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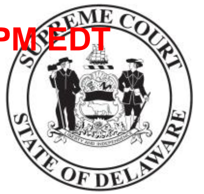

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ELIZABETH RIZZUTO, Individually and in her capacity as surviving spouse of CHARLES RIZZUTO, JR., deceased, and as personal representative of the estate of CHARLES RIZZUTO, JR.,	)
Plaintiffs Below, Appellant	) No. 62,2015
v.	) C.A. No. Below: N10C-12-156 DCS
DELAWARE CLINICAL AND LABORATORY PHYSICIANS, P.A., A Delaware corporation,	)
Defendant Below, Appellee	)

Appeal from the Superior Court of the State of Delaware,
In and For New Castle County, C.A. No. N10C-12-156 DCS

APPELLANT'S REPLY BRIEF

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Dated: May 29, 2015

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SUMMARY OF ARGUMENT

Appellant-Plaintiff Elizabeth Rizzuto in various capacities ("Plaintiff" or "Appellant") submits this Reply Brief in further support of her appeal against Appellee-Defendant Delaware Clinical and Laboratory Physicians, P.A. ("Defendant" or "DCLP").

First, Defendant's argument that there are purported deficiencies in the Appendix to Plaintiff's Opening Brief is a non-starter. Plaintiff has satisfied all the requirments of Supr. Ct. R. 9(e)(ii) and 14(e). There is a complete record before this Court for appropriate appellate review.

Second, Defendant's "no-causation evidence" arguments are all misleading and erroneous, both as a matter of fact, and law. Defendant's breach of the admitted standard of care, two-person support of a frail patient to prevent a fall, was the obvious and indisputable cause of Mr. Rizzuto's injury. Any reasonable jury could have reached the same verdict as this one did.

ARGUMENT

I. THE RECORD IS SUFFICIENT

A. As A Matter Of Law, Plaintiff Is Not Required To Provide The Entire Record On Appeal

Defendant erroneously states that "[p]laintiff's failure to include all relevant portions of the record necessary for appellate review warrants affirmation of the trial judge's grant of judgment as a matter of law for Defendant." (Ans. Br. at 10). Defendant cites *Trioche v. State*, 525 A.2d 151, 154 (Del. 1987), and Supr. Ct. R. 9(e)(ii) and 14(e). In *Trioche*, this Court held that appellants must provide "such portions of the trial transcripts as are necessary to give [the] Court a fair and accurate account of the context in which the error occurred." *Trioche*, 525 A.2d at 154. That was done here, and Plaintiff did not err by omitting the pleadings and jury instructions listed on pages 10 and 11 of Defendant's Answering Brief.

B. As A Matter Of Law, Defendant May Supplement The Appendix

Defendant further alleges that Plaintiff impermissibly excluded a number of portions of the record that Defendant deems "necessary for appellate review." (Ans. Br. at 11). Plaintiff's appendix included "such portions of the trial transcripts as are necessary to give the Court a fair and accurate account of the context in which the error occurred." *Trioche*, 525 A.2d at 154. To the extent that Defendant intends to rely upon additional portions of the record in its opposition, it is permitted to supplement the record before the Court with "such other parts of the record material

to the questions presented as [they wish] the Justices to read." Supr. Ct. R. 14(e).

The Defendant has done so. (*See generally* Appendix to Ans. Br.).

II. THE TRIAL COURT ERRED WHEN IT RULED AS A MATTER OF LAW UNDER SUPERIOR COURT CIVIL RULE 50(b) THAT NO REASONABLE JURY COULD FIND IN FAVOR OF PLAINTIFF ON THE ISSUE OF CAUSATION: A REPLY TO DEFENDANT'S CONTRARY CONTENTION

A. 18 *Del. C.* § 6853(e) Does Not Require That Medical Causation Evidence Come ***Only*** From A Plaintiff's Retained Medical Expert.

The statute does not say that "expert" evidence can only be provided by a retained forensic expert. To graft such a requirement onto the statute would be nonsensical. For instance, a medical negligence defendant could concede (and often does) that the alleged negligent act did cause the injury. For example, a bowel perforation during surgery is responsible for an ensuing infection while the perforation is argued to be a recognized complication of the surgery and not negligence.

Here, the Defendant admitted in the Pre-Trial Stipulation the causal connection between the fall and the hip fracture. (A 27). At page 15 of its Answering Brief, Defendant states: "That Defendant admitted Mr. Rizzuto fell on January 20, 2009 and fractured his hip is **immaterial**; the question for the jury was whether that injury was proximately caused by an act or omission of Defendant." (Emphasis supplied). Admission of a key, and undeniable, fact can't possibly be immaterial. That is the crux of the case and no reasonable jury could possibly conclude otherwise.

B. There Was Expert Testimony In This Case That Fully Satisfied The Statutory Directive Of § 6853(e).

The two-person assist protocol to prevent falls was not followed by Defendant's technologist, Ms. Kane, and the fall occurred. She acknowledged the two-person assist protocol in response to a question from Defendant's counsel. (A 175).

Plaintiff's expert, Elise Parker, R.N. said the same thing and described the "safest" two-person assist maneuver in detail. (A 136-8; Op. Br. at 10-11). She said "they're responsible to ensure the patient's safety, do everything they could to prevent falls." (*Id.*).

It was entirely proper for the trial court to submit this issue to the jury and the jury gave it credit. To the extent necessary to resolve this appeal without Defendant's admission, the two "weigh experts" agreed. The verdict should not be disturbed.

C. Given The Facts (Undisputed) Of This Case, The Issues Of Standard Of Care And Causation Are Merged Into One.

The sole purpose of the two-person assist protocol was to prevent a fall. There was no two-person assist and there was a fall. Nowhere is there evidence or a suggestion that the injury, a hip fracture, was not caused by the fall. Defendant's contention that Mr. Rizzuto's underlying medical condition caused the fall is beside the point. (*See* Ans. Br. at 18-19). If anything, evidence of Mr. Rizzuto's underlying medical condition can only serve to bolster Plaintiff's argument that the standard of

care required two people to weigh a person in his condition. The breach of the standard of care was, *ipso facto*, the cause of the injury.

D. Defendant's Attempt To Give Meaningful Weight To Dr. Sacher's Testimony Is Pointless.

Dr. Sacher is a hematologist who treats blood diseases. (B 147). He does not weigh patients who need assistance. It has never been apparent why he was involved in the trial for any reason[1], much less as an expert on how to manage a frail patient's ambulation. He said that any departure from the standard of care "really depends upon the circumstances and the dialogue between Ms. Kane and Mr. Rizzuto at the time."

Q: Which you don't know anything about because you weren't there, right?
A: Correct.

(B 172).

Defendant goes to some lengths to rehash the evidence it presented on standard of care and comparative negligence[2], yet neglects to consider that all facts must be taken in a light most favorable to the Plaintiff. *See Del. Elec. Coop., Inc. v. Pitts*, 1993 Del. LEXIS 409, *2-3 (Del. Oct. 22, 1993). At this stage of the proceedings that evidence, which the jury rejected, is inconsequential.

[1] Except to endorse Ms. Kane's testimonial version of the incident, which the jury rejected.
[2] *See* Ans. Br. at 6-7, 18-19

CONCLUSION

For the reasons stated here and in the Opening Brief, Appellant respectfully submits that the court below erred in setting aside the jury's verdict and granting judgment as a matter of law to Appellee. The judgment should be reversed and the verdict of the jury reinstated.

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