CASE NO. 24-CV-1187

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

SYLVIA PEARSON, PERSONAL REPRESENTATIVE, ESTATE OF BARRY MICHAEL PEARSON AND INDIVIDUALLY, ET. AL.,

Appellants,

v.

MEDSTAR WASHINGTON HOSPITAL CENTER, ET. AL.,

Appellees.

Appeal from the Superior Court of the District of Columbia Civil Division
in Case 2022 CA 001213 M and 2022 CA 001311 M
(The Honorable Maurice A. Ross)

BRIEF OF APPELLEES – Kaiser Foundation Health Plan of the Mid-Atlantic States, Inc. and Mid-Atlantic Permanente Medical Group, P.C.

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STATEMENT OF JURISDICTION

This appeal is from a final judgment that disposes of all parties' claims. *See* D.C. Court of Appeals Rule 28(a)(5).

STATEMENT OF ISSUES

1. Whether the trial court properly granted summary judgment in favor of the Appellees due to the Appellants' failure to offer legally sufficient expert testimony in support of their claims?

    a. Whether the trial court correctly determined that the Appellants failed to establish a *prima facie* case of medical negligence against unnamed and unidentified Kaiser Appellee providers due to the failure of the Appellants' experts to identify a single health care provider who breached the national standard of care?

    b. Whether the trial court properly determined that the opinions of the Appellants' experts were unreliable because the theory of *res ipsa loquitor* cannot be reliable applied to the facts of this medical malpractice case?

2. Whether the trial court properly determined that joint liability cannot be imposed on the Appellees based on the alleged actions/inactions of unnamed and unidentified providers based on the theory of apparent or ostensible agency, as these theories are not recognized in the District of Columbia?

3. Whether the trial court properly granted summary judgment as to the Appellants' informed consent claim because the Appellants failed to sufficiently plead the elements necessary for such a claim by not identifying a specific medical procedure or treatment at issue or providing necessary expert testimony?

STATEMENT OF THE CASE

This is an appeal from a judgment rendered in favor of the Appellees, MedStar Washington Hospital Center (hereafter "MWHC"), Kaiser Foundation Health Plan of the Mid-Atlantic States, Inc., and Mid-Atlantic Permanente Medical Group, P.C. (hereafter "Kaiser Appellees"), in a wrongful death, survival, and informed consent action brought by the Appellants, Sylvia Pearson, individually and as personal representative of her late husband Barry Pearson (hereafter "Mr. Pearson" or "the Decedent") estate, based on alleged medical negligence during Mr. Pearson's three-month admission to MWHC from September 19, 2019 – December 24, 2019.

On December 13, 2024, the parties appeared before the Honorable Maurice A. Ross for an oral motions hearing on the following motions: (1) MWHC and Kaiser Appellees' Motions to Exclude the Testimony of Plaintiffs' Experts Thureiyya Rodriguez and Salvador Guerrero; (2) MWHC's Motion for Summary Judgment, and (3) Kaiser Appellees' Motion for Summary Judgment. A1145 – 1153. After hearing oral arguments and considering all parties' pending motions, Judge Ross issued an order excluding the testimony of Plaintiffs' experts **and** ordering judgment in favor of all Appellees with respect to all of Plaintiffs' Counts and claims in the Plaintiffs' Second Amended Complaint.

Judge Ross concluded that the Appellants failed to "carr(y) her burden of demonstrating that the doctrine" of *res ipsa loquitor* can "reliably be applied to the

complex circumstances of this medical negligence case." Further, Judge Ross determined summary judgment was warranted as to all providers who were not specifically identified in the Plaintiffs' Second Amended Complaint and as to whom there had been no specific allegations relating to (1) standard of care, (2) breach, and (3) causation. *See* A2 – Order Granting Defendant Medstar Washington Hospital Center's Motion to Exclude Testimony of Plaintiff's Experts and Motion for Summary Judgment.

In accordance with Judge Ross's ruling, judgment was entered in favor of the Appellees as to all claims. A1154 – 1157. [1]

On December 24, 2024, the Appellants filed a Notice of Appeal. A1158 – 1159.

STATEMENT OF FACTS

Pursuant to D.C. Court of Appeals Rule 28(j), the Kaiser Appellees adopt and incorporate the Statement of Facts set out in the Brief of MWHC as if provided herein.

SUMMARY OF ARGUMENT

The trial court properly granted summary judgment on behalf of the Defendants/Appellees as the trial court correctly determined that the opinions of the

[1] The Appellants do not raise an appellate challenge to the entry of summary judgment as to their claim of general negligence or their claim for punitive damages.

Appellants' two 'expert' witnesses, wound care expert, Salvador Guerrero, D.O. (hereafter "Dr. Guerrero") and wound, ostomy, and continence nurse expert, Thureiyya K. Rodriguez, WCN, (hereafter "Ms. Rodriguez"), were unreliable and not legally sufficient to be applied to the complex circumstances of this medical negligence case.

The trial court properly excluded the testimony of the Appellants' experts, Dr. Guerrero and Ms. Rodriguez, because the Appellants' experts did not identify a single health care provider of the Kaiser Appellees whose care and treatment of Mr. Pearson allegedly breached the national standard of care, nor did the Appellants' experts delineate how that alleged breach caused Mr. Pearson's injuries.

The trial court also properly excluded the causation opinions of Dr. Guerrero and Ms. Rodriguez, which were entirely based on the doctrine of *res ipsa loquitor.* The trial court properly determined that the doctrine of *res ipsa loquitor* could not reliably be applied to the facts of this medical malpractice case given the deposition testimony of Dr. Guerrero and Ms. Rodriguez that the development of pressure injuries can be unavoidable in similar conditions as Mr. Pearson's case, and the experts' failure to demonstrate a reliable basis for concluding that their theory as to the cause of Mr. Pearson's pressure injury (i.e., medical negligence) was "more probable than any other theory based on the evidence."

Additionally, the trial court properly declined to apply the theory of apparent or ostensible agency in this case as: (1) the District of Columbia does not recognize the theory of apparent or ostensible agency in medical malpractice cases, and (2) the Appellants failed to identify a single individual who represented to Mr. Pearson that any specific health care provider was an agent of the Kaiser Appellees.

Finally, the trial court properly granted summary judgment in the Appellees' favor as to the Appellants' informed consent claim. Summary judgment was proper as the Appellants failed to identify a specific medical procedure at issue and failed to provide expert testimony establishing the probabilities of therapeutic success in treating a wound in a hospital setting versus in a skilled nursing facility (hereafter "SNF"), the frequency of the occurrence of particular risks (in a hospital setting versus in a SNF), the nature of available alternatives to treatment and whether or not disclosure would be detrimental to a patient.

ARGUMENT

I. The trial court properly granted summary judgment in favor of the Appellees due to the Appellants' failure to offer legally sufficient expert testimony in support of their claims.

In their brief, the Appellants assert that the trial court abused its discretion by excluding the opinions of the Appellants' experts, Dr. Guerrero and Ms. Rodriguez. The trial court did not abuse its discretion. Rather, the trial court properly excluded the opinions of Dr. Guerrero and Ms. Rodriguez because these experts (1) did not

identify a single health care provider of the Kaiser Appellees who breached the national standard of care and caused Mr. Pearson's injury, and because these experts (2) rendered unreliable causation opinions improperly based on the doctrine of *res ipsa loquitor*.

"The decision to admit expert testimony lies within the sound discretion of the trial court, whose ruling will be sustained unless clear abuse of discretion is shown." *D.C. v. Anderson*, 597 A.2d 1295, 1299 (D.C. 1991) (quoting *Rotan v. Egan*, 537 A.2d 563, 570 (D.C. 1988)). The trial judge's decision to admit or exclude expert testimony "will be affirmed unless it is manifestly erroneous." *Haidak v. Corso*, 841 A.2d 316, 322 (D.C. 2004).

On appeal, this Court reviews a "trial court's grant of summary judgment de novo, applying the same standard as the trial court." *Reeves v. Wash. Metro. Area Transit Auth.*, 135 A.3d 807, 811 (D.C. 2016).

Rule 56(a) provides that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." D.C. Super. Ct. Civ. R. 56(a). The moving party has the initial burden of proving that there is no genuine issue of material fact in dispute; after satisfying that burden, the burden shifts to the non-moving party to establish such an issue exists. *Bradshaw v. District of Columbia*, 43 A.3d 318, 323 (D.C. 2012).

A fact is "material" if it might affect the outcome of the case. *See Baker v. Chrissy Condo. Ass'n*, 251 A.3d 301, 305 (D.C. 2021). There is a "genuine dispute" over a fact if "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Id*.

Once the burden has shifted, the non-moving party must set forth "significant probative evidence tending to support the complaint," consisting of specific facts showing there is a genuine issue for trial. *Barrett v. Covington & Burling LLP*, 979 A.2d 1239, 1245 (D.C. 2009). The non-moving party must do more than rely on conclusory allegations or denials in his or her pleadings and must establish more than a "metaphysical doubt" or a "scintilla of evidence." *See Gilbert v. Miodovnik*, 990 A.2d 983, 988 (D.C. 2010). "There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *See Barrett,* 979 A.2d at 1245 (D.C. 2009).

i. The Appellants failed to establish a *prima facie* case of medical negligence against unnamed and unidentified providers of the Kaiser Appellees due to the failure of the Appellants' experts to identify a single health care provider who breached the national standard of care.

In a medical malpractice case, a plaintiff must establish the applicable standard of care, a deviation from that standard, and a causal relationship between the deviation and the injury. *Travers v. District of Columbia*, 672 A.2d 566, 568

(D.C. 1996). A plaintiff must produce evidence that establishes, to a reasonable degree of medical certainty, that a health care provider's breach of the national standard of care caused the plaintiff's injuries. *Travers*, 672 A.2d at 568.

Before a plaintiff can establish a breach occurred, a plaintiff must establish what the standard of care required. To establish the standard of care, a plaintiff must produce testimony from a qualified expert as to the "course of action that a reasonably prudent doctor with the defendant's specialty would have taken under the same or similar circumstances." *Travers*, 672 A.2d at 568. Further, the expert must opine "that a particular course of treatment is followed *nationally* either through reference to a published standard, discussion of the described course of treatment with practitioners outside the District at seminars or conventions, or through presentation of relevant data." *Hill v. Medlantic Health Care Grp.*, 933 A.2d 314, 325 (D.C. 2007) (quoting *Strickland v. Pinder*, 899 A.2d 770, 773-74 (D.C. 2006)) (emphasis in original). "An expert in a medical malpractice case must establish the basis for his knowledge of the applicable national standard of care and link his opinion testimony to the applicable national standard." *Hill*, 933 A.2d at 325 (D.C. 2007).

As such, in order to establish a national standard, "the plaintiff must establish through expert testimony the course of action that a reasonably prudent doctor with the defendant's specialty would have taken under the same or similar circumstances."

Meek v. Shepard, 484 A.2d 579, 581 (D.C. 1984) (emphasis added). "The purpose of expert testimony is to avoid jury findings based on mere conjecture or speculation." *Travers*, 672 A.2d at 568.

In the present matter, the Appellants contend the trial court erred in excluding the opinions of Appellants' experts that *every* health care provider that interacted with Mr. Pearson during his three-month hospitalization at MWHC breached the standard of care. However, the Appellants failed to offer any expert testimony that identifies a specific health care provider during Mr. Pearson's near 100-day admission at MWHC of the Kaiser Appellees who allegedly violated the national standard of care, or how the alleged breach of the standard of care caused an injury to Mr. Pearson.

As a fundamental premise, it is manifestly unfair and contrary to Rule 26 of the D.C. Superior Court Rules of Civil Procedure for an expert to utterly disregard the specialty and scope of the care provided by the Kaiser Appellees, by failing to identify the Kaiser medical provider(s) who rendered the care; and failing to specifically describe how that care by provided the Kaiser medical provider was negligent and caused injuries to the Plaintiffs' decedent.

The Expert Report of Appellants' wound care expert, Dr. Guerrero, failed to identify a single named health care provider of Appellees who allegedly breached the standard of care in the care and treatment of Mr. Pearson. A899 – A902. The

Appellants' Designation of Expert Witnesses also did not identify any specific Kaiser health care provider who purportedly breached the standard of care in the care and treatment of Mr. Pearson. A19 – A.24.

At deposition, rather than identify a specific health care provider who breached the standard of care, Dr. Guerrero repeatedly offered the overbroad assertion that all "nurses, physicians" and "anybody that came in contact with Mr. Pearson upon admission and throughout his (MWCH) hospital stay" violated the standard of care. A835. Additionally, Ms. Rodriguez, the Appellants' wound, ostomy, and continence nurse expert, opined that every provider who interacted with Mr. Pearson during his three-month hospitalization at MWHC breached the standard of care. A370.

By this overly broad testimony, Dr. Guerrero and Ms. Rodriguez are encompassing scores of medical providers who treated Mr. Pearson over his nearly 100-day admission at MWHC, including but not limited to: cardiologists, infectious disease physicians, intensive care physicians, neurologists, gastroenterologists, pulmonologists, radiologists, and other physicians involved in Mr. Pearson's care. Put simply, Appellants' experts failed to identify, by name, a single employee of the Kaiser Appellees whose care of Mr. Pearson was allegedly negligent.

While Dr. Guerrero and Ms. Rodriguez articulated violations of the standard of care, their testimony was not supported by any reports or documents that set a national standard of care.

A testifying expert must establish that a particular course of treatment is followed nationally either through "reference to a published standard," "[discussion] of the described course of treatment with practitioners outside the District . . . at seminars or conventions," or through presentation of relevant data. *Strickland*, 899 A.2d at 773 – 74. An expert's background or personal expertise alone is not sufficient to demonstrate an understanding of the national standard of care. *See id*. at 774 (finding that there was "no doubt in this case that Dr. Stark qualifie[d] as an expert cardiologist," but that "[w]ithout any supplemental support…this testimony amounted to nothing more than the expert's opinion, which this court has repeatedly stated is insufficient to demonstrate the national standard of care.").

Despite the requirements that an expert opine what a reasonably prudent provider with the identified defendant's specialty would have done under the same or similar circumstances, with reference to publications and data regarding the national standard of care, the Appellants' experts failed to identify a single health care provider of the Kaiser Appellees whose care of Mr. Pearson was allegedly negligent.

Contrary to the assertion of Appellants, the trial court did not improperly exclude the testimony of Dr. Guerrero and Ms. Rodriguez because these opinions "did not comport with Defendants' medical records." Rather, Judge Ross explained that he was excluding the opinions of the Appellants' experts that every provider involved in Mr. Pearson's care breached the standard of care because:

> "[w]ithout this minimal degree of specificity, Plaintiff cannot establish a *prima facie* case of medical negligence against unidentified [providers]. It will not do for Plaintiff's experts to opine categorically, as they do, that *any* [provider] who participated in Mr. Pearson's treatment in *any* way, breached the standard of care and caused Mr. Pearson's injury."

See A2 – Order Granting Defendant Medstar Washington Hospital Center's Motion to Exclude Testimony of Plaintiff's Experts and Motion for Summary Judgment at 6 – 7.

Accordingly, the Kaiser Appellees respectfully request that this Court find the trial court did not abuse its discretion in excluding the opinions of the Appellants' experts that any provider who participated in Mr. Pearson's care in any way breached the standard of care and affirm the decision of the court below. Further, as the Appellants' lacked legally sufficient expert testimony to establish a *prima facie* case of medical negligence, the Kaiser Appellees respectfully request that this Court find the trial court properly entered judgement in favor of the Kaiser Appellees.

ii. The trial court properly determined that the opinions of the Appellants' experts were unreliable because the theory of *res ipsa loquitur* cannot be reliably applied to the facts of this medical malpractice case.

Even if the Appellants' experts were permitted to offer standard of care opinions regarding unnamed and unidentified health care providers, the trial court properly determined that the Appellants failed to carry their burden of demonstrating the doctrine of *res ipsa loquitur* could reliably be applied to the circumstances of this medical malpractice case.

The admission of expert testimony in the District of Columbia is governed by Federal Rule of Evidence (hereafter "FRE") 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). *See Motorola Inc. v. Murray*, 147 A.3d 751, 756-57 (D.C. 2016).

For an expert's opinion to be admissible pursuant to FRE 702, the proponent of the testimony bears the burden of demonstrating each of the following:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

See FRE 702.

In ruling on the admissibility of expert testimony under FRE 702, the trial court performs a "gatekeeping function" to "'determine reliability in light of the particular facts and circumstances of the particular case.'" *Motorola*, 147 A.3d at 755 (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 158 (1999). A trial court "must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert*, 509 U.S. at 589. FRE 702 allows trial courts "broad latitude" and "considerable leeway" in deciding how to go about making the preliminary assessment of the reliability of proffered expert testimony. *Lewis v. United States*, 263 A.3d 1049, 1060 (D.C. 2021) (citing *Motorola*, 147 A.3d at 755). Expert testimony may be excluded where the expert is unable to show a reliable basis for his theory. *Haidak*, 841 A.2d at 327.

The Appellants argue that the trial court erred in excluding the testimony of their experts due to their reliance on the doctrine of *res ipsa loquitor* in rendering their opinions. Further, the Appellants contend the trial court committed reversible error by granting summary judgment in the Appellees' favor due to their lack of legally sufficient expert testimony. The record plainly fails to support the Appellants' contentions.

Res ipsa loquitur is not to be invoked lightly in any case, and particularly not where medical malpractice is claimed, for "despite all precautions and skill, [complications do] sometimes follow accepted and standard medical treatment."

Gubbins v. Hurson, 885 A.2d 269, 282 (D.C. 2005) (citing *Quin v. George Washington University*, 407 A.2d 580, 583 (D.C. 1979)).

Thus, "'[d]ue to the great variety of infections and complications which, despite all precautions and skill, sometimes follow accepted and standard medical treatment, an inference of negligence in a medical malpractice suit cannot be based solely on the fact that an adverse result follows treatment.'" *Giordano v. Sherwood*, 968 A.2d 494, 499 (D.C. 2009) (*quoting Quin*, 407 A.2d at 583 (emphasis added)).

To support a theory of res *ipsa loquitur* at the trial court level, the Plaintiffs carried the burden to establish that Mr. Pearson's injury "(1) ordinarily [would] not occur in the absence of negligence, [and] (2) [was] caused by an agency or instrumentality within the exclusive control of the defendant." *Quin*, 407 A.2d at 583. The Appellants failed to carry the burden on both prongs, as now detailed:

a. The Appellants failed to establish a reliable basis that Mr. Pearson's injury is an injury that ordinarily does not occur in the absence of negligence.

i. The cause of Mr. Pearson's pressure injury is not a matter of common knowledge

Regarding the first required showing, expert testimony is necessary to establish that the at-issue injuries ordinarily do not occur in the absence of negligence in the context of complex medical malpractice cases. *See id*. at 583-84. However, expert testimony is not sufficient if there is "a lack of consensus in the

medical field as to the cause of [the injury] following [the treatment], despite agreement that such [a result] is a rarity [.]" *Id*. at 584 (emphasis added).

As stated in *Quin*, "we must be fair to the patient who has received a result which either common or expert knowledge teaches ordinarily would not occur without negligence, and to the doctor if there is a result which could occur without negligence." *Id*. Therefore, *res ipsa loquitor* "is applicable only where it is a matter of common knowledge among laymen or medical [professionals] or both that the injury would not have occurred without negligence." *Id*.

As the cause of Mr. Pearson's pressure injury is not one within the common knowledge of lay individuals, the doctrine of *res ipsa loquitor* is not applicable.

ii. A res ipsa loquitor inference cannot be drawn in cases such as Mr. Pearson's where it is equally plausible that the alleged injury resulted from natural causes.

Further, a *res ipsa loquitur* inference cannot reliably be drawn in a medical malpractice case where it is equally plausible that the injury resulted from natural causes. *Id. (*finding "that appellant was not entitled to the benefit of a *res ipsa loquitur* instruction under the facts of this case. A review of the evidence shows two equally plausible conclusions were deducible i.e., the hole in the splenic vein arose from improper ligation by the surgeons, or from natural causes.")

The Appellants argue that the first prong of the *res ipsa loquitor* test is met as a Stage 4 pressure injury is a "Never Event" and an injury that ordinarily does not

occur in the absence of negligence. However, as the trial court duly noted, the reliability of the Appellants' experts is undermined by the concessions of Appellants' experts that pressure injuries (the alleged injury) can be unavoidable under certain circumstances, including under circumstances that are similar to the facts in this case. *See* A2 – Order Granting Defendant Medstar Washington Hospital Center's Motion to Exclude Testimony of Plaintiff's Experts and Motion for Summary Judgment at 5.

In support of their opinions that Mr. Pearson's pressure injury must have been caused by medical negligence on the part of the Appellees, the Appellants' experts expressly relied on guidelines from Centers for Medicare & Medicaid Services (hereafter, "CMS") that describe Stage 3 or 4 pressure ulcers acquired after admission to a healthcare facility as a "Never Event" and a "Hospital Acquired Condition". *See* A852 and A946.

However, the CMS guidelines the Appellants' experts rely upon do **not** establish that such pressure injuries cannot arise in the absence of medical negligence. *See Stuck v. Miami Valley Hosp.*, 141 N.E.3d 290, 300 - 301 (Ohio Ct. App. 2020) (observing that, "[n]o court of which we are aware in this or any other state has held that the occurrence of a 'never event' or a 'hospital acquired condition' alone satisfies a medical negligence plaintiff's obligation to demonstrate the applicable standard of care, the defendant's breach of that duty, or the causal

connection between the defendant's breach and the plaintiff's damages." *see also* 42 U.S.C. 18122(a) (establishing that "[t]he development, recognition, or implementation of any guideline or other standard under any Federal health care provision shall not be construed to establish the standard of care or duty of care owed by a health care provider to a patient in any medical malpractice or medical product liability action or claim.") (emphasis added).

In fact, Dr. Guerrero himself testified that pressure injuries may be unavoidable in patients who are dying, and Dr. Guerrero specifically acknowledged that hemodynamic instability could contribute to an unavoidable pressure injury. *See* A844 and A845. The Appellants' other expert, Ms. Rodriguez, also testified that pressure injuries may be unavoidable in patients with organ failure who are actively dying. *See* A941.

Further, Dr. Guerrero and Ms. Rodriguez both acknowledged that they consider medical literature published by the National Pressure Ulcer Advisory Panel (hereafter "NPUAP") as authoritative. *See* A831 and A858 (Dr. Guerrero describing the NPUAP as the "only source that [he] consider[s] authoritative" and the "gold standard"); A960 (Ms. Rodriguez agreeing that the NPUAP is "the authoritative voice for improved patient outcomes in pressure ulcer prevention and treatment").

The acknowledgements that both of the Appellants' experts made regarding pressure injuries being unavoidable in patients who are actively dying and with

hemodynamic instability are consistent with literature published by the NPUAP that they considered authoritative. *See* A533, Joyce Black, et al., *Pressure Ulcers: Avoidable or Unavoidable? Results of the National Pressure Ulcer Advisory Panel Consensus Conference, Ostomy Wound Management* (February 2011) ("The panelists unanimously voted that not all pressure ulcers are avoidable because there are patient situations where pressure cannot be relieved and perfusion cannot be improved.") (emphasis added); A539 ("The panelists reached consensus that unavoidable pressure ulcers may develop in patients who are hemodynamically unstable, terminally ill, have certain medical devices in place, and are nonadherent with artificial nutrition or repositioning.") (emphasis added).

Thus, given that both Dr. Guerrero and Ms. Rodriguez conceded that pressure injuries can be unavoidable in circumstances similar to Mr. Pearson's, and provided that literature explaining the same is authoritative, the trial court properly determined both experts did not have a reliable basis for opining that Mr. Pearson's pressure injury "would not have occurred without negligence."

Since the doctrine of *res ipsa loquitor* was essential to the causation opinions of both of Appellants' experts, as neither expert rendered a causation opinion independent from their assertion that Mr. Pearson's injury could not have occurred in the absence of medical negligence, the trial court did not abuse its discretion in excluding the opinions of Appellants' experts.

Accordingly, due to Appellants' failure to reliably establish the first required showing necessary to support a causation theory on the basis of *res ipsa loquitor*, the Kaiser Appellees respectfully request that this Court affirm the decision of the court below.

b. The Appellants failed to establish a reliable basis that Mr. Pearson's injury was probably caused by an instrumentality under the Appellees' exclusive control.

i. Appellants' experts fail to identify an instrumentality under the Appellees' exclusive control.

Regarding the second required showing, the Appellants carry the burden to establish that Mr. Pearson's pressure injury was "'probably' caused by an instrumentality under [the Appellees'] exclusive control." *Quin*, 407 A.2d at 585. The Appellants unsuccessfully contend that they satisfied this prong, arguing that Mr. Pearson's harm was caused by something only the Appellees' controlled – the care the Appellees' medical personnel provided, or failed to provide to Mr. Pearson. This assertion plainly fails to comport with District of Columbia law.

An inference of a party's exclusive control of an instrumentality may flow automatically where a defendant is in <u>complete control of a procedure</u> which results in injury. *See Quin*, 407 A.2d at 585 (emphasis added).

In this case, Dr. Guerrero's and Ms. Rodriguez's testimony pertaining to Mr. Pearson's pressure injury as a "Never Event" or "Hospital Acquired Condition," does not alleviate the failure to identify a *specific medical procedure* or

instrumentality that allegedly caused Mr. Pearson's pressure injury to warrant a finding of *res ipsa loquitor*. This case does not involve a situation where the Kaiser Appellees were "in complete control of a *procedure* which results in an injury," so as to "automatically" permit an inference that the injury was caused by an instrumentality under the Kaiser Appellees' exclusive control. *Quin*, 407 A.2d at 585.

Lacking supporting case law from District of Columbia, and in an attempt to alleviate the failure of the Appellants' experts to identify a specific medical procedure or instrumentality that caused Mr. Pearson's alleged injuries, the Appellants cite to a Maryland case, *Brown v. Meda*. *See Brown v. Meda*, 537 A.2d 635 (Md.App. 1988), aff'd, *Meda v. Brown*, 569 A.2d 202 (Md. 1990). However, the facts of *Meda* are not analogous to this case, and the Appellants' reliance on the *Meda* case is misguided.

In *Meda*, a plaintiff's ulnar nerve was injured during a *procedure* while plaintiff was under the effects of anesthesia. In *Meda*, the plaintiff's experts testified that the appropriate standard of care required only that the plaintiff's arm be positioned in such a manner as to protect the ulnar nerve from injury during this procedure. *See Brown*, 537 A.2d at 641-42. The plaintiff's experts could not determine precisely how the plaintiff's nerve was compressed - as there were several possible ways - but both experts "ruled out other possible causes and that the injury

could have been caused only by the negligent position of the arm" during the procedure. *See Brown*, 537 A.2d at 642.

Unlike in *Meda*, in this case, Dr. Guerrero's and Ms. Rodriguez's causation theory does not rely upon a specific medical procedure as the cause of Mr. Pearson's pressure injury. Instead, the Appellants contend that the joint exclusive control of Mr. Pearson's medical care over a near 100-day hospitalization, without reference to a specific medical procedure or event at issue, caused Mr. Pearson's injuries. As such, the Appellants' reliance on the *Meda* case is misguided.

The Appellants' theory, if accepted, would turn the concept of *res ipsa loquitor* on its head as the exclusive control requirement would be satisfied for every event that arises out of the long-term care and treatment of a patient at any health care facility or hospital.

ii. Appellants have failed to establish that their experts' theory of causation was more probable than any other theory based on the evidence

Where [a party] relies on circumstantial evidence to establish causation as an element of *res ipsa loquitur*, the evidence must make [the party's] theory reasonably probable, not merely possible, and more probable than any other theory based on the evidence." *See Quin*, 407 A.2d at 585 (emphasis added).

Putting aside the inherent vagueness of "joint exclusive control of Mr. Pearson's medical care" as the purported instrumentality of injury, the Appellants

make no meaningful effort to demonstrate that their experts' theory of causation was "more probable than any other theory based on the evidence", i.e. – that Mr. Pearson died of natural causes and his multiple comorbidities that pre-existed his at-issue admission to MWHC. *Quin*, 407 A.2d at 585.

In *Quin*, the appellant was not entitled to the benefit of a *res ipsa loquitur* instruction for two related reasons. First, the court found the evidence presented showed two equally plausible conclusions regarding the cause of injury – i.e. a hole in the splenic vein arose from improper ligation by the surgeons, or from natural causes (spontaneous rupture). *See Quin*, 407 A.2d at 584. Second, the court determined that the record did not support the contention that the at issue injury was "probably" caused by an instrumentality under the defendant's control because "the injury could have resulted from natural causes." *Id*. at 585.

In this case, Mr. Pearson was a terminally ill patient who developed a pressure injury over the course of a three-month hospitalization. Upon admission to MWHC on September 19, 2019, Mr. Pearson's pre-existing comorbidities included, among other things: end-stage renal disease on hemodialysis, chronic obstructive pulmonary disease with chronic hypoxemia, pulmonary fibrosis, pulmonary hypertension, and heart failure. A230. By September 29, 2019 (ten days into his MWCH Admission), Mr. Pearson was receiving vasopressors due to his low blood pressure. Mr. Pearson received vasopressors at various times throughout his

admission.[2] A476.031 – .032, A476.034 – .38, A476.42, A476.45 – .46, A476.50, A476.53 – 54.

By October 18, 2019, the Pulmonary/Critical Care fellow documented that Mr. Pearson was "actively dying and is unlikely to recover[.]" A476.041. By October 22, 2019, the Palliative Care Team began following Mr. Pearson. A476.015. By October 31, 2019, Mr. Pearson's status was changed to 'Do Not Resuscitate.' A476.016. By November 18, 2019, Mr. Pearson was ventilator dependent. A476.047. Both of the Appellants' experts acknowledged that pressure injuries can be unavoidable under these types of conditions that Mr. Pearson had. *See* A844, A845, and A941.

Based on Mr. Pearson's extensive and severe comorbidities (which were no fault of Appellees), the associated complications that manifested during Mr. Pearson's hospitalization to the point that he was deemed to be "actively dying" by October 18, and the vasopressor medications administered to treat Mr. Pearson's low blood pressure – which are known to reduce skin perfusion, and tissue perfusion can

[2] Vasoactive medications may be required to maintain blood pressure and some of these medications constrict peripheral blood vessels, diminishing perfusion to the skin and other tissues under pressure." *See* Joyce Black, et al., *Pressure Ulcers: Avoidable or Unavoidable? Results of the National Pressure Ulcer Advisory Panel Consensus Conference, Ostomy Wound Management* (February 2011) ("[e]ven when blood pressure can be maintained at a relatively stable level, 82% of the panel agreed that local tissue perfusion can be so impaired that any amount of pressure is sufficient to cause an ulcer.")

be so impaired that any amount of pressure is sufficient to result in a wound – the Appellants failed to establish a reliable basis for concluding that their theory as to the alleged cause of the pressure injury (i.e., medical negligence on the part of the Appellees) was "more probable than any other theory based on the evidence." *Quin*, 407 A.2d at 585 (emphasis added). Thus, given Dr. Guerrero's and Ms. Rodriguez's concessions that pressure injuries can be unavoidable under such conditions, an inference of *res ipsa loquitor* cannot be reliably drawn under the circumstances of Mr. Pearson's case. *See id*. at 584.

Accordingly, the trial court properly excluded the testimony of the Appellants' experts on the basis of their unreliable application of the doctrine of *res ipsa loquitor* to Mr. Pearson's injury.

The Kaiser Appellees respectfully request that this Court find that the trial court did not commit reversible error by granting summary judgment based on its exclusion of the Appellants' experts' unreliable causation opinions and affirm the decision of the court below.

II. The trial court properly determined that the Appellants could not rely on the theory of apparent or ostensible agency to impose joint liability on all unnamed and unidentified health care providers of the Appellees.

The Appellants contend that the trial court erred in determining that a group approach to *res ipsa loquitor* could not be applied to impose joint liability to the Appellees based on the theory of apparent or ostensible agency. However, the trial

court properly declined to apply the theory of apparent or ostensible agency to this case as: (1) the District of Columbia does **not** recognize the theory of apparent or ostensible agency in medical malpractice cases, and (2) the Appellants failed to identify a single individual who represented to Mr. Pearson that any specific health care provider was an agent of the Kaiser Appellees.

i. The District of Columbia does not recognize the theory of apparent or ostensible agency in cases of alleged medical negligence by non-employee physicians.

Ostensible or apparent agency is not recognized as a theory of liability in medical malpractice cases in the District of Columbia. In cases in which the D.C. Court of Appeals has considered the theory of ostensible agency in the context of medical malpractice cases, it has declined to adopt it. *See Hill v. Medlantic Health Care Group*, 933 A.2d at 314, n. 17 (D.C. 2007); *see also Street v. Washington Hospital Center*, 558 A.2d 690, 692-93 (D.C. 1989).

The District of Columbia does not recognize the theory of ostensible or apparent agency in medical malpractice cases, so the trial court did not commit reversable error by declining to adopt the Appellants' theory to impose joint liability on the Kaiser Appellees based on the actions of unnamed and unidentified health care providers.

ii. Should apparent or ostensible agency apply, the Appellants failed to present evidence that Kaiser or MWHC represented that any specific health care provider was an agent of the Kaiser Appellees.

Should this Court determine the theory of apparent or ostensible agency applies in medical malpractice cases in the District of Columbia, and should the Appellants be permitted to argue that the unidentified providers were apparent agents of the Kaiser Appellees, Appellants' argument should still fail, for the following reasons.

The principles of apparent or ostensible agency are as follows:

> One who represents that another is his [or her] servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he [or she] were such.

Street, 558 A.2d at 692 (quoting the Restatement (Second) Agency § 267 (1958)).

In *Hill* and *Street*, the Court dealt with named practitioners to determine whether an agency relationship existed between the provider and the hospital. With named providers on the record, the Court was able to determine the validity of the appellants claims relating to the matter of agency. *See generally Hill*, 933 A.2d at n. 17; *Street*, 558 A.2d at 692-93.

Mr. Pearson was treated for numerous months at MWHC by numerous providers, and yet the Appellants have failed to identify a specific Kaiser employee whose care of Mr. Pearson was allegedly negligent. Without naming any specific

employee of the Kaiser Appellees, the Appellants are unable to assert whether any specific individual was represented to Mr. Pearson as an agent of Kaiser. As such, the trial court properly determined that the Appellants were not able to rely on the theory of apparent or ostensible agency to impose liability against the Kaiser Appellees.

The Appellants argue that the Restatement Third of Torts supports Appellant's contention that the Appellees "coordinated business care operational model" allows the doctrine of *res ipsa loquitor* to be applied to the Appellees under a theory of apparent or ostensible agency. First and foremost, the Restatement Third of Torts is not binding or authoritative precedent, nor is it case-law.

The Appellants cite a portion of the Restatement providing that "[i]f two parties have an ongoing relationship pursuant to which they share responsibility for a dangerous activity, and if an accident happens establishing the negligence of one of the two, imposing *res ipsa loquitur* liability on both is proper." Restatement (Third) of Torts: Liability for Physical and Emotional Harm, § 17. The Appellants noticeably fails to include the Restatement's example of this concept, detailed as follows: "[c]onsider a building owned and controlled by one party and having an elevator purchased from a second party and serviced by the latter under an exclusive service contract. If the elevator malfunctions, *res ipsa loquitur* warrants findings of negligence on the part of both parties." *Id*.

The example that the Restatement provides for a scenario involving multiple defendants in a medical malpractice case is for "patients who suffer harm in the course of surgery" when liability can be narrowed the individuals present during the procedure. *Id*.

Furthermore, the Appellants fail to provide a single factual citation to the record (the Joint Appendix) in support of their claim that the Appellants or Mr. Pearson relied on the 'image' of MWHC and Kaiser as one institution providing care to Mr. Pearson. The Appellants also do not provide a single citation to the record supporting their claim that "Defendant MWHC presented Defendant Kaiser doctors and nurses as part of the team responsible for care, and Defendant Kaiser doctors and nurses did the same for Defendant MWHC personnel." Contrary to the Appellants' unsupported assertions, the record indicates that Mr. Pearson chose MWHC for his care based on its location, not due to any representation made to him by the Kaiser Appellees. A654.

Thus, even if the District of Columbia recognized the doctrine of apparent or ostensible agency, the elements of the claim were not met. Accordingly, the trial court did not err in rejecting the imposition of liability on the Appellees based on the doctrine of apparent or ostensible agency and the Kaiser Appellees respectfully request this Court affirm the decision of the trial court.

III. The Appellant failed to sufficiently plead the elements necessary to establish an informed consent claim, so the trial court's grant of summary judgment in favor of Appellees as to the informed consent claim was proper.

On appeal, this Court reviews a "trial court's grant of summary judgment de novo, applying the same standard as the trial court." *Reeves*, 135 A.3d at 81.

To prevail on a lack of informed consent claim, a plaintiff must first prove that a defendant failed to obtain the plaintiff's informed consent before engaging in a medical procedure or treatment. *See* Standardized Civil Jury Instructions for the District of Columbia, No. 9-8 (rev. ed. 2024) (emphasis added).

The case law on lack of informed consent recognizes the "duty of a physician to inform the patient of the consequences of a proposed treatment." *Crain v. Allison*, 443 A.2d 558, 561 (D.C. 1982); *see also Canterbury v. Spence*, 150 U.S.App. D.C. 263, 271, 464 F.2d 772, 780 (1972) (emphasis added). "[N]ot all risks need be disclosed; only material risks must be disclosed." *Crain*, 443 A.2d at 562. A material risk is a risk "which a reasonable person would consider significant in deciding whether to undergo a particular medical treatment." *Abbey v. Jackson*, 483 A.2d 330, 332 (D.C. 1984).

Because different patients have varying needs for information, the scope of disclosure will vary even among patients with the same condition. *Crain*, 443 A.2d at 562. However, at a minimum, a physician must disclose the nature of the condition, the nature of the proposed treatment, any alternate treatment procedures,

and the nature and degree of risks and benefits inherent in undergoing and in abstaining from the proposed treatment. *Id*. at 562

In this case, the Appellants failed to identify any specific treatment or procedure that Mr. Pearson underwent during his lengthy admission to MWHC. In Plaintiffs' Second Amended Complaint, the Appellants merely asserted that the Appellees failed to disclose the risk of Mr. Pearson developing a pressure injury and the extent of his pressure injury. A186. The Appellants further alleged that, had this risk been disclosed, Ms. Pearson would have insisted on transferring Mr. Pearson to a SNF or another health facility to treat the pressure sore before it became life-threatening. A186.

However, it is not sufficient for the Appellants to claim that the Appellees failed to disclose the reasonably foreseeable risks with respect to their management of Mr. Pearson's "long-term hospitalization," as a "long-term hospitalization" is unreasonably vague, and does not delineate a specific medical procedure or treatment.

Judge Ross demonstrated the flaw in the Appellants' informed consent claim by stating:

> Well, for example, for informed consent, I'm, like, informed consent as to what is [–] what the – that – so basically if I – if you're in the hospital, so now do you have to tell people if you're in the hospital for an extended stay, even if you come in and you think it's going to be overnight, that if you're here for an extended stay and you're not mobile, if you're not mobile, you may develop a –

> But why don't you respond to the basic of [counsel's] argument and then -- and then -- but the informed consent claim. The informed consent as to what?

See Hearing Transcript at 10:14-24.

Put simply, the Appellants failed to allege that the Appellees failed to obtain informed consent before engaging in a *specific* medical procedure or providing specific medical treatment.

Additionally, even if the Appellants' theory was legally sufficient, a claim of informed consent also requires that the Appellants demonstrate a causal connection, and demonstrate that a causal relation exists between the alleged negligence and the alleged injury sustained.

"Once there has been a breach of the duty to disclose, the patient must demonstrate a causal relation between the physician's failure to disclose the material information and the injury sustained." *Lasley v. Georgetown Univ.*, 688 A.2d 1381, 1384 (D.C. 1997) (quoting *Gordon v. Neviaser*, 478 A.2d 292, 294 (D.C. 1984)).

Proof of causation in a lack of informed consent case requires medical expert opinion testimony. *See id*. at 1381. There must be expert testimony to establish some of the elements of proof. In general, expert testimony is "required to establish the nature of the risks inherent in a particular treatment, the probabilities of therapeutic success, the frequency of the occurrence of particular risks, the nature of available

alternatives to treatment and whether or not disclosure would be detrimental to a patient." *Miller-McGee v. Washington Hosp. Ctr.*, 920 A.2d 430, 439 (D.C. 2007).

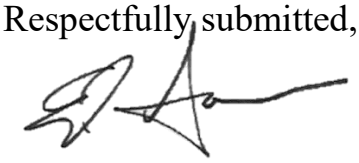
The Appellants failed to produce expert testimony to establish the elements of proof necessary for an informed consent claim. Dr. Guerrero did not testify (nor did his expert report state) anything about the nature of the risks inherent in treating decedent's wounds in a hospital as opposed to a skilled nursing facility (SNF). Likewise, the Appellants failed to produce expert testimony required to establish the probabilities of therapeutic success in treating a wound in a hospital setting versus in a SNF, the frequency of the occurrence of particular risks (in a hospital setting versus in a SNF), the nature of available alternatives to treatment and whether or not disclosure would be detrimental to a patient.

Therefore, as the Appellants' informed consent claim was not based on a specific medical procedure or treatment and lacked the requisite expert testimony on material risks and causation, summary judgment was properly granted by the trial court. Accordingly, the Kaiser Appellees respectfully request that this Court affirm the ruling of the trial court.

CONCLUSION

For the foregoing reasons, the Kaiser Appellees respectfully request this Court to affirm the trial court's ruling.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on July 30th, 2025, a copy of the Appellees' Brief was electronically filed and served through this Court's electronic filing system to:

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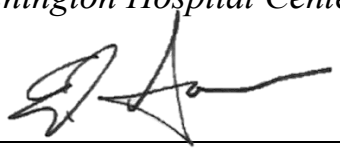

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