Falls at the hospital: medical malpractice or ordinary negligence? Recent Court of Appeals opinions

Why it matters: Rule 9(j) *very* briefly.

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 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 before the underlying statute of limitations expires, the complaint "shall be dismissed." This special pleading requirement does *not* apply to other types of malpractice or to ordinary negligence actions. Rule 9(j) was enacted as an attempt to curb frivolous medical malpractice claims. But it has had the side effect of generating more than its fair share of appellate wrangling. Since it was enacted in 1995, well over 100 published opinions have been issued interpreting its undefined provisions, reconciling it with other procedural rules, and determining when it does and does not apply. [See an overview here.] One group of those opinions has examined whether the complaint actually alleged a "medical malpractice action" in the first place, or whether it merely stated a claim for ordinary negligence. If a claim is ordinary negligence, Rule 9(j) does not apply, even if the event occurred in a medical setting and the defendant was a "health care provider."

Falling in a medical facility

Patient falls–either from standing or lying positions—have featured somewhat prominently in these cases. Where the court has concluded that the fall involved a provider's clinical assessment or judgment, the claims have been classified as medical malpractice. *See Sturgill v. Ashe Memorial Hospital, Inc.*, 186 N.C. App. 624 (2007) (failure to restrain fall-risk patient where restraints required medical order); *Deal v. Frye Reg. Med. Ctr*, 202 N.C. App. 584 (2010) (unpub'd) (failure to conduct requisite fall risk screening); *see also Littlepaige v. US*, 528 Fed Appx 289 (4th Cir. 2013) (unpub'd) (failure to secure patient who had been placed on "falls precaution").

On the other hand, where the court considers the alleged lapse to be a matter of mere "physical or manual activity" rather than of specialized judgment or skill, the claim is ordinary negligence. *See Horsley v. Halifax Reg. Med. Ctr.*, 725 S.E.2d 420 (N.C. App. 2012) (failure to give a cane to psychiatric patient who fell in hallway); *Lewis v. Setty*, 130 N.C. App. 606 (1998) (failure to adequately lower an exam table when moving patient to wheelchair); *Alston v. Granville Health Sys.*, 207 N.C. App. 264 (2010) (unpub'd) (unrestrained plaintiff's fall from gurney where there was no allegation that restraint was matter of medical judgment).

Two recent opinions: *Locklear v. Cummings* and *Gause v. New Hanover Regional Medical Center*

We can now add two more fall-related opinions to the list, each reaching a different conclusion:

- Last week the Court of Appeals issued *Locklear v. Cummings* (COA16-1015; May 16, 2017), with the panel divided as to the result. Locklear sued the doctor, hospital, medical center, and physician group after she fell off the operating table during cardiovascular surgery and sustained various injuries. The complaint was filed one day before the statute of limitations was up, and although it included a Rule 9(j) certification, it omitted a phrase that was added to the rule in 2011. The trial court dismissed her complaint with prejudice for failure to comply with Rule 9(j). The Court of Appeals reversed, the majority concluding that (as in *Alston*) Ms. Locklear's claims sounded in ordinary negligence. 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. 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. The majority responded by noting, in part, that "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." The dissenting judge also disagreed with the majority in substance, asserting that "clinical judgment and intellectual skill" were indeed at issue.

- In its recent opinion in Gause v. New Hanover Reg. Med. Ctr., 795 S.E.2d 411 (Dec. 30, 2016), on the other hand, a Court of Appeals panel unanimously declared that a different type of fall gave rise to a medical malpractice claim. As an X-ray technician was preparing to take chest images of Mrs. Gause from a standing position, the elderly plaintiff fell straight backward, sustaining severe traumatic brain injury. The technician had observed Mrs. Gause before and during her positioning in front of the x-ray machine, but then had turned away to prepare to make the images. Discovery (including the technician's own testimony) revealed that the technician's clinical judgment was required in determining whether it was safe to take Mrs. Gause's x-rays standing rather than seated or lying down. Thus the alleged negligence occurred in the context of "medical assessment or clinical judgment" and was properly classified as a medical malpractice action. Because Mrs. Gause's complaint did not include a Rule 9(j) certification, the trial court properly dismissed it.

It is too early to tell if defendants in *Locklear* will seize their right to have the case heard by the North Carolina Supreme Court (or to first request *en banc* review by the Court of Appeals). For now, these two cases are additional guidance for lawyers deciding whether to obtain Rule 9(j) opinions prior to filing their clients' complaints.