NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 CA 0591

RICHARD BRYANT LOGAN AND CARRIE LOGAN

VERSUS

DR. DONALD PAUL SCHWAB, JR.

Judgment Rendered: JUL 07 2015

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On Appeal from the
32nd Judicial District Court
In and for the Parish of Terrebonne
State of Louisiana
No. 165756

The Honorable Timothy C. Ellender, Judge Presiding

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BEFORE: MCDONALD, CRAIN, AND HOLDRIDGE, JJ.

McDonald, J. concurs. I believe the plaintiffs proved the standard of care, but failed to prove a breach of the standard.

HOLDRIDGE, J.

This is an appeal of a judgment dismissing a medical malpractice claim after a jury concluded that plaintiffs had failed to establish the applicable standard of care. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL HISTORY

In August 2010, Richard Logan underwent a laparoscopic cholecystectomy to remove his gallbladder. The procedure was performed by Dr. Donald Paul Schwab, Jr., a general surgeon. The removal of the gallbladder requires the surgeon to clip and cut two structures: the cystic artery and the cystic duct. During the procedure, Dr. Schwab clipped and cut what he believed to be Mr. Logan's cystic duct, but was actually his common bile duct. Due to Mr. Logan's medical condition, his cystic duct had been "obliterated" and his common bile duct was located where his cystic duct should have been. As a consequence, Mr. Logan's left and right hepatic ducts were also transected during the procedure and bile began to leak from his liver. Dr. Schwab immediately sought the advice of Dr. Ian Carmody, a liver transplant surgeon at Ochsner Hospital in New Orleans. Dr. Carmody instructed Dr. Schwab to stabilize the patient and transfer him to Ochsner. At Ochsner, Dr. Carmody performed additional surgery on Mr. Logan to repair the problem.

A medical review panel was convened. In December 2011, the panel rendered an opinion concluding that there was no breach of the standard of care on the part of Dr. Schwab. The panel specifically noted that common bile duct injuries are a known risk of laparoscopic gallbladder removal. Thereafter, Mr. Logan filed a petition for medical malpractice against Dr. Schwab. Mr. Logan's wife, Carrie, joined in the petition asserting a claim for loss of consortium.

Following a three-day trial, the jury returned a verdict finding that the Logans had not proven by a preponderance of the evidence the "standard of care applicable to general surgeons performing laparoscopic gallbladder removal surgery[.]" On March 15, 2013, the trial court signed a judgment in accordance with the jury verdict and dismissed the Logans' suit with prejudice. After their motion for new trial was denied,[1] the Logans lodged this appeal asserting three assignments of error.[2] Specifically, they contend that:

1. The trial judge's conduct at trial improperly influenced and confused the jury;

2. The trial judge erred in allowing the expert testimony of Dr. Edward Staudinger and the admission of the medical review panel opinion; and

3. The jury erred in finding that the plaintiffs did not prove the applicable standard of care for general surgeons performing laparoscopic gallbladder removal surgery.

DISCUSSION

Conduct of the Trial Judge

In their first assignment of error, the Logans contend that the judge's conduct during the trial improperly influenced and confused the jury. At the outset we note that a trial judge is presumed to be impartial. **Whalen v. Murphy**, 05-2446 (La.App. 1 Cir. 9/15/06), 943 So.2d 504, 509, writ denied, 06-2915 (La. 3/16/07), 952 So.2d 696. While a trial judge is afforded discretion in conducting a trial, that discretion is circumscribed by considerations of justice and fairness. The judge is generally prohibited from engaging in a pattern of judicial conduct that

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[1] The Logans also filed motions to recuse the trial judge and for a rehearing of their motion for new trial. These motions were denied as well.

[2] The Logans appealed both the March 15, 2013 final judgment as well as the judgment denying their motion for new trial. They subsequently filed an "Amended Motion and Order for Devolutive Appeal" from the same two judgments as well as the judgment denying their subsequent motions to recuse and for a rehearing of their motion for new trial. However, the Logans' arguments on appeal do not pertain to either of the interlocutory judgments. Thus, our review is limited accordingly. See Uniform Rules, Courts of Appeal, Rule 2-12.4B(4).

demonstrates prejudice to one party or partiality to the other party. **Reed v. Recard**, 97-2250 (La.App. 1 Cir. 11/18/98), 744 So.2d 13, 16, writ denied, 98-3070 (La. 2/12/99), 738 So.2d 572, abrogated on other grounds by **Sultana Corp. v. Jewelers Mut. Ins. Co.**, 03-0360 (La. 12/3/03), 860 So.2d 1112.

Further, the judge, in the presence of the jury shall not comment upon the facts of the case, either by commenting upon or recapitulating the evidence, repeating the testimony of any witness, or giving an opinion as to what has been proved, not proved, or refuted. La. C.C.P. art. 1791. However, any improper conduct by the trial judge constitutes reversible error only when a review of the record as a whole reveals the conduct was so prejudicial that the complaining party was deprived of a fair trial. **Kirby v. State ex rel. Louisiana State University Bd. of Sup'rs**, 14-0017 (La.App. 1 Cir. 11/7/14), ___ So.3d ___, ___, 2014 WL 5791567, 16; **Reed**, 744 So.2d at 16. Moreover, the failure of a party to object to an impropriety constitutes a waiver of the right to complain of the alleged error on appeal. See **Kirby**, ___ So.3d at ___; **Johnson v. H. W. Parson Motors, Inc.**, 231 So.2d 73, 78-79 (La.App. 1 Cir. 1970). See also **State ex rel. J.B. v. J.B., Jr.**, 35,846 (La.App. 2 Cir. 2/27/02), 811 So.2d 179, 183-84, citing **Oh v. Allstate Ins. Co.**, 428 So.2d 1078 (La.App. 1 Cir. 1983).

At no time during the trial of this matter did the Logans object to any of the alleged instances of improper conduct by the trial judge that they now complain of on appeal. Even so, based on our review of the record as a whole we do not find that the complained-of conduct was so prejudicial that the Logans were deprived of a fair trial.

Specifically, the Logans allege that the trial court inappropriately inquired into the amount of fees that were being paid to the Logans' expert in the presence

of the jury.[3] However, assuming arguendo that this constituted a comment on the evidence in the case, we note that a review of the relevant colloquy indicates that the trial judge inquired about the costs for the defendant's expert as well. Therefore, we find no partiality in this regard.

The Logans also allege that the trial judge gave a warm greeting to defense witness, Dr. Rau, in the presence of the jury. The sole basis for this allegation is Carrie Logan's testimony at a post-trial hearing on the Logans' motion to recuse the trial judge. No other individual, not even the Logans' attorney, attests to witnessing this alleged interaction.[4] However, Ms. Logan's testimony at the hearing, which occurred after the unfavorable jury verdict was returned, was unsubstantiated in another regard, and therefore, is not above question.[5]

Finally, the Logans argue that the trial judge walked around the courtroom and ate candy while sitting in the jury box and that this behavior distracted and confused the jury. Clearly, this behavior did not constitute a comment on the facts of the case. And while inappropriate and untoward, we cannot say that it was so unjust or unfair such that it would have deprived the Logans of a fair trial.

In sum, the Logans made absolutely no objections during the course of the trial, nor did they request that the jury be admonished in any way. Even so, we note that the jury was properly instructed to disregard anything the trial judge said

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[3] At the hearing on their motions to recuse and for rehearing on their motion for new trial, the Logans offered into evidence the affidavit of the jury foreperson stating that based upon the trial judge's question to the Logans' lawyer regarding the fees paid to their expert witness, Dr. Murphy, the jury rejected the testimony of Dr. Murphy and "was confused in answering Jury Interrogatory number one (1)." Pursuant to La. Code of Evid. Art. 606B, such an affidavit was arguably inappropriate. Even so, it would not be dispositive in this matter.

[4] Defense counsel contends that neither he nor the defendant witnessed this encounter. Counsel for the Logans admits that he did not witness this either, nor did the juror mention it in her affidavit.

[5] Ms. Logan claimed that the trial judge asked the defendant's witness, Dr. Rau, how much he was getting paid as an expert. However, no such exchange appears in the record.

or did that suggested he favored any particular party or had any opinion regarding the case. Accordingly, we find this assignment of error to be without merit.

Admission of Expert Testimony and Medical Review Panel Opinion

The Logans also assign as error the trial court's refusal to strike the expert testimony of Dr. Edward Staudinger, as well as its refusal to exclude from evidence the medical review panel opinion concerning Mr. Logan's claim against Dr. Schwab in which Dr. Staudinger participated. The crux of the Logans' argument is that Dr. Staudinger applied a community or local standard of care rather than a national standard of care in forming his medical review panel opinion.

In a medical malpractice action against a physician, the plaintiff is required to prove: (1) the standard of care applicable to the physician; (2) a violation of that standard of care by the physician; and (3) a causal connection between the physician's alleged negligence and the claimed injuries. See La. R.S. 9:2794A; **Pfiffner v. Correa**, 94-0924 (La. 10/17/94), 643 So.2d 1228, 1233; **Vanner v. Lakewood Quarters Retirement Community**, 12-1828 (La.App. 1 Cir. 6/7/13), 120 So.3d 752, 755. With regard to the applicable standard of care, a medical malpractice plaintiff must prove 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 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. La. R.S. 9:2794A(1); **LeBlanc v. Landry**, 08-1643 (La.App. 1 Cir. 6/24/09), 21 So.3d 353, 360 writ denied, 09-1705 (La. 10/2/09), 18 So.3d 117.

It is undisputed that the defendant. Dr. Schwab, practices in the medical specialty of general surgery. Therefore, the applicable standard of care is not that of the community or locale, but that practiced by general surgeons across the nation, i.e. the "national" standard of care. See **LeBlanc**, 21 So.2d at 360.

Dr. Staudinger was tendered as an expert in general surgery without objection. On direct examination, Dr. Staudinger testified that Dr. Schwab did everything required of him under the national standard of care. However, on cross-examination, the Logans' attorney questioned Dr. Staudinger regarding his prior deposition testimony wherein he related how he had determined the applicable standard of care when rendering his medical review panel opinion in this case. In his deposition, Dr. Staudinger testified that he considered, among other things, the procedure that was performed and whether what was done "is what usually occurs in the community." However, at trial Dr. Staudinger maintained that the standard in the community is commensurate with the standard of care across the nation. Nevertheless, the Logans' attorney moved to strike Dr. Staudinger's expert testimony on the basis that it "was not in compliance with the jurisprudence." He later moved to have the medical review panel opinion excluded from evidence as well. Both of these motions were denied.

The admission of expert testimony is governed by La. Code of Evid. art. 702. According to this article, when scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion. In **Cheairs v. State ex rel. Department of Transportation and Development**, 03-0680 (La. 12/3/03), 861 So.2d 536, 542, the Louisiana Supreme Court adopted the following

three part inquiry for determining whether the admission of expert testimony is proper:

1. Is the expert qualified to testify competently regarding the matters he intends to address?

2. Is the methodology by which the expert reaches his conclusions sufficiently reliable as determined by the sort of inquiry mandated in **Daubert** ?[6]

3. Will the testimony assist the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue?

A trial court is accorded broad discretion in determining whether expert testimony should be held admissible and who should or should not be permitted to testify as an expert. **Cheairs**, 861 So.2d at 541. An appellate court should not disturb a trial court's evidentiary ruling on the admissibility of expert opinion evidence absent an abuse of that discretion. See **MSOF Corp. v. Exxon Corp.**, 04-0988 (La.App. 1 Cir. 12/22/05), 934 So.2d 708, 717, writ denied, 06-1669 (La. 10/6/06), 938 So.2d 78.

In the instant matter, the Logans do not challenge Dr. Staudinger's qualifications but rather the basis on which he formed his medical review panel opinion. However, under the facts of this case, we need not resort to a **Daubert** analysis, as Dr. Staudinger specifically testified at trial regarding the national standard of care and further asserted that the community standard is commensurate with the national standard of care. Furthermore, his testimony pertaining to the applicable standard of care was in conformance with that given by other expert witnesses at trial regarding the national standard of care. Cf. **Iseah v. E.A. Conway Memorial Hosp.**, 591 So.2d 767, 772 (La.App. 2 Cir. 1991), writ denied, 595 So.2d 657, writ denied, 595 So.2d 657 (La. 1992) (where court noted that there

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[6] See **Daubert v. Merrell Dow Pharmaceuticals, Inc.**, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

was no evidence indicating that the national standard of care was different from the local standard of care). Thus, even if we were to find that the admission of Dr. Staudinger's testimony was in error, we would nonetheless be constrained to find it harmless error because his testimony was merely corroborative and cumulative of other properly admitted evidence, including the trial testimony of Dr. Normand, another medical review panelist in this case. See **McGlothlin v. Christus St. Patrick Hosp.**, 10-2775 (La. 7/1/11), 65 So.3d 1218, 1230.

Finally, we note that the admissibility of the medical review panel opinion is expressly provided for by statute; La. R.S 40:1299.47(H) provides that "[a]ny report of the expert opinion reached by the medical review panel shall be admissible as evidence in any action subsequently brought by the claimant in a court of law, but such expert opinion shall not be conclusive and either party shall have the right to call, at his cost, any member of the medical review panel as a witness." But see **McGlothlin**, 65 So.3d at 1229-30. Therefore, for all of the foregoing reasons, we find no abuse of discretion on the part of the trial court in denying the Logans' motion to strike Dr. Staudinger's expert testimony and denying their motion to exclude the medical review panel opinion. This assignment of error is likewise without merit.

Standard of Care

Lastly, the Logans contend that the jury erred in failing to find that they had satisfied their burden of proof in establishing the applicable standard of care. As previously noted, to establish a medical malpractice claim against a physician, a plaintiff must establish by a preponderance of the evidence: (1) the standard of care applicable to the physician; (2) a violation of that standard of care by the physician; and (3) a causal connection between the physician's alleged negligence and the claimed injuries. See La. R.S. 9:2794A. The resolution of each of these

inquiries are determinations of fact which should not be reversed on appeal absent manifest error. **Martin v. East Jefferson Gen. Hosp.**, 582 So.2d 1272, 1276 (La. 1991); **Aymami v. St. Tammany Parish Hosp. Service Dist. No. 1**, 13-1034 (La.App. 1 Cir. 5/7/14), 145 So.3d 439, 446.

Expert testimony is generally required to establish the applicable standard of care. See **Samaha v. Rau**, 07-1726 (La. 2/26/08), 977 So.2d 880, 884. Under the manifest error standard of review, when the fact finder's determination is based on its decision to credit the testimony of one of two or more witnesses, that finding can virtually never be manifestly erroneous. This rule applies equally to the evaluation of expert testimony, including the evaluation and resolution of conflicts in expert testimony. **Aymami**, 145 So.3d at 447. Further, a jury may accept or reject in whole or in part the opinion expressed by an expert; such testimony is to be weighed the same as any other evidence. **Matherne v. Barnum**, 11-0827 (La.App. 1 Cir. 3/19/12), 94 So.3d 782, 790, writ denied, 12-0865 (La. 6/1/12), 90 So.3d 442. Where expert witnesses present differing testimony, it is the responsibility of the trier of fact to determine which evidence is the most credible. **Aymami**, 145 So.3d at 447.

In the instant matter, expert witnesses for the defense opined that the standard of care required a surgeon to obtain the "critical view of safety" (also known as the "Triangle of Calot") by circumferentially dissecting and isolating only the two structures entering the gallbladder, i.e. the cystic artery and the cystic duct. Specifically, with regard to the cystic duct, the surgeon must circumferentially dissect around it up to the neck of the gallbladder. Once the "critical view" is obtained of the edge of the liver and the two structures entering the gallbladder, then the surgeon may proceed to clip and cut the structures. While experts for the defense agreed that, as a general rule, the standard of care required a

surgeon to identify the proper anatomy before cutting, they clarified that the standard also allowed for exceptions to that rule such as when a perceptual error occurs due to a distortion of the anatomy, like in the present case where the common bile duct was located where the cystic duct should have been.

The sole expert witness for the Logans, Dr. Leo Murphy, averred that regardless of any anatomical anomalies, a surgeon must, without exception, positively and conclusively identify a structure before proceeding to cut it. Dr. Murphy also testified that the standard of care required an additional step than that opined by the defense witnesses. Specifically, he maintained that the surgeon must continue the circumferential dissection beyond the neck of the gallbladder all the way "to the point where [the gallbladder] is stuck to the liver." He admitted that this step was not part of the "critical view" but averred that it was necessary to ensure that the "critical view" obtained is the correct one. The Logans offered no other evidence, either testimonial or documentary, to corroborate Dr. Murphy's contention that the standard of care required this additional step.

Dr. Murphy admitted that apart from failing to carry out this additional step, Dr. Schwab did everything correctly and in accordance with the standard of care. Indeed, he stated that his only objection was Dr. Schwab's failure to complete this additional step. Consequently, in order for the Logans to prevail on the merits of their claim, it was essential that they prove that the applicable standard of care encompassed this additional step. In concluding that the Logans had failed to prove by a preponderance of the evidence the applicable standard of care, the jury obviously chose not to credit Dr. Murphy's opinion, at least insofar as he suggested that the standard of care required an additional step than that suggested by the other medical experts. After a thorough review of the entire record in this matter, and cognizant of the deference due a jury's credibility determinations, we find no

manifest error in the jury's finding. Thus, having rejected the testimony of the Logans' sole expert witness, the jury reasonably concluded that the Logans failed to prove the applicable standard of care. This assignment of error is also without merit.

CONCLUSION

For all of the forgoing reasons, the March 15, 2013 judgment dismissing the Logans' suit is hereby affirmed. All costs of this appeal are assessed to Richard and Carrie Logan.

AFFIRMED.