SUPERIOR COURT
OF THE
STATE OF DELAWARE

JOHN A. PARKINS, JR.
JUDGE

NEW CASTLE COUNTY COURTHOUSE
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April 28, 2014

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Re: William F. Nutter, Individually and as Personal Representative of the Estate of Rhonda Nutter, Decedent v. Christiana Care Health Services, Inc., a/k/a Christiana Care Health Systems, Inc., Rebecca R. Moore, M.D., Brian McGillen, M.D., and Christiana Medical Group, P.A. C.A. No. N10C-09-067 JAP

Dear Counsel:

This letter concerns whether, as a matter of law, the doctrine of comparative negligence does not apply to medical negligence cases. For the reasons below, the court holds that, in a factually appropriate case, comparative negligence may be asserted as in a medical negligence matter.

An examination of the doctrine of comparative evidence reveals no reason why it cannot be applied in medical negligence cases. Despite its

name "comparative negligence" is based upon a comparison of causation, *i.e.* the relative degree to which the conduct of the parties contributed to the harmful occurrence. The proverbial seminal case here is the Supreme Court's opinion in *Moffitt v.Carroll*[1] in which the court emphasized that comparative negligence is a two step analysis. First there must be a determination whether both parties were negligent in a manner which proximately caused the injuries. Then, and only then, is the negligence of the parties to be compared. This is to be done by an apportionment based on proximate causation. According to the *Moffitt* court:

> This Court has interpreted the Delaware comparative negligence statute as contemplating an apportionment of negligence based upon proximate causation. Pursuant to the Delaware statute, the apportionment of comparative negligence is a "separate consideration" which should be examined by the trier of fact only after the elements of each actor's individual negligence (duty, breach of duty, and proximate causation) have first been determined. That is, after the trier of fact finds that two or more actors were independently negligent, the amount of negligence attributed "comparatively" to each actor is determined based upon the extent to which their respective negligent conduct contributed to the occurrence of the harmful event.[2]

The court sees no reason why this cannot be done in this case. If the evidence otherwise supports an instruction on comparative negligence the jury will simply be asked--if it finds both the decedent and the defendant were negligent in a manner proximately causing Mrs. Nutter's death--to

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[1] 640 A.2d 169 (Del. 1994).
[2] *Id.* at 173.

compare the degree to which the negligent conduct contributed to the cause of Mrs. Nutter's death.

The doctrine of comparative negligence is a creature of statute, and nothing in the statute creating this doctrine prohibits its application in medical negligence cases. Indeed, the statute provides that the doctrine applies "[i]n all actions brought to recover damages for negligence which results in death or injury."[3] There are, of course, a host of statutes which apply exclusively to medical negligence actions. Plaintiff has not pointed to any of those statutes, and the court could find none, which preclude the application of the doctrine in medical negligence cases.

The court holds, therefore, that comparative negligence may be applied in medical negligence cases when the facts warrant the application of that doctrine. Citing to this court's opinion in *Ragnis v. Myers*[4] Plaintiff argues that, even if comparative negligence can be applied as a general matter in medical negligence cases, it cannot be applied in this particular case. In *Ragnis* this court held that, in the medical negligence case then before it, the applicability of the doctrine depends upon when the plaintiff's negligence occurred: "(i) the pre-treatment period; (ii) the treatment period during which the alleged medical negligence occurred; and (iii) the post-medical negligence period." According to the instant plaintiff, "a plaintiff [in a medical negligence case] can only be found negligent for acts or omissions occurring during the second period." He reads *Ragnis* far too broadly. The

[3] 10 Del. C. sec. 8132
[4] 62 A.3d 1225 (Del. Super. 2012)

Ragnis court never intended to create a series of three pigeon holes--some of which could give rise to comparative negligence cases and others of which could not--for use in future cases. Indeed this court noted:

> This Court joins other courts addressing this issue, that each case must be examined on its own facts. The ruling in this case is not applicable in all medical negligence cases where the injured or deceased may have been negligent in some respect.[5]

The applicability of the doctrine here turns on the facts of this case. Before deciding whether to give an instruction on comparative negligence the court will need to determine whether there is evidence which could cause a reasonable trier of fact to conclude Mrs. Nutter was negligent in a manner which proximately caused her death. This will entail, of course, hearing the evidence at trial. Assuming there is such evidence (and further assuming, there is evidence at trial upon which a reasonable trier of fact could also find defendant negligent in a fashion which proximately cause the decedent's demise) the court will give such an instruction. Otherwise, it will not.

Very truly yours,

John A. Parkins, Jr.

oc: Prothonotary

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[5] *Id.* at 1232