NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 CA 1428

IN RE: MEDICAL REVIEW PANEL FOR THE CLAIM OF TARA LORRAINE

Judgment Rendered: JAN 19 2016

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On Appeal from the Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
No. C607582

Honorable Kay Bates, Judge Presiding

* * * * * *

Robert T. Talley
Baton Rouge, Louisiana

Counsel for Plaintiff/Appellant
Tara Lorraine

Guice A. Giambrone, III
Kelly M. Brian
Metairie, Louisiana

Counsel for Defendants/Appellees
Dr. Ross Quartano, Dr. Louis Lamendola, and Dr. Andre Bruni

* * * * * *

Theriot, J concurs with reasons

BEFORE: McDONALD, McCLENDON, AND THERIOT, JJ.

McCLENDON, J.

A dental patient, Tara Lorraine, seeks review of a trial court judgment rendered in accordance with a jury verdict that found no malpractice by defendants, Dr. Ross Quartano, Dr. Andre Bruni, and Dr. Louis Lamendola. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

On January 21, 2010, Ms. Lorraine sought dental treatment at Bluebonnet Dental Care, L.L.C. Over the course of the next several months, Ms. Lorraine was treated at Bluebonnet Dental Care by Dr. Quartano, Dr. Bruni, and Dr. Lamendola for a variety of issues, including tooth decay, sensitivity, pain, and inflammation. Due to continuing pain and dental issues, Ms. Lorraine sought dental treatment with other providers beginning in August of 2010.

On April 7, 2011, Ms. Lorraine filed a complaint with the Louisiana Patient's Compensation Fund requesting a medical review panel, naming Dr. Quartano, Dr. Bruni, Dr. Lamendola, and Bluebonnet Dental Care as defendants. Ms. Lorraine asserted that during her course of treatment at Bluebonnet Dental Care she sustained three separate and distinct injuries. Specifically, Ms. Lorraine alleged that during her initial visit on January 21, 2010, Dr. Quartano spilled etchant on her throat, which caused a permanent and obvious scar. Second, Ms. Lorraine alleged that during her visit on April 30, 2010, Dr. Lamendola extracted one of her permanent molars without her actual or legal informed consent. Finally, Ms. Lorraine alleged that during the course of her treatment at Bluebonnet Dental Care, Dr. Quartano and Dr. Bruni left substantial underlying decay prior to filling several of her teeth. Ms. Lorraine asserted that the failure to remove the underlying decay resulted in extreme pain and suffering and required remediation by another dentist at additional expense.

The medical review panel unanimously concluded that the evidence did not support a breach in the standard of care by Dr. Quartano and Dr. Bruni. With regard to Dr. Lamendola and Bluebonnet Dental Care, the panel determined that

a material fact existed regarding informed consent that did not require an opinion from the panel.

Ms. Lorraine subsequently filed a petition for damages in the 19th Judicial District Court, naming Dr. Quartano, Dr. Bruni, and Dr. Lamandola, as defendants.[1] Following a jury trial, the jury found that Ms. Lorraine failed to prove the applicable standards of care and rendered a verdict in favor of defendants. The trial court signed a judgment in accordance with jury verdict on August 13, 2014, and dismissed Ms. Lorraine's claims against the three defendants. On that same day, the trial court also signed a judgment denying a motion for new trial and/or JNOV that had been filed by Ms. Lorraine.

Ms. Lorraine now appeals, raising the following assignments of error:

1. The trial court erred in allowing Defendants to use peremptory strikes to remove four black jurors from the jury in an illegal and systematic attempt to racially alter the jury to prejudice the Plaintiff, a black female, in violation of the Louisiana Supreme Court decision in *Alex v. Rayne Concrete Service*, 951 So 2d 138 (La. 2007) and the U.S. Supreme Court decision in *Batson v. Kennedy*, 476 U.S. 79 (1986).

2. The trial court erred in refusing to grant a new trial and/or JNOV based upon jury misconduct.

3. The jury erred (and the trial court erred in refusing to grant a new trial and/or JNOV for this reason) in finding that Plaintiff failed to prove the standard of care for informed consent for the extraction of her permanent tooth by Defendant Lamendola DDS, since the standard of care for dental informed consent is set by statute under R.S. 40:1299.131.

4. The jury erred (and the trial court erred in refusing to grant a new trial and/or JNOV for this reason) in finding that Plaintiff failed to prove the standard of care related to the chemical burn caused to Plaintiff's neck by Defendant Quartano DDS, since there was no necessity for Plaintiff to prove standard of care since this is a case involving an obvious careless act from which a lay person can infer negligence under the Louisiana Supreme Court decision in *Pfiffner v. Correa*, 643 So. 2d 1228, (La. 1994).

5. The jury erred (and the trial court erred in refusing to grant a new trial and/or JNOV for this reason) in finding that Plaintiff failed to prove the standard of care relating to Defendants' filling Plaintiff's teeth over significant and substantial decay since the

[1] Bluebonnet Dental Care was also named a defendant, but was later dismissed by summary judgment.

unanimous expert testimony established that the standard of care required that decay should be excavated before filling the patient's tooth, and since this is a case involving an obvious careless act from which a lay person can infer negligence under the Louisiana Supreme Court decision in *Pfiffner v. Correa*, 643 So. 2d 1228, (La. 1994).

DISCUSSION

ASSIGMENTS OF ERROR NUMBERS 1 AND 2

In her first assignment of error, Ms. Lorraine contends the trial court improperly denied her challenges under **Batson v. Kentucky**, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), to defendants' systematic peremptory striking of potential African-American jurors. Ms. Lorraine asserts that during the selection of the jury in this case, defendants attempted to use five peremptory challenges to strike African-American jurors.

In **Batson**, the United States Supreme Court stated that "[p]urposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." 476 U.S. at 86, 106 S.Ct. at 1717. In an extension of **Batson**, the United States Supreme Court has held that a private litigant in a civil case may not use peremptory challenges to exclude jurors on the account of race. To do so is a violation of the Equal Protection Clause. **Edmonson v. Leesville Concrete Co., Inc.**, 500 U.S. 614, 628, 111 S.Ct. 2077, 2087, 114 L.Ed.2d 660 (1991).

To make a **Batson** challenge, the challenging party first must make a *prima facie* showing that the opposing party exercised a peremptory challenge on the basis of race. To establish a *prima facie* case, the challenging party must show: (1) the challenge was directed at a member of a cognizable group; (2) the challenge was peremptory rather than for cause; and (3) relevant circumstances sufficient to raise an inference that the prospective juror was struck on account of his being a member of that cognizable group. See **Batson**, 476 U.S. at 96, 106 S.Ct. at 1723.

The burden then shifts to the opposing party to articulate a race-neutral explanation for striking the jurors in question which is related to the case to be

tried. **Batson**, 476 U.S. at 97, 106 S.Ct. at 1723. A neutral explanation is one that is based on some factor other than the race of the juror excused. In this second step of the process, the explanation need not be persuasive, or even plausible, and unless a discriminatory intent is inherent in the stated reasons, the explanation given should be deemed race-neutral. **Lee v. Magnolia Garden Apartments**, 96-1328 (La.App. 1 Cir. 5/9/97), 694 So.2d 1142, 1147, writ denied, 97-1544 (La. 9/26/97), 701 So.2d 990. However, a mere "gut feeling" falls short of an articulate reason that enables a trial judge to assess the plausibility of the proffered reason for striking a potential juror. **Alex v. Rayne Concrete Service**, 05-1457, 05-2344, 05-2520 (La. 1/26/07), 951 So.2d 138, 153.

If reasons are presented for the exercise of a peremptory challenge that are racially neutral on their face, an issue of fact is joined, and the trial court must assess the weight and credibility of that explanation in order to determine whether the party raising the **Batson** challenge has carried his burden of proving purposeful discrimination. In most cases, this consists of a ruling on the credibility of the attorney exercising the challenge. **Lee**, 694 So.2d at 1147. At this final stage, the trial court must consider the persuasiveness of the explanations. It is at this stage that implausible or fantastic justifications may be found to be pretexts for purposeful discrimination. **Id.** The trial court's duty under **Batson** is "to assess the plausibility" of the proffered reason for striking a jury "in light of all evidence with a bearing on it." **Miller-El v. Dretke**, 545 U.S. 231, 252, 125 S.Ct. 2317, 2331, 162 L.Ed.2d 196 (2005). However, the trial court's conclusion on the ultimate question of discriminatory intent is a finding of fact that is accorded great deference on appeal. **Lee**, 694 So.2d at 1147.

Ms. Lorraine notes that defendants sought to use peremptory challenges against five prospective African-American jurors, namely, Elijah Parker, Brandon Jay, Gregory McClay, Samantha Amy Johnson, and Brenda Marie Kelley. After each juror was challenged for cause, Ms. Lorraine raised a **Batson** challenge. Regarding the first four jurors, the trial court concluded that the defendants gave a race-neutral reason for dismissing each juror.

Specifically, as to Mr. Parker, defendants stated that he did not see a dentist regularly, which they felt was important in a dental malpractice case.[2] The trial court concluded that the reason given was race-neutral.

With regard to Mr. Jay, defendants stated that they "did not get many answers out of him" and that he "is a full-time student with a part-time job." Defendants noted that Mr. Jay did not indicate that he had any experience with fillings, root canals, extractions, or dental complications. Also, Mr. Jay indicated that he was attending school full time, and he was an on-call employee for Home Depot and Home Care 360. The trial court concluded that the reasons given were race-neutral.

With regard to Mr. McClay, defendants stated that they chose to strike him because of his non-committal responses, specifically regarding dental care. Similarly, with regard to Ms. Johnson, defendants stated that they were dissatisfied with her responses to questions and her level of participation.[3] Further, regarding Ms. Kelley, defendants asserted that they were not getting information from her. Although the trial court concluded that the reasons given for Mr. McClay and Ms. Johnson were race-neutral, the trial court sustained Ms. Lorraine's **Batson** challenge as to Ms. Kelley, denied the defendants' peremptory strike, and ordered her to be seated on the jury.

Ms. Lorraine submits that the same reasons that warranted Ms. Kelley's service on the jury warranted participation by the other four stricken jurors and reflects defendants' systematic discrimination in jury selection. Ms. Lorraine contends that lack of participation was not a sufficient race-neutral reason when

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[2] On appeal, Ms. Lorraine contends that a similarly situated white juror, Jeffrey Dykes, also stated that he did not go to the dentist regularly. However, Mr. Dykes, unlike Mr. Parker, admitted that he did go to the dentist, albeit not regularly, and that he had previously had teeth extracted and teeth fillings that had failed. Even so, the defendants also used a peremptory strike to remove Mr. Dykes from the jury.

[3] When questioned further by the trial court as to the reason for seeking to strike Ms. Johnson, defendants also averred that Ms. Johnson was a stay at home mom with a young child. On appeal, Ms. Lorraine points out that there is no evidence in the record that Ms. Johnson had children. However, when the defendants provided this explanation to the trial court, Ms. Lorraine offered no objection or contradictions to the statements made by defendants. And while Ms. Lorraine argues that Ms. Lesley Taylor, a white mother, was allowed to stay on the jury, we note that Ms. Taylor had one daughter who attends college.

defendants asked very limited questions to each of the specific jurors during *voir dire*.

We disagree. We note that the explanations defendants provided for striking Mr. Parker and Mr. Jay specifically involved their limited dental treatment experience. Further, Mr. Jay was a full-time student with two part-time jobs. And although the questions specifically directed to Mr. McClay and Ms. Johnson were limited, defendants asked a number of additional questions to the entire panel regarding their dental treatment experience. The record reflects that the panel members responded to many of defendants' questions by nodding their heads and raising their hands. The trial court was in the best position to evaluate each panel member's level of involvement with the questions that were asked to the entire panel, especially in light of the nonverbal responses. Accordingly, we conclude that the trial court did not abuse its discretion in finding that defendants articulated legitimate race-neutral explanations for striking the jurors at issue.

Further, we note that a number of other African-Americans were seated as jurors, and that defendants used a number of peremptory challenges to strike multiple white jurors as well. We cannot conclude that African-Americans were being systematically excluded from the jury. We find no error by the trial court in its denial of Ms. Lorraine's **Batson** challenges. Assignment of error number one is without merit.

In her reply brief, Ms. Lorraine argues that defendants used eight peremptory strikes when LSA-C.C.P. art. 1764 limited defendants to six such strikes.[4] However, Ms. Lorraine lodged no objection with the trial court when defendants used their last two peremptory strikes. Even assuming that this issue was preserved for appeal and can be raised for the first time in a reply brief, we note that there were multiple defendants in this matter, and the trial court had

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[4] Specifically, LSA-C.C.P. art. 1764B provides:

> If trial is by a jury of twelve, each side is allowed six peremptory challenges. If there is more than one party on any side, the court may allow each side additional peremptory challenges, not to exceed four.

discretion to allow the additional peremptory strikes. See LSA-C.C.P. art. 1764B. Moreover, Ms. Lorraine does not assert that she was denied additional peremptory challenges. As such, this argument is without merit.

In her second assignment of error, Ms. Lorraine contends that the trial court erred in failing to grant a new trial and/or judgment notwithstanding the verdict based on juror misconduct. Specifically, Ms. Lorraine notes that the jury was instructed not to deliberate unless all twelve jurors were present in the jury room. The jury retired to deliberate at 1:12 p.m., and reconvened with a verdict at 3:45 p.m. However, juror William Temple testified that during a break in deliberations, he left the jury to secure medication and when he returned the remaining jurors had already completed deliberations and had finished voting without him. Under these circumstances, Ms. Lorraine submits that a new trial was warranted under LSA-C.C.P. art. 1972(3), which provides that "[a] new trial shall be granted, upon contradictory motion of any party, ... [w]hen the jury was bribed or has behaved improperly so that impartial justice has not been done."

Louisiana jurisprudence relative to juror or jury misconduct reveals that the courts of this state have been reluctant to set aside jury verdicts based upon allegations of improper behavior. **Perkins v. Allstate Ins. Co.**, 05-2676 (La.App. 1 Cir. 11/3/06), 950 So.2d 850, 853 (citing **Brown v. Hudson**, 96-2087 (La.App. 1 Cir. 9/19/97), 700 So.2d 932-36, writ denied, 97-2623 (La. 1/1/98), 705 So.2d 1103, cert. denied, 524 U.S. 916, 118 S.Ct. 2297, 141 L.Ed.2d 157 (1998)). The party seeking a new trial based on jury misconduct must prove that the level of behavior was of such a grievous nature as to preclude the impartial administration of justice. **Simoneaux v. Amoco Prod. Co.**, 02-1050 (La.App. 1 Cir. 9/26/03), 860 So.2d 560, 566, writ denied, 04-0001 (La. 3/26/04), 871 So.2d 348. This is a heavy burden to overcome. Moreover, the law does not favor a multiplicity of litigation; a litigant having been afforded a day in court will not be granted a second opportunity in the absence of good and compelling reasons. **Perkins**, 950 So.2d at 854.

The standard of review of a judgment on a motion for new trial, whether on peremptory or discretionary grounds, is that of abuse of discretion. **Wood v. Humphries**, 11-2161 (La.App. 1 Cir. 10/9/12), 103 So.3d 1105, 1116, writ denied, 12-2712 (La. 2/22/13), 108 So.3d 769.

At the hearing on the motion for new trial, Mr. Temple's testimony regarding the events surrounding deliberations was hazy at best, and he could not recall with any specific detail the alleged incident. Mr. Temple acknowledged that at the time he was taking hydrocodone because he was in pain related to cancer. Mr. Temple also indicated that he did not remember eating lunch that day. Mr. Temple testified that prior to leaving the jury room, he asked the bailiff for permission to leave, went down the hall and placed a phone call to a pharmacy, and then returned to the jury room. Mr. Temple testified that when he returned, the jurors went back into the courtroom, without Mr. Temple voting. With regard to Mr. Temple's testimony, the trial court specifically stated: "[T]his particular witness doesn't have much credibility," and explained that "his testimony is nothing short of incredible, so I have to discount that witness." Because we find no manifest error in the trial court's factual determination of credibility, we cannot conclude that the trial court abused its discretion in denying Ms. Lorraine's motion for new trial and/or JNOV. Ms. Lorraine's second assignment of error is without merit.[5]

ASSIGNMENT OF ERROR NUMBERS 3, 4, AND 5

Pursuant to LSA-R.S. 9:2794A, a plaintiff bears the burden of proving (1) the standard of care applicable to the healthcare provider, (2) whether the healthcare provider breached that standard of care, and (3) whether any breach

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[5] Additionally, Mr. Temple acknowledged that he agreed with the jury verdict. Specifically, the following colloquy occurred at the hearing on the motion for new trial:

> Q. Okay. And you also did mention after you came back in here and the verdict was read, someone asked you if you agreed with the verdict, correct?
>
> A. Each one of us, yes.
>
> Q. Correct. And you did say that, yes, you agreed with the verdict?
>
> A. I agreed. But I wasn't never voting nowhere else.

of the standard of care by the healthcare provider proximately caused the plaintiff to suffer injuries that would not otherwise have been incurred.

In her third assignment of error, Ms. Lorraine alleges that the trial court erred in finding that she failed to prove the standard of care for informed consent for the extraction of her permanent tooth by Dr. Lamendola. Specifically, Ms. Lorraine contends that on an April 30, 2010 visit, one of her molars was extracted without her consent.

Louisiana Revised Statutes 40:1299.131 sets out the requirements for informed consent for dentists and oral surgeons.[6] Before dental treatment, the dentist or oral surgeon must inform the patient in general terms about the nature and purpose of the treatment, together with any risks that are recognized in the statute. LSA-R.S. 40:1299.131B(1) and C(1). Also, the patient must be given an opportunity to ask questions concerning such dental treatment or course of dental treatment, and his questions, if any, should be answered in a satisfactory manner. LSA-R.S. 40:1299.131B(2) and C(2).

Ms. Lorraine contends that because the standard of care is set forth by the referenced statute, she established a *prima facie* case by showing that Dr. Lamendola extracted her permanent tooth without her consent. Ms. Lorraine asserts that because she met her *prima facie* case, the burden shifted to Dr. Lamendola to prove that he obtained her legal consent prior to the extraction.

We disagree. We recognize that consent need not be in writing. See LSA-R.S. 40:1299.131F. Although Ms. Lorraine contends that she never gave informed consent to have her tooth pulled, Dr. Lamendola testified that prior to extracting her tooth, he discussed treatment options with Ms. Lorraine in order to "save her tooth," including a root canal, build-up, and crown for the tooth, but that Ms. Lorraine elected to have her tooth pulled. The jury may have believed Dr. Lamendola's testimony and concluded that Ms. Lorraine did provide informed

[6] Louisiana Revised Statues 40:1299.131 was redesignated as LSA-R.S. 40:1161.1 by 2015 La. Acts No. 84, effective June 2, 2015.

consent. Accordingly, we find no manifest error in the jury's finding in this regard. Ms. Lorraine's third assignment of error is without merit.

In her fourth assignment of error, Ms. Lorraine alleges that the jury erred in finding that she failed to prove the standard of care relating to a chemical burn caused by Dr. Quartano. Ms. Lorraine avers that on her initial visit on January 21, 2010, Dr. Quartano spilled etchant on her neck, which caused a permanent and obvious scar that she has to cosmetically cover every day.[7] Ms. Lorraine contends that under the Louisiana Supreme Court decision in **Pfiffner v. Correa**, 94-0924, 94-0963, and 94-0992 (La. 10/17/94), 643 So.2d 1228, her claim relating to Dr. Quartano's spilling the substance on her neck required no expert evidence of the standard of care or breach. Specifically, in **Pfiffner**, the Louisiana Supreme Court stated:

> The jurisprudence has also recognized that there are situations in which expert testimony is not necessary. Expert testimony is not required where the physician does an obviously careless act, such as fracturing a leg during examination, amputating the wrong arm, dropping a knife, scalpel, or acid on a patient, or leaving a sponge in a patient's body, from which a lay person can infer negligence.

643 So.2d at 1233. Ms. Lorraine maintains that negligence can be inferred herein such that the jury's finding that she failed to prove the standard of care is manifestly erroneous and must be set aside.

Dr. Quartano acknowledged that the mark on Ms. Lorraine's neck was a possible burn from etchant.[8] Although not a common occurrence, the etchant material can drip onto the patient. While Ms. Lorraine posits that no expert was needed because negligence can be inferred, Dr. Wilkinson, a dental surgeon and member of the medical review panel in this case, testified that the medical review panel found no liability on the part of Dr. Quartano, noting that the "use of certain materials in dentistry can cause skin irritation without negligence." Dr. Wilkinson

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[7] The scar is approximately three millimeters by five millimeters.

[8] The etchant is phosphoric acid that can potentially be deleterious to a person's skin if left on for a prolonged period.

also testified that the gel "is not strong enough to cause any kind of a serious burn." Further, both Dr. Quartano and Dr. Wilkinson testified that spilling etchant on a patient is not a breach of the standard of care. The evidence is sufficient to substantiate the jury's finding that Ms. Lorraine did not prove the applicable standard of care relating to the spillage of etchant by Dr. Quartano. An appellate court must not re-weigh the evidence or substitute its own factual findings because it may have decided the case differently. **Pinsonneault v. Merchants & Farmers Bank & Trust Co.**, 01-2217 (La. 4/3/02), 816 So.2d 270, 279. In light of the foregoing, we are unable to conclude that the jury manifestly erred. Assignment of error number four is without merit.

In her fifth assignment of error, Ms. Lorraine contends that the jury erred in finding that she failed to prove the standard of care relating to defendants' filling her teeth over significant and substantial decay. Ms. Lorraine maintains that unanimous expert testimony established that the standard of care required that decay should be excavated before the filling the tooth. Moreover, Ms. Lorraine asserts that these claims fall under the doctrine of *res ipsa loquitur* insofar as the act of leaving decay under a filling is akin to leaving a sponge inside a surgical patient. See **Pfiffner**, 643 So.2d at 1233.

We disagree. Both Dr. Quartano and Dr. Wilkinson testified that there was no evidence that decay was left in Ms. Lorraine's teeth prior to the fillings. Even so, the evidence in the record indicates that removal of all decay is not always necessary prior to filling a tooth. Specifically, Dr. Quartano testified:

> Because sometimes in conservative treatment, decay can be left inside of a tooth so as to avoid future root canals or further treatment, or in an attempt to prolong it.
>
> So, if there is potential for a root canal, if we can put a filling in there and we can buy that tooth another two, three, four, five years, six months, whatever the time may be, then there is less chance that throughout the course of the patient's life that we will have to do further treatment beyond a root canal.

Dr. Quartano further testified:

> Any tooth that has large amounts of decay that might be exhibiting a little bit of sensitivity, hot or cold, would be a perfectly good situation to where instead of automatically going into the nerve of

> the tooth, destroying the nerve of the tooth, and destroying the blood supply to that tooth to rather hopefully remove most of the decay, have the tooth repair itself and create dentin in between where the decay was and the nerve was so that you have a live tooth for a longer period of time. That would be a great situation to leave decay.

According to Dr. Wilkinson, even if there had been some decay, it was not necessarily a breach of the standard of care. Considering the foregoing, we find no merit in Ms. Lorraine's fifth assignment of error.[9]

CONCLUSION

For the foregoing reasons, the trial court's August 13, 2014 judgment rendered in accord with the jury verdict is affirmed. Costs of this appeal are assessed to plaintiff/appellant, Tara Lorraine.

AFFIRMED.

[9] Similarly, we find no merit in assignment of error numbers three, four, and five to the extent Ms. Lorraine asserts therein that the trial court erred in refusing to grant a new trial and/or JNOV.

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 CA 1428

IN RE: MEDICAL REVIEW PANEL FOR THE CLAIM OF TARA LORRAINE

THERIOT, J., concurring and assigning reasons.

I concur with the result reached by the majority, and write separately simply to emphasize the propriety of the trial court's ruling denying the motion for new trial and/or JNOV filed by plaintiff-appellant, Tara Lorraine.

In her second assignment of error, Ms. Lorraine argues that the trial court erred by failing to grant a new trial and/or JNOV based upon juror misconduct. She contends that the jury deliberated and reached a verdict while one particular juror, William Temple, was not present in the jury deliberation room. The record reflects that, after the jury's verdict was announced, jury polling was conducted regarding each interrogatory on the jury verdict form. All jury votes were 12-0 or 11-1 in favor of defendants-appellees, Drs. Ross Quartano, Andre Bruni, and Louis Lamendola.

Louisiana Code of Civil Procedure art. 1797(B) provides: "If a trial is by a jury of twelve, **nine** of the jurors must concur to render a verdict." (emphasis added). Consequently, even if we accept that Mr. Temple's vote should be discounted on account of irregularities concerning his presence or absence in the

jury deliberation room at the time at which the jury reached its verdict, the number of votes in support of the jury's verdict would be sufficient to sustain it as a legal verdict.