

IN THE SUPREME COURT OF THE STATE OF MONTANA
SUPREME COURT CAUSE NO. DV 21-0390

RANDY LAEDEKE, and DARLA PRENN, for
THE ESTATE OF LILA M. LAEDEKE,

Plaintiffs/Appellants,

v.

BILLINGS CLINIC,

Defendant/Appellee.

APPELLEE'S RESPONSE BRIEF

On appeal from the Montana Thirteenth Judicial District Court, In and for the
County of Yellowstone, Cause No. DV-18-0323

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STATEMENT OF THE ISSUES

Whether the District Court properly granted Billings Clinic's motion to dismiss because Appellants did not submit their application to the Montana Medical Legal Panel before the statute of limitations on their medical malpractice claim had run.

Whether the statute of limitations began running again and expired because Appellants failed to accomplish service of the complaint on Billings Clinic within six months of filing.

STATEMENT OF THE CASE

This appeal stems from Appellants' failure to bring their medical malpractice claim within the statute of limitations. Following the death of their mother in February 2014, Appellants waited three years to probate their mother's estate and over three years to properly file their complaint with the Montana Medical Legal Panel ("MMLP"). After the MMLP proceeding, Appellants filed a complaint in District Court against Billings Clinic on March 5, 2018, alleging medical malpractice in the treatment and care of their mother, Lila Laedeke. Another three years after that, they served their complaint on Billings Clinic.

On May 19, 2021, the Thirteenth Judicial District Court in Yellowstone County granted Defendant Billings Clinic's Motion to Dismiss Plaintiffs' Claims because the claims were barred by the applicable statute of limitations. Dkt. 24 (the

“Order to Dismiss”) (attached as Exhibit D). The District Court correctly held the statute of limitations was not tolled, and Appellants’ claim accrued by February 25, 2014. While the District Court did not address the six-month service deadline, Appellants’ failure to serve Billings Clinic with the complaint within six months of filing also cause the clock on the statute of limitations to begin running again and expire. Ultimately, Appellants ask this Court to decide whether they have properly complied with statutory deadlines.

STATEMENT OF FACTS

Appellants are Darla Prenn and Randy Laedeke, the children of Lila Laedeke and co-personal representatives of Lila’s estate. In February 2014, Lila underwent a partial toe amputation at the Billings Clinic. Dkt 1 at 2-3 (attached as Exhibit A). She was discharged home on February 13, 2014. *Id.* She died on February 15, 2014, and underwent an autopsy on February 16, 2014. Ex. A to Appellants’ Op. Br. The autopsy was performed by a private forensic pathologist, Dr. Thomas Bennett, who issued his autopsy report on February 25, 2014. *Id.* He listed the probable cause of death as “Hypertensive and atherosclerotic cardiovascular disease.” *Id.* Appellants have brought medical malpractice claims against Billings Clinic for an alleged failure to treat Lila’s cardiovascular disease. By the date of the autopsy report, February 25, 2014, Appellants possessed the facts they relied upon to bring their medical malpractice claim.

Just shy of the three-year limitations period, on February 16, 2017, Appellant Randy Laedeke submitted a request for review to the Montana Medical Legal Panel (“MMLP”). Appellants’ Op. Br., 4. In the request for review, Mr. Laedeke – a former Billings attorney appearing *pro se* – claimed that Billings Clinic failed to diagnose and treat Lila Laedeke’s heart disease. Dkt. 6 at Ex. A (attached as Exhibit B). Despite his request for review, Mr. Laedeke was not legally authorized to bring a claim on behalf of his mother because Appellants had declined to probate Lila Laedeke’s estate in the three years that had passed since her death. Mr. Laedeke subsequently applied to the Thirteenth Judicial District Court in Yellowstone County to be appointed as personal representative of his mother’s estate. The court issued Letters of Informal Appointment of Personal Representative on March 3, 2017. *Id.* Mr. Laedeke then submitted a complete application for review to the MMLP on April 3, 2017. *Id.*

The MMLP issued its decision on January 29, 2018. Plaintiffs filed their complaint on March 5, 2018, and waited another three years, until March 5, 2021, before serving the complaint and summons on Defendant Billings Clinic. Over eight years have now lapsed since Lila Laedeke’s death.

STANDARD OF REVIEW

Appeals from orders granting or denying motions to dismiss are reviewed *de novo*. *Meagher v. Butte-Silver Bow City-Cty.*, 2007 MT 129, ¶ 13, 337 Mont. 339,

160 P.3d 552. A motion to dismiss under Rule 12(b)(6) admits the allegations in the well-pled complaint and the court must consider the complaint in the light most favorable to the plaintiff. *Tally Bissell Neighbors, Inc. v. Eyrie Shotgun Ranch, LLC*, 2010 MT 63, ¶ 15, 355 Mont. 387, 228 P.3d 1134. This Court's role is to review whether the District Court's conclusions of law were correct. *Blackburn v. Blue Mountain Women's Clinic*, 286 Mont. 60, 68, 951 P.2d 1 (1997) (citing *Boreen v. Christensen*, 267 Mont. 405, 408, 884 P.2d 761, 762 (1994)).

SUMMARY OF THE ARGUMENT

The Montana Code provides a distinct statute of limitations for medical malpractice claims. *See* Mont. Code Ann. § 27-2-205. It also requires a prospective plaintiff to first file their claim with the MMLP prior to filing a complaint in District Court. Mont. Code Ann. § 27-6-701. Appellants failed to properly file their MMLP claim before the statute of limitations had run. Though Appellants wish to avail themselves of the *discovery doctrine* to subvert the applicable limitations period, the District Court properly held that Appellants' claim had accrued by the time they received Lila's autopsy report on February 25, 2014. Appellants did not submit a complete MMLP application until April 3, 2017, past the three-year statute of limitations.

Appellants raise numerous new unsubstantiated allegations in their appeal brief and the Court should therefore ignore them as hearsay and otherwise lacking

support in the record. The Court should limit its review to well-pleaded allegations found in the complaint. *Stowe v. Big Sky Vacation Rentals, Inc.*, 2019 MT 288, ¶ 20, 398 Mont. 91, 454 P.3d 655 (appellate review of Rule 12(b)(6) motion to dismiss is limited to well-pleaded allegations in the complaint).

Furthermore, Appellants failed to serve Billings Clinic with the complaint within six months of filing and the statute of limitations began running again and expired thereby serving as an additional basis for finding Appellants' claims time barred. Accordingly, this Court should affirm the Order to Dismiss.

ARGUMENT

I. PLAINTIFF'S CAUSE OF ACTION ACCRUED BY FEBRUARY 25, 2017, AT THE LATEST.

The District Court correctly dismissed Appellants' claims because they were time-barred. The analysis was straightforward.

Medical negligence claims currently have a two-year statute of limitations. Mont. Code Ann. § 27-2-205 (eff. April 29, 2015). Before section 27-2-205 was amended in 2015, the statute of limitations was three years. *See* Mont. Code Ann. § 27-2-205 (eff. April 29, 2015), *amended by* 2015 Mont. Laws, ch. 368. The Court ruled the three-year statute of limitations should apply because Appellants' cause of action accrued before the amendment.

To determine when Appellants' cause of action accrued, the District Court looked no further than Appellants' own admissions. In their response to Billings

Clinic's motion to dismiss, Appellants represented, "Plaintiff's case was filed...well before the three years ran from the time the cause of death was known when the preliminary autopsy report was written by Dr. Bennett on February 25, 2014." Dkt. 21 at 3 (attached as Exhibit C). The District Court then found "the applicable statute of limitations would require the action to commence no later than February 25, 2017." Order to Dismiss, 3.

Appellants argue that they did not fully understand the facts constituting their medical negligence claims until *after* they had filed their application with the MMLP. Their argument is non sequitur. Appellants would have no basis to file an application with the MMLP unless they believed medical negligence had occurred. Furthermore, Appellants admitted they suspected medical negligence as early as the date of Dr. Bennett's autopsy report. Appellants' argument is a mere subversion of the statute of limitations.

II. APPELLANTS' FEBRUARY 2017 MMLP APPLICATION DID NOT TOLL THE STATUTE OF LIMITATIONS, NOR DID BILLINGS CLINIC'S ULTIMATE DISCLOSURE OF MEDICAL RECORDS.

A. The February 2017 MMLP application was incomplete.

The statute of limitations had run by February 25, 2017, unless it was tolled. In medical negligence actions, the statute of limitations is tolled when a claimant files their Application with the MMLP. Mont. Code Ann. § 27-6-702. Appellants' Application was not submitted until April 3, 2017, after the limitations period had

run. Appellants dispute the date they submitted their Application, and contend that it was submitted on February 17, 2017, when Randy submitted a “request to review” to the MMLP. The District Court rejected Plaintiffs’ argument because it was contrary to the MMLP Rules of Procedure.

The MMLP Rules of Procedure specify that a claim is only submitted when a complete Application is received. The Rules of Procedure for the Montana Medical Legal Panel apply to “all proceedings before the Montana Medical Legal Panel established by the Act.” MMLP Rule 2; see also *In Re Rules of Procedure of the MMLP Order*, Supreme Court of Montana (May 7, 2013). MMLP Rule 6(h) says:

An Application made by a Claimant who is not also the Patient will not be considered complete and will not be transmitted until that legal documentation is provided to the office of the Director showing that the Claimant is the legally authorized representative of the Patient.

Appellants did not submit a complete application until April 3, 2017. They could not submit an application before then because they had not been appointed as personal representatives of Lila’s estate. Only after they submitted proof that they were authorized to bring a claim on behalf of Lila’s estate was their application complete and transmitted. The Court correctly found that the three-year limitations period had run before their MMLP submission, or by February 25, 2017.

In his response to the motion to dismiss, Plaintiff Randy Laedeke argued that his “request for review,” submitted to the MMLP on February 17, 2017, was

sufficient to toll the statute of limitations. He contends that Montana is a “Notice Filing State.” Mr. Laedeke is likely thinking of “notice pleading,” which is recognized in Montana with a novel concept he appears to have come up with called “notice filing.” Both the MMLP Rules of Civil Procedure and Montana law do not support Appellants’ argument.

B. Appellants’ review of medical records during the MMLP process did not constitute a new discovery nor did it toll the statute of limitations.

Appellants rely on two provisions in section 27-2-205, MCA to support their argument that the limitations period had not passed. The first is the discovery provision and the second is the tolling provision, both of which can be found below:

Action in tort or contract for injury or death against [a medical provider], based upon alleged professional negligence or for rendering professional services without consent or for an act, error, or omission, must...be commenced within 2 years after the date of injury or within 2 years **after the plaintiff discovers or through the use of reasonable diligence should have discovered the injury**, whichever occurs last, but in no case may an action be commenced after 5 years from the date of injury. However, **this time limitation is tolled for any period during which there has been a failure to disclose any act, error, or omission upon which an action is based and that is known to the defendant** or through the use of reasonable diligence subsequent to the act, error, or omission would have been known to the defendant.

Mont. Code Ann. § 27-2-205(1)(emphasis added). Appellants’ arguments are contradictory and have been squarely rejected by the Montana Supreme Court.

Appellants first argue they did not discover Billings Clinic's negligence until they reviewed Lila's medical records during the MMLP process. This argument contradicts the facts. On the one hand, Appellants admit they initiated the MMLP process because they believed Billings Clinic was negligent. In their brief, they state, "February 16, 2017 PR Randy Laedeke fax filed a medical negligence claim against [Billings Clinic] for failure to diagnose and treat Lila's coronary heart disease and congestive failure." Appellant's Op. Br., 4. On the other hand, Appellants take the contradictory position that "the statute of limitations is tolled under the first discovery rule in 27-2-205, until plaintiff discovered the injury or cause of death and that the injury was caused by Defendant." *Id.*, 14. Either Appellants possessed facts sufficient to support a complaint with the MMLP or they did not. Their conduct suggests it was the former.

Appellants' argument that the tolling provision should apply contradicts Montana case law. The tolling provision of section 27-2-205 does not apply to the statute of limitations at all. Rather, it tolls the 5-year statute of repose in medical malpractice actions. *See Blackburn*, 286 Mont. at 75 ("§ 27-2-205(1), MCA, applies exclusively to toll the five-year statute of repose under certain limited circumstances, we additionally overrule *Major*, *Monroe*, and *Wisher*, to the extent they suggest that the statutory provision may apply to toll the statute of limitations in medical malpractice cases."); *see also Wilson v. Brandt*, 2017 MT 290, fn. 3,

389 Mont. 387, 406 P.3d 452 (“The second sentence of § 27-2-205, MCA, allows tolling ‘for any period during which there has been a failure to disclose any act, error, or omission upon which an action is based.’ We held in a prior case that this sentence applies exclusively to toll the five-year statute of repose and does not apply to the statute of limitations.”).

Next, a failure to obtain or review medical documents does not toll the statute of limitations. *Major v. N. Valley Hosp.*, 233 Mont. 25, 30, 759 P.2d 153 (1988) overruled on other grounds by *Blackburn*, 286 Mont. at 75. In *Major*, the Montana Supreme Court rejected the argument that Appellants mirror in their Opening Brief. There, the patient died on March 20, 1982, from delayed medical treatment. *Major*, 233 Mont. at 27. Two months later, her mother contacted counsel to discuss a medical malpractice claim. *Id.* She requested her daughter’s medical records in July 1982 but did not take possession of those records until two years later, or in October 1984. *Id.* It was not until April 17, 1985 that she filed an MMLP application. *Id.* The Court found that the tolling provision of section 27-2-205 is the codification of the fraudulent concealment doctrine. *Id.* at 31. Where the appellant was “cognizant of the fact of the injury complained of” at the time of the patient’s death, fraudulent concealment could not occur. *Id.* Summarizing the *Major* case, the Supreme Court has said, “her lack of knowledge of the facts

contained in the medical record did not prevent her from discovering the injury at issue in the case.” *Wilson v. Brandt*, ¶ 20 (citing *Major*, 233 Mont. at 30).

In this case, Appellants were aware of the injury for which they submitted their MMLP Application long before they ever reviewed medical records. Appellants could have requested their mother’s medical records pursuant to Section 50-16-522, MCA, regardless of when they were appointed Personal Representative of the Estate. Mont. Code Ann. § 50-16-522. They cannot now claim the injury was concealed from them until they received the records.

III. APPELLANTS’ CLAIMS ARE ALSO BARRED BECAUSE THEIR FAILURE TO SERVE THE COMPLAINT WITHIN SIX MONTHS OF FILING RESTARTED THE CLOCK ON THE STATUTE OF LIMITATIONS.

The District Court did not address this argument in its Order granting Billings Clinic’s motion to dismiss, but it serves as additional support for the dismissal of Appellants’ claims. The statute of limitations began running again after Appellants failed to serve their complaint on Billings Clinic within six months of filing as required by Section 25-3-106, MCA. The dismissal of Appellant’s claims is separately supported by the failure to accomplish service within six months of filing the complaint.

At this point, over eight years have lapsed since Appellants’ cause of action accrued, but the statute of limitations was tolled for a portion of that time. The statute of limitations is tolled during the MMLP review process and for 30 days

after a decision is rendered. Mont. Code Ann. § 27-6-702. The statute of limitations is also tolled when a complaint is filed, thereby commencing an action. *Webb v. T.D.*, 275 Mont. 243, 250, 912 P.2d 202, 207 (1996). However, the statute of limitations begins running again in a medical malpractice action if the plaintiff fails to accomplish service within six months of filing.

The statute of limitations was no longer tolled on September 5, 2018, six months after Appellants filed their complaint. Appellants' claims may be subject to the pre-2015 statute of limitations, but they did not file their claim with the court until 2018. In 2018, the applicable deadline for service of process was six months.

A plaintiff in a medical malpractice action shall accomplish service within 6 months after filing the complaint. If the plaintiff fails to do so, the court, on motion or on its own initiative, shall dismiss the action without prejudice unless the defendant has made an appearance. Mont. Code Ann. § 25-3-106 (eff. April 29, 2015). The relevant dates are again:

- Date of Death: February 15, 2014
- Date of Autopsy: February 25, 2014
- Personal Representative Appointed March 3, 2017
- Application for Review of Claim: April 3, 2017
- Decision by MMLP: February 1, 2018
- Complaint filed: March 5, 2018

- Date Required for Service: September 5, 2018
- Date of Service: March 5, 2021

Appellants waited three years after filing to serve their complaint and summons. Their failure to timely effect service restarted the clock on the statute of limitations on September 5, 2018. Any other interpretation of the Legislature's requirement that a medical malpractice complaint is served within six months would render the statute futile. If the statute of limitations does not restart after the deadline for service has passed, plaintiffs would have a second bite at the apple. By way of example, if the limitations period begins to run only after a dismissal without prejudice, plaintiffs could ignore the six-month service deadline and re-file after dismissal, thereby earning *another* six months for service of process. The effect of this interpretation would be contrary to legislative intent and render the statute requiring service of a medical malpractice complaint within six months of filing meaningless.

Where a Montana statute is similar to its federal counterpart, the Court may look to federal case law for guidance in its interpretation. *Morrow v. Monfric, Inc.*, 2015 MT 194, ¶ 8, 380 Mont. 58, 354 P.3d 558. Federal courts have held that dismissal without prejudice of a time-barred claim is, in effect, a dismissal with prejudice. Many federal courts have faced this conundrum in interpreting Federal Rule of Civil Procedure 4, which says, in relevant part:

(m) Time Limit for Service. If a defendant is not served within 90 days after the complaint is filed, the court--on motion or on its own after notice to the plaintiff--must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1), or to service of a notice under Rule 71.1(d)(3)(A).

Fed. R. Civ. P. 4(m).

Courts tasked with interpreting Rule 4(m) have dismissed an otherwise time-barred claim with prejudice. *See Cardenas v. City of Chicago*, 646 F.3d 1001, 1007-08 (7th Cir. 2011); *Zapata v. New York City*, 502 F.3d 192, 197 (2d Cir. 2007). While the federal rule requires the court to conduct a “good cause” analysis for a plaintiff’s failure to serve, expiration of the statute of limitations is not considered good cause. 1 Moore, *Moore's Federal Practice - Civil* § 4.82[2] (2020). Importantly, Montana’s medical malpractice statute does not require a good cause analysis. Instead, it mandates that the court shall dismiss an action if it is not served within six months. Mont. Code Ann. § 25-3-106.

Appellants’ failure to accomplish service within the six months allowed in medical malpractice cases renders their claims time barred. By the time Appellants served the complaint on Billings Clinic, two and a half years had passed since the statute of limitations began running again. Without tolling, Appellants waited seven years to begin prosecuting their claims. With tolling, Appellants waited over

four and a half years to begin prosecuting their claims. Their delay contradicts the purpose of the statute of limitations.

The policy underlying the bar imposed by statutes of limitations is, at its roots, one of basic fairness. As we have stated in the past, our system of jurisprudence is designed to achieve substantial justice through application of the law after the parties have had an opportunity to fully present both sides of a controversy. The failure to bring an action within a reasonable time is clearly not conducive to a full presentation of the evidence nor a search for the truth. Consequently, the law will not reward the plaintiff who sleeps on his or her rights to the detriment of a defendant.

Ereth v. Cascade Cty., 2003 MT 328, ¶ 16, 318 Mont. 355, 81 P.3d 463. The Montana Supreme Court recognizes the importance of applying procedural bars “regularly and consistently.” *State v. Redcrow*, 1999 MT 95, ¶ 34, 294 Mont. 252, 980 P.2d 622. Otherwise, a defendant would face an indefinite risk of lawsuit while her ability to defend against the claim diminished over time. *See, e.g., Christian v. Atl. Richfield Co.*, 2015 MT 255, ¶ 13, 380 Mont. 495, 358 P.3d 131 (excessive delay does not promote the full presentation of evidence or the search for truth); *Cassidy v. Finley*, 173 Mont. 475, 480, 568 P.2d 142, 144 (1977) (facts concerning stale claims become obscured by lapse of time, defective memory, or death or removal of witnesses); *Roberts v. Nickey*, 2002 MT 37, ¶ 20, 308 Mont. 335, 43 P.3d 263 (there exists risk of prejudice to defendant if statute of limitations not applied to stale child support obligations). Montana statute, legislative intent,

and fairness dictate that Appellants' claims were appropriately dismissed because the statute of limitations had expired.

CONCLUSION

The Court should affirm the District Court's Order to Dismiss. Even though Appellants possessed the facts for which they eventually brought their MMLP claim in 2014, Appellants submitted an MMLP application after the statute of limitations on their claim had run in 2017. Additionally, they fail to provide any support to toll the statute of limitations, and their failure to accomplish service within six months restarted the statute of limitations.

RESPECTFULLY SUBMITTED this 31st day of May, 2022.

CROWLEY FLECK PLLP

By: /s/David P. Whisenand
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APPENDIX

<u>Document Name/Date/Docket No.</u>	<u>Exhibit</u>
Complaint (Mar. 5, 2018) (Dkt. 1)	A
Brief in Support of Billings Clinic’s Rule 12(b)(6) Motion for Summary Judgment (Mar. 23, 2021) (Dkt. 6)	B
Response and Brief Opposing Motion to Dismiss (Apr. 30, 2021) (Dkt. 21).....	C
Order Granting Defendant’s 12(b)(6) Motion to Dismiss (May 19, 2021) (Dkt. 24).....	D

CERTIFICATION OF COMPLIANCE

I certify that *Appellee's Response Brief* is double spaced, proportionately spaced, typed in Times New Roman, has a typeface of 14 points and contained 3,739 words, excluding the caption, certificate of compliance and certificate of service.

/s/David P. Whisenand

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of May, 2022, a copy of the foregoing document was served on the following persons by the following means:

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/s/David P. Whisenand

CERTIFICATE OF SERVICE

I, David Patrick Whisenand, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Response to Motion to Dismiss to the following on 05-31-2022:

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Electronically Signed By: David Patrick Whisenand
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