MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT
GALLATIN COUNTY

JULIE KOSTELECKY, an individual, on behalf of herself and her minor child S.M.K.; JASON KOSTELECKY, an individual, on behalf of himself and his minor child S.M.K.; Plaintiffs, v. PEAS IN A POD, LLC; LACEY ALLEN; ERICA WILLIAMS; JANE AND JOHN DOES 1-10 Defendants.	Cause No. DV-18-1249B **OPINION AND ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

This matter comes before the Court upon Defendants' motion for summary judgment. The motion is fully briefed, and a hearing was held on February 11, 2021. After oral argument, Plaintiffs submitted a Notice of Supplemental Evidence. Pursuant to Rule 56(c), Mont. R. Civ. P., "a party opposing the motion [for summary judgment] must file a response, and any opposing affidavits, within 21 days after the motion is served or a responsive pleading due, whichever is later." The Court finds Plaintiffs' Notice of Supplemental Evidence to be untimely and improper. It will not be considered by the Court.

From the oral arguments and its review of the briefs, the Court is fully advised.

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BACKGROUND

In October 2015, Lacey Rolsma-Allen and Erica Williams formed Peas in a Pod, LLC ("Peas in a Pod"). The two operated Peas in a Pod as a daycare out of Rolsma-Allen's home in Belgrade, Montana, where Rolsma-Allen and Williams provided care to their own children and others. The Kostleckys enrolled their 3-year-old daughter at Peas in a Pod in early 2016. That fall, they enrolled their infant daughter, "S.M.K." S.M.K. began attending Peas in a Pod in November 2016. Plaintiffs have alleged S.M.K. was injured at Peas in a Pod on December 22, 2016. After picking up S.M.K. from Peas in a Pod the evening of December 22, 2016, Plaintiffs Jason and Julie Kostelecky ("Kosteleckys") took S.M.K. to a walk-in clinic for a possible ear infection. Dr. Krutchick examined S.M.K., found no sign of trauma to S.M.K.'s head, indicated S.M.K. was in "no distress," and her head was "atraumatic" and "normocephalic." Dr. Krutchick also found that S.M.K. had a "flat" anterior fontanelle, which she testified is reassuring for the absence of a head injury in an infant.

On January 16, 2017, S.M.K. had her 4-month well child checkup with her primary care provider, Dr. Heather Kjerstad. At the checkup, Dr. Kjerstad determined S.M.K.'s head circumference had increased excessively since her 2-month checkup. Based on medical imaging, S.M.K. was diagnosed with bilateral subdural hematomas. The Kostleckys made an appointment for S.M.K. at Primary Children's Hospital in Salt Lake City a week later. In the meantime, S.M.K. returned to Peas in a Pod.

In Salt Lake City, doctors initially believed S.M.K.'s condition was most consistent with "non-accidental trauma." However, the results of additional evaluation were inconsistent with non-accidental trauma. Consequently, S.M.K.'s lead doctor in Salt Lak City, pediatric neurosurgeon Dr. Douglas Brockmeyer, came to doubt the initial belief that S.M.K.'s condition

was the result of non-accidental trauma and stated the initial assumption was "unfortunate." Dr. Brockmeyer testified that S.M.K.'s subdural hematomas were the result of a ruptured blood vessel, which could have been either: (1) spontaneous; or (2) the result of trauma. Dr. Brockmeyer explained that "trauma" would include accidental trauma and could have resulted from something as minor as rolling over.

Dr. Brockmeyer testified that "trauma" of some kind (as opposed to a spontaneous rupture) was the more likely explanation for S.M.K.'s condition. Dr. Brockmeyer has no opinion as to what type of trauma most likely caused the condition. Dr. Brockmeyer testified he cannot determine precisely when the condition arose. He further testified it is not medically possible to determine where S.M.K. might have been injured. S.M.K.'s primary care provider, Dr. Kjerstad, testified she does not know when, where, or how S.M.K.'s condition originated. Dr. Brockmeyer and Dr. Kjerstads' testimony is uncontroverted.

No medical provider has testified S.M.K. was injured on December 22, 2016. Plaintiffs have disclosed no expert who claims S.M.K. was injured on December 22, 2016, or linking Defendants' conduct to S.M.K's subdural hematomas.

The Kosteleckys testified they do not know what caused S.M.K.'s medical condition or who, if anyone, may have been associated with any injury to S.M.K. Plaintiffs testified they "have no idea" whether Defendants Erica Williams or Lacey Rolsma-Allen harmed S.M.K., either accidentally or deliberately.

Williams and Rolsma-Allen testified that S.M.K. did not sustain an injury at Peas in a Pod on December 22, 2016, or at any other time. A former part-time Peas in a Pod employee who was at the daycare most of the day on December 22, 2016 testified that, to her knowledge, S.M.K. did not sustain an injury at Peas in a Pod.

In November 2018, the Kosteleckys sued Defendants, alleging claims for negligence, negligence *per se*, negligent entrustment, negligent supervision, negligent training, breach of contract, and violation of the Montana Consumer Protection Act.

DISCUSSION

Summary judgment is only proper when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Rule 56(c)(3), Mont. R. Civ. P. Summary judgment is an extreme remedy which should not replace a trial on the merits where there are material factual disputes. The party moving for summary judgment has the initial burden of establishing the absence of genuine issues of material fact. The burden then shifts to the party opposing summary judgment to show, by more than mere denial or speculation, that there are genuine issues of material fact to be resolved. "[A]ll reasonable inferences which can be drawn from the evidence presented should be drawn in favor of the non-moving party." *Lee v. Great Divide Ins. Co.*, 2008 MT 80, ¶ 10, 342 Mont. 147, 182 P.3d 41.

"Ordinarily, negligence actions involve factual issues which make summary judgment inappropriate. However, if a plaintiff fails to offer proof of any one of the elements of negligence (duty, breach, causation, and damages), then summary judgment in favor of the defendants is proper." *Singleton v. L.P. Anderson Supply Co., Inc.*, 284 Mont. 40, 44, 943 P.2d 968, 970 (1997) (citations omitted).

To prevail on their negligence, negligence *per se*, negligent entrustment, negligent supervision, and negligent training claims, the Kosteleckys must prove duty, breach, causation, and damages. *Cusenbary v. Mortensen*, 1999 MT 221, ¶ 21, 296 Mont. 25, 987 P.2d 351. Plaintiffs' remaining claims likewise require proof that a breach of some duty by Peas in a Pod

caused Plaintiffs' alleged damages. *See, e.g., Anderson v. ReconTrust Co.,* 2017 MT 313, ¶ 19 ("The Montana Consumer Protection Act provides a private cause of action ... upon proof that a consumer suffered 'ascertainable loss of money or property' caused by the 'use or employment' of 'unfair or deceptive acts or practices'..."); Mont. Code. Ann. § 27-1-311 (damages for breach of contract are "the amount which will compensate the party aggrieved for all the detriment which was proximately caused thereby ..."). Defendants contend the Kosteleckys are unable to establish the causation element of their claims – i.e. that S.M.K.'s subdural hematomas were caused by Defendants' conduct.

"If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." Rule 702, Mont. R. Evid. "[E]xpert testimony is required when the issue presented is sufficiently beyond the common experience of the trier of fact and the expert testimony will assist the trier of fact in determining the issue or understanding the evidence." *Dayberry v. City of E. Helena*, 2003 MT 321, ¶ 17, 318 Mont. 301, 80 P.3d 1218. It is undisputed that the development of subdural hematomas is beyond the common experience and understanding of the trier of fact and expert testimony is necessary.

A medical expert's opinion is admissible only if it can be made on a "more likely than not" basis. *Butler v. Domin,* 2000 MT 312, ¶ 13, 302 Mont. 452, 15 P.3d 1189 (citations omitted). With regard to causation, the expert must be able to state that the "Defendants' actions more likely than not caused the injuries claimed." *Hinkle v. Shepherd School District #37, et. al.,* 2004 MT 175, ¶ 38, 322 Mont. 80, 93 P.3d 1239.

In *Butler*, the Montana Supreme Court concluded the district court properly excluded testimony of a medical expert who testified that a particular injection "could have" caused the plaintiff's injury. "Could have" indicates a mere possibility and does not meet the "more likely that not" standard. *Id.*, ¶ 15. Similarly, in *Hinkle*, the Supreme Court held that a doctor's proffered testimony that defendants' conduct could have had something to do with plaintiff's medical condition was insufficient to meet the threshold of establishing defendants' conduct more likely than not caused the claimed injuries. *Hinkle* ¶ 38; *see also McClue v. Safeco Ins. Co.*, 2015 MT 222, ¶ 30, 380 Mont. 204, 354 P.3d 604.

In this case, Plaintiffs have not retained medical experts. Rather, Plaintiffs rely on S.M.K.'s treating providers (non-retained experts) to support their claims. However, S.M.K.'s treating providers have failed to present testimony sufficient to establish Defendants' conduct more likely than not caused S.M.K.'s subdural hematomas.

On December 22, 2016, the date Plaintiffs' allege S.M.K. sustained her injury, Dr. Karen Krutchick examined S.M.K. and found her to be in good health. Dr. Krutchick testified she found no evidence or indication of head trauma during her examination. Her testimony is uncontroverted.

Dr. Kjerstad, S.M.K.'s primary care provider, similarly testified she could not identify any medical evidence to support a finding that Defendants inflicted trauma on S.M.K., and could not testify to a reasonable degree of medical certainty who, if anyone, caused injury to S.M.K.

S.M.K.'s neurosurgeon, Dr. Brockmeyer, testified S.M.K.'s subdural hematomas were more likely than not caused by "trauma" rather than occurring spontaneously. Dr. Brockmeyer testified that "trauma" could be anything from an accidental trauma (including something as benign as rolling over) to a non-accidental trauma. Dr. Brockmeyer was unable to specify the

nature of the trauma that caused S.M.K.'s medical condition. Dr. Brockmeyer was unable to identify when, how, or by whom, if anyone at all, S.M.K.'s subdural hematomas originated. Dr. Brockmeyer stated he wanted to avoid using the term "injury" because they were not sure if that was the cause of S.M.K.'s condition.

Dr. Brockmeyer's opinions are insufficient to establish the required causal connection. Dr. Brockmeyer is unable to specify on a more probable than not basis the nature of the trauma that caused S.M.K.'s medical condition, whether it was accidental or non-accidental, or even a level of force necessary to cause the subdural hematomas. Further, a causal connection cannot be made because Plaintiff's have failed to allege any specific conduct on the part of Defendants that caused S.M.K.'s condition.

Plaintiffs rely on Detective Tom Pallach's interview with Allen wherein Allen stated, "Honestly we're human we get frustrated...Honestly the best thing we do too if we do get to that point sometimes they just have to be put in their little bed and then you just have to walk away for a few minutes." In Det. Pallach's report he noted, "It was at this point in the interview that [Allen] made a motion with her hands of pushing or throwing action with her arms." Det. Pallach interpreted the motion to be as though Allen would throw a child down into their bed. This is simply Det. Pallach's interpretation of a motion made by Allen. Allen did not admit to throwing children down into their beds and there is no allegation or evidence that any Defendant threw S.M.K. into a bed. Any theory that this was the cause of S.M.K.'s subdural hematomas is purely speculative.

Ultimately, there are no allegations that Defendants shook S.M.K., dropped S.M.K., bumped S.M.K.'s head, that S.M.K. fell while in Defendants' care, or that S.M.K. suffered any other level of trauma (accidental or non-accidental) while in Defendants' care. There is simply

no specific incident that Plaintiffs allege caused S.M.K.'s subdural hematomas. Therefore, it is impossible for Dr. Brockmeyer, or any other expert, to link S.M.K.'s medical condition to Defendants' conduct.

In addition, agencies tasked with investigating the Kosteleckys' claims against Defendants failed to provide a causal link between Defendants conduct and S.M.K.'s subdural hematomas. Det. Pallach conducted an investigation on behalf of the Gallatin County Sherriff's Office. Det. Pallach interviewed S.M.K.'s parents, a teenager who babysat S.M.K. in their home, Lacey Allen-Rolsma, Erica Williams, and others. Det. Pallach testified he was unable to establish probable cause as to who (if anyone) caused S.M.K.'s condition and was unable to determine how her condition arose. Further, the Montana Department of Public Health Human Services conducted its own investigation and determined any allegation of possible abuse or neglect by Peas in a Pod to be unsubstantiated. Jason and Julie Kostelecky testified they had no evidence to support their allegation S.M.K. was harmed at Peas in a Pod.

Plaintiffs argue Defendants violated statutory or administrative rules regarding the operation of Peas in a Pod – failing to maintain sign-in sheets, operating outside the proper time limits of their license, hiring an underage and unqualified care-giver who provided care to S.M.K, and failing to have Williams and Rolsma-Allen present at the daycare at all times while the daycare operated. Plaintiffs also argued Defendants identified the incorrect date on which S.M.K. first attended Peas in a Pod, misrepresented calls or text messages to the Kosteleckys to report on S.M.K.'s fussiness and crying, and failed to comply with the language of the parent handbook. Given these allegations, the Kosteleckys argue the credibility of Rolsma-Allen and Williams is at issue and should be submitted to the jury. The Court disagrees. Even if all Plaintiffs' allegations regarding the operation of Peas in a Pod are true, the allegations at most

establish licensing violations and a poorly operated childcare facility. However, the allegations are insufficient to establish that Defendants' caused S.M.K.'s subdural hematomas. In the absence of a causal connection between Defendants' conduct and S.M.K.'s injury, issues of Defendants' credibility and the general operation of Peas in a Pod have no relevance.

Neither Dr. Brockmeyer nor any of S.M.K.'s other treating medical providers have testified that Defendants' conduct more likely than not caused S.M.K.'s medical condition. As a result, pursuant to *Hinkle,* Plaintiffs are not able to prove the causation element of any of their claims and Defendants are entitled to summary judgment.

IT IS HEREBY ORDERED that Defendants' Motion for Summary Judgment is **GRANTED**. Counsel for Defendants shall submit a proposed Judgment within 14 days of the date of this Order.

DATED this 7 day of April 2021.

Hon. Rienne H. McElyea
District Court Judge

c: Mike Black and Anthony Jackson
Ross D. Tillman and Zach Franz
John Amsden
Emailed 4/7/21 mb