MEMORANDUM DECISION

ATTORNEYS FOR APPELLANT

Nathaniel Lee
Faith E. Alvarez
Indianapolis, Indiana

ATTORNEYS FOR APPELLEES

Elizabeth A. Schuerman
Indianapolis, Indiana

Kelly J. Pitcher
Cassie N. Heeke
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Jane Flynn, Individually, and as next best friend of Dwayne A. Carter, Deceased,

Appellant-Plaintiff,

v.

Indiana University Health, d/b/a Methodist Health, Brian L. Brewer, M.D., and Tara N. Roberts, N.P.,

Appellees-Defendants.

October 11, 2022

Court of Appeals Case No. 22A-CT-149

Appeal from the Marion Superior Court

The Honorable John F. Hanley, Judge

Trial Court Cause No. 49D11-2010-CT-34498

Altice, Judge.

Case Summary

[1] Following a decision of the medical review panel (MRP) finding no failure to meet the applicable standard of care, Jane Flynn, individually and as next best friend of Dwayne Carter, deceased, filed a medical malpractice complaint in the trial court against Indiana University Health d/b/a Methodist Health (IU Health), Brian L. Brewer M.D. (Dr. Brewer), and Tara N. Roberts, N.P. (Nurse Roberts). IU Health filed a motion for summary judgment and, thereafter, Dr. Brewer and Nurse Roberts filed a motion for summary judgment. The trial court granted the motions for summary judgment and Flynn appeals, raising four issues that we consolidate and restate as:

> I. Was Flynn's complaint time-barred for failure to comply with the applicable statute of limitations?
>
> II. Did the trial court err when it struck Flynn's untimely response to Dr. Brewer and Nurse Roberts's motion for summary judgment and thereafter granted summary judgment to Dr. Brewer and Nurse Roberts?
>
> III. Was Flynn's designated expert testimony insufficient to rebut the MRP's opinion as to IU Health such that it was entitled to summary judgment?

[2] We affirm.

Facts & Procedural History

[3] On August 31, 2014, Carter was involved in a single vehicle moped accident. He was transported to IU Health for medical treatment for left-side pain and

difficulty breathing. Carter remained at IU Health until September 9, 2014, when Nurse Roberts, working under the supervision of Dr. Brewer, discharged Carter. On September 12, 2014, Carter was found deceased in his home.

[4] On July 25, 2016, Flynn, individually and as next best friend of Carter, filed a proposed complaint against IU Health, Dr. Brewer, and Nurse Roberts (collectively, Defendants) with the Indiana Department of Insurance (IDOI). The proposed complaint stated that, while at IU Health, a chest CT revealed multiple rib fractures and pneumothorax,[1] Carter was admitted to the critical care unit for some days, and, at one point, a chest tube was inserted for drainage. The proposed complaint further alleged:

> 10. Defendants failed to adequately diagnose and treat [] Carter for his chest trauma, discharging him prematurely despite evidence of rising leukocytosis and respiratory [] compromise leading to his sudden death on September 12, 2014.
>
> 11. As a direct and proximal result of the negligence of [IU Health] and [Nurse] Roberts, under the supervision of [Dr.] Brewer [], [] Carter was denied the chance of survival and perished on September 12, 2014.

[1] Pneumothorax, sometimes called collapsed lung, is a condition occurring when air leaks into the space between the lungs and chest wall.

Appellant's Appendix Vol. II at 54. The proposed complaint asked the MRP to render a decision stating that Defendants breached the applicable standard of care and that said breach resulted in damages to Flynn.

[5] On May 12, 2020,[2] the MRP issued a unanimous opinion "as to all Defendants" determining that "the evidence does not support the conclusion that the Defendants failed to meet the applicable standard of care as charged in the Complaint." *Id*. at 58. The same day, the MRP chairperson emailed the MRP's opinion to all counsel. In addition, and pursuant to statute,[3] the panel chair mailed the opinion and other related materials to all counsel by certified mail. The mailing address on file with the IDOI for Flynn's counsel was on Delaware Street in Indianapolis, but the panel chair sent the certified mailing to a former address on Michigan Street. The USPS tracking information reflected that the certified mailing was returned and delivered to the original sender on May 21, 2020.[4]

---

[2] We note that the opening text of the MRP's opinion states "this matter convened on March 16, 2020," and, at the bottom, is typed, "Dated: This 16th day of March, 2020." *Appellant's Appendix Vol. II* at 58. However, the email sending the opinion to counsel is dated May 12, 2020, as is the cover letter for the MRP packet sent by certified mail. *Id*. at 56, 57. In this appeal, the parties proceed on the premise that the MRP rendered its opinion on May 12, 2020, and we do likewise.

[3] Ind. Code § 34-18-10-26 provides:

> The chairman shall submit a copy of the panel's report to:
>
> (1) the commissioner; and
>
> (2) all parties and attorneys;
>
> by registered or certified mail within five days after the panel gives its opinion.

[4] The record does not contain any evidence as to whether Flynn's counsel ever received the MRP's opinion by U.S. Mail or, if so, the date of such receipt.

[6] On October 1, 2020, Flynn filed her complaint (the Complaint) against Defendants in the trial court. The Complaint recited Flynn had filed a proposed complaint with the IDOI on July 25, 2016 and, in Paragraph 13, she stated that

> *on May 14, 2020*, *Plaintiff's [sic] received the Opinion of the [MRP]* that the evidence does not support the conclusion that Defendants failed to comply with the appropriate standard of care and that Defendants' conduct was a factor of the resultant damages to Plaintiff.

Id. at 18 (emphasis added). The Complaint stated that Dr. Brewer and Nurse Roberts were employed by IU Health and that "despite [Carter's] continued leukocytosis . . . as well as continued shortness of breath," Nurse Roberts discharged him and Dr. Brewer cosigned the discharge, and Carter thereafter died in his home on September 12, 2020. Flynn alleged:

> Defendants [Dr.] Brewer [] and [IU Health] failed to conform to the standard of care by failing to perform proper laboratory testing and imaging studies which could have predicted pneumonia and emphysema and denying [] Carter the opportunity for medical intervention.
>
> [] Defendants failed to adequately diagnose and treat [] Carter for his chest trauma.
>
> [] Defendants [Dr.] Brewer [] and [IU Health] failed to properly and timely assess and treat [] Carter and take appropriate actions.
>
> [] [D]efendant [Nurse] Roberts [], under the supervision of defendant [Dr.] Brewer [], discharged [] Carter prematurely,

> despite evidence of rising leukocytosis and respiratory compromise, leading to his sudden death on September 12, 2014.

Id. at 18-19. Flynn asserted that as a direct and proximate result "of the negligence and/or medical malpractice [of] Defendants," Carter "was denied the chance of survival" and Flynn suffered damages. *Id*. at 19.

[7] On April 15, 2021, IU Health moved for summary judgment, and, on April 27, 2021, Dr. Brewer and Nurse Roberts likewise filed a motion for summary judgment. Each motion asserted that summary judgment was warranted on two grounds: (1) Flynn's October 1, 2020 Complaint was time-barred as it was filed outside of the applicable statute of limitations, and (2) Flynn failed to present expert testimony to rebut the expert opinion of the MRP and, thus, no genuine issue of material fact existed as to whether Defendants breached the applicable standard of care.

[8] On April 29, 2021, Dr. Brewer and Nurse Roberts filed their Answer to Flynn's Complaint, and IU Health filed its Answer on May 11, 2021. Each of their respective Answers denied Paragraph 4 of Flynn's Complaint, which asserted that Dr. Brewer and Nurse Roberts were employed by IU Health.

[9] On May 14, 2021, Flynn filed a response to IU Health's motion for summary judgment. In addressing IU Health's claim that her Complaint was untimely filed, Flynn argued that because the MRP chairperson, on May 12, 2020, mailed the MRP's opinion by certified mail to the wrong address and her counsel did not receive it until May 27, 2020, the time for her to file was

extended by an additional fifteen days, and/or that a dispute existed as to when Flynn received the MRP opinion, thereby precluding summary judgment on the statute of limitations basis. In further support that her Complaint was timely filed, Flynn argued that several of the Indiana Supreme Court's COVID-19 Emergency Orders issued in 2020 tolled statutes of limitation such that her Complaint was timely. With regard to IU Health's claim that Flynn had no expert testimony to rebut the MRP's opinion, Flynn designated the affidavit of Terry Mandel, D.O. (Dr. Mandel), which Flynn argued illustrated that genuine issues of material fact existed as to whether IU Health's care and treatment fell below the applicable standard of care and whether its conduct proximately caused Carter's death.

[10] Dr. Mandel's affidavit stated that Carter suffered "a very serious blunt injury to his chest" in the accident, and aside from his injuries, Carter suffered from chronic left and right heart failure as well as chronic obstructive pulmonary disease "which complicated his treatment plan." *Id.* at 126. The affidavit outlined Carter's treatment while at IU Health, including the following: A chest x-ray revealed "increasing left pneumothrorax" [sic], a chest tube was placed, and "bloody fluid was drained from the left pleural space"; Carter's white count was elevated and "extensive workup" was ordered but "Infectious Disease consult was not included in the workup"; a chest x-ray taken after the chest tube was removed on September 7 "showed persistent subcutaneous emphysema along the left flank," and Carter was discharged from IU Health on September 9, 2014 although "no further radiology studies had been performed,

WBC remained elevated at 15.3[,] and no further microbiology studies had been ordered." *Id.* at 126-27.

[11] Dr. Mandel then averred, in part:

> 23. Dwayne *Carter had been discharged* from [IU Health] on September 9, 2014 by [Nurse] Roberts, [] under the supervision of [Dr.] Brewer [] *with untreated pneumonia and empyema*.
>
> 24. *That it was a breach of the standard of care to release the patient home without further observations and treatments to stabilize his adverse medical condition*.
>
> 25. As a direct and proximal cause of the actions of Nurse [] Roberts and [Dr.] Brewer [], and [IU Health], Dwayne Carter perished at home on September 12, 2014.

Id. at 128 (emphases added).

[12] On May 28, 2021, Flynn filed a response to Dr. Brewer and Nurse Roberts's motion for summary judgment, which mirrored her response to IU Health's motion for summary judgment, and she designated the same evidentiary materials in support. On June 9, 2021, Dr. Brewer and Nurse Roberts filed a motion to strike Flynn's response, asserting that their motion for summary judgment was filed and served on April 27, 2021, Flynn had thirty days to respond under Ind. Trial Rule 56(C) or until May 27, 2021, such that her May 28, 2021 response was one day late and could not be considered under T.R. 56. Flynn filed a response to the motion to strike, asking the court to deny it because, among other things, the motions for summary judgment filed by IU

Health and by Dr. Brewer and Nurse Roberts were "essentially identical" and that she had filed the same evidence and arguments on May 14, 2021 in her response to IU Health's motion for summary judgment, such that "Plaintiff's evidence is already designated and properly before the Court." *Appellant's Appendix Vol. III* at 7. Dr. Brewer and Nurse Roberts filed a reply, asserting that while the two summary judgment motions "contain similar arguments, they are two different motions filed by separately represented parties in this matter" and "[i]t is not sufficient for [Flynn] to rely on her response to IU Health's motion in order to oppose [Dr. Brewer and Nurse Robert's] motion." *Id*. at 12.

[13] The next day, Flynn filed a motion seeking to rely on her May 14, 2021 designation of evidence (to IU Health) and asking that her May 28, 2021 response be deemed timely filed. In support, she argued that, effectively, Dr. Brewer and Nurse Roberts's summary judgment motion was a "successive" motion to IU Health's and that "[a] party opposing a successive summary judgment motion—i.e., one that is relevant to the same factual circumstances as a previously filed motion for summary judgment—is not required to re-designate its evidence '[a]s long as the trial court is aware of the materials a party relies upon in opposition."' *Id*. at 17 (quoting from an unpublished appellate memorandum decision). Dr. Brewer and Nurse Roberts filed a motion in opposition, asserting that Flynn's motion should be denied for various reasons, including that the two summary judgment motions were not "successive motions," and, rather, are distinct, independent motions filed by separate parties by separate counsel without coordination or consultation with

each other. Further, Dr. Brewer and Nurse Roberts argued that while a trial court has authority to alter the deadline for responding to a motion for summary judgment, this authority applies only where the party moves for a continuance within the applicable time limit, which did not occur here. *See* T.R. 56(I). Therefore, they argued, the trial court did not have authority to consider Flynn's late-filed response to their summary judgment motion.

[14] Thereafter, on July 7, 2021, IU Health filed a reply in support of its motion for summary judgment. First, IU Health argued that there was no genuine issue of material fact that Flynn failed to comply with the statute of limitations, vigorously opposing Flynn's calculations and dates used to support her position that her Complaint was timely filed, as well as Flynn's interpretations of our Supreme Court's COVID-19 Emergency Orders. Second, IU Health asserted that Dr. Mandel's affidavit was "insufficient to rebut the [MRP's opinion] with regard to IU Health" and failed to create a genuine issue of material fact, explaining:

> Dr. Mandel stated that NP Roberts discharged Mr. Carter from IU Health on September 9, 2014, and that the act of discharging Mr. Carter breached the standard of care because he required further observation and treatment. Dr. Mandel's affidavit does not set forth the standard of care applicable to IU Health and does not state how IU Health breached the standard of care with regard to Mr. Carter. If Dr. Mandel's opinion is that Mr. Carter should not have been discharged, his affidavit places the responsibility for that decision on NP Roberts and Dr. Brewer and neither NP Roberts nor Dr. Brewer were employees of IU Health. Dr. Mandel does not express any specific criticisms

> regarding the care provided by IU Health. As such, his affidavit is insufficient to rebut the opinion of the medical review panel.

Id. at 27, 37. Along with its reply, IU Health filed a supplemental designation of evidence, submitting its May 11, 2021 Answer to Flynn's Complaint.

[15] On September 24, 2021, Flynn filed a motion for leave to amend her complaint, stating that her original "contains a scrivener's error" in Paragraph 13, which included the sentence stating that the MRP's opinion was received on May 14, 2020. *Id*. at 59. The proposed amended complaint deleted the sentence stating the date of receipt and contained no other statement concerning when the MRP's opinion was received. On September 27, 2021, Dr. Brewer and Nurse Roberts filed an objection to Flynn's motion, arguing that the amendment was not offered merely to correct a scrivener's error but, rather, it materially changed Paragraph 13 to omit the date of receipt of the MRP's opinion, which date directly affects the calculations of the statute of limitations. Dr. Brewer and Nurse Roberts argued that, as they already had filed a motion for summary judgment on the basis of Flynn's failure to comply with the applicable statute of limitations, they would be unduly prejudiced if the trial court were to accept Flynn's proposed amended complaint.

[16] Meanwhile, on September 25, 2021, Flynn filed a motion to strike Dr. Brewer and Nurse Roberts's motion for summary judgment, stating that they failed to answer the Complaint before filing for summary judgment. Flynn argued that Dr. Brewer and Nurse Roberts improperly raised affirmative defenses for the first time in their summary judgment motion, namely that no expert would

testify at trial on the standard of care and that the Complaint was time barred. Flynn maintained that she was unfairly prejudiced because Dr. Brewer and Nurse Roberts "trapped [her] into defending against their unknown defenses without the ability to properly explore the relevant facts of either defense." *Id.* at 56.

[17] That same day, Dr. Brewer and Nurse Roberts filed a response in opposition to Flynn's motion to strike, arguing, first, that Indiana caselaw allows for a statute of limitations defense to be raised by a motion for summary judgment so long as doing so does not prejudice the plaintiff by depriving her of or hindering pursuit of a legal right. Second, they argued, that Flynn's failure to produce an expert to rebut the MRP's opinion was not an affirmative defense, and rather, addressed her inability to meet her burden to make a prima facie case of medical malpractice, which was not required to be raised in their answer. Third, they asserted that Flynn was not prejudiced and "trapped" into responding, noting that she neither timely filed a response nor requested additional time to conduct discovery.

[18] The court held a hearing on September 27, 2021, on the various pending motions. On December 9, 2021, the trial court issued an order (1) denying Flynn's motion to strike Dr. Brewer and Nurse Roberts's summary judgment motion, (2) denying Flynn's motion to rely on evidence filed on May 14, 2021 and her request for leave to file a response to Dr. Brewer and Nurse Roberts's motion, (3) granting Dr. Brewer and Nurse Roberts's motion to strike Flynn's late-filed response to their summary judgment motion, and (4) denying Flynn's request for leave to file

an amended complaint. On December 20, 2021, the court issued an order granting IU Health's motion for summary judgment, finding that Flynn failed to comply with the statute of limitations and that she failed to designate expert testimony to rebut the MRP's opinion. The court also issued a separate order summarily granting Dr. Brewer and Nurse Roberts's motion for summary judgment.

[19] Flynn now appeals.

Discussion & Decision

Standard of Review

[20] We review a summary judgment ruling de novo. *Biedron v. Anonymous Physician 1*, 106 N.E.3d 1079, 1089 (Ind. Ct. App. 2018), *trans. denied*. A party seeking summary judgment bears the burden to make a prima facie showing that there are no genuine issues of material fact and that the party is entitled to judgment as a matter of law. *Id*. Once the moving party satisfies this burden through evidence designated to the trial court, the non-moving party may not rest on its pleadings, but must designate specific facts demonstrating the existence of a genuine issue for trial. *Id*. When the defendant is the moving party, the defendant must show that the undisputed facts negate at least one element of the plaintiff's cause of action or that the defendant has a factually unchallenged affirmative defense that bars the plaintiff's claim. *Giles v. Anonymous Physician I*, 13 N.E.3d 504, 510 (Ind. Ct. App. 2014), *trans. denied*.

[21] Our review of a summary judgment motion is limited to those materials properly designated to the trial court, and we construe the evidence in a light most favorable to the non-moving party, resolving all doubts as to the existence of a genuine factual issue against the moving party. *Biedron*, 106 N.E.3d at 1089. We are not constrained to the claims and arguments presented to the trial court, and we may affirm a grant of summary judgment on any theory supported by the designated evidence. *Id*. A trial court's grant of summary judgment is clothed with a presumption of validity, and an appellant has the burden of demonstrating that the grant of summary judgment was erroneous. *Giles*, 13 N.E.3d at 510.

[22] To establish a prima facie case of medical malpractice, a plaintiff must demonstrate: (1) a duty on the part of the defendant in relation to the plaintiff; (2) a failure to conform her conduct to the requisite standard of care required by the relationship; and (3) an injury to the plaintiff resulting from that failure. *Sorrells v. Reid-Renner*, 49 N.E.3d 647, 651 (Ind. Ct. App. 2016). Before filing suit, a plaintiff must present a proposed complaint to a MRP for it to determine whether the evidence supports the conclusion that the defendants acted or failed to act within the appropriate standards of care as charged in the complaint. Ind. Code §§ 34-18-8-4, -10-22(a).

[23] A unanimous opinion of the MRP 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, 769 (Ind. Ct. App. 2004), *trans. denied*. Thus, when a MRP renders an opinion in favor of the

defendant health care provider, the plaintiff must then come forward with expert medical testimony to rebut the panel's opinion to survive summary judgment. *Sorrells*, 49 N.E.3d at 651; *Perry*, 808 N.E.2d at 769; *Bunch v. Tawari,* 711 N.E.2d 844, 850 (Ind. Ct. App. 1999).

I. Statute of Limitations

[24] Flynn argues that Defendants were not entitled to summary judgment on the basis that she failed to timely file her Complaint. Defendants' position is that, under the applicable medical malpractice statutes, Flynn needed to file her complaint in the trial court by September 25, 2020, and therefore, her October 1, 2020 Complaint was time-barred. Flynn, on the other hand, argues that she had until October 13, 2020 to file a Complaint. The parties' respective positions raise questions as to on what date the Medical Malpractice Act's two-year occurrence-based statute of limitations[5] was triggered[6] – i.e., was it the date of discharge on September 9, 2014, or the date of death on September 12, 2014. Further, because filing a proposed complaint with the IDOI (which in this case

---

[5] *See* I.C. § 34-18-7-1(b).

[6] Our Supreme Court has explained that in the medical malpractice context, the "trigger date" is:

> the point at which a particular claimant either knew of the malpractice and resulting injury or learned of facts that would have led a person of reasonable diligence to have discovered the malpractice and resulting injury. If this date is less than two years after the occurrence of the alleged malpractice, the statute of limitation bars the claim unless it is not reasonably possible for the claimant to present the claim in the remaining time, in which case the claimant must do so within a reasonable time after the discovery or trigger date. If such date is more than two years after the occurrence of malpractice, the claimant has two years within which to commence the action.

David v. Kleckner, 9 N.E.3d 147, 153 (Ind. 2014) (internal citation omitted).

occurred on July 25, 2016) "tolls the applicable statute of limitations to and including a period of ninety days following the receipt of the opinion of the medical review panel by the claimant,"[7] the date on which Flynn received the MRP's opinion was relevant to the statute of limitations calculations, and the parties presented various arguments on that point – i.e., whether she received it on May 12, 2020, when the panel chair emailed it, or on May 14, 2020, which is the date the Complaint states she received it,[8] or on May 27, 2020, when Flynn states (without evidentiary support) that her counsel received it by mail after it was first sent to the wrong address by certified mail.

[25] Flynn argued, alternatively, that even if she was required to file by September 25, 2020, as Defendants asserted, our Supreme Court issued a series of Emergency Orders in 2020 related to the COVID-19 pandemic that expressly tolled statutes of limitation. Our court recently addressed the effect of that tolling language in *William F. Braun Milk Hauling, Inc. v. Malanoski*, 192 N.E.3d 213 (Ind. Ct. App. 2022). There, Malanoski was injured in a vehicular accident on August 19, 2019, and filed a personal injury action on September 24, 2021, about five weeks beyond the ordinary two-year personal injury statute of limitations. The defendant filed an Ind. Trial Rule 12(B)(6) motion to dismiss.

---

[7] *See* I.C. § 34-18-7-3.

[8] On appeal, Flynn argues that the trial court should have granted her motion for leave to amend her Complaint "to correct a scrivener's error" concerning the statement that she received the MRP's opinion on May 14, 2020. *Appellant's Brief* at 26. Amendment of the Complaint is relevant only to the statute of limitations arguments, and as we ultimately base our decision today on other grounds, we need not reach Flynn's claim that the trial court erred in denying her motion for leave to amend.

The trial court denied the motion, and we affirmed. In reaching that decision, we noted that "the Indiana Supreme Court's order issued at 2:12 p.m. on March 23, 2020, unambiguously 'tolls all … statutes of limitations' in all civil matters before Indiana's trial courts." *Id*. at 218. We continued,

> The Court's next three emergency orders (dated April 3, April 24, and May 13, 2020) specifically state that they are extending "[t]he effective date of all orders granting emergency relief to trial courts under Administrative Rule 17, … *including but not limited to*" tolling of time limits. To the extent that the tolling of statutes of limitations could be construed as something different from the tolling of time limits, the all-encompassing italicized phrase clearly extends the tolling of statutes of limitations through at least May 30, 2020. Accordingly, the limitations period for Malanoski's personal injury claim was tolled for over two months, and her complaint was timely filed.

Id. (italics in original) (citation to record omitted).

[26] Assuming without deciding that Flynn's medical malpractice statute of limitations was likewise "tolled for over two months" by the Court's Emergency Orders, thus making her Complaint timely filed, we nevertheless find, as discussed below, that summary judgment was properly granted to Dr. Brewer and Nurse Roberts and to IU Health on their respective motions. We discuss each in turn.

II. Dr. Brewer & Nurse Roberts: Motion to Strike Flynn's Summary Judgment Response & Designation

[27] Flynn argues that the trial court erred in granting Dr. Brewer and Nurse Robert's motion to strike Flynn's response and designation of evidence, which she filed on May 28, 2021, in opposition to their April 27, 2021 motion for summary judgment. As Dr. Brewer and Nurse Roberts observe, the bright-line rule in Indiana is that "[w]hen a nonmoving party fails to respond to a motion for summary judgment within 30 days by either filing a response, requesting a continuance under Trial Rule 56(I), or filing an affidavit under Trial Rule 56(F), the trial court cannot consider summary judgment filings of that party subsequent to the 30-day period." *State ex rel. Hill v. Jones-Elliott*, 141 N.E.3d 1264, 1267 (Ind. Ct. App. 2020) (quoting *HomEq Servicing Corp. v. Baker*, 883 N.E.2d 95, 98-99 (Ind. 2008)).

[28] Flynn argues, not that the trial court abused its discretion, but rather that it should have considered the response and designated evidence filed on May 14, 2021 – in opposition to IU Health's April 15, 2021 motion for summary judgment – as being "dually designated" in response to Dr. Brewer and Nurse Roberts's later-filed "essentially identical" motion for summary judgment. *Appellant's Brief* at 24. This court has decided that same argument adversely to Flynn's position in *Rood v. Mobile Lithotripter of Ind., Ltd* ., 844 N.E.2d 502 (Ind. Ct. App. 2006).

[29] There, the plaintiff filed a complaint alleging negligence against a physician and a hospital. The physician and the hospital filed motions for summary judgment

five days apart, and the plaintiff failed to timely respond to the hospital's motion. When the plaintiff did file a response to the hospital's motion, he designated the same evidence as was designated in response to the physician's motion. The hospital filed a motion to strike the response and designated evidence, and after a hearing, the trial court granted the motion to strike as well as the hospital's motion for summary judgment. This court affirmed. In so doing, we explained that the language of T.R. 56 does not allow parties to "rely without specificity on the entire assembled record to fend off or support motions for summary judgment." *Id*. at 507. Without having timely designated evidence specifically in response to the hospital's motion, we held that the plaintiff did not satisfy the designation requirements of T.R. 56 and did not establish that there were genuine issues of fact for trial.

[30] The *Rood* court stated that "even if the trial court knew that the evidence designated against [the physician] could also be used to defeat [the hospital's] motion for summary judgment," the plaintiff still failed to properly designate any evidence in response to the hospital's motion. *Id*. Similarly, here, the trial court could not consider – and did not err in striking – Flynn's untimely response to Dr. Brewer and Nurse Roberts's motion simply because her response was similar or even the same as her response to IU Health's motion. [9]

[9] Flynn also suggests that her May 14, 2021 designation of evidence "was, on its face, designated against all Defendants" because, in one instance in her May 14 pleadings, she uses the plural possessive Defendants' rather than just singular possessive Defendant's. *Appellant's Brief* at 23; *Appellant's Appendix Vol. II* at 106.

[31] In the present matter, the MRP rendered a unanimous expert opinion that the conduct of Dr. Brewer and Nurse Roberts did not fall below the applicable standard of care. The trial court had no opposing expert opinion to consider. Accordingly, it did not err by granting summary judgment in favor of Dr. Brewer and Nurse Roberts. *See Sorrells*, 49 N.E.3d at 651 (to survive summary judgment, plaintiff must come forward with expert medical testimony to rebut the MRP).

III. IU Health: No Issue of Material Fact on Breach of Standard of Care

[32] "An opposing affidavit submitted to establish that a defendant [health care provider] breached the applicable standard of care must set forth that the expert is familiar with the proper standard of care under the same or similar circumstances, what that standard of care is, and that the defendant's treatment of the plaintiff fell below that standard." *Perry*, 808 N.E.2d at 769. If the plaintiff fails to designate sufficient expert testimony, there is no genuine issue of material fact and summary judgment is appropriate. *Bunch*, 711 N.E.2d at 850.

This argument was never raised before the trial court and thus is waived. Furthermore, it lacks merit, at best, and is disingenuous at worst. Flynn's May 14, 2021 response and designation of evidence were expressly filed in response to IU Health's motion *only*, and each refers to IU Health (or Defendant in the singular) numerous times throughout. Indeed, as Dr. Brewer and Nurse Roberts note, "it is apparent" that the May 14, 2021 response and designation were not intended to be against all Defendants because "[i]f that were the case, there would have been no reason for Flynn to later file a response and designation of evidence in opposition to Brewer and Roberts's Motion for Summary Judgment." *Appellees' Brewer/Roberts's Brief* at 19.

[33] Here, Flynn maintains that Dr. Mandel's affidavit "should have defeated summary judgment[.]" *Appellant's Brief* at 21. Dr. Mandel's affidavit stated various aspects of Carter's care and treatment while at IU Health and then averred that Carter was discharged, by Nurse Roberts under the supervision of Dr. Brewer, "with untreated pneumonia and empyema" and that "it was a breach of the standard of care to release the patient home without further observations and treatments to stabilize his adverse medication condition." *Appellant's Appendix Vol. II* at 128. He continued, "As a direct and proximal cause of the actions of" all three Defendants, Carter died. *Id*. Flynn argues on appeal that Dr. Mandel's affidavit created genuine issues of material fact for trial as to whether "Defendants' care and treatment of Carter fell below the applicable standard of care" and whether "Defendants' conduct was the proximate cause of Carter's injuries." *Appellant's Brief* at 20, 22.

[34] IU Health, however, argues that Dr. Mandel's affidavit "is insufficient to rebut the [MRP's] Opinion with regard to IU Health." *Appellee IU Health's Brief* at 11. We must agree. Although Dr. Mandel's affidavit states that it was a breach of the standard of care for "the Defendants" to discharge Carter without further observation or treatment of his conditions, Carter was released by Nurse Roberts and Dr. Brewer, who were not employees of IU Health according to IU Health's designated evidence.[10] Dr. Mandel's affidavit does not identify what

[10] IU Health and Nurse Roberts and Dr. Brewer, in their respective answers to Flynn's Complaint, denied that Nurse Roberts and Dr. Brewer were employees of IU Health. IU Health designated its answer in its

aspects of Carter's care that IU Health was responsible for or in what way IU Health's treatment breached the standard of care with regard to Carter. As such the affidavit does not create any issue of fact as to whether IU Health breached the standard of care. Accordingly, Flynn's expert affidavit in opposition to summary judgment is insufficient to rebut the MRP's opinion with regard to IU Health, and the trial court appropriately granted summary judgment in its favor.[11]

[35] For the reasons discussed herein, the trial court properly granted summary judgment in favor of IU Health and in favor of Dr. Brewer and Nurse Roberts.[12]

---

supplemental designation filed with its reply in July 2021. It is not clear if their employment was addressed at the MRP stage, and if not, why not, but at the latest Flynn was made aware in April and May 2021, when the answers were filed, which was before she filed her responses to the summary judgment motions. Flynn did not seek a continuance to conduct discovery or leave to amend the Complaint to add any additional defendants.

[11] IU Health also maintains that Dr. Mandel's affidavit was insufficient to rebut the MRP's opinion on the basis that he fails to state that he is familiar with the standard of care for hospitals or otherwise state what the applicable standard of care was for IU Health with regard to Carter. We have indeed held that a failure to set forth a standard of care can render a plaintiff's expert's opinion insufficient. *See e.g.*, *Perry*, 808 N.E.2d at 770 (finding plaintiff's designated evidence was insufficient to withstand summary judgment where doctor testified that the test conducted on plaintiff-patient was suboptimal and flawed, but his testimony did not establish what the standard of care was). However, we have also held that an expert's affidavit, even if it "does not directly state that [the affiant doctor] is familiar with the applicable standard of care," was nevertheless sufficient to withstand summary judgment where "it is evident" that the affiant's "employment and experience made him [] familiar with the applicable standard of care." *See McIntosh v. Cummins*, 759 N.E.2d 1180, 1184 (Ind. Ct. App. 2001), *trans. denied*. Finding that Dr. Mandel's affidavit was insufficient on other grounds, we need not resolve whether his affidavit was sufficient in terms of establishing the applicable standard of care for IU Health.

[12] To the extent that Flynn asserts summary judgment was improper because she was prejudiced by the fact that Defendants filed their respective answers after they filed their motions for summary judgment, we are not persuaded. Initially, we observe that T.R. 56 provides, "[a] party against whom a claim . . . is asserted may, *at any time*, move with or without supporting affidavits for a summary judgment in his favor[.]" T.R. 56(B) (emphasis added). Moreover, Dr. Brewer and Nurse Roberts filed their answer on April 29, 2021, two days after their motion for summary judgment. IU Health filed its answer on May 11, 2021, which was just

[36] Judgment affirmed.

Vaidik, J. and Crone, J., concur.

less than one month after their April 15, 2021 motion for summary judgment, and still before Flynn filed her May 14 response to IU Health's motion. Flynn has not established prejudice.