IN THE

INDIANA COURT OF APPEALS

CAUSE NO. 49A05-1404-CT-00165

KATHY L. SINER, Personal Representative of the Estate of Geraldine A. Siner, Deceased, and JOHN T. SINER, prior EPOA and Medical Representative,	
Appellant/Plaintiff,	Appeal from the Marion Superior Court No. 12
v.	Cause No. 49D12-1305-CT-020123
	The Honorable Heather Welch, Judge
KINDRED HOSPITALS LIMITED PARTNERSHIP d/b/a KINDRED HOSPITAL INDIANAPOLIS, et al. , DENNIS NICELY, Administrator, MOHAMMED MAJID, Attending Physician, DAVID UHRIN, RN,	
Appellees/Defendants.	

APPELLEES' BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page No.

Cases

Rules

STATEMENT OF ISSUE

Appellant/Plaintiff Kathy Siner ("Kathy"), Personal Representative of the Estate of Geraldine Siner ("Geraldine"), appeals the trial court's entry of summary judgment in favor of Appellees/Defendants Kindred Hospital Limited Partnership d/b/a Kindred Hospital – Indianapolis ("Kindred Hospital"), David Uhrin, and Dennis Nicely (collectively, the "Kindred Defendants") on Kathy's medical malpractice claim. Kathy presents numerous issues on appeal, which the Kindred Defendants consolidate and restate as follows:

> Whether the trial court properly granted summary judgment in favor of the Kindred Defendants when there was no conclusive expert medical testimony establishing that the Kindred Defendants proximately caused Geraldine's injuries.[1]

STATEMENT OF CASE[2]

This case arises from allegations of medical malpractice against several defendants, including the Kindred Defendants, while Geraldine was a patient at Kindred Hospital.

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[1] Appellate Rule 46(A)(4) dictates that the Statement of Issues "shall concisely and particularly describe each issue presented for review." Kathy's Statement of Issues is a two-page, multi-paragraph mixture of issues, alleged facts, and vague arguments. (Appellant's Br. 1-2.) The Kindred Defendants' ability to respond to Kathy's various contentions has been hampered by these, among other, violations of the Indiana Rules of Appellate Procedure. *See Nolan v. Taylor*, 864 N.E.2d 419, 420 n.1 (Ind. Ct. App. 2007). The Kindred Defendants address only the propriety of summary judgment in their favor. They do not discuss the separate summary judgment order and issues relating to Mohammed Majid, M.D., a co-Appellee/Defendant in this appeal.

[2] A Statement of Case "shall briefly describe the nature of the case, the course of the proceedings relevant to the issues presented for review, and the disposition of these issues by the trial court . . . ." Ind. App. R. 46(A)(5). Kathy's Statement of Case includes aspects of the procedural history having no bearing on the issues presented for review, and does not include other information important to the disposition of this appeal.

(Appellant's App. 1-2; Appellees' App. 4.)[3] After Geraldine passed away, her daughter Kathy filed a proposed medical malpractice complaint against these defendants with the Indiana Department of Insurance. (Appellant's App. 1; Appellees' App. 4.) On January 28, 2013, the Medical Review Panel issued its expert opinion that "[the defendants'] conduct may have been a factor of some resultant damages, but not the death of the patient." (Appellant's App. 27; Appellees' App. 15.)

Kathy filed a civil Complaint against the defendants, including the Kindred Defendants, on May 6, 2013. (Appellant's App. 1-4.) On December 6, 2013, the Kindred Defendants filed a Motion for Summary Judgment and a supporting Memorandum and Designation of Evidence. (Appellees' App. 1-37.) The Kindred Defendants' Designation of Evidence included the opinion of the Medical Review Panel and an affidavit from James R. Krueger, M.D. ("Dr. Krueger"), who had served as a member of the Panel. (Appellees' App. 12, 15-22.) The Kindred Defendants argued that Kathy's medical malpractice claim against them failed as a matter of law because there was no panel opinion or expert medical testimony that established conclusively the essential element of causation. (Appellees' App. 1-37.) The trial court set a summary judgment hearing for February 18, 2014. (Appellant's App. 16.)

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[3] "The purpose of an Appendix in civil appeals . . . is to present the Court with copies of only those parts of the record on appeal that are necessary for the Court to decide the issues presented." Ind. App. R. 50(A)(1). The Appellant's Appendix neglects to include any of the Kindred Defendants' summary judgment filings and is incomplete with respect to Kathy's own filings, and therefore fails to provide all documents "necessary for the Court to decide the issues presented." *See Kelly v. Levandoski*, 825 N.E.2d 850, 856 (Ind. Ct. App. 2005) (holding that appellants must include "all documents relating to the disposition of the motion for summary judgment, including any documents . . . designated and filed with the trial court"); *Yoquelet v. Marshall Cnty.*, 811 N.E.2d 826, 830 (Ind. Ct. App. 2004) (dismissing appeal for failure to include all designated summary judgment evidence in the appendix). This is just one of many deficiencies in the Appellant's Appendix. Other defects are addressed more fully in the Kindred Defendants' Motion to Strike filed contemporaneously herewith.

On February 6, 2014, Kathy filed her Response to the Kindred Defendants' Motion for Summary Judgment and opposing Designation of Evidence, including an affidavit.[4] (Appellant's App. 110-117.) Contemporaneously with her summary judgment filings, Kathy also moved for more time to file evidence and additional authority opposing the Kindred Defendants' Motion for Summary Judgment. (Appellant's App. 17.) Over the Kindred Defendants' objection, the trial court granted Kathy until February 18, 2014, the day of the summary judgment hearing, to submit these materials. (*Id.*) On February 18, 2014, Kathy filed an Addendum to her summary judgment Response and another affidavit.[5] (Appellees' App. 38; Appellant's App. 188-192.)

The trial court conducted its summary judgment hearing as scheduled on February 18, 2014. (Appellant's App. 18.) On March 13, 2014, the trial court entered an order granting the Kindred Defendants' Motion for Summary Judgment, concluding "that there is no genuine issue of material fact as to whether the actions of [the Kindred Defendants] were a proximate cause of Geraldine Siner's injuries." (Appellees' App. 110.) This appeal ensued.

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[4] Kathy has submitted on appeal an Appellant's Appendix volume marked "Background Information for the Court." Kathy filed this "Background Information" in the trial court on July 9, 2013, but never designated it on summary judgment in accordance with the requirements of Trial Rule 56. (Appellant's App. 116-17.) Consequently, while her "Background Information" is technically part of the trial court record below, it is not part of the summary judgment record on appeal and cannot be considered in reviewing the trial court's entry of summary judgment in the Kindred Defendants' favor. *See Fraternal Order of Police, Lodge No. 73 v. City of Evansville*, 829 N.E.2d 494, 496 (Ind. 2005) (citing Ind. T. R. 56(H) and noting that "review of a summary judgment motion is limited to those materials designated to the trial court").

[5] Kathy complains in passing about the trial court entering summary judgment prior to the completion of discovery. (Appellant's Br. 4.) Kathy never requested a verified stay of summary judgment proceedings pending additional discovery with respect to the Kindred Defendants pursuant to Trial Rule 56(F). (Appellant's App. 5-19.) Trial Rule 56(F) would have required Kathy to file an affidavit averring under oath the need for additional time to establish facts by affidavit or further depositions. *See* Ind. Tr. R. 56(F). Kathy's only mention of the need to conduct further discovery was a vague and equivocal reference in her Response to the Kindred Defendants' Motion for Summary Judgment, in which she claimed that "*[i]f* Discovery of [certain documents] are deemed relevant, a continuance for further Discovery is herein requested." (Appellant's App. 114-15) (emphasis added). Kathy went on to say that regardless of these additional matters, her arguments and affidavits "should be ample" to oppose summary judgment. (*Id.*)

STATEMENT OF FACTS[6]

Kathy asserts that several defendants, including the Kindred Defendants, were negligent in the care or treatment of Geraldine while she was a patient at Kindred Hospital. (Appellant's App. 1; Appellees' App. 4.) Although Geraldine was hospitalized at Kindred Hospital, the Kindred Defendants were not responsible for her pulmonary care. (Appellees' App. 25.) Rather, Indiana University Pulmonary and Critical Care ("I.U. Pulmonology Service") directed Geraldine's pulmonary care during her hospitalization. (Appellant's App. 197; Appellees' App. 21-22, 25.) I.U. Pulmonology Service handles all billing for its services, and its physicians and faculty are not paid or employed by Kindred Hospital. (Appellees' App. 25) I.U. Pulmonology Service is an independent contractor of Kindred Hospital, but otherwise has no affiliation with the hospital. (*Id.*) Kindred Hospital's Admission Agreement, which Geraldine's power-of-attorney signed on her behalf at the time of admission, advises patients that certain providers who care for a patient as part of the medical team "are independent contractors and not employees or agents of the hospital." (Appellees' App. 24-25, 34-37.)

On January 28, 2013, the Medical Review Panel issued its expert opinion. (Appellant's App. 27-36; Appellees' App. 15-19.) The Panel determined that "[the defendants'] conduct may have been a factor of some resultant damages, but not the death of the patient." (Appellant's App. 27; Appellees' App. 15.) The Panel thus affirmatively opined that the defendants were not the proximate cause of Geraldine's death. (*Id.*) The Panel declined to render an affirmative,

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[6] Kathy's Statement of Facts is not presented in accordance with the applicable standard of review, nor is it fully supported by citations to the appendix as required by Appellate Rule 46(A)(6)(a)-(b). Kathy's Statement of Facts also contains numerous facts that are immaterial to the resolution of her appeal. *Cf.* Ind. App. R. 46(A)(6). As noted above, *supra* note 4, this Court cannot consider any facts – including those contained in Kathy's "Background Information" – that were not properly designated to the trial court in accordance with Trial Rule 56.

conclusive opinion as to whether the defendants proximately caused Geraldine's other injuries. (Appellant's App. 27; Appellees' App. 15, 21.)

The Kindred Defendants filed their Motion for Summary Judgment and designated as evidence the Panel's expert medical opinion. (Appellees' App. 12, 15-19.) The Kindred Defendants also designated as evidence the expert medical testimony of Dr. Krueger, who had served as one of the Panel members. (Appellees' App. 12, 20-22.) Dr. Krueger verified in his affidavit that, in light of I.U. Pulmonology Service's responsibility for Geraldine's pulmonary care, "Kindred did not cause injury to [Geraldine]." (Appellees' App. 22.) Dr. Krueger further averred that "even before [Geraldine's] admission to Kindred Hospital . . . , and throughout that hospitalization," – and irrespective of who was directing Geraldine's pulmonary care once she arrived – "her condition was terminal, her mentation was severely and irreversibly impaired, and her multiple chronic comorbidities made any claim of damages speculative." (Appellees' App. 21.) Kathy offered two affidavits, among other things, in response to the Kindred Defendants' Motion for Summary Judgment and designated evidence. (Appellant's App. 119-126, 188-195.) However, none of her evidence addressed, much less established, the causation of Geraldine's injuries or death. (*Id.*)

SUMMARY OF ARGUMENT

It is well settled that in medical malpractice cases, the plaintiff must prove by expert medical testimony not only that the defendant breached the standard of care, but that the defendant's conduct proximately caused the alleged injury. When the 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 present expert medical testimony to rebut this

deficiency and demonstrate the existence of a genuine issue as to causation. Kathy failed to meet her burden in this regard.

The Kindred Defendants designated expert medical testimony, in the form of Dr. Krueger's affidavit, that they did not proximately cause injury to Geraldine. The Medical Review Panel's expert opinion similarly foreclosed any causal link between the Kindred Defendants and Geraldine's death. Accordingly, in order to avoid summary judgment on her medical malpractice claim, Kathy needed to demonstrate a genuine issue of material fact as to causation. Kathy's summary judgment evidence, including her two affidavits, did not establish or even address the essential element of causation. Any vague and inconclusive speculation that the Kindred Defendants may have caused some injury to Geraldine cannot carry the day or save Kathy's medical malpractice claim from summary judgment.

While Kathy offers a litany of accusations and arguments on appeal, much of which is unsupported by cogent reasoning or legal authority, none of her assertions support the existence of proximate cause necessary to sustain a medical malpractice claim or change the outcome of the trial court's ruling. The Kindred Defendants' evidence on this point was dispositive and uncontroverted. Absent conclusive evidence of causation, Kathy's medical malpractice claim fails as a matter of law, and the Kindred Defendants are entitled to judgment in their favor. The trial court's summary judgment order should be affirmed.

ARGUMENT[7]

I. Standard Of Review.

The trial court's grant of summary judgment "enters appellate review clothed with a presumption of validity." *Cnty. Council v. Nw. Ind. Reg'l Dev. Auth.*, 944 N.E.2d 519, 523-24 (Ind. Ct. App. 2011), *trans. denied.* "The purpose of summary judgment is to terminate litigation about which there can be no factual dispute and which may be determined as a matter of law." *Bastin v. First Ind. Bank*, 694 N.E.2d 740, 743 (Ind. Ct. App. 1998). Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ind. T. R. 56(C); *Crawfordsville Square, LLC v. Monroe Guar. Ins. Co.*, 906 N.E.2d 934, 937 (Ind. Ct. App. 2009), *trans. denied.*

Once the moving party makes a *prima facie* showing of the non-existence of a genuine issue of material fact, the burden shifts to the opposing party to come forward with specific evidence demonstrating that there is a genuine issue for trial. *Brunton v. Porter Mem. Hosp. Ambulance Serv.*, 647 N.E.2d 636, 638 (Ind. Ct. App. 1994). The non-moving party may not rest on her pleadings but instead, must "set forth specific facts, using supporting materials contemplated under the rule, which show the existence of a genuine issue for trial." *Stevenson v. Hamilton Mut. Ins. Co.*, 672 N.E.2d 467, 471 (Ind. Ct. App. 1996), *reh'g denied.* A trial court must grant summary judgment against a party who fails to make a showing sufficient to establish the existence of any element essential to that party's claim. *Briggs v. Finley*, 631 N.E.2d 959, 963 (Ind. Ct. App. 1994), *trans. denied.*

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[7] Kathy fails to support each of her contentions with cogent reasoning and citations to legal authorities as required by Appellate Rule 46(A)(8)(a). The Kindred Defendants have done their best to decipher and respond to the arguments asserted by Kathy on appeal.

When reviewing the grant or denial of a summary judgment motion, this Court applies the same standard as the trial court. *Martinez v. Park*, 959 N.E.2d 259, 267-68 (Ind. Ct. App. 2011). Summary judgment will be affirmed on appeal if it is sustainable on any theory or basis found in the evidentiary matter designated to the trial court. *Brunton*, 647 N.E.2d at 638. Applying these standards, it is apparent that the trial court's grant of summary judgment in favor of the Kindred Defendants should be affirmed.

II. Kathy's Medical Malpractice Claim Fails As A Matter Of Law Absent The Essential Element Of Causation.

"Medical malpractice cases are no different from other kinds of negligence actions regarding what must be proven." *Nasser v. St. Vincent Hosp. and Health Servs.*, 926 N.E.2d 43, 47 (Ind. Ct. App. 2010), *trans. denied.* The plaintiff must show the following: a duty owed to the patient by the defendant; (2) a breach of duty by allowing conduct to fall below the applicable standard of care; and (3) a compensable injury proximately caused by the defendant's breach of duty. *Id.* To hold a defendant liable for a patient's injury, the defendant's act or omission must be deemed to be a proximate cause of that injury. *Id.* Proximate cause involves two inquiries: (1) whether the injury would not have occurred but for the defendant's negligence; and (2) whether the patient's injury was reasonably foreseeable as the natural and probable consequence of the act or omission. *Id.*

It is well settled that "[i]n a medical negligence claim, the plaintiff must prove by expert medical testimony not only that the defendant was negligent, but also that the defendant's negligence proximately caused the [alleged] injury." *Clarian Health Partners, Inc. v. Wagler*, 925 N.E.2d 388, 392 (Ind. Ct. App. 2010), *reh'g denied*; *see also Schaffer v. Roberts*, 650 N.E.2d 341, 342 (Ind. Ct. App. 1995). Expert medical testimony is necessary in these circumstances due to "the complexity of medical diagnosis and treatment." *Martinez*, 959 N.E.2d

at 268. 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 then 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*, 694 N.E.2d 1148, 1152 (Ind. Ct. App. 1998).

Here, the Kindred Defendants designated the expert opinion of the Medical Review Panel, which determined that "[the defendants'] conduct may have been a factor of some resultant damages, but not the death of the patient." (Appellant's App. 27; Appellees' App. 15.) The Panel affirmatively opined that the defendants were not the proximate cause of Geraldine's death. (*Id.*) The Panel equivocated and declined to render an affirmative, conclusive opinion as to whether any of the defendants – including the Kindred Defendants – proximately caused Geraldine's other injuries. (Appellant's App. 27; Appellees' App. 15, 21.) The Kindred Defendants also designated the expert medical testimony of Dr. Krueger, who opined that in light of I.U. Pulmonology Service's responsibility to direct Geraldine's pulmonary care, "Kindred did not cause injury to [Geraldine]."[8] (Appellees' App. 22.) Moreover, as Dr. Krueger observed, Geraldine was already terminal when she arrived at Kindred Hospital, and her condition was so severe and irreversible that any claim for damages was "speculative."[9] (Appellees' App. 21.)

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[8] Kathy devotes several pages of her Appellant's Brief to challenging the Kindred Defendants' evidence that I.U. Pulmonology Service was an independent contractor responsible for Geraldine's pulmonary care, not Kindred Hospital. (Appellant's Br. 17-19.) For example, Kathy questions the veracity of the affidavit from Kindred Hospital's CEO explaining the relationship between Kindred and I.U. Pulmonology Service. (Appellees' App. 24-25.) Kathy claims that the statements regarding that relationship were not true at the time Geraldine was a patient at Kindred. (Appellant's Br. 18.) Kathy designated no evidence that contradicts the sworn testimony offered by the Kindred Defendants, which remains uncontroverted. Kathy's hypotheses are not evidence sufficient to create a genuine issue for trial.

[9] Negligence cannot be established be inferential speculation alone. *Beckom v. Quigley*, 824 N.E.2d 420, 424 (Ind. Ct. App. 2005). Likewise, speculation is not sufficient to establish

Once the Kindred Defendants designated this evidence, the burden shifted to Kathy to come forward with contrary evidence – in the form of expert medical testimony – to create a genuine issue of material fact on the essential element of causation. *See Morton*, 694 N.E.2d at 1152; *see also Simms v. Schweikher*, 651 N.E.2d 348, 350 (Ind. Ct. App. 1995) (affidavit of physician stating that conduct during surgery was within the standard of care required the plaintiff to come forward with expert testimony in opposition to that evidence), *trans. denied.* She failed to do so. The affidavits Kathy submitted in opposition to the Kindred Defendants' Motion for Summary Judgment were completely silent on the question of causation. (Appellant's App. 119-126, 188-195; Appellees' App. 107.) Accordingly, the Kindred Defendants were entitled to judgment as a matter of law, and the trial court properly granted summary judgment in their favor. *See Blaker v. Young*, 911 N.E.2d 648, 651 (Ind. Ct. App. 2009) (providing that when a defendant in a medical malpractice action moves for summary judgment and can show there is no genuine issue of material fact, the defendant is entitled to summary judgment unless the plaintiff can establish, by expert testimony, a genuine issue of material fact for trial), *trans. denied.*

Kathy attempts to avoid the undisputed effect of Dr. Krueger's expert medical testimony by characterizing it as an about-face from when he served on the Medical Review Panel,[10] further suggesting that Dr. Krueger was trying to alter the entire Medical Review Panel's opinion or speak for the other Panel members. (Appellant's Br. 14-15.) There is nothing in the record to support these assertions. Nowhere in his affidavit does Dr. Krueger state that his opinion

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causation or overcome summary judgment. *Clark v. Sporre*, 777 N.E.2d 1166, 1174-75 (Ind. Ct. App. 2002).

[10] The Kindred Defendants strongly object to any assertion that Dr. Krueger was unfairly or unethically incentivized to "change [his] opinion." (Appellant's Br. 15.) Kathy's insinuations are unsubstantiated and unwarranted.

constitutes that of the entire Panel or any of its other members. (Appellant's App. 196-98; Appellees' App. 20-22.)

Kathy's misconception of Dr. Krueger's testimony aside, her theory overlooks the salient fact that the Medical Review Panel severed any causal link between the Kindred Defendants and Geraldine's death, and never conclusively opined as to the causation of her other injuries. (Appellant's App. 27; Appellees' App. 15, 21.) Dr. Krueger's affidavit does not conflict with the Panel's opinion. Rather, it constitutes expert medical testimony on a matter that the Panel did not conclusively address: the causal link – or lack thereof – between the Kindred Defendants and Geraldine's injuries. In other words, Dr. Krueger picked up where the Medical Review Panel left off, and taken together, their expert opinions close the door on causation for Geraldine's injuries or death and defeat Kathy's medical malpractice claim as a matter of law.

Contrary to Kathy's suggestion, the Medical Review Panel's opinion does not support the element of causation essential to her medical malpractice claim or create a genuine issue for trial even with respect to the proximate cause of Geraldine's alleged injuries. The Panel could only opine that "[the defendants'] conduct *may* have been a factor[.]" (Appellant's App. 27; Appellees' App. 15) (emphasis added). A plaintiff's burden may not be carried with evidence based merely upon supposition or speculation. *Topp v. Leffers*, 838 N.E.2d 1027, 1033 (Ind. Ct. App. 2006), *trans. denied.* Evidence establishing a mere possibility of cause or which lacks reasonable certainty or probability is not sufficient evidence by itself to support a verdict. *Id.* Medical testimony couched in terms less than a reasonable degree of medical certainty – such as "possible" or "probable" or "may" – standing alone, is not sufficient to support a verdict. *Id.*; *see also City of East Chicago v. Litera*, 692 N.E.2d 898, 901 (Ind. Ct. App. 1998), *trans. denied.*

This Court has routinely ordered summary judgment in favor of a health care provider when the plaintiff's opposing evidence did not conclusively establish the actual existence of causation necessary to support a medical malpractice claim. In *Malooley v. McIntyre*, 597 N.E.2d 314, 318 (Ind. Ct. App. 1992), the Court reversed the trial court's denial of summary judgment absent evidence of causation. The Court concluded that one panel member's opinion that he was unable to determine whether causation existed did not give rise to a question of fact precluding summary judgment, because his opinion "was not evidence which tends to support the [plaintiff's] allegation that there was a causative nexus between conduct and death. . . . [I]t was incumbent upon the [plaintiff] to *bring forth facts as to the actual existence of causation.*" *Id.* (emphasis added). Similarly, in *Carey v. Indiana Physical Therapy, Inc.*, 926 N.E.2d 1126, 1129-30 (Ind. Ct. App. 2010), the Court affirmed the trial court's grant of summary judgment where the patient's expert medical witness did not provide a causal link between the alleged negligence and injuries and was therefore insufficient to create a factual issue as to causation. As the Court explained, the expert's "testimony did not *show the necessary 'causative nexus' in the form of "facts as to the actual existence of causation.*" *Id.* (emphasis added, citation omitted); *see also Wagler*, 925 N.E.2d at 394.

Here, Kathy did not offer any expert medical testimony establishing the actual existence of causation. *See Carey*, 926 N.E.2d at 1129-30; *Malooley*, 597 N.E.2d at 318. The Medical Review Panel could not render an affirmative, conclusive opinion as to whether the Kindred Defendants proximately caused Geraldine's injuries (other than her death). The Panel's opinion that the defendants' conduct "*may* have been a factor" cannot carry the day. (Appellant's App. 27; Appellees' App. 15) (emphasis added). *See Topp*, 838 N.E.2d at 1033 (concluding that expert medical witness's written report was not sufficiently certain to show causation where he used

terms like "possibly" and "may"); *see also Litera*, 692 N.E.2d at 901 (holding that expert medical witness's testimony that patient's fall "may" have worsened condition was not certain enough to sustain a judgment in the patient's favor). Indeed, as Dr. Krueger testified, he was "intentionally equivocal" in reaching his decision in support of the Panel's opinion because Geraldine was already terminal and her condition was severe and irreversible by the time she arrived at Kindred Hospital, such that "any claim of damages is speculative." (Appellees' App. 21.)

Elsewhere in her Appellant's Brief, Kathy focuses on whether the Kindred Defendants breached the standard of care. (Appellant's Br. 16-17, 20-22, 24-26.) She points to the Medical Review Panel's other opinion that the standard of care was breached. (Appellant's Br. 14, 28; Appellant's App. 26; Appellees' App. 15.) She also points to her own affidavits as showing that there were "additional acts of malpractice with damages" committed by the Kindred Defendants. (Appellant's Br. 16-17, 20.) For example, Kathy raises concerns regarding Geraldine's Do Not Resuscitate designation and Scope of Treatment form, and the procedures and decisions of Kindred's Ethics Committee. (Appellant's Br. 20-22, 24-26.) Kathy's focus is misdirected, and her evidence and allegations are immaterial given the absence of any evidence of causation.

The existence of a breach of the standard of care – even if true – does not preclude summary judgment in the Kindred Defendants' favor. Causation is an essential element of a medical malpractice claim, separate and apart from the element of breach, and there is no expert medical testimony to establish this independent element and thereby support Kathy's claim. *See, e.g., Alexander v. Scheid*, 726 N.E.2d 272, 279 (Ind. 2000). Summary judgment is mandatory against a party who fails to make a showing sufficient to establish the existence of *any* element essential to that party's claim. *Briggs*, 631 N.E.2d at 963.

Moreover, factual disputes that are irrelevant or unnecessary will not be considered on a motion for summary judgment. *Lawlis v. Kightlinger & Gray*, 562 N.E.2d 435, 439 (Ind. Ct. App. 1990), *trans. denied.* Despite conflicting facts and inferences on some elements of a claim, summary judgment may be proper where there is no dispute regarding a fact that is dispositive of the matter. *Owen v. Vaughn*, 479 N.E.2d 83, 87 (Ind. Ct. App. 1985); *see also Bowman ex rel. Bowman v. McNary*, 853 N.E.2d 984, 988 (Ind. Ct. App. 2006) (noting that appellate court "will not hesitate to reverse a trial court's [summary judgment] ruling if it has . . . improperly considered immaterial factual disputes"). It is well settled that a defendant in a negligence action may obtain summary judgment by demonstrating that the undisputed material facts negate just one element of the plaintiff's claim. *See, e.g., Pfenning v. Lineman*, 947 N.E.2d 392, 403 (Ind. 2011); *Allison v. Union Hosp., Inc.*, 883 N.E.2d 113, 119 (Ind. Ct. App. 2008). When there is no genuine issue of material fact and any one of the elements required for a negligence claim is absent, summary judgment is appropriate. *Pfenning*, 947 N.E.2d at 403; *see also Ellis v. City of Martinsville*, 940 N.E.2d 1197, 1202 (Ind. Ct. App. 2011).

The only dispositive inquiry for purposes of summary judgment in this case was whether the Kindred Defendants were the proximate cause of Geraldine's injuries or death. Kathy could not prevail on her medical malpractice claim without proving causation. The Medical Review Panel's opinion and the expert testimony of Dr. Krueger establish that there is no causal link between the Kindred Defendants and Geraldine's injuries or death. Kathy's affidavits said nothing about causation and were non-responsive to the evidence designated by the Kindred Defendants on summary judgment. (Appellant's App. 119-126, 188-195; Appellees' App. 107.) In short, Kathy's affidavits were not the expert medical testimony necessary to create a genuine issue of material fact as to causation and preclude the entry of summary judgment in the Kindred

Defendants' favor. *See Bd. of School Comm'rs of City of Indpls. v. Pettigrew*, 851 N.E.2d 326, 330 (Ind. Ct. App. 2006) (holding that summary judgment was appropriate notwithstanding possible conflicting facts and inferences on some elements of plaintiff's claim, where there was no dispute or conflict regarding causation), *trans. denied.* Kathy's failure to prove causation properly ended the trial court's analysis, and should end this Court's analysis on appeal. *See, e.g., Terra-Products, Inc. v. Kraft Gen. Foods, Inc.*, 653 N.E.2d 89, 90 (Ind. Ct. App. 1995), *trans. denied*; *Ind. Civil Rights Comm'n v. Am. Commercial Barge Line Co.*, 523 N.E.2d 241, 243 n.1 (Ind. Ct. App. 1988), *reh'g denied.*[11]

CONCLUSION

Kathy failed to meet the burden required to bring a medical malpractice claim against the Kindred Defendants by not presenting expert medical testimony – indeed, any evidence at all – on the essential element of causation. The trial court correctly concluded that there was no genuine issue of material fact as to whether the Kindred Defendants were a proximate cause of Geraldine's injuries. Accordingly, this Court should affirm the trial court's order granting summary judgment in favor of the Kindred Defendants.

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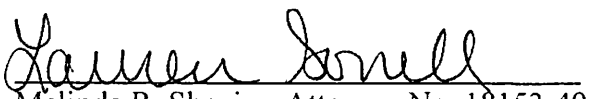
[11] In a final attempt to overturn the trial court's summary judgment in the Kindred Defendants' favor, Kathy insists that the trial court "displayed a bias against this case, perhaps due to [her] 'pro se' standing." (Appellant's Br. 26.) However, Kathy never raised the issue of bias in the trial court or requested a change of judge or venue. (*See generally* Appellant's App. 5-19.) She also fails to present any cogent reasoning or legal authority to support this claim on appeal. Accordingly, the issue of bias is waived and not properly before this Court. *See Triplett v. USX Corp.*, 893 N.E.2d 1107, 1117 (Ind. Ct. App. 2008) (affirming rule that failure to develop cogent argument results in waiver of the issue 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."). Even if this Court could consider Kathy's bias argument, there is nothing in the record to even suggest the existence of actual bias and prejudice against her. *See Resnover v. State*, 507 N.E.2d 1382, 1391 (Ind. 1987) (explaining that to support a claim of judicial bias, the record must show actual bias and prejudice). Adverse rulings or findings by a trial judge are not enough to show bias or prejudice. *Id.*

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing document was served upon the following individuals by way of First Class United States mail, postage prepaid, this 7th day of November, 2014.

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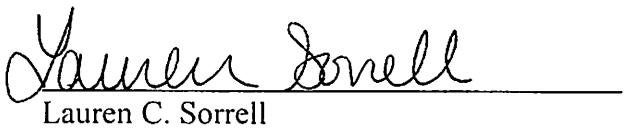

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