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ATTORNEYS FOR APPELLANT:

NATHANIEL LEE
LAURA R. CROWLEY
Lee, Cossell, Kuehn & Love, LLP
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

DAVID J. MALLON, JR.
JENNY R. BUCHHEIT
Ice Miller LLP
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

NATOSHA CANFIELD, Individually, and Next Best Friend of D.C., Minor,	)	
Appellant-Plaintiff,	)	
vs.	)	No. 49A02-1104-CT-292
CLARIAN HEALTH PARTNERS, INC. d/b/a METHODIST HOSPITAL,	)	
Appellee-Defendant.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patrick L. McCarty, Judge
Cause No. 49D03-1007-CT-30250

December 12, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

In 2006, a premature infant, D.C., was accidentally given an overdose of a blood-thinning drug while in the neonatal intensive care unit ("NICU") at an Indianapolis hospital. The overdose caused a temporary thinning of his blood that lasted about twenty-four hours. Although other infants died as a result of similar overdoses, D.C. recovered.

D.C.'s mother, Natosha Canfield ("Mother"), filed an action on both D.C.'s behalf and her own behalf against Clarian Health Partners, Inc. d/b/a Methodist Hospital ("Clarian")[1] for negligence and negligent infliction of emotional distress. Clarian admitted negligence with respect to the overdose itself, but filed a motion for summary judgment on Mother's individual claim for negligent infliction of emotional distress and for partial summary judgment on D.C.'s additional negligence claims. Mother filed a motion for a thirty-day extension of time to respond, and the trial court did not rule on it. Two months later, she filed her response, and Clarian filed a motion to strike her designated materials as untimely. The trial court granted Clarian's motion to strike and eventually granted its motion for summary judgment and partial summary judgment.

Mother now appeals the trial court's judgment. Finding that her response was untimely and that Clarian was entitled to judgment as a matter of law, we affirm in all respects.

[1] Clarian Health Partners is now known as IU Health, Inc. However, for the sake of clarity and consistency, we will refer to the Appellee as "Clarian."

Facts and Procedural History

On August 30, 2006, Mother gave birth to D.C. at Methodist Hospital. Because D.C. was born prematurely, at twenty-eight weeks' gestation, he was immediately placed in the NICU, where Mother visited him daily. On September 16, 2006, after returning home from her morning visit to the NICU, Mother received a call from a doctor at Methodist informing her that D.C. had been given an accidental overdose of the anti-coagulant heparin. When Mother returned to the NICU approximately ten minutes later, she was greeted by a doctor who apprised her of the situation and indicated her desire to address any concerns that Mother might have concerning D.C.'s overdose. When Mother went to D.C.'s bedside, she did not notice any visible changes in his condition since her morning visit. She also observed that the overall conditions in the NICU did not appear to have changed. During the twenty-four hours following his overdose, D.C. experienced transient coagulopathy, a temporary thinning of the blood. The NICU staff treated him with the antidote Protamine Sulfate and performed a precautionary work-up, which required a cranial ultrasound and follow-up coagulation tests. On September 17, 2006, or later, Mother learned from her own father that the newspaper had reported that five infants in the Methodist NICU had received heparin overdoses and that two (and eventually three) of them had died as a result.

D.C. remained at Methodist until November 22, 2006. At some point between September 16 and November 22, 2006, he experienced axillary thrombus in his left arm,

sepsis, and MRSA.[2] However, medical review panel physician Mary T. Degeneffe, M.D., concluded that those conditions were not a result of the heparin overdose.

On July 8, 2010, Mother filed an action against Clarian on D.C.'s behalf for negligence and on her own behalf for negligent infliction of emotional distress.[3] Clarian admitted negligence only with respect to the overdose itself. On September 2, 2010, Clarian filed a motion for partial summary judgment for all other claims of negligence concerning D.C.'s care and treatment before and after the overdose and a motion for summary judgment on Mother's individual claim for negligent infliction of emotional distress. In support of its motion, Clarian designated excerpts from Mother's deposition as well as the affidavits of Dr. Degeneffe and NICU nurse Debra Lynne Ward. Dr. Degeneffe stated under oath in part,

> 3. Based on my board certification in pediatrics, as well as consultations with neonatologists regarding this matter, I am qualified to render an opinion as to the care and treatment provided by Clarian … to [D.C.] from the time of his birth on August 30, 2006, until his discharge from Clarian on November 22, 2006. My opinions in this matter are all based on a reasonable degree of medical certainty.
>
> 4. My opinion that Clarian deviated from the standard of care in this case was based on the fact that Clarian administered an improper dose of heparin to [D.C.] on September 16, 2006.
>
> 5. It is my opinion, however, that Clarian did not deviate from the standard of care with respect to any other aspect of the care or treatment provided to

[2] "Axillary thrombus" is "a clot formed in the cardiovascular systems during life from constituents of blood" in the "space below the glenohumeral joint." STEDMAN'S MEDICAL DICTIONARY 189, 1985 (28th ed. 2009). "Sepsis" is a condition indicating "the presence of various pathogenic organisms, or their toxins, in the blood or tissues." *Id*. at 1749. "MRSA" (Methicillin-resistant Staphylococcus aureus) is "a type of staph bacteria that is resistant to treatment with [a] certain group of antibiotics called beta-lactams, including methicillin, oxacillin, penicillin, and amoxicillin." http://www.cdc.gov/Features/MRSAinHealthcare.

[3] In the original cause, Mother and D.C. were joined by the other surviving infant and that infant's parents. However, the trial court severed the claims, and Mother and D.C.'s case was filed under a new cause number.

> [D.C.] from the time of his birth on August 30, 2006, until his discharge from Clarian on November 22, 2006.
>
> 6. It is also my opinion that the only injury that resulted from Clarian's negligent administration of heparin to [D.C.] in this case was transient coagulothopy, which lasted less than twenty-four hours, and which required treatment with Protamine, a precautionary work-up requiring a cranial ultrasound, and follow-up coagulation tests. The overdose of heparin, however, did not lead to any further injury for [D.C.].
>
> 7. Further, [D.C.] did not develop an axillary thrombus in his left arm, sepsis, MRSA, or receive "too much fluid" as alleged in Plaintiffs' Second Amended Complaint for Damages [as] a result of the heparin overdose or any other aspect of the care rendered by Clarian to [D.C.].

Appellant's App. at 47-48.

On September 20, 2010, Mother filed a motion for a thirty-day extension of time to respond. The trial court did not rule on her motion but set a hearing on Clarian's summary judgment motion for November 1, 2010. Upon Mother's request, the hearing was rescheduled for December 13, 2010. On December 3, 2010, Mother filed a response to Clarian's summary judgment motion, designating the affidavit of her own purported medical expert. On December 10, 2010, Clarian filed a motion to strike Mother's response and designated materials as untimely. On December 23, 2010, the trial court held a hearing on Clarian's motion to strike as well as its motion for summary judgment on Mother's individual claim.

On January 3, 2011, the trial court granted Clarian's motion to strike Mother's designated materials. Subsequently, on March 4, 2011, the trial court heard argument on Clarian's motion for partial summary judgment on D.C.'s claims. On March 7, 2011, the trial court issued an order granting Clarian's motion for summary judgment on Mother's

individual claim and partial summary judgment on D.C.'s claims.[4] Mother now appeals.[5] Additional facts will be provided as necessary.

Discussion and Decision

This appeal concerns procedural and substantive issues surrounding Clarian's motion for summary judgment on Mother's individual claim and partial summary judgment on D.C.'s claims. Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). "A genuine issue of material fact exists where facts concerning an issue which would dispose of the litigation are in dispute or where the undisputed facts are capable of supporting conflicting inferences on such an issue." *Mahan v. Am. Standard Ins. Co.*, 862 N.E.2d 669, 675 (Ind. Ct. App. 2007), *trans. denied*. We review the trial court's decision to grant or deny summary judgment using the same standard as the trial court, in which all factual inferences must be construed in favor of the non-moving party and all doubts as to the existence of a material factual issue must be resolved against the moving party. *Kroger Co. v. Plonski*, 930 N.E.2d 1, 4-5 (Ind. 2010). If the moving party fails to make a prima facie showing of no

[4] The March 7, 2011 order stated that there was "no just reason for delay" regarding Mother's individual claim, but was silent regarding the status of D.C.'s claims. Appellant's App. at 74. On March 15, 2011, Clarian filed a motion for final order regarding D.C.'s claims. On April 8, 2011, the trial court clarified its prior order, specifically stating that the order was also a final, appealable order regarding D.C.'s claims. *Id.* at 80.

[5] Clarian has filed a motion to strike from the record on appeal portions of the Appellant's Appendix and Appellant's Brief, which we grant in an order issued contemporaneously with this decision. We recognize the exception cited in Mother's argument which allows stricken evidence to sometimes be considered by this Court in assessing whether such evidence was properly stricken. However, we note that in this case, the evidence was stricken on procedural grounds (untimeliness) and not on substantive grounds (i.e., the relevance of its contents). As such, the cited exception is inapplicable in this case.

genuine issue of material fact and appropriateness of judgment as a matter of law, then summary judgment is precluded regardless of whether the non-moving party designates facts and evidence in response. *Clarian Health Partners, Inc. v. Wagler*, 925 N.E.2d 388, 392 (Ind. Ct. App. 2010), *trans. denied*. However, once the moving party has carried its initial burden, the non-moving party must come forward with sufficient evidence demonstrating the existence of genuine factual issues, and if she fails to do so, summary judgment should be granted. *Mahan*, 862 N.E.2d at 675-76.

I. Motion to Strike Mother's Response

Mother first asserts that the trial court erred in granting Clarian's motion to strike her designated evidence and affidavits as untimely filed. The trial court has broad discretion in ruling on the admissibility of evidence, and such discretion extends to rulings on motions to strike affidavits for failure to comply with summary judgment rules. *Plonski*, 930 N.E.2d at 5. An abuse of discretion occurs if the trial court's decision is against the logic and effect of the facts and circumstances before it. *McGuire v. Century Surety Co.*, 861 N.E.2d 357, 360 (Ind. Ct. App. 2007).

Indiana Trial Rule 56(C) states that an "adverse party shall have thirty (30) days after service of the [summary judgment] motion to serve a response and any opposing affidavits." Trial Rule 56(I) states that the trial court may, for cause found, alter any time limit set forth in the rule upon motion made within the applicable time limit. If the non-moving party fails to respond within thirty days (1) by filing affidavits showing issues of material fact; (2) by filing an affidavit under Trial Rule 56(F) indicating the unavailability of facts necessary to

craft a response; or (3) by requesting an extension of time within which to file her response, then the "trial court lacks discretion to permit that party to thereafter file a response." *Desai v. Croy*, 805 N.E.2d 844, 849 (Ind. Ct. App. 2004), *trans. denied*. "The rule of *Desai* is a bright line rule both for trial courts and the parties who litigate summary judgment motions." *Life v. F.C. Tucker Co.*, 948 N.E.2d 346, 351 (Ind. Ct. App. 2011) (citation and internal quotation marks omitted).

Here, Mother *did* file a request for extension of time to file her response within the applicable time limit, and as such, she claims that she adhered to *Desai*'s bright line rule. The trial court did not rule on her request before the thirty-day limit expired. As a result, she essentially claims that she was justified in operating under the assumption that her request would be granted and in waiting to file her response until two months after the expiration of the thirty-day period.[6] We disagree and find *McGuire* to be dispositive.

In *McGuire*, the defendant filed a motion for summary judgment on December 1, 2005. On December 29, 2005, the plaintiffs filed a motion for extension of time to respond to the summary judgment motion. The trial court did not rule on the plaintiffs' request for extension until January 13, 2006, when it denied her motion. 861 N.E.2d at 359. On appeal, the plaintiffs claimed that the trial court's denial outside the thirty-day timeframe effectively deprived them of the ability to file a formal response at all. *Id*. at 360. Another panel of this

[6] To the extent Mother relies on verbal indications from the trial court regarding an extension of time to obtain expert witnesses, we note that the trial court made those statements at a July 2010 hearing in the context of an anticipated trial and that such statements predated Clarian's motion for summary judgment. As such, the statements cannot be construed as tantamount to the trial court granting Mother an extension of time to file a response to a motion that had not even been filed.

Court disagreed, reasoning that although due process is violated when a trial court grants a motion for extension of time only to later rescind that ruling after the moving party has relied on the granting of the motion, no such deprivation occurs when the trial court has not ruled on the motion by the end of the thirty-day period. *Id*. Instead, the Court stated that "without having received immediate notice from the trial court that the motion would be granted, counsel should have assumed it would be denied and acted accordingly." *McGuire*, 861 N.E.2d at 360 n.2.

Likewise, here, Mother should have filed a response within thirty days of Clarian's summary judgment motion instead of assuming that the trial court would grant her motion for extension and waiting another seventy-four days to file her response. Because Mother's response was untimely, the trial court did not abuse its discretion in granting Clarian's motion to strike it.

II. D.C.'s Negligence Claim

Mother next asserts that the trial court erred in granting partial summary judgment in favor of Clarian on D.C.'s negligence claim. At the outset, we note that as support for her negligent care argument against Clarian, Mother cites statements contained in the affidavit of Dr. Joye M. Carter regarding the severity and duration of D.C.'s reaction to the heparin overdose. However, this affidavit was part of the designated materials stricken by the trial court; as such, it is not a part of the record and is therefore improper for consideration on appeal. *See e.g., Boczar v. Meridian St. Found.*, 749 N.E.2d 87, 92 (Ind. Ct. App. 2001) ("Matters outside the record cannot be considered by the court on appeal.").

We are now left to determine whether, absent Mother's designated materials, summary judgment is nonetheless inappropriate. *See Wagler*, 925 N.E.2d at 392 (stating that where moving party fails to make prima facie showing of no genuine issue of material fact and appropriateness of judgment as a matter of law, summary judgment is precluded regardless of whether non-moving party designates facts and evidence in response). In her brief, Mother essentially concedes that affirming the trial court's ruling on the motion to strike will destroy D.C.'s claim for negligent care and treatment (other than the overdose itself). Appellant's Br. at 15-16. Thus, we affirm the trial court's decision to grant Clarian's motion for partial summary judgment on this claim.

III. Negligent Infliction of Emotional Distress

Finally, Mother contends that the trial court erred in granting summary judgment in favor of Clarian on her individual claim for negligent infliction of emotional distress. The tort of negligent infliction of emotional distress has two separate and distinct branches: direct impact liability and bystander liability. *Atl. Coast Airlines v. Cook*, 857 N.E.2d 989, 998 (Ind. 2006).[7] To recover under the "direct impact rule," a plaintiff must demonstrate,

[7] At the risk of appearing quixotic, I once again

> reiterate my belief that the time has come to clear the decks of the so-called "impact rule" and ... allow the tort of negligent infliction of emotional distress to stand on its own inherent elements. If we trust jurors to determine whether a criminal defendant should live or die, then we should consider them capable of deciding whether a claimant's serious emotional trauma is both legitimate and reasonable, without imposing any artificial impediment to recovery.

Taele v. State Farm Mut. Auto. Ins. Co., 936 N.E.2d 306, 312 n.5 (Ind. Ct. App. 2010) (Crone J., dissenting) (quoting *Ketchmark v. NIPSCO*, 818 N.E.2d 522, 526-27 (Ind. Ct. App. 2004) (Crone J., dissenting), *trans. denied* (2011).

among other things, that she suffered a direct physical impact resulting from the negligence of another. *Id*. at 997 (citation and quotation marks omitted). Here, Mother did not suffer a direct physical injury; as such, she is limited to pursuing recovery under the "bystander rule." To recover under the bystander rule, a plaintiff must demonstrate (1) that she "actually witnessed or came on the scene soon after the death or severe injury of a loved one with a relationship to [her]," i.e., her child, caused by the defendant's tortious conduct, *id*. at 997-98 (citation and quotation marks omitted); and (2) that she sustained emotional trauma "which is serious in nature and of a kind and extent normally expected to occur in a reasonable person." *Groves v. Taylor*, 729 N.E.2d 569, 573 (Ind. 2000). Bystander recovery is limited to situations where the emotional trauma arises from the shock of experiencing a traumatic event involving a loved one. *Smith v. Toney*, 862 N.E.2d 656, 663 (Ind. 2007). The criteria to consider in determining liability under the bystander rule are: "the severity of the victim's injury, the relationship of the plaintiff to the victim, and circumstances surrounding the plaintiff's discovery of the victim's injury." *Id*. at 660. These criteria derive from public policy and are issues of law for a court to resolve. *Id*.

Here, the parent-child relationship is undisputed. However, Mother's argument fails to pinpoint exactly what the traumatic event was, i.e., the overdose itself, the treatment with Protamine, or any visible trauma or pain suffered by D.C. during the aftermath of the overdose. Assuming that it was the overdose, for which Clarian admitted negligence with respect to D.C., we note that because Mother was not present in the NICU to witness D.C. when he actually received the overdose, we must determine whether the circumstances

surrounding her discovery of the overdose constitute witnessing the "gruesome aftermath" of a traumatic event within minutes after it occurred. *Groves*, 729 N.E.2d at 573 (Ind. 2000). She testified in her deposition that she learned of the overdose when one of the doctors called her at home shortly after it was discovered. Appellant's App. at 56. When she arrived at the NICU about ten minutes later, the doctor spoke with her to address any concerns that she might have. When Mother saw D.C., she did not notice any bleeding or any changes in D.C. as compared to his condition earlier that day. *Id*. She also said that she did not remember anything being different in the NICU as compared to the conditions earlier that day.[8] *Id*. Finally, she said that she did not remember seeing any visible difference in D.C.'s condition from the date of the overdose to the next two days. *Id*. at 56. In short, Mother learned of D.C.'s overdose through indirect means and only later learned about the magnitude of the overdosing incident. As such, her situation did not involve the trauma of witnessing either an event itself or its gruesome aftermath. *Groves*, 729 N.E.2d at 573.

Based on the foregoing, we conclude that the record fails to support Mother's claim for negligent infliction of emotional distress as a matter of law. Thus, the trial court did not err in granting Clarian's motion for summary judgment on her claim. Accordingly, we affirm.

Affirmed.

MAY, J., and BROWN, J., concur.

[8] Mother stated in her deposition that she did not know that other infants had died from similar overdoses until at least the next day, when her father read the story in the newspaper and relayed the information to her. Appellant's App. at 57.