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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

LORETTA CLINE, Executrix of the Estate
of Henry Cline,

Plaintiff,

v.

Civil Action No. 09-C-2034
Judge Jennifer Bailey

KIREN JEAN KRESA-RE AHL, M.D.

Defendant.

2011 FEB -3 PM 1:20
CATHY S. GATSON, CLERK
KANAWHA CO. CIRCUIT COURT

ORDER OF DISMISSAL

On April 7, 2010, came defendant Kiren Jean Kresa-Reahl, M.D., by counsel Barry M. Taylor and Jenkins Fenstermaker, PLLC, for hearing upon her Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the West Virginia Rules of Civil Procedure, and West Virginia Code § 55-7B-6, as amended, as previously noticed and served on December 19, 2009. Also appearing was plaintiff, by counsel, Matthew C. Lindsay and Tabor Lindsay & Associates.

The Court, having reviewed the Motion, supporting Memorandum, plaintiff's Response thereto, Dr. Kresa-Reahl's Reply to plaintiff's Response, applicable case law and having heard the arguments of counsel in support of and opposing the Motion, is now of the opinion that the Motion is well taken and hereby grants Dr. Kresa-Reahl's Motion to Dismiss. In support of its ruling, the Court makes the following findings of fact and conclusions of law:

Findings of Fact

1. Plaintiff filed a Complaint alleging medical negligence against Dr. Kresa-Reahl on October 29, 2009. The allegations in plaintiff's Complaint relate to patient care rendered to decedent, Henry Cline, on February 22, 2009.

2. Dr. Kresa-Reahl, a licensed health care provider and board-certified neurologist with her practice at Capitol Neurology in Charleston, West Virginia, timely answered plaintiff's Complaint, denied the substantive allegations contained therein and preserved a number of affirmative defenses, including lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted pursuant to Rules 12(b)(1) and 12(b)(6) of the West Virginia Rules of Civil Procedure, and also based upon plaintiff's failure to comply with the statutory pre-suit filing requirements of the Medical Professional Liability Act ("MPLA").

3. Prior to filing this action, plaintiff, by counsel, mailed a letter to Dr. Kresa-Reahl dated July 6, 2009 with the heading "Notice of Claim and Statement Pursuant to West Virginia Code § 55-7B-6(c)." The letter purportedly constituted a pre-suit notice of claim as required by the MPLA. Plaintiff did not include a screening "certificate of merit" to support or substantiate the claim pursuant to West Virginia Code § 55-7B-6(b), and to date no certificate of merit has been provided.

4. Plaintiff relied upon the exception to the general rule as provided in West Virginia Code § 55-7B-6(c) by stating in her letter of July 6, 2009, "[n]o expert witness is needed as [decedent] did not receive adequate information regarding treatment options...." Plaintiff did not further explain the absence of a certificate of merit or further support her attempted reliance upon the exception for providing a certificate of merit.

5. Within thirty (30) days of receiving plaintiff's purported pre-suit notice of claim, Dr. Kresa-Reahl responded by letter dated August 4, 2009. In her letter, Dr. Kresa-Reahl made various specific objections to plaintiff's notice of claim and requested more definite statements, details and information regarding plaintiff's understanding of pertinent factual issues. Specifically, plaintiff had failed to adequately meet the exception to providing a certificate of merit and the necessary

expert testimony on standard of care, any breach thereof, causation and the establishment of cause of death.

6. Plaintiff, by counsel, replied to Dr. Kresa-Reahl's letter of August 4, 2009 with a brief letter dated August 5, 2009. Plaintiff asserted simply "[w]e feel we have fully complied with the statutory and case law requirements for the filing of our claim."

7. No further communication or action was taken until plaintiff filed her Complaint on October 29, 2009.

Conclusions of Law

1. West Virginia Code § 55-7B-6(a) requires that certain prerequisites be met before a claimant is entitled to file a medical malpractice action against a health care provider. Section 55-7B-6(a) provides that "...no person may file a medical professional liability action against any health care provider without complying with the provisions of this section." This section limits the Court's subject matter jurisdiction over such matters pending a claimant's compliance with the pre-suit filing requirements of the statute. See Syllabus Point 2, Westmoreland v. Vaidya, 222 W.Va. 205, 664 S.E.2d 90 (2008); Syllabus Point 2, Hinchman v. Gillete, 217 W.Va. 378, 618 S.E.2d 387 (2005). See also, Elmore v. Triad Hospitals, Inc., 220 W.Va. 154, 160, 640 S.E.2d 217, 223 (2006).

2. West Virginia Code § 55-7B-6(b) further mandates that a claimant serve a Notice of Claim and Certificate of Merit "[a]t least thirty days prior to the filing of a medical professional liability action against a health care provider...." Elmore, 220 W.Va. at 160, 640 S.E.2d at 223.

3. West Virginia Code § 55-7B-6(c) provides one exception to the requirement of a certificate of merit, but only under specific and limited circumstances. Section 55-7B-6(c) permits a claimant to forego obtaining and serving a certificate of merit when "...the cause of action is based upon a well-established legal theory of liability which does not require expert testimony supporting

a breach of the applicable standard of care..." A claimant who relies upon this exception must "file a statement specifically setting forth the basis of the alleged liability of the health care provider in lieu of a screening certificate of merit." See Westmoreland, 222 W.Va. at 210, 664 S.E.2d at 95.

4. Plaintiff did not provide Dr. Kresa-Reahl with a certificate of merit. Although she attempted to rely instead upon the exception established in West Virginia Code § 55-7B-6(c), she failed to meet the requirements of the exception. In her notice of claim letter dated July 6, 2009, plaintiff asserted, "[n]o expert witness is needed as [decedent] did not receive adequate information regarding treatment options...." However, plaintiff failed to state a well-established legal theory of liability as required by this Code section. Dr. Kresa-Reahl properly responded to plaintiff's notice of claim within thirty (30) days by letter dated August 4, 2009, giving plaintiff written and specific notice of, and a fair opportunity to address and correct, the defects and insufficiencies in plaintiff's purported notice of claim. See Syllabus Point 3, Westmoreland, 222 W.Va. 205, 664 S.E.2d 90 (2008).

5. Plaintiff was given a fair opportunity to address and correct the defects and insufficiencies in her purported notice of claim and failed to do so, and took no further action until filing her Complaint on October 29, 2009. Plaintiff did not even attempt to state a well-established legal theory of liability until filing a Response to Dr. Kresa-Reahl's Motion to Dismiss on March 31, 2010.

6. In her March 31 Response, plaintiff attempted to characterize her claim as an informed consent theory, which is not applicable to the facts stated herein.

7. This Court agrees that physicians have a duty to obtain a patient's informed consent. Syllabus Point 2, Cross v. Trapp, 170 W.Va. 459, 294 S.E.2d 446 (1982). Moreover, this Court agrees that "the duty of disclosure is predicated upon a *recommended* treatment or procedure."

Hicks v. Ghaphery, 212 W.Va. 327, 335, 571 S.E.2d 317, 325 (2002) (emphasis added). Dr. Kresa-Reahl did not recommend thrombolytic therapy to Mr. Cline in the present case and, therefore, this case is not one predicated upon a recommended treatment or procedure. Accordingly, the case at bar is not an informed consent case.

8. Even if this case was based upon the theory of informed consent, expert medical testimony ordinarily is required in informed consent cases in West Virginia “to establish certain matters including...alternative methods of treatment.” Cross, 170 W.Va. at 468, 294 S.E.2d at 455. Expert testimony ordinarily is required to establish which treatments are medically reasonable or indicated in a given situation and, accordingly, should be disclosed or recommended by the physician. Id.

9. The reasonableness and appropriateness of treatments or procedures must be left to the medical judgment of trained physicians, and must be assessed based upon the particular circumstances and conditions known when patient care is rendered. Neither patient preference or desire nor medical hindsight can be allowed to drive determinations regarding which treatments or procedures were medically reasonable at the time and, therefore, should have been presented and discussed by the physician. Hicks, 212 W.Va. at 335, 571 S.E.2d at 325, *citing* Vandi v. Permanente Medical Group, Inc., 7 Cal.App.4th 1064, 1070, 9 Cal.Rptr.2d 463, 467 (1992).

10. Physicians are not legally obligated to disclose or recommend treatments, against their discretion and medical judgment, which are not medically reasonable or indicated under the circumstances in order to obtain an informed consent or meet the applicable standard of medical care. Otherwise, physicians would be required to discuss hundreds of possible treatments and procedures with every patient, regardless of the patient’s condition, presentation and past medical history. Hicks, 212 W.Va. at 335, 571 S.E.2d at 325. “It would be anomalous to create a legally

imposed duty which would require a physician to disclose and offer to a patient a medical procedure which, in the exercise of his or her medical judgment, the physician does not believe to be medically indicated.” *Id. quoting Vandi*, 7 Cal.App.4th at 1070, 9 Cal.Rptr.2d at 467.

11. A determination as to whether a physician’s decision to not recommend or disclose a particular procedure, treatment or therapy met or breached the applicable standard of medical care requires expert testimony. *Hicks*, 212 W.Va. 327, 571 S.E.2d 317 (2002); *Cross*, 170 W.Va. 459, 294 S.E.2d 446 (1982).

12. Expert opinion is necessary in this case to establish whether thrombolytic therapy was medically indicated under the circumstances of Mr. Cline’s care and also is necessary to establish whether such therapy would have altered the ultimate outcome for Mr. Cline. Plaintiff’s filing of her Complaint prior to review and certification by an expert familiar with the applicable standard of care at issue, causation and cause of death, was premature.

13. Furthermore, by Dr. Kresa-Reahl’s letter of August 4, 2009, plaintiff was provided a fair opportunity to address and correct the defects and insufficiencies in her attempted reliance upon the certificate of merit exception provided in West Virginia Code § 55-7B-6(c). By filing a Complaint without taking the opportunity to address and correct the issues properly raised by Dr. Kresa-Reahl, plaintiff failed to make a good faith and reasonable effort to further the statutory purposes of the MPLA. *Cf. Westmoreland*, 222 W.Va. 205, 664 S.E.2d 90 (2008) (reversing, in part, a dismissal for lack of certificate of merit because defendant did not provide plaintiff with any pre-suit notice specifying defects or insufficiencies).

14. The case at bar is not “the unique case” identified by the West Virginia Supreme Court of Appeals and is fully distinguishable from *Westmoreland* inasmuch as plaintiff was provided a fair opportunity to support her attempted reliance upon the exception, but failed to do so.

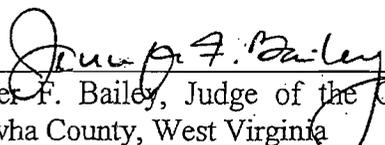
Accordingly, plaintiff is not entitled to "a second chance to provide a certificate of merit." Westmoreland, 222 W.Va. at 212 n.14, 664 S.E.2d at 97 n.14. See also, Sayre v. United States of America, No. 2:09-0295, 2009 U.S. Dist. LEXIS 114864 (S.D.W. Va. Dec. 9, 2009) (Memorandum Opinion and Order by Judge John T. Copenhaver, Jr., applying West Virginia's MPLA and Westmoreland, finding expert testimony necessary to establish informed consent cause of action, and dismissing claim without prejudice for failure to serve defendant with a certificate or merit).

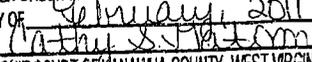
IT IS, THEREFORE, ORDERED that defendant Kiren Jean Kresa-Reahl, M.D.'s Motion to Dismiss is granted and plaintiff's Complaint and causes of action asserted thereunder in this Civil Action No. 09-C-2034, be dismissed, without prejudice, pursuant to Rules 12(b)(1) and 12(b)(6) of the West Virginia Rules of Civil Procedure, and West Virginia Code § 55-7B-6, as amended.

IT IS FURTHER ORDERED that Civil Action No. 09-C-2034 be struck from the docket of this Court, all claims against defendant Kiren Jean Kresa-Reahl, M.D., having been addressed and dismissed by this Order.

IT IS FURTHER ORDERED that the Circuit Clerk provide a copy of this Order to all counsel of record upon its entry at the addresses set forth below.

Entered this 2nd day of February, 2011.


Jennifer F. Bailey, Judge of the Circuit Court of
Kanawha County, West Virginia

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF THE CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 4
DAY OF February, 2011
 CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA 

Matthew C. Lindsay, Esquire (WV Bar ID # 7896)
TABOR LINDSAY & ASSOCIATES
Post Office Box 1269
Charleston, West Virginia 25325
(Counsel for plaintiff)

Barry M. Taylor, Esquire (WV Bar # 3697)
Matthew L. Williams, Esquire (WV Bar # 10886)
JENKINS FENSTERMAKER, PLLC
Post Office Box 2688
Huntington, West Virginia 25726-2688
(Counsel for Kiren Jean Kresa-Reahl, M.D.)