

FILED 

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

2020 SEP 29 PM 12: 09

ZACH DAMRON,

Plaintiff,

CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

v.

Civil Action No. 18-C-1391
Judge Carrie Webster

PRIMECARE MEDICAL OF WEST
VIRGINIA, INC., and JOHN/JANE DOE
EMPLOYEES, AND JOHN/JANE DOE
CORRECTIONAL OFFICERS/ADMINISTRATORS,

Defendants.

**ORDER GRANTING DEFENDANT, PRIMECARE MEDICAL OF WEST
VIRGINIA, INC.'S RENEWED MOTION TO DISMISS AND ALTERNATIVE
MOTION FOR SUMMARY JUDGMENT**

On March 9, 2020, came Plaintiff, Zach Damron, by counsel, Paul M. Strobel and the law firm of Strobel & Strobel, PLLC, and Defendant, PrimeCare Medical of West Virginia, Inc., by counsel, Mark R. Simonton and the law firm of Offutt Nord, PLLC, for a hearing on *Defendant, PrimeCare Medical of West Virginia, Inc.'s Renewed Motion to Dismiss and Alternative Motion for Summary Judgment* which is pending before the Court.

WHEREFORE, the Court, having reviewed and considered the briefs filed by the parties and the respective arguments of counsel, does hereby find that the matters presented in *Defendant, PrimeCare Medical of West Virginia, Inc.'s Renewed Motion to Dismiss and Alternative Motion for Summary Judgment* are ripe for review and does hereby make the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On or about October 5, 2016, Plaintiff, Zach Damron ("Plaintiff") was assaulted by a fellow inmate during his incarceration at the Western Regional Jail. *See Comp.* at ¶ 7.

2. On November 1, 2018, Plaintiff, by counsel, sent a Notice of Claim to PrimeCare, pursuant to the mandatory pre-suit filing requirements set forth in the West Virginia Medical Professionals Liability Act (W.Va. Code § 55-7B-1, *et seq.*) (the "MPLA"), asserting that during his incarceration Plaintiff repeatedly complained to PrimeCare regarding his broken jaw, but despite such complaints, was not referred to a maxillofacial specialist until approximately one month after the altercation. *See Notice of Claim* (November 1, 2018).

3. Plaintiff's Notice of Claim was not accompanied by a Screening Certificate of Merit, but instead, contained the following statement:

[Plaintiff] informs [PrimeCare] that the claimant believes that no screening certificate of merit is necessary because the action against defendant is based upon a well-established legal theory of liability that does not require expert testimony supporting a breach of the applicable standard of care.

See id.

4. The next day, on November 2, 2018, Plaintiff filed his Complaint asserting claims for: (i) violation of Plaintiff's rights under the Constitution of the State of West Virginia and violation of public policy, West Virginia Code and policy directives and (ii) intentional infliction of emotional distress / outrageous conduct. *See generally Compl.*

5. On December 10, 2018, Plaintiff filed an Amended Complaint asserting additional causes of action for: (i) violations of the United States Constitution / deliberate indifference (42 U.S.C. § 1983), (ii) negligence, and (iii) violation of policy and procedure / right to medical care. *See generally* Amend. Compl. (December 10, 2018).

6. On April 30, 2019,¹ PrimeCare filed a *Motion to Dismiss and Alternative Motion for Summary Judgment* asserting, *inter alia*, that it was a “health care provider” pursuant to the MPLA and that Plaintiff had failed to comply with the MPLA’s mandatory pre-suit notice requirements by failing to provide a Screening Certificate of Merit prior to the commencement of this action.² *See Defendant, PrimeCare Medical of West Virginia, Inc. [sic] Memorandum of Law in Support of Motion to Dismiss and Alternative Motion for Summary Judgment* (April 30, 2019).

7. This Court conducted a hearing on PrimeCare’s *Motion to Dismiss and Alternative Motion for Summary Judgment* on August 22, 2019 and entered an Order on October 3, 2019 which stated, in pertinent part, as follows:

[PrimeCare]’s Motion to Dismiss or in the Alternative, Motion for Summary Judgment on the issues of failing to adhere to the Medical Professional Liability Act’s pre-suit filing requirements and failure to meet the two year statute of limitations for a personal injury action is hereby DENIED. The Court finds that the statute of

¹ PrimeCare’s deadline to respond to Plaintiff’s Amended Complaint was extended until April 30, 2019, by mutual agreement of the parties. *See Stipulation of Extension of Time for Defendant, PrimeCare Medical of West Virginia, Inc. to Respond to Amended Complaint* (April 24, 2019).

² On December 17, 2018, PrimeCare, by counsel, provided notice of Plaintiff, pursuant to *Hinchman v. Gillette*, 217 W.Va. 378, 618 S.E.2d 387 (2005), that Plaintiff’s pre-suit notice was insufficient and that a Screening Certificate of Merit was required.

limitations was tolled, pursuant to Plaintiff filing his Notice of Claim on November 2, 2016. *The Court determines that pursuant to the Medical Professional Liability Act, Plaintiff should have filed a Screening Certificate of Merit in conjunction with his Notice of Claim. Plaintiff is hereby given sixty (60) days from the entry of this Order to provide a certificate of merit and amend his Complaint to comply with the Medical Professional Liability Act;*

See Order at ¶ 1 (October 3, 2019) (emphasis added).

8. On December 2, 2019, Plaintiff did not provide a Screening Certificate of Merit and amend his Complaint to comply with the MPLA as required by this Court's October 3, 2019 Order. *See id.*

9. On December 19, 2019, PrimeCare filed its *Renewed Motion to Dismiss and Alternative Motion for Summary Judgment* asserting that Plaintiff's claims should be dismissed as the result of his failure to the comply with the MPLA's pre-suit notice requirements and this Court's October 3, 2019 Order, as well as pursuant to the West Virginia Supreme Court of Appeals' November 12, 2019 opinion in *State ex rel. PrimeCare Medical of West Virginia, Inc. v. Faircloth*, 2019 W.Va. LEXIS 565, 835 S.E.2d 579 (2019). *See generally, Defendant, PrimeCare Medical of West Virginia, Inc.'s Renewed Motion to Dismiss and Alternative Motion for Summary Judgment With Supplemental Incorporated Memorandum of Law* (December 19, 2019).

10. On January 21, 2020, Plaintiff filed his *Response to Defendant's [Renewed] Motion to Dismiss Complaint* asserting, *inter alia*, that he "agrees to the dismissal of any claims brought pursuant to the West Virginia MPLA[.]" but is still

entitled to proceed with his claim for deliberate indifference made pursuant to 42 U.S.C. § 1983. *See generally, Response to Defendant's Motion to Dismiss Complaint* (January 21, 2020).

11. On February 5, 2020, PrimeCare filed its *Reply In Support of Its Renewed Motion to Dismiss and Alternative Motion for Summary Judgment* and asserted that because it is undisputed that PrimeCare is a "health care provider[.]" as defined by the MPLA, all of Plaintiff's claims against it which relate to the rendering, or failure to render, health care services are exclusively governed by the MPLA because the West Virginia Supreme Court of Appeals has made unmistakably clear that "[w]here the alleged tortious acts or omissions are committed by a health care provider within the context of rendering 'health care'...the act applies regardless of how the claim have been plead." *See* Syl. Pt. 4, in part, *Blankenship v. Ethicon, Inc.*, 221 W.Va. 700, 656 S.E.2d 451 (2007). *See generally, Defendant, PrimeCare Medical of West Virginia, Inc.'s Reply In Support of Its Renewed Motion to Dismiss and Alternative Motion for Summary Judgment* (February 5, 2020).

12. On March 9, 2020, this Court conducted a hearing on PrimeCare's *Renewed Motion to Dismiss and Alternative Motion for Summary Judgment* during which counsel for each party presented their respective arguments to the Court.

CONCLUSIONS OF LAW

13. In this action, it is undisputed that PrimeCare is a "health care provider[.]" as the term is defined in the MPLA.

14. The MPLA provides that "...no person may file a medical professional liability³ action against any health care provider without[,]” “[a]t least 30 days prior to the filing of [the] medical professional liability action against a health care provider, serv[ing] by certified mail, return receipt requested, a notice of claim...together with a screening certificate of merit.” See W.Va. Code § 55-7B-6(a),(b).

15. This Court’s October 13, 2019 Order specifically found that, in order to comply with the MPLA’s pre-suit notice requirements, “Plaintiff should have filed a Screening Certificate of Merit in conjunction with his Notice of Claim.” See Order at ¶ 1. Accordingly, the Court gave Plaintiff sixty days from the entry of that Order “to provide a certificate of merit and amend his Complaint to comply with the [MPLA.]” *Id.*

16. Nevertheless, Plaintiff did not provide a Screening Certificate of Merit or amend his Complaint to comply with the MPLA as instructed by this Court.

17. During the pendency of this action, the West Virginia Supreme Court of Appeals issued a *per curiam* opinion in *State ex rel. PrimeCare Medical of West Virginia, Inc. v. Faircloth*, recognizing that “[t]he pre-suit notice requirements

³ The MPLA defines “medical professional liability” broadly to include:

...any liability for damages resulting from the death or injury to a person for any tort or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient. It also means other claims that may be contemporaneous to or related to the alleged tort or breach of contract or otherwise provided, all in the context of rendering health care services.

See W.Va. Code § 55-7B-2(i) (emphasis added).

contained in the [MPLA] are jurisdictional, and failure to provide such notice deprives a circuit court of subject matter jurisdiction.” Syl. Pt. 2, *State ex rel. PrimeCare Medical of West Virginia, Inc. v. Faircloth*, 2019 W.Va. LEXIS 565, 835 S.E.2d at 579.

18. Further, in *PrimeCare Medical of West Virginia, Inc. v. Faircloth*, the West Virginia Supreme Court of Appeals found that “[a] circuit court has no authority to suspend the [MPLA’s] pre-suit notice requirements and allow a claimant to serve notice after the claim has filed suit. To do so would amount to a judicial repeal of W.Va. Code § 55-7B-6.” Syl. Pt. 5, *id.*

19. Accordingly, when a claimant, such as Plaintiff in the matter *sub judice*, fails to comply with the MPLA’s mandatory pre-suit requirements prior to commencing a civil action against a health care provider, such as PrimeCare, a circuit court is not permitted to take any further action other than to dismiss the action from its docket. See W.Va. R. Civ. P. 12(h)(3) (“[w]henver it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.”); see also Syl. Pt. 1, *Hinkle v. Bauer Lumber & Home Bldg. Ctr.*, 158 W.Va. 492, 211 S.E.2d 705 (1975) (“[w]henver it is determined that a court has no jurisdiction to entertain the subject matter of a civil action, the forum court must take no further action in the case other than to dismiss it from the docket.”); see also, Syl. Pt. 2, *State ex rel. PrimeCare Medical of West Virginia, Inc.*, 2019 W.Va. LEXIS 565, 835 S.E.2d at 579; *Keith v. Lawrence*, 2015 W.Va. LEXIS 1129, 2015 WL 7628691 (2015) (memorandum decision) (finding that

an interlocutory appeal was permissible from an order denying a motion to dismiss for deficient MPLA pre-suit notice because the circuit court had resolved a jurisdictional questions.).

20. In the case at bar, the exclusive basis of Plaintiffs claims against PrimeCare concerns its alleged delay in referring Plaintiff to a maxillofacial specialist despite his numerous complaints regarding his broken jar. *See generally* Compl.; *see also generally* Amend. Compl.

21. The West Virginia Supreme Court of Appeals has made clear that “[w]here the alleged tortious acts or omissions are committed by a health care provider within the context of rendering ‘health care’...the [MPLA] applies regardless of how the claims have been plead.” *See* Syl. Pt. 4, in part, *Blankenship*, 221 W.Va. at 700, 656 S.E.2d at 451.

22. All of Plaintiff’s claims in this action, regardless of how they are pled, stem solely from the rendering, or alleged failure to render, “health care”⁴ and therefore sound in terms of medical negligence.

23. Accordingly, Plaintiff is not permitted to hide behind the guise of a constitutional claim in order to avoid the mandatory application of the MPLA or otherwise excuse his failure to provide a Screening Certificate of Merit.

24. Therefore, as a result of Plaintiff’s failure to timely provide a Screening

⁴ “Health care” means...(2) *any act, service or treatment performed or furnished, or which should have been performed or furnished, by any health care provider or person supervised by or acting under the direction of a health care provider or licensed professional for, to or on behalf of a patient during the patient’s medical care, treatment or confinement*, including, but not limited to, staffing, *medical transport, custodial care or basis care*, infection control, positioning, hydration, nutrition and similar patient services. *See* W.Va. Code § 55-7B-2(e)(2) (emphasis added).

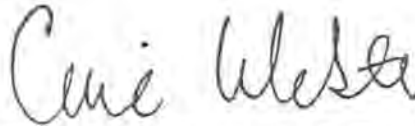
Certificate of Merit prior to the commencement of this action as required by the MPLA, this Court lacks subject matter jurisdiction and must dismiss Plaintiff's claims, in their entirety, given that all of the claims are subject to the requirements of the MPLA.

CONCLUSION

WHEREFORE, for the aforementioned reasons, this Court hereby ADJUDGES, ORDERS and DECREES that PrimeCare's *Renewed Motion to Dismiss and Alternative Motion for Summary Judgment*, should be, and is hereby GRANTED. Accordingly, Plaintiff's claims in this matter are hereby DISMISSED WITH PREJUDICE with each party to pay their own costs and attorneys' fees. Plaintiff's exceptions and objections are hereby noted and preserved.

The Clerk of this Court is hereby directed to forward a certified copy of this Order to all counsel of record, without cost.

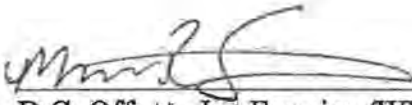
ENTERED this 28th day of September, 2020.



Honorable Carrie L. Webster, Judge
Thirteenth Judicial Circuit

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. SATSON, CLERK OF 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. 30
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS
DAY OF September 2020
Cathy S. Satson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Prepared By:



D.C. Offutt, Jr., Esquire (WV #2773)

Anne Liles O'Hare, Esquire (WV #9171)

Mark R. Simonton, Esquire (WV #13049)

Offutt Nord, PLLC

949 Third Avenue, Suite 300

Huntington, West Virginia 25728-2868

Telephone: (304) 529-2868

Facsimile: (304) 529-2999

dcoffutt@offuttnord.com

alohare@offuttnord.com

mrsimonton@offuttnord.com

Counsel for Defendant, PrimeCare Medical of West Virginia, Inc.

Inspected By:

Signed by
Mark R. Simonton, Esq.
With Express Permission



Paul M. Strobel, Esquire (WV Bar #5758)

Strobel & Strobel, PLLC

405 Capitol Street, Suite 102

Charleston, West Virginia 25301

Telephone: (304) 346-0197

Facsimile: (304) 346-6029

paulstroeb@aol.com

Counsel for Plaintiff, Zach Damron