MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Ardith Radil and Larry Radil,
Appellant-Plaintiffs,

v.

Kuumba K. Long, M.D. and Midwest Eye Consultants, P.C. d/b/a Cataract and Laser Institute,
Appellee-Defendants.

May 27, 2022

Court of Appeals Case No. 21A-CT-2376

Appeal from the Wabash Superior Court

The Honorable Benjamin D.R. Vanderpool, Judge

Trial Court Cause No. 85D01-1604-CT-278

Mathias, Judge.

[1] Ardith Radil and Larry Radil, wife and husband, appeal the trial court's grant of summary judgment in favor of Kuumba K. Long, M.D. and Midwest Eye Consultants, P.C. d/b/a Cataract and Laser Institute (collectively, "Dr. Long") on the Radils' complaint alleging medical malpractice. The Radils present a single issue for our review, namely, whether they designated evidence to show a genuine issue of material fact precluding summary judgment for Dr. Long. We affirm.

Facts and Procedural History

[2] On Tuesday April 22, 2014, Dr. Long performed cataract surgery on Ardith's right eye. On Wednesday April 23, Dr. Michelle Vangets saw Ardith for a routine follow up visit, and Dr. Vangets removed some "loose tissue" from Ardith's right eye with a forceps. Appellants' App. Vol. 5 p. 9. On Friday April 25, Ardith saw Dr. Long and Dr. Michelle Vangets for a routine follow up visit. Ardith reported to Dr. Long that she was having "a problem seeing" with her right eye, and, after he examined her eye, Dr. Long prescribed eye drops to use three times daily. Appellants' App. Vol. 2 p. 96. Dr. Long also instructed Ardith to "call if there were any changes, decreased vision, pain, or concerns." *Id.*

[3] On Monday April 28, Ardith called Dr. Long and told him that her "pain and vision were worse." *Id.* Dr. Long told Ardith to come in for an examination, which she did that day. At that appointment, Dr. Long diagnosed Ardith with endophthalmitis and referred her to a retinologist, Dr. Sang Kim. Ardith saw Dr. Kim later that same day, and he diagnosed her with acute postoperative

endophthalmitis and recommended surgery, which he performed that day. Ardith did not recover, and she lost vision in her right eye.

[4] On April 20, 2016, the Radils filed a complaint with the trial court, and on April 21, they filed a proposed complaint for damages with the Indiana Department of Insurance ("IDOI") alleging that Dr. Long had committed medical malpractice that resulted in her loss of vision. In their proposed complaint, the Radils alleged that, "[o]n or about April 26, 2014, and thereafter," Dr. Long "breached his duty when he negligently failed to provide appropriate care and treatment" to Ardith, which resulted in permanent injury to her. *Id.* at 44.

[5] In March 2017, the Radils filed their submission of evidence ("submission") to the Medical Review Panel ("the Panel"), which included the following description of events following her visit with Dr. Vangets on April 23:

> Subsequently, Ms. Radil developed decreased vision, pain in and around her right eye, and Dr. Long referred Ms. Radil to the Retina Institute for evaluation of her acute endophthalmitis in her right eye after cataract surgery. The possible source of the infection was from Dr. Vangets' efforts at removal of the loose tissue described during the initial post-op visit, because Ms. Radil did not have pain or any other signs/symptoms of infections until after Dr. Vangets removed the tissue.
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> On April 28, 2014, Ms. Radil presented to Sang Kim, M.D. at the Retina Institute for evaluation. She had been referred by Dr. Long. She complained of severe, worsening, and blurry vision in her right eye, pain all over her right eye and floaters to her right eye since her cataract surgery on April 22, 2014 by Dr. Long. She

> was unable to localize her pain and noted floaters in her right eye since April 25, 2014, and could not see out of the right eye since the morning of April 26, 2014, upon waking up. She complained of mild blurry vision to her left eye as well since the cataract surgery by Dr. Long on March 25, 2014. This day, Ms. Radil had severe decrease in her visual acuity of light perception with pinhole and no improvement in the right eye. Dr. Kim found 4+ vitreous debris with a posterior vitreous detachment on ultrasound B-scan, and assessed endophthalmitis right eye, epiretinal membrane left eye, floaters left eye, and multifocal intraocular lens (IOL) both eyes. Dr. Kim recommended vitrectomy surgery to the right eye.

Appellants' App. Vol. 5 pp. 9–10 . And the Radils alleged that Dr. Long was negligent in the following ways:

- Failing to perform an appropriate cataract surgery to the right eye, subsequently leaving loose tissue post-operatively at incision site.
- Causing a peaked pupil to the incision due to vitreous that was likely externalized.
- Causing endophthalmitis as a result of poor technique during surgery or when injecting the eye with Moxifloxacin and Triamcinolone intra-operatively.

Id. at 31. Finally, as part of their submission to the Panel, the Radils provided all of Ardith's relevant medical records.

[6] In Dr. Long's submission of evidence to the Panel, he denied the Radils' allegations of negligence. In particular, he alleged that "the follow up appointments with Dr. Vangets provide no indication that Mrs. Radil's

infection could have been diagnosed at an earlier date." *Id.* at 142. And he stated that,

> [i]t was not until the [sic] April 28, 2014, when Dr. Long saw Mrs. Radil after a significant change in vision that the infection was appreciable. Unfortunately, the records of Dr. Kim indicate that Mrs. Radil had experienced the vision change two days earlier but had not alerted Dr. Long, or his office, to allow for a more prompt diagnosis.

Id. Thereafter, the Panel issued its unanimous opinion that Dr. Long's treatment of Ardith did not fall below the appropriate standard of care as alleged in the Radils' proposed complaint.

[7] On October 4, with the favorable Panel decision, Dr. Long filed a motion for summary judgment. On March 15, 2018, the Radils filed their response in opposition to summary judgment. The Radils designated as evidence two affidavits: one from Dr. Bernard Spier, who had not yet been identified as an expert witness by the Radils, and one from Ardith. In light of Dr. Spier's affidavit, Dr. Long withdrew his summary judgment motion and scheduled a deposition of Dr. Spier.

[8] Notably, for the first time in her affidavit, Ardith stated that she had called Dr. Long on Saturday April 26 and Sunday April 27, 2014 ("the Relevant Weekend"), to report that she had worsening pain and vision changes in her right eye. Ardith stated that Dr. Long had told her during both calls to continue to use the prescribed eye drops and to see him on Monday April 28. Ardith also stated that she had spoken with Dr. Long on the morning of Monday April 28

before she saw him in the office and he told her that he wanted to see her "immediately." Appellants' App. Vol. 2 p. 210.

[9] In his affidavit, Dr. Spier stated his opinion that Dr. Long was negligent when, after talking to Ardith on each occasion over the Relevant Weekend, he did not either examine Ardith or refer her to another health care provider to be examined. Dr. Spier also stated that that negligence caused Ardith's injuries. Dr. Spier did not identify any other acts or omissions by Dr. Long as negligent.

[10] On September 15, 2020, Dr. Long filed a motion in limine seeking, in relevant part, to exclude from trial "[a]ny reference to breaches of the standard of care not contained in [the Radils'] Submission to the Medical Review Panel." Appellants' App. Vol. 3 p. 13. The trial court granted that motion in limine. However, prior to trial, on June 30, 2021, Dr. Long filed his second motion for summary judgment and alleged that, in light of the Panel decision favorable to Dr. Long, he was entitled to summary judgment.

[11] In his memorandum in support of summary judgment, Dr. Long argued that, because the Radils did not include in their submission any evidence of Ardith's calls to Dr. Long over the Relevant Weekend, and because Dr. Spier's opinion rested on those phone calls, exclusively, Dr. Spier's expert opinion was not admissible evidence upon which the Radils could rely to rebut the Panel decision. The Radils responded and stated that, under Indiana's notice pleading rules, they had sufficiently alleged negligence related to the phone calls over the Relevant Weekend to support the admission of Dr. Spier's opinion. Following a

hearing, the trial court entered summary judgment for Dr. Long. This appeal ensued.

Discussion and Decision

[12] The Radils contend that the trial court erred when it entered summary judgment for Dr. Long. Our standard of review for summary judgment appeals is well settled. The Indiana Supreme Court has explained that

> [w]e review summary judgment de novo, applying the same standard as the trial court: "Drawing all reasonable inferences in favor of . . . the non-moving parties, summary judgment is appropriate 'if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009) (quoting T.R. 56(C)). "A fact is 'material' if its resolution would affect the outcome of the case, and 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." *Id.* (internal citations omitted).
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> The initial burden is on the summary-judgment movant to "demonstrate [ ] the absence of any genuine issue of fact as to a determinative issue," at which point the burden shifts to the non-movant to "come forward with contrary evidence" showing an issue for the trier of fact. *Id.* at 761-62 (internal quotation marks and substitution omitted). And "[a]lthough the non-moving party has the burden on appeal of persuading us that the grant of summary judgment was erroneous, we carefully assess the trial court's decision to ensure that he was not improperly denied his day in court." *McSwane v. Bloomington Hosp. & Healthcare Sys.*, 916 N.E.2d 906, 909-10 (Ind. 2009) (internal quotation marks omitted).

Hughley v. State, 15 N.E.3d 1000, 1003 (Ind. 2014) (omission and some alterations original to *Hughley*).

[13] The Medical Malpractice Act ("the Act") requires that, before a malpractice claim is pursued in court, it must be presented to a medical review panel in a proposed complaint for damages. Ind. Code § 34–18–8–4 (2021). 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 must render its decision "based upon the evidence submitted by the parties." I.C. § 34–18–10–17(e).

[14] To prove medical malpractice, a plaintiff must show "'(1) that the physician owed a duty to the plaintiff; (2) that the physician breached that duty; and (3) that the breach proximately caused the plaintiff's injuries.'" *Siner v. Kindred Hosp. Ltd. P'ship*, 51 N.E.3d 1184, 1187 (Ind. 2016) (quoting *Mayhue v. Sparkman*, 653 N.E.2d 1384, 1386 (Ind. 1995)). "A 'unanimous opinion of the medical review panel' in favor of the movant is 'ordinarily sufficient' to meet this initial burden, requiring the non-movant to rebut the medical panel opinion with expert medical testimony." *Id.* at 1187–88 (quoting *Stafford v. Szymanowski*, 31 N.E.3d 959, 961 (Ind. 2015)).

[15] Here, it is undisputed that Dr. Long satisfied his burden as summary judgment movant and the burden shifted to the Radils to rebut the Panel opinion in Dr. Long's favor with expert medical testimony. *See id.* The Radils' only expert

medical testimony designated in opposition to summary judgment was Dr. Spier's opinion that Dr. Long was negligent when, during the calls with Ardith over the course of the Relevant Weekend, he did not examine Ardith or refer her to a health care provider to be examined. Dr. Long argued in support of his summary judgment motion that Dr. Spier's opinion was inadmissible under this Court's holding in *McKeen v. Turner*, 61 N.E.3d 1251 (Ind. Ct. App. 2016), *adopted*, 71 N.E.3d 833 (Ind. 2017), and the trial court agreed.

[16] In *McKeen*, we considered Dr. McKeen's appeal of the trial court's denial of his motion to strike the plaintiff's expert witness' opinion regarding a theory of negligence that Dr. McKeen alleged had not been presented to the Panel. We affirmed the trial court and held as follows:

> The Act requires that the [Panel] consider two things in reaching its conclusion on a claim of medical malpractice: (1) the proposed complaint; and (2) *the evidence submitted by the plaintiff*. Our Supreme Court has held that so long as, under principles of notice pleading, the proposed complaint encompasses specific allegations regarding the defendant's alleged malpractice that were not explicitly raised to the [Panel], those allegations may be raised for the first time during subsequent litigation. In other words, the plaintiff's narrative at trial need not be identical to his [Panel] narrative *so long as evidence relating to his theories of malpractice was before the panel*.
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> To synthesize these two sources of authority, we hold that a plaintiff may raise any theories of alleged malpractice during litigation following the [Panel] process if (1) the proposed complaint encompasses the theories, *and* (2) *the evidence related to those theories was before the [Panel]*.

Id. at 1262 (emphases added).

[17] Here, in his summary judgment motion, Dr. Long acknowledged that, in light of our notice pleading rules, the Radils had satisfied the first prong under *McKeen*. But he argued that the Radils had not satisfied the second prong, i.e., they did not present evidence regarding the Relevant Weekend phone calls to the Panel. And when it entered summary judgment for Dr. Long, the trial court found that the Radils had "failed to meet their burden to establish the *McKeen* Factors . . . to establish a genuine issue of material fact." Appellants' App. Vol. 2 p. 29.

[18] In their brief on appeal, the Radils assert in relevant part that they satisfied the second prong of *McKeen* in that they "submitted to the Panel the records [Dr. Long] created establishing that Ardi[th] and [Dr. Long] communicated during the Relevant Weekend." Appellants' Br. at 18. In support, they direct us to a single page in their appendix on appeal, which, they maintain, shows "a Communications and Patient Annotation ('CPA') form [stating] that on April 28, 2014[sic]: 'pt had vision change and called Dr. Long. Dr. Long saw patient this morning, has endoph[th]almitis. Referred to Dr. Kim for vitrectomy.'" *Id.* (citing Appellants' App. Vol. 5 p. 243).[1]

[1] Dr. Long has included a more legible copy of this document in his appendix. *See* Appellees' App. Vol. 2 p. 11.

[19] The Radils' contention on this issue is not well taken. The Radils have consistently asserted throughout this litigation that Ardith called Dr. Long on her way to his office on Monday, April 28. The CPA includes a single record of a phone call between Ardith and Dr. Long, and that record is dated April 28. The CPA does not include any reference to phone calls over the Relevant Weekend as alleged by the Radils.[2] Nor do the Radils argue that the evidence supports an *inference* that Ardith spoke with Dr. Long over the Relevant Weekend, which, to put it bluntly, it does not.

[20] In sum, the Radils contend that they submitted evidence to the Panel that Ardith spoke with Dr. Long by telephone over the Relevant Weekend. In support, they cite a single page of their appendix, but that page does not refer or allude to any phone call other than a call on April 28, 2014, which was the Monday after the Relevant Weekend. Accordingly, the Radils did not satisfy the second prong under *McKeen*, and they did not designate any admissible evidence to create a genuine issue of material fact precluding summary judgment for Dr. Long. The trial court did not err when it entered summary judgment in favor of Dr. Long.

[21] Affirmed.

Brown, J., and Molter, J., concur.

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[2] There is a line above the April 28 call record on the CPA, but the text is illegible. In any event, neither party asserts that that line of the CPA is relevant to any issue on appeal.