IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

MICHELLE McGONIGLE Petitioner, v. BAYHEALTH MEDICAL CENTER, INC. t/a, d/b/a BAYHEALTH HOSPITAL, SUSSEX CAMPUS, et al., Respondent.	)	C.A. No. S23C-08-036 MHC

ORDER

Submitted: May 29, 2026
Decided: August 24, 2026

Caitlin E. McAndrews, Esquire, McAndrews, Mehalick, Connolly, Hulse & Ryan, P.C., *Attorney for the Plaintiff*

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CONNER, J.

INTRODUCTION

The present case is a medical negligence suit brought by Michelle McGonigle and Paul McGonigle (collectively, "Plaintiffs") against Dr. Attebery and Comprehensive Breast Center, LLC (collectively, "Defendants"). Before the Court is Defendants' Motion for Partial Summary Judgment. In the Motion for Summary Judgment, Defendants argue: (1) Plaintiffs' contentions that Dr. Attebery caused their injuries fail as a matter of law; (2) any claim that Defendants increased the risk of Ms. McGonigle's suffered complications fails as it lacks the necessary expert testimony; and (3) Plaintiffs' loss of consortium claim tied to Counts III and V fail as a matter of law. For the reasons stated hereinafter, the Court is not persuaded by Defendants' arguments, and therefore, the Motion for Summary Judgment is **DENIED**.

STATEMENT OF FACTS

I. MS. MCGONIGLE'S MEDICAL HISTORY

Ms. McGonigle was referred to Dr. Attebery after diagnostic imaging revealed a potential mass in her breast.[1] Additional diagnostic imaging was ordered, and returned unremarkable for cancer.[2] In April of 2021, Ms. McGonigle met with Dr. Attebery again to discuss a second bilateral breast reduction.[3] Ms. McGonigle had undergone an initial breast reduction surgery in 2011 with Dr. Lohner, who Dr. Attebery had trained under during her fellowship.[4] Ms. McGonigle sought a second breast reduction surgery due to shoulder pain and the concern of undiagnosed cancer from the weight and density of her breasts.[5]

On September 10, 2021, Ms. McGonigle underwent the second breast reduction surgery to provide symmetry to the breasts and alleviate neck and back pain.[6] There is conflicting testimony as to whether Ms. McGonigle knew the risks associated with a second breast reduction, such as the risk of nipple loss. After the surgery, Ms. McGonigle testified that she was very limited in what she could do,

[1] Defs.' Mot. for Summ. J., D.I. 64, at 2.
[2] *Id.*
[3] *Id.*
[4] *Id.*; Pls.' Resp. in Opp'n to Defs.' Mot. for Summ. J., D.I. at 2.
[5] Defs.' Mot. for Summ. J., D.I. 64, at 2-3.
[6] *Id.* at 3.

including but not limited to, changing clothes, taking a shower, and completing daily tasks around the house.[7]

Ms. McGonigle did not heal properly after the surgery and required further medical treatment.[8] Ms. McGonigle underwent an additional surgery with Dr. Attebery in October of 2021.[9] After this surgery, Ms. McGonigle testified that she lost her nipples.[10] Ms. McGonigle discontinued her care with Dr. Attebery.[11] She sought further emergency and medical care at Penn Medicine, where she underwent several reconstructive surgeries.[12]

II. PLAINTIFFS' EXPERT REPORT

Plaintiffs allege that Dr. Attebery deviated from the standard of care and caused the alleged injuries. Plaintiffs' expert, Dr. Elliot Duboys, set forth seven alleged deviations in his expert report.[13]

First, Dr. Duboys opines that Dr. Attebery deviated from the standard of care by failing to review previous surgical records from her first breast reduction surgery with Dr. Lohner.[14] In the first breast reduction surgery, Dr. Lohner utilized a medial

[7] Pls.' Resp. in Opp'n to Defs.' Mot. for Summ. J., D.I. 78, at 3.
[8] *Id.* at 3.
[9] *Id.* at 4.
[10] *Id.*
[11] *Id.* at 4.
[12] *Id.* at 5.
[13] Pls.' Resp. in Opp'n to Defs.' Mot. for Summ. J., D.I. 78, Ex. C, at 1.
[14] *Id*. at 6.

pedicle as the vascular supply for the nipple-areolar complex.[15] In the second breast reduction surgery, Dr. Attebery utilized a parenchymal pedicle and resected breast tissue from the lateral, superior, and medial portions of Ms. McGonigle's breasts.[16] Dr. Duboys opines that by resecting the tissue in the lateral, superior, and medial portion, Dr. Attebery compromised the blood supply to the nipple-areolar complex that Dr. Lohner relied upon in his procedure.[17]

Second, Dr. Duboys opines that Dr. Attebery deviated from the standard of care by failing to consider the placement of incisions and scars from the first breast reduction surgery.[18] In his report, Dr. Duboys notes that the records do not mention the presence of scars from Ms. McGonigle's prior breast reduction surgery.[19] Dr. Duboys opines that Dr. Attebery's placement and incision of the "Wise Pattern" could have compromised the circulation to the breasts.[20]

Third, Dr. Duboys opines that Dr. Attebery failed to provide proper treatment regarding a skin rash that Ms. McGonigle developed after the surgery.[21] Dr. Attebery prescribed ice and a Medrol Dose Pack, which Dr. Duboys stated was not prudent.[22] In his report, Dr. Duboys notes that the risks associated with the Medrol Dose Pack

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[15] *Id.*
[16] *Id.*
[17] *Id.* at 7.
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*

do not outweigh the benefits.[23] Ms. McGonigle was a freshly operated patient, and the risks associated with a Medrol Dose Pack include wound breakdown and delayed healing.[24] If the rash were an allergic reaction, removal of the tape and cleansing of the wound would have resolved the reaction.[25] Dr. Duboys also opines that consideration as to why the rash only appeared along the horizontal incisions, and not all incisions, should have been given.[26] Additionally, Dr. Duboys opines that a rash may be seen with vascular compromise, and that should have been considered as a differential diagnosis.[27]

Dr. Duboys opines that the fourth deviation involves a delay in diagnosis and treatment.[28] The office note from September 16, 2021 indicated that Ms. McGonigle's nipples appeared "dusky."[29] Dr. Duboys opines that dusky nipples are a sign of vascular compromise and potential/impending wound breakdown.[30] Additionally, an office note from October 21, 2021, stated: "wound dehiscence immediately after her surgery."[31] Dr. Duboys opines that if the wound dehisced immediately after surgery, it should have been treated at that time.[32]

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[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*

The fifth alleged deviation from the standard of care involves Dr. Attebery's improper blame on Ms. McGonigle's activity level.[33] Dr. Duboys opines that too much emphasis was attributed to Ms. McGonigle's activity level.[34] Dr. Duboys stated that the placement of the sutures into tissue of questionable viability decreased the tensile strength of the wound, not the activity level of Ms. McGonigle.[35]

Sixth, Dr. Duboys found that Dr. Attebery deviated from the standard of care by recommending that Ms. McGonigle place ice on her breast.[36] Even though Dr. Attebery instructed Ms. McGonigle not to place the ice on the incisions, there was little room to place ice on the breast and not the incision, due to the "Wise" pattern of the incision.[37] As ice is a vasoconstrictor, it can be a contributing factor to decreased vascularity to the nipple-areolar complex.[38]

Lastly, Dr. Duboys opines that Dr. Attebery deviated from the standard of care because there was a lack of informed consent.[39] Ms. McGonigle testified in her deposition that Dr. Attebery never discussed the potential complications of breast

[33] *Id.*
[34] *Id.*
[35] *Id.* at 7-8.
[36] *Id.* at 8.
[37] *Id.*
[38] *Id.*
[39] *Id.*

reduction surgery, such as the risk of losing nipples.[40] The office visit notes rarely document that the risks and/or complications were discussed with Ms. McGonigle.[41]

In his report, Dr. Duboys notes additional considerations that Dr. Attebery did not take to minimize the loss of breast tissue and the nipple-areolar complex, and ultimate wound dehiscence.[42] The five additional considerations are as follows: (1) failure to review previous records; (2) failure to recognize the significance of minimal blood loss; (3) delay in diagnosis and treatment; (4) use of Nitrodur; and (5) failure to consider the cause and/or significance of prolonged swelling.[43]

In the expert report, Dr. Duboys states that it his opinion to a reasonable degree of medical certainty, that as a result of the actions and/or inactions of Dr. Attebery, Ms. McGonigle suffered bilateral wound dehiscence with vascular compromise to the parenchyma of the breasts and nipple-areolar complexes resulting in nipple loss and loss of breast tissue.[44] As a result of Dr. Attebery's actions or inactions, Dr. Duboys opines that Ms. McGonigle was required to undergo multiple breast reconstruction and corrective surgeries, as well as follow-up procedures.[45]

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[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.* at 8-9.
[44] *Id.* at 9.
[45] *Id.*

III. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants filed the instant Motion for Summary Judgment on March 31, 2026.[46] Defendants argue that there is no expert testimony that Dr. Attebery directly caused Ms. McGonigle's injuries. Therefore, Count III, the medical negligence claim against Dr. Attebery, must be dismissed. Because Count V, the negligence claim against the Comprehensive Breast and Surgical Center, is derivative of Count III, it must also be dismissed. Furthermore, there is no precision or specific percentage testimony that Dr. Attebery increased the risk of known complications. Therefore, Counts III and V must be dismissed. Count VI, Mr. McGonigle's loss of consortium claim against Defendants, should be dismissed because it is derivative of Counts III and V. Defendants argue that there is no genuine issue of material fact and summary judgment should be granted.

IV. PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs filed their Response Brief in Opposition to Defendants' Motion for Summary Judgment on April 30, 2026.[47] Defendants filed their Reply Brief on May 29, 2026.[48] Defendants also filed a number of motions *in limine* that interacted with the summary judgment motion. Plaintiffs argue that there is expert testimony that

[46] Defs.' Mot. for Summ. J., D.I. 64.
[47] Pls.' Resp. in Opp'n to Defs.' Mot. for Summ. J., D.I. 78.
[48] Defs.' Reply Brief in support of Mot. for Summ. J., D.I. 79

Dr. Attebery's actions and/or inactions caused Ms. McGonigle's injuries and increased the risk of her injuries. Plaintiffs argue that they have established a prima facie case of medical negligence, including the production of an expert report and expert testimony to establish causation. Additionally, Plaintiffs argue that Dr. Duboys' increased risk of harm opinions are sufficient under Delaware law. Plaintiffs argue that because Count III has been established, and Count V is derivative of Count III, Count V should not be dismissed. Lastly, for the same reasons, Count VI, the loss of consortium claim, should not be dismissed. For these reasons, Plaintiffs ask the Court to deny Defendants' Motion for Summary Judgment.

STANDARD OF REVIEW

Under Delaware Superior Court Civil Rule 56, a party is entitled to summary judgment when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.[49] If the moving party satisfies the initial burden, then the burden of proof shifts to the nonmoving party to establish the existence of genuine issues of material facts.[50] The Motion will be viewed in the light most favorable to the non-moving party. "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict

[49] Super. Ct. Civ. R. 56(c).
[50] *Brown v. Dollar Tree Stores, Inc.*, 2009 WL 5177162, at *2 (Del. Super. Ct. 2009).

for that party."[51] "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted."[52]

DISCUSSION

I. PLAINTIFFS' CLAIM THAT DR. ATTEBERY CAUSED THEIR INJURIES DOES NOT FAIL AS A MATTER OF LAW.

Plaintiffs have produced sufficient expert testimony to support their claim that Dr. Attebery caused Plaintiffs' injuries. Plaintiffs' standard of care and causation expert, Dr. Duboys, testified regarding Dr. Attebery's alleged deviations from the standard of care in the treatment of Ms. McGonigle. Dr. Duboys also wrote an expert report detailing the alleged deviations.

Defendants bring forth two arguments to support their claim. First, Defendants argue that Count III, the negligence claim against Dr. Attebery, should be dismissed because there is no expert testimony that Dr. Attebery caused Ms. McGonigle's injuries. Second, Count V, the negligence claim against Comprehensive Breast and Surgical Center, should be dismissed because it is derivative of the negligence claim against Dr. Attebery. For the reasons discussed hereinafter, Defendants' arguments do not prevail.

A. There is expert testimony that Dr. Attebery caused Ms. McGonigle's injuries.

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[51] *Health Sols. Network, LLC v. Grigorov*, 2011 WL 443996, at *2 (Del. 2011) (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986)).
[52] *Id.* at 250-51.

Plaintiffs have produced expert testimony that Dr. Attebery caused Ms. McGonigle's injuries. Delaware law requires a plaintiff to present expert medical testimony as to: "(1) the applicable standard of care; (2) the alleged deviation from the standard; and (3) the causal link between the breach of the standard of care and the alleged injury."[53] "Delaware law mandates that such medical opinions 'be based on a reasonable degree of medical probability.'"[54] While it is "strongly encouraged" that experts state their opinion in terms of "of reasonable medical probability" or a "reasonable medical certainty," experts are not required to use such terminology.[55] It is the Court's discretion to determine whether an expert's opinion satisfies the legal standard.[56] Experts may not base their opinions on speculation or conjecture.[57] "Therefore, an expert witness's testimony 'concerning possible medical consequences, rather than ... reasonable medical probability' [is] impermissible speculation."[58] Delaware courts have found that "[t]he absence of an expert opinion stated with reasonable medical probability as to negligence or causation warrants summary judgment."[59]

[53] *Trott v. Bayhealth Med. Ctr., Inc.*, 2024 WL 658859, at *6 (Del. Super. Ct. 2024).
[54] *Id.* at *7.
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*

In the case, *Trott v. Bayhealth*, the Court found that the plaintiff's expert testimony did not establish that the nurses' breaches of the standard of care proximately caused the plaintiff's injury.[60] In *Trott*, the expert opined within a reasonable degree of medical certainty that the nurses deviated from the standard of care in their treatment of the plaintiff.[61] However, the expert repeatedly testified that "he could not opine that the nurses' deviation from the standard of care more likely than not changed the outcome."[62] The expert declined to opine with medical probability or certainty that the nurses' negligence and deviation from the standard of care caused the plaintiff's injury.[63]

In contrast, the Supreme Court of Delaware in *Froio v. Du Pont Hospital for Children*, reversed the Superior Court's judgment granting the defendant's motion for summary judgment.[64] The Superior Court granted the defendant's motion for summary judgment because they found there was "'no clear statement of what the doctor should have done differently.'"[65] In the plaintiff's expert report, the expert opined that several factors "may" have contributed to the injury.[66] The expert opined that the doctor deviated from the standard of care, which resulted in the injuries, and

[60] *Id.*
[61] *Id.*
[62] *Id.* at *8.
[63] *Id.* at *9.
[64] *Froio v. Du Pont Hosp. for Child.*, 816 A.2d 784, 787 (Del. 2003).
[65] *Id.* at 786.
[66] *Id.* at 785.

stated all opinions to a reasonable degree of medical certainty.[67] During the expert's deposition, the Superior Court found that the expert provided somewhat contradictory statements regarding whether the doctor should have known that the patient needed an extra level of care due to her medical condition.[68] However, the Supreme Court found that the expert did not contradict herself, because even though there were some inconsistencies in her deposition testimony, the expert did not repudiate her opinion.[69] The Supreme Court reversed and remanded the Superior Court's decision.

The present case is distinguishable from *Trott*. Dr. Duboys opined, in his expert report and deposition, that it is his opinion, within a reasonable degree of medical certainty, that Dr. Attebery deviated from the standard of care in the following ways:

> (1) failure to review previous surgical records; (2) failure to consider placement of incisions and scars from precious surgeries; (3) improper treatment; (4) delay in diagnosis and treatment; (5) improper blame on patient's activity level; (6) use of ice; and (7) lack of informed consent.[70]

Dr. Duboys' expert report also contains a discussion section, where Dr. Duboys lists additional considerations that must be taken to minimize the loss of breast tissue and

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[67] *Id.*
[68] *Id.* at 787.
[69] *Id.*
[70] Pls.' Resp. in Opp'n to Defs.' Mot. for Summ. J., D.I. 78, Ex. C, at 7-8.

the nipple-areolar complex and ultimate wound dehiscence that were not considered by Dr. Attebery. These considerations are listed as follows:

> (1) failure to review previous records; (2) failure to recognize significance of minimal blood loss; (3) delay in diagnosis and treatment; (4) use of Nitrodur; and (5) failure to consider cause and/or significance of prolonged swelling.[71]

Additionally, in his expert report, Dr. Duboys expressly offers causation expert testimony. Dr. Duboys wrote the following:

> It is my opinion within a reasonable degree of medical certainty, that as a result of the actions and/or inactions of Dr. Attebury, MM [Ms. McGonigle] suffered bilateral wound dehiscence with vascular compromise to the parenchyma of the breasts and nipple areolar complexes resulting in nipple loss and loss of breast tissue.[72]

Dr. Duboys opined that as a result of these injuries, Ms. McGonigle was required to undergo additional procedures and multiple breast reconstruction and corrective surgeries.[73] During his deposition, Defendants had the opportunity to question Dr. Duboys regarding his expert report and his causation opinions.

Even so, Defendants argue that there is no expert testimony that Dr. Attebery caused Ms. McGonigle's injuries. Defendants argue that Dr. Duboys did not testify that Dr. Attebery caused Ms. McGonigle's injuries, but rather, a "handful" of medical decisions contributed to the increased risk of nipple loss.[74] However, similar to

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[71] *Id.* at 8-9.
[72] *Id.* at 9.
[73] *Id.*
[74] Defs.' Mot. for Summ. J., D.I. 64, at 2.

Froio, Dr. Duboys' expert report, along with his deposition testimony, demonstrate that Dr. Duboys opines that all of the alleged deviations, taken together, caused the injuries. In *Froio*, the expert listed six deviations of the standard of care, opined that these several factors may have contributed to the patient's injuries, stated that the deviations in the standard of care resulted in the injury, and stated her opinions to a reasonable degree of medical certainty.[75] Once again, Dr. Duboys stated in his report that Dr. Attebery's actions and/or inactions caused Ms. McGonigle to suffer bilateral wound dehiscence with vascular compromise to the parenchyma of the breast and nipple-areolar complexes, resulting in nipple loss and breast tissue. He testified in his deposition that all of the deviations taken together caused the injury. In both his expert report and deposition, he stated that his opinions are based on a reasonable degree of medical certainty.

Defendants also argue that during his deposition, Dr. Duboys could not say to a reasonable degree of medical certainty that the location of the new incisions contributed to the complications.[76] Defendants argue that Dr. Duboys' testimony was too speculative, because he said the decision to prescribe the Medrol Dose Pack or to provide a full thickness incision to the pectoralis fascia "could have", or "might" have contributed to the increased risk.[77] In his deposition, Dr. Duboys stated

[75] *Froio*, 816 A.2d at 787.
[76] Defs.' Mot. for Summ. J., D.I. 64, at 14.
[77] *Id.*

that "[i]f she went down to pectoralis fascia in the inferior aspect or the transverse incision over there, that could have compromised the circulation."[78] However, he continued to say, "[t]his would be a deviation, and . . . this combined with other attributed to the overall complication that Ms. McGonigle sustained."[79] Furthermore, in his report, Dr. Duboys states that "it was not prudent" to initially place Ms. McGonigle on the Medrol Dose Pack, as the risks outweigh the benefits.[80] Dr. Duboys lists this as a deviation, and stated in his deposition that he believed Dr. Attebery breached the standard of care by prescribing the steroid to Ms. McGonigle at the time that she did.[81] Dr. Duboys further testified that he does not believe that the use of steroids itself would have caused nipple loss, but the use of steroid impacted the nipple loss and wound breakdown.[82] Dr. Duboys then testified to a reasonable degree of medical probability that the steroids, taken with the other deviations, "certainly contributed to the wound breakdown."[83]

If Defendants believe there are inconsistencies in Dr. Duboys' testimony, then they may explore those inconsistencies on cross-examination. Delaware courts have found that "[c]ontradictory statements are not fatal where the expert does not

[78] Tr. of Dr. Duboys' Deposition, at 54:13-16.
[79] *Id.* at 54:19-23.
[80] Pls.' Resp. in Opp'n to Defs.' Mot. for Summ. J., D.I. 78, Ex. C, at 7.
[81] *Id.*
[82] Tr. of Dr. Duboys' Deposition, at 67:8-19.
[83] *Id.* at 67:13-69:13.

repudiate an opinion finding a standard and violation."[84] So long as the expert's testimony provides the minimal evidence of the appropriate standard of care and a breach of that standard, any inconsistencies in the expert's testimony must be resolved by a jury and are thus irrelevant for ruling on a Motion for Summary Judgment.[85] After a careful reading of Dr. Duboys' deposition transcript, the Court does not find that he repudiated his opinions.

The Court finds that Dr. Duboys' causation testimony is sufficient to survive the Motion for Summary Judgment. By accepting Plaintiffs' argument, the Court is not ignoring Dr. Duboys' deposition testimony and solely relying on his report, as Defendants suggest in their Reply Brief in support of their Motion for Summary Judgment.[86] Rather, the Court is analyzing Dr. Duboys' expert report in conjunction with his deposition testimony. The Court is satisfied that Plaintiffs have established causation expert testimony based on Dr. Duboys' expert report and deposition testimony.

Defendants also argue that if the Court accepts Plaintiff's theory, then depositions would be irrelevant, and motions in limine and motions for summary judgment would be moot.[87] Defendants cite to Rule 26 of the Delaware Superior Court Rules,

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[84] *Vogel v. Duran*, 2009 WL 2574089, at *2 (Del. Super. Ct. 2009)(citing *Froio v. Dupont Hospital for Children,* 816 A.2d 784, 787 (Del.2003)).
[85] *Green v. Weiner*, 766 A.2d 492, 495-96 (Del. 2001).
[86] Defs.' Reply Br. in Supp. of the Mot. for Summ. J., D.I. 84, at 2.
[87] *Id.*

stating that parties are required to disclose expert opinions, and the basis of those opinions, so the opposing party can properly prepare for depositions and trial. However, it is unclear how accepting Plaintiffs' argument would amount to a "wild goose chase", prevent meaningful opportunity for cross-examination at trial, or eliminate motion practice, as Defendants claim.[88] Dr. Duboys prepared his expert report and was deposed by Defendants. Defendants do not argue that Dr. Duboys' deposition testimony exceeded the scope of his expert report.

For these reasons, the Court is satisfied that Plaintiffs have met their burden of establishing expert causation testimony, and there is a genuine issue of material fact as to whether Dr. Attebery caused Plaintiffs' injuries.

B. Plaintiffs Are Not Required to Establish Every Subpart in the Complaint.

Defendants argue that Plaintiffs have not established several subparts of Paragraph 42 of the Complaint. However, Plaintiff is not required to establish every subpart of the Complaint.

Defendants argue that the following subparts of Paragraph 42 were not established by expert testimony: (1) failure to diagnose and treat Ms. McGonigle; (2) failure to properly order and perform diagnostic test results; (3) failure to consult proper medical personnel; (4) failure to supervise and control others caring for Ms. McGonigle; (5) failure to perform proper diagnostic testing; (6) failure to refer Ms.

[88] *Id.* at 3.

McGonigle to a proper medical specialist; (7) performing an unnecessary second breast reduction; (8) improperly performed the surgical procedure; (9) failure to connect blood supply during the October 8, 2021 procedure; and (10) allowing the worsening of condition resulting in additional injuries.[89]

While the Court agrees that expert testimony has not been provided to support some of these subpart arguments, Plaintiffs do not argue that every subpart was proven by expert testimony. Instead, Plaintiffs argue that they are not required to prove every single allegation set forth in the Complaint.[90] Plaintiffs produced Dr. Duboys' expert report, which detailed seven deviations from the standard of care. Defendants were on notice of Plaintiffs' medical negligence claim, and Plaintiffs established a prima facie case for medical negligence that is supported by expert testimony.

For these reasons, the Court will not dismiss Plaintiffs' medical negligence claim for failure to establish every subpart of the Complaint. Plaintiffs adequately pled a medical negligence claim and provided expert testimony establishing the necessary elements.

C. The Motion for Summary Judgment on Count V is Denied.

[89] Defs.' Mot. for Summ. J., D.I. 64, at 11.
[90] Pls.' Resp. in Opp'n to Defs.' Mot. for Summ. J., D.I. 78, at 19.

Defendants argue that, in addition to the subsections in Count III, there is no expert testimony to support Plaintiffs' claims under Count V. In addition to the subsections of Count III, Count V of the Complaint states that the Comprehensive Breast Center was negligent in that its agents: (1) improperly trained staff to diagnose and treat Ms. McGonigle; (2) improperly trained staff to order, perform, and read diagnostic testing; (3) failure to employ proper policies and procedures; and (4) utilized medical personnel without adequate training.[91] Defendants argue that the only "agent" that could be identified for Count V to hold Comprehensive Breast Center, LLC liable is Dr. Attebery.[92] Defendants state that because the underlying claim against Dr. Attebery fails, Count V must fail as well.

However, for the reasons stated above, the claim against Dr. Attebery does not fail. Plaintiffs have produced sufficient expert testimony, between Dr. Duboys' expert report and his deposition transcript, to create a genuine issue of material fact as to whether Dr. Attebery breached the standard of care and caused Plaintiffs' injuries. Dr. Duboys set forth seven standard of care deviations, and stated that it is his opinion, to a reasonable degree of medical certainty, that the seven deviations contributed to or caused the nipple loss and wound breakdown. Defendants may explore his testimony and opinions on cross examination. However, Plaintiffs'

[91] Defs.' Mot. for Summ. J., D.I. 64, at 15.
[92] *Id.*

negligence claim against Comprehensive Breast Center is sufficient to survive a Motion for Summary Judgment.

For these reasons, Defendants' Motion for Summary Judgment on Count V, the negligence claim against Comprehensive Breast Center, is **DENIED**.

II. PLAINTIFFS DO NOT NEED TO PRODUCE PERCENTAGE EXPERT TESTIMONY REGARDING THE INCREASED RISK OF KNOWN COMPLICATIONS.

Plaintiffs do not need to produce an expert to provide an exact statistic or percentage quantifying how Dr. Attebery's alleged deviation from the standard of care increased the risk of the injuries. Both parties cite to cases involving the increased risk of harm doctrine, which do not apply to the present case. Defendants concede that this case does not involve the increased risk of future complications.[93] However, Defendants argue that because the surgery already had a risk of nipple loss, Plaintiffs' expert needs to quantify how Dr. Attebery's alleged deviations increased the risk, with a specific percentage.[94] Plaintiffs argue that a percentage is not required. The Court agrees with the Plaintiffs.

Both parties discuss the increased risk doctrine several times throughout their submissions to the Court. Even though Defendants concede that the increased risk doctrine does not apply, for the purpose of clarity, the Court will explain why it does

[93] *Id.* at 23.
[94] *Id.* at 24.

not apply to the present case. In *United States v. Anderson*, the Delaware Supreme Court adopted the increased risk of future harm doctrine, which provides that "a person may recover damages if the person's risk of suffering a negative medical condition is increased because of medical malpractice."[28] However, the Delaware Supreme Court "did not hold that a plaintiff must present evidence of the precise statistical percentage" of the increased risk of future harm.[29] In *Debussy v. Graybeal*, the Court found that the injury compensated under the increased risk doctrine "is the increased risk of harm, not the harm itself."[95]

The present case does not involve a future injury. Plaintiffs' expert does not opine that Dr. Attebery's alleged negligence increased the risk of a future injury. Dr. Duboys opines that Dr. Attebery deviated from the standard of care, in the ways aforementioned, and those deviations caused Plaintiffs' injuries. For these reasons, the Court finds that the increased risk doctrine does not apply.

Even so, Defendants argue that the Court should follow the ruling in *Kern v. Alfred I. Dupont Institute of the Nemours Foundation*, where the Court was asked to analyze what is required to prove an increased risk of harm claim.[96] *Kern* was a medical negligence case involving a 2-month-old child who underwent throat

[95] *DeBussy v. Graybeal*, 2016 WL 7161239, at *1 (Del. Super. Ct. 2016).
[96] *Kern ex rel. Kern v. Alfred I. Dupont Inst. of Nemours Found.*, 2004 WL 2191036 (Del. Super. Ct. 2004).

surgery to widen her trachea.[97] The surgery failed, and post-operative complications developed.[98] The plaintiff brought suit against the hospital, alleging that the nurses negligently monitored an intravenous tube inserted in the child's head, which increased the risk that the throat surgery would fail.[99] The plaintiff sought to force the operating physician to testify as to the standard of post-operative care and causation.[100] The Court had to decide whether the increased risk doctrine could be expanded to cover the plaintiff's claim. However, the Court dismissed the claim because "no expert [would] state with reasonable probability and precision what the chances were that the surgery would have worked, much less offer any opinion as to the percentage by which Defendant's alleged negligence reduced the chance of success."[101] The Court held that "percentages are vital because they form the basis for any damages calculation by the jury. Without them, the jury would be left to speculate."[102] However, the Court did not decide whether the increased risk doctrine applied to the plaintiff's case because there was no causation expert.

Defendants rely on *Kern* to support their argument that Plaintiffs' expert must specifically quantify a percentage of the increased risk of Ms. McGonigle's injuries. However, the present case is distinguishable from *Kern*. The Court in *Kern* did not

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[97] *Id.* at *1.
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.* at *4.
[102] *Id.*

decide whether the increased risk doctrine applied to the plaintiff's case. The plaintiff sought to force the treating physician to testify as the causation expert. There was no expert to testify to a reasonable degree of medical certainty.

In the present case, Dr. Duboys states:

> It is my opinion within a reasonable degree of medical certainty, that as a result of the actions and/or inactions of Dr. Attebery, MM [Ms. McGonigle] suffered bilateral wound dehiscence with vascular compromise to the parenchyma of the breasts and nipple areolar complexes resulting in nipple loss and loss of breast tissue.[103]

Dr. Duboys' testimony does not cause the jury to speculate because it is his opinion, within a degree of medical certainty, that the deviations alleged in his report caused Ms. McGonigle's injuries. Dr. Duboys' inability to assign a percentage does not render his testimony inadmissible, or warrant the granting of a Motion for Summary Judgment. These arguments are better addressed on cross-examination during trial.

Plaintiffs, on the other hand, cite to *Signey v. Pfaff*, where the Court found that the plaintiff's expert was not required to provide percentages in supporting his opinion that the doctor's alleged deviation from the standard of care caused the plaintiff's injuries.[104] In *Signey*, the plaintiff's expert testified that the defendant deviated from the standard of care, but quantification of the deficits caused by the alleged negligence "was difficult for him because it was hard to know whether Ms.

[103] Pls.' Resp. in Opp'n to Defs.' Mot. for Summ. J., D.I. 78, Ex. C, at 9.
[104] *Signey v. Pfaff*, 2023 WL 6449153 (Del. Super. Ct. 2023).

Signey would have had them absent a deviation."[105] The doctor testified that had the defendant acted timely and appropriately, the plaintiff either would not have had, or would have less neurological deficits than what she currently has.[106] The Court found that the doctor did not have to provide a percentage of "how much worse the plaintiff is as a result of the Defendant's breach."[107] "All that is required under the instant facts is testimony that it is worse. How much worse is a question to be decided for the jury."[108]

The present case is similar to *Signey*. Surgeries generally have risks associated with them. The risks of surgery may happen with or without medical negligence, but medical negligence often increases the risk of the injuries occurring. Similar to *Signey*, Dr. Duboys could not quantify "how much worse" Ms. McGonigle was after the second breast reduction surgery. Dr. Duboys can only testify that she is worse, and to a reasonable degree of medical certainty, she is worse due to Dr. Attebery's alleged deviation from the standard of care. Dr. Duboys specifically attributes Ms. McGonigle's injuries to Dr. Attebery's alleged deviations in the standard of care.

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[105] *Id.* at *2.
[106] *Id.*
[107] *Id.*
[108] *Id.*

Dr. Duboys stated that his opinions were made with a reasonable degree of medical certainty, and that Dr. Attebery deviated from the standard of care, causing Ms. McGonigle's injuries. The jury is not left to speculate. For these reasons, the Court finds that exact percentages are not necessary in the present case.

III. PLAINTIFFS' LOSS OF CONSORTIUM CLAIM DOES NOT FAIL AS A MATTER OF LAW.

The loss of consortium claim does not fail as a matter of law. Defendants argue that because the loss of consortium claim is tied to Counts III and V, which fail as a matter of law, the loss of consortium claim must fail too. However, for the reasons aforementioned, Counts III and V do not fail as a matter of law, and summary judgment was denied on both counts. Therefore, Defendants' argument on the loss of consortium claim does not prevail. Defendants' Motion for Summary Judgment on the loss of consortium claim is **DENIED**.

CONCLUSION

For these reasons, Defendants' Motion for Summary Judgment is **DENIED**.

IT IS SO ORDERED.

/s/ Mark H. Conner
Mark H. Conner, Judge

oc: Prothonotary
via File & Serve