JUDITH ST. MARTIN	*	**NO. 2000-CA-1539**
VERSUS	*	**COURT OF APPEAL**
SHELIA SWEENEY AND TOURO INFIRMARY,	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	

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CONSOLIDATED WITH:	**CONSOLIDATED WITH:**
JUDITH ST. MARTIN	**NO. 2000-CA-1540**
VERSUS	
SHELIA SWEENEY, TOURO INFIRMARY, AND CHICAGO INSURANCE COMPANY (INTERSTATE INSURANCE GROUP) AND SCHOOL OF PHYSICAL THERAPY AT OHIO UNIVERSITY	

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 92-5105 C/W 94-7780, DIVISION "M-16"
Honorable Piper Griffin, Judge Pro Tempore
* * * * * *

Charles R. Jones
Judge
* * * * * *

(Court composed of Chief Judge William H. Byrnes III, Judge Charles R. Jones, Judge Patricia Rivet Murray)

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REVERSED

We review on appeal the judgment awarding Appellant, Judith St. Martin, damages in the amount of $125,000 along with interest and costs. Ms. St. Martin filed a Petition for Damages against Sheila Sweeny, Touro

right leg was 3”-4” shorter then her left leg. In 1981, Dr. J. Gregory Kinnett, an orthopedic surgeon, created a hip socket for Ms. St. Martin. In 1989 Dr. Kinnett performed the “Ilizarow procedure” on Ms. St. Martin to lengthen her right leg. Dr. Kinnett was trained under Russian science doctor Ilizarow who invented the procedure to lengthen the bone and increase bone growth. After the procedure was preformed, Ms. St. Martin’s leg was held together with screws that had to be turned every six hours in order for the leg to heal properly. The operation was successful. The Ilizarow device was removed in January of 1991 at which time Ms. St. Martin was placed in a long leg cast. The long leg cast was eventually replaced with a short leg cast that was removed in May of 1991. Dr. Kinnett prescribed that Ms. St. Martin go to Touro Infirmary’s Back in Action Clinic for physical therapy at that time.

While at the Back in Action Clinic in late May, Shelia Sweeny, a student therapist was administering Ms. St. Martin’s therapy when Ms. St. Martin was injured. Ms. Sweeny was unsupervised at the time of the accident.

Ms. St. Martin alleges that Ms. Sweeny “ordered her to bear full weight” on her right leg. Ms. Sweeny testified that she told Ms. St. Martin to bear “as much weight as she was comfortable with”. Ms. St. Martin claims that she followed Ms. Sweeny’s instruction and immediately she heard a

"pop" and as a result sustained a fractured right tibia. Appellant alleges that her right leg had been equaled to her left leg as a result of the Ilizarow procedure and that the accident caused her leg to once again shorten.

Ms. St. Martin was placed back into a long leg cast and subsequently was able to get around with a cane. She blames the above accident for a slip and fall in Macy's department store whereby she sustained a shattered artificial hip and femur. The claim against Macy's was settled.

Procedural History

Ms. St. Martin filed a Petition for Damages against Touro Infirmary (hereinafter "Touro") and Ms. Sweeny in March of 1992 in the Civil District Court for the Parish of Orleans. The first petition alleged liability for Ms. St. Martin's fractured tibia. A second suit was consolidated with the first suit naming Ohio University and Chicago Insurance Company as defendants (Ms. Sweeny's school at the time and their insurance carrier).

Touro settled for $100,000. The district court granted approval of the settlement and entered judgment. The settlement served as Touro's statutory admission of liability as to Ms. Sweeny. Ms. St. Martin proceeded against the Louisiana Patient's Compensation Fund (Hereinafter "PCF") through Touro for the remaining damages.

The jury returned a verdict assessing 50% comparative fault to Touro,

30% comparative fault to St. Martin and 20% comparative fault to an "other person or event". The total damages awarded were $125,000, along with legal interest and court costs, subject to the credit for the $100,000 paid by Touro in settlement. From this judgment, Ms. St. Martin appeals.

Discussion

Ms. St. Martin's primary argument is that after rendition of the $125,000 judgment in her favor, she in effect was awarded nothing. Ms. St. Martin argues that the district court erred in the assessment of fault between the parties and that the PCF was standing in the "shoes" of Touro who received a credit for the $100,000 paid by Touro in settlement which negated the entire award.

Allocation of fault

In her first assignment of error, Ms. St. Martin argues that the district court erred in allowing the PCF to present evidence challenging liability and causation with respect to the first $100,000 of the plaintiff's damages, when liability and damages of at least $100,000 was admitted by Touro, thus triggering the PCF. Ms. St. Martin further argues that the PCF relitigated the issue of causation as it relates to Touro's admission of liability. The PCF contends that although it could not contest liability for the first $100,000 in damages, it could introduce evidence of comparative fault in proving that the

admitted malpractice did not cause damages in excess of $100,000.

In her argument Ms. St. Martin relied on *Pendleton v. Barrett*, 95-2066 (La.5/31/96), 675 So.2d 720, wherein the Supreme Court addressed the question of the burden of proving a causal relationship between the fault statutorily admitted by virtue of a settlement for $100,000 and the damages claimed by the plaintiff. The court found that when a health care provider admits liability by settling for $100,000, the plaintiff was relieved of the obligation of proving a causal connection between the admitted malpractice and the plaintiff's original and primary harm. But if the plaintiff was asserting claims for secondary damages, then he had the burden of proving that the secondary harm was caused by medical negligence. However, in *Graham v. Willis-Knighton Medical Center, et al*, 97-0188 (La. 9/9/97), 699 So 2d 365, 372, the Supreme Court reasoned "On reconsideration, we chose not to adhere to the *Pendleton* pre-trial procedure, but to focus on which party has the burden of proving causation at trial. We now conclude that the legislative intent of "liability" in Section 1299.44 C(5) was that the payment of $100,000 in settlement establishes proof of liability for the malpractice and for damages of at least $100,000 resulting from the malpractice, which is a very significant benefit to the medical malpractice victim. However, at the trial against the Fund [PCF], the plaintiff has the burden of proving that

the admitted malpractice caused damages in excess of $100,000".

Ms. St. Martin had the burden of proving that the admitted malpractice was in excess of $100,000. Therefore, the district court did not err in allowing the PCF to introduce evidence of comparative fault in order to contest whether the admitted malpractice caused damages in excess of $100,000.

As to the issue of liability, Ms. St. Martin contends that the district court erred in allowing the PCF to introduce the deposition of Sheila Sweeny. Because Ms. Sweeny resided in Virginia, her deposition in lieu of live testimony was used at the trial. More specifically, Ms. St. Martin argues that Ms. Sweeny's deposition relitigates the issue of liability and did not determine whether Ms. St. Martin's damages exceeded or failed to exceed $100,000. Ms. St. Martin timely objected to the admission of Ms. Sweeny's deposition in district court.

The record reflects that there was extensive communication between the court and the parties as to what portions of Ms. Sweeny's deposition would be omitted. The court's response to Ms. St. Martin's objection was as follows:

> "I have already ruled on that issue (liability), and I have asked prior to now for you to go through the deposition, understanding that I'm going to allow the deposition to come in. To the extent that I am going to allow it to come in, my

> appreciation is that you have gone through it and you have addressed different lines of questioning in the deposition and ruled [sic] accordingly---or at least made notations of what you are objecting to."

After careful review of Ms. Sweeny's deposition and the omission of certain statements, the district court asked Ms. St. Martin whether or not she agreed with everything that was struck from Ms. Sweeny's statement in addition to the excerpts that were added, Ms. St. Martin responded in the affirmative. Therefore, after no further objection by either party, those portions agreed upon were excluded from the deposition that was used as evidence in lieu of Ms. Sweeny's live testimony.

In *Dickens v. Commercial Union Insurance*, 99-0698 (La.App. 1 Cir. 6/23/00), 726 So. 2d 1193, 1197, the court reasoned that "The trial court has much discretion in determining whether to allow the use of deposition testimony at trial, and its decision will not be disturbed upon review in the absence of an abuse of discretion." Although the issue in *Dickens* was the unavailability of a witness, a comparison can be made with the instant case. The district court was very particular in determining which excerpts of Ms. Sweeny's deposition would be used. The court, along with the parties, read through the deposition and excluded the portions that were objectionable to Ms. St. Martin, and from there, the district court concluded which testimony

could be used. In applying *Dickens*, the district court did not err in allowing the deposition of Ms. Sweeny to be introduced at trial. It was well within the court's discretion to allow the deposition to be admitted.

Ms. St. Martin was assessed with 30% comparative fault which she challenges on appeal arguing that there was no basis for the jury to reach such a conclusion. Her supporting argument is that Ms. Sweeny insisted that she put weight on her leg and that she, being a reasonable person, followed Ms. Sweeny's instructions.

The PCF relies on the testimony of Dr. Kinnett to support the finding of 30% comparative fault as it relates to Ms. St. Martin. Dr. Kinnett testified that after removal of Ms. St. Martin's short leg cast, he instructed her not to bear full weight on her right leg. Ms. St. Martin was also instructed to use crutches during the time that she was to attend physical therapy. Dr. Kinnett also testified that Ms. St. Martin went against his instructions during physical therapy while at the Back in Action Center when she applied weight to her leg. Agreeing with Dr. Kinnett, Ms. St. Martin testified that she did indeed receive these instructions from Dr. Kinnett and that she understood the instructions. Dr. Kinnett testified that it is reasonable for a patient to follow the instructions of their physical therapist, he also stated that the physical therapists are "supposed to interview the patient and by interview,

they are supposed to by training know specific questions to ask that can give them pertinent information or glean information from the patient rather than the patient having to provide all the information themselves". Although there is no indication in the record that Ms. Sweeny failed to interview Ms. St. Martin, the fact still remains that Ms. St. Martin was specifically instructed by Dr. Kinnett not to bear full weight on her leg and then contradictorily instructed by Ms. Sweeny.

The jury obviously found Ms. St. Martin's testimony as to the instructions given by Dr. Kinnett and Ms. Sweeny to be credible. Ms. St. Martin did not deny having received instructions from Dr. Kinnett not to bear full weight on her right leg. This Court reasoned in *Ibieta v. Star Casino, Inc., et al*, 98-0314 (La. App. 4 Cir 10/7/98), *writ denied*, 98-2806 (La. 1/8/99), that "[t]he findings of the trier of fact are reviewed under the manifest error standard. It is well settled that a court of appeal may not set aside a jury's finding of fact in the absence of 'manifest error' or unless it is 'clearly wrong,' and where there is a conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed on review. *Hill v. Morehouse Parish Police Jury*, 95-1100 (La. 1/16/96), p. 4, 666 So.2d 612, 614".

We find that the district court was manifestly erroneous in not

considering the testimony of Ms. Sweeny and Ms. St. Martin that was not contradicted. Even under a *de novo* standard of review we find Ms. St. Martin's testimony to be reasonable and credible. Ms. Sweeny's deposition states that Ms. St. Martin was not using her crutches on the day of the accident and that Ms. Sweeny "asked her (Ms. St. Martin) to put weight on the right leg as she was comfortable, and if she had pain or discomfort at all to stop". Being a reasonable person, yet following the instructions of her therapist, Ms St. Martin testified, "She (Ms. Sweeny) gave me directions to put my weight on my bad leg, and I followed direction and the leg popped". We cannot fault Ms. St. Martin for following the instructions of someone whom she considered a professional. Dr. Kinnett referred Ms. St. Martin to Ms. Sweeny for rehabilitation. It was reasonable to proceed based upon the assumption that the instructions given by Dr. Kinnett were general in nature and intended to apply to her activities in general, but that they could be superceded by the more specific instructions of Ms. Sweeny who was in the best and most immediate position to judge what was appropriate in the specific context of rehabilitation.

Although we do agree with the district court in that there was no relitigation of the issue of liability by the PCF through the deposition of Ms. Sweeny and considering the rule in *Graham*, Ms. St. Martin failed in her

burden of proving that the admitted malpractice of Touro caused damages in excess of the jury's award of $125,000, thus triggering the PCF. However, considering Dr. Kinnett's testimony regarding the duty of Ms. St. Martin to follow his specific instructions in not placing weight on her leg and the duty of Ms. Sweeny to better advise her client, we conclude that the district court erred in accepting the jury's finding that Ms. St. Martin was 30% at fault and reverse the jury's finding in this respect.

For the reasons stated above, we find that in addition to the 20% allocation of fault assigned to Ms. Sweeny by the jury, Ms. Sweeny also is assigned the 30% allocation of fault that the jury originally assigned to Ms. St. Martin, thus allocating 50% comparative fault to Ms. Sweeny.

Jury Instructions

During deliberations, the jury questioned the court as to whether Ms. Sweeny "fell" [sic] under Touro for the purpose of allocating fault. The court determined that this was a question for the jury to decide. Ms. St. Martin argued that Ms. Sweeny was a Touro employee at the time of the accident and that the district court erred in not advising the jury of such. The

defendants argued that Ms. St. Martin's request that the court affirmatively respond to the jury's question in effect was a request for a directed verdict to conclude that Ms. Sweeny was a Touro employee. At no time did Ms. St. Martin ask the jury to find that Touro employed Ms. Sweeny. The record reflects that Ms. Sweeny was a student participating in an unpaid internship negotiated by Ohio University. Although Ms. Sweeny received living accommodations and meal tickets from Touro, Ms. St. Martin did not represent to the jury that Ms. Sweeny was indeed an employee of Touro, therefore, the jury was well within its discretion to make its own decision regarding Ms. Sweeny's status after being instructed to do so by the court. This assignment of error lacks merit.

Ms. St. Martin further argues that the district court erred in excluding jury charge #9 entitled "Aggravation of Pre-Existing Injury". This jury charge provided that the defendant tortfeassor, "takes his victim as he finds them". Ms. St. Martin contends that had this charge not been excluded, it would have allowed the jury to award her a sum of money for the full extent of her injuries sustained due to her May 28, 1991 accident, the resulting leg length discrepancy, and for her subsequent fall in June 1993.

The PCF argues that omitting jury charge #9 had no effect on the outcome of the case, and cites La. R.S. 40:1299.41, the Louisiana Medical

Malpractice Act (hereinafter "MMA"), as controlling in this instance. The MMA provides that a qualified health care provider (Touro in this case) was only responsible for the damages caused by the malpractice. The MMA applies to all medical malpractice claims against a qualified healthcare provider and its provisions must be strictly construed. *Sewell v. Doctors Hospital*, 600 So. 2d 577, 578 (La. 1992). La. R.S. 40:1299.41. La. R.S. 40:1229.41 (I) of the MMA provides in pertinent part,

> Nothing in this part shall be construed to make the patient's compensation fund liable for any sums except those arising from medical malpractice.

The term "malpractice" is defined in La.R.S. 40:1229.41 A(8) as:

> [A]ny intentional tort or any breach of contract based on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient, including failure to render services timely and the handling of a patient…

Under the MMA, then, a qualified health care provider may only be held liable for damages caused by malpractice. *Id* at 578. Thus, under the MMA, the PCF can only be liable for the amount of damages cause by Touro's statutorily admitted failure to supervise a student physical therapist, Ms. Sweeny, working with a Touro patient.

Ms. St. Martin further contends that it was error for the jury to find

that “other causes” were at fault in connection with her May 28th accident. The PCF contends that the jury’s fault allocation was reasonable under the circumstances because the PCF presented substantial evidence in support of apportioning fault. The PCF relies on the testimony of Dr. Kinnett and the contradictory testimony of Dr. David Aiken, the PCF’s expert. According to the record, prior to the May 28th incident, Dr. Kinnet saw Ms. St. Martin on May 7th, 1991 at which time she informed Dr. Kinnett that she had recently fallen. Dr. Kinnett X-rayed Ms. St. Martin and concluded that nothing was wrong. At that time, Dr. Kinnett removed Ms. St. Martin’s short-leg cast and it was then that he prescribed physical therapy. While Dr. Kinnett testified that he believed that there was a “pin track” left in Ms. St. Martin’s leg from the Ilizarow procedure, Dr. Aiken explained that it was impossible for a pin track to be located in the area of the new bone growth and that the May 7th X-ray clearly showed a stress fracture caused by Ms. St. Martin’s fall in Macy’s or some other unreported incident.

The jury was instructed to allocate fault to “some other person or event”. The jury allocated 20% comparative fault to that “person or event”, not naming anyone or anything specific. It is assumed by Ms. St. Martin that the “other person or event” was Ms. Sweeny. However, the jury relied on the evidence presented at trial and finding that Touro admitted 100% liability in

the negligence of Ms. Sweeny, it is possible that the "event" was Ms. St. Martin's fall prior to her May 7th X-ray in which Dr. Aiken opines was not cared for properly.

Within statutory guidelines, the trial court is given wide discretion in framing questions to be posed as special jury interrogatories, and absent some abuse of that discretion, Courts of Appeal will not set aside those determinations. *Grayson v. R.B. Ammon and Associates, Inc*., 2000 WL 1673426, 99 2597 La.App. 1 Cir. 11/3/00, (La.App. 1 Cir. 2000).

There was no abuse of discretion in the district court's instruction to the jury, however, the district court was manifestly erroneous in not considering the uncontested testimony of Ms. Sweeny and Ms. St. Martin which results in this Court reversing the jury's finding and allocating Ms. Sweeny with 50% comparative fault and Ms. St. Martin with zero.

Damages

The jury awarded Ms. St. Martin nothing for past medical expenses; $50,000 for past, present and future lost wages; $25,000 for past present, and future pain and suffering; $20,000 for mental anguish; and $30,000 for permanent disability, thus totaling $125,000 in damages. Ms. St. Martin avers that the district court erred in not awarding her more damages. Before

an appellate court may disturb a jury's award for damages, "the record must clearly reveal that the trier of fact abused its discretion in making its award". *American Motorist Ins. Co. v. American Rent-All*, 579 so. 2d 429 (La. 1991); see also *Youn v. Maritime Overseas Corp*., 623 So. 2d 1257 (La. 1993), cert. denied, 510 U.S. 1114 (1994); *Pattison v. Valley Forge, Ins. Co*., 599 So. 2d 873, 877 (La. App. 4th Cir.), *writ denied*, 604 So. 2d 1001 (La. 1992).

Once again, relying the testimony of Dr. Aiken, we conclude that Ms. St. Martin's injury as a result of the May 28th incident was a fractured tibia. Dr. Aiken stated while observing the X-ray of Ms. St. Martin's leg after the accident, that "There is stress in this bone from the weight of the foot, and that stress works this little crack back and forth. We call it a 'fatigue fracture'. Just like if you are trying to break a coat hanger, you get a crack. You work it, work it and it breaks all the way through. So this is a stress fracture of the tibia, and if you leave it alone and don't put a cast on it, it's going to go all the way through and break all the way through no matter what". This court held in *Johnson v. Allstate Ins. Co.*, 410 So.2d 777 (La. App. 4th Cir. 1982), that a "[d]amage award of $18,775 to minor plaintiff who suffered a fractured tibia of the right leg, was hospitalized for six to ten days, wore a hard plastic cast for two months during which he used a wheel chair, was treated as a hospital outpatient for seven months, was still

experiencing pain a year after the accident, and had a rating of 5% permanent disability would be upheld as not clearly erroneous".

A women who had been drinking fell over the railing from the top deck of Bayou Jean Lafitte and landed on a bumper approximately nineteen feet below the deck while cruising on the Mississippi River. She suffered a fractured femur and damage to her teeth. The broken leg required the insertion of a metal rod through her femur and subsequent surgery to remove the rod. This Court awarded general damages in the amount of $50,000 for the fractured leg and $10,000 for the damage to her teeth. *Morse v. New Orleans Steamboat Co.,* 580 So.2d 544 (La. App. 4th Cir. 1991).

In accordance with previous decisions of this Court, the jury's award of $75,000 in general damages adequately compensates Ms. St. Martin for her injuries and we will not disturb this award of general damages in that the district court did not abuse its much discretion.

Decree

For the foregoing reasons stated herein, we find that the district court did not err in its instruction to the jury and that the damages awarded by the jury to Ms. St. Martin were adequate. We further find that there was no relitigation of the issue of liability yet Ms. St. Martin did establish that the district court erred in assessing her with 30% comparative fault. Therefore,

we hereby reverse the judgment of the district court finding that it was manifestly erroneous in its allocation of fault to Ms. St. Martin and allocate that 30% comparative fault to Ms. Sweeny in addition to the 20% comparative fault already assigned to Ms. Sweeny by the giving.

REVERSED