
MEMORANDUM OPINION

FACTS

¹ Darren John-Baptist, Esquire, is counsel for the Plaintiff. James L. Hymes III, Esquire, is counsel for Defendant Roy Lester Schneider Hospital. Dr. Robin L. Ellett was never served with the summons and complaint.

of the proposed Complaint on February 16, 2011. Plaintiff filed her Complaint with this Court on June 10, 2011.

DISCUSSION

Section 166i of the Medical Malpractice Act (“MMA”) sets out specific requirements that must be complied with in order to properly file a claim in the Superior Court against a health care provider.² First, a complainant must file a proposed complaint with the Committee by mailing a copy by registered or certified mail to the Commissioner of Health. The Committee may determine the type of medical expert needed to review the claim and arrange for the expert to review the medical records and legal papers submitted to the Committee.³ The expert then submits a written opinion on whether the defendant acted or failed to act within the appropriate standards of medical care. “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.”⁴ The Virgin Islands Supreme Court has previously determined that the MMA’s pre-filing requirements are jurisdictional, and therefore, if they are not followed, the Superior Court lacks subject matter jurisdiction over the claims.⁵

Further, the Virgin Islands code states:

(a) No 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 act, omission or neglect except that for such a claim against a health care provider for malpractice arising from a foreign object being left in a patient’s body the time within which the claim must be filed shall be computed from the time the plaintiff discovers the presence of the foreign object or discovers facts which would reasonably lead to the discovery of the presence of the foreign object; Provided, That any malpractice claim brought under this subchapter may be filed within two years of the last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the alleged act, omission or neglect; Provided further, That a toll of the statute of limitations shall operate 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.⁶

² VIRGIN ISLANDS CODE ANN. tit. 27, § 166i (1997).

³ See *id.* § 166i(d)(l).

⁴ *Brady v. Citron*, 55 V.I. 802 (V.I. 2011).

⁵ See *id.*; 27 V.I.C. § 166i(b).

⁶ 27 V.I.C. § 166d.

Generally, the 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 his injury and knows that the acts causing the injury constitute malpractice.⁷ There are two tolling doctrines that are potentially applicable to this case; the “fraudulent concealment” statutory exception and the equitable “discovery rule.”

This case turns on whether the statute of limitations began to run on February 26, 2009, the date of Mr. Frederick’s last treatment at RLSH, or whether a tolling doctrine applies. The date the Plaintiff received the autopsy report is not in dispute. If the Court finds that the statute of limitations was tolled until the Plaintiff received the autopsy report on June 12, 2009, then the Plaintiff has properly complied with the MMA’s procedural requirements. Otherwise, the Plaintiff’s claim is untimely.

A. THE FRAUDULENT CONCEALMENT TOLLING PROVISION DOES NOT APPLY BECAUSE THERE IS NO EVIDENCE THAT DEFENDANT ROY LESTER SCHNEIDER HOSPITAL ACTIVELY CONCEALED ITS NEGLIGENCE.

The “fraudulent concealment” tolling doctrine is a statutory construct. “[A] toll of the statute of limitations shall operate 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.”⁸ The relevant inquiry, then, is whether there is evidence that the defendant took affirmative steps to conceal the wrongful conduct and whether there was actual concealment.⁹

The Motion to Dismiss argues that the Plaintiff’s claims accrued on February 26, 2009, the last day that Mr. Frederick was treated at RLSH. Medical malpractice has a two-year statute of limitations, and RLSH argues that the Plaintiff had actual or constructive knowledge of the alleged malpractice on February 26, 2009, meaning that the statute of limitations had run on February 28, 2011 (because February 26, 2011 was a Saturday). The Plaintiff cites *Samuel v. Government*,¹⁰ for the proposition that the Plaintiff was in possession on the critical facts that Mr. Frederick had been hurt and that RLSH was allegedly responsible for the injury. The Plaintiff also cites *Samuel* for the idea that a claim accrues upon the awareness of actual injury or immediately after injury manifests itself, not upon the awareness that the injury constitutes a legal wrong.¹¹

The Plaintiff’s Opposition argues that she made several attempts to obtain an autopsy report, was repeatedly turned away in her attempts to obtain the report, and was only able to obtain the autopsy report on June 12, 2009. She argues that this was the first point that it was revealed that the husband died as a result of the blunt force trauma for which he originally went to the emergency room on February 24, 2009 and was discharged. The Plaintiff argues that a

⁷ See *Phillip v. Taylor*, 18 V.I. 437 (D.V.I. 1981).

⁸ 27 V.I.C. § 166d.

⁹ See *Simmonds*, 2009 WL 1117307; *Payne v. Gov’t*, 44 V.I. 213, 217 (Super. Ct. 2002).

¹⁰ 48 V.I. 620, 630 (D.V.I. App. Div. 2006)

¹¹ *Id.* at 631.

tolling of the statute of limitations occurred because the healthcare provider had actual knowledge of negligence and failed to disclose it to the patient. The Plaintiff argues that the proper date upon which the statute of limitations began to run is the day the Plaintiff received the autopsy report, June 12, 2009.

RLSH replies that the fraudulent concealment exception does not apply in this case because there was no affirmative and independent act of concealment that would divert or mislead the plaintiff from discovering the injury. Further, RLSH argues that there is no evidence of actual concealment of the alleged malpractice.

The Court agrees with RLSH. The statutory tolling for fraudulent concealment does not apply in this case. There is no evidence of actual concealment, nor is there evidence that RLSH took affirmative steps to conceal. The only fact that hints at this is the delay in the autopsy report, particularly given that the autopsy was done on March 2, 2009. The delay in giving the Plaintiff the autopsy report does not rise to the level required by the statute's tolling provision. Additionally, the Plaintiff has not alleged that she was misled into thinking there was no claim when there was one. For these reasons, the Court finds that the statute of limitations is not tolled by fraudulent concealment.

B. THE EQUITABLE DISCOVERY RULE DOES NOT APPLY BECAUSE FREDERICK KNEW OF THE DECEDENT'S INJURY WHEN IT OCCURRED.

In the Virgin Islands, application of the equitable "discovery rule" tolls the statute of limitations when the injury or its cause is not immediately evident to the victim."¹²

The 'polestar' of the discovery rule is not the plaintiff's actual knowledge of injury, but rather whether the knowledge was known, or through the exercise of reasonable diligence, knowable to the plaintiff The question arises whether a plaintiff's discovery of the actual, as opposed to the legal, injury is sufficient to trigger the running of the statutory period . . . We have in the past stated that a claim accrues . . . upon awareness of actual injury, not upon awareness that this injury constitutes a legal wrong.¹³

Applying Virgin Islands law, the Third Circuit ruled the discovery rule inapplicable when a plaintiff knew or should have known that ongoing symptoms or issues are not normal.¹⁴ Further, a delay in receiving medical records must be "significant and unreasonable" to justify application of the discovery rule to toll a statute of limitations.¹⁵

¹² *Warner v. Ross*, 164 F. App'x 218, 220 (3d Cir. 2006) (citing *Joseph v. Hess Oil*, 867 F.2d 179, 182 (3d Cir.1989)).

¹³ *Simmonds v. Gov't*, CIV.A. 2003/0137A, 2009 WL 1117307, at *6 (D.V.I. App. Div. Apr. 22, 2009).

¹⁴ *Warner*, 164 F. App'x at 220.

¹⁵ See *Espinosa v. Gov't*, 20 V.I. 78 (Terr. Ct. 1983).

The Plaintiff argues that the discovery rule applies because she had no way to know that the decedent's death was due to medical malpractice until she received the autopsy report. Although she knew the decedent was in the hospital and discharged two days prior to his readmittance and death, the Court agrees that the Plaintiff may not have known that she had a legal claim until she received the autopsy report. However, the Supreme Court has made clear that the statute of limitations begins to run when the actionable injury occurs and the plaintiff is aware of the injury's probable cause, not when a plaintiff learns that an injury is actionable or constitutes malpractice.¹⁶ Further, Virgin Islands case law has implied that delays in receiving medical records, absent some kind of prejudice, are not enough to equitably toll a statute of limitations.

In *Payne v. Government of the Virgin Islands*, the most factually similar case to the one at hand, Payne gave birth to her child and an employee of the hospital told her that tests performed on the baby for heart murmurs were negative. Fearing something was wrong, Payne brought the baby back to the hospital on July 1, 1998, but was told that nothing was wrong and to take the baby home. On July 2, 1998, Payne again returned to the hospital with the baby and the baby died while at the hospital on that same day.¹⁷ The Court determined that

[a] review of the record indicates that Plaintiffs requested the medical records on August 12, 1998, and on October 26, 1998, and they received them on October 30, 1998. The Court does not view that time period as such a significant or unreasonable delay under the circumstances so as to have a negative prejudicial impact on Plaintiffs' claim and warrant equitable tolling of the statute of limitations.¹⁸

The Territorial Court in *Payne* found that the delay in receiving the records was not enough of a delay to equitably toll the statute of limitations.

In *Espinosa v. Government of the Virgin Islands*, the Plaintiff's seven-year-old son died of pneumonia two days after she had taken him to the hospital.¹⁹ The Plaintiff later tried to retrieve his medical records but was unsuccessful for some time.²⁰ The court in *Espinosa* rejected the contention that the delay in sending Espinosa the autopsy reports equitably tolled the statute of limitations.²¹

In *Samuel v. Government of the Virgin Islands*, the Plaintiff had a cyst removed from her arm and had subsequent discoloration and swelling that her doctor assured her were normal.²² After the complications continued, Samuel got a second opinion and was told that the post-surgery procedure was handled improperly. The District Court ultimately rejected Samuel's

¹⁶ See *United States v. Kubrick*, 445 U.S. 111, 118-23 (ruling that a medical malpractice claim accrues at the time a plaintiff becomes aware of the injury and its probable cause, not when the plaintiff knows the injury also resulted from malpractice); see also *Samuel v. Gov't*, 48 V.I. 620 (D.V.I. App. Div. 2006).

¹⁷ See *Payne*, 44 V.I. at 213.

¹⁸ See *id.*

¹⁹ See *Espinosa* 20 V.I. at 78.

²⁰ See *id.*

²¹ *Id.*

²² *Samuel v. Gov't*, 48 V.I. 620 (D.V.I. App. Div. 2006).

contention that the statute of limitations should be tolled because she did not know there was malpractice until she received a second opinion on her condition. The court explained that Samuel knew or should have known that the issues she was having with her arm were not normal, despite the doctor's contention.

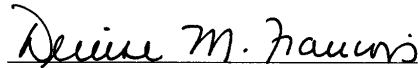
Similarly, in *Warner v. Ross* the plaintiff experienced numbness after having a wisdom tooth removed. The numbness never went away, and the Third Circuit found that the "discovery rule is inapplicable here because Warner knew or should have known that her ongoing pain and numbness were not normal side effects of the extraction procedure."²³

In the present case, the delay between the Plaintiff's request for the autopsy report and when she actually received the autopsy report does not create an equitable tolling situation. First, under the Supreme Court's rule, the statute of limitations began to run at the time the injury occurred: in this case, on the day of the decedent's second hospital visit and his death. The statute of limitations began to run on that day because the Plaintiff became aware of the injury and its probable cause on that day. Because the statute of limitations began to run on February 26, 2009, when the Plaintiff received the autopsy report on June 12, 2009, she still had roughly twenty (20) months to file her medical malpractice claim. With the overwhelming weight of case law against tolling, and with ample time still available in which to bring her claim, this Court finds that an equitable tolling pursuant to the discovery rule does not apply to this case.

CONCLUSION

Frederick knew or should have known that the hospital had some part in her husband's death when he died on February 26, 2009. As the discovery rule and the fraudulent concealment tolling provision do not apply, the Court finds that the statute of limitations began to run on February 26, 2009, and expired on February 28, 2011. The Complaint in this matter was filed on June 10, 2011, after the statute of limitations had elapsed. Therefore, the Court lacks subject matter jurisdiction over this matter, and the Court will grant the Motion to Dismiss.

DATED: February 14, 2014


DENISE M. FRANCOIS
Judge of the Superior Court
of the Virgin Islands

ATTEST:
ESTRELLA H. GEORGE
Acting Clerk of the Court

BY: 
LORI BOYNES-TYSON
Court Clerk Supervisor 2/18/14

²³ *Warner v. Ross*, 164 F. App'x 218, 220 (3d Cir. 2006).