

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

HELEN ADKINS,

Plaintiff,

v.

Civil Action No 20-C-391
Judge Christopher Chiles

CAROLYN CLARK, M.D.

Defendant.

**ORDER GRANTING MOTION TO DISMISS PLAINTIFF'S COMPLAINT FILED
AGAINST DEFENDANT, CAROLYN CLARK, M.D.,
WITH PREJUDICE**

On February 4, 2021 came Defendant Carolyn Clark, M.D., by counsel, D. C. Offutt, Jr., and Offutt Nord, PLLC, for a hearing upon his motion to dismiss the Complaint filed against her pursuant to W. Va. R. Civ. P 12(b), based upon the ground that the Complaint was filed against Defendant beyond the applicable statute of limitations. Upon mature consideration of the filings and arguments of counsel, the Court GRANTS such motion and makes the following findings of facts and conclusions of law:

Findings of Facts

1. This is a medical malpractice action commenced under the provisions of the Medical Professional Liability Act, W. VA. CODE §§55-7B-1 *et seq.* (MPLA).
2. According to the Complaint, this cause of action arose due to a left ureteral injury to Plaintiff which allegedly occurred during a total abdominal hysterectomy with bilateral salpingo-oophorectomy and lysis of adhesions performed by Dr. Clark on March 22, 2018, which Plaintiff claims she first discovered on March 28, 2018.
3. The statute of limitations for a medical malpractice action is two years from the injury or the date the cause of action otherwise arises, W. VA. CODE §55-7B-4(a); therefore, the

most liberal interpretation of the facts and allegations establishes that the expiration of the statute of limitations for the present action was March 28, 2020. However, due to the COVID-19 pandemic and resulting declarations of judicial emergency by the Supreme Court of Appeals of West Virginia, all status of limitations and status of reposed that would otherwise expire between March 23, 2020 and May 15, 2020, expired on May 18, 2020. As a result, the statute of limitations for Plaintiff's cause of action against Dr. Clark expired at the latest on May 18, 2020.

4. Dr. Clark was initially served with a Notice of Medical Professional Liability Claim by Plaintiff's counsel by letter dated February 27, 2020. The Notice of Claim was not accompanied by a Screening Certificate of Merit, but stated that Plaintiff discovered the medical negligence about which she complained on March 22, 2018, and that she needed sixty additional days in which to obtain a Screening Certificate of Merit as required by the West Virginia Medical Professional Liability Act, W. Va. Code §55-7B-1-12 ("MPLA").

5. Dr. Clark was served with a Revised Notice of Medical Professional Liability Claim and Screening Certificate of Merit dated May 18, 2020. The Revised Notice of Claim and Screening Certificate of Merit was received in Dr. Clark's office on May 26, 2020.

6. The Certificate of Merit served on Dr. Clark makes reference to medical negligence which was discovered or occurred on March 9, 2017. No surgery was performed by Dr. Clark on Plaintiff on March 9, 2017, and Dr. Clark performed no surgeries on Plaintiff prior to the hysterectomy performed at Cabell Huntington Hospital on March 22, 2018. However, to the extent that this error in the Screening Certificate of Merit is deemed to be a deficiency in compliance with the notice requirements of the MPLA, Dr. Clark has waived the deficiency and for the purposes of her motion agrees that the MPLA pre-suit notice requirements have been met by Plaintiff.

7. Before receipt of the Revised Notice of Claim and Screening Certificate of Merit, Dr. Clark's counsel responded to the original Notice of Claim on May 13, 2020, requesting a signed authorization to collect Plaintiff's medical records and a Screening Certificate of Merit.

8. On August 31, 2020, a paralegal for Dr. Clark's counsel provided Plaintiff's counsel with copies of medical records received from Cabell Huntington Hospital which had been obtained pursuant to Plaintiff's written authorization and advised counsel that additional records would be sent as they were received.

9. No direct response was made on Dr. Clark's behalf to the Revised Notice of Claim and Screening Certificate of Merit and there was no demand for pre-suit mediation.

10. Plaintiff's counsel sent a letter to Dr. Clark's counsel on November 13, 2020, asking if Dr. Clark wished to engage in pre-suit mediation.

11. Dr. Clark's counsel responded to Plaintiff's counsel on November 17, 2020, and advised him that the statute of limitations had expired on Plaintiff's claims against Dr. Clark.

12. Dr. Clark had thirty days from the date of receipt of the Revised Notice of Claim and Screening Certificate of Merit, or until June 26, 2020, to respond to the Revised Notice of Claim and Screening Certificate of Merit if she wished to do so, but the MPLA places no requirement on her to respond in any manner. During this thirty day period, the statute of limitations was tolled by the MPLA's tolling provisions. Because Dr. Clark did not respond to the Revised Notice of Claim, the statute of limitations was then tolled an additional thirty days beyond her deadline for responding, if she chose to do so, or until July 26, 2020.

13. Plaintiff's Complaint was filed on November 23, 2020, three months and twenty-one days after the tolling provisions of the MPLA had expired.

14. Dr. Clark filed a Motion to Dismiss Plaintiff's Complaint on December 3, 2020, claiming that Plaintiff had failed to file the Complaint within the applicable statute of limitations.

Conclusions of Law

1. "A cause of action for injury to a person alleging medical professional liability against a health care provider arises as of the date of the injury . . . and must be commenced within two years of the date of such injury, or within two years of the date when such person discovers, or with the exercise of reasonable diligence, should have discovered such injury, whichever last occurs" W. VA. CODE §55-7B-4(a).

2. There is no dispute that absent the judicial emergency caused by the COVID-19 pandemic, the statute of limitations on the cause of action alleged by Plaintiff expired on March 28, 2020, which is two years after the discovery that her ureter had been injured during surgery performed by Dr. Clark on March 22, 2018.

3. The prerequisites for commencing a medical malpractice action in West Virginia are clearly set forth in W. VA. CODE §55-7B-6. Subsection (b) provides that "[a]t least 30 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."

4. Subsection (b) also provides that "[t]he 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."

5. Subsection (i) of W. VA. CODE §55-7B-6 further provides that "[a]ny 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 mail 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 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 last occurs.”

6. Dr. Clark was initially served with a Notice of Medical Professional Liability Claim by Plaintiff’s counsel by letter dated February 27, 2020. The Notice of Claim was not accompanied by a Screening Certificate of Merit, but stated that Plaintiff discovered the medical negligence about which she complained on March 22, 2018, and that she needed sixty additional days in which to obtain a Screening Certificate of Merit as required by the West Virginia Medical Professional Liability Act, W. Va. Code §55-7B-1-12 (“MPLA”) which would have been on or before April 27, 2020.

7. The April 27, 2020, deadline to file the Screening Certificate of Merit was extended due to the COVID-19 judicial emergency until May 18, 2020, and Dr. Clark was served with a Revised Notice of Claim and Screening Certificate of Merit on that date which she received in her office on May 26, 2020.

8. Since no pre-suit mediation was requested by Dr. Clark pursuant to the provisions of W. VA. CODE §56-7B-6(h), in accordance with W. VA. CODE §56-7B-6(i), the statute of limitations expired as to any claim against her on July 26, 2020. The Plaintiff’s Complaint was not filed with the Circuit Clerk until November 23, 2020, three months and twenty-one days after the tolling provisions of the MPLA had expired. Accordingly, the Plaintiff’s Complaint is barred by the statute of limitations and must be dismissed, with prejudice.

9. The Supreme Court of Appeals held in Syllabus Point 2 of *State ex rel. Primecare Medical of West Virginia, Inc. v. Faircloth*, 835 S.E.2d 579 (W. Va. 2019), that “[t]he pre-suit notice requirements contained in the West Virginia Medical Professional Liability Act are jurisdictional, and that the failure to comply with the requirements deprives a circuit court of subject matter jurisdiction.”

10. The Court in *SER Primecare* further held that a circuit court has no authority to suspend the requirements of the MPLA. Syl. Pt. 5, *SER Primecare, supra*.

11. The MPLA does not toll the statute of limitations until a defendant has made a decision about pre-suit mediation one way or the other. If the Legislature had intended for the statute of limitations to be tolled indefinitely until such time the defendant has made a definitive statement that she is not interested in pre-suit mediation, it would have so provided in the language of the MPLA.

12. Contrary to Plaintiff’s position, the statement in the May 13, 2020, letter from Dr. Clark’s counsel concerning pre-suit mediation does not constitute a fraudulent misrepresentation or concealment of a material fact. There is nothing fraudulent about the statement whatsoever. Telling opposing counsel that a defendant may wish to consider pre-suit mediation after receiving the relevant medical records doesn’t misrepresent anything and it doesn’t conceal a material fact.

13. The doctrine of equitable estoppel does not apply to this factual situation to toll or further extend the deadline for filing Plaintiff’s Complaint. Equitable estoppel requires (1) a showing of the plaintiff’s actual and reasonable reliance on the defendant’s conduct or representations and (2) evidence of improper purpose on the part of the defendant or of the defendant’s actual or constructive knowledge of the deceptive nature of its conduct. Estoppel applies “when a party is induced to act or refrain from acting to her detriment because of her

reasonable reliance on another party's misrepresentation or concealment of a material fact." Furthermore, the doctrine of estoppel "should be applied cautiously, only when equity clearly requires that it be done." *Samsell v. State Line Development Co.*, 154 W. Va. 48, 174 S.E.2d 318 (1970). The MPLA sets out precisely when the statute of limitations is tolled in a medical professional liability case and a Circuit Court has no authority to enlarge or expand this time period for equitable reasons because Plaintiff's counsel made a mistake by assuming the defendant was going to engage in pre-suit mediation and delayed filing the Complaint until after the statute of limitations had run on Plaintiff's claim.

Order

Accordingly, Defendant Clark's motion to dismiss is **GRANTED, WITH PREJUDICE**, inasmuch as the Complaint was filed beyond the statute of limitations. Plaintiff's objections to this ruling are hereby noted.

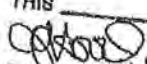
The Circuit Clerk will provide attested copies of this Order to all counsel of record: D. C. Offutt, Jr., 949 Third Avenue, Suite 300, Huntington, W. Va. 25701 and Robert B. Kuenzel, Post Office Box 607, Chapmanville, WV 25508-0607.

It is so **ORDERED** this ____ day of March, 2021.

/s/ **CHRISTOPHER D. CHILES**

Christopher D. Chiles, Judge
Cabell County Circuit Court

PREPARED AND SUBMITTED BY COUNSEL FOR CAROLYN CLARK, M.D. WITH REVISIONS BY NATALIE N. MATHENY, CIRCUIT COURT LAW CLERK

STATE OF WEST VIRGINIA
COUNTY OF CABELL
I, JEFFREY E. HOOD, CLERK OF THE CIRCUIT
COURT FOR THE COUNTY AND STATE AFORESAID
DO HEREBY CERTIFY THAT THE FOREGOING IS A
TRUE COPY FROM THE RECORDS OF SAID COURT
ENTERED ON MAR 16 2021
GIVEN UNDER MY HAND AND SEAL OF SAID COURT
THIS MAR 16 2021
 CLERK
CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA