IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

GERALD SYNDER,
Plaintiff-Appellant,

vs.

Court of Appeals No. 32,303
Dist. Ct. No. D-506-CV-2010-00054

LEA REGIONAL MEDICAL CENTER, JOHN C. HARMSTON, M.D., KRYSTEN MCCOOL, PA, JOHN AND/OR JANE DOES 1 – 5

Defendants-Appellees.

BRIEF IN CHIEF

Civil Appeal from the Fifth Judicial District Court
County of Lea
The Honorable Mark Sanchez

The Sawyers Law Group
James W. Klipstine, Jr.
1601 N. Turner, Suite 400
Hobbs, NM 88240
575 393-1300
Attorney for Plaintiff-Appellant

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NATURE OF THE CASE

This is the appeal of the grant of summary judgment in a medical malpractice case.

SUMMARY OF RELEVANT FACTS

Gerald Snyder was injured on the job when he stepped from his pickup on an oilfield location near Eunice, New Mexico and heard something snap in his knee. [RP 549; DS 2]

On advice of his worker's compensation carrier he sought the assistance of Dr. John Harmston, an orthopedic surgeon in Hobbs, New Mexico for treatment of the problem. Dr. Harmston, after examination, recommended a total knee replacement. On January 16, 2007 surgery was performed on Mr. Snyder at Lea Regional Hospital in Hobbs, New Mexico. [RP 549, DS 2].

After surgery Mr. Snyder noticed and photographed an injury to his knee where the compression wrapping on the knee had cut into the flesh on the side and back of the knee. After the surgery Mr. Snyder reported to Dr. Harmston that he had numbness and foot drop to his operative leg. The operative dressing was removed and disclosed blisters and necrotic skin perpendicular to the long axis of the leg, at the region of the peroneal nerve. [RP 549, DS 2].

Subsequently, Mr. Snyder was diagnosed with peroneal nerve palsy resulting in drop foot. He was subsequently discharged from his position as a pumper in the

oilfield and has since been placed on Social Security disability. [RP 549, DS 2].

COURSE OF THE PROCEEDINGS

On January 14, 2010 Mr. Snyder filed a Complaint against Dr. Harmston, his nurse-practitioner assistant, and the hospital alleging medical negligence. After taking the deposition of Robert Tonks, M.D., an expert retained by Plaintiff, Mr. Snyder stipulated to a judgment dismissing the nurse-practitioner and the hospital. [RP 549, DS 2]

On May 15, 2012 Dr. Harmston filed a Motion for Summary Judgment based on a claim that Plaintiff's expert, Dr. Tonks, failed to establish an essential part of Plaintiff's claim- causation. [Plaintiff filed a response to Defendant Harmston's Motion for Summary Judgment but his Response was filed on June 13, 2012 and the trial court refused to consider the Response. Plaintiff was allowed to argue the evidence submitted by Defendant Harmston in his Motion. All references to the evidence presented, therefore, are from evidence submitted by Defendant Harmston in his Motion for Summary Judgment.] [RP 549-550, DS 2-3].

Dr. Harmston in his Motion for Summary Judgment and its accompanying brief attached excerpts from the deposition of Robert Tonks, M.D. as well as the opinion letter of Dr. Tonks submitted by Plaintiff pursuant to a scheduling order by the trial court. References to the Motion will be noted as Motion, p.___, Fact ____;

to the opinion letter: Ex.1 Tonks opinion p. ___; to the deposition Ex.2 Tonks deposition p. _____, line _____. [RP 550, DS 3]

Dr. Tonks in his opinion letter, attached as Exhibit 1 to Dr. Harmston's Motion stated in relevant part that Dr. Harmston fell below the standard of care in the treatment of Mr. Snyder. The basis of this opinion was that although the surgery was mechanically sound, "losing the drain and wrapping a compressive dressing around the knee caused pressure on the peroneal nerve caught between the swollen knee and the tight compressive dressing." The opinion was stated by Dr. Tonks to be to a degree of medical certainty. [RP 443, Ex. 1 Tonks opinion p. 2].

At his deposition, Dr. Tonks stated under oath his opinion at the time of the deposition was the same that stated in the opinion letter. [RP 438, Ex. 2 Tonks depo p. 15 line 21 - p.16, line 5].

Dr. Tonks expressed the opinion that some orthopedic surgeons after knee replacement surgery use a drain and some don't use a drain. [RP 442, Ex. 2 Tonks depo p. 48, lines 1 – 22]. He goes on to state:

> "If you don't put a drain in, you're assuming there's going to be a lot of bleeding. When you pull the drain out accidently, now the assumption you're making is the blood is going to be profusive inside the knee, it's not going to be drained out anymore because you pulled the drain out. So either you put a drain in there or you allow for

swelling. But you can't put a compressive dressing on a wound that you expect to bleed, expect not to have problems.

That's really what this case is. There's a lot of bleeding here in the case. There was no place for that blood to go except expand inside the knee. And then there was compressive dressing on the outside and the nerve got caught between the compressive dressing on the outside and the swelling on the inside of the knee."

[RP 442, Ex. 2 Tonks depo p. 46, lines 4 – 18].

Dr. Tonks stated clearly:

Is it okay not to have a drain and have a compressive wrap? No.

[RP 443, Ex. 2, Tonks depo. p. 53, lines 13 – 14].

Undisputed fact Number 17 in Dr. Harmston's Motion for Summary Judgment, accepted as true for purposes of the Motion, acknowledges the crux of Dr. Tonks opinion of medical negligence was that after the drain was pulled from Plaintiff's knee, causing blood to expand in Plaintiff's knee, Dr. Harmston used a compressive wrap on the knee, which applied pressure on the knee and caused the peroneal nerve to be caught between the wrap and the swelling inside the knee, leading to peroneal nerve damage. [RP 422-423, Motion, p. 4-5, fact. 17].

Dr. Harmston asserted in his Motion for Summary Judgment that because Dr. Tonks could not quantify the amount of pressure placed on Mr. Snyder's

peroneal nerve by the combination of the swelling caused by blood with no place to go and the compressive wrapping, he failed to establish that the combination resulted in the harm [RP 551, DS 4].

In his Motion Dr. Harmston asserts Dr. Tonks opined the worrisome issue with nerve compression is pressure to the nerve. [RP 444, Ex. 2, Tonks depo at p. 54, lines 13 – 16]. Dr. Tonks believes nerves go out based on a continuum of quantity of pressure applied over time. A small amount of pressure applied over a longer period of time or a larger amount of pressure applied over a shorter period of time may cause a nerve to go out. [RP 446, Ex. 2, Dr. Tonks depo at p. 62, lines 3 – 12].

Dr. Harmston further asserted in his Motion that because of this opinion by Dr. Tonks on how nerve injury occurs, he must be able to show in Mr. Snyder's case the amount of pressure the compressive wrap actually applied to the knee and the amount of time over which the pressure was applied. [RP 429, Motion p. 10, line 42].

In his Motion, Dr. Harmston pointed to the following evidence to support his position:

Q. …Is there any way to tell us within a reasonable degree of medical probability how much millimeters of mercury the compressive wrap used on him, how much pressure was put?

A. No.

[RP 430, Motion p. 11, Ex.2 Tonks depo p. 51, line 16, p. 52, line 15].

Q. As you sit here today can you, within a reasonable degree of medical probability, tell us whatever compression you believe was put on the nerve was from the compressive wrap that was put on the 16th or the wound redressing on the 19th? Can you say one way or another?

A. I don't know.

[RP 430, Motion p.11, Ex. 2 Tonks depo p.68, lines 19-25]

At the time of the hearing on the Motion, Plaintiff argued the evidence outlined above, all of which was before the Court as a matter of record by Defendant Harmston's pleadings, was sufficient to establish an issue of fact sufficient to preclude judgment as a matter of law. Dr. Harmston argued that Plaintiff's expert's failure to quantify the exact amount of pressure applied by the combination of swelling and compressive wrapping to the nerve failed to establish causations. Summary Judgment was granted by the trial court [RP 538].

The grant of summary judgment was appealed. [RP 542]. The New Mexico Court of Appeals initially proposed summary reversal of the grant of summary judgment. [CN1- p. 1] The court stated that summary judgment is appropriate where there are no genuine issues of material fact and movant is entitled to judgment as a matter of law. **Self v. United Parcel Service**, 1998 NMSC 046, 126

NM 396, 970 P2d 582. Citing **Woodhull v. Meinel**, 2009 NMCA 015, 145 NM 533, 202 P3d 126, the Court of Appeals further stated that it was mindful that summary judgment is a drastic remedial tool which demands the exercise of caution in its application and appellate courts should review the record in the light most favorable to support trial on the merits.[CN1-p.2]

The burden is always on the moving party to show an absence of a genuine issue of fact and that it is entitled as a matter of law to judgment in its favor. **Brown v. Taylor** 120 NM 302, 305, 901 P2d 720 (1995). Even if the basic material facts are undisputed, if equally logical but conflicting reasonable inferences can be drawn from the facts an award of summary judgment is inappropriate. **Marquez v. Gomez** 116 NM 626, 631, 866 P2d 354 (NMCA 1991)[CN1-p.3]

In its first proposal of summary reversal of the trial court's grant of summary judgment, this Court identified Dr. Harmston's argument as being "the failure of Plaintiff's expert to quantify the amount of pressure placed by the compressive wrap or the length of the time Plaintiff's peroneal nerve was compressed, rendered the expert opinion speculative on the issue of causation." [CN1-p.5]

The court noted that for a plaintiff to establish medical negligence, a plaintiff must show: "(1) the defendant owed the plaintiff a duty recognized by law; (2) the defendant breached the duty by departing from the proper standard of medical

practice recognized in the community; and (3) the acts or omissions complained of proximately caused the plaintiff's injuries." **Blauwkamp v. Univ. of N.M Hosp.**, 114 N.M. 228, 231, 836 P.2d 1249, 1252 (Ct. App. 1992). The proximate cause of an injury must be an act which actually aids in bringing about an injury; it need not be the last or nearest act, nor need it be the sole cause of the injury. **Martinez v. First Nat'l Bank of Santa Fe,** 107 N.M. 268, 270, 755 P.2d 606, 608 (Ct. App. 1987). The Court further noted that, "[w]ith few exceptions, proximate cause is a question of fact to be determined by the factfinder." **Lerma ex rel. Lerma v. State Highway Dep't,** 117 N.M. 782, 784-85, 877 P.2d 1085, 1087-88 (1994). [CN1-p.5-6].

The Court concluded that to the extent the district court held that the expert testimony did not establish to a degree of reasonable medical probability that there existed a causal connection between the alleged malpractice and the injury, the Court proposed to disagree citing **Alberts v. Schultz**, 1999-NMSC-015, ¶ 38, 126 N.M. 807, 975 P.2d 1279 (stating that a plaintiff's burden is one of "reasonable medical probability"). The Court suggested that the expert's opinion in the Snyder case was "sufficient to support an inference that the injury was caused by the failure of the party in control to exercise due care" citing **Mireles v. Broderick**, 117 N.M. 445, 448, 872 P.2d 863, 866 (1994) (indicating that it is appropriate for a medical negligence case to go to the jury where an expert provides "the foundation

for an inference of negligence . . . that a certain occurrence indicates the probability of negligence"). "An inference is not a supposition or a conjecture, but is a logical deduction from facts proved[.]" **Romero v. Philip Morris Inc**., 2010-NMSC-035, ¶ 10, 148 N.M. 713, 242 P.3d 280. When reasonable inferences may be drawn, summary judgment is inappropriate. [CN1-p.6]

Dr. Harmston filed a memorandum in opposition to the proposed summary reversal asserting as he did in his Motion for Summary Judgment that the testimony of Plaintiff's expert, Dr. Tonks, failed to establish proximate causation between Dr. Harmston's negligence in wrapping the knee with a compression wrap without providing an outlet for the inevitable pressure buildup and the subsequent nerve injury because Dr. Tonks could not state the exact amount of pressure applied over the precise period of time to the nerve and, therefore, could not state that the negligent act caused the injury [MIO1-1]. His position was that to establish causation, the Plaintiff must have expert testimony that shows the alleged conduct caused the alleged injury to a reasonable degree of medical probability. **Bourgeous v. Horizon Healthcare Corp.**, 117 N.M. 434, 440, 872 P.2d 852, 858 (1994). "The burden of proving reasonable medical probability rests with the plaintiff, and a causal connection between the alleged act of malpractice and the Plaintiff's loss or damages cannot be substantiated by arguments based upon conjecture, surmise, or speculation." **Alberts v. Schultz**, 1999-NMSC-015, 1138,

126 N.M. 807, 975 P.2d 1279. [MIO1-1-2]. To put it another way, "proximate cause must be shown as a probability, not a possibility." *Id.* at 1138, 1288 (citing **Buchanan v. Downing,** 74 N.M. 423, 426, 394 P.2d 269, 271-72 (1964)). MIO1-1-2].

He also raised the issue that **Mireles v. Broderick**, 117 NM 445, 872 P2d 863 (1994) cited by the Court in its proposed summary reversal which addressed the issue of allowing a jury to determine medical negligence was, in fact, based on a claim of res ipsa loquitar and causation in such cases is different than in claims for direct negligence. [MIO1-5].

The Court of Appeals in a second notice of proposed summary disposition again proposed summary reversal but withdrew any reliance on **Mireles v. Broderick**, supra. [CN2-3]. The court stated in its second calendar notice proposing reversal that the standard in New Mexico for proving proximate causation in a medical negligence case is "proof to a reasonable degree of medical probability." **Alberts v.Schultz**, 1999-NMSC-015, ¶ 29,126 N.M. 807,975 P.2d 1279. This does not require proof to an absolute certainty. Rather, the plaintiff need only present "evidence that the injury more likely than not was proximately caused by the act of negligence." *Id.; see also id.* ¶ 30 ("Both the `preponderance of evidence' and the `reasonable degree of medical probability' standards connote proof that a causal connection is more probable than not."). The Court stated that

it appears that Plaintiff's expert satisfied that burden by testifying that Dr. Harmston's use of a compressive wrap without a way to drain the wound caused the damage to Plaintiff's peroneal nerve. Dr. Harmston, therefore, did not meet his burden on summary judgment of negating the element of causation. **Blauwkamp v. Univ. of N.M. Hosp.**, 114 N.M. 228, 231, 836 P.2d 1249, 1252 (Ct. App. 1992) ("A defendant seeking summary judgment in a medical malpractice action bears the initial burden of negating at least one of the essential elements upon which the plaintiffs claims are grounded." [CN2-4].

To the extent Dr. Harmston took issue with Plaintiff's expert's inability to quantify the precise amount of pressure applied or the exact duration of time, the Court suggested that it was a matter of the weight of the evidence and credibility of the expert and is an impermissible basis for granting summary judgment. **Juneau v. Intel Corp.,** 2006-NMSC-002, ¶ 27, 139 N.M. 12, 127 P.3d 548 (stating that "summary judgment is not an appropriate vehicle for courts" to weigh the evidence and judge the credibility of the witnesses). [CN2-4-5].

Dr. Harmston filed a memorandum in opposition to the second proposed summary reversal asserting that the case cited by the Court in its proposed second notice of summary disposition , **Alberts v. Schultz,** 1999 NMSC 015, 126 NM 807, is factually similar to the Snyder case on appeal and that, therefore, proximate

causation could be decided as a matter of law. [MIO2-3]. The Court of Appeals then assigned to this case to its general docket to brief this issue.

ISSUE PRESENTED

A. CONTENTIONS OF APPELLANT

1. The opinion evidence of a well-qualified expert who states the reasons for his opinion creates an issue of fact in a medical malpractice case that precludes the entry of summary judgment.
2. The fact that a well-qualified expert cannot testify to the exact amount of pressure placed on a knee joint over a precise period of time , which pressure has in his opinion to a reasonable degree of medical certainty resulted in nerve injury, does not render his opinion speculative but, if anything, goes to the weight and credibility of his opinion.

B. STANDARD OF REVIEW

1. **Read v. Western Farm Bureau Mutual Ins. Co.**
   90 NM 369; 563 P2d 1162 (NMCA 1977)

   On Summary Judgment the appellate Court must view the matters presented in the most favorable aspect they will bear in support of the right to trial on the issue.

2. **Pharamaseal Labs, Inc. v. Goffe**
   90 M 753, 568 P.2d 589 (1977)

   In deciding whether Summary Judgment was proper, reviewing Court

must look to the whole record and take note of any evidence therein which puts a material fact at issue.

3. **Self v. United Parcel Serv., Inc.,**
1998-NMSC-046, 126 N.M. 396, 970 P.2d 582

Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. The appellate court reviews these legal questions de novo.

C. PRESERVATION OF THE ISSUE

The issue was preserved by the Plaintiff appearing and arguing the evidence at the hearing on the Motion for Summary Judgment.

ARGUMENT

SUMMARY JUDGMENT WAS NOT PROPER IN THIS CASE

The sole issue on appeal in this case is whether the trial court was correct in granting summary judgment for Dr. Harmston in the face of a well-qualified expert opinion expressed by Dr. Tonks, the Plaintiff's expert.

Dr. Tonks' credentials and qualifications have not been disputed. Rather Dr. Harmston bases his claim of right to summary judgment on the claim that Dr. Tonks' undisputed testimony is insufficient to establish causation as a matter of law.

Dr. Tonks clearly and unequivocally states that Dr. Harmston fell below the

applicable standard of care and was negligent in his treatment of Mr. Snyder. Dr. Tonks' expert opinion was precisely stated in his opinion letter, to wit: " Dr. Harmston fell below the standard of care in the treatment of Mr. Snyder" [RP 443, Ex.2, Tonks opinion. p. 2].

New Mexico law in this area is embodied in its most direct expression in **UJI Civil 13-1101 NMRA** which sets out the following method imposed on claimants in proving negligence:

In treating, operating upon, and caring for a patient, John Harmston, M.D. is under the duty to possess and apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified doctors practicing under similar circumstances, giving due consideration to the locality involved. A doctor who fails to do so is negligent.

The only way in which you may decide whether the doctor in this case possessed and applied the knowledge and used the skill and care which the law required of him is from evidence presented in this trial by a doctor testifying as an expert witness. In deciding this question, you must not use any personal knowledge of any of the jurors. [As adapted for the facts of this case.]

The clear expression of expert opinion that Dr. Harmston was negligent provided by an undisputedly qualified expert, Dr.Tonks, creates an issue of material fact which precludes summary judgment when the opinion is more than a

simple conclusory statement. The opinion is more than a conclusory statement when it includes a statement of the reasons for the conclusions.

Dr. Tonks stated the precise reasons for his conclusion of negligence in his expert report as well as his deposition, facts which were submitted to the trial court in Dr. Harmston's motion for summary judgment. His opinion was based on the fact, to a reasonable degree of medical certainty, that losing the drain and wrapping a compressive wrapping around the knee caused pressure on the peroneal nerve caught between the swollen the and the tight compressive dressing which resulted in the injury to the nerve. [RP 443, Ex.1, Tonks opinion p.2]

Dr. Harmston takes Dr. Tonks' statements out of context to attempt to show that because he cannot state the exact amount of pressure applied over a precise period of time in Mr. Snyder's knee joint the Plaintiff cannot establish that the negligence of Dr. Harmston proximately caused the injury to Mr. Snyder. This position is incorrect.

Again the clearest expression of causation in contained in the Uniform Jury Instructions, **UJI Civil 13-305 NMRA**: An act or omission is a "cause" of injury or harm if it contributes to bringing about the injury or harm, and if injury would not have occurred without it. It need not be the only explanation for the injury or harm, nor the reason that is nearest in time or place. It is sufficient if it occurs in combination with some other cause to produce the result. To be a "cause", the act

or omission, nonetheless, must be reasonably connected as a significant link to the injury or harm. [As adapted to the facts in this case.]

The Court of Appeals in its second proposed notice of summary reversal clearly stated the correct standard: The standard in New Mexico for proving proximate causation in a medical negligence case is "proof to a reasonable degree of medical probability." **Alberts v.Schultz**, 1999-NMSC-015, ¶ 29,126 N.M. 807,975 P.2d 1279. This does not require proof to an absolute certainty. Rather, the plaintiff need only present "evidence that the injury more likely than not was proximately caused by the act of negligence." *Id.; see also id.* ¶ 30 ("Both the `preponderance of evidence' and the `reasonable degree of medical probability' standards connote proof that a causal connection is more probable than not."). The Court stated that it appears that Plaintiff's expert satisfied that burden by testifying that Dr. Harmston's use of a compressive wrap without a way to drain the wound caused the damage to Plaintiff's peroneal nerve. [CN1-5].

Dr. Tonks did that when he testified in his deposition:

" That is really what this case is. There's a lot of bleeding here in the case. There was no place for that blood to go except expand inside the knee. And then there was compressive dressing on the outside, and the nerve got caught between the compressive dressing on the outside and the swelling on the inside of the knee" [RP 442, Tonk's depo: p. 46, lines 15-18].

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" If you put a drain in and the drain comes out, now your thought process is to let the knee bleed, and - but there is no drain to let the blood out, so now it is going to expand.

If you put a compressive dressing where you let the blood expand, that is where the problem comes in because now you compress everything in the middle - the skin, the nerves, the fascia, all the things that are bad caught between the swelling inside and the constriction outside." [RP 442, Tonk's depo. p. 47, lines 11-23].

Attacks on Dr. Tonks opinion by their very nature raise an issue of fact to be resolved by the factfinder. The authorities cited by the Court of Appeals in its two proposals for summary reversal on this position are exactly correct. Dr. Harmston's position that the issue of the time period and the exact amount of pressure on the nerve disqualifies Dr. Tonks opinion is simply not correct. The amount of pressure and the time period over which it was applied does nothing to invalidate Dr. Tonks' conclusion that the negligence occurred when Dr. Harmston applied a compression wrap without providing any way for the pressure to be relieved from the knee. The result of that buildup of pressure compressed the nerve between the swelling in the knee and the compressive wrap resulting in nerve injury. The Court of Appeals quite appropriately noted that with a few exceptions,

proximate cause is a question of fact to be determined by the factfinder. **Lerma ex rel Lerma v. State Highway Department** ,117 NM 782, 877 P2d 1085 (1994). [CN1-5-6].

Dr. Harmston relies on the following exchange during Dr. Tonks' deposition to support his claim that Plaintiff cannot establish proximate causation as a matter of law.

> Q. Is there any way to tell how much pressure is put on the tissues by one of these compressive wraps?
>
> A. No.
>
> Q. When – I mean, like could you quantify it by pounds per square inch or any other measurement?
>
> A. If you quantify it, it would be millimeters of mercury pressure. They are compressive dressings that you put on for, you know, venostasis disease that have various levels of compression, from 15 to 40 millimeters of pressure.
>
> Q. Now, as it applies to Mr. Snyder, we do not know how much pressure was put on his tissues by the compressive dressing, true?
>
> A. That is correct.
>
> Q. In any quantitative way?
>
> A. Correct.

Q. As you said here right now, you could not tell us how much?

A. Too much.

Q. *Well, I mean, quantitatively could you tell us? Is there any way to tell us within a reasonable degree of medical probability how much millimeters of mercury the compressive wrap used on him, how much pressure was put?* [emphasis added]

A. *No.* [emphasis added]

[RP 443, Tonks depo page 51, line 16 - page 52, line 15].

Although Dr. Harmston emphasizes Dr. Tonks' failure to be able to state how many millimeters of mercury pressure was caused by the compressive wrap, the critical response is Dr. Tonks' answer to the prior question that it was "too much" pressure.

Dr. Harmston's conclusion contained in his response to the second proposed disposition by summary reversal that, based on the experts inability to quantify the pressure, it is impossible to establish within a reasonable degree of medical probability that the compressive wrap this case created enough pressure to cause the injury asks this Court to ignore the obvious response from Dr. Tonks that the wrap created "too much" pressure.

Dr. Harmston's reliance on **Alberts v. Schultz** 1999 NMSC 015, 126 NM 807 is completely misplaced. In **Alberts,** supra. the claim of negligence was that

the treating physician failed to timely examine the patient to ascertain his condition and then delayed in referring the patient to a specialist. The issue of negligence in **Alberts**, supra. was failure to timely provide services. That is not the issue of negligence in this case. The issue of negligence in this case is the inappropriate wrapping of the joint resulting in nerve injury.

CONCLUSION

The trial court should not have granted summary judgment in this case. The expert opinion of Mr. Snyder's expert, Dr. Robert Tonks, became more than a conclusory statement when Dr. Tonks stated with specificity the basis of his expert opinion. This opinion created a genuine issue of material fact which precluded the grant of summary judgment. Disputes concerning the basis of the expert opinion should be properly resolved by the factfinder.

Dr. Tonks inability to state the exact amount of pressure or the time period over which the pressure was applied to the peroneal nerve does not constitute an inability to establish proximate causation particularly when the doctor testified. that "too much" pressure was the proximate cause of the nerve injury when Dr. Harmston wrapped his patient's knee joint without providing a way for the pressure to be released.

The trial court's grant of summary judgment should be reversed and this matter should be remanded for trial on the merits.

THE SAWYERS LAW GROUP

By James W. Klipstine, Jr.
1601 N. Turner, Suite 400
Hobbs, NM 88240
Tel No. 575 393 1300
Fax No. 575 393 1869
Jklipstine@klipsawlaw.com

CERTIFICATE OF SERVICE

I, James W. Klipstine, Jr. hereby certify that a true and correct copy of the foregoing Brief in Chief to J. Scott Mann, Kemp Smith LLP, 221 North Kansas Street #1700, El Paso, Texas 79901-1401. This was done on the 23rd day of May, 2013.

James W. Klipstine, Jr.