

Rule 9(j): 120-day extensions

Emily P. Turner
Assistant Professor
School of Government

January 28, 2022



UNC
SCHOOL OF GOVERNMENT

www.sog.unc.edu

What We Will Cover

Rule 9(j) context

Rule 9(j) extensions of time

- *Mechanics of the motion*
- *Standard*
- *Mechanics of the order*

Limitations on Rule 9(j) extensions

Other statute of limitations issues

- *Vaughn v. Mashburn*
- *Rule of Civil Procedure 15*
- *Voluntary dismissals*

Why Rule 9(j)?

“[Rule 9(j)] averts frivolous actions by precluding any filing in the first place by a plaintiff who is unable to procure an expert who both meets the appropriate qualifications and, after reviewing the medical care and available records, is willing to testify that the medical care at issue fell below the standard of care.”

Vaughan v. Mashburn, 371 N.C. 428, 435 (2018)

Why Rule 9(j) Extension of Time?

“Upon motion by the complainant prior to the expiration of the applicable statute of limitations, ... 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.”

Rule 9(j) Extension: The Mechanics

Rule 9(j) Extension of Time—HOW?

“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. 1-83 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.”

STATE OF NORTH CAROLINA		File No. <input type="text"/>
<input type="text"/> County	In The General Court Of Justice <input type="checkbox"/> District <input type="checkbox"/> Superior Court Division	
Name Of Complainant(s) <input type="text"/>	MOTION AND ORDER EXTENDING STATUTE OF LIMITATIONS IN MEDICAL MALPRACTICE ACTION	G.S. 1A-1, Rule 9(j)
VERSUS		
Name Of Prospective Defendant(s) <input type="text"/>		
MOTION		
<p>The complainant(s) named above intends to commence a medical malpractice action against the prospective defendant(s) named above on a cause of action that arose in the county named above, and, based on the facts listed below, needs additional time to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure. The applicable statute of limitations has not yet expired. The complainant(s) moves to extend the statute of limitations for a period not to exceed one hundred twenty (120) days.</p> <p><i>(Specify basis for motion to enable judge to determine good cause exists.)</i></p> <div style="text-align: center; height: 200px;"></div>		
Date <input type="text"/>	Signature <input type="text"/>	<input type="checkbox"/> Complainant <input type="checkbox"/> Attorney

Rule 9(j) Extension of Time—WHO?

“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. 1-83 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.”

What's the Standard?

The extension of the statute of limitations is not automatic. The trial judge may allow a motion to extend the statute of limitations only “upon a determination that good cause exists for the granting of the motion and that the ends of justice would be served by an extension.”

Thigpen v. Ngo, 355 N.C. 198, 202 (2002) (quoting Rule 9(j)).

What About Entry of the Order?

- Pursuant to Rule of Civil Procedure 58, an order allowing the 120-day extension must be filed in order to be enforceable

Watson v. Price, 211 N.C. App. 369, 373 (2011)

ORDER

The undersigned Resident Superior Court Judge of the county named above has has not determined that good cause exists for granting the above motion and that the ends of justice will be served by an extension.

The Court finds the facts listed in the motion and adopts those as a basis for determining good cause.

It is ORDERED that:

the motion is allowed and the statute of limitations applicable to the complainant(s) cause of action is extended to and including the date shown below.

the motion is denied.

Statute Of Limitations Extended To:

Date Of Order

Rule 6!

Signature Of Resident Superior Court Judge

Name Of Resident Superior Court Judge (Type Or Print)

NOTE: *Rule 9(j) of the Rules of Civil Procedure provides, "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."*

What About Service?

- No service necessary for motion, which can be heard *ex parte*
- No service necessary for order

“The trial court’s order in the present action did not require service, and a complaint had not yet been filed. In addition, the motion to extend time may be (and was) heard *ex parte*. ... Accordingly, plaintiff was not required to serve notice of the filing extension on defendant. . . .” Timour v. Pitt Cty. Mem’l Hosp., Inc., 131 N.C. App. 548, 550 (1998), aff’d, 351 N.C. 47 (1999).

Rule 9(j) Extension: Limitations

No Double Dipping: Rule 9(j) Extension *or* Rule 3 Extension

- No “piggybacking” with Rule 3 (no 140-day extension).

Carlton v. Melvin, 205 N.C. App. 690, 696 (2010)

“Rule 9(j) prevails over Rule 3 in this instance.”

What can the extension be used for?

“[I]t is not entirely clear from case law whether a complaint is time-barred where it asserts that the expert review of the medical care and medical records occurred during a 120–day extension period granted by the trial court, rather than asserting that the review occurred before the running of the original statute of limitations.”

Boyd v. Rekuc, 246 N.C. App. 227, 235–36 (2016)

What can the extension be used for?

Even though the limitations period can be extended for 120 days under Rule 9(j), this extension is for the limited purpose of filing a complaint. There is no language in Rule 9(j) that indicates this time period can also be used, as plaintiff did here, to locate a certifying expert, add new defendants, and amend a defective pleading.

Brown v. Kindred Nursing Centers E., L.L.C., 364 N.C. 76, 84 (2010)

What can the extension be used for?

“[O]ur Court stated that *Brown* prevents a plaintiff from utilizing a 120–day extension to locate a certifying expert *only if* he has already filed a defective complaint prior to obtaining the extension.”

Boyd v. Rekuc, 246 N.C. App. 227, 236 (2016).

What can the extension be used for?

- Not to fix problems in an *existing* case.

“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).”

Brown v. Kindred, 364 N.C. 76, 90 (2010); Vaughan v. Mashburn, 371 N.C. 428, 440 n. 2 (2018) (quoting same in full).

What about an extension that ends without a Rule 9(j) certification?

“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*.”

Smith v. Axelbank, 222 N.C. App. 555, 561 n.1 (2012); but see Cartrette v. Duke Med. Ctr., 189 N.C. App. 403 (2008) (unpublished).

Other Statute of Limitation Issues

What if a plaintiff fails/neglects/forgets to include a Rule 9(j) certification, or the certification language is defective
...and then the statute of limitations expires?

Can this be corrected?

Rule 15 amendment?

Rule 41(a) voluntary dismissal/refiling?

Remember Why Rule 9(j)?

“The legislature’s intent was to provide a more specialized and stringent procedure for plaintiffs in medical malpractice claims through Rule 9(j)’s requirement of expert certification prior to the filing of a complaint. Accordingly, permitting amendment of a complaint to add the expert certification where the expert review occurred after the suit was filed would conflict directly with the clear intent of the legislature.”

Vaughan v. Mashburn, 371 N.C. 428, 438–39 (2018)

When is a medical malpractice action commenced?

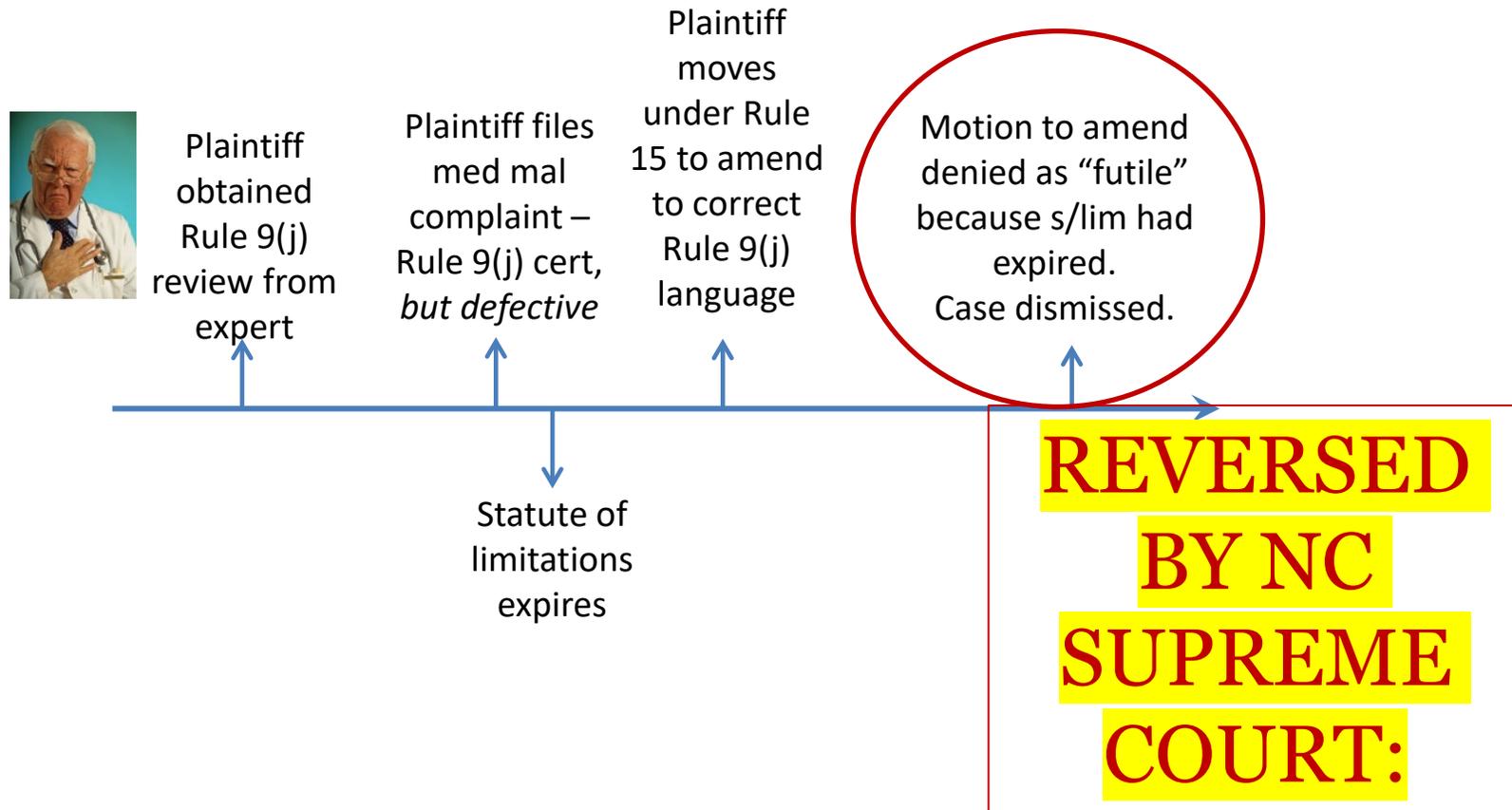
“An action is only ‘commenced’ under Rule 9(j) if it has been properly reviewed by an expert at the time of filing.” Alston v. Hueske, 244 N.C. App. 546, 554-54 (2016)

What if a plaintiff fails/neglects/forgets to include a Rule 9(j) certification, or the certification language is defective ...and then the statute of limitations expires?

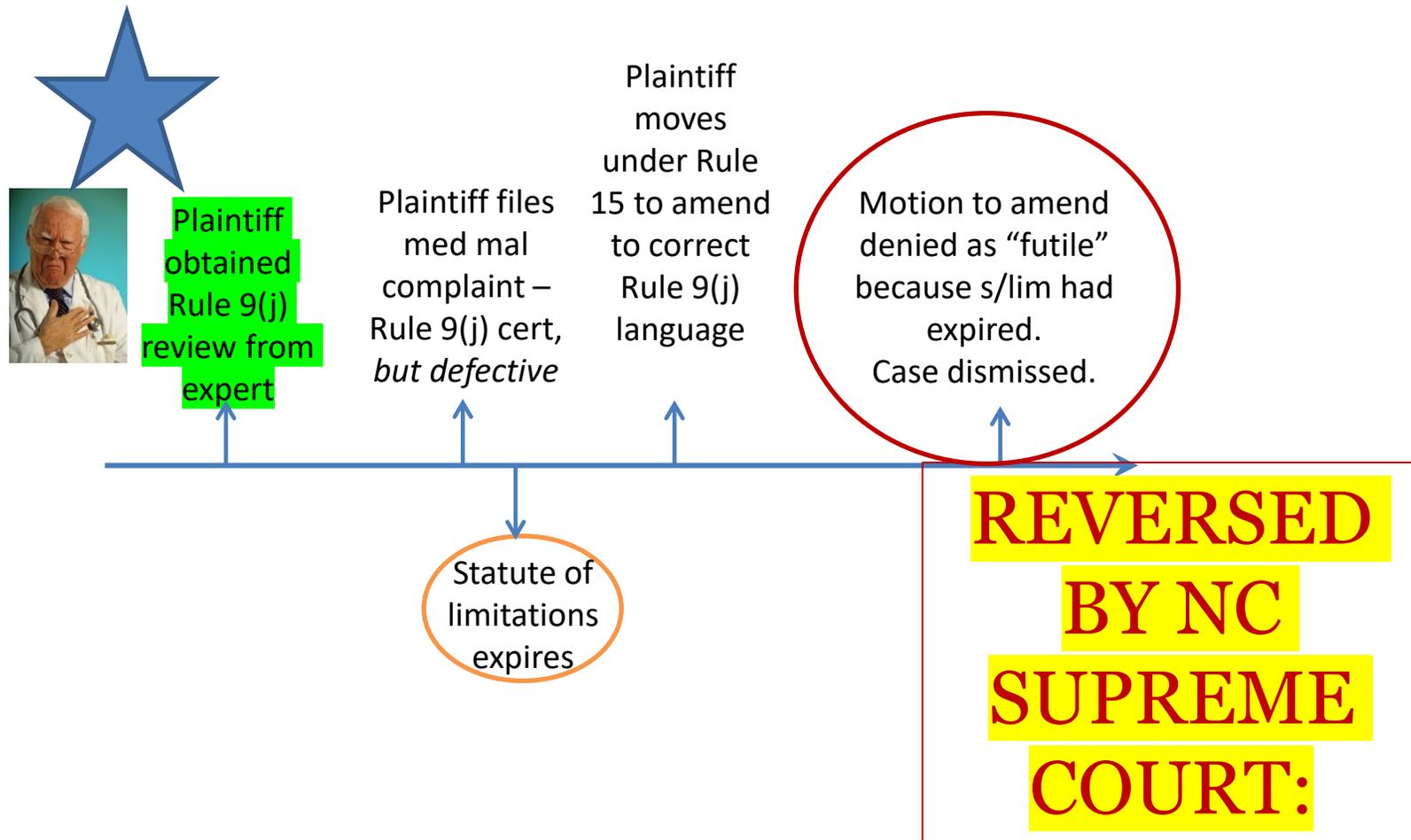
Can this be corrected?

**YES: IF THERE WAS
SUBSTANTIVE COMPLIANCE
WITH RULE 9(J)**

Vaughan v. Mashburn, 371 N.C. 428 (2018)



Vaughan v. Mashburn, 371 N.C. 428 (2018)



“We again emphasize that...the expert review required by Rule 9(j) must occur **before the filing of the original complaint.** ...But when a plaintiff prior to filing *has* procured an expert who meets the appropriate qualifications and, after reviewing the medical care and available records, is willing to testify that the medical care at issue fell below the standard of care, dismissing an amended complaint would not prevent frivolous lawsuits. Further, dismissal under these circumstances would contravene the principle **‘that decisions be had on the merits and not avoided on the basis of mere technicalities.’**”



Vaughn v. Mashburn,
371 N.C. 428, 441–42 (2018)

797 S.E.2d 299 (Mem)
Supreme Court of North Carolina.

ORDER

Upon consideration of the petition filed on the 31st of
January 2017 by Plaintiff in this matter for discretionary
North Carolina Court of



“...a plaintiff...may file an amended complaint under Rule 15(a) to cure a defect in a Rule 9(j) certification when the expert review and certification occurred before the filing of the original complaint...[and]...such an amended complaint may relate back under Rule 15(c)”

M. VAUGHAN
Lindsay MASHBURN
Wor
From N.C. Court
(15CVS910) Twen
Attorneys and La
Patricia P. Shield
Attorney at Law,
Law, Mooresville
Joshua D. Neigh
Maria.
Harold Holmes,
Attorney at Law
Law, for Mashb

Vaughan v. Mashburn, 371 N.C. 428, 441 (2018)

What if a plaintiff fails (neglects/forgets) to include a Rule 9(j) certification, or the certification language is defective
...and then the statute of limitations expires?

Can this be corrected?

Rule 15 amendment?

Rule 41(a) voluntary dismissal/refiling?



What if a plaintiff fails/neglects/forgets to include a Rule 9(j) certification, or the certification language is defective ...and then the statute of limitations expires?

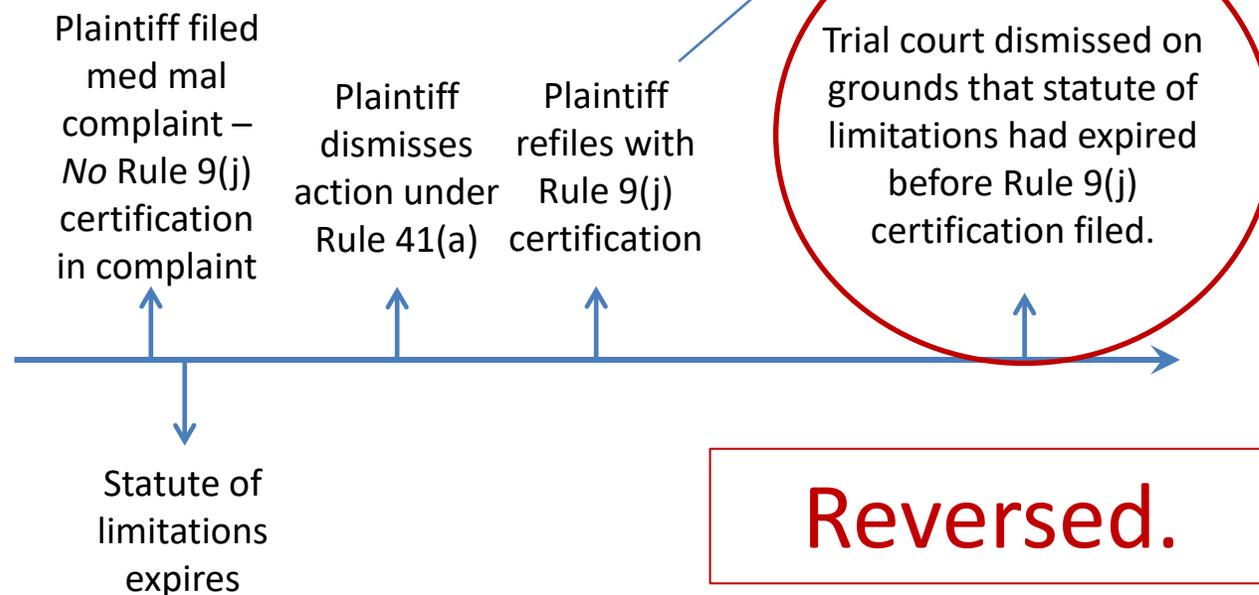
Can this be corrected?

**YES: IF THERE WAS
SUBSTANTIVE COMPLIANCE
WITH RULE 9(J)**



...and asserts that the expert review had occurred prior to filing original complaint

Boyd v. Rekuc, 246 N.C. App. 227 (2016)



THANK YOU SO MUCH!

CONTACT INFO

Emily P. Turner

Assistant Professor

UNC School of Government

eturner@sog.unc.edu

(919) 843-2032



UNC
SCHOOL OF GOVERNMENT

www.sog.unc.edu