NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 CA 2141

ROBERT BUIE AND LORNA BUIE

VERSUS

DR. JOHN C. BEATROUS, M.D. AND
LOUISIANA MEDICAL MUTUAL INSURANCE COMPANY

Judgment Rendered: May 6, 2011

* * * * * * *

Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 2008-10229

Honorable Patricia T. Hedges, Judge

* * * * * * *

Jacques F. Bezou
Christine Y. Voelkel
Covington, LA

Attorneys for
Plaintiffs – Appellants
Robert and Lorna Buie

Deborah Deo Gracias Trahan
Emily G. Couvillon
Covington, LA

Attorneys for
Defendants – Appellees
Dr. John C. Beatrous and
La. Medical Mutual Ins.
Co.

* * * * * *

BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

WELCH, J.

The plaintiffs-appellants, Robert Buie and his wife, Lorna Buie, appeal a judgment on a jury verdict dismissing their medical malpractice claims against the defendants, Dr. John C. Beatrous and his professional liability insurer, Louisiana Medical Mutual Insurance Company (LAMMICO). The Buies also appeal the trial court's denial of their motion for judgment notwithstanding the verdict (JNOV) or alternatively, for a new trial. We affirm in compliance with Uniform Rules—Courts of Appeal, Rule 2-16.1(B).

On February 15, 2005, Mr. Buie underwent endoscopic sinus surgery to drain his sinuses and to remove nasal polyps. The surgery was performed by Dr. Beatrous, an otolaryngologist (commonly referred to as an "ENT" or an "ear, nose, and throat" doctor). Following surgery, Mr. Buie suffered a loss of vision in his left eye. Dr. Beatrous then consulted Dr. Kyle Acosta, an ophthalmologist. Dr. Acosta evaluated Mr. Buie and initiated medical treatment, which included administering high-dose steroids. Following Mr. Buie's discharge from the hospital, Dr. Acosta continued to treat Mr. Buie for his vision loss, and he also consulted with Dr. James Diamond, an ophthalmologist who specializes in the retina and vitreous. However, Mr. Buie's vision to his left eye has never been (and never will be) restored.

As a result of Mr. Buie's injury, a complaint was filed with the Division of Administration, and in accordance with La. R.S. 40:1299.47, a medical review panel was convened, which was comprised of three otolaryngologists—Drs. A. Foster Hebert, Virginia Bringaze, and M. Lisa Leonard—and the attorney chairman. On November 13, 2007, the medical review panel issued a written and signed opinion that the "evidence **does** support the conclusion that [Dr. Beatrous] failed to meet the applicable standard of care...."

Thereafter, on January 14, 2008, the Buies initiated the instant medical malpractice action against Dr. Beatrous and LAMMICO. Following a five-day jury trial that ended on December 5, 2008, the jury rendered a unanimous verdict in favor of Dr. Beatrous, finding that he did not breach the standard of care for otolaryngologists in his surgery of Mr. Buie. By judgment signed on December 15, 2008, the trial court entered judgment on the jury verdict and dismissed the Buies' claims against Dr. Beatrous and LAMMICO. The Buies filed a motion for JNOV or alternatively for a new trial, which the trial court denied. From both the judgment entered on the jury verdict and the judgment denying the motion for JNOV and new trial, the Buies have appealed.

On appeal, the Buies essentially argue that: (1) the jury's factual finding that Dr. Beatrous did not breach the standard of care in his treatment of Mr. Buie was manifestly erroneous; (2) the trial court erred in denying the Buies' motion for JNOV or alternatively, their motion for new trial; (3) the trial court erred in allowing the three doctors that served on the medical review panel to testify at trial; and (4) the trial court erred by failing to instruct the jury regarding the doctrine of *res ipsa loquitur*.

A plaintiff in a medical malpractice action is required to establish: (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 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; and (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. See La. R.S. 9:2794(A). Summarizing, at trial the plaintiff must establish the standard of care applicable to the doctor, a violation by the doctor of that standard of care, and a causal connection between the doctor's alleged negligence and the plaintiff's injuries. **Pfiffner v. Correa**, 94-0924, 94-0963, 94-0992, pp. 7-8 (La. 10/17/94), 643 So.2d 1228, 1233.

It is well-settled in Louisiana law that findings of fact may not be reversed on appeal absent manifest error or unless clearly wrong. **Stobart v. State, through Department of Transportation and Development,** 617 So.2d 880, 882 (La. 1993). The reviewing court must do more than just simply review the record for some evidence that supports or controverts the trial court's findings; it must instead review the record in its entirety to determine whether the trial court's findings were clearly wrong or manifestly erroneous. *Id.* The issue to be resolved by a reviewing court is not whether the trier of fact was right or wrong, but whether the fact finder's conclusion was a reasonable one. *Id.* If the findings are reasonable in light of the record reviewed in its entirety, an appellate court may not reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. **Stobart**, 617 So.2d at pp. 882-883. The manifest error standard demands great deference to the trier of fact's findings; for only the trier of fact can be aware of the variations in demeanor or tone of voice that bear so heavily on the listener's understanding a belief in what is said. **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989). Thus, where two permissible views of the evidence exist, the fact finder's choice between them cannot be manifestly erroneous or clearly wrong. *Id.*

In this case, the jury's finding that Dr. Beatrous did not breach the applicable standard of care with regard to his treatment of Mr. Buie was reasonably supported by the expert opinion testimony of Drs. Hebert and Bringaze.[1] Although the plaintiffs' expert, Dr. Harry Allen Hamburger, an ophthalmologist, expressed his opinion that Dr. Beatrous breached the standard of care because Mr. Buie's loss of vision in the left eye was caused when Dr. Beatrous negligently severed the optic nerve, the expert opinions of Drs. Acosta and Diamond, as well as the diagnostic testing that Dr. Diamond performed on Mr. Buie, suggested otherwise. Thus, the jury was faced with two different, yet reasonable and permissible views of the evidence, and its choice between them cannot be clearly wrong. See **Rosell**, 549 So.2d at 844. Therefore, after a thorough review of the record, we find that the jury's conclusion was reasonable and that its factual finding that Dr. Beatrous did not breach the applicable standard of care for otolaryngologists in his

---

[1] Although we note that Drs. Hebert, Bringaze, and Leonard were the members of the medical review panel that initially found in favor of the plaintiffs, the opinion made the following findings:

1. There were proper pre-op procedures.
2. The consent was properly given.
3. There was prompt and proper removal of the packing.
4. The ophthalmologist was properly and timely consulted.
5. There was post-operative bleeding in the orbit that was not caused by the packing.
6. There was a compromise of circulation to the eye; the cause of which was not determinable in the record.
7. There was evidence of hematoma in the orbit.
8. The steroids were fully and appropriately administered under the circumstances.
9. Diabetes was not medically induced or exacerbated and is a non-issue as the patient did not reveal his prior history to the surgeon.
10. Cortisone was properly administered under the circumstances.
11. The physician should have performed a lateral canthotomy at the onset of the patient's complaint. The performance of same, however, may not have altered the outcome to the patient.

Based on these factual findings, it appears that the medical review panel's opinion that Dr. Beatrous failed to meet the applicable standard of care with regard to his treatment of Mr. Buie was based solely on its determination that Dr. Beatrous should have performed a lateral canthotomy at the onset of Mr. Buie's complaints. However, during the trial of this matter and based on a consensus among *all* of the experts at trial after further review of the matter, the plaintiffs stipulated that a lateral canthotomy was not medically indicated.

treatment of Mr. Buie was not manifestly erroneous. Furthermore, in light of the quality and weight of the evidence supporting the conclusion that Dr. Beatrous did not breach the applicable standard of care, we find that the trial court properly denied the motion for JNOV and did not abuse its discretion in denying the motion for a new trial.

With regard to allowing the members of the medical review to testify at trial, we find no merit to the Buies' assignment of error. First and foremost, we note that pursuant to La. R.S. 40:1299.47(H), either party has the right to call any member of the medical review panel as a witness at trial. See also **Medine v. Roniger**, 2003-3436, pp. 7-10 (La. 7/2/04), 879 So.2d 706, 712-713. In fact, it was the plaintiffs who called Dr. Hebert as an expert witness at the trial of this matter. Thus, any objection to his testimony was waived. Although the Buies further contend that the members of the medical review should have been disqualified from testifying because they improperly attempted to alter or amend the medical review panel opinion after the medical review panel proceedings had concluded, we note that the altered or amended opinions were properly excluded from evidence by the trial court. To the extent that the panel members changed their opinion at trial as to whether Dr. Beatrous breached the standard of care, individually, they were entitled to do so and the plaintiffs were afforded the opportunity to cross-examine the individual panel members as to the fact that they changed their opinions and to raise the issue of their credibility in this regard before the jury. Accordingly, we do not find that trial court abused its discretion by allowing the members of the medical review panel to testify at trial.

Lastly, we find that the trial court properly refused to instruct the jury regarding the doctrine of *res ipsa loquitur*. The doctrine of *res ipsa loquitur* permits the inference of negligence from the surrounding circumstances.

Broussard v. Voorhies, 2006-2306, p. 6 (La. App. 1st Cir. 9/19/07), 970 So.2d 1038, 1043, writ denied, 2007-2052 (La. 12/14/07), 970 So.2d 535. *Res ipsa loquitur* is not a substantive legal tenet, but rather an evidentiary doctrine under which a tort claim may be established by circumstantial evidence. *Id.* A jury should only be instructed on the doctrine of *res ipsa loquitur* if the trial court determines that reasonable minds could not differ on the presence of **all three** of the following criteria for its use: (1) the injury is of the kind which does not ordinarily occur in the absence of negligence on someone's part; (2) the evidence sufficiently eliminates other more probable causes of the injury, such as the conduct of the plaintiff or of a third person; and (3) the alleged negligence of the defendant must be within the scope of the defendant's duty to the plaintiff. **Linnear v. CenterPoint Entergy Entex/Reliant Energy**, 2006-3030, p. 10 (La. 9/5/07), 966 So.2d 36, 44. If reasonable minds could not conclude that all three criteria are satisfied, then the legal requirements for the use of *res ipsa loquitur* are not met, and consequently, the jury should not be instructed on the doctrine. *Id.*

Applying the applicable criteria, we find that that the trial court properly rejected the plaintiffs' request for a *res ipsa loquitur* instruction. This case does not meet the first requirement because several of the experts, including Dr. Stephen Meyer, an ophthalmologist, opined that loss of vision following ophthalmological surgery can ordinarily occur in the absence of negligence or through no fault of the surgeon. We also note that in advance of surgery, Mr. Buie executed a consent form which reflected numerous risks associated with the surgery, including a loss of vision. Negligence may not be inferred when the injury is a recognized complication that can occur in the absence of negligence. **Lindner v. Hoffman**, 2004-1019, p. 5 (La. App. 4th Cir. 1/12/05), 894 So.2d 427, 431. Thus, because reasonable minds could not

differ on the finding that loss of vision from surgery can occur in the absence of negligence, the trial court properly decided not to instruct the jury regarding this doctrine.

Accordingly, the trial court's December 15, 2010 judgment incorporating the jury's verdict and the December 15, 2010 judgment denying the motion for JNOV or new trial are affirmed in compliance Uniform Rules—Courts of Appeal, Rule 2-16.1(B). All costs of this appeal are assessed to the plaintiffs-appellants, Robert and Lorna Buie.

AFFIRMED.