No. DA 21-0552

IN THE SUPREME COURT
OF THE STATE OF MONTANA

STEPHANIE KIPFINGER, BEN CUNNINGHAM, Individually and as Natural Guardian and Next Friend of E.C., a Minor

Plaintiffs-Appellants,

v.

GREAT FALLS OBSTETRICAL & GYNECOLOGICAL ASSOCIATES, And JULIE KUYKENDALL,

Defendants-Appellees.

On Appeal from the Cascade County District Court
Cause No. ADV-17-0699(b)
The Honorable Elizabeth A. Best

APPELLEES' RESPONSE BRIEF

Gary Kalkstein
Joe Newman
KALKSTEIN LAW FIRM, PC
P.O. Box 8568
225 N. Adams St.
Missoula, MT 59807-87568
Telephone: (406) 721-9800
Facsimile: (406) 721-9896
Gary@kalksteinlaw.com
Joe@kalksteinlaw.com

Attorneys for Appellees'

June 28, 2022

Counsel for Appellants:

Daniel J. Flaherty
FLAHERTY GALLARDO LAW OFFICE
1026 1st Avenue South
P.O. Box 1968
Great Falls, MT 59403
Telephone: (406) 727-8494
Facsimile: (406) 727-8537
daniel@greatfallsfirm.com

Michael L. Brooks
THE BROOKS LAW FIRM
7100 N. Classen Blvd., Ste. 300
Oklahoma City, OK 73116
Telephone: (405) 840-1066
Facsimile: (405) 843-8446
michael.brooks@brookslawok.com

Nicholas C. Rowley
Benjamin R. Novotny
TRIAL LAWYERS FOR JUSTICE
421 West Water St., 3rd Floor
Decorah, Iowa 52101
Telephone: (563) 382-5071
Facsimile: (888) 801-3616
nick@tl4j.com
ben@tl4j.com

William V. Ballew, III
BALLWE LEGAL, P.C.
530 Highland Park Dr.
Missoula, MT 459803
Telephone: (406) 414-9546
Facsimile: (406) 414-9549
will@ballwelegal.com

Table of Contents

Table of Contents i

Table of Authorities iv

Statement of the Issues 1

Statement of the Case 1

Statement of the Facts 4

Standard of Review 6

Summary of the Argument 7

Argument:

I. The district court correctly granted summary judgment based on the arguments and materials respectively relied upon by the parties 9

II. Kipfinger and Cunningham's new argument – premised almost entirely upon testimony they did not rely upon at the district court level – should be rejected; alternatively, if Dr. Halrass' complete transcript is considered, it should be considered for the same purpose and in the same context as in district court 12

III. The district court's evidentiary determinations regarding the totality of Dr. Harlass' opinions were not an abuse of discretion and its grant of summary judgment was correct. 17

A. By applying the wrong standard of review to the evidentiary determinations regarding Dr. Harlass' testimony, Kipfinger and Cunningham have failed to present a tenable basis for reversal. 17

B. Rather than require 'magic words,' the district court applied unambiguous Montana law. 19

C. Upon the arguments and evidence respectively relied upon by the parties, the district court did not abuse its discretion and correctly granted summary judgment. 21

D. The district court's determinations regarding the entirety of Dr. Harlass' testimony were not an abuse of discretion, and its grant of summary judgment to Dr. Kuykendall and Great Falls OB/GYN was correct. 23

1. Dr. Harlass' fetal scalp electrode opinion – explicitly conditional and concededly not based upon a national standard of care – is legally insufficient. 24

2. Dr. Harlass' opinion about ordering Pitocin – explicitly conditional, rationalized through circular logic, and concededly not based upon a national standard of care – is legally insufficient. 28

3. Dr. Harlass' opinion regarding discontinuation of Pitocin – not directed at Dr. Kuykendall when disclosed and concededly based on personal practice – is legally insufficient. 31

4. Dr. Harlass' opinion about when the C-section should have been called – dependent on contextually unreasonable presumptions and irreconcilable with the complaint's allegations – is legally insufficient. 33

5. Dr. Harlass' opinion the C-section should have been performed within 30 minutes of calling it – equivocally critical of a third party, concededly premised upon unknowns, and concededly a function of discretion and personal preference – is legally insufficient. 35

6. Dr. Harlass' opinion concerning delivery attendance – irreconcilable with Kipfinger and Cunningham's allegations, concededly not based upon a national standard of care, and concededly equivocal – is legally insufficient. 37

Conclusion 40

Certificate of Compliance with Rule 11 42

Certificate of Service 43

Table of Authorities

Cases

Beehler v. Eastern Radiological Associates, P.C.
2012 MT 260, 367 Mont. 21, 289 P.3d 131 ..... 9, 11, 16, 26

Brookins v. Mote
2012 MT 283, 367 Mont. 193, 292 P.3d 347 ..... 22, 23, 25, 27, 28, 32, 35

Butler v. Domin
2000 MT 312, 302 Mont. 452, 15 P.3d 1189 ..... 6, 18, 19, 20, 22, 27, 35, 39

Dalton v. Kalispell Regional Hosp.
256 Mont. 243, 846 P.2d 960, 962 (1993) 20, 30, 39

Estate of Nielsen v. Pardis
265 Mont. 470, 878 P.2d 234, 236 (1994) 9, 26

Estate of Willson . Addison
2011 MT 179, 361 Mont. 269, 258 P.3d 410..... 9, 10, 11, 12, 16, 19, 26, 32, 33

Falcon v. Cheung
257 Mont. 296, 848 P.2d 1050, 1055-56 (1993) 25, 27, 28

Lorang v. Fortis Ins. Co.
2008 MT 252, 345 Mont. 12, 192 P.3d 186 10

McClue v. Safeco Ins. Co. of Illinois
2015 MT 222, 380 Mont. 204, 354 P.3d 604 ..... 7, 18

Norris v. Fritz
2012 MT 27, 364 Mont. 63, 270 P.3d 79 ..... 20, 27, 30, 33, 37, 39

Pilgeram v. Greenpoint
2013 MT 354, 373 Mont. 1, 313 P.3d 839 ..... 7, 12, 15, 16

Stevens v. Novartis Pharmaceuticals Corp.
2010 MT 282, 358 Mont. 474, 247 P.3d 244 ..... 34, 37

Statutes

Mont. Code Ann. § 26-2-601 10

Other Authorities

Mont. R. Civ. P. 56(c)(3)..... 7, 8, 12, 14, 15, 16, 23, 24

STATEMENT OF THE ISSUES

1. Whether the district court correctly granted summary judgment in Dr. Kuykendall and Great Falls OB/GYN's favor based on the arguments made and materials respectively relied upon by the parties.

2. Whether the deposition testimony of Frederick Harlass, MD, not relied upon by Kipfinger and Cunningham in opposing summary judgment should be considered on appeal and, if so, in what context.

3. Whether the district court abused its discretion in determining the opinions of Frederick Harlass, MD, failed to satisfy evidentiary pre-requisites, such as the 'more likely than not' test.

STATEMENT OF THE CASE

Stephanie Kipfinger and Ben Cunningham, individually and on behalf of E.C., a minor, filed this medical malpractice action against Benefis Health Systems, Inc. ("Benefis") in 2017. Kipfinger and Cunningham alleged negligence and gross negligence of Benefis and its employees caused a hypoxic-ischemic brain injury to E.C. (*See generally* Compl. (Sept. 19, 2017)). More than a year later, Julie Kuykendall, MD, and Great Falls Obstetrical & Gynecological Associates ("Great Falls OB/GYN") were added as defendants. (1st Amnd. Compl. (hereinafter "Complaint" or "Compl.") ¶¶ 77-81 (Oct. 22, 2018)). One theory of recovery was pled against Dr. Kuykendall. (*Id.*, at ¶ 81 (claiming starting Kipfinger's C-section

without (allegedly) communicating or ensuring Benefis' NICU team was ready was a departure from the standard of care)).[1]

The original allegations, however, remained substantially unchanged. Kipfinger and Cunningham alleged Benefis' employees knew an urgent C-section was needed. (Compl. ¶ 69). Kipfinger and Cunningham alleged, despite such knowledge, "a team to intubate [E.C.] was not available," and "a neonatologist was not available." (*Id.*, at ¶ 69, *see also* ¶ 54 ("Benefis did not have a provider with complete resuscitation skills immediately available to the delivery room.")). Kipfinger and Cunningham also alleged the need for intubation became apparent *after* the C-section had begun. (*Id.*, at ¶ 69 ("Once the delivery did occur and the need for an intubation became apparent. . . [.]")).

The opinions of Kipfinger and Cunningham's only disclosed obstetrician/gynecologist witness, Frederick Harlass, MD, were, like the Complaint's allegations, primarily critical of Benefis and its employees. (*See e.g.* Appellants' Supp. App. Ex. A ("Harlass Report") at 2 ("The nurses failed. . .") ("The nurses failed . . .") ("Nurses failed. . .") ("The hospital staff failed . . .") ("The hospital failed . . .")). When Dr. Harlass attempted to explain his criticisms of Dr. Kuykendall at deposition, he could not do so without conditioning his opinions,

[1] The lone theory of recovery against Great Falls OB/GYN, ostensibly, sounds in alleged vicarious liability for Dr. Kuykendall's conduct. (Compl. ¶ 78).

equivocally blaming Benefis, contradicting the Complaint's allegations, and/or resorting to sources other than a nationally applicable standard of care. (*See* infra Arg. § III.D.). Kipfinger and Cunningham neither amended nor supplemented Dr. Harlass' opinions after settling with and dismissing Benefis in early 2021.

Thus, Dr. Kuykendall and Great Falls OB/GYN moved for summary judgment June 30, 2021. (Defs.' MSJ (June 30, 2021)); (Defs.' Brf. Supp. MSJ (June 30, 2021)). The district court rejected the argument that Dr. Kuykendall was individually immune under Montana Code Annotated § 28-10-702. (Ord. on Defs.' MSJ (Sept. 27, 2021) ("Order") at 3-4).[2] The district court granted the motion, however, because Kipfinger and Cunningham failed to proffer admissible expert testimony prima facie establishing Dr. Kuykendall allegedly departed from a nationally applicable standard of care. (*Id.*, at 4-9).[3]

The district court found Kipfinger and Cunningham's briefing unimpressive and unhelpful, (Order n. 1), and that they had failed to comply with both Montana Rule of Civil Procedure 56 and the operative scheduling order, (*Id.*, at n. 2). The district court found Kipfinger and Cunningham's opposition to summary judgment relied mostly upon the testimony of unqualified witnesses, (*Id.*, at 6-7), and that the

[2] This ruling is not being appealed.

[3] As the district court found it "unnecessary" to reach Dr. Kuykendall and Great Falls OB/GYN's causation argument, no issue in that regard was ripe for appeal. (Order at 9).

written report of their only obstetrician/gynecologist witness, Dr. Harlass, was primarily critical of settled party Benefis, (*Id.*, at 7-8). To ensure Kipfinger and Cunningham were not penalized by the shortcomings of their argument and briefing, (*Id.*, at 8), the district court sua sponte requested and considered Dr. Harlass' entire deposition transcript. (*See* Appellants' Opening Brf. n. 2 (Mar. 25, 2022)).[4] After considerable time spent in review, the district court determined Dr. Harlass' opinions concerning Dr. Kuykendall's alleged negligence failed to reflect a 'more likely than not' degree of certainty and/or were not based upon a national standard of care.

STATEMENT OF FACTS

Stephanie Kipfinger presented to the Birth Center owned and operated by Benefis in Great Falls, Montana, during the early morning hours of January 9, 2016. (Stmt. of Undisputed Facts Supp. Defs.' MSJ ¶ 6 (June 30, 2021) ("Defs.' SOF")). Julie Kuykendall, MD, a board-certified obstetrician/gynecologist, was at the facility

[4] Kipfinger and Cunningham's brief, note 2, accurately indicates the district court sua sponte requested and considered Dr. Harlass' entire deposition transcript. The remaining statements made in that footnote, however, should be scrutinized carefully.

The transcript was "provided" by Kipfinger and Cunningham's counsel only because they were first to see and respond to the email from the district court's office. Dr. Kuykendall and Great Falls OB/GYN affirmatively dispute the district court considered Dr. Harlass' complete transcript for purposes of "making its summary-judgment ruling[s]." As discussed infra, the complete transcript was considered by the district court to determine whether justice required excusing Kipfinger and Cunningham's various failures and deficiencies of briefing. The district court did not file Dr. Harlass' complete transcript with its order, which appears to be an intentional decision. Dr. Kuykendall and Great Falls OB/GYN did not oppose Kipfinger and Cunningham's appellate motion to supplement the record because Dr. Harlass' complete transcript was, in fact, considered by the district court. Understanding the proper context in which that material was considered, however, is vital to resolution of this appeal.

covering call for other Great Falls OB/GYN providers.[5] (*Id.*, at ¶¶ 4, 7). Sometime in the morning, Dr. Kuykendall was notified of Kipfinger's admission. (*Id.*, at ¶ 8).

The first many hours of Kipfinger's admission were unremarkable. (Appellants' Opening Brf. 4 (conceding fetal heart tracings were entirely normal for the first several hours), 5 (conceding subsequent changes in tracing characteristics did not warrant physician intervention)). Dr. Kuykendall examined and evaluated Ms. Kipfinger around noon. (*Id.*, at 5). Oxytocin (Pitocin) was administered to Ms. Kipfinger in the early afternoon. (*Id.*).

At 4:10pm, Dr. Kuykendall ordered a non-emergent C-section for Ms. Kipfinger. (Appellants' Opening Brf. 6); (*see also* Compl. ¶¶ 17, 25). Dr. Kuykendall began the C-section at 4:41pm. (Appellants' Opening Brf. 7). E.C. was delivered within six minutes. (*Id.*).

Kipfinger and Cunningham subsequently filed this medical malpractice action against Benefis, later adding a claim that Dr. Kuykendall departed from the standard of care by allegedly starting Kipfinger's C-section "without communicating or ensuring" Benefis' resuscitation team was ready. (Compl. ¶ 81). However, Kipfinger and Cunningham concede: an intubation team was unavailable, (*Id*, at ¶ 69), a neonatologist was unavailable, (*Id.*), the need for intubation became apparent only

[5] Dr. Kuykendall was an employee of Great Falls OB/GYN. (*Id.*, at ¶ 5).

after the delivery occurred, (*Id.*), and that a provider capable of intubation was present for the entire delivery, (*Id.*, at ¶¶ 49-50).

One obstetrician/gynecologist witness, Frederick Harlass, MD, was disclosed in support of Kipfinger and Cunningham's claims. (*See* Harlass Report). The district court determined Dr. Harlass' criticisms of Dr. Kuykendall failed to reflect a 'more likely than not' degree of certainty and/or were not based upon a national standard of care. (Order 8). The district court granted summary judgment to Dr. Kuykendall and Great Falls OB/GYN. (*Id.*, at 8-9).[6]

STANDARD OF REVIEW

A district court's grant or denial of a motion for summary judgment is reviewed de novo. *Butler v. Domin*, 2000 MT 312, ¶ 19, 302 Mont. 452, 15 P.3d 1189. Determinations of admissibility embedded within a district court's summary judgment rulings, however, are reviewed for an abuse of discretion. *Butler*, ¶¶ 10-17 (where the district court's determination within a summary judgment ruling that a medical expert's opinions lacked more likely than not certainty was reviewed for

[6] Kipfinger and Cunningham's statement of facts should be rejected, considered in a limited capacity, or considered for purposes of context only. The newfound factual position substantially differs from and exceeds the scope of their factual position at the district court level. (*See* Pls.' Stmt. of Disputed Facts (Aug. 16, 2021) ("Pls.' SOF")). It relies heavily on testimony not relied upon in district court. (*Compare e.g. Id.*, at ¶ 7 (relying on merely two pages of Dr. Harlass' deposition testimony)). Dr. Kuykendall and Great Falls OB/GYN, now confined to the record, had no opportunity to present rebuttal evidence and argument. More prejudicially, perhaps, Kipfinger and Cunningham repeatedly and improperly point to opinion witnesses – e.g. Dr. Harlass and Beth Diehl – as purported proof of underlying fact. Documentary evidence (e.g. Benefis' internal guidelines) is proffered with neither foundation for its authenticity nor foundation for its purported applicability to Dr. Kuykendall. Most of Kipfinger and Cunningham's statement of facts, moreover, is immaterial to this appeal. The issues on appeal concern the district court's determinations about Dr. Harlass' opinions and its conclusions flowing therefrom.

an abuse of discretion). Thus, a district court's determinations regarding pre-requisite sufficiency of medical expert testimony are first reviewed for an abuse of discretion, then the remaining aspects of the summary judgment order are reviewed for correctness. *McClue v. Safeco Ins. Co. of Illinois*, 2015 MT 222, ¶¶ 7-14, 380 Mont. 204, 354 P.3d 604. Neither novel arguments nor novel legal theories are considered on appeal. *Pilgeram v. Greenpoint*, 2013 MT 354, ¶ 20, 373 Mont. 1, 313 P.3d 839. This Court is "especially wary of new arguments [on appeal] in the context of summary judgment." *Pilgeram*, ¶ 24.

SUMMARY OF THE ARGUMENT

The district court correctly granted summary judgment based on the arguments presented and materials respectively relied upon by the parties. Under well-established Montana law, a medical malpractice plaintiff, to avoid summary judgment, is affirmatively burdened with producing admissible expert testimony prima facie establishing a nationally applicable standard of care and a departure therefrom. Kipfinger and Cunningham, however, premised most of their opposition to Dr. Kuykendall and Great Falls OB/GYN's motion upon testimony of unqualified witnesses. By merely attaching Dr. Harlass' equivocal written report and two pages of his deposition testimony, as correctly concluded by the district court, Kipfinger and Cunningham failed to carry their burden under Rule 56 and failed to comply with requirements imposed by the operative scheduling order.

Dr. Kuykendall and Great Falls OB/GYN take no position concerning whether the district court should or should not have sua sponte considered the remainder of Dr. Harlass' deposition transcript. However, Kipfinger and Cunningham's new argument – premised almost entirely upon testimony they failed to rely upon in opposing summary judgement – should not be considered. If Kipfinger and Cunningham's novel argument and/or the testimony of Dr. Harlass they failed to rely upon in opposing summary judgment is considered, it should be considered for the same purpose and in the same context as in district court – i.e. determining whether justice required excusal of their substandard briefing, their noncompliance with Rule 56, and their noncompliance with the operative scheduling order.

Regardless, the district court did not abuse its discretion in determining the totality of Dr. Harlass' opinions failed to satisfy evidentiary pre-requisites. Dr. Harlass' opinions are conditional, equivocal, irreconcilable with the Complaint's allegations, and/or concern matters of discretion, personal practice, and/or individual hospital policy rather than a national standard. None of Dr. Harlass' opinions reflect that Dr. Kuykendall more likely than not departed from a nationally applicable standard of care. The district court, therefore, correctly granted summary judgment to Dr. Kuykendall and Great Falls OB/GYN.

//

//

ARGUMENT

Summary judgment should be granted when a movant demonstrates the absence of material factual issues and entitlement to judgment as a matter of law. Mont. R. Civ. P. 56(c)(3). In medical malpractice cases, "no genuine issue of material fact exists and the defendant is entitled to judgment as a matter of law" where there is no admissible expert testimony prima facie establishing the applicable standard of care, a departure from that standard of care, and injury caused by that departure. *Estate of Willson v. Addison*, 2011 MT 179, ¶ 17, 361 Mont. 269, 258 P.3d 410. To avoid summary judgment, the plaintiff is burdened with "affirmatively producing the required expert medical testimony." *Estate of Nielsen v. Pardis*, 265 Mont. 470, 473, 878 P.2d 234, 236 (1994). Failure to affirmatively proffer admissible expert testimony establishing the elements of medical malpractice "is fatal to the plaintiff's claim." *Beehler v. Eastern Radiological Associates, P.C.*, 2012 MT 260, ¶ 21, 367 Mont. 21, 289 P.3d 131.

I. The district court correctly granted summary judgment based on the arguments presented and materials respectively relied upon by the parties.

Kipfinger and Cunningham use the district court as a scapegoat to disguise the real issue at hand. Kipfinger and Cunningham concede they had the burden of producing expert medical testimony prima facie establishing Dr. Kuykendall departed from an applicable standard of care. (Appellant's Opening Brf. 11); *Estate*

of Willson, ¶ 17. Kipfinger and Cunningham contend they "presented the opinions of Dr. Frederick Harlass" to meet that burden, (*Id.*), and blame the district court for purportedly "misreading [] Dr. Harlass's deposition testimony," (*Id.*, at 13). Kipfinger and Cunningham's argument is disingenuous.

In reality, Kipfinger and Cunningham based their opposition to summary judgment primarily upon the testimony of unqualified witnesses.

> Plaintiffs argue against summary judgment . . . citing multiple expert witnesses ***who are not qualified to testify*** [concerning] whether Dr. Kuykendall breached the standard of care. See, § 26-2-601(2), MCA.

(Order at 6-7 (emphasis added), *see also* n. 3). The district court correctly concluded the testimony of those non-obstetrician/gynecologist witnesses was inadmissible under Montana Code Annotated § 26-2-601 as to issues of Dr. Kuykendall's alleged negligence. (*Id.*).[7] As a matter of law, summary judgment cannot be avoided through the inadmissible opinions of unqualified witnesses. *See Lorang v. Fortis Ins. Co.*, 2008 MT 252, ¶ 79, 345 Mont. 12, 192 P.3d 186 ("only admissible evidence may be considered" in resolving a motion for summary judgment).

Only two pages of Dr. Harlass' deposition testimony were relied upon by Kipfinger and Cunningham in opposing summary judgment. (Pls.' SOF ¶ 7 (citing

[7] Kipfinger and Cunningham have not disputed that conclusion.

"Depo Harlass 186-187")).[8] Those two pages, in sum, reflect Dr. Harlass' opinion the C-section should have been called at 3:20pm. (Appellants' Supp. App. Ex. B ("Dep. Harlass, MD") 186:1-187:25). The district court reviewed those two pages, (Order 6 ("The Court combed expert depositions . . . filed by the Plaintiffs")) and was entirely within its discretion to determine the opinion expressed therein failed to satisfy pre-requisite evidentiary standards, (*see* discussion infra § III.D.4).

Despite having an affirmative burden of presenting qualified expert testimony, *Estate of Willson*, ¶ 17; *Beehler*, ¶ 21, Kipfinger and Cunningham did not rely upon Dr. Harlass' other deposition testimony to oppose summary judgment. The district court's order reflects this truth:

> To defeat a motion for summary judgment [a medical malpractice plaintiff] must produce competent expert medical testimony establishing the applicable standard of care [and a] departure from that standard[.]
>
> [***]
>
> The Court combed expert depositions and disclosures filed by the Plaintiffs.
>
> [***]
>
> The Court has concluded . . . the Plaintiffs have not shown a genuine dispute of material fact[.]

//

//

[8] None of the other purported facts relied upon by Kipfinger and Cunningham were premised upon Dr. Harlass' deposition testimony. (Pls.' SOF ¶¶ 1-6, 8-15).

(Order at 2-3, 6, 8-9). Summary judgment, as indicated multiple ways by the district court, was granted because Kipfinger and Cunningham failed to meet their burden under Rule 56 of proffering competent (i.e. admissible opinion from a qualified witness) expert testimony prima facie establishing Dr. Kuykendall departed from an applicable standard of care. (*See Id.*, at 2-3, 6, 8-9, n.2).[9] The district court's grant of summary judgment to Dr. Kuykendall and Great Falls OB/GYN, therefore, "was not only entirely appropriate; it was required as a matter of law." *Estate of Willson*, ¶ 21.

II. Kipfinger and Cunningham's new argument – premised almost entirely upon testimony they did not rely upon at the district court level – should be rejected; alternatively, if Dr. Harlass' complete transcript is considered, it should be considered for the same purpose and in the same context as in district court.

The general rule that neither new arguments nor new legal theories will be considered for the first time on appeal is well established. *Pilgeram*, ¶ 20. This rule is founded in fundamental fairness. *Pilgeram*, ¶ 21. Novel arguments are reviewed on appeal only when failure to previously raise the matter is justified by extenuating circumstances. *Pilgeram*, ¶ 21. This Court is "especially wary of new arguments in the context of summary judgment." *Pilgeram*, ¶ 24.

[9] Notably, Kipfinger and Cunningham do not argue they met their burden as medical malpractice plaintiffs opposing a motion for summary judgment.

Here, upon scrutiny, Kipfinger and Cunningham's appellate argument is almost entirely novel. The legal basis is new, as Kipfinger and Cunningham cited no substantive authority in opposing this aspect of the summary judgment motion. (Pls.' Opp. to Defs.' MSJ 4:19-7:19 (Aug. 16, 2021)). The factual basis is substantially new, as only two pages of Dr. Harlass' deposition testimony were relied upon by Kipfinger and Cunningham in opposing summary judgment. (Pls.' SOF ¶ 7). The two pages of Dr. Harlass' deposition testimony relied upon by Kipfinger and Cunningham in opposing summary judgment, (*Id.*), are **not** cited in the first prong of their new argument, (Appellants' Opening Brf. 14-17), and constitute barely a scintilla of the second prong of their new argument, (*Id.*, at 17-27).

Kipfinger and Cunningham did **not** rely upon the remainder of Dr. Harlass' deposition testimony in opposing summary judgment. (Pls.' Opp. to Defs.' MSJ. 4:19-7:19); (Pls.' SOF). Kipfinger and Cunningham, in fact, concede this point. (Appellants' Opening Brf. n. 2 (representing Dr. Harlass' complete transcript was sua sponte requested by the district court)). Dr. Kuykendall and Great Falls OB/GYN agree the district court "considered all of Dr. Harlass's deposition testimony." (*Id.*). However, Kipfinger and Cunningham's bald assertion that Dr. Harlass' complete transcript was part of the "summary-judgment ruling," (*Id.*), is patently incorrect.

//

//

See Mont. R. Civ. P. 56(c)(3).[10]

Dr. Harlass' complete transcript was considered by the district court to determine whether justice required excusing the failures and shortcomings of Kipfinger and Cunningham's briefing.

> It is not . . . fair to completely erase a claim . . . because a motion was wholly improperly briefed.
>
> [***]
>
> Plaintiffs' briefing is singularly unimpressive and not helpful. It is not the Court's job to organize a cogent argument to defeat summary judgment.
>
> [***]
>
> Simply filing a Statement of Disputed Facts and attaching disclosures for the Court to sift through is not compliance with Rule 56 or the Court's Scheduling Order.

(Order at 6, n.1-2). The district court then explicitly stated it had:

> [E]xpended considerable time reviewing the testimony . . . ***to ensure that the Plaintiffs were treated fairly and justly and were not penalized by [their own] substandard briefing.***

(*Id.*, at 8 (emphasis added)).

Attempting to obscure that crucial distinction and disguise their failures, Kipfinger and Cunningham choose to paint the district court as the villain. Both

[10] Rule 56(c)(3) unambiguously contemplates the summary judgment determination being rendered upon the materials "on file." Kipfinger and Cunningham did not file Dr. Harlass' entire transcript in opposing summary judgment. Nor did the district court file Dr. Harlass' complete transcript with its order. Thus, Dr. Harlass' complete transcript was not "on file" when the district court issued its order. Rule 56(c)(3). The district court's choice not to file Dr. Harlass' complete transcript, taken in context, suggests it was considered for purposes beyond the bona fide summary judgment determination.

prongs of Kipfinger and Cunningham's argument criticize the district court's interpretation of Dr. Harlass' transcript. (Appellants' Opening Brf. 10-11 (arguing the district court erroneously (i) imposed a magic words requirement on Dr. Harlass' testimony and (ii) misread Dr. Harlass' testimony)). Kipfinger and Cunningham neglect to mention ***why*** that testimony was even being considered.

The district court did not consider Dr. Harlass' complete transcript in determining whether summary judgment was appropriate upon the arguments presented and evidence relied on by the respective parties. The district court considered Dr. Harlass' complete transcript, rather, to determine whether justice required excusing Kipfinger and Cunningham's failure to present a cogent argument, failure to comply with Rule 56, failure to comply with the operative scheduling order, and "substandard briefing." (Order at 6, n. 1-2, 8).

The argument now presented by Kipfinger and Cunningham is, at its core, a new argument that should not be considered on appeal. *Pilgeram*, ¶¶ 20-24. Kipfinger and Cunningham were represented by well-qualified counsel – two Montana firms and a nationally recognized firm – at the time of briefing. No extenuating circumstances justify Kipfinger and Cunningham's failure to rely upon any legal authority in opposing this facet of the summary judgment motion. No extenuating circumstances justify Kipfinger and Cunningham's failure to rely upon the complete testimony of their only obstetrician/gynecologist witness in opposing

summary judgment. Accepting Kipfinger and Cunningham's appellate argument at face value, therefore, would eviscerate the affirmative burden of medical malpractice plaintiffs at the Rule 56 stage. *See Estate of Willson*, ¶ 17; *Beehler*, ¶ 21.

Fundamental fairness also precludes consideration of Kipfinger and Cunningham's appellate argument. *Pilgeram*, ¶ 21. Considering Kipfinger and Cunningham's argument at face value would reward "substandard briefing," (Order at 8), and reward noncompliance with court orders. (*Id.*, at n. 2). More problematically, perhaps, considering Kipfinger and Cunningham's argument at face value would penalize the district court for expending additional discretionary effort "to ensure [they] were treated fairly and justly." (*Id.*, at 8).

Dr. Harlass' complete transcript should not be considered in determining whether the district court correctly concluded Kipfinger and Cunningham failed to meet their burden as nonmovants under Rule 56. (Order, at 6 (indicating the district court reviewed expert depositions filed by Plaintiffs), 8-9 (concluding Plaintiffs failed to identify a genuine dispute of material fact)); *see also Estate of Willson*, ¶ 21 (where district court was "required" to grant summary judgment in defendants' favor where the plaintiff failed to file expert testimony establishing an essential element of a medical malpractice claim). Dr. Harlass' complete transcript should be considered only in assessing whether the district court's extra determination – i.e. Kipfinger and Cunningham's failure to meet their Rule 56 burden, failure to comply

with court orders, and failure to present a cogent argument was not excused by that extraneous evidence, (*Id.*, at 6, n. 1-2, 8) – was an abuse of discretion.

III. The district court's evidentiary determinations regarding Dr. Harlass' opinions were not an abuse of discretion and, even if Dr. Harlass' complete transcript is considered, the grant of summary judgment was correct.

Kipfinger and Cunningham apply the wrong standard of review and thus, fail to provide a legally tenable basis to reverse the district court's order. (*See* infra § III.A). Kipfinger and Cunningham also fail to refute the unambiguous points of Montana law supporting the district court's determinations and conclusions. (*See* infra § III.B). The district court neither abused its discretion nor erred in granting summary judgment to Dr. Kuykendall and Great Falls OB/GYN based upon the evidence relied upon by Kipfinger and Cunningham. (*See* infra § III.C). Even if Dr. Harlass' entire transcript is considered, the district court's determinations were not an abuse of discretion, and its grant of summary judgment was nevertheless correct. (*See* infra § III.D).

A. By applying the wrong standard of review to the district court's evidentiary determinations concerning Dr. Harlass' testimony, Kipfinger and Cunningham have failed to present a tenable basis for reversal.

Kipfinger and Cunningham concede they had the burden of producing expert medical testimony prima facie establishing Dr. Kuykendall departed from an applicable standard of care. (Appellants' Opening Brf. at 11). Kipfinger and

Cunningham also concede expert medical testimony failing the 'more likely than not' test is insufficient as a matter of law. (*Id.*, at 14). Kipfinger and Cunningham ignore, however, that determining whether expert medical testimony satisfies the 'more likely than not' test is a question of admissibility. *McClue*, ¶ 29 (expert medical opinion is admissible if it passes the 'more likely than not' test).

Even when passed upon at the summary judgment stage, a district court's determination that expert medical testimony fails the 'more likely than not test' is reviewed under an abuse of discretion standard. *See Butler*, ¶¶ 10-17. The procedural posture of *Butler* was identical to the procedural posture of this matter – a medical malpractice plaintiff appealing an order granting summary judgment in favor of the defendants. *Butler*, ¶ 9. An abuse of discretion standard of review applied to the district court's determinations regarding whether expert medical testimony was rendered with 'more likely than not' certainty. *Butler*, ¶¶ 13-17. In cases involving these intertwined issues, the district court's determinations regarding pre-requisite sufficiency of the expert medical testimony are reviewed for an abuse of discretion, then the remaining summary judgment conclusions are reviewed for correctness. *McClue*, ¶¶ 7-14.

Kipfinger and Cunningham do **not** argue the district court abused its discretion in any way, shape, or form. By failing to apply the appropriate standard of review, *see Butler*, ¶¶ 13-17; *McClue*, ¶¶ 7-14, Kipfinger and Cunningham have

failed to present a tenable legal basis to reverse the district court's determinations that Dr. Harlass' opinions fail the 'more likely than not' standard of admissibility. For this reason, Kipfinger and Cunningham's argument should be rejected.

B. Rather than require 'magic words,' the district court applied unambiguous Montana law.

Kipfinger and Cunningham concede expert medical testimony failing the 'more likely than not' test is legally insufficient, (Appellants' Opening Brf. 14 (quoting *Estate of Willson*, ¶ 18)), and concede *Butler* is valid binding precedent, (*Id.*, at 9 (quoting *Butler*)). Kipfinger and Cunningham choose to ignore, however, *Butler* explicitly stands for the proposition that expert medical testimony reflecting mere possibility fails the 'more likely than not' test as a matter of law. *Butler*, ¶¶ 13-15.

Here, the district court specifically and correctly based determinations regarding Dr. Harlass' opinions upon *Butler's* holding. (Order at 5 (citing *Butler*, ¶¶ 13, 15)). The district court's analysis began with the following unambiguous point: "An opinion about possibilities is insufficient as a matter of law." (*Id.* (citing *Butler*, ¶ 15)). That quotation plainly demonstrates the district court's analysis focused on whether the *substance* of Dr. Harlass' opinions reflected possibility versus probability.

Kipfinger and Cunningham choose to ignore the district court's stated analytical framework and, instead, simply argue the determinations were based on 'magic words.' (Appellants' Opening Brf. 14-17). However, Kipfinger and Cunningham fail to identify where the district court purportedly stated, determined, or concluded magic words were required. (*Id.* (containing no citation to the district court's order)). Kipfinger and Cunningham also fail to address *Butler*, the stated authority upon which the district court's determinations in that regard were explicitly based. (*Id.* (containing no mention of *Butler*)). Most importantly, perhaps, Kipfinger and Cunningham fail to acknowledge another unambiguous rule upon which the district court made determinations.

Medical opinions reflecting something other than a nationally applicable standard cannot establish the first two elements of a medical malpractice claim. *Norris v. Fritz,* 2012 MT 27, ¶ 44, 364 Mont. 63, 270 P.3d 79. A physician's personal practices and/or preferences do not reflect a nationally applicable standard. *Norris*, ¶ 44. Nor do an individual hospital's policies and/or procedures reflect a nationally applicable standard. *Dalton v. Kalispell Regional Hosp.*, 256 Mont. 243, 247, 846 P.2d 960, 962 (1993). The district court specifically determined some or all of Dr. Harlass' opinions were "not based on a national standard of care." (Order at 8). That determination was not an abuse of discretion and was, in fact, correct. (*See* infra § III.D).

In sum, rather than address the district court's actual determinations, Kipfinger and Cunningham argue at a strawman. Even arguendo entertaining Kipfinger and Cunningham's misdirected position, however, the testimony cited fails to demonstrate the district court erred, let alone abused its discretion. (Appellants' Opening Brf. 16-17 (citing Dep. Harlass, MD, 10:7-13, 49:15-50:13, 52:13-54:02, 218:12-17, 221:2-8)). Agreeing it is generally fair to assume opinions are rendered with reasonable certainty, (Dep. Harlass, MD, 10:7-13), is immaterial when specific opinions subsequently given patently reflect mere possibility. Claiming to be generally familiar with standards of care, (*Id.*, at 49:15-50:13, 52:13-54:02), is immaterial when specific opinions subsequently given patently reflect personal practice and/or hospital policy. Purporting to have previously opined Dr. Kuykendall departed from the standard of care, (*Id.*, at 218:12-17, 221:2-8), neither means such an opinion was given nor renders any such opinion admissible. The district court neither abused its discretion nor erred in determining Dr. Harlass rendered no opinion establishing Dr. Kuykendall more likely than not departed from a nationally applicable standard of care.

C. Upon the arguments and evidence respectively relied upon by the parties, the district court did not abuse its discretion and correctly granted summary judgment.

The district court did not abuse its discretion in determining the opinions

contained in Dr. Harlass' written report failed the 'more likely than not' test.[11] Kipfinger and Cunningham's representation that Dr. Harlass' written report lists "eight . . . violations by Dr. Kuykendall," (Appellants' Opening Brf. 18), is demonstrably false. Five of twelve critiques in Dr. Harlass' report are exclusively directed at settled party Benefis, (Harlass Report *Care Critique* ¶¶ 1-2, 4, 9, 12)), and two critiques are directed at no one in particular, (*Id.*, at *Care Critique* ¶¶ 10-11). Of the five remaining critiques in Dr. Harlass' report, three are equivocally directed at settled party Benefis. (*Id.*, at *Care Critique* ¶¶ 3,[12] 7-8)). Equivocal opinions fail the 'more likely than not' test. *Brookins v. Mote*, 2012 MT 283, ¶ 68, 367 Mont. 193, 292 P.3d 347 ("equivocal testimony does not clearly establish the standard of care and a deviation"); *see also Butler*, ¶¶ 13-15. One of the two remaining written critiques, (*Id.*, at *Care Critique* ¶ 5), is irreconcilable with Dr. Harlass' express opinion that Benefis' nurses failed to provide Dr. Kuykendall the necessary information, (*Id.*, at *Care Critique* ¶ 4). Kipfinger and Cunningham concede the remaining written critique, (*Id.*, *Care Critique* ¶ 6), was erroneously written, (Appellants' Opening Brf. n. 4).

//

//

[11] Kipfinger and Cunningham also relied upon two pages of Dr. Harlass' deposition testimony in opposing summary judgment. (Pls.' SOF ¶ 7). For organizational symmetry, those pages are discussed infra in *Section* III.D.4.

[12] Care critique one criticizes Benefis for the same alleged conduct.

The district court neither abused its discretion nor erred in determining Dr. Harlass' written report was legally insufficient to create a material factual dispute. Dr. Harlass' written opinions were – directly, equivocally, and/or irreconcilably – "critical of the hospital." (Order 7-8). Kipfinger and Cunningham had "clearly enough time" to address the deficiencies and equivalencies in Dr. Harlass' written report, particularly post-settlement with Benefis. *Brookins*, ¶ 67. Their failure to do so is no basis to overturn the district court's determinations.

D. The district court's determinations regarding the entirety of Dr. Harlass' testimony were not an abuse of discretion and were, in fact, correct.

The second prong of Kipfinger and Cunningham's argument is almost entirely premised upon testimony not relied upon in opposing summary judgment. (Appellants' Opening Brf. 17-27). If the entirety of Dr. Harlass' testimony is considered on appeal, it should be considered in the same context as was considered by the district court – to determine whether justice required excusing Kipfinger and Cunningham's failure to satisfy their Rule 56 burden, failure to comply with the operative scheduling order, and substandard briefing. (*See* supra § II). Regardless, the district court's determinations that the totality of Dr. Harlass' opinions failed pre-requisite admissibility standards were not an abuse of discretion, and its grant of summary judgment was correct.

1. Dr. Harlass' fetal scalp electrode opinion – explicitly conditional and concededly not based upon a national standard of care – is legally insufficient.

Kipfinger and Cunningham's new argument regarding placement of a fetal scalp lead (a/k/a electrode) is factually flawed and legally incorrect. None of the testimony now presented to this Court, (Appellants' Opening Brf. at 19-20 (citing Dep. Harlass, MD 158-162, 244-246)), was relied upon by Kipfinger and Cunningham in opposing summary judgment, (Pls.' SOF ¶ 7). The district court sua sponte considered this testimony, not to determine whether summary judgment was appropriate under Rule 56, but, rather, to determine whether Kipfinger and Cunningham's failure to meet their burden should be excused. (*See* supra §§ I-II). Moreover, as Kipfinger and Cunningham did **not** even claim Dr. Kuykendall departed from the standard of care by allegedly failing to place a fetal scalp electrode, Dr. Harlass' opinion thereabout would have been entirely irrelevant but for the district court's choice to take *another discretionary step in Kipfinger and Cunningham's favor.* (*See* Order at 7 (treating Dr. Harlass' opinions as substantive amendments to the complaint "to avoid prejudice")).

Regardless, the district court did not abuse its discretion – and correctly concluded – Dr. Harlass' opinion regarding placement of a fetal scalp electrode was legally insufficient. Kipfinger and Cunningham make a dispositive concession:

> Dr. Harlass clarified that a fetal scalp lead is not mandatory with every Category II tracing and would not have been required if Dr. Kuykendall felt the tracing was clearly Category II[.]

(Appellants' Opening Brf. at 19-20). Dr. Harlass' opinion, in other words, is conditional.

Expert opinions turning upon unproven conditions and/or assumptions are legally insufficient to establish the elements of medical malpractice. In *Brookins*, for example, a proffered expert witness opined that, *if* a certain physician had been convicted of a sexual offense, had DEA licensing restrictions, and/or had a history of malpractice, *then* the hospital departed from the standard of care in credentialing that physician without further inquiry. *Brookins*, ¶ 66. This Court explicitly held that opinion was "insufficient to state [] a breach of the standard of care had occurred." *Brookins*, ¶ 66. The conditional opinion, rather, demonstrated the expert witness had inadequate information to offer an affirmative (e.g. more likely than not) opinion. *Brookins*, ¶ 66; *see also Falcon v. Cheung*, 257 Mont. 296, 304, 848 P.2d 1050, 1055-56 (1993) (an opinion the patient should have been transferred more quickly – based on assumptions about the hospital situation – did not establish a departure from the standard of care; it "merely raised the question [of] whether or not a delay in transferring the patient was an issue").

Contrary to Kipfinger and Cunningham's burden-shifting argument, (Appellants' Opening Brf. at 20), Dr. Kuykendall was not required to prove or

disprove the condition upon which Dr. Harlass' opinion depends. Rather, as plaintiffs bringing this medical malpractice claim, Kipfinger and Cunningham were affirmatively burdened with producing admissible expert testimony prima facie establishing Dr. Kuykendall departed from the standard of care. *Estate of Willson*, ¶ 17; *Beehler*, ¶ 21; *Estate of Nielsen*, 265 Mont. at 473, 878 P.2d at 236. Dr. Kuykendall was deposed and other discovery was conducted throughout this litigation. If the fact necessary to establish the condition upon which Dr. Harlass' scalp electrode opinion depends was elicited, Kipfinger and Cunningham were burdened with presenting it. They failed to do so, and the district court's rejection of Dr. Harlass' conditional scalp electrode opinion was neither an abuse of discretion nor error.

Notwithstanding its conditional nature, Dr. Harlass' scalp electrode opinion – as a criticism of Dr. Kuykendall – is irreconcilable with his other opinions. Dr. Harlass' written report states settled party Benefis' "[n]urses failed to notify [Dr. Kuykendall] of the need [for] a fetal scalp lead." (Harlass Report, *Care Critique* ¶ 4 (underlining added)). Thus, even arguendo assuming a nationally applicable standard of care otherwise would have more likely than not required Dr. Kuykendall to place a fetal scalp lead, Dr. Harlass conceded a third party failed to provide the information necessary to act. An opinion based on an unproven condition, and irreconcilable with the witness' other opinions, is legally insufficient to establish the

essential elements of medical malpractice. *See e.g. Brookins*, ¶ 66; *Falcon*, 257 Mont. at 304, 848 P.2d at 1055-56.

Moreover, Dr. Harlass conceded his fetal scalp electrode opinion was **not** based upon a *national* standard of care:

> Q: And [the decision to insert a fetal scalp lead, rupturing the membranes,] would be a physician decision, true, not a nursing decision?
>
> A: Well, I don't know what their protocols are. [. . .]
>
> [***]
>
> A: As I so testified, I don't know what the individual hospital's policies are there. ***That is a hospital specific matter***.

(Dep. Harlass, MD, 247:15-248:14 (emphasis added)). *Norris*, ¶ 44 ("[a] medical malpractice plaintiff must establish that a physician's conduct breached a national standard of care"). An opinion about "a hospital specific matter," (*Id.*), does not establish a national standard of care. Regardless, in the above-cited line of questioning, Dr. Harlass conceded to lacking information necessary to render an affirmative opinion. Premised upon an unproven condition, irreconcilable with his other opinions, concerning a hospital specific matter about which he concededly lacks the necessary information, Dr. Harlass' fetal scalp lead opinion fails to 'more likely than not' establish Dr. Kuykendall departed from a nationally applicable standard of care. *Butler*, ¶ 15; *see also Brookins*, ¶ 66; *Falcon*, 257 Mont. at 304, 848 P.2d at 1055-56; *Norris*, ¶ 44.

2. Dr. Harlass' opinion about ordering Pitocin – explicitly conditional, rationalized through circular logic, and concededly not based upon a national standard of care – is legally insufficient.

Kipfinger and Cunningham's new argument about ordering Pitocin again relies exclusively upon testimony not relied upon in opposing summary judgment. (*Compare* (Appellants' Opening Brf. at 20-21 (citing Dep. Harlass, MD 116-118; 164-165)) *with* (Pls.' SOF ¶ 7)). Kipfinger and Cunningham again point to testimony explicitly based on an unproven condition:

> Q: Across the board, just a clear, bright line departure?
>
> A: ***If*** the physician does not know clearly that's a Category I baby, ***then*** it's beneath the standard of care to implement an oxytocin. . . [.]

(Dep. Harlass, MD, 164:6-11 (emphasis added)). As previously discussed, opinions based on unproven conditions are legally insufficient to establish the elements of medical malpractice. *See e.g. Brookins*, ¶ 66; *Falcon*, 257 Mont. at 304, 848 P.2d at 1055-56. Neither at the district court level nor on appeal have Kipfinger and Cunningham attempted to prove the condition upon which Dr. Harlass' opinion depends.

Instead, Kipfinger and Cunningham simply point to testimony where Dr. Harlass stated an additional or modified caveat to his opinion. (*See* Appellants' Opening Brf. at 21 (citing Dep. Harlass, MD, 165:05-18 (if a fetal scalp lead is used in conjunction, then Pitocin can be initiated with a Category II tracing))). As

previously discussed, however, Dr. Harlass conceded that whether to place a fetal scalp lead is a matter of individual hospital policy – not a national standard – and he lacked information about the individual policy of Benefis. (Dep. Harlass, MD, 247:15-248:14). Dr. Harlass' criticism of Dr. Kuykendall ordering Pitocin, (*Id.*, at 165:05-18), therefore, is a flawed attempt to create a standard of care through circular logic.[13] Moreover, also as previously discussed, Dr. Harlass affirmatively blamed settled party Benefis' nurses for failing to inform Dr. Kuykendall a fetal scalp lead was needed. (Harlass Report, *Care Critique* ¶ 4). Thus, even arguendo assuming the lack of a fetal scalp lead converted otherwise appropriate conduct (ordering Pitocin) into a departure from the standard of care, Dr. Harlass assigns the fault to Benefis – a third party from whom Kipfinger and Cunningham have already received a monetary settlement.[14]

Notwithstanding its illogical, conditional nature, Dr. Harlass' opinion about ordering Pitocin is purely based on Benefis' protocol. (Dep. Harlass, MD, 164:16-165:4). Kipfinger and Cunningham have not argued, let alone established, Benefis' internal protocol applied to Dr. Kuykendall – who was not a Benefis employee.

[13] Under Dr. Harlass' circular rationale, (i) Dr. Kuykendall ordering Pitocin at 1320 would have been appropriate had Dr. Kuykendall simultaneously performed an act unrequired by a nationally applicable standard of care (i.e. place a fetal scalp lead), but (ii) Dr. Kuykendall failing to perform an act unrequired by the nationally applicable standard of care (i.e. place a fetal scalp lead) would somehow convert otherwise appropriate conduct (i.e. ordering Pitocin) into a departure from the standard of care.

[14] To conclude a factual dispute exists, despite Dr. Harlass affirmatively blaming Benefis nurses for failing to provide Dr. Kuykendall the necessary information, would be irreconcilable with Dr. Harlass' concession the standard of care is prospective – i.e. turns on the information the provider had at the time. (Dep. Harlass, MD, 34:22-35:9).

Regardless, hospital protocols, policies, and guidelines cannot establish the standard of care in medical malpractice cases. *Dalton v. Kalispell Regional Hosp.*, 256 Mont. 243, 247, 846 P.2d 960, 962 (1993); *see also Norris*, ¶ 44. Even arguendo assuming Benefis' internal protocol applied to Dr. Kuykendall, Dr. Harlass merely parroting an internal protocol does not establish a nationally applicable standard of care for a board-certified OB/GYN.

In context with his other testimony, moreover, Dr. Harlass' opinion about ordering Pitocin clearly fails the 'more likely than not' test. First, Dr. Harlass framed the opinion as a personal preference at least once. (Dep. Harlass, MD, 168:18-19 ("I personally would not start Pitocin in Category II, unless there was a scalp lead on")). Personal practices and preferences cannot establish the standard of care in medical malpractice cases. *Norris*, ¶ 44. Second, Dr. Harlass conceded Pitocin was given for an appropriate purpose. (*Id.*, at 155:7-21 (testifying Pitocin is given to promote vaginal delivery and agreeing vaginal delivery is preferrable to C-section)). Third, there is an irreconcilable disconnect between Dr. Harlass' criticism of Pitocin being initiated and Dr. Harlass having no criticism of it being administered for the next one hundred minutes. (*Compare Id.*, at 122:6-8 (opining Pitocin probably should have been discontinued at 1520), *with* 163:24 (testifying Pitocin was started at 1340)). Fourth, Dr. Harlass conceded Pitocin performs the same function as a fetal scalp electrode. (*Id.*, at 165:18-166:2 ("[Pitocin] was our fetal scalp lead")). An

opinion premised upon an unproven condition, founded on idiosyncratic preference and hospital policy, rationalized through analytical paradox and circular logic, does not establish with 'more likely than not' certainty that Dr. Kuykendall departed from a nationally applicable standard of care.

3. Dr. Harlass' opinion regarding discontinuation of Pitocin – not directed at Dr. Kuykendall when disclosed and concededly based on personal practice – is legally insufficient.

Dr. Harlass' opinion regarding discontinuation of Pitocin is, likewise, legally insufficient to establish Dr. Kuykendall more likely than not departed from a nationally applicable standard of care. Kipfinger and Cunningham again rely exclusively upon testimony they did **not** rely upon in opposing summary judgment. (*Compare* (Appellants' Opening Brf. at 22 (citing Dep. Harlass, MD, 122:06-17, 166:18-167)) *with* (Pls.' SOF ¶ 7)). In opposing summary judgment, as pertains to this sub-issue, Kipfinger and Cunningham relied only upon the opinion from Dr. Harlass' report: "The Oxytocin should have been discontinued at 1515 at the latest." (Harlass Report, *Care Critique* ¶ 11). That opinion patently fails to establish Dr. Kuykendall more likely than not departed from a nationally applicable standard of care.

As Kipfinger and Cunningham failed to amend or supplement Dr. Harlass' report, no ambiguities nor deficiencies in that opinion should be construed in their

favor. *Brookins*, ¶ 67 (noting the plaintiff "clearly [had] enough time" to address insufficiencies in the expert disclosure). Regardless, it would be patently unreasonable to infer the opinion about discontinuation of Oxytocin is critical of Dr. Kuykendall when the corollary opinion about initiation of Oxytocin is expressly critical of settled-party Benefis' employees. (*Id.*, at *Care Critique* ¶ 2).

Dr. Harlass' deposition testimony, likewise, contains no opinion establishing the nationally applicable standard of care more likely than not required Dr. Kuykendall to discontinue Pitocin by a time certain. Dr. Harlass expressed a belief Dr. Kuykendall should have discontinued Pitocin at 1520. (Dep. Harlass, MD, 122:06-17). Kipfinger and Cunningham contend that belief is based upon a national standard of care simply because Dr. Harlass never stated otherwise. (Appellants' Opening Brf. at 22). Contrary to Kipfinger and Cunningham's flawed position, however, there is no presumption that testimony given by a physician establishes a nationally applicable standard of care.[15] *Estate of Willson*, ¶ 17 (the plaintiff has an affirmative burden of presenting expert medical testimony prima facie establishing the essential elements of a medical malpractice claim).

//

//

[15] This is not a 'magic words' argument. There is a fundamental difference in meaning between (a) an opinion that a person should have done something, and (b) an opinion that a person's failure to do something was unreasonable under national standards of practice in a sub-specialty of a given profession.

Even arguendo assuming such a presumption existed, Kipfinger and Cunningham's argument *still* fails because Dr. Harlass conceded the opinion was merely based on personal practice. (Dep. Harlass, MD, 122:6-17). A physician's personal practices do not establish a national standard of care. *Norris,* ¶ 44. Dr. Harlass' opinion, therefore, is irrelevant, inadmissible, and immaterial. *Id.*; (*Id.* ("And then if you look at 1520. That's where I would have shut off the Pitocin, okay.")). The district court neither abused its discretion nor erred in rejecting this personal practice opinion. (*See* Order at 8).

4. Dr. Harlass' opinion about when the C-section should have been called – dependent on contextually unreasonable presumptions and irreconcilable with the Complaint's allegations – is legally insufficient.

Kipfinger and Cunningham's position concerning when the C-section should have been called, again, erroneously presumes Dr. Harlass' opinion reflects a nationally applicable standard of care. (Appellants' Opening Brf. 22-23). As previously discussed, however, no such presumption exists. Kipfinger and Cunningham were affirmatively burdened with proffering expert testimony establishing the essential elements, including a nationally applicable standard of care. *Estate of Willson*, ¶ 17; *Norris*, ¶ 44. As disclosed, Dr. Harlass' opinion about when the C-section should have been called is not directed at Dr. Kuykendall. (Harlass Report, *Care Critique* ¶ 10).

Even arguendo assuming it could be reasonable to assume an opinion reflects a national standard of care in some cases, it would have been unreasonable for the district court to do so under the present circumstances. Kipfinger and Cunningham concede the pre-requisite sufficiency a medical expert's opinions should be interpreted in context. (Appellants' Opening Brf. at 16 (quoting *Azure*, 182 Mont. at 256)). Thus, Dr. Harlass' opinion about timing of the C-section should be considered against the backdrop of his other five opinions – all of which Dr. Harlass conceded as reflecting merely hospital policy and/or personal practice. (*See* supra § III.D.1-3, infra § III.D. 5-6).

Additionally, Dr. Harlass' opinion in this regard is fatally irreconcilable with Kipfinger and Cunningham's allegations. Allegations of fact are binding against the pleader. *Stevens v. Novartis Pharmaceuticals Corp.*, 2010 MT 282, ¶ 74, 358 Mont. 474, 247 P.3d 244. As correctly noted by the district court, at no relevant point did Kipfinger and Cunningham "move[] to amend their allegations in the Complaint," (Order at 7), even after settling with Benefis. The complaint alleges as fact that "a team to intubate the baby was not available" and that "a neonatologist was not available to attend the delivery." (Compl. ¶ 69). Therefore, to have concluded Dr. Harlass' opinion in this regard created a material factual dispute would have implied the corollary conclusion that a material dispute existed regarding whether a nationally applicable standard of care required Dr. Kuykendall to subject E.C. to a

longer period without oxygenation via intubation. The district court correctly avoided that unreasonable conclusion and absurd corollary.

5. Dr. Harlass' opinion the C-section should have been performed within 30 minutes of calling it – equivocally critical of a third party, concededly premised upon unknowns, and concededly a function of discretion and personal preference– is legally insufficient.

Kipfinger and Cunningham's new argument regarding time elapsed between calling and performing the C-section again relies exclusively upon testimony not relied upon in opposing summary judgment. (*Compare* (Appellants' Opening Brf. at 23-24 (citing Dep. Harlass, MD 127:04-130:10; 169:14-170:13; 181:15-182:11)) *with* (Pls.' SOF ¶ 7). As disclosed, moreover, Dr. Harlass' opinion in this regard was equivocally critical of settled party Benefis. (Harlass Report, *Care Critique* ¶ 7). Equivocal opinions are legally insufficient to establish the elements of medical malpractice. *Brookins*, ¶ 68; *see also Butler*, ¶¶ 13-15.

Regardless, Dr. Harlass' testimony fails to 'more likely than not' attribute the purported delay between calling and performing the C-section to Dr. Kuykendall. At the threshold, Dr. Harlass agreed the C-section was performed thirty-one (31) minutes after Dr. Kuykendall made the decision to perform it, (Dep. Harlass, MD, 127:4-9), meaning his criticism concerns a purported delay of, at most, one minute. Dr. Harlass could **not** attribute that purported minute delay to Dr. Kuykendall. For example, Dr. Harlass agreed the C-section was performed within thirty minutes of

Kipfinger signing the consent form, (*Id.*), and never suggested the consent process should have been skipped. The ostensibly three minutes it took Kipfinger to read and sign the consent form accounts for more than the purported minute upon which Dr. Harlass' criticism depends. More directly, however, Dr. Harlass reiterated he was equivocally critical of settled party Benefis for the purported minute delay and conceded having no knowledge of what happened between the calling and performing of the C-section. (*Id.*, at 252:17-253:6 ("who knows what was going on in that 25 minutes")).

Dr. Harlass also conceded the time between calling and performing a C-section is a discretionary matter of clinical judgment, rather than a nationally applicable standard. The testimony cited by Kipfinger and Cunningham demonstrates Dr. Harlass' opinion simply parrots an American College of Obstetrics and Gynecology bulletin. (*See e.g.* Dep. Harlass, MD, 127:15 *et seq.* ("The ACOG says . . ."), 128:9 *et seq.* ("the ACOG has said . . ."), 129:16 *et seq.* ("the [ACOG] has stated . . ."). Dr. Harlass conceded, however, that ACOG bulletins merely constitute guidelines, not nationally applicable standards of care. (*Id.*, at 133:6-23). Dr. Harlass personally believes practicing by ACOG guidelines is the "the easiest thing to do," (*Id.*, at 129:24-130:10), but conceded classification of and time between calling and performing a C-section are matters of clinical judgment, (*Id.*). Dr.

Harlass' personal belief that practicing by a certain guideline is easiest does not establish a nationally applicable standard of care. *Norris*, ¶ 44.

6. Dr. Harlass' opinion concerning delivery attendance – irreconcilable with Kipfinger and Cunningham's allegations, concededly a mere recitation of a hospital policy, and concededly equivocal – is legally insufficient.

Kipfinger and Cunningham's argument regarding the theory of negligence alleged in the complaint again relies upon testimony not relied upon in opposing summary judgment. (*Compare* (Appellants' Opening Brf. at 24-27 (citing Dep. Harlass, MD, 140-143, 189-192)) *with* (Pls.' SOF ¶ 7)). Even through newfound reliance upon this testimony, however, Kipfinger and Cunningham cannot escape their own allegations. *Stevens*, ¶ 74 (factual allegations are binding against the pleader at any stage of a proceeding). Kipfinger and Cunningham claimed Dr. Kuykendall departed from the standard of care by starting Kipfinger's C-section without ensuring someone capable of neonatal intubation was present, (Compl. ¶ 81), but alleged as fact that:

- The need for intubation was not apparent before the C-section was started (Compl. ¶ 69 ("Once the delivered did occur and the need for an intubation team because apparent . . .")).
- "[A] team to intubate the baby was not available[.]" (Compl. ¶ 69).
- "[A] neonatologist was not available to attend the delivery[.]" (Compl. ¶ 69).

Those allegations, binding against Kipfinger and Cunningham, mean (1) there was no apparent reason for Dr. Kuykendall to have called a provider capable of intubation before the procedure started, and (2) even if there had been reason, neither a NICU team nor neonatologist were available.

Regardless, Kipfinger and Cunningham concede Dr. Harlass' opinion concerns the presence of *someone* (anyone) capable of neonatal intubation. (Appellants' Opening Brf. at 27 (quoting Dep. Harlass, MD, 140:21-141:02 ("there should have been *somebody* there that could intubate"))). Kipfinger and Cunningham alleged as fact, however, that someone capable of intubation – the provider who, in fact, intubated E.C. – was present the entire time. (*See e.g.* Compl. ¶ 50 (Darrin Dixon "was in [E.C.'s] operating room at the start of the delivery.")). Therefore, even arguendo assuming Dr. Harlass had rendered a more likely than not opinion reflecting a national standard of care, the district court's grant of summary judgment upon this sub-issue was *still* correct.

Dr. Harlass' opinion in this regard, however, fails to reflect a national standard of care. Dr. Harlass conceded lacking knowledge as to whether a national standard of care required Dr. Kuykendall to solicit a neonatologist's attendance. (Dep. Harlass, MD, 190:14-18). Putting the cart before the horse, Kipfinger and Cunningham simply presume "the district court took that statement [] out of context." (Appellants' Opening Brf. 25). The first sentence of Dr. Harlass' answer,

however, provides plenty of context: "I think each hospital has to decide who has the capability and [is] in-house to intubate." (Dep. Harlass, MD, 190:14-18). These issues, in other words, are matters of individual hospital policy, not a national standard. Dr. Harlass' written report and other testimony demonstrate the same:

- The hospital failed to follow ***its own policy*** with respect to attendance[.] (Harlass Report, *Care Critique* ¶ 12).
- This clearly was a violation of ***their protocol***. (Dep. Harlass, MD, 140:7-8).
- ***[P]er the protocol*** there should have been somebody there that could intubate (*Id.*, at 140:24-141:2).

(Emphasis added to each). As a matter of law, merely reciting Benefis' internal policy fails to establish a national standard of care applicable to Dr. Kuykendall. *Dalton*, 256 Mont. at 247, 846 P.2d at 962; *see also Norris*, ¶ 44.

Dr. Harlass' opinion in this regard also fails the 'more likely than not' test. The line of questioning concerning his delivery attendance opinion culminated in Dr. Harlass stating:

> Whether at the discretion of the nurse, the doctor, or both, per the protocol, there should have been somebody there that could intubate.

(Dep. Harlass, MD, 139:23-141:2). Accordingly, in Dr. Harlass' opinion, the onus *could* have fallen to Benefis nurses, *could* have fallen to Dr. Kuykendall, or *could* have fallen to both. Opinions reflecting mere possibilities (e.g. "could have") are insufficient as a matter of law. *Butler*, ¶ 15. For myriad reasons, therefore, the

district court did not abuse its discretion and correctly rejected Dr. Harlass' opinion about delivery attendance.

CONCLUSION

Dr. Kuykendall and Great Falls OB/GYN respectfully request this Court affirm the district court's order. As plaintiffs bringing a medical malpractice action, Kipfinger and Cunningham were affirmatively burdened with proffering admissible expert testimony prima facie establishing the essential elements of their claim in response to Dr. Kuykendall and Great Falls OB/GYN's motion for summary judgment. Kipfinger and Cunningham failed to do so.

"It [was] not the [district court's] job to organize a cogent argument to defeat summary judgment [on Kipfinger and Cunningham's behalf]." (Order n. 1). Kipfinger and Cunningham chose to rely upon an equivocal report primarily directed at settled party Benefis and a mere two pages of Dr. Harlass' deposition testimony. The district court went out of its way, expending "considerable time" reviewing the remainder of Dr. Harlass' testimony, to ensure Kipfinger and Cunningham "were not penalized by [their own] substandard briefing." (*Id.*, at 8). To reverse the district court's order would reward noncompliance and nonchalance.

The argument Kipfinger and Cunningham now present is misrepresentative of the summary judgment proceedings and disrespectful to the district court. Nevertheless, even represented by two Montana law firms and two out-of-state law

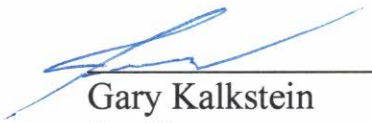
firms, Kipfinger and Cunningham cannot demonstrate the district court erred, let alone abused its discretion. Dr. Harlass' opinions are riddled with uncertainty, primarily critical of a settled party Benefis, and concern matters of personal preference and/or internal hospital policy. The district court correctly applied Montana law and was entirely within its discretion to prevent a jury from potentially awarding a verdict against Dr. Kuykendall and Great Falls OB/GYN based on inadmissible testimony and emotional appeal.

RESPECTFULLY SUBMITTED this 28th day of June, 2022.

Gary Kalkstein
Joe Newman

CERTIFICATE OF COMPLIANCE

1. This brief complies with the typeface and text-style requirements of M. R. App. P. 1192) because this brief has been prepared in proportionally spaced typeface using 14-point Times New Roman Style.
2. This brief complies with the line-spacing requirements of M. R. App. P. 11(3)(b) because the brief is double spaced, except for footnotes and quoted and indented material.
3. This brief complies with the type-volume limitation of M. R. App. P. 11(4)(a) because this brief contains less than 10,000 words, excluding the parts of the brief exempted by M. R. App. P. 11(4)(d).



Gary Kalkstein
Joe Newman

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of June, 2022, I served a true and correct copy of Appellees' Response Brief to Appellants' Opening Brief via U.S. Mail on the following:

Daniel J. Flaherty
FLAHERTY GALLARDO
LAW FIRM
1026 1st Avenue South
P.O. Box 1968
Great Falls, MT 59403
Telephone: (406) 727-8494
Facsimile: (406) 727-8537
daniel@greatfallsfirm.com

Michael L. Brooks
THE BROOKS LAW FIRM
7100 N. Classen Blvd., Ste. 300
Oklahoma City, OK 73116
Telephone: (405) 840-1066
Facsimile: (405) 843-8446
michael.brooks@brookslawok.com

Nicholas C. Rowley
Benjamin R. Novotny
TRIAL LAWYERS FOR JUSTICE
421 West Water St., 3rd Floor
Decorah, Iowa 52101
Telephone: (563) 382-5071
Facsimile: (888) 801-3616
nick@tl4j.com
ben@tl4j.com

William V. Ballew, III
BALLWE LEGAL, P.C.
530 Highland Park Dr.
Missoula, MT 459803
Telephone: (406) 414-9546
Facsimile: (406) 414-9549
will@ballwelegal.com

Attorneys for Appellants

Gary Kalkstein
Joe Newman

CERTIFICATE OF SERVICE

I, Gary Darling Kalkstein, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 06-28-2022:

William V. Ballew (Attorney)
530 Highland Park Drive
Missoula MT 59803
Representing: Ben Cunningham, Stephanie Kipfinger
Service Method: eService

Paul Gallardo (Attorney)
1026 1st Avenue South
Great Falls MT 59401
Representing: Ben Cunningham, Stephanie Kipfinger
Service Method: eService

Joe J. Newman (Attorney)
225 N Adams St
Missoula MT 59801
Representing: Great Falls Obstetrical and Gynecological Associates, Julie Kuykendall
Service Method: eService

Daniel J. Flaherty (Attorney)
P.O. Box 1968
Great Falls MT 59403
Representing: Ben Cunningham, Stephanie Kipfinger
Service Method: E-mail Delivery

Benjamin Novotny (Attorney)
421 West Water Street, Third Floor
Decorah IA 52101
Representing: Ben Cunningham, Stephanie Kipfinger
Service Method: E-mail Delivery

Michael L. Brooks
The Brooks Law Firm
7100 N. Classen Blvd., Ste. 300
Oklahoma City OK 73116
Service Method: E-mail Delivery
E-mail Address: michael.brooks@brookslawok.com

Nicholas c. Rowley
Trial Lawyers for Justice
421 West Water St., 3rd Floor
Decorah IA 52101
Service Method: E-mail Delivery
E-mail Address: nick@tl4j.com

Electronically signed by Jennifer Loobey on behalf of Gary Darling Kalkstein
Dated: 06-28-2022