

JOHN J. SALERNO

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NO. 2002-CA-1519

VERSUS

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COURT OF APPEAL

**NATIONAL-CANAL VILLERE
SUPERMARKETS/NATIONAL
TEA COMPANY, NATIONAL
TEA COMPANY SELF
INSURANCE FUND, AND
FRANK MCEACHERN**

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FOURTH CIRCUIT

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STATE OF LOUISIANA

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CONSOLIDATED WITH:

CONSOLIDATED WITH:

JOHN J. SALERNO

NO. 2002-CA-1520

VERSUS

**FRANK MCEACHERN,
HERMAN J. HOHENSEE,
GEORGE BAEHR, JOHN DOE,
JIM DOE, NATIONAL-CANAL
VILLERE
SUPERMARKETS/NATIONAL
TEA COMPANY, AND
NATIONAL TEA COMPANY
SELF INSURANCE FUND**

CONSOLIDATED WITH:

CONSOLIDATED WITH:

**IN RE: MEDICAL REVIEW
PANEL OF JOHN J. SALERNO**

NO. 2002-CA-1521

CONSOLIDATED WITH:

**NATIONAL TEA COMPANY
AND GENERAL ACCIDENT
INSURANCE COMPANY**

VERSUS

**CHRISTIAN HEALTH
MINISTRIES, INC., D/B/A
MERCY+BAPTIST MEDICAL
CENTER**

CONSOLIDATED WITH:

NO. 2002-CA-1522

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NOS. 91-20230 C/W 91-23298 C/W 94-15738
C/W 95-8461, DIVISION "A-5"
Honorable Carolyn Gill-Jefferson, Judge

* * * * *

**Charles R. Jones
Judge**

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(Court composed of Judge Charles R. Jones, Judge Michael E. Kirby, and Judge Terri F. Love)

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LOUISIANA PATIENT'S COMPENSATION FUND

AFFIRMED

The Appellants, Mercy Hospital and the Louisiana Patient Compensation Fund, jointly appeal the judgment of the district court granting the Appellees, National-Canal Villere Supermarkets, et al; and its insurer, General Accident Insurance Company, contribution in the amount of \$450,000 as a result of a medical malpractice claim. We affirm.

Facts

In December 1990, John Salerno, now deceased, slipped and fell in Canal Villere, a local supermarket owned by The National Tea Company. He sustained a herniated lumbar disc, which eventually required a lumbar

laminectomy and discectomy. On March 28, 1991, Mr. Salerno went to the Blood Center for Southeast Louisiana where he banked his blood in the event he needed a transfusion as a result of the surgery. At that time, Mr. Salerno's blood was tested for the hepatitis C virus and the results were negative.

Mr. Salerno underwent surgery for his herniated disc at Mercy Hospital on April 5, 1991. He was discharged on April 10, 1991. In June of that same year, Mr. Salerno began experiencing fatigue, nausea, vomiting and jaundice. He underwent blood testing again on July 3, 1991, at which time he tested positive for the hepatitis C virus.

Procedural History

In October 1991, Mr. Salerno filed a Petition for Damages in the Civil District Court for the Parish of Orleans against National-Canal Villere Supermarkets, et al; and its self-insured fund for the slip and fall accident. He later amended his petition to add his complications and contraction of the hepatitis C virus as it related to his damages. National-Canal Villere Supermarkets settled with Mr. Salerno in the amount of \$550,000, specifically stating in the Receipt and Release Agreement that \$100,000 was allocated for Mr. Salerno's back injury and \$450,000 was allocated for all

claims and damages as it related to the hepatitis C virus claim. Prior to settling the case, National-Canal Villere Supermarkets filed a claim against Mercy Hospital for contribution alleging that Mercy Hospital was negligent and transmitted the hepatitis C virus to Mr. Salerno while he was in the care of Mercy Hospital. After trial on the merits, the district court rendered judgment in favor of National-Canal Villere Supermarkets against Mercy Hospital and awarded damages in the amount of \$450,000. The judgment was silent as to legal interest. The district court adopted the post trial memorandum filed by National-Canal Villere Supermarkets as its Reasons for Judgment; however, the district court excluded Section C of the memorandum which related to the question of *res ipsa loquitor*. National-Canal Villere Supermarkets filed a motion in the district court for a new trial seeking legal interest. This motion was denied.

Mercy Hospital timely appeals the judgment of the district court finding the hospital liable for contribution in the amount of \$450,000. National-Canal Villere Supermarkets answered this appeal seeking legal interest.

Argument

Mercy Hospital assigns four assignments of error in this appeal.

Mercy Hospital argues that the district court erred in finding that Mercy Hospital committed malpractice; that the district court applied the wrong standard of care; that the district court erred in finding that Mercy Hospital was negligent under the theory of *res ipsa*; and that the district court erred in failing to find the \$450,000 settlement excessive. However, we find that there are really are two (2) issues in this appeal raised by Mercy Hospital: (1) the excessiveness of the award; and (2) whether National-Canal Villere Supermarkets proved, by a preponderance of the evidence, that Mercy Hospital breached the standard of care for a medical facility, thus resulting in an award for damages under the theory of medical malpractice. Because our review of the record indicates that National-Canal Villere Supermarkets met its burden of proof in establishing the liability of the hospital, we affirm.

Standard of Review

In a medical malpractice action a plaintiff faces a two-fold burden: first, to establish by a preponderance of the evidence that the physician's treatment fell below the ordinary standard of care in his medical specialty; [and] second, to prove a causal relationship between the alleged negligent treatment and the resulting injury. La. R.S. 9:2794; *Morris v. Ferriss*, 95-1790 (La. App 4 Cir. 2/15/96), 669 96-0676 (La. 4/26/96), 627 So.2d 671;

Martin v. East Jefferson General Hospital, 582 So.2d. 1272 (La. 1991).

We are instructed that before a fact finder's verdict may be reversed, we must find from the record that a reasonable factual basis does not exist for the verdict, and that the record establishes the verdict is manifestly wrong. *Stobart v. State through the Dept. Of Transp. and Development*, 617 So.2d 880 (La. 1993); *Richoux v. Metropolitan Gastroenterology*, 522 So.2d 677 (La. App 5 Cir 3/14/88); *Malbrough v. Hamsa*, 463 So2d 639 (La. App 5 Cir. 12/11/84); *Protti v. Tolmas*, 459 So.2d 612 (La. App 5 Cir. 11/13/84); *Moore v. Healthcare Elmwood, Inc.* 582 So.2d 871 (La. App 5 Cir. 6/5/91).

This Court, in *Hubbard v. State*, 852 So.2d. 1097 (La. App. 4 Cir. 8/13/03), reiterated that [i]n a medical malpractice action, the plaintiff must establish a causal connection between the defendant's negligent treatment and the sustained injury. *Tucker v. Lain*, 98-2273, 01-0608, 01-0609, p.14 (La. App. 4 Cir. 9/5/01), 798 So.2d 1041, 1049, *writ denied*, 2001-2715 (La. 1/4/02), 805 So.2d 210, *citing* La. R.S. 9:2794; *Martin v. East Jefferson General Hospital*, 582 So.2d 1272 (La. 1991). Cause-in-fact is usually a "but for" inquiry which tests whether the injury would not have occurred but for the defendant's negligence. *Id. citing, Cay v. State, DOTD* 631 So.2d 393 (La. 1994). Causation is a factual determination that should not be reversed

on appeal absent manifest error. *Id.* citing, *Housley v. Cerise*, 579 So.2d 973 (La. 1991).

To prove medical malpractice, the plaintiff must establish by the preponderance of the evidence: the standard of care, a breach of that standard, causation, and damages. *Pellerin v. Humedcenters, Inc., et al.*, 703 So.2D 1312, 97-2195 (La. 11/21/97). This requires that the plaintiff prove that one or more hospital employees performed in a substandard way so as to violate this customarily accepted standard of care. *Coleman v. Touro Infirmary of New Orleans*, 506 So.2d 517 (La. App. 4 Cir. 1987). A hospital is bound to exercise the amount of care toward a patient that the particular patient's condition may require and to protect that patient from external circumstances peculiarly within the hospital's control. *Hunt v. Bogalusa Community Medical Center*, 303 So.2d 745, 747 (La. 1974).

Of course, the reviewing court may not merely decide if it would have found the facts of the case differently. Rather, notwithstanding the belief that they might have decided it differently, the court of appeal should affirm the trial court where the latter's judgment is not clearly wrong or manifestly erroneous. Because the court of appeal has a constitutional function to perform, it has every right to determine whether the trial court verdict was

clearly wrong based on the evidence, or clearly without evidentiary support. *Ambrose v. New Orleans Dept. Ambulance Service*, 639 So.2d216, rehearing denied, 93-3099 (La. 7/5/94).

Discussion

Our review of the record indicates that National Canal Villere Supermarkets proved, by a preponderance of the evidence, that Mercy Hospital and its employees performed in such a substandard way as to find Mercy Hospital liable to Mr. Salerno in contracting the hepatitis C virus. Further, we find that the district court was not manifestly erroneous in concluding that the trial testimony and the evidence before it presented a reasonable, factual basis in concluding that National-Canal Villere Supermarkets is owed \$450,000 in contribution from Mercy Hospital. The district court, in its Reasons for Judgment, relied upon testimony at trial to establish that Mercy Hospital breached the standard of care as to Mr. Salerno. We agree.

Following Louisiana jurisprudence, Mercy Hospital had a duty to protect Mr. Salerno from the risk factors associated with contracting the hepatitis C virus while in the care of Mercy Hospital. It has been established that the duty of the hospital has been traditionally limited by the rule that no

one is required to guard against or take measures to avoid that which a reasonable person under the circumstances would not anticipate as likely to happen. The hospital is bound to use reasonable care in light of the requirements of the patient's unknown condition. *Austin v. St. Charles Gen. Hospital*, 587 So.2d 742, 745 (La. App. 4 Cir. 9/26/91) writ denied, 590 So.2d. 80 (La. 1991). In light of the facts and the limited duty of Mercy hospital, a reasonable person undergoing a lumbar laminectomy and discectomy would assume that they are protected from contracting any disease while in the care of the hospital's medical staff. Mercy Hospital owed this duty to Mr. Salerno and failed to provide it.

Sheri Everett was the Infection Control Coordinator at Mercy Hospital at the time of Mr. Salerno's hospitalization. She testified on behalf of Mercy Hospital that in the course of her duties, which included a daily check of the hospital lab results, she found no evidence during her initial investigation to suggest that Mercy Hospital transmitted the hepatitis C virus to Mr. Salerno. After reinvestigating the matter, Ms. Everett still concluded that there were no noted breaks in the procedure or other unusual events during Mr. Salerno's surgery or post-operative period. Ms. Everett's testimony was corroborated by that of Dr. Wilmont Ploger, Mr. Salerno's operating physician, who testified that neither he nor anyone of his surgical team

tested positive for the hepatitis C virus at the time of the operation, and that he had no knowledge of unsterilized instruments, nor any other postoperative problems regarding Mr. Salerno's care.

National-Canal Villere Supermarkets argues that the district court found Ms. Everett's testimony to be "inconsistent and unbelievable" and that her investigation lacked credibility. In a medical malpractice action, the assessment of factual conflicts, including those involving the contradictory testimony of expert witnesses, lies within the province of the trier of fact. *Hunter v. Bossier Medical Center*, 718 So.2d 636, 640 (La. App. 2 Cir. 9/25/98). Where medical experts express differing views, judgments and opinions, great deference is given to the fact finder's determinations, which should not be reversed on appeal unless the reviewing court concludes that no reasonable factual basis exists for them. *Piro v. Chandler*, 780 So.2d 394, 397 (La. App. 2 Cir. 11/1/00). We find that despite the contradictory testimony in the record, the district court is the trier of fact and we cannot substitute our judgment for the judgment of the district court. Thus, based upon the record before us, we cannot say that the district court is clearly erroneous.

Dr. Frederic Regenstein, a clinical professor of medicine and surgery

at the Tulane Medical Center, with a board certification in internal medicine and gastroenterology, and a sub-specialty in Hepatology, testified that the most probable cause of Mr. Salerno contracting the hepatitis C virus was something related to his surgery or hospitalization. Notwithstanding that, Dr. Regenstein also testified that one cannot tell just by looking at the record that there was a break in sterile technique because such events are not always documented.

We cannot say that the district court errs in finding that the four physicians Mercy Hospital called to testify established "more likely than not" that Mr. Salerno's had contracted the hepatitis C virus, but that this contact was not due to the most popular risk factors which include, a blood transfusion, contraction of HIV, receiving tattoos, having sex with multiple partners, being exposed to toxins or having poor circulation of the liver. [I]f there is no reasonable factual basis for the trial court's finding, no additional inquiry is necessary for a finding of manifest error. However, if a reasonable factual basis exists, an appellate court may set aside a trial court's factual findings only if, after reviewing the record in its entirety, it determines that the trial court's finding was clearly wrong. *Stobart v. State, through Dept. of Transp. and Development*, 617 So.2d 880, 882 (La. 1993). Even though an appellate court may feel its own evaluation and inferences are more

reasonable than the fact finder's, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review where conflict exists in the testimony. *Id.* Where this court can clearly recognize the inconsistent testimony after thoroughly reviewing the record, we find that the only probable source of the hepatitis C virus infection was Mr. Salerno's hospital stay. The evidence presents a causal connection to that of Mr. Salerno contracting the hepatitis C virus. Once again, medical malpractice cases require that a plaintiff establish a causal connection between the negligent treatment and the sustained injury. *Tucker v. Lain*, 1998-2273 (La. App. 4 Cir. 9/5/01), 798 So.2d 1041, 1049.

Mercy Hospital argues that for the district court to allocate only \$100,000 to Mr. Salerno's back injury was completely arbitrary and unreasonable and that related case law only awards \$90,000 - \$150,000 for the contraction of the hepatitis C virus, and that the \$450,000 award was excessive. We disagree.

National-Canal Villere Supermarkets relies on the testimony of Mr. Salerno's counsel, Roger LaRue, who testified regarding the allocation of monies in the settlement agreement and the circumstances under which the settlement was entered into. Mr. LaRue explained that all of the lower quantum cases that he researched dealt with people in remission for the

hepatitis C virus, finding distinction from the instant case where Mr. Salerno was very sick. In its argument National-Canal Villere Supermarkets makes a distinction between *Casey v. Baptist Hospital*, 526 So.2d 1332, and the case at bar. In *Casey* the plaintiff was awarded \$150,000 for contracting the hepatitis C virus after giving birth and needing a blood transfusion. The amount that was awarded in *Casey* was for the plaintiff's pain, mental anguish, and prolonged concern over reoccurrence during future years. However, unlike the case at bar, the plaintiff in *Casey* survived.

An appellate court should rarely disturb an award for general damages, and "only when the award is beyond that which a reasonable trier could assess for the effects of the particular injury to the particular plaintiff under the particular circumstance". *Youn v. Maritime Overseas Corp.*, 623 So2d 1257 (la. 1993). The award of \$450,000 does not "shock the conscious" such that the award is should be lowered or reversed. The district court, in its Reasons for Judgment found that National-Canal Villere Supermarkets was the original tortfeasor in Mr. Salerno's slip and fall which resulted in his back injury, and that Mercy Hospital is the sole cause of his contraction of the hepatitis C virus which the court described as "much more severe than any of the reported decisions and unlike any of the plaintiffs in the reported decisions, the HCV will cause [sic] Salerno's death." We do not

find that the district court was arbitrary nor unreasonable. The award of \$550,000 in which Mercy Hospital is liable for \$450,000 is reasonable under the circumstances considering the nature of the injury.

Further, we recognize that in National-Canal Villere Supermarket's Answer to this appeal, National-Canal Villere Supermarkets argues that since the judgment of the district court was silent regarding legal interest, legal interest attaches automatically under La. R.S. 13:3404, which provides:

Legal interest shall attach from the date of judicial demand, on all judgments, sounding in damages, "ex delicto", which may be rendered by any of the courts.

Mercy Hospital argues that National-Canal Villere Supermarkets did not pray for legal interest and that under La. C.C. P. art. 1921 it is not entitled to such because the court "shall award interest as prayed for or as provided by law". We agree.

In the instant case, the judgment of the district court is silent as to the legal interest because National-Canal Villere Supermarkets failed to pray for legal interest in its Petition for Damages pursuant to La. C.C. P. art. 1921. Therefore, National-Canal Villere Supermarkets cannot be awarded legal interest.

Decree

For the reasons stated herein, we find that the district court was not manifestly erroneous nor clearly wrong in awarding contribution in the amount of \$450,000 to National-Canal Villere Supermarkets, et al; and General Accident Insurance Company against Mercy Hospital and the Louisiana Patient Compensation Fund. Thus, we affirm the judgment of the district court. We further find that no legal interest is due to National-Canal Villere Supermarkets.

AFFIRMED