, 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.” *Grantham v. Crawford*, 204 N.C. App. 115, 118–19 (2010) (citations omitted).⁴ The question is whether “there is ample evidence in th[e] record that a reasonable person armed with the knowledge of the plaintiff at the time the pleading was filed would have believed” the witness would qualify. *Morris v. Southeastern Orthopedics Sports Med. & Shoulder Ctr.*, 199 N.C. App. 425, 437–38 (2009) (quotation omitted). Determining what the plaintiff knew or should have known is largely a matter of examining the discovery materials, and [T]o the extent there are *reasonable* disputes or ambiguities in the forecasted evidence, the trial court should draw all reasonable inferences in favor of the nonmoving party at this preliminary stage of determining whether the party *reasonably expected* the expert witness to qualify under Rule 702. *Moore v. Proper*, 366 N.C. 25, 32 (2012). Whether the plaintiff could reasonably expect the witness to qualify as an expert under Rule 702 is a question of law reviewed by the appellate courts *de novo*. *Trapp v. Macchioli*, 129 N.C. App. 237, 241 n.2 (1998). The trial court must, however, make findings of fact and conclusions of law when determining plaintiff’s expectation was not reasonable. *Moore*, 366 N.C. at 32.
2. **Cases Holding Plaintiff had Reasonable Expectation of Qualification.**
 - a. *Moore v. Proper*, 366 N.C. 25 (2012) examined whether a retired dentist had spent the “majority of [his] professional time” in “active clinical practice” as required by Rule 702(b)(2)a, even though he practiced only a few hours a week. The plaintiff alleged she had received a fractured jaw during a tooth extraction in 2006. She designated Dr. Dunn as her reviewing expert. Dr. Dunn had retired from full-time dentistry in 1997 and had been a local health department director from 1998 to 2000, during which time he had performed many extractions. After 2000, he maintained his license and performed dentistry on a “fill-in basis” for dentists who were ill. He testified to filling in for anywhere from 30 days to two-and-a-half months during the year prior to the alleged malpractice. He testified that he had spent “less than 5 percent” of a full work

⁴ Beyond the determination under Rule 9(j) of “reasonable expectation” is the broader issue of an expert’s ultimate qualification to testify. “Whether an expert will ultimately qualify to testify is controlled by Rule 702.” *Moore v. Proper*, 366 N.C. 25 (2012). A discussion of the cases interpreting the requirements of Rule 702(b) is outside the scope of this chapter.

week on general dentistry, but that one-hundred percent of his time practicing general dentistry was “active clinical practice.” The rest of his workweek was away from dentistry serving on city council, running for mayor, and spending time with family. *Id.* at 27. The trial court dismissed plaintiff’s appeal on the basis that she could have no reasonable expectation Dr. Dunn would qualify under Rule 702. The Court of Appeals reversed, and the Supreme Court agreed, holding that plaintiff’s expectation was in fact reasonable. In defining “active clinical practice,” the court stated that

A continuum exists between active and inactive clinical practice. On the one hand, there is inactive practice, an extreme example of which would be a professional performing one hour of clinical practice per year. On the other hand, there is active practice, an extreme example of which would be a full-time practitioner devoting eighty hours to clinical practice each week. Whether a professional's clinical practice is considered *active* during the relevant time period will necessarily be decided on a case-by-case basis considering, among other things, the total number of hours engaged in clinical practice, the type of work the professional is performing, and the regularity or intermittent nature of that practice. No one factor is likely to be determinative. Instead, the court must look to the totality of the circumstances when making this determination.

Id. at 33. In terms of whether a “majority of [the witness’s] professional time” in the prior year was in active clinical practice, the court stated that “professional time” is the “*actual* time spent engaged in the profession...[which] may include time spent in clinical practice, administration, continuing education, or any other capacity related to the field – necessarily excluding time spent outside the profession.” *Id.* at 34. So, although Dr. Dunn spent only a few hours per week in “active clinical practice,” those hours constituted the entirety of his “professional time.” Thus he met the requirement for “majority of professional time,” under Rule 702, and plaintiff therefore had a reasonable expectation of his qualifications. *Id.* at 820.

- b. Braden v. Lowe, ___ N.C. App. ___, 734 S.E.2d 591 (2012). This case turned on the question of whether plaintiff’s witness had performed “the procedure that [was] the subject of the complaint” “during the year immediately preceding the date of the occurrence that is the basis for the action,” as required by Rule 702(b)(2). *Id.* at ___, 734 S.E.2d at 596–97. The alleged negligent act took place in January 2005. Without addressing “the actual qualification of [the witness] as an expert under Rule 702,” the Court of Appeals concluded that the plaintiff could have reasonably expected him to qualify for purposes of Rule 9(j) based on his statements that he had performed the relevant procedures “since 2000” and “on a daily basis in 2004.” *Id.* at 597–98.

- c. *Grantham v. Crawford*, 204 N.C. App. 115 (2010). A licensed obstetrician familiar with practice in North Carolina was reasonably expected to qualify to testify regarding obstetrical care even though the witness was still in fellowship and had not completed board certification – these matters went to the weight of her testimony rather than the question of her qualification under Rule 702. *Id.* at 119. Further, a nurse-midwife specializing in obstetrics and originally certified in North Carolina was qualified to testify regarding obstetrical care even though the midwife had not practiced in North Carolina for a number of years. Her time away from the state was a matter of credibility, not “threshold qualification.” *Id.* at 119–20.
- d. *Morris v. Southeastern Orthopedics Sports Medicine and Shoulder Ctr., P.A.*, 199 N.C. App. 425 (2009). Plaintiff designated her treating surgeon, who practiced in the same specialty as defendant and worked at a major academic hospital, as her reviewing expert. The court held that as long as the expert met the qualifications of Rule 9(j), there was no requirement that that person be specially retained by plaintiff as an expert witness, and it was reasonable for plaintiff to expect the treating physician to qualify. *Id.* at 439–40.
- e. *Trapp v. Macchioli*, 129 N.C. App. 237 (1998). In a suit against an anesthesiologist related to insertion of a central venous line, plaintiff designated an emergency medicine specialist as her Rule 9(j) reviewing expert. *Id.* at 238. The court of appeals reversed the trial court’s dismissal of her complaint, holding that it was reasonable for plaintiff to expect the expert to qualify under Rule 702 in light of evidence that his practice was similar to anesthesiology in that both specialties perform central venous lines. *Id.* at 240–41.

3. Cases Holding Plaintiff Had No Reasonable Expectation of Qualification.

- a. *Knox v. University Health Systems of Eastern Carolina, Inc.*, 187 N.C. App. 279, 284–85 (2007). Plaintiff had no reasonable expectation that her designated Rule 9(j) witness, a board certified obstetrician, would qualify as an expert working in the same or similar specialty as defendants, an emergency room physician and a trauma surgeon. The record also reflected no “extraordinary circumstances” to support certification of the obstetrician under Rule of Evidence 702(e).
- b. *Smith v. Serro*, 185 N.C. App. 524, 528–29 (2007). In his action against a physical medicine and rehabilitation specialist for injuries suffered in an outpatient program, plaintiff could not reasonably have expected his designated witness, an orthopedic surgeon, to qualify under Rule 702.

- c. *Allen v. Carolina Permanente Medical Grp*, 139 N.C. App. 342, 349–350 (2000). In his action against a board-certified family practitioner, Plaintiff had no reasonable expectation that his witness, a board-certified general surgeon practicing in the area of general surgery, would qualify under the particular requirements of Rule 702(c) applicable to testimony against general practitioners.
4. **Treating Physician as Reviewer.** In *Morris v. Southeastern Orthopedics Sports Medicine and Shoulder Ctr., P.A.*, 199 N.C. App. 425 (2009), plaintiff designated her treating surgeon, who practiced in the same specialty as defendant and worked at a major academic hospital, as her reviewing expert. The court held that as long as the expert met the qualifications of Rule 9(j), there was no requirement that that person be specially retained by plaintiff as an expert witness, and it was reasonable for plaintiff to expect the treating physician to qualify. *Id.* at 439–40.
- VI. **Constitutionality.** In 2001, the Court of Appeals ruled that Rule 9(j)'s certification requirement violated the equal protection clauses of the North Carolina and United States Constitutions and article 1, section 18 of the North Carolina Constitution (“due course of law”). *Anderson v. Assimos*, 146 N.C. App. 339, 345–46 (2001). The Supreme Court reversed, holding that the Rule 9(j)'s certification requirement was not implicated because the plaintiff's claim was based solely on a *res ipsa loquitur* theory. *Anderson v. Assimos*, 356 N.C. 415, 417 (2002). Thus the Court of Appeals should not have addressed the constitutionality of Rule 9(j). *Id.* Our appellate courts have not squarely addressed the constitutionality of Rule 9(j) in the years since the Supreme Court issued this opinion. Because the 2011 amendments made Rule 9(j)'s requirements ever more stringent, new constitutional challenges may loom in the coming years.
- VII. **Claims Filed in Federal Court.** Failure to comply with Rule 9(j) is a ground for dismissal of a North Carolina state medical-malpractice claim filed in federal court. See, e.g., *Estate of Williams–Moore v. Alliance One Receivables Mgmt, Inc.*, 335 F.Supp.2d 636, 649 (M.D.N.C. 2004); *Frazier v. Angel Med. Ctr.*, 308 F.Supp.2d 671, 676–77 (W.D.N.C. 2004); *Moore v. Pitt Cnty. Mem'l Hosp.*, 139 F.Supp.2d 712, 713–14 (E.D.N.C. 2001); *Pederson v. United States*, 2014 WL 693245, *2-3 (E.D.N.C. 2014) (unpublished).

**Appendix: North Carolina Rule of Evidence 702
(N.C. Gen. Stat. § 8C-1, Rule 702)**

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, or otherwise, if all of the following apply:

- (1) The testimony is based upon sufficient facts or data.
- (2) The testimony is the product of reliable principles and methods.
- (3) The witness has applied the principles and methods reliably to the facts of the case.

(a1) 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 as defined in G.S. 90-21.11(2)b. against a hospital, or other health care or medical facility, a person shall not give expert testimony on the appropriate standard of care as to administrative or other nonclinical issues unless 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) 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.