# SUMMARY JUDGMENT - T.R. 56

**I.** **Purpose**: Purpose of a motion for summary judgment is to end litigation about which there can be no factual dispute and which may be determined as a matter of law. *Bushong v. Williamson*, 790 N.E.2d 467, 474 (Ind.2003).

## II. Limitations on Use

Summary judgment is a lethal weapon and courts must be mindful of its aims and targets and beware of overkill in its use. *Mayfield v. Levy Co.*, 833 N.E.2d 501, 505 (Ind.Ct.App.2005). Trial court should carefully scrutinize to ensure that a party is not improperly prevented from having its day in court." *Owens Corning Fiberglass Corp. v. Cobb*, 754 N.E.2d 905, 908 (Ind.2001).

Even if the trial court does not believe that the moving party will be successful at trial, summary judgment should not be entered where material facts conflict or where conflicting inferences arise from undisputed facts. *Kreighbaum v. First Nat'l Bank & Trust*, 776 N.E.2d 413, 419 (Ind.Ct.App.2002).

## III. Particular Types of Cases

**A.** ***Insurance***. The construction of an insurance policy is a question of law that is particularly appropriate for summary judgment when its terms are unambiguous. *Marlatt v. United Farm Bureau Family Ins. Co.*, 640 N.E.2d 1073, 1076 (Ind.Ct.App.1994); Holiday Hospitality Franchising, Inc. v. Amco Ins. Co., 983 N.E.2d 574 (Ind.2013)

B. ***Contracts*****.** When the terms of a contract are unambiguous, the meaning of that contract is a question of law for the court to decide. Summary judgment is particularly appropriate in contract disputes. Where ambiguity exists, and extrinsic evidence is required, construction of the contract is for the fact finder and summary judgment should not be granted. Whether a contract is ambiguous is a question of law. *Plumlee v. Monroe Guar. Ins. Co.*, 655 N.E.2d 350 (Ind.Ct.App.1995); *Hastings Mut. Ins. Co. v. Webb*, 659 N.E.2d 1049 (Ind.Ct.App.1995); *Holiday Hospitality Franchising, Inc. v. Amco Ins. Co*., 983 N.E.2d 574 (Ind.2013).

C. ***Negligence*****.** Summary judgment is generally ("rarely appropriate") inappropriate in negligence cases. *Lean v. Reed*, 876, N.E.2d 1104 (Ind. 2007); *Estate of Mintz v. Connecticut General Life Insurance Co*., 905 N.E.2d 994 (Ind. 2009); *Pier 1 Imports (U.S.), Inc. v. Acadia Merrillville Reality, L.P.*, 991 N.E.2d 965 (Ind. Ct. App. 2013) (reversed trial court's granting of summary judgment to landowner and snow removal contractor in slip and fall case). However, a defendant is entitled to judgment as matter of law when undisputed material facts negate at least one element of plaintiff's claim.

*Colen v. Pride Vending Serv.*, 654 N.E.2d 1159, 1162 (Ind.Ct.App. 1995). Issues of duty are questions of law for the court and may be appropriate for disposition by summary judgment. *Frye v. Rumbletown Free Methodist Church*, 657 N.E.2d 745, 747 (Ind. Ct. App. 1995). However, sometimes the existence of a duty depends on underlying facts that require resolution by the trier of fact. *Rhodes v. Wright*, 805 N.E.2d 382, 386 (Ind. 2004).

D. ***Medical Malpractice***. When the movant on summary judgment relies only upon the opinion of the medical review panel that found no breach of the standard of care but was silent on other elements of malpractice, the plaintiff-nonmovant is only obligated to present expert testimony on the standard of care element of malpractice. *Kennedy v. Murphy*, 659 N>E.2d 506, 508 (Ind. 1995). In a medical malpractice action, substantive law requires expert opinion as to the existence and scope of the standard of care which is imposed upon physicians and as to whether particular acts or omissions measure up to the standard of care. A unanimous opinion of the medical review panel that the defendant did not breach the applicable standard of care is ordinarily sufficient to negate the existence of a genuine issue of material fact entitling the physician to summary judgment. Expert opinion testimony is not always required in medical malpractice cases. Cases not requiring expert testimony are those fitting under the "common knowledge" or *res ipsa loquitur* exception. *Simmons v. Egwu*, 662 N.E.2d 657, 658 (Ind. Ct. App. 1996).

## IV. General Procedure

A. ***Initial Filing***:

1. ***Claimant:*** A party seeking to recover on a claim, counterclaim, or cross-claim, or to obtain a declaratory judgment, may file a Motion for Summary Judgment at any time after the expiration of twenty (20) days from the commencement of the action or at any time after being served with a Motion for Summary Judgment. T.R. 56(A).

2. ***Non-Claimant:*** A party defending against a claim, cross-claim, counter claim, or declaratory judgment may file a Motion for Summary Judgment at any time. T.R. 56(B).

B. ***Issues:*** Motion may be made as to "all" issues or "any part thereof." T.R. 56(A) & (B).

C.. ***Affidavits:*** Motion need not be accompanied by supporting affidavits. T.R. 56(A) & (B).

D***. Motion and Designation:*** The motion and any supporting affidavits shall be served in accordance with the provisions of T.R. 5. At the time of serving and filing the motion, the moving party shall designate to the court all parts of pleadings, depositions,

answers to interrogatories, admissions, matters of judicial notice, and any other matters on which it relies for purposes of the motion. T.R. 56(C).

E. ***Timing of Designation****:* At the time of serving and filing the motion the designation shall be served and filed.

F**.** ***T.R. 56(I) Alteration of Time*****:** Upon finding cause, the court may alter any time limit set forth in T.R. 56 upon motion made within the applicable time limit. T.R. 56(I). This allows an alteration of time for the moving party as well as the adverse party.

- ***Discretion****:* Accepting a belated filing of material designated in support of motion for summary judgment was not an abuse of discretion when the trial court gave the opponent ample opportunity to respond to the belated designation. Pursuant to T.R. 56 (I) if a trial court finds good cause, it may alter any time limit set forth in T.R.56. Turner *v. Board of Aviation Commissioners,* 743 N.E.2d 1153 (Ind.Ct.App. 2001) (court allowed filing, less than one week before hearing, of designation of materials relied upon in support of motion for summary judgment because attorney suffered back injury.) cited with approval in *Simon Prop. Group v. Action Enterprise,* 827 N.E.2d 1235 (Ind.Ct.App. 2005) *trans. denied,* 841 N.E.2d 185 (Ind. 2005) (T.R.56(I) revised by adding "upon motion made within the applicable time limit" after trial court decision and before *Simon* appellate court decision)

**G.** ***T.R.56(E) Supplementation****:* The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. T.R.56(E). This allows supplementation by the moving party as well as the adverse party.

- ***By Movant****: Reed v. City of Evansville,* 956 N.E.2d 684 (Ind.Ct.App. 2011) *trans. denied* 963 N.E.2d 1117 2012. The City filed a motion for summary judgment and designated evidence to which the Reeds filed a brief in opposition and designated evidence. The City filed a reply brief and "supplemental designated evidence". The trial court denied a motion by Reed to strike the City's "supplemental designated evidence". The trial court granted the City's motion for summary judgment. Reeds contend the City's "supplemental designated evidence" must be stricken because it was filed along with the City's reply memorandum and not with its original motion for summary judgment and designation of evidence. The Court of Appeals stated:

> We faced a similar issue in *Spudich v. Indiana Pub. Serv. Co.*, 745 N.E.2d 281 (Ind.Ct.App. 2001) *trans. denied,* and concluded that "Trial Rule 56(E) allows either party to submit supplemental designations" of evidence for summary judgment. *Id*. at 289; accord *id*. at 287. Indeed, it is within the trial court's discretion to permit affidavits (accompanying the motion for summary judgment) to be supplemented by additional affidavits (i.e., accompanying movant's reply). T.R.56 (E). Accordingly, we decline the Reeds' Request to Strike the City's Supplemental Affidavits.

H. ***Response***

1**.** ***Timing****:* The response to a motion for summary judgment and any opposing affidavits must be served and filed within thirty (30) days of service of the motion. "An adverse party shall have thirty (30) days *after service* of the motion to serve a response and any opposing affidavits." (Emphasis added). T.R.56(C). T.R. 6 (E) allows three (3) additional days to respond when the motion and designation are served by mail.

- ***Effect of Cross-Motion****:* A party may not circumvent the deadlines for filing a responsive summary judgment pleading by filing its own motion for summary judgment, therein incorporating the responsive pleading. *City of Mishawaka v. Kvale,* 810 N.E.2d 1129 (Ind.Ct.App. 2004) (The City had already failed to respond to the Kvale Estate's motion for summary judgment within thirty (30) days as required by T.R.56(C).

When considering cross-motions for summary judgment, the trial court is required to consider each motion separately, construing the facts most favorable to the non-moving party in each instance. *Sees v. Bank One, Indiana, N.A.*, 839 N.E.2d 154 (Ind. 2005) and *Kochis v. City of Hammond,* 883 N.E.2d 182 (Ind.Ct.App. 2008).

Non-movant's failure to file response to motion for summary judgment with a designation of evidence and attached affidavits within thirty (30) days from motion justified trial court striking the response along with the designation of evidence and attached affidavits, and non-movant's own motion for partial summary judgment did not entitle them to designate the same evidence and attach the same affidavits. *Life v. F.C. Tucker Company, Inc.,* 948 N.E.2d 346 (Ind.Ct.App. 2011).

2. ***T.R. 56 (I) Alteration of Time****:* Upon finding cause, the court may alter any time limit set forth in T.R. 56 upon motion made within the applicable time limit. T.R. 56(I). This allows an alteration of time for the adverse party as well as the moving party.

- ***Discretion***: Trial court's denial of request for extension of time to respond to Motion for Summary Judgment in order to complete discovery was appropriate exercise of its discretion and therefore response filed more than thirty (30) days after motion was not subject to consideration by trial court. *Erwin v. Roe,* 928 N.E.2nd 609 (Ind.Ct.App. 2010*).* See also *McGuire v. Century Surety Co.,* 861 N.E.2d 357 (Ind.Ct.App. 2007) (denial after filing deadline of timely filed motion for extension of time to respond to summary judgment motion was not an abuse of discretion, even though adverse party needed extra time to inform bankruptcy trustee of situation, given that adverse party filed suit prior to filing bankruptcy petition. Denial was also not a violation of due process, even though adverse party was not allowed to respond to

summary judgment motion, given that adverse party should not have assumed the motion would be granted, and they were not acting in reliance on a prior court order).

Trial court acted within its discretion in granting plaintiff's motions for extension of time to respond to defendant's motion for summary judgment, although plaintiff did not file affidavit indicating why facts necessary to justify opposition were unavailable, where record revealed that trial court had ample cause to grant each extension of time. T.R.56(F)(I). GEICO Ins. Co. v. Rowell, 705 N.E. 2d 476 (Ind.Ct.App. 1999)

Trial court order granting adverse party an additional 30 days to respond to movant's motion for summary judgment, rather than the 90 days requested was not an abuse of discretion. *Newman v. Jewish Community Center Assn. of Indianapolis*, 875 N.E.2d 729 (Ind. Ct. App. 2007)

3. ***Bright Line Rule***: T.R. 56 (I) means:

> [i]f the non-moving party fails to respond to a motion for summary judgment within thirty days, by either (1) filing affidavits showing issues of material fact, (2) filing his own affidavit under Rule 56 (F) indicating why the facts necessary to justify his opposition are unavailable, or (3) requesting an extension of time in which to file his response under 56(I), then a trial court lacks discretion to permit that party to thereafter file a response. In other words, a trial court may exercise discretion and alter time limits under 56(I) only if the nonmoving party has responded or sought an extension within thirty days from the date the moving party filed for summary judgment.

*Desai v. Croy*, 805 N.E. 2d 844, 849 (Ind. Ct. App. 2004), trans. denied. (Decided before January 1, 2005 amendment to subdivision (I) added "upon motion made *within the applicable time limit*". (emphasis added)

Although Indiana case law was inconsistent on this issue in the past, "[a]ny residual uncertainty was resolved in 2005 when [our supreme court] cited Desai with approval and declared:

> When a nonmoving party fails to respond to a motion for summary judgment within thirty days by either filing a response, requesting a continuance under Trial Rule 56 (I) or filing an affidavit under Trial Rule 56 (F), the trial court cannot consider summary judgment filings of that party subsequent to the 30-day period."

*HomEq Servicing Corp. v. Baker*, 883 N.E.2d 95, 98-99 (Ind. 2008) (quoting *Borsuk v. Town of St. John*, 820 N.E. 2d 118, 124 n.5 (Ind. 2005)

This principle was recently followed in *DeLage Landen Financial Services, Inc. v. Community Mental Health Center, Inc*., 965 N.E.2d 693 (Ind.Ct.App.2012) in which a trial court was reversed for denying a motion to strike a response to a summary judgment motion as untimely and granting a T.R.60 (B) motion for relief from judgment. The non-movant attempted to distinguish the facts from *HomeEq,* in part, based on the filing of a T.R. 6(B)(2) request for enlargement of time. (outside the T.R. 56(I) time limit). The court applying the principles of statutory construction under which trial rules are to be construed together and in harmony, whenever possible, concluded that since T.R.56 has its own enlargement of time provision it is not subject to T.R.6(B)(2). Thereafter in *Mitchell v. 10th and The Bypass, LLC*., 973 N.E.2d 606 (Ind.CtApp.2012) our appellate court affirmed a trial court that granted a non-movant's motion to vacate an order granting partial summary judgment before final judgment had been entered, then considered new evidence submitted in connection with the motion, although submitted beyond the T.R. 56(I) time limit, and revised its interlocutory order pursuant to under T.R.54 (B). In Footnote 3 of the opinion the court specifically stated that *DeLage* and *HomeEq* are inapposite. The Indiana Supreme Court granted transfer on March 28, 2013. *Mitchell v. 10th and The Bypass, LLC*., 981 N.E.2d 55 ( 985 N.E.2d 338 Table) (Ind. 2013). Before you start thinking the Supreme's are going to reverse *Mitchell* read *Kindred v. Townsend,* 2011WL 6916511 2011 Ind. App. Unpub. LEXIS 1842 (Ind.Ct.App.2011) *transfer denied* 971 N.E.2d 664 (Ind. 2013). A trial court entered judgment against non-movant who did not timely respond to a summary judgment motion, indicating it could not consider any such filing in opposition to the motion. Non-movant then filed a motion to correct error and a T.R.60(B) motion for relief from judgment (mistake, surprise or excusable neglect). The trial court ordered it's summary judgment entered as a final judgment, dismissed the motion to correct error and then granted the motion for relief form judgment thus vacating the summary judgment. Our Appellate Court found the trial court did not abuse its discretion and affirmed. Our Supreme Court denied transfer on July 31, 2012. Former Justice Frank Sullivan dissented citing *HomeEq, Borsuk and Desai* and stating, in part, that the non-movants motions "constituted impermissible end-runs around the time deadlines of T.R.56(C)."

- ***Missing Extension of Time Deadline*:** When a non-moving party has received an enlargement of time pursuant to T.R.56 (I) any response, including a subsequent motion for enlargement of time must be made within the additional period granted by the trial court. The rationale of *Homeq* and the cases leading up to it are not restricted to the initial thirty (30) day period following the filing of a motion for summary judgment. In accord with *Homeq* the trial court lacked discretion to grant the extension because the motion was made after the extension of time for a response had expired. *Miller v. Yedlowski,* 916 N.E.2d 246 (Ind.Ct.App. 2009).

- ***Alteration of Time by Agreement of the Parties Only***: Trial court did not have discretion to accept untimely responsive documents and thus properly granted moving party's motion to strike designation in opposition to summary judgment even though moving party had agreed to an extension of time but responding party did not file

a formal request with the trial court for the extension. Having failed to do so, the trial court was without discretion to accept the late-filed documents. The court had granted two prior requests for extension but the responsive designation was filed after the last extension deadline date had expired. Note: The Court of Appeals affirmed the trial court striking not only the late-filed designation of evidence but also a supplemental pleading that only provided additional legal authorities. *Booher v. Sheeram*, 937 N.E.2d 392 (Ind.Ct.App. 2010), *trans. denied; Brown v. Banta*, 682 N.E.2d 582 (Ind.Ct.App. 1997).

4. ***Successive Motions for Summary Judgment****:* A party opposing successive motions for summary judgment is not required to re-designate its evidence to meet the time limitation set forth in T.R.56(C). *Justice v. Clark Memorial Hospital*, 718 N.E.2nd 1217 (Ind.Ct.App. 1995), trans. denied.

Landlord's motion for summary judgment on breach of contract claim against tenant, and tenant's response to the motion could be treated as successive motion and successive response with respect to landlord's earlier motion for judgment on the pleadings on tenant's counterclaim and affirmative defense of failure consideration, which earlier motion was substantively treated as a motion for summary judgment, and thus, tenant was not required to re-designate the summary judgment evidence submitted in opposition to the original motion, in order for the evidence to be timely submitted in opposition to later motion. However, tenant also filed a response to landlord's second motion for summary judgment more than thirty (30) days after the motion was filed, to which landlord filed a motion to strike arguing trial court was without discretion to extend the time for response and also arguing his motion for summary judgment was not a successive motion because the initial motion was of a different nature and targeted tenants' counterclaim. The trial court properly treated tenants' "responses" as successive and presented with successive motions for summary judgment and material in opposition to summary judgment relevant to the same factual circumstances had discretion to grant tenant additional time to respond to the second motion and could properly consider them in ruling on the landlord's second motion. The trial court's action in this case preceded the January 1, 2005 amendment to T.R.56 (I). *Simon Property Group, L.P. v. Action Enterprises, Inc.*, 827 N.E.2d 1235 (Ind.Ct.App. 2005) *trans. denied*, 841 N.E.2d 185 (Ind. 2005).

5. ***Rescinding Alteration of Time****:* Trial court abused its discretion in setting aside order granting an extension of time to respond to motion for summary judgment, striking pleadings timely filed pursuant to that order and providing responding party one day notice of summary judgment hearing. Order was allegedly "inconsistent" with prior case management orders, and order bore stamped signature and was issued without hearing. Mere allegation of "inconsistency" did not support setting aside order, stamped signature was the equivalent of written signature and hearing was not required. T.R.56(I). Responding party was also deprived of due process right to present a case in court, where counsel received notice of rescission of prior order less than one hour

before hearing on motion. Chandler v. Dillon Ex Rel. Bennett, 754 N.E.2d 1002 (Ind.Ct.App. 2001)

6. ***Timing of Alteration of Time****:* Although the decision to alter a time limit under T.R.56(I) is committed to the sound discretion of the trial court, before the time limit to respond to a motion for summary judgment can be altered, a motion for summary judgment must be filed. Motion to shorten time to respond to a motion for summary judgment can be filed either contemporaneously with or after motion for summary judgment. *Logan v. Royer*, 848 N.E.2d 1157 (Ind.Ct.App. 2006) (motion to shorten time in which non-moving party could respond to motion for summary judgment was not ripe for trial court's consideration prior to filing a motion for summary judgment. The court could not have determined whether alteration was appropriate since there were no actual facts presented, non-moving party's discovery motion was still pending and non-moving party could not have adequately opposed motion to reduce time to respond.)

7. ***T.R. 56 (F)****:* If a party opposing summary judgment shows that facts essential to justify opposition cannot be presented by affidavit, the court may refuse the application for summary judgment or may order a continuance to allow affidavits to be obtained, depositions to be taken, or discovery to be had. T.R. 56(F). The party opposing summary judgment should present by affidavit the reasons that facts essential to justify opposition cannot be presented. T.R. 56(F).

As a general proposition it is improper for a court to grant summary judgment while reasonable discovery requests that bear on issues material to the motion are still pending. Kroger Co. v. Plonski, 930 N.E.2d 1 (Ind. 2010)

8**.** ***Designation****:* The responding party shall designate to the court (at the time the response is filed) all parts of pleadings, depositions, answers to interrogatories, admissions, matters of judicial notice, and any other matters on which it relies for purposes of the motion. T.R. 56(C).

- The responding party shall also designate to the court each material issue of fact that that party asserts precludes entry of summary judgment and the evidence relevant thereto. T.R. 56(C).

- Filing a T.R. 56(C) designation on the day of the hearing contravenes the rule. *Nobles v. Cartwright*, 659 N.E.2d 1064, 1070 (Ind.Ct.App. 1995); *Morton v. Moss*, 694 N.E.2d 1148 (Ind.Ct.App. 1998).

I. ***Supplementation****:* The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. T.R. 56(E). This allows supplementation by the non-moving party as well as the moving party.

1. ***Expands Upon:*** Non-moving party filed designation on extended deadline date and later without having sought a further extension filed additional exhibits and a memorandum on the day scheduled for summary judgment hearing, which was continued to a later date, and thereafter. A late-filed affidavit "expands on" the reference to affiant and his opinion found in a timely filed affidavit. Therefore, the court viewed the late-filed affidavit as a mere supplement to the timely filed affidavit under T.R. 56(E). Trial court did not abuse its discretion in considering the late-filed affidavit when ruling on the motion for summary judgment. *Indiana University v. Logan*, 728 N.E.2d 855 (Ind. 2000).

Affiant's "supplemental affidavit" "expands upon" the information provided in the initial affidavit and is therefore supplemental in nature. The trial court did not abuse its discretion in denying motion to strike the "supplemental affidavit". *Campbell v. A.A.A. Bail Bonds, Inc.*, 879 N.E.2d 1229 (Ind. Ct. App. 2008) (unpublished).

2. ***Merely Supplements***: Timely filed affidavit referenced the moving party having incurred substantial legal fees and expenses in the litigation. At the summary judgment hearing, moving party informed the court that he intended to file an affidavit of attorney fees and court gave opposing counsel time to respond. Non-moving party subsequently filed a motion to strike affidavit of attorney fees. Trial court denied that motion and granted fees. Court of appeals affirmed concluding that the attorney fee affidavit "merely supplements" the timely filed affidavit by detailing and quantifying the amount of fees incurred as stated in the affidavit, citing T.R.56 (E). No abuse of discretion in admission of supplemental affidavit filed after deadline but before summary judgment hearing. *Fort Wayne Lodge, LLC v. EBH Corp.*, 805 N.E.2d 876 (Ind. Ct. App. 2004).

Even assuming, without deciding, that late-filed affidavit supplemented timely designated affidavits in opposition to summary judgment motions, trial court did not abuse its discretion in excluding the affidavit filed after it held a hearing and ruled on motions. *Kessling v. Beegle*, 858 N.E.2d 980 (Ind. Ct. App. 2006)

Trial court properly considered moving party's post-hearing supplemental affidavit and documentation. Non-moving party was not prejudiced as that party was given time to respond, supplemental affidavit presented no new substantive evidence, non-moving party had already addressed the previously designated evidence in its brief and had failed to renew its motion to strike upon submission of supplemental affidavit. "Because the Estate [non-moving party] has failed to develop any other argument it might have made to challenge the summary judgment in its brief, we affirm the trial court's summary judgment…" Estate of Collins v. McKinney, 936 N.E. 2d 252 (Ind.Ct App. 2010)

J. ***No Oral Testimony:*** A pre 1994 incarnation of T.R.56(E) provided in part: "The trial court may permit affidavits to be supplemented or opposed by deposition, answers to interrogatories, further affidavits or, within the discretion of the judge, testimony of

witnesses." (emphasis added) *Mid-State Bank v. 84 Lumber Co.*, 629 N.E.2d 909 (Ind. Ct. App. 1994) (trial court did not err in refusing to allow oral testimony at summary judgment hearing.) Effective February 1, 1995 subdivision (E) amendment deleted "or, within the discretion of the judge, testimony of witnesses."

K. ***Reply Briefs and Sur-Reply Briefs****:* Local procedure rule allowing moving party for summary judgment to file reply brief to non-moving party answer brief opposing summary judgment did not conflict with T.R.56, which neither expressly permits nor precludes reply briefs, and thus local rule was valid. *Spudich v. Northern Indiana Public Service Company*, 745 N.E.2d 281 (Ind. Ct. App. 2001) *trans. denied.*

Trial court did not err in refusing to strike moving party's reply memorandum to non-moving party's response in opposition to moving party's motion for summary judgment wherein reply memorandum was filed to explain additional legal authority and no new facts were offered. Hearing on motion for summary judgment was held after reply memorandum was filed. Moving party did not have any objection to reply memorandum at the time it was filed, and reply memorandum in no way affected moving party's' burden on summary judgment, even though rules did not provide for filing of reply memorandum. T.R.56(C). *Nelson v. Denkins,* 598 N.E.2d 558 (Ind. Ct. App. 1992).

L**.** ***Hearing****:*

1. ***Timing and Request****:* Any party may request that the court conduct a hearing on a motion for summary judgment. Such a request must be made not later than ten (10) days after the response to the motion was filed or was due. Under these circumstances, the Court shall conduct a hearing on the motion not fewer than ten (10) days after the time for filing the response. In the absence of a timely request for a hearing, the conduct of the hearing is discretionary with the Court. T.R. 56(C). The court may also set a hearing on its own motion cancel it and decide the motion based on the filings unless one of the parties timely requested that a hearing be scheduled. *Christmas v. Kindred Nursing Ctrs*., 952 N.E.2d 872,(Ind.Ct.App. 2011).

- ***Alteration of Hearing Time****:* Trial court had good cause to hold hearing, on defendant corporation's summary judgment motion in plaintiff shareholder's derivative action, on the day after plaintiff filed his response to the motion instead of holding the hearing no less than ten (10) days after the response, where trial was set to begin in five (5) days. T.R. 56(I) does not require a motion by a party before the court may act. See also *Ahnert v. Wildman*, 376 N.E.2d 1182 (Ind.Ct.App.1978). ("although hearing on the motions for summary judgment was held within ten (10) days of the filing and service of notice, thus contravening the plain language of T.R.56, the record contains no objection thereto. Under the circumstances, the defect is waived.");

T.R.56(I) does not require a party to request alteration of time limits. *Riggin v. Rea Riggin & Sons, Inc.*, 738 N.E.2d 292 (Ind. Ct. App. 2000). (summary judgment hearing

held the day after non-moving party filed response to motion for summary judgment. On appeal non-moving party claimed "the rule presumes a party will request an alteration of the time limits." Appellate court concluded, "Support for such a contention cannot be found in the text of the rule." (Effective January 1, 2005 subdivision (I) amendment added, "*upon motion made* within the applicable time limit" (emphasis added)

Trial court did not abuse discretion in overruling challenge by decedent's estate to hearing date on defendants' summary judgment motions and denying motion for continuance even though hearing date was less than ten (10) days after estate's response was due, where hearing date was set in accord with original deadline for filing summary judgment motions, parties agreed to extend deadline, estate made no request to change the hearing date due to the later filing date, extending filing deadline was precipitated by estate's filing of fifth amended complaint and estate did not object to the hearing date until four days before the hearing. T.R.56(C)(I). *Coleman v. Charles Court, LLC*. 797 N.E.2d 775 (Ind. Ct. App. 2003)

## V. Designation of Materials

**A.** ***Purpose***: The purpose of the designation requirement is to substantially limit the scope of materials that the trial court must review in order to determine the propriety of summary judgment. *Dzvonar v. Interstate Glass Co.,* 631 N.E.2d 516, 518 (Ind. Ct. App. 1994).

Further, the designation required saves the trial court from having to search the record to find support for a party's claim. *Nyby v. Waste Mgmt. Inc.*, 725 N.E.2d 905, 913 n.3 (Ind. Ct. App. 2000). It is **reversible error** for the court to search the record beyond the materials specifically designated by the parties. *See Graham v. Vasil Mgmt. Co.*, 618 N.E.2d 1349 (Ind. Ct. App. 1993).

**B.** ***Method***

No particular method of designation is required. As long as the trial court is apprised of the specific material upon which the parties rely in support of or in opposition to a motion for summary judgment, then the material may be considered. *National Bd. of Examiners for Osteopathic Physicians & Surgeons v. American Osteopathic Ass'n*, 645 N.E.2d 608, 615 (Ind. Ct. App. 1994) (case reviews precedent up to time of decision concluding "lack of consensus" exists.); *Hamilton v. Prewitt*, 860 N.E.2d 1234, 1241 (Ind. Ct. App. 2007).

Parties may choose the placement of evidence designation. Designation may be placed in a motion for summary judgment, a memorandum supporting or opposing the motion, a separate filing identifying itself as the designation of evidence, or an appendix to the motion or memorandum. The only requirement as to placement is that the designation

clearly identify listed materials as designated evidence in support of or opposition to the motion for summary judgment. If the designation is not in the motion itself, it must be in a paper filed with the motion, and the motion should recite where the designation of evidence is to be found in the accompanying papers. *Filip v. Block*, 879 N.E.2d 1076, 1081 (Ind. 2008).

However, although a party can choose where to designate evidence, the courts and opposing parties should not be required to flip from one document to another to identify the evidence a party claims is relevant to its motion. Rather, the entire designation must be in a single place, whether as a separate document or appendix, or part of a motion or other filing. *Filip v. Block*, 879 N.E.2d 1076,1081 (Ind. 2008).

A party should file a list of factual matters that are or are not in dispute, a specific designation of their location in the record, and a brief synopsis of why those facts are material. *Pierce v. Bank One-Franklin NA*, 618 N.E.2d 16, 19 (Ind. Ct. App. 1993).

A party relying on answers to interrogatories or admissions should file them separately from the summary judgment memorandum. Then, in the memorandum, the party should specifically designate the number of the interrogatory answer that supports its contention. *Briar v. Elder-Beerman Dep't Store, Inc*., 645 N.E.2d 8, 12 (Ind. Ct. App. 1994).

A party relying on deposition answers should either publish the deposition in its entirety and then attach any excerpts to its memorandum or publish the excerpts for the first time when it argues the motion, so long as the excerpts are accompanied by the proper certification. *Martin Rispens & Son v. Hall Farms Inc.* 610 N.E.2d 429, 440 n.3 (Ind. Ct. App. 1992), *vacated on other grounds by* 621 N.E.2d 1078 (Ind. 1993).

Designating evidentiary materials in their entirety fails to meet the specificity requirement. Unless a document in its entirety is required as designated evidentiary matter, regardless of how concise or short the document is, specific reference to the relevant portion of the document must be made. *Duncan v. M&M Auto Serv. Inc.*, 898 N.E.2d 338, 341 (Ind. Ct. App. 2008).

### C. ***Failure of Designation***

Parties cannot rely on the assembled record without specificity. It is not within the trial court's duties to search the record, and the trial court errs in doing so. *Graham v. Vasil Management Co., Inc.*, 618 N.E.2d 1349, 1350 (Ind. Ct. App. 1993); *Hamilton v. Prewett*, 860 N.E.2d 1234, 1241 (Ind. Ct. App. 2007).

The trial court must confine its examination to those portions of the record specifically designated by the parties. A party's failure to provide specific citations acts as a failure to make or respond to a motion for summary judgment properly. *Rosi v. Business Furniture Corp.*, 615 N.E.2d 431 (Ind. 1993).

D. ***Evidence***

1. ***Types of Materials***: The evidentiary materials used by the parties may include pleadings, depositions, answers to interrogatories, admissions, matters of judicial notice, and any other matters. T.R. 56(C).

2. ***Admissibility***: An affidavit or other evidence that would be inadmissible at trial may be considered at the summary judgment stage of the proceedings if the substance of the affidavit or other evidence would be admissible in another form at trial. *Reeder v. Harper*, 788 N.E.2d 1236, 1241-42 (Ind. 2003) (allowing affidavit of deceased declarant); *see also Schlotman v. Taza Café*, 868 N.E.2d 518, 521 (Ind. Ct. App. 2007) (allowing consideration of records obtained from website because the evidence was admissible in content and would be admissible in another form at trial).

Documents designated to the court must be self-authenticated or be accompanied by certifications of authenticity.

Hearsay statements that do not comply with an exception to the hearsay exclusion rule of evidence and that are contained in any evidentiary material are improper for use in summary judgment. *Spier v. Plymouth*, 593 N.E.2d 1255,1259-60 (Ind. Ct. App. 1992); *McGee v. Bonaventura*, 605 N.E.2d 792 (Ind. Ct. App. 1993); *Smith v. Delta Tau Delta*, 988 N.E.2d 325 (Ind.Ct.App.2013)

3**.** ***Not Suitable***: The following are not suitable evidence for the purposes of summary judgment despite the fact that they may be specifically designated by a party:

Briefs of the parties. *Auffenberg v Board of Trustees of Columbus Regional Hosp.*,646 N.E.2d 328, 330 (Ind. Ct. App. 1995).

Facts presented only in a party's brief. *J.A.W. v. Roberts*, 627 N.E.2d 802, 808 (Ind. Ct. App. 1994).

Conclusions of law contained in an affidavit. *L.K.I. Holdings, Inc. v. Tyner*, 658 N.E.2d 111, 117 (Ind. Ct. App. 1995*).*

Improper expert opinion contained in an affidavit. V*ogler v. Dominguez*, 624 N.E.2d 56 (Ind. Ct. App. 1993); *Randolph County Hosp. v. Livingston*, 650 N.E.2d 1215 (Ind. Ct. App. 1995). See *Curtis v. Miller's Health Systems,Inc*., 972 N.E.2d 966 (Ind.Ct.App.2012) (In some circumstances a nurse may qualify as an expert regarding medical standards of care and causation. nurse not qualified in this case)

Affidavits that contradict the same witness' sworn deposition testimony. *Van Etten v. Fegaras*, 803 N.E.2d 689, 692 (Ind. Ct. App. 2004); *Smith v. Delta Tau Delta*, 988 N.E.2d 325 (Ind.Ct.App.2013)

Unsworn or unverified statements and exhibits. *Smith v. Delta Tau Delta,* 988 N.E.2d 325 (Ind.Ct.App.2013)

4. ***Affidavits*** must comply with the guidelines provided in T.R. 56(E).

Supporting and opposing affidavits shall be made on personal knowledge. T.R. 56(E). *Femco v. Colman,* 651 N.E.2d 790, 794 (Ind. Ct. App. 1995); *Hayes v. Trustees of Indiana University,* 902 N.E.2d 303 (Ind.Ct.App.), trans. denied, 919 N.E.2d 551 (Ind. 2009)

Supporting and opposing affidavits shall set forth such facts as would be admissible in evidence. T.R. 56(E); *Scott v. City of Seymour,* 659 N.E.2d 585, 592 (Ind. Ct. App. 1995).

Supporting and opposing affidavits shall affirmatively show that the affiant is competent to testify to the matters stated therein. T.R. 56(E); *Gallatin Group v. Central Life Assurance Co.*, 650 N.E.2d 70, 73 (Ind. Ct. App. 1995). However, there need not be an explicit recital of personal knowledge when it can be reasonably inferred from the contents that the material parts are within the affiant's knowledge and competency. *Decker v. Zengler,* 883 N.E.2d 839, 844 (Ind. Ct. App. 2008).

5. ***Verification****:* Affidavits must be properly verified.

The suggested form for verification is set forth in T.R. 11.

Strict compliance with T.R. 11 is not mandatory. An affidavit has been defined as a written statement of fact that is sworn to as the truth before an authorized officer. The chief test of the sufficiency of an affidavit is its ability to serve as a predicate for a prosecution. *Jordan v. Deery*, 609 N.E.2d 1104, 1110 (Ind. 1993).

6. ***Good Faith***: Affidavits must be made in good faith. T.R. 56(G).

**7.** ***Remedies for Improper Affidavits***.

A party may move to strike an improper affidavit, and it may be removed from the designated materials. *Gross v. Bow Lanes, Inc*., 661 N.E.2d 1220 (Ind. Ct. App. 1996). The court may strike improper affidavits on its own motion. *Paramo v. Edwards,* 563 N.E.2d 595, 600 (Ind. 1990).

Failure to make a motion to have an improper affidavit stricken from the designated evidentiary materials waives the issue on appeal. *Gross v. Bow Lanes, Inc*., 661 N.E.2d 1220 (Ind. Ct. App. 1996); *Paramo v. Edwards*, 563 N.E.2d 595 , 600 (Ind. 1990); *Avco*

*Financial Servs., Inc. v. Metro Holding Co.*, 563 N.E.2d 1323, 1327 (Ind. Ct. App. 1990)*; Doe v. Shults-Lewis*, 718 N.E.2d 738, 749 (Ind. 1999).

If it appears to the court that any of the affidavits are presented in bad faith or solely for the purpose of delay, the court shall order the party employing the affidavits to pay to the other party the amount of reasonable expenses the filing of the affidavits caused him to incur, which may include reasonable attorney fees. T.R. 56(G). The court may also find in contempt any party or attorney presenting affidavits in bad faith or solely for the purpose of delay. T.R. 56(G)

## VI. Burden of Proof

### A. *Movant*

The moving party bears the burden of making a prima facie showing that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *Indiana BMV v. Ash, Inc.*, 895 N.E.2d 359, 365 (Ind. Ct. App. 2008). This is true even if the non-movant fails to designate any thing. *Monroe Guaranty Insurance Co. v. Magwerks Corp*., 829 N.E.2d 968 (Ind. 2005)

When a defendant moving for summary judgment makes a prima facie showing to negate an element of a cause of action, or the undisputed facts nevertheless show the movant is entitled to judgment as a matter of law, the burden shifts to the plaintiff to demonstrate the existence of a factual issue for trial. *York v. Union Carbide Corp*., 586 N.E.2d 861, 864 (Ind. Ct. App. 1992).

The threshold burden is on the movant to demonstrate the absence of a genuine issue of material fact. This burden is not satisfied where facts presented as undisputed can support different inferences. *American Mgmt. v. MIF Realty, L.P.*, 666 N.E.2d 424, 428, 430-31 (Ind. Ct. App. 1996).

### B. *Cross-Motions*

Cross-motions for summary judgment on the same issues do not alter the standard of review; rather the inquiry remains whether a genuine issue of material fact exists that requires a trial on the merits. *Walling v. Appel Serv. Co.*, 641 N.E. 647, 649 (Ind. Ct. App. 1994).

In the context of cross-motions for summary judgment, the trial court must consider each motion separately to determine whether the moving party is entitled to judgment as a matter of law. *Kochis v. Hammond*, 883 N>E.2d 182, 186 (Ind. Ct. App. 2008); *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013)

When any party has moved for summary judgment, the court may grant summary judgment for any other party on the issues raised by the motion, even though the other

party did not make a motion. T.R. 56(B). A party who moves for summary judgment bears the risk that the court will enter summary judgment in favor of the non-moving party, even when the non-moving party has not filed a cross-motion for summary judgment or otherwise responded to the summary judgment motion. *Larson v. Karagan*, 979 N.E.2d 655 (Ind.Ct.App.2012)

## VII. Considerations in the Decision-Making Process

A. ***The Court Converting Movant's Motion to Dismiss to a Motion for Summary Judgment****:* It is impermissible for a court to convert movant's motion to dismiss to a motion for summary judgment unless the court provides explicit notice and an opportunity for the parties to conduct further discovery and present T.R.56 materials. *Lanni v. National Collegiate Athletic Association,et al*., 989 N.E.2d 791 (Ind.CourtApp. 2013)

B**.** ***When Discovery Is Pending***: It is generally improper to grant summary judgment when discovery requests are pending; however, a trial court may grant a motion for summary judgment when the pending discovery is unlikely to develop a genuine issue of material fact. *Forhardt v. Bassett*, 788 N.E.2d 462, 473 Ind. Ct. App. 2003). See also *Gill v. Evansville Sheet Metal Works,Inc*., 970 N.E.2d 633 (Ind. 2012) (local rule permitting pre-discovery entry of summary judgment in asbestos tort cases should not have been adhered to on fact sensitive issue whether contractor's removal or installation of asbestos-containing products constituted improvement to real property. We are bound by our local rules but not when they defeat justice instead of serving the rules intended function!)

C. ***Materiality*****:** A fact is "material" for summary judgment purposes if it helps to prove or disprove an essential element of the plaintiff's cause of action. *Lake States Ins. Co. v. Tech Tools, Inc.*, 664 N.E. 2d 742, 747 (Ind. Ct. App. 1996).

Although there may be genuine disputes over certain facts, a fact is "material" when its existence facilitates the resolution of an issue in the case. *American Mgmt., Inc. v. MIF Realty*, 743 N.E.2d 314, 318 (Ind. Ct. App. 2001).

D. ***Genuineness*****:** A factual issue is "genuine" for purposes of summary judgment when facts concerning an issue that would dispose of the litigation are in dispute or where the facts are capable of supporting conflicting inferences. *Poznanski ex rel. Poznanski v. Horvath*, 788 N.E.2d 1255, 1258 (Ind. 2003).

E. ***Undisputed Facts***: If the facts are undisputed, the trial court's task is to determine the law applicable to the undisputed facts, and correctly apply it. *Hibler v. Conseco, Inc.*, 744 N.E.2d 1012, 1017-18 (Ind. Ct. App. 2001).

F. ***Construction of Facts and Inferences***; Resolution of Doubts: Facts and inferences must be liberally construed in favor of the nonmovant, and all doubts must be resolved in the nonmovant's favor. *Pierce v. Bank One-Franklin, NA.*, 618 N.E.2d 16-18 (Ind. Ct. App. 1993).

G. ***Credibility***: Summary judgment is inappropriate if a reasonable trier of fact could choose to disbelieve the movant's account of the facts. It is error to base summary judgment solely on a party's self-serving affidavit, when evidence before the court raises a genuine issue as to the affiant's credibility. Inconsistencies and evasive language within the movant's designated evidence may form a basis for denying summary judgment. *Insuremax Ins. Co. v. Bice*, 879 N.E.2d 1187, 1190 (Ind. Ct. App. 2008). Summary judgment must be denied if the resolution hinges on state of mind, credibility of witnesses, or weight of testimony. *Ackles v. Hartford Underwriters Ins. Corp.*, 699 N.E.2d 740, 742 (Ind. Ct. App. 1998).

H. ***Failure of Nonmovant to Respond/Improper Response by Nonmovant***

Summary judgment shall not be granted as a matter of course because the opposing party fails to offer opposing affidavits or evidence, but the court shall make its determination from the evidentiary matter designated to the court. T.R. 56(C).

The lack of opposition to another's motion for summary judgment does not result in an automatic summary judgment because the moving party still bears the burden of showing the propriety of summary judgment. *Alexander v. Dowell*, 669 N.E.2d 436, 439 (Ind. Ct. App. 1996); *Countrywide Home Loans, Inc. v. Holland*, 993 N.E.2d 184 (Ind.Ct.App. 2013)

I. ***Special Findings*** are not required in summary judgment proceedings and are not binding on appeal. However, such findings assist the appellate court in ascertaining the trial court's rationale for its judgment. *Watters v. Dinn*, 633 N.E.2d 280, 285 (Ind. Ct. App. 1994).

## VIII. Appeals

### A. *Partial Summary Judgment*

A summary judgment granted on less than all issues involved in a claim or with respect to less than all the claims or parties is interlocutory unless the court certifies in writing unless the trial court expressly determines in writing that there is no just reason for delay and expressly directs entry of judgment as to less than all the issues, claims, or parties. T.R. 56(C).

If there is no such certification, then the granting of a partial summary judgment must be appealed as an interlocutory order, and the appeal is controlled by Ind. Appellate Rule 14(B). *See Millspaugh v. Ross,* 645 N.E.2d 14 (Ind. Ct. App. 1994).

If summary judgment is not granted on all claims, then, if practicable, the court shall ascertain which factual issues exist without substantial controversy and make an order specifying those facts, to limit the facts in controversy at trial. T.R. 56(D).

B**.** ***Denial***

The denial of a motion for summary judgment is not a final order because it does not irretrievably dispose of all issues between the parties. *Keith v. Mendus*, 661 N.E.2d 26, 35 (Ind. Ct. App. 1996).

Denial of a motion for summary judgment may be appealed through the interlocutory appeal process. *Keith v. Mendus,* 661 N.E.2d 26, 35 (Ind. Ct. App. 1996).

Denial of a motion for summary judgment may be appealed after a verdict is entered by the trier of fact which renders the order final. *United Servs. Auto. Ass'n v. Caplin*, 656 N.E.2d 1159, 1161 (Ind. Ct. App. 1995).

Michael P. Scopelitis
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