

NOT DESIGNATED FOR PUBLICATION

JAMES HONORE * NO. 2000-CA-2302
VERSUS * COURT OF APPEAL
EUGENE J. GOMES, D.D.S., * FOURTH CIRCUIT
ET AL. * STATE OF LOUISIANA
*
*
*

CONSOLIDATED WITH: CONSOLIDATED WITH:
JAMES HONORE NO. 2000-CA-2303
VERSUS
EUGENE J. GOMES, D.D.S.,
AND THE MEDICAL
PROTECTIVE COMPANY

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NOS. 92-15018 C/W 94-6860, DIVISION "I-7"
HONORABLE TERRI F. LOVE, JUDGE

JUDGE MAX N. TOBIAS, JR.

(Court composed of Judge Steven R. Plotkin, Judge Michael E. Kirby, and Judge Max N. Tobias, Jr.)

PLOTKIN, J., CONCURS WITH WRITTEN REASONS

EDWIN R. MURRAY
MICHAEL C. DARNELL
MURRAY, DARNELL & WILLARD, L.L.C.
1540 NORTH BROAD STREET
NEW ORLEANS, LA 70119
COUNSEL FOR PLAINTIFF/APPELLANT

CHARLES J. FULDA, IV
JACQUELINE G. GRIFFITH
GRIFFITH, BATTARD & JOHNSON
1615 POYDRAS STREET
SUITE 1000
NEW ORLEANS, LA 70112
COUNSEL FOR DEFENDANT/APPELLEE

AFFIRMED AND REMANDED

Plaintiff, James Honore, appeals the judgment of the district court annulling a jury verdict in his favor on the basis of La. C. C. P. art. 2004. For the reasons set forth below, we affirm the judgment and remand the matter to the trial court for further proceedings.

Mr. Honore filed a medical malpractice action against defendant, Eugene Gomes, D.D.S., and his medical malpractice insurer, the Medical Protective Company, based on dental treatment Mr. Honore had received. Mr. Honore called one expert witness at trial, Texas dentist Larry Harkins, to testify that Dr. Gomes's treatment of the plaintiff failed to comply with the

requisite standard of care. Dr. Harkins testified that he was currently a licensed and practicing dentist in Texas. Based on his testimony, the court accepted Dr. Harkins as an expert in the field of general dentistry.

Following a jury trial, a verdict was rendered in favor of the plaintiff and against the defendants for \$65,000.00. The court entered judgment in conformity with the verdict on 22 May 1996.

Shortly after trial, the defendants discovered that Dr. Harkins did not possess a valid license to practice dentistry in the State of Texas at the time of trial on 6 May 1996, or his 18 August 1995 deposition. The defendants timely filed a petition to annul the judgment based on fraud and ill practices based on the false testimony that was instrumental in Dr. Hawkins being certified as an expert.

The matter was submitted to the court on the briefs. On 26 October 1999, the court granted judgment in favor of the defendants, annulling the judgment. In the reasons for judgment, the trial court found that the 1996 judgment was obtained by fraud due to the material misrepresentations made to the jury by the plaintiff's expert dental witness. The court stated that these misrepresentations deprived the jury of information vital to a determination concerning Dr. Harkins as an expert and his credibility in general. As such, the judgment was null for a vice of substance. In addition,

the court concluded that enforcement of the judgment against the defendants would be inequitable.

The plaintiff appeals this decision, arguing that a physician need not be licensed at the time of trial to qualify as an expert. He also argues that Dr. Harkins did not commit perjury or a fraud on the court because he was unaware that his license had been revoked. Finally, the plaintiff argues that the defendants were not deprived of a legal right and, thus, the trial court abused its discretion by annulling the judgment.

According to La. C. C. P. art. 2004, “a final judgment obtained by fraud or ill practices may be annulled.” There are two criteria to make this determination: (1) when the circumstances under which the judgment was rendered show the deprivation of legal rights of the litigant who seeks relief, and (2) when the enforcement of the judgment would be unconscionable and inequitable. *Kem Search, Inc. v. Sheffield*, 434 So. 2d 1067, 1070 (La. 1983). The article is not limited to cases of actual fraud or intentional wrongdoing, but is sufficiently broad to encompass all situations when a judgment is rendered through some improper practice or procedure which operates, even innocently, to deprive the party cast in judgment of some legal right. *Id.* The trial court has great discretion in deciding when a judgment should be annulled because of fraud or ill practice. *Id.* at 1071;

Belle Pass Terminal, Inc. v. Jolin, Inc., 99-2988, p. 6 (La. App. 1 Cir. 12/22/00), 774 So. 2d 1251, 1254.

The legal right of which a litigant must be deprived to have a judgment annulled has been defined as the opportunity to appear and assert a defense. *Johnson v. Jones-Journet*, 320 So.2d 533, 537 (La.1975); *Foret v. Terrebonne, Ltd.*, 93-676, p. 3 (La. App. 5 Cir. 1/25/94), 631 So.2d 103, 105. When ill practices are alleged, the court must examine the case from an equitable viewpoint to determine whether the party seeking annulment has met the burden of showing "how he was prevented or excused" from asserting his claims or defenses. *Foret*, 93-676 at p. 3, 631 So.2d at 105.

The trial court found that the defendants were prevented from attacking Dr. Hawkins's credibility on the basis of lack of licensure because he fraudulently held himself out to be a licensed dentist engaged in clinical practice when questioned at deposition and at trial. We agree. We find that the defendants were prevented from conducting a thorough cross-examination of Dr. Hawkins at trial. This deprivation is more significant because Dr. Hawkins was the plaintiff's only expert witness. We cannot say that Dr. Hawkins's lack of licensure did not affect the jury. In other words, as noted by the trial court, the effect of Dr. Hawkins's testimony on the jury award is unknown. Thus, it would be inequitable to allow the jury verdict to

stand. We find that the trial court did not abuse its discretion in annulling the judgment.

Accordingly, we affirm the judgment of the trial court annulling the judgment of 22 May 1996 and remand the matter to the trial court for further proceedings.

AFFIRMED AND REMANDED