

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 CA 1417

PATRICIA LEBOURGEOIS, AS LEGAL TUTRIX OF THE MINOR CHILD,
KEVIN ROBERT TEMPLE

VERSUS

OFFICER LEO KELLER, OFFICER GERRICK NELSON, OFFICER OTIS
NACOSTE, SERGEANT JACK CULLEN, GREG PHARES, CHIEF OF
POLICE, BATON ROUGE POLICE DEPARTMENT AND THE CITY OF
BATON ROUGE

Judgment Rendered: MAY - 4 2007

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Suit Number 452,465

Honorable R. Michael Caldwell, Presiding

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Baton Rouge, Officer Leo Keller,
Officer Gerrick Nelson, and Sergeant
Jack Cullen

DMC McClendon Agrees and Assigns Additional Reasons.

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Officer Otis Nacoste

* * * * *

BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

GUIDRY, J.

In this action to recover damages for the alleged injury to and death of a detainee, plaintiff/appellant, Kevin Robert Temple,¹ appeals the trial court's judgment dismissing his claims against defendants/appellees, Officer Leo Keller, Officer Gerrick Nelson, Officer Otis Nacoste, Sergeant Jack Cullen, and the City of Baton Rouge. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

On August 9, 1997, Baton Rouge City Police Officers Leo Keller and Gerrick Nelson arrested Veronica Temple Lee for simple battery. Officer Nelson transported Ms. Lee to the Highland Road precinct, where she was photographed and a prisoner intake form was completed. Thereafter, Ms. Lee was placed in a holding cell, where she was notified that she was going to be issued a misdemeanor summons for simple battery and she would be released when a family member arrived to pick her up.² During this time, Ms. Lee did not exhibit to the police officers any signs of physical injury, other than a small amount of blood on her hands, nor did she give any indication that she might harm herself.

When Officers Keller and Nelson left the precinct between 6:15 p.m. and 6:25 p.m. that evening, Ms. Lee was in the holding cell, alive, and visibly uninjured. Officer Otis Nacoste and Sergeant Jack Cullen were the only individuals inside the precinct, in addition to Ms. Lee, when Officers Keller and Nelson departed. Officer Nacoste was assigned to the precinct desk that evening and was responsible for monitoring unattended prisoners, in addition to answering phone calls and writing reports. Sergeant Cullen was in the shift manager's office completing paperwork.

¹ On January 4, 2006, Kevin Robert Temple was substituted as party plaintiff, having reached the age of majority.

² A relative was called to pick up Ms. Lee due to some confusion as to her identity. At the time of her arrest, Ms. Lee told police officers that her name was Kerri Bernard, but no personal identification was found at that time to verify her identity.

At approximately 6:47 p.m., Officer Nacoste discovered Ms. Lee hanging from the bars in her cell. Her short-sleeved shirt was off and was tied in a knot around her neck and in a knot around the cell bars. She was found in a kneeling position, facing the cell bars with a puddle of blood on the floor in front of her. Emergency Medical Services responded and transported Ms. Lee to the Baton Rouge General Medical Center, where she was pronounced dead at 7:33 p.m. Dr. Alfredo Suarez conducted an autopsy for the East Baton Rouge Parish Coroner's Office, which indicated that Ms. Lee died of asphyxiation. However, at that time, based on information provided to him and an examination of the body, Dr. Suarez did not deem it necessary to open and examine Ms. Lee's skull.

The family of Ms. Lee, believing she would not have harmed herself, had a private autopsy conducted on July 13, 1998. Ms. Lee's body was exhumed, and Dr. Emil Laga, a board certified pathologist, performed the autopsy. In his examination, Dr. Laga opened and examined Ms. Lee's skull where he found a complex hairline basilar skull fracture running from right to left and crossing bones that shielded the middle ear and pituitary gland, as well as crossing the brain stem. Additionally, Dr. Laga found blood in Ms. Lee's inner ear, on the underside of her scalp, and inside the membranes of her brain. Upon further examination of the body, Dr. Laga also found blood in Ms. Lee's nose, stomach, upper airway, and upper gastrointestinal passages.

Thereafter, Patricia LeBourgeois, as legal tutrix of Ms. Lee's then minor child, Kevin Robert Temple, filed a petition for damages alleging various claims against the defendants for the injury and death of Ms. Lee. A bench trial was held on January 23 and 24, 2001. At the conclusion of the plaintiff's case, defendants made several motions for involuntary dismissal pursuant to La. C.C.P. art. 1672. In a judgment rendered in open court and signed on February 15, 2001, the trial

court granted defendants' motions and dismissed plaintiff's suit with prejudice.³ Plaintiff subsequently appealed this judgment. On September 20, 2002, this court reversed the trial court's judgment granting an involuntary dismissal and remanded the case to the trial court for further proceedings. See LeBourgeois v. Keller, 01-1143 (La. App. 1st Cir. 9/20/02) (unpublished opinion).

The trial in this matter resumed on April 25, 2006, with the presentation of defendants' evidence. Thereafter, on May 12, 2006, the trial court signed a judgment dismissing all of plaintiff's claims against the defendants with prejudice. Plaintiff now appeals from this judgment.

DISCUSSION

Plaintiff first asserts on appeal that the trial court erred in failing to find that this court's previous decision in LeBourgeois was the law of the case so as to create a presumption of liability against the defendants and in favor of the plaintiff at the commencement of defendants' case in chief. In our previous opinion, this court determined that the trial court erred in granting defendants' motions for involuntary dismissal and remanded the matter to the trial court for further proceedings. Specifically, we stated:

after reviewing the record in its entirety, we find that it was manifest error for the trial court to disregard Dr. Laga's testimony as speculative and not based on good theory By rejecting Dr. Laga's uncontradicted testimony, we find that the trial court manifestly erred and this interdicted the remainder of the factfinding process.

As such, the previous opinion stated that based on the evidence then presented, it was error for the trial court to grant the defendants' motions for an involuntary dismissal.

The "law of the case" principle is a discretionary guide, which, among other things, relates to the conclusive effects of appellate rulings at a trial on remand. See Held v. Aubert, 02-1486, p. 17 (La. App. 1st Cir. 5/9/03), 845 So. 2d 625, 639.

³ Plaintiff consented to the dismissal of Chief of Police Greg Phares.

The reasons for the “law of the case” doctrine are to avoid relitigation of the same issue, to promote consistency of result in the same litigation, and to promote efficiency and fairness to both parties by affording a single opportunity for the argument and decision of the matter at issue. Held, 02-1486 at p. 17, 845 So. 2d at 639. However, the principles underlying the law of the case doctrine are not present in the instant case. As stated above, the prior opinion addressed the narrow issue of whether the trial court erred in granting the defendants’ motions for an involuntary dismissal. The trial court correctly noted that the law of the case doctrine simply precluded it from granting another motion for involuntary dismissal on remand. The opinion did not rule on liability or causation, nor did it state or suggest that there was to be any presumption in favor of the plaintiff or that the burden of proof ordinarily imposed in a civil case was to be altered in any way on remand. Rather, the case was simply remanded for the defendants to present their evidence. The trial court, after reviewing all of the evidence, could then make a credibility evaluation of the plaintiff’s prior uncontradicted testimony in light of the additional evidence offered by the defendants. See Caldwell v. Texas Industries, Inc., 441 So. 2d 472, 476 (La. App. 2nd Cir. 1983). Therefore, we find plaintiff’s argument that our prior decision was the law of the case, beyond the narrow issue of whether the trial court erred in granting the defendants’ motions for an involuntary dismissal, or that it created any presumption in his favor on remand to be without merit.

Plaintiff also asserts that the trial court erred in finding, after the presentation of defendants’ evidence, plaintiff did not carry his burden of proof by showing, more probably than not, that the defendants negligently or intentionally caused Ms. Lee’s death. In an action to recover damages for injuries allegedly caused by another’s negligence or intentional conduct, the plaintiff has the burden of proving such negligence or intentional conduct by a preponderance of the evidence. See

Benjamin ex rel. Benjamin v. Housing Authority of New Orleans, 04-1058, p. 5 (La. 12/1/04), 893 So. 2d 1, 4. Proof is sufficient to constitute a preponderance when the entirety of the evidence, both direct and circumstantial, shows that the fact or causation sought to be proved is more probable than not. Cangelosi v. Our Lady of the Lake Regional Medical Center, 564 So. 2d 654, 664 (La. 1989). Thus, the plaintiff must produce evidence from which the factfinder can reasonably conclude that his injuries, more probably than not, were caused by the negligence or intentional acts of the particular defendant. The plaintiff, however, does not have to conclusively exclude all other possible explanations for his injuries. See Hanks v. Entergy Corp., 06-477, pp. 19-20 (La. 12/18/06), 944 So. 2d 564, 578. Placing the burden on the plaintiff requires him to persuade the factfinder concerning the defendants' negligence or intentional conduct, and if the factfinder is undecided after all of the evidence has been presented, the plaintiff loses because of the failure of his evidence. See Cangelosi, 564 So. 2d at 664.

Proof may be by direct or circumstantial evidence. Hanks, 06-477 at p. 20, 944 So. 2d at 578. A fact established by direct evidence is one that has been testified to by witnesses as having come under the cognizance of their senses. Cangelosi, 564 So. 2d at 664. Circumstantial evidence, on the other hand, is evidence of one fact, or set of facts, from which the existence of the fact sought to be determined may reasonably be inferred. Cangelosi, 564 So. 2d at 664-665. If, as in this case, circumstantial evidence is relied on, that evidence, taken as a whole, must exclude every other reasonable hypothesis with a fair amount of certainty. This does not mean, however, that it must negate all other possible causes. Hanks, 06-477 at p. 20, 944 So. 2d at 579.

Causation is a factual question to be determined by the factfinder. See Benjamin, 04-1058 at p. 7, 893 So. 2d at 6. As an appellate court, we may not set aside a trial court's finding of fact in the absence of manifest error or unless it is

clearly wrong, and where there is conflict in the testimony, inferences of fact should not be disturbed on appeal, even though the reviewing court may feel that its own evaluations and inferences are as reasonable. Rosell v. ESCO, 549 So. 2d 840, 844 (La. 1989). In order to reverse a trial court's determination of fact, an appellate court must review the record in its entirety and (1) find that a reasonable basis does not exist for the finding, and (2) further determine the record establishes the factfinder is clearly wrong or manifestly erroneous. Stobart v. State, Department of Transportation and Development, 617 So. 2d 880, 882 (La. 1993). Nevertheless, the issue to be resolved by the reviewing court is not whether the factfinder was right or wrong, but whether the factfinder's conclusion was reasonable. Stobart, 617 So. 2d at 882.

If the findings are reasonable in light of the record reviewed in its entirety, an appellate court may not reverse even though convinced that, had it been sitting as the trier of fact, it would have weighed the evidence differently. Stobart, 617 So. 2d at 882. When findings are based on determinations regarding the credibility of witnesses, the manifest error-clearly wrong standard demands great deference to the trier of fact's findings, for only the factfinder can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding and belief in what is said. Rosell, 549 So. 2d at 844. Moreover, the rule that questions of credibility are for the trier of fact applies to the evaluation of expert testimony, unless the stated reasons of the expert are patently unsound. Credibility determinations, including the evaluation and resolution of conflicts in expert testimony, are factual issues to be resolved by the trier of fact, which should not be disturbed on appeal in the absence of manifest error. Hanks, 06-477 at pp. 23-24, 944 So. 2d at 580-581.

In the instant case, the trial court determined that the evidence presented by plaintiff as to causation was circumstantial. Based on this evidence, the trial court

found that plaintiff established, more probably than not, that the skull fracture found by Dr. Laga during the second autopsy occurred while Ms. Lee was alive and in the jail cell. However, as to how that injury occurred and its relation to Ms. Lee's death, the trial court determined that plaintiff's evidence was not sufficient to meet his burden of proof because it did not eliminate other reasonable possibilities, which were established by the defendants' contradictory evidence, as to how Ms. Lee's injury and death occurred with a fair amount of certainty. From our review of the entire record, we do not find that the trial court was manifestly erroneous.

Plaintiff's expert, Dr. Laga, opined that the skull fracture occurred while Ms. Lee was alive and that such condition would have rendered her physically unable to hang herself. Dr. Suarez also indicated that if Ms. Lee had a skull fracture as described by Dr. Laga, she would not have been able to hang herself. Dr. Laga also opined that there is nothing inherent about a hanging that causes a skull fracture and based on the way Ms. Lee was found, there is no way she could have hit the back of her head so as to cause the injury. Additionally, Dr. Laga stated that Ms. Lee's hands, postmortem, showed bruising, and in his opinion, these bruises represent defensive wounds, as offensive wounds would have left an impression or a mark of the object that was hit, and they occurred prior to Ms. Lee's death. Further, the defendant officers testified that they did not notice bruising or marks of this nature on Ms. Lee's hands prior to her detention. Finally, Ms. Lee's mother testified that Ms. Lee was turning her life around and did not have a reason to kill herself. From this evidence, plaintiff asserted that the only reasonable possibility is that the defendant officers must have injured Ms. Lee so as to cause the skull fracture and then hung Ms. Lee to cover it up.

However, the record also shows that the defendant officers, whom the trial court specifically found to be credible, testified that Ms. Lee was cooperative and did not give them any trouble during her arrest or detention. Officer Nacoste also

testified that he knew a family member was on the way to pick up Ms. Lee and that anyone could enter the precinct at any time in full view of Ms. Lee's jail cell. The defendant officers, in particular Officer Nacoste and Sergeant Cullen, stated that they did not do anything to cause Ms. Lee's injury or death. Finally, Officers Keller and Nelson stated that they had noticed a small amount of blood on one or both of Ms. Lee's hands prior to her detention.

Additionally, defendants' expert, Dr. Gerald Liuzza, a pathologist with the Louisiana State University Health Sciences Center, testified that, assuming certain facts presented to him at the trial, he agreed that the skull fracture likely occurred while Ms. Lee was in the jail cell. However, Dr. Liuzza specifically stated that this time frame included the time during Ms. Lee's hanging. According to Dr. Liuzza, there are events that could have happened during the hanging process, such as twisting or banging, that could easily have caused a basal skull fracture. As such, Dr. Liuzza opined that he would focus on events related to the hanging as possibly having caused the skull fracture, which in his opinion resulted from an injury to the side of Ms. Lee's head. Dr. Liuzza also stated if Ms. Lee was injured so as to cause a skull fracture and then hanged, he would very likely expect to see some evidence of the injury to the head that caused the fracture, and neither autopsy report indicated any such evidence of injury.

Further, the record also establishes that at the time of her arrest, Ms. Lee had just been in an altercation with her roommate, had given the police a false name, and was taking Xanax, a medication for her nerves, all of which goes to Ms. Lee's state of mind during this time period. Considering all of this evidence, and after reviewing the record in its entirety, we find that the trial court was clearly presented with conflicting lay and expert testimony as to what caused Ms. Lee's injury and death. The trial court, being in the best position to review and evaluate this testimony, determined that the evidence presented by the defendants was more

credible and presented a reasonable hypothesis as to how Ms. Lee was injured and died. Accordingly, we cannot find that the trial court was manifestly erroneous or clearly wrong in finding that the plaintiff failed to meet his burden of proof in establishing that more probably than not the defendants negligently or intentionally caused injury or death to Ms. Lee.⁴

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court. All costs of this appeal are assessed against the plaintiff/appellant, Kevin Robert Temple.

AFFIRMED.

⁴ Based on our determination, we pretermint discussion of plaintiff's argument regarding the application of res ipsa loquitor.

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 **McCLENDON, agrees and assigns additional reasons.**

I agree and respectfully assign additional reasons. One of plaintiff's medical experts and the defendants' medical expert agreed that it was virtually impossible to determine if the fracture occurred before, during, or after the hanging. However, even assuming the trial court clearly erred in finding that the death occurred in the cell, the result would be the same. Based on the totality of the evidence in the record and the trial court's finding that defendants' medical expert was more credible than Dr. Laga, as well as the finding that the police officers were credible, the record provides no basis for reversal.