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Case Number 62,2015

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 OPENING BRIEF

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Dated: April 13, 2015

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NATURE AND STAGE OF PROCEEDINGS

On December 16, 2010, Appellants, 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. (hereafter "Plaintiff" or "Mrs. Rizzuto"), brought this medical negligence action against Appellee, Delaware Clinical And Laboratory Physicians, P.A. (hereafter "Defendant" or "DCLP"). (A 1). Plaintiffs alleged that one or more agents, servants or employees of DCLP was medically negligent in the care of Plaintiff's decedent, Charles Rizzuto on January 20, 2009, when he fell in Defendant's office, fracturing his right hip. (A 23-5). Specifically, the Complaint, accompanied by the requisite Affidavit of Merit, averred:

> One or more agents, servants or employees of defendant Delaware Clinical And Laboratory Physicians, P.A. were negligent and departed from the acceptable standards of medical care as defined in 18 Del. C. Chapter 68, in that they:
>
> (a) Failed to properly support wheelchair bound Charles Rizzuto, when they knew or should have known that he required weight support and assistance while being weighed for purposes of a medical examination.
>
> (b) Permitted Charles Rizzuto to fall while he was under their care and supervision.

(A 24). Defendant denied all the allegations of Plaintiffs' Complaint.

A jury trial lasting three (3) days was held from July 21 – 23, 2014. (A 40). Plaintiff called three witnesses: Frank Beardell, M.D. (Charles Rizzuto's treating

physician and the principal of DCLP), Elizabeth Rizzuto, and Elise Parker, R.N. (A 42). Plaintiff also introduced contemporaneous incident reports of the fall prepared by DCLP employees. (A 43).

At the close of Plaintiff's case-in-chief on July 22, 2014, Defendant moved for judgment as a matter of law on the grounds that Plaintiff had not proved through expert testimony that Defendant's negligence caused Mr. Rizzuto's injury. (A 43, 104-8). The trial court denied Defendant's motion then and again, when a renewed motion was made at the close of all the evidence. (A 43, 109 & 109-A). The jury received customary instructions on 18 *Del. C.* § 6853(c), and on direct and circumstantial evidence:

> Generally speaking, there are two types of evidence from which a jury may properly find the facts. One is direct evidence -- such as the testimony of an eyewitness. The other is indirect or circumstantial evidence -- circumstances pointing to certain facts.
>
> As a general rule, the law makes no distinction between direct and circumstantial evidence. The law simply requires that the jury find the facts from all of the evidence in the case: both direct and circumstantial.
>
> Direct evidence is proof that does not require an inference, such as the testimony of someone who claims to have personal knowledge of a fact.
>
> Circumstantial evidence is proof of a fact, or a series of facts, that tends to show that some other fact is true.
>
> For circumstantial evidence to be sufficient to warrant the finding of a fact, the circumstances must lead to the conclusion with reasonable certainty. In other words, circumstantial evidence must have sufficient probative value to constitute the basis for a legal inference. A conclusion must be rationally and logically drawn from

> the facts established by the evidence when viewed in the light of common experience. To support a conclusion, the circumstantial evidence must be capable of convincing a rational trier of fact that the conclusion is more probable than any other alternative.

(A 35-6).

On July 23, 2014, the jury returned a verdict for Plaintiff, awarding $250,000 to the estate of Charles Rizzuto, and $50,000 to Mrs. Rizzuto. (A 37-9). After the jury returned its verdict, Defendant renewed its motion for judgment as a matter of law which again was denied (A 197). Defendant then filed a Renewed Motion. (A 199). The trial court heard oral argument on October 3, 2014 and granted the motion by decision and order dated February 2, 2015. (A 20-1).

This appeal was docketed on February 10, 2015. (A 22).

SUMMARY OF ARGUMENT

Plaintiff contends the trial court erred when it set aside a jury verdict in favor of Plaintiff and entered judgment as a matter of law under Superior Court Civil Rule 50(b) for Defendant on the grounds that no reasonable jury could find in favor of Plaintiff on the issue of causation. Plaintiff argues that the case was properly submitted to the jury and the verdict should stand for the following three reasons:

1. Defendant's Pre-Trial Admission Satisfied The Requirements Of 18 *Del. C.* §6853(e);

2. The Evidence From Health Care Providers And The Retained Medical Expert Satisfied The Requirements Of 18 *Del. C.* §6853(e);

3. The Causation Nexus Between Breach Of Standard Of Care And Patient Injury Is Within The Common Knowledge Of The Ordinary Lay Juror And Fits The Facts Of This Case.

STATEMENT OF FACTS

On January 20, 2009, Charles Rizzuto, age 57, while being weighed on a standing weight scale in Defendant's medical office by Defendant's employee, fell and fractured his right hip. (A 24, 44-8). He was present for a routine medical visit, a part of which included taking the patient's weight, and a blood sample prior to examination by the physician. On that day Mr. Rizzuto, who suffered from amyloidosis, was in a frail, weak condition, dizzy, arrived via wheelchair and weighed about 140 pounds. (A 47, 176-8).

While being weighed in the phlebotomy lab by Defendant's medical technologist, Eileen Kane, he was not supported and fell off the scale, fracturing his right hip. (A 44-6). Ms. Kane promptly prepared an incident report which read:

> To: Muriel Hall
>
> Subject: INCIDENT REPORT
>
> On Tuesday, 1/20/09, I was attempting to weigh Charles Rizzuto, a patient of Dr. Frank Beardell's, and Charles fell off the scale. He fell towards the right and landed on his right hip. I attempted to catch as he was going down, but he fell too quickly.
>
> The patient then complained of severe hip pain. Mr. Rizzuto was then sent for an exray [sic], results are pending at this time.
>
> Eileen kane

(A 46).

The scale had a platform raised 3-4 inches off the floor and had sliding weight adjusters at the top. (A 179). Ms. Kane was the only person assisting Mr. Rizzuto at

the time of his fall. (A 180). Ms. Kane's supervisor, Muriel Hall, received the incident report and with a separate statement of the incident that read:

> The patient was attempting to step onto the scale and fell. Eileen caught his arm and prevented the patient from hitting his head. However, the patient landed on his right hip. The patient experienced pain and was sent for an xray. The xray (pelvis w/ lat R hip) revealed the following impression:
> Slightly impacted nondisplaced right femoral neck fracture.

(A 44). Part III of the same form had the question: "What factors led to the accident?" Muriel Hall wrote in response: "fell off scale." (A 45).

In the Pretrial Order under "**II. FACTS ADMITTED WITHOUT FORMAL PROOF**," Plaintiff stated: "1. Charles Rizzuto fell in Defendant's medical office on January 20, 2009 and sustained a fracture to his right hip." Defendant stated in response: "1. Admitted. To the extent any negligence is expressed or implied, denied." (A 27).

Dr. Beardell's office note for that day, January 20, 2009, contains this entry: "…and, in fact, he did have a fall in the office today while he was being weighed, landing on his right hip…" (A 47).

Even Mrs. Rizzuto, a trained nurse, testified on cross-examination:

> **Q:** Okay. I know you mentioned earlier that initially when you wheeled your husband in, there were two people in the room?

> **A:** Absolutely. I never would have left the room if there weren't two staff members there. And I knew they were going to try to put him on the scale, I wouldn't 'cause I would have been happy to help them weigh.

(A 100).

According to all the evidence, a patient who fits Mr. Rizzuto's profile – weak, unsteady, lightheadedness, dizzy, etc. – must be managed by a "two-person assist" for any ambulatory activity.

Plaintiff's retained expert, Elise Parker, R.N., testified:

> **A:** There are ways to move a patient to ensure patient safety, and generally those involve the assistance of a caregiver. And at this instance probably a two-person assist would be the safest, given the patient's condition, his debilitated status and his risk for falls. So it would be probably a two-person assist, they would, one person would assist the patient in coming to a standing position. Generally that involves close body contact, you ask the patient to put their hands on your shoulders, you lift the patient, the other person would be standing by, probably one person on either side in close contact.
>
> This would not be what they call a standby assistance, this would be a close assistance, probably one person on either side would walk the patient to the scale, assist the patient in getting on the scale, one person would stabilize the patient, again, with close contact while the other person would perform the act of adjusting the scale, obtaining the weight.
>
> And then probably to reverse the process, you know, it's tricky to get up and down off of these scales, so you'd have to have two people there in close contact assisting the patient off the scale, stepping backwards off the scale, turning to the side, getting off the scale, moving them back to their chair.

Q: And that would be the standard acceptable medical practice?
A: That would be a safe way of moving the patient from the chair to the scale. And, yes, I would consider that a standard of practice.
Q: And I'll ask you to assume that in this particular case that was not done with Charles Rizzuto and he sustained the fall and injury, in your opinion, stated in terms of reasonable medical probability, was that a departure from acceptable standards of care?
A: Given that it was they're responsible to ensure the patient's safety, do everything they could to prevent falls, yes, I would say it was a departure from standards of care.
Q: And once that type of patient is in the, I'll say the custody of the medical care providers, are they responsible to prevent him from suffering any harm?
A: They're responsible to do everything within their practice to do that, yes.
Q: And are they expected to adhere to reasonable standards of medical practice in doing that?
A: Yes.

(A 136-8).

Eileen Kane testified:

Q: What was DCLP's protocol for weighing a patient?
A: The doctors wanted the patients weighed every time they were being seen, with exception, if they were too weak to get up out of a wheelchair. Or even just to get up on a scale, I shouldn't just say a wheelchair. But then if a patient was going to receive some kind of therapy or medication, sometimes it was necessary, but I would let the doctor make that judgment, and then two people would assist a patient onto a scale.
Q: Were there times where you would weigh a patient on your own?
A: Clarify, a regular patient or a weakened patient?
Q: Start with a weakened patient.
A: With a weakened patient, no.

Q: You would have assistance?
A: Yes. Either, A, I would convince the patient not to get on the scale, or if they truly insisted, I would get help.

(A 175).

ARGUMENT

I. 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. QUESTION PRESENTED

Did the trial court err when it set aside a jury verdict for the Plaintiff and entered judgment as a matter of law for the Defendant under Super. Ct. R. Civ. P. 50(b) on the grounds that the evidence of causation at trial was so insufficient that no reasonable jury could find for the Plaintiff? This question was preserved in Plaintiff's opposition to Defendant's Motion for Judgment as a Matter of Law (JMOL) at the close of Plaintiff's case-in-chief (A 104-8), and Defendant's Renewed Motions JMOL made at the close of all evidence (A 109), and again after the jury returned a verdict for the Plaintiff (A 204-8).

B. SCOPE OF REVIEW

On appeal, a trial court's grant of a renewed motion for judgment as a matter of law is reviewed under the standard set forth in *Del. Elec. Coop., Inc. v. Pitts*, 1993 Del. LEXIS 409 (Del. Oct. 22, 1993):

> In review of a trial court's grant or denial of a motion for judgment n.o.v. this court applies the same standard of review as the trial court. Viewing the findings in a light most favorable to the nonmoving party, the question becomes whether, under any reasonable view of the evidence, the jury could justifiably find in favor of the

> nonmoving party. Under our standard of review, "the factual findings of a jury will not be disturbed if there is any competent evidence upon which the verdict could reasonably be based."

Id. at *2-3 (citations omitted).

C. MERITS OF ARGUMENT

Under the framework set forth in *Del. Elec. Coop., Inc. v. Pitts*, Plaintiff contends the evidence presented at trial was sufficient for a reasonable jury to properly consider the question of causation for the following reasons:

1. Defendant's Pre-Trial Admission Satisfied The Requirements Of 18 *Del. C.* § 6853(e)

18 *Del. C.* § 6853(e) states: "No liability shall be based upon asserted negligence unless expert medical testimony is presented as to the alleged deviation from the applicable standard of care in the specific circumstances of the case and as to the causation of the alleged personal injury…"

The statute does not preclude an admission of liability, and to construe it that way would be an absurdity. *See In re Will of Palecki*, 920 A.2d 413 (Del. Ch. 2007) (discussing absurdity doctrine when interpreting statutory intent). Nor can the statute be reasonably interpreted as limiting "expert medical testimony" to that of Plaintiff's retained expert witness, which the Defendant argued and the trial court (Exh. A at 17) accepted, erroneously we contend. *See also Daniels v. State*, 538 A.2d 1104, 1109-1110 (Del. 1988) ("…the "golden rule" of statutory construction provides that

the unreasonableness of the result produced by one among alternative interpretations of a statute is just cause for rejecting that interpretation in favor of the interpretation that would produce a reasonable result.").

Where Defendant voluntarily accepted the causal connection between the fall and the hip injury as "admitted without formal proof" in the Pre-Trial Order (A 27), Plaintiff did not need to prove that fact at trial. Discussing pre-trial procedure under Super. Ct. R. Civ. P. 16 in *Cebenka v. Upjohn Co.*, 559 A.2d 1219 (Del. 1989), this Court held:

> In both the Federal Rules of Civil Procedure and the Superior Court Civil Rules, Rule 16 governs pretrial procedure and management. Rule 16 provides authority for the pretrial conference. The pretrial conference and order is designed to familiarize the litigants with the issues in the case; reduce surprises at trial; and facilitate the overall litigation process. The pretrial order, which is entered following the pretrial conference, "controls the subsequent course of the action."

Id. at 1222-1223 (citations omitted). Super. Ct. R. Civ. P. 16(c) further provides in relevant part:

> Subjects to be discussed at pretrial conferences. -- The participants at any conference under this Rule may consider and take action with respect to:
>
> (1) The formulation and simplification of the issues, including the elimination of frivolous claims or defenses;
>
> …
>
> (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof,
>
> …

> (4) The avoidance of unnecessary proof and of cumulative evidence;

Where Rule 16 provides for the parties to "avoid unnecessary proof" and simplify the issues prior to trial, Defendant was bound by its admission in the pre-trial order.

Even if Defendant had not conceded this fact in the pre-trial order, it has never been disputed at any time that Mr. Rizzuto's fractured right hip was proximately caused by the fall in Defendant's medical office on January 20, 2009. First, the medical records, both contemporaneous and subsequent, are riddled with descriptions of the fall causing the fracture. (A 47). Second, the issue never appeared during discovery, Defendant never moved for summary judgment at any time prior to trial, and Defendant did not present any evidence at trial to support an argument that the injury was not caused by the fall. (A 1-22).[1] Third, even if it had been in dispute at trial, such a dispute would have to be resolved in "a light most favorable" to the Plaintiff in the context of Defendant's Motion For Judgment as a Matter of Law. *Del. Elec. Coop., Inc.*, 1993 Del. LEXIS 409 at *2-3.

2. The Evidence From Health Care Providers And The Retained Medical Expert Satisfied The Requirements Of 18 *Del. C.* § 6853(e)

Expert evidence on causation sufficient to satisfy the requirements of 18 *Del. C.* § 6853(e) came from Frank Beardell, M.D., Elise Parker, R.N., and Eileen Kane,

[1] In *Dishmon v. Fucci*, 32 A.3d 338 (Del. 2011), this Court described a valid Affidavit of Merit as establishing a *prima facie* case for the Plaintiff. Here, the Affidavit of Merit was challenged (as is customary in every case filed under 18 *Del. C.* Chap. 68) and upheld. (A 8).

medical technologist. Ms. Parker and Ms. Kane established (agreed) that a patient in Mr. Rizzuto's condition should be assisted by two persons when moved in order to prevent falls and comply with the standard of care. (A 136-7, 174-5). They were the "how-to-weigh" experts. Mr. Rizzuto was not assisted by two persons. (A 180). Ms. Kane, acknowledging the standard of care, claimed that Mr. Rizzuto disobeyed her instructions to remain seated and tried to ambulate to the scale on his own. (A 178-9). This testimony was contrary to her own contemporaneous incident report, and was heard only after litigation ensued. (A 92-3). The jury obviously did not credit that version of events.

At trial, the jury heard two accounts of Mr. Rizzuto's fall. In Plaintiff's case, Mr. Rizzuto fell because the medical technologist, Eileen Kane, attempted to weigh him without the support of two (2) people as required by the standard of care. (A 134-5). The linchpin of Plaintiff's case was the Incident Report created by Ms. Kane on January 20, 2009. It reads in part: "On Tuesday, 1/20/09, I was attempting to weigh Charles Rizzuto, a patient of Dr. Frank Beardell's, and Charles fell off the scale. He fell towards the right and landed on his right hip. I attempted to catch as he was going down, but he fell too quickly." (A 46). From that report, Plaintiff argued to the jury the obvious inference that Defendant had not provided a two-person assist to prevent falls and, as a consequence, the patient fell.

In Defendant's case, the jury heard that Mr. Rizzuto was responsible for his own fall because he disobeyed instructions. In support of its comparative negligence allegation, Defendant relied solely on the testimony of Eileen Kane. Ms. Kane testified that on January 20, 2009, she instructed Mr. Rizzuto to remain seated in a wheelchair and he, uncharacteristically, defied her order and attempted to weigh himself. (A 178-9). Defendant contended that Mr. Rizzuto's failure to obey Ms. Kane's instruction was the reason he fell. The Defendant never argued that it was acceptable practice for one person to try to weigh a person like Mr. Rizzuto.

No "scientific, technical or other specialized knowledge"[2] of an expert witness could have assisted the trier of fact in determining who or what proximately caused Mr. Rizzuto's fall. As Plaintiff highlighted at trial, Ms. Kane's testimony about her instruction to Mr. Rizzuto to remain seated exists nowhere in the written record and is conspicuously inconsistent with the Incident Report she created the day of the fall. (A 46). It was heard for the first time when her deposition was taken. The ultimate question arising from these facts is: Did Eileen Kane breach the standard of care by attempting to weigh Mr. Rizzuto by herself, or did he disobey her and thereby cause his own fall? Proximate cause in this case turned on a simple factual dispute. *See Ebersole v. Lowengrub*, 180 A.2d 467, 469 (Del. 1962) ("…questions of proximate cause except in rare cases are questions of fact ordinarily to be submitted to the jury

[2] D.R.E. 702

for decision."). Answering that question required the jury only to weigh the credibility of Eileen Kane and decide which version of events was more likely than not to be true. Delaware courts have long recognized that "the jury is the sole judge of credibility." *Littleton v. Ironside*, 2010 Del. Super. LEXIS 618, *4 (Del. Super. Ct. 2010) (*citing Pryor v. State*, 453 A.2d 98, 100 (Del. 1982)).

In its Renewed Motion For Judgment as a Matter of Law (A 199-203), Defendant contended that a single answer by Plaintiff's retained expert, Elise Parker, R.N., nullified all of Plaintiff's *prima facie* evidence of causation. (A 201). Defendant cites to the following cross-examination testimony by Ms. Parker:

> **Q:** Do you have an understanding as to what caused Mr. Rizzuto's **fall**?
> **A:** I don't think I am in a position to comment on that.

(A 201, 165) (emphasis added). From this isolated answer, Defendant concludes in the next sentence: "…Plaintiff's sole expert failed to causally relate the alleged negligence to the Plaintiff's claimed **injuries**." (A 201) (emphasis added). Ms. Parker was asked that question after this exchange:

> **Q:** Well, is it fair to say you don't have any opinion on way or the other as to whether Mr. Rizzuto bears any responsibility for the fall?
> **A:** Well, given the fact that he was the one with the debilitated medical conditions, I mean, he had orthostatic hypotension, he has some other conditions that are listed on the screen here, so, yeah, whether he liked it or not, he was in a debilitated condition.

(A 165).

Defendant fails to account for all the facts that must be viewed in a light most favorable to Plaintiff, and also fails to appreciate that there is no distinction between the failure to prevent the fall and the cause of the injury. It has never been disputed and was, in fact, accepted by Defendant that Mr. Rizzuto's fractured right hip was caused by the fall in Defendant's medical office on January 20, 2009. (A 27).

Frank Beardell, M.D. was Mr. Rizzuto's treating physician at DCLP and saw him immediately after the fall on January 20, 2009. (A 27). Dr. Beardell was identified by Plaintiff as an expert on February 8, 2012 and was expected to offer testimony that "[Mr. Rizzuto] was a compliant patient who sustained a fracture of his right hip while under the care of his office staff on January 20, 2009." (A 50). Dr. Beardell was not only the first physician to see Mr. Rizzuto after the fall, but contemporaneously ordered the x-ray confirming that Mr. Rizzuto's right hip had been fractured. (A 77-8). Dr. Beardell testified on direct examination in Plaintiff's case as follows:

> **Q:** Could you read [1/20/09 Office Note (A 47-8)] to us, please?
> **A:** "He continues with significant issues related to pain from his peripheral neuropathy, as well as worsening of his orthostatic hypotension. And, in fact, he did have a fall in the office today while he was being weighed, landing on his right hip, which, in fact, is quite sore. I am sending him for an X-ray immediately after this visit."
> **Q:** So I gather it was apparent to you that he was having pain in his right hip when you examined him and talked to him?
> **A:** Correct.

> **Q:** And you're the one who ordered the X-ray?
> **A:** Correct.
> **Q:** And then that confirmed that there indeed was a fracture?
> **A:** Correct.

(A 60). Plaintiff submits that this piece of testimony, standing alone, establishes the fall as the but-for cause of Mr. Rizzuto's fractured right hip and satisfies the requirements of 18 *Del. C.* § 6853(e). In *Green v. Weiner*, 766 A.2d 492, 495 (Del. 2001), this Court held:

> Section 6853 does not require medical experts to couch their opinions in legal terms or to articulate the standard of care with a high degree of legal precision or with "magic words." Similarly, to survive a motion for judgment as a matter of law, the Greens are not required to provide uncontradicted evidence of the elements of their negligence claim. Instead, the Greens must provide credible evidence of each of these elements from which a reasonable jury could find in their favor.

(Footnote omitted).

Defendant's myopic and hypertechnical argument, which the court-below accepted, is, we submit, erroneous. Limiting causation evidence to a plaintiff's retained medical expert, and then focusing on a single response at the exclusion of all other evidence in the case, does not comport with a reasonable interpretation of 18 *Del. C.* § 6853(e). Nor does it comport with the instructions given to the jury on the evaluation of evidence generally or, for that matter, on the statute itself. Specifically, the jury was instructed: "In deciding whether any fact has been proved

by a preponderance of the evidence, you may, unless I tell you otherwise, consider the testimony of all witnesses regardless of who called them, and all exhibits received into evidence regardless of who produced them." (A 32). Thus, the jury had sufficient evidence and instruction to properly consider the question of causation and the verdict should stand. *See Del. Elec. Coop., Inc.*, 1993 Del. LEXIS 409 at *2-3 ("'the factual findings of a jury will not be disturbed if there is any competent evidence upon which the verdict could reasonably be based.'" (citations omitted)).

3. The Causation Nexus Between Breach Of Standard Of Care And Patient Injury Is Within The Common Knowledge Of The Ordinary Lay Juror And Fits The Facts Of This Case.

Plaintiff agrees the question of proximate cause in medical negligence cases is ordinarily subject to the expert medical testimony requirement of 18 *Del. C.* §6853(e), and that requirement was satisfied here.[3] The medical causation aspect of health care provider negligence is often beyond the ken of the average lay juror. For instance, did a delay in diagnosis of cancer harm the patient, see generally *Mammarella v. Evantash*, 93 A.3d 629 (Del. 2014), or was a disease caused by smoking or exposure to toxic fumes? Nevertheless, the unique facts of this case do

[3] Ms. Kane's incident report, in fact, comes from an "expert" on how to weigh a frail, weak patient. The report makes very clear that she was the only person assisting Mr. Rizzuto, and that he fell when she (alone) was "weighing" him and two persons were not present to prevent the fall. (A 46). The defense never tried to separate out medical negligence from medical causation except to focus on the one response from Ms. Parker, who on direct examination had made it clear that the health care providers were responsible to "ensure the safety" of the patient with a two-person close assist. In this instance, the negligence and the resulting injury are inextricably intertwined.

not, as a practical matter, implicate the elements of 18 *Del. C.* § 6853 designed to accommodate the "medical" elements of medical negligence claims that are inherently outside the knowledge of a layperson.[4] Plaintiff's position here is the secondary question of proximate cause aligns more closely with ordinary negligence (e.g. – a slip and fall), versus "medical" negligence, because every element of causation is comfortably within the common knowledge of a layperson.

There are many situations where the link between health care provider negligence and patient harm is readily apparent to lay persons: patient falls off bed with unraised side-rails; doctor uses unsanitary surgical instrument and infection occurs; doctor does not discover surgical injury to bowel and contents leak out; nurse spills burn-causing acid on patient's skin; doctor's scalpel slips and lacerates tissue outside operative site. The list goes on.[5]

In *Harvey v. Wolfer*, 1996 Tenn. App. LEXIS 138 (Tenn. Ct. App. 1996), the plaintiff alleged that the defendant physician and an assistant "either let go or dropped me." *Id.* at *2. The court concluded, on the question of negligence, that the act of allowing the patient to fall was "an act not implicative of medical science and,

[4] *See generally* D.R.E. 702 and *O'Donald v. McConnell*, 858 A.2d 960, 960 (Del. 2004) ("…the purpose of expert medical testimony, as recognized by the General Assembly, which is that, subject to the exceptions listed in the statute, the proximate cause of injuries that are claimed to be attributable to medical negligence are not within the common knowledge of a layperson.")

[5] *The Common Knowledge Exception To The Expert Testimony Requirement For Establishing The Standard Of Care In Medical Malpractice*, 59 Ala. L. Rev. 51 (2007), is an extensive discussion of the "common knowledge" exception to the requirement of expert medical testimony. This article focuses on the breach in duty of care, but the same reasoning should apply to causation questions.

one that may be assessed on the basis of common experience." *Id.* at *5. Similarly, a medical provider assisting a post-surgical patient transfer from a wheelchair to a waiting car could be found negligent without the necessity of expert medical testimony. *Lawrence v. Frost St. Outpatient Surgical Ctr., L.P.* 2004 Cal. App. Unpub. LEXIS 8473 (Cal. App. 4th Dist. Sept. 17, 2004). That court explained:

> A layperson can apply common knowledge to evaluate how to safely transfer a patient with a numb leg from a wheelchair to a vehicle after outpatient surgery. This is something ordinary individuals, untrained in the medical profession, do on a regular basis when picking up family and friends after surgery.

Id. at *13.

By statute, South Carolina recognizes a "common knowledge and experience" exception to the requirement of expert witness affidavits in medical malpractice cases. *Brouwer v. Sisters of Charity Providence Hosps.,* 763 S.E.2d 200 (S.C., Aug. 6, 2014). In *Brouwer*, the court held that "negligent exposure of a patient to latex with a known allergy can result in an allergic reaction in that patient, is a matter within the common knowledge or experience so that no special learning is needed…" *Id.* at 204.

The facts of the instant case are in the category of the obvious. Mr. Rizzuto fell because he was not supported by the two-person assist required by the standard of care. This is far from a sophisticated medical issue that requires specialized knowledge to explain to lay persons, although the expert evidence here was

sufficient for that purpose. *See generally Vohrer v. Kinnikin*, 2014 Del. Super. LEXIS 129, *10 (Del. Super. Ct. Feb. 26, 2014) ("A plaintiff will satisfy his burden to establish a *prima facie* case that the defendant's conduct was the proximate cause of the plaintiff's injuries when such a finding 'relates to a matter within a lay person's scope of knowledge.'" (footnote omitted))

In *Simmons v. Bayhealth Med. Ctr., Inc.*, 2008 Del. LEXIS 225, 950 A.2d 659 (Del. 2008), this Court reversed a Superior Court grant of summary judgment on a "common sense" rationale. There, a hospital patient fell and suffered injury when assisted by only a single female nurse. The operative question was whether the patient was "alert" at the time. *Id.* at *13. The Superior Court ruled that question was medical in nature and expert medical evidence was necessary to prove that point. *Id.* This Court disagreed, saying:

> The Superior Court's conclusion that Simmons' alertness (or non-alertness) was necessarily a subject of expert testimony, was erroneous. In the circumstances of this case, whether or not Simmons was alert was a question "readily amenable to a common sense analysis by a lay person." Nurse Farrell had explained the factors that she relied upon in making her assessment of alertness, and Dr. Zerefos had provided an overview of the facts that would support either determination. Therefore, the jury would not have had to engage in "unguided speculation," as the Superior Court feared.

Id. at *14 (footnotes omitted).

Although not involving the medical negligence statute, *Money v. Manville Corp. Asbestos Disease Compensation Trust Fund*, 596 A.2d 1372 (Del. 1991) addressed the broad issue of proximate cause in tort cases. In *Money* this Court analyzed whether expert testimony was required to establish causation between exposure to asbestos, and asbestos-related disease. In ruling that proving causation required plaintiff to present expert testimony, this Court said:

> The issue of proximate cause is ordinarily a question of fact to be submitted to the jury. However, before the question of proximate cause may be submitted to the jury, the plaintiff is required to establish a prima facie case on that issue. It is permissible for a plaintiff to make a prima facie case that a defendant's conduct was a proximate cause of the plaintiff's injuries, based upon an inference from the plaintiff's competent evidence, if such a finding relates to a matter which is within a lay person's scope of knowledge.

Id. at 1375 (citation omitted). *See also McKeon v. Goldstein*, 164 A.2d 260, 262 (Del. 1960) ("Proximate cause is always to be determined on the facts of each case, upon mixed questions of logic, common sense, justice, policy and precedent." (citation omitted)).

Analogs to Plaintiff's line of reasoning here are also seen in this Court's opinions in *Hazel v. Delaware Supermarkets, Inc.*, 953 A.2d 705 (Del. 2008) and *Howard v. Food Fair Stores, New Castle, Inc.*, 201 A.2d 638 (Del. 1964), and the Superior Court's opinions in *Dougherty v. Horizon House, Inc.*, 2008 Del. Super.

LEXIS 278 (Del. Super. Ct. June 25, 2008) and *Smith v. Chrysler Corp.*, 1996 Del. Super. LEXIS 489 (Del. Super. Ct. Oct. 25, 1996).

In *Hazel v. Delaware Supermarkets, Inc.*, 953 A.2d 705 (Del. 2008), a premises liability action, this Court reversed the Superior Court's grant of summary judgment against the plaintiff on the issue of causation. The plaintiff allegedly fell in the frozen food section of the supermarket due to slippery conditions created by a pallet of frozen food that was left in the aisle. This Court reversed on the grounds that plaintiff had made a *prima facie* case and did not need an expert because a reasonable jury could conclude that a pallet stocked with frozen food could thaw and create a dangerous and slippery floor. *Hazel*, 953 A.2d at 710. *See also id.* at n.10.

In *Howard v. Food Fair Stores, New Castle, Inc.*, 201 A.2d 638 (Del. 1964), also a premises liability action, this Court again reversed the Superior Court's grant of summary judgment against the plaintiff. Although *Howard* did not address the necessity of expert testimony, it did address the sufficiency of plaintiff's evidence on the issue of causation. In discussing whether plaintiff had met her burden as to causation, this Court said:

> Accepting the testimony of [plaintiff] which is not seriously challenged, it appears that the grease-like substance on the floor was there in conjunction with water which obviously would have increased the slippery nature of the area. This, at least, is an inference justifiably to be drawn from her testimony. Furthermore the uncontested fact that she fell because both feet slipped out from under

> her, it seems to us, warrants the conclusion that such fall was caused solely by a slippery condition on the floor.
>
> We think, therefore, with respect to the cause of her fall, her testimony would warrant the conclusion that it was caused by a condition on the floor of the defendant's store consisting of grease and water in conjunction. Therefore, as to the cause of her fall there is certainly a genuine issue of fact, assuming its denial by the defendant, which upon trial would be submitted to the jury for its determination.

Howard, 201 A.2d at 641.

Citation to *Hazel* and *Howard* serves here to illustrate that this Court has employed a common sense approach to evaluating causation, when the facts so permit. Conceptually, the elements of causation at play in the instant case are akin to those in both *Hazel* and *Howard* in that nothing more than common sense is necessary to make the causal connection between the negligence and the injuries.

In *Dougherty v. Horizon House, Inc.*, 2008 Del. Super. LEXIS 278 (Del. Super. Ct. June 25, 2008), the plaintiff, a mentally handicapped adult resident of a group home, wandered out of the facility in a snow storm and suffered severe frostbite requiring his fingers to be amputated. *Id.* at *3. A lawsuit was filed alleging the group home was medically negligent in failing to supervise plaintiff and allowing him to leave the home in the snow storm. *Id.* at *1. Plaintiff filed an Affidavit of Merit from a nurse, and defendant moved to have the court determine if the Affidavit met the requirements of 18 *Del. C.* § 6853(c), which provides, *inter alia*, "that there are reasonable grounds…and that the breach was a proximate cause of injury…" *Id.*

at *4. Defendant argued that the nurse's affidavit could not satisfy 18 *Del. C.* § 6853(c) because she was not a "physician" who was "licensed to practice medicine" and was therefore unable to opine as to causation. *Id.* at *5. Finding the facts of the case to be at odds with the statutory language of 18 *Del. C.* § 6853(c), the Superior Court ruled:

> In this case, the alleged breach of duty was failure to keep watch over a patient, and the resulting injury was frostbite. While ordinarily, in a healthcare medical negligence case, a physician licensed to practice medicine must render an expert opinion in the Affidavit of Merit that the negligence caused the claimed injuries, the Court sees no reason why a physician is required to render a causation opinion in this case, where, if a breach is found, the causal connection between breach and injury would be patently obvious.

Id. at *16. (footnote omitted)[6].

In *Smith v. Chrysler Corp.*, 1996 Del. Super. LEXIS 489 (Del. Super. Ct. Oct. 25, 1996), not a medical negligence case, the Superior Court was tasked with determining whether defendant was entitled to summary judgment after plaintiff failed to produce expert testimony establishing causation between contact with an automobile airbag and plaintiff's facial injuries. *Id.* at *1. In ruling that expert

[6] *See also Dougherty*, 2008 Del. Super. LEXIS 278 at n.22. ("At oral argument, Plaintiff's counsel observed that Defendant's position would require a physician licensed to practice medicine to render an expert opinion in an Affidavit of Merit as to causation even if Plaintiff had been hit by a car and killed, instead of suffering frostbite.")

testimony was not required for plaintiff to make a *prima facie* case of causation, the Superior Court, citing to the Third Circuit, held:

> … As a matter of ordinary experience, a particular act or omission might be expected under the circumstances to produce a particular result. If the result has indeed followed, it may be permissible to conclude that a causal relation exists. On the other hand, the correlation between certain conditions…may be beyond lay knowledge. Therefore, expert medical testimony should be used to aid [the trier of fact's] comprehension that a particular condition may arise out of a specific injury. *Bushman v. Halm*, 3d Cir., 798 F.2d 651, 659 (1986). If the alleged injury logically flows from the incident or use, expert testimony is not required. *Id*. at 660. The Court cited a broken leg sustained in an automobile accident as an example of this "logical flow." See also *Lewis v. State*, Del. Supr., 416 A.2d 208 (1980) (holding that probable physical injury resulting from a knife is not beyond the comprehension of laypersons).
>
> In opposing the present Motion, plaintiff argues two points. First, that it does not take an expert to demonstrate that the facial injuries which Mrs. Smith sustained were proximately caused by contact with the airbag. Second, that it does not take an expert to determine whether warnings are adequate. As to these two points, the Court agrees. Defendants have failed to sustain their burden of demonstrating that expert testimony is required on those issues. That contact with the airbag caused Mrs. Smith's injuries does not appear to be a matter within the exclusive purview of an expert. Instead, such injuries could very well be said to "logically flow" from contact with an airbag.

Smith, 1996 Del. Super. LEXIS 489 at *7-8 (*citing Bushman v. Halm*, 3d Cir., 798 F.2d 651, 659 (1986); *Lewis v. State*, Del. Supr., 416 A.2d 208 (1980)).

Tracking the Superior Court's reasoning in *Dougherty* and *Smith,* Plaintiff takes the position here that "the causal connection between the breach and injury would be [is] patently obvious[7]," and "the alleged injury logically flows from the incident[8]." Once the jury determined who was responsible for the fall (i.e. – failing to safeguard the patient), it is both obvious and logical that any injury Mr. Rizzuto sustained was caused by the fall. Just as a medical expert was not needed to make the causal connection between exposure to a snowstorm and frostbite in *Dougherty,* an automobile airbag and facial injuries in *Smith,* an automobile accident and a broken leg in *Bushman*[9]*,* or assault with a knife and a stab wound in *Lewis*[10], medical expertise is not needed by a lay jury to make the causal connection between Mr. Rizzuto's fall and his fractured hip. As such, Plaintiff presented a surfeit of evidence on each element of her claim and the jury's verdict should stand. *Cf. Episcopo v. Williams*, 203 A.2d 273, 275 (Del. 1964) ("We think that appeals as well as trials should, where possible and where the other side has not been prejudiced, be decided on the merits and not upon nice technicalities of practice.").

[7] *Dougherty*, 2008 Del. Super. LEXIS 278 at *16
[8] *Smith,* 1996 Del. Super. LEXIS 489 at *8
[9] *Bushman v. Halm,* 798 F.2d 651, 659 (3d. Cir. 1986)
[10] *Lewis v. State,* 416 A.2d 208 (Del. 1980)

CONCLUSION

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

HUDSON & CASTLE LAW, LLC

/s/ Ben T. Castle
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Attorney for Plaintiffs Below-Appellants

Dated:

Exhibit A

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

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,	)	
v.	)	C.A. No. N10C-12-156 DCS
DELAWARE CLINICAL AND LABORATORY PHYSICIANS, P.A., a Delaware corporation,	)	
Defendant.	)	

Submitted: December 8, 2014
Decided: February 2, 2015

Upon Consideration of Defendant's Renewed Motion for Judgment as a Matter of Law or, in the Alternative, Motion for New Trial or, in the Alternative, Remittitur –
Renewed Motion for Judgment as a Matter of Law is GRANTED and Motion for New Trial or, in the Alternative, Remittitur is CONDITIONALLY DENIED

OPINION

Ben T. Castle, Esquire, Hudson & Castle Law, LLC, Wilmington, Delaware, Attorney for Plaintiffs.

Gregory S. McKee, Esquire, Wharton, Levin, Ehrmantraut & Klein, P.A., Wilmington, Delaware, Attorney for Defendant.

STREETT, J.

Introduction

Defendant Delaware Clinical and Laboratory Physicians, P.A. ("Defendant") has filed a Renewed Motion for Judgment as a Matter of Law. Defendant seeks to have the Court set aside the jury's verdict for Plaintiffs Elizabeth Rizzuto ("Mrs. Rizzuto"), individually and in her capacity as surviving spouse of Charles Rizzuto, Jr. ("Mr. Rizzuto"), and as personal representative of Mr. Rizzuto's estate (collectively, the "Plaintiffs").

Defendant argues two bases in support of its Renewed Motion for Judgment as a Matter of Law. First, Defendant contends that the testimony of Elise Parker, R.N. ("Ms. Parker") (Plaintiffs' medical expert) regarding the applicable standard of care and alleged breach is insufficient to establish that Defendant was medically negligent based on Ms. Parker's disagreement with Defendant's good faith choice of a proper alternative. Second, Defendant contends that Ms. Parker's testimony did not causally relate Defendant's alleged negligence to Mr. Rizzuto's injury (a hip fracture).

Defendant has also filed, in the alternative, a Motion for New Trial, or in the alternative, Remittitur on the basis that the verdict is excessive.

Plaintiffs oppose Defendant's Motions.

For the reasons set forth below, Defendant's Renewed Motion for Judgment as a Matter of Law is granted and Defendant's Motion for New Trial or, in the Alternative, Remittitur is conditionally denied.

Factual & Procedural Background

On December 16, 2010, Mrs. Rizzuto, in her individual capacity and as personal representative of Mr. Rizzuto, filed a complaint against Defendant, alleging medical negligence. The Complaint avers that on January 20, 2009, Mr. Rizzuto fell and fractured his right hip when Defendant's nursing staff attempted to weigh him on a scale during a routine visit.[1] The Complaint further avers that Defendant's agents, servants, and employees "departed from acceptable standards of medical care" because they failed to properly support Mr. Rizzuto "when they knew or should have known that he required weight support and assistance while being weighed for purposes of a medical examination" and they permitted him to fall while he was under their care and supervision.[2]

A jury trial was held on July 21 – 23, 2014. The parties did not dispute that Mr. Rizzuto fell and fractured his right hip in Defendant's medical office on January 20, 2009 and that Mr. Rizzuto subsequently died from causes unrelated to the hip fracture.[3] However, they disputed whether Eileen Kane, a medical

[1] Compl., ¶¶ 4 – 5 (Dec. 16, 2010).

[2] *Id.* at ¶ 6.

[3] Joint Pretrial Stipulation, 2 (June 17, 2014).

technologist employed by Defendant, deviated from the applicable standard of care. The parties also disputed the issues of causation and damages.

Frank Beardell, M.D. (Mr. Rizzuto's treating physician and one of Defendant's members), Mrs. Rizzuto, and Ms. Parker (Plaintiffs' medical expert) testified on Plaintiffs' behalf.

At the close of Plaintiffs' case, Defendant moved for judgment as a matter of law under Rule 50(a)(1).[4] Defendant argued that "the mere disagreement with the clinical judgment is insufficient to establish medical negligence" under Delaware law.[5] Specifically, Defendant asserted, without providing the transcript of Ms. Parker's testimony, that Ms. Parker "conceded that there were options" and "agreed that Ms. Kane exercised those options" when Ms. Parker testified about the applicable standard of care.[6] Defendant further argued that Plaintiffs did not present expert testimony that "any alleged negligence caused Mr. Rizzuto's hip fracture" and that Ms. Parker testified that she did not know what caused Mr. Rizzuto's fall.[7]

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[4] Superior Court Civil Rule 50(a)(1) provides that:

> [i]f during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the Court may determine the issue against the party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

[5] Transcript of Jury Trial Proceedings, at 7 (July 22, 2014) (hereinafter "Day #2 Tr. at _____").

[6] *Id.*

[7] *Id.*

The Court denied Defendant's Motion for Judgment as a Matter of Law. The Court found that Ms. Parker testified that any healthcare provider would need to assess if a person was at risk for falling and that a two-person assist is the safest way to move a patient who is at risk for falling. The Court also found that Dr. Beardell's report and addendum thereto showed that Mr. Rizzuto fell in the office while he was being weighed, Mr. Rizzuto landed on his right hip, Dr. Beardell sent Mr. Rizzuto for an x-ray immediately after the visit, and the right hip films demonstrated a slightly impacted, nondisplaced right femoral neck fracture.[8]

The Defendant's case consisted of the following: the live testimony of Ms. Kane (the medical technologist) and the videotaped depositions of Muriel Hall (Defendant's Executive Director at the time of Mr. Rizzuto's fall) and Ronald Sacher, M.D. (Defendant's medical expert).

After the close of all of the evidence, Defendant, again without providing a transcript, moved for judgment as a matter of law "for the reasons set forth earlier."[9] As to Defendant's first basis (i.e., Ms. Parker "conceded that there were options" and "agreed that Ms. Kane exercised those options"), the Court found that Plaintiffs' expert testified that there was a "departure" from the standard of care.[10] The Court denied Defendant's Motion and the case was submitted to the jury.

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[8] *Id.* at 9 – 10.

[9] *Id.* at 18.

[10] *Id.*

On July 23, 2014, the jury returned a verdict for the Plaintiffs and awarded $250,000 in damages to Mr. Rizzuto's estate and $50,000 in damages to Mrs. Rizzuto.

On August 1, 2014, Defendant filed a Renewed Motion for Judgment as a Matter of Law or, in the Alternative, Motion for New Trial or, in the Alternative, Remittitur. On August 22, 2014, Plaintiffs filed a response opposing Defendant's Motions.

On October 3, 2014, a hearing on Defendant's Renewed Motion for Judgment as a Matter of Law was held. The Court reserved decision.

Having reviewed the record, including the transcripts of the three-day jury trial, this is the Court's decision on Defendant's Renewed Motion for Judgment as a Matter of Law or, in the Alternative, Motion for New Trial or, in the Alternative, Remittitur.

Parties' Contentions

Defendant asserts two bases in support of its contention that it is entitled to judgment as a matter of law. First, Defendant argues that "Ms. Parker's opinion that a two-person assist was 'a standard of practice' (rather than the standard of practice) is nothing more than a disagreement with Ms. Kane's good-faith choice of a proper alternative."[11] Second, Defendant argues that Plaintiffs' sole expert

[11] Def.'s Renewed Mot. for Judgment as a Matter of Law, ¶ 4 (Aug. 1, 2014) (emphasis in original).

"failed to causally relate the alleged negligence to [Mr. Rizzuto's] claimed injuries."[12]

In the alternative, Defendant contends that "the Court should award a new trial or remittitur because the verdict is excessive under the circumstances."[13]

Plaintiffs oppose Defendants' Motions.

As to Defendant's Renewed Motion for Judgment as a Matter of Law, Plaintiffs do not dispute that "the Delaware statute on medical negligence liability specifies that medical negligence must be tied to harm through expert evidence."[14] However, Plaintiffs contend that Ms. Parker's testimony that "it was they're responsible [sic] to ensure the patient's safety, do everything they could to prevent falls,"[15] Ms. Kane's testimony that "with a weak, dependent patient '. . . two people would assist a patient onto a scale' and such a weakened patient would have 'assistance,'"[16] and Ms. Kane's contemporaneous report (which was reviewed by Ms. Parker and mentioned in Ms. Parker's testimony) satisfy the requirement that

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[12] *Id.* at ¶ 3.

[13] *Id.* at ¶ 6.

[14] Pls.' Resp., ¶ 1 (Aug. 22, 2014).

[15] *Id.* at ¶ 2 (quoting Testimony Excerpt of Elise Parker, R.N., at 14 (July 22, 2014) (hereinafter "Parker's Testimony Excerpt at _____").

[16] *Id.* at ¶ 1 (quoting Testimony Excerpt of Eileen Kane, at 9 (July 22, 2014) (hereinafter "Kane's Testimony Excerpt at _____").

expert medical testimony "show that 'the alleged deviation from the standard of care' caused the injury."[17]

As to Defendant's Motion for New Trial or, in the Alternative, Remittitur, Plaintiffs contend that "Defendant has offered neither authority nor any rationale that would justify disturbance of this verdict for a hip fracture that confined Mr. Rizzuto to his home during the remaining months of his life, and necessitated daily care from Mrs. Rizzuto."[18]

Standard of Review

Superior Court Civil Rule 50(b) "provides a mechanism that allows the non-prevailing party to have the verdict, or any judgment entered thereon, set aside and secure judgment in his favor."[19] Pursuant to Rule 50(b), if the Court does not grant a motion for judgment as a matter of law that is made at the close of all of the evidence, "the Court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion."[20] Within 10 days after entry of judgment, the moving party may file a renewed motion for judgment

[17] *Id.* (citing 18 *Del. C.* § 6853(e)).

[18] *Id.* at ¶ 7.

[19] *Burgos v. Hickok*, 695 A.2d 1141, 1144 (Del. 1997). *See also Daub v. Daniels*, 2013 WL 5460160, *2 (Del. Super. Sept. 30, 2013).

[20] Super. Ct. Civ. R. 50(b).

as a matter of law.[21] However, the moving party "cannot present new legal theories or arguments not advanced in the original motion."[22]

In reviewing a renewed motion for judgment as a matter of law, the Court determines "whether the evidence and all reasonable inferences justify a jury verdict in favor of the plaintiff."[23] The evidence is viewed in the light most favorable to the non-moving party.[24] The Court does not weigh the evidence or determine the credibility of witnesses.[25]

The Court will not set aside the jury's verdict "if there is any competent evidence upon which the verdict could reasonably be based."[26] However, a jury is "not permitted to make [ ] factual findings in favor of a party at trial if 'there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue . . . .'"[27] As such, "the entry of a verdict in favor of the defendant is appropriate only when, under the evidence presented by the plaintiff, reasonable

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[21] *Id.*

[22] *Lesh v. ev3, Inc.*, 2013 WL 6040418, *2 (Del. Super. Aug. 29, 2013), *rev'd on other grounds*, 2014 WL 4914905 (Del. Sept. 30, 2014). *See also* Super. Ct. Civ. R. 50(a)(2) (providing that the original motion "shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment"); *Teague v. Kent Gen. Hosp.*, 89 A.3d 42, 48 (Del. 2008).

[23] *Lesh v. ev3, Inc.*, 2013 WL 6040418 at *2. *See also Drayton v. Price*, 2010 WL 1544414, *4 (Del. Super. Apr. 19, 2010) (quoting *Mazda Motor Corp. v. Lindahl*, 706 A.2d 526, 530 (Del. 1998)) ("The court must determine if under any reasonable view, the jury could find in favor of the non-moving party").

[24] *Atwell v. RHIS, Inc.*, 2007 WL 1153054, *1 (Del. Super. Feb. 27, 2007).

[25] *Bunting v. Citizens Fin. Grp., Inc.*, 2007 WL 2122137, *3 (Del. Super. June 29, 2007).

[26] *Cooney-Koss v. Barlow*, 2013 WL 1400899, *1 (Del. Super. Feb. 28, 2013), *aff'd in part and rev'd in part*, 87 A.3d 1211, 1214 (Del. 2014).

[27] *Drayton v. Price*, 2010 WL 1544414 at *4 (internal quotation marks omitted) (quoting *Carney v. Preston*, 683 A.2d 47, 55 – 56 (Del. Super. 1996) (quoting Super. Ct. Civ. R. 50(a)).

minds could draw but one inference and that inference is a verdict favorable to the plaintiff is not justified."[28]

Discussion

In the instant case, Defendant seeks to have the verdict in favor of Plaintiffs set aside on two grounds. First, Defendant argues that Ms. Parker's "agreement that Ms. Kane acted reasonably in her care of Mr. Rizzuto, even if she believes there were better options, is insufficient to establish medical negligence."[29] Second, Defendant argues that Plaintiffs failed to establish causation because Plaintiffs' "sole expert admitted that she had no opinion that the alleged negligence, rather than something else, caused the alleged injury."[30]

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[28] *Burgos v. Hickok*, 695 A.2d at 1144.

[29] Def.'s Renewed Mot. for Judgment as a Matter of Law at ¶ 4.

[30] *Id.* at ¶ 4.

In footnotes to its Renewed Motion for Judgment as a Matter of Law, Defendant also argues that Ms. Parker's opinion "was based on nothing but 'speculation or conjecture'" because she "testified repeatedly that she was not sure of what occurred." *See* Def.'s Renewed Mot. for Judgment as a Matter of Law at n. 1 (quoting *Mammarella v. Evantash*, 93 A.3d 629, 635 (Del. 2014)). Defendant also argues that Ms. Parker's testimony "was insufficient to establish a *prima facie* case" because she testified that "she has never worked with a medical technologist, never worked in a hematology practice, and was unfamiliar with [Defendant's] policies." *See* Def.'s Renewed Mot. for Judgment as a Matter of Law at n. 3.

To the extent that Defendant's first argument relates to the issue of causation, the record shows that Defendant did not raise such argument as a basis for its original Motion for Judgment as a Matter of Law. As a result, the Court will not address any argument that Ms. Parker's causation opinion was speculative or conjectural. *See Atwell v. RHIS, Inc.*, 2007 WL 1153054 at *1 ("The post-trial Motion cannot proffer new legal theories and arguments not raised in the Motion sought to be renewed").

Similarly, the Court will not address Defendant's second argument regarding foundation for Ms. Parker's testimony because Defendant did not assert foundation as a basis in its original motion.

The Court notes, however, that Defendant objected to foundation as to "Ms. Parker's familiarity and knowledge as to the standard of care applicable to a medical technologist, not a nurse, not a doctor" during direct examination. *See* Parker's Testimony Excerpt at 9. Defendant argued that "there's been no foundation that Ms. Kane [sic] is familiar with medical technologists, the standard of care applicable to medical technologists, familiar with medical technologist standard of care in a hematology practice." *Id.* at 8. Plaintiffs argued that the applicable standard of care in this case was for any healthcare provider treating "weak compromised patients" and that Defendant should have raised the issue in a pre-trial *Daubert* motion *in limine*. *Id.* at 8, 10. After the Court found that Defendant did not raise any *Daubert* motions preliminarily, Defendant asserted that it did not object to Ms.

Pursuant to 18 *Del. C.* § 6853(e), "[n]o liability shall be based upon asserted negligence unless expert medical testimony is presented as to the alleged deviation from the applicable standard of care in the specific circumstances of the case and as to the causation of the alleged personal injury or death."[31] Accordingly, a plaintiff who asserts a medical negligence claim "must produce expert medical testimony that specifies: (1) the applicable standard of care; (2) the alleged deviation from that standard; and (3) the causal link between the deviation and the alleged injury."[32] To survive a motion for judgment as a matter of law, the plaintiff must provide "credible evidence of each of these elements from which a reasonable jury could find in [the plaintiff's] favor."[33] However, the plaintiff is not required to provide "uncontradicted evidence."[34]

Under Delaware law, medical experts are required to testify to "a reasonable medical probability" or "a reasonable medical certainty."[35] A medical expert's

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Parker "opining at trial . . . the foundation [that she is familiar with the standard of care applicable to a medical technologist] hasn't been laid here today." *Id.* at 10, 11. The Court directed Plaintiffs to "lay the foundation next." *Id.* at 10. Plaintiffs then asked Ms. Parker to address the standard of care applicable to any health care provider who is treating a frail, weak, debilitated patient who suffered from orthostatic hypotension. *Id.* at 6, 11. Thereafter, Defendant did not raise any further objections as to foundation.

[31] 18 *Del. C.* § 6853(e). *See also Mammarella v. Evantash*, 93 A.3d at 635.

[32] *Kardos v. Harrison*, 980 A.2d 1014, 1017 (Del. 2009) (internal quotation marks omitted) (quoting *Green v. Weiner*, 766 A.2d 492, 494 – 95 (Del. 2001)). *See also Simmons v. Bayhealth Med. Ctr., Inc.*, 2008 WL 2089891, *3 (Del. May 15, 2008).

[33] *Green v. Weiner*, 766 A.2d at 495. *See also Hackman v. Christiana Care Health Servs.*, 882 A.2d 742, 744 (Del. 2004)).

[34] *Id.*

[35] *Mammarella v. Evantash*, 93 A.3d at 635 (internal quotation marks omitted) (quoting *O'Riley v. Rogers*, 69 A.3d 1007, 1011 (Del. 2013)).

opinion cannot be based "on speculation or conjecture."[36] However, medical experts are not required "to couch their opinions in legal terms or to articulate the standard of care with a high degree of legal precision or with 'magic words.'"[37]

A. *There is competent evidence in the record upon which a verdict in favor of Plaintiffs on the issue of breach of standard of care could reasonably be based.*

In the instant case, the jury found that Defendant breached the standard of care in its treatment of Mr. Rizzuto on January 20, 2009. However, Defendant contends that Plaintiff's only medical expert (Ms. Parker) "agreed" that Defendant "acted reasonably" which is insufficient to establish medical negligence.

At trial, Ms. Parker testified on direct examination that:

> Health care providers are responsible for ensuring patients' safety, and the patient would need to be assessed to see whether it was safe for the patient to be weighed, to be transferred from the chair a few steps to the scale. Given the patient's orthostatic hypotension[38], he would be at risk for falls and he would need to be assessed for the most safe way to move the patient. Generally that would be assistance from the staff there to make sure the patient was able to stand safely without having any symptoms, and then walk to the scale and then get on the scale and tolerate standing on the scale.
>
> * * *

[36] *Id.*

[37] *Green v. Weiner*, 766 A.2d at 495.

[38] Ms. Parker testified that a patient with orthostatic hypotension "often can experience some dizziness" and may lose consciousness when the patient changes "from a lying or sitting position to a standing position." *See* Parker's Testimony Excerpt at 7.

> There are ways to move a patient to ensure patient safety, and generally those involve the assistance of a caregiver. And at this instance probably a two-person assist would be the safest, given the patient's condition, his debilitated status and his risk for falls . . . .[39]

Ms. Parker further testified that a two-person assist "would be a safe way of moving the patient from the chair to the scale. And, yes, [she] would consider that a standard of practice."[40]

When Plaintiffs' attorney asked Ms. Parker to "assume that in this particular case that was not done with [Mr.] Rizzuto and he sustained the fall and injury," Ms. Parker testified that:

> [g]iven that it was they're responsible [sic] to ensure the patient's safety, do everything they could to prevent falls, yes, I would say it was a departure from the standards of care.[41]

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[39] *Id.* at 12 – 13.

Ms. Parker testified that the two-person assist involved:

> . . . one person would assist the patient in coming to a standing position. Generally that involves close body contact, you ask the patient to put their hands on your shoulders, you lift the patient, the other person would be standing by, probably one person on either side in close contact.
>
> This would not be what they call a standby assistance, this would be close contact, probably one person on either side would walk the patient to the scale, assist the patient in getting on the scale, one person would stabilize the patient, again, with close contact while the other person would perform the act of adjusting the scale, obtaining the weight.
>
> And then probably to reverse the process . . . you'd have to have two people there in close contact assisting the patient off the scale, stepping backwards off the scale, turning to the side, getting off the scale, moving them back to their chair. *See id.* at 13 – 14.

[40] *Id.* at 14.

[41] *Id.*

On cross examination, Defendant's attorney asked Ms. Parker about Ms. Kane's deposition testimony that she (Ms. Kane) instructed Mr. Rizzuto to stay seated. Ms. Parker testified that:

> . . . in the event that the patient was assessed and considered at risk for standing or walking due to underlying medical conditions demonstrated, then the health care provider is responsible for communicating with the patient and determining the best course of action to ensure patient safety at that point. I'm not sure instructing the patient to stay seated, you know, was the best. But, you know, that was apparently, you know, one option at that time, that that staff person.[42]

Ms. Parker also testified that there was a breach in the standard of care because Ms. Kane did not adequately assess Mr. Rizzuto and Ms. Kane did not adequately support Mr. Rizzuto in transferring him from the chair to the scale:

> I believed that there should have been another person to provide assistance if she [Ms. Kane] was going to transfer him from the chair to the scale.
>
> * * *
>
> . . . When you attempt to provide some patient care or assessment, or in this case obtaining a patient weight, you need to assess the patient's capabilities in order to be able to tolerate that procedure, or undergo that test or treatment, and in this case it was weighing, so that was the actual assessment part. And then the, when you actually enact the procedure or treatment, whatever, you need to make sure that you have the skills, equipment, training, the capability to provide a safe and, you know, appropriate treatment or test or procedure.[43]

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[42] *Id.* at 32.

[43] *Id.* at 38.

Ms. Parker stated that Ms. Kane "knew that [Mr. Rizzuto] was feeling weak and dizzy at the time of presentation."[44] Ms. Parker also stated that "there were other staff people employed at the time that would have been available to assist."[45]

Contrary to Defendant's assertion that "Ms. Parker disagreed with Ms. Kane's good faith and appropriate treatment decision," Ms. Parker testified that Ms. Kane breached the standard of care because she did not properly assess Mr. Rizzuto and adequately support him in transferring him to the scale. Although Ms. Parker did not dispute that advising a patient to stay seated is one way to attempt to protect the patient's safety if a healthcare provider feels that a patient is too weak to be weighed[46], Ms. Parker did not testify that Ms. Kane, in fact, instructed Mr. Rizzuto to stay seated or that Ms. Kane would have exercised appropriate medical judgment if she had instructed Mr. Rizzuto to stay seated. Indeed, Ms. Parker testified on redirect that Ms. Kane did not state in her January 20, 2009 "incident report" that she (Ms. Kane) instructed Mr. Rizzuto to stay seated.[47]

Under Delaware law, "questions of whether a standard of care has or has not been met are ordinarily jury questions."[48] In this case, the jury received the

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[44] *Id.* at 39.

[45] *Id.* at 30.

[46] *Id.* at 33 – 34.

[47] *Id.* at 43.

[48] *Peterson v. Del. Food Corp.*, 2001 WL 1586831, *1 (Del. Dec. 6, 2001).

"alternative treatment instruction"[49] which had been submitted by the defense prior to trial.[50] The alternative treatment instruction provides that "[w]hen a healthcare provider chooses between appropriate alternative medical care, harm resulting from that good-faith choice of one proper alternative over the other is not medical negligence."[51] Viewing the evidence in the light most favorable to Plaintiffs, Ms. Parker's "expert testimony raises an issue of material fact for consideration by the jury."[52] Thus, Defendant's first ground for setting aside the verdict and awarding judgment in its favor (i.e., although Ms. Parker disagreed with Ms. Kane's "good-faith choice of a proper alternative, Ms. Parker "agreed" that Ms. Kane acted reasonably in her treatment of Mr. Rizzuto) is without merit.

B. *The record does not contain competent evidence upon which a verdict in favor of Plaintiffs on the issue of causation could reasonably be based.*

After finding that Defendant breached the standard of care in its treatment of Mr. Rizzuto on January 20, 2009, the jury found that Defendant's breach of the standard of care was a proximate cause of injury to Mr. Rizzuto. Defendant contends that it is entitled to judgment as a matter of law because Plaintiffs' sole

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[49] *See Corbitt v. Tatagari*, 804 A.2d 1057, 1063 (Del. 2002) (noting the "alternative treatment" instruction was approved by the Delaware Supreme Court in 1992) (citing *Riggins v. Mauriello*, 603 A.2d 827, 829 – 31 (Del. 1992)).

[50] *See* Def.'s Proposed Jury Instructions, at 14 (May 19, 2014); Trans. ID 55467601.

[51] Final Jury Instructions, at 12 (July 23, 2014); Trans. ID 55776719.

[52] *Cooney-Koss v. Barlow*, 87 A.3d at 1214.

medical expert, Ms. Parker, "admitted that she had no opinion that the alleged negligence . . . caused the alleged injuries."[53]

In Delaware, proximate cause is "that direct cause without which the accident would not have occurred."[54] The law is clear that "[t]he issue of proximate cause is generally a question of fact for the jury."[55] However, in a medical negligence case, the "plaintiff's medical expert must provide direct testimony demonstrating the causal connection between the defendant's alleged negligent conduct and the plaintiff's alleged injuries" under 18 *Del. C.* § 6853(e).[56] Section 6853(e) "does not permit a jury to connect the dots between a bare allegation of medical negligence and an injury."[57]

In the instant case, Plaintiffs asserted in the Complaint that Defendant's nursing staff members were negligent in failing to properly support Mr. Rizzuto and allowing Mr. Rizzuto to fall and that Mr. Rizzuto sustained a right hip fracture as a direct and proximate result of the fall. Ms. Parker testified that Ms. Kane was

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[53] Def.'s Mot. at ¶ 5.

[54] *Spicer v. Osunkoya*, 32 A.3d 347, 350 (Del. 2011) (internal quotation marks omitted) (quoting *Chudnofsky v. Edwards*, 208 A.2d 516, 518 (Del. 1965)).

[55] *Lupinacci v. Med. Ctr. of Del.*, 805 A.2d 867, 870 (Del. 2002).

[56] *Henry v. Fisher*, 2010 WL 1427354, *1 (Del. Super. Apr. 7, 2010). *See also Green v. St. Francis Hosp.*, 791 A.2d 731, 739 (Del. 2002) (finding "[t]o establish a claim for medical negligence, [the plaintiff] was required to show that a breach of the standard of care was the proximate cause of [the plaintiff's] injuries").

[57] *Dickenson v. Sopa*, 2013 WL 3482014, *4 (Del. Super. June 20, 2013), *aff'd*, 2013 WL 6726884 (Del. Dec. 19, 2013).

Defendant's staff member who was present when Mr. Rizzuto fell.[58] Thus, Plaintiffs are required to make a sufficient evidentiary showing as to the causal link between the deviation from the standard of care and the alleged injury (i.e., Ms. Kane's failure to adequately assess and properly support Mr. Rizzuto and Mr. Rizzuto's hip fracture).

Contrary to Plaintiffs' argument that the cause of Mr. Rizzuto's hip fracture is "self-evident,"[59] "the proximate cause of injuries that are claimed to be attributable to medical negligence are not within the common knowledge of a layperson" unless an exception to Section 6853 applies.[60] Here, Plaintiffs do not allege that any of the exceptions to Section 6853 apply. As a result, Plaintiffs were required to present the jury with expert medical testimony as to causation.

Ms. Parker was Plaintiffs' only medical expert. On direct examination, Ms. Parker testified about the applicable standard of care and the deviation from that

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[58] Parker's Testimony Excerpt at 29.

[59] *Id.* at ¶ 1.

[60] *O'Donald v. McConnell*, 2004 WL 1965034, *2 (Del. Aug. 19, 2004) (rejecting the appellant's argument that causation was "obvious" and "indisputable"). *See also* 18 *Del. C.* § 6853(e), which provides, in relevant part, that:

> . . . expert medical testimony shall not be required if a medical negligence review panel has found negligence to have occurred and to have caused the alleged personal injury or death and the opinion of such panel is admitted into evidence; provided, however, that a rebuttable inference that personal injury or death was caused by negligence shall arise where evidence is presented that the personal injury or death occurred in any 1 or more of the following circumstances:
>
> > (1) A foreign object was unintentionally left within the body of the patient following surgery;
> > (2) An explosion or fire originating in a substance used in treatment occurred in the course of treatment; or
> > (3) A surgical procedure was performed on the wrong patient or the wrong organ, limb or part of the patient's body.

standard of care. She did not testify about the causal link between the deviation and Mr. Rizzuto's injury.

Although Ms. Parker testified that a two-person assist would be a standard of practice for "moving the patient from the chair to the scale" and that Ms. Kane breached the standard of care because "there should have been another person to provide assistance if [Ms. Kane] was going to transfer [Mr. Rizzuto] from the chair to scale," Ms. Parker did not testify that any of Defendant's staff members, including Ms. Kane, moved or transferred Mr. Rizzuto from the chair to the scale. Indeed, Ms. Parker testified on cross examination that, during Ms. Kane's deposition, Ms. Kane stated that she attempted to support Mr. Rizzuto after he took himself to the scale:

> . . . [Ms. Kane] went to turn to get her supplies and when she went to turn, [Mr. Rizzuto] got up and went to the scale, and by the time she got in turn and got to him, he had one foot on the scale.
>
> * * *
>
> She went around to his left side, put her hand on his shoulder and started to adjust.
>
> * * *
>
> His second foot came up on the scale, down he went.[61]

While Ms. Parker testified that she did not "think anyone really knows exactly what transpired,"[62] Ms. Parker did not testify that any act or omission by Ms. Kane, during Ms. Kane's version of the incident, caused Mr. Rizzuto's fall.

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[61] *Id.* at 41.

In addition, when Defendant's attorney asked Ms. Parker if she had "an understanding as to what caused Mr. Rizzuto's fall," Ms. Parker responded, "I don't think I'm in a position to comment on that."[63] As to whether Mr. Rizzuto had any responsibility for the fall, Ms. Parker stated, "I wasn't there, I'm not sure."[64]

As Plaintiffs' point out, Ms. Parker testified that she reviewed Ms. Kane's report which stated that: "[o]n Tuesday, 1/20/09, [Ms. Kane] was attempting to weigh Charles Rizzuto, a patient of Dr. Frank Beardell, and Charles fell off the scale."[65] However, a review of the record shows that the report did not state that Ms. Kane instructed Mr. Rizzuto to stay seated and Ms. Parker's testimony did not establish that any failure to instruct Mr. Rizzuto to stay seated caused his fall.[66] Despite Plaintiffs' assertion that the report establishes the "reason Mr. Rizzuto fell,"[67] Ms. Kane's report, on its face, does not establish a causal link between Ms. Kane's deviation from the standard of care and Mr. Rizzuto's fall. Furthermore, it was undisputed, prior to trial, that Mr. Rizzuto fell and fractured his right hip in Defendant's office on January 20, 2009.

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[62] Parker's Testimony Excerpt at 27.

[63] *Id.* at 42.

[64] *Id.*

[65] *Id.* at 6.

[66] *Id.* at 43.

[67] Pls.' Resp. at ¶ 1.

Although Plaintiffs contend that Ms. Kane's testimony satisfies the expert testimony requirement under Section 6853(e), Ms. Kane testified as a fact witness for the defense. Moreover, Ms. Kane's testimony about Defendant's office protocol for weighing patients does not establish or otherwise support Plaintiffs' claim that she (Ms. Kane) "allowed" Mr. Rizzuto to fall.[68]

Ms. Kane testified that:

> The doctors wanted the patients weighed every time they were being seen, with exception, if they were too weak to get up out of a wheelchair. Or even just to get up on a scale, I shouldn't just say a wheelchair. But then if a patient was going to receive some kind of therapy or medication, sometimes it was necessary, but I would let the doctor make that judgment, and then two people would assist a patient onto a scale.[69]

Ms. Kane further testified that she "would convince [a weakened patient] not to get on the scale, or if they truly insisted, [she] would get help."[70] Ms. Kane's testimony about Defendant's office protocol does not establish a causal link between her alleged deviation from the standard of care and Mr. Rizzuto's fall.

Thus, although Plaintiffs produced expert medical testimony that considered the applicable standard of care and the alleged deviation from that standard, there is no credible evidence from which a reasonable jury could find in Plaintiffs' favor

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[68] *Id.* at ¶ 1.

[69] Kane's Testimony Excerpt at 8 – 9.

[70] *Id.* at 9.

on the issue of causation. Ms. Parker, Plaintiffs' sole medical expert, did not opine with any degree of certainty that Defendant's alleged negligence was the cause of Mr. Rizzuto's fall. Despite Plaintiffs' contention otherwise, Ms. Kane's contemporaneous report and her testimony for the defense about Defendant's office protocol when weighing a patient do not satisfy Plaintiffs' requirement under 18 *Del. C.* § 6853(e) to produce expert medical testimony that specifies the causal link between the deviation in the standard of care and the alleged injury.

Viewing the evidence in the light most favorable to Plaintiffs, there is not sufficient record evidence to support the jury's determination that Defendant's breach of the standard of care was a proximate cause of injury to Mr. Rizzuto.[71] Thus, Defendant's Renewed Motion for Judgment as a Matter of Law is granted. The judgment is reopened and judgment for Defendant as a matter of law on the issue of causation is hereby entered.

[71] *Compare Mammarella v. Evantosh*, 93 A.3d at 636 (affirming the Superior Court's determination that no reasonable jury could find in favor of the plaintiff on the issue of causation where the plaintiff's sole causation expert did not, and could not, provide legally sufficient testimony to support the plaintiff's medical negligence claim where the expert did not testify to a reasonable degree of medical probability) *with Reddy v. PMA Ins. Co.*, 20 A.3d 1281, 1291 (Del. 2011) (affirming the Superior Court's denial of a motion for judgment as a matter of law where there was expert testimony regarding the proximate cause of a patient's injury and, thus, sufficient record evidence to support the jury's determination that the doctor's negligent conduct proximately caused the patient's failure to have corrective surgery performed). *See also Russell v. Kanaga*, 571 A.2d 724, 732 (Del. 1990) (finding the Superior Court did not err in granting a motion for a directed verdict where the plaintiffs "were unable to produce any expert testimony that [the plaintiff-patient's] pain was caused through the medical negligence of [the defendant-doctor]").

In accordance with Superior Court Civil Rule 50(c)(1)[72], the Court will now issue a conditional ruling on Defendant's Motion for New Trial in the event the judgment as to liability is hereafter vacated or reversed.

Defendant filed a Motion for New Trial or, in the Alternative, Remittitur on the ground that the jury verdict was excessive.[73]

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[72] Rule 50(c)(1) provides, in relevant part, that:

> [i]f the renewed motion for judgment as a matter of law is granted, the Court shall also rule on the motion for new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the ground for granting or denying the motion for the new trial.

[73] In footnote 4 to its Motion for New Trial or, in the Alternative, Remittitur, Defendant asserts that "the Court summoned specific jurors who did not respond affirmatively to voir dire, over [Defendant's] objection, to ascertain why they did not come forward. The Court then excluded some otherwise qualified jurors after suggesting to them that they might be biased, despite their earlier agreement to serve." Plaintiffs did not respond to Defendant's assertion and Defendant did not address its assertion during oral argument on the Motion.

To the extent that Defendant is asserting a second basis for its Motion for New Trial or, in the Alternative, Remittitur, Defendant's assertion is without merit.

Superior Court Civil Rule 47(a) provides that in a civil jury trial, "the Court alone shall examine all jurors on the Voir Dire unless it shall otherwise direct." Pursuant to the Delaware Jury Act, "[t]he Court shall determine on the basis of information provided on the juror qualification form or interview with the prospective juror or other competent evidence whether the prospective juror is disqualified for jury service." 10 *Del. C.* § 4509(a). Section 4509(b) provides that "[a]ll persons are qualified for jury service except those who are:

(1) Not citizens of the United States;
(2) Less than 18 years of age;
(3) Not residents of the county of prospective jury service;
(4) Unable to read, speak and understand the English language;
(5) Incapable, by reason of physical or mental disability, of rendering satisfactory jury service; or
(6) Convicted felons who have not had their civil rights restored."

In addition, "[a] person who is not disqualified may be excluded from jury service by the Court only upon a finding that such person would be unable to render impartial jury service or would be likely to disrupt or otherwise adversely affect the proceedings." 10 *Del. C.* § 4511(c). The Court "shall determine on the basis of information provided on the juror qualification form or interview with the prospective juror or other competent information whether the prospective juror shall be excused or excluded from jury service." 10 *Del. C.* § 4511(a). *See also Farrall v. A. C. & S. Co.*, 1989 WL 70882, *2 (Del. Super. May 11, 1989) (finding the Court was empowered under 10 *Del. C.* § 4511(a) to exclude prospective jurors based on their answers to an availability question on the juror qualification form).

The law is clear that the "goal of *voir dire* examination is to seat an impartial jury that will decide the case on the evidence presented and follow the Court's instructions on the law." *Tyler v. Albert Dworkin, M.D., P.A.*, 747 A.2d 111, 120 (Del. Super. 1999); *Sammons v. Doctors for Emerg. Servs., P.A.*, 913 A.2d 519, 538 (Del. 2006). The Court's "assessment of a juror's honesty during *voir dire* is entitled to 'special deference.'" *Cooke v. State*, 97 A.3d 513, 555 (Del. 2014). The Court's procedures may depart from the provisions of the Delaware Jury Act as long as the departures do not constitute "a substantial failure to comply" with the Act. *Celotex Corp. v. Wilson*, 607 A.2d 1223, 1227 (Del. 1992). Technical deviations "that do not frustrate the random selection and fair cross section requirements, and do not result in impermissible discrimination and arbitrariness, will not constitute a substantial failure to comply with the Delaware Jury Act." *Id.* at 1228.

Here, Defendant cites *Hughes v. State* in support of its assertion that *voir dire* prohibits questions that "condition" jurors. 490 A.2d 1034 (Del. 1985). In *Hughes*, the Delaware Supreme Court noted that "the practice in Delaware favors limited voir dire and prohibits questions which are designed to 'condition' jurors," however the "nature and extent of voir dire examination rests within the sound discretion of the trial court." *Id.* at 1041 – 1042.

The Court has reviewed the transcript of *voir dire*. Contrary to Defendant's assertion, the Court did not summon "specific jurors who did not respond affirmatively to voir dire, over [Defendant's] objection, to ascertain why they did not come forward." The Court also did not exclude "some otherwise qualified jurors after suggesting to them that they might be biased, despite their earlier agreement to serve."

In one instance, a prospective juror informed the Court that her daughter is an attorney in New York and her husband is an attorney for Highmark Blue Cross Blue Shield of Delaware who "usually has pretty significant opinions" about lawsuits and medical negligence suits:

> THE COURT: And does that influence your ability to be fair and impartial in this type of case?
> PROSPECTIVE JUROR: Occasionally, depending on the case.
> THE COURT: Any questions?
> PLAINTIFFS' ATTORNEY: What are his strong views about medical negligence lawsuits?
> PROSPECTIVE JUROR: He's usually fair and balanced, so he looks at the particular case and sometimes feels that lawsuits are brought when they might not have been brought.
> THE COURT: Okay. All right. Please step outside for a minute.
> PROSPECTIVE JUROR: Sure.
> (Prospective juror leaves the room.)
> THE COURT: She appears to be somewhat biased.
> PLAINTIFFS' ATTORNEY: She appears to be somewhat biased.
> THE COURT: I would certainly think so.
> DEFENDANTS' ATTORNEY: I would say, your Honor, that question is whether she's biased versus her husband.
> THE COURT: Well, we can bring her back in and you can ask her that. I thought she said she that she was somewhat influenced by her husband, but please bring her back in, you can ask her the question.
> DEFENDANTS' ATTORNEY: Sure.
> (Prospective juror enters the room.)
> DEFENDANTS' ATTORNEY: Just a follow-up question. Does your husband's views on medical negligence cases translate to your views on medical negligence cases?
> PROSPECTIVE JUROR: Not always, no.
> THE COURT: Sometimes?
> PROSPECTIVE JUROR: Sometimes.
> DEFENDANT'S ATTORNEY: And based on that, do you believe you could be fair and balanced in this matter?
> PROSPECTIVE JUROR: I don't know enough about the case. My, I'm sorry to say it, but my personal view is that a lot of people bring suits when they shouldn't.
> DEFENDANT'S ATTORNEY: That's fair. That's what we're doing. Thank you.
> THE COURT: We're going to excuse you . . . Please go back downstairs.

See Transcript of Jury Trial Proceedings, at 29 – 31 (July 21, 2014) (hereinafter "Day #1 Tr. at ___").

When the Court asked counsel if they wanted "to go through the jury list to be sure there are no people who are retired, for instance, or have any other reasons why they should have come forward," Plaintiffs' attorney identified a man whose spouse is a registered nurse at Delaware Hospice, an occupational health nurse, a medical dosimetrist, a registered nurse at Pennsylvania Hospital, a treatment specialist, and a person who wrote "U" on her questionnaire. Then, the follow exchange occurred:

> DEFENDANT'S ATTORNEY: . . . I don't believe there was a specific voir dire question that addressed just medical training, I think it said have you had a negative experience or would that

Superior Court Civil Rule 59(a) provides, in pertinent part, that:

> [a] new trial may be granted as to all or any of the parties and on all or part of the issues in an action in which there has been a trial for any of the reasons for which new trials have heretofore been granted in the Superior Court.

In reviewing a motion for new trial, the Court "must determine whether the verdict is against the great weight of evidence."[74] The Court will not disturb the jury's verdict "unless 'the evidence preponderates so heavily against the jury verdict that a reasonable jury could not have reached the result' or the Court is convinced that the jury disregarded applicable rules of law, or where the jury's verdict is tainted by legal error committed by the Court during the trial."[75]

Under Delaware law, a jury has "significant discretion to determine the appropriate measure of an award."[76] The verdict "is presumed to be correct and

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> bias you. In other words, there was no reason for them to come forward. I don't know if just because they have medical training if we need to probe them on that issue alone based on the voir dire that the parties have agreed to.
> THE COURT: It sounds as though [Plaintiff's attorney] is asking that they be voir-dired.
> DEFENDANT'S ATTORNEY: I understand that, you Honor. My point on the defense side is there's no basis to do that if they haven't responded yes to voir dire.
> THE COURT: Well, in view of the fact that we have seen from other people who have come in who did respond yes to the voir dire and talked about their training in the health care industry, I think it's a legitimate concern at this point.

See Day #1 Tr. at 46 – 49. Ultimately, the Court excused two of the six prospective jurors identified by Plaintiffs' attorney. The man whose spouse is a registered nurse at Delaware Hospice stated that the "health care system needs work" and that he had opinions that would tend to favor one side over the other based on his experience with the Veterans Administration. *See* Day #1 Tr. at 51 – 52. In addition, the occupational health nurse stated she worked for Christiana Care for seventeen years and it was "possible" she might tend to favor one said over the other. *See* Day #1 Tr. at 53.

[74] *Kemp v. Christiana Care Health Servs.*, 2012 WL 1593127, *2 (Del. Super. May 2, 2012).

[75] *Mitchell v. Haldar*, 2004 WL 1790121, *3 (Del. Super. Aug. 4, 2004) (quoting *Storey v. Camper*, 401 A.2d 458, 465 (Del. 1977)). *See also Shapira v. Christiana Care Health Servs., Inc.*, 99 A.3d 217, 224 (Del. 2014).

[76] *Streetie v. Progressive Classic Ins. Co.*, 2011 WL 6307823, *1 (Del. Dec. 13, 2011).

just 'unless so grossly out of proportion to the injuries suffered as to shock the Court's conscience and sense of justice.'"[77]

In the instant case, Defendant asserts that a new trial should be awarded because Plaintiffs did not admit evidence of medical bills, "claimed pain and suffering for only approximately three months following a successful hip fracture repair, and had underlying medical conditions that impacted his pain and suffering."[78] The record shows that the jury heard Dr. Beardell's testimony that Mr. Rizzuto had pain in his right hip when Dr. Beardell examined him shortly after Mr. Rizzuto fell on January 20, 2009 and that the injury "slowed [Mr. Rizzuto] down to some degree."[79] The jury also heard Mrs. Rizzuto's testimony that prior to January 20, 2009, Mr. Rizzuto "was definitely losing ground" as a result of his underlying medical conditions, but

> he liked to have visits, there were people he used to work with that would come and see him, they'd take him out to . . . the coffee shop. He would go to dinner with friends. We used to like to go to Cosmos Restaurant. And he just generally enjoyed being around people, talking with people.[80]

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[77] *Mitchell v. Haldar*, 2004 WL 1790121 at *3 (quoting *Porter v. Murphy*, C.A. No. N99C-08-258, at 1 (Del. Super. Oct. 2, 2001). *See also Larrimore v. Homeopathic Hosp. Ass'n.*, 181 A.2d 573, 579 (Del. 1962) (affirming trial court's order for a new trial on damages where the verdict was so grossly excessive that the jury "mistook the nature of the action" or the verdict was the result of "passion, prejudice, whim or caprice"); *Morris v. Maternity & Gynecology Assocs.*, 2001 WL 1729133, *2 (Del. Super. Dec. 10, 2001).

[78] Def.'s Renewed Mot. for Judgment as a Matter of Law at ¶ 6.

[79] Day #1 Tr. at 112, 142.

[80] *Id.* at 156 – 57; 164.

Mrs. Rizzuto also testified that Mr. Rizzuto was admitted to the hospital from the emergency room after the fall on January 20, 2009, he was operated on the next day (January 21, 2009) by an orthopedic surgeon, his skin was opened and screws and a pin were put in his hip, and he was hospitalized for three days. She also testified that, upon release, he was "home-bound," he did not meet his friends at Cosmos Restaurant, and "he didn't really go out except to go to physicians' appointments" until his death on April 13, 2009.[81]

In determining the amount of damages, the jury was instructed that:

> [t]he purpose of a damages award in a civil lawsuit is reasonable and just compensation for the harm proximately caused by the negligence. Certain guiding principles must be employed to reach a proper damages award. Damages must be proved with reasonable probability rather than a reasonable probability that an injury exists. While pain and suffering are proper elements on which to determine monetary damages, the damages for pain and suffering must be fair and reasonably determined and may not be determined by a fanciful or sentimental standard. They must be determined from a conclusion about how long the suffering lasted, the degree of suffering, and the nature of the injury causing the suffering.
>
> If you find for Plaintiff, you should award the sum of money that in your judgment will fairly and reasonably compensate him for the following elements of damage that you find exist by a preponderance of the evidence:

[81] *Id.* at 163 – 64.

1. Compensation for Plaintiff's pain, suffering and disability that he has suffered from the time of injury to the date of his death.

In evaluating pain and suffering, you may consider its mental as well as physical consequences. You may also consider such things as discomfort, anxiety, grief, or other mental or emotional distress that may accompany any deprivation of usual pleasurable activities and enjoyments.

In evaluating impairment or disability, you may consider all the activities Plaintiff used to engage in, including those activities for work and pleasure, and you may consider to what extent these activities were impaired because of the injury.

The law does not prescribe any definite standard by which to compensate an injured person for pain and suffering or impairment, nor does it require that any witness should have expressed an opinion about the amount of damages that would compensate for such injury. Your award should be just and reasonable in light of the evidence and reasonably sufficient to compensate Plaintiff fully and adequately.[82]

Although Defendant cites *Medical Center of Delaware, Inc. v. Lougheed*[83] where the jury awarded a similar amount of damages where the plaintiff had sustained a permanent injury, underwent unsuccessful surgery to treat her pain, and had ongoing pain that would continue for the duration of her life (an estimated 48.3

[82] Final Jury Instructions, at 16 – 17; Trans. ID 55776719.

[83] *Med. Ctr. of Del., Inc. v. Lougheed*, 661 A.2d 1055 (Del. 1995).

years), the "decision on a motion for new trial requires a judicial assessment based upon the distinct evidence and individual circumstances of each particular case."[84]

Moreover, the jury was also instructed to "return a verdict without prejudice or sympathy. There is no indication that the jury acted unreasonably or irrationally."[85] Although "reasonable minds can differ regarding the monetary value of these damages, this Court cannot conclude that the consensus reached by the twelve minds comprising this jury is so unreasonable or excessive as to shock the Court's conscience and sense of justice."[86] As such, Defendant's Motion for New Trial or, in the Alternative, Remittitur is conditionally denied.

Conclusion

Thus, Defendant's contention that Ms. Parker "agreed" that Ms. Kane acted reasonably in her treatment of Mr. Rizzuto even though she "disagreed" with Ms. Kane's "good-faith choice of a proper alternative" is not a ground for setting aside the verdict and awarding judgment in Defendant's favor. However, Defendant is entitled to judgment as a matter of law because there is no credible evidence from which a reasonable jury could find in Plaintiffs' favor on the issue of causation.

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[84] *Mitchell v. Haldar*, 2004 WL 1790121 at *7.

[85] *Kemp v. Christiana Care Health Servs.*, 2012 WL 1593127 at *3.

[86] *Caldwell v. White*, 2005 WL 1950902, *4 (Del. Super. May 25, 2005).

Accordingly, Defendant's Renewed Motion for Judgment as a Matter of Law is hereby GRANTED. The judgment is reopened and judgment for Defendant as a matter of law is hereby entered.

Defendant's Motion for New Trial or, in the Alternative, Remittitur is hereby CONDITIONALLY DENIED.

IT IS SO ORDERED.

Diane Clarke Streett
Judge

Original to Prothonotary

cc: Ben T. Castle, Esquire
Gregory S. McKee, Esquire

Exhibit B

DONALD LAWRENCE, Plaintiff and Appellant, v. FROST STREET OUTPATIENT SURGICAL CENTER, L.P., Defendant and Respondent.

D042108

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

2004 Cal. App. Unpub. LEXIS 8473

September 17, 2004, Filed

PRIOR HISTORY: APPEAL from a judgment of the Superior Court of San Diego County, No. GIS007306. Luis R. Vargas, Judge.

DISPOSITION: Reversed.

JUDGES: HALLER, J.; BENKE, Acting P. J., HUFFMAN, J. Concurred.

OPINION BY: HALLER

OPINION

Donald Lawrence appeals from a summary judgment in favor of Frost Street Outpatient Surgical Center (Frost). We hold the trial court erred in concluding that expert testimony was required to establish the standard of care applicable to a health care provider who was helping a patient transfer from a wheelchair to the patient's car after outpatient surgery. Accordingly, Frost cannot prevail on its summary judgment motion premised on

Lawrence's failure to designate a standard of care expert witness. We reverse the summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On September 29, 2000, Lawrence underwent an outpatient hernia repair procedure at Frost's **[*2]** surgical center. Upon his discharge on the same date, Lawrence fell and injured himself when a Frost employee was helping him transfer from a wheelchair into his car.

In August 2001 Lawrence filed a complaint for personal injury damages against Frost. The complaint alleges two causes of action: one denominated premises liability and the other general negligence. Both are premised on the same facts and sound in professional negligence by a health care provider. Lawrence alleged that as he "attempted to stand with the assistance of [the Frost employee] in preparation for entering a parked vehicle[,] [the Frost employee] failed to properly assist [him] in exiting the wheelchair and entering the parked vehicle[,] causing [him] to fall . . . and severely fracture his . . . leg."

During the course of pretrial proceedings, Lawrence supported this theory with claims that at the time of the attempted wheelchair transfer, his leg was numb and the employee assisting him knew of this condition. He

further asserted that his wife was coming to help him enter the car but instead of waiting for her, the Frost employee attempted the transfer alone. As pretrial matters progressed, Lawrence **[*3]** proffered a second theory of liability, this one premised on Frost's failure to properly monitor him before discharge from the recovery room. According to Lawrence, he was given potent narcotics and sedatives during his surgery and Frost nurses failed to monitor him for a sufficient period of time to allow for his safe discharge.

As part of pretrial discovery, the parties exchanged expert witness information. Frost identified several experts, including registered nurse Diane Jones, who Frost designated as its standard of care expert. Although Lawrence identified several medical doctors and nurse Marlene Vermeer as expert witnesses, he did not designate any of them as standard of care experts. When describing the scope of Vermeer's designation, Lawrence stated she would testify "as to the causation and extent of injuries."

In response to Lawrence's failure to designate a standard of care expert, on October 7, 2002, Frost moved for summary judgment. The motion was premised solely on standard of care issues. Frost argued that expert testimony was necessary to establish the standard of care, and that summary judgment was proper because (1) Lawrence had failed to designate an expert to **[*4]** address standard of care, and (2) Frost's expert's declaration showed it had complied with the standard of care. Frost submitted the declaration of its designated standard of care expert, nurse Jones, who declared: "Based on . . . my knowledge regarding the applicable standard of care for non-physician care of a patient in a post-surgical setting, it is my professional medical opinion that at all times relevant to [Lawrence's] claims, the medical care rendered to [Lawrence] by [Frost] was appropriate and did not violate the applicable standard of care." To further support its motion, Frost submitted the expert witness information exchanged between the parties showing that Lawrence had failed to designate a standard of care expert.

Lawrence did not file an opposition to Frost's summary judgment motion; instead, on October 11, 2002, he filed a motion to augment his expert witness designation. A lengthy procedural morass ensued. Initially, the trial court granted summary judgment in favor of Frost, but then retracted the telephonic ruling. Thereafter, the court granted Lawrence's motion to augment and continued the summary judgment proceedings to allow Lawrence to designate Dr. **[*5]** Jeffrey Mazin as his standard of care expert and to file opposition to the summary judgment motion. Lawrence did so, but Frost objected to Lawrence's opposition pleadings because he had ignored the court's prior rulings requiring him to submit a declaration from Dr. Mazin to create a triable issue of fact on breach of the standard of care. After another round of motions, including Lawrence's request to continue the summary judgment motion to augment his expert designation to include nurse Vermeer as a standard of care expert, the court granted summary judgment in Frost's favor and concluded Lawrence's new motion to augment was moot. Lawrence appeals.

DISCUSSION

Lawrence argues (1) the court abused its discretion in failing to continue the summary judgment proceedings in order to first rule on his motion to designate nurse Vermeer as a standard of care expert, and (2) summary judgment was improper because expert testimony was not necessary to prove his claim.

For reasons we will explain below, we conclude a standard of care expert was not necessary for Lawrence to prevail on his wheelchair transfer theory of liability and therefore summary judgment was improper. Accordingly, **[*6]** we need not determine whether the court abused its discretion in its other rulings, nor need we further delineate the details of the convoluted procedural history underlying this case. Instead, we concentrate on the legal basis for the court's summary judgment ruling and the quality of the evidence Lawrence presented in response to Frost's summary judgment motion.

A. *Lawrence's Opposition to Frost's Summary Judgment Motion and the Court's Ruling*

Lawrence's opposition to Frost's summary judgment motion did not directly contest Frost's assertion that this case required expert testimony. Rather, Lawrence relied on two declarations and deposition testimony to establish there was a triable issue of material fact concerning standard of care: (1) his own declaration in which he described the incident, stated his leg was numb when he was in the wheelchair, and claimed that the Frost employee did not wait for his wife to arrive to assist in

his transfer from the wheelchair to the car; (2) portions of the deposition testimony of the Frost employee assisting the transfer who acknowledged that she knew his leg was numb as she transported him to the parking lot; and (3) a declaration **[*7]** from nurse Vermeer opining that Frost fell below the standard of care in prematurely discharging Lawrence after surgery and in the manner in which it transferred him from the wheelchair to the car.

Of particular relevance here, Lawrence did not present a declaration from his designated standard of care expert (Dr. Mazin) stating that Frost's conduct fell below the standard of care. Instead-apparently because the doctor had belatedly concluded any negligence was a nursing, not a physician, issue-Lawrence's expert evidence was confined to nurse Vermeer's declaration stating that Frost violated the standard of care.

The trial court concluded Lawrence's evidentiary showing was inadequate. The court reasoned that because this was a medical malpractice case, expert testimony was needed to establish the breach of the standard of care and Lawrence had not rebutted Frost's showing there was no breach. Although Frost had met its evidentiary burden by submitting the declaration of a properly designated standard of care expert, Lawrence had failed to do so. Instead, Lawrence relied on nurse Vermeer, an expert he had never designated as a standard of care expert. The court determined Vermeer's **[*8]** declaration was inadmissible and granted summary judgment.

B. *Analysis*

A "party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 850*.) The moving party bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if this burden is met, the burden of production shifts to the opposing party to make a prima facie showing of a triable issue of material fact. (*Ibid*.)

On appeal from a summary judgment, we review the record de novo, considering all of the evidence presented by the parties except evidence properly excluded by the trial court. (*Merrill v. Navegar, Inc. (2001) 26 Cal.4th 465, 476*.) We are not bound by the court's stated reasons for its summary judgment ruling; rather, we examine the facts before the trial court and then independently determine their effect as a matter of law. (*Rubenstein v. Rubenstein (2000) 81 Cal.App.4th 1131, 1143*.) We view the evidence in the light most favorable **[*9]** to the losing party, liberally construing the opposing party's evidentiary showing while strictly scrutinizing the moving party's showing. (*Saelzler v. Advanced Group 400 (2001) 25 Cal.4th 763, 768*; *Molko v. Holy Spirit Assn. (1988) 46 Cal.3d 1092, 1107, 252 Cal. Rptr. 122*.) To prevail on a summary judgment motion, a moving defendant must carry its burden as to all theories of liability reflected in the pleadings. (*Lopez v. Superior Court (1996) 45 Cal.App.4th 705, 714*.) "We begin by identifying the issues framed by the pleadings since it is these allegations to which the motion must respond." (*Hernandez v. Modesto Portuguese Pentecost Assn. (1995) 40 Cal.App.4th 1274, 1279*.)

Here, Lawrence proffered two negligence theories: (1) Frost negligently transferred him from the wheelchair to his car, and (2) Frost prematurely discharged him from the surgical center. Frost had to establish that Lawrence could not prevail under either theory in order to succeed in its summary judgment motion. To meet its burden, Frost argued expert testimony was necessary to establish standard of care; it had a qualified expert who would testify **[*10]** there was no breach of care; and plaintiff could not present admissible evidence on this issue. Although we agree that medical malpractice cases typically require standard of care experts, there is a well-recognized "common knowledge" exception to this general rule. Accordingly, Frost is entitled to summary judgment only if neither of Lawrence's theories of liability qualify for this exception.

Health care providers are required to exercise a "reasonable degree of skill, knowledge and care ordinarily possessed and exercised by members in their profession under similar circumstances. (*Alef v. Alta Bates Hospital (1992) 5 Cal.App.4th 208, 215*.) In cases where the conduct required of a medical professional is not within the common knowledge of a layperson, a plaintiff must present expert testimony to prove a breach of the standard of care, and must also prove that the defendant's breach was the cause, within a reasonable medical probability, of the injury. (*Bushling v. Fremont Medical Center (2004) 117 Cal.App.4th 493, 509*.) A plaintiff need not present such expert testimony if under the particular circumstances of the case, the level of care that should **[*11]** have been exercised by the medical practitioner is within the common knowledge of a

layperson. As explained by the California Supreme Court, "'" The standard of care against which the acts of a [medical practitioner] are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony [citations], *unless the conduct required by the particular circumstances is within the common knowledge of the layman*." [Citations.]"' (*Flowers v. Torrance Memorial Hospital Medical Center (1994) 8 Cal.4th 992, 1001*, italics added.)

The "common knowledge" exception in medical care negligence cases applies primarily in cases invoking the doctrine of res ipsa loquitur; i.e., when a layperson "'is able to say as a matter of common knowledge and observation that the consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised"' (*Flowers v. Torrance Memorial Hospital Medical Center, supra, 8 Cal.4th at p. 1001*), and that the defendant probably is the person responsible for the injury (*Gannon v. Elliot (1993) 19 Cal.App.4th 1, 6)*. **[*12]** Expert testimony is not required in cases where "'"scientific enlightenment is not essential for the determination of an obvious fact"'"; that is, when "the jury is capable of appreciating and evaluating the significance of a particular event." (*Id. at pp. 6-7*.) Illustrative of scenarios where a jury may infer negligence without the aid of an expert are when a surgeon removes the wrong leg or a surgical instrument is left in the patient's body. (See *Curtis v. Santa Clara Valley Medical Center (2003) 110 Cal.App.4th 796, 801*.) In contrast, when the facts involve a complex medical procedure and risks which are not commonly understood by laypersons and the patient suffers an unexpected injury, expert testimony is necessary for the jury to find negligence. (*Id. at pp. 800-803* [blindness following posterior spinal fusion].)

We agree Lawrence could not prove his premature discharge theory without an expert. A layperson cannot be expected to know the criteria used in the medical profession to ascertain when it is medically safe to discharge a patient after surgery, particularly where the patient has ingested medication and the physical **[*13]** effects of the drugs must be explained. Thus, this theory requires expert testimony.

This is not true of Lawrence's other theory. A layperson can apply common knowledge to evaluate how to safely transfer a patient with a numb leg from a wheelchair to a vehicle after outpatient surgery. This is something ordinary individuals, untrained in the medical profession, do on a regular basis when picking up family and friends after surgery. Further, a layperson knows that a patient will not normally fall and break a leg if due care is exercised by medical personnel assisting the patient into a vehicle. Thus, expert testimony on the standard of care is not necessary for a jury to evaluate whether the Frost employee exercised due care while assisting Lawrence to transfer from the wheelchair to the vehicle, and Lawrence's failure to designate an expert does not, as a matter of law, defeat this theory of liability. [1]

> 1 Although expert testimony is not *required* to show breach of the standard of care for the wheelchair transfer, such testimony may nevertheless be admissible if the trial court determines it could provide the jury with relevant information beyond its common knowledge to assist in the resolution of the issues. (*Evid. Code, § 801, subd. (a)*; see, e.g., *Gannon v. Elliot, supra, 19 Cal.App.4th at pp. 6, 8, 10-11*; see generally *People v. McAlpin (1991) 53 Cal.3d 1289, 1299-1300, 283 Cal. Rptr. 382* [admissibility of expert opinion is question of degree; jury need not be completely ignorant of subject to allow expert testimony).]

[*14] In short, because Frost's summary judgment motion was premised on a faulty legal assessment, it was not entitled to summary judgment. Moreover, independent of the expert standard of care issue, even if we were to assume that Frost carried its burden to show there was no breach of the duty of due care based on nurse Jones's opinion, [2] Lawrence successfully opposed the motion. Lawrence proffered admissible evidence which, if liberally construed, showed his leg was numb, the Frost employee knew of the condition, and yet the employee failed to wait for Lawrence's wife to assist or to take other precautions when transferring him from the wheelchair to the car. This evidence, which stands apart from nurse Vermeer's contested declaration, was enough to create a triable issue of fact and defeat Frost's summary judgment motion. [3]

> 2 Although not necessary to resolve this case on appeal, we note that once the ground of Lawrence's failure to designate a standard of care expert is removed from Frost's summary judgment motion, nurse Jones's conclusory

statements in her declaration-the latter which must be strictly construed-may be too sparse to carry Frost's initial burden of production. (See *Kelley v. Trunk (1998) 66 Cal.App.4th 519, 524*.)

[*15]

3 In reversing the summary judgment, we express no opinion regarding additional expert witness or discovery issues which may ensue on remand.

DISPOSITION

The summary judgment is reversed. Frost to pay costs on appeal.

HALLER, J.

WE CONCUR:

BENKE, Acting P. J.

HUFFMAN, J.