

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2016 CA 1139

J
MT.
CATHERINE MATTHEWS, PATRICK MATTHEWS, MONICA
MATTHEWS AND LEANDER MATTHEWS, JR.

VERSUS

LOUIS J. PROVENZA, M.D. AND DEEPAK DIXIT, M.D. AND DR.
DEEPAK DIXIT, L.L.C.

DATE OF JUDGMENT: **MAY 24 2017**

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 2010-16406, DIVISION C, PARISH OF ST. TAMMANY
STATE OF LOUISIANA

HONORABLE RICHARD A. SWARTZ, JUDGE

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BEFORE: HIGGINBOTHAM, THERIOT AND CHUTZ, JJ.

Disposition: AFFIRMED.

Higginbotham, J. concurs.

CHUTZ, J.

Plaintiffs-appellants, Catherine Matthews, and her major children, Patrick Matthews, Leander Matthews, Jr., and Monica Matthews, appeal the trial court's dismissal of their claims of alleged medical malpractice and wrongful death against defendant-appellee, Dr. Louis J. Provenza. For the following reasons, the trial court's judgment is affirmed.

Because the trial court set forth in detail the relevant facts, they will not be reiterated in this memorandum opinion. Instead, the focus of this opinion is on the issues raised by plaintiffs in this appeal.

Plaintiffs, the surviving spouse and major children of decedent, Leander Matthews, challenge the trial court's conclusion that they failed their burden of proving a breach in the standard of care. They assert that the collective testimony of Dr. Ratnakar Pernenkil, Dr. Barry Kusnick, and Dr. John Kokemor established that, due to a prior episode of ventricular tachycardia during a surgery performed by Dr. Provenza on Mr. Matthews in 2004, the standard of care required that Mr. Matthews either receive a preoperative evaluation by a cardiologist or specific cardiac testing prior to the induction of general anesthesia in conjunction with the surgery Dr. Provenza was scheduled to perform on May 14, 2007. Describing Dr. Provenza as "intimately familiar" with Mr. Matthews' medical history and noting that Dr. Provenza had provided care to Mr. Matthews since before 2002 and was present during the prior ventricular tachycardia episode, plaintiffs contend that Dr. Provenza's failure to ensure that Mr. Matthews underwent either a cardiac evaluation or the recommended cardiac testing before the 2007 surgery demonstrates a breach in the standard of care. Thus, they urge the trial court erred in dismissing their claims against Dr. Provenza.

In order to prevail in a medical malpractice action, a plaintiff is required to establish: (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 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; (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; and (3) that as a proximate result of this lack of knowledge or skill or failure to exercise this degree of care, the plaintiff suffered injuries that would not otherwise have been incurred. See La. R.S. 9:2794(A); ***Knight v. Gould***, 2010-1355 (La. App. 1st Cir. 3/25/11), 65 So.3d 158, 160-61. In other words, the plaintiff must establish the standard of care applicable to the doctor, a breach of that standard of care, and that the substandard care caused an injury the plaintiff would otherwise not have suffered. ***Id.*** at 161. It is well settled that the resolution of each of these inquiries involves a determination of fact. ***Id.*** A court of appeal may not set aside a factual determination by a trial court in the absence of “manifest error” or unless it is “clearly wrong.” See ***Stobart v. State, through Dep’t of Transp. and Dev.***, 617 So.2d 880, 882 (La. 1993).

In medical malpractice actions, opinions from medical experts are necessary to determine both the applicable standard of care and whether that standard was breached. When medical experts are called to testify, the views of such expert witnesses are persuasive, although not controlling, and any weight assigned to their testimony by the trier of fact is dependent upon the facts on which the opinion is based as well as the expert’s qualifications and experience. The trier of fact must assess the testimony and credibility of all the witnesses and make factual determinations regarding these evaluations. ***Knight***, 65 So.3d at 161.

If the experts' opinions are in conflict concerning the standard of care applicable to a case, the reviewing court will give great deference to the conclusions of the finder of fact. *Id.* The issue to be resolved on appeal is not whether the trier of fact was right or wrong, but whether the fact finder's conclusion was a reasonable one. *Stobart*, 617 So.2d at 882.

A review of the expert testimony shows that while all three of the doctors agreed the standard of care required a cardiac evaluation and/or further cardiac testing after the 2004 ventricular tachycardia episode during surgery, they did not conclude that it was Dr. Provenza who was responsible for ensuring Mr. Matthews' conformance with those recommendations. Dr. Pernenkil, an expert physician in the field of cardiology who had evaluated Mr. Matthews in 2004 immediately after the ventricular tachycardia episode, testified that Dr. Provenza met the standard of care by consulting a physician to clear Mr. Matthews before the 2007 surgery. Furthermore, he stated that Dr. Provenza did not breach the standard of care by failing to advise the clearing physician of the 2004 prior cardiac event. Dr. Pernenkil also opined that Mr. Matthews had a responsibility to follow up on the physicians' recommendations.

Dr. Kusnick, also accepted by the trial court as an expert physician in the field of cardiology, stated that it was appropriate for Dr. Provenza to rely on the recommendation of the physician who conducted the consultation for surgical clearance. Dr. Kusnick elaborated that as a neurosurgeon, Dr. Provenza lacked the requisite internal medicine training to assess a patient's medical risk prior to an operation. According to Dr. Kusnick, Dr. Provenza could not and should not have addressed the wide complex tachycardia from which Mr. Matthews suffered. Like Dr. Pernenkil, Dr. Kusnick testified that Mr. Matthews had a responsibility to himself to follow up with cardiac care especially since upon awakening from the 2004 surgery, a cardiologist was tending to him.

Dr. Kokemor was an internist who served on the medical review panel that rendered an opinion finding the evidence did not support the conclusion that Dr. Provenza failed to meet the standard of care but did support the conclusion that Dr. Deepak Dixit, who cleared Mr. Matthews for the May 14, 2007 surgery, had failed to meet the standard of care.¹ In his deposition testimony, Dr. Kokemor stated that it was Dr. Dixit's obligation to pursue any issues Mr. Matthews may have had and to obtain any necessary records from the appropriate sources before providing surgical clearance. Dr. Kokemor stated that had he had the specific information that Dr. Provenza had about the prior ventricular tachycardia episode he would have remembered. But nothing in Dr. Kokemor's testimony established that because Dr. Provenza knew of the prior episode it was, therefore, his responsibility to have Mr. Matthews evaluated by a cardiologist before surgery or to ensure that Mr. Matthews had additional cardiac testing so as to support a finding that Dr. Provenza breached the standard of care. Dr. Kokemor concurred in the medical review panel's conclusion finding the evidence insufficient to establish that Dr. Provenza failed to meet the standard of care. In his deposition testimony, Dr. Kokemor specifically indicated that it was Dr. Dixit's responsibility to update Mr. Matthews' cardiac testing, particularly since he had presented to Dr. Dixit with a blood pressure of 200/100.

Based on this expert testimony, a reasonable factual basis exists to support the trial court's conclusion that plaintiffs failed their burden of proving that Dr. Provenza breached the applicable standard of care. As such, that finding is not

¹ Plaintiffs settled their claims against Dr. Dixit with the entity responsible for his actions and omissions prior to trial.

manifestly erroneous.² To the extent the expert testimony supported a finding that the standard of care required Mr. Matthews receive further cardiac evaluation or testing, none of the experts concluded that this standard of care was imputable to Dr. Provenza. Accordingly, the trial court correctly dismissed plaintiffs' medical malpractice claims against Dr. Provenza.

DECREE

The trial court's judgment is affirmed. This memorandum opinion is issued in compliance with URCA Rule 2-16.1.B. Appeal costs are assessed against plaintiffs-appellants, Catherine Matthews, Patrick Matthews, Leander Matthews, Jr., and Monica Matthews.

AFFIRMED.

² Plaintiffs contend that much of Dr. Provenza's testimony was self-serving, contradictory, and unworthy of acceptance by any reasonable factfinder and ask that this court disregard all of his testimony as lacking in credibility. The trial court's conclusion is supported by the expert testimony as articulated herein with limited reliance on Dr. Provenza's version of the facts. Insofar as those facts established by his testimony that may form a basis of the trial court's conclusion, the trier of fact was free to believe Dr. Provenza's testimony in part. See *Pennison v. Carrol*, 2014-1098 (La. App. 1st Cir. 4/24/15), 167 So.3d 1065, 1076, writ denied, 2015-1214 (La. 9/25/15), 178 So.3d 568. The only essential fact that Dr. Provenza provided and upon which the experts may have relied to form those portions of their respective opinions articulated herein was that Dr. Provenza referred Mr. Matthews to a physician to obtain surgical clearance. Clearly, the trial court was within its province to believe this aspect of Dr. Provenza's testimony. Moreover, even without his testimony, Dr. Kokemor explained that surgical clearance followed the patient irrespective of what facility to which it was provided. Thus, the trial court could have reasonably determined that Dr. Provenza relied on the surgical clearance even if he had not expressly requested it.