IONA MATHEWS	*	**NO. 2004-CA-2222**
VERSUS	*	**COURT OF APPEAL**
WEST JEFFERSON MEDICAL CENTER, DR. E. QUINN PEEPER, DR. KARIM TOURSARKISSIAN, DR. RICHARD G. HELMAN	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	* * * * * * *	

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2000-8037, DIVISION "A-5"
Honorable Carolyn Gill-Jefferson, Judge
* * * * * *
CHIEF JUDGE JOAN BERNARD ARMSTRONG
* * * * * *

(Court composed of Chief Judge Joan Bernard Armstrong, Judge Charles R. Jones and Judge Dennis R. Bagneris Sr.)

LAWRENCE D. WIEDEMANN
WIEDEMANN & WIEDEMANN
821 BARONNE STREET
NEW ORLEANS, LA 70113

COUNSEL FOR PLAINTIFF/APPELLANT

J. DON KELLY, JR.
LEMLE & KELLEHER, L.L.P.
601 POYDRAS STREET
2100 PAN AMERICAN LIFE CENTER
NEW ORLEANS, LA 70130-6097

COUNSEL FOR DEFENDANT/APPELLEE

AFFIRMED

Plaintiff-appellant, Iona Matthews, appeals a judgment of December 30, 2003, dismissing her medical malpractice claim against the defendant-appellee, Dr. E. Quinn Peeper. We affirm.

Plaintiff's malpractice claim arises out of exploratory laparoscopic surgery performed by Dr. Peeper on the plaintiff on April 7, 1997, in order to locate the source of plaintiff's complaints of excruciating abdominal pain. It is undisputed that a miniature exploratory camera was inserted through a tiny puncture by means of a 10-mm trocar. The plaintiff does not allege any malpractice in connection with Dr. Peeper's decision to perform the surgery; nor does the plaintiff allege any malpractice in connection with Dr. Peeper's decision to employ a 10- mm trocar. The procedure turned up nothing.

Following the surgery plaintiff required morphine for her abdominal pain. However, Dr. Peeper and others at West Jefferson Medical Center asked for a psychiatric consult because of what was characterized as inappropriate behavior. No malpractice is alleged in connection with the decision to ask for a psychiatric consult.

On April 11, 1997, Dr. Frank DiVicenti performed surgery and discovered that plaintiff's complaints were attributable to a knuckle of the small bowel stuck in the trocar puncture site from the April 7, 1997

laparoscopic procedure performed by the defendant, Dr. Peeper. This complication was referred to in testimony as a "Richter's hernia." Dr. DiVicenti removed approximately two inches of plaintiff's small bowel which allegedly had been traumatized by the laparoscopic procedure. The plaintiff required an extended and painful hospital stay and recuperative period.

The Medical Review Panel found that the defendant health care providers did not breach the standard of care.

Subsequently, on May 23, 2000, plaintiff filed suit in the Civil District Court for the Parish of Orleans naming as original defendants: West Jefferson Medical Center, Dr. Karim Toursarkissian, Dr. Richard G. Helman and the defendant-appellant herein, Dr. E. Quinn Peeper. Pursuant to a trial on the merits directed solely against Dr. Peeper, the twelve person jury returned a unanimous verdict in favor of Dr. Peeper. The jury verdict was based on the response to the first written jury interrogatory in which the jury found that the plaintiff did not "meet her burden of proving the standard of care that applied to Dr. Peeper." We infer from this finding a finding by the jury that Dr. Peeper's testimony and that of his experts were credible. The interrogatory form indicated that in reaching that answer the jury was not to proceed to the ensuing interrogatories but was to sign the form and return to

the courtroom, i.e., a negative answer to the first interrogatory was dispositive of the case against Dr. Peeper. The plaintiff assigns no error in regard to the interrogatory in question or to the form of the interrogatories as a whole. In conformity with that verdict, the trial court rendered a judgment on December 30, 2003, dismissing the plaintiff's claim against Dr. Peeper with prejudice.

The plaintiff filed a Motion for New Trial and an alternative Motion for JNOV, both of which were denied by judgment dated March 9, 2004.

It is from the judgment of dismissal with prejudice of December 30, 2003 that the plaintiff brings this devolutive appeal *in forma pauperis*.

The plaintiff's only assignment of error complains that in view of the opinions expressed by Dr. Peeper, which plaintiff contends are consistent with those of plaintiff's expert, Dr. Joel Engel, the conclusions of the fact finder were manifestly erroneous.

The malpractice alleged by the plaintiff consists of Dr. Peeper's failure at the conclusion of the procedure to stitch and close the tiny puncture of fascia. Dr. Peeper relies on two meritorious defenses, either of which alone is sufficient to warrant affirming the judgment of the trial court: (1) Dr. Peeper did, in fact, stitch and close the fascia; and (2) regardless, the standard of care does not require that he do so when a 10-mm trocar is

employed as was done in the instant case.

Plaintiff contends that Dr. Peeper admitted in his testimony that the failure to do the stitching was malpractice. The plaintiff bases this contention on those portions of Dr. Peeper's testimony wherein he states on cross examination that doing the stitching would provide the plaintiff the best chance of a successful outcome:

> Q. If you did not do the stitching, as you say you owed the obligation to Iona Mathews as is shown in your submission to the Medical Review Panel, then you violated your obligation to her as a physician [pursuant to your Hippocratic Oath to give your patients the best opportunity not to have an adverse result]; did you not?
> A. Correct.

However, in the context of the defendant's testimony as a whole, in which he insists that he did the stitching, it can be seen that the defendant was actually making a hypothetical statement about how he might view the failure to do the stitching; he was not making a statement that he failed to do the stitching.

The plaintiff's brief also refers to Dr. Peeper's written submission to the Medical Review Panel wherein it is stated that: "The primary trocar incision was not closed."

When confronted with this statement on cross-examination at trial, Dr.

Peeper testified that he had no recollection of the original written submission made on his behalf by his attorney to the Medical Review Panel. He testified that the submission does not say that he made that statement himself, and he emphatically denied ever having made such a statement. Moreover, on redirect examination, Dr. Peeper identified a supplemental written submission to the Medical Review Panel. Dr. Peeper testified that this supplemental submission states that the trocar incisions were closed. Based on the implicit finding that Dr. Peeper's was a credible witness, a finding that the trocar incisions were closed and that Dr. Peeper, himself, never made any inconsistent statements to the contrary is also warranted. Therefore, the record contains an adequate basis for explaining away the statement found in the original written submission to the Medical Review Panel that the trocar incision was not closed, such that in the context of the record as a whole the statement that it was not closed does not provide this Court with a basis for finding manifest error.

Plaintiff contends that Dr. Peepers' "admission" in the instant case is "indistinguishable" from that of the defendant physician in the case of *Kippers v. Corcoran*, 97-870 (La.App. 5 Cir. 1/27/98), 707 So.2d 463. First, we note that it is not clear exactly what the defendant, Dr. Corcoran, said on the stand in *Kippers.* At most the *Kippers* court seems to have inferred an

admission of negligence from Dr. Corcoran's testimony that injury to the hepatic duct "should not happen, or if the duct is completely cut through, we should recognize it . . ." The testimony of Dr. Peepers relied upon by the plaintiff in the instant case is not analogous to that of Dr. Corcoran in *Kippers.*

Moreover, the defendant argues that the standard for medical malpractice is not "the best opportunity for a successful outcome" in the opinion of the treating physician, as the plaintiff contends. Instead, it is as set forth by this Court in *Serigne v. Ivker*, 00-0758 (La.App. 4 Cir. 1/23/02), 808 So.2d 783: the degree of knowledge or skill required by doctors in the same practice area in a similar locale.

The difference between this Court's standard in *Serigne* and the standard which the plaintiff urges this Court to apply in the instant case is significant. The standard urged by the plaintiff is a subjective standard that could vary from physician to physician, whereas the statutory scheme contemplates an objective standard applying across the board to all physicians in the same practice in the same area. We may safely assume that the legislature determined that where the opinion or practice of the individual physician is at odds with that of, what we might refer to by way of analogy as the "industry strandard," that more often than not, the patient

will be better served by the industry standard. If the outcome is not successful, physicians are presumed to be on notice of the objective standard by which they will be judged. To put it another way, application of the subjective standard would, in effect, allow each practitioner to establish his own malpractice standards according to what he thought best. Instead, this Court in *Serigne* called for the following standard:

> Louisiana has set out the requirements to sustain a cause of action in medical malpractice in Louisiana Revised Statute 9:2794. The plaintiff must initially demonstrate **what degree of knowledge or skill is required by doctors in the same practice area in a similar locale.** [] La.Rev.Stat. 9:2794(A)(1). The plaintiff must then show that the defendant lacked or failed to utilize that standard of care. La.Rev.Stat.9:2794(A)(2). Finally, the plaintiff must show that the defendant's conduct was the proximate cause of the plaintiff's injury. La.Rev.Stat. 9:2794(A)(3). *Giammanchere v. Ernst*, 96-2458 (La.App. 4 Cir. 05/19/99), 742 So.2d 572, 575. Each element must be proven by a preponderance of the evidence. *Martin v. East Jefferson General Hospital*, 582 So.2d 1272, 1276 (La.1991).
>
> Determinations of the requisite level of skill required, whether there has been a breach and causation, are findings of fact and should only be reversed upon a finding of manifest error. *Martin*, 582 So.2d at 1276. The appellate court may only reverse if "(1) the record reflects no reasonable factual basis for the trial court's finding, and (2) the record establishes that the finding is clearly wrong." *Giammanchere*, 742 So.2d at 575 (citing *Baumeister v. Plunkett*, 95-2270 (La.5/21/96), 673 So.2d 994, 998).

Id., 00-758, pp. 4-5, 808 So.2d at 787.

This Court in *Serigne* went on to elaborate on the standard of care as established by prior precedent in this Court:

> A physician's duty is to exercise the degree of skill ordinarily employed by his professional peers under similar circumstances. The law does not require absolute precision in medical diagnoses. Acts of professional judgment are evaluated in terms of reasonableness under the circumstances then existing, not in terms of the result or in light of subsequent events.

Id., 00-758, p. 5, 808 So.2d at 787.

This Court in *Serigne* also commented on the need for expert testimony to establish the standard of care appropriate under the facts of the case, noting that when there is disagreement among experts, "the trial court's determination is given a great deal of deference." *Id.,* p. 6, 808 So.2d at 788. This is a point particularly relevant to the case at hand which involves conflicting expert opinions and one which this Court expressed with even greater emphasis in *Williams v. Robinson,* 98-3016 (La.App. 4 Cir. 5/31/00), 765 So.2d 400:

> In order to reverse the jury's verdict, an appellate court must find that there is no reasonable factual basis for that verdict in the record, and that the record establishes that the verdict is manifestly wrong. *Stobart v. State, Through Dep't of Transportation and Development,* 617 So.2d 880

> (La.1993); *Pellerin, supra* at p. 5, 696 So.2d at 592. **The reviewing court must give great deference to a jury's findings when medical experts express different views, judgments and opinions about whether the standard of care was met in any given case.**[] *Moore v. Willis-Knighton Medical Center*, 31203, p. 4 (La.App. 2 Cir. 10/28/98), 720 So.2d 425, 428-29.

Id., 93-3016, p. 6, 765 So.2d at 403.

After concluding in *Williams* that the jury was indeed faced with conflicting expert testimony, this Court went on to sustain the jury's finding against the plaintiffs:

> Unfortunately for the plaintiffs, the jury apparently was persuaded by the testimony of defendants' experts. Expert opinions are not controlling, and any weight given to such opinions by the jury is dependent upon the expert's qualifications, experience, and studies upon which his testimony is based. *Moore*, supra at p. 6, 720 So.2d at 429. Where there are two permissible views of the evidence, the fact finder's choice between the two cannot be manifestly erroneous or clearly wrong. *Rosell v. ESCO*, 549 So.2d 840 (La.1989).

Id., 93-3016, p. 15, 765 So.2d at 407.

Williams also stands for the proposition that the weight of the findings of the medical review panel is subject to credibility decisions which are to be made by the fact finder. *Id.*, 93-3016, p. 7, 765 So.2d at 404. The jury implicitly agreed with the finding of the Medical Review Panel. The jury's implicit fact findings are subject to the manifest error standard of review.

Hall v. Folger Coffee Co., 03-1734, pp. 4-5, fn. 9 (La. 4/14/04), 874 So.2d 90, 95-96; *Noel v. Noel,* 04-0105, p. 6 (La.App. 4 Cir. 9/8/04), 884 So.2d 615, 619.

Moving now to a consideration of Dr. Peeper's defense that the standard of care does not require that the puncture site be stitched when a 10-mm trocar is employed, plaintiff's expert OB/GYN, Dr. Joel Engel, who neither treated nor examined the plaintiff, testified concerning an article from a publication entitled *Contemporary OB/GYN*. The article states in pertinent part that:

> Trocars of 10mm or larger, inserted at lateral sites, increase the risk of postoperative herniation and incarceration of the small bowel if the trocar sites are not properly closed.

When asked by plaintiff's counsel if this were "an accepted publication by the gynecological community in this country," instead of answering "Yes", Dr. Engel responded:

> This is – there is a journal. It's called *Contemporary OB/Gyn* that we all receive. I don't know who publishes it. It's probably a medical equipment company. But it has interesting articles that we get every month. **And it's not what's called a pier** [sic] **review journal like *New England Journal* something like that.** But it's widely read and widely distributed to all OBs.

As to this description of the *Contemporary OB/GYN* by Dr. Engel, the

fact finder below cannot be faulted for failing to give greater weight to this publication than to the expert testimony of the defendant, Dr. Peeper, to the contrary. Dr. Peeper was accepted by the court as an expert OB/GYN. He testified that the standard of care does not require a stitch for a 10-mm trocar, only for trocars exceeding that size.

In contrast to the plaintiff's reliance upon *Contemporary OB/GYN*, Dr. Peeper in his testimony resorted to *Novack's Gynecology* which he described as an "authoritative text on gynecology." He testified that it is a textbook he uses to teach doctors studying for their board certification exams as well medical students. Dr. Peeper testified also that *Novak's Gynecology* calls for closure of the fascia only when a trocar **larger** than 10-mm is used.

Dr. Eugene Hoffman, an expert OB/GYN, and a member of the Medical Review Panel, was called to testify for the defendant. He testified that the standard of care does not require the closure of the fascia when a 10-mm trocar is employed. He specifically disagreed with Dr. Engel's opinion in this regard. He further testified that in over twenty years of practice he had never had a patient experience a Richter's hernia.

Dr. Leonard Weather, also an expert OB/GYN, was called to testify by the defendant. He testified that the standard of care does not require the closure of the fascia when a 10-mm trocar is employed. Like Dr. Hoffman,

he specifically stated that he disagreed with Dr. Engel in this regard.

Additionally, as noted above, the jury had the benefit of the finding of the Medical Review Panel that Dr. Peeper had not violated the standard of care.

Dr. Peeper testified that plaintiff's Richter's hernia is quite uncommon as a complication of laparoscopic procedure, so much so that he had never encountered one before in all of the perhaps as many as 2000 such procedures he had attended over the years.

In addition to the two defenses found in Dr. Peeper's brief and discussed above, a review of the record as a whole reveals that Dr. Peeper also testified to facts from which a reasonable fact finder could conclude that the plaintiff's problems were not caused by the procedure performed by Dr. Peeper. The presence of chronic inflammatory cells instead of acute inflammatory in the bowel and the lack of cell death indicate a different source of the plaintiff's problems from the one that forms the basis of this suit against Dr. Peeper; and the fact that the plaintiff had an unrelated umbilical hernia could account for her Richter hernia even if the trocar site had been sutured as Dr. Peeper contends it was.

Having found no manifest error, the judgment of the trial court is affirmed.

AFFIRMED