Survey of Recent Developments in Medical Malpractice Law

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The Indiana Court of Appeals, the United States Court of Appeals for the Seventh Circuit and the Indiana Legislature addressed several medical malpractice issues during the survey period. The Indiana Court of Appeals found that a medical review panel has jurisdiction to determine whether a health care provider is "qualified" under the Indiana Medical Malpractice Act.[1] It also reaffirmed its strict foundational requirements for expert testimony.[2] In addition, the court issued an opinion which opens the door for a plaintiff's recovery for a lost chance at survival regardless of whether survival was probable.[3] The federal appellate court found that the federal district court lacked jurisdiction in the case of *Jones v. Griffith*,[4] a case that was discussed in last year's survey article and which touched on many medical malpractice issues. Finally, the Indiana Legislature increased the minimum amount recoverable for injuries under the Indiana Medical Malpractice Act from five hundred thousand dollars ($500,000.00) to seven hundred fifty thousand dollars ($750,000.00).[5]

I. STATE COURT DEVELOPMENTS

A. Jurisdiction of Medical Review Panel to Determine Questions of "Qualified Health Care Provider"

Indiana's Medical Malpractice Act[6] ("Act"), which applies to medical malpractice actions brought in Indiana courts,[7] requires that an action against a health care provider be presented to a medical review panel

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1. Guinn v. Light, 536 N.E.2d 534, 547 (Ind. Ct. App. 1989).
2. *See infra* notes 32-65 and accompanying text.
3. *See infra* notes 66-84 and accompanying text.
4. 870 F.2d 1363, 1369 (7th Cir. 1989), *rev'g* 688 F. Supp. 446 (N.D. Ind. 1988).
5. Limitations on Recovery, Pub. L. No. 189-1989, § 1 (amending IND. CODE § 16-9.5-2-2 (1988)).
6. IND. CODE. §§ 16-9.5-1-1 to -10-3 (1988).
7. IND. CODE. § 16-9.5-9-2 (1988). Federal law now preempts Indiana law concerning the procedural requirement of the medical review panel in "patient dumping" cases, discussed in Grubbs, *Health Law Update*, 23 IND. L. REV. 391 (1990).

before commencing that action in a state court.[8] The Act applies to health care providers who are "qualified" under the terms of the Act.[9] Filing the proposed complaint with the Indiana Insurance Commission tolls the statute of limitations, extending the time in which to file a complaint in state court until ninety (90) days after the claimant receives the opinion of the medical review panel.[10]

In *Guinn v. Light*,[11] the court addressed the issue of the authority of the medical review panel to decide the question of whether a particular health care provider is "qualified," where the authority would affect the tolling of the applicable statute of limitations. In *Guinn*, the plaintiff alleged that the defendants, two dentists, committed malpractice while treating her on August 10, 1982. She filed her proposed complaint, pursuant to the provisions of the Act,[12] on July 16, 1984. On July 19, 1984, she was informed in writing by the commissioner that the proposed defendants were not "qualified" under the Act. Nonetheless, the parties formed a medical review panel, selected a chairman for the panel, and the defendants served interrogatories. Almost nine (9) months later, on April 15, 1985, the chairman of the panel notified the parties that the medical review panel did not have jurisdiction over the action because the defendants were not "qualified" under the Act. The plaintiff filed her complaint in state court forty-four (44) days after the chairman's notice to the parties.

Once the complaint was filed in state court, the defendants moved for summary judgment, claiming that the plaintiff was barred from bringing the action against them because the statute of limitations[13] had run on August 10, 1984. The trial court agreed with the defendants and granted the summary judgment against the plaintiff. The trial court held that because the defendants were not qualified under the Act, the statute of limitations had expired during the time that the plaintiff's proposed complaint was pending before the medical review panel.

After the plaintiff's motion to correct errors was denied by the trial court, the plaintiff appealed to the Fourth District Court of Appeals.

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8. *Id.* § 16-9.5-9-2(a). The statute provides exceptions for cases where the parties enter a written agreement that the claim is not to be presented to a medical review panel, *id.* § 16-9.5-9-2(b); where the patient's pleadings state that the patient seeks damages of fifteen-thousand dollars ($15,000.00) or less, *id.* § 16-9.5-9-2.1 (1988); or where the medical review panel fails to render an opinion within the time allowed for a panel opinion, *id.* § 16-9.5-9-3.5.

9. *Id.* § 16-9.5-2-1.

10. *Id.* § 16-9.5-9-1(b).

11. 536 N.E.2d 546 (Ind. Ct. App. 1989).

12. IND. CODE §§ 16-9.5-9-1 to -2 (1977).

13. *Id.* § 16-9.5-9-1.

The court reversed the trial court's grant of summary judgment, holding that the plaintiff was not barred by the statute of limitations:[14]

> Because there is no statutory exception providing for the statute of limitations to begin running again prior to the claimant's receipt of the medical review panel's opinion, the statute is tolled until that event occurs even though the claimant has actual knowledge defendant is not "qualified" under the Act. Thus, Guinn had ninety days after receiving the review panels' opinion to file her complaint in the trial court, and did so. For those reasons, Guinn's complaint was timely-filed in the Madison Superior Court.[15]

In denying the dentists' petition for rehearing, the court only discussed the issue of the medical review panel's authority to determine whether the dentists were qualified under the Act. The defendants argued that the panel did not have authority because, by the provisions of the Act: "The panel shall have the *sole* duty to express its expert opinion as to whether or not the evidence supports the conclusion that the defendant or defendants acted or failed to act within the appropriate standard of care as charged in the complaint."[16] The dentists claimed that the statute, as written, prohibited the medical review panel from deciding whether it has jurisdiction of a case under consideration. Therefore, because the defendants were not qualified, the Act did not apply to them and the old statute of limitations[17] would apply to bar the plaintiffs' action.

The court disagreed, holding "[s]tatutes which vest authority to act in administrative agencies necessarily grant authority to the agency to determine whether it has jurisdiction to act in a given situation."[18] The court cited the United States Supreme Court,[19] the Indiana Supreme Court,[20] and an annotation[21] in support of its holding. Further, the court held that the medical review panel must have authority to determine if a health care provider is qualified under the Act. If the health care provider is not qualified, any action by the medical review panel is *ultra*

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14. Guinn v. Light, 531 N.E.2d 534, 536-38 (Ind. Ct. App. 1988), *reh'g denied*, 536 N.E.2d 546 (1989).

15. *Id.* at 538.

16. *Id.* at 546 (emphasis supplied) (citing IND. CODE § 16-9.5-9-7 (1988)).

17. IND. CODE § 34-4-19-1 (1941).

18. *Guinn*, 536 N.E.2d at 546.

19. MacAuley v. Waterman S. S. Corp., 327 U.S. 540 (1946).

20. Anderson Lumber & Supply Co. v. Fletcher, 228 Ind. 383, 390, 89 N.E.2d 449, 452 (1950).

21. 2 AM. JUR. 2D *Administrative Law* § 332 (1962).

vires and void.[22] "Thus, the Medical Review Panel here had authority to determine whether Light and Funderburk were 'qualified' health care providers as the *sine qua non* of its jurisdiction to proceed further."[23] Therefore, the court denied the defendants' petition for rehearing because the medical review panel had the implied authority to determine whether the dentists were qualified under the Act.[24]

Judge Garrard, in a separate opinion, concurred with the court. He reasoned that the defendants' claim required too narrow a reading of the provision. First, the defendants' interpretation of the medical review panel's authority would create a procedure contrary to the statutory scheme of the Act: it would require claimants to file a proposed complaint with the commissioner *and* file that complaint in state court to avoid the statute of limitations defense in cases where the health care providers are later determined to be not qualified under the Act. Imposing this requirement would be contrary to the Act. As Judge Garrard stated: "[i]t will be the rare occasion indeed where a claimant knows in advance whether or not his health care provider is qualified. . . . The strict application of I.C. 16-9.5-1-5 without regard to the rest of the Act does not appear to further the legislature's intent in enacting the statute."[25]

Second, Judge Garrard wrote "[a] basic rule of statutory construction admonishes us that a statute is to be construed as a whole."[26] The Act requires all actions[27] against health care providers to be presented to a medical review panel, regardless of whether the health care provider is "qualified."[28] Because the defendant dentists were within the definition of "health care providers" in the Act, the plaintiff was required to submit the proposed complaint to the commissioner for reference to the medical review panel.[29] Also, the Act's extension of the statute of limitations to include ninety days after the receipt of the medical review panel's opinion does not limit its application to the statute of limitations of the Act—rather, it "tolls the *applicable* statute of limitations. . . ."[30] Therefore, because the dentists were "health care providers" under the Act, the Act would toll the running of any applicable statute of limitations

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22. *Guinn*, 536 N.E.2d at 546-47 (citing *Anderson Lumber*, 228 Ind. at 390, 89 N.E.2d at 452).

23. *Id.* at 547.

24. *Id.* at 549.

25. *Id.* at 548 (Garrard, J., concurring).

26. *Id.* (citations omitted).

27. The Act does except some actions from its requirements.

28. *Guinn*, 536 N.E.2d at 548-49 (Garrard, J., concurring) (citing IND. CODE §§ 16-9.5-9-2, -2.1).

29. *Id.* at 549.

30. *Id.* (citing IND. CODE § 16-9.5-9-1) (emphasis added by court).

until ninety days following the receipt of the medical review panel's opinion.

The court's decision in *Guinn* effectively closed a loophole by which qualified health care providers could unfairly assert a presumably superseded statute of limitations defense against unwary claimants who follow the procedural requirements of the Act. The court's decision confirmed a uniform procedure for medical malpractice cases,[31] eliminating the risks created for claimants who are uncertain whether the health care provider is or is not a "qualified" health care provider under the Act.

B. Procedural Developments Affecting Expert Testimony in Medical Malpractice Cases

During the survey period, the Indiana Court of Appeals decided three medical malpractice appeals concerning expert testimony.

1. Sufficiency of Expert Testimony to Contradict a Unanimous Medical Review Panel Opinion.—Ellis v. Smith[32] was decided on September 26, 1988 and rehearing was denied on November 10, 1988. The court of appeals reversed the trial court's denial of summary judgment for three reasons. First, summary judgment was appropriate where the plaintiffs failed to provide expert opinion contrary to a negative medical review panel decision. Second, an unverified, unpublished deposition was insufficient to satisfy the requirement of the expert opinion. Finally, affidavits filed late which were based on information not within the affiant's personal knowledge were inadmissible and not sufficient to provide expert testimony contrary to the medical review panel's opinion.[33]

In *Ellis*, the plaintiff claimed that the doctor negligently failed to inform them of potential risks involved with an elective surgical procedure. Michael Smith sought the procedure to correct equine contractions caused by muscular dystrophy, corrections which would allow him to place his feet flatly on the ground. If successful, the surgery would have enabled Michael to stand for longer periods. The surgery was not successful; instead, Michael could not walk of all after the surgery. The plaintiff claimed that the doctor performed more extensive surgery than had been discussed without informing them of the risks, thereby causing Michael's premature confinement to a wheelchair.

The plaintiff filed a proposed complaint with the Indiana Insurance Commissioner for reference to a medical review panel, pursuant to the

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31. Noting the exceptions allowed by the Act and the preemption by the federal "patient-dumping" statute; *see supra* notes 7-8.

32. 528 N.E.2d 826 (Ind. Ct. App. 1988).

33. *Id.* at 826.

requirements of the Act.[34] The medical review panel concluded that the doctor's conduct conformed to the applicable standard of care. The plaintiff filed suit after the panel's decision. The defendant moved for summary judgement, utilizing the panel's opinion as expert testimony that the defendant was not negligent.

In opposition to the defendant's motion for summary judgment, the plaintiff offered the defendant-doctor's deposition without an affidavit verifying the contents and without a motion to publish the deposition. The plaintiff also offered affidavits of a Dr. Smith, filed on the day of the third hearing on defendant's second motion for summary judgment.

The court held that defects in the evidence offered by the plaintiff made summary judgment in favor of the defendant appropriate. The plaintiffs' evidence, whether excluded or admitted, failed to provide expert testimony sufficient to provide a genuine issue of material fact with respect to the appropriateness of the doctor's conduct.[35] Because the defendant's deposition was both unverified and unpublished, it was inadmissible for summary judgment consideration.[36] Further, even if the deposition was admissible for consideration, it did not provide expert testimony contrary to the medical review panel's opinion because it did not include an opinion that there was a causal connection between the purported inadequate disclosure and the resulting damage.[37] Without evidence of the causal connection, the plaintiffs' suit was subject to summary judgment.

Dr. Smith's affidavits were also insufficient to provide expert testimony contrary to the medical review panel's opinion that the defendant's conduct met the applicable standard of care. The plaintiffs filed Dr. Smith's affidavits on the same day as the third hearing on the defendant's second motion for summary judgment.[38] The court held that the affidavits were untimely, stating: "[I]t is clear that any filing of opposing affidavits must be done prior to the day of hearing."[39] The court also held that the trial court committed reversible error by accepting and considering the affidavits.

The court held that, even if timely, Dr. Smith's affidavits were inadmissible. Citing Trial Rule 56(E),[40] the court held that Dr. Smith's

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34. IND. CODE §§ 16-9.5-1-1 to -10-3 (1988).
35. *Ellis*, 528 N.E.2d at 828.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* (citing Larr v. Wolf, 451 N.E.2d 664, 666 (Ind. Ct. App. 1983)).
40. Trial Rule 56(E) of the Indiana Rules of Trial Procedure provides in part, as follows: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

affidavits failed to show that she was competent to testify as a medical expert. Dr. Smith's affidavits showed that she had studied medicine in Indiana and was aware of the standard of care in the state. They did not show, however, familiarity with the standard of care in the same or similar locality or a uniform, nationwide minimum standard.[41] The affidavits' defects rendered them inadmissible.

2. Expert Testimony Against One Defendant Not Provided by Other Defendant's Responses to Request for Admission or Interrogatories.— In *Shoup v. Mladick*,[42] decided on May 8, 1989, the Court of Appeals, Third District, held that requests for admissions and interrogatories submitted to one co-defendant doctor were not binding on the other co-defendant and were insufficient to provide expert testimony contrary to a unanimous medical review panel opinion.[43] Dr. Miller and Dr. Mladick were named as defendants in a medical malpractice suit by the plaintiffs. The plaintiffs alleged that the plaintiff's ankle had been negligently treated by each of the doctors.

The plaintiffs submitted their proposed complaint to a medical review panel in accordance with the Indiana Medical Malpractice Act. The medical review panel unanimously concluded that the evidence did not support a finding of negligence against Dr. Mladick. However, the panel found that Dr. Miller's conduct did not meet the applicable standard of care and "may have" caused plaintiff's resultant damages. After receiving the panel's opinion, plaintiffs filed their complaint. Dr. Mladick moved for summary judgment.

The plaintiffs argued that expert testimony showing Dr. Mladick's negligence was provided in the admission Dr. Miller gave in response to the plaintiffs' request for admission.[44] Dr. Miller answered a request for admission by "admitting" that Dr. Mladick was negligent, careless and failed to meet the appropriate standard of care in treating and operating on the plaintiff's trimalleolar fracture of the left ankle, and that he, Dr. Miller, was familiar with the appropriate standard of care.[45] The plaintiffs argued that Dr. Miller's responses showed Dr. Miller's competency to testify as an expert witness and that it was his opinion that Dr. Mladick failed to meet the appropriate standard of care; thus, summary judgment would be inappropriate where expert opinion contrary to the medical review panel's opinion created a genuine issue of material fact.[46]

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41. *Ellis*, 528 N.E.2d at 829 (citing Wilson v. Sligar, 516 N.E.2d 1099 (Ind. Ct. App. 1987)).
42. 537 N.E.2d 552 (Ind. Ct. App. 1989).
43. *Id.* at 553.
44. *Id.*
45. *Id.*
46. *Id.*

The court held that Dr. Miller's responses to the plaintiffs' requests for admissions were insufficient to provide expert testimony contrary to the unanimous medical review panel's opinion.[47] The court upheld the summary judgment granted to Dr. Mladick by the trial court because "[r]equests for admissions of facts addressed to one defendant are not binding upon a co-defendant. T. R. 36 admissions apply to and bind the answering party, not a co-defendant."[48] Requests for admissions do not bind co-defendants because they are designed to define and limit matters in controversy. "Once admitted, the T. R. 36 fact is settled for all purposes of that cause of action. The need to prove such fact at trial is eliminated."[49] Here, instead of limiting matters, the plaintiffs attempted to create a matter in controversy by use of the admissions. The court held, however, that without other evidence, "[t]he Shoups' failure to provide admissible expert opinion contrary to a unanimous medical review panel finding defeats their medical malpractice claim against Dr. Mladick."[50]

The Shoups also argued that summary judgment was inappropriate while there was pending discovery. The plaintiffs served supplemental interrogatories upon Dr. Miller prior to the summary judgment. The court held that while the general rule is that summary judgment is inappropriate while discovery is pending, an exception is made when the discovery is unlikely to uncover or develop a genuine issue of material fact.[51] In fact, the supplemental interrogatories did not develop a genuine issue of material fact. Thus, even though the supplementary interrogatories were still pending when summary judgment was granted (the answers were still pending when summary judgment was granted), the answers were submitted prior to the trial court's decision on the plaintiffs' motion to correct errors and still no genuine issue of material fact existed.[52] The trial court properly granted summary judgment because requests for admissions to one party are insufficient to provide expert medical testimony against a co-defendant, and summary judgment is not inappropriate where pending discovery is unlikely to develop a genuine issue of material fact.

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47. *Id.*

48. *Id.*

49. *Id.* (citing F. W. Means & Co. v. Carstens, 428 N.E.2d 251, 257 (Ind. Ct. App. 1981)).

50. *Id.* at 553 (citing Ellis v. Smith, 528 N.E.2d 826 (Ind. Ct. App. 1988)); *see supra* notes 32-41 and accompanying text.

51. 537 N.E.2d at 554 (citing Roark v. City of New Albany, 466 N.E.2d 62, 66 (Ind. Ct. App. 1984)).

52. *Id.*

3. *Expert Testimony Excluded at Trial as Trial Rule 37 Sanction.*— In *Brown v. Terre Haute Regional Hospital*,[53] the court affirmed the trial court's exclusion of expert witnesses' testimony as a sanction for noncompliance with a discovery order.[54] The court held that the plaintiff's conduct during the course of discovery justified the sanction, over the plaintiff's objection that the sanction was too harsh under the circumstances.[55]

Brown was injured in a one-car accident. When he was admitted to Terre Haute Regional Hospital, he could not move from the neck down. He was placed in intensive care with the diagnosis of a cervical spine injury. He was placed in cervical traction with fifteen pounds of weight applied. Brown's condition improved and he began to regain feeling in his extremities. As he made progress, the weight applied to the cervical traction was decreased. A factual issue arose at trial whether Brown complained of a change in his condition when the weight applied had been reduced to five pounds. An x-ray taken the day after the

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53. 537 N.E.2d 54 (Ind. Ct. App. 1989).

54. Four other errors asserted by the appellant were not reversible error. Brown argued that the hospital violated Brown's motion in limine, which the trial court had granted. The court disagreed, holding that Brown did not make a proper objection at trial and that the trial court had not abused its discretion in admitting the evidence. *Id.* at 59-60.

Brown next argued that the trial court erred in granting the hospital's motion for judgment on the evidence. Again, the court disagreed. Of the four contentions for which Brown alleged error in the court's removing them from the jury, one was waived by failure to make an argument on appeal, two were removed for the reason that no evidence of a connection between the contentions and the injuries was presented. The final contention concerned the permanency of Brown's injuries. Because the jury found against Brown on the issue of liability, any possible error in removing this contention was harmless. *Id.* at 60.

Brown also claimed that the trial court committed reversible error in denying his motion to amend the pleadings to conform to the evidence. The court found no reversible error, Brown did not show that he was prevented from introducing any evidence, he was not denied any instruction with respect to the evidence, and he was not restricted in his final argument. Any error in denying the motion, the court held, was harmless. *Id.*

Finally, Brown asserted that the trial court erred in instructing the jury. Brown's complaint was based on the trial court's giving of three of the hospital's instructions and denying three of Brown's instructions. Brown argued that the hospital's instructions were misleading and contained inadequate explanations. The court held, however, that Brown's objections to the hospital's allegedly misleading instructions were remedied by one of Brown's instructions, which the trial court gave to the jury. In objecting to the hospital's instructions for providing an inadequate explanation, Brown failed to demonstrate how he was harmed. Brown's objection to the hospital's instruction that expert medical testimony must demonstrate that the plaintiff's injuries were caused by the defendant's negligence was not reversible error because, the court held, it was a correct statement of the law. *Id.* at 61.

55. *Id.* at 58.

reduction to five pounds of applied weight showed that Brown's cervical vertebrae were again out of alignment. Five pounds of weight were added to realign the vertebrae. The next day, Brown's doctor determined that Brown's spinal column was unstable and requested a neurosurgeon's evaluation. Subsequently, the neurosurgeon performed fusion surgery to remedy the recurrent sublaxation.[56]

After Brown filed suit against the hospital, the hospital served Brown with interrogatories regarding experts retained by the plaintiff. Brown responded that no experts had been retained. From the time of his initial response, the plaintiff never formally supplemented his answers as required by the Trial Rules.[57] Brown verbally informed the hospital of five experts, one of whom was Dr. Worth. Thirteen (13) days before trial, Brown filed a witness list including an expert not previously identified. The expert was deposed four days prior to trial. Three days prior to trial, Brown identified yet another expert witness.

The hospital moved the trial court to exclude both new experts' testimony because of their late addition, or alternatively, for a continuance. The hospital also asked Brown, pursuant to the trial rules, whether any previously deposed expert had developed new or different opinions of which the hospital had not been informed. The court granted a one week continuance after denying the defendant's motion to exclude the new experts' testimony. During the continuance, the hospital deposed the new experts and redeposed Dr. Worth because Brown informed it that Dr. Worth had new opinions.

Dr. Worth's new opinions concerned residual injuries resulting from care received at the hospital and Brown's reduced chance of recovery. Dr. Worth affirmed twice at the end of his deposition that he had disclosed all of his opinions. He did not voice any opinion about the effect or existence of a delay between the change in Brown's condition and treatment of that change.

At trial, Brown's attorney asked Dr. Worth for "his opinion as to the effect the passage of time would have on a patient's prognosis after he complains about a change in his condition."[58] The hospital objected and moved to exclude Dr. Worth's testimony. The trial court sustained the motion, excluding Dr. Worth's testimony about the effect of the delay. At the end of trial, the jury rendered a verdict for the hospital.[59]

On appeal, Brown argued that he had not disobeyed the trial court's discovery order; or, if he had, it was a technical violation which did

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56. *Id.* at 56.
57. IND. R. CIV. P. 26(E)(1) .
58. *Brown*, 537 N.E.2d at 58.
59. *Id.* at 56, 57-58.

not justify the sanction.[60] The court held that Brown had violated a specific discovery order, for which violation the trial court properly imposed a sanction within its discretionary authority.[61]

Brown claimed that discovery had been conducted informally. Though he had not supplemented his answers to interrogatories pursuant to the trial rules, he had verbally informed the hospital about his experts. Further, he informed the hospital about Dr. Worth's new opinions which led to the second deposition of Dr. Worth. Brown argued that his conduct was in compliance with the trial court's discovery order. The court held that Brown had violated the discovery order. During the continuance Brown was specifically ordered to inform the hospital of new expert opinions. "The purpose for the order was clearly to allow the deposing of these witnesses to discover their new opinion testimony. The opinion testimony of an expert is discoverable pursuant to Indiana Rules of Procedure, Trial Rule 26(B)(4)."[62] The opinion to which Brown wanted Dr. Worth to testify was not an opinion Dr. Worth revealed during his second deposition. The witness affirmed during his deposition that he had no other opinions, and it was a violation of the trial court's discovery order to introduce additional opinion at trial.[63]

Brown claimed that his violation was technical, if a violation at all. He argued that discovery had been informal, that no bad faith had been shown, that the gravity of the sanction was too harsh under the circumstances, and that principles of equity should apply. The court disagreed. The court held that the trial court "was within its province in determining Brown had abused discovery despite the informality accepted by the parties. The sanction imposed was not too harsh for the circumstances."[64] Further, the court held that Brown had ample opportunity to inform the hospital of Dr. Worth's expert opinion concerning the effect of delay prior to the time of trial. Thus "the court did not abuse its discretion when it 'drew the line' and refused to allow Dr. Worth to testify to additional undisclosed opinions."[65]

C. "Loss of Chance" Theory of Damages Adopted

The Indiana Court of Appeals, Second District, also decided a case in which the testimony of the plaintiff's experts was insufficient to prevent summary judgment in favor of the defendants. In *Watson v.*

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60. *Id.* at 58.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at 59.

Medical Emergency Services,[66] decided January 16, 1989,[67] the court affirmed summary judgment in favor of the defendants because the testimony of the plaintiff's experts failed to demonstrate that the defendants' negligence proximately caused damage to the plaintiff. However, the court indicated that the plaintiff's cause of action—for "loss of chance" to live—may be an acceptable theory of damages in Indiana.[68]

In *Watson*, the decedent's widow filed a medical malpractice claim against the defendants for a failure to diagnose cancer. Mr. Watson went to the emergency room of Methodist Hospital in August of 1979 and January of 1980, because he was suffering from a cold. X-rays were taken during the January visit. No diagnosis of cancer was made by the emergency room attendant, the supervising doctor, nor by two radiologists. A lung biopsy was performed on Mr. Watson in June, when it was determined that he had terminal cancer. He died in September of 1980.

Mrs. Watson filed her proposed complaint on behalf of the estate of her deceased husband. The medical review panel unanimously decided that the physicians had not breached their duty of care. Mrs. Watson then filed her complaint in Hamilton County Superior Court after the panel proceedings were concluded. After discovery was conducted, the trial court granted summary judgment in favor of the defendants. The Second District Court of Appeals affirmed the trial court's grant of summary judgment because the plaintiff's expert testimony failed to demonstrate that Mr. Watson's damages were proximately caused by any negligence by the physicians.

The expert's depositions, viewed in favor of the plaintiff, showed a breach of duty owed to Mr. Watson. The court found that an affidavit of one of the plaintiff's experts arguably created a genuine issue of fact as to whether the physicians should have taken more tests and sought a more complete history. Though the affidavit was conclusory and vague, and the depositions of other experts testified specifically that more tests and a more complete history were not indicated by the x-rays, the court found that the plaintiff's evidence was sufficient to avoid summary judgment on the issue of breach of duty.[69]

However, the plaintiff's evidence was not sufficient to avoid summary judgment on the issue of proximate cause. The court found that all the expert witnesses were in agreement that cancer was not a probable diagnosis from the x-rays taken in January of 1980. Further, even if

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66. 532 N.E.2d 1191 (Ind. Ct. App. 1989).
67. *Reh'g denied*, February 14, 1989.
68. *Watson*, 532 N.E.2d at 1196 n.2.
69. *Id.* at 1193-94.

more complete testing had revealed the presence of cancer, Mrs. Watson did not present evidence that the cancer was treatable. The court found that the experts' opinions on the hypothetical results of various types of treatments were not opinions "to a reasonable degree of medical certainty."[70] In fact, the opinions expressed only mere possibilities.[71] Mere possibilities are insufficient to establish an issue of fact:[72] "None of the experts stated that [Mr. Watson's] life could have been saved or even prolonged had he begun receiving treatment in January."[73] Without expert testimony demonstrating that the alleged breach of duty proximately caused Mr. Watson's damages, the plaintiff was subject to summary judgment against her.[74]

The court commented on the plaintiff's theory of damages in a footnote.[75] The doctrine of "loss of chance" has not been specifically adopted by Indiana precedent. However, the court expressed a favorable view of this theory where a plaintiff's evidence demonstrates a "lost of chance" beyond a mere possibility. An expert's testimony that a patient's chances of survival were reduced as a result of a physician's negligent failure to diagnose a disease may present a justiciable issue of fact of proximate cause for compensable damages. The loss of chance doctrine "requires establishment by a plaintiff that if proper treatment had been given, better results would have followed."[76]

Recognizing a compensable loss for a plaintiff whose chances at a better result have been reduced due to another's negligence is a welcome and reasonable development. To require plaintiffs in medical malpractice cases, especially failure to diagnose cancer cases, to show that with proper care a full recovery was probable is simply too harsh a standard. To the claimant and the claimant's family, a reduction in the chance for a full recovery or a shortening of a life expectancy clearly is a substantial loss.

The first indication that the "loss of chance" doctrine would be an acceptable theory of proximate cause in Indiana is found in a criminal case.[77] Defendants in *Graham v. State* were convicted of manslaughter because they treated the decedent even though neither defendant had a license to practice medicine in Indiana.[78] Further, the treatment they

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70. *Id.* at 1195.
71. *Id.* at 1195-96.
72. *Id.* at 1195.
73. *Id.* at 1196.
74. *Id.*
75. *Id.* at n.2.
76. *Id.*
77. Graham v. State, 480 N.E.2d 981 (Ind. Ct. App. 1985).
78. *Id.* at 94. *See also* Bermann v. State, 486 N.E.2d 653 (Ind. Ct. App. 1985).

gave to the patient weakened the decedent to such an extent "that she was physically unable to undergo the chemotherapy *which could have extended her life.*"[79] The lost chance for proper treatment satisfied the proximate cause requirement linking the defendant's actions to the patient's death.

There is additional support for this theory of damages in Indiana decisions in the area of expert medical testimony. Indiana courts have stated clearly that a properly qualified medical expert may testify regarding "possibilities" and is not restricted only to opinions based on medical certainty.[80] For example, in *Kaminski v. Cooper*,[81] plaintiff was awarded a substantial sum following trial in an automobile collision case. On appeal, defendant argued that the trial court improperly admitted expert medical testimony concerning possible future medical conditions of the plaintiff. The opinion testimony of plaintiff's expert physician that plaintiff may need a total knee joint replacement in the future (depending on other factors such as arthritis and pain) was admitted.[82] The court found the doctor's testimony to be admissible even though the doctor did not state that it was "reasonably medically certain" that this care would be needed. Thus, Indiana courts have recognized that an increased chance for future medical treatment is a compensable loss when the possibility of the need for additional treatment was caused by the negligence of another party.[83]

In a footnote in the *Watson* case, the court takes only a small but logical step forward from this reasoning. If a plaintiff can recover for possible future treatment, then a loss of the opportunity for a better recover also is a compensable element of damages in a claim against a health care provider who failed to provide the proper care. This view is accepted in many well-reasoned decisions in other jurisdictions as well.[84]

II. 7th Circuit

The United States Court of Appeals for the Seventh Circuit reversed the decision of the United States District Court for the Northern District

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79. *Id.* (emphasis added).

80. *See, e.g.*, Noblesville Casting Div. of TRW, Inc. v. Prince, 438 N.E.2d 722 (Ind. 1982); Yang v. Stafford, 515 N.E.2d 1157 (Ind. Ct. App. 1987); Kaminski v. Cooper, 508 N.E.2d 29 (Ind. Ct. App. 1987).

81. 508 N.E.2d 29.

82. *Id.* at 30.

83. *See supra* notes 75-76 and accompanying text.

84. This view is accepted in many well-reasoned decision in other jurisdictions as well. *See generally* Annotation, *Medical Malpractice: "Loss of Chance" Casualty*, 54 A.L.R. 4th 10 (1987); and for a particularly well-reasoned decision in a failure to diagnose cancer case, see Wheat v. United States, 630 F. Supp. 699 (W.D. Tex. 1986).

of Indiana, Fort Wayne Division, in *Jones v. Griffith*.[85] The district court's opinion[86] was discussed in last year's survey article.[87] Judge Posner wrote for the court of appeals, holding that the district court was without jurisdiction to hear the case because the issue was not a justiciable "case or controversy."[88]

The district court's opinion was remarkable in several respects. First, the entry included an order from the federal trial court to an Indiana medical review panel to render a specific finding under Indiana Code Section 16-9.5-9-7(c) that the case involved factual issues requiring resolution by a jury.[89] Second, the district court found that the standard of care for "informed consent" cases was dependent both on expert opinion and on questions of fact requiring lay witness testimony. Third, the district court found the term "factor," as used in Indiana Code Section 16-9.5-9-7(e) to be a less restrictive term than the phrase "substantial factor" as that phrase was used under Indiana law to define the standard for proximate cause in medial malpractice cases.[90]

On appeal, the court did not find any fault with the district court's analysis of the issues presented by the parties. However, the court reversed the district court on grounds not raised by the parties.[91] The court held that the district court's instructions amounted to an advisory opinion, prohibited by the article III of the United States Constitution.[92] Because the plaintiff filed a "proposed" complaint, pursuant to the Act, no actual case or controversy was presented to the district court.

> Mrs. Jones did not ask the federal district court for damages or any other relief against Dr. Griffith, or for that matter against anyone else. She asked the court to give legal instructions to an advisory panel mulling over a dispute that may never be the subject of a lawsuit.[93]

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85. 870 F.2d 1363 (7th Cir. 1989).

86. Jones v. Griffith, 688 F. Supp. 446 (N.D. Ind. 1988) (Lee, J.), *rev'd*, 870 F.2d 1363 (7th Cir. 1989).

87. Ruge, *Medical Malpractice*, 22 IND. L. REV. 535, 543-47 (1989).

88. *Jones*, 870 F.2d at 1366.

89. *Jones*, 688 F. Supp. at 462.

90. *Id.* at 460-61.

91. *Jones*, 870 F.2d at 1366.

92. *Id.*

93. *Id.* at 1365-67. The plaintiff based her action on Indiana Code Section 16-9.5-10-1, which provides in pertinent part as follows: "A court having jurisdiction over the subject matter and the parties to a proposed complaint . . . may, upon the filing of a copy of the proposed complaint and a written motion under this chapter, (1) preliminarily determine any affirmative defense or issue of law or fact that may be preliminarily determined under the Indiana Rules of Procedure; or (2) compel discovery in accordance with the Indiana Rules of Procedure; or (3) both.

The court reasoned that the Act requires procedures similar to administrative proceedings, where a party must exhaust all administrative remedies prior to any recourse to federal courts.[94] Therefore, the district court was without jurisdiction to act where no justiciable case or controversy was before it.

Whether this decision will have any effect on the state courts in Indiana is yet to be seen. The circuit court of appeals overlooked the specific statutory authority in the Medical Malpractice Act giving trial courts jurisdiction over certain disputes which develop during the medical review panel process.[95] The court made no suggestions for litigants regarding what should be done when guidance from a court is needed in the course of medical review panel proceedings.

III. Legislative Developments

The last session of the Indiana Legislature passed a bill increasing the total amount recoverable for any injury or death under the Indiana Medical Malpractice Act from $500,000.00 to $750,000.00.[96] The increased limit applies to claims based on acts of malpractice on or after January 1, 1990.[97] The law was not amended with respect to the total amount of liability for the health care provider which is still limited to $100,000.00. Thus, claims exceeding $100,000.00 will be paid by the professional liability insurer for the health care provider up to $100,000.00 and by the Indiana Patient Compensation Fund up to an additional $650,000.00.

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94. *Id.* at 1367.

95. See Ind. Code §§ 16-9.5-10 et seq.

96. Limitations on Recovery, Pub. L. No. 189-1989, § 1 (amending Ind. Code § 16-9.5-2-2).

97. *Id.*