In the Intermediate Court of Appeals of West Virginia

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MICHELLE STOUDT,

Plaintiff Below, Petitioner,

v. No. 22-ICA-159

KRISTEN P. EADS, M.D.,

Defendant Below, Respondent.

RESPONDENT'S BRIEF

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ASSIGNMENTS OF ERROR

Respondent, Kristen P. Eads, M.D. ("Defendant," "Dr. Eads," or "Respondent") responds to Petitioner's Assignments of Error below.

STATEMENT OF THE CASE

A. STATEMENT OF THE FACTS

On January 13, 2012, Petitioner and Plaintiff below, Michelle Stoudt ("Plaintiff," "Ms. Stoudt," or "Petitioner"), underwent a cesarean section, or "c-section" performed by Dr. Osterman Cotes. Appx. 0000002 (Compl. ¶ 8). It is undisputed that Dr. Eads did not participate in this procedure. After this procedure, Petitioner developed abdominal pain. Appx. 000004 (Compl. ¶ 25) ("Plaintiff had been suffering from abdominal pain since the C-section was performed on January 13, 2012[.]"); Appx. 000036-37 (Stoudt Dep. 36-40).

By late 2016, Petitioner was still experiencing the abdominal pain that had begun after the 2012 c-section. Appx. 000037, 000048 (Stoudt Dep. 39:17-24, 84:8-17). On December 13, 2016, Petitioner underwent another abdominal surgical procedure, during which Dr. Cotes and Dr. Bassam N. Shamma performed an ovarian cystectomy on the petitioner, and Dr. Eads performed an appendectomy. Appx. 0000002 (Compl. ¶ 9). These procedures were performed consecutively in the same operating room on the same day. This was the first time Dr. Eads ever treated the patient. Petitioner continued to have abdominal pain after this procedure, and she testified that the pain was the same as the pain she experienced in the years prior to the 2016 procedure. *See* Appx. 000037 (Stoudt Dep. 39:17-24).

On July 2, 2018, Petitioner underwent another c-section procedure. Appx. 0000003 (Compl. ¶ 12). During this procedure, a foreign body was incidentally found by the obstetrician in the omentum of the patient's abdomen and was removed. 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." Appx. 000053 (Pathology Report).[1] Petitioner testified that the stomach pain she had been experiencing since her c-section in 2012 ended after the foreign body was removed in 2018. Appx. 000037 (Stoudt Dep. 39:17-24). However, her medical records from 2019 document continued abdominal pain over the last 3 years, and in fact, she underwent a gallbladder removal surgery in October 2019 because of this continued epigastric pain. *See* Appx. 000075-78.

Petitioner disclosed Wanda Kaniewski, M.D. as her medical expert in this matter. Dr. Kaniewski was deposed regarding her opinions, and in her testimony admitted that the patient had a variety of health problems that could have caused her abdominal pain. For example, among other issues, Ms. Stoudt 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 Dr. Kaniewski admitted each of these issues could cause abdominal pain. Appx. 000088-90 (Kaniewski Dep. 71:22-79:14).

Moreover, Dr. Kaniewski testified as follows:

> Q. . . . I'm reading from your affidavit and I want to ask you if you agree with this statement that you swore to.

[1] While Petitioner alleges the foreign body was a "plastic bag" or "Endocatch bag" this is not supported by this evidence.

A. Okay.

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.

Appx. 90 (Kaniewksi Dep. 80:23-81:23).

Reiterating her opinions at the close of the deposition, Dr. Kaniewski further testified as follows:

Q. Okay. And you've told me how you believe the Endo Catch bag, as you put it, that was left in the patient's abdomen, as you believe – how that has caused [Ms. Stoudt] harm, right?

A. How that has what?

Q. How that has resulted in harm to Mrs. Stoudt. You've told me how that has happened, right?

A. So the only harm I can come up with is, is the abdominal pain, potentially, but –

Q. Right.

A. -- it's very – it's trickier to tell why because she has had a – a lot going on in the abdomen.

Appx. 000230 (Kaniewski Dep. 91:9-20).

B. RELEVANT PROCEDURAL HISTORY

Petitioner filed this lawsuit on October 6, 2020, against Dr. Eads as well as Dr. Cotes and Dr. Shamma. Petitioner 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* Appx. 0000002 (Compl. ¶ 10). However, Dr. Cotes and Dr. Shamma were subsequently dismissed from this action with prejudice on statute of limitations grounds. As such, Dr. Eads was the only remaining defendant. Dr. Eads moved the Circuit Court for summary judgment on the grounds that (1) there was no evidence which Plaintiff could use to establish that it was Dr. Eads, and not Dr. Cotes or Dr. Shamma, who left behind the foreign object in the plaintiff's abdomen; and (2) Plaintiff was unable to prove that the foreign body, and not a myriad of other medical conditions, caused her abdominal pain. On August 29, 2022, the Circuit Court granted Dr. Eads' Motion for Summary Judgment on the basis that Plaintiff could not prove the causation element of her claim. Petitioner has now filed the instant appeal from that ruling.

SUMMARY OF ARGUMENT

The Circuit Court of Kanawha County committed no error in granting Respondent's Motion for Summary Judgment. The Circuit Court, armed with the

undisputed facts, including the testimony of Petitioner's own expert witness, correctly and properly found that Petitioner could not prove proximate causation, an essential element of her claim. Moreover, while the Circuit Court granted judgment on the causation issue and therefore did not rule on Petitioner's ability to prove that Dr. Eads was negligent, the lack of evidence to prove that Dr. Eads breached the standard of care also provides grounds for the decision to grant judgment to Dr. Eads. For these reasons, the Circuit Court's decision to grant judgment to Dr. Eads should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent does not believe that oral argument is necessary in this case. According to Rule 18(a) of the *West Virginia Rules of Appellate Procedure,* Respondent believes that the dispositive issues have been authoritatively decided and that the facts and legal arguments are adequately presented in the briefs and record on appeal such that the decisional process would not be significantly aided by oral argument. However, should this Court determine that it would be helpful and/or necessary for counsel to present oral argument, Respondent's counsel is certainly willing and available to do so.

ARGUMENT

I. The Circuit Court correctly held that Petitioner was required to prove causation to a reasonable degree of medical probability under the MPLA.

For the first time, on appeal, the Petitioner/Plaintiff below argues that she was not required to prove causation to a reasonable degree of medical probability under the MPLA. As is evident from the record, at no time did Petitioner raise this argument in response to Dr. Eads' Motion for Summary Judgment—it was not raised in the briefing or at the hearing on the motion. Rather, Petitioner took the position before the Circuit

Court that she was able to prove causation to a reasonable degree of medical probability. Only now that judgment has been entered against her has she raised issue with Dr. Eads' recitation of the MPLA causation standard in the briefing below and asserted that she should not be held to that standard. As the Supreme Court of Appeals has noted, the Court has "continually held that issues not raised in the trial court and first raised on appeal are considered waived." *Builders' Serv. & Supply Co. v. Dempsey*, 224 W. Va. 80, 84 n.9, 680 S.E.2d 95, 99 n.9 (2009) (citing *Roberts v. Stevens Clinic Hosp.,* 176 W.Va. 492, 499, 345 S.E.2d 791, 798–99 (1986); *Bell v. West,* 168 W.Va. 391, 397, 284 S.E.2d 885, 888 (1981)).

Nevertheless, the Circuit Court was correct in holding that Petitioner was required to prove causation by expert testimony to a reasonable degree of medical probability under the West Virginia Medical Professional Liability Act ("MPLA"), W. Va. Code § 55-7B-1, *et seq.* This is well established. This case presents a claim of medical negligence against a health care provider, and it is therefore governed by the MPLA. 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. The Supreme Court of Appeals has held that under West Virginia law, expert testimony is required to prove that the alleged medical negligence proximately caused the plaintiff's injury. *Dellinger v. Pediatrix Medical Group, P.C.*, 232 W. Va. 115, 124-25, 750 S.E.2d 668, 677-78 (2013). "Moreover, the expert who testifies as to proximate causation must 'state the matter in terms of a reasonable probability.'" *Id.* at Syl. Pt. 4 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. 232 W. Va. at 124, 750 S.E.2d at 677.

The Supreme Court of Appeals has upheld circuit courts' decisions to award summary judgment where plaintiffs have failed to prove causation to a reasonable degree of probability by medical expert testimony in medical negligence cases. In *Dellinger v. Pediatrix Medical Group, P.C.*, a 2013 wrongful death medical malpractice lawsuit, the Court upheld entry of summary judgment in favor of the defendant health care provider on the basis that the plaintiff had not "provided a single medical witness who offered testimony causally connecting" the decedent's death to the defendant doctor's alleged negligence. *Id.* The Court further explained:

> 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. The lack of expert medical testimony as to causation was therefore equally fatal to petitioner's case as her failure to present a disputed issue of material fact on medical negligence.

Id.

Petitioner attempts to focus solely on the text of the MPLA and to rely on semantics to argue that a medical expert need not testify to a reasonable degree of

medical probability. However, this disregards the body of case law decided by the Supreme Court of Appeals of West Virginia interpreting the MPLA and holding that a plaintiff in a medical negligence case must prove causation to a reasonable degree of medical probability through expert testimony. In fact, Petitioner acknowledges that the Supreme Court of Appeals has held that an expert physician must testify to causation in terms of a reasonable probability. However, Petitioner inexplicably seems to imply that there is a distinction between a physician testifying to a reasonable degree of probability and testifying to a reasonable degree of medical probability. The Supreme Court of Appeals has not drawn such a distinction. Rather, the Court has pointed out that causation need only be stated by a medical expert in terms of reasonable probability as opposed to certainty. *Hovermale v. Berkeley Springs Moose Lodge No. 1483*, 165 W. Va. 689, 695-96, 271 S.E.2d 335, 340 (1980). Notably, the West Virginia Pattern Jury Instructions for medical negligence cases reinforce that a medical expert must testify to causation to a degree of reasonable probability. In the "Notes and Sources" of the Section 503 - Causation, the authors included the following: "Expert witnesses must establish the causal relationship testimony by reasonable probability. W. Va. Code § 55-7B-7; *Hovermale v. Berkeley Springs Moose Lodge*, 165 W. Va. 689, 271 S.E.2d. 335 (1980)."

The cases cited by Petitioner in her brief only support the entry of summary judgment in favor of Dr. Eads. Petitioner asserts that her expert was not required to testify to proximate causation to a reasonable degree of medical probability because “[t]hose words simply do not exist in our statutory scheme or in the case law interpreting it.” Petitioner’s Br. 7. At the same time, Petitioner cites to *Dellinger*, where the Supreme

Court explicitly upheld summary judgment where a plaintiff could not prove causation through expert testimony to a reasonable degree of medical probability. *Dellinger*, 232 W. Va. at 123-24, 750 S.E.2d at 676-77 ("[P]etitioner herein has provided not a single medical witness who offered testimony causally connecting Amber's death to Dr. Caceres' alleged negligent failure to intubate earlier. In fact, the only witness whose testimony petitioner offered in opposition to summary judgment expressly stated he could not proximately relate Amber's death to any actions of Dr. Caceres **to a reasonable degree of medical probability**.") (emphasis added). Indeed, the *Dellinger* decision quite clearly supports the entry of summary judgment in favor of Dr. Eads.

Petitioner's reliance on *Pygman v. Helton*, 148 W. Va. 281, 134 S.E.2d 717 (1964), and *Sexton v. Grieco*, 216 W. Va. 714, 613 S.E.2d 81 (2005), is also misplaced. *Pygman* is an automobile accident injury case that was not governed by the MPLA. The Court in *Pygman* held that a medical expert's causation opinions need not be held to a reasonable degree of certainty and that a jury may draw reasonable inferences from an expert's testimony. 148 W. Va. at 286-87, 134 S.E.2d at 721. In *Sexton*, the Court held that a medical expert need not testify to causation by way of a "rigid incantation" or say any magic words to establish their causation opinions. 216 W. Va. at 719-20, 613 S.E.2d at 86-87. While the cases permit a jury to draw reasonable inferences from a medical expert's causation testimony where the specific words of the proximate cause standard aren't specifically testified to, the cases do not hold that a jury should be presented with opinions from which no reasonable inferences could be drawn such that proximate cause could be established. In *Pygman* and *Sexton*, unlike in this case, the jury would be able to draw a reasonable inference from the expert's testimony that the

plaintiff's alleged injuries had resulted not from other causes, but from the negligence of the defendant. In the case at bar, the petitioner's expert Dr. Kaniewski was asked direct questions regarding causation and was unable to testify that the alleged negligence of Dr. Eads caused the petitioner's alleged injury. A jury cannot reasonably draw an inference from Dr. Kaniewski's testimony which would contradict her testimony. Additionally, a jury may not make an inference based on speculation. *Dellinger*, 232 W. Va. at 124, 750 S.E.2d at 677.

Another case Petitioner relies on, *Stewart v. George*, 216 W. Va. 288, 607 S.E.2d 394 (2004), is not analogous to this case. In *Stewart*, the plaintiff's expert testified that the negligence of the defendant physician in failing to diagnose the patient's diabetes and hyperglycemia increased the patient's risk of developing the infection he ultimately developed. Because of the nature of an injury in the form of an infection, there are various factors that can make a patient susceptible to infection and increase a patient's risk of developing infection, one of which was hyperglycemia. The case at bar does not involve an injury that results from a set of risk factors. The alleged injury in this case is abdominal pain allegedly caused by a foreign object in the patient's abdomen. Therefore, the pain was either caused by the foreign object or it wasn't. Petitioner was required to prove, through her expert, that the foreign object was the proximate cause of her abdominal pain. Her expert was unable to do so to a reasonable degree of medical probability, as required by West Virginia law. *See Dellinger*, 232 W. Va. at 123-24, 750 S.E.2d at 676-77.

In accordance with the established holdings of the Supreme Court of Appeals interpreting the MPLA, this Court should affirm the Circuit Court's ruling that the plaintiff

was required to prove causation by the testimony of her medical expert to a reasonable degree of medical probability and failed to do so.

II. The Circuit Court properly granted summary judgment to Dr. Eads because, even viewing the evidence in the light most favorable to Petitioner, she cannot prove the causation element of her claim.

Even viewing the evidence in the light most favorable to her, Petitioner cannot prove that any alleged negligence on the part of Dr. Eads proximately caused her alleged damages. Notably, Petitioner's Statement of the Case in her brief is utterly devoid of citations to any evidence of causation. This is unsurprising, as the medical records and expert testimony in this case conclusively do not establish causation, as the Circuit Court recognized. The medical records and expert testimony show that Petitioner had a variety of other health problems that could have caused her abdominal pain as opposed to the foreign object. Petitioner's expert specifically testified to a reasonable degree of medical probability that she could not be certain which of the petitioner's complaints of pain could be attributed to the foreign body as opposed to her other many causes. For example, among other issues, the petitioner 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 Petitioner's expert Dr. Kaniewski admitted each of these issues could cause abdominal pain. Appx. 000088-90 (Kaniewski Dep. 71:22-79:14).

Moreover, Dr. Kaniewski testified as follows:

Q. . . . I'm reading from your affidavit and I want to ask you if you agree with this statement that you swore to.

A. Okay.

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.**

Appx. 000090 (Kaniewski Dep. 80:23-81:23) (emphasis added).

In summarizing her opinions at the end of her deposition, Dr. Kaniewski testified as follows with regard to her causation opinions:

Q. Okay. And you've told me how you believe the Endo Catch bag, as you put it, that was left in the patient's abdomen, as you believe – how that has caused [Ms. Stoudt] harm, right?

A. How that has what?

Q. How that has resulted in harm to Mrs. Stoudt. You've told me how that has happened, right?

A. So the only harm I can come up with is, is the abdominal pain, **potentially**, but –

Q. Right.

A. **-- it's very – it's trickier to tell why because she has had a – a lot going on in the abdomen.**

Appx. 000230 (Kaniewski Dep. 91:9-20) (emphasis added).

An expert's testimony that something "may" be a cause or "potentially" may be a cause of a patient's alleged injury is insufficient under West Virginia law to establish proximate cause. While the Court must view evidence in the light most favorable to the nonmoving party, the Court is not required to turn a blind eye to evidence that is simply unfavorable to the nonmoving party. Dr. Kaniewski's testimony simply does not rise to the level of a reasonable degree of medical probability; she was unable to say what caused the Petitioner's alleged abdominal pain.

Likewise, Dr. Eads' medical expert, Kurt Stahlfeld, M.D., also was unable to say whether the foreign body caused the Petitioner any abdominal pain. He testified that it is impossible to know whether it did, because foreign bodies inside a patient do not always cause a patient pain, and this patient had a lot of other conditions that could have caused her abdominal pain. Appx. 280-84. However, Dr. Stahlfeld was able to testify to a reasonable degree of medical certainty that the Petitioner's abdominal pain was <u>not</u> caused by an Endocatch bag left by Dr. Eads, as her abdominal pain began four years before the surgery Dr. Eads performed, and the evidence proves that Dr. Eads removed the Endocatch bag containing the appendix when he removed the appendix. Appx. 272-73, 283.

Because there is no expert testimony establishing to a reasonable degree of medical probability that any alleged negligence on the part of Dr. Eads caused

Petitioner any abdominal pain, Petitioner cannot prove the causation element of her claim. The Circuit Court, recognizing this, properly granted judgment to Dr. Eads, and this Court should affirm.

III. The Court may also properly affirm the Circuit Court's decision to grant judgment to Dr. Eads on the basis that Petitioner cannot prove that Dr. Eads was negligent.

Dr. Eads also moved the Circuit Court for summary judgment on the basis that Petitioner could not prove Dr. Eads was negligent—there is no evidence by which Petitioner could establish that Dr. Eads breached the applicable standard of care. Specifically, Petitioner cannot prove that it was Dr. Eads and not another surgeon who left the foreign body in her abdomen. Petitioner has no evidence which excludes the other two surgeons who operated on her abdomen from being responsible for leaving the foreign object behind. Because the Circuit Court granted judgment on the issue of causation, it did not decide the issue of whether Petitioner could prove the breach element of her medical negligence claim. However, this provides an additional basis on which this Court could affirm the entry of judgment in favor of Dr. Eads. The Supreme Court of Appeals has held that an appellate court "may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment." Syl. Pt. 2, *Milmoe v. Paramount Senior Living at Ona, LLC*, 875 S.E.2d 206, 207 (W. Va. 2022) (quoting Syl. Pt. 3, *Barnett v. Wolfolk*, 149 W. Va. 246, 140 S.E.2d 466 (1965)).

A. Petitioner cannot prove when the foreign body was left in her abdomen—let alone that it was left there by Dr. Eads.

Based on the undisputed facts, Petitioner cannot prove that Dr. Eads left the foreign body in her abdomen. As such, she cannot prove that Dr. Eads failed to act in accordance with the applicable standard of care. It is undisputed that Ms. Stoudt began experiencing abdominal pain after her 2012 c-section. Appx. 0000004 (Compl. ¶ 25); Appx. 000036-37 (Stoudt Dep. 36-40). It is further undisputed that Dr. Eads was not involved in the 2012 surgery and did not provide any care to Ms. Stoudt until 2016. *See* Appx. 0000002 (Compl. ¶ 9). Additionally, there is no dispute over the fact that three surgeons—Dr. Cotes, Dr. Shamma, and Dr. Eads—operated on the Ms. Stoudt in 2016 on the same day, during the same abdominal surgery. *Id.*

There would be no way for a reasonable jury to conclude, based on the evidence, that Dr. Eads was responsible for leaving the foreign body in Ms. Stoudt's abdomen. The evidence indicates that the foreign body likely was left in the petitioner's abdomen during the 2012 c-section, as that is when her complaints of abdominal pain began. Because Dr. Eads was not involved in that surgery, he could not be responsible for causing the injury. However, even if Petitioner were able to prove that the foreign body was left in her abdomen in 2016 (which she cannot and which is not consistent with the timeline of her abdominal complaints), she cannot establish that it was Dr. Eads who was responsible for leaving the foreign body behind. There were two other surgeons who operated on Ms. Stoudt in addition to Dr. Eads during the 2016 abdominal surgery—both Dr. Cotes and Dr. Shamma were in the operating room and operated on the patient that day. Petitioner has presented no evidence that excludes Dr. Cotes and Dr. Shamma from responsibility for the foreign object. Petitioner did not even

take the depositions of Dr. Cotes and Dr. Shamma. Though she originally sued Dr. Cotes and Dr. Shamma, alleging they could be responsible, the Circuit Court dismissed Petitioner's claims against them as untimely. Therefore, out of necessity, Petitioner attempts to paint Dr. Eads as the culprit behind the foreign body even though there is no evidence to establish it. Petitioner simply cannot prove that it was Dr. Eads who left the foreign body in the plaintiff's abdomen and not one of the other two surgeons.

B. Petitioner cannot prove that the foreign body found in her abdomen was an Endocatch bag.

In a feeble effort to try and tie the foreign body to Dr. Eads, Petitioner speculates that the foreign body was an Endocatch (or endotech or endopouch) bag, even though the pathologist who examined it determined it was not even a bag, but rather a roll of plastic film. In her Statement of the Case, Petitioner misleads the Court by continually referring to the foreign body as an Endocatch bag and asserting that such a bag was only used by Dr. Eads. Again, this is unsupported speculation. There is no evidence by which Petitioner can prove these claims.

First, there is no evidence that the object found in the patient's abdomen was an Endocatch bag. Petitioner points to the medical report of the obstetrician who removed the foreign object from Ms. Stoudt's abdomen, wherein he noted that the object was "what appeared to be an Endopouch." Appx. 000294-295. This was the obstetrician's thought upon first removing the object in the patient's omentum and does not purport to be a conclusive finding. Petitioner did not take the deposition of the obstetrician who removed the foreign object, so there is no evidence that he removed the omentum attached to the object, manipulated the object, or examined it closely after he discovered it during the c-section procedure he was performing. Instead, the

obstetrician sent the foreign object to pathology to be examined by a pathologist, who is duly qualified to examine objects removed from a patient's body. In fact, Petitioner's expert Dr. Kaniewski admitted that a pathologist would be qualified to determine whether a foreign body was an Endocatch bag, as pathologists receive many specimens they examine in such bags. *See* Appx. 000317 (Kaniewski Dep. 48:16-18) ("[P]athologists sure as heck see a lot of Endo Pouches because a lot of their specimens arrive in Endo Pouches.").

The pathologist who examined the foreign object did not determine that it was an Endocatch bag. Rather, the pathologist described the object as a "role [sic] of plastic film." *See* Appx. 000053. There is no mention of the object being a bag. *See id.* Nor did the pathologist document that the object had a colorful suture or string attached to it, as both Dr. Eads and Petitioner's expert Dr. Kaniewski testified that the Endocatch bags have attached to them. *See id.*; Appx. 000063-64 (Eads Dep. 39:9-11, 44:3-14); Appx. 000086 (Kaniewski Dep. 26:5-17).

Notably, during Ms. Stoudt's 2012 surgery, which Dr. Eads was not involved in and after which Ms. Stoudt's abdominal pain began, Seprafilm, a filmy adhesion barrier, was implanted into her abdomen. *See* Appx. 000074. A quick glance at the image of Seprafilm on the current manufacturer's website shows what clearly looks like it could be described as a roll of plastic film. *See* Appx. 000304 (*Seprafilm*, Baxter (https://advancedsurgery.baxter.com/seprafilm) (last visited February 2, 2023)). While Petitioner's expert Dr. Kaniewski speculated without evidentiary support that the object was an Endocatch bag, she acknowledged that "Seprafilm is a potential there" and noted that "you could say technically if it rolled up like that, which is unlikely, maybe it

didn't dissolve or didn't get biodegraded because of how it got rolled up." Appx. 000318 (Kaniewski Dep. 42:12-17). Dr. Eads' expert, Kurt Stahlfeld, M.D., testified that it was much more likely the object found in the patient's abdomen was Seprafilm than an Endocatch bag. Appx. 000308, 313 (Stahlfeld Dep. 9:24-10:5; 29:21-30:7). He testified that Dr. Eads' removal of the appendix after it was placed in the Endocatch bag proves that the Endocatch bag was removed with the appendix. Appx. 000309, 311 (Stahlfeld Dep. 13:22-14:24; 19:15-20:11).

Petitioner has attempted to create an issue of fact over whether the foreign object was an Endocatch bag. However, this is not an issue that can be decided by a jury because there is no evidence to support a determination that the foreign object was an Endocatch bag. The pathology report, which documents the findings of the pathologist who actually examined the object, did not determine that the object was a bag. *See* Appx. 000053. The object is no longer available to be examined. While Dr. Eads did use an Endocatch bag to remove the appendix, the record indicates the appendix was in fact removed, meaning the bag containing the appendix would certainly have been removed with it. Dr. Eads testified that he placed the appendix in the bag and therefore removed the bag from the patient's body at the same time as the appendix was removed. Appx. 000058, 62, 65 (Eads Dep. 17:7-12, 36:12-16, 45:9-11). Dr. Eads' operative report demonstrates that the appendix was placed in the bag for removal and a pathology report confirms the appendix was removed from her abdomen that day. *See* Appx. 000053, 67-70. Petitioner's expert Dr. Kaniewski acknowledged that Dr. Eads specifically documented that he placed the appendix into the bag and that the appendix was removed. Appx. 000087 (Kaniewski Dep. 30:16-31:15). The evidence

therefore is that the Endocatch bag used by Dr. Eads was removed because it contained the appendix, and it is undisputed that the appendix was in fact removed. A jury finding that the object was an Endocatch bag would therefore only be based on the unsupported speculation of Petitioner's expert and not on any facts. Speculation cannot create a genuine issue of fact. *Chafin v. Gibson*, 213 W.Va. 167, 174, 578 S.E.2d 361, 368 (2003); *Gibson v. Little Gen. Stores, Inc.*, 221 W.Va. 360, 363, 655 S.E.2d 106, 109 (2007).

Second, and moreover, even if Petitioner could prove that the foreign object was an Endocatch bag, which she cannot, Petitioner cannot prove that such a bag was not also used by the other surgeons who operated on the patient in 2012 and 2016. Petitioner attempted to sue those other two surgeons in this action but did not timely file her Complaint against them. For this reason, Petitioner is trying to paint Dr. Eads as the culprit behind the foreign object out of necessity, even though the evidence does not indicate that he was. Though the other two surgeons did not include any reference to using an Endocatch bag in their operative report, that does not establish that those surgeons did not use Endocatch bags that day. Petitioner did not depose those surgeons and therefore has no evidence to exclude them from responsibility. Petitioner and her expert cannot establish, except through mere speculation, that the object was left behind by Dr. Eads and not by the other two surgeons, Dr. Cotes and Dr. Shamma. The speculative opinion of Petitioner's expert that Dr. Eads is responsible should not be permitted to be presented to the jury.

C. Petitioner cannot prove her claim through mere speculation.

Because there is simply no evidence by which Plaintiff could prove the foreign object was an Endocatch bag or that the object was left in the patient's abdomen by Dr. Eads rather than Dr. Cotes or Dr. Shamma, Plaintiff is attempting to prove her case through unsupported speculation. Plaintiff has nothing more to support her claims than her mere allegations. It is well settled that "[u]nsupported speculation is insufficient to defeat a summary judgment motion." *Gibson*, 221 W.Va. at 363, 655 S.E.2d at 109; *accord Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 61, 459 S.E.2d 329, 338 (1995). "To successfully defend against a motion for summary judgment, the plaintiff must make some showing of fact which would support a prima facie case for his claim." Syl. Pt. 2, *Conaway v. Eastern Associated Coal Corp.*, 178 W.Va. 164, 358 S.E.2d 423 (1986). However, "[i]f the evidence favoring the nonmoving party is 'merely colorable . . . or is not significantly probative, . . . summary judgment may be granted.'" *Williams*, 194 W.Va. at 61, 459 S.E.2d at 338 (alterations in original). "Even in cases where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." *Johnson v. Kilmer*, 219 W.Va. 320, 323, 633 S.E.2d 265, 268 (2006).

Accordingly, summary judgment is also appropriate in this matter on the separate grounds that Petitioner cannot prove that Dr. Eads breached the applicable standard of care, as Petitioner can only cite to unsupported speculation to support her position. The Court therefore may affirm the Circuit Court's decision on this basis as well.

CONCLUSION

The Circuit Court of Kanawha County committed no error in granting Respondent's Motion for Summary Judgment. The Circuit Court properly applied the well-established rule that the MPLA requires a plaintiff to prove causation by expert testimony to a reasonable degree of medical probability. The Circuit Court correctly determined that Petitioner had failed to meet her burden of proof on the issue of causation, as Petitioner's expert was unable to testify to a reasonable degree of medical probability that any alleged negligence on the part of Dr. Eads proximately cause the petitioner's abdominal pain. Therefore, this Court should affirm the Circuit Court's decision to grant summary judgment to Dr. Eads. Furthermore, this Court may also affirm the Circuit Court's decision on the basis that the record clearly demonstrates that Petitioner is unable to prove that Dr. Eads—and not the other two surgeons who operated on the petitioner's abdomen—left the foreign body in her abdomen.

WHEREFORE, based upon the foregoing reasons, Defendant Below/Respondent, Kristen P. Eads, M.D., respectfully requests that this Honorable Court uphold the Circuit Court of Kanawha County's August 29, 2022 Order granting Respondent's Motion for Summary Judgment and award any such other and further relief as this Court deems just and proper.

KRISTEN P. EADS, M.D.,

By Counsel.

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In the Intermediate Court of Appeals of West Virginia

MICHELLE STOUDT,

Plaintiff Below, Petitioner,

v. No. 22-ICA-159

KRISTEN P. EADS, M.D.,

Defendant Below, Respondent.

CERTIFICATE OF SERVICE

I, Morgan E. Villers, the undersigned counsel for Respondent, Kristen P. Eads, M.D., do hereby certify that true copies of **RESPONDENT'S BRIEF** have been served on counsel of record on this 3rd day of February, 2023, via the United States mail, postage prepaid, addressed as follows:

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