

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 CW 1214R

BETTY CASTILLE

VERSUS

**DR. DRAKE E. BELLANGER, DR. JOHN M. WHITAKER AND SURGICAL
SPECIALTY GROUP, INC., A PROFESSIONAL MEDICAL CORPORATION**

Judgment Rendered: SEP 11 2009



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On Remand to the First Circuit from the Louisiana Supreme Court
On Writ of Certiorari

From the Nineteenth Judicial District Court,
Parish of East Baton Rouge, State of Louisiana,
Docket No. 510,174, Section 27

The Honorable Donald R. Johnson, Judge Presiding

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BEFORE: PARRO, PETTIGREW, AND McCLENDON, JJ.

JSP
PETTIGREW, J. concurs

McCLENDON, J.

In this medical malpractice action, the defendants ask this court to grant their application for a writ of review and reverse the judgment of the trial court, which granted the plaintiff's motion for a new trial. For the reasons that follow, we conclude that the trial court abused its discretion in granting the plaintiff's motion for a new trial on the ground that the jury verdict in favor of the defendants was contrary to the law and the evidence. Accordingly, we grant the writ application, reverse the judgment granting a new trial, and reinstate the judgment rendered in accordance with the jury verdict.

FACTS AND PROCEDURAL HISTORY

On January 14, 2002, Eddie Castille, a thirty-one-year-old man weighing 582 pounds, underwent gastric bypass surgery in an effort to lose weight. The procedure was performed by Dr. Drake E. Bellanger of the Surgical Specialty Group, Inc. Mr. Castille developed complications after the surgery and died on January 22, 2002.

Mr. Castille's widow, Betty, filed a request for a medical review panel. The panel concluded that Dr. Bellanger met the applicable standard of care. Mrs. Castille then filed the instant medical malpractice action, and the matter was tried before a jury in October of 2007. Judgment was signed on November 13, 2007, reflecting the jury's verdict in favor of the defendants, Dr. Bellanger and Surgical Specialty Group, Inc. Thereafter, Mrs. Castille filed a motion for new trial, which was heard and granted on May 19, 2008. On June 4, 2008, the trial court signed a judgment granting the motion for new trial, and the defendants applied for a supervisory writ to this court.

On September 22, 2008, a majority of a panel of this court denied the writ application. **Castille v. Bellanger**, 08-1214 (La.App. 1 Cir. 9/22/08) (unpublished writ action). Thereafter, the defendants applied for a writ of certiorari to the Louisiana Supreme Court. The supreme court granted the writ application and remanded the case to this court with instructions "to review the record and render a full opinion, following appropriate briefing and argument

from the parties.” **Castille v. Bellanger**, 08-2553 (La. 1/30/09), 999 So.2d 765.

DISCUSSION

Louisiana Code of Civil Procedure article 1972 provides, as follows:

A new trial shall be granted, upon contradictory motion of any party, in the following cases:

(1) When the verdict or judgment appears clearly contrary to the law and the evidence.

(2) When the party has discovered, since the trial, evidence important to the cause, which he could not, with due diligence, have obtained before or during the trial.

(3) When the jury was bribed or has behaved improperly so that impartial justice has not been done.

In the instant case, the trial judge based his ruling on Article 1972(1), finding, in written reasons issued on January 20, 2009, that “the verdict was clearly wrong and against the great weight of the evidence presented.”¹

Although the granting of a new trial is mandatory if the trial court finds that the verdict is contrary to the law and evidence under LSA-C.C.P. art. 1972(1), the jurisprudence interpreting this provision recognizes the trial judge’s discretion in determining whether the evidence is contrary to the law and evidence. **Martin v. Heritage Manor South Nursing Home**, 00-1023, p. 3 (La. 4/3/01), 784 So.2d 627, 630. In considering a motion for new trial, the trial judge is free to evaluate the evidence without favoring either party; the judge may draw his or her own inferences and conclusions and may evaluate the credibility of the witnesses to determine if the jury has erred in giving too much credence to an unreliable witness. **Hunter v. State ex rel. LSU Medical School**, 05-0311, p. 6 (La.App. 1 Cir. 3/29/06), 934 So.2d 760, 764, writ denied, 06-0937 (La. 11/3/06), 940 So.2d 653. The trial court’s discretion in ruling on a motion for new trial is great, and its decision will not be disturbed on appeal absent an abuse of that discretion. However, the fact that a determination on a motion for new trial involves judicial discretion does not imply that the trial court

¹ There is no assertion herein that the verdict was contrary to the law, only that the jury verdict was clearly contrary to the evidence.

can freely interfere with any verdict with which it disagrees. Fact-finding is the province of the jury, and the trial court must not overstep its duty in overseeing the administration of justice and unnecessarily usurp the jury's responsibility. A motion for new trial solely on the basis of being contrary to the evidence is directed squarely at the accuracy of the jury's factual determinations and must be viewed in that light. Thus, the jury's verdict should not be set aside if it is supportable by any fair interpretation of the evidence. **Hunter**, 05-0311 at p. 6, 934 So.2d at 764-65.

In this matter, the undisputed evidence established that Mr. Castille underwent a laparoscopic Roux-en-Y gastric bypass on January 14, 2002, and was released to go home on January 17, 2002. At about 10:00 a.m. on January 18, 2002, Mr. Castille called Dr. Bellanger's office complaining of serious abdominal pain, nausea, gas, and sweating. Dr. Bellanger's nurse set up an appointment for Mr. Castille to come to the office between 2:00 and 3:00 that afternoon. Sometime thereafter, Mr. Castille called the office a second time, stating that he wanted to go directly to the emergency room because of the pain. Dr. Bellanger advised Mr. Castille to come straight to his office because he did not want Mr. Castille waiting in the emergency room.

Dr. Bellanger saw Mr. Castille in his office that afternoon. Mr. Castille reported pain and nausea, and upon examination, although his abdomen was not tender, there was pain on deep palpitation. Dr. Bellanger's differential (or preliminary) diagnosis was stomach distention and/or bowel obstruction. Mr. Castille was admitted to the hospital at 2:50 p.m., and he was placed in a room at 3:09 p.m. His vital signs as documented by a hospital nurse at that time were within normal limits. Dr. Bellanger ordered standing and prone x-rays "ASAP" at 3:10 p.m., with other lab tests. At some point after 5:25 p.m., Dr. Bellanger ordered a catheter to monitor Mr. Castille's hydration in anticipation of surgery.

The x-rays were taken at 7:21 p.m., and Dr. Bellanger received them shortly thereafter. The x-rays showed that Mr. Castille's remaining stomach was distended, but it was not perforated at the time the x-rays were taken. By 8:15

p.m., green drainage was reported coming from the tube in Mr. Castille's stomach, indicating that it had perforated. Mr. Castille was taken for a second surgery at 9:44 p.m.² to repair the perforation and an intestinal hernia, which surgery was completed at 12:30 a.m. on January 19, 2002. Dr. Bellanger ordered a broad-spectrum antibiotic when Mr. Castille was in recovery, which was first administered at 1:55 a.m. At some point between 1 a.m. and 2 a.m., Mr. Castille showed signs of "systematic inflammatory response" and developed sepsis.

On the morning of January 20, 2002, Mr. Castille was slightly better, but he developed a high fever later that day. On January 21, 2002, a third surgery was performed to remove a necrotic section of intestine. Mr. Castille died on January 22, 2002.

In her motion for a new trial and in response to this writ application, Mrs. Castille argued that Dr. Bellanger breached the standard of care required of him in his post-surgical care of Mr. Castille. Specifically, Mrs. Castille alleged that Dr. Bellanger failed to timely send Mr. Castille to the emergency room after he called on the morning of January 18, 2002, failed to act to obtain the x-rays in a more timely fashion, and failed to timely administer antibiotics after formulating the suspected diagnoses of abdominal distention and/or bowel obstruction, which diagnoses were emergent medical conditions and later confirmed.

Dr. Jerry R. Meyers, Mrs. Castille's expert in general surgery and follow-up care, testified that abdominal distention and bowel obstruction are emergency conditions that require surgery to correct. Dr. Meyers stated that when Mr. Castille called Dr. Bellanger's office the second time that was an indication that he was "in trouble" and reasonable care would have required getting Mr. Castille to the hospital for x-rays on the second call, if not the first. Dr. Meyers also opined that once the x-rays were ordered ASAP, reasonable care required having the x-rays expedited, and the failure to do so in this case led to the complications resulting in Mr. Castille's death. Lastly, Dr. Meyers was of the

² The hospital record reflects that anesthesia began at 10:05 p.m.

opinion that there was no downside to administering antibiotics where a concern about perforation exists. He testified that once the green discharge was noted, antibiotics should have been administered immediately. On cross examination, Dr. Meyers admitted that in his original report following his review of the medical records in this case, he did not criticize the failure to administer prophylactic antibiotics.

Dr. Andrew Hargroder, the defendants' expert in general surgery and laparoscopic bariatric surgery, was a member of the medical review panel in this matter. Dr. Hargroder testified that there was no delay at all between the time the x-rays were taken and Mr. Castille's second surgery. Dr. Hargroder agreed that there was no reason to delay taking the x-rays. No additional testimony was given by Dr. Hargroder regarding the follow-up to the x-rays. He stated that surgery rather than antibiotic treatment is the first choice in treating distention or bowel obstruction. Dr. Hargroder testified that upon presentation, Mr. Castille did not have an infection. However, he agreed that the longer a distention goes untreated, the more likely there will be a perforation, and the need for antibiotics is heightened. Dr. Hargroder stated that if it is not possible to get the patient to surgery, then the administration of antibiotics would be the proper course of action, with surgery always being the first choice. He also agreed that although the onset of contamination with a perforation does not mean that there is an active infection, there might be one "in the making." Dr. Hargroder testified that once Dr. Bellanger took Mr. Castille to surgery and confirmed the leak, antibiotics were ordered. Dr. Hargroder further testified that there was no evidence that giving Mr. Castille antibiotics any earlier would have prevented the sepsis and changed the outcome in this case. He concluded that Dr. Bellanger's treatment of Mr. Castille was appropriate.

Dr. Bellanger testified that in his experience, the emergency room is almost always backlogged. He stated that while he has no control over the waiting in the emergency room at the hospital, he has control over the waiting in his office and wanted Mr. Castille to go to his office to avoid the wait. Dr.

Bellanger also noted that when admitted to the hospital, Mr. Castille's vital signs were normal and a hospital bed may not have been available for him. Dr. Bellanger testified that upon admission he ordered flat and erect x-rays and also ordered IV fluids, lab work, and pain medication. Dr. Bellanger testified that he wanted the x-rays as quickly as they could be done because he felt that Mr. Castille had a problem. He testified that the x-rays were a piece of the puzzle in evaluating Mr. Castille and that the x-rays were required to confirm his preliminary diagnosis of abdominal distention and/or bowel obstruction. Dr. Bellanger stated that if he had gotten the x-rays sooner, he quite possibly could have made a decision earlier regarding treatment. Dr. Bellanger admitted that he made no calls to try to expedite the x-rays, but stated that in his experience it has been difficult to expedite things by calling the emergency room at the hospital. Dr. Bellanger was asked and answered the following:

Q. So if you had seen the x-ray earlier, it's possible that it would have looked less – there would have been less distention, so it is possible that you would not have taken Mr. Castille to surgery?

A. It wouldn't have been as helpful in making the decision, I'll put it that way.

Q. Okay. A few more questions and we will finish. In your experience with the emergency room at Our Lady of the Lake, have you been able to expedite the treatment of patients over there by calling?

A. Depending upon how busy it is, it can be difficult.

Q. So calling over there in your experience, has it made a big difference in getting your patients into rooms and being treated?

A. Not usually.

Dr. Bellanger further testified that he was considering many things that could be going on with Mr. Castille, and once he got the x-rays, he was more certain that it was a bowel obstruction. While waiting for the x-rays, Dr. Bellanger testified that IV fluids were given and blood work was being done. Once he had the x-rays, Dr. Bellanger testified that he was able to make the decision to take Mr. Castille to surgery. Further, while discussing the surgery with Mr. Castille, the hospital nurse notified Dr. Bellanger of the green drainage.

Dr. Bellanger explained that the perforation was caused by an internal hernia that obstructed the small bowel. Dr. Bellanger stated that it was the type of obstruction that would likely put out bacteria and cause infection if left unaddressed. He further testified, like Drs. Meyers and Hargroder, that treatment is primarily surgical and antibiotics are secondary.

With regard to prophylactic antibiotics, Dr. Bellanger stated that while antibiotics generally do not cause harm, there can be a question as to their effectiveness especially relative to dealing with the source of the problem. Dr. Bellanger testified that antibiotics can cause side effects and the administration of antibiotics depends on a lot of factors.³

The jury rendered a verdict in favor of the defendants specifically finding that Dr. Bellanger did not fail to provide reasonable care to Mr. Castille. The trial judge granted Mrs. Castille's motion for a new trial and, in written reasons, concluded:

According to the undisputed facts presented, Dr. Bellanger inappropriately delayed reviewing the x-rays and failed to take any steps to determine why the x-rays had not been done until approximately four (4) hours from the time he ordered them. Dr. Bellanger acknowledged that it was his responsibility to follow-up with his patients and staff in such emergent situations. Likewise, another expert testifying in the case verified Dr. Bellanger's acknowledgement.

The Court found merit in plaintiff's argument that the evidence presented during the trial of this matter was manifestly contrary to the jury verdict. Namely, plaintiff argued that Dr. Bellanger's failure to obtain the x-rays in a timely fashion contributed to the failure to timely surgically intervene, thereby causing Mr. Castille's death. Plaintiff further argued that the administration of antibiotics would have slowed the progression of infection, which would have allowed Dr. Bellanger time to perform the surgery and increased Mr. Castille's likelihood of survival.

The jury could have accepted the testimony of Dr. Hargroder, an expert in laparoscopic bariatric surgery. The jury could have reasonably believed the testimony of Dr. Hargroder that there was no evidence that giving prophylactic

³ The defendants also presented the deposition testimony of Dr. J. Stephen Scott. Dr. Scott testified regarding Dr. Bellanger's training and experience. Dr. John Whitaker also testified for the defendants. He stated that he assisted Dr. Bellanger in the initial surgery and recalled no problems. Additionally, the deposition of Dr. William Hines was taken by the defendants. Although read to the jury, the deposition was not introduced into evidence. Dr. Hines, an expert in critical care and a pulmonologist/intensivist, treated Mr. Castille after his second surgery and after being consulted by Dr. Bellanger.

antibiotics any earlier would have altered the outcome in this case. Further, the jury could have also accepted the testimony of Dr. Bellanger regarding the wait time in the emergency room and the availability of hospital beds, as well as his testimony regarding the x-rays and the administration of antibiotics. The jury could have reasonably believed that any responsibility for the x-rays not having been taken sooner did not lie with Dr. Bellanger and that by ordering the x-rays ASAP, Dr. Bellanger met his standard of care. The jury could have reached the conclusion, based on the totality and a fair interpretation of the evidence, that Dr. Bellanger's post-surgical treatment of Mr. Castille was appropriate and did not fall below the standard of care required of him.

While the trial judge does have discretion in granting a new trial and is entitled to draw his own inferences and conclusions from the evidence and evaluate witness credibility to determine whether the jury erred in giving too much credit to an unreliable witness, he may not interfere with a jury verdict with which he simply disagrees when that verdict is based on a fair interpretation of the evidence. **Martin**, 00-1023 at p. 14, 784 So.2d at 636-37. In this case, the jury verdict was based on the testimonies of several qualified physicians, including Dr. Bellanger, Dr. Meyers, a general surgeon and expert in follow-up care, and Dr. Hargroder, a general surgeon and expert in laparoscopic bariatric surgery. We conclude that the trial judge abused his discretion in granting a new trial on the grounds that the jury verdict was contrary to the law and the evidence, as the jury's verdict was clearly based on a fair interpretation of the evidence.

CONCLUSION

For the above and foregoing reasons, we grant the writ application of the defendants, reverse the judgment of the trial court granting the plaintiff's motion for a new trial, and reinstate the judgment rendered in accordance with the jury verdict in favor of the defendants.

WRIT GRANTED, JUDGMENT REVERSED, AND JURY VERDICT REINSTATED.