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

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

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**ORAL ARGUMENT REQUESTED**

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## ARGUMENT IN REPLY

Plaintiff does not dispute Rezin Orthopedics' account of the governing legal standards. Rather, plaintiff defends the appellate court's decision to invade the province of the jury by offering a one-sided account of the testimony pertaining to the standard of care and dismissing the defense testimony on that topic as "irrelevant" or "misleading." (Response at 29, 30.) On the issue of proximate causation, plaintiff doubles down on her selective approach to the record. Failing to acknowledge the defense-supporting causation testimony–of defendants' medical experts and of plaintiff's own medical expert–plaintiff provides only general characterizations of the testimony that the record easily disproves, and claims that the appellate court reached an "obvious" conclusion. (Response at 33.)

Plaintiff's failure to meaningfully confront the defense evidence demonstrates that she cannot defend the appellate court's judgment. Its errant application of the controlling legal standards and its selective reading of the trial testimony clash with fundamental principles governing all negligence cases.

### I. Like the Appellate Court, Plaintiff Does Not Acknowledge the Competent Testimony of Four Qualified Medical Experts Who Rebutted Plaintiff's Causation Theory.

Plaintiff's argumentative statement of facts contains multiple significant errors. On the topic of proximate causation, the Court should note, in particular, three of the misleading or wholly inaccurate statements in plaintiff's brief.

First, plaintiff attempts to undermine one of Rezin's proximate causation defenses by stating that the patient's orthopedic surgeon, Dr. Stephen Treacy, and "[e]ach of the other physicians to testify also agreed that Glenn's DVT probably was diagnosable and treatable on or around March 3, when he should have been seen for his two-week

appointment." (Response at 16.) No citation to the record accompanies this inaccurate statement.

Neither Dr. Treacy nor any one of the three defense expert witnesses testified as plaintiff claims. Plaintiff repeatedly implies that Dr. Treacy testified the DVT was diagnosable and treatable by the time plaintiff contended Mr. Steed should have returned for a follow-up visit (response at 6, 16, 35), but Dr. Treacy made clear that whether and when the DVT could be diagnosed and treated was contingent on unknown factors. Dr. Treacy testified on cross-examination as follows:

> "Q. But if your treatment plan had been followed as you ordered, then you would have been in a position to prevent the pulmonary embolism, correct?
>
> MS. DEFALCO: Objection, your Honor; calls for speculation.
>
> THE COURT: Overrruled.
>
> THE WITNESS: I would have had an opportunity to evaluate him that day, and if on that date I thought that a DVT was a potential problem, I would have had an opportunity to evaluate that further if I thought that was an issue on that day.
>
> Q. Because you understand if he had come in that day complaining of tightness and pain in the area of the cast, that that could, in fact, be the result of DVT? It would have been your obligation at that point in time to conduct a thorough examination to either confirm that or rule it out, correct?
>
> A. It would have been one of the considerations that we would have if he was coming in that day with those complaints." (C 1471-72.)

Dr. Treacy explained that treatment would have been available *if*, at a follow-up visit, the patient complained and the complaints led to a DVT diagnosis. (C 1372-73.)

On redirect examination, Dr. Treacy testified that he did not have an opinion regarding what he would have found at a follow-up visit on March 3. He stated:

> "Q. With respect to what may have happened if Mr. Steed presented on any day to Rezin Orthopedics, it's true that you don't know what he would have complained of, right?
>
> A. Correct.
>
> Q. And it is also true that you wouldn't know what would be found on physical exam?
>
> A. Correct." (C 1475.)

Dr. Jeffrey Huml, another defense expert witness, also did not testify that Mr. Steed had developed diagnosable DVT as of March 3. A triple board-certified physician (Sup R 10), who addresses the issue of DVT management multiple times every day (Sup R 16), Dr. Huml testified to the contrary: that the first sign of a clinically significant DVT was March 7. (Sup R 44.) He observed that the medical record contains no report of shortness of breath, pain in the chest or other DVT symptoms prior to March 7. (Sup R 42, 44.)

Dr. Michael Pinzur, a board-certified orthopedic surgeon testifying for both defendants, Dr. Treacy and Rezin (C 3163, 3166), also contested plaintiff's theory. Dr. Pinzur testified that "*we don't know when the DVT happened*. So if he [Dr. Treacy] saw the patient before the DVT happened, the exam wouldn't be beneficial. If he saw the patient after the DVT happened, then it might be beneficial." (Emphasis added.) (C 3197-98.) Similarly, Dr. Jacob Bitran, a hematologist who explained to the jury the risk-benefit analysis physicians undertake in deciding whether to order prophylactic treatment to prevent DVT formation (Sup R 90, 107-13), had no opinion as to when Mr. Steed's blood clot formed. (Sup R 132.)

Thus, in direct contradiction to plaintiff's description of the trial testimony in her statement of "facts," none of the defense medical witnesses supported plaintiff's conclusion that Mr. Steed had developed DVT by March 3, much less that the condition was diagnosable and treatable on that date. Plaintiff's expert, Dr. Mathew Jimenez, alone speculated that a DVT existed by March 3, two weeks after Mr. Steed's initial appointment, and that Dr. Treacy would have diagnosed a clot, treated it, and prevented a pulmonary embolism. The defense testimony countered Dr. Jimenez's theory, contrary to plaintiff's claim in her brief that "no expert rebutted Plaintiff's evidence" that Mr. Steed likely was symptomatic, diagnosable and treatable on March 3. (Response at 34.)

The testimony described above was but one aspect of the defense testimony that rebutted Dr. Jimenez' proximate causation theory and demonstrates the appellate court's error in presuming that a DVT existed on March 3 and likely would have been diagnosed and treated. The appellate court apparently overlooked this crucial aspect of the defense testimony; it is not mentioned in the appellate court's abbreviated proximate causation discussion. *Steed v. Rezin Orthopedics and Sports Medicine, S.C.*, 2019 IL App (3d) 170299-U ("*Steed*"), ¶¶ 31, 32. Instead, on an issue the record demonstrates was a question of fact, the appellate court assumed that plaintiff's medical conclusions were correct, disregarded the defense testimony, and ruled in plaintiff's favor as a matter of law.

In a second misleading statement plaintiff presents as an undisputed fact, she claims that "[a]ll of the medical experts agree that Glenn, specifically, was at an increased risk for developing a DVT, mainly because of his injury and the cast used to treat his injury." (Response at 14.) Plaintiff does not provide record citations for this

incomplete and misleading summary of the medical testimony. By omitting the baseline from which Mr. Steed's risk for DVT "increased," plaintiff mischaracterizes the testimony of the medical witnesses for the defense, who testified that Mr. Steed presented a low risk for developing DVT (as plaintiff admits 20 pages after the above quoted statement (response at 37.))

In testimony that consumes more than 20 pages of the trial transcript, Dr. Treacy explained his analysis of Mr. Steed's low risk of developing a DVT, an assessment supporting Dr. Treacy's conclusion that anticoagulant medication was not indicated for Mr. Steed. (C 1419-44.) Dr. Treacy observed, as did Dr. Huml, that the percentage of symptomatic DVT in lower extremity injuries, even for individuals who have had surgery, unlike Mr. Steed, is 1 percent or less, according to the medical literature. (C 1443; Sup R 30.) Dr. Pinzur did not categorize Mr. Steed as presenting an increased risk of developing blood clots (C 3192); to the contrary, in his view, the risk for developing a clot below the knee is so low that whether treatment ever is needed is questionable. (C 3232-33.) Drs. Bitran and Huml similarly characterized Mr. Steed's potential risk as relatively low. (Sup R 28-30, 113-14.) Both of these defense experts explained that Mr. Steed had none of the risk factors that made him more likely to develop a DVT than any other individual with a lower extremity injury requiring a cast. (Sup R 28-30, 113-14.)

In a third mischaracterization of the trial record, plaintiff claims that the defense testimony pertained only to pulmonary embolism, which occurs when a piece of a clot breaks off and travels to the lungs, and not to deep vein thrombosis, a blood clot in the lower extremity. (Response at 34-35.) Again, the record tells a significantly different story. Dr. Huml told the jury that the first time Mr. Steed complained of symptoms

suggesting that a DVT had developed may have been after March 3, the date Dr. Jimenez contended a Rezin receptionist should have scheduled Mr. Steed's follow-up appointment. (Sup R 42-44.) Dr. Huml explained that, according to the medical records, March 7 was the first complaint of thigh pain and that Mr. Steed had no symptoms of pulmonary embolism until his sudden death on March 7. (Sup R 42, 44.) Dr. Pinzur's testimony supported the inference that Dr. Jimenez could only speculate that the DVT had developed by March 3. As Dr. Pinzur explained, feelings of cast tightness with achiness or pain are common complaints and most often caused by swelling. (C 3190-91, 3195-96.)

The testimony pertaining to pulmonary embolism, to which plaintiff did not object at trial, is neither irrelevant nor deceptive as plaintiff claims. (Response 35.) Dr. Jimenez acknowledged the close connection between DVT and pulmonary embolism. He conceded on cross-examination that the progression of a DVT to a pulmonary embolism is random and unpredictable; DVT can form quickly over a matter of hours, cause no symptoms and progress to a fatal pulmonary embolism without warning. (C 3063-64.) Taken together with the defense testimony cited above, a reasonable jury could have concluded that Mr. Steed's course followed a progression Dr. Jimenez described as possible on cross-examination: on March 7, a clot rapidly developed, caused Mr. Steed's thigh pain and, shortly thereafter, embolized to the lungs causing sudden death. (C 3063-65.)

Plaintiff fails to confront the trial testimony rebutting her causation theory. She cannot defend the appellate court's failure to apply fundamental legal standards placing the burden on her to prove that a deviation from the standard of care was a proximate

cause of Mr. Steed's death. See *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 112 (2004). Whether the Court considers the issue in the context of medical malpractice or general negligence case law, resolution of the conflicting causation testimony belonged with the jury, not with the appellate court. See *Borowski v. Von Solbrig*, 60 Ill. 2d 418, 423 (1975); *Peach v. McGovern*, 2019 IL 123156, ¶ 61.

The record dispels plaintiff's suggestion that the appellate court's failure to acknowledge the conflicting testimony may be excused based on plaintiff's contention that a proximate cause conclusion was "obvious." (Response at 32.) Judgment n.o.v. does not hinge on whether a trial or reviewing court finds the resolution of a factual issue "obvious." That plaintiff may have presented, in her view, persuasive evidence of proximate causation does not justify the appellate court's disregard of the competing evidence presented by Rezin, the party that did not bear the burden of proof.

Plaintiff's selection of the issues to raise in her post-trial motion do not support her defense of the appellate court. If the evidence so overwhelmingly supported plaintiff's proximate cause theory, she would have argued it as a basis for judgment n.o.v.; she did not. Nor did she challenge, post-trial, in the appellate court, or in this Court the jury instruction on sole proximate cause. To the extent that plaintiff accurately cites any of the defense testimony, she accomplishes nothing more than identifying isolated statements that may be construed as consistent with her theory–a far cry from eliminating a question of fact, as plaintiff must–to justify the drastic conclusion of the appellate court. Its ruling invaded the "very essence" of the jury's function. *Peach,* 2019 IL 123156, ¶ 61. This Court need look no further than the flawed proximate cause

analysis to reverse and vacate the appellate court's decision and reinstate the judgment entered on the jury's verdict.

## II. Plaintiff Defends the Appellate Court's Judgment as a Matter of Law on the Standard of Care by Urging This Court to Ignore Competent Testimony Supporting the Defense.

Plaintiff ignores this Court's precedent supporting the admission of Dr. Pinzur's testimony that Rezin, through its employees, complied with the standard of care. See *Advincula v. United Blood Services*, 176 Ill. 2d 1, 29 (1996); *Darling v. Charleston Community Memorial Hospital*, 33 Ill. 2d 326, 331 (1965). "[I]f there is any evidence, together with reasonable inferences to be drawn therefrom, demonstrating a substantial factual dispute, or where the assessment of credibility of the witnesses or the determination regarding conflicting evidence is decisive to the outcome," a court must deny a request for judgment n.o.v. *Maple v. Gustafson,* 151 Ill. 2d 445, 454 (1992). Judgment n.o.v. is limited to "extreme situations." *Jefferson v. Mercy Hospital & Medical Center*, 2018 IL 162219, ¶ 31. The exacting *Pedrick* standard precludes judgment as a matter of law unless "all of the evidence, viewed in the light most favorable to the opponent, so overwhelmingly favors [a] movant that a contrary verdict could not stand." *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 178 (quoting *Pedrick v. Peoria & Eastern R.R. Co.,* 37 Ill. 2d 494, 510 (1967)).

Here, the circuit court's rulings comported with the applicable legal standards requiring the court to permit Rezin to present its defense and, after the jury returned a verdict in its favor, to deny plaintiff's post-trial motion and allow the verdict to stand. The jurors considered the conflicting evidence and reached a decision based on the testimony and reasonable inferences they drew from the evidence. Plaintiff describes in

her brief only the testimony and her characterization of the testimony that support her position. This selective approach to the trial record, accepted by the appellate court, finds no approval in this Court's precedent.

### A. Plaintiff Acknowledges That a Qualified Defense Expert Testified That Rezin Complied With the Standard of Care; the Jury Properly Considered the Testimony to Assess the Medical Facility's Conduct.

Plaintiff erroneously claims that the jury should have heard only plaintiff's version of what constituted negligence of Rezin, that the trial court should have barred Dr. Pinzur's testimony on the topic of Rezin's compliance with the standard of care, and that the appellate court correctly ignored it. (Response at 25-26.)

Before trial, in moving to bar Dr. Pinzur's testimony, plaintiff acknowledged that Rezin had disclosed Dr. Pinzur's opinion that the staff complied with the standard of care in scheduling Mr. Steed's appointment. (C 2422.) As the basis for her motion *in limine* No. 12, plaintiff argued that the Rezin's receptionists acknowledged an obligation to follow Dr. Treacy's instruction. (C 2423.) Observing that plaintiff cited no authority for the position that the standard of care for an institution is defined solely by an internal policy, the trial court denied plaintiff's motion. (C 2424, 2427-28.) The trial court acknowledged plaintiff's standard of care position for the institution, and also that "if the Defense wants to have the opportunity to present their side of the case on the standard of care issue, I am obligated to provide them with that opportunity. I am not going to bar it. It's been disclosed. I think whatever arguments can be made to those diverging, if they are diverging, positions on the standard of care, each side is entitled to make the arguments." (C 2427-28.)

Consequently, Dr. Pinzur appropriately testified not only that Dr. Treacy complied with the standard of care in his treatment of Mr. Steed, but also that selection of the date for follow-up complied with the standard of care, because "seeing [Mr. Steed] at two weeks really doesn't impact on the care. The next key point is going to be at the point when you take the cast off, which will be in four to six weeks." (C 3184.) Contrary to plaintiff's brief, Rezin's counsel elicited Dr. Pinzur's opinion on scheduling in direct examination of the witness. (Response at 7.)

Plaintiff revisited the topic on cross-examination of Dr. Pinzur. (C 3208-11.) Plaintiff inquired of Dr. Pinzur whether the receptionist was obligated to make an appointment within the two-week timeframe noted by Dr. Treacy. Dr. Pinzur agreed that the receptionist should make an appointment "[w]ithin that ballpark" (C 3208), but did not agree with plaintiff that the appointment had to be made within two weeks. Dr. Pinzur repeatedly opined on cross-examination that two or three weeks would not make a difference and, despite plaintiff's repeated questioning, disagreed that the standard of care obligated a receptionist to discuss the date with Dr. Treacy for "a difference of a week or so." (C 3211.) Dr. Pinzur reiterated his view of the standard of care for Rezin, to the effect that, "[a] difference of a week is a common thing." (C 3218.) When plaintiff inquired again on re-cross-examination, Dr. Pinzur again disagreed that the doctor's instruction required a shorter timeframe for the return visit. (C 3241.)

Plaintiff did not renew his objection to Dr. Pinzur's testimony when he took the stand, and, in doing so, forfeited any objection to admissibility of the testimony at trial. See *Simmons v. Garces,* 198 Ill. 2d 541, 569 (2002). On the merits, plaintiff fails to address or even to acknowledge the decisions of this Court cited in Rezin's brief that

demonstrated the relevance of Dr. Pinzur's testimony to the jury's consideration of whether Rezin's conduct established negligence. (Brief at 24-25.) Instead, plaintiff contends that Dr. Pinzur's testimony was "not relevant." (Response at 26.) Plaintiff is wrong. Expert testimony, in addition to bylaws, statutes, community practice and custom and practice, sheds light on whether a facility acts as a reasonably careful institution under similar circumstances. See *Advincula,* 176 Ill. 2d at 29; *Darling*, 33 Ill. 2d at 331.

The testimony of plaintiff's own expert demonstrates why a jury may consider a broad range of evidence of the standard of care applicable to a medical institution and undermines plaintiff's contention that the appellate court properly considered "the issue to be purely administrative and completely straightforward." (Response at 30.) According to Dr. Jimenez, the standard of care required Rezin to schedule Mr. Steed for a two-week follow-up visit because he was a patient at risk for DVT and receiving a cast. (C 3009-10.) Expanding further upon the standard of care applicable to scheduling a patient for a follow-up visit, Dr. Jimenez described the two-week limit for the next visit as a "clinical decision." (C 3011.)

Plaintiff repeatedly acknowledges this testimony but fails to grasp its significance. As this Court has recognized, certain aspects of a medical institution's operations involve medical judgments. *Greenberg v. Michael Reese Hospital*, 83 Ill. 2d 282, 293 (1980). Scheduling an orthopedic patient for follow-up after placement of a cast, according to plaintiff's medical expert, involves exactly that–medical judgment. Where medical judgment informs the standard of care, expert testimony is not only appropriate, it is necessary. See *Pogge v. Hale*, 253 Ill. App. 3d 904, 915-16 (4th Dist. 1993); *Roberts v. St. Francis Health Services, Inc*., 198 Ill. App. 3d 891, 897 (1st Dist. 1990).

Plaintiff proceeded to trial against Rezin on an institutional negligence theory. She cannot now disclaim the role the physician, who is employed by Rezin, played in scheduling the follow-up visit where she presented expert medical testimony that the standard of care required a two-week follow-up based on the physician's clinical judgment. Rezin had the right to present expert medical testimony through Dr. Pinzur attacking the basis of Dr. Jimenez' standard of care opinion. Any difference between Dr. Pinzur's standard of care opinion and the custom and practice of the receptionists at Rezin and Dr. Treacy's order did not permit the appellate court to disregard Dr. Pinzur's testimony. Rather, his testimony was competent evidence from which a jury could conclude that Rezin–through Dr. Treacy and its receptionists–attempted to hold itself to a higher standard of care.

Plaintiff's disagreement with Dr. Pinzur's assessment of Rezin's scheduling conduct does not support plaintiff's claim that the testimony of this undisputedly qualified medical expert could be disregarded by the appellate court as a "mere scintilla." (Response at 26.) Nor may plaintiff properly disregard Dr. Pinzur's testimony as merely espousing personal practice. (Response at 25-26.) Dr. Pinzur explained at length his qualifications to testify, including his supervision of a program to decrease blood clots for patients cared for throughout the Loyola University Health System. (C 3167.) Dr. Pinzur formulated his opinions based upon a reasonable degree of medical certainty, not simply on personal practice. (C 3178).

Moreover, plaintiff and her amici, the Illinois Trial Lawyers Association, cite case law standing for the unchallenged proposition that, in certain instances, institutional negligence may be determined without expert testimony. (Response at 30; ITLA brief at

7.)[1] Unlike the defendant HMO in *Jones v. Chicago HMO*, 191 Ill. 2d 278 (2000), Rezin does not argue that plaintiffs failed to present expert testimony to establish a question of fact regarding a breach of the standard of care. See *Jones*, 191 Ill. 2d at 298 (recognizing that the standard of care applicable to a hospital may be proved by a number of evidentiary sources, and expert testimony may not be required in every case). Neither *Jones,* cited in ITLA's brief, nor any case plaintiff cited support the basis for the appellate court's decision and plaintiff's argument: that Rezin could not rely on expert testimony to challenge plaintiff's contention of negligence in scheduling Mr. Steed's return visit. Plaintiff cites no authority for this proposition in her brief and, in her argument concerning the standard of care, cites only *Steed* and two inapposite cases addressing an expert's reliance on personal practice. (Response at 25-32.) The dearth of citation to relevant authority indicates forfeiture of the issue under Supreme Court Rule 341(h)(7), (i). See *Vancura v. Katris*, 238 Ill. 2d 352, 369-70 (2010).

**B. The Testimony of Rezin's Staff Supported the Jury's Verdict.**

Plaintiff asks this Court to consider only isolated statements of the testimony of Rezin's staff for her theory of an "absolute," inflexible duty to schedule Mr. Steed's follow-up appointment at two weeks after his first office visit–and to disregard any conflicting testimony. (Response at 28-30.) Plaintiff repeatedly claims that the testimony supports the conclusion that receptionists were required to follow Dr. Treacy's order, but does not confront other testimony establishing their interpretation of conduct entailed in

[1] ITLA similarly challenges only the relevance of Dr. Pinzur's testimony and offers a single sentence concerning proximate causation in urging this Court to affirm the appellate court's order. (ITLA brief at 7.) Like the appellate court, ITLA ignores the competent testimony concerning proximate causation.

following Dr. Treacy's order, other than to declare it "unfair," "irrelevant," and "unconvincing." (Response at 29, 30.)

Although plaintiff may have found unpersuasive Jodi Decker's testimony explaining the custom and practice for patients needing to schedule multiple visits at the clinic, the jury may have had a different view of the testimony, which Rezin describes in its brief at pp. 27-28. Plaintiff claims Ms. Decker's testimony is irrelevant because Mr. Steed was not a post-operative patient or a patient needing a series of appointments. (Response at 29.) Notably, Ms. Decker did not agree with the limitations plaintiff suggests concerning Ms. Decker's custom and practice for scheduling multiple appointments. (C 2722.) The jury may well have found Ms. Decker's testimony to be enlightening and convincing, particularly because she was not a Rezin employee when she testified at trial. (C 2700-01.)

Plaintiff similarly discounts the testimony of another receptionist, Victoria Hare, who also testified regarding the policies and procedures for scheduling patients' follow-up appointments. (C 1242.) Ms. Hare did not recall scheduling Mr. Steed's follow-up appointment for March 13, 2009. (C 1247.) She explained at trial that, according to her custom and practice during the relevant timeframe, she scheduled follow-up appointments based on the physician's directive and also by communicating with the patient. (C 1272.) If a date within approximately one week of the physician's requested date could not be worked out after discussion with the patient, Ms. Hare's practice was to consult the doctor. (C 1270-71.) She testified that she had no reason to believe she deviated from her custom and practice in scheduling Mr. Steed. (C 1272.)

Plaintiff cites her own testimony and Dr. Treacy's testimony to prove that Ms. Hare did not discuss the March 13 scheduling with Dr. Treacy. (Response at 27-28.) Yet, the jury may have found Ms. Hare's properly admitted custom and practice testimony to be more persuasive. Plaintiff's argument merely establishes conflicting testimony in the record. The conflicting testimony presented a jury question, not a question of law for the appellate court. See *Firstar Bank of Illinois v. Peirce*, 306 Ill. App. 3d 525, 531 (1st Dist. 1999).

### C. The Trial Court Instructed the Jury to Consider Plaintiff's Claim Against Rezin Under a Professional Standard of Care, an Issue Plaintiff Did Not Challenge in Her Post-Trial Motion or in the Appellate Court.

Plaintiff admits that the trial court instructed the jury to consider Rezin's conduct under the pattern instruction setting forth a professional standard of care for institutional negligence. (Response at 31, citing C 2200.) The pattern instruction, IPI (Civil) No. 105.03.01, told the jury to "consider opinion testimony from qualified witnesses," along with evidence of policies and procedures. (C 2200.) Plaintiff does not square her argument that the case involved "purely administrative issues" (response at 30) with her failure to challenge the professional negligence instruction on appeal, or with the testimony of her own medical expert witness concerning Rezin's conduct.

Plaintiff's last argument on the standard of care issue further demonstrates the absence of logic in plaintiff's position. She argues that the only issue is whether the receptionist received an order from a physician, regardless of the date and, apparently, regardless of whether the order could be tethered to any aspect of Mr. Steed's treatment. (Response at 31.) Plaintiff's argument that failing to follow any physician order

regardless of the timeframe selected wholly disregards a fundamental issue that only could be resolved by a jury: whether Rezin's conduct, even if correctly described by plaintiff, was negligent under the applicable instruction. Whether plaintiff proved that a receptionist failed to follow Rezin's procedure leaves open the question of whether plaintiff proved negligence, because, as the jury was instructed, procedures are only one aspect of the evidence the jury was instructed to consider. See *Ziegert v. South Chicago Community Hospital*, 99 Ill. App. 3d 83, 97-99 (1st Dist. 1981).

## III. Plaintiff's New Trial Arguments Are Resolved by Rulings for the Defense on Issues I and II Above.

No remand is necessary for the appellate court to consider plaintiff's new trial request. The record and applicable law make apparent that plaintiff claims trial error on easily resolved issues intertwined with the judgment n.o.v. issues. Pursuant to Supreme Court Rule 366(a)(5), this Court may appropriately dispense with plaintiff's alternative request for a new trial.

### A. Plaintiff Cannot Show the Trial Court Abused Its Discretion in Ruling in Rezin's Favor on Plaintiff's "Manifest Weight" Argument and in Denying Plaintiff's Motion *in Limine* 12.

For all of the reasons set forth in Arguments I and II above, the record does not meet this Court's standard for a new trial. The ample testimony concerning Rezin's compliance with the standard of care and rebutting plaintiff's causation theory supported the trial court's exercise of discretion in denying plaintiff's post-trial request for a new trial. See *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 178-79 (2006). No remand is necessary to consider the manifest weight argument given the thorough discussion of the issues before this Court.

Plaintiff's claim of trial error regarding the denial of plaintiff's motion *in limine* 12 was raised in plaintiff's response (p. 28), and Rezin fully addresses that issue above. (pp. 9-11.) Not only was the trial court's ruling with respect to motion *in limine* 12 appropriate, but plaintiff also forfeited the issue by eliciting testimony on the very subject plaintiff sought to bar. *Simmons*, 198 Ill. 2d at 569.

### B. The General Verdict Rule Defeats Plaintiff's Claims of Trial Error, All of Which Pertain to the Standard of Care.

To overcome the general verdict rule, plaintiff relies on the appellate court's manifestly erroneous ruling that plaintiff proved proximate cause as a matter of law. (Response at 39.) Plaintiff does not otherwise contest Rezin's argument that a plaintiff cannot succeed on a request for a new trial based on claims of error that pertain to only one of several defenses that could exonerate a defendant, a principle that is well established in medical malpractice case law. See *Arient v. Alhaj-Hussein*, 2017 IL App (1st) 1623969, ¶¶ 44-46; see also *Lazenby v. Mark's Construction, Inc.*, 236 Ill. 2d 83, 101 (2010). Undisputedly, the three rulings in question pertain to the standard of care: the trial court's order denying plaintiff's motion *in limine* No. 12, "to bar testimony that the standard of care allowed for a follow-up appointment later than two weeks" (C 2151); the order granting defendant's motion *in limine* No. 32 to prohibit hearsay testimony regarding a telephone conversation between Mr. Steed and Rezin; and plaintiff's claim that defense counsel inappropriately mentioned in closing the testimony of one of the receptionists. Should this Court agree with Rezin that ample causation evidence supports the jury's verdict, remand to consider trial error pertaining solely to the standard of care would be a pointless exercise.

### C. Plaintiff Cannot Establish That the Trial Court Abused Its Discretion in Denying Plaintiff's Post-Trial Motion Based on the Ruling Barring Hearsay Testimony, a Correct Ruling That Plaintiff Sidestepped Through Improper Hypothetical Questions.

Admitting that the testimony plaintiff sought to introduce concerning a telephone conversation Mr. Steed reported to his wife, concerning his statements to a Rezin receptionist and the receptionist's statements to Mr. Steed, plaintiff concedes that Ms. Steed's proffered testimony include multiple layers of hearsay. (Response at 42.) Plaintiff stated in an offer of proof that, her husband reported a telephone call to Rezin in which he complained that his right calf was achy and that his cast felt tight. (C 3149-51.) Plaintiff, who did not personally hear the conversation, sought to testify that the person to whom Mr. Steed was speaking told him to elevate his leg and place ice behind his knee. (*Id.*) Plaintiff offered the testimony to prove her contention that Rezin breached the standard of care in handling the February 25th telephone call from Mr. Steed. After careful consideration of plaintiff's argument, the trial court, found the testimony constituted hearsay that did not fall within any exception to the general rule (C 2599-2609), a correct ruling based on plaintiff's attempt to use the testimony to prove the truth of the matter asserted–that Rezin allegedly mishandled the telephone call. See *Agins v. Schomberg*, 397 Ill. App. 3d 127, 136-37 (1st Dist. 2009).

Plaintiff argues that the testimony was not offered for the truth of the matter asserted; rather, it was a statement of intent to telephone Rezin. (Response at 42-43.) Yet, intent to make the call did not pertain to any issue in dispute. Plaintiff also argues that the call demonstrated an effect on the listener, Ms. Steed (response at 43), another point lacking any relevance to plaintiff's claims.

In any event, plaintiff adroitly circumvented the trial court's ruling by repeatedly posing hypotheticals suggesting the content of the February 25 conversation to the jury, including during the testimony of Cheryl Haddon, a technician who assisted in casting Mr. Steed, and during Dr. Jimenez' testimony, when counsel inquired what the standard of care required if Mr. Steed reported a tight cast to Rezin. (C 2679-87, 3026-33.) The jury received plaintiff's message: during a telephone call that the parties stipulated Mr. Steed made to Rezin on February 25 (C 1231-32), Mr. Steed complained of pain and tightness in his cast and was not seen immediately. The trial court observed that plaintiff improperly suggested what was said during the barred conversation with Cheryl Haddon (C 2685-86), a correct interpretation of plaintiff's end-run around the ruling and strong evidence that plaintiff can establish no prejudice after disclosing the information to the jury through the hypotheticals posed to two witnesses.

### D. Plaintiff Erroneously Argues That Defense Counsel's Closing Argument Violated an Order *in Limine*–the Order Plaintiff Mentions Referred to a Different Witness.

Plaintiff rests her contention that defense counsel misstated the evidence in closing argument on an erroneous description of an *in limine* order. Plaintiff claims that the trial court granted her motion *in limine* No. 10 "without reservation," and barred any of the receptionists from testifying that Mr. Steed was difficult to schedule. (Response at 45.) The record establishes that the court granted motion *in limine* No. 10 only with respect to Ms. Haddon's testimony and denied the motion regarding custom and practice testimony of the Rezin receptionists, which included Ms. Decker. (C 2405-15, 2142-43.) Plaintiff misstates the trial court's ruling regarding motion *in limine* No. 10. The court's

comment that it would "grant that motion in limine" referred only to the second of two sections of motion *in limine* No. 10. (C 2617-19.)

Defense counsel appropriately commented on the evidence in closing argument, given Ms. Decker's testimony supporting the inference that, for some reason, she encountered difficulty in scheduling a post-casting follow-up appointment for Mr. Steed. (C 3255.) Nothing about the statement indicates, as plaintiff argues, that defense counsel "blamed" or was critical in some way of Mr. Steed with respect to scheduling. (Response at 46.)

Defense counsel's argument bears no relationship to the cases plaintiff cites in her brief, which involved argument far exceeding the boundaries of zealous advocacy. (Response at 47-48.) Plaintiff cites cases involving repeated and inflammatory statements during closing argument, such as 1) a defendant driver was under the influence at the time of the subject accident without any evidence to support the accusation, *Ferrer v. Vecchione*, 98 Ill. App. 2d 467, 474 (1st Dist. 1968); 2) a plaintiff suffered the subject injury in a prior accident despite testimony to the contrary by both the plaintiff and a treating physician, *Flynn v. Cusentino*, 59 Ill. App. 3d 262, 267 (3d Dist. 1978); and 3) a defendant construction company's witnesses were present at the time of the accident in the absence of any testimony to support the argument, *Flewellen v. Atkins*, 99 Ill. App. 2d 409, 418-19, 420-21 (1st Dist. 1968).

Here, defense counsel's argument contained no comparable blatant misconduct of counsel. The brief reference to Ms. Decker's permissible custom and practice testimony comported with the latitude permitted in drawing reasonable inferences from the evidence in closing argument. See *McDonnell v. McPartlin*, 192 Ill. 2d 505, 524 (2000).

The innocuous comment here is even further distinguished from the egregious situations in the cases plaintiff cites by the trial court's admonition to the jury to disregard any argument that was inconsistent with the evidence. (C 3255.) The instruction cured any conceivable error. See *Bruske v. Arnold,* 44 Ill. 2d 132, 138 (1969).

## 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: July 17, 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 5976 words.

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## NOTICE OF FILING AND PROOF OF SERVICE

I hereby certify that on July 17, 2020, I electronically filed the Reply Brief of Defendant-Appellant Rezin Orthopedics and Sports Medicine, S.C., with the Illinois Supreme Court by using the Odyssey eFileIL system.

I certify that on July 17, 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.

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