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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| KAY A. MARTIN, | ) | |
| | ) | |
| Plaintiff Below, | ) | |
| Appellant | ) | |
| | ) | |
| v. | ) | No. 312,2015 |
| | ) | |
| DOCTORS FOR EMERGENCY SERVICES, P.A., and CHRISTIANA CARE HEALTH SERVICES, INC., | ) | |
| | ) | |
| Defendants Below, | ) | |
| Appellees | ) | C.A. No. Below: N12C-06-187 EMD |

Appeal from the Superior Court of the State of Delaware,
In and For New Castle County, C.A. No.: N12C-06-187 EMD

# APPELLANT'S CORRECTED OPENING BRIEF

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Dated: October 12, 2015

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## NATURE AND STAGE OF PROCEEDINGS

This is a medical negligence case that was tried to a jury in New Castle County from January 5, to January 13, 2015. The jury returned a verdict in favor of appellees (hereafter "Defendants")[1], finding that there had been no breach in the standard of medical care. (A 425). Thereafter, Appellant (hereafter "Plaintiff" or "Kay Martin"), moved for a new trial under Superior Court Civil Rule 59(a). (A 430). That motion was denied on June 3, 2015. (A 473). This appeal was docketed on June 23, 2015. (A 36).

The complaint was filed on June 21, 2012, (A 39), alleging that Defendants were negligent in the Christiana Hospital Emergency Department when they allowed an unknown person to remove, improperly, a rigid cervical collar from a patient with a suspected traumatic cervical spine injury, and then discharged her without performing standard diagnostic procedures for this injury, and without diagnosing and treating her spinal cord injury. (A 40).

Trial was originally scheduled to begin on March 24, 2014 (A 8). Prior to that trial date Plaintiff filed a Motion in Limine to exclude standard-of-care testimony from Defendants' designated expert, Michael Van Rooyen, M. D., on the ground that there were not "sufficient facts" as required by Delaware Rule of Evidence

[1] The Defendants presented a unitary defense. Although separate legal entities, they were represented by the same attorneys and considered the conduct of one the conduct of both. (A 50)

702(1) to support his proffered opinion (A 43). That motion was denied at the pre-trial conference on February 26, 2014 (A 65). At that pre-trial conference the original trial date was cancelled by the Court (A 19). Eventually a new trial date of January 5, 2015, was set. Plaintiff renewed her Motion in Limine, which was denied on December 3, 2014 (A 74). At trial Dr. Van Rooyen testified that in his opinion Defendants had met the standard of care (A 262 to 300). Dr. Van Rooyen's professional credentials were never an issue (A 451), only the absence of a factual basis for his opinion was challenged (A 452).

On December 16 and 17, 2014, 19 and 20 days before trial, the Defendants produced under Court order the Christiana Care Health Services "Trauma Program Policy and Procedure Manual" (A 348). It included Policy 127, Backboard Removal Process for ED Hallway Patients (A 351), and Policy 1002, Patient Management Protocol-Cervical Spine Injury Evaluation (A 348). Both Policies spelled out in detail who and how a patient such as Ms. Martin should be evaluated and managed in the Emergency Department. Both Policies mandate a physician evaluation of a potential cervical spine injury before the patient is "cleared". Neither Policy had been made available[2] at the time depositions were taken of the personnel who were

[2] Plaintiff had made seven Requests For Production between September 11, 2012 and December 5, 2014 that encompassed these documents (A 348 to 352). Defendants denied production and insisted that the only relevant document was the "Nexus Algorithm," which had been produced at the time of the First request on October 24, 2012. (A 346). That algorithm is not referenced anywhere in the Martin hospital chart (A 91 to 111).

involved with Ms. Martin's care[3], nor were they available when the forensic experts were deposed.[4] The instructions the Policies outline were not followed in the evaluation of Ms. Martin's injury. (A 346 to 352).

After the jury returned a verdict in favor of Defendants (A 425-427), Plaintiff moved for a new trial under Superior Court Civil Rule 59(a), contending that the verdict was against the great weight of the evidence (A 434 to 436). That motion was denied (A 473) and this appeal followed (A 36).

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[3] Linda Jones, R.N., Defendant's designated 30(b)(6) witness testified at deposition on August 20, 2013 she was "not aware" of any guidelines dealing with this particular problem other than the Nexus Algorithm. (A 236).

[4] While calculating an award of counsel fees in a Rule 11 sanction case where tire-testing results had been improperly concealed and withheld, a partial dissenter on the Ninth Circuit Court of Appeals observed: "The fees that most likely spring to mind are those wasted on expert discovery that took place under the mistaken assumption that key test results supporting the (plaintiffs') liability theory did not exist." *Haeger v. The Goodyear Tire & Rubber Company,* 2015 U.S. App. (9th Cir. 2015).

## SUMMARY OF ARGUMENT

I. There were no existent "facts" (or data) to provide the requisite foundation for Dr. Van Rooyen to tell the jury that in his professional opinion the medical standard of care had been satisfied in the removal of the patient's rigid cervical collar and failure to maintain spinal precautions until cleared by a physician. The only "facts" established that (a) an unknown hospital aide removed, improperly, a cervical stabilizing collar from a patient with a suspected spinal cord injury, did not document the removal, and then (b) a physician assistant who did not know she had arrived in a collar, failed to order neck imaging studies, and discharged her without diagnosis or treatment of the spinal cord injury, in the absence of any supervision or evaluation by a physician. The trial court violated D.R.E. 702(1) and abused its discretion when it permitted the jury to hear Dr. Van Rooyen's opinion that the standard of care had been met.

II. The jury verdict in favor of Defendants was contrary to the great weight of the evidence, indeed contrary to all the evidence (excepting the Van Rooyen testimony), regarding the standard of care. The uncontradicted evidence established that:

(1) The Plaintiff was admitted to Defendants' Emergency Department with a suspected spinal cord injury;

(2) Detailed Emergency Department written safety policies were not

followed in the management of a patient with a suspected spinal cord injury:

(3) An unknown hospital aide removed the collar in violation of detailed safety policies while Plaintiff was in a hospital hallway awaiting evaluation and care;

(4) The Plaintiff was subsequently examined by a Physician Assistant who did not know she had arrived fitted with a collar and cervical stabilization devices, did not suspect a spinal cord injury, did not order imaging studies of her neck that would have revealed the injury, and did not diagnose a spinal cord injury;

(5) The Plaintiff was discharged ambulatory without evaluation by an Emergency Medicine physician and without diagnosis and treatment of a spinal cord injury.

The trial court abused its discretion when it refused to grant a new trial as authorized by Superior Court Civil Rule 59(a) when the jury verdict was against the great weight of the evidence.

## STATEMENT OF FACTS

## EMERGENCY DEPARTMENT EVENTS

On September 15, 2011 Kay Martin, age 36, visited a friend to see her new apartment at the end of a routine work day. As she stood up to leave in time to put her children to bed, she lost consciousness (fainted), free-falling face first and striking her forehead and chin on furniture that caused a backward hyperextension of her head and neck (A 146). 911 was called and an ambulance arrived at 7:38 p.m. She was fitted with a rigid cervical collar and placed on a backboard with straps and CIDs (cervical immobilization devices). (A 90).

She was transported to the Emergency Department at Christiana Hospital where she was triaged at 8:28 p.m. by triage nurse, Linda Ramsey, R.N. (A 92). Nurse Ramsey completed a prescribed admission form but did not indicate on the form that the patient arrived by ambulance or that the patient was restrained on a backboard in a cervical collar (A 92). Ms. Martin was then moved to a hallway, lying supine (flat) on a gurney. Within minutes "a male in scrubs" asked her to sit up while he removed the collar, palpated the back of her neck and told her she was "fine." (A 212).[5] That person has never been identified by the Defendants, the

[5] Standard safe collar removal from a patient with a suspected cervical spine injury requires gentle movement of the head from side to side while in a supine position as well as flexion and extension of the neck when all other criteria warranting removal are met. (A 81, 349).

collar has not been located, and the collar's presence and removal was not documented anywhere in the patient's chart. (A 356).

Approximately three (3) hours later, at 11:25 P.M., she was wheeled into an examining room and seen by Chris Giaquinto, P.A., a physician assistant (A 357). Mr. Giaquinto has no memory of these events (A 77), but the chart indicates he conducted an examination, ordered a CT Scan of her head because of a laceration to her forehead, made arrangements for her to be seen by a plastic surgeon early on the 16th to repair the laceration, and discharged her home after the CT Scan report was normal for any intracranial injury. (A 104) There were no imaging studies (CT) of her neck. (A 91 to 111). Nor was there any assessment by a physician (A 40).

She left the hospital in the company of her mother and husband at 1:26 A.M. without spinal cord precautions. (A 220). She did not know her cervical spinal cord was injured or that normal activity would cause more cord inflammation, deterioration and swelling that would compress the cord resulting in partial upper extremity paralysis and enduring pain. (A 147 to 148).

The medical chart documents the mechanism of injury (falling and striking head), "tingling in both hands," and "bilateral hand pain." (A 93, 96). Ms. Martin was discharged without any spinal cord precautions, without having been evaluated by a physician, and without any diagnosis of spinal cord injury. (A 110 to 111).

## EMERGENCY DEPARTMENT STANDARDS OF CARE AND SAFETY POLICIES

Linda Jones, R.N., Defendants' designated Rule 30(b)(6) witness, testified that it was a breach of the standard of care not to document the collar removal, a step in the hand-off process. (A 238 to 241). Mr. Giaquinto testified that it was below standard of care not to document the collar removal, and that the method of collar removal used here was below the standard of care (A 81).

Defendants' Policies 127 and 1002 provide as follows:

1. 127-Backboard Removal Policy for ED Hallway Patients ED hallway patients who meet the defined criteria can be removed from a backboard by an RN/LPN/APN and at least 3 other staff members. Patient must remain on C-spine precautions until evaluated and cleared by physician. (A 351, emphasis added). (Because of her loss of consciousness Ms. Martin did not even meet the "defined criteria"). The Policy concludes with a direction to the nursing staff to "Inform patient to remain supine with collar in place until evaluated by physician". (A 352, emphasis added).

2. 1002-Patient Management Protocol: Cervical Spine Injury Evaluation. This 3-page Protocol defines the evaluation and management process for patients with a "potential or actual cervical spine injury". It

makes clear that a patient in Ms. Martin's category must have radiographic studies of the cervical spine and those studies must have an official interpretation from an attending radiologist before the rigid collar and spine precautions are discontinued, and that can only be done by a trauma surgeon in consultation with a spine surgeon. (A 348 to 350).

There is nothing in that Protocol that authorizes the events that occurred in this instance.

Dr. Dorothy Dixon, a certified Emergency Medicine Physician employed by Defendants, counter signed Mr. Giaquinto's chart as "teaching physician" *some* days later (A 117 to 118). At the time Dr. Dixon signed the chart she did not know that the patient had arrived under spinal cord precautions, that she had never been evaluated for a spinal cord injury, or that she left the Emergency Department with an undiagnosed spinal cord injury. (A 118).

The evidence established the following undisputed standards of care:

1. An adult patient who falls from a standing position and sustains injury above the clavicles must be suspected to have a neck injury until ruled out. (A 348).

2. When a patient arrives at the hospital ER by ambulance fitted with a cervical collar the triage nurse must document those facts in the chart. (A 350).

3. Cervical collar removal can only be performed by specially trained providers following a prescribed step-by-step procedure to protect the spinal cord. (A 348 to 349).

4. A suspected cervical spine injury with neurologic deficit signs, (tingling, bilateral hand pain) and/or "distracting injury" must be evaluated by imaging studies. (A 348).

5. The Defendants' Policy 1002 for clearance of patients with traumatic head injuries above the clavicles (i.e. potential cervical spine injury) requires imaging studies interpreted by an attending radiologist and evaluated by a trauma surgeon in consultation with a spine surgeon. (A 349).

6. Delaware statutory law prohibits physician "supervision" of physician assistants "in name only." 24 Del. C. § 1771(d) (A 433).

Despite the admitted facts and the undisputed standards of care, all of which were violated according to testimony from Defendants' employees and according to their own hospital Polices, the Defendant's standard of care expert testified as follows:

> **Q**: And you don't know who that was. And you don't know what steps that person took to remove the collar, do you?
> **A:** Well, only insofar as Miss Martin testified that the person asked her some questions and examined her neck, but I don't know the additional steps they took.
> **Q:** What exactly did Miss Martin say about that?
> **A:** I'd have to refer to her deposition. I apologize, I don't

remember.
**Q:** She told us that she was on the gurney, this person came in, asked her to sit up and, then, palpated the back of her neck. He took the collar off and we never heard from him again.

Based on that information, which is the only information, how can you or anyone else state with any degree of reasonable medical probability that the collar was taken off in accordance with standard of care?
**A:** I mean, I can't know the specific questions that were asked or the specific details of that conversation. All I can know is that the person who – the hospital person asked her questions, palpated the neck, and took the collar off; but I don't know the specifics of what they said.
**Q:** So, you don't know who it was and you don't know exactly what they did, other than what she described. So, how can you, as a professional, as a witness here, as an expert, testify to a degree of reasonable medical probability to a jury that this was done properly?
**A:** I mean – again, I can't specifically state what – what the provider asked and how they examined her. I can only state that by pretty widely-accepted protocol in emergency medicine, we do that, and we do it every day, and we do it in the hallway to make patients more comfortable.
**Q:** Who's "we"?
**A:** Emergency providers.
**Q:** Well, from an intellectually honest point of view, you're teaching residents, for instance, how can you say that it was done the right way when you don't know who did it or exactly what they did?
**A:** I mean, I can't say with certainty exactly what was done. So, I can't say it was absolutely in the right way, but I will say that, based on my experience and training and based on my experience in many emergency departments and based on clearing the C-spines of probably thousands of patients, I mean, it's done in a fairly protocolized way, and it sounded like it was consistent with that protocolized way of doing things.

> **Q:** Well, you say "protocolized way of doing things," and you don't know who did it or how they did it? How can you intellectually get to that point in your thinking?
> **A:** Because of the description that Miss Martin gave about somebody asked her questions, examined her neck, discontinued the collar, and the fact that that's consistent with – we do that in the Emergency Department, we go to patients, ask them questions, discontinue their collar. And, then, further, I guess supported by the fact that if I was wondering if that was the right thing to do, the PA who examined her later on found her to have no neck tenderness, neurologically intact with no distracting injuries; so, therefore, it sort of validates that – (A 309-311). (Emphasis added)

Dr. Van Rooyen was the last witness the jury heard before returning a verdict. The Jury Verdict Form posed the question, "Do you find that the defendants breached the standard of care in their care of Kay Martin?" to which the jury marked "no." (A 425).

## ARGUMENT

### I. THE TRIAL COURT ERRED WHEN IT ADMITTED EXPERT OPINION TESTIMONY IN THE ABSENCE OF SUFFICIENT FACTS TO SUPPORT THE OPINION. ADMISSION OF THIS UNRELIABLE TESTIMONY IN A JURY TRIAL VIOLATED DELAWARE RULE OF EVIDENCE 702(1).

#### A. QUESTION PRESENTED

Did the trial court abuse its discretion when it admitted expert opinion testimony in a jury trial in the absence of sufficient facts, a requisite predicate of reliability under Delaware Rule of Evidence 702(1)? This question was preserved in Plaintiff's Motion in Limine filed on January 13, 2014 (A 45), denied on February 26, 2014 (A 65), then renewed (A 67) and again denied on December 3, 2014 (A 74).

#### B. SCOPE OF REVIEW

On appeal, a trial court's erroneous admission of unreliable expert opinion testimony in a jury trial is reviewed under an abuse of discretion standard. *Perry v. Berkley*, 996 A. 2d 1262 (Del. Supr. 2010); *General Motors Corporation v. Grenier*, 981 A. 2d 531 (Del.Supr. 2009); *Timblin v. Kent General Hospital*, 640 A.2d 1021 (Del. 1994).

## C. MERITS OF ARGUMENT I

The trial court erred when it declined to exclude from jury consideration the opinion of Dr. Van Rooyen that Defendants satisfied the standard of medical care. This opinion from a sophisticated expert witness was admitted despite the absence of any evidence that critical emergency department procedures were performed in compliance with the standard of care. It is axiomatic that any expert opinion testimony must, under D.R.E. 702(1), be based "on sufficient facts or data---". Data is not a consideration here. The only evidence in this case describing how the collar was removed establishes a bald disregard for the standard of care.

This Court has established a five-step test to determine admissibility of scientific or technical expert testimony:

> (1) the witness is qualified as an expert by knowledge, skill, experience, training, or education; (2) the evidence is relevant; (3) the expert's opinion is based upon information reasonably relied upon by experts in the particular field; (4) the expert testimony will assist the trier of fact to understand the evidence or determine a fact in issue; and (5) the expert testimony will not create unfair prejudice or confuse or mislead the jury. *Bowen v. E.I. DuPont Nemours & Co.,* 906 A.2d 787, 795 (Del. 2006).

If any one of the Daubert five-steps is missing, then it renders the expert's analysis unreliable and the testimony inadmissible. *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 745 (3d Cir, 1994), cert. denied, 513 U. S. 1190 (1995).

This Court addressed the factual predicate requirement of Rule 702(1) in *Perry v. Berkeley*, 996 A.2d 1262 (Del. 2010). There, a physician was not informed

about the plaintiff's prior back injuries and treatments and yet was asked to render an opinion concerning causation of back injuries in a negligence personal injury action. The trial court ruled the opinion inadmissible, saying:

"I mean, *Daubert*, it's really a *Daubert* problem. This motion (in limine), as I see it, doesn't focus on qualifications or competence or methodology or science involved, it focuses on factual foundation. And if the factual foundation isn't there, the opinion is not valid." On appeal this Court reviewed the history of D.R.E. 702(1) and treatise commentary as well as case law from other jurisdictions and upheld exclusion of the opinion, noting "The Superior Court properly held that (Dr.) did not have a correct understanding of the facts of the case, thereby completely undermining the foundation of his expert opinion and not merely his credibility." At. Page 1270. This Court also cited with approval a Virginia Supreme Court reversing a trial court's admission of "Expert testimony founded on assumptions that have no basis in fact is not merely subject to refutation by cross-examination or by counter experts; it is inadmissible," and "error subject to reversal on appeal". *Vasques v. Mabini*, 269 Va.177, 606 S.E. 2d 809 (Va.2005). At page 1269.

Admittedly ignorant of "exactly" what was done here, Dr. Van Rooyen's statement that the collar clearance "sounded" like it was done in a "fairly protocolized" way (that met the standard of care) (A 311) leads directly to the

concern this Court observed in *Timblin v. Kent General Hospital*, 640 A.2d 1021, 1026 (Del. 1994):

> Delaware courts have recognized that evidence of statistical probability creates a significant risk of jury confusion and unfair prejudice because such evidence may lead a jury to decide a case based on what happens normally instead of what happened in the case before it.

The Court also noted that what "normally happens" was irrelevant to the jury's determination of liability. *Id* at 1027.

Likewise, in *Wheat v. State*, Del. Supr., 527 A.2d 269 (1987) this Court noted:

> [E]xpert testimony ... is not, as some current practice suggests, a mechanism for having someone of elevated education or station engage in a laying on of hands, placing an imprimatur, upon the justice of one's cause ... Experts are not, in theory, called to tell the jury who should win. They are called, instead, to provide knowledge to the jury to permit the jury rationally to decide the case before it.

*Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999) illustrates the problem by using the phrase "is (the evidence) genuinely scientific, as distinct from being unscientific speculation offered by a genuine scientist (?)".

Cherry-picking certain facts and ignoring other material facts renders an expert opinion unreliable and inadmissible. *LeClercq. v. The Lockformer Company*, 2005WL 1162979 (N.D. ILL. Apr. 28, 2005). That court went on to say "such selective use of facts fail to satisfy the scientific method and Daubert—this disregard of relevant data undermines the reliability of (the) entire opinion-"

*Nationwide Agribusiness Insurance Co. v. August Winter & Sons, Inc.* 2014 Wisc. App. LEXIS 804, 856 N.W. 2d 346 involved a boiler explosion. A liability expert opined that the explosion was caused by an "assumed fact", i.e. that a screw was not tightened and gas was allowed to escape. Relying on the "sufficient facts" language of Wisconsin's counterpart to D.R.E. 702, the court affirmed the exclusion of the opinion because of insufficient facts to buttress the expert's opinion. Here Dr. Van Rooyen said essentially the same thing when he assumed that defense providers followed a "protocolized" method of collar removal when there simply is no evidence from any source to support that speculation. The only evidence (from Kay Martin and the medical chart) directly contradicts any "assumption" or "speculation."

The defense witnesses schooled in cervical collar removal all agreed on who is authorized to remove a collar, on the several careful steps that must be followed in order to remove a collar, and documentation of the removal. Physician Assistant Giaquinto matter-of-factly described the procedure this way:

> **Q**: We showed the jury yesterday in the opening a clip of your deposition, video deposition, in which you are watching the video of a doctor demonstrating how a surgical collar should be removed?
> **A**: Yes.
> **Q**: You saw that?
> And at the time we took your deposition I asked you if you agreed is that the right way to do it. And you indicated it was?
> **A**: Yes.

**Q**: Still say that?
**A**: Yes. Yes, it was. (A 79).

**Q:** Mr. Giaquinto, the standard of care is that when a collar is removed from the patient who is suspected of having a neck injury to document it. Isn't that the standard of care?
**A**: It should be as stated in the video that we watched yesterday.
**Q**: Okay. And did you hear the attorney for the defense yesterday tell the jury that it's never documented?
**A**: I believe so, yes.
**Q**: That would not be the standard of care, would it?
**A**: I guess not. (A 81).

Step-by-step documentation is critical to a continuum of communication when several different care providers are involved. Had Mr. Giaquinto known this history he most likely would have ordered a CT scan of the neck, which would have revealed the injury. The film could easily have been performed at the same time as the CT scan of the head. (A 86).

Mr. Giaquinto's "teaching physician," Dr. Dixon, answered in this manner:

**Q**: What is the level of care? What's the standard of care that applies?
**A**: The standard of care is to observe the nexus criteria and to safely remove the collar.
**Q**: And when a patient is in the emergency room passed on from one provider to another, right, triage one, triage two, hall nurse, physician's assistant, radiology, so forth; right, a lot of handoffs, a lot of the different people involved?
**A**: There are a lot of people involved in the care of emergency department patients, that's true.
**Q**: And for that reason isn't it very important to have a chart that carefully documents important events?

**A**: Yes. Important events that involve patients's care should be documented, yes, absolutely. (A 125).

Linda Jones, R.N. Vice-President of Emergency and Triage Services and the designated Rule 30 (b)(6) witness, said:

"Typically the individual who removes the collar documents it...That's a normal process of care...That would be considered something that we would typically document." (A 240).

The only evidence of the method of collar removal was that an unknown person in hospital garb took off the collar without even attempting to follow the standard NEXUS protocol. That person did not chart any record of what he had done, thus leaving no history for subsequent care providers, an error that compounded the earlier gaps in the chart documentation. This serial neglect of the standard-of-care procedures set the stage for the ultimate mistake – failure to diagnose a cervical spine injury.

In the context of medical causation testimony this Court has made recent strict rulings. "Likely" and "feasible" don't pass the admissibility test of "reasonable medical probability," *Mammarella v. Evantash*, 93 A.3d 629 (Del. 2014); *Moses v. Drake*, 109 A.3d 562 (Del. 2015).

Dr. Van Rooyen's baseless conclusory opinion should not have been admitted as evidence before a jury. To allow it was error that led directly to the jury's confused and unjust verdict. The trial court's decision should be reversed and a new trial granted. *Timblin v. Kent General Hospital*, supra.

## ARGUMENT

### II. THE TRIAL COURT ERRED WHEN IT REFUSED TO GRANT A NEW TRIAL PURSUANT TO CIVIL RULE 59(a) ON THE GROUND THAT THE JURY VERDICT FOR THE DEFENSE WAS AGAINST "THE GREAT WEIGHT" OF THE EVIDENCE. THIS REFUSAL WAS AN ABUSE OF DISCRETION.

#### A. QUESTION PRESENTED

Did the trial court abuse its discretion when it denied Plaintiff's motion for a new trial, where all of the properly admitted evidence established that the Defendants breached the standard of medical care applicable to a suspected cervical spine injury? This question was preserved in Plaintiff's Motion for a New Trial filed January 26, 2015 (A 430), and denied on June 1, 2015 (A 446 to 454).

#### B. SCOPE OF REVIEW

The Scope of Review is to determine whether or not the judicial discretion of the trial court has been abused. *Storey v. Camper, 407 A.2d 458,* 1979 Del. LEXIS 357*; Tyndall v. Tyndall*, 214 A.2d 124 (Del. 1965); *Timblin v. Kent General Hospital*, 640 A.2d 1021 (Del. 1994).

#### C. MERITS OF ARGUMENT

Superior Court Civil Rule 59(a) states that the "grounds" for granting a new trial before a jury are those "... for any of the reasons for which new trials have heretofore been granted in the Superior Court..."

Asking this Court to reverse a trial court's discretionary decision to deny a new trial because the verdict is against the great weight of the evidence is a daunting task, and rightly so. Article IV Section II(1)(a) of the 1897 Delaware Constitution provides, inter alia,

> "... Provided that an appeal from a verdict of a jury, the findings of the jury, if supported by the evidence, shall be conclusive..."

*Storey v. Camper*, 401 A.2d 458 (Del. 1979) established a general rule "... that a trial judge is only permitted to set aside a jury verdict when in his judgment it is at least against the great weight of the evidence," at p. 465.

While the jury here said there was no breach in the standard of medical care rendered to Kay Martin on September 15, 2011, the uncontradicted evidence established that a rigid cervical spine collar was removed from a patient with a suspected cervical spine injury without adherence to universally recognized removal and documentation standards of care, that she never received a physician assessment, that her neck injury (later confirmed) was undiagnosed, and she was discharged without spine precautions or information she had a neck injury. Without performing the removal procedure in accordance with minimal standards and documenting the event, the stage was set for a sub-standard assessment of a cervical spine injury.

The only hook the jury could hang its no-breach verdict on was the discredited testimony and, we contend improperly admitted, of Dr. Van Rooyen.

Article IV, Section 11(1)(a) of the Delaware Constitution protects a jury verdict only "if supported by the evidence." The *Camper* decision states that "the verdict of the jury as to questions of fact properly submitted to it is conclusive," 401 A.2d at p. 462. While we contend the Van Rooyen opinion testimony was not properly admitted and therefore cannot support the verdict, we also contend that it was so baseless and weak that the ensuing verdict was contrary to the great weight of the admitted evidence.

In *Timblin*, this Court reversed the denial of a motion for new trial, determining that statistical evidence was improperly admitted. The Court said:

> "An analysis of the statistical probability evidence introduced by Kent General reveals that such evidence had minimal probative value and created a substantial risk of confusion and prejudice." *Id.* at 1024.

Dr. Van Rooyen's under oath comment that the collar was removed in a "fairly protocolized" way had the same misleading impact. In considering Plaintiff's Motion For a New Trial, the trial judge noted "that experts can make assumptions based on facts in the record to form their opinion" (A 462, emphasis added). Here, the facts of record flatly contradict an expert assumption that the collar was removed in a protocolized way, much less in accordance with the standard of care. The assumption by Dr. Van Rooyen fails

the *Vasques v. Mabini*, *supra*, test, cited approvingly by this Court in *Perry v. Berkeley*, *supra*, at p. 14 of this brief.

The lower court, it its ruling, said "I remember the notion in that there's circumstantial evidence here that [the collar] was removed correctly" (A 469). With deference, there was no evidence the collar was removed correctly, direct or circumstantial. If Ms. Martin's testimony is discredited[6] all that is left is a factual vacuum (nowhere does the hospital chart mention collar), which cannot support an assumption.

The other glaring mis-assumption by Dr. Van Rooyen was that the hospital policies, 127 and 1002 (A 348 to 352) did not mean what they plainly said. When asked what "physician" referred to in Policy 127, Dr. Van Rooyen answered:

> "...this policy should probably say 'provider' instead of physician." I'm not going to rewrite it; but it's clear what it means." (A 330).

The assumption that physician means "provider," and thus encompasses the physician assistant (A 330), is nothing more than Humpty-Dumpty's famous dictum: "When I use a word it means just what I choose it to mean – nothing more or less." That testimony makes a mockery of the hospital's policy-making procedures, not to mention patient safety.

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[6] From her first deposition in this litigation the testimony has always been the same.

With all deference, the decision not to grant a new trial exceeded the bounds of reason under the circumstances of this case. *Peters v. Gelb*, 314 A.2d 901 (Del. 1973). The verdict here was contrary to the unrebutted evidence and thus "against the great weight of the evidence". The trial court's refusal to grant a new trial under Rule 59(a) was an abuse of discretion.

## CONCLUSION

For the reasons stated here, Plaintiff respectfully submits that the court below erred (1) in admitting expert opinion testimony unsupported by sufficient facts, and (2) in refusing to grant a new trial when they jury's verdict was against the great weight of the evidence. The judgment should be reversed.

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