STATE OF VERMONT

SUPERIOR COURT Addison Unit	CIVIL DIVISION Docket No. 189-11-16 Ancv
Michael Quinlan, Plaintiff v. Five-Town Health Alliance, Inc., Sean May, Defendants	

DECISION ON MOTION TO DISMISS

This case represents Plaintiff's second attempt to avoid the clear operation of the combination of 14 V.S.A. § 1492 and 12 V.S.A. § 1042. In his first case ("*Quinlan I*"), he filed suit two weeks before the statute of limitations ran, but failed to file the certificate of merit required by § 1042. When, after the statute had run, Defendants filed a Motion to Dismiss based on that failure, he first filed a Petition to Clerk for Automatic 90-Day Extension of the Statute of Limitations Under 12 V.S.A. § 1042(d), Complaint, and Certificate of Merit in this case ("*Quinlan II*"). He then filed an opposition in *Quinlan I*. Subsequently, the court dismissed *Quinlan I*, "without prejudice to any party's rights or arguments in [*Quinlan II*]." Now, Defendants have moved to dismiss *Quinlan II*, arguing that the filing of the Petition and Complaint came too late to save Plaintiff's claims from the statute of limitation. For the reasons below, the court grants the motion.[1]

While the procedural postures differ, this is not the first court to confront the question of a late-filed certificate of merit under the relatively new regime created by 12 V.S.A. § 1042. In *McClellan v. Haddock*, no. 482-5-15 Cncv, (Vt. Super. Ct. Nov. 30, 2015), the plaintiff filed a timely complaint, without a certificate of merit; after the statute had run, she moved to amend to add the certificate, and asked the court to consider her motion as a petition under § 1042(d). In

[1] Plaintiff responded to the dismissal of *Quinlan I* with a Motion for Reconsideration, asking that the court consider its filing of the complaint and certificate of merit in *Quinlan II* as an Amended Complaint in *Quinlan I*. The reasoning below equally supports denial of that Motion.

Joseph v. Dartmouth-Hitchcock Clinic, no. 28-6-16 Gicv, 2016 WL 6661784 (Vt. Super. Ct. Aug. 29, 2016), the plaintiff filed a timely complaint, without a certificate of merit; after the statute had run, he filed a § 1042(d) petition and an amended complaint, to which he attached a proper certificate. Most recently, in *Dufresne v. Kaplan*, no. 748-9-16 Cncv, (Vt. Super. Ct. Jan. 10, 2017), the plaintiff filed a timely complaint, without a certificate of merit; after the statute had run, she filed a certificate of merit and a motion to grant an automatic extension of the statute of limitations.

The three courts responded differently. In *McClellan*, the court denied the motion to amend, and concluded that the 90-day extension must be requested before the limitation period runs, not after. In *Joseph*, the court dismissed the original complaint, and ruled that the amended complaint could not be considered as such, but would instead be considered as a newly filed complaint; it then concluded that the petition, while filed after the statute had run, had nevertheless tolled the limitation period, making the otherwise late-filed "amended complaint" timely. In *Dufresne*, the court allowed the late-filed certificate to cure the defect, and so save the case from the running of the statute.

Tempting though it might be to distinguish the various cases on their procedural postures, the question ultimately remains the same: to secure the tolling of the limitation period allowed by 12 V.S.A. § 1042(d), must a medical malpractice plaintiff file either (1) a complaint properly supported by a certificate of merit or (2) a petition to extend the limitations period before that period has run? As the court was drafting this opinion, our Supreme Court delivered the definitive answer to this question. On appeal from the dismissal in *McClellan*, the Court first held that a medical malpractice complaint filed without a certificate of merit is fatally defective, and cannot be amended to cure that defect. *McClellan v. Haddock*, 2017 VT 13, ¶¶ 13-20, 25. The Court went on to conclude that any request to extend the statute of limitations must precede both the filing of a complaint and the running of the statute. *Id*, ¶ 27. These conclusions mandate the dismissal of this case.[2]

[2] The statute allows one exception to mandatory dismissal: "[t]he failure to file the certificate of merit as required by this section shall be grounds for dismissal of the action without prejudice, except in the rare instances in which a court determines that expert testimony is not required to establish a case for medical malpractice." 12 V.S.A. § 1042(e). That exception clearly does not apply here. Plaintiff has not even suggested that this should be one of those "rare instances"; nor do the allegations of the Complaint suggest a breach so obvious that no expert testimony would be required. *See Senesac v. Associates in Obstetrics and Gynecology*, 141 Vt. 310, 313 (1982) (expert testimony required in medical malpractice cases except "where the violation of the standard of medical care is 'so apparent to be comprehensible to the lay trier of fact' ").

To save his claims, Plaintiff makes two arguments not advanced in any of the cases above. He argues first that application of 12 V.S.A. § 1042 to dismiss his claims with prejudice violates the Common Benefits Clause of the Vermont Constitution and the Equal Protection Clause of the 14th Amendment to the United States Constitution. He argues next that 12 V.S.A. § 558 tolls the statute of limitations, allowing this action to be filed within one year of the dismissal of *Quinlan I*. These arguments, while creative, nevertheless fail to withstand more than passing scrutiny.

The first argument founders on the observation that contrary to Plaintiff's assertion, § 1042 treats all litigants the same; it requires the dismissal of all complaints filed without a certificate of merit without prejudice. 12 V.S.A. § 1042(e). That some claims may thereafter be time-barred is a function not of a § 1042 dismissal but of the statute of limitations. Moreover, the class of claimants whose claims may then be time-barred is self-selecting, consisting solely of those who through ignorance or negligence have failed to avail themselves of the protection of the automatic extension provision. This is clearly not a suspect class; nor is there any fundamental right at issue here. Thus, there need only be a rational basis for the legislature's limitation of actions. *See In re Letourneau*, 168 Vt. 539, 553 (1998) ("Absent a suspect classification or a violation of a fundamental right, a legislative classification does not deny equal protection of the laws if it is rationally related to a legitimate public purpose."). The court has no difficulty discerning a rational basis for (a) statutes of limitations in general, (b) the wrongful death statute in particular, or (c) the workings of § 1042; each is sufficiently obvious to require no further elucidation here.

Plaintiff's revival argument fares no better. This argument rests on the assertion that a dismissal under § 1042 is jurisdictional. That assertion, in turn, rests on an interpretation of the term, "jurisdictional," far broader than the purpose of § 558(a)(2) allows. The proper understanding of the "lack of jurisdiction of the subject matter" prong of § 558(a)(2) is that it revives only those claims that have been dismissed due to having been commenced in the wrong court. Claims that have been dismissed on the merits, in contrast, fall beyond the ambit of the statute. *See Leno v. Meunier*, 125 Vt. 30, 36 (1965) (construing earlier version of § 558(a)(2)) ("Generally, statutes providing in substance that if an action is brought within the period of limitations and is disposed of on a ground not affecting the merits a new action may be begun within a stated time thereafter have been held applicable to suits dismissed or disposed of because of lack of jurisdiction."). One need look no further than the caption of § 1042 to divine

the legislature's intent in this regard. Dismissal of a case for failure to file a certificate of merit is a dismissal on the merits, not for lack of jurisdiction. *Cf. Plante v. Charlotte Hungerford Hosp.*, 12 A.3d 885, 893 (Conn. 2011) ("we agree . . . that a plaintiff's failure to comply with the requirements of [Connecticut's certificate of merit statute] does not destroy the court's subject matter jurisdiction over the claim; it does not affect the power of the court to hear her medical malpractice action" (internal quotation marks and citation omitted)).[3] Thus, the saving provision of § 558(a)(2) does not avail Plaintiff.

The only question that remains is whether the dismissal required here should be with or without prejudice. The certificate of merit statute clearly provides that any dismissal shall be without prejudice. 12 V.S.A. § 1042(e). The operation of the statute of limitations, however, would make any subsequent filing futile. *See McClellan*, 2017 VT 13, n.10. Thus, 14 V.S.A. § 1492 requires that this matter be dismissed with prejudice.

ORDER

Defendants' Motion to Dismiss is **granted**. All claims in the matter are **dismissed with prejudice**. The clerk will enter judgment for Defendants.

Electronically signed on March 06, 2017 at 05:42 PM pursuant to V.R.E.F. 7(d).

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[3] There is an irony in the court's discovery of this authority. The court's research path began with its review of Plaintiff's authorities. It bears observation that the first several of these are completely unhelpful; a careful reading of each reveals that any pertinence to the determination of whether a dismissal under § 1042 is jurisdictional is only superficial. The one case Plaintiff cites that is on point in fact refutes his argument. At page 11 of his Opposition, Plaintiff cited *Bennett v. New Milford Hospital, Inc.*, 12 A.3d 865 (2011), for the proposition that because a dismissal for lack of a certificate of merit "is a dismissal for lack of jurisdiction," "§ 558 applies, extending the statute of limitations by one year from when [*Quinlan I*] was dismissed under § 1042." A close reading of *Bennett*, however, makes clear that Connecticut's certificate of merit requirement is not jurisdictional. 12 A.3d at 881-83. In dicta, the court goes on to suggest that in some cases, Connecticut's "accidental failure of suit statute" might supply relief. 12 A.3d at 884; this is the quote on which Plaintiff pins his hopes.

In the very next sentence, the court suggests, "[f]or additional discussion of this particular relief, see the discussion in the companion case also released today, *Plante v. Charlotte Hungerford Hospital*, 300 Conn. 33, 12 A.3d 885 (2011)." Plaintiff evidently failed to follow the Connecticut court's advice; had he done so, he might have abandoned his reliance on *Bennett*. The *Plante* court made clear that a claimant whose case is dismissed for failure to include a certificate of merit finds no relief in the dismissal "for want of jurisdiction" prong of the Connecticut statute. 12 A.3d at 893. Instead, "any relief for the plaintiffs in this case must lie under the matter of form provision of [the Connecticut statute]." *Id.* Unfortunately for Plaintiff, the Vermont statute has no provision even remotely analogous to the "matter of form" language of the Connecticut statute. *Compare* 12 V.S.A. § 558(a) *with* C.G.S.A. § 52-592(a). Thus, his argument founders on his own authority.

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Samuel Hoar, Jr.
Superior Court Judge