[Cite as *Lowry v. Rothstein*, 2008-Ohio-2066.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

R. BRUCE LOWRY Plaintiff-Appellant	:	C.A. CASE NO. 22288
vs.	:	T.C. CASE NO. 06 CV 32
LAWRENCE B. ROTHSTEIN, M.D., ET AL. Defendants-Appellees	:	(Civil Appeal From Common Pleas Court)

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O P I N I O N

Rendered on the 29th day of February, 2008.

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Colleen M. Hegge, Atty. Reg. No. 0038506, John J. Schmidt, Atty. Reg. No. 0059417, 441 Vine Street, 3700 Carew Tower, Cincinnati, OH 45202
Attorneys for Plaintiff-Appellant R. Bruce Lowry

Wayne E. Waite, Atty. Reg. No. 0008352, Lindsay M. Johnson, Atty. Reg. No. 0077753, 1800 One Dayton Centre, 1 South Main Street, Dayton, OH 45402
Attorneys for Defendant-Appellee Lawrence B. Rothstein, M.D.

Howard P. Krisher, Atty. Reg. No. 0009088, Joseph L. Feller, Atty. Reg. No. 0069898, 400 National City Center, 6 North Main Street, Dayton, OH 45402
Attorneys for Defendant-Appellee Greater Cincinnati Pain Management Center, Inc.

James R. Matthews, Atty. Reg. No. 0043979, Suite 1400, One East Fourth Street, Cincinnati, OH 45202
Attorney for Defendant-Appellee Medical Mutual of Ohio

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GRADY, J.

{¶ 1} Plaintiff, R. Bruce Lowry, appeals from an order dismissing his action against Defendants, Lawrence B. Rothstein, M.D. and Cincinnati Pain Management Center, Inc.

{¶ 2} Lowry resides in Montgomery County and suffers from chronic back pain. During the fall of 2004, Lowry had several meetings with Dr. Rothstein regarding his back pain. The meetings occurred in Hamilton County at the offices of Cincinnati Pain Management Center, Inc. ("CPMC") Ultimately, Lowry decided to have Dr. Rothstein perform surgery on his back.

{¶ 3} Dr. Rothstein performed surgery on Lowry's back on January 4, 2005 at the Whitewater Valley Medical Center in Connersville, Indiana. According to Lowry, the surgery resulted in permanent injury in the form of spinal nerve damage, a dropped foot, and scarring. Lowry later underwent additional surgery to correct those problems, but he still suffers from permanent injury.

{¶ 4} On January 3, 2006, Lowry commenced an action against Dr. Rothstein and CPMC in the common pleas court of Montgomery County. He alleged that Dr. Rothstein negligently recommended and performed the January 4, 2005 surgery, and that both defendants failed to disclose the material risks of

the surgery. Lowry filed an amended complaint and added Medical Mutual of Ohio as a defendant.

{¶ 5} On February 28, 2007, Dr. Rothstein filed a Civ.R. 12(B)(1) motion to dismiss for lack of subject matter jurisdiction. According to Dr. Rothstein's motion, because Indiana law governs Lowry's claims, Lowry must comply with Indiana's Medical Malpractice Act, Ind. Code 34-18-1, et seq. Dr. Rothstein argued that Lowry's failure to submit a proposed complaint to the Indiana Department of Insurance prior to commencing his action in court, as required by Indiana's Medical Malpractice Act, precluded the Ohio court from exercising jurisdiction in the action. CPMC joined in the motion to dismiss.

{¶ 6} On June 12, 2007, the trial court agreed with the arguments made by the defendants and granted the motion to dismiss. Finding that Indiana's two-year statute of limitations had run on Lowry's claims, the trial court entered the dismissal with prejudice. Lowry filed a timely notice of appeal.

{¶ 7} **FIRST ASSIGNMENT OF ERROR**

{¶ 8} "THE TRIAL COURT ERRED IN HOLDING THAT INDIANA LAW GOVERNS LOWRY'S CLAIMS AGAINST ROTHSTEIN, AND THUS IN GRANTING ROTHSTEIN'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER

JURISDICTION."

{¶ 9} **SECOND ASSIGNMENT OF ERROR**

{¶ 10} **"THE TRIAL COURT ERRED IN FINDING THAT INDIANA LAW APPLIES TO LOWRY'S CLAIMS AGAINST GCPM, AND THUS IN GRANTING GCPM'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION."**

{¶ 11} Civ.R. 12(B)(1) authorizes dismissal of an action when the court in which the action was commenced lacks jurisdiction over the subject matter of the litigation. The standard of review of a dismissal pursuant to Civ.R. 12(B)(1) is "whether any cause of action cognizable by the forum has been raised in the complaint." *State ex rel. Bush v. Spurlock* (1989), 42 Ohio St.3d 77, 80. This determination involves a question of law that we will review de novo. *Shockey v. Fouty* (1995), 106 Ohio App.3d 420, 424. A de novo review requires an independent review of the lower court's decision, without deference to that court's conclusions of law. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711.

{¶ 12} The trial court applied a choice-of-law analysis and determined that Indiana law governed the claims brought by Lowry against the defendants. The finding was based on the fact that the surgery took place in Indiana. The trial court then relied on a provision of Indiana's Medical Malpractice

Act in dismissing Lowry's complaint. The trial court found, in part:

{¶ 13} "Applying the factors listed in Section 145 of the Restatement of the Law of Conflicts, Sections A through G, all favor the application of Indiana law in this case. The mere fact that the Plaintiff and the Defendant are both residents of the State of Ohio, without more, does not give the State of Ohio a more significant relationship to this case than the State of Indiana. Therefore, the court finds that Indiana law applies to this case because the alleged injury occurred in Indiana. It is undisputed that the Plaintiff did not file a proposed complaint with the Indiana Department of Insurance prior to the filing of this lawsuit as required by IC Section 34-18-2-1. Thus, the court lacks jurisdiction to hear this case, and therefore, the court grants the Defendant's motion to dismiss the Plaintiff's complaint. Since Indiana's statute of limitations has expired, said dismissal shall be with prejudice." Decision (Dkt. 67), p. 5-6.

{¶ 14} Lowry argues that the trial court's decision should be reversed because the trial court erred in applying Indiana law rather than Ohio law to the claims for relief in his action. Generally, when a tort action implicates the laws of multiple jurisdictions, the law of the forum state, where the

action is filed, governs matter of procedure and the law of the state where the injury occurred governs issues of substantive law; that is, the applicable duty of care and its breach. We need not reach the choice-of-law issue, however, because even if the substantive law of Indiana applies, Lowry was not required to file a proposed complaint with the Indiana Department of Insurance prior to commencing his action in an Ohio court.

{¶ 15} The trial court's finding and conclusion and the arguments of the parties to this appeal implicate four provisions of the Indiana Medical Malpractice Act, which are set out below.

{¶ 16} Ind. Code 34-18-8-1 preserves a right of action on a claim for relief for medical malpractice, and provides:

{¶ 17} "Commencement of action; complaint

i. "Sec. 1. Subject to IC 34-18-10 and sections 4 through 6 of this chapter, a patient or the representative of a patient who has a claim under this article for bodily injury or death on account of malpractice may do the following:

ii. "(1) File a complaint in any court of law having requisite jurisdiction.

iii. "(2) By demand, exercise the right to a trial by jury."

{¶ 18} Ind. Code 34-18-8-4 provides for prior review of a claim by a medical review panel, and provides:

{¶ 19} "Notwithstanding section 1 of this chapter, and except as provided in sections 5 and 6 of this chapter, an action against a health care provider may not be commenced in a court in Indiana before:

{¶ 20} "(1) the claimant's proposed complaint has been presented to a medical review panel established under IC 34-18-10 (or IC 27-12-10 before its repeal); and

{¶ 21} "(2) an opinion is given by the panel." (Emphasis supplied.)

{¶ 22} The provisions of the Act that require notice of an action to be given to the insurance commissioner of the State of Indiana provide as follows:

{¶ 23} Ind. Code 34-18-9-1:

{¶ 24} "Proposed complaints; notice to named defendants

i. "Sec. 1. Within ten (10) days after receiving a proposed complaint under IC 34-18-8, the commissioner shall forward a copy of the complaint by registered or certified mail to

> each health care provider named as a defendant, at the defendant's last and usual place of residence or the defendant's office."

{¶ 25} Ind. Code 34-18-9-2:

{¶ 26} "Medical liability insurers; notice of suit to commissioner

i. "Sec 2. A medical liability insurer of a health care provider against whom an action has been filed under IC 34-18-8-6(a) shall provide written notice to the commissioner within thirty (30) days after:

ii. "(1) the filing of the action; and

iii. "(2) the final disposition of the action."

{¶ 27} Ind. Code 34-18-9-3 requires insurers to advise the insurance commissioner that it has placed a reserve of a certain amount to pay a claim, and the amount of a claim that's paid. Those requirements serve the broader regulatory purposes of the Act, which governs insurers as well as claimants and providers.

{¶ 28} The trial court found that it lacks subject matter jurisdiction in the action that Lowry filed because he failed to serve notice of the action on the insurance commissioner of

Indiana by filing a copy of the complaint with that office. The trial court erred in so finding, because Ind. Code 34-18-9-2 instead places that duty on medical liability insurers, and no other provision imposes the duty on plaintiffs. Furthermore, the section on which the trial court relied, Ind. Code 34-18-2-1, merely precedes the definitional provisions of the Act and provides that those definitions "apply throughout this article." Ind. Code 34-18-2-1 has no substantive effect.

{¶ 29} The trial court erred when it found that it lacks subject matter jurisdiction because Plaintiff Lowry failed to notify the insurance commissioner of Indiana of the action he commenced. Defendants had urged the court to commit that error in their motion to dismiss. However, they also argued, and argue on appeal, that the Ohio court lacks subject-matter jurisdiction because Lowry failed to submit his claim for review by a medical review panel, and therefore the action is barred by Ind. Code 34-18-8-4. They contend that the requirement is applicable to any medical malpractice action filed pursuant to Ind. Code 34-18-8-1, because that section is expressly made "[s]ubject to . . . sections 4 through 6 of this chapter."

{¶ 30} We agree that the right of action authorized by Ind. Code 34-18-8-1 is subject to the medical review panel

requirements of Ind. Code 34-18-8-4, which mandate submission of a claim for review by a panel and that an opinion be rendered by the panel before the action is filed. However, Ind. Code 34-18-8-4 expressly provides that "an action against a health care provider may not be commenced in a court in Indiana before" its medical review panel provisions are satisfied.[1] By its terms, Ind. Code 34-18-8-4 does not apply to actions filed in the court of another state, as this action was, even when the substantive law of Indiana may govern issues of duty of care and its breach. Indeed, by limiting the medical review panel's role to actions filed in Indiana, the Indiana legislature acknowledged that the procedural requirements of Ind. Code 34-18-8-4 could not govern an action filed in another state, and as a practical manner should not govern in that instance.

{¶ 31} The plain language of Ind. Code 34-18-8-4 applies only to actions commenced in a court in the State of Indiana. Lowry's action was commenced in a court in Ohio, not Indiana. The Supreme Court of Illinois was faced with a similar

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[1] **Other provisions of the Act toll the statute of limitations on filing the claim while the panel considers the claim and until it renders an opinion, and authorize introduction of the opinion in evidence. The conclusions the panel reaches in its opinion do not bar the claim as a matter of law.**

situation in *Ransom v. Marrese* (1988), 122 Ill.2d 518, 524 N.E.2d 555. The *Ransom* court held that the pre-filing requirements in Indiana's Medical Malpractice Act do not apply to actions commenced in courts outside of Indiana. As the Illinois Supreme Court explained:

{¶ 32} "This court must apply Indiana judicial rules of statutory construction in considering whether the Indiana statute, section 16-9.5-9-2, requires claimants to follow the medical review panel procedure before commencing a malpractice action in a court of Illinois. In Indiana, courts have consistently held that judicial construction of a statute is permissible only when the statute is ambiguous and of doubtful meaning. . . . If the language of the statute is clear and unambiguous, judicial interpretation is inappropriate and the courts will adopt the meaning the statute clearly expresses. . . .

{¶ 33} "Applying these standards to the Indiana Medical Malpractice Act, we observe that the language of section 16-9.5-9-2 is plain and unambiguous. The language expressly limits the requirements of a medical review panel's opinion to actions commenced in 'any court of this State.' A circuit court in our State certainly is not a court in the State of Indiana. The defendant really is asking this court to

construe the statute in a manner which would ignore the words 'of this State' and make the language meaningless. We cannot do that." 122 Ill.2d 518, 525, 524 N.E.2d 555, 558-59.

{¶ 34} We agree with the Supreme Court of Illinois that the plain language of Indiana's Medical Malpractice Act limits the application of Ind. Code 34-18-8-4 to actions commenced in Indiana courts. Because the present action was commenced by Lowry in an Ohio court, we find that the trial court erred in dismissing Lowry's claims because he failed to comply with the pre-filing requirements contained in Ind. Code 34-18-8-4.

{¶ 35} More than two years had passed from the date of Lowry's surgery, January 4, 2005, until the court entered its judgment on June 12, 2007. Because it found that Lowry's action was not properly commenced, the court further held that any action that would comply with the Indiana Medical Malpractice Act could not now be filed, because Indiana maintains a two-year statute of limitations on medical malpractice claims.

{¶ 36} Ind. Code 34-18-7-1 provides that a medical malpractice claim is barred "unless the claim is filed within two (2) years after the date of the alleged act, omission, or neglect . . ." Having found that the action Lowry filed in Ohio is not subject to those other provisions of the Act on

which the trial court relied, we necessarily also find that the action Lowry commenced on January 3, 2006, alleging negligence with respect to the surgery that was performed on January 4, 2005, satisfies Indiana's two-year statute. It likewise satisfies Ohio's one-year statute for malpractice claims. R.C. 2305.113.

{¶ 37} The assignment of error is sustained. The judgment of the trial court is reversed and the cause remanded for further proceedings consistent with this opinion.

BROGAN, J. and FAIN, J., concur.

Copies mailed to:

Colleen M. Hegge, Esq.
John J. Schmidt, Esq.
Wayne E. Waite, Esq.
Lindsay M. Johnson, Esq.
Howard P. Krisher, Esq.
Joseph L. Feller, Esq.
James R. Matthews, Esq.
Hon. James W. Luse