ATTORNEYS FOR APPELLANT

Dennis R. Brown
Dennis H. Geisleman
Geisleman & Brown, LLP
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE

Kathryn Elias Cordell
Jarrod Malone
Katz Korin Cunningham PC
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Linda G. Holsten, individually and as surviving spouse of Paul A. Holsten, Deceased,

Appellant-Plaintiff,

v.

Lynn Faur, M.D., and Cameron Memorial Community Hospital, Inc. a/k/a Urgent Care of Cameron Hospital,

Appellees-Defendants.

July 8, 2021

Court of Appeals Case No. 20A-CT-2072

Interlocutory Appeal from the Steuben Circuit Court

The Honorable Allen N. Wheat, Judge

Trial Court Cause No. 76C01-1804-CT-150

Weissmann, Judge.

[1] In this interlocutory appeal, we are asked to determine whether a medical malpractice plaintiff's proposed complaint encompassed a particular theory of negligence, such that the plaintiff can be said to have presented the theory to a medical review panel before filing suit, as required by Indiana's Medical Malpractice Act. We find the theory was not encompassed by the plaintiff's proposed complaint, and therefore, the trial court lacked subject matter jurisdiction to enter partial summary judgment on that portion of the plaintiff's medical malpractice claim. Accordingly, we vacate the court's entry of partial summary judgment and remand for partial dismissal without prejudice.

Facts

[2] Paul A. Holsten (Paul) passed away the day after receiving health care at two facilities operated by Cameron Memorial Community Hospital, Inc. (Cameron Hospital)—an urgent care center and a hospital emergency room. Pursuant to Indiana's Medical Malpractice Act, Linda G. Holsten (Linda), individually and as Paul's surviving spouse, filed a proposed complaint with the Indiana Department of Insurance, asserting negligence claims against Cameron Hospital and urgent care physician Lynn Faur, M.D. The complaint alleged, in pertinent part:

> 1. Paul A. Holsten was a patient of defendant Cameron Memorial Community Hospital, Inc. a/k/a Urgent Care of Cameron Hospital . . . when he presented on April 24, 2015, with complaints of shortness of breath and findings of wheezing and productive cough.

2. Upon further work up by his treating physician, Lynn Faur, M.D., it was determined that his oxygen saturation level was 88% and he was diagnosed with "COPD exacerbation". No routine chest x-ray was ordered or taken prior to making this diagnosis. Mr. Holsten had no history of COPD, pneumonia or asthma prior to this visit.

3. In fact, Mr. Holsten had a community acquired pneumonia that aggressively progressed into necrotizing staphylococcus aureus pneumonia after being prescribed oral steroids in the form of Medrol Dosepak and oral antibiotics for his COPD exacerbation when he was discharged home at 9:16 a.m.

4. Despite filling the medications and taking them according to instructions, Mr. Holsten's shortness of breath increased and his condition deteriorated, resulting in him presenting to Cameron Memorial Community Hospital [emergency room] approximately 11 hours later in the evening of April 24, 2015. His condition continued to deteriorate and he developed respiratory failure, requiring transfer to Parkview Regional Medical Center in Fort Wayne, Indiana, the following morning. Despite appropriate care at Parkview Regional Medical Center, Mr. Holsten expired at 5:41 p.m. on April 25, 2015, from the necrotizing staphylococcus aureus pneumonia.

5. Plaintiff contends that defendant care providers were negligent in two areas. First the standard of care required that a chest x-ray should have been ordered at Urgent Care of Cameron Hospital as an essential first order to determine the nature and cause of Mr. Holsten's shortness of breath, including recognition of his community acquired pneumonia.

6. Second, upon the finding of a right lung infiltrate and suspicion of a community acquired pneumonia, steroids were contraindicated and would not have been given to Mr. Holsten. Mr. Holsten had a predisposing factor of diabetes mellitus which made him more prone to infections and can increase the severity

> of even common infections. It is for that reason that steroids are contraindicated as they can cause a marked increase in blood sugar that has drastic effects on the diabetic's immune function and ability to fight infection.
>
> 7. Plaintiff contends that Paul Holsten developed an anti-inflammatory response to steroids that exacerbated his moderate community acquired pneumonia to a rapidly progressing necrotizing pneumonia that caused his death.
>
> 8. As a direct result of the negligence of defendants, Linda Holsten suffered the wrongful death of her husband . . . .

App. Vol. II, pp. 54-55. We refer to the allegations of rhetorical paragraphs 5 and 6 above as the "X-ray theory" and "steroid theory" of negligence, respectively.

[3] A medical review panel (MRP) was selected and provided with medical records from Paul's care at both the urgent care center and the hospital emergency room. Linda also submitted a narrative statement that identified the following questions for the MRP's consideration:

> 1. Should Lynn Faur, M.D. and/or Urgent Care of Cameron Hospital have obtained a chest x-ray on April 24, 2015?
>
> 2. Would obtaining a chest x-ray early in his pulmonary disease process have made a difference in Paul Holsten's treatment and therefore his survival?
>
> 3. Did the care provided by Lynn Faur, M.D. and/or Urgent Care of Cameron Hospital actually put Mr. Holsten in harm's way by prescribing steroids, which were contraindicated for an infection in a patient who had chronic diabetes?

App. Vol. II, p. 81.

[4] After reviewing the parties' evidentiary submissions, the MRP issued a written report expressing the following unanimous opinion as to Cameron Hospital:

> 1. The evidence supports the conclusion that said Defendant failed to comply with the appropriate standard of care as charged in the Complaint.
>
> 2. The panelists are unable to determine if the conduct complained of was a factor of the resultant death.

App. Vol. II, pp. 67-68. A nearly identical opinion was issued as to Dr. Faur.

[5] Linda's counsel subsequently met with the MRP to discuss its opinion. During this meeting, panelist Adam Will, M.D., advised that, in addition to Dr. Faur's acts and omissions at the urgent care center, the physicians who treated Paul at the emergency room failed to follow the hospital's sepsis protocol. According to Dr. Will, this delayed the administration of certain antibiotic treatments and may have played a role in Paul's death.

[6] Linda timely filed a formal complaint against Cameron Hospital and Dr. Faur in the Steuben Circuit Court. The complaint's pertinent allegations were identical to those asserted in the proposed complaint—save one. The steroid theory of negligence was replaced with the following:

> 9. Second, upon the finding of a right lung infiltrate and suspicion of a community acquired pneumonia, hospital care and monitoring was required to institute timely (and correct) antibiotic therapy. Unfortunately, upon return to Cameron

> Memorial Community Hospital later on April 24, 2015,[1] hospital sepsis protocols were not followed further delaying the administration of the necessary antibiotic therapy for Mr. Holsten's severe pneumonia.

App. Vol. II, p. 23. We refer to the allegations of rhetorical paragraph 9 above as the "sepsis theory" of negligence.

[7] Cameron Hospital eventually moved for partial summary judgment on Linda's complaint, arguing that the sepsis theory of negligence had not been presented to the MRP as required by Indiana's Medical Malpractice Act. In support of its motion, Cameron Hospital designated the deposition testimony of Dr. Will, who explained that, although he identified the sepsis theory during the MRP process, that theory and Paul's emergency room care in general were never discussed by the panel.[2] The MRP considered only the X-ray theory, the steroid theory, and more broadly, whether Dr. Faur provided Paul with the appropriate standard of care at the urgent care center. App. Vol. II, pp. 104-05.

[8] Finding the sepsis theory had not been presented to the MRP, the trial court granted Cameron Hospital's motion for partial summary judgment. Linda now appeals, and the substantive issue remains whether she presented the sepsis

---

[1] Though the complaint implies Paul visited the same hospital twice on this date, Paul actually visited two separate Cameron Hospital facilities—the urgent care center, located at 1381 N. Wayne Street, followed by the hospital emergency room, located at 416 E. Maumee Street. App. Vol. II, pp. 52, 74.

[2] According to Dr. Will: "We specifically asked, and we struggled with this, as to whether this purely focused on the Urgent Care operations or if it more broadly applied to the hospital. We did not receive clarification of that, so as [the proposed complaint] focused on Lynn Faur and a/k/a Urgent Care of Cameron Hospital, we only made a decision based upon the care received in that setting." App. Vol. II, p. 105.

theory to the MRP. Because she did not, we find the trial court lacked subject matter jurisdiction to enter summary judgment on the sepsis theory portion of Linda's medical malpractice claim.[3] *See Albright v. Pyle*, 637 N.E.2d 1360, 1363 (Ind. Ct. App. 1994) ("The lack of subject matter jurisdiction can be raised at any time.").

Discussion and Decision

I. The MRP Process

[9] Indiana's Medical Malpractice Act provides, in pertinent part, that "an action against a health care provider may not be commenced in a court in Indiana before: (1) the claimant's proposed complaint has been presented to a medical review panel . . . ; and (2) an opinion is given by the panel."[4] Ind. Code § 34-18-8-4. As explained by our Supreme Court in *Johnson v. St. Vincent Hosp., Inc.*, the MRP process "accommodates the discernment of facts," thereby encourag[ing] the mediation and settlement of claims and discourag[ing] the filing of unreasonably speculative lawsuits." 273 Ind. 374, 388-89, 404 N.E.2d 585 (1980).[5]

---

[3] Although Cameron Hospital alleged in its motion for partial summary judgment that the trial court lacked subject matter jurisdiction, App. Vol. II, p. 34, the issue was not briefed for the trial court or on appeal.

[4] There are limited exceptions to this general rule, but none apply here.

[5] *Johnson* was overruled, in part, on other grounds by *In re Stephens*, 867 N.E.2d 148 (Ind. 2007), and abrogated on other grounds by *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994). *See Plank v. Cmty. Hosps. of Ind., Inc.*, 981 N.E.2d 49, 51 n.2 (Ind. 2013).

[10] After a proposed complaint is filed and a MRP is selected, the parties provide the panel with medical records and other written evidence in support of their respective positions. Ind. Code §§ 34-18-10-1, -17. It is also "common practice" for the parties to submit narrative statements that, among other things, "point out potential breaches of the standard of care by the defendant(s)." *McKeen v. Turner*, 61 N.E.3d 1251, 1256 (Ind. Ct. App. 2016), *adopted by* 71 N.E.3d 833 (Ind. 2017). However, these statements "do not constitute evidence to be considered by the MRP." *McKeen*, 61 N.E.3d at 1257.

[11] The MRP "has the sole duty to express the panel's expert opinion as to whether or not the evidence supports the conclusion that the defendant or defendants acted or failed to act within the appropriate standards of care as charged in the complaint." Ind. Code § 34-18-10-22(a). But "[t]he Act does not call for, or permit, the disclosure of the specific reasons underlying the MRP's opinions." *McKeen*, 61 N.E.3d at 1257; *see* Ind. Code § 34-18-10-22(b) (providing four scripted opinions from which the MRP must choose). Once the MRP has issued a written report of its opinion, the claimant may file a formal complaint in a court of law. Ind. Code § 34-18-8-4.

II. Subject Matter Jurisdiction

[12] By requiring a claimant to undergo the MRP process before filing suit, Indiana's Medical Malpractice Act "grants subject-matter jurisdiction over medical malpractice actions first to the medical review panel, and then to the trial court." *Putnam Cty. Hosp. v. Sells*, 619 N.E.2d 968, 970 (Ind. Ct. App.

1993). "Subject-matter jurisdiction is the power of a court to hear and decide a particular class of cases." *Id.* Thus, a trial court has no jurisdiction to hear and adjudicate a medical malpractice claim until a MRP issues its opinion on the claimant's proposed complaint. *Terry v. Cmty. Health Network, Inc.*, 17 N.E.3d 389, 393 (Ind. Ct. App. 2014).

[13] While a medical malpractice plaintiff generally must go through the MRP process before filing suit, "there is no requirement for such plaintiff to fully explicate and provide the particulars or legal contentions regarding the claim." *Miller by Miller v. Mem'l Hosp. of S. Bend, Inc.*, 679 N.E.2d 1329, 1332 (Ind. 1997). Our Supreme Court has held that a "'plaintiff may raise any theories of alleged malpractice during litigation following the MRP process if (1) the proposed complaint encompasses the theories, and (2) the evidence relating to those theories was before the MRP." *McKeen v. Turner*, 71 N.E.3d 833, 834 (Ind 2017) (quoting and adopting 61 N.E.3d at 1262).

[14] Though the *McKeen* opinion does not directly link its two-part test to a trial court's subject matter jurisdiction, both the test and a court's jurisdiction over a medical malpractice claim are grounded in the Act's requirement that such a claim first be submitted to a MRP. *See McKeen*, 61 N.E.3d at 1256 (emphasizing that a MRP must consider whether "defendants acted or failed to act within the appropriate standards of care *as charged in the complaint*"). We therefore find the *McKeen* test applicable in determining subject matter jurisdiction over a medical malpractice plaintiff's claim.

III. Notice Pleading

[15] There is no dispute that the MRP heard evidence relating to the sepsis theory—after all, it was a panelist's review of that evidence which brought the theory to light. Linda also concedes that she did not specifically allege the sepsis theory in her proposed complaint. Appellant's Br. p. 19; Reply Br. p. 8. In such circumstances, our analysis "focus[es] on the content of the proposed complaint" and "whether, under principles of notice pleading, that complaint encompasses theories of negligence raised by the plaintiff after the MRP process has concluded." *McKeen*, 61 N.E.3d at 1260.

[16] Notice pleading "requires only '(1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for the relief to which the pleader deems entitled[.]'" *Miller*, 679 N.E.2d at 1332 (quoting Ind. Trial Rule 8(A)). "A complaint's allegations are sufficient if they put a reasonable person on notice as to why plaintiff sues." *Noblesville Redevelopment Comm'n v. Noblesville Assocs. Ltd. P'ship*, 674 N.E.2d 558, 564 (Ind. 1996). In the litigation context, the opposing party is the person requiring notice. *Id.* But during the MRP process, the panel must also be notified of a claim. *See* Ind. Code § 34-18-10-22(a) (obligating MRP to consider "appropriate standards of care *as charged in the complaint*" (emphasis added)).

[17] Where a proposed complaint alleges negligence generally, it can be presumed that the MRP had notice of, and considered, all theories of negligence relating to the evidence before it. *See Whitfield v. Wren*, 14 N.E.3d 792, 806 (Ind. Ct.

App. 2014) (presuming MRP considered unspecified theories relating to the evidence where proposed complaint alleged that "medical treatment provided by Defendants fell below the standard of care within the medical community[.]"). However, where a complaint alleges only specific theories of negligence, the MRP may reasonably rely upon those allegations in issuing its opinion. *See Beta Alpha Shelter of Delta Tau Delta Fraternity, Inc. v. Strain*, 446 N.E.2d 626, 630 (Ind. Ct. App. 1983) ("[W]here the plaintiff's complaint expressly sets forth its theories and facts in support thereof, the defendant may properly rely upon them in preparing for trial.").

IV. Specific Allegations

[18] Linda's proposed complaint narrowly focused on two specific theories of negligence—the X-ray theory and the steroid theory. Rhetorical paragraphs 5 and 6 specifically alleged that Cameron Hospital was negligent in those "*two areas*," both of which concern the health care Paul received at the urgent care center. App. Vol. II, p. 54 (emphasis added). Nowhere in her proposed complaint does Linda mention the sepsis theory of negligence or any other specific theory related to Paul's care at the hospital emergency room.

[19] To overcome the specificity of her proposed complaint, Linda points to rhetorical paragraph 8 as containing "broad general allegations" of negligence which encompass the sepsis theory. Appellant's Br. p. 19. This, however, is an overly generous reading of that paragraph. Paragraph 8 simply states: "As a direct result of the negligence of defendants, Linda Holsten suffered the

wrongful death of her husband . . . .” App. Vol. II, p. 55. A reasonable person would interpret the “negligence” in paragraph 8 as referring to the X-ray theory and steroid theory specifically alleged in the preceding paragraphs. *See Strain*, 446 N.E.2d at 630 (holding express allegation that “heating and air-conditioning units were installed . . . in a negligent and careless manner” negated any inference that design defect was also being alleged). The content of Linda’s proposed complaint does not encompass—specifically or generally—the sepsis theory of negligence.

V. Beyond the Pleadings

[20] Alternatively, Linda claims Cameron Hospital had actual notice that her medical malpractice claim may go beyond the specific theories of negligence alleged in her proposed complaint. Specifically, Linda highlights the following objection, which she lodged in response to a Cameron Hospital interrogatory asking her to identify the hospital’s alleged breaches of the standard of care:

> Objection. . . . The investigation of this case is continuing. In addition, the Plaintiff, on the advice of counsel, relies upon the Indiana Medical Malpractice Act and the provisions therein which provide for the review of any case by a Medical Review Panel to determine any act or omission on the part of any health care provider which may be below the standard of care. This matter has been initiated as a Proposed Complaint filed with the Insurance Commissioner providing for review of any claim and determination of the validity of a claim by a Medical Review Panel as a preliminary matter. See the Proposed Complaint for allegations of negligence.

App. Vol. II, p. 134.

[21] A court may look beyond the pleadings in determining whether a complaint adequately notifies the defendant of a particular claim. *Strain*, 446 N.E.2d at 630. But as indicated above, it is the MRP, not Cameron Hospital, that required notice—at least as it relates to the transfer of jurisdiction from the MRP to the trial court under Indiana's Medical Malpractice Act. *See* Ind. Code § 34-18-8-4. There is no indication that Linda's interrogatory objection was submitted to the MRP. And even if it was, the objection does nothing to expand upon or generalize the specific theories of negligence alleged in Linda's proposed complaint.

[22] Again, the MRP "has the *sole duty* to express the panel's expert opinion as to whether or not the evidence supports the conclusion that the defendant or defendants acted or failed to act within the appropriate standards of care *as charged in the complaint*." Ind. Code § 34-18-10-22(a) (emphasis added). The sepsis theory was not encompassed by the allegations of Linda's proposed complaint and, therefore, was not presented to the MRP. Accordingly, the trial court lacked subject matter jurisdiction to adjudicate that portion of Linda's medical malpractice claim.

VI. Procedural Outcome

[23] "When a court lacks subject matter jurisdiction, any action it takes is void." *Perry v. Stitzer Buick GMC, Inc.*, 637 N.E.2d 1282, 1286 (Ind. 1994). An attack on the court's subject matter jurisdiction therefore "cannot form the basis of a motion for summary judgment." *Id.* "Instead, when not pled in the answer, the

appropriate vehicle for such a challenge is a motion to dismiss for lack of subject matter jurisdiction under Indiana Trial Rule 12(B)(1)." *Id.* "A dismissal under Trial Rule 12(B)(1) is not an adjudication on the merits nor is it *res judicata*." *Id.* "A plaintiff thus is free to refile the action in the same tribunal or another tribunal that has jurisdiction." *Id.*

[24] The trial court lacked subject matter jurisdiction over the sepsis theory portion of Linda's medical malpractice claim. We therefore vacate the court's entry of partial summary judgment and remand, instructing the trial court to dismiss, without prejudice, the sepsis theory portion of Linda's claim.

[25] Kirsch, J., and Altice, J., concur.