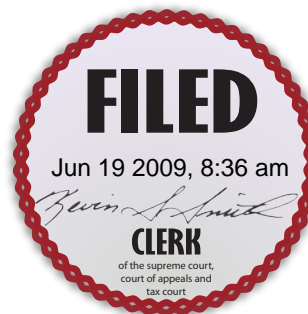


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEYS FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

KATHY A. LEE
JILL M. BRACKEN EMERSON
Cline Farrell Christie Lee & Caress, P.C.
Indianapolis, Indiana

KAREN R. ORR
LIA M. HANSON
Stuart & Branigin LLP
Lafayette, Indiana

IN THE
COURT OF APPEALS OF INDIANA

CAROLYN LANGE,)
)
 Appellant-Plaintiff,)
)
 vs.)
)
 SISTERS OF ST. FRANCIS HEALTH)
 SERVICES, INC. d/b/a ST. CLARE)
 MEDICAL CENTER,)
)
 Appellee-Defendant.)
)

No. 54A05-0808-CV-480

APPEAL FROM THE MONTGOMERY SUPERIOR COURT
The Honorable Peggy Q. Lohorn, Judge
Cause No. 54D02-0701-CT-179

June 19, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Carolyn Lange appeals the trial court's dismissal of her complaint against Sisters of St. Francis Health Services, Inc., d/b/a St. Clare Medical Center ("St. Clare"). Specifically, Lange argues that although she failed to file a timely appeal of the trial court's order dismissing her complaint, she did not receive notice of the order; therefore, she is entitled to relief pursuant to Trial Rule 72(E). Because the CCS contains evidence that the trial court's order dismissing Lange's complaint was mailed to each party and the record reveals that St. Clare received a copy of the order, we conclude that Lange is not entitled to relief pursuant to Trial Rule 72(E). We therefore dismiss this appeal as untimely.¹

Facts and Procedural History

On October 25, 2007, Lange filed a Proposed Complaint for Damages ("Proposed Complaint") with the Indiana Department of Insurance ("IDOI") alleging that St. Clare committed medical malpractice by failing to properly monitor her shower while she was a patient in the hospital. Specifically, the Proposed Complaint alleges:

4. On November 8, 2005, Mrs. Lange presented to St. Clare for an incision and drainage of a right axillary abscess.

5. On November 9, 2005, Mrs. Lange was instructed that she needed to take a shower so that the nurses could change the right axillary dressing.

6. Mrs. Lange walked to the bathroom for the shower accompanied by a nurse who watched her remove the packing and dressing from her right axilla area. Mrs. Lange was left alone to shower on her own.

7. Mrs. Lange showered on her own. At the end of the shower, Mrs. Lange had to exit the shower to pull the nurse's call light to obtain nursing assistance.

¹ We therefore grant St. Clare's August 21, 2008, motion to dismiss this appeal.

8. Mrs. Lange fell on her right leg, ankle and foot which was bent underneath her. Mrs. Lange scooted on the floor to the call light.

9. It was determined that Mrs. Lange had fractured the bimalleolar of her right ankle. Mrs. Lange was required to undergo an open reduction internal fixation of her right ankle fracture. She has been required to undergo extensive therapy and rehabilitation. She continues to have ongoing problems with the right ankle fracture.

10. The fall and injuries sustained by Mrs. Lange were proximately caused by the carelessness and negligence of the Defendant by failing to provide appropriate nursing care.

Appellant's App. p. 19-20.

The following day, on October 26, 2007, Lange filed a Complaint for Damages ("Complaint") in Montgomery Superior Court alleging that St. Clare breached its duty to maintain a safe premises and that as a result Lange suffered injuries. The Complaint contains many of the same allegations as the Proposed Complaint but also alleges:

5. On November 9, 2005, Mrs. Lange was instructed that she needed to take a shower so that the nurses could change the right axillary dressing. In the shower stall, no non-slip mat, no hand rails, and no bench were provided. The shower curtain did not fit the opening on the sides or at the bottom. There was no call light within Mrs. Lange's reach while she was in the shower. . . .

* * * * *

7. The fall and injuries sustained by Mrs. Lange were proximately caused by the carelessness and negligence of the Defendant, including, but not limited to, one or more of the following acts and omissions:

- a. The Defendant carelessly and negligently failed to provide a safe environment in the shower area for hospital patrons, including the Plaintiff;
- b. The Defendant carelessly and negligently failed to inspect and discover the dangerous condition existing on the premises;
- c. The Defendant carelessly and negligently failed to remedy the existing dangerous condition on the premises when the Defendant knew or should have known of the existence of the same; and
- d. The Defendant carelessly and negligently failed to warn the Plaintiff of the dangerous condition existing in the shower area when said Defendant knew or should have known of the same.

Id. at 6-7.

On December 28, 2007, St. Clare filed a motion to dismiss Lange's Complaint in Montgomery Superior Court for lack of subject matter jurisdiction. Specifically, St. Clare alleged that although the

Complaint before this Court purports to allege ordinary negligence, the [C]omplaint actually alleges medical malpractice. . . . Plaintiff's claim is subject to the Indiana Medical Malpractice Act, Ind. Code § 34-18-1-1 *et seq.* . . . Under the Act, a medical malpractice action may not be brought in an Indiana court until after a medical review panel is formed and issues an opinion on the alleged act of malpractice.

Id. at 10. Lange filed a response, arguing that she had two claims, one for premises liability that was properly before the trial court and the second for medical malpractice that was properly before the IDOI. The trial court held a hearing on March 26, 2008.

On May 5, 2008, when Lange's attorney had not received an order on St. Clare's motion to dismiss, Lange's attorney's assistant, Barbara Sharp, called Montgomery Superior Court and was told that the court had not yet ruled and that they had "no idea" when it would rule. *Id.* at 47 (Affidavit of Barbara Sharp). However, two days later, on May 7, 2008, the trial court granted St. Clare's motion to dismiss. The CCS entry provides:

```
05/07/2008 Notice: M DISPOSED: DI RJO: Y Vol: 7 Pg: 841  
  
Court enters order Granting Defendant's Motion to Dismiss  
for Lack of Subject Matter Jurisdiction. (see order)  
(Notify Plaintiff, by counsel, and Defendant, by counsel)  
sc 5/9/08 jrb
```

Id. at 3.

On June 17, 2008, forty-three days after last checking with the trial court on the status of St. Clare's motion to dismiss, Sharp again called the court. She was told that the court granted St. Clare's motion to dismiss on May 7, 2008, and was faxed a copy of the

order. Sharp then contacted St. Clare's law firm's paralegal, Cathy Slagle, and asked if their law firm had received a copy of the trial court's May 7, 2008, order. *Id.* at 48 (Sharp's Affidavit). According to Sharp, Slagle told her "they had only recently (within approximately the past 10 days) received a copy of the Order, but they only received that copy after noticing on www.doxpop.com that a ruling had been issued." *Id.* (Sharp's Affidavit).

On June 20, 2008, Lange filed a Notice of Appeal. Also on June 20, 2008, Lange filed a Verified Motion to Extend Time to File Appeal Pursuant to Trial Rule 72(E), a supporting affidavit from Barbara Sharp, and a supporting brief. St. Clare filed a response.

On July 1, 2008, the trial court denied Lange's verified motion to extend time to file an appeal. *Id.* at 3 (CCS entry). On July 25, 2008, Lange filed a second Notice of Appeal for the denial of her verified motion to extend time to file an appeal. This Court has consolidated both appeals under the current cause number.

Discussion and Decision

Lange raises two issues on appeal, one of which we find dispositive: whether the trial court erred when it denied her verified motion for extension of time to file an appeal pursuant to Indiana Trial Rule 72(E). Specifically, Lange argues that she failed to file a timely appeal because she did not receive notice of the trial court's order dismissing her Complaint and therefore she is entitled to relief pursuant to Trial Rule 72(E).

Indiana Trial Rule 72(D) imposes two duties on clerks of court. First, "[i]mmediately upon the entry of a ruling upon a motion, an order or judgment" the clerk

must mail a copy of the entry to each of the parties. Second, the clerk must make a record of such mailing. The Chronological Case Summary (CCS) constitutes that record. *See Collins v. Covenant Mut. Ins. Co.*, 644 N.E.2d 116, 117 (Ind. 1994). Trial Rule 72(E) then provides:

Lack of notice, or the lack of the actual receipt of a copy of the entry from the Clerk shall not affect the time within which to contest the ruling, order or judgment, or authorize the Court to relieve a party of the failure to initiate proceedings to contest such ruling, order or judgment, except as provided in this section. When the mailing of a copy of the entry by the Clerk is not evidenced by a note made by the Clerk upon the Chronological Case Summary, the Court, upon application for good cause shown, may grant an extension of any time limitation within which to contest such ruling, order or judgment to any party who was without actual knowledge, or who relied upon incorrect representations by Court personnel. Such extension shall commence when the party first obtained actual knowledge and not exceed the original time limitation.

According to our Supreme Court, Trial Rule 72(E) “plainly states that *only* if the CCS does not contain evidence that a copy of the court’s entry was sent to each party may a party claiming not to have received such notice petition the trial court for an extension of time to initiate an appeal.” *Collins*, 644 N.E.2d at 118 (emphasis added).

In *Collins*, the CCS prepared by the court reporter contained the following notation “1/31/91 Notice: Y,” which preceded a description of both the order and the entry. *Id.* Our Supreme Court said that the “Y” represented “yes,” which meant that notice was, in fact, sent to the parties. *Id.* The Court indicated that “[t]his [was] the sort of ‘note’ contemplated by T.R. 72(E).” *Id.* Accordingly, the Court concluded that the reference to notice in the CCS sufficiently demonstrated mailing notice of the trial court’s January 31, 1991, judgment. *Id.*

Here, the CCS entry for May 7, 2008, provides:

Court enters order Granting Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction. (see order) (Notify Plaintiff, by counsel, and Defendant, by counsel) sc 5/9/08 jlb

Appellant's App. p. 3. Similar to *Collins*, the notation provides "Notice: M." "M" represents "mailed," which means that notice was, in fact, mailed to each party. In addition, the entry provides that Plaintiff and Defendant were notified.² Thus, the CCS contains evidence that a copy of the court's order was sent to each party.

Nevertheless, citing a line from *Trojnar v. Trojnar*, 698 N.E.2d 301 (Ind. 1998), Lange argues that because *neither* party received a copy of the trial court's May 7, 2008, order dismissing her Complaint, a rebuttable presumption arises that the order was never mailed and therefore Trial Rule 72(E) still applies. In *Trojnar*, our Supreme Court stated:

As a result of Trial Rule 72, *Markle*, and *Collins*, lawyers may rely on the Clerk's office to send the court's rulings, and thus, their burden to check regularly the records of each court in which they have a pending case is lessened, although a proper Clerk's notation on the CCS will *presumptively* establish the fact that notice was mailed.

Id. at 304 (emphasis added). Lange's argument, however, is based on a faulty premise. That is, Lange's attorney claims throughout her brief that neither party received a copy of the court's May 7, 2008, order; however, according to Lange's attorney's own evidence, that is simply not the case. For example, citing Sharp's affidavit, Lange's attorney writes at one point that paralegal Slagle's law firm did *not* receive a copy of the order. *See* Appellant's Br. p. 4 ("Ms. Slagle informed Ms. Sharp that they had not received a copy of the order but had learned of the order via Doxpop.com."). This is *not* what Sharp (who

² Lange makes much to do about the fact that "notify" is used in the present tense as opposed to in the past tense. However, in light of the fact that the notation provides "Notice: M," we find this choice of tenses to be purely unintentional.

works in the same law firm as Lange’s attorney) states in her affidavit, however. Sharp *unequivocally* states that Slagle’s law firm received a copy of the order *after* checking www.doxpop.com. See Appellant’s App. p. 48 (“On that same day, June 17, 2008, I contacted a paralegal, Cathy Slagle, from Stuart & Branigin, counsel for the Defendant in this matter, to inquire if they had received a copy of the Court’s May 7, 2008, Order. Ms. Slagle advised me that they had only recently (within approximately the past 10 days^[3]) received a copy of the Order, but they only received that copy after noticing on www.doxpop.com that a ruling had been issued.”). Because Lange’s argument is based on the premise that neither party received a copy of the trial court’s order, and it is apparent that St. Clare, in fact, received a copy of the order, we dismiss this argument outright.⁴

According to *Collins*, Trial Rule 72(E) “plainly states that *only* if the CCS does not contain evidence that a copy of the court’s entry was sent to each party may a party claiming not to have received such notice petition the trial court for an extension of time to initiate an appeal.” *Collins*, 644 N.E.2d at 118 (emphasis added). Here, the CCS contains evidence that the trial court’s order dismissing Lange’s complaint was mailed to each party. Lange is therefore not entitled to relief pursuant to Trial Rule 72(E). As for

³ As a matter of curiosity, we note that ten days before June 17, 2008, was June 7, 2008, which was a Saturday and *just happened* to be the thirty-first day after the trial court entered its order dismissing Lange’s Complaint.

⁴ We pause to point out that Lange is *not* arguing that she or St. Clare received the order after the expiration of the thirty-day deadline to appeal. Lange is clear in her argument that neither party received the order: “Neither Lange’s counsel nor St. Clare’s counsel received a copy of the court’s order from the court or the clerk’s office. Counsel for St. Clare learned of the order via Doxpop.com.” Appellant’s Br. p. 14. While counsel for St. Clare may have *first* learned of the order via doxpop.com, the affidavit makes clear that St. Clare then received a copy of the order. While we do not know the dates for each of these events, St. Clare claims on appeal that it was aware of the order well within the thirty day window for filing a notice of appeal. See Appellee’s Br. p. 13.

Lange's request that we use our equitable power to hear her untimely appeal, we decline, noting that Lange allowed more than forty days to elapse before checking back with Montgomery Superior Court personnel on the status of St. Clare's motion to dismiss her Complaint. We therefore dismiss this appeal as untimely.

Dismissed.

RILEY, J., and DARDEN, J., concur.