

UNITED STATES DISTRICT COURT
NORTHER DISTRICT OF INDIANA
SOUTH BEND DIVISION

THERESA RHOADES and MICHAEL)
ALLEN RHOADES, individually and)
as parents and next friends of)
CHELSEA RHOADES, a minor)

Plaintiffs,)

v.)

3:05-cv-0586

PENN HARRIS MADISON SCHOOL)
CORPORATION, an Indiana political subdivision;)
DAVID R. TYDGAT, individually and in his)
official capacity as Principal of Penn High School,)
a division of Penn-Harris-Madison School)
Corporation; DAVE RISNER, individually)
and in his official capacity as Associate Principal)
of Penn High School; STEVEN HOPE, individually)
and in his official capacity as)
Assistant Principal of Penn High School;)
VICKIE MARSHALL, individually and in her)
official capacity as Guidance Counselor at)
Penn High School; MARNI CRONK)
Individually and in her official capacity as)
Guidance Counselor at Penn High School; and)
MADISON CENTER, INC. an Indiana)
non-profit corporation.)

Defendants.)

**MADISON CENTER, INC.’S REPLY TO
PLAINTIFFS’ RESPONSE TO MOTION TO DISMISS**

Comes now defendant, Madison Center, Inc., by counsel, and files its reply to plaintiffs’ response to Madison Center’s motion to dismiss. It is respectfully submitted that plaintiffs’ response establishes that all claims stem from an alleged act of medical malpractice. Because

plaintiffs have not submitted the medical malpractice claim to a medical review panel pursuant to Indiana law, this Court lacks subject matter jurisdiction with respect to plaintiffs' state law claims. Madison Center's motion to dismiss should therefore be granted with respect to those claims.

PLAINTIFFS' CONCESSIONS

Plaintiffs' introductory paragraph and statement of facts contain concessions which are at odds with positions taken subsequently in plaintiffs' response. First, the first sentence of plaintiffs' response establishes that Chelsea Rhoades is, in fact, a plaintiff who obtained a medical diagnosis. Second, on page 2, plaintiffs concede that the basis of the complaint is an incorrect diagnosis communicated to Chelsea. Finally, plaintiffs concede that they are requesting damages for "pain and suffering, mental anguish, humiliation and/or emotional distress."

(Response at 2.)

ARGUMENT

Plaintiffs' Complaint Does, In Fact, Allege Bodily Injury

Plaintiffs assert that their claims do not fall within the Indiana Medical Malpractice Act because they do not allege a bodily injury. Plaintiffs' assertion is actually incorrect. Paragraph 4.5 of plaintiffs' complaint asserts that as a direct and proximate result of defendants' actions and/or omissions plaintiffs incurred damages for "pain and suffering." This assertion can only mean bodily pain and suffering in the context of the paragraph because plaintiffs also request damages for "mental anguish, humiliation and/or emotional distress." (Complaint at ¶ 4.5.) These allegations are contained in each and every one of plaintiffs' claims. (See ¶¶ 5.6, 6.4, 7.6, 8.4, 9.4, 10.6.) Furthermore, plaintiffs' prayer for damages includes damages for "pain and suffering."

Plaintiffs' assertion that medical malpractice claims are limited solely to cases in which there is bodily injury is also legally incorrect. *Keim v. Potter*, 783 N.E.2d 731 (Ind.Ct.App. 2003) is a medical malpractice case based on an incorrect diagnosis that the plaintiff tested positive for hepatitis C. The damages alleged were plaintiffs' emotional distress from being informed that he had an infectious disease which could be transmitted to his family members and, further, which could ultimately cause liver damage. Plaintiff, in fact, did not have hepatitis C. The issue in the case was whether the plaintiff, in his medical malpractice claim, could recover for the emotional distress under Indiana's modified impact rule. In ruling in favor of the patient, the Court of Appeals stated:

We hold that where, as here, a patient claims emotional damages as a result of alleged medical malpractice, he is sufficiently 'directly involved' to satisfy the modified impact rule. Keim is entitled to present his emotional damages claim to a trier of fact.

783 N.E.2d at 735. In a footnote, the Court noted:

Keim also contends, in the alternative, that the impact rule should not apply to medical malpractice victims seeking emotional damages. But we need not go that far. Instead, we have determined that patients who bring medical malpractice claims satisfy the requirements of the modified impact rule.

Id. n. 4.

Keim involved a medical malpractice claim subject to the Indiana Medical Malpractice Act. A proposed complaint was filed with the Department of Insurance and an opinion was rendered by the medical review panel. 783 N.E.2d at 734. Consequently, the Indiana Court of Appeals has implicitly, if not explicitly, acknowledged that the Medical Malpractice Act covers emotional distress-type damages and not solely bodily injuries.

Plaintiffs' reliance on *Thomas v. Deitsch*, 743 N.E.2d 1218 (Ind.Ct.App. 2001) and *Peters v. Cummins Mental Health, Inc.*, 790 N.E.2d 572 (Ind.Ct.App. 2003) is misplaced.

Neither case was decided on the basis of the nature of the damages claimed, but rather, on the nature of the defendant's conduct. *Thomas*, involved an intoxicated patient who appeared for an appointment with his physician. The physician called the police to notify them that the patient was operating a motor vehicle. The patient was subsequently arrested by the police for operating the vehicle while intoxicated. The Indiana Court of Appeals ruled that the case did not fall within the Medical Malpractice Act because the actions of the physician did not fall within the scope of the Act. Specifically, the Court stated:

As we recently concluded in *Winona Memorial Hospital, et al v. Kuester*, 737 N.E.2d 824 (Ind.Ct.App. 2000), the Medical Malpractice Act 'applies to conduct, curative or salutary in nature, by a health care provider acting in his or her professional capacity, and is designed to exclude only conduct which is unrelated to the promotion of a patient's health or the provider's exercise of professional expertise, skill, or judgment. *Id.* at 828 (quoting *Methodist Hospital of Indiana, Inc. v. Ray*, 551 N.E.2d 463, 468 (Ind.Ct.App. 1990) *adopted on trans.*, 558 N.E.2d 829 (Ind. 1990)). Considering the operative facts alleged in *Thomas*'s proposed complaint, we hold that those facts do not fall within the Medical Malpractice act.

743 N.E.2d at 1220.

Similarly, *Peters* did not involve actions within the scope of the Medical Malpractice Act. *Peters* involved a mother's cause of action for infliction of emotional distress and defamation based upon a statement in her son's psychological assessment which stated that the mother (plaintiff) had been "declared an unfit mother and [the child] was removed from her custody." 790 N.E.2d at 574. The Court ruled that the claim did not fall within the Medical Malpractice Act both because the plaintiff was not a "patient or representative of a patient" and, further, because: "the act is not all-inclusive as to claims against medical providers and a claim against a medical provider sounding in general negligence or premises liability rather than medical malpractice is outside the Act." 790 N.E.2d at 576. The statement in the plaintiff's son's

psychological assessment was not related in any way to curative and salutary actions rendered by a health care provider acting in his or her professional capacity.

The present case, however, is based entirely on a psychological assessment given to one of the plaintiffs, Chelsea Rhoades, and a subsequent alleged misdiagnosis following that assessment. Paragraph 3.1 of plaintiffs' complaint states:

The incidents and claims in this action arise out of the administration and implementation of a program known as "TeenScreen".

Further, paragraph 3.22, also contained within the "factual allegations" states:

Before the examination, Chelsea had no mental health problems, was normal and well-adjusted, and was a high achiever in school and elsewhere. The diagnosis was erroneous, improper, and done with reckless disregard for the welfare of Chelsea.

These factual allegations are incorporated by reference as the basis of each and every one of plaintiffs' claims. Furthermore, plaintiffs' statement of facts notes that plaintiffs' seven claims resulted from Madison Center's allegedly incorrect diagnosis. (Response at p. 2 *citing* complaint paragraphs 3.22-3.23.) Madison Center's actions relating to the diagnosis resulting from the "TeenScreen" are clearly acts within the scope of the Medical Malpractice Act. Plaintiffs are therefore subject to the jurisdictional prerequisites of the Medical Malpractice Act.

Plaintiffs' Claims Are Based On An Alleged Act Of Medical Malpractice.

Plaintiffs contend that the incident complained of is not within the Medical Malpractice Act because Chelsea was not a patient of Madison Center because there was no contract, express or implied, for health care treatment. Plaintiffs' argument should be rejected, however, because it is contrary to Indiana law.

Plaintiffs are correct in asserting that Indiana Code 34-18-2-22 defines a patient as:

An individual who receives or should have received health care from a health care provider, under a contract, express or implied, and includes a person having a claim of any kind, whether derivative or otherwise, as a result of alleged malpractice on the part of a health care provider. Derivative claims include the claim of a parent or parents, guardian, trustee, child, relative, attorney, or any other representative of the patient including claims for loss of services, loss of consortium, expenses, and other similar claims.

Plaintiffs are incorrect, however, in concluding that because there is a requirement of a contract, express or implied, that the contract must be entered into by the patient herself. Indiana case law, in fact, holds otherwise.

The issue of whether the contract must be between the patient, or the patient's representative, and the health care provider was addressed by the Indiana Court of Appeals in *Gooley v. Moss*, 398 N.E.2d 1314 (Ind.Ct.App. 1979). In ruling that the contract does not need to be between the patient, or even a patient representative, and the health care provider, the Court of Appeals stated:

Dr. Moss entered into a contract with the Marion County Department of Public Welfare, by the terms of which he agreed to perform a hysterectomy on Cathy Gooley. This contract was for an act which qualifies as 'health care' as that term is defined in I.C. 16-9.5-1-1(i). Because the Department of Public Welfare did not have the power to authorize the sterilization (citation omitted), Dr. Moss may not be permitted to rely upon that consent as a defense to charges of assault and battery. Nevertheless, a contract did exist. Cathy Gooley was a 'patient' as that term is defined in I.C. 16-9.5-1-1(c): '...A natural person who receives or should have received health care from a licensed health care provider, under a contract, express or implied.' (Footnotes omitted.)

398 N.E.2d at 1320. Similarly, *Walters v. Rinker*, 520 N.E.2d 568 (Ind.Ct.App. 1988), a case cited in plaintiffs' memorandum, notes that:

While Dr. Walters contends that the relationship between himself and Rinker was a non-consensual one because Rinker did not personally seek Dr. Walters' assistance, at least three Indiana cases support the conclusion that a consensual relationship between a

physician and a patient may exist where others have contracted with the physician on the patient's behalf. *See Scruby v. Waugh* (1985), Ind.App. 476 N.E.2d 533 (physician-patient relationship existed for the purposes of medical malpractice action where estranged wife contracted with the physician who signed commitment papers); *Detterline v. Bonaventura* (1984), Ind.App., 465 N.E.2d 215 (physician-patient relationship existed for purposes of malpractice action where wife contracted with the physician who signed commitment papers); *Gooley v. Moss* (1979), Ind.App., 398 N.E.2d 1314 (physician-patient relationship existed for purposes of medical malpractice action where county department of public welfare contracted with the physician to perform surgery upon a ward of the department)

* * *

The important fact in determining whether the relationship is a consensual one, however, is not who contracted for the service but whether it was contracted for with the express or implied consent of the patient *or for his benefit* (emphasis added).

520 N.E.2d at 472. Read together, these cases establish that as long as there is a contract to provide medical services for the benefit of a person, that person is a "patient" pursuant to the Indiana Medical Malpractice Act, even if the party contracting with the health care provider on behalf of the patient is unauthorized to do so.

Plaintiffs' complaint asserts in paragraph 3.16 that Madison Center personnel were acting as agents and on behalf of the other defendants in administering the "TeenScreen" test to Chelsea. There is, therefore, a contract, either express or implied, to provide the psychological testing to Chelsea. Chelsea is a "patient" under the provisions of the Medical Malpractice Act.

Plaintiffs also assert that giving Chelsea the "TeenScreen" psychological evaluation and the diagnosis resulting from that testing does not constitute medical care under the Indiana Medical Malpractice Act. This argument, however, is refuted by plaintiffs' own complaint which states that:

The stated goal of “TeenScreen” program is to “make voluntary mental health checkups available for all American teens.” . . . “TeenScreen” has been promoted as a tool for screening children for mental health problems, particularly depression, and as a suicide prevention tool.”

(Complaint at ¶ 3.1.) The TeenScreen goal and its use as a screening device for mental health problems, particularly depression, and as a suicide prevention tool is obviously conduct, curative or salutary in nature, by a health care provider acting in his or her professional capacity. *See, e.g., Thayer v. OrRico*, 792 N.E.2d 919, 924, (2003). In *Thayer*, the Court of Appeals noted a psychologist is a “health care provider” as defined by the Indiana Medical Malpractice Act. *Id.*

Chelsea is a patient pursuant to the terms of the Indiana Medical Malpractice Act. Her parents’ claims are all derivative of the allegedly incorrect diagnosis that Chelsea received. The use of the TeenScreen to screen children with mental health issues is clearly within the term “health care” under the Indiana Medical Malpractice Act. Therefore, plaintiffs’ claims all involve medical malpractice as that term is defined by the Indiana Medical Malpractice Act and cases interpreting the Act.

This Court Lacks Jurisdiction Over Plaintiffs’ State Law Claims Based On An Incorrect Diagnosis.

Madison Center concedes that plaintiffs’ claims based on federal question jurisdiction are not subject to the provisions of the Indiana Medical Malpractice Act. Plaintiffs’ only federal question jurisdiction claims, however, involve their first two claims. Claims III-VII are all state law claims stemming from an alleged incorrect diagnosis. Consequently, because plaintiffs did not satisfy the jurisdictional prerequisites of the Indiana Malpractice Act, this Court lacks subject matter jurisdiction over claims III-VII. Those claims should, therefore, be dismissed.

Plaintiffs' Request For Severance Is Inappropriate.

Plaintiffs' reliance on *Doe v. Madison Center Hospital*, 652 N.E.2d 101 (Ind.Ct.App. (1995)), to support a request for a severance instead of dismissal is misplaced. *Doe* involved a case in which the plaintiff conceded that several counts were covered by the Medical Malpractice Act and did not contest the dismissal of those claims. Severance was not an issue.

“Severance” is properly used in a situation in which some parties or claims are separated from other claims to proceed separately and independently. F.R.C.P. 21 discusses severance in the following context:

Misjoinder of parties is not ground for dismissal of an action. The parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. *Any claim against a party may be severed and proceeded with separately.* (Emphasis added.)

Severance implies a separate proceeding with a separate judgment while a separate trial is indicative of a single judgment despite separate trials on different issues. *See McDaniel v. Anheuser-Busch, Inc.*, 987 F.2d 298, 304 (5th Cir. 1993) *citing* 9 Wright & Miller, *Federal Practice and Procedure: Civil* § 2387 (1971).

Severance is inappropriate in the present case because this Court's lack of jurisdiction over plaintiffs' state law claims precludes any separate proceeding on those issues in this Court. The appropriate remedy is dismissal of those claims. Alternatively, to the extent that plaintiffs' request for severance indicates a desire to proceed on both the two federal claims and five state law claims in this court, the more appropriate remedy is a stay of all proceedings including plaintiffs' federal claims, pending compliance with the Indiana Medical Malpractice Act. After plaintiffs' file their proposed complaint with the Indiana Department of Insurance, and obtain an

opinion from the medical review panel, the case will be in position to proceed on all plaintiffs' claims in this Court.

WHEREFORE, defendant Madison Center, Inc. respectfully requests this Court to dismiss Counts III, IV, V, VI, and VII of plaintiffs' complaint. Alternatively, Madison Center requests the Court to stay all proceedings in this case pending plaintiffs' compliance with the Indiana Medical Malpractice Act.

/s/D. Andrew Spalding

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CERTIFICATE OF SERVICE

I certify that service of the above document was made on the 18th day of November, 2005

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