Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

FILED
Oct 26 2009, 8:15 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEY FOR APPELLANT:

I. PETER POLANSKY
Polansky, Cichon & Batey, Chtd.
Chicago, Illinois

ATTORNEYS FOR APPELLEES
IBRAHIM S. ZABANEH, M.D.,
& ZABANEH MEDICAL CORP.:

GREGORY A. CRISMAN
CARLY A. BRANDENBURG
Eichhorn & Eichhorn, LLP
Hammond, Indiana

IN THE
COURT OF APPEALS OF INDIANA

KIMBERLY MOSLEY, as Personal Representative of the Estate of Betty Boyd, Deceased,	)	
Appellant-Respondent/Plaintiff,	)	
vs.	)	No. 45A05-0904-CV-190
IBRAHIM S. ZABANEH, M.D. and ZABANEH MEDICAL CORPORATION,	)	
Appellees-Petitioners/Defendants,	)	
and	)	
G. ANTHONY BERTIG, in his capacity as Panel Chairman, and JAMES ATTERHOLT, Commissioner, Indiana Department of Insurance,	)	
Appellees/Third-Party Respondents.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable William E. Davis, Judge
Cause No. 45D05-0808-MI-25

October 26, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Kimberly Mosley, as Personal Representative of the Estate of her mother, Betty Boyd, appeals the trial court's dismissal of her proposed complaint against Ibrahim S. Zabaneh, M.D., and Zabaneh Medical Corporation. Nearly nine months after her medical review panel submission was due, Dr. Zabaneh and his medical corporation filed a motion to dismiss the proposed complaint pursuant to Indiana Code section 34-18-10-14, which the trial court granted. Because the evidence shows that Mosley failed to comply with the schedule for submission of evidence as established by the chairman of the medical review panel and good cause has not been shown for her failure to do so, we conclude that the trial court did not abuse its discretion by dismissing Mosley's proposed complaint. We therefore affirm the trial court.

Facts and Procedural History

On September 22, 2006, Boyd, represented primarily by Chicago, Illinois, attorney Ruth Batey ("plaintiff's counsel"), filed a proposed complaint for medical malpractice with the Indiana Department of Insurance against Dr. Zabaneh, an obstetrician/gynecologist, and Zabaneh Medical Corporation (collectively, "Dr. Zabaneh") asserting Dr. Zabaneh's failure to timely diagnose and treat Boyd's breast cancer. Dr. Zabaneh was represented by attorneys in the Hammond, Indiana, law firm of Eichhorn & Eichhorn, LLP ("defense counsel"). Boyd passed away from her breast

cancer on April 10, 2007. Thereafter, Boyd's daughter, Mosley, was appointed personal representative of her mother's estate and was substituted as plaintiff in this case. An amended complaint was filed on June 1, 2007, alleging two counts: wrongful death and a survival action. On September 11, 2007, plaintiff's counsel propounded interrogatories and requests for production on Dr. Zabaneh.

On September 17, 2007, medical review panel chairman G. Anthony Bertig sent a letter to plaintiff's counsel and defense counsel informing them that the medical review panel had been formed with the last member being selected on September 17, 2007.[1] The letter also informed the parties that the panel had been certified to the Department of Insurance and set forth the following submission dates:

Plaintiff's submissions:	November 20, 2007
Defendant's submissions:	January 20, 2008
Plaintiff's rebuttal:	February 4, 2008

Appellant's App. p. 150.

On February 12, 2008, defense counsel wrote plaintiff's counsel and inquired about the status of Mosley's nearly three-month overdue panel submission. A telephone conversation between the attorneys ensued. During this phone conversation, plaintiff's counsel requested to take Dr. Zabaneh's deposition. She also asked if she could wait to tender her panel submission until after Dr. Zabaneh's deposition.[2] Although unclear, an

[1] With some exceptions not relevant here, this date is important because "[t]he panel shall give its expert opinion within one hundred eighty (180) days after the selection of the last member of the initial panel." Ind. Code § 34-18-10-13(a). One hundred and eighty days from September 17, 2007, was March 15, 2008. According to subsection (b), "If the panel has not given an opinion within the time allowed under subsection (a), the panel shall submit a report to the commissioner, stating the reasons for the delay."

[2] As support that this phone conversation occurred, both parties point to an intra-office email at Eichhorn & Eichhorn dated February 15, 2008. *See* Appellant's App. p. 27 ("I received a call from Ruth

additional telephone conversation occurred during which specific dates for the deposition were discussed. *See id.* at 229 (plaintiff's counsel's affidavit averring that a telephone conversation occurred on February 25, 2008, during which she requested specific dates for Dr. Zabaneh's deposition), 26 (intra-office email at Eichhorn & Eichhorn dated March 12, 2008: "Have you heard anything from Ruth Batey re: Dr. Zabaneh's dep? I know that we provided dates and were waiting to hear back from her. Please try her again and see if we can get this scheduled soon. . . . I'm assuming we'll be looking at dates in April and beyond."). In any event, a deposition was *not* scheduled for Dr. Zabaneh despite the fact that Mosley's submission was at this point four months late.

On June 11, 2008, Chairman Bertig's assistant sent an email to plaintiff's counsel at rabateypcblaw@sbcglobal.net and copied defense counsel requesting that plaintiff's counsel "please advise" as to the status of her then nearly seven-month overdue panel submission. *Id.* at 28. Defense counsel—but not plaintiff's counsel—replied that plaintiff's counsel had requested an extension of time from them to depose Dr. Zabaneh but that the deposition had not yet taken place. Defense counsel said that they would pursue scheduling with plaintiff's counsel. As such, on June 27, 2008, defense counsel emailed plaintiff's counsel at rabateypcblaw@sbcglobal.net about scheduling the deposition and inquired about available dates.

On July 21, 2008, defense counsel sent plaintiff's counsel—by email and by letter—a request that she tender her panel submission within fourteen days, or by August 5, 2008. *Id.* at 31. The email was sent to rabateypcblaw@sbcglobal.net, and the letter

---

Batey a little while ago. She received your [February 12, 2008] letter inquiring into the status of her submission. She said she wants Dr. Zabaneh's deposition first and that she had told that to Greg. She wants you to call her on Monday. Her number is . . . .").

was sent by certified mail to plaintiff's counsel's law firm on West Wacker Drive in Chicago.

On August 4, 2008, which happened to be the day before the deadline set forth by defense counsel in the letter, plaintiff's counsel called defense counsel to try to schedule Dr. Zabaneh's deposition. Plaintiff's counsel was told that they would have to get back to her.

On August 14, 2008, Dr. Zabaneh filed in Lake Superior Court a Petition for Preliminary Determination: Motion to Dismiss for Failure to Prosecute. Dr. Zabaneh argued that pursuant to Indiana Code sections 34-18-10-13 and 14 and Indiana Trial Rule 41, Mosley's proposed complaint should be dismissed for failure to prosecute and for failure to tender plaintiff's panel submission within the 180-day statutory panel opinion deadline, which had expired in March 2008. *See supra* note 1. In support of his motion to dismiss, Dr. Zabaneh attached several exhibits, including the February 12, 2008, letter sent to plaintiff's counsel, intra-office emails at Eichhorn & Eichhorn, various emails sent to plaintiff's counsel, and the July 21, 2008, letter sent to plaintiff's counsel's on West Wacker Drive.

On August 25, 2008, Dr. Zabaneh served his interrogatories and production requests on Mosley. This was almost one year after they had been propounded on him.

After four extensions of time, Mosley filed her response to Dr. Zabaneh's motion to dismiss on December 12, 2008. In her response, Mosley included an affidavit from plaintiff's counsel averring the following:

> 6. That during the Spring of 2008, my mother was diagnosed with breast cancer and commenced treatment for the same. That in June of 2008, I sold

> my Illinois residence and relocated to Indiana to aid in my mother's medical care and treatment.
> 7. That in June of 2008, [my law firm] relocated to a new office from 77 West Wacker Drive to 180 N. Stetson Avenue in Chicago, Illinois.
> 8. The first time that I saw any of the e-mails attached in support of [Dr. Zabaneh's] pending motion to dismiss was upon receipt of said motion.
> 9. That [my law firm] only accepts service by mail.
> 10. That it is not my usual custom and practice to use . . . the following e-mail address:
> rabateypcblaw@sbcglobal.net.
> 11. That I have never communicated with counsel in [this] matter via e-mail and thus never anticipated use of the same. In fact, all my correspondence with said counsel had been only via the following media: phone or via fax or letter.
> 12. That in late winter/early spring of 2008, [my law firm] switched e-mail servers from sbcglobal to network solutions, and we obtained new e-mail addresses as a result of the same.
> 13. That I never received the 7/21/08 letter . . . .
> 14. That prior to December 2008, I do not recall ever having been provided with dates for the deposition of Dr. Zabaneh. . . .

Appellant's App. p. 230. On January 13, 2009, the trial court, without issuing any findings, granted Dr. Zabaneh's motion to dismiss pursuant to Indiana Code section 34-18-10-14 with prejudice.

Thereafter, Mosley filed a motion to correct error, and a hearing was held. After taking the matter under advisement, on March 13, 2009, the trial court, again without issuing any findings, denied Mosley's motion to correct error. Mosley now appeals.

Discussion and Decision[3]

[3] On appeal, Dr. Zabaneh attempts to refute many of Boyd's arguments, but unfortunately Dr. Zabaneh provides no citations for the evidence. For example, he claims that defense counsel left several telephone messages for plaintiff's counsel between February and August 2008 that were never returned and that on one occasion, plaintiff's counsel's assistant called to say that plaintiff's counsel was aware of their many attempts to reach her. But in support, Dr. Zabaneh either cites nothing or cites paragraphs from his motion to dismiss, which, in turn, does not contain any citations to the record. This could have been remedied had defense counsel simply provided an affidavit averring what happened.

In addition, in responding to Mosley's argument that plaintiff's counsel never received the July 21, 2008, letter from defense counsel because the copy admitted into evidence is unsigned and not on law firm letterhead, Dr. Zabaneh explains that Eichhorn & Eichhorn's firm-wide practice is to maintain an

Mosley contends that the trial court erred in dismissing her proposed complaint pursuant to Indiana Code section 34-18-10-14. We review the dismissal of a proposed complaint under the Medical Malpractice Act for an abuse of discretion. *Adams v. Chavez*, 874 N.E.2d 1038, 1043 (Ind. Ct. App. 2007), *clarified on reh'g*, 877 N.E.2d 1246. An abuse of discretion exists where the trial court's decision is clearly against the logic and effect of the facts and circumstances before it or the reasonable, probable, and actual deductions to be drawn therefrom. *Id.*

Under the Medical Malpractice Act, there are three ways a trial court can grant relief before the medical review panel has issued its opinion, one of which is Indiana Code section 34-18-10-14. *See id.* at 1041. Indiana Code section 34-18-10-14 provides:

> A party, attorney, or panelist who fails to act as required by this chapter without good cause shown is subject to mandate or appropriate sanctions upon application to the court designated in the proposed complaint as having jurisdiction.

Thus, a trial court cannot grant relief under Section 34-18-10-14 unless two conditions have been met: (1) a party, attorney, or panelist has failed to act as required by Indiana

---

unsigned copy of all letters sent on plain paper. Again, however, defense counsel did not include such information in an affidavit.

In light of this, on July 15, 2009, Mosley filed a Motion to Strike Alleged Factual Statements Contained within Appellees' Brief. Although we find the above statements and a few others to be problematic, we find the vast majority of the challenged statements to be supported by the evidence. To the extent that Dr. Zabaneh's attorneys cite unsupported evidence in their brief, we did not rely on it when setting forth the facts in this case and otherwise do not rely on it on appeal. We hereby grant Appellant's motion to strike the following statements in the Appellees' Brief: (1) the following sentence on page five of Appellees' Brief: "However, Dr. Zabaneh is unaware of any alleged request Boyd claims to have made seeking overdue discovery"; (2) the following sentences on page five of Appellees' Brief starting with "Bo[yd] omitted from her Appellant's brief any mention of Dr. Zabaneh's numerous attempts, both successful and unsuccessful, to contact Boyd's counsel via telephone between February 15, and August 4, 2008" and ending with "Also, the assistant to Boyd's counsel telephoned Dr. Zabaneh's counsel on July 15, 2008, to convey that Boyd's counsel was aware of Dr. Zabaneh's past attempts to reach her"; and (3) the following sentence on page five of Appellees' Brief: "It is Eichhorn & Eichhorn, LLP's firm wide practice to maintain a correspondence board containing copies of all sent letters." We therefore grant in part and deny in part Mosley's July 15 motion.

Code chapter 34-18-10 and (2) good cause has not been shown for the failure to act. *Adams*, 874 N.E.2d at 1043. Several sections of Indiana Code chapter 34-18-10 require action, and the failure to take action under any of these sections may be grounds for relief, including dismissal, under Section 34-18-10-14. *Id.* For example, the parties must promptly submit their documentary evidence to the medical review panel, Ind. Code § 34-18-10-17(a), must participate in the selection of a panel chairman, *id.* § 34-18-10-4(1), and, "if the chairman establishes a schedule for submission of evidence under Indiana Code section 34-18-10-3(c), the parties must comply with that schedule, *Galindo v. Christensen*, 569 N.E.2d 702, 705 (Ind. Ct. App. 1991) ('Implicit in [Indiana Code section 34-18-10-3(c)] is the corresponding duty upon the parties to comply with the schedule, if one is set by the chair. . . .')." *Adams*, 874 N.E.2d at 1043.

Here, Dr. Zabaneh alleged that Mosley failed to act by failing to submit her evidence to the medical review panel pursuant to Indiana Code sections 34-18-10-3(c)[4] and 17(a).[5] As noted above, the failure to take action under these sections may be grounds for dismissal. The question is whether good cause has been shown for Mosley's failure to act. Chairman Bertig established that Mosley's submission was due on

---

[4] This section provides:

> The chairman of the medical review panel shall expedite the selection of the other panel members, convene the panel, and expedite the panel's review of the proposed complaint. *The chairman may establish a reasonable schedule for submission of evidence to the medical review panel* but must allow sufficient time for the parties to make full and adequate presentation of related facts and authorities.

Ind. Code § 34-18-10-3(c) (emphasis added).

[5] This section provides, "The evidence in written form to be considered by the medical review panel shall be *promptly submitted* by the respective parties." Ind. Code § 34-18-10-17(a) (emphasis added).

November 20, 2007. As the undisputed evidence shows, defense counsel contacted plaintiff's counsel by mail in February 2008, which was nearly three months after the deadline had passed, to inquire about Mosley's overdue panel submission. It was only at this point that plaintiff's counsel inquired about deposing Dr. Zabaneh and then submitting her panel submission—even though the deadline had already passed without her first seeking permission from Chairman Bertig for an extension. If defense counsel had not prodded things along at this point, it is uncertain how much additional time would have passed before plaintiff's counsel took any action in this case. In any event, although the record is murky regarding the phone conversation that ensued between the attorneys and what specific dates were discussed for Dr. Zabaneh's deposition, the record is clear that no deposition occurred and plaintiff's counsel did not contact defense counsel again until six months later in August 2008, nearly nine months after her panel submission was due and again without any communication to the panel chair for an extension of time.

This Court has stated on several occasions that "it is . . . well settled that a trial court is vested with the discretion to impose appropriate sanctions, including dismissal of a proposed complaint, when a party, without good cause shown, fails to act in a timely manner." *Rambo v. Begley*, 796 N.E.2d 314, 320 (Ind. Ct. App. 2003). More specifically, with regard to the parties' duty to comply with the chairman's submission schedule, we have held that, necessarily, the initial burden falls upon the party submitting the proposed complaint. *Id.* We aptly noted that "[i]t is not a defendant's duty to prosecute [a] plaintiff's case. In short, the burden rests upon the complainant to advance

his cause." *Id.* at 321 (quotation omitted). Therefore, we find that Mosley's arguments on appeal that plaintiff's counsel did not receive defense counsel's emails and letters because they were improperly addressed or it was not plaintiff's counsel's custom to check email do not hold much weight. Simply put, it was not Dr. Zabaneh's burden to contact Mosley in the first instance to encourage her to file her panel submission or to schedule Dr. Zabaneh's deposition. As such, plaintiff's counsel's alleged lack of receipt of these emails and letters is of no consequence. It was Mosley's burden to file her panel submission and to schedule Dr. Zabaneh's deposition, and *if* Dr. Zabaneh was not cooperating with Mosley's deposition request, then Mosley should have contacted the panel chair or sought assistance from the trial court. The record shows, however, that Mosley never even contacted Chairman Bertig to request a simple continuance. In fact, Mosley left him in the dark, requiring his assistant to check on things in June 2008, nearly seven months after Mosley's submission was due. This is not good cause.[6]

Mosley also argues that good cause exists because Dr. Zabaneh completed his discovery late. As for a party's failure to comply with discovery, we note that the other party "has at his [or her] disposal the ability to request, in a formal manner, discovery completion to counteract any contumacious conduct by a defendant." *Id.* Specifically, Indiana Code section 34-18-11-1 provides:

> (a) A court having jurisdiction over the subject matter and the parties to a proposed complaint filed with the commissioner under this article may,

[6] Although we sympathize with plaintiff's counsel because her mother was diagnosed with breast cancer in the "Spring of 2008," we note that this diagnosis came well after the November 2007 panel submission deadline had passed. In any event, we note that there were other attorneys in her law firm who could have taken over duties in this case, as can be seen from the hearing on Mosley's motion to correct error.

> upon the filing of a copy of the proposed complaint and a written motion under this chapter, do one (1) or both of the following:
>
> * * * * *
>
> (2) compel discovery in accordance with the Indiana Rules of Procedure.
>
> * * * * *
>
> (c) The court has jurisdiction to entertain a motion filed under this chapter only during that time after a proposed complaint is filed with the commissioner under this article but before the medical review panel gives the panel's written opinion under IC 34-18-10-22.

Although Mosley now alleges that she was prevented from turning in her panel submission by the November 20, 2008, deadline because Dr. Zabaneh did not complete his discovery until after filing his motion to dismiss, she did not follow the procedure set forth in Section 34-18-11-1. Although we do not condone Dr. Zabaneh's tardy completion of discovery, this does not establish good cause for Mosley's failure to act. *See Rambo*, 796 N.E.2d at 321-22. Because Mosley has failed to act as required by Indiana Code sections 34-18-10-3(c) and 17(a) and good cause has not been shown for her failure to act, the trial court did not abuse its discretion in dismissing Mosley's proposed complaint.

Affirmed.

BAILEY, J., and BRADFORD, J., concur.