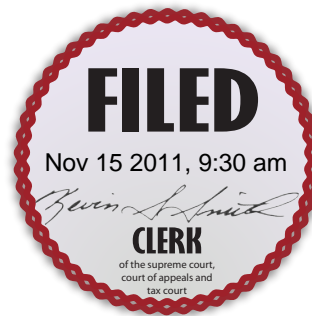


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

NORTH LAKE NURSING AND)
REHABILITATION CENTER, LLC. d/b/a)
NORTHLAKE REHABILITATION CENTER,)
)
Appellant-Petitioner,)

vs.)

No. 45A03-1105-CT-229

THE ESTATE OF COCTEUS MASON by)
Special Administrator, TYNIESHA SPEARS,)
)
Appellee-Respondent.)

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Jeffery J. Dywan, Judge
Cause No. 45D11-1102-CT-33

November 15, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BARNES, Judge

Case Summary

North Lake Nursing and Rehabilitation Center, LLC, d/b/a Northlake Nursing and Rehabilitation Center (“Northlake”), appeals the trial court’s denial of its motion for preliminary determination of a proposed complaint filed with the Indiana Department of Insurance by Tyniesha Spears, as the special administrator of the Estate of Cocteus Mason (“Estate”). We affirm.

Issue

Northlake raises two issues, which we consolidate and restate as whether the trial court properly concluded that the Journey’s Account Statute applied to the proposed complaint.

Facts

On February 5, 2010, the Estate filed a complaint against Northlake in the trial court. The Estate alleged that Mason had lived at Northlake between June 2008 and October 2008, that Northlake was aware Mason was a “fall risk,” that Northlake failed to make and implement an accurate fall risk assessment, that Northlake had failed to properly monitor and supervise Mason, that Mason was injured in falls in September 2008, and that he died in October 2008 as a result of his injuries. Appellant’s App. p. 16. Northlake filed a motion to dismiss the Estate’s complaint without prejudice because Northlake was a qualified provider under the Indiana Medical Malpractice Act and because the Estate had failed to file a proposed complaint with the Indiana Department of

Insurance and present the claim to a medical review panel. On July 6, 2010, the trial court granted Northlake's motion and dismissed the Estate's complaint without prejudice.

On January 11, 2011, the Estate filed a proposed complaint against Northlake with the Indiana Department of Insurance. Northlake then filed a motion for preliminary determination with the trial court. Northlake alleged that Mason lived at the facility until October 14, 2008, and the Estate had until October 14, 2010, to file its proposed complaint with the Indiana Department of Insurance, but it failed to do so. The Estate responded that the action was saved by the Journey's Account Statute, Indiana Code Section 34-11-8-1. Relying on Eads v. Community Hospital, 932 N.E.2d 1239 (Ind. 2010), the trial court agreed with the Estate and found that the "Journey's Account Statute extended the time limitation for the Estate to file its proposed complaint" and that "the claim [was] not barred by the two-year statute of limitations applicable to medical malpractice claims." Id. at 9. The trial court, therefore, denied Northlake's motion for preliminary determination. Northlake now appeals.

Analysis

The issue is whether the trial court properly denied Northlake's motion for preliminary determination. A motion for preliminary determination of law under Indiana Code Section 34-18-11-1, which is unique to Indiana's Medical Malpractice Act, is a procedure that authorizes the trial court to assert jurisdiction over threshold issues before the medical review panel has acted. Hodge v. Johnson, 852 N.E.2d 650, 652 (Ind. Ct. App. 2006), trans. denied. When accompanied by evidence, the motion for preliminary determination is subject to the same standard of appellate review as a summary judgment.

Id. “[W]here the evidence shows that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate.” Id. “We construe all facts and reasonable inferences drawn therefrom in a light most favorable to the non-moving party.” Id. When a pure question of law is presented, we review the matter de novo. Id.

It is undisputed that a two-year statute of limitations is applicable here pursuant to Indiana Code Section 34-18-7-1(b). It is also undisputed that the statute of limitations expired in October 2010 because Northlake last provided care to Mason in October 2008. However, after the trial court dismissed the Estate’s complaint without prejudice in July 2010, the Estate did not file its proposed complaint with the Indiana Department of Insurance until January 2011. The issue here is whether the Estate’s claim is saved by the Journey’s Account Statute.

“When applicable, the Journey’s Account Statute serves to resuscitate actions that have otherwise expired under a statute of limitations.” Basham v. Penick, 849 N.E.2d 706, 709 (Ind. Ct. App. 2006). “This statute is typically used to save an action filed in the wrong court.” Keenan v. Butler, 869 N.E.2d 1284, 1290 (Ind. Ct. App. 2007). The statute provides:

- (a) This section applies if a plaintiff commences an action and:
 - (1) the plaintiff fails in the action from any cause except negligence in the prosecution of the action;
 - (2) the action abates or is defeated by the death of a party; or

- (3) a judgment is arrested or reversed on appeal.
- (b) If subsection (a) applies, a new action may be brought not later than the later of:
 - (1) three (3) years after the date of the determination under subsection (a); or
 - (2) the last date an action could have been commenced under the statute of limitations governing the original action;

and be considered a continuation of the original action commenced by the plaintiff.

Ind. Code § 34-11-8-1. “The Journey’s Account Statute is designed to ensure that the diligent suitor retains the right to a hearing in court until he receives a judgment on the merits.” Vesolowski v. Repay, 520 N.E.2d 433, 434 (Ind. 1988) (discussing Indiana Code Section 34-1-2-8, repealed by Pub. L. No. 1-1998, § 221; see now Ind. Code § 34-11-8-1). “Its broad and liberal purpose is not to be frittered away by narrow construction.” Id.

Northlake argues that the Journey’s Account Statute is inapplicable because the Estate’s original trial court action failed due to “negligence in the prosecution of the action.” I.C. § 34-11-8-1(a)(1). “Negligence in the prosecution” ordinarily refers to “a failure to diligently prosecute as required by [Trial Rule] 41(E), but the language of the statute is more broad.” Zambrana v. Anderson, 549 N.E.2d 1078, 1081 (Ind. Ct. App. 1990).

Northlake relies in part on Mayfield v. Continental Rehabilitation Hosp. of Terre Haute, 690 N.E.2d 738 (Ind. Ct. App. 1998), trans. denied, in which the Journey’s

Account Statute did not save the plaintiffs' claim. There, the plaintiffs filed an action against a hospital after a patient was allowed to wander out of the hospital in a disoriented state. The trial court dismissed the action because the plaintiffs had failed to file a proposed complaint with the Indiana Department of Insurance pursuant to the Medical Malpractice Act. The plaintiffs then filed a proposed complaint with the Indiana Department of Insurance, but the hospital filed a motion for preliminary determination, alleging that the proposed complaint was filed outside of the statute of limitations. The trial court granted judgment to the hospital.

On appeal, this court held that the Journey's Account Statute did not apply because there was "negligence in the prosecution" of the plaintiffs' initial action. This court held: "We can conceive of no reason, other than negligence, why the [plaintiffs] could not have filed their complaint with the Department of Insurance within [the two-year] period." Mayfield, 690 N.E.2d at 741. Consequently, the Journey's Account Statute did not apply and did not save the plaintiffs' action.

However, the Estate relies primarily on our supreme court's recent decision in Eads v. Community Hospital, 932 N.E.2d 1239 (Ind. 2010). In Eads, the plaintiff filed a premises liability action against a hospital, but the trial court dismissed the action because it determined that the complaint actually alleged medical malpractice, no proposed complaint had been filed with the Indiana Department of Insurance as required by the Medical Malpractice Act, and it had no jurisdiction. Approximately two weeks before the trial court dismissed the action, the plaintiff had submitted a proposed medical malpractice complaint to the Indiana Department of Insurance. The hospital then filed a

motion for preliminary determination, contending that the proposed complaint was barred by the two-year statute of limitations for medical malpractice claims, and the trial court granted judgment for the hospital.

On appeal, our supreme court noted that the Journey's Account Statute can "revive a claim subject to" the Medical Malpractice Act. Eads, 932 N.E.2d at 1243 (citing Vesolowski, 520 N.E.2d at 435). The court analyzed whether the plaintiff's initial action failed for reasons other than "negligence in the prosecution." Id. The court noted that examples of negligence in the prosecution are failure to prosecute, failure to pay the filing fee, and naming the wrong party. Id. at 1244. The court then held:

There may be instances where the incorrect assertion of a general negligence claim is "negligence in the prosecution." But we do not agree that dismissal of a general negligence claim for failure to comply with the [Medical Malpractice Act] necessarily precludes application of the [Journey's Account Statute]. As Judge Kirsch noted in [his] dissent, "[f]or more than thirty years, claimants and courts have wrestled with the question of what activities fall within the [Medical Malpractice Act]." Eads [v. Community Hospital], 909 N.E.2d 1009, 1016 (Ind. Ct. App. 2009). . . . Given this lack of clarity as to the precise boundaries of the [Medical Malpractice Act's] application, it is not necessarily negligent to have failed to predict where the courts would come down on the application of the statute to a set of facts alleging negligence at the periphery of medical malpractice.

Though the [Journey's Account Statute] does not explicitly refer to good faith in the filing of the original action, Indiana courts have implied a good faith requirement. E.g., Basham v. Penick, 849 N.E.2d 706, 709 (Ind. Ct. App. 2006). For the same reason we do not find negligence in the prosecution, we are not persuaded that Eads exhibited bad faith when she filed her original claim sounding in general negligence.

Id. The court ultimately held that the plaintiff's claim was saved by the Journey's Account Statute. Id.

Eads also distinguished Mayfield, noting that the plaintiffs' actions in Mayfield suggested that they "believed their claim was governed by the [Medical Malpractice Act] from the outset." Eads, 932 N.E.2d at 1245. Moreover, we note that Mayfield did not discuss the feasibility of the plaintiffs' initial claim, which seems to conflict with the good faith requirement discussed in Eads. For these reasons, we find Mayfield distinguishable.

Here, as in Eads, we cannot say that the dismissal of the Estate's general negligence claim for failure to comply with the Medical Malpractice Act necessarily precludes application of the Journey's Account Statute. Northlake makes no argument that the Estate's initial complaint was filed in bad faith or that the Estate's claim was undoubtedly a medical malpractice claim rather than a negligence action. The only "negligence in prosecution" that Northlake identifies is the Estate's failure to file a timely proposed complaint after it discovered that Northlake was a qualified provider under the Medical Malpractice Act.

We acknowledge that the Estate's initial claim was dismissed in July 2010, that the two-year statute of limitation on the claim ran in October 2010, and that the Estate did not file its proposed complaint until January 2011. However, the delay in filing the proposed complaint resulted after the initial complaint had already been dismissed. Once the Estate's initial action failed "from any cause except negligence in the prosecution of the action," the Journey's Account Statute extended the time for bringing the proposed

complaint. I.C. § 34-11-8-1(a)(1). The Journey’s Account Statute allowed the new action to be “brought not later than the later of: (1) three (3) years after the date of the determination under subsection (a); or (2) the last date an action could have been commenced under the statute of limitations governing the original action. . . .” I.C. § 34-11-8-1(b) (emphasis added). Consequently, the Estate had to bring the action no later than July 2013, which is three years after its trial court action was dismissed. Whether the Estate allowed the statute of limitations to pass October 2010 without any action on its part is irrelevant to whether the Journey’s Account Statute is applicable.

We conclude that Northlake failed to demonstrate “negligence in the prosecution” of the Estate’s initial claim. I.C. § 34-11-8-1(a)(1). As a result, the Journey’s Account Statute is applicable, and the Estate had three years from the dismissal of the initial complaint to file its proposed complaint with the Indiana Department of Insurance. The Estate timely filed its proposed complaint under the Journey’s Account Statute, and the trial court properly denied Northlake’s motion for preliminary determination.

Conclusion

The trial court properly denied Northlake’s motion for preliminary determination. The Journey’s Account Statute is applicable, and the Estate’s proposed complaint with the Indiana Department of Insurance was timely. We affirm.

Affirmed.

ROBB, C.J., and BRADFORD, J., concur.