No. 125150

# IN THE SUPREME COURT OF ILLINOIS

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| SUSAN STEED, as Independent Administrator of the Estate of GLENN STEED, deceased, | On Appeal from the Illinois Appellate Court, Third Judicial District |
| *Plaintiffs-Appellees,* | Appellate Docket no. 3-17-0299 |
| v. | There Heard on Appeal from the 12th Judicial Circuit, Will County, Illinois |
| REZIN ORTHOPEDICS AND SPORTS MEDICINE, S.C., | Docket No. 12 L 000048 |
| *Defendant-Appellant.* | The Honorable Theodore J. Jarz, Judge Presiding |

# *AMICUS CURIAE* BRIEF OF ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL

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## Points and Authorities

## Argument

Your amicus Illinois Association of Defense Trial Counsel ("IADTC") submits that this appeal provides the Court an opportunity to affirm that a plaintiff not only carries the burden to establish all elements of its cause of action, but also that judgment *n.o.v.* cannot be entered when trial evidence supports the jury's verdict. The Third District's Order pretermits any analysis of the plaintiff's burden to establish the proximate cause of her injuries, and improperly disregards the jury's verdict on the cause of action against Rezin Orthopedics and Sports Medicine, S.C.

*First*, the Order ignores the two components of the proximate cause element, whether Rezin Orthopedics' actions were the cause-in-fact and legal cause of Mr. Steed's death. There is no discussion of whether the scheduling timeframe made his death reasonably certain to occur, or even that it was a substantial factor in his death. The Order similarly skips past a foreseeability analysis, whether a reasonable person would have foreseen his death if a two-week return appointment was not scheduled.

***Second***, the appellate Order disregards the jury's verdict without recognizing the proximate-cause evidence supporting it. The Order's brief, single-paragraph discussion of proximate cause recites trial testimony that unanimously supports a plaintiff verdict, improperly substituting the panel's judgment in place of the jury's defense verdict. In its race past the proximate cause analysis the Order

loses track of the judgment *n.o.v.* standard, which requires a verdict to stand where the jury resolved a substantial evidentiary dispute.

The IADTC urges this Court to employ its *de novo* review to reverse the Third District's Order by correctly reviewing the proximate cause evidence in accordance with this Court's long-standing judgment *n.o.v.* precedent.

**The jury heard significant evidence to support its verdict that the lack of a two-week return appointment did not proximately cause Mr. Steed's death.**

Assuming, *arguendo*, that Rezin Orthopedics' failure to schedule a two-week return appointment constitutes a breach of the applicable standard of care (*Order*, ¶¶*27, 28*), the panel's review of the proximate-cause element does not establish the breach as either the "cause-in-fact" or "legal cause" of Mr. Steed's death.

1. **Substantial evidence supports the jury's verdict that the failure to schedule a two-week return appointment was not a cause-in-fact of Mr. Steed's death.**

Cause–in-fact is shown "where there is reasonable certainty that the injury would not have occurred 'but for' the defendant's conduct, or where a defendant's conduct was a 'substantial factor' in bringing about the harm." *Stanphill v. Ortberg*, 2018 IL 122974 ¶34. Under the "but for" test, a defendant's conduct is not the cause of an event "if the event would have occurred without it." *Turcios v. DeBruler Co.*, 2015 IL 117962, ¶23. Under the "substantial factor" test, the defendant's conduct is a cause of the event "if it was a material element and a substantial factor in bringing the event about." *Id.*

The Third District initiated its single paragraph reversing the jury verdict on proximate cause with an incorrect evidentiary presumption favoring plaintiff even though the jury found for Rezin Orthopedics on the issue: the Order affirmatively states that Mr. Steed had a DVT by March 3 – within the two-week return appointment timeframe. The Order reads:

> Here, the evidence presented at trial showed that if Glenn had returned to the clinic within two weeks, ***his DVT*** would have likely been diagnosed and treated. ¶31. (***emphasis added***)

The panel's presumption that Mr. Steed had a diagnosable DVT by March 3 was incorrect. The parties offered conflicting evidence on whether the DVT developed and manifested symptoms before or after that date.

Plaintiff's expert Dr. Mathew Jimenez, an orthopaedic surgeon, offered testimony over objection Mr. Steed "most likely" had a DVT by March 3, and that it would have been diagnosed and treated if Mr. Steed had been seen within the two-week timeframe. *C3026, 3033-35*. However, defense experts offered opinions directly contradicting that conclusion.

Dr. Jeffrey Huml, a board-certified internal medicine physician, testified that Mr. Steed exhibited "none" of the typical risk factors for developing a DVT, and that medical studies showed the likelihood of a DVT development following a lower-extremity tendon injury as less than one percent. *Sup R 29-30.*

Therefore, Dr. Huml testified that Mr. Steed's "first sign of a clinically significant DVT" was his complaint of thigh pain that began on March 7. *Sup R*

*43-44*. And he concluded that the initial presenting symptom of the pulmonary embolism was Mr. Steed's sudden death. *Sup R 42*. Each date is subsequent to the two-week return appointment timeframe, and in direct conflict with Dr. Jimenez's opinion – as well as the Third District's improper presumption of fact.

The defendants also called Dr. Jacob Bitran, a hematology expert. Dr. Birtran agreed that Mr. Steed was at a low risk for developing a DVT, although he offered no opinion on when the DVT itself formed. *Sup R 113-14, 132*. And tellingly, Dr. Bitran offered the opinion that Mr. Steed's DVT could have been treated earlier, yet only "if the DVT was there." *Sup R 136*.

Thus, every medical expert agreed that Mr. Steed death was the result of an undiagnosed DVT and pulmonary embolism. However, the "but for" or "substantial factor" evidence against Dr. Treacy and Rezin Orthopedics was contested because there was no consensus at trial on whether a DVT even existed by March 3. The appellate panel was simply wrong to conclude under a judgment *n.o.v.* standard of review that the trial evidence "showed" that had Mr. Steed returned within two weeks "***his DVT***" would have been likely diagnosed and treated. *Order, ¶31*.

The Third District's failure to undertake a meaningful review of the entire trial record violated this Court's longstanding common law on when judgment *n.o.v.* is properly entered. "[V]erdicts ought to be directed and judgments *n.o.v.* entered only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no

contrary verdict based on the evidence could ever stand." *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill.2d 494, 510 (1967). "The appellate court should not usurp the function of the jury and substitute its judgment on questions of fact fairly submitted, tried, and determined from the evidence which did not greatly preponderate either." *Maple v. Gustafson*, 151 Ill.2d 445, 452 (1992).

The Third District's failure to undertake a cause-in-fact analysis, and to instead adopt a factual stance not conclusively borne out by trial evidence and rejected by the jury, is the very "usurpation" of the jury function rejected by the Court in *Maple*. In accordance with that law, the Order should be reversed.

**2. Substantial evidence supports the jury's verdict that the failure to schedule a two-week return appointment was not a legal cause of Mr. Steed's death.**

In much the same manner, the Third District offered no discussion of proximate cause's second component, the "legal cause" of Mr. Steed's injury. And as result, the Order improperly reversed a jury verdict, under a judgment *n.o.v.* standard, despite clear evidence that the Mr. Steed's DVT and pulmonary embolism were unforeseeable to a reasonable person.

"Legal cause" is essentially a public policy question, one which this Court has posed as, "How far should a defendant's legal responsibility extend for conduct that did, in fact, cause the harm?" *Stanphill,* 2018 IL 122974, ¶34. Legal cause is "established only when it can be said that the injury was 'reasonably foreseeable.'" *Id.* Whether an injury is reasonably foreseeable is an objective test, what a reasonable person would see the likely result to be. *Id.*

As related above, the jury heard significant expert testimony that Mr. Steed's development of a DVT, and subsequent pulmonary embolism, were medically unforeseen. Dr. Huml and Dr. Bitran testified at length that Mr. Steed did not meet any criteria to make him a higher DVT risk, and that DVTs occur in less than one percent of patients with a lower-extremity tendon injury. *Sup R 26-32, 113-14, 116.*

The jury heard the defendant Dr. Treacy offer similar testimony, and from Dr. Michael Pinzur, an orthopaedic surgeon expert. *C 1456-57, 3192.* Defense testimony was consistent that not treating Mr. Steed as a patient at-risk for DVT was within the standard of care.

The DVT-probability statistics were even established by plaintiff's expert, Dr. Jimenez. He confirmed his prior sworn statement that "the risk of the blood clot alone is Achilles' tendon is less than one percent and that fatal [pulmonary embolism] is even less than that." *C 3059.* In sum, the expert testimony at trial overwhelmingly confirmed that Mr. Steed's DVT and pulmonary embolism were not medically foreseeable, and the jury so resolved as well.

Perhaps in light of that significant evidence, plaintiff did not appeal Dr. Treacy's favorable verdict. But by ignoring that evidence as it relates to the Rezin Orthopedics desk staff's scheduling practices, the Third District is implicitly resolving that a two-week development of a DVT and pulmonary embolism were nevertheless foreseeable to the receptionists at Rezin Orthopedics.

Even if, as the Order holds, that the receptionists' failure to follow the super bill in scheduling the appointment constitutes a breach of a reasonably careful orthopaedic facility, that breach must of necessity still result in a reasonably foreseeable injury to the plaintiff for liability to attach. *Order,* ¶*28.* In the circumstance here – where the evidence shows the medical outcome was not foreseeable – it is difficult to comprehend how the receptionists' breach of duty foreseeably caused medical injury.

The Third District's disconnect from any foreseeability analysis, and its disregard for the jury's verdict for Rezin Orthopedics, creates a perverse public-policy outcome. The Order creates DVT-development foreseeability where neither the medical experts nor the jury saw it as it related to Dr. Treacy's alleged negligence; yet then imposes that foreseeability on non-medical staff at Rezin Orthopedics to find liability for its scheduling practices.

If the concept of "legal cause" is truly one of public policy, this cannot be the result. A medical facility cannot be liable for its staff's failure to execute a scheduling directive when the professional standard of care did not support a finding that the plaintiff's injury was medically foreseeable even if the scheduling directive had been met.

The Third District's failure to undertake a foreseeability analysis, and failure to follow the judgment *n.o.v.* standard of review, created an illogical outcome for Rezin Orthopedics and, potentially, any other Illinois medical facility. The Order should be reversed.

## Conclusion

Proximate cause cannot be presumed by the plaintiff, jury, or court. Here there is little question but that Third District's Order does just that.

The Order is manifest example of a court rejecting what this Court has repeatedly noted to be solely a jury's function, fact finding:

> The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

*Peach v. McGovern*, 2019 IL 123156, ¶61, *quoting, Dowler v. New York, Chicago & St. Louis R.R. Co.*, 5 Ill. 2d 125, 130 (1955).

The Third District's failure to properly assess the proximate-cause trial evidence against Rezin Orthopedics, and conform its analysis to the proper judgment *n.o.v.* standard, resulted in the incorrect appellate outcome. The Illinois Association of Defense Trial Counsel urges the Court to enforce its common law and reverse the Rule 23 Order, reinstating the jury's proper verdict in favor of Rezin Orthopedics and Sports Medicine, S.C.

Respectfully submitted,

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**Rule 341(c) Certificate of Compliance**

I certify that this brief conforms the requirements of Rules 341(a) and (b). The number of words in this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, and the Rule 341(c) certificate of compliance, is 1,977 words.

Respectfully submitted,

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