IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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MICHELLE STOUDT,

Petitioner,

vs.

Case No. 22-ICA-159
(20-C-874)

KRISTEN P. EADS, M.D.,

Respondent.

PETITIONER'S BRIEF

Todd Wiseman, WV Bar #6811
WISEMAN LAW FIRM, PLLC
1510 Grand Central Avenue
Vienna, WV 26105
(304) 428-3006
todd@wisemanlawfirm.com

David A. Sims (W. Va. Bar No. 5196)
LAW OFFICES OF DAVID A. SIMS, PLLC
P.O. Box 5349
Vienna, West Virginia 26105
Phone (304) 428-5291
david.sims@mywvlawyer.com

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ASSIGNMENTS OF ERROR

Petitioner raises the following assignments of error for the Court's review on appeal:

I. **Granting summary judgment to Respondent was improper because, considering the evidence in the light most favorable to the Plaintiff, the Circuit Court erred in deciding that Michelle Stoudt did not meet her burden of proof on the issue of proximate cause.**

II. **The Circuit Court erred in determining that Plaintiff had to prove proximate cause to a reasonable degree of medical probability, as the Medical Professional Liability Act does not require it.**

STATEMENT OF THE CASE

A. Factual Summary:

This case is a medical professional liability claim arising under the Medical Professional Liability Act (MPLA) codified in W.Va. Code § 55-7B-1 filed by Petitioner Michelle Stoudt (hereinafter "Petitioner") against Respondent Kristen P. Eads, M.D. (hereinafter "Respondent" or "Respondent Eads", a surgeon in Kanawha County, West Virginia.

The facts contained in the record of this case confirm that on December 13, 2016, Plaintiff underwent two surgeries - an ovarian cystectomy and an appendectomy - in the same operating room, but which were performed by different physicians. (Appx. at 000077, 000067). Respondent Eads is the surgeon who performed an appendectomy on the Petitioner Michelle Stoudt and the only one to use an Endocatch bag during the procedure. (Appx. at 000067). These facts are important as they establish the factual basis for the deviation from the standard of care.

After performing the appendectomy upon Petitioner, Respondent Eads failed to account for all his medical supplies. Namely, the Respondent failed to account for an Endocatch bag that he had left in Petitioner's abdomen. (Appx. at 000001). He failed to account for it because he left it inside of the Petitioner, which the standard of care did not permit. In fact, everyone testified,

including Dr. Eads, that leaving the Endocatch bag behind is a breach of the standard of care. (Appx. at 000109).

In a subsequent cesarean surgery performed on July 2, 2018, Randall J. Hill, M.D., an OB physician, upon the Petitioner to deliver Petitioner's baby, discovered an Endocatch bag left behind by someone other than himself. (Appx. at 000295). The record before the Circuit Court confirmed that the surgeons who also performed surgery upon the Appellant on the same date as Respondent Eads did not utilize Endocatch bags as part of their medical instrument inventory. In fact, the only mention of anyone using an Endocatch bag was Respondent Eads. (Appx. at 000067). Petitioner claims that Respondent Eads negligently left the Endocatch bag inside of her and that he failed to account for the same post-surgery, in deviation of recognized standards of care. In fact, Respondent Eads conceded in his deposition that leaving behind an Endocatch bag would be a breach of the standard of care. (Appx. at 000109).

Petitioner claims that she suffered damages as a result of Respondent's negligent conduct - namely that she suffered pain as a direct result of the Endocatch bag being left in her abdomen. (Appx. at 000036).

B. Brief Procedural History

This civil action was filed on October 6, 2020. Initially, the Petitioner sued Dr. Osterman Cotes and Dr. Bassan N. Shamma. Doctors Cotes and Shamma were dismissed from the case with prejudice on the grounds of statute of limitations issues. Dr. Kristen P. Eads ("Dr. Eads") remained in the case until the entire case was dismissed by dispositive motion on August 29, 2022. In the circuit court's dismissal of this civil action, it opined that the Petitioner could not prove that her damages were proximately caused by the negligence of Dr. Eads. The Circuit Court further opined that the MPLA statute, W.Va. Code § 55-7B-1, *et seq.*, placed the burden upon the Petitioner to

prove the proximate cause of her injuries by expert testimony to a reasonable degree of medical probability. The MPLA does not place any such burden on Petitioner to do that. The MPLA requires the Petitioner to prove that her pain was proximately caused by the Respondent, which she did.

SUMMARY OF ARGUMENT

It was reversible error for the circuit court to grant the entry of summary judgment in favor of Respondent Eads on the basis that Plaintiff Stoudt could not establish proximate cause for the damages she was claiming resulting from the Endocatch bag that was left behind in her abdomen to a reasonable degree of medical probability.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to R.A.P. 10(c)(6), oral argument is necessary as the dispositive issues would be significantly aided by oral argument. Petitioner requests that the Court set this matter for argument because the case involves a result against the weight of the evidence and is deserving of the attention of these Justices of the Intermediate Court of Appeals.

STANDARD OF REVIEW

The Intermediate Court of Appeals should review the Circuit Court's granting of summary judgment using a *de novo* standard of review. Syl. Pt. 1, *Painter v. Peavy*, 451 S.E.2d 755 (W.Va. 1994).

DISCUSSION OF ASSIGNMENTS OF ERROR

I. Granting summary judgment to Respondent was improper because, considering the evidence in the light most favorable to the Plaintiff, there was sufficient evidence creating a genuine issue of material fact on the issue of pain being caused by the Endocatch bag.

"A motion for summary judgment should be granted only 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." *Andrick v. Town of Buckhannon*, 421 S.E.2d 247, 249 (W.Va. 1992). "A party is not entitled to summary judgment unless the facts established show a right to judgment with such clarity as to leave no room for controversy and show affirmatively that the adverse party cannot prevail under any circumstances." *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 133 S.E.2d 770, 777 (W.Va. 1963).

Summary judgment is not favored, and on appeal from an order granting summary judgment, the facts will be viewed in the light most favorable to the losing party. *Andrick v. Town of Buckhannon*, 421 S.E.2d 247, 249 (1992) (citing *Masinter v. WEBCO Co.*, 262 S.E.2d 433 (W.Va. 1980)). Syllabus point five of *Jividen v. Law*, 461 S.E.2d 451 (W.Va. 1995), defines "genuine issue" in the following manner: "Roughly stated, a 'genuine issue' for purposes of West Virginia Rule of Civil Procedure 56(c) is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trialworthy issue is present where the non-moving party can point to one or more disputed 'material' facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law."

Petitioner established by her own testimony that she was experiencing pain in the area where the Endocatch bag was found. (Appx. at 000036). Petitioner's expert witness Wanda

Kaniewski, M.D. testified during her deposition that it was more likely than not that some of the pain that Petitioner was experiencing was caused by the Endocatch bag. (Appx. at 000090). Respondent's expert witness Kurt Stahlfeld, M.D. testified that he was not going to testify at a trial in this case that the Endocatch bag was causing Petitioner's pain. (Appx. at 000283).

II. The Circuit Court erred in determining that Plaintiff had to prove proximate cause to a reasonable degree of medical probability, as the Medical Professional Liability Act does not require it.

As our Supreme Court of Appeals of West Virginia has said, "[i]t is the general rule that in medical malpractice cases negligence or want of professional skill can be proved only by expert witnesses." Syl. Pt. 2, *Roberts v. Gale*, 149 W.Va. 166, 139 S.E.2d 272 (1964); Syllabus point 1, *Farley v. Meadows*, 185 W.Va. 48, 404 S.E.2d 537 (1991)." Syl. pt. 3, *Farley v. Shook*, 218 W.Va. 680, 629 S.E.2d 739 (2006) (*per curiam*). "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." Syl. Pt. 4, *Short v. Appalachian OH–9, Inc.*, 203 W.Va. 246, 507 S.E.2d 124 (1998).

Respondent Eads took these two basic principles of law and implied in his Memorandum of Law in Support of Motion for Summary Judgment that the MPLA required Petitioner to prove proximate cause by expert testimony. (Appx. at 000013). However, the MPLA simply does not have that requirement. The MPLA simply requires a plaintiff to prove that the injury alleged was proximately caused by the healthcare provider's breach of the standard of care. In other words, a plaintiff must demonstrate that the injury he or she sustained was proximately caused by the negligence of the healthcare provider.

Petitioner provided ample evidence that the pain she was experiencing was caused by the Endocatch bag being left in her abdomen. First, Petitioner provided her own testimony that she

experienced pain in the abdomen in the area where the Endocatch bag was located. (Appx. at 000036). Second, Petitioner's expert witness Wanda Kaniewski, M.D. testified that the Endocatch bag could cause the pain Petitioner was experiencing. (Appx. at 000090). Finally, Respondent's expert witness testified that he was not going to say that the Endocatch bag did not cause her pain. (Appx. at 000283).

Because there were other potential causes of Petitioner's pain, the Circuit Court concluded that there was not sufficient evidence to support Petitioner's causation argument that the Endocatch bag was a proximate cause of her pain. The trial court based its position upon the argument that expert testimony is required to prove causation - and that such expert testimony required a threshold of reasonable degree of medical probability, but that analysis was simply wrong, as the statute and our case law in West Virginia does not have such a requirement.

The MPLA statutory scheme does not impose a threshold standard which requires a plaintiff to establish that pain, or damages, was *to a reasonable degree of medical probability proximately caused by a foreign body negligently left inside of a patient.* Rather, W.Va. Code § 55-7B-3 provides that:

> (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.

Our Supreme Court of Appeals of West Virginia has taken the position that Respondent Eads' interpretation of the statute is simply wrong. "Where a physician is testifying as to the causal relation between a given physical condition and the Respondent's negligent act, he need only state

the matter in terms of a reasonable probability." Syl. Pt. 3, *Hovermale v. Berkeley Springs Moose Lodge No. 1483*, 165 W.Va. 689, 271 S.E.2d 335 (1980); *see also*, *Dellinger v. Pediatrix Med. Grp., P.C.*, 232 W. Va. 115, 750 S.E.2d 668, 670 (2013) quoting Syl. Pt. 3 of *Hovermale*. In other words, Petitioner's expert was not required to testify that the Endocatch bag was a proximate cause of Petitioner's pain to a reasonable degree of medical probability. Those words simply do not exist in our statutory scheme or in the case law interpreting it. However, it was the Circuit Court's misapprehension of the law that caused it to make the wrong decision on summary judgment.

In *Dellinger v. Pediatrix Med. Grp. P.C.*, 232 W. Va. 115, 750 S.E.2d 668, 677 (2013), our Supreme Court of Appeals of West Virginia makes certain that litigants understand the importance of the opinion:

> While petitioner urges that the jury may nonetheless infer proximate cause notwithstanding her lack of medical testimony on this issue, we find there is quite simply nothing upon which a jury may make such an inference beyond abject speculation.

In the case *sub judice*, Petitioner simply is not relying on abject speculation to establish proximate cause. She has provided her testimony, the testimony of her expert witness, and the testimony of the Respondent's expert all in support of the issue on proximate cause. Syllabus Point 1 of *Pygman v. Helton*, 148 W.Va. 281, 134 S.E.2d 717 (1964), permits a party to survive summary judgment if the evidence is "of such character as would warrant a reasonable inference by the jury that the injury in question was caused by the negligent act or conduct of the Respondent." In *Pygman*, the Supreme Court of Appeals of West Virginia found that the expert's testimony clearly demonstrated the existence of proximate cause and rejected the notion that he was required to express causation by way of a " 'rigid incantation.' " *Sexton*, 216 W.Va. at 720, 613 S.E.2d at 87 (citing *Hovermale*, 165 W.Va. at 696, 271 S.E.2d at 340). As such, our Supreme Court found that the expert testimony was "of such character" as to permit the inference described in *Pygman. Id.*

Permitting a jury to draw inferences from evidence is not the functional equivalent of speculation. *See also* Syl. Pt. 4, *Kyle v. Dana Transport, Inc.*, 220 W.Va. 714, 649 S.E.2d 287 (2007) (requiring threshold showing in *res ipsa loquitur* cases of sufficient evidence "that will lead to reasonable inferences by the jury" as opposed to evidence "which would force the jury to speculate in order to reach its conclusion").

In *Sexton v. Grieco*, 216 W.Va. 714, 720, 613 S.E.2d 81, 87 (2005), our Supreme Court of Appeals of West Virginia found that it was reversible error for the trial court to grant judgment as a matter of law in favor of the Respondent doctors where the jury could reasonably infer causation from an expert's testimony. Plaintiff's expert testified to the effect that all other potential causes of plaintiff's injury were reasonably excluded as having caused plaintiff's injury, leaving only the negligence of the Respondent doctors. The trial court determined that due to plaintiff's attorney's failure to ask a " 'direct' question ... on the issue of proximate causation," plaintiff failed in her burden to establish causation. *Id.* at 717, 613 S.E.2d at 84.

In *Stewart v. George*, 216 W.Va. 288, 607 S.E.2d 394 (2004), our Supreme Court of Appeals of West Virginia found the entry of summary judgment erroneous where plaintiff's retained expert testified that the Respondent doctor's failure to diagnose and treat hyperglycemia created a risk factor which contributed to plaintiff's development of infection. Dismissing the Respondent doctor's argument that the expert did not exclude every other possible contributing cause, our Supreme Court found that the expert's testimony clearly reflected his opinion that the doctor's negligence was a causative factor in his development of an infection. *Id.* at 293, 607 S.E.2d at 399. *See also, Dellinger v. Pediatrix Med. Grp., P.C.*, 232 W. Va. 115, 124, 750 S.E.2d 668, 677 (2013). As the Justices of this Court can plainly see, Respondent Eads and the Circuit Court were relying on words and phrases that simply do not exist in the statute or in our case law.

Petitioner's expert, Respondent Eads' expert and Respondent Eads himself have all confirmed that leaving a foreign body inside of a patient, as happened to the Petitioner, could foreseeably result in pain. Petitioner has testified about her pain. (Appx. at 000036). While it may be the case that there were other pains that Petitioner was experiencing, and perhaps other causes of some of those pains, the existence of that pain is not a reason to grant summary judgment on the issue of proximate cause. *Stewart v. George*, 216 W.Va. 288, 607 S.E.2d 394 (2004). Petitioner simply met her burden of proof to overcome the entry of a Rule 56 Motion for Summary Judgment. The trial court's entry of summary judgment improperly deprived the Petitioner of the right to a jury trial. As the finder of fact, the jury was quite capable of hearing the evidence and evaluating proximate cause based upon the testimony that would have been elicited at a trial in this matter and making a decision as to what pain Petitioner was experiencing because of the Endocatch bag that was left in her abdomen by Dr. Eads.

Petitioner testified that she had abdominal pain, at times, in the location wherein the Endocatch bag was found. (Appx. at 000036). Petitioner's expert Wanda Kaniewski, M.D. testified that an Endocatch bag could have caused Petitioner to suffer pain. (Appx. at 000090). The pain caused by Respondent Eads' negligent deviation from accepted surgical standards of care, is clearly separate from other pain she may have experienced at times. Dr. Kaniewski testified about the pathophysiology of the pain caused by the foreign body to a reasonable degree of medical probability. (Appx. at 000090). Finally, Respondent Eads' expert witness, Kurt Stahlfeld, M.D. testified that he was not going to testify that the Endocatch bag did not cause Petitioner's pain. (Appx. at 000283). Petitioner has clearly demonstrated that Respondent Eads was not entitled to summary judgment, and that a trialworthy issue exists. Petitioner was simply deprived of her Seventh Amendment right to a trial by jury. A plaintiff does not have to show that the breach was

the sole proximate cause of the injury - e.g. pain - just a proximate cause. *Mays v. Chang*, 213 W.Va. 220, 579 S.E.2d 561 (2003).

CONCLUSION

As the Respondent Eads knows, there are genuine issues of material fact that precluded this Court's entry of an Order which granted him summary judgment. There is no dispute that an Endocatch bag is a foreign body and it is not intended to be left in the abdomen after surgery. There was sufficient testimony from expert witnesses to establish the proximate cause of Petitioner's pain in her abdomen was the Endocatch bag that was left behind by Respondent Eads.

Michelle Stoudt,
Petitioner By Counsel

Todd Wiseman, WV Bar #6811
WISEMAN LAW FIRM, PLLC
1510 Grand Central Avenue
Vienna, WV 26105
(304) 428-3006
todd@wisemanlawfirm.com

David A. Sims (W. Va. Bar No. 5196)
LAW OFFICES OF DAVID A. SIMS, PLLC
P.O. Box 5349
Vienna, West Virginia 26105
Phone (304) 428-5291
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Defendant/Respondent.

CERTIFICATE OF SERVICE

The undersigned counsel for the Plaintiff/Petitioner hereby certifies that on the 21st day of December, 2022, he served the foregoing **PETITIONER'S BRIEF** upon Salem C. Smith and Morgan E. Villers, counsel for Defendant/Respondent, by depositing a true and exact copy thereof in the United States Mail, postage prepaid, addressed as follows:

Salem C. Smith
Morgan E. Villers
FLAHERTY SENSABAUGH BONASSO, PLLC
200 Capitol Street
P. O. Box 3843
Charleston, WV 25338-3843

Todd Wiseman, WV Bar #6811
WISEMAN LAW FIRM, PLLC
1510 Grand Central Avenue
Vienna, WV 26105
Phone: (304) 428-3006
Fax: (304) 428-1304
email: todd@wisemanlawfirm.com

David A. Sims, WV Bar #5196
Law Offices of David A. Sims, PLLC
P. O. Box 5349
Vienna, WV 26105
Phone: (304) 428-5291
david.sims@mywvlawyer.com

Counsel for Plaintiff/Petitioner