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IN THIS ISSUE

The Supreme Court of Appeals of West Virginia recently issued an opinion in State ex rel. PrimeCare v. Faircloth emphasizing the importance of the pre-suit notice requirements set forth in the West Virginia Medical Professional Liability act, West Virginia Code § 55-7B-6. The Court's decision emphasized the importance of plaintiffs' compliance with these requirements and made clear the folly of considering said requirements as mere formalities, and the subject matter jurisdiction implications arising therefrom.

Subject Matter Jurisdiction in the Context of Pre-Suit Notice Requirements for West Virginia Medical Professional Liability Act Cases – A Review of *State ex rel. PrimeCare Medical of West Virginia, Inc. v. Faircloth, et al.*

ABOUT THE AUTHOR

Bernard S. Vallejos is a Member of Farrell, White & Legg PLLC in Huntington, West Virginia. His practice focuses on defense of medical malpractice, products liability, workplace injury (deliberate intent) and mass/toxic tort litigation. He is particularly knowledgeable about underground coal mining litigation, having traveled underground on numerous occasions for machine and site inspections in a litigation context. He is active in the Defense Trial Counsel of West Virginia, currently serving a second three-year term as a Member of that organization's Board of Governors after serving as the former Chairman of its Medical Liability Committee. He was named the first ever Young Lawyer of the Year by the Defense Trial Counsel of West Virginia in 2014. He has been selected for numerous consecutive years for inclusion in The Best Lawyers in America, and also has been recognized for multiple years as a Rising Star by West Virginia Super Lawyers. He has co-authored, with Tamela J. White, the annual supplement for two book chapters published by the American Bar Association and BNA Books regarding agencies regulating pharmaceutical and medical device manufacturers and the state regulatory scheme for pharmaceuticals. He can be reached at bsv@farrell3.com.

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Constance A. Endelicato
Vice Chair of Newsletters
Wood Smith Henning & Berman
cendelicato@wshblaw.com

Parties in medical professional liability cases in West Virginia have engaged in a number of legal battles regarding the pre-suit notice requirements set forth in West Virginia Code § 55-7B-6. These often revolve around the necessity of the Notice of Claim and Screening Certificate of Merit mandated by this statute, relative to the allegations pled in a Complaint that was filed before plaintiff served these materials. The Supreme Court of Appeals of West Virginia in *State ex rel. PrimeCare Medical of West Virginia, Inc. v. Faircloth, et al.*, ___ W. Va. ___, 835 S.E.2d 579 (2019) ("*PrimeCare*") recently addressed these requirements, emphasizing the importance of plaintiffs' compliance with them and making clear the folly of considering said requirements as mere formalities.

The Estate of Cody Grove, plaintiff in *PrimeCare* originally sued a correctional officer, Officer Zombro, and the Regional Jail Authority in the Circuit Court of Berkeley County. *Id.* at 583. Plaintiff alleged that "Mr. Grove was able to commit suicide because Officer Zombro failed to conduct one or more 'safety checks' on Mr. Grove." *Id.* Subsequently, plaintiff moved to amend its Complaint to add PrimeCare Medical of West Virginia, Inc. ("PrimeCare"), a health care provider, as a defendant, asserting medical professional liability against it. *Id.* The Circuit Court of Berkeley County granted plaintiff's Motion, but plaintiff failed to serve a Notice of Claim and Screening Certificate of Merit prior to filing its Amended Complaint. *Id.* at 584. PrimeCare moved to dismiss the Amended Complaint, prompting the Circuit Court to instruct plaintiff to serve notice under the West Virginia Medical Professional Liability Act ("MPLA"). *Id.* Following (deficient) service of a purported notice, the Circuit Court denied PrimeCare's Motion to Dismiss. *Id.* PrimeCare subsequently filed a Writ of Prohibition. *Id.* at 585.

The Supreme Court of Appeals of West Virginia ("Court") engaged in a detailed examination of the chronology of events leading up to the filing of the Motion to Dismiss. *Id.* at 583-85. Of particular importance, the Court pointed out the defectiveness of the "Notice of Medical Malpractice Claim/Certificate of Merit" that plaintiff e-filed after being instructed by the Circuit Court to do so, because it was not served properly. *Id.* at 584, n. 9; *see also* W. Va. Code § 55-7B-6(b) ("At least thirty days prior to the filing of a medical professional liability action against a health care provider, the claimant ***shall serve by certified mail, return receipt requested***, a notice of claim on each health care provider the claimant will join in litigation." (***emphasis supplied***)). The Court also noted that plaintiff did not provide a screening certificate of merit, but instead relied upon the statutory exception that such was unnecessary because the theory of liability was well-established and there was no need for expert testimony to establish the standard of care. *Id.*, n. 10; *see also* W. Va. Code § 55-7B-6(c) ("Notwithstanding any provision of this code, if a claimant or his or her counsel,

believes that no screening certificate of merit is necessary because the cause of action is based upon a well-established legal theory of liability which does not require expert testimony supporting a breach of the applicable standard of care, the claimant or his or her counsel, shall file a statement specifically setting forth the basis of the alleged liability of the health care provider in lieu of a screening certificate of merit.").

The Court began its analysis with the standard applicable to a writ of prohibition, i.e., that "'[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. W. Va. Code, 53-1-1.'" *Id.* at 585, *citing* Syl. Pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W. Va. 314, 233 S.E.2d 425 (1977). The Court proceeded to explain that a statutorily required notice is jurisdictional: "'Generally the want of notice required by statute is a jurisdictional defect which cannot be cured.' 4 Cooley on Taxation (4th Ed.), sec. 1590, p. 3135." *Id.*, *citing Gates v. Morris*, 123 W. Va. 6, 11, 13, S.E.2d 473, 476 (1941). Upon this predicate, the Court ultimately agreed with PrimeCare that "the MPLA's pre-suit notice requirements are jurisdictional and, therefore, that failure to provide such notice deprives a circuit court of subject matter jurisdiction." *PrimeCare*, ___ W. Va. ___, 835 S.E.2d at 585. The Court clarified that where a petition raises a jurisdictional challenge based "upon a determination of fact, prohibition will not lie", but if "the challenge 'rests upon the determination of a question of law, prohibition will lie if the trial court has exceeded its jurisdiction or usurped a jurisdiction that in law does not exist.'" *Id.*, *citing Lewis v. Fisher*, 141 W. Va. 151, 154-55, 171 S.E. 106, 107 (1933). In light of the question of law, the standard of review was *de novo*. *PrimeCare*, ___ W. Va. ___, 835 S.E.2d at 585.

The Court found that the MPLA is clear as to the pre-suit notice requirements, to wit: "[***N***]***o person may file*** a medical professional liability action against any health care provider ***without complying with the provisions of*** [W. Va. Code § 55-7B-6]." W. Va. Code § 55-7B-6(a) (***emphasis supplied***). Consequently, the Court held in a new syllabus point: "The pre-suit notice requirements contained in the West Virginia Medical Professional Liability Act are jurisdictional, and failure to provide such notice deprives a circuit court of subject matter jurisdiction." Syl. Pt. 2, *PrimeCare*, ___ W. Va. ___, 835 S.E.2d 579.

In attempting to avoid the pre-suit notice requirements set forth in the MPLA, plaintiff in *PrimeCare* advanced the argument that it was not asserting claims for medical malpractice and/or that involved medical professional liability, but rather that it was alleging "non-medical" claims. *Id.* at 586. The Court disagreed, finding that the MPLA is clear on this issue, as well: "'Medical professional liability' is '***any liability for damages resulting from the death*** or injury of a person for ***any tort*** or breach of contract ***based on health care services rendered, or which should have been rendered***, by a

health care provider or health care facility to a patient.'" *Id.*, *citing* W. Va. Code § 55-7B-2(i) (***emphasis supplied***). Moreover, "medical professional liability" includes "'other claims that may ***be contemporaneous to or related to*** the alleged tort or breach of contract or otherwise provided, ***all in the context of rendering health care services***.'" *Id.* The Court specifically noted that the prior holding in *Boggs v. Camden-Clark Mem'l Hosp. Corp.*—that the MPLA does not apply to other claims that may be contemporaneous to or related to the alleged act of medical professional liability—is no longer correct, as said holding was based on a prior version of the MPLA that no longer is in effect. *Id.*, n. 18. The Court also reviewed the broad definitions of "health care", "health care provider" and "health care facility" set forth in the MPLA. *Id.* at 586-587, *citing* W. Va. Code §§ 55-7B-2(e), (f) and (g).

The Court reviewed the assertions in the Amended Complaint, which alleged liability on the part of PrimeCare for: (1) failing to properly assess Mr. Grove's potential for suicide; (2) failing to properly house and monitor Mr. Grove in light of his (allegedly) known potential for suicide; and (3) failing to properly train, monitor, and discipline Officer Zombro, for his alleged failure to monitor Mr. Grove. *PrimeCare*, ___ W. Va. ___, 835 S.E.2d at 587. The Court concluded that the allegations constituted a claim for "medical professional liability" because the alleged acts/omissions were "'health care services rendered, or which should have been rendered by a health care provider or health care facility to a patient.'" *Id.*, citing W. Va. Code § 55-7B-2(i). With respect to plaintiff's claim that the Amended Complaint also alleged that PrimeCare violated various state constitutional provisions, the Court responded that the MPLA applies to any "alleged tortious acts or omissions . . . committed by a health care provider within the context of the rendering of 'health care' . . . regardless of how the claims have been pled." *PrimeCare*, ___ W. Va. ___, 835 S.E.2d at 587, *citing* Syl. Pt. 4, in part, *Blankenship v. Ethicon, Inc.*, 221 W. Va. 700, 656 S.E.2d 451 (2007).

Upon concluding that the MPLA applied to all claims alleged against PrimeCare, the Court next turned to the issue of whether plaintiff properly served a Notice of Claim pre-suit upon PrimeCare, as required by the MPLA. The Court found that plaintiff failed to comply with its statutory obligation because it did not serve a Notice of Claim upon PrimeCare (1) by certified mail, return receipt requested and (2) thirty days prior to filing its Amended Complaint. *PrimeCare*, ___ W. Va. ___, 835 S.E.2d at 588-89. Rather, plaintiff filed the Amended Complaint before it served PrimeCare with any purported Notice of Claim. *Id.* Consequently, it was clear that the Circuit Court lacked subject matter jurisdiction over the claims asserted by plaintiff against PrimeCare.

Finally, the Court addressed what action the Circuit Court should take upon the Court's remand of the civil action. In short, once the

Circuit Court was aware that plaintiff failed to comply with the pre-suit notice requirements set forth in the MPLA, what should it have done? The Court focused on the fact that post-suit notice was not proper pursuant to the plain language of the MPLA, and that the Circuit Court's attempt to provide plaintiff the opportunity to provide post-suit notice was improper, holding in another new syllabus point: "A circuit court has no authority to suspend the MPLA's pre-suit notice requirements and allow a claimant to serve notice after the claimant has filed suit. To do so would about to a judicial repeal of W. Va. Code § 55-7B-6." *Id.* at Syl. Pt. 5. The Court also emphasized that Rule 12(h)(3) of the West Virginia Rules of Civil Procedure mandates dismissal of any action wherein it appears that the court lacks subject matter jurisdiction. *Id*. at 589. Therefore, the Court granted PrimeCare's writ, remanded the action to the Circuit Court, and instructed it to enter an Order dismissing plaintiff's claims against PrimeCare.

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