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IN THE SUPREME COURT OF THE STATE OF DELAWARE

KAY A. MARTIN, Plaintiff-Below Appellant, v. DOCTORS FOR EMERGENCY SERVICES P.A., and CHRISTIANA CARE HEALTH SERVICES, INC., Defendants- Below Appellees.	)	No. 312,2015 Court Below – Superior Court of the State of Delaware in and for New Castle County C.A. No. N12C-06-187 EMD

APPELLEES' ANSWERING BRIEF

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NATURE OF PROCEEDINGS[1]

This is an appeal of Plaintiff Below/Appellant Kay A. Martin ("Ms. Martin" or "Plaintiff") of: (1) the Superior Court's Orders dated February 26, 2014 and December 3, 2014, permitting testimony regarding Michael VanRooyen, MD, MPH, MA (Hon.), FACEP, FAAEM's opinion that the man who examined Ms. Martin in the hallway of the Emergency Department prior to removing her neck collar and backboard met the standard of care; and (2) the Superior Court's denial of Plaintiff's Motion for a New Trial because Plaintiff failed to meet her substantial burden of proving that the verdict was against the great weight of the evidence.

A plaintiff in a medical negligence case such as this one has the burden of proving three elements by a preponderance of the evidence: (1) that there was a breach in the standard of care, which is defined as "that degree of skill and care

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[1] Plaintiff raised an issue in the Nature of the Proceedings section regarding the timeliness of the disclosure of certain hospital policies. Unless the Court expresses an interest in this topic, Defendants will not re-engage in a debate concerning the disclosure of these policies except to say that Defendants offered Tom Sweeney, M.D. (the 30(b)(6) witness for Emergency Department policies), for a three and a half hour deposition to explain why the policies were not relevant or breached, which he did in great detail.

Notably, Plaintiff never again brings up the disclosure of the policies in the body of the brief or makes any direct claim that these policies affected her case. At trial, Plaintiff never asked her experts about the policies, and the only testimony on the policies came from Dr. Michael VanRooyen, Defendants' emergency medicine expert, who testified that policies do not establish the standard of care and that, in any event, the second policy Plaintiff references, Policy 1002, was inapplicable to Plaintiff because she was not a Trauma patient. (B-35; B-52). Trauma patients are patients with multi-system injuries that require a team of physicians to be called in to treat them quickly. (B-52). Plaintiff was not called in as a Trauma patient, nor has any expert claimed that she should have been. (*Id.*).

ordinarily employed, in the same or similar field of medicine as [the] defendant, and the use of reasonable care and diligence";[2] (2) that the breach caused harm; and (3) damages.

On June 21, 2012, Plaintiff filed a Complaint against Doctors for Emergency Services, P.A. ("DFES"), and Christiana Care Health Services, Inc. ("CCHS"), alleging three areas in which she believed the standard of care was breached: (1) care provided by the nurses (who were CCHS employees) who evaluated Plaintiff when she initially arrived at Christiana Hospital; (2) care provided by a provider in blue scrubs in the hallway in removing her cervical collar and backboard and who was unable to be identified; and (3) care provided by a physician's assistant ("PA") named Chris Giaquinto ("PA Giaquinto") (a DFES employee) in evaluating her and discharging her. (Transaction I.D. 44937923).

Plaintiff was required to prove these breaches through expert medical testimony. 18 *Del. C.* § 6853(e) ("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[.]"). Plaintiff was likewise required to prove causation and damages through expert testimony. *Id.*

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[2] Delaware Civil Pattern Jury Instructions, §7.1A.

As the case developed and Plaintiff disclosed her experts, the only identified issues became: (1) whether Ms. Martin was appropriately evaluated in the Emergency Department for a spinal cord injury; and (2) if not, whether the additional imaging studies Ms. Martin claims were warranted would have diagnosed Ms. Martin's injury.

At trial, Plaintiff called Dr. Jeffrey P. Smith, an emergency medicine physician, who opined that the nurses met the standard of care (B-78) and that PA Giaquinto breached the standard of care in failing to order additional imaging due to Ms. Martin's complaints of pain in both of her hands (B-86).[3]

Notably, at trial Plaintiff asked Dr. Smith **no questions** about whether the provider in the hallway breached the standard of care. Yet, whether the jury properly concluded that the hallway provider met the standard of care forms the basis for the vast majority of Plaintiff's Opening Brief.[4]

Defendants identified and called two experts: (1) Dr. Harel Deutsch, a neurosurgeon who opined that Ms. Martin's presentation in the emergency room did not indicate a spinal cord injury (B-17), that nothing that was done or not done

[3] Plaintiff also called a neurosurgeon, Dr. Richard Meagher, but his opinions are irrelevant to the issues raised in this appeal, and he was not mentioned in Plaintiff's Opening Brief, so Defendants do not summarize his opinions herein.

[4] This argument, as with much of Plaintiff's Opening Brief, seems to demonstrate an unwillingness to appreciate that Plaintiff had the burden of proving that there was a breach of the standard of care – it was not Defendants' burden to prove that there wasn't.

in the emergency room caused any injury to Ms. Martin (B-17), and that in fact the tests, specifically the MRIs, performed on Ms. Martin after she was discharged from the emergency room established that Ms. Martin did not have a spinal cord injury until after she underwent neck surgery approximately a month later (B-20-22); and (2) Dr. VanRooyen, Interim Chair of Emergency Medicine at Brigham and Women's Hospital (associated with Harvard Medical School) in Boston, Massachusetts, who testified that there were no breaches in the standard of care by any provider (B-37) – the nurses, the hallway provider, or PA Giaquinto – because the nurses' care was appropriate (this was not a point in issue because no expert said the nursing care was inappropriate) (*Id.*), the hallway provider's care was appropriate because Ms. Martin's description of the evaluation matched the steps a provider should take prior to clearing a collar and backboard and because an examination performed shortly thereafter evidenced no signs of a spinal cord injury (B-37-39; B48), and finally that PA Giaquinto's care met the standard of care because Ms. Martin satisfied all five of the well-established, national criteria for clearing a person of a neck injury without imaging studies. (B-39-45).

In fact, Dr. VanRooyen and Dr. Smith (Plaintiff's emergency medicine expert) agreed that the NEXUS criteria (the five-part criteria for clearing a patient of a spinal injury) were applicable and that four out of the five criteria were met. (B-39-45; B-86). The only criteria they disagreed on was whether at the time of

PA Giaquinto's exam Ms. Martin showed any "neurological deficit." Dr. Smith believed that Ms. Martin's hand pain was a "neurological deficit." (B-86). Dr. VanRooyen disagreed, testifying that a "neurological deficit" is precisely what it sounds like – an absence of something, either movement or sensation. (B-43-44). Pain – an exaggerated sensation – does not qualify as a "deficit." (*Id.*). Moreover, Dr. Smith was cross-examined on whether Ms. Martin's hand pain could reasonably have been explained by the fact that she fell on both of her hands when she passed out. (B-82).

Dr. VanRooyen further opined that the imaging studies which would have been required if Ms. Martin had not been cleared would not have shown any injury or resulted in different treatment. (B-45). These imaging studies (x-rays or CAT scans) were designed to pick up on issues with the bone (fractures or evidence of instability), and an x-ray taken soon after Ms. Martin's trip to the emergency department showed no evidence of a fracture or instability. (*Id.*). Based on this, he opined that, even if Ms. Martin had not been cleared, the necessary tests would have been normal and she would not have required any additional treatment prior to discharge from the Emergency Department. (*Id.*).

Prior to trial, Plaintiff filed two Motions *in Limine* (B-208-212; B-217-223) to exclude Dr. VanRooyen's testimony regarding the care provided by the provider in blue scrubs in the hallway, claiming that the opinion was unsupported by facts

and that the testimony would be prejudicial based upon Dr. VanRooyen's "sparkling multi-page resume." (B-210). Defendants responded to these motions (B-213-216; B-224-226), explaining that not only was there a factual basis for Dr. VanRooyen's opinion in Plaintiff's description of what happened and based upon the later clearly documented, complete exam which showed no evidence of a spinal injury, but also that Plaintiff's own Emergency Department expert, Dr. Smith, agreed that the manner in which the collar and backboard were removed in the hallway and the failure to document this process were not breaches in the standard of care. (B-78-79).

The Court entered Orders on February 26, 2014 and December 3, 2014 denying Plaintiff's motions, reasoning that Plaintiff's concern regarding Dr. VanRooyen's impressive resume weighed against Plaintiff's *Daubert* challenge, that "a lot of what [Plaintiff] raised is tremendous cross-examination of a witness," that Dr. VanRooyen was "using generally accepted principles; it's just a question of whether it's based on the types of facts that the Plaintiff wishes it was based on," and that "any potential prejudice, because the standard is unfair prejudice, not just prejudice, can be done with an effective cross-examination." (B-133-134).

Dr. VanRooyen testified at trial about the process of evaluating patients in the hallway in the Emergency Department to remove collars and backboards, why this is undertaken quickly, and why he is not concerned that the process is not

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documented. (B37-39). Plaintiff's counsel cross-examined Dr. VanRooyen thoroughly at trial, particularly with respect to his opinion that the provider in the hallway met the standard of care. (B-48-49).

Ultimately, the case was tried to completion from January 5 to January 13, 2015. The jury concluded that Plaintiff failed to meet her burden of proof, and returned a verdict in favor of the Defendants on the afternoon of January 13th, finding no breach in the standard of care.

Plaintiff filed a Motion for New Trial on January 26, 2015 (B-227-234), and Defendants filed a Response in Opposition to the Motion on February 9, 2015. (B-235-241). Oral argument was heard on June 1, 2015, and the Court denied Plaintiff's Motion following oral argument. In its ruling, the Court explained that:

> One of the important things in this case is to remember where the burden of proof is in the case. The burden of proof by preponderance of the evidence is on the plaintiff to carry each and every element of the case. Mr. Castle points out that there's only one person who testified with respect to removal of the collar, because it was unidentified who the person was who removed the collar, and that person was Kay Martin. Kay Martin could have testified to that fact and the defendant could have put on no evidence. The plaintiff could have had Ms. Martin testify about a fact and brought an expert witness in and testified to it. And if on cross-examination the credibility of Ms. Martin or the doctor was brought into enough of an issue as to credibility, even if the jury found for the defendant in that circumstance, it doesn't necessarily mean that I would grant a new trial under 59(a)[...]"
>
> So there's a lot of questions in this case that were presented to the jury. I don't think anything was clearer for one side or the other. And whether the Court would have said there's a breach of the standard of

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care, but maybe not proximate cause, is not up to the Court. It's up to the jury. And in this case there was – there was questions of credibility as to a number of the witnesses. Dr. Smith testified that you didn't need to document and so did Dr. VanRooyen. I understand the argument plaintiff makes about the assumption with respect to the person that took it off, but I remember that the notion is that there's circumstantial evidence here that it was removed correctly, including the follow-up examination by Dr. – Physician Assistant Giaquinto. And even there, there was a long series of questions with respect to his documenting the examination, and there were questions of fact that would have to be determined on whether he did certain tests and didn't do certain tests, and whether that was credible or not was the difference between what Ms. Martin said and Physician Assistant Giaquinto said. Under those circumstances, even where evidence is conflicting, but sufficient evidence may be gathered therefrom to support a verdict for either party, the issue of fact is left to the jury. And that's also out of the *Storey* case.

And I do not find that – or hold that the standard here has been met; that the judgement was against the jury verdict and my judgment was against the great weight of the evidence. In other words, barring exceptional circumstances, a trial judge should not set aside a jury verdict on such grounds unless, on a review of all the evidence, the evidence preponderates so heavily against the jury verdict that a reasonable jury could not have reached the result. I do not find that that standard has been met in this case. There's just too much conflicting evidence to that point. And there's questions of credibility, which is also left to the jury.

I mean, like I said, the defendants could present a case merely through cross-examination. It doesn't mean that I would direct a verdict at the end of the case – or end of the plaintiff's case for the plaintiff merely because the plaintiff put on the evidence and the defense didn't put on anything. You have to carry a burden of proof. But in this case, there was plenty of evidence put on by the defendant with respect to the standard of care and the lack of a violation of the standard of care. And under those circumstances, I'm not going to overturn the jury verdict, so I will deny the motion.

(B-110-114).

Thereafter, on June 23, 2015, Plaintiff filed a Notice of Appeal and an Opening Brief on October 5, 2015. The Supreme Court issued a Brief Deficiency on October 8, 2015, and Plaintiff filed an Amended Opening Brief on October 12, 2015. Defendants now file their Answering Brief.

SUMMARY OF ARGUMENTS

1) Plaintiff/Appellant's argument is denied. The Superior Court's decision to permit testimony from Dr. VanRooyen – an undisputedly highly-qualified emergency medicine expert – that the provider who removed Ms. Martin's cervical collar and backboard in the hallway of the Emergency Department did so within the standard of care was well-supported by: (a) Ms. Martin's own testimony concerning what was done in this case; (b) Dr. VanRooyen's extensive experience in emergency medicine and his testimony regarding how the process is typically done; and (c) the lack of any findings that would have required the cervical collar and backboard to remain in place in the examination performed by PA Giaquinto shortly thereafter.

2) Plaintiff/Appellant's argument is denied. The jury verdict in favor of Defendants was well supported by the evidence, and the Superior Court appropriately denied Plaintiff's Motion for New Trial because the jury's verdict was supported by the evidence, which established that each of the evaluations of Ms. Martin were appropriate and that Ms. Martin did not have evidence of a spinal cord injury at the time of her visit to the Emergency Department on September 15, 2011.

STATEMENT OF FACTS

On the evening of September 15, 2011, Ms. Martin was visiting a friend. When Ms. Martin stood up, she passed out (or experienced a "syncopal episode" as it is referred to in the medical records and by the experts) and struck her head on a piece of furniture.

While in the hallway in the Emergency Department, Ms. Martin described a man in "blue scrubs" who asked her questions, palpated or pressed on her neck (Plaintiff reported no tenderness in this area) and removed her cervical collar and backboard. (B-36-37).

Following the removal of her collar and backboard in the hallway, Ms. Martin was seen and examined by PA Giaquinto, who performed and documented an examination which consisted of a neurological evaluation, a physical examination, ordering several tests, and even placing a phone call to a plastic surgeon at approximately 1:00 a.m. to get Ms. Martin scheduled for an appointment to stitch her forehead that very same morning (a feat Dr. VanRooyen testified went above and beyond). (B-37).

Part of the examination included a review of what are known in the medical world as the "NEXUS criteria." (B-37). The NEXUS criteria is a list of five criteria a medical provider can use to clear a patient's spine without using imaging studies, such as x-rays or CT scans. (B-41-45).

If a patient satisfies all five NEXUS criteria, no imaging is necessary and the patient is not suspected to have a spinal cord injury. (B-45). The criteria were developed from patient studies of over 34,000 patients and are well-accepted as the standard for clearing patients of spinal injuries in emergency medicine. (*Id.*).

Plaintiff's emergency medicine expert, Dr. Smith, and Defendants' emergency medicine expert, Dr. VanRooyen, agreed that Plaintiff satisfied four out of the five criteria for clearing a patient of spinal injury. (B-39-45; B-86). The only criteria they disagreed on was whether, at the time of PA Giaquinto's exam, Plaintiff had a "neurological deficit." Dr. Smith testified that Ms. Martin had a neurological deficit because she had reported pain in both of her hands. (B-86). Dr. VanRooyen explained to the jury that a neurological "deficit" is precisely what it sounds like – a "deficit," or an **absence** of sensation or motor function. (B-43-44). Pain is, by definition, not a "deficit." (*Id.*). Moreover, Ms. Martin's pain was further explained by the fact that she fell forward onto both of her hands. (B-82).

Dr. VanRooyen further explained that, even if Ms. Martin had not cleared the NEXUS criteria, the imaging studies that would have been ordered would be either an x-ray or a CT scan. (B-45). These studies are designed only to show bony abnormalities, such as a fracture or instability of the spine. (*Id.*). Ms. Martin's later testing established that she did not have either of these diagnoses,

and Dr. VanRooyen therefore concluded that, even if the imaging studies had been performed, Ms. Martin's outcome would not have been different. (*Id.*).

Finally, based upon Ms. Martin's description of the examination performed by the provider in the hallway, which matched the highly-protocolized way in which this type of examination is performed regularly in emergency medicine, together with the results of the complete and well-documented exam by PA Giaquinto later that same evening, Dr. VanRooyen concluded that the provider in the hallway met the standard of care in determining that Ms. Martin could be cleared of her collar and backboard. (B-37-39; B-48).

Ultimately, the jury concluded that Plaintiff failed to meet her burden of proof and returned a verdict in Defendants' favor.

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ARGUMENTS

A. THE SUPERIOR COURT'S ORDERS PERMITTING TESTIMONY BY DR. VANROOYEN THAT THE PROVIDER WHO REMOVED PLAINTIFF'S CERVICAL COLLAR AND BACKBOARD IN THE HALLWAY MET THE STANDARD OF CARE WERE WELL-SUPPORTED BY A REASONED, LOGICAL EVALUATION BY AN UNDOUBTEDLY HIGHLY-QUALIFIED EXPERT.

1) Questions Presented. Whether the Superior Court appropriately permitted testimony by Dr. VanRooyen that the provider who removed Plaintiff's cervical collar and backboard in the hallway met the standard of care because the opinion was grounded in the facts and in Dr. VanRooyen's extensive, unquestioned emergency medicine expertise. In the highly unlikely event it was an abuse of discretion to admit the testimony, whether its admission rose to the level of "significant unfair prejudice" and "denied appellant a fair trial." *Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247 (Del. 2011).

2) Scope of Review. The Superior Court is given "'broad latitude' to decide whether the proffered expert testimony is sufficiently reliable and relevant" and this determination "to admit or exclude expert testimony under D.R.E. 702" will not be overturned absent "an abuse of discretion." *Perry v. Berkley*, 996 A.2d 1262, 1267 (Del. 2010). "Judicial discretion is the exercise of judgment directed by conscience and reason, and when a court has not exceeded the bounds of reason in view of the circumstances and has not so ignored recognized rules of law or practice so as to produce injustice, its legal discretion has not been abused."

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Firestone Rubber & Tire Co. v. Adams, 541 A.2d 567, 570 (Del. 1988) (citations omitted).

3) Merits of Argument.

Not only were Dr. VanRooyen's opinions concerning the hallway provider's care relevant and reliable, their admission did not result in such unfair prejudice that Plaintiff was denied a fair trial. Both of these arguments are addressed below.

a. Dr. VanRooyen's Opinions Were Relevant and Reliable.

First, Dr. VanRooyen's opinions were based upon his extensive, unquestioned knowledge and expertise in emergency medicine, Plaintiff's recollection of her examination in the hallway, and the documented results of an examination performed shortly thereafter on Plaintiff which indicated no evidence of a spinal cord injury. Together, these facts establish that the core issues of admissibility under Rule 702 are met – that is, that Dr. VanRooyen's testimony was relevant and reliable. *Sigismondi v. Hall*, 2007 WL 625286 (Del. Super. Ct. Feb. 8, 2007) (attached as Exhibit A) ("At its core, Rule 702 and *Daubert* require that the trial judge act as a gatekeeper by ensuring that any expert testimony that is offered is both reliable and relevant.").

Plaintiff takes no issue with the relevance of Dr. VanRooyen's opinion. The opinion goes directly to whether one of the providers who cared for

Plaintiff during the timeframe in question met the standard of care and is clearly relevant.

Instead, Plaintiff challenges the reliability of Dr. VanRooyen's opinion, claiming that, because Dr. VanRooyen does not know "exactly" what was done, he cannot opine on whether the examination met the standard of care. (Plaintiff's Corrected Opening Brief, p. 15). However, the law does not require an expert to know precisely every detail of the facts. Indeed, if complete knowledge of every detail were the prerequisite to expert testimony, experts would rarely, if ever, be permitted to offer their opinions.

To that end, "*Daubert* states that a judge should find an expert opinion reliable under Rule 702 if it is based on '**good grounds**,' *i.e.*, if it is based on the methods and procedures of science." *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 744 (3d Cir. 1994) (emphasis added) (citations omitted).[5] "The grounds for the expert's opinion merely have to be good, they do not have to be perfect." *Id.* (citations omitted). "The judge might think that there are good grounds for an expert's conclusion even if the judge thinks that there are better grounds for some alternative conclusion, and even if the judge thinks that a scientist's methodology

[5] As the Delaware Supreme Court has noted, "[s]ince Delaware Rule of Evidence 702 is identical to its federal counterpart," Delaware Courts may and have relied upon federal law in interpreting and applying D.R.E. 702. *M.G. Bancorporation, Inc. v. Beau*, 737 A.2d 513, 521 (Del. 1999). Therefore, the federal law cited in this Answering Brief evaluating Federal Rule of Evidence 702 is equally applicable to an evaluation of D.R.E. 702.

has some flaws such that if they had been corrected, the scientist would have reached a different result." *Id.*

The reliability tool is not meant to exclude evidence simply because there are questions concerning the reliability. *Paoli*, 35 F.3d at 744 ("[T]he reliability requirement must not be used as a tool by which the court excludes all questionably reliable evidence."). Rather, the question of reliability "turns on whether the expert's technique or principle [is] sufficiently reliable so that it will aid the jury in reaching accurate results." *Id.*

The Third Circuit emphasized that the standard for reliability "is not that high." *Paoli*, 35 F.3d at 745. In fact, the primary limitation on a judge's admissibility determinations in this context are not on ***including*** evidence, but rather on ***excluding*** it. *Id.* at 746 ("[T]he primary limitation on the judge's admissibility determinations is that the judge should not exclude evidence simply because he or she thinks that there is a flaw in the expert's investigative process which renders the expert's conclusions incorrect."). "The judge should only exclude the evidence if the flaw is large enough that the expert lacks 'good grounds' for his or her conclusions." *Id.*

Dr. VanRooyen's opinions were supported by several good grounds, including: (1) Plaintiff's testimony concerning the examination this individual performed; (2) Dr. VanRooyen's extensive knowledge of and experience with the

manner in which this examination is performed in emergency medicine; and (3) the results of an examination later that same evening on Plaintiff which revealed no basis to conclude that Plaintiff had a spinal cord injury.

First, Plaintiff described the examination as one in which the provider in blue scrubs asked her questions and palpated or touched her neck, which she acknowledged was not tender or painful.[6] (B-37).

Second, Dr. VanRooyen linked Plaintiff's description to the way in which this type of exam – which happens regularly and without documentation in Emergency Departments and which is "highly protocolized" – is typically performed and noted that her description matched the way in which this exam is supposed to be performed. (B-38). He was further able to couple Plaintiff's description with his experience and knowledge of how the procedure is performed

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[6] Although Plaintiff takes issue in the Opening Brief with the fact that this examination was not documented, Plaintiff's expert did not have any concerns about the fact that this event was not documented and Dr. VanRooyen likewise testified that this event is almost never documented and did not need to be documented. Plaintiff's reliance on Linda Jones, R.N. (who was not an expert in the case and with respect to whom the jury was specifically instructed not to consider her testimony as expert testimony) and Dr. Dorothy Dixon (who merely said that "important events" need to be documented) is also misplaced.

Moreover, as the issue raised by Plaintiff in this argument is not whether the standard of care was **actually met**, but rather whether Dr. VanRooyen had **sufficient factual basis to opine** on the standard of care, the point is irrelevant for purposes of this argument.

Plaintiff also raised the irrelevant, conclusory, and unsupported argument that PA Giaquinto's actions would have been different if he had known Plaintiff arrived at the hospital on a collar and backboard, but this argument was likewise contradicted by the evidence presented. In explaining why the collar removal did not need to be documented by the hallway provider, Dr. VanRooyen testified that the provider who ultimately saw Plaintiff was required to (and in this case did) evaluate for a spinal injury based upon Plaintiff's mechanism of injury, irrespective of whether Plaintiff arrived at the hospital in a collar and backboard or not. (B-38-39). Thus, the documentation of this event had no impact on the examination performed by PA Giaquinto.

to determine that the individual who performed the examination was trained in how to clear a spine because the steps Plaintiff described matched the steps a trained provider would take in evaluating a patient for spinal cord injury. (*Id.*).

Finally, Dr. VanRooyen was reassured that the hallway provider's examination was performed correctly and that the determination to clear Plaintiff's spine was appropriate by the later examination performed by PA Giaquinto, which demonstrated no spinal cord injury. (B-49). This conclusion was based on the simple, medically supported principle that if a spinal cord injury were detectable in the earlier examination, it would show up in the later examination. (*Id.*). Because no evidence of spinal cord injury appeared in the later appropriate examination, Dr. VanRooyen was further reassured that there was no evidence of spinal cord injury in the earlier examination where the collar and backboard were removed, making it appropriate for the hallway provider to remove the devices. (*Id.*).

Notwithstanding this thorough, reasoned, factual basis for Dr. VanRooyen's opinion, Plaintiff claims that this opinion was factually unsupported by making conclusory arguments that the opinion was an impermissible use of a statistical probability or that Dr. VanRooyen was "cherry-picking" the facts. Neither of these arguments is applicable here.

First, the case law does not support these arguments as a basis for excluding Dr. VanRooyen's testimony. To the contrary, the Delaware Supreme Court has

previously specifically rejected the arguments Plaintiff proposes for limiting expert testimony in *Ashley v. State*, 988 A.2d 420 (Del. 2010). In *Ashley*, the appellant attacked the trial judge's decision to allow expert testimony that the heroin found in appellant's vehicle was not for personal use, and instead was intended for delivery by appellant. *Id.* at 424. Appellant argued that the expert's approach was unreliable because "there are 'no facts to apply anything to,'" and therefore that the expert's opinion was inadmissible under Rule 702. *Id.*

The Supreme Court rejected this argument and held that the trial judge did not abuse his discretion in allowing the testimony, explaining that the appellant's concern was "not with the expert's method, but rather with his conclusion, and that any infirmity in the conclusion involved a fact question that was presented to the jury through cross examination." *Id.* at 424-25. Just as occurred in this case, the jury was given the opportunity to evaluate the expert's opinion following cross-examination and "resolved the fact issue" against appellant. *Id.*

Likewise, in *Sigismondi v. Hall* (Exhibit A), the Superior Court rejected a challenge to a medical expert's testimony which was based upon an incomplete review of the medical records. 2007 WL 625286 at *1-2 (Exhibit A). On cross-examination, the doctor was presented with additional medical records for the first time which indicated that one of the plaintiff's claimed injuries did not occur until months after the incident at issue. *Id.* at *1.

Nevertheless, on redirect, the doctor affirmed that his opinions remained unchanged even after reviewing the previously unseen medical records. *Id.* The defendant objected to this opinion, claiming that it was not supported by facts or scientific knowledge. *Id.* The Superior Court rejected this argument, noting that the doctor's decision to base his opinions on the medical records he had reviewed and the mechanics of the accident as presented to him by plaintiff were supported, at least in part, by the medical records he had reviewed and his opinions were therefore deemed admissible. *Id.* at *2.

Second, Dr. VanRooyen's opinion was different from the statistical testimony deemed inadmissible in *Timblin v. Kent Gen. Hosp. (Inc.)*, 640 A.2d 1021 (Del. 1994). In *Timblin*, the Court raised concern about testimony that a significant percentage of patients with the plaintiff's presentation have the same outcome plaintiff had, indicating that the plaintiff would have likely had the same outcome without taking into account whether the providers had some role in causing the outcome.

Here, Dr. VanRooyen's testimony was not solely based on the "protocolized" way in which this examination is typically performed. Instead, his opinion that the examination was appropriate was bolstered by Plaintiff's own testimony concerning how the examination was performed, as well as the results of

an exam performed within hours of the hallway provider's examination which showed that it was appropriate to clear Plaintiff from a collar and backboard.

Third, Defendants disagree with the accusation that Dr. VanRooyen was "cherry-picking" the facts (indeed, Plaintiff does not cite to any fact which contradicts Dr. VanRooyen's conclusions) but, even if this were so, this argument goes to the weight, not the admissibility, of the testimony, and Plaintiff had sufficient opportunity to cross-examine Dr. VanRooyen at trial. *See*, *e.g.*, *Porter v. Turner*, 954 A.2d 308, 313 (Del. 2008) (affirming the Superior Court's decision to admit expert testimony, although there was "some doubt" about the accuracy of the assumptions underlying the expert's opinions, because this doubt did not require exclusion of the opinions, but rather could be addressed in cross-examination).

The *Perry* case cited by Plaintiff is inapposite to the facts of this case. In *Perry*, an expert testifying on causation was unaware of previous injuries of the same type claimed by the plaintiff as a result of the incident at issue in the case. 996 A.2d at 1270. Here, there is no claim that the facts upon which Dr. VanRooyen relied were so fundamentally flawed. To the contrary, Plaintiff herself described an examination consistent with Dr. VanRooyen's extensive emergency medicine experience in how the examination is and should be done.

The *Vasquez v. Mabini*, 606 S.E.2d 809 (Va. 2005) case is likewise inapplicable. Setting aside for the moment that *Vasquez* is a Virginia case, the

expert in *Vasquez* made economic projections of what the decedent plaintiff's earnings would have been had she not died, which were wholly unsupported by the plaintiff's previous earnings and efforts to find employment.[7] *Id.* at 811.

Here, there are no such concerns. Plaintiff herself reported the examination performed, and medical records from shortly thereafter established that Plaintiff had no indication of spinal cord injury while she was in the Emergency Department.

Thus, because Dr. VanRooyen's opinions are based upon sufficient facts, because any concerns regarding the completeness and accuracy of these facts could have been (and in many instances were) explored in cross-examination, and because the case law supports admission of the testimony, the Superior Court correctly determined that Dr. VanRooyen's opinions were admissible.

b. Dr. VanRooyen's Opinions Did Not Significantly Unfairly Prejudice Plaintiff.

In the unlikely event the Court determines that it was an abuse of discretion to admit the well-reasoned opinions of a highly-qualified expert, the Court would then determine "whether the abuse constituted significant unfair

[7] Plaintiff also cites cases from Illinois (*LeClercq v. The Lockformer Co.*, 2005 WL 1162979 (N.D. Ill. Apr. 28, 2005) (largely dealing with whether experts were sufficiently qualified to offer opinions) and Wisconsin (*Nationwide Agribusiness Ins. Co. v. August Winter & Sons, Inc.*, 2014 WL 4920799 (Wis. Ct. App. Oct. 2, 2014) (where the expert made no effort to link the facts that supposedly supported his opinion to his opinion, despite being questioned on this issue) which are also inapplicable.

prejudice and denied the appellant a fair trial." *Sheehan*, 15 A.3d at 1253. However, Dr. VanRooyen's testimony regarding the care provided by the provider in the hallway did not rise to this level.

First and foremost, Plaintiff makes no effort in the Opening Brief to explain why Dr. VanRooyen's testimony regarding the care of the hallway provider rose to this extreme level. Nor, Defendants believe, could she under the facts.

The hallway provider's care was not presented as an issue by Plaintiff in her case-in-chief through any expert testimony. Plaintiff's case-in-chief focused on the care provided by PA Giaquinto, and whether he met the standard of care.

In fact, Plaintiff asked **no** questions of her emergency medicine expert regarding whether the hallway provider's care met the standard of care.[8] Although Plaintiff now presents this issue as the central issue in her appeal, the trial unfolded in a very different manner and with a very different focus.

Thus, the jury could reasonably have concluded that the lack of convincing evidence presented by Plaintiff on the issue of whether the hallway provider breached the standard of care alone was enough to render a verdict that Plaintiff

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[8] On cross-examination, Dr. Smith volunteered that he believed it was a breach of the standard of care for the cervical collar to be removed in the hallway. (B-79). However, the jury could reasonably have ignored or given little credibility to this off-hand and non-responsive comment during cross examination. Dr. Smith never offered any explanation of why he believed this was a breach, nor did Plaintiff follow-up on this testimony. In any event, Dr. Smith certainly did not provide the detailed rationale Dr. VanRooyen offered to the jury in support of his conclusion that the standard of care was met by this provider and, as with the other testimony concerning whether the standard of care was met, it appears that the jury placed greater confidence in Dr. VanRooyen's opinions.

failed to meet her burden of proof that the standard of care was not met. *See*, *e.g.*, *Cuonzo v. Shore*, 958 A.2d 840, 845 (Del. 2008).

For this reason as well, Plaintiff's appeal should be denied on this issue.

B. THE SUPERIOR COURT APPROPRIATELY DENIED PLAINTIFF'S MOTION FOR NEW TRIAL BECAUSE THE JURY'S VERDICT IN FAVOR OF DEFENDANTS WAS SUPPORTED BY THE EVIDENCE.

1) Questions Presented. Whether the Superior Court appropriately denied Plaintiff's Motion for New Trial because the jury's verdict was supported by the expert testimony of Dr. Deutsch, Dr. VanRooyen, and, in many cases, Plaintiff's expert, Dr. Smith.

2) Scope of Review. A trial judge's denial of a motion for new trial will only be overturned if there is an "abuse of discretion." *Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979).

3) Merits of Argument.

At its core, Plaintiff's claim is that the jury should not have given Dr. VanRooyen's testimony so much credence. However, that is precisely what the jury is entitled to do.

Plaintiff rightly acknowledges that asking this Court to reverse the Superior Court's denial of a new trial "is a daunting task, and rightly so." Nevertheless, Plaintiff points to three places where she contends the evidence did not support the verdict: (1) that Dr. VanRooyen's opinions concerning the care provided by the provider in the hallway were unsupported; (2) that the care provided by the provider in the hallway had to be documented; and (3) Policies 127 and 1002.

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When considering a motion for a new trial under Delaware Superior Court Civil Rule 59, a trial judge must give "enormous deference" to the jury's verdict. *Cuonzo*, 958 A.2d at 844. A trial judge may set aside a jury verdict only if the evidence so heavily outweighs the verdict that a reasonable jury could not have reached that result. *Storey*, 401 A.2d at 465. "It is clear that a trial judge should not set aside a jury verdict based upon the weight of the evidence unless the evidence preponderates so heavily against the jury verdict as to render the latter unreasonable." *Schmidt v. Hobbs*, 1988 WL 116388, at *1 (Del. Oct. 14, 1988) (citing *Storey*, 401 A.2d at 465) (attached as Exhibit B).

In order to uphold the verdict in this case, the Court need only conclude that a reasonable jury could find that Plaintiff failed to meet her burden of proving that either Defendant breached the standard of care. *See Cuonzo*, 958 A.2d at 845. The Court "must attempt to reconcile any apparent inconsistencies in a jury's verdict[,]" and "[t]he verdict will stand as long as there is one possible method of construing the jury's answers as consistent with one another and the general verdict." *Yarusso v. Int'l Sport Mktg., Inc.*, 1999 WL 463531, *7 (Del. Super. Ct. Apr. 1, 1999) (citing *Grand Ventures, Inc. v. Whaley*, 622 A.2d 655, 664 (Del. Super. 1993), *aff'd*, 632 A.2d, 63, 72 (Del. 1993)) (attached as Exhibit C).

Plaintiff carried the burden of proving by a preponderance of the evidence that the Defendants breached the standard of care through expert testimony. 18

Del. C. § 6853(e). After hearing five days of testimony, seeing numerous exhibits, and deliberating amongst themselves, the jury concluded that the standard of care was not breached. Plaintiff now claims that this decision was against the great weight of the evidence, but this argument ignores much of the evidence presented to the jury.

A large part of the argument put forth by Plaintiff rests upon a lack of appreciation of the fact that only one standard of care issue was presented to the jury by Plaintiff's own emergency medicine expert. Dr. Smith posited clearly that his only allegation concerned one prong of the five NEXUS criteria, namely, the "neurologic deficit" prong. (B-86). He opined that Plaintiff's bilateral hand pain qualified as a neurologic deficit. (*Id.*) He specifically acknowledged, however, that the other four criteria were met. (*Id.*). He further acknowledged that the nurses met the standard of care. (B-78). Despite this narrow and focused standard of care opinion from Dr. Smith, Plaintiff raises issues of documentation, supervision, and protocols never referenced by Plaintiff's own expert and, in fact, contradicted by Plaintiff's own expert.

Dr. Smith's sole allegation of a breach regarding the care provided by PA Giaquinto was refuted directly by Dr. VanRooyen, an Emergency Department physician at Brigham and Women's Hospital and a professor at Harvard Medical School with a forty-two page curriculum vitae. He testified that all five NEXUS

criteria were met and that Plaintiff was appropriately clinically cleared. (B-39; B-41-45). He explained that pain is not a "neurologic deficit," and that instead a "deficit" is the loss of something, such as weakness (the loss of strength) or numbness (the loss of feeling). (B-43). By way of example, he highlighted the portion of the T-Sheet where neurologic deficits were to be noted, and explained that there was no listing for pain under that category – only sensory (numbness) and motor (weakness) functions. (*Id.*).

Finally, although Plaintiff's Opening Brief is largely focused on the care provided by the individual in the hallway who removed Plaintiff's cervical collar, Plaintiff did not ask either of her experts at trial whether this care was appropriate (or, as she now claims, inappropriate). As set forth above, § 6853(e) clearly provides that "[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."

Although Plaintiff did not elicit testimony regarding the care provided in the hallway to Plaintiff, Defendants elicited confirmation that this care was appropriate through Dr. VanRooyen, and the jury ultimately accepted his analysis. As set forth above, his opinions concerning the care provided by the hallway provider were well-supported.

As is often the case in a matter which makes it to trial, the jury heard evidence from Plaintiff's experts that the standard of care was not met, and they also had highly credible testimony from Defendants' well-credentialed standard of care expert that the care provided met (and in some places exceeded) the applicable standard of care, specifically addressing the concerns raised by Plaintiff's experts in his testimony. There was more than sufficient weight to the Defendants' evidence for the jury to reach its verdict.

Plaintiff highlights only two areas where she claims the evidence was insufficient: (1) Dr. VanRooyen's testimony concerning whether the provider in the hallway met the standard of care; and (2) that Policies 127 and 1002 mandated a different result.

As set forth in greater detail above, Dr. VanRooyen's opinion concerning the care provided by the individual in the hallway to Ms. Martin was factually, medically, and logically supported, and was largely uncontradicted.

Concerning Policy 127's reference to clearance by a "physician," Defendants' response is two-fold: (1) Dr. VanRooyen specifically testified that policies do not establish the standard of care (B-35); and (2) both Plaintiff's own ED expert, Dr. Smith, and Dr. VanRooyen specifically testified that PA's could see patients without having an attending see the patient afterwards, and neither expert took issue with a PA clearing a patient like Plaintiff (B-35; B-76-77; B-79).

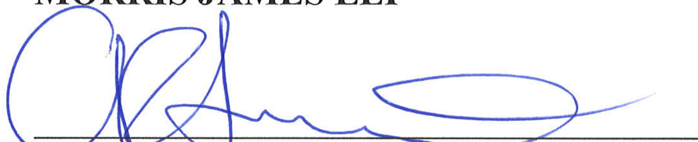
Policy 1002 is likewise irrelevant as neither of Plaintiff's experts testified that Trauma Policy 1002 was applicable to Plaintiff's care, and Dr. VanRooyen specifically and clearly addressed why it was **not** applicable to Plaintiff, and instead was designed for a patient with "major multi-organ trauma" (B-52).

Plaintiff's Opening Brief's focus on theories of breaches which are unsupported by expert testimony or which are, at the very least, the subject of contested expert testimony, is insufficient to sustain Plaintiff's substantial burden in establishing that a new trial is warranted and, accordingly, Plaintiff's appeal should be denied.

CONCLUSION

Because the Superior Court appropriately permitted Dr. VanRooyen to testify that the hallway provider met the standard of care based on Plaintiff's testimony, Dr. VanRooyen's extensive expertise, and the results of the later examination of Plaintiff, and because the Superior Court appropriately denied Plaintiff's Motion for New Trial because the jury's verdict was supported by substantial evidence, Defendants respectfully request that Plaintiff's appeal be denied.

MORRIS JAMES LLP



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CERTIFICATE OF SERVICE

I, Courtney R. Hamilton, hereby certify that on this 4th day of November, 2015, I have caused the following document to be served electronically on the parties listed below:

Appellees' Answering Brief and Appendix to Appellees' Answering Brief

Online service to:

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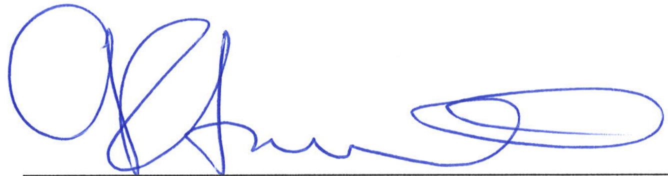

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