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IN THE
COURT OF APPEALS OF INDIANA

Cynthia Rossner, Individually and as Legal Guardian of Shawn Rossner,

Appellants-Plaintiffs,

v.

Take Care Health Systems, LLC, Premise Health Employer Solutions LLC, d/b/a Premise Health, and Healthworks Med Group of Indiana, P.C.,

Appellees-Defendants,

June 3, 2021

Court of Appeals Case No. 20A-CT-1955

Appeal from the St. Joseph Superior Court

The Honorable David C. Chapleau, Judge

Trial Court Cause No. 71D06-1801-CT-4

Robb, Judge.

Case Summary and Issue

[1] Cynthia Rossner, individually and as legal guardian of Shawn Rossner, ("Rossner"), appeals the trial court's grant of summary judgment in favor of Take Care Health Systems, LLC ("Take Care"), Premise Health Employer Solutions LLC d/b/a Premise Health ("Premise Health"), and Healthworks Med Group of Indiana, P.C. ("Healthworks") (collectively, the "Defendants") and raises two issues for our review which we consolidate and restate as whether the trial court erred in granting summary judgment in Defendants' favor. Concluding no genuine issues of material fact exist and the Defendants are entitled to judgment as a matter of law, we affirm.

Facts and Procedural History

[2] The Defendants operate the Notre Dame Wellness Center (the "Center"), an on-site workplace wellness center for University of Notre Dame faculty, staff, and their dependents. The Center employs (among others) a full-time physician, nurse practitioners, and registered nurses. At all times relevant to this case, Dr. Julie Ortega-Schmitt and Dr. Annette Millie practiced at the Center; Dr. Ortega-Schmitt was the Center's medical director. Notably, Dr. Millie was practicing on a *locum tenens*[1] basis at the time.

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[1] A *locum tenens* physician is "one filling an office for a time or temporarily taking the place of another[.]" Merriam-Webster, Locum Tenens, https://www.merriam-webster.com/dictionary/locum%20tenens (last visited May 10, 2021) [https://perma.cc/DGF8-MW5Q].

[3] Over a five-day period in early March 2014, Shawn Rossner, a maintenance worker at the university, sought treatment three times at the Center; specifically, March 3, 6, and 8.

[4] On March 3, Shawn presented to the Center with flu-like symptoms, including chills, fever, body aches, vomiting, and a headache. Dr. Ortega-Schmitt believed Shawn had a viral infection consistent with influenza and prescribed him Tamiflu for five days. She advised that he take ibuprofen and Tylenol alternatively for his chills and body aches and advised that he call or return if his symptoms did not improve in forty-eight hours. Three days later, on Thursday, March 6, Shawn returned to the Center where Dr. Ortega-Schmitt again evaluated him. This time, Shawn presented with joint pain, difficulty walking, body aches, an occasional rash, and an intermittent fever; he was slightly tachycardic and had a slightly low oxygen saturation level. Dr. Ortega-Schmitt believed Shawn was dehydrated and administered intravenous fluids. Thereafter, Shawn's heart rate returned to normal, and his other vital signs improved. Dr. Ortega-Schmitt believed Shawn was at risk for pneumonia given his lower oxygen saturation level; therefore, she treated him with an antibiotic as a precaution. She also prescribed another medication as needed for a cough and to help Shawn sleep, advised him to continue taking ibuprofen, remain off work for the week, and return to the Center for a follow up on Saturday.

[5] On Saturday, March 8, Shawn returned to the Center for his follow up where Dr. Millie, a *locum tenens* physician, treated him. At the time, the Center did not allow *locum tenens* physicians to independently log into its electronic patient

records. Instead, *locum tenens* physicians were required to access such records through support staff. They could review the records on those individuals' computers or on print outs ordered by those individuals. The physicians also could discuss the patient records with support staff as they accessed the records on their computers. A nurse assisting Dr. Millie printed Shawn's medical records for her during Shawn's third visit to the Center. Dr. Millie verbally reviewed Dr. Ortega-Schmitt's notes regarding Shawn's two recent visits and discussed the notes with a nurse and medical assistant prior to seeing Shawn.

[6] At the visit, Shawn reported that he was doing better and had not had a fever. He also stated he was feeling well enough to return to work on Monday. Dr. Millie advised him to finish the course of antibiotics and cleared him to return to work two days later. Thereafter, however, Shawn's condition deteriorated. Instead of returning to work on Monday, Shawn visited an urgent care facility for cold symptoms, confusion, slurred speech, and a high fever. The clinic sent him to a hospital emergency room where he was evaluated and diagnosed with bacterial endocarditis. He was admitted to the intensive care unit and subsequently suffered a hemorrhagic stroke, which left him paralyzed and unable to speak.

[7] In December, Shawn's wife, Cynthia, was appointed as his legal guardian. Rossner subsequently initiated a number of actions on behalf of herself and as guardian for Shawn.

[8] Rossner filed a proposed complaint for medical malpractice on March 17, 2015 and several amended proposed complaints thereafter with the Indiana Department of Insurance ("DOI") against Take Care and Healthworks.[2] In the third amended complaint, Rossner alleged, in part, that Take Care and Healthworks "failed to implement processes, policies and procedures whereby important health information would be gathered, documented, and made available to the various healthcare providers" at the Center. Appellants' Appendix, Volume 4 at 11-12, ¶¶ 65, 68. Therefore, Rossner alleged, the two entities "failed to meet the reasonable and accepted standard of medical care to which [they are] subject" and that failure was a proximate cause of Shawn's injuries. *Id.* at ¶¶ 66-67, 69-70.

[9] On January 4, 2018, Rossner filed a Complaint for Damages and Demand for Jury Trial against Defendants alleging negligence and loss of consortium. Rossner specifically alleged, and Defendants specifically denied, that Indiana's Medical Malpractice Act ("MMA") did not apply to Rossner's claims and that Rossner did not learn of the records policy until October 31, 2017. *Id.*, Vol. 2 at 12 (Rossner's complaint), 23-24 (Defendants' answer).

[10] On July 12, 2019, Defendants filed a motion to dismiss the lawsuit with supporting memorandum, alleging (1) the trial court lacked subject matter jurisdiction under Indiana Code section 34-18-8-4 over Rossner's claims

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[2] Rossner also named other individuals and entities but did not name Premise Health as a defendant in the proposed DOI complaints. *See* Appellants' Appendix, Volume 3 at 20-65; *id.*, Vol. 4 at 2-18.

because Rossner failed to submit a proposed complaint naming Defendants[3] to a medical review panel; and (2) Rossner's claim is barred by the two-year statute of limitations as provided by the MMA. Defendants also submitted exhibits, including Rossner's complaint; affidavits of Meghann Leaird, Director for the Patient's Compensation Division of the DOI, and Dr. Millie; Rossner's proposed and amended complaints filed with the DOI; the deposition of Dr. Ortega-Schmitt; and excerpts from Rossner's medical review panel submission.

[11] A hearing on the motion was held on May 28, 2020. On June 29, the trial court issued an order treating Defendants' motion to dismiss as a motion for summary judgment[4] and granting it in Defendants' favor, concluding, in pertinent part:

> 6. [Rossner] allege[s] general negligence in that the [D]efendants failed to have appropriate policies and procedures in place relating to the manner in which [Dr. Millie], who evaluated and treated Shawn[,] was able to access [his] electronic medical records from [the] two previous visits. [Rossner] further allege[s] failure to properly train Dr. Millie with respect to how to obtain information from the patient's electronically stored chart.
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> * * *

[3] Again, Rossner filed several complaints with the DOI but did not name Premise Health as a defendant.

[4] Trial Rule 12(B) provides that if a motion to dismiss asserting failure to state a claim upon which relief can be granted presents matters outside the pleadings, it shall be treated as a motion for summary judgment.

9. [D]efendants are qualified as "health care providers" under the [MMA].

10. [Rossner] argue[s] the case of [*G.F. v. St. Catherine Hosp., Inc.*, 124 N.E.3d 76 (Ind. Ct. App. 2019), *trans. denied*], where a doctor negligently disclosed private medical information while the patient's friend was in the room, and based on her prior knowledge of CD4 levels, she was able to deduce that the patient was HIV-positive, and the patient brought suit based on this unauthorized disclosure of his health information. The *G.F.* case is inapposite to the case at bar. The plaintiff patient's action in [*G.F.*] was not under the MMA because the claim was not about care given the patient but rather about embarrassing disclosure of HIV status to a 3rd person, something any juror could comprehend without expert testimony. In the case at bar[, Rossner] is alleging negligent care and lack of adequate access to medical records, something that does require medical expertise to understand the standard of care. [D]efendants . . . must balance the need for patient privacy against access to necessary information for correct diagnosis. The very privacy that was violated in *G.F.* was a likely concern of [D]efendants when not sharing passwords with every temporary doctor who works a short amount of time at the clinic. The designated evidence shows that [D]efendant's permanent staff printed the electronic file of Shawn . . . for Dr. Millie before she examined Shawn[.] *This policy of the clinic is related to medical treatment, advice and care of all patients of the clinic, including Shawn[.]*

11. [I]n the case before us, these electronic records were available to the doctor on duty via the other permanent staff at the Wellness Center. The Wellness Center nurse printed out both Shawn[']s March 3 and March 6, 2014 clinic records for Dr. Millie's review in her care and treatment of this patient on the morning of March 8, 2014. Dr. Millie's use of those records or her choice not to use those records lies within the standard of care of a medical professional and is subject to the [MMA] and

requires compliance with all of the procedures including presentation to a panel under the [MMA].

12. Claims of failure to properly train staff likewise fall within the purview of the [MMA].

13. This court finds that the alleged failure to implement appropriate policies and procedures regarding physician access to medical records raises the legal question of whether [D]efendants have deviated from the reasonable and accepted standards of medical care and is not merely operational business practices and policies completely unrelated to medical treatment, advice and care. As such, [Rossner's] claim is one for medical malpractice and is therefore subject to the MMA. The MMA imposes a two-year statute of limitations for claims against health care providers: A claim, whether in contract or tort, may not be brought against a health care provider based upon professional services or health care that was provided or that should have been provided unless the claim is filed within two (2) years after the date of the alleged act, omission, or neglect[.]

14. The substantive acts and omissions complained of herein occurred on and before March 8, 2014. [Rossner was] aware of the alleged failure to provide proper diagnosis and appropriate treatment within two days thereafter, on March 10, 2014, when [Rossner] allege[s] the patient received the accurate diagnosis. The complaints filed with the [DOI] show knowledge of the password policy within the two years before the statute of limitations ran.

15. [Rossner is] asserting that the stroke was not prevented by the course of treatment selected by the Wellness Center's doctor and that this was not proper medical care within the appropriate standard of care. That includes the issues of whether the facility chose to appropriately limit direct password-enabled access to

> records. That issue should have been presented to the expert panel members under the [MMA] and the complaint was not filed within two years. The motion . . . must be granted.

Appealed Order [Granting Summary Judgment] at 3-6 (emphasis added).

[12] On July 29, Rossner filed a motion to correct error alleging the same, which the trial court later denied. Rossner now appeals.

Discussion and Decision

I. Standard of Review

[13] Summary judgment is a tool which allows a trial court to dispose of cases where only legal issues exist. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). In reviewing a trial court's ruling on summary judgment, this court stands in the shoes of the trial court, applying the same standards in deciding whether to affirm or reverse summary judgment. *C.F.,* 124 N.E.3d at 81. Summary judgment is appropriate only if the designated evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); *Sedam v. 2JR Pizza Enters., LLC*, 84 N.E.3d 1174, 1176 (Ind. 2017). The moving party bears the initial burden of showing the absence of any genuine issue of material fact as to a determinative issue. *Hughley*, 15 N.E.3d at 1003.

[14] Once the movant for summary judgment has established that no genuine issue of material fact exists, the nonmovant may not rest on its pleadings but must set

forth specific facts which show the existence of a genuine issue for trial. *Perkins v. Fillio*, 119 N.E.3d 1106, 1110 (Ind. Ct. App. 2019). "A fact is 'material' if its resolution would affect the outcome of the case, and an issue is 'genuine' if a trier of fact is required to resolve the parties' differing accounts of the truth, or if the undisputed material facts support conflicting reasonable inferences." *Hughley*, 15 N.E.3d at 1003. As opposed to the federal standard which permits the moving party to merely show the party carrying the burden of proof lacks evidence on a necessary element, Indiana law requires the moving party to "affirmatively negate an opponent's claim." *Id.* (quotation omitted). Our review is limited to the evidence designated to the trial court, T.R. 56(H), and we construe all facts and reasonable inferences drawn from those facts in favor of the non-moving party, *Meredith v. Pence*, 984 N.E.2d 1213, 1218 (Ind. 2013). On appeal, the non-moving party carries the burden of persuading us the grant of summary judgment was erroneous. *Hughley*, 15 N.E.3d at 1003.

[15] Because we review a summary judgment ruling de novo, a trial court's findings and conclusions offer insight into the rationale for the court's judgment and facilitate appellate review but are not binding on this court. *Breece v. Lugo*, 800 N.E.2d 224, 226 (Ind. Ct. App. 2003), *trans. denied*. Additionally, we are not constrained by the claims and arguments presented to the trial court, and we may affirm a summary judgment ruling on any theory supported by the designated evidence. *Denson v. Estate of Dillard*, 116 N.E.3d 535, 539 (Ind. Ct. App. 2018).

II. Application of the MMA

[16] In granting summary judgment in favor of the Defendants, the trial court found that Rossner's claim is subject to the MMA. Rossner disagrees and contends the claim is one for ordinary negligence. We agree with the trial court.

[17] Whether a case is one of medical malpractice as defined by the MMA is a question for the court. *Peters v. Cummins Mental Health, Inc.,* 790 N.E.2d 572, 576 (Ind. Ct. App. 2003), *trans. denied*. The MMA is not all-inclusive for claims against healthcare providers, nor is it intended to be extended to cases of ordinary negligence. *C.F.,* 124 N.E.3d at 84. The MMA covers "curative or salutary conduct of a health care provider acting within his or her professional capacity, but not conduct unrelated to the promotion of a patient's health or the provider's exercise of professional expertise, skill, or judgment." *Howard Reg'l Health Sys. v. Gordon*, 952 N.E.2d 182, 185 (Ind. 2011).

[18] To determine whether the MMA applies, we look to the substance of a claim. *Id.* The test is whether the claim is based on the provider's behavior or practices while acting in his or her professional capacity as a provider of medical services. *Madison Ctr., Inc. v. R.R.K.,* 853 N.E.2d 1286, 1288 (Ind. Ct. App. 2006), *trans. denied*. Neither the fact that alleged misconduct occurred in a healthcare facility nor that the injured party was a patient at the facility or of the provider, by itself, makes the claim one for malpractice. *Id.*

> A case sounds in ordinary negligence where the factual issues are capable of resolution by a jury without application of the standard of care prevalent in the local medical community. By

> contrast, a claim falls under the [MMA] where there is a causal connection between the conduct complained of and the nature of the patient-health care provider relationship.

B.R. ex rel. Todd v. State, 1 N.E.3d 708, 714-15 (Ind. Ct. App. 2013) (internal citations omitted), *trans. denied*. "[A]cts or omissions of a health care provider unrelated or outside the provider's role as a health care professional" are outside the scope of the MMA. *Collins v. Thakkar*, 552 N.E.2d 507, 510 (Ind. Ct. App. 1990), *trans. denied*.

[19] Rossner's characterization of the claim as general negligence does not alter that it is truly one for medical malpractice. Here, the very essence of Rossner's claim is that Dr. Millie was unable to exercise professional expertise and judgment and did not timely and accurately diagnose Shawn's septic condition because of the Defendants' policy preventing *locum tenens* physicians from directly and independently accessing a patient's electronic records. Although the policy relates to the doctor's ability to directly access the electronic records, the designated evidence shows that Dr. Millie did, in fact, review Dr. Ortega-Schmitt's progress notes from Shawn's prior visits, rendering the policy itself irrelevant to Rossner's claim. Nonetheless, as our supreme court has stated, "Surely the skillful, accurate, and ongoing maintenance of test and treatment records bears strongly on subsequent treatment and diagnosis of patients. It is a part of what patients expect from health care providers. It is difficult to contemplate that such a service falls outside the [MMA]." *Howard Reg'l Health Sys.*, 952 N.E.2d at 186. Therefore, we conclude Rossner's claim falls within

the purview of the MMA and the trial court properly granted summary judgment in favor of the Defendants on this issue.

[20] Accordingly, because Rossner's claim is one for medical malpractice, Rossner must meet the statutory requirements of Indiana Code section 34-18-8-4. This section states that a claimant *must* present its proposed complaint to a medical review panel and an opinion must be rendered by said panel before an action against a health care provider may be commenced in court. Ind. Code § 34-18-8-4. Rossner failed to do so, and it is well-established that a court lacks subject-matter jurisdiction over a claim of medical malpractice until a proposed complaint has been presented to the DOI and a medical review panel has rendered an opinion. *Lake Imaging, LLC v. Franciscan Alliance, Inc.*, No. 20A-CT-1490 (Ind. Ct. App. May 4, 2021) at *5.

[21] The parties disagree as to when the statute of limitations began to run, namely whether it began on March 8, 2014, the occurrence of the alleged malpractice, or October 31, 2017, when Rossner alleges it discovered Defendants' policy on *locum tenens* physicians' access to patient records. However, assuming arguendo that the statute of limitations began to run on October 31, 2017, as Rossner contends, the statute of limitations would be fatal to any claim Rossner were to now file with the DOI as it has been over two years. *See id.*; *see also* Ind. Code § 34-18-7-1(b) (stating that a claimant has two years after the alleged act, omission, or neglect to bring an action against a health care provider); *see also* Ind. Code § 34-18-7-3(a) (stating the filing of a proposed complaint tolls the applicable statute of limitations).

[22] Because Rossner failed to present its proposed complaint to the DOI, the trial court was without jurisdiction to hear the case on the merits, and it properly granted summary judgment in favor of Defendants on this issue.[5]

Conclusion

[23] We conclude no genuine issues of material fact exist and Defendants are entitled to judgment as a matter of law. Accordingly, we affirm the judgment of the trial court.

[24] Affirmed.

Bailey, J., and May, J., concur.

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[5] Rossner also claims that the trial court erroneously found that Dr. Millie was able to review Dr. Ortega-Schmitt's notes from Shawn's first two visits on March 3 and 6, which, in turn, affected the trial court legal analysis. Rossner also contends the trial court "erred by injecting privacy considerations into its analysis [and] such concerns cut against application of the [MMA]." Appellants' Brief at 16. As stated above, we are not bound by the trial court's findings, *Breece*, 800 N.E.2d at 226, and neither of these issues affect our analysis as to whether Rossner's claims fall within the MMA and therefore, we need not resolve any alleged errors.