RECENT DEVELOPMENTS IN MEDICAL MALPRACTICE

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INTRODUCTION

This Article discusses developments in medical malpractice law in Indiana during the survey period, October 1, 2008 through September 30, 2009 (the "Survey Period").

The Indiana General Assembly did not add to, amend, or repeal any section of Indiana's Medical Malpractice Act (the "Act")[1] in the 2009 Regular and Special Sessions. Therefore, this Article examines the ten published cases decided by the Indiana Court of Appeals and Indiana Supreme Court during the Survey Period.

I. STATUTE OF LIMITATIONS

Statute of Limitations issues often arise in medical malpractice cases. Generally, in a medical malpractice case:

> A claim, whether in contract or tort, may not be brought against a health care provider based upon professional services or health care that was provided or that should have been provided unless the claim is filed within two (2) years after the date of the alleged act, omission, or neglect, except that a minor less than six (6) years of age has until the minor's eighth birthday to file.[2]

However, Indiana's courts have found that in certain circumstances the statute of limitations date may be deferred.[3] For example, plaintiff who cannot reasonably know of the alleged malpractice within the two-year period may institute a claim for relief within two years from the "trigger date."[4] However,

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1. IND. CODE §§ 34-18-1-1 to -18-2 (2008).

2. *Id.* § 34-18-7-1.

3. *See* Herron v. Anigbo, 897 N.E.2d 444, 449 (Ind. 2008), *reh'g denied*, No. 4S503-0811-CV-594, 2009 Ind. LEXIS 119 (Ind. Feb. 10, 2009).

4. The court defined the "trigger date" before the Survey Period. *See id.* at 454.

> [T]he ultimate question becomes the time at which a patient "either (1) knows of the malpractice and resulting injury or (2) learns of facts that, in the exercise of reasonable diligence, should lead to the discovery of the malpractice and the resulting injury." Although we have sometimes referred to the critical date as the "discovery date," we think a more accurate term is "trigger date," because actual or constructive discovery of the malpractice often postdates the time when these facts are known. Moreover, the trigger date, unlike a typical discovery date applicable to an accrual of a claim, in most circumstances does not start a fixed limitations period. Rather, it is the date on which a fixed deadline becomes activated.

Id. at 448-49 (footnote omitted) (quoting Booth v. Wiley, 839 N.E.2d 1168, 1172 (Ind. 2005)).

if the "trigger date" is within two years after the alleged malpractice, the plaintiff must exercise reasonable due diligence in order to file before the statute of limitations has run.[5] Reasonable diligence is determined on a case-by-case basis but requires the claimant to pursue the facts to determine if there is a cognizable claim.[6]

A. Overton v. Grillo

During the Survey Period, the Indiana Supreme Court decided in *Overton v. Grillo*[7] that the "trigger date" to file a medical malpractice claim occurred when the patient was told by her doctor that she had cancer and not when an attorney informed her of the possibility of a medical malpractice claim.[8]

Christine Overton had a mammogram on July 7, 1999.[9] Dr. Marshall Grillo told Ms. Overton that the mammogram was normal.[10] However, another mammogram performed on October 2, 2000 revealed the presence of a lesion, and an ultrasound performed on the same date revealed cancer.[11] Ms. Overton's attorney advised her of the possibility of a claim for medical malpractice on October 11, 2001.[12] Ms. Overton testified in a deposition that October 11, 2001 was the first date she had any information to believe she may have a medical malpractice claim against Dr. Grillo.[13] Eight days later, Ms. Overton and her husband filed a medical malpractice lawsuit against Dr. Grillo.[14]

The trial court granted summary judgment in favor of Dr. Grillo on the issue of statute of limitations. The court decided that Ms. Overton had "enough information to lead a reasonably diligent person . . . to [discover]" the possibility of malpractice on October 2, 2000, when she was diagnosed with cancer, and there were nine months remaining under the statute of limitations.[15] In an unpublished opinion, the Indiana Court of Appeals reversed and remanded deciding that there were issues of fact with regard to the statute of limitations period.[16] The Indiana Supreme Court granted transfer to address the statute of limitations issue.[17]

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5. *Id.* at 449.
6. *Id.*
7. 896 N.E.2d 499 (Ind. 2008), *reh'g denied*, No. 64504-0811-CV-595, 2009 LEXIS 118 (Ind. Feb. 10, 2009).
8. *Id.* at 504.
9. *Id.* at 501.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* (quoting the trial court grant of summary judgment).
16. *Id.* (citing Overton v. Grillo, 874 N.E.2d 404 (Ind. Ct. App. 2007), *vacated*, 896 N.E.2d 499 (Ind. 2008)).
17. *Id.* at 502.

The court found that *Boggs v. Tri-State Radiology, Inc.* controlled this case.[18] In *Boggs*, Ms. Boggs underwent a mammogram on her left breast in July 1991.[19] She was told to return in one year. In August 1992 following a second mammogram, Ms. Boggs was diagnosed with breast cancer and subsequently died. Ms. Boggs's husband filed a lawsuit for medical malpractice in July 1994, and the Indiana Supreme Court ultimately held that Ms. Boggs became aware of her injury in August 1992.[20] Thus, the statute of limitations barred Ms. Boggs' July 1994 medical malpractice complaint.[21]

Therefore, Ms. Overton had enough information on October 2, 2000, the date of the second mammogram, to put her on inquiry notice of the possibility of bringing a medical malpractice claim against Dr. Grillo.[22] Thus, the court determined that October 2, 2000 was Ms. Overton's "trigger date."[23] The court next determined that nothing prevented Ms. Overton from filing a medical malpractice complaint in the nine months remaining in the limitations period.[24] The court affirmed the decision of the trial court granting summary judgment in favor of Dr. Grillo.[25]

B. Herron v. Anigbo

The Indiana Supreme Court in *Herron v. Anigbo*,[26] again affirmed a trial court's decision granting summary judgment in favor of a physician for a patient's failure to file a claim within the applicable statute of limitations period. In *Herron*, Victor Herron underwent spinal surgery performed by neurosurgeon Dr. Anthony Anigbo on March 6, 2002.[27] Mr. Herron experienced post-surgical problems, including speaking difficulties, infection, and pulmonary difficulties, which required the use of a ventilator for nine months.[28] In June 2003, Mr. Herron presented to another neurosurgeon, Dr. Matthew Hepler, who noted several postoperative complications, some of which could require revision surgery.[29] Then, in November 2003, another physician informed Mr. Herron that his "condition ha[d] deteriorated since the accident, and that a likely cause of the

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18. *Id.* at 503 (citing Boggs v. Tri-State Radiology, Inc., 730 N.E.2d 692 (Ind. 2000)).
19. *Boggs*, 730 N.E.2d at 694.
20. *Id.* at 699.
21. *Id.* at 695-96.
22. *Overton*, 896 N.E.2d at 504.
23. *Id.*
24. *Id.*
25. *Id.*
26. 897 N.E.2d 444 (Ind. 2008), *reh'g denied*, No. 4S503-0811-CV-594, 2009 Ind. LEXIS 119 (Ind. Feb. 19, 2009).
27. *Id.* at 447. Mr. Herron's spinal surgery came about due to a fall at his home the previous day on March 5, 2002. The fall rendered him a quadriplegic. *Id.*
28. *Id.*
29. *Id.*

deterioration was negligent follow-up care."[30] On November 11, 2003, Mr. Herron underwent a second spinal surgery along with the application of a halo.[31]

Mr. Herron then filed his medical malpractice complaint against Dr. Anigbo on December 7, 2004, more than two years after the surgery.[32] The complaint accused Dr. Anigbo of "failure to take proper precautions prior to surgery, failure to monitor the patient after surgery, and failure to properly perform the surgery."[33]

Dr. Anigbo filed a motion for summary judgment in the state court matter, arguing that the two-year occurrence-based statute of limitations barred Mr. Herron's complaint.[34] The trial court granted summary judgment finding that Mr. Herron knew, or should have known, in the exercise of reasonable diligence of Dr. Anigbo's malpractice based on Dr. Hepler's June 2003 report. The trial court reasoned that the remaining nine-months on the statute of limitations gave Mr. Herron a "meaningful opportunity to file his claim before the statute expired in March 2004."[35] The Indiana Court of Appeals reversed and remanded finding that Mr. Herron did not discover his claim until November 2003, when he was informed of his deteriorated condition.[36] Furthermore, the remaining four months of the statute of limitations did not allow Mr. Herron a meaningful opportunity to file a medical malpractice claim.[37]

In *Herron*, the court noted that the proper procedure in a medical malpractice case when a statute of limitations issue cannot be resolved in summary judgment had not been determined.[38] The court cited *Jacobs v. Manhart*,[39] a previous Indiana Court of Appeals decision, which showed that a hearing may be required to resolve disputed facts and to determine when the trigger date is set.[40] However, the *Herron* court explicitly held that factual issues related to the running of the statute of limitations period, such as the date of when a plaintiff first learns of medical malpractice, are issues to be resolved by the trier of fact.[41]

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30. *Id.* Dr. Jacquelyn Carter was the physician who informed Mr. Herron that his condition had deteriorated since the spinal surgery.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*; *see also* IND. CODE § 34-18-74(b) (2008).

35. *Herron*, 897 N.E.2d at 447.

36. *Id.*

37. *Id.* (citing Herron v. Anigbo, 866 N.E.2d 842, 846 (Ind. Ct. App. 2007), *vacated*, 897 N.E.2d 444 (Ind. 2008)). Both the trial court and the Indiana Court of Appeals assumed the statute of limitations began to run on the date of Mr. Herron's initial surgery on March 6, 2002. *Id.* at 447-48.

38. *Id.* at 452.

39. 770 N.E.2d 344 (Ind. Ct. App. 2002).

40. *Herron*, 897 N.E.2d at 452 (citing *Jacobs*, 770 N.E.2d at 352).

41. *Id.* This is the prevailing view in other jurisdictions according to the court. *Id.* (citing Brin v. S.E.W. Investors, 902 A.2d 784 (D.C. 2006); Lipsteuer v. CSX Transp., Inc., 37 S.W.3d 732 (Ky. 2000); Martin v. Arthur, 3 S.W.3d 684 (Ark. 1999); Collins v. Pittsburgh Corning Corp.

Even though the trier of fact resolved factual issues related to the running of the statute of limitations period, the *Herron* court still affirmed the trial court's ruling for summary judgment in favor of Dr. Anigbo.[42] The court decided that even if Mr. Herron did not have enough information to lead a reasonably diligent person to discover a possible claim of medical malpractice until November 2003, four months remained to sue for medical malpractice.[43] Therefore, as a matter of law, this was sufficient time for Mr. Herron to assert a claim.[44] The court hinted that if Mr. Herron had offered evidence to show that he was not reasonably able to consult an attorney within that four month time period, it may very well have decided differently.[45]

C. Newkirk v. Bethlehem Woods Nursing and Rehabilitation Center, LLC

In *Newkirk v. Bethlehem Woods Nursing and Rehabilitation Center, LLC*,[46] a third case decided by the Indiana Supreme Court on statute of limitations during the Survey Period, the court analyzed the interaction of the statute of limitations of Indiana's Wrongful Death Act[47] (the "Wrongful Death Act") and the statute of limitations for the Act.[48] In *Newkirk*, Martha O'Neal was admitted to Bethlehem Woods Nursing and Rehabilitation Center on September 10, 2001 following surgery.[49] On September 22, 2001, Ms. O'Neal was found in a pool of her own blood, and she was then transferred to the hospital.[50] Ms. O'Neal died less than two months later on November 6, 2001.[51]

On October 22, 2003, more than two years after the alleged act or omission of medical malpractice, Ms. O'Neal's estate brought a complaint under the Wrongful Death Act, alleging medical malpractice against Bethlehem.[52] Bethlehem moved for summary judgment arguing that the medical malpractice claim was time-barred because it was not brought within two years of the alleged

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673 A.2d 159 (Del. 1996); Pennwalt Corp. v. Nasios, 550 A.2d 1155 (Md. 1988)).

42. *Id.* at 453.

43. *Id.*

44. *Id.* The court did not decide the trigger date in this case. Instead, it assumed that even if November 2003 was the trigger date, the remaining four months was sufficient time for Mr. Herron to reasonably bring a claim for medical malpractice. *Id.*

45. *Id.* The decision noted that Mr. Herron offered no claim that there was a barrier for him to assert a claim within two years following the March 6, 2002 spinal surgery. *Id.*

46. 898 N.E.2d 299 (Ind. 2008).

47. IND. CODE § 34-23-1-2 to -2-1 (2008 & 2009 Supp.).

48. *Newkirk*, 898 N.E.2d at 300.

49. *Id.*

50. *Id.* The case does not discuss the circumstances surrounding what exactly happened to Ms. O'Neal before she was found in a pool of her own blood. However, it does specifically state that Ms. O'Neal's death was caused by the medical malpractice of Bethlehem. *Id.*

51. *Id.*

52. *Id.*

act or omission of malpractice.[53] The trial court agreed and granted summary judgment in favor of Bethlehem.[54] The Indiana Court of Appeals reversed, finding that the claim arose under the Indiana's Professional Services Statute,[55] because Bethlehem was not a "qualified provider" under the Medical Malpractice Act (MMA) and therefore was not entitled to its protections.[56] Furthermore, the Indiana Court of Appeals held that the estate's claim was filed within the limitations provided by the Wrongful Death Act, and therefore it was timely filed.[57]

The Indiana Supreme Court held that the medical malpractice caused Ms. O'Neal's death and that the medical malpractice claim terminated at her death.[58] The court further held that the wrongful death claim was required to be filed by Ms. O'Neal's personal representative within two years of the occurrence of medical malpractice.[59] Therefore, the court determined that the claim of Ms. O'Neal's estate was time-barred and affirmed the decision of the trial court, granting summary judgment in favor of Bethlehem.[60]

D. Eads v. Community Hospital

In *Eads v. Community Hospital*,[61] the Indiana Court of Appeals determined

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53. *Id.*

54. *Id.*

55. The Indiana Professional Services statute reads:

> An action of any kind for damages, whether brought in contract or tort, based upon professional services rendered or which should have been rendered, may not be brought, commenced, or maintained, in any of the courts of Indiana against physicians, dentists, surgeons, hospitals, sanitariums, or others, unless the action is filed within two (2) years from the date of the act, omission, or neglect complained of.

IND. CODE § 34-11-2-3 (2008).

56. *Newkirk*, 898 N.E.2d at 300-02 (citing Estate of O'Neal *ex rel.* Newkirk v. Bethlehem Woods Nursing and Rehab. Ctr. LLC, 878 N.E.2d 303, 314 (Ind. Ct. App. 2007), *aff'd on reh'g*, 887 N.E.2d 1019 (Ind. Ct. App. 2008)).

57. *Id.* (citing *Estate of O'Neal*, 878 N.E.2d at 315).

58. *Id.* at 301.

59. *Id.* at 302. The court determined that Indiana's Professional Services Statute was the applicable statute to determine whether the medical malpractice claim was timely filed because Bethlehem was not a "qualified provider" under the Act. *Id.* at 300. The court determined that the legislature had codified procedures under Indiana's Professional Services Statute to determine statute of limitations issues under these circumstances. *Id.* at 302. The court determined that the failure of the personal representative to bring a claim for medical malpractice within two years of the occurrence of the alleged malpractice made the claim time-barred. *Id.* Although the claim was filed within two years of Ms. O'Neal's death, it was not filed within two years of the occurrence of malpractice. *Id.*

60. *Id.*

61. 909 N.E.2d 1009 (Ind. Ct. App. 2009), *trans. granted, opinion vacated*, No. 45A03-0807-CV-350, 2010 Ind. LEXIS 40 (Ind. Jan. 14, 2010).

that a claim for medical malpractice filed with the Indiana Department of Insurance (IDOI) after the statute of limitations had run was not a continuation of a claim for negligence filed in a state trial court.[62] Therefore, the claim was not timely filed under Indiana's Journey's Account Statute.[63]

On August 15, 2004, Suzanne Eads received treatment at Community Hospital for an ankle injury.[64] Upon discharge from the hospital, Ms. Eads requested a wheelchair to exit the hospital.[65] A hospital employee refused the request and instead told Ms. Eads that "she could leave the [h]ospital on crutches."[66] As Ms. Eads was leaving the hospital, she fell and sustained injuries to her back and left hand.[67]

Instead of filing a proposed complaint with the IDOI, as is the typical practice in medical malpractice actions, Ms. Eads filed a complaint for negligence in state court on August 8, 2006.[68] On February 21, 2007, the hospital filed a motion to dismiss the state court claim without prejudice for lack of subject matter jurisdiction, arguing that the claim was a claim for medical malpractice.[69] In response, Ms. Eads argued that her claim was based on premises liability and that it was not within the jurisdiction of the Act.[70] The state court agreed with Community Hospital and, on April 12, 2007, the state court dismissed Ms. Eads's claim without prejudice.[71]

On March 26, 2007, before the state court's dismissal of the negligence claim, Ms. Eads filed a proposed complaint for medical malpractice with the IDOI.[72] The hospital then filed a petition for preliminary determination[73] and a motion for summary judgment.[74] The hospital argued that the medical malpractice claim was barred as a matter of law based on the statute of limitations because it was not filed within two years of the alleged occurrence of medical malpractice under the Act.[75] The trial court, after a hearing, dismissed

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62. *Id.* at 1014.

63. *Id.* Indiana's Journey's Account Statute is found at IND. CODE § 34-11-8-1 (2008).

64. *Eads*, 909 N.E.2d at 1011.

65. *Id.*

66. *Id.* (quoting Appendix of Appellant at 9, 909 N.E.2d 1009 (Ind. Ct. App. 2009)).

67. *Id.*

68. *Id.* The negligence claim was filed within the applicable two-year statute of limitations. *Id.* Complaints for medical malpractice, with certain exceptions, must be field with the Department of Insurance before the complaint can be filed in court. IND. CODE § 34-18-8-4 (2008). The claim is then presented to a medical review panel, which renders an opinion. *Id.*

69. *Eads*, 909 N.E.2d at 1011-12.

70. *Id.* at 1011.

71. *Id.*

72. *Id.*

73. *See* IND. CODE § 34-18-11-1 (2008) ("A court having jurisdiction over the subject matter . . . may . . . (1) preliminarily determine an affirmative defense or issue of law or fact that may be preliminarily determined under the Indiana Rules of Procedure. . . .").

74. *Eads*, 909 N.E.2d at 1011-12.

75. *Id.* at 1012.

the medical malpractice claim with prejudice on June 11, 2008.[76] Ms. Eads appealed the trial court's ruling.[77]

The Indiana Court of Appeals noted that it was undisputed that Ms. Eads filed her complaint for medical malpractice after the applicable two-year statute of limitations had run.[78] However, Ms. Eads claimed that her lawsuit should be allowed to proceed under Indiana's Journey's Account Statute.[79] The Journey Account Statute's purpose "is to preserve the right of a diligent suitor to pursue a judgment on the merits."[80]

The court went on to explain that if Ms. Eads's medical malpractice claim was to be saved by the Journey's Account Statute, she must establish that her medical malpractice claim was a continuation of her negligence claim filed in state court.[81] It was significant to the court that Ms. Eads did not appeal the trial court's dismissal of her negligence complaint.[82] The court found that the medical malpractice claim was not a continuation of her negligence claim as there is a "basic distinction between a common law claim of negligence and the statutory medical malpractice regime."[83] Therefore, the court affirmed the judgment of the trial court granting summary judgment in favor of the hospital.[84]

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76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* IND. CODE § 34-11-8-1 (2008) states

> (a) This section applies if a plaintiff commences an action and: (1) the plaintiff fails in the action from any cause except negligence in the prosecution of the action; (2) the action abates or is defeated by the death of a party; or (3) a judgment is arrested or reversed on appeal. (b) If subsection (a) applies, a new action may be brought not later than the later of: (1) three (3) years after the date of the determination under subsection (a); or (2) the last date an action could have been commenced under the statute of limitations governing the original action; and be considered a continuation of the original action commenced by the plaintiff.

80. *Eads*, 909 N.E.2d at 1013 (citing Keenan v. Butler, 869 N.E.2d 1284, 1290 (Ind. Ct. App. 2007)). The court went on to cite an Indiana Supreme Court case which stated:

> The Journey's Account Statute applies by its terms to preserve only a "new action" that may be "a continuation of the first." Its typical use is to save an action filed in the wrong court by allowing the plaintiff enough time to refile the same claim in the correct forum. For example, the statute enables an action dismissed for lack of personal jurisdiction in one state to be refiled in another state despite the intervening running of the statute of limitations.

Id. (quoting Cox v. Am. Aggregates Corp., 684 N.E.2d 193, 195 (Ind. 1997)).

81. *Id.*

82. *Id.* at 1014 (stating that if Ms. Eads truly believed that the trial court's dismissal of her negligence claim was incorrect then she would have appealed that decision).

83. *Id.* (explaining that the source of the liability between negligence and medical malpractice is "wholly different").

84. *Id.*

II. JURISDICTION OF THE ACT

A claim for medical malpractice against a qualified health care provider must be presented to a medical review panel before the plaintiff proceeding with an action in a trial court.[85] Under the Act, malpractice is defined as "a tort or breach of contract based on health care or professional services that were provided, or that should have been provided, by a health care provider, to a patient."[86] The statute defines health care as "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."[87] The Indiana Court of Appeals decided two cases during the Survey Period regarding subject-matter jurisdiction and the scope of the Act.

A. Fairbanks Hospital v. Harrold

In *Fairbanks Hospital v. Harrold*,[88] the Indiana Court of Appeals determined whether a claim against a hospital for failure to adequately supervise an employee was a claim for medical malpractice.[89] Natalie Harrold was admitted to Fairbanks Hospital for in-patient, substance abuse treatment.[90] Counselor Larry Shears was involved in Ms. Harrold's care while she was at Fairbanks.[91] Mr. Shears made unwanted sexual advances towards Ms. Harrold, and after Ms. Harrold was discharged, she reported Mr. Shears' behavior to another employee at Fairbanks.[92] Fairbanks later discharged Mr. Shears.[93]

Fairbanks "double-filed"[94] a proposed complaint with the IDOI and a civil lawsuit in state court against Fairbanks.[95] The allegations against Fairbanks included negligent supervision and vicarious liability for the intentional torts, including a battery claim, of Mr. Shears.[96] The medical review panel in the IDOI case found that Fairbanks failed to comply with the applicable standard of care.[97]

Ms. Harrold then proceeded with her state court claim, and Fairbanks sought a determination of law that Ms. Harrold's claims fell within the scope of the

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85. IND. CODE § 34-18-8-4 (2008).

86. *Id.* § 34-18-2-18.

87. *Id.* § 34-18-2-13.

88. 895 N.E.2d 732 (Ind. Ct. App. 2008).

89. *Id.* at 733-34.

90. *Id.* at 734.

91. *Id.*

92. *Id.*

93. *Id.*

94. Often, when a plaintiff files both a complaint before the IDOI and in state court involving the identical cause of action, this is referred to as "double-filing." The Act requires claims for medical malpractice to first be presented to a medical review panel before they can be heard in state court. IND. CODE § 34-18-8-4 (2008).

95. *Harrold*, 895 N.E.2d at 734.

96. *Id.*

97. *Id.*

Act.[98] The trial court determined that the Act did not cover Ms. Harrold's claims against Fairbanks.[99] The trial court then granted Fairbanks' request to certify its order for interlocutory appeal, and the Indiana Court of Appeals accepted jurisdiction over the interlocutory appeal.[100]

Fairbanks argued that Ms. Harrold's claim was based on whether Fairbanks made appropriate decisions in selecting individuals who could work with patients.[101] Fairbanks further argued that the claims were based on decisions that affected Ms. Harrold's health care and that therefore the claims fell within the scope of the Act.[102] However, the court found otherwise.[103] The court determined that both the claim of sexual misconduct against Mr. Shears, and the claim that Mr. Shears was in a position to carry out the sexual misconduct because of Fairbank's negligent supervision, must "sound in medical malpractice in order for the action to come within the Act's purview."[104] The court found that an "employee's sexual conduct with a patient cannot constitute a rendition of health care or professional services," and therefore the Act did not apply.[105]

B. Popovich v. Danielson

In the other case decided by the Indiana Court of Appeals during the Survey Period regarding subject-matter jurisdiction, the court determined that claims against a physician based on assault, battery, defamation, and breach of contract all fell within the jurisdiction of Act.[106]

On June 16, 2006, Patricia Popovich was involved in an automobile accident and was brought to the hospital by an ambulance.[107] Ms. Popovich suffered broken ribs as well as injuries to her chest, abdomen, and significant cuts to her legs.[108] Plastic surgeon, Dr. John Danielson, was called in for a consultation to examine Ms. Popovich.[109] Ms. Popovich alleged that Dr. Danielson spoke to her in a rude and demeaning manner and that he refused to provide her pain medication.[110] She further alleged that Dr. Danielson accused her of driving

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98. *Id.*

99. *Id.* at 734-35.

100. *Id.* at 735.

101. *Id.*

102. *Id.* at 735-36.

103. *Id.* at 738.

104. *Id.*

105. *Id.* (citing Grzan v. Charter Hosp. of Nw. Ind., 702 N.E.2d 786 (Ind. Ct. App. 1998); Murphy v. Mortell, 684 N.E.2d 1185 (Ind. Ct. App. 1997); Doe *ex rel.* Roe v. Madison Ctr. Hosp., 652 N.E.2d 101 (Ind. Ct. App. 1995)).

106. Popovich v. Danielson, 896 N.E.2d 1196, 1198-1200 (Ind. Ct. App. 2008), *trans. denied*, No. 64A03-0804-CV-146, 2009 LEXIS 386 (Ind. Apr. 23, 2009).

107. *Id.* at 1198.

108. *Id.*

109. *Id.* at 1199.

110. *Id.*

drunk, which Dr. Danielson also noted in his medical report.[111] Ms. Popovich demanded that Dr. Danielson stop any and all treatment, and Ms. Popovich further claimed that Dr. Danielson charged an excessive amount for services.[112]

Ms. Popovich filed her complaint in state court rather than before the IDOI.[113] Dr. Danielson moved to dismiss Ms. Popovich's complaint on the basis that she failed to present her claims before a medical review panel before filing her complaint.[114] The trial court determined that it did not have subject matter jurisdiction over Ms. Popovich's claims and dismissed the case without prejudice.[115]

First, as for the assault and battery claim, the court of appeals determined that it fell within the purview of the Act.[116] The court decided that the alleged battery was based on Dr. Danielson's behavior while acting in his professional capacity and while providing medical services.[117] Second, the court analyzed Ms. Popovich's defamation claim, which alleged that Dr. Danielson deliberately misrepresented and falsified her physical and mental condition.[118] The court determined that this claim questioned Dr. Danielson's "exercise of professional expertise, skill, or judgment" and that the claim fell within the jurisdiction of the Act.[119]

Next, the court discussed Ms. Popovich's breach of contract claim against Dr. Danielson in which she alleged that Dr. Danielson failed to report accurately and correctly his necessary medical findings and observations in his medical report.[120] Like the defamation claim, the court determined that a medical review panel needed to address this claim and that it fell under the Act.[121] Finally, the court discussed Ms. Popovich's claim that Dr. Danielson committed fraud when he submitted an excessive medical bill.[122] The court determined that because Ms. Popovich failed to aver this claim specifically and sufficiently, it prevented the court from determining whether the claim fell under the Act.[123] Therefore, the court affirmed the ruling of the trial court.[124]

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111. *Id.*
112. *Id.* at 1199-1200.
113. *Id.* at 1200.
114. *Id.*
115. *Id.* at 1198.
116. *Id.* at 1202.
117. *Id.*
118. *Id.*
119. *Id.* at 1203 (quoting Collins v. Thakker, 552 N.E.2d 507, 510 (Ind. Ct. App. 1990)).
120. *Id.*
121. *Id.*
122. *Id.* at 1203-04.
123. *Id.* at 1204.
124. *Id.*

III. Damages Sought Against the Patient Compensation Fund

The Act establishes a Patient Compensation Fund (the "Fund"), which acts as excess insurance for health care providers.[125] The total amount a plaintiff can recover for an act of malpractice occurring after June 30, 1999 is $1,250,000; however, the total amount paid by the qualified health care provider is limited to $250,000.[126] The remaining amount is paid by other liable health care providers or the Fund.[127] Often, Indiana courts have to adjudicate disputes regarding the damages a plaintiff is entitled to from the Fund.

A. Atterholt v. Herbst

In *Atterholt v. Herbst*,[128] a case decided by the Indiana Supreme Court during the Survey Period, the court determined that evidence of a patient's odds of survival and ability to work is admissible in determining excess damages due from the Fund.[129] On March 6, 2002, Jeffry Herbst presented to his family physician with reports of "a fever, congestion, nausea, loss of appetite, and decreased urine output."[130] Mr. Herbst's physician diagnosed him with bilateral pneumonia and sent him to the hospital where he died later that night.[131] An autopsy determined that Mr. Herbst instead died from fulminant myocarditis, an acute inflammation of the heart.[132] Mr. Herbst's estate sued the primary care physician and hospital where Mr. Herbst received care.[133] The estate settled with the physician and the hospital under a qualified settlement, allowing the estate access to the Fund for additional damages.[134]

The estate then brought an action to obtain excess damages from the Fund.[135] The estate moved for a determination of law that the question presented before the court was the amount of damages and "not the liability for, or the proximate cause of, such damages."[136] The trial court granted the estate's motion and at a

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125. *See* IND. CODE § 34-18-6-1 (2008).

126. *See id.* § 34-18-14-3.

127. *Id.*

128. 902 N.E.2d 220 (Ind.), *reh'g granted, opinion clarified*, 907 N.E.2d 528 (Ind. 2009).

129. *Id.* at 224.

130. *Id.* at 221.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* Mr. Herbst's estate anticipated that the Fund would rely on *Cahoon v. Cummings*, 734 N.E.2d 535, 541 (Ind. 2000), a case in which the Indiana Supreme Court held that "damages for negligently causing an increased risk of harm are 'proportional to the increased risk attributable to the defendant's negligent act or omission.'" *Herbst*, 902 N.E2d at 221 (quoting *Cahoon*, 734 N.E.2d at 541). However, "[t]he Fund responded that it was not seeking to relitigate whether the providers were liable for [Mr.] Herbst's death, but rather challenged the amount of damages attributable to the providers conduct." *Id.*

bench trial, the Fund moved to submit expert evidence that even with appropriate care, Mr. Herbst had less than a ten percent chance of surviving the hospitalization.[137] The trial court excluded the Fund's evidence and found that the damages for the estate exceeded $2.5 million.[138] Consequently, the court ordered that the Fund pay the statutory maximum of $1 million.[139] The Fund appealed the trial court's ruling, and the Indiana Court of Appeals affirmed the trial court's decision.[140] The Indiana Supreme Court granted transfer.[141]

The court determined that evidence of an increased risk of harm is relevant to the valuation of damages.[142] Therefore, both the expert evidence of Mr. Herbst's chance of survival and his chance of working in the future were relevant to the determination of damages.[143] The court then remanded the case for a determination of the extent of the Fund's liability.[144]

B. Butler v. Indiana Department of Insurance

In *Butler v. Indiana Department of Insurance*,[145] a second case decided by the Indiana Supreme Court during the Survey Period regarding excess damages from the Fund, the court analyzed the amount of medical expenses an estate should be able to recover in a wrongful death case involving the death of an unmarried adult with no dependants.[146]

Nondis Jane Butler filed a medical malpractice case against Clarian Health Partners, Inc. and several individual health care providers pursuant to the Act.[147] Before resolution of the case, Ms. Butler died leaving no dependants.[148] Ms. Butler's estate then settled with Clarian Health Partners in a structured settlement so that the estate could seek excess damages from the Fund.[149]

The Fund moved for partial summary judgment alleging that the estate could only recover the expenses Ms. Butler actually incurred for the medical care rather than the total amount of the medical bills.[150] The trial court determined that the estate was not entitled to "the difference between the total of medical bills received and the amounts actually paid and accepted as full satisfaction by the

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137. *Id.* at 221-22.

138. *Id.*

139. *Id.*

140. *Id.* (citing Atterholt v. Herbst, 879 N.E.2d 1221, 1227 (Ind. Ct. App. 2008), *trans. granted, opinion vacated*, 902 N.E.2d 220 (Ind. 2009)).

141. *Id.*

142. *Id.* at 223.

143. *Id.*

144. *Id.* at 225.

145. 904 N.E.2d 198 (Ind. 2009).

146. *Id.* at 199.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

medical providers."[151] The Indiana Court of Appeals affirmed the trial court's decision, and the Indiana Supreme Court granted transfer.[152]

The Fund argued that in Indiana Code section 34-23-1-2,[153] the statute governing actions for wrongful death of unmarried adult persons without dependents, the plain language of the statute only permits recovery for expenses actually paid.[154] The estate responded by arguing that the statute refers to "reasonable" expenses and that the law is clear in common law tort actions that a plaintiff may recover the reasonable value of medical services, regardless of whether the plaintiff is personally liable for the bills.[155]

However, the court found it significant that the claim was not a common law tort claim but rather a statutory wrongful death claim.[156] The court then agreed with the Fund and found the applicable section of the statute to be unambiguous.[157] Therefore, the court held that, with respect to damages under Indiana Code section 34-23-1-2(c)(3)(A), the amount recoverable is the portion of the billed charges actually accepted rather than the total amount billed.[158]

IV. Incurred Risk in the Medical Malpractice Context

The Indiana Supreme Court decided in *Spar v. Cha*[159] that, with possible exceptions, incurred risk is not a defense in a medical malpractice case based on negligent care or lack of informed consent.[160] Brenda Spar consulted with obstetrician/gynecologist, Dr. Jin Cha in 1999 and 2000 due to difficulty conceiving a child.[161] Dr. Cha suspected endometriosis.[162] Dr. Cha suggested a

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151. *Id.* at 199-201. It is important to note that before the bench proceeding, the parties entered into a factual stipulation that Ms. Butler incurred medical bills for relevant treatment rendered in the total amount of $410,062.46, of which $25,979.75 was actually paid by the Estate. *Id.* at 199. The parties also entered into a partial settlement for the Fund to pay $188,046.88 to settle all claims against the Fund except claims for "additional medical expenses that were not paid but were billed" to Ms. Butler or her estate. *Id.* at 200.

152. *Id.* at 201 (citing Butler v. Ind. Dep't of Ins., 875 N.E.2d 235 (Ind. Ct. App. 2007), *trans. granted, opinion vacated*, 904 N.E.2d 198 (Ind. 2008)).

153. The statute states, in part: "(c) In an action to recover damages for the death of an adult person, the damages: . . . (3) may include but are not limited to the following: (A) Reasonable medical, hospital, funeral, and burial expenses necessitated by the wrongful act or omission that caused the adult person's death. . . ." IND. CODE § 34-23-1-2 (2008).

154. *Butler*, 904 N.E.2d at 201.

155. *Id.* at 201-02.

156. *Id.* at 202.

157. *Id.*

158. *Id.* at 203; *see* IND. CODE § 34-23-1-2(c)(3)(A) (2008)).

159. 907 N.E.2d 974 (Ind. 2009).

160. *Id.* at 976.

161. *Id.* at 977.

162. *Id.*

laparoscopy for Ms. Spar to determine if her fallopian tubes were clogged.[163] Dr. Cha performed laparoscopic surgery on Ms. Spar in 2001.[164] Before the procedure, Dr. Cha advised Ms. Spar of the risks associated with the procedure.[165] Two days after the procedure it was discovered that Ms. Spar's bowel had been perforated during the procedure and she experienced multiple post-operative complications.[166]

Ms. Spar later brought a medical malpractice case against Dr. Cha alleging that he failed to advise her of available alternative procedures and that he failed to obtain her informed consent in performing the laparoscopy.[167] The Medical Review Panel rendered a unanimous decision that Dr. Cha failed to comply with the standard of care, and Ms. Spar proceeded with her case in state court.[168] At trial, the jury was instructed on incurred risk.[169] In closing argument, Dr. Cha's counsel argued that because Ms. Spar was told of the risks of the procedure, she accepted and incurred the risk by going forward with the procedure.[170] The jury rendered a verdict in favor of Dr. Cha, and Ms. Spar appealed.[171] The Indiana Court of Appeals reversed and remanded the case, holding that "incurred risk is not a defense to claims of lack of informed consent or negligent performance of a medical procedure."[172] The Indiana Supreme Court granted transfer.[173]

The court agreed with the Indiana Court of Appeals that incurred risk "has little legitimate application in the medical malpractice context."[174] Ultimately, "[t]he patient is entitled to expect that the services will be rendered in accordance with the standard of care, however risky the procedure may be."[175] The court discussed that the only situation where incurred risk could be applicable in a medical malpractice case is when a patient refuses a blood transfusion prior to surgery based on religious reasons and later experiences complications for failing to undergo the blood transfusion.[176] The court also discussed that patients can waive the right to be informed, but that there was no evidence that Ms. Spar

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163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.* at 978.
167. *Id.*
168. *Id.* at 978-79.
169. *Id.* at 979.
170. *Id.*
171. *Id.*
172. *Id.* (citing Spar v. Cha, 881 N.E.2d 70, 74-75 (Ind. Ct. App. 2008), *trans. granted, opinion vacated*, 907 N.E.2d 974 (Ind. 2009)).
173. *Id.*
174. *Id.* at 982.
175. *Id.*
176. *Id.* at 983 n.2 (citing Shorter v. Drury, 695 P.2d 116, 124 (Wash. 1985) (discussing a patient's refusal to receive a blood transfusion as a possible exception to the rule that incurred risk is not applicable in the medical malpractice context)).

waived her right to informed consent.[177] Therefore, the court concluded it was error for the trial court to instruct the jury on incurred risk and remanded the case for a new trial.[178]

V. Admissibility of an Expert's Opinion

In *Blaker v. Young*,[179] the final published case decided during the Survey Period, the Indiana Court of Appeals held that a plaintiff's expert witness's opinion was based on speculation and was not sufficient to demonstrate a genuine issue of material fact on the issue of breach of care.[180]

On March 24, 2003, neurosurgeon Dr. Ronald Young performed back surgery on Myers Blaker to attempt to relieve the headaches and neck pain Mr. Blaker had been experiencing.[181] Following surgery, Mr. Blaker went into respiratory arrest and required intubation.[182] An MRI showed that Mr. Blaker experienced a stroke in the area of the brain supplied by the posterior inferior cerebellar artery (PICA).[183]

Mr. Blaker then filed a medical malpractice claim against Dr. Young, and the Medical Review Panel issued the unanimous expert opinion that Dr. Young met the applicable standard of care in his treatment of Mr. Blaker.[184] Mr. Blaker then proceeded with his medical malpractice case in state court.[185] Dr. Young moved for summary judgment based on the unanimous panel opinion arguing there was no evidence he failed to meet the proper standard of care.[186] In response to Dr. Young's motion for summary judgment, Mr. Blaker presented an expert witness affidavit of Dr. Mitesh Shah, which stated, "I am of the opinion, *assuming* Dr. Young did not identify the right PICA during the surgery of March 24th, 2003, it is below a reasonable medical standard to not do so."[187] Mr. Blaker also submitted an affidavit of one of the medical review members, which stated, "I am willing to alter my impression such that *if* the right PICA was not identified and was injured because of that, then that would fall below the standard of care."[188]

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177. *Id.* at 983.

178. *Id.*

179. 911 N.E.2d 648 (Ind. Ct. App. 2009), *reh'g denied*, No. 49A02-0811-CV-1038, 2009 Ind. App. LEXIS 2400 (Ind. Ct. App. Oct. 26, 2009), *trans. denied*, 2010 Ind. LEXIS 172 (Ind. Feb. 25, 2010).

180. *Id.* at 652.

181. *Id.* at 649.

182. *Id.*

183. *Id.* at 649-50.

184. *Id.* at 650.

185. *Id.*

186. *Id.* at 651.

187. *Id.* (quoting Appendix of Appellant at 81, 911 N.E.2d 648 (Ind. Ct. App. 2009) (emphasis in original)).

188. *Id.* (quoting Appendix of Appellant at 88, 911 N.E.2d 648 (Ind. Ct. App. 2009) (emphasis in original)).

The trial court granted summary judgment in favor of Dr. Young and found that Mr. Blaker failed to designate any admissible expert opinion to create a genuine issue of material fact for trial.[189] Mr. Blaker appealed.[190]

The Indiana Court of Appeals affirmed the decision of the trial court.[191] The court noted that Mr. Blaker's experts failed to state a definite opinion that Dr. Young failed to meet the appropriate standard of care and that the hypothetical stated in the two affidavits was based on speculation.[192] Therefore, it was not enough for the experts to opine that *if* Dr. Young failed to do something, it resulted in a breach of the standard of care.[193]

CONCLUSION

Indiana's courts will continue to grapple with the provisions of the Act and how they apply to medical malpractice cases. In addition, although the Indiana General Assembly did not add to, amend, or repeal any section of the Act during the Survey Period, pressure to do so certainly comes from the plaintiff's bar. As two Marion County trial courts rendered verdicts in excess of $5 million[194] during the Survey Period in medical malpractice cases,[195] the General Assembly will continue to weigh arguments regarding the provisions of the Act and specifically, whether to increase the damage caps under the Act.

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189. *Id.*

190. *Id.* at 649.

191. *Id.*

192. *Id.* at 652.

193. *Id.*

194. The verdicts will be reduced to $1.25 million under the Act.

195. INDIANA CO-COUNSEL 4 (Sept. 2009); Jeff Swiatek, *Widower Might Challenge Malpractice Cap*, INDIANAPOLIS STAR, Sept. 5, 2009, at 1A.