

City of Summers County,

Barbara Stine Trivett as )  
Administratrix of the Estate of Jasper )  
Trivett, Conservator, )  
Plaintiff, )  
vs.) )  
Carmen Cales, )  
Jacob Woodrum, )  
Summers County EMS, Inc, )  
Summers County Commission d/b/a )  
Summers County Office of )  
Emergency Management, )  
Defendants )

Case No. CC-45-2021-C-27

**ORDER GRANTING MOTION TO DISMISS OF DEFENDANTS SUMMERS COUNTY  
COMMISSION D/B/A SUMMERS COUNTY OFFICE OF EMERGENCY  
MANAGEMENT AND CARMEN CALES**

On the 6th day of December, 2021, came John J. Mize, counsel for the Plaintiff; Drannon L. Adkins, counsel for Defendants Summers County Commission (hereinafter "SCC") and Carmen Cales; and Lynette S. Marshall, counsel for Defendants Summers County EMS, Inc. and Jacob Woodrum, for a motions hearing in the above-captioned matter. Whereupon, the Court heard arguments from counsel on the *Motion to Dismiss* filed by Defendants SCC and Cales and thereafter ordered the matter be taken under advisement. Having now fully considered the matter, the Court is of the opinion that the Motion should be GRANTED, based upon the following FINDINGS and CONCLUSIONS:

**FINDINGS OF FACT**

1. The alleged facts in this matter pertaining to Defendants SCC and Cales are largely undisputed as recited by the parties in their filings related to the Motion.
2. The Plaintiff alleges that on the morning of September 15, 2019, she awoke to find her infant son, Jasper Trivett, unresponsive and having difficulty breathing.

Compl., ¶ 17.

3. She immediately placed a call with Summers County 911, which was answered by dispatcher Carmen Cales at approximately 4:18 a.m. *Id.* at ¶¶ 19-21.
4. The Plaintiff requested Ms. Cales dispatch emergency services to her location. *Id.* at ¶ 22.
5. The Plaintiff then alleges that, after some discussion with the Plaintiff, Ms. Cales twice attempted to contact Summers EMS, but was unsuccessful. *Id.* at ¶¶ 25-26.
6. Following the two failed attempts to reach Summers EMS, the Plaintiff contends that she asked Ms. Cales for assistance and instruction in performing cardiopulmonary resuscitation on her son, but Ms. Cales stated that 911 “do[es] not give directions on how to perform CPR.” *Id.* at ¶¶ 27-28.
7. The Plaintiff then asked if she should transport Jasper to the hospital herself, and Ms. Cales advised her to do so. *Id.* at ¶¶ 30-31. The call was disconnected at 4:21 a.m. *Id.*
8. The Plaintiff further alleges that while she was transporting Jasper to the hospital, Ms. Cales continued her attempts to contact emergency services. *Id.* at ¶ 32. Ms. Cales connected with emergency service worker Jacob Woodrum and explained the details of the Plaintiff’s emergency, but instructed him not to attempt to meet the Plaintiff as she was transporting Jasper to the hospital on her own. *Id.* at ¶¶ 33-35.
9. Tragically, Jasper died on September 17, 2019. *Id.* at ¶ 1.
10. On the 12th day of October, 2021, the Plaintiff filed the Complaint in this matter, alleging, *inter alia*, negligence on behalf of SCC and vicarious liability of SCC for the actions and/or omissions of Carmen Cales. See, generally, Compl.

11. Defendants SCC and Cales thereafter filed their *Motion to Dismiss* on the 11th day of November, 2021, asserting three arguments: (1) the Plaintiff's pertinent claims are not actionable under the public duty doctrine of the West Virginia Governmental Tort Claims and Insurance Reform Act, W. Va. Code § 29-12A-1, *et seq.* (hereinafter "GTCIRA"); (2) additional immunities under the GTCIRA preclude the Plaintiff's claims; and (3) the Plaintiff's Complaint was filed outside the applicable statute of limitations.

## CONCLUSIONS OF LAW

### Standard of Review

12. Under the West Virginia Rules of Civil Procedure, a defendant may move for dismissal of a complaint for "failure to state a claim upon which relief can be granted." W.Va. R. Civ. P. 12(b)(6).
13. "The purpose of a motion under Rule 12(b)(6) is to test the sufficiency of the complaint." *Cantley v. Lincoln County Com'n.*, 221 W.Va. 468, 471, 655 S.E.2d 490, 493 (2007).
14. In view of long-held judicial policies favoring the determination of actions on the merits, "motion[s] to dismiss for failure to state a claim should be viewed with disfavor and rarely granted." *John W. Lodge Distributing Co., Inc. v. Texaco, Inc.*, 161 W.Va. 603, 605, 245 S.E.2d 157, 158 (1978).
15. Accordingly, "[f]or purposes of the motion to dismiss, the complaint is construed in the light most favorable to the plaintiff, and its allegations are to be taken as true." *Id.*
16. A motion to dismiss for failure to state a claim should then only be granted when the plaintiff can prove no set of facts in support of the claims presented. Syl. Pt. 3, *Chapman v. Kane Transfer Co.*, 160 W.Va. 530, 236 S.E.2d 207 (1977).

17. Defendants SCC and Cales assert that the Plaintiff can prove no set of facts supporting its claims because they are not actionable under the GTCIRA statute of limitations and various immunities set forth therein.
18. Because the Court CONCLUDES that the GTCIRA statute of limitations bars the Plaintiff's claims against Defendants SCC and Cales, the Court begins there.  
The Plaintiff's Complaint was filed outside the GTCIRA statute of limitations.
19. In their Motion, Defendants SCC and Cales correctly note that, "[i]n general, a political subdivision can only be held liable in a civil action for damages if such a cause of action fits into the framework codified in [the GTCIRA]." Defs.' Mem. in Support of Mot. to Dismiss, 7.
20. The parties do not appear to dispute the applicability of the GTCIRA to the Plaintiff's claims against Defendants SCC and Cales, as they both fall within the enumerated definitions of "political subdivision" and "employee" respectively. See, W.Va. Code § 29-12A-3(b) (defining "Political subdivision" as "any county commission . . ."); and see, W.Va. Code § 29-12A-3(a) (defining "Employee" as any "employee . . . who is authorized to act and is acting with[in] the scope of his or her or employment for a political subdivision").
21. Despite this, the Plaintiff contends that the applicable statute of limitations for its claims against Defendants SCC and Cales could be set forth in the West Virginia Medical Professional Liability Act, W.Va. Code § 55-7B-1, *et seq.* (hereinafter "MPLA"). The Court disagrees.
22. As Defendants SCC and Cales rightly point out, the SCC, through its 911 center, is not a "Health Care Facility" or "Health Care Provider" as defined by the MPLA. W.Va. Code § 55-7B-2(f), -2(g) (listing the institutions that fall within the MPLA's definitions).

23. Being unable to read a 911 center into the MPLA's definitions of "Health Care Facility" or "Health Care Provider", the Court must find the MPLA not applicable to the Plaintiff's claims against Defendants SCC and Cales. *See, e.g., Phillips v. Larry's Drive-In Pharm, Inc.*, 220 W.Va. 484, 493, 647 S.E.2d 920 (2007) (concluding that because pharmacies were not listed in the MPLA's definition of "Health Care Provider", the Legislature intended to exclude them from the MPLA). The Plaintiff's claims against Defendants SCC and Cales instead are covered by the GTCIRA.

24. Claims filed within the framework of the GTCIRA are generally subject to a two-year statute of limitations. W.Va. Code § 29-12A-6.

25. Jasper's tragic death occurred on September 17, 2019. Thus, the Plaintiff had until September 17, 2021 to file a complaint alleging any claims against SCC or Ms. Cales. The Plaintiff's Complaint was filed on October 12, 2021, roughly twenty-five days after the close of the applicable filing window.

26. In her response, the Plaintiff asserts that the two-year statute of limitations should be extended, either due to the savings provision or the tolling provision of the GTCIRA statute of limitations.

*The savings provision of the GTCIRA statute of limitations does not apply.*

27. The Plaintiff first asserts that the savings provision, permitting the filing of GTCIRA actions on behalf of a minor so long as they are filed prior to the minor's twelfth birthday, stretches the statute of limitations in this case to August 9, 2031, what would have been the date of Jasper's twelfth birthday.

28. The savings provision reads in full:

[a]n action against a political subdivision to recover damages for injury, death, or loss to a minor, brought by or on behalf of a minor who was under the age of ten years at the time of such injury, shall be commenced within two years after the



cause of action arose or after the injury, death or loss was discovered or reasonably should have been discovered, whichever last occurs, or prior to the minor's twelfth birthday, whichever provides the longer period.

W.Va. Code § 29-12A-6(b) (emphasis added).

29. Based upon a plain reading of the statute, the Court cannot conclude that the savings provision applies here, as Jasper regrettably will not have a twelfth birthday. Because Jasper passed before his twelfth birthday, no such birthday exists in the future to maintain the saving provision's applicability.
30. Courts that have likewise considered the application of savings provisions in such cases have generally concluded that they do not apply because children cease to have birthdays after they die. See Gretchen R. Fuhr, Civil Procedure/Tort Law-Better Off Dead?: Minority Tolling Provision Cannot Save Deceased Child's Claim, 31 W. New Eng. L. Rev. 491, 533 n. 8 (2009) (citing *Randolph v. Methodist Hosps., Inc.*, 793 N.E.2d 231 (Ind. Ct. App. 2003); *Bailey v. Martz*, 488 N.E.2d 716 (Ind. Ct. App. 1986), superseded by statute, Ind. Code § 34-23-2-1 (2008), as recognized in *Ellenwine v. Fairley*, 846 N.E.2d 657 (Ind. 2006); *Joslyn v. Chang*, 837 N.E.2d 1107 (Mass. 2005); *Baker v. Binder*, 609 N.E.2d 1240 (Mass. App. Ct. 1993); *Regents of Univ. of N.M. v. Armijo*, 704 P.2d 428 (N.M. 1985); *Holt v. Lenko*, 791 A.2d 1212 (Pa. Super. Ct. 2002); *Campos v. Ysleta Gen. Hosp., Inc.*, 879 S.W.2d 67 (Tex. App. 1994)).
31. The savings provision inapplicable, the Plaintiff's claims against Defendants SCC and Cales must therefore have been filed within the two-year statute of limitations unless tolled by the discovery rule.

*The statute of limitations cannot be tolled here.*

32. The Plaintiff's second assertion in response to the Defendants' statute of

limitations argument is that the filing date must be tolled due to the discovery rule.

33. Generally, the discovery rule tolls the statute of limitations to the point in time when the plaintiff "knew or should have known" of the injury at issue. *Dunn v. Rockwell*, 225 W.Va. 43, 689 S.E.2d 255 (2009).
34. In the instant case, the Plaintiff first noticed Jasper unresponsive on September 15, 2019. She contacted 911 immediately thereafter and drove Jasper to the hospital within a few minutes. Jasper passed away two days later, on September 17, 2019.
35. The Plaintiff argues that the statute of limitations began to run, not when she became aware of Jasper's passing, but from the moment she discovered the conversations between Ms. Cales and Mr. Woodrum. While the contents of that conversation may have provided the Plaintiff with a legal basis for this action, she nevertheless became aware of the factual basis on September 17, 2019. That moment triggered the statute of limitations.
36. Accordingly, the Court CONCLUDES that the Plaintiff's claims against Defendants SCC and Cales were filed outside the GTCIRA statute of limitations and are therefore untimely. They must be DISMISSED, pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure.
37. Because the Court must dismiss this matter as untimely, it declines to consider the other grounds for dismissal set forth in the *Motion to Dismiss*.

WHEREFORE, based upon the foregoing, and it appearing proper to do so, it is hereby **ORDERED and ADJUDGED** as follows:

1. The *Motion to Dismiss* of Defendants Summers County Commission D/B/A/

Summers County Office of Emergency Service and Carmen Cale is **GRANTED**,  
and both Defendants shall be REMOVED from this action;

2. The Clerk of this Court shall transmit attested copies of this order to counsel of record, if not registered for electronic notification.

ENTER: February 17, 2022.

**/s/ Robert Irons**  
Circuit Court Judge  
31st Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit [www.courtsww.gov/e-file/](http://www.courtsww.gov/e-file/) for more details.