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

MARCIA JAMES-ST. JULES,	)	
	)	
Plaintiff,	)	**CIVIL NO. SX-09-CV-136**
	)	
v.	)	**ACTION FOR DAMAGES**
	)	
JACQUELINE THOMPSON, M.D., JUAN F. LUIS HOSPITAL & MEDICAL CENTER and GOVERNMENT OF THE VIRGIN ISLANDS,	)	**MEDICAL MALPRACTICE**
	)	
Defendants.	)	

MEMORANDUM OPINION

MOLLOY, Judge.

THIS MATTER comes before the Court on the following motions filed by the Defendants: (1) Motion for Dismissal Under FRCP 12 filed on May 19, 2009; (2) Petition to Have Motion Deemed Admitted filed on January 14, 2011;[1] and (3) Motion Requesting Dismissal filed on May 9, 2012.[2] Plaintiff has not filed a response to any of these motions.

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[1] Defendants are requesting that the Court deem the contents of the May 19, 2009 motion to dismiss as admitted and grant the motion to dismiss because Plaintiff failed to file an opposition to the motion. A party's refusal to respond to a motion does not entitle the moving party to an order automatically granting the motion. The Court must make an individualized determination as to whether Defendant is entitled to a dismissal under the rules of this Court. Thus, the Court will deny Defendants' Petition to Have Motion Deemed Admitted.

[2] Defendant filed this one-paragraph motion requesting dismissal for failure to prosecute under Rule 41(b) of the Federal Rules of Civil Procedure because Plaintiff failed to respond or oppose the motion to dismiss filed on May 19, 2009 and the January 14, 2011 Petition to Have Motion Deemed Admitted. When considering whether to dismiss a case for failure to prosecute, the Court must consider the following six factors: (1) the extent of the plaintiff's personal responsibility; (2) the prejudice, if any, to the other parties in the litigation; (3) whether the plaintiff has demonstrated a history of dilatoriness; (4) whether the plaintiff or attorney's conduct was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal; and (6) the meritoriousness of the plaintiff's claim. *Halliday v. Footlocker Specialty, Inc.*, 53 V.I. 505, 513 (V.I. 2010). Defendants have not submitted any arguments or analysis with respect to any of these six factors. Because Defendants have failed to present any arguments as to why this case should be dismissed for failure to prosecute, the Court will summarily deny this motion. *See Simpson v. Golden*, 56 V.I. 272, 280 (V.I. 2012) ("the rules that require a litigant to brief and support his arguments . . . before the Superior Court, are not mere formalistic requirements. They exist to give the Superior Court the opportunity to consider, review, and address an argument[.]").

For the reasons stated below, the Court will grant the Defendants' motion to dismiss but will permit Plaintiff thirty (30) days to file an amended complaint.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, Marcia James-St. Jules ("James-St. Jules" or "Plaintiff"), alleges the following in her Verified Complaint filed on March 17, 2009.

On January 21, 2007, James-St. Jules, sought medical treatment at the Juan F. Luis Hospital and Medical Center ("JFL") after experiencing heartburn and pain for a period of time. Verified Compl. ¶ 7. While at the hospital, emergency room personnel diagnosed James-St. Jules with gall stones and referred her to Dr. Jacqueline Thompson ("Dr. Thompson"), a physician employed at JFL. *Id.* at ¶¶ 2, 8, and 9. During an appointment and after reviewing her medical records, Dr. Thompson advised James-St. Jules that she would have to undergo surgery to remove the gall stones. *Id.* at ¶ 11. After Dr. Thompson performed the surgery on James-St. Jules on January 29, 2007, Dr. Thompson advised her "that her gall bladder with the stones were removed." *Id.* at ¶ 14. Despite having this surgery, James-St. Jules continued to experience abdominal pain after being discharged from the hospital. *Id.* at ¶ 15.

During a follow-up visit, James-St. Jules informed Dr. Thompson that she was still experiencing pain in her abdominal area and could not sit up for long periods of time. *Id.* at ¶¶ 17-18. Dr. Thompson advised James-St. Jules that the pain might be a result of fluid retention and scheduled her for a sonogram. *Id.* at ¶ 19. After reviewing the result of the sonogram, Dr. Thompson advised James-St. Jules "that there [w]as in fact fluid in her abdominal area, but that it was not that critical. *Id.* at ¶ 20. Dr. Thompson also informed James-St. Jules "that the fluid would naturally be absorbed by Plaintiff's body. *Id.*

Shortly thereafter, Dr. Thompson admitted James-St. Jules into the hospital because she continued to experience abdominal pain. *Id.* at ¶ 21. Dr. Thompson administered antibiotics to James-St. Jules and scheduled her to have another sonogram, which Dr. Thompson later confirmed revealed that James-St. Jules had fluid in her abdominal area. Dr. Thompson drained the fluid from James-St. Jules' body and sent the fluid to a lab to see if there was bacteria in the fluid. *Id.* at ¶¶ 21-22. After receiving the lab results, Dr. Thompson advised James-St. Jules that the fluid in her body was not critical, did not cause any problems, and "that the antibiotics prescribed had done its job." *Id.* at ¶ 23.

James-St. Jules was again readmitted to JFL in the end of February 2007, where she remained for two days, and more fluid was drained from her body. *Id.* at ¶ 24. James-St. Jules was released from the hospital but still felt "excruciating" pain and was readmitted to the hospital for a third time in March 2007. *Id.* at ¶ 25. Dr. Thompson again drained fluid from James-St. Jules' body and also scheduled a CT scan. *Id.* at ¶ 26. After reviewing the CT scan, Dr. Thompson advised James-St. Jules that she would have to undergo another surgery. *Id.* James-St. Jules was under the impression that this second surgery was "exploratory to see why [she] was retaining fluid." *Id.* at ¶ 27.

James-St. Jules then decided to seek medical attention off-island and was transported to the Cleveland Hospital. *Id.* at ¶ 28. After performing an examination, physicians at the Cleveland Hospital advised James-St. Jules that she was malnourished, dehydrated, jaundiced, and not suitable for surgery at that time. *Id.* at ¶ 29. James-St. Jules was cleared to undergo surgery on March 13, 2007, after physicians at the Cleveland Hospital drained additional fluid from her body. *Id.* at ¶¶ 30-31.

On March 21, 2007, the doctors at Cleveland Hospital advised James-St. Jules that she was in the beginning stages of sepsis and that the fluid in her system contained bacteria, which was dangerous and critical to her system. *Id.* at ¶ 32. The doctors at Cleveland Hospital also advised James-St. Jules that Dr. Thompson "should have known of the bile fluid and its effect on [her] system" and "that Dr. Thompson should have caught it before the fluid caused [her] to be septic." *Id.* at ¶¶ 32-33.

On March 17, 2009, James-St. Jules filed a civil complaint against the Defendants alleging a single cause of action for medical malpractice against JFL, Dr. Thompson, and the Government of the Virgin Islands (collectively "Defendants"). *Id.* at ¶¶ 34-38.

II. LEGAL STANDARD

Defendants filed their pre-answer dismissal motions contending that the Court lacks subject matter jurisdiction. A motion to dismiss for lack of subject matter jurisdiction is governed by Rule 12(b)(1) of the Federal Rules of Civil Procedure.[3] The applicable standard of review under Rule 12(b)(1) differs depending on whether the moving party has made a facial attack or a factual attack on the court's power to hear the case. *Mortensen v. First Fed. Sav. and Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). "A facial attack, as the adjective indicates, is an argument that considers a claim on its face and asserts that it is insufficient to invoke the subject matter jurisdiction of the court" based on a jurisdictional defect.

[3] Rule 12(b)(1) of the Federal Rule of Civil Procedure is applicable to the practice and procedure in the Superior Court through Rule 7 of the Rules of the Superior Court.

Constitution Party of Pennsylvania v. Aichele, 757 F.3d 347, 358 (3d Cir. 2014). Under a facial attack, "the court must only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff." *Id.* (citing *In re Schering-Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 243 (3d Cir. 2012)). Thus, under a facial attack, the Court must "apply the same standard of review it would use in considering a motion to dismiss under Rule 12(b)(6)." *Id.*

Conversely, when a factual challenge is made, that is, when a defendant disputes the existence of certain jurisdictional facts alleged by plaintiffs, the Court "is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Carpet Group Intern. v. Oriental Rug Importers Ass'n, Inc.*, 227 F.3d 62, 69 (3d Cir. 2000). In such a case, "no presumptive truthfulness attaches to plaintiff's allegations . . . [and] the burden of proving the existence of subject matter jurisdiction lies with the plaintiff." *Id.* A factual attack to the Court's subject matter jurisdiction may only occur after the allegations of the complaint have been controverted. *Mortensen v. First Federal Savings and Loan Assoc.*, 549 F.2d 884, 892 n. 17 (3d Cir. 1977) ("A factual jurisdictional proceeding cannot occur until plaintiff's allegations have been controverted.").

In this matter, Defendants filed their motions to dismiss prior to filing an answer. Thus, the Court will consider Defendants' motion to dismiss for lack of subject matter jurisdiction as a facial attack and will accept all properly pleaded factual allegations as true. *Askew v. Church of the Lord Jesus Christ*, 684 F.3d 413, 417 (3d Cir. 2012) ("As the defendants had not answered and the parties had not engaged in discovery, the first motion to dismiss [for lack of subject matter jurisdiction] was facial.").

III. DISCUSSION

Defendants contend that the Court lacks subject matter jurisdiction and that the Court should dismiss the complaint for the following three reasons: (1) Plaintiff failed to comply with the procedural requirements of the Virgin Islands Medical Malpractice Act ("MMA"); (2) Plaintiff's claim is time barred under the MMA; and (3) Plaintiff failed to comply with the requirements of the Virgin Islands Tort Claims Act ("VITCA").

A. Virgin Islands Medical Malpractice Act

Before filing a medical malpractice claim in the Superior Court against a health care provider, a prospective plaintiff must first comply with the procedural requirements of the MMA. These procedural requirements are set out in 27 V.I.C. § 166i. First, a prospective plaintiff must file a copy of its proposed complaint with the Medical Malpractice Action Review Committee ("Committee") by either delivering it or mailing it by registered or certified mail to the Virgin Islands Commissioner of Health ("Commissioner"). *Id.* § 166i(b) and (c). The Commissioner must then forward the proposed complaint to each health care provider named as a defendant who may file a proposed answer within twenty (20) days. *Id.* § 166i(c). After the expiration of the date for receipt of the defendant's proposed answer, the Committee must determine the type of medical experts necessary to review the malpractice claim. *Id.* § 166(i)(d). The medical expert must then review the plaintiff's medical records and the proposed legal briefs to submit an opinion to the Committee as to "whether or not the defendant acted or failed to act within the appropriate standards of medical care as charged in the proposed complaint." *Id.* §166i(d)(1). Section 166i(b) is clear in 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 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 . . ."

27 V.I.C. § 166i(b). The MMA also provides that "[n]o claim, whether in contract or tort, may be brought against a health care provider based upon professional services or health care rendered or which should have been rendered unless filed within two (2) years from the date of the alleged, omission or neglect." *Id.* § 166d(a). "It is only after this process is completed, or ninety days has elapsed since the claimant's proposed complaint was filed with the Committee, that a complainant may commence an action in the Superior Court." *Brady v. Cintron*, 55 V.I. 802, 814-15 (V.I. 2011) (citing 27 V.I.C § 166i(b)). The pre-filing requirements of the MMA are jurisdictional, and a plaintiff's failure to adhere to these requirements precludes this Court from exercising jurisdiction over the claims. *Brady*, 55 V.I. at 815 ("the plain language and historical purpose of the statute clearly indicate that the Legislature intended the pre-filing requirements of 27 V.I.C. § 166i to limit the authority of courts in this territory in adjudicating medical malpractice actions.").

In her complaint, James-St. Jules alleges, in a conclusory fashion, that this Court has jurisdiction over this matter because "Plaintiff has complied with all filing jurisdictional prerequisites of the Medical Malpractice Act . . ." Verified Compl. ¶ 5. Because Defendants are making a facial attack to the claims raised by James-St. Jules, the Court must apply the same standard of review used under a motion to dismiss under Rule 12(b)(6) in determining whether the Court has subject matter jurisdiction. Under Rule 12(b)(6), the Court "must accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Fleisher v. Standard Ins. Co.*, 679 F.3d 116, 120 (3d Cir. 2012) (internal citations omitted). In order to defeat a Rule 12(b)(6) motion, a plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level . . ." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). As stated by the United States Supreme Court, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570)). Although a court is required to accept as true all factual allegations, "unsupported conclusions and unwarranted inferences" are not entitled to the presumption of truthfulness. *Schuylkill Energy Res., Inc. v. Pa. Power & Light Co.*, 113 F.3d 405, 417 (3d Cir. 1997).

As stated above, James-St. Jules asserts a single conclusory allegation in the complaint that she has complied with all of the filing jurisdictional prerequisites of the MMA. This unsupported conclusion is not entitled to the presumption of truthfulness. In order to plead a plausible claim under the MMA, James-St. Jules was required to plead facts demonstrating the date she timely filed a proposed complaint with the Committee, the date the Committee forwarded her proposed complaint to any experts for review, or the date when the experts rendered an opinion on her claim (or that ninety days has elapsed since the filing of her proposed complaint). 27 V.I.C. § 166i. The complaint is totally silent on these procedural prerequisites. The Court, therefore, finds that James-St. Jules has failed to properly plead any facts that would plausibly suggest that she has complied with the pre-filing requirements of the MMA. *See Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 521 (8th Cir. 2007) (opining that with respect to 12(b)(1) motions, "[t]he plaintiff must assert facts that affirmatively and plausibly suggest that the pleader has the right [she] claims, rather than facts that are merely consistent with such a right."). Nonetheless, despite these deficiencies in the complaint, the Court must grant James-St. Jules an opportunity to amend her complaint unless amendment would be futile. *See Alston v. Parker*, 363 F.3d 229, 235 (3d Cir. 2004). An amendment would be futile if the complaint, as amended, would fail to state a claim upon which relief could be granted. *Great Western Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159, 175 (3d Cir. 2010). At this juncture, the Court does not find that allowing James-St. Jules leave to amend her complaint to include allegations regarding the pre-filing requirements of the MMA would be futile. Accordingly, the Court will dismiss the complaint but will grant James-St. Jules leave to amend the complaint.

B. Virgin Islands Tort Claims Act

Defendants also argue that the Court lacks subject matter jurisdiction because James-St. Jules failed to comply with the procedural requirements of the Virgin Islands Tort Claims Act. The Revised Organic Act ("ROA")[4] grants sovereign immunity to the Government of the Virgin Islands for tort claims, providing "that no action shall be brought against the government of the Virgin Islands or against any officer or employee thereof in his official capacity without the consent of the legislature . . ." 48 U.S.C. § 1541(b). The Legislature of the Virgin Islands waived the government's immunity from certain tort claims when it enacted the VITCA. *See* 33 V.I.C. § 3401-3416. The VITCA states, in relevant part,

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[4] The ROA serves as the *de facto* constitution for the territory of the Virgin Islands. *Bryan v. Fawkes*, 61 V.I. 201, 232 (V.I. 2014).

> No judgment shall be granted in favor of any claimant unless such claimant shall have complied with the provisions of this section applicable to his claim:
>
> (c) a claim to recover damages for injuries to property or for personal injury caused by the tort of an officer or employee of the Government of the Virgin Islands while acting as such officer or employee, shall be filed within ninety days after the accrual of such claim unless the claimant shall within such time file a written notice of intention to file a claim therefor, in which event the claim shall be filed within two years after the accrual of such claim.

33 V.I.C. § 3409(c).[5] The plain language of section 3409(c) requires a claimant to file a tort claim or a written notice of intent to file a claim against the Government within 90 days of the accrual of such claim. Section 3410 allows the Superior Court to permit late filings only if a claim was "filed within two years after the accrual of the cause of action, if reasonable excuse for late filing is shown, if the late filing does not cause substantial prejudice to the Government, and if the late filing contains the information required by 33 V.I.C. § 3410." *Fleming v. Cruz*, 2015 V.I. Supreme LEXIS 16, *25 (V.I. June 16, 2015). Because James-St. Jules alleges a claim for medical malpractice against the Government, JFL, and Dr. Thompson (as an employee of JFL), the provisions of the VITCA applies to the facts of this case. *See Richardson v. Knud Hansen Mem'l Hosp.*, 744 F.2d 1007 (3d Cir. 1984) (". . . a malpractice claimant against the Government must comply with the provisions of the Virgin Islands Tort

[5] According to the provisions of the VITCA, the Government of the Virgin Islands "includes the executive, legislative, and judicial branches of the Government of the Virgin Islands, agencies and instrumentalities of the Government of the Virgin Islands . . . including but not limited to the Virgin Islands Government Hospitals and Health Facilities Corporation." 33 V.I.C. § 3401. The Virgin Islands Government Hospitals and Health Facilities Corporations ("GHHFC") is a public entity of the Government of the Virgin Islands that has jurisdiction over JFL. 19 V.I.C. § 245. The GHHFC also has the power to "manage, operate, superintend, control, and maintain the hospitals and health facilities of the Government of the Virgin Islands in partnership with the Government." *Id.* § 244(e). Thus, because JFL is under the jurisdiction of the GHHFC and subject to its management, operations, and control, it is clear to the Court that JFL is an arm of the GHHFC, and therefore, falls within the definition of "Government" under the VITCA.

Claims Act as well as the provisions of the [MMA] . . .") (citing *Saludes v. Ramos*, 744 F.2d 992 (3d Cir. 1984)).

Unlike its ruling with regards to the MMA, the Supreme Court of the Virgin Islands has yet to definitively rule whether the pre-filing requirements of the VITCA are jurisdictional or are non-jurisdictional claims-processing rules. *See Fleming*, 2015 V.I. Supreme LEXIS 16, *25 n.13 ("In this case, we do not decide whether the VITCA's claim-filing requirements are jurisdictional . . . We leave a decision on whether the VITCA's claim-filing mandates are jurisdictional for another day."); *see also Brunn v. Dowdye*, 59 V.I. 899, 905 n.6 (V.I. 2013) (assuming without deciding that section 3408(a) of the VITCA was jurisdictional). The Third Circuit Court of Appeals and other Virgin Islands courts, however, have expressly held that a plaintiff's failure to comply with the procedural requirements of the VITCA precludes a court from exercising subject matter jurisdiction over such claims. *See Richardson*, 744 F.2d at 1010; *Brewley v. Government of the Virgin Islands*, 59 V.I. 100, 103 (V.I. Super. Ct. 2012) (opining that "the requirements of section 3409 of the VITCA are jurisdictional and that they must be strictly followed"); *Speaks v. Gov't of the Virgin Islands*, 2009 U.S. Dist. LEXIS 3565, *15-16 (D.V.I. Jan. 14, 2009) ("Timely compliance with the VITCA's notice requirement is a jurisdictional prerequisite to bringing suit on a plaintiff's tort claims.").

In *Richardson*, the Third Circuit Court of Appeals held that the terms of the VITCA waiving the Government's immunity from tort liability are jurisdictional. There, the court held that the ROA conferred upon the Territory of the Virgin Islands the "attributes of autonomy similar to those of a sovereign government or state." *Id.* at 1010. The Third Circuit further stated:

> One of these attributes of autonomy is immunity from tort liability, so that the government of the Virgin Islands may not be sued without its consent. We believe the terms of this consent are jurisdictional, just as they are under the Federal Tort Claims Act. It follows that the terms may not be waived. We therefore conclude that the Government is not precluded, even at this late date, from raising questions of compliance with the [VITCA].

Id. (citations omitted).

The case in *Richardson* originated in the District Court of the Virgin Islands when the plaintiff filed a wrongful death action against the defendant on October 20, 1980. *Id.* at 1008. Up until 1984, when Congress amended the ROA to bestow jurisdiction to the Superior Court (formerly Territorial Court),[6] the District Court of the Virgin Islands had general original jurisdiction over civil actions arising under territorial law in which the amount in controversy was more than $500. *See Callwood v. Enos*, 230 F.3d 627, 630-31 (3d Cir. 2000); *see also Carty v. Beech Aircraft Corp.*, 679 F.2d 1051, 1057 (3d Cir. 1982) (characterizing jurisdiction of the District Court of the Virgin Islands under the ROA prior to the 1984 amendments as "more like a state court of general jurisdiction than a United States district court."). In *Callwood*, the Third Circuit stated;

> The Revised Organic Act originally vested the District Court of the Virgin Islands . . . with the general original jurisdiction over all other matters in the Virgin Islands, subject to the exclusive jurisdiction of the local courts over civil actions in which the amount in controversy was less than $500 and over criminal actions for local offenses in which the maximum punishment did not exceed six months in prison or a $100 fine. Under this jurisdictional framework, the District Court of the Virgin Islands heard the majority of cases brought in the Virgin Islands, whether those cases were brought under federal law or local law, civil law or criminal law. . . Since October 1, 1991, . . . all civil actions that are based on local law and that do not satisfy diversity jurisdiction requirements must be brought in the Territorial Court of the Virgin Islands, with a few exceptions."

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[6] The Territorial Court was renamed the Superior Court on October 29, 2004. *See Magens Point Resort Hotel v. Benjamin*, 58 V.I. 191, 195 n.1 (V.I. 2009).

Id. On October 1, 1991, the Virgin Islands Legislature amended the Virgin Islands Code to grant original jurisdiction to the Territorial Court giving legislative effect to the 1984 amendments to the ROA and effectively "divest[ing] the District Court of the Virgin Islands of jurisdiction over all local civil actions, but does not divest the District Court of its federal question and diversity jurisdiction in civil actions . . ." *Brow v. Farrelly*, 994 F.2d 1027, 1032-34 (3d Cir. 1993). Accordingly, when the District Court adjudicated Richardson's claim for wrongful death when the case was filed in 1980, and prior to the 1991 amendments made by the legislature, it was acting as a territorial court. *See also George v. Wilson*, 59 V.I. 984, 986 n.1 (V.I. 2013) ("At the time of George's case [1978], the District Court of the Virgin Islands served as a local, or territorial court when hearing cases based on local law. However, on October 1, 1991, the Virgin Islands Code was amended and granted original jurisdiction over all local matters to the Virgin Islands Territorial Court, now named the Superior Court.") (brackets added). Therefore, the appeal in *Richardson* from the District Court to the Third Circuit resulted in the Third Circuit acting as the Supreme Court of the Virgin Islands because the Third Circuit was hearing an appeal from the District Court when that court had original jurisdiction in civil actions and acted as a local or territorial court adjudicating the case based on local law. *See Better Bldg. Maint. of the Virgin Islands v. Lee*, 60 V.I. 740, 755 (V.I. 2014) ("before the creation of the Virgin Islands Supreme Court 'the District Court's task [in a diversity action] was to 'predict' how [the Third Circuit], sitting essentially as the Supreme Court of the Virgin Islands, would resolve [an] issue of territorial law.") (quoting *Edwards v. HOVENSA, LLC*, 497 F.3d 355, 362 n.5 (3d Cir. 2007)). Because a decision of the Third Circuit rendered in its capacity as the "de facto court of last resort in the Virgin Islands" is binding on the Superior Court, *see In re People of the Virgin Islands*, 51 V.I. 374, 389 n.9 (V.I. 2009), this Court is bound by the Third Circuit's decision in *Richardson* ruling that the provisions of the VITCA are jurisdictional.

Here, the Court finds that the complaint fails to allege a plausible claim under the VITCA. Paragraph 5 of the complaint simply alleges that "Plaintiff has complied with all filing jurisdictional prerequisites of the . . . Virgin Islands Tort Claims Act." This allegation is insufficient. The complaint fails to state whether James-St. Jules filed a notice of intent to file a claim within 90 days of accrual of her claim for medical malpractice. A "cause of action in a medical malpractice claim accrues and the statute of limitations begins to run when the patient knows both the existence and cause of [her] injury and knows that the acts causing the injury constitute malpractice." *Frederick v. Ellet*, 2014 V.I. LEXIS 5, *5 (V.I. Super. Ct. Feb. 14, 2014) (citing *Phillip v. Taylor*, 18 V.I. 437 (D.V.I. 1981)). Based on the allegations in the complaint, James-St. Jules' cause of action accrued on March 31, 2007, the date the physicians at Cleveland Hospital informed her that she was in the beginning stages of sepsis, that fluid in her body contained bacteria, and that Dr. Thompson should have known of the bile fluid before it caused James-St. Jules to be septic. Section 3409(c) requires that a claim to recover damages for personal injury under the VITCA must be filed within 90 days after the accrual of such claim, unless the claimant filed a notice of intention to file a claim within the 90 days period allowing the claim to be filed within two years after accrual of such claim.[7] James-St.

[7] The Court recognizes that section 3409(c) gives the Court discretion to permit a claimant to file a claim at any time within two years after the accrual of such claim even if the claimant fails to file a claim or notice of intention to file a claim within 90 days of the date her cause of action accrued. However, the Court may exercise this discretion in allowing an untimely claim only if the application for such permission is "made upon motion based upon affidavits showing reasonable excuse for the failure to file the notice of intention and that the Virgin

Jules filed the instant complaint on March 17, 2009, clearly more than 90 days after the accrual of her claim. However, the Court would still retain jurisdiction if she filed a notice of intention to file such a claim within 90 days of March 31, 2007—the date her cause of action began to accrue. James-St. Jules, however, makes no such allegation.

Again, as with James-St. Jules' MMA claim, because Defendants are making a facial attack to the complaint, the Court will allow James-St. Jules an opportunity to amend her complaint to include the appropriate jurisdictional allegations. *See supra* Part III.A.

IV. CONCLUSION

For the reasons stated above, the Court will dismiss the complaint due to James-St. Jules' failure to allege facts demonstrating that she complied with the pre-filing requirements of the MMA and the VITCA. The Court, however, will grant James-St. Jules thirty (30) days leave to amend her complaint to cure these pleading deficiencies. An appropriate Order follows.

Dated: June 25, 2015

ROBERT A. MOLLOY
Judge of the Superior Court

ATTEST:
ESTRELLA GEORGE
Acting Clerk of the Court

By: ____________________
Court Clerk Supervisor

Dated: 6/26/15

Islands . . . had, prior to the expiration of the time limited for the filing of the notice of intention, actual knowledge of the facts constituting the claim." 33 V.I.C. § 3409(c). James-St. Jules has filed no such application.

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

MARCIA JAMES-ST. JULES, **Plaintiff,** **v.** **JACQUELINE THOMPSON, M.D., JUAN F. LUIS HOSPITAL & MEDICAL CENTER and GOVERNMENT OF THE VIRGIN ISLANDS,** **Defendants.**	**CIVIL NO. SX-09-CV-136** **ACTION FOR DAMAGES** **MEDICAL MALPRACTICE**

ORDER

THIS MATTER comes before the Court on the following motions filed by the Defendants: (1) Motion for Dismissal Under FRCP 12 filed on May 19, 2009; (2) Petition to Have Motion Deemed Admitted filed on January 14, 2011; and (3) Motion Requesting Dismissal filed on May 9, 2012. For the reasons stated in the accompanying Memorandum Opinion of even date, it is hereby

ORDERED that Defendants' Motion to Dismiss filed on May 19, 2009, is **GRANTED;** it is further

ORDERED that Defendants' Petition to Have Motion Deemed Admitted filed on January 14, 2011, is **DENIED;** it is further

ORDERED that Defendants' Motion Requesting Dismissal filed on May 9, 2012, is **DENIED;** it is further

ORDERED that Plaintiff's claim for medical malpractice against Defendants is **DISMISSED WITHOUT PREJUDICE,** with leave to amend the Verified Complaint, **within thirty (30) days of the date of entry of this Order,** to add sufficient facts pertaining to the pre-filing requirements of the Virgin Islands Medical Malpractice Act and the Virgin Islands Tort Claims Act; it is further

ORDERED that copies of this Order shall be provided to all counsel of record.

Dated: June 25, 2015

ROBERT A. MOLLOY
Judge of the Superior Court

ATTEST:
ESTRELLA GEORGE
Acting Clerk of the Court

By: ____________________
Court Clerk Supervisor

Dated: 6/26/15