MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Elsie D. Weaver,
Appellant-Plaintiff,

v.

Richard D. Weiss, M.D. d/b/a Michiana Eye Center, LLC,
Appellee-Defendant.

March 13, 2023

Court of Appeals Case No. 22A-CT-1296

Appeal from the St. Joseph Circuit Court

The Honorable John E. Broden, Judge

Trial Court Cause No. 71C01-2103-CT-97

Memorandum Decision by Judge Foley
Judges Robb and Mathias concur.

Foley, Judge.

[1] This appeal arises from a medical malpractice action. Elsie[1] Weaver ("Weaver") contests the trial court's grant of summary judgment in favor of Richard D. Weiss, M.D. d/b/a Michiana Eye Center, LLC ("Dr. Weiss"). We agree, however, with the trial court. Weaver was obligated to designate expert medical evidence rebutting the opinion of the medical review panel. She did not. Accordingly, we affirm.

Facts and Procedural History

[2] Weaver is blind in her right eye. Dr. Weiss, an ophthalmologist, treated Weaver during 2017. In April of that year, Dr. Weiss performed an intraocular lens implant surgery[2] on Weaver's left eye. Weaver felt that the procedure aggravated her dry eyes and resulted in complications that would necessitate future procedures. Weaver exhibits several risk factors that increase her likelihood of suffering from these complications. In accordance with the medical malpractices statutes, Weaver filed her proposed medical malpractice complaint with the Indiana Department of Insurance on March 19, 2019, contending that Dr. Weiss's treatment was negligent and below the appropriate standard of care. The resulting medical review panel unanimously opined that Dr. Weiss complied with the appropriate standard of care. Weaver then filed her complaint in the trial court on March 11, 2021. Dr. Weiss filed a motion

[1] Weaver is referred to alternately in the record as "Elise" and "Elsie."

[2] Replacing the lens of the eye with an artificial lens is a remedy for cataracts.

for summary judgment on April 5, 2021.[3] Weaver responded, attaching the report of Dr. Sara Frye. Dr. Weiss argued that the report of Dr. Frye was insufficient to establish a genuine issue of material fact: it neither delineated the applicable standard of care nor opined that Dr. Weiss had fallen short of that standard.

[3] After a hearing, the trial court denied the motion on July 6, 2021. Following several amendments to the complaint and additional discovery, Dr. Weiss filed a second motion for summary judgment on December 28, 2021. As a part of that discovery, the parties deposed Dr. Frye, whose report had been designated in the original motion for summary judgment. Dr. Frye affirmatively testified that the surgery was without complication and that Dr. Weiss did not breach the standard of care.[4]

[4] This time, the trial court granted the summary judgment motion, concluding that Weaver had not presented expert testimony giving rise to a genuine dispute of material fact. Weaver now appeals.

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[3] The evidence designated under Trial Rule 56 at this point consisted of Weaver's two complaints and the signed opinion of the medical review panel.

[4] Weaver designated evidence, including the transcript of Dr. Frye's deposition testimony, medical records, and Dr. Weiss's responses to a request for admissions ("RFAs"). Dr. Weiss designated Weaver's signed informed consent forms.

Discussion and Decision

[5] Weaver contends that the trial court erred in granting summary judgment to Dr. Weiss. "'When this Court reviews a grant or denial of a motion for summary judgment, we stand in the shoes of the trial court.'" *Minser v. DeKalb Cnty. Plan Comm'n*, 170 N.E.3d 1093, 1098 (Ind. Ct. App. 2021) (quoting *Burton v. Benner*, 140 N.E.3d 848, 851 (Ind. 2020)). "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 a judgment as a matter of law.'" *Id*. (quoting *Murray v. Indianapolis Pub. Schs.*, 128 N.E.3d 450, 452 (Ind. 2019)); *see also* Ind. Trial Rule 56(C).

[6] The summary judgment movant invokes the burden of making a *prima facie* showing that there is no issue of material fact and that it is entitled to judgment as a matter of law. *Burton*, 140 N.E.3d at 851. The burden shifts to the non-moving party which must then show the existence of a genuine issue of material fact. *Id*. On appellate review, we resolve "[a]ny doubt as to any facts or inferences to be drawn therefrom . . . in favor of the non-moving party." *Id*.

[7] We review the trial court's ruling on a motion for summary judgment de novo, and we take "care to ensure that no party is denied his day in court." *Schoettmer v. Wright*, 992 N.E.2d 702, 706 (Ind. 2013). "We limit our review to the materials designated at the trial level." *Gunderson v. State, Ind. Dep't of Nat. Res.*, 90 N.E.3d 1171, 1175 (Ind. 2018), *cert. denied*. Because the trial court entered findings of fact and conclusions of law, we also reiterate that findings of fact

and conclusions of law entered by the trial court aid our review, but they do not bind us. *In re Supervised Estate of Kent*, 99 N.E.3d 634, 637 (Ind. 2018).

[8] "'When a medical review panel renders an opinion in favor of the physician, the plaintiff must come forward with expert medical testimony to rebut the panel's opinion . . . .'" *Overshiner v. Hendricks Reg'l Health*, 119 N.E.3d 1124, 1132 (Ind. Ct. App. 2019) (quoting *Robertson v. Bond*, 779 N.E.2d 1245, 1249 (Ind. Ct. App. 2002), *trans. denied*), *trans denied*. "Because of the complex nature of medical diagnosis and treatment, expert testimony is generally required to establish the applicable standard of care." *Desai v. Croy*, 805 N.E.2d 844, 850 (Ind. Ct. App. 2004) (citing *Simms v. Schweikher*, 651 N.E.2d 348, 349–50 (Ind. Ct. App. 1995)), *trans denied*. "If medical expert opinion is not in conflict regarding whether the physician's conduct met the requisite standard of care, there are no genuine triable issues." *Id*. Not only does Weaver fail to produce the necessary expert rebuttal testimony, but in fact, Weaver's own expert witness positively opined that Dr. Weiss's treatment fell within the ambit of the appropriate standard of care.

[9] Weaver's argument is that her expert's opinion may have been inaccurate as Dr. Frye did not have access to all of the relevant medical records.[5] Leaving aside the peculiarity that the case could have proceeded through the medical

[5] Dr. Weiss contests this. And, indeed, the record does seem to suggest that Dr. Frye had reviewed all the medical records at the time of her deposition and that the later supplement of records in discovery was merely duplicative. We assume, arguendo, however, that the later disclosed records may have contained information unavailable to Dr. Frye at the time of her deposition.

review panel and review and deposition of an expert doctor without a complete set of medical records having been obtained, we are unmoved by what is essentially a speculative attempt by Weaver to impeach Weaver's own witness ("[I]t is *possible* that Dr. Frye's opinion" may have differed upon review of the later-obtained records. Appellant's Br. p. 13 (emphasis added)). "'Mere speculation is insufficient to create a genuine issue of material fact to defeat summary judgment.'" *Mann v. Arnos*, 186 N.E.3d 105, 115 (Ind. Ct. App. 2022) (quoting *Biedron v. Anonymous Physician 1*, 106 N.E.3d 1079,1089 (Ind. Ct. App. 2018), *trans. denied*), *trans. denied*. We see nothing in the record to suggest that Weaver attempted to depose Dr. Frye a second time or obtain an affidavit upon the discovery of these previously unrelied-upon medical records.[6] The question before the trial court was not whether Dr. Frye's testimony was credible or accurate, but rather, whether at the time of the summary judgment ruling either party had designated any expert medical testimony to rebut the conclusion of the medical review panel. By her own admission, Weaver had not done so. That is dispositive and supports the trial court's decision to grant Dr. Weiss's motion for summary judgment.

[10] Weaver raises two remaining issues which we briefly dispatch here. First, she asserts that Dr. Weiss "failed to obtain proper consent" from Weaver.

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[6] This is precisely why Weaver's primary authority—*Bunger v. Brooks,* 12 N.E.3d 275 (Ind. Ct. App. 2014), *trans denied*—is materially distinguishable. *Bunger* centered on the issue of causation, and the plaintiffs there designated an affidavit from an expert witness explicitly opining that the injuries were directly caused by the surgery.

Appellant's Br. p. 16. Leaving aside that the parties designated Weaver's surgical consent, executed, witnessed, and signed, we observe that Weaver's assertion only appears in a heading in her brief and is not further developed. That section of the brief merely provides a descriptive history of some of Indiana's case law on informed consent and fails to contend that there exists genuine issues of material fact arising from questions about consent. It does not even attempt to apply any of the described precedent to the case at bar. The contention, therefore, is waived. "'We will not become an advocate for a party, nor will we address arguments which are either inappropriate, too poorly developed or improperly expressed to be understood.'" *Dridi v. Cole Kline LLC*, 172 N.E.3d 361, 364 (Ind. Ct. App. 2021) (quoting *Ramsey v. Rev. Bd. of Ind. Dep't of Workforce Dev.*, 789 N.E.2d 486, 487 (Ind. Ct. App. 2003)); *see also* Ind. Appellate Rule 46(A)(8)(a); *Clark Cnty. Drainage Bd. v. Isgrigg*, 963 N.E.2d 9, 18 (Ind. Ct. App. 2012) (citing *Watson v. Auto Advisors, Inc.*, 822 N.E.2d 1017, 1027–28 (Ind. Ct. App. 2005), *trans. denied*) ("'When parties fail to provide argument and citations, we find their arguments are waived for appellate review.'").

[11] Finally, Weaver argues that the trial court erred in denying her motion to deem Weiss's answers to Weaver's requests for admission ("RFAs") as admitted. Weaver devotes significant briefing to this issue, but it is predicated on a demonstrably faulty premise. Weaver argues that the RFAs were not "signed under oath by either [Dr. Weiss] or [his] attorney" in derogation of Trial Rule 36. Appellant's Br. p. 18. Trial Rule 36, of course, has no oath requirement. It

merely requires that a party or its attorney sign the responses. We direct Weaver to page 134 of the second volume of her appendix which clearly features a signature block displaying the digital signature of Dr. Weiss's attorney in response to Weaver's RFAs. The trial court did not err in denying Weaver's motion to have the RFAs deemed admitted.

[12] Weaver fails to shoulder her burden to demonstrate the existence of a genuine issue of material fact. Thus, the trial court is affirmed.

[13] Affirmed.

Robb, J., and Mathias, J., concur.