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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 12-1069

TRESA DELLINGER, Individually and in her capacity as Executrix of the Estate of AMBER DELLINGER, deceased

Petitioner/Plaintiff Below,

v.

Appeal from a final order from the Circuit Court of Kanawha County (09-C-681)

PEDIATRIX MEDICAL GROUP, P.C.,

Respondent/Defendant Below.

BRIEF ON BEHALF OF THE RESPONDENT, PEDIATRIX MEDICAL GROUP, P.C.

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I. RESPONSE TO ASSIGNMENT OF ERROR

There was no error by the trial court. The trial court's finding that Summary Judgment was proper was based upon Petitioner's expert testimony that there was no standard of care deviation on the part of the Respondent and no causal relationship between the acts of the Respondent and the minor's death from La Crosse Encephalitis.

II. STATEMENT OF THE CASE

A. Procedural History

On April 14, 2009, Petitioner filed this wrongful death medical malpractice action in Kanawha County Circuit Court pursuant to the West Virginia Medical Professional Liability Act, West Virginia Code §§ 55-7B-1 *et seq.*, stemming from the death of her six (6) year old daughter, AD[1], from La Crosse Encephalitis[2]. *See* Complaint. Charleston Area Medical Center ("CAMC") was the only named defendant on Petitioner's original Complaint. *Id.* On May 14, 2009, Petitioner filed her Amended Complaint and added Pediatrix Medical Group, P.C. as a defendant on the basis that its employee, Manuel Jose Caceres, M.D. ("Dr. Caceres"), was allegedly negligent in failing to treat and properly manage AD's airway, proximately causing her death. *See* Amended Complaint [Ex. D, Exhibit A thereto][3].

On September 23, 2010, the Court entered a Scheduling Order [Ex. A], which established, *inter alia*, the following deadlines:

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[1] The full name of the minor child has been redacted in favor of initials, pursuant to Rule 40(e) of the West Virginia Rules of Appellate Procedure.

[2] The La Crosse Virus is a mosquito-transmitted virus. West Virginia is one of the few states in the United States where it has occurred at such an incidence to result in epidemiologic and medical scientific evaluation. Treating physician Manuel Caceres, M.D. was one of the investigators in one of the principal medical journal articles discussing the disease. *See* James E. McJunkin, et al., *La Crosse Encephalitis in Children*, 344 NEW ENG. J. MED. 11 (Mar. 15, 2001). This article was known to and referred to by plaintiff's counsel throughout the case.

[3] Each document in the Appendix is referred to by "Ex. ___" for reference. Respondent notes that Petitioner failed to comply with the mandates of Rule 7 of the West Virginia Rules of Appellate Procedure. Respondent advises the Court that it previously conferred with counsel for Petitioner and agreed to the inclusion of the pleadings (each with exhibits thereto), Orders and Hearing transcripts set forth in the Appendix submitted by Petitioner.

1. Plaintiff's Expert Witness Disclosure: January 3, 2011
2. Defendants' Expert Witness Disclosure: March 4, 2011
3. End of Discovery: May 3, 2011
4. Trial Date: August 1, 2011

On January 14, 2011, Petitioner filed her expert witness disclosures and identified Marc Weber, M.D., J.D. ("Dr. Weber") as her sole liability expert. *See* Plaintiff's Expert Witness Disclosure; *see also* Pediatrix Medical Group, P.C.'s Motion for Summary Judgment and Memorandum of Law in Support of the Same and Exhibits thereto [Ex. D]. Dr. Weber's deposition was completed on May 18, 2011, during which he admitted that his only opinion as to Pediatrix and Dr. Caceres was that once a blood gas result pertaining to AD available to Dr. Caceres, Dr. Caceres had the obligation to intubate the patient. *See* Weber Depo. [Ex. E, Exhibit A thereto], pp. 106-112. Dr. Weber admitted that there is no dispute of fact that the blood gas result was not available to Dr. Caceres before his arrival at the hospital and that Dr. Caceres met his obligation by appropriately and timely intubating the patient. *Id.*

On May 20, 2011, Pediatrix filed its Motion for Summary Judgment on the basis that Petitioner failed to establish a *prima facie* case due to lack of medical expert testimony of standard of care deviation or causation. *See* Motion for Summary Judgment on Behalf of Defendant, Pediatrix Medical Group, P.C. and Memorandum of Law in Support of the same [Ex. D]. At the time the Motion for Summary Judgment was filed, Dr. Weber's discovery deposition transcript was not available. *Id.* Pediatrix later the supplemented its Motion with the testimony of Dr. Weber. *See* Supplementation to Motion for Summary Judgment on Behalf of Defendant, Pediatrix Medical Group, P.C. and Memorandum of Law in Support of the Same [Ex. E]. CAMC also filed a Motion for Summary Judgment. On July 12, 2011, Petitioner filed a

combined Response to Pediatrix's and CAMC's Motions for Summary Judgment. *See* Plaintiff's Brief in Opposition to Defendants' Motions for Summary Judgment [Ex. F]. No Rule 56(e) affidavit or other evidence was provided in opposition to Pediatrix's Motion for Summary Judgment. *Id.*

On June 21, 2011, Petitioner filed a Motion for Continuance on the basis that her expert witness, Dr. Weber, was unavailable to appear personally at trial. *See* Motion for Continuance [Ex. B]. On July 15, 2011, the parties appeared at a Pre-Trial Conference. The trial court heard oral argument on Petitioner's Motion for Continuance and on the pending summary judgment motions. *See* Transcript of July 15, 2011 Pre-Trial Conference [Ex. H]. The trial court granted the Motion for Continuance and denied each of the defendants' summary judgment motions. *Id.*; *see also* Order [Ex. I]. Trial was rescheduled for March 12, 2012. *See* [Ex. I]. The same day as that hearing, plaintiff had noticed the deposition of a defense liability expert, Michael Waldeck, M.D., in Huntington, West Virginia. That deposition was continued by agreement of the parties due to the trial continuance. *See* Notice of Deposition dated July 12, 2011.

On July 18, 2011, Pediatrix noticed the deposition of Petitioner's economic expert, Laura Savory Miller, an economist with Rufus & Rufus, A.C. *See* Notice of Deposition Duces Tecum of Laura Savory Miller; *see also see also* Order Granting Pediatrix Medical Group, P.C.'s Motion for Summary Judgment [Ex. R, ¶ 12]. Pediatrix deposed Ms. Miller on July 21, 2011. *See* [Ex. R, ¶ 13].

On July 27, 2011, Petitioner noticed the deposition of Kelly Wooten, a CAMC nurse who was involved in the care in issue. *Id.* at ¶ 14. Petitioner deposed Ms. Wooten on August 4, 2011. *Id.* at ¶ 15. Between August 4, 2011 and the March 5, 2012 Pre-Trial Conference, Petitioner engaged in no further discovery, made no supplementation of Dr. Weber's opinions

and sought no Rule 16 or Rule 26 relief from the Court such as through a Motion for Leave to disclose a new expert or to add to Dr. Weber's opinions. Petitioner was silent.

On February 23, 2012, Pediatrix renewed its Motion for Summary Judgment. *See* Renewed Motion for Summary Judgment on Behalf of Defendant, Pediatrix Medical Group, P.C. [Ex. J]. On February 29, 2012, Petitioner filed a *pro forma* Response, again not submitting any Rule 56(e) evidence in opposition. *See* Response to Pediatrix Medical Group, P.C.'s Motion for Summary Judgment [Ex. K]. On March 5, 2012, Pediatrix filed its Reply to the same. *See* Pediatrix Medical Group, P.C.'s Reply to Plaintiff's Response to Defendant's Renewed Motion for Summary Judgment [Ex. L].

On March 5, 2012, the parties appeared at the Pre-Trial Conference for the March 12, 2012 trial date. *See* Transcript of March 5, 2012 Pre-Trial Conference [Ex. M]. The trial court was advised that CAMC and Petitioner had resolved the case. *Id.* The Court heard oral argument on the Renewed Motion for Summary Judgment. *Id.* The Court took the Renewed Motion for Summary Judgment under advisement and ordered the parties to report to the Court no later than noon on March 7, 2012 as to the status of resolution. *See* [Ex. R]. On March 7, 2012, the parties notified the trial court that the matter had not resolved. *Id.* The trial court thereafter granted Summary Judgment in favor of Pediatrix. *Id.* The Court instructed Pediatrix's counsel to prepare the Order.

On April 4, 2012, Pediatrix submitted a proposed Order to the trial court pursuant to Rule 24.01, West Virginia Trial Court Rules. *See* Pediatrix Medical Group, P.C.'s Motion for Entry of an Order [Ex. N]. Petitioner's counsel submitted an alternative Order. *See* Plaintiff's Proposed Order Granting Pediatrix Medical Group, P.C.'s Motion for Summary Judgment (not entered by the Court) [Ex. P].

On May 1, 2012, Petitioner filed a Motion for Reconsideration and Alternative Motion to Deny or Reject the Order Submitted by Pediatrix and Enter the Order Submitted by Plaintiff. *See* Motion for Reconsideration; *see also* Alternative Motion to Deny or Reject the Order Submitted by Pediatrix and Enter the Order Submitted by Plaintiff [Ex. O]. On July 18, 2012, Pediatrix filed Responses to both of these Motions. *See* Pediatrix Medical Group, P.C.'s Response to Motion for Reconsideration; *see also* Pediatrix Medical Group, P.C.'s Response to Alternative Motion to Deny or Reject the Order Submitted by Pediatrix and Enter the Order Submitted by Plaintiff [Ex. Q].

On July 25, 2012, the parties appeared before the trial court for a Hearing on these matters. *See* Transcript of July 25, 2012 Hearing [Ex. S]. The trial court granted Pediatrix's Motion for Entry of An Order and on July 26, 2012 entered the Order Granting Pediatrix Medical Group, P.C.'s Motion for Summary Judgment from which Petitioner now appeals. *Id.*; *see also* [Ex. R].

Petitioner has appealed the trial court's final judgment pursuant to Rule 5 of the West Virginia Rules of Appellate Procedure. W. VA. R. APP. P. 5.

B. Statement of Facts

Petitioner's Statement of Facts is replete with argument and not fact. Petitioner's decision to present this appeal in such a matter demonstrates the inability to refute the clear record below that there was and is no *prima facie* case of medical professional liability as to Pediatrix. Although a child died, the child died not because of a standard of care deviation on the part of the only health care provider employed by Pediatrix.

AD was taken to the Emergency Department at Raleigh General Hospital on September 18, 2007 by her parents due to headache and fever for several days. *See* [Ex. R, ¶ 20]. She had

"several scattered bug bites" on her body. *Id.* Her headache and fever appeared to resolve during the emergency department stay. She was discharged home with her parents being instructed to bring her back if her condition worsened. *Id.* The next day, on September 19, 2007, her parents brought her back because of headache, fever, nosebleed, vomiting, abdominal pain, backache and neck lymphadenopathy. *Id.* at ¶ 21. The patient was diagnosed with a urinary tract infection and "headache and fever, rule out partially treated meningitis." She was admitted to Raleigh General Hospital. *Id.*

The patient's condition continued to worsen. She was transferred to Charleston Area Medical Center, Women's and Children's Division ("CAMC") by ambulance on September 21, 2007. *Id.* at ¶ 22. On September 22, laboratory tests confirmed that she was suffering from the La Crosse Virus with Encephalitis. *Id.* Encephalitis "is irritation and swelling (inflammation) of the brain, most often due to infection. Encephalitis is a rare condition. It occurs more often in the first year of life and decreases with age. The very young and the elderly are more likely to have a severe case" U.S. National Library of Medicine, Pubmed at http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0002388/ (last accessed 1/9/2013). It is and was undisputed that there is no cure or effective treatment for this viral infection of the brain. Caceres Depo. [Ex. D, Exhibit E thereto], pp. 87:14 – 88:5; Weber Depo. [Ex. E, Exhibit A thereto], p. 20:6-16.

The parents subjectively believed that the child was improving prior to the time she started having seizures. It was and is uncontested that Dr. Caceres was not involved in the patient's care until after her seizures started and she had to be transferred to the Pediatric Intensive Care Unit.

The seizure activity started while a CAMC employed nurse was trying to start an intravenous ("IV") line in the patient's arm. The parents were in the room and contended that the nurse, using the same needle, repeatedly (up to about a dozen times) tried to start the IV notwithstanding their pleas and that of the patient for the nurse to stop. It was and is uncontested that CAMC and its nurse(s) are not Pediatrix, all nursing staff and the medical resident involved at that time being CAMC employees.

The events were established in discovery as follows, establish the time line which taken, *in para materia* with Dr. Weber's deposition testimony, demonstrates that the trial court correctly entered summary judgment.

At 2:15 a.m. on September 23, 2007 the patient had pain at her IV site in her left arm. *See* September 23, 2007 Nurses' Progress Notes at 0215 [Ex. D, Exhibit B thereto]. The IV needed replaced. The CAMC employed nurse, accompanied by the patient's parents, took the patient to a treatment room. *Id.* During attempts start the IV, the patient began having focal seizures. *Id.* It was and is uncontested that Dr. Caceres was not involved with the patient's care at any time during the events in the treatment room and throughout the IV insertion process.

Because of the seizure activity, she was transferred to the Pediatric Intensive Care Unit ("PICU") between 2:30 a.m. and 2:45 a.m. Treatment for seizures began. CAMC-employed medical resident physician, Anita Hawks-Henley, D.O. ("Dr. Hawks") evaluated and stayed with the patient. It is uncontested that Dr. Hawks was not negligent, Dr. Weber testifying that he had no criticisms of her. Weber Depo. [Ex. E, Exhibit A thereto], p. 92:15-19.

Dr. Hawks was the on-site physician from 2:30 a.m. until Dr. Caceres' arrival sometime between 3:40 a.m. and 3:50 a.m. It is uncontested that there was and is no claim of negligence on the part of Dr. Caceres through 3:45 a.m. *Id.* at pp. 106-112.

Between 2:30 a.m. and 3:45 a.m. various actions were taken to address the patient's seizure activity. These included the referenced arterial blood gas collection and chest x ray. *See* Physicians' Orders – PICU/PTCU Admission [Ex. D, Exhibit D thereto]; *see also* Caceres Depo. [Ex. D, Exhibit E thereto], pp. 41:24 – 42:20. Petitioner's discussion concerning respiratory distress was her case against the settling defendant CAMC and the nursing care in the treatment room. Petitioner's expert did not advance a standard of care criticism against any physician for the same:

> Q: So as far as you're concerned all of the actions of Dr. Henley, then Dr. Hawks, met the standard of care for a resident physician?
> A: Yes. For a resident physician, yes.

Weber Depo. [Ex. E, Exhibit A thereto], p. 92:15-19.

> Q. So you would expect Dr. Caceres, that once he is told about the blood gas results, that that is when you would find that he needed to intervene with the patient?
> A. In terms of airway management, yes.
> Q. And airway management is your exclusive criticism in this case?
> A. Yes.
>
> ...
>
> Q: And you have no basis or fact to dispute Dr. Caceres' testimony that the blood gas was first available to him when he arrived; correct?
> A: Correct.
> Q. And after he arrived, he immediately, timely and appropriately completed an intubation?
> A. Correct.

Id. at pp. 106:17-24, 111:17-25.

> Q. So, with respect to the timing of intubation, once Dr. Caceres had the available blood gas, he acted appropriately and within the standard of care; right?
> A. Yes. Once he had the result, that's correct.

Id. at p. 112:2-7.

While it is correct that studies were done to evaluate the patient's respiratory status, there was no expert testimony of any standard of care issue relative to the same. *See generally id.*

Returning to the time line, in the 2:30 a.m. to 3:45 a.m. time period, the patient was treated with anti-seizure medication. Caceres Depo. [Ex. D, Exhibit E thereto], pp. 41:24 – 42:20. Dr. Caceres had informed Dr. Hawks that if the initial medications did not appear to be working such that the patient may need the medication Phenobarbital, that he was to be notified immediately because that may indicate that the virus-induced brain inflammation was quite virulent. *Id.* at pp. 40:8-12, 42:10-14. Unfortunately, the patient did require that medication. *Id.* at p. 40:8-12. Dr. Hawks notified Dr. Caceres of that at about 3:35 a.m. and he came to the hospital with the plan to sedate the patient and place her on a ventilator for support. *Id.* at pp. 33:6-18, 40:9-14, 43:6-14, 62:14-23. As stated, Dr. Weber testified that there was no negligence on the part of Dr. Caceres through 3:45 a.m.

Dr. Caceres arrived to the hospital between 3:40 a.m. and 3:50 a.m. *Id.* at pp. 33:6-7, 43:3-5, 51:1 – 52:24, 62:9-13; *see also* Petitioner's Brief, p. 8; *see also* [Ex. R, ¶ 27]; *see also* Weber Depo. [Ex. E, Exhibit A thereto], pp. 107:18-22, 111:17-21.

It was and is the arterial blood gas result which Petitioner's expert, Dr. Weber testified was the trigger for intubation and placement on a ventilator. It was the arterial blood gas result that Dr. Weber testified was the duty owed by Dr. Caceres which was at issue in this case:

> Q. So you would expect Dr. Caceres, that once he is told about the blood gas results, that that is when you would find that he needed to intervene with the patient?
> A. In terms of airway management, yes.
> Q. And airway management is your exclusive criticism in this case?
> A. Yes.
>
> ...

Q. Okay. So I want to make sure. You have no criticism of Dr. Caceres before 3:45 a.m.; correct?
A. I don't have any criticism prior to the time that he was aware or should have been aware of the blood gas result. That's correct.

...

Q. And all of his other care was at all times appropriate and within the standard of care?
A. I believe so, yes.

Weber Depo. [Ex. E, Exhibit A thereto], pp. 106:17-24, 108:8-14, 108:23 – 109:1.

Q. And once he was aware of the blood gas result, Dr. Caceres completed the intubation effectively and timely, did he not?
A. That's correct. Once he arrived in the unit, it was a rapid sequence, intubation that was done without any apparent complications.

...

Q: And you have no basis or fact to dispute Dr. Caceres' testimony that the blood gas was first available to him when he arrived; correct?
A: Correct.
Q. And after he arrived, he immediately, timely and appropriately completed an intubation?
A. Correct.

Id. at pp. 108:15-22, 111:17-25.

Q. So, with respect to the timing of intubation, once Dr. Caceres had the available blood gas, he acted appropriately and within the standard of care; right?
A. Yes. Once he had the result, that's correct.

Id. at p. 112:2-7.

Therefore, the sole standard of care question presented from these facts as defined by Dr. Weber was, once the arterial blood gas result was available to Dr. Caceres, did he act appropriately and within the standard of care in proceeding to intubate this patient? The uncontested facts and Dr. Weber's testimony answered this question with an uncontroverted "yes."

Beginning with the arrival of Dr. Caceres, it was undisputed that the first time the arterial blood gas result (the trigger for intubation) was available was when he arrived at the bedside. Caceres Depo. [Ex. D, Exhibit E thereto], pp. 33:6-7, 43:3-5, 62:9-13. Dr. Caceres immediately proceeded to intubate the patient and place her on a ventilator. *Id.* at pp. 48:5-17, 53:1 through 54:14. He also took other actions to treat the patient.

Petitioner's statement in her recitation of facts that there was a dispute concerning the timing of intubation is not only wrong but irrelevant. Dr. Weber testified that there was no material fact in dispute that the study results became available after Dr. Caceres arrived and once available, Dr. Caceres acted appropriately and within the standard of care. Weber Depo. [Ex. E, Exhibit A thereto], pp. 106-109, 111-112; *see also* Caceres Depo. [Ex. D, Exhibit E thereto], pp. 48:5-17, 53:1 through 54:14.

The La Crosse Virus is a dangerous virus. When it attacks the brain, it causes death because there is no treatment for it. Weber Depo. [Ex. E, Exhibit A thereto], p. 20:6-16; Caceres Depo. [Ex. D, Exhibit E thereto], pp. 87:14 – 88:5. The dispute between Petitioner and CAMC and the conduct of the CAMC nurses in the treatment room involved the IV and the patient's breathing while the IV was being started. Those issues were not standard of care or causation issues advanced against Pediatrix in the case below. The trial court was correct and should be affirmed.

III. SUMMARY OF ARGUMENT

The trial court properly granted Summary Judgment in favor of Pediatrix. The sole issue of potential liability was defined by Petitioner's expert as: "once Dr. Caceres was told about the blood gas results, he needed to intervene with the patient in terms of airway management (intubation)." The trial court correctly found that Petitioner failed to make a *prima facie* case of

medical professional liability against Pediatrix through her expert. There was no material issue of fact or law in dispute as to this Respondent and this Court should AFFIRM the trial court's ruling.

IV. STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not necessary given the plain and unequivocal record below. W. VA. R. APP. P. 12(c). Petitioner's attempt to mislead the Court through assertions of factual controversy should be rejected given the plain admission by her expert setting out the duty to address the blood gas finding as the sole issue of liability and that Pediatrix discharged that duty within the standard of care. The factual recitation relates to Petitioner's claims against the former defendant, CAMC and not Pediatrix. If this Court has any question not resolved herein or by review of Dr. Weber's deposition testimony in context of the Court's Order Granting Summary Judgment, the ten (10) minute oral argument window is adequate. W. VA. R. APP. P. 18(a), 19.

V. ARGUMENT

A. Summary Judgment Standard of Review

"A circuit court's entry of summary judgment is reviewed *de novo*." Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Summary Judgment is proper where the record demonstrates "that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." W. VA. R. CIV. P. 56; *Mueller v. American Electric Power Energy Services*, 214 W. Va. 390, 392-93, 589 S.E.2d 532, 534-35 (2003). Summary Judgment should be granted "when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, *Aetna Casualty & Surety Co. v. Federal Ins. Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963). In other words, "[s]ummary judgment is appropriate if, from the totality of the evidence

presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove. Syl. Pt. 2, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995). "The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." *Painter* at Syl. Pt. 3.

Petitioner in this circumstance presented to the trial court no Rule 56(e) affidavit or sworn testimony from Dr. Weber or any other medical expert to refute or to establish that once the arterial blood gas report was available, negligence occurred:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, *by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.*

W. VA. R. CIV. P. 56(e) (*emphasis supplied*). Petitioner did not attempt to (1) rehabilitate the evidence attacked by Pediatrix, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery was necessary. *Williams* at Syl. Pt. 1.

Petitioner contends that the trial court orally stated at the July 15, 2011 Pre-Trial Conference that no further discovery was to be had; however, the parties continued voluntarily to engage in discovery after that point in time and the Petitioner never filed a motion or presented the trial court with any Rule 56(e) material notwithstanding having that extended opportunity to do so. There is no Order in the record below prohibiting discovery. The Order reset the trial date and the parties engaged in discovery thereafter. Petitioner had access to the Court and could have utilized the Rules of Procedure to seek discretionary action by the Court. Petitioner did not.

Instead, Petitioner provided the trial court with unsupported speculation and conjecture regarding the availability of the blood gas result, which the trial court properly determined to be insufficient to defeat Pediatrix's Motion for Summary Judgment. *Id.* at 60-61, 459 S.E.2d at 337-38 ("[U]nsupported speculation is not sufficient to defeat a summary judgment motion." Furthermore, "the evidence illustrating the factual controversy cannot be conjectural or problematic."). The trial court also correctly understood that while it is true that "the nonmoving party is entitled to the most favorable inferences that may reasonably be drawn from the evidence, such evidence 'cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another.'" *Marcus v. Holley*, 217 W. Va. 508, 516, 618 S.E.2d 517, 525 (2005), *citing Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985). Therefore, the trial court appropriately granted Pediatrix's Motion for Summary Judgment.

B. <u>The Trial Court Correctly Found That Petitioner Had Not Established a *Prima Facie* Case of Medical Negligence Against Pediatrix Medical Group, P.C.</u>

In a medical negligence case the duty is upon the injured party to establish duty, breach of duty, causation and damages. W. VA. CODE § 55-7B-3 (2003); Syl. Pts. 3, 6, *Farley v. Shook, et al.*, 218 W. Va. 680, 629 S.E.2d 739 (2006); Syl. Pt. 4, *Daniel v. Charleston Area Medical Center,* 209 W. Va. 203, 544 S.E.2d 905 (2001). Petitioner agreed that expert testimony was required for her to establish her case. Dr. Weber, her expert, defined the standard of care issue as: "once Dr. Caceres was told about the blood gas results, he needed to intervene with the patient in terms of airway management (intubation)." Having defined the issue, Dr. Weber than admitted that there was no material issue of fact in dispute as to Pediatrix relative to the same:

> Q. So you would expect Dr. Caceres, that once he is told about the blood gas results, that that is when you would find that he needed to intervene with the patient?
> A. In terms of airway management, yes.
> Q. And airway management is your exclusive criticism in this case?

A. Yes.

...

Q. Okay. So I want to make sure. You have no criticism of Dr. Caceres before 3:45 a.m.; correct?
A. I don't have any criticism prior to the time that he was aware or should have been aware of the blood gas result. That's correct.

...

Q. And all of his other care was at all times appropriate and within the standard of care?
A. I believe so, yes.

Weber Depo. [Ex. E, Exhibit A thereto], pp. 106:17-24, 108:8-14, 108:23 through 109:1.

Q. And once he was aware of the blood gas result, Dr. Caceres completed the intubation effectively and timely, did he not?
A. That's correct. Once he arrived in the unit, it was a rapid sequence, intubation that was done without any apparent complications.

...

Q: And you have no basis or fact to dispute Dr. Caceres' testimony that the blood gas was first available to him when he arrived; correct?
A: Correct.
Q. And after he arrived, he immediately, timely and appropriately completed an intubation?
A. Correct.

Id. at pp. 108:15-22, 111:17-25.

Q. So, with respect to the timing of intubation, once Dr. Caceres had the available blood gas, he acted appropriately and within the standard of care; right?
A. Yes. Once he had the result, that's correct.

Id. at p. 112:2-7.

There is no material dispute of fact that the blood gas result was not available to Dr. Caceres prior to the time he arrived at the hospital:

Q: Okay. Was that [blood gas result] related to you, Doctor?
A: When?

Q: At any time. At any time that night -- at any time that night?
A: Yes, the blood gas result was related to me by the respiratory therapist when I arrived.

Caceres Depo. [Ex. D, Exhibit E thereto], p. 33:2-7.

Q: Did you -- when did you learn the results of that venous blood gas?
A: When I came in.

Id. at p. 43:3-5.

Q: Did you first learn of the blood gas when you arrived at the hospital or did you learn it at home?
A: No, I learned when I arrived at the hospital.

Id. at 62:9-13.

The trial court appropriately applied Dr. Weber's own testimony that the duty that Dr. Caceres had regarding the airway arose when the blood gas result was available to him and that the undisputed fact in the case is and was that the result was not available until Dr. Caceres was at the bedside and had already decided to intubate the patient.

Petitioner attempts, through argument only, to undermine the clarity with which the trial court reviewed this record and ruled. Petitioner's argument fails on the four corners of Dr. Weber's testimony alone. The trial court correctly understood the difference between the allegations against the settling defendant, CAMC, and Pediatrix. The trial court correctly applied the distinction between the two (2) defendants. The Petitioner elected to not even attempt to submit some Rule 56(e) material to the trial court. The absence of a disputed, material issue of fact or law was and remains uncontested on this record.

Petitioner now advances a new argument not presented to the trial court hypothecating that Dr. Weber was unable to given an opinion regarding when the blood gas result became available because a time was not in the medical record. Petitioner's failure to raise this objection/argument before the trial court constitutes waiver of the argument and it should not be

considered by this Court. *See* Syl. Pt. 1, *State v. Simons*, 201 W. Va. 235, 496 S.E.2d 185 (1997), *citing* Syl. Pt. 1, *State Road Commission v. Ferguson*, 148 W. Va. 742, 137 S.E.2d 206 (1964) ("Where objections were not shown to have been made in the trial court, and the matters concerned were not jurisdictional in character, such objections will not be considered on appeal."). Moreover, opinion by Dr. Weber is not fact. The fact is and was that the test result was available first when Dr. Caceres was already present. Dr. Weber admitted he had no fact to dispute Dr. Caceres' first-hand knowledge:

> Q: And you have no basis or fact to dispute Dr. Caceres' testimony that the blood gas was first available to him when he arrived; correct?
> A: Correct.

Weber Depo. [Ex. E, Exhibit A thereto], p. 111:17-21.

Petitioner alternatively blames either her counsel for not asking the right question or Dr. Caceres for not volunteering information about the publication of the blood gas result to him. Likewise, this argument was not presented to the court-below and should be disregarded. *See* Syl. Pt. 1, *Simons*, 201 W. Va. 235, 496 S.E.2d 185, *citing* Syl. Pt. 1, *State Road Commission*, 148 W. Va. 742, 137 S.E.2d 206. Notwithstanding, this argument is wrong. Dr. Caceres testified that the test result was not available to him until he arrived at the hospital. Caceres Depo. [Ex. D, Exhibit E thereto], pp. 33:6-7, 43:3-5, 62:9-13. Dr. Weber testified that once Dr. Caceres had the blood gas result he appropriately and within the standard of care managed the issue. Weber Depo. [Ex. E, Exhibit A thereto], pp. 108:15-22, 112:2-7.

Petitioner had three (3) years to develop her case. She was granted a continuance by the trial court and did not seek leave to add a new expert and did not attempt to rehabilitate Dr. Weber. The reason for inaction was and remains clear: Pediatrix was not involved during the time of the alleged negligence by CAMC employees during the time of the IV incident.

Pediatrix was not a part of the inciting event during which seizures began. Dr. Weber admitted that the resident physician, Dr. Hawks met the standard of care and agreed that he had no criticisms of Dr. Caceres prior to 3:45 a.m. Pediatrix's duty arose when Dr. Caceres was first informed of the blood gas result upon his arrival at the hospital, which occurred after he had already planned to place the patient on a ventilator, and once given the test result Dr. Caceres executed his duty within the standard of care. If Petitioner now attempts to challenge the veracity of Dr. Caceres' testimony regarding when the blood gas results were available, Petitioner failed to use the discovery process to establish a genuine issue of material fact contrary to Dr. Caceres' first-hand and unchallenged knowledge and testimony. The trial court had no fact presented to it by Petitioner contrary to Dr. Caceres' and Dr. Weber's own sworn testimony and therefore properly found that Petitioner's unsupported speculation and conjecture failed to create a genuine issue of material fact sufficient to defeat Pediatrix's Motion for Summary Judgment. W. VA. R. CIV. P. 56; *Marcus v. Holley*, 217 W. Va. 508, 516, 618 S.E.2d 517, 525 (2005), *citing Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985).

Petitioner cites but fails to properly apply the *Fout-Iser* decision with respect to the instant matter, and specifically the issue of standard of care. *Estate of Fout-Iser ex rel. Fout-Iser v. Hahn*, 220 W. Va. 673, 649 S.E.2d 246 (2007). In that case, plaintiff's expert witness, Dr. Dicke testified that it was his opinion that defendant violated the standard of care by failing "to provide some additional either guidance or direction by himself or somebody else that would allow him to be comfortable rendering an interpretation of the patient and the images that he received." *Id.* at 677, 649 S.E.2d at 250. Dr. Weber never testified that Dr. Caceres violated or breached the standard of care. Dr. Weber testified that the duty of care arose when the blood gas results were available to Dr. Caceres. Dr. Weber admitted that the facts of the case were that the

results were not available until Dr. Caceres was already prepared to intubate the patient. He testified that once Dr. Caceres had that information, he met the applicable standard of care. Weber Depo. [Ex. E, Exhibit A thereto], pp. 106:17-24, 108:8 through 109:1, 111:17-25, 112:2-7. The *Fout-Iser* decision affirms the trial court's decision.

Petitioner also argues that the trial court incorrectly concluded that Dr. Weber admitted that Dr. Caceres met the applicable standard of care. Petitioner fails to divulge to the Court that Dr. Weber did just that:

> Q. So, with respect to the timing of intubation, once Dr. Caceres had the available blood gas, he acted appropriately and within the standard of care; right?
> A. Yes. Once he had the result, that's correct.

Weber Depo. [Ex. E, Exhibit A thereto], p. 112:2-7.

Put simply, Petitioner failed to rehabilitate the evidence attacked by the moving party, produce additional evidence showing the existence of a genuine issue for trial, or submit an affidavit explaining why further discovery is necessary. Syl. Pt. 1, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995). Each of Petitioner's arguments on standard of care is flawed because of her reliance on unsupported assertions, mere possibilities and speculation. The trial court properly granted Summary Judgment for Pediatrix on the basis that Petitioner has not and cannot present *prima facie* evidence that Dr. Caceres violated the applicable standard of care. Consequently, this Court should AFFIRM the trial court's decision.

Petitioner also presents a new assignment of error regarding the trial court's proper decision that Petitioner failed to create a genuine issue of material fact on the issue of proximate causation. Petitioner failed to include that assertion as an assignment of error in her Notice of Appeal. Petitioner's failure to raise this issue in her Notice of Appeal constitutes waiver of the

argument and it should not be considered by this Court. *See* Syl. Pt. 1, *Simons*, 201 W. Va. 235, 496 S.E.2d 185, *citing* Syl. Pt. 1, *State Road Commission*, 148 W. Va. 742, 137 S.E.2d 206.

In any event, the trial court properly found that Petitioner was unable to present a *prima facie* case of medical negligence as to Pediatrix because she did not present any fact or basis indicating a causal relationship between Dr. Caceres' actions and the patient's death. W. VA. CODE § 55-7B-3(a) (2003). The trial court correctly found that Petitioner's expert, Dr. Weber, did not provide testimony that the patient's death occurred as a result of Dr. Caceres' actions, without which she would have lived. *Webb v. Sessler*, 135 W. Va. 341, 347-48, 63 S.E.2d 65, 68 (1950) (citations omitted) (holding that West Virginia defines the "proximate cause" of an injury as "the last negligent act contributing thereto, without which such injury would not have resulted" and it "must be understood as that cause which, in actual sequence, unbroken by any independent cause, produced the event, without which such event would not have occurred."); *see also McCoy v. Cohen*, 149 W. Va. 197, 214, 140 S.E.2d 427, 438-39 (1965) (citations omitted) ("One requisite of proximate cause is . . . that such act or omission did produce the injury.").

Dr. Weber testified that the patient's death occurred either due to an acute hypoxic event due to an inability to move air for a period of time, or because of her infection with the La Crosse Virus and development of La Crosse Encephalitis. Dr. Weber admitted that his theory regarding an acute hypoxic event, which would occur because of insufficient oxygenation, was unsupported by the record:

> Q. What evidence is there that she was not moving air for several minutes?
> A. I don't have any evidence in the record. That's what I was alluding to. Up until the time -- Even through the time she was in the unit, the monitoring would not seem to be consistent with that.

Q. Indeed, the evidence, at least from the people who were involved in the care of the patient at that time, is all supportive of the notion that the patient was able to move air?
A. And would be indicated by the record, that's correct.
Q. And if the patient is able to move air, how it is that there's a hypoxic ischemic event that occurs?
A. If the patient was, in fact, moving air adequately, there wouldn't . . .

Weber Depo. [Ex. E, Exhibit A thereto], pp. 46:25 – 47:19.

As to Dr. Caceres, the testimony was:

Q. Even if someone assumes that the blood gas result should have been given to Dr. Caceres earlier, you cannot quantify any injury that happened to this patient because of the blood gas not being given to him before 3:50 a.m., isn't that true?
A. Correct. And the delay in intubation, I can't quantify it.
Q. You cannot say more likely than not that this patient would have lived if the blood gas value would have been given to Dr. Caceres earlier?
A. That's correct.

Id. at p. 112:8-20.

Just as with the issue of standard of care, Petitioner's citation to the *Fout-Iser* decision is unpersuasive. *Fout-Iser*, 220 W. Va. 673, 649 S.E.2d 246 (2007). In *Fout-Iser*, plaintiff's causation expert, Dr. McLaughlin, testified that the delay in ultrasound contributed to the death of the fetus and that he was certain within a reasonable degree of medical certainty that the outcome for the fetus would have been different but for such delay. *Id.* at 678, 649 S.E.2d at 2251. In contrast, Dr. Weber specifically admitted that he could not opine that AD would have survived if the blood gas results had been given to Dr. Caceres earlier. As such, the *Fout-Iser* decision supports the trial court's ruling with respect to Pediatrix's Motion for Summary Judgment.

Therefore, the trial court properly granted Summary Judgment for Pediatrix on the basis that Petitioner has not and cannot present *prima facie* evidence that Dr. Caceres proximately

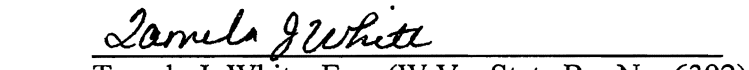
caused or contributed to AD's death. Consequently, this Court should AFFIRM the trial court's decision.

VI. CONCLUSION

WHEREFORE, for the foregoing reasons, and others which may be apparent to this Court, the Petitioner has failed to demonstrate that the trial court improperly granted Summary Judgment for Pediatrix Medical Group, P.C. Therefore, Petitioner's appeal should be DENIED and the Court should AFFIRM the trial court's decision to grant Summary Judgment to Pediatrix Medical Group, P.C.

PEDIATRIX MEDICAL GROUP, P.C.,
Respondent and Defendant Below,

By Counsel.



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 12-1069

TRESA DELLINGER, Individually and in her capacity as Executrix of the Estate of AMBER DELLINGER, deceased

Petitioner/Plaintiff Below,

v.

Appeal from a final order from the Circuit Court of Kanawha County (09-C-681)

PEDIATRIX MEDICAL GROUP, P.C.,

Respondent/Defendant Below.

CERTIFICATE OF SERVICE

I, the undersigned counsel for Defendant, Pediatrix Medical Group, P.C., do hereby certify that I served the foregoing ***Brief on Behalf of the Respondent, Pediatrix Medical Group, P.C.*** on this the 11th day of January, 2013, via U.S. Mail, postage prepaid, upon the following counsel of record:

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