IN THE IOWA DISTRICT COURT IN AND FOR SCOTT COUNTY

AMY CURRY, f/k/a AMY KOLLMAN **Plaintiff,** **v.** **GENESIS HEALTH SYSTEM d/b/a GENESIS MEDICAL CENTER DAVENPORT and GENESIS HEALTH GROUP AND SHOBHANA TALUKDAR, M.D.,** **Defendants.**	)	**Case No. LACE131370** **RULING AND ORDER**

The Defendant's Motion for summary judgment filed February 5, 2021 came before the Court for oral argument on April 2, 2021. The Plaintiff appeared by Attorney James Cook. The Defendants appeared by their attorney, Jason O'Rourke. The Plaintiff filed a written resistance on March 12, 2021. The Court has listened to the arguments of counsel, considered the pleadings, the written motion of the Defendant, the Plaintiff's written resistance, and the applicable law. The Court notes the Plaintiff failed to file a separate statement of disputed facts as required by Iowa R. Civ. P. 1.981(3). The Court enters the following ruling on the pending motion.

UNDISPUTED FACTS

Defendant Shobhana Talukdar, M.D. is a physician licensed to practice medicine in Iowa with a specialization in obstetrics and gynecology. Dr. Talukdar was employed by Genesis from 2016 to December 31, 2017. On February 23, 2017, Plaintiff sought treatment at Genesis for

vaginal bleeding and abdominal pain. On March 23, 2017, Plaintiff consulted with Dr. Talukdar regarding treatment options and elected to proceed with a hysterectomy.

On April 4, 2017, Dr. Talukdar performed a total laparoscopic hysterectomy on Plaintiff. In her post-operative Note, Dr. Talukdar recorded as follows: "The LigaSure device was inserted through the right side port and this was used to release the adhesions from the uterus and anterior abdominal wall." Plaintiff was released from Genesis on April 5, 2017 with no indication of problems. She returned to Genesis late in the evening on April 7, 2017 with a fever and abdominal pain and was seen and evaluated by Dr. John Hartman on April 8, 2017. Dr. Hartman's note states: "There is no immediate postop note. There is no full operative note available at this time. I am uncertain as to exactly how the operation was performed." *Plaintiff's Exhibit 5.*

In her deposition, Dr. Talukdar testified she dictated the post operative note after the surgery but the note was not translated into the software system. *Deposition of Dr. Talukdar, p. 14.* When she learned the note was not available to Dr. Hartman, Dr. Talukdar called him and described "what happened at the time of surgery…" *Deposition of Dr. Talukdar, p. 15.* In her resistance, Plaintiff concedes the documentation issue "is not a causative factor" in the case but argues the documentation should be considered "to provide context for the balance of plaintiff's criticisms" of Dr. Talukdar's treatment of plaintiff. *See Plaintiff's Resistance to Defendants' Motion for summary judgment, p. 2.*

On April 8, 2017, Dr. Hartman performed an exploratory laparotomy which revealed the Plaintiff had two perforations of the rectum and a "sigmoid injury." *See Plaintiff's Exhibit 10.* On his handwritten post-op note identified as Plaintiff's Exhibit 10, Dr. Hartman drew a diagram of the colon and marked the two perforations and "burn injury." Plaintiff's negligence claim is

based on two perforations of the rectum, and a tear in the sigmoid colon, discovered by Dr. Hartman four days after the surgery performed by Dr. Talukdar.

Plaintiff retained Dr. James Kondrup as an expert witness. Dr. Kondrup does not criticize the decision to perform the hysterectomy. *Plaintiff's Ex. 11, p. 39, lines 1-7.* Dr. Kondrup opined that Dr. Talukdar breached the standard of care by failing to perform a bubble test at the conclusion of the hysterectomy. Dr. Talukdar's operative note does not reference a bubble test and Dr. Talukdar was not asked in her deposition whether a bubble test was performed. According to Dr. Kondrup, a bubble test should be performed any time adhesions are excised from the bowel. *Plaintiff's Ex. 11, p. 49, lines 13-15.* Dr. Kondrup does not know whether a bubble test was performed. *Plaintiff's Ex. 11, p. 94, lines 7-12.*

Injury to the bowel is a known risk of a laparoscopic hysterectomy. *Plaintiff's Ex. 11, p. 47, lines 8-11.* Thermal injury to the bowel is also a known risk of a laparoscopic hysterectomy. *Plaintiff's Ex. 11, p. 72, lines 7-10.* Between 50 and 66 percent of bowel injuries are not immediately apparent to the surgeon. *Plaintiff's Ex. 11, p. 72, lines 21-24.* Dr. Kondrup admits that simply because an injury occurred to the bowel does not mean the surgeon breached the standard of care. *Plaintiff's Ex. 11, p. 74, lines 12-16.* From the records reviewed, Dr. Kondrup could not identify when the perforation occurred. *Plaintiff's Ex. 11, page 36, lines 5-10.* However, he offered the opinion that in order to cause a thermal injury to the colon, Dr. Talukdar would have had to be within three millimeters of the colon when using the LigaSure device. *Plaintiff's Ex. 11, page 100, lines 7-16.*

Defendant's motion for summary judgment focuses on the alleged failure of the Plaintiff's expert to provide opinions sufficient to establish a prima facie case for medical

negligence. Defendant focuses on the causation prong of the burden of proof. Defendant highlights the following testimony from the deposition of Dr. Kondrup:

> Q: At the end of the day, under oath, you can't point to any specific part of her technique that caused the injury or fell below the standard of care. Is that true?
> A: That's correct.

Plaintiff's Ex. 11, p. 92, lines 12-16.

Plaintiff's resistance to the motion for summary judgment argues defendant is attempting to use her "failure to create an adequate operative report against liability" and that "reasonable inferences can be drawn about how the injuries occurred, and what should have been done" to avoid or minimize the severity of the injuries. Plaintiff argues that the injuries discovered by Dr. Hartman three days later constitute evidence Dr. Talukdar violated the medical standard of care during the surgery on April 4, 2017.

ANALYSIS AND CONCLUSIONS OF LAW

I. Summary Judgment Standard

A motion for summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 1.981(3). The moving party carries the burden of proving the absence of an issue of material fact. *McIlravy v. N. River Ins. Co.*, 653 N.W.2d 323, 328 (Iowa 2002). A fact is "material" when it could affect the outcome of the case. *DuTrac Cmty. Credit Union v. Radiology Grp. Real Estate, L.C.*, 891 N.W.2d 210, 215 (Iowa 2017). "If reasonable minds may differ on the resolution of an issue, a genuine issue of material fact exists." *McIlravy*, 653 N.W.2d at 328. In ruling on a motion for summary judgment, the facts must be viewed in the light most favorable to the non-moving party. *Hlubek v. Pelecky*, 701 N.W.2d 93, 95 (Iowa 2005). Thus, the Court "consider[s] on behalf of the nonmoving party every legitimate inference

that can be reasonably deduced from the record." *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 717–18 (Iowa 2001). "An inference is legitimate if it is 'rational, reasonable, and otherwise permissible under the governing substantive law.'" *Id.* (quoting *Butler v. Hoover Nature Trail, Inc.*, 530 N.W.2d 85, 88 (Iowa Ct. App. 1994)).

A nonmoving party "cannot rely on the mere assertions in his pleadings but must come forward with evidence to demonstrate that a genuine issue of fact is presented." *Linn v. Montgomery*, 903 N.W.2d 337, 342 (Iowa 2017) (quoting *Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 827 (Iowa 2007)). If the record establishes the "resisting party has no evidence to factually support an outcome determinative element of that party's claim, the moving party will prevail on summary judgment." *Wilson v. Darr*, 553 N.W.2d 579, 582 (Iowa 1996). Even where factual disputes exist, summary judgment may nevertheless be appropriate if those in dispute are not material to the resolution of the case, and the uncontroverted facts establish that the moving party is entitled to judgment in its favor. *See Linn*, 903 N.W.2d at 345–47. "Speculation is not sufficient to generate a genuine issue of fact." *Hlubek*, 701 N.W.2d at 95–96.

A. Expert testimony is required to establish breach of the medical standard of care and causation.

To establish a prima facie case for medical negligence, the Plaintiff bears the burden to establish the applicable standard of care, a breach of the standard of care, and a causal relationship between the breach and the injury. *Kennis v. Mercy Hosp. Med. Ctr.*, 491 N.W.2d 161, 165 (Iowa 1992). In most circumstances, evidence of the standard of care, breach and causation must be established by expert testimony. *Oswald v. LeGrand*, 453 N.W.2d 634, 635 (Iowa 1990). Moreover, causation, like the other elements, cannot be based upon mere speculation. *See Walls v. Jacob N. Printing Co.,* 618 N.W.2d 282, 286 (Iowa 2000). "The

longstanding Iowa rule is that in a tort action the necessity of expert testimony or the quality of necessary expert testimony determines whether substantial evidence supports the submission of the causal relationship between the act of the wrongdoer and the injury." *Doe v. Cent. Iowa Health Sys.*, 766 N.W.2d 787, 792 (Iowa 2009). "Where an injury may occur despite due care, a finding of negligence cannot be predicated solely on the fact it did occur." *Perin v. Hayne*, 210 N.W.2d 609, 613 (Iowa 1973).

The Iowa Supreme Court recently addressed the causation issue in *Susie v. Family Health Care of Siouxland,* 942 N.W.2d 333 (Iowa 2020). In *Susie,* Plaintiff's right arm was amputated to stop the progression of necrotizing fasciitis. *Id.* at 335. Plaintiff filed suit for medical negligence alleging a physician's assistant failed to timely diagnose and administer antibiotics to address the infection. *Id.* Plaintiff did not have a witness who could opine that "immediate administration of antibiotics on September 29, 2012, would have more likely than not avoided the injury" to Plaintiff. *Id.* at 339. After examining the record, the Court concluded there was "only speculative testimony in the record from which a jury could infer it was more likely than not that [plaintiff's] arm would have been saved by administration of antibiotics on September 29, 2012." *Id.* at 339-40.

The circumstances of the surgery in this case are similar to those in *Perin v. Hayne*, 210 N.W.2d 609, 613 (Iowa 1973). In *Perin,* the district court directed a verdict in Defendant's favor in a medical malpractice action related to an anterior approach cervical fusion. Plaintiff alleged an injury to her vocal cord related to her right recurrent laryngeal nerve allegedly injured during surgery. *Id.* at 611-12. Plaintiff's expert testified the injury could occur even if the surgeon used proper care and skill. *Id.* at 612. The expert did not criticize the defendant's surgical technique and the location of injury was within the surgical field. *Id.* at 613. The supreme court affirmed

the directed verdict holding that a finding of negligence cannot be predicated simply upon the fact that an injury occurred during surgery. *Id.*

In this case, three days separate the original surgery and the discovery of the alleged injury. Plaintiff's expert acknowledges bowel injuries are a known risk of a laparoscopic hysterectomy and that such injuries can occur even in the absence of negligence. While plaintiff's experts opines the standard of care requires a bubble test at the conclusion of the procedure, he admits the bubble test may not have revealed the injury. Plaintiff offers no evidence to explain how the Plaintiff's result would have differed had the bubble test been performed *and* revealed an injury to the colon (assuming the bubble test would have revealed the injury).

It is true Plaintiff's expert opines that that in order for the colon to sustain the injuries which developed, the surgeon must have been within 3 millimeters of the bowel. According to plaintiff's expert, the spread on the LigaSure device is 2 to 3 millimeters. However, the Plaintiff's expert also admitted he could not point to any specific part of Dr. Talukdar's technique that fell below the standard of care. In his deposition, Dr. Kondrup admits he does not know how Dr. Talukdar addressed the plaintiff's sigmoid adhesions. *Plaintiff's Ex. 11, p. 45, lines 5-19.* Dr. Talukdar was not questioned about this issue in her deposition. *Plaintiff's Ex. 11, p. 45, lines 23-25; p. 46, lines 1.*

At best, the testimony of Plaintiff's expert is confusing. At worst, the testimony of Plaintiff's expert is contradictory. The testimony from Plaintiff's expert would leave the jury to speculate whether Dr. Talukdar's technique fell below the standard of care in causing injury. Plaintiff's expert does not know whether a bubble test was performed, and when or how the

injuries occurred, but he cannot criticize Dr. Talukdar's technique. Much like in *Perin* and *Susie,* the jury would be required to infer negligence simply because the plaintiff sustained an injury.

Having reviewed the summary judgment record in the light most favorable to Plaintiff, the Court finds there are no genuine issues of material fact and summary judgment is appropriate because Plaintiff cannot present any evidence beyond mere speculation that Dr. Talukdar's surgical technique on April 4, 2017 was negligent. Expert testimony is required on this issue. Plaintiff's expert conceded in his deposition that bowel injuries are a risk of this type of surgery and that an injury can occur to a patient's bowel, even in the absence of negligence. To allow a jury to infer the injuries discovered three days later were caused by the negligence of Dr. Talukdar would be inviting the jury to speculate. A jury cannot be left to speculate on causation in a claim for medical negligence when the causal connection is beyond the knowledge and experience of a layperson. *See Doe v. Cent. Iowa Health Sys.*, 766 N.W.2d 787, 794 (Iowa 2009)

The Supreme Court's decision in *Thompson v. Kaczinski,* 774 N.W.2d 829 (Iowa 2009) does not change the result. In *Thompson,* the Iowa Supreme Court adopted the Restatement (Third) "scope of liability" causation analysis to replace the previously utilized proximate cause analysis for cases such as the one at issue. *Id.* at 836-37. The element of causation includes the following two components: factual cause and scope of liability. *Id.* at 837 (citing Restatement (Third) ch. 6 Special Note on Proximate Cause, at 575). Factual cause requires the plaintiff to show that "but-for the defendant's conduct, [the plaintiff's] harm would not have occurred." A defendant's conduct is not the factual cause of the plaintiff's harm "[i]f the plaintiff would have suffered the same harm had the defendant not acted negligently." *Berte v. Bode*, 692 N.W.2d 368, 372 (Iowa 2005) (quoting Dan B. Dobbs, *The Law of Torts* § 168, at 409 (2009)). Here

Plaintiff has failed to establish that the negligence of Dr. Talukdar was the factual cause of the injury to Plaintiff. As discussed above, Plaintiff's expert admits the bowel can be injured even in the absence of negligence.

While causation is generally a jury question, *Thompson*, 774 N.W.2d at 836, in some cases, causation may be decided as a matter of law. *See e.g., Faber v. Herman*, 731 N.W.2d 1, 11 (Iowa 2007) (finding the plaintiff failed to prove there was causation between an attorney's negligence and the damages alleged by the plaintiff as a matter of law). "Where the facts are so clear and undisputed, and the relation of the cause and effect so apparent to every candid mind, that but one conclusion may be fairly drawn therefrom," the Court may enter summary judgment in a defendant's favor. *Thompson*, 774 N.W.2d at 836 (citing *Lindquist v. Des Moines Union Ry.*, 239 Iowa 356, 362, 30 N.W.2d 120, 123 (1947)) (internal quotation omitted).

In the medical malpractice context, summary judgment is appropriate where a party cannot produce evidence upon which liability can be found. *Cox v. Jones,* 470 N.W.2d 23, 26 (Iowa 1991). "In this case, the issue becomes 'whether there was *evidence* upon which liability could be found.'" *Id.* (emphasis in original); *Oswald v. LeGrand,* 453 N.W.2d 634, 635 (Iowa 1990); *Donovan v. State,* 445 N.W.2d 763, 766 (Iowa 1989). Here, Plaintiff argues a bubble test was required and the failure to conduct the test prevented the injury to the bowel from being discovered, subjecting Plaintiff to "greater harm." *See Plaintiff's Resistance to Defendants' Motion for summary judgment, p. 7.* However, Plaintiff fails to offer any evidence of the "greater harm" suffered by Plaintiff from a delay in discovery as a result of injuries caused by a breach of the standard of care in the surgeon's technique. Plaintiff argues that the Court can "draw reasonable inferences" from Dr. Talukdar's "general description of her surgical technique." *Plaintiff's Resistance, p. 2.* Under

this record, suggesting a court can "draw reasonable inferences" is asking the court to speculate. A jury would also be required to speculate in order to assign liability to the Defendants.

The Court finds Plaintiff is unable to provide substantial competent evidence to demonstrate that Dr. Talukdar's surgical technique breached the applicable standard of care and caused harm to Plaintiff. *See Cox,* 470 N.W.2d at 26; *Oswald,* 453 N.W.2d at 640. Therefore, summary judgment is appropriate.

RULING

For the foregoing reasons, the motion for summary judgment of Genesis Health System d/b/a Genesis Medical Center Davenport, Genesis Health Group and Dr. Shobhana Talukdar is GRANTED. The Court directs the clerk to provide copies of this Ruling and Order to the counsel of record. All of the above is SO ORDERED.

State of Iowa Courts

Case Number	**Case Title**
LACE131370	CURRY AMY VS GENESIS HEALTH SYSTEM
Type:	ORDER FOR JUDGMENT

So Ordered

Jeffrey D. Bert

Jeffrey D. Bert, District Court Judge
Seventh Judicial District of Iowa

Electronically signed on 2021-04-21 09:08:49