

Case No. 125150

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In the  
**Supreme Court of Illinois**

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SUSAN STEED, as Independent Administrator of the Estate of GLENN STEED, deceased,

*Plaintiff-Respondent,*

v.

REZIN ORTHOPEDICS AND SPORTS MEDICINE, S.C., an Illinois Corporation,

*Defendant-Petitioner.*

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On Appeal from the Illinois Appellate Court,  
Third Judicial District, Case No. 3-17-0299,  
There on Appeal from the Circuit Court of the Twelfth Judicial Circuit  
Will County, Illinois, Case No. 10 L 340,  
The Honorable Theodore J. Jarz, Presiding

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BRIEF OF *AMICI CURIAE* UNIVERSITY OF CHICAGO MEDICINE,  
INGALLS MEMORIAL HOSPITAL, RUSH UNIVERSITY MEDICAL  
CENTER, NORTHSORE UNIVERSITY HEALTH SYSTEM, ADVOCATE  
HEALTH CARE, NORTHWESTERN MEMORIAL HOSPITAL, LOYOLA  
UNIVERSITY MEDICAL CENTER, AND SOUTHERN ILLINOIS  
HEALTHCARE

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## INTEREST OF THE *AMICI*

The University of Chicago Medicine, Ingalls Memorial Hospital, Rush University Medical Center, Northshore University Healthsystem, Advocate Healthcare, Northwestern Memorial Hospital, Loyola University Medical Center, and Southern Illinois Healthcare (collectively, the “*Amici*”), are among the largest health care providers in the State of Illinois. Together they treat hundreds of thousands of patients in Illinois each year. The *Amici* have the shared mission of improving the health and wellbeing of the communities they serve by providing the highest quality health care to their patients. The *Amici* have a unique perspective on, and understanding of, health care policy and the ways in which institutional standards can impact patient care. They respectfully submit this brief to inform this Court of the negative effects the appellate court’s ruling will have on institutional health care standards throughout Illinois.

In their efforts to provide the highest level of care to their patients, the *Amici* and other health care providers throughout the state often establish protocols, policies, and guidelines that require more of their staff than the bare minimum required by the relevant medical standard of care. Those practices work to increase the overall level of patient care and should therefore be encouraged. As a matter of public policy, the law should not expose health care providers to greater or additional liability simply because they set their expectations higher than what is minimally required by the medical standard

of care. Indeed, doing so would create perverse incentives for health care providers to lower their quality of patient care to avoid this new liability.

The *Amici* respectfully submit this brief so that the Court may better understand the errors in the appellate court's application of the law regarding the standard of care, and how those errors will result in unintended and negative consequences on institutional health care policy, and ultimately, on patient care.

### STATEMENT OF FACTS<sup>1</sup>

Plaintiff's decedent Glenn Steed suffered a partial tear of his Achilles tendon on January 29, 2009. C2334.<sup>2</sup> On February 17, 2009, Mr. Steed went to the Rezin Orthopedics and Sports Medicine, S.C. ("Rezin") office in Plainfield, Illinois, where he was examined and diagnosed with his injury by Dr. Stephen H. Treacy, M.D. C1318, C1329. Dr. Treacy told Mr. Steed to return to the office to receive a plaster cast within a day or two, and to come back for another follow-up appointment two weeks later. C1323. Dr. Treacy wrote those instructions on Mr. Steed's "super bill," a document which he provided to Jodi Decker, the Rezin receptionist on duty that day. C1332.

Ms. Decker scheduled Mr. Steed to receive his cast on February 19, 2009, but she did not schedule a subsequent follow-up appointment. C2710. After

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<sup>1</sup> This brief addresses only the appellate court's holdings related to the institutional duty and standard of care. This section is therefore limited to a recitation of the facts that are relevant to those holdings.

<sup>2</sup> Citations to the common law record are made herein as C \_\_\_\_.

receiving his cast on February 19, 2009, Rezin receptionist Victoria Hare scheduled Mr. Steed for a follow-up appointment on March 13, 2009, approximately three and a half weeks after his initial evaluation. C1247-49.

Mr. Steed called Rezin's office in Joliet, Illinois, on February 25, 2009, and his appointment was rescheduled from March 13, 2009 to March 12, 2009. C2827. Mr. Steed's achiness began to improve, but on the evening of March 7, 2009, he felt a new pain in his right thigh. C2958. By the morning of March 8, 2009, Mr. Steed had died of a pulmonary embolism that originated in his right leg as a deep vein thrombosis. C2965-66, 3006-07.

It was established at trial that Dr. Treacy's professional custom and practice included noting the date of a patient's follow-up appointment at the bottom of the "super bill." C1323-35. It was also established that Rezin's internal custom and practice was that receptionists would schedule appointments within one or two days of the date a physician ordered for a patient's return, or possibly later depending on the patient's schedule and the physician's approval. C1270-71, C2724-25.

The jury heard testimony regarding the applicable standard of medical care from three expert witnesses. Plaintiff's orthopedic surgeon expert, Dr. Mathew Jimenez, testified that the standard of care required Dr. Treacy and Rezin to schedule Mr. Steed's follow-up appointment within two weeks after his initial appointment. C3009-10.

Rezin called Dr. Michael Pinzur, an orthopedic surgeon and the Quality Medical Director for Loyola Hospital. Dr. Pinzur testified that scheduling Mr. Steed's follow-up appointment within four to six weeks of his initial evaluation would satisfy the standard of care. C3183-84, C3210. Dr. Treacy similarly testified that the medical standard of care would have allowed for Mr. Steed's follow-up appointment to be scheduled up to four weeks after his first evaluation. C1452-54. In other words, both Dr. Pinzur and Dr. Treacy opined that Rezin complied with the applicable standard of care when it scheduled Mr. Steed's follow-up appointment three and a half weeks after his first appointment.

The court instructed the jury that in deciding whether Rezin was negligent, it could "consider opinion testimony from qualified witnesses, and evidence of policies and procedures." C2200. The court also instructed the jury that "[t]he law does not say how a reasonably careful orthopedic office practice would act under these circumstances. That is for you to decide." (*Id.*) After the jury returned a general verdict in favor of Rezin, Plaintiff moved for judgment notwithstanding the verdict, arguing that the circuit court should not have allowed the jury to make a factual finding as to whether Rezin breached the applicable standard of care. C2329-57. The court denied Plaintiff's motion and Plaintiff appealed. C3315.

The appellate court reversed the jury's verdict and entered judgment in Plaintiff's favor. *Steed v. Rezin Orthopedics and Sports Medicine*, 2019 IL App

(3d) 170299-U. In doing so, the appellate court found that the evidence conclusively established that “the standard of care of a ‘reasonably careful’ treating institution was to follow the written order on the super bill.” *Id.* ¶ 28. The appellate court reached that conclusion by relying *exclusively* on the testimony regarding Rezin’s scheduling protocol and Dr. Treacy’s custom and practice with regard to scheduling follow-up appointments. *Id.* ¶¶ 27-28. It held that the expert testimony regarding the medical standard of care had no bearing on the institutional standard of care. *Id.* ¶ 29. Thus, according the appellate court, there was no factual issue for the jury to decide as to Rezin’s negligence because the receptionists testified that they failed to follow Dr. Treacy’s instructions on the super bill. *Id.* ¶¶ 28-29. This appeal followed.

### ARGUMENT

Illinois courts have long held that the standard of care to be applied to a health care facility facing a claim of institutional negligence may be established by a variety of evidence, including expert testimony on the relevant medical and professional standards. Here, the appellate court disregarded the expert testimony presented at trial, and erroneously found that the institutional standard of care was conclusively established by evidence of the facility’s custom and practice alone.

That departure from the well-settled case law sets a dangerous precedent and sends the wrong message to health care providers. The appellate court’s decision will expose health care providers to greater liability if they set

administrative guidelines, policies, and procedures that exceed the medical and professional standard of care in any way. Following the appellate court's reasoning, a facility that sets its own internal standards higher than the medically accepted standard, will thus automatically be held to a higher standard of care in a negligence action than the physicians it employs. Such an imbalance will only encourage health care providers to *lower* the bar and establish internal policies and procedures that sufficiently meet the *minimum* standard of care. It will, in this regard, lead to a "race to the bottom" for Illinois health care providers.

Health care facilities should be incentivized to provide the highest possible level of care by setting internal policies and guidelines that exceed the minimum level of acceptable care. The appellate court's decision will lead to the opposite result, discouraging health care providers from seeking to providing the highest achievable level of care. For that reason, the *Amici* respectfully ask this Court to reverse the appellate court's decision and reinstate the jury verdict in favor of Rezin.

**I. The appellate court erred in holding that the jury could not consider expert testimony to determine the standard of care applicable to Rezin.**

The appellate court held that the testimony regarding Rezin's internal policies and protocols, as well as Dr. Treacy's custom and practice, was sufficient on its own to conclusively establish the standard of care that Rezin was required to satisfy. *Steed*, 2019 IL App (3d) 170299-U, ¶¶ 27-29. The appellate court erroneously found that Rezin "presented no evidence" to refute

Plaintiff's contention that the standard of care required Rezin to schedule Mr. Steed's follow-up appointment within two weeks of his initial evaluation. *Id.* ¶ 29. It reached that finding by improperly disregarding the expert testimony of Dr. Treacy and Dr. Pinzur as to the applicable standard of care.

As the appellate court explained, Plaintiff's claim against Rezin in this case relied on a theory of institutional negligence. *Id.* ¶ 25. Thus, the duty Rezin owed to Mr. Steed was to "act as would a 'reasonably careful' health care provider under the circumstances." *Id.* ¶ 26 (citing *Advincula v. United Blood Servs.*, 176 Ill. 2d 1, 29 (1996)). It is well established that that whether a health care provider is reasonably careful "may be shown by a wide variety of evidence, including, but not limited to, *expert testimony*, [] bylaws, statutes, accreditation standards, custom, and community practice." *Advincula*, 176 Ill. 2d at 29 (emphasis added); *see also Greenberg v. Michael Reese Hosp.*, 83 Ill. 2d 282, 293 (1980) (finding it appropriate that "a broad range of evidence be available to establish the applicable standard of care" for institutional negligence cases). This Court has made it clear that bylaws, customs, and regulations may aid the jury "in deciding what was feasible and what the defendant knew or should have known," but they do "not conclusively determine the standard of care." *Darling v. Charleston Comm. Mem. Hosp.*, 33 Ill. 2d 326, 332 (1965); *see also Advincula*, 176 Ill. 2d at 38 ("In Illinois negligence law, while custom and practice can assist in determining what is proper conduct, they are not conclusive necessarily of it.").

The appellate court thus erred as a matter of law in refusing to account for Rezin's expert testimony and relying exclusively on the custom, practice, and protocol evidence to establish the applicable standard of care. *Advincula*, 176 Ill. 2d at 29; *see also Johnson v. St. Bernard Hosp.*, 79 Ill. App. 3d 709, 718 (1st Dist. 1979) (expert medical testimony assisted in establishing the applicable standard of care in negligence action against hospital). The custom, practice, and protocol evidence was not conclusive. *Advincula*, 176 Ill. 2d at 38; *see also Ziegert v. S. Chicago Comm. Hosp.*, 99 Ill. App. 3d 83, 99 (1st Dist. 1982) (“[W]hile hospital bylaws are to be considered as evidence, they do not conclusively determine the standard of care.”); *Andrews v. Northwestern Mem. Hosp.*, 184 Ill. App. 3d 486, 494 (1st Dist. 1989) (explaining that “state licensing, regulations, the hospital’s bylaws, an accreditation standards are admissible but they do not conclusively determine the standard of care” for institutional negligence claims against hospital).

The appellate court further erred in finding that the evidence relating to the medical standard of care was relevant as to Dr. Treacy’s alleged negligence, but not as to Rezin’s. *See Steed*, 2019 IL App (3d) 170299-U, ¶¶ 27-29. This was not a case where Plaintiff’s theory of Rezin’s negligence was based purely on an alleged administrative error with no medical implications. Plaintiff’s theory was that Mr. Steed would not have died if Rezin had scheduled his follow-up appointment within two weeks of his initial visit. Because that theory inherently involves an analysis of medical issues, expert

testimony was necessary to establish whether Rezin's conduct satisfied the applicable standard of care. In other words, this case was "not the type which laypersons could evaluate without the aid of expert testimony." *Pogge v. Hale*, 253 Ill. App. 3d 904, 917 (4th Dist. 1993).

Dr. Treacy and Dr. Pinzur's testimony that the standard of care required a follow-up appointment within four to six weeks contrasted with Dr. Jimenez's testimony and the testimony regarding Rezin's protocols. That contrast created a disputed issue of fact that the circuit court correctly left to the jury to resolve. It was appropriate for the jury to consider the expert testimony in determining Rezin's standard of care, and the appellate court erred in removing that testimony from the analysis and thereby invading the province of the jury. *See Adivincula*, 176 Ill. 2d at 29.

**II. The appellate court's decision encourages providers to lower institutional health care standards, which will lead to unintended consequences on patient care.**

The effects of the appellate court's misapplication of the law in this case are not limited to an erroneous entry of judgment against Rezin. The appellate court's decision, if affirmed by this Court, signals to Illinois health care providers that they should not set their standards any higher than what is minimally necessary to satisfy the medical standard of care. It will, therefore, create a "race to the bottom" of acceptable standards for care, which will in turn lead to more negative outcomes for patients.

By holding that the standard of care in cases of institutional negligence can be established exclusively through evidence of the institution's customs, practices, and protocols, the appellate court has removed any incentive for health care providers to set internal guidelines and standards that are higher than they need to be. In fact, the appellate court's decision will act as a disincentive for health care institutions in Illinois to establish internal standards and protocols that require their staff to go above and beyond what is minimally required by the professional standard of care because by doing otherwise, providers will be voluntarily exposing themselves to a greater risk of liability in the event that those higher standards and protocols are not met.

Health care providers should be encouraged, as a matter of public policy, to expect more from their staff and medical professionals than the bare minimum. Establishing an administrative policy that is more stringent than what is medically required should not expose a health care provider to greater risk of liability. When providers strive for higher standards, it inevitably leads to better outcomes for patients. But, of course, the opposite is true, as well.

If the appellate court's decision stands, Rezin will suffer in this case, but in the long run, Illinois patients will pay a much heavier price. The *Amici* therefore respectfully ask this Court to reverse the appellate court's decision and avoid the perverse incentives and unintended consequences that would follow from its application.

## CONCLUSION

The jury in this case appropriately considered the contrasting expert testimony, as well as the evidence of Rezin's customs and practices, when determining the standard of care. The appellate court, on the other hand, misapplied the law by disregarding the relevant expert testimony and invaded the province of the jury. The appellate court's holding that the custom and practice evidence is conclusive of the standard of care will have a wide-ranging negative impact on health care policy and patients in Illinois. Health care providers will no longer be incentivized to set institutional standards that exceed the minimum acceptable standard of medical care. And lower institutional standards will almost certainly lead to more negative outcomes for Illinois patients. The *Amici* ask this Court to reverse the appellate court's decision and thereby continue to encourage health care providers to achieve the highest possible standard of care.

WHEREFORE, and for all the reasons stated above, *Amici Curiae* the University of Chicago Medicine Ingalls Memorial Hospital, Rush University Medical Center, Northshore University Healthsystem, Advocate Healthcare, Northwestern Memorial Hospital, Loyola University Medical Center, and Southern Illinois Healthcare, respectfully suggest that this Court should reverse the appellate court's decision and reinstate judgment in favor of Rezin Orthopedics and Sports Medicine, S.C.

Dated: March 3, 2020

Respectfully submitted,

The University of Chicago Medicine,  
Ingalls Memorial Hospital, Rush  
University Medical Center,  
Northshore University  
Healthsystem, Advocate Healthcare,  
Northwestern Memorial Hospital,  
Loyola University Medical Center,  
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CERTIFICATE OF COMPLIANCE

The undersigned, an attorney, certifies that Brief of the *Amici Curiae* the University of Chicago Medicine Ingalls Memorial Hospital, Rush University Medical Center, Northshore University Healthsystem, Advocate Healthcare, Northwestern Memorial Hospital, Loyola University Medical Center, and Southern Illinois Healthcare conforms to the requirements of Rule 341(a) and (b). The length of this Brief, excluding the words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 2,701 words.

Dated: March 3, 2020

/s/ J. Timothy Eaton