MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Tyler Zipes
Hovde Dassow + Deets, LLC
Indianapolis, Indiana

ATTORNEY FOR APPELLEES

R. Steven Johnson
Sacopulos, Johnson & Sacopulos
Terre Haute, Indiana

IN THE COURT OF APPEALS OF INDIANA

Millie J. White,

Appellant-Respondent,

v.

John Lee Nichols, DDS and John L. Nichols, DDS, PC,

Appellees-Petitioners,

March 29, 2021

Court of Appeals Case No. 20A-MI-1705

Appeal from the Vigo Superior Court

The Honorable Matthew L. Headley, Special Judge

Trial Court Cause No. 84D06-2001-MI-518

Robb, Judge.

Case Summary and Issue

[1] Millie White filed a proposed complaint for dental malpractice against John Lee Nichols, D.D.S. and John L. Nichols, D.D.S., P.C. (collectively, "Dr. Nichols"). While the case was pending before the medical review panel, Dr. Nichols filed a motion for preliminary determination in the trial court seeking an order redacting certain information contained in White's submission to the medical review panel. The trial court ordered the information redacted. White appeals, raising several issues for our review, of which we find the following dispositive: whether the trial court had jurisdiction to entertain the motion for preliminary determination. Concluding it did not, we reverse the trial court.

Facts and Procedural History

[2] On March 5, 2015, Dr. Nichols placed a bridge in the upper right quadrant of White's mouth. White immediately complained the bridge was causing pain and pressure. Thereafter, White continued to have pain and discomfort from the bridge and returned to Dr. Nichols multiple times between March 2015 and February 2016 for adjustments, none of which alleviated her pain.

[3] In July 2016, White submitted a Patient Mediation Request to the Indiana Dental Association ("IDA"). IDA's "peer review process" is voluntary and

non-binding.[1] On September 22, 2016, White received a letter (the "Resolution Letter") from IDA describing her complaint, stating the committee's findings, and making a recommendation. A copy of the Resolution Letter was also provided to Dr. Nichols, although he had declined to participate in the process.[2]

[4] On February 27, 2017, White filed a proposed complaint for malpractice with the Indiana Department of Insurance alleging that Dr. Nichols was negligent in his care and treatment of White, causing significant damage to her bite, teeth, and mouth; pain and suffering; and past and future medical expenses.

[5] The medical review panel was fully formed in July 2019 and White made her submission to the panel on October 31, 2019. The submission included the text of the Resolution Letter. *See* Appendix of Appellant, Volume 2 at 39-40. Dr. Nichols sent correspondence to the chairman of the medical review panel "stating [they] would be required to file a Motion for Preliminary Determination of Law . . . with regard to pages 5-6 of White's Submission which included a Resolution from the Indiana Dental Association[.]" *Id.* at 16-17, 46. Aside from asking for an extension to make their submission and

---

[1] IDA's website describes its peer review process and how a patient with "quality-of-care" issues can file a complaint. Indiana Dental Association, Find a Resolution – File a Complaint (Mar. 10, 2021), https://indental.org/public-resources/file-a-complaint/ [https://perma.cc/P2A4-YWD8]. Once a peer review form is submitted, a "mediation-trained dentist will contact the involved parties and make every attempt to help [the patient] and the dentist reach a mutually satisfactory resolution." *Id.* If mediation is unsuccessful, the case goes to a committee hearing before a panel of dentists who review findings and make recommendations for a resolution. *See id.*

[2] Although Dr. Nichols declined to participate in mediation, "the local peer review chair determined enough information [was] available to hold a [committee] Hearing." Appendix of Appellant., Volume 2 at 54.

explaining why an extension was necessary, Dr. Nichols did not request the chairman take any action with regard to White's submission.

[6] On January 27, 2020, before making their own submission to the medical review panel, Dr. Nichols filed a Motion for Preliminary Determination of Law in the trial court, seeking a preliminary determination of law that the content of the Resolution Letter should be redacted from White's submission to the medical review panel.[3] Dr. Nichols relied on the limited jurisdiction granted to a trial court in Indiana Code section 34-18-11-1(a)(1) to preliminarily determine an affirmative defense or issue of law or fact and argued the "proposed redaction[is] a question of law for the Court to determine because the Peer Review Committee decision is inadmissible as a matter of statutory law." *Id.* at 25.[4] Dr. Nichols' prayer for relief requested the trial court "redact from

---

[3] White's submission also included a section titled "Duty and Function of the Medical Review Panel" to which Dr. Nichols objected. Ultimately, White agreed to redact that portion of the submission and only inclusion of the Resolution Letter remained contested. *See* Appealed Order at 1.

[4] Indiana Code section 34-30-15-9 prohibits both the discovery of and the use as evidence in judicial or administrative proceedings "records or determinations of or communications to a peer review committee" without a prior waiver by the committee.

Dr. Nichols argues the Resolution Letter cannot be included in White's submission and considered by the medical review panel because of this statutory evidentiary privilege, noting that when he made a third-party request for production of "any and all records" in IDA's possession pertaining to White, IDA objected and stated the review committee had not executed a waiver. Brief of Appellees at 11 (page number based on .pdf pagination). White argues IDA's peer review process is not akin to a "peer review committee" as the term is used in chapter 34-30-15, the Resolution Letter is not protected by section 34-30-15-9, and the medical review panel is not a "judicial or administrative proceeding."

Because we resolve this case on grounds of the trial court's jurisdiction, we need not reach the issue of whether the peer review evidentiary privilege applies to IDA's committee or the Resolution Letter and if so, whether it is applicable at this stage of the proceedings.

[White's] Submission . . . Pages 5-6 entitled 'Resolution from the Indiana Dental Association[.]'" *Id.* at 17-18.

[7] White opposed the motion for preliminary determination. She argued that the relief sought is outside the trial court's limited jurisdiction to preliminarily determine matters while a case is still pending before the medical review panel. She also argued that the trial court "may not act as a gatekeeper of evidence presented to the medical review panel[.]" *Id.* at 66.

[8] On May 11, 2020, the trial court issued an order on the motion for preliminary determination. The trial court stated the issue as "whether or not the Indiana Dental Association's written peer review of this matter is permitted to be included in [White's] submission to the Indiana Department of Insurance package (which would then be reviewable by the Medical Review Panel[])." *Id.* at 74. But the trial court's judgment was that it "is ruling on the discovery issue only – which is to *grant* [Dr. Nichols'] third-party motion." *Id.* at 76.

[9] Dr. Nichols filed a Trial Rule 60(B) motion for relief from the trial court's order, alleging the trial court's order was in need of clarification, as it "did not specifically rule on the redaction[] prayed for in [the] Motion for Preliminary Determination." *Id.* at 78-79. In an accompanying brief, Dr. Nichols specifically noted the motion for preliminary determination "was not a discovery motion." *Id.* at 86. White again argued the trial court did not have jurisdiction to entertain the motion for preliminary determination. On August

20, 2020, the trial court issued the following order on Dr. Nichols' Trial Rule 60(B) motion:

> Court concludes that this is a discovery issue – whether a party can discover, and then use, a peer review committee's analysis, which is privileged pursuant to statute, in its submission to the [Indiana Department of Insurance].
>
> Court concludes and orders White to redact the clearly privileged peer review analysis from its proposed submission to the [Indiana Department of Insurance] prior to consideration by the members of that panel.

Appealed Order at 3. White now appeals.[5]

Discussion and Decision

I. Standard of Review

[10] Before a plaintiff may pursue a malpractice complaint in court against a qualified healthcare provider, the Indiana Medical Malpractice Act (the "MMA") requires the plaintiff to present a proposed complaint to a medical

---

[5] White brought this appeal as if from a final judgment. *See* Notice of Appeal at 2. In general, orders in preliminary determination proceedings are not final judgments unless they include the language required by Appellate Rule 2(H)(2) because the medical malpractice case, of which the preliminary determination is a unique part, continues. *Ramsey v. Moore*, 959 N.E.2d 246, 253 (Ind. 2012). The appealed order does not include this language, but Dr. Nichols does not argue the case should be dismissed because of this or for any other reason. Moreover, although a party who pursues an appeal from a non-final judgment has forfeited the right to appeal, we still have jurisdiction to consider a premature appeal on the merits. *In re D.J. v. Indiana Dep't of Child Servs.*, 68 N.E.3d 574, 579 (Ind. 2017). As White and Dr. Nichols, the parties to the preliminary determination proceeding, are also the only parties to the medical malpractice case and as an early determination of this issue will promote a more efficient use of resources than an appeal after the medical malpractice case is decided, we exercise our discretion to address this appeal now.

review panel, and the panel must give its opinion as to whether the provider breached the standard of care. *See* Ind. Code § 34-18-8-4; *Anonymous Hosp. v. Spencer*, 158 N.E.3d 380, 384-85 (Ind. Ct. App. 2020). A motion for preliminary determination of law under Indiana Code section 34-18-11-1 is a procedure that nonetheless permits a trial court to assert jurisdiction over threshold issues before a medical review panel has acted. *Haggerty v. Anonymous Party 1*, 998 N.E.2d 286, 294 (Ind. Ct. App. 2013).

[11] White argues that the trial court erred in interpreting Indiana statutory and case law which formed the basis for the court's decision that her submission to the medical review panel should be redacted. Our standard of review of a trial court's decision on a motion for preliminary determination depends on whether the court "resolved disputed facts, and if so, whether the trial court conducted an evidentiary hearing or ruled on a paper record." *Spencer*, 158 N.E.3d at 384 n.1 (citation omitted). Where, as here, the court neither conducted an evidentiary hearing nor resolved any disputed facts or credibility issues, a pure question of law is presented, and we review the matter de novo. *See Lorenz v. Anonymous Physician #1*, 51 N.E.3d 391, 397 (Ind. Ct. App. 2016). We therefore owe no deference to the trial court's interpretation of the relevant statutes and case law. *Spencer*, 158 N.E.3d at 384.

II. Trial Court's Jurisdiction

[12] Pursuant to the MMA, a party to a malpractice action may request the appropriate 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; or . . . compel discovery in accordance with the Indiana Rules of Procedure." Ind. Code § 34-18-11-1(a). The trial court has jurisdiction to entertain a motion for preliminary determination only during the time after a proposed complaint is filed and before the medical review panel gives the panel's written opinion. Ind. Code § 34-18-11-1(c).

[13] In defining the narrow parameters of the trial court's jurisdiction under this statute, our supreme court has stated:

> First, the court can determine either affirmative defenses or issues of law or fact that may be preliminarily determined under the Indiana Trial Rules and, secondly, it may compel discovery in accordance with the Indiana Trial Rules. Therefore, we must turn to the Indiana Trial Rules to further define the courts' power. Our review of the rules reveals that Trial Rule 8(C) contains a listing of affirmative defenses, Trial Rule 12(B) and (C) sets forth a listing of matters which can be preliminarily determined by motion, and Trial Rules 26 through 37, inclusively, contain the discovery rules. We hold that [Indiana Code section 34-18-11-1] specifically limits the power of the trial courts of this State to preliminarily determining affirmative defenses under Trial Rule[8(C)], 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.

Griffith v. Jones, 602 N.E.2d 107, 110 (Ind. 1992).[6]

[14] The trial court premised its exercise of jurisdiction on the motion for preliminary determination raising a discovery issue. *See* Appealed Order at 3. But even Dr. Nichols has disavowed discovery as an avenue for the trial court's jurisdiction. *See* App. of Appellant, Vol. 2 at 86. The motion for preliminary determination clearly did *not* ask the trial court for any relief under Trial Rules 26 to 37 and even if it did, there was no relief to be granted – both parties already *had* the Resolution Letter, as it was provided to both parties by IDA when it closed its review. *See id.* at 54. *Use* of the Resolution Letter is not a discovery issue but an evidentiary one. And as we will discuss further below, *infra* Section III, our supreme court held in *Griffith* that trial courts do not have jurisdiction under section 34-18-11-1(a) "to instruct the medical review panel concerning . . . the evidence it may consider in reaching its opinion[.]" 602 N.E.2d at 111.

[15] Dr. Nichols claimed the trial court had jurisdiction to "'preliminarily determine an affirmative defense or issue of law or fact' that does not pertain to the issues reserved for the medical review panel[,]" App. of Appellant, Vol. 2 at 21 (quoting Ind. Code § 34-18-11-1(a)(1)), and posited that the proposed redaction was an issue of law for the trial court to decide, as the Resolution Letter was inadmissible as a matter of statutory law, *id.* at 25. Dr. Nichols' argument that

---

[6] *Griffith* construed Indiana Code section 16-9.5-10-1, which is the precursor to the current section 34-18-11-1. The two statutes are identical in all relevant respects.

subsection 34-18-11-1(a)(1) confers jurisdiction on the trial court to decide this issue rests on a partial quote of the statute, however. Subsection 34-18-11-1(a)(1) in full states that the trial court may "preliminarily determine an affirmative defense or issue of law or fact *that may be preliminarily determined under the Indiana Rules of Procedure*[.]" As noted above, that means any issue of law or fact that may be preliminarily determined under Trial Rule 12(D) – that is, "the defenses specifically enumerated (1) through (8) in [Trial Rule 12(B)], and the motion for judgment on the pleadings mentioned in [Trial Rule 12(C)]." Ind. Trial Rule 12(D); *see Griffith*, 602 N.E.2d at 110. Dr. Nichols' motion did not ask for a ruling on any Trial Rule 12(B) matter – namely, lack of subject matter or personal jurisdiction; incorrect venue; insufficient process or service of process; failure to state a claim upon which relief can be granted; failure to join a necessary party; or the same action pending in another Indiana state court. Nor was it a motion for judgment on the pleadings or motion for summary judgment seeking a determination on the merits of White's complaint per Trial Rule 12(C). *See Mourning v. Allison Transmission, Inc.*, 72 N.E.3d 482, 486 (Ind. Ct. App. 2017) ("A motion for judgment on the pleadings is typically directed toward a determination of the substantive merits of the controversy."); T.R. 12(C) ("If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment[.]"). And although privilege *could* in certain circumstances be considered an affirmative defense, *see Haggerty*, 998 N.E.2d at 291 (noting an affirmative defense controverts an element of the plaintiff's claim; or in other words, admits the allegations but excuses fault), the

privilege asserted here is not *Dr. Nichols'* privilege but a third party's, and therefore, it is not an affirmative defense to a claim against him.

[16] "[T]he grant of power to the trial court to preliminarily determine matters is to be narrowly construed." *Griffith*, 602 N.E.2d at 110. Because Dr. Nichols' motion for preliminary determination did not ask the trial court to determine an affirmative defense or an issue of law or fact under the Trial Rules or to compel discovery, the trial court exceeded its statutory authority to preliminarily determine the law in this case.[7] *See Connersville Diagnostic & Therapeutic Ctr., Inc. v. Thomas*, 649 N.E.2d 636, 637 (Ind. Ct. App. 1994) (holding the trial court did not have the power to make a preliminary determination where the defendants' request was not related to affirmative defenses, issues of law or fact under Trial Rule 12(D), or discovery under Trial Rules 26 through 37).

III. Scope of Jurisdiction

[17] Even if the trial court did have jurisdiction pursuant to Indiana Code section 34-18-11-1, it would not have had the authority to order redaction of the Resolution Letter from White's submission.

---

[7] Although Dr. Nichols' motion for preliminary determination relied solely on the trial court having jurisdiction pursuant to Indiana Code section 34-18-11-1(a)(1), Dr. Nichols now argues that the trial court also had jurisdiction pursuant to Indiana Code section 34-18-10-14 to order redaction "of the legal argument in White's Submission"; in other words, the "Duty and Function of the Medical Review Panel" section. *See* Brief of Appellees at 12 (quoting *Sherrow v. GYN, Ltd.*, 745 N.E.2d 880, 885 (Ind. Ct. App. 2001), in which we held legal argument is inappropriate in evidentiary submissions because legal argument is not evidence and remanded for all legal argument to be redacted from the challenged submission). However, White agreed to redact that section of her submission prior to the trial court's order and Dr. Nichols does not argue section 34-18-10-14 would also grant the trial court jurisdiction to order redaction of the Resolution Letter.

[18] Our supreme court has emphasized that the medical review panel process is intended to be "informal" and "limited":

> The statute contemplates that the panel will function in an informal and reasonable manner. It is guided by a trained lawyer who presumptively will not deny to each party a reasonable opportunity to present its evidence and authorities. The scope of the panel's function is limited. It does not conduct a hearing or trial and does not render a decision or judgment. There is, therefore, no reason to mandate that the statute relegate burdens of proof or production and to otherwise specify procedures applicable in hearings and trials. The panel is conducting a rational inquiry into the extent and source of the patient's injuries for the purpose of forming its expert opinion.

Johnson v. St. Vincent Hosp., 273 Ind. 374, 390-91, 404 N.E.2d 585, 596 (1980), *overruled 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).

[19] The court has further stated that in light of the legislature's clear intent for the medical review panel process to be informal,

> 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*.

Griffith, 602 N.E.2d at 110 (emphasis added).

[20] In *Chen v. Kirkpatrick*, 738 N.E.2d 727 (Ind. Ct. App. 2000), we applied *Griffith* in addressing whether a trial court properly denied a doctor's motion for

preliminary determination seeking removal of certain reports he deemed irrelevant to his care and treatment of the particular patients at issue from the plaintiffs' submission to the medical review panel. The doctor argued there should be a "gatekeeper" to determine the evidence that may be submitted to and/or considered by the medical review panel. *Id.* at 729. We reviewed Indiana Code section 34-18-10-17, concerning evidence to be submitted to the medical review panel, and determined that section makes clear that the medical review panel alone has the power to determine the evidence it will consider, *see* Ind. Code § 34-18-10-17(b) ("The evidence may consist of . . . any other form of evidence *allowable by the medical review panel*.") (emphasis added), and the chairman's role is simply to ensure that "each panel member has the opportunity to review every item of evidence submitted by the parties[,]" Ind. Code § 34-18-10-17(d). *Chen*, 738 N.E.2d at 730. We also noted that *Griffith* "unequivocally" held that trial courts do not have jurisdiction pursuant to Indiana Code section 34-18-11-1 to instruct the medical review panel concerning the evidence it may consider in reaching its opinion. *Id.* Accordingly, we concluded that "neither the medical review panel chairman nor the trial court may act as a gatekeeper and remove from consideration by the medical review panel materials submitted to it by the parties." *Id.*

[21] The same is true here. Dr. Nichols seeks to have the trial court act as a gatekeeper and redact evidence submitted to the medical review panel by White. Dr. Nichols claims that unless the trial court is allowed to do so, they "would have no avenue for legal relief." Br. of Appellee at 15. However, the

legislature and our courts have been quite clear that acting as a gatekeeper is not the trial court's role in the medical review panel process and the admissibility of the Resolution Letter can still be raised and decided at trial. Accordingly, assuming the trial court should have considered Dr. Nichols' motion for preliminary determination at all, the trial court erred in granting the relief Dr. Nichols sought and ordering the Resolution Letter to be redacted from White's submission to the medical review panel.

Conclusion

[22] The trial court erred in ruling on Dr. Nichols' motion for preliminary determination and ordering the Resolution Letter to be redacted from White's submission to the medical review panel. The judgment of the trial court is reversed.

[23] Reversed.

Bailey, J., and Tavitas, J., concur.