

SUPREME COURT OF LOUISIANA

No. 01-C-1517 c/w 01-C-1519 c/w 01-C-1521

LOUIS COLEMAN, INDIVIDUALLY AND AS FATHER OF LOUIS

FRANK COLEMAN

versus

DR. RICHARD DENO, DR. IVAN SHERMAN, AND JOELLEN SMITH

HOSPITAL

KNOLL, Justice, dissenting in part.*

I concur with the majority opinion finding that the lower courts erred in finding an intentional tort of "patient dumping." However, I disagree with the majority's conclusion that there was no manifest error in the jury's finding of malpractice against Dr. Deno. To the contrary, the record clearly supports that Dr. Deno was not negligent in his medical treatment of Coleman, and further, Coleman's allegations against Dr. Deno should be dismissed for lack of causation.

Plaintiffs' experts testified in a *conclusory* fashion that the need to amputate Mr. Coleman's arm resulted from Dr. Deno's fault. A review of the record indicates that those experts, while they conceded the possibility that Coleman's infection was the result of intravenous ("IV") drug abuse, never sufficiently explained the pathogenesis that left the muscles in his arm dead. Furthermore, plaintiffs' experts never

* Retired Judge Robert L. Lobrano, assigned as Justice *Pro Tempore*, participating in the decision.

satisfactorily addressed how the administration of antibiotics by Dr. Deno during the period when Coleman was under Dr. Deno's care *would* (not "could") have changed the ultimate condition of Coleman's arm. Stated simply, Coleman failed to prove the element of causation.

Verily, by spreading the net of his allegations far and wide for the responsibility of his compartment syndrome which testimony showed developed within mere hours, Coleman had given himself a somewhat unique causation case to prove. Despite the short window of time in which a compartment syndrome develops, Coleman sought to fault both Dr. Sherman, who saw Coleman on June 7 when he presented with no complaint of arm pain and relayed no history of being injected with IV drugs, and Dr. Deno, who saw Coleman on June 8. However, Coleman was not diagnosed with a compartment syndrome until June 11. It was *essential* for Coleman to provide causation evidence that connected his compartment syndrome of June 11 to Dr. Deno who last saw Coleman on June 8. *See Pfiffner v. Correa*, 94-0294 (La. 10/17/94), 643 So. 2d 1228, 1229 (holding that "[a] plaintiff must also establish, with adequate evidence, however, a causal connection between a defendant's negligence and the plaintiff's injuries.") This causation evidence is woefully lacking from the record.

Not implying any disparagement of the impressive qualifications of Coleman's expert, Dr. Crane, his fields of expertise were limited to "infectious diseases and internal medicine." It must be recalled that any action or inaction by Dr. Deno was attenuated in both time and place from the onset of the compartment syndrome,¹ and the testimony of Dr. Crane as an infectious diseases specialist was speculative in the sense that Coleman had to do more than connect Dr. Deno with the loss of Coleman's

¹ While Dr. Deno treated Coleman at JoEllen Smith Hospital, an x-ray at Charity Hospital when he was admitted revealed that there was no gas in the arm tissues.

arm. Coleman also had to provide the jury with a basis of opinion by which it could distinguish between any fault by Dr. Deno and Charity Hospital. *See* LA. CIV. CODE art. 2323. While not his burden, Dr. Deno provided the basis for the jury to draw this distinction. Of all the experts who were not involved in treating Coleman at the time of illness, Dr. Deno's expert, Dr. Nichols, an expert in surgical infectious diseases, alone provided a sufficient factual basis from which the jury could distinguish any fault among the several treating physicians, fault that was attenuated according to Coleman's own allegations. Dr. Nichols testified that Dr. Deno properly diagnosed Coleman as having cellulitis and that even when arriving at Charity, Coleman had no limb-threatening sepsis.

It is significant that Coleman's surgeon, Dr. Redmond, testified that Coleman's condition was the result of three specific strains of strep bacteria and no fault of Dr. Deno. Dr. Redmond, as the surgeon who surgically examined Coleman's arm, was the one person who could best evaluate how long before the surgery Coleman had developed the compartment syndrome. Dr. Redmond testified that based on the condition of the tissues he was examining as he explored the arm, the compartment syndrome began merely hours earlier. The record evidence clearly establishes that the compartment syndrome began on June 11, 1988, and the ultimate cause of Coleman's condition did not develop until after Coleman left Dr. Deno's care on June 8, 1988. Additionally, Dr. Redmond testified that even if Dr. Deno had started antibiotics while Coleman was under Dr. Deno's care, that would not have changed the course of Coleman's condition.

Notwithstanding, Coleman builds much of his own causation argument upon his own testimony that Dr. Deno told him that it was acceptable for him to delay reporting to Charity Hospital so he could go home and gather belongings for his hospital stay.

Even if one accepts as true Coleman's assertion that his delay in reporting was critical in causing the death of his arm muscles, his causation argument begins to unravel. Under Coleman's analysis of delay=causation, his own decision to delay reporting to Charity Hospital by some two and a half hours when he signed a statement acknowledging Dr. Deno's orders to go "directly" to Charity Hospital a mere ten to fifteen minutes away, was a superseding cause of his condition. Indeed, Coleman's emphasis on delay=causation underscores that Dr. Deno's care and treatment were blameless.

Although there is arguably a conflict between Coleman's self-serving oral testimony and the written order to go "directly" to Charity which Coleman signed, any conflict lies completely within the element of causation for the delay, an element which Coleman had the burden to prove. Stated differently, this is not even a case where on the one hand Coleman testified that he was told that he could delay his reporting but on the other hand Dr. Deno testified that he told him otherwise. Even in such a situation, it would have been manifestly erroneous for the jury to conclude that Dr. Deno caused the delay, because the conflict between the testimony of the parties would be resolved against Coleman by his written acknowledgment. *See Rosell v. Esco*, 549 So.2d 840, 844-45 (La. 1989) (holding that "[w]here 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, the court of appeal may well find manifest error or clear wrongness based upon a credibility determination.")

This is a case whereby Coleman's signature recognizing Dr. Deno's order to go immediately to Charity, Coleman acknowledged that he was ordered not to delay, and he later seeks to undermine his own acknowledgment. Under this court's test for

finding manifest error, because Coleman is essentially contradicting himself, his delay=causation argument is even more “internally inconsistent or implausible on its face.” *See id.*

While any one of the flaws in Coleman’s arguments and his attempts to carry his burden of proof shows that the jury’s verdict against Dr. Deno is insupportable, when the case is examined as a whole, one cannot realistically ignore that the verdict based upon these manifold flaws constitutes manifest error. Perhaps if the jury had found a modicum of fault on the part of Charity Hospital, the institution which Coleman himself had argued bore responsibility for failing to timely provide a surgical consult,² it might be possible to infer that the jury had reached a reasoned decision. Instead, the jury’s finding of no fault by Charity on such clear facts to the contrary compels the conclusion that the numerous inflammatory references by Coleman to patient dumping skewed the outcome of the verdict. In short, the jury’s allocation of fault, in both its positive and negative findings thereof, demonstrates that its finding of fault against Dr. Deno was based solely upon the patient dumping theory that this court today has resoundingly rejected.

Thus, finding both that plaintiffs failed to prove causation and that the apportionment of fault to Dr. Deno was based upon an impermissible theory of recovery, I conclude that the jury verdict of malpractice by Dr. Deno was manifestly erroneous. For these reasons, I respectfully dissent.

² Having settled with Charity Hospital, Coleman downplayed any fault of Charity. However, the settlement did not relieve the jury of its responsibility of apportioning fault to Charity. *See* LA. CIV. CODE art. 2323.