

STATE OF INDIANA, COUNTY OF ELKHART
IN THE ELKHART SUPERIOR COURT NO. 2

LINDA GIEREK, *et al.*,
Plaintiffs,

v.

ANONYMOUS 1, *et al.*,
Defendants.

CAUSE NUMBER
20D02-1911-CT-000243

FILED
April 26, 2022
Elkhart Superior Court 2
JH

ORDER

This Order addresses two issues. First, the Plaintiffs¹ have filed a Supplemental Motion for Class Certification (the Plaintiffs' "Motion"). Second, the Patient Compensation Fund (the "PCF") has filed a Motion for Summary Judgment (the PCF's "Motion") on its counterclaim for declaratory judgment and asks the Court to decide whether the Plaintiffs' claims are medical malpractice claims that must be filed with the Department of Insurance. The Defendants (collectively, the "Providers") have cross-moved for summary judgment on the same issue (the Providers' "Motion"). The Court DENIES the PCF's Motion and GRANTS the Providers' Motion. The Court holds that it does not have jurisdiction to decide the Plaintiffs' Motion because the medical review panel process has not been completed. Plaintiffs' Motion is DENIED at this time.

¹ Various cases stemming from the same series of incidents have been consolidated into this case. "Plaintiffs" includes the various plaintiffs in all of these cases.

UNDISPUTED FACTS

This case involves the sterilization procedure used at a hospital, one of the defendants in this case (the "Hospital"). The Hospital hires technicians to sterilize surgical instruments after the instruments are used. The only education requirement for applicants applying to be a technician is a high school diploma or its equivalent. Technicians receive on-the-job training and begin working immediately. After beginning work, technicians are required to earn a certification that involves 400 hours of training, which they complete at work. The managers in the sterilization department are not required to be licensed to practice medicine or have any specific bachelor's degree. No physicians directly supervise the sterilization department, and the individual who is ultimately responsible for the sterilization department is the COO of the Hospital.

Technicians are required to follow a multistep process to ensure that the instruments are completely sterile. From April to September 2019, one technician (the "Technician") routinely failed to complete one of the steps in this process. In particular, the Technician did not use a brush to remove debris from the instrument. The Plaintiffs underwent surgeries at the Hospital during this timeframe. The Hospital eventually learned that the Technician was not completing each step in the sterilization procedure and concluded that at least one instrument used during the Plaintiffs' surgeries may not have been medically

sterile. The Hospital was concerned that the Plaintiffs could have potentially contracted communicable diseases, specifically several loathsome diseases. The Hospital reached out to the Plaintiffs, informed the Plaintiffs of the Technician's mistake, and offered testing at no cost. To date, none of the Plaintiffs has contracted such a disease or suffered any physical harm. Instead, the Plaintiffs seek damages for emotional distress and the expense of past and future testing for these diseases.

DISCUSSION

The Court begins with the PCF's Motion before turning to the Providers' Motion. The Court concludes with the Plaintiff's Motion.

A. The PCF's Motion

The PCF requests summary judgment on its counterclaim for declaratory judgment. Specifically, the PCF asks the Court to decide, as a matter of law, that the Plaintiffs' claims are claims for ordinary negligence, not medical malpractice. The Indiana Supreme Court has explained, "summary judgment is appropriate only where the evidence shows that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. All facts and reasonable inferences drawn from those facts are construed in favor of the nonmoving party." *Boggs v. Tri-State Radiology, Inc.*, 730 N.E.2d 692, 695 (Ind. 2000) (citations omitted).

The question before the Court is whether the Providers' failure to complete each step in the sterilization process sounds in medical malpractice or ordinary negligence. The PCF argues that the Hospital's sterilization procedure does not constitute "health care" under the Medical Malpractice Act (the "MMA" or the "Act"), whereas the Providers argue that it does.

Under Indiana law, "'Health care' means 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." Ind. Code § 34-18-2-13. As the Indiana Court of Appeals has observed, in deciding whether the alleged negligence constitutes medical malpractice, "[t]he question is whether the negligence alleged against Defendants qualifies as 'health care.' If so, Plaintiffs' claims are subject to the MMA; if not, they are claims of general negligence." *Robertson v. Anonymous Clinic*, 63 N.E.3d 349, 357 (Ind. Ct. App. 2016).

A claim is not necessarily a claim for medical malpractice or a claim that falls within the scope of the MMA simply because a medical provider is the defendant. *Id.* at 358 (citing *Peters v. Cummins Mental Health, Inc.*, 790 N.E.2d 572, 573 (Ind. Ct. App. 2003)). The court of appeals has held,

The Act 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. When deciding

whether a claim falls under the provisions of the Act, we are guided by the substance of a claim to determine the applicability of the Act. We reiterate that 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. We also noted more recently that . . . [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 Medical Malpractice Act where there is a causal connection between the conduct complained of and the nature of the patient-health care provider relationship.

Id. (quoting *Terry v. Cmty. Health Network, Inc.*, 17 N.E.3d 389, 393 (Ind. Ct. App. 2014)) (internal quotation marks, citations, and brackets removed). “[T]o fall outside the Malpractice Act a health care provider’s actions must be demonstrably unrelated to the promotion of the plaintiff’s health or an exercise of the provider’s professional expertise, skill, or judgment.” *Id.* at 359.

The PCF argues that (1) decontaminating instruments is not “health care” because it is a ministerial task that does not allow for the exercise of independent medical judgment tailored to a specific patient, requires only minimal training, and is not supervised by a physician; and (2) medical expert testimony is not required to understand that the Providers breached the standard of care.

1. Ministerial Tasks

As the Providers point out, the PCF has not cited any case law that supports its argument that “ministerial tasks” are not “health care.” Instead, the PCF analogizes this case to premises liability cases and a case that involved a nonmedical cosmetic procedure.

The most obvious way that the premises liability cases can be distinguished from this case is that this case is not a premises liability case, but even if this case were a premises liability case, the Court does not agree with the PCF’s argument. The PCF reasons that *Harts v. Caylor-Nickel Hosp., Inc.*, 553 N.E.2d 874 (Ind. Ct. App. 1990) (faulty bed rails caused the patient to fall), and *Pluard v. Patients Comp. Fund*, 705 N.E.2d 1035 (Ind. Ct. App. 1999) (poorly secured surgical lamp fell on the patient), are similar to this case because the Technician’s task of sterilizing the instruments “did not involve a health care decision involving the exercise of professional skill or judgment.” *Pluard*, 705 N.E.2d at 1038. The PCF basically claims that the Technician’s job was simplified to such an extent that there was no room for decision making or improvisation.

But the Providers’ duty to sterilize instruments *does* involve health care decisions involving the exercise of professional skill or judgment. Installation of bed rails and lamps are much further removed from the treatment of patients than sterilization of instruments that will be used in surgery. Also, bed rails and lamps

are not unique to the medical context. A bed rail in a rental property's bunk beds could collapse, and a photographer could improperly install overhead lights that fall when he or she attempts to adjust their position. With extremely limited exceptions,² sterilization of instruments is peculiar to the practice of medicine and is necessary to perform surgeries safely. The designated evidence shows that the Technician was required to identify an instrument and the correct sterilization procedure for such instrument. These are health care decisions that require sufficient professional skill and judgment to make correctly, no matter how much equipment manufacturers and the Hospital have simplified the decision-making process. The Technician then mistakenly skipped a step in the health care process due to his lack of professional skill. *Harts* and *Pluard* are distinguishable.

Next, the PCF argues that instrument sterilization is not a medical procedure because there was no medical oversight of the sterilization department. The PCF likens this case to *OB-GYN Associates of Northern Indiana, P.C. v. Ransbottom*, 885 N.E.2d 734 (Ind. Ct. App. 2008), in which the court of appeals held that laser hair removal is not health care, so the plaintiff's claim was not a claim for medical malpractice. The PCF contends that the holding in *Ransbottom* is that

² For example, tattooing and piercing. Interestingly, tattooing, even for artistic purposes, was once considered the "practice of medicine or osteopathic medicine" under Indiana law. See *State ex rel. Med. Licensing Bd. of Indiana v. Brady*, 492 N.E.2d 34, 36-38 (Ind. Ct. App. 1986).

the plaintiff's claim was not medical malpractice because the machine did not require the operator to have any particular license or be supervised by a physician. The PCF then argues that in this case, the Hospital did not require sterilization technicians to have licenses and certifications, and they were not supervised by physicians. So, the Plaintiffs' claims are not claims of medical malpractice.

To accept the PCF's argument, the Court would have to disregard important language in *Ransbottom* that the PCF overlooks. While the court of appeals did place significant weight on the fact that no licensure is required to operate a laser hair removal machine, equally important was "the fact that physicians were not involved in Ransbottom's treatment." *Ransbottom*, 885 N.E.2d 734, 739 (Ind. Ct. App. 2008). In fact, "Ransbottom's laser hair removal treatment was not recommended or supervised by a physician, nor in any other way conducted under a physician's auspices." *Id.*

In this case the undisputed facts show that the Plaintiffs' treatment was recommended and supervised by physicians, or at least under a physician's auspices. The PCF agrees that "[Sterilization] Techs do not interact with patients," (PCF's Motion, p 16). But the services that the technicians provided were under the auspices of the Providers. The fact that the Providers delegated one step in the Plaintiffs' treatment to the Technician is inconsequential as to whether the

Plaintiffs' claims are claims for malpractice because physicians were involved in the Plaintiffs' treatment, in contrast to Ransbottom's treatment.

It is well-established that Indiana law does not permit a physician to avoid liability by delegating what is the physician's own duty to fulfill, as set out in *Funk v. Bonham*, 183 N.E. 312 (Ind. 1932):

A surgeon performing the delicate operation of deep surgery in the abdomen cannot assign details of the operation to those who assist him in the operation, unknown to the patient, and escape liability by delegating and relying upon such assistants to do and perform those acts which it was his duty to perform. And, although the proposition here contended for is supported by evidence that good surgery practice depended upon nurses to account for all instruments and sponges used, such expert evidence does not exonerate the surgeon as a matter of law, but such evidence is competent for a jury to consider in ascertaining the fact whether this surgeon was negligent in leaving the sponge in the cavity. . . . A surgeon is charged, as a matter of law, with the duty to remove sponges used in the operation, which sponges will not be of use in the abdomen after the operation. Ordinary care and caution forbids a surgeon to delegate the absolute authority and responsibility to a nurse or nurses to account for sponges and to thus escape responsibility himself.

183 N.E. at 315-16. While the issue before the Court is not whether the Providers are shielded from liability, the Court sees no reason why the same principle should not apply when deciding whether delegating a medical duty to a non-practitioner removes a case from the purview of the MMA. Where a physician delegates one aspect of a patient's health care to a staff member, the physician is not shielded from liability, and likewise, the delegated act does not fall outside of the MMA

merely because a low-skilled staff member completes it. The Court is unpersuaded by the PCF's argument.

2. *Necessity of Expert Testimony*

The PCF also argues that the Plaintiffs' claims are not medical malpractice claims because there is no need for expert testimony to determine whether the Providers breached the standard of care. Initially, the Court notes that even if expert testimony were not required to determine whether the Providers breached the standard of care, the PCF has not addressed whether expert testimony is necessary to determine whether the conduct complained of was or was not a factor of the resultant alleged damages. *See* Ind. Code § 34-18-10-22(b)(4). For that reason, the Court would be unable to grant summary judgment in the PCF's favor based on this argument.

Notwithstanding causation, the Court agrees with the Providers that medical expert testimony is necessary in deciding whether the Providers breached the standard of care. The PCF claims that the Hospital's sterilization procedures are set out in easy-to-understand and easy-to-follow checklists. Implicit in the PCF's argument is that the Hospital's sterilization procedures *are* the standard of care. As the Providers point out, the internal rules and procedures of an organization do not necessarily equate to the standard of care. *Wal-Mart Stores, Inc. v. Wright*, 774 N.E.2d 891, 894-95 (Ind. 2002). The Providers' sterilization

procedures may exceed the standard of care in the local community, and even with the missing step, the sterilization process may have been sufficient to meet the standard of care, meaning there is no need for future testing. But such a conclusion could only be reached with the assistance of expert opinion. The PCF's Motion is denied.

B. The Providers' Motion

The Providers have cross-moved for summary judgment on the same issue the Court addressed in the previous section of this Order. As noted above, "to fall outside the Malpractice Act a health care provider's actions must be demonstrably unrelated to the promotion of the plaintiff's health or an exercise of the provider's professional expertise, skill, or judgment." *Robertson*, 63 N.E.3d at 359. The Providers argue that their technician's failure to complete all steps in the sterilization process (1) is not demonstrably unrelated to the promotion of the plaintiff's health and (2) is not demonstrably unrelated to an exercise of the Providers' professional expertise, skill, or judgment.³ The Court agrees.

First, sterilization of surgical instruments is clearly related to the promotion of patient health. While this may seem obvious, the PCF attempts to analogize the

³ The parties disagree as to whether Indiana law requires the Providers to satisfy both elements of the test or just one. The Court is inclined to agree with the PCF that both elements are necessary for an action to constitute medical negligence. However, the Court need not decide this issue because the Providers' sterilization oversights satisfy both elements.

facts of this case to cases involving intentional torts and premises liability claims in an effort to prove the opposite. But this case involves neither intentional torts nor premises liability claims. As the Providers' expert explained, "[Sterile Processing] is essential to the proper operation of a hospital. It is an integral part of providing healthcare to patients. The hospital itself and the physicians and other healthcare providers could not provide proper healthcare to patients unless [Sterile Processing] provided them with properly processed sterile medical equipment." (Affidavit of Dr. Rutala [Providers' Ex. G], ¶ 5).

The Court also does not find persuasive the PCF's argument that Dr. Rutala's conclusion would inevitably lead to all claims filed against healthcare providers being considered claims for medical negligence. The PCF points to deposition testimony in which Dr. Rutala stated, "it's hard for me to imagine something that we do in a hospital that doesn't contribute to quality of patient care." (Dep. of Dr. Rutala [PCF's Ex. 3], 41:13-16). The PCF has cherry-picked this quote from a lengthier discussion of what contributes to the quality of patient care, in which Dr. Rutala made clear that things like providing clean linens and maintaining a clean operating room contribute to the quality of patient care but are not nearly as important as sterilizing medical instruments. The mere fact that these other actions contribute to patient care does not mean that everything a hospital does constitutes health care under the MMA.

Second, the PCF argues that sterilizing surgical instruments does not require the exercise of medical expertise, skill, or judgment. The parties' disagreement is largely over how the Technician's oversight should properly be characterized. The parties have submitted lengthy discussions of the Technician's education and training, as well as the measures that equipment manufacturers and the Hospital have taken to simplify the task of sterilizing equipment. The PCF asks the Court to narrowly focus on the specific step that the Technician failed to perform in a simple-to-follow checklist. The Providers emphasize the broader context in which the oversight occurred: performing surgery on the Plaintiffs.

The PCF's argument mistakes the forest for the trees. If the Court were to adopt the PCF's narrow focus on the specific step that was missed in the sterilization process, any plaintiff would be hard-pressed to ever bring a claim of medical negligence. Nearly any step in the provision of health care can be broken down far enough that a lay person could perform it. For example, few would argue that if a surgeon amputates the right leg when it is the left leg that should have been removed, the patient's claim would fall under the Act. If the surgeon delegates to a staff member the task of marking the correct leg for amputation, and the surgeon removes the wrong leg, the patient's claim would still sound in medical malpractice, even though advanced medical training and skill is not required to know the difference between right and left.

The mere fact that the Providers have simplified and streamlined the sterilization of surgical instruments and delegated the task to someone who does not have advanced medical training is inconsequential. As explained in the Court's discussion of the PCF's Motion, delegation of one aspect of a surgeon's duty to staff members does not remove such aspect from the purview of the MMA. The sterilization of instruments is an integral part of health care, and the PCF's argument ignores the medical expertise, skill, and judgment that were undoubtedly necessary to develop the Hospital's streamlined process. There is no genuine issue of material fact, and the Providers are entitled to judgment as a matter of law that the Plaintiffs' claims based on the Providers' failure to sterilize instruments is a claim for medical negligence, not ordinary negligence. The Providers' Motion is granted.

C. The Plaintiffs' Motion

The Court now turns to the Plaintiffs' request for class certification. The Court has already determined that the Plaintiffs' claims are subject to the MMA. The Plaintiffs request what the Court considers to be two forms of relief. First, the Plaintiffs request that the Court grant class status at this juncture of the litigation, meaning before medical review panels have issued an opinion. Second, the Plaintiffs request that the Court direct the Department of Insurance to form a single medical review panel to review the Plaintiffs' claims, rather than the

hundreds that would be required if each patient's claim is reviewed individually. The Court holds that it does not have subject matter jurisdiction to grant either form of relief.

Generally speaking, "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 medical review panel . . . ; and (2) an opinion is given by the panel." Ind. Code § 34-18-8-4. There are exceptions. "[A] claimant may commence an action in court for malpractice at the same time the claimant's proposed complaint is being considered by a medical review panel," but the court may only set a trial date, rule on the MMA equivalent of a Trial Rule 41(E) motion, and decide a motion for preliminary determination filed under Ind. Code §§ 34-18-11-1 to -5. I.C. § 34-18-8-7. A court also has jurisdiction to order a party, attorney, or medical review panelist to act as required under the MMA. *Sherrow v. GYN, Ltd.*, 745 N.E.2d 880, 883-84 (Ind. Ct. App. 2001) (citing I.C. § 34-18-10-14). The Court has no subject matter jurisdiction to take any other action until the medical review panel has given an opinion. I.C. § 34-18-8-4. The Court now turns to the Plaintiffs' requests.

1. Jurisdiction to Certify the Class

The parties characterize the Plaintiffs' request for class certification as a motion for preliminary determination under I.C. §§ 34-18-11-1 to -5. The Indiana

Supreme Court has held that “the grant of power to the trial court to preliminarily determine matters is to be narrowly construed.” *Griffith v. Jones*, 602 N.E.2d 107, 110 (Ind. 1992). The supreme court has also held that the preliminary determination chapter of the MMA “specifically limits the power of the trial courts of this State to preliminarily determining affirmative defenses under Trial Rules, 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.” *Id.* at 110. But the supreme court has decided at least one appeal from a trial court’s entry of summary judgment in the context of a motion for preliminary determination. See *Boggs v. Tri-State Radiology, Inc.*, 730 N.E.2d 692 (Ind. 2000); see also *Wood v. Schuen*, 760 N.E.2d 651 (Ind. Ct. App. 2001) (affirming the trial court’s entry of summary judgment on a motion for preliminary determination).

In light of the supreme court’s holding *Griffith*, the Court concludes that it does not have jurisdiction at this stage of the proceedings to decide whether to grant the Plaintiffs’ request for class certification. The statutory grant of power to the courts to preliminarily determine issues of law is to be narrowly construed, and given the lack of case law on whether courts have subject matter jurisdiction to decide this issue before the medical review panel has given an opinion, the Court declines the Plaintiffs’ invitation to deviate from the general rule set out in

Griffith. The Court holds that it does not have subject matter jurisdiction to grant the Plaintiffs' request for class certification.

2. *Jurisdiction to Dictate Medical Review Panel Procedures*

Practically speaking, it appears that the Plaintiffs' request for class certification is merely one step toward achieving their ultimate goal, which is to present their cases to a single medical review panel. In other words, the Plaintiffs ask the Court to dictate the procedure the Department of Insurance should use when forming medical review panels. Once again, the Court concludes that it does not have subject matter jurisdiction to grant this request.

In *Griffith*, discussed above, the Indiana Supreme Court quoted earlier precedent that explains,

[The MMA] contemplates that the panel will function in an informal and reasonable manner. It is guided by a trained lawyer who presumptively will not deny to each party a reasonable opportunity to present its evidence and authorities. The scope of the panel's function is limited. It does not conduct a hearing or trial and does not render a decision or judgment. There is, therefore, no reason to mandate that the statute relegate burdens of proof or production and to otherwise specify procedures applicable in hearings and trials. The panel is conducting a rational inquiry into the extent and source of the patient's injuries for the purpose of forming its expert opinion. The absence from the statute of specific procedures is reasonable in light of this limited purpose and function and does not raise a serious constitutional question on the ground of vagueness or indefiniteness.

602 N.E.2d at 110 (quoting *Johnson v. St. Vincent Hospital, Inc.*, 404 N.E.2d 585, 596

(Ind. 1980). The *Griffith* court held, "[i]n view of the fact that the legislature clearly

intended for the medical review panel to function in an informal manner in rendering its expert medical opinion, we believe that the legislature did not simultaneously intend to empower trial courts to dictate to the medical review panel concerning . . . the manner in which the panel arrives at its opinion . . .” *Id.* In this case, as in *Griffith*, the Department of Insurance, in forming the panel or panels, “should be allowed to operate in the informal manner contemplated by the legislature.” *Id.* at 111. Courts do not have subject matter jurisdiction to dictate procedure to medical review panels unless such procedure the panel choses to follow violates the MMA.⁴ The Court is unaware of any precedent at the Department of Insurance for forming a single panel to review the claims of numerous claimants. But if the MMA does not require one panel for one claimant, the Court concludes that the legislature has left the question of whether similar medical malpractice claims may reviewed by a single medical review panel to the discretion of the Department of Insurance. The Plaintiffs’ Motion is denied.

⁴ Subject to the limited exception detailed in *Sherrow v. GYN, Ltd.*, 745 N.E.2d 880 (Ind. Ct. App. 2001) and I.C. § 34-18-10-14.

CONCLUSION

In summary, the PCF's motion for summary judgment is denied. The Providers' motion for summary judgment is granted. The Plaintiffs' motion for class certification is denied.



JH

Stephen R. Bowers, Judge
Elkhart Superior Court No. 2

