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' REPLY BRIEF

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

COUNSEL FOR PETITIONERS

C. Edward Amos, II (WVSB #12362)
Scott S. Segal (WVSB #4717)
SEGAL & AMOS, PLLC
810 Kanawha Boulevard, East
Charleston, WV 25301
(304) 344-9100
Counsel for Petitioners
scott.segal@segal-law.com
edward.amos@segal-law.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Petitioners submit this Reply Brief to address and refute the arguments raised in Respondent's opposition. The circuit court granted summary judgment on a record that, when viewed in the light most favorable to Petitioners, contains more than sufficient expert testimony to create genuine issues of material fact on both direct and loss-of-chance causation. Respondent's brief misstates the evidence. It disregards the testimony of Petitioners' experts. Moreover, it improperly attempts to convert factual disputes into legal conclusions. This Reply seeks to clarify the record and demonstrate why reversal and remand for trial are required.

I. INTRODUCTION

Respondent's opposition mischaracterizes both Petitioners' expert testimony and the standards set forth in the West Virginia Medical Professional Liability Act ("MPLA"). Petitioners presented detailed, fact-based testimony from two qualified physicians—Dr. Ozuna (spine surgeon) and Dr. Gottesman (hospitalist). Both experts testified, to a reasonable degree of medical probability, that Respondent's employees breached the standard of care by failing to escalate Mr. Hernandez's deteriorating neurological condition. This failure deprived Mr. Hernandez of a greater than 25% chance of improved recovery. The circuit court erred by dismissing this testimony as "speculative" and by weighing it against the self-serving views of former defendants, rather than allowing a jury to decide causation.

II. REPLY ARGUMENT

A. RESPONDENT CONTINUES TO MISCONSTRUE PETITIONERS' EXPERT TESTIMONY

Respondent's assertion that Petitioners' experts relied solely on "hope" or "thoughts" completely disregards the comprehensive nature of their testimony. Both Dr. Ozuna and Dr. Gottesman clearly linked the breaches of the standard of care to causation; thus, meeting the statutory standard of reasonable medical probability. *See, e.g.*, J.A. 647, Ozuna Dep. at 113:6–20;

J.A. 669, Gottesman Dep. at 121:8–122:7; J.A. 665, *id*. at 106:16–108:13; J.A. 659-660, *id*. at 68:20-69:22.

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 both Drs. Ozuna and Gottesman are stated with reasonable medical probability. Their opinions are not speculative. Furthermore, their opinions 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.

Courts have long held that expert testimony need not be phrased with talismanic words so long as the opinion conveys the probability standard. Respondent improperly narrows the breach to "escalation alone," divorcing it from the natural consequences of escalation in a hospital setting. The sole purpose of escalation is to trigger timely physician review and additional diagnostic or surgical intervention. Petitioners' experts explained that had escalation occurred, Mr. Hernandez would have received earlier decompression—just as he later did at Winchester Medical Center, with measurable benefit.

To this point, Dr. Ozuna testified as follows:

> Q. Had surgery -- let's -- let's say Dr. Juneja had ordered an MRI on the 7th. It had been done. The patient was taken back to surgery either by Dr. Yalamanchili or someone else. Do you have an opinion as to what the patient's condition would have been at that point?
>
> A. Postoperatively?
>
> Q. Yes, sir.
>
> A. You can't tell for sure, but **it certainly would have given him a better chance than what he had. He had some improvement even after surgery a year later.**
>
> Q. . . . After the second surgery with Dr. Yalamanchili, you had documented that he was an -- an ASIA A complete with C-6 motor quadriplegic in T-3

sensory level. Are you saying that had surgery been done on the 7th he might have gone from an A to a B or an A to a C, or --

A. Potentially, yes. I doubt he would get --

Q. Well --

A. -- all the way back to normal, but he lost his chance.

Q. Can you quantify that in a percentage?

A. I would say it's -- it's, you know -- 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, you know, not to -- to allow him to have some chance of improvement, you know, obviously not worsen, because he never had his improvement allowed by the surgeries that he had performed.

J.A. 642-43, Ozuna Dep. at 80:21-82:1 (emphasis added). Dr. Ozuna further clarified that escalation would have resulted in a better outcome for Mr. Hernandez:

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.

J.A. 648-49, Ozuna Dep. at 119:13-120:7.

Q. You have an opinion that the wrong surgery was performed, correct?

A. Yes.

Q. If that is your opinion, that the wrong surgery was performed, then **there's nothing the nurses or the PTs or OTs could have done to change the outcome; is that correct?**

A. No, that's not true. It's the same question over again.

Q. Give me an answer again to that one.

A. So I believe it's not true. You know, if he had had a posterior laminectomy or a wider exposure and actually decompressed the cord, he would have had a chance to get better. Nothing, basically, was done except for him to get -- get worse while he was in there.

J.A. 649, Ozuna Dep. at 120:22-121:15 (emphasis added).

Dr. Gottesman also testified that had the nurses escalated Mr. Hernandez's case up the chain of command 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. Dr. Gottesman further 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 108:9–108:13 (emphasis added). These actions, would have resulted in an MRI revealing Mr. Hernandez's continued severe spinal cord impingement/compression necessitating intervention. J.A. 659-660, *id*. at 68:20-69:22.

Both of Petitioners' 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.

B. RESPONDENT'S CONTROL ARGUMENT MISSTATES THE LAW

Respondent insists that because nurses and therapists could not themselves order surgery, causation fails. This argument confuses duty with control. The MPLA requires Petitioners to prove that Respondent's employees breached the applicable standard of care and that the breach was a proximate cause of harm. Nurses' and therapists' duty to escalate is precisely designed to ensure that patients receive timely physician intervention. To hold otherwise would nullify the hospital's responsibility to enforce its chain-of-command policies.

C. PROXIMATE CAUSE WAS ESTABLISHED

Respondent's suggestion that Petitioners must prove exactly which administrator or physician would have acted, and how, demands psychic foresight. West Virginia law does not require that "exact" standard of proof. West Virginia law requires only that expert testimony show the breach was a substantial factor in producing the harm. *See* W. Va. Code § 55-7B-3, -7. As made clear in *Est. of Fout-Iser ex rel. Fout-Iser v. Hahn*, 220 W. Va. 673, 649 S.E.2d 246 (2007), causation in medical negligence is generally for the jury where competent expert evidence exists. *Estate of Fout-Iser ex rel. Fout-Iser*, 220 W. Va. 673; *see Mays v. Chang*, 213 W. Va. 220, 224, 579 S.E.2d 561, 565 (2003) ("questions of proximate cause are often fact-based issues reserved for jury resolution.").

Petitioners' experts testified that earlier decompression between March 7 and March 13, 2020, more likely than not would have restored function. *See, e.g.,* J.A. 669, Gottesman Dep. at 122:21–123:10 ("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."); J.A. 648, Ozuna Dep. at 120:16–21 ("We do know that he did get better after his third surgery a year later."). J.A. 651, *id.* at 130:11-131:21) This testimony clearly creates a classic jury question.

Further, Respondent's reliance on *Stoudt v. Eads* is misplaced. *See Stoudt v. Eads*, 248 W. Va. 583, 889 S.E.2d 305 (Ct. App. 2023) (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). Unlike in *Stoudt*, where the expert could not connect pain to the alleged negligence beyond speculation, Petitioners' experts drew a direct causal line from failure to escalate to loss of timely surgical intervention. Petitioners' experts did so with reasonable medical certainty.

D. LOSS OF CHANCE THEORY FULLY SATISFIED

Respondent argues Petitioners failed to prove loss of chance under W. Va. Code § 55-7B-3(b). Simply put, the record in this case and the laws do not support Respondent's argument. Dr. Ozuna testified unequivocally that timely decompression would have offered at least a 50–70% likelihood of improvement—well above the statutory 25% threshold. *See* J.A. 642-43, Ozuna Dep. at 80:21–82:6. Dr. Gottesman concurred that escalation would have initiated the process leading to such decompression. *See* J.A. 669, Gottesman Dep. at 121:8-123:10. This is precisely the type of evidence courts have accepted under the loss of chance doctrine. Respondent faults Petitioners for not deposing risk managers or administrators. But, the statute imposes no such burden. It requires medical expert testimony establishing that adherence to the standard of care would have provided a greater than 25% chance of improved outcome. Petitioners supplied such expert testimony.

Dr. Ozuna's testimony included the following:

> Q. Doctor, do you have an opinion, based upon 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.

Q. And do you believe that they should have done that to meet the standard of care?

A. Yes, I do.

Q. Doctor, do you—do you have—I'm sorry. What is your opinion in that regard? You may have said it, but I missed it.

A. Yes. If they had initiated at least an MRI, triggered the consult from a second opinion that evaluated the situation, they would have decompressed the patient similar to what Dr. Salvetti did a year later, and the patient would have had some improvement. He had improvement 12 months later.

Q. And do you think that improvement would have been greater than 25—or that there would have been a—

A. Yes, I do.

Q. —greater than 25 percent chance of an improvement?

A. Yes.

Q. Dr. Ozuna, lastly, 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 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 chain of command and the policy that was shown to you by defense counsel, if the nurses and staff, therapists, had—if that would be the standard of care under the circumstances of Mr. Hernandez's situation?

A. Yes, I do.

Q. And what is that opinion?

A. That—same as before, 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. 651, Ozuna Dep. at 132:23–135:6. The following testimony by Dr. Ozuna further demonstrate that there was sufficient evidence of loss of chance to preclude summary judgment:

Q. Let me ask you this, Dr. Ozuna: Do you have an opinion within a reasonable degree of medical certainty as to whether Mr. Hernandez had a greater than 25 percent chance of an improved recovery had Dr. Yalamanchili met the standard of care?

A. Yes, I believe that.

Q. And let me ask it this way then: What is your opinion?

A. My opinion is that if he had had an earlier decompression he could have had a chance at improvement, and I believe it's more than 25 percent within reasonable medical certainty.

Q. When you say had he had an earlier decompression, was earlier decompression required to meet the standard of care?

A. Yes.

J.A. 651, Ozuna Dep. at 131:23-132:14. Dr. Gottesman also opined that had BMC employees complied with the applicable standard of care, 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. 665, Gottesman Dep. at 108:3-13, J.A. 669, 121:18-123:10.

Both 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.

E. RESPONDENT'S "DISPROVING A NEGATIVE" ARGUMENT IGNORES THE GOVERNING LOSS-OF-CHANCE STANDARD

Respondent's argument that Petitioners cannot meet their burden because no one can "prove" that a third surgery would have corrected the underlying condition is misplaced. In fact, Respondent's framing of the issue is misplaced. It seeks to hold Petitioners to the impossible task of disproving a negative, *i.e.*, demonstrating with absolute certainty what would have happened had the surgery occurred. Importantly, West Virginia law does not impose such a burden. *See Mays,* 213 W. Va. at 224, 579 S.E.2d at 566 ("To be clear, a plaintiff's burden of proof is to show that a defendant's breach of a particular duty of care was *a* proximate cause of the plaintiff's injury, not the *sole* proximate cause."). Respondent has cited no authority, neither statute nor case law, where such a standard is applied. **No such authority exists.**

Here, Petitioners' expert testimony establishes precisely that: had the nursing staff communicated the patient's continuing deterioration, the physicians would have ordered additional diagnostic imaging and a surgical consult. Such communication would have led to decompression surgery similar to the procedure later performed by Dr. Salvetti. The decompression surgery, even when delayed, resulted in measurable improvement. The jury is entitled to conclude that timely surgical intervention would have given the patient a substantial chance of significantly greater recovery.

Respondent's argument therefore fails as a matter of law. The loss of that chance—the deprivation of the opportunity for improvement caused by Respondent's negligence—is the cognizable injury. *Mays*, 213 W. Va. at 222 ("the lost chance of early detection and treatment" is the harm). The law does not require Petitioners to prove what the outcome of the unperformed surgery would have been with mathematical certainty. Interestingly, Respondent did not, and could not, cite any West Virginia law to support their argument. West Virginia law requires only proof,

to a reasonable degree of medical probability, that Respondent's breach eliminated a substantial opportunity for a better result. *See, Mays*, 213 W. Va. 220. Petitioners have more than met their burden. Accordingly, the circuit court's ruling—by imposing an unattainable standard of absolute certainty—was obvious legal error and must be reversed.

F. THE CIRCUIT COURT IMPROPERLY WEIGHED EVIDENCE

Respondent defends the circuit court's reliance on testimony from former defendants Drs. Yalamanchili, Juneja, and Kutlu. Summary judgment is not a vehicle to credit one side's testimony over another's. "[T]he 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). Petitioners presented expert opinions that, if believed, support liability. By crediting the testimony of the dismissed defendants over the testimony of Petitioners' qualified experts, the circuit court improperly weighed credibility and factual sufficiency. Thus, the circuit court impermissibly invaded the jury's fact-finding function.

III. CONCLUSION

WHEREFORE, based upon the foregoing facts, legal standards, evidentiary standards, and argument, Petitioners respectfully request that this Court reverse the circuit court's order granting summary judgment and remand this case for further proceedings.

COUNSEL FOR PETITIONERS,
SAMUEL HERNANDEZ and
ZUSMITHA ARNESTO

/s/ C. Edward Amos, II
C. Edward Amos, II (WVSB #12362)
Scott S. Segal (WVSB #4717)
SEGAL & AMOS, PLLC
810 Kanawha Boulevard, East

Charleston, WV 25301
(304) 344-9100
Counsel for Petitioners
scott.segal@segal-law.com
edward.amos@segal-law.com

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' Reply Brief to be served upon counsel for all parties to this appeal listed below via the Court electronic filing system:

Joshua K. Boggs, Esq.
Lauren T. Krupica, Esq.
West Virginia United Health System, Inc.
1238 Suncrest Towne Centre Drive
Morgantown, WV 26505
Counsel for City Hospital, Inc., d/b/a WVU Medicine/Berkeley Medical Center

Signed this day, September 19, 2025.

/s/ C. Edward Amos, II
C. Edward Amos, II (WVSB #12362)
SEGAL & AMOS, PLLC
810 Kanawha Boulevard, East
Charleston, WV 25301
(304) 344-9100
edward.amos@segal-law.com