

IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

J.M.A.,

Plaintiff,

vs.

CIVIL ACTION NO.: 19-C-75
(Judge Joseph Reeder)

MARSHALL UNIVERSITY JOAN C. EDWARDS
SCHOOL OF MEDICINE; MARSHALL UNIVERSITY
BOARD OF GOVERNORS; RADIOLOGY, INC.;
CABELL HUNTINGTON HOSPITAL, INC.; and
JOHN DOE DOCTOR – Radiologist,

Defendants.

**MOTION TO DISMISS DEFENDANT, CABELL HUNTINGTON
HOSPITAL, INC., AND MEMORANDUM OF LAW IN SUPPORT THEREOF**

COMES NOW Defendant, Cabell Huntington Hospital, Inc., by and through counsel, Rebecca C. Brown and the law firm of Bailes, Craig & Yon, PLLC, and moves this honorable Court to dismiss this action pursuant to W. Va. Code § 55-7B-1, *et seq.*, W.V.a Code § 14-2-2b, as well as West Virginia Rules of Civil Procedure 12(b)(1), 12 (b)(3) and 12 (b)(6).

The bases for this Motion are set forth in the following Memorandum of Law.

I. INTRODUCTION

This case is before the Court on a Motion to Dismiss by Cabell Huntington Hospital, Inc. (hereinafter "CHH") pursuant to W. Va. Code § 14-2-2a and 55-7B-6(a)-(d); W. Va. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, 12(b)(3) for lack of venue, and 12(b)(6) for failure to state a claim upon which relief can be granted.

II. STATEMENT OF FACTS

This is a medical malpractice case wherein the Plaintiff, J.M.A. claims a breach of privacy caused him to suffer "severe anxiety and humiliation." On April 10, 2019, Plaintiff, J.M.A. filed a Complaint against Defendant Marshall University, Joan C. Edwards School of Medicine, Marshall University Board of Governors; Radiology, Inc., Cabell Huntington Hospital, Inc. and John Doe doctor, to obtain damages, restitution and equitable relief for himself related to a claim that the Defendants made, "Sensitive Information" accessible to unwanted third parties, including the Plaintiff's fellow students. The Plaintiff alleges that unredacted and radiological image(s) that were not de-identified were shared with his fellow classmates while he was a student at Marshall University School of Medicine, causing him to suffer damages.

III. ARGUMENT

A. Plaintiff's Pre-suit Filing of Notice Was Defective.

The Circuit Court of Putnam County does not have jurisdiction over this matter because Plaintiff did not comply with W. Va. Code § 55-7B-6 in filing his claim against CHH. Subsection b of said Code section states in pertinent part:

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 on each health care provider the claimant will join in litigation. The notice of claim shall include a statement of the theory or theories of liability upon which a cause of action may be based, and a list of all health care providers and health care facilities to whom notices of claim are being sent, together with a screening certificate of merit. The screening 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. A separate screening certificate of merit must be provided for each health care provider against whom a claim is asserted.

The West Virginia Court of Appeals has affirmed dismissal of a claim for failure to comply with W. Va. Code § 55-7B-6. The Supreme Court found no error in the dismissal of the case for violation of this code. *McLaughlin v. Murphy*,¹ CHH is a not-for-profit hospital located in Huntington, West Virginia and is a health care provider under the provisions of W. Va. Code § 55-7B-1, *et seq.* Cabell Huntington Hospital received neither a notice of claim, nor a screening certificate of merit signed by an expert with the above information included. Further, Plaintiff did not provide this Defendant with his statement of intent to provide the above-referenced certificate of merit pursuant to W. Va. Code § 55-7B-6(d). Accordingly, this Court lacks jurisdiction over the claims asserted against this Defendant. Therefore, this case must be dismissed.

B. Venue is not proper in Putnam County, West Virginia.

West Virginia Code Section 12(b)(3) permits dismissal for improper venue. Venue is not proper in Putnam County, in this case for multiple reasons. Generally venue is proper in West Virginia where the defendant resides or where the cause of action arose. In this case the Defendant, Cabell Huntington Hospital is a corporation with its principle place of business located in Cabell County. Further, it was at that facility where the alleged cause of action arose. Therefore, venue for this case against Cabell Huntington

¹17-0453 (Berkeley County 15-C-682)

Hospital is only proper in Cabell County. Putnam County is also the improper venue for this cause of action against the Defendants other than CHH due to West Virginia Code Section 14-2-2(b). West Virginia Code Section 14-2-2a states in pertinent part:

- (b) **Notwithstanding the provisions of section two [§14-2-2] of this article, any civil action in which Marshall University Board of Governors, Marshall University, the Marshall University School of Medicine or any department or office of any of those entities, or any officer, employee, agent, intern or resident of any of those entities, acting within the scope of his or her employment, is made a party defendant, shall be brought in the circuit court of any county wherein the cause of action arose, unless otherwise agreed by the parties.**

Clearly, all of the non-CHH parties are Marshall Defendants to this lawsuit and therefore, venue is proper only in Cabell County, West Virginia. Therefore, this case must be dismissed.

C. Failure to State a Claim upon Which Relief May Be Granted.

Claims against CHH are vague and state that hospital records were accessed by a professor at the Marshall University School of Medicine, who was inadequately trained, hired and or supervised-none of which would have been the responsibility of CHH. None of the 103 (One Hundred and Three) paragraphs of the Complaint state with any specificity claims related to care by CHH. Instead, the Complaint groups all of the Defendants together. Dismissal for failure to state a claim is proper "where it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Murphy v. Smallridge*.² Other than stating that CHH is the location where

² 196 W.Va. 35, 37, 468 S.E.2d 167, 168 (1996)

the breach occurred, this Complaint does not state a claim against this Defendant upon which relief may be granted and therefore this Complaint against CHH must be dismissed.

IV. CONCLUSION

In conclusion, this case was not filed pursuant to the statutory requirements of the W. Va. Code 55-7B-1, *et seq.* which is fatal to the case. Therefore, the Court has been deprived of subject matter jurisdiction over this claim pursuant to W. Va. R. Civ. P. 12(b)(1). Further, Plaintiff failed to state a claim upon which relief could be granted as to Cabell Huntington Hospital under W. Va. R. Civ. P. 12(b)(6). Finally, venue is not proper against the Marshall Defendants outside of Cabell County Therefore, this claim must be dismissed. WHEREFORE, CHH respectfully moves this honorable Court to dismiss this action against it with prejudice for the reasons set out herein.

CABELL HUNTINGTON HOSPITAL, INC.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he/she served the foregoing
MOTION TO DISMISS DEFENDANT, CABELL HUNTINGTON HOSPITAL, INC.,
AND MEMORANDUM OF LAW IN SUPPORT THEREOF upon counsel named below
by depositing a true copy thereof in the United States mail, postage prepaid at Huntington,
West Virginia on the 26th day of April, 2019, addressed as follows:

Troy N. Giatras, Esquire
Matthew W. Stonestreet, Esquire
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