

Court on February 25, 2011, in Case No. ST-11-CV-117. Small died on August 26, 2011, and Defendants filed a suggestion of death on September 22, 2011. On February 16, 2012, this Court dismissed the case for failure to substitute a successor or representative for Decedent. Plaintiff then petitioned the Court to be appointed as personal representative and administrator of Decedent's estate on June 4, 2013, and filed the instant action on June 7, 2013.

STANDARD

Fed. R. Civ. P. 12(b)(1), made applicable to the Superior Court through SUPER CT. R. 7, provides that upon motion by the pleader, a claim, counterclaim, cross-claim, or third party claim shall be dismissed when the court lacks subject-matter jurisdiction.

ANALYSIS

Defendants move to dismiss the Complaint on the grounds that this Court lacks subject matter jurisdiction because Plaintiff has failed to comply with the provisions of the Virgin Islands Medical Malpractice Act ("MMA").¹ In opposition, Plaintiff asserts that Decedent complied with the MMA by filing his proposed complaint with the Medical Malpractice Action Review Committee (the "Committee") on November 3, 2010. In reply, Defendants argue that Plaintiff's wrongful death action was not submitted to the Committee, and therefore any claims in the Complaint seeking to recover damages related to the death of Decedent should be dismissed from the action.

27 V.I.C. § 166i(a) establishes that the Medical Malpractice Action Review Committee was created within the Office of the Commissioner of Health "to arrange for expert review of all malpractice claims before actions based upon such claims are commenced in court." As a result, a

¹ 27 V.I.C. § 166, et seq.

claimant must first file a proposed complaint with the Committee,² and the Committee “shall determine ... the type of medical expert or experts who are needed to review the malpractice claim ...[and] shall arrange for the expert to review the medical records and the legal papers submitted to the Committee.”³ The expert(s) shall then “submit to the Committee an opinion in writing concerning whether or not the defendant acted or failed to act within the appropriate standards of medical care as charged in the proposed complaint.”⁴ If the expert’s 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.”⁵

27 V.I.C. § 166b provides that the “only damages which may be awarded in an action under this subchapter are the following: (1) economic damages; and (2) noneconomic damages.” Noneconomic damages are defined as: “(1) pain and suffering; (2) loss of consortium; (3) inconvenience; (4) physical impairment; and (5) disfigurement.”⁶ Notably absent from the list of noneconomic damages is death. And, while the MMA states that “recovery in an action for wrongful death of a patient shall be as provided in Title 5, section 76, Virgin Islands Code, and shall be subject to the same limitations on recovery as are provided for in this section,”⁷ there is no obvious indication that a wrongful death action requires strict compliance with the MMA’s procedural requirements.

² 27 V.I.C. § 166i(b).

³ 27 V.I.C. § 166i(d).

⁴ *Id.*

⁵ 27 V.I.C. § 166i(b).

⁶ 27 V.I.C. § 166(n).

⁷ 27 V.I.C. § 166b(f). 27 V.I.C. § 166b(a) establishes that the “total amount recoverable for any injury of a patient may not exceed two hundred and fifty thousand dollars (\$250,000) per occurrence.”

Nevertheless, at least one court in the Virgin Islands has determined that a plaintiff bringing a wrongful death action must still comply with the MMA. In *Espinosa v. Gov't of the V.I.*,⁸ the Territorial Court determined that the MMA and the Virgin Islands Wrongful Death Act (“WDA”) “cannot be harmonized with respect to wrongful death actions based upon alleged medical negligence, and thus the more recently enacted and more specific Malpractice Act must govern this action.”⁹ As a result, the court dismissed the complaint for failure to submit a proposed complaint to the Committee as required by the MMA.

Plaintiff's failure to comply with the MMA is not fatal to her wrongful death action, however. *Espinosa* is distinguishable from the case at hand because, in *Espinosa*, a proposed complaint setting forth the wrongful acts of the health care providers was never submitted to the Committee for expert review. Here, Decedent delineated Defendants' wrongful acts in his proposed personal injury complaint that was submitted to the Committee for expert review,¹⁰ and those same wrongful acts are the basis for Plaintiff's wrongful death action.¹¹

“[C]ourts generally agree that wrongful death claims are derivative in nature, at least in the sense that they are dependent on a wrong committed against the decedent.”¹² A wrongful death action is “predicated on the wrongful act, negligence, default or breach of contract or warranty committed by the defendant which, as the result of the decedent's death, transformed a personal

⁸ 1983 V.I. LEXIS 38, *7-8, 20 V.I. 78, 82, 1983 WL 889838 (V.I. Terr. Ct. 1983).

⁹ *Id.*

¹⁰ In his proposed complaint, Decedent asserted that Defendants injected him with a contrast dye containing Gadolinium to perform a MRI on his brain and alleges that the Gadolinium poisoned him causing him to develop Nephrogenic Systemic Fibrosis and other maladies. Decedent's Complaint, at page 3.

¹¹ In her Complaint, Plaintiff asserts that Defendants injected Decedent with a contrast dye containing Gadolinium to perform a MRI on his brain, which poisoned him and caused him to develop Nephrogenic Systemic Fibrosis, other maladies, and ultimately to die. Plaintiff's Complaint, at page 4.

¹² *Laizure v. Avante at Leesburg, Inc.*, 109 So. 3d 752, 760-761, 2013 Fla. LEXIS 249, *20-22, 38 Fla. L. Weekly S 102, 2013 WL 535417 (Fla. 2013).

injury claim into one for wrongful death.”¹³ For this reason, a wrongful death action is often not considered a new “cause of action,” but rather only a “right of action” in a personal representative to enforce the decedent's claim for any personal injury that resulted in death.¹⁴ And, the Virgin Islands WDA itself refers to the action as a “right of action,” not a cause of action.¹⁵ As a result, Plaintiff's wrongful death action should not be considered to be a new “claim” under the MMA that is separate and distinct from Decedent's personal injury claim and that requires additional expert review.¹⁶

In addition, the Court notes that the purpose of the MMA's expert review requirement is to eliminate claims that lack merit,¹⁷ and this purpose is not effectuated by requiring that the same claim be submitted twice to the Committee simply because a decedent's personal representative is now seeking to enforce a previously submitted claim. The substitution of the parties itself has no bearing on the merits of the claim.

Moreover, under the MMA, the medical expert is charged simply with the task of determining “whether or not the defendant acted or failed to act within the appropriate standards of medical care as charged in the proposed complaint.” The expert is not charged with the task of issuing an opinion as to whether the claimant has presented facts that tend to prove each of the

¹³ *Id.*

¹⁴ See, e.g., *Wright v. Eli Lilly & Co.*, 65 Va. Cir. 485, 496, 2004 Va. Cir. LEXIS 295, *27 (Va. Cir. Ct. 2004).

¹⁵ See 5 V.I.C. § 76 (“‘Right of action’ (c) When the death of a person is caused by the wrongful act, negligence, default, or breach of contract or warranty of any person, ... and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued, the person ... that would have been liable in damages if death had not ensued shall be liable for damages as specified in this section notwithstanding the death of the person injured, although death was caused under circumstances constituting a felony”).

¹⁶ The Court also notes that the statute does require a claimant to file an amended proposed complaint with the Committee in the event the claimant develops new ailments caused by the malpractice described in the proposed complaint. Such a requirement would be overly burdensome on the claimants, the Committee, and the experts tasked to review such claims. Rather, the statute focuses on the conduct of the healthcare provider and only peripherally on the injuries that are sustained.”

¹⁷ See *Abdallah v. Callender*, 1 F.3d 141, 28 V.I. 416 (3d Cir. V.I. 1993).

elements of a negligence claim, for example.¹⁸ Likewise, while the MMA covers breach of contract claims,¹⁹ and the expert's opinion concerning whether the defendant acted within the appropriate standards of medical care could be relevant to the issue of breach of the contract, the expert is not empowered under the statute to determine whether there was a contract between the parties, whether the breach was material, or whether damages resulted from the breach.²⁰ Therefore, while a medical expert's opinion on the issue of whether the health care provider's wrongful acts actually caused a decedent's death could be helpful to determine whether a wrongful death action has merit, the MMA does not require the expert to generate an opinion on this issue of causation.

The Court finds that it has subject matter jurisdiction over the wrongful death claims in the Complaint because Decedent had already presented his negligent malpractice claims to the Committee in Case No. ST-11-CV-117 in compliance with the MMA. As a result, Defendants' motion to dismiss will be denied.

¹⁸ "[T]he foundational elements of negligence [are] (1) a legal duty of care to the plaintiff [and] (2) a breach of that duty of care by the defendant, (3) constituting the factual and legal cause of (4) damages to the plaintiff." *Lembach v. Antilles Sch., Inc.*, 2015 V.I. LEXIS 35, *10 (V.I. Super. Ct. Apr. 7, 2015).

¹⁹ Pursuant to 27 V.I.C. § 166(f), "'Malpractice' means any tort or breach of contract based on health care or professional services rendered, or which should have been rendered by a health care provider, to a patient."

²⁰ To state a claim for a breach of contract under Virgin Islands law, a plaintiff must establish: "(1) the existence of a contract between the parties; (2) that the defendant breached a material duty imposed by that contract; and (3) that damages resulted from the breach." *George v. Virgin Islands Lottery Comm'n*, 54 V.I. 533, 539 (V.I. 2010).

Hedlund v. GVI

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An Order consistent with this Opinion shall follow.

Dated: September 10, 2015

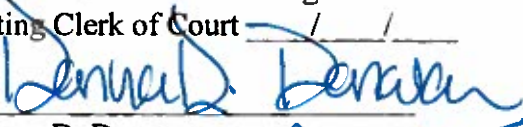
ATTEST: Estrella H. George
Acting Clerk of Court

by:

Donna D. Donovan

Court Clerk Supervisor


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS


9/11/2015