MEMORANDUM DECISION

APPELLANT PRO SE

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IN THE COURT OF APPEALS OF INDIANA

Joseph F. Olivares,
Appellant,

v.

Anonymous Dr. T.G.,
Appellee.

April 21, 2021

Court of Appeals Case No. 20A-CT-2337

Appeal from the Lake Superior Court

The Honorable Calvin D. Hawkins, Judge

Trial Court Cause No. 45D02-2009-CT-937

Brown, Judge.

[1] Joseph F. Olivares, *pro se*, appeals the trial court's order denying his motion to transfer venue, granting Dr. T.G.'s motion for summary judgment, and ordering the Indiana Department of Insurance ("IDOI") to dismiss his proposed complaint for medical malpractice filed on July 14, 2020. We affirm and remand for a determination of damages pursuant to Ind. Appellate Rule 66(E).

Facts & Procedural History

[2] On July 14, 2020, Olivares filed a Proposed Complaint in Medical Malpractice Against Dr. T.G. with the IDOI and alleged that Dr. T.G. performed a Hawkins test as an exam to his left shoulder in 1998 and an exploratory surgery on June 22, 1998. Olivares alleged that after the surgery Dr. T.G. informed him that it was his belief that the rotator cuff tear repaired by surgery did not arise out of and in the course of employment. Olivares then fired Dr. T.G. He alleged that another orthopedic surgeon moved his left shoulder in a full range of motion in 2005 and he did not experience any pain but could not move his left shoulder actively afterwards. He asserted that he could not receive care "until [Dr. T.G.] states what he saw in surgery, as to bruising of the humeral head in diagnosis." Appellee's Appendix Volume II at 19.

[3] On September 18, 2020, Dr. T.G. filed a Petition for Preliminary Determination and Motion for Summary Judgment in the Lake Superior Court. On September 28, 2020, Olivares filed a sixteen-page Motion to Transfer asserting that venue was proper in Elkhart County under Ind. Trial Procedure

Rule 75(A)(4) as Goshen Hospital and the associated officers where Dr. T.G. was a partner were located in Elkhart County.

[4] On October 27, 2020, the trial court entered an order indicating that the court held a status conference at which Olivares appeared telephonically and scheduled a hearing on Dr. T.G.'s motion for summary judgment.

[5] On December 1, 2020, the court held a hearing. On December 3, 2020, it entered an order finding that venue in Lake County was proper and noted that Dr. T.G.'s counsel represented that Dr. T.G., the only defendant, left Elkhart County and resided and practiced in Missouri and Olivares lived in Michigan. The court granted Dr. T.G.'s motion for summary judgment and ordered the IDOI to dismiss Olivares's July 14, 2020 proposed complaint for medical malpractice. It noted that Dr. T.G. asserted in his affidavit that Olivares filed a past claim for malpractice with the IDOI on April 14, 2000, alleging malpractice against Dr. T.G. and others related to the same care complained of in his current proposed complaint, and the medical review panel found no malpractice in an opinion dated January 14, 2002. The court found that Dr. T.G. had met his burden to demonstrate that Olivares's July 14, 2020 claim was filed well after the statute of limitations deadline. The court observed that Dr. T.G.'s affidavit demonstrated Olivares filed a complaint in the Elkhart Circuit Court under cause number 20C01-0004-CT-23 that was associated with the same June 1998 rotator cuff repair surgery, the claim was dismissed on October 20, 2000, and the court destroyed the file on May 15, 2007, pursuant to Administrative Rule 7. The court also noted that the designated evidence

demonstrated that Olivares had sufficient information to discover he had a cause of action and that he did, in fact, assert that cause of action within the permissible time frame to bring a claim. The court concluded that Olivares's July 14, 2020 claim failed as a matter of law. The court also concluded that, even assuming there was some form of concealment on Dr. T.G.'s part, the designated and unrefuted facts still showed that Olivares had sufficient information to discover that he had a cause of action for malpractice against Dr. T.G. related to the 1998 care.

Discussion

[6] Olivares argues that the trial court erred by failing to dismiss Dr. T.G.'s petition based upon a lack of subject matter jurisdiction, the summons and complaint were not served on him, the court erred in not transferring the action, he stated an active concealment action, and his due process rights were violated.

[7] We note that Olivares is proceeding *pro se*. Such litigants are held to the same standards as trained attorneys and are afforded no inherent leniency simply by virtue of being self-represented. *Zavodnik v. Harper*, 17 N.E.3d 259, 266 (Ind. 2014). Moreover, this Court "will not become an advocate for a party, or address arguments that are inappropriate or too poorly developed or expressed to be understood." *Basic v. Amouri*, 58 N.E.3d 980, 984 (Ind. Ct. App. 2016) (internal quotation marks omitted), *reh'g denied*.

[8] To the extent Olivares fails to develop an argument with respect to the issues he attempts to raise on appeal, those arguments are waived. *See Loomis v. Ameritech*

Corp., 764 N.E.2d 658, 668 (Ind. Ct. App. 2002) (argument waived for failure to provide cogent argument), *reh'g denied*, *trans. denied*; Ind. Appellate Rule 46(A)(8)(a) (argument must be supported by cogent reasoning and citations to authorities and the record).

[9] With respect to Olivares's claim that the trial court lacked subject matter jurisdiction, we note an action against a health care provider may not be commenced in a trial court until a medical review panel has reviewed the proposed complaint and rendered an opinion. *Thomas v. Deitsch*, 743 N.E.2d 1218, 1220 (Ind. Ct. App. 2001) (citing Ind. Code § 34-18-8-4). "However, [t]he filing of a copy of the proposed complaint and motion with the clerk confers jurisdiction upon the court over the subject matter and the parties to the proceeding for the limited purposes stated in this chapter.'" *Id.* (quoting Ind. Code § 34-18-11-2(b)). One such "limited purpose" stated in the Malpractice Act is for the trial court to "preliminarily determine an affirmative defense or issue of law or fact that may be preliminarily determined under the Indiana Rules of Procedure." *Id.* (quoting Ind. Code § 34-18-11-1(a)(1)). The record reveals that Dr. T.G. filed his Petition for Preliminary Determination and Motion for Summary Judgment and memorandum in support of his petition and motion on September 18, 2020, and referred to Olivares's proposed complaint as Exhibit A, which contains the proposed complaint. We conclude that the trial court did not lack subject matter jurisdiction.

[10] As for Olivares's assertion he did not receive the summons and the complaint and challenges personal jurisdiction, we note that he does not assert he raised

the issue of personal jurisdiction before the trial court, and that he appeared before the trial court. Accordingly, he has waived this issue. *See Ellis v. M & I Bank*, 960 N.E.2d 187, 192 (Ind. Ct. App. 2011) (providing that a defendant can waive a lack of personal jurisdiction and submit to the jurisdiction of the court by responding or appearing and failing to raise the issue of lack of jurisdiction).

[11] To the extent Olivares asserts the trial court erred in denying his motion to transfer, we note that "[g]enerally, any case may be venued in any court in the state, subject to the right of an objecting party to request that the case be transferred to a preferred venue listed in Rule 75(A)." *Randolph Cty. v. Chamness*, 879 N.E.2d 555, 556 (Ind. 2008). Ind. Trial Procedure Rule 75(A)(4), provides that "[p]referred venue lies in . . . the county where either the principal office of a defendant organization is located or the office or agency of a defendant organization or individual to which the claim relates or out of which the claim arose is located, if one or more such organizations or individuals are included as defendants in the complaint." On appeal, Olivares cites Ind. Trial Procedure Rule 75(A)(10), which provides:

> Preferred venue lies in . . . the county where either one or more individual plaintiffs reside, the principal office of any plaintiff organization or governmental organization is located, or the office of any such plaintiff organization or governmental organization to which the claim relates or out of which the claim arose is located, if the case is not subject to the requirements of subsections (1) through (9) of this subdivision or if all the defendants are nonresident individuals or nonresident organizations without a principal office in the state.

As pointed out by the trial court, Olivares lives in Michigan, and the only defendant, Dr. T.G., has long resided and practiced in Missouri. The trial court did not err in denying Olivares's motion to transfer.

[12] As for Olivares's claim that he demonstrated concealment, Indiana's Medical Malpractice Statute of Limitations provides:

> 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 . . . .

Ind. Code § 34-18-7-1(b). In determining whether a medical malpractice claim has been commenced within the medical malpractice statute of limitations, the discovery or trigger date is the point when a claimant either knows of the malpractice and resulting injury, or learns of facts that, in the exercise of reasonable diligence, should lead to the discovery of the malpractice and the resulting injury. *David v. Kleckner*, 9 N.E.3d 147, 152-153 (Ind. 2014). Depending on the individual circumstances of each case, a patient's learning of the resulting disease or the onset of resulting symptoms may or may not constitute the discovery or trigger date. *Id.* at 153. The point at which a particular claimant either knew of the malpractice and resulting injury, or learned of facts that would have led a person of reasonable diligence to have discovered the malpractice and resulting injury, must be determined. *Id.* When a medical malpractice defendant asserts the statute of limitations as an affirmative defense, that defendant "bears the burden of establishing that the

action was commenced beyond that statutory period." *Id.* (quoting *Overton v. Grillo*, 896 N.E.2d 499, 502 (Ind. 2008), *reh'g denied*). If established, the burden shifts to the plaintiff to establish "an issue of fact material to a theory that avoids the defense." *Id.* (quoting *Overton*, 896 N.E.2d at 502 (quoting *Boggs v. Tri-State Radiology, Inc.*, 730 N.E.2d 692, 695 (Ind. 2000), *reh'g denied*)).

[13] The equitable doctrine of fraudulent concealment may operate to toll the statute of limitations in the medical malpractice context until the termination of the physician-patient relationship or until discovery of the alleged malpractice, whichever is earlier. *Boggs*, 730 N.E.2d at 698. When the doctrine is applicable, "the patient must bring his or her claim within a reasonable period of time after the statute of limitations begins to run." *Id.* To successfully invoke the doctrine of fraudulent concealment, a plaintiff must establish the concealment of material information somehow prevented him from inquiring into or investigating his condition, thus preventing him from discovering a potential cause of action. *Garneau v. Bush*, 838 N.E.2d 1134, 1142 (Ind. Ct. App. 2005), *trans. denied*.

[14] The alleged malpractice of Dr. T.G. occurred in 1998. Olivares filed his complaint against Dr. T.G. on July 14, 2020. Because the evidence shows that the action was commenced more than two years after the date of the alleged malpractice, the burden shifts to Olivares to establish an issue of fact material to a theory that avoids the defense. We cannot say that Olivares has developed a cogent argument or has met his burden of establishing an issue of fact material to a theory that avoids the defense of the statute of limitations.

[15] With respect to Dr. T.G.'s request for appellate attorney fees, we note Dr. T.G. asserts that Olivares's bad faith was both substantive and procedural, Olivares admitted that he had the facts necessary to discover his alleged malpractice in 2000 and again in 2005, and Olivares had already filed a claim against him in 2000 which the medical review panel rejected.

[16] Appellate Rule 66(E) provides in pertinent part that this Court "may assess damages if an appeal . . . is frivolous or in bad faith. Damages shall be in the Court's discretion and may include attorneys' fees." Our discretion to impose damages is limited to instances when "an appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay." *Thacker v. Wentzel*, 797 N.E.2d 342, 346 (Ind. Ct. App. 2003) (citing *Orr v. Turco Mfg. Co., Inc.*, 512 N.E.2d 151, 152 (Ind. 1987)). In addition, while Ind. Appellate Rule 66(E) provides this Court with discretionary authority to award damages on appeal, we must use extreme restraint when exercising this power because of the potential chilling effect upon the exercise of the right to appeal. *Id.* (citing *Tioga Pines Living Ctr., Inc. v. Ind. Family & Soc. Serv. Admin.*, 760 N.E.2d 1080, 1087 (Ind. Ct. App. 2001), *aff'd on reh'g*, *trans. denied*). Indiana appellate courts have classified claims for appellate attorneys' fees into substantive and procedural bad faith claims. *Id.* (citing *Boczar v. Meridian St. Found.*, 749 N.E.2d 87, 95 (Ind. Ct. App. 2001)). To prevail on a substantive bad faith claim, the party must show that "the appellant's contentions and arguments are utterly devoid of all plausibility." *Id.* Procedural bad faith, on the other hand, occurs when a party flagrantly disregards the form and content

requirements of the rules of appellate procedure, omits and misstates relevant facts appearing in the record, or files briefs written in a manner calculated to require the maximum expenditure of time both by the opposing party and the reviewing court. *Id.* at 346-347. Even if the appellant's conduct falls short of that which is "deliberate or by design," procedural bad faith can still be found. *Id.* at 347.

[17] Olivares failed to develop a cogent argument with respect to some of his issues and does not appear to dispute the trial court's finding that he filed a claim for malpractice in 2000 related to the same care, and that the medical review panel found no malpractice in an opinion in 2002. Under these circumstances, we conclude that an award of damages, including appellate attorneys' fees, is appropriate.

[18] For the foregoing reasons, we affirm the trial court's order and remand for a determination of damages pursuant to Appellate Rule 66(E).

[19] Affirmed and remanded.

Bradford, C.J., and Vaidik, J., concur.