IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

JEANORAH WILLIAMS, INDIVIDUALLY, AND AS PERSONAL REPRESENTATIVE AND NEXT FRIEND TO BABY ZACHARY CADEN WILLIAMS,	SX-16-CV-446
Plaintiff,	
vs.	ACTION FOR DAMAGES
JUAN F. LUIS HOSPITAL, THROUGH THE GOVERNMENT OF THE VIRGIN ISLANDS; AND DR. MICHELE B. BERKELEY,	2019 VI SUPER U54
Defendants.	

Appearances:

Lee J. Rohn, Esq.
Lee J. Rohn & Associates
St. Croix, USVI
For Plaintiffs

Royette V. Russell, Esq.
Department of Justice
St. Croix, USVI
For Defendants

MEMORANDUM ORDER

WILLOCKS, Administrative Judge

¶1 **THIS MATTER** is before the Court on Defendants Juan F. Luis Hospital, through the Government of the Virgin Islands, and Dr. Michele B. Berkeley's (hereinafter collectively "Defendants"), Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim Due to Statute of Limitations (hereinafter "Motion to Dismiss"), filed on September 20, 2016. Also, before the Court is the Defendants' Renewed Motion to Dismiss for Lack of Subject-Matter Jurisdiction (hereinafter "Renewed Motion to Dismiss"), and Motion for Relief from Order

Dated November 21, 2018 (hereinafter "Motion for Relief"), both filed on November 29, 2018. The Plaintiff, Jeanorah Williams, individually, and as personal representative and next of friend to baby Zachery Caden Williams (hereinafter "Plaintiff"), filed an Opposition to Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim Due to Statute of Limitations (hereinafter "Motion in Opposition"), on September 6, 2016. The Plaintiff also filed a Motion for Sanctions for Failing to Comply with this Court's Order (hereinafter "Motion for Sanctions"), on December 11, 2018. The Defendants also filed an Opposition to the Motion for Sanctions, on December 12, 2018.

I. Background

¶2 The Plaintiff filed a proposed verified complaint with the Medical Malpractice Action Review Committee (hereinafter the "Committee"), on May 6, 2016. (Opp. at 3). On May 9, 2016, Plaintiff then filed a complaint with the Superior Court under case number SX-16-CV-307 (hereinafter "First Lawsuit"). (Renewed Mot. at 1). In the complaint, the Plaintiff alleged that the Defendants failed to properly treat the Plaintiff during the birth of baby Williams, which lead to his death. (Compl. at 5.) On September 20, 2016, the Defendants' moved to dismiss the complaint for a lack of subject matter jurisdiction. (*Id.*) On October 17, 2016, at the request of the Plaintiff, the Court dismissed the case without prejudice due to a lack of subject matter jurisdiction (*Id.*) On August 10, 2016, Plaintiff filed the above-captioned Complaint with the Superior Court asserting the same allegations. (Opp. at 3.) On September 20, 2016, the Defendants moved to dismiss the case for lack of subject matter jurisdiction. (Mot. to Dismiss dated Sept. 20, 2016.) Then, on August 21, 2018, Plaintiff filed a motion demanding that the Defendants respond to their discovery request, which the Court granted in its Order dated November 21, 2018. (Nov. 21, 2018 Order at

1.) In response, the Defendants filed a Renewed Motion to Dismiss and Motion Seeking Relief. (Renewed Mot. & Mot. for Relief dated Nov. 29, 2018.) Subsequently, the Plaintiff filed a Motion for Sanctions due to the Defendants' failing to comply with the Court's November 21, 2018 order. (Mot. for Sanctions dated Dec. 11, 2018.) The Defendant then filed a Motion in Opposition to the Motion for Sanctions. (Opp'n to Mot. for Sanctions dated Dec. 12, 2018.)

II. Subject Matter Jurisdiction

¶3 Pursuant to Rule 12(b)(1) of the Virgin Islands Rules of Civil Procedure, a party may challenge the court's ability to hear a case by asserting lack of subject matter jurisdiction as a defense.[1] A Rule 12(b)(1) motion may be treated as either a facial or factual challenge to the court's subject matter jurisdiction.[2]

¶4 According to the Virgin Islands District Court, and this Court, a facial 12(b)(1) motion attacks the complaint on its face.[3] By asserting a facial challenge, the defendant is "arguing that the complaint on its face does not allege sufficient grounds to establish subject matter jurisdiction."[4] In reviewing a facial attack, the court must consider the allegations of the complaint, and the documents referenced within, in a light most favorable to the plaintiff, and must accept the allegations in the complaint as true.[5] The plaintiff has the burden of proving that the court has jurisdiction.[6]

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[1] V.I.R. Civ. Pro 12(b)(1).
[2] *Hansen v. Gov. Juan F. Luis Hosp. & Med. Ctr.* No. SX-15-CV-509, 2018 V.I. LEXIS 87, at *4 (V.I. Super. 2018) *see Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977).
[3] *Id.*
[4] *Weiss v. Maccaferri Inc.*, No. 14-46, 2016 U.S. Dist. LEXIS 50436, at * 4 (D.V.I. Apr. 12, 2016)(citation omitted).
[5] *Id.*
[6] *Gould Elecs., Inc. v. United States*, 220 F.3d 169, 178 (3d Cir. Pa. 2000)(citation omitted).

¶5 A factual challenge attacks the court's subject matter jurisdiction in fact and separate from the pleadings.[7] Although a factual challenge attacks the court's power to hear a case, the court is nevertheless entitled to weigh the evidence in order to determine its own jurisdiction.[8] Furthermore, the plaintiff has the burden of proving that the court does, in fact, have jurisdiction and unlike with a facial attack, allegations within the complaint are not presumed to be true.[9]

¶6 Given that the Defendants have not challenged any of the factual allegations within the Complaint, the Renewed Motion to Dismiss appears to be a facial attack of the Court's subject matter jurisdiction.[10] In addition, the Defendants have not answered the Complaint and the parties have yet to engage in discovery, which generally forces the Court to base its review solely on the Complaint.[11] However, the parties have thoroughly briefed the matter and the Plaintiff has provided exhibits and arguments outside of the Complaint, to which the Defendants have had time to respond. Moreover, given that the Defendants have not challenged any facts within the Complaint, except whether the Plaintiff filed her Complaint in accordance with Title 27 Virgin Islands Code Section 166i (hereinafter "Section 166i"), a fact asserted by the Plaintiff outside of the Complaint, the Court will consider all the evidence and review the Motion as a factual challenge.

¶7 Section 166i sets out specific requirements before a medical malpractice claim can be filed in the Superior Court. More specifically, Section 166i provides that:

> [n]o action against a health care provider may be commenced in court before the claimant's proposed complaint has been filed with the Committee and the

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[7] *Weiss v. Maccaferri Inc.*, 2016 U.S. Dist. LEXIS 50436* 3 (D.V.I. Apr. 12, 2016) (citation omitted).
[8] *Mortensen v. First Fed. Sav. and Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977).
[9] *Id.*
[10] *Hansen v. Gov. Juan F. Luis Hosp. & Med. Ctr.* No. SX-15-CV-509, 2018 V.I. LEXIS 87, at *5 (V.I. Super. 2018).
[11] *Id.*

> Committee has received the expert opinion as required by this section, provided, that if said opinion is not received by the Committee within ninety days from the date the complaint was filed with the Committee, the claimant may commence his action against the health care provider in court; Provided further, That the commencement of the court action shall not prevent the Committee from obtaining the expert opinion. [12]

¶8 The requirements of Section 166i are non-waivable jurisdictional conditions that must be satisfied in order to vest the trial court with subject matter jurisdiction to hear an individual's medical malpractice claim.[13] Therefore, if a plaintiff fails to comply with the jurisdictional requirements before filing an action with the Superior Court, then the court must dismiss the case for lack of subject matter jurisdiction.[14]

¶9 Here, the Plaintiff filed her proposed complaint with the Committee on May 6, 2016, and then filed the present action on August 10, 2016, more than ninety (90) days after filing her proposed complaint with the Committee. Therefore, the Plaintiff has met the pre-litigation requirements of Section 166i.

¶10 The Defendants argue that the Plaintiff failed to comply with Section 166i because she previously filed the same complaint with the Court in the First Lawsuit, on May 9, 2016, only three days after filing her proposed complaint with the Committee. (Mot. at 1.) While the Plaintiff did initially file the same complaint in the First Lawsuit, that case was voluntarily dismissed without prejudice and therefore the Plaintiff is entitled to refile the claim.[15]

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[12]. 27 V.I.C.§166i(b).
[13] *Brady v. Cintron*, 55 V.I. 802, 815 (V.I. 2011).
[14] *Id.*
[15] V.I.R. Civ. Pro 41(a).

III. Statute of Limitations

¶11 The Defendants also assert that the instant Complaint, which was filed on August 10, 2016, is barred by the two-year statute of limitations, pursuant to 27 V.I.C. § 166d.

¶12 Generally, the statute of limitations for a medical malpractice claim begins to run when the patient knows the existence and cause of his injury and knows that the act constitutes malpractice.[16] However, here there are two tolling doctrines that are potentially applicable to this case, the fraudulent concealment doctrine and equitable tolling doctrine.

a. Fraudulent Concealment Tolling Doctrine

¶13 The fraudulent concealment tolling doctrine, codified in 27 V.I.C. § 166d, states that the statute of limitations shall be tolled for "any period during which the health care provider had actual knowledge of any act, omission or neglect or knowledge of facts which would reasonably indicate such act, omission or neglect which is the basis for a malpractice claim and failed to disclose such fact to the patient."[17] Therefore, the Court must determine whether the defendant attempted to conceal wrongful conduct and if there was actual concealment.[18]

¶14 Here, the Plaintiff claim that the Defendants falsely told her that no babies could leave the nursery and that no one could go to the nursery to see baby Williams due to complications." (Compl. 4.) After the Plaintiff made numerous attempts to see baby Williams, Dr. Lopez informed the Plaintiff that, "due to complications during birth, baby William's head was swollen, and he had bleeding in his brain." (*Id.*) Dr. Lopez also stated that "as soon as the baby was stable she

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[16] *Frederick v. Ellet*, 2014 V.I. LEXIS 5, at *5 (V.I. Super. 2014).
[17] 27 V.I.C. § 166d(a).
[18] *Frederick v. Ellet*, 2014 V.I. LEXIS 5, at *5 (V.I. Super. 2014).

would be allowed to see him." (*Id.*) However, later that day, Dr. Lopez informed the Plaintiff that baby Williams had died. (*Id.*)

¶15 Based on these allegations, the Court finds that the statutory tolling for fraudulent concealment does not apply. The allegations made in the Plaintiff's Complaint do not indicate that the Defendants concealed or made any attempt to conceal acts which may have led to the death of baby Williams. Moreover, the Defendants did not attempt to affirmatively conceal any acts that would prevent the Plaintiff from discovering baby Williams' injuries. Therefore, the statute of limitations is not tolled under the fraudulent concealment doctrine.

b. Equitable Tolling Doctrine

¶16 Under the laws of the Virgin Islands,

> the statute of limitations for a second action may be equitably tolled when an earlier action is dismissed for lack of personal jurisdiction if: (1) the first action gave the defendant timely notice of the plaintiff's claim; (2) the lapse of time between the first and second actions will not prejudice the defendant; and (3) the plaintiff prosecuted the first action in good faith and diligently filed the second action.[19]

¶17 Moreover, the doctrine of equitable tolling preserves the protections the statute of limitations affords to defendants, while also avoiding unfairness to plaintiffs who diligently but mistakenly prosecute their claims in a court that lacks personal jurisdiction when those claims would then be time-barred if refiled properly.[20]

¶18 Here, the Plaintiff has satisfied the three factors for equitable tolling. The Plaintiff's First Lawsuit was voluntarily dismissed due to a lack of subject matter jurisdiction. However, the First Lawsuit gave the Defendants timely notice of the Plaintiff's claim, as the First Lawsuit was filed on May 9, 2016, prior to the end of the two-year statute of limitations. In addition, the Plaintiff

[19] *William v. Government of the Virgin Islands*, 51 V.I. 57, 72 (D.V.I. June 10, 2009)
[20] *Id.*

filed the present action on August 10, 2016, and the First Lawsuit was dismissed on October 17, 2016. Therefore, the Defendants were not prejudiced due to a lapse of time between the first and second action because the second action was filed prior to the dismissal of the First Lawsuit.

¶19 Moreover, the Plaintiff prosecuted the first action in good faith given that she believed that the Defendants were liable for the death of baby Williams. She also diligently filed the second action after realizing that the First Lawsuit was filed improperly. Therefore, the Court finds in its discretion that the equitable tolling doctrine is applicable to this case.

c. Virgin Islands Tort Claims Act

¶20 The Third Circuit Court of Appeals has held that malpractice claims against the Government of the Virgin Islands must comply with the requirements of Virgin Islands Torts Claim Act (hereinafter "Torts Claim Act"), in addition to Section 166i.[21] Therefore, under the Torts Claim Act, a plaintiff is required to plead facts demonstrating the date the proposed complaint was timely filed with the Committee or that ninety days have elapsed from the time a proposed complaint was filed.[22] Moreover, the Tort Claim Act states in relevant part that:

> [A] claimant who fails to file a claim or notice of intention within the time limit may, in the discretion of the court, be permitted to file such claim at any time within two years after the accrual thereof. The application of such permission shall be made upon motion showing a reasonable excuse for the failure to file the notice and that the Virgin Islands or appropriate department or agency had, prior to the expiration of the time limited for the filing of the notice, actual knowledge of the facts constituting the claim.[23]

[21] *Richardson v. Knud Hansen Memorial Hospital*, 744 F.2d 1007, 1010 (3d Cir. 1984); *see also James-St. Jules v. Thompson*, SX-09-CV-136, 2015 V.I. LEXIS 74 *16-20 (V.I. Super. 2015).
[22] *James-St. Jules v. Thompson*, SX-09-CV-136, 2015 V.I. LEXIS 74 *12 (V.I. Super. 2015).
[23] 33 V.I.C. § 3409(c).

¶21 Here, given that the Plaintiff filed the First Lawsuit within the two-year statute of limitations, therefore given the Defendants actual notice of the claim, the Court finds that the Plaintiff has met the requirements of the Tort Claim Act.

IV. Plaintiff's Motion for Sanctions

¶22 Under Rule 37 of the Virgin Islands Rules of Civil Procedure,

> [i]f a party fails to provide information . . . as required by Rule 26(a) or (e), the party is not allowed to use that information . . . to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless."[24] "In addition to or instead of this sanction, the court on motion and after giving an opportunity to be heard may order payment of the reasonable expenses, including attorney's fees, caused by the failure.[25]

§23 Whether or not to impose sanctions under Rule 37 due to a party's failure to comply with discovery is a matter within the court's discretion.[26] Substantial justification for failure to disclose is met if there is a "genuine dispute concerning compliance."[27] Thus, substantial justification requires that there be justification that would allow a reasonable person to believe that the parties differed as to whether the party was required to comply.[28] In addition, the proponent must have a reasonable basis in law and fact for failure to comply.[29]

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[24] V.I.R. Civ. Pro 37(c)(1)(A)
[25] *Id.*
[26] *Davis v. Varlack Ventures, Inc.*, 2013 V.I. Supreme LEXIS 36 at ** (V.I. 2013)(citing *Newman v. GHS Osteopathic, Inc. Parkview Hosp. Div.*, 60 F.3d 153, 156 (3d Cir. 1995).
[27] *Id.* see also *Fitz v. Ralph Wilson Plastics Co.*, 1997 U.S. Dist. LEXIS 12632 at **12(D.N.J. 1997)
[28] *Fitz v. Ralph Wilson Plastics Co.*, 1997 U.S. Dist. LEXIS 12632 at **12(D.N.J. 1997)
[29] *Id.*

§24 Where there is no substantial justification for the parties failure to comply the Court must also examine whether the failure was harmless.[30] In order to determine whether a Rule 26 violation is harmless, a court must consider the: "prejudice or surprise to the opposing party, the ability of the party to cure that prejudice; the likelihood of disruption at trial; and the bad faith or willfulness of the violating party."[31]

¶25 Here the Defendants do not argue that there was a genuine dispute justifying its failure to disclose. Rather, the Defendants claim that they did not respond to the Plaintiffs' request for discovery because the Court has not ruled on two of their dispositive motions and Plaintiff's counsel did not meet with the Defendants counsel prior to filing the motion for sanctions in accordance with Rule 37(a)(1). However, this explanation does not satisfy the test for substantial justification as it does not constitute a genuine dispute regarding the parties compliance with discovery.

§26 Furthermore, while the Defendants have failed to comply with the Plaintiffs' written discovery request propounded since June 2017 the matter has yet to be scheduled for trial. Thus, the Plaintiffs have not been prejudiced as the Defendants still have an opportunity to respond to the Plaintiffs' request prior to trial. Moreover, while the Defendants failure to comply has delayed the litigation process it is not likely that the delay will disrupt trial as a trial date has yet to be set. In addition, the Court does not find that the Defendants failure to comply was done in bad faith given that the Defendants were waiting for the Court to respond to their dispositive motions, which were filed prior to the Plaintiffs' request for discovery. Therefore, even though the Defendants violated Rule 26 by failing to comply with the Plaintiffs' discovery request, the Court finds that the violation

[30] *Davis v. Varlack Ventures, Inc.*, 59 V.I. 229, 237 (V.I. 2013).
[31] *Id.*

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does not warrant sanctions, as there has been no prejudice to the Plaintiffs and the Defendants were not acting in bad faith.

Accordingly, it is hereby:

ORDERED that the Defendants' Renewed Motion to Dismiss is **DENIED**. It is further

ORDERED that the Defendants' Motion for Relief is **DENIED**. It is further

ORDERED that the Defendants' respond to the Plaintiff's written discovery request within ten (10) days from the date this order is entered. It is further

ORDERED that the parties have ten (10) days from the date this order is entered to submit a stipulated amended scheduling order. It is further

ORDERED that the Plaintiff's Motion for Sanctions is **DENIED**.

DONE and so ORDERED this 15 day of April, 2019.

HAROLD W. L. WILLOCKS
Administrative Judge of the Superior Court

ATTEST:
Estrella George
Clerk of the Court

By: ______________________
Deputy Clerk

Dated: 4/16/19