IP 04-0728-C H/S Lyons v Lutheran Hospital
Judge David F. Hamilton Signed on 9/15/04

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

EDWARD LYONS,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 1:04-cv-00728-DFH-VSS
	)	
LUTHERAN HOSPITAL OF INDIANA,	)	
MEDTRONIC, INC.,	)	
	)	
Defendants.	)	

Stephen B. Caplin
CAPLIN PARK TOUSLEY & MCCOY
sbcpc@yahoo.com

Jeremy A. Klotz
ICE MILLER
jeremy.klotz@icemiller.com

Kevin R. Knight
ICE MILLER
kevin.knight@icemiller.com

Charles W. McNagny
cwm1@glmlaw.net

Julie A. Robinson
CAPLIN PARK TOUSLEY & MCCOY
julieahudson@hotmail.com

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

EDWARD LYONS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO. 1:04-cv-0728-DFH-VSS
	)	
LUTHERAN HOSPITAL OF INDIANA and MEDTRONIC, INC.,	)	
	)	
	)	
Defendants.	)	

ENTRY ON MOTION TO REMAND

Plaintiff Edward Lyons sued defendants Medtronic, Inc. and Lutheran Hospital of Indiana, Inc. in an Indiana state court for wrongs that he says injured his late wife Sandra Lyons and ultimately caused her death. Defendant Medtronic removed this action from state court arguing that defendant Lutheran Hospital, whose presence would defeat complete diversity of citizenship, was fraudulently joined as a defendant. Plaintiff has moved to remand the action.

The first issue is whether plaintiff fraudulently joined Lutheran Hospital of Indiana as a defendant, in which case diversity is complete and the court has jurisdiction, or whether the hospital is a proper defendant in this case. In

opposing remand, Medtronic has raised a second issue. It argues that if the court finds that the claim against Lutheran Hospital must be remanded, then the court should sever the claims against the two defendants and retain jurisdiction over the claims against Medtronic. For the reasons explained below, the court finds that plaintiff did not fraudulently join the hospital and that severance is not appropriate. Accordingly, the court grants the motion to remand the entire action and awards plaintiff his attorney fees incurred as a result of the removal. See 28 U.S.C. § 1447(c).

I. *Plaintiff's Allegations*

Sandra Lyons suffered from serious back pain. She had surgery to implant a Neurostimulator System manufactured by defendant Medtronic. On March 19, 2002, Mrs. Lyons had another operation to replace the lead wire on the Neurostimulator System. The surgery was performed at Lutheran Hospital of Indiana in Fort Wayne, Indiana. For present purposes, the court must accept as true plaintiff's allegations that the lead wire used in the March 19th surgery was defective.

After the March 19th surgery, Mrs. Lyons suffered continuing severe pain. She returned to Lutheran Hospital a few days later to deal with complications

resulting from the alleged defect in the Medtronic device. Plaintiff alleges that while at the hospital on March 26th, Mrs. Lyons slipped, fell, and hit her head, resulting in her death.

As the surviving spouse and as personal representative of Mrs. Lyons' estate, plaintiff Edward Lyons asserts three distinct sets of claims. First, he alleges that Medtronic manufactured and sold a medical device that was defective within the meaning of Indiana product liability law. The complaint alleges expressly that Sandra Lyons' death was a proximate result of the defective product. Second, plaintiff alleges a claim for premises liability against Lutheran Hospital based on the fatal slip and fall. The third claim is a medical malpractice claim against Lutheran Hospital and some of its doctors, but plaintiff has not yet actually asserted that claim in this case. Under Indiana law, a plaintiff may not file most medical malpractice claims in court without first submitting the claim for evaluation by a medical review panel acting under the supervision of the Indiana Department of Insurance. Ind. Code § 34-18-8-4. Plaintiff has advised the court that he has initiated such a claim alleging that Lutheran Hospital and several doctors provided substandard care that injured Mrs. Lyons and caused her death. See Pl. Br. at 2 n.1. If the panel review process does not resolve the case, plaintiff would then have the ability to assert such a claim in court.

II. *Fraudulent Joinder*

Medtronic argues that plaintiff's claims against Lutheran Hospital are necessarily claims for medical malpractice, so that they could not be asserted in any court at the time of removal because plaintiff had not completed the panel review process. Because these claims should be dismissed immediately without prejudice, Medtronic argues, the joinder of Lutheran Hospital as a defendant is so flawed that the court should deem Lutheran Hospital to have been fraudulently joined.[1]

Diversity cannot be destroyed by joinder of non-diverse parties if that joinder is fraudulent. *Hoosier Energy Rural Elec. Co-op, Inc. v. Amoco Tax Leasing IV Corp.*, 34 F.3d 1310, 1315 (7th Cir. 1994). "Fraudulent" joinder is an unfortunate legal term of art. Despite its connotations, it is not necessarily intended to cast aspersions on the character of plaintiffs or their counsel. "Fraudulent" joinder occurs "either when there is no possibility that a plaintiff can state a cause of action against nondiverse defendants in state court, or where

[1]In cases where the Indiana Medical Malpractice Act applies, "the Indiana Courts have no jurisdiction until the review panel issues its opinion, and the federal district court is bound by this decision in a diversity suit." *Johnson v. Methodist Hosp. of Gary*, 547 F. Supp. 780, 782 (N.D. Ind. 1982); see also *Castelli v. Steele*, 700 F. Supp. 449, 455 (S.D. Ind. 1988) ("It is well settled under this provision that any medical malpractice action filed in an Indiana court must be dismissed without prejudice for want of jurisdiction if an opinion has not first been obtained by a medical review panel.").

there has been outright fraud in plaintiff's pleading of jurisdictional facts." *Id.*, quoting *Gottlieb v. Westin Hotel Co.*, 990 F.2d 323, 327 (7th Cir. 1993). The latter form of fraudulent joinder is rare and is not alleged to have occurred here.

Where the defense argues that the plaintiff cannot possibly state a viable claim against the non-diverse defendant, the defense bears a "heavy burden" to establish fraudulent joinder. *Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 73 (7th Cir. 1992). "The defendant must show that, after resolving all issues of fact *and law* in favor of the plaintiff, the plaintiff cannot establish a cause of action against the in-state defendant." *Id.* (emphasis in original). In making that evaluation, the court must give plaintiff the benefit of the doubt on all fairly disputable issues of both fact and law. *Id.*; *Hoosier Energy*, 34 F.3d at 1315; *Gottlieb*, 990 F.2d at 327. Joinder is not fraudulent if a plaintiff's claims depend on fairly debatable issues of state law that require substantial analysis. "A claim which can be dismissed only after an intricate analysis of state law is not so wholly insubstantial and frivolous that it may be disregarded for purposes of diversity jurisdiction." *Batoff v. State Farm Ins. Co.*, 977 F.2d 848, 853 (3d Cir. 1992).

To apply that general standard here, the court must consider whether there is any reasonable possibility that a state court might find that plaintiff has a claim against Lutheran Hospital that falls outside the scope of the Medical

Malpractice Act, so that the claim is now ripe for litigation. Giving the plaintiff the benefit of disputes as to both facts and law, the answer is yes. The court cannot find fraudulent joinder here.

The special procedures under the supervision of the Indiana Department of Insurance apply to claims for "malpractice." See Ind. Code §§ 34-18-8-1 & -4. The Medical Malpractice Act defines "malpractice" as "a tort or breach of contract based on health care or professional services that were provided, or that should have been provided, by a health care provider, to a patient." Ind. Code § 34-18-2-18. The Act defines a tort as a "a legal wrong, breach of duty, or negligent or unlawful act or omission proximately causing injury or damage to another." Ind. Code § 34-18-2-28.

Indiana courts have repeatedly explained that the Act does not apply to every negligent act or omission by a health care provider. *E.g.*, *Winona Memorial Foundation v. Lomax*, 465 N.E.2d 731, 742 (Ind. App. 1984) (holding that hospital patient's "premises liability" claim for injuries resulting from fall caused by negligent maintenance of hospital floor was not a malpractice claim within the scope of the Act). In general, "the Act applies to conduct, curative or salutary in nature, by a health care provider acting in his or her professional capacity, and is designed to exclude only conduct which is unrelated to the promotion of a

patient's health or the provider's exercise of professional expertise, skill, or judgment." *Winona Memorial Hosp., Ltd. P'ship v. Kuester,* 737 N.E.2d 824, 828 (Ind. App. 2000), citing *Methodist Hospital of Indiana, Inc. v. Ray*, 551 N.E.2d 463, 466 (Ind. App. 1990), adopted on transfer, 558 N.E.2d 829 (Ind. 1990). The Act requires malpractice claims to be evaluated by an expert medical panel before they can be pursued in court. The scope of the panel's expertise can be useful in considering whether a claim qualifies as "malpractice" under the Act, and is thus required to be submitted to a panel, or whether a claim is one for ordinary negligence and not subject to the Act. "Such matters as the maintenance of reasonably safe premises are within the common knowledge and experience of the average person. Health care providers, who must make up the medical review panel . . . are no more qualified as experts on such matters than the average juror." *Winona Mem'l Found. v. Lomax,* 465 N.E.2d at 740.

Indiana case law draws some fine distinctions along the boundaries between malpractice claims and other negligence claims. For example, in *Putnam County Hospital v. Sells*, 619 N.E.2d 968 (Ind. App. 1993), the injured person was a child who had just had surgery. She was in the recovery room, under the influence of anesthesia. The rails on her hospital bed had not been raised, and the patient fell out of bed and injured her face. The Indiana Court of Appeals held that the claim was a claim for malpractice rather than ordinary negligence.

The complaint alleged that the hospital had been negligent in failing to train and supervise its staff in monitoring patients recovering from surgery, and that hospital staff were negligent in failing to monitor and observe the patient, and in failing to ensure that railings were in place while the patient was under the influence of anesthesia. *Id.* at 971. Because the complaint attacked the hospital's care of a patient under anesthesia, the appellate court found that the claim was not for premises liability but for medical malpractice. *Id.*

Putnam County Hospital carefully distinguished the case of *Harts v. Caylor-Nickel Hospital, Inc.*, 553 N.E.2d 874 (Ind. App. 1990), which held that a claim for injury resulting from a fall from a hospital bed was a claim for premises liability and not for medical malpractice. In *Harts*, the bedrail gave way when the patient tried to use it to turn over in bed. As the *Putnam County Hospital* court explained the distinction: "The bedrailing was in place but did not work properly. Thus, Harts' claim involved negligent maintenance of the hospital's premises or equipment." 619 N.E.2d at 971.

How should claims arising from Mrs. Lyons' fall be characterized? As *Putnam County Hospital* and *Harts* demonstrate, the details matter. Yet the complaint here does not provide any detail about the circumstances of Mrs. Lyons' fall. It says in relevant part: "While at Hospital, Sandra slipped, fell, and

struck her head as a result of the negligence of the Hospital." Cplt. ¶ 9. Plaintiff was not required to provide more detail, of course, and plaintiff may not even be in a position to provide more detail at this point. Without more factual detail, and keeping in mind the court's obligation to give plaintiff the benefit of all fairly arguable issues of both fact and law, the court cannot say that the claim in this case is so obviously a claim for malpractice that plaintiff's joinder of Lutheran Hospital as a defendant was fraudulent.

Medtronic contends that plaintiff's claim against Lutheran Hospital "is either a medical malpractice case or it's not; Plaintiff cannot have it both ways." Def. Br. at 9 n.4. The assertion has appealing simplicity, but it is not accurate. For example, plaintiff could argue that the doctors named in the malpractice complaint performed the March 19th surgery negligently or that they cared for Mrs. Lyons negligently after she returned to the hospital on March 22nd. At the same time, plaintiff could argue that Mrs. Lyons' fall on March 26th was also the result of either negligent maintenance of the premises (not malpractice) or negligent supervision of a medicated patient by nursing staff (malpractice), or perhaps both. Plaintiff has suggested in his reply brief that Mrs. Lyons fell while she was still at the hospital but after a doctor had ordered her discharge, indicating that the fall might not have been caused by any negligence on the part of medical staff. Pl. Reply Br. at 9. If true, those details would tend to indicate

that the claim is not for medical malpractice. In any event, the details of the accident cannot be resolved at this point and may require trial to be resolved. At this point, the court certainly cannot say that the joinder was fraudulent.[2]

Medtronic has also tried to turn the burden of persuasion here upside down: "At the time of removal in this case, Plaintiff's Complaint was insufficient to support a determination that Plaintiff's allegations against Lutheran [Hospital] did not fall within the Act." Def. Br. at 9. Plaintiff has no burden here, and was not required to plead facts sufficient to negate the defense based on the Medical Malpractice Act. Medtronic is the party who must carry the heavy burden on the issue of fraudulent joinder. It cannot do so by merely showing that plaintiff's claim *might* fall within the Act; it must show that plaintiff's claim *could not possibly* fall outside the Act. Medtronic has failed to make such a showing.

---

[2]In fact, one of the challenges for plaintiff and his counsel in this dispute is to avoid being prematurely trapped into arguing that wrongdoing by the hospital was either definitely medical malpractice or definitely not medical malpractice. Whether any alleged negligent acts or omissions by the hospital were one or the other or both may have to await trial (and possibly also an opinion from the medical review panel). A plaintiff who fears being trapped prematurely may need to file both a medical malpractice complaint with the Department of Insurance and a non-malpractice complaint in court, as plaintiff has done here, and then wait for the review panel to complete its work before both theories can be presented to one jury in one trial. Then, after a verdict, the legal consequences of the particular findings (such as damages caps that apply only to medical malpractice claims) could be sorted out.

III. *Severance of Claims*

As an alternative to its fraudulent joinder argument based on the Medical Malpractice Act, Medtronic argues that the court should sever plaintiff's claims against it from his claims against Lutheran Hospital. Medtronic argues that the claims are so different and arise from such different circumstances or occurrences that they should be severed. Under this approach, the claims against the hospital would be remanded to state court and the product liability claims against Medtronic would stay in this court. This argument is a version of what has been called "fraudulent misjoinder," under which potentially viable but unrelated claims against resident and non-resident defendants would be joined in one action to destroy diversity and thereby prevent removal by the non-resident defendants. See *Conk v. Richards & O'Neil, LLP*, 77 F. Supp. 2d 956, 970-71 (S.D. Ind. 1999) (rejecting claim of fraudulent *mis*joinder and remanding to state court after finding that claims against Indiana defendants and non-Indiana defendants were sufficiently related so that state court could allow their joinder in one action); see also *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996) (finding fraudulent misjoinder of unrelated claims for purpose of preventing removal by non-resident defendant), abrogated on other grounds by *Office Depot v. Cohen*, 204 F.3d 1069, 1077-78 (11th Cir. 2000).

Whether the claims against the two defendants were misjoined should be evaluated under state procedural law rather than federal law. See *Bridgestone/Firestone, Inc. v. Ford Motor Co.*, 260 F. Supp. 2d 722, 728 (S.D. Ind. 2003); *Conk*, 77 F. Supp. 2d at 970-71; accord, *Sweeney v. Sherwin Williams Co.*, 304 F. Supp. 2d 868, 873 (S.D. Miss. 2004); *Jamison v. Purdue Pharma Co.*, 251 F. Supp. 2d 1315, 1321 & n.6 (S.D. Miss. 2003) (explaining that federal rules cannot be used to expand jurisdiction of federal courts).

Indiana Trial Rule 20(A)(2) addresses joinder of defendants:

> All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of, or arising out of, the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.

Rule 20(a) of the Federal Rules of Civil Procedure contains virtually identical language. The parties have not identified any significant difference between federal courts' and Indiana courts' applications of these provisions. The choice between the two may have no practical effect here, as it did not in *Conk*.

Plaintiff's claims against Medtronic and Lutheran Hospital satisfy the standards of both the state and federal rules. Plaintiff seeks to hold both

defendants severally liable for Mrs. Lyons' death. Those claims arise from the same series of occurrences that allegedly culminated in her death. According to plaintiff, Medtronic's defective product caused Mrs. Lyons to return to the hospital a few days after the surgery in which the defective product was implanted. At the hospital, she encountered the negligence that most immediately caused her death. Plaintiff's theory of the case will raise some challenging issues of foreseeability and intervening causation. See generally *Holden v. Balko*, 949 F. Supp. 704 (S.D. Ind. 1996) (holding that alleged original tortfeasor could not, to reduce his own liability, assert comparative fault of doctor who treated the injury). Nevertheless, plaintiff seeks one trial about one series of occurrences ending in death, with all potentially responsible parties as defendants. That approach will usually be both more just and more economical than a series of trials against different defendants. In a series of separate trials, each defendant could try to defend itself by blaming the absent parties. Further, combining all claims and defendants in one case would present common questions of fact regarding the cause of Mrs. Lyons' death and the resulting damages that might be awarded if liability is found, as well as common questions of law relating to damages.[3]

---

[3]Medtronic magnanimously suggests that severance would be in plaintiff's interest because it would give him two opportunities to win. Medtronic proposes a federal trial on the product liability claim and a state trial on all claims against the hospital (and perhaps the doctors). Def. Br. at 21-22. Plaintiff is skeptical, (continued...)

Medtronic argues that the alleged wrongs – distributing a defective product and the negligence claim against the hospital – occurred at different times and are subject to substantially different legal standards. That's true as far as it goes. But Medtronic's arguments in favor of severance are based on a mistaken assertion: "There is no mention in the Complaint, or in Plaintiff's Memo, suggesting that the alleged [product] defect led to Decedent's slip and fall." Def. Br. at 21. On the contrary, plaintiff alleges explicitly in Count III, Paragraph 18 of the complaint against Medtronic that "as a result of the defective condition of the Stimulator, Sandra died, and the Estate has suffered damages." The same allegation is incorporated into Count IV against Medtronic. In evaluating misjoinder and severance, the critical fact here is that plaintiff is alleging that Mrs. Lyons' death was caused by both Medtronic and the hospital. If plaintiff were required to pursue two separate cases, the defendant in each case could name the other as a responsible non-party, thus bringing the cases back together.

Medtronic also argues that the court should exercise its discretion under Rule 21 of the Federal Rules of Civil Procedure to sever these claims, citing

---

[3](...continued)
as is the court, about this apparent generosity. In the court's experience, the greater risk is to plaintiff from allowing each defendant in separate trials to defend itself by putting a proverbial "empty chair" on trial, thus posing a significant risk of inconsistent verdicts that would all go against plaintiff.

Rice v. Sunrise Express, Inc., 209 F.3d 1008, 1016 (7th Cir. 1999) (finding severance proper, though severance did not affect subject matter jurisdiction because case arose under federal law). The use of Rule 21 to expand a federal court's jurisdiction, however, does not appear to be an option. "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein." Fed. R. Civ. P. 82. Even if severance were available as a matter of discretion, though, the court would not sever because of the potential for multiple trials with inconsistent results.[4]

[4]Another factor weighs against the proposed severance, even if the court were permitted to carry it out so as to expand its jurisdiction. As noted, plaintiff is also pursuing malpractice claims against the hospital and several doctors under the Medical Malpractice Act. Unless those claims are resolved by the medical review panel process, plaintiff can reasonably be expected to add those defendants in the future to any lawsuit based on Mrs. Lyons' death and/or the allegedly defective product and resulting injuries, which could include injuries from further medical treatment. Thus, even if the court severed now and retained jurisdiction over the product liability claim, there is a substantial prospect that fairness could require the court to allow later addition of the hospital and/or doctors as defendants in the future. That step would destroy diversity of citizenship and require remand then.

IV. *Attorney Fees Under 28 U.S.C. § 1447(c)*

Plaintiff has asked the court to award his attorney fees incurred as a result of the remand. Under 28 U.S.C. § 1447(c), a plaintiff who secures a remand is presumed to be entitled to a fee award. *Garbie v. DaimlerChrysler,* 211 F.3d 407, 411 (7th Cir. 2000); *Wisconsin v. Hotline Indus., Inc.*, 36 F.3d 363, 367-68 (7th Cir. 2000). The plaintiff is not required to show that the removal was done in bad faith or was unreasonable. *Garbie*, 211 F.3d at 410; *Tenner v. Zurek*, 168 F.3d 328, 329-30 (7th Cir. 1999).

As Judge Tinder has explained, an issue of fraudulent joinder can be "so close that costs should not be granted." *Valentine v. Ford Motor Co.*, 2003 WL 23220758, *6 (S.D. Ind. 2003) (awarding fees for remand where issue was not so close as to warrant denial of fees). However, the issue of fraudulent joinder in this case is not close. Medtronic has attempted to defend its removal by essentially trying to shift the burden to plaintiff to prove that his claims against the hospital do *not* fall within the Medical Malpractice Act. That is not the applicable standard. The applicable standard requires Medtronic to show that plaintiff has no viable claim against the hospital even if all debatable questions of fact and law are resolved in plaintiff's favor. Medtronic cannot meet this standard. Accordingly, the general presumption in favor of a fee award applies.

See *id*. The case will be remanded effective immediately. Plaintiff may submit a fee petition no later than September 30, 2004, and Medtronic may file any opposition 14 days after the petition is filed. If either side requests a hearing, the court will hold one, but in the absence of a request the court will decide the amount of a reasonable fee based on the written submissions.

So ordered.

Date: September 15, 2004

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

Copies to:

Stephen B. Caplin
CAPLIN PARK TOUSLEY & MCCOY
sbcpc@yahoo.com

Jeremy A. Klotz
ICE MILLER
jeremy.klotz@icemiller.com

Kevin R. Knight
ICE MILLER
kevin.knight@icemiller.com

Charles W. McNagny
cwm1@glmlaw.net

Julie A. Robinson
CAPLIN PARK TOUSLEY & MCCOY
julieahudson@hotmail.com