

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Columbus Regional Hospital,
Appellant-Defendant,

v.

Sally Clark and
Ronald K. Clark,
Appellees-Plaintiffs,

v.

Jane Doe, M.D.,
Non-Appealing Defendant.

April 15, 2021

Court of Appeals Case No.
20A-CT-1624

Interlocutory Appeal from the
Bartholomew Superior Court

The Honorable James D. Worton,
Judge

Trial Court Cause No.
03D01-1909-CT-5154

Weissmann, Judge.

- [1] This medical malpractice appeal hinges on a signature.
- [2] Columbus Regional Hospital (Hospital) claims the trial court should have granted its motion for summary judgment because the only evidence of substandard medical care provided by Plaintiff Sally Clark was an unsigned letter from her expert. Clark contends the lack of a signature on her expert's letter is irrelevant, especially as she submitted a signed version of the document after the trial court denied Hospital's motion for summary judgment.
- [3] We conclude the unsigned letter was inadmissible hearsay which could not be considered by the trial court when ruling on Hospital's motion for summary judgment. We also conclude Clark waited too long to cure the letter's deficiencies. Finding no genuine issue of material fact exists as to Hospital's liability, we reverse the trial court's denial of Hospital's motion for summary judgment.

Facts

- [4] Complications during a heart procedure in 2014 resulted in Sally Clark receiving a permanent pacemaker. Five years later, Clark filed a complaint alleging the cardiologist botched the procedure and Hospital, as the cardiologist's alleged employer, was vicariously liable for the cardiologist's malpractice.

- [5] Hospital sought summary judgment and, as supporting evidence, designated the medical review panel's earlier determination in this dispute. The panel found "[t]he evidence does not support the conclusion that [Hospital and the cardiologist] failed to meet the applicable standard of care and the conduct complained of was not a factor in the resultant damages." App. Vol. II, p. 19. Hospital also designated evidence establishing it did not employ the cardiologist at the time of Clark's heart procedure. *Id.* at 21-22.
- [6] Clark responded to Hospital's summary judgment motion by designating an unsigned, unverified letter purportedly written by Erik N. Prystowsky, M.D., to Clark's counsel in 2015. Dr. Prystowsky suggested in the letter that the cardiologist's treatment of Clark fell below the applicable standard of care.
- [7] At the summary judgment hearing, Hospital argued that the letter from Dr. Prystowsky was inadmissible hearsay and moved to strike it. *Id.* at 42; Tr. Vol. II, pp. 7-8. However, Hospital did not seek specifically to strike Clark's two other designated documents that quoted verbatim from Dr. Prystowsky's letter. App. Vol. II, pp. 34, 37-41. Hospital maintained it was entitled to summary judgment because the record contained no other evidence refuting the medical review panel's finding that neither Hospital nor the cardiologist failed to meet the applicable standard of care. If the cardiologist did not commit malpractice, Hospital argued, it could not be vicariously liable for the cardiologist's actions.
- [8] The trial court denied Hospital's motion for summary judgment without explanation. *Id.* at 200. It never expressly ruled on Hospital's motion to strike

the unsigned letter. Hospital sought certification for interlocutory appeal of the summary judgment order, arguing that the trial court erred in considering Dr. Prystowsky's unsworn letter. *Id.* at 185. Two weeks later, Clark moved to supplement her summary judgment response with a signed and verified copy of Dr. Prystowsky's letter. *Id.* at 188. The trial court granted Clark's motion to supplement and subsequently certified the summary judgment order for interlocutory appeal. *Id.* at 200-02. This Court later granted Hospital's motion for leave to file an interlocutory appeal under Indiana Appellate Rule 14(B).

Discussion and Decision

[9] Repeating its arguments from the summary judgment hearing, Hospital claims the trial court was obligated to grant its motion for summary judgment. We review a trial court's ruling on summary judgment *de novo*. *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009). Summary judgment is appropriate if the designated evidence establishes that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.*; Ind. Trial Rule 56. The party moving for summary judgment has the burden of meeting these two requirements. *Goodwin v. Yeakle's Sports Bar & Grill, Inc.*, 62 N.E.3d 384, 386 (Ind. 2016). Once met, the burden shifts to the non-moving party to establish facts demonstrating a genuine issue. *Id.*

[10] Where facts or inferences are in doubt, they must be construed in favor of Clark, the non-moving party. *See id.* Hospital, as the party appealing the trial court's summary judgment determination, bears the burden of persuading us

the denial of summary judgment was erroneous. *Ryan v. TCI Architects/Eng'rs/Contractors, Inc.*, 72 N.E.3d 908, 913 (Ind. 2017).

I. Waiver

- [11] As a preliminary matter, Clark requests we find Hospital waived any error by moving to strike only one of her three designated documents containing the substance of Dr. Prystowsky's letter. But Clark does not cite any supporting authority and, therefore, has waived this claim. *See Schon v. Frantz*, 156 N.E.3d 692, 702 (Ind. Ct. App. 2020); Ind. Appellate Rules 46(B) (requiring parties to support their contentions with citation to authority).
- [12] Hospital does not respond to Clark's waiver claim. A party's failure to respond to an issue raised in an opponent's brief is akin to not filing a brief. *R.L. Turner Corp. v. Wressel*, 44 N.E.3d 26, 42 (Ind. Ct. App. 2015). Hospital's silence results in a lower standard of review—that is, prima facie error—as to the unchallenged issue. *See id.*
- [13] Clark's waiver and Hospital's silence notwithstanding, we find Hospital sufficiently preserved its challenge to Dr. Prystowsky's letter. At the hearing, Hospital contended summary judgment was proper on all issues because "Dr. Prystowsky's report is unsigned, unverified and is in admissible (sic) hearsay and does not qualify as proper evidence under trial rule 56E (sic) . . ." Tr. Vol. II, p. 7. Although Hospital only moved to strike Clark's designated Exhibit 3, which consisted solely of Dr. Prystowsky's letter, Hospital's arguments made clear that it was objecting to the trial court's consideration of Dr. Prystowsky's

letter in any form. Hospital did not waive any error resulting from the trial court's consideration of that letter.

II. Denial of Summary Judgment

- [14] Hospital contends the absence of a signature on Dr. Prystowsky's letter is dispositive. The letter is inadmissible hearsay, according to Hospital, and could not be considered by the trial court. As Clark presented no other evidence indicating the cardiologist's treatment fell below the standard of care, Hospital argues it is entitled to summary judgment.
- [15] In response, Clark does not dispute that the unsigned, unverified letter was hearsay. Rather, she asserts Hospital suffered no prejudice because Hospital received Dr. Prystowsky's opinion through discovery long before the summary judgment proceedings. Clark also claims she cured any defect in the original letter by submitting a signed and verified version of it after the trial court denied summary judgment.
- [16] Relying on the elements of Clark's claims, the express requirements of Trial Rule 56, and our decisions interpreting that rule, we conclude Hospital is correct and is entitled to summary judgment. To prevail on her malpractice claim, Clark was required to establish the following elements: (1) a duty by the cardiologist and Hospital in relation to her; (2) failure by the cardiologist and Hospital to conform to the requisite standard of care required by the relationship; and (3) an injury to Clark resulting from those failures. *Ford v. Jawaid*, 52 N.E.3d 874, 877-78 (Ind. Ct. App. 2016).

- [17] The standard of care for health care providers requires them to exercise the degree of skill and care ordinarily possessed and exercised by a reasonably skillful and careful practitioner under the same or similar circumstances. *Glon v. Mem'l Hosp. South Bend, Inc.*, 111 N.E.3d 232, 239 (Ind. Ct. App. 2018), *trans. denied*. A medical malpractice claimant generally must present expert medical testimony to establish the applicable standard of care, breach of that standard, and proximate cause. *Id.*
- [18] Hospital's summary judgment motion was based on two contentions: (1) no question of material fact existed as to whether the cardiologist met the applicable standard of care; and (2) Hospital could not be vicariously liable for the cardiologist's actions because she was not Hospital's employee. Clark does not dispute that Hospital met its initial burden by designating the medical review panel's determination and an affidavit indicating the cardiologist was not Hospital's employee. The burden then shifted to Clark to establish a question of material fact, rendering summary judgment improper. *See Goodwin*, 62 N.E.3d at 386.
- [19] The only expert medical evidence designated by Clark that refuted the medical review panel's determination was Dr. Prystowsky's unsigned letter. App. Vol. II, pp. 31-32. That letter was hearsay because it was an out-of-court assertion offered in court to prove the truth of the matter asserted—that is, that the cardiologist's treatment of Clark fell below the standard of care. *See Ind. Evidence Rule 801(c)*; App. Vol. II, pp. 42-43. Absent an applicable exception, hearsay is inadmissible as evidence. *In re E. T.*, 808 N.E.2d 639, 641 (Ind.

2004); Evid. R. 802. A trial court may not consider inadmissible evidence, including an unsworn letter from an expert, when determining whether summary judgment should be granted. *Johnston v. State Farm Mut. Auto. Ins. Co.*, 667 N.E.2d 802, 806 (Ind. Ct. App. 1996).

[20] Clark offers no hearsay exception which would render the letter admissible. In light of Hospital's proper objection to the letter as inadmissible hearsay, the trial court could not consider the inadmissible letter in determining whether Hospital was entitled to summary judgment. *Id.*

[21] Clark's post-judgment supplementation of her designated evidence does not impact that result. Clark incorrectly suggests Indiana Trial Rule 56(E) authorized her belated correction of Dr. Prystowsky's unsigned, unverified letter. But that rule authorizes only supplementation of "affidavits," not other types of designated evidence. Tr. R. 56(E); *Auto-Owners Ins. Co. v. Bill Gaddis Chevrolet Dodge, Inc.*, 973 N.E.2d 1179, 1182 (Ind. Ct. 2012).

[22] The appellate decisions Clark cites also do not advance her argument. They either involve supplementation of affidavits specifically authorized by Trial Rule 56(E) or supplementation of designated evidence prior to the trial court's ruling on a summary judgment motion. *See Ind. Univ. Med. Ctr., Riley Hosp. Child. v. Logan*, 728 N.E.2d 855, 859 (Ind. 2000) (supplementation occurred before summary judgment hearing); *Jordan v. Deery*, 609 N.E.2d 1104, 1109 (Ind. 1993) (two supplementations occurred at least thirteen days before trial court's summary judgment ruling); *Winbush v. Mem'l Health Sys., Inc.*, 581

N.E.2d 1239, 1242 (Ind. 1991) (post-hearing, pre-ruling supplementation); *Estate of Collins v. McKinney*, 936 N.E.2d 252, 257-258 (Ind. Ct. App. 2010) (same); (*Fort Wayne Lodge, LLC v. EBH Corp.*, 805 N.E.2d 876, 885 (Ind. Ct. App. 2010), *trans. denied*) (belated supplementation of affidavit pursuant to T.R. 56(E)). Here, Clark did not seek to supplement her designated evidence with a sworn version of Dr. Prystowsky’s letter until a month after the trial court ruled on Hospital’s motion for summary judgment.¹

[23] By the time Clark moved to supplement her designated evidence, Hospital already had launched an interlocutory appeal of the trial court’s summary judgment order. The trial court therefore did not consider the revised letter in denying summary judgment nor could it. *See Mitchell v. 10th and the Bypass, LLC*, 3 N.E.3d 967, 973 (Ind. 2014) (ruling that even a trial court considering whether to materially modify a non-final summary judgment order may consider only the evidence properly before it at the time the order was first entered); *Hussain v. Salin Bank & Trust*, 143 N.E.3d 322 (Ind. Ct. App. 2020) (stating only properly designated evidence admissible at trial may be considered when ruling on summary judgment motion and such evidence does not include unsworn statements or unverified exhibits); *Breining v. Harkness*, 872 N.E.2d

¹ Clark indicated during the summary judgment hearing on June 26, 2020, that she would be willing to “resubmit” Dr. Prystowsky’s letter, but she did not request explicitly permission to supplement her designated evidence. Tr. Vol. II, p. 10. The trial court denied Hospital’s motion for summary judgment June 30, 2020. App. Vol. II, p. 7. Clark moved to supplement her designated evidence with a signed version of the letter August 4, 2020—35 days after the trial court’s ruling—and only after Hospital established in its motion for interlocutory appeal that unsworn letters could not be considered in summary judgment proceedings. App. Vol. II, p. 188.

155, 159 (Ind. Ct. App. 2007), *reh. denied, trans. denied* (refusing to consider on appeal material designated by party after summary judgment hearing). Clark's belated submission of a verified letter from her expert is tantamount to a coach trying to change the outcome of a basketball game by putting a better shooter on the court after the final buzzer has sounded.

[24] Hospital is entitled to summary judgment, as Clark offered no admissible evidence raising a genuine issue of material fact as to the compliance of the cardiologist and Hospital with the standard of care. The judgment of the trial court is reversed, and this case is remanded for entry of summary judgment in favor of Hospital.

Altice, J., concurs.

Kirsch, J., dissents without a separate opinion.