SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

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SUSSEX COUNTY COURTHOUSE
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RE: ***Kennedy v. Invacare Corp. and Neighborcare, Inc.***
C.A. No. 04C-06-028-RFS

Date Submitted: November 1, 2005
Date Decided: January 31, 2006

Dear Counsel:

This is my decision on Defendant Invacare's ("Invacare") Motion for Reargument. For the following reasons, Invacare's Motion for Reargument is denied.

**STATEMENT OF THE CASE**

On September 9, 2002, Jeannie and James Kennedy ("the Kennedys') were renting a motor operated bed manufactured by Invacare Inc. The bed was installed and maintained by Neighborcare Services Corporation ("Neighborcare"). Jeannie Kennedy used the bed during her recuperation from knee replacement surgery. Mrs. Kennedy injured her right knee while using the bed on September 9, 2002. The Kennedys filed suit against both Invacare and Neighborcare on theories of negligence,

*res ipsa loquitor*, and strict product liability. Essentially, the Kennedys allege that the Defendants failed to provide a reasonably safe bed, failed to warn of a dangerous condition, and failed to properly inspect the bed.

Plaintiffs have submitted a single expert's report in support of their claim that Invacare acted negligently. Plaintiff's expert, Robert B. Benowitz, states that the bed malfunctioned in a manner that, "should not occur absent a problem with the design or manufacture of the bed by Invacare or improper maintenance, set up or handling by Neighborcare." At this stage of the action, Mr. Benowitz is the sole expert for the Plaintiffs on the causation issue.

Invacare has filed a motion for Summary Judgment arguing that it was entitled to a decision in its favor as a matter of law under Superior Court Rule 56. Invacare argued that this Court needed to exclude Plaintiff's expert report, under Delaware Rule of Evidence 702, because it was "too speculative." Defendant asserted that an expert must prioritize the causes of the mishap. If Mr. Benowitz's report is excluded, there is no expert testimony which is required to support this negligence action. Neighborcare joined in with Invacare's motion.

This Court ruled that the Kennedys' expert report was sufficient under Delaware Rule of Evidence 702. Accordingly, with this report as admissible evidence, Defendant's Motion for Summary Judgement was denied.

Defendant Invacare filed this Motion for Reargument, alleging that this Court erred in ruling that, "*with respect to Invacare* the proffered expert opinion cannot be distinguished from the facts in *Phillips* [*v. Delaware Power and Light Co.*, 216 A.2d 281 (Del.1966)]"[1]

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[1]Defendant's Motion for Reargument, at 1

## DISCUSSION

The standard for a Rule 59(e) motion for reargument is well defined under Delaware law. A motion for reargument "will be denied unless the Court has overlooked a controlling precedent or legal principles, or the Court has misapprehended the law or facts such as would have changed the outcome of the underlying decision." *Board of Managers of the Delaware Criminal Justice Information System v. Gannet Co.*, 2003 Del.Super. Lexis 27 at *4. A motion for reargument is not intended to rehash the arguments already decided by the court. *McElroy v. Shell Petroleum, Inc.*, Del.Supr., 618 A.2d 91 (table), No. 375, 1992, Moore, J. (Nov. 24, 1992)(Order).

Invacare argues in their motion that the Court's decision of September 15, 2005, demonstrates a misapprehension of the law and facts as it pertains to Invacare's case. However, Invacare's entire motion rests upon a disagreement with this Court as to how the ruling in *Phillips* relates to this case. In spite of this Court's ruling that the facts in *Phillips* are clearly distinguishable from the facts in this case, Defendant asserts that when Invacare is looked at as a defendant distinguishable from Neighborcare, the facts of *Phillips* are no longer distinguishable. This is not the case.

In *Phillps*, the two competing possible reasons for the bursting of the pipe were negligence of the party and cold weather. In this case, the competing possible reasons for Mrs. Kennedy's injuries are negligence by Invacare and/or negligence by Neighborcare. Under Defendant's theory, if the court were to grant summary judgment for Invacare, it would then be forced to also grant summary judgment in favor of Neighborcare under the same argument.

This Court fully considered the argument being made by Defendant in its decision on September 15, 2005. This Court's decision of that date clearly explains how this case is

distinguishable from *Phillips*. Accordingly, this Court believes the expert testimony of Mr. Benowitz to be admissible and therefore finds that summary judgment in favor of defendant Invacare is denied.

**CONCLUSION**

Considering the foregoing, Invacare's motion to reargue is DENIED.

**IT IS SO ORDERED.**

Very truly yours,

Judge Richard F. Stokes