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New Decision Provides No Clear Answer to Complex Medical Malpractice Issue

This past week, the Indiana Court of Appeals set out to provide a clear resolution to a very complex procedural issue in Indiana medical malpractice law. The result was far from a clear resolution. The three-judge panel split with a 2-1 decision and resulted in each judge writing an opinion weighing in on the matter. The opinions of Judge Kirsch and Judge Brown agreed in result but differed substantially in reasoning, while Judge Vaidik disagreed all together.

In the case, *Miller v. Dobbs*, the issue before the court was whether the plaintiffs in a medical malpractice case had timely filed their claim. On the surface this may seem like a simple statute of limitations issue. However, the issue is much more complicated than that. Under the Indiana Medical Malpractice Act, typically a claim must be brought within two years of the injury-causing event with a handful of exceptions. However, there is an additional wrinkle in this mix. In a typical non-medical malpractice case the way a claim is brought sufficiently within the statute of limitations is to file the claim in a court. However, in an Indiana medical malpractice case one must first file a proposed copy of the complaint – the document that initiates a lawsuit – with the Indiana Department of Insurance. The precise

reasoning for this is not important for our purposes in this post.

In this case, the plaintiffs delivered a copy of their proposed complaint with the Department in a timely manner. However, the plaintiffs' counsel made a slight error and forgot to deliver the check for \$7 as a filing and processing fee. The Department promptly notified plaintiffs' counsel of the oversight who then proceeded to mail the check out. The problem arises because the day that plaintiffs' counsel was informed of the error was the same day that the statute of limitations was set to expire. Moreover, the check did not arrive until three days later. Thus, we have a situation in which the paperwork was properly filed in time but the check had not been paid in time. The resulting issue for the court to decide was whether the delay in receiving the check meant that the proposed complaint was not "filed" in time.

Defendants pointed to a series of Indiana cases that held in the non-medical malpractice context that a case is not "filed" prior to the statute of limitations until the complaint, summons, and payment are all delivered to the court. The first opinion in the case is that of Judge Kirsch. In the typical case the first opinion that appears is the majority opinion. When that is true, the law is clear. The majority opinion is the law. However, when, as you have here, there is no majority opinion then there is no clear statement of law. The reason we do not have a majority opinion in this case is simple; each opinion is only subscribed to by a single judge. Thus, no majority can arise. Where this gets complicated is that while the result is binding, and if another case perfectly mirrored these details the opinion would control it, there is no actual statement of why the result the court reached is the right one. Seem confusing? If so, do not feel alone. Most law students learning this issue of majority vs. concurring opinions get confused.

Returning to the substance of the case, Judge Kirsch looked to the cases cited by defendants and found that they were not controlling over this case because each of those dealt with the Indiana Trial Rules. This case was one governed exclusively by the Medical Malpractice Act and not the Trial Rules. In arriving at his decision, Judge Kirsch, recognized that Indiana has long held a preference "to decide a case on the merits whenever possible." In light of this policy and the minimal delay in payment, he determined that the law would allow the plaintiffs' claims to proceed.

In an opinion that concurred in result but disagreed in reasoning, Judge Brown took a more concerted approach to her reasoning. Unlike Judge Kirsch's opinion, which may aptly be classified as result driven, Judge Brown underwent a critical analysis of the specific language of the Act. She looked directly at the language of the law and found that a critical reading of the text of the law actually answered the issue. The Act states, "[a] proposed complaint . . . is *considered filed*

when a copy of the proposed complaint is delivered or mailed by registered or certified mail to the commissioner.” It also provides, “[t]he following fees must accompany each proposed complaint filed.” In light of that language she applied the recognized policy of law that “[s]o long as two statutes can be read in harmony with one another, we presume that the Legislature intended for them both to have effect.” Under this premise, the only way to provide effect to each term of these two sections of the Act is to read it to not require payment of the fee to be “filed.”

Despite the opinions of Judge Kirsch and Judge Brown providing the result, Judge Vaidik provided a dissenting opinion that differed both in reasoning and result. She argued against Judge Kirsch’s opinion by contesting the concept that a minimal delay and small amount is decisive. She contended that there would then be no basis upon which to determine what is sufficiently minimal in delay or amount to warrant applying Judge Kirsch’s approach. In response to Judge Brown, she contended that such a reading fails to place a defendant on notice and would allow a peculiar result if the filed proposed complaint were to sit with the Department of Insurance for a year or more prior to receiving the fee. She also looked to the Department’s website that describes the procedure and notes, “A proposed complaint is filed when a copy is delivered or mailed by registered or certified mail to the Department with the required filing and processing fees. If an insufficient filing fee is submitted, the proposed/amended complaint will not be considered filed until the date the appropriate fees are received.” She further recognizes the difficulty in the case of holding the plaintiffs’ claims barred for the error of their attorney. However, she finds it important to hold the state’s attorneys to the standard of minimal competence and requiring them to know the procedures of the law.

Based upon the split decisions in this case I fully expect the case to be transferred to the Indiana Supreme Court. Based upon the three opinions from the appellate judges I foresee two likely results that could occur from the Supreme Court. The Court will either reverse the decision and side with Judge Vaidik or they will affirm the result and adopt the opinion of Judge Brown. A year ago prior to the recent change of two justices, I would have been confident in prognosticating on this result going in favor of Judge Brown’s opinion. However, in light of the fact that there will have been two new justices, including the state’s newest justice, Loretta Rush, whose appointment was announced this morning I find myself without the slightest idea what the Court will ultimately hold.

Regardless of the ultimate outcome of this case, what it unquestionably does is provide a shining example for the importance of skilled and experienced counsel when pursuing any legal matter let alone medical malpractice.

Join us again for further insight into the complex nature of the law.

****UPDATE****

The Indiana Supreme Court has granted transfer of this case and will review the decision. Thus, the Court of Appeals opinion has been vacated.

Sources

- *Miller v. Dobbs*, 976 N.E.2d 91 (Ind. Ct. App. 2012), *trans. granted*, 982 N.E.2d 298 (Ind. 2013).
- Medical Malpractice Act – Ind. Code article 34-18.

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