

NUMBER 06-331

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

ERNEST BROUSSARD, INDIVIDUALLY AND ON BEHALF OF GRACE
BROUSSARD AND KEITH BROUSSARD, INDIVIDUALLY

VERSUS

MEDICAL PROTECTIVE COMPANY AND DR. JOHN BURTON

AMY, J., dissenting.

Without question this is a tragic case, all the more so as we view the events in hindsight. Having said this, it is crucial to remember that the jury charged with deciding this case first heard the facts before concluding that the plaintiffs failed to establish their case. Even if this court might have decided those facts differently, it may not substitute its own judgment for that of the trier of fact absent manifest error. *Rosell v. ESCO*, 549 So.2d 840 (La.1989). After reviewing the record, I do not find manifest error in the jury's determination. The trial judge found similarly in his denial of the plaintiffs' motion for new trial.

Simply, the parties presented the jury with two competing views of the evidence. The plaintiffs presented Dr. Howard Snyder and Dr. Christopher Martinez, both accepted as experts in the field of emergency medicine. Both testified that Dr. Burton breached the applicable standard of care in that a patient presenting with chest pain of the nature described and with an abnormal EKG, should be administered oxygen and certain medications, including nitroglycerin and beta-blockers. Dr. Snyder further stated that "the only way to exclude or rule out, . . . , a heart attack or cardiac ischemia with certainty is to admit the patient to the hospital, do a series of tests over 24 hours relatively speaking"

In opposition, Dr. Burton and his witnesses focused on whether Mrs.

Broussard's presentation indicated that an acute cardiac process or acute cardiac ischemia was underway. Dr. Burton testified that, while he found Mrs. Broussard's EKG abnormal, he saw no indication of an acute process. Rather, he explained that some individuals "just have abnormal EKGs, that's just the way that their electrical impulses show on their heart, and that's just the way some people's hearts are." Dr. Burton explained that, rather than relying solely on the EKG, he eliminated an ongoing acute coronary syndrome from his diagnosis based on, among other things, Mrs. Broussard's laboratory testing results and x-rays. He reviewed both of these for the jury and found neither revealed an acute cardiac process.

The jury also heard Dr. Burton review Mrs. Broussard's history and his physical exam insofar as they factored into his determination not to further pursue the possibility of a heart-related etiology of her symptoms. He testified that chest pain is one of the most common complaints in the emergency department and that Mrs. Broussard reported that her pain was better upon sitting rather than lying. Dr. Burton explained that cardiac ischemia is not usually positional in nature, but that improvement upon sitting is consistent with a gastrointestinal etiology. Also, while vomiting and nausea are not specific to any one condition and can be consistent with a heart-related process, Dr. Burton explained that diarrhea is not so related and is more indicative of an intestinal problem. Dr. Burton denied that oxygen was required for Mrs. Broussard as her pulse oximetry reading was within normal limits. He also denied finding Mrs. Broussard's breathing to be labored on examination. Finally, Dr. Burton testified that, upon physical examination, he recorded that Mrs. Broussard demonstrated "marked palpable tenderness" in the chest wall. He remarked that he underlined the term "marked" on his notes and that the area had been tender to the extreme as "just a light touch would elicit pain, and sitting up – I mean, she - - it

really created a lot of pain, a lot more than you would expect with just some little soreness from little muscular things.” Dr. Burton distinguished this type of finding from “cardiac pain” which he noted was often difficult for patients to pinpoint. Given his findings, the laboratory testing results, and the x-rays, Dr. Burton determined that Mrs. Broussard was sufficiently stable for discharge. As noted on the discharge sheet, he felt that she should report to her cardiologist the following week.

The jury was also presented with the opinion of the Medical Review Panel wherein the panel unanimously concluded that Dr. Burton did not breach the applicable standard of care and made further findings favorable to Dr. Burton. The opinion provides, in part:

The evidence does not support the conclusion that the defendant, *Dr. John M. Burton*, failed to comply with the appropriate standard of care as charged in the complaint.

Responses to Specific Allegations:

1. *Did Dr. Burton’s failure to administer nitrates both to relieve her pain and to enable detection of a cardiac etiology of Mrs. Broussard’s chest pain constitute a breach in the acceptable standard of care?* No.

2. *Did Dr. Burton’s failure to order telemetry monitoring of Mrs. Broussard constitute a breach in the acceptable standard of care?* No.

3. *Did Dr. Burton’s failure to consult a cardiologist when faced with an abnormal EKG and chest pain constitute a breach in the acceptable standard of care?* No.

4. *Did Dr. Burton’s failure to administer oxygen both to relieve her pain and to enable detection of a cardiac etiology of Mrs. Broussard’s chest pain constitute a breach in the acceptable standard of care?* No.

5. *Did Dr. Burton’s failure to treat Mrs. Broussard’s hypertension both as a precautionary matter and to enable a diagnosis of hypertensive angina constitute a breach in the acceptable standard of care?* No.

6. *Did Dr. Burton’s failure to admit Mrs. Broussard to a telemetry or intensive care unit for 24 hour monitoring and follow up*

constitute a breach in the acceptable standard of care? No.

7. *When faced with a patient with acute chest pain and cardiac risk factors who denies abdominal pain; did the diagnosis of gastroenteritis constitute a breach in the acceptable standard of care? No.*

8. *Did Dr. Burton's failure to order a repeat EKG and repeat cardiac enzymes prior to discharge of a patient with an abnormal EKG and chest pain that resolves only after the administration of Morphine constitute a breach in the acceptable standard of care? No.*

This patient presented with symptoms that were consistent with a GI etiology, not a cardiac etiology. Dr. Burton prudently pursued a limited cardiac workup - adequate in our opinion - to satisfactorily exclude the likelihood of acute cardiac illness. The EKG and cardiac enzymes results are not consistent with pain of cardiac etiology of eight to nine hours duration. Also, the presence of frequent diarrhea is not consistent with the cardiac etiology of her symptoms, and the air fluid levels of the x-ray are consistent with the GI etiology of her symptoms. Finally, the cause of the patient's unfortunate demise was never determined.

Additionally, we do not feel it is appropriate to retrospectively analyze the findings in the ER, based upon the knowledge of the patient's subsequent death.

Thus, the jury was presented with the concise findings of three experts who found unanimously that Dr. Burton responded appropriately given the presentation.

Moreover, the jury heard testimony at trial from two of the panel members, Dr. Larry Parker and Dr. Steven Hedelsky. Both physicians' views were consistent with Dr. Burton's assessment of Mrs. Broussard's symptoms and test results. Dr. Parker, a board certified family practitioner who limits his practice to emergency medicine, confirmed that the evidence did not support the conclusion that Dr. Burton failed to meet the applicable standard of care. Dr. Parker testified that both the EKG and the patient's complaints of pain must be considered together. Like Dr. Burton, he explained that Mrs. Broussard's description of her chest pain as "burning" in nature was consistent with a gastrointestinal problem as was the improvement of symptoms upon a positional change. Dr. Parker also referenced diarrhea as being "much more

likely on the gastrointestinal stomach side.” Neither did he find that oxygen was required given the pulse oximetry reading. Summarizing other factors significant in the Medical Review Panel’s evaluation, Dr. Parker referenced the abdominal x-ray suggesting a stomach etiology, the elevated white blood cell count suggesting an infection, and profuse diarrhea, vomiting, and nausea. He stated that: “[a]ll of these things, when you put them together, tend to suggest strongly this is a lady who’s having a really bad stomach problem.”

Dr. Hedelsky, a physician board certified in emergency medicine, also confirmed his view of the accuracy of the Medical Review Panel Opinion. He again found Mrs. Broussard’s presentation more consistent with a gastrointestinal etiology and explained that, in his opinion, the EKG was normal for this patient. In response to questions regarding algorithms prescribing certain procedures based on a patient’s presentation, Dr. Hedelsky distinguished lateral cardiac ischemia, the consideration suggested by the EKG, from cardiac ischemic pain. The former, Dr. Hedelsky explained, is a pathology, whereas cardiac ischemic pain is a symptom. He observed that “[m]ost chest pain is not unstable angina or angina or ischemic pain” and further confirmed that one can have ischemic changes that are not ischemic chest pain. Dr. Hedelsky explained that in assessing chest pain, the physician must speak with the patient in order to obtain the history and character of the pain, along with symptoms associated with it. He also stated that the physician must acquire the patient’s risk factors and determine whether there are indications “of other illness processes that would exclude - - that would point you in a different direction and you have to take that whole clinical picture, and then along with that do whatever lab tests you think are appropriate with that clinical picture, and put those together.” Dr. Hedelsky referenced the importance of Dr. Burton having performed a physical exam at the

time he was making his diagnosis as opposed to consideration based only on the medical records.

Obviously, the jury was called upon to consider conflicting witness testimony and opinion. In *Lasyone v. Kansas City Southern Railroad*, 00-2628, p. 11 (La. 4/3/01), 786 So.2d 682, 692, the supreme court observed that “it is well accepted that the trier of fact is charged with the determination of what credibility it assigns to expert witnesses and then to decide which expert among those testifying that it finds more credible.” While the responsibility of credibility determinations rests with the trier of fact, an appellate court may find manifest error if documents or objective evidence “so contradict the witness’s story, or the story itself is so internally inconsistent or implausible on its face, that a reasonable fact-finder would not credit the witness’s story[.]” *Sportsman Store of Lake Charles, Inc. v. Sonitrol Security Systems of Calcasieu, Inc.*, 99-021, pp. 6-7 (La. 10/19/99), 748 So.2d 417, 421. In the absence of such factors, however, “and [if] a fact-finder’s determination is based on its decision to credit the testimony of one or two or more witnesses, that finding can *virtually never* be manifestly erroneous or clearly wrong.” *Id.* (Emphasis added.)

In light of the above evidence, I find no manifest error in the jury’s determination of the standard of care issue in favor of Dr. Burton. The plaintiffs attempted to prove that the standard of care required Dr. Burton to consider Mrs. Broussard’s EKG as sufficiently suggestive of a cardiac-related etiology of her symptoms so as to require more extensive treatment. Notwithstanding its ability to reject this presentation outright, the jury was also presented with the defendant’s expert testimony indicating that, at most, Mrs. Broussard’s EKG suggested a non-emergent pathology which, when combined with the other circumstances of her presentation, led Dr. Burton to view her chest pain and symptoms in another light.

Dr. Burton's experts found this not to be a breach of the standard of care. Despite rigorous cross-examination, the defense experts' testimony was not so contradicted, internally inconsistent, or implausible that it was unreasonable to accept.

For these reasons, I conclude that the jury's determination was not manifestly erroneous. I respectfully dissent.