MEMORANDUM DECISION

IN THE

Court of Appeals of Indiana

Roberta Miller, et al.,

Appellants-Plaintiffs

v.

Franciscan Alliance, Inc.,
d/b/a Franciscan Health
Indianapolis,

Appellee-Defendant

May 28, 2024

Court of Appeals Case No.
23A-CT-2566

Appeal from the Marion Superior Court

The Honorable Timothy Wayne Oakes, Judge

Trial Court Cause No.
49D02-2303-CT-10398

Memorandum Decision by Chief Judge Altice

Judges Bradford and Felix concur.

Altice, Chief Judge.

Case Summary

[1] While Robert Lewis (Robert) was undergoing surgery at Franciscan Alliance, Inc. d/b/a Franciscan Health Indianapolis (the Hospital), the anesthesia machine failed. Robert suffered complications and died about a week later. Roberta Miller, as Special Administrator of the Estate of Robert Lewis, Deceased, and Jeanetta Lewis, Individually (collectively, the Estate) filed a proposed complaint with the Indiana Department of Insurance (the IDOI) against, among others, the Hospital, alleging medical malpractice. About a year later, the Estate filed a complaint in the trial court against the Hospital only (the Complaint), alleging that Hospital employees were negligent in maintenance and inspection of the anesthesia machine.

[2] The Hospital filed an Ind. Trial Rule 12(B)(1) motion to dismiss the Complaint, for lack of subject matter jurisdiction. Specifically, the Hospital argued that the claims were within the scope of Indiana's Medical Malpractice Act (the MMA) and that the medical review panel (MRP) had not yet rendered an opinion as required under the MMA. The Estate maintained that the Complaint alleged claims of ordinary negligence, not medical malpractice. The trial court granted the Hospital's motion.

[3] The Estate appeals, raising the following restated issue: Are claims that non-medical Hospital employees improperly inspected and maintained an anesthesia machine within the scope of the MMA?

[4] We reverse and remand.

Facts & Procedural History

[5] On April 1, 2021, seventy-four-year-old Robert presented to the Hospital for planned heart procedures including coronary artery bypass. Toward the end of the surgery, the anesthesia ventilator machine experienced "an abrupt loss of function." *Appendix Vol. III* at 59. The anesthesiologist then delivered oxygen manually to Robert through the "Ambu bag" mechanism on the machine, Robert's chest was reopened, and open cardiac massage took place until another anesthesia ventilator machine was brought into the operating room. *Id.* at 35, 145. According to the Estate, Robert suffered acute respiratory failure and cardiac arrest while in the operating room. Robert survived but, post-surgery, developed infection and other complications, including shock, compromised cardiac function, and hypovolemia. Robert died on May 2, 2021.

[6] The Hospital owns and maintains the anesthesia machine that malfunctioned during Robert's procedure. The Hospital investigated the cause of the failure, including meeting with a representative of the manufacturer, and ultimately determined that an electronic component inside the machine failed, namely "a switch that operates the bag vent lever." *Appendix Vol. V* at 38.

[7] The Hospital employees who maintain and inspect the equipment at issue work in the biomedical – or clinical – engineering department (the Engineering Department). The Hospital keeps records of the preventive maintenance performed on their machines. The Engineering Department utilized the manufacturer's guidelines and specifications for preventative maintenance on the anesthesia machines. The manufacturer's documentation "tells you what parts to replace and how often to replace them," as well as how to perform calibrations. *Appendix Vol. VI* at 29.

[8] Several employees in the Engineering Department were "trained OR technician[s]," including Ken Perkins. *Appendix Vol. V* at 11. Sometime prior to Robert's surgery, Perkins maintained and inspected the machine at issue. Perkins holds an Associate's Degree in electrical engineering technology from ITT Technical Institute, and before being employed by the Hospital in 2018, Perkins was an electronic technician who repaired cable TV test equipment for many years. Subsequent to being hired by the Hospital, Perkins received a one-week training course on anesthesia machines from the manufacturer.

[9] On March 7, 2022, the Estate filed a proposed complaint for medical malpractice with the IDOI, naming the Hospital as one of several defendants, alleging that the health care providers' medical treatment breached the standard of care. As to the Hospital, the Estate also claimed that "[t]he employees, agents and representatives of [the Hospital] failed to maintain the anesthesia machine in proper working order," leading to the injury and death of Robert. *Appendix Vol. II* at 42.

[10] Separate from the proposed complaint that remained pending before the MRP, the Estate filed, on March 10, 2023, the Complaint in the trial court. The Complaint alleged that "[t]he employees, agents and representatives of [the Hospital] failed to properly maintain the anesthesia machine used during [Robert]'s surgery and failed to properly inspect the equipment to keep it in safe working order." *Id*. at 11.

[11] On August 1, 2023, the Hospital filed a T.R. 12(B)(1) motion to dismiss the Complaint for lack of subject matter jurisdiction, arguing that maintenance and inspection of the anesthesia machine was part of the health care provided to Robert by the Hospital such that the Estate's claims sounded in medical malpractice, not ordinary negligence, and thus the trial court lacked subject matter jurisdiction because the MRP had not yet rendered an opinion.[1] In support of its motion to dismiss, the Hospital filed eight exhibits, including the Complaint, the IDOI proposed complaint, certain discovery responses, and depositions of the surgeon, the anesthesiologist, Perkins, and Benjamin Esslinger, the Hospital's regional director of clinical engineering.

[12] The anesthesiologist stated in his deposition that, prior to Robert's surgery, he tested the machine by performing "a checklist that the machine sort of walks you through," testing for leaks and the switch between automatic and manual

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[1] Ind. Code § 34-18-8-4 states that "an action against a health care provider may not be commenced in a court in Indiana before: (1) the claimant's proposed complaint has been presented to a [MRP] ... and (2) an opinion is given by the [MRP]." The statute further provides, "Until the panel issues its opinion, the trial court has no jurisdiction to hear and adjudicate the claim." *Id.*

ventilation. *Appendix Vol. III* at 83. He described that, during the surgery, he saw an error message on the anesthesia machine that he had never seen before, and it was "something to the effect of, unable to deliver automatic ventilation." *Id*. at 30, 108. When asked about the malfunctioning switch that operated the bag vent on the machine, the anesthesiologist stated: "I am not an engineer understanding those innards . . . of the machine. I don't know." *Id*. at 64. The anesthesiologist was never contacted by the Engineering Department to discuss what transpired during the surgery and was not informed as to what caused the malfunction. The anesthesiologist was not aware of what preventative maintenance was performed on the anesthesia machine.

[13] The surgeon testified that he is not trained how to use anesthesia machines. When asked whether he ever inquired about the reason the machine malfunctioned, the surgeon replied that he did not and that "it was left to biomedical and for them to look through the machine and figure out what happened." *Appendix Vol. IV* at 108. Esslinger testified in his deposition that the Engineering Department, while conducting its investigation into the machine's failure, did not speak to or consult with the anesthesiologist or anyone who was in the operating room on the day of Robert's surgery.

[14] On October 2, 2023, after holding an oral argument on the pending motion, the trial court summarily granted the Hospital's motion to dismiss the Complaint, concluding it lacked subject matter jurisdiction because the allegations sounded in medical malpractice, not ordinary negligence. The Estate now appeals.

Discussion & Decision

Standard of Review

[15] Subject matter jurisdiction is the power of a court to hear and decide a particular class of cases. *Terry v. Cmty. Health Network, Inc.*, 17 N.E.3d 389, 392 (Ind. Ct. App. 2014). A trial court ruling on a motion to dismiss for lack of subject matter jurisdiction under T.R. 12(B)(1) may consider not only the complaint but also any affidavits or evidence submitted in support. *B.R. ex rel. Todd v. State*, 1 N.E.3d 708, 711 (Ind. Ct. App. 2013), *trans. denied*. If such evidence is presented, the trial court may weigh the evidence to resolve the jurisdictional issue. *Martinez v. Oaklawn Psychiatric Ctr., Inc.*, 128 N.E.3d 549, 554 (Ind. Ct. App. 2019), *clarified on reh'g*, *trans. denied*.

[16] If the facts before the trial court are not in dispute, as is the case here, then the question of subject matter jurisdiction is purely one of law. *Id*. Under these circumstances no deference is afforded to the trial court's conclusion because appellate courts independently evaluate questions of law. *Id.* Therefore, we will review the trial court's grant of the Hospital's motion to dismiss de novo. *See OB-GYN Assocs. of N. Ind., P.C. v. Ransbottom*, 885 N.E.2d 734, 736 (Ind. Ct. App. 2008), *trans. denied*.

The MMA - Background

[17] Enacted in 1975, the MMA dictates the statutory procedures for medical malpractice actions. *G.F. v. St. Catherine Hosp., Inc.*, 124 N.E.3d 76, 84 (Ind. Ct. App. 2019). Because the MMA is in derogation of common law, its statutory

provisions are to be strictly construed against limiting a claimant's right to bring suit. *Id.*; *B.R.*, 1 N.E.3d at 713.

[18] The MMA applies to patients who have claims for bodily injury or death "on account of malpractice," which is defined as "a tort or breach of contract based on health care or professional services that were provided, or that should have been provided, by a health care provider, to a patient." Ind. Code §§ 34-18-2-1, 18; *Cutchin v. Beard*, 171 N.E.3d 991, 994 (Ind. 2021). "Health care," in turn, is defined as "an act or treatment performed or furnished, or that should have been performed or furnished, by a health care provider for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement." I.C. § 34-18-2-13. While considering the scope of the MMA, we have stated that it "covers curative or salutary conduct of a health care provider acting within his or her professional capacity[.]" *Ransbottom*, 885 N.E.2d at 738. "'Professional capacity' in this context no doubt alludes to the function of physicians and nurses as licensed health care professionals who are skilled in promoting and maintaining health." *Id.* (some quotations omitted). The General Assembly's purpose for requiring medical malpractice claims to be reviewed by a MRP "is to provide an expert determination on the question of whether a provider complied with the appropriate standard of care." *B.R.*, 1 N.E.3d at 716.

[19] Thus, the MMA "is not all-inclusive for claims against healthcare providers, nor is it intended to be extended to cases of ordinary negligence." *Cutchin*, 171 N.E.3d at 998. It does not apply to conduct "unrelated to the promotion of a patient's health or the provider's exercise of profession[al] expertise, skill, or

judgment." *G.F.*, 124 N.E.3d at 85 (internal quotation omitted). We have recognized that "[g]eneral negligence can occur during the course of ongoing medical treatment *if the negligent act itself* does not involve curative or salutary conduct, the promotion of the patient's health, or the exercise of professional expertise, skill, or judgment." *Id*. (emphasis added). In facing the issue of whether a claim fell within the MMA, we have offered the following distinction:

> A case sounds in ordinary negligence [rather than medical 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. at 86 (quoting other cases).

[20] When deciding whether a claim falls under the provisions of the MMA, we look to the substance of a claim. *Rossner v. Take Care Health Sys., LLC*, 172 N.E.3d 1248, 1255 (Ind. Ct. App. 2021), *trans. denied*. The fact that the alleged misconduct occurs in a healthcare facility or that the injured party was a patient at the facility, is not dispositive in determining whether the claim sounds in medical malpractice. "The test is whether the claim is based on the provider's behavior or practices while acting in his professional capacity as a provider of medical services." *Terry*, 17 N.E.3d at 392. "[T]he 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." *Doe v. Ind. Dep't of Ins.,* 194 N.E.3d 1197, 1201 (Ind. Ct. App. 2022) (quotation omitted), *trans. denied*.

[21] We have recognized that application of these tests has resulted in "hairline distinctions between claims that sound in medical negligence and those that sound in ordinary negligence." *Martinez*, 128 N.E.3d at 557. Indeed, as our Supreme Court has observed, there are "grey areas on the fringe of the MMA," such that claimants and courts "have wrestled with the question of what activities fall within the MMA" for several decades. *Eads v. Cmty. Hosp*., 932 N.E.2d 1239, 1244 (Ind. 2010) (quotation omitted).

Applicability of the MMA Here

[22] In arguing that the trial court erred when it granted the Hospital's motion to dismiss, the Estate relies, in part, on this court's decision in *Pluard v. Patient's Compensation Fund*, 705 N.E.2d 1035 (Ind. Ct. App. 1999), *trans. denied*. In *Pluard*, plaintiffs filed a claim alleging negligence after a surgical lamp detached from the wall and fell on a newborn's head as a nurse, responding to direction from a surgeon, was positioning the lamp for a surgical procedure. We observed that it was not the nurse's positioning of the light – but its detachment from the wall – that caused the injury. Finding that such did not involve a health care decision or the exercise of professional skill or judgment, we held that Pluard's claim did not sound in medical malpractice. *Id*. at 1038.

[23] The Hospital urges that *Pluard* is not dispositive and that maintenance and inspection of the anesthesia machine "was part and parcel of the health care provided to [Robert]," and, thus, the Estate's claim "fits squarely within the scope of the MMA." *Appellee's Brief* at 21. The *Pluard* court rejected a similar argument that focusing the lamp to ready the patient for the medical procedure "was part and parcel" of his medical care and treatment. 705 N.E.2d at 1038. We explained:

> [M]anipulation of the light . . . has not been alleged to have caused his injury. Pluard was injured because the light fell on him; the light fell on him because it was not properly attached to the wall. Put another way, the duty to secure the light . . . involved the general duty to maintain safe premises and equipment. *As such, it involves issues capable of resolution without application of the standard of care prevalent in the local medical community, and thus, is outside the purview of the [MMA]*, which requires convening a panel of medical experts for the purpose of judging a completely different kind of question.

Id. (emphasis added).

[24] Another case we find relevant to our decision is *Harts v. Caylor-Nickel Hosp., Inc.*, 553 N.E.2d 874 (Ind. Ct. App. 1990), *trans. denied*, where Harts, who was a patient, fell out of a hospital bed and suffered injuries. A nurse had positioned the safety bedrails in an up position, but the bedrail collapsed as Harts was attempting to use it for support. Harts brought a negligence suit on the theory of premises liability and maintained that his claim was not within the purview of the MMA. The *Harts* court agreed, observing that Harts "did not allege any

breach of duty directly associated with medical negligence that was integral to the rendering of medical treatment that would subject his claim to the MMA." *Id*. at 879.

[25] A few years later, we reached a different conclusion in *Putnam Cnty. Hosp. v. Sells*, 619 N.E.2d 968 (Ind. Ct. App. 1993), where a patient still under the effects of anesthesia administered during a tonsillectomy fell from her bed in a recovery room; the railings on her bed were not in the upright position. On appeal, we concluded that Sells's complaint raised a claim for medical malpractice within the scope of the MMA, as the allegations were that the hospital was negligent by failing to train and supervise its staff properly concerning the procedures for monitoring patients after surgery, failing to properly monitor and observe Sells in the recovery room, and failing to take steps to insure that she would not injure herself while under anesthesia. The *Sells* court distinguished its facts from those in *Harts*, pointing out that Harts's bedrail "was in place but did not work properly" and that, in contrast to the claims raised in *Harts*, Sells was not making "an allegation of faulty premises or equipment." *Sells*, 619 N.E.2d at 971.

[26] More recently, this court has observed that "*Harts* and *Pluard* stand for the proposition that matters are not subject to the MMA when they can be resolved without reference to the local medical standard of care." *Robertson v. Anonymous Clinic*, 63 N.E.3d 349, 361 (Ind. Ct. App. 2016) *trans. denied*.

[27] Turning to the case at hand, we recognize that the anesthesia machine used in Robert's surgery was in a general sense part of his medical care; however, the inquiry requires a more focused examination of whether the claimed misconduct involved the exercise of professional medical judgment or skill by the medical provider and whether a jury would be capable of resolving factual issues without applying the standard of care prevalent in the local medical community. *See Preferred Prof'l Ins. Co. v. West*, 23 N.E.3d 716, 728 (Ind. Ct. App. 2014) (recognizing that although plaintiffs' claims concerning improper handling of phone message slips in doctor's office "in a general sense" would not exist but for the medical provider's treatment of the patient, "the inquiry must be more focused"), *disapproved of in part on other grounds by Cutchin*, 171 N.E.3d at 996, *trans. denied*. Here, the claimed misconduct concerns the action or inaction of the technicians and engineers in the Engineering Department with regard to their inspection and maintenance of internal electrical components of the anesthesia machine at a time prior to Robert's surgery. The allegedly negligent conduct did not "involve[] provision of medical services" or "the exercise of professional medical judgment or skill by the medical provider." *Doe*, 194 N.E.2d at 1201; *West*, 23 N.E.3d at 728. Indeed, in conducting an investigation into what occurred with the machine, the Engineering Department saw no need to speak to or consult with the anesthesiologist or surgeon, who each subsequently testified that they did not know anything about how the anesthesia machine worked and that it was for the biomedical team to determine what happened.

[28] We agree with the Estate that

> the trier of fact will be called upon to examine the engineer's conduct in failing to maintain the equipment prior to the procedure, not the medical professionals' skill or judgment during the procedure. The latter requires reference to the standard of care prevalent in the medical community at large, while the former does not.

Appellant's Brief at 10. That is, we find that the Estate's claims in the Complaint are capable of resolution by a jury "without application of the standard of care prevalent in the local medical community." *B.R.*, 1 N.E.3d at 714. In such a case, the MRP "is no better equipped" than the average juror to consider whether the Engineering Department complied with the appropriate standard of care.[2] *Id*. at 716 (finding that MRP was no better equipped than jurors to determine whether a case manager – who was an employee of a health provider but was not a health care professional – was negligent in placement of child in foster home); *see also H.D. v. BHC Meadows Hosp., Inc.,* 884 N.E.2d 849, 855 (Ind. Ct. App. 2008) ("We fail to see why the therapist's act of faxing a patient's confidential information to a fax machine located in a school office, without taking precautions to ensure that the materials are discreetly received by the

[2] While the Hospital suggests that a biomedical engineer or technician could potentially be on the MRP, a medical review panel consists of a panel chairman, who is an attorney, and three panel members, all of whom are health care providers. I.C § 34-18-10-3; *see also* I.C. § 34-18-10-5 (stating that those eligible for membership on a MRP are, excluding health facility administrators, "all health care providers in Indiana, whether in the teaching profession or otherwise, who hold a license to practice in their profession").

intended recipient, would necessitate consideration by a medical review panel."), *trans. denied*.

[29] For the above reasons, and mindful that the MMA is to be construed narrowly, we conclude that the Estate's claims concerning the adequacy of the Engineering Department's inspection and maintenance of the anesthesia machine sound in general negligence rather than medical malpractice. *See e.g.*, *St. Mary Med. Ctr. v. Bakewell*, 938 N.E.2d 820, 822 (Ind. Ct. App. 2010) (patient's claims that medical center negligently maintained the premises by failing to install appropriate handrails and mats in the shower and by failing to warn her of the dangerous nature of the shower were not claims of "negligent failure to provide appropriate care," and thus not subject to the MMA), *trans. denied*. Accordingly, the trial court does not lack subject matter jurisdiction, and we reverse the trial court's grant of the Hospital's T.R.12(B)(1) motion and remand for proceedings consistent with this opinion.

[30] Judgment reversed and remanded.

Bradford, J. and Felix, J., concur.

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