

NOT DESIGNATED FOR PUBLICATION

**JOHN C. PALMER AND
DIANE H. PALMER, HIS WIFE**

VERSUS

**TOUSSAINT A. LECLERCQ,
M.D.**

*

NO. 2004-CA-1609

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COURT OF APPEAL

*

FOURTH CIRCUIT

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STATE OF LOUISIANA

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CONSOLIDATED WITH:

**JOHN C. PALMER AND
DIANE H. PALMER, HIS WIFE**

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**TOUSSAINT A. LECLERCQ,
M.D.**

CONSOLIDATED WITH:

NO. 2004-CA-2221

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NOS. 97-8568 C/W 98-11580, DIVISION "H-12"
Honorable Michael G. Bagneris, Judge

* * * * *

Judge Roland L. Belsome

* * * * *

(Court composed of Chief Judge Joan Bernard Armstrong, Judge David S. Gorbaty, Judge Roland L. Belsome)

ARMSTRONG, C. J., CONCURS WITH REASONS

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AFFIRMED IN PART; REVERSED IN PART; RENDERED IN PART

The Appellants, Toussaint A. Leclercq, M.D. (“Dr. Leclercq”) and Louisiana Patient’s Compensation Fund (“PCF”), appeal the district court judgment in favor of the Appellees, John J. Palmer and Diane H. Palmer.

We affirm in part, reverse in part, and render in part.

STATEMENT OF FACTS

John Palmer and his ex-wife, Diane Palmer, brought a medical malpractice action against the on call neurosurgeon, Dr. Toussaint A. Leclercq (“Dr. Leclercq”), claiming his delay in coming to the hospital to diagnose and treat Mr. Palmer resulted in Mr. Palmer’s paralysis extending to his hands.

On the night of Saturday, February 12, 1994, just before midnight, Mr. Palmer was involved in a single vehicle accident. Mr. Palmer was found outside the vehicle. He was brought by ambulance to Memorial Medical Center (“Mercy Hospital”) emergency room with the chief complaint of not being able to move his legs.

Dr. Jacquelyn Kirby Helm (“Dr. Kirby Helm”) was the emergency room physician on duty that Saturday night and the early morning hours of Sunday, February 13, 1994. Dr. Kirby Helm’s examination of Mr. Palmer

revealed his paralysis extended from the mid-chest down. She further found he could move his arms, hands, and fingers. She ordered routine labs and a portable x-ray of the cervical spine. Dr. Kirby Helm reviewed the portable x-ray and did not see a fracture or any abnormality. The cervical collar was removed and the patient remained secured on the backboard. Upon learning that Mr. Palmer had multiple traumatic injuries, including paralysis, she had both the surgeon on call, Dr. Francisco Soler (“Dr. Soler”), and the neurosurgeon on call, Dr. Leclercq, paged to rule out internal bleeding and a spinal cord injury, respectfully.

Dr. Soler arrived at the emergency room sometime shortly after Mr. Palmer arrived. He examined Mr. Palmer and ruled out internal bleeding. However, efforts to reach Dr. Leclercq continued. Around 1:30 a.m. Dr. Kirby Helm made contact with Dr. Leclercq, described the patient’s condition, and requested his presence in the emergency room. Dr. Leclercq refused to come to the hospital and told her to get x-rays of the spine and let him know.

Additional x-rays of Mr. Palmer’s spine were taken and these were reported to Dr. Leclercq over the phone as being negative for a fracture. Even though Dr. Leclercq felt in his mind that Mr. Palmer probably had a fracture that was not diagnosed because of the difficulty of reading the x-ray,

he again refused to come to the hospital.

After Dr. Leclercq's second refusal to come to the hospital, Dr. Kirby Helm decided to contact the neurologist on call, Dr. Friedman, to see if he could help her determine on which level the spinal injury was located, but she reached Dr. Thomas Krefft ("Dr. Krefft"), the neurologist who was taking calls for Dr. Friedman that night. When Dr. Krefft informed Dr. Kirby Helm that he was a neurologist and recommended that she call a neurosurgeon, Dr. Kirby Helm told him that she had called a neurosurgeon, but he refused to come to the hospital. Due to the circumstances, Dr. Krefft came to the hospital and conducted a neurological examination. His results confirmed that Mr. Palmer's lower extremities were paralyzed but determined that his upper extremities were completely normal. Specifically, Mr. Palmer had sensation and strength in his hands and fingers. Later that same Sunday morning Dr. Leclercq finally came to the hospital and saw Mr. Palmer. However, he did not document a complete neurosurgical examination into the medical chart.

On Monday morning Dr. David Kline ("Dr. Kline") saw Mr. Palmer on a neurosurgical consultation, starting at 7:30 a.m. He found numerous hand problems that were not present during Dr. Kirby Helm's hand examination shortly after midnight on Sunday morning and Dr. Krefft's

hand examination at 4:00 a.m. on Sunday.

Mr. Palmer eventually had surgery in which he regained some gross motor function of his hands. Through rehabilitative therapy, Mr. Palmer regained some fine motor skills function in the right hand more than left; however, he remains wheelchair bound, paralyzed from the mid chest down into his legs.

A bench trial was held and a judgment rendered in favor of the Palmers on September 17, 2002, which was amended on May 27, 2004. The Palmers were awarded \$225,000 from the trial court on their medical malpractice claim against Dr. Leclercq. The trial court also issued a judgment taxing costs dated September 29, 2004 in the sum of \$15,084.75 against Dr. Leclercq. The PCF subsequently intervened and Dr. Leclercq and the PCF have appealed. Plaintiffs answered the appeal.

STANDARD OF REVIEW

The standard of review for factual findings in this case is the manifestly erroneous or clearly wrong standard. It is a well-settled principle that an appellate court may not set aside a trial court's finding of fact unless it is clearly wrong. Where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be

disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable. *Rosell v. ESCO*, 549 So.2d 840 (La. 1989). For the reviewing court, the issue to be resolved is not whether the trier of fact was wrong but whether the factfinder's conclusions were reasonable. *Stobart v. State trowth Dept. of Transp. and Development*, 617 So.2d 880 (La. 1993).

With respect to issues of law, the Court of Appeal is required to determine whether the trial court applied the applicable law appropriately. This Court stated in *Glass v. Alton Ochsner Medical Foundation*, 2002-0412, p. 3, 832 So.2d 403, 406 (La. App. 4 Cir. 11/6/02), that “the standard of review of appellate courts in reviewing a question of law is simply whether the court’s interpretative decision is legally correct.”

DISCUSSION

Assignments of Error

Dr. Leclercq, the PCF, and the Palmers present several assignments of error, which this Court will address and organize in the following sequence:

- (1) Dr. Leclercq contends that the trial court improperly determined that Dr. Leclercq committed medical malpractice with respect to his treatment of plaintiff, Palmer, when in fact; no physician-patient relationship existed between Dr. Leclercq and plaintiff at any time during the time period in question.
- (2) Dr. Leclercq contends that the plaintiff failed to prove, through testimony or the medical records, that any new injury or aggravation was caused by Dr. Leclercq’s non-involvement and

non-treatment during the time period at issue and the PCF contends that the trial court erred in finding that Dr. Leclercq was responsible for Palmer's change in condition from the night of the accident to the next morning.

- (3) The PCF contends that the trial court's determination of liability of Dr. LeClercq was erroneous as a matter of law, as there is no basis in law for Dr. LeClercq to be vicariously liable for acts and omission of other health care providers who treated Palmer and allocation of 100% fault to Dr. LeClercq for exacerbation of Palmer's injuries was erroneous, because in order to find Dr. LeClercq at fault, the trial court acknowledged that the care rendered by other health care providers caused further injury to John Palmer.
- (4) Dr. Leclercq contends that the plaintiff failed to prove through testimony, or the medical record, the extent of the injury to his left hand; therefore, failed to prove his damages and the PCP contends that the trial court erred in awarding \$225,000 damages to the Palmers for aggravation of John Palmer's paralysis of his left hand.
- (5) Fifth, Dr. Leclercq contends that the trial court erred in asserting court cost against Dr. Leclercq as a qualified health care provider.
- (6) Sixth, the plaintiff's contend that the trial court erred in permitting the PCF to intervene and in granting the fund a suspensive appeal.

First Assignment of Error

Dr. Leclercq contends that the trial court improperly determined that Dr. Leclercq committed medical malpractice with respect to his treatment of plaintiff, Palmer, when in fact, no physician-patient relationship existed between Dr. Leclercq and plaintiff at any time during the time period in question.

The evidence indicated that Dr. Leclercq learned of Mr. Palmer's condition from Dr. Kirby Helm. While talking to Dr. Kirby Helm via phone, he asked her to perform a CAT scan, which he assumed she would order since he asked her to do so, to determine what was wrong with Mr. Palmer and to let him know. When questioned what his plan was to manage Mr. Palmer, Dr. Leclercq testified that he was "hoping that the abdominal problem was finished and they would do a CAT scan of the spine and hopefully we would find out what's wrong." [Emphasis added].

This Court finds that when Dr. Leclercq, the on call neurosurgeon, ordered x-rays and asked Dr. Kirby Helm to report the results back to him, it constituted the rendering of "health care" as defined by the Louisiana Medical Malpractice Act, La.R.S. 40:1299.41, *et seq.* La.R.S. 40:1299.41 (A)(9) defines "health care":

(9) "Health care" means any act, or treatment performed to furnished, or which should have been performed or furnished, by any health care provider for, to or on behalf of any patient during the patient's medical care, treatment or confinement.

Accordingly, the trial court did not err in finding a physician-patient relationship existed between Dr. Leclercq, the on call neurosurgeon, and Mr. Palmer, the patient, during the time period in question.

Second Assignments of Error

Dr. Leclercq contends that the plaintiff failed to prove, through

testimony or the medical records, that any new injury or aggravation was caused by Dr. Leclercq's non-involvement and non-treatment during the time period at issue. The PCF contends that the trial court erred in finding that Dr. Leclercq was responsible for Palmer's change in condition from the night of the accident to the next morning.

When Mr. Palmer arrived at the hospital just before midnight on Saturday, Dr. Kirby Helm was the physician in charge of the emergency room. She testified that her examination of Mr. Palmer indicated movement of his arms, hands and fingers. Following Dr. Kirby Helm's examination, at approximately 4:00 a.m. Sunday, Dr. Krefft, a neurologist, examined Mr. Palmer and conducted his own examination that included examining reflexes in Mr. Palmer's arms, hands, and fingers. Dr. Krefft discussed in detail his examination of Mr. Palmer's hands including all the fingers and both thumbs. He had sensation and strength in his hands and fingers. Dr. Krefft further stated that if subsequent to his exam, if Mr. Palmer's examination showed that he lost use in both hands, that would have been a change in condition from what he saw, examined, and documented prior to 4:00 a.m. Sunday morning.

Later that same Sunday morning, Dr. Leclercq finally came to the hospital and personally saw Mr. Palmer. However, he did not document a

complete neurosurgical examination into the medical chart anytime on Sunday. On Monday morning Dr. David Kline saw Mr. Palmer on a neurosurgical consultation. Dr. Kline found numerous hand problems that were not present during Dr. Kirby Helm's hand examination shortly after midnight on Sunday morning and during Dr. Krefft's hand examination at 4:00 a.m. on Sunday morning.

The trial court found Dr. Kirby Helm and Dr. Krefft's exams to be acceptable. This Court finds that there was sufficient factual basis for the trial court to find that a change took place in Mr. Palmer's ability to use his hands and fingers.

Furthermore, at trial there were conflicting opinions between two expert neurosurgeons, Dr. Kline for Dr. Leclercq and Dr. Goodkin for the Palmers. The trial court sitting as finder of fact chose to accept Dr. Goodkin's opinion.

Dr. Goodkin was present when Dr. Kirby Helm and Dr. Krefft both testified. He accepted their testimony for the purposes of his foundation of facts. Dr. Goodkin stated that Dr. Leclercq's refusals to come in when called were breaches of the standard of care. In his opinion, those two breaches were contributing factors to the mechanism of further injury or further damage to Mr. Palmer.

Dr. Goodkin testified that there are two possible causes of the injury and the subsequent loss of function of Mr. Palmer's hand functions. One was edema, the swelling in the spinal court, that occurred because Dr. Leclercq did not come to the hospital, examine the x-rays, see the dislocation at C7-T-1 that the non-neurosurgeons missed, and reduce or at least protect the site of the dislocation. The other possibility was a secondary injury to an already traumatized cord that occurred because Dr. Leclercq did not examine the x-rays, those physicians did not know that there was a dislocation at the base of the neck. Accordingly, because they did not know that, and because Dr. Leclercq had not warned them to keep a collar on the patient to stabilize his neck, they log rolled him un-collared onto the x-ray table, thereby exposing the patient to secondary injury that would have explained the subsequent loss of hand function.

Dr. Goodkin affirmed that more probably than not had Dr. Leclercq met the applicable standard of care for a neurosurgeon, the injuries suffered by Mr. Palmer's hands would not have been what they are.

This Court finds that Dr. Goodkin's expert testimony, and the factual testimony of Dr. Kirby Helm and Dr. Krefft upon which he relied, together give sufficient grounds to support the trial court finding that there was a change in Mr. Palmer's condition that resulted in his loss of hand function.

Accordingly, the trial court did not err.

Third Assignments of Error

The LCF contends that the trial court's determination of liability of Dr. LeClercq was erroneous as a matter of law, as there is no basis in law for Dr. LeClercq to be vicariously liable for acts and omission of other health care providers who treated Palmer and allocation of 100% fault to Dr. LeClercq for exacerbation of Palmer's injuries was erroneous, because in order to find Dr. LeClercq at fault, the trial court acknowledged that the care rendered by other health care providers caused further injury to John Palmer.

As stated in the second assignment of error, Dr. Goodkin explained the two possible causes of Mr. Palmer losing hand functions. He further testified that Dr. Leclercq's failure to come to the emergency room in a timely fashion led to a sequence of events which allowed or added to problems which subsequently occurred and had Dr. Leclercq come in once he was called, more probably that not Mr. Palmer would not have lost his hand functions

The reason for Dr. Leclercq having to come in was that he was a board certified neurosurgeon who would see, diagnose and treat things that non-neurosurgeons could not. One of those things was the correct level of the dislocation. Dr. Goodkin testified that it is hard to get a good x-ray of

the C7-T1 level and he did not fault the physicians actually working on Mr. Palmer for not finding it. Without any neurosurgical guidance, the remaining physicians were left to do as well as they could under the circumstances. Because Dr. Leclercq did not examine the x-rays, those physicians did not know that there was a dislocation at the base of the neck.

Dr. Goodkin summarized his testimony by stating that there were two mechanisms, one or the other of which more probable that not caused Mr. Palmer to lose his hand functions, and that both mechanisms resulted from Dr. Leclercq's breach of the standard of care. The testimony of Dr. Goodkin substantiated that there was a neurosurgical standard of care that Dr. Leclercq breached. However, there is no testimony in the record establishing non-neurosurgical standard of care that would have applied to any of the other doctors.

Accordingly, this Court finds that these assignments of error are without merit.

Fourth Assignments of Error

Leclercq contends that the plaintiff failed to prove through testimony, or the medical record, the extent of the injury to his left hand; and therefore failed to prove his damages. The PCF contends that the trial court erred in awarding \$225,000 damages to the Palmers for aggravation of John Palmer's

paralysis of his left hand.

In *Youn v. Maritime Overseas Corp.* 623 So.2d 1257, 1261 (La. 1993), the Supreme Court dealt with the issue of whether the court of appeal erred in reducing the trial court's award of general damages. The Supreme Court specifically held:

The standard for appellate review of general damage awards is difficult to express and is necessarily non-specific, and the requirement of an articulated basis for disturbing such awards gives little guidance as to what articulation suffices to justify modification of a generous or stingy award. Nevertheless, the theme that emerges from *Gaspard v. LeMaire*, 245 La. 239, 158 So.2d 149 (1963) through *Coco v. Winston Industries, Inc.*, 341 So.2d 332 (La.1976), and through *Reck* to the present case is that the discretion vested in the trier of fact is "great," and even vast, so that an appellate court should rarely disturb an award of general damages. Reasonable persons frequently disagree about the measure of general damages in a particular case. It is only when the award is, in either direction, beyond that which a reasonable trier of fact could assess for the effects of the particular injury to the particular plaintiff under the particular circumstances that the appellate court should increase or reduce the award.

Given the temporary loss of function of hands, months of out of state rehabilitation, residual permanent impairment in Mr. Palmer's left hand and jurisprudence regarding quantum, the damage award of \$225,000 was reasonable given the trial court's broad discretion. Accordingly, the trial court did not err.

Fifth Assignment of Error

Dr. Leclercq contends that the trial court erred in assessing court costs against Dr. Leclercq as a qualified health care provider.

Louisiana law limits the liability of a qualified health care provider for damages arising out of a claim for medical malpractice. Specifically, La.

R.S. 40:1299.42 (B) states:

B. (1) The total amount recoverable for all malpractice claims for injuries to or death of a patient, exclusive of future medical care and related benefits as provided in R.S. 40:1299.43, shall not exceed five hundred thousand dollars plus interest and cost.

(2) A health care provider qualified under this Part is not liable for an amount in excess of one hundred thousand dollars plus interest thereon accruing after April 1, 1991, for all malpractice claims because of injuries to or death of any one patient.

(3)(a) Any amount due from a judgment or settlement or from a final award in an arbitration proceeding which is in excess of the total liability of all liable health care providers, as provided in Paragraph (2) of this Subsection, shall be paid from the patient's compensation fund pursuant to the provisions of R.S. 40:1299.44(C).

[Emphasis added.]

Regardless of who the parties are to a medical malpractice lawsuit, Louisiana law specifically limits the liability of a qualified health care provider with respect to a claim for medical malpractice. La. R.S.

40:1299.42(B) limits a plaintiff's recovery against a health care provider to \$100,000 plus interest.

The Louisiana Fifth Circuit Court of Appeal in a similar situation stated:

We believe La. R.S. 40:1299.42 B is clear that the limitation of liability for a qualified health care provider is \$100,000.00 plus *interest*. However, liability of LPCF is limited to \$500,000.00 plus *interest and cost*. We find support for this position in *Gladney v. Sneed*, 32,107 (La.App. 2 Cir. 8/18/99), 742 So.2d 642, *writ denied*, 1999-2930 (La.1/14/00), 753 So.2d 215. In *Gladney*, the court ruled that the assessment of court costs could not be made against a qualified health care provider. While *Gladney* only concerned court costs and did not involve a taxation of costs pursuant to article 970, we believe the rationale in *Gladney* holds true in the case before us, and we adopt its rationale. Therefore, we find the trial court erred in taxing costs to Dr. Bartholomew, and we amend the judgment taxing costs pursuant to La. C.C.P. art. 970 to name only the LPCF.

LeRay v. Bartholomew, 03-1370, (La. App. 5 Cir. 03/30/04) 871 So.2d 492, 499.

In light of the forgoing legislation and jurisprudence, this Court finds the trial court erred in taxing costs to Dr. Leclercq. This Court further amends the trial court's judgment to assess costs to the PCF, not Dr. LeClercq.

Since the award for costs is reviewable on appeal to the extent the

PCF has exposure to be assessed costs, the PCF has an interest or a right to object to the amount of costs awarded in this case. Thus, this Court will address the issue of whether the trial court's award of \$ 15,084.75 in costs was excessive.

“Courts have great discretion in assessing court costs.” *Cajun Electric Power Cooperative v. Owens-Corning Fiberglass Corporation*, 616 So.2d 645, 647 (La. 1993). Although the costs awarded at first blush seem excessive, the trial court has great discretion in assessing costs and should not be reversed unless there is an abuse of discretion. C.C.P. art. 1920; *Green v. Orleans Parish School Board*, 365 So.2d 834 (La. App. 4 Cir., 1979). This court finds that the trial court did not abuse its discretion. Accordingly, the trial court did not err.

Sixth Assignment of Error

The plaintiffs contend that the trial court erred in permitting the PCF to intervene and in granting the fund a suspensive appeal.

The PCF's right to intervene and appeal is statutorily recognized. La. R.S. 40:1299.44 (C)(6) specifically states:

Any settlement approved by the court shall not be appealed. **Any judgment** of the court fixing damages recoverable in any such contested proceedings **shall be appealable pursuant to the rules governing appeals in any other civil case tried by the court.**

[Emphasis added.]

The rules governing appeals in other civil cases include La.Code Civ.P. art. 1091 and La.Code Civ.P. art. 2086. Specifically, La.Code Civ.P. art. 1091 states:

A third person having an interest therein may intervene in a pending action to enforce a right related to or connected with the object of the pending action against one or more of the parties thereto by:

- (1) Joining with plaintiff in demanding the same or similar relief against the defendant;
- (2) Uniting with defendant in resisting the plaintiff's demand; or
- (3) Opposing both plaintiff and defendant.

In addition, La.Code Civ.P. art. 2086 states “[a] person who could have intervened in the trial court may appeal, whether or not any other appeal has been taken.”

The trial court held a contradictory hearing on the plaintiffs’ motion to strike the intervention and vacate the order of suspensive appeal and denied that motion in its entirety. This Order recognized the PCF’s right to intervene and it in effect, affirms the PCF’s right to intervene retroactive to the date of filing of the petition for intervention. See La.C.C.P. art. 1033.

Accordingly, the trial court did not err in allowing the PCF to intervene.

CONCLUSION

For the forgoing reasons, the trial court is affirmed in: (1) finding a physician-patient relationship existed; (2) finding a new injury or aggravation was caused by Dr. Leclerq's non-involvement and non-treatment; (3) finding Dr. Leclerq was responsible for Mr. Palmer's change in condition from the night of the accident to the next morning; (4) allocating 100% fault to Dr. Leclerq for exacerbation of Mr. Palmer's injuries; (5) awarding \$225,000 in damages; and, (6) permitting the PCF to intervene. However, the trial court's award taxing costs to Dr. Leclerq is reversed and the judgment of the trial court is amended to assess costs to the PCF, not Dr. Leclerq.

AFFIRMED IN PART; REVERSED IN PART; RENDERED IN PART