MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Dennis Lowrance,
Appellant-Plaintiff,

v.

South Bend Orthopedics Associates, Inc., d/b/a South South Bend Orthopedics, Henry Kim, M.D., Michael Yergler, M.D. and Saint Joseph Regional Medical Center-South Bend Campus, Inc., d/b/a Saint Joseph Regional Medical Center
Appellees-Defendants.

November 22, 2022

Court of Appeals Case No. 22A-CT-590

Appeal from the St. Joseph Circuit Court

The Honorable John E. Broden, Judge

Trial Court Cause No. 71C01-2104-CT-181

Robb, Judge.

Case Summary and Issues

[1] Dennis Lowrance was a patient of South Bend Orthopedics Associates, Inc. d/b/a South Bend Orthopedics, Henry Kim, M.D., Michael Yergler, M.D. (collectively, "Surgical Defendants"), and Saint Joseph Regional Medical Center – South Bend Campus, Inc. d/b/a Saint Joseph Regional Medical Center ("Medical Center")[1] (the Surgical Defendants and Medical Center collectively called "Defendants"). Lowrance filed a complaint against the

[1] The Medical Center has noted throughout this litigation that its correct appellation is simply "Saint Joseph Regional Medical Center – South Bend Campus, Inc." *See* Brief of Appellee [Medical Center] at 5.

Defendants for alleged negligent conduct related to two shoulder surgeries the Surgical Defendants performed on him at the Medical Center. The Defendants each filed a motion for summary judgment to which Lowrance replied, designating first an unsworn "expert report" prepared by an out-of-state doctor and then, after the Defendants' filed a motion to strike that evidence, seeking to supplement his designation with an attestation to the expert report and an affidavit by another doctor. The trial court denied Lowrance's requests to supplement his designated evidence, struck the expert report, and accordingly granted the Defendants' motions for summary judgment because there was no properly designated evidence that the Defendants breached the standard of care.

[2] Lowrance appeals the trial court's order, raising several issues that we restate as: 1) whether the trial court should have allowed Lowrance to supplement his designation; 2) whether the trial court properly struck the expert report; and 3) whether the trial court properly granted summary judgment to the Defendants. We conclude the trial court did not err in denying Lowrance's motions to supplement his designated evidence or in striking the expert report. Because that left no evidence to oppose the Defendants' motions for summary judgment, we also conclude the trial court did not err in granting summary judgment for the Defendants. We affirm.

Facts and Procedural History

[3] In 2017, Lowrance filed with the Indiana Department of Insurance a Proposed Complaint for Damages against the Defendants in which he alleged he was a

patient of the Surgical Defendants from December 10, 2015 through August 17, 2016. On December 10, 2015, the Surgical Defendants performed a right total shoulder arthroplasty[2] on Lowrance at the Medical Center. On June 23, 2016, they performed a revision of the right shoulder arthroplasty, again at the Medical Center. Lowrance claimed he suffered injuries as a result of negligent treatment by the Defendants. The Medical Review Panel (the "Panel") unanimously concluded the evidence did not support the conclusion that the Defendants failed to meet the appropriate standard of care.

[4] Lowrance then filed his Complaint in the trial court. On May 27, 2021, the Medical Center filed its motion for summary judgment. Lowrance moved for and was granted an enlargement of time until July 26 to respond to the Medical Center's motion. The Surgical Defendants filed their motion for summary judgment on July 8. Both motions for summary judgment designated the unanimous opinion of the Panel and noted that Lowrance had not provided expert testimony in opposition to the Panel's decision. Lowrance sought and was granted an additional enlargement of time until August 6 to respond to the Medical Center's summary judgment motion so that his responses to both motions would be due on the same date.

[5] Lowrance filed responses to both motions on August 5, designating as his sole evidence in opposition to summary judgment the "Expert Report of Dr.

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[2] In layman's terms, an arthroplasty is a joint replacement.

Scarcella" (the "Scarcella Report"). *See* Appellant's Appendix, Volume II at 123-37, 142-56. Dr. Scarcella is licensed to practice in California and stated in the report that he has "familiarity with the standard of care . . . on the matters at issue herein." *Id.* at 124, 143. His curriculum vitae states he is currently an attending physician in the Department of Emergency Medicine at three California hospitals. *Id.* at 135, 154. The Scarcella Report details the doctor's reasons for "hold[ing] the opinion to a reasonable degree of medical certainty that the defendants and each of them deviated from the applicable standard of care in this matter[.]" *Id*. at 124, 143. The report is signed by Dr. Scarcella but is neither verified nor sworn under oath.

[6] The Medical Center filed a motion to strike the Scarcella Report, in which the Surgical Defendants joined, alleging it was unsworn and unverified, does not comply with the requirements of Indiana Trial Rule 56 for an affidavit, constitutes inadmissible hearsay, and fails to set forth an appropriate foundation for any of the opinions contained therein. On September 1, Lowrance filed a response to the motion to strike and a motion for leave to supplement his designation of evidence pursuant to Rule 56(E). Accompanying the motion was his proposed supplemental evidence: the "Affidavit of Anthony Scarcella, M.D., JD." which Lowrance claimed "merely adds perfunctory language . . . to appease Defendants." *Id.* at 188-90. In this document, Dr. Scarcella affirms "under the pains and penalties of perjury" that the content of the Scarcella Report is "true and accurate to the best of [his] knowledge and belief." *Id.* at 189.

[7] On September 17, Lowrance filed a second motion to supplement his designation of evidence pursuant to Rule 56(E) with the affidavit of Dr. Perry Cooke, M.D.[3] The Surgical Defendants filed a motion to strike the Cooke affidavit as untimely.

[8] Following a hearing on the pending motions, the trial court issued an order denying Lowrance's motion to supplement the Scarcella Report, granting the Defendants' motions to strike the Scarcella Report and Cooke affidavit, and granting summary judgment to the Defendants. Lowrance filed a motion to correct error that was denied, and he now appeals.

Discussion and Decision

I. The Law of Summary Judgment

[9] Indiana Trial Rule 56 sets forth our summary judgment procedure:

> The motion [for summary judgment] and any supporting affidavits shall be served in accordance with the provisions of Rule 5. An adverse party shall have thirty (30) days after service of the motion to serve a response and any opposing affidavits. . . .

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[3] Seemingly acknowledging that the case turned on whether the Scarcella Report was admissible as summary judgment evidence, Lowrance included within this second motion to supplement an alternative motion for the trial court to belatedly permit the Scarcella Report and Cooke affidavit pursuant to Trial Rule 6(B)(2). *See* Appellant's App., Vol. II at 208 (acknowledging that in the "potentially unfortunate situation" that the trial court denies the first motion to supplement and strikes the Scarcella Report, his response "would lack evidence/testimony of a medical expert, necessary to defeat" summary judgment).

Lowrance does not rely on this rule in his appellate brief, but we note that Trial Rule 6(B)(2), which allows a court to allow an enlargement of time if it finds excusable neglect, does not apply to summary judgment materials because Trial Rule 56 has its own enlargement of time provision. *DeLage Landen Fin. Servs., Inc. v. Cmty. Mental Health Ctr., Inc.*, 965 N.E.2d 693, 698 (Ind. Ct. App. 2012), *trans. denied*.

> At the time of filing the motion or response, a party shall designate to the court all parts of pleadings, depositions, answers to interrogatories, admissions, matters of judicial notice, and any other matters on which it relies for purposes of the motion.

Ind. Trial Rule 56(C). "For cause found, the Court may alter any time limit set forth in this rule upon motion made *within the applicable time limit*." T.R. 56(I) (emphasis added).

[10] Paragraph (E) sets forth the form for affidavits supporting or opposing the motion:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies not previously self-authenticated of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

T.R. 56(E). The requirements of Trial Rule 56(E) are mandatory and a court considering a motion for summary judgment should disregard inadmissible information contained in the parties' designations. *Morris v. Crain*, 71 N.E.3d 871, 877 (Ind. Ct. App. 2017). Properly designated evidence which would be

admissible at trial does not include documents that are unsworn statements or unverified documents. *Zelman v. Capital One Bank (USA) N.A.*, 133 N.E.3d 244, 248 (Ind. Ct. App. 2019). Trial Rule 11(B) sets forth the guidelines for affidavits:

> When in connection with any civil or special statutory proceeding it is required that any pleading, motion, petition, supporting affidavit, or other document of any kind, be verified, or that an oath be taken, it shall be sufficient if the subscriber simply affirms the truth of the matter to be verified by an affirmation or representation in substantially the following language:
>
> "I (we) affirm, under the penalties for perjury, that the foregoing representation(s) is (are) true.
>
> (Signed) _____"
>
> Any person who falsifies an affirmation or representation of fact shall be subject to the same penalties as are prescribed by law for the making of a false affidavit.

Trial Rule 11(B) provides one method for binding an affiant, but "[a]ny form of verification is sufficient if it serves the essential purpose of subjecting the affiant to the penalties for perjury." *Gary/Chicago Airport Bd. of Auth. v. Maclin*, 772 N.E.2d 463, 472 (Ind. Ct. App. 2002).

II. Motions to Strike

[11] Lowrance contends the trial court abused its discretion when it granted the Defendants' motions to strike. A trial court has broad discretion in ruling on

the admissibility of evidence, which includes discretion to grant or deny motions to strike affidavits on the grounds they fail to comply with the summary judgment rules. *Webb v. City of Carmel*, 101 N.E.3d 850, 856-57 (Ind. Ct. App. 2018). A trial court abuses its discretion when its decision is clearly against the logic and effect of the facts and circumstances. *Id.*

A. The Scarcella Report and Supplemental Affidavit

[12] The trial court denied Lowrance's motion to supplement the Scarcella Report with an affidavit and correspondingly granted the Defendants' motion to strike the Scarcella Report upon determining that 1) the Scarcella Report was not an affidavit admissible under Trial Rule 56 because it is neither sworn nor verified and 2) Rule 56 only allows affidavits to be supplemented. Lowrance argued at the hearing on the motion to strike and in his motion to correct error that the Scarcella Report "is in reality the same as an Affidavit" because it indicated "that the doctor knew this was to be presented to the Court." Appellant's App., Vol. II at 222; *see also* The Transcript, Volume 2 at 13-14 (counsel for Lowrance arguing the Scarcella Report "most definitely meets the criteria" for an affidavit because it states "with a reasonable degree of medical certainty these are his opinions based off of these facts" and would "[c]learly . . . withstand the perjury test"). On appeal, however, Lowrance concedes the Scarcella Report "was not verified under penalty of perjury." Appellant's Brief at 29.

[13] "An affidavit has been defined as a written statement of fact which is sworn to as the truth before an authorized officer. The chief test of the sufficiency of an

affidavit is its ability to serve as a predicate for a perjury prosecution." *Jordan v. Deery*, 609 N.E.2d 1104, 1110 (Ind. 1993) (internal citations omitted). In order for an affiant to be subject to the penalties for perjury, the affiant must make the affidavit under "oath or affirmation." *See* Ind. Code § 35-44.1-2-1 (providing that a person commits Level 6 felony perjury if he or she "makes a false, material statement under oath or affirmation, knowing the statement to be false or not believing it to be true"). Accordingly, an affidavit provided in support of, or in objection to, a motion for summary judgment must be verified by an oath or affirmation. *Tannehill by Podgorski v. Reddy*, 633 N.E.2d 318, 321 (Ind. Ct. App. 1994), *trans. denied*. Because the Scarcella Report was not, by Lowrance's own concession, verified by oath or affirmation, it was not an affidavit admissible for summary judgment purposes. *See Ind. Univ. Med. Ctr., Riley Hosp. for Child. v. Logan*, 728 N.E.2d 855, 859 (Ind. 2000) ("An unsworn letter from an expert may not be considered in summary judgment proceedings.").

[14] The issue, then, is whether Lowrance "can amend his designation with the Affidavit of Dr. Scarcella affirming under penalty of perjury the contents of the earlier designated report" and thereby make the Scarcella Report a viable affidavit for summary judgment purposes. Appellant's Br. at 19. Lowrance contends that he can because he "filed a timely response and the trial court has discretion whether to accept later filed evidence." *Id.*

[15] Lowrance tries to bootstrap the Scarcella affidavit onto what he calls his "timely response," but we find the trial court did not err in denying Lowrance's motion to supplement his designation of evidence with the Scarcella affidavit for two

reasons. First, Lowrance did not file a timely response. In *Desai v. Croy*, we held:

> [W]here a nonmoving party fails to respond within thirty days by either (1) filing affidavits showing issues of material fact, (2) filing his own affidavit under Rule 56(F) indicating why the facts necessary to justify his opposition are unavailable, or (3) requesting an extension of time in which to file his response under [Rule] 56(I), the trial court lacks discretion to permit that party to thereafter file a response.

805 N.E.2d 844, 850 (Ind. Ct. App. 2004) (citing *Seufert v. RWB Med. Income Props. I Ltd. P'ship*, 649 N.E.2d 1070, 1073 (Ind. Ct. App. 1995)), *trans. denied*. *Desai* established a bright-line rule that was ultimately adopted by our supreme court: a trial court lacks discretion to permit summary judgment filings after the initial thirty-day period or subsequent deadlines granted pursuant to Rule 56(I) pass without an appropriate response. *HomEq Servicing Corp. v. Baker*, 883 N.E.2d 95, 98-99 (Ind. 2008) (citing *Desai* with approval). Under these terms, Lowrance did not file a timely response because, although he filed the Scarcella Report within the time allowed by the trial court, it was not an affidavit showing issues of material fact.[4] Thus, Lowrance's argument that the *Desai*/*HomEq* line of cases has "no applicability here, because [he] filed a timely

[4] For purposes of summary judgment, it is properly designated evidence that constitutes the required response. Lowrance's memoranda making legal argument in response to the motions for summary judgment are not sufficient in themselves to constitute a response in this context given the language of *Desai*.

response and the trial court has discretion whether to accept later filed evidence[,]" is incorrect. Appellant's Br. at 18-19.

[16] Second, and similarly, Trial Rule 56(E) states that the trial court "may permit *affidavits* to be supplemented . . . by . . . further affidavits." (Emphasis added.) But Lowrance did not timely file an affidavit, as we have already determined. *See supra* ¶¶ 13, 15. Therefore, there was nothing to supplement. *See Miller v. Yedlowski*, 916 N.E.2d 246, 252 n.4 (Ind. Ct. App. 2009) (noting that because there was no timely-filed affidavit, the rule that a trial court can consider a belated affidavit pursuant to Trial Rule 56(E) to supplement a timely-filed affidavit does not apply), *trans. denied*. As counsel for the Medical Center stated succinctly at the hearing on the motion to strike:

> [I]f you get an extension . . ., you have to respond within the time of the extension. Once . . . the deadline has run there is only one exception. And the exception under Trial Rule 56 is that a party can supplement an affidavit. . . . But if there isn't an affidavit to supplement there is no exception.

Tr., Vol. 2 at 29-30 (cleaned up).

[17] The trial court did not err in denying Lowrance's motion to supplement his purported designation of evidence with Dr. Scarcella's affidavit, and because the Scarcella Report was not verified under penalty of perjury, did not abuse its discretion in granting the Defendants' motion to strike the report.

B. Cooke Affidavit

[18] Lowrance also contends the trial court erred in concluding the Cooke affidavit was untimely and therefore it did not have discretion to allow Lowrance's designation to be supplemented with it. For the same reasons we concluded the trial court was correct in not allowing the Scarcella Report to be supplemented by the Scarcella affidavit, we conclude the trial court correctly did not allow the Cooke affidavit to be filed. No affidavits were timely filed in opposition to the motions for summary judgment, and therefore, there were no affidavits that could be supplemented pursuant to Trial Rule 56(E). Further, the Cooke affidavit standing alone was untimely as it was filed well after the August 6 deadline granted by the trial court pursuant to Rule 56(I). Accordingly, we conclude the trial court properly struck the Cooke affidavit.

III. Summary Judgment

[19] The standard for granting summary judgment is as follows:

> The judgment sought shall be rendered forthwith 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 a judgment as a matter of law. . . . Summary judgment shall not be granted as of course because the opposing party fails to offer opposing affidavits or evidence, but the court shall make its determination from the evidentiary matter designated to the court. . . .

T.R. 56(C).

[20] It is well settled that a plaintiff alleging medical malpractice must demonstrate that the defendant owed a duty to the plaintiff and violated a standard of reasonable care, causing injury to the plaintiff. *Siner v. Kindred Hosp. Ltd. P'ship*, 51 N.E.3d 1184, 1187 (Ind. 2016). Generally, under our state's distinctive summary judgment standard, the movant has a heavy burden to demonstrate the absence of any genuine issue of material fact on at least one element of the claim. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). In a medical malpractice claim, the unanimous decision of the medical review panel that the medical provider did not breach the applicable standard of care is ordinarily sufficient to meet this initial burden. *Stafford v. Szymanowski*, 31 N.E.3d 959, 961 (Ind. 2015). In such situations, the burden shifts to the plaintiff, who, because of the complex nature of medical diagnosis and treatment, is generally required to rebut medical review panel opinion with expert medical testimony. *Id*. If medical expert opinion is not in conflict regarding whether the medical provider's conduct met the requisite standard of care, there are no genuine triable issues and the plaintiff's medical malpractice claim is subject to summary disposition. *Speaks v. Rao*, 117 N.E.3d 661, 667 (Ind. Ct. App. 2018).

[21] Here, the Defendants moved for summary judgment and designated the unanimous decision of the Panel that none of the Defendants failed to meet the applicable standard of care in Lowrance's case. As explained above, the trial court properly struck and/or refused to consider Lowrance's purported medical expert testimony. Therefore, Lowrance did not designate any timely, competent medical expert testimony to rebut the Panel's opinion. The trial

court properly granted summary judgment in the Defendants' favor because the designated evidence shows there is no genuine issue as to any material fact and they are entitled to judgment in their favor.[5]

Conclusion

[22] The trial court did not err in denying Lowrance's motion to supplement his designated evidence or in granting the Defendants' motions to strike. And because this leaves no evidence opposing the Defendants' motions for summary judgment, the trial court did not err in granting those motions and entering judgment for the Defendants. Accordingly, we affirm.

[23] Affirmed.

Pyle, J., and Weissmann, J., concur.

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[5] We recognize, as Lowrance points out, that "[s]ummary judgment is a lethal weapon and courts must be mindful of its aims and targets and beware of overkill in its use." Appellant's Br. at 17 (citing *Bunch v. Tiwari*, 711 N.E.2d 844, 847 (Ind. Ct. App. 1999)). Our summary judgment principles do err "on the side of letting marginal cases proceed to trial on the merits, rather than risk short-circuiting meritorious claims." *Hughley*, 15 N.E.3d at 1004. This does not, however, relieve the parties of the obligation to observe the procedural rules for putting evidence before the trial court for its consideration or put the onus on the trial court or this court to excuse failure to do so in order to give a party his day in court. *See Snyder v. Prompt Med. Transp., Inc.*, 131 N.E.3d 640, 648 (Ind. Ct. App. 2019) (disagreeing with plaintiff's argument that "even if its expert disclosures were untimely, the sanction of striking the affidavits is too harsh because it resulted in summary judgment being entered against it" because the plaintiff did not seek relief from the deadline imposed by the trial court), *trans. denied*.