WATSON, BLANCHE, WILSON & POSNER

Recent Developments in
Medical Malpractice & Health Law

AServing Healthcare Professionals for Over 65 years@

Est. 1945

www.wbwplaw.com

Vol. 9 Issue 1 **Summer 2013**

Malpractice Cap

On April 12, 2013, the Louisiana Supreme Court denied the plaintiff's writ application in the last of the most recent cases challenging the constitutionality of the medical malpractice cap on damages, *Arrington v. ER Physican Group, Inc.* This followed a decision on March 13, 2012, by the Court that affirmed the constitutionality of the Louisiana Medical Malpractice Act's $500,000 cap on general damages in a medical malpractice lawsuit in *Oliver v. Magnolia Clinic*. In spite of the *Oliver* decision, the plaintiffs in *Arrington* continued to pursue their challenge to the constitutionality of the medical malpractice cap. The April 12, 2013, writ denial put an end to that challenge. At this time, there are no pending cases challenging the constitutionality of the Louisiana Medical Malpractice cap on damages.

Prescription

In *Turner v. Willis-Knighton Medical Center,* 108 So. 3d 60 (La. 1/25/13), the Louisiana Supreme Court addressed prescription in a medical malpractice case. The court reversed the Louisiana Second Circuit Court of Appeal that had overruled the hospital's Exception of Prescription where the plaintiff filed a medical malpractice lawsuit within 90 days of receipt of a letter from the PCF notifying her that panel was dismissed for failure to appoint an attorney chairperson, but more than 90 days from the date the malpractice complaint was dismissed for failure to appoint a chairperson. In this case, the plaintiff filed a medical malpractice claim with the PCF on August 20, 2009, the last day of the one-year prescription period. The Medical Malpractice Act provides that an attorney chairperson shall be appointed within one year from the date the complaint is filed. In May, 2010, the plaintiff was notified that the claim would be dismissed if she did

not appoint a chairperson within one year from the date the complaint was filed. An attorney chairperson was not appointed by August 20, 2010, and the PCF notified the plaintiff by letter that was received on August 27, 2010, that her claim had been dismissed for failure to timely appoint a chairperson. Under the Act, the suspension of prescription ceases 90 days after the claim has been dismissed for failure to appoint a chairperson. The hospital argued that the 90 day period started on the one year anniversary date for the failure to appoint a chairperson, or in this case, August 20, 2010. The plaintiff argued the 90 day period did not start until she received the dismissal letter, which was August 27, 2010. The plaintiff filed a lawsuit on November 23, 2010, more than 90 days from August 20, 2010, but within 90 days from August 27, 2010.

The Second Circuit agreed with the plaintiff that the 90 day period did not start until the plaintiff received the dismissal letter on August 27, 2010, and thus the November 23, 2010, lawsuit was timely filed. The Louisiana Supreme Court granted the hospital's writ application and reversed the Second Circuit. The Court found that the 90 day grace period begins to run from the date of dismissal, not the date the plaintiff receives the dismissal. The Court said that dismissal, not notification, triggers the 90 day grace period in which prescription continues to be suspended. Because the plaintiffs suit was filed outside this grace period, it had prescribed.

In *Ward v. Vivian Healthcare and Rehabilitation Center,* 2013 WL 1980020 (La. App. 2nd Cir. 5/15/2013), the Louisiana Second Circuit Court of Appeal agreed with the trial court that the a deficient PCF complaint that does not satisfy the minimum requirements for a complaint filed with the PCF under the Medical Malpractice Act is still sufficient to suspend prescription. In this case, the claimant filed a PCF claim within one year of the patient's death. However, the complaint did not satisfy the minimum requirements required under the Act because it failed to provide the date of death and a brief description of the alleged malpractice. The PCF returned the complaint and requested the missing information be provided within thirty days. The claimant provided the requested information to the PCF more than one year from the date of the patient's death. The defendant health care provider filed an Exception of Prescription and argued that the failure to timely submit a claim that met the requirement of the Act did not suspend prescription and the PCF did not have the authority to grant an additional 30 days to correct the request. The trial court denied the Exception and the Second Circuit denied the defendant's writ application. However, the Louisiana Supreme Court granted the defendant's writ application and remanded the case back to the Second Circuit for briefing, argument and a full opinion. On remand, the Second Circuit affirmed the trial court's decision to deny the Exception of Prescription. The Court noted that the legislature did not provide any penalty for the failure of a request for a medical review panel to contain all of the minimum requirements of the Act and there was no evidence that the defendant was prejudiced by the deficient request. The court would not provide a penalty where the legislature has not done so. The court also noted that the Act does not explicitly require a date of death and the court said the statement that the provider did not provide proper care to the patient which caused his death was sufficient complied with the minimum requirements of the Act.

In *Davidson v. Glenwood,* 108 So. 3d 345 (La. App. 2nd Cir. 2013), the Louisiana Second Circuit Court of Appeal affirmed an Exception of Prescription. In this case, the plaintiff had surgery on April 6, 2006. During the procedure, a piece of a Bookwalter retractor was inadvertently left in the abdominal cavity. On July 12, 2006, the plaintiff first felt a square corner in his abdomen and knew there was something that shouldn't be there. Then, on August 15, 2006, a CT scan performed after an automobile accident revealed a metallic structure in the plaintiff's pelvis. An April 24, 2008, an MRI had to be stopped because of a metal object. On March 27, 2009, the plaintiff filed a PCF claim and he asserted that he did not discover the presence of the foreign metal object in his abdominal cavity until he had the MRI on April 24, 2008. The defendants filed Exceptions of Prescription, which were sustained and the Second Circuit affirmed. The court noted that the law does not require that the plaintiff be informed of possible malpractice by a medical practitioner before prescription begins to run, but the plaintiff only needs information that is enough to excite attention and put the plaintiff on guard to call for inquiry.

Expert Testimony in Malpractice Cases

In *Benjamin v. Zeichner,*113 So. 3d 197 (La. 4/5/2013), the Louisiana Supreme Court addressed experts in medical malpractice cases. The court refused to allow plaintiff's expert to testify at trial because he was not licensed to practice medicine at the time of trial on the alleged medical malpractice. This lawsuit was filed against a surgeon concerning surgery performed on August 29, 2000. At trial in April of 2011, the plaintiff presented an expert in general surgery. The surgeon defendant challenged the plaintiff's general surgeon expert because he did not meet the requirements of Louisiana Revised Statutes 9:2794(D)(1) that required all experts in a medical malpractice action against a physician be practicing medicine at the time testimony is given. In this case, which was tried in April, 2011, the general surgeon expert had given up his license to practice medicine in Louisiana in March of 2007, and his license in Alabama lapsed on December 31, 2010. The statute required a current medical license or graduation from an accredited medical school. The general surgeon expert did not have a current license and he was unable to provide proof that he graduated from an accredited medical school. The trial court excluded him as an expert witness at trial, granted a directed verdict in favor of the defendant because the plaintiff had no expert, and dismissed the plaintiff's lawsuit. The Supreme Court affirmed the trial court's decision.

Medical Review Panel

The Louisiana Supreme Court in *Fanguy v. Lexington Insurance Co.,* 110 So. 3d 127(La. 4/1/2013), addressed the qualification for members of a medical review panel. The Court affirmed the disqualification of a medical review panel physician member for failing to disclose a financial relationship he had with a physician defendant whose care was reviewed by the panel. In this case, the medical review panelist nominated by the physician defendant failed to disclose that he and the physician

defendant were both officers of the same corporation, Jefferson Ambulatory Surgery Center, LLC. The trial court granted the plaintiff's Motion to Exclude the testimony of the medical review panelist, but allowed the panel opinion and the testimony of the other two panelist. The Court of Appeal affirmed the trial court and additionally found that the medical review panel opinion and the testimony of the other two physician members should also have been excluded. The Supreme Court granted the defendants writ application and affirmed the Court of Appeal in part, but found that justice would best be served by ordering the reconstitution of the medical review panel with different physician members and to allow that panel to decide the case.

Motion for Summary Judgment

In *McLendon v. Williams,* 2013 WL 692458 (La. App. 2nd Cir. 2/27/2013), the Louisiana Second Circuit Court of Appeal sustained the defendant's Motion for Summary Judgment in a medical malpractice case on the issue of causation. In this case, the plaintiff was scheduled for a hysterectomy and on the day of surgery was given various medications prior to surgery. After the administration of these medications, but before the surgery was performed, it was learned that the patient's pregnancy test was positive and the surgery was cancelled. The patient later miscarried. The plaintiffs filed suit alleging that the defendants breached the standard of care in failing to properly interpret the pregnancy test, in referring a pregnant patient to radiology and administering medication contraindicated for pregnancy, and that these breaches alleged caused the miscarriage, as well as physical and emotional suffering.

A medical review panel found that the hospital had breached the standard of care by not properly charting the results of the pregnancy test and notifying the doctor, but that the breach was not a factor in the alleged damages because the preoperative x-ray and anesthesia did not cause the miscarriage. The defendant hospital filed a Motion for Summary Judgment based on that panel opinion. In response, the plaintiff produced the affidavits of two experts, and the hospital filed two Motions in Limine to exclude these experts from testifying. One expert was not qualified to testify about causation, and the plaintiff conceded that. The hospital argued the other expert's opinion on causation that the administration of Versed and the other drugs caused the miscarriage was not based on scientific data or research. The trial court granted the Motion in Limine and did not allow the expert to testify about causation, but then denied the hospital's Motion for Summary Judgment. The Second Circuit reversed and sustained the Motion for Summary Judgment. The Court found that the plaintiff failed to produce factual support to show that she could meet her evidentiary burden of proof at trial because the trial court had prevented her expert from testifying about causation and the plaintiff would not be able to prove by a preponderance of the evidence that she suffered injuries that would not otherwise have occurred.

Similarly, in *Jackson v. Suazo-Vasquez, M.D.,* 2013 WL 1786431 (La. App. 1st Cir. 4/26/13), the Louisiana First Circuit Court of Appeal affirmed summary judgment in a case where the plaintiffs failed to offer evidence to prove a causal connection (medical

causation) between the defendants' conduct and the damages claimed by the plaintiff. In this case, the defendants offered affidavits from physicians that there was no deviation from the standard of care and the patient's death was caused by a stroke that was not preventable by anyone. The plaintiff did not offer any evidence to support that the alleged breaches caused the patient's death and/or a loss of a chance of survival and the district court granted summary judgment and the First Circuit affirmed. The First Circuit also found that the plaintiff's registered nurse expert was not qualified to provide testimony on the patient's chance of survival because that was not a nursing issue. The court noted that whether the defendant's alleged fault caused the patient's death or loss of a chance of survival turned on complex medical issues that were beyond the expertise of the registered nurse expert.

Also, in *Blood v. Southwest Medical Center,* 102 So. 3d 1053 (La. App. 3rd Cir. 2012), the Third Circuit Court of Appeal affirmed summary judgment in favor of a hospital where the plaintiff failed to offer sufficient evidence. The court found that an affidavit from a CRNA was insufficient to show that the hospital's nurse had a duty to inspect a surgical chair that the patient was placed following a procedure. In this case, the plaintiff had gastric bypass surgery. The day after the surgery, the patient was transferred from his bed to a reclining surgical chair. As the nurse attempted to recline the chair, the chair abruptly reclined further back than expected and allegedly injured the patient's back. The plaintiff asserted that the nurse failed to properly complete the transfer of the patient from his bed to the chair and failed to inspect or operate the chair. The court noted that the affidavit of the nurse only stated that it was necessary to physically inspect the chair, but it did not state by whom it was necessary and thus the plaintiff failed to establish the standard of care for the nurse in question, an essential element of her case. Summary judgment was affirmed.

In *Battaglia v. Chalmette Medical Center, Inc.,* 2012 WL 4960192 (La. App. 4th Cir. 2012), the Louisiana Fourth Circuit Court of Appeal sustained summary judgment in favor of a health care provider even though the plaintiff offered the testimony of two experts. The court found the two experts the plaintiff offered, both anesthesiologists, failed to establish the applicable standard of care was breached by the surgeon defendant. The court found that the plaintiff was required to offer evidence to establish the standard of care for a surgeon and failed to do so.

Qualified Health Care Provider Status

In *Luther v. IOM Company, LLC*, 109 So. 3d 467 (La. App. 2nd Cir. 1/16/2013), the Louisiana Second Circuit Court of Appeal found that the Louisiana Patient's Compensation Fund was equitably estopped from reversing its decision that health care providers were qualified under the Malpractice Act. In this case, the PCF issued a certification that two health care providers were qualified under the Act. Later, the two health care providers entered into a settlement with the plaintiffs for $100,000. When the PCF received the Petition to Approve the Settlement, it asserted that the earlier certification was issued in error and the two health care providers were not qualified under

the Act. The PCF said that due to a software problem, the computer system erroneously generated a letter stating that there was PCF coverage. The health care providers filed a Motion for Summary Judgment on PCF coverage, which was denied by the trial court. On appeal, the Second Circuit reversed and found that under equitable estoppel principles the PCF was precluded from withdrawing PCF certification of coverage because the two health care providers had relied on that representation when the decided to settle the case for $100,000 and when the PCF did not receive any additional information. The initial letter stated that the PCF reserved its right to revise qualification and coverage determination upon receipt of additional information. But, in this case, the evidence showed that no new information was obtained by the PCF and the problem was an error in the computer software that erroneously generated a letter stating there was PCF coverage.

The Louisiana Supreme Court granted the PCF's Writ Application in this case on April 19, 2013, but a decision on this issue has not been rendered by the court.