FOR PUBLICATION

ATTORNEYS FOR APPELLANT:

GEORGE M. PLEWS
TONYA J. BOND
Plews Shadley Racher & Braun, LLP
Indianapolis, Indiana

LARA D. ENGELKING
Engelking Law Group, LLC
Carmel, Indiana

ATTORNEYS FOR APPELLEE:

JILL M. BRACKEN-EMERSON
KATHY A. LEE
Cline, Farrell, Christie, Lee & Caress, P.C.
Indianapolis, Indiana

ATTORNEY FOR AMICI CURIAE:
Indiana Trial Lawyers Association:

DANIEL L. ROBINSON
GEORGE CLYDE GRAY
Gray Robinson Ryan & Fox
Indianapolis, Indiana

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IN THE
COURT OF APPEALS OF INDIANA

DOE CORPORATION, an Anonymous Health Care Provider,	)	
Appellant-Petitioner,	)	
vs.	)	No. 49A05-1007-MI-408
LOLITA C. HONORE Special Administratrix of the Estate of ANDREA HONORE, Deceased,	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patrick L. McCarty, Judge
Cause No. 49D03-0907-MI-34432

July 8, 2011

OPINION ON REHEARING - FOR PUBLICATION

FRIEDLANDER, Judge

In a published opinion, we reversed the trial court's order granting a motion to dismiss on jurisdictional grounds Doe Corporation's motion seeking a preliminary determination of law (PDL) regarding the validity of an opinion of the medical review panel (MRP), and remanded the matter to the trial court. Lolita Honoré, as special administratrix of the estate of Andrea Honoré (collectively the Estate) has filed a petition for rehearing requesting that we reconsider our decision. The Indiana Trial Lawyers Association (ITLA) has filed a motion seeking permission to appear as amicus curiae on the petition for rehearing in this case. We grant ITLA's motion to appear on the petition for rehearing. Likewise, we grant the Estate's petition for rehearing for the limited purpose of clarifying our opinion vis-á-vis the role of the Rules of Evidence in the Medical Review Panel process. We write to alleviate any confusion that may have been caused by imprecise language in the original opinion.

"One of the principal legislative purposes behind the Medical Malpractice Act in general . . . was to foster prompt litigation of medical malpractice claims." *Ellenwine v. Fairley*, 846 N.E.2d 657, 665 (Ind. 2006). The intention was for MRPs to function in an informal manner in rendering an expert medical opinion. *Griffith v. Jones*, 602 N.E.2d 107 (Ind. 1992). A trial court's jurisdiction to intervene in the workings of an MRP is limited to the determination of affirmative defenses or issues of law or fact that may be preliminarily determined under our Trial Rules, or to compel discovery. *Id*. "[T]rial courts . . . do not have jurisdiction to instruct the medical review panel concerning definitions of terms and phrases used in the Medical Malpractice Act, the evidence that it

may consider in reaching its opinion, or the form or substance of its opinion." *Griffith v. Jones*, 602 N.E.2d at 111.

A trial court may be involved in setting the composition of a panel, but may not dictate the content of the panel's opinion. *Hoskins v. Sharp*, 629 N.E.2d 1271 (Ind. Ct. App. 1994). All health care providers in Indiana who hold a license to practice in their profession are available for selection as a member of an MRP. Ind. Code Ann. § 34-18-10-5 (West, Westlaw current through Pub. Laws approved & effective through 6/28/2011). Registered or licensed practical nurses are included within the statutory definition of health care providers under the MMA. I.C. § 34-18-2-14 (West, Westlaw current through Pub. Laws approved & effective through 6/28/2011). To be clear, no case has limited a nurse's right to opine on the issue of causation as an MRP member. Rather, the limitation has been placed upon the nurse's ability to testify at the summary judgment stage or at trial. *Nasser v. St. Vincent Hosp. & Health Servs.*, 926 N.E.2d 43 (Ind. Ct. App. 2010). That limitation on the nurse's *testimony* regarding causation comes from Evidence Rule 702 because of the "significant difference in the education, training, and authority to diagnose and treat diseases between physicians and nurses." *Id*. (emphasis supplied). "[T]he determination of the medical cause of injuries for purposes of offering expert testimony is beyond the scope of nurses' professional expertise." *Id*.

Here we were presented with the situation where the parties agreed that the nurse panel member would not be allowed to opine on causation in the written panel opinion. In fact, the attorney for Doe Corporation expressly asked the MRP Chair to state his position regarding whether he was going to honor the agreement of the parties with

respect to the nurse's part in the written panel opinion. Otherwise, counsel for Doe Corporation would have sought a PDL from the trial court on the issue. The MRP Chair represented that only the physician panelists would be allowed to render opinions regarding causation in the written panel opinion, thus expressing an intention to honor the agreement. On the basis of that representation, Doe Corporation declined to seek a PDL.

Much to Doe Corporation's surprise, when the written panel opinion was issued, and after the time period for seeking a PDL had elapsed, the written panel opinion contained the nurse's opinion on causation. Aside from the merits of the MRP Chair's decision on purely legal grounds, the MRP Chair reneged on the agreement upon which Doe Corporation relied. Absent statutory authority for judicial enforcement of such agreements, there are nonetheless due process concerns that may warrant a sanction under I.C. § 34-18-10-23 (West, Westlaw current through Pub. Laws approved and effective through 6/28/2011) for the MRP Chair's failure to abide by the agreement. We believe that the trial court should be afforded the opportunity to consider the issue of whether a sanction is warranted here for the MRP Chair's failure to abide by the parties' agreement and remand for a determination of that issue.

The parties entered into the agreement due to concerns about the admissibility of the nurse's opinion on causation in the context of future litigation in this matter. I.C. § 34-18-10-23 (West, Westlaw current through Pub. Laws approved and effective through 6?28/2011) provides that the written report of the MRP is admissible as evidence in any action brought by the claimant, but is not conclusive evidence for either party. Should a nurse give an opinion on causation in the written panel opinion, the appropriate remedy,

on motion of a party, would be for the trial court to strike that opinion from the written panel report, when a party seeks to introduce the report in evidence at summary judgment or at trial. *Nasser v. St. Vincent Hosp. & Health Servs.*, 926 N.E.2d 43.

Our statement in the original opinion that "the MRP Chair failed to carry out his statutory duties and should have been sanctioned" for "allowing the nurse to opine on causation" suggests a conclusion that was unintended. *Doe Corp. v. Honore*, 2011 WL 15855328 *5 (Ind. Ct. App. April 27, 2011). We intended to express that it appears to us that the MRP Chair failed to carry out his statutory duties by declining to honor the agreement of the parties relating to a limitation on the content of the written panel opinion, an agreement he represented to them would further be honored by the MRP. The trial court, in that situation should be allowed to determine if a sanction is warranted for the MRP Chair's failure to abide by the agreement after representing to Doe Corporation that he would do so, in turn causing Doe Corporation to forego seeking a PDL. The portion of our statement for "allowing the nurse to opine on causation" should have been further qualified by the phrase "in contravention of the parties' agreement and the MRP Chair's representations to them in that regard."

We affirm our opinion in all other respects.

BAILEY, J., and BROWN, J., concur.