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Indiana Supreme Court Examines Ability to Use Third-Party Carrier to File Medical Malpractice Case

This midweek post takes us back to three prior discussions on the issue of the deadline for filing a medical malpractice case. In our first discussion, we looked at the Indiana Court of Appeals decision in *Miller v. Dobbs*, in which the court in a plurality opinion determined that failure to pay the filing contemporaneous to the filing of a medical malpractice complaint with the Indiana Department of Insurance (the "DOI") did not make the complaint untimely. In the second of our three discussions, we examined the case *Moryl v. Ransone*, in which the Indiana Court of Appeals held that the third-party carrier rule for filing a civil case does not apply to the filing of a medical malpractice complaint with the DOI. The third discussion focused on the Indiana Supreme Court's decision in *Miller v. Dobbs*: affirming the majority outcome of the court of appeals. Today, we return to *Moryl v. Ransone* as the Supreme Court has granted transfer and handed down a decision.

In order to understand the result of *Moryl v. Ransone*, we need to briefly discuss the mechanics of filing a medical malpractice case in Indiana. Unlike almost every other civil claim, a medical malpractice case cannot be filed directly with a trial court. The case must be first, or contemporaneously, filed with the DOI. Cases

filed directly with a trial court can be filed in person or mailed in – with limited exceptions for faxing. For filings that are mailed in, Indiana Trial Rule 5(F) provides a list of scenarios where the case is deemed "filed" at an earlier date than it is actually received by the court. Rule 5(F) states:

> **Rule 5(F) Filing With the Court Defined.**
> The filing of pleadings, motions, and other papers with the court as required by these rules shall be made by one of the following methods:
> * * *
> (3) Mailing to the clerk by registered, certified or express mail return receipt requested; [or]
> (4) Depositing with any third-party commercial carrier for delivery to the clerk within three (3) calendar days, cost prepaid, properly addressed;

The reason that Rule 5(F) is important is because it has the effect of tolling a deadline. This, obviously, is important when the statute of limitations is set to expire on a case.

Trial Rule 5(F) takes an apparent sharp detour from the Indiana Medical Malpractice Act. The relevant portion is Ind. Code § 34-18-7-3, which reads:

> **Tolling of statute of limitations; filing of proposed complaint**
> (a) The filing of a proposed complaint tolls the applicable statute of limitations to and including a period of ninety (90) days following the receipt of the opinion of the medical review panel by the claimant.
> (b) A proposed complaint under IC 34-18-8 is considered filed when a copy of the proposed complaint is delivered or mailed by registered or certified mail to the commissioner.

Notably, section 34-18-7-3 does not have the third-party carrier exception of Rule 5(F)(4). This difference led the court of appeals to hold that the use of a third-party carrier was not an acceptable method for filing a medical malpractice complaint with the DOI and therefore, Mrs. Moryl's case was barred as untimely.

The problem with the court of appeals conclusion is that it overlooks a meaningful portion of the Indiana Code that answers the issue. Section 1-1-7-1(a) provides:

> **Registered or certified mail.**
> (a) If a statute enacted by the general assembly or a rule, as defined

> by IC 4-22-2-3, requires that notice or other matter be given or sent by registered mail or certified mail, a person may use:
> (1) any service of the United States Postal Service or any service of a designated private delivery service (as defined by the United States Internal Revenue Service) that:
> (A) tracks the delivery of mail; and
> (B) requires a signature upon delivery; or
> * * *
> to comply with the statute or rule.

A plain reading of this section makes clear that where the Indiana Code section says "certified mail" it necessarily includes a third-party carrier such as FedEx. Thus, since I.C. § 34-18-7-3(b) specifically says "certified mail," it necessarily includes FedEx that was used by Mrs. Moryl.

Interestingly, "[b]efore 2007, Indiana Code section 1-1-7-1 required mailing through the United States Postal Service only. [But, i]n 2007, the General Assembly amended section 1-1-7-1 to extend compliance to mailing through certain private delivery services." Also of note is that prior to this month, no Indiana court of record has ever addressed Section 1-1-7-1. Yet, this is the second case to address the section this month. The other, which does not merit substantial discussion here, is *Gupta v. Busan*.

So why, you ask, was this section overlooked by the court of appeals? The answer is simply that it was not raised by the parties to the appeal until after the court of appeals had rendered its decision. Thereafter, Mrs. Moryl's attorney filed a petition for rehearing premised on Section 1-1-7-1. The court of appeals summarily denied the petition. Consequently, we do not know the reason for the court of appeals declining to rehear the case despite having the answer within its grasp. The readily apparent and only plausible answer is that the court of appeals deemed that Mrs. Moryl had waived this argument for failure to have raised it prior to a petition for rehearing. This concern was certainly on display in briefing to the supreme court, and unquestionably was present in the defendants' brief in opposition to rehearing.

If an issue is waived due to failure to preserve it, then it is foreclosed from argument. This typically occurs in failure to object to an action taken by a court, but it also applies to failure to raise a timely argument. The general purpose for this is the policy of not wasting court resources by allowing a subsequent argument on appeal that should have been made to the trial court in the first place. In this case, you can see how there is certainly a potential for a finding that the argument has been waived. Nevertheless, the analysis for waiver is more complicated than it may

appear on first glance.

In rejecting the defendants' waiver argument, the court quoted from a prior court of appeals decision.

> The rule that parties will be held to trial court theories by the appellate tribunal does not mean that no new position may be taken, or that new arguments may not be adduced; all that it means is that substantive questions independent in character and not within the issues or not presented to the trial court shall not be first made upon appeal. Questions within the issues and before the trial court are before the appellate court, and new arguments and authorities may with strict propriety be brought forward.

The court further recognized that "[t]he crucial factor [ ] in determining whether the plaintiff may interject what appears to be a new issue into the apeal is whether the defendant had unequivocal notice of the existence of the issue and, therefore, had an opportunity to defend against it." In answering the resulting question – did the defendant have unequivocal notice – the court looked at the trial court's characterization of the issue: "whether Plaintiff's complaint was timely filed." At the trial court and on appeal, the issue advanced was whether Trial Rule 5(F) provided the basis for tolling the statute of limitations. Despite now relying upon Section 1-1-7-1, the court found the argument not waived.

Interestingly, the court noted in its analysis that "the defendants had notice of its existence from the plaintiff's petitions for rehearing and transfer and twice responded with counterarguments." This seems interesting to me because if the argument had first been made in Mrs. Moryl's reply brief before the court of appeals, this rationale would not hold water – because the defendants could not have responded to the argument. Yet, the fact that it arrived in a petition for rehearing, thereby delaying bringing it to the court of appeals's attention, somehow opened the door to its use because it could now be responded to. It is an interesting proposition, but one that leaves your author vexed by the peculiarity in result.

Lastly, the court added a point that your author had latched onto when earlier speculating on the future of this case. After discussing the supreme court's decision in *Miller v. Dobbs*, I noted three takeaways from the case:

> (1) despite Chief Justice Dickson's recent authorship of *Johnson v. Wysocki*, the go-to justice for statutory interpretation cases is still Justice Massa; (2) this iteration of the Court is intrinsically deferential to the specific language of statutes; and (3) the Court is a pragmatic

> one not blinded by rigid formalities that directly contradict common sense.

My first point seems weekend now, since this case was also authored by Chief Justice Dickson. However, the third point is the issue that was very much on display in the conclusion of this case. Chief Justice Dickson wrote:

> Our decision constitutes a refusal to elevate form over substance. We are unwilling to fortify the armory of those who attack the law as famous for its ability to elevate form over substance. We see no substantive difference between a proposed medical malpractice complaint mailed via FedEx Priority Overnight, tracking and return receipt requested, and a proposed complaint mailed via USPS registered and certified mail. And neither does the Indiana General Assembly, as evident by their adoption of Indiana Code section 1-1-7-1.
>
> Join us again next time for further discussion of developments in the law.

Sources

- *Moryl v. Ransone*, 987 N.E.2d 1159 (Ind. Ct. App. 2013), *reh'g denied, vacated in part, affirmed in part on trans.*, ---N.E.3d---, No. 46S04-1403-CT-149, 2014 WL 911858 (Ind. Mar. 10, 2014).

- *Miller v. Dobbs*, 976 N.E.2d 91 (Ind. Ct. App. 2012), *aff'd*, 991 N.E.2d 562 (Ind. 2013).

- *Gupta v. Busan*, ---N.E.3d---, No. 87A01-1307-MI-340, 2014 WL 880697 (Ind. Ct. App. Mar. 6, 2014).

- *Bielat v. Folta*, 141 Ind.App. 452, 454, 229 N.E.2d 474, 475 (1967), *trans. denied*.

- Indiana Medical Malpractice Act – codified at Ind. Code art. 34-18.

- Indiana Code § 1-1-7-1.

- Colin E. Flora, *Indiana Supreme Court Weighs in on Medical Malpractice Filing Deadline*, HOOSIER LITIGATION BLOG (Aug. 1, 2013).

- Colin E. Flora, *Indiana Medical Malpractice Filing Using Third-Party Carrier*, HOOSIER LITIGATION BLOG (May 9, 2013).

- Colin E. Flora, *New Decision Provides No Clear Answer to Complex Medical Malpractice Issue*, HOOSIER LITIGATION BLOG (Sep. 14, 2012).