IN THE INDIANA COURT OF APPEALS
CAUSE NO. 49A05-1404-CT-00165

KATHY SINER, Personal Representative of the Estate of Geraldine A. Siner, deceased; and John T. Siner, prior OA & medical representative Appellant, v. Kindred Hospital, Limited Partnership d/b/a Kindred Hospital of Indianapolis, et al., Dennis Nicely, Administrator, Mohammed Majid, Attending Physician David Uhrin, RN Appellee.	Appeal from the Marion Superior Court 12 Case No.: **49A05-1404-CT-00165** The Honorable Heather Welch, Judge

BRIEF OF APPELLEE MOHAMMED MAJID, M.D.

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I. STATEMENT OF THE ISSUE

I. Whether the Trial Court appropriately granted summary judgment to Dr. Majid in this medical negligence case, where Dr. Majid designated unrebutted expert medical testimony that he did not proximately cause the decedent's alleged injuries.

II. STATEMENT OF THE CASE

A. Nature of the Case.

In this medical negligence case, the Plaintiff failed to designate admissible expert medical testimony to support the element of proximate causation, and thereby failed to present a *prima facie* case for medical negligence in response to Dr. Majid's motion for summary judgment.

B. Course of Proceedings

The Proposed Complaint was filed on November 10, 2009.[1] It broadly alleged negligence against multiple healthcare providers during a lengthy admission to Kindred Hospital. (Majid App, p. 1-2). A Medical Review Panel was formed and, on December 17, 2012, the Panel determined that "the defendants" failed to meet the standard of care, but further found "their conduct *may have been* a factor of *some* resultant damages, but not the death of the patient." (Majid App, p. 17)

After the Panel Opinion was issued, one of the Panel members, James Krueger, M.D, provided an affidavit to clarify his panel opinion following a more detailed review of the evidence. By his affidavit, Dr. Krueger disclosed that he had failed to recognize that the specific

[1] Although Ms. Siner has listed Tim Siner on documents filed throughout this matter, Mr. Siner has never appeared personally or by counsel.

care he criticized by his Panel opinion had actually not been provided by Dr. Majid. With this realization and based on his more in-depth review, he determined that Dr. Majid had not breached the standard of care, and therefore did not proximately cause any injury. He also clarified that, at the time of the Panel proceedings, he inserted the language "may have been a factor of some resultant damages", to signal the speculative nature of the Plaintiff's causation claim. (Majid App, p. 21-23).

On August 26, 2013, Dr. Majid filed his Trial Rule 56 Motion for Summary Judgment. (Majid App, p. 3-4). He designated the Panel Opinion and the affidavit from Dr. Krueger. (Majid App. p. 14-23). Ms. Siner was granted an extension of time, which put her response due on November 1, 2013. (Majid App, p. 43). She filed a response on that date, but failed to designate any expert testimony beyond the initial written Panel Opinion. (App, p. 21-49).

The Court held a hearing on Dr. Majid's summary judgment motion on November 19, 2013. At the hearing, Ms. Siner attempted to tender additional designated evidence—which still did not contain any expert testimony. (App, p. 50-52). The Court struck Ms. Siner's late-file materials, because Ms. Siner had failed to request additional time to designate materials prior to the November 1, 2013 deadline for her response. (Majid App, p. 43). During the hearing, counsel for Dr. Majid re-iterated that the Panel's written and certified Medical Review Panel Opinion was speculative in nature as to the issue of causation and could not as a matter of law carry the Plaintiff's summary judgment burden.

C. Disposition by the Trial Court.

The Trial Court granted Dr. Majid's motion for summary judgment based on the absence of admissible expert testimony to support a *prima facie* case for medical negligence by an eight (8) page memorandum order issued on November 26, 2013. The Trial Court entered judgment

for Dr. Majid as a matter of law, and the Order was categorized a final and appealable order. (Majid App, p. 29-35). Ms. Siner moved to correct error on December 26, 2013. (App, p. 59). Dr. Majid filed a Statement in Opposition, and Ms. Siner filed a reply in support of her motion to correct error. (Majid App, p. 37; App, p. 99). On February 10, 2014, the Trial Court issued a four (4) page memorandum order denying the Appellant's Motion to Correct Error. (Majid App, p. 42-26). That same day, Ms. Siner initiated this appeal.

In her motion to correct error, Ms. Siner claimed that it was error for the Trial Court to strike her late-designated evidence. The Trial Court's orders explained that it lacked jurisdiction to consider the late-filed evidence, but that the evidence was inconsequential in any event because the late designation did not contain any expert testimony to support the necessary element of causation. (Majid App, p. 45).

Regarding the motion for summary judgment, the Trial Court determined that the affidavit of Dr. Krueger carried Dr. Majid's initial summary judgment burden to show the absence of non-speculative expert testimony as to the material element of proximate causation; that the Panel's written opinion that a breach "may have caused some injury" sounded in speculation and could not carry the Plaintiff's burden to rebut Dr. Krueger's affidavit; and, that the Plaintiff failed to designate any expert testimony to create a material issue of fact as to the element of causation. The pertinent portion of the Trial Court's written memorandum granting summary judgment is as follows:

> It is well settled that in a medical negligence claim, the plaintiff must prove by expert testimony not only that the defendant was negligent, but also that the defendant's negligence proximately caused the injury. *Schaffer v. Roberts,* 650 N.E.2d 341, 342 (Ind.Ct.App.1995); and *Nasser v. St. Vincent Hosp. and Health Services,* 926 N.E.2d 43 (Ind.Ct.App.2010).
>
> When a defendant provides expert medical testimony establishing that the defendant's conduct did not cause the plaintiff's condition, it is incumbent upon

the plaintiff to come forward with expert medical testimony to rebut the lack of causation and demonstrate the existence of a genuine issue as to causation. *Morton v. Moss, M.D.,* 694 N.E.2d 1148, 1152 (Ind.Ct.App. 1998). If the plaintiff fails to provide sufficient expert testimony, summary judgment should be granted in favor of the defendants. *Mills v. Berrios,* 851 N.E.2d 1066, 1070 (Ind.Ct.App.2006). As a general rule, expert testimony is required in medical malpractice cases to prove that the defendant's negligence proximately caused the plaintiff's injury. *Singh v. Lyday,* 889 N.E.2d 342, 357-58 (Ind.Ct.App. 2008).

Majid App, p. 33-34.

...

The plaintiff's burden requires that she present evidence of probative value based on facts, or inferences to be drawn from facts. Her burden may not be carried with evidence based merely upon supposition or speculation. An inference cannot arise or stand by itself. There must first be a fact established from which the inference arises, *Palace Bar,* [381 N.E.2d 858, 861 (Ind. 1978)], *citing Prudential Insurance Co. v. Van Wey,* (1945) 223 Ind. 198, 204, 59 N.E.2d 721, 725.

A doctor's testimony can only be considered evidence when he states that the conclusion he gives is based on reasonable medical certainty that a fact is true or untrue. *Palace Bar* at 864. A doctor's testimony that a certain thing is possible is no evidence at all. *Id.* His opinion as to what is possible is no more valid than the jury's own speculation as to what is or is not possible. *Id.* The Court does find that *Palace Bar* applies to this case because two of the doctors from the Medical Review Panel simply stated that the defendants conduct may have been a factor of some resultant damages but not the Plaintiff's death. The Court finds that the Medical Review Panel opinion on causation does not create a genuine issue of material fact. Dr. Majid, in his designation of the Affidavit of Dr. Krueger, has presented expert testimony that he did not cause injury to the Plaintiff. Dr. Majid cited *Topp v. Leffers,* 838 N.E.2d 1027, 1034 (Ind.Ct.App. 2004), stating that "[a]n expert medical opinion that lacks reasonable certainty, standing alone, is not sufficient to support a judgment."

Since the Plaintiff has not designated expert testimony establishing the existence of a genuine issue of material fact on the issue of causation, the Defendant is entitled to judgment as a matter of law. Therefore, the Defendant, Dr. Mohammed Majid's, Motion for Summary Judgment is hereby GRANTED.

Majid App, p. 34-35.

The co-defendants to this action ("the Kindred Hospital defendants") moved for summary judgment after the order of summary judgment in favor of Dr. Majid was issued. (App, p. 15).

The Trial Court subsequently granted Kindred's motion. (App, p. 18). Ms. Siner also appealed from that order as to Kindred, and the appeals have been consolidated by this Court. This Appellee's Brief addresses only those issues raised on appeal as they pertain to Dr. Majid and, it does not address the propriety of the order granting summary judgment to the Kindred Hospital defendants.

III. STATEMENT OF FACTS

The Panel Opinion rendered in this matter was as follows:

> The panel is of the unanimous opinion that the evidence supports the conclusion that the defendants failed to comply with the appropriate standard of care, and that their conduct *may have been* a factor of *some* resultant damages, but not the death of the patient."
>
> Majid App, p. 17 (emphasis added).

Following the Panel's determination, one of the Medical Review Panel members, Dr. Krueger, performed an additional review of the medical records that had been submitted to him during the panel proceedings, and then provided an affidavit to clarify his opinions. Within the affidavit, he disclosed that his Panel Opinion was based on the pulmonary care that had been provided to Geraldine Siner and an injury caused by application of a CPAP mask. He had incorrectly attributed this care to Dr. Majid, because he failed to recognize that a pulmonologist was involved in the patient's care concurrently with Dr. Majid. Based on this more thorough review of the materials, he opined that it was reasonable for Dr. Majid to rely on and defer to the expertise of the Pulmonology Service with respect to the application of the CPAP mask. (Majid App, p. 21-23). Specifically, Dr. Krueger stated:

> 3. On approximately December 17, 2012 the Medical Review Panel convened. Based on my review of the submissions and medical records, I determined a breach in the standard of care occurred in the care of Geraldine Siner. My determination was based solely on prolonged application of a CPAP mask to the

patient. I did not differentiate among the healthcare providers that rendered care to Geraldine Siner when I rendered this opinion.

...

5. Since I rendered my panel opinion, I have had the opportunity to review the records of Geraldine Siner in greater detail. Based on this review, I determined Mohammad Majid, M.D, had consulted the Pulmonology service, and that the Pulmonology service was directing the pulmonology care of Ms. Siner, including directions for continued CPAP. The Pulmonology service's determination that the patient should continue CPAP was based on the patient's inability to maintain adequate perfusion with a non-rebreather mask, and their decision that aggressive measures such as tracheotomy and intubation were not appropriate in a terminal patient. I failed to recognize these facts when I rendered my panel opinion. Based on the involvement of the Pulmonary service, I have determined that it was reasonable for Dr. Majid to defer to their judgment. Therefore, it is my opinion that Dr. Majid met the standard of care by consulting the Pulmonary Service and did not cause any injury to Geraldine Siner.

6. I tender this affidavit in an effort to clarify my expert opinions. I wish to emphasize that Dr. Majid met the standard of care and did not cause any injury to Geraldine Siner in regard to the issue of CPAP application.

Majid App, p. 21-23.

Dr. Majid's motion for summary judgment designated the affidavit of Dr. Krueger and the Certified Medical Panel Opinion. (Majid App, p. 14-23) In response, Ms. Siner failed to designate any admissible expert testimony establishing and meeting her burden of proof on the element of proximate causation. (App, p. 21-49).

IV. SUMMARY OF ARGUMENT

In a medical negligence claim, the Plaintiff must prove by expert medical testimony that the alleged negligence proximately caused the injuries being alleged in the Complaint. Absent such proof, the Plaintiff cannot make a *prima facie* case. Thus, when a defendant moves for summary judgment and designates expert testimony establishing the absence of causation,

summary judgment is appropriate if the Plaintiff does not come forward with expert testimony to create a genuine issue of material fact on that issue. Expert testimony submitted in response must rise beyond the level of supposition or speculation, because the mere possibility of causation will not suffice to create a triable issue.

Despite other arguments raised by the Plaintiff (including the propriety of the order striking her late-designated evidence and an allegation of personal bias against her), the singularly dispositive issue before this Court is whether the Trial Court's entry of summary judgment in favor of Dr. Majid was appropriate and supported by the designated facts. Dr. Majid designated both the affidavit of Dr. Krueger and the Certified Panel Opinion in support of his motion for summary judgment. The Plaintiff failed to designate any expert testimony on the element of causation to support a prima facie case of medical negligence as to Dr. Majid. The affidavit of Dr. Krueger affirmatively established that there was no causation set forth in Ms. Siner's malpractice claim as to Dr. Majid. Dr. Krueger's affidavit sufficiently switched the burden onto Ms. Siner for purposes of summary judgment. Furthermore, the language contained in the Certified Panel opinion stating that the conduct complained of "*may have* been a factor of *some* damages", (Majid App, p. 17, emphasis added), provided only speculation, and was not sufficient to carry the Plaintiff's burden to prove that a material issue of genuine fact remained as to the issue of causation. The Trial Judge properly short circuited this matter as Ms. Siner could not properly establish the essential elements of her claim. When a plaintiff cannot establish through admissible expert medical testimony all elements of her claim, a trial court should as a matter of law grant summary judgment to terminate the litigation. The Trial Judge followed the applicable summary judgment standards and properly granted summary judgment to Dr. Majid.

V. ARGUMENT

A. Summary judgment standard.

When reviewing a trial court's grant of summary judgment, the appellate court applies the same standard as the trial court. *Carlson v. Warren*, 878 N.E.2d 844, 850 (Ind.Ct.App.2007) (citing *Auto–Owners Ins. Co. v. Harvey*, 842 N.E.2d 1279, 1282 (Ind. 2006)). Summary judgment "shall be rendered forthwith if the designated evidentiary materials shows 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." Ind. Trial Rule 56(C). The party moving for summary judgment bears the burden of showing the absence of a factual issue and that they are entitled to judgment as a matter of law. *McGee v. Bonaventura*, 605 N.E.2d 792, 794 (Ind.Ct.App.1993). When that initial burden has been met, the opposing party cannot rest upon its pleadings. *Id.* It must then present sufficient rebuttal evidence to demonstrate the existence of a genuine issue of material fact. *Id.* (citing T.R. 56(E)).

On appellate review, "all facts and inferences drawn from them are construed in favor of the non-moving party." *Carlson*, 878 N.E.2d at 850–51 (citing *Auto–Owners Ins. Co.*, 842 N.E.2d at 1282). The trial court's order granting or denying a motion for summary judgment is cloaked with a presumption of validity, and the appealing party has the burden of persuading the appellate tribunal that the decision was erroneous. *Roberts v. Sankey*, 813 N.E.2d 1195, 1197 (Ind.Ct.App.2004), *trans. denied.*

To prevail in a case alleging medical negligence, the plaintiff must present expert testimony to establish each element of her case. *Id.* (citing, *McGee v. Bonaventure,* 605 N.E.2d, 794 (Ind.Ct.App. 1993). The elements of the tort of negligence are the existence of a duty on the part of the defendant, its violation through unreasonable conduct, and damages proximately

arising from its violation. *Rhodes v. Wright*, 805 N.E.2d 382, 385 (Ind.2004); *Miller v. Griesel*, 308 N.E.2d 701 (Ind. 1974). The absence of proof having probative value on any one of these elements makes judgment for the defendant mandatory. *American Optical Company v. Weidenhammer*, 457 N.E.2d 181 (Ind. 1983). "In a medical negligence claim, the plaintiff must prove by expert medical testimony not only that the defendant was negligent, but that the defendant's negligence proximately caused the plaintiff's injury." *Clarian Health Partners, Inc., v. Wagler,* 925 N.E.2d 388, 392 (Ind.Ct.App. 2010), *citing, Schaffer v. Roberts,* 650 N.E.2d 341, 342 (Ind.Ct.App. 1995). Speculation as to a causal relationship that may or could exist does not suffice as expert testimony on causation. *Clark v. Sporre,* 777 N.E.2d 1166, 1170 (Ind.Ct.App. 2002). Speculation by an expert on the issue of causation is not sufficient to overcome summary judgment. *Porter v. Whitehall Laboratories,* 791 F.Supp. 1335 (S.D. Ind. 1992).

B. Summary judgment was appropriate because Plaintiff failed to present non-speculative expert testimony supporting the element of causation.

Substantive law required the Plaintiff to present affirmative expert testimony from which the trial court could reasonably infer that Dr. Majid breached the standard of care in the care and treatment he provided to Geraldine Siner, and that such a breach resulted in a cognizable injury. *Clarian,* 925 N.E.2d at 394. The Plaintiff failed to do so, thus dictating a finding of summary judgment in favor of Dr. Majid.

1. The speculative language of the Panel Opinion regarding the issue of causation does not carry the Plaintiff's burden of creating a genuine issue of material fact.

Plaintiff cannot avoid summary judgment by resting on the speculative and inconclusive wording of the Certified Medical Review Panel Opinion, which states that "the conduct complained of *may* have been a factor of *some* resultant damages." (Majid App, p. 17, emphasis added). It first should be noted that the causation language chosen by the Medical Review Panel

for this case was a departure from the statutory language that the Medical Malpractice Act proscribes for such opinions. The Act calls upon the Medical Review Panel to provide a definitive answer to the question of medical causation. The proscribed language calls for the panel to determine whether "[t]he conduct complained of was or was not a factor of the resultant damages"; it does not call upon the Panel to speak in terms of mere possibility, as it did here. I.C. 34-18-10-22.

The language chosen by this Panel, that there "may have" been "some" damages, speaks only in terms of *the possibility* of causation. It equally implies the conduct complained of *may not* have been a factor in damages. It merely speculates on the issue of causation; thus, it does not serve as sufficient evidence to create a triable issue. *Clark v. Sporre,* 777 N.E.2d 1166, 1170 (Ind.Ct.App. 2002).

The principle that non-speculative testimony is required to support a claim of causation is a "well-established rule." *Palace Bar, Inc., v. Fearnot,* 381 N.E.2d 858, 861 (Ind. 1978). In *Topp v. Leffers,* 838 N.E.2d 1027, 1034 (Ind.Ct.App. 2004), a panel of this Court explained why expert testimony that there "may have" been causation sounds in speculation only, and does not serve to create an issue for the jury's consideration:

> A plaintiff's burden may not be carried with evidence based merely upon supposition or speculation. Evidence establishing a mere possibility of cause or which lacks reasonable certainty or probability is not sufficient evidence by itself to support a verdict. **An expert medical opinion that lacks reasonable certainty, standing alone, is not sufficient to support a judgment.**
>
> The expert opinions of Dr. Reecer and Dr. Schreier, standing alone, are not sufficient to sustain Topp's burden on the element of causation because they lack reasonable medical certainty. In his written report, Dr. Reecer stated, "Ms. Topp had prior spine complaints which *could possibly* have been aggravated by the accident." Appellant's App. at 150 (emphasis added). He went on to say, "All things considered, Ms. Topp *may* have had an aggravation of her preexisting spine complaints." *Id.* (emphasis added). During his deposition, Dr. Reecer again confirmed that he believed Topp may have had an aggravation of her pre-existing

> spine complaints. *Id.* at 211. In *Litera,* an expert medical witness testified that a patient's fall may have worsened his condition, and that it was possible that the patient would have reached his present condition at some point without the fall. We held that this testimony was not of sufficient certainty to sustain the judgment in favor of the injured patient. *Litera,* 692 N.E.2d at 901–02. Like the expert medical witness in *Litera,* Dr. Reecer uses the terms "possibly" and "may." Such testimony is not of sufficient certainty to show that Leffers' actions caused the aggravation of Topp's pre-existing injuries.
>
> *Topp v. Leffers*, 838 N.E.2d 1027, 1034-1035 (Ind. Ct. App. 2005); *citing, City of East Chicago v. Litera,* 692 N.E.2d 898, 901-2 (Ind.Ct.App.1998)

Likewise, in *Clark,* 777 N.E.2d at 1170, a panel of this Court applied the same principles to a medical negligence claim and determined that expert testimony in terms of the mere possibility of causation is not admissible in a medical negligence claim.

The Panel's decision to select the phraseology that "the conduct complained of *may have* been a factor of *some* damages" can only be read as providing speculation on the issue of causation. Simply put, there was no evidence to rebut Dr. Krueger's opinion as to the absence of proximate causation.

2. *Summary judgment is appropriate where the defendant provides an affidavit attesting to the absence of causation, when the only designated expert testimony is a Panel Opinion that is silent on the issue.*

In *Malooley v. McIntire,* 597 N.E.2d 314 (Ind.Ct.App. 1992), and in *Clarian Health, Inc., v. Wagler,* 925 N.E.2d, 388, 394 (Ind.Ct.App. 2010), *reh'g denied,* this Court affirmed that a panel opinion, such as the one that was before the Trial Court on summary judgment, in which the panel could not render an opinion on the issue of causation, is insufficient to carry a plaintiff's burden to overcome summary judgment when that element has been negated by other expert testimony.

In *Malooley,* 597 N.E.2d at 315-316, a panel of this Court considered whether the following panel opinion:

> "OPINION OF PANEL MEMBERS, DR. HILLBURN AND DR. FRENCH"
> [...]
> 2. The evidence supports the conclusion that defendant, Dr. Cure, failed to meet the appropriate standard of care as charged in the complaint.
> 3. As to defendant, Dr. Malooley, there is a material issue of fact, not requiring expert opinion, bearing on liability for consideration by the court or the jury.
> 4. As to the defendants, Dr. Cure and Dr. Malooley, the conduct complained of was not a factor of the resultant damages.
>
> "OPINION OF PANEL MEMBER, DR. SHAPIRO"
> [...]
> 2. The evidence supports the conclusion that defendant, Dr. Cure, failed to meet the appropriate standard of care as charged in the proposed complaint.
> 3. As to defendant, Dr. Malooley, there is a material issue of fact, not requiring expert opinion, bearing on liability for consideration by the court or jury.
> 4. **As to defendants, Dr. Cure and Dr. Malooley, it is not possible to determine from the evidence submitted, whether or not the conduct complained of with respect to Dr. Cure and Dr. Malooley was or was not a factor of the resultant damages.**
> *Malooley,* 597 N.E.2d at 315-316.

After the entry of summary judgment for the defendants, the plaintiff argued that trial court ignored the opinion of Dr. Shapiro, who found a material issue of fact on the issue of liability for Dr. Malooley, and who had not been able to determine whether the actions of Dr. Cure and Dr. Malooley caused plaintiff's injuries. The Court *rejected* the Estate's reliance that the question of causation remained in controversy: "[I]t was incumbent upon the Estate to bring forth facts as to the actual existence of causation... the Panel's opinion, including Dr. Shapiro's separate opinion, logically supports only two arguments: 1) that there was no causation, or 2) that causation could not be determined. Dr. Shapiro's opinion lends no support whatsoever to the argument that there was causation." *Malooley,* 597 N.E.2d at 318.

In holding that the plaintiff had not overcome the burden to establish a material issue of fact for trial, the Court issued a word of caution which is directly applicable to scenario set forth this case:

> When, as here, a medical malpractice civil suit is filed after a medical review panel has issued an opinion which finds against the complainant upon the issue of causation, and no member of the panel opines that causation does exist, the complainant proceeds in considerable peril if he rests upon the factual allegations in his complaint. The complainant must do more than rest upon his complaint.
>
> *Malooley*, 597 N.E.2d at 319.

The *Malooley* Court found that the record was "entirely devoid of evidence from which the trial court could reasonably infer a causal link between the appellants' actions and McIntire's death." 597 N.E.2d at 319.

The case of *Clarian v. Wagler*, 925 N.E.2d 388, also involved procedural facts similar to those in this case. Wagler's claim for medical negligence against Clarian Health Partners was considered by a Medical Review Panel. Two out of the three panelists determined that Clarian failed to meet the standard of care but could not determine whether the failure to meet the standard of care caused Wagler's alleged injuries. A third panelist, Dr. Cefali, found that Clarian met the standard of care and did not cause plaintiff's alleged injuries. Clarian moved for summary judgment based upon the absence of affirmative expert testimony on the issue of medical causation. The trial court denied the motion because the opinion was not unanimous and because it believed that the causation opinion of Dr. Cefali was inconclusive. A panel of this Court reversed.

In reversing the denial of summary judgment, the Court found that the opinion of Dr. Cefali stood as affirmative evidence which carried Clarian's burden to show the absence of causation, and that the panel opinion provided no evidence to support plaintiff's allegation of a causative nexus between defendant's conduct and plaintiff's injuries. *Clarian,* 925 N.E.2d at 395.

Dr. Majid designated the affidavit of Panel Expert James Krueger, M.D., in which Dr. Krueger expressed that Dr. Majid did not cause any injury to the Plaintiff. As a result, there were no genuine issues of material fact. The element of causation had been sufficiently negated through unrebutted expert medical testimony.

3. The Plaintiff cannot rely on her own lay opinions and arguments, unsupported by admissible expert medical testimony, to create a genuine issue of material fact on the issue of causation.

Despite the well-settled rule that a plaintiff cannot rely on argumentative denials or her own opinions as to the issue of causation to create a genuine issue of material fact, the Plaintiff has attempted to insert her own views as to what is and is not appropriate medical care and what does and does not constitute medical causation before this court. *Shidler v. Dwyer,* 417 N.E.2d 281, 293 (Ind. 1981). For example, the Plaintiff argues without expert support and contrary to Dr. Krueger's expert opinion, that Dr. Majid actually was responsible for the patient's pulmonary care. Yet despite any unsupported argument the Plaintiff may make, the fact remains that even when the designated evidence is considered in the light most favorable to her, her claim for causation rests on speculation only. The Plaintiff's unsupported lay arguments cannot create a genuine issue of material fact. Both *Malooley v. McIntire* and *Clarian v. Wagler, Supra,* are instructive that in a case such as this, clear and non-speculative expert testimony is required on the necessary element of medical causation.

C. The "other" issues raised by the Plaintiff on appeal are inconsequential to the disposition of this appeal.

In her Appellant's Brief, the Plaintiff argues that it was error for the Trial Court to strike the materials she submitted on the date of the hearing of Dr. Majid's motion for summary

judgment. The Plaintiff also argues that that the Trial Judge "displayed a bias against this case, perhaps due to [her] 'Pro Se' standing. These "other" issues are without merit, and are inconsequential to the disposition of this appeal. These arguments fail to address the complete absence of admissible expert medical testimony to support the Plaintiff's claim for medical negligence.

The Trial Judge appropriately addressed this issue of the Plaintiff's late-designated evidence in its order on the Plaintiff's motion to correct error. The Trial Judge correctly determined that it was without jurisdiction to consider the late-filed materials under the principles elucidated in *Desai v. Croi,* 805 N.E.2d 844, 848 (Ind.Ct.App. 1995), *Miller, M.D., v. Yedlowski,* 916 N.E.2d 246 (Ind.Ct.App.2009), and *Seufert v. RWB Medical Income Proprieties I Ltd. Partnership,* 649 N.E.2d 1070, 1073 (Ind.Ct.App1995). But the Trial Judge also correctly noted that the late designated materials did not contain any expert testimony. (Majid App, p. 45). Therefore, the Trial Court's Order striking the materials was inconsequential to the determination that Dr. Majid was entitled to summary judgment, because even if the materials had been considered by the Trial Judge, there was no expert medical testimony to create a genuine issue of material fact for the element of causation.

The claim that the Trial Judge was biased against Ms. Siner as a *pro se* litigant is equally without merit. It was never raised before the trial court, and has not been supported by cogent argument, and are therefore the issue has been waived on appeal. *Dunaway v. Allstate Ins. Co.,* 813 N.E.2d 376, 387 (Ind.Ct.App. 2004) ("Issues not raised before the trial court on summary judgment cannot be argued for the first time on appeal and are waived); *Triplett v. USX Corp.,* 893 N.E.2d 1107, 1117 (Ind.Ct.App. 2008) (failure to develop cogent arguments results in waiver on appeal). Moreover, there is no evidence in the record of judicial bias, or any prejudice

resulting therefrom. *See, Resnover v. State,* 507 N.E.2d 1382, 1391 (Ind. 1987) (to support a claim of judicial bias, the record must show actual bias and prejudice). That Ms. Siner has been held to established rules of law regarding the requirements of Ind. T.R. 56 and the requirement of expert medical testimony to support each element of her medical negligence claim does not demonstrate bias. *See, Rickels v. Herr,* 638 N.E.2d 1280, 1283 (Ind.Ct.App. 1994); *Thacker v. Wentzel,* 797 N.E.2d 342, 345 (Ind.Ct.App. 2003) (*pro se* litigants held to same rules as trained counsel). Her failure to designate admissible expert testimony to support the element of causation is equally fatal to her claim as a *pro* se litigant as it would be to any medical negligence claim brought by counsel.

VI. CONCLUSION

Dr. Majid filed a motion for summary judgment supported by expert medical testimony which demonstrated that the Plaintiff's alleged damages were not caused by any breach in the standard of care committed by him. The Plaintiff failed to designate any admissible expert medical testimony sufficient to create a material issue of fact as to the element of medical causation. Based upon the designated evidence, the Plaintiff cannot prove a *prima facie* case for medical negligence. The Trial Court's Order granting summary judgment in favor of Dr. Majid was appropriate and in accordance with well-settled law. Accordingly, Dr. Majid requests this Court to affirm the entry of summary judgment in his favor.

Respectfully Submitted,

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WORD COUNT CERTIFICATE

I verify that this Appellee's Brief contains no more than 14,000 words.

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of December, 2014, the foregoing was served upon the following persons, by depositing copies of same in the United States Mail, first class postage prepaid, in properly addressed envelopes and with proper postage affixed thereto:

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