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Indiana Court Provides Guidance on Breadth of Medical Malpractice Act

Today, we return to one of our more frequent topics for discussion on the Hoosier Litigation Blog: the Indiana Medical Malpractice Act. Many of our prior discussions have looked at the procedural process of bringing a medical malpractice case in Indiana. Such discussions have included the deadline for filing a medical malpractice case, whether a medical malpractice complaint can be filed with a third-party carrier, whether the Indiana Patient's Compensation Fund can contest liability after the healthcare provider admits liability, hospital liability for the actions of non-employee doctors, and the loss of chance doctrine in medical malpractice cases. This week's discussion is very different. The other discussions all began with the presumption that the case was a "medical malpractice" case governed by the Medical Malpractice Act. This week we take a look at the Indiana Court of Appeals case from yesterday that examined the boundaries of what constitutes a case governed by the Medical Malpractice Act.

Regular readers of the HLB know that I try to avoid delving into the specific facts of cases whenever possible. This case – *B.R. v. State of Indiana* – is a case in which the facts are essential to understanding how the law works. Sadly, that means going into rather tragic facts.

> B.R. was three years old when [the Department of Child Services] removed him from his home and placed him in therapeutic foster care. B.R. was referred to the [Adult and Child Mental Health Center, Inc.] for a mental health assessment. He was diagnosed with neglect of a child and disruptive behavior disorder. B.R. was also significantly developmentally delayed.
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> For all of these reasons, B.R. was placed with therapeutic foster parents Michelle Foster and Darrell Riley. A Health Center employee supervised this placement and served as B.R.'s case manager. Because therapeutic foster care can be quite stressful, respite care is made available from time to time, and Michelle Foster requested respite care for the weekend of September 21 to 23, 2007. B.R.'s case manager arranged for him to be placed in respite care with therapeutic foster parents Mark and Penny Hughes.
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> On September 22, 2007, B.R. ran from the Hugheses' residence onto an adjacent property where a swimming pool was located. B.R. entered the pool, and he was later found floating facedown and non-responsive. B.R. suffered catastrophic brain damage as a result of this near drowning.

B.R.'s biological parents, ultimately through the child's guardian, filed suit on his behalf against, among other defendants, the Health Center for negligently placing him with the Hugheses. The case alleged:

> that the Health Center breached its duty to B.R. by (1) providing inadequate supervision and monitoring of B.R. while he was placed in therapeutic foster care; (2) failing to adequately supervise B.R.'s foster parents; (3) failing to provide for adequate supervision of B.R. by his foster parents; (4) failing to properly place B.R. given his special needs and disabilities; (5) failing to adequately inspect the Hugheses' home and surrounding area; (6) failing to adequately inspect the Hugheses' property before placing B.R. in the home; (7) failing to adequately inspect the surrounding area and neighborhood of the Hugheses' home to ensure B.R.'s safety; (8) failing to inform the Hugheses that B.R. needed to be watched at all times for his own protection and safety; (9) failing to warn the Hugheses that B.R. had a tendency to runaway; and (10) failing to take appropriate precautions to protect B.R. given his special needs and characteristics.

The Health Center filed a Rule 12(B)(1) motion to dismiss for lack of subject matter

jurisdiction – meaning that it is not the kind of case that the trial court was permitted to decide – arguing that the case was one of medical malpractice and thus had to be handled under the Medical Malpractice Act, which requires filing of the case with the Indiana Department of Insurance and a determination by the medical review panel. The trial court agreed and dismissed the case. The child's guardian appealed.

In deciding whether this case was a medical malpractice case, the court started with the guiding "principle that the statutory procedures for bringing a medical malpractice action are in derogation of common law, and as such, they are to be strictly construed against limiting a claimant's right to bring suit." Put simply, because the rules of law prior to the Medical Malpractice Act allowed for medical malpractice cases to be filed like normal cases and the Act functions to constrict the prior right to sue, the Act is to be interpreted narrowly so as not to curtail the rights of more people than it was intended to.

The Medical Malpractice Act applies "to a patient . . . who has a claim 'for bodily injury or death on account of malpractice.'" The Act defines "malpractice" as "a tort or breach of contract based on health care or professional services that were provided . . . by a health care provider, to a patient." It further defines a patient to be "an individual who receives . . . health care from a health care provider[.]" And for one last definition: the Act defines "health care" as "an act or treatment performed or furnished . . . by a health care provider for . . . a patient during the patient's medical care, treatment, or confinement." There was no dispute about whether the Health Center constituted a "health care provider:" it did. Thus, the question of whether the Act controlled the case boiled down to "was the Health Center providing health care to B.R. when it placed him with the Hugheses?"

In answering the question, the court recognized that, "[i]mportantly, the Medical Malpractice Act 'pertains to curative or salutary conduct of a health care provider acting within his or her professional capacity.'" As a result, the Act was designed so as to not apply to conduct unrelated to "the promotion of a patient's health or the provider's exercise of professional expertise, skill, or judgment." Thus, the court reasoned, the fact that a person is a patient of a health care provider does not settle the issue of whether the Medical Malpractice Act applies. The true test is "whether the claim is based on the [health care] provider's behavior or practices while 'acting in his professional capacity as a provider of medical services.'" That is, a case is not subject to the Medical Malpractice Act when a jury can decide the issues "without application of the standard of care prevalent in the local medical community." The "standard of care prevalent . . ." language just means the routine or typical practices of doctors in the community. Put more simply, what would a doctor not committing malpractice do in that situation?

B.R.'s guardian argued that this case did not require looking to the prevalent medical standard of care. The issue stems from the negligence of the Health Center placing the child with unfit foster parents. There was no physician, psychologist, or other health care professional input on that decision. The court looked to a previous case holding that cosmetic laser hair removal, though conducted by a nurse, was not "health care" because "physicians were not involved in [the] treatment, and the operator of the laser machine was not required to be a healthcare worker or possess healthcare credentials[.]" Applying that case to B.R.'s case, the court reasoned that it was not "health care" because no health care professional was required to participate and, in fact, none did so participate.

As a result of the court's decision, barring review by the Indiana Supreme Court, B.R.'s case will have its day in court. More importantly to future cases, the decision stands as a guidepost for determining when a case can bypass the expensive and taxing procedures of the Medical Malpractice Act along with its cap on recovery. Hopefully, as a result, B.R. will be provided with the opportunity to seek damages to help provide the care he needs.

Join us again next time for further discussion of developments in the law.

Sources

- *B.R. v. State of Indiana*, --- N.E.2d ---, No. 55A05-1212-CT-639 (Ind. Ct. App. Nov. 21, 2013).
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