

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

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No. 94-50243  
Summary Calendar

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MARY ANN RAYBURN,

Plaintiff-Appellant,

VERSUS

UNITED STATES OF AMERICA,

Defendant-Appellee.

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Appeal from the United States District Court  
For the Western District of Texas  
(EP-92-CV-58)

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(January 26, 1995)

Before JONES, BARKSDALE and BENAVIDES, CIRCUIT JUDGES.

PER CURIAM:\*

Appellant, Mary Ann Rayburn ("Rayburn"), appeals from an adverse judgment of the district court which denied her relief in her action to recover personal injury damages under the Federal Tort Claims Act, 28 U.S.C. § 2671 et. seq. Because the trial court's finding was not clearly erroneous, we affirm.

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\* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

## FACTS

In February 1985, Rayburn sought medical treatment for swelling in her right eye at the William Beaumont Army Medical Center. After several referrals, a CT scan performed in July 1985 revealed the presence of a tumor in her right orbit. Rayburn had surgery in July and in September 1985, but because of the tumor's position and the risk of damage to Rayburn's eye and vision, the surgeon did not remove the entire tumor. Subsequent to these surgeries, Rayburn was followed with clinical examinations and CT scans. Although performed, Rayburn's first post-operative CT scan was lost and was not repeated until June 1986. By that time, Rayburn had consulted several physicians who differed regarding their recommended courses of treatment. By February 1987, Rayburn's condition had worsened; tests indicated that the tumor had enlarged significantly from September 1985. In August 1987, Rayburn had surgery to remove the remaining tumor which required the removal of the contents of Rayburn's right orbit as well. Rayburn filed an administrative claim alleging that the United States, through its agents, committed medical malpractice. The United States Army Claims Service denied Rayburn's claim and she filed a complaint under the Federal Tort Claims Act seeking damages for the failure "to adequately monitor the meningioma behind her right eye after surgery in September, 1985." Following a bench trial, the court determined that "[r]easonable and prudent physician(s) would have required more frequent monitoring" of Rayburn's condition following her September 1985 surgery but that

the failure to monitor did not impact Rayburn's ultimate results and was not the proximate cause of her injuries. The court also concluded that the surgeons provided treatment that fell within the standard of care and that their procedures and approaches were not the proximate cause of Rayburn's injuries.

#### APPLICABLE LAW

The United States is liable for its torts if a private person would be liable for the same act or omission under local laws. 28 U.S.C. § 1346(b). Under the FTCA, liability for medical malpractice is controlled by state law. Ayers v. U.S., 750 F.2d 449, 452 n.1 (5th Cir. 1985); see also Urbach v. U.S., 869 F.2d 829, 831 (5th Cir. 1989). Because the alleged medical malpractice occurred in Texas, its law controls.

A physician has a duty to render care to a patient with the degree of ordinary prudence and skill exercised by physicians of similar training and experience in the same or similar community under the same or similar circumstances. Speer v. U.S., 512 F.Supp. 670, 675 (N.D. Tex. 1981), aff'd, 675 F.2d 100 (5th Cir. 1982). A plaintiff in a medical malpractice action must prove four elements to establish liability: "(1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) actual injury to [the] plaintiff, and (4) . . . [proof that] the breach [was] a proximate cause of the injury." Urbach, 869 F.2d at 831. The plaintiff must establish a definite causal connection between the defendant's negligence and the plaintiff's injury. Duff v. Yelin, 751 S.W.2d 175, 176 (Tex. 1988). In addition, a plaintiff in a

Texas medical malpractice action is required to provide expert medical testimony demonstrating familiarity with the pertinent standard of care, explaining that the defendant breached the standard of care, and indicating that the breach proximately caused the injury. Ayers, 750 F.2d at 455.

Findings of fact shall not be set aside unless clearly erroneous. Fed. R. Civ. P. 52(a). Causation is a question of fact and, in a bench trial, it is reviewed under the clearly erroneous standard. Urbach, 869 F.2d at 831. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." U.S. v. United States Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948).

#### ANALYSIS

Rayburn asserts that the district court's conclusion regarding the proximate cause of her injuries was clearly erroneous. She contends that the delay in properly diagnosing and treating her condition prior to the 1985 surgeries and the inadequate follow-up care she received from 1985 to 1987 caused her to lose her eye. Rayburn's expert witness, Dr. Klingon, a New York neurologist, testified by deposition that the delay from February 1985 to July 1985 in making the diagnosis and in providing treatment coupled with the surgical treatment Rayburn received caused her to lose her eye. Although Klingon acknowledged that Rayburn's vision may have been impaired or lost with more aggressive surgical intervention in

1985, he testified that Rayburn's medical care fell below the standard of care and was a proximate cause of her injuries.

At the trial, Dr. Vasquez, Rayburn's neurosurgeon, testified that even if the tumor had been removed in February of 1985, Rayburn's results would have been no different. Dr. Leech, another neurosurgeon assigned to Rayburn's case, also testified at trial that had the diagnosis been made in February 1985, the ultimate outcome for Rayburn would not have differed and she would have eventually lost her entire eye. Dr. Leech further testified that, in his opinion, Dr. Vasquez did not deviate from the standard of care for neurosurgeons during either of the 1985 surgeries and that if he had resected the entire tumor at that time, Rayburn would have suffered injury to optical nerves or vessels.

The clearly erroneous standard of review "recognizes the unique opportunity of the district court to make credibility choices and resolve conflicts in the evidence." Ayers, 750 F.2d at 452. From the testimony of Dr. Vasquez and Dr. Leech, there was ample evidence for the court to conclude that the physicians' failure to frequently monitor was not a proximate cause of Rayburn's injuries. Because the district court's findings are not clearly erroneous, the judgment of the trial court is **AFFIRMED**.