MEMORANDUM DECISION

ATTORNEYS FOR APPELLANT

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IN THE COURT OF APPEALS OF INDIANA

Matthew J. Surburg,
Appellant-Defendant,

v.

Shannon G. Stoops,
Appellee-Plaintiff

November 17, 2022

Court of Appeals Case No. 22A-CT-468

Interlocutory Appeal from the Hancock Circuit Court

The Honorable R. Scott Sirk, Judge

Trial Court Cause No. 30C01-2011-CT-1735

Crone, Judge.

Case Summary

[1] Shannon G. Stoops filed a complaint against Matthew J. Surburg, M.D., alleging that he provided negligent medical care to her deceased husband Tracy. Dr. Surburg filed a motion for summary judgment asserting that he did not cause the injuries alleged in Shannon's complaint. The trial court denied the motion. Dr. Surburg now appeals, arguing that the trial court erred. We disagree and therefore affirm.

Facts and Procedural History

[2] According to Shannon's amended complaint, Dr. Surburg was Tracy's primary care physician. On July 7, 2017, Tracy went to Dr. Surburg complaining of severe back pain. Dr. Surburg diagnosed a rhomboid muscle strain and prescribed opioids and muscle relaxers. On January 5, 2018, another physician diagnosed Tracy with stage IV lung cancer. Tracy died on May 6, 2018.

[3] In June 2019, Shannon filed a pro se proposed complaint for damages against Dr. Surburg with the Indiana Department of Insurance. The complaint alleged that "medical care or treatment rendered by" Dr. Surburg "was negligent and below the appropriate standard of care" and that "as a proximate result" of this negligence Tracy "incurred medical expenses, additional treatment, related expenses, lost wages and/or intangible damages of a nature as to require compensation." Appellant's App. Vol. 2 at 15. In October 2020, the medical review panel members unanimously opined that Dr. Surburg "failed to meet the applicable standard of care as charged in the Proposed Complaint" but that they

were "unable to conclude whether the conduct complained of was a factor of any resultant damages." *Id*. at 37.

[4] In November 2020, Shannon filed a pro se complaint against Dr. Surburg, which was later amended. The amended complaint includes the following allegations:

> 7. Mutually agreed upon by the medical review panel board members, Tracy Stoops, was not given proper medical evaluation within the appropriate amount of time by Matthew Surburg. The agreed upon time was no later than the end of August of 2017. By that given time, Matthew Surburg did not have enough understanding of what was wrong with Tracy Stoops. Since Tracy had no improvement from July 7, 2017, further testing should have been done such as radiological imaging, blood work, and/or sedimentation rate. A more aggressive paradigm is what a reasonable, prudent practitioner would do at the time of care.
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> ….
>
> 9. …. August 21, 2017, Tracy developed a lump on the right side of his throat that Matthew Surburg'[s] nurse practitioner diagnosed as a salivatory [sic] gland stone. Tracy Stoops was given antibiotics and a CT scan was ordered. August 26, 2017, the CT scan report showed there was a mass of the parotid gland measuring 2.4 x 1.8 x 1.9 cm that was concerning for an abscess, parotid neoplasm (benign & malignant tumors), or supportive lymphadenopathy (infection considered less likely) and was said to benefit from an ultrasound for further evaluation and ultrasound-guided aspiration. The ultrasound and aspiration were never done. On [the] December 14, 2017 CT scan ordered by the oncologist, this was found to be a heterogenous right paratracheal mass measuring 3.0 x 3.1 cm. Proper evaluation and early treatment of this cancer could have stopped the spreading of Tracy's cancer.

….

16. December 6, 2017, Tracy Stoops had his first consultation with Dr. Fred Butler. Dr. Butler did a bone marrow biopsy and ran a series of blood test[s]. December 15, 2017, Dr. Butler consulted with Dr. Julia Compton about treating Tracy and decided to start radiation treatment at St. Vincent hospital. Tracy started radiation after he spent a week in St. Vincent hospital. January 5, 2018, Tracy, and Shannon Stoops are made aware of the exact cancer Tracy Stoops had, ALK Positive Non-small Cell Stage IV Lung Cancer. Dr. Butler treated Tracy with the first line therapy chemotherapy drug, Alectinib. Studies show that overall **survival rate** of patients is **6.8 years** with **early** diagnosis. Dr. Julia Compton treated Tracy with palliative radiotherapy to shrink the cancer and slow its growth.

17. February 14, 2018, Dr. Fred Butler ordered a CT scan of Tracy's chest, abdomen, and pelvic area. One and a half months of radiation and chemotherapy treatments, there was overall significant improvement in metastatic disease. There were no new lesions. One lesion was completely gone. Others were shrunk by half the size. The medical review panel stated Matthew Surburg missed something in August and he should have done radiological testing. The testing would have shown Tracy Stoops' cancer, which could have been treated early, and the cancer could have been in remission by this time.

18. Tracy Stoops continued radiation and chemotherapy treatments until April 30, 2018. Dr. Julia Compton informed Tracy and Shannon Stoops that the cancer had spread to Tracy's brain ….

19. Tracy W. Stoops passed away on May 6, 2018 ….

20. By reason of the Defendant's, Matthew Surburg, negligence, failure to meet the applicable standard of care, lack of proper

> medical evaluation and breach of duty, Tracy Stoops suffered severe physical harm, emotional and physical distress, medical expenses, loss of future revenues, and other damages.
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> 21. Defendant, by and through his employees, failed to treat Tracy Stoops to reasonable and accepted standards of medical care. The failure of Defendant to treat Tracy Stoops with the appropriate medical care was a responsible cause of Tracy Stoops' undiagnosed cancer and subsequent issues that arose from the cancer.
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> 22. By reasons of the Defendant's, Matthew Surburg, negligence, failure to meet the applicable standard of care, lack of proper medical evaluation, and breach of duty, Plaintiff, Shannon Stoops, has lost the love, affection, companionship, intimacy, and enjoyment of life with her life-mate and husband. Shannon Stoops has suffered severe emotional, mental, and physical distress, medical expenses, funeral expenses, loss of past and future revenues, hers, and Tracy Stoops'.

Id. at 21-26.

[5] In August 2021, Dr. Surburg filed a motion for summary judgment, in support of which he designated Shannon's various complaints, a certified copy of the medical review panel opinion, and the affidavit of Edward Fox, M.D. Dr. Fox's affidavit reads in pertinent part as follows:

> 5. I am board certified in Internal Medicine, Medical Oncology, and Hematology.
>
> 6. I am familiar with the standard of care for diagnosis, treatment, and management of lung cancer, including the type of cancer at issue in this matter.

> ….
>
> 8. I have reviewed [the parties' pleadings and discovery responses and numerous medical records].
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> 9. Based upon my review of the above records and pleadings, my opinion is that Mr. Stoops' cancer had already metastasized at the time he presented to Dr. Matthew Surburg on July 5, 2017.
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> 10. Even if Mr. Stoops' cancer had been diagnosed by August 31, 2017, which is the date identified by the members of the medical review panel, Mr. Stoops' cancer was incurable.
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> 11. I am of the opinion that Mrs. Stoops' claim that her husband had a median survival of 6.8 years is incorrect.
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> 12. I am of the opinion that any delay between August 31, 2017 and diagnosis did not impact the ultimate outcome as Mr. Stoops' cancer was incurable on July 5, 2017. The alleged acts/omissions by Dr. Surburg did not cause the resultant injuries and damages complained of in the Plaintiffs' Amended Complaint.
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> 13. The opinions I have expressed herein are to a reasonable degree of medical certainty.

Id. at 46-47. None of the discovery responses or medical records referred to above were attached to or served with the affidavit.

[6] Shannon did not file a response to Dr. Surburg's summary judgment motion or move to strike Dr. Fox's affidavit. In December 2021, after a hearing, the trial court issued an order summarily denying Dr. Surburg's motion. This interlocutory appeal ensued.

Discussion and Decision

[7] "Summary judgment is appropriate only if the designated evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Rossner v. Take Care Health Sys., LLC*, 172 N.E.3d 1248, 1254 (Ind. Ct. App. 2021) (citing, inter alia, Ind. Trial Rule 56(C)), *trans. denied*. "Even though Indiana Trial Rule 56 is nearly identical to Federal Rule of Civil Procedure 56, we have long recognized that 'Indiana's summary judgment procedure … diverges from federal summary judgment practice.'" *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014) (alteration in *Hughley*) (quoting *Jarboe v. Landmark Cmty. Newspapers of Ind., Inc.*, 644 N.E.2d 118, 123 (Ind. 1994)). "In particular, while federal practice permits the moving party to merely show that the party carrying the burden of proof lacks evidence on a necessary element, we impose a more onerous burden: to affirmatively 'negate an opponent's claim.'" *Id*. (quoting *Jarboe*, 644 N.E.2d at 123). "Indiana consciously errs on the side of letting marginal cases proceed to trial on the merits, rather than risk short-circuiting meritorious claims." *Id*. at 1004.

[8] For the trial court to properly grant summary judgment, the moving party must have made a prima facie showing that its designated evidence negated an element of the non-moving party's claim, and, in response, the non-moving party must have failed to designate evidence to establish a genuine issue of material fact. *Cox v. Mayerstein-Burnell Co.*, 19 N.E.3d 799, 804 (Ind. Ct. App. 2014). "Only after the moving party carries its burden is the non-moving party … required to present evidence establishing the existence of a genuine issue of

material fact." *Morris v. Crain*, 71 N.E.3d 871, 879 (Ind. Ct. App. 2017). "In deciding whether summary judgment is proper, we consider only the evidence the parties specifically designated to the trial court." *Bertucci v. Bertucci*, 177 N.E.3d 1211, 1221 (Ind. Ct. App. 2021) (citing Ind. Trial Rule 56(C), -(H)).

[9] We review a trial court's summary judgment ruling de novo. *Mann v. Arnos*, 186 N.E.3d 105, 114 (Ind. Ct. App. 2022), *trans. denied*. Shannon has not submitted an appellee's brief, so we may reverse the trial court's ruling if Dr. Surburg's brief presents a case of prima facie error. *Hahn-Weisz v. Johnson*, 189 N.E.3d 1136, 1140-41 (Ind. Ct. App. 2022). In this context, prima facie error means on first appearance, at first sight, or on the face of it. *Id*. at 141. "This less stringent standard of review 'relieves [us] of the burden of controverting arguments advanced in favor of reversal where that burden properly rests with the appellee.'" *Id*. (alteration in *Hahn-Weisz*) (quoting *Jenkins v. Jenkins*, 17 N.E.3d 350, 352 (Ind. Ct. App. 2014)). "We are obligated, however, to correctly apply the law to the facts in the record in order to determine whether reversal is required." *Id*.

[10] "In order to recover in a medical malpractice action based upon negligence, a party must establish that 1) the defendant owed the [patient] a duty of care; 2) the defendant breached the duty by failing to conform his conduct to the requisite standard of care; and 3) the [patient] suffered compensable injury that was proximately caused by the defendant's breach." *Gates v. Riley ex rel. Riley*, 723 N.E.2d 946, 950 (Ind. Ct. App. 2000), *trans. denied*. "When the defendant doctor moves for summary judgment and can show [that] there is no genuine

issue of material fact as to any one of these elements, the defendant is entitled to summary judgment as a matter of law unless the plaintiff can establish, by expert testimony, a genuine issue of material fact for trial." *Hoskins v. Sharp*, 629 N.E.2d 1271, 1277 (Ind. Ct. App. 1994). Because Shannon's loss of consortium claim is "purely derivative" of the medical malpractice claim, she must prove all the elements of the latter claim or she "will not be entitled to recover." *Mayhue v. Sparkman*, 653 N.E.2d 1384, 1386 (Ind. 1995).

[11] As mentioned above, the medical review panel opined that Dr. Surburg failed to conform his conduct to the requisite standard of care, but it was unable to conclude whether Dr. Surburg's conduct caused Tracy's alleged injuries. In the affidavit that Dr. Surburg designated in support of his summary judgment motion, Dr. Fox opined that Dr. Surburg's conduct did *not* cause Tracy's alleged injuries. But the affidavit does not comply with Indiana Trial Rule 56(E), which states in pertinent part,

> 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.*

(Emphasis added.) The discovery responses and medical records referred to in Dr. Fox's affidavit—in other words, the factual bases for his opinion—were not "attached thereto or served therewith" in support of the summary judgment motion.

[12] "The requirements of Trial Rule 56(E) are mandatory." *Miller v. Monsanto Co.*, 626 N.E.2d 538, 543 (Ind. Ct. App. 1993). Where an "affidavit does not meet the strict requirements of Trial Rule 56(E), the court may disregard it upon its own motion." *Bunch v. Tiwari*, 711 N.E.2d 844, 849 (Ind. Ct. App. 1999) (noting that certain medical records relied on by medical expert had not been attached to or served with his affidavit as required by Trial Rule 56(E) and thus could not be considered by trial court or appellate court, but that affidavit should not have been stricken because, inter alia, expert's opinion was supported by other medical records that were "specifically designated and submitted in compliance with the trial rules"). Thus, Shannon's failure to file a motion to strike Dr. Fox's affidavit did not preclude the trial court from disregarding it and denying Dr. Surburg's summary judgment motion on its own motion.[1] That being the case, we affirm the trial court's ruling.

[1] Moreover, Dr. Fox's affidavit does not affirmatively negate the causation and injury elements of Shannon's medical malpractice claim vis-à-vis the loss-of-chance doctrine. *See Alexander v. Scheid*, 726 N.E.2d 272, 279 (Ind. 2000) ("We think that loss of chance is better understood as a description of the injury than as either a term for a separate cause of action or a surrogate for the causation element of a negligence claim. If a plaintiff seeks recovery specifically for what the plaintiff alleges the doctor to have caused, i.e., a decrease in the patient's probability of recovery, rather than for the ultimate outcome, causation is no longer debatable. Rather, the problem becomes one of identification and valuation or quantification of that injury."). Here, Shannon did not allege that Dr. Surburg's negligence caused Tracy's "ultimate outcome," i.e., his death, an ultimate outcome we all face; rather, she alleged that Dr. Surburg's negligence caused a decrease in Tracy's life expectancy of approximately 6.8 years. Dr. Fox disagreed with that figure, but he did not give his own estimation or specifically opine that Tracy would have died on May 6, 2018, even if his cancer had been diagnosed sooner. Thus, the identification and valuation of Tracy's injury remain questions of fact for a jury to determine. *See id*. at 279-80, 281 (stating that "a decrease in life expectancy" as a result of a doctor's negligence "is nothing more than valuation of an item of damages that is routinely valued in other contexts[,]" and that although "[m]oney is an inadequate substitute for a period of life, … it is the best a legal system can do").

[13] Affirmed.

May, J., and Weissmann, J., concur.