ATTORNEY FOR APPELLANTS

Charles P. Rice
Murphy Rice, LLP
Mishawaka, Indiana

ATTORNEY FOR APPELLEES

Mallory Reider Inselberg
Eichhorn & Eichhorn, LLP
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Darren Woodcox and Elizabeth Woodcox, as Personal Representatives of the Estate of Dylan Woodcox,

Appellants-Plaintiffs,

v.

Anonymous Hospital, Anonymous M.D., and Anonymous N.P.,

Appellees-Defendants.

May 17, 2022

Court of Appeals Case No. 21A-CT-1565

Appeal from the Marion Superior Court

The Honorable Timothy W. Oakes, Judge

Trial Court Cause No. 49D02-2009-CT-31708

Friedlander, Senior Judge.

Statement of the Case

[1] Darren Woodcox and Elizabeth Woodcox ("the Woodcoxes"), as personal representatives of the estate of their infant son, Dylan Woodcox, appeal the trial

court's denial of their motions for summary judgment and declaratory judgment. We affirm.

Issues

[2] The Woodcoxes raise four issues, which we consolidate and restate as: whether the trial court erred in denying their motion for summary judgment and declaratory judgment.

[3] On cross-appeal, the Anonymous Hospital ("the Hospital"), the Anonymous M.D. ("the M.D."), and the Anonymous N.P. ("the N.P.") (collectively, "the Providers") raise one claim: whether the Woodcoxes' appeal should be dismissed.

Facts and Procedural History

[4] A final judgment has not yet been issued in this case, and we state the facts subject to further determination by the finder of fact. Dylan Woodcox was born on January 26, 2015, and he faced a number of medical challenges during his short life. He had been diagnosed with Tetralogy of Fallot, a serious heart condition. In addition, Dylan was fed through a nasogastric tube, which enters the nose and runs through the esophagus, terminating in the stomach.

[5] On April 11, 2015, Dylan was admitted to a hospital in South Bend, Indiana with symptoms of respiratory distress. His symptoms were so severe that he was transferred to the Hospital by helicopter that night, while Darren followed by car. Upon arrival at the Hospital, Dylan was placed in a cardiac intensive care unit. Hospital staff spoke with Elizabeth about Dylan's medical history.

[6] The Woodcoxes had taken Dylan to the Hospital for treatment in the past. The Hospital's admission documents noted that Dylan's parents were his legal guardians for purposes of consenting to proposed treatments.

[7] The next morning, Dylan's treatment team, which included the M.D., decided to replace Dylan's nasogastric tube with a nasal jejunal tube ("NJ tube"). An NJ tube is more intrusive than a nasogastric tube, extending from the nose to and through the stomach, terminating in the small intestine. The N.P. issued an order for the NJ tube, and Anonymous R.N. ("the R.N.") placed the tube in Dylan. Darren was present at the Hospital that morning, but the placement of the NJ tube was not discussed with him in advance. Darren signed a general consent form for medical treatment, but only after the NJ tube was placed. The Hospital does not seek a patient or guardian's individual consent for every aspect of a patient's care.

[8] The Woodcoxes allege that the R.N. incorrectly placed the NJ tube, perforating Dylan's intestines. He died on April 17, 2015, allegedly due to the perforation and resulting sepsis, despite later surgical intervention at the Hospital.

[9] On January 19, 2016, the Woodcoxes filed a proposed complaint with the Indiana Department of Insurance ("the DOI") alleging that the Providers committed medical malpractice. The case was assigned to a medical review panel ("the Review Panel"), which has not yet issued a decision.

[10] The parties exchanged discovery and took depositions, and in the process the Woodcoxes learned of the R.N.'s role in Dylan's treatment. On March 17, 2020, the Woodcoxes filed with the DOI an amended proposed complaint, adding the

R.N. as a defendant. The Woodcoxes also raised a new claim under 42 U.S.C. § 1983 against all proposed defendants, as well as a request for injunctive relief.

[11] On September 14, 2020, the R.N. filed with the trial court a joint petition for preliminary determination of law and motion for summary judgment. The R.N. asked the court to be dismissed from the case, claiming the statute of limitations had expired for the Woodcoxes' claims.

[12] On December 15, 2020, the Woodcoxes filed with the DOI a second amended proposed complaint, in which they no longer listed the R.N. as a defendant. They also eliminated their § 1983 claim. Instead, the Woodcoxes raised claims of medical malpractice and battery, as well as a request for declaratory judgment. They sought a declaration that the Providers' decision to place an NJ tube in Dylan fell outside the jurisdiction of the Review Panel because the Providers did not obtain informed consent from them prior to the procedure, and, in the absence of their consent, the Providers committed a battery on Dylan.

[13] On December 16, 2020, in response to the R.N.'s joint petition for preliminary determination of law and motion for summary judgment, the Woodcoxes filed with the trial court a "Counter-Claim for Declaratory Judgment, Battery, and Medical Malpractice" ("the Counter-Claim"), along with a cross-motion for preliminary determination, summary judgment, and declaratory judgment. Appellants' App. Vol. 2, pp. 57-58. The Woodcoxes asked the trial court: (1) to declare that the placing of the NJ tube without parental consent was a battery as a matter of law; (2) to further declare that the battery claim fell outside the

jurisdiction of the Review Panel; and (3) to award damages for the battery and the Providers' medical malpractice. The Woodcoxes conceded that the statute of limitations had expired as to their claims against R.N., but they claimed the Hospital remained vicariously liable for her actions.

[14] On March 17, 2021, the Providers filed a motion to dismiss the Counter-Claim. They argued that the Woodcoxes were in essence asking the trial court to decide the merits of their medical malpractice claim even though the Review Panel had exclusive jurisdiction over those claims until the Panel issued an opinion. The Providers also moved to strike certain exhibits the Woodcoxes had designated in their motion for summary judgment.

[15] On May 20, 2021, the trial court held a hearing on the parties' motions. The court subsequently granted R.N.'s motion for summary judgment, dismissing the Woodcoxes' claims against her. On July 9, 2021, the trial court, in a separate order, denied the Woodcoxes' motion for summary judgment and declaratory judgment and dismissed without prejudice their claims for declaratory judgment, battery, and medical malpractice. The court further denied as moot the Providers' motion to strike. In its conclusion, the court also stated, "The Court further finds there is no just reason for delay and expressly directs entry of Final Judgment, without prejudice . . . against Darren and Elizabeth Woodcox . . . ." Appellants' App. Vol. 2, p. 12. This appeal followed.

Discussion and Decision

I. Cross-Appeal Claim – Jurisdiction Over Appeal

[16] The Providers argue that this Court should not reach the merits of the Woodcoxes' appeal because their appeal is interlocutory in nature, and the Woodcoxes did not follow the process set forth in Indiana Appellate Rule 14 to pursue an interlocutory appeal. We disagree that dismissal is necessary.

[17] A party seeking review of denial of a summary judgment motion must ordinarily do so by way of interlocutory appeal. *Bd. of Trustees of Ball State Univ. v. Strain*, 771 N.E.2d 78 (Ind. Ct. App. 2002). But this Court has appellate jurisdiction in "all appeals from Final Judgments of Circuit, Superior, Probate, and County Courts" except for those appeals that go directly to the Indiana Supreme Court. Ind. Appellate Rule 5(A). A judgment is considered final if, among other circumstances:

> the trial court in writing expressly determines under Trial Rule 54(B) or Trial Rule 56(C) that there is no just reason for delay and in writing expressly directs the entry of judgment (i) under Trial Rule 54(B) as to fewer than all the claims or parties, or (ii) under Trial Rule 56(C) as to fewer than all the issues, claims or parties . . . .

Ind. Appellate Rule 2(H).

[18] Indiana Trial Rule 56(C) provides, in relevant part:

> A summary judgment upon less than all the issues involved in a claim or with respect to less than all the claims or parties shall be interlocutory unless the court in writing expressly determines that there is no just reason for delay and in writing expressly directs entry

> of judgment as to less than all the issues, claims or parties. The court shall designate the issues or claims upon which it finds no genuine issue as to any material facts.

[19] Here, the trial court expressly stated in its order that there was no just reason for delay and directed the entry of final judgment, albeit without prejudice, fulfilling the requirements of Trial Rule 56(C). The Providers argue, without citation to authority, that "the sole mechanism by which to seek appellate review of a court order on a preliminary determination under I.C. § 34-18-11-1 is through an interlocutory appeal pursuant to Ind. Appellate Rule 14." Appellees' Br. p. 14. They also cite *Cardiology Associates of Northwest Indiana, P.C. v. Collins*, 804 N.E.2d 151,154 (Ind. Ct. App. 2002), in which a panel of this Court stated that a judgment that purports to be final under Indiana Trial Rule 56(C) "must possess the requisite degree of finality and must dispose of at least a single substantive claim." That case is factually distinguishable from the current case because it dealt with a breach of contract claim rather than medical malpractice.

[20] The trial court's order dismissed all of the Woodcoxes' claims, leaving nothing else for the court to determine. We conclude that the court followed the appropriate procedure under Trial Rule 56(C), and as a result, the order is a final, reviewable judgment for purposes of Appellate Rule 2(H). *Cf. Ramsey v. Moore*, 959 N.E.2d 246, 253 (Ind. 2012) (dismissing appeal from a preliminary determination of law in medical malpractice case; although the trial court's order contained the "magic language" required under Trial Rule 54(B) or 56(C), that language applied to only one of the several claims at issue). We now turn to the merits of the Woodcoxes' claims.

II. Preliminary Determination of Law

[21] The Woodcoxes argue that the trial court erred in rejecting their request to declare that their claim of battery, based on a theory of an absence of informed consent, was outside the scope of the Review Panel's work. The Providers respond that the core issue here is whether their conduct in the course of treating Dylan fell below the reasonable standard of care, and they conclude the court properly left that issue to be decided by the Review Panel.

[22] The parties agree that our review of the trial court's decision is de novo. On appeal from a denial of summary judgment, we apply the same standard as the trial court. *Tippecanoe Valley Sch. Corp. v. Landis*, 698 N.E.2d 1218 (Ind. Ct. App. 1998), *trans. denied*. Summary judgment should be granted only when the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Id.* (citing Ind. Trial Rule 56(C)). We will reverse the trial court if we determine that it misapplied the law, but the party appealing the denial of summary judgment bears the burden of persuading us that the trial court's decision was improper. *Id.*

[23] Resolving the parties' dispute requires review of Indiana's Medical Malpractice Act ("MMA"). *See* Ind. Code § 34-18-1-1 (1998) *et seq*. The MMA was designed to curtail, not expand, liability for malpractice. *Cmty. Health Network v. McKenzie*, No. 20S-CT-648, 2022 WL 1101560, at *3 (Ind. April 13, 2022). As a result, the MMA is in derogation of the common law and should be strictly construed against imposing limitations on a claimant's right to bring suit. *Id.*

[24] An action against a health care provider for medical malpractice "may not be commenced in a court before . . . the claimant's proposed complaint has been presented to a medical review panel . . . and . . . an opinion is given by the panel." Ind. Code § 34-18-8-4 (1998). A plaintiff may also file the proposed complaint with a court while the complaint is pending before a review panel if: (1) the complaint provides anonymity for the defendant(s); and (2) the plaintiff and the trial court do not pursue the case until after the review panel has issued its opinion. Ind. Code § 34-18-8-7 (1999).

[25] The Review Panel in this case has not yet issued an opinion, but the General Assembly has provided a mechanism by which litigants may, in limited circumstances, seek relief in court before an opinion is issued. Indiana Code section 34-18-11-1 (1998) provides, in relevant part:

> (a) A court having jurisdiction over the subject matter and the parties to a proposed complaint filed with the commissioner under this article may, upon the filing of a copy of the proposed complaint and a written motion under this chapter, do one (1) or both of the following:
>
> (1) preliminarily determine an affirmative defense or issue of law or fact that may be preliminarily determined under the Indiana Rules of Procedure; or
>
> (2) compel discovery in accordance with the Indiana Rules of Procedure.
>
> (b) The court has no jurisdiction to rule preliminarily upon any affirmative defense or issue of law or fact reserved for written opinion by the medical review panel under IC 34-18-10-22(b)(1), IC 34-18-10-22(b)(2), and IC 34-18-10-22(b)(4).

[26] The Woodcoxes argue that their motion for summary judgment and declaratory relief was proper, and should have prevailed, because their claim for battery falls outside of the Review Panel process. Based on Indiana Supreme Court precedent, we cannot agree that their motion was a permissible use of the preliminary question of law procedure.

[27] In *Griffith v. Jones*, 602 N.E.2d 107 (Ind. 1992), a patient who underwent a femoral angiography died after experiencing anaphylactic shock from a reaction to the radiographic contrast dye used during the procedure. His estate's personal representative, Carol Jones, filed a proposed complaint with the Indiana Department of Insurance, raising a claim of lack of informed consent along with other claims.

[28] Jones ultimately filed with the trial court a petition for preliminary determination of law. With respect to the claim of lack of informed consent, Jones asked the trial court to: (1) "order the medical review panel to find that there were material issues of fact not requiring expert opinion bearing on liability for consideration by the court or jury;" and (2) "enter partial summary judgment in her favor on the issue of informed consent." *Id.* at 109. The trial court denied the motion for partial summary judgment but directed the medical review panel to conclude "that there are material issues of fact, not requiring expert opinion, bearing on liability for consideration by the court or jury." *Id.*

[29] The Indiana Supreme Court reversed the trial court on that point, stating:

> In view of the fact that the legislature clearly intended for the medical review panel to function in an informal manner in rendering its expert medical opinion, we believe that the legislature did not simultaneously intend to empower trial courts to dictate to the medical review panel concerning either the content of the panel's opinion or the manner in which the panel arrives at its opinion, or the matters that the panel may consider in arriving at its opinion. In other words, the grant of power to the trial court to preliminarily determine matters is to be narrowly construed.

Id. at 110.

[30] Next, the Court considered a predecessor of Indiana Code section 34-18-11-1, which, like the current statute, authorized a trial court to "preliminarily determine an affirmative defense or issue of law or fact that may be preliminarily determined under the Indiana Rules of Procedure." The Court determined that the statute "specifically limits the power of the trial courts of this State to preliminarily determining affirmative defenses under Trial Rules, deciding issues of law or fact that may be preliminarily determined under Trial Rule 12(D), and compelling discovery pursuant to Trial Rules 26 through 37, inclusively." *Id.* Finally, the Court remanded the case to the trial court to reconsider its decision.

[31] In the Woodcoxes' case, they, like Jones, raised a claim of lack of informed consent and argued that it fell outside the jurisdiction of the Review Panel. In addition, the Woodcoxes, like Jones, claimed that the trial court should grant them summary judgment and instruct the Review Panel to refrain from considering the issue of informed consent. The *Griffith v. Jones* Court determined those claims are not among the issues of law or fact that may be preliminarily addressed by a trial court under Trial Rule 12 or Trial Rules 26 through 37. As a result, the trial court

did not err in denying the Woodcoxes' motion for summary judgment and declaratory judgment because the court lacked jurisdiction to address the Woodcoxes' issues now. *See Stromblad v. Anonymous Doctor No. 1*, 179 N.E.3d 540 (Ind. Ct. App. 2021) (trial court erred in granting motion to dismiss medical malpractice complaint for failure to prosecute; claims under Trial Rule 41(E) fall outside the narrow range of jurisdiction granted to trial courts to preliminarily decide issues of law or fact); *but see Wood v. Schuen*, 760 N.E.2d 651 (Ind. Ct. App. 2001) (trial court had jurisdiction to determine whether doctor could be held liable for a lab's negligence in misreading a patient's test sample; there was no evidence that a doctor-patient relationship existed, leaving the court to decide "a pure question of law"), *trans. denied*.

[32] In addition, even if a petition for preliminary determination of law or fact was an appropriate method by which the trial court could have addressed whether the Review Panel has jurisdiction over the Woodcoxes' battery claim, the Woodcoxes would not prevail because their battery claim is, in substance, a matter for the Review Panel to address. Malpractice in the medical setting is "a tort or breach of contract based on health care or professional services that were provided, or that should have been provided, by a health care provider, to a patient." Ind. Code § 34-18-2-18 (1998). Accordingly, as a panel of this Court has explained:

> the [MMA] neither specifically includes nor excludes intentional torts from the definition of malpractice. Rather, the [MMA] applies to conduct, curative or salutary in nature, by a health care provider acting in his or her professional capacity, and is designed to exclude only that conduct unrelated to the promotion of a patient's health or the provider's exercise of professional expertise, skill, or judgment.

> It is therefore the substance of a claim, not its caption, which determines whether compliance with the [MMA] is necessary.

Van Sice v. Sentany, 595 N.E.2d 264, 266 (Ind. Ct. App. 1992) (citations and quotations omitted). Accordingly, a claim against a medical provider sounding in general negligence or premises liability rather than medical malpractice, is outside the coverage of the MMA. *Peters v. Cummins Mental Health, Inc.*, 790 N.E.2d 572 (Ind. Ct. App. 2003), *trans. denied*.

[33] Indiana law recognizes the duty of a physician to make a reasonable disclosure of material facts relevant to a treatment decision the patient is required to make. *Auler v. Van Natta*, 686 N.E.2d 172 (Ind. Ct. App. 1997), *trans. denied*. In *Boruff v. Jesseph*, 576 N.E.2d 1297 (Ind. Ct. App. 1991), a patient had told her doctor that she did not want the doctor's partner to perform her surgery. But on the day of her surgery, the doctor was running late, so the partner performed the surgery instead. The patient experienced permanent complications after the surgery and sued her doctor, claiming medical malpractice and battery, based on her lack of consent to having the doctor's partner perform the surgery.

[34] The doctor argued that the patient's battery claim was subject to the requirements of the MMA. A panel of this Court agreed, stating that the patient's "allegation concerns precisely that type of conduct specifically included within the purview of the Act: both surgical assignments and the actual conduct of a given operation are related to the promotion of a patient's health and require physicians to exercise professional skill, expertise, and judgment." *Id.* at 1298-99.

[35] By contrast, in *Pluard ex rel. Pluard v. Patients Comp. Fund*, 705 N.E.2d 1035 (Ind. Ct. App. 1999), *trans. denied*, a hospitalized infant was injured when a surgical lamp fell from the wall and struck his head, causing a hematoma and scarring. A panel of this Court determined that the failure to properly secure the light "did not involve a health care decision involving the exercise of professional skill or judgment." *Id.* at 1038. Instead, the case concerned a general duty to maintain a safe premises. As a result, the infant's claim fell outside the purview of the MMA.

[36] Here, in their Counter-Claim and in their second amended proposed complaint, the Woodcoxes alleged the following with respect to their battery claim:

> The [Providers] knowingly approved, directed, aided and/or abetted the intentional placement of an NJ tube in Dylan Woodcox without proper authorization.
>
> As a proximate result of the battery committed by the [Providers], Dylan Woodcox died and Dylan Woodcox underwent additional treatment and surgery, incurred permanent injuries and suffering and his estate and parents incurred expenses, pain and suffering and intangible damages of a nature as to require compensation.

Appellants' App. Vol. 2, p. 76; Appellants' App. Vol. 3, p. 153.

[37] The circumstances of this case are closer to those of *Boruff* than those of *Pluard*. The choice to replace the nasogastric tube with an NJ tube, as well as the process of placing the NJ tube in Dylan, were related to the promotion of Dylan's health and required the Providers to exercise professional skill, expertise, and judgment. The Providers' acts were not a matter of general negligence or premises liability.

[38] We further note that in their Counter-Claim and their second amended proposed complaint, the Woodcoxes described their damages from the Providers' alleged medical malpractice as follows:

> As a proximate result of the negligence of the [Providers], Dylan Woodcox died and Dylan Woodcox underwent additional treatment and surgery, incurred permanent injuries and suffering and his estate and parents incurred expenses, pain and suffering and intangible damages of a nature as to require compensation.

Appellants' App. Vol. 2, pp. 76-77; Appellants' App. Vol. 3, pp. 153-54.

[39] The Woodcoxes' alleged damages arising from their claims of medical malpractice and battery are identical, providing an additional reason to conclude that they both fall under the Review Panel's jurisdiction.

[40] The trial court did not err in denying the Woodcoxes' motion for summary judgment and declaratory judgment. In addition, the court did not err in dismissing the Woodcoxes' claims on the merits. We express no opinion on the merits of the Woodcoxes' claims, but the Review Panel's process must proceed to its conclusion before the trial court may adjudicate those claims.

Conclusion

[41] For the reasons stated above, we affirm the judgment of the trial court.

[42] Judgment affirmed.

Crone, J., and Weissmann, J., concur.