No. 125150

In the Supreme Court of Illinois

SUSAN STEED, as Independent Administrator of the Estate of GLENN STEED, deceased,

Plaintiff-Appellee,

v.

REZIN ORTHOPEDICS AND SPORTS MEDICINE, S.C., an Illinois corporation,

Defendant-Appellant.

On Appeal from the Appellate Court of Illinois
Third Judicial District, No. 3-17-0299
There Heard on Appeal from the Circuit Court of the
12th Judicial Circuit, Will County, Illinois, No. 10 L 340
The Honorable **Theodore J. Jarz**, Judge Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT REZIN ORTHOPEDICS AND SPORTS MEDICINE, S.C.

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POINTS AND AUTHORITIES

NATURE OF THE ACTION

In this medical malpractice action, plaintiff sued an orthopedic surgeon who had treated plaintiff's husband for a lower leg and ankle injury. Plaintiff also sued the surgeon's employer, a medical corporation owning and operating an orthopedic and sports medicine clinic. Plaintiff proceeded to trial on her survival and wrongful death claims based on plaintiff's medical negligence theories against the surgeon and institutional negligence theories against the clinic. After hearing seven days of testimony and attorney argument, the jury reached a general verdict for both defendants. Claiming that the clinic was negligent as a matter of law, plaintiff sought judgment notwithstanding the verdict or, alternatively, a new trial, as to the clinic but not the doctor.

The appeal to this Court arose from the appellate court's decision to reverse the judgment on the jury's verdict and to find – as a matter of law – both a breach of the standard of care and proximate causation, despite the testimony of qualified medical experts supporting the clinic's defenses to plaintiff's negligence and causation theories.

ISSUES PRESENTED FOR REVIEW

1. Whether plaintiff met the stringent standards governing the entry of JNOV as to the standard of care where the defense presented competent testimony rebutting plaintiff's theory of a breach of the standard of care by a medical clinic.

2. Whether plaintiff was entitled to JNOV where the record presents conflicting evidence on the issue of proximate causation.

3. Whether plaintiff is entitled to a new trial given the preclusive effect of the general verdict rule.

JURISDICTION

This Court has jurisdiction under Supreme Court Rules 301, 303 and 315. The trial court entered judgment on the jury's verdict on November 10, 2016. (C 2169.) On April 7, 2017, the trial court denied plaintiff's timely filed post-trial motion. (C 3315.) Plaintiff filed a notice of appeal within 30 days, on May 3, 2017. (C 3318.) The appellate court filed its decision on July 19, 2019. *Steed v. Rezin Orthopedics and Sports Medicine, S.C.*, 2019 IL App (3d) 170299-U. (A 4.) Pursuant to this Court's order extending the deadline for filing a Rule 315 petition for leave to appeal (A 18), on September 27, 2019 Rezin Orthopedics and Sports Medicine, S.C. ("Rezin Orthopedics" or "the clinic"), filed its petition, which this Court granted on November 26, 2019 (A 19).

STATEMENT OF FACTS

Alleging medical negligence in connection with the care her husband received at Rezin Orthopedics, plaintiff Susan Steed, as independent administrator of the estate of Glenn Steed, deceased, filed this lawsuit against Dr. Stephen Treacy and the clinic. (C 17-23.) This appeal – only as to Rezin Orthopedics – followed a verdict for both defendants.

Diagnosis of Mr. Steed's Achilles Tendon Tear

Glenn Steed sustained an injury to his lower right leg and ankle during a pick-up basketball game on January 29, 2009. (C 2933.) After a few weeks passed, Mr. Steed felt his condition had improved, but might not be just a sprain. (C 2996.) Consequently, Mr. Steed, a 42-year-old former marathon runner, made an appointment to see Dr. Treacy. (C 2934, 2936.)

Dr. Treacy, an orthopedic surgeon, examined Mr. Steed at Rezin Orthopedics' Plainfield office on February 17, 2009. (C 1287, 2936.) Rezin Orthopedics, an Illinois medical corporation, owns and operates a medical clinic with facilities in Joliet, Plainfield, Ottawa and Morris, Illinois. (C 1285.) Dr. Treacy noted that Mr. Steed's swelling and pain had diminished since the day of the injury, and his function had improved, indicating a healing process between the time of injury and the February 17 office visit. (C 1315.) Based on the physical examination, Dr. Treacy diagnosed a partial Achilles tendon tear. (C 1282, 1309, 1315.) With a partial tear, only some of the tissue fibers are torn, which permits both surgical and non-surgical options. (C 1317.)

Dr. Treacy discussed with the patient the topic of deep vein thrombosis ("DVT"), referring to the blood vessels within the lower leg. (C 1339.) "Thrombosis" is a blood clot that usually resolves on its own (C 1442), but can cause a life-threatening event if the clot breaks free, travels towards and reaches the lungs, causing a pulmonary embolism (C 1340-41). Less than 1% of patients with lower extremity injuries have symptomatic DVT. (C 1443.) In Dr. Treacy's opinion, Mr. Steed's presentation, the diagnosis and the risk category did not make him an appropriate candidate for anticoagulant medication. (C 1456.) Dr. Treacy recommended treating the injury non-surgically by placing Mr. Steed's lower leg in a cast for about six weeks. (C 1318, 1329.)

Dr. Treacy's custom and practice included noting the dates for follow-up appointments at the bottom of a document called a "super bill," which he would give to the receptionist at the end of each patient's appointment. (C 1323-25.) The receptionist would use the document for scheduling patient appointments (C 2724-25) and then forward the document for billing (C 2707). On the super bill pertaining to Mr. Steed's

February 17 appointment, Dr. Treacy wrote that Mr. Steed should return two weeks later for examination. (C 1332.) The receptionist on duty, Jodi Decker, scheduled Mr. Steed to return for his cast placement at Rezin Orthopedics' Joliet office on February 19, 2009, but did not schedule a subsequent appointment. (C 2710.)

Mr. Steed, who had driven himself to the appointment on February 17 and would be unable to drive after placement of his lower right leg in a cast, scheduled an appointment two days later for casting, when his wife could drive him. (C 1323, 2710, 2939.) An engineer for a truck parts designer and manufacturer (C 2914), Mr. Steed did not want to return for cast placement on February 18; he wanted to go to work that day and consult with colleagues about assisting him with transportation during the weeks he could not drive (C 2939).

Scheduling Follow-up Appointment After Placement of Cast

With the assistance of Cheryl Haddon, a Rezin "ortho tech," Dr. Robert McNab placed Mr. Steed's right leg in a cast at Rezin Orthopedics' Joliet office on February 19, 2009. (C 2939-41.) On that day, Victoria Hare was manning the reception desk in Joliet. She scheduled Mr. Steed for a follow-up appointment with Dr. Treacy on March 13, 2009, approximately three and a half weeks after Mr. Steed's initial appointment. (C 1247-49.) Ms. Hare did not recall the specific reason for selecting March 13 for Mr. Steed's follow-up appointment. (C 3013.) A medical office receptionist with more than 30 years of experience (C 1265), Ms. Hare's routine custom and practice for scheduling follow-up appointments at Rezin Orthopedics in the relevant timeframe involved communicating with the patient to learn his availability on or near the date requested by

the physician. (C 1270-71.) Ms. Hare would consult with the physician in the event of a scheduling difficulty. (*Id*.)

Plaintiff testified she was present when Mr. Steed made his appointment and contended that there was not "a lot of back and forth between Glenn and Miss Hare in scheduling this appointment." (C 2954.) On cross-examination, plaintiff conceded that Mr. Steed's calendar referenced various work commitments for March 3, 5, 6 and 9. (C 3144-45.)

Mr. Steed's Condition After Casting

Over several days after Dr. McNab placed the cast, Mr. Steed began to experience achiness in his leg. (C 2945-46.) On February 24, 2009, after he came home from work, Mr. Steed reported to his wife a change – that his cast began to feel tight. (C 2945-46.) He planned to call the doctor the next day. (C 2946.) Mr. Steed telephoned Rezin Orthopedics' Joliet office on February 25 (C 1232-33, 2171), and Rossana Popplewell (a/k/a Rossana Alberico) (C 2819)), a Rezin Orthopedics receptionist, moved Mr. Steed's appointment from March 13 to March 12, 2009 (C 2827, 2832).

Plaintiff repeatedly testified at trial that Mr. Steed changed his homecare plan after the February 25 phone call. (C 2948-51.) Rather than elevate his leg after work by placing it on the couch and ottoman at the couple's home, after the telephone call, Mr. Steed raised his leg higher and placed ice behind his knee on a daily basis. (C 2948-50.) Mr. Steed also took Aleve at his wife's suggestion. (C 2948-50.) Plaintiff observed that her husband's condition improved (C 2950-51), but his symptoms did not completely resolve (C 2950-51).

Mr. Steed's New Symptom on March 7 and Death on March 8

Late in the evening of Saturday, March 7, 2009, for the first time, Mr. Steed complained to his wife that he was experiencing a new pain – in his right thigh. (C 2958.) Mr. Steed told plaintiff that he would call Rezin Orthopedics on Monday. (C 2958-59.) Plaintiff found Mr. Steed dead the next morning. (C 2965-66.) He died of a pulmonary embolism caused by a deep vein thrombosis ("DVT") in his right leg. (C 3007.)

Plaintiff's Liability Theories and Pre-Trial Motions

Plaintiff filed a combined wrongful death and survival action against Dr. Treacy and Rezin Orthopedics in the Circuit Court of Will County. (C 17.) In her fourth amended complaint, plaintiff alleged that Rezin Orthopedics negligently failed to: (1) monitor Mr. Steed's condition; (2) timely schedule a follow-up appointment for Mr. Steed as Dr. Treacy ordered; (3) communicate Mr. Steed's concerns to a physician following Mr. Steed's February 25 telephone call; (4) advise Mr. Steed of the potential risks of pulmonary thromboembolism during Mr. Steed's February 25 telephone call; and (5) advise Mr. Steed to return to Rezin Orthopedics or seek immediate medical care in response to Mr. Steed's February 25 telephone call. (C 710-13.) Plaintiff attached to the fourth amended complaint a 735 ILCS 5/2-622 report attesting to a meritorious cause of action against Rezin Orthopedics for healing art malpractice. (C 720.)

In plaintiff's motion *in limine* no. 12, she sought to bar the defense from challenging the standard of care for Mr. Steed's follow-up appointment with Dr. Treacy as permitting the appointment for any date later than two weeks after February 17, the date of his first appointment. (C 2151-55.) Plaintiff cited no case law to the court to support her position that Dr. Treacy's custom and practice alone defined the standard of

care for the clinic. (C 2422-2423.) Ultimately, the trial court ruled that Rezin Orthopedics was entitled to defend itself by contesting plaintiff's version of the standard of care. The court denied plaintiff's motion. (C 2427-28.)

Among other motions *in limine*, the trial court heard defendants' motion *in limine* no. 32 to bar plaintiff from recounting her husband's description of the content of a February 25 telephone conversation with Rezin Orthopedics. (C 1972.) Ms. Steed heard about the conversation only from her husband. (C 2609.) Plaintiff offered the testimony to prove that, on February 25, Mr. Steed reported tightness in his cast to a Rezin Orthopedics receptionist, and that the receptionist told Mr. Steed to elevate his right leg above his heart and ice behind his knee. (C 3151.) Based on the multiple layers of hearsay inherent in the testimony, the court ruled that plaintiff could not testify to what her husband had told her about what Mr. Steed allegedly said to the receptionist and the receptionist's statements in response. (C 1972-77, 2609, 3151.) The court ruled that plaintiff could testify to the complaints Mr. Steed voiced to her. (C 2609.)

Evidence Presented at Trial

At trial, plaintiff's orthopedic surgeon expert, Dr. Mathew Jimenez, testified that Mr. Steed exhibited several risk factors for DVT during Dr. Tracey's initial examination on February 17, 2009. (C 3009-10.) According to Dr. Jimenez, the standard of care required Dr. Treacy and Rezin Orthopedics to schedule Mr. Steed's follow-up appointment two weeks after his initial evaluation. (C 3009-10.) Dr. Jimenez opined that scheduling Mr. Steed's follow-up appointment on March 13, 2009, about three and a half weeks after his initial evaluation, violated the standard of care. (C 3012-13.)

Over a speculation objection, Dr. Jimenez also testified that, if Mr. Steed had been seen at a two-week interval, a calf clot would have been diagnosed and treated, and he likely would have survived. (C 3033-35.) On cross-examination, Dr. Jimenez acknowledged his prior statement that "the risk of the blood clot alone in Achilles' tendon is less than one percent and that fatal PE [pulmonary embolism] is even less than that." (C 3059.) Dr. Jimenez also acknowledged that a DVT can: (1) form over a matter of hours, days or weeks; (2) be symptomatic or have no symptoms; (3) become a fatal pulmonary embolism with the first sign being sudden death; and (5) never become a pulmonary embolism. (C 3063-64.)

Dr. Jimenez conceded that a patient with a lower leg injury may experience a fatal pulmonary embolism even if the patient is treated with chemoprophylaxis. (C 3068.) Dr. Jimenez also admitted that whether or when a DVT breaks off is a random event that cannot be predicted (C 3064), and that the first time Mr. Steed complained of feeling pain indicating a clot in the veins above the knee was March 7, the night before he died and days after Dr. Jimenez' follow-up deadline (C 3080).

Rezin Orthopedics Staff Testimony

Plaintiff also called three Rezin Orthopedics' receptionists, Jodi Decker (C 2700), Victoria Hare (C1223) and Rossana Popplewell (C 2819), to testify to the follow-up appointment scheduling procedure. Ms. Decker explained that the clinic's procedures in February of 2009 permitted a patient to call for a follow-up appointment. (C 2719.) The receptionist would hand the patient an appointment card with a phone number, advise of the timeframe for the follow-up appointment and instruct the patient to call the office after checking his calendar. (C 2719.) The custom and practice for a patient required to

schedule a series of appointments was for the receptionist to schedule the next appointment and instruct the patient to call to schedule additional appointments or to schedule additional dates at the next appointment. (C 2721.)

The scheduling process involved working with the doctor's schedule and the patient's schedule to find a date, time and location for the appointment. (C 2717.) Ms. Decker, who no longer works at Rezin Othopedics (C 2700-01), had no reason to believe that she deviated from her routine custom and practice on February 17, 2009 (C 2721) when she made only one appointment for Mr. Steed to be casted on February 19 (C 2710).

Plaintiff questioned Ms. Hare regarding the procedure for handling telephone calls from patients. Ms. Hare, who has been working as a receptionist in a medical office since 1977 and joined Rezin Orthopedics in 2006 (C 1265), testified regarding the policies and procedures for conveying messages from a patient to a doctor or physician's assistant when a patient calls with an issue regarding a patient's cast. (C 1235.) She explained that, under some circumstances, a patient may call and a message will not necessarily be generated for the physician or physician's assistant. (C 1242.) For example, if the call merely involved rescheduling as a matter of patient convenience, the call may not generate a message. (C 1268-69.)

Plaintiff also questioned Ms. Hare concerning scheduling patients for follow-up appointments. (C 1242.) Ms. Hare did not recall her interaction with Mr. Steed; she testified based on Rezin Orthopedics' computer record and her custom and practice. (C 1247, 1251, 1254-55, 1270-71.) A computer entry showed that, on February 19, Ms. Hare scheduled Mr. Steed for a follow-up appointment on March 13. (C 1247-48.) She agreed

that a receptionist is supposed to follow the doctor's order for scheduling. (C 1242.) Ms. Hare's custom and practice in February 2009 for scheduling follow-up appointments included communication and agreement from the patient. (C 1272.) Ms. Hare was not trained to assign a follow-up visit without taking into account the patient's availability. (C 1272.) A patient had to agree to the date. (C 1272.)

Elaborating on her custom and practice for scheduling follow-up appointments, if a patient could not come in for an appointment on the day requested by the physician, Ms. Hare would attempt to schedule on the day after or the day before the specified date, or at one of the other Rezin Orthopedics clinic locations. (C 1270.) Past about a week, Ms. Hare would say to the patient, "we are getting past a week that the doctor wants to see you. I really think that we need to reach another conclusion or I would have to ask the doctor if it's okay if you are waiting longer than he wanted to see you." (C 1270-71.) She had no reason to believe that she deviated from her custom and practice in making Mr. Steed's appointment on February 19. (C 1272.)

Plaintiff also questioned Rossana Popplewell, a Rezin receptionist who handled a telephone call from Mr. Steed on February 25. (C 2826-27.) Ms. Popplewell had no information regarding the purpose of the call. (C 2838.) She had no recollection of the telephone conversation and testified solely based on custom and practice and the computer record of the call. (C 2823, 2826-28.) Ms. Popplewell agreed that, if a patient telephoned and complained about a cast, the call should generate some type of contact with the patient's doctor or his assistant. (C 2842.) Ms. Popplewell takes a patient's availability into account in scheduling and noted that a physician does not have to be consulted to reschedule a patient's appointment for convenience purposes. (C 2848.)

Defense Expert Witness Testimony

Dr. Michael Pinzur, a board-certified orthopedic surgeon, testified as a standard of care witness on behalf of both Dr. Treacy and Rezin Orthopedics. (C 3163, 3166.) His practice is limited to foot and ankle disorders, which includes the Achilles tendon. (C 3166.) Dr. Pinzur serves as quality medical director for Loyola University Health System (C 3163); in addition to teaching medical students and residents DVT prophylaxis and treatment, as a quality medical director, Dr. Pinzur chairs the venous thromboembolism task force for the Loyola University Health System (C 3166-67).

Dr. Pinzur testified that Rezin Orthopedics' staff acted within the standard of care by scheduling Mr. Steed's follow-up appointment for March 13, 2009, even though that date was more than two weeks after the date of Mr. Steed's initial visit with Dr. Treacy, because seeing the patient at three or three and a half weeks did not make a difference. (C 3234-35.) Dr. Treacy's treatment plan for Mr. Steed appropriately called for the cast to remain in place for four to six weeks (C 3181), and the standard of care did not require any follow-up visits between the first appointment and the time Mr. Steed was scheduled to have his cast removed (C 3184).

As to the standard of care applicable to Dr. Treacy, Dr. Pinzur determined that seeing the patient at four to six weeks was reasonable. (C 3184.) Equating chemical prophylaxis with rat poison (C 3185), Dr. Pinzur found no deviation from the standard of care by Dr. Treacy in not recommending that treatment option. (C 3191-93.) Dr. Pinzur explained that the risks of anticoagulant medication for patients with a below the knee injury may be worse than the risk of a blood clot. (C 3186.) Mr. Steed, a young, active individual, was at low risk for blood clots. (C 3192.) Dr. Pinzur also observed that

virtually every patient at Loyola who developed a DVT or pulmonary embolism had been on chemoprophylaxis before developing a clot. (C 3191.) The medication is not universally beneficial. (C 3191.)

Dr. Pinzur also explained that a DVT occurring under the circumstances, five or six weeks after the original injury, was extremely rare. (C 3238.) Dr. Pinzur explained that the timing of the DVT was unknown, so he could not conclude that Dr. Treacy would have been in a position to diagnose a DVT two weeks after the initial office visit. (C 3197.)

Dr. Treacy also testified that the applicable standard of care did not require a follow-up appointment for Mr. Steed two weeks after his initial visit. (C 1452-53.) In Dr. Treacy's opinion, three weeks for follow-up would have been reasonable, and the literature suggested that the standard of care would have been satisfied by a four-week return appointment. (C 1453-54.) Dr. Treacy, a board-certified orthopedic surgeon (C 1384), explained his treatment plan at length and that Mr. Steed was not an appropriate candidate for Coumadin or other anticoagulant medication based on his presentation, the diagnosis and the risk. (C 1456-57.) Dr. Treacy observed that medication does not prevent all DVTs, and that medications can cause bleeding, ulcers, stroke and tissue damage. (C 1444-47.) He took those risks into account in determining his treatment of Mr. Steed. (C 1447.)

Dr. Treacy relied on his office notes to testify regarding his one encounter with Mr. Steed. (C 1288.) An office note stated, "[w]e reviewed the risks of DVT." (C 1458-59). Dr. Treacy explained that the risk factors for DVT increase dramatically at age 60,

and Mr. Steed was 42 years old. (C 1419-20.) Dr. Treacy explained that Mr. Steed did not have most of the dozen or so recognized risk factors for DVT. (C 1421-42.)

Dr. Treacy also explained that his instruction for Mr. Steed to return in two weeks was not intended specifically to evaluate for the presence of DVT. (C 1452.) The return visit was part of the general treatment program (C 1452), and Dr. Treacy anticipated evaluating the healing process and other treatment options at the next office visit (C 1331-32). Dr. Treacy did not know what complaints Mr. Steed may have voiced or what Dr. Treacy may have found on physical examination on a day other than February 17, 2009, the date of his examination, when he conducted a risk benefit analysis for treating Mr. Steed. (C 1474-75.)

The defense called two additional medical experts who rebutted Dr. Jimenez' contention that an earlier follow-up visit would have prevented Mr. Steed's death as well as plaintiff's standard of care theories. **Dr. Jeffrey Huml**, a physician board certified in internal medicine, pulmonary and critical care medicine, and neuro critical care (Sup R 10), opined that Mr. Steed did not have any of the medical conditions that would have placed him at a higher risk for developing a DVT. (Sup R 28-29.) Describing the medical literature, Dr. Huml testified that it contains no reports of fatal pulmonary embolism with an isolated Achilles' tendon injury. (Sup R 31.)

In Dr. Huml's view, Mr. Steed exhibited no symptoms of a pulmonary embolism until the night before his death. (Sup R 42.) In the context of a saddle embolism, the type of clot experienced by Mr. Steed (C 3006), the initial presentation may be sudden death, because the clot is so voluminous (Sup R 42-43).

Dr. Huml also explained that patients receiving an appropriate dose of anticoagulant may develop a DVT or a fatal pulmonary embolism. (Sup R 43.) The same is true of patients taking an aspirin daily – they may develop a DVT and sustain a fatal pulmonary embolism. (Sup R 43.)

Defendants' hematology expert, **Dr. Jacob Bitran**, testified that administering aspirin to Mr. Steed as a prophylactic anticoagulant would not have been effective in preventing the formation of Mr. Steed's DVT. (Sup R 108.) Dr. Bitran also opined that the risk of internal bleeding inherent in the administration of anticoagulant medication outweighed any potential benefit to Mr. Steed, who was at low risk for developing a DVT. (Sup R 110, 113, 116.) From a hematological standpoint, Mr. Steed had been appropriately treated for the development of a DVT. (Sup R 151.)

Jury Instructions, Defense Verdict and Denial of Plaintiff's Post-Trial Motion

The circuit court denied plaintiff's request for a directed finding that Rezin Orthopedics was negligent for its staff's failure to schedule Mr. Steed's return appointment on a date two weeks after his February 17, 2009 evaluation. (C 2176.) The jury considered that claim as well as plaintiff's other institutional negligence claims – an alleged failure "to notify any physician or physician's assistant on February 25, 2009, after the Decedent telephoned the Defendants' Joliet office" and "to timely schedule the Decedent to return to the office for an examination after the phone call on February 25, 2009." (C 2201.) The trial judge instructed the jury that Rezin Orthopedics denied "that it did any of the things claimed by the Plaintiff," and that it was "negligent in doing any of the things claimed by the Plaintiff," as well as that any claimed act or omission of Rezin Orthopedics was a proximate cause of plaintiff's claimed damages. (C 2201.)

The trial court instructed the jury to consider whether Rezin Orthopedics was negligent under the pattern instruction setting forth a professional standard of care for institutional negligence:

> "Negligence by an orthopedic office practice is the failure to do something that a reasonably careful orthopedic office practice would do, or the doing of something that a reasonably careful orthopedic office practice would not do, under circumstances similar to those shown by the evidence.
>
> In deciding whether the Defendant, Rezin Orthopedics and Sports Medicine, S.C., was negligent, you may consider opinion testimony from qualified witnesses, and evidence of policies and procedures.
>
> The law does not say how a reasonably careful orthopedic office practice would act under these circumstances. That is for you to decide." (C 2200.)

The court also instructed the jury to consider whether something other than the conduct of the defendant constituted the sole proximate cause of injury. (C 2196.) The jury returned a general verdict for the defendants, and the circuit court entered judgment on the verdict. (C 2169.)

Plaintiff's post-trial motion requested JNOV against Rezin Orthopedics on the issue of liability and a new trial solely on the issue of damages, or, alternatively, a new trial on all issues. (C 2329-57.) Plaintiff asserted trial error pertaining only to the standard of care. She argued that the circuit court erred by denying her motion for a directed finding and allowing the jury to determine the standard of care applicable to Rezin Orthopedics and make a factual finding as to whether that standard had been breached. (C 2329-57.) Plaintiff also raised claims of evidentiary error and an alleged misstatement in closing argument. (C 2329-57.) Plaintiff did not contest rulings on the instructions concerning the issues and duty of care applicable to Rezin Orthopedics or the sole

proximate cause instruction. (C 2222-46). The circuit court denied plaintiff's post-trial motion. (C 3315.)

Appellate Court's Decision

The appellate court granted plaintiff's request for an order reversing the trial court's denial of JNOV based on the panel's conclusions that plaintiff's evidence of Dr. Treacy's and Rezin Orthopedics' custom and practice for scheduling follow-up appointments established the applicable standard of care, and that Rezin violated its duty when a receptionist scheduled Mr. Steed's follow-up visit a week and a half later than the two-week timeframe specified by Dr. Treacy. *Steed*, ¶¶ 27-28. The panel also ruled that Dr. Treacy's and other experts' testimony did not bear on the assessment of the standard of care applicable to Rezin Orthopedics. *Steed*, ¶ 29. The appellate court also ruled that the clinic's negligence was a proximate cause of Mr. Steed's death, based on the appellate court's conclusion that, had Mr. Steed returned to the clinic in two weeks, his condition likely would have been diagnosed and treated. *Steed*, ¶ 31.

ARGUMENT

The appellate court's decision to cast aside the jury's verdict cannot be reconciled with decades of precedent mandating respect for juries as fact-finding bodies in all categories of cases. See *Maple v. Gustafson*, 151 Ill. 2d 445, 454 (1992); *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967). Recently, in *Peach v. McGovern*, this Court reiterated that an appellate court must not usurp the jury's function. 2019 IL 123156, ¶¶ 59-61. In *Peach*, this Court reversed an errant appellate decision that disturbed a circuit court's denial of a plaintiff's motion for a new trial. In words wholly applicable here, this Court observed:

> "The very essence of [a jury's] 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." (Internal quotation marks omitted.) *Id.* ¶ 61.

Whether Rezin Orthopedics acted as would a reasonably careful facility under similar circumstances and whether the claimed breaches proximately caused Mr. Steed's injury and death were issues for the fact finder to ponder and resolve. See *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 112 (2004). The circuit court rightly denied plaintiff's attempts, before and after the trial, to preclude the defense from challenging plaintiff's rendition of the standard of care and plaintiff's causation theory. (C 681, 2424, 2427, 3330-32.) The appellate court, however, analyzed the record with blinders on; the court ignored the defense evidence and discarded the jury's conclusions. This Court, accordingly, should reinstate the judgment.

I. The Trial Record Plainly Shows a Question of Fact on the Issue of Proximate Cause.

Plaintiff's argument for JNOV on appeal focused exclusively on the standard of care element of her negligence claim against Rezin Orthopedics. Because plaintiff failed to offer any argument regarding the element of proximate cause, the appellate court should have affirmed the jury's general verdict on that basis. See *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 492 (2002). The circuit court found the evidence refuting plaintiff's causation theory to be sufficiently robust; in fact, the jury received the "sole proximate cause" instruction (C 2196) – an instruction plaintiff did not challenge in her post-trial motion or on appeal. Yet, the appellate court negated the jury's verdict in two

cursory and erroneous paragraphs in which the appellate court simply ignored the defense testimony. *Steed*, ¶¶ 31-32. See *Stanphill v. Ortberg*, 2018 IL 122974, ¶ 34; *Jefferson v. City of Chicago*, 269 Ill. App. 3d 672, 675-76 (1st Dist. 1995).

Plaintiff had the burden to present evidence that a deviation from the standard of care proximately caused Mr. Steed's death. See *Sullivan*, 209 Ill. 2d at 112. Viewing the evidence in the light most favorable to Rezin Orthopedics under the *Pedrick* standard, the record easily demonstrates that the trial court correctly denied plaintiff's post-trial request for judgment notwithstanding the verdict, a ruling this Court should affirm under the *de novo* standard of review. See *Ries v. City of Chicago*, 396 Ill. App. 3d 418, 427-28 (1st Dist. 2009), *aff'd* 242 Ill. 2d 205 (2011). Proximate causation principles firmly entrenched in medical malpractice and general negligence case law demonstrate the error in the appellate court's analysis, which disregarded both aspects of proximate cause: actual cause and legal cause. See *First Springfield Bank & Trust v. Galman*, 188 Ill. 2d 252, 257-58 (1999); *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 455 (1992); *Thacker v. U N R Industries, Inc.*, 151 Ill. 2d 343, 354 (1992); *LaSalle Bank, N.A. v. C/HCA Development Corp.*, 384 Ill. App. 3d 806, 828 (1st Dist. 2008).

A. Substantial Evidence Supported a Defense Verdict on the Issue of Whether the Conduct of Rezin Orthopedics Was a Cause of Mr. Steed's Death.

In the appellate court's recitation of "the evidence presented at trial," the court noted only that Mr. Steed died on March 8, 2009, from an "easily diagnosed and treatable" DVT that progressed into a pulmonary embolism, and surmised that a follow-up appointment in accordance with Dr. Treacy's order likely would have resulted in diagnosis of and treatment for Mr. Steed's DVT. *Steed*, ¶ 31. However, multiple "facts"

in the court's summary – beginning with the initial erroneous assumption that Mr. Steed actually had developed a DVT at the time plaintiff contended he should have been seen for a follow-up visit – were contradicted by defendants' competent expert testimony.

To establish cause-in-fact, a plaintiff must show that the defendant's conduct was "a material element and a substantial factor" in bringing about the claimed injury. *Galman*, 188 Ill. 2d at 258. A plaintiff must prove to "a reasonable certainty that a defendant's acts caused the injury" and that, "absent that conduct, the injury would not have occurred." *Id.*; see *Lee*, 152 Ill. 2d at 455.

The defense expert testimony revealed the weakness in the causation theory of Dr. Jimenez, plaintiff's sole liability expert. He speculated that a DVT had formed and would have been diagnosed in an office visit two weeks following the February 17 initial examination. (C 3026.) Qualified medical professionals rebutted that testimony. Dr. Huml, a pulmonologist with three board certifications, explained to the jury that Mr. Steed exhibited no symptoms of a pulmonary embolism until March 7, the night before his death. He had not previously reported shortness of breath, pain in the chest or other DVT symptoms. (Sup R 42, 44.) In Dr. Huml's view, the first symptom of pulmonary embolism was Mr. Steed's death on March 8, 2009. (Sup R 42.) Dr. Huml elaborated that, with a saddle pulmonary embolism such as Mr. Steed's, the initial presentation may be sudden death, given the size of that category of clot. (Sup R 42.)

Dr. Pinzur also testified that the record did not establish the date of formation of the DVT (C 3197), which contradicted the conclusion that a diagnosable condition even existed on or about March 3, when Dr. Jimenez contended Mr. Steed should have

returned for a follow-up visit. In additional testimony challenging Dr. Jimenez' claim that Mr. Steed had a diagnosable DVT during the relevant timeframe, Dr. Treacy testified that fewer than 1% of patients with lower extremity injuries have symptomatic DVT. (C 1443.)

Dr. Jimenez' cross-examination concessions supported the defense position. He testified that pulmonary emboli may be entirely asymptomatic prior to an individual's death. (C 3063.) Dr. Jimenez also conceded on cross-examination that the progression of DVTs into pulmonary emboli is random and unpredictable. (C 3064.)

The reasonable conclusion from the undeniably conflicting testimony is that, even if Mr. Steed had returned to see Dr. Treacy in the two-week timeframe advocated by Dr. Jimenez, Mr. Steed would not have exhibited symptoms prompting a change in Dr. Treacy's treatment plan.

Defendants' hematology expert, Dr. Bitran, as well as Dr. Huml, buttressed the conclusion that Dr. Treacy would not have changed his treatment plan had Mr. Steed returned for an appointment on March 3. Dr. Bitran and Dr. Huml both testified that anticoagulant medication was not indicated for Mr. Steed because (a) the health risks outweighed the potential benefit for this patient, and (b) medical literature shows that anticoagulants do not decrease the incidence of DVTs in patients like Mr. Steed. (Sup R 39-40, 108-09, 113-14.)

In additional testimony calling into question Dr. Jimenez' causation theory, plaintiff testified that Mr. Steed's tightness and achiness improved following the February 25 call to Rezin Orthopedics. (C 2949.) The symptoms improved with ice and elevation as well as taking Aleve. (C 2950-51.)

The defense expert testimony demonstrated the significance of plaintiff's account of Mr. Steed's symptoms in late February. Dr. Pinzur testified the complaints about tightness in the cast did not mean that Mr. Steed had a DVT. (C 3190.) Dr. Pinzur did not agree with Dr. Jimenez that most of the swelling in the ankle had resolved when Dr. Treacy saw Mr. Steed on February 17. (C 3198.) Swelling from the injury may increase weeks later. (C 3198-99.) Dr. Pinzur explained that swelling and the retention of fluid is common and only swelling that is not resolved by elevation is a concern. (C 3190-91.) Similarly, Dr. Huml described the concept of "dependent edema," which refers to swelling that occurs after a long day of being upright and is relieved by elevation. (Sup R 78.) Dr. Huml explained that, after being at work all day, a patient may feel cast tightness due to dependent edema rather than development of DVT. (Sup R 78.) Dr. Treacy also testified that the potential for dependent edema exists when a patient has a cast on his leg. (C 1380.) A concern arises when cast tightness is not relieved by elevation. (C 1364-67.)

Accordingly, even if Mr. Steed had been scheduled for a follow-up visit with Dr. Treacy two weeks after his initial visit, around March 3, 2009, the jury heard sufficient evidence for reasonable minds to differ in determining whether (a) DVT or a pulmonary embolism had formed by about March 3, 2009, or (b) Dr. Treacy would have had any clinical reason to initiate treatment for either of those conditions.

The appellate court did not account for any of the defense testimony in reaching its conclusion about the trial record. This Court should vacate the appellate court's judgment and reinstate the judgment on the jury's verdict.

B. The Defense Presented Evidence Showing That Scheduling Mr. Steed's Follow-up Appointment on March 13, 2009, Was Not the Legal Cause of His Death.

The appellate court also ignored the fundamental principle that a plaintiff must prove both "legal cause" as well as "cause in fact" to recover. See *Mengelson v. Ingalls Health Ventures*, 323 Ill. App. 3d 69, 75 (1st Dist. 2001); see also *Galman*, 188 Ill. 2d at 257-58. The appellate court's analysis suggests it paid no consideration to whether scheduling Mr. Steed's follow-up appointment on March 13, 2009, was the legal cause of Mr. Steed's injury. Legal cause requires an objective analysis and is "essentially a question of foreseeability." *Mengelson*, 323 Ill. App. 3d at 75. The appellate court did not confront the central "legal cause" query – whether Rezin Orthopedics should bear responsibility for the conduct, if in fact it caused the harm. *Stanphill*, 2018 IL 122974 ¶ 34. On this record, it should not.

Expert testimony showed that Mr. Steed's development of a DVT that progressed into a fatal pulmonary embolism was an unforeseeable event. Additionally, the expert testimony demonstrated Mr. Steed's death was a "highly extraordinary" occurrence. See *Lee*, 152 Ill. 2d at 456 (quoting Restatement (Second) of Torts, Section 435(2), at 449 (1965)).

Defendants' pulmonology expert, Dr. Huml, testified that the incidence of fatal pulmonary embolisms in patients recovering from a ruptured Achilles tendon, such as Mr. Steed, is "virtually none," and he is aware of "no case reports in the history of the English medical literature of fatal pulmonary embolism with isolated Achilles tendon injury." (Sup R 30-31.) Dr. Huml also testified that Mr. Steed was not at a high risk for developing a DVT. (Sup R 28 29.)

Dr. Pinzur similarly supported a conclusion that the injury was not a foreseeable result of the clinic's conduct. He observed that, when Mr. Steed initially saw Dr. Treacy, Mr. Steed had been mobilizing his injured leg for three weeks. (C 3238.) It was a rare occurrence to have a blood clot five to six weeks after the original injury. (C 3238.) Nothing about the circumstances fit the usual progression, in Dr. Pinzur's view. (C 3238.)

Dr. Treacy's testimony provided further evidence of the extraordinary nature of the event. Dr. Treacy explained that, even with lower extremity surgery, which is a risk factor, less than 1% of patients have symptomatic DVT. (C 1443.) Even Dr. Jimenez acknowledged the rarity of Mr. Steed's condition: that the risk of developing a blood clot following an Achilles tendon injury is less than 1% and the risk of a fatal pulmonary embolism is even lower. (C 3059.)

The appellate court's conclusion that the evidence and reasonable inferences, viewed in a light most favorable to Rezin Orthopedics, overwhelmingly favored plaintiff cannot be reconciled with the medical expert testimony presented to the jury. This Court need go no further than the proximate cause analysis to reverse the appellate court's judgment and reinstate the judgment entered on the jury's verdict.

II. Plaintiff Failed to Meet the Stringent Standards Governing the Entry of JNOV as to the Standard of Care.

Applying the *de novo* standard of review, this Court also should reach the conclusion that plaintiff fell far short of establishing that the jury heard no testimony supporting the conclusion that Rezin Orthopedics, through its staff, complied with the standard of care applicable to a reasonably careful healthcare provider under the circumstances. See *Advincula v. United Blood Services*, 176 Ill. 2d 1, 29 (1996)

(recognizing that a medical facility must act as would a "reasonably careful" facility under similar circumstances); see also *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 132 (1999) (noting the *de novo* standard of review applicable to a trial court's decision on a motion for directed verdict or JNOV). Here, rather than considering the entire record of testimony, the appellate court relied solely on one aspect of the facility's custom and practice, that Dr. Treacy would instruct the receptionist regarding his preference for scheduling a follow-up appointment, and that, in this case, the receptionist scheduled Mr. Steed's appointment three and a half weeks later instead of two weeks later, as Dr. Treacy wrote. *Steed*, ¶¶ 26-27.

In its decision, the appellate court briefly mentioned the testimony of defense medical experts. *Steed*, ¶¶ 15-18. *The court acknowledged defense testimony that the standard of care did not require Mr. Steed to be scheduled to return in two weeks, and that Rezin Orthopedics did not violate the standard of care by scheduling the appointment three and a half weeks later*. *Id*. ¶ 16. The court swept aside the defense testimony, however. Considering isolated testimony of "custom and practice" to be conclusive evidence of standard of care, the appellate court stated that the standard of care applicable to Dr. Treacy differs from the standard applicable to the facility and erroneously declared the defense "presented no evidence to refute" the court's myopic view of the facility's conduct. *Id*. ¶¶ 28-29.

A. Conflicting Testimony Concerning the Standard of Care Supported the Circuit Court's Decision to Deny Plaintiff's Motion for JNOV and Required the Appellate Court to Affirm That Ruling.

This Court's decisions in *Advincula* and *Darling v. Charleston Community Memorial Hospital* articulate the principles demonstrating the fundamental flaw in the

appellate court's decision. A medical care facility must act as do reasonably careful facilities under similar circumstances, *Advincula*, 176 Ill. 2d at 29, and has a duty to operate in accordance with the legal standard of "reasonable conduct in light of the apparent risk." *Darling*, 33 Ill. 2d 326, 331 (1965). "[A] wide variety" of evidence, including expert testimony, bylaws, statutes, accreditation standards, community practice – as well as custom and practice – bears on the issue of whether a facility fulfills its obligations. *Advincula*, 176 Ill. 2d at 29; see IPI (Civil) No. 105.03.01.

Consistent with the evidentiary requirements this Court has established in these decisions, both parties here presented expert testimony regarding (a) the standard of care applicable to Rezin Orthopedics, and (b) whether the receptionist's scheduling of Mr. Steed's follow-up appointment violated that standard. Plaintiff's expert, Dr. Jimenez, testified that the standard of care required a follow-up appointment two weeks after his initial visit and that scheduling his appointment three and a half weeks later violated the standard of care. (C 3009-13.) Defendants, in turn, presented expert witnesses whose testimony rebutted Dr. Jimenez's opinions and soundly disproves the appellate court's statement that the "custom and practice" evidence purportedly establishing the applicable standard of care for Rezin Orthopedics "was not contradicted." *Steed*, ¶ 28.

Dr. Treacy testified that he was not obligated to schedule Mr. Steed's follow-up appointment two weeks after his initial visit; rather, the standard of care would have allowed Mr. Steed's follow-up appointment to be scheduled up to four weeks later. (C 1452-54.) Dr. Treacy described medical literature recommending that patients like Mr. Steed return for an initial follow-up visit four weeks after cast placement. (C 1454.) Dr. Treacy's testimony established that his written direction for Mr. Steed's follow-up

appointment to be scheduled two weeks after the initial visit reflected Dr. Treacy's personal preference, a higher standard than was medically required. (C 1454-55.)

In additional testimony supporting the clinic's conduct, Dr. Pinzur opined that the standard of care required the Rezin Orthopedics receptionist to schedule Mr. Steed's follow-up appointment "four to six weeks" after cast placement. (C 3184, 3210.) The jury could infer from Dr. Pinzur's testimony that scheduling Mr. Steed's follow-up appointment three and a half weeks after his initial visit exceeded the standard of care. (C 3183-84.) In Dr. Pinzur's view, it made no medical difference whether Mr. Steed returned two weeks or six weeks after his initial visit. (C 3209-10, 3235-36.)

In *Advincula*, this Court held that, "while custom and practice can assist in determining what is proper conduct, they are not conclusive necessarily of it." *Advincula*,; see *Darling*, 33 Ill. 2d at 331-32 (evidence of the defendant hospital's regulations "aided the jury in deciding" the standard of care, but "did not conclusively determine the standard of care"). Evidence of "local usage or general custom" at an institution may be overcome by expert testimony establishing a separate and distinct standard of care. See *Advincula*, 176 Ill. 2d at 38.

The appellate court gave lip service to the legal standards governing the evidence relevant to whether a treating healthcare facility conducted itself in a reasonably careful manner under the circumstances. *Steed*, ¶ 26. In the next paragraph, however, the appellate court declared that plaintiff met her burden of proving the standard of care applicable to Rezin Orthopedics, as a matter of law, without accounting for the defense expert testimony supporting the opposite conclusion: that the clinic's staff did not deviate

from the standard of care in scheduling Mr. Steed's appointment for March 13 rather than March 3-5.

B. Testimony of the Rezin Orthopedics' Staff Refuted Plaintiff's Claim of Negligence.

Although the appellate court's decision to enter JNOV for plaintiff hinges on the panel's determination of custom and practice testimony, *Steed*, ¶¶ 27-29, the appellate court omitted from its analysis significant portions of the custom and practice testimony of the three receptionists who acknowledged the two-week follow-up order. *Steed*, ¶ 27. The three Rezin Orthopedics receptionists provided additional custom and practice testimony, which established some flexibility in the scheduling protocol. It was not written in stone, as the appellate court erroneously concluded.

Jodi Decker, the receptionist on duty at the time of Mr. Steed's February 17 appointment, explained that the custom and practice for a patient who needed multiple additional appointments was for the receptionist to schedule the first visit and instruct the patient to call to schedule additional appointments or to schedule additional dates at the next upcoming appointment. (C 2721.) Ms. Decker testified that she had no reason to believe that she deviated from her routine custom and practice on February 17, 2009 (C 2721) in making only one appointment for Mr. Steed for his casting placement on February 19 (C 2710).

Victoria Hare also testified regarding the policies and procedures for scheduling patients for follow-up appointments. (C 1242.) While heeding the physician's directive to schedule an appointment within a particular timeframe, Ms. Hare explained that scheduling follow-up appointments required not only the physician's directive, but also

communication and agreement with the patient. (C 1272.) Were a patient unavailable for an appointment on the day requested by the physician, the receptionist would attempt to schedule the day before or the day after the requested date, and, if necessary, would check for availability at another Rezin Orthopedics clinic location. (C 1720.) Past approximately a week after the requested date, Ms. Hare would advise the patient of the doctor's instruction, and would explain that another conclusion would have to be reached or the doctor's approval obtained. (C 1270-71.) Like Ms. Decker, Ms. Hare also testified that she had no reason to believe that she had deviated from her custom and practice in making Mr. Steed's appointment on February 19, 2009. (C 1272.)

In *Advincula*, this Court recognized the significant role of custom and practice in determining professional negligence, including institutional negligence, as well as in the area of ordinary negligence. *Advincula*, 176 Ill. 2d at 37. Custom and practice assists in determining the standard of care. *Id*. A witness may describe routine practice to prove that her conduct on a particular occasion was in conformity with that practice. See *Hajian v. Holy Family Hospital*, 273 Ill. App. 3d 932, 942 (1st Dist. 1995). Although the appellate court considered the custom and practice testimony concerning Dr. Treacy's super bill notations and the receptionists' acknowledgment of their responsibility to schedule appointments accordingly, the court disregarded additional custom and practice testimony of the receptionists as well as the expert testimony refuting plaintiff's standard of care theory. The appellate court erred in concluding that "all the evidence" overwhelmingly favored the plaintiff. *Steed*, ¶ 29.

C. In Addition to This Court's Precedent, Appellate Decisions Illustrate the Third District's Analytical Error.

Pogge v. Hale, 253 Ill. App. 3d 904 (4th Dist. 1993), a decision recognizing a substantive distinction between institutional negligence claims that involve medical issues and those that involve purely administrative issues, demonstrates the appellate court's error in discarding the defense expert testimony.

In *Pogge*, the appellate court explained that, where an alleged breach of an institutional duty involves medical issues, evidence of the facility's rules, regulations, and bylaws do not, on their own, conclusively establish the prevailing standard of care. 253 Ill. App. 3d at 917. Rather, a plaintiff *must* present expert testimony in conjunction with the policies to establish the applicable standard of care, because such a claim is "not the type which laypersons could evaluate without the aid of expert testimony." *Id.*

One of the plaintiff's institutional negligence claims in *Pogge* involved a breached hospital policy that allegedly resulted in a delay in the patient receiving emergency medical treatment. *Id.* at 915. The appellate court recognized that expert opinion on that issue was necessary to establish whether any delay constituted a deviation from the standard of care. *Id.*; see also *Evanston Hospital v. Crane*, 254 Ill. App. 3d 435, 442 (1st Dist. 1993) (hospital bylaws may be admissible but do not relieve plaintiff of the burden of establishing by expert testimony that the defendant's conduct breached the standard of care).

Similarly, here plaintiff's claim against Rezin Orthopedics involves an inherently medical issue—the treatment plan for Mr. Steed's ruptured Achilles tendon and the medical decision regarding when to schedule his follow-up appointment with his surgeon.

Plaintiff's theory of Rezin Orthopedics' negligence did not, as the appellate court suggested, hinge on a purely administrative function. *Steed*, ¶ 29.

Notably, the jury received instructions requiring an assessment of whether Rezin Orthopedics was negligent under a professional standard of care. The trial court instructed the jury to consider whether the defendant orthopedic office was negligent, meaning "something that a reasonably careful orthopedic office practice would do, or the doing of something that a reasonably careful orthopedic office practice would not do, under circumstances similar to those shown by the evidence." (C 2200.) The trial court instructed the jury to "consider opinion testimony from qualified witnesses," and notably, plaintiff did not challenge this instruction, in her post-trial motion or in the appellate court. (C 2222-46.) Contrary to this instruction, the appellate court framed the issue as requiring "the assessment of a general standard of care." *Steed*, ¶ 29.

D. A Plaintiff May Not Unilaterally Define the Standard of Care.

The appellate court's ruling rests on the faulty premise that a plaintiff not only may determine its allegations of negligence, but also can dictate the conclusion that the allegations, if proved, indeed constitute negligence. *Steed*, ¶¶ 19, 28. The appellate court quoted a portion of the issues instruction, the paragraph setting forth the ways in which plaintiff contended Rezin Orthopedics was negligent. *Steed*, ¶ 19. The appellate court, however, omitted the remainder of the instruction, which told the jury that, not only did Rezin Orthopedics deny "that it did any of the things claimed by the Plaintiff," but also denied "that they were negligent in doing any of the things claimed by the plaintiff," as well as denied that any of the claimed acts or omissions were a proximate cause of plaintiff's claimed damages. (C 2201.) Rezin Orthopedics was entitled to dispute whether

the conduct, if proved, constituted negligence, and to have a jury decide whether Rezin Orthopedics breached its duty of care, based on all of the testimony, including the expert testimony.

Permitting plaintiff to unilaterally define the standard of care would create an illogical and inequitable framework in medical malpractice litigation. The appellate court based its determination that the experts' testimony was irrelevant on the receptionist's role in selecting the appointment date. *Id.* ¶¶ 27-29. However, had Dr. Treacy decided that a follow-up visit three and a half weeks later was appropriate, written that date on the "super bill," and given it to the receptionist who followed the instruction and scheduled Mr. Steed to return on March 13, 2009—then, under the appellate court's reasoning, the experts' standard of care opinions would have been relevant and probative.

Regardless of who selected Mr. Steed's follow-up appointment date, Mr. Steed would have received the same medical care. According to the Third District's analysis, however, if *Dr. Treacy* had scheduled the follow-up appointment date, the expert testimony would have created a question of fact regarding the applicable standard of care for the jury, and the court would not have disturbed the jury's verdict. The appellate court, therefore, created an arbitrary, bizarre distinction that imposes a more stringent and restrictive standard of care concerning Mr. Steed's medical treatment on the Rezin Orthopedics receptionists than on the medical professionals directing Mr. Steed's treatment. The logical extension of the appellate court's ruling provides an additional basis for vacating the appellate court's decision and reinstating the judgment.

III. Plaintiff's Meritless New Trial Arguments Pertain Only to the Standard of Care and Cannot Overcome the General Verdict Rule.

As in the appellate court, in this Court plaintiff may contend that she is entitled to a new trial in the alternative to JNOV. Should plaintiff request a new trial as alternative relief, this Court should deny it, despite the appellate court's determination not to address plaintiff's new trial arguments. *Steed*, ¶ 33. See *Gatto v. Walgreen Drug Co.*, 61 Ill. 2d 513, 520 (1975) (recognizing that, pursuant to Supreme Court Rule 366(a)(5), a remand to the appellate court was unnecessary for the appellate court to decide an issue before consideration by this Court).

The general verdict rule governs plaintiff's new trial arguments. In the appellate court, plaintiff argued that the trial court abused its discretion in permitting Rezin Orthopedics to contest plaintiff's standard of care evidence with expert testimony and in granting a motion *in limine* that barred plaintiff from testifying to the content of a conversation plaintiff claims occurred between Mr. Steed and a Rezin Orthopedics' receptionist. Plaintiff also argued she was denied a fair trial based on an isolated comment in closing by defense counsel, to the effect that scheduling Mr. Steed was "a little difficult," which drew a curative instruction by the judge. These points all pertained to plaintiff's standard of care theory.[1] Plaintiff cannot establish prejudice given the strong testimony recounted above on the element of proximate cause.

[1] With her argument seeking a "new trial on damages only," plaintiff also requested the appellate court to allow a new trial based on the manifest weight of the evidence. (Plaintiff's appellate brief at 17.) For all of the reasons set forth in Arguments I and II, the record does not meet this Court's standard for a new trial: the ample testimony concerning Rezin Orthopedics' compliance with the standard of care and rebutting plaintiff's causation theory supports the trial court's exercise of discretion in denying

A plaintiff cannot succeed on a request for a new trial based on claims of error that pertain to only one of several grounds that could exonerate a defendant. Where a defendant asserts two defenses, and a jury returns a general verdict in favor of that defendant, a reviewing court presumes that the jury resolved all issues in favor of the defendant. See *Lazenby v. Mark's Construction, Inc.*, 236 Ill 2d 83, 101 (2010). This principle is well established in medical malpractice case law. See *Arient v. Alhaj-Hussein*, 2017 IL App (1st) 162369, ¶¶ 44-46; see also *Jones v. Beck*, 2014 IL App (1st) 131124, ¶ 30 (upholding defense verdict in medical malpractice case based on the two-issue rule, despite the appellate court's finding of instructional error); *Davis v. Kraff*, 405 Ill. App. 3d 20, 39 (1st Dist. 2010) (without a special interrogatory revealing the jury's findings on any one of multiple potentially dispositive issues, the appellate court presumed that the jury determined all issues in favor of the defense); *Robinson v. Boffa*, 402 Ill. App. 3d 401, 407 (1st Dist. 2010) (affirming verdict in favor of defendant where plaintiff appealed on grounds relating to proximate cause defense concerning the conduct of a non-party physician, but defendant's second causation defense concerning preexisting health issues supported the jury's verdict); *Tabe v. Ausman*, 388 Ill. App. 3d 398, 402-05 (1st Dist. 2009) (holding that failure to follow two-issue rule in medical negligence case constituted reversible error).

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plaintiff's post-trial request for a new trial. See *Maple v. Gustafson*, 151 Ill. 2d 445, 455-56 (1992).

A. The Trial Court Did Not Abuse Its Discretion in Allowing Rezin Orthopedics to Defend Itself on the Standard of Care (Plaintiff's Motion *in Limine* No. 12).

The trial court properly denied plaintiff's motion *in limine* no. 12 seeking to bar testimony that the standard of care applicable to Dr. Treacy allowed Rezin Orthopedics to schedule a follow-up appointment later than two weeks after Mr. Steed's initial appointment. (C 2151-56.) Plaintiff was incorrect in arguing that the trial court's denial of motion *in limine* no. 12 allowed defendants to introduce testimony that plaintiff contended was unnecessary given Dr. Treacy's instruction and the actual date scheduled for the office visit. Claiming defendant had no viable reason for scheduling the appointment on March 13 rather than March 3-5 (C 2155) plaintiff requested an order barring the expert testimony the defense disclosed on standard of care, and even barring cross-examination of plaintiff's medical expert (C 2155).

During hearings on the motions *in limine*, the trial court asked whether any case law held that, where an institution has adopted a policy consistent with one standard of care, it may not challenge the standard of care beyond its internal policy. (C 2423-24.) Plaintiff's counsel cited no supporting authority in its motion (C 2151-55) or in answer to the trial court's question. (C 2424). Observing that the standard of care is broader than the policy of a single institution and the court's obligation to permit the defense to present its side of the case on the standard of care, the trial court denied plaintiff's motion. (C 2423-28.)

The allegations contained in plaintiff's own Fourth Amended Complaint placed in issue the standard of care applicable to Rezin Orthopedics' scheduling Mr. Steed's follow-up appointment. Plaintiff alleged that both the clinic *and* Dr. Treacy were

negligent in their alleged failure to schedule a timely follow-up visit for Mr. Steed. (C 691, 698.) Therefore, evidence regarding the applicable standard of care as it applied to both Rezin Orthopedics and to Dr. Treacy was relevant.

Plaintiff mischaracterized the concept of duty. By plaintiff's argument, the receptionists' obligation to Dr. Treacy to follow his instructions controlled the standard of care. At issue, however, is Rezin Orthopedics' duty to provide medical care to Mr. Steed within the applicable standard of care. As set forth in Argument II above, a jury may consider a healthcare facility's custom and practice in determining the standard of care along with a variety of evidence, including expert testimony bearing on the standard of care. *Advincula*, 176 Ill. 2d at 29. Custom and practice is relevant but not conclusive. *Id* at 38; *Darling*, 33 Ill. 2d at 331. In ruling on motion *in limine* no. 12, the trial court correctly reasoned that the standard of care issue is "broader than what one institution does" (C 2424) and properly permitted Rezin Orthopedics to challenge plaintiff's standard of care position.

Notably, plaintiff did not cite a single case in her appellate briefs supporting her contention that the instruction from Dr. Treacy to set Mr. Steed's appointment in two weeks conclusively established the standard of care. Consequently, plaintiff forfeited the argument on appeal. See *Ballard RN Center v. Kohll's Pharmacy & Homecare, Inc.*, 2015 IL 118644, ¶ 48; Ill. S. Ct. Rule 341(h)(7). The trial court's denial of plaintiff's motion *in limine* no. 12 presents no basis for reversal.

B. The Trial Court Properly Excluded Hearsay Testimony.

The trial court did not abuse its discretion by excluding evidence regarding the contents of a phone call made by Mr. Steed to the Rezin office on February 25, 2009. The

court granted defendants' motion *in limine* no. 32 to bar plaintiff from testifying to the contents of the telephone call conversation on the basis that the proffered testimony was hearsay. (C 1972-77).

At trial, plaintiff sought to testify that Mr. Steed told plaintiff that, when Mr. Steed called Rezin Orthopedics' office on February 25, he reported experiencing achiness in his right calf and that his cast felt tight. (C 3149-51.) Further, plaintiff was prepared to testify that the person to whom Mr. Steed was speaking told Mr. Steed to elevate his leg and place ice behind his knees. (*Id*.) Plaintiff offered the testimony to prove her contention that Rezin Orthopedics breached the standard of care in handling the February 25th telephone call from Mr. Steed.

In a ruling clearly within its discretion, the trial court determined that the testimony constituted hearsay, an out of court statement by a declarant submitted to prove the truth of the matter asserted. Ill. R. Evid. 801. Rezin Orthopedics argued that information told to plaintiff by Mr. Steed about what a third person said is double hearsay that does not fall within any exception to the general rule. (C 1972-77, 2599.) The trial court properly determined that the testimony did not fall within the "state of mind" exception to the hearsay rule. (C 2067-77.) See *Agins v. Schomberg*, 397 Ill. App. 3d 127, 136-37 (1st Dist. 2009).

The claims against Rezin Orthopedics set forth in the issues instruction included that it allegedly "[f]ailed to notify any physician or physician's assistant on February 25, 2009, after the Decedent telephoned the Defendants' Joliet office; or [f]ailed to timely schedule the Decedent to return to the office for an examination after the phone call on February 25, 2009." (C 2201.) The barred testimony pertained to those theories. Plaintiff

would have testified that Mr. Steed reported his symptoms of tightness and achiness to Rezin Orthopedics on February 25, and that the receptionist merely instructed Mr. Steed to elevate his leg above his heart and ice the leg below his knee. (C 3149-52) (offer of proof).) This testimony falls squarely within the definition of hearsay, in that plaintiff proposed to offer it to prove the truth of her contention – that a receptionist received information that should have prompted further action. See generally, *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 99 (1995).

Plaintiff also argued that, even if hearsay, the testimony fell within the state of mind exception contained in Illinois Rules of Evidence 803(3), another argument the trial court properly rejected. (C 2599-2600.) Mr. Steed's account of the February 25 conversation did not bear on his intent to contact Rezin Orthopedics; by the time of the conversation with plaintiff, he already had called the clinic. The state of mind exception applies only to show the state of mind of the declarant of the hearsay statement, not the state of mind of the person who heard the hearsay statement, as plaintiff suggested to the trial court. (C 2599.) See *People v. Cloutier*, 178 Ill. 2d 141, 155 (1997).

Regardless of the order *in limine* granting defendants' motion no. 32, plaintiff presented the information to the jury by other means. The parties stipulated to the fact that Mr. Steed telephoned Rezin Orthopedics on February 25, 2009, and plaintiff's counsel read the stipulation to the jury. (C 1231-32.) Circumventing the trial court's order *in limine*, plaintiff repeatedly posed hypotheticals suggesting the content of the February 25 conversation to the jury. During the testimony of Cheryl Haddon, an ortho tech who assisted in casting Mr. Steed, plaintiff posed several hypotheticals in which a patient called and reported a problem with a cast. (C 2679-87.) In a sidebar, the court observed

that plaintiff was improperly suggesting what was said during the barred conversation and instructed plaintiff to move on to another topic. (C 2685-87.)

Plaintiff again attempted to circumvent the *in limine* order during Dr. Jimenez' testimony, by inquiring what the standard of care required if Mr. Steed reported a tight cast to Rezin Orthopedics. (C 3027-33.) Despite the trial court's rulings that repeatedly sustained objections to the questioning, the jury received the message: that Mr. Steed complained of pain and tightness in his cast and was not seen immediately. (C 3033.)

Accordingly, not only did the trial court properly bar the hearsay testimony, plaintiff can establish no prejudice after disclosing the information to the jury through the testimony of her expert, Dr. Jimenez.

C. No Error Occurred During Defense Counsel's Closing Argument in Referencing Ms. Decker's Testimony, and Plaintiff Sustained No Prejudice.

On appeal, plaintiff presented a third basis for a new trial relating to the standard of care. The comments at issue are as follows:

> "So we heard from Jodi Decker. She testified on February 17th that she made the appointment for Mr. Steed to have his cast placed in accordance with Dr. Treacy's instruction. His instruction was to have the cast placed in a day or two. Jodi Decker did that. She also said that scheduling with Mr. Steed was a little difficult. And we have evidence that - - so Jodi Decker got Mr. Steed to commit to the cast placement appointment with the intent that when he came back for the cast placement appointment, he would schedule the next follow-up visit." (C 3255.)

Plaintiff objected to the argument as misstating the evidence. (C 3255.) The trial court admonished the jury that closing argument is not evidence and that the jurors should disregard any argument that is inconsistent with the evidence. (C 3255.)

Plaintiff argued on appeal that the comment violated an order *in limine* granting plaintiff's motion *in limine* no. 10. (Plaintiff's brief at 23.) Plaintiff had requested the court to bar "argument, reference or inference by defense counsel as to why Decedent's follow-up appointment with Dr. Treacy was set for March 13, 2009, along with certain testimony by Cast Tech Cheryl Haddon that the Decedent was a busy man…." (C 2138.) The trial court denied plaintiff's motion to the extent she sought to bar evidence of custom and practice, but granted the motion in that the court would not permit guess and conjecture. (C 2415.)

Defense counsel's statement constituted a reasonable inference from Ms. Decker's trial testimony, in which she testified to her routine custom and practice for scheduling follow-up appointments and, further, that she had no reason to believe that she had deviated from her custom and practice in scheduling Mr. Steed for casting on February 19 but did not set a later, two-week follow-up appointment. (C 2717-21.) Ms. Decker's testimony supported the inference that, for some reason, she encountered difficulty in scheduling a post-casting follow-up appointment for Mr. Steed. Defense counsel did not exceed the wide latitude permitted in drawing reasonable inferences from evidence in this aspect of her closing argument. See *McDonnell v. McPartlin*, 192 Ill. 2d 505, 524 (2000); see also *Guski v. Raja*, 409 Ill. App. 3d 686, 698 (1st Dist. 2001).

A trial court can cure error in closing argument with a cautionary instruction. See *Bruske v. Arnold*, 44 Ill. 2d 132, 138 (1969); *Wilson v. Humana Hospital*, 399 Ill. App. 3d 751, 759 (1st Dist. 2010). A court's cautionary instruction renders misstatements of counsel harmless; a jury is presumed to follow a court's instructions. See *People v.*

Simms, 192 Ill. 2d 348, 398 (2000). Here, the trial court's admonition to the jury cured any possible error.

Defense counsel's isolated statement, considered in the context of a lengthy closing argument, as well as a seven-day trial, did not have deprive plaintiff of a fair trial. See *Diaz v. Legal Architects, Inc.*, 397 Ill. App. 3d 13, 42 (1st Dist. 2009). The trial as a whole was fair, and the jury heard evidence sufficient to support its verdict for Rezin Orthopedics. See *Grillo v. Yeager Construction*, 387 Ill. App. 3d 577, 601 (1st Dist. 2008).

CONCLUSION

WHEREFORE, defendant-appellant, Rezin Orthopedics and Sports Medicine, S.C., requests that this Honorable Court reverse the appellate court's order and reinstate the circuit court's judgment entered on the jury's verdict.

Dated: March 3, 2020

Respectfully submitted,

/s/ Karen Kies DeGrand

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 40 pages.

/s/ Karen Kies DeGrand
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APPENDIX

E-FILED
3/3/2020 8:13 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

TABLE OF CONTENTS OF APPENDIX

VERDICT FORM B

We, the jury, find for the Defendants, Rezin Orthopedics and Sports Medicine, S.C., and Stephen H. Treacy, M.D., and against the Plaintiff, Susan Steed, independent administrator of the Estate of Glenn Steed, deceased.

Foreperson

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

STEED
Plaintiff
vs
REZIN ORTHOPEDICS
Defendant

CASE NO: 10 L 340

2017 APR 11 AM 11:55
CLERK OF THE CIRCUIT COURT
WILL COUNTY, IL
FILED

COURT ORDER

THIS MATTER COMING BEFORE THE COURT ON PLAINTIFF'S MOTION FOR JNOV AGAINST REZIN ORTHOPEDICS AND A NEW TRIAL ON DAMAGES ONLY, OR IN THE ALTERNATIVE, A NEW TRIAL ON ALL ISSUES AGAINST REZIN ORTHOPEDICS,

THE COURT HAVING REVIEWED THE PLEADINGS AND CONSIDERED THE ARGUMENTS

IT IS HEREBY ORDERED

PLAINTIFF'S MOTION IS DENIED

Attorney or Party, if not represented by Attorney
Name M. DEFALCO
ARDC # 6239235
Firm Name MRN
Attorney for D ROSM
Address 211 S. WHEATON
City & Zip WHEATON 60187
Telephone 630 653 9300

Dated: 4/7 2017

Entered: _____
Judge

ANDREA LYNN CHASTEEN, CLERK OF THE CIRCUIT COURT OF WILL COUNTY

2010L000340

APPEAL TO THE THIRD DISTRICT APPELLATE CC
FROM THE CIRCUIT COURT OF THE TWELFTH JUDICIA
WILL COUNTY, ILLINOIS

SUSAN STEED, as Independent Administrator of the Estate of GLENN STEED, Deceased
Plaintiff/Appell ent

vs

REZIN ORTHOPEDICS AND SPORTS MEDICINE, SC, an Illinois Corporation AND STEPHEN H. TREACY, M.D.
Defendant/Appell ee

CASE NO: 2010 L 340

*Any and all case numbers listed will be prepared & charged accordingly

NOTICE OF APPEAL

☐ Joining Prior Appeal ☒ Separate Appeal ☐ Cross Appeal
(Check appropriate box)

Appellant's Name: Susan Steed	Appellant's Attorney: Lauren A. Levin of Mirabelli Durkin & Rudin, LLC
Address:	Address: 180 N. LaSalle Street, Ste. 3650
City/State/Zip:	City/State/Zip: Chicago, IL 60601
Telephone:	Telephone: 312/229-5555
☐ Pro Se	☒ A.R.D.C. #: 6293220

Appellee's Name: Rezin Orthopedics and Sports Medicine	Appellee's Attorney: Marcellino DeFalco of Mutherin, Rehfeldt & Varchetto
Address:	Address: 211 South Wheaton, Ste 200
City/State/Zip:	City/State/Zip: Wheaton, IL 60187
Telephone:	Telephone: 630/653-9300
☐ Pro Se	☐ A.R.D.C. #:

An appeal is taken from the order or judgment described below:

Date of the judgment/order being appealed: November 10, 2016 & April 7, 2017

Name of Judge who entered the judgment/order being appealed: The Honorable Theodore J Jarz

Nature of order appealed from: to reverse the jury's verdict in favor of the Defendant, Rezin Orthopedics and Sports Medicine, S C

I understand that a "Request for the Preparation of Record on Appeal" form must be completed and filed within the case. A deposit is requested to be paid in advance for starting the preparation and transmission of the Record on Appeal. It is understood and agreed that once a Notice of Appeal is submitted, the Appellant/Appellant's Attorney is responsible for the costs of preparing the Record on Appeal, regardless of whether the Appeal is successful, dismissed, the time is extended, or a party elects to not transmit the Record on Appeal to the Appellate Court. The Clerk of the Circuit Court of Will County reserves the right to send this case to collections or pursue a claim to recover the costs and expenses, including reasonable attorney's fees, related to the preparation and transmission of the Record on Appeal.

(Signature)

PROOF OF SERVICE – by mail

The undersigned certifies, under penalty of perjury, that I served a copy of the attached document upon all parties to this case, or their attorneys of record, by enclosing the same in an envelope addressed to each such party at their address listed above, with postage fully prepaid and mailed said envelope in a U.S. Post Office Mail Box in 180 N. LaSalle St., Ste. 3650, Chicago, Illinois on the 3 day of May, 2017.

(Signature)

ANDREA LYNN CHASTEEN, CLERK OF THE CIRCUIT COURT OF WILL COUNTY

16C Revised (12/16)

2019 IL App (3d) 170299-U

Order filed July 19, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

SUSAN STEED, as Independent Administrator of the Estate of Glenn Steed, deceased, Plaintiff-Appellant, v. REZIN ORTHOPEDICS AND SPORTS MEDICINE, S.C., an Illinois Corporation and STEPHEN H. TREACY, M.D., Defendants (SUSAN STEED, as Independent Administrator of the Estate of Glenn Steed, deceased, Plaintiff-Appellant, v. REZIN ORTHOPEDICS AND SPORTS MEDICINE, S.C., an Illinois Corporation, Defendant-Appellee).	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois, Appeal No. 3-17-0299 Circuit No. 10-L-340 Honorable Theodore J. Jarz, Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Holdridge and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Plaintiff is entitled to judgment *n.o.v.* on the issue of liability where evidence overwhelmingly established that orthopedic treatment facility was negligent in failing to schedule follow-up appointment as ordered by treating physician.

¶ 2 Plaintiff, Susan Steed, as independent administrator of the Estate of Glenn Steed, filed suit against defendants, Rezin Orthopedics and Sports Medicine, S.C. and Stephen H. Treacy, M.D., alleging medical negligence for failing to prevent a deep vein thrombosis (DVT) and resulting pulmonary embolism that caused Glenn's death. The jury returned a verdict in favor of both defendants. Plaintiff filed a posttrial motion only challenging the verdict in favor of Rezin Orthopedics, which the trial court denied. On appeal, she argues (1) that the trial court erred in denying her motion for judgment *n.o.v.* against Rezin Orthopedics and a new trial on the issue of damages only, or alternatively, a new trial on all the issues and (2) that she is entitled to a new trial based on the trial court's admission of irrelevant and prejudicial evidence.

¶ 3 BACKGROUND

¶ 4 On January 29, 2009, Glenn Steed sustained an injury to his right leg and ankle while playing basketball with some co-workers. On February 17, 2009, he visited Rezin Orthopedics and Sports Medicine (Rezin Orthopedics) in Plainfield to address the discomfort he was still feeling in his lower leg. Dr. Stephen Treacy, an orthopedic surgeon employed by Rezin Orthopedics, diagnosed Glenn with a partially torn Achilles tendon. Dr. Treacy's treatment plan included placing Glenn's right leg in a cast with his foot pointed in a downward direction, a position called plantar flexion, for six weeks. He also ordered Glenn to return to the clinic in two weeks for a follow-up examination. The receptionist scheduled Glenn's cast appointment for February 19, 2009, at the Joliet clinic. On February 19, Glenn had a plaster cast placed around his right leg. Before he left the office, a receptionist scheduled

Glenn's follow-up appointment for March 13, 2009. The next day, Glenn complained to his wife that the position of his ankle in the cast was uncomfortable. On February 25, 2009, Glenn called the Joliet office, and a receptionist changed his follow-up appointment from March 13 to March 12. On March 8, 2009, Glenn suffered a pulmonary embolism from a deep vein thrombosis (DVT) and died.

¶ 5 Susan Steed, Glenn's wife and the administrator of his estate, filed suit against Rezin Orthopedics and Dr. Treacy alleging medical negligence. Susan claimed that Dr. Treacy was negligent in failing to schedule a timely follow-up appointment for Glenn. She also alleged that Rezin Orthopedics' receptionists were negligent in failing to follow Dr. Treacy's order and schedule Glenn's follow-up appointment within two weeks and failing to schedule an immediate appointment for Glenn as a result of his February 25 phone call. The complaint claimed that, had Glenn returned to Rezin Orthopedics on or before March 3, 2009, the DVT would have been diagnosed and the fatal pulmonary embolism would have been prevented.

¶ 6 At trial, Dr. Treacy testified that on February 17, 2009, he told Glenn that he wanted to see him again in two weeks. It was Dr. Treacy's custom and practice to note the date of a follow-up appointment on the bottom of a document referred to as a "super bill" and to give the super bill to the receptionist on duty at the end of every appointment. The receptionist would then schedule the appointment in accordance with Dr. Treacy's instructions.

¶ 7 Dr. Treacy did not place a cast on Glenn's leg at the initial appointment on February 17 because Glenn had driven himself to the appointment and could not drive home with a cast on his right leg. Instead, he ordered casting at a later date and a follow-up exam in two-weeks. He wrote those instructions on the super bill and handed it to Jodi Decker, the Rezin Orthopedics receptionist on duty that day. Decker scheduled Glenn's casting appointment

for February 19 at the Rezin Orthopedics office in Joliet. She did not schedule a follow-up appointment at that time.

¶ 8 Decker testified that she was familiar with the protocol for scheduling patient follow-up appointments. An order for a patient to return to be casted and an order to follow-up in two weeks are two instructions that Decker expected Dr. Treacy to write at the bottom of the super bill. Dr. Treacy gave Glenn's super bill to Decker before Glenn left the Plainfield office. Decker stated that it was the custom and practice at Rezin Orthopedics to follow the instructions on the super bill. It was also common practice to schedule the first appointment and then schedule the follow-up when the patient returned for the first appointment. She scheduled the appointment for Glenn's casting in Joliet and told him to check his calendar and schedule the follow-up appointment when he returned for casting.

¶ 9 On February 19, 2009, Glenn reported to the Joliet office, and Dr. McNab, a podiatrist, placed a cast around Glenn's right lower leg and ankle. At the conclusion of the February 19 appointment, Victoria Hare, another Rezin Orthopedics receptionist, scheduled Glenn's follow-up appointment with Dr. Treacy for March 13, 2009. Hare testified that she had been a receptionist at Rezin Orthopedics for many years and throughout her years of service there was a protocol in place for how to schedule patients. All patients scheduled follow-up appointments with a receptionist. According to the protocol, receptionists were supposed to follow the doctor's order and schedule patients to come back in accordance with the doctor's instructions. The practice in the office was to make an appointment for a date within the time frame the physician wrote at the bottom of the super bill.

¶ 10 Before Glenn left the Joliet office, he also received written instructions on caring for his cast from Cheryl Hadden, the technician who assisted with the casting procedure. The

instructions advised him to report any changes to his cast, any tightness of his cast, and any marked swelling or pain in his leg.

¶ 11 A day or two later, Glenn began experiencing some discomfort and achiness in his right leg. On February 24, he commented to his wife that his cast felt tight. The next day, on February 25, 2009, he called Rezin Orthopedics' Joliet office and spoke with receptionist Rossana Popplewell. As a result of that phone call, Popplewell changed Glenn's follow-up appointment from March 13 to March 12.

¶ 12 Popplewell testified that she could not remember the content of her conversation with Glenn. After reviewing her notes from that day, she stated that she changed the appointment from March 13 to March 12, but the only information she recorded as a reason for the change was "f/u cast." She stated that "f/u" indicated that it was a follow-up appointment. She did not record any other information regarding Glenn's phone call. She testified that every receptionist at Rezin Orthopedics was responsible for scheduling patients, and it was their responsibility to schedule patients in accordance with doctors' orders. She also noted that, as a receptionist at Rezin Orthopedics, she was required to write down a message if a patient reported having an issue with his or her cast. No message was produced relating to Glenn's phone call.

¶ 13 After the February 25 phone call, Glenn began icing the back of his right leg while his leg was elevated. At Susan's suggestion, he also started taking Aleve. Susan testified that the combination of Aleve and elevation with ice made Glenn's leg feel better but did not completely alleviate the symptoms. Late in the evening on Saturday, March 7, 2009, Glenn complained for the first time that he was experiencing pain in his right thigh. Glenn and Susan decided that Glenn should telephone Rezin Orthopedics first thing on Monday morning. On Sunday morning,

Susan woke and found Glenn lying on the floor, unresponsive. He died as a result of a pulmonary embolism from a DVT that originated in his right calf.

¶ 14 Susan presented the expert testimony of Dr. Mathew Jiminez, a board certified orthopedic surgeon. He testified that during Glenn's February 17 examination, he presented several risk factors for DVT. Glenn was older than 40, with an elevated body mass index and an injury to the leg that required a cast. Because of these factors, it was Jiminez's opinion that the standard of care applicable to both Dr. Treacy and Rezin Orthopedics required them to set his follow-up appointment for two weeks from his initial appointment. He testified that a three-and-a-half-week appointment from the date of casting was not within the standard of care.

¶ 15 Dr. Treacy testified that the professional standard of care did not require him to schedule Glenn's follow-up appointment for two weeks after his first visit. In his opinion, the applicable standard of care permitted the follow-up visit to be schedule for three or even four weeks after Glenn's first appointment.

¶ 16 Dr. Michael Pinzur, an orthopedic surgeon and the quality medical director at Loyola Hospital, testified as an expert witness on defendants' behalf. Part of Pinzur's duties at Loyola included designing a plan for reducing blood clots for patients within the hospital. He opined that the professional standard of care did not require Rezin Orthopedics to schedule Glenn's follow-up appointment for two weeks after the date of his first visit. He testified that Rezin Orthopedics could have scheduled the following appointment for three-and-a-half weeks, rather than two weeks as Dr. Treacy had ordered, and it still would have been within the standard of care. According to Pinzur, it would have been within the applicable standard of care for Rezin Orthopedics to schedule the follow-up appointment anytime between four and six weeks after the date of Glenn's initial visit with Dr. Treacy.

¶ 17 Dr. Jeffery Huml, a board certified physician in internal and pulmonary medicine, testified as an expert regarding the science of a DVT. He stated that pain or tightness in a leg that is in a cast might be indicative of a DVT and should be examined immediately. He testified that patients at a higher risk of developing a DVT are ones who suffered a fracture or have undergone surgery and are obese, extremely old, or have a family history of blood clots. Since Glenn did not exhibit any of these conditions, Huml opined that he was not at high risk for developing a DVT.

¶ 18 Dr. Jacob Bitran specializes in internal and hematology medicine and was another expert witness called by defendants. He also testified that Glenn was a low risk patient for the development of a DVT. He stated that from a hematological standpoint, Glenn had been appropriately treated for the development of a DVT. He also testified that Glenn's pulmonary embolism formed from a clot that originated in his right lower leg as a result of the plaster cast treatment. He noted that when a DVT is diagnosed, it is easily treated and further complications are preventable.

¶ 19 Susan presented Illinois Pattern Jury Instructions, Civil, No. 20.01 (2006), to the jury. In relevant part, the instruction alleged that Rezin Orthopedics was negligent in one or more of the following ways:

> "Failed to schedule the Decedent for a follow-up appointment in two weeks from February 17, 2009, in accordance with Dr. Stephen H. Treacy's order;
>
> Failed to notify any physician or physician's assistant on February 25, 2009, after the Decedent telephoned the Defendants' Joliet office; or
>
> Failed to timely schedule the Decedent to return to the office for an examination after the phone call on February 25th, 2009."

The instruction also stated that Susan alleged "one or more of [the negligent acts] was a proximate cause of her damages."

¶ 20 The trial court denied Susan's proposed jury instruction regarding a directed finding. That instruction provided:

> "The court has determined that the Defendant, Rezin Orthopedics and Sports Medicine, S.C., is negligent for failing to schedule the Decedent for a follow-up appointment in two weeks from February 17, 2009, in accordance with the Dr. Stephen H. Treacy's order. This is not an issue you will need to decide."

¶ 21 The jury returned a general verdict in favor of Rezin Orthopedics and Dr. Treacy. Susan filed a posttrial motion, requesting judgment *n.o.v.* in her favor and against Rezin Orthopedics and a new trial on the issue of damages only or, in the alternative, a new trial on all issues. The motion did not request any relief regarding the judgment entered in favor of Dr. Treacy. In her motion, Susan also argued that she was entitled to a new trial based on the trial court's admission of irrelevant and prejudicial evidence. The trial court denied Susan's motion, and she appeals.

¶ 22 ANALYSIS

¶ 23 Susan contends that the trial court erred in failing to enter judgment *n.o.v* and order a new trial on the issue of damages only based on the court's prejudicial error in denying her motion for a directed finding on defendant's negligence. She claims that judgment *n.o.v.* should be entered against Rezin Orthopedics on the issue of liability because the evidence, when viewed in the light most favorable to Rezin Orthopedics, so overwhelmingly favors her that a contrary verdict

cannot stand. She asks us to reverse the trial court's denial of her motion and remand for a new trial on the issue of damages only, or in the alternative, remand for a new trial on all the issues.

¶ 24 A directed verdict or a judgment *n.o.v.* should only be entered where the evidence, when viewed in the light most favorable to the nonmoving party, so overwhelmingly favors the movant that no contrary verdict based upon the evidence could ever stand. *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967). We review *de novo* a trial court's decision on a motion for a directed verdict or judgment *n.o.v.* *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 132 (1999). In ruling on a motion for judgment *n.o.v.*, the trial court does not weigh the evidence, nor is it concerned with the credibility of witnesses. See *Pedrick*, 37 Ill. 2d at 510. A judgment *n.o.v.* is improper where there is any evidence, together with reasonable inferences to be drawn therefrom, demonstrating a substantial factual dispute, or where witness credibility or a resolution of conflicting evidence is decisive of the outcome. *Maple v. Gustafson*, 151 Ill. 2d 445, 454 (1992).

¶ 25 In an action for negligence against a health care provider, a plaintiff must show (1) the applicable standard of care, (2) that the health care provider deviated from that standard of care, and (3) that the deviation was the proximate cause of plaintiff's injury. *Neade v. Portes*, 193 Ill. 2d 433, 443-44 (2000). A health care provider may be found liable in a negligence case based on two separate theories: (1) liability for its own "institutional" negligence; and (2) vicarious liability for the professional negligence of its agents or employees. *Groeller v. Evergreen Healthcare Center LLC*, 2015 IL App (1st) 140932, ¶ 22 (noting the application of institutional liability theory to hospitals and nursing homes). In cases alleging health care facility negligence, our supreme court has noted that health care facilities have an independent duty to assume responsibility for the care of their patients. See *Darling v. Charleston Community Memorial*

Hospital, 33 Ill. 2d 326, 332 (1965); *Jones v. Chicago HMO Ltd. of Illinois*, 191 Ill. 2d 278, 295 (2000). An institutional duty of care involves the facility's management and administrative responsibilities, rather than medical responsibilities, to enforce rules and policies "adopted by the [facility] to insure a smoothly run [facility] routine and adequate patient care and under which the physicians have agreed to operate." *Johnson v. St. Bernard Hospital*, 79 Ill. App. 3d 709, 718 (1979).

¶ 26 To fulfill this duty, a treating health care facility must act as would a "reasonably careful" health care provider under the circumstances. *Advincula v. United Blood Services*, 176 Ill. 2d 1, 29 (1996). This duty has been found based on claims that a health care facility (1) failed to require treatment and consultation by specialists and failed to review physicians' qualifications (*Andrews v. Northwestern Memorial Hospital*, 184 Ill. App. 3d 486, 489 (1989) (reasonably careful duty applied to hospitals)), and (2) failed to properly monitor and attend to the care of a patient (*Groeller*, 2015 IL App (1st) 140932, ¶ 22 (reasonable careful duty applied to nursing homes)). Whether a health care facility is reasonably careful in its administrative duties may be shown by a variety of evidence, including (1) expert testimony, (2) the custom and practice of a health care facility, and (3) the rules and regulations of a health care provider. *Darling*, 33 Ill. 2d at 331-32; *Andrews*, 184 Ill. App. 3d at 494.

¶ 27 Here, the evidence regarding the standard of care of a reasonably careful orthopedic facility was clear. A reasonably careful orthopedic facility under the circumstances was required to schedule patient follow-up appointments as instructed in the super bill. Dr. Treacy and three Rezin Orthopedics receptionists testified that it was Dr. Treacy's custom and practice to write the date of a follow-up appointment on the bottom of the super bill and deliver the super bill to the receptionist on duty at the end of every appointment. Dr. Treacy testified that it was his custom

and practice to note the date of the follow up appointment and then it was up to the receptionist to schedule the appointment in accordance with his instructions. He stated that he ordered Glenn to return within two weeks of casting, wrote those instructions on the super bill, and handed the super bill to Decker. Decker agreed with Treacy's assessment of the facility's policy regarding follow-up appointments. She acknowledged that Treacy ordered a two-week follow-up exam for Glenn, but she did not schedule the appointment. Instead, receptionist Hare scheduled the appointment after Glenn received his cast two days later. Hare testified that it was her responsibility, as with other receptionists, to schedule patient appointments and take patient phone calls. She also acknowledged that it was the custom and practice of the office to schedule follow-up appointments for two weeks after casting, as ordered by the physician. She did not schedule Glenn within that time frame. Finally, Popplewell, the receptionist who answered Glenn's phone call, concurred that the protocol for all receptionists was to schedule patients for follow-up appointments as directed in the super bill. Thus, Susan met her burden of proving the standard of care applicable to Rezin Orthopedics in the management and administration of patient care.

¶ 28 The evidence established, through physician testimony, office protocol, administrative scheduling documents and custom and practice, that the standard of care of a "reasonably careful" treating institution was to follow the written order on the super bill. That evidence was not contradicted. The evidence also demonstrated that Rezin Orthopedics breached the standard of care. The super bill instructed the receptionists to schedule the appointment for two weeks from February 19, and the receptionists did not schedule the appointment within that two-week window. No one testified that Rezin Orthopedics scheduled or attempted to schedule the follow-up appointment between February 19 and March 3. Because there is no evidence demonstrating

a factual dispute, the trial court erred in denying Susan's motion for judgment *n.o.v.* on the issue of Rezin Orthopedics liability.

¶ 29 Rezin Orthopedics claims judgment *n.o.v.* is not appropriate because the record contains sufficient evidence to support a finding that it was within the standard of care to schedule a follow-up appointment within four weeks of casting an Achilles tear. The record contains evidence indicating that a follow-up appointment scheduled two to six weeks from the date of casting was within the professional standard of care. But the issue on appeal is not whether a directed verdict on the issue of negligence is appropriate against Dr. Treacy—a question that *would* involve consideration of the professional standard of care. We have been asked to evaluate whether a verdict should have been entered against Rezin Orthopedics. That question requires the assessment of a general standard of care based on a reasonably careful orthopedic facility. That standard of care was established by plaintiff, and defendant presented no evidence to refute it. Based on the standard of care applied to an orthopedic treatment facility, all the evidence as to Rezin Orthopedics' negligence so overwhelmingly favors plaintiff that no verdict for defendant could ever stand.

¶ 30 In this case, however, the jury returned a general verdict for Rezin Orthopedics. When a jury enters a general verdict for defendant, we do not know the basis for its finding of no liability. See *Maple*, 151 Ill. 2d at 449. We do not know whether the jury entered the verdict in favor of defendant because it found that Rezin Orthopedics did not breach the standard of care or because it found no causal connection between Glenn's death and the failure to schedule the appointment as instructed. Thus, although we agree that the evidence at trial overwhelmingly established that Rezin Orthopedics breached the standard of care, we must also evaluate

proximate cause. See generally *Neade*, 193 Ill. 2d at 443-44 (plaintiff must establish standard of care, breach, and proximate cause).

¶ 31 Here, the evidence presented at trial showed that if Glenn had returned to the clinic in two weeks, his DVT would have likely been diagnosed and treated. Both Dr. Bitran and Dr. Huml testified that the pulmonary embolism that resulted in Glenn's death formed from a clot that originated in Glenn's casted leg. Evidence from both parties' experts also revealed that a DVT is easily diagnosed and treatable. Susan testified that Glenn experienced discomfort and swelling shortly after he was fitted for the cast on February 19. Treacy ordered a follow-up visit for two weeks, and Rezin Orthopedics scheduled his follow up appointment for March 13, a date more than three weeks after casting. Glenn suffered a pulmonary embolism and died on March 8. The record before us demonstrates that defendant's negligence was a proximate cause of Glenn's death.

¶ 32 We recognize that the standard for entry of judgment *n.o.v.* is a high one and is not appropriate if " 'reasonable minds might differ as to inferences or conclusions to be drawn from the facts presented.' " See *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 178 (2006) (quoting *Pasquale v. Speed Products Engineering*, 166 Ill. 2d 337, 351 (1995)). However, in this case, the evidence and inferences, when viewed in a light most favorable to Rezin Orthopedics, so overwhelmingly favor Susan that no contrary verdict can stand. Accordingly, we reverse and remand with directions to enter judgment in favor of Susan on the issue of liability and to hold a new trial on the issue of damages only. See *Wiggins v. Bonsack*, 2014 IL App (5th) 130123, ¶ 27; *Hickox v. Erwin*, 101 Ill. App. 3d 585, 590 (1981) (reversing and remanding with directions to enter judgment in favor of plaintiff and hold new trial only on issue of damages where evidence of proximate cause was overwhelming).

¶ 33 Based on our determination of the first issue, we need not address Susan's alternative request for a new trial based on the prejudicial impact of the trial court's evidentiary rulings.

¶ 34 CONCLUSION

¶ 35 The judgment of the circuit court of Will County is reversed and remanded with directions to enter judgment against Rezin Orthopedics and hold a new trial on the issue of damages.

¶ 36 Reversed and remanded with directions.

SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING
200 East Capitol Avenue
SPRINGFIELD, ILLINOIS 62701-1721

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Clerk of the Court

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August 15, 2019

Karen Kies DeGrand
Donohue Brown Mathewson & Smyth LLC
140 South Dearborn St., Suite 800
Chicago, IL 60603

In re: Steed v. Rezin Orthopedics and Sports Medicine, S.C.
125150

Today the following order was entered in the captioned case:

Motion by Petitioner for an extension of time for filing a Petition for Leave to Appeal to and including September 27, 2019. Allowed.

Order entered by Justice Kilbride.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

cc: Appellate Court, Third District
Martin J. Lucas
Stephen Allen Rehfeldt

SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
200 East Capitol Avenue
SPRINGFIELD, ILLINOIS 62701-1721
(217) 782-2035

FIRST DISTRICT OFFICE
160 North LaSalle Street, 20th Floor
Chicago, IL 60601-3103
(312) 793-1332
TDD: (312) 793-6185

November 26, 2019

In re: Susan Steed, etc., Appellee, v. Rezin Orthopedics and Sports Medicine, S.C., etc., Appellant. Appeal, Appellate Court, Third District.
125150

The Supreme Court today ALLOWED the Petition for Leave to Appeal in the above entitled cause.

We call your attention to Supreme Court Rule 315(h) concerning certain notices which must be filed.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING
200 East Capitol Avenue
SPRINGFIELD, ILLINOIS 62701-1721

CAROLYN TAFT GROSBOLL
Clerk of the Court

(217) 782-2035
TDD: (217) 524-8132

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December 27, 2019

Karen Kies DeGrand
Donohue Brown Mathewson & Smyth LLC
140 South Dearborn St., Suite 800
Chicago, IL 60603

In re: Steed v. Rezin Orthopedics and Sports Medicine, S.C.
125150

Today the following order was entered in the captioned case:

Motion by Appellant for an extension of time for filing appellant's brief to and including February 4, 2020. Allowed.

Order entered by Justice Kilbride.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

cc: Martin J. Lucas
Stephen Allen Rehfeldt

SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING
200 East Capitol Avenue
SPRINGFIELD, ILLINOIS 62701-1721

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January 29, 2020

Karen Kies DeGrand
Donohue Brown Mathewson & Smyth LLC
140 South Dearborn St., Suite 800
Chicago, IL 60603

In re: Steed v. Rezin Orthopedics and Sports Medicine, S.C.
125150

Today the following order was entered in the captioned case:

Motion by Appellant for an extension of time for filing appellant's brief to and including March 3, 2020. Allowed.

Order entered by Justice Kilbride.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

cc: Martin J. Lucas
Stephen Allen Rehfeldt

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Plaintiff's Motion in Limine No. 8-To Bar Argument or Inference that the Plaintiff Failed to Call a Nonparty Witness to Testify	11/08/2016	C 2131-C 2133
Plaintiff's Motion in Limine No. 9-To Bar Questioning of the Plaintiff's Medical Expert, Dr. Matthew Jimenez, Regarding his Medical Malpractice Lawsuits	11/08/2016	C 2134-C 2137
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Plaintiff's Exhibit 32 – Chest, September 2004 Supplement		E 376-E 379
Plaintiff's Exhibit 35 – Orthopaedic Knowledge Update – Foot and Ankle – Cover page		E 380

NOTICE OF FILING AND PROOF OF SERVICE

I hereby certify that on March 3, 2020, I electronically filed the Defendant-Appellant's Opening Brief and Appendix with the Illinois Supreme Court by using the Odyssey eFileIL system.

I certify that on March 3, 2020, I electronically served the above-mentioned document through the court electronic filing manager and by email to the attorneys of record listed below. Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct.

/s/Patrice A. Serritos
Patrice A. Serritos

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appellate@dbmslaw.com
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E-FILED
3/3/2020 8:13 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK