IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

2022 AUG 29 PM 1:30

CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

MICHELLE STOUDT,

Plaintiff,

v.

Civil Action No. 20-C-874
Honorable Jennifer Bailey

KRISTEN P. EADS, M.D.,

Defendant.

ORDER

Pending before this Court is Defendant, Kristen P. Eads, M.D.'s ("Dr. Eads" and/or "Defendant") Motion for Summary Judgment. After hearing argument of counsel and considering Dr. Eads' Motion for Summary Judgment, Plaintiff's Response thereto, and Dr. Eads' reply Brief, upon mature consideration and for good cause shown, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On January 13, 2012, Plaintiff underwent a cesarean section, or "c-section" performed by Dr. Osterman Cotes.

2. It is undisputed that Dr. Eads did not participate in the Plaintiff's January 13, 2012, procedure.

3. After the January 13, 2012, procedure, Plaintiff developed abdominal pain.

4. By late 2016, Plaintiff was still experiencing the abdominal pain that had begun after the 2012 c-section.

5. On December 13, 2016, Plaintiff underwent another abdominal surgical procedure, during which Dr. Cotes and Dr. Bassam N. Shamma performed an ovarian cystectomy on the plaintiff, and Dr. Eads performed an appendectomy.

6. This December 13, 2016, procedure was the first time Dr. Eads ever treated the patient.

7. Plaintiff continued to have abdominal pain after the December 13, 2016, procedure, and the pain was the same or similar as the pain she experienced in the years prior to the procedure.

8. On July 2, 2018, the plaintiff underwent another c-section procedure. During this procedure, a foreign body was incidentally found and removed from the patient's abdomen. The doctor who performed the procedure noted that the foreign body looked to be an Endocatch bag.

9. The foreign body was sent to pathology, where it was examined by a pathologist. The pathology report of the examination described the foreign body as "a role [sic] of plastic film."

10. Plaintiff testified that the stomach pain she had been experiencing since her c-section in 2012 ended after the foreign body was removed in 2018.

11. However, Plaintiff's medical records from 2019 document continued abdominal pain the last 3 years, and in fact, she underwent a gallbladder removal surgery in October 2019 because of this continued epigastric pain.

12. Plaintiff filed this lawsuit on October 6, 2020, against Dr. Eads as well as Dr. Cotes and Dr. Shamma. *See* Compl. Plaintiff alleged the same claims of medical negligence against the three doctors based on the foreign object being left behind in her abdomen, though she was unable to allege which of the three physicians was responsible for it. *See* Compl. ¶ 10.

13. However, Dr. Cotes and Dr. Shamma were subsequently dismissed from this action with prejudice on statute of limitations grounds. As such, Dr. Eads is the only remaining defendant.

14. There is no dispute that Defendant Eads utilized an Endocatch bag as part of the appendectomy performed on Plaintiff and the surgeons performing the cystectomy do not mention using an Endocatch bag. However, there is also evidence that Seprafilm, a filmy adhesion barrier that is intentionally left in a patient's body cavity to prevent adhesions, was implanted in the Plaintiff's abdomen during her 2012 c-section performed by Dr. Cotes and Dr. Shamma.

15. The medical records and expert testimony in this case show that the patient had a variety of other health problems that could have caused her abdominal pain. For example, among other issues, the plaintiff had been injured in a car accident in 2012, had stones in her gallbladder, a contracted gallbladder, gallbladder attack, hepatitis, pancreatitis, and engaged in drug abuse, and Plaintiff's expert Dr. Kaniewski admitted each of these issues could cause abdominal pain.

16. Plaintiff's expert Dr. Kaniewski testified to a reasonable degree of medical probability that *she could not* be certain of whether or which instances of the plaintiff's abdominal pain were due to a foreign body or other multiple causes. Specifically, Dr. Kaniewski testified during her deposition:

> Q. That it's your opinion that the cause of some of the patient's pain over the last several years may have been related to the missed foreign body—
>
> A. Yes.
>
> Q.—but you cannot be certain of which pain is related as the medical records are not consistently reporting the location of it. Do you agree with that statement?
>
> A. Yes.
>
> Q. Yes?
>
> A. Yes.
>
> Q. All right. And you hold that – and you agree to that statement to a reasonable degree of medical probability, right?

A. Yeah. There's a lot of – a lot going on with this patient.

Q. Right. In other words, what you're saying here, under proximate cause, is you can't be certain of which pain is due to a foreign body or other multiple causes because of how the records describe the different locations. That's what you're saying, right?

A. I guess, putting it one way, yes.

CONCLUSIONS OF LAW

1. Under Rule 56 of the West Virginia Rules of Civil Procedure, summary judgment is proper where the moving party 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. *Painter v. Peavy*, 451 S.E.2d 755, 758 (W. Va. 1994).

2. The West Virginia Supreme Court of Appeals consistently has held that a motion for 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." *Id.* at Syl. Pt. 2.

3. "Summary 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.*, 459 S.E.2d 329 (W. Va. 1995) (emphasis added).

4. A "nonmoving party, in order to defeat a motion for summary judgment, must show that there will be sufficient competent evidence available at trial to warrant a finding favorable to the nonmoving party." *Chafin v. Gibson*, 578 S.E.2d 361, 365 (W. Va. 2003) (citing *Williams*, 459 S.E.2d at 337-38). "[T]he West Virginia Rules of Civil Procedure, as well as the judicial pronouncements of [the Supreme Court of Appeals of West Virginia], unequivocally state that a party opposing a motion for summary judgment may not rest upon mere allegations

or denials; rather, through his response by affidavits or otherwise, he must provide specific facts showing that there is a genuine issue for trial." *Id.* at 368. Importantly, "[a] non-moving party 'cannot create a genuine issue of material fact through a mere speculation or the building of one inference upon another.'" *Id.* (citing *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985)).

5. This is a medical professional liability action and is governed by the West Virginia Medical Professional Liability Act ("MPLA"), W. Va. Code § 55-7B-1, *et seq.*

6. Pursuant to the MPLA, in order to prove that an injury resulted from the failure of a health care provider to follow the applicable standard of care, the following elements must be proven through expert testimony:

> (a) The following are necessary elements of proof that an injury or death resulted from the failure of a health care provider to follow the accepted standard of care:
>
> (1) The health care provider failed to exercise that degree of care, skill and learning required or expected of a reasonable, prudent health care provider in the profession or class to which the health care provider belongs acting in the same or similar circumstances; and
>
> (2) Such failure was a proximate cause of the injury or death.

W. Va. Code § 55-7B-3; *see also* Syl. Pt. 4, *Dellinger v. Pediatrix Med. Group, P.C.*, 750 S.E.2d 668 (W. Va. 2013) (quoting Syl. Pt. 4, *Short v. Appalachian OH-9, Inc.*, 507 S.E.2d 124 (W. Va. 1998)) ("In a malpractice case, the plaintiff must not only prove negligence but must also show that such negligence was the proximate cause of the injury."). "It is the general rule that in medical malpractice cases negligence or want of professional skill can be proved only by expert witnesses." Syl. Pt. 3, *Dellinger*, 750 S.E.2d 668 (quoting Syl. Pt. 2, *Roberts v. Gale*, 139 S.E.2d 272 (W. Va. 1964)).

7. While there may be a genuine dispute of material fact as to what the foreign object in Plaintiff actually was and who left it there, Plaintiff has failed to put forth evidence that

the object was the proximate cause of her damages. Even if Plaintiff were able to prove that the foreign object was left in her abdomen in 2016 and that it was left by Dr. Eads and not another surgeon, Plaintiff clearly had other conditions causing her abdominal pain, as she had been suffering from such pain for 4 years prior to her 2016 surgery, per her own testimony.

8. The evidence shows that, among other issues, the plaintiff had been injured in a car accident in 2012, had stones in her gallbladder, a contracted gallbladder, gallbladder attack, hepatitis, pancreatitis, and engaged in drug abuse, and Plaintiff's expert Dr. Kaniewski admitted each of these issues could cause abdominal pain.

9. Plaintiff's expert, Dr. Kaniewski, specifically testified to a reasonable degree of medical probability that she could not be certain of whether or which instances of the plaintiff's abdominal pain were due to a foreign body or other multiple causes.

10. Plaintiff therefore has presented no expert testimony by which she could prove that her abdominal pain was caused by the foreign object.

11. Under West Virginia law, expert testimony is required to prove that the alleged negligence proximately caused the plaintiff's injury. *Dellinger*, 750 S.E.2d at 677-78 (quoting *Short v. Appalachian OH–9, Inc.*, 507 S.E.2d 124, 132 (W. Va. 1998)). "Moreover, the expert who testifies as to proximate causation must 'state the matter in terms of a reasonable probability.'" *Id.* at Syl. Pt. 4 (granting summary judgment to Defendant where Plaintiff's experts could not testify to a reasonable degree of medical probability that Defendant's alleged negligence proximately caused the injury). The Supreme Court of Appeals has held that proximate cause cannot be based on speculation, and that a medical expert's failure to establish proximate cause through their testimony is fatal to a Plaintiff's case. *Id.* at 677.

12. Without expert testimony to prove proximate cause, Plaintiff cannot prove an essential element of her claim.

13. Because Plaintiff has failed to establish a *prima facie* case of medical negligence, the Court grants judgment in favor of Dr. Eads.

Based upon the above findings of fact and conclusions of law, the Court hereby GRANTS Defendant's Motion for Summary Judgment.

Accordingly, this matter is **DISMISSED** and **STRICKEN** from the active docket of this Court. The Circuit Court Clerk is hereby **DIRECTED** to send a certified copy of this **ORDER** to all interested parties and counsel of record.

ENTERED this 25th day of August 2022.

Jennifer F. Bailey

Jennifer F. Bailey, Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 29 DAY OF August, 2022
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA