MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Ashlyn E. Cox,

Appellant-Plaintiff,

v.

Anonymous Physician A, Anonymous Physician B, and Anonymous Physician Group

Appellees-Defendants,

Commissioner of the Indiana Department of Insurance,

Party of Interest.

October 23, 2023

Court of Appeals Case No. 23A-MI-534

Appeal from the Wayne Superior Court

The Honorable Charles K. Todd, Jr., Judge

Trial Court Cause No. 89D01-1911-MI-155

Memorandum Decision by Judge Bradford
Judge Weissmann concurs.
Judge Riley dissents with a separate opinion.

Bradford, Judge.

Case Summary

[1] Ashlyn Cox received medical treatment for which she sought damages under Indiana's Medical Malpractice Act ("the MMA"). After Cox's counsel neglected to timely respond to discovery requests and otherwise failed to meet deadlines established by the MMA and the medical review panel ("the Panel"), counsel for Anonymous Physician A, Anonymous Physician B, and Anonymous Physician Group (collectively, "the Appellees") petitioned the trial court to invoke jurisdiction and dismiss Cox's complaint pending before the Indiana Department of Insurance ("IDOI"). After a hearing, the trial court granted the Appellees' motion. Cox argues that the trial court abused its discretion in dismissing her case because she had good cause when (1) she did not obtain a written opinion from the medical review panel within 180 days of the panel's formation and (2) her counsel failed to submit written evidence to the panel by the deadline. Because we affirm the trial court's dismissal under issue two, we need not reach issue one.

Facts and Procedural History

[2] On March 27, 2019, Cox filed a complaint for damages under the MMA. On May 2, 2019, the Appellees served their first set of discovery on Cox; however, they received no response or request to extend the discovery-response deadline from Cox, despite sending e-mails on July 26, 2019, August 19, 2019, and September 24, 2019, and a letter on October 11, 2019, followed by a final e-mail on November 14, 2019. On November 20, 2019, after having received no response from Cox, the Appellees petitioned the trial court for a preliminary determination of law and to compel discovery responses. On December 4, 2019, the trial court held a hearing on the matter, after which it granted the Appellees' motion to compel. Eight days later, Cox provided her written discovery responses.

[3] On April 24, 2020, the Appellees sought to form the Panel and e-mailed Cox to discuss appointing a panel chairperson. Cox neglected to reply to that e-mail, so the Appellees sent another e-mail on May 15, 2020. After receiving no response from Cox, the Appellees sent a third e-mail on June 17, 2020. On July 3, 2020, the Appellees sent a fourth e-mail to Cox. On July 3 and 11, 2020, Cox e-mailed the Appellees suggesting potential panel chairpersons. On July 17, 2020, Robert Strohmeyer ("Chairman Strohmeyer") accepted his appointment as the panel chairman. Prior to the formation of the remainder of the Panel, Cox deposed two of the Appellees.

[4] On May 26, 2021, Chairman Strohmeyer informed the parties that he had selected the other panel members and had set various deadlines for submissions of evidence. The deadline for Cox's submission of evidence to the Panel was

July 9, 2021, and the 180-day deadline for the Panel to render its opinion was November 22, 2021. Cox did not object to Chairman Strohmeyer's proposed schedule.

[5] July 9, 2021, passed without Cox's tendering her evidentiary submission to the Panel or requesting an extension. On July 13, 2021, Chairman Strohmeyer e-mailed Cox's counsel to inquire about the status of her overdue submission. After receiving no response, Chairman Strohmeyer e-mailed Cox's counsel a second time on August 4, 2021. On August 23, 2021, Cox's counsel responded, informing Chairman Strohmeyer and the Appellees that he had not "been able to complete" the submission because he had been "overburdened with work[.]" Appellant's App. Vol. II p. 152. Cox's counsel also requested a sixty-day extension to tender Cox's submission. The Appellees' counsel responded that same day, informing Cox's counsel and Chairman Strohmeyer that they had no objection to that extension. Cox's new evidentiary submission deadline was October 22, 2021.

[6] Again, Cox failed to tender her evidentiary submission to the Panel by the updated October 22, 2021 deadline and neglected to request an extension to do so. On November 2, 2021, Chairman Strohmeyer e-mailed Cox's counsel inquiring about the submission's status. Twenty-two days later, Cox's counsel responded to Chairman Strohmeyer's e-mail, informing him and the Appellees that his "work schedule continues to be overwhelming[,]" and belatedly requesting an additional forty-five-day extension. Appellant's App. Vol. II p. 157. On November 28, 2021, the Appellees e-mailed Chairman Strohmeyer

and Cox that they needed time to consider Cox's belated request for an extension. Two days later, the Appellees informed Chairman Strohmeyer and Cox that they objected to Cox's belated request for a second extension.

[7] Meanwhile, the Panel did not issue its opinion by its November 22, 2021 deadline, despite Cox's not seeking an extension of the deadline. On December 2, 2021, the Appellees petitioned the trial court to invoke its jurisdiction and dismiss Cox's complaint pending before the IDOI. Over the next month, the parties submitted briefing and various motions, and, on January 8, 2022, Cox submitted her evidentiary submission to the Panel.

[8] On September 29, 2022, the trial court held a hearing on all pending motions. During that hearing, Cox's counsel admitted that Cox's submission had been due on July 9, 2021, that it had not been timely tendered, and that he had not timely requested an extension. Further, Cox's counsel admitted that the rescheduled deadline for Cox's submission had been October 22, 2021, that the submission had not been timely tendered, and that he had not timely requested another extension. On February 21, 2023, the trial court issued its order granting the Appellees' motion to dismiss.

Discussion and Decision

[9] "Before a party brings a medical malpractice action in an Indiana court, the [MMA] requires that the proposed complaint be presented to a medical review panel and that the panel render an opinion." *Ramsey v. Moore*, 959 N.E.2d 246,

250 (Ind. 2012) (citing Ind. Code § 34-18-8-4). The MMA endows "the chairman of the medical review panel with various powers, including the responsibility to establish a reasonable schedule for submission of evidence to the medical review panel." *Reck v. Knight*, 993 N.E.2d 627, 631 (Ind. Ct. App. 2013) (citing Ind. Code § 34-18-8-4), *trans. denied*. The MMA provides that once the review panel is formed, it "shall give its expert opinion within one hundred eighty (180) days[.]" Ind. Code § 34-18-10-3(c). "Implicit in these provisions is the corresponding duty upon the parties to comply with the schedule" and "an available remedy for any breach is court-ordered sanctions." *Galindo v. Christensen*, 569 N.E.2d 702, 705 (Ind. Ct. App. 1991).

[10] In a medical-malpractice case, "[w]hen a plaintiff fails to adhere to the submission schedule, a defendant may seek recourse in a trial court while a complaint is pending before a medical review panel[,]" which may include dismissal. *Ramsey*, 959 N.E.2d at 250. The trial "court may dismiss the complaint pending before the medical review panel if the plaintiff fails to show good cause for not adhering to the submission deadline." *Id*. The "trial court's choice of sanctions upon a failure to comply with the [MMA] is a matter committed to the trial court's discretion." *Quillen v. Anonymous Hosp*., 121 N.E.3d 581, 584 (Ind. Ct. App. 2019), *trans. denied*. "We will affirm if there is any evidence supporting the trial court's decision and will reverse only if the decision is clearly against the logic and effect of the facts and circumstances or if the trial court misinterpreted the law." *Id*. at 585.

[11] The Indiana General Assembly has expressed that the MMA's timelines are of "extreme importance in ensuring the fairness of the [MMA]" and "[n]o party may be dilatory in the selection of the panel, the exchange of discoverable evidence, or in any other matter necessary to bring a case to finality, and the courts and medical review panels shall enforce the timelines set forth in this article[.]" Ind. Code § 34-18-0.5-1. Here, Cox failed to respond to the Appellees' discovery requests for seven months, and only responded after the trial court had granted the Appellees' motion to compel the responses. Additionally, the Appellees sent four e-mails from April 24, 2020, through July 3, 2020, attempting to select a chairperson for the Panel, and Cox's counsel neglected to reply until the fourth email on July 3, 2020.

[12] More importantly, Cox twice failed to adhere to the evidentiary-submission deadlines imposed by Chairman Strohmeyer. First, Cox responded forty-five days late to the July 9, 2021 deadline (and only after Chairman Strohmeyer had twice asked for a status update), at which point she belatedly asked for an extension. While the Appellees assented to the first extension, it is well-settled that the trial court should "consider the entire record of facts and circumstances surrounding the particular case when determining whether dismissal of a proposed complaint is an appropriate sanction." *Beemer v. Elskens*, 677 N.E.2d 1117, 1120 (Ind. Ct. App. 1997), *trans. denied*. Second, Cox's counsel again failed to tender her evidentiary submission or timely request another extension by the updated October 22, 2021 deadline. In fact, Cox's counsel waited thirty-three days after the deadline had expired, and twenty-two days after Chairman

Strohmeyer had requested a status update, before finally advising the Panel and the Appellees that the evidentiary submission was not ready and requesting an additional forty-five-day extension. At this point, the Appellees objected to another extension. As a result of Cox's failure to adhere to Chairman Strohmeyer's deadlines, the trial court had the discretion to dismiss Cox's case if she failed to show good cause. *See Ramsey*, 959 N.E.2d at 250.

[13] Cox argues that the trial court abused its discretion in dismissing her complaint when her counsel failed to adhere to the submission schedule because she exhibited good cause for noncompliance. In making that argument, Cox asserts that "the good cause was the enormity of the task in completing [her] written submission of evidence and the work schedule of her counsel[,]" who "was, and always is, extremely busy[.]" Appellant's Br. p. 30. Cox points to the factors enumerated in *Beard v. Dominguez*, 847 N.E.2d 1058, 1058–59 (Ind. Ct. App. 2006), *trans. denied*, to support her argument that the trial court abused its discretion, which are:

> [t]he length of the delay; the reason for the delay; the degree of personal responsibility on the part of the plaintiff; the degree to which the plaintiff will be charged for the acts of his attorney; the amount of prejudice to defendant caused by the delay; the presence or absence of a lengthy history of having deliberately proceeded in a dilatory fashion; the existence and effectiveness of sanctions less drastic than dismissal which fulfill the purposes of the rules and the desire to avoid court congestion; the desirability of deciding the case on the merits; and the extent to which plaintiff has been stirred into action by a threat of dismissal as opposed to diligence on the plaintiff's part.

(quoting *Lee v. Friedman*, 637 N.E.2d 1318, 1320 (Ind. Ct. App. 1994)). Cox's reliance on the *Beard* factors, however, is unavailing because we decided that case before the Indiana General Assembly had emphasized the "extreme importance" of the MMA's timelines. Ind. Code § 34-18-0.5-1.

[14] Like the trial court, we find this case more analogous to *Quillen*. In *Quillen*, the defendants moved to dismiss the plaintiff's complaint because she had failed to comply with, object to, or request an extension of the evidentiary-submission deadlines, and had failed to communicate with the review panel and defendants' counsel regarding her belated submission for the original and updated submission schedule. 121 N.E.3d at 583–84. The plaintiff had indicated that she had had good cause for noncompliance due to "family matters that had occupied counsel's attention at some point for an unknown length of time." *Id*. at 584. The trial court, although it issued no findings, "must have found that Quillen failed to show good cause[,]" and we saw "no reason to second-guess that conclusion." *Id*. at 587.

[15] In this case, the trial court concluded that "the facts of this cause reflect missed deadlines and non-compliance by" Cox's counsel. Appellant's App. Vol. II p. 24. While Cox's counsel noted his busy schedule, those concerns "did not manifest in any objection" and counsel repeatedly failed to adhere to deadlines or timely request extensions. Appellant's App. Vol. II p. 24. Simply put, Cox's counsel's arguments "can be summed up as […] being too busy to meet all of counsel's obligations and that the handling of medical malpractice cases carries a considerable amount of expertise and significant work." Appellant's App.

Vol. II pp. 24–25. As a result, the trial court found that "good cause ha[d] not been shown for the failure to act." Appellant's App. Vol. II p. 25. We do not doubt counsel's desire to advocate zealously for Cox, but we cannot say that counsel's allegedly busy schedule justifies noncompliance with the MMA deadlines or lack of communication with the Panel and opposing counsel.

[16] For these reasons, we conclude that the trial court did not abuse its discretion in dismissing Cox's complaint. *See Ramsey*, 959 N.E.2d at 250. Because we conclude that the trial court did not abuse its discretion under the submission-deadline issue, we need not reach the issue relating to Cox's alleged failure to meet the Panel's statutory 180-day opinion deadline.

[17] The judgment of the trial court is affirmed.

Weissmann, J., concurs.

Riley, J., dissents with separate opinion.

Riley, Judge, dissenting.

[18] I respectfully part ways with the majority and would conclude that the trial court abused its discretion by dismissing the medical malpractice case against Appellees. While I agree with the majority that the egregiousness of the discovery violations requires an appropriate court-ordered response, I disagree with the sanction imposed under the circumstances of this case.

[19] The General Assembly's 2017 enactment of Indiana Code section 34-18-0.5-1 admonished the parties, panels, and courts of the "extreme importance" of the MMA's deadlines. Thus, as noted by the majority, in a medical-malpractice case, "[w]hen a plaintiff fails to adhere to the submission schedule, a defendant may seek recourse in a trial court while a complaint is pending before a medical review panel[,]" which may include dismissal. *Ramsey v. Moore*, 959 N.E.2d 246, 250 (Ind. 2012). The trial "court may dismiss the complaint pending before the medical review panel if the plaintiff fails to show good cause for not adhering to the submission deadline." *Id*. The "trial court's choice of sanctions upon a failure to comply with the [MMA] is a matter committed to the trial court's discretion." *Quillen v. Anonymous Hosp*., 121 N.E.3d 581, 584 (Ind. Ct. App. 2019), *trans. denied*.

[20] On the other hand, it is, and has always been, the policy of the law in this state to dispose of cases on their merits, whenever possible. *See Nwannunu v. Weichman & Assocs., P.C.,* 770 N.E.2d 871, 879 (Ind. Ct. App. 2002). Because medical malpractice cases are typically time-consuming due to their complex

nature, life-altering consequences, and necessity of expert testimony to establish the standard of care, their legal preparation and discovery might be more involved than the typical civil case. *See Lusk v. Swanson*, 753 N.E.2d 748, 753 (Ind. Ct. App. 2001). Although the Indiana General Assembly directed that the MMA's timelines are of "extreme importance in ensuring the fairness of the [MMA]" and "the courts and medical review panels shall enforce the timelines set forth in this article[,]" the trial court is endowed with discretionary power to enforce these timelines. I.C. § 34-18-0.5-1.

[21] Despite this discretionary authority, in deciding whether a procedural dismissal should be granted, the trial court should, in addition to a good cause showing, carefully evaluate the work already performed by the parties to progress the case and the degree of prejudice to the defendant caused by the discovery violations. *In borderline cases where counsel for a plaintiff identifies the experts who will testify and exchanges some meaningful disclosure of what the testimony will be, there may be less drastic alternatives to a procedural dismissal.* In these instances, the court may, for example, authorize a deposition of the expert at the plaintiff's expense or limit the expert's testimony to those matters adequately disclosed. These measures would encourage full disclosure and eliminate the prejudice suffered by a defendant as a result of inadequate or untimely discovery responses. Affirmation of a trial court's dismissal of a medical malpractice case based on a good cause showing alone regardless of the severity of the discovery violations and the progress of the case, will send a message to the trial court that it has no alternative but to dismiss even for marginal discovery deficiencies. In essence,

this will transform Indiana Code section 34-18-0.5-1 into a sword that will be used to prematurely cut off an action before it can be properly determined whether it should be disposed of on the merits.

[22] Here, eight months before the trial court considered Appellees' dismissal request, Cox had filed her evidentiary filings with the Panel. Cox's Panel brief required the review of over 1,000 pages of medical records and 639 pages of deposition testimony and resulted in a ninety-page evidence brief. Appellees have provided no evidence that they have been prejudiced by the actions of Cox's counsel and that they deserve the extreme remedy of dismissal of Cox's Complaint. I would reverse the trial court and remand for the imposition of an appropriate sanction.