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TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2017-CA-001960-MR

KIMBERLY STEWART

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE MARY M. SHAW, JUDGE  
ACTION NO. 17-CI-002575

KENTUCKIANA MEDICAL CENTER, LLC;  
CARDIOVASCULAR SPECIALISTS, P.S.C.;  
CARDIOVASCULAR SURGICAL CARE  
P.L.L.C.; DR. ANIS G. CHALHOUB; AND  
DR. JOHN D. RUMISEK

APPELLEES

OPINION  
AFFIRMING

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BEFORE: ACREE, COMBS, AND MAZE, JUDGES.

MAZE, JUDGE: Kimberly Stewart appeals from an order of the Jefferson Circuit Court which dismissed her medical malpractice and related claims against Kentuckiana Medical Center (KMC), Dr. Anis G. Chalhoub, Dr. John D. Rumisek and their practice groups. We agree the claims against KMC were barred by lack

of personal jurisdiction. We further conclude that Stewart's malpractice claims against Dr. Chalhoub and Dr. Rumisek were subject to Indiana law. However, we find that her claims were not barred for lack of subject-matter jurisdiction or particular-case jurisdiction because the medical-panel review requirements of the Indiana Medical Malpractice Act only apply to actions filed in an Indiana court. Nevertheless, we conclude that these claims were properly subject to dismissal under the doctrine of *forum non conveniens*. Hence, we affirm the order dismissing the claims for this reason.

The relevant facts of this action are as follows: Stewart is a resident of Indiana. KMC is a Florida corporation that operated a hospital in Clarksville, Indiana. Dr. Chalhoub and Dr. Rumisek are both licensed to practice medicine in Indiana and Kentucky. Their practice groups, Cardiovascular Surgical Care, PLLC and Cardiovascular Specialists, PSC, are located in Louisville, Kentucky.

On May 30, 2014, Stewart presented herself to the emergency room at KMC, complaining of a headache and a single fainting episode. The admitting physician called in Dr. Chalhoub for a cardiology consult. He diagnosed Stewart with bradycardia and sick sinus syndrome. Based upon this diagnosis, Dr. Chalhoub recommended that Stewart have a pacemaker installed. Dr. Chalhoub called in Dr. Rumisek for an additional consult and to perform the procedure.

On June 2, 2014, Dr. Rumisek implanted a pacemaker in Stewart's heart. The following day, Dr. Rumisek performed a second surgery to adjust the lead placement. Subsequently, Stewart developed an infection at the surgical site. On June 18, 2014, Dr. Rumisek performed a surgical debridement to treat the infection. After each of the surgeries, Stewart followed up with both doctors at their Louisville offices. Stewart's last follow-up visit with Dr. Chalhoub was in September 2014, and her last follow-up visit with Dr. Rumisek was in August 2014.

On July 1, 2016, Stewart began treating with a new cardiologist, who advised her that she never had sick sinus syndrome and that the pacemaker was not medically necessary. Based on this information, Stewart filed the current complaint in Jefferson Circuit Court, naming KMC, Dr. Chalhoub, Dr. Rumisek, and their respective practice groups. In lieu of an answer, all of the defendants filed motions to dismiss pursuant to CR<sup>1</sup> 12.02. They argued that Stewart's action was barred due to her failure to comply with the medical review panel requirements of the Indiana Medical Malpractice Act. I.C.<sup>2</sup> § 34-18-8-4. As additional grounds for dismissal, KMC separately argued that Kentucky could not exercise personal jurisdiction over it.

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<sup>1</sup> Kentucky Rules of Civil Procedure.

<sup>2</sup> Indiana Code.

After reviewing the briefs and arguments of counsel, the trial court granted the motions. The court found that it lacked subject-matter jurisdiction over Stewart's claims against Drs. Chalhoub and Dr. Rumsiek until she complied with the medical-review panel provisions of the Indiana Medical Malpractice Act. Consequently, the court dismissed those claims without prejudice. The court also found that it lacked personal jurisdiction over KMC. Stewart now appeals from these orders.

As an initial matter, we agree with the trial court that Kentucky cannot exercise personal jurisdiction over KMC. Indeed, Stewart does not argue otherwise. In pertinent part, KRS<sup>3</sup> 454.210(2)(a) provides that

A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a claim arising from the person's:

1. Transacting any business in this Commonwealth;
2. Contracting to supply services or goods in this Commonwealth;
3. Causing tortious injury by an act or omission in this Commonwealth; [or]
4. Causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this Commonwealth, provided that the tortious injury occurring in

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<sup>3</sup> Kentucky Revised Statutes.

this Commonwealth arises out of the doing or soliciting of business or a persistent course of conduct or derivation of substantial revenue within the Commonwealth[.]

In the current case, Stewart is an Indiana resident, and her alleged injury took place entirely in Indiana. Furthermore, KMC is a foreign corporation that does business exclusively in Indiana. There was no evidence offered that it regularly does business or solicits business in Kentucky. There is simply no basis under the statute to exercise personal jurisdiction over KMC.

On the other hand, Dr. Chalhoub and Dr. Rumisek maintain a presence in Kentucky. Since they are already subject to personal jurisdiction in Kentucky, the long-arm provisions of KRS 454.210 do not apply. The primary question, therefore, is whether the Indiana Medical Malpractice Act bars the filing of Stewart's action until her claim is submitted to an Indiana medical review panel.

Indiana's Medical Malpractice Act is a procedural mechanism for claims of medical malpractice. *Indiana Patient's Compensation Fund v. Patrick*, 929 N.E.2d 190, 193-94 (Ind. 2010). In pertinent part, the Act requires that, before a malpractice claim is pursued in court, a proposed malpractice complaint must be presented to a medical review panel. I.C. § 34-18-8-4. After the proposed complaint is filed and the panel selected, "[t]he evidence in written form to be considered by the medical review panel shall be promptly submitted by the respective parties." I.C. § 34-18-10-17(a). The panel is directed to issue an 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 standards of care as charged in the complaint.” I.C. § 34-18-10-22(a). With certain enumerated exceptions, the panel must issue its opinion within one hundred eighty days after the selection of the last member of the initial panel. I.C. § 34-18-10-13(a). Until the panel issues its opinion, an Indiana trial court has no jurisdiction to hear and adjudicate the malpractice claim. *St. Anthony Med. Ctr. Inc. v. Smith*, 592 N.E.2d 732, 735-36 (Ind. App. 1992).<sup>4</sup>

Dr. Chalhoub and Dr. Rumisek urge that Indiana substantive law must apply to a claim that arose in Indiana and is based upon actions occurring primarily in Indiana. *Castelli v. Steele*, 700 F. Supp. 449, 455 (S.D. Ind. 1988). We agree. Kentucky substantive law should generally be applied if the claim has a significant contact with this forum. *Adam v. J.B. Hunt Transp., Inc.*, 130 F.3d 219, 231 (6<sup>th</sup> Cir. 1997), *abrogation recognized in Nolfi v. Ohio Ky. Oil Corp.*, 675 F.3d 538, 544 (6<sup>th</sup> Cir. 2012) (citing *Foster v. Leggett*, 484 S.W.2d 827, 829 (Ky. 1972), and *Arnett v. Thompson*, 433 S.W.2d 109 (Ky. 1968)).

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<sup>4</sup> In 2017, the Kentucky General Assembly enacted KRS Chapter 216C, which, like the Indiana Act, provided for medical review panels as a prerequisite to filing a medical malpractice action. 2017 Ky. Laws Ch. 22 (Eff. 6-29-17). Kentucky’s Act did not take effect until after Stewart’s claims arose. Furthermore, the Kentucky Supreme Court recently declared the Act unconstitutional as a violation of the open-courts provision of Ky. Const. § 14. *Commonwealth v. Claycomb by & through Claycomb*, 566 S.W.3d 202 (Ky. 2018).

We find no significant contacts in this case supporting application of Kentucky law. Stewart is an Indiana resident, and she was treated in an Indiana hospital. The only contact with Kentucky arises from her follow-up visits with Dr. Chalhoub and Dr. Rumisek at their Louisville offices. However, Stewart does not allege any independent negligence arising from those contacts in Kentucky. Based upon the lack of significant contacts with Kentucky, we conclude that Indiana substantive law applies to her claim.

However, this is not the end of the inquiry. Dr. Chalhoub and Dr. Rumisek argue that, since Indiana law applies in this case, the trial court lacked subject-matter jurisdiction over Stewart's claims until she completed the medical-review panel requirement. As a point of clarification, Kentucky recognizes a distinction between subject-matter jurisdiction and particular-case jurisdiction. Subject-matter jurisdiction concerns the court's authority to hear "this kind of case." *Commonwealth v. Steadman*, 411 S.W.3d 717, 722 (Ky. 2013) (citing *Hisle v. Lexington-Fayette Urban Cty. Gov't*, 258 S.W.3d 422, 429 (Ky. App. 2008)). In contrast, particular-case jurisdiction refers to the court's authority to determine a specific case. *Id.* Obviously, the Jefferson Circuit Court has subject-matter jurisdiction over a medical malpractice claim meeting the court's jurisdictional minimums. Rather, IC § 34-18-8-4 creates a condition precedent to the filing of a medical malpractice claim. While Indiana courts characterize this as a question of

subject-matter jurisdiction, Kentucky courts define such a condition precedent as a matter involving the court's jurisdiction over the particular case.

But for purposes of this appeal, the distinction is not controlling. The controlling question is whether a Kentucky court lacks jurisdiction absent compliance with the medical-review panel requirement. Dr. Rumisek and Dr. Chalhoub rely heavily on *Miller v. Bernard*, No. 2003-CA-000590-MR, 2004 WL 1635789 (Ky. App. July 23, 2004). In that case, a panel of this Court addressed a similar situation involving an Indiana resident who brought a medical malpractice claim in Kentucky based upon alleged medical malpractice occurring at an Indiana hospital. Kentucky's only connections with the case were that the physician was a Kentucky resident and that the decedent's autopsy was performed in Kentucky. After finding that Indiana law applied, the panel concluded that the plaintiff's failure to comply with Indiana's medical-review panel requirement deprived the Kentucky court of subject-matter jurisdiction. *Id.* at \*3.

But since *Miller* is not a published opinion, it is not binding authority in the current case. CR 76.28(4)(c). Furthermore, *Miller* did not directly address whether the Indiana statute was applicable on its face. In fact, the express language of I.C. § 34-18-8-4 requires the submission of a proposed medical malpractice complaint to a medical review panel before an action may be “commenced in a court in Indiana[.]”



Similar language has been held to include a Federal District Court sitting in Indiana. *Hines v. Elkhart Gen. Hosp.*, 465 F. Supp. 421, 424 (N.D. Ind. 1979), *aff'd*, 603 F.2d 646 (7<sup>th</sup> Cir. 1979). However, when a Federal District Court is presented with a claim in diversity jurisdiction based upon substantive rights created by State law, the court qualifies as a state court for purposes of the statute.

*Id.* In such cases, a United States District Court is

in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State.

*Guaranty Trust Co. v. York*, 326 U.S. 99, 108-09, 65 S. Ct. 1464, 1469-70, 89 L. Ed. 2079 (1945).

In contrast, a Kentucky state court, even when it applies the substantive law of Indiana, is operating pursuant to its own jurisdiction. Therefore, I.C. § 34-18-8-4 cannot be read to require submission of a medical malpractice complaint to a medical review panel prior to filing an action in a Kentucky court. Rather, “the Indiana legislature intended that the panel procedure would apply in State and probably Federal courts in Indiana but would have no application to a suit prosecuted in a forum outside the State of Indiana.” *Ransom v. Marrese*, 122 Ill. 2d 518, 525, 524 N.E.2d 555, 558 (1988). Consequently, we disagree with the trial court that it lacked subject-matter jurisdiction over Stewart’s claims.

Nevertheless, we agree with Dr. Chalhoub and Dr. Rumisek that Stewart should not be permitted to engage in forum shopping simply to avoid the medical-review panel requirement. Forum shopping is clearly against the public policy of Kentucky. *State Farm Mut. Auto. Ins. Co. v. Marley*, 151 S.W.3d 33, 41 (Ky. 2004). Under the doctrine of *forum non conveniens*, a stay or a dismissal without prejudice may be appropriate where the chosen forum has jurisdiction and venue, but where another court also having proper jurisdiction and being a proper venue would be a more convenient forum to hear the case. *Dollar Gen. Stores, Ltd. v. Smith*, 237 S.W.3d 162, 166 (Ky. 2007).

In this case, the Jefferson Circuit Court has personal jurisdiction over some, but not all of the defendants in the case. As previously noted, Stewart's claims have only a minimal connection with Kentucky. Moreover, all of the claims could be brought in an Indiana court once Stewart complies with the medical-review panel requirements.<sup>5</sup> Under the circumstances, we conclude that the trial court would have been within its discretion to stay or to dismiss the complaint without prejudice based upon *forum non conveniens*. Therefore, we shall affirm on this basis.

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<sup>5</sup> Stewart also asserted claims against KMC, Cardiovascular Specialists, P.S.C., and Cardiovascular Surgical Care, P.L.L.C. for negligent hiring, retention, supervision, privileging or credentialing. The claims against KMC are likewise barred due to lack of personal jurisdiction. To the extent that these claims remain pending against the practice groups, they may also be stayed or dismissed without prejudice under the doctrine of *forum non conveniens*.

Accordingly, we affirm the order of the Jefferson Circuit Court dismissing Stewart's complaint on the grounds stated in this opinion.

ALL CONCUR.

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