

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-780

Filed: 15 March 2016

Wake County, No. 14 CVS 9339

TIMOTHY S. BOYD, Plaintiff,

v.

GREGORY M. REKUC, M.D. and RALEIGH ADULT MEDICINE, P.A., Defendant.

Appeal by Plaintiff from order entered 12 January 2015 by Judge Paul G. Gessner in Wake County Superior Court. Heard in the Court of Appeals 30 November 2015.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Patricia P. Shields and Joshua D. Neighbors, and Gaylord Rodgers, PLLC, by Daniel M. Gaylord, for the Plaintiff-Appellant.

Young Moore and Henderson, P.A., by Elizabeth Pharr McCullough and Kelly Street Brown, for the Defendants-Appellees.

Lincoln Derr PLLC, by Sara R. Lincoln and Lori R. Keeton for Amicus Curiae, North Carolina Association of Defense Attorneys.

The Law Office of D. Hardison Wood, by D. Hardison Wood and Reginald Mathis, for Amicus Curiae, North Carolina Advocates for Justice.

DILLON, Judge.

Timothy S. Boyd (“Plaintiff”) appeals from the trial court’s order dismissing his medical malpractice claims. For the following reasons, we reverse.

I. Background

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Plaintiff's complaint asserts claims for medical malpractice against Defendants Gregory M. Rekuc, M.D., and Raleigh Adult Medicine, P.A., contending that Defendants' failure to provide him with up-to-date vaccinations proximately caused his suffering from a number of maladies. His action was dismissed because he did not file his complaint with the certification required by Rule 9(j) of the Rules of Civil Procedure within the applicable three (3) year statute of limitations. (Rule 9(j) requires essentially that a medical malpractice complaint asserts that an expert has reviewed the relevant medical care and medical records and is willing to testify that the medical care provided by the defendants did not comply with the applicable standard of care.) The dates relevant to this appeal are as follows:

On 16 March 2011, Plaintiff was last seen by Defendants.¹

On 14 March 2014, Plaintiff filed a medical malpractice complaint against Defendants in a prior action, within the applicable three (3) year statute of limitations; however, his complaint did not comply with the Rule 9(j) certification requirements.

On 16 June 2014, Plaintiff voluntarily dismissed the prior action, pursuant to Rule 41 of the Rules of Civil Procedure.

¹ Plaintiff claims that he was still under the care of Defendants as of 25 April 2011 when he was admitted to Wake Medical Center where he was diagnosed with his various maladies. However, for purposes of resolving this appeal, it does not matter whether the date Defendants last provided care was on 16 March or 25 April.

On 14 July 2014, Plaintiff commenced this present action, filing a complaint *with* the required Rule 9(j) certification. Specifically, the complaint asserted, not only that the Rule 9(j) expert review occurred, but also that the expert review occurred *prior to 14 March 2014* (when the first complaint was filed).

On 12 January 2015, the trial court granted Defendants' motion to dismiss Plaintiff's complaint, concluding that the second complaint was not filed within the applicable statute of limitations. Plaintiff timely appealed.

II. Analysis

A. *Brisson* Controls Our Case

The only issue on appeal is whether the trial court correctly concluded that Plaintiff's second complaint was barred by the applicable statute of limitations. We hold that the trial court erred in its conclusion. Specifically, where a plaintiff voluntarily dismisses a medical malpractice complaint which was timely filed in good faith but which lacked a required Rule 9(j) certification, said plaintiff may re-file the action after the expiration of the applicable statute of limitations *provided that* (1) he files his second action within the time allowed under Rule 41 and (2) the new complaint asserts that the Rule 9(j) expert review of the medical history and medical care occurred prior to the filing of the original timely-filed complaint.

This case involves the interplay between Rule 9(j) and Rule 41(a)(1) of our Rules of Civil Procedure.

Rule 9(j) requires that a complaint alleging medical malpractice (where *res ipsa loquitur* does not apply) “shall be dismissed” *unless* the complaint specifically asserts that the relevant medical care and medical records have been reviewed by a qualified expert. N.C. Gen. Stat. § 1A-1, Rule 9(j) (2014). Rule 9(j) also provides that *prior to the expiration of the applicable statute of limitations*, a medical malpractice complainant may move the trial court for an order “to extend the statute of limitations for a period not to exceed 120 days . . . in order to comply with this Rule[.]” *Id.*

Rule 41(a)(1) allows a plaintiff to dismiss *any* action voluntarily prior to resting his case. *Id.* § 1A-1, Rule 41(a)(1). The Rule further provides essentially that, where the dismissed action was filed within the applicable statute of limitations, said plaintiff can commence a new action (based on the same claim) outside of the applicable statute of limitations so long as the new action is commenced *within one year* after the original action was dismissed. *See Brockweg v. Anderson*, 333 N.C. 486, 489, 428 S.E.2d 157, 159 (1993).

The relevant facts in the present case are essentially “on all fours” with our Supreme Court’s 2000 opinion in *Brisson v. Santoriello*, 351 N.C. 589, 528 S.E.2d 568 (2000). In *Brisson*, the relevant timeline was as follows:

27 Jul 1994 – Alleged malpractice occurred (Three-year statute of limitations);

3 Jun 1997 – Complaint filed just within the applicable statute of limitations,
but without the proper Rule 9(j) certification;

6 Oct 1997 – Plaintiff voluntarily dismisses the action pursuant to Rule 41;

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9 Oct 1997 – A second action filed *with* Rule 9(j) certification. The certification asserted, not only that an expert review had occurred, but also that the review took place *prior to* the filing of the *original* complaint, though the certification was “inadvertently omitted from the [original complaint][.]” *Id.* at 592, 528 S.E.2d at 569.

Based on these facts, our Supreme Court held that the second action was not time-barred since it was filed within one year of the Rule 41(a)(1) voluntary dismissal. *Id.* at 597, 528 S.E.2d at 573. The Court stated that “[t]he only limitations are that the [voluntary] dismissal [of the first action] not be done in bad faith and that it be done prior to a trial court’s ruling dismissing plaintiff’s claim or otherwise ruling against plaintiff at any time prior to plaintiff resting his or her case at trial.” *Id.* Therefore, *Brisson* essentially allows a plaintiff who has filed a defective medical malpractice complaint to voluntarily dismiss the action to gain a year to file a complaint which complies with Rule 9(j). Of note, the Court did not *expressly rely* in its holding on the fact that the second complaint asserted that the Rule 9(j) review had occurred prior to the filing of the original complaint.

The Supreme Court has clarified *Brisson* on three separate occasions of note; however, that Court has never overruled *Brisson*. Our Court has also commented on *Brisson* and Rule 9(j) on a number of occasions. The key cases from the past sixteen (16) years are discussed below, with an emphasis on the Supreme Court’s holdings.

Essentially, the Supreme Court cases stand for the following: A medical malpractice complaint which fails to include the required Rule 9(j) certification is

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subject to dismissal with prejudice pursuant to Rule 9(j). Prior to any such dismissal, however, said plaintiff may amend or refile (pursuant to Rules 15 or 41, respectively) the complaint with the proper Rule 9(j) certification. Further, if such subsequent complaint is filed after the applicable statute of limitations has expired but which otherwise complies with Rule 15 or 41, the subsequent complaint is not time-barred *if it asserts that the Rule 9(j) expert review occurred before the original complaint was filed.*

2002: Supreme Court Opinion – *Thigpen v. Ngo*

The first occasion of note in which our Supreme Court addressed *Brisson* was in 2002 in *Thigpen v. Ngo*, 355 N.C. 198, 558 S.E.2d 162 (2002). Here, our Supreme Court held that if a complaint *which lacks the required Rule 9(j) certification* is amended pursuant to Rule 15 to include the certification, the amended complaint *will not relate back* to the original complaint (for statute of limitations purposes) *unless* the amended complaint asserts that the Rule 9(j) expert review occurred *prior to* the filing of the *original* complaint. *Id.* at 204, 558 S.E.2d at 166. *Thigpen* did not involve a Rule 41(a)(1) dismissal, thereby distinguishing that case from *Brisson*. The Court, though, did comment on *Brisson*, stating that a plaintiff who fails to include the Rule 9(j) certification could take a voluntary dismissal “to effectively extend the statute of limitations.” *Id.* at 201, 558 S.E.2d at 164.

2004: Supreme Court Adopts Dissent from our Court in
Bass v. Durham County

The second important Supreme Court decision was actually a short statement reversing an opinion of our Court “[f]or the reasons stated in the dissenting opinion[.]” *Bass v. Durham Cnty.*, 358 N.C. 144, 592 S.E.2d 687 (2004) (per curiam). *Bass* involved the interplay of the Rule 9(j) certification, Rule 9(j)’s 120-day extension provision and Rule 41(a)(1) with the following factual timeline:

Aug 1996 – Date of alleged malpractice (three-year statute of limitations);

Aug 1999 – Three years after the alleged malpractice, instead of filing a complaint, the plaintiff obtains 120-day extension from the trial court, as allowed by Rule 9(j);

2 Dec 1999 – On the 120th day from the extension order, the plaintiff files the complaint, but without the required Rule 9(j) certification;

13 Dec 1999 – After the 120-day extension expired, the plaintiff files an amended complaint *with* a Rule 9(j) certification;

29 May 2001 – Plaintiff voluntarily dismisses the complaint;

12 Jun 2001 – Plaintiff files a new action with a Rule 9(j) certification. However, the record on appeal reflects that the certification in this new complaint did *not* assert whether the Rule 9(j) expert review had occurred prior to the filing of the original complaint;

26 Oct 2001 – Trial court dismisses all of the plaintiff’s claims.

On appeal, in a 2-1 decision, our Court reversed the trial court’s dismissal, relying on *Brisson* to conclude that the 12 June 2001 complaint in the second action was not time-barred since Rule 41 can be used to cure the defects of a timely filed complaint.

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Bass v. Durham Cnty., 158 N.C. App. 217, 222, 580 S.E.2d 738, 741 (2003), *rev'd*, 358 N.C. 144, 592 S.E.2d 687 (2004).

Judge Tyson, however, issued a dissenting opinion, *see* 158 N.C. App. at 223, 580 S.E.2d at 742 (Tyson, J., dissenting), which was adopted by the Supreme Court, *see* 358 N.C. 144, 592 S.E.2d 687 (2004). In his dissent, Judge Tyson concluded that the majority had misapplied *Brisson*. 158 N.C. App. at 223, 580 S.E.2d at 742. He concluded that *Thigpen*, in fact, controlled. *Id.* at 224-25, 580 S.E.2d at 743. Judge Tyson, though, never stated that the Supreme Court in *Thigpen* had overruled *Brisson*, but rather stated that the “[t]he facts of *Brisson* are distinguishable from the case at bar.” *Id.* at 224, 580 S.E.2d at 743. Judge Tyson pointed out that the plaintiff in *Bass* did not file any complaint with the required Rule 9(j) certification until after the applicable statute of limitations had expired and the 120-day extension had run. *Id.* at 225, 580 S.E.2d at 743. Moreover, though not *expressly* mentioned by Judge Tyson, the record on appeal reveals that the plaintiff never stated that the Rule 9(j) expert review had occurred prior to the filing of his first complaint, instead merely asserting that “[t]he medical care provided by Defendants has been reviewed by a person who is reasonably expected to qualify as an expert witness[.]” *Bass*, No. COA02-841, Record on Appeal at 15, 42. Therefore, just as in *Thigpen*, a certification in a new pleading which asserts that a Rule 9(j) expert review had been conducted

does not relate back to a prior defective pleading where the new pleading fails to assert that the review took place before the filing of the original (defective) pleading.

In *dicta*, Judge Tyson noted that the second complaint in *Brisson* was filed, *not only* within the one-year period allowed for in Rule 41(a)(1), *but also* within 120 days of the expiration of the applicable statute of limitations, opining that the second complaint “would have been timely filed if plaintiffs had requested and received the 120-day extension.” *Id.* at 224, 580 S.E.2d at 743.

2005-2010: Court of Appeal’s Conflicting Interpretations of
Brisson, Thigpen, and Bass

In 2005, Judge (now Justice) Jackson, writing for our Court, applied *Bass*, *Thigpen*, and *Brisson* to conclude essentially that a complaint with a Rule 9(j) certification did not relate back to a prior complaint which was voluntarily dismissed where the second complaint failed to assert that the Rule 9(j) expert review occurred prior to the filing of the first complaint. *In re Barksdale v. Duke Univ. Med. Ctr.*, 175 N.C. App. 102, 107-08, 623 S.E.2d 51, 55-56 (2005) (noting that the plaintiff had admitted that the expert review occurred “well after the filing of the initial complaint”). Specifically, Judge (now Justice) Jackson honed in on language from our Supreme Court in *Thigpen*, stating that the General Assembly intended for the expert review to be a prerequisite of filing a malpractice complaint and that “permitting [the] 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.” *Id.* at 107, 623 S.E.2d at 55 (quoting *Thigpen*, 355 N.C. at 203-04, 558 S.E.2d at 166).

In 2006, however, our Court issued an opinion which interpreted the interplay of *Brisson*, *Thigpen*, and *Bass* a little differently. See *Ford v. McCain*, 192 N.C. App. 667, 666 S.E.2d 153 (2008). Specifically, the *Ford* panel stated that Judge Tyson’s *dicta* in *Bass* (referred to herein above) effectively limited *Brisson* to actions where the second complaint is filed *within 120 days* after the statute of limitations has expired, because Rule 9(j) otherwise allows a complainant to seek a 120-day extension of the statute of limitations. The *Ford* panel so held even though Rule 41 makes no mention of a 120-day timeframe and even though the plaintiff in *Brisson*, never sought a 120-day extension. *Id.* at 672 n. 1, 666 S.E.2d at 157 n. 1.²

2010: Our Supreme Court Speaks Again in *Brown v. Kindred Nursing*

In 2010, our Supreme Court, on the third (and most recent) occasion of note, commented on *Brisson* in the case of *Brown v. Kindred Nursing*, 364 N.C. 76, 82-83, 692 S.E.2d 87, 91 (2010). In *Brown*, the Supreme Court *reaffirmed* its holding in *Brisson*. *Id.* at 82, 692 S.E.2d at 91. The Court essentially reconciled *Brisson* with its other holdings in the same way Judge (now Justice) Jackson had done in

² Even assuming that *Brisson* only applies to second actions (commenced following a voluntary dismissal of a first action) filed within 120 days of the statute of limitations expiration, rather than all those filed within one year of the dismissal of the prior action as allowed under Rule 41, we note that, here, the second action was filed within 120 days of the expiration of the applicable statute of limitations.

Barksdale. See *id.* at 82-83, 692 S.E.2d at 91. Essentially, the Supreme Court stated that a complaint containing the required Rule 9(j) certification filed *after* the applicable statute of limitations has expired will relate back to a prior, voluntarily dismissed complaint *if* (1) the refiled complaint is filed within one year of the dismissal of the first complaint *and* (2) the refiled complaint states that the Rule 9(j) expert review took place *prior to* the filing of the *original* action. See *id.* Specifically, the Court stated that under *Brisson*, “Rule 9(j) does not prevent parties from voluntarily dismissing a nonconforming complaint and filing a new complaint with proper certification,” emphasizing that “in *Brisson*, the plaintiffs had complied with every portion of Rule 9(j) except for including the certification in the [original] complaint.” *Id.* at 82, 692 S.E.2d at 91. The Supreme Court did not state that *Brisson* only applied where the second action is filed within 120 days of the statute of limitations, rather than to all actions filed within one year of the dismissal of the prior complaint as allowed under Rule 41. Rather, under *Brown*, it appears that a plaintiff can utilize the entire year allowed for under Rule 41 to refile the action, provided that the new action asserts that the expert review occurred prior to the filing of the first action.

2011-2016: Decisions from the Court of Appeals

In 2011, our Court issued a decision, stating that “[b]ased on the facts of the instant case, *Brisson* was overruled by the Supreme Court in *Bass*.” *McKoy v.*

Beasley, 213 N.C. App. 258, 263, 712 S.E.2d 712, 717 (2011). This statement from our Court cannot stand for the proposition that *Brisson* was overruled *in its entirety*, for such a reading would conflict with our Supreme Court's opinion in *Brown*. (Notably, our *McKoy* decision never mentions *Brown*.) In any event, the *McKoy* case involved a plaintiff who filed a wrongful death claim within the applicable statute of limitations but *without* a Rule 9(j) certification. After said action was dismissed without prejudice, the plaintiff filed a new action outside of the applicable statute of limitations which contained a Rule 9(j) certification. *Id.* at 260-61, 712 S.E.2d at 713-14. Though not expressly stated in the opinion, the record on appeal in *McKoy* reveals that the new complaint failed to state whether the Rule 9(j) expert review took place before the filing of the original action. *McKoy*, No. COA09-1315, Record on Appeal at 6-7. Furthermore, we believe that, for this reason, the holding in *Brisson* was not applicable to *McKoy*. That is, to the extent that *Brisson* could have been read to allow a Rule 41 dismissal to save *any* type of Rule 9(j) defect in a medical malpractice complaint (even where the plaintiff failed to have a medical review conducted prior to filing said complaint), *Brisson* had been "overruled" (or, more accurately, narrowed) by *Thigpen* and *Bass*: The extra time provided in Rule 41 to file a second action can only save an otherwise time-barred second complaint if the second

complaint asserts that the expert review was conducted prior to the filing of the original complaint.³

As recently as January of this year (2016), our Court has acknowledged that *Brisson* remains good law, allowing “a 9(j) deficient complaint to be dismissed [pursuant to Rule 41] and then re-filed with a sufficient 9(j) statement within one year of dismissal.” *Alston v. Hueske*, ___ N.C. App. ___, ___, 781 S.E.2d 305, 310-11 (2016).

B. Rule 9(j)'s 120-Day Extension Provision

Defendants make mention of Rule 9(j)'s provision allowing a plaintiff to seek from the trial court an order extending the statute of limitations by 120 days to allow the plaintiff additional time to comply with the requirements of the Rule. However, here, this provision does not come into play since Plaintiff never sought a 120-day extension of the statute of limitations. 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 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.

³ There is language in *McKoy* which could be read to suggest that Rule 41 cannot be used even to save a defective complaint where the expert review had already occurred. However, such a reading would totally eradicate any precedential value of *Brisson* and be at odds with the reasoning in *Thigpen*.

It could be argued from the text of the rule that the purpose of the 120-day extension is to allow a plaintiff additional time, *not only* to draft the required Rule 9(j) pleading *but also* to locate an expert to conduct the medical review, since the drafting of a pleading itself should not take that long if the review has, otherwise, already taken place. The Supreme Court in *Thigpen* suggested that the 120-day statute of limitations extension allows for the actual review to take place during this 120-day extension period. *Thigpen*, 355 N.C. at 203-04, 558 S.E.2d at 166 (stating that “[t]he 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*” (emphasis added)).

However, the Supreme Court held in *Brown* by a 4-3 decision that the 120-day extension allowed under Rule 9(j) can only be used “for the limited purpose of filing a complaint. [It cannot be used] . . . to locate a certifying expert, add new defendants, and amend a defective pleading.” 364 N.C. at 84, 692 S.E.2d at 92. In *Brown*, the plaintiff filed a defective complaint and then obtained a 120-day extension, during which he obtained a certifying expert and filed an amended complaint. *Id.* The dissent in *Brown* interpreted the majority’s holding to apply to *any* situation where a 120-day extension was obtained, not just situations where the plaintiff has already filed a complaint prior to obtaining the 120-day extension to file an amended complaint. *Id.* at 90, 692 S.E.2d at 95-96 (Hudson, J., dissenting) (questioning the

majority's reasoning that the purpose of providing for a 120-day extension was to allow a plaintiff an additional four (4) months merely to draft an appropriate Rule 9(j) statement).

In 2016, though, our Court, in *Alston*, interpreted *Brown* much more narrowly than suggested by the *Brown* dissent. That is, our 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. *Alston*, ___ N.C. App. at ___, 781 S.E.2d at 309 (stating that "Rule 9(j) also provides an avenue to extend the statute of limitations in order to provide additional time, if needed, to meet the expert review requirement," but that the extension "may not be used to amend a previously filed complaint").

We need not resolve this question in this appeal, however, since the issue is not before us.

III. Conclusion

Based on our Supreme Court's holdings in *Brisson*, *Thigpen*, *Bass*, and *Brown*, we hold that the trial court erred in its order dismissing Plaintiff's complaint: Plaintiff filed his original complaint within the applicable statute of limitations. Though his original complaint was filed without the required Rule 9(j) certification and, therefore, subject to be dismissed with prejudice, *see* N.C. Gen. Stat. § 1A-1, Rule 9(j), Plaintiff voluntarily dismissed his original complaint pursuant to Rule 41(a)(1)

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before any such dismissal with prejudice occurred. He, then, refiled his complaint within the one year time period allowed under Rule 41, and asserted in said complaint that the expert review of his medical care and history had been conducted prior to the filing of the original complaint. Therefore, we reverse the order of the trial court dismissing Plaintiff's complaint and remand the matter for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Chief Judge McGEE and Judge DAVIS concur.