

NOT DESIGNATED FOR PUBLICATION

**IN RE: LILLIAN JOHNS AND
SHALONDA JOHNS
APPLYING TO OBTAIN AN
ORDER TO EXHUME THE
BODY OF THE DECEASED,
MELVIN JOHNS**

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NO. 2002-CA-1467

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COURT OF APPEAL

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FOURTH CIRCUIT

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STATE OF LOUISIANA

VERSUS

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**DR. NAURANG AGRAWAL,
ET AL.**

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CONSOLIDATED WITH:

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**IN RE: LILLIAN JOHNS AND
SHALONDA JOHNS**

NO. 2002-CA-1468

VERSUS

**NAURANG AGRAWAL, M.D.,
ET AL.**

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 95-1597, DIVISION "H-12"
Honorable Michael G. Bagneris, Judge

Judge David S. Gorbaty

(Court composed of Chief Judge William H. Byrnes III, Judge Max N. Tobias Jr., Judge David S. Gorbaty)

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AFFIRMED

In this appeal, plaintiffs contend that the trial court erred in finding that the negligence of Dr. Agrawal was not the legal cause of Melvin Johns's death. For the reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY

In 1967, Mr. Johns had a routine chest x-ray taken at the Veterans Administration Medical Center ("VAMC") that revealed a rounded calcific shadow in the upper right quadrant of his abdomen. In February 1968, the VAMC diagnosed the mass as a hydatid liver cyst, but subsequent testing found no evidence of hydatid disease. The VAMC monitored the mass on a regular basis and detected no change in the shape or size of the suspected cyst from 1968 through 1979. Throughout this time, Mr. Johns was healthy and asymptomatic. By 1982, the VAMC began performing annual ultrasounds of the mass, and continued such until 1993.

In August 1987, Mr. Johns underwent a CT scan of the abdomen at the recommendation of Dr. Naurang Agrawal, a gastroenterologist at Tulane

University Medical Center (“Tulane”). The report and findings of the scan were forwarded to both Dr. David Shurden, Mr. Johns’s primary care physician at VAMC who actually ordered the scan, and Dr. Agrawal at Tulane.

Mr. Johns did not return for follow-up with Dr. Agrawal until December 1987. At that visit, Dr. Agrawal suggested that Mr. Johns undergo an intravenous pyelogram (“IVP”), which provides information about the structure and function of the kidney, urethra, and bladder, and any blockage along this tract. Mr. Johns did not have this test performed at that time, and did not return to Tulane for any more office visits.

Mr. Johns continued to be monitored by other health care providers, such as Dr. Francisco Jaramillo and Dr. David Shurden. Mr. Johns had a second abdominal CT scan in August 1988, which showed a large calcified cystic mass on the right, extending from the upper level of the right kidney into the liver, identical in appearance to what was shown on the CT scan taken in 1987. On September 9, 1988, Mr. Johns met with Dr. Jaramillo to discuss the results of the scan. Dr. Jaramillo recommended an arteriogram and/or surgical exploration of the mass, since he suspected renal carcinoma. Mr. Johns declined these procedures.

On January 30, 1993, after discovering blood in his urine, Mr. Johns

returned to Dr. Jaramillo, who recommended an IVP and a cystogram, among other procedures, to determine the true location and nature of the mass. The results of these tests suggested that Mr. Johns's cyst was probably a renal mass. By February 1994, Mr. Johns agreed to aggressive treatment of his renal condition, but unfortunately, the tumor had metastasized and was inoperable. Mr. Johns died on October 14, 1994.

On December 12, 1996, plaintiffs filed suit in the Civil District Court for the Parish of Orleans naming Dr. Agrawal, Dr. Jaramillo, Dr. Shurden, and Tulane as defendants. The petition alleges that these defendants failed to treat and diagnose Mr. Johns's kidney cancer. It does not name the VAMC as a defendant, since plaintiffs had already filed an action in federal court against the United States in the interim. In January 1997, defendants Tulane and Dr. Agrawal filed a third-party claim against the United States for the acts of the VAMC in this state court proceeding. This matter was then removed to federal court, where it remained for several months before being remanded to state court. In March 1998, after a trial on the merits, plaintiffs obtained a judgment against the United States in federal court for the negligence of the VAMC.

In February 2001, plaintiffs tried their case in state court against Dr. Agrawal and Tulane for the misdiagnosis of Mr. Johns's kidney cancer.

The jury rendered a verdict in favor of defendants, Dr. Agrawal and Tulane. After the trial, the trial court granted an exception of prescription filed by defendants. Plaintiffs subsequently filed this appeal.

DISCUSSION

Plaintiffs assert that the trial court erred when it allowed into evidence, over their objection and without curative instructions, testimony concerning a previous judgment entered against the VAMC in a companion case arising out of Melvin Johns's death. Plaintiffs argue that the repeated references to the federal district court action and the finding of negligence against the VAMC confused the jurors with extraneous information about a party that was not before the court.

At trial, plaintiffs raised issues about the VAMC and the prior federal court proceeding. During voir dire, plaintiffs' counsel advised potential jurors that the physicians treating Mr. Johns at the VAMC had "determined from tests incorrectly that this was a growth on his liver when in fact it was a growth on his kidney." In his opening statement, plaintiffs' counsel again mentioned that Mr. Johns had been treated and diagnosed at the VAMC with a "growth" in his liver, and stated that the growth was "watched" annually

by the physicians at the VAMC. Plaintiffs established through Shalonda Jones' testimony on direct examination that Mr. Johns had been a longtime patient of the VAMC, and that Mr. Johns had first been treated there by Dr. Agrawal. Additionally, plaintiffs' counsel read and offered into evidence the entire testimony of plaintiffs' pathology expert, Dr. Kris Sperry from the federal court proceeding. Further, through direct examination of their experts, Dr. Selwyn Freed and Dr. Neil Baum, plaintiffs established that plaintiffs had brought an action against the VAMC in federal court and that the VAMC had been found negligent. Each of these witnesses then testified, on direct examination, that the finding of negligence of the VAMC, in their opinion, had nothing to do with the claims of negligence of Dr. Agrawal in this action.

Since plaintiffs raised the issue of the VAMC judgment themselves, we find that they have waived their objection to its introduction. Further, the trial court did not err in permitting the limited amount of relevant information about the federal court proceeding as it did bear some logical connexity to the issues at hand. This assignment of error is without merit.

Plaintiffs next contend that the trial court erred when it failed to give

adequate or accurate instructions to the jury regarding the burden of proof as to the fault of nonparties and when it submitted Interrogatory Number 4, which named the VAMC as an entity that could have a percentage of fault attributed to it. At trial, plaintiffs urged that the jury be instructed, “In cases like this, when the defendant claims that non-defendants are at fault for injuries, the burden shifts to the defendant to show both the fault of the non-defendant tortfeasors and the percentage of that fault.” *Haney v. Francewar*, 588 So.2d 1172 (La. App. 1 Cir. 1991).

Interrogatory Number 2 queried: “If you found that defendant Dr. Naurang Agrawal and/or defendant Tulane Medical Center Hospital and Clinic breached the applicable standard of care, was this breach a legal cause of plaintiff Melvin Johns’ death?” The jury responded in the negative. The interrogatory form instructed, “[I]f you answered NO to Interrogatory No.2, it is not necessary to answer any further interrogatories.” As such, the jury never reached Interrogatory Number 4, which addressed the potential fault of the VAMC. The jury determined that the plaintiffs failed to meet their burden of proof as to causation by Dr. Agrawal. Thus, the question of fault of nonparties was not at issue.

The adequacy of the jury instructions must be determined in light of the instructions as a whole. *Hi-Tech Timber v. Valley Elec. Member.*, 94-1033 (La. App. 3 Cir. 2/1/95), 649 So.2d 1203. An appellate court must exercise great restraint before overturning a jury verdict because the instructions were so erroneous as to be prejudicial. *Id.*

As a matter of law, under Louisiana's comparative fault system, the factfinder must determine (1) whether another person, including nonparties, was at fault; (2) if so, whether such fault was the legal cause of the damages; and (3) the degree of such fault, expressed in a percentage. La. C.C. art. 2323(A); La. C.C.P. art. 1812. This inquiry requires the jury to consider the nature of each party's conduct and the extent of the causal relationship between the conduct and the damages claimed. *Hollie v. Beauregard Parish Police Jury*, 96-198 (La. App. 3 Cir. 8/28/96), 680 So.2d 1218.

There was no error in instruction to the jury as to the comparative fault of others or the inclusion of the VAMC on the jury verdict form. The jury was given adequate instruction on determining fault when there is a possibility of multiple causes. This assignment of error lacks merit.

Finally, plaintiffs allege that the trial court erred in finding in favor of

the defendant, Dr. Agrawal. Plaintiffs assert that the jury verdict on the issue of legal cause was manifestly erroneous and contrary to the clear weight of the evidence. Plaintiffs argue that the jury's determination that Dr. Agrawal's failure to adequately and timely advise Mr. Johns about the results and meaning of his 1987 CT scan was not a legal cause of his death must have been the product of confusion.

In a medical malpractice action against a physician, the plaintiff carries a two-fold burden of proof. The plaintiff must first establish by a preponderance of the evidence that the doctor's treatment fell below the ordinary standard of care expected of physicians in his medical specialty, and must then establish a causal relationship between the alleged negligent treatment and the injury sustained. LSA-R.S. 9:2794; *Smith v. State through DHHR*, 523 So.2d 815, 819 (La.1988); *Hastings v. Baton Rouge General Hospital*, 498 So.2d 713, 723 (La.1986). Resolution of each of these inquiries are determinations of fact which should not be reversed on appeal absent manifest error. *Housley v. Cerise*, 579 So.2d 973 (La., 1991); *Smith*, 523 So.2d at 822; *Rosell v. ESCO*, 549 So.2d 840 (La.1989); *Hastings*, 498 So.2d at 720. If the trial court or jury's findings are reasonable in light of the

record reviewed in its entirety, the court of appeal may not reverse, even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. *Sistler v. Liberty Mutual Ins. Co.*, 558 So.2d 1106, 1112 (La.1990); *Arceneaux v. Domingue*, 365 So.2d 1330 (La.1978). Where two permissible views of the evidence exist, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong. *Rosell v. ESCO*, 549 So.2d at 844; *Housley, supra*.

In the case at bar, there was adequate evidence to support the jury's conclusion that Dr. Agrawal's actions were not the legal cause of Mr. Johns's death. Both plaintiffs and defendants established the potential fault of others. Defendants adduced testimony from Dr. Susan Weyer, a medical review panelist, confirming that the VAMC had diagnosed Mr. Johns with a liver cyst in 1968, but recent testing (the CT scan) suggested by Dr. Agrawal showed that the problem was in his kidney. Dr. Weyer's testimony also established that additional testing of the growth had been ordered by Dr. Shurden and Dr. Jaramillo, and these physicians should have been made aware of the comparison of the two abnormal CT scans from 1987 and 1988. Dr. Freed also suggested that if other health care providers failed to inform

Mr. Johns of the possibility that his mass was renal cell carcinoma, he would be critical of them as well.

Further, there was even sufficient evidence adduced to allocate fault to Mr. Johns. Mr. Johns never returned to Dr. Agrawal after the December 1987 visit, but instead sought treatment from Dr. Jaramillo, a urologist, in September 1988. Dr. Jaramillo testified that on the first visit after obtaining the results of a second CT scan, he recommended further workup for the kidney mass to Mr. Johns in each subsequent visit, telling him that a calcified mass in the kidney is presumed cancerous until proven otherwise, but Mr. Johns refused his suggestions. Dr. Jaramillo testified that each time Mr. Johns presented to him, he urged him to get tests, and explained the importance and need for the tests, but to no avail. In sum, upon hearing all of the evidence, the jury could reasonably have concluded that Dr. Agrawal's actions were not the cause of Mr. Johns's demise, but that it was caused by another party, or even by his own inaction.

Plaintiffs have failed to assert any error of the trial court in granting the defendants/ appellees' exception of prescription of the survival action. As such, the trial court's dismissal of the survival claim stands.

CONCLUSION

Accordingly, for the foregoing reasons, we affirm the judgment of the trial court.

AFFIRMED