IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

NO. 25-ICA-224

SAMUEL HERNANDEZ and ZUSMITHA ARNESTO,
Plaintiffs Below, Petitioners,

v.

CITY HOSPITAL, INC. d/b/a WVU MEDICINE–BERKELEY MEDICAL CENTER,
Defendant Below, Respondent.

PETITIONERS' BRIEF

(On appeal from the Circuit Court of Berkeley County – CC-02-2022-C-52)

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I. ASSIGNMENTS OF ERROR

The Circuit Court of Berkeley County granted the Defendant/Respondent's motion for summary judgment and denied Plaintiffs/Petitioners' motion for reconsideration. The circuit court held that Plaintiffs/Petitioners' evidence was speculative and insufficient to create a genuine issue of material fact as to causation. The circuit court further held that summary judgment was therefore appropriate under Rule 56(c) of the West Virginia Rules of Civil Procedure. This Court should reverse the circuit court's order and remand for further proceedings based on the following:

A. The circuit court erred by failing to review all facts and permissible inferences therefrom in a light most favorable to Petitioners as the nonmoving party;

B. The circuit court erred by finding that there was no genuine dispute of material fact as to causation, despite Petitioners' presentation of evidence relating to relevant and admissible expert medical opinion testimony that various specific breaches of the standard of care by Respondent's employees did, in fact, proximately cause Petitioner Samuel Hernandez's injuries; and

C. The circuit court erred by usurping the fact-finding role of the jury.

II. INTRODUCTION.

This case involves medical malpractice claims filed in the Circuit Court of Berkeley County. The claims arise from injuries and permanent disability suffered by Petitioner Samuel Hernandez ("Mr. Hernandez") due to the medical negligence of Respondent, City Hospital, Inc., doing business as Berkeley Medical Center, ("BMC") through its employees.

Specifically, Petitioners[1] alleged that various nurses, therapists, and staff of BMC breached the applicable standard of care for in the assessment and treatment of Mr. Hernandez immediately following spinal surgery. These deviations proximately caused his decline in function and subsequent permanent and life-altering neurological and physical impairment and disability.

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[1] Petitioner Zusmitha Arnesto is Mr. Hernandez's wife, who has asserted claims for loss of consortium.

The evidence provided to the circuit court by Petitioners was sufficient to create a genuine issue of material fact as to causation. The evidence presented was not speculative, and BMC failed to identify evidence that contradicted Petitioners' admissible expert testimony. Despite the law and evidence before the court, summary judgment was granted on March 12, 2025. Petitioners moved for reconsideration to remedy a clear error of law and to prevent obvious injustice. That motion for reconsideration was denied on May 7, 2025. This Court should reverse the circuit court's order granting summary judgment and remand this case to the circuit court so that the parties may proceed to trial on the merits.

III. STATEMENT OF THE CASE

A. Statement of Facts

Petitioners' medical malpractice claims against BMC relate to the negligent acts and omissions by various nurses and other staff employed by BMC. These acts and failures to act were committed during Mr. Hernandez's stay at BMC's hospital from March 6 to March 13, 2020. J.A. 028-042, Amended Complaint. Upon admission to BMC, Mr. Hernandez was independent and ambulatory. Mr. Hernandez was admitted to the hospital for elective surgery. At BMC, Mr. Hernandez was to undergo spinal surgery intended to address his spinal canal stenosis and to decompress his spinal cord. J.A. 540, 544-545, 581-585, 091-092, Med. Recs. at HERNANDEZ 000010, 000663–64, 001002–06, BMC 000667, 674.

Dr. Ravi Yalamanchili, Mr. Hernandez's treating neurosurgeon, elected to perform a C5–C6 and C6–C7 anterior cervical discectomy and fusion with placement of a PEEK cage. J.A. 545, 096, 100, 091, 092, *id*. at HERNANDEZ 000664, BMC 000383, 387, 667, 674. Immediately following this surgery, Mr. Hernandez was unable to move either of his legs, and he complained of weakness in his left arm. J.A. 107, *id*. at BMC 000353. An MRI was ordered immediately after this first surgery, which revealed that his severe spinal stenosis persisted, with large projecting osteophytes continuing

to compress his spinal cord. J.A. 552-558, 572-573, 588-591, 612, *id*. at HERNANDEZ 00552, 0741–46, 000751, 000917–18, 001055–58, 001303.

Dr. Yalamanchili then elected to perform another procedure on Mr. Hernandez. The second surgery required the removal of the cervical plate and interbody grafts placed in the first procedure and re-opening the joint fusion ("arthrodesis") to extend the discectomies and place an anatomic PEEK bone at the C6–C7 and a Cornerstone PSR bone at the C5–C6. These procedures were performed before replacing the previous plate with a larger one, fixed into place with 13 mm screws into the bodies of Mr. Hernandez's C5, C6, and C7 vertebrae. J.A. 541-543, *id*. at HERNANDEZ 000649–51.

Following the second procedure, Mr. Hernandez remained unable to move his lower extremities. J.A. 558, *id*. at HERNANDEZ 000751. He was unable to feel much, if any, sensation in them. *Id*. Still, none of his physicians, nurses, or other care staff sought another STAT MRI to investigate the state of his spine post-surgery or to otherwise seek a second opinion as to whether Dr. Yalamanchili's surgical procedures adequately resolved Mr. Hernandez's spine compression. J.A. 588-589, 591-593, *id*. at HERNANDEZ 001055–56, 001058, 001061, 001071; J.A. 642, 651, Ozuna Dep. at 77:17–80:14, 130:10–131:5; J.A. 658-659, 662-663; Gottesman Dep. at 57:2–58:8, 60:3–6, 68:11–19, 77:16–79:6, 84:1–10.

Both of the above-described discectomy and fusion surgeries occurred on March 6, 2020. This was the first day of Mr. Hernandez's eight-day hospital stay at BMC. On March 7, 2020, Mr. Hernandez was diagnosed with paraplegia and motor deficits at the C6–C7 level. As a result thereof, Mr. Hernandez was unable to move his lower extremities and his upper and lower extremities experienced severe numbness. J.A. 558-562, 608-612, *id*. at HERNANDEZ 000751–55, 001299–1303. Throughout the next week, BMC employees continued to document Mr. Hernandez's ongoing post-operative paraplegia and adverse neurological symptoms. J.A. 563-571. 574-585. 594-607, *id*.

at HERNANDEZ 000756–64, 000994–1000, 001008–09, 001002–06, 001095–97, 001103–04, 001290–98.

However, at no point did any BMC staff properly exercise their independent medical and/or nursing judgment to advocate for their patient. Moreover, BMC staff failed to use the chain of command to seek appropriate medical consultations, assessments, and interventions to address Mr. Hernandez's neurological decline and to protect him from further injury caused by Dr. Yalamanchili's negligence. J.A. 644-648, 651, Ozuna Dep. at 89:3–90:4, 101:24–102:14, 109:9–110:12, 111:6–113:5, 117:5–23, 119:7–23, 130:10–132:14; J.A. 659-668, 670, Gottesman Dep. at 65:8–67:5, 69:23–72:11, 75:15–76:10, 77:16–79:6, 82:5–16, 84:1–10, 101:4–17, 102:21–103:5, 105:12–24, 106:10–111:2, 111:12–112:22, 113:4–116:10, 119:2–15, 125:17–126:8; J.A. 676-680, Alejos Dep. at 37:4–20; 38:11–39:18, 40:18–41:16, 70:8–14, 71:9–73:5, 93:1–94:22.

By the time Mr. Hernandez was discharged from the care of BMC on March 13, 2020, he was quadriplegic and completely dependent on others for all activities of daily living. J.A. 547-551, 579-580, 586-587, 613-619, 621-636, Med. Recs. at HERNANDEZ 000729–33, 000999–1000, 001008–09, 001435–41, 001851–66; J.A. 640-641, 650, Ozuna Dep. at 44:3–16, 51:15–22, 126:19–127:4. Today, Mr. Hernandez remains wheelchair bound and requires extensive support.

B. Relevant Procedural History

BMC moved the circuit court for summary judgment on December 12, 2024. J.A. 018-019, Dkt. Sheet at 16-17. After briefing for all parties was complete, the circuit court entered an order granting judgment as a matter of law in BMC's favor on March 12, 2025. J.A. 021, *id*. at 19. Petitioners thereafter moved for reconsideration, which was denied on May 7, 2025. J.A. 021-022, *id*. at 19-20.

Petitioners filed their Notice of Appeal on May 28, 2025. Subsequently, this Court entered a Scheduling Order for expedited briefing pursuant to W. Va. R. App. P. 21(c), with Petitioners'

opening brief due on August 8, 2025, Respondent's brief due on September 8, 2025, and Petitioners' reply brief due on September 23, 2025, or within fifteen days of the filing of the Respondent's brief or summary response.

IV. SUMMARY OF ARGUMENT

The only issue challenged by BMC on summary judgment was whether there was sufficient evidence for Petitioners to prove causation. To demonstrate a genuine issue of material fact as to causation, Petitioners need only demonstrate that they will provide, at trial (as they did in Petitioners' expert depositions through sworn testimony), "testimony by one or more knowledgeable, competent expert witnesses" that the negligent acts and/or omissions by BMC's employees proximately caused Mr. Hernandez's injuries. *See* W. Va. Code § 55-7B-7(a). This opinion testimony must be stated with reasonable medical probability. *Id.* The West Virginia Supreme Court of Appeals has held that "questions of proximate cause are often fact-based issues reserved for jury resolution." *Mays v. Chang*, 213 W.Va. 220, 224, 579 S.E.2d 561, 565 (2003).

Further, Petitioners' burden is to show that Respondent's breaches of the standard of care were "*a* proximate cause" of Mr. Hernandez's injuries, "not the *sole* proximate cause." *See id.* (emphasis in original). Because causation is a fact-intensive issue typically reserved for the jury, and because the expert testimony of Petitioners' experts, Dr. Richard Ozuna[2] and Dr. Aaron Leo Gottesman,[3] constitutes sufficient evidence to create a genuine issue of material fact as to whether the alleged breaches of the applicable standard of care by BMC's nursing and other staff were a

[2] Dr. Ozuna is licensed to practice medicine in the State of Massachusetts and board certified by the American Board of Orthopedic Surgery. Dr. Ozuna's medical practice is focused on the treatment of back and neck disorders and includes the use of advanced techniques, such as minimally invasive microsurgery and complex spinal cord reconstruction. J.V. 684-692. Respondent did not challenge Dr. Ozuna's qualifications or the basis for his opinions, nor did the Court note any criticisms.

[3] Dr. Gottesman is a physician who is board certified in internal medicine who specializes in hospital medicine. J.A. 696-699; J.A. 657, Gottesman Dep. at 6:11 to 7:7. Respondent did not challenge Dr. Gottesman's qualifications or the basis for his opinions. Again, the Court did not note any criticisms.

proximate cause of Mr. Hernandez's complete quadriplegia and other related injuries and damages, the circuit court's ruling was erroneous. Thus, the judgment of the circuit court should be reversed. The case should be remanded and allowed to go forward to trial.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, Petitioners respectfully request oral argument under Rule 19. Oral argument is warranted because:

1. This appeal involves assignments of error in the circuit court's application of settled law;
2. The circuit court exercised its discretion in an unsustainable manner under well-established legal standards;
3. The ruling is contrary to the weight of the evidence, including admissible expert testimony on causation; and
4. The appeal presents a narrow legal issue that would benefit from oral presentation and clarification.

Given these factors, oral argument will aid the Court in resolving the issues presented and ensure that the substantial legal and factual errors in the decision below are fully addressed.

VI. STANDARD OF REVIEW

In conducting its *de novo* review of the order granting summary judgment, this Court must consider that pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, a motion for summary judgment may only be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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." W. Va. R. Civ. P. 56. A "material fact" is one that "has the capacity to sway the outcome of the litigation under applicable law . . . [f]actual disputes that are irrelevant or unnecessary will not be counted."

Jividen v. Law, 194 W. Va. 705, 714, 461 S.E.2d 451, 460 (1995). Importantly, all facts at issue on summary judgment, along with all permissible inferences therefrom, must be viewed "in the light most favorable to the nonmoving party." *Williams v. Precision Coil*, 194 W. Va. 52, 59–60, 459 S.E.2d 329, 336–37 (1995). A "genuine issue" of material fact means that there is "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Jividen*, 194 W. Va. at 713, 461 S.E.2d at 459. As such, Petitioners' burden as the nonmoving party is simply to offer "more than a scintilla of evidence" to support the challenged claim. *Id*. at 713, 461 S.E.2d at 459.

Further, in reviewing the denial of a motion for reconsideration to alter or amend a judgment:

> The standard of review applicable to an appeal from a motion to alter or amend a judgment, made pursuant to W. Va. R. Civ. P. 59(e), is the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal to this Court is filed.

Otto v. Catrow Law PLLC, 243 W. Va. 709, 715, 850 S.E.2d 708, 714 (2020), quoting *Wickland v. Am. Travellers Life Ins. Co.*, 204 W. Va. 430, 513 S.E.2d 657 (1998). In the instant case, the grant of summary judgment was the "judgment upon which the motion is based," and the standard of review of an order granting summary judgment is *de novo. Otto*, 243 W. Va. at 715, 850 S.E.2d at 714; *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

VII. ARGUMENT

A. The expert testimony of Drs. Ozuna and Gottesman is sufficient to create a genuine issue of material fact as to the causal connection between BMC employees' alleged breaches of the standard of care and Petitioners' damages.

In ruling on respondent's motion for summary judgment, the circuit court failed to consider the totality of Petitioners' expert testimony regarding causation, or to view all facts relied upon by these experts—and all permissible inferences therefrom—in the light most favorable to Petitioners as the nonmoving party. Instead, the circuit court's order largely mirrors Respondent's arguments, emphasizing isolated words such as "hope" and "think" from Petitioners' two medical causation

experts to label their opinions speculative, even though both experts provided opinions to the reasonable degree of medical probability required under West Virginia law.

The circuit court's findings of fact ignore Dr. Ozuna's expert testimony that proper nursing interventions—including requesting second opinions from qualified medical staff and using the chain of command to prevent Mr. Hernandez's discharge until the cause of his functional decline had been properly assessed, diagnosed, and treated—would have, to a reasonable degree of medical certainty, resulted in Mr. Hernandez recovering greater function than he ultimately achieved after undergoing another surgical procedure a year later.

Contrary to the circuit court's conclusions of law, the evidence establishes which medical personnel should have been informed about Mr. Hernandez's condition. Those individuals include qualified medical staff such as spine surgeons, neurologists, or an external neurosurgeon; the head of neurology; or other neurosurgical consultants working with the hospital. Timely communication to these providers would have prompted additional radiological studies and surgical intervention to decompress Mr. Hernandez's spine before his discharge to rehabilitation. *See* J.A. 730, Order at Concl. of Law 14.

This testimony, together with all reasonable inferences, is sufficient to support a jury's finding that BMC employees' failure to follow hospital policies and procedures regarding chain-of-command escalation and patient advocacy more likely than not caused a delay in the surgical care necessary to repair the damage caused by Dr. Yalamanchili's March 6, 2020, surgeries. Acting sooner with these additional surgical procedures would, within a reasonable degree of medical probability, have allowed Mr. Hernandez to regain greater neurological and physical function.

As such, the circuit court erred in requiring Petitioners' experts to identify the specific administrator or other individual who should have been informed and could have prevented Mr.

Hernandez's discharge to rehabilitation before his condition was adequately evaluated and treated. For example, in *Est. of Fout-Iser v. Hahn*, 220 W. Va. 673, 649 S.E.2d 246 (2007), the West Virginia Supreme Court of Appeals held that expert testimony was sufficient to defeat summary judgment where a radiologist breached the applicable standard of care by failing to seek additional guidance from "somebody else," without naming the specific individual. *Id*. at 677–78, 649 S.E.2d at 250.

Rather than viewing the facts in the light most favorable to the nonmoving party, the circuit court departed from the law set forth in *Estate of Fout-Iser* and imposed a higher level of factual detail and specificity than is required under West Virginia law when reviewing Petitioners' arguments and the testimony of their causation experts. *See Est. of Fout-Iser*, 220 W. Va. at 677–78, 649 S.E.2d at 250; *Jividen*, 194 W. Va. at 713, 461 S.E.2d at 459 (recognizing that the nonmoving party need only offer "more than a scintilla of evidence" to support the challenged point of law).

As detailed below, Petitioners' experts, Drs. Ozuna and Gottesman, each testified that their opinions were held to a reasonable degree of medical probability, as required by West Virginia law. Both experts opined that BMC employees deviated from the applicable standard of care owed to Mr. Hernandez by:

1. Failing to provide independent medical and nursing assessments;
2. Failing to exercise independent medical and nursing judgment;
3. Failing to provide appropriate interventions in response to Mr. Hernandez's postoperative neurological decline; and
4. Failing to properly advocate for Mr. Hernandez by escalating concerns up the chain of command.

Both of Petitioners' experts further testified that these breaches resulted in a delay in timely surgical decompression of Mr. Hernandez's spine, causing additional irreversible neurological damage and loss of function. Per Drs. Ozuna and Gottesman, had BMC employees complied with the standard of care by requesting a STAT cervical MRI following the second fusion procedure,

seeking a second opinion, and/or using the chain of command to prevent his discharge, the resulting damage and loss of function would have been avoided or substantially reduced.

Dr. Ozuna, a board-certified orthopedic surgeon, opined that if BMC employees had ordered an additional MRI after the second procedure, further surgical repair of Mr. Hernandez's spine would have provided a 50% to 70% chance of neurological improvement. *See* J.A. 642-43, Ozuna Dep. at 80:21–82:6. He further opined that had BMC nurses sought a second opinion or escalated concerns regarding Mr. Hernandez's neurological decline, his condition would have improved. *See* J.A. 648-49, 651, *id.* at 119:24–120:11, 120:16–24, 131:11–21. Finally, he testified that had BMC acted within the standard of care and decompressed Mr. Hernandez's spine before discharge, his chance of improved recovery would have been greater than 25%. *See* J.A. 651-52, *id.* at 132:7–10, 132:23–135:6.

Dr. Ozuna unequivocally testified:

> Q. And what **. . .** is your opinion?
>
> A. Yes. My opinion is that he would have had a greater than 25 percent chance of improvement within a reasonable medical certainty if he'd had some notification of staff above and initiated the care that was just outlined.
>
> Q. And, Doctor, do you have an opinion as to whether exercising . . . the chain of command . . . and the policy that was shown to you by defense counsel, if the nurses and staff, therapists, . . . if that would be the standard and care . . . under the circumstances of Mr. Hernandez's situation?
>
> A. Yes, I do.
>
> Q. And what is that opinion?
>
> A. That . . . if they had notified somebody above that could initiate the process that we outlined, the care would have been improved, and his chances of improvement would be more than 25 percent, within reasonable medical certainty.

J.A. 652, Ozuna Dep. at 134:10–135:6.

Similarly, Dr. Gottesman opined that had BMC employees complied with the applicable

standard of care in the ways described above, a "chain reaction" would "more likely than not" have occurred, resulting in a reversal of some of the neurological and motor damage suffered by Mr. Hernandez. *See* J.A. 666, Gottesman Dep. at 109:8–18.

These opinions are more than sufficient to create a genuine issue of material fact as to whether the breaches of the standard of care by BMC employees were a proximate cause of Petitioners' damages—even if they were not the sole proximate cause. In its motion, BMC did not substantively challenge the content of these opinions; instead, it argued that the experts' testimony amounted to mere "speculation" or "conclusory assumptions." To support this claim, BMC selectively cited deposition excerpts where its own counsel used the terms "speculation" and "assumption" in questioning. Neither expert ever characterized their opinions that way, nor did they retreat from their testimony. Rather, both experts simply acknowledged that they could not guarantee a different outcome with absolute certainty, which is not the applicable legal standard under West Virginia law.

For example, Dr. Gottesman testified:

> A. That's . . . correct. **I can't guarantee and predict what would have happened with 100 percent certainty.**

J.A. 670, Gottesman Dep.at at 125:14–16 (emphasis added).

* * *

> A. Well, sure. In my opinion, . . . **had the nursing staff escalated the call, there is a chain reaction which, in my opinion,** hopefully and **more likely than not,** I hope, would have occurred, which would have been that whoever the collective nursing staff would have escalated this case to would have acted upon this information and would have communicated with an external neurosurgeon, the head of service, or the other neurosurgery group working in this hospital to do a second opinion on quality basis and to reassess the case**. I obviously can't guarantee the outcome**, **and I'm not going to say that, "Had that been done, 100 percent that there would have been . . . a complete reversal."** I think a competent neurosurgeon, again, I think, would have realized what happened and hopefully would have intervened and reversed at least some of this damage. **But the first step of triggering that on the nursing side would have been the escalation process.**

J.A. 669, *id.* at 121:11–122:7 (emphasis added).

* * *

A. I think at least would have reversed some of the damage that was done. **I, of course, can't tell you that all of it would have been completely reversed and he would have been completely back to a completely functional state, but it's my opinion that he certainly would have recovered function certainly beyond what he did eventually, which was very little.**

J.A. 669, *id.* at 122:12–18 (emphasis added).

* * *

A. **I'm not qualified to say with absolute certainty that had he had the surgery at some point between the 7th and the 13th that he would have completely recovered his function, nor to what degree he would have recovered. But I'm of the opinion that had surgery been done to relieve the compression of the spinal cord, certainly a degree of recovery would have returned.** I mean, we know from a year later that he had surgery almost a year later, and he recovered some function at that point in time. It stands to reason that the earlier this decompression would have been successfully performed that he would have recovered even more function.

J.A. 669, *id.* at 122:21–123:10 (emphasis added).

Dr. Ozuna also emphasized in his deposition that his causation opinions are more than mere speculation or assumption:

Q. Doctor, do you have a feeling that if someone of any of those groups had brought these conditions -- brought these issues up to someone outside of Dr. Yalamanchili, and asked for that second opinion, and it had been granted, **do you believe that the -- it is, within a reasonable degree of medical certainty, likely that his condition would have improved before he was discharged**?

* * *

THE WITNESS: **Yes, I do.**

J.A. 651, Ozuna Dep. at 130:11–18, 130:21 (emphasis added).

It is undisputed that West Virginia law does not require medical experts, such as Drs. Gottesman and Ozuna, to express their opinions with absolute certainty. The applicable standard is "reasonable medical probability" under W. Va. Code § 55-7B-7(a)(2), and both experts provided their causation opinions to that standard, as discussed above.

Notably, Dr. Ozuna specifically opined that had BMC employees complied with the applicable standard of care in their treatment of Mr. Hernandez, there was greater than a 25% chance that his neurological and mobility impairments would have improved:

> Q. Doctor, do you have an opinion, based on a reasonable degree of medical certainty, as to whether Mr. Hernandez had a greater than 25 percent chance of an improved recovery had Dr. Juneja and Dr. Kutlu performed an MRI before his discharge and sought a second opinion?
>
> A. Yes, I believe so.

J.A. 652, Ozuna Dep. at 133:24–134:17

* * *

> A. My opinion is that he would have had a greater than 25 percent chance of improvement within a reasonable medical certainty if he'd had some notification of staff above and initiated the care that we just outlined."

J.A. 651 -652. *id.* at 132:23–133:7.

Under West Virginia law:

> If the plaintiff proceeds on the 'loss of chance' theory, i.e., that the health care provider's failure to follow the accepted standard of care deprived the patient of a chance of recovery or increased the risk of harm to the patient which was a substantial factor in bringing about the ultimate injury to the patient, the plaintiff must also prove, to a reasonable degree of medical probability, that following the accepted standard of care would have resulted in a greater than twenty-five percent chance that the patient would have had an improved recovery or would have survived.

W. Va. Code § 55-7B-3(b). Dr. Ozuna's testimony is sufficient to demonstrate proximate cause under a "loss of chance" theory under West Virginia law.

No statute or other authority under West Virginia law requires Petitioners' experts to entirely rule out the possibility that nothing could have resulted in a better outcome for Mr. Hernandez. Moreover, Dr. Ozuna specifically explained why he does not find this argument persuasive in forming his causation opinion:

> Q. And if that was the case, there was nothing the nurses or the OTs or PTs could have done to change his outcome, is that correct?

A. If we assume that he was not going to get better, that is correct. But we don't know. **We do know that he did get better after his third surgery a year later.**

J.A. 648, Ozuna Dep. at 120:16–21 (emphasis added).

It is well-established under West Virginia law that expert causation testimony such as that provided by Petitioners' experts is sufficient to defeat summary judgment. *See, e.g.*, *Est. of Fout-Iser*, 220 W. Va. at 678, 649 S.E.2d at 250 (reversing a grant of summary judgment where the expert opined that, within a reasonable degree of medical certainty, had the hospital staff not delayed ordering necessary medical testing, the outcome for the patient would likely have been different); *Stewart v. George*, 216 W. Va. 288, 293, 607 S.E.2d 394, 399 (2004) (reversing a grant of summary judgment where the expert testified that the doctor's failure to diagnose and treat hyperglycemia created a risk factor contributing to the plaintiff's infection, and rejecting the argument that the expert was required to exclude every other possible contributing cause).

For all of the reasons described above, the opinion testimony of Drs. Ozuna and Gottesman is sufficient to support a jury finding that BMC employees proximately caused Petitioners' damages. Accordingly, the circuit court erred in granting judgment as a matter of law.

B. The circuit court erred by finding there was no genuine dispute of material fact as to causation, despite Petitioners' presentation of evidence relating to relevant and admissible expert medical opinion testimony that various specific breaches of the standard of care by Respondent's employees did proximately cause Petitioner Samuel Hernandez's injuries.

Notably, while BMC filed various motions *in limine* in the circuit court, it never moved to exclude the causation opinions of Drs. Ozuna or Gottesman. Nor did BMC challenge the admissibility of their opinions or their qualifications to testify. Likewise, the circuit court did not exclude their opinions or question their qualifications. *See* J.A. 719-38, Order. As shown in the evidence discussed above, the medical causation testimony of Drs. Ozuna and Gottesman is sufficient under West Virginia law to permit a jury to infer that the breaches of the standard of care

by BMC's nurses, therapists, and staff proximately caused Petitioners' damages.

West Virginia law is clear:

> To be sufficient to warrant a finding by the jury of the proximate cause of an injury, expert medical testimony need only be 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 defendant.

Pygman v. Helton, 148 W. Va. 281, 286-87, 134 S.E.2d 717, 721 (1964).

Unlike the standard of care, proximate cause may be established through a reasonable inference of causation and does not require proof to a reasonable certainty. *Sexton v. Grieco*, 216 W. Va. 714, 718–20, 613 S.E.2d 81, 85–87 (2005). "Permitting a jury to draw inferences from evidence is not the functional equivalent of speculation." *Dellinger v. Pediatrix Med. Grp., P.C.*, 232 W. Va. 115, 124 n.15, 750 S.E.2d 668, 677 n.15 (2013).

The circuit court's own order acknowledged that the West Virginia Supreme Court of Appeals has "specifically rejected the requirement that the [expert] tie the injury to the negligence by way of … any rigid incantation or formula." J.A. 729, Order at Concl. of Law 11 (quoting *Sexton*, 216 W. Va. at 720, 613 S.E.2d at 87). Even the failure of counsel to ask an expert a direct question about proximate cause does not render the testimony insufficient, so long as the testimony as a whole permits a reasonable inference of causation. *See Sexton*, 216 W. Va. at 720; *Dellinger*, 232 W. Va. at 124.

Viewed in its entirety, the deposition testimony of Petitioners' experts clearly reflects that both Drs. Ozuna and Gottesman were providing opinions to a reasonable degree of medical probability. *See Est. of Fout-Iser*, 220 W. Va. at 677 n.8, 649 S.E.2d at 250 n.8 (holding that where deposition testimony reflects that opinions are offered with reasonable medical probability, failure to use the exact phrase does not render the testimony inadequate).

The circuit court nevertheless relied on *Stoudt v. Eads* in finding that Petitioners' expert testimony was speculative. That reliance was misplaced. The facts in *Stoudt* are starkly different

from this case. In *Stoudt*, the plaintiff alleged that abdominal pain was caused by a surgical device left in her body, but the pain both predated the surgery and persisted after the device was removed. The plaintiff's expert opined only that the device "may" have caused the pain and admitted it was "tricky" to establish a direct link because other causes were possible. *Stoudt v. Eads*, 248 W. Va. 583, 586-90, 889 S.E.2d 305, 308-10 (Ct. App. 2023).

By contrast, Petitioners' experts drew a clear causal connection between BMC employees' failures—specifically, the failure to escalate Mr. Hernandez's decline up the chain of command, seek second opinions, and order a STAT MRI—and the delay in surgical repair of the March 6, 2020 injury that led to Mr. Hernandez's permanent quadriplegia. Their testimony establishes, within a reasonable degree of medical probability, that avoiding this delay would have allowed Mr. Hernandez to recover more neurological and physical function. No alternative causes exist in this record, and Petitioners' experts did far more than opine that BMC's conduct "may" have caused harm. The circuit court therefore erred in equating this testimony with the speculation in *Stoudt*.

Similarly, the circuit court's reliance on *Dellinger* and *Tolley* was misplaced. In *Dellinger*, the plaintiff's expert expressly admitted he could not state, to a reasonable degree of probability, that earlier intubation would have changed the patient's outcome, and he could not quantify the harm caused. *Dellinger*, 232 W. Va. at 123, 750 S.E.2d at 676. In *Tolley*, an alleged toxic-exposure case, the plaintiff's expert could not identify the actual cause of the plaintiff's respiratory condition and could only speculate about exposure. *Tolley v. Acf Indus.*, 212 W. Va. 548, 575 S.E.2d 158 (2002). Both cases involved outright speculation, unlike the reasoned, probability-based testimony offered here.

The record here contains ample evidence that escalation up BMC's chain of command would have altered Mr. Hernandez's care. Both Dr. Ozuna and Dr. Gottesman testified that the applicable standard of care required BMC hospitalists, nurses, and staff to advocate for Mr.

Hernandez by seeking second opinions and escalating concerns about his decline past Dr. Yalamanchili. *See* J.A. 642, 644-48, 651, Ozuna Dep. at 77:17-80:14, 89:3-90:4, 101:24-102:14, 109:6-110:12, 111:6-113:5, 117:5-23, 119:7-23, 130:10-132:14; J.A. 658-668, 670, Gottesman Dep. at 57:2-58:8, 60:3-6, 65:8-67:5, 68:11-19, 69:23-72:11, 75:15-76:10, 77:16-79:6, 82:5-16, 84:1-10, 101:4-17, 102:21-103:5, 105:12-24, 106:10-111:2, 111:12-112:22, 113:4-116:10, 119:2-15, 125:17-126:8.

Dr. Ozuna specifically testified, to a reasonable degree of medical probability, that had BMC employees not breached these standards of care, Mr. Hernandez's outcome likely would have improved:

> Q. Your disclosure states that, 'To a reasonable degree of medical probability, if the nursing staff had gone up their chain of command, which may include notifying risk management, Mr. Hernandez would have received a proper medical assessment prior to his discharge, he would have been provided additional radiological studies following the second surgery on March 6, 2020, and prior his discharge to acute inpatient rehabilitation on March 13, 2020, and proper surgical intervention to decompress his spinal cord.' **So, to a reasonable degree of medical probability,** . . . an RN reporting this case to risk management would have resulted in risk management or whomever entirely upending Dr. Yalamanchili's and the hospitalists' plan of care?
>
> A. Yes, I think so.

J.A. 647, Ozuna Dep. at 113:6–20.

* * *

> Q. If that is your opinion, that the wrong surgery was performed, then there's nothing the nurses or PTs or OTs could have done to change the outcome, is that correct?
>
> A. No, that's not true.

J.A. 649, *id.* at 121:1–6.

* * *

> Q. If the wrong surgery was performed from the beginning, does that mean that Mr. Hernandez could not have recovered? His . . . decompression would have

been such that he would have been a paraplegic because of that surgery?

* * *

A. I would say I disagree with that.

J.A. 649, *id.* at 121:22–122:11.

Moreover, Dr. Gottesman testified similarly that if the nurses had escalated Mr. Hernandez's case beyond Dr. Yalamanchili, post-surgery and "communicated with an external neurosurgeon, the head of service, or other neurosurgery group working in this hospital to do a second opinion," the case would, with reasonable medical probability, have been seen by a competent neurosurgeon who "would have realized what happened and hopefully would have intervened and reversed at least some of this damage." J.A.669, Gottesman Dep. at 121:8–122:7. Further, Dr. Gottesman testified that in his opinion: "I think that had [nursing staff] escalated this case up the chain of command appropriately that . . . . **More likely than not**, I think more would have been done to assess and reassess and investigate the circumstances." J.A. 665, *id*. at 106:16–108:13. According to Dr. Gottesman, to a degree of medical probability, had an MRI been done, it would have shown continued severe spinal cord impingement/compression necessitating intervention. J.A. 659-660, *id*. at 68:20-69:22.

Respondent's own policies and procedures explicitly allow nurses to escalate patient care concerns beyond the attending physician to that physician's superior if the nurse has reason to doubt or question the care being provided. *See* J.A. 664, *id.* at 101:1-17. Dr. Gottesman testified that, had the nursing staff escalated Mr. Hernandez's case as required by the standard of care, "more likely than not" there would have been communication with "an external neurosurgeon, head of [neurology] service, or other neurosurgery group working with this hospital to do a second opinion … and assess the case." *See* J.A. 668-69, *id.* at 119:21-121:21. According to Dr. Gottesman, timely intervention at that stage would have resulted in Mr. Hernandez recovering substantially more

function than he ultimately did following the delayed decompression surgery a year later. *See* J.A. 669, *id.* at 122:8-18.

Contrary to the circuit court's Conclusion of Law 14, the evidence clearly establishes who should have been informed regarding Mr. Hernandez's deteriorating condition. Those individuals include qualified medical staff, such as spine surgeons, neurologists, an external neurosurgeon, the head of neurology service, or another neurosurgical group affiliated with the hospital. Had those providers been informed, they would have ordered additional radiological studies and performed surgical decompression before discharging Mr. Hernandez to rehabilitation.

Petitioners' experts were not required to identify a specific individual by name. Dr. Ozuna testified that appropriate notifications would have been to "qualified medical staff, including spine surgeons [and] neurologists." *See* J.A. 646, Ozuna Dep. at 109:6-17. Dr. Gottesman similarly testified that escalation should have reached "an external neurosurgeon, head of [neurology] service, or other neurosurgery group working with this hospital to do a second opinion … and assess the case." *See* J.A. 668-669, Gottesman Dep. at 119:21-121:21. This testimony is **not** speculation; it reflects a clear chain of medical responsibility under standard practice.

For example, in *Estate of Fout-Iser v. Hahn,* the West Virginia Supreme Court of Appeals held the following expert testimony to be adequate to defeat summary judgment:

> [Defendant] Dr. Rhee, in his capacity as a radiologist, was responsible for providing an interpretation of the images. Per Ms. Niland's testimony, Dr. Rhee was not satisfied with the quality of the images he was receiving. Since he is the one that's responsible for rendering that interpretation, I would consider it his responsibility 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.

Estate of Fout-Iser, 220 W. Va. at 677–678, 649 S.E.2d at 250 (emphasis added).

Further, Petitioners specifically offered deposition testimony from Dr. Ozuna in which he stated:

Q. Your opinion that the standard of nursing care required the BMC nurses to seek a second opinion and other medical intervention is -- is regardless of the fact that they don't have the training, education, and experience of a physician or surgeon, correct?

A. Yes.

Q. Okay. You've opined that "The nurses' failure to exercise independent professional judgment, as required by their license, was a substantial deviation from the standard of care, including Kackley and Blue, and caused additional irreversible neurological damage and loss of function." So is it your opinion that the nurses should have known that Mr. Hernandez's outcome was not appropriate despite the surgeon and the hospitalists believing that it was?

A. Yes.

Q. And is it your opinion that Mr. Hernandez's outcome could have been changed had the nurses sought out further medical intervention or second opinions?

A. Yes.

Q. At what point between the 6th and the 13th should the nurses have acted to change the outcome of Mr. Hernandez's case?

A. At any point.

Q. So your opinion assumes that Mr. Hernandez's condition after the second surgery could have been altered?

A. Yes.

J.A. 648, Ozuna dep. at 119:7-120:11.

Dr. Ozuna further testified as follows:

Q . . . .do you have an opinion, based on a reasonable degree of medical certainty, as to whether Mr. Hernandez had a greater than 25 percent chance of an improved recovery had the nursing staff, the therapists, and the other hospital staff that were treating or caring for Mr. Hernandez in his postoperative period between the 6th and the 13th exercised their chain of command and sought a -- a second opinion of his condition?

A. I do.

Q. And what --

A. Yes.

Q. -- is your opinion?

A. Yes. My opinion is that he would have had a greater than 25 percent chance of improvement within a reasonable medical certainty if he'd had some notification of staff above and initiated the care that we just outlined.

Q. And, Doctor, do you have an opinion as to whether exercising the -- the chain of command and -- and the policy that was shown to you by defense counsel, if the nurses and staff, therapists, had -- if that would be the standard and care in the -- in the -- under the circumstances of Mr. Hernandez's situation?

A. Yes, I do.

Q. And what is that opinion?

A. That -- same -- same as before, that if they had notified somebody above that could initiate the process that we outlined [prior to discharge initiated at least an MRI, triggered the consult from a second opinion that evaluated the situation], the care would have been improved, and his chances of improvement would be more than 25 percent within reasonable medical certainty.

J.A. 651-652, *id*. at 132:23-135:6.

As Petitioners have demonstrated, both of their medical experts opined, to a reasonable degree of medical probability, that escalation up the chain of command and advocacy for a second opinion by a different neurosurgeon would have resulted in additional surgical intervention that would have improved Mr. Hernandez's outcome. Accordingly, the circuit court erred in finding that there was no genuine dispute of material fact as to causation.

When viewed in the light most favorable to the nonmoving party—here, Petitioners—the evidence satisfies the causation requirements of W. Va. Code §§ 55-7B-3(a)(1)–(2) and 55-7B-3(b). The causation opinions of Drs. Ozuna and Gottesman are stated with reasonable medical probability, are not speculative, and are sufficient to permit a reasonable jury to infer that the breaches of applicable standards of care by BMC's employees proximately caused Petitioners' damages. West Virginia law is clear that such expert testimony, together with the reasonable inferences a jury may

draw from it, is sufficient to defeat summary judgment. *See Estate of Fout-Iser*, 220 W. Va. at 677-78, 649 S.E.2d at 250.

Accordingly, the circuit court's grant of summary judgment should be reversed.

C. The circuit court erred by usurping the fact-finding role of the jury.

The circuit court's order focuses on the testimony of three defendants who have since been dismissed from this case—surgeon Dr. Yalamanchili and hospitalists Dr. Juneja and Dr. Kutlu—and the ways in which they contradicted or criticized the opinions of Petitioners' causation experts. *See* J.A. 725-26, Order ¶¶ 28-31. The circuit court noted that these witnesses testified they would not have expected Mr. Hernandez's post-surgical neurological and physical limitations to resolve in less than a year and that they either did not believe a second opinion was necessary or that escalation up the chain of command would have altered his outcome.

However, testimony on a factual issue is not exclusive, and "the jury has a right to weigh the testimony of all witnesses, experts and otherwise." *Papenhaus v. Combs*, 170 W. Va. 211, 217, 292 S.E.2d 621, 627 (1982) (quoting *Webb v. Chesapeake & O. Ry. Co.*, 105 W. Va. 555, 144 S.E. 100 (1928), syl. pt. 2). By crediting the testimony of the dismissed defendants over the testimony of Petitioners' qualified experts, the circuit court improperly weighed credibility and factual sufficiency—tasks reserved for the jury. The circuit court's conclusion that Petitioners' experts were engaging in "mere speculation" in light of other witness testimony was itself a factual determination that usurped the jury's role as fact-finder.

VIII. CONCLUSION

For the reasons set forth above, Petitioners respectfully request that this Court reverse the circuit court's order granting summary judgment and remand this case for further proceedings.

Dated: August 6, 2025.

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

NO. 25-ICA-224

SAMUEL HERNANDEZ and ZUSMITHA ARNESTO,
Plaintiffs Below, Petitioners,

v.

CITY HOSPITAL, INC. d/b/a WVU MEDICINE–BERKELEY MEDICAL CENTER,
Defendant Below, Respondent.

(On appeal from the Circuit Court of Berkeley County – CC-02-2022-C-52)

CERTIFICATE OF SERVICE

I, C. Edward Amos, II, counsel for Petitioners Samuel Hernandez and Zusmitha Arnesto, do hereby certify that caused a true and correct copy of the foregoing Petitioners' Brief to be served upon counsel for all parties to this appeal listed below via the Court electronic filing system per Appellate Rule of Procedure 37 and 38A:

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