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IN THE  
COURT OF APPEALS OF INDIANA

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The Health and Hospital  
Corporation of Marion County  
d/b/a Eagle Valley Meadows  
and American Senior  
Communities, LLC,  
*Appellants-Defendants,*

v.

Sharon Dial, as Administrator  
for the Estate of Robert  
McFerran, Deceased,  
*Appellee-Plaintiff*

July 30, 2021

Court of Appeals Case No.  
20A-CT-2382

Appeal from the Marion Superior  
Court

The Honorable P.J. Dietrick,  
Judge

Trial Court Cause No.  
49D12-2001-CT-000369

**May, Judge.**

[1] The Health and Hospital Corporation of Marion County d/b/a Eagle Valley Meadows and American Senior Communities, LLC (collectively, “Eagle Valley Meadows”) appeal the trial court’s order denying their motion for summary

judgment. Eagle Valley Meadows presents one issue for our review, which we revise and restate as whether a proposed complaint alleging medical malpractice filed with the Indiana Department of Insurance in the name of a deceased individual on behalf of a deceased alleged victim of malpractice tolls the statute of limitations pursuant to Indiana Code section 34-18-7-3. We affirm and remand.

## Facts and Procedural History

[2] On December 6, 2010, Robert McFerran (“Robert”) was admitted to Eagle Valley Meadows, a nursing home in Indianapolis. Robert thereafter resided primarily at Eagle Valley Meadows until his death on February 25, 2012. Robert was survived by his wife, Betty McFerran (“Betty”), and four adult children, including Karen Brinsley and Sharon Dial. Betty was the administrator of Robert’s estate until she passed away on October 2, 2013. On October 7, 2013, Attorney David Stewart filed a proposed complaint with the Indiana Department of Insurance (“IDOI”) on behalf of Betty, individually and as wife of Robert, deceased. The proposed complaint alleged Eagle Valley Meadows provided negligent medical care and, as a result, Robert suffered permanent injuries, pain, emotional distress, and death.

[3] On December 3, 2013, Karen Brinsley was appointed the successor administrator of Robert’s supervised estate for the sole purpose of prosecuting a wrongful death claim. Brinsley subsequently left Indiana, and Sharon Dial was appointed successor administrator of Robert’s estate in 2015. On October 7,

2019, the medical review panel issued an opinion in favor of Eagle Valley Meadows. On January 3, 2020, Dial, as administrator of Robert’s estate, filed a complaint in Marion Superior Court alleging Eagle Valley Meadows’ negligence resulted in Robert’s death.

[4] Eagle Valley Meadows filed a motion for summary judgment on April 10, 2020. Eagle Valley Meadows argued Betty’s proposed complaint was a legal nullity due to her death before the proposed complaint was filed with the IDOI, and therefore, the proposed complaint did not toll the applicable statute of limitations, which resulted in Dial’s suit being brought outside the statute of limitations period. Dial filed a response to Eagle Valley Meadows’ motion for summary judgment on August 17, 2020, and the trial court held a hearing on the motion on September 24, 2020. At the conclusion of the hearing, the trial court directed both parties to submit post-hearing briefs:

I’m going to ask you both this—if, if you all happen to come across a case in the next 2 weeks that talks about procedural mechanisms at the Department of Insurance level and whether our trial rules apply, don’t apply, which ones apply, by all means just file a notice of additional authority with the court . . . And the other thing is if you come across a case, obviously from Indiana, but maybe somewhere else here in the Midwest that does address this particular issue, I’d be interested if I can’t find it myself . . . I guess what I’m getting at is this—to me, I understand the caselaw that [Eagle Valley Meadows] has sighted [sic], and they’re older cases. I want to see if there’s any more current cases that talk about that rule of law, that black-letter rule as it applies to newly created causes of action such as a claim under the Medical Malpractice Act.

(Tr. Vol. II at 24-25.) The parties' post-hearing briefs primarily addressed the applicability of the Trial Rules, and the trial court summarily denied Eagle Valley Meadows' motion for summary judgment on October 23, 2020. The trial court subsequently certified the order for interlocutory appeal, and we accepted jurisdiction on January 21, 2021.

## Discussion and Decision

[5] Our standard of review is well-settled:

When we review a grant or denial of a motion for summary judgment, our standard of review is the same as it is for the trial court. *Reed v. Reid*, 980 N.E.2d 277, 285 (Ind. 2012). The moving party must show there are no genuine issues of material fact and he is entitled to judgment as a matter of law. *Id.* If the moving party carries its burden, then the nonmoving party must present evidence establishing the existence of a genuine issue of material fact. *Id.* In deciding whether summary judgment is proper, we consider only the evidence the parties specifically designated to the trial court. Ind. Trial Rule 56(C), (H). We construe all factual inferences in favor of the non-moving party and resolve all doubts regarding the existence of a material issue against the moving party. *Reed*, 980 N.E.2d at 285.

*Asklar v. Gilb*, 9 N.E.3d 165, 167 (Ind. 2014). “We ‘consciously err[ ] on the side of letting marginal cases proceed to trial on the merits, rather than risk short-circuiting meritorious claims.’” *Brown by Brown v. Southside Animal Shelter, Inc.*, 158 N.E.3d 401, 405 (Ind. Ct. App. 2020) (quoting *Hughley v. State*, 15 N.E.3d 1000, 1004 (Ind. 2014)), *aff’d on reh’g*, 162 N.E.3d 1121 (Ind. Ct. App. 2021), *trans. denied*.

[6] Generally, a plaintiff has two years from the date of accrual to file a personal injury action. Ind. Code § 34-11-2-4. This also holds true for actions brought in tort or contract against medical providers. Ind. Code § 34-18-7-1. However, in Indiana, a plaintiff alleging medical malpractice must present a proposed complaint to a medical review panel and wait for the panel to render an opinion before initiating suit in state court, unless all parties agree in writing that the claim should not be presented to a medical review panel or the plaintiff seeks no more than \$15,000 in damages. Ind. Code §§ 34-18-8-4 to -6. As a result, Indiana Code section 34-18-7-3 provides that “[t]he filing of a proposed complaint tolls the applicable statute of limitations to and including a period of ninety (90) days following the receipt of the opinion of the medical review panel by the claimant.”

[7] Eagle Valley Meadows argues that because Betty was dead at the time the proposed complaint was filed with the IDOI, the proposed complaint was void ab initio.<sup>1</sup> In support of its argument, Eagle Valley Meadows cites numerous cases from around the country that hold a deceased individual cannot initiate a lawsuit. *See Miller’s Est. v. St. Joseph Cnty. Home*, 87 N.E.2d 886, 887 (Ind. Ct. App. 1949) (holding court lacked jurisdiction to consider complaint brought in name of nonexistent entity); *Guernsey’s Est. v. Pennington*, 70 N.E. 1008, 1008 (Ind. Ct. App. 1904) (holding estate of dead man without a representative could

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<sup>1</sup> Void ab initio is, in the words of the trial court, a “fancy legal term,” (Tr. Vol. II at 13), that means “an act or action that never had any legal existence at all because of some infirmity in the action or process.” *Trook v. Lafayette Bank & Tr. Co.*, 581 N.E.2d 941, 944 (Ind. Ct. App. 1991), *trans. denied*.

not prosecute appeal); *Adelsberger v. United States*, 58 Fed. Cl. 616, 618 (Fed. Cl. 2003) (holding Bureau of Prisons employee who died before suit was filed did not have the capacity to sue the federal government and could not be included as a plaintiff in class action lawsuit seeking unpaid overtime pay); and *Gregory v. DiCenzo*, 713 A.2d 772, 775 (R.I. 1998) (holding statute of limitations prevented substitution of executor for plaintiff who died five weeks before personal injury suit was brought in her name).

[8] However, none of the cases cited by Eagle Valley Meadows involves a proposed complaint filed in front of a medical review panel, which is the situation in the case at bar. At the summary judgment hearing, the trial court specifically asked Eagle Valley Meadows, “[A]re there any more current Court of Appeals or Indiana Supreme Court cases that talk about a position of an improper party at the Indiana Department of Insurance level and how that translates to a superior court filing?” (Tr. Vol. II at 16.) Eagle Valley Meadows acknowledged that it could not find an appellate decision with the same procedural facts as the instant case. We therefore hold that, while a party must be alive to initiate a complaint in a state or federal court, the cases Eagle Valley Meadows cites do not answer whether a proposed complaint filed before the IDOI by the deceased

administrator of the alleged malpractice victim’s estate tolls the statute of limitations.<sup>2</sup>

[9] Nor do the Indiana Trial Rules determine the issue presented in the instant case.<sup>3</sup> The Trial Rules require a living plaintiff to file a complaint in state court. *See* Ind. T.R. 17(A) (“Every action shall be prosecuted in the name of the real party in interest.”). If the plaintiff subsequently dies or becomes incompetent, then the plaintiff’s successor in interest may be substituted for the plaintiff. Ind. T.R. 25. But the Trial Rules’ pertinence to proceedings before the IDOI and the medical review panel is unsettled. The trial court questioned the parties at the summary judgment motion hearing regarding the applicability of the Trial Rules:

THE COURT: Let me ask you this, Mr. Mills [Attorney for Eagle Valley Meadows]—and I know both of you practice in this area quite a bit—do the rules of trial procedure apply to proceedings before the Department of Insurance, or do they have their own procedural set of rules?

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<sup>2</sup> Similarly, we are not convinced by Eagle Valley Meadows’ argument that “[t]he Proposed Complaint filed on October 7, 2013 was not filed by a ‘patient’ as required by the Indiana Medical Malpractice Act.” (Appellant’s Br. at 14.) Indiana Code section 34-18-8-1 provides that “a patient or the representative of a patient” may file a complaint in a court of law and demand trial by jury. However, Eagle Valley Meadows’ argument mistakenly conflates what is required for a complaint to be filed in state court with what is required for a proposed complaint to be filed before the IDOI.

<sup>3</sup> We note that this issue could have been avoided had either Brinsley or Dial filed an amended proposed complaint while the proposed complaint was pending before the medical review panel. *See Van Sice v. Sentany*, 595 N.E.2d 264, 267 (Ind. Ct. App. 1992) (“First, there is no statutory prohibition against filing a motion to amend the proposed complaint with the Commissioner of Insurance, and indeed, it is routine practice to allow amendment during the pendency of the panel’s review.”).

MR. MILLS: The Indiana rules apply, there's debate over which rules specifically apply. I would say some do, some don't. Certainly the discovery rules apply, um, pursuant to the med mal act, which of course is statutory, um, so the med mal act specifically says that the trial rules apply as they're required.

THE COURT: Okay.

MR. STEWART [Attorney for Dial]: The bottom line is that you have some leeway with the Indiana Department of Insurance in filing complaints, and so the trial rules don't always apply when it comes to filing a complaint with the Department of Insurance.

(Tr. Vol. II at 13.) The parties further addressed this question in their post-hearing briefs, and Eagle Valley Meadows noted that Indiana's Trial Rules related to discovery and failure to prosecute do apply to proceedings before administrative agencies. *See* Ind. T.R. 28(F) ("Whenever an adjudicatory hearing . . . is held by or before an administrative agency, any party to that adjudicatory hearing shall be entitled to use the discovery provisions of Rules 26 through 37 of the Indiana Rules of Trial Procedure."); *see also Beard v. Dominguez*, 847 N.E.2d 1054, 1059 (Ind. Ct. App. 2006) (affirming dismissal of action pending before medical review panel pursuant to Trial Rule 41(E)). However, neither party provided authority regarding the applicability of Trial Rule 17 or Trial Rule 25 to proceedings before the medical review panel.

[10] Dial relies on out-of-state cases that have allowed substitution pursuant to the particular state's court rules for a deceased party after the statute of limitations period has expired. *See Martinez v. Segovia*, 62 P.3d 331, 338 (N.M. Ct. App.



2002) (holding widow could be substituted for deceased plaintiff even though statute of limitations period expired before the substitution occurred); *Talan v. Murphy*, 443 So.2d 207, 208-09 (Fla. Ct. App. 1983) (holding father could proceed as plaintiff in suit brought on behalf of deceased son even though father filed suit before his appointment as personal representative of his son’s estate), *reh’g denied, pet. for review denied*; and *Nutter v. Woodard*, 614 N.E.2d 692, 695 (Mass. Ct. App. 1993) (holding plaintiff could amend complaint to include estate of deceased defendant and amendment related back to filing of original complaint). However, like the cases cited by Eagle Valley Meadows, these cases all concern matters filed in state courts rather than proposed medical malpractice complaints presented to a medical review panel. Dial’s invocation of Indiana Code section 34-11-8-1, which allows for the continuation of an action if it abates or is defeated by the death of a party, is misplaced because the statute also contemplates that the plaintiff was alive when the lawsuit was filed. *Id.* (“This section applies if a plaintiff commences an action and . . .”). We are thus left with a question of first impression.

[11] Even though the Indiana Constitution does not have a “case or controversy” clause like the United States Constitution, Indiana courts are limited by the doctrine of judicial restraint to the resolution of “concrete disputes” between litigants. *Horner v. Curry*, 125 N.E.3d 584, 589 (Ind. 2019). When the court strays from deciding actual disputes between adverse litigants and fashioning meaningful relief, it risks encroaching on the powers properly entrusted to the legislative and executive branches. *Holcomb v. City of Bloomington*, 158 N.E.3d

1250, 1267-68 (Ind. 2020) (Slaughter, J., dissenting) (discussing *Horner*, 125 N.E.3d at 589). Therefore, a court cannot perform its function and award meaningful relief unless it is satisfied that the plaintiff has standing to bring suit and is the real party in interest. *Town of Georgetown v. Sewell*, 786 N.E.2d 1132, 1137-38 (Ind. Ct. App. 2003). While the two ideas are related, “standing and the real party in interest rule are separate concepts.” *Fish v. 2444 Acquisitions, LLC*, 46 N.E.3d 1261, 1265 (Ind. Ct. App. 2015), *trans. denied*. Standing concerns “whether a party has an actual demonstrable injury for purposes of a lawsuit.” *Id.* (quoting *Hammes v. Brumley*, 659 N.E.2d 1021, 1029 (Ind. 1995), *reh’g denied*). “A real party in interest, on the other hand, is the person who is the true owner of the right sought to be enforced.’ The real party in interest ‘is entitled to the fruits of the action.’” *Id.* (quoting *Hammes*, 659 N.E.2d at 1030). Therefore, while Robert is the victim of the alleged malpractice, the administrator of his estate is the real party in interest and is required to bring suit in state court because the administrator stands to recover and distribute whatever judgment may be entered against Eagle Valley Meadows. *See* Ind. Code § 34-23-1-1 (personal representative of deceased individual may bring wrongful death action against tortfeasor due to tortfeasor’s wrongful act or omission, if had the deceased individual lived, the deceased individual could have sued the tortfeasor for the same act or omission). The presence of a living party able to accept relief is part and parcel of the court performing its judicial function.

[12] We are not convinced, however, that the medical review process requires that a proposed complaint be filed by a living person as administrator of the estate of a deceased victim of alleged medical malpractice. “The purpose of the medical review panel is to ‘review medical malpractice complaints’” and “‘express [an] expert opinion as to whether or not the evidence supports the conclusion that the defendant or defendants failed to act within the appropriate standards of care as charged in the complaint.’” *Whitfield v. Wren*, 14 N.E.3d 792, 805-06 (Ind. Ct. App. 2014) (citing Ind. Code § 34-18-10-1, -22(a)) (emphases removed) (brackets in original). The central issue for the medical review panel was whether Eagle Valley Meadows’ care for Robert fell below the applicable standard of care. The identity of the administrator of Robert’s estate is not relevant to that question. Even though the proposed complaint contained claims supposedly brought in Betty’s individual capacity, those claims were directly linked to damages incurred as a result of the allegedly negligent medical care given to Robert.

[13] In support of her position, Dial argues Eagle Valley Meadows “made no effort to claim or show any prejudice,” nor did Eagle Valley Meadows assert “that the allegations filed in the name of the deceased widow differ in any substantial way from the allegations made by the personal representative later appointed.” (Appellee’s Br. at 8.) Prejudice to the defendant is assumed when a suit is filed outside the statute of limitations period, and the defendant does not have to make an individualized showing of prejudice. *See Heitman v. State*, 627 N.E.2d 1307, 1309 (Ind. Ct. App. 1994) (“The statute of limitations exists primarily to

insure against inevitable prejudice and injustice to a defendant that a delay in prosecution creates.”); *see also Stickdorn v. Zook*, 957 N.E.2d 1014, 1021 (Ind. Ct. App. 2011) (party moving for summary judgment on a statute of limitations defense must first make prima facie showing claim was brought outside statute of limitations period and then the burden shifts to nonmovant to show genuine issue of material fact as to why suit is not barred by statute of limitations).

However, this case is not like the typical statute of limitations case where the plaintiff simply waits to file a lawsuit for a lengthy period of time after the plaintiff's cause of action accrues. Here, a proposed complaint was filed less than two years after Robert's death, and therefore, Eagle Valley Meadows was timely made aware of claims that its care for Robert fell below the applicable standard of care. Consequently, the danger that statutes of limitation are meant to protect defendants from is not present here. The medical review process was not thwarted, and Eagle Valley Meadows has not shown how it was prejudiced because the proposed complaint was filed on behalf of Betty after her death, rather than on behalf of Karen Brinsley or Sharon Dial.

[14] We are also guided by the general principle that a party may not sit on its rights only to later take advantage of an alleged error. *See Reid v. State*, 231 N.E.2d 808, 810 (Ind. 1967) (“This Court has held on a number of occasions that a party may not sit idly by and permit the Court to act, in even an erroneous [manner], and then attempt to take advantage of the error at a later time.”). We acknowledge that it is not clear from the record on appeal when Eagle Valley

Meadows learned of Betty's death.<sup>4</sup> However, if Eagle Valley Meadows did not learn of Betty's death until Dial filed suit in state court, that fact demonstrates that she was not essential to the medical review panel's review. Further, Eagle Valley Meadows could have discovered Betty's death while the proposed complaint was pending before the medical review panel because death certificates are public records subject to disclosure. *See Evansville Courier & Press v. Vanderburgh Cnty. Health Dept.*, 17 N.E.3d 922, 931 (Ind. 2014) (holding death certificates are public records subject to disclosure pursuant to Indiana's Access to Public Records Act). Indiana Code section 34-18-11-1 allows a party to petition a trial court for preliminary determination of a question of law or fact as long as the issue is not one reserved for the medical review panel. Thus, any infirmity in the proposed complaint that resulted from it being filed in Betty's name could have been addressed while the complaint was still pending before the medical review panel. Eagle Valley Meadows chose to allow the medical review panel process to play itself out and did not raise any objection to the proposed complaint being filed in Betty's name until the actual lawsuit was filed in the name of a living successor administrator of Robert's estate.

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<sup>4</sup> In support of her response to Eagle Valley Meadows' motion for summary judgment, Dial designated her responses to interrogatories and requests for production, which Eagle Valley Meadows served upon her counsel in 2014. Dial asserted in her designation of evidence that the discovery requests were answered in 2015, but Eagle Valley Meadows moved to strike the designated responses on the grounds that Dial never served Eagle Valley Meadows with the responses and that the responses were unsigned. The trial court granted Eagle Valley Meadows' motion to strike, and Eagle Valley Meadows did not include the discovery responses in its Appendix. Nonetheless, even though Eagle Valley Meadows did not timely receive responses to its discovery requests, Eagle Valley Meadows did not move to compel responses while the proposed complaint was pending before the medical review panel.

[15] For all these reasons, we affirm the trial court's denial of Eagle Valley Meadows' motion for summary judgment and remand for further proceedings not inconsistent with this opinion. *See Red Arrow Stables, Ltd. v. Velasquez*, 725 N.E.2d 110, 117 (Ind. Ct. App. 2000) (holding suit was not barred by statute of limitations and affirming trial court's denial of motion for summary judgment), *trans. denied*.

## Conclusion

[16] A proposed complaint before the IDOI is not void ab initio simply because it was filed in the name of a deceased individual as administrator of the estate of a deceased alleged victim of malpractice. Therefore, the filing of the proposed complaint in the case at bar served to toll the statute of limitations, and Dial's suit against Eagle Valley Meadows was timely filed. We thus affirm the trial court's denial of Eagle Valley Meadows' motion for summary judgment and remand for further proceedings.

[17] Affirmed and remanded.

Bailey, J., and Robb, J., concur.