Rule 9(j) Pleading Issues

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The Rule
What Must be Asserted

Rule 9(j)

What Must be Pled When Qualified Expert has Reviewed

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 an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care.

Rule 9(j)

No Certification Needed if Facts Establish Res Ipsa Loquitur doctrine

- “Any complaint alleging medical malpractice…..shall be dismissed unless:
- “(3)The pleading alleges facts establishing negligence under the existing common law doctrine of res ipsa loquitur.”

“Medical Malpractice Action”
90-21.11(2)

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

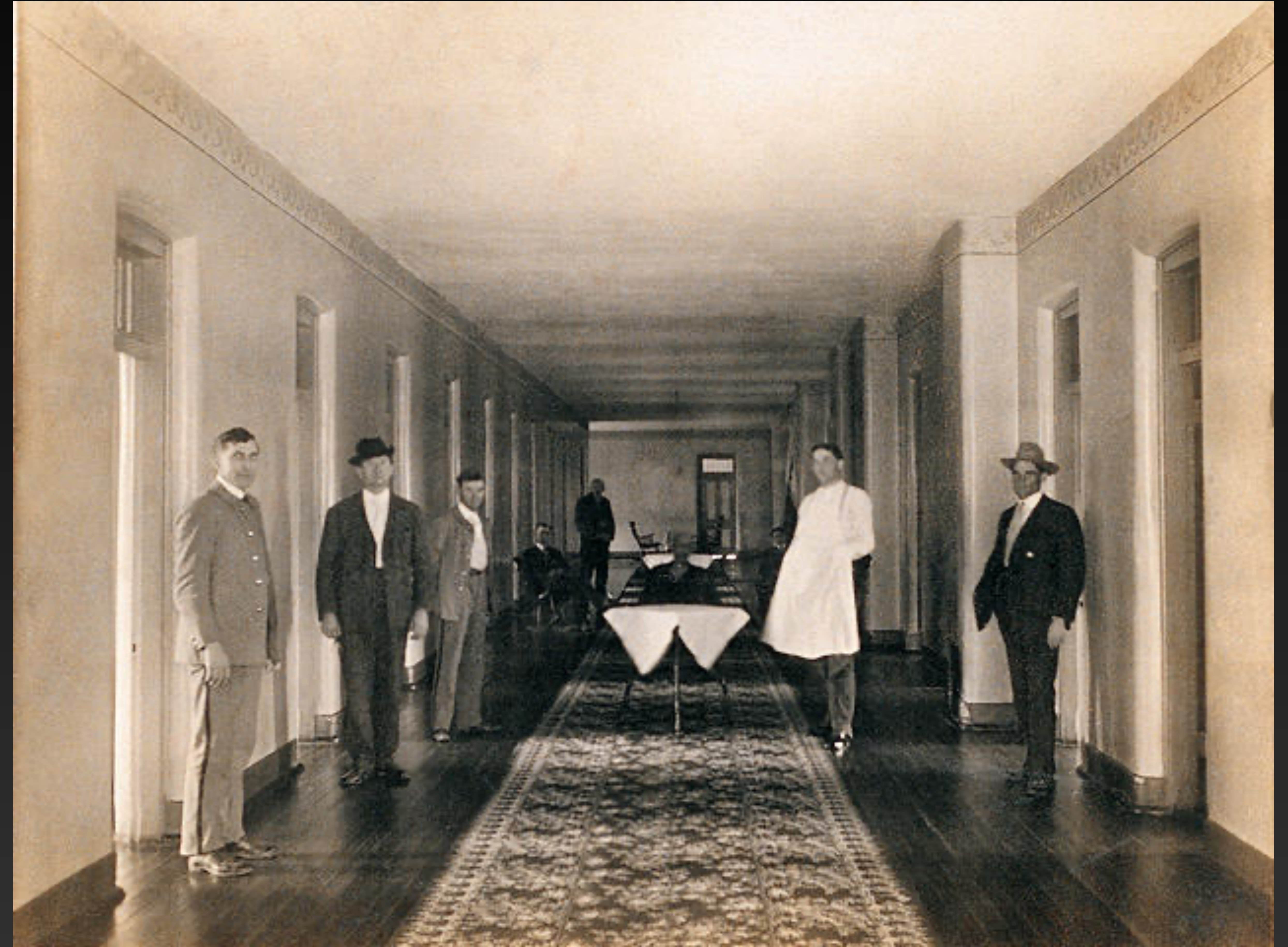
“Health Care Provider”
90-21.11

- A Person who is licensed under Chapter 90 (e.g. surgery, dentistry, etc)
- A hospital or nursing home or adult care home licensed under Chapter 131E or 131D. (Or any person acting at the direction or under supervision of a person described above)

Civil Actions Covered by 9(j)
- Must Involve Medical Care-

Adult Care Homes
Estate of Baldwin v. RHA Health Services
246 NCApp 58 (2016)

Medical Professionals Giving Orders

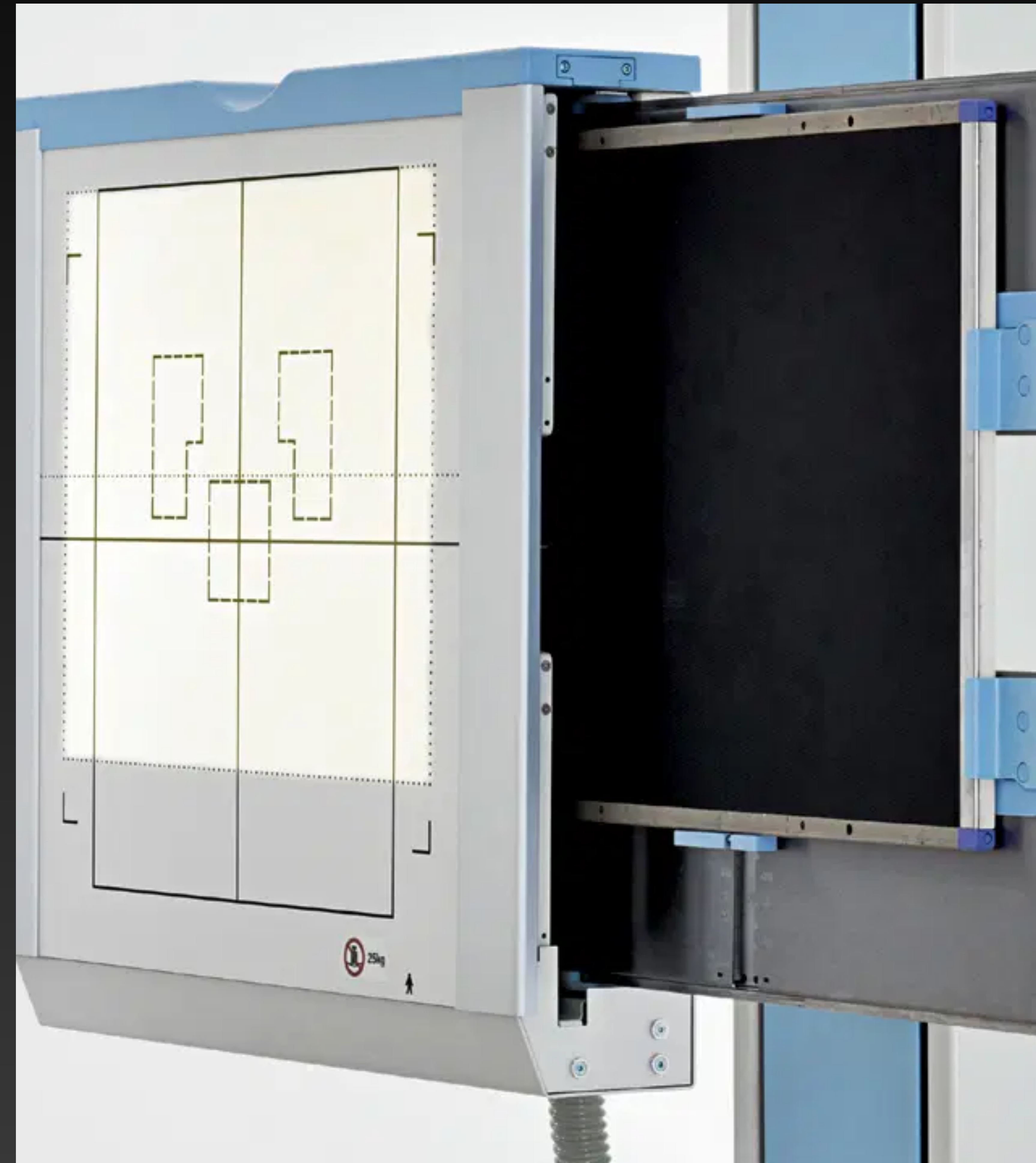


Adult Care Homes Licensed Under Chapter 122C- Estate of Baldwin v. RHA

Medical Professionals Giving Orders

- Plaintiff sues a facility for mentally ill licensed under Chapter 122C. Plaintiff (facts)
- Plaintiff failed to include 9(j) certification language. Plaintiff asserted that a "health care provider" as defined under 90-21.11 only covered <u>entities licensed under Chapter 131E.</u> Since an Adult Care home is licensed under Chapter 122C, Plaintiff argued no certification required as Adult Care homes were not "health care providers.'
- Court Dismissed Complaint - noting 90-21.11(1) also defined "health care provider" as "any other person acting under the direction or supervision of a person" licensed under Chapter 90 (in this case nurse and physician's assistant) - As such defendant's employees were rendering medical services at the direction of individuals licensed under Chapter 90. Certification was required!

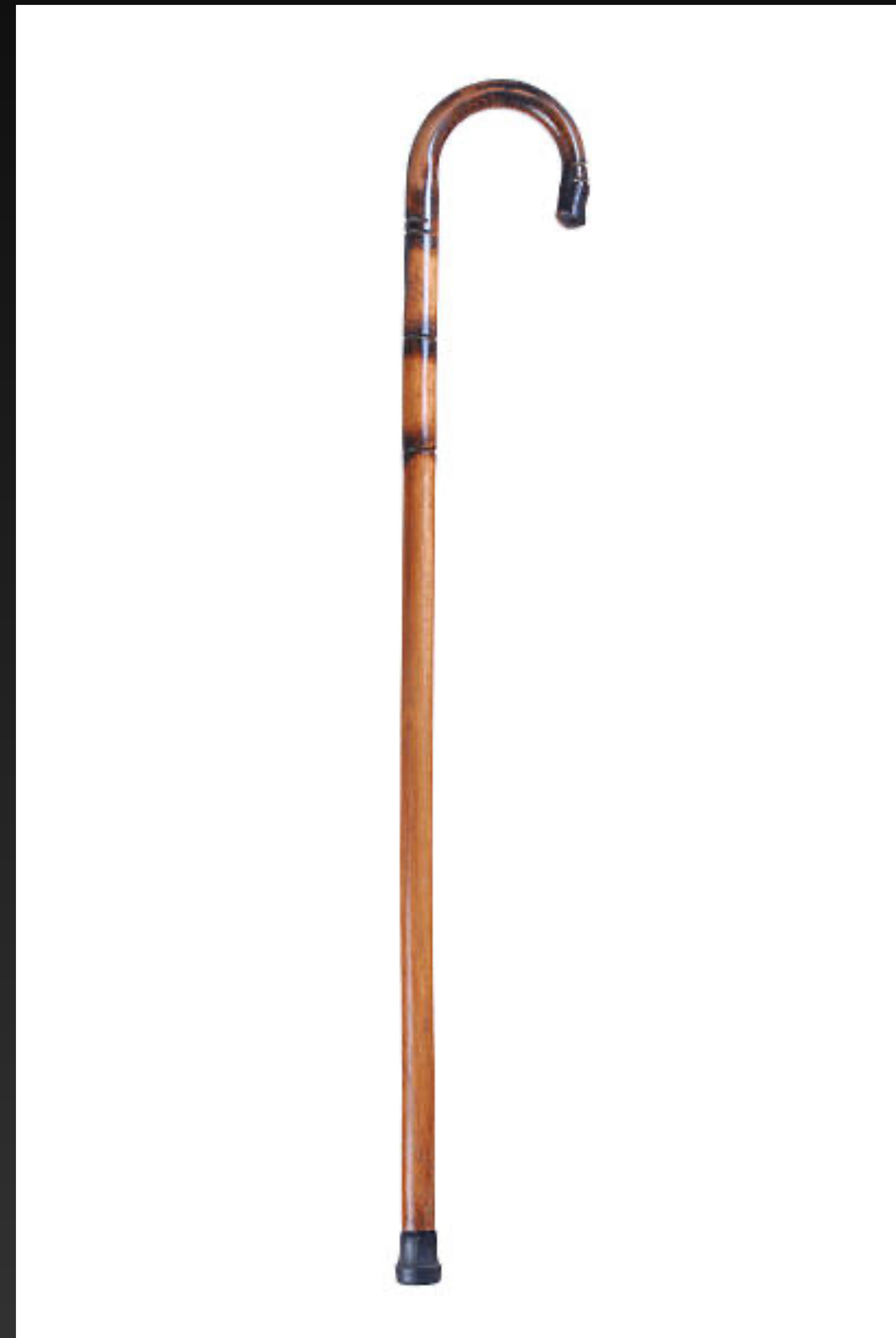
Failing While Standing for X ra ry



Gause v. New Hanover Reg' Med Ctr.
251 N.C.App 413 (2016)

- Patient presented to E.R. with a history of falling. She came to E.R. experiencing chest pain.
- Plaintiff was asked if she would be able to stand for x ray - she says "I think so. & immediately and rapidly stood up unassisted from wheelchair.X ray tech watches her take a few steps forward - she seemed stable- he turned around to move a tube in position when she fell. P sustains brain injury.
- P files complaint based on res ipsa loquitur. No 9(j) certification.
- Citing Sturgill v. Ashe Memorial Hosp Inc, 186 NCApp 624 (2007)(pt falls in hospital room after not "properly restrained" Court affirms dismissal as Plaintiff here had alleged defendant "failed to take adequate precautions…" and "unlike the nurses in Norris v. Rowan Mem. Hospital, 21 NCApp 623(1974){fall from hospital bed}, the x ray tech here "was required by the x ray order to decide whether to take the x ray with the patient standing, sitting or lying down" and as such involved medical decision making.
- Court also cited Lewis v. Setty, 130 N.C. App 606 (1998), a case where quadriplegic fell while being transferred from examination table to wheelchair (alleged ordinary negligence - no 9(j) certification) where court held such removal "did not involve an occupation involving specialized knowledge or skill" Here - Defendant was not involved predominantly physical or manual activity when the Plaintiff fell'

Failing to Offer a Cane



Horsley v. Halifax Reg. Med. Ctr
220 N.C. 411 (2012)

- Plaintiff had difficulty walking and standing. Husband brought her cane but hospital said it would provide one for her.
- Plaintiff walking to cafeteria. While standing against wall she said :"I'm going to fall." No nurse offered her cane or wheelchair.
- P files ordinary negligence claim - no 9(j) certification
- Held: No certification required - nothing in record on appeal indicates decision to offer a cane to a patient requires a written order or medical assessment - no specialized skill required.

Conduct of Autopsy

Norton v. Scot Mem. Hosp
250 N.C. 392 (2016)

- Plaintiff (widow) files complaint alleging she was prevented from seeing her husband by hospital staff before he died; that a portion of the autopsy was in violation of her orders There was no Rule 9(j) certification. Trial court dismisses
- Court of Appeals holds the Negligent Infliction of Distress action was not covered by Rule 9(j) as it was not a "medical malpractice action" which is defined as a "civil action for personal injury or death" Plaintiff had not filed a wrongful death action. "These damages are not damages sustained by (decedent)(but rather the wife)
- The allegations surrounding the conduct of the autopsy was not covered by Rule 9(j) as it did not involve the provision of medical care.

Lack of Bed Restraints

Sturgill v. Ash Mem'l Hosp
186 NCApp 624 (2007)

Lack of Bed Restraints

- Plaintiff admitted to hospital unable to walk and disoriented.
- Nurse implements Fall Prevention Plan and put bedrails up and placed restraints on patient. Patient later found on floor with head injury and fractures.
- No 9(j) certification - alleged ordinary negligence
- Court of Appeals noted plaintiff's complaint was based on failure to apply restraints (which required a physician order), not on failure to implement fall prevention plan or failure to supervise. As such, 9(j) certification was required.

Patient Catches Fire
While Smoking

Taylor v. Vencor Inc
136 NC App 528 (2000)

Observance of Patient While Patient Smoking

- Plaintiff alleged the patient, who had mental and physical problems required direct supervision. While in designated area she tried to light a cigarette which caught her nightgown on fire - resulted in death.
- Plaintiff alleged inadequate staffing failure to provide adequate observation and supervision. No 9(j) certification.
- Court of Appeals reversed trial court granting motion to dismiss. "The observance and supervision of the plaintiff, when she smoked in the designated smoking area, did not constitute an occupation involving specialized knowledge or skill."

Corporate Negligence

Estate of Waters v. Jarman
144 NCApp 98 (2001)

No 9(j) for Corporate Negligence Claims

- Plaintiff's complaint alleged hospital was liable both through respondent superior and violations of it's independent corporate duties by failing to assess physician credentials; continuing their privileges; failing to monitor their performance and failing to follow hospital procedures
- "Because these claims assert administrative and management deficiencies and do not arise out of the furnishing of professional services in the performance of …health care, they are not claims for medical malpractice. No 9(j)certification required.

Providing Access Code to Records

Acosta v. Byrum

180 N.C. App 562 (2006)

- Defendant physician provides his access code to medical record files to his office manager. Office manager then provides confidential psychiatric records to third parties without patient's consent.
- Held: Providing Access code is an administrative act. No clinical care involved. Rule 9(j) does not apply and certification not required.

C O

D E

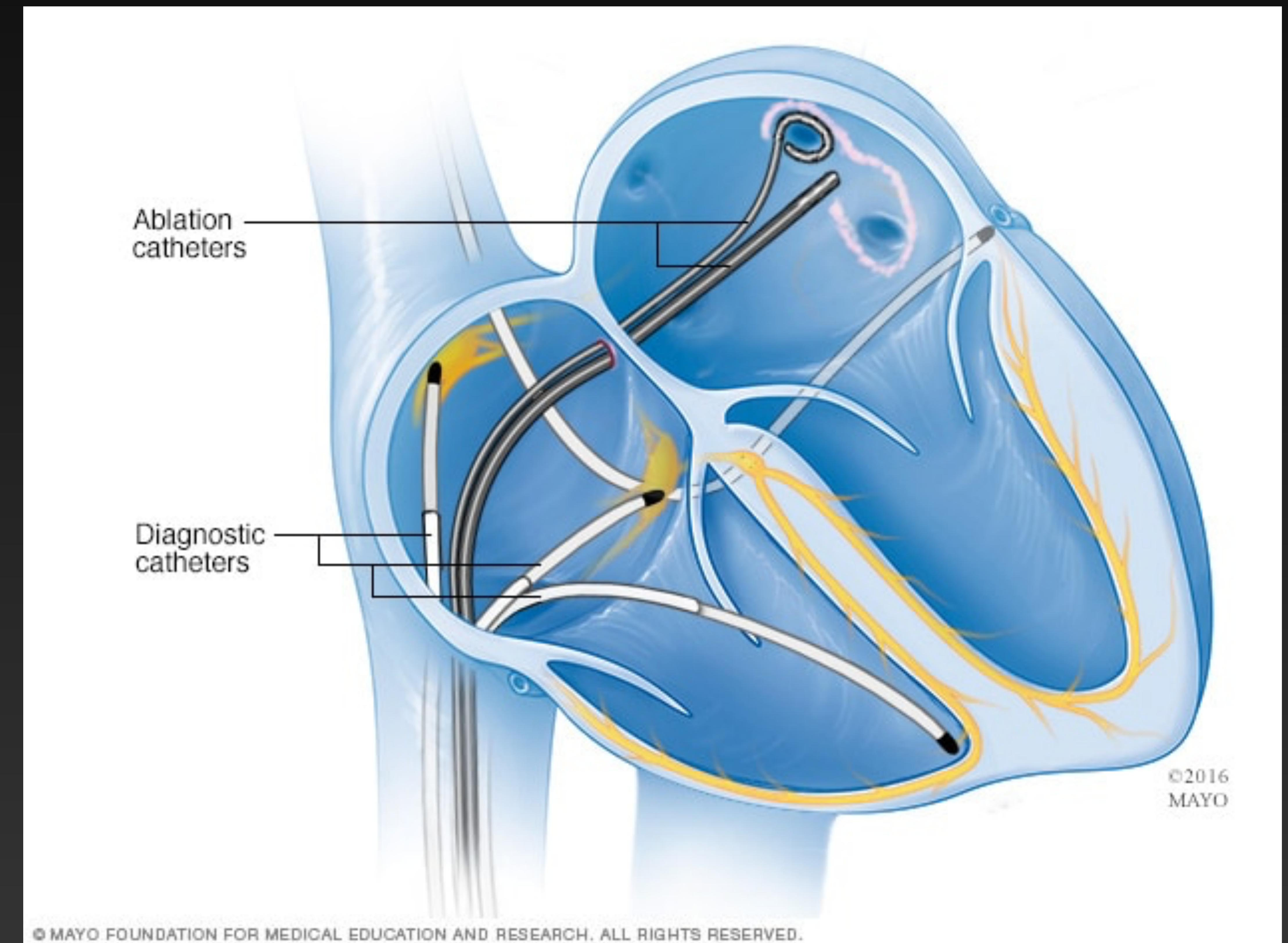
Res Ipsa Loquitur

Res Ipsa Not Applicable

Bluitt v. Wake Forest Univ Baptist
259 N.C. App 1 (2018)

- Plaintiff alleged she was negligently burned on her back during a cardiac ablation procedure. Plaintiff's complaint relied upon the theory of res ipsa loquitur for recovery. No 9(j) certification was included.
- Defendant filed "Motion to Dismiss for Failure to Comply with Rule 9(j) and submitted affidavits in support. Trial court dismissed complaint.
- Court of Appeals reviewed under a Rule 12(b)(6)standard and reviewed de novo noting a dismissal under 9(j) presents a question of law.
- Court noted the majority of medical treatment involves inherent risks coupled with the scientific and technical issues. As such, the theory of res ipsa loquitur is typically not appropriate as its application requires that jurors using their common knowledge and experience can conclude that injuries are not likely to occur if proper care is used. A cardiac ablation procedure does not fit that definition.
- A Court considering a 9(j) motion can consider affidavits as court must consider the facts to apply the law to them. This does not convert the 9(j) Motion to a Summary Judgment Motion.

Cardiac Ablation & Res Ipsa Loquitur



The 120 Day Extension

Rule 9(j)

Text of Rule Pertaining to The 120 Day Extension

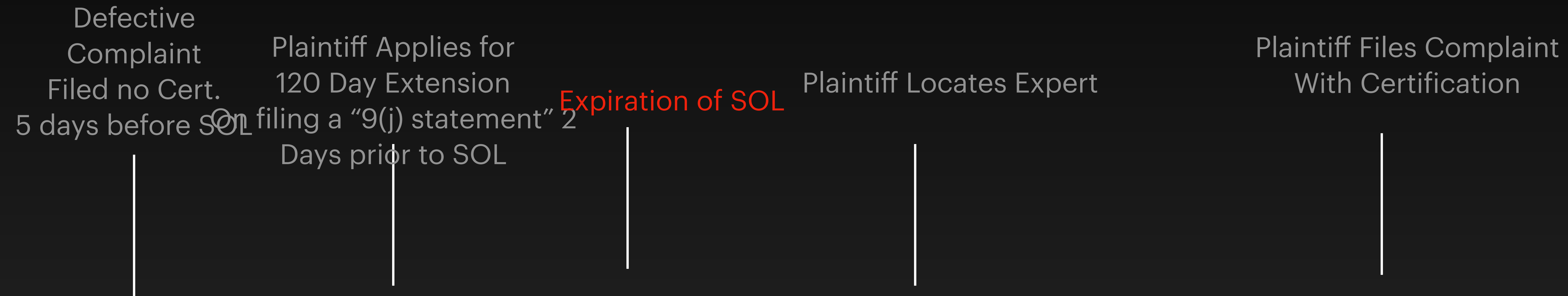
Upon motion by the complainant prior to the expiration of the applicable statute of limitations, a resident judge of the superior court for a judicial district in which venue for the cause of action is appropriate under G.S. 1-82 or, if no resident judge for that judicial district is physically present 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.

Within the Applicable Statute of Limitations

- Personal Injury - 3 years. (N.C.G.S. 1-52)
- Wrongful Death - 2 years (N.C.G.S. 1-53)

Can the 120 Day Extension Be Used To Locate an Expert?

Brown v. Kindred Nursing Ctrs. East, 364 NC 76 (2010)



Court of Appeals affirms dismissal - holding that the pro se complaint did not toll the SOL as it did not contain a 9(j) statement and the 120 day extension provision could not be used to locate an expert.

Narrowing the Brown Decision -Using the 120 Day Extension to Locate an Expert

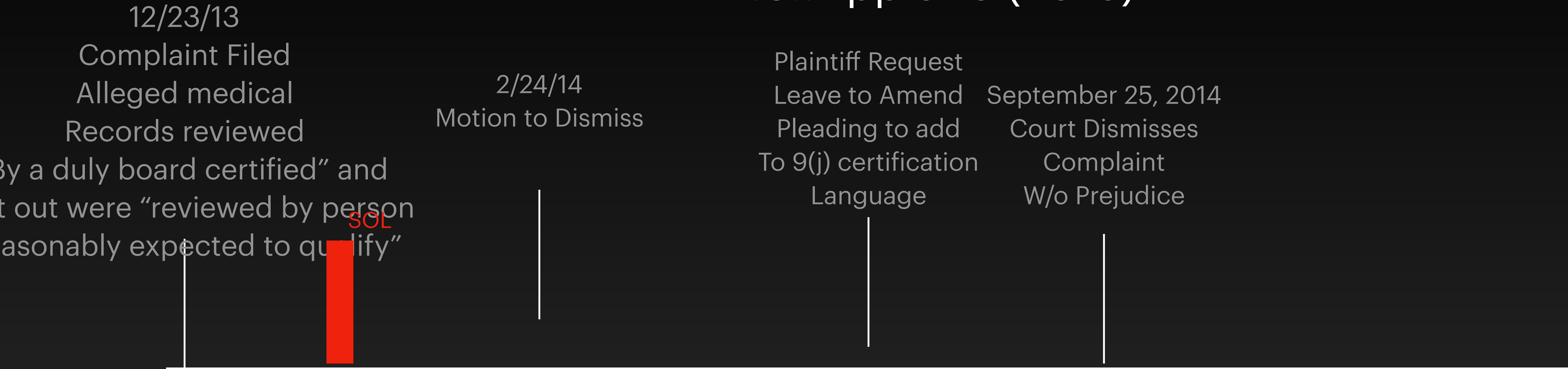
Boyd v. Rekuc
246 NCApp 227 (2015)
Narrows Brown

- While the 120 day extension was not used in Boyd the Court commented upon the holding in Brown and noted it had narrowed the reach of Brown in the case of Alston v. Hueske, 244 N.C. App 546 (2016) {which also did not involve a 120 day extension}
- Court stated : "Further, though not relevant here, we point out that it is not entirely clear from case law whether a complaint is time-barred where it asserts that the expert review occurred during a 120 day extension period granted by the trial court, rather than asserting the review occurred before the running of the statute of limitations"
- "…our Court stated that Brown prevents a plaintiff from using a 120-day extension to locate a certifying expert only if he has already filed a defective complaint prior to obtaining an extension. " The Court noted that in Alston, in referencing the 120 day extension language of Rule 9(j) stated : "The intent was to allow additional time to find an expert to review the medical records so that they may be reviewed prior to filing the complaint…" Alston, at 551.

Amendments to 9(j) and Relation Back

Alston v. Hueske

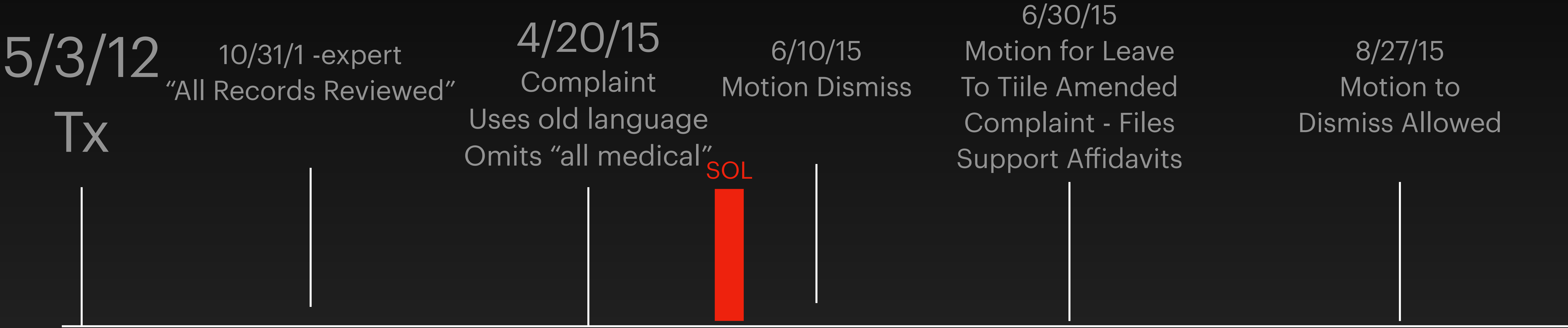
- 244 N.C..App 546 (2016)



Court of Appeals affirms trial court's dismissal reasoning "because This plaintiff did not file the complaint with the proper 9(j) certification before the running of the SOL, the complaint cannot have been deemed to have commenced within the statute."

Vaughn v. Mashburn

- 251 N.C. App 494 (2016)_



In the amended complaint "Plaintiff simply alleged the medical care. Has been reviewed by a person who is reasonably expected to qualify. <u>There is no evidence In the record the reviewed occurred *before* the filing of the original complaint. Specifically, there was no affirmative affidavit or date showing the review took place before the statute of limitations expired" - ANY AMENDMENT WOULD BE FUTILE</u>

BOYD V. REKUC

- 246 N.C. App 227, rev. denied. 792 S.E. 2d 517 (2016)

In a comprehensive opinion, review all prior relevant cases, Court reverses trial court stating "though his original complaint was filed without the required Rule 9(j) certification...Plaintiff voluntarily dismisses his original complaint before any dismissal with prejudice occurred. He then refiled his complaint within the one year period allowed under Rule 41 and asserted <u>that the expert review...had been conducted prior to the filing OF THE ORIGINAL COMPLAINT..</u>

Locklear v Cummings

- 822 S.E.2d 587 (2018)
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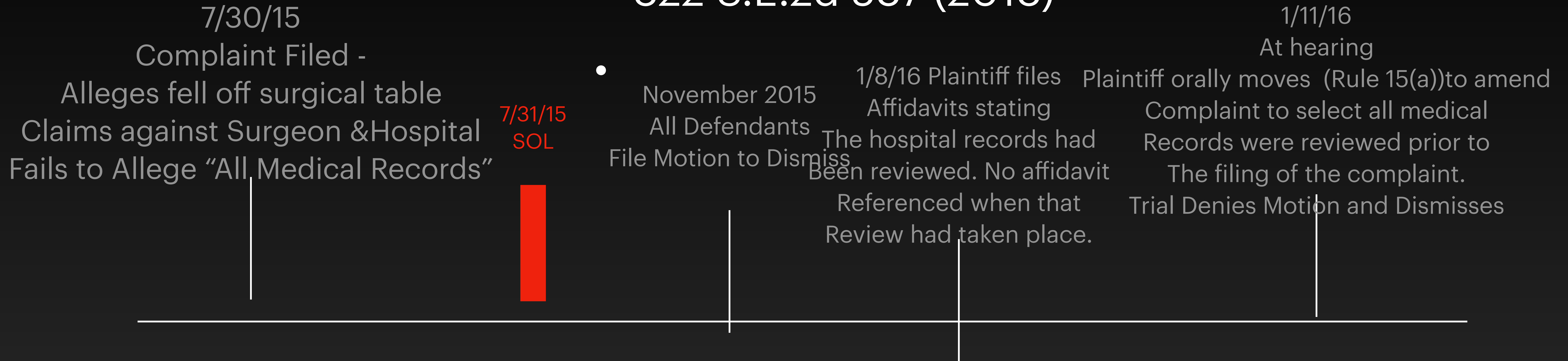

Court of Appeals reverses trial court, citing Vaughn, noting that in this case the plaintiff specially asserted the amendment would reflect the review took place prior to the filing of the original complaint

“Certain” vs. “All”

Fairfield v. Wake Med, 821 S.E.2d 277 (2018)

- Where plaintiff used the words that the expert has reviewed “certain” medical records vs. the statutorily required “all” records pertaining to the negligence dismissal was required.

Missing Words

The cat sat in the ________.

Turn on the ________.

The fox is in the ________.

Let the dog get ________.

It can ________ on the rug.

Can you get me a ________, please?

“Reasonably Expected to Testify”

“Reasonably Expected to Qualify”

....have been reviewed by a person who is reasonably expected to qualify an expert witness under Rule 702 of the Rules of Evidence...

Reasonably Expected to Qualify

General Principles

- Whether a plaintiff reasonably believes that an expert witness will qualify as an expert is a question of law. Grantha v. Crawford, 204 N.C. App 115 (2010).
- Whether a plaintiff reasonably believes that an expert under Rule 9(j) meets the qualifications as an expert under Rule 702(b) at the time the complaint is filed is a different issue from whether that expert in fact qualifies which is determined after discovery is completed. Moore v. Proper, 366 N.C. 25 (2012)
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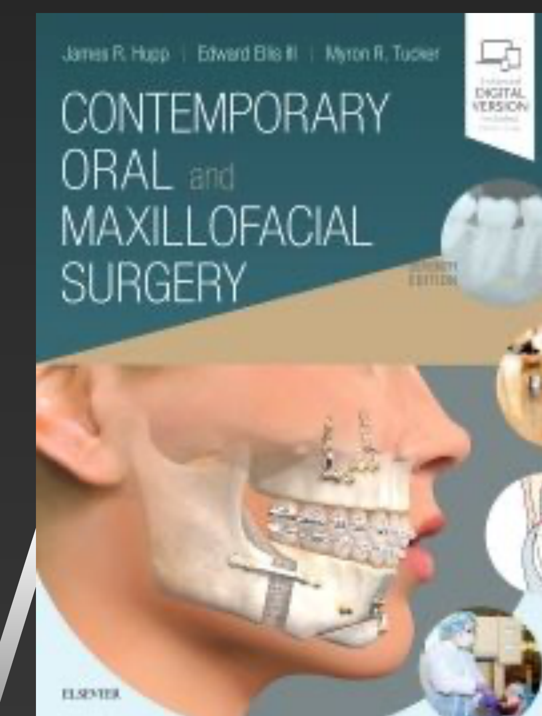
Kennedy v. Deangelo
264 N.C.App 65 (2019)

Findings Required if Dismissing Complaint under Rule 9(j)

- Plaintiff alleges general dentist was negligent when he placed a temporary denture in her mouth without support. Also had claims against a periodontist and oral surgeon.
- Trial Court, on a Rule 9(j) motion to dismiss made b the general dentist, granted the motion but did not make any findings regarding whether the two expert specialists could have reasonably been expected to testify against a general dentist
- "The trial court did not make the findings required by our precedent and that, in turn, prevents this Court from engaging in meaningful appellate review of the trial court's determination. <u>Estate of Wooden,</u> 222 NC App 396, 403 (2012)

Defendant General Dentistry

Plaintiff Expert Periodontist and Oral Surgeon



“Reasonably Expected To Qualify and Differing Specialities”

Reasonable Expectation

Differing Specialties

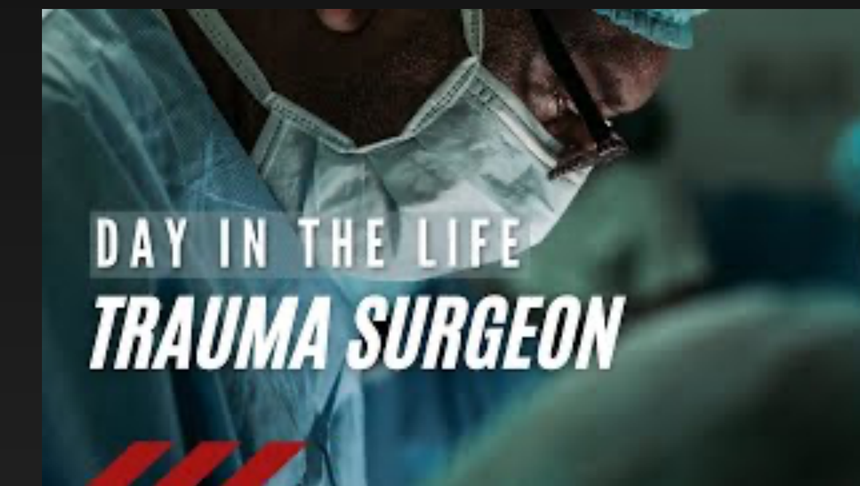
Knox v. Univ. Health Sys. Of E Carolina
187 N.C.App 279 (2007)

Where Both Defendant's Were Specialist Plaintiff
Could not "Reasonably Expect" her Obstetrician to Qualify

- Where Plaintiff's certifying expert was an obstetrician, such specialist could not be reasonably expected to qualify against a doctor specializing in emergency medicine and other doctor specializing in trauma surgery.

Defendant E.R. Doctor

Defendant Trauma Surgeon



Plaintiff Expert Obstetrician

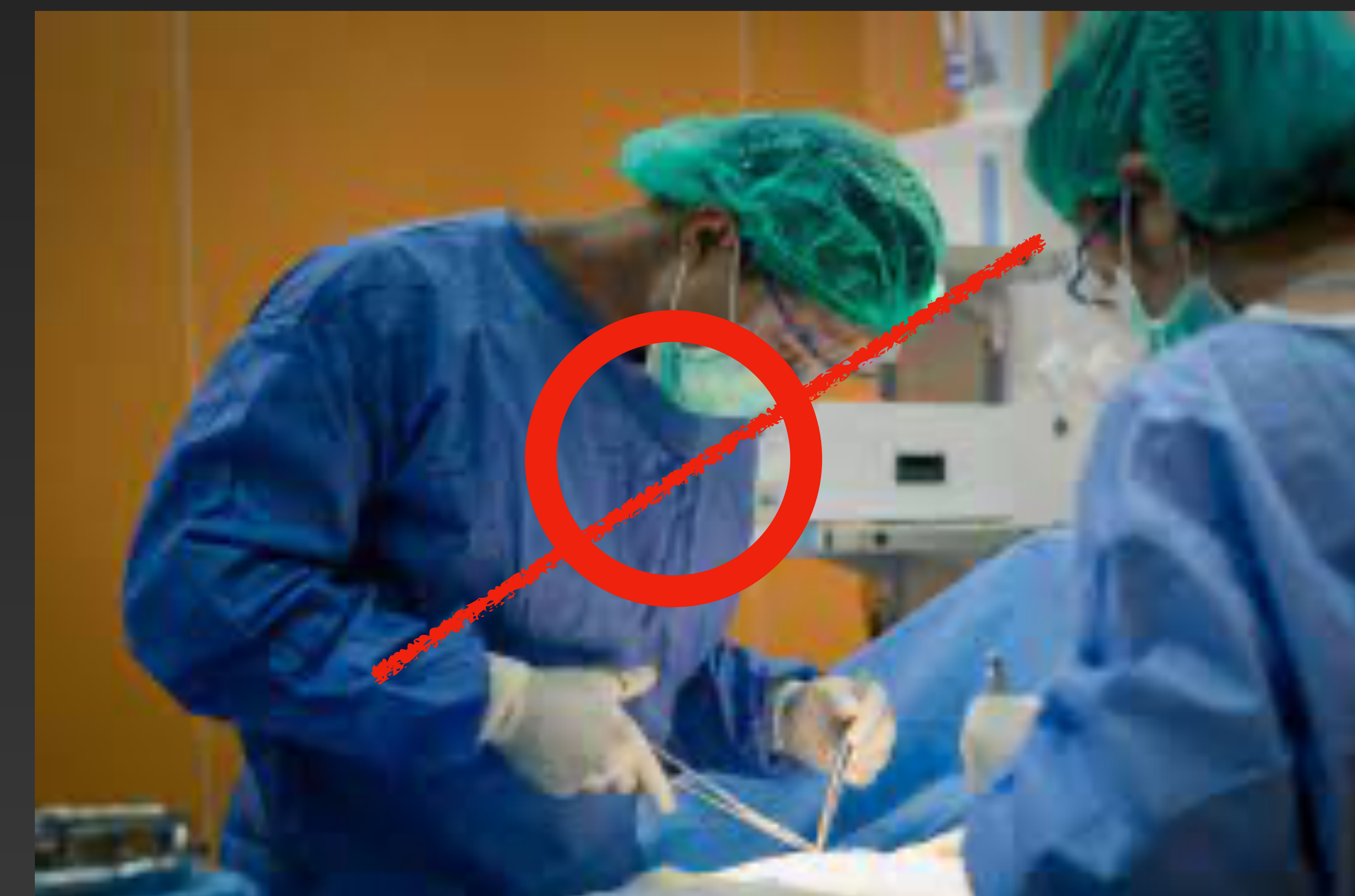
Defendant Family Doc vs. General Surgeon

Allen v. Carolina Permanente Med Group
139 N.C. App 342 (2000)

- Plaintiff's alleged that the medical care had been reviewed by a general surgeon "a person who is reasonably expected to qualify under Rule 702 that said medical care did not comply with the standard of care."
- Defendant was a board certified family doctor
- Court held "we are unconvinced that plaintiff could have 'reasonably expected' (her expert) to qualify as an expert witness....the case law clearly states where (the defendant) is a specialist the expert witness must also specialize in the same or similar specialty"

Family Doctor

General Surgeon



Smith v. Serro
185 NCApp 524 (2007)
Reasonably Expect Orthopedist vs Physical medicine

- Plaintiff admitted to rehabilitation following brain injury. While there fell during a bowling outing.
- Plaintiff files suit against rehab doctor and included 9(j) certification. During discovery it is revealed plaintiff's expert is orthopedic surgeon. Defendants move to dismiss on grounds plaintiff could not have "reasonably expected" an orthopedist to testify against a different speciality of rehab medicine.
- Plaintiff tried to characterize the "procedure" involved as "rehabilitation of patients after brain injury." Court of Appeals stated even if it accepted that Plaintiff expert was familiar with standard of care, Plaintiff could "have had no reasonable expectation" that an orthopedist could testify against a non similar specialist who was a rehabilitation specialist.

Defendant Physical Medicine

Plaintiff Expert Orthopedist

Failing to Note Pt on IV Antibiotics so Patient (Dr Braden) Not Continued on Antibiotics.

Braden v. Lowe
223 N.C. 213 (2012)

- Whether plaintiff could reasonably expect the witness to qualify as an expert is a question of law.
- "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 the witness would qualify as an expert"
- If subsequent discovery shows 9(j) statement is not supported by the facts dismissal is appropriate.
- Is Issue "amputation of toe" vs. "continuance of antibiotics" - Court of Appeals rules P could reasonably expect their expert to qualify as he testified he had been in position of restarting antibiotics following bronchoscopies."
- "We stress our ruling does not address the actual qualification of (Plaintiff's Expert)

Defendant Orthopedic Surgeon

Plaintiff Expert Internal Medicine

Reasonable Expectations
Differing Specialties

- Patient's experts could not have been expected to testify to the applicable standard of care against a dentist because the dentist was a general dentist while the experts were a periodontist and an oral surgeon, neither of whom regularly practiced in the field of general dentistry. Remanded to have court make findings to permit meaningful appellate review. Kennedy v. Deangelo (cite)

Morris v. Southeastern Orthopedics Sports Med.
199 N.C.App 425 (2009)
Subsequent Treater and "Reasonable Expectation"

- Plaintiff files a complaint on 12 January 2005 with appropriate 9(j) certification.
- In interrogatory answers, plaintiff averred that she had contacted the expert on 20 October 2005 and expert had stated he was willing to testify on 15 November 2004. However, in a deposition the expert stated he did not review the records until after the case had been filed.
- In June of 2006 Plaintiff's expert witness designation stated a subsequent treating physician "who may be called to testify at the trial not as a retained expert witness but instead will offer his opinion testimony as a subsequent treating physician…that the care was below the standard of care" This expert was deposed and stated he had previously communicated to the attorney in October 2004 there was a breach of the standard of care and he was willing to testify to that. Plaintiff served supplemental answers to the 9(j) interrogatories which referenced the subsequent treater.
- Trial court dismisses plaintiffs complaint on the basis of Rule 9(j) noncompliance.
- Court of Appeals reverses noting that at the time the pleading was filed the plaintiff's attorney knew the subsequent treater had told him his opinion and was willing to testify. Further, this treater was a well qualified physician is the same specialty as the defendant. "These facts would cause a reasonable person to believe that (the subsequent treater) also met the requirements of Rule 9(j).

“Majority of Professional Time”

Reasonably Expected to Qualify

Interplay with 702(e) -“Majority of Professional Time”

- Rule 702(b) requires that any expert shall not testify in a medical malpractice action unless it is shown (where defendant is a specialist) that: 1)that expert has specialized in the same speciality or a similar speciality which includes the performance of the procedure at issue, and 2)during the year immediately preceding the occurrence of alleged negligence, the expert devoted “a majority of his or her professional time” to either or both the active clinical practice of the same health care profession (if a specialist then the active clinical practice of that speciality or similar speciality which includes the performance of the procedure)
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Majority of Professional Time - Reasonable Expectation to Qualify

Moore v. Proper

“Reasonably Expected”

Case of Retired Dentist & Majority of Professional Time
Moore v. Proper
366 N.C. 25 (2012)

- Plaintiff has tooth extracted on 26 January 2008 at which time her jaw was fractured.
  - Plaintiff files complaint with proper certification that case had been reviewed by a person reasonably expected to qualify
  - Discovery showed Plaintiff’s expert was dentist who while retired since 1997, had maintained his license and attended yearly CME courses.
  - For the year preceding 2008, he first estimated he had worked about 30 days doing fill in work but later testified he filled in for a dentist for 2 1/2 months. He stated that 100% of his time practicing dentistry on a fill in basis constituted active clinical practice.
- Expert also testified he has served on Asheville City Council during this time period.
- Trial court grants summary judgment. No findings. Order stated “no reasonable person would have expected expert to testify.
- Supreme Court reverses. Court noted this was not a question of whether expert actually qualifies but rather whether he was “reasonably expected to qualify.’ That compliance is determined at time of filing and depends on facts and circumstances that were known or should have been known at the time of filing. All reasonable inferences in favor of the nonmoving party.

“Reasonably Expected”

Case of Retired Dentist & Majority of Professional Time
Moore v. Proper
366 N.C. 25 (2012)

- Court noted a continuum exists between active and inactive practice (1 hour vs. 80 hours)
- “Whether a professional’s clinical practice is considered <u>active</u> 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.”

Greater than 50%?

Active Clinical Practice
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Professional Time =Actual Time Spent (eg:Clinical, Administration, Continuing Ed)