MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Shanika Day, Individually and as Administrator for the Estate of Terrell Day, and Harvey Morgan,

Appellants-Plaintiffs,

v.

Anonymous Corporation and Anonymous Medical Services,

Appellees-Defendants,

April 28, 2021

Court of Appeals Case No. 20A-MI-1565

Appeal from the Marion Superior Court

The Honorable Timothy W. Oakes, Judge

Trial Court Cause No. 49D02-2005-MI-16272

Robb, Judge.

Case Summary and Issue

[1] Shanika Day, individually and as administrator of the estate of Terrell Day, and Harvey Morgan (collectively, "Day") have initiated a medical malpractice action against Anonymous Corporation and Anonymous Medical Services (collectively, "Medical Providers") by filing a proposed complaint with the Indiana Department of Insurance. After all parties made their submissions of evidence to the medical review panel, Day filed a motion for preliminary determination in the trial court, seeking an order requiring Medical Providers to redact from their submission what Day characterizes as legal argument. The trial court found Medical Providers had not included improper legal argument in their submission and dismissed the petition.

[2] Day now appeals, raising one issue for our review which we restate as whether the trial court properly determined that Medical Providers' submission did not contain legal argument and therefore did not need to be redacted. Concluding the trial court did not err, we affirm.

Facts and Procedural History

[3] Day's proposed complaint alleges that on the afternoon of September 26, 2015, Medical Providers responded to a medical emergency in Indianapolis. Upon arrival at the scene, Medical Providers found Terrell lying on his back in the grass with his hands handcuffed behind him. He had been running prior to being handcuffed, and eyewitnesses said he appeared to be in distress. Medical

Providers conducted a brief examination and then left the scene after a police officer signed Terrell's name to a refusal of medical treatment form. Approximately forty minutes later, Medical Providers were called back to the scene and found that Terrell had died.[1]

[4] In February 2016, Day filed a proposed complaint for medical malpractice alleging Medical Providers "failed to examine, treat and stabilize Terrell . . . for his emergency medical condition; . . . failed to properly transport [him] to the appropriate medical facility for testing and appropriate treatments[; and] were careless and negligent in allowing a police officer to make a medical decision for [him]." Appellants' Appendix, Volume II at 21.

[5] While this case was pending before the medical review panel, Day filed in the United States District Court for the Southern District of Indiana a Section 1983 claim against the police officers involved in Terrell's arrest. The case reached the Seventh Circuit Court of Appeals, which issued an opinion on January 10, 2020.

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[1] Although Day's entire argument is that Medical Providers wrongly included in their submission to the medical review panel facts as stated in a Seventh Circuit Court of Appeals opinion in a case against the police officers involved in this incident, Day has cited to the "Background" section of the underlying summary judgment decision from the District Court in the Statement of the Facts section of their brief to this court. *See* Brief of Appellants at 6-8 (citing to Appellants' Appendix, Volume II at 74-81). Aside from this being incongruous with their argument, it is unclear if the District Court decision, or any of the 200 pages of other documents from the federal court case included in the appendix, are properly before this court, as it does not appear that these documents were presented to the trial court. We have, accordingly, limited our recitation of the facts to those alleged in Day's proposed complaint, attached as an exhibit to the petition for preliminary determination and therefore unquestionably before both the trial court and this court.

[6] Medical Providers made their submission of evidence to the medical review panel in the malpractice action on February 12, 2020, and included the following introduction to a section titled "Discussion of Plaintiffs' Allegations of Malpractice": "Prior to addressing [Day's] allegations, the Panelists should receive insight as to the facts of this case. The United States Seventh Circuit Court of Appeals have provided an interpretation of the facts." *Id.* at 30. The submission then recited verbatim the facts as set forth in the Seventh Circuit opinion. *See id.* at 30-32.

[7] Day objected to the inclusion of this material from the Seventh Circuit opinion in Medical Providers' submission and, after informal attempts to resolve the issue failed, filed a petition for preliminary determination in the trial court. The petition alleged Medical Providers' submission improperly included "legal arguments regarding the facts of the case" contrary to statutory and case law. *Id.* at 14. Medical Providers responded, arguing they had not included statements of law or legal argument in their submission.

[8] After a hearing,[2] the trial court issued two complementary orders. On August 20, 2020, the court entered an order finding Medical Providers "did not improperly include legal argument from the Seventh Circuit Court of Appeals. A distinction exists between facts and an Opinion, Holding, or legal standards."

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[2] Day requested this hearing be transcribed, but the court reporter filed a notice to this court and the parties that because the hearing was conducted by WebEx, it was not recorded. This court accepted the notice, and the parties did not attempt to file an agreed statement of the record.

Appealed Order at 1. On August 24, 2020, the trial court issued an order concluding Medical Providers "shall be allowed to submit to the Medical Review Panel the facts from the Seventh Circuit opinion and the Petition [for Preliminary Determination] is hereby dismissed, and this matter is now a final appealable Order." *Id.* at 4.[3] Day now appeals.

Discussion and Decision

I. Background

[9] Before a plaintiff may pursue a malpractice complaint in court against a qualified healthcare provider, the Indiana Medical Malpractice Act (the "MMA") requires the plaintiff to present a proposed complaint to a medical review panel, and the panel must give its expert opinion as to whether the provider breached the standard of care. *See* Ind. Code § 34-18-8-4; *Anonymous*

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[3] Day brought this appeal as if from a final judgment. *See* Notice of Appeal at 2. "The authority of the Indiana Supreme Court and Court of Appeals to exercise appellate jurisdiction is generally limited to appeals from final judgments." *Allstate Ins. Co. v. Fields*, 842 N.E.2d 804, 806 (Ind. 2006). Our supreme court has stated that orders in preliminary determination proceedings are not final judgments unless they include the language required by Trial Rule 54(B) and Appellate Rule 2(H)(2) because the medical malpractice case, to which the preliminary determination is "inextricably linked[,]" continues. *Ramsey v. Moore*, 959 N.E.2d 246, 252-53 (Ind. 2012). Accordingly, orders in preliminary determinations must include this language or be appealed pursuant to Appellate Rule 14(B)(2) as discretionary interlocutory appeals.

Although the appealed order in this case stated that "this matter is now a final appealable [o]rder[,]" Appealed Order at 4 (based on .pdf pagination), it did not include the precise language required by the rules. At Medical Providers' request, *see* Brief of Appellees at 10, we did not dismiss this case for lack of a final appealable order but temporarily stayed the appeal and remanded for the trial court to clarify its order. On March 26, 2021, the trial court issued an amended order including the language required to make the order a final judgment. We therefore resume jurisdiction over this appeal to consider the merits of Day's argument. But we also take this opportunity to remind parties to medical malpractice/preliminary determination actions that an order on a preliminary determination is an *interlocutory order* absent the "magic language" required to make it a final judgment and to proceed on appeal accordingly or risk dismissal.

Hosp. v. Spencer, 158 N.E.3d 380, 384-85 (Ind. Ct. App. 2020), *trans. denied*. Medical review panels consist of three health care providers and one attorney, who serves as chairperson and does not vote. Ind. Code § 34-18-10-3. The chairperson, among other things, "shall advise the panel relative to any legal question involved in the review proceeding[.]" Ind. Code § 34-18-10-19. Parties are permitted to submit evidence to the panel in written form that may consist of "medical charts, x-rays, lab tests, excerpts of treatises, depositions of witnesses including parties, and any other form of evidence allowable by the medical review panel." Ind. Code § 34-18-10-17(a), (b). In addition, the medical review panel may consult with other medical authorities and examine reports by other health care providers. Ind. Code § 34-18-10-21(b), (c).

[10] A motion for preliminary determination of law under Indiana Code section 34-18-11-1 is a procedure that nonetheless permits a trial court to assert jurisdiction over threshold issues before a medical review panel has acted. *Haggerty v. Anonymous Party 1*, 998 N.E.2d 286, 294 (Ind. Ct. App. 2013). The preliminary determination procedure is unique to the MMA. *Id.* Pursuant to the MMA, a party to a malpractice action may request the appropriate 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; or . . . compel discovery in accordance with the Indiana Rules of Procedure." Ind. Code § 34-18-11-1(a). In defining the narrow parameters of the trial court's authority under this statute, our supreme court has stated:

> First, the court can determine either affirmative defenses or issues of law or fact that may be preliminarily determined under the Indiana Trial Rules and, secondly, it may compel discovery in accordance with the Indiana Trial Rules. Therefore, we must turn to the Indiana Trial Rules to further define the courts' power. Our review of the rules reveals that Trial Rule 8(C) contains a listing of affirmative defenses, Trial Rule 12(B) and (C) sets forth a listing of matters which can be preliminarily determined by motion, and Trial Rules 26 through 37, inclusively, contain the discovery rules. We hold that [Indiana Code section 34-18-11-1] specifically limits the power of the trial courts of this State to preliminarily determining affirmative defenses under Trial Rule[8(C)], deciding issues of law or fact that may be preliminarily determined under Trial Rule 12(D), and compelling discovery pursuant to Trial Rules 26 through 37, inclusively.

Griffith v. Jones, 602 N.E.2d 107, 110 (Ind. 1992).[4]

[11] In addition, Indiana Code section 34-18-10-14, although not part of the preliminary determination chapter, provides, "A party, attorney, or panelist who fails to act as required by [the medical review] chapter without good cause shown is subject to mandate or appropriate sanctions upon application to the court designated in the proposed complaint as having jurisdiction."

[4] *Griffith* construed Indiana Code section 16-9.5-10-1, which is the precursor to the current section 34-18-11-1. The two statutes are identical in all relevant respects.

II. Basis of Trial Court's Authority

[12] We address first the basis of the trial court's authority to act in this case, as Medical Providers argue that Day has not presented any cogent argument supporting the court's authority to act as Day requests. Day's motion for preliminary determination cited both Indiana Code chapter 34-18-11 and section 34-18-10-14 as bases for the trial court's authority to decide this issue and requested the trial court order Medical Providers to redact all legal argument from their submission. *See* Appellants' App., Vol. II at 12, 17.

[13] "[T]he grant of power to the trial court to preliminarily determine matters is to be narrowly construed." *Griffith*, 602 N.E.2d at 110. As noted above, *supra* ¶ 10, section 34-18-11-1 grants the trial court authority to compel discovery or to preliminarily determine an affirmative defense or any issue of law or fact that may be preliminarily determined under Trial Rule 12(D) – that is, "the defenses specifically enumerated (1) through (8) in [Trial Rule 12(B)], and the motion for judgment on the pleadings mentioned in [Trial Rule 12(C)]." Ind. Trial Rule 12(D); *see Griffith*, 602 N.E.2d at 110. Day requested none of this relief and therefore the trial court had no authority to act pursuant to section 34-18-11-1. *See Sherrow v. GYN, Ltd.*, 745 N.E.2d 880, 883 (Ind. Ct. App. 2001) (holding that patient's request for trial court to edit the legal argument in an evidentiary submission is not authorized by Indiana Code section 34-18-11-1).

[14] Day also cited Indiana Code section 34-18-10-14 in their motion for preliminary determination. Medical Providers acknowledge this but argue that because Day

did not cite to that specific statute in their appellate brief, instead citing to sections 34-18-10-17 and -21 and *Sherrow v. GYN, Ltd.*, any argument that the trial court had authority to act under section 34-18-10-14 has been waived. We agree Day's motion and brief are not a model of clarity and consistency in setting forth section 34-18-10-14 as statutory authority supporting their requested relief. But *Sherrow* was decided in the context of section 34-18-10-14. 745 N.E.2d at 884-85. And sections 34-18-10-17 and -21 describe actions required of the parties and panel pursuant to chapter 34-18-10. Section 34-18-10-14 provides that a "party, attorney, or panelist *who fails to act as required by this chapter* without good cause shown is subject to mandate or appropriate sanctions upon application to the court[.]" (Emphasis added.) Because Day alleges chapter 34-18-10 contemplates the parties submitting and the panel considering only "evidence," not legal argument or reasoning, their claim that the submission contains improper material has alleged a failure by Medical Providers to comply with section 34-18-10-17 and a potential failure by the panel to comply with section 34-18-10-21. Therefore, we will address whether Day is entitled to relief pursuant to section 34-18-10-14.

III. "Legal Argument"

[15] A trial court's choice of sanctions upon a failure to comply with the MMA is a matter committed to the trial court's discretion. *Quillen v. Anonymous Hosp.*, 121 N.E.3d 581, 584 (Ind. Ct. App. 2019), *trans. denied*. We will affirm if there is any evidence supporting the trial court's decision and will reverse only if the decision is clearly against the logic and effect of the facts and circumstances or

if the trial court misinterpreted the law. *Id*. We apply a de novo standard of review to matters of statutory interpretation. *Howard Reg'l Health Sys. v. Gordon*, 952 N.E.2d 182, 185 (Ind. 2011).

[16] Day relies heavily on the case of *Sherrow v. GYN, Ltd.*, 745 N.E.2d 880 (Ind. Ct. App. 2001). In *Sherrow*, the health care providers' evidentiary submission to the medical review panel included the following phrase: "Nor is a physician liable for errors in judgment or honest mistakes in the treatment of a patient." *Id.* at 881. The patient objected to this as improper legal argument and asked the chairperson of the panel to return the submission to the health care providers to remove the legal argument. The chairperson refused. The patient then filed a motion for preliminary determination. The trial court also refused to require the health care providers to redact this legal argument from their submissions. The patient appealed.

[17] The contested evidentiary submission in *Sherrow* contained discussion of the legal standards applicable in medical malpractice cases. We concluded that "such legal argument is inappropriate in evidentiary submissions because legal argument is not 'evidence.'" *Id.* at 885. We based this decision on Indiana Code sections 34-18-10-17 and -21 which describe evidence "as consisting of medical charts and reports, deposition excerpts, comments from medical authorities, and reports by health care providers" but neither of which authorize parties to include in evidentiary submissions "their interpretations of guiding legal precedent[.]" *Id.* We also concluded the statutory role of the panel chairperson supports this result. The panel chairperson, based upon his or her

professional experience as an attorney, is responsible for advising the three medical professionals on the panel about the law. Ind. Code § 34-18-10-19. Parties should not be permitted to bypass the chairperson's role in this regard and include legal arguments in their evidentiary submissions; rather, "if parties want the panel to be advised on any legal question during the medical review process, they should submit a request to the panel chairperson instead of including legal argument in evidentiary submissions[.]" *Sherrow*, 745 N.E.2d at 885. Finally, we noted that if legal argument were allowed in the panel submissions, they "would become lengthy legal memoranda in which the parties debate and argue points of law" which would not further the intent for medical review panels to operate in an informal manner. *Id.* (citing *Griffith*, 602 N.E.2d at 110). Therefore, we reversed the trial court and remanded with instructions for all legal argument to be redacted from the health care providers' submission. *Id.*

[18] Day contends that the statement of facts from the Seventh Circuit opinion is legal argument that must be redacted from Medical Providers' submission pursuant to the reasoning in *Sherrow.* The trial court disagreed, finding that there is a distinction between facts and an opinion, holding, or legal standard. *See* Appealed Order at 1.

[19] We agree with the trial court. In *Sherrow*, the one objectionable phrase was the health care providers' "interpretation[] of guiding legal precedent" – a statement of what the health care providers perceived to be a legal standard applicable to a

medical malpractice case. 745 N.E.2d at 885.[5] Such a statement was an attempt to persuade the panel on the ultimate question of whether the health care providers breached the standard of care. As this statement was not evidence and as advising the medical review panel of the applicable legal standards is within the purview of the chairperson, it was inappropriate in an evidentiary submission. But Day does not identify any inappropriate legal standards in the fact statement from the Seventh Circuit opinion. Instead, they argue that inclusion of any part of a legal opinion is per se inappropriate. It is not the fact of material coming from a legal opinion that makes it legal argument; it is the *content* of the material. "Legal argument" implies some manner of persuasion based on a particular interpretation of legal principles – an argument is "a form of rhetorical expression intended to convince or persuade[.]" Merriam-Webster, Argument (Apr. 13, 2021), https://www.merriam-webster.com/dictionary/argument [https://perma.cc/2NCY-V9SM]. If Medical Providers had included the same statement of facts in their submission without attributing it to a court opinion, a good faith argument could not be made that the statement constituted legal argument on the basis of its content alone.

[20] Day is correct that a statement of facts is not one of the categories of "evidence" included in section 34-18-10-17(b), but a party's submission is not limited solely

[5] The trial court in *Sherrow* noted that that statement the patient objected to was an "ineptly paraphrased . . . passage from a case." 745 N.E.2d at 882.

to evidence. The medical review panel process "is intended to be informal and limited; it is also intended to place little to no risk on the participants." *McKeen v. Turner*, 61 N.E.3d 1251, 1261 (Ind. Ct. App. 2016), *opinion adopted by* 71 N.E.3d 833 (Ind. 2017). "It is common practice for the parties' attorneys to draft and submit narrative statements to accompany the medical evidence." *Id.* at 1256. Although a narrative statement is not required to be included in an evidentiary submission, nothing in the MMA prohibits such statements, and "indeed, they are likely helpful to the [panel] and opposing counsel[.]" *Id.* at 1256-57. And because such statements are not evidence, they are not considered by the medical review panel in reaching its ultimate conclusion. *Id.* (citing Ind. Code § 34-18-10-22(a), providing that the panel is to consider the evidence and the proposed complaint in reaching its opinion); *see also* Ind. Code § 34-18-10-17(e) (requiring each panel member to take an oath affirming they will "well and truly consider the evidence submitted by the parties" and will render a decision "based upon the evidence submitted by the parties"). In other words, the inclusion of a narrative statement is not itself objectionable, as it should have no bearing on the panel decision.

[21] Because a narrative statement is not prohibited from being included in an evidentiary submission, because Day has not identified any improper legal argument in the statement of facts included in the submission,[6] and because the

[6] Day does contend the statement of facts is not factually accurate. *See* Br. of Appellants at 22-23. However, Medical Providers' submission is clear that the statement is an "interpretation" of the facts by the Seventh Circuit and does not represent them as anything more than that. *See* Appellants' App., Vol. II at 30.

panel is sworn to consider only evidence in making its decision, we conclude Day did not show that a party, attorney, or panelist failed to act as required by Indiana Code chapter 34-18-10.

Conclusion

[22] Day did not show that they were entitled to have the statement of facts redacted from Medical Providers' submission as a sanction and therefore, the trial court did not abuse its discretion in denying Day's motion seeking such relief. The judgment of the trial court is affirmed.

[23] Affirmed.

Bailey, J., and Tavitas, J., concur.