Circuit Court for Baltimore County
Case No. C-03-CV-22-001277

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 393

September Term, 2023

JANE DOE

v.

UNIVERSITY OF MARYLAND FACULTY PHYSICIANS, INC.

Berger,
Nazarian,
Beachley,

JJ.

Opinion by Beachley, J.

Filed: May 14, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

On June 8, 2020, appellant Jane Doe filed a complaint against appellee University of Maryland Faculty Physicians, Inc. ("FPI") and its employee, Sheena Carr,[1] in the Circuit Court for Baltimore City. This complaint was dismissed on October 26, 2020, based on improper venue. Appellant refiled the same complaint in the Circuit Court for Baltimore County on April 1, 2022. The second complaint was dismissed as barred by the statute of limitations. Appellant noted this timely appeal and presents five questions for our review, which we have rephrased and consolidated to a single question:[2]

[1] Ms. Carr was never served and is not a party to this appeal.

[2] Appellant presented the following questions in her brief:

I. Did the [c]ourt err when it failed to find that [a]ppellant timely filed her claim in Baltimore City rather than Baltimore County and refiled in Baltimore County as permitted by law?

II. Did the [c]ourt err when it failed to find that the refiled case was timely filed pursuant to the Court of Appeals COVID-19 Administrative Orders Suspending the Statutes of Limitations and Other Deadlines?

III. Did the [c]ourt err when it failed [to] address that [a]ppellant had [pled] sufficient facts [i]n [s]upport of Count I - Negligence Versus Appellee For Negligent Hiring, Firing and Supervision?

IV. Did the [c]ourt err when it failed to address that [a]ppellant's [c]laims of Intrusion Upon Seclusion (Count II) and Respondeat Superior (Count IV) should not have been dismissed as Defendant Carr's conduct of accessing medical records was within the scope of her employment?

V. Did the [c]ourt err when it dismissed [a]ppellant's Breach of Contract [c]laim (Count III) as the parties had a contract for medical services, of which it is both expressly and impliedly warranted that patient Protected Health Information should not be improperly disclosed?

Did the circuit court err in dismissing appellant's second complaint as barred by the statute of limitations?

We discern no error and therefore affirm.

BACKGROUND[3]

Appellant was a patient of FPI, who created and stored medical records related to her treatment. On April 26, 2018, appellant contacted FPI, reporting that "she believed her confidential and protected health information was inappropriately accessed." On May 10, 2018, FPI provided confirmation to appellant that her medical records had been inappropriately accessed by Ms. Carr. Appellant claimed that the unauthorized access caused her "severe emotional and psychological distress."

On June 8, 2020, appellant filed a complaint in the Circuit Court for Baltimore City against FPI and Ms. Carr alleging negligence, intrusion upon seclusion, and breach of contract. FPI moved to dismiss based on improper venue, which the court granted on October 26, 2020, after appellant failed to respond to the motion.

Appellant filed an essentially identical complaint in the Circuit Court for Baltimore County on April 1, 2022. FPI again moved to dismiss, this time raising limitations and failure to state a claim as defenses. Appellant responded that her complaint was timely, relying on the administrative orders issued by Chief Judge Barbera during the COVID-19 pandemic and a tolling exception enunciated in *Bertonazzi v. Hillman*, 241 Md. 361 (1966).

[3] Because this appeal stems from the granting of a motion to dismiss, our factual recitation assumes the truth of the allegations in the complaint.

On March 29, 2023, the court granted FPI's motion to dismiss based on the statute of limitations. Appellant then noted this timely appeal.

DISCUSSION

Appellant presents two arguments. First, she argues that, because the Baltimore City complaint was dismissed due to improper venue, the statute of limitations was tolled under the holding in *Bertonazzi*. Second, she argues that the administrative orders issued by Chief Judge Barbera during the COVID-19 pandemic tolled the statute of limitations until March 28, 2022.[4]

FPI responds that the holding in *Bertonazzi* was mooted by the passage of Rules 2-101 and 2-327, neither of which are applicable to the present case. FPI additionally asserts that the COVID-19 administrative orders only tolled statutes of limitations for the four months that the courts were closed to the public, not the entire two years during which the Judiciary operated under emergency procedures.[5]

We review the grant of a motion to dismiss *de novo*, "assum[ing] the truth of all well-pleaded facts in the complaint and all reasonable inferences drawn therefrom." *Matter of Hosein*, 484 Md. 559, 571-72 (2023) (citing *Hancock v. Mayor of Balt.*, 480 Md. 588, 603 (2022); *Wheeling v. Selene Fin. LP*, 473 Md. 356, 374-75 (2021)).

[4] Specifically, appellant avers that "Pursuant to the [a]dministrative [o]rders, [a]ppellant would have 240 days from March 28, 2022 to refile this case, even if it had not already been filed." When asked at oral argument, appellant's counsel could not explain how he calculated 240 days.

[5] The parties also present arguments concerning whether appellant's complaint failed to state a claim. Because we hold that appellant's complaint was not timely filed, we need not address this issue.

Appellant first argues that "[t]his case falls exactly into the holding of the Supreme Court of Maryland" in *Bertonazzi v. Hillman*, 241 Md. 361 (1966). In *Bertonazzi*, the plaintiff filed suit in July 1963 in Baltimore County after consulting a map and incorrectly concluding that the defendant lived in Baltimore County. *Id.* at 363. The plaintiff's complaint was dismissed on September 4, 1963, for improper venue because the defendant in fact lived in Baltimore City. *Id.* at 364. "An hour or two later, [the plaintiff's] lawyer refiled the suit in Baltimore City." *Id.* Because the statute of limitations had expired in August 1963, and the plaintiff failed to prove estoppel, the trial court granted the defendant's motion for summary judgment. *Id.* The Supreme Court noted that the plaintiff's "difficulty would not arise in the federal system" or in most other states, because those jurisdictions allow the transfer of cases or have saving statutes allowing for refiling within a certain period of time. *Id.* at 365. The Court concluded that, by filing suit within the limitations period, albeit in the wrong venue, the statute of limitations was tolled from the date of filing to the date of dismissal (44 days). *Id.* at 366. The Court noted that "[t]he effort to seek redress in a court of law against [the defendant] was made in good faith, although inartificially both on the facts and under the law." *Id.* at 365.

In *Antar v. Mike Egan Ins. Agency, Inc.*, 209 Md. App. 336 (2012), this Court examined the continuing precedential value of *Bertonazzi*. Writing for our Court, Judge Moylan explained that "the *Bertonazzi* exception might never have come to pass if Maryland at the time had actually had a saving statute." *Id.* at 348. The *Bertonazzi* opinion itself suggests that its exception was necessitated by Maryland's lack of both a saving

statute and statute providing for the transfer of cases without refiling. *Bertonazzi*, 241 Md. at 365. "Significantly, both of those deficiencies . . . have since been remedied." *Antar*, 209 Md. App. at 353. Since 1992, Maryland has had both a rule allowing for transfer of venue (Rule 2-327) and a rule allowing for the refiling of a case initially filed in the wrong venue (Rule 2-101). *Id.* at 353-54. Judge Moylan noted that the Supreme Court had subsequently "'confined [*Bertonazzi*] to the special circumstances which culminated in the filing of the suit in the wrong county[,]'" thus "effectively administer[ing] euthanasia to *Bertonazzi*." *Id.* at 348, n.3 (emphasis removed) (quoting *Walko Corp. v. Burger Chef Sys., Inc.*, 281 Md. 207, 214 (1977)). Noting that "*Bertonazzi* has, in effect, been reduced to a lifeless hypothetical[,]" the Court expressed frustration that *Bertonazzi* "still haunts us as it is regularly and promiscuously invoked . . . as a proffered 'Open Sesame' for every conceivable variety of tolling exception[,]" "remain[ing] a chronic nuisance[.]" *Id.* at 350, n.4. Judge Moylan concluded that "we discern extremely little, if any at all, precedential vitality left in *Bertonazzi v. Hillman*. Its ghost should be laid to rest." *Id.* at 354-55.

We see no reason to diverge from Judge Moylan's thorough dissection of *Bertonazzi* in *Antar*. Thus, appellant's reliance on *Bertonazzi* is misplaced and her only recourse is Rule 2-327 or Rule 2-101. Appellant did not request a transfer of venue to Baltimore County under Rule 2-327,[6] and the circuit court did not abuse its discretion in not doing so

[6] Rule 2-327(b) provides: "If a court sustains a defense of improper venue but determines that in the interest of justice the action should not be dismissed, it may transfer the action to any county in which it could have been brought." In appellant's opening brief she states, "For whatever reason, the previous associate handling this case did not respond to the motion to dismiss for improper venue, probably because she thought it would be

sua sponte. Rule 2-101[7] simply does not apply to appellant's case because appellant's initial, timely complaint was not "filed in a United States District Court or a court of another state" as provided in subsection (b), nor was the complaint dismissed for lack of subject matter jurisdiction by the District Court of Maryland as contemplated by subsection (c) of Rule 2-101. Moreover, even if Rule 2-101 did apply (which it does not), the Rule provides that the complaint must be refiled "within 30 days after the entry of the order of dismissal." Appellant did not file the Baltimore County complaint within that 30-day savings period. In addition, when her complaint was dismissed in Baltimore City on October 26, 2020, she had until April 26, 2021, to file a timely complaint within the

transferred instead of being dismissed, or that she would simply refile the case in Baltimore County." We shall refrain from commenting on what the "previous associate" did or did not do.

[7] Rule 2-101 provides, in pertinent part:

> (b) **After Certain Dismissals by a United States District Court or a Court of Another State.** Except as otherwise provided by statute, if an action is filed in a United States District Court or a court of another state within the period of limitations prescribed by Maryland law and that court enters an order of dismissal (1) for lack of jurisdiction, (2) because the court declines to exercise jurisdiction, or (3) because the action is barred by the statute of limitations required to be applied by that court, an action filed in a circuit court within 30 days after the entry of the order of dismissal shall be treated as timely filed in this State.
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> (c) **After Dismissal by the District Court of Maryland for Lack of Subject Matter Jurisdiction.** If an action is filed in the District Court of Maryland within the period of limitations prescribed by Maryland law and the District Court dismisses the action for lack of subject matter jurisdiction, an action filed in a circuit court within 30 days after the entry of the order of dismissal shall be treated as timely filed in the circuit court.

applicable three-year statute of limitations. It is therefore apparent that appellant had no need to invoke the savings provision of Rule 2-101, and her late filing on April 1, 2022, "was a consequence of [her] own failure to exercise ordinary diligence[.]" *See Antar*, 209 Md. App. at 351 n.6 (emphasis removed) (quoting *Kumar v. Dhanda*, 198 Md. App. 337, 349 (2011), *aff'd* 426 Md. 185 (2012)).

Appellant's second argument also fails. In her opening brief, appellant argues that the COVID-19 administrative orders tolled statutes of limitations for two years—from March 16, 2020, to March 28, 2022. She specifically asserts that she "would have 240 days from March 28, 2022 to refile this case."[8] However, in her reply brief, appellant acknowledges the Supreme Court's recent decision in *In the Matter of Hosein*, 484 Md. 559 (2023), and concedes that the administrative orders only tolled statutes of limitations for the four months that the courts were closed to the public, from March 16, 2020, to July 20, 2020. In an order issued on April 3, 2020 (two months before appellant filed her initial complaint in Baltimore City), Chief Judge Barbera ordered that "statutes of limitations[] shall be tolled or suspended, as applicable, effective March 16, 2020, *by the number of days that the courts are closed to the public* due to the COVID-19 emergency[.]" *Murphy v. Liberty Mutual Ins. Co.*, 478 Md. 333, 359 (2022) (emphasis added). An administrative order issued on May 22, 2020, further clarified that "'tolled or suspended by the number of days that the courts were closed' means that the days that the offices of the clerks of court were closed to the public (*from March 16, 2020 through July 20, 2020*) do not count

[8] *See* footnote 4, *supra*.

against the time remaining for the initiation of that matter[.]" Revised Administrative Order (May 22, 2020) (emphasis added), available at https://mdlaw.ptfs.com/awweb/pdfopener?md=1&did=29853 (https://perma.cc/T3KQ-J5S3); *see also Murphy*, 478 Md. at 362.

Thus, the COVID-19 administrative orders only tolled statutes of limitations for 126 days, plus an additional 15 days for those "cases with deadlines that were suspended during the closure of the court clerks' offices[.]" *Hosein*, 484 Md. at 574. Even under the best-case scenario for appellant, the administrative orders would have tolled appellant's case for 141 days.[9] Absent any tolling, the statute of limitations for appellant's claims would have expired on April 26, 2021 (three years after accrual). Even if we were to add the full 141 days to April 26, 2021, the statute of limitations would have expired on September 14, 2021. Because appellant filed her Baltimore County complaint more than six months after that date, on April 1, 2022, it was undoubtedly filed long after any potential expiration of the limitations period. As in *Walko Corp.*, appellant here failed to exercise ordinary diligence in the pursuit of her claims. *See* 281 Md. at 215 ("The unexplained delay in bringing a timely action here hardly bespeaks the 'ordinary diligence' required of one seeking to toll the statute of limitations.").

We conclude that the circuit court did not err in dismissing appellant's complaint.

[9] FPI argues that none of the COVID-19 tolling period applied to appellant's case because the statute of limitations did not expire *while* the courts were closed. Because we hold that the complaint was filed long after the maximum possible tolling period, we need not decide this specific issue.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.