

No. 31757 – Bernard Boggs, as Administrator of the Estate of Hilda Boggs, deceased, as personal representative of the statutory beneficiaries of the wrongful death claim herein asserted and in his own right v. Camden-Clark Memorial Hospital Corporation, United Anesthesia, Inc., and Manish I. Koyawala, M.D.

FILED

December 8, 2004

released at 3:00 p.m.

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Maynard, Chief Justice, dissenting:

I believe that the circuit court properly dismissed Appellant's complaint for failure to comply with the clear provisions of the 2001 version of W.Va. Code § 55-7B-6. By reversing the circuit court, the majority opinion disregards plain statutory language and rules in a manner clearly contrary to this Court's recent decision in *State ex rel. Miller v. Hon. Stone*, ___ W.Va. ___, ___ S.E.2d ___ (No. 31755, December 2, 2004).

In *Miller*, Petitioner filed her notice of claim on May 9, 2003, and the certificate of merit on June 20, 2003. However, she filed her medical malpractice complaint on June 9, 2003. The circuit court ruled that Petitioner's complaint could not properly be filed until 30 days after the filing of the certificate of merit, which was July 30, 2003, after the 2003 amendments to the Medical Professional Liability Act became applicable. Petitioner thereafter sought a writ in this Court to prohibit the enforcement of the circuit court's order. This Court denied the writ after finding that the circuit court's order was correct.

The applicable statutory language in both *Miller* and the instant case provides:

(b) At least thirty days prior to the filing of a medical professional liability action against a health care provider, the claimant shall serve by certified mail, return receipt requested, a notice of claim. The notice of claim shall include a statement of the theory or theories of liability upon which a cause of action may be based, together with a screening certificate of merit. The certificate of merit shall be executed under oath by a health care provider qualified as an expert under the West Virginia rules of evidence and shall state with particularity: (1) the expert's familiarity with the applicable standard of care in issue; (2) the expert's qualifications; (3) the expert's opinion as to how the applicable standard of care was breached; and (4) the expert's opinion as to how the breach of the applicable standard of care resulted in injury or death. . . .

* * *

(d) If a claimant or his or her counsel has insufficient time to obtain a screening certificate of merit prior to the expiration of the applicable statute of limitations, the claimant shall comply with the provisions of subsection (b) of this section except that the claimant or his or her counsel shall furnish the health care provider with a statement of intent to provide a screening certificate of merit within sixty days of the date the health care provider receives the notice of claim.

(e) Any health care provider who receives a notice of claim pursuant to the provisions of this section must respond, in writing, to the claimant within thirty days of receipt of the claim or within thirty days of receipt of the certificate of merit if the claimant is proceeding pursuant to the provisions of subsection (d) of this section.

(f) Upon receipt of the notice of claim or of the screening certificate, if the claimant is proceeding pursuant to the provisions of subsection (d) of this section, the health care provider is entitled to pre-litigation mediation before a qualified mediator upon written demand to the claimant.

(g) If the health care provider demands mediation pursuant to the provisions of subsection (f) of this section, the mediation shall be concluded within forty-five days of the date of the written demand. The mediation shall otherwise be conducted pursuant to rule 25 of the trial court rules, unless

portions of the rule are clearly not applicable to a mediation conducted prior to the filing of a complaint or unless the supreme court of appeals promulgates rules governing mediation prior to the filing of a complaint. If mediation is conducted, the claimant may depose the health care provider before mediation or take the testimony of the health care provider during the mediation.

(h) The failure of a health care provider to timely respond to a notice of claim, in the absence of good cause shown, constitutes a waiver of the right to request pre-litigation mediation. Except as otherwise provided in this subsection, any statute of limitations applicable to a cause of action against a health care provider upon whom notice was served for alleged medical professional liability shall be tolled from the date of the mailing of a notice of claim to thirty days following receipt of a response to the notice of claim, thirty days from the date a response to the notice of claim would be due, or thirty days from the receipt by the claimant of written notice from the mediator that the mediation has not resulted in a settlement of the alleged claim and that mediation is concluded, whichever last occurs. If a claimant has sent a notice of claim relating to any injury or death to more than one health care provider, any one of whom has demanded mediation, then the statute of limitations shall be tolled with respect to, and only with respect to, those health care providers to whom the claimant sent a notice of claim to thirty days from the receipt of the claimant of written notice from the mediator that the mediation has not resulted in a settlement of the alleged claim and that mediation is concluded.¹

This Court explained in *Miller*,

A proper reading of W.Va. Code § 55-7B-6(b), indicates that 30 days before a plaintiff files a medical malpractice action, he or she must serve a notice of claim on the defendant. This notice of claim is to include two things – (1) a statement of the

¹The provisions of W.Va. Code § 55-7B-6, as amended in 2003, are substantially the same as those in the 2001 version with the exception of several relatively minor changes.

theory or theories of liability upon which a cause of action may be based; and (2) a screening certificate of merit. However, under subsection (d), if a claimant has insufficient time to obtain a screening certificate of merit prior to the expiration of the statute of limitations, the claimant shall file a statement of the theory or theories of liability along with a statement of intent to provide a screening certificate of merit within 60 days of the date the health care provider receives notice of claim.

Pursuant to subsection (e), once a claimant files his or her certificate of merit under subsection (d), a health care provider, upon receipt of the certificate, must respond to the claimant, in writing, within 30 days. According to subsection (f), the health care provider is entitled to pre-litigation mediation before a qualified mediator upon written demand to the claimant. Subsection (g) indicates that if the health care provider demands mediation, the mediation shall be conducted within 45 days of the date of the written demand.

Significantly, subsection (h) indicates that the statute of limitations applicable to the medical malpractice action shall be tolled from the date of the mailing of a notice of claim to 30 days following receipt of a response to the notice of claim, 30 days from the date a response to the notice of claim would be due, or 30 days from the receipt by the claimant of written notice from the mediator that the mediation has not resulted in a settlement of the alleged claim and that mediation is concluded, whichever occurs last.

Miller, slip op. at 8-9.

Upon application of the clear provisions of W.Va. Code § 55-7B-6 (2001), to the facts of the instant case, it is obvious that the circuit court properly dismissed Appellant's complaint.¹ The facts show that Appellant provided Appellees with a screening certificate

¹I agree with the circuit court that "notwithstanding the fact that other theories of recovery are alluded to in the [Appellant's] pleadings, since the giving or failure to give appropriate types and levels of medical care to the plaintiff's decedent is the common

of merit on June 2, 2003. Appellant thereafter filed suit on June 27, 2003, less than the 30 days mandated by W.Va. Code § 55-7B-6(f). Thus, Appellees were not provided their 30-day time period in which to demand pre-litigation mediation prior to the filing of Appellant's complaint. Pursuant to W.Va. Code § 55-7B-6(a) (2001), "no person may file a medical professional liability action against any health care provider without complying with the provisions of this section."

Finally, I note that the result of the dismissal of Appellant's complaint would most likely have been the re-filing of the complaint under the 2003 amendments to the Medical Professional Liability Act, which became applicable on July 1, 2003. Contrary to the assertions in the majority opinion, there would have been no injustice to Appellant. Rather, his causes of action simply would have been governed by an amended version of the Medical Professional Liability Act.

Accordingly, for the reasons set forth above, I dissent.

gravamen of all theories of relief advanced by the [Appellant]" the entire action falls within the scope of the Medical Professional Liability Act.