

NOT DESIGNATED FOR PUBLICATION

KEITH BROUSSARD, BOBBY G.
BROUSSARD AND JEANNE D.
BROUSSARD

NO. 03-CA-734

FIFTH CIRCUIT

VERSUS

COURT OF APPEAL

R. DOUGLAS BOSTICK, JR., M.D., AND
WESTSIDE PEDIATRIC CLINIC, A
MEDICAL CORPORATION AND ABC
INSURANCE COMPANY, AND DEF
INSURANCE COMPANY

STATE OF LOUISIANA, APPEAL,
FIFTH CIRCUIT

FEB 23 2004

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 526-534, DIVISION "D"
HONORABLE ROBERT M. MURPHY, JUDGE PRESIDING

Robert M. Murphy
CLERK

February 23, 2004

SUSAN M. CHEHARDY
JUDGE

Panel composed of Judges Edward A. Dufresne, Jr.,
James L. Cannella, Marion F. Edwards, Clarence E. McManus
and Susan M. Chehardy

CANNELLA, J., DISSENTS WITH REASONS

LANNY R. ZATSKIS
KAREN D. McCARTHY
YVETTE A. D'AUNOY
ANDREW N. LEE

Zatskis McCarthy & Associates
650 Poydras
Suite 2750
New Orleans, Louisiana 70130
COUNSEL FOR APPELLANT,
KEITH BROUSSARD, BOBBY BROUSSARD,
AND JEANNE BROUSSARD

STEWART E. NILES, JR.
DANIEL E. BURAS

Jones, Walker, Waechter, Poitevent,
Carrere & Denegre
201 St. Charles Avenue
47th Floor
New Orleans, Louisiana 70170-5100
COUNSEL FOR APPELLEES,
R. DOUGLAS BOSTICK, JR., M.D.,
WESTSIDE PEDIATRIC CLINIC, AND
LOUISIANA MEDICAL MUTUAL COMPANY

REVERSED AND RENDERED

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In this medical malpractice action, after trial, the jury found that the pediatrician did not breach the applicable standard of care in his treatment of Keith Broussard. After reviewing all of the evidence and testimony, we hold that the jury was manifestly erroneous in concluding that Dr. Bostick was not negligent. Accordingly, we reverse the jury's verdict and render.

Keith Broussard was a patient of Dr. Douglas Bostick from Keith's birth in September of 1979 until October of 1994. Keith's medical history indicates several notable illnesses. When Keith was 6 years old, he was diagnosed with asthma. He was treated by Dr. Bostick and two other West Side pediatricians for asthma-related illnesses from 1985 until 1994. Further, Keith was diagnosed with numerous allergies and treated with periodic allergy injections. At times, Dr. Bostick referred Keith to an allergist, Dr. Alan Sheen, for treatment of his allergies and asthma. Furthermore, Keith was treated for pneumonia on three occasions when he was 14 years old.

Beginning at age 12, Keith began to experience severe headaches, which caused nausea, vomiting, intense light sensitivity, and extreme pain. He also

experienced dry skin, especially on his face. He experienced tingling in his arms and legs, discoloration of the skin on his palms and the soles of his feet, swelling of his tongue, and extreme fatigue.

Mrs. Broussard testified that she reported Keith's headaches to Dr. Bostick but he denies that Mrs. Broussard reported headaches except when he was 5 years old. Further, Mrs. Broussard and Keith testified that they told Dr. Bostick of the tingling in his arms and legs, to which Dr. Bostick replied that they were "growing pains." Dr. Bostick denied that the Broussards informed him of the tingling and denies informing Keith and Mrs. Broussard that these were "growing pains." Mrs. Broussard also testified that, while Dr. Bostick was examining Keith's throat during an office visit when he was about 13, she commented that she could not see down his throat when she examined his throat. Dr. Bostick denied any knowledge of this comment. Finally, Dr. Bostick admitted that he did not notice discoloration of Keith's palms or the soles of his feet.

When Keith was 13 years old in September of 1992, he was 55 ½ inches tall, which is approximately 4 feet, 7 ½ inches tall. He remained approximately that height until after his 15th birthday in September of 1994. Keith's height measurements were taken on most of his 16 visits to West Side Pediatric Clinic between January 1992 to September 1994 but these measurements were not plotted on the growth chart in Keith's file. It was undisputed at trial that, if Keith's measurements had been properly plotted on a growth chart, the chart would have shown that his height was below the 0% for his age. In common parlance, Keith's height was "off the chart." Further, it is undisputed that Keith had not exhibited any secondary male sex characteristics by the time he was 15 years old.

Keith and his mother testified that they asked Dr. Bostick numerous times during the 16 office visits between January of 1992 and October of 1994 about his small stature. They testified that he told them that Keith was a "late bloomer" and

that he would be starting puberty soon. In January 1993, Keith presented to Dr. Bostick with a lump on his nipple and both parties testified that Dr. Bostick stated that was a sign of the onset of puberty.

Dr. Bostick testified that he was never asked about Keith's short stature, that he never called Keith a "late bloomer," that his staff was responsible for plotting measurements on the growth chart, and that Keith did grow between January 1992 and October 1994. Further, he testified that he "begged" Mrs. Broussard to get with West Side Pediatric Clinic's "program," which meant bringing Keith for a "well child visit" not just "sick child visits." Dr. Bostick was sure that he had explained this distinction to Mrs. Broussard. He was also sure that, if Mrs. Broussard had gotten with the "program" and Dr. Bostick had seen Keith on a well child visit, he would have performed a "review of systems," which would have revealed Keith's symptoms earlier.

During 1994, Mrs. Broussard began to seek monthly referrals to Keith's allergist. It is undisputed that she and Dr. Bostick exchanged words regarding her desire to have the allergist manage Keith's care. In September of 1994, Dr. Bostick refused to provide further referrals to the allergist until Keith came to his office. In October of 1994, Mrs. Broussard again took Keith to West Side Pediatric Clinic but requested another physician. Dr. Moore, another pediatrician with West Side, saw Keith on October 11, 1994. During that office visit, Mrs. Broussard demanded testing to investigate Keith's growth disturbance or a referral to the appropriate specialist.

On October 17, 1994, Mrs. Broussard received word from Dr. Moore that Keith's blood test showed that he had very poor thyroid function. Dr. Moore referred Keith to an endocrinologist, Dr. Talik Mallik, who diagnosed Keith with untreated Hashimoto's thyroiditis, which lead to hypothyroidism. Dr. Mallik

prescribed Synthroid and referred Keith to a pediatric endocrinologist, Dr. Grace Banuchi, who treated Keith until he reached adulthood.

At trial, Dr. Banuchi testified that Keith's predicted parental height was between 164.9 centimeters and 184.9 centimeters. At the time of trial, Keith was 23 years old and his height was 167 centimeters or 5 feet, 5 inches. She testified that he had reached the lower end of the range of his predicted parental height.

At trial, Keith Broussard testified that he had been teased about his stature during high school even by adults. He stated that he had experienced many painful events, including missing his senior prom, because girls would not date him since he was so small. He felt that he had been "robbed" of an important time in his life because he would have been bigger in high school if he had been diagnosed earlier.

Dr. Beverly Howze, Ph.D., testified as Keith's treating psychologist, that he had suffered long term emotional damage as a result of his small stature during his high school and early college years. As a result, he had a poor self-image, low self-esteem, and a lack of self-confidence. Both Keith and Dr. Howze testified that, after two years of therapy, his self-image, self-esteem, and self-confidence were improving.

Procedural history

On October 10, 1995, the Broussards filed a complaint with the State of Louisiana requesting that a medical review panel be convened. On April 22, 1998, the medical review panel found that Dr. Bostick had breached the applicable standard of care. On June 5, 1998, the medical review panel issued its written decision stating:

It is the opinion of the medical review panel in the above-named matter that: the evidence supports the conclusion that the defendants failed to comply with the appropriate standard of care as alleged. The conduct complained of was a factor in the resultant damages. The claimant suffered a disability in that he had a compromise in his final adult height; he has delayed pubertal development and long term psychological issues

affecting his self-image. Based on the evidence before it at this time, the panel is unable to determine whether there is a permanent impairment and the percentage of said impairment.

On July 6, 1998, the Broussards filed suit against Dr. Bostick, his clinic, and their insurers. On May 28, 2002, trial commenced. After a nine-day trial, the jury, in a 9 to 3 verdict, found that the plaintiffs did not prove that either Dr. Bostick or West Side Pediatric Clinic breached the applicable standard of care with respect to Keith Broussard. Plaintiffs thereafter filed a timely notice of appeal.

Analysis

In their brief, plaintiffs allege four assignments of error: (1) that the jury's verdict was clearly wrong because there was overwhelming evidence of the defendants' breach; (2) the trial court's jury instruction regarding burden of proof was clearly wrong and caused error; (3) the trial court erred in denying plaintiffs' motion in limine seeking to keep the fact that one of plaintiffs' attorneys was Keith's maternal aunt, which caused prejudice to plaintiffs during trial; and (4) the trial court erred in allowing the defendants to display an exhibit to the jury that had been deemed inadmissible.

A trial court's findings of fact may not be reversed absent manifest error or unless clearly wrong. *Stobart v. State of Louisiana, through Dep't of Transp. and Dev.*, 92-1328 (La.4/12/93), 617 So.2d 880. This court has a constitutional duty to review facts. *Ambrose v. New Orleans Police Dep't Ambulance Serv.*, 93-3099, 93-3110, 93-3112 (La.7/5/94), 639 So.2d 216. Because we have this duty, we must determine whether the verdict was clearly wrong based on the evidence, or clearly without evidentiary support. *Id.* The reviewing court must do more than just simply review the record for some evidence which supports or controverts the trial court's findings; it must instead review the record in its entirety to determine whether the trial court's finding was clearly wrong or manifestly erroneous. *Id.* at 882. The issue to be resolved by a reviewing court is not whether the trier of fact

was right or wrong, but whether the factfinder's conclusion was a reasonable one.

Id. The reviewing court must always keep in mind that "if the trial court's or jury's findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse, even if convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* at 882-83 (citing *Housley v. Cerise*, 579 So.2d 973 (La.1991)) (quoting *Sistler v. Liberty Mutual Ins. Co.*, 558 So.2d 1106, 1112 (La.1990)).

In their first assignment of error, plaintiffs contend that the jury erred, as a matter of law, in determining the standard of care. Plaintiffs argue that the jury accepted the testimony of defendants' experts, which was internally inconsistent with regard to whether there was a breach in the standard of care. Plaintiffs argue that, when the defendants' experts were questioned regarding Dr. Bostick's actions, they stated that there was no breach. When the experts were presented with hypothetical situations involving the specific facts of this case, however, they indicated that the doctor in the hypothetical situation had breached the applicable standard of care.

La. R.S. 9:2794 provides, in pertinent part:

A. In a malpractice action based on the negligence of a physician licensed under R.S. 37:1261 et seq . . . , the plaintiff shall have the burden of proving:

(1) The degree of knowledge or skill possessed or the degree of care ordinarily exercised by physicians ... licensed to practice in the state of Louisiana and actively practicing in a similar community or locale and under similar circumstances; and where the defendant practices in a particular specialty and where the alleged acts of medical negligence raise issues peculiar to the particular medical specialty involved, then the plaintiff has the burden of proving the degree of care ordinarily practiced by physicians ... within the involved medical specialty.

(2) That the defendant 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.

(3) That as a proximate result of this lack of knowledge or skill or the failure to exercise this degree of care the plaintiff suffered injuries that would not otherwise have been incurred.

* * *

C. In medical malpractice actions the jury shall be instructed that the plaintiff has the burden of proving, by a preponderance of the evidence, the negligence of the physician.... The jury shall be further instructed that injury alone does not raise a presumption of the physician's ... negligence. The provisions of this Section shall not apply to situations where the doctrine of *res ipsa loquitur* is found by the court to be applicable.

In *Fuselier v. Dauterive*, 00-0151 (La. 7/14/00), 764 So.2d 74, 79-80, the

Louisiana Supreme Court reiterated:

A physician is required to exercise that degree of skill ordinarily employed under similar circumstances by others in the profession and also to use reasonable care, diligence, and judgment. *Hastings v. Baton Rouge General Hospital*, 498 So.2d 713 (La.1986). A physician is not required to exercise the highest degree of care possible; rather, his duty is to exercise the degree of skill ordinarily employed by his professional peers under similar circumstances. *Gordon v. Louisiana State University Board of Sup'rs*, 27,966 (La.App. 2 Cir. 3/1/96), 669 So.2d 736; *writ denied*, 96- 1038 (La.5/31/96), 674 So.2d 263. In a medical malpractice action, the plaintiff has the burden of proving, by a preponderance of the evidence, (1) that the doctor's treatment fell below the standard of care expected of a physician in his medical specialty; and (2) the existence of a causal relationship between the alleged negligent treatment and the injury sustained. *Id.* (citing *White v. McCool*, 395 So.2d 774 (La.1981)).

To support the contention that Dr. Bostick's care of Keith Broussard fell below the standard of care, plaintiffs called Dr. Jerry Casey and Dr. Thomas Alchediak, experts in pediatrics, to testify. Dr. Casey, who was chosen by the defendants to serve on the medical review panel, testified that, based on his review of the pertinent medical records, there was a "deviation" from the standard of care. Dr. Casey felt that there was incomplete documentation, specifically on the growth chart, in Dr. Bostick's file on Keith Broussard. He determined that there were "close to a hundred weight and height" measurements taken but not plotted, which caused Dr. Bostick to fail to diagnose Keith's lack of growth in a timely fashion, which resulted in breach of standard of care.

Dr. Casey stated that, “it’s generally accepted in endocrinological circles, that any time there is a marked deviation after age three, ... a work-up should be instituted.” He stated that if he had seen a child’s growth level off at age twelve, he would obtain a history from the parents, order tests including bone age, blood work to evaluate the child’s blood count, TSH levels, and a physical examination. Further, Dr. Casey agreed that “whatever damages Keith suffered” were a result of Dr. Bostick’s failure to timely diagnose Keith’s failure to grow.

Dr. Casey made his own chart of the measurements of Keith from birth until age 12 found in Dr. Bostick’s chart on Keith. After charting the measurements, he testified that the chart

shows that somewhere during the second decade of life, at approximately twelve – twelve and a half years old – that the patient's channel that he was following, which was in about the fifth to tenth percentile, suddenly deviated off the growth chart and there was a dramatic slowing in growth for a period of about two to two and a half years.

He agreed that Keith’s lack of growth during that time was fairly obvious once the measurements were plotted. He noted that there was inconsistency in the measurements, i.e., Keith’s height would appear to *decrease* between two consecutive visits, which was probably attributable to improper measuring. He noted that improper measuring can be the result of different people measure in different ways, inconsistency with measuring with shoes on or off, and carelessness in measuring.

According to his plotted chart, Keith was in the 50th percentile from birth until 24 months of age. At four, Keith’s height measurement dropped to the 10th percentile. He remained around between the 5th and 10th percentile until he was 12 years old. After 12 years old, his height measurement dropped below the 5th percentile and remained parallel until age 15. After Keith was diagnosed with hypothyroidism and began taking Synthroid, he began to grow again.

Dr. Casey believes that, in retrospect, Keith suffered from hypothyroidism, which caused “that marked delay in growth” from age 12 ½ to age 15. He also opined that Keith may have experienced mild constitutional growth delay. In Dr. Casey’s opinion, a pediatrician has a duty to observe and investigate a lack of growth, especially when the parents express concern regarding lack of growth. Lack of growth is often the first sign of childhood disease. Even if Keith’s mother did not express concerns about Keith’s lack of growth, Dr. Casey stated that he would have taken action if he had seen the graph of Keith’s measurements.

In Dr. Casey’s experience with treating asthma patients, they are not shorter than their peers as a group. Further, he disagreed with Dr. Bostick’s statement that Keith’s asthma caused “delayed puberty” or affected growth. More probably, delay in pubertal development was related to his hypothyroidism. Moreover, Dr. Bostick still had a duty to investigate Keith’s lack of growth, if he had noticed it. Further, short-term use of inhaled steroids has not been shown to produce growth delays in asthmatic children.

Dr. Casey disputed statements that Keith’s growth curve always followed the expected path for constitutional growth delay. Further, he agreed that the longer hypothyroidism goes untreated, the greater the effect it can have on growth. When Keith’s blood was tested, the test revealed that he was “severely hypothyroid.”

In his opinion, Dr. Casey believed that Dr. Bostick’s failure to diagnose hypothyroidism “caused Keith Broussard to suffer a disability in the fact that he had a compromise in his final adult height.” He testified that Keith “did not produce enough thyroid hormone at a critical stage in his adolescent growth, that even upon receiving thyroid hormone, his growth delay was so much, he had no potential to reach his projected adult height.”

He reiterated that he and the other panel members found that there was “delayed pubertal development and long term psychological issues affecting his age.” He also stated that the panel was unable to determine whether there was permanent impairment. Dr. Casey also opined that the lack of secondary male characteristics would probably affect a young man’s self image and ability to participate in social and physical activities.

In conclusion, Dr. Casey reiterated that, “If a child was not growing or reaching puberty by age 14, it is a breach of the standard of care not to plot, examine and test the patient for childhood disease concerning lack of growth.” Dr. Casey further noted that, if a parent brings in a child complaining of growth delay and the doctor saw that there was a growth failure, it is a breach of the standard of care to fail to inquire about both parents’ height. Finally, assuming that Keith was 65 ½ inches tall at 23 years old, Dr. Casey testified that Keith still did not reach his projected adult height because he did not get thyroid hormone at the appropriate time.

Dr. Alchediak, who was selected by plaintiffs as a member of the medical review panel, found, after reviewing Dr. Bostick’s medical records, that “there had been findings that were perhaps overlooked during the clinic visits, that may have given Dr. Bostick and his colleagues some red flags, suggesting to them to do further work-up, looking for causes of short stature.” Dr. Alchediak agreed that Dr. Bostick’s care of Keith did not meet the standard of care for pediatricians.

Dr. Alchediak agreed that, if a doctor had seen a growth chart plotted with Keith’s height measurements from age 13 to age 15 and failed to investigate the cause or nature of the problem, the doctor’s actions were a breach of the standard of care. He further testified that his actions in the situation where the patient exhibited a consistent growth rate until 13 years old then exhibited a decreased or stagnant rate would be to (1) discuss the findings with the patient and family, (2)

determine that there was no other cause for short stature (i.e., chronic illness causing malabsorption of nutrition), (3) suggest an initial blood work-up, (4) discuss the patient with and/or referred the patient to an endocrinologist, and, finally, (5) document his actions.

Further, Dr. Alchediak testified that Dr. Bostick's records did not reflect that Bostick asked the Broussards about a history of delayed puberty or short stature. Dr. Alchediak also found that Dr. Bostick's records did not contain a differential diagnosis regarding Keith's short stature or discussion of same with Keith's family. Dr. Alchediak agreed that, even if a child has asthma which has been treated with steroids, it is necessary to investigate a growth abnormality.

Dr. Alchediak testified that based on his review of Dr. Bostick's records, Keith's height had been measured each time he visited the clinic but it was unclear from the growth chart whether the measurements had been plotted before or after Keith's last visit to Dr. Bostick. In his clinic, the doctors plot the patient's height and weight measurements "so we are forced to look at it, ourselves."

Dr. Alchediak refuted the notion that a doctor does not perform a full examination of a chronically ill child during an office visit. He specifically stated that he would investigate short stature in a child "regardless of his other diagnosis." He also agreed that, if a doctor notices that a child is of extremely short stature, it is important to perform a differential diagnosis, which gives the doctor a "blueprint" that is helpful in ordering tests. He further testified that he would order "simple things," like a hemoglobinopathy, free T-4, TSH, which are blood tests, a urine test, and an x-ray of the patient's hand. He also would also schedule a follow-up visit in two to four weeks to discuss the results with the patient and family and document all of his actions. Dr. Alchediak did not find documentation that Dr. Bostick noticed Keith's short stature, discussed same with the Broussards, or performed any tests to investigate.

Dr. Alchediak found that Dr. Moore ordered tests that Dr. Alchediak would have ordered. In evaluating the laboratory report, Dr. Alchediak found that Keith's thyroid hormone was profoundly low and his TSH was extremely elevated, which indicated that the hypothalamus was attempting to trigger the thyroid to produce more thyroid hormone. This is classic symptom of primary hypothyroidism. Further, Keith's low hormone level and high TSH level reveals that he was "profoundly hypothyroid."

Dr. Alchediak agreed that hypothyroidism causes failure to grow and develop in children. He also agreed that undiagnosed hypothyroidism in children is associated with depression. Further, he disagreed with the characterization that asthmatic children are shorter than their peers. Further, in his experience, short courses of steroids do not affect the height of children.

Dr. Alchediak testified that "a concern by a parent ... should never be ignored." He also stated that constitutional growth delay is a diagnosis of exclusion, which is used after a thorough investigation of other underlying causes.

He agreed that, when a child presents with an acute episode, the primary focus is to stabilize the child. He, however, noted that the level of acuteness of the episode may allow investigation of other illnesses. When asked whether he would have noticed Keith's short stature during office visits from the time he was 12 ½ until he was 15, Dr. Alchediak testified, "I would hope that I would have noticed short stature during one of 16 visits." Dr. Alchediak did not "recall any extensive review of systems, or, at least, anything that I identified that appeared that there was an attempt to identify organic cause for short stature."

Dr. Alchediak opined that, even if he had seen records reflecting steroid and Ritalin prescriptions, his opinion that Dr. Bostick had breached the standard of care would not have changed. He reiterated that it is important that a doctor note pertinent benign and pathologic processes in progress notes. Further, he agreed

that, if a private practitioner fails to attend to an observed problem because he is too busy, it is a breach of the standard of care.

Defendants presented testimony from pediatricians Dr. George Sterne and Dr. Charles Watts to directly controvert testimony of plaintiffs' expert pediatricians, Dr. Casey and Dr. Alchediak. George Sterne, M.D., is a board certified pediatrician. After reviewing Keith Broussard's medical records from Dr. Bostick, Dr. Mallik, Dr. Banuchi, Dr. Sheen, and Dr. Coignet, depositions of the Broussard family, and relevant pediatric medical literature, Dr. Sterne came to the conclusion that Dr. Bostick complied with the prevailing standard of care. Moreover, Dr. Sterne determined that Dr. Bostick's office had plotted Keith Broussard's height and weight at 13 years old and 15 years old, which was within the prevailing standards of care. He also found that Keith Broussard's file contained a growth chart from birth to 24 months that had been plotted at the clinic, which showed that Keith started at about average and trended downward during that period of time.

Dr. Sterne testified that the size of the child at birth is a reflection of the mother's health, socioeconomic status and nutrition. At about nine months, the child's genetics "come more into play." Keith Broussard ended up between the 25th and 50th percentile when he was 24 months old but tended more toward 25th percentile.

Dr. Sterne testified that the formula of doubling a "careful measurement of length" of the child on his 2nd birthday could give a reasonably close approximation of adult height in boys plus or minus 3 to 4 inches. Keith Broussard was 34 inches tall at 24 months and, thus, the formula indicates that he would be 68 inches tall, or 5 feet, 6 inches, plus or minus 3 or 4 inches. Dr. Sterne confirmed that Keith's height of 5 feet, 5 ½ inches tall, which was measured one week before trial, was within the range predicted using this formula.

Regarding the American Academy of Pediatrics table for the interval of the frequency for well-child evaluations, Dr. Sterne called it a “reasonable frequency,” which is more guideline than standard. He also confirmed that, from 1992 until 1994, both Nelson’s and American Academy of Pediatrics recommended well-child visits for children over 6 years old every two years. Dr. Sterne reiterated that Dr. Bostick’s plotting of Keith’s height and weight at 13 years old and 15 years old complied with the guidelines of Nelson’s and American Academy of Pediatrics as well as the prevailing standard of care. Further, Dr. Sterne testified that Dr. Bostick’s failure to plot measurements obtained during acute-care visits was not necessary because “taking care of that problem ... is [the] important thing to do.” He added that, with few exceptions, “more frequent plotting of heights and weights at that age, are not likely to lead you to anything useful.”

Further, Dr. Sterne testified that well-child visits in children over 10 years old vary from acute-care visits in the amount of time set “because there are a lot of issues in adolescents that need to be addressed.” He also denied that Dr. Bostick failed to take into account complaints by Keith or his parents that were listed in the chart. Furthermore, based on Dr. Banuchi’s calculations of Keith’s predicated parental height range, Dr. Sterne believed that Keith had reached his predicted parental height.

Dr. Sterne also testified that factors including asthma, steroids, delayed puberty secondary to constitutional growth delay, irritable bowel syndrome as well as hypothyroidism can cause delayed onset of growth and puberty. In this case, Dr. Sterne believed that the steroid regime prescribed by Dr. Sheen, which was appropriate in the early 1990’s, was a factor in Keith’s slow growth. He further stated that it is “well documented in the literature” that moderate to severe asthmatics have a delay in their growth. He would strongly disagree with the statement of any other pediatrician who suggested otherwise.

Dr. Sterne further opined that it cannot be proven that Keith's delayed pubertal development was caused by hypothyroidism. He did believe that Keith's hypothyroidism affected Keith's growth but he also believed that Keith had constitutional growth delay. Further, in Dr. Sterne's opinion, which was based upon his review of the medical records, Keith did not suffer permanent effects from an "alleged delay" in diagnosis of hypothyroidism. Moreover, even though Keith's measurements at age 13 placed him below the 5th percentile on the growth chart, Dr. Sterne testified that Dr. Bostick did not have a duty to investigate short stature or delayed growth.

Dr. Sterne further agreed that Dr. Bostick's telephone conversations with Mrs. Broussard was a reasonable attempt to confirm that the mother make his clinic the primary caregiver for her child. Dr. Sterne strongly disagreed with Dr. Casey's statement that it was the prevailing standard of care for pediatricians to plot the heights and weights of a child on each acute visit because it is not that productive. In conclusion, Dr. Sterne agreed that Dr. Bostick complied with all prevailing standards of care.

On cross examination, when Dr. Sterne was presented with a hypothetical situation in which a mother inquired about her son's lack of growth between 13 years old and 14 and $\frac{3}{4}$ years old, he admitted that the pediatrician should have investigated and, if he did not, had breached the standard of care. He stated that if a parent had expressed concern for the child's lack of growth during a specific time frame, he would have plotted the available measurements for that time frame. Dr. Sterne also stated that he would have yearly plotted the growth measurements for a child who was frequently visiting his office even if the visits were for acute care.

Dr. Sterne admitted that Keith had a delay in attaining his adult height, which could partially be blamed on thyroid hormone deficiency. Dr. Sterne also

admitted that in his deposition he blamed Keith's failure to attain his adult height entirely on thyroid hormone deficiency.

Further, Dr. Sterne agreed that Keith's growth measurement fell entirely off the chart when he was 12 years old. Dr. Sterne testified that he had referred "some" asthma patients who had received repeated courses of steroids to an endocrinologist. He also admitted that Dr. Bostick's records reflect that he had not referred Keith to an endocrinologist. Dr. Sterne also admitted that he did not find anything in the record indicating that Keith's parents were advised to bring him in for periodic visits.

While Dr. Sterne still felt that Keith did not have any long term permanent damage, he did agree that Keith would naturally have been upset during his growth delay because he was not growing and developing the way his peers were. Further, Dr. Sterne agreed that a young man who had to conceal his lack of development by showering after PE wearing his underpants would feel embarrassment, which would affect him at the time. He further admitted that he was not a psychologist.

Defendants also presented testimony from Dr. Charles Watts, who as a partner in West Side Pediatric Clinic, was one of Keith's treating physicians as well as an expert in pediatrics. Dr. Watts testified that he did not refer to growth charts or a full evaluation of Keith when he examined him because he was acutely ill. Further, Dr. Watts denied that Mrs. Broussard complained about Keith's height on either visit with him.

Dr. Watts testified that Keith's growth rate was at the 25th percentile between birth and 24 months. From 2 years to 13 years, Keith tracked between the 5th and the 10th percentile on the growth chart. He agreed that, if an adult now measures in the 8th percentile, that would be consistent with this early growth pattern.

Dr. Watts further opined that when he saw Keith Broussard in November of 1992 that Keith was suffering from constitutional growth delay since Keith was in the 5th percentile on the growth chart and he had not started puberty. Further, he testified that chronic illnesses such as asthma, steroid use, and metabolic disorders such as hypothyroidism can be factors in delayed onset of puberty. Dr. Watts also agreed that Keith had delayed onset of puberty.

Dr. Watts testified that plotting Keith's growth between his thirteenth and fifteenth year was reasonable and consistent with Nelson's and American Academy of Pediatrics' guidelines. Dr. Watts testified that, according to Dr. Bostick's notes, he "beseeched" and "implored" Mrs. Broussard over the phone to bring Keith in for a well child visit but she refused. Dr. Watts reiterated that, notwithstanding the fact that he is Dr. Bostick's partner at Westside Pediatric, his testimony is the truth. Further, he testified, as an expert, that Dr. Bostick complied with the prevailing standard of care when he treated Keith Broussard.

Dr. Watts admitted that the growth chart that he had reviewed in front of the jury was not the appropriate chart to use if a child was not growing and developing normally. Dr. Watts also admitted that the Policy Reference Guide of the American Academy of Pediatrics, which defendants relied upon heavily as evidence of the applicable standard of care, read, "The recommendations in this publication do not indicate an exclusive course of treatment, or serve as a standard of medical care."

Dr. Watts stated that, even after 23 years of practicing pediatrics, he could not recognize that a child is extremely short for his chronological age merely by observing him. Conversely, Dr. Watts then stated that he would be able to recognize a discrepancy if a child was chronologically 14 ½ years old but looked like he was 9 or 10 years old. Moreover, when Dr. Watts was asked to assume that Dr. Bostick saw Keith 7 or 8 times from January 1993 to October 1994, which

meant Keith was between 13 and 15 years old, and, further assume that Keith appeared to be 9 or 10 years old at the oldest, he admitted that he would have done something about monitoring his growth and development, if Keith had appeared 9 at 14. Dr. Watts also testified that he would have investigated but admitted that Dr. Bostick's notes do not indicate that he investigated. Later, Dr. Watts counted 15 visits to Westside Pediatric clinic between the time that Keith was 12 ¼ years old until he was 14 ¾ years old.

Dr. Watts disputed the other physicians' opinion that "constitutional growth delay" is a diagnosis of exclusion. Watts did admit that "failure to grow" and "falling off the trend line like that" were not consistent with constitutional growth delay. Further, admitted that Dr. Bostick did not order blood tests to investigate Keith's lack of growth after seeing him 15 times but that Dr. Moore ordered tests after seeing Keith one time.

Dr. Watts did confirm that it was the pediatrician's primary duty to monitor the growth and development of a child. Dr. Watts further confirmed that an accurately and completely plotted growth chart is the key to following growth.

Dr. Watts testified that, at Westside Pediatric Clinic, the "staff" plots the measurements on the growth chart but, ultimately, the doctors are responsible for their actions. In the end, Dr. Watts admitted that, in his expert opinion, if a child and the child's mother expressed concern over the child's lack of growth during a period of time when the child failed to grow, a pediatrician's failure to investigate whether the child had a disease "would constitute a problem," which should have been addressed through investigation, testing or referral to a specialist.

Dr. Watts testified that the American Academy of Pediatrics reference book was "the standard of care that all of the doctors adhered to" per clinic policy. Dr. Watts agreed that, by "investigation," he meant a "well child investigation" or a "thorough evaluation from stem to stern." He also agreed that, in his clinic, his

staff was expected to follow the standard of care, which was plotting growth measurements obtained on “well child visits.”

Although we are always reluctant to overturn a jury's verdict, the jury's decision in this case was manifestly erroneous. All of the pediatric experts testifying at trial agreed that, where a parent raises the issue of growth, the issue must be addressed by the physician. Further, Dr. Casey testified that it was the duty of the pediatrician, whose primary focus is the growth and development of the child, to investigate a lack of growth, which would be indicated by a flattening of the growth curve on a well-plotted growth chart.

Dr. Bostick explained that the Broussards did not complain of Keith's lack of growth, which was unequivocally controverted by Keith Broussard and his mother. Further, Dr. Bostick testified that Keith only visited Westside Clinic for acute illnesses, which did not afford Dr. Bostick the time to investigate his lack of growth. Dr. Bostick also blamed Mrs. Broussard's failure to “get with the program” and alleged refusal to bring Keith for a “well-child” visit for his failure to diagnose Keith's lack of growth.

Here, even if we found Dr. Bostick's testimony that neither Keith nor his mother ever complained of Keith's short stature to be plausible, Dr. Watts, who is Dr. Bostick's partner, admitted that he would have investigated if he had seen a 14 year old boy who appeared to be 9 years old. We find that the record reveals that the jury's verdict was clearly wrong and warrants reversal. Because we find merit in plaintiffs' first assignment of error, we pretermitt discussion of plaintiffs' remaining assignments of error.

Once it has been determined that the trier of fact is clearly wrong, the appellate court is empowered by La. C.C.P. art. 2164 to render “any judgment which is just, legal, and proper upon the record on appeal.” In making an initial award of damages at the appellate level, we are not limited to an award of either

the lowest or highest amount we would affirm. Instead, we set the award in an amount that is just compensation for the damages revealed by record. *Dolmo v. Williams*, 99-0169 (La. App. 4 Cir. 9/22/99), 753 So.2d 844, 848.

Damages

“General damages’ are those which cannot be fixed with pecuniary exactitude; they involve mental or physical pain or suffering, inconvenience, loss of intellectual gratification, or other losses of life or lifestyle which cannot be definitively measured in monetary terms.” *Boswell v. Roy O. Martin Lumber Co., Inc.*, 363 So.2d 506 (La. 1978).

In the instant case, the jury *made no award* to compensate for injuries resulting from negligence. In such circumstance, the appellate court should make a *res nova* determination of the appropriate total amount of damages to be awarded to the Plaintiff for the injuries sustained. *Mart v. Hill*, 505 So.2d 1120 (La. 1987).

The Medical Malpractice Act in pertinent part, limits recovery for medical malpractice victims who have been injured by qualified health care providers as follows:

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.

La. R.S. 40:1299.42(B)(1) and (2). This provision limits each health care provider's liability for compensation to \$100,000.00. Accordingly, the health care provider in this case, Dr. Bostick, is liable for a maximum of \$100,000.00. In awarding general damages we must evaluate each case according to its own particular circumstances. *Gaspard v. LeMaire*, 245 La. 239, 158 So.2d 149 (1963).

In the instant case, the delay in diagnosis caused both a physical and an emotional injury. The evidence shows that as a consequence of Dr. Bostick's negligence Keith Broussard suffered during his high school and early college years because of his extremely small stature. Further, Dr. Casey testified that Keith failed to reach his predicted adult height because he did not have a sufficient level of thyroid hormone at a critical stage. Dr. Banuchi also stated that Keith had reached the low end of the range of his predicted adult height.

Dr. Beverly Howze, a clinical psychologist, found that Keith experienced problems in adolescence with self-image. According to Keith's statements to her in therapy, his small stature prevented him from being selected for athletic activities and diminished his opportunity to attract adolescent girls. Further, he was not invited to social functions and he did not date in high school. Keith missed many important social experiences of his high school years, including his senior prom. In addition, because he did not develop secondary male sexual characteristics, he had extreme anxiety and humiliation regarding his appearance while changing in the locker room before physical education classes. Keith testified that he would wear his underwear, while taking a mandatory shower in the boys' locker-room after physical education class during high school, to prevent the other boys from seeing his lack of development.

According to Dr. Howze, Keith remained extremely anxious about his small and underdeveloped physical stature through his first year in college. He struggled academically, also. At the time of trial, although Keith had a more normal appearance, he was still wracked with self-doubt and daily worrying according to Dr. Howze. Because he still has a youthful appearance, he still has self-image problems.

In Dr. Howze's opinion, Keith's small stature caused Keith emotional pain and anguish. His depression and anxiety as an adolescent, which were described

by Keith, his mother, and medical records, were directly related to his undiagnosed growth problem.

Further, that previous pain and anguish still affects Keith today. Moreover, Keith has continuing problems with anxiety and socialization that relate back to the period in his life that he failed to grow. He is affected today by a “worrying pattern” that started in his adolescence. Further, he has some difficulty with intimacy with his girlfriend. Keith also has a problem asserting himself in school and at work. Dr. Howze believes that Keith needs further therapy.

The court is of the opinion that Keith Broussard is entitled to damages in the amount of \$100,000.00 for pain, suffering, and loss of enjoyment of life.

Regarding past and future medical expenses, although there was evidence that Keith Broussard received therapy and even testimony that he would need future therapy, the record is devoid of evidence as to the costs of past and/or future therapy.

The Louisiana Supreme Court in *Stiles v. K Mart Corp.*, 597 So.2d 1012, 1013 (La.1992), stated:

When the record establishes that future medical expenses will be necessary and inevitable, the court should not reject an award of future medical expenses on the basis that the record does not provide the exact value of the necessary expenses, if the court can examine the record and determine from evidence of past medical expenses and other evidence a minimum amount that reasonable minds could not disagree will be required. La.Code of Civ. Proc. art. 2164.

This court, being reluctant to reject the granting of an award for necessary future medical care on the basis that the record does not provide the cost of it, and following *Stiles*, looked for evidence on the record of similar past medical expenses as a reference to determine what would be a reasonable award in the instant case. However, although we find an undisputed need for future therapy, we cannot award future medical expenses because, as noted above, we find no evidence of past medical expenses to serve as a comparison.

In the original petition, plaintiffs asked for an award of loss of consortium suffered by Mr. and Mrs. Broussard. For the following reasons, this court finds that the plaintiffs abandoned the issue of Keith's parents' loss of consortium. While plaintiffs in their original petition sought an award for the loss of society suffered by Keith's parents, and the issue of loss of consortium was itemized as an element of recovery on the jury form, plaintiffs failed to seek these damages on appeal. Here, plaintiffs neither specified this issue nor addressed it as an assignment of error in their appellate brief. "All specifications or assignments of error must be briefed. The court may consider as abandoned any specification or assignment of error which has not been briefed." Uniform Rules, Court of Appeal, Rule 2- 12.4.

Conclusion

We find that the record reveals that the jury's verdict was clearly wrong and warrants reversal. We further find that Keith Broussard is entitled to an award of \$100,000.00 in general damages with legal interest thereon from the date of judicial demand until paid. All costs at the appellate and trial level are assessed to defendants.

REVERSED AND RENDERED

KEITH BROUSSARD, BOBBY G.
BROUSSARD AND JEANNE D.
BROUSSARD

NO. 03-CA-734

FIFTH CIRCUIT

VERSUS

COURT OF APPEAL

R. DOUGLAS BOSTICK, JR., M.D.,
AND WESTSIDE PEDIATRIC CLINIC,
A MEDICAL CORPORATION AND
ABC INSURANCE COMPANY, AND
DEF INSURANCE COMPANY

STATE OF LOUISIANA



CANNELLA, J., DISSENTS WITH REASONS

I respectfully dissent from the majority opinion. The case was tried before a jury. The jury heard the testimony and considered the evidence and returned a verdict in favor of the Defendant. In my view, there is support in the record for the jury finding and it was not manifestly erroneous.

EDWARD A. DUFRESNE, JR.
CHIEF JUDGE

SOL GOTHARD
JAMES L. CANNELLA
THOMAS F. DALEY
MARION F. EDWARDS
SUSAN M. CHEHARDY
CLARENCE E. McMANUS
WALTER J. ROTHSCHILD

JUDGES



FIFTH CIRCUIT
STATE OF LOUISIANA
101 DERBIGNY STREET (70053)
POST OFFICE BOX 489
GRETNA, LOUISIANA 70054

PETER J. FITZGERALD, JR.
CLERK OF COURT

GENEVIEVE L. VERRETTE
CHIEF DEPUTY CLERK

GLYN RAE WAGUESPACK
FIRST DEPUTY CLERK

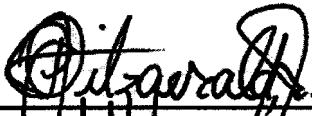
JERROLD B. PETERSON
DIRECTOR OF CENTRAL STAFF

(504) 376-1400

(504) 376-1498 FAX

CERTIFICATE

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED ON OR DELIVERED THIS DAY **FEBRUARY 23, 2004** TO ALL COUNSEL OF RECORD AND TO ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:



PETER J. FITZGERALD, JR.
CLERK OF COURT

03-CA-734

Daniel E. Buras Jr.
Attorney at Law
35th Floor
909 Poydras Street
New Orleans, LA 70112

Stewart E. Niles Jr.
Attorney at Law
47th Floor
201 St. Charles Avenue
New Orleans, LA 70170

Yvette A. D'Aunoy
Attorney at Law
Suite 2750
650 Poydras Street
New Orleans, LA 70130

NOT DESIGNATED FOR PUBLICATION

KEITH BROUSSARD, BOBBY G.
BROUSSARD AND JEANNE D.
BROUSSARD

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INSURANCE COMPANY, AND DEF
INSURANCE COMPANY

STATE OF LOUISIANA

ON REHEARING ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL
DISTRICT COURT, PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 526-534, DIVISION "D"
HONORABLE ROBERT M. MURPHY, JUDGE PRESIDING

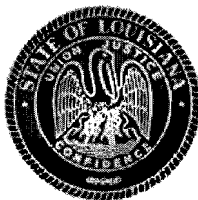
April 13, 2004

 **CANNELLA, J., DISSENTS**

, EDWARD A. DUFRESNE, JR.
CHIEF JUDGE

SOL GOTHARD
JAMES L. CANNELLA
THOMAS F. DALEY
MARION F. EDWARDS
SUSAN M. CHEHARDY
CLARENCE E. McMANUS
WALTER J. ROTHSCHILD

JUDGES



FIFTH CIRCUIT
STATE OF LOUISIANA
101 DERBIGNY STREET (70053)
POST OFFICE BOX 489
GRETNA, LOUISIANA 70054

PETER J. FITZGERALD, JR.
CLERK OF COURT

GENEVIEVE L. VERRETTE
CHIEF DEPUTY CLERK

GLYN RAE WAGUESPACK
FIRST DEPUTY CLERK

JERROLD B. PETERSON
DIRECTOR OF CENTRAL STAFF

(504) 376-1400

(504) 376-1498 FAX

CERTIFICATE

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A handwritten signature in black ink, appearing to read "P. Fitzgerald, Jr.", written over a horizontal line.

PETER J. FITZGERALD, JR.
CLERK OF COURT

03-CA-734

Daniel E. Buras Jr.
Stewart E. Niles Jr.
Attorneys at Law
909 Poydras Street
35th Floor
New Orleans, LA 70112

Yvette A. D'Aunoy
Attorney at Law
650 Poydras Street
Suite 2750
New Orleans, LA 70130