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IN THE SUPREME COURT OF THE STATE OF DELAWARE

LAURA COONEY-KOSS and JEROME KOSS, Plaintiffs Below-Appellants, v. JENNIFER H. BARLOW, M.D., Defendant Below-Appellee.	)	No. 162,2013 Appeal from the Superior Court of the State of Delaware in and for New Castle County C.A. No. N10C-10-230 WCC

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A. DIANE MCCRACKEN, M.D., and ALL ABOUT WOMEN OF CHRISTIANA CARE, INC., Defendants Below, Appellants, v. LAURA COONEY-KOSS and JEROME KOSS, Plaintiffs Below, Appellees.	)	No. 161,2013 Appeal from the Superior Court of the State of Delaware in and for New Castle County C.A. No. N10C-10-230 WCC

DEFENDANTS BELOW, APPELLANTS A. DIANE MCCRACKEN, M.D.'S AND ALL ABOUT WOMEN OF CHRISTIANA CARE, INC.'S

REPLY BRIEF ON APPEAL AND DEFENDANT BELOW, CROSS-APPELLEE JENNIFER BARLOW, M.D.'S ANSWERING BRIEF ON CROSS-APPEAL

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Dated: October 21, 2013

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I. THE SUPERIOR COURT ERRED WHEN IT EXCLUDED THE TESTIMONY OF TAK LUI, M.D., A TREATING PHYSICIAN WHOSE TESTIMONY WAS MATERIAL AND ESSENTIAL TO DR. MCCRACKEN'S CARE AND TREATMENT DECISIONS.

The Kosses do not dispute that Dr. Tak Lui was the treating anesthesiologist during Ms. Koss's surgery, that he documented his presence on the medical records at the relevant time, that Dr. McCracken had conversations with him during the procedure, or that he would have conveyed his concerns to Dr. McCracken before she performed the hysterectomy as he would under similar circumstances. Criticisms that Dr. Lui does not have a specific recall of the procedure or conversations with Dr. McCracken may be fertile ground for cross-examination, but they do not render his testimony speculative under the circumstances. Therefore, the trial court erred in excluding Dr. Lui's testimony.

The Kosses agree that Dr. Liu can rely on "what is in the medical record to give testimony", consistent with Delaware law. Appellee Ans. Br. on Appeal 26; *Thomas v. Frank Morris Co.*, 1990 WL 91114, at *1 (Del. Super. Ct. Jun. 13, 1990) (permitting the testimony of a treating doctor who had no present recollection of the treatment). That is precisely what Dr. Lui did here when he testified that he could "reconstruct" his involvement based on his review of the treatment records. (A0089) Moreover, Dr. Lui testified that he would not

"usually" document a patient's stability. (A0092) To accept the argument that Dr. Lui, or any physician, is precluded from testifying about his thought-processes merely because he did not document them would preclude any fact witness from testifying as to his routine observations, contrary to the rules of evidence. *Oberly v. Howard Hughes Med. Inst.*, 472 A.2d 366, 385 (Del. Ch. 1984), *noted to be abrogated on other grounds*, *Staats v. Lawrence*, 576 A.2d 663 (Del. Super. Ct. 1990) (citing *Bennett v. Andree*, 270 A.2d 173 (Del. 1970)), *aff'd*, 582 A.2d 936, 1990 WL 168242 (Del. Oct. 3, 1990); *Aikman v. Kanda*, 975 A.2d 152, 164, 164 n.15 (D.C. Ct. App. 2009).

But Dr. Lui's testimony is based on more than just the records. For example, he testified that, "[i]f we had concerns about vital signs, yes, we would let the surgeon know." (A0090) (emphasis added) Thus, as part of his routine, Dr. Lui would have informed a surgeon (like Dr. McCracken) of his concerns (which he would have had with Ms. Koss). This is exactly the type of "semi-automatic" conduct that is evidence of Dr. Lui's routine and practice and can be used to show that he acted similarly when he treated Ms. Koss. *Brown v. Liberty Mut. Ins. Co.*, 774 A.2d 232, 243 (Del. 2001); *Brett v. Berkowitz*, 706 A.2d 509, 516 (Del. 1998).

Contrary to the Kosses' suggestion, Dr. Lui did not need to be identified as an expert to provide testimony as to his care. As a treating physician who was identified in the Pretrial Stipulation, Dr. Lui can testify as to his treatment.

(A0262); Super. Ct. Civ. R. 16(d); D.R.E. 602 (witness is competent to testify based on personal knowledge); *Thomas*, 1990 WL 91114 at *1. Dr. Lui was never offered, nor asked to offer, opinions as to any medical negligence of the AAW Defendants, and therefore there was no need to identify him as an expert.

Nor do the Kosses address how Dr. Cartagena's (the Kosses' anesthesiologist's) testimony -- that Ms. Koss's blood loss of 1,000 milliliter blood loss in a short period of time was not a "catastrophe" -- opened the door for Dr. Lui's testimony based on the Superior Court's ruling. (A0837, A0879, A0902, A0926-27) Indeed, Dr. Cartagena's testimony stands in stark contrast to Dr. Lui's deposition testimony that he would be "greatly alarm[ed]" at this amount of blood loss. (A0108) To preclude Dr. Lui's testimony after Dr. Cartagena opened the door was therefore error.

Finally, the Kosses do not address the AAW Defendants' argument that their concerns as to his lack of recall go to weight, not admissibility. Under similar circumstances, this Court has held that issues as to lack of recall, where a witness testified as to how he "typically" handles similar situations, are grounds for cross-examination, not wholesale exclusion of the testimony. *McNally v. State*, 980 A.2d 364, 369-70 (Del. 2009). Here, the Kosses would likewise be permitted to cross-examine Dr. Lui as to his lack of specific recall, but his otherwise-relevant and qualified testimony should have been admitted. It would then be for a jury to

weigh the credibility of the witness based on his routine and practice rather than his recall. *Debernard v. Reed*, 277 A.2d 684, 686 (Del. 1971) (jury should hear relevant testimony and can evaluate witness's credibility).

In this case, the central issue is whether Dr. McCracken was reasonable in proceeding with a hysterectomy or whether the patient's condition was stable enough to allow her more time to try other, more conservative measures first. As Dr. Lui was involved in Ms. Koss's care at this critical point in time and was communicating directly with Dr. McCracken, giving her vital information about the stability of the patient, his testimony as to <u>his</u> concern, based on his routine and practice, goes to the "very heart of the case" because it was important "in order to resolve an issue central to the trial's outcome". *Barrow v. Abramowicz*, 931 A.2d 424, 435 (Del. 2007). Excluding Dr. Lui's testimony significantly prejudiced the AAW Defendants, as there is a fundamental difference between hearing testimony from the defendant about her perception of the patient's stability and hearing it from a treating anesthesiologist whose sole job is to evaluate, among other things, the impact of a patient's blood loss intraoperatively, who had the same concern and "alarm" that Dr. McCracken had, and who does not have an interest in the outcome of the litigation. Therefore, the trial judge abused his discretion in excluding Dr. Lui's testimony, and this Court should reverse the judgment below.

II. THE SUPERIOR COURT ERRED WHEN IT EXCLUDED RELEVANT AND PROBATIVE MEDICAL RECORDS AND TESTIMONY RELATING TO MS. KOSS'S CREDIBILITY, HER CLAIMS OF DAMAGES, AND CAUSATION.

The Kosses state in conclusory fashion that the records and testimony are irrelevant and unduly prejudicial without addressing the arguments raised by the AAW Defendants. But more importantly, the Kosses fail to address the central point -- that the May 2012 Records and supporting expert testimony are relevant to causation because they support the AAW Defendants' defense that other conservative methods to stop Ms. Koss's bleeding suggested by Dr. Spellacy would not have been successful, similar to when they failed in 2012 (as documented by the hospital admission records that were excluded). But even if this testimony was prejudicial in some respect (which is denied), neither the Court nor the Kosses addressed the propriety of a limiting instruction, which could have addressed both parties' concerns. *Register v. Wilmington Med. Ctr.*, 377 A.2d 8, 10 (Del. 1977); *State Farm Mut. Auto. Ins. Co. v. Enrique*, 3 A.3d 1099, 2010 WL 3448534, at *3 (Del. Sept. 3, 2010). As the records were relevant and material, the Superior Court erred in excluding them and the related expert testimony.

The Kosses do not dispute that Ms. Koss made inconsistent statements at trial and in the May 2012 Records that related to her bleeding history and the surgery at issue. (A1562-A1576) That Ms. Koss addressed her ulcerative colitis at

trial without reference to the May 2012 Records, or that some evidence may have been cumulative, does not render the records inadmissible, as they would have permitted the jury to evaluate her complete medical condition, her claimed damages, and her credibility. (A0362-64); *Enrique*, 2010 WL 3448534 at *2 (Del. Sept. 3, 2010) (party is not precluded from offering relevant evidence where issue is not contested); *Friedel v. Osunkoya*, 994 A.2d 746, 754 (Del. Super. Ct. 2010); *Sammons v. Doctors for Emergency Servs., P.A.*, 913 A.2d 519, 536 (Del. 2006).

More importantly, the opinions of Dr. Bird and Dr. Lessin as to Ms. Koss's bleeding history are relevant to the AAW Defendants' causation defense. Their opinions refuted the Kosses' proximate cause argument that, even if the additional conservative treatment methods recommended by Dr. Spellacy had been employed, they, more likely than not, would have failed to stop Ms. Koss's bleeding and Koss would still have needed a hysterectomy. This was a central issue in the case, and the jury should have heard this testimony. *Money v. Manville Corp. Asbestos Disease Compensation Trust Fund*, 596 A.2d 1372, 1375 (Del. 1991) (party must establish proximate cause of claimed injuries in negligence case).

The Kosses' criticisms that these experts could not identify the specific bleeding disorder (as opposed to a bleeding disorder of "unknown etiology")[1] go to

[1] It is a recognized that there are a certain number of bleeding disorders that are of "unknown"

the factual basis of their opinions and, therefore, go to weight, not admissibility. (A0301-02); D.R.E. 702; *Perry v. Berkley*, 996 A.2d 1262, 1271 (Del. 2010) ("We recognize that, as a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is for the opposing party to challenge the factual basis of the expert opinion on cross-examination."). There is no dispute that Ms. Koss's hematology work-ups did not demonstrate a specifically defined blood disorder, and, indeed, both Dr. Bird and Dr. Lessin agreed.[2] (A0223-25; A0300-02) But it is not infrequent that experts retained for litigation draw different conclusions from the treating physicians, as experts are able to review a much larger universe of records and have more time to consider the issue.[3] Here, both Dr. Bird and Dr. Lessin stated that it was their expert opinion, based on their review of the relevant records and their expertise, that Ms. Koss suffered from a rare undiagnosed bleeding disorder that was not recognized by these tests. (A0223-

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etiology and variety. (A0301-02)

[2] Dr. Lessin did, however, identify as abnormal Ms. Koss's PT/INR values during her blood tests that further support his opinion that Ms. Koss had an underlying bleeding disorder. (A0301-02)

[3] Indeed, although the Kosses' experts have opined, after reviewing the records years later, that Dr. McCracken acted unreasonably, Ms. Koss testified that her treating physicians at the time believed that Dr. McCracken had "saved [Ms. Koss's] life". (A0517-18)

25; A0300-02). As the Kosses identify no basis to suggest that either physician was unqualified to offer this opinion, these opinions were admissible.

Similarly, the AAW Defendants should not be faulted for identifying Dr. Lessin ten (10) days prior to trial to maintain the trial date under the circumstances. It was only after the Superior Court excluded the May 2012 Records and Dr. Bird's expert testimony on August 30, 2012 and ordered that expert testimony was necessary that a decision as to how to proceed needed to be made. As discovery had continued long after the discovery deadline, and given that the May 2012 Records were only received in late June/early July 2012, the AAW Defendants believed that the trial date could be maintained and that Dr. Lessin could be deposed before trial. *Christian v. Counseling Res. Assocs., Inc.*, 60A.3d 1083, 1085 (Del. 2013); (A0034-37; A0232-39). Moreover, as this evidence was relevant and material, the Superior Court should have pursued less drastic options than wholesale exclusion, such as allowing the Kosses to depose Dr. Lessin at the AAW Defendants' expense. In any case, the AAW Defendants were under no obligation to pursue a continuance rather than attempt to maintain the trial date by identifying a new expert pursuant to the Superior Court's direction.[4]

[4] At no time did the Superior Court agree to a continuance; instead, it posited it as a potential option that could be pursued by a party. (A0339-A0341) If the Kosses objected to the timing of the identification of the expert (despite the fact that they did not object to discovery proceeding

Furthermore, the Kosses' argument that the AAW Defendants waived their argument is factually and legally inaccurate. The issue raised at trial that the AAW Defendants chose not to pursue related to Dr. McCracken learning of Ms. Koss's prior blood transfusion history, which supported her view that Ms. Koss's bleeding condition was urgent. (A0654, A0672-73, A0679-80, A0682) This decision is unrelated to the admissibility of the subsequent May 2012 Records (which were unrelated to the care in May 2010) or the expert opinions of Dr. Bird and Dr. Lessin as to credibility, causation and damages. Moreover, as the AAW Defendants argued these points at numerous points during discovery, at the Pretrial Conference, and at trial, they did not waive this point. (A0131-A0156, A0222-A0225, A0230-A0240, A0259, A0276, A0330-A0341, A0384-A0393, A0471-A0496; A1517-A1539) Under the circumstances, the Superior Court's exclusion of this relevant testimony and evidence significantly prejudiced the AAW Defendants, and this Court should reverse this matter and remand this case with instructions to admit the evidence.

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long after the discovery deadline passed), they likewise could have moved for continuance.

III. THE SUPERIOR COURT ERRED WHEN IT DID NOT PERMIT THE AAW DEFENDANTS TO IMPEACH WILLIAM SPELLACY, M.D. WITH MEDICAL LITERATURE.

The Kosses' do not dispute that medical literature can be used for impeachment. Nor do they dispute that the literature was relevant to their sole standard of care witness's credibility. Their argument of "surprise", however, ignores two crucial facts. First, Dr. Spellacy identified these very impeachment materials during discovery at his deposition as reasonably reliable. (A0045) This impeachment material included literature that he authored. Second, the AAW Defendants did not use any medical literature in their case-in-chief but, instead, attempted to use this for impeachment after reserving the right to do so explicitly in the Pretrial Stipulation. As the AAW Defendants never attempted to use medical literature affirmatively in their case-in-chief but only attempted to use it for impeachment after Dr. Spellacy's testimony rendered it relevant, there was no basis to find any evidence of surprise or improper conduct. Therefore, the Superior Court committed reversible error when it limited the cross-examination of Dr. Spellacy, the Kosses' only standard of care expert, by precluding the AAW Defendants from impeaching him with medical literature (including his own)

which contradicted his sworn testimony.[5] (A0245, A0257, A0998-A1005); *Green v. A.I. duPont Inst. of the Nemours Found.*, 759 A.2d 1060, 1063 (Del. 2000).

As argued *supra*, the Kosses cannot claim surprise when, before trial, Dr. Spellacy specifically identified the very sources used for cross-examination as reasonably reliable and when the AAW Defendants reserved the right to use medical literature to cross-examine the experts at trial in the Pretrial Stipulation. (A0045, A0245, A257, A0998) Thus, there was no "unfair surprise-advantage obtained, through failure to abide by the Rules" that required the Superior Court to limit the ability to impeach the Kosses' only standard of care expert with relevant evidence. *Concord Towers, Inc. v. Long*, 348 A.2d 325, 326 (Del. 1975) (citing *Hoey v. Hawkins,* 332 A.2d 403 (Del. 1975)).

Moreover, that the Kosses requested this information during discovery does not require production nor preclude its use at trial. No party is under any requirement to produce trial preparation materials (such as disclosure of impeachment evidence) where an appropriate objection is made. Super. Ct. Civ. R. 26(b)(5). The AAW Defendants specifically objected to the production of medical literature for use at trial as "beyond the discovery rules for the State of Delaware" but stated that they would produce them "[t]o the extent that [the] documents are

[5] In fact, the Superior Court specifically recognized that "The Rules of Evidence don't require that that be provided ahead of time[.]" (A1005-06)

required to be produced". (B000004) There is, however, no Delaware law requiring the production of impeachment materials before trial where the opposing party is on notice. *McBride v. State*, 477 A.2d 174, 181-82 (Del. 1984); *State v. Block*, 2000 WL 303351, at *2 (Del. Super. Ct. Feb. 18, 2000). Similarly, despite the Kosses' citation to the dissenting opinion in *Stapleton ex rel. Clark v. Moore*, 932 N.E.2d 487, 500-01 (Ill. Ct. App. 2010), *appeal denied*, 943 N.E.2d 1109 (Ill. 2011), the Illinois Court of Appeals permitted cross-examination of the party's expert with medical literature when the proper foundation was laid, even when it was not disclosed. Here, the materials were disclosed by Dr. Spellacy himself at his deposition.

The Kosses cite *Ballard v. Bd. of Educ. of Christina School Dist.*, 1985 WL 188988 (Del. Super. Ct. Mar. 27, 1985) to argue that impeachment material must be produced. That case, however, addressed whether a teacher who is subject to a hearing for termination before the School Board was entitled to access to confidential students' records to respond to Board's complaints under 14 *Del. C.* § 4111. *Ballard*, 1985 WL 188988, at *1. The Superior Court held that, as a matter of justice, the statute did not prevent a teacher in a closed hearing from having the same access to the confidential records as the Board. *Id.* Here, however, not only did the AAW Defendants reserve the right to use medical literature for cross-examination, but the Kosses also had the same access to the impeachment

materials because Dr. Spellacy specifically identified them in discovery as reasonably reliable. (A0044-45, A0257) Thus, there should have been nothing to offend the Court's sense of justice.

Similarly, that some of the cases in support of the AAW Defendants' position are criminal, rather than civil, cases do not change the outcome. Regardless of the type of case, it is axiomatic that a witness's biases, prejudices and motives are always subject to cross-examination. *Jackson v. State*, 770 A.2d 506, 515 (Del. 2001). Likewise, the Kosses agree that *McBride, supra*, "rests on the purpose behind longstanding Delaware case law and Court Rules which do not require or permit disclosure of specific materials before trial." Appellee Ans. Br. on Appeal 37. That is precisely the issue here, as the AAW Defendants were not required to produce impeachment evidence "until the witness has given testimony at trial." *McBride*, 477 A.2d at 182 (citations omitted).[6] *See also Block*, 2000 WL 303351 at *2 (finding that disclosure of impeachment material is not required "[i]n a typical case" before the witness testifies).

Likewise, the case of *Eanes v. Peninsula United Methodist Homes*, 1988 WL 77728 (Del. Super. Ct. Jul. 1, 1988) supports the AAW Defendants' position.

[6] If disclosure of impeachment evidence is not required in the criminal context where the defendant was on trial for Murder in the First Degree, it can hardly be claimed that it is required in the civil context where the party's interests are arguably far less significant.

In *Eanes*, the Industrial Accident Board (IAB) held, *inter alia*, that a non-privileged report should have been produced for effective cross-examination of a witness and that, without permitting effective cross-examination, the Board committed reversible error. *Id.* at *3-4. In contrast, the medical literature identified herein did not need to be produced before trial under the discovery rules (i.e., it was effectively privileged) and not until after Dr. Spellacy testified to make the potential impeachment evidence relevant. But as in *Eanes*, the Superior Court's ruling to limit cross-examination by permitting counsel to quote from the medical literature without referencing the sources amounts to reversible error because the Superior Court did not provide the AAW Defendants with "a full, fair, and effective adjudication of the issues by allowing a more informed cross-examination of the witness." *Id.* at *4. Indeed, there is a fundamental difference between having counsel make conclusory statements without any citation and permitting counsel to cite specific medical literature that the witness finds authoritative (including his own literature) and that contradicts his sworn testimony.

The Kosses attempt to minimize Dr. Spellacy's inconsistent statements when he changed his sworn testimony at trial from that during voir dire minutes earlier. That this occurred during voir dire, outside the presence of the jury, highlights the fundamental error in allowing Dr. Spellacy and the Kosses to have advance notice of the cross-examination before the jury can hear the impeachment evidence to

undermine Dr. Spellacy's credibility. *Jackson*, 770 A.2d at 515. Said differently, the Superior Court granted the Kosses an unfair advantage that significantly prejudiced the AAW Defendants by not only precluding them from referencing the actual medical literature but by also compounding the error by allowing the Kosses' main standard of care expert to hear the cross-examination in advance and adjust his testimony accordingly without any recourse. *Concord Towers, Inc.*, 348 A.2d at 326.

In sum, the Superior Court's ruling precluded a legitimate inquiry into the Kosses' main expert's credibility and, therefore, significantly prejudiced the AAW Defendants. As the questions posed on cross-examination went to the "very heart of the case" and "might well have affected the outcome, the Superior Court abused its discretion. *Green*, 759 A.2d at 1063. This Court should grant a new trial with the relevant impeachment evidence admitted.

IV. THE SUPERIOR COURT ERRED WHEN IT DID NOT GRANT THE AAW DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW WHERE THE KOSSES' STANDARD OF CARE EXPERT AGREED THAT DR. MCCRACKEN MADE AN APPROPRIATE MEDICAL JUDGMENT.

The AAW Defendants do not dispute that the Kosses' standard of care expert, Dr. William Spellacy, initially identified breaches in the standard of care during his direct examination. On cross-examination, however, he agreed that Dr. McCracken attempted no fewer than six (6) conservative measures that failed to stop Ms. Koss's uterine bleeding, that those conservative measures failed, and that Dr. McCracken could exercise her medical judgment and perform a hysterectomy within the standard of care. (A0985, A0988, A0997-98) Thus, despite Dr. Spellacy's testimony that other conservative techniques were appropriate and that, in his opinion, they would have worked to prevent a hysterectomy, Dr. Spellacy's testimony also established that Dr. McCracken's decision to remove Ms. Koss's uterus in the circumstances of this case was appropriate, within the standard of care, and in good-faith.

The important point to emphasize is that Dr. Spellacy's opinion that he would have acted differently, or that his hypothesized treatment would have had a different result, does not establish medical negligence under Delaware law. *Riggins v. Mauriello*, 603 A.2d 827, 831 (Del. 1992). To establish negligence, the Kosses needed to offer expert testimony that Dr. McCracken's good faith choice of

treatments fell below the standard of care. 18 *Del. C.* § 6854(e). As Dr. Spellacy agreed that a physician like Dr. McCracken acts reasonably when she concludes that a hysterectomy is appropriate after a series of conservative methods to stop a significant uterine hemorrhage have failed, Dr. Spellacy agreed that her treatment was within the standard of care (despite his disagreement with her medical judgments). This testimony was not "hypothetical", as even the Superior Court concluded that Dr. Spellacy agreed with this "general proposition". (A1554)

That the AAW Defendants did not initially move for judgment as a matter of law as to this issue does not affect the analysis. A party may move for judgment as a matter of law "at any time before submission of the case to the jury." Super. Ct. Civ. R. 50(a)(2). There is no dispute that the AAW Defendants did just that. (A1400-A1401; A1517-A1539) The only issue is whether "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue". *Id.* R. 50(a)(1). In view of Dr. Spellacy's testimony on cross-examination, the Superior Court committed error when it concluded that a jury had a sufficient basis to determine whether Dr. McCracken was medically negligent. As Delaware law precludes a finding of medical negligence under these circumstances, this Court should reverse the Superior Court's denial of the AAW Defendants' motion for judgment as a matter of law, set aside the verdict, and enter judgment in favor of the AAW Defendants.

V. THE SUPERIOR COURT ERRED AS A MATTER OF LAW WHEN IT DENIED THE AAW DEFENDANTS' MOTION FOR A NEW TRIAL IN VIEW OF THE KOSSES' IMPROPER CLOSING ARGUMENT THAT UNFAIRLY PREJUDICED THE AAW DEFENDANTS.

The Kosses cite various cases to suggest that it is proper to argue that a defendant should be held accountable for her alleged negligence. Those cases, however, addressed the issue of proximate cause, or whether the defendant should be held accountable for causing some injury. *Spicer v. Osunkoya*, 2001 WL 36291589, at *5 (Del. Super. Ct. Jan. 30, 2011), *affirmed*, 32 A.3d 347 (Del. 2011); *Vollendorf v. Craig*, 2004 WL 440418, at *2 (Del. Super. Ct. Mar. 9, 2004). In this case, however, there was no dispute that Dr. McCracken caused the claimed injury (i.e., the removal of Ms. Koss's uterus due to her significant hemorrhaging). Instead, the case focused on whether Dr. McCracken complied with the standard of care and the extent of the claimed damages. The focus of the Kosses' argument was therefore on punishing Dr. McCracken for her care, not for causing the claimed injuries. This argument was improper under the circumstances and significantly prejudiced the AAW Defendants' right to a fair trial. Therefore, this Court should reverse the verdict.

That the jury was instructed on the law properly does not negate the fact that the argument was improper, as any argument that misstates Delaware law may be reversible in and of itself. *Cunningham v. McDonald*, 689 A.2d 1190, 1196 (Del.

1997); *DeAngelis v. Harrison,* 628 A.2d 77, 80 (Del. 1993); *Sears, Roebuck and Co. v. Midcap*, 893 A.2d 542, 552 (Del. 2006). By asking the jury to hold Dr. McCracken accountable in this case, the Kosses sought to punish Dr. McCracken, an issue with no relevance to a medical negligence case. As the Kosses' emphasized this "accountability" argument numerous times in their closing argument, this was not a "brief" error. (A1412, A1414, A1421); Appellee Ans. Br. on Appeal 44.

Given the conflicting testimony between the experts, including Dr. Spellacy's numerous concessions, the question as to whether Dr. McCracken breached the standard of care was close. (A0985, A0988, A0997-98) Emphasizing to the jury that it should hold Dr. McCracken accountable was not cumulative of other testimony, as the Kosses emphasized the "accountability" argument. Under these circumstances, the argument was improper, significantly prejudiced the AAW Defendants' substantial rights (i.e., to have a trial, *inter alia*, where the jury was not misled on the applicable law), and jeopardized the fairness of the trial process. *Med. Ctr. of Del., Inc. v. Lougheed*, 661 A.2d 1055, 1060 (Del. 1995). Therefore, this Court should reverse the jury's verdict and remand this case for a new trial.

SUMMARY OF CROSS-APPEAL ARGUMENT

1. Denied. The Superior Court's grant of partial summary judgment to Jennifer Barlow, M.D. was appropriate because there was no expert medical testimony that any negligence by Dr. Barlow was a proximate cause of any claimed injuries.

STATEMENT OF FACTS ON CROSS-APPEAL

On April 22, 2010, Dr. Jennifer Barlow, an employee of AAW, performed a cesarean section at Christiana Hospital to deliver Ms. Koss's baby. (A1044-A1046) In the Complaint, the Kosses alleged that Dr. Barlow was negligent in her suturing of Ms. Koss's uterus after the cesarean section and in her failure to monitor appropriately and discharge Ms. Koss after the surgery. (A0022)

Initially, the Kosses identified two obstetrics and gynecology (OB/GYN) experts: Berto Lopez, M.D.[7] and William Spellacy, M.D. (A0158) At Dr. Lopez's deposition, which was taken before Dr. Spellacy's deposition, counsel for the Kosses stated that they were not asserting negligence against Dr. Barlow:

> MR. SHELSBY: There was a series of questions before we took the break with regard to the doctor's opinions, and, just so it's clear, his opinions with regard to the breaches that were being discussed with regard to the physician's assistant are breaches by the physician's assistant as well as the practice, but we are not making the claim that Dr. Barlow breached the standard of care in that regard and we're not making a claim that Dr. Barlow breached the standard of care.
>
> MR. MCKEE: In any regard?
>
> MR. SHELSBY: Yeah.

[7] The Kosses ultimately elected not to call Dr. Lopez at trial. (A0249, A0261) Therefore, only Dr. Spellacy testified as to the alleged breaches in the standard of care.

(B000024) Based on this representation, the AAW Defendants requested that the Kosses dismiss Dr. Barlow but received no response. (B000026-30)

Thereafter, the AAW Defendants deposed Dr. William Spellacy. (A0041; B000020) Although Dr. Spellacy testified that his opinions were consistent with those of Dr. Lopez (both as identified in the expert disclosure and at Dr. Lopez's deposition), Dr. Spellacy raised two criticisms of Dr. Barlow's care that Dr. Lopez did not raise. (A0047-48) First, Dr. Spellacy testified that it was a breach in the standard of care to use a single, rather than double, layer suture to close the uterine incision. (A0047-48, A0050) Second, he testified that it was breach in the standard of care for Dr. Barlow to use Arista powder, rather than additional sutures, to stop the post-suture bleeding. (A0050) Dr. Spellacy expressed no other criticisms against Dr. Barlow. (A0051)

Dr. Spellacy testified that a double layer suture was required to permit a safe pregnancy in the future. (A0047) Due to Ms. Koss's hysterectomy, however, Dr. Spellacy agreed that this did not cause any injury because she will be unable to have any future pregnancies. (A0062) Dr. Spellacy further admitted that he did not know whether any bleeding continued after Dr. Barlow applied Arista powder to the suture line. (A0049) Therefore, he did not know whether the bleeding present on May 2, 2010 had been ongoing or began that day. (A0049)

Dr. Spellacy further testified that Ms. Koss's delayed postpartum hemorrhage on May 2, 2010 was caused by uterine atony (relaxation of the muscle), but he did not know what caused that condition. (A0049-50) He further admitted that Dr. Barlow's negligence played no role in Ms. Koss's hemorrhage on May 2, 2010 that led to her hysterectomy:

> Q: Is it your opinion that the one-layer closure lead in part to the postpartum hemorrhage?
> A: **No. No. The hemorrhage is coming from a different thing.**
> Q: Okay.
> A: This is bleeding from the scar, out of the uterus, inside the abdomen.
> Q: All right. And let me just close this. I appreciate your opinion as far as the 2-layer versus the one-layer suture. Did the decision to use the one-layer suture play any role in the subsequent events as it relates to the postpartum hemorrhage at issue in this case?
> A: **I don't know**, but when they went back in there was a hole in that line.
> Q: Okay.
> A: The one layer closer did not completely close the uterus. Or if it did, it opened up subsequently, because when they went back in there was -- I think they said 2-centimeter hole in the -- in that scar. And there shouldn't be any hole. **Now, how much of that was contributing to the bleeding, I don't know.**
> Q: Can you give an opinion as to a reasonable degree of medical probability as to whether the decision to use a 1-layer suture versus the 2-layer suture contributed to the dehiscence of the site that lead to the postpartum hemorrhage?
> A: I'm not sure I'm following you, but what I'm saying is that one layer closure lead to the fact that the uterine incision opened up a hole. **Whether that hole was contributing significantly to the amount of hemorrhage, I don't think we'll ever know, because the blood's coming out of the cervix, and we don't know exactly where it's coming from within the uterine**

cavity.

. . .

Q: Was there any evidence subsequent to April 22nd but before May 2nd, 2010, that there was continued bleeding from the site. [sic]
A: Well, they saw blood in the peritoneal cavity when she came back in.
Q: On May 2nd?
A: On May 2nd. **Now, when it appeared there and if some came from that uterine incision that was improperly -- I believe -- closed, I don't know quantitatively how much of it was related to that.**
Q: Okay.
A: **I'm not saying that's the major hemorrhage, but I'm saying that reflects on the surgical techniques that that doctor used.**
Q: And just -- again, I'm not trying to be repetitive, I just want to understand. Did Dr. Barlow's failure to use the 2-layer stitch to both properly suture the hysterotomy site and appropriately stop the bleeding play any role in this postpartum hemorrhage 10 days later?
A: **Again, I don't know, because the -- incision that was closed had a defect in it when they finally looked at it at the time of opening the abdomen.**

(A0049-50) (emphasis added) Later in the deposition, Dr. Spellacy admitted that he did not know what role, if any, Dr. Barlow's negligence on April 22, 2010 played in causing Ms. Koss's delayed postpartum hemorrhage on May 2, 2010. (A0060-61)

The AAW Defendants filed a motion for partial summary judgment as to all claims against Dr. Barlow because: (1) the Kosses had stated on the record that

there were no longer claims against Dr. Barlow; and (2) the only expert to offer opinions as to Dr. Barlow, Dr. Spellacy, was unable to state to a reasonable degree of medical probability that any breach by Dr. Barlow caused or contributed to the Kosses' claimed injuries. (B000019-22) At the hearing on the motion, the AAW Defendants explained that there was no expert testimony that any hole from the uterine incision (also known as the hysterotomy site) caused the hemorrhage on May 2, 2010. (A0159-60) Instead, it served only as a "means of egress" for the bleeding on May 2, 2010 and played no causal role in the hemorrhage, pain and suffering, or other claimed injuries. (A0160)

In response, the Kosses noted that counsel's statement at Dr. Lopez's deposition applied only to him. (B000032-33) They further argued that Dr. Spellacy's testimony established that the alleged failure to properly suture the uterine incision created a hole that permitted "blood to go from the uterus into Plaintiff's abdominal cavity." (B000032) The Kosses, however, did not identify any expert testimony causally relating any negligence by Dr. Barlow to the hemorrhaging on May 2, 2010, the hysterectomy, any subsequent pain and suffering of the Kosses, or any other claimed injuries. (B000031-33)

The Superior Court granted the AAW Defendants' motion for partial summary judgment on August 29, 2012 and dismissed Dr. Barlow. (B000086-92) The Superior Court noted that any bleeding from the uterine incision site played no

role in causing or leading to the hysterectomy. (B000090-92) Therefore, Superior Court held that, viewing the evidence in the light most favorable to the Kosses, there was no evidence that Dr. Barlow's negligence was a proximate cause of Ms. Koss's hemorrhaging on May 2, 2010 or any claimed injuries. (B000089-90)

ARGUMENT ON CROSS-APPEAL

THE SUPERIOR COURT'S GRANT OF PARTIAL SUMMARY JUDGMENT TO JENNIFER BARLOW, M.D. WAS PROPER BECAUSE THERE WAS NO MEDICAL TESTIMONY THAT ANY NEGLIGENCE BY DR. BARLOW WAS A PROXIMATE CAUSE OF THE KOSSES' CLAIMED INJURIES.

A. Question Presented

Did the Superior Court grant partial summary judgment appropriately to Jennifer Barlow, M.D. when the Kosses' only medical expert was unable to offer any opinion that Dr. Barlow's alleged negligence proximately caused any of the Kosses' claimed injuries?

The AAW Defendants preserved this issue when they filed their motion for partial summary judgment and when they argued the motion to the Superior Court. (A0008, A0010, A0157-62; B000018-30)

B. Scope of Review

This Court reviews a lower court's decision to grant summary judgment *de novo*. *Berns v. Doan*, 961 A.2d 506, 510 (Del. 2008). This Court must determine "whether the record shows that there is no genuine, material issue of fact and the moving party is entitled to judgment as a matter of law." *Id.* (quoting *Williams v. Geier*, 671 A.2d 1368, 1375 (Del. 1996)). The moving party is entitled to summary judgment where the non-moving party fails to establish an element

essential of her case "since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991) (quoting *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986)).

C. Merits of Argument

The Kosses' claimed damages related to the hemorrhaging she experienced on May 2, 2010, the hysterectomy to treat that condition, and the subsequent pain and suffering. To causally link Dr. Barlow's negligence[8] to those injuries, the Kosses presented the testimony of William Spellacy, M.D. Dr. Spellacy, however, was unable to offer any opinions that negligence by Dr. Barlow proximately caused or contributed in any way to the Kosses' claimed injuries or damages. Without testimony providing that necessary causal link, the Kosses were unable to establish a *prima facie* case of medical negligence against Dr. Barlow. The Superior Court's grant of partial summary judgment to Dr. Barlow was therefore proper, and this Court should affirm.

[8] The AAW Defendants dispute that Dr. Barlow was negligent. In viewing the evidence in the light most favorable to the Kosses, the non-moving party, the AAW Defendants concede that Dr. Barlow was negligent for purposes of the AAW Defendants' motion for partial summary judgment only. *Burkhart*, 602 A.2d at 59; Super. Ct. Civ. R. 56(c).

Initially, the Kosses' counsel represented, on the record, that they were not making any claims as to Dr. Barlow in any regard. (B000024) This statement was not limited to Dr. Lopez, as counsel's use of the word "we" refers to the Kosses. (B000024) Indeed, it was this statement that led the AAW Defendants to request Dr. Barlow's dismissal on multiple occasions. (B000026-30) By stating, on the record, that the Kosses were no longer pursuing claims against Dr. Barlow, the Kosses' counsel made a binding judicial admission. *See Merritt v. UPS*, 956 A.2d 1196, 1201-02 (Del. 2008) (voluntary and knowing statements by counsel in depositions are judicial admissions that are conclusive and binding). The Superior Court could therefore have given it conclusive effect. *Id.* at 1202. Therefore, regardless of the lack of expert testimony, this Court can affirm the grant of partial summary judgment to Dr. Barlow on this binding judicial statement alone, as there is no genuine issue of material fact that the Kosses agreed to dismiss claims against Dr. Barlow. *See Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995) ("We recognize that this Court may affirm on the basis of a different rationale than that which was articulated by the trial court. We also recognize that this Court may rule on an issue fairly presented to the trial court, even if it was not addressed by the trial court.").

But even if this statement by the Kosses' counsel were not deemed a binding judicial admission, the Superior Court determined properly that AAW Defendants

are still entitled to a judgment as a matter of law because Dr. Spellacy was unable to opine that any negligence by Dr. Barlow was a proximate cause of any injuries. In a medical negligence action, a party must offer medical expert testimony that the defendant deviated from the applicable standard of care and that the alleged deviation caused the claimed personal injuries. 18 *Del. C.* § 6854(e). Testimony that a defendant was negligent is insufficient; rather, the plaintiff must offer expert medical testimony that the negligence was a proximate cause of some claimed injury to a reasonable degree of medical probability. *Id.*; *Culver v. Bennett,* 588 A.2d 1094, 1096-97 (Del. 1991); *Rayfield v. Power*, 840 A.2d 642, 2003 WL 22873037, at *1 (Del. Dec. 2, 2003); *General Motors Corp. v. Freeman*, 164 A.2d 686, 688-89 (Del. 1960). A party's failure to establish that any negligence was a proximate cause of the claimed injuries means that the party cannot establish a *prima facie* case, entitling the defendant to summary judgment. *Money*, 596 A.2d at 1375.

The Kosses claimed damages related to Ms. Koss's hysterectomy and their subsequent pain and suffering.[9] Dr. Spellacy, however, was unable to state to a reasonable degree of medical probability that Dr. Barlow's negligence was a proximate cause of Ms. Koss's delayed postpartum hemorrhage, her resulting

[9] Dr. Spellacy admitted that any potential damages resulting from a single-layer suture for future pregnancies never occurred and will never occur due to the hysterectomy. (A0062)

treatment (i.e., the hysterectomy), or any claimed damages. When asked what causal role her negligence played, he repeatedly testified, "I don't know". (A0049-50, A0060-61) As a result, there was no medical expert testimony that Dr. Barlow's negligence was a proximate cause of any injury.

Dr. Spellacy's testimony that the failure to use a proper suture may have allowed some bleeding to continue does not change the outcome. Dr. Spellacy testified that he did not know whether any bleeding, in fact, continued. (A0049) Moreover, as the Superior Court noted, any bleeding discovered on May 2, 2010 could have resulted, not from improper suturing, but from Dr. McCracken's massaging of the uterus before the hysterectomy. (B000091) In other words, even if any bleeding from the negligence was considered an "injury" (which was never claimed), testimony that Dr. Barlow's negligence caused this injury was speculative and insufficient to be placed before a jury. *See Henne v. Balick*, 146 A.2d 394, 396 (Del. 1958) ("The law does not permit a recovery of damages which is merely speculative or conjectural.").

More importantly, Dr. Spellacy testified that he did not know to what degree, if any, the hole from the uterine incision contributed to Ms. Koss's bleeding because "we don't know exactly where it's [the bleeding is] coming from within the uterine cavity." (A0049) He agreed that Ms. Koss's hemorrhage on May 2, 2010 was "coming from a different thing" (not Dr. Barlow's negligent

suturing) and occurred spontaneously. (A0049-50, A0052, A0061-62) The Superior Court recognized this fact and concluded properly that, based on Dr. Spellacy's testimony, "the incision itself had no causal relationship to the uterine bleeding or the organ's [the uterus's] failure to contract." (B000091) Therefore, even if some amount of blood came out of the improperly-sutured hole, "this was not the medical complication that led to Plaintiff's hysterectomy." (B000091) Said differently, even if Dr. Barlow had properly sutured the uterus, there is no medical testimony that it would have made any difference, as Ms. Koss still would have suffered a hemorrhage, still would have undergone the hysterectomy, and still would have the claimed damages and injuries. Dr. Spellacy offered no testimony to refute that conclusion at any time.

Viewing the evidence in the light most favorable to the Kosses and accepting Dr. Spellacy's testimony that Dr. Barlow was negligent, the Kosses failed to make a *prima facie* case of medical negligence against Dr. Barlow because there was no testimony that her conduct was a proximate cause of any claimed injury, an essential element of their claim. As there is no genuine issue of material fact and Dr. Barlow was entitled to judgment as a matter of law, the Superior Court properly granted summary judgment to Dr. Barlow. Therefore, the judgment below should be affirmed.

CONCLUSION

For the reasons set forth in the AAW Defendants' Opening Brief and the reasons set forth herein, the AAW Defendants request that this Court reverse the verdict below and enter judgment in favor of the AAW Defendants or, in the alternative, reverse the verdict below and remand this matter for a new trial.

As to the Kosses' Cross-Appeal, because there was no evidence that Dr. Barlow's negligence was a proximate cause of any claimed injuries, the Superior Court determined properly that there as no genuine issue of material fact and that Jennifer Barlow, M.D. was entitled to judgment as a matter of law. Therefore, this Court should affirm the grant of partial summary judgment by the Superior Court to Defendant Below, Cross-Appellee Jennifer Barlow, M.D.

Respectfully submitted,

/s/ Gregory S. McKee

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