IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1015

Filed: 16 May 2017

Robeson County, No. 15 CVS 1945

MARJORIE C. LOCKLEAR, Plaintiff,

v.

MATTHEW S. CUMMINGS, M.D., SOUTHEASTERN REGIONAL MEDICAL CENTER, DUKE UNIVERSITY HEALTH SYSTEM and DUKE UNIVERSITY AFFILIATED PHYSICIANS, INC., Defendants.

Appeal by Plaintiff from orders entered 2 February 2016 and 4 February 2016 by Judge James Gregory Bell in Robeson County Superior Court. Heard in the Court of Appeals 8 March 2017.

Law Offices of Walter L. Hart, IV, by Walter L. Hart, IV, for Plaintiff-Appellant.

Cranfill Sumner & Hartzog LLP, by Jaye E. Bingham-Hinch, David D. Ward, and Katherine Hilkey-Boyatt, for Defendant-Appellees Matthew S. Cummings, M.D., Duke University Health System, and Duke University Affiliated Physicians, Inc.

Brotherton Ford Berry & Weaver, PLLC, by Robert A. Ford and Demetrius Worley Berry, for Defendant-Appellee Southeastern Regional Medical Center.

HUNTER, JR., Robert N., Judge.

Marjorie C. Locklear ("Plaintiff") appeals from an order dismissing her complaint against Defendants Dr. Matthew Cummings, Duke University Health System, and Duke University Affiliated Physicians (collectively "Duke Defendants") under Rule 9(j), as well as the denial of her motion to amend under Rule 15(a).

Plaintiff also appeals from an order dismissing her complaint against Defendant Southeastern Regional Medical Center ("Southeastern") under Rules 9(j) and 12(b)(5), as well as the denial of her motion to amend under Rule 15(a). After review, we reverse in part and affirm in part.

I. Factual and Procedural Background

On 30 July 2015, one day before the statute of limitations expired, Plaintiff filed a complaint against Defendants, seeking monetary damages for medical negligence. The complaint alleges the following narrative.

On 31 July 2012, Dr. Cummings performed cardiovascular surgery on Plaintiff. During surgery, Dr. Cummings failed to monitor and control Plaintiff's body and was distracted. Additionally, he did not position himself in close proximity to Plaintiff's body. While Plaintiff "was opened up and had surgical tools in her[,]" Plaintiff fell off of the surgical table. Plaintiff's head and the front of her body hit the floor. As a result of the fall, Plaintiff suffered a concussion, developed double vision, injured her jaw, displayed bruises, and was "battered" down the left side of her body. Plaintiff also had "repeated" nightmares about falling off the surgical table. Duke Defendants and Defendant Southeastern acted negligently by retaining physicians, nurses, and other healthcare providers who allowed Plaintiff's accident to occur.

On 9 September 2015, private process server, Richard Layton, served Duke Defendants by delivering Plaintiff's civil cover sheet, summons, and complaint to

Margaret Hoover, a registered agent for Duke Defendants. On 19 September 2015, Gary Smith, Jr. served Plaintiff's summons and complaint on Dr. Cummings. Lastly, on 24 September 2015, Smith served Plaintiff's summons and complaint on Southeastern by delivering the papers to C. Thomas Johnson, IV, Southeastern's Chief Financial Officer.[1]

On 10 November 2015, Dr. Cummings and Duke Defendants filed a joint answer and motion to dismiss. Dr. Cummings and Duke Defendants denied the allegations in Plaintiff's complaint and asserted defenses under Rules 12(b)(6) and 9(j) of the North Carolina Rules of Civil Procedure.

On 23 November 2015, Southeastern filed an answer and denied Plaintiff's allegations. Southeastern moved to dismiss Plaintiff's compliant under Rules 12(b)(4), 12(b)(5), 12(b)(6), and 9(j) of the North Carolina Rules of Civil Procedure. On 29 December 2015, Johnson filed an affidavit. In the affidavit, Johnson swore he was the Chief Financial Officer of Southeastern, but not the corporation's registered agent.

On 11 January 2016, the trial court held a hearing on all the Defendants' pending motions. During argument, Plaintiff requested "leave of the Court to amend [the] complaint so that there's no controversy hereafter." Plaintiff moved under Rule

[1] In Smith's affidavit, he listed Johnson as Southeastern's registered agent.

60, not Rule 15(a), because "Rule 60 . . . allows a mere clerical order – error to be corrected." Then, Plaintiff requested leave "pursuant to Rules 15(a) and 60."

On 2 February 2016, the trial court granted Dr. Cummings's and Duke Defendants' motion to dismiss pursuant to Rule 9(j) and denied Plaintiff's motion to amend under Rule 15(a). On 4 February 2016, the trial court granted Southeastern's motion to dismiss pursuant to Rules 9(j) and 12(b)(5) and denied Plaintiff's motion to amend under Rule 15(a). Plaintiff filed timely notice of appeal.

II. Standard of Review

The standard of review of a Rule 12(b)(6) motion to dismiss is *de novo*. *Leary v. N.C. Forest Prods., Inc.,* 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003). Likewise, a trial court's order dismissing a complaint pursuant to Rule 9(j) is reviewed *de novo* on appeal because it is a question of law. *Barringer v. Wake Forest Univ. Baptist Med. Ctr.*, 197 N.C. App. 238, 256, 677 S.E.2d 465, 477 (2009) (citation omitted).

We review the trial court's dismissal under Rule 12(b)(5) *de novo*. *New Hanover Cty. Child Support Enforcement ex rel. Beatty v. Greenfield*, 219 N.C. App. 531, 533, 723 S.E.2d 790, 792 (2012) (citation omitted).

III. Analysis

A. Motions to Dismiss under Rule 12(b)(6) and Rule 9(j)

Plaintiff argues the trial court erred in dismissing her complaint against all the Defendants under Rule 12(b)(6) and Rule 9(j). Because Plaintiff's claims sound in ordinary negligence, not medical malpractice, we agree.

"In North Carolina, the distinction between a claim of medical malpractice and ordinary negligence is significant for several reasons, including that medical malpractice actions cannot be brought [without Rule 9(j) compliance]." *Gause v. New Hanover Reg'l Med. Ctr.*, ___ N.C. App. ___, ___, 795 S.E.2d 411, ___ (2016) (citing N.C. Gen. Stat. § 1A-1, Rule 9(j) (2015)).

"Whether an action is treated as a medical malpractice action or as a common law negligence action is determined by our statutes[.]" *Smith v. Serro*, 185 N.C. App. 524, 529, 648 S.E.2d 566, 569 (2007). N.C. Gen. Stat. § 90-21.11(2)(a) defines a medical malpractice action as "[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 . . . health care by a health care provider." N.C. Gen. Stat. § 90-21.11(2)(a). "The term 'professional services' is not defined by our statutes but has been defined by the Court as 'an act or service arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual.'" *Gause*, ___ N.C. App. at ___, 795 S.E.2d at ___ (quoting *Sturgill v. Ashe Mem'l Hosp., Inc.*, 186 N.C. App. 624, 628, 652 S.E.2d 302, 305 (2007)). "Our courts

have classified as medical malpractice those claims alleging injury resulting from activity that required clinical judgment and intellectual skill." *Id.* at ___, 795 S.E.2d at ___ (citation omitted). "Our courts have classified as ordinary negligence those claims alleging injury caused by acts and omissions in a medical setting that were primarily manual or physical and which did not involve a medical assessment or clinical judgment." *Id.* at ___, 795 S.E.2d at ___ (citation omitted).

In cases of a plaintiff falling, the deciding factor is whether the decisions leading up to the fall required clinical judgment and intellectual skill. Where the complaint alleges or discovery shows the fall occurred because medical personnel failed to properly use restraints, the claim sounded in medical malpractice. *Sturgill*, 186 N.C. App. at 628-30; *Alston v. Granville Health Sys.*, 221 N.C. 416, 421, 727 S.E.2d 877, 881 (2012) ("*Alston II*"). However, when a complaint alleged the plaintiff fell of a gurney in an operating room while unconscious, this Court held the claim sounded in ordinary negligence, not medical malpractice. *Alston v. Granville Health Sys.*, No. 09-1540, 2010 WL 3633738 (unpublished) (Sept. 21, 2010) ("*Alston I*").[2] The

[2] In *Alston I*, this Court reversed the trial court's dismissal of plaintiff's complaint and held Rule 9(j) certification was not required, because plaintiff's claims sounded in ordinary negligence. Following discovery and a motion for summary judgment, the trial court granted summary judgment for defendants and dismissed the plaintiff's action again. This Court upheld the subsequent dismissal, as discovery showed "the decision to restrain a patient under anesthesia is one that requires use of specialized skill and knowledge and, therefore, is considered a professional service." *Alston II*, 221 N.C. App. at 421, 727 S.E.2d at 881.

question is whether the actions leading to the fall require specialized skill or clinical judgment. *Gause*, ___ N.C. App. at ___, 795 S.E.2d at ___ (citations omitted).

In her complaint, Plaintiff states, *inter alia*:

> 23. That, at all times relevant to this action, Defendant Cummings . . . held himself out to possess the special skills and knowledge possessed by other physicians practicing in the specialized field of internal medicine, cardiology, and cardiovascular surgery.
>
> 24. That the medical care and treatment rendered to Plaintiff by Defendant Cummings on July 31, 2012 has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the North Carolina Rules of Evidence, and who is willing to testify that the medical care rendered to Plaintiff fell below the applicable standard of care.
>
> 25. That the medical care and treatment of Defendant Cummings has been reviewed by a person that Plaintiff will seek to have qualified by an expert witness under Rule 702 of the North Carolina Rules of Evidence, and who is willing to testify that the medical care rendered to Plaintiff fell below the applicable standard of care.
>
> ...
>
> 27. That the times, places, and on the occasion herein in question, Defendant Cummings was negligent, and his acts and omissions of negligence include, but are not limited to:
>
> > a) In failing to use his best professional judgment and skill while operating on the Plaintiff;
> >
> > b) In failing to properly control Plaintiff's body during the surgery;
> >
> > c) In failing to properly monitor Plaintiff's body

> during surgery;
>
> d) In allowing himself to be distracted;
>
> e) In not positioning himself in close proximity to Plaintiff's body;
>
> f) In not properly supervising and directing the proximity of nurses and other staff in relation to Plaintiff;
>
> g) In allowing Plaintiff to fall off the operating table;
>
> h) In failing to use good judgment, reasonable skill, and diligence in the treatment of Plaintiff; and
>
> i) Defendant Cummings was otherwise careless and negligent.

Plaintiff's complaint sounds in ordinary negligence, not medical malpractice. Although Plaintiff uses language which would seemingly trigger a medical malpractice claim, we conclude the *facts* in Plaintiff's complaint give rise to a claim of ordinary negligence. Plaintiff's factual allegation, namely "Plaintiff was allowed to fall off the operating table while Plaintiff was opened up and had surgical tools in her[,]" forecasts the type of injury resulting from actions not requiring specialized skill or clinical judgment. *Gause*, ___ N.C. App. at ___, 795 S.E.2d at ___ (citations omitted).

Dr. Cummings and Duke Defendants contend Plaintiff failed to argue her action is not medical malpractice, and, thus, Plaintiff is barred from raising this issue on appeal. Defendants further contend we cannot address this issue on appeal, as it

would constitute this Court improperly supplementing an appellant's brief. However, in our *de novo* review, we cannot review whether the trial court erred in dismissing Plaintiff's complaint under Rule 9(j) without addressing whether Rule 9(j) certification is required.

Notwithstanding Defendants' arguments, we hold this action sounds in ordinary negligence. Therefore, Plaintiff was not required to comply with Rule 9(j). Accordingly, the trial court erred in dismissing Plaintiff's complaint under Rules 12(b)(6) and 9(j).[3]

The concurring and dissenting opinion asserts our majority supplements Plaintiff's arguments on appeal and improperly concludes Plaintiff's claims sound in ordinary negligence. In support of this contention, the concurring and dissenting opinion cites to the legislative intent of Rule 9(j).

At the outset, as stated above, our majority does not improperly supplement Plaintiff's appeal because, in our *de novo* review, we must decide whether Rule 9(j) certification is required before we can affirm a trial court's dismissal of a complaint for lack of Rule 9(j) compliance.

Next, we note a court's "consideration of a motion brought under Rule 12(b)(6) is limited to examining the legal sufficiency of the allegations contained within the

[3] Because we reverse the trial court's order on Rule 12(b)(6) and Rule 9(j) grounds, we need not address whether the trial court erred in denying Plaintiff's motion to amend her complaint under Rule 15 of the North Carolina Rules of Civil Procedure.

four corners of the complaint." *Hillsboro Partners, LLC v. City of Fayetteville*, 226 N.C. App. 30, 32-33, 738 S.E.2d 819, 822 (2013) (citation omitted). *See also Jackson/Hill Aviation, Inc. v. Town of Ocean Isle Beach*, ___ N.C. App. ___, ___, 796 S.E.2d 120, ___ (2017) (citation omitted). Additionally, "[d]ismissal of an action under Rule 12(b)(6) is appropriate when the complaint 'fail[s] to state a claim upon which relief can be granted.'" *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, ___, 781 S.E.2d 1, 7 (2015) (quoting N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2013)) (second alteration in original). "When the complaint on its face reveals that *no law* supports the claim [or] reveals an absence of facts sufficient to make a valid claim . . . dismissal is proper." *Id.* at ___, 781 S.E.2d at 8 (citation omitted) (emphasis added). Accordingly, there is no need to delve into the legislative intent behind Rule 9(j). Instead, we look at the four corners of Plaintiff's complaint and acknowledge that Plaintiff revealed facts sufficient to make a valid claim, a claim of ordinary negligence, under our case law. *See id.* at ___, 781 S.E.2d at 8 (citation omitted).

B. Motion to Dismiss under Rule 12(b)(5)

Plaintiff next contends the trial court erred in dismissing her claims against Southeastern under Rule 12(b)(5). We disagree.

Rule 4 of the North Carolina Rules of Civil Procedure governs service of process in North Carolina. Rule 4 states, *inter alia*:

> (a) Summons — Issuance; who may serve.–Upon the filing of the complaint, summons shall be issued forthwith, and

> in any event within five days. The complaint and summons shall be delivered to some proper person for service. In this State, such proper person shall be the sheriff of the county where service is to be made or some other person duly authorized by law to serve summons.
>
> . . .
>
> (h) Summons—When proper officer not available.—If at any time there is not in a county a proper officer, capable of executing process, to whom summons or other process can be delivered for service, or if a proper officer refuses or neglects to execute such process, or if such officer is a party to or otherwise interested in the action or proceeding, the clerk of the issuing court, upon the facts being verified before him by written affidavit of the plaintiff or his agent or attorney, shall appoint some suitable person who, after he accepts such process for service, shall execute such process in the same manner, with like effect, and subject to the same liabilities, as if such person were a proper officer regularly serving process in that county.
>
> (h1) Summons—When process returned unexecuted. –If a proper officer returns a summons or other process unexecuted, the plaintiff or his agent or attorney may cause service to be made by anyone who is not less than 21 years of age, who is not a party to the action, and who is not related by blood or marriage to a party to the action or to a person upon whom service is to be made. This subsection shall not apply to executions pursuant to Article 28 of Chapter 1 or summary ejectment pursuant to Article 3 of Chapter 42 of the General Statutes.

N.C. Gen. Stat. § 1A-1, Rule 4 (2016).

Plaintiff argues service by a private process server is permissible under the North Carolina Rules of Civil Procedure if the private process server files an affidavit under N.C. Gen. Stat. § 1-75.10.[4]

Southeastern contends holding Plaintiff's service was proper conflates Rule 4(a) with Rule 4(h) and Rule 4(h1). We agree.

Here, Plaintiff hired a private process server, Smith, to serve Southeastern. On 24 September 2015, Smith served Johnson, the Chief Financial Officer of Southeastern. On 14 October 2015, Smith signed an "Affidavit of Process Server" asserting he was over the age of 18 years, not a party to the action, and "authorized by law to perform said service."

In North Carolina, private process service is not always "authorized under law". The proper person for service in North Carolina is the sheriff of the county where service is to be attempted or some other person duly authorized by law to serve summons. N.C. Gen. Stat. § 1A-1, Rule 4(a). Although Plaintiff's process server filed the statutorily required affidavit, a self-serving affidavit alone does not confer "duly authorized by law" status on the affiant. Legal ability to serve process by private process server is limited by statute in North Carolina to scenarios where the sheriff is unable to fulfill the duties of a process server. N.C. Gen. Stat. § 1A-1, Rule 4(h),

[4] In support of her argument, Plaintiff also cites *Garrett v. Burris*, No. COA14-1257, 2015 WL 4081832 (unpublished) (N.C. Ct. App. July 7, 2015). However, *Garrett* is an unpublished opinion and is not binding authority.

(h1). For example, if the office of the sheriff is vacant, the county's coroner may execute service. N.C. Gen. Stat. § 162-5. Additionally, if service is unexecuted by the sheriff under Rule 4(a), the clerk of the issuing court can appoint "some suitable person" to execute service under Rule 4(h). Here, the record does not disclose the sheriff was unable to deliver service so that the services of a process server would be needed. This is commonly accepted statutory practice in North Carolina and discussed in treatises dealing with civil procedure. *See* William A. Shuford, *North Carolina Civil Practice and Procedure* § 4.2 (6th ed.); 1 G. Gray Wilson, *North Carolina Civil Procedure* § 4-4, at 4-16 (2016). Accordingly, we affirm the trial court's order dismissing Plaintiff's claims against Southeastern under Rule 12(b)(5) of the North Carolina Rules of Civil Procedure.

IV. Conclusion

For the foregoing reasons, we reverse the trial court's order dismissing Plaintiff's complaint against Dr. Cummings and Duke Defendants. We affirm the trial court's order dismissing Plaintiff's complaint against Southeastern.

REVERSED IN PART; AFFIRMED IN PART.

Judge CALABRIA concurs.

Judge BERGER concurring in part and dissenting in part.

BERGER, Judge, concurring in part and dissenting in part.

Plaintiff failed to comply with Rule 4 of the North Carolina Rules of Civil Procedure when she failed to serve her summons and complaint on Defendant Southeastern Regional Medical Center ("Southeastern") through a person authorized by law. Therefore, I concur with the majority that the trial court did not err when it granted Southeastern's motion to dismiss pursuant to Rule 12(b)(5) for insufficiency of service of process.

However, Plaintiff pleaded a claim of medical malpractice by a healthcare provider in her complaint, not a claim of ordinary negligence as asserted by the majority. Because this was a medical malpractice claim, Plaintiff did not comply with pleading requirements when she failed to allege that "all medical records pertaining to the alleged negligence . . . have been reviewed" as required by Rule 9(j). Because the amendment of a complaint for medical malpractice to correct a deficient Rule 9(j) certification is improper and does not relate back to the date of filing the complaint, the trial court did not err in denying Plaintiff's motion to amend which was filed after the statute of limitations had expired. In dismissing Plaintiff's complaint, the trial court did not err, as stated in the majority's opinion, and I must respectfully dissent.

On July 30, 2015, Plaintiff filed a complaint for damages and punitive damages in Robeson County Superior Court alleging medical malpractice by Defendants in that:

(a) Defendant Cummings ("Dr. Cummings"), is a physician practicing in the fields of internal medicine, cardiology, and cardiovascular surgery, and he treated Plaintiff and had a responsibility to treat Plaintiff;

(b) Dr. Cummings "held himself out to possess the special skills and knowledge possessed by other physicians practicing in the specialized field of internal medicine, cardiology, and cardiovascular surgery[;] and held himself out to possess the special skills and knowledge possessed by other physicians practicing in the specialized field of internal medicine, cardiology, and cardiovascular surgery in his locality or other similar localities with the same training and experience."

(c) On July 31, 2012, Dr. Cummings, with the assistance of nurses and staff of Southeastern Regional Medical Center ("Southeastern"), performed cardiovascular surgery on Plaintiff, and during the surgery, Plaintiff suffered injuries when she "was allowed to fall off the operating room table while Plaintiff was opened up and had surgical tools in her."

(d) "[T]he medical care rendered to Plaintiff fell below the applicable standard of care."

(e) Defendants were negligent in failing to comply with the standard of care set forth in Article 1B of the North Carolina General Statutes, entitled "Medical Malpractice Actions", Section 90-21.12, "Standard of health care";

(f) Dr. Cummings failed to use his "best professional judgment and skill while operating on the Plaintiff"; failed "to properly control Plaintiff's body during the surgery"; failed "to properly monitor Plaintiff's body during surgery"; was distracted; was not properly positioned during surgery; did not properly supervise or direct nurses and staff regarding proper positioning; and failed "to use good judgment, reasonable skill, and diligence in the treatment of Plaintiff[.]"

(g) The remaining Defendants were directly and vicariously liable for negligent employment and/or retention of health care professionals and their actions in this matter.

(h) Plaintiff further alleged that the professional medical care and treatment provided by Defendants was reviewed by an individual "reasonably expected to qualify" and that "Plaintiff will seek to have qualified by an

> expert witness . . . , and who is willing to testify that the medical care rendered to Plaintiff fell below the applicable standard of care."

Plaintiff's complaint was a malpractice action, defined as either:

> 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.

N.C. Gen. Stat. § 90-21.11(2)(a) and (b) (2015).

Plaintiff, throughout her complaint, asserted that Dr. Cummings, Southeastern, Duke University Health System, and Duke University Affiliated Physicians, Inc. had provided professional medical services to Plaintiff. She further alleged that Dr. Cummings, while "acting in the course and scope of his employment," utilized his professional skill and judgment in operating on Plaintiff, and in doing so, failed to position himself to properly control and monitor Plaintiff's body. Plaintiff further asserted that Dr. Cummings failed to properly supervise other health care professionals during the operation.

Plaintiff's complaint alleges that each Defendant violated the standard of care set forth in N.C. Gen. Stat. § 90-21.12. Subparagraph (a) of that statute reads as follows:

> Except as provided in subsection (b) of this section, in any *medical malpractice* action as defined in G.S. 90-21.11(2)(a), the defendant health care provider shall not be liable for the payment of damages unless the trier of fact finds by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time of the alleged act giving rise to the cause of action; or in the case of a *medical malpractice* action as defined in G.S. 90-21.11(2)(b), the defendant health care provider shall not be liable for the payment of damages unless the trier of fact finds by the greater weight of the evidence that the action or inaction of such health care provider was not in accordance with the standards of practice among similar health care providers situated in the same or similar communities under the same or similar circumstances at the time of the alleged act giving rise to the cause of action.

N.C. Gen. Stat. § 90-21.12(a) (emphasis added).

Plaintiff's brief acknowledges that her complaint was one for medical malpractice. In her Statement of the Case, Plaintiff states, "Marjorie Locklear ("Plaintiff" or "Locklear") commenced this *medical malpractice action* on 30 July 2015." (emphasis added). Plaintiff's brief also focuses on Rule 9(j) certification, which is only applicable to medical malpractice claims.

Plaintiff does not argue that this is an action for ordinary negligence as the majority has found; thus, this argument should be deemed abandoned. " 'It is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein. These arguments are deemed abandoned by virtue of [Rule 28(b)(6) of the North Carolina Appellate Procedures].' " *Sanchez v. Cobblestone Homeowners Ass'n of Clayton, Inc.*, ___ N.C. App. ___, ___, 791 S.E.2d 238, 245 (2016) (citation and brackets omitted).

The majority cites to the unpublished opinion *Alston*, wherein this Court held the decedent's injuries from falling off a gurney in an operating room sounded in ordinary negligence and not medical malpractice. *Alston v. Granville Health Sys.*, 207 N.C. App. 264, 699 S.E.2d 478 (2010), *aff'd*, 221 N.C. App. 416, 727 S.E.2d 877 (2012) (unpublished). This Court held the "[p]laintiff's sole cause of action [wa]s for ordinary negligence under a theory of *res ipsa loquitur*," and did not require compliance with Rule 9(j). *Id.* Further, "[b]ecause [p]laintiff herein elected to proceed solely on a *res ipsa loquitur* theory, [p]laintiff is bound by that theory." *Id.*

The transfer of a patient from the operating table to a gurney before or after surgery, as in *Alston*, is "primarily manual or physical and … d[oes] not involve a medical assessment or clinical judgment." *Gause v. New Hanover Regional Medical Center*, ___ N.C. App. ___, ___, 795 S.E.2d 411, 415 (2016).

Conversely, in the case *sub judice*, Plaintiff alleged her injuries occurred from falling off of the operating table *during* the surgery. The positioning and controlling of Plaintiff's body while on the operating table, during active surgery, while Plaintiff's opened body contained surgical tools, required "clinical judgment and intellectual skill." *Id*. Thus, because Plaintiff's factual allegations sound in medical malpractice, and her complaint specifically alleges medical malpractice, Plaintiff is required to comply with Rule 9(j).

Further, converting Plaintiff's action into one for ordinary negligence would allow her to circumvent the requirement of expert certification for her medical malpractice complaint. The majority's finding that this is an action for ordinary negligence creates a loophole for Plaintiff after she improperly filed her medical malpractice claim. Plaintiff's witnesses for an ordinary negligence claim will still be testifying as to the proper positioning and monitoring of a body during cardiovascular surgery, and the witnesses who will be qualified to testify are the same doctors and nurses who would testify to the proper procedures during a cardiovascular surgery under a medical malpractice lawsuit. The majority's conversion of Plaintiff's medical malpractice action into an ordinary negligence action defeats the legislative intent of Rule 9(j).

Turning to Plaintiff's arguments under Rule 9(j), they fail. In pertinent part, Rule 9(j) states that:

> 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 Evidence 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
>
> . . .
>
> Upon motion by the complainant prior to the expiration of the applicable statute of limitations, a resident judge of the superior court . . . 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.

N.C. Gen. Stat. § 1A-1, Rule 9(j) (2015).

Thus, dismissal of a medical malpractice action is required unless the pleading requirements of Rule 9(j) are satisfied. Our Supreme Court held that:

> Rule 9(j) clearly provides that "*any* complaint alleging medical malpractice . . . *shall* be dismissed" if it does not comply with the certification mandate . . . [W]e find the inclusion of "shall be dismissed" in Rule 9(j) to be more than simply "a choice of grammatical construction." While other subsections of Rule 9 contain requirements for pleading special matters, no other subsection contains the mandatory language "shall be dismissed." This indicates that medical malpractice complaints have a distinct requirement of expert certification with which plaintiffs must comply. Such complaints will receive strict consideration by the trial judge. Failure to include the certification necessarily leads to dismissal.

Thigpen v. Ngo, 355 N.C. 198, 202, 558 S.E.2d 162, 165 (2002) (emphasis in original) (internal citations and brackets omitted). Here, Plaintiff provided proper certification regarding *medical care and treatment*, but failed to comply with Rule 9(j) as there was no allegation concerning review of medical records.

On January 11, 2016, Plaintiff in open court moved to amend the complaint pursuant to Rule 15(a) to comply with Rule 9(j). The trial court correctly denied this motion as it was made nearly six months after the statute of limitations had expired.

This Court previously held that "Rule 9(j) must be satisfied at the time of the complaint's filing." *Alston v. Hueske*, ___ N.C. App. ___, ___, 781 S.E.2d 305, 309 (2016). In *Hueske*, as here, the plaintiff sought to amend her complaint to comply with the certification requirements of Rule 9(j). This Court noted that

> [b]ecause the legislature has required strict compliance with this rule, our courts have ruled that if a pleader fails to properly plead his case in his complaint, it is subject to dismissal without the opportunity for the plaintiff to

> amend his complaint under Rule 15(a). To read Rule 15 in this manner would defeat the objective of Rule 9(j) which . . . seeks to avoid the *filing* of frivolous medical malpractice claims.

Id., at ___, 781 S.E.2d at 310 (emphasis in original) (internal citations and quotation marks omitted).

> The title of Rule 9, 'Pleading special matters,' plainly signals the statute's tailoring to address distinct situations set out in the statute. [R]elation back is not available through Rule 15(c) of the North Carolina Rules of Civil Procedure to comply with Rule 9(j) . . . . Rule 9(j) mandates that any complaint which fails to comply with the certification requirement, "*shall be dismissed*." . . . [A] trial judge can dismiss with prejudice where a complaint does not contain the certification required by Rule 9(j) and the statute of limitations has expired.

Bass v. Durham Cty. Hosp. Corp., 158 N.C. App. 217, 225, 580 S.E.2d 738, 743 (2003) (Tyson, J., dissenting) (internal citations and quotation marks omitted) (emphasis in original), *rev'd for the reasons stated in the dissenting opinion*, 358 N.C. 144, 592 S.E.2d 687 (2004). *See also Thigpen v. Ngo*, 355 N.C. 198, 205, 558 S.E.2d 162, 167 (2002) ("[W]e hold that once 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."); *Fintchre v. Duke University*, ___ N.C. App. ___, ___, 773 S.E.2d 318, 325 (2015) ("[W]here plaintiff failed to file a complaint including a valid Rule 9(j) certification within the statute of limitations, granting plaintiff's motion to amend . . . would have been futile . . . .").

Such is the case here. Plaintiff alleged that her care and treatment occurred July 31, 2012, and she filed her action July 30, 2015, one day before the statute of limitations would expire. Plaintiff's medical malpractice complaint failed to include a required Rule 9(j) certification regarding review of medical records.

Plaintiff failed to seek amendment of her complaint until January 11, 2016, nearly six months after the statute of limitations had expired, and 44 days beyond "[t]he 120-day extension of the statute of limitations available to medical malpractice plaintiffs by Rule 9(j) . . . for the purpose of complying with Rule 9(j)." *Bass* at 225, 580 S.E.2d at 743 (citing N.C. Gen. Stat. § 1A-1, Rule 9(j) (2001)). Allowing an amendment would have been futile, so it cannot be said that the trial court abused its discretion in denying that motion. Plaintiff failed to plead proper Rule 9(j) certification in her complaint before the statute of limitations expiration. If any complaint alleging medical malpractice shall be dismissed for failure to comply with the certification mandate of Rule 9(j), it cannot be said that the trial court erred in granting Defendants' motion to dismiss.