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IN THE
COURT OF APPEALS OF INDIANA

Penny Korakis,
Appellant-Plaintiff,

v.

Memorial Hospital of South Bend, Michael R. Messmer, D.O., David A. Halperin, M.D.,
Appellees-Defendants.

November 3, 2022

Court of Appeals Case No. 22A-CT-867

Appeal from the St. Joseph Circuit Court

The Honorable John Broden, Judge

The Honorable Andre B. Gammage, Magistrate

Trial Court Cause No. 71C01-2106-CT-215

Altice, Judge.

Case Summary

[1] Penny Korakis brought a medical malpractice action against David A. Halperin, M.D. (Dr. Halperin), Michael R. Messmer, D.O. (Dr. Messmer), and Memorial Hospital of South Bend (the Hospital), alleging negligent care and treatment following a car accident, and the trial court granted summary judgment in favor of each of the three defendants. Korakis appeals and asserts that the expert affidavit that she submitted in opposition to summary judgment was sufficient to create a genuine issue of material fact.

[2] We affirm.

Facts & Procedural History

[3] On August 3, 2017, Korakis was in an automobile accident and was taken to the Hospital for emergency care. Among other things, Korakis reported pain extending from her left hand to her left shoulder. She received medical care and treatment in the emergency room (ER) from Dr. Halperin. This treatment included x-rays of her left arm and hand. Dr. Halperin diagnosed Korakis with acute soft tissue injury.

[4] Korakis returned to the Hospital on August 10, where she was treated by a nurse practitioner who ordered additional x-rays of, among other things, Korakis's left shoulder, elbow, and wrist. Korakis was referred to and thereafter received treatment from Dr. Messmer on several occasions in August and September 2017. During his treatment, Dr. Messmer ordered additional x-rays of Korakis's wrist and later referred her to physical therapy. Korakis began

physical therapy but returned to Dr. Messmer in October 2017, due to continued and worsening pain in her elbow. Thereafter, Korakis sought a second opinion from Michael Kelbel, M.D., who ordered an MRI of, as is relevant here, her elbow. Korakis returned to Dr. Messmer for treatment on October 27 and November 9, 2017. According to Korakis, Dr. Messmer told her on November 9 that she may have had a fracture to her left elbow.

[5] On June 6, 2019, Korakis filed a proposed complaint with the Indiana Department of Insurance (IDOI) against Dr. Halperin, Dr. Messmer, and the Hospital (collectively, Defendants), alleging that the care and treatment she received from them, including failures to diagnose and treat her, was negligent and fell below the standard of care. More specifically, Korakis alleged that Dr. Halperin "failed to identify and diagnose the true extent of [her] injuries, which included broken bones." *Appellant's Appendix Vol. II* at 47. She alleged that during her follow-up appointments with Dr. Messmer, he "failed to properly examine [her] injuries and the x-rays taken thereof and failed to determine and disclose to [Korakis] the true extent of the injuries that she incurred on August 3, 2017, which included broken bones." *Id.* at 48.

[6] A Medical Review Panel (MRP) was formed and, on or about March 11, 2021, the MRP issued its expert opinion that "the evidence does not support the conclusion that [Defendants] failed to meet the applicable standard of care as charged in the complaint." *Id.* at 53, 56, 59.

[7] On June 2, 2021, Korakis filed a complaint against Defendants in the trial court, which she amended on June 18, 2021. She alleged, as she had in her IDOI proposed complaint, that Defendants failed "to properly identify, diagnose, and treat" her injuries, "including broken bones," resulting in required corrective surgery. *Id*. at 13, 20. She asserted claims for negligence and negligent infliction of emotional distress, resulting in economic and non-economic damages.

[8] On July 15, 2021, Dr. Halperin filed a motion for summary judgment based on the favorable MRP opinion. Five days later, Dr. Messmer and the Hospital filed a motion for summary judgment, similarly based upon the MPR opinion.

[9] In September, Korakis filed a response to each of the motions for summary judgment. She argued that Dr. Halperin failed to identify a fracture to Korakis's elbow, "despite it being apparent from the initial x-rays." *Id*. at 117. As to Dr. Messmer, Korakis asserted that he failed to adequately review the x-rays taken on August 3 and 10, 2017, failed to order additional x-rays, and failed to identify the fracture. In her responses, Korakis argued that genuine issues of material fact precluded summary judgment, including whether Drs. Halperin and Messmer breached the standard of care in their respective treatment of her.

[10] In support of each response, Korakis designated, among other things, the expert affidavit of James E. Kemmler, M.D. (Dr. Kemmler). Dr. Kemmler testified to his credentials, including that he "practiced orthopedic medicine for

approximately 25 years" and had "extensive experience performing standard of care reviews for personal injury and medical malpractice cases." *Id*. at 121. He testified about the medical records that he reviewed and to the chronology of Korakis's treatment. His conclusions included the following:

> 31. Upon review of the relevant x-rays and other medical records, it is my opinion that Ms. Korakis suffered an occult fracture of her left elbow.
>
> 32. This fracture can be observed in the x-rays taken during Ms. Korakis' initial visit to the emergency [room] as well as those taken on August 10, 2017.
>
> 33. The records indicate that Dr. Halperin failed to identify Ms. Korakis' fracture during her initial visit to the emergency room.
>
> 34. The records also indicate that Dr. Messmer failed to order additional x-rays of Ms. Korakis' left elbow when appropriate.
>
> 35. It is my opinion that Dr. Messmer should have done more testing prior to placing Ms. Korakis in a sling and ordering physical therapy.
>
> 36. The delay in identifying and providing the appropriate treatment for Ms. Korakis' fracture likely worsened her condition and contributed to her stiffness, limited range of motion, limited recovery, and current condition.
>
> 37. Accordingly, it is my opinion that Dr. Messmer [sic] treatment of Ms. Korakis[] fell below the standard of care.

Id. at 124.

[11] On October 28, 2021, the trial court held a hearing on the summary judgment motions. Dr. Messmer and the Hospital argued that Dr. Kemmler's affidavit was insufficient because "nowhere does he state what the appropriate standard of care is[,]" and "[a]t best, his affidavit says what he would do, what he thinks is appropriate. But his personal opinion is irrelevant." *Transcript* at 7, 12. Dr. Messmer and the Hospital continued, "[N]ever does he say that [the] Hospital breached that standard of care." *Id*. at 7.

[12] Dr. Halperin argued that Dr. Kemmler's affidavit was insufficient because Dr. Kemmler, who was an orthopedic specialist, did not state that he was familiar with the applicable standard of care for an emergency medicine physician in the same or similar circumstances as Dr. Halperin. Furthermore, Dr. Halperin argued, "[T]here is no statement . . . that Dr. Halperin breached the standard of care," and "without that . . . it's insufficient to create a genuine issue of material fact." *Id*. at 15.

[13] The trial court subsequently issued an order on December 13, 2021, granting both motions for summary judgment. The order addressed, among other things, the sufficiency of Dr. Kemmler's affidavit and found, in part:

> This Court first finds that Dr. Kemmler's affidavit should have but does not address the actions of each Defendant. Over the course of Plaintiff's treatment, each Defendant played a different role at different times in Plaintiff's treatment. It would, therefore, be required that Dr. Kemmler's affidavit state the standard of care expected by each Defendant and detail how each Defendant breached that standard of care. Dr. Kemmler's

> affidavit does not detail the standard of care for each Defendant, nor does it detail how each Defendant breached that standard.
>
> Dr. Kemmler's affidavit does not detail the standard of care Dr. Halperin should have provided or how the standard was breached. While Dr. Kemmler's affidavit says Dr. Messmer "fell below the standard of care", his affidavit does not detail the standard of care Dr. Messmer should have provided, nor does the affidavit detail how the standard was breached. Finally, with respect to Defendant Memorial Hospital, Dr. Kemmler's affidavit fails to mention, in any way, what Memorial Hospital did wrong. Dr. Kemmler's affidavit is not sufficient to establish the existence of a genuine issue of material fact as to any of these defendants.

Appellant's Appendix Vol. II at 195-96.[1]

[14] Following an unsuccessful motion to correct error, Korakis now appeals.

Discussion & Decision

[15] 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

[1] The trial court also found that "the doctrine of *res ipsa loquitor* does not apply to the facts here." *Appellant's Appendix Vol. II* at 197.

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*.

[16] 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.

[17] 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). 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.

[18] Korakis argues that Dr. Kemmler's affidavit created genuine issues of fact such that summary judgment in favor Defendants was improper. We disagree.

[19] In opposing a MRP opinion favorable to the health care provider, "[t]he plaintiff must present expert medical testimony establishing: (1) the applicable standard of care required by Indiana law; (2) how the defendant doctor breached that standard of care; and (3) that the defendant doctor's negligence in doing so was the proximate cause of the injuries complained of." *Glon v. Mem'l Hosp. of S. Bend, Inc.*, 111 N.E.3d 232, 239 (Ind. Ct. App. 2018) *trans. denied*; *Perry*, 808 N.E.2d at 769. Failure to provide sufficient expert testimony will usually subject the plaintiff's claim to summary disposition. *See Perry*, 808 N.E.2d at 768.

[20] In considering whether Dr. Kemmler's affidavit was substantively sufficient to defeat the summary judgment motions, we begin by observing that, although

Dr. Kemmler's affidavit averred that Dr. Messmer's treatment of Korakis "fell below the standard of care," it rendered no similar opinion as to either Dr. Halperin or the Hospital. *Appellant's Appendix Vol. II* at 124. That is, while Dr. Kemmler averred that Dr. Halperin failed to identify the fracture and misdiagnosed Korakis with a soft tissue injury, it did not state that Dr. Halperin's failure to do so was a breach of the standard of care. Likewise, the affidavit does not identify any particular negligent acts or omissions on the part of the Hospital or opine that the Hospital breached the standard of care. Accordingly, Dr. Halperin's affidavit did not create a genuine issue of material fact with regard to either Dr. Halperin or the Hospital, and each was entitled to summary judgment. *See Syfu v. Quinn,* 826 N.E.2d 699, 704 (Ind. Ct. App. 2005) (no genuine issue of material fact was established by affidavit that failed to aver that treating physician's conduct fell below the standard of care).

[21] We next turn to Dr. Messmer. While Dr. Kemmler avers that Dr. Messmer's treatment of Korakis fell below the standard of care, he does not state what that standard of care was.[2] In *Oelling v. Rao*, our Supreme Court determined that the plaintiff's expert's affidavit failed to create a genuine issue for trial because "the affidavit needed to set out the applicable standard of care" as well as a statement that the treatment fell below that standard. 593 N.E.2d 189, 190

[2] Neither does Dr. Kemmler articulate the applicable standard of care for Dr. Halperin or for the Hospital. And, as noted by the trial court, it is possible that the standard of care could be different for the Hospital where Korakis was transported after the accident and sought treatment a week later for continued pain, for the ER doctor, and for the D.O. that treated Korakis in the months after the accident.

(Ind. 1992); *see also Perry*, 808 N.E.2d at 768 ("[A]n opposing affidavit . . . 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.").

[22] Here, Dr. Kemmler, who practiced orthopedic medicine, did not state that he is familiar with the standard of care for a D.O. in the same or similar circumstances as Dr. Messmer, and certainly, the standard of care for an orthopedist and a D.O. are not the same. For these reasons, Dr. Kemmler's affidavit was insufficient to create a genuine issue of material fact with regard to Dr. Messmer. *See e.g.*, *Glon*, 111 N.E.3d at 240 (finding expert affidavit insufficient to rebut MRP opinion where affidavit did not present evidence on what the hospital's post-operative standard of care was and did not state that hospital breached the standard of care); *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); *Lusk v. Swanson*, 753 N.E.2d 748, 754 (Ind. Ct. App. 2001) (finding pulmonologist's expert affidavit insufficient to defeat summary judgment for orthopedic surgeon where affiant did not "articulate the requisite standard of care" and "failed to state . . . that he was familiar with the standard of care for orthopedic surgeons"), *trans. denied*.

[23] Korakis argues that "[e]ven if Dr. Kemmler did not explicitly state what the proper standard of care was, the standard of care was implicit in [his] very

specific statements about how Dr. Messmer's treatment fell below the standard of care," thus suggesting that the trial court should draw inferences as to the standards of care. *Appellant's Brief* at 18. We believe that approach is not consistent with what the *Oelling* Court directed in terms of setting out the standard of care.

[24] There, the plaintiff, in opposition to summary judgment, submitted the affidavit of Steven Meister, M.D., who was certified in the specialty of cardiology. Dr. Meister stated his opinion that the cardiac catheterization performed on Oelling was unnecessary and resulted in complications and corrective surgery. Our Supreme Court held that Dr. Meister's affidavit was insufficient to survive summary judgment, explaining that it is not enough for the expert to state that he or she "would have treated [the patient] differently." *Id.* at 191. Rather, the plaintiff's expert's testimony must state

> what other reasonable doctors similarly situated would have done under the circumstances. Because Dr. Meister's affidavit fails to set out any standard at all, it is insufficient to raise a material issue of fact as to whether the defendants' conduct fell below that which was reasonable under the circumstances.

Id.

[25] More recently, this court applied *Oelling* in *Overshiner v. Hendricks Reg'l Health*, 119 N.E.3d 1124, 1132 (Ind. Ct. App. 2019), *trans. denied*, where plaintiffs sued several health providers (obstetrician, pediatrician, and the hospital) after their infant child, Kaitlyn, suffered injuries and medical conditions during birth. The

trial court granted a directed verdict in favor of the defendant health providers because, while plaintiffs' expert, Dr. Robert Shuman, who was board certified in neuropathy, testified that the treating providers breached the standard of care, he did not testify that he was familiar with the standard of care in the same or similar circumstances. Plaintiffs filed a motion to correct error, which the trial court denied.

[26] On appeal, plaintiffs argued:

> [Dr. Shuman] testified very specifically to what the proper treatment for a child in Kaitlyn's situation was, what the treatments actually given were, and what the consequences of those treatments were; and that *he thus illustrated on a practical basis what the standard of care meant when applied to Kaitlyn's situation*.

Id. at 1130 (emphasis added). We affirmed the trial court's entry of a directed verdict for the health care providers because Dr. Shuman, who was a neuropathologist, did not testify to the standard of care required of the defendant health care providers, "*i.e.*, the standard of care applicable to obstetricians, pediatricians, and the nursing staff of a community hospital treating a child like Kaitlyn under the same or similar circumstances." *Id*. at 1133. We further stated "that any inference intended to be proven by the evidence," as suggested by the plaintiffs, "cannot logically be drawn without undue speculation as to the applicable standard of care." *Id.* Likewise, we find here that drawing any inference about the standard of care applicable to Dr. Messmer would require undue speculation.

[27] Because Dr. Kemmler provided no testimony about the requisite standard of care for a doctor in Dr. Messmer's same or similar circumstances, the affidavit did not create a genuine issue of material fact precluding summary judgment for Dr. Messmer.[3] *See Lusk*, 753 N.E.2d 754 (rejecting argument that the requisite standard of care for orthopedic surgeon was "apparent from the contents" of expert pulmonologist's affidavit); *compare Scholl v. Majd*, 162 N.E.3d 475, 480-81 (Ind. Ct. App. 2020) (finding that, although neurosurgeon's expert testimony regarding standard of care for orthopedic surgeon was "imprecise," he did state that the standard of care is "what a reasonably skilled doctor with reasonably skilled training would do in a given situation" and that such statement, combined with other testimony, demonstrated familiarity with the standard of care sufficient to defeat motion for judgment on the evidence).

[28] For all the reasons discussed herein, the trial court appropriately granted summary judgment in favor of Defendants.

[29] Judgment affirmed.

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[3] In reaching our decision today, we recognize that there exists some divergence on the extent of what must be explicitly stated with regard to the standard of care in the plaintiff's expert's affidavit, with some panels of this court concluding that it is sufficient if the expert sets forth evidence from which it "was evident" that the affiant was familiar with the relevant standard of care. *See e.g.*, *McIntosh v. Cummins*, 759 N.E.2d 1180, 1184 (Ind. Ct. App. 2001) ("Although[] the affidavit does not directly state that Dr. Glanzman is familiar with the applicable standard of care, it is evident from the content of the affidavit that Dr. Glanzman's employment and experience made him indeed familiar with the applicable standard in the treatment of bone fractures and x-rays."), *trans. denied*. We respectfully offer that further guidance from our Supreme Court on this matter would be helpful to practitioners.

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