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

RESPONSE BRIEF OF PLAINTIFF-APPELLEE, SUSAN STEED, AS INDEPENDENT ADMINISTRATOR OF THE ESTATE OF GLENN STEED, DECEASED

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POINTS AND AUTHORITIES

NATURE OF THE ACTION

This appeal stems from Susan Steed's Wrongful Death action against Defendants, Rezin Orthopedics and Sports Medicine, S.C. and its employee, Stephen H. Treacy, M.D., alleging medical negligence for their failure to diagnose and treat a deep vein thrombosis in his injured, casted right leg before it progressed to a fatal pulmonary embolism. Glenn died from this negligence on March 8, 2009. Plaintiff only appealed the verdict in favor of Rezin Orthopedics, so only the conduct of the office practice is at issue.

Glenn first saw Dr. Treacy on February 17, 2009, to receive treatment for an Achilles tendon injury to his right lower extremity. Dr. Treacy's February 17 order directed the reception staff at Rezin Orthopedics to schedule Glenn for a follow-up appointment in two weeks. The receptionists, however, failed to follow Dr. Treacy's order and did not schedule Glenn's return follow-up appointment to take place until March 13, 2009. Before the two weeks, Glenn developed a DVT, which was diagnosable and treatable.

On February 25, 2009, Glenn telephoned Rezin Orthopedics to report his symptoms, which were consistent with a DVT. The receptionist who answered Glenn's telephone call rescheduled his follow-up office visit to take place one day earlier than originally scheduled – to March 12, 2009 instead of on March 13, 2009.

By then, the pulmonary embolism from the DVT had killed Glenn.

On October 27, 2016, this case was assigned out to trial before the Honorable Judge Theodore J. Jarz. On November 10, 2016, the jury returned a verdict in favor of Defendants. The trial court entered judgment on the verdict, and Plaintiff brought at appeal against Rezin Orthopedics, only.

In a Rule 23 Order, the appellate court properly reversed the judgment on the jury's verdict, finding as a matter of law in Plaintiff's favor as to the standard of care and proximate cause. Subsequently, Rezin Orthopedics successfully appealed to this Court even though the issues on appeal turn exclusively on the specific facts of this case and are not applicable generally.

ISSUES PRESENTED FOR REVIEW

1. Did the appellate court properly discount the testimony from the defense experts as irrelevant to the applicable standard of care against Rezin Orthopedics, when it determined that the Plaintiff was entitled to JNOV as to the standard of care?

2. Did the appellate court properly determine that Plaintiff was entitled to JNOV on the issue of proximate cause based on the overwhelming and uncontroverted evidence?

3. Alternatively, is Plaintiff entitled to a new trial based on the manifest weight of the evidence standard?

4. In the event that the decision of the appellate court is reversed, should this Court remand this case to the appellate court to determine if Plaintiff is entitled to a new trial as the result of errors on the part of the trial court?

STATEMENT OF FACTS

Background

On January 29, 2009, the Decedent, Glenn Steed, a borderline-obese but otherwise-healthy 42 year-old male tore his Achilles tendon during a basketball game he was playing with some co-workers. (C 2933-2935). Glenn had worked for over 15 years in various rising roles as an engineer at Hendrickson, a company that designs and manufactures commercial full-size truck suspensions. (C 2914-2916). On May 13, 2006, he married his high school sweetheart, Susan Steed, after almost 20 full years of dating. (C 2922). When Glenn died, Susan was seven months pregnant with their first child, Olivia. (C 3119).

On March 8, 2009, Glenn died from a pulmonary embolism that originated from a deep vein thrombosis (DVT) that propagated from the deep veins in his injured right leg. His cause of death was undisputed. (C 1469, 3007-3008, 3196-3197; Sup R 131, 132).

The concern for DVT has been known in medicine for many years, and every orthopedic patient is at risk. (C 1345, 1348, 3185). A DVT is a blood clot in the deeper vein in the extremity that can cause very significant harm if the clot is big enough that it prevents blood from flowing through the veins, or if the clot breaks free from the wall of the vessel and moves up the vein toward the lungs. When the clot moves up into the lungs, it becomes a pulmonary embolism, which is a life-threatening event. (C 1339-1340, 3007-3008, 3064-3065, 3080; Sup R 45-46).

Physicians do not always know exactly which orthopedic patients will develop a DVT, if it will propagate or not, or if it will be fatal if it does propagate or embolize. But, orthopedic physicians consider the risk of DVT when developing their treatment plans. (C 3097-3098).

Dr. Treacy's Initial Evaluation of Glenn's Injury, According to Dr. Treacy

On February 17, 2009, Glenn presented as a new patient to orthopedic surgeon, Dr. Stephen H. Treacy, at the Plainfield, Illinois office of Rezin Orthopedics, for evaluation of his Achilles tendon injury. (C 1287, 2704). Dr. Treacy was an employee of Rezin Orthopedics. (C 1282). Glenn reported to Dr. Treacy that he developed swelling and pain associated with the injury to his right lower leg, *but that the pain and swelling had been resolving*. (C 1303-1304). Dr. Treacy found mild swelling of the leg on physical examination. (C 1308). After reviewing the history from Glenn and performing a physical

examination, Dr. Treacy diagnosed Glenn's injury as a partial versus full thickness Achilles tendon tear. (C 1309, 1315).

Dr. Treacy's initial evaluation of Glenn included a physical examination with a specific DVT examination. Toward that end, he noted "negative Homan's, no cording." (C 1300, 3022; E 170). Also at the initial evaluation, Dr. Treacy had a comprehensive discussion with Glenn about his DVT risk, which included the subjects of DVT and pulmonary embolism. (C 1458, 1460).

Dr. Treacy's treatment plan included placing Glenn's lower right leg in a plaster cast in plantar flexion (with his ankle pointed in a downward direction) and returning Glenn to his clinic for a follow-up examination in two weeks. (C 1318-1319, 1323). Dr. Treacy testified at great length regarding the specific, important medical reasons for why he wanted to see Glenn back in his clinic in two weeks. (C 1323, 1328-1333, 1369-1370, 1452-1456, 1468, 1473).

Glenn was likely to remain in a cast for six weeks, and Dr. Treacy wanted to see him back at two-week intervals to check on the progress of healing until Dr. Treacy was comfortable taking him out of the cast and starting different therapy modalities. (C 1329-1333). Dr. Treacy explained that when he sees a patient back in two weeks, he reassesses the patient and continues to determine the patient's treatment plan. (C 1332, 1452-1453).

For one, Dr. Treacy was hopeful that there would be more healing at the first two-week follow-up appointment, which would allow him to change the cast from the plantar flexion position to a neutral or more neutral position. A neutral position would be more comfortable for Glenn. It would allow for partial weight bearing, which would allow for more function with day-to-day activities. (C 1328-1331, 1455). Additionally, Dr. Treacy

wanted to see Glenn back in two weeks to determine if a different type of cast could be used. (C 1332)

Dr. Treacy also wanted to see Glenn back in two weeks to evaluate if surgical treatment was necessary. (C 1332). Surgery on the Achilles tendon gets more difficult as time passes because of the development of scar tissue where the tear occurred. When a surgeon makes the decision about whether to do surgery, the surgeon wants to make it earlier rather than later because he or she does not want to deal with more scar tissue. (C 1317, 1455-1456).

Dr. Treacy's treatment plan, which included seeing his patient back at two-week intervals, took into account Glenn's risk for developing DVT. (C 1461, 1473). *Dr. Treacy recognized that DVT could occur in Glenn's case* because he had an orthopedic injury related to his lower extremity. DVT's occur more frequently in the lower extremities. Also, Glenn's particular injury involved the tearing of tissues that can cause a cascade of events in the body, including bleeding. (C 1339-1340, 1348-1349). Additionally, immobilizing the ankle with a plaster cast puts a patient at an increased risk for developing a DVT, so not only did the injury put Glenn at risk but so did the treatment. (C 1350, 1356). Finally, Glenn's age of 42 (specifically, over 40) put him into a higher risk category. (C 1354, 1356).

Dr. Treacy intended to perform another DVT examination at the two-week follow-up. Specifically, he planned to take a relevant history, remove the cast, and perform a physical examination. (C 1369-1370, 1452, 1469-1470). If Glenn reported tightness and pain in the area of the cast at or around the two-week mark, Dr. Treacy would have considered a possible DVT. If he was unable to rule out a DVT clinically, he would have

ordered tests. (C 1366, 1370-1372, 1472, 1472) At the two-week point, Dr. Treacy would have been in a position to provide Glenn with treatment for a DVT that, more likely than not, would have saved his life. (C 1372-1373, 1470).

Dr. Treacy discussed the treatment plan and two-week follow-up with Glenn. (C 1331). Glenn did not indicate to Dr. Treacy that he had a scheduling issue or conflict that would have prevented Glenn from returning to Dr. Treacy's clinic in two weeks. (C 1334). If for some reason Dr. Treacy was not available to re-evaluate his patient in two weeks, Glenn could have been seen by one of Dr. Treacy's six associates, or his physician's assistant, at any of Rezin Orthopedics' four clinic locations. (C 1284, 1331). *In any event, Dr. Treacy was adamant that he wanted his patient to be scheduled back in two weeks to be evaluated.* (C 1323, 1328-1333, 1369-1370, 1452-1456, 1468, 1473).

The Standard of Care for Scheduling the Follow-up Appointment

Plaintiff's retained orthopedic expert, Dr. Matthew Jimenez, was the only medical expert to directly address the standard of care required by Rezin Orthopedics on direct examination. Toward that end, he testified that the standard of care required the reception staff to schedule Glenn for the two-week follow-up visit that was ordered by Dr. Treacy. (C 3009, 3082). They did not have the discretion to change the follow-up date without consulting Dr. Treacy. (C 3012). It was outside of the standard of care for the receptionist to go a week-and-a-half outside of Dr. Treacy's order. (C 3013).

On cross examination, Dr. Treacy admitted that the receptionists were responsible for complying with his follow-up order. (C 1325). A receptionist could not schedule out beyond the timeframe he ordered without permission. There was no evidence that permission was sought and received in this case. (C 1338-1339). Dr. Treacy could not say

whether that failure was a violation of any practice of Rezin Orthopedics because he had not seen any written handbook or rule. But, Dr. Treacy had an expectation that the receptionists should follow his order. (C 1339).

Defendants' retained orthopedic expert, Dr. Michael Pinzur, did not defend (or even mention) the reception staff on direct examination. On cross examination, Dr. Pinzur testified that when Dr. Treacy handed the receptionist the super bill with the two-week order, that receptionist had the responsibility and obligation to make an appointment within that two-week timeframe. (C 3208). He explained that every office has a different scheduling protocol that its office staff should follow. (C 3209-3210, 3216).

Based on his personal practice, Dr. Pinzur would allow a receptionist to go a week-and-a-half outside of his order without asking permission. (C 3218). He admitted that it is not appropriate for a receptionist to disregard a doctor's orders. He also admitted that all of the receptionists involved in this case testified that they had an obligation to follow Dr. Treacy's order. (C 3218).

The Negligent Scheduling of Glenn's Follow-Up Appointment, According to Dr. Treacy

Dr. Treacy memorialized the two-week follow-up time period in Glenn's medical record and ordered the receptionist to schedule Glenn for a two-week follow-up appointment. (E 170, C 1323-1324). Per his custom and practice, and in accordance with the protocol for scheduling patient follow-up appointments, Dr. Treacy would have written his two-week follow-up order at the bottom of the "super bill" that he would have handed to the receptionist. A super bill was the form used by Rezin Orthopedics to generate a bill for a physician's services. (C 1324-1328).

In addition to a two-week follow-up appointment, Glenn needed an appointment in a day or two in order to have his injured leg casted. Glenn could not be casted at his initial visit because he had driven himself to the appointment. (C 1323). Dr. Treacy used the super bill as a means of ordering the receptionist to schedule Glenn for a follow-up appointment in two weeks because that is when he needed to see Glenn back. (C 1323, 1326)

The receptionist had a responsibility to comply with Dr. Treacy's follow-up order, as written. (C 1325-1326). Dr. Treacy did not provide any medical reason to the receptionist when he ordered Glenn to be scheduled back in two weeks, and only he had the qualifications to determine if it was appropriate to go beyond the two-week date anyway. (C 1325-1327). For these reasons in particular, if there was any issue with scheduling Glenn to come back within the timeframe that he ordered, he would have expected the receptionist to ask for his permission. No one asked for his permission, though. In fact, Dr. Treacy was not aware that the follow-up appointment had been set for March 13 (as opposed to March 3) until after Glenn died. (C 1326, 1328, 1338-1339). March 3 was fourteen days out, but March 13 was twenty four days out.

According to the scheduling protocol in place at Rezin Orthopedics, Dr. Treacy's patients walk out of the office with an appointment card that reflects the follow-up timeframe from his dictation and from the super bill. (C 1335-1337). March 13 is beyond when Dr. Treacy expected his patient to be scheduled. He expected Glenn to have been scheduled to return to his clinic in two weeks because that is what he ordered. (C 1333, 1339, 1469). The person in the best position to have set Glenn's two-week follow-up

appointment was Jodi Decker, the receptionist working at the Plainfield office on February 17. (C 1335-1337, 2703).

The Negligent Scheduling of Glenn's Follow-Up Appointment, According to Receptionist Jodi Decker

Jodi Decker was the receptionist working at the Plainfield office on February 17. (C 2703). Prior to coming to work for Rezin Orthopedics in 2006, she had no experience working as a receptionist. By the time of trial, she had been let go because Rezin Orthopedics downsized. (C 2701).

Rezin Orthopedics trained its receptionists how to schedule patients for follow-up appointments. (C 2703, 2714). In addition to relaying their respective follow-up orders to the reception staff by writing the follow-up date or timeframe at the bottom of the patient's super bill at the end of an office visit, the physicians would sometimes also verbally relay their respective follow-up orders to the receptionists. (C 2705-2706).

Ms. Decker understood that when Dr. Treacy wrote at the bottom of the super bill on February 17 that Glenn was supposed to follow up with his clinic in two weeks, **it was an order that she was supposed to follow**. She had no discretion to schedule a patient more than a few days outside of a physician's order. (C 2704-2705, 2707-2709, 2724). She assumed that Dr. Treacy had a good reason for wanting to see his patient back in two weeks. (C 2709). He was in the best position to know what was in his patient's best interest medically. (*Id.*).

Despite Dr. Treacy's order, at the end of Glenn's office visit on February 17, Ms. Decker only scheduled a single appointment for Glenn to be casted in the Joliet office on February 19. She could not explain why she did not set the two-week appointment ordered by Dr. Treacy. (C 2710, 2713). Even though Ms. Decker set the casting appointment for

February 19, Dr. Treacy's physician's assistant, Rebecca Johnson, filled out the appointment card. Filling out the appointment card was a responsibility of the receptionist making the appointment. (C 2711-2712).

When she set only the February 19 appointment, Ms. Decker knew that Glenn was going to be casted by a different doctor at a different office, and that the other receptionist would not have direct access to the super bill with Dr. Treacy's order for Glenn to be returned to the clinic in two weeks. (C 2712-2713, 2725-2726). Ms. Decker was present on February 19 when Glenn's follow-up appointment was set for a week-and-a-half outside of the timeframe ordered by Dr. Treacy, but she did not get involved in the scheduling. (C 2704, 2728).

The Negligent Scheduling of Glenn's Follow-Up Appointment, According to Receptionist Victoria Hare

After Glenn was casted on February 19, Ms. Victoria Hare, one of the receptionists on duty at the Joliet office, scheduled his follow-up visit for March 13. When she testified, Ms. Hare had no memory of scheduling the appointment. (C 1247). Ms. Hare claimed to be an experienced receptionist but admitted that she was not qualified by her reportedly ample experience to make medical decisions on behalf of the patients at Rezin Orthopedics. Further, she recognized that she had no discretion to choose a patient's follow-up timeframe or to modify a physician's follow-up order. (C 1234, 1244, 1246-1247, 1265, 1276, 1278).

Ms. Hare also echoed that the receptionists were responsible for scheduling Glenn for the two-week follow-up appointment that Dr. Treacy ordered. (C 1242-1243, 1249, 1252, 1254-1255). A receptionist is supposed to schedule the patient for whatever timeframe the physician writes down at the bottom of the super bill, which is how the

physicians at Rezin Orthopedics communicated their follow-up orders to the reception staff. (C 1243, 1252).

Even if Ms. Hare did not have access to Glenn's super bill from February 17, she still had a responsibility to find out when Dr. Treacy wanted to see his patient back for follow-up and to schedule Glenn accordingly. (C 1276). There were other sources of information available to her besides the super bill (*e.g.*, calling the billing office where the super bill was sent after February 17, asking the physician, asking the PA, looking at the physician's notes inside of the patient's chart, asking Ms. Decker). (C 1252-1258).

The Negligent Scheduling of Glenn's Follow-Up Appointment, According to Susan Steed

Susan Steed drove her husband to his casting appointment on February 19. (C 2939). At trial, she recognized Ms. Hare as the receptionist who scheduled Glenn for his follow-up appointment. Susan stood at the reception counter with Glenn and observed their exchange. Susan indicated there was not a lot of back-and-forth, and that the scheduling process was fast. Glenn did not pull out his calendar – he did not even carry a pocket calendar or have a smart phone at the time. (C 2953-2954, 2956).

Susan was aware of Glenn's schedule, including his schedule during the first week in March, because he maintained a calendar at home of personal and work-related events that was posted on their refrigerator. She was adamant that Glenn had no big obligations during the first week in March that would have prevented him from scheduling a two-week follow-up appointment with Dr. Treacy. Moreover, she was available to drive him to any appointments that could have been set during the first week in March. (C 2954-2957).

The Steeds' Joint Plan to Telephone Rezin Orthopedics to Report Glenn's Change in Condition Following his Casting Appointment.

On February 20, the day after Glenn was casted, he reported to Susan that the position of his ankle in the cast was uncomfortable, and that his calf was achy. (C 2944-2946). The discomfort and achiness persisted for approximately four days, at which time there was a change in Glenn's condition. After work on the evening of February 24, Glenn reported to Susan that his cast felt tight over his calf. Together, they planned for Glenn to call Dr. Treacy's office the following day to report the tight feeling of his cast. (C 2945-2946).

On February 25, Glenn telephoned the Joliet office of Rezin Orthopedics from his office, per their plan. (C 1231-1232, 2948).

The Telephone Conversation Between Glenn and Rezin Orthopedics

Ms. Rosanna Popplewell (formerly, Rosanna Alberico) was the receptionist who answered Glenn's telephone call on February 25. At trial, she had no recollection as to the content of their conversation. (C 2832, 2838). On February 25, Ms. Popplewell changed Glenn's follow-up appointment from March 13 to March 12, but the only information she could glean at trial from the office record relating to the changed appointment was that the reason was, "f/u cast." (C 2838).

Prior to changing Glenn's appointment, even if the change was made per his request, Ms. Popplewell admitted that she had a responsibility to ask questions to figure out what the issue was with respect to his cast, which caused him to telephone the office. (C 2836, 2838). Further, Ms. Popplewell had a responsibility to take the information she was supposed to elicit from Glenn and determine if a message should have been sent to the physician or the physician's assistant regarding Glenn's cast. (C 2839).

Following their conversation, Ms. Popplewell never took down a message to pass on to Dr. Treacy or his physician's assistant. Ms. Popplewell admitted that a message should be generated whenever a patient calls with a complaint about a cast. (C 2842). She had the control over the decision as to whether to take down a message, as opposed to the patient calling into the office. (C 2849).

All of the receptionists from Rezin Orthopedics, as well as Dr. Treacy, testified consistently about the protocol in place at Rezin Orthopedics for answering patient telephone calls. If a patient reported having an issue with his cast, the receptionist was required to write a message for the physician or physician's assistant. Receptionists do not have the medical knowledge or training to distinguish between a medical emergency and a non-emergency. (C 1242-1245, 1338, 2708-2709, 2725).

Glenn's Condition Following the Telephone Call

The achiness and tightness that Glenn was feeling inside of his cast remained at a relatively stable level until March 7, when there was another change in his condition. (C 2958). On the evening of Saturday March 7, he experienced pain in his right thigh for the first time. Together, the Steeds planned for Glenn to telephone Rezin Orthopedics again first thing on Monday morning. (C 2959).

Sunday morning, March 8, Susan found her husband dead on the floor of their bedroom, with his hands clenched to his chest. (C 2965-2966).

Foreseeability: Glenn's Risks for DVT, According to the Expert Testimony

The allegations of negligence in the case against Dr. Treacy related to his failure to his failure to order chemoprophylaxis in order to prevent a DVT, despite Glenn's risks for DVT. (C 2203). The issue of chemoprophylaxis is not relevant to the case against Rezin

Orthopedics, but the trial testimony from the medical experts for both parties on the subject of chemoprophylaxis demonstrated that Glenn was at risk for developing a DVT.

All of the medical experts agreed 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. The primary difference of opinion at trial between the Plaintiff's expert and the Defendants' experts turned on whether Glenn's risk level was high enough to require chemoprophylaxis under the standard of care applicable to orthopedic physicians.

The Plaintiff's orthopedic expert, **Dr. Jimenez**, testified that Glenn had four major DVT risks: Glenn was older than 40, had an elevated BMI, had an injury, and had venous stasis, or loss of motion from the cast, which was in plantar flexion, requiring that Glenn be non-weight bearing. (C 3009-3011, 3014).

Dr. Treacy acknowledged that every orthopedic patient is at risk for developing DVT, and he recognized the risk in Glenn. Specifically, Glenn had an orthopedic injury related to his lower extremity where DVT's occur more frequently than they do in the upper extremity. And, Glenn's particular injury involved the tearing of tissues that can cause a cascade of events in the body, including bleeding. In other words, the injury to the leg in and of itself was a risk factor. (C 1348, 1349). Further, immobilizing the ankle by using a cast also placed Glenn at risk for developing DVT. (C 1350, 1353). The standard of care required Dr. Treacy to consider that Glenn was at an increased risk for DVT development due to his injury, immobilization, age, and casting. (C 1354, 1356).

To counter Dr. Jimenez' testimony, the Defendants retained orthopedic physician Dr. Pinzur. They also retained two physicians to testify *only with regard to causation*: pulmonologist, Dr. Jeffrey Huml, and hematologist/oncologist, Dr. Jacob Bitran. The sole

purpose of their testimony was to establish that Glenn's level of risk did not warrant the risks associated with chemoprophylaxis. (C 1495, 1499). The three medical experts for the defense testified consistently with Dr. Treacy and agreed that Glenn was at an increased risk for developing a DVT.

Rezin Orthopedics' orthopedic physician expert **Dr. Pinzur** agreed with Dr. Jimenez, and admitted along with Dr. Treacy, that Glenn's injury itself put him at risk for DVT development, and that the cast chosen for treatment was another potential risk. (C 3229, 3230). A casted patient has reduced mobility that creates the potential for stasis to occur. The issue of stasis is a factor for people developing DVT. (C 3230). Patients with below-knee injuries have a 10-40 % chance risk of asymptomatic DVT. (C 32 32).

Rezin Orthopedics' pulmonology expert **Dr. Huml** noted that evaluation of DVT risk is dependent upon that specific individual. When he evaluated this case, he did not specifically place any percentage of risk on Glenn as far as the development of DVT. (Sup R 63). He agreed that Glenn's cast was a risk factor and, specifically, a short cast that was on for less than a month. Also, the injury that Glenn sustained playing basketball was a risk factor for the development of DVT because, as the other physicians also explained, the injury itself will prompt stasis. The placement of a cast on an injured lower extremity affects the level of stasis. (Sup R 68). In a surgical population, Glenn's BMI over 25 would place him at risk for development of DVT. (Sup R 67).

According to Rezin Orthopedics' hematology/oncology expert **Dr. Bitran**, Glenn's risk factors included his injury and the fact that he was immobile to an extent as a result of the cast and the injury. (Sup R 113, 138).

The Likely Treatability of Glenn's DVT, According to the Expert Testimony

As previously indicated, **Dr. Treacy** testified that, at the two-week appointment, he probably would have done a work-up to be able to diagnose Glenn's DVT and, at that time, probably would have been in a position to provide Glenn with life-saving treatment. (C 1366-1373, 1452, 1469-1472). Each 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. They further agreed, as follows, that once diagnosed, treatment for the DVT probably would have saved Glenn's life.

Dr. Jimenez explained that Dr. Treacy probably would have diagnosed Glenn's DVT at the two-week physical examination because Dr. Treacy would have had to remove the cast to do an Achilles exam, which would have allowed him to look at the entire leg. Also, Dr. Treacy would have performed the same tests that he did at Glenn's initial exam, which were to look for pain and swelling and a palpable cord – Homans' sign. (C 3024).

At the time of Dr. Treacy's initial examination, Glenn's swelling had reduced since the initial trauma. Additional swelling, therefore, would not be from the injury. (C 3024). Additionally, the fit of Glenn's cast was checked at the time of casting to accommodate some additional swelling, which usually happens close in time and related to an injury. (C 3025). If a cast starts to get tight at some point, the physician must determine why the leg is swelling. A month out from the injury, the physician must think about other causes, and a blood clot should be at the top of the list. (C 3025, 3026).

Glenn's complaints about tightness of the calf at around the two-week mark were most likely a DVT. There are only a few things that would cause random swelling that is not related to an injury. (C 3026). An ultrasound would be the next step. (C 3021).

Once diagnosed on ultrasound, there are effective medications used to treat DVT, which are aimed toward preventing it from traveling to the lungs. (C 2999, 3001). The key is getting to the clot early. (C 3067-3068). For a known clot, therapeutic doses of medication make for a much lower risk of clot propagation, sudden pulmonary embolism, and sudden death.

If Glenn had been seen at the two-week interval that was ordered by Dr. Treacy, the calf clot likely would have been diagnosed and treated aggressively, and Glenn likely would have survived. (C 3033-3035). Moreover, more likely than not, Glenn would have survived had he been seen on an urgent basis when he called into Rezin Orthopedics on February 25 with complaints of pain and tightness in his cast. (C 3034-3036).

Susan testified that the symptoms Glenn experienced relative to his casted lower extremity were achiness or pain that then started to become cast tightness. (C 3194, 3195). **Dr. Pinzur** acknowledged that there was no significant resolution of his symptoms as described by Susan, meaning pain or achiness and the tightness in the cast, or any reduction in swelling, up until the date of his death. (C 3195-3196). Swelling from an injury generally happens acutely. (C 3198).

When swelling is not resolved by elevation that is a concern. (C 3190-3191). The symptoms Susan described could certainly be attributed to and are consistent with the development of a lower extremity DVT. (C 3195-3196). Dr. Pinzur testified that if Glenn experienced these symptoms before the two weeks, Dr. Treacy would have been in a position to diagnose the development of the DVT. (C 3196). Blood clots in the legs are treatable. (C 3185).

Dr. Huml also acknowledged that Glenn's complaints might be significant and indicative of the development of a DVT. Tightness in the calf on or about February 25 might have been an indication of a DVT. Pain in the thigh might be an indication of propagation of the clot. (Sup R 45, 46). These symptoms should be checked by caregivers emergently because the potential of it being a DVT undiagnosed could lead to the propagation of that DVT and, ultimately, embolization causing death. (Sup R 61).

The treatment of DVT will reduce the risk of pulmonary embolism by 80 to 90 percent. Treatment of DVT that has been diagnosed in the lower extremity is quite effective. If Glenn had been treated for DVT prior to March 8, he more likely than not would have survived. (Sup R 72).

Dr. Bitran, like the others, agreed that the blood clot probably formed as a result of the Achilles tendon injury Glenn sustained. (Sup R 131). DVT, if untreated, can progress to pulmonary embolism in the vast majority of cases and, in fact, at least 90 percent of pulmonary emboli arise from DVT. (Sup R 136).

When a DVT is diagnosed, there are regimens available to treat the DVT so it does not progress to fatal pulmonary embolism. Had Glenn been seen and worked up prior to the time of his pulmonary embolism, Dr. Treacy could have treated his DVT. (Sup R 136). If the DVT was diagnosed before the pulmonary embolism and treated with anticoagulant therapy, it is more likely than not the pulmonary embolism would have been prevented. (Sup R 136).

The Rulings of the Trial Court and Appellate Court

The parties argued their respective motions *in limine*, and the trial court ruled on the motions but no written order was presented to the court by either party. On the record, the trial court granted the following of the Plaintiff's motions *in limine*: No. 10, *To Bar the Defendants from Testifying Why the 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*; and, No 11, *To Bar Allegations of Contributory Negligence or a Failure to Mitigate Damages.* (C 2138-2145, 2146-2150).

The trial court denied the 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*. (R. C2151-2156).

The trial court granted the Defendant's Motion *in Limine* No. 32, *To Bar Susan Steed from Testifying as to Content of February 25th, 2009 Telephone Call as Hearsay*. (R. C2293-2298).

After all of the evidence was heard, and both sides rested, the Plaintiff was allowed to submit two versions of Illinois Pattern Jury Instruction, Civil, No. 20.01 (2011) to the jury, differentiating the issues in this case between the conduct of Dr. Treacy and the conduct of Rezin Orthopedics.

In relevant part, the Plaintiff's instruction No. 20.01-A, which was given by the court, alleged negligence on the part of Rezin Orthopedics in one or more of the following respects:

> Failed to schedule the Decedent for a follow-up appointment in two weeks from February 17th, 2009, in accordance with Dr. Stephen H. Treacy's order.
>
> Failed to notify a physician or physician's assistant on February 25th, 2009, after the Decedent telephoned the Defendants' Joliet office to report symptoms related to his casted leg.
>
> Failed to timely schedule the Decedent to return to the office for an examination to diagnose or rule out a DVT on February 25th, 2009, when the Decedent telephoned the Defendants' Joliet office to report symptoms related to his casted leg.
>
> (C 2201).

The trial court denied the Plaintiff's proposed IPI, Civil, No. 3.06, the instruction regarding a directed finding, which provided that:

> 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 17th, 2009, in accordance with the Dr. Stephen H. Treacy's order. This is not an issue you will need to decide.

The trial court also denied the Plaintiff's motion for a directed finding on this narrow issue that was brought by the Plaintiff at the time of the jury instruction conference. (C 2176).

On November 10, 2016, after eight days of evidence, the jury returned a verdict in favor of both of the Defendants and against the Plaintiff. The trial court entered judgment on the verdict. On April 7, 2017, the trial court heard the Plaintiff's post-trial motion, which requested JNOV in favor of the Plaintiff 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 trial court denied the Plaintiff's post-trial motion. (C 3315, 3320-3335).

On July 19, 2019, after receiving briefs from both parties and hearing oral argument, the Third District Appellate Court filed an order under Illinois Supreme Court

Rule 23, which reversed the trial court's entry of judgment in favor of Defendant, Rezin Orthopedics, and remanded with directions to enter judgment against Rezin Orthopedics and hold a new trial on the issue of damages.

ARGUMENT

Introduction

Dr. Treacy, an orthopedic surgeon, ordered and instructed the non-medical staff at Rezin Orthopedics to schedule his patient, Glenn Steed, for a follow-up appointment in two weeks. He issued that follow-up order for very specific medical reasons that were in Glenn's best medical interest. The receptionists failed to follow Dr. Treacy's simple and direct order. This straightforward fact scenario was at the heart of Plaintiff's theory of liability against Rezin Orthopedics.

The appellate court recognized that there was no competent and compelling evidence, whether expert testimony or otherwise, to excuse much less explain Rezin Orthopedics' failure. And, the appellate court recognized that the overwhelming and uncontroverted evidence proved that Glenn's death was the tragic consequence of the failure to follow Dr. Treacy's simple and direct order. Their failure prevented Dr. Treacy from examining Glenn during the timeframe when he could have readily diagnosed and successfully treated Glenn's DVT before it progressed to a deadly embolism.

Defendant's argument that the appellate court held the corporate defendant to a higher standard than the medical professional is misleading and has no merit. (See Def. Br. at p. 31). To the extent the acts or omissions of non-medical staff even reflect a "standard of care," this Defendant did not provide any evidentiary, legal or even logical explanation to support its "higher standard" position. There was no medical testimony or

evidence of policies and procedures to contradict the straightforward premise that non-medical staff must follow a physician's order. The conduct of the receptionists should be judged by their response to the actual order from Dr. Treacy, not another order he might have given.[1] This argument subverts the testimony of Defendants' own employees and agents, who established, unequivocally, that they had no medical training that would allow them to unilaterally change or ignore the order on the super bill.

Defendant's argument that the medical treatment for Glenn would have been the same regardless of the date of the follow-up visit also is illogical. (See Def. Br. at p. 31). Any proper medical examination would have addressed the patient's current complaints. Glenn had signs and symptoms of a DVT for many days prior to March 3 and continued exhibit symptoms until his death on March 8. Dr. Treacy, an employee and agent of Defendant at the time, would have recognized and addressed those signs and symptoms to spare Glenn's life.

The Appellate Court Properly Followed the *Pedrick* Standard to Reverse the Judgment in Favor of Defendant Rezin Orthopedics and to Remand the Case for a New Trial on Damages, Only.

The appellate court properly reversed the trial court to find for the Plaintiff, notwithstanding the jury's verdict for the Defendant, Rezin Orthopedics. Rezin Orthopedics' entire argument on this appeal overlooks that the law of JNOV exists because there are circumstances – present in this case, especially – where "all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that

[1] Defendant was allowed at trial, over Plaintiff's objection, to introduce evidence that the standard of care for Dr. Treacy would have permitted him to order a follow-up visit as far out as four to six weeks. But, Defendant's receptionists would have had no way of knowing if that were true, and their job responsibilities related to the order as written.

no contrary verdict based on that evidence could ever stand." *Maple v. Gustafson*, 151 Ill.2d 445, 453 (1992), citing *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill.2d 494, 510 (1967).

Under *Pedrick* and its progeny, the granting of JNOV does not mean that there must be a complete absence of evidence favoring the verdict winner to justify the grant of JNOV. A directed finding is proper even where there may be some evidence to support the nonmovant's allegations, but where that evidence is found to be only a mere scintilla, or where there is some evidence supporting the nonmovant's claim that loses its significance when viewed in the context of all of the evidence. *Williams v. Chicago Osteopathic Health Systems*, 274 Ill.App.3d 1039, 1048 (1st Dist. 1995). That is what happened in this case, where Rezin Orthopedics attempted to introduce some evidence to support its defense, but that evidence was scant and inconsequential based on its lack of relevancy and its speculative nature.

Rezin Orthopedics' reliance on *Peach v. McGovern*, 2019 IL 123156 is misplaced. (See Def. Br. at p. 16). The appellate court did not "usurp" the function of the jury. The reasoning for reversing the trial court for failing to enter JNOV was sound – there were no conflicting inferences and conclusions to be drawn from the testimony put on by both parties. This is true as to both the standard of care and proximate cause. This was not a low impact, nominal property damage automobile case, where the jury is assumed to be very capable of deciding whether a plaintiff's claimed serious and permanent damages are credible or causally related.

The appellate court followed the law that applies to JNOV. This law compelled reversal of the trial court. The evidence adduced at trial clearly and unequivocally

established that the reception staff failed to follow Dr. Treacy's follow-up order for Glenn, and in failing to do so, breached the standard of care. The evidence was uncontroverted. Further, it was clearly and unequivocally established that Glenn's fatal pulmonary embolism probably could have been prevented if Dr. Treacy's two-week order was followed because Glenn's DVT was diagnosable and treatable at the point in time when the follow-up visit should have taken place.

For these reasons, and the reasons to follow, the decision of the appellate court to reverse and remand this case for a new trial limited to damages only should stand.

I. The Appellate Court Properly Determined that the Plaintiff was Entitled to JNOV as to the Standard of Care Because the Testimony to Support the Plaintiff's Claim was Uncontroverted.

There is no merit to Rezin Orthopedics' grievance that the appellate court "swept aside" expert testimony, or ignored testimony from the receptionists, and purportedly relied solely on the facility's custom and practice to find that the Plaintiff was entitled to JNOV. (See Def. Br. at p. 24). In this case, the custom and practice in place at Rezin Orthopedics for how Dr. Treacy relayed his follow-up order to the reception staff by writing it on the bottom of the super bill is not at issue – the issue was that the reception staff failed to follow the physician's follow-up order, regardless of how that order was communicated. If custom and practice alone were enough, Rezin Orthopedics could be sued because Dr. Treacy's physician's assistant wrote out Glenn's appointment card for February 19, instead of the receptionist whose job it was, according to the facility's custom and practice. (C 2711-2712). Rezin Orthopedics either does not comprehend this simple distinction between pure office policy and standard of care or is trying to bury it.

Consistent with the jury instruction on institutional negligence that was given in this case (C 2200), the appellate court specifically considered the testimony from qualified witnesses and evidence of policies and procedures. *Steed v. Rezin Orthopedics and Sports Medicine, S.C.*, 2019 IL App (3d) 170299-U at ¶¶ 26-28. In doing so, the appellate court properly determined that the uncontroverted evidence proved that Rezin Orthopedics violated its policies and procedures, as well as the standard of care, by failing to follow Dr. Treacy's order to schedule Glenn to return in two weeks. *Id*. at ¶¶ 27-28. Further, in doing so, the appellate court explicitly recognized the high standard required for entry of JNOV. *Id*. at ¶ 32.

Plaintiff's orthopedic expert, Dr. Jimenez, supported Plaintiff's theory of liability against Rezin Orthopedics when he testified , specifically, that Rezin Orthopedics deviated from the standard of care by disregarding Dr. Treacy's order. His opinion was based on his medical expertise. (C 3012-3013). The defense experts did not provide any meaningful evidence to the contrary.

The only expert testimony the jury heard to support that Rezin Orthopedics complied with the standard of care came from its retained orthopedic expert Dr. Pinzur. On cross examination, Dr. Pinzur conceded that a receptionist must follow a physician's order and must follow the policies and protocols of its office, but in the same breath he offered that a week or so would not make a difference in the appointment time. (C 3207-3219). He provided no basis for his statement that a week or so would not have made a difference, other than his personal practice. (C 3218). Personal practice is insufficient for an expert medical opinion. See *Schmitz v. Binette*, 368 Ill. App. 3d 447, 455-56 (1st Dist. 2006), citing *Walski v. Tiesenga*, 72 Ill. 2d 249 (1978)(finding personal practices used by

a testifying expert are not relevant and are insufficient to establish the applicable medical standard of care). Dr. Pinzur's testimony on the standard of care that applied to Rezin Orthopedics was the type of testimony that the appellate court was supposed to disregard as a "mere scintilla" or scant and inconsequential evidence.

Dr. Treacy and Dr. Pinzur provided testimony about the professional standard of care that applied to Dr. Treacy relating to the allowable follow-up timeframe, but the appellate court properly disregarded this testimony as not relevant to the institutional negligence claim against the office practice. *Id.* at ¶ 29. The appellate court clearly recognized the real issue: Dr. Treacy wanted to see his patient in two weeks. He had medical reasons for his order. The receptionists, who had no medical training, failed to follow his order. The failure on their part proximately caused Glenn's death.

The testimony from the receptionists clearly and unequivocally established the protocol in place across the offices for how a physician used a patient's super bill to communicate the patient's follow-up orders to the reception staff. This is purely custom and practice and was not required by the standard of care. They unanimously agreed that the reception staff, who have no medical training, have an obligation to follow a physician's follow-up order. (C 1234, 1242-1244, 1246-1247, 1249, 1242, 1252-1255, 1265, 1276, 1278, 2703-2709, 2714, 2724, 2822-2826). While this may be evidence of custom and practice for receptionists, it also is standard of care evidence.

The appellate court rightfully reasoned that the evidence at trial from both parties proved, overwhelmingly, that the reception staff had a duty to follow a physician's order, which was breached in this case.

A. The Appellate Court Smartly Rejected the Expert Testimony from the Defense about the Professional Standard of Care that Applied to Dr. Treacy as Immaterial to the Case Against Rezin Orthopedics.

The appellate court appropriately recognized that the professional standard of care that applied to Rezin Orthopedics was something different than the professional standard of care that applied to Dr. Treacy and, therefore, was not relevant on the appeal against only the facility. *Steed*, ¶ 29. The timeframe applicable to Dr. Treacy with regard to when he maybe could have seen Glenn again for follow-up in compliance with the standard of care was not an issue for the jury to consider. Different professional negligence jury instructions and different issues instructions applied to Rezin Orthopedics versus Dr. Treacy. (C 2200-2203).

Ironically, Plaintiff's case against Rezin Orthopedics was premised on a consensus among the parties that Dr. Treacy adhered to the standard of care when he ordered Glenn to be returned to his clinic in two weeks. The only witnesses competent to testify as to the standard of care that applied to Dr. Treacy (Dr. Jimenez for Plaintiff, and Drs. Treacy and Pinzur for Rezin Orthopedics) agreed that Dr. Treacy's follow-up timeframe was within the standard of care. Because there was no material relevance, the only reason the defense could possibly have had at trial for introducing the standard of care that applied to Dr. Treacy was to mislead the jury into believing that this was a viable defense as to the standard of care and to dilute the otherwise-overwhelming evidence on proximate cause.

The irrelevant, speculative and hypothetical assertion that some period of time greater than two weeks may have been acceptable for Glenn's follow-up could never be connected to the evidence anyway because no one asked Dr. Treacy for his permission to

schedule Glenn outside of the two-week timeframe ordered by Dr. Treacy. (C 1326-1327, 1338-1339).

Further, the appellate court likely agreed that the trial court erred in denying the 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*. (R. C2151-2156), which anticipated some confusion on the real issues of standard of care and proximate cause in the case against Rezin Orthopedics. The Plaintiff's Motion *in Limine* No. 12 sought to bar testimony that the standard of care [applicable to Dr. Treacy] allowed for a follow-up appointment later than two weeks. (R. C2151-2156).

The appellate court rightfully discounted Defendants' evidence on the standard of care that applied to Dr. Treacy. Dr. Treacy's order was in place, and the receptionists failed to follow it.

B. The "Other" Custom and Practice Testimony from Ms. Decker and Ms. Hare does Nothing to Defend their Failure to Schedule Glenn's Follow-up Appointment in Accordance with Dr. Treacy's Order.

The jury heard from Dr. Treacy and three receptionists (Ms. Decker, Ms. Hare, and Ms. Popplewell) that the receptionists had an absolute duty to schedule the facility's patients in accordance with the physician's follow-up orders. Further, they admitted that Glenn was not scheduled in accordance with Dr. Treacy's specific two-week follow-up order. They acknowledged that Dr. Treacy was in the best position to decide when Glenn should follow-up, and they admitted that they have no medical knowledge to make medical decisions for the patients. In other words, they would have understood nothing about the myriad of very specific medical reasons Dr. Treacy offered for why he needed to see Glenn back in two weeks.

The receptionists understood that they must ask permission if they were going to go outside of a physician's order, but they did not ask for Dr. Treacy's permission in this case. Rezin Orthopedics is wrong to claim that there was flexibility to the scheduling protocol – at least, not without permission from the physician who ordered a specific follow-up timeframe. (See Def. Br. at pgs. 27-28).

The appellate court reviewed the testimony that the jury heard and properly determined that the uncontroverted evidence overwhelmingly favored Plaintiff's case.

Unconvincingly, Rezin Orthopedics attempts to use Ms. Decker's testimony about her custom and practice for scheduling "multiple" or serial appointments as some sort of excuse for not scheduling Glenn's two-week follow-up appointment. (See Def. Br. at p. 27). According to Ms. Decker's custom and practice for patients who needed to schedule multiple visits, or a series of visits, she would just schedule the first visit and have some dialogue with the patient about scheduling future visits at another time. (C 2721). This testimony is irrelevant here, since Glenn was not a post-operative patient or the type of patient who needed a series of appointments or multiple appointments scheduled. Further, no one testified that Ms. Decker's personal practice, which she dubbed her custom and practice, adhered to the standard of care.

Rezin Orthopedics also, unconvincingly, attempts to defend its weak position with some testimony from Ms. Hare about how her custom and practice allowed her to schedule a patient outside of the timeframe ordered by the physician, *with permission from the physician*. (See Def. Br. at p. 28); see also, C 1270-1271). It makes no sense to rely on this testimony because Ms. Hare clearly deviated from her custom and practice and failed to seek Dr. Treacy's permission in this case.

It is important to add that it is unfair and misleading for Rezin Orthopedics to interject repeatedly that Ms. Hare's custom and practice relied on communication with the patient and agreement from the patient because it infers that Glenn was at fault. (See Def. Br. at p. 28). Glenn's conduct was not at issue in this case. First, the Plaintiff's Motion *in Limine* No 11, *To Bar Allegations of Contributory Negligence or a Failure to Mitigate Damages* was granted. (C 2146-2150). Moreover, the reception staff admitted that scheduling was their responsibility.

The appellate court was right not to give the custom and practice testimony from Ms. Decker and Ms. Hare the weight that Rezin Orthopedics does.

C. The Deviation from the Standard of Care in this Case Involved Purely Administrative Issues and Matters of Common Knowledge that Did Not Require Expert Opinion.

Rezin Orthopedics is unconvincing with its attempt to complicate the allegation of negligence relating to the failure to schedule Glenn's appointment according to Dr. Treacy's two-week follow-up order. (See Def. Br. at p. 29). *Pogge v. Hale*, 253 Ill.App.3d 904 (4th Dist. 1993) may stand for the proposition that there is a substantive distinction between institutional negligence claims that involve medical issues and those that involve purely administrative issues, but its application to this case is misplaced.

The timeframe ordered by Dr. Treacy as part of his treatment plan involved a medical issue, but the fact that the reception staff was supposed to follow a physician's order certainly did not. The logical reasoning for why not is because the reception staff had no medical training or medical knowledge to permit it to make medical decisions. The appellate court was right to consider the issue to be purely administrative and completely straightforward. *Steed*, ¶ 25-27.

In fact, at the trial court level, recognizing that the two-week standard of care issue was not the type of deviation that required expert testimony to understand or prove, Plaintiff offered the ordinary negligence jury instructions. (C 2177-2179). Ultimately, the professional negligence instructions were used with the jury, which instructed that expert testimony and custom and practice (or, opinion testimony from qualified witnesses and evidence of policies and procedures) could be considered. (C 2200). Plaintiff provided overwhelming evidence that the receptionists deviated from the standard of care through Dr. Jimenez and through every Rezin Orthopedics employee to testify on the issue.

D. The Appellate Court Properly Determined that Rezin Orthopedics Breached the Standard of Care by Failing to Follow *Whatever* Timeframe was Ordered by a Physician.

Rezin Orthopedics' argument that the standard of care imposed upon Rezin Orthopedics was more restrictive than the standard of care imposed upon Dr. Treacy confuses the real issue. (See Def. Br. at p. 30). While Rezin Orthopedics complains that Dr. Treacy could have gone out up to four to six weeks with his follow-up appointment, so that it is unfair that Rezin Orthopedics should be bound by a two-week date, that is the not issue at bar. The real issue is whether Rezin Orthopedics was required to follow the physician's follow-up order regardless of the timeframe selected by the physician. For good measure, if Dr. Treacy had selected March 12 or 13 as the follow-up timeframe, Plaintiff would have no basis for appeal.

Plaintiff did not unilaterally define the standard of care – Rezin Orthopedics did not offer any evidence to contradict Plaintiff's theory of negligence. As discussed above, the standard of care turned on the expert testimony and the evidence of the facility's policies and procedures. The opinion testimony from qualified witnesses for the defense was either

scant (Dr. Pinzur's personal practice testimony that he or his associates would have allowed the reception staff to go a week or a week-and-a-half outside of Dr. Treacy's order) or not relevant (the testimony from Drs. Treacy and Pinzur about the professional standard of care that applied to Dr. Treacy). The employee testimony was clear and unequivocal about how the reception staff was required to follow a physician's order.

The appellate court was right to find that the uncontroverted evidence of negligence overwhelmingly proved that the reception staff was negligent for failing to follow the written order on the super bill. Steed, ¶¶ 28-29.

II. The Appellate Court Properly Determined that Proximate Cause was Overwhelmingly Supported by the Evidence.

In light of the general verdict, once it was established that the overwhelming evidence at trial proved that Rezin Orthopedics breached the standard of care, the appellate court reviewed the evidence on the issue of proximate cause. *Steed*, ¶ 30. The appellate court's proximate cause analysis did not specifically address "actual cause" or "legal cause" because that was not necessary for it to reach the proper conclusion. It reiterated the overwhelming proximate cause evidence in succinct summary and determined that the record clearly demonstrated a finding of proximate cause. *Steed*, ¶ 32. The appellate court did not give the issue of proximate cause short shrift, as Rezin Orthopedics insinuates. (See Def. Br. at p. 18). The evidence on proximate cause was straightforward, so it was not complicated to address.

Rezin Orthopedics is wrong to say that the Plaintiff's argument for JNOV on appeal focused exclusively on the standard of care. (See Def. Br. at p. 17). The primary issue on Plaintiff's appeal involved the two-week standard of care issue, but the whole point throughout the Plaintiff's appeal was that proximate cause was so obvious that a ruling in

the Plaintiff's favor on the two-week issue should result in a new trial limited to damages, only. Plaintiff's appeal explicitly acknowledged that it was for the jury to determine whether or not Glenn's DVT would have been diagnosable and treatable if he was brought back in the two-week timeframe ordered by Dr. Treacy. (See Def. Br. at p. 13). Plaintiff further pointed out how the evidence on proximate cause overwhelmingly favored Plaintiff's case to prove that Glenn's DVT would have been diagnosable and treatable if he had been brought back in two weeks. (See Def. Br. at p. 15).

Plaintiff contended in the appellate court and still contends that there would have been a jury finding in favor of Plaintiff on the issue of proximate cause if the trial court had barred evidence that the professional standard of care applicable to Dr. Treacy would have allowed him to order a follow-up any time between up to four and six weeks. The issue regarding proximate cause simply should have been limited to whether the DVT would have been diagnosable and treatable if Glenn had been brought back in the two-week timeframe ordered by Dr. Treacy. *Rezin Orthopedics never even called any expert to dispute that the reception staff's failure to schedule Glenn for a two-week follow-up appointment proximately caused Glenn's untimely death.*

Realizing this, the appellate court reversed and remanded this case for a new trial limited to damages, only, to rectify the errors made by the trial court, all the while recognizing that the standard for entry of JNOV is a high one. *Steed,* ¶ 32.

A. Rezin Orthopedics' Attempt to Conjure Contradictory Evidence to Refute "Cause-in-Fact" Falls Flat.

The evidence introduced at trial by both parties proved to "a reasonable certainty" that the failure of the reception staff to follow Dr. Treacy's order to schedule Glenn for a follow-up appointment "caused the injury," and that, "absent that conduct, the injury would

not have occurred." See, *e.g.*, *First Springfield Bank & Trust v. Galman*, 188 Ill.2d 252, 257-258 (1999). The fact of the matter is that no expert rebutted Plaintiff's evidence that Glenn was likely symptomatic from a DVT at the time when he should have returned to Rezin Orthopedics, and that his DVT was diagnosable and treatable before it propagated to a fatal pulmonary embolism.

Dr. Jimenez provided all of his opinions to a reasonable degree of medical and orthopedic certainty – he did not speculate, as Rezin Orthopedics contends. (C 3009). Dr. Jimenez testified that Glenn's complaints about tightness of the calf at around the two-week mark were *most likely* a DVT. (C 3026). He further testified that once diagnosed, there are effective medications used to treat DVT, which are aimed toward preventing it from traveling to the lungs. (C 2999, 3001). If Glenn had been seen at the two-week interval that was ordered by Dr. Treacy, the calf clot *likely* would have been diagnosed and treated aggressively, and Glenn *likely* would have survived. (C 3033-3035). Moreover, *more likely than not*, Glenn would have survived had he been seen on an urgent basis when he called into Rezin Orthopedics on March 25 with complaints of pain and tightness in his cast. (C 3034-3036).

Dr. Jimenez' testimony on cross examination about the signs and symptoms of a pulmonary embolism were hardly "concessions" as dubbed by Rezin Orthopedics (See Def. Br. at p. 20) since the real issue was whether a DVT (as opposed to a pulmonary embolism) was diagnosable and treatable at the two-week mark. In culling out this testimony, Rezin Orthopedics attempts to confuse the Court by conflating a DVT and a pulmonary embolism. A pulmonary embolism is the tragic consequence of an untreated

DVT. The point is that if Glenn had been seen, his DVT would have been diagnosed and treated before it progressed to a pulmonary embolism.

Dr. Treacy agreed with Dr. Jimenez and went even further and admitted that at the two-week appointment, he probably would have done a work-up to be able to diagnose Glenn's DVT. At that time, he probably would have been in a position to provide Glenn with life-saving treatment. (C 1366-1373, 1452, 1469-1472).

Dr. Huml's testimony that Rezin Orthopedics touts as refuting Plaintiff's overwhelming cause-in-fact evidence is very deceptive because it relates only to a pulmonary embolism and not to a DVT. (See Def. Br. at p. 19). Even taking everything Dr. Huml testified to about the first signs and symptoms of a pulmonary embolism as true, his testimony was not relevant to the issue of whether Glenn's DVT could have been diagnosed and treated to prevent a pulmonary embolism.

Rezin Orthopedics conveniently omitted Dr. Huml's testimony that the treatment of DVT will reduce the risk of pulmonary embolism by 80 to 90 percent. Treatment of DVT that has been diagnosed in the lower extremity is, in fact, quite effective. If Glenn had been treated for DVT prior to March 8, he more likely than not would have survived. (Sup R 72).

The testimony Rezin Orthopedics cites to from Dr. Huml and Dr. Bitran about anticoagulant medication (See Def. Br. at p. 20) is completely misplaced and irrelevant here, where the case against Dr. Treacy is not at issue. It is not relevant whether Dr. Treacy properly treated Glenn to prevent a DVT. What is relevant is whether the DVT could have been diagnosed and treated therapeutically (as opposed to prophylactically) at the point in time when Glenn should have been scheduled to return to Dr. Treacy's clinic.

Dr. Pinzur did not contradict Dr. Jimenez on the issue of when the DVT formed. Instead, he equivocated and merely relayed, "Well, we don't know when the DVT happened." (C 3197). This testimony, cited by Rezin Orthopedics as contradictory, is neutral, at best. (See Def. Br. at pgs. 19-20). This type of testimony does not even rise to the level of the type of evidence described in *Pedrick* as a "mere scintilla" – and then disregarded. *Pedrick*, 37 Ill.2d 494, 502.

If anything, Dr. Pinzur supported Plaintiff's theory when he testified that if Glenn experienced the symptoms Susan described at the time of the two-week appointment, Dr. Treacy would have been in a position to diagnose the development of the DVT. (C 3196). Blood clots in the legs are treatable. (C 3185).

Further, Rezin Orthopedics totally mischaracterizes Dr. Pinzur's testimony about the signs and symptoms of DVT and the significance of swelling. (See Def. Br. at p. 21). Dr. Pinzur acknowledged that the symptoms Susan described could certainly be attributed to and are consistent with the development of a lower extremity DVT. (C 3195-3196). Further, both he and Dr. Treacy acknowledged the significance of her testimony that Glenn's swelling was not resolved by elevation and, therefore, was concerning for DVT. (C 3190-3191, 3195-3196, 1366-1367).

Essentially, the entire proximate cause/cause-in-fact defense is premised on believing it was a total coincidence that Glenn reported symptoms consistent with a DVT and then died of a pulmonary embolism that originated in his casted lower extremity. The appellate court recognized this when it properly determined that Plaintiff had overwhelmingly proved her case on the issue of proximate cause.

B. Among Other Compelling Evidence, Dr. Treacy's Discussion with Glenn about Glenn's Specific Risks for DVT Development Proves Uncontroverted Foreseeability, or Legal Cause.

Rezin Orthopedics seemingly argues that because Glenn was at low risk for developing a DVT, the appellate court should have overlooked his meaningful risk for developing DVT and clear DVT symptomology. (See Def. Br. at p. 22). This argument is unavailing.

The testimony from both sides proved that the concern for DVT has been known in medicine for many years, and every orthopedic patient is at risk. (C 1345, 1348, 3185). In fact, Dr. Treacy explicitly admitted that he recognized that Glenn was at risk for DVT. (C 1348). Toward that end, Dr. Treacy made it a point to have a comprehensive discussion with Glenn about his DVT risk that would have included the subjects of DVT and pulmonary embolism. (C 1458, 1460).

All the defense experts testified that Glenn's risk for developing DVT was low, but they all arrived at this opinion after deliberately stratifying his DVT risk. The purpose behind their testimony was to opine at trial that Glenn was not a candidate for chemoprophylaxis under the standard of care, but in formulating and relaying their respective opinions, they listed his specific risk factors. A low risk is still a risk, and a foreseeable risk at that.

The appellate court recognized that Glenn's DVT was foreseeable when it properly determined that Plaintiff had overwhelmingly proved her case on the issue of proximate cause. No qualified opinion witness testified that Glenn's DVT was unforeseeable. On the contrary, the evidence was uncontroverted that Glenn had known risk factors for developing a DVT.

III. Alternatively, the Plaintiff is Entitled to a New Trial Because the Verdict was Against the Manifest Weight of the Evidence.

A new trial is proper where, as in this case, the verdict is contrary to the manifest weight of the evidence. *Mizowek v. DeFranco*, 64 Ill.2d 303, 310 (1976). The trial court was empowered by the Plaintiff's post-trial motion to weigh the evidence and to set aside the verdict because it was contrary to the manifest weight of the evidence, pursuant to the lesser standard set out in *Mizowek*. See also, *Maple v. Gustafson*, 151 Ill.2d 419 (1992) and *Usslemann v. Jansen*, 257 Ill.3d 978 (1st Dist. 1994) (finding a verdict is against the manifest weight of the evidence where the opposite conclusion is clearly evident or where the findings of the jury are unreasonable, arbitrary and not based on any of the evidence). The trial court's denial of the Plaintiff's post-trial motion was in error. Although, when considering the evidence in this case in the light most favorable to both Defendants, the Plaintiff submits that she was entitled to JNOV against Rezin Orthopedics and a new trial on damages, only.

IV. Alternatively, this Case Should be Remanded to the Appellate Court to Decide Whether the Plaintiff is Entitled to a New Trial on All Issues Based on the Admission of Certain Irrelevant and Highly Prejudicial Evidence and Argument.

It was unnecessary for the appellate court to consider whether Plaintiff was entitled to a new trial based on evidentiary errors raised by Plaintiff on appeal because of its decision to reverse and remand for a new trial limited to damages. In the unlikely event that this Court does not affirm the appellate court's decision, this matter should be remanded to the appellate court for consideration of the trial court's evidentiary errors. See *e.g.*, *Carter v. SSC Odin Operating Co., LLC*, 237 Ill. 2d 30, 38-39 (2010) ("For the reasons that follow, we reverse the judgment of the appellate court on the issue that it addressed

and we remand the cause to the appellate court so that it may consider and decide issues not reached by it previously.") See also, *Schwartz v. Cortelloni*, 177 Ill. 2d 166, 172 (1997) (same); *Boatmen's National Bank v. Direct Lines, Inc.*, 167 Ill. 2d 88 (1997) (same).

Regardless of the considering court, Plaintiff is entitled to a new trial on all issues based on the prejudicial impact of the trial court's evidentiary rulings. Rezin Orthopedics cites to the "general verdict rule" to claim that the trial court's errors should be forgiven. (See Def. Br. at p. 32). To reiterate, in light of the general verdict, after the appellate court determined that the evidence at trial overwhelmingly favored Plaintiff, the appellate court made a calculated and proper decision to review the evidence on the issue of proximate cause. *Steed*, ¶ 30. After doing so, the appellate court properly determined that Plaintiff was entitled to JNOV on the issue of proximate cause, too, because the evidence from both parties proved, overwhelmingly, that Glenn's DVT would have been diagnosed and treated and his life saved had Rezin Orthopedics followed the standard of care. *Steed*, ¶ 32.

A. It was Error to Deny the Plaintiff's Motion *in Limine* No. 12.

Rezin Orthopedics relies on the pleadings, and specifically, the Fourth Amended Complaint, in an attempt to support its position that the professional standard of care that applied to Dr. Treacy was relevant evidence. (See Def. Br. at p. 34). This argument has no merit. While the pleadings were the vehicle through which Plaintiff ended up in the court house, the issues instructions were what dictated the relevant issues for the jury to decide. The only issues that pertained to the professional standard of care related to Dr. Treacy was his alleged failure to properly assess Glenn's DVT risk and prescribe chemoprophylaxis because of Glenn's DVT risk – nothing about his failure to schedule Glenn to return to see him in two weeks. (C 2203).

It would not have made sense to bring a scheduling allegation against Dr. Treacy at trial because uncontroverted evidence from both parties proved that Dr. Treacy ordered Glenn to be scheduled to return in two weeks, which was within the standard of care. In fact, the entire issue with regard to Rezin Orthopedics' failure to schedule Glenn's two-week appointment hinged on Dr. Treacy's order as being proper. Rezin Orthopedics cannot change Dr. Treacy's order after-the-fact to try to pivot from the real standard of care issue. And, Plaintiff did not "conclusively" establish the standard of care, without supporting case law, by insisting that the real issue remain in focus. (See Def. Br. at p. 35).

Defendants' expert testimony about the hypothetical standard of care was not controlling over the ample and uncontroverted testimony from all of Defendants' receptionists. According to the Comments for Illinois Pattern Jury Instruction, Civil, No. 105.03.01 (2011), which covers institutional negligence, "There is no case law on whether the breach of the duty of an institution must be proven generally only by expert testimony or other evidence of professional standards. Accordingly, the second paragraph of this instruction does not use the mandatory language contained in the third paragraph of IPI 105.01." See *Northern Trust Co. v. Louis A. Weiss Memorial Hosp.*, 143 Ill.App.3d 479, 492 (1st Dist.1986); see also, *Andrews v. Northwestern Memorial Hosp.*, 184 Ill.App.3d 486, 540 (1st Dist. 1989) (expert medical testimony not required in an institutional negligence case to establish standard of care).

The jury failed to weigh the appropriate evidence, but the appellate court understood easily that the professional standard of care that applied to Rezin Orthopedics was different than the professional standard of care that applied to Dr. Treacy. *Steed*, ¶ 29. As a result of its misunderstanding, and for the reasons set forth more fully in Section I,

Subsection A, above, the trial court erred when it allowed the defense to interject irrelevant, confusing, prejudicial, and improperly hypothetical testimony to the jury about the standard of care that applied to Dr. Treacy.

B. It was Error to Grant the Defendant's Motion *in Limine* No. 32 and to Prohibit Testimony Regarding Glenn's February 25 Telephone Conversation with Rezin Orthopedics.

Defendant's Motion *in Limine* No. 32 sought to bar Susan from testifying as the content of the February 25 telephone conversation as hearsay. (C 2293-2298). The trial court should have denied the Defendant's Motion *in Limine* No. 32 and, instead, adopted the law and reasoning set forth in the *Plaintiff's Trial Brief in Support of Admitting Certain Testimony of Susan Steed*. (C 2067-2077). The contents of the telephone conversation between Glenn and receptionist Ms. Popplewell should have been admitted into evidence through Susan's testimony because some portions of the conversation were well known exceptions to the rules otherwise prohibiting hearsay testimony, and the remaining portions of the conversation were not hearsay.

According to Susan, in testimony restricted to an offer of proof, when Glenn called Rezin Orthopedics on February 25, he followed through on their plan and, in fact, reported the achiness and tight feeling in his cast around his calf. In response to Glenn's complaints, Ms. Popplewell told him to elevate his right leg above the heart and to ice behind his knee. In reliance on Ms. Popplewell's instructions, Glenn began to elevate his right leg and ice behind his knee regularly. He also began to take Aleve, an anti-inflammatory. Based on Glenn's representations, Susan was content that he addressed his new complaint. (C 2950, 3150-3153).

Pursuant to the trial court's ruling on the Defendants' Motion *in Limine* No. 32, *To Bar Susan Steed from Testifying as to Content of the February 25, 2009 Telephone Call as Hearsay*, Susan was not permitted to provide this testimony to the jury. The only evidence admitted with regard to the telephone call was as follows: 1) On February 25, Glenn placed a telephone call to Rezin Orthopedics; 2) Glenn's telephone call was answered by Ms. Popplewell); 3) Ms. Popplewell changed Glenn's follow-up appointment from March 13 to March 12, to follow-up with his cast; and 4) Glenn changed his behavior following the telephone conversation, to ice behind his knee and elevate above the level of his heart. (C 2536-2542, 2598-2610).

According to the explicit mandate of Rule 805 of the Illinois Rules of Evidence, hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conform with an exception to the hearsay rules. Ill. R. Evid. 805 (Lexis 2020).

There are three components to this conversation: 1) statements Glenn made to Susan; 2) statements Glenn made to Rezin Orthopedics; and, 3) statements Rezin Orthopedics made to Glenn. Breaking down the conversation into the three component parts, it is clear that each component of the conversation was admissible so that Susan should have been permitted to testify as to the entire February 25 telephone conversation between Glenn and Ms. Popplewell.

First, Susan should have been permitted to testify that on February 25, Glenn did, in fact, telephone Rezin Orthopedics to report the change in his condition, namely the tightness he was feeling in his leg inside of his cast. This testimony was not hearsay because it did not relate to the truth of the matter asserted. It was offered by Susan as an

exception to the general rule prohibiting hearsay because it was a statement of intent. The testimony confirms that Glenn acted in accordance with his intent, and in furtherance of the Steeds' joint plan to telephone Rezin Orthopedics to report the change in his condition. See *People v. Bartall*, 98 Ill.2d 294 (1983)(finding the defendant's statement was admissible to prove his intent and to prove that he acted in accordance with that intent).

Further, the fact that Glenn comforted his wife by letting her know that he acted in accordance with their plan to telephone Rezin Orthopedics offered peace of mind to Susan, who was worried about her husband, which was one of the primary reasons they planned together for him to place the telephone call. In that regard, Glenn's statement relaying that he placed the call also goes to the effect on the listener because Susan relied on it. If Glenn had not informed her that he placed the call then she would have placed the call, or she would have brought him to the office personally. (C 3152-3153).

If a statement is offered to show its effect on the listener, rather than to prove its truth, it is not hearsay. *McManus v. Feist*, 76 Ill.App.2d 99 (4th Dist. 1966) (defendant's testimony that judge told him he should plead guilty because there were no witnesses was properly admitted to explain why defendant entered guilty plea). See also, *Baker v. Granite City*, 112 Ill.App.3d 1096 (5th Dist. 1983)(deeming an allegedly hearsay letter admissible because the letter was offered to prove that the proponent of the evidence acted in reliance on the content of the letter). It was abundantly clear from Susan's offer of proof that she took no further action after the February 25 in reliance on the statements made by Glenn to her regarding his telephone conversation that date. (C 3152-3153).

The second component of the telephone conversation involved Glenn's statements to Ms. Popplewell when he called Rezin Orthopedics. Reports of an achy feeling in his

calf and of tightness in his cast go directly to the "then existing mental, emotional, or physical condition," deemed admissible pursuant to Rule 803(3) of the Illinois Rules of Evidence. Ill. R. Evid. 803(3)(Lexis 2020). Even further, it should be construed as a statement made for medical diagnosis and treatment, which is excepted from hearsay by Rule 803(4) of the Illinois Rules of Evidence. Ill. R. Evid. 804(4)(Lexis 2020). This makes sense considering that, technically, it was medical advice that Glenn received, albeit impermissibly, on the other end of the line (*i.e.*, to elevate above the level of his heart and to ice behind his knee). (C 2950).

The final component to the conversation, which would be the statements made by Ms. Popplewell (*i.e.*, the medical advice that she gave Glenn during the course of her employment) was not hearsay. Whatever the receptionist told to Glenn should be construed as a statement by a party's agent or servant (formerly, an admission versus a statement). Rule 801(d) of the Illinois Rules of Evidence provides for certain statements that are not hearsay, which explicitly include a statement (versus an "admission") by a party's agent or servant. Ill. R. Evid. 801(d)(2)(D)(Lexis 2020).

According to the committee comments, "Rule 801(d)(2)(D) confirms the clear direction of prior Illinois law that a statement by a party's agent or servant concerning a matter within the scope of the agency or employment, made during the course of the relationship, constitutes an admission of a party opponent." The agency relationship between Rezin Orthopedics and its receptionist was admitted at the time of trial. In fact, the receptionists were produced by the Defendant at the time of trial pursuant to Illinois Supreme Court Rule 237 and were called by the Plaintiff to testify at the time of trial pursuant to Section 2-1102 of the Illinois Code of Civil Procedure.

The trial court's ruling erroneously deprived Susan of her opportunity to prove that Rezin Orthopedics failed to notify a physician or physician's assistant on February 25 about Glenn's condition after he telephoned to report symptoms related to his casted leg, as well as that Rezin Orthopedics failed to timely schedule him to return to the office for an examination to diagnose of rule out a DVT after the February 25 telephone call.

Without the benefit of Susan's testimony at trial that she provided in her offer of proof, the jury was left to speculate about what occurred during the February 25 telephone call. This was highly prejudicial. Even worse, the jury was permitted to impermissibly infer that Glenn called to change the appointment as a matter of convenience or for some other reason, inferences which were rightly barred by the granting of the Plaintiff's Motions *in Limine* Nos. 10 and 11. This was not only prejudicial but also blatantly untrue. In using Glenn's personal and work calendar for reference, he had no conflict that would have prevented him from attending an appointment at any time during the weeks of March 1 or 8. Further, Susan was not working and was available to drive him any of those days. (C 2954-2956, 3145-C3147).

C. Defendants' Attorney Interjected Deposition Testimony that was Specifically Barred *in Limine* as Part of Her Closing Argument, Which Constituted Improper Use of Deposition Testimony, a Blatant Mischaracterization of Evidence, a Violation of the Trial Court's Ruling *in Limine*, and Improper Argument.

The Plaintiff's Motion *in Limine* No. 10, which was granted by the trial court without reservation, specifically barred any of the receptionists from commenting on Glenn being a difficult patient to schedule because none of them had any specific recollection of their encounters. (C 2138-2145).

Ms. Decker, the receptionist who scheduled the February 19 office visit at the end of the initial visit on February 17, specifically, was barred from offering unfounded commentary from her deposition that scheduling was a "little difficult" with Glenn, based on the speculative nature of the testimony because she was never able to elaborate. She admitted at her deposition that she did not know why she did not set the two-week follow-up, and the trial court granted the Plaintiff's motion to prevent her from conjuring an explanation at the time of trial. (R. C2138-2145).

In accordance with the trial court's ruling, this lay witness followed the instruction from the trial court and avoided testifying about Glenn being a "little difficult" to schedule. In a blatant and purposeful violation of the trial court's ruling, the Defendants' counsel took the testimony from the deposition that helped the Defendants' case, even though it was barred at trial, and used it for argument. "So we heard from Jodi Decker. She testified on February 17 that she made the appointment for Mr. Steed to have his cast placed in accordance with Dr. Treacy's instruction…She also said 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 appointment, *he* would schedule the next follow-up visit." (R. C3255). This argument was not based on evidence and was barred by law.

Counsel for the Plaintiff timely and appropriately objected, but the harm was already done. The jury was permitted to blame Glenn based on testimony that was barred in the first place due to its speculative nature, as well as the motions *in limine* related to barring any claim for contributory negligence or for a failure to mitigate damages.

Counsel has every right to be vigorous in closing argument in making fair comment upon the evidence. The Defendants' counsel at trial, on the other hand, had no right to misrepresent the evidence or argue facts not in evidence. Certainly, the Defendants' counsel should not have violated the rulings of the court made *in limine* on a whim because it makes her argument sound better or, somehow, more convincing. This argument was extremely prejudicial, especially because it was aimed directly toward the most solidly proven allegation in the Plaintiff's case: the failure on the part of the receptionists to schedule the two-week follow-up appointment. The prejudicial impact of this "testimony" by way of argument was insurmountable and constituted reversible error.

It is well established in Illinois that counsel's arguments are limited to the evidence presented. She cannot testify or supply new or additional facts to the jury during closing arguments. *Ferrer v. Veccione*, 98 Ill. App.2d 467, 474 (1968), citing *Owen v. Willett Truck Leasing Corp*., 61 Ill.App.2d 395 (1965). Supplying new facts during closing argument is reversible error. See also, *Flynn v. Cusentino*, 59 Ill.App.3d 262, 267 (1987)(trial court erred in allowing defense counsel to argue during closing summation additional facts not in the record); *Flewellen v. Atkins*, 99 Ill.App.2d 409 (1968)(new trial required where counsel interjected evidence not in the record in a personal injury case); *Mattice v. Klawans*, 312 Ill.299 (1924)(verdict reversed and a new trial granted in close case due to improper closing argument: "[t]his line of argument was improper because counsel had no right to testify in his argument to the jury.").

Counsel's latitude did not extend to interjecting facts into her closing argument that were not evidence to the trial of the case and, even more egregious, were explicitly barred from evidence. See *Ferry v. Checker Taxi Company, Inc.*, 165 Ill.App.3d 744, 750 (1st

Dist. 1987); See also, *Wille v. Navistar Int'l Transp. Corp.*, 222 Ill. 3d 833, 837 (1st Dist. 1991)(The Appellate Court will reverse a judgment based upon errors in closing argument when the errors are clearly improper and prejudicial.

Based on defense counsel's testimony, the jury might have decided that Glenn bore the blame for the delay in his scheduling because he was *so* difficult to schedule, inferring that Rezin Orthopedics *finally* was able to get him to commit to a date. This type of misstatement of evidence in final argument resulted in something far less than the kind of fair trial to which all litigants are entitled and, therefore, a new trial must be ordered. See *Rutledge v. St. Anne's Hospital*, 230 Ill.App.3d 786 (1st Dist. 1992)(finding plaintiff was denied a fair trial because of defense counsel's prejudicial remarks which distorted and misrepresented the evidence and the law and was calculated to mislead the jury).

The violation in this case is even more egregious than the violations described in the case law cited to herein because the Defendants' counsel in this case "testified" to matters explicitly barred *in limine*.

V. Defendant's *Amici* Add Nothing to this Appeal.

Rezin Orthopedics made its way to this Court with a hyperbolic claim that the appellate court's decision was of universal significance. The truth, though, is that this was a very fact-specific case, and the only case law of significance cited to is the well-settled case law that applies to JNOV, the propriety of which is not even questioned. None of the good reasons proffered in Illinois Supreme Court Rule 315(a) exist here for this Court to reconsider the sound reasoning of the appellate court.

In an attempt to support the defense, the Illinois Association of Defense Trial Counsel filed an *Amicus Curiae* brief that merely echoes the same unsupported and misleading proximate cause arguments made by Rezin Orthopedics in its brief.

Also in an attempt to support the defense, a group of several Chicagoland area hospitals filed an *Amici Curiae* brief, attempting in vain to make it sound as though the appellate court's opinion, filed under Illinois Supreme Court Rule 23, will transcend time and place to, somehow, affect all hospitals, everywhere – even though this was a case about the receptionists at a doctor's office, who answer telephone calls and schedule patient appointments, which are two things that do not really take place at hospitals. Really, it is hard to conceive of any other case where the ruling would apply to other hospitals, clinics or medical offices, let alone to their detriment.

Their brief echoed the same losing arguments as Rezin Orthopedics relating to the appellate court's sound rejection of the testimony relating to the professional standard of care the applied to Dr. Treacy versus Rezin Orthopedics. The appellate court did not rule that any departure from an internal practice or procedure is *per se* negligence, so as to have any effect on patient care universally, let alone untoward consequences to patient care. No one ignored the standard of care testimony by the defense experts, either – the fact is that none of them testified regarding the standard of care the specifically applied to the non-physician staff.

The entire argument about policies and procedures and custom and practice is a red herring. Defendant's reception staff was required to follow its physician's follow-up order because that was their job, for the health and safety of the patient, and not because of some internal policy or procedure. There was no written policy/protocol in place at Rezin

Orthopedics, and there did not need to be because it was common knowledge and common sense that the lay reception staff should follow the physician's orders because they are not in a position to make medical decisions for the facility's patients.

CONCLUSION

For all of the sound reasons set forth in this Appellee Brief, Plaintiff respectfully requests this Court to affirm the appellate court's decision to reverse the judgment on the jury's verdict, finding as a matter of law for the Plaintiff on the issues of standard of care and proximate cause. Alternatively, the Plaintiff should be entitled to a new trial based on the lesser manifest weight of the evidence standard set out in *Mizowek*. In the unlikely event the decision of the appellate court is reversed, this cause should be remanded to the appellate court to determine if Plaintiff entitled to a new trial as the result of errors on the part of the trial court.

WHEREFORE, Plaintiff-Appellee, Susan Steed, as Independent Administrator of the Estate of Glenn Steed, Deceased, respectfully requests that this Honorable Court affirm the appellate court's order to reverse and remand this matter to the trial court for a new trial on damages, only, as well as to grant any additional relief that this Honorable Court deems just and proper under the circumstances.

Dated: June 16, 2020

Respectfully submitted,

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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 50 pages.

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NOTICE OF FILING AND PROOF OF SERVICE

I hereby certify that on June 16, 2020, I electronically filed Response Brief of Plaintiff-Appellee, Susan Steed, As Independent Administrator of the Estate of Glenn Steed, Deceased with the Supreme Court of Illinois by using the Odyssey eFileIL system.

I certify that on June 16, 2020, I electronically served the above-mentioned document through the court electronic filing manager and by email to the attorneys of record listed below on the Service List. 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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