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**IN THE
COURT OF APPEALS OF INDIANA**

INDIANA PATIENT'S)
COMPENSATION FUND,)

Appellant-Plaintiff,)

vs.)

THOMAS W. BREWER and)
PAMELA S. BREWER, Individually)
and as Co-Guardians of CHASE)
MCKINSEY BREWER, a Minor,)

Appellees-Defendants.)

No. 10A01-0610-CV-425

APPEAL FROM THE CLARK CIRCUIT COURT
The Honorable Daniel F. Donahue, Judge
Cause No. 10C01-0501-CT-27

November 7, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Thomas and Pamela Brewer, individually and on behalf of their son, Chase Brewer, initiated medical malpractice proceedings stemming from Chase's birth against Daniel Edward Catalano, M.D., and Clark Memorial Hospital (the "Hospital"). Ultimately, the Brewers settled the medical malpractice claim with the Hospital for the statutory maximum of \$100,000. The Brewers then sought payment of excess damages from the Indiana Patient's Compensation Fund (the "Fund"). The Fund paid the statutory maximum of \$650,000 for Chase's injuries, but disputed whether Thomas and Pamela were entitled to separate excess damage awards for their alleged emotional distress injuries. Following a bench trial, the trial court concluded that Thomas and Pamela suffered distinct injuries as a result of the alleged malpractice and, therefore, were entitled to two additional excess damage awards in the amount of \$750,000 to Pamela and \$375,000 to Thomas. The Fund appeals, raising the following dispositive issue: whether Thomas and Pamela are entitled to separate excess damage awards for their emotional distress injuries. Concluding that Thomas and Pamela are not entitled to separate excess damage awards because Chase was the only actual victim of malpractice and any recovery to which Thomas and Pamela are entitled must be recovered as part of Chase's excess damage award, we reverse.

Facts and Procedural History¹

In the early morning hours of March 23, 1999, Pamela went into labor and the

¹ We note that in its Statement of Facts, the Fund explained some medical terminology by citing to Wikipedia, an online encyclopedia. See Appellant's Brief at 2 n.2, 4 n.3. It is acknowledged on Wikipedia's home page that it is an encyclopedia that "anyone can edit." http://en.wikipedia.org/wiki/Main_Page (last visited Oct. 17, 2007). Thus, we would caution against citing Wikipedia as a source in an appellate brief, especially when there are other, more demonstrably reliable sources also available online.

Brewers went to the Hospital for the delivery of their first child. When Pamela's labor had not progressed after several hours, she was given Pitocin to assist her labor. When her membranes ruptured, Dr. Catalano noted there was thick meconium² in her amniotic fluid. The Brewers were told this was not a problem as long as suction was used when the child was delivered. Pamela's labor again stalled, and plans for a Cesarean section were made. However, as Pamela was being readied for the surgery, the child descended and the Cesarean section was postponed in favor of allowing Pamela to push. At approximately 4:50 p.m., Chase was finally delivered. Pamela could not see the delivery and she did not see Chase after he was delivered. Thomas, however, was able to see Chase be delivered and noted that he was "blue and floppy." Tr. at 39. Chase's Apgar score³ was low, and he was immediately taken to a warmer where the doctors and nurses gathered around to work on him. Neither Thomas nor Pamela was able to see what was occurring, but because of the demeanor of the medical team, they knew something was wrong. Neither parent was able to hold Chase after his delivery.

Several hours after delivery, Chase was transferred to a children's hospital in Louisville, where he remained for twenty-seven days. Although Thomas had been able to see Chase through a glass window prior to his transfer, Pamela was not able to see him until

² "Meconium" is a "substance that builds up in the bowels of a growing fetus and is normally discharged shortly after birth." <http://www.webmd.com/baby/glossary-pregnancy-related-terms?page=2> (last visited Oct. 17, 2007). When meconium or meconium-stained amniotic fluid is "aspirated" or inhaled into the lungs of term, post-term, or small newborns, respiratory distress can occur. *Id.*

³ The Apgar score is "an index used to evaluate the condition of a newborn infant based on a rating of 0, 1, or 2 for each of five characteristics of color, heart rate, response to stimulation of the sole of the foot, muscle tone, and respiration with 10 being a perfect score." Merriam Webster Online Medical Dictionary, www.intelihealth.com (last visited Oct. 23, 2007).

she was discharged from the hospital and visited him the day after his birth in Louisville. Thomas and Pamela were not initially allowed to touch Chase because of concern that stimulation would cause seizures. Doctors informed Thomas and Pamela that Chase had aspirated a substantial amount of meconium prior to delivery, preventing adequate oxygenation to his brain. He suffers from moderate to severe cerebral palsy as a result.

In February of 2000, Thomas and Pamela filed with the Indiana Department of Insurance a proposed complaint for medical malpractice against the Hospital and Dr. Catalano. The claims against the Hospital were submitted to a Medical Review Panel, which unanimously concluded that the evidence did not support the conclusion that the Hospital failed to meet the applicable standard of care. Because Dr. Catalano is a non-qualified provider under the Medical Malpractice Act, the Brewers's claims against him proceeded directly to a jury trial. The jury rejected the Brewers's negligence claims and found in favor of Dr. Catalano.

After the Medical Review process was completed, the Brewers proceeded with their complaint against the Hospital. Despite the Medical Review Panel's conclusion that it was not negligent, the Hospital agreed to settle the matter with the Brewers for the statutory maximum of \$100,000.⁴ The Brewers then filed a petition for payment of excess damages from the Fund. The petition sought payment of three statutory maximum excess damage awards; one each to Chase, Thomas, and Pamela.⁵ The Fund paid the statutory maximum

⁴ The statutory damage limitation applicable to the Brewers's action provided: "A health care provider qualified under this [Act] is not liable for an amount in excess of one hundred thousand dollars (\$100,000) for an occurrence of malpractice." Ind. Code § 34-18-14-3(b). The amount was raised to \$250,000 effective July 1, 1999.

excess damage award of \$650,000 for Chase,⁶ but disputed Thomas's and Pamela's entitlement to damage awards. Thomas's and Pamela's claims proceeded to a bench trial, at the conclusion of which the trial court entered findings of fact and conclusions of law determining that Thomas and Pamela were each entitled to a separate excess damage award for emotional distress and awarding Thomas \$375,000 and Pamela \$750,000 from the Fund. The Fund now appeals.

Discussion and Decision

I. Standard of Review

Under Trial Rule 52, we “shall not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” Ind. Trial Rule 52(A). Findings of fact are clearly erroneous when the record lacks any reasonable inference from the evidence to support them, and the trial court's judgment is clearly erroneous if it is unsupported by the findings and the conclusions that rely upon those findings. Purcell v. S. Hills Invs., LLC, 847 N.E.2d 991, 996 (Ind. Ct. App. 2006). In determining whether the findings or judgment are clearly erroneous, we will not reweigh the evidence or determine the credibility of witnesses, but consider only the evidence that supports the judgment and the reasonable inferences to be drawn from that evidence. Hill v. Davis, 832 N.E.2d 544, 548 (Ind. Ct. App. 2005).

⁵ As the Fund points out, the Brewers's complaint referenced only Chase's injuries. Appellant's App. at 13. The first mention of injury to Thomas and Pamela is in the petition for payment of excess damages. Id. at 24.

⁶ The statutory maximum damage award applicable to this action is \$750,000 because Chase's injury occurred before July 1, 1999. Ind. Code § 34-18-14-3(a)(2). Because the Hospital had already paid \$100,000 in damages for Chase's injury, the maximum excess damage award to which Chase was entitled from the

We are dealing here with the interpretation of the medical malpractice statute. The interpretation of a statute is a question of law. City of Jasper v. Collignon, 789 N.E.2d 80, 95 (Ind. Ct. App. 2003), trans. denied. Although we defer substantially to findings of fact, we do not so defer to conclusions of law. Purcell, 847 N.E.2d at 996. We review questions of law under a *de novo* standard and owe no deference to a trial court's legal conclusions. State Auto Ins. Cos. v. Shannon, 769 N.E.2d 228, 231 (Ind. Ct. App. 2002), trans. denied.

II. Entitlement to Additional Caps

The Fund contends that even if Thomas and Pamela proved emotional distress injuries,⁷ “their emotional distress damage award must be included in the damages awarded as part of their child’s claim and subject to that statutory cap.” Brief of Appellant at 7. The Brewers counter that the plain language of the Medical Malpractice Act entitles them to recover separate caps for their direct emotional distress injuries.

This court has recently found in favor of the Fund on this issue. In Ind. Patient’s Comp. Fund v. Butcher, 863 N.E.2d 11 (Ind. Ct. App. 2007), we addressed whether the parents of a child who died within a few days of birth due to alleged malpractice were each entitled to recover under separate caps for the emotional distress attendant to their child’s death:

We hold that although Eric and Dorothy, individually and on behalf of Samuel, [their deceased newborn son,] have valid claims for which they may be entitled to recover, that recovery is limited to the statutorily-dictated cap for “the injury or death suffered by the actual victim of the malpractice.” Goleski v. Fritz,

Fund was \$650,000.

⁷ The Fund also raises as an issue whether the evidence supports a finding that Thomas and Pamela suffered emotional distress that is serious in nature, susceptible to medical diagnosis, and proven through medical evidence. See Appellant’s Brief at 9 (citing Ryan v. Brown, 827 N.E.2d 112, 124 (Ind. Ct. App. 2005)). Because of our resolution of the statutory issue, we need not address this evidentiary issue.

768 N.E.2d 889, 891 n.1 (Ind. 2002). Here, the actual victim of the malpractice is Samuel.

Id. at 16; cf. Ind. Patient's Comp. Fund v. Winkle, 863 N.E.2d 1, 9 (Ind. Ct. App. 2007), trans. denied (“In their negligent infliction of emotional distress claims, Lori and Darrin may recover all emotional damages that were suffered as a result of the miscarriage; however, those emotional damages must be recovered under the single statutory cap allotted to Lori.”).

Pursuant to the reasoning of Goleski:

[M]yriad potential claimants may bring a malpractice action, and any successful plaintiff may be awarded damages. However, the actual recovery for those damages must be limited to one statutory maximum for each actual victim of malpractice who suffers an injury or death.

Butcher, 863 N.E.2d at 19.

As in Butcher, where the only actual victim of the malpractice was the Butcher's deceased newborn son, the only actual victim of the Hospital's malpractice is Chase.⁸ As we noted in Winkle, although emotional distress is an independent tort, for purposes of recovery under the Medical Malpractice Act, it is considered a claim derivative of the actual victim's malpractice claim. 863 N.E.2d at 7-8. Thomas's and Pamela's emotional distress damages are therefore recoverable only under the one maximum statutory excess damage award allotted and paid to Chase. The trial court's separate awards to Thomas and Pamela are contrary to law and are, therefore, reversed.

Reversed.

VAIDIK, J., and BRADFORD, J., concur.

⁸ There is no allegation that Pamela was a victim of any malpractice during Chase's delivery. She

has alleged no additional injuries due to the care she received during labor and delivery.