

IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE
MIDDLE DIVISION

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LESLIE NARD,)
)
 Claimant,) Claim No. T20071190
)
 vs.)
)
 STATE OF TENNESSEE,)
) Regular Docket
 Defendant.)

ORDER GRANTING SUMMARY JUDGMENT AND DISMISSING CLAIM

This matter came before Robert N. Hibbett, Commissioner and judge of the facts and law, upon the State's Motion for Summary Judgment. Neither party has requested oral argument on the motion; therefore the Tribunal shall rule based on the submitted record. The State argues the claim should be dismissed because (1) the claim is barred by the applicable statute of limitations, (2) Claimant is unable to establish that the State breached its duty of care, (3) Claimant cannot establish causation, (4) Claimant cannot establish negligence with respect to her medical care, and (5) Claimant failed to comply with the mandatory provisions of the Health Care Liability Act. Because the claim was not filed with the Division of Claims Administration within the applicable limitations period, the claim must be dismissed.

CLAIMANT'S ALLEGATIONS AND DATES IN COMPLAINT

The Claimant filed her claim with the Division of Claims Administration on April 30, 2007. The claim was subsequently transferred to the Middle Grand Division Claims Commissioner on July 30, 2007. The Claimant filed a formal Claim on August 16, 2007 which alleged the following:

2. During the period of Ms. Nard's incarceration, she underwent a bilateral modified mastectomy for breast cancer on November 4, 2004. Thereafter, she was treated for breast reconstruction and thereafter, had her breast implants reconstructed during the period of her incarceration February 4, 2004 through the date of her release from the Tennessee Department of Correction on May 10, 2006. During her care and post-operative course of treatment, because of the lack of necessary care afforded by the Tennessee Women's Prison and the State, she was required to have these implants removed. They became infected and she has suffered from severe disfigurement and scarring as a result of these procedures.

While the Claimant does not appear to specify the statutory basis for her claim, it appears to be based upon medical negligence and the negligent care, custody and control of her person while she was in state's custody. These are personal injury claims and the applicable statute of limitations is Tenn. Code Ann. § 28-3-104:

(a) The following actions shall be commenced within one (1) year after the cause of action accrued:
(1) Actions for libel, for injuries to the person, false imprisonment, malicious prosecution, breach of marriage promise;

Therefore, because the claim was filed April 30, 2007, the negligence or discovery of the negligence would have had to have occurred in the year preceding otherwise the claim is time barred.

The Claimant has agreed with the following material facts submitted by the State as they relate to the limitations period:

1. Claimant underwent a bilateral mastectomy and breast reconstruction surgery in November, 2004, at Nashville General Hospital.
2. Claimant was released on parole on May 10, 2006.

The Claimant disputes other material facts as they relate to the limitations period.

ANALYSIS OF CLAIMANT'S ARGUMENT AGAINST SUMMARY JUDGMENT

The Claimant has argued in her Response to Defendant's Motion for Summary Judgment that:

The "discovery rule"; "equitable estoppel"; "fraudulent concealment"; and the fact that the claimant was of "unsound mind", tolled the statute of limitations in the case at bar.

It is apparent that the negligence did not occur during the year prior to the filing of the claim because there is nothing in the submitted record that speaks to any negligent act during that period. She, in fact, was not in custody of the State for

the overwhelming majority of that period. It is probative to look to the

Claimant's deposition concerning the years 2006 and 2007:

Q. What made you decide to file a lawsuit and speak to Mr. Carter in '06 to '07?

A. Mainly because of the loss of my breasts, and the trouble I was having with my implants, and the scarring and scar tissue and numbness.

Q. Did anything happen in the year 2006 that you believe was negligence on the part of the state?

A. I can't remember that. Just that I have had a lot of complaints and I don't know how far they went or nothing really in 2006. I know I had problems but I can't recall what it was.

Q. You have no idea what problems you had in '06?

A. No, sir.

Q. Is there any particular reason why you cannot recall that?

A. Just a lot of things I can't remember and I get confused on.

Q. Do you recall anything that happened in '07 that you believe the State was negligent?

A. '07?

Q. I believe you just said you don't remember '06, right?

A. Right.

Q. Do you remember anything that happened in '07 that you believe was negligence on behalf of the State?

A. '07? No, sir.

Dep. of Claimant, pages 47-48.

It is clear from the Claimant's statements that she is not claiming any negligence on the part of the State in 2006 or 2007. What the Claimant is arguing is that the State's negligence was discovered during the applicable timeframe. The Claimant insinuates that State officers or employees misled her and concealed

her injury from her discovery so that she did not timely file her claim. However, she has not pointed to anything in the record to show the State fraudulently concealed its negligence or her injury. She has also failed to show when or where the State misled her into not discovering negligence or injury.

The Tribunal now looks to when the Claimant purports to have discovered the negligence. Again, we look to the Claimant's deposition:

Q. Okay. Now, Mrs. Nard, can you explain what your claims against the State is for?

A. It's for the loss of my breasts while I was incarcerated.

Q. Could you be more specific?

A. When I entered into admissions, they had found a lump and they failed to get me to have a mammogram for five months solid. Missing appointments repeatedly.

Dep. of Claimant, page 13.

Q. Okay. So are you saying that the act, so to speak, that you were suing the State over is the State's failure to get you to your appointments on time in 2004?

A. Yes.

Q. Is there any other act or conduct that you accuse the State of doing that was negligent or that harmed you?

A. Yes, sir. They didn't get me to any therapies or -- they weren't keeping the appointments. I didn't have the therapy that was requested. Daily showers, cleansing, schedule dressings changes, moisturizers, lotions, et cetera, which caused my wounds not to heal in the proper time. They also put these expanders in, which should have been - - I should have had chemo first, the chemo first, the chemo first. It caused it to be delayed because it was

backwards. They did the procedures backwards, to my understanding.

Dep. of Claimant, pages 14-15.

Q. Okay. So when you filed the complaint in 2007, you were stating that you don't believe or you're not sure that your implants had been removed; is that correct?

A. At that time they hadn't been removed. I do know that.

Q. Okay. So when you filed the complaint, you were suing for conduct or negligence of the State that occurred in 2004 or 2005; is that correct?

A. That's when it started. And then it took on the second part, which was 2006, 2007, on to this point I guess.

Q. you were paroled in May of 2006; is that right?

A. Yes, Sir.

Dep. of Claimant, page 33.

In looking at the Claimant's deposition in its best light in support of her claim, it appears she is saying the State was guilty of ongoing negligence concerning the removal of her breasts in 2004 and her aftercare. Nothing in the record indicates that State employees concealed their negligence or mislead her so she would not discover the State's alleged negligent acts.

Furthermore, the Tribunal has read the Claimant's deposition and nothing from her answers indicates that the Claimant is of unsound mind or is

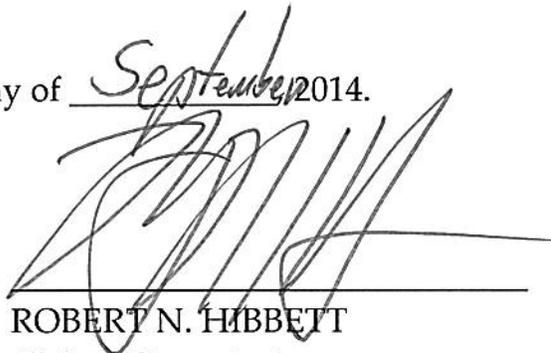
intellectually disabled. An IQ score of 84, in and of itself, does not prove the Claimant suffers from an unsound mind.

Based on the foregoing, the Tribunal finds the claim is barred by the statute of limitations and, therefore, the Tribunal lacks jurisdiction over the claim. The Tribunal further finds that because the claim is time barred then it is not necessary to rule on the remaining issues that are the basis for the State's Motion for Summary Judgment.

IT IS, THEREFORE, ORDERED:

1. That the claim is respectfully dismissed.
2. That the court costs, if any, are taxed to the Claimant.

ENTERED this 17 day of September, 2014.



ROBERT N. HIBBETT
Claims Commissioner
Sitting as the Trial Court of Record

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing document has been served upon the following parties of record:

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This 22nd of Sept., 2014.



PAULA SWANSON
Administrative Clerk
Tennessee Claims Commission