ATTORNEYS FOR APPELLANT

Gabriel A. Hawkins
Gregory L. Laker
Cohen & Malad, LLP
Indianapolis, Indiana

ATTORNEYS FOR APPELLEES

Susan E. Cline
Louise K. Conces
Cline Law Group, LLC
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Jane Doe,
Appellant-Plaintiff,

v.

Indiana Department of Insurance and The Indiana Patient's Compensation Fund,
Appellees-Defendants.

August 31, 2022

Court of Appeals Case No. 22A-CT-84

Appeal from the Marion Superior Court

The Honorable Heather A. Welch, Judge

Trial Court Cause No. 49D01-2104-CT-12804

Altice, Judge.

Case Summary

[1] Jane Doe was sexually assaulted by her nurse, Nathaniel Mosco, while a patient at Indiana University Ball Memorial Hospital (the Hospital). The issue before us is whether the trial court correctly determined, on summary judgment,

that the Indiana Medical Malpractice Act (the MMA) does not apply to Doe's claims for damages based on the sexual assault.

[2] We affirm.

Facts & Procedural History

[3] In the early morning hours of January 17, 2018, Doe was admitted to the Hospital's intensive care unit in Muncie, after having suffered a stroke. Mosco, a registered nurse at the Hospital, was assigned to care for Doe during the day shift. On two occasions that day, after administering morphine and cleaning her catheter, Mosco assaulted Doe by "rubbing [her] clitoris" for several minutes and "put[ting] his fingers inside of [her]." *Appendix Vol. II* at 65. While "masturbating [her]," Mosco told Doe that he was going to "make [her] feel good." *Id*. Later that day, after Doe had moved into a chair, Mosco returned, knelt in front of her, and placed his hands under her gown. As he pushed against the inside of her legs, Doe asked him what he was doing. Mosco again indicated that he was going to "make [her] feel good," and Doe "sternly" rejected his advances. *Id*. at 65, 63. Mosco eventually left.

[4] Doe promptly reported the assault to the nurse who replaced Mosco that evening. Mosco was arrested the next day and later charged with Level 6 felony sexual battery. Following a jury trial, Mosco was convicted of Class B misdemeanor battery, a lesser included offense, on May 21, 2019.

[5] Doe filed her complaint for damages against the Hospital and Mosco in Delaware County on October 4, 2019, alleging the intentional tort of sexual

battery, for which the Hospital was vicariously liable, as well as the negligent hiring, retention, and supervision of staff.[1] Doe also filed a proposed complaint for damages with the Indiana Department of Insurance (the IDI), which parroted her civil complaint.

[6] In April 2021, Doe and the Hospital entered into a release and settlement agreement (the Agreement). In exchange for payments totaling $400,000, Doe agreed to dismiss her proposed complaint before the IDI and her civil complaint for damages. However, the Agreement expressly provided: "Plaintiff does not release the Indiana Patient's Compensation Fund [(the Fund)] for liability in damages in excess of the monies received from Defendant, and Plaintiff will pursue the Fund for additional monies. This settlement is not conditioned on Plaintiff's ability to recover additional funds from the [Fund]." *Id*. at 105.

[7] In tandem with execution of the Agreement, Doe initiated an action in Marion County by filing a petition against the Fund and the Commissioner of the IDI (collectively, the Fund) for additional compensation. Doe requested a damages hearing and indicated that she sought excess damages from the Fund not to exceed $1,000,000. The Fund eventually moved for summary judgment on the basis that Doe's underlying claims against the Hospital and Mosco were not

[1] Later, on summary judgment, Doe designated evidence of two separate incidents involving Mosco while he was employed as a nurse at Indiana University Methodist Hospital in Indianapolis before being transferred to the Hospital in Muncie. The alleged sexual assaults occurred in June 2017 and September 2017, and one incident involved accusations that were notably similar to the case at hand. Though reported to police, neither of these prior investigations resulted in prosecution.

covered by the MMA. Following a hearing, the trial court granted the Fund's motion for summary judgment on December 27, 2021. Doe now appeals.

Standard of Review

[8] On review of a grant or denial of a motion for summary judgment, we stand in the shoes of the trial court and review summary judgment de novo. *Arrendale v. Am. Imaging & MRI, LLC*, 183 N.E.3d 1064, 1067-68 (Ind. 2022). Summary judgment is appropriate "if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Ind. Trial Rule 56(C). Further, "[w]hether a case is one of medical malpractice as defined by the MMA is a question for the court," making the issue particularly suited for determination on summary judgment. *Rossner v. Take Care Health Sys., LLC*, 172 N.E.3d 1248, 1255 (Ind. Ct. App. 2021), *trans. denied*; *see also Community Health Network, Inc. v. McKenzie*, 185 N.E.3d 368, 375 (Ind. 2022) ("The interpretation of the MMA presents a question of law subject to de novo review.").

Discussion & Decision

[9] The MMA is "a comprehensive statute covering tort and breach-of-contract claims that are 'based on health care or professional services that were provided, or that should have been provided, by a health care provider, to a patient.'" *Cutchin v. Beard*, 171 N.E.3d 991, 994 (Ind. 2021) (quoting Ind. Code § 34-18-2-18 (defining malpractice)). In the instant case, the parties do not dispute that Doe alleged a tort by a healthcare provider that occurred while she

was a patient at the Hospital. Their disagreement centers on whether the tortious conduct – the sexual assault – was "based on health care or professional services" that were provided to her. I.C. § 34-18-2-18; *see also McKenzie*, 185 N.E.3d at 376 (setting out the requirements imposed by the statutory definition of malpractice).

[10] The MMA is not all-inclusive for claims by patients against healthcare providers nor is it intended to extend to cases of ordinary negligence. *Rossner,* 172 N.E.3d at 1254. Rather, it covers only "curative or salutary conduct of a health care provider acting within his or her professional capacity" and "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); *see also Collins v. Thakkar*, 552 N.E.2d 507, 510-11 (Ind. Ct. App. 1990) ("The legislature's establishment of a medical review panel, the sole purpose of which is to provide an expert determination on the question of whether a provider complied with the appropriate standard of care, suggests that the scope of the Act is [] confined to actions premised upon the exercise of professional judgment."), *trans. denied*.

[11] The fact that the alleged misconduct occurred in a healthcare facility, or that the injured party was a patient at the facility, is not dispositive of whether the MMA applies. *Rossner*, 172 N.E.3d at 1255. Instead, we must look to the substance of the claim and determine whether it is based on the provider's behavior or practices while acting in his or her professional capacity as a provider of medical services. *Id*. We have explained:

> 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.

Id. (quoting *B.R. ex rel. Todd v. State*, 1 N.E.3d 708, 714-15 (Ind. Ct. App. 2013), *trans. denied*).[2] Thus, "acts or omissions of a health care provider unrelated or outside the provider's role as a health care professional" are outside the reach of the MMA. *Collins*, 552 N.E.2d at 510.

[12] "In sum, the appropriate analysis involves first, the nature of the conduct alleged in the complaint – whether or not the alleged negligence involves provision of medical services – and, second, whether the rendering of medical services is to the plaintiff for the plaintiff's benefit." *Anonymous Hosp., Inc. v. Doe*, 996 N.E.2d 329, 334 (Ind. Ct. App. 2013), *trans. denied*.

[13] Although the MMA neither specifically includes nor excludes intentional torts from the definition of malpractice, this court has consistently held that a health care provider's sexual misconduct with a patient does not constitute the provision of health care or professional services. *See*, *e.g.*, *Fairbanks Hosp. v.*

---

[2] Doe quotes this longstanding standard in her brief but argues that it was replaced with a new standard set out in *Martinez v. Oaklawn Psychiatric Ctr., Inc.*, 128 N.E.3d 549 (Ind. Ct. App. 2019), *clarified on reh'g*, 131 N.E.3d 777, *trans. denied*. We will discuss *Martinez* later, but, for now, we observe that *Martinez* has never been cited or applied by this court since it was decided three years ago, but the longstanding standard has been applied as recently as last year – over six months before the trial court issued its summary judgment order in this case. *See Rossner*, 172 N.E.3d at 1255.

Harrold, 895 N.E.2d 732 (Ind. Ct. App. 2008) (claims based on hospital employee's unwanted sexual advances toward patient, which included battery, did not to fall under the MMA), *trans. denied*; *Grzan v. Charter Hosp. of Nw. Ind.*, 702 N.E.2d 786, 792 (Ind. Ct. App. 1998) ("Absent a therapist-patient relationship, Greer's sexual conduct with Grzan is too remote from the actual rendition of professional services and does not call into question Greer's use of skill or expertise as a health care provider.");[3] *Doe by Roe v. Madison Ctr. Hosp.*, 652 N.E.2d 101, 104 (Ind. Ct. App. 1995) (complaint, which alleged coerced sexual intercourse between a minor patient and hospital employee, held not to fall under the MMA because the allegations "do not constitute a rendition of health care or professional services[,] … were not designed to promote her health[, and] … do [not] call into question [provider's] use of skill or expertise as a health care provider), *trans. dismissed*.

[14] In *Murphy v. Mortell*, 684 N.E.2d 1185 (Ind. Ct. App. 1997), *trans. denied*, we considered the applicability of the MMA in facts similar to this case. An employee molested the patient while she was unconscious in the intensive care unit of Wishard Hospital. The employee, a critical care respiratory therapy technician, was subsequently convicted of sexual battery. After the parties

[3] *Gzran* noted a potential exception to the general rule that a provider's sexual relationship with a patient does not constitute the rendition of health care services. The limited exception would permit "malpractice actions against psychiatrists and other psychotherapists when such therapists mishandle the transference phenomenon and engage in sexual conduct with their patients." *Id.* at 791. "Basic to actionable malpractice premised on the misuse of the transference phenomenon is the existence of the therapist-patient relationship," which was not present in *Gzran* and is certainly not in the case at hand.

settled the civil matter, the patient sought payment of excess damages from the Fund. The trial court determined, on summary judgment, that the patient was not entitled to compensation from the Fund because her claim was not one for medical malpractice. In affirming the trial court, we explained:

> Murphy's allegations that Barger molested her did not constitute a rendition of health care or professional services. Further, although the acts occurred during Murphy's confinement in the hospital, the acts were not designed to promote her health and did not call into question Barger's use of skill or expertise as a health care provider. In addition, Murphy's allegations do not describe professional services. Rather, they present factual issues capable of resolution by a jury without application of the standard of care prevalent in the local medical community.

Id. at 1188. In other words, the action sounded in general negligence and did not fall withing the purview of the MMA.

[15] Against this backdrop of cases establishing that a provider's sexual assault of a patient generally does not fall under the MMA, Doe directs us to *Martinez*, 128 N.E.3d 549, which she essentially claims changed everything and "render[ed] respondeat superior determinations coterminous with the MMA." *Appellant's Brief* at 14.

[16] In *Martinez*, after inpatient treatment for mental illness, Martinez moved into a group home operated by Oaklawn Psychiatric Center. Oaklawn provided patients with supervised living, and employees, called residential assistants, helped patients develop their ability to function independently by establishing and maintaining routines and managing daily activities. These employees were

trained in non-violent, verbal de-escalation strategies and trained to call 911 when medical attention was required and to remove themselves from possibly violent situations.

[17] An incident occurred between Martinez and Kennedy Kafatia, a residential assistant, when Kafatia attempted to enforce curfew. Martinez refused, and a struggle ensued when Kafatia walked near Martinez to turn off a lamp in the living room. According to Kafatia, after both men dropped the lamp, Martinez attempted to charge at him, and in response, Kafatia fell back slightly, extended his right foot, and kicked Martinez, causing a large laceration to his right shin. Martinez started bleeding and walked into the kitchen and called 911. Kafatia remained in the living room to wait for the police, which was consistent with Oaklawn's protocol for handling altercations with the psychiatric patients. Responding officers found Martinez sitting on a chair in the kitchen. He was unconscious and surrounded by a pool of blood. He died from his injuries, and Kafatia was arrested for battery resulting in death.

[18] Martinez's estate filed a complaint against Oaklawn alleging that Kafatia, while acting in the course and scope of his employment, negligently or recklessly injured Martinez and that employees failed to render basic first aid to him after the injury. The estate alleged that Oaklawn was vicariously liable for the actions of its employees and separately liable for negligent supervision, training, and staffing. The trial court dismissed the action after determining that the estate's claims fell under the MMA.

[19] On appeal, this court set out in detail the well-established law for determining applicability of the MMA. *Martinez*, 128 N.E.3d at 555-57. The court then took a detour to discuss *Cox v. Evansville Police Dep't*, 107 N.E.3d 453 (Ind. 2018), a case having nothing to do with the MMA.

[20] In *Cox*, the Supreme Court addressed the scope-of-employment rule, traditionally known as respondeat superior, and held that cities may be liable for an on-duty police officer's sexual assault of an individual in the officer's custody. *Id*. at 456 ("[W]hen an officer carrying out employment duties physically controls someone and then abuses employer-conferred power to sexually assault that person, the city does not, under respondeat superior, escape liability as a matter of law for the sexual assault."). In so holding, the Court applied a wide breadth of caselaw from non-police contexts,[4] and explained:

> Although scope-of-employment liability is rooted in this control, it extends beyond actual or possible control, holding employers responsible for some risks inherent in the employment context. Ultimately, the scope of employment encompasses the activities that the employer delegates to employees or authorizes employees to do, plus employees' acts that naturally or predictably arise from those activities.
>
> This means that the scope of employment – which determines whether the employer is liable – may include acts that the

[4] In other words, the Court did not change the scope-of-employment rule, it just considered it for the first time in the context of an on-duty police officer's sexual assault of a citizen. *Id*. at 459 ("Vicarious liability for an on-duty police officer's sexual assault is an issue of first impression for this Court.").

> employer expressly forbids; that violate the employer's rules, orders, or instructions; that the employee commits for self-gratification or self-benefit; that breach a sacred professional duty; or that are egregious, malicious, or criminal.
>
> The scope of employment extends beyond authorized acts for two key reasons. First, it is equitable to hold people responsible for some harms arising from activities that benefit them. When employees carry out assigned duties, those employment activities "further the employer's business" to an appreciable extent, benefiting the employer. But delegating employment activities also carries an inherent risk that those activities will naturally or predictably give rise to injurious conduct. When that happens, the employer is justly held accountable since the risk accompanies the employer's benefit.
>
> Second, holding employers liable for those injurious acts helps prevent recurrence. Employers can take measures – like selecting employees carefully and instituting procedures that lessen employment dangers – to reduce the likelihood of tortious conduct….
>
> To be clear, the focus in determining the scope of employment "must be on how the employment relates to the context in which the commission of the wrongful act arose." When tortious acts are so closely associated with the employment that they arise naturally or predictably from the activities an employee was hired or authorized to do, they are within the scope of employment, making the employer liable. But tortious acts are not within the scope of employment when they flow from a course of conduct that is independent of activities that serve the employer.

Id. at 461-62 (extensive internal citations omitted).

[21] After discussing *Cox*, and without explaining why a case on vicarious liability[5] was relevant to the issue of the MMA's applicability, the *Martinez* court stated:

> Considering the nuances of all of the Indiana cases in this area together with our supreme court's recent direction in *Cox*, we believe that the current test … as to whether the [MMA] applies to specific misconduct is to determine whether that misconduct arises naturally or predictably from the relationship between the health care provider and patient or from an opportunity provided by that relationship. It is further important to realize that, under *Cox*, such conduct may include otherwise tortious or abusive conduct.
>
> If this standard is not met, or if the misconduct is a pure question of premises liability, then standard negligence law applies. We now apply this test to the facts and circumstances of this case.

Martinez, 128 N.E.3d at 558. The court, however, proceeded to set out, in length, the various cases cited by the parties – many of which we addressed *supra* – and never actually applied the "current test." In its concluding paragraph, it simply observed that "Kafatia's attempt to enforce Martinez's curfew was part of Oaklawn's provision of healthcare to Martinez" and that after the ensuing altercation, Kafatia "followed Oaklawn's protocol by removing himself from Martinez's immediate physical presence and waiting for law enforcement to assist with Martinez." *Id*. at 562. Under these facts and

---

[5] Vicarious liability was not at issue in *Martinez*, as the parties expressly agreed that Kafatia was an employee of Oaklawn, a health care provider, and was acting within the scope of his employment when the incident occurred. *See Martinez*, 128 N.E.3d at 556.

circumstances, "together with the broadened scope of employment set forth in *Cox*," the court held that the claims based on the incident/injury fell squarely within the scope of the MMA. *Id*.

[22] According to Doe, the effect of *Martinez* is that courts in Indiana should no longer limit application of the MMA to curative or salutary conduct of a health care provider acting within his or her professional capacity or exclude conduct unrelated to the promotion of a patient's health or the provider's exercise of professional expertise, skill, or judgment. Rather, relying on *Martinez*, Doe argues that courts need only consider whether the alleged misconduct arose naturally or predictably from the relationship between the health care provider and the patient or from an opportunity provided by that relationship. Because Mosco's employment as a nurse to Doe authorized him to touch her genitals, Doe reasons that his sexual assault of her is subject to the MMA. This is a bridge too far.

[23] *Martinez* did not involve the sexual assault of a patient by a health care provider, an act that has consistently been held to be outside the definition of medical malpractice because its very nature is antithetic to the promotion of the patient's health or a provider's exercise of professional expertise, skill, or judgment. We refuse to completely unmoor a medical malpractice action from "the provision of what our case law has established is the very essence of health care, i.e., conduct, curative or salutary in nature, by a health care provider acting in his or her professional capacity." *Fairbanks Hosp.*, 895 N.E.2d at 738 (internal quotation omitted).

[24] Moreover, on the facts of that case, the *Martinez* court did not need to address *Cox* or craft a new standard for determining application of the MMA.[6] And, in fact, the *Martinez* court essentially applied the accepted and longstanding standard. That is, Kafatia injured Martinez while trying to enforce rules (i.e., curfew), which were there to promote Martinez's treatment, and Kafatia's reaction to Martinez's defiance, as well as Kafatia's decision whether to render aid after the injury, required Kafatia's exercise of professional expertise, skill, or judgment. In other words, the expert opinion of the medical review panel was called for to determine whether Kafatia complied with the appropriate standard of care while acting in his professional capacity and providing health care to Martinez.

[25] In contrast, here, Doe's allegations do not describe professional services relating in any way to the promotion of her health; rather, they present factual issues capable of resolution by a jury without application of the standard of care prevalent in the local medical community. *See Doe by Roe*, 652 N.E.2d at 104. Nor do her allegations call into question the degree of skill exercised by Mosco. *See Collins*, 552 N.E.2d at 511 (MMA held not to apply where physician's alleged act of intentionally performing an abortion while examining patient –

---

[6] The author of this opinion acknowledges that he was on the *Martinez* panel. Upon further reflection, the author, though having no issue with the result reached in *Martinez*, does not agree with the opinion's reliance on *Cox*, which dealt only with vicarious liability – an issue separate and distinct from applicability of the MMA. *See, e.g., McKenzie*, 185 N.E.3d at 377 (applying *Cox* scope-of-employment discussion to address vicarious liability *after* determining that the MMA did not apply to patient's claim, which the Court expressly found to be "unrelated to either the promotion of a patient's health or the provider's exercise of professional expertise, skill, or judgment").

with whom he had a sexual relationship – to determine whether she was pregnant was "wanton and gratuitous" conduct that "although plainly occurring during the rendition of health care, w[as] not designed to promote the patient's health" and did not "call into question Thakkar's use of the skill or expertise required of members of the medical profession"); *cf. Doe*, 996 N.E.2d at 335-36 (where complaint based on allegation that patient in psychiatric hospital was rendered incompetent to make an informed decision regarding sexual conduct with a fellow patient due to psychotropic drugs prescribed her, "layman's typical life experience cannot be expected to provide a basis for assessment of the propriety of a particular pharmacological regimen" and "fact-finder cannot be expected to determine whether there has been a breach of a particular standard of care absent expert medical testimony"). A medical review panel is no more equipped to address Doe's sexual assault allegations in this case than the average juror. Accordingly, we conclude that Doe's claims do not fall within the purview of the MMA and, therefore, the trial court properly granted summary judgment in favor of the Fund.

[26] Judgment affirmed.

Vaidik, J. and Crone, J., concur.