DONALD PONSETI, INDIVIDUALLY AND AS ADMINISTRATOR AND SUCCESSION REPRESENTATIVE OF THE SUCCESSION OF MARVIN PONSETI AND THEODORE PONSETI, ET AL	*	**NO. 2018-CA-0109**
	*	**COURT OF APPEAL**
	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

*** * * * * * ***

VERSUS

TOURO INFIRMARY, GHI INSURANCE COMPANY, NURSE JANE DOE, DOCTOR JOHN DOE AND XYZ INSURANCE COMPANY

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2006-10346, DIVISION "I-14"
Honorable Piper D. Griffin, Judge
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Judge Roland L. Belsome
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(Court composed of Judge Roland L. Belsome, Judge Joy Cossich Lobrano, Judge Regina Bartholomew-Woods)

BARTHOLOMEW-WOODS, J. DISSENTS, IN PART, WITH REASONS.

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AFFIRMED
DECEMBER 5, 2018

In this survival action, the Defendants, Touro Infirmary (Touro) and Healthcare Casualty Insurance, appeal the trial court's judgment in favor of the Plaintiff, Donald Ponseti. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

On Saturday, August 27, 2005, Mr. Marvin Ponseti, who was seventy-five years old, was admitted to Touro due to a low-grade fever and complaints concerning an infected left leg. Mr. Ponseti was initially admitted as a non-urgent (triage level three) patient. Subsequently, on Sunday, August 28, 2005, Mr. Ponseti went into atrial fibrillation[1] and was treated with medication. After diagnosing the heart issue, Mr. Ponseti was transferred to the telemetry unit on the sixth floor of the hospital. However, as a result of the medication, his heart returned to normal sinus rhythm before he arrived to the telemetry unit.

As a result of Hurricane Katrina, Touro lost power at approximately 3:00 a.m. on Monday, August 29, 2005. Shortly after, Touro lost water pressure. As a

[1] Dr. Royce Yount, an expert in cardiology and Mr. Ponseti's treating physician, testified that atrial fibrillation is an abnormal heart rhythm, which is common in older patients.

result of the heat and deteriorating conditions, management made the decision to evacuate the hospital.

On the morning of Wednesday, August 31, 2005, Mr. Ponseti's temperature began to gradually rise. His last chart note at approximately 9:35 a.m. reflected that his fever was 101.4. On Wednesday afternoon, Mr. Ponseti was brought outside to the third floor parking garage for evacuation. While waiting, Mr. Ponseti's declining condition was presented to Dr. Royce Yount, his treating cardiologist. After assessing Mr. Ponseti, Dr. Yount immediately started a code for ventricular fibrillation.[2] Mr. Ponseti was brought back inside into the third floor Intensive Care Unit for continued code treatment. However, the treatment was unsuccessful and Mr. Ponseti expired.

As a result of Mr. Ponseti's death, the Plaintiff, Donald Ponseti,[3] filed a Petition for Damages asserting survival claims based on premises liability.[4] The Petition for Damages was subsequently amended to include certain medical malpractice claims.[5] At that time, the Defendants filed an Exception of Prematurity on the medical malpractice claims, which was granted by the trial court. After a medical review panel ruled in favor of the Defendants, the trial court

[2] Dr. Yount testified that vetricular fibrillation, as opposed to atrial fibrillation, can be fatal if not treated immediately.
[3] Donald Ponseti was Mr. Ponseti's cousin.
[4] Initially, several other heirs were included as plaintiffs in the Petition for Damages. The petition also included wrongful death claims. However, by consent judgment on a motion to dismiss, all of the other plaintiffs except for Donald Ponseti, in his capacity as administrator and succession representative of Mr. Ponseti's succession, were dismissed from the lawsuit. In addition, the wrongful death claims were also dismissed.
[5] Leslie Hirsch, Touro's Chief Executive Officer, was named as an additional defendant in the amended petition; however, he was later dismissed from the suit.

granted the Defendants motion for summary judgment and dismissed the medical malpractice claims.

The case continued to trial on the premises liability claims. After a two-day bench trial, the trial court rendered a judgment in favor of the Plaintiff in the amount of $50,000.00. The Defendants appealed, and the Plaintiff filed an answer to the appeal.

DISCUSSION

On appeal, the Defendants assert two assignments of error alleging that the evidence was insufficient to support the trial court's award for survival damages. Conversely, in his answer to the appeal, the Plaintiff argues for an increase in the damages award.

SUFFICIENCY OF THE EVIDENCE

In their assignments of error, the Defendants argue that the Plaintiff failed to demonstrate two critical elements required in a survival action based in negligence: a breach of the duty of care, and damages. As it relates to the sufficiency of the evidence, the fundamental principle of tort liability in Louisiana is that "[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." La. C.C. art. 2315. In any negligence action, including a premises liability action, the plaintiff has the burden of proving by a preponderance of the evidence the following five elements: 1) duty of care owed by defendant to plaintiff; 2) breach of that duty by defendant; 3) cause-in-fact; 4) legal causation; and 5) damages to plaintiff caused by that breach. *Zimko v. American Cyanamid*, 03-0658, p. 21 (La. App. 4 Cir. 6/8/05), 905 So.2d 465, 481-82.

DUTY/BREACH

Concerning the duty and breach elements, the Defendants do not dispute that Touro had a duty to provide adequate ventilation for its patients, s*ee Falcone v. Touro Infirmary*, 13-0015, 13-0016, pp. 6-7 (La. App. 4 Cir. 11/6/13), 129 So.3d 641, 646. However, they argue that, according to their expert, Touro's duty was to provide "non-toxic, *breathable* air." They further maintain that since Mr. Ponseti was brought out to the parking deck in stable condition, the Defendants met their duty to provide breathable air. Therefore, they conclude the evidence does not establish a breach of duty to provide adequate ventilation. We disagree.

"Duty is a question of law; the inquiry is whether the plaintiff has any law (statutory, jurisprudential, or arising from general principles of fault) to support the claim that the defendant owed him a duty." *Falcone*, 13-0016, p. 5, 129 So.3d at 645. Despite the expert testimony at trial, this Court has already held that Touro was required to provide adequate ventilation, which meant "air that is being filtered or moving." *Falcone*, 13-0016, p. 6, 129 So.3d at 646 n.3 (citing *Serou v. Touro Infirmary*, 12-0089, p. 26 (La. App. 4 Cir. 1/9/13), 105 So.3d 1068, 1088).[6] In addition, "ventilation" is defined as the "circulation of air" or "a system or means of providing fresh air." VENTILATION, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/ventilation (last visited November 7, 2018).

Having concluded that Touro had a duty to provide circulating air, we turn to the issue of whether the Plaintiff established a breach of duty. Here, the trial court was presented with conflicting views of the evidence. In particular, Elysha

[6] Notably, "[t]here is a distinction between refrigerated or chilled air and conditioned or moved air." *Falcone*, *id.*

Oriol testified that she was an oncology nurse stationed in the telemetry unit during the hurricane. She explained that when the building lost power, the loss of air conditioning was apparent after a couple of hours. She further described the heat as "oppressively hot and stagnant." She further testified that she did not see any fans, open windows or spot coolers in the telemetry unit. Significantly, she explained that she did not feel any type of movement in the air. Likewise, Robin Caceres, Mr. Ponseti's treating nurse, testified that there was no fresh air and it "felt like there wasn't air moving." To the contrary, Dr. Yount and Dierdre DeGruy, a nurse who was assisting Dr. Yount, testified that they saw fans and spot coolers throughout the building; however, Ms. DeGruy did not specifically recall seeing spot coolers on the sixth floor.[7]

Giving weight to the treating nurses' testimonies that there was no fresh or circulating air in the telemetry unit, the trial court found that Touro breached its duty to provide adequate ventilation. Questions of fact as determined by the factfinder, be it a jury or a judge, are reviewed under the manifest error or clearly wrong standard of review. *Falcone*, 13-0015, p. 4, 129 So.3d at 645. When there are two permissible views of the evidence, the trier of fact's choice between them cannot be manifestly erroneous. *Rosell v. ESCO*, 549 So.2d 840, 844 (La. 1989). Accordingly, we do not find that the trial court was manifestly erroneous in finding that Touro breached its duty to provide adequate ventilation to Mr. Ponseti.

SURVIVAL DAMAGES AND QUANTUM

Turning to the damages element, both the Defendants and the Plaintiff take issue with the survival damage award. While the Defendants argue that the

[7] Scott Landry, the Director of Facility Services, also testified that there were spot coolers and fans throughout the hospital.

evidence was not sufficient to support the award of survival damages, the Plaintiff argues that award should be increased.

The Defendants maintain that there was no evidence presented to establish that Mr. Ponseti's experienced pain and suffering prior to his death. "Survival damages may be awarded for the pre-death mental and physical pain and suffering of the deceased. A jury may award damages for pain and suffering in a survival action where there is the smallest amount of evidence of pain, however brief, on the part of the deceased, based on his actions or otherwise." *Thompson v. Crawford*, 17-1400, p. 1 (La. 11/13/17), 229 So.3d 451, 452 (citation omitted). In determining survival damages, the factfinder should consider the severity and duration of any pain and suffering or any pre-impact fear experienced by the deceased up to the moment of death. *Maldonado*, 12-1868, p. 37, 152 So.3d at 936 (citation omitted). Survival damages are awarded "if there is even a scintilla of evidence of pain or suffering on the part of the decedent, and fright, fear, or mental anguish during an ordeal leading to the death is compensable." *Leary v. State Farm Mut.Auto. Ins. Co.*, 07-1184, pp. 3-4 (La. App. 3d Cir. 3/5/08), 978 So.2d 1094, 1098 (quotation omitted).

However, where there is no indication that a decedent consciously suffered, an award for pre-death physical pain and suffering should be denied. *Maldonado*, 12-1868, pp. 37-38, 152 So.3d at 936 (citation omitted). The question of whether the decedent actually consciously suffered is a factual issue, governed by the manifest error-clearly wrong standard. *Id*.

In this case, the evidence revealed that after the hospital lost power and water pressure, it became unsanitary and unbearably hot. The toilets were backed up and the patients could not bathe or wash their hands. Nurse Oriol testified that

the patients were sweating and miserable. They were complaining of being hot and she provided ice packs when available.

Nurse Caceres remembered changing sheets because the patients' beds were drenched in sweat. She testified that the circumstances were "beyond everybody being anxious and worried." She further testified that she was terrified and felt unsafe. In particular, she observed fires from the windows, people looting, and people walking around outside with baseball bats and pipes. She also started seeing people she did not recognize in the hospital.

After his death, Dr. Samantha Huber, M.D. performed the autopsy on Mr. Ponseti. She concluded that Mr. Ponseti's cause of death was cardiac arrhythmia caused by the stress of Hurricane Katrina. Dr. Jim Hirschman, an expert in internal medicine with a specialty in cardiology, testified that the stress to Mr. Ponseti's body, including the heat and sweating, the altered nutrition and inadequate hydration promoted a new atrial fibrillation, which proceeded to cause ventricular fibrillation and death. Considering the physical and mental stresses of the hospital environment post-Katrina, we do not find the trial court was manifestly erroneous in awarding survival damages for Mr. Ponseti's pain, suffering, fear and mental anguish during this ordeal before his death. *See Leary*, *supra*.

Turning to quantum, the issue is whether the trial court abused its discretion in awarding the Plaintiff only $50,000.00 in survival damages for the two-and-a-half days he suffered prior to his death. When rendering the award, the trial court reasoned that "there was very little evidence of pain and suffering."

"In the assessment of damages in cases of offenses, quasi offenses, and quasi contracts, much discretion must be left to the judge or jury." La. C.C. art. 2324.1. According to the Supreme Court:

> The assessment of "quantum," or the appropriate amount of damages, by a trial judge or jury is a determination of fact, one entitled to great deference on review. As such, "the role of an appellate court in reviewing general damages is not to decide what it considers to be an appropriate award, but rather to review the exercise of discretion by the trier of fact." *Youn v. Maritime Overseas Corp.*, 623 So.2d 1257, 1260 (La. 1993). Moreover, "before a Court of Appeal can disturb an award made by a [fact finder,] the record must clearly reveal that the trier of fact abused its discretion in making its award. Only after making the finding that the record supports that the [trier of fact] abused its much discretion can the appellate court disturb the award, and then only to the extent of lowering it (or raising it) to the highest (or lowest) point which is reasonably within the discretion of that court."

Wainwright v. Fontenot, 00-0492, p. 6 (La. 10/17/00), 774 So.2d 70, 74 (quotation omitted).

In light of the limited evidence of pain and suffering produced at trial, we cannot say that the survival damages award is unreasonably low. Accordingly, we find no abuse of discretion in the trial court's survival damages award of $50,000.00 for Mr. Ponseti's pain and suffering.[8]

CONCLUSION

For the foregoing reasons, the trial court's judgment awarding the Plaintiff survival damages is affirmed.

AFFIRMED

[8] While the Plaintiff cites to numerous cases to support an increase in the survival damage award, an examination of similar cases is unnecessary here. *See Robinette v. Lafon Nursing Facility of the Holy Family*, 15-1363, p. 27 (La. App. 4 Cir. 6/22/17), 223 So.3d 68, 86 (examination of awards in similar cases is only appropriate after an abuse of discretion is established).