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Brisson v. Santoriello and Rule 9(j): A Step Backward in the Pursuit to Prevent Frivolous Medical Malpractice Actions in North Carolina

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RECENT DEVELOPMENTS

Brisson v. Santoriello and Rule 9(j): A Step Backward in the Pursuit to Prevent Frivolous Medical Malpractice Actions in North Carolina

North Carolina Rule of Civil Procedure 41(a)(1)[1] allows a plaintiff to take a voluntary dismissal without prejudice at any time before "resting" his case.[2] If the original action was commenced within the statute of limitations, the plaintiff may re-file an action based on the same claim within one year of the voluntary dismissal.[3]

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1. N.C. R. CIV. P. 41(a)(1). Throughout this Recent Development, any mention of a "Rule" refers to the specific North Carolina Rule of Civil Procedure, unless otherwise indicated. The relevant portion of Rule 41(a)(1), governing voluntary dismissals, reads as follows:

> Subject to the provisions of Rule 23(c) and of any statute of this State, an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim. If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time.

Id.

2. *Id.*; *see also* Southeastern Fire Ins. Co. v. Walton, 256 N.C. 345, 347, 123 S.E.2d 780, 782 (1962) (noting that a plaintiff's right to take a voluntary dismissal under the former rule is not subject to judicial review). Under Rule 41(a)(1), a plaintiff is deemed to have "rested his case" when he is given an opportunity at a summary judgment hearing to introduce evidence and argue his position, and thereafter the matter is submitted to the court for determination. Alston v. Duke Univ., 133 N.C. App. 57, 61, 514 S.E.2d 298, 301 (1999) (quoting Wesley v. Bland, 92 N.C. App. 513, 515, 374 S.E.2d 475, 477 (1988)). However, if the plaintiff does not make opposing arguments at the hearing, he may still take a voluntary dismissal as a matter of right before he rests his case. *Id.*; *Wesley*, 92 N.C. App. at 514–15, 374 S.E.2d at 476 (" 'Where a party appears at a summary judgment hearing and produces evidence or is given an opportunity to produce evidence and fails to do so, and the question is submitted to the court for decision, he has "rested his case" within the meaning of Rule 41(a)(1)(i).' " (quoting Maurice v. Hatterasman Motel Corp., 38 N.C. App. 588, 591–92, 248 S.E.2d 430, 432–33 (1978))).

3. Under Rule 41(a)(1), a plaintiff may voluntarily dismiss and re-file a claim within the one-year "savings" provision only once as a matter of right. N.C. R. CIV. P. 41(a)(1); Parrish v. Uzzell, 41 N.C. 479, 483–84, 255 S.E.2d 219, 221 (1979); City of Raleigh v. Coll.

For the past decade, North Carolina courts have operated under the assumption that the one-year tolling provision was subject to the original complaint conforming "in all respects to the rules of pleading."[4] In *Brisson v. Santoriello*,[5] however, the North Carolina Supreme Court changed this rule. This Recent Development attempts to clarify where North Carolina law stands concerning voluntary dismissals in medical malpractice actions as a result of *Brisson*.

Brisson involved a medical malpractice action for alleged negligence in performing an abdominal hysterectomy.[6] Rule 9(j) of the North Carolina Rules of Civil Procedure requires a medical malpractice plaintiff to attach an expert certification to the complaint.[7] The *Brisson* plaintiffs failed to attach the Rule 9(j) certification, and the defendants moved to dismiss the case pursuant to Rules 9(j) and 12(b)(6).[8] The plaintiffs then filed a motion to amend the complaint to include the proper certification, or in the alternative, to dismiss the claims without prejudice pursuant to Rule 41(a)(1).[9] The trial judge denied the plaintiffs' motion to amend, but reserved ruling on the defendants' motion to dismiss.[10] Consequently,

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Campus Apts., Inc., 94 N.C. App. 280, 282, 380 S.E.2d 163, 164–65 (1989), *aff'd*, 326 N.C. 360, 388 S.E.2d 768 (1990). This is commonly referred to as the "second dismissal" rule. 2 G. GRAY WILSON, NORTH CAROLINA CIVIL PROCEDURE § 41-4, at 42 (2d ed. 1995).

4. Estrada v. Burnham, 316 N.C. 318, 323, 341 S.E.2d 538, 542 (1986) ("[I]n order for a timely filed complaint to toll the statute of limitations and provide the basis for a one-year 'extension' by way of a Rule 41(a)(1) voluntary dismissal without prejudice, the complaint must conform in all respects to the rules of pleading . . . ."); *see also* Sweet v. Boggs, 134 N.C. App. 173, 176, 516 S.E.2d 888, 890 (1999) (holding that a defective complaint cannot toll the statute of limitations under Rule 41(a)(1)); Robinson v. Entwistle, 132 N.C. App. 519, 522–23, 512 S.E.2d 438, 441 (holding that Rule 41(a)(1) is only available where the complaint complies with the rules of pleading prior to the expiration of the statute of limitations), *discretionary review denied*, 350 N.C. 595, 537 S.E.2d 482 (1999).

5. 351 N.C. 589, 528 S.E.2d 568 (2000).

6. 351 N.C. at 590–91, 528 S.E.2d at 569. Pamela Brisson's husband, Dallas Brisson, was also a plaintiff in this action alleging loss of consortium. *Id.*

7. N.C. R. CIV. P. 9(j). Rule 9(j) provides that a medical malpractice claim must assert in the pleadings that a person reasonably expected to qualify as an expert, who is willing to testify that the claim is valid, has reviewed the case. *Id.* The rule provides for a 120-day extension of the relevant statute of limitations to comply with expert certification requirement, upon a determination that "good cause" exists for granting the extension. *Id.* There is substantial conflict among trial lawyers over whether Rule 9(j) is a prudent law, and questions have also been raised as to its constitutionality; these issues, however, are beyond the scope of this Recent Development. *See* Mark R. Melrose, *Closing the Courthouse Doors: Rule 9(j) and Rule 702*, TRIAL BRIEFS, Sept. 2000, at 11.

8. *Brisson*, 351 N.C. at 591, 528 S.E.2d at 569.

9. *Id.* at 592, 528 S.E.2d at 569–70.

10. *Id.* at 592, 528 S.E.2d at 570.

the plaintiffs took a voluntary dismissal without prejudice; but then subsequently re-filed the action after the original statute of limitations had expired.[11] The North Carolina Supreme Court addressed whether the plaintiffs' voluntary dismissal effectively extended the statute of limitations even though the original complaint lacked a Rule 9(j) certification.[12]

The *Brisson* court construed Rules 41 and 9(j) together and held that the Rule 9(j) defect did not bar the plaintiffs from utilizing the one-year "savings" provision of Rule 41(a)(1).[13] The court refused to apply its earlier holding established in *Estrada v. Burnham*,[14] when the court held that in order to take advantage of the Rule 41(a)(1) "savings" provision, the original complaint "must conform in all respects to the rules of pleading."[15] The North Carolina Court of Appeals cited *Estrada* as binding authority in two recent cases, including one medical malpractice action, addressing whether pleading defects preclude a plaintiff's use of the Rule 41(a)(1) one-year extension.[16] This precedent to the contrary and the strong dissent in *Brisson*[17] suggest that the *Brisson* majority's reasoning is flawed.[18]

To understand fully the implications of *Brisson*, some discussion of the voluntary dismissal rule is in order. The voluntary dismissal without prejudice is one of the most powerful litigation tools available to a plaintiff's attorney.[19] It allows plaintiff's counsel to take a

11. *Id.* The statute of limitations for filing a medical malpractice action in North Carolina is three years. N.C. GEN. STAT. § 1-15 (1999).

12. *Brisson*, 351 N.C. at 593, 528 S.E.2d at 570.

13. *Id.* at 597, 528 S.E.2d at 573.

14. 316 N.C. 318, 323, 341 S.E.2d 538, 542 (1986); *see infra* notes 68–72 and accompanying text (discussing *Estrada*).

15. *Id.* at 323, 341 S.E.2d at 542.

16. *See, e.g.*, Sweet v. Boggs, 134 N.C. App. 173, 176, 516 S.E.2d 888, 890 (1999) (holding that Rule 41(a)(1) could not revive the action after the statute of limitations had expired because the original complaint was defective); Robinson v. Entwinstle, 132 N.C. App. 519, 522–23, 512 S.E.2d 438, 441 (affirming the dismissal of the plaintiff's action because both the original and amended complaints failed to comply with Rule 9(j) and "Rule 41(a)(1) is only available in an action where the complaint complied with the rules which govern its form and content prior to the expiration of the statute of limitations"), *discretionary review denied*, 350 N.C. 595, 537 S.E.2d 482 (1999).

17. *Brisson*, 351 N.C. at 598–601, 528 S.E.2d at 573–75 (Wainwright, J., dissenting).

18. *See infra* notes 96–100 and accompanying text.

19. *See* 2 WILSON, *supra* note 3, § 41-1, at 32 (stating that the voluntary dismissal "has salvaged more lawsuits than any other procedural device"). Rule 41(a)(1) has commonly been used by plaintiffs for one-time judge or jury shopping and provides a safety net for unprepared lawyers. *Id.* at 33; *see also* 8 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 41.11 (3d ed. 2000) (listing over twenty reasons why a plaintiff may take a voluntary dismissal).

voluntary dismissal, regardless of opposition from the defense or the court, at any time before he "rests his case"[20] by simply giving oral notice of a voluntary dismissal without prejudice in open court.[21] This escape mechanism allows a plaintiff to cure not only defects which were not apparent until trial, but also to have a test run at presenting his case.[22] The voluntary dismissal without prejudice has been utilized more than any other procedural device to save a failing lawsuit and allow a plaintiff to start over with a clean slate.[23]

Considering the power the voluntary dismissal rule places in the hands of plaintiffs' attorneys, its frequent abuse is not surprising. These abusive tactics include the following: (1) pursuing one-time jury and judge shopping;[24] (2) avoiding dismissal for violation of discovery and other court orders;[25] and (3) avoiding summary judgment, Rule 12(b)(6) dismissals, and judgment on the pleadings.[26]

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20. N.C. R. CIV. P. 41(a)(1). For a discussion of when a plaintiff is deemed to have "rested his case," see *supra* note 2.

21. *See* Danielson v. Cummings, 300 N.C. 175, 179, 265 S.E.2d 161, 163 (1980); Gilliam v. First Union Nat'l Bank, 125 N.C. App. 416, 418, 481 S.E.2d 334, 336 (1997).

22. *See* W. BRIAN HOWELL, HOWELL'S SHUFORD, NORTH CAROLINA CIVIL PRACTICE AND PROCEDURE § 41-2, at 477 (5th ed. 1998) ("Rule 41(a)(1) provides . . . a second chance for the plaintiff who, during the course of the presentation of his evidence, perceives that such evidence may be insufficient. As long as the plaintiff does so before resting his case, the plaintiff may voluntarily dismiss . . . and attempt to 'mend his licks.' "); 2 WILSON, *supra* note 3, § 41-1, at 33 (indicating that Rule 41(a)(1) is often used to cure defects that did not become apparent until trial).

23. *Brisson*, 351 N.C. at 597, 528 S.E.2d at 572–73 (citing 2 WILSON, *supra* note 3, at 32).

24. *See, e.g.*, Thompson v. Newman, 331 N.C. 709, 710, 417 S.E.2d 224, 224–25 (1992) (taking a voluntary dismissal after the judge quashed the plaintiff's subpoena for certain witnesses and denied the plaintiff's motion to continue).

25. *See, e.g.*, Cassidy v. Cheek, 308 N.C. 670, 672, 303 S.E.2d 792, 794 (1983) (avoiding dismissal because of failure to comply with discovery order).

26. *See, e.g.*, Alston v. Duke Univ., 133 N.C. App. 57, 60–61, 514 S.E.2d 298, 300 (1999) (avoiding summary judgment based on failure to comply with Rule 9(j)); Wesley v. Bland, 92 N.C. App. 513, 513, 374 S.E.2d 475, 476 (1988) (avoiding summary judgment); *see also* 2 WILSON, *supra* note 3, § 41-1, at 33, § 41-2, at 36 (discussing the various ways plaintiffs have abused the voluntary dismissal rule).

North Carolina is not the only state to experience abuses of the voluntary dismissal rule. Illinois also addressed this issue in *Gibellina v. Handley*, 535 N.E.2d 858 (Ill. 1989). The Illinois Supreme Court, after noting the increasing number of voluntary dismissals to avoid adverse rulings and dispositive motions, held that a "trial court may hear and decide a motion which has been filed *prior to* a [voluntary dismissal] motion when that motion, if favorably ruled on by the court, could result in a final disposition of the case." *Gibellina*, 535 N.E.2d at 865–69. In 1993, the Illinois legislature codified the *Gibellina* rule. *See* Act of July 28, 1993, 1993 Ill. Laws 157 (codified at 735 ILL. COMP. STAT. ANN. 5/2-1009 (West 1992 & Supp. 2000)).

On the other hand, Georgia honors a plaintiff's right to voluntarily dismiss regardless of bad faith intentions, despite the inconvenience or irritation it may cause the defendant. *See* GA. CODE ANN. § 9-11-41 (2000). Under Georgia law, a plaintiff can

Rule 41(a)(1) has also been used in an attempt to extend the statute of limitations in order to file a valid complaint.[27] In *Estrada v. Burnham*,[28] however, the North Carolina Supreme Court eliminated this latter abuse by limiting the availability of the one-year extension under Rule 41(a)(1) to complaints that "conform in all respects to the rules of pleading."[29] The *Estrada* rule was particularly significant in medical malpractice actions if the complaint had a Rule 9(j) defect.[30] For example, in *Robinson v. Entwinstle*,[31] the North Carolina Court of Appeals held that the plaintiff's complaint did not conform to the rules of pleading because it failed to comply with Rule 9(j) before the statute of limitations expired.[32] But, as a result of *Brisson*, medical malpractice plaintiffs may now relax for an additional year.[33]

In *Brisson*, the supreme court held that the plaintiffs' voluntary dismissal effectively extended the statute of limitations, allowing them to recommence the action within one year, even though the complaint lacked a Rule 9(j) certification.[34] The court disregarded the court of appeals's reasoning, and relied instead on its own statutory construction of Rules 41 and 9(j).[35] The court noted that " 'statutes

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voluntarily dismiss without prejudice any time before resting his case during the actual trial, notwithstanding any pretrial proceeding where the court considers evidence. *See* Delta Air Lines, Inc. v. Van Diviere, 384 S.E.2d 272, 273 (Ga. Ct. App. 1989); Muhanna v. O'Kelley, 363 S.E.2d 626, 627 (Ga. Ct. App. 1987).

27. Estrada v. Burnham, 316 N.C. 318, 320–21, 341 S.E.2d 538, 540–41 (1986).

28. 316 N.C. 318, 341 S.E.2d 538 (1986).

29. *Id.* at 323, 341 S.E.2d at 542.

30. *See* Robinson v. Entwinstle, 132 N.C. App. 519, 523, 512 S.E.2d 438, 441 (holding that a one-year extension was unavailable when the plaintiff's original complaint did not include a Rule 9(j) certification and subsequent amendment named expert that was not qualified), *discretionary review denied,* 350 N.C. 595, 537 S.E.2d 482 (1999).

31. 132 N.C. App. 519, 512 S.E.2d 438 (1999).

32. *Id.* at 523, 512 S.E.2d at 441.

33. As discussed *infra* notes 82–101 and accompanying text, a plaintiff can utilize the one-year extension of Rule 41(a)(1) as a means of curing a Rule 9(j) defect and extending the statute of limitations. *See Brisson*, 351 N.C. at 597, 528 S.E.2d at 573.

34. *Id.* at 593, 528 S.E.2d at 570.

35. *Id.* at 594, 528 S.E.2d at 571. The North Carolina Court of Appeals and the North Carolina Supreme Court differ entirely in their analysis of this case. *Compare Brisson*, 351 N.C. at 594–98, 528 S.E.2d at 571–73 (reflecting the supreme court's emphasis on statutory construction), *with* Brisson v. Santoriello, 134 N.C. App. 65, 67–73, 516 S.E.2d 911, 913–16 (1999) (reflecting the court of appeals's focus on the plaintiff's motion to amend). The court of appeals focused on the trial judge's decision denying the plaintiffs' motion to amend. *Brisson*, 134 N.C. App. at 68–69, 516 S.E.2d at 914. The court pointed out that the plaintiffs erroneously believed that they had to get leave of court to amend the complaint; thus, the judge's denial of the amendment was error. *Id.* The court of appeals held that *Estrada* was irrelevant to its decision because the *Brisson* plaintiffs filed an amended complaint, which related back under Rule 15(c) of the North Carolina Rules of Civil Procedure; therefore, the complaint "complied with the rules, which govern its form and content prior to the expiration of the statute of limitations." *Id.* at 72, 516 S.E.2d at

dealing with the same subject matter must be construed *in pari materia* and harmonized, if possible, to give effect to each.' "[36] After completing statutory analysis, the court concluded that Rules 9(j) and 41 could be harmonized to give effect to each;[37] but in doing so it failed to recognize the practical effects of its decision.

The court acknowledged the Rule 9(j) requirement—that an expert witness certification must be attached to a complaint in a medical malpractice action—but concluded that the legislature must have intended Rule 41(a)(1) to be available to toll the statute of limitations because Rule 9(j) does not expressly preclude a plaintiff's use of a Rule 41(a)(1) voluntary dismissal.[38] The court supported its conclusion by noting that a defendant can move for an involuntary

916. Conversely, the supreme court held that the plaintiffs' motion to amend was "neither dispositive nor relevant to the outcome of this case." *Brisson*, 351 N.C. at 593, 528 S.E.2d at 570. The higher court relied solely on the relationship between Rules 9(j) and 41, noting that whether the proposed amended complaint related back "has no bearing on this case once plaintiffs took their voluntary dismissal." *Id.*

What is striking about these markedly different approaches is that the court of appeals presumably would have upheld the trial court's dismissal had the amended complaint not related back (as a result of Rule 15(c) being unavailable to cure a Rule 9(j) defect). *See Brisson*, 134 N.C. App. at 65, 516 S.E.2d at 916 ("*Estrada* ... can be distinguished ... by the fact that, here, plaintiffs filed an amended complaint that related back to the filing of the original complaint.... Thus, *insofar as plaintiffs filed an amended complaint* ... we hold that plaintiffs were entitled to the benefit of the Rule 41(a)(1) extension." (emphasis added)). The issue of whether Rule 15(c)—governing the relation back of amendments to comply with the statute of limitations—applies to proposed amendments to cure a Rule 9(j) defect has never been addressed by the North Carolina Supreme Court. *See* Keith v. N. Hosp. Dist., 348 N.C. 693, 511 S.E.2d 646 (1998) (declining to review whether Rule 15(c) is available to cure a rule 9(j) defect).

In *Keith v. Northern Hospital District*, the court of appeals reviewed a case in which a medical malpractice plaintiff failed to include the Rule 9(j) certification in her complaint; the trial judge denied her motion to amend the complaint to relate back to the date of the original filing. 129 N.C. App. 402, 403–04, 499 S.E.2d 200, 201–02 (1998). The three judges agreed that the dismissal was proper; however, they did not agree on whether the Rule 15(c) relation back provision could be used to cure a Rule 9(j) defect. *See id.* at 406–08, 499 S.E.2d at 203–04. The North Carolina Supreme Court denied certiorari in *Keith* and has yet to address whether Rule 15(c) is available to cure a Rule 9(j) defect. *Keith*, 348 N.C. 693, 511 S.E.2d 646 (1998). Nevertheless, *Brisson* renders the issue largely insignificant because a plaintiff can now use Rule 41(a)(1) to cure a defective complaint. *See Brisson*, 351 N.C. at 597, 528 S.E.2d at 573. For an insightful analysis of *Keith* and Rule 9(j), see Daniel Burt Arrington, Note, Keith v. Northern Hospital District of Surry County *and Rule 9(j): Preventing Frivolous Medical Malpractice Claims at the Expense of North Carolina's Equitable Powers*, 77 N.C. L. REV. 2303, 2305–25 (1999).

36. *Brisson*, 351 N.C. at 595, 528 S.E.2d at 571 (quoting Bd. of Adjustment v. Town of Swansboro, 334 N.C. 421, 427, 432 S.E.2d 310, 313 (1993)).

37. *Id.*, 528 S.E.2d at 571–72.

38. *Id.*, 528 S.E.2d at 571 ("Had the legislature intended to prohibit plaintiffs in medical malpractice actions from taking voluntary dismissals where their complaint did not include a Rule 9(j) certification, then it could have made such intention explicit.").

dismissal under Rule 41(b) if a plaintiff fails to comply with the rules or any order of the court.[39] Therefore, the court stated that the legislature intended Rule 41(b) to dispose of defective complaints.[40] A closer look at Rules 9(j) and 41, however, suggests that the legislature intended otherwise.[41]

The express language of Rule 9(j) clearly states that a complaint alleging medical malpractice "shall be dismissed" unless the pleading contains the proper expert witness certification.[42] Moreover, subsection (j) is the only subsection of Rule 9 expressly mandating dismissal for failing to comply with the special pleading requirement.[43] This inclusion suggests that the legislature intended to treat violations of subsection (j) with less tolerance than other provisions of Rule 9.

The text of subsection (j) also reveals the error in the court's reasoning. As the dissent properly asserted,[44] Rule 9(j) provides a plaintiff with the opportunity, prior to the expiration of the statute of limitations, to obtain a 120-day extension of the statute of limitations in order to comply with the certification requirement.[45] More importantly, the plaintiff must show that "good cause" exists before the extension will be granted.[46] The majority's conclusion allows a plaintiff to avoid this "good cause" showing by taking a voluntary dismissal and re-filing the claim within one year. However, the legislature probably did not intend a plaintiff who cannot obtain a 120-day extension, for lack of good cause, to be able to take a voluntary dismissal without prejudice and then utilize the one-year extension pursuant to Rule 41(a)(1). Such a result defies the trial judge who determined that an extension was not warranted in the first place. Furthermore, the 120-day extension would be wholly

39. *Id.* at 595, 528 S.E.2d at 571–72; *see also* N.C. R. CIV. P. 41(b) (stating that a defendant may move for an involuntary dismissal of a claim if the plaintiff fails to comply with the rules or any order of the court).

40. *Brisson*, 351 N.C. at 595, 528 S.E.2d at 572.

41. *See infra* notes 42–53 and accompanying text.

42. N.C. R. CIV. P. 9(j).

43. *See* N.C. R. CIV. P. 9. The dissent aptly pointed out the "shall be dismissed" clause; Justice Wainwright used this language to refute the majority's contention that the legislature would have expressly addressed Rule 41(a)(1) if it had intended the one-year savings provision to be unavailable. *Brisson*, 351 N.C. at 599–600, 528 S.E.2d at 574 (Wainwright, J., dissenting). Under his view, the legislature did not address Rule 41(a)(1) because it never imagined Rule 41(a)(1) as an option since the complaint was to be mandatorily dismissed for failure to comply with Rule 9(j). *Id.* (Wainwright, J., dissenting).

44. *Id.* at 599, 528 S.E.2d at 574 (Wainwright, J., dissenting).

45. N.C. R. CIV. P. 9(j).

46. *Id.*

unnecessary if the legislature intended to make the Rule 41(a)(1) "savings" provision available to cure a Rule 9(j) defect.[47] Thus, *Brisson*'s result appears inconsistent with the legislature's intent in creating Rule 9(j), and more specifically, the requirement of a "good cause" showing to obtain the 120-day extension.[48]

The court's reliance on Rule 41(b) to assist defendants in disposing of defective complaints was also misplaced. By pointing out the availability of Rule 41(b), the court implied that defendants will not be prejudiced because the legislature provided a backup for defendants to move for an involuntary dismissal.[49] Thus, the court concluded that the legislature intended to subject a plaintiff's

47. For a similar reading of Rule 9(j) with respect to amending a complaint to comply with the certification requirement, see Arrington, *supra* note 35, at 2317.

48. The history of Rule 9(j) is useful in discerning the legislature's intent. The official comment to Rule 9 states: "This rule is designed to lay down some special rules for pleading in typically recurring contexts which have traditionally caused trouble when no codified directive existed." N.C. GEN. STAT. § 1A-1, Rule 9 cmt. (1999). The title of the legislation enacting subsection (j) is very explicit: "An Act to Prevent Frivolous Medical Malpractice Actions by Requiring the Expert Witnesses in Medical Malpractice Actions Have Appropriate Qualifications to Testify on the Standard of Care at Issue and to Require Expert Witness Review as a Condition of Filing a Medical Malpractice Action." Act of June 20, 1995, ch. 309, 1995 N.C. Sess. Laws 611 (codified at N.C. R. CIV. P. 9(j)). The act's title clearly indicates that the legislature intended to make expert review a condition precedent for filing a medical malpractice action.

Furthermore, when the bill was in committee, there were concerns about the difficulty in finding qualified experts under Rule of Evidence 702 before the statute of limitations expired. *See* House Select Comm. on Tort Reform, Minutes, H.B. 730, 1995 Leg., 2d Sess. (N.C. 1995). Several changes were made to the bill, including the addition of a ninety-day extension of the statute of limitations, which ultimately was increased to 120 days before adoption. *Compare* H.B. 730, 1995 Leg., 2nd Sess. (N.C. 1995) (3rd version May 3, 1995), *with* Act of June 20, 1995, ch. 309, 1995 N.C. Sess. Laws 611 (codified at N.C. R. CIV. P. 9(j)). The provision allowing for a 120-day extension evidences the legislature's awareness that this prerequisite review would burden plaintiffs and the need to accommodate meritorious claims that might otherwise expire. The legislature had to make the pleading requirements onerous in order to achieve its objective—preventing frivolous medical malpractice actions. Justice Wainwright properly considered these points in his dissent. *See Brisson*, 351 N.C. at 599, 528 S.E.2d at 574 (Wainwright, J., dissenting).

The majority relied heavily on the fact that the legislature could have specifically addressed Rule 41 had it intended to preclude a Rule 41(a)(1) extension to cure a Rule 9(j) defect. *Id.* at 595, 528 S.E.2d at 571. In 1999, however, the North Carolina General Assembly considered, and rejected, a bill that would have made an involuntary dismissal for failure to comply with Rule 9(j) "not an adjudication on the merits." S.B. 1012, 1999 Leg., 2d Sess. (N.C. 1999) (rejected). Although there is no way of knowing exactly why the legislature rejected this provision, its rejection seems more consistent with the view that the legislature did not intend Rule 41 to aid plaintiffs in curing a Rule 9(j) defect.

49. *See Brisson*, 351 N.C. at 595, 528 S.E.2d at 571–72 (stating that Rule 41(b) allows defendants to move for an involuntary dismissal for failure to comply with the pleading rules).

complaint to a Rule 41(b) involuntary dismissal for failing to comply with Rule 9(j).[50] The practical effect of the court's conclusion creates a significant, incidental result—any competent plaintiff's attorney will take a voluntary dismissal *as matter of right* in the face of an involuntary dismissal based on a Rule 9(j) defect.[51] Certainly, a trial judge has the discretion to order an involuntary dismissal "without" prejudice,[52] but plaintiff's attorneys will invariably take a guaranteed one-year extension rather than chance the judge's discretion.[53] It is arguably legal malpractice not to do so. Thus, *Brisson* effectively destroys Rule 41(b) as a defensive remedy in medical malpractice actions when there is a Rule 9(j) defect in the pleading.

Furthermore, the court's interpretation of Rules 41 and 9(j) is inconsistent with well-established rules of statutory construction. When two statutes deal with the same subject—one in "general and comprehensive terms" and the other in a "more minute and definite way"—the statutes should be construed together and harmonized to give a consistent legislative policy to each.[54] However, to the extent that there is any repugnancy between them, the more definite statute should prevail over the general statute unless it appears that the legislature intended otherwise.[55] This rule of statutory construction is "true *a fortiori* when the special act is later in point of time, although

50. *See id.*

51. Because a plaintiff can take a voluntary dismissal any time before resting her case, the plaintiff can voluntarily dismiss and avoid an involuntary dismissal. N.C. R. CIV. P. 41(a)(1). This possibility has already been recognized in a case decided after *Brisson*. *See* Allen v. Carolina Permanente Med., Group, No. COA99-1038, 2000 N.C. App. LEXIS 903, at *9, 533 S.E.2d 812, 816 (N.C. App. Aug. 1, 2000); *see also infra* notes 91–94 and accompanying text (discussing *Allen*).

52. Whedon v. Whedon, 313 N.C. 200, 213, 328 S.E.2d 437, 445 (1985) ("The trial court's authority to order an involuntary dismissal without prejudice is . . . exercised in the broad discretion of the trial court and the ruling will not be disturbed on appeal in the absence of a showing of abuse of discretion.").

53. Under Rule 41(b), the judge has discretion to dismiss a claim without prejudice and allow a plaintiff up to a year to re-file the claim, even if the original statute of limitations has expired. Lumber Co. v. Barkley, 120 N.C. App. 271, 272–73, 461 S.E.2d 780, 782 (1995) ("Although the savings provision of Rule 41(b) is triggered differently than the savings provision of Rule 41(a) in that Rule 41(b) requires the judge to affirmatively grant extra time, the effect of each savings provision once triggered is the same.").

54. McIntyre v. McIntyre, 341 N.C. 629, 631, 461 S.E.2d 745, 747 (1995) (citing Food Stores v. Bd. of Alcoholic Control, 268 N.C. 624, 628–29, 151 S.E.2d 582, 586 (1966) (quoting 82 C.J.S. *Statutes* § 369, at 839–43 (1953))); *see also* Bd. of Adjustment v. Town of Swansboro, 334 N.C. 421, 427, 432 S.E.2d 310, 313 (1993) (stating that statutes dealing with the same subject should be construed *in pari materia* and harmonized, if possible).

55. *McIntyre*, 341 N.C. at 631, 461 S.E.2d at 747 (citing *Food Stores*, 268 N.C. at 628–29, 151 S.E.2d at 586).

the rule is applicable without regard to the respective dates of passage."[56] The court misapplied these tenets of statutory construction in *Brisson*.

Rule 9(j) is a specific rule that addresses only medical malpractice claims, whereas Rule 41 is a general rule addressing dismissals in a variety of settings. Moreover, Rule 9(j) was enacted over twenty-five years after Rule 41.[57] Further, there is no indication that the legislature intended the more general act (Rule 41) to be controlling.[58] The court's interpretation of these statutes is also questionable for at least three additional reasons. First, the majority's interpretation effaces 41(b) in practice.[59] Second, it negates the "good cause" provision of Rule 9(j).[60] Finally, it extends the statute of limitations beyond that which the legislature provided for in the Rule 9(j) 120-day extension.[61]

Because the court's construction creates inconsistency between the two Rules, the better interpretation is that the legislature, aware of the apparent conflicts, intended Rule 41(a) to be unavailable to cure Rule 9(j) defects. This view is more consistent with the rules of statutory construction stated above and is further supported by the legislature's explicit mandate that a defective complaint under Rule 9(j) "shall be dismissed."[62]

Notwithstanding its focus on statutory construction, the court also addressed prior case law dealing with voluntary dismissals.[63] The defendants in *Brisson*, citing *Estrada*, argued that the one-year extension was not available because the complaint did not "conform in all respects to the rules of pleading."[64] The court distinguished *Estrada* on the grounds that the plaintiff in that case had filed the

56. *Id.*

57. *Compare* N.C. R. CIV. P. 9(j) (enacted in 1995), *with* N.C. R. CIV. P. 41 (enacted in 1967).

58. *Cf. Brisson*, 351 N.C. at 595, 528 S.E.2d at 571 (noting the lack of express legislative intent as to whether Rule 41(a)(1) was available to cure a Rule 9(j) defect).

59. *See supra* notes 49–53 and accompanying text (explaining the practical effect of *Brisson* on the availability of Rule 41(b)).

60. *See supra* notes 44–48 and accompanying text (discussing the plaintiff's ability to evade the "good cause" showing).

61. The dissent in *Brisson* pointed out that the majority's conclusion will effectively extend the medical malpractice statute of limitations to four years and 120 days. *Brisson*, 351 N.C. at 600, 528 S.E.2d at 574–75 (Wainwright, J. dissenting). For a more detailed discussion of this aspect of the dissent, see *infra* notes 96–100 and accompanying text.

62. N.C. R. CIV. P. 9(j).

63. *See Brisson*, 351 N.C. at 595–97, 528 S.E.2d at 572.

64. *Id.* at 595, 528 S.E.2d at 572 (quoting Estrada v. Burnham, 316 N.C. 318, 323, 341 S.E.2d 538, 542 (1986)).

complaint in bad faith for the sole purpose of tolling the statute of limitations.[65] The *Brisson* court also indicated that the language relied on from *Estrada* was mere dicta and not controlling.[66] It is significant, however, that the language in *Estrada* was the supreme court's conclusion after construing the Rules of Civil Procedure as a whole.[67] In *Estrada*, the court noted that the Rules of Civil Procedure " 'should be construed as a whole, giving no one rule disproportionate emphasis over another applicable rule.' "[68] After construing Rules 41(a)(1) and 11(a)[69] together, the court stated: "[W]e *hold* . . . that, in order for a timely filed complaint to toll the statute of limitations and provide the basis for a one-year 'extension' by way of a Rule 41(a)(1) voluntary dismissal without prejudice, *the complaint must conform in all respects to the rules of pleading, including Rule 11(a)*."[70] Thus, it is difficult to understand the *Brisson* court's characterization of this statement as mere dicta given that it was the product of the same methodology undertaken in *Brisson*. In *Estrada*, the court construed the Rules of Civil Procedure *in pari materia* and concluded that the Rule 41(a)(1) extension was only available if the complaint "conform[ed] in all respects to the rules of pleading."[71] The *Estrada* court's reference to Rule 11(a)[72] only strengthens the court's understanding that a complaint must conform to all other rules of pleading as well.

The *Brisson* court also noted that the *Estrada* court did not cite any authority for its conclusion.[73] While this is true, the majority *itself* failed to cite authority for its conclusion in *Brisson*. The probable explanation for the omission of authority from both cases stems from the fact that statutory construction depends, in part, on legislative intent. Unfortunately, North Carolina does not currently have a system for publishing a full legislative history, and thus legislative intent is difficult to determine.[74]

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65. *Id.* at 596, 528 S.E.2d at 572.

66. *Id.*

67. *See Estrada*, 316 N.C. at 323, 341 S.E.2d at 542.

68. *Id.* (quoting WILLIAM A. SHUFORD, NORTH CAROLINA CIVIL PRACTICE & PROCEDURE § 1-3 (2d ed. 1981).

69. N.C. R. CIV. P. 11. Rule 11 governs the signing of pleadings and requires that all pleadings be filed in good faith and not for an improper purpose. *Id.*

70. *Estrada*, 316 N.C. at 323, 341 S.E.2d at 542 (emphasis added).

71. *Id.*

72. *Id.*

73. *Brisson*, 351 N.C. at 597, 528 S.E.2d at 572.

74. *See* North Carolina *ex rel.* Edminsten v. J.C. Penny Co., Inc., 292 N.C. 311, 317, 233 S.E.2d 895, 899 (1977) ("Strictly speaking, North Carolina has no documented legislative history."); G. Nicholas Herman, *A Practical System for Legal Research*, 21 N.C.

In rejecting the *Estrada* rule, the court stated that a literal interpretation of that rule "could essentially eviscerate the legislature's intent in creating the long-standing benefit of a Rule 41(a)(1) voluntary dismissal one-year extension."[75] Accordingly, the court held that Rule 41(a)(1) provides a plaintiff with a guaranteed one-time opportunity to discontinue a lawsuit and start over.[76] Incidentally, application of the *Estrada* rule would still have made the one-year extension available in all cases *except* where there was a defect in the pleading (so Rule 41(a)(1) would be available to cure evidentiary defects or other problems arising before the plaintiff rests her case).

Brisson declared only two limitations to utilizing the one-year extension: (1) "the dismissal [must] not be done in bad faith," and (2) "[the dismissal must] 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."[77] The second limitation is interesting because there is no general requirement that a plaintiff take a voluntary dismissal prior to *any* adverse ruling. Perhaps the court was actually referring to dispositive rulings, but this would only repeat its first statement—that a voluntary dismissal must be taken before a trial court dismisses—and such duplication would seem unnecessary. Another possible interpretation, and one that helps reduce the potential for abuse of Rule 41(a)(1), is that the court meant to make the one-year extension unavailable once a plaintiff receives *any* adverse ruling. For example, suppose the trial judge ruled to exclude certain evidence or denied plaintiff a continuance or extension for any particular request. The second limitation would

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CENT. L.J. 85, 89 n.9 (1995) ("There is no formal collection of legislative history in North Carolina such as that found in federal law."); Louise Stafford, *North Carolina Legislative History*, 38 N.C. ST. B. Q. 22 (1991) (compiling a helpful guide to researching legislative history in North Carolina); Margaret Creasy Ciardella, Note, *The 1985 General Assembly Enacts Broad Based Tax Relief for North Carolina Citizens*, 64 N.C. L. REV. 1508, 1508 n.5 (1985) ("Because North Carolina does not have any recorded legislative history the analysis is limited to a reading of the prior statute and the effect the amendments have on these statutes. Some insight into the legislative purpose of the amendments can be garnered, however, by noting the titles to the various acts."). A legislative record of the floor debates would provide lawyers and courts with information as to what the General Assembly considered and rejected when drafting a law. This record would aid the courts in determining legislative intent when they are called upon to interpret statutes such as the ones involved in *Brisson*. Perhaps North Carolina will adopt such a policy in the future, but for now, the courts continue to rely on assumptions about what the legislature did or did not consider when drafting laws.

75. *Brisson*, 351 N.C. at 597, 528 S.E.2d at 572.

76. *Id.* at 597, 528 S.E.2d at 573.

77. *Id.*

keep a plaintiff from dismissing the case and starting over with a more lenient judge. The limitation would not only curb abuse of Rule 41(a)(1), but it would also make for better use of the courts' time and resources.[78] The court's intention in creating this limitation is unclear, but it will surely be the subject of debate for future courts to reconcile.

The majority concluded its opinion by discussing the "practical ramifications" of its decision.[79] In its view, the majority merely harmonized the provisions of Rules 9(j) and 41(a).[80] Medical malpractice plaintiffs will not be thrown out of court merely because their attorney failed to attach a Rule 9(j) certification, and frivolous claims ultimately will be dismissed for failure to obtain an expert witness.[81] This conclusion is very sympathetic towards medical malpractice plaintiffs, and in cases like *Brisson*, where the plaintiff inadvertently failed to include the certification, this is a desirable outcome. The course taken in *Brisson* to cure this sort of clerical error, however, will have several significant ramifications for future medical malpractice litigation in North Carolina.

First, *Brisson* has seriously curtailed the Rule 9(j) certification as a prerequisite to filing a medical malpractice action. Although the requirement continues to exist, the substance of Rule 9(j) is impaired because a plaintiff can circumvent the requirement by taking a voluntary dismissal. This result permits a "file first, then dismiss, then review" scenario that is at odds with Rule 9(j)'s purpose of preventing frivolous medical malpractice suits by mandating expert review as a prerequisite to filing.[82] Unfortunately, *Brisson* may allow, if not

78. Arguably, this interpretation contradicts the court's statement that Rule 41(a)(1) is available to avoid dismissal for "rule violations" and "evidentiary failures." *Id.* A plaintiff can still a take a pre-emptive voluntary dismissal, however, if she fears dismissal for a rule violation or anticipates exclusion of evidence. *See* Schnitzlein v. Hardee's Food Sys., 134 N.C. App. 153, 157–58, 516 S.E.2d 891, 893 (1999) (holding that a voluntary dismissal as a matter of right was available because the motion to dismiss did not address the merits of plaintiff's case); HOWELL, *supra* note 22, at § 41-2 (explaining that participation in a motion to dismiss hearing for failure to comply with a discovery order does not preclude a plaintiff from taking a voluntary dismissal as a matter of right when the court does not address the merits of the case (citing Lowe v. Bryant, 55 N.C. App. 608, 613, 286 S.E.2d 652, 654 (1982))). Thus, this rule would simply bar plaintiffs from judge shopping, and thereby abusing Rule 41(a)(1) to extend the statute of limitations after an adverse ruling.

79. *Brisson*, 351 N.C. at 597–98, 528 S.E.2d at 573.

80. *Id.*

81. *Id.*

82. *See* Keith v. N. Hosp. Dist., 129 N.C. App. 402, 405–06, 499 S.E.2d 200, 202 (1998) (rejecting the "file first, review later" argument as inconsistent with the purpose of Rule 9(j)).

encourage, crafty lawyers to engage in this type of conduct. Although the one-year extension is limited to complaints filed in good faith, bad faith filing will often be difficult to establish.[83] Arguably, if a plaintiff re-files the claim within a short period (e.g., within a few weeks), this timing would suggest that the complaint was filed in good faith and that the omission of the expert certification was merely an oversight. This certainly could be considered when bad faith is at issue. This critique, however, seems quite unfair considering that Rule 41(a) expressly grants plaintiffs the right to take a whole year to re-file.[84] Moreover, a lawyer acting in good faith who had valid reasons for not re-filing immediately might be penalized for doing what she is wholly entitled to do—take up to a year to re-file the lawsuit.

Second, *Brisson* may also lead to the questionable practice of getting unqualified experts to review the treatment in order to meet the statute of limitations, and then dismissing the action with an extra year to comply.[85] Under *Brisson*, a plaintiff who cannot find someone reasonably expected to qualify as an expert witness could arguably get an unqualified witness to review the treatment, and then voluntarily dismiss the claim with an extra year to find a qualified expert. A quick comparison of two different cases indicates that this possibility has already been realized.

In *Robinson v. Entwinstle*,[86] decided before *Brisson*, a medical malpractice plaintiff filed his complaint without including the Rule 9(j) certification.[87] Before the defendants filed responsive pleadings,

83. *See infra* note 103 and accompanying text. After the *Brisson* decision was announced, Kari R. Johnson, a Raleigh lawyer who wrote an amicus brief on behalf of the North Carolina Association of Defense Attorneys, expressed similar concerns: "It's clear that the plaintiff had lined up a 9(j) expert when the first complaint was filed, but the Supreme Court opinion can be read to allow people who don't have 9(j) expert[s] to file, then dismiss in order to give them time to line up an expert." Michael Dayton, *Plaintiff Could Take Dismissal To Fix Rule 9(j) Defect,* N.C. LAW. WEEKLY, May 15, 2000, at A3 (quoting Kari R. Johnson).

84. N.C. R. CIV. P. 41(a)(1).

85. At the same time Rule 9(j) was enacted, the legislature heightened the requirements for expert witness qualifications in medical malpractice lawsuits. *See* N.C. R. EVID. 702 (Expert Qualifications). Therefore, while Rule 9(j) made it harder to file a malpractice action by requiring expert review, Rule 702 also reduced the number of people who qualified as experts in medical malpractice actions. Given the reduced number of experts available to meet the Rule 9(j) requirements, attorneys who do not specialize in medical malpractice litigation—i.e., those who will not have a list of qualified experts that are usually consulted—may be enticed to get unqualified experts and then locate someone who qualifies at a later date.

86. 132 N.C. App 519, 512 S.E.2d 438, *discretionary review denied*, 350 N.C. 595, 537 S.E.2d 482 (1999).

87. *Id.* at 520, 512 S.E.2d at 439.

the plaintiff amended his complaint to include the proper certification. The named expert, however, did not qualify under Rule 702 of the North Carolina Rules of Evidence.[88] The plaintiff then took a voluntary dismissal without prejudice and re-filed the lawsuit within one year.[89] The North Carolina Court of Appeals, citing *Estrada*, held that the Rule 41(a)(1) "savings" provision could not extend the statute of limitations because the treatment had not been subject to review by a qualified expert prior to the expiration of the statute of limitations.[90]

Conversely, in *Allen v. Carolina Permanente Medical Group*,[91] decided less than three months after *Brisson*, the North Carolina Court of Appeals suggested that the Rule 41(a)(1) one-year extension might be available when a plaintiff's Rule 9(j) expert is not "reasonably expected" to qualify under Rule 702.[92] In *Allen*, the plaintiff's complaint included the Rule 9(j) certification. The court of appeals, however, affirmed the trial court's involuntary dismissal with prejudice because the plaintiff could not have "reasonably expected [the expert] to qualify" under Rule 702.[93] In response to the plaintiff's argument that the trial court should have dismissed the case without prejudice, the court of appeals, citing *Brisson*, implied that had the plaintiff in *Allen* taken a voluntary dismissal before the court involuntarily dismissed with prejudice, the one-year extension to re-file the claim would have been available.[94] Presumably, *Brisson*'s good faith requirement extends to finding experts that are reasonably expected to satisfy Rule 9(j); however, proving bad faith under these circumstances would be more difficult than establishing bad faith where the complaint is wholly lacking in expert review.[95]

Third, as the dissent pointed out, *Brisson* extended the statute of limitations for filing a medical malpractice action.[96] By obtaining a 120-day extension, a plaintiff has as long as three years and four

88. *Id.* at 520–21, 512 S.E.2d at 439–40.
89. *Id.*
90. *Id.* at 522–23, 512 S.E.2d at 441.
91. No. COA99-1038, 2000 N.C. App. LEXIS 903, 533 S.E.2d 812 (N.C. App. Aug. 1, 2000).
92. *See id.* at *9, 533 S.E.2d at 815.
93. *Id.*
94. *See id.* at *16–17, 533 S.E.2d at 817.
95. The *Brisson* defense lawyer, Barry S. Cobb, had similar concerns that the *Brisson* majority opinion will allow plaintiffs to circumvent Rule 9(j) by getting unqualified experts to review the case and then voluntarily dismissing the case in order to get a qualified expert. Dayton, *supra* note 83, at 3.
96. *Brisson*, 351 N.C. at 600, 528 S.E.2d at 574 (Wainwright, J., dissenting).

months to file a valid complaint.[97] If that is not enough time, the plaintiff may file the complaint anyway and, to avoid the appearance of filing in bad faith, wait until the defense makes a motion to dismiss (which could take up to a month[98]), and then take a Rule 41(a)(1) voluntary dismissal.[99] This conduct is deplorable, but unscrupulous lawyers will nonetheless attempt it. Incidentally, this result also creates a safety net for incompetent or results-driven lawyers who cannot (or do not attempt to) get a 120-day extension.[100]

Finally, *Brisson* reduces the judicial control that trial judges will have in managing their courts. If a trial judge cannot deny a 120-day extension without knowing whether her order will be respected,[101] the court has lost its power to regulate a claim that it obviously perceived unworthy of an extension. In addition, suppose the re-filed claim ends up in front of the same judge who initially denied the extension. Whether or not trial judges will be extra-critical of these lawyers the second time around is not known; but if so, it will be at the expense of the client who may not have done anything wrong.

While the court's attempt to harmonize Rules 41 and 9(j) to protect a meritorious claim is commendable, there is an alternative course that can achieve the same result without creating some of these problems. Notwithstanding that Rule 9(j) provides an opportunity to extend the statute of limitations by 120 days, there is nothing in Rule 9(j) that requires a judge to dismiss the claim "with" prejudice.[102] Drawing upon a trial judge's authority to dismiss without prejudice is a much more efficient way to handle Rule 9(j) defects when the plaintiff merely fails to attach the required

97. *See* N.C. R. CIV. P. 9(j). The statute of limitations for filing a medical malpractice action in North Carolina is three years. N.C. GEN. STAT. § 1-15 (1999).

98. *See* N.C. GEN. STAT. § 1A-1, Rule 12 (1999).

99. Again, the plaintiff is subject to the good faith requirement. *But see* Hawkins v. State, 117 N.C. App. 615, 623–24, 453 S.E.2d 233, 238 (1995) (holding that there was neither evidence the plaintiff filed the first complaint solely to toll the statute of limitations when he waited over two months to dismiss the complaint, nor was there a judicial admission that the plaintiff filed and dismissed the original complaint in bad faith).

100. Arguably, a plaintiff would be better off not even trying to get a 120-day extension so that it does not appear as if he is filing (or dismissing) in bad faith.

101. Recall that a plaintiff can escape the good cause requirement of Rule 9(j) by filing the complaint, and then dismissing it without prejudice to gain an extra year. *See supra* notes 44–48 and accompanying text.

102. *See* N.C. R. CIV. P. 9(j); *see also* Keith v. N. Hosp. Dist., 129 N.C. App. 402, 405 n.3, 499 S.E.2d 200, 202 n.3 (1998) (noting that the Rule 9(j) mandatory dismissal does not preclude a trial judge from using his discretion to dismiss without prejudice). This discretion to dismiss without prejudice was also re-affirmed by the court of appeals after the *Brisson* decision. *See* Allen v. Carolina Permanente Med. Group, No. COA99-1038, 2000 N.C. App. LEXIS 903, at *16, 533 S.E.2d 812, 817 (N.C. App. Aug. 1, 2000).

certification. The trial judge is often in the best position to determine whether the plaintiff made a clerical error by failing to attach the 9(j) certification (in which case a dismissal without prejudice is within the judge's discretion), or whether the plaintiff is filing in bad faith without having prior expert review (in which case a dismissal with prejudice is warranted).[103] Furthermore, there will rarely be a sufficient record for a later court to distinguish good faith from bad faith.[104] By allowing judges to determine whether a particular 9(j) defect warrants dismissal with or without prejudice, the legislature's goal of preventing frivolous claims is accomplished and the threatened abuse of Rule 41(a)(1) is prevented. Under this regime both sides are better off; defendants are protected from unethical behavior and plaintiffs can save their voluntary dismissal without prejudice for a rainy day.

In today's litigious society, it is imperative to have a mechanism for curbing frivolous lawsuits. Rule 9(j) was the General Assembly's attempt to do so in the area of medical malpractice,[105] but *Brisson* has taken the reform effort a step back. The General Assembly needs to clarify how plaintiffs can remedy inadvertent defects like the one in *Brisson*. One approach could be to revise Rule 9(j) to include a provision that allows plaintiffs to amend the complaint to comply with the Rule, perhaps subject to a "good cause" showing that the proper expert review was made prior to the expiration of the statute of limitations. This would ensure that meritorious claims are not summarily dismissed for merely failing to attach the requisite certification in the complaint. The legislature also needs to clarify when the Rule 41(a)(1) extension should be available. Neither *Estrada* nor *Brisson* cited authority for their opposing applications of Rule 41. Therefore, a directive from the General Assembly would eliminate the uncertainty surrounding the use of a Rule 41(a)(1)

103. Note that in *Estrada* the court determined that the complaint was filed in bad faith only after the plaintiff's attorney admitted, in oral argument, that the sole reason he filed the action was to toll the statute of limitations. *See* Estrada v. Burnham, 316 N.C. 318, 324–25, 341 S.E.2d 538, 542–43 (1986). In light of *Estrada*, an attorney predisposed to abuse Rule 41(a)(1) is not likely to thereafter admit his bad faith and be tossed out of court (and sanctioned). Even if the court could later investigate whether the plaintiff had obtained expert review prior to the original statute of limitations, it is much more efficient to make such an inquiry when the plaintiff files the complaint the first time. If he merely failed to attach the certification, then he will be able to produce the proper certification in a matter of minutes. If he cannot produce the certification, it is appropriate to assume that actual expert review is lacking.

104. *See supra* note 103.

105. *See* Act of June 20, 1995, ch. 309, 1995 N.C. Sess. Laws 611 (codified at N.C. R. CIV. P. 9(j)).

extension in cases where the complaint does not conform in all respects to the rules of pleading and where a plaintiff has received an adverse ruling prior to resting his case.

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