IN THE INDIANA COURT OF APPEALS
CAUSE NO. 49A05-1404-CT-00165

Kathy L. Siner, Personal Representative of the Estate of Geraldine A. Siner, Deceased; and John T. Siner, prior EPOA & Medical Representative)

v.

Kindred Hospital, limited Partnership d/b/a Kindred Hospital of Indianapolis, et al., D. Nicely, Administrator, D. Uhrin, RN, and Mohammed Majid, Attending Physician)

Appeal from the
Marion Superior Court 12

Lower Court Cause No: 49D121305-CT-020123

The Honorable Heather Welch, Judge

POSTMARKED ON:

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CLERK OF COURTS
STATE OF INDIANA

BRIEF OF APPELLANT

Kathy Siner, pro se, legal representative of Geraldine A. Siner, deceased; & Tim Siner, pro se.

1807 Commerce Ave. , Indianapolis, IN 46201 (317) 266-9453

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TABLE OF AUTHORITIES

Health Care Consent Act IC 16-8-11, through 12-1; IC 16-36-5-2 on

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Health Care Consent Act IC 16-8-11,12)

Ind Powers of Attorney Act (Ind Code Sec. 30-5-5-16 (b) (2), etc.

In Payne v Marion General Hospital (1990) Ind. App, 549 N.E.2nd 1043,1046, trans denied

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Article 1, Section 1, Indiana Constitution. Protection for life and liberty is guaranteed by the constitution. Article 1, Sections 1 and 12, Indiana Constitution.

CASE LAW REGARDING SUMMARY JUDGMENT

Summary judgment is only appropriate when the designated evidence demonstrates there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *IND. RULES of TRIAL PROCEDURE. 56C. e.g., Jones v. Nichols, 765 N.E. 2nd 153, 156 (Ind. Ct. App. 2002).*

The moving party bears the burden of making a prima facie case showing that there are no genuine issues of material fact. *Commercial Coin Laundry Systems v. Enneking, 766 N.E.2nd 433, 438 (Ind App. 2002), citing I/N Tek v. Hitachi Ltd., 734 N.E. 2d 584, 586 (Ind. App. 2000).*

If the party moving for summary judgment is successful in establishing that there is no issue of material fact, only then does the burden shift to the nonmoving party to designate evidence establishing the existence of a genuine issue of material fact. *Trial Procedure Rule 56; Klinker v. 'First Merchants Bank, N.A., 964 N.E.2d 190 (Ind 2012).*

If the prima facie case is made that as a matter of law, there are no genuine issues of material fact, the party opposing summary judgment must respond by designating facts establishing a genuine issue for trial. *Bushong, 790 N.E.2d at 474, citing Stephenson v. Ledbetter, 596 N.E. 2d 1369, 1371 (Ind. 1992).*

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 material facts are capable of supporting conflicting inferences on such an issue. *Commercial Coin Laundry Systems v. Enneking, 766 N.E.2nd 438 citing Gilman v. Hohman, 725 N.E. 2d 425, 428 (Ind. App. 2000, trans denied).*

Courts will construe all facts and reasonable inferences derived from those facts in the light most favor of the nonmoving party. *Wilson v. Lincoln Federal Savings Bank, 790 N.E.2d 1042, 1046; Lake Cent. Sch. Corp. v. Hawk Dev. Corp., 793 NE. E.2d 1080, 1083 (Ind. Ct.App. 2003).*

If the court has any doubts concerning the existence of a genuine issue of material fact, the court must resolve those doubts in favor of the non-moving party and deny summary judgment. *Wilson, 790 N.E.2d, at 1046, citing McGee v. Bonaventura, 605 N.E. 2d 792, 793 (Ind. App 1993).*

I. STATEMENT OF THE ISSUES

Whether it was an error of law, and/or abuse of discretion, that Summary Judgment was granted to 1. Dr. M. Majid and 2. Kindred Hospital, et al, based on the following:

Whether it was abuse of discretion and/or error of law to not consider the IDOI Medical Panel's unanimous opinion of malpractice against all listed parties, including Majid, as 'expert medical opinion'.

Weather the 'changed opinion' of one panel member, when hired as the Defense's medical expert can be 'undisputed fact', when it is in dispute with his prior panel opinion.

Whether it was abuse of discretion and/or error of law to accept parts of the Defenses' medical expert's opinion to be that of the Medical Panel's, when it was not claimed to be; e.g., His opinion that damages could only be 'speculative',etc.

Whether it was abuse of discretion and/or error of law in Majd's Summary judgment to accept that no damages from malpractice had been established, when Majid's own Medical Expert admitted that damages "were documented" on the sole issue of malpractice he discussed.

Whether it was an abuse of discretion and/or error of law to accept claims by both Defense teams as ' Undisputed Facts' in Summary Judgment, when they had been disputed with Designated evidence, as malpractice as matter of law in Majid's case, and with Medical experts and as matters of law in the case of Kindred, et. al.

Whether it was abuse of discretion and/or error of law to say that none of Siner's Designated Evidence was timely filed in the case of Majid's Motion for Summary Judgment, when 4 Exhibits had been attached and label as "Designated Evidence" to her timely filed Response (though without a separate cover sheet); to allow Summary Judgment despite Siner's complaint in her Response that inadequate medical information had been provided due to obstructionist tactics by the Defense; to Strike Designated Evidence Siner brought to the hearing on Majid's Summary Judgment; and to deny her plea for time allowance to obtain further affidavits from

Medical experts, when it was claimed that Siner could not prevail without such (despite her designation of the Panel Opinion as such, etc.

Whether it was abuse of discretion and/or error of law to accept aspects of the Defendant's explanation of 'causation' by an outside agency as undisputed, in light of Siner's arguments against such.

Whether it was abuse of discretion and/or error of law to accept the Defenses' case law, when it the cases were essentially dissimilar to the current case.

Whether it was an abuse of discretion and/or error of law to grant final judgment based on only one instance of malpractice, when multiple acts and occurrences of malpractice were not only alleged in the complaint, but when central ones were argued and substantiated by law, designated evidence, and medical experts.

Whether it was abuse of discretion and/or error of law to apply case law which differed essentially from the facts of this case.

Whether there was abuse of discretion in rulings against Siner, perhaps due to her Pro Se standing.

The above was revised after-the-fact, and not all above arguments are presented under the above headings. some were combined in an effort to reduce pages, others evolved during the course of arguing related points. There is not adequate time or space allowance to edit and reorganize arguments more than has already been done. However, each of the above is argued herein, and is offered to substantiate the general Issues of :

1. Whether Summary Judgment should have been granted to M. Majid,

2. Whether Summary Judgment should have been granted to Kindred Hospital, et al.

II. STATEMENT OF THE CASE

This case was filed in the Department of Insurance against Kindred Hospital, et al, including but not limited to Dennis Nicely, CEO, David Uhrin RN, Jeff Clearwater; and against Dr. M. Majid, attending physician. On January 28th, 2013, the Department of Insurance Medical Review Panel of 3 doctors issued the unanimous opinion against all listed defendants:

The panel is of the unanimous opinion that the evidence supports the conclusion that the defendants failed to comply with the appropriate standard of care, and that their conduct may have been a factor of some resultant damages, but not the death of the patient.

On May 6th, 2013, the case was filed, then assigned to Marion County Superior Court 12. The Complaint alleged that the defendants, individually or collectively, in multiple acts and occurrences, were negligent or intentional, in the denial of the appropriate standard of care. The Complaint further alleged that Kindred Hospital, et al, and Majid, (Siner's attending physician,) violated not just the accepted 'standards of care', but also matters of law, and violations of contract and Administrative Code, etc. (See Complaint App p.1.)

Siner's Service of Summonses were initially accepted with two exceptions. However, when the Defense for Kindred made an appearance, they moved to Quash all Summones, and fine Siner for the cost of their Motion to Quash. This was granted as an instant order. The initial 6 months of the case were spent in Dispute over this matter, attempts to re-serve Summones, Siner's attempt to obtain a lawyer, the hearing on costs, and as persons again accepted service, various a few appearances and responses to the complaint were made. Siner had attempted to include some persons and several unnamed doctors in the case as 'ostensible agents' of Kindred Hospital, but was told such could not be done after Panel, (despite her showing via case law that such could be done). At the 11/19/13 hearing Summary Judgments were granted to several of those Doctors with the court saying that Siner had not filed a response, though not properly labeled as such

(App p.222) Siner was told her Motion at that hearing (App p.236) made no sense, and asked if she wanted to withdraw it. (Motion that four be removed as individual defendants, but included as Agents of Kindred Hospital, App p.236, based on arguments from App. p 222) Siner agreed to release some addional staff after the court indicated that the Statute of Limitations prohibited their inclusion, and those Defendants were immediately dismissed from the case. Siner distributed her Discovery requests at the 11/19/13 hearing, when a Case Management Plan was also scheduled to be set, but the court indicated that a CMP was no longer a concern, and asked Kindred, et.al their preference for a hearing on Summary Judgment. At the same hearing, Majid's Motion on Summary Judgment and Siner's objections were heard. On 11/26/13 Summary Judgment for Majid was granted. Siner filed a Motion to Correct Error 12/26/13, which was denied 2/13/13.

On 12/6/13, the same day Answers were filed for some of Kindred's Defendants, a Motion for Summary Judgment for Kindred Hospital and several employees was also filed, and hearing was set for 2/18/14. Siner continued to try to compel answers to her initial Discovery requests prior to that hearing, but was unsuccessful. Answers given lacked the key request for Audit Trails. On 3/19/14 an Order granting Kindred's Motion for Summary Judgment was granted. Notice of Appeals were timely filed for Majid and then for Kindred. The cases were later consolidated.

III. STATEMENT OF FACTS

Majid and Kindred,et al were granted Summary Judgments prior to completion of Discovery or an agreed upon list of Undisputed facts. The Defense claimed there were no undisputed facts, though they didn't specify any as agreed upon, and Siner disputed with evidence, experts, and law many listed in Summary Judgment as 'undisputed'. A summary of the case is needed to give

context to the following arguments, so an a brief attempt to outline the sequence of events will be made, though some facts are assumed to be disputed, and therefore listed as 'alleged'.

Gerri Siner was a retired Methodist minister, who was 83 at the time of the incidents in this case. She had Alzheimer's and was cared for in her home by her 3 children after her husband died in 2001. As a doctor at Kindred commented on medical record, she did look and respond to conversation, however, she was becoming increasingly difficult to understand, and non-verbal, and could therefore could no longer direct her own medical care. She had allocated such to her family, and signed legal documents designating her son, John T. Siner, as her Enduring Power of Attorney and Medical Representative. (App p155, and p 164) This was noted on Kindred intake documents (App.p 167,p168).

Gerri Siner entered Kindred Hospital October of 2007. She was in Kindred's ICU until approximately November 6th, when she was transferred to a Rehab wing of the hospital, and the Siners were told that she could return home in approximately one week. Kathy Siner alleges that when she saw her mother for the first time since that transfer on 11/10/13, she had lost a significant amount of weight, displayed symptoms of dehydration, her arms were bruised, and she was acting very frightened in her dark room with shades drawn, etc. After waiting to question her doctor about her precipitous decline for nearly 8 hours, she left, but returned the next day at approximately noon. At 4pm, Siner alleges that her mother lurched back in the chair staff had transferred her to, with eyes crossed and mouth open, totally motionless. Staff were immediately called to the room, but Siner alleges that they were not following any emergency procedures, despite her pleas that they do so. Kathy attests that she had to give mouth to mouth resuscitation twice due to the non-responsiveness of staff and that she revived her and was

pleading that she was not 'DNR', pleading that they check her chart. After doing so, staff finally assisted her. Kindred's response during the panel process was that she had not coded, but no staff members have submitted affidavits or questions asked of them in IDOI Discovery. Siner alleges that Kindred has attempted to cover up this event, sent tests to outside hospitals who said they had been destroyed, etc. Kindred refused to provide Audit Trails in Discovery to show if/when their Hospital records had been altered. Five days after this event, Kindred said their Ethics committee met and decided to over-ride the family and make Siner 'DNR', (App. p 128) with a denial of treatment. (App p.54-58) The sequence of the events surrounding this the struggle by the Siners to keep their Mother Code 1, and Majid and Kindred's efforts to reduce her code are herein outlined with designated evidence. After prolonged efforts, the Siners were able to transfer Gerri Siner to Methodist on December 8th, where she was treated, in many ways healed, and was treated. The Siners allege that the damage done by prolonged deprevation of oxygen on 11/11/07, and additional damage due to a lack of treatment by Kindred, in large measure could not be reversed.

Note: A detailed description of these acts and occurrences with substantiating hospital records and other evidence, arguments, and answers to the defenses' arguments, regarding these violations and acts of malpractice were presented to the IDOI Panel. The Documents submitted to the Panel were also filed in the lower court on 7/9/13 in an effort to inform the court of the scope of the case, so these filings are herein filed as a 2nd Appendix. Except in reference to items alleged, these arguments and exhibits are not included herein, except where the same exhibits were submitted during Summary Judgment.

ARGUMENT

SUMMARY OF PRIMARY ARGUMENTS: Summay Judgment was granted to Dr. M. Majid and Kindred Hospital, et al, Dennis Nicely, David Uhrin, despite abuse of discretion and errors of law, in that the Defense failure to satisfy the standards for Summary judgment, and Siner disputed their arguments for Summary judgment, and established her prima facia case.

Foundational assertions in the Court's Summary Judgment (= SJ), that there was "no just reason for delay" and that M.Majid, M.D. was ' entitled to full, complete, and final Judgment' in his favor " as a matter of law" (SJ p 7) are as follows:

1. "....the undisputed evidence demonstrates the defendant did not breach any duty owed to the plaintiff.

2. "...when the medical review panel opines that the plaintiff has failed to make a prima facie case, he or she must then come forward with expert medical testimony to rebut the panel's opinion in order to survive summary judgment." (SJ p 5).

3. "The Court finds that the Medical Review Panel opinion on causation does not create a genuine issue of material fact." (Because) ".....expert medical opinion that lacks reasonable certainty, standing alone, is not sufficient to support a judgment." (SJ p7)

4. " Since the Plaintiff has not designated expert medical testimony establishing the existence of a genuine issue of material fact on the issue of causation, the Defendant is entitled to judgment as a matter of law. " (SJ p 7)

SUMMARY OF ARGUMENT: It was abuse of discretion and/or error of law to not consider the IDOI Medical Panel's unanimous opinion of malpractice against all listed parties, including Majid, as ' medical expert opinion' in Siner's favor. If accepted as such, the 'changed opinion' of one panel member, when hired as the Defense's medical expert, is not 'undisputed fact' as designated in the Summary Judgment.

The opinion of the Indiana Department of Insurance (IDOI) Medical Panel, reads:

The panel is of the unanimous opinion that the evidence supports the conclusion that the defendants failed to comply with the appropriate standard of care, and that their conduct may have been a factor of some resultant damages, but not the death of the patient. (App. p27)

The question as to whether malpractice occurred was answered affirmatively, and unanimously. This opinion of malpractice was against each and every party listed in the IDOI complaint: Kindred Hospital, et.al, including but not limited to: Dr. M. Majid, Dennis Nicely, Kindred's acting CEO, David Uhrin, RN, and Jeff Clearwater. The Panel opinion was filed as Designated Evidence by both Siner and Majid (App. p27). Siner argued that the question of a breach in duty (malpractice) was conclusive in the Panel's opinion, and stood as "medical expert opinion" (App. p 22)

The Summary Judgment statement that "....the undisputed evidence demonstrates the defendant did not breach any duty owed to the plaintiff" ignores the expert medical opinion of the Panel, which was unanimous and unambiguous on the issue of breach of duty - that Majid (and all others listed) had failed to comply with the standard of care. (App p22)

The Summary judgment stated that it was the medical review panel's opinion that the " plaintiff has failed to make a prima facie case," requiring that she "come forward with expert medical testimony to rebut the panel's opinion in order to survive summary judgment" . This 'reading' of the Panel's opinion was not what the opinion asserted. The Panel did not assert that

the plaintiff failed to make a prima facie case, but rather had the highly unusual unanimous opinion that the Hospital and all parties listed had breached their duty to the Gerri Siner. Majid used case law where the panel opinion where there was no opinion of malpractice determined by the Panel, or where one panel member asserted that there were no damages, and the other two claimed that circumstances prohibited determination of such, etc. Siner argued in her Response that this cases were misapplied due to such fundamental differences from the current case. (App p23) Yet, Majid's medical expert's opinion was in the Summary Judgment's list of 'Undisputed Facts', despite the obvious contradiction of his opinion that Majid had not committed malpractice, and the Panel opinion that he had. Therefore it was not the case that, as SJ claimed: ***" the undisputed evidence demonstrates the defendant did not breach any duty owed to the plaintiff"***. Further, it was not the case '***that the medical review panel opined that the plaintiff failed to make a prima facie case'*** requiring her to ***'rebut the panel's opinion in order to survive summary judgment.'*** (SJ above) There was no need to 'rebut' a panel opinion that was clearly in Siner's favor concerning the breach of duty by Majid. The Panel opinion was 'in dispute' with the 'changed opinion' of Majid's medical expert, so Majid did not satisfy the requirements of Summary Judgment to establish by undisputed fact and law that he did not commit malpractice.

<u>SUMMARY OF ARGUMENT</u>: Majid and the Summary judgment claimed that no damages from this malpractice had been established, however, Majid's own Medical Expert admitted that damages "were documented" (App p108) on the sole issue of malpractice he discussed.

ARGUMENT: The panel opinion was that " ***the defendants failed to comply with the appropriate standard of care, and that their conduct may have been a factor of some resultant damages,"*** **(App. p74)** However, because the 2nd phrase is worded 'may' and 'some' damages, Majid argues that this is to be taken as an assertion of the lack, and/or the impossibility, of establishing damages. SJ also says in point 3. above that the panel opinion " lacks reasonable certainty, standing alone, is not sufficient to support a judgment." Summary Judgment standards do not make it incumbent on the non-movant to establish damages in Summary Judgment, but rather she only needs to show that the Defendant's attempts to establish facts are disputed. (SJ p7) If it is at minimum accepted that Krueger's 'changed opinion' is in dispute with the Panel opinion that a duty was breached by Majid, the only issue of 'causation' remaining is one of damages from that malpractice. We will turn to a full discussion of the 'changed opinion' of the Defense's medical expert, Dr. Krueger, in the next 'consolidated' discussion of Summary Judgments, but on this point it suffices to summarize that a) Dr. Krueger limited his ***personal*** panel opinion of malpractice to only one issue; saying, "My determination was based solely on prolonged application of a CPAP mask to the patient." (App. p108) He went on to say that he personally thought words such as 'may have' caused 'some' of the resultant damages, because he felt that *"it would be speculation to say she perceived any harm related to prolonged application of CPAP,* ***although the source of facial wounds were documented.***" (bold print added). (App. p108) It was pointed out at the SJ hearing, and in Siner's ***Answer to Majid's Opposition to Motion to Correct Error:***

Therefore, on the CPAP issue, not only does the Panel opinion stand as evidence that Majid's actions constituted malpractice, but on the issue of whether this breach caused damages, Dr. Krueger's stated opinion concedes the issue of 'resultant damages' to have been documented.

The evidence relied on by the Defendant therefore does not establish that there is no genuine issue of material fact'. Rather, these two items of evidence* can be used to establish the fact that there was malpractice by Majid (panel opinion) and damages resulted (Krueger's affidavit).

Therefore, based simply on the Defendant's two items of evidence, expert opinion establishes that the Defendant was negligent, and that this negligence caused damages. (App p.101)

Summary Judgment asserted that " *Since the Plaintiff has not designated expert medical testimony establishing the existence of a genuine issue of material fact on the issue of causation, the Defendant is entitled to judgment as a matter of law.* " (SJ p 7)

However, based simply on the above, Siner did through the Defenses Designated Evidence alone show that 1) the medical experts on the Panel were of the opinion that Majid had a duty which he breached, and that Dr. Krueger as a medical expert said damages were documented from the sole issue of malpractice he addressed.

Trial Rule 56(C) "Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Majid's Motion did not bear "the initial burden of showing no genuine issue of material fact and the appropriateness of judgment as a matter of law" Monroe Guar. Ins. Co. v Magwerks Corp. 829 N.E.2d 968, 975 (Ind.2005).

SUMMARY OF ARGUMENT: It was abuse of discretion and/or error of law to say in the SJ that Siner had no Designation of Evidence in her 11/1/13 timely filed Response, when it did have after the signature of her Response: (Designated Evidence A, C, D, E); then to Strike the added Designation of Evidence filed the day of SJ hearing by Siner 11/19/13 (additional Evidence F through M filed); to deny Siner's request at the SJ hearing to supplement her evidence with a medical expert's opinion at Majid's hearing; to not allow further continuance of hearings based on Siner's complaints and requests for such in her timely filed Responses to the Defendants, etc.

ARGUMENT : - K.Siner timely filed the Response " Against Mohammed Majid, M.D's Motion for Summary Judgment on 11/1/13. (App. p21) Rather than being filed with a separate cover page, at the end of the response, it is written: ***"Designation of Evidence – Exhibits A, C, D, and E are submitted as Evidence."***, followed by those Exhibits. (See App p26) While these exhibits were clearly "Designated Evidence", this statement and the Exhibits lacked a separate cover sheet from the attached Response. However, at the SJ hearing when it was said Siner had no evidence, it was discussed with the judge that this Designated Evidence was filed 11/1/13. The judge asked what exhibits were attached, and they were itemized for the court. No objection was raised by the Defense to this evidence. However, in Summary Judgment (SJ p. 2) it is written that Siner "did not include any designation of evidence" in the timely filed 11/1/13 Response (see below)

K.Siner filed an ***additional*** 'Designation of Evidence', with **Exhibits F through added** on the day of the Summary Judgment hearing of 11/19/13. They were distributed to all parties just prior to the hearing, she summarized their content during the SJ hearing. Later during SJ hearing, Majid's attorney said those exhibits were not timely filed, and the judge asked if they moved to Strike, which he did, and the court struck them from the record. As follows, in the Summary Judgment, it is written:

" Under Indiana Law, when a nonmovant fails to respond to a motion for summary judgment before the response deadline, by either filing a response, requesting a continuance.... the trial court cannot consider the nonmovant's filings after the stipulated deadline. (Morton v. Moss, 694....) .... The Court finds that Plaintiff failed to timely file her November 19,2013 designation of evidence which was due November 1, 2013. The Plaintiff did files a Response to the Defendant's Motion for Summary Judgment but did not include any designation of evidence nor request for an extension of time. Thus the Court is required to GRANT the Defendant's oral Motion to Strike the Plaintiff's November 19, 2013 Designation of Evidence." (SJ p2)

The case law above pertains to a case where there was ***no*** response by the deadline, and the

Response in this case was timely filed 11/1/13, with 4 Exhibits as 'Designated Evidence', but without a separate cover sheet from the Response. The timely filed Response to Majid's request Summary Judgment even contained a section titled **Inadequate Medical Information for Informed Medical Information,** (App p23) and an exhibit C, (App p40) that the Defense had used obstructionist tactics and refused to produce even basic requests for medical information repeatedly claiming Siner's medical information was a 'workplace product', confidential, and repeatedly claiming that medical records were protected by 'attorney client privilege'. (App. p 42, 43, 44, 45 are offered as sample pages of such claims.) In her 11/1/13 timely Response to the Motion for Summary Judgment, Siner attested that 'only a written interrogatory of about 15 questions was submitted to Dr. Majid during IDOI Discovery... yet no answers, or even objections, were ever produced. (App.p 24)

Additional, of the evidence Siner did have, the majority of the Designated evidence was filed, and rejected, the day of the hearing: 11/19/13. (App. p50, 51)

Rather than require a strike, Trial Rule 56 (F) allows the court to "order a continuance" to permit additional , affidavits, etc. 'as is just'. Yet the Court claimed:

"Plaintiff was required to raise such arguments before or on the November 1, 2013 deadline for the Court to even consider whether the benefits of Rule 56 could be invoked". (SJ p2)

The Response and Designated Evidence (A,B (law), C, D, and E, were timely filed on 11/1/13 though they lacked a separate cover sheet, it was written that these exhibits were 'Designated Evidence' and it was also argued in the 11/1/13 timely Response that additional information from the Defendants was needed. It was also requested at the hearing of 11/19/13 that a

continuance be granted to allow Siner to obtain a medical expert's statement despite that lack of needed information. however. all requests were denied.

Trial Rule 56 (F) Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

SUMMARY OF ARGUMENT - It was an abuse of discretion and/or error of law to accept claims by both Defense teams as ' Undisputed Facts' in Summary Judgment, when they had been disputed. This included the opinions of the Defenses' Medical Expert, Dr. Krueger who limited his discussion and opinion of malpractice to one issue, when numerous acts and occurrences of malpractice alleged in the complaint, with samples argued in Siner's Response, and substantiated with Designated Evidence. This included the inference that parts of Krueger's opinion were that of the entire panel, such as his opinion that 'damages' would be speculative. (Even on the sole issue he discussed, he admitted that damages were 'documented' as previously shown.)

ARGUMENT: Dr. James Krueger was the medical expert for both Defense teams: Dr. Majid, and Kindred Hospital. et al. He had served on the IDOI medical panel in this case, but said he had 'changed his mind' on his original finding of malpractice against all parties. In his Affidavits for both parties said he no longer found that anyone had breached their duties.

Kruger's opinion in both cases was essentially the same:

1) Krueger said his finding of malpractice was "based solely on the prolonged application of a CPAP mask."(oxygen mask). (App p108)

2) "My opinion regarding the impact of the CPAP mask was intentionally equivocal. I found that the subject conduct "may have been a factor of some resultant damages..." because her prior condition made "any claim to damages speculative." (App p197)

3) 'I determined that 'Pulmonary Services directed Ms. Siner's pulmonary care...'(App p108).

4) Pulmonary had not recommended "tracheotomy or intubation" because they were "not appropriate in a terminal patient." app (This would have met the 'standard of care.')

5) And ... "I determined that it was reasonable for Kindred defer to the judgment of the Pulmonary Service.." (App p198) Note: The same was said of Majid. (App. p 108)

"Therefore, it is my opinion that Kindred met the standard of care by consulting with Pulmonary Service and that Kindred did not cause injury to Ms. Siner." (App p198) (Note: the same was said of Majid (App p109)

First, when a panel member changes their opinion after being hired by a party they originally found against, this doctor's 'changed opinion' cannot alter the original panel opinion, and change a 'unanimous' panel opinion into a 'divided' one. Were this the case, the panel opinion itself could end up 'for hire' after the fact, thereby negating the basis of having a fair and unbiased panel prior to determine malpractice prior to the legal process. Panels must be conducted without any monetary conflict of interest via bids for assistance from the parties involved. It is quite evident that a 'changed opinion' from findings of malpractice against all parties to findings of malpractice against none is in dispute with the panel opinion.

Second, Krueger never attributes these opinions to any other panel members, yet they are included in SJ as though they are, with related assertions are listed under 'undisputed facts'. As the above quotations example, assertions are qualified as 'my opinion', or with phrases such as 'I found', etc. (App p107-109) and (App p196-198)

Third, Krueger's opinion which limited malpractice to only one issue, that of the CPAP oxygen mask, was not claimed to be that of the panel, but his own. He explained that he found all parties listed to have been guilty of malpractice on this matter in his panel opinion because he "did not

differentiate" (App. p108) among the various health care providers listed. Siner argued at hearing that a unanimous opinion of malpractice - against a hospital, it's CEO, and all parties listed – was quite rare, relating that in a search after panel opinion on the IDOI website, for findings against Indianapolis area hospitals, she could not find any other unanimous opinions. Siner also argued that it was unlikely the entire panel based solely their opinion solely on the issue of the CPAP malpractice, or against all parties because no one paid attention to who they were finding to have committed malpractice.

Response to Krueger's Affidavit

1) On the first premise, the same reasons given against it in Majid's Motion for Summary Judgment, apply to Kindred. e.g., a) This was only claimed to be Krueger's opinion, b) Krueger's opinion was 'in dispute' with the IDOI Medical Panel's Opinion c) The Panel's Opinion constituted 'expert medical opinion', so Krueger's was not 'undisputed fact'.
In Summary Judgment for Kindred, unlike that for Majid, the court accepts that the panel opinion and Krueger's changed opinion, were in dispute. However, Krueger's opinions were still listed as 'undisputed fact' for Kindred, despite the fact that Siner obtained additional Medical Experts who also affirmed that malpractice was committed by Kindred.

2) On the second assertion concerning damages being speculative, as was pointed out at hearing, Krueger was already on court record in his affidavit for Majid saying ***"...it would be speculative to say that she perceived any harm related to prolonged application of CPAP, although the source of the facial wounds were documented."*** (App p 108) That is: Even on the sole malpractice issue he addresses, he admits damages were documented".

Dr. Timothy Pohlman, the medical director of Trauma Intensive Care at IU Methodist Hospital, in his Affidavit for Siner (pg.) also affirmed that the prolonged use of a BiPAP mask, to the

point of facial wounds, etc. was malpractice, and that these facial wounds were 'damages' documented by Methodist Hospital's 'wound team' (App p189)

Further, Dr. Pohlman added to the list of damages against Kindred; for example:

"On December 8, 2007 Geraldine A. Siner was transferred from Kindred Hospital to Methodist Hospital's ICU, by request of her family and healthcare respresentative, John T. Siner. The patient required intubation and immediate bronchoscopy for left atelectasis (collapsed lung) which I found on initial imaging studies. I recall that Gerri Siiner's family expressed shock when informed of her collapsed lung, saying that Kindred Hospital had not informed them of this. According to patient records obtained from Kindred Hospital, the left lung atelectasis was known on December 5, 2007. In my opinion that the lack of timely resolution of the lung collapse on December 5, 2007 represents a deviation from the Standard of Care." (App p189)

The collapse of Gerri Siner's left lung and taking ***no*** steps to re-inflate the lung to alleviate this trauma damage and suffering constituted malpractice with damages. Not telling the family and Gerri Siner's Medical Representative is also a violation of medical Administrative code, as persons have a right to medical information needed to make informed decisions concerning their care. Pohlman diagnosed and re-inflated Gerri Siner's collapsed lung within hours of her entry to Methodist Hospital December 8th. That Gerri Siner was left with a collapsed lung for 3 days is clearly 'damages' with suffering, etc. Either Dr. Majid and Kindred nurses didn't check her with something so basic as a stethoscope, or pay attention to xrays of the collapsed lung on 12/5/2007, or they intentionally let her suffer from this with no attempt to help her or remedy the problem.

Krueger's assertions 3, 4, and 5 all assume a separation between Kindred and the 'Pulmonary Services' their hospital offers its patients. The fault in this argument for Majid will be deferred, but Kindred added an affidavit from **Kristy Walden**, Kindred's current CEO, to argue:

1. 'Pulmonary Services handles all billing for its care and services'.

2. Pulmonary physicians and faculty are not paid or employed by Kindred', and Kindred's Admission Agreement states certain providers part of the medical team "are independent contractors and not employees of the hospital".

3. Therefore, Kindred is not responsible for the prolonged use of the CPAP mask which Krueger (initially) found to be malpractice.

On 1. Siner argued that while the Affidavit from Kindred's CEO might be true of their ***current*** billing and corporate restructure, it was ***not*** true at the time Gerri Siner was in Kindred Hospital. A sample page of "Kindred Hospital Indianapolis Charge Category Detail" was submitted. This billing summary from Kindred - sent to Gerri Siner, her insurance, and Medicare at the time of service - included all pulmonary services such as oxygen, respiratory therapist, etc. all billed by Kindred Hospital. Siner affirmed at hearing that no separate bills were sent from "IU Pulmonary Services". *See Siner's Designated Evidence Exhibit M: 'Pulmonary Services ' billing & staff, (App p183-185)*

Further, K. Siner also included sample sheets of Kindred's hospital records listing staff from Pulmonary Services, Respiratory Therapists, etc, as Kindred staff. (App p183-185)) Siner also related at hearing that when a Respiratory Therapist had been served an earlier Summons, Kindred's Motion to Quash all Summonses explicitly stated that she was still a Kindred employee, which substantiates that Kindred employees, not IU Pulmonary employees, provided these 'pulmonary services'.

In Siner's timely filed Response to Kindred's Summary Judgment, she also requested a continuance for further Discovery to request documents of corporate affiliation or substantiating contracts if such existed in 2007. (App p115) However, Walden's statements were present tense, and billings sent to Siner showed these services were billed by Kindred.

While Walden and the exhibit of Kindred's Intake documents referred to Doctors being 'independent contractors', Kindred had not designated a Pulmonary doctor, but rather the unspecified 'IU Pulmonary services', as being responsible for the BiPAP/CPAP malpractice. Siner pointed out in hearing that the Pulmonary Specialist who had seen Gerri Siner at Kindred was a Dr. Sheski, and that he was listed on a document in Siner's Designated Evidence as being Kindred's Medical Director,(App p57) for which he would have been compensated by Kindred. Further, the Director of Kindred's Respiratory is listed, etc. (App p57) However, in that no doctor was named as being responsible for this supposed 'recommendation' (which Siner also related she could not find in hospital records she had been given to date) such claims of an 'independent contractor' vs. 'Pulmonary services' were inconsistent and ambiguous.

Further, a 'recommendation' does not remove Majid's or Kindred's from legal liability. At Kindred's SJ hearing, Siner used the example of a gang member who said another gang member 'recommended' that they do something, saying such certainly would not result in declaring them 'not guilty', 'not responsible', and 'not liable' for actions they took.

Dr. Pohlman also discusses the additional incidents of malpractice with damages:

"Methodist records document that Gerri Siner was also suffering from over-whelming infection, and septic shock at the time of intake. There is no documentation produced for me that indicate SCCM Surviving Sepsis Guidelines, even from 2004, were followed. (App p190)

Despite Medical Expert Opinion of this order, the Summary Judgment for Kindred concludes saying, "..there is no genuine issue of material fact as to whether the actions of the Defendants ... were the proximate cause of Geraldine Siner's injuries." (SJ p19))

SUMMARY ARGUMENT: In that Summary Judgment can be limited to only one issue, it was an abuse of discretion and/or error of law to issue 'complete and final' summary judgments for all Defendants based on only one instance of malpractice, while ignoring the many additional acts and occurrence of malpractice which Siner's complaint alleged, and which her Responses to requests for Summary Judgment argued with law, and opposing medical experts' opinions.

ARGUMENT: Medical expert affidavits for Siner affirmed that there were additional acts of malpractice with damages, thereby disputing Krueger's assertion that there was only one issue of malpractice, or that damages would only be speculative. The central complaint of the case is the violation of Indiana Code by the Defendants relating to a Patient's Right to Self Determination.

The ***Patient Self Determination Act*** has been called the 'Miranda Rights' of Healthcare. Federal law mandates that all healthcare providers receiving federal funding inform patients of their Rights to Self-Determination of their healthcare. In Indiana these were/are spelled out in the Health Care Consent Act IC 16-8-11, through 12-1; IC 16-36-5-2 on 'Do not Resuscitate' Orders, IC 16-36-5-12 which " may be issued only by the declarant's attending physician": and only if (A) "The attending physician has determined the patient is a qualified person," which is defined as 'terminal' - incapable of recovery, etc. and only if the patient or their medical representative requests such. (Health Care Consent Act IC 16-8-11,12) and the Ind Powers of Attorney Act (Ind Code Sec. 30-5-5-16 (b) (2), etc. In Payne v Marion General Hospital (1990) Ind. App, 549 N.E.2nd 1043,1046, trans denied, the appellate court said, and the ***Supreme Court*** affirmed on *pg 38 in the case of Lawrence No. 29S04-9106-CV-00460,*

"The patient's right of self-determination is the sine qua non of the physician's duty to obtain informed consent."

"Recognition of the basic natural rights of each person to life and liberty is the starting point for courts in dealing with cases of this class. Article 1, Section 1, Indiana Constitution. Protection for life and liberty is guaranteed by the constitution. Article 1, Sections 1 and 12, Indiana Constitution. Courts must be vigilant in cases coming before them to protect these basic natural rights." *IN Supreme Court in the case of Lawrence No. 29S04-9106-CV-00460.*

The above references to Ind Code in 2007 when these incidents occurred. In 2013, Indiana Code underwent revision, and a new POST form (Physician's Orders for Scope of Treatment) was adopted. The patient or their Medical Representative must sign this form, and not just the physician. This consent by the patient / medical representative was always required by law, but the new form simply makes that legal requirement all the more explicit. Siner commented at SJ hearing that they liked to think that cases such as their own had helped to bring about the adoption of the new POST form. As Kindred, as seen in their Designated Evidence, the Siners repeatedly tried to write their treatment choices on these forms, because Kindred and Majid repeatedly tried to over-ride their instructions.

This was in violation of Indiana code pertaining to a patient's right to self-determination, it was a breach of contract for what they were being paid to do – treat Gerri Siner. It was even a violation Kindred's own Ethical Policies, as shall be shown.

The central complaint is that Gerri Siner was reclassified as DNR (Do Not Resuscitate), and her treatment options were limited by Scope of Treatment form fir despite the "Full Code" instructions from her family, Enduring Power of Attorney & Medical Representative. The Siners contend that this was in violation of Indiana Code 16-36, and that the federal Patient Self Determination Act requires that all patients be informed of these rights upon entry to medical facilities. It is also a violation of Contract law, pertaining to the expectation by any patient that hospitals and medical doctors and staff are under obligation to help the patient, unless the patient or their medical representative expressly instructs them to do otherwise, and of course, to 'do no harm'.

Siner's Designated Evidence (App p 155-175) shows that :

F. John T. Siner was legally designated as Gerri Siner's Enduring Power of Attorney
G. John T. Siner was Gerri Siner's legal Medical Representative

H. Kindred's Intake documents displayed that John T. Siner was Gerri Siner's Legal Representative, and that Kathy and Darla Siner were authorized to receive all medical information concerning her.

I. Kindred's Progress Notes show that L.S.Jones, NP, spoke to Tim Siner on 11/12/07, noting ***"He restated that patient is to be a full code."*** The next entry on this page, was 11/16/07 Ethics committee met today to discuss code status. Decision was made by committee to make patient a No Code..."

J. Is Kindred Hospital's "Statement of Ethical Policies" given to patients at Intake, an in keeping with the Patients Self Determination Act and Indiana Code, it says " In the event a patient, patient's family, agent or other representative desires to make a treatment decision which involves removal/withholding of life-supporting treatment..." Then "A review by the Ethics Committee may be required." (App. p171)

This process was not followed. And Kindred's Ethics Committee, not 'Pulmonary Services' is on record as making the "Decision" to reduce a patient to DNR/ No code, against her Medical Representative's instructions. This issue, these exhibits, these highly accomplished medical experts, however, are not discussed in SJ, while Krueger's statements are again summarized as 'Undisputed Fact". The Summary Judgment reads:

The Court finds that there is no genuine issue of material fact as to whether the actions of the Defendants', Kindred Hospitals Limited Partnership d/b/a Kindred Hospital, David Uhrin, and Dennis Nicely were proximate cause of Geraldine Siner's injuries. (sj P19)

SUMMARY OF ARGUMENT: Per Indiana Code and per his own Order, Majid as a matter of law, was responsible for the malpractice of the prolonged use of the CPAP mask, and for violating Code by giving Orders that violated the patient's family and Enduring Power of Attorney's instructions on care.

ARGUMENT: Krueger had maintained that Pulmonary Service had not recommended usual 'standard of care' treatments for Gerri Siner such as tracheotomy or intubation, because Gerri Siner was a "terminal patient". However, this argument is circular, since per 2007 Indiana

Medical Code, presented at the hearing for summary judgment, only Majid, Gerri Siner's "attending physician" could make the designation that she was a 'terminal patient', which was prerequisite per Indiana Code to 'Do not resuscitate' code designations. Further, such decisions are prohibited by Code if not approved by the patient, or their family or designated Health Care Representative and/or Enduring Power of Attorney.

Majid altered these orders despite contrary instructions from Gerri Siner's EPOA. (See Affidavit of Tim Siner, App p178-182) IC 16-36-5-2 through 12 specify that 'Do not Resuscitate' Orders " may be issued ***only*** by the declarant's attending physician", ***only*** if "The attending physician has determined the patient is a qualified person, i.e., 'terminal' or incapable of recovery, AND ***only*** if the patient or their medical representative is in agreement. The accepted 'standard of care ' measures which Krueger claims were not 'recommended by Pulmonary Services' were actually ***prohibited*** by Dr. Majid on 11/22/07 in the *"Physician's Life Support Orders"* (Siner's 11/1/13 Designated Evidence D, app), where Majid ordered "NO CPR IN THE EVENT OF CARDIOPULMONARY ARREST, DO NOT PERFORM THE FOLLOWING: Vasopressors, Intubation, Cardioverson, ….. " etc. (Read Orders App p47)

Majid claimed that " The family now agreed that their mother should not be a full code" on Designated Evidence D. (App p47) However, it is shown that this was not the case on Designated Evidence E, written by Siner on the same form provided by the nurse's station, and on: 11/20/07, the family continued their clear and on-going insistence that Gerri Siner was to remain a Category 1. or 'full code'. (App p49, App p 176, and the Affidavit of Tim Siner App p 178-182)) They only allowed for one exception to full code after Majid continued to argue against full coe: that if compression CPR was required (atypical for hospitals since shock

'paddles' are available) that they do so as trained for the elderly or infants to avoid breaking ribs. This was the only concession given to Majid who had warned Gerri Siner's Medical Representative that Gerri Siner would likely suffer painful broken ribs if he did not reduce code to prohibit such. Since only Majid, Siner's Attending Physician, could legally determine Gerri Siner to be "terminal", Krueger's claim that Pulmonary Services opted not to use other options because Gerri Siner was 'terminal' is circular. Only Majid could make that determination, and these treatment options had been prohibited by his Order anyway. Therefore, Siner's arguments and Designated Evidence showed that by Law, and by Order, Majid was responsible, not Pulmonary.

FURTHER ARGUMENTS AGAINST KINDRED'S SUM MARY JUDGMENT AS MATTERS OF LAW:

SUMMARY OF ARGUMENT – Kindred "Ethics committee" knowingly violated law, and their own 'Statement of Ethical Policies" by over-riding Gerri Siner's family and Enduring Power of Attorney and Medical Representative's instructions to keep her Full Code and provide treatment. Yet, the Court did not retain this issue for further evaluation or trial.

ARGUMENT - Just as one would hope they could trust the motivations of a minister, one would hope they could trust the motivations of an "Ethics" committee. However, at least at the time of these events, the 'Ethics' committee at Kindred Hospital did not even follow Kindred Hospital's intake document **" Kindred Hosp Indianapolis Statement of Ethical Policies" (App p.171)** Siner's Designated Evidence against Kindred contains a SCOPE form reducing Gerri Siner from 'full code' treatment as requested by her Enduring Power of Attorney and Medical Representative to DNR with "No CPR and no life-sustaining therapies. A Dr. Ober

signed the form writing: ***Code Form completed per Ethics committee decision / note from 11/16/07. (App. p128)***

Siner's Medical Expert, Dr. Lawrence Reed, the Director of I.U. Health's Methodist Trauma Center, and tenured Professor of Surgery at IU. School of Medicine, wrote:

... Kindred's "Protocol Form for Review of Ethics Cases' (App. p 54) **explicity states that the decision to be made by the Ethics Committee concerning Geraldine Siner was " *Whether to override family decisions to keep patient as a code 1 (full code) and making patient a code 3 (no code)*" and that they had "*Legal concerns with changing code status despite family opposition*."**

It was therefore clearly known by Kindred that they were acting against both the family's objections and legal responsibilities when the Hospital's Ethics Committee recommended reducing the patient from a 'full code' Scope of Treatment to a 'no code' designation, where treatment is withheld.

... To withhold medical treatment, when that is what the patient or their medical representative has contracted and instructed a health care facility to do, is as serious a breach of medical duty as any. Such is to deny the services contracted and paid for on behalf of the patient. (App p.121)

" This breach in the standard of care by Kindred is very serious and should be thoroughly evaluated to prevent its recurrence." (App p 122)

Yet, these issues were not mentioned in the Motions for Summary Judgment, or retained for Consideration or trial in the court's dismissal of all defendants.

Dr. Timothy Pohlman concluded saying

"..guidelines were not followed apparently because the patient was under DNR order. This is an additional breach in the Standard of Care. ... Full damages and suffering that more likely than not resulted from re-prioritization of treatment modalities for Gerri Siner based on her existing 'DNR' order that was left in place without full agreement of her Surrogate decision makers would warrant reassessment of her care at Kindred Hospital" (App p 190-191)

When a hospital decides to not treat a patient they were contracted to help, it is obvious to even the layman that damages and suffering result. Combined with the Affidavits above, such is more than adequate to 'dispute' any assertions to the contrary, and thereby prohibit the Defendants from prevailing in Summary Judgment.

SUMMARY OF ARGUMENT – The Court's use of Discretion, on all but requested time allowance, displayed a bias against this case, perhaps due to Siner's 'Pro Se' standing.

ARGUMENT It was recognized in criminal law that a Plaintiff without legal counsel usually cannot get a 'fair trial'. Such is the case in civil trials as well, though there is no 'right to an attorney' due to the limitations of resources, etc. But the denial of a fair trial in civil proceedings can also be a serious denial of justice. Attorneys severely limit the medical malpractice cases they will take on due to the prolonged process, where averages recorded by the IDOI show that a typical case is many years from start to finish. Many attorneys will only get involved in the Plaintiff is willing to 'settle' and rather quickly, to avoid such costs. Some demand substantial retainers to avoid such. One affiliated with a firm who advertises on TV admitted that they never take cases to trial. When a grave injustice is done, it feels rather like an offer of 'hush money' when settlements require silence. This case has been pursued as a matter of principle and ethics, and few attorneys have the financial luxury of taking on a case on that basis.

Due to all of this, it is unfair to assume that because a family does not have an attorney, that their complaint is without merit. Some Pro Se plaintiffs have been severely wronged, and yet are unable to obtain counsel. Anyone trying to pursue a case Pro Se spends countless hours just

trying to understand the steps that need to be taken, and the continual 'I can't give you legal advice' even to basic questions of process such as Q: 'Why hasn't the judge responded?' could be answered so simply as to say 'You need to label your request as a Motion, and attach an Order for the court'. Instead, many hours of effort are lost and a person has no clue as to why. These basics are not found on civil websites for the average citizen. Attorneys have said they feel quite sorry for Pro Se plaintiffs, and embarrassed that they are often ridiculed for their earnest efforts in a manner that they do not even understand is ridicule. Events in this case often left me feeling that such was the case.

E.g., The original Summonses filed with the Clerk were properly served to individual addresses for the Doctors in this case, and to their current or last known place of work: Kindred Hospital. The same attorneys had just represented these Defendants in the IDOI, yet they refused to accept summonses when asked ahead of time, while Kindred's CEO had said she would accept such except for Doctors, and they WERE accepted at Kindred. Yet, their attorneys then made an appearance and immediately filed a Motion to Quash those Summonses, which was immediately granted by the Court as an 'instant order', with Fines assessed against the Plaintiff for the time involved in the Motion to Quash (Thousands). (App p199) This Motion's objections were based on a mailing that was NOT the Service of the Summons, and NOT even something the Plaintiff had filed. She immediately wrote to tell the defendants that she had not filed it. Yet she was being assessed fees for the time to respond to something that was not even submitted to the Court file. It involved lengthy research and explanation to .write a 'Motion to Reconsider' the order. (App p203) That long Motion was denied within days, but it was set for hearing, when the judge threatened that though the Plaintiff was without funds, she could attach to property for the Defense, and one of the attorneys present could verify that she had done so. Everyone was put

under Oath and the Defense lawyer requesting the Quash and fees was put on the stand to 'testify' that her time was worth more, and she said things such as that the Pro Se Plaintiff wrote things that 'did not make sense'. The entire hearing seemed to be for the purpose of sternly warning to not pursue the case, threatening and ridiculing me by even having a hearing. After this, serving Summonses was prolonged, since even those who worked at Kindred Hospital were then refusing to sign. The Plaintiff pointed out that such avoidance would not be tolerated in child support courts, etc. and that since it was obvious that the Defendant would have filed to 'Quash' no matter what, fees for such were not warranted. All of this despite the fact that Siner had prevailed in the IDOI process with a unanimous opinion of malpractice against all parties listed. This was filed with the complaint, and therefore was known to the court. Similar favorable Opinions could not be found on the IDOI website, yet she was being treated as though she had a case without Merit, or that she didn't belong in the court process due to not being an attorney.

This was followed by the Court saying at hearing that Siner had not filed any objection to Summary Judgment releasing some Doctors who she had written a researched ***"Letter to the Court, with considerations relevant to judicial decision" (App p222b) was timely filed*** prior to that hearing, when she also filed a ***Motion to Remove those Parties as Individual Defendants, while Retaining their Standing as Kindred Hospital's Agents.*** (App p 236) The Court said the Motion made no sense, and asked Siner if she wanted to withdraw it, which she agreed to. These filings may have been formatted improperly, and labeled oddly, but they certainly made sense and had sound legal research behind them. (e.g, App p225-228) Such incidents, combined with the Strike and Denial of requests to accept Designated Evidence, etc. in the summary judgment process, stacked the cards against Siner in a serious and seemingly unjust manner. If

she had filed a Motion to Quash based on something never on court record, or asked for fees for such, or failed to reply to Summonses which sat at her workplace, etc. or responded to Discovery requests, or simply failed to respond, as had the Attorneys, she felt confident that penalties should and would follow.

However, this is what many Pro Se Plaintiffs are up against. Their treatment in the upper courts is strikingly better. These arguments are brought up in the hope of "being heard", for the sake of so many who never are. This problem within the system typically results in a denial of justice, with unjust discrimination against those who invest enormous effort to stand up for a just cause.

CONCLUSION

For the foregoing reasons, Kathy L. Siner, pro se, and John T. Siner, pro se, respectfully requests this honorable Court find that Dr. M. Majid, Kindred Hospital, et.al, Dennis Nicely, and David Uhrin did not satisfy the requirements for Summary Judgment, and remand this case to a lower court, for the completion of a Case Management Plan and Trial.

Respectfully submitted,

Kathy L. Siner, Pro Se _____

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Respectfully submitted,

John Timothy Siner, Pro Se _____

c/o Kathy Siner, above address

Certificate of Service

I certify that on 10/6/14 (date) a copy of the foregoing brief was delivered via:

_____

to the below parties, by Kathy Siner, Signed: _____

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Summary Judgment Orders

SJ 1→20

STATE OF INDIANA	)	IN THE MARION SUPERIOR COURT 12
	)	SS:
COUNTY OF MARION	)	CAUSE NO.: 49D12-1305-CT-020123
KATHY L. SINER, PERSONAL REPRESENTATIVE OF THE ESTATE OF GERALDINE A. SINER, DECEASED JOHN T. SINER, EPOA & Medical Representative,	)	
Plaintiff,	)	
v.	)	
KINDRED HOSPITAL LIMITED PARTNERSHIP d/b/a KINDRED HOSPITAL OF INDIANAPOLIS, et al., MOHAMMED A. MAJID, M.D., DENNIS NICELY, M.D., DAVID UHRIN, M.D., JEFF CLEARWATER,	)	
Defendants.	)	

FILED

263 NOV 26 2013

CLERK OF THE MARION CIRCUIT COURT

ORDER GRANTING DEFENDANT, MOHAMMED MAJID, M.D.'s, MOTION FOR SUMMARY JUDGMENT

The Plaintiff, Kathy L. Siner, alleged in her Complaint, filed May 6, 2013, that the Defendants failed to comply with the appropriate standard of care with acts of negligence, incompetence and/or intent in their treatment of her mother, Geraldine A. Siner, who is deceased. The Plaintiff also alleged the Defendants chose to "delay/withhold life sustaining medical intervention without consent."

On September 3, 2013, the Defendant, Mohammed Majid, M.D., filed a Motion for Summary Judgment and a memorandum in Support of Mohammed Majid, M.D.'s Motion for Summary Judgment on the issue of causation. On November 1, 2013, the Plaintiff filed her

motion against Mohammed Majid, M.D.'s Motion for Summary Judgment. On November 19, 2013, the Defendant filed his Reply in Support of Motion for Summary Judgment. On November 19, 2013, the date of the hearing on Dr. Majid's Motion for Summary Judgment, Plaintiff filed her Designation of Evidence. On November 19, 2013, attorney Brett Clayton appeared for Dr. Majid and the Plaintiff appeared without representation and the parties presented argument to the Court on Dr. Majid's Motion for Summary Judgment. During the summary judgment hearing, Attorney Clayton requested that the Court strike the Plaintiff's November 19, 2013 designation of evidence because it was not timely filed. "Under Indiana law, when a nonmovant fails to respond to a motion for summary judgment before the response deadline, 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 the nonmovant's filings after the stipulated deadline. *See HomEq Servicing Corp. v. Baker*, 883 N.E.2d 95, 98-99 (Ind. 2008).

If the non-moving party fails to properly respond or designate evidence before the response deadline as required by T.R. 56, and the moving party has shown that it is entitled to summary judgment, summary judgment must be entered against the non-moving party. *Morton v. Moss*, 694 N.E.2d 1148, 1152 (Ind. App. Ct. 1998). The Court finds that Plaintiff failed to timely file her November 19, 2013 designation of evidence which was due on November 1, 2013 or a request for an extension of time was due my November 1, 2013. The Plaintiff did file a Response to the Defendant's Motion for Summary Judgment but did not include any designation of evidence nor requested an extension of time. Thus, the Court is required to GRANT the Defendant's oral Motion to Strike the Plaintiff's November 19, 2013 Designation of Evidence.

UNDISPUTED FACTS

The Medical Review Panel issued an opinion on January 28, 2013, stating that "the panel is of the unanimous opinion that the evidence supports the conclusion that the defendants (Kindred Hospital Limited Partnership dba Kindred Hospital of Indianapolis, Mohammed Majid, M.D., Dennis Nicely, David Uhrin, and Jeff Clearwater) failed to comply with the appropriate standard of care, and that their conduct may have been a factor of some resultant damages, but not the death of the patient". (*Defendant's Exhibit A*). In addition, Dr. James Krueger, a member of the Medical Review Panel, provided an Affidavit which stated he served on the Medical Review Panel and reviewed the submissions and medical records and formulated opinions regarding the medical care of Geraldine Siner. (*Dr. James Krueger's Affidavit ¶ 2*). Dr. Krueger stated that on based on his review of the submission; he determined a breach in the standard of care occurred in the care of Geraldine Siner based solely on prolonged application of a CPAP mask to the patient. (*Id.* at ¶ 3). Dr. Krueger did not differentiate among the healthcare providers. (*Id.* at ¶ 3). Dr. Krueger's opinion that the conduct "may have been a factor of some resultant damages" and it included this language because he thought any claim for damages by Plaintiff would be speculative because Geraldine Siner was terminal, with severely impaired mentation, and was suffering from multiple severe comorbidities such that it would be speculation to says that she perceived any harm related to prolonged application of CPAP". (*Id.* at ¶ 4). Dr. Krueger went on to say that since he issued his panel opinion that he has reviewed the medical records in greater detail and he now states that "Dr. Majid did consult with Pulmonology service, and that the Pulmonology service was directing the pulmonology care of Geraldine Siner, including directions for continued CPAP". (*Id.* at ¶ 5). He further admitted he failed to recognize that the Pulmonology service's determination that the patient should continue

CPAP was based on the patient's ability to maintain adequate perfusion with an on-rebreather mask, and their decision that aggressive measures such as tracheotomy and intubation were not appropriate in a terminal patient. (*Id.*). Dr. Krueger now opines that based on the involvement of the Pulmonary service that it was reasonable for Dr. Majid to defer to the judgment of Pulmonary and that Dr. Majid met the standard of care and did not cause any injury to Geraldine Siner. (*Id.*) The Plaintiff's Response in Opposition to Dr. Majid's Motion for Summary Judgment emphasized the inconclusiveness of the Medical Review Panel Opinion. The Plaintiff has not offered expert testimony supporting her allegation that a breach in the standard of care by Dr. Majid caused the injuries alleged in the Complaint. The Defendant is seeking summary judgment on the issue of causation only arguing that there is no material dispute of fact on the issue of causation.

STANDARD ON A MOTION FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the designated evidence demonstrates there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *Jones v. Nichols*, 765 N.E.2d 153, 156 (Ind. Ct. App. 2002). Courts will construe all facts and reasonable inferences derived from those facts in favor of the nonmoving party. *Lake Cent. Sch. Corp. v. Hawk Dev. Corp.*, 793 NE.E.2d 1080, 1083 (Ind. Ct. App. 2003). The party moving for summary judgment has the burden of making a prima facie case that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law; if it is successful, the burden shifts to the nonmoving party to designate evidence establishing the existence of a genuine issue of material fact. Trial Procedure Rule 56(C); *Klinker v. First Merchants Bank, N.A.*, 964 N.E.2d 190 (Ind. 2012).

EXPERT TESTIMONY

In medical malpractice cases, it is well-established that when the medical review panel opines that the plaintiff has failed to make a prima facie case, he or she must then come forward with expert medical testimony to rebut the panel's opinion in order to survive summary judgment. *Perry v. Driehorst, M.D.*, 808 N.E.2d 765, 769 (Ind. Ct. App. 2004). The plaintiffs cannot prevail in a medical malpractice action or any other tort claim where the undisputed evidence demonstrates that the defendant did not breach any duty owed to the plaintiff. *Id.* To maintain a claim of medical malpractice, the plaintiff must show (1) a duty owed to the plaintiff by the defendant, (2) a breach of the duty by allowing conduct to fall below a set standard of care, and (3) a compensable injury proximately caused by defendant's breach of the duty. *Id.* To determine whether the physician's conduct fell below the legally prescribed standard of care, the plaintiff-patient must present expert testimony to establish what a reasonably prudent physician would or would not have done in treating the plaintiff. *Id.* Failure to provide expert testimony will usually subject the plaintiff's claim to summary disposition. *Id.*

It is well settled that in a medical negligence claim, the plaintiff must prove by expert testimony not only that the defendant was negligent, but also that the defendant's negligence proximately caused the plaintiff's injury. *Schaffer v. Roberts*, 650 N.E.2d 341, 342 (Ind. Ct. App. 1995); and *Nasser v. St. Vincent Hosp. and Health Services,* 2926 N.E.2d 43 (Ind. Ct. App. 2010).

When a defendant provides expert medical testimony establishing that the defendant's conduct did not cause the plaintiff's condition, it is incumbent upon the plaintiff to come forward with expert medical testimony to rebut the lack of causation and demonstrate the existence of a genuine issue as to causation. *Morton v. Moss, M.D.*, 694 N.E.2d 1148, 1152 (Ind. Ct. App.

1998). If the plaintiff fails to provide sufficient expert testimony, summary judgment should be granted in favor of the defendants. *Mills v. Berrios*, 851 N.E.2d 1066, 1070 (Ind. Ct. App. 2006). As a general rule, expert testimony is required in medical malpractice cases to prove that the defendant's negligence proximately caused the plaintiff's injury. *Singh v. Lyday*, 889 n.e.2d 342, 357-58 (Ind. Ct. App. 2008).

In the case *Palace Bar, Inc. v. Fearnot*, 381 N.E.2d 858 (Ind. 1978), the Indiana Supreme Court held that it was not sufficient for Plaintiff's doctor to testify that it was possible that the heart attack caused the fall which resulted in the death or it was possible that the fall caused the death and held that the trial Court was required to grant judgment for the Defendant. This was a slip and fall case where the question for the jury was could the fall down the stairs have caused the death. The doctor in this case testified that "it was possible that the decedent had a heart attack when he left the bar stool, and it was possible that he had a heart attack when he fell, but there was no way of knowing which of these possibilities actually happened to the point of being a medical fact or conclusion."

The plaintiff's burden requires that she present evidence of probative value based on facts, or inferences to be drawn from facts. Her burden may not be carried with evidence based merely upon supposition or speculation. An inference cannot arise or stand by itself. There must first be a fact established from which an inference arises. *Palace Bar* at 861, *citing Prudential Insurance Co. v. VanWey*, (1945) 223 Ind. 198, 204, 59 N.E.2d 721, 725.

A doctor's testimony can only be considered evidence when he states that the conclusion he gives is based on reasonable medical certainty that a fact is true or untrue. *Palace Bar* at 864. A doctor's testimony that a certain thing is possible is no evidence at all. *Id.* His opinion as to what is possible is no more valid than the jury's own speculation as to what is or is not possible.

Id. The Court does find that *Palace Bar* applies to this case because two of the doctors from the Medical Review Panel simply stated that that the defendants conduct may have been a factor of some resultant damages but not the Plaintiff's death. The Court finds that the Medical Review Panel opinion on causation does not create a genuine issue of material fact. Dr. Majid, in his designation of the Affidavit of Dr. Krueger, has presented expert testimony that he did not cause injury to the Plaintiff. Dr. Majid cited *Topp v. Leffers*, 838 N.E.2d 1027, 1034 (Ind. Ct. App. 2004), stating that "[a]n expert medical opinion that lacks reasonable certainty, standing alone, is not sufficient to support a judgment."

Since the Plaintiff has not designated expert testimony establishing the existence of a genuine issue of material fact on the issue of causation, the Defendant is entitled to judgment as a matter of law. Therefore, the Defendant, Dr. Mohammed Majid's, Motion for Summary Judgment hereby is GRANTED.

There is no just reason for delay, and Mohammed A. Majid, M.D. is entitled to judgment in his favor and against Kathy L. Siner, Personal Representative of the Estate of Geraldine A. Siner, Deceased, John T. Siner, EPOA & Medical Representative on Plaintiff's Complaint as a matter of law. This Judgment is a full, complete, and final Judgment on the Plaintiff's Complaint. The Clerk of this Court shall enter this Judgment in the Judgment Docket.

SO ORDERED, ADJUDGED, AND DECREED THIS 26TH DAY OF NOVEMBER 2013.

Heather Welch

Heather Welch, Judge
Marion Superior Court, Civil 12

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STATE OF INDIANA	)	IN THE MARION COUNTY SUPERIOR COURT 12
	)SS:	CIVIL DIVISION, ROOM T-1760
COUNTY OF MARION	)	CAUSE NO. 49D12-1305-CT 020123

KATHY L. SINER, PERSONAL REPRESENTATIVE OF THE ESTATE OF GERALDINE A. SINER, DECEASED JOHN T. SINER, EPOA & Medical Representative

Plaintiff,

v.

KINDRED HOSPITAL LIMITED PARTNERSHIP d/b/a KINDRED HOSPITAL OF INDIANAPOLIS, et al., MOHAMMED A. MAJID, M.D., DENNIS NICELY, M.D., DAVID UHRIN, M.D., JEFF CLEARWATER, ANONYMOUS NURSES A, B, C, & RT, And ANONYMOUS M.D.'S A, B, C, & D

Defendants.

ORDER DENYING THE PLAINTIFF'S MOTION TO CORRECT ERROR

I. Background

The Plaintiff, Kathy L. Siner, alleged in her Complaint, filed May 6, 2013, that the Defendants failed to comply with the appropriate standard of care with acts of negligence, incompetence, and/or intent in their treatment of her mother, Geraldine A. Siner, who is deceased. The Plaintiff also alleged the Defendants chose to "delay/withhold life sustaining medical intervention without consent." This medical negligence case was then submitted to a Medical Review Panel. On January 7, 2013, a Medical Review Panel opined that "[The Defendant's] conduct may have been a factor of some resultant damages, but not the death of the patient." (Def.'s Designation Exhibit A, Certified Panel Opinion). Following the Panel's

determination, the Defendant met with Dr. Krueger, and submitted an affidavit from Dr. Krueger as expert testimony that there was a lack of a causal nexus between Plaintiff's allegations of breach and the injuries alleged. (Def.'s Designation Exhibit B, Affidavit of Dr. Kreuger. Accordingly, Defendant filed a Motion for Summary Judgment on September 4, 2013.

On September 23, 2013, Plaintiff filed a request for a 30 day extension of time to respond, which was granted until November 1, 2013. On November 1, 2013, the Plaintiff filed a Response to Defendant's Motion for Summary Judgment. Defendant's requested a hearing for their Motion for Summary Judgment which was held on November 19, 2013. At this hearing, Plaintiff filed her Designation of Evidence. However, Defendant's attorney, Brett Clayton, requested that the Court strike the Plaintiff's designation of evidence because it was not timely filed. The Court granted Defendant's request and subsequently the Court granted Defendant's Motion for Summary Judgment on November 26, 2013. On December 26, 2013, Plaintiff filed a Motion to Correct Error.

II. Law and Analysis

The issue in Plaintiff's Motion to Correct Error, is whether the Court erred in denying Plaintiff's designation of evidence or request to submit expert medical testimony at the November 19, 2013 hearing. "Under Indiana law, when a nonmovant fails to respond to a motion for summary judgment before the response deadline, 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 the nonmovant's filings after the stipulated deadline." *HomEq Servicing Corp. v. Baker*, 883 N.E.2d 95, 98-99 (Ind. 2008). Accordingly, if the non-moving party fails to properly respond or designate evidence before the response deadline as required by T.R. 56, and the moving party has shown that it is entitled to summary judgment; summary judgment must be

entered against the non-moving party. *Morton v. Moss*, 694 N.E.2d 1148, 1152 (Ind. App. Ct. 1998). Despite the Plaintiff's argument that it was within the trial court's discretion to order a continuance or alter any time limits found within Rule 56, Indiana case law is clear that the remedies provided by 56(F) and (I) are not available to a nonmoving party who has failed to oppose or respond to the motion within the thirty-day limit established by 56(C). *Desai v. Croy*, 805 N.E.2d 844, 848 (Ind. Ct. App. 1995); *Miller, M.D. v. Yedlowski*, 916 N.E.2d 246 (Ind. Ct. App 2009). Specifically, in *Seufert v. RWB Medical Income Properties I Ltd. Partnership*, the court held that,

> T.R. 56 requires an adverse party to respond within 30 days by either (1) filing affidavits showing issues of material fact, (2) filing his own affidavit indicating why the facts necessary to justify his opposition are unavailable, or (3) requesting an extension of time in which to file his response.

649 N.E.2d 1070, 1073 (Ind. Ct. App. 1995).

In this case, Plaintiff did not file an affidavit under 56(F), or show cause for alteration of time under 56(I), before the November 1, 2013 deadline. In her Motion to Correct Error, Plaintiff claims that due to financial difficulties in obtaining a medical expert and problems with getting full compliance from the Defendant concerning discovery requests, that the Court can utilize Rule 56(F) to "refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." However, as shown above in both *Desai* and *Seufert*, Plaintiff needed to raise such arguments before or on the November 1, 2013 deadline for the Court to even consider whether the benefits of Rule 56 could be invoked. *Id.* Similarly, Plaintiff was required to request a continuance of time before the November 1 deadline for Rule 56(I) to apply. *Id.*

The Plaintiff did file a Response to the Defendant's Motion for Summary Judgment on November 1, 2013; however, this Response did not include a request for an extension of time or an affidavit of expert medical opinion. In Plaintiff's Motion to Correct Error, she claims that Exhibits A, C, D, and E were designated as evidence on page 6 of Plaintiff's Response to the Defendant's Motion for Summary Judgment. However, in medical malpractice cases, it is well-established that when the medical review panel opines that the plaintiff has failed to make a prima facie case, he or she must then come forward with expert medical testimony to rebut the panel's opinion in order to survive summary judgment. *Perry v. Driehorst*, M.D., 808 N.E.2d 765, 769 (Ind. Ct. App. 2004). Consequently, because no affidavit of expert medical testimony is included in Exhibits A, B, C, and E, such evidence would not affect the determination of summary judgment in this case. Thus, the Court hereby DENIES Plaintiff's Motion to Correct Error.

SO ORDERED, ADJUDGED, AND DECREED this 10 th day of February 2014.

Heather A Welch

Heather Welch, Judge
Marion Superior Court, Civil 12

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STATE OF INDIANA	)	IN THE MARION SUPERIOR COURT 12
	)	SS:
COUNTY OF MARION	)	CAUSE NO.: 49D12-1305-CT-020123

KATHY L. SINER, Personal Representative of the Estate of Geraldine A. Siner, Deceased, John T. Siner, EPOA, Medical Representative

Plaintiff,

v.

KINDRED HOSPITAL LIMITED PARTNERSHIP d/b/a KINDRED HOSPITAL OF INDIANAPOLIS, et al., DENNIS NICELY, DAVID UHRIN, and JEFF CLEARWATER,

Defendants.

FILED

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Elizabeth A White

CLERK OF THE MARION CIRCUIT COURT

ORDER GRANTING DEFENDANTS, KINDRED HOSPITAL LIMITED PARTNERSHIP d/b/a KINDRED HOSPITAL – INDIANAPOLIS, DAVID UHRIN, AND DENNIS NICELY'S MOTION FOR SUMMARY JUDGMENT

On December 6, 2013, the Defendants, Kindred Hospital, et al ("the Hospital"), David Uhrin ("Uhrin"), and Dennis Nicely ("Nicely) (collectively "the Defendants"), filed their Motion for Summary Judgment, Brief in Support of Summary Judgment, Designation of Evidence in Support of Motion for Summary Judgment and Motion for Hearing. The Defendants argue that there is no genuine issue of material fact as to causation. On February 6, 2014, Plaintiff, Kathy L. Siner, Personal Representative of the Estate of Geraldine A. Siner, Deceased, John T. Siner, EPOA & Medical Representative Kathy L. Siner ("Siner"), timely filed Plaintiff's Response to Motion for Summary Judgment on Defendants, Kindred Hospital, Dennis Nicely, and David Uhrin, and also a designation of evidence. On February 6, 2014, Siner filed a document entitled "Extension of 1 Week Requested to File an Affidavit & Case Law". On February 13, 2014, the

Court Granted Siner's request by making a case chronology entry (since Siner did not provide a proposed order as required by the Marion County Local Rules). The Court Granted Siner's Motion for Extension of time to Respond to Summary Judgment until February 18, 2014. On February 18, 2014, Siner filed the Affidavit of Timothy H. Pohlman, M.D. and Law for hearing on February 18, 2014.

A hearing was held on Defendants' Motion for Summary Judgment on February 18, 2014. Attorney Shapiro appeared on behalf of the Defendants and Siner appeared in person and without counsel. The parties presented argument on the Defendants' Motion for Summary Judgment. The Court took the matter under advisement. The Court having reviewed the above motions and designations of evidence finds as follows:

UNDISPUTED FACTS

Plaintiff, Kathy Siner, filed a complaint on May 6, 2013 alleging that the Defendants failed to comply with the appropriate standard of care in their treatment of her Mother, Geraldine Siner, who is deceased. Specifically, Plaintiff alleges the hospital's negligence was a proximate cause of injuries to Geraldine Siner's nervous system, respiratory system, cardiovascular system, and musculoskeletal system. Plaintiff argues that such losses and injuries require compensation.

The matter was submitted to a Medical Review Panel which rendered a decision on January 28, 2013. The Panel unanimously determined that the Hospital "failed to comply with the appropriate standard of care, and that their conduct may have been a factor of some resultant damages, but not the death of the patient." (*See* Defendants' Designation of Evidence, Exhibit A). However, Dr. James Krueger, a member of the Medical Review Panel, provided a subsequent Affidavit (*See* Defendants' Designation of Evidence, Exhibit B). Dr. Krueger stated

that the panel opinion included language such as "may have" and "some resultant damages" because any causal relationship between the Plaintiff's allegations and the alleged damages "would be speculative". Dr. Krueger stated that after reviewing the medical records in greater detail, he determined that since Indiana University Pulmonary and Critical Care ("the Pulmonary Service") had directed Ms. Siner's pulmonary care during her time at Kindred, the Pulmonary Service was responsible for her pulmonary care, not Defendants and that the Defendants did after this additional review meet the standard of care. This was in conflict with his panel opinion. Kindred's CEO confirmed that the Pulmonary Service was responsible for Ms. Siner's pulmonary care. (*See Affidavit of Kristy Walden, Defendants' Designation of Evidence, Exhibit C*). The Pulmonlogy Service handles all billing for its care and services, and its physicians and faculty are not paid or employed by Kindred. (*Id.* at paragraphs 11-12). Furthermore, Kindred's Admission Agreement states that certain providers who care for a patient as part of the medical team "are independent contractors and not employees or agents of the hospital. (*See Kindred Hospital Indianapolis Admission Agreement, Defendants' Designation of Evidence, Exhibit C2*). Kindred and the Pulmonology Service have an independent contractor relationship. The Plaintiff designated the Affidavits of Dr. Timothy H. Pohlman and Lawrence Reed. Both of these physicians do opine that the Defendants found that there was practice below the standard of care. However, neither affidavit addresses the issue of causation of Geraldine Siner's injuries or death.

PARTIES ARGUMENTS

Defendants maintain that Kindred and the Pulmonology Service have an independent contractor relationship and are otherwise not affiliated with one another. (Defendants' Designation of Evidence, Exhibit C). Dr. Krueger's original opinion in the Medical Review Panel's determination was that the Defendants breached the standard of care because of the

pulmonology care involved. Therefore, Defendants argue that they are not liable for any injuries to Ms. Siner. Furthermore, neither Dr. Krueger nor any member of the Medical Review Panel commented on causation. Rather, the Panel's opinion stated that Defendants' conduct *may* have been a factor of *some* resultant damages.

Plaintiff argues that the Panel's opinion and Dr. Krueger's opinion are in dispute. Plaintiff also presents Affidavits from other physicians which contend that Defendants' conduct resulted in other instances of malpractice with resulting damages. (*See* Plaintiff's Designation of Evidence, Exhibits 1 & 2). Plaintiff does not offer evidence or argument to rebut Defendants' position that causation cannot be determined from the Medical Review Panel's opinion, but maintains that genuine issues of material fact persist which preclude a ruling of summary judgment.

STANDARD ON MOTION FOR SUMMARY JUDGMENT

Summary judgment is appropriate if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Ind. Trial Rule 56(c).*

"A party seeking summary judgment bears the burden of making 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." *Indianapolis Downs, LLC v. Herr*, 834 N.E.2d 699, 703 (Ind. Ct. App. 2005), *trans. denied.* A trial court may not look beyond the designated evidence when ruling upon a party's motion for summary judgment. *Id.* "To be considered genuine for the purpose of summary judgment, an issue of material fact must be established by sufficient evidence in support of the claimed factual dispute to require a jury or judge to resolve the parties' differing

version of the truth at trial." *Estate of Sullivan v. Allstate Co.*, 841 N.E.2d 1220, 1225 (Ind. Ct. App. 2006).

LEGAL ANAYLSIS

Defendants' Medical Negligence

In a medical malpractice case in Indiana, the plaintiff has the burden of proving each element of negligence against the defendant by a preponderance of the evidence. *Bruce v. U.S. ex rel. U.S. Dep't of Health & Human Servs.*, 1:09-CV-0174-TWP-DML, 2010 WL 3893752, at *2 (S.D. Ind. Sept. 30, 2010); *Peak v. Campbell*, 578 N.E.2d 360, 361 (Ind. 1991). In a medical negligence claim, the plaintiff must prove by expert medical testimony not only that the defendant was negligent, but that the defendant's negligence proximately caused the alleged injury. *Clarian Health Partners, Inc. v. Wagler*, 925 N.E.2d 388, 392 (Ind. Ct. App. 2010). When a defendant provides expert medical testimony establishing that the defendant's conduct did not cause the plaintiff's condition, it is incumbent upon the plaintiff to come forward with expert medical testimony to rebut the lack of causation and demonstrate the existence of a genuine issue as to causation. *Morton v. Moss, M.D.*, 694 N.E.2d 1148, 1152 (Ind. Ct. App. 1998). Therefore, Plaintiff Siner must present evidence from which the trial court could reasonably infer a causal link between the Defendants' treatment of Geraldine Siner and Plaintiff's claims of negligence. *Id.* At 394.

Defendants maintain that Plaintiff's speculation that the Hospital's level of care may have caused some injury to Geraldine Siner is insufficient. Defendants rely on *Malooly v. McIntyre*, 597 N.E.2d 314, (Ind. Ct. App. 1992). In this case, the Court of Appeals held that a panel opinion that could not render an opinion as to causation is insufficient and will not carry a

plaintiff's burden to overcome summary judgment. In *Malooly*, as in the present case, the Medical Review Panel did not expressly determine the existence of causation between the injuries complained of and the Defendants' actions. It is incumbent upon the Estate to bring forth facts which would create a genuine issue of material fact as to the actual existence of causation. *Id.* At 318. Thus, the Court hereby GRANTS the Defendants', Kindred Hospitals Limited Partnership d/b/a Kindred Hospital, David Uhrin, and Dennis Nicely's, Motion for Summary Judgment.

ORDER

The Court finds that there is no genuine issue of material fact as to whether the actions of Defendants', Kindred Hospitals Limited Partnership d/b/a Kindred Hospital, David Uhrin, and Dennis Nicely, were a proximate cause of Geraldine Siner's injuries.

Therefore, the Court hereby GRANTS the Defendants', Kindred Hospitals Limited Partnership d/b/a Kindred Hospital, David Uhrin and Dennis Nicely's, Motion for Summary Judgment on the issue of causation. There is no just reason for delay, and Defendants, Kindred Hospitals Limited Partnership d/b/a Kindred Hospital, David Uhrin and Dennis Nicely, are entitled to judgment in their favor and against Kathy L. Siner, Personal Representative of the Estate of Geraldine A. Siner, Deceased, John T. Siner, EPOA & Medical Representative. This Judgment is a full, complete, and final Judgment on Plaintiff's Complaint as to Defendants', Kindred Hospitals Limited Partnership d/b/a Kindred Hospital, David Uhrin and Dennis Nicely, in this case. The Clerk of this Court shall enter this Judgment in the Judgment Docket

SO ORDERED, ADJUDGED AND DECREED this 13th day of March, 2014

Heather Welch

Heather Welch, Judge
Judge, Marion County Superior Court
Civil Division, Room 12

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