JAMES HUNTER, INDIVIDUALLY AND ON BEHALF OF HIS DECEASED WIFE, HATTIE HUNTER	*	**NO. 2003-CA-1131**
	*	**COURT OF APPEAL**
	*	**FOURTH CIRCUIT**
VERSUS		
	*	**STATE OF LOUISIANA**
DR. ELMA LEDOUX, DR. PHELAN, DR. GILLESPI, DR. LCLEAN AND TOURO	*	
HOSPITAL A/K/A TOURO	*	
CLINIC A/K/A TOURO INFIRMARY HOSPITAL	*	
<u>CONSOLIDATED WITH:</u>	*	**<u>CONSOLIDATED WITH:</u>**
JAMES HUNTER, INDIVIDUALLY AND ON BEHALF OF HIS DECEASED WIFE, HATTIE HUNTER	*	**NO. 2003-CA-2028**
	*	
	*	
VERSUS		
	*	
DR. ELMA LEDOUX, DR. PHELAN, DR. GILLESPI, DR. MCLEAN AND TOURO	*	
HOSPITAL A/K/A TOURO	*	
CLINIC A/K/A TOURO INFIRMARY HOSPITAL	*	

CONSOLIDATED WITH:	*	**CONSOLIDATED WITH:**
JAMES HUNTER, INDIVIDUALLY AND ON BEHALF OF HIS DECEASED WIFE, HATTIE HUNTER	*	**NO. 2003-CA-2029**
	*	
VERSUS		
DR. ELMA LEDOUX, JR., DR. TIMOTHY PHELAN, DR. GILLESPI, TOURO HOSPITAL A/K/A TOURO CLINIC A/K/A TOURO INFIRMARY HOSPITAL, LOUISIANA STATE UNIVERSITY MEDICAL SCHOOL AND THE STATE OF LOUISIANA	*	

*** * * * * * ***

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NOS. 94-1561 C/W 95-18687, DIVISION "B-15"
Honorable Rosemary Ledet, Judge
* * * * * *
CHIEF JUDGE JOAN BERNARD ARMSTRONG
* * * * * *

(Court composed of Chief Judge Joan Bernard Armstrong, Judge James F. McKay III and Judge Dennis R. Bagneris Sr.)

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AFFIRMED

The defendants-appellants, Touro Infirmary and the State of Louisiana through the LSU School of Medicine representing Dr. Timothy Phelen, appeal a medical malpractice wrongful death and survival claim judgment in favor of the plaintiff, James Hunter, individually and on behalf of his deceased wife, Hattie Hunter. We affirm.

PROCEDURAL HISTORY

The plaintiff, James Hunter, individually and on behalf of his deceased wife, Hattie Hunter, filed a petition for damages alleging medical malpractice against Dr. Elma Ledoux, Dr. Timothy Phelan, Dr. Joseph Gillespie, Glenda Bonneval, R.N., Touro Infirmary a/k/a Touro Hospital, Louisiana State University Medical School and the State of Louisiana, resulting in the death of his wife, Hattie Hunter.

Mrs. Hunter was admitted to Touro Infirmary on January 27, 1993, through the emergency department, complaining of chest pain. She had a history of hypertension and diabetes. Testing revealed that she had had an extensive myocardial infarction causing serious damage to her heart muscle. Thrombolytic (clot busting) therapy produced o results.

On January 31, 1993, the decedent was transferred out of the Cardiac Care Unit to a specialized heart monitoring area.

Early on the morning of February 1, 1993, the decedent was examined by the cardiac fellow, Dr. Colon and by the LSU resident, Dr. Tim Phelan.

In the late afternoon of February 1, 1993, she died. The cause of death was determined to be a myocardial rupture, i.e., a rupture of an exterior wall of her heart.

On October 26, 1995, a medical review panel rendered a unanimous

opinion in favor of the defendants.

Due to lack of service, Drs. Phelan and Gillespie were initially dismissed with prejudice on September 22, 1997. Pursuant to a motion for a new trial, the dismissal with prejudice was revoked and Drs. Phelan and Gillespie were dismissed without prejudice on November 17, 1997.

On May 11, 1998, Dr. Gillespie was dismissed with prejudice pursuant to his motion for summary judgment. On February 26, 1999, pursuant to the plaintiff's motions, Dr. Elma Ledoux was dismissed without prejudice and on May 26, 2000, Glenda Bonneval, R.N., was also dismissed without prejudice. On December 20, 1999, Dr. Timothy Phelan was dismissed with prejudice.

A jury rendered a verdict in favor of the plaintiff for $800,000.00, plus interest based on findings that Touro was 50% at fault and that Dr. Timothy Phelan was 50% at fault. Due to perceived discrepancies in the jury polling, a judgment ordering a new trial was rendered on April 24, 2000. This judgment was vacated on May 26, 2000, and a JNOV was rendered in favor of the defendants.

On May 15, 2002, this Court reversed the JNOV and remanded for a new trial. *Hunter v. Ledoux,* 00-2227 (La.App. 4 Cir. 5/15/02), 825 So.2d 1215. On November 22, 2002, the Louisiana Supreme Court reversed both

the trial court and this Court in the following brief opinion:

> Any discrepancy by the jury polling was, under the facts of this case, harmless error. Because the general verdict and the answers to the jury interrogatories were harmonious, the trial court was required to direct entry of an appropriate judgment based upon the verdict and interrogatory answers. See La. C.C.P. art. 1813(C). Accordingly, the judgments of the trial court and the Court of Appeal are reversed. This case is remanded to the district court for the entry of judgment in accordance with the jury verdict as reflected on the jury verdict form, reserving to the parties all post judgment proceedings.

Hunter v. Ledoux, 02-2193 (La. 11/22/02), 834 So.2d 974.

Pursuant to the remand from the Supreme Court, on November 27, 2002, the trial court rendered a judgment in favor of James Hunter and against Louisiana State University Medical Center/State of Louisiana and Touro Hospital for $800,000.00, plus interest and expert costs. Fault was apportioned 50% to Louisiana State University Medical Center/State of Louisiana, for negligence attributable to Dr. Timothy Phelan and 50% to Touro Hospital.

On February 14, 2003, Touro Infirmary's Motions for JNOV or Alternatively for a New Trial and the State of Louisiana's Motion to Set Aside Judgment and Motion for Judgment were denied without consideration. At the same time, Touro Infirmary's Motion to Conform

Judgment to Applicable Law was granted. Judgment was rendered on March 13, 2003, assessing expert witness costs. An Amended Judgment was rendered on March 14, 2003, in favor of plaintiff and against Dr. Timothy Phelan and Touro Infirmary for $500,000.00, plus interest and expert costs, apportioning fault equally between Dr. Phelan and Touro.

This Amended Judgment was superceded by a Second Amended Judgment rendered on September 9, 2003 in favor of plaintiff and against Touro and the State through the LSU Medical School fllowing a hearing and rehearing on Touro's Motion to Conform Amended Judgment to Applicable law. This judgment in the sum of $500,000.00 was to be paid as follows: $100,000.00 by Touro, $250,000.00 by the State through the LSU Medical School, and $150,000.00 by the Louisiana Patient's Compensation Fund, plus interest and expert costs as assessed in the judgment of March 13, 2003, apportioning fault equally between the State through the LSU Medical School and Touro.

Touro appeals on two grounds, one procedural and the other, substantive. The procedural error asserted by Touro is the failure of the trial court to consider its Motion for JNOV or Alternatively for New Trial. Substantively, Touro contends that the plaintiff failed to prove causation in that Mrs. Hunter's death was unpreventable and not attributable to any

negligence on the part of Touro. Thus, while Touro does not contest its responsibility for the actions of its nursing staff, it argues that Mrs. Hunter would have died regardless of the actions of that staff.

The State through LSU School of Medicine representing Dr. Timothy Phelan also appealed. The State assigned errors similar to those assigned by Touro as well as numerous others.

The plaintiff answered the appeal, assigning as error the failure of the trial court to apply two separate statutory damage caps to the original jury verdict.

FACTS

The plaintiff testified that around 10:00 o'clock or 10:30 on the morning of February 1, 1993, his wife started complaining of chest pains and difficulty breathing. She had been receiving oxygen until around 7:00 o'clock a.m. earlier in the day when they wheeled her out of the room for an examination. When she was returned to her room the oxygen was not reattached to her nose.

As the day went on, his wife's breathing problems got progressively worse and he talked to the nurses about ten times trying to get them to get a doctor up to see his wife. He told them about her chest pains and difficulty

breathing: "All they told me was that the doctor said to give her a Tylenol." He testified that no team of doctors came to examine his wife during that whole day. He only left the room for about twenty to twenty-five minutes at around 4:30 p.m. to get a sandwich.

The plaintiff testified that his wife told him that she could neither rest nor sleep she was in so much pain, "And, I just kept calling."

The plaintiff described the scene when his wife died as follows:

> A. After I told them, had to go and tell them, "why don't somebody come, because I thin[k] she was passing away." The doctor was supposed to come, but you know where he was?
> Q. Where was he?
> A. Sitting in an office back behind the bedroom back there. He was sitting in the office, him and two or three nurses came running out there with their, uh, some kind of air machine which you put their nose and stuff, had all that. And, then I – I – I got loose then, you know.
> Q. What do you mean, you "got loose," what did you tell them?
> A. I told them, I said, "you was in there all this time and I have been trying to get you to come out here and see about my wife." I – I was talking pretty loud, you know, to him.

He contradicted Dr. Phelan's testimony that he had visited the decedent's room at 10:30 in the morning:

> Really, I didn't see him at 10:30, I mean, let's just tell it just like it was, he wasn't in there at 10:30. I mean, I am going to tell it just like it is, I don't care what happens, I mean, you know. If I'm, you

> know, if he can say, you Know, about it – I'm going to tell the truth, I came up here to tell the truth. Really, he wasn't in there at no 10:30, but he said he was in there at 10:30, I just almost bit my lip off. He wasn't in there, he know he wasn't in there.

The plaintiff testified that three or four times during the day he was told by a nurse that a doctor had been contacted but that his only response was to order Tylenol for her.

Angelle Pepetone Bommarito was qualified as an expert in nursing. She graduated from Charity Nursing School in December of 1992, and then ended up sharing a hospital room at Touro with the decedent a few weeks later. Like the decedent, she was being treated for heart problems.

Nurse Bommarito testified that her bed was approximately six feet from that of the decedent. She said that there was a curtain between the beds, but that it was pulled back most of the time.

She testified that on February 1, 1993, she was able to observe the decedent's action and could hear what she said. Nurse Bommarito testified that the decedent "was pretty much okay in the morning," but, "As the day wore on she started having complaints. . . [o]f chest pains." During the later part of the day the decedent started experiencing shortness of breath which got progressively worse. Nurse Bommarito became frustrated seeing the decedent having problems and her husband quietly getting upset. Nurse

Bommarito's mother was visiting the room at the time and Nurse Bommarito observed her mother and the plaintiff commenting throughout the day on the failure of anyone to appear to address the decedent's complaints. She testified that she heard the plaintiff say things like:

> I called the nurse. Where is she? Why isn't the doctor coming in here?

She testified that in response to calls made by the plaintiff a nurse appeared on a couple of occasions and told the plaintiff such things as:

> I'm putting in a call to the doctor. I'm waiting on the doctor. We're waiting to hear.

She testified that at mid-morning a group of medical staff came in and asked the decedent how she was feeling and the decedent told them that she was having chest pains:

> And at that point, as they were leaving, I recall, I recall the doctor saying, "We'll see about getting you some Tylenol." And, I specifically remember, because I turned to my mother and under my breath, kind of laughed, unfortunately, I apologize. But, I was like, "Tylenol? What are they going to give this patient Tylenol for when she is starting with chest pain."

Nurse Bommarito did not recall the decedent having shortness of breath yet at this point in the day. She thought that she started noticing the shortness of breath about an hour or two later around 1:00 or 2:00 p.m. At the same time she noticed that the plaintiff was becoming more vocal. She

described the plaintiff as a quiet gentleman:

> "[B]ut as the day wore on his face changed and he started talking more. And, I just remember him making these faces standing at the door, and saying, "Why aren't they coming," you know, "What's going on here? What's going on here?"

She recalled that after the plaintiff visited the nurse's station outside the door of the room he returned, stating that: "The doctor is being called." Nurse Bommarito became so concerned that she herself went to the nurse's station at least twice where she told them that:

> Ms. Hattie is having problems. Is someone going to come in here.

Nurse Bommarito had the following colloquy with plaintiff's counsel on direct examination:

> Q. What was your opinion later that afternoon of the quality of nursing care given to Hattie Hunter?
> A. It was a poor opinion.
> Q. What do you mean, "poor."
> A. I had just gotten out of nursing school, and I knew what nurses were supposed to do. Everything was fresh in my mind. I was ready to go out into the nursing field and be a good nurse. And, I didn't see good nursing in my room that day.
> Q. Why not?
> A. Because nursing skills require assessments, and we – as nurses, we have responsibilities to the patient, and those responsibilities are taught to us when we are in nursing school. There is several things as nurse we can do without having to call the doctor. And, I didn't see too

many of those things that day.

Q. Such as?

A. Such as, when a patient says that they are having chest pain, we can go and take the oxygen and put it to their nose at two-liters. We can go ahead and check urine output and input, and we can check the patient's vital signs. We can go to the patient, feel her, talk to her, you know, find out where the chest pain is coming from. We can, check the telemetry, see what kind of rhythm the patient's heart is in. We can check the med page and see if appropriate medication, such as nitroglycerin, ordered. If not, we call doctors. We tell them what is going on, and we are not intimidated by calling another doctor, or paging the doctor several times. And, these things – I mean, I didn't see what was going on at the nurses' station, but in the room with Ms. Hattie, I didn't see these things.

Nurse Bommarito testified that chest pains and shortness of breath were considered to be red flags in nursing school. This is really common knowledge, just as are some of the well publicized warning signs of skin cancer, for example, the sore that won't heal and any change in a mole.

She also testified that the nurse should have observed the decedent's shortness of breath and the failure to do so was a deviation from appropriate nursing standards, just as the failure to note such an observation on the chart would also be a deviation.

Dianne Morris, the decedent's grandniece visited the decedent in the

hospital around 2:00 p.m. on the day she died. She observed the decedent breathing "very hard" and fast. When she asked the decedent how she felt, the decedent told her that she had a headache but had no other complaints. She stayed in the room up until 5:30 which was prior to the time the decedent died. She testified that during the time she was there the decedent's breathing was consistent – it got no better or worse. Also during that time she observed a nurse come in to check on the Ms. Hunter, but no doctors. The nurse did not talk to the decedent and the decedent said nothing to the nurse. Ms. Morris did not recall what, if anything, the nurse did.

On cross-examination she testified that for about an hour she was alone with the decedent while the plaintiff went off to get something to eat.

Dr. Harvey L. Alpern testified by video deposition as the plaintiff's expert in internal medicine and cardiovascular disease. When asked if the decedent's chart for the day of her demise showed "a significant deterioration and a significant worsening of the patient's condition" by the afternoon when compared with the morning notes on the chart, Dr. Alpern responded:

> The patient has chest pain. Chest pain is a significant finding in a patient with cardiac disease.

The chart shows that Dr. Gillespi was then paged, but Dr. Gillespi was not on call and was not on duty that day. Dr. Alpern testified that the paging of the wrong doctor was a deviation from the standard of care appropriate for hospitals and that by doing so, Touro reduced the decedent's chance for survival:

> Any length of time that resulted in delay from a physician seeing her would result in a decreased chance of survival.

Dr. Alpern inferred from the chart that by the time Dr. Phelan, the doctor on duty, responded to the page at 3:18 p.m. he issued no instructions to the nurse to do anything different to address the decedent's worsening symptoms. At 4:00 p.m., Dr. Phelan issued instructions to give the decedent Tylenol. The plan was to see how the decedent's pain responded to the Tylenol, but Dr. Phelan never checked back to see how the pain progressed. Dr. Alpern testified that this was a deviation from the appropriate standard of care and that that deviation reduced her prospects for survival.

When asked about the delay between 2:56 p.m. when the first attempt was made to page someone concerning the decedent's complaints and 4:00 p.m. when Tylenol was finally prescribed Dr. Alpern testified that such a delay was inappropriate:

> When one deals with chest pain, one has to be immediately responsive. The problem with chest pain is delay, and with delay in chest pain there is

> always, with an ischemic event, or whatever the cause, the delay results in lack of evaluation, lack of treatment, and this lack of evaluation and lack of treatment is essentially no treatment, and this can result in death.

In this case, Dr. Alpern was of the opinion that the delay in question resulted in a diminished chance of survival for the decedent. Dr. Alpern testified that at 3:18 p.m., Dr. Phelan should have ordered oxygen and an electrocardiogram. He also should have seen the patient immediately. Based on his review of the medical records and Dr. Phelan's deposition, Dr. Alpern was of the opinion that Dr. Phelan did not visit the decedent after 3:18 p.m. the afternoon she died, but that he should have done so:

> It is the responsibility for the physician on call who has a patient with chest pain, has a change in character chest pain, a new finding, to evaluate the patient to determine the extent, cause and severity. And one cannot do that without visiting the patient.

Dr. Phelan's failure to discharge this responsibility was a deviation in the appropriate standard of care that diminished the decedent's chance of survival. However, Dr. Alpern noted that Dr. Phelan could have ordered oxygen and an electrocardiogram immediately over the telephone prior to physically examining the decedent and that the failure to do so "more likely than not" diminished the decedent's chance of survival.

Dr. Alpern explained why Tylenol when it was finally prescribed was

too little too late:

> Given that she presented with the findings, such as the nurse described and we have just seen, that requires a more potent medication than Tylenol, if one believes it to be of ischemic etiology. If the doctor believed it to be of another etiology, such as pericarditis, it would not be an appropriate medication, because the appropriate medication for pericarditis would be a nonsteroidal anti-inflammatory or other anti-inflammatory of which Tylenol is the weakest.

Therefore, when Dr. Phelan prescribed Tylenol it was a deviation from the appropriate standard of care. Dr. Alpern testified that:

> I believe that more likely than not [the decedent] would have survived had the physician reached her earlier and evaluated her for the possible types of conditions that can cause the symptoms that she had, investigated them, and initiated treatment.

Dr. Alpern testified that in addition to the obvious significance of the chest pain in a cardiac patient that the decedent was experiencing on the afternoon she died, the decedent's shortness of breath was also significant in that it was indicative of any one of four serious heart conditions. It was Dr. Alpern's opinion that the failure of the physician to address problems was a deviation from the standard of care resulting in a diminished chance of survival for the decedent.

When asked about the decedent's chance of survival for more than a week when she was first seen by an emergency room physician some six

hours after the first onset of symptoms, Dr. Alpern testified that she had about a 50% chance of survival. He explained that the first few hours are statistically the most critical and that she had survived that period. She had improved from the time she was admitted to the emergency room until the time she was in the cardiac care unit. Dr. Alpern testified that after the critical first 24 hour post attack period her chances improved to 80%. Based on studies, Dr. Alpern further projected a 50% chance of survival for five years assuming "three-vessel disease, and that is just an assumption, that makes her at the worst risk, and with the knowledge that she has diabetes. . ."

The real thrust of Dr. Alpern's testimony was that it was negligence to administer nothing more than Tylenol in the absence of any direct observation of the decedent by a physician after she demonstrated an obvious change and worsening of symptoms stereotypically indicative of some form of cardiac distress. We find that the small technical matters of which LSU complains are not material to Dr. Aplern's conclusion.

TOURO'S ASSIGNMENT OF ERROR #1 – Defendant's Motion for Judgment Notwithstanding the Verdict or for a New Trial was neither heard nor considered.

When the Supreme Court remanded this case, its order expressly reserved to the parties "all post judgment proceedings", which would normally include any motions for JNOV and for a new trial. LSU and Touro complain that, contrary to the order of the Supreme Court, the trial court refused to consider the defendants' motions for JNOV or alternatively for new trial. This assignment of error is based upon the following colloquy with the trial judge on remand from the Supreme Court:

> THE COURT:
>
> What happened was, there was a jury verdict. [Judge Tobias] granted a new trial.
>
> By stipulation of all of you, you said it was going to cost too much money to have a new trial. "Will you render a decision? [Judge Tobias] said, "Okay. Judgment for the defendants."
>
> That was appealed and it was reversed. You don't get two bites at the apple.
>
> MR. BOURQUE [COUNSEL FOR LSU]:
>
> Actually, it was appealed.
>
> But, what the Fourth Circuit and the Supreme Court ruled was that the plaintiff argued that they had never procedurally consented to Judge Tobias to ruling JNOV.
>
> THE COURT:
>
> It's in the record by stipulation of all counsel.
>
> Your motion for JNOV is denied.

For purposes of argument, we will accept as correct the defendants' assertion that the trial court refused to consider their post-trial motions contrary to the order of the Supreme Court and that it was error to do so. However, we find such error to be harmless because the standard for granting a JNOV is as follows:

> A trial court's authority to grant a JNOV under Article 1811 of the Code of Civil Procedure "is limited by the jurisprudence to those cases where the jury's verdict is absolutely unsupported by any competent evidence." *Boudreaux v. Schwegmann Giant Supermarkets*, 585 So.2d 583, 586 (La.App. 4 Cir.1991), *writs denied*, 590 So.2d 593, 594 (La.1992). An appellate court reviewing the grant of a JNOV applies the same criteria used by the court below, as set forth in *Anderson v. New Orleans Public Service*, 583 So.2d 829, 832 (La.1991):
>
> **A JNOV is warranted when the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary verdict.** The motion should be granted only when the evidence points so strongly in favor of the moving party that reasonable men could not reach different conclusions, not merely when there is a preponderance of evidence for the mover. In making this determination, the court should not evaluate the credibility of the witnesses, and all reasonable inferences or factual questions should be resolved in favor of the non-moving party. [Emphasis added.]

Selico v. Intercontinental Bulktank Corp., 98-0763 (La.App. 4 Cir. 5/12/99), 733 So.2d 1240, 1245.

As in the course of this opinion as hereinafter set forth, we will find no material manifest error in the findings of the trial court, *per force*, it would have been error for the trial court to overturn the jury verdict on a motion for JNOV. In other words, this Court's finding of no manifest error means that the jury verdict represents at least one reasonable way of looking at the record which automatically means a JNOV is not warranted.

We note that while Touro and LSU both argue that the trial court committed a procedural error in failing to allow them to argue their post-trial motions, neither defendant attempts to demonstrate the underlying merits of those motions. There is no merit in this assignment of error.

TOURO'S ASSIGNMENT OF ERROR #2 – Insufficient Evidence exists on the Issue of Causation to Satisfy Plaintiff's Burden.

Touro does not dispute the fact that the appropriate standard of care was not met. Instead, Touro argues that "heart ruptures, such as that which killed Mrs. Hunter, occur suddenly, are unpreventable, are untreatable and universally fatal, and there was nothing that the Touro staff could have done to prevent Mrs. Heart from rupturing." Touro cites *Webb v. Tulane Medical*

Center Hosp., 96-2092 (La.App. 4 Cir. 10/1/97), 700 So.2d 1141, where the decedent's cardiopulmonary arrest was brought on by aspiration vomitus (the inhalation of his vomit), such inhalation was found to be "very sudden" and "very unpredictable" and, therefore, not attributable to the substandard monitoring of the patient.

Touro's position in this regard is supported by the testimony of Drs. Ledoux and Ernst. However, this case is distinguishable from *Webb* in that the decedent in the instant case showed obvious signs of cardiac distress for some time that went untreated or were treated so inadequately as to be the equivalent of no treatment. Thus, *Webb* has no bearing on the instant case as the decedent in *Webb* experienced aspiration vomitus without warning and his death was virtually instantaneous. It was within the province of the jury to believe the testimony of Dr. Alpern that prompt appropriate treatment could have given the decedent a five-year 50% chance of survival in preference to the testimony of Drs. Ledoux and Ernst. The trier of fact determines which expert is more credible. *Miller v. Miller,* 602 So.2d 330 (La.App. 4 Cir.1992).

Moreover, we note that Dr. Ernst's opinion is based, at least in part, on the assumption that the decedent was "no worse than she had been that morning." On this issue the jury was entitled to find, as it implicitly did, that

Dr. Phelan was not entitled to believe that decedent was "no worse than she had been that morning" based on the testimony of Nurse Bonneval as hereinafter set forth. Similarly, when Dr. Ernst was asked whether the failure of a physician to check on the decedent personally in response to her complaints of chest pain was a deviation from the appropriate standard of care, his negative response was based on the assumption that it was "the same pain that was expressed on the previous meeting that whichever physician had with this patient," an assumption that runs counter to the testimony by Nurse Bonneval as noted above and discussed below.

Additionally, in response to a hypothetical question posed by the plaintiff's attorney, Dr. LeDoux admitted that if the physician were alerted to a significant change in the decedent's condition he should have attended to her personally. Dr. Ledoux's testimony throughout was based on the assumption that there was no objective change in the decedent's condition and that when she succumbed it was without warning as the result of a sudden unpreventable crisis. We cannot say that it was unreasonable for the jury to conclude otherwise.

Dr. Angela McClean, was qualified as an expert in internal medicine. At the time of the decedent's death she was the resident on the clinical medicine service. She was involved with the treatment of the decedent's

hypertension and diabetes rather than her coronary condition. Her testimony at trial as to whether she saw the decedent on the day of her death was inconsistent with her deposition testimony given approximately five years earlier. She attempted to explain away the inconsistency by stating that when she denied seeing the patient after January 31, 1993, the day before her death, what she meant was that after that date she was not "the primary physician for the patient." While a reasonable fact finder could have accepted this explanation, it might fail to persuade other reasonable fact finders. Therefore, we cannot say that the jury committed manifest error in implicitly failing to credit Dr. McClean's testimony. Furthermore, when asked hypothetically whether Dr. Phelan should have gone to see the decedent personally if alerted to a change in her condition she responded that he should have. And, as already noted, the record would allow a reasonable fact finder to conclude that Dr. Phelan was so notified but failed to respond.

THE LSU SCHOOL OF MEDICINE REPRESENTING DR. TIMOTHY PHELAN'S ASSIGNMENT OF ERROR #1 – The jury erred in finding liability against Dr. Phelan since plaintiff failed to prove two elements of his case against Dr. Phelan: breach in the

standard of care and causation.

We have already addressed the issue of causation in connection with Touro's assignment of error #2 above and find no manifest error in the finding of causation.

LSU argues that Dr. Phelan, an LSU resident on duty for his first day of cardiac rotation, was merely following the treatment plan set up by his superior, Dr. Ledoux, the Tulane staff cardiologist, and that he had no reason to believe that there had been any change in the decedent's condition that would warrant any deviation in that plan. This contention is contradicted by the testimony of Nurse Bonneval.

Nurse Bonneval testified that in the afternoon she noted that the decedent was complaining of chest pains. She also noted that the decedent had elevated blood pressure, pulse and respiration rates. She described this as a substantial change for the worse in the decedent's condition from that which she had noted earlier in the day, which is why she called the doctor. When asked if she informed Dr. Phelan of "all of this", she responded affirmatively. She testified that when she called the medical resident all he told her was that he would call her back. She testified that that afternoon an hour elapsed between the time she first called or tried to page a doctor and a doctor called back with any kind of doctor's order to do something.

Based on Nurse Bonneval's testimony, which is not so internally inconsistent or so contradicted by documentary or objective evidence as to be unworthy of belief, the jury was entitled to conclude, as it implicitly did, that Dr. Phelan was informed by Nurse Bonneval of the decedent's worsening condition but failed to take any reasonable action in response.

Moreover, while it initially may have been appropriate for Dr. Phelan to follow the treatment plan of Dr. Elma Ledoux, the Touro staff cardiologist, it is negligent to continue following a treatment plan when it becomes apparent that the assumptions upon which that plan was based are no longer true, e.g., when the decedent in the instant case began showing classic symptoms of cardiac distress. Taking LSU's argument to its logical conclusion could lead to the unreasonable result that a patient's obvious external hemorrhaging could be ignored by a resident physician if it were encompassed by the original treatment plan set up by that resident's superior physician.

THE LSU SCHOOL OF MEDICINE REPRESENTING DR. TIMOTHY PHELAN'S ASSIGNMENT OF ERROR #2 – The trial court erred by excluding the evidence of Dr. Alpern's financial problems and bankruptcy.

LSU argues that it was error for the trial court to exclude evidence of the financial problems of the plaintiff's medical expert, Dr. Alpern. LSU contends that such evidence would have shown that Dr. Alpern is financially dependent on the fees he earns from doing such work as was involved in his testimony as an expert on behalf of the plaintiff in the instant case, allowing the jury to discount his testimony on the basis that it was biased. There is no suggestion that Dr. Alpern's personal financial history has any direct bearing on any of the facts sought to be proved or disproved in this case.

Assuming for the purposes of argument that Dr. Alpern's personal financial history is relevant, La. C.E. art. 403 allows the exclusion of even relevant evidence "if its probabtive value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . ."

We find no abuse of the trial court's discretion in excluding evidence of Dr. Alpern's personal financial history, as we cannot say that it is unreasonable to conclude that such evidence would be unduly prejudicial. The trial court allowed evidence of a number of facts that were unflattering to Dr. Alpern concerning his background as a medical practitioner. As Dr. Alpern was testifying as a medical expert, his history as a medical practitioner has much greater probative value than does his personal

financial hisotry. Had Dr. Alpern been testifying as a financial expert, his own personal financial history might be more relevant. The relevance of the fact that an expert is being compensated for his expert opinion is not the same as the relevance of that expert's personal financial history. Based on a review of the record as a whole we find that the trial judge exercised his discretion with discrimination in determining which facts concerning Dr. Alpern personally were admissible and which were not.

We find no merit in this assignment of error.

THE LSU SCHOOL OF MEDICINE REPRESENTING DR. TIMOTHY PHELAN'S ASSIGNMENT OF ERROR #3 – The testimony of plaintiff's expert was based on such inaccurate facts that it was error to admit the testimony, and this Court should give it no probative value.

LSU contends that Dr. Alpern's deposition testimony was,

> [B]ased on substantial inaccurate assumptions . . . He did not know basic facts concerning the patient's medical history and had inaccurate information on the treating physicians' individual roles in the patient's care.

The essence of Dr. Alpern's testimony was that it was a breach of the standard of care to ignore the stereotypical signs of the decedent's cardiac

distress and that this resulted in a diminished chance of survival. The particular pieces of Dr. Alpern's testimony to which LSU specifically objects are not material to this essence of his opinion, and assuming for purposes of argument only that the admission of the testimony complained of was error, we find it to be harmless error as we do not believe that the exclusion of that testimony would have resulted in any difference in the verdict of the jury. For example, the fact that Dr. Alpern may have been unaware that the decedent may have had an electrocardiogram early in the day prior to demonstrating warning signs of cardiac distress, probably has no bearing on the wisdom of ordering such a test once there is an obvious change in the patient's objective cardiac symptoms.

THE LSU SCHOOL OF MEDICINE REPRESENTING DR. TIMOTHY PHELAN'S ASSIGNMENT OF ERROR #4 – It was clear error to allow the lay/opinion testimony of Angela Bommarito, a separate patient at Touro.

The thrust of this assignment of error is that Angela Bommarito was so heavily sedated on pain medication that she was not competent to testify. LSU also complains that Nurse Bommarito was improperly qualified as an expert as she had only just graduated from nursing school. The trial court

has great discretion in determining whether to qualify a witness as an expert, and such discretion will not be disturbed on appeal unless shown to be manifestly erroneous. *Home Ins. Co. of Illinois v. National Tea Co.*, 577 So.2d 65 (La.App. 1 Cir.1990), *reversed in part on other grounds and affirmed in part,* 588 So.2d 361 (La.1991). The trial court has great discretion in allowing expert testimony. *Mistich v. Volkswagen of Germany, Inc.*, 95-0939 (La.1/29/96), 666 So.2d 1073; *Clement v. Griffin*, 91-1664 (La.App. 4 Cir. 3/3/94), 634 So.2d 412; *Bergeron v. State Boxing and Wrestling Com'n,* 01-2247 (La.App. 4 Cir. 10/2/02), 829 So.2d 620, 622, *writ den.* 02-2741 (La. 2/7/03), 836 So.2d 99. A trial judge has wide discretion in determining whether to allow a witness to testify as an expert and his judgment will not be disturbed by an appellate court unless it is clearly erroneous. *Levy v. Levy,* 02-0279 (La.App. 4 Cir. 10/2/02), 829 So.2d 640, 648; *Becnel v. Lafayette Ins. Co.*, 99-2966, p. 7-8 (La.App. 4 Cir. 11/15/00), 773 So.2d 247, 251. We find no abuse of the trial court's discretion in this regard and note that the jury was free to consider Nurse Bommarito's medical condition in weighing her testimony.

LSU complains that it was prejudicial and confusing to the jury for the trial court to allow Nurse Bommarito to "testify about the care *she was given,* even though the care to Bommarito was not at issue." There are no

citations to the record in support of this contention. Therefore, it is impossible for this court to ascertain exactly what portions of Nurse Bommarito's testimony LSU finds objectionable on this issue or whether LSU offered the necessary contemporaneous objections. Accordingly, we find it appropriate to disregard LSU's argument on this portion of this assignment of error pursuant to Uniform Rules – Courts of Appeal, Rule 2—12.4.

THE LSU SCHOOL OF MEDICINE REPRESENTING DR. TIMOTHY PHELAN'S ASSIGNMENT OF ERROR #5 – The trial court committed clear error by commenting on the testimony during trial and coaching plaintiff's counsel on the strategy.

LSU cites no legal authorities in support of this assignment of error. LSU complains that:

> At a recess outside the presence of the jury, the district court actually commented on the testimony of Ms. Bommarito. The district court ended up coaching plaintiff's attorney on elements lacking in his case and the proper way to establish foundation for the witness. The district court even pointed out the areas lacking in the direct examination that would result in a directed verdict if not cured. (R. VI, p. 105) Objections were made and the defendants moved for a mistrial. (R. VI, p. 101-108). The district court denied these motions. The witness was called back to the stand

> and following instructions from the court, the plaintiff's attorney was able to cure the defects in his foundation with the witness. The subsequent motions for directed verdict were denied. Objections were repeated after the directed verdict in light of the trial court's bias against Touro hospital. (See, R. VII pp. 45-52.).

The trial court, out of the presence of the jury instructed the plaintiff's counsel that:

> You've got to clearly get a witness to identify the applicable standards of care. And then you are going to have to get, based on the evidence, to show what's happening, you know, to frame it within those standards of care to get there.
>
> * * * *
>
> Now, from that point of view, the questions you are asking are – need to be phrased to cover the various hypothecs that are associated, and do it in multiple stages. Assume one, "Is that a breach?" And if she says, yes or no – suppose she says, no, okay, add to it another one, "Is that a breach?"
>
> "No."
>
> If that – if you add to it another, then maybe the witness says, yes. But, you can't, you know, the problem is, you need to build it so that the witness, so that you can get to the point of whether there is a breach of an applicable standard of care. And, that is where I am coming from.
>
> The trial court denied the motion for mistrial.

Generally, the trial judge is afforded discretion in conducting the trial,

even a jury trial, but such discretion is circumscribed by considerations of justice and fairness and by the Code of Civil Procedure provision prohibiting the trial judge from making any kind of comments on the evidence. LSA-C.C.P. art. 1791. *Dixon v. Winn-Dixie Louisiana, Inc.*, 638 So.2d 306, 1993-1627 (La.App. 4 Cir. 5/17/94).

La. C.C.P. art. 1791 prohibits the judge from commenting on the evidence in the presence of the jury. LSU admits that the comments made by the judge that are the subject of this assignment of error were not made in the presence of the jury. LSU cites no authority that suggests either explicitly or implicitly that comments on the evidence by the trial judge out of the presence of the jury would constitute error. In fact, as noted earlier, LSU cites no authorities of any kind in support of any of the arguments made in connection with this assignment of error.

In *Dixon, supra,*p. 11, 638 So.2d at 316, this Court found that the trial court erred in making an improper comment on the evidence contrary to the prohibition set forth La. C.C.P. art. 1791, but applied a harmless error standard of review:

> However, the fact that the trial judge violated the prohibition does not automatically require reversal of the jury verdict. That result is mandated only when review of the record as a whole reveals that the improper comments made by the trial judge were so prejudicial that the complaining party was deprived of a fair trial. Our review of the record

> reveals that the trial judge's error in this case did not rise to that level. Thus, the error is harmless and does not require reversal of the trial court judgment.

Id.

Therefore, in accordance with the *Dixon* case, if it was error for the trial judge to make the comment he made, then we find such error to be harmless. Moreover, we note that *Dixon* is consistent with our earlier observation that the LSA-C.C.P. art. 1791 prohibition on comments on the evidence concerns comments made in front of the jury which did not occur in the instant case.

LSU states in its brief that the trial judge had a bias against Touro, referring to a colloquy between the trial judge and the attorney for LSU during the course of which the trial judge stated in pertinent part:

> Let me also preface these remarks, that my family continues, even in spite of – even after the incident where Touro nurses falsified my mother's records while she was in the Skilled Care Unit, and we brought it to Touro's attention – even after that, in subsequent hospitalizations of my mother within the same five month period, we continued to bring her back to Touro. Has nothing to do with – and my family contributes to Touro. **But for Touro to stand up to say that their nurses record things accurately, or take that position, is not for me to decide in this case. It is for the jury to decide in this case.** [Emphasis added.]

The most significant thing about this statement is the trial judge's

declaration that it was not for him to decide the issue of the accuracy of Touro's records, but that it was a matter for the jury to decide. LSU points to nothing in the record from which we might infer that the trial judge did anything to influence the jury's decision in this regard. We note that Touro does not contend that there was any bias against it on the part of the trial judge. Of greatest significance is the fact that the trial judge originally threw out the jury verdict in favor of the plaintiff and rendered a judgment in favor of the defendants, dismissing the plaintiffs' suit. It is only because the trial judge's original judgment in favor to the defendants was reversed by the Supreme Court that LSU is now faced with an adverse judgment.

Thus, even if we were to assume for purposes of argument that the trial court was biased against Touro, we find that LSU has failed to show that it was prejudiced in any way by such bias. Touro has not raised the issue and the trial judge originally ruled in favor of both Touro and LSU on the merits. Accordingly, we find no merit in LSU's argument of bias or prejudice against Touro.

Similarly, we find that in view of the trial court's rejection of the jury verdict in favor of the plaintiffs and its original judgment in favor of the defendants, dismissing the plaintiffs' suit, we find no merit in LSU's implicit contention that the trial judge was biased in favor of the plaintiffs when he

suggested to the plaintiff's counsel how to structure his hypothetical question.

La. C.E. art. 611A authorizes the court to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . [m]ake the interrogation and presentation effective for the ascertainment of the truth." La. C.E. art. 614B allows the court to question witnesses. In the instant case, the trial judge refrained from asking the questions LSU complains of, but instead suggested them to plaintiffs' counsel outside of the presence of the jury. By doing so the trial court was scrupulous in avoiding any appearance of partiality that could result in the kind of error found by this court in *Wilson v. PNS Stores, Inc.,* 98-1004 (La.App. 4 Cir. 12/16/98), 725 So.2d 66. See also *Midyett v. Midyett,* 32,208 (La.App. 2 Cir. 9/22/99), 744 So.2d 669.

Mistrial is a drastic remedy. The trial court is vested with discretion on the decision to grant or deny a motion for mistrial. *Griggs v. Riverland Medical Center*, 98-256 (La.App. 3 Cir. 10/14/98), 722 So.2d 15. The prerequisite for a successful motion for mistrial in civil jury case is that trial judge determines that it is impossible to reach a proper judgment because of some error or irregularity. *Jordan v. Intercontinental Bulktank Corp.,* 621 So.2d 1141 (La.App. 1 Cir.1993). The trial judge is vested with broad

discretion to grant motion for mistrial, but only if no other remedy would afford relief or where justice would not be done if trial were continued. *Williams v. Diehl*, 625 So.2d 251 (La.App. 5 Cir.1993). Motion for mistrial should be granted upon proof of prejudicial conduct occurring during jury trial, which cannot be cured by admonition or instructions. *Alfonso v. Piccadilly Cafeteria, Inc.*, 95-279 (La.App. 5 Cir. 11/28/95), 665 So.2d 589. A motion for mistrial in civil case should be granted when, before trial ends and judgment is rendered, the trial judge determines that it is impossible to reach proper judgment because of some error or irregularity and where no other remedy would provide relief to moving party. *Searle v. Travelers Ins. Co.*, 557 So.2d 321 (La.App. 4 Cir.1990). Guidelines to be considered by the trial court are: (1) whether error or irregularity makes it impossible to reach proper verdict; (2) whether there is no remedy that will provide relief to moving party; (3) and whether prejudicial misconduct cannot be cured by instruction or admonition. *Vicknair v. Dimitryadis*, 93-0003, p. 4-5 (La.App. 4 Cir. 1/13/94), 640 So.2d 275, 278. Mistrial is a drastic remedy, and should be employed only sparingly, when no other remedy is available. *Ghanaee v. American Airlines, Inc.*, 95-1101, p. 3 (La.App. 4 Cir. 5/24/95), 656 So.2d 303, 304.

Based upon the foregoing analysis, we find that LSU has pointed to

no problem with the conduct of the trial so egregious as to warrant the imposition of the drastic remedy of mistrial.

Accordingly, we find no merit in this assignment of error.

THE PLAINTIFF'S ANSWER TO THE APPEAL – The failure of the trial court to allow multiple damage caps was error.

The plaintiff answered the defendants' appeal contending that he is entitled to two separate $500,000.00 medical malpractice caps because there were two separate acts of medical malpractice resulting in two or more separate injuries to the decedent. However, as we find that the acts of negligence resulting in the decedent's cardiac distress and ultimate rupture are not severable, the plaintiff is only entitled to one cap. *Turner v. Massiah*, 94-2548 (La. 6/16/95), 656 So.2d 636.

Accordingly, we find no merit in the plaintiff's answer to the appeal.

DECREE

For the foregoing reasons, the judgment of the trial court is affirmed at appellants' cost.

AFFIRMED