

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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No. 25-ICA-224

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SAMUEL HERNANDEZ  
AND ZUSMITHA ARNESTO,

Plaintiffs Below, Petitioners,

v.

CITY HOSPITAL, INC. d/b/a  
WVU MEDICINE/BERKELEY MEDICAL CENTER,

Defendant Below, Respondent

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**RESPONDENT'S RESPONSE IN OPPOSITION  
TO PETITIONERS' BRIEF IN SUPPORT OF APPEAL**

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## INTRODUCTION

Respondent City Hospital, Inc. d/b/a WVU Medicine/Berkeley Medical Center (“BMC”) urges the Court to deny Petitioners’ appeal. In the underlying action brought pursuant to the West Virginia Medical Professional Liability Act (“MPLA”), Petitioners’ experts<sup>1</sup> opined that Respondent’s employees—nurses, physical therapists, and occupational therapists—breached the standard of care when they failed to escalate Mr. Hernandez’s post-surgical condition to an individual or department outside of the assigned surgical and medical care team. Petitioners’ experts failed to causally connect, either through direct causation or a loss of chance theory, Respondent’s employees’ alleged breach of the standard of care with Mr. Hernandez’s post-surgical condition. In addition, Petitioners’ experts’ opinions are speculative, conditional, and ignore the uncontroverted evidence developed in the underlying action. Without expert testimony linking the alleged breach to Petitioners’ injury, there is no genuine issue of material fact and the Circuit Court’s award of summary judgment in favor of Respondent must be affirmed.

### I. STATEMENT OF THE CASE

On February 17, 2020, Mr. Hernandez tripped and fell from standing and injured his cervical vertebrae.<sup>2</sup> Mr. Hernandez received care at University of Virginia Medical Center<sup>3</sup> until he was discharged on February 20, 2020. On February 25, 2020, he sought outpatient neurosurgical care from Dr. Ravi Yalamanchili.<sup>4</sup> Dr. Yalamanchili is not and was not, at the time this cause of action arose, employed by BMC but had privileges to perform neurosurgery at BMC. Dr. Yalamanchili’s plan of care for Mr. Hernandez included steroid therapy to treat spinal cord edema<sup>5</sup>

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<sup>1</sup> Petitioners’ causation experts are spine surgeon Dr. Ozuna and hospitalist Dr. Gottesman.

<sup>2</sup> JA 068 – 073; JA 074 – 076; JA 077 – 0797.

<sup>3</sup> JA 080 – 086.

<sup>4</sup> JA 087 – 090.

<sup>5</sup> “Edema” here refers to post-injury swelling of the spinal cord.

pre-surgically and a surgical procedure, an anterior cervical discectomy (“ACD”) and fusion at C5-6 and C6-7, to take place on March 6, 2020, at BMC.<sup>6</sup>

Mr. Hernandez was ambulatory and continent of bowel and bladder when he entered BMC on March 6, 2020.<sup>7</sup> Mr. Hernandez’s surgery was performed by Dr. Yalamanchili at approximately 1:20 P.M.<sup>8</sup> At 3:56 P.M., a nursing assessment in the Post-Anesthesia Care Unit (“PACU”) determined that Mr. Hernandez was unable to move his left lower extremity.<sup>9</sup> Dr. Yalamanchili ordered a stat MRI, which “showed recurrent/residual disk, especially at C5-6 and C6-7,”<sup>10</sup> indicating that the intended decompression of Mr. Hernandez’s cervical spine had not been achieved. As a result, Dr. Yalamanchili performed a second ACD on Mr. Hernandez at 7:03 P.M.<sup>11</sup>

The next day, March 7, 2020, at approximately 11:03 A.M., hospitalist Dr. Kutlu<sup>12</sup> wrote a Progress Note indicating that Mr. Hernandez “states that he did not have any significant neurological improvement. Unable to move his lower extremities. Cont[inues] to have severe numbness in both upper and lower extremities . . . .”<sup>13</sup>

Over the course of Mr. Hernandez’s seven-day inpatient admission, he experienced some post-surgical progress. Mr. Hernandez was unable to urinate as of March 6, 2020, at 11:10 P.M., for which bladder catheterization was performed.<sup>14</sup> On March 7, 2020, Dr. Yalamanchili wrote a Progress Note stating that Mr. Hernandez “says he is getting feeling back into his trunk area. This

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<sup>6</sup> JA 087 – 090.

<sup>7</sup> JA 091, 092. *See also* JA 157 – 158, Samuel Hernandez Dep. 17:8-24; 18:1-22.

<sup>8</sup> JA 096.

<sup>9</sup> JA 104 – 106.

<sup>10</sup> JA 107.

<sup>11</sup> JA 108.

<sup>12</sup> Dr. Kutlu (and Dr. Juneja referenced *infra*) is not and was not at the time this cause of action arose employed by Respondent.

<sup>13</sup> JA 110.

<sup>14</sup> JA 115; JA 116 – 117.

is what he had as he recovered from similar problem last time. Incision [clean and dry]. Will need inpatient rehab.”<sup>15</sup>

On March 8, 2020, at 7:30 A.M., Nurse Mychael Blue wrote: “Has weak grips equal, has numbness to arms says he can feel a little more, able to raise arms up, numbness to legs, absent plantar and dorsi flexions . . . .”<sup>16</sup> On March 9, 2020, Nurse Deborah Kackley noted: “Now able to raise right arm today but unable to grip with either hand yet- does have some feeling in hands. Unable to move legs- no feeling yet . . . .”<sup>17</sup> Dr. Kutlu noted on March 10, 2020, “upper extremity strength is improved, lower extremity motor strength [with] no improvement yet.”<sup>18</sup>

By the day of his discharge, March 13, 2020, one of the physical therapists noted “[patient] is motivated and continues to show improvement daily.”<sup>19</sup> An occupational therapist noted “[Patient] is making fair progress towards goals. [Patient] was able to sit unassisted this date on [edge of bed] for approx. 1 min x2 assisted seated breaks between trials . . . [Patient] will benefit from an acute rehab stay for increased independence in ADLs<sup>20</sup> and functional mobility.”<sup>21</sup> Nurse Deborah Kackley noted, “Patient now able to use hands somewhat- grip is weak. Unable to feel or move legs . . . being [discharged] to Winchester Rehab today.”<sup>22</sup>

On February 5, 2021, Mr. Hernandez underwent a third surgery, performed at Winchester Medical Center, in an attempt to alleviate his remaining cervical spinal stenosis to any degree possible.<sup>23</sup> A post-surgical CT scan on February 6, 2021, revealed that the surgery performed at

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<sup>15</sup> JA 118.

<sup>16</sup> JA 122.

<sup>17</sup> JA 124.

<sup>18</sup> JA 125.

<sup>19</sup> JA 129.

<sup>20</sup> “ADLs” are activities of daily living.

<sup>21</sup> JA 131.

<sup>22</sup> JA 134.

<sup>23</sup> JA 135 – 136.

Winchester Medical Center resolved the “moderate to severe spinal stenosis with moderate cord compression at the C5-C6 level . . . .”<sup>24</sup>

Mr. Hernandez testified that after the 2021 surgery, he regained the ability to sense temperature on his bottom side, feeling in parts of his groin, and the ability to wiggle his toes when his leg spasms and is positioned straight in front of him.<sup>25</sup> Dr. Salvetti, the surgeon who performed the March 2021 surgery, testified that Mr. Hernandez regained “minor improvements in his neurological function”<sup>26</sup> from that operation. However, Mr. Hernandez remains wheelchair bound and dependent on others for activities of daily living.

Petitioners filed a civil action in the Circuit Court of Berkeley County, asserting that Respondent, through its employed nurses, physical therapists, and occupational therapists, “breached the standard of care by failing to provide proper independent assessments of Mr. Hernandez and the adverse changes in his condition . . . by failing to seek out proper physician interventions so that the cause of Mr. Hernandez’s decline in function could be properly diagnosed . . . by failing to be advocates for Mr. Hernandez and seek out proper medical care and treatment for his decline in function prior to his discharge to rehabilitation . . . by failing to use the chain of command to make sure that Mr. Hernandez’s deteriorating condition was properly assessed and treated before he was discharged to rehabilitation.”<sup>27</sup> Petitioners’ Amended Complaint sought punitive damages as well as damages for past and future medical and hospital bills, physical and psychological injuries, emotional distress and mental pain and suffering, loss of income and earning capacity, loss of consortium and various enumerated and non-enumerated damages.<sup>28</sup>

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<sup>24</sup> JA 140.

<sup>25</sup> JA 158, Samuel Hernandez Dep. 18:15-22.

<sup>26</sup> JA 241, David Salvetti, M.D. Dep. 35:17.

<sup>27</sup> JA 028, ¶¶ 57-60.

<sup>28</sup> JA 028, p. 13-14.

On December 12, 2024, Respondent filed its Motion for Summary Judgment. Neurosurgeon Dr. Yalamanchili and hospitalists Dr. Juneja and Dr. Kutlu were dismissed from the underlying action pursuant to monetary settlements after Respondent’s motion was filed. On March 12, 2025, the Circuit Court granted summary judgment to Respondent. On April 8, 2025, Petitioners filed their Motion to Reconsider Order Granting Summary Judgment. The Circuit Court filed its Order Denying Plaintiffs’ Motion to Reconsider Order Granting Summary Judgment on May 7, 2025. Petitioners filed their Notice of Appeal on May 28, 2025, and perfected their appeal on August 6, 2025.

## II. SUMMARY OF ARGUMENT

The standard of review of a Circuit Court’s decision to grant summary judgment is *de novo*,<sup>29</sup> and that applies where Petitioner filed a Motion to Reconsider the original order under Rule 59(e).<sup>30</sup> Rule 56(c) of the West Virginia Rules of Civil Procedure provides that a motion for summary judgment “shall be rendered forthwith 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 a judgment as a matter of law.”<sup>31</sup> This Court should affirm the entry of summary judgment because the Circuit Court properly found that the evidence at the close of discovery was “so one-sided [in favor of Respondent] that [the Respondent] must prevail as a matter of law.”<sup>32</sup>

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<sup>29</sup> “A circuit court’s entry of summary judgment is reviewed *de novo*.” *Painter v. Peavy*, 192 W. Va. 189, 192, 451 S.E.2d 755, 758 (1994).

<sup>30</sup> “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 L. PLLC*, 243 W. Va. 709, 715, 850 S.E.2d 708, 714 (2020) (citing Syl. Pt 1, *Wickland v. Am. Travellers Life Ins. Co.*, 204 W. Va. 430, 513 S.E.2d 657 (1998)).

<sup>31</sup> See *Angelucci v. Fairmont Gen. Hosp. Inc.*, 217 W.Va. 364, 368, 618 S.E.2d 373, 377 (2005).

<sup>32</sup> *Wilson v. Daily Gazette Co.*, 214 W. Va. 208, 213, 588 S.E.2d 197, 202 (2003) (*quoting Williams v. Precision Coil*, 194 W.Va. 52, 61, 459 S.E.2d 329, 338 (1995)).

The key consideration is whether there is a genuine issue as to any material fact; however, a material fact is genuine *only* when a reasonable jury could render a verdict for the nonmoving party if the record at trial were identical to the record compiled in the summary judgment proceedings.<sup>33</sup> The nonmoving party must offer more than a mere scintilla of evidence and must produce evidence sufficient for a reasonable jury to find in the non-moving party's favor. This evidence cannot be conjectural or problematic.<sup>34</sup> Additionally, the nonmoving party cannot create a genuine issue of material fact through mere speculation or building of one inference upon another.<sup>35</sup> Finally, the nonmoving party may not rest on allegations of his or her unsworn pleadings and must instead come forth with evidence of a *genuine* factual dispute. Mere allegations are insufficient in response to a motion for summary judgment to show that there is a genuine issue for trial.<sup>36</sup>

The Circuit Court granted summary judgment to Respondent in the underlying MPLA action because Petitioners did not produce evidence, in the form of expert testimony, to establish the alleged breach of the standard of care as a proximate cause of Mr. Hernandez's injuries as required by W. Va. Code § 55-7B-3(a).<sup>37</sup> In addition, Petitioners failed to prove causation under a "loss of chance" theory, because they failed to produce evidence "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 . . . ." <sup>38</sup> The

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<sup>33</sup> *Powderidge Unit Owners Ass'n v. Highland Props., Ltd.*, 196 W.Va. 692, 698, 474 S.E.2d 872, 878 (1996) (emphasis added).

<sup>34</sup> *Williams*, 194 W.Va. at 59, 459 S.E. 2d at 336.

<sup>35</sup> *Id.* at 60, 337.

<sup>36</sup> *Powderidge*, 196 W.Va. at 698, 474 S.E.2d at 878, nn.10–11.

<sup>37</sup> The elements of proof required by W. Va. § Code 55-7B-3(a) are (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.

<sup>38</sup> W. Va. Code § 55-7B-3(b).

Circuit Court appropriately determined that Petitioners' experts' speculative and conclusory opinions, which ignore the underlying facts, are contrary to the uncontroverted evidence.

Because Petitioners' expert testimony was insufficient to create the causal links necessary for the case to reach a jury under either causation path, directly pursuant to W. Va. Code § 55-7b-3(a)(1-2) or through the "loss of chance" theory, W. Va. Code § 55-7b-3(b), the Circuit Court determined that summary judgment was appropriate. This Court should affirm the Circuit Court's determination that, without sufficient expert testimony on causation as required by the MPLA, there is no genuine issue of material fact, and Respondent is entitled to summary judgment.<sup>39</sup>

### **III. STATEMENT REGARDING ORAL ARGUMENT**

Respondent requests oral argument under Rule 19 of the West Virginia Rules of Appellate Procedure because Petitioners claim that the Circuit Court erred in the application of settled law, improperly exercised discretion where the law governing that discretion is settled, ruled contrary to the weight of the evidence, and that this appeal presents a narrow issue of law. Accordingly, Respondent agrees that Rule 19 oral argument will allow the parties to fully address the issues brought before the ICA.

### **IV. ARGUMENT**

#### **A. Petitioners failed to produce evidence to causally connect Respondent's alleged failure to escalate Mr. Hernandez's care to his post-surgical progress and ultimate outcome. Accordingly, the Circuit Court did not err in granting Summary Judgment to Respondent.**

"When the principles of summary judgment are applied in a medical malpractice case, one of the threshold questions is the existence of expert witnesses opining the alleged negligence."<sup>40</sup>

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<sup>39</sup> *Hamon v. Morris*, No. 20-0841, 2021 WL 5033682, at \*6 (W. Va. Oct. 29, 2021) (memorandum decision).

<sup>40</sup> *Calhoun v. Traylor*, 218 W. Va. 154, 157, 624 S.E.2d 501, 504 (2005) (citing *Neary v. Charleston Area Medical Center, Inc.*, 194 W.Va. 329, 460 S.E.2d 464 (1995)).

Petitioners are wrong when they state that the Circuit Court failed to view their experts' testimony in totality, all facts relied upon, and all inferences therefrom in the light most favorable to Petitioner.<sup>41</sup> The Circuit Court granted summary judgment after finding that Petitioners produced **no evidence** to support the existence of a genuine issue of material fact as to causation in the underlying medical malpractice action. Because Petitioners did not produce causation evidence, one of the two elements of proof required by W. Va. § Code 55-7B-3(a)(1-2),<sup>42</sup> the Circuit Court's grant of summary judgment was appropriate, and this Court should affirm the Circuit Court's ruling.

Contrary to Petitioners' claim, the Circuit Court did not grant summary judgment to Respondent because Petitioners' experts' used the wrong words in their opinions. The Circuit Court granted summary judgment to Respondent because Petitioners' experts' use of certain words—"hope" and "think" in particular—represents the experts' inability to make the requisite causal connection between the alleged breach and Plaintiffs' alleged injuries. This is not mere semantics – it is a fatal issue for Petitioners in this action. Petitioners' experts' reliance on such speculative statements does not establish causation to a reasonable degree of medical probability between the Respondent's alleged breach and Mr. Hernandez's injuries and ultimate outcome. Because the Circuit Court found insufficient evidence of a causal connection between the Respondent's alleged breach of the standard of care and Mr. Hernandez's injuries, there was no basis upon which a jury could reasonably infer that any conduct of Respondent was a proximate cause of Mr. Hernandez injuries, and the Circuit Court appropriately rendered summary judgment in favor of Respondent.

**1) Petitioners' experts' narrow standard of care opinions make apparent that Respondent was unable to exert control over Mr. Hernandez's post-surgical progress or ultimate outcome.**

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<sup>41</sup> Pet'rs' Br. p. 7.

<sup>42</sup> *See supra* n. 37.

A clear understanding of Petitioners' experts' opinions against BMC's employees is a necessary predicate to affirming the Circuit Court's Order Granting Summary Judgment. Petitioners' experts opined that Respondent's employees—nurses, physical therapists, and occupational therapists— failed to meet the standard of care when they did not escalate Mr. Hernandez's condition through BMC's hierarchy<sup>43</sup> to involve someone outside the care team regarding Mr. Hernandez's post-surgical progress, allegedly violating City Hospital Medical Staff Rules and Regulations, specifically Section D, Paragraph 9, Nursing Responsibility for Patient Care Surveillance. Dr. Gottesman expanded on this alleged breach as follows:

[I]f a nurse has any reason to doubt or question the care provided to any patient and the escalation process, about informing the attending physician and that a nurse has the ability to escalate care beyond the level of the attending physician to the superior of the attending, who may refer the matter up the chain of command to the vice president of patient care services, and go beyond that if necessary to the CEO, president of the medical staff, et cetera. This is the specific component which, in my opinion, was not followed and was violated by the nursing staff collectively.<sup>44</sup>

Similarly, Dr. Ozuna opined that had the BMC employees made a call to escalate Mr. Hernandez's care above the assigned care team (specifically Dr. Yalamanchili, Dr. Juneja, and Dr. Kutlu), they would have met the standard of care.<sup>45</sup> Accordingly, the experts' standard of care opinions are that the failure to escalate Mr. Hernandez's care beyond the assigned care team was a breach of the standard of care.

Petitioners' experts do not opine, nor have Petitioners suggested, that Respondent's employees could have exercised control over whether additional surgical procedures or radiological studies actually would have occurred if Mr. Hernandez's care had been escalated

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<sup>43</sup> For the sake of clarity in writing, the alleged breach of the standard of care will be referred to as "failure to escalate" throughout.

<sup>44</sup> JA 304-305 100:8-18; 101:4-17.

<sup>45</sup> JA 357, Richard Ozuna, M.D. Dep. 113:2-5, Sept. 23, 2024.

beyond the care team. The parties agree that ordering or performing additional surgical procedures or radiological studies is outside of the scope of practice for nurses, physical therapists, and occupational therapists.<sup>46</sup>

Petitioners misstate the record when they denote that “Dr. Ozuna . . . opined that if **BMC employees had ordered** an additional MRI after the second procedure, further surgical repair would have provided a 50% to 70% chance of neurological improvement.”<sup>47</sup> The excerpt to which Petitioners are referring took place in the context of questioning by counsel for former defendant neurosurgeon Dr. Yalamanchili. Dr. Yalamanchili’s counsel asked Dr. Ozuna if he could quantify by percentage the benefits of earlier decompression surgery and Dr. Ozuna stated, “we know that if you get to decompressions early they do improve 50 to 70 percent of the time short-term. But the real purpose is . . . to allow him to have some improvement . . . because he never had his improvement allowed by the surgeries that he had performed.”<sup>48</sup> No witness, expert or lay, has suggested that Respondent’s employees could have ordered any test or procedure for Mr. Hernandez because this is not within the scope of practice of nurses, physical therapists, occupational therapists. Therefore, the only breach of the standard of care relevant to this appeal is BMC’s employees’ alleged failure to escalate Mr. Hernandez’s condition through BMC’s hierarchy such that other interventions, like further radiological studies and surgical intervention, *might* have been ordered by a physician. This is important because, according to Petitioners’ expert Dr. Gottesman, escalation was the maximum Respondent’s employees could have done to meet the standard of care:

**Q.** And had the nurses done what you said and escalated through . . . the hierarchy and nothing changed, would you still be of the opinion that the nurses caused his paraplegia?

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<sup>46</sup> JA 729, ¶ 12.

<sup>47</sup> Pet’rs’ Br. p. 10 (citing JA 642-43) (emphasis added).

<sup>48</sup> JA 349-350, Ozuna Dep. 81:5-24; 82:1.

- A. No. I can't expect the nurses to do more than escalate up the chain of command. I think the key factor is that they would escalate and that, had it been escalated appropriate, that competent care would have been subsequently provided. **Had the nurses done all that and nothing would have changed, I can't fault the outcome if the nurses escalated and followed their policies and chain of command as required.**<sup>49</sup>

Similarly, Dr. Ozuna responded, "I think so," when asked "had [Respondent's employees] made the telephone call to escalate, whatever that telephone call would have been, would they have met the standard of nursing care?"<sup>50</sup> Accordingly, because Respondent's employees could not exercise control over potentially outcome-changing interventions, Petitioners' experts opined that escalation efforts alone would have met the standard of care, regardless of what happened after escalation occurred.

**2) Petitioners' experts do not establish proximate cause, specifically, that Respondent's alleged failure to escalate hindered Mr. Hernandez's post-surgical progress or resulted in a loss of chance for his condition to improve.**

Petitioners' theorize that had Respondent's employees escalated Mr. Hernandez's care beyond the care team **and such escalation would have resulted in a different plan of care,**<sup>51</sup> Mr. Hernandez would have had a "greater than twenty-five percent chance" of "improved recovery."<sup>52</sup> The flaw in Petitioners' causation opinion is the attempt to predict what would have happened in the face of escalation, given the undisputed fact that Respondent's employees had no control over instituting a different plan of care and the complete lack of evidence that a new plan of care would

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<sup>49</sup> JA 310, Gottesman Dep. 124:22-24 – 125:1-10; *see also* JA 306 – 307, Gottesman Dep. 108:18-24; 109:1-13 (Dr. Gottesman again opining that the standard of care would have been met by the Respondent's employees even if nothing in Mr. Hernandez's care or outcome changed once the hierarchy became involved).

<sup>50</sup> JA 357, Ozuna Dep. 113:2-5.

<sup>51</sup> "[Mr. Hernandez] would have had a greater than 25 percent chance of improvement within a reasonable medical certainty if he'd had some notification of the staff above **and initiated the care that we just outlined.**" JA 363, Ozuna Dep. 134:13-17 (emphasis added).

<sup>52</sup> W. Va. Code § 55-7b-3(b).

have been undertaken.<sup>53</sup> Because this information was never elicited by Petitioners we can never know, to any degree of probability, what Mr. Hernandez's future would have held.

- a) **Petitioners' experts' testimony failed to establish that the alleged failure to escalate was the proximate cause of Mr. Hernandez's post-surgical progress and ultimate outcome pursuant to W. Va. Code § 55-7b-3(a)(1-2).**

Petitioners' experts' opinions did not create a genuine issue of material fact such that a jury could infer that Respondent's employees' failure to escalate through the chain of command caused Mr. Hernandez's injuries. In fact, Petitioners' experts establish nothing more than possibilities that might have resulted had the Respondent's employees escalated Mr. Hernandez's care; possibilities over which Respondent's employees had no factual or legal control. As excerpted above, Dr. Gottesman unequivocally testified that Respondent's employees would have met the standard of care even if they escalated the care through the hierarchy and no changes were made in Mr. Hernandez's care as a result.<sup>54</sup> Dr. Gottesman further expanded on his opinion:

- Q. And so, of course, **the idea that something would have changed, that's . . . speculation. None of us know what would have happened, correct?**
- A. **That's . . . correct.** I can't guarantee and predict what would have happened with 100 percent certainty.<sup>55</sup>  
. . .
- Q. So what I'd like to understand before trial is how these nurses' failure to make the call to . . . escalate caused Mr. Hernandez's paraplegia.
- 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

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<sup>53</sup> See *infra* pages 18-19 (discussing the testimony of former defendant physicians regarding Mr. Hernandez's care and potential escalation thereof).

<sup>54</sup> JA 310 – 311, Gottesman Dep. 124:22-24 - 125:1-10.

<sup>55</sup> *Id.* Gottesman Dep. 124:22-24; 125:1-16.

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.

**Q.** So . . . your **assumption** is that after that second surgery, something could have been done to reverse . . . the paralysis that he was experiencing after that; is that correct?

**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.

**Q.** Do you believe that you are qualified . . . to express that opinion?

**A.** I'm not qualified to say with absolute certainty that had he had the surgery at some point between the 7<sup>th</sup> and the 13<sup>th</sup> 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.<sup>56</sup>

Petitioners' spine surgery expert Dr. Ozuna opined:

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<sup>56</sup> **JA 310**, Gottesman Dep. 121:8-24; 122; 123:1-10 (emphasis added).

**Q.** So, to a reasonable degree of medical probability, **you are speculating** that 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.**<sup>57</sup>

...

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

**A.** Yes.

**Q.** . . . **There's also a possibility that his condition was unchangeable after the second surgery;** is that fair?

**A.** **That's fair.**

**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 he did get better after his third surgery a year later.<sup>58</sup>

Both Petitioners' experts admit that their causation opinions are predicated on speculation rather than a reasonable degree of medical probability. Ultimately, "proximate cause cannot be based on speculation."<sup>59</sup> Petitioners' experts' opinions are insufficient to establish causation such

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<sup>57</sup> **JA 357**, Ozuna Dep. 113:15-20 (emphasis added).

<sup>58</sup> **JA 359**, Ozuna Dep. 119:24; 120:1-21 (emphasis added).

<sup>59</sup> *Stoudt v. Eads*, 248 W. Va. 583, 589, 889 S.E.2d 305, 311 (Ct. App. 2023).

that this medical malpractice action against Respondent should reach the jury for consideration. Petitioners take pains to point out that their experts hold their opinions to a reasonable degree of medical probability,<sup>60</sup> as required by W. Va. Code § 55-7B-7(a), and that their experts need not “tie the injury to the negligence by way of . . . any rigid incantation or formula.”<sup>61</sup> This simply is not enough to create the necessary causal connection when their opinions are otherwise self-serving, speculative, and conditioned upon the unknown actions and decisions of unknown actors for which Petitioners’ evidence is entirely lacking.<sup>62</sup>

Petitioners’ experts did not and could not opine whether, if BMC employees had taken different action, Mr. Hernandez’s paraplegia would have resolved, improved, or been altered by any measure. Both experts speculated<sup>63</sup> that, because Mr. Hernandez’s third surgery in March 2021 yielded benefit,<sup>64</sup> an earlier surgery, sometime between March 7 and March 13, 2020, would have had positive results. To accept Petitioners’ experts’ opinions on causation, multiple assumptions are required. First, purely from a medical perspective, the experts’ causation opinions assume that a surgery between March 7 and 13, 2020 would have improved Mr. Hernandez’s post-surgical neurological condition. They assume that such surgery **could** have been performed sometime between March 7 and March 13, 2020, that such surgery **would** have been performed, and that such surgery would have resulted in an outcome better than Mr. Hernandez’s condition at discharge on March 13, 2020.

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<sup>60</sup> Pet’rs’ Br. p. 12.

<sup>61</sup> *Sexton v. Grieco*, 216 W. Va. 714, 720, 613 S.E.2d 81, 87 (2005).

<sup>62</sup> The WVSCA in *Dellinger*, highlighted the insufficiency of medical expert testimony “‘conditioned’ upon . . . the existence of facts of which petitioner offered no proof.” *Dellinger v. Pediatrix Med. Grp., P.C.*, 232 W. Va. 115, 122, 750 S.E.2d 668, 675 (2013)(citation omitted).

<sup>63</sup> **JA 359**, Ozuna Dep. 120:20-21; **JA 310**, Gottesman Dep. 123:4-10.

<sup>64</sup> **JA 158**, Samuel Hernandez Dep. 18:17-22.

These assumptions cannot reasonably be made because they are contrary to the evidence. Specifically, Dr. David Salvetti<sup>65</sup> testified that had Mr. Hernandez sought care from him in February 2020, he would have performed a different surgery altogether— a posterior cervical laminectomy, the surgery he performed in March 2021, and had he done so, he would have achieved full decompression of Mr. Hernandez’s spine, and to a reasonable degree of probability, Mr. Hernandez would have maintained his ability to walk, utilize his upper extremities, and control his bowels and bladder.<sup>66</sup> In that same vein, Dr. Ozuna opined that Dr. Yalamanchili performed the “wrong surgery”<sup>67</sup> both<sup>68</sup> times on March 6, 2020, and that the reason for Mr. Hernandez’s post-surgical neurological deficits was the failure of this incorrect surgery to provide the intended decompression<sup>69</sup> of his spine.

Accordingly, given the testimony of two expert surgeons that the proximate cause of Mr. Hernandez’s post-surgical neurological deficits was either or both that 1) the “wrong surgery” was performed – twice by Dr. Yalamanchili on March 6, 2020; and, 2) that the surgeries performed on March 6, 2020 failed to achieve the intended decompression of Mr. Hernandez’s spine, a jury would have no basis to reasonably infer proximate cause from the conduct of BMC non-physician employees who provided post-surgical care to Mr. Hernandez.

**b) The Circuit Court’s Order Granting Summary Judgment should be affirmed because Petitioners’ experts’ “loss of chance” causation opinions fail to causally link the alleged failure to escalate and Mr. Hernandez’s post-surgical progress and ultimate outcome.**

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<sup>65</sup> See *supra* p. 4 (discussing surgeon David Salvetti, M.D.’s role in Mr. Hernandez’s care).

<sup>66</sup> JA 245 – 246, Salvetti Dep. 53:12-22;54;55:1-10.

<sup>67</sup> JA 335, Ozuna Dep. 22:4-9; 23:22-24; JA 336, 28:4-24; 29; JA 337, 30; 31:1-16; 21-24; 32:1-5; 33:2-6; JA 340, 42:13-20; JA 342, 50:18-19; 20-24.

<sup>68</sup> JA 342, Ozuna Dep. 50:2-5.

<sup>69</sup> JA 339, Ozuna Dep. 41:19-24; JA 340, 42:2-12.

Petitioners' experts advanced a "loss of chance" causation theory to suggest that, because Respondent's employees failed to escalate Mr. Hernandez's care, he lost a chance for recovery. Petitioners claim that 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."<sup>70</sup> Petitioners misstate the Circuit Court's Order. The fact that Petitioners' experts could not name a person to whom Respondent's employees should have escalated had no bearing on the Circuit Court's decision. It is clear from the Circuit Court's Order that it is Petitioners' failure to develop any evidence to support their claim that had someone outside the care team become involved in Mr. Hernandez's care, "they would have ordered additional radiological studies and performed surgical decompression before discharging Mr. Hernandez to rehabilitation."<sup>71</sup> Petitioners' position is based on speculation and is concocted from the hopes of Petitioners' experts, but not on evidence to support their experts' predictions of either changes in Mr. Hernandez's care and treatment or of improvement in his injuries in light of this speculative care and treatment.

To succeed on the "loss of chance" theory, Petitioners were:

[R]equire[d] **to make two distinct evidentiary showings . . .** that the defendant's failure to follow the 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." And the plaintiff "must also prove" that following the 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."<sup>72</sup>

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<sup>70</sup> Pet'rs' Br. p. 8.

<sup>71</sup> Pet'rs' Br. p. 19.

<sup>72</sup> *Graham v. Dhar*, 33 F.4th 178, 182–83 (4th Cir. 2022) (emphasis added).

Accordingly, under the “loss of chance” theory, Petitioners are required to prove **both** that 1) Respondent’s employees’ failure to invoke BMC’s chain of command deprived Mr. Hernandez of a chance of recovery, which was a substantial factor in bringing about the ultimate injury; and 2) that following the standard of care would have resulted in a greater than twenty-five percent chance that the patient would have had an improved recovery. Petitioners have failed to do this. The Circuit Court appropriately granted summary judgment in favor of Respondent, and the Petitioners’ appeal presents no counter evidence or argument to establish how the Court erred in applying loss of chance legal analysis to this action.

Petitioners produced no evidence to suggest that escalation by Respondent’s employees could have or would have resulted in upending Dr. Yalamanchili’s plan of care or otherwise changing the course of Mr. Hernandez’s care in any way, and any suggestion that such events would have taken place is unreliable considering the testimony of the former-defendant providers involved.

Contrary to Petitioners’ theory that escalation would have changed the course of Mr. Hernandez’s care, Dr. Yalamanchili, the neurosurgeon who performed Mr. Hernandez’s surgeries on March 6, 2020, was confident in his judgment that Mr. Hernandez required more time before a decrease in inflammation, physical therapy, and other rehabilitative efforts revealed their full effects, and that improvement might take **a year** to come to fruition.<sup>73</sup> Hospitalist, Dr. Juneja, testified that he had no doubts as to Dr. Yalamanchili’s explanation of Mr. Hernandez’s post-surgical condition, nor any doubts about Dr. Yalamanchili’s handling of Mr. Hernandez’s

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<sup>73</sup> JA 373, Ravi Yalamanchili, M.D. Dep. 29:7-24; JA 374, 30:1-5; 11-21.

condition.<sup>74</sup> Hospitalist, Dr. Kutlu, testified that he did not feel that a second opinion was warranted, and, accordingly, did not seek one.<sup>75</sup>

The evidence is uncontested that Mr. Hernandez's physicians were keenly aware of his post-surgical neurological condition, and all were aligned in their commitment to the plan of care. Petitioners' experts' opinion—that something else would have been done had Respondent's employees alerted other individuals—does not take into account the presence of medical staff who were actively involved and aware of Mr. Hernandez's unanticipated post-surgical condition. Their opinions assume that risk management or human resources would have questioned the medical judgment and medical decision making of Dr. Yalamanchili **and disregarded it entirely**. The opinions further assume that these physicians, who the evidence shows were engaged with Mr. Hernandez, attentive to his condition, and had a reasoned basis for their plan of care, would have been summarily dismissed and replaced by some unknown individuals who would have taken some other approach to Mr. Hernandez's care. The opinions are not supported by the evidence.

Petitioners did not depose any risk manager, human resources staff, executive, administrator, or BMC medical staff present during Mr. Hernandez's March 2020 admission to establish how they would have responded had they been contacted about Mr. Hernandez's care or what their typical practice and procedure might be in cases where the assigned medical team's care is questioned by nurses or other non-physician providers. Besides Dr. Yalamanchili, Petitioners did not depose any BMC surgeon or neurosurgeon<sup>76</sup> who may have been available at the time of Mr. Hernandez's admission. Neither Dr. Ozuna nor Dr. Gottesman rely on any studies or articles regarding functions of hospital hierarchy in cases with questioned outcomes, nor did they rely on

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<sup>74</sup> JA 447, Manie Juneja, M.D. Dep. 59:13-22; 60:1-14.

<sup>75</sup> JA 485, Mehmet Kutlu, M.D. Dep. 30:5-9.

<sup>76</sup> JA 450, Juneja Dep. 71:1-4 (regarding whether Dr. Juneja could have consulted with someone from "WVU Neurosurgery" had he felt compelled to do so).

any data or information regarding the operations of BMC that would lend support or plausibility to their “thought” or “hope” that Mr. Hernandez’s course of care would have been altered despite Dr. Yalamanchili’s active involvement in Mr. Hernandez’s care.

Petitioners’ experts are simply assuming that what they believe should have happened if care had been escalated would have happened. These are precisely the types of opinion— “based on irrational and intuitive feelings, guesses, or speculation”<sup>77</sup>— that lack reliability and, fail to support the “loss of chance” causation theory.<sup>78</sup>

Applying the law to this action, Petitioners were required to prove that Respondent’s employees’ failure to escalate deprived Mr. Hernandez a chance of recovery, which was a substantial factor in bringing about the ultimate injury, and that following the standard of care would have resulted in a greater than twenty-five percent chance that Mr. Hernandez would have had an improved recovery. Petitioners’ experts simply have not met their burden of proof and the Circuit Court properly granted summary judgment on Petitioners’ loss of chance theory of causation.

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<sup>77</sup> *Harris v. CSX Transp., Inc.*, 232 W. Va. 617, 622, 753 S.E.2d 275, 280 (2013).

<sup>78</sup> Compare *Bunner v. United States*, in which the Court found that the plaintiff proved the physician’s alleged negligence “deprived him of a twenty-five percent or greater chance of an improved outcome,” based upon expert testimony that included years’ worth of medical records and the establishment of facts regarding the type of cancer the plaintiff had, the rate of typical tumor growth, and the size of tumor presentation over the course of plaintiff’s medical treatment, which together led to the reasoned conclusion that had the physician met the standard of care, the patient would have required “less extensive surgery.”<sup>78</sup> In *Wilkinson v. United States*, the Southern District of West Virginia denied defendant’s motion for summary judgment when the Plaintiff’s expert, proceeding under the “loss of chance” theory, identified studies that proved that later diagnoses of head and neck cancer result in poorer outcomes, and opined that the breach of the standard of care led to a “reduction of life expectancy of 30 to 35 percent”<sup>78</sup> based on the rates of survival at each stage of cancer. In both *Bunner* and *Wilkinson*, the plaintiff’s experts supported a “loss of chance” theory by directly linking the breach of the standard of care with a decreased or decreasing percentage chance at improvement and indicating that the deprivation of a chance of recovery was a substantial factor in bringing about the ultimate injury. These experts relied on medical studies and literature that proved the percentage by which plaintiff’s recovery decreased over time, coupled with the facts of the case at hand.

**c) Petitioners’ attempt to distinguish the case law relied upon by the Circuit Court is unpersuasive as such cases provide authoritative legal analysis applicable to the issues presented here.**

Contrary to Petitioners’ arguments,<sup>79</sup> the Circuit Court’s Order cites cases that directly support the affirmation of summary judgment for Respondent. Petitioners claim that the Circuit Court’s reliance on *Stoudt v. Eads*, is “misplaced,”<sup>80</sup> when, in reality, it provides an authoritative analysis of causation directly applicable to this action.

In *Stoudt*, this Court found that “Ms. Stoudt failed to produce expert testimony connecting the alleged negligence and her damages. Without such expert testimony, no jury could reasonably infer a causal connection in this case[.]”<sup>81</sup> This Court affirmed summary judgment, in part, because Ms. Stoudt’s causation expert “was merely speculating regarding whether the foreign object caused Ms. Stoudt’s abdominal pain.”<sup>82</sup> The Court highlighted the fact that that “Dr. Kaniewski ‘could not be certain of whether or which instances of [Ms. Stoudt’s] abdominal pain were due to a foreign body or other multiple causes[.]’”<sup>83</sup> The problematic causation testimony in *Stoudt* is similar to the testimony at issue here in that it was speculative and lacking a basis for a reasoned inference concerning Stoudt’s abdominal pain:

Finally, Ms. Stoudt states in her brief that Dr. Kaniewski testified “about the pathophysiology of the pain caused by the foreign body to a reasonable degree of probability” and that Dr. Kaniewski testified “that it was more likely than not, that some of the pain [Ms. Stoudt] was experiencing was caused by the Endo Catch bag.” . . . However, the closest Dr. Kaniewski testified to a reasonable degree of probability was that the foreign object “may” have caused pain.

Other statements by Dr. Kaniewski further demonstrate that she was speculating whether the foreign object caused abdominal pain. Dr. Kaniewski testified that “*if [Ms. Stoudt] had pain connected to that*

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<sup>79</sup> Pet’rs’ Br. p. 15-16.

<sup>80</sup> Pet’rs’ Br. p. 15.

<sup>81</sup> *Stoudt*, 248 W. Va. at 589, 889 S.E.2d at 311.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

*plastic bag* then it's probably because it's rubbing against the abdominal wall.” (Emphasis added). Furthermore, Dr. Kaniewski was asked directly what harm was caused to Ms. Stoudt from the foreign object. Dr. Kaniewski responded, “[s]o *the only harm that I can come up with is, is the abdominal pain, potentially*, but ... it’s trickier to tell why because she has had ... a lot going on in the abdomen.” (Emphasis added).

These statements by Dr. Kaniewski demonstrate that she was merely speculating regarding possible causes of abdominal pain. Her testimony does not provide the basis for a *reasoned* inference concerning the cause of abdominal pain. In other words, Dr. Kaniewski’s testimony **would require a jury to speculate or guess whether the foreign object caused any harm.**<sup>84</sup>

Comparing the statements considered by this Court in *Stoudt*, to Petitioners’ experts’ testimony, the experts’ causation opinions are as speculative, if not more so, than those rejected in *Stoudt*. To accept Petitioners’ experts’ causation opinion—that Mr. Hernandez was deprived of a chance to possibly regain neurological function because Respondent’s employees did not escalate his care—one must assume that someone outside the control of Respondent’s employees would have done something, likewise outside of Respondent’s control. Determining *whether* that care would have been initiated is the equivalent to the *Stoudt* expert “speculating regarding possible causes of abdominal pain.”<sup>85</sup> Petitioners here are asking that a jury be allowed to determine proximate cause without critical information upon which such an inference can be made. Just like the possibility that an Endo catch bag may have caused pain, the possibility that a different plan of care would have been triggered by actors over which Respondent’s employees had no control would require a jury to speculate or guess whether meeting the standard of care would have improved Mr. Hernandez’s outcome.

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<sup>84</sup> *Id.* at 590, 312.

<sup>85</sup> *Id.*

In *Tolley v. ACF Industries, Inc.*, plaintiff's expert's medical causation opinions failed to establish proximate cause between the employer's action and the employee's alleged toxic exposure because the opinions were based "solely on possibility."<sup>86</sup> The plaintiff/employee could produce no evidence that he was exposed to a toxic chemical, and his expert could not connect his symptoms to an alleged exposure by merely establishing that Plaintiff *could have been* exposed.<sup>87</sup> Likewise here, Petitioners want a jury to decide what could have or may have happened had Respondent's employees escalated Mr. Hernandez's care. This is precisely the type of "indeterminate expert testimony on causation that is based solely upon possibility" that cannot withstand a motion for summary judgment.

Citing *Estate of Fout-Iser*, Petitioners argue that the Court failed to view the facts in light most favorable to the nonmoving party, as is required<sup>88</sup> when considering a motion for summary judgment. However, in *Fout-Iser* in response to the motion for summary judgment the nonmoving party produced evidence that supported the expert's opinion. Plaintiff produced expert opinion evidence that the alleged breach of the standard of care—the delay in treatment— caused the death of a neonate, and this was supported by the expert's explanation that a 32-week fetus has a greater than 90 percent chance of surviving. This opinion, coupled with testimony from other witnesses

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<sup>86</sup> *Tolley v. ACF Indus., Inc.*, 212 W. Va. 548, 558, 575 S.E.2d 158, 168 (2002).

<sup>87</sup> The Court specifically criticized plaintiff's expert for failing to produce evidence that would have served to establish a causal link such as to how often plaintiff was in the area where he could have been exposed to the chemical, the proximity to the chemical, ventilation, and frequency/level of exposure to the chemical. *Id.* at 559, 169.

<sup>88</sup> *Powderidge Unit Owners Ass'n v. Highland Props., Ltd.*, 196 W. Va. 692, 699, 474 S.E.2d 872, 879 (1996) (cleaned up) ("The movant's burden is only [to] point to the absence of evidence supporting the nonmoving party's case. If the moving party fails to meet this initial burden, the motion must be denied, regardless of the nonmovant's response. If the movant, however, does make this showing, the nonmovant must go beyond the pleadings and contradict the showing by pointing to specific facts demonstrating a "trialworthy" issue. To meet this burden, the nonmovant must identify specific facts in the record and articulate the precise manner in which that evidence supports its claims. As to material facts on which the nonmovant will bear the burden at trial, the nonmovant must come forward with evidence which will be sufficient to enable it to survive a motion for directed verdict at trial. If the nonmoving party fails to meet this burden, the motion for summary judgment *must* be granted.")

about the effects the delay had on the ability to provide care to the baby, led the Court to find genuine issues of material fact regarding both a breach of the standard of care and whether the breach caused injury.<sup>89</sup>

In the present action, viewing the facts in the light most favorable to Petitioners reveals a dearth of causation evidence that prevents this action from reaching a jury. Petitioners have provided nothing to support a genuine issue of material fact as to whether Respondent's employees' failure to escalate caused or affected Mr. Hernandez's post-surgical condition. Accordingly, because Petitioners experts have not established a causal link between Respondent's alleged breach of the standard of care and Mr. Hernandez's injuries, the Circuit Court's grant of summary judgment should be affirmed.

**B. The Circuit Court did not usurp the jury's fact-finder role when it found that the evidence is so one-sided in favor of Respondent that summary judgement was appropriate as a matter of law.**

Petitioners argue that the Circuit Court usurped the fact-finding role of the jury by focusing on testimony of the three former-defendant medical care providers involved: Dr. Yalamanchili, Dr. Juneja, and Dr. Kutlu.<sup>90</sup> Petitioner argues that this was error because the jury should be permitted to weigh the testimony of all witnesses, expert and otherwise and because the Circuit Court "credit[ed] the testimony of the dismissed defendants over the testimony of Petitioners' qualified experts . . . ." which should be undertaken by the jury.<sup>91</sup> Petitioners argue that the Circuit Court's conclusion that their expert's engaged in "'mere speculation' in light of other witness testimony was itself a factual determination that usurped the jury's role as fact-finder."<sup>92</sup> Again, Petitioners misstate or misconstrue the Circuit Court's Order.

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<sup>89</sup> *Est. of Fout-Iser ex rel. Fout-Iser v. Hahn*, 220 W. Va. 673, 679, 649 S.E.2d 246, 252 (2007).

<sup>90</sup> Pet'rs' Br. p. 22.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

The Circuit Court did not make a factual determination when it found that Petitioners' experts engaged in speculation. The Order accurately identified the fact that Petitioners have produced no evidence<sup>93</sup> to support their experts' opinions that had Respondent's employees escalated Mr. Hernandez's care, someone outside of the care team would have gotten involved and initiated a different plan of care, the one recommended by Petitioners' experts. The Circuit Court's Order also points out evidence in the form of testimony from the former defendants<sup>94</sup> regarding their experience with Mr. Hernandez's unexpected post-surgical outcome and how questions regarding his post-surgical process were being handled. Accordingly, the Circuit Court granted summary judgment because Petitioners' experts' causation opinions—that Respondent's employees caused Mr. Hernandez's injuries or caused him to lose the chance to improve—failed to link the alleged breach of the standard of care to Mr. Hernandez's outcome because Petitioners presented no evidence that meeting the standard of care would have resulted in a greater than 25% chance of improved recovery.

The Circuit Court's ruling is consistent with the lower court's grant of summary judgment in *Dellinger*, in which the West Virginia Supreme Court of Appeals affirmed. Petitioner could not combat "factual deficits in the evidence" highlighted in the moving party's motion for summary judgment.<sup>95</sup> The WVSCA reiterated that the non-moving party's "burden in opposing summary judgment"<sup>96</sup> cannot be accomplished with "unsupported speculation,"<sup>97</sup> even though the "nonmoving party is entitled to the most favorable inferences that may reasonably be drawn from

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<sup>93</sup> JA 726, ¶¶ 34-35; JA 727 ¶¶ 36-37.

<sup>94</sup> JA 373, Ravi Yalamanchili, M.D. Dep. 29:7-24; JA 374, 30:1-5; 11-21; JA 447, Manie Juneja, M.D. Dep. 59:13-22; 60:1-14; JA 448, Manie Juneja, M.D. Dep. 65:10-22; JA 449, 66:1; JA 485, Mehmet Kutlu, M.D. Dep. 30:5-9.

<sup>95</sup> *Dellinger v. Pediatrx Med. Grp., P.C.*, 232 W. Va. 115, 122, 750 S.E.2d 668, 675 (2013).

<sup>96</sup> *Id.* (citations omitted).

<sup>97</sup> *Id.*

the evidence, [such evidence] cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another.”<sup>98</sup> In *Dellinger*, the petitioner attempted to defeat summary judgment by asserting that her expert’s opinion—that the patient should have been intubated sooner— presented a question for the jury as to whether “the results of the blood gas labwork were complete and available before [the physician] arrived at the hospital and, if so, when they were available.”<sup>99</sup> The WVSCA rejected petitioner’s contention that the lack of such evidence created a jury issue, stating that petitioner “misapprehends her burden at summary judgment . . . in the context of a medical negligence case,” and held that the lack of evidence on this point would “require[] the jury to engage in absolute speculation.”<sup>100</sup> Here, the Circuit Court likewise determined that the evidence that Petitioners would present to the jury: Petitioners’ experts’ opinion that someone would have done something else or that a “chain reaction” would have occurred to improve Mr. Hernandez’s recovery, had Respondent’s employees escalated his care, would leave a jury with the same evidentiary deficit present in *Dellinger*.

Determining whether there is genuine issue of material fact, based on the evidence available at the close of discovery, is the trial court’s central task at the summary judgment stage.<sup>101</sup> The Circuit Court did not improperly weigh evidence or determine whether the available evidence was true. On the contrary, when a Circuit Court determines, as here, there is not “enough competent evidence available at trial to enable a finding favorable to the nonmoving party,”<sup>102</sup> summary

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<sup>98</sup> *Id.*

<sup>99</sup> *Dellinger*, 232 W. Va. at 121, 750 S.E.2d at 674.

<sup>100</sup> *Id.* at 122, 675 (specifically, the Court was referencing the issue of the availability of the blood gas results and the applicable standard of care regarding when and if the blood gas results should have been available sooner).

<sup>101</sup> *Williams*, 194 W. Va. at 59, 459 S.E.2d at 336 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 212 (1986)(“The circuit court’s function at the summary judgment stage is not ‘to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.’”).

<sup>102</sup> *Williams*, 194 W. Va. at 60–61, 459 S.E.2d at 337–38.

judgment is the only appropriate disposition. The Circuit Court did not usurp the jury's role nor improperly deny a jury the opportunity to consider the evidence in this action in granting summary judgment to Respondent. Accordingly, this Court should affirm the Circuit's Court Order.

## V. CONCLUSION AND PRAYER FOR RELIEF

Petitioners have the burden to prove both that Respondent's employees breached the standard of care and that such breach was a proximate cause of Mr. Hernandez's damages. While proximate cause, "[a]s a general rule . . . in a medical malpractice claim is a determination for the factfinder which should be premised upon reasonable inferences drawn from expert testimony based on a reasonable degree of probability," without "expert testimony connecting the alleged negligence and [Petitioners'] damages . . . no jury [can] reasonably infer a causal connection. . . ."<sup>103</sup>

In response to Respondent's motion for summary judgment, Petitioners were required to "offer some concrete evidence from which a reasonable finder of fact could return a verdict in its favor or other significant probative evidence tending to support the complaint."<sup>104</sup> Petitioners failed to do this. Petitioners have produced no evidence from which a reasonable jury could find or infer causation between Respondent's employees' alleged failure to escalate and Mr. Hernandez's continued post-surgical paraplegia or a lost chance to recover from his post-surgical condition. Because Petitioners produced no genuine issue of material fact as to the alleged breach of the standard of care by Respondent's employees being a proximate cause of Mr. Hernandez's injuries, the Circuit Court's Order Granting Summary Judgment was appropriate and should be affirmed.<sup>105</sup>

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<sup>103</sup> *Stoudt*, 248 W. Va. at 589, 889 S.E.2d at 311.

<sup>104</sup> *Painter*, 192 W. Va. at 193, 451 S.E.2d at 759.

<sup>105</sup> Summary adjudication of Mr. Hernandez's claims will dispose of any claims brought by his wife as none of her claims can exist independently of Mr. Hernandez's negligence claims. *See S. Env't, Inc. v. Bell*, 244

**Respectfully Submitted,**

*/S/ Lauren T. Krupica*

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W. Va. 465, 473, 854 S.E.2d 285, 293 (2020) (citation omitted) (“claim for loss of consortium cannot be maintained independent of a cognizable personal injury claim.”).

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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No. 25-ICA-224

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SAMUEL HERNANDEZ  
AND ZUSMITHA ARNESTO,

Plaintiffs below, Petitioners,

v.

CITY HOSPITAL, INC. d/b/a  
WVU MEDICINE/BERKELEY MEDICAL CENTER,

Defendant Below, Respondent

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CERTIFICATE OF SERVICE

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I, Lauren T. Krupica, hereby certify that service of the foregoing “*Respondent’s Response in Opposition to Petitioners’ Brief in Support of Appeal,*” was made via the Court’s File & ServeXpress electronic filing system, which will generate electronic notices of this filing to all e-filing participants in this action, **on September 5, 2025.**

/S/ Lauren T. Krupica

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