

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2013 CA 2053

JEW
V 6W by JEW

MARGAREE HANEY

VERSUS

DR. JANET E. LEWIS

Judgment Rendered: SEP 08 2014

Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 596837

Honorable Janice Clark, Judge

Leonard Cardenas, III
Baton Rouge, LA

Attorney for Appellee
Plaintiff – Margaree Haney

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Attorney for Appellants
Defendants – Janet E. Lewis, M.D.
and Louisiana Medical Mutual
Insurance Company

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Louisiana Patient’s Compensation
Fund and Louisiana Patient’s
Compensation Fund Oversight Board

BEFORE: WHIPPLE, C.J., WELCH, AND CRAIN, JJ.

Crain, J dissents in part on original reasons

WELCH, J.,

Defendants, Dr. Janet E. Lewis and Louisiana Medical Mutual Insurance Company (LMMIC), appeal a judgment granting a motion for a judgment notwithstanding the verdict (JNOV) rendered in favor of plaintiff, Margaree Haney, on the issue of liability. Defendants also appeal judgments awarding Ms. Haney damages and conditionally granting a motion for a new trial.¹ We reverse the JNOV, reinstate the jury verdict, reverse the damage awards, and affirm the judgment conditionally granting the motion for a new trial.

BACKGROUND

On the morning of March 24, 2008, between the hours of 9:00 am and 10:00 am, Dr. Lewis performed a total knee replacement surgery on Mrs. Haney's left knee at Greater Baton Rouge Surgical Hospital (Baton Rouge Surgical Hospital). It is undisputed that during the procedure, Mrs. Haney sustained an injury to her popliteal artery.

Almost immediately following the surgery, while Mrs. Haney was still in the operating room, Dr. Lewis was unable to discern a pulse in Mrs. Haney's left foot, which is indicative of a blood flow problem. At 10:37 am, Mrs. Haney was received in the recovery room and attempts by Dr. Lewis and the nursing staff to locate a pulse in Mrs. Haney's left foot were unsuccessful. Dr. Lewis telephoned Dr. Albert Sam, a vascular surgeon, and apprised him of the situation. Dr. Sam told Dr. Lewis to have Mrs. Haney transferred to Baton Rouge General Medical Center (Baton Rouge General) "pronto," which, according to Dr. Sam, was the closest facility that had the services needed to provide for her care. At 10:40 am, Dr. Lewis wrote orders to transfer Mrs. Haney to Baton Rouge General-Midcity. Mrs. Haney was picked up by ambulance from Baton Rouge Surgical Hospital at

¹ The Louisiana Patient's Compensation Fund and the Louisiana Patient's Compensation Fund Oversight Board also filed appellate briefs in this matter seeking reversal of the JNOV, reinstatement of the jury verdict, and reversal of ruling granting the conditional motion for new trial.

2:10 pm and was admitted to Baton Rouge General at 3:00 pm. At 3:40 pm, Mrs. Haney was taken to an angiogram suite where Dr. Sam performed a blood flow study. Mrs. Haney arrived in the operating room shortly before 6:00 pm, where Dr. Sam performed surgery on Mrs. Haney to repair the injured artery.

According to the medical testimony, typically there is a 4-6 hour window of time to repair an injured popliteal artery and restore blood flow in order for the patient to have a reasonable opportunity to have a preserved, functional limb. This window of time starts from the point of injury; after it is exceeded, there is a risk of permanent damage to the lower extremity. Mrs. Haney's knee replacement surgery during which the artery was injured was completed at 10:00 am, and she was not brought to surgery to repair the injured artery until nearly eight hours thereafter. It is essentially undisputed that because of the injury to Mrs. Haney's popliteal artery during the knee replacement surgery, or because of the lapse of time between the injury and the surgical repair to restore blood flow to Mrs. Haney's leg, or a combination of both, Mrs. Haney developed "foot drop," a permanent neurological injury to her left extremity.

Because Dr. Lewis is a qualified healthcare provider for the purpose of the Medical Malpractice Act, a medical review panel was convened to evaluate Mrs. Haney's malpractice claim against Dr. Lewis. The panel concluded that there was no deviation from the appropriate standard of medical care by Dr. Lewis. In so doing, the panel found that consent was proper for the procedure, observed that arterial injury was a known potential complication of the procedure, and found that Dr. Lewis discussed this with Mrs. Haney when obtaining her consent. The panel further noted that when Mrs. Haney arrived in the recovery room, the lack of pulse in her extremity was noted by Dr. Lewis, and the panel concluded that the appropriate referrals and consults were timely made to address this complication.

On November 18, 2010, Mrs. Haney filed this lawsuit against Dr. Lewis, alleging that Dr. Lewis was negligent in: (1) recommending that she undergo an unnecessary and potentially dangerous surgery; (2) failing to adequately warn her of the dangers of the surgery; (3) failing to exercise reasonable care in performing the surgery; (4) failing to notice or diagnose damage caused in the performance of and/or during the surgery; (5) failing to take immediate remedial measures to repair damage caused in the performance of the surgery; (6) failing to appropriately document complications or damage caused during the surgery in her post-surgical operative notes and subsequent transfer orders; (7) failing to inform her, her family members, or any other physician of the complications or damage caused in the performance of the surgery; and (8) failing to document or warn of the severity of those complications or damage.

A three-day jury trial was held. Mrs. Haney testified and presented the testimony of Dr. Lewis; Dr. Sam; Dr. Niels Linschoten, an orthopedic surgeon; her daughter; and her husband, and presented documentary evidence. At the close of Mrs. Haney's case, the defense moved for a directed verdict on certain aspects of the liability claim. The motion was first directed to the allegation that Dr. Lewis was negligent in recommending that Mrs. Haney undergo surgery. The court deferred this claim to the merits. The defense also sought a directed verdict on the allegation that Dr. Lewis failed to warn Mrs. Haney of the dangers of the surgery, urging that there was no evidence presented on this issue. Mrs. Haney's attorney did not oppose the motion with respect to any claim of lack of informed consent, noting that Mrs. Haney did consent to the surgery, but stressing that Mrs. Haney did not consent to negligence in the performance of that surgery. The trial court stated, "so stipulated, so ordered." The defense also asked for a directed verdict on the allegation that Dr. Lewis failed to take remedial measures to repair the damage caused in the performance of the surgery. Mrs. Haney's attorney stipulated that Dr.

Lewis timely recognized the arterial blood flow problem; again, the trial court indicated that in accordance with the stipulation, the motion for directed verdict was granted.

Thereafter, the defense presented the testimony of Dr. Lewis and Dr. Ricardo Rodriguez, an orthopedic surgeon and a member of the medical review panel that evaluated Mrs. Haney's malpractice claim, and numerous medical records. Following the conclusion of the trial, the jury returned a verdict finding that Dr. Lewis was not negligent in her treatment of Mrs. Haney. The trial court entered judgment in accordance with the verdict on May 17, 2013, dismissing Mrs. Haney's claims with prejudice.

Subsequently, Mrs. Haney filed a motion for a JNOV, a motion for a conditional new trial, or alternatively, a motion for a new trial. Therein, Mrs. Haney urged that the only conclusion reasonable jurors could have reached was that Dr. Lewis breached the standard of care by failing to have her treated by a vascular surgeon within 4-6 hours of causing the injury to her popliteal artery. She submitted that the jury was wrong and unreasonable in concluding that a "5-hour delay" between the injury and the arrival of Mrs. Haney at Baton Rouge General, which resulted in an eight-hour delay in the surgical repair of the artery by Dr. Sam, was not a deviation from the standard of care. Mrs. Haney argued that any explanation or reason for the delay is not compelling, believable, or reasonable, and that the delay was simply inexcusable. In her motion for a new trial, Mrs. Haney argued that the jury was confused, that its verdict was based on the non-issue of informed consent, and that a miscarriage of justice would result if its verdict was allowed to stand. Lastly, Mrs. Haney asked that a new trial on both mandatory and discretionary grounds be conditionally granted in the event the JNOV was reversed on appeal.

On July 29, 2013, the trial court held a hearing on the motions. During the hearing, the court expressed its belief that different triers of fact could have reasonably come to different conclusions with respect to the conduct of the surgery. However, the court granted the JNOV on the issue of Dr. Lewis's subsequent care and management of Mrs. Haney and limited the JNOV to the care and management of Mrs. Haney as regards to her "belated transport" and "belated surgery." The court indicated that it would rule on the motion for a new trial at a later time and notify the parties by minute entry. Dr. Lewis and LMMIC filed an application for supervisory writs challenging the trial court's granting of the JNOV, which this court denied.²

On September 9, 2013, a hearing was held by order of the court to permit the parties to present additional arguments. Thereafter, on October 2, 2013, the trial court issued a ruling that awarded damages and conditionally granted the motion for a new trial. The court's ruling, recited in open court and reflected in a minute entry, stated that the motion for a new trial was conditionally granted for the reasons enumerated in the granting of the JNOV and for the following specific grounds: (1) the verdict was contrary to the law and evidence and jury confusion prevented impartial and fair administration of justice, (2) good grounds existed to grant a new trial to prevent a miscarriage of justice, and (3) "the five or six hours of inexcusable delay in obtaining medical intervention at the Baton Rouge General with Dr. Sam is unreasonable under the circumstances."

On October 10, 2013, the trial court signed a judgment in accordance with its earlier rulings. The judgment granted the JNOV in part on the issue of post-surgery maintenance and care of Mrs. Haney and awarded Mrs. Haney compensatory damages in the amount of \$178,574.36 for past medical expenses and general damages in the amount of \$500,000.00. The judgment further

² **Haney v. Lewis**, 2012-1725 (La. App. 1st Cir. 12/4/12)(unpublished writ action).

conditionally granted the motion for new trial for the oral reasons articulated at the July 29, 2013 hearing in granting the JNOV and in the October 2, 2013 minute entry. Additionally, the trial court ordered that the judgment was a final judgment on all issues and that there existed no good reason for delay.

On October 18, 2013, the trial court signed an amended judgment. Therein, the trial court entered judgment against Dr. Lewis and LMMIC in the amount of \$100,000.00 and against the Louisiana Patient Compensation's Fund in the amount of \$578,574.36. The amended judgment incorporated all of the rulings from the October 10, 2013 judgment.

Dr. Lewis and LMMIC have appealed the October 2, 10, and 18 judgments of the trial court, as well as the July 29, 2013 partial judgment granting the JNOV. In this appeal, they contend that the trial court erred in granting the JNOV, awarding damages, and conditionally granting the motion for new trial. The Louisiana Patient Compensation's Fund and the Louisiana Patient's Compensation Fund Oversight Board also appealed, seeking reversal of the JNOV, reinstatement of the jury verdict, and reversal of the judgment granting the motion for new trial.

In this appeal, Mrs. Haney filed an answer, asserting that in the event that the JNOV or the conditional grant of a new trial are not affirmed on appeal, she appeals from the judgment as being manifestly erroneous and an abuse of discretion, including but not limited to, appealing from the alleged patent jury misconduct by the jury deciding the case on the non-issue of whether Mrs. Haney gave her consent to Dr. Lewis to perform the knee replacement surgery. In her brief, Mrs. Haney maintains that if the JNOV is not affirmed on appeal, a legal error arising by virtue of jury misconduct requires this court to conduct a *de novo* review of the record. She further submits that if the JNOV is reversed and this court does not overturn the jury's verdict on a *de novo* review or upon finding the

jury verdict to be manifestly erroneous, this court should affirm the grant of a new trial.

JUDGMENT NOTWITHSTANDING THE VERDICT

The Louisiana Supreme Court has set forth the following criteria to be used in determining whether a JNOV is proper:

JNOV is warranted when the facts and inferences point so strongly and overwhelmingly in favor of one party that the trial court believes that reasonable persons 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 persons could not reach different conclusions, not merely when there is a preponderance of evidence for the mover. The motion should be denied if there is evidence opposed to the motion which is of such quality and weight that reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions. In making this determination, the trial court should not evaluate the credibility of the witnesses, and all reasonable inferences of factual questions should be resolved in favor of the non-moving party.

Trunk v. Medical Center of Louisiana at New Orleans, 2004-0181 (La. 10/19/04), 885 So.2d 534, 537, quoting **Joseph v. Broussard Rice Mill, Inc.** 00-0628 (La. 10/30/00), 772 So.2d 94, 99.

This rigorous standard is based upon the principle that where there is a jury, the jury is the trier of fact. *Id.* Thus, a trial court is not authorized to interfere with a jury's verdict simply because it believes another result would be correct.

Gutierrez v. Louisiana Department of Transportation and Development, 2011-1774 (La. App. 1st Cir. 3/23/12), 92 So.3d 380, 387, writ denied, 2012-1237 (La. 9/21/12), 98 So.3d 343.

In reviewing a JNOV, an appellate court must first determine whether a trial court erred in granting the JNOV using the above-mentioned criteria in the same way as a trial court decides whether to grant the motion. **Trunk**, 885 So.2d at 537. Thus, this court must determine whether the facts and inferences point so strongly and overwhelmingly in favor of the moving party that reasonable persons could not arrive at a contrary verdict. *Id.* Stated simply, this court must decide whether the

jury's verdict is one which reasonable persons could not have rendered; if reasonable persons could have arrived at the same verdict given the evidence presented, then a JNOV is improper. **Cavalier v. State, Department of Transportation and Development**, 2008-0561 (La. App. 1st Cir. 9/12/08), 994 So.2d 635, 644.

Louisiana Revised Statutes 9:2794 sets forth the elements a plaintiff must prove in order to succeed in a medical malpractice claim against a physician. The plaintiff must prove, by a preponderance of the evidence, the standard of care applicable to the physician, a violation of that standard of care by the physician, and a causal connection between the physician's alleged negligence and the plaintiff's injuries resulting therefrom. **Pfiffner v. Correa**, 94-0924 (La. 10/17/94), 643 So.2d 1228, 1233. Where the defendant physician practices in a particular specialty and the alleged acts of medical negligence raise issues peculiar to that specialty, the plaintiff has the burden of proving the degree of care ordinarily practiced by physicians within that specialty. **Vanner v. Lakewood Quarters Retirement Community**, 2012-1828 (La. App. 1st Cir. 6/7/13), 120 So.3d 752, 755-56. Expert testimony is generally required to establish the standard of care and whether the standard of care was breached, except where the negligence is so obvious that a lay person can infer negligence without the guidance of expert testimony. **Vanner**, 120 So.3d at 756. According to the supreme court, one instance of obvious negligence can involve unnecessary delays in the diagnosis and treatment of a patient, such as leaving a patient to bleed to death in an emergency room. **Pfiffner**, 643 So.2d at 1234.

In this case, the trial court granted the JNOV solely on the issue of Dr. Lewis's post-surgery care of Mrs. Haney and not on the allegation that Dr. Lewis had performed the knee replacement surgery negligently. Mrs. Haney submits that conflicting evidence on the issue of whether Dr. Lewis was negligent in injuring

Mrs. Haney's popliteal artery during the total knee replacement surgery prevented the trial court from granting JNOV on that issue. Thus, our review of the propriety of the JNOV is limited to Dr. Lewis' conduct with respect to her post-surgery care of Mrs. Haney.

The record reflects that Mrs. Haney's total knee replacement surgery began at approximately 9:00 am and concluded at approximately 10:00 am. After the surgery was complete and while they were still in the operating room, Dr. Lewis discovered that Mrs. Haney did not have a pulse in one of the main arteries of her left foot, which is indicative of a blood flow problem. Dr. Lewis estimated that she discovered the blood flow problem at 10:20 am. Dr. Lewis did a Doppler study in the operating room to see if she could locate a pulse and could not. Mrs. Haney was moved to the PACU, a recovery room, at 10:37 am, with Dr. Lewis at her bedside. Dr. Lewis continued attempts to locate the pulse and attempts were made to warm up Mrs. Lewis' foot in the hopes of restoring the blood flow; still, no pulse was detected. Dr. Lewis placed a call to Dr. Sam, a vascular surgeon whom she knew personally, and told him that she had done a total knee replacement and her patient had no pulse in her left foot. Dr. Sam testified that he told Dr. Lewis to "get her over here pronto," and that the closest facility with the services needed to provide care for Mrs. Haney was Baton Rouge General. Dr. Lewis estimated that the driving time from Baton Rouge Surgical Center to Baton Rouge General with traffic was 25-30 minutes, while Dr. Sam estimated the drive time to be 50 minutes to an hour in the worst traffic.

The medical evidence established that the indication of a lack of proper blood flow to the extremity caused by a popliteal injury during total knee replacement surgery is a matter that should be handled with urgency because the sooner the compromise of the artery is discovered and responded to, the better the outcome is to the patient. The medical evidence established that the prognosis for

a person who suffers this type of injury during surgery is poor if the diagnosis of that complication or the management of the complication is delayed. According to the medical experts, typically there is a 4-6 hour window from the time of the injury to restore blood flow; after that time period is exceeded, there is a risk of permanent damage in the lower extremity. Dr. Linschoten explained that after the 4-6 hour window of time is passed, certain tissues start to die, and the longer the repair is delayed, the more tissue damage is done. Thus, Dr. Linschoten acknowledged that the amount of time involved between detecting a vascularization complication and getting that complication addressed by a vascular surgeon is significant.

At 10:40 am, minutes after Mrs. Haney arrived in the recovery room, Dr. Lewis wrote orders transferring Mrs. Haney to Baton Rouge General and ordered a stat arterial blood flow study be done at that facility. At 11:50 am, at Dr. Lewis' request, a call was placed to Baton Rouge General, and it was reported that Mrs. Haney's name was on their board and they were still working to get a bed for Mrs. Haney. At 12:00 pm, Kristan Smith, the head nurse at Baton Rouge Surgical Hospital, telephoned Baton Rouge General, requested status on the bed, and stated that she would try to get the arterial study done at her hospital while waiting for the bed at Baton Rouge General. A technician from a vascular lab arrived in the recovery room at 12:30 pm to perform the vascular study; Mrs. Haney's dressing and soft cast were removed. At 12:55 pm, the arterial study was performed.

Dr. Sam recalled speaking to Dr. Lewis a second time after the initial consultation for a status update on where Mrs. Haney was in the transportation process. Mrs. Haney was picked up by ambulance from Baton Rouge Surgical Hospital at 2:10 pm, three and one half hours after her transfer order had been written by Dr. Lewis. She arrived at Baton Rouge General at 2:45 pm, four hours after the transfer order had been written and almost five hours after the total knee

replacement surgery had been completed. Mrs. Haney was admitted to Baton Rouge General at 3:00 pm. At 3:40 pm, Mrs. Haney was taken to a special procedures unit where Dr. Sam performed an angiography or blood flow study to determine whether he could restore flow without having to do surgery. Dr. Sam discovered that pathway was not possible and that Mrs. Haney required surgery. Mrs. Haney arrived in the operating room at 5:56 pm, where surgery was performed by Dr. Sam to repair the injured popliteal artery, nearly eight hours after the total knee replacement surgery had been completed.

Dr. Sam testified that Mrs. Haney had been expected so things were “pretty much teed up” when she arrived at Baton Rouge General. Dr. Sam was questioned whether he had the opinion that there was a lack of sense of urgency in this case by Dr. Lewis or the staff that worked on her following the knee replacement surgery. Dr. Sam stated that he defined that just by the length of time that went by from when he was called to when he got Mrs. Haney. He also pointed out that multiple calls were made by the nursing staff regarding the transfer to Baton Rouge General. Dr. Sam testified that he could not speak on what had been done at the outside facility to be able to say that there was no urgency at that point. When asked whether the delay in transferring Mrs. Haney to his facility seemed like an unusual delay, Dr. Sam responded that obviously he would have preferred for Mrs. Haney to arrive at his facility sooner than she did to increase her chance of having a good outcome. Further, when asked whether, based on the standard of care for vascular surgeons in wanting to get the patient in their care to repair an injured artery, Mrs. Haney’s case in fact fell outside of the time frame he would have preferred, Dr. Sam replied, “Correct.”

Dr. Linschoten, an expert in the field of reconstructive surgery, agreed that if it was shown that Dr. Lewis recognized the absence of a pulse in the operating room, immediately called Dr. Sam, who agreed to accept Mrs. Haney, wrote an

order at 10:40 am for Mrs. Haney's transfer and got Mrs. Haney approved for transfer to Baton Rouge General, the vascular injury was recognized in a timely fashion and a referral or consultation was timely made. Dr. Linschoten further agreed that the time a receiving hospital accepts or actually gets a patient for transfer is somewhat outside the control of an orthopedic surgeon. He acknowledged that the timing to get an ambulance to retrieve the patient from the transferring hospital is also outside the orthopedic surgeon's control and that all an orthopedic surgeon can do to expedite the process is to continue to ask the nurses to make the phone calls and get the process moving. Dr. Linschoten testified, "We write the order, tell the nurse, tell the nurse it needs to be done as soon as possible, and that's about as much as you can do as an orthopedic surgeon." Dr. Linschoten further testified that any unnecessary delay in the transfer process "would be inexcusable."

Dr. Rodriguez, who served on the medical review panel, opined that there was nothing he looked at in this case that would indicate that Dr. Lewis breached the standard of care in her treatment of Mrs. Haney. When asked questions regarding the process of getting a patient transferred from one hospital to another, Dr. Rodriguez testified that a call is placed to the hospital informing it the physician would like to transfer the patient, the charge nurse is spoken to, and the charge nurse starts to make the arrangements. When asked whether there was anything he could do as an orthopedic surgeon other than to continue to ask the nurses to call the receiving hospital to get the patient accepted, Dr. Rodriguez stated that that was about all that could be done. Dr. Rodriguez acknowledged that if there is a complication from his surgery, he has the obligation to take action, including the management of that patient during the post-operative complications. He also acknowledged that in the case of a total knee replacement surgery, that management obligation includes recognizing the problem and then making sure

that the patient is treated and or operated on by a vascular surgeon. Dr. Rodriguez stated that Dr. Lewis diagnosed the injury and took steps to get Mrs. Haney to the appropriate facility. Dr. Rodriguez testified that “other than putting [Mrs. Haney] in her own car and taking her over there... I don’t [know] how else she could have made it go faster.” Dr. Rodriguez was also asked a hypothetical question in which he was told to assume that he discovered, during the performance of a total knee replacement surgery, that something went wrong with the popliteal artery and there was no blood flow. He was further asked to assume that he had telephoned a hospital that told him it did not have a bed for him and would get back with him. Dr. Rodriguez was asked, “am I correct in assuming that you, yourself, Dr. Rodriguez, wouldn’t just sit back and wait, but you would go to one of the other qualified hospitals...rather than trying to just stick with the one facility that’s not accepting your patient right away?” Dr. Rodriguez responded, “Correct.” When asked whether, if he needed a vascular surgeon who was limited to one hospital that did not have room for a patient who needed vascular repair, he would go to another surgeon that could go to another hospital or at least explore that possibility, Dr. Rodriguez responded, “Yes.” Finally, when asked whether that is part of the standard of care and the management of a patient with that kind of complication, Dr. Rodriguez responded, “Yes, I think you need to try to find someone as quickly as possible.”

Dr. Lewis acknowledged that she appreciated the need to deal with the complication arising from Mrs. Haney’s surgery urgently and appreciated the seriousness of the condition. Dr. Lewis agreed that there is a 4-6 hour window of time to get an injured popliteal artery fixed through a vascular surgeon and after that time, the patient can have devastating complications, including the foot drop condition Mrs. Haney now has.

Dr. Lewis testified that after discovering the absence of a pulse in Mrs. Haney's left foot, she called Dr. Sam, whom she knew personally and had his cell phone number, so she was able to contact him easily. She stated that she considers Dr. Sam to be an excellent vascular surgeon and that she would have chosen him for a family member. Dr. Lewis acknowledged that there were at least 12 vascular surgeons in Baton Rouge. She explained that she did not call another vascular surgeon or another hospital because she did not believe it would have helped, as she would have been starting the transfer process all over again and Baton Rouge General was the closest institution. She also noted that the whole paperwork part of the transfer process, where it slows down, will happen anywhere, so she decided it was quicker to keep pushing on this transfer, this doctor, this closest hospital to get it done. Dr. Lewis testified that the nurses were working on getting Mrs. Haney accepted at Baton Rouge General and that the transfer had been delegated to the head nurse at her facility and thus "to the top." She further stated this case did not involve a matter of the receiving hospital not accepting Mrs. Haney, but of working out the details required to accept her. When questioned whether, for whatever reason, she could not get the patient to the receiving hospital within the 4-6 hour window of time, would she go to another doctor or hospital, she responded, "If you think it's just definitely not going to happen." She stated her belief that it would have taken longer to start all over with another doctor and another hospital in the afternoon, considering traffic in Baton Rouge and the same paperwork delay. She testified her options were starting the clock over again or going with the one transfer they were working on. In short, Dr. Lewis stated, she did what she thought was the best option at the time. Dr. Lewis also noted that Mrs. Haney was at Baton Rouge General within the 4-6 hour window of time to have the artery surgically repaired.

It is undisputed that following the surgery, Mrs. Haney developed “foot drop,” a permanent neurological injury to her left extremity. According to Dr. Linschoten, who treated Mrs. Haney for the condition, Mrs. Haney does not have the ability to lift her foot up or down and has no sensation in her foot because of the lack of nerve supply to her leg. Dr. Linschoten agreed that the neurological injury or damage Mrs. Haney sustained was caused by the damage to the popliteal artery and the nerve right by it during the total knee replacement surgery, or by the delay between the injury occurring and it being recognized and treated with a sense of urgency, or both. When he was asked whether the loss of blood flow was responsible for Mrs. Haney’s permanent leg damage, Dr. Sam stated that it was hard to say, observing that it could have resulted from the period of time that there was no blood flow or from the actual physical injury to the artery. Dr. Sam testified that it was difficult to distinguish and that both could have caused Mrs. Haney’s damage.

In this case, the trial court granted the JNOV with the following observations:

A patient, the court recalls, in the recovery room for a good period of time before they could not get certain vital signs. The court recalls that there was no vascular surgeon on staff at that hospital. The court also recalls there was testimony as to the distance from that hospital on Harding Boulevard to Baton Rouge General Midcity. There’s also certainly hospitals closer, Lane Memorial, Earl K. Long, that kind of testimony is certainly lay testimony, and it does not require a PHD. Moreover, it’s troubling that a nurse be allowed to make the final decision as to when, how, and where a patient can be accepted to a receiving hospital. It appears to this court certainly—and no doubt we’ve all done it time to time when a nurse says something you don’t think is correct, you can go over her head. That’s why you have chiefs of staff, and that’s why you have CEOs on the board, and the issue before this court under care and management of this patient does lend itself to the imposition of a JNOV in this court’s opinion.

The medical testimony established that any surgeon who has performed a procedure where there is a sudden cessation of blood flow of any extremity should consult a vascular specialist immediately or as urgently as possible to avoid permanent damage to that extremity. The evidence established and the parties stipulated that Dr. Lewis did timely diagnose the condition and timely consulted a vascular surgeon regarding the complication. While there was expert testimony that any unnecessary delay in transferring Mrs. Haney to the facility where the repair was to be performed would have been "inexcusable," there was no expert testimony establishing that the delay in this case was in fact inexcusable or avoidable. The evidence showed that Dr. Lewis promptly ordered Mrs. Haney's transfer to Baton Rouge General, calls were placed to that receiving facility, the head nurse of Baton Rouge Surgical Center was handling Mrs. Haney's transfer, and the arterial study that was scheduled to be performed at Baton Rouge General was performed at Baton Rouge Surgical Center. The jury was required to make a factual determination as to whether there was an appropriate sense of urgency on Dr. Lewis's part or whether the delay in Mrs. Haney's transfer to Baton Rouge General for the surgical repair by Dr. Sam was unnecessary or unreasonable and thus constituted a breach of the standard of care. In finding Dr. Lewis did not breach the standard of care in her post-surgery care of Mrs. Haney, the jury obviously found Dr. Lewis's testimony to be credible and her explanation why she did not seek out other vascular surgeons or other facilities to be reasonable under the circumstances. Furthermore, there was expert medical testimony indicating that Dr. Lewis did what could be expected of an orthopedic surgeon in getting Mrs. Haney transferred to Baton Rouge General for the arterial repair surgery by Dr. Sam.

Considering all of the evidence, we cannot say that the evidence points so strongly and overwhelmingly in favor of Mrs. Haney that reasonable persons could

not have rendered a verdict finding that Dr. Lewis did not breach the standard of care in her post-surgery treatment of Mrs. Haney. Instead, we conclude that on the evidence presented, reasonable persons could have found that Dr. Lewis was not negligent in her treatment of Mrs. Haney. Therefore, the trial court erred in granting the JNOV on the liability issue. Accordingly, we reverse the JNOV and reinstate the jury's verdict.

MANIFEST ERROR REVIEW

In her answer to the appeal, Mrs. Haney requests that we conduct a manifest error review of the jury's liability determination. Under the manifest error standard of review, an appellate court can reverse a jury's factual finding only if no reasonable basis for the conclusion exists in the record and the record establishes that the finding is clearly wrong. **Stobart v. State, Department of Transportation and Development**, 617 So.2d 880, 882 (La. 1993). The issue to be resolved by this court is not whether the trier of fact is right or wrong, but whether the factfinder's conclusion is a reasonable one in light of the entire record. *Id.* Thus, if the findings are reasonable in light of the record viewed in its entirety, an appellate court may not reverse, even though convinced had it been sitting as the trier of fact, it would have weighed the evidence differently. **Richard v. Richard**, 2011-0229 (La. 10/25/11) 74 So.3d 1156, 1158.

There was no expert medical testimony establishing that Dr. Lewis in fact breached the standard of care required of an orthopedic surgeon in her treatment of Mrs. Haney. Dr. Sam made it clear that he was not offering any opinion as to the manner in which Dr. Lewis performed the surgery. Dr. Linschoten also stated that he was only testifying as Mrs. Haney's treating physician and did not intend to offer any opinion as to whether Dr. Lewis breached the standard of care in treating Mrs. Haney.

Further, it was not established at trial precisely how the popliteal artery injury occurred. Dr. Sam opined that during the total knee replacement surgery, Dr. Lewis in some fashion caused the injury and damage to Mrs. Haney's popliteal artery. He testified that when he observed the artery during the repair procedure, the wall was damaged, bruised and "basically lacerated." Dr. Linschoten opined that some type of hardware used by Dr. Lewis during the procedure caused the injury and acknowledged on direct examination that the injury was probably caused by some "mechanical inappropriate action" during the surgery. Dr. Linschoten also acknowledged that if the procedure had been done correctly, with all of the "tools and tricks of the trade," "a hundred percent of the time you avoid this injury." However, on cross-examination, Dr. Linschoten admitted that he has performed a surgery in which a popliteal artery was injured and he did not believe that he had performed the procedure negligently. Ultimately, Dr. Linschoten acknowledged it was possible that a patient could have a popliteal artery injury during the performance of a total knee replacement even where the physician was not negligent and that he could only "speculate" as to what might have happened in this case.

Moreover, there was evidence indicating that an injury to a popliteal artery, while an extremely rare complication in a total knee replacement, is a known risk of the surgery. There was medical evidence establishing that injury to a popliteal artery can occur in a number of ways during a total knee replacement surgery and that the injury can occur even when the procedure is done properly and there is no negligence on the part of the orthopedic surgeon. Dr. Rodriguez testified regarding various medical articles that contradicted Dr. Linschoten's statement that a surgeon should avoid an arterial injury "100%" of the time if the procedure is performed properly. Additionally, Dr. Rodriguez acknowledged that the medical literature has identified at least three times during a total knee replacement procedure when a

popliteal artery can be injured even though the procedure is done correctly and there is no negligence on the part of the surgeon. For instance, the dislocation of the knee joint in some patients requires excessive forces that need to be placed behind the tibia, and that maneuver could result in the stretching of popliteal vessels and subsequent injury. Dr. Rodriguez acknowledged that it was possible that Mrs. Haney's popliteal artery could have been injured while pulling the lower leg bone forward or when her knee was straightened out or hyperextended and it would not necessarily have been negligence for the artery to have been injured under either scenario.

Based on the totality of the evidence, the finding that Dr. Lewis did not breach the standard of care during the performance of the total knee replacement surgery is reasonably supported by the record and is not manifestly erroneous. Furthermore, we have previously concluded that a reasonable basis for the determination that Dr. Lewis was not negligent in her post-surgery treatment of Mrs. Haney exists in the record. Because the liability determination is reasonable in light of the record in its entirety and is not manifestly erroneous, this court may not reverse that ruling.

MOTION FOR NEW TRIAL

Louisiana Code Civil Procedure art. 1811A(2) provides that a motion for JNOV may be joined with a motion for a new trial or that a motion for a new trial may be moved for in the alternative. If the motion for JNOV is granted, the trial court is required to also rule on the motion for new trial by determining whether it should be granted if the judgment is thereafter vacated or reversed. La. C.C.P. art. 1811C(1). If the motion for a new trial has been conditionally granted and the JNOV is reversed on appeal, the new trial shall proceed unless the appellant court orders otherwise. La. C.C.P. art. 1811C(2).

A new trial shall be granted when: (1) the verdict or judgment appears clearly contrary to the law and the evidence; (2) the party has discovered evidence since the trial which could not have been obtained before or during the trial; or (3) when the jury was bribed or behaved improperly so that impartial justice has not been done. La. C.C.P. art. 1972. The standard of review of a judgment on a motion for new trial on peremptory grounds is that of abuse of discretion. **Wood v. Humphries**, 2011-2161 (La. App. 1st Cir. 10/9/12), 103 So.3d 1105, 1118, writ denied, 2012-2712 (La. 2/22/13), 108 So.3d 769.

Additionally, a discretionary basis for granting a new trial is set forth in La. C.C.P. art. 1973, which authorizes the trial court to grant a new trial in any case in which there are good grounds for it. **Jackson v. Home Depot, Inc.**, 2004-1653 (La. App. 1st Cir. 6/10/05), 906 So.2d 721, 728. The trial court's discretion in ruling on a motion for new trial under this article is great, and its decision will not be disturbed on appeal absent an abuse of that discretion. *Id.*

Mrs. Haney filed a motion for a new trial or conditional new trial in the event that the JNOV would be reversed on appeal on two peremptory grounds: (1) the verdict was contrary to the law and evidence, and (2) jury misconduct. She also asserted that there was good cause for the granting of a new trial on the basis of jury confusion. In her motion, Mrs. Haney argued that the jury engaged in misconduct by rendering a verdict on the non-issue of informed consent. This argument is based on the fact that the jury requested to see the consent form for the knee replacement surgery during deliberations, the jury explained in open court why it wanted to see the form, the trial court denied the request, and thereafter, the jury returned a verdict exonerating Dr. Lewis of liability. According to Mrs. Haney, the jury informed the bailiff it reached a verdict only seven minutes after exiting the courtroom. Mrs. Haney suggested that the jury obviously concluded that Mrs. Haney gave Dr. Lewis consent to treat her and thereby assumed all risks,

even those to which Mrs. Haney did not consent—specifically, the delay that transpired before Dr. Lewis had Mrs. Haney transported to Baton Rouge General for the surgical repair. Mrs. Haney argued that because of the jury's misconduct and confusion, impartial justice had not been done, and further, that it would be a miscarriage of justice for the jury verdict to stand.

The trial court agreed, finding that jury confusion prevented the impartial and fair administration of justice and that good grounds existed to grant a new trial to prevent a miscarriage of justice. The trial court also granted the motion for a conditional new trial on the same grounds upon which the JNOV was granted, namely, that the jury's verdict was unreasonable to the extent it found Dr. Lewis was not negligent in her post-management care of Mrs. Haney. Specifically, the court found that the delay in obtaining medical intervention to repair the damaged artery at Baton Rouge General was inexcusable and unreasonable under the circumstances.

Regarding the claim of jury confusion, the record reflects that after retiring for deliberations, the jury made three requests. First, they requested their notebooks, and the trial court allowed them to be sent to the jurors. At 3:40 pm, the jury asked for documentation of Dr. Lewis' transfer order and her post-op notes. The jury was brought back into the court room to identify the exact documentation they wished to see, and various documents were sent to the jurors. At 4:50 pm, another note from the jury was presented to the court asking to see the signed consent form for Dr. Lewis to perform the surgery. The parties' attorneys engaged in a lengthy discussion regarding this request because the trial court had granted the defendants' motion for directed verdict on the issue of whether Dr. Lewis failed to warn Mrs. Haney of the danger of the surgery based upon the parties' stipulation regarding the issue of informed consent. The trial court noted that in light of the directed verdict and earlier stipulation of the parties, it did not

charge the jury on the issue of informed consent to the procedure. Mrs. Haney's counsel expressed the concern that the jury may believe that because Mrs. Haney consented to surgery, she gave up her right to complain and thus consented to a negligent surgery. The trial court brought the jury back in to ascertain what consent form they were referring to. One juror informed the court the jury wanted to see the consent form Mrs. Haney signed for Dr. Lewis to do the surgery. The court informed the jury that it did not instruct them on the issue of consent. Thereafter, a juror indicated that it had been stated that risks were made known to the patient, and the question they were curious about was whether vascular risks had been clearly stated to the patient prior to surgery and whether that was on the written consent. The trial court again informed the jury that it had not instructed them on consent and that it had instructed them on the law applicable to the case. One juror responded that it was "not really the consent." She stated that "[w]e just want to see if it's known—I guess you could say, did she neglect to inform her on things, just risks, because we think that's an important part of caring and providing for someone. We think that—we think that's definitely part of the decision, yeah."

After the jury was retired, the trial court stated that it had granted the directed verdict to narrow the issues to eliminate jury confusion as much as possible and that "[y]ou can see the jury confusion." The trial court proposed to recharge the jury on the issues in this case. Mrs. Haney's attorney indicated that the safest course of action was to tell the jury "no"; otherwise it would create an issue of informed consent that needed to be fully addressed in the charges. The court indicated it could declare a mistrial, but encouraged the parties to craft a stipulation. After discussion, the parties' attorneys stipulated that the trial court would instruct the jury that it would not give the consent form to it and that the court would not comment on the denial. The jury was returned to the courtroom and the court instructed them that the request for the consent form was denied.

Thereafter, the jury returned a verdict of 9-3 finding Dr. Lewis was not negligent in her treatment of Mrs. Haney.

Upon reviewing the record, we find no abuse of the trial court's great discretion in conditionally granting the motion for new trial on the basis of jury confusion. The jury heard evidence that a popliteal artery injury is a known risk of total knee replacement surgery. The jurors sought to obtain the consent form signed by Mrs. Haney because they wanted to know whether the vascular risks of the surgery were on that form and whether they were explained to Mrs. Haney. It was apparent to the court during its discussions with the jury that the jury was confused on the liability issue. The trial court ultimately concluded that this jury confusion could have contributed to the jury's decision to absolve Dr. Lewis of any liability under the circumstances of this case. Defendants have not demonstrated that the trial court abused its discretion in granting the conditional motion for a new trial, and this court may not reverse that ruling.³

CONCLUSION

For the foregoing reasons, the trial court's July 29, 2013 judgment granting the JNOV is reversed, the jury verdict is reinstated, and the October 10, 2013 and October 18, 2013 judgments awarding damages against Dr. Janet Lewis, Louisiana Medical Mutual Insurance Company and the Louisiana Patient's Compensation Fund are reversed. In accordance with the reinstated jury verdict, judgment is hereby entered in favor of Dr. Janet Lewis and Louisiana Medical Mutual Insurance Company and against Margaree Haney, dismissing this malpractice action with prejudice. The October 2, 2013 and October 10, 2013 judgments conditionally granting the motion for a new trial are affirmed and the matter is remanded to the trial court for proceedings consistent with this opinion. All costs

³ Because we uphold the trial court's granting of the new trial on discretionary grounds, we need not address the peremptory grounds on which the granting of the motion for a conditional new trial was based.

of this appeal are assessed 50% to plaintiff, Margaree Haney, and 50% to defendants, Dr. Janet Lewis and Louisiana Medical Mutual Insurance Company.

JNOV REVERSED; DAMAGE AWARDS REVERSED; JURY VERDICT REINSTATED AND JUDGMENT RENDERED; JUDGMENTS CONDITIONALLY GRANTING MOTION FOR NEW TRIAL AFFIRMED AND REMANDED.

MARGAREE HANEY

FIRST CIRCUIT

VERSUS

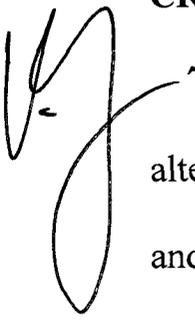
COURT OF APPEAL

DR. JANEL LEWIS

STATE OF LOUISIANA

2013 CA 2053

CRAIN, J. dissents in part.



I disagree with the majority opinion insofar as it affirms the trial court's alternative order granting a new trial. I would vacate the order granting a new trial and reinstate the jury's verdict. I do not find either factual support for the alleged "jury confusion" or that any such "jury confusion" in this case would constitute good grounds for a new trial under Louisiana Code of Civil Procedure article 1973, particularly considering that the document at the root of the alleged confusion, the consent form, was not provided to the jury.