MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Patricia A. Voltz and Megan E. Cecil, Co-Personal Representatives of the Estate of Wallace L. Cecil, Deceased,

Appellants-Plaintiffs,

v.

Park Place Christian Community of St. John, Inc., d/b/a Park Place of St. John, and Symbria

February 14, 2023

Court of Appeals Case No. 22A-CT-951

Appeal from the Lake Superior Court

The Honorable Calvin D. Hawkins, Judge

Trial Court Case No. 45D02-1807-CT-289

Rehab, Inc, d/b/a Alliance Rehab, Inc.,
Appellees-Defendants.

Memorandum Decision by Senior Judge Shepard
Judges Robb and Bradford concur.

Shepard, Senior Judge.

[1] Patricia Voltz and Megan Cecil (Representatives) appeal the trial court's entry of summary judgment in favor of Park Place of St. John and Symbria Rehab, asserting that notations in uncertified medical records establish the existence of an issue of material fact that precludes summary judgment. Concluding there exists no *genuine* issue of fact created by the designated evidence, we affirm.

Facts and Procedural History

[2] The facts most favorable to the Representatives, the non-movants, follow. Representatives are the children of Wallace Cecil. Ninety-one-year-old Cecil was admitted to Park Place for rehabilitative care, and Symbria conducted Cecil's physical therapy services while he was there. Due to his difficulty swallowing, Cecil's status while he was a patient at Park Place was "NPO," meaning "nothing by mouth." Appellee's App. Vol. II, p 191.

[3] On October 31, 2017, Cecil was having a physical therapy session. During a rest period, Cecil began coughing and choking. Marley Hawn, a Park Place

registered nurse, was called into the room to render aid. Nurse Hawn performed a "finger sweep" of Cecil's mouth and removed a mucus plug, but Cecil continued to experience respiratory distress. Emergency personnel were called, and paramedic Michael Gillette removed a "large fatty mass" from Cecil's airway. Appellants' App. Vol. 3, p. 110 (Representatives' Desig. of Evid. Ex. 5). Thereafter, Cecil was transported to the hospital where he ultimately died.

[4] Representatives filed a proposed complaint against Park Place with the medical review panel and then filed a complaint for medical malpractice in the trial court. The trial court proceedings were stayed until the medical review panel process was complete. The medical review panel issued a unanimous opinion that Park Place met the applicable standard of care. Thereafter, Park Place and Symbria filed for summary judgment in the trial court, which the court later granted after a hearing. The Representatives now appeal.

Issue

[5] The sole issue we decide is whether the trial court erred by granting summary judgment for Park Place and Symbria on Representatives' claims of medical negligence.

Discussion and Decision

[6] When reviewing the entry of summary judgment, our standard of review is similar to that of the trial court: whether there exists a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law.

City of Indianapolis v. Cox, 20 N.E.3d 201 (Ind. Ct. App. 2014), *trans. denied*. "Once the moving party has sustained its initial burden of proving the absence of a genuine issue of material fact and the appropriateness of judgment as a matter of law, the party opposing summary judgment must respond by designating specific facts establishing a genuine issue for trial." *Sheehan Const. Co., Inc. v. Cont'l Cas. Co.*, 938 N.E.2d 685, 689 (Ind. 2010). All facts and reasonable inferences drawn from those facts are construed in favor of the non-movant. *Id.* Further, the trial court's grant of summary judgment is clothed with a presumption of validity, and the party who lost in the trial court has the burden of demonstrating the grant of summary judgment was erroneous. *Auto-Owners Ins. Co. v. Benko*, 964 N.E.2d 886 (Ind. Ct. App. 2012) (quoting *Cox v. N. Ind. Pub. Serv. Co., Inc.*, 848 N.E.2d 690, 695-96 (Ind. Ct. App. 2006)), *trans. denied*.

[7] The elements of a medical malpractice claim are: (1) the medical provider owed a duty to the plaintiff; (2) the medical provider failed to conform his or her conduct to the requisite standard of care; and (3) an injury to the plaintiff resulting from that failure. *Glon v. Mem'l Hosp. of S. Bend, Inc.*, 111 N.E.3d 232 (Ind. Ct. App. 2018), *trans. denied*. The plaintiff must present expert medical testimony establishing: (1) the applicable standard of care required by Indiana law; (2) how the defendant medical provider breached that standard of care; and (3) that the medical provider's negligence in doing so was the proximate cause of the injuries complained of. *Id.*

[8] Before filing suit, a plaintiff must present a proposed complaint to a medical review panel for its opinion as to whether the evidence supports the conclusion that the defendant acted or failed to act within the appropriate standard of care as charged in the complaint. Ind. Code §§ 34-18-8-4 (1998), 34-18-10-22(a) (1998). A unanimous opinion of the medical review panel that the defendant did not breach the applicable standard of care is sufficient to negate the existence of a genuine issue of material fact. *Perry v. Driehorst*, 808 N.E.2d 765 (Ind. Ct. App. 2004), *trans. denied*. In order to survive summary judgment in such a situation, the plaintiff must present expert medical testimony to rebut the panel's opinion. *Glon*, 111 N.E.3d 232.

[9] In limited instances, however, expert opinion evidence may not be required because the doctrine of res ipsa loquitur applies. This doctrine recognizes that the circumstances surrounding an injury may be such as to raise a presumption, or at least permit an inference, of negligence on the part of the defendant, despite the medical review panel's opinion to the contrary. *St. Mary's Ohio Valley Heart Care, LLC v. Smith*, 112 N.E.3d 1144 (Ind. Ct. App. 2018), *trans. denied*. Under the doctrine, negligence may be inferred where: (1) the injuring instrumentality was within the management or exclusive control of the defendant, and (2) the accident is of the type that does not ordinarily happen if those who have the management or control exercise proper care. *Id.* Because application of this doctrine does not depend on the standard of care but, rather, depends entirely upon the nature of the occurrence out of which the injury

arose, expert opinion is required only when the issue of care is beyond the realm of the layperson. *Id.*

[10] Here, the medical review panel issued a unanimous opinion in favor of Park Place. *See* Appellee's App. Vol. II, pp. 64-73 (Park Place Desig. of Evid., Ex. H). Nevertheless, Representatives assert that the combination of the doctrine of res ipsa loquitur and the testimony of their expert create a genuine issue of fact such that summary judgment was improper.

[11] To establish the first element of res ipsa loquitur, the plaintiff must show either that a specific instrument caused the injury and the defendant had control over that instrument *or* that any reasonably probable causes for the injury were under the control of the defendant. *Aldana v. Sch. City of E. Chicago*, 769 N.E.2d 1201 (Ind. Ct. App. 2002), *trans. denied*. Although a plaintiff may point to several alternative causes of the injury, he or she must specifically identify those potential causes and show that they were within the exclusive control of the defendant; otherwise, the plaintiff's res ipsa loquitur claim must fail. *Slease v. Hughbanks*, 684 N.E.2d 496 (Ind. Ct. App. 1997).

[12] As to this element, Representatives assert that Park Place and Symbria had control over Cecil, as he was completely reliant on his caregivers for everything in his daily life, and that this control satisfies the first element of the doctrine. *See* Appellants' Br. p. 13. However, the doctrine requires that the *injuring instrumentality* was within the defendant's control. In this case, the injuring

instrumentality is the mass that was removed from Cecil's airway, not Cecil himself.

[13] Further, it does not resolve the issue to simply substitute the mass for Cecil and say that the mass was within the exclusive control of Park Place and Symbria. We must first know the identity of the mass in order to determine whether it was within the exclusive control of Park Place and Symbria. Indeed, Representatives acknowledge that in order to stave off summary judgment, they must "come forward with admissible evidence that Cecil choked **on food**" rather than "some natural bodily substance." Appellants' Br. p. 13 (emphasis added). Thus, we turn to Representatives' designated evidence showing that the substance Cecil choked on was food.

[14] Summary judgment should be granted only if the designated evidence authorized by Trial Rule 56 shows there is no genuine issue of material fact. *Stafford v. Szymanowski*, 31 N.E.3d 959 (Ind. 2015). Indiana courts have long held that unsworn statements and unverified or uncertified exhibits do not qualify as proper Rule 56 evidence. *487 Broadway Co., LLC v. Robinson*, 147 N.E.3d 347 (Ind. Ct. App. 2020); *see also Ind. Univ. Med. Ctr. v. Logan*, 728 N.E.2d 855, 858 n.2 (Ind. 2000) (noting uncertified documents and unsworn statements, including uncertified medical records, were inadmissible and not proper Rule 56 evidence).

[15] In opposition to summary judgment, Representatives designated as evidence ten exhibits. To attempt to show that the mass Cecil choked on was food,

Representatives rely upon Exhibit 2, which contains excerpts from Cecil's emergency room medical records. These records, however, were neither certified nor authenticated and thus cannot be considered because they are not proper evidence under Rule 56.[1]

[16] Assuming, arguendo, the records were proper Rule 56 evidence, we are not persuaded the notations in the records create a genuine issue of material fact that would preclude summary judgment. "An issue is 'genuine' if a trier of fact is required to resolve the parties' differing accounts of the truth, or if the undisputed material facts support conflicting reasonable inferences." *Eggers v. CSX Transp., Inc.*, 198 N.E.3d 688, 691 (Ind. Ct. App. 2022) (quoting *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009)).

[17] To be a *genuine* issue of fact, the claim must have legal probative force. *Bastin v. First Ind. Bank*, 694 N.E.2d 740 (Ind. Ct. App. 1998), *trans. denied*; *see Gaboury v. Ireland Rd. Grace Brethren, Inc.*, 446 N.E.2d 1310 (Ind. 1983) (stating that, to be considered genuine under Rule 56, a material issue must be established by sufficient evidence of the claimed factual dispute such that a trier of fact is required to resolve parties' differing versions); *see also Raymundo v. Hammond*

[1] In addition to their lack of authentication, the notations in the hospital records are imbedded in several layers of hearsay, each layer of which would require a showing of conformity with an exception to the rule against hearsay in order to be admissible. Ind. Evidence Rule 805 ("Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule."). While Representatives present argument on this issue, our determination that the records are not proper Rule 56 evidence causes a ruling thereon to be unnecessary.

Clinic Ass'n, 449 N.E.2d 276 (Ind. 1983) (transparent contentions cannot defeat motion for summary judgment).

[18] In an attempt to create a genuine issue of material fact, Representatives point to the notations in Cecil's emergency room records and speculate that the mass may have been food. Examination of these notations shows that they all cite purported statements by Michael Gillette or unidentified EMS agents.

ED Notes by Nieman, Jaclyn, RN at 10/31/2017 10:32 AM

Author: Nieman, Jaclyn, RN	Service: (none)	Author Type: Registered Nurse
Filed: 10/31/2017 12:24 PM	Date of Service: 10/31/2017 10:32 AM	Creation Time: 10/31/2017 10:33 AM
Status: Addendum	Editor: Nieman, Jaclyn, RN (Registered Nurse)	

Related Notes: Original Note by Nieman, Jaclyn, RN (Registered Nurse) filed at 10/31/2017 11:53 AM

Witnessed arrest. EMS cpr 20mins. 3 epi given per ems. Pulses palpable, MD Goldenberg at bedside. RT at bedside with manual ventilation. Per EMS '3in fatty piece of meat' removed from oral airway.

Appellants' App. Vol. 3, p. 43 (underlining added).

ED Provider Notes by Goldenberg, Eric, MD at 10/31/2017 11:03 AM

Author: Goldenberg, Eric, MD	Service: Emergency Medicine	Author Type: Physician
Filed: 10/31/2017 12:51 PM	Date of Service: 10/31/2017 11:03 AM	Creation Time: 10/31/2017 11:03 AM
Status: Signed	Editor: Goldenberg, Eric, MD (Physician)	

Related Notes: Original Note by Khan, Sonia, DO (Resident) filed at 10/31/2017 12:45 PM

Date of Service: 10/31/2017

Time Seen By Providers:
Attending Physician: n/a
PA/Res/NP : Time Seen [10/31/17 1030]
Bypass First Provider for COH Patients/Nurse ONLY Visit: n/a

History

Chief Complaint
Patient presents with
- Cardiac Arrest

History of Present Illness
Wallace Cecil is a 91 yo male who presents to the ED via EMS in cardiopulmonary arrest. Per EMS report patient is from nursing home and had a witnessed arrest after choking on food bolus while eating. CPR initiated by bystanders immediately. EMS arrived and continued CPR, patient intubated in the field after a white fatty

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FRANCISCAN ALLIANCE	FRANCISCAN HEALTH CROWN POINT 1201 South Main St CROWN POINT IN 46307-8481 Legal Medical Record	Cecil, Wallace MRN: E3499624, DOB: 2/12/1926, Sex: M Adm: 10/31/2017, D/C: 10/31/2017

ED Notes (continued)

ED Provider Notes by Goldenberg, Eric, MD at 10/31/2017 11:03 AM (continued)

food substance 2-3 inches long was extracted from the throat during inspection with laryngoscope per EMS prior to intubation. Patient was supposed to be NPO per report and had G tube for this reason. ACLS protocol followed, CPR continued and patient given 3 doses of 1 mg epinephrine per protocol. Patient regained pulse briefly without return of respiratory effort on his arrival here however went back into cardiac arrest.

Id. at 43-44 (underlining added).

FRANCISCAN ALLIANCE	FRANCISCAN HEALTH CROWN POINT 1201 South Main St CROWN POINT IN 46307-8481 Legal Medical Record	Cecil, Wallace MRN: E3499624, DOB: 2/12/1926, Sex: M Adm: 10/31/2017, D/C: 10/31/2017

ED Notes (continued)

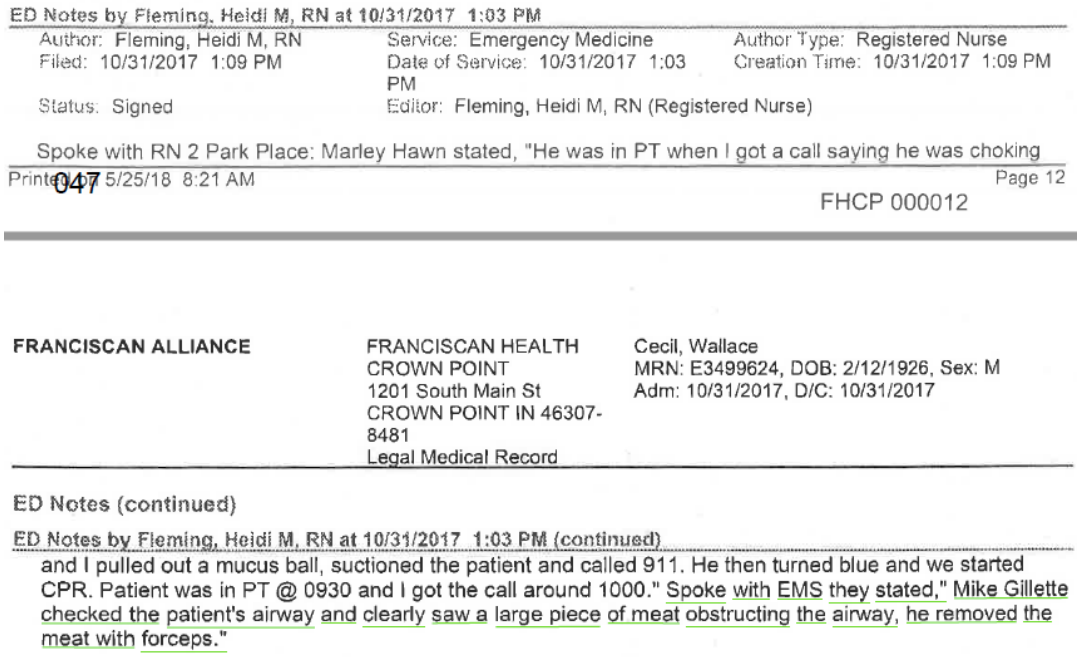
ED Provider Notes by Goldenberg, Eric, MD at 10/31/2017 11:03 AM (continued)

Khan, Sonia, DO
Resident
10/31/17 1245

10/31/2017 12:47 PM
Eric Goldenberg, MD: Attending Note:
I personally examined the patient, confirmed the history as documented in the chart by the resident physician, reviewed orders and results, and discussed the plan with the resident provider and the patient.

I agree with above, patient came in with a weak pulse after PEA arrest. Per EMS, he had a 2-3 inch piece of food which they thought was meat lodged in his airway, we did not view this blockage ourselves, they remove this and intubated him, they did get return of spontaneous circulation after 3 apneas and compressions. Here he quickly lost his pulse and went into V. fib, compressions started, shocked twice, medications given including bicarb, calcium, epinephrine, amiodarone. No significant return of spontaneous circulation after this and quickly progressed from V. fib into asystole. Patient had been saturating well, high 90s,. Patient had an IO in the left tibia, peripheral access gained in the ED. there are appropriate resuscitative efforts and asystole with no cardiac activity on ultrasound, time of death at 1059. While after this, x-ray did reveal pneumothorax likely from compressions. I spoke with 1 daughter the phone and the other person.

Id. at 47 (underlining added).



ED Notes by Fleming, Heidi M, RN at 10/31/2017 1:03 PM

Author: Fleming, Heidi M, RN | Service: Emergency Medicine | Author Type: Registered Nurse
Filed: 10/31/2017 1:09 PM | Date of Service: 10/31/2017 1:03 PM | Creation Time: 10/31/2017 1:09 PM
Status: Signed | Editor: Fleming, Heidi M, RN (Registered Nurse)

Spoke with RN 2 Park Place: Marley Hawn stated, "He was in PT when I got a call saying he was choking

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FHCP 000012

FRANCISCAN ALLIANCE

FRANCISCAN HEALTH
CROWN POINT
1201 South Main St
CROWN POINT IN 46307-8481
Legal Medical Record

Cecil, Wallace
MRN: E3499624, DOB: 2/12/1926, Sex: M
Adm: 10/31/2017, D/C: 10/31/2017

ED Notes (continued)

ED Notes by Fleming, Heidi M, RN at 10/31/2017 1:03 PM (continued)

and I pulled out a mucus ball, suctioned the patient and called 911. He then turned blue and we started CPR. Patient was in PT @ 0930 and I got the call around 1000." Spoke with EMS they stated," Mike Gillette checked the patient's airway and clearly saw a large piece of meat obstructing the airway, he removed the meat with forceps."

Id. at 47-48 (underlining added).

[19] In moving for summary judgment, among other things Park Place designated the affidavit of registered nurse Marley Hawn and the sworn deposition testimony of both physical therapy assistant Whitney Manual and paramedic Michael Gillette. Nurse Hawn attested that on the morning in question she administered Cecil's medication via his gastrostomy tube and that:

> 8. During my care of Mr. Cecil, I never provided Mr. Cecil food or medication orally, per medical instructions. During the morning of October 31, 2017, no individual or employee of Park Place brought food to Mr. Cecil's room, provided any food, or otherwise fed him. No individual provided Mr. Cecil food or medication orally, per medical instructions.

Appellee's App. Vol. II, pp. 227-28 (Park Place Desig. Evid., Ex. L). Therapist Manual testified in her deposition that she took Cecil from his room to the

therapy room. *Id.* at 183 (Park Place Desig. Evid., Ex. K). She also acknowledged that no Symbria personnel had food that day in the therapy room prior to this incident. *Id.* at 205.

[20] Paramedic Gillette definitively testified that he did not know what the mass was and that he could not say it was food:

> Q. And how would you describe that obstruction?
>
> A. It was some sort of mass. I don't know whether it was a fatty mass or food.
>
> . . . .
>
> Q. I was looking at your report. [Y]ou described it as a large fatty mass.
>
> A. Correct.
>
> Q. How large?
>
> A. It was approximately three inches long, from what I recall.
>
> . . . .
>
> Q. Did you have the impression that it was a food product?
>
> A. Again, I couldn't analyze it at the time, so I can't say.
>
> Q. I'm just wondering why you chose the adjective fatty to describe it.
>
> A. At the time, like I said, I couldn't analyze it, so it looked like a large fatty mass to me.
>
> Q. Can you compare it to something that we might all have a better idea of what you mean by a large fatty mass? Can you actually compare it to something?
>
> A. Looked like --- I don't know --- like human fat, I guess it could look like, yeah.
>
> . . . .

> Q. The question is whether it came from outside his body or inside his body.
>
> A. That I can't answer.

Id. at 87, 89-90, 95 (Park Place Desig. of Evid., Ex. I).

[21] We are not persuaded that the unauthenticated notations in Cecil's medical records, had they been considered, create a genuine issue of material fact that precludes summary judgment. As we noted, the notations involve multiple layers of hearsay as they are notes that were made by emergency room staff based on what they understood unidentified individuals to have said. However, Gillette, who was the paramedic that administered aid to Cecil and that removed the mass from Cecil's airway, made it clear that the mass could not be identified and, specifically, that he could not say it was food. Thus, we conclude that even had the notations been proper Rule 56 evidence, they would not have created a genuine issue of material fact to thwart summary judgment.

[22] As a final matter, we address the affidavit of Representatives' medical expert, as the Representatives assert that it, in combination with the doctrine of res ipsa loquitur, create a genuine issue of fact. Dr. Rocchi stated in his affidavit:

> 8. For a resident of a long term care or rehabilitation facility with the same conditions and in the same circumstances as Mr. Cecil to choke to death on a piece of food can only happen if his caregivers either furnished him with food, or were inattentive enough to permit him to obtain a piece of food, either of which would be a breach of the standard of care.

Appellants' App. Vol. 3, p. 180 (Appellants' Desig Evid., Ex. 9).

[23] Dr. Rocchi's opinion that *if* Cecil's caregivers at Park Place furnished him with food or were inattentive to the point that he obtained food on his own, Park Place would have deviated from the standard of care, does not refute the evidence presented by Park Place nor does it create a question of fact. Rather, it is a hypothetical based on an assumption of the facts. There is no evidence in the record to provide a factual basis for the hypothetical situation on which Dr. Rocchi's opinion is based (that Cecil was likely to have been given or otherwise obtained food), causing his opinion to be speculative at best. Consequently, Dr. Rocchi's opinion is insufficient to create a genuine issue of material fact. *See Blaker v. Young*, 911 N.E.2d 648 (Ind. Ct. App. 2009) (holding that doctors' opinions, based on assumptions and speculation, were insufficient to raise genuine issue of material fact), *trans. denied*.

Conclusion

[24] Based on the foregoing, we conclude Representatives failed to rebut the medical review panel's unanimous opinion with expert testimony or application of the doctrine of res ipsa loquitur to establish the existence of a genuine issue of material fact. Accordingly, summary judgment for Park Place and Symbria was proper.

[25] Affirmed.

Robb, J., and Bradford, J., concur.