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Indiana Supreme Court Weighs In on Medical Malpractice Filing Deadline

Yesterday the Indiana Supreme Court handed down a concise but extremely informative decision in the realm of medical malpractice law. In keeping with what has become a very distinct pattern in cases involving statutory interpretation, the opinion was authored by Justice Mark S. Massa. In the decision – *Miller v. Dobbs* – the state's highest court determined that the filing of a medical malpractice claim was not untimely despite the fact that the $7 filing fee was not paid in full until after the statute of limitations had expired.

For those new to the Hoosier Litigation Blog, this is not our first look at the *Miller v. Dobbs* case. Just under a year ago, we discussed the Court of Appeals decision in a post entitled *New Decision Provides No Clear Answer to Complex Medical Malpractice Issue*. The Court of Appeals decision was as split as can occur. Two judges agreed that the case should go back to the trial court and the injured patient could proceed with her malpractice case. A third judge disagreed with the result entirely. Even the two judges agreeing in the result disagreed over the reasoning for reinstating the case. As this post is dedicated to the Supreme Court's decision, we shall not dwell any longer on the Court of Appeals decision as we have

already discussed it in great detail in the prior post.

As I had predicted in the prior post, the case ended up before the Indiana Supreme Court. The unanimous decision was authored by Justice Massa. I have written extensively on this blog about Justice Massa and his decisions. With this opinion now the fifth that we have discussed here on the Hoosier Litigation Blog, I think it is safe to say that much of my previous opinions and prognostications are panning out. Before I get caught up in discussing how this case provides further insight into the current iteration of the Indiana Supreme Court, we must discuss the decision.

As brief background, in Indiana, medical malpractice cases are a unique creature that comes with a host of additional procedural hoops that must be passed through prior to proceeding as a normal case. The most notable is that in order to bring a medical malpractice case the plaintiff must file the case with the Indiana Department of Insurance (DOI). Though the medical malpractice act does not include a statute of limitations, since filing with the DOI is a prerequisite to filing the case in a court of law – meaning it must be filed in the same period as the claims general statute of limitations.

We previously summarized the specific facts of the case. As I am not of mind to reinvent my own wheel, the previous summation was:

> In this case, the plaintiffs delivered a copy of their proposed complaint with the [DOI] in a timely manner. However, the plaintiffs' counsel made a slight error and forgot to deliver the check for $7 as a filing and processing fee. The Department promptly notified plaintiffs' counsel of the oversight who then proceeded to mail the check out. The problem arises because the day that plaintiffs' counsel was informed of the error was the same day that the statute of limitations was set to expire. Moreover, the check did not arrive until three days later. Thus, we have a situation in which the paperwork was properly filed in time but the check had not been paid in time. The resulting issue for the court to decide was whether the delay in receiving the check meant that the proposed complaint was not "filed" in time.

It only took one lengthy paragraph for the Court to resolve the key issue of the case. First looking to the overall structure of the Medical Malpractice Act, the Court recognized that the filing and processing fee portion is located in a different section of the Act than the filing of the complaint. Further, the language of the fees section notes that it is to "accompany each proposed complaint filed[.]" The Court interpreted this language to suggest that the "filed" complaint is separate and

distinct from the filing and processing fee. Second, the Court looked to the long-standing public policy in Indiana that cases be decided on the "merits rather than disposing of them via procedural technicalities." Accordingly, the Indiana Supreme Court has previously found that procedural rules such as appellate filing fees "exist to facilitate the orderly presentation and disposition of [cases.]" Though this discussion was couched in a history of dealing with appellate rules, the Court saw fit to implicitly expand that concept into the trial realm.

It stands as an important note that in contrast to the filing of the medical malpractice complaint with the DOI, the filing of any complaint with an Indiana court of law – including the medical malpractice complaint – must be accompanied by the filing fee to be deemed filed. This is governed by Indiana Trial Rule 3, entitled Commencement of an action, which states:

> A civil action is commenced by filing with the court a complaint or such equivalent pleading or document as may be specified by statute, by payment of the prescribed filing fee or filing an order waiving the filing fee, and, where service of process is required, by furnishing to the clerk as many copies of the complaint and summons as are necessary.

Importantly, the rule very specifically identifies that payment of the fees is a mandatory requirement to commencement of the action. The Court's interpretation of the Medical Malpractice Act recognized that the separation between the section governing fees and the section entitled, similarly to Trial Rule 3, Commencement of action; complaint.

Consequently, the Court held that Mrs. Miller could have her day in court.

Let us now return to what insight we can gain about the Indiana Supreme Court after this decision. This is now the fifth unanimous opinion penned by Justice Massa that has made its way onto our little blog. This is also the fifth that deals specifically with a matter of statutory interpretation. Indeed, it is the second interpreting the Medical Malpractice Act. Of those five decisions, four have ultimately gone in favor of the plaintiff(s). Only one went the way of the other party. I say the other party not out of some Michigan-Ohio State sense of saying "the team up north," but because the other party was a third-party – the State of Indiana – that was permitted to intervene in the case after a jury verdict so as to protect its interest in a portion of a punitive damages award.

Three of Justice Massa's opinions have read as founded upon a highly textualist approach to statutory interpretation. Those opinions were *Robertson v.*

B.O., *State v. Doe*, and *City of Indianapolis v. Buschman*. The fourth, *Walczak v. Labor Works*, was a minor departure from textualism and, due to a lack of clarity in the statutory language, required a foray into legislative intent. The *Miller v. Dobbs* case is different for one major reason.

Like the three textualist decisions, the specific text of the statute was enough for the Court to decide the case. Despite that reality, the Court still introduced the concept of public policy. Make no mistake about it; there is nothing more intrinsically antithetical to textualism than resorting to public policy. Nevertheless, the opinion is dedicated in equal parts to the text as well as the public policy.

I think what can be taken from this case is the following: (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. To this third point, Justice Massa has twice now expressed an almost folksy common sense in footnotes to cases. In *Walczak v. Labor Works*, he utilized the "Duck Test." He stated:

> James Whitcomb Riley (1849–1916), our celebrated "Hoosier Poet," is widely credited with the origination of the Duck Test; as he expressed it, "[w]hen I see a bird that walks like a duck and swims like a duck and quacks like a duck, I call that bird a duck."[1]
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> [Footnote 1] Michael Heim, EXPLORING INDIANA HIGHWAYS: TRIP TRIVIA 68 (2007). Others attribute the Duck Test to labor leader and noted anti-Communist James B. Carey. See THE YALE BOOK OF QUOTATIONS 131 (Fred R. Shapiro, ed., 2006) (quoting Carey as saying, in the September 3, 1948 New York Times, "A door-opener for the Communist party is worse than a member of the Communist party. When someone walks like a duck, swims like a duck, and quacks like a duck, he's a duck.").
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> All questions of origination aside, the Duck Test is a classic example of Hoosier pragmatism, and it enjoys wide judicial acceptance. See, e.g., Lake v. Neal, 585 F.3d 1059, 1059 (7th Cir. 2009) ("Joseph Lake, the plaintiff in this suit, flunks the Duck Test. He says, in effect, that if it walks like a duck, swims like a duck, and quacks like a duck, it sure as heck isn't a duck." (emphasis in original)).

Quite notably, he referred to the Duck Test as "a classic example of Hoosier pragmatism[.]" That pragmatism was on display in *Miller v. Dobbs*. In a footnote, Justice Massa noted:

> This case brings to mind Poor Richard's well-known admonition: "For want of a Nail the Shoe was lost; for want of a Shoe the Horse was lost; and for want of a Horse the Rider was lost, being overtaken and slain by the Enemy, all for want of Care about a Horse-shoe Nail." Benjamin Franklin, Poor Richard's Almanac (U.S. Gov't Printing Office, facsimile ed. 2006) (1758).

Aside from revealing that Justice Massa is seemingly well read, it shows a reverence for not losing sight of the forest through the trees.

An interesting result of the *Miller v. Dobbs* case is that it now calls for me to reevaluate the future of another case that we have previously discussed – *Moryl v. Ransone*. In that case the Court of Appeals upheld the dismissal of a case as untimely where the filings were sent via a third-party carrier. In trial courts and appellate courts, using a third-party carrier can make it so that a filing, though actually delivered later, is calculated to have been made at an earlier date. However, the Medical Malpractice Act, though listing that filing by registered or certified mail, is silent on third-party carriers. Consequently, due to this silence, the Court of Appeals and trial court held that the case was untimely filed. The case is awaiting a determination on petition for rehearing as I write this piece.

I am all but certain that rehearing will be denied and that transfer to the Supreme Court will be sought. What I have been uncertain about is whether the Court would grant transfer and even then how the Court would rule. The textualist approach would affirm the Court of Appeals' decision and bar the claim. However, as I noted, there are more broad interpretation approaches that can be utilized by the Supreme Court to exercise public policy in favor of letting the case proceed. Prior to *Miller v. Dobbs* I was very dubious about whether the Court would even grant transfer. Now I would say that the odds of granting transfer is around 55-60% and the odds of finding for the plaintiff to be an even 50-50 split.

My change in opinion stems from two portions of the *Miller v. Dobbs* opinion. The most obvious is the discussion of public policy in relation to a statute of limitations issue in the Medical Malpractice Act. For that reason alone I sincerely hope that Mrs. Moryl's counsel opts to follow the advice of United States Supreme Court Justice Antonin Scalia and noted author Brian Garner from their book *Making Your Case: The Art of Persuading Judges*, and send a letter of significant

authority to the Court of Appeals apprising the court of the *Miller v. Dobbs* decision pursuant to Indiana Appellate Rule 48.

The less obvious point is from the fourth and final footnote of the case. In it, the Court states:

> We note that prudent counsel will avoid this issue entirely by complying scrupulously with all procedural rules and requirements. As Poor Richard put it, "he adviseth to Circumspection and Care, even in the smallest Matters, because sometimes a little Neglect may breed Great Mischief." Franklin, supra note 1.

This note inspires confidence due to the discretionary nature of most cases that are decided by Indiana's Supreme Court. The Court, in cases such as this, must grant the right to even argue the case to them. Thus, it is a rarity that cases with very limited application are heard by the Court. There can be no question that the *Moryl v. Ransone* decision is not one to be widely applicable. Nevertheless, the dictates of justice encourage the Court to review the matter even if Mrs. Moryl is the only person to benefit. The fact that the Court seemed to recognize that *Miller v. Dobbs* was as well a matter of limited application and yet granted review is an encouraging sign that Mrs. Moryl's case has not yet hit the end of the line.

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

Sources

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- *Robertson v. B.O.*, 977 N.E.2d 341(Ind. 2012).
- *State v. Doe*, 987 N.E.2d 1066 (Ind. 2013).
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- *Walczak v. Labor Works*, 983 N.E.2d 1146 (Ind. 2013).

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

- Ind. Trial Rule 3. Commencement of an action.

- Ind. Appellate Rule 48.

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