

DESIGNATED NOT FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 1817

CHARLIE NERVE

VERSUS

THE FRANKLIN FOUNDATION HOSPITAL, INC.

Judgment Rendered: June 8, 2007

On Appeal from the Sixteenth Judicial District Court
In and For the Parish of St. Mary
State of Louisiana
Docket No. 113,012

Honorable John E. Conery, Judge Presiding

Scott M. Hawkins
Chris Villemarette
Lafayette, LA

Counsel for Plaintiff/Appellee
Estate of Charlie Nerve

Katherine A. Pavy
Lafayette, LA

Counsel for Defendant/Appellant
Louisiana Patients' Compensation
Fund and Oversight Board

BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

*Parro, J., concurs.
Guidry, J., would not reduce the principal
damages but concurs with the
opinion which affirms the judgment
as written.*

McCLENDON, J.

The only issue raised in the appeal of this medical malpractice case is whether the jury's monetary damage awards for the survival and wrongful death claims are excessive. Although we find the survival damages awarded by the jury to be excessive, for the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

On December 31, 2002, Gladys Nerve, a 45-year old female, went to the emergency room of The Franklin Foundation Hospital, complaining of abdominal pain, nausea, and vomiting. Thereafter, she was admitted to the hospital and referred to Dr. Donna Tesi, a general surgeon. On January 2, 2003, Dr. Tesi performed surgery to remove Ms. Nerve's gall bladder. The procedure was completed without complication. While in recovery, Dr. Tesi was called to evaluate Ms. Nerve due to her labored breathing. A chest x-ray was taken, which suggested pulmonary edema, and Ms. Nerve was placed on oxygen. Dr. Tesi also transferred Ms. Nerve to the intensive care unit (ICU) for close monitoring. Dr. Tesi left the nursing staff with specific written instructions regarding Ms. Nerve's vital signs and with instructions to call Dr. Tesi if Ms. Nerve's vital signs reached certain levels. By the early morning hours of January 4, 2003, Ms. Nerve's condition deteriorated to the point that the levels set by Dr. Tesi were met. The nurses attempted to relieve Ms. Nerve's discomfort by administering pain and anti-anxiety medications, but failed to contact Dr. Tesi. Later that morning, at 8:53 a.m., Ms. Nerve asked the nurse for a washcloth, but by the time the nurse turned to give the washcloth to her, Ms. Nerve was unresponsive and not breathing. The nurse then called for a doctor, but despite resuscitative efforts, Ms.

Nerve remained in a coma and unresponsive until her death on January 11, 2003.¹

Ms. Nerve had no spouse or children, so her father, Charlie Nerve, presented a claim of medical malpractice to a medical review panel. On September 22, 2004, the medical review panel determined that The Franklin Foundation Hospital had breached the standard of care it owed to Ms. Nerve in failing to notify Dr. Tesi of Ms. Nerve's deterioration in the early morning hours of January 4, 2003. The medical review panel found no deviation from the standard of care with regard to Dr. Tesi. On September 29, 2004, Mr. Nerve filed a petition for damages against the hospital.² Mr. Nerve died on January 30, 2005, and the Estate of Charlie Nerve was substituted as plaintiff on February 3, 2005.

On March 11, 2005, the trial court signed a judgment approving plaintiff's settlement with The Franklin Foundation Hospital for \$100,000, with a reservation of plaintiff's rights to proceed against the Louisiana Patient's Compensation Fund (PCF) for additional damages, if any. Judgment dismissing the hospital was signed on April 14, 2005.

Plaintiff amended its petition to seek payment of additional damages from the PCF, and a jury trial of the matter was held on December 12 and 13, 2005. Following the testimony of the first witness, Dr. Tesi, the PCF stipulated that Ms. Nerve's death and her suffering from 3:00 a.m. on January 3, 2003, until her death on January 11, 2003, were caused by the negligence of the hospital. The PCF also stipulated to \$55,428.00 in special damages, representing the medical expenses of Ms. Nerve, and further

¹ Ms. Nerve was transferred to Iberia General Hospital on January 5, 2003, where she was taken off of life support and died on January 11, 2003.

² An amending petition added Dr. Tesi as a defendant, but she was dismissed after filing a motion for summary judgment, which was granted on December 17, 2004.

stipulated to \$7,300.53, as part of the general damage award, representing funeral expenses incurred for Ms. Nerve. Therefore, the only issues presented to the jury were plaintiff's claims for survival and wrongful death general damages. On December 13, 2005, the jury returned a verdict awarding \$600,000 in survival damages and \$400,000 in wrongful death damages.

In accordance with LSA-R.S. 40:1299.42, the trial court reduced the general damage award to \$500,000, exclusive of medical expenses, and ordered that credit be given to the PCF for the \$100,000 partial settlement paid by The Franklin Foundation Hospital. Accordingly, the judgment signed on January 5, 2006, was for \$455,428.

The PCF filed a suspensive appeal on January 13, 2006, assigning as error the jury's abuse of discretion in awarding \$600,000 in survival damages and \$400,000 in wrongful death damages. On September 15, 2006, plaintiff filed a motion to partially dismiss the PCF's suspensive appeal, which was referred to the appeal panel.

DISCUSSION

The trier of fact is given much discretion in the assessment of damages. LSA-C.C. art. 2324.1. In reviewing an award of general damages, the court of appeal must determine whether the trier of fact has abused its much discretion in making the award. **Turner v. Ostrowe**, 01-1935, p. 5 (La.App. 1 Cir. 9/27/02), 828 So.2d 1212, 1216, writ denied, 02-2940 (La. 2/7/03), 836 So.2d 107, citing **Youn v. Maritime Overseas Corp.**, 623 So.2d 1257, 1260 (La. 1993), cert. denied, 510 U.S. 1114, 114 S.Ct. 1059, 127 L.Ed.2d 379 (1994). The discretion vested in the trier of fact is "great," and even vast, so that an appellate court should rarely disturb an award of general damages. Reasonable persons frequently disagree about the measure

of general damages in a particular case. It is only when the award is, in either direction, beyond that which a reasonable trier of fact could assess for the effects of the particular injury to the particular plaintiff under the particular circumstances that the appellate court should increase or reduce the award. **Youn**, 623 So.2d at 1261. Only after it is determined that there has been an abuse of discretion is a resort to prior awards appropriate, and then only to determine the highest or lowest point of an award within that discretion. **Turner**, 01-1935 at p. 5, 828 So.2d at 1216-17, citing **Coco v. Winston Industries, Inc.**, 341 So.2d 332, 335 (La. 1976); **Ratliff v. State ex rel. Dept. of Transp. and Dev.**, 02-0733, p. 18 (La.App. 1 Cir. 3/28/03), 844 So.2d 926, 939, writ denied, 03-1739 (La. 10/10/03), 855 So.2d 350.

Survival Damages

Louisiana Civil Code article 2315.1 grants the right to pursue a survival action. Article 2315.1 provides, in pertinent part:

A. If a person who has been injured by an offense or quasi offense dies, the right to recover all damages for injury to that person, his property or otherwise, caused by the offense or quasi offense, shall survive for a period of one year from the death of the deceased in favor of:

...

(2) The surviving father and mother of the deceased, or either of them if he left no spouse or child surviving.

A trial court is within its much discretion in awarding survival damages for pain and suffering where there is the smallest amount of evidence of pain on the part of the deceased by his actions or otherwise. The factors to be considered in assessing quantum for pain and suffering are the severity and duration of the pain. **Barthel v. State, Dept. of Transp. and Dev.**, 04-1619, p. 9 (La.App. 1 Cir. 6/10/05), 917 So.2d 15, 21.

In this matter, Dr. Tesi testified at trial that the nurses' delay in calling her to intubate Ms. Nerve delayed oxygen from getting into Ms. Nerve's lungs and brain, resulting in Ms. Nerve's brain death. Dr. Tesi believed that the nurses should have called her "at least" as early as 1:00 a.m. on the morning of January 4, 2003. If the nurses had done that, Ms. Nerve would not have suffered the anxiety, the rapid breathing, and the symptoms she ultimately endured. Dr. Tesi testified:

I think that what happened from 1:00 in the morning when they started documenting that she was anxious till 8:00, or maybe even 3:30 when they were documenting that she was very anxious, she was moaning, that her nail beds became dusky, I think it is from that point that she really started being terribly compromised, and that at 8:53 when she coded, that was just the final straw. I think our window of opportunity was at 3:00 in the morning, not at 8:00.

Dr. Tesi testified that after midnight on January 4, 2003, Ms. Nerve had a rapid heart rate and a rapid respiratory rate. At 1:00 a.m., her heart rate was 127 beats per minute (higher than the 120 rate set by Dr. Tesi) and her respiratory rate was 28 (below the rate of 30 set by Dr. Tesi). Her blood pressure was 165 over 92. At 2:00 a.m., Ms. Nerve's blood pressure had risen to 172 over 80, her heart rate had risen to 128 beats per minute, and her respiratory rate remained at 28. At 3:00 a.m. on January 4, 2003, the nurses noted that Ms. Nerve's heart rate had increased to 138 beats per minute, her respiratory rate was up to 40 (higher than the parameter set by Dr. Tesi), and her blood pressure had risen to 178 over 93. The nurses further documented in their notes: "Patient very anxious. Unable to go to sleep." Dr. Tesi testified that any time a patient shows symptoms of anxiety, that is a mental status change, which is significant and indicates that something else is happening. At 4:00 a.m., Ms. Nerve's heart rate was up to 140 beats per minute, her respiratory rate was 40, and her blood pressure had risen to 190

over 105. At 4:30 a.m., the nurses noted that Ms. Nerve was “still anxious,” that the medication, Versed, had not helped, and that the pain medication, Demerol, was given. At 5:00 a.m., Ms. Nerve’s heart rate was 140 and her respiratory rate was 40. Her blood pressure had again risen, to 190 over 112, and Ms. Nerve’s oxygen saturation level had dropped to 83%.

By 7:00 a.m., Ms. Nerve’s heart rate was 140, her respiratory rate was 40, and her blood pressure had dropped to 169 over 99. At 7:30 a.m., the nurses noted that Ms. Nerve’s respirations were shallow and rapid with an occasional non-productive cough. Also noted was the difficulty in hearing Ms. Nerve’s breath sounds due to her moaning. Dr. Tesi testified that the moaning is another mental status change and that she should have been called. Ms. Nerve would answer questions when spoken to, but would return to sleep, mumbling constantly. Ms. Nerve denied that she had abdominal discomfort or shortness of breath. However, the nurses noted that Ms. Nerve’s nail beds were dusky. At 8:00 a.m., Ms. Nerve had a bed bath and her linens were changed. Also at 8:00, the nurses noted Ms. Nerve’s heart rate at 152 beats per minute, a respiratory rate of 40, and her blood pressure rate had now dropped to 160 over 86. At 8:30 a.m., Ms. Nerve was able to drink a small amount of juice. At 8:53 a.m., after asking for a washcloth, Ms. Nerve went into respiratory arrest. Once Ms. Nerve coded, she was unresponsive and in a coma. Dr. Tesi believed that at that point, Ms. Nerve was not experiencing any pain.

Ms. Nerve endured pain, suffering, distress, and anxiety for at least six hours prior to her death. She was oxygen-deprived, and her anxiety was clearly demonstrated. Her heart raced, her blood pressure rose, and her breathing became rapid and shallow as she was struggling for air. According to Dr. Tesi, Ms. Nerve went into acute respiratory arrest because

she simply was worn out, since she had been, in essence, running since 3:00 that morning. Additionally, Ms. Nerve's brain was irreparably damaged due to oxygen deprivation.

However, after careful consideration, we conclude that the \$600,000 damage award for Ms. Nerve's pain and suffering is excessive under the particular facts of this case. Resorting to a review of prior awards, we reduce the award to \$500,000, the highest amount we believe the jury could have awarded. See Wingfield v. State ex rel. Dept. of Transp. and Development, 01-2668, pp. 32-33 (La.App. 1 Cir. 11/8/02), 835 So.2d 785, 809-10, writs denied, 03-0313, 03-0339, 03-0349 (La. 5/30/03), 845 So.2d 1059 and 1060, cert. denied, Louisiana ex rel. Dept. of Transp. and Development v. Wingfield, 540 U.S. 950, 124 S.Ct. 419, 157 L.Ed.2d 282 (2003) (jury award of \$800,000 for severe pain and suffering experienced for several hours, while mostly conscious until death, after an horrific accident, reinstated); Strawder v. Zapata Haynie Corporation, 94-453, 94-454, pp. 2-5 (La.App. 3 Cir. 11/02/94), 649 So.2d 554, 557-59 (award of \$500,000 for pain and suffering, experienced after an explosion for a period of thirty minutes until death, found not to be excessive); Randall v. Chevron U.S.A., Inc., 13 F.3d 888, 892 & 901 (5th Cir. 1994), modified on other grounds, 22 F.3d 568 (5th Cir. 1994), cert. dismissed, Sea Savage, Inc. v. Chevron U.S.A., Inc., 512 U.S. 1265, 115 S.Ct. 5, 129 L.Ed.2d 906 (1994), and cert. denied, 513 U.S. 994, 115 S.Ct. 498, 130 L.Ed.2d 408 (1994) (award reduced from \$1,000,000 to \$500,000 for pain and suffering for accident in which mechanic fell overboard and clung to barnacle-encrusted oil platform leg for twenty-five minutes before drowning).

In light of the fact that our reduction of the survival damages award has no impact on the final reduced award for damages decreed in the trial court's judgment, there is no need to amend the judgment.

Wrongful Death Damages

Louisiana Civil Code article 2315.2 provides, in pertinent part:

A. If a person dies due to the fault of another, suit may be brought by the following persons to recover damages which they sustained as a result of the death:

...

(2) The surviving father and mother of the deceased, or either of them if he left no spouse or child surviving.

The elements of damage for a wrongful death action are loss of love, affection, companionship, services, support, medical expenses, and funeral expenses. Additionally, the courts have allowed damages in wrongful death actions for mental pain, suffering, and distress resulting from the death of the victim. **Hill v. Shelter Mut. Ins. Co.**, 05-1783, p. 5 (La. 7/10/06), 935 So.2d 691, 695.

In this matter, although Mr. Nerve had other children, he was closest to Ms. Nerve. Ms. Nerve was not married and did not have any children. Mr. Nerve's daughter, Mattie Dupas, testified that her father lived with Ms. Nerve after their mother died. He lived with his daughter for eleven years, and Ms. Nerve took care of his needs, such as cooking, cleaning, and getting her father to doctor appointments, as her mother had done. However, after Mr. Nerve had open heart surgery, Ms. Nerve could no longer handle her father alone. He was a large man, and after the surgery, his legs were weaker and he was losing his eyesight. Mr. Nerve went to live with Ms. Dupas for about a year, because there was other help in Ms. Dupas' home. During this period, Ms. Nerve continued to visit her father every day.

However, there came a point where Mr. Nerve could not remain alone during the day, as everyone in Ms. Dupas' home was either working or at school, and the decision was made to move Mr. Nerve to the nursing home in Patterson, where Ms. Nerve worked. Mr. Nerve stayed in Patterson for about a year. He then decided to move to the nursing home in Franklin in order to be closer to his children and grandchildren, who could walk or ride their bicycles to visit him. Ms. Nerve continued to visit her father almost every day on her way home from work, and continued to clean his clothes and cook special meals for him.

Ms. Nerve was her father's primary caregiver and devoted most of her free time to him, cooking, cleaning, and generally taking care of him. Ms. Dupas testified that, although the other children helped sometimes, it was Ms. Nerve who took care of their father. When Ms. Dupas told her father that Ms. Nerve had suffered a brain death, Mr. Nerve cried and kept asking what had happened. The decision had to be made whether to remove Ms. Nerve from life support, and although Mr. Nerve was too upset to go to the hospital, he signed the consent form. After Ms. Nerve was taken off of the ventilator, Ms. Dupas went to her father and told him that she was "still on her own." The next morning, Mr. Nerve wanted to see his daughter. In a wheelchair, he was rolled up to Ms. Nerve's bed, and talked to her and held her hand for about one-half hour. When he turned toward his other children in the hospital room, Ms. Nerve died. Ms. Dupas testified that after his daughter's death, Mr. Nerve cried a lot and spoke of Ms. Nerve all the time.

The record clearly establishes that the loss of his daughter was overwhelming to Mr. Nerve, and he continued to grieve for the remainder of his life. One day, after the nursing staff reported that Mr. Nerve was no longer getting out of bed, he got up, gathered his shoes and things, and said

his daughter was waiting for him and that he was going to meet her. The nurses asked which daughter, and Mr. Nerve said it was Gladys. Mr. Nerve died that night. Based on the facts of this case, we do not find that the jury abused its discretion in awarding \$400,000 to Mr. Nerve for the death of his daughter.

Motion to Partially Dismiss Appeal

Lastly, we address plaintiff's motion for a partial dismissal of the appeal. Because the PCF stipulated to the amount of special damages, plaintiff seeks to enforce that portion of the judgment, contending that it amounts to a judicial confession and is not appealable. However, the PCF took a suspensive appeal from the entire judgment, which had the effect of suspending its obligation to pay the stipulated amount due. LSA-C.C.P. art. 2123. Plaintiff cites no jurisprudence, rule, or statutory provision that allows the enforcement of a portion of a judgment that has been suspensively appealed. Accordingly, we deny plaintiff's motion to partially dismiss the appeal.

CONCLUSION

For the reasons expressed herein, we affirm the judgment of the trial court. Additionally, we deny plaintiff's motion to partially dismiss the appeal. Costs of this appeal are assessed to the PCF.

**MOTION TO PARTIALLY DISMISS APPEAL DENIED;
JUDGMENT AFFIRMED.**