

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Brad Hackett, and
Diane Hackett,
Appellants / Cross-Appellees-Plaintiffs,

v.

Renn J. Crichlow, M.D., and
Orthopedics – Indianapolis Inc.
d/b/a OrthoIndy at St. Vincent
Indianapolis,

*Appellees / Cross-Appellants-
Defendants.*

December 11, 2023

Court of Appeals Case No.
22A-CT-1594

Appeal from the Marion Superior
Court

The Honorable Heather A. Welch,
Judge

Trial Court Cause No.
49D01-1902-CT-5967

Memorandum Decision by Judge Kenworthy

Judges Crone and Felix concur.

Kenworthy, Judge.

Case Summary

[1] Following a jury verdict in this medical malpractice case, Brad and Diane Hackett (“the Hacketts”) present three issues for our review:

1. Did the trial court err by excluding evidence of care provided to Brad in 2019 and 2020, which included evidence of his below the knee amputation?
2. Did the trial court err in prohibiting the Hacketts from arguing that Dr. Renn Crichlow and Orthopedics-Indianapolis, Inc., d/b/a OrthoIndy at St. Vincent Indianapolis (collectively “Defendants”) could have called members of the Medical Review Panel (“MRP”) to testify?
3. May panel members change their opinion after the issuance of the MRP opinion?

[2] Discerning no reversible error, we affirm.¹

Facts and Procedural History

[3] Brad Hackett is a fifty-three-year-old union pipe fitter and welder. He is hardworking and prides himself on providing for his family. He and Diane

¹ On cross-appeal, Defendants raise the issue of whether the trial court erred in denying their motion for judgment on the evidence. We need not address the cross-appeal because we affirm the trial court on the other issues in favor of Defendants.

have been married for fifteen years. Prior to Brad's amputations, he and Diane enjoyed frequent motorcycle rides together. Brad often traveled for work but helped with chores around the home when he was there.

[4] In 1997, Brad suffered from an episode of deep vein thrombosis² following a hip replacement. To prevent future episodes, he received an inferior vena cava ("IVC") filter.³ Because of the IVC filter, Brad also suffers from venous hypertension, which can affect how wounds heal: "the blood backs up and you just can't get oxygen or nutrients into the tissues and the tissues become more susceptible to breakdown and become harder to heal." *Tr. Vol. 4* at 59.

[5] In late 2014, Brad began experiencing swelling in his right big toe. The swelling would last a day or two and then shrink back down. Brad continued his activities and work as usual. In the spring of 2015, Brad was working in Iowa and had irritation in his toe. Upon Diane's encouragement over a telephone call, Brad went to the emergency room. The doctors told Brad he needed surgery, and Brad drove back to Indiana to have the surgery and recover at home.

[6] Brad admitted himself to St. Vincent Hospital on April 3, 2015, to have the surgery. Dr. Crichlow, a healthcare provider hired by OrthoIndy to work at St.

² Deep vein thrombosis occurs "when a thrombus (blood clot) forms in one of the large veins, usually in the lower limbs, leading to either partial or complete circulation blockage." *Confidential Ex. Vol. 1* at 216.

³ An IVC filter is a device that acts as a "dam" to trap blood clots and prevent them from traveling to the heart and lungs. *Tr. Vol. 4* at 59.

Vincent, diagnosed Brad with osteomyelitis in his toe. Dr. Crichlow disarticulated⁴ the toe on April 4, 2015. Brad received IV antibiotics during his hospitalization and was discharged on April 5, 2015, with instructions to take oral antibiotics and pain medication.

[7] Brad went to Dr. Crichlow for follow-up appointments on April 20, May 6, and June 8, 2015. During the June 8 visit, Brad's skin was warm with redness and localized edema at the disarticulation site. Dr. Crichlow diagnosed Brad with cellulitis and prescribed Diflucan and Bactrim.

[8] On the afternoon of June 10, following a voicemail from an OrthoIndy employee and a visit to his primary care physician, Brad went to the St. Vincent Emergency Department. He was treated with two grams of IV vancomycin and discharged early the next morning.

[9] When Brad followed up with Dr. Crichlow later that morning, Dr. Crichlow ordered an MRI. Brad could not undergo the MRI because he had an IVC filter and metal in his eye. OrthoIndy staff ordered a CT scan for June 12. Instead, Brad went to the Emergency Department of IU Methodist Hospital on June 11. A CT scan showed osteomyelitis of the second, third, and fourth metatarsal heads with significant degenerative changes and septic arthritis.

⁴ Disarticulation involves “cut[ting] structures at the joint,” unlike amputation, which “involves actually cutting a bone and then repairing structures around it.” *Id.* at 156.

[10] On June 12, 2015, Dr. Bradford Legge performed a transmetatarsal amputation (“TMA”)⁵ of Brad’s right foot. Brad started six weeks of IV antibiotics. About two weeks later, Dr. Legge drained and revised the amputation to remove additional infection.

[11] Between 2015 and 2019, Dr. Legge provided ongoing care for Brad, including care for ulcers and infections in his left leg. Dr. Legge did not render care to Brad for his right foot again until October 2019. By that time, although Brad’s right foot had healed from the TMA, he developed a new infection.⁶ Eventually, Dr. Roman Natoli performed a below the knee amputation (“BKA”) of Brad’s right leg to prevent the infection from spreading further.

[12] The Hacketts filed a proposed complaint for medical malpractice with the Indiana Department of Insurance on July 10, 2015, and amended their proposed complaint in August 2017. They alleged Defendants failed to properly treat Brad for osteomyelitis in his toe, resulting in the need for the TMA performed by Dr. Legge. In January 2019, the MRP issued an opinion finding Defendants “failed to comply with the applicable . . . standard of care as charged in the complaint and the conduct complained of was a factor of the resultant damages.” *Appellant’s App. Vol. 2* at 76.

⁵ A TMA is an amputation of part of the foot, along the bases of the toes. *Tr. Vol. 2* at 229.

⁶ Dr. Keith Armitage testified that B streptococcus was detected in the 2015 culture, but the 2019 culture showed e-coli.

[13] The Hacketts filed a complaint in Marion County Superior Court in February 2019 and moved for partial summary judgment based on the MRP opinion. In response, Defendants provided two expert affidavits contradicting the MRP opinion—from orthopedic foot and ankle surgeon Dr. George Holmes and infectious disease specialist Dr. Keith Armitage—dated May 2019. The trial court denied the Hacketts’ motion for summary judgment.

[14] Around September 2019, Defendants provided the MRP members with the expert affidavits. Each panelist responded by providing an affidavit stating “the Medical Review Panel opinion I signed does not correctly reflect my opinions on this case.” *Appellant’s App. Vol. 3* at 18, 27–28, 37. In November 2019, Defendants filed their own motion for summary judgment, using the affidavits as support. The trial court granted the Hacketts leave to depose the panelists before responding to the motion for summary judgment.

[15] The Hacketts scheduled depositions of two of the panelists, issuing notices in March 2020. But the depositions were cancelled after one of the panelists advised the Hacketts he had not received his fee. The Hacketts moved to compel the panelists to give depositions without paying the doctors their customary fees. One of the panelists moved for a protective order against the Hacketts, and the other panelist joined in the motion. The Hacketts then withdrew the motion to compel the depositions and ultimately did not depose the panelists.

- [16] In May 2020, the Hacketts filed a brief in opposition to Defendants’ motion for summary judgment. In July 2020, the trial court held a hearing and denied the motion.
- [17] In September 2020, Dr. Natoli performed the BKA on Brad’s right leg. Five months later, the Hacketts responded to discovery requested by Defendants in February 2019. This response did not disclose Brad’s BKA or list the BKA as an element of damages. The response did not disclose that Dr. Natoli was now Brad’s medical provider or provide medical records from him.
- [18] In November 2021, the Hacketts filed their expert witness disclosures, including two witnesses addressing economic damages and the three MRP members “by and through” the MRP decision. *Appellee’s App. Vol. 2* at 15. In December 2021, Defendants disclosed Dr. Holmes, Dr. Armitage, and the MRP members as experts.
- [19] During a pretrial conference on May 9, 2022, the Hacketts advised they would offer into evidence the MRP opinion but would not call any physician to testify as an expert. A day later, the Hacketts disclosed they intended to take recorded depositions of Dr. Legge and Dr. Natoli to play at trial. The Hacketts deposed Dr. Natoli as a treating physician on May 27, 2022.
- [20] In an order issued May 18, 2022, the trial court (1) required the parties to disclose expert opinions prior to trial per Indiana Trial Rule 26 and (2) permitted treating physicians to testify as fact witnesses for treatment and diagnosis—not for whether there was a breach in the standard of care or

whether the breach caused Brad's injuries. The Hacketts named as witnesses Brad and Diane Hackett, their economic experts, and the MRP chairman. Defendants named Dr. Crichlow, Dr. Holmes, and Dr. Armitage, and possibly a panelist from the MRP.

[21] At the final pretrial conference held on May 31, 2022, the court heard argument on the pending legal and evidentiary issues. The trial court ruled the Hacketts could proceed to trial based solely on the written MRP opinion. The Hacketts deposed Dr. Legge later that day.

[22] On June 1, 2022, Defendants filed a motion to exclude evidence of care provided in 2019 and 2020, including the BKA. The trial court granted the motion on June 3, excluding "any recovery related to Plaintiffs' 2020 Below Knee Amputation; Thus, Dr. [Legge] can only testify about treatment provided before the MRP opinion was issued." *Appellant's App. Vol. 2* at 34. On June 5, the Hacketts filed a motion in limine to bar Defendants from stating the MRP panelists later changed their opinions. The trial court granted the motion.

[23] A jury trial was held on June 6, 2022. The Hacketts proffered, but the trial court excluded, information about Brad's BKA through Dr. Natoli's deposition. Defendants moved for judgment on the evidence, which the trial court denied. The jury rendered a verdict for Defendants, and the trial court entered judgment accordingly. The Hacketts now appeal.

1. No Reversible Error in Excluding Additional Evidence of the BKA

[24] The Hacketts argue the trial court erred by excluding evidence of Brad’s BKA. Where—as here—a plaintiff alleges medical malpractice, the plaintiff must show: “(1) duty owed to plaintiff by defendant, (2) breach of duty by allowing conduct to fall below the applicable standard of care, and (3) compensable injury proximately caused by defendant’s breach of duty.” *Bader v. Johnson*, 732 N.E.2d 1212, 1217 (Ind. 2000). “The decision to admit or exclude evidence, including expert testimony, is a matter within the discretion of the trial court.” *Shaw v. Sundaram*, 108 N.E.3d 923, 930 (Ind. Ct. App. 2018). We will reverse only if the trial court’s decision is “clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.” *K.S. v. State*, 849 N.E.2d 538, 544 (Ind. 2006) (internal quotation omitted). Even if the trial court erred, “we will reverse only if the error is inconsistent with substantial justice”—a determination we make by considering “the probable impact upon the trier of fact.” *Shaw*, 108 N.E.3d at 930.

[25] The Hacketts argue the trial court should have permitted them to present evidence of the BKA because the BKA was a continuation of care considered by the MRP. In their amended proposed complaint, the Hacketts alleged:

The medical care and treatment provided to Brad Hackett by Renn J. Crichlow, M.D. . . . and OrthoIndy At St. Vincent Indianapolis . . . on or around June, 2015 was careless, negligent and failed to comply with appropriate standards of medical care

and treatment required and/or expected of physicians and healthcare providers in the State of Indiana.

Appellant's App. Vol. 2 at 47.⁷ The Hacketts further claim their “penultimate theory was always that Dr. Crichlow failed to cut above the infection when he performed the initial surgery, which then allowed the infection to continue to

⁷ In its entirety, the amended proposed complaint names the parties, then alleges the following:

10. The medical care and treatment provided to Brad Hackett by Renn J. Crichlow, M.D., Patrick Maier, M.D., Julie Gebhart, P.A., Danielle Barnes, R.N., Laura Clouser, R.N., St Vincent Emergency Physicians, Inc., Orthopedics-Indianapolis, Inc. d/b/a OrthoIndy At St Vincent Indianapolis, and St Vincent Hospital Indianapolis on or around June, 2015 was careless, negligent and failed to comply with appropriate standards of medical care and treatment required and/or expected of physicians and healthcare providers in the State of Indiana.

11. As a result of the careless and negligent acts and/or omissions of Renn J. Crichlow, M.D., Patrick Maier, M.D., Julie Gebhart, P.A., Danielle Barnes, R.N., Laura Clouser, R.N., St Vincent Emergency Physicians, Inc., Orthopedics-Indianapolis, Inc. d/b/a OrthoIndy At St Vincent Indianapolis, and St Vincent Hospital Indianapolis, Brad Hackett incurred bodily injury, some of which is permanent in nature, additional medical expenses, pain and suffering, scarring, deformity, mental anguish, bodily impairment and other losses, expenses, costs and damages recoverable under Indiana law.

12. As a result of the injuries to Brad Hackett, his Wife, Diane Hackett, lost the services and consortium of her Husband, and incurred medical expenses, losses, costs and damages recoverable under Indiana law.

WHEREFORE, Plaintiffs, Brad Hackett and Diane Hackett, pray for a medical review panel finding of malpractice against Defendants, Renn J. Crichlow, M.D., Patrick Maier, M.D., Julie Gebhart, P.A., Danielle Barnes, R.N., Laura Clouser, R.N., St Vincent Emergency Physicians, Inc., Orthopedics-Indianapolis, Inc. d/b/a OrthoIndy At St Vincent Indianapolis, and St Vincent Hospital Indianapolis, and for all other just and proper relief in the premises.

Id. at 47–48. In their complaint, the Hacketts named the parties—narrowing the defendants to Dr. Crichlow and OrthoIndy—and made the same allegations as the proposed complaint, adding:

The medical care and treatment provided to Brad Hackett by [Defendants] on or around June, 2015 was careless, negligent and failed to comply with appropriate standards of medical care and treatment required and/or expected of physicians and healthcare providers in the State of Indiana, as determined by a Medical Review Panel pursuant to Indiana law. A true and accurate copy of such Medical Review Panel Decision is attached hereto as Exhibit A.

Id. at 55 (emphasis added).

spread through Brad's leg; ultimately resulting in the need for a BKA." *Appellant's Br.* at 15.

[26] The Hacketts also argue Defendants opened the door to evidence of the BKA during opening statements and their questioning of the witnesses. *Appellant's Br.* at 17–18. Particularly, the Hacketts claim Defendants opened the door when they questioned whether Brad was “predestined” to end up with a BKA. *Tr. Vol. 5* at 32; *see Tr. Vol. 2* at 139; *Tr. Vol. 4* at 55, 56, 76, 77, 81. The Hacketts attempted to present rebuttal testimony in the form of Dr. Natoli's deposition.

[27] We first note that it is unclear from the record when and how the Hacketts disclosed Brad's BKA to Defendants. The earliest Defendants might have learned of an amputation beyond the TMA was March 19, 2021, when Defendants received medical records from SRT Prosthetics and Orthopedics. On March 25, 2021, after reviewing those records, Defendants' counsel emailed the Hacketts' counsel, stating, “The records reference a transtibial prosthetic. Has Mr. Hackett undergone a recent amputation beyond the one TMA performed by Dr. Legge?” *Appellant's App. Vol. 2* at 14. The record does not indicate whether the Hacketts responded to that question. The earliest indication in the record of an affirmative disclosure of the BKA is a February 2022 life-care-planning document from the Hacketts' expert witness Laura Lampton. The Hacketts confirmed they planned to claim damages for both the TMA and the BKA on May 12, 2022, *id.* at 71–72, which was less than a month before trial.

[28] Despite the Hacketts' claim to the contrary, the jury *did* hear about the BKA. They learned about the BKA during jury selection. *Tr. Vol. 2* at 127. Then, during Defendants' opening statements, Defendants likened Brad to people "with diabetic feet . . . who lose their toes first and then more of their foot and then maybe all the way to the ankle and then up to the knee." *Id.* at 133. Dr. Legge testified he was aware Brad underwent the BKA. Dr. Armitage testified about the "seven year trajectory" of infections and amputations leading to the BKA, explaining how the infections in 2014 and 2015 differed from the infections in 2019 and 2020. *Tr. Vol. 4* at 60, 78. Dr. Holmes testified there was a "high likelihood" Brad would eventually have a BKA given the infection in his great toe, the TMA, and the failure of the TMA to heal. *Tr. Vol. 5* at 32. The Hacketts relied solely on the MRP opinion, which was issued prior to the BKA, and presented no expert testimony or other evidence regarding causation.

[29] Even if we assume the trial court erred by excluding Dr. Natoli's deposition and additional evidence of the BKA, any error is harmless.⁸ Dr. Natoli's deposition did not address the appropriate standard of care or whether Dr. Crichlow caused the need for the BKA. Rather, Dr. Natoli expressly denied having any opinions about the standard of care or causation. Dr. Natoli's deposition added

⁸ The parties argue about the trial court's exclusion of BKA evidence by applying *McKeen v. Turner*, 61 N.E.3d 1251, 1256 (Ind. Ct. App. 2016), *adopted by* 71 N.E.3d 833 (Ind. 2017). Because the jury heard evidence of the BKA, we need not decide the applicability of *McKeen*.

nothing more to connect the BKA to the original surgery performed by Dr. Crichlow.

[30] Ultimately, the jury heard about the BKA but declined to award *any* damages. And the jury did not find Dr. Crichlow liable for *initial* damages related to the TMA. Considering this result, it is difficult to imagine the jury finding liability for damages related to the BKA performed when Brad had a new infection over four years later. Any error here was harmless.

2. No Reversible Error in Limiting the Hacketts' Arguments to the Jury

[31] The Hacketts argue Defendants opened the door to instruction or argument that Defendants could have also called panel members to testify because Defendants' counsel told the jury during opening statements that while it would see the MRP opinion, it would not hear testimony from any of the panel members. Defendants' counsel also said he would not have the chance "to poke any holes in . . . [the panelists'] conclusions." *Tr. Vol. 2* at 133. Defendants' counsel made similar arguments during closing argument. The Hacketts claim the written MRP opinion is sufficient to meet their burden of proof, and the Defendants' statements created the impression that the Hacketts failed to meet their burden of proof because they failed to present any live expert testimony. The Hacketts argue the trial court should have permitted them to tell the jury that Defendants could have called the MRP panelists to testify because Indiana Code Section 34-18-10-23 states "either party, at the

party's cost, has the right to call any member of the medical review panel as a witness.”

- [32] The Hacketts did not preserve this issue for appeal. The Hacketts cite several instances in which they claim Defendants opened the door, but they do not cite—and we do not find in the record—any objection or offer of proof on this issue. The Hacketts did not make contemporaneous objections to defense counsel's statements. The Hacketts admitted a trial deposition of MRP Chair Richard Kraege taken the night before his testimony. In this deposition, the Hacketts asked Kraege to explain the MRP process. But they did not ask Kraege to explain both parties' ability to call the MRP members to testify. Nor did they make any other offer of proof. *See* Ind. Evidence Rule 103(a).
- [33] Further, the Hacketts do not specifically argue the trial court prohibited any proposed jury instruction, nor did they include jury instructions for our review. The Hacketts did not cite to the portion of the record in which they requested the trial court to allow their counterarguments to the jury. An appellant's contentions “must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on.” Ind. Appellate Rule 46(A)(8)(a). This issue is waived.
- [34] Waiver notwithstanding, even assuming the trial court erred by not allowing these arguments, any error is harmless at most. The jury was properly instructed that the MRP opinion was not conclusive, *Appellee's App. Vol. 2* at 90; that Defendants had no burden to disprove the Hacketts' claims, *id.* at 99; and

that statements made by attorneys are not evidence, *Tr. Vol. 2* at 110–12, *Tr. Vol. 3* at 144, *Tr. Vol. 4* at 208, & *Tr. Vol. 5* at 128.⁹ And we must presume the jury followed the trial court’s instructions. *Pruitt v. State*, 622 N.E.2d 469, 473 (Ind. 1993).

[35] And the jury *did* hear testimony from Kraege that *both* parties, and their independent experts, are allowed to talk to the MRP members after the MRP opinion is rendered. *Tr. Vol. 2* at 188, 200. Kraege also testified that it is a good idea for parties to contact MRP members after the opinion is rendered, *id.* at 200–04, and that MRP members are required to testify if asked, *id.* at 193. On this record, we find no reversible error.

3. No Error in the Panelists’ Changed Opinions

[36] Finally, the Hacketts argue the MRP panelists should not be allowed to change their minds after the MRP issues its opinion. The Hacketts note before the panelists consider evidence or render an opinion, they must affirm under oath to “well and truly consider the evidence submitted by the parties;” and to render their opinions “without bias, based upon the evidence submitted by the parties,” and without communicating with any party before rendering their opinions. *Appellant’s App. Vol. 3* at 77–79; *see* I.C. § 34-18-10-17(e). The Hacketts argue that allowing panelists to change their opinions “eliminates all credibility of the Panel process and the Panel Members Opinion.” *Appellant’s*

⁹ The Defendants provided select jury instructions for our review. *See Appellee’s App. Vol. 2* at 79–111.

Br. at 28.¹⁰ The Hacketts also claim that because Indiana Code Section 34-18-10-25(d) assigns fees of the panel to the side in whose favor the majority MRP opinion is written, allowing the MRP panelists to change their minds “creates barriers of time and expense for most plaintiffs, and increases the costs of cases, costs that will be borne by both parties.” *Appellant’s Br.* at 27.

[37] Typically, all witnesses, including experts, may change their opinions. *See* 32 C.J.S. Evidence § 980. At trial, a party’s counsel may challenge an expert witness during cross-examination about whether the expert changed her opinion to help the other party’s case. We find nothing conflicting with the notion that a member of the MRP can both “well and truly consider the evidence” before rendering an opinion and later come to a different conclusion based on new or additional evidence.

[38] Further, the Hacketts made several strategic decisions to navigate the panelists’ changed opinions. They filed a motion to compel the panelists to give depositions without paying the panelists’ fees but withdrew the motion when one panelist filed (and another panelist joined) a protective order against them. The Hacketts ultimately chose not to depose the MRP panelists and did not call the MRP members or any other experts as witnesses. The Hacketts filed—and

¹⁰ The Hacketts use language from Judge Kirsch’s concurrence in the vacated Court of Appeals decision *Siner v. Kindred Hospital, LP*, 33 N.E.3d 377 (Ind. Ct. App. 2015) (Kirsch, J. concurring in part), *rev’d in part by Siner v. Kindred Hosp., LP*, 51 N.E.3d 1184 (Ind. 2016), to show panelists’ changed opinions have been “previously viewed by this Court as highly suspect, unsavory, and without procedural safeguards.” *Appellant’s Br.* at 26. The Indiana Supreme Court did not adopt or address the language cited by the Hacketts.

the trial court granted—a motion in limine to prevent Defendants from disclosing the MRP members’ changed opinions.

[39] The Hacketts essentially argue “as a matter of equity and fairness” MRP members should not be allowed to change their opinions. *Id.* at 25. But the Hacketts challenge no specific ruling of the trial court, nor do they explain what specific remedy they seek on appeal.¹¹ The Hacketts have not established trial court error.

Conclusion

[40] The trial court did not err in its exclusion of additional evidence of the BKA, limitation of the Hacketts’ arguments to the jury, or treatment of the panelists’ changed opinions. Accordingly, we affirm.

[41] Affirmed.

Crone, J., and Felix, J., concur.

¹¹ To the extent the Hacketts ask us to change policy behind or the language of the Medical Malpractice Act, that undertaking is better left to the legislature.