# Amending defective Rule 9(j) certifications under Rule 15(a): The Supreme Court's new opinion in Vaughan v. Mashburn

Earlier this month the North Carolina Supreme Court issued its opinion in Vaughan v. Mashburn, an important case interpreting Rule 9(j), the special pleadings rule for medical malpractice actions.

Rule 9(j) of the North Carolina Rules of Civil Procedure requires plaintiffs filing medical malpractice complaints to include a specific allegation that the medical care and medical records have been reviewed by an expert who meets certain qualifications and who is willing to testify that there was a breach of the standard of care. If a plaintiff fails to include the Rule 9(j) language, the complaint "shall be dismissed." This special pleading requirement does not apply to other types of malpractice or to ordinary negligence actions. The original aim of the rule was to reduce frivolous med mal litigation; but, as I have noted in the past, in its short life it has generated well over 100 published appellate opinions as courts have grappled with its undefined provisions, reconciled it with other procedural rules, and tried to determine when it does and does not apply.

*Vaughan*, the latest such case, centers on whether a party can invoke Rule of Civil Procedure 15 to amend defective language in a Rule 9(j) certification. Before filing her action, Ms. Vaughan had timely obtained the required expert review of her medical care and medical records. When her attorney filed the complaint, he included a Rule 9(j) certification, but it was defective in the following sense: it certified that the medical *care* had been reviewed, but it failed to also state that the medical *records* had been reviewed. The medical "records" language had been added to Rule 9(j) in 2011, and the attorney erroneously included the pre-2011 language. Soon after the complaint was filed, the original statute of limitations expired. When the mistake in the Rule 9(j) certification was revealed, Ms. Vaughan's counsel moved to amend the complaint to add the omitted phrase. Following existing Court of Appeals precedent, the superior court denied the motion to amend as "futile" because, even if granted, the Rule 9(j) certification could not be properly made prior to expiration of the statute of limitations. Based on its prior decisions (*Fintchre* (2016); *Alston* (2016); and *Keith* (1998)), the Court of Appeals affirmed.

The Court of Appeals panel itself was, however, clearly not happy about the outcome, having this to say:

"We are again compelled by precedent to reach a 'harsh and pointless outcome' as a result of 'a highly technical failure' by Vaughan's trial counsel—the dismissal of a non-frivolous medical malpractice claim and the 'den[ial of] any opportunity to prove her claims before a finder of fact.'" (quoting *Fintchre* (Stevens, J., concurring)).

The Supreme Court granted discretionary review of the case in March 2017, and last month reversed the Court of Appeals decision, giving Plaintiff relief from that "harsh and pointless" outcome. Harmonizing strict enforcement of Rule 9(j) with the liberal amendment process in Rule

15, the Supreme Court held that **"a plaintiff in a medical malpractice action 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)."** The court explained that

"We again emphasize that in a medical malpractice action the expert review required by Rule 9(j) must occur before the filing of the original complaint. This pre-filing expert review achieves the goal of 'weed[ing] out law suits which are not meritorious before they are filed.'…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.'"

So, on remand Ms. Vaughan will be given the opportunity to amend her complaint and proceed with her case on its merits rather than have it turned away irrevocably on a technicality.

One thing the Supreme Court's decision does not make clear is whether Rule 15 could be used to cure a complaint that *omits* the Rule 9(j) certification language from the med mal complaint altogether. Is an omitted certification a "defect in a Rule 9(j) certification"? From a policy perspective, it seems that an omission would amount to the same thing as some lesser defect, as long as the plaintiff can prove that he or she timely obtained the required expert review itself prior to filing the complaint. In any event, perhaps it is unlikely that our courts will be tested on this point—its seems that a party who has gone through the trouble and expense of obtaining the proper expert review will likely remember to drop some language about it in the complaint.

Before I go I should note that, along with *Vaughn*, the Supreme Court also issued a decision in another medical malpractice case, and the outcome of that case on remand will be affected by *Vaughan*. In Locklear v. Cummings, Ms. Locklear sued the doctor, hospital, medical center, and physician group after she fell off the operating table during cardiovascular surgery and sustained various injuries. (For some background, see my earlier blog about patient falls and med mal here.) Her counsel pleaded her case as a med mal case, obtained a Rule 9(j) expert review, and included a Rule 9(j) certification in the complaint. The problem was that the attorney made the same mistake counsel made in *Vaughan*: omitted the post-2011 language about medical "records" (and was not able to amend it before the original statute of limitations expired). Like the trial judge in *Vaughan*, the judge dismissed Ms. Locklear's case for failure to comply with Rule 9(j). The Court of Appeals reversed (Locklear v. Cummings (COA16-1015; May 16, 2017)), the majority concluding that Ms. Locklear's claims sounded in ordinary negligence, not medical malpractice. Citing language from earlier opinions, the majority concluded that her injuries did not arise from a failure of "clinical judgment and intellectual skill" necessary to amount to a "medical malpractice action" as that term is defined by our statutes. Thus no Rule 9(j) certification had been necessary in the first place.

The dissenting judge noted that the complaint itself characterized the claims as medical malpractice and that, since Ms. Locklear's attorneys had failed to argue that the complaint was ordinary negligence, the appellate court should not make the argument for her.

This month the Supreme Court agreed with the dissenting judge on that point and reversed the Court of Appeals *per curiam*, thus sending the case back to the lower court as a medical malpractice action (as it had been characterized in the complaint). Prior to the Supreme Court's ruling in *Vaughan*, this would have been a terrible result for the Ms. Locklear: the defect in her Rule 9(j) certification would have been incurable under Court of Appeals precedent. Now that *Vaughan* has been decided, Ms. Locklear has the opportunity to seek leave to correct the Rule 9(j) defect under Rule 15(a). Assuming she properly obtained the required expert witness review prior to filing of her original complaint, one imagines the trial court would permit the defect to be cured and allow the case to go forward on its merits.