

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

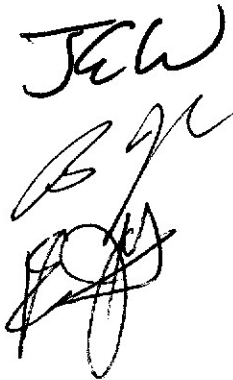
FIRST CIRCUIT

NUMBER 2010 CA 0456

DAWN VERDIN, WIFE OF AND DON A. VERDIN

VERSUS

HOSPITAL SERVICE DISTRICT NO. 1 OF THE PARISH OF TERREBONNE,  
STATE OF LOUISIANA, THE OWNER AND OPERATOR OF TERREBONNE  
GENERAL MEDICAL CENTER AND HENRY LAWRENCE HAYDEL, II,  
M.D., FELIX MATHIEU, M.D., AND CHARLES J. LEDOUX, JR., M.D.



Judgment Rendered: September 10, 2010

\*\*\*\*\*

Appealed from the  
Thirty-Second Judicial District Court  
In and for the Parish of Terrebonne, Louisiana  
Trial Court Number 145,551

Honorable Randall Bethancourt, Judge

\*\*\*\*\*

Patrick H. Hufft  
Charles C. Justice, III  
New Orleans, LA

Attorneys for  
Plaintiffs – Appellants  
Dawn and Don A. Verdin

Barry Boudreaux  
Carl Schwab  
Houma, LA

Attorneys for  
Defendant – Appellee  
Henry L. Haydel, II, M.D.

\*\*\*\*\*

BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

Welch, J.

Plaintiffs, Dawn and Don Verdin, appeal a judgment entered in accordance with a jury's verdict finding that defendant, Dr. Henry Lawrence Haydel, II, did not breach the standard of care in his treatment of Don Verdin, as well as the trial court's denial of their motion for a judgment notwithstanding the verdict. We affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

This medical malpractice action stems from a back surgery performed on Mr. Verdin by Dr. Haydel, an orthopedic surgeon, on February 27, 2002, at Terrebonne General Medical Center (TGMC). Mr. Verdin suffered from a herniated disc at the L5-S1 level. It is undisputed that while performing the laminectomy/discectomy surgery to remove disc material, Dr. Haydel's instrument punctured Mr. Verdin's iliac artery, necessitating emergency surgery to repair the injury. Upon completion of that emergency surgery, it was discovered that Mr. Verdin's bowel had also been punctured, requiring another surgery to repair that wound. While it was somewhat disputed whether Dr. Haydel or the general surgeons repairing the wound to the iliac artery caused the bowel, or cecum injury, Dr. Haydel admits in brief that the cecum was penetrated during the lumbar surgery. Following the lumbar surgery and the complications arising therein, Mr. Verdin developed a severe infection, requiring an extended hospital stay, during which he developed a number of additional complications prior to his discharge on March 23, 2002.

Mr. Verdin filed a medical malpractice complaint with the Louisiana Patient's Compensation Fund against Dr. Haydel, asserting that Dr. Haydel failed to obtain his informed consent to the procedure, breached the standard of care in performing the lumbar surgery, and failed to promptly recognize, diagnose, and treat the injuries arising during the surgery. He also brought claims against Dr.

Felix Mathieu and Dr. Charles Ledoux, the general surgeons who repaired the artery and bowel perforations, Dr. William Kinnard, who allegedly participated in the lumbar surgery, and TGMC. The Medical Review Panel found that the evidence did not support the conclusion that the hospital or any of the medical professionals failed to meet the applicable standard of care as charged in the complaint. With respect to Dr. Haydel, the panel specifically concluded that: (1) Mr. Verdin was adequately informed of the risks of the procedure; (2) Mr. Verdin experienced a rare known occurrence in spinal surgery, injury to the iliac artery and cecum, which was promptly recognized; and (3) surgical consultation was obtained promptly to repair the injuries to the artery and cecum. The panel further found that Drs. Mathieu and Ledoux responded promptly, properly performed the indicated procedure, and treated Mr. Verdin properly postoperatively.

On June 17, 2005, Mr. Verdin and his wife filed this lawsuit against TGMC and Drs. Haydel, Mathieu, and Ledoux. In the petition, plaintiffs asserted three theories of liability with respect to Dr. Haydel: (1) Dr. Haydel failed to properly inform Mr. Verdin of the risks of the surgery and thus failed to obtain Mr. Verdin's informed consent; (2) Dr. Haydel negligently perforated Mr. Verdin's right iliac artery and cecum during the surgery, causing him to undergo two remedial surgical procedures which caused him to develop sepsis, necessitating an extended ICU stay requiring intubation, ventilation, and sedation, during which time he also developed pneumothorax and a wrist drop; and (3) Dr. Haydel failed to promptly recognize, diagnose, and treat Mr. Verdin's injuries, to properly chart records, and to assist in the emergency exploratory surgery.

Summary judgment was rendered in favor of Drs. Mathieu and Ledoux and TGMC. The case against Dr. Haydel was tried by a jury. Following a four-day trial, during which numerous expert witnesses testified, the jury returned a verdict finding that Mr. Verdin gave informed consent to the lumbar surgery and that Dr.

Haydel did not breach the standard of care in his treatment of Mr. Verdin. The trial court entered judgment on the verdict. Plaintiffs filed a motion for judgment notwithstanding the verdict and alternatively a motion for a new trial, which were denied by the trial court. This appeal, in which plaintiffs allege prejudicial error in various evidentiary determinations, attack the jury verdict as manifestly erroneous, and challenge the denial of their motion for JNOV, followed.

### **EVIDENTIARY CHALLENGES**

Plaintiffs contend that the trial court committed a number of prejudicial errors which combined to cause an allegedly erroneous jury verdict and resulted in a denial of their right to a fair trial. These alleged errors include: (1) the trial court's denial of their motion in limine to exclude the opinion of the Medical Review Panel; (2) the trial court's admission of and failure to strike the testimony of Dr. Chad Millet at trial; (3) the failure of the court to change the caption of the case to eliminate the parties previously dismissed; (4) the trial court's allowing defense counsel to improperly influence the jury in closing arguments; and (5) the trial court's action in changing the jury form two times during jury deliberations.

#### **Opinion of the Medical Review Panel**

Plaintiffs filed a motion to strike or exclude evidence of the Medical Review Panel's opinion on the basis that it was fatally flawed, highly prejudicial, and dangerously misleading. First, they insisted that the panel's reasons for rejecting the malpractice claim demonstrate that its opinion was based on an erroneous legal standard that has been specifically repudiated by the Louisiana Supreme Court in **Fusilier v. Dauterive**, 2001-0151 (La. 7/14/00), 764 So.2d 74. In **Fusilier**, the Supreme Court rejected the proposition that the standard of care is met when a physician, who negligently causes injuries, takes measures to correct them. **Fusilier**, 2001-0151 at p. 10, 764 So.2d at 81. Plaintiffs pointed out that in the opinion, the panel stated that Mr. Verdin experienced a rare known occurrence in



spinal surgery which was promptly recognized, and surgical consultation was obtained promptly to repair the injuries to the artery and cecum. Plaintiffs argued that the panel's failure to address the issue of negligent surgical procedures in its opinion was dangerously misleading to the jury as lay persons could read the opinion to mean that simply recognizing and taking care of an injury promptly is sufficient to satisfy the standard of care contrary to the **Fusilier** holding. Plaintiffs urged that giving the jury a **Fusilier** charge at the end of the trial would serve to further confuse the jury about the proper standard by which to judge Dr. Haydel's actions.

In denying the motion, the trial court concluded there was no danger that the admission of the panel's opinion would confuse the jury because the parties could offer evidence explaining the opinion and have experts explain the basis for the opinion to the jury. In this appeal, plaintiffs insist that the anticipated jury confusion did result and that confusion clearly contributed to the improper jury verdict. We disagree.

Louisiana Revised Statutes 40:1299.47(H) provides that the report of the expert opinion reached by the Medical Review Panel shall be admissible in any action brought by the claimant in a court of law. In addition to the panel's findings, testimony, and depositions given thereafter which support the panel finding, are also admissible. **Galloway v. Baton Rouge General Hospital**, 602 So.2d 1003, 1007 (La. 1992).

Dr. Chad Millet, an orthopedic surgeon and member of the Medical Review Panel reviewing Mr. Verdin's claim, testified by video deposition. He stated that the panel received TGMC's chart of the surgery and Dr. Haydel's records and that all of the panel physicians discussed the medical issues involved in detail including the surgery, Dr. Haydel's surgical technique, and the complications that arose during the surgery. Dr. Millet attested that none of the physicians on the panel had

any criticism of the manner in which Dr. Haydel provided medical treatment, including the surgery that Dr. Haydel performed on Mr. Verdin. Dr. Wilmot Ploger, who testified at trial as an expert in the field of orthopedic surgery, was also a member of the panel. He stated that he looked at all the evidence and concluded that the manner in which Dr. Haydel performed the surgery was correct and that Dr. Haydel met the standard of care of a board certified orthopedic surgeon.

As the trial court correctly recognized in overruling the motion to exclude the panel's opinion, if there could have been any confusion in the language chosen by the panelists regarding whether the surgical technique utilized by Dr. Haydel met the standard of care, the expert witnesses' testimony clearly established that the panelists did consider whether Dr. Haydel's performance during the lumbar surgery breached the standard of care. Thus, plaintiffs' insistence that the panel found Dr. Haydel did not breach the standard of care simply because he recognized the injuries resulting from the surgery and had them promptly treated was contradicted by the evidence. Moreover, the jury was given a **Fusilier** charge in which it was instructed that the standard of care is not met when a physician who negligently causes injuries takes prompt corrective measures. The court instructed the jury that if it found Mr. Verdin's injury was a known surgical complication and that Dr. Haydel promptly recognized and treated the complication, such was not determinative of liability. Under these circumstances, we do not believe that the introduction of the opinion of the Medical Review Panel presented the danger of confusing the jury or leading it to apply the wrong standard of care in this case.

Plaintiffs also sought to exclude the opinion of the Medical Review Panel on the basis that two of its members, Dr. Julius Levy and Dr. Millet, were not qualified to serve on the panel. The basis for the attack on Dr. Levy was that he was not a spine or orthopedic surgeon, while plaintiffs attacked Dr. Millet's

qualifications on the basis that he had not performed or assisted in a spinal surgery for six years prior to Mr. Verdin's lumbar surgery.

Louisiana Revised Statutes 40:1299.47(C)(3)(f) permits physicians who hold an unrestricted license to practice medicine in Louisiana and who are engaged in the active practice of medicine in this State to serve on medical review panels. Plaintiffs brought claims against medical professionals who were general surgeons; thus, the fact that Dr. Levy was not a spine or orthopedic surgeon is of no moment. Moreover, as we find no error in the trial court's conclusion that Dr. Millet was qualified to render an opinion on the standard of care of orthopedic surgeons, he was clearly competent to serve on the Medical Review Panel.

For all of the above reasons, we find that the trial court did not err in allowing the introduction of the opinion of the Medical Review Panel into evidence.

#### **Testimony of Dr. Chad Millet**

During the videotaped deposition and in the trial court, plaintiffs objected to Dr. Millet's qualifications, urging that he did not possess the requisite knowledge to qualify as an expert witness regarding the standard of care because he had not assisted nor performed spine surgery for six years preceding Mr. Verdin's 2002 surgery. They also asserted that although Dr. Millet had taken continuing medical education courses in the field of orthopedics, those courses were not specifically in the area of spine surgery, and therefore, they submitted that Dr. Millet was not qualified to testify regarding the procedure employed by Dr. Haydel, the complications arising from lumbar surgeries, or the known risks involved in lumbar surgeries. The trial court overruled the objection and accepted Dr. Millet as an expert in the field of orthopedic surgery.

In challenging this ruling, plaintiffs contend that the trial court erred in qualifying Dr. Millet as an expert witness because the physician failed to meet the

expert witness requirements of La. R.S. 9:2794(D)(1)(b) and (c). These provisions require that in order to qualify as an expert witness on whether a physician departed from the standards of medical care, the physician must have knowledge of accepted standards of medical care for the treatment of the condition involved in the claim, and the physician must be qualified on the basis of training to offer an expert opinion regarding those accepted standards of medical care.

Trial courts have great discretion in determining the qualifications of experts and the effect and weight to be given to expert testimony. In the absence of a clear abuse of this discretion, this court will not disturb a trial court's ruling on the qualification of a witness. **Bradbury v. Thomas**, 98-1678, p. 9 (La. App. 1<sup>st</sup> Cir. 9/24/99), 757 So.2d 666, 673. It is well settled that the law does not require an expert to be actively practicing in the particular specialty about which he or she will testify. **Bradbury**, 98-1678 at p. 10, 757 So.2d at 674. The court need only be satisfied that the witness is qualified to give testimony regarding the applicable standard of care. *Id.*

The record reflects that Dr. Millet is a board certified orthopedic surgeon who performed 100-150 lumbar laminectomy/discectomy procedures while in private practice from 1990 through 1996. Although Dr. Millet ceased doing lumbar procedures in 1996 to focus on arthritis and joint replacement surgeries, he took continuing medical education courses in all of the subspecialties of orthopedics, including spinal surgery, and he was recertified as an orthopedic specialist in 2002. Dr. Millet stated that when he served on the Medical Review Panel in 2005, he was board certified with privileges to do the type of spinal surgery he was reviewing. The mere fact that Dr. Millet did not perform spinal surgery for a six-year period prior to Mr. Verdin's surgery is insufficient to disqualify him from testifying regarding the standard of care in this subspecialty of orthopedic surgery. Dr. Millet was actively engaged in the practice of orthopedic

surgery at the time of his testimony, had significant experience in performing spinal surgery, took continuing education courses on all of the subspecialties of orthopedic surgery, including spinal surgery, and was board certified with privileges to perform the type of surgery performed on Mr. Verdin. Under these circumstances, we find the trial court did not abuse its discretion in finding that Dr. Millet possessed the requisite knowledge and experience to testify as an expert in orthopedic surgery and render an opinion on whether Dr. Haydel breached the standard of care.

#### **Additional alleged procedural irregularities**

In their fourth assignment of error, plaintiffs contend that the trial court committed three additional errors that likely caused the jury confusion and ultimately led to the jury's erroneous verdict. At trial, plaintiffs asked the trial court to alter the caption of the lawsuit to remove the names of Drs. Mathieu and Ledoux, who had been originally named as defendants and who were dismissed by summary judgment, on the basis that if their names were left on the caption, and the court told the jury they were dismissed by summary judgment, the jury may imply that plaintiffs settled with these doctors. The trial court denied the request, stating that it would read the caption and then inform the jury that due to pretrial motions, the only remaining parties were plaintiffs and Dr. Haydel. At the outset of the trial, the court informed the jury that plaintiffs alleged that Dr. Haydel improperly performed the surgery and injured the iliac artery and cecum. The court instructed the jury before trial that the parties stipulated that Dr. Haydel injured the iliac artery and that if called to testify, Drs. Mathieu and Ledoux would testify that Dr. Haydel injured the cecum during the operation. Moreover, the jury was instructed that Dr. Haydel did not know whether he injured the cecum but deferred to Drs. Mathieu and Ledoux. Thus, the jury knew that the other doctors who were sued denied liability and attributed the injuries to Dr. Haydel's actions;

therefore, there was no danger that the jury would be confused because of the caption as to which medical professional was being charged with negligence.

Nor do we find merit in plaintiffs' claim that the fact the jury was given two revised jury verdict forms proves that the jury was hopelessly confused and renders its verdict defective and unreliable. The record reflects that the jury initially asked the trial court about a question on the first jury verdict form regarding causation and the court instructed the jury again on the law on causation. Shortly thereafter, the jury questioned whether the verdict form was worded correctly, and the trial court presented counsel for plaintiffs and defendant with a new verdict form the court believed was worded correctly, and plaintiffs' attorney acknowledged that the verdict form accurately reflected the law. The trial court later went back on record stating that the jury had a question about informed consent. The trial court then submitted a third jury form to the parties and plaintiffs' attorney objected on the basis that the fact the jury was on its third form in two hours showed that the jury was confused. The trial court brought the jury back into the courtroom and told the jury:

[T]here are two components of what the plaintiffs are saying of why there should be a judgment against Dr. Haydel. One is this breach in the standard of care in treatment of Don Verdin. That's one. The other one has to do with the informed consent. Okay. The plaintiff says Mr. Verdin did not give the doctor informed consent. . . . So those are two different things. That's why they're No. 1 and No. 2. If you choose to find that Dr. Haydel either breached the standard of care in the surgery, or if you find that Mr. Verdin didn't give Dr. Haydel informed consent, then you move on and complete the questionnaire. Okay? On the other hand, if you feel that Dr. Haydel did not breach the standard of care, and that Don Verdin did give the doctor informed consent, then it's over, sign it, date it, and come back in. Okay? So that's the deal.

The members of the jury exited the courtroom at 3:38 p.m. to further deliberate and by 4:19 p.m., the court reconvened after being informed that the jury reached a verdict. The jury verdict form appearing in the record shows that the jurors found that Dr. Haydel did not breach the standard of care in his care and treatment of Mr.

Verdin and that Mr. Verdin gave informed consent to the surgery. The jury left the sections relating to causation and damages blank, signed the form, and dated it. The trial court obviously cleared up any confusion the jury may have had over the wording of the previous jury forms with the third jury form and the jury responses indicated that the jury was in no way confused when it rendered its verdict.

Lastly, regarding plaintiffs' claim that it was prejudicial error for the defense to mention Dr. Haydel's family history of medical practice in the community during closing argument, we note that plaintiffs failed to assert an objection in the trial court prior to the conclusion of the trial and have not preserved this issue for review. Moreover, the reference to the medical service of Dr. Haydel's family in discussing Dr. Haydel's accomplishments in general during closing arguments could hardly be found to be so prejudicial as to warrant a reversal of the jury verdict.

As we have found no evidentiary or other error contributing to the jury's verdict, we shall review its liability determination for manifest error.

### **LIABILITY**

In order to prevail in a medical malpractice action against a physician who practices in a particular specialty, the plaintiff must establish: (1) the degree of care ordinarily practiced by physicians within the involved medical specialty; (2) that the physician either lacked this degree of knowledge or skill or failed to use reasonable care and diligence, along with his best judgment in the application of that skill; and (3) that as a proximate result of this lack of knowledge or skill or failure to exercise this degree of care the plaintiff suffered injuries that would not have otherwise been incurred. La. R.S. 9:2794. In other words, the plaintiff must establish the standard of care applicable to the physician, the breach of that standard of care, and the substandard care caused an injury the plaintiff would not have otherwise suffered. **Thibodaux v. Leonard J. Chabert Medical Center,**



2006-0599, p. 4 (La. App. 1<sup>st</sup> Cir. 9/14/07), 981 So.2d 686, 689, writ denied, 2007-2039 (La. 12/7/07), 969 So.2d 640.

The physician's conduct is always evaluated in terms of reasonableness under the circumstances existing when his professional judgment was exercised. The physician will not be held to a standard of perfection nor evaluated with the benefit of hindsight. *Id.* When medical experts are called to testify as to the standard of care and breach, the views of such witnesses are persuasive, although not controlling, and any weight assigned to their testimony by the trier of fact is dependent upon the expert's qualification and experience. The trier of fact must assess the testimony and credibility of witnesses and make factual determinations regarding those evaluations. **Bradbury**, 98-1678 at pp. 8, 757 So.2d at 673.

In this case, the parties presented conflicting expert medical testimony on whether Dr. Haydel breached the standard of care. Where there are contradictory expert opinions concerning compliance with the applicable standard of care, the reviewing court will give great deference to the conclusions of the trier of fact. **Bradbury**, 98-1679 at pp. 8-9, 757 So.2d at 673. The issue on appeal to be resolved is not whether the jury was right or wrong, but whether its conclusion was a reasonable one. **Stobart v. State, Department of Transportation and Development**, 617 So.2d 880, 882 (La. 1993).

The record reflects that Dr. Haydel performed spinal surgery on Mr. Verdin at the L1-S1 disc level to repair a herniated disc. The disc is surrounded by a ligament called the annulus which holds the disc into position between vertebral bodies. When a herniation occurs, disc material can herniate out of or within the annulus, which can cause nerve root impingement. Mr. Verdin had a contained herniated disc, meaning the disc material was confined within the annulus.

During the surgery to remove the disc material that had herniated out of the disc space, Dr. Haydel's instrument penetrated the anterior annulus and punctured



Mr. Verdin's iliac artery and cecum. Dr. Mathieu, the general surgeon who repaired the puncture wounds, testified that both the puncture wounds in the artery and the cecum were three millimeters or an eighth of an inch. Dr. Mathieu testified that the iliac artery lies right on top of the annulus of the L5-S1 disc and that the cecum is in the immediate vicinity of the artery, just millimeters away from the anterior annulus.

The type of surgery performed on Mr. Verdin is referred to as a "blind" procedure because the surgeon cannot see the tip of his instrument while it is inside the disc space. The experts agreed that in order to meet the standard of care required of a board certified orthopedist in performing this type of surgery, a surgeon was required to develop a plan to ensure that his instrument did not penetrate the anterior annulus and enter the retroperitoneal cavity, where it could encounter vessels and organs.

Dr. Haydel, a board certified orthopedic surgeon who performed over 100 discectomy operations prior to operating on Mr. Verdin, testified that in order to avoid going through the ligament into the retroperitoneal cavity, he employs the "feel" approach in which he feels for the annulus and relies on the resistance he feels from the anterior annulus to ensure he does not go past that level. Additionally, in determining the point at which to stop, Dr. Haydel relied on the depth at which he placed his instrument. Dr. Haydel testified that this is the method he was trained to employ by other spine surgeons.

The evidence showed that a known, but rare, complication can occur during spinal surgery when the surgeon's instrument penetrates the anterior annulus and enters the retroperitoneal cavity and encounters vessels or organs in close proximity to the annulus. One way that this can occur is when the annulus, upon which the surgeon is relying to gauge distance inside the disc space, is incompetent because there is some deficiency in the annulus and the surgeon, who is unable to

feel resistance from the ligament, penetrates the annulus with his instrument and enters the retroperitoneal cavity. Injuries to the iliac artery and the cecum are known medical risks of lumbar surgery.

In this case, Dr. Haydel testified that Mr. Verdin's annulus was incompetent and his instrument went outside the anterior annulus because the annulus did not provide resistance. Orthopedic surgeons testifying for the defense squarely stated that injuries such as those Mr. Verdin experienced can occur in the absence of a breach in the standard of care by the physician and can happen even when the surgeon is properly trained, has extensive experience, and uses the carefulness of a board certified surgeon.

Three experts in orthopedic surgery testified that Dr. Haydel's method of guarding against going through the annulus with his instrument met the standard of care required of orthopedic surgeons and that Dr. Haydel did not breach the standard of care but employed accepted surgical practices in performing Mr. Verdin's surgery. On the other hand, plaintiffs' expert suggested that Dr. Haydel should have employed additional precautions during the surgery which defense experts insisted were not necessary to meet the standard of care in performing spinal surgery.

Plaintiffs' expert, Dr. Joseph Rauchwerk, testified that he performed 800-1000 similar lumbar surgeries from 1979-2002. He testified that Dr. Haydel's performance fell below the standard of care because Dr. Haydel did not measure the disc using the grids on the MRI, did not use instruments with measurements on them or put measurements on his instruments, did not use loops to assist him, and relied on the anterior annulus to let him know how deep he was going. Dr. Rauchwerk testified that Dr. Haydel could have taken measurements of the disc space from Mr. Verdin's MRI which had grids on it as described in a 1996 article he referenced discussing how to measure the anterior margin of the annulus for

surgical planning. Such measurements, he explained would tell the surgeon how far he could insert his instrument without damage to the vessels and organs on the anterior aspect of the vertebral body. When asked if knowing this mean measurement is reasonable and called for by the standard of care, Dr. Rauchwerk replied that it was reasonable especially if a surgeon does not do many lumbar surgeries or does other types of surgeries such as cervical surgery. Dr. Rauchwerk testified that taking measurements was an "absolute must" for any doctor who operates on a person's spine. However, on cross-examination, Dr. Rauchwerk conceded that such measurements are one of many "options" and are not a "must."

Dr. Rauchwerk further testified that if the surgeon does not obtain these measurements from the MRI, the only way to avoid complications is to use instruments with markings on them representing the actual depth it is safe to go. He added that these markings tell a surgeon who is inexperienced in lumbar surgery how deep he can go. He testified that the depth to which the instrument penetrates the disc space should never exceed 2.7 centimeters and that the surgeon who performs occasional spine surgery should have instruments marked at this level. The third breach of the standard of care identified by Dr. Rauchwerk was Dr. Haydel's failure to use loop magnification with high intensity lighting. He claimed that with this type of equipment, the surgeon can see the white annulus.

In this appeal, plaintiffs concede that they are not asserting that marking instruments and measuring MRI films are necessary in every case, acknowledging that Dr. Rauchwerk admitted that these procedures were "optional." They insist that the testimony of the defense witnesses Dr. Charles Billings and Dr. Ploger establishes that Dr. Haydel breached the standard of care because Dr. Haydel admitted he did not take any other precaution other than feeling for resistance from the annulus. We disagree.

Dr. Billings, who performed over 1000 spinal surgeries in 28 years of

surgical practice, and reviewed depositions, medical records, hospital records, and Dr. Haydel's post-operative report, testified that the manner in which Dr. Haydel performed the surgery on Mr. Verdin met the standard of care applicable to board certified orthopedic surgeons. Dr. Billings testified that he does a similar procedure as the one described by Dr. Haydel in performing spinal surgery. He agreed that the standard of care required an orthopedic surgeon to develop a plan to ensure he does not penetrate the anterior annulus and acknowledged that the literature gives surgeons "suggestions" on developing this plan. However, he emphatically stated that the failure to use instruments with markings on them is "absolutely not" a breach of the standard of care and is not a requirement or necessity for a successful discectomy. He observed that marked instruments could be useful in residency training programs to give the residents an awareness of the appropriate dimensions, but did not believe that markings provided any measure of safety as they could be covered with blood and tissue, making the markings unreadable, and could not prevent catastrophic complications. He also stated that measuring the dimension of disc space is a "guideline" which would not stop the potential complication of an instrument being placed too far, regardless of whether the surgeon employs that method. Dr. Billings testified that he uses loop magnification but some surgeons do not. He does not instruct his residents to use loops or headlights, but instructs them that some type of illumination or good operating lights are critical. When asked if it is shown that a surgeon's only method of knowing when to stop when inside a disc space is by purely gauging the resistance of the anterior annulus wall, that was an "accident waiting to happen," Dr. Billings admitted "it could be," and stated that most surgeons rely on several different physical parameters of the disc to determine where they are in the disc space. He stated that he instructs his residents to look at the instrument and that observing the contour of the vertebra may give you some useful information. Dr.

Billings opined that taking into account the method employed by Dr. Haydel in this case and the literature, Dr. Haydel met the standard of care in orthopedic surgery.

Dr. Ploger, a board certified orthopedic surgeon who performed approximately 400 spinal surgeries similar to Mr. Verdin's from 1974-2002, testified that he examined all of the evidence and concluded that the manner in which Dr. Haydel performed the surgery was correct and met the standard of care of a board certified orthopedic surgeon. Dr. Ploger testified that he performed all of his surgeries the same way Dr. Haydel did them by feeling for resistance from the anterior annulus and did not use instruments with markings for distance on them. Rather, he stated, in order to know how far he is inside the disc space with his instrument, he relies on his knowledge of the length of his instrument and the resistance he feels from the anterior longitudinal ligament to determine at which point to stop. He also acknowledged that even if the surgeon knows the width and height of the different angles of the disc, most of the discectomy procedure is done "blindly" by doing a "feel-type" procedure because the surgeon cannot see the front portion of his instrument as he is pulling disc material out of the disc space.

Dr. Millet, who performed 100-150 lumbar surgeries from 1990-1996, found the technique employed by Dr. Haydel in performing Mr. Verdin's surgery was appropriate and was "very close" to the technique he utilized in performing his surgeries. He testified that a surgeon's instrument could penetrate the confines of the annulus without there being a breach in the standard of care if there is a defect in the annulus or there is disc material that has gone outside the disc space. He attested that he and most orthopedic surgeons use the "feel approach" rather than measurements to determine the depth at which they can place their instruments in the disc space.

A review of the entire record reveals that the jury simply accepted the testimony of three expert orthopedic surgeons that Dr. Haydel did not breach the

standard of care during the spinal surgery performed on Mr. Verdin and discounted the testimony of plaintiffs' expert. The jury was presented with evidence that the standard of care did not require Dr. Haydel, who had extensive surgical experience and an obvious knowledge of his instruments, to use instruments with measurements on him or to use diagnostic films to measure the disc space as suggested by plaintiffs' expert. Although Mr. Verdin unfortunately experienced serious complications during his back surgery, the evidence showed that these complications can arise even when a surgeon is exercising the utmost care required of a board certified orthopedic surgeon. Given that there were conflicting expert witness opinions concerning whether Dr. Haydel complied with the standard of care, this court is bound to give the jury deference in its decision to accept the expert opinions offered by the defense witnesses. We find the jury's verdict to be a reasonable one based on the record, and we may not disturb that ruling.<sup>1</sup>

### **CONCLUSION**

For the foregoing reasons, the judgment appealed from is affirmed. All costs of this appeal are assessed to plaintiffs, Don and Dawn Verdin.

**AFFIRMED.**

---

<sup>1</sup> In light of this finding, it is unnecessary to address the trial court's denial of the motion for JNOV.