

**STATE OF LOUISIANA
COURT OF APPEAL, THIRD CIRCUIT**

06-331

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

VERSUS

MEDICAL PROTECTIVE COMPANY AND DR. JOHN BURTON

**APPEAL FROM THE
FOURTEENTH JUDICIAL DISTRICT COURT
PARISH OF CALCASIEU, NO. 2004-3397
HONORABLE R. RICHARD BRYANT, JR., DISTRICT JUDGE**

**BILLY H. EZELL
JUDGE**

Court composed of Oswald A. Decuir, Jimmie C. Peters; Marc T. Amy, Glenn B. Gremillion, and Billy H. Ezell, Judges.

Amy, J., dissents and assigns written reasons.

REVERSED AND RENDERED.

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EZELL, JUDGE.

In this matter, the family of Grace Broussard appeals the decision of the trial court that Dr. John Burton met his required standard of care in treating her. They assert that the heart-related etiology for her presented symptoms should have been more fully investigated before her discharge from the emergency room. The jury hearing the case, after struggling to understand the required standard of care, found in favor of Dr. Burton. We find the jury's findings to be manifestly erroneous and accordingly, reverse and render judgment.

Grace Broussard presented to the emergency room of Christus St. Patrick Hospital around 2:00 a.m. on November 25, 2001, complaining chiefly of chest pain. She was sixty years old, a smoker, had previously undergone a hysterectomy, and had a dramatic family history of heart disease, with several of her family dying extremely young.¹ Accompanying her complaint of chest pains were complaints of nausea, vomiting, and diarrhea. She described her chest pain as "burning." Dr. Burton examined Mrs. Broussard and ordered an EKG, lab tests, and chest x-rays.

The EKG results noted: "Normal sinus rhythm[;] T wave abnormality, consider lateral ischemia[;] Abnormal ECG." Dr. Burton confirmed that the EKG readings could be consistent with cardiac ischemia.² Dr. Burton noted a differential diagnosis of "gastroenteritis, angina, CW pain." Based on the complaints of nausea, vomiting, and diarrhea, and the outcome of the blood tests, Dr. Burton diagnosed Mrs. Broussard as having gastroenteritis and prescribed a GI cocktail for her symptoms. This eased her nausea, but her chest pain did not subside. Dr. Burton eventually gave

¹Mrs. Broussard's father died of heart problems when he was 55. She also had five siblings, three sisters, and two brothers, die due to heart conditions between the ages of 36 and 42.

²Ischemia is a blockage of the blood vessels or coronary arteries that supply blood to the heart. This blockage reduces blood flow to the heart, can result in chest pain, and untreated, can lead to arrhythmia or heart attack.

her a shot of morphine for her pain. He recommended she follow-up with a cardiologist the next week. Mrs. Broussard was never given any aspirin or nitroglycerine for her chest pain. Mrs. Broussard was discharged from St. Patrick Hospital at 5:46 that morning.

Mrs. Broussard returned home with her husband, Ernest, who assisted in putting her to bed. When he attempted to wake her just before noon, he was unable to do so. Mrs. Broussard's death certificate lists the time of death as 7:00 a.m., just over an hour after she left the hospital.

Mr. Broussard filed this suit along with his son, Keith. Dr. Burton and his medical malpractice insurer were named as defendants. The Broussards allege that Dr. Burton failed to adequately rule out what they claim to be a deadly cardiac problem which led to Mrs. Broussard's death.

After twice seeking clarification as to the standard of care, the jury found in favor of Dr. Burton, stating that the Broussards failed to prove by a preponderance of the evidence that Dr. Burton deviated from the standard of care for an emergency room physician. From this decision, the Broussards appeal, asserting three assignments of error. They claim that the jury erred in failing to find that Dr. Burton breached the standard of care in the treatment rendered, that the jury erred in not finding that Dr. Burton's negligence contributed to Mrs. Broussard's death, and that the jury erred in failing to award damages as a result of the alleged malpractice. Because the first two assignments of error concern whether Dr. Burton was liable for medical malpractice, we will address them together.

LIABILITY

Louisiana Revised Statute 9:2794 sets forth the burden of proof applicable to medical malpractice claims, providing, in part:

A. In a malpractice action based on the negligence of a physician licensed under R.S. 37:1261 et seq., . . . the plaintiff shall have the burden of proving:

(1) The degree of knowledge or skill possessed or the degree of care ordinarily exercised by physicians . . . licensed to practice in the state of Louisiana and actively practicing in a similar community or locale and under similar circumstances; and where the defendant practices in a particular specialty and where the alleged acts of medical negligence raise issues peculiar to the particular medical specialty involved, then the plaintiff has the burden of proving the degree of care ordinarily practiced by physicians . . . within the involved medical specialty.

(2) That the defendant either lacked this degree of knowledge or skill or failed to use reasonable care and diligence, along with his best judgment in the application of that skill.

(3) That as a proximate result of this lack of knowledge or skill or the failure to exercise this degree of care the plaintiff suffered injuries that would not otherwise have been incurred.

On appeal, a jury's determination is considered under the manifest error standard of review. *Martin v. East Jefferson Gen. Hosp.*, 582 So.2d 1272 (La.1991). We find the decision of the jury that Dr. Burton did not fail to meet his standard of care to be manifestly erroneous, unsupported by the record, and a result of jury confusion.

The jury instructions for the trial included a paragraph which read:

BASED ON THE BASIC RULES OF MEDICINE, DR. BURTON MUST RULE OUT ALL LIFE THREATENING ILLNESSES THAT A PATIENT'S SYMPTOMS COULD HAVE INDICATED. PHYSICIANS ARE OBLIGATED TO RULE OUT THESE IMMINENT, SERIOUS AND LIFE THREATENING CAUSES FIRST. FAILURE TO ELIMINATE THESE CAUSES CAN SUBJECT A PATIENT TO A FORSEEABLE RISK OF HARM AND WOULD FURTHER CONSTITUTE A BREACH OF THE APPLICABLE STANDARD OF CARE.

We find this to be the correct, applicable standard of care, as was indicated by all experts in this case, including Dr. Burton. While Mrs. Broussard presented with symptoms that could be diagnosed as indicative of problems other than cardiac in

nature, the simple fact of this case is that she presented with an abnormal EKG that indicated possible cardiac ischemia. This fact was known by Dr. Burton, and it was his duty to rule out this possible life-threatening condition before discharging her.

Dr. Larry Parker, an expert for the defense, testified that he saw the abnormal T Wave in the EKG done on Mrs. Burton. He testified that this should lead one to consider lateral ischemia. Furthermore, he stated that a positive test such as this has a 75% sensitivity, meaning a positive test is indicative of cardiac ischemia 75% of the time. He testified that differentiating between patients with benign conditions and those with life threatening ones is the most important responsibility in the emergency room. He stated that nausea and vomiting can be associated with cardiac ischemia and that while GI problems are unlikely to kill a patient, cardiac ischemia could kill within 24 hours.

Dr. Steven Hedlesky, another expert for the defense, also testified that nausea and vomiting can be consistent with cardiac ischemia. Mrs. Broussard described her chest pain by clenching her closed fist to her chest. Dr. Hedlesky noted that this is called a “Levine sign,” and is an indication of tightness in the chest that can be associated with cardiac ischemia. He stated that an ST-depression, like the one presented by Mrs. Broussard’s EKG, was a significant abnormality and should be “yielded more weight” when seen without an older EKG to compare it to. Moreover, when presented with a hypothetical patient who had the same family history, complaints of chest pain, and EKG readings as Mrs. Broussard, he stated that the treating emergency room physician should give nitrates and aspirin.

Dr. Burton himself admitted that he had no prior EKG to compare to Mrs. Broussard’s EKG from that morning, and that because of this, he had to consider the fact that the cardiac ischemia could be acute. Dr. Burton also admitted that EKGs

indicating cardiac ischemia require a repeat EKG. He did not perform this second, admittedly required test. He agreed that medical textbooks state that indications of cardiac ischemia require treatment with nitroglycerine, aspirin, oxygen, and eventually morphine if pain does not subsist. He did not take any such action until Mrs. Broussard was administered morphine a mere fifteen minutes before her discharge. She was never given nitroglycerine or aspirin. He stated there was no reason not to give nitroglycerine to Mrs. Broussard, and that if she had responded well to it, he would have admitted her to the hospital. He further testified that had she been admitted to the hospital, she would have had a ninety percent chance of surviving her cardiac ischemia.

While he stated that the results of the blood work and chest x-rays led him to believe Mrs. Broussard was suffering from gastroenteritis, Dr. Burton testified that these tests *did not rule out* cardiac ischemia. In fact, Dr. Burton testified himself that Mrs. Broussard was discharged from the hospital without cardiac ischemia, a potentially life-threatening condition, being ruled out. This is the most damning testimony. Dr. Burton clearly admits that he breached the standard of care in failing to rule out a potentially life threatening condition prior to the discharge of Mrs. Broussard. Accordingly, we find that the jury, clearly confused by the instructions, committed manifest error in failing to find that Dr. Burton failed to meet the standard of care. We further find that this breach contributed to Mrs. Broussard's demise, as she would have had a ninety percent chance of surviving her ischemia had she been admitted to the hospital, according to Dr. Burton. Therefore, we reverse the decision of the jury and render judgment in favor of the Broussards.

DAMAGES

Once it has been determined that the trier of fact is clearly wrong, the appellate court is empowered by LSA-C.C.P. Art. 216[4] to render

any judgment which is just, legal and proper. Courts of appeal may award damages when the trial court initially rejects plaintiff's demands and where the record contains sufficient proof of damages. In making an initial award of damages at the appellate level, we are not limited to an award of either the lowest or highest amount we would affirm. Instead, we set the award in an amount which is just compensation for the damages revealed by record.

Gordon v. Willis Knighton Med. Ctr., 27,044 (La.App. 2 Cir. 6/21/95), 661 So.2d 991, 999, *writs denied*, 95-2776, 95-2783, (La. 1/26/96), 666 So.2d 679.

Louisiana Civil Code Article 2315.1 grants to designated beneficiaries a cause of action to recover the damages that a person suffered and would have been entitled to recover from a tort-feasor, if the person had lived. The survival action permits recovery only for the damages suffered by the victim from the time of the injury to the moment of death. The elements of damage for the survival action are pain and suffering, loss of earnings, and other damages sustained by the victim up to the moment of death. *Pierre v. Lallie Kemp Charity Hosp.*, 515 So.2d 614, 618 (La.App. 1 Cir.), *writ denied*, 515 So.2d 1111 (La.1987); La.Civ. Code art. 2315.1. Fright, fear, or mental anguish while an ordeal is in progress is also legally compensable. *Dawson v. James H. Stuart and Deaton, Inc.*, 437 So.2d 974 (La.App. 4 Cir.1983).

The record establishes that Mrs. Broussard feared for her cardiac health due to her extreme family history of the disease. She was extremely stressed during her stay in the emergency room, vomiting and suffering from diarrhea. She agonized in this fear, suffering from chest pain for over three hours. The Broussards ask for \$50,000 in their survival action for this pain and anguish, and we find that to be an appropriate award. See *Gordon*, 661 So.2d 991.

The Broussards also seek damages for the wrongful death of Mrs. Broussard. The elements of damage for wrongful death are loss of love and affection, loss of services, loss of support, medical expenses, and funeral expenses. *Todd v. Sauls*,

94-10 (La.App. 3 Cir. 12/21/94), 647 So.2d 1366, *writs denied*, 95-0206, 95-0219 (La. 3/24/95), 651 So. 2d 289. The record establishes medical expenses in the amount of \$2,665.16 and funeral expenses in the amount of \$10,956.94. These amounts are hereby awarded to the Broussards. Additionally, Mrs. Broussard was working full time as a clerk at a drug store at the time of her death. Dr. Charles Bettinger found the loss of support Mr. Broussard suffered as a result of her death to be \$178,812. This amount is also awarded to Mr. Broussard.

Finally, the record establishes close, affectionate relationships between Mrs. Broussard and both her husband and son. Mr. and Mrs. Broussard were married for forty-one years and had a loving union. He became depressed and withdrawn after her death. She was equally active and important in Keith's life, as well as those of his children and grandchildren. We hereby award Earnest Broussard \$128,782.95 in wrongful death damages and Keith Broussard \$128,782.95 in wrongful death damages.

The trial court also taxed the Broussards with the costs of the trial and expert witness fees in the amount of \$500 each for the testimonies of Drs. Parker and Hedlesky. In accordance with our other findings in this case, we also reverse the award of these costs.

DECREE

In accordance with the above reasons, the judgment of the trial court is hereby reversed. Judgment is hereby rendered in favor of the Plaintiffs as follows: \$128,782.95 in wrongful death damages for Ernest Broussard; \$128,782.95 in wrongful death damages for Keith Broussard; \$50,000 for the survival action; \$178,812 in loss of support and services; \$10,956.94 in funeral expenses; and \$2,665.16 in medical expenses. All awards are made with legal interest thereon from

the date of judicial demand until paid. Costs of the trial, expert witness fees, and of this appeal are assessed against Dr. John Burton and Truck Insurance Exchange Company.

REVERSED AND RENDERED.