For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

SHEMEKA RAYMOND-BENJAMIN AS PERSONAL REPRESENTATIVE FOR THE ESTATE OF LINDA RAYMOND, DECEASED, Appellant/Plaintiff, v. **DR. KIDANE ASSEFA D/B/A THE EYE CLINIC** Appellee/Defendant.	)	**S. Ct. Civ. No. 2018-0020** Re: Super. Ct. Civ. No. 185/2015 (STT)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas-St. John
Superior Court Judge: Hon. Michael C. Dunston

Argued: July 9, 2019
Filed: March 20, 2020

Cite as: 2020 VI 1

BEFORE: **RHYS S. HODGE**, Chief Justice; **IVE ARLINGTON SWAN**, Associate Justice; and **DARRYL DEAN DONOHUE, SR.,** Designated Justice.[1]

APPEARANCES:

Rhea R. Lawrence, Esq.
Law Offices of Lee J. Rohn and Associates, LLC
St. Croix, U.S.V.I.
Attorney for Appellant,

Su-Layne Walker, Esq.
Assistant Attorney General
St. Thomas, U.S.V.I.
Attorney for Appellee.

[1] Associate Justice Maria M. Cabret is recused from this matter. The Honorable Judge Darryl Dean Donohue, Sr., a retired judge of the Superior Court of the Virgin Islands, sits in her place pursuant to title 4, section 24(a) of the Virgin Islands Code.

OPINION OF THE COURT

HODGE, Chief Justice.

¶ 1 Shemeka Raymond-Benjamin, personal representative for the estate of Linda Raymond ("Raymond"), deceased, appeals from a Superior Court order granting summary judgment to Dr. Kidane Assefa, the defendant, in a medical malpractice action. For the reasons that follow, we reverse the Supreme Court's grant of summary judgment and remand for further proceedings.

I. BACKGROUND

¶ 2 On June 27, 2011, Raymond visited Dr. Assefa complaining of pain and swelling in her left eye. Dr. Assefa was the Chief of Ophthalmology at the Roy Lester Schneider Regional Hospital. Raymond told Dr. Assefa that she had recently lost a hard contact lens and was concerned that it was still in her eye. Dr. Assefa prescribed eye drops, but after two weeks the pain did not go away, so Raymond went to her primary care doctor, Dr. James Nelson, who ordered a CT scan. The CT report stated that "[t]here is no evidence of radiopaque foreign body," but that there was a "soft tissue abnormality [that] may be associated with the lost contact lens. Alternatively, this may represents [sic] a mucocele or a cyst or less likely a mass lesion." Dr. Nelson sent Raymond back to Dr. Assefa to receive the results of the CT scan. Dr. Assefa's post-surgical notes indicate, and Raymond stated that he told her, that the CT scan confirmed the presence of a hard contact lens in her eye and that he would need to surgically remove it. His notes also state that he told Raymond that there was a chance there would be no lens, though Raymond disputed that he told her this before the surgery. The surgery, performed on July 25, 2011, was unsuccessful in resolving Raymond's discomfort, and Dr. Assefa suggested that Raymond visit eye specialists in the states.

Over the next few months Raymond visited eye specialists in Florida and Virginia, who, after an MRI and a biopsy, diagnosed her with sarcoidosis, an inflammatory disease. On October 6, 2011, Raymond filed a complaint with the Medical Board at the Schneider Regional Medical Center accusing Dr. Assefa of malpractice for unnecessary surgery, failing to do a biopsy during the surgery, and making a "questionable incision" on her eye.

¶ 3 On June 21, 2013, Raymond filed her proposed complaint with the Medical Malpractice Action Review Committee (" The Committee"). The Committee is located within the Office of the Commissioner of Health and is charged with "arrang[ing] for expert review of all malpractice claims before actions based upon such claims are commenced in court." 27 V.I.C. § 166i(a). Three days after filing the proposed complaint with the Medical Malpractice Committee, Raymond filed a lawsuit against Dr. Assefa in the Superior Court of the Virgin Islands on June 24, 2013, alleging malpractice ("*Raymond I*") (Super. Ct. Civ. No. ST-15-CV-185). In her verified complaint Raymond asserted that the Virgin Islands Medical Malpractice Act ("MMA") did not apply to the suit because:

> [T]he government has failed to fulfill the conditions precedent for limitations of damage to include not setting up an independent fund from the premiums paid into malpractice insurance, not hiring a manager to invest said funds, not setting up a self insurance plan, not properly setting up and appointing the proper members to the medical malpractice review committee, not hiring experts to review proposed claims, not properly reviewing proposed claims prior to suit being filed and other violations of the statute.

(J.A. 543.) The complaint contains no other claims that the MMA does not apply to Dr. Assefa.

¶ 4 Dr. Assefa submitted his answer on July 26, 2013, including affirmative defenses that "[t]he Court lacks personal and subject matter jurisdiction over the defendant"; "[t]he Court lacks jurisdiction over this cause of action to the extent the plaintiff has failed to comply with the strict

statutory filing requirements of Title 27, V.I.C. § 166 *et seq.*"; and "[t]he plaintiff is bound by the provisions of Title 27, V.I.C. § 166 *et seq.*, by reason of the fact that this is a cause of action for medical malpractice against health care providers covered by the Risk Management Program . . . ." (J.A. 553). The suit proceeded with discovery for two years. On January 15, 2014, Raymond issued a request for documents, including documents related to "any and all insurance policies." Dr. Assefa responded on February 25, 2015: "Defendant Dr. Assefa responds this matter is being defended by and coverage is provided pursuant to the provisions of [the MMA]." However, he did not produce the requested documentary proof of coverage. On May 21, 2015, Dr. Assefa filed a Motion to Dismiss, arguing that the Superior Court lacked subject-matter jurisdiction due to the MMA because Raymond had not waited 90 days after filing the proposed complaint with the Committee before initiating *Raymond I* in court and attaching, for the first time, proof of his qualifying insurance coverage. On June 17, 2015, the Superior Court dismissed *Raymond I* without prejudice for lack of subject-matter jurisdiction. Raymond did not appeal from the dismissal order in *Raymond I*.

¶ 5 On April 23, 2015, Raymond filed the suit currently at issue, *Raymond II*. On November 8, 2017, Dr. Assefa filed a "Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim Due to Statute of Limitations," arguing that the statute of limitations had expired. The Superior Court determined that it had subject matter jurisdiction but converted the motion to dismiss into a motion for summary judgment and ordered the parties to submit supplemental briefs on whether the statute of limitations had been equitably tolled. On January 29, 2018, the Court granted summary judgment for Dr. Assefa, finding that there was no genuine dispute of material fact on the question of equitable tolling. Raymond timely filed her notice of appeal on February

28, 2018.[2] *See* V.I. R. APP. P. 5(a)(1).

II. DISCUSSION

A. Jurisdiction and Standard of Review

¶ 6 This Court has appellate jurisdiction over "all appeals from the decisions of the courts of the Virgin Islands established by local law." 48 U.S.C. § 1613a(d); *see also* 4 V.I.C. § 32(a) (granting this Court jurisdiction over "all appeals arising from final judgments, final decrees or final orders of the Superior Court"). Because the Superior Court's January 29, 2018 order disposed of all issues in the underlying claim by dismissing the action as time-barred, it is a final judgment within the meaning of section 32(a). *See Williams v. United Corp.*, 50 V.I. 191, 193-94 (V.I. 2008).

¶ 7 We review a grant of summary judgment *de novo*, applying "the same test that the lower court should have utilized." *Id.* at 194. A motion for summary judgment should be granted if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Id.* (internal quotation marks omitted). Upon the moving party's claim that there is no evidence to support the opposing party's case, the burden shifts to the nonmoving party to present evidence of a "genuine issue for trial such that a reasonable jury could return a verdict for the non-moving party." *Id.* In ruling on the motion, the trial court "must view the inferences to be drawn from the underlying facts in the light most favorable to the non-moving party, and [] must take the non-moving party's conflicting allegations as true if 'supported by proper proofs'"; however, "[t]he

[2] In April 2018, Raymond passed away, and she is replaced in this suit, with leave of this Court, by Shemeka Raymond-Benjamin as personal representative. Due to Raymond's death, the appeal has been held in abeyance in accordance with an order from this Court. This Court lifted the abeyance on February 21, 2019. All references to Raymond should be construed as referring to the Estate of Linda Raymond.

non-moving party may not rest upon mere allegations but must present actual evidence showing a genuine issue for trial." *Id.*

B. Equitable Tolling

¶ 8 The parties do not dispute that this action was filed outside of the two-year statute of limitations made applicable by 27 V.I.C. §166d(a).[3] Thus, the action is timely only if the statute of limitations was tolled, and therefore summary judgment is appropriate if there is no "genuine issue as to any material fact" showing that the statute of limitations should be tolled. Raymond argues two bases for tolling the statute of limitations: the common-law doctrine of equitable tolling, laid out by this Court in *Jensen v. Virgin Islands Water & Power Authority*, 52 V.I. 435 (V.I. 2009), and statutory tolling under the Virgin Islands Medical Malpractice Act ("MMA"), 27 V.I.C. § 166d. Each issue is addressed in turn.

¶ 9 Raymond first argues that the statute of limitations should be equitably tolled. Equitable tolling is a common law doctrine that seeks to "avoid[] the unfairness to plaintiffs that would occur if plaintiffs who diligently but mistakenly prosecute their claims in a court that lacks personal jurisdiction find their claims time-barred when they refile in a proper jurisdiction." *Pichierri v. Crowley*, 59 V.I. 973, 979 (V.I. 2013) (citing *Island Insteel Sys. v. Waters*, 296 F.3d 200, 205 (3d Cir. 2002)). Raymond argues that she was mistaken about Dr. Assefa's insurance coverage and so she "diligently but mistakenly" prosecuted her case in *Raymond I*, but, because Dr. Assefa failed to prove that he was covered under the MMA for two years, the statute of limitations ran out. She

[3] The parties disagree as to when the cause of action accrued, and therefore when the statute of limitations expired, but the defendant's conduct upon which the claim is based took place in 2011 and the defendant knew about it by the end of that year, and so the period would undoubtedly have expired some time in 2013.

argues that the statute of limitations should thus be deemed equitably tolled for the period of *Raymond I*'s pendency.

¶ 10 In the Virgin Islands, a statute of limitations may be equitably tolled in any case in which a first action was dismissed for any reason other than on the merits, as long as three factors are met: "(1) the first action gave defendant timely notice of plaintiff's claim; (2) the lapse of time between the first and second actions will not prejudice the defendant; and (3) the plaintiffs acted reasonably and in good faith in prosecuting the first action, and exercised diligence in filing the second action." *Jensen*, 52 V.I. at 443; *see also Williams v. Tutu Park, Ltd.*, 51 V.I. 701, 707 (D.V.I. 2009) ("[A] plaintiff exercising reasonable diligence could as easily make a mistake regarding the existence of subject matter jurisdiction as he could mistake the existence of personal jurisdiction.") (citations omitted). The test is "highly 'fact-specific.'" *Jensen*, 52 V.I. at 443. (quoting *Island Insteel*, 296 F.3d at 218).

¶ 11 In this case, it is undisputed that the first two *Jensen* factors are met; the only question is whether the third factor is met. The Superior Court determined that the third factor was not met because Raymond filed the first action before the court obtained subject-matter jurisdiction,[4] and

[4] The Medical Malpractice Act establishes a pre-filing requirement 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. This Court has held that this requirement is a jurisdictional bar: the judicial system does not obtain subject-matter jurisdiction over a matter governed by the MMA until the 90 days have passed or the Committee has received the expert opinion. *Brady v. Cintron*, 55 V.I. 802, 815-16 (V.I. 2011).

This Court ordered supplementary briefing to address the question of whether *Brady* should be revisited in the wake of the United States Supreme Court's decision in *Fort Bend Cty. v. Davis*, 139 S. Ct. 1843 (2019). However, on further review, we need not reach that issue in this

there was no evidence of any justification for this failure.

¶ 12 Equitable tolling is appropriate when "the policies underlying statutes of limitations would not be served by holding plaintiffs' claims time-barred" because plaintiffs provided timely notice to defendants, who were not prejudiced, and plaintiffs made a good-faith error. *Island Insteel*, 296 F.3d at 217 (citing *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 428 (1965)). Its purpose is to protect aggrieved plaintiffs from too-dire consequences of a good faith mistake, *see id.* at 205; it is thus unavailable when a plaintiff was lackadaisical about prosecuting her claims, or when the initial suit was not prosecuted in good faith. *See Pichierri*, 59 V.I. at 982 ("[T]his type of equitable action is not for those who lack diligence."); *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984) ("One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence."); *Estate of Melendez v. Gov't of the V.I.*, No. 1:09-cv-00009, 2010 U.S. Dist. LEXIS 75663, at *10 (D.V.I. 2010) (unpublished) ("The equitable tolling doctrine was designed to protect litigants from being deprived of a right to sue through no fault of their own; not to give a second chance to those who have neglected to diligently pursue their rights.").

¶ 13 Raymond first argues that "filing" is not the same as "prosecuting", but we disagree. Filing is part and parcel of prosecuting a claim; it is the first act taken in prosecuting a case, and failure to diligently file can be symptomatic of failure to diligently prosecute. *See Pichierri*, 59 V.I. at 982. However, failure to file in a manner that grants the court subject-matter jurisdiction cannot be in and of itself sufficient evidence of failure to prosecute, because to so hold would render the

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proceeding, as a party's good faith must be determined based on the laws in effect at the time, and it is unquestionable that *Brady* was the law at the time Raymond filed her first action. The time to re-assess *Brady* would have been during *Raymond I*, which was dismissed due to the jurisdictional bar but that dismissal order was not appealed; it is not necessary for the disposition of *Raymond II*. We therefore do not reach that question in this proceeding.

entire doctrine of equitable tolling moot; the doctrine's purpose is to compensate for exactly such an error. Rather, the mistaken filing must have been "unreasonable" or in bad faith. *See id.* at 981-82 (finding that the plaintiff's "actions were not reasonable or in good faith" when the evidence that was offered to show that he acted promptly did not actually demonstrate that he had made any efforts whatsoever to timely serve the defendant).

¶14 Raymond next argues that she acted in good faith in prosecuting the first action because she was unaware that Dr. Assefa was covered, and for two years he failed to take the simple step of proving it, and so she had no way of knowing that the *Raymond I* court lacked jurisdiction over the case.[5] Subject-matter jurisdiction is a prerequisite to any legal action, and the party asserting jurisdiction must generally prove that the court has subject-matter jurisdiction. *Gov't of the V.I. v. UIW-SIU*, 64 V.I. 312, 323 (V.I. 2016). We held in *Brady* that under the MMA, courts lack subject-matter jurisdiction over an action if "a health care provider [is] covered by the Government of the Virgin Islands, Department of Health's Self-Insurance Retention Program or any other insurance policy as provided for in section 166e of this Title," 27 V.I.C. § 166a, and the plaintiff has not complied with the procedures required under the statute. In order for a court to have jurisdiction over a medical malpractice action, our *Brady* precedent thus requires either that the plaintiff has complied with the requirements of the MMA or that the defendant is not covered by the MMA.

¶15 Raymond claims that she had no way of knowing that Dr. Assefa was covered because he failed to prove it by providing documentary evidence. However, in her complaint Raymond stated that Dr. Assefa is "a licensed physician in St. Thomas, U.S. Virgin Islands." Section 166e(e) of

[5] This argument itself may not be made in good faith, as Raymond failed to allege in her *Raymond I* complaint that Dr. Assefa was not covered and merely alleged that the MMA did not apply because it was not being properly implemented.

the MMA provides that:

> [A] license to provide health care in the territory is effective only after the health care provider is covered by:
> (1) the insurance policy procured pursuant to subsection (a) of this section, or
> (2) the Self-Insurance Retention Program established pursuant to subsection (f) of this section, or
> (3) any other insurance policy providing professional liability coverage of not less than $250,000 for an injury suffered by a patient as a result of a single occurrence.

27 V.I.C. § 166e(e). In other words, section 166e(e) makes possession of the insurance coverage mandated by the MMA a necessary prerequisite to licensure as a physician in the Virgin Islands. By stating in her *Raymond I* complaint that Dr. Assefa was a licensed physician in the territory, Raymond certified to the Superior Court that this was true to the best of her knowledge, information, and belief, *see* FED. R. CIV. P. 11(b); *accord*, V.I. R. CIV. P. 11(b),[6] and she provided no reason for a belief that his license was granted in contravention of the statutory licensure requirements under the MMA. Raymond never moved to amend her *Raymond I* complaint to remove this factual representation or to allege any reason to believe that her initial belief was incorrect in that Dr. Assefa did not possess conforming insurance coverage under the MMA. This indicates that Raymond did not act in good faith in filing *Raymond I*, as she had no good faith belief that Dr. Assefa was not covered under the MMA. Therefore, Raymond has failed to satisfy the third *Jensen* factor and is not entitled to equitable tolling of the statute of limitations, as

[6] At the time Raymond filed her complaint, Federal Rule of Civil Procedure 11(b) was applicable to proceedings in the Superior Court pursuant to former Superior Court Rule 7. Effective March 31, 2017, the Virgin Islands Rules of Civil Procedure were made applicable to civil cases in the Superior Court to the exclusion of the federal rules. However, Virgin Islands Rule of Civil Procedure 11(b) and Federal Rule of Civil Procedure 11(b) impose identical requirements with respect to the effect of asserting factual allegations in a complaint.

properly determined by the Superior Court in granting summary judgment.

C. Statutory Tolling

¶ 16 Raymond also raised before the Superior Court the question of whether the statute of limitations should be tolled under the terms of the MMA itself, because Dr. Assefa failed to disclose facts that could have suggested malpractice. The MMA allows for tolling the statute of limitations during any period when "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." 27 V.I.C. § 166d. To interpret this provision, we rely on our traditional principles of statutory interpretation. "Where a statute's language is plain and unambiguous, no further interpretation is required." *Daley-Jeffers v. Graham*, 69 V.I. 931, 939 (V.I. 2018); *see also In re Infant Sherman*, 49 V.I. 452, 468 (V.I. 2008) (Swan, J., concurring) ("In interpreting a statute, the court looks first to the statute's plain meaning and, if statutory language is facially unambiguous, its inquiry comes to an end."); *Mansell v. Mansell*, 490 U.S. 581, 588 (1989) ("Where, as here, the question is one of statutory construction, we begin with the language of the statute.").

¶ 17 The MMA states that the statute of limitations shall toll "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." 27 V.I.C. § 166d. This language is not ambiguous. It imposes a clear choice for the healthcare provider: inform the patient of any known

malpractice or potential malpractice or become subject to a tolling of the statute of limitations.[7] Thus, the appropriate inquiry is whether Dr. Assefa had "actual knowledge" or "knowledge of facts which would reasonably indicate" an act or failure to act on which a malpractice claim may be based, and whether he disclosed this information.[8]

¶ 18 The Superior Court wholly failed to address the issue of statutory tolling that Raymond properly raised, which is an abuse of discretion that typically leads us to automatically reverse the judgment appealed and to remand to the Superior Court. "[F]ailure [by the Superior Court] to address an argument — even on a question of law to which this Court owes the Superior Court no deference — itself constitutes grounds for reversal." *Gerace v. Bentley*, 65 V.I. 289, 297 (V.I.

[7] We do not address in this proceeding the effect, if any, on the tolling issue where plaintiff clearly learns the fact of the malpractice prior to being advised of the malpractice by the health care provider.

[8] Since this case will be remanded, we point out the inconsistency of the standard that courts that have interpreted this provision (27 V.I.C. § 166d) have applied. Some courts have referred to it as the "fraudulent concealment" provision and interpreted it as requiring the physician to have taken affirmative actions to conceal his or her malpractice. *Warner v. Ross*, 164 Fed. Appx. 218, 220 (3d Cir. 2006); *Simmonds v. Gov't of the V.I.*, No. 2003/0137a, 2009 U.S. Dist. LEXIS 35130, at *26 (D.V.I. 2009) (unpublished); *Frederick v. Ellet*, No. ST-11-CV-381, 2014 V.I. LEXIS 5, at *6-*7 (V.I. Super. Ct. 2014) (unpublished). This interpretation stems from a 2002 case in which the Territorial Court stated that "[t]he Third Circuit Court of Appeals has held that the query in fraudulent concealment cases is whether there is evidence that the defendant took affirmative steps to conceal the wrongful conduct and that there must be actual concealment. *See Montrose Medical Group Participating Savings Plan v. Bulger*, 243 F.3d 773 (3rd Cir. 2001)." *Payne v. Gov't of the V.I.*, 44 V.I. 213, 217 (V.I. Super. Ct. 2002). However, in *Montrose*, the Third Circuit applied the federal doctrine of fraudulent concealment to an employee benefits law that suspends a statute of limitations in the case of "fraud or concealment." 29 U.S.C. § 1113. Fraudulent concealment is a common-law doctrine that the United States Supreme Court has held is implicit in any statute of limitations in order to prevent a responsible party from affirmatively hiding their guilt and thus using the courts to avoid liability. *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946). In no respect do the doctrine of fraudulent concealment or the text of 29 U.S.C.S. § 1113 resemble § 166d of the MMA; they are irrelevant to the interpretation of the unambiguous plain text of § 166d.

2016) (citing *Gov't of the V.I. v. Connor*, 60 V.I. 597, 604 (V.I. 2014)); *see also Bryan*, 61 V.I. at 476 (remanding a case where the Superior Court failed to "make any factual findings or issue any conclusions of law" on a claim). "Ordinarily, when the Superior Court enters judgment on one basis, but fails to consider alternate arguments that were raised by the parties, this Court will decline to address those alternate issues in the first instance, and instead direct the Superior Court to do so on remand." *Rennie v. Hess Oil V.I. Corp.*, 62 V.I. 529, 540 (V.I. 2015); *see also United Corp. v. Tutu Park Ltd.*, 55 V.I. 702, 720 n.16 (V.I. 2011). We therefore remand to the Superior Court to address Raymond's statutory tolling argument consistent with the legal principles articulated herein.

III. CONCLUSION

¶ 19 Raymond has not offered any evidence that her alleged belief that Dr. Assefa was not covered was in good faith, and thus the filing of *Raymond I* cannot serve as a basis on which to equitably toll the statute of limitations. However, the Superior Court neglected to address Raymond's claim of statutory tolling, and therefore we reverse that aspect of the judgment in this case and remand to the Superior Court to determine whether there is a genuine issue of material fact as to whether Dr. Assefa had "actual knowledge" or "knowledge of facts which would reasonably indicate" an act or failure to act on which a malpractice claim may be based, and whether he disclosed that information.

Dated this 20 day of March, 2020.

BY THE COURT:

/s/ Rhys S. Hodge
RHYS S. HODGE
Chief Justice

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court