

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2004 CA 2644R

JASON WILLIAM HAMILTON AND CATHERINE HAMILTON

VERSUS

**CAREY E. WINDER, M.D. AND THE ORTHOPEDIC CLINIC, INC.
(A PROFESSIONAL MEDICAL CORPORATION)**

Judgment Rendered: MAY - 4 2007

On Appeal from the Nineteenth Judicial District Court
In and For the Parish of East Baton Rouge
State of Louisiana
Docket No. 492,352

Honorable R. Michael Caldwell, Judge Presiding

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Baton Rouge Orthopedic Clinic, Inc.

BEFORE: WHIPPLE, McCLENDON AND WELCH, JJ.

McCLENDON, J.

This medical malpractice matter has been remanded from the Louisiana Supreme Court following its per curiam opinion reversing our prior decision, which vacated the trial court's judgment and remanded the matter for a new trial. We had determined that the trial court summarily removed a tardy juror without first determining his unavailability. **Hamilton v. Winder**, 04-2644 (La.App. 1 Cir. 2/10/06), 924 So.2d 267. The supreme court determined that the removal of the juror was within the trial court's discretion to control the proceedings at trial, reinstated the trial court's judgment, and remanded the matter to this court for consideration of the remaining assignments of error. **Hamilton v. Winder**, 06-0994 (La. 6/16/06), 931 So.2d 358. Finding no merit in appellants' other assignments of error, we affirm.

FACTS AND PROCEDURAL HISTORY

On February 12, 2000, while playing with the Baton Rouge Kingfish hockey team in Lafayette, the plaintiff, Jason Hamilton, suffered an elbow laceration. The cut required three stitches and was sutured at the hockey game by the attending physician of the opposing team, the Lafayette Ice Gators. Mr. Hamilton was also given antibiotics by said physician. Upon his return to Baton Rouge, Mr. Hamilton complained of swelling and pain in the elbow, and was seen by the defendant, Dr. Carey Winder, an orthopedic surgeon and the Kingfish team physician. Dr. Winder, noting the possibility of infection, drew fluid from the olecranon bursal sac in Mr. Hamilton's elbow and ordered a cell count and culture on the fluid drawn. The result of the culture was negative, and Dr. Winder diagnosed Mr. Hamilton with post-injury bursitis. Mr. Hamilton continued to experience pain and swelling despite treatment by Dr. Winder. Eventually, Dr. Winder performed surgery

on Mr. Hamilton's left elbow on March 21, 2000, and repaired a triceps tendon avulsion. Mr. Hamilton remained under the care of Dr. Winder and continued antibiotic treatment, but had continued complaints of pain and tenderness. On May 5, 2000, surgery was again performed by Dr. Winder for debridement of infection in the elbow. The infection was identified as staphylococcus aureus (staph). Because of said staph infection, Mr. Hamilton was placed on intravenous antibiotics. Subsequently, Mr. Hamilton sought treatment with an infectious disease specialist, Dr. Candace Warner. The infection eventually resolved while Mr. Hamilton was under the care of Dr. Warner and Dr. Winder.

Following his treatment, Mr. Hamilton filed a medical complaint against Dr. Winder and Dr. Winder's employer, Baton Rouge Orthopedic Clinic, LLC (known and referred to as The Orthopedic Clinic, Inc. (A Professional Medical Corporation) (the orthopedic clinic), alleging negligent treatment and diagnosis which ruined his hockey career. On December 6, 2001, a medical review panel convened, but was continued to allow for the submission of additional evidence. Following the admission of the additional medical records, the panel, on January 21, 2002, concluded that the evidence did not support the allegations that defendants failed to meet the appropriate standard of care.

On February 13, 2002, Mr. Hamilton and Catherine Hamilton filed the present action against Dr. Winder and the orthopedic clinic, alleging that Dr. Winder failed to timely and adequately diagnose and treat Mr. Hamilton's injury.¹ Specifically, plaintiffs alleged that defendants failed to prescribe antibiotic treatment for Mr. Hamilton or prescribed inadequate antibiotic

¹ At the time suit was filed, Catherine Hamilton was Mr. Hamilton's spouse although a petition for divorce was filed and they were separated.

treatment; failed to order cultures and cell counts as necessary; failed to order timely cultures; repaired Mr. Hamilton's tendon triceps avulsion without his consent; and failed to make an infectious disease referral once the staph infection was discovered. Plaintiffs contended that defendants' actions were below the standard of care required of them, which prolonged Mr. Hamilton's elbow infection, and resulted in a buy-out of Mr. Hamilton's contract to play professional hockey and an inability to secure any contracts with National Hockey League (NHL) teams. Mr. Hamilton sought damages including past, present, and future pain and suffering, loss of earning capacity, disability, medical and pharmaceutical expenses, loss of consortium with his wife, loss of enjoyment of life and inconvenience, and loss of income and/or earning capacity. Mrs. Hamilton also sought damages for the loss of consortium with her husband and for loss of enjoyment of life and inconvenience.

Following a trial on the merits, a jury verdict was returned on May 25, 2004, in favor of the defendants, and judgment was signed on June 16, 2004. Plaintiffs appealed.

ASSIGNMENTS OF ERROR

On review in this appeal are the following assignments of error:

1. The trial court erred in denying plaintiffs' **Batson** challenge to defendants' use of peremptory challenges to dismiss African-American jurors.
2. The trial court abused its discretion when it allowed speculative and prejudicial testimony by Dr. Winder of habit in the absence of adequate foundation of specific instances of his habit contrary to LSA-C.E. art. 406.
3. The trial court erred in qualifying Dr. Winder as an expert in his own malpractice case.
4. The jury could not have reasonably concluded from the evidence presented that Dr. Winder did not breach the standard of care owed to Jason Hamilton.

5. The trial court erred in failing to allow Dr. Candace Warner to testify as to the standard of care in the treatment of infections.

6. The trial court erred when it allowed Mr. Hansis to testify as an expert and to testify concerning unspecified alleged off-ice activities of Mr. Hamilton.

7. The trial court erred in *sua sponte* dismissing the claim of Catherine McDaniel Hamilton.

DISCUSSION

Plaintiffs' Batson Challenge

In this assignment of error, plaintiffs assert that the trial court erred in finding that the defendants provided racially neutral explanations for the use of their peremptory challenges to exclude three African-American women from serving on the jury.

In **Batson v. Kentucky**, 476 U.S. 79, 89, 106 S.Ct. 1712, 1719, 90 L.Ed.2d 69 (1986), the Supreme Court held that the Equal Protection Clause of the United States Constitution prohibits engaging in purposeful discrimination on the grounds of race in the exercise of peremptory challenges. **Batson** was made applicable to civil trials in **Edmonson v. Leesville Concrete Co., Inc.**, 500 U.S. 614, 630-31, 111 S.Ct. 2077, 2088, 114 L.Ed.2d 660 (1991). **Alex v. Rayne Concrete Service**, 05-1457, p. 8 n.11 (La. 1/26/07) ___ So.2d ___, ___.

As our supreme court has explained:

A defendant's **Batson** challenge to a peremptory strike requires a three-step inquiry. First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge on the basis of race. Second, if the showing is made, the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question. Although the prosecutor must present a comprehensive reason, the second step of this process does not demand an explanation that is persuasive, or even plausible; so long as the reason is not inherently discriminatory, it suffices. Third, the court must then determine whether the defendant has carried his burden of

proving purposeful discrimination. This final step involves evaluating the persuasiveness of the justification proffered by the prosecutor, but the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.

State v. Snyder, 98-1078, p. 7 (La. 9/6/06), 942 So.2d 484, 489, quoting **Rice v. Collins**, 546 U.S. 333, ___, 126 S.Ct. 969, 973-74, 163 L.Ed.3d 824 (2006); **Rayne Concrete Service**, 05-1457 at p. 8, ___ So.2d at ___.

Because a trial court's findings pertaining to purposeful discrimination turn largely on credibility evaluations, such findings should be entitled to great deference by a reviewing court. Accordingly, a trial court's rulings regarding discriminatory jury selection are entitled to great deference and will not be overturned absent a finding of manifest error. **State v. Elie**, 05-1569, p. 5 (La. 7/10/06), 936 So.2d 791, 795; **Rayne Concrete Service**, 05-1457 at p. 8, ___ So.2d at ___.

During the jury selection process in this matter, defense counsel used peremptory challenges to exclude three African-American women, Laurianne Toney, Tonya Coleman, and Tykoboomb Hill, from the jury. With the exclusion of the third black female, plaintiffs' counsel objected, making a **Batson** challenge. The trial court, without expressly ruling on whether plaintiffs had made a prima facie showing of intentional discrimination, asked defendants' counsel for an explanation for the challenges. After hearing the explanations, the trial court "accepted it [as] a non-racial explanation."

Because the voir dire was recorded with only a cassette recorder, portions of the tape are inaudible, and the transcript is incomplete. However, the record shows the following. Ms. Toney stated on voir dire that she was a 41-year-old black female and married. She stated that she

processes medical claims for Medicare. When asked if she had a bias about medical malpractice in general, Ms. Toney responded:

Ms. Toney: Actually, I don't because, I guess, I see some (inaudible) that goes on. But the claims of services that are not rendered a lot of times to the elderly, and you have the (inaudible) resolution. I believe (inaudible) if they can prove that it's not negative on the doctor's part, then I could award in this case. Then if there was something on the plaintiff's side where he was in error in not seeking medical care (inaudible) or in enough time, then (inaudible) based on that.

Ms. Ashman: Okay

Ms. Toney: - - (inaudible) as far as malpractice.

Ms. Coleman stated on voir dire that she was a single 30-year-old black female with four children and that she was employed as a housekeeper. When asked if anyone would have a problem serving on what would probably be a week-long jury due to personal commitments, Ms. Coleman responded that her daughter's graduation was the next morning at nine o'clock and that they were leaving for Florida the day after graduation.

Ms. Hill stated that she was an unemployed single black female with children. She stated that she had previously been employed as a customer service representative for Chevron for eight years. When asked to provide the reason for striking Ms. Hill, defense counsel responded:

She is unemployed. And, Your Honor, we would prefer to have someone that is employed to place a value on a life. The other jurors that we struck have - - I want to respectfully invite the court's attention that the plaintiff struck two black jurors in a row. We struck one of the other jurors because of - - (inaudible) fraud and doctors cheating. And the first juror that we struck was somebody worked on - - (inaudible) - - and they couldn't make choices. But in reference - - (inaudible).

Thereafter, the court accepted the explanation as a non-racial explanation. Based on the record before us, we agree. Despite the incomplete transcript, nothing indicates that defendants employed purposeful racial discrimination in the use of their peremptory challenges.

According great deference to the trial court's ruling, we find no manifest error. This assignment of error is without merit.

Habit Testimony of Dr. Winder

During discovery, plaintiffs propounded to defendants a set of interrogatories, which included a request regarding the antibiotics given or prescribed to Mr. Hamilton. Defendants responded with a list of prescriptions, as indicated in Dr. Winder's office records, the hospital records, and the pharmacy records. Defendants further answered that "plaintiff may also have been given samples of antibiotics for which no prescription was written." Thereafter, but prior to trial, plaintiffs filed a motion in limine seeking to exclude testimony of Dr. Winder regarding his dispensing of samples of medication for which no prescription was written. Plaintiffs contended the testimony would be speculative, irrelevant and overly prejudicial. The trial court's ruling on the motion was deferred to the merits.

On appeal, plaintiffs contend that the trial court erred in allowing Dr. Winder to testify regarding his usual practice of prescribing medication to his patients. They assert that the trial court incorrectly allowed Dr. Winder to testify that he must have given antibiotic samples to Mr. Hamilton because it was his habit to do so. Plaintiffs also contend that the trial court erred in allowing Dr. Winder to testify as to his usual practice regarding the removal of surgical drains. In both situations, plaintiffs assert that it was error to allow such testimony.

However, this assertion is contrary to LSA-C.E. art. 406, which provides:

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove

that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice. The evidence may consist of testimony in the form of an opinion or evidence of specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine.

Dr. Winder testified that it was his usual practice to give Kingfish players samples of antibiotic and anti-inflammatory medications whenever possible.² He stated that the players were on a limited budget, and by giving them samples, the players were not out-of-pocket for the expense while waiting for reimbursement. Typically, Dr. Winder testified, the players did not have to buy their medication. Dr. Winder testified that while he did not have specific recollections from four years earlier, based on a review of his records and how he typically handled a situation, he believed he gave Mr. Hamilton samples of antibiotics.

Plaintiffs also objected to Dr. Winder's testimony regarding his practice of removing a drain from a surgical site within a week of surgery. The Hamiltons indicated that the surgical drain put in place after Mr. Hamilton's first surgery was not removed for more than a week. Dr. Winder testified that he would never wait a week to remove a drain. He also testified that whenever a drain was in place, the patient was always kept on antibiotics.

As plaintiffs contend, a major issue in this matter is what antibiotics were prescribed or given to Mr. Hamilton and when they were prescribed or given. Under LSA-C.E. art. 406, Dr. Winder's testimony was relevant to show his usual practice of dispensing sample medications to Kingfish players and that he dispensed antibiotics to Mr. Hamilton in accordance with

² Dr. Winder testified that every year, he was able to get one of the drug representatives to give him enough samples of anti-inflammatory medication to supply the team, which he would keep in the training room. Dr. Winder stated, however, that the samples of antibiotic medication given to him were kept in his office and not in the training room.

this practice. Dr. Winder's testimony was also relevant to show his practice regarding drain removal and that he followed this practice, despite a lack of documentation with regard to the removal of Mr. Hamilton's drain. Plaintiffs' attack on Dr. Winder's testimony goes to the weight of the evidence, not the admissibility of the testimony. As the trier of fact, the jury was free to accept or reject, in whole or in part, the testimony of any witness. **Scoggins v. Frederick**, 98-1814, 98-1815, 98-1816, p. 15 (La.App. 1 Cir. 9/24/99), 744 So.2d 676, 687, writ denied, 99-3557 (La. 3/17/00), 756 So.2d 1141. It was up to the jury, as the fact finder that determines credibility, to accept either the testimony of Dr. Winder or that of the Hamiltons regarding these issues. See **Brandt v. Engle**, 00-3416, p. 11 (La. 6/29/01), 791 So.2d 614, 621. The trial court did not abuse its discretion in admitting the testimony of Dr. Winder as to his routine practices.

Testimony of Dr. Winder as an Expert

In this assignment of error, plaintiffs claim that the trial court erred in allowing Dr. Winder to testify as an expert on his own behalf, since he was a defendant in the case and his testimony was unreliable and overly prejudicial. The trial court allowed Dr. Winder to testify as an expert in the field of orthopedic surgery.

With regard to the initial part of plaintiffs' argument, LSA-R.S. 9:2794D sets forth the criteria necessary for a physician to testify as an expert witness in a medical malpractice action. Of particular importance in this matter is Subsection D(5), which provides that "[n]othing in this Subsection shall be construed to prohibit a physician from qualifying as an expert solely because he is a defendant in a medical malpractice claim." Plaintiffs' assertion that the trial court erred in qualifying Dr. Winder as an expert merely because he was a defendant in the case is without merit.

Plaintiffs additionally argue, however, that Dr. Winder's testimony was unreliable and unduly prejudicial. Louisiana Code of Evidence article 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Also, Louisiana Code of Evidence article 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time.

Whether evidence is relevant is within the discretion of the trial court, and its ruling will not be disturbed on appeal in the absence of a clear abuse of his discretion. **Hunter v. State ex rel. LSU Medical School**, 05-0311, p. 3 (La.App. 1 Cir. 3/29/06), 934 So.2d 760, 763, writ denied, 06-0937 (La. 11/3/06), 940 So.2d 653.

Plaintiffs claim that Dr. Winder's testimony did not fit within these guidelines as it was not reliable and, even if relevant, it was overly prejudicial in that his expert testimony was given a stamp of approval by the court. Thus, they assert, the trial court erred when it permitted Dr. Winder to interpret the treatment of Mr. Hamilton by Dr. Warner, the infectious disease specialist.

The record shows that Dr. Winder was offered as an expert after plaintiffs objected to his testimony translating medical terms and abbreviations used in Dr. Warner's medical reports. Dr. Winder was testifying as a fact witness when he was asked to "read and just translate the medical terminology" in the medical records of Dr. Warner. Plaintiffs objected to the testimony as hearsay. The objection was sustained, at which

time Dr. Winder was offered and accepted as an expert witness. Thereafter, Dr. Winder translated the medical shorthand in Dr. Warner's report and additionally testified as to Dr. Warner's course of treatment for Dr. Hamilton as provided in her medical records. Dr. Winder's testimony was limited to translating medical terms and abbreviations and reading Dr. Warner's course of treatment for Mr. Hamilton. Based on our review of the record, we find no abuse of the trial court's discretion in admitting this evidence. This assignment of error is without merit.

Testimony of Dr. Warner

In this assignment of error, plaintiffs contend that the trial court erred in failing to allow Dr. Warner to testify as to the standard of care in the treatment of infections.

Louisiana Revised Statute 9:2794A sets forth the burden of proof in a medical malpractice action:

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.

The supreme court has held:

[I]t is a specialist's *knowledge* of the requisite subject matter, rather than the specialty or sub-specialty within which the specialist practices, which determines whether a specialist may testify as to the degree of care which should be exercised by general practitioners. A particular specialist's knowledge of the subject matter on which he is to offer expert testimony should be determined on a case by case basis.

McLean v. Hunter, 495 So.2d 1298, 1302 (La. 1986).

This court has held that where medical disciplines overlap, it is appropriate to allow a specialist in one field to give expert testimony as to the standard of care applicable to performing a particular procedure common to both disciplines. In determining whether testimony regarding the standard of care will be limited under LSA-R.S. 9:2794A to a specialist who practices the same specialty as the defendant, the operative statutory phrase is "where the alleged acts of medical negligence raise issues peculiar to the particular medical specialty involved." Where the procedure alleged to be negligently performed is one that is not limited to a particular specialty, and where there is no showing that the standard of care is different for different medical disciplines, an expert with knowledge of the requisite procedure should be allowed to testify regarding the standard of care for performing that procedure. The party offering such an expert must show the witness's expertise, skill, and training in the procedure. **Ricker v. Hebert**, 94-1743, pp. 3-4 (La.App. 1 Cir. 5/5/95), 655 So.2d 493, 495.

In this matter, when plaintiffs called Dr. Candace Warner to testify at trial, defendants stipulated that she was qualified as an expert in infectious disease. Thereafter, and following some questioning, plaintiffs sought to have Dr. Warner qualified as an expert in the treatment of bursal infections to establish the applicable standard of care. Defendants objected stating they had no problem with Dr. Warner being offered as an expert to show how an

infectious disease specialist would treat a bursal infection, but objected to Dr. Warner's testimony to show how an orthopedist would treat a bursal infection. Upon questioning by defense counsel, Dr. Warner admitted that orthopedists often treat infections themselves, and if there is simply a laceration over the olecranon bursa, for which an orthopedist has prescribed oral antibiotics, an infectious disease specialist would not typically be consulted at that point. Dr. Warner additionally stated that if an orthopedist scheduled surgery to remove a bursa and possibly repair a tendon, an infectious disease specialist would not usually be called in unless there was a strong suspicion of infection. Dr. Warner further stated that she had been consulted several times by orthopedists regarding infectious olecranon bursitis and patella bursitis. The trial court recognized that the study of infectious disease is a rare and extensive subspecialty of the general practice of medicine and determined that Dr. Warner could testify regarding her treatment of Mr. Hamilton, but that she could not testify as to the standard of care of an orthopedist.

We cannot say that the trial court abused its discretion in limiting Dr. Warner's testimony to her specialty as an infectious disease specialist. Plaintiffs failed to establish that Dr. Warner had the knowledge of the requisite subject matter as to the degree of care which should be exercised by an orthopedist. This assignment of error is without merit.

Testimony of Ron Hansis

Plaintiffs also objected to the testimony of Ron Hansis, who was qualified as an expert in the field of professional hockey. Plaintiffs contend that the trial court erred in allowing him to testify as an expert on Mr. Hamilton's career and that Mr. Hansis's testimony "amounted to nothing more than inadmissible hearsay used to attack Mr. Hamilton's character and

was orchestrated to mislead, prejudice and confuse the jury; it had no probative value and its admission was prejudicial error and clearly wrong.”

Mr. Hansis was general manager of the Baton Rouge Kingfish when Mr. Hamilton played for the Kingfish. When questioned about his qualifications, Hansis testified that he played professional hockey for ten years, coached professionally, and was a co-founder of the East Coast Hockey League (ECHL) (the league in which the Kingfish was included). As a coach and general manager in the ECHL, Mr. Hansis recruited players, evaluated players and consummated working arrangements with the major league hockey teams. On cross-examination, Mr. Hansis admitted that he has neither played at the NHL level, nor been an agent at the NHL level. He stated he was never Mr. Hamilton’s agent and that he did not know Mr. Hamilton’s statistics as a player. Mr. Hansis also testified that he had never before been qualified as an expert. Plaintiffs objected to his qualification as an expert, but the trial court determined that Mr. Hansis was qualified to testify as an expert in the field of professional hockey.

Admissibility of expert testimony in Louisiana is governed by LSA-C.E. art. 702. A trial court is accorded broad discretion in determining whether expert testimony should be held admissible and who should or should not be permitted to testify as an expert. **Cheairs v. State ex rel. Dep’t of Transp. and Dev.**, 03-0680, p. 6 (La. 12/03/03), 861 So.2d 536, 540-41.

In **Daubert v. Merrell Dow Pharmaceuticals, Inc.**, 509 U.S. 579, 589, 113 S.Ct. 2786, 2795, 125 L.Ed.2d 469 (1993), the United States Supreme Court called upon trial courts to perform a “gatekeeping” function to ensure that scientific expert testimony and evidence was not only relevant, but also reliable. In **State v. Foret**, 628 So.2d 1116, 1123 (La. 1993), the

Louisiana Supreme Court recognized that courts may rely on the standard enunciated in **Daubert** when evaluating the admissibility of scientific expert testimony pursuant to LSA-C.E. art. 702.³ Thereafter, in **Kumho Tire Co., Ltd. v. Carmichael**, 526 U.S. 137, 151-52, 119 S.Ct. 1167, 1176, 143 L.Ed.2d 238 (1999), the United States Supreme Court determined that trial courts may apply the **Daubert** factors when determining the admissibility of all expert testimony, not just scientific testimony. At the same time, the Court recognized a trial court's broad discretion in determining whether the specific factors in **Daubert** are reasonable measures of reliability in a particular case. The trial court's decision to admit or exclude expert testimony is subject to the abuse of discretion standard. **Kumho**, 526 U.S. at 152, 119 S.Ct. at 1176; **State v. Craig**, 95-2499, pp. 8-9 (La. 5/20/97), 699 So.2d 865, 870, cert. denied, 522 U.S. 935, 118 S.Ct. 343, 139 L.Ed.2d 266 (1997).

In this matter, Mr. Hansis testified regarding the levels of hockey and professional hockey as well as the talent in each league. As general manager of the Kingfish, Mr. Hansis saw Mr. Hamilton play hockey many times. He testified that Mr. Hamilton's skill level for the ECHL was average "at best." Mr. Hansis testified that if a player with a three-year NHL contract has been

³ The non-exclusive factors established in **Daubert** to be considered by trial courts in determining the admissibility of expert testimony include the following:

- (1) The "testability" of the scientific theory or technique;
- (2) Whether the theory or technique has been subjected to peer review and publication;
- (3) The known or potential rate of error; and
- (4) Whether the methodology is generally accepted in the scientific community.

Daubert, 509 U.S. at 592-94, 113 S.Ct. at 2796-97. **Foret** characterized the **Daubert** factors as "observations" which provide a helpful guide for our lower courts in considering this difficult issue. **Foret**, 628 So.2d at 1123; **Cheairs**, 03-0680 at p. 7, 861 So.2d at 541.

at the ECHL level for two years and has been with different teams, his chances were not good to move up to the NHL in his third year. Mr. Hansis further testified that from a coach's or general manager's perspective, a player's character as well as his off-ice character were absolutely important when recruiting. The hockey league wanted to present an image in bringing this new sport into the community by getting involved in local programs and having their players seen as role models for children. Image was very important to the league.

Mr. Hansis was then asked whether he received any reports from outside the Kingfish organization regarding the off-ice activities of Mr. Hamilton. Without getting into the details, Mr. Hansis testified that while he was general manager for the Kingfish, he received reports regarding Mr. Hamilton's off-ice activities, which caused him concern. Mr. Hansis stated the team would try to deal with the situation internally, but if a player is moved from his affiliate to another team, a red flag is raised, and if he is moved again, as was the case with Mr. Hamilton, there is obviously more concern. Mr. Hansis testified that there was no need to inform the other teams as to what was going on because they already knew. Mr. Hansis stated that there was a "zero tolerance at every level above ours for this sort of activity" and that these types of activities would affect whether a player would move up to the American Hockey League or the National Hockey League.

Plaintiffs' lawsuit is based on their contention that the negligent treatment of Mr. Hamilton's elbow by Dr. Winder ultimately resulted in the buyout of Mr. Hamilton's NHL contract. Defendants presented the testimony of Mr. Hansis to show that Mr. Hamilton did not make it to the NHL for other reasons, including his level of talent and his off-ice behavior.

The trial court permitted Mr. Hansis to testify regarding the business of professional hockey. The trial court clearly determined that the testimony of Mr. Hansis “would assist the trier of fact to understand the evidence or to determine a fact in issue.” LSA-C.E. art. 702, Official Comment (c). While the trial court also permitted Mr. Hansis to testify that the Kingfish organization received reports of Mr. Hamilton’s off-ice behavior, which was based on his personal knowledge, the court did not allow Mr. Hansis to testify as to the details, since Mr. Hansis had no personal knowledge of such events and such testimony would be impermissible hearsay. After reviewing the trial court’s decision to qualify Mr. Hansis as an expert in the field of professional hockey, we find no abuse of the trial court’s broad discretion. This assignment of error is without merit.

Breach of Standard of Care

Throughout the trial of this matter, plaintiffs asserted that Dr. Winder committed a series of breaches of the standard of care owed to Mr. Hamilton, resulting in a persistent infection lasting from February through June of 2000, two surgeries, and ultimately the loss of Mr. Hamilton’s NHL contract. They contend that the jury’s verdict in favor of the defendants was clearly contrary to the weight of the evidence.

The appropriate standard for appellate review of factual determinations in civil cases is the manifest error-clearly wrong standard, which precludes the setting aside of a fact finder’s finding of fact unless that finding is clearly wrong in light of the record reviewed in its entirety. Thus, a reviewing court may not merely decide if it would have found the facts of the case differently. An appellate court should affirm the trial court where the trial court’s judgment is not clearly wrong or manifestly erroneous.

Driscoll v. Stucker, 04-0589, p. 17 (La. 1/19/05) 893 So.2d 32, 46.

One of the basic tenets of the manifest error standard of review is that reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review where conflict exists in the testimony. **Driscoll**, 04-0589 at pp. 17-18, 893 So.2d at 46; **Stobart v. State, Dep't of Transp. and Dev.**, 617 So.2d 880, 882 (La. 1993). In order to reverse the fact finder's determinations (1) the appellate court must find from the record that a reasonable factual basis does not exist for the finding of the trial court, and (2) the appellate court must further determine that the record establishes that the finding is clearly wrong (manifestly erroneous). The issue to be resolved by the reviewing court is not whether the trier of fact is right or wrong but whether the fact finder's conclusion was a reasonable one. The reviewing court must always keep in mind that if the trial court's findings are reasonable in light of the record reviewed in its entirety, the appellate court may not reverse, even if convinced that had it been sitting as trier of fact, it would have weighed the evidence differently. **Driscoll**, 04-0589 at p. 18, 893 So.2d at 46; **Stobart**, 617 So.2d at 882-83.

In this matter, Mr. Hamilton's laceration on his elbow occurred on February 12, 2000, following his fall during a hockey game in Lafayette. The laceration was sutured, and Mr. Hamilton was placed on antibiotics. Mr. Hamilton continued playing hockey. He saw Dr. Winder in his office in Baton Rouge on February 22, 2000, after playing two days previously, complaining of swelling and pain. Dr. Winder's impression was traumatic olecranon bursitis of the left elbow. Infection was not noted, but an aspiration of the elbow "was sent off for cultures because of the possibility of infection." Mr. Hamilton's sutures were removed, and an elbow sleeve was ordered. Mr. Hamilton was instructed to complete his current course of

antibiotics, but Dr. Winder was of the opinion that further antibiotics were not required at that time. The culture report was negative for infection.

On February 27, 2000, Dr. Winder saw Mr. Hamilton in the training room and again aspirated the bursa. The fluid was discarded. On February 28, 2000, Dr. Winder saw Mr. Hamilton in his office, and Mr. Hamilton received his elbow sleeve. Although noting that Mr. Hamilton was having problems with recurrent fluid accumulation in the bursa, Dr. Winder specifically noted that there was no sign of infection. Plaintiffs contend that Dr. Winder should have performed a cell count and culture on the bursal fluid removed, but discarded, on February 27, 2000. Had the cell count and culture been performed, according to Dr. Aimee Habachin-Gould, plaintiffs' expert in orthopedic surgery, the infection would have been obvious, calling for the need of continued antibiotic treatment.

Dr. Larry Ferachi, defendants' expert in the field of orthopedic surgery, testified that Mr. Hamilton's condition looked like a resolving case of traumatic bursitis and not infection, and that it was appropriately treated with anti-inflammatory medication and steroids. He noted that steroids should never be given if there was a significant chance of infection. However, if an infection is not suspected, it should not be treated with antibiotics at all. Dr. Ferachi further testified that if an infection is suspected in a situation where fluid has been aspirated, cultures should be ordered. Otherwise, it was his opinion that cultures were not necessary. Dr. Brunet, defendants' expert in sports medicine, testified that the standard of care required that a cell count and culture be taken with the first aspiration. After that, he stated, it would depend on the doctor's clinical suspicions.

Dr. Winder continued to treat Mr. Hamilton over the next month with anti-inflammatory medications and steroids. Mr. Hamilton also received a

steroid injection. Plaintiffs assert that Dr. Winder's treatment of Mr. Hamilton with steroids, orally and by injection, masked the signs and symptoms of the underlying infection.

Dr. Gould testified that steroids can mask symptoms of an infection and that some steroids can actually weaken and rupture a tendon. Accordingly, Dr. Gould was of the opinion that it was below the standard of care to treat Mr. Hamilton with steroids when an infection was present. Defendants' experts all agreed that steroids can decrease inflammation of an infection, but that their effects wear off after several days, and in Mr. Hamilton's case, they did not believe suppression of symptoms was an issue. The medical records show that Mr. Hamilton received a steroid injection on March 1, 2000. Dr. Winder's medical note of March 6, 2000, indicated that Mr. Hamilton was to continue his Medrol dosepack, a steroid treatment lasting six days. Thus, according to Dr. Ferachi and Dr. Brunet, by the time of Mr. Hamilton's office visit on March 20, 2000, any of the effects of steroid treatment would have run their course and an infection, if present, would be evident. Dr. Petrie, an expert in orthopedic surgery and a member of the medical review panel in this matter, was of the same opinion. Dr. Winder's notes on March 20, 2000, indicated that there were no signs of infection.

Because Mr. Hamilton's condition had not improved after nearly a month, Dr. Winder, on the office visit of March 20, 2000, recommended surgery to "excise his olecranon bursa and explore the triceps." Dr. Winder discussed with Mr. Hamilton the possibility of an avulsion, or tear, of part of the triceps that might be accounting for Mr. Hamilton's persistent symptoms and his failure to respond to the non-surgical measures that had been attempted.

Surgery was performed the following day, on March 21, 2000, and a triceps tendon avulsion was discovered. Dr. Winder repaired the tendon by drilling two holes into the bone and reattaching the tendon with sutures. Cultures were taken. Prior to discharge that same day, Mr. Hamilton was given a prescription for a three-day supply of antibiotics and was told to return in two days for removal of the surgical drain.

Plaintiffs argue that when surgery was performed on March 21, 2000, Dr. Winder was negligent in not ordering the gram stain “stat” during the surgery and checking the result prior to drilling into the bone. Dr. Gould testified that it was below the standard of care in failing to order the culture results immediately. Dr. Winder testified that nothing preoperatively or intraoperatively indicated infection, so he did not order the gram stain “stat.” Dr. Ferachi testified that the notes from surgery were again consistent with a finding of traumatic olecranon bursitis rather than infection, and that because there was no indication of infection, it was not below the standard of care not to order the gram stain immediately. Dr. Brunet and Dr. Petrie also testified that it was not below the standard of care.

Plaintiffs next assert a breach of the standard of care in failing to provide antibiotic coverage for the entire period following Mr. Hamilton’s first surgery, from March 21, 2000 through March 30, 2000. Although there are no records from Dr. Winder indicating that Mr. Hamilton was seen by Dr. Winder on March 23, 2000, the discharge notes indicated that Mr. Hamilton was to be seen in two days for the removal of the surgical drain. Additionally, Dr. Winder’s nurse’s medication log and the pharmacy records indicate that pain medication was given to Mr. Hamilton on March 23, 2000. Accordingly, Dr. Winder testified, based on these notations, he knew he saw Mr. Hamilton on March 23, 2000, removed the drain, checked on the culture

results, and kept Mr. Hamilton on antibiotics. Admittedly, Dr. Winder's records do not document these actions.

Dr. Petrie testified that it would fall below the standard of care if Mr. Hamilton was not on continued antibiotic treatment between March 21, 2000, and March 30, 2000, but that it was his opinion that Mr. Hamilton received antibiotics during that period. Dr. Petrie further recognized that record keeping is different when practicing sports medicine than in an in-office orthopedic practice.

On March 24, 2000, the final report on the culture from surgery was completed, which was positive for the presence of staph. According to the medication log, Mr. Hamilton was placed on the antibiotic Augmentin on March 30, 2000. Dr. Winder testified that he had no doubt that he saw Mr. Hamilton in his office on March 30, 2000. He further testified that it was on that date that the staples were removed and the wound did not look good, so he opened it up in two places to drain. He testified that since the antibiotic Keftab was not solving the problem, he switched Mr. Hamilton to Augmentin. Dr. Winder further testified that he chose Augmentin because the type of infection that Mr. Hamilton had was sensitive to that antibiotic.

Plaintiffs contend that Dr. Winder breached the standard of care owed by him to Mr. Hamilton in failing to provide IV antibiotics beginning on March 30, 2000, when a deep wound infection was indicated. Dr. Gould testified that oral antibiotics do not have a high enough concentration to fight deep infections and, in light of the drilling into the bone and the foreign body (the tycron suture) in his elbow, IV antibiotics should have been used. It was Dr. Brunet's opinion, however, that there was nothing in the medical records to indicate a deep bone infection. Dr. Brunet was of the opinion that the records indicated a soft tissue infection and oral antibiotics were

appropriate. Dr. Petrie also believed that Mr. Hamilton did not have osteomyelitis, or a bone infection.

Plaintiffs further contend that Dr. Winder breached the standard of care in failing to provide antibiotic coverage for the period of April 14, 2000 to April 26, 2000. On April 4, 2000, Dr. Winder prescribed for Mr. Hamilton a ten-day supply of the antibiotic Levaquin. Dr. Winder changed the previously prescribed antibiotic because Mr. Hamilton complained of stomach irritation with the Augmentin. His office note of April 3, 2000, also indicated that Mr. Hamilton's staph infection was sensitive to Levaquin and that he was going to keep Mr. Hamilton on the antibiotic for as much as four weeks while his wound healed. At Mr. Hamilton's next office visit on April 10, 2000, Dr. Winder again indicated that Mr. Hamilton would continue on the Levaquin.

Finally, plaintiffs assert a breach in the standard of care in prescribing the wrong antibiotics. Plaintiffs assert Dr. Winder prescribed Levaquin from April 3, 2000, through April 13, 2000, but by April 24, 2000, Mr. Hamilton's elbow was draining pus. Rather than prescribing a different antibiotic or performing a drug sensitivity screen, Dr. Winder again prescribed Levaquin.

Dr. Winder saw Mr. Hamilton in his office on April 24, 2000, at which time Dr. Winder noted that Mr. Hamilton was off of antibiotics. While Dr. Winder also noted "a little superficial purulence," he "did not find any deep purulence at all." Additionally, x-rays did not suggest any deep infection. Dr. Winder indicated he was putting Mr. Hamilton back on Levaquin and gave him a three-week supply in an attempt to completely resolve the healing.

Dr. Ferachi testified that based on the culture and sensitivity report for Mr. Hamilton, the type of staph that Mr. Hamilton had was sensitive to all the oral antibiotics given or prescribed by Dr Winder. Dr. Ferachi also did not agree with Dr. Gould that Levaquin should not have been used under Mr. Hamilton's circumstances. Dr. Brunet was also of the opinion that Levaquin was a reasonable choice of antibiotic.

After hearing all of the evidence, the jury was presented with two reasonable and permissible views of the evidence. As the fact finder, the jury had the choice to believe the testimony and evidence of the plaintiffs' witnesses or those of the defendants. Following a thorough review of the record, we cannot say that because the jury chose to believe the testimony and evidence as presented by the defendants, the verdict of the jury, that plaintiffs failed to prove that Dr. Winder committed malpractice in his treatment of Mr. Hamilton, was manifestly erroneous or clearly wrong. Although we may have weighed the evidence differently had we been sitting as the trier of fact, the jury findings are reasonable in light of the record reviewed in its entirety, and we cannot reverse. **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989). This assignment of error is without merit.

CONCLUSION

For the foregoing reasons, the June 16, 2004 judgment of the trial court in favor of the defendants is affirmed.⁴ Costs of this appeal shall be borne by the plaintiffs.

AFFIRMED.

⁴ Finding no merit in plaintiffs' other assignments of error, it is not necessary for us to address Catherine Hamilton's loss of consortium claim.