RECENT DEVELOPMENTS IN MEDICAL MALPRACTICE

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PREMATURITY & SCOPE OF ACT

Administrative Negligence Claim Within Scope of Act

In *Bonilla v. Jefferson Parish Hospital Service District #2,* 210 Si, 3d 540 (La. App. 1st Cir. 12/28/2016), the First Circuit Court of Appeal affirmed an Exception of Prematurity involving claims of administrative negligence against a hospital administrator. This case concerned treatment of Whitney Bonilla at East Jefferson General Hospital from Saturday, August 31, 2013, to September 4, 2014. Ms. Bonilla was 37 weeks pregnant, and her obstetrician, Dr. Christina Goodridge, diagnosed her with chorioamnionitus, a bacterial infection affecting the membranes surrounding the fetus and amniotic fluid. Dr. Goodridge performed a Cesarean section on August 31, and Ms. Bonilla remained a patient until September 4 and she received antibiotic treatment for her infection. While a patient of the hospital, Ms. Bonilla was treated by Dr. Goodridge and Dr. Hogan. On August 31, Dr. Goodridge transferred care or "handed off" care to Dr. Hogan. On September 3, Dr. Hogan transferred care back to Dr. Goodridge. Ms. Bonilla was discharged on September 4, 2013. On September 6, 2013, Ms. Bonilla was readmitted with a diagnosis of acute sepsis, acute multi-organ failure and acute septic shock. As a result of her sepsis and toxic shock syndrome, her hands and feet became gangrenous and surgeons had to amputate her right arm, left hand and both legs below the knee.

Ms. Bonilla filed a medical malpractice complaint against Dr. Goodridge, Dr. Hogan and East Jefferson General Hospital asserting malpractice in failing to treat the infection and asserting the hospital was vicariously liable for the acts of its employees and of the physicians. Ms. Bonilla filed a separate Petition for Damages in the 24th JDC against East Jefferson General Hospital asserting that before she was admitted, the hospital administrators had a duty to implement an administrative policy setting forth the procedures for physicians to follow when handing off patients. She asserted that he Louisiana Medical Malpractice Act did not apply to this claim for administrative negligence. East Jefferson General Hospital filed an Exception of Prematurity and Exception of No Cause of Action. The District Court granted the Exception of Prematurity after applying the *Coleman* factors, and the First Circuit affirmed.

The First Circuit found that allegations of unreasonable, inadequate and improper handoffs were unintentional torts based on health care or professional services

rendered, or which should have been rendered to a patient. The court also said the hospital's failure to have a hand off policy and leaving it up to the physicians to decide how to hand off fell within the training and supervision of physician handoffs. The definition of "malpractice" in the Act includes all legal responsibility of a health care provider in the training and supervision of health care providers.

The First Circuit also analyzed the claim under the *Coleman* factors and found that those factors were satisfied. The court agreed with the trial court that the existence or absence of a policy regarding patient handoffs is inherently treatment related and a matter of professional skill.

The First Circuit also distinguished decisions of the Louisiana Supreme Court in *LaCoste v. Pendleton Methodist Hospital, L.L.C.*, 966 So. 2d 519 (La. 2007) and *Billeaudeau v. Opelousas General Hospital Authority*, 218 So. 3d 513 (La. 2016) cases cited by the plaintiff to support her position. The court noted in *LaCoste* the only claim was against the hospital for the failure to provide an adequate facility during a natural disaster and there were no allegations of malpractice against any physicians. In this case, the First Circuit said Ms. Benilla's claim against the hospital administrators is entirely dependent on the subsequent underlying medical malpractice by the physicians for failing to properly perform a hand off.

The court also distinguished the *Billeaudeau* case based on the nature of the claim in that case, which involved negligent credentialing, and in that case, the Supreme Court did not directly relate the negligent credentialing to the treatment of any given patient and it did not involve the dereliction of professional skill. In this case, the First Circuit noted that the handoffs occurred while the physicians and Ms. Bonilla were in the hospital, unlike the credentialing in *Billeaudeau* that occurred prior to the patient entering the hospital for treatment. The court also said that handoff policy would dictate to physicians what information must be shared with each other about the patient's condition when transferring a patient between physicians. The court went back to its reasoning that hand off policy is the type of treatment related medical decisions that a hospital can be liable for under the supervision and training of health care providers once they enter the building and engage in the practice of medicine.

The First Circuit also said that what constitutes a proper handoff policy would necessarily require expert medical testimony and would be beyond the scope of common knowledge, satisfying the second *Coleman* factor. The court also said expert medical testimony would be required to establish the cause of the infection and consequent catastrophic injuries. The court said all handoffs, and the policies that govern them, involve the assessment of a patient's condition because they include specific information about the patient's condition, a clinical impression of the patient and a diagnosis of the patient, satisfying the third *Coleman* factor. The court noted that the hospital did not point to any specific rule by the Louisiana Department of Health and Hospitals pertaining to handoffs between physicians so the fourth *Coleman* factor of whether the policy is within the scope of activities a hospital is licensed to perform did

not weigh in favor of finding the claim was within the scope of the Act. With regard to the fifth *Coleman* factor of whether the injury would have occurred if the patient had not sought treatment, the court said since this administrative negligence was treatment related and completely dependent on the existence of a subsequent act of malpractice by the physicians, this fifth factor weighs in favor of finding the claim falls within the scope of the Act. Ms. Bonilla did not allege an intentional tort so the sixth C*oleman* factor is satisfied.

The Louisiana Supreme Court denied the plaintiff's writ application (215 So. 3d. 235 (La. 4/7/2017)), and Justice Crighton concurred in the denial distinguishing the *Billeaudeau* decision and he said:

> "In contrast, plaintiff's allegations here concern her transfer to another doctor's care, which is directly related to her treatment and arises out of a patient-physician relationship. While I recognize the severe and tragic facts in this case, I find it primarily concerns the regulation of the practice of medicine, patient care, and patient treatment by physicians working at the hospital, which invokes the Louisiana Medical Malpractice Act. Thus, in my view, the instant case is not analogous to *Billeaudeau,* and this Court properly declined to exercise its supervisory jurisdiction."

Assigning Bed to Patient Outside Scope of Act

In *Cumpton v. St. Frances Specialty Hospital, Inc., 216* So. 3d 244 (La. App. 2nd Cir. 2/15/2017), *writ denied*, 221 So. 3d 72 (La. 5/12/2017), the Second Circuit found that negligence in providing a patient with an inadequately-sized bed is not within the scope of the Medical Malpractice Act. In this case, Leo Burgess Cumpton was admitted to St. Frances Specialty hospital for treatment of a long-term respiratory condition. Upon admittance, Mr. Cumpton was placed on a special mattress on a standard-sized bed frame to address pressure ulcers. Mr. Cumpton was six feet, three inches tall and he weighed 225 pounds. He was too tall for the bed assigned and his feet rested on top of and hung over the footboard. Five days after his admission, he was found on the floor, presumably because he fell out of bed. Due to the fall, he suffered a hematorma and died from complications related to the hematoma.

The plaintiffs filed a complaint with the Louisiana Patient's Compensation Fund and a Petition in District Court. In the Petition, the plaintiffs alleged that the hospital was negligent in providing Mr. Cumpton with an inadequately-sized bed. The hospital filed a Motion for Partial Summary Judgment arguing that the alleged failure to provide Mr. Cumpton with an appropriately-sized bed was within the scope of the Louisiana Medical Malpractice Act. The District Court denied the Motion and the Second Circuit affirmed.

The Second Circuit analyzed the issue using the six *Coleman* factors. The plaintiffs conceded fifth factor that the injury would not have occurred if the patient had not sought treatment and the six factor of whether the alleged tort was intentional weighed in favor of defendant. The Second Circuit analyzed the other four factors.

With regard to whether the alleged wrong was treatment related or caused by a dereliction of professional skill, the Second Circuit said Mr. Cumpton being too large for the bed was not related to his respiratory problems or pressure ulcers and providing a properly sized bed required no professional skill. The court also said expert medical evidence was not required as it is common knowledge of how a person is suppose to fit into a bed. Further, the court said no assessment of medical conditions was required to determine whether Mr. Cumpton needed a larger bed. The court also did not believe the incident was within the scope of activities a hospital was licensed to perform but occurred when Mr. Cumpton fell out of a bed that was too short for his frame. The court found these four factors weighed in favor of the plaintiff and when examining the *Coleman* factors in their totality, the trial court was not in error in denying the Motion for Partial Summary Judgment.

Injury During Changing of Diaper to Prevent Ulcers W/I Scope of Act

In the context of an Exception of Prescription, the Second Circuit Court of Appeal in *Evans v. Heritage manor Stratmore Nursing & Rehabilitation,* --- So. 3d --- (La. App. 2nd Cir. 9/27/17) found that injury to a patient during the changing of a diaper that was necessary to prevent ulcers in a paralyzed patient qualifies as medical malpractice in the definition found in the Act. The issue arose in connection with an Exception of Prescription filed by the nursing home related to a claim that a patient was injured when a CNA hit the patient while changing his diaper after the patient became combative. During the course of changing the patient's diaper and T-shirt, the patient took a swing at the CNA striking her and the CNA, in an immediate reflex, struck the patient. The patient timely filed a medical malpractice claim related to other care and treatment. Two years after the striking incident, the patient filed a Petition following an unfavorable panel opinion. The nursing home filed an Exception of Prescription as to the striking incident asserting that battery did not arise from medical treatment and was not malpractice pursuant to the Act thus the patient had one year from the date of the incident to file a Petition and the filing of the PCF complaint did not suspend prescription. The Second Circuit did not agree with this reasoning and found the claim was within the scope of the Act, thus prescription was suspended upon the timely filing of the PCF complaint. The Second Circuit reversed the granting of the Exception of Prescription by the trial court.

Non-Patient Claims

In *Perry v. State Farm Mutual Automobile Insurance Company, 209* So. 3d 308 (La. App. 5th Cir. 12/14/16), the Louisiana Fifth Circuit Court of Appeal reversed the granting of an Exception of Prematurity filed by an emergency room physician and hospital in a case involving a claim by a non-patient injured in an automobile accident allegedly caused by a patient who was prematurely discharged from the emergency room while still under the influence of medications administered in the ER. In this case, the patient, Melissa St. Blanc-Champagne was treated at Ochsner Medical Center emergency by Dr. Marc Labat and she was administered several intravenous drugs. Ms. St. Blanc-Champagne was discharged while she was allegedly still under the influence of the drugs and Dr. Labat and the hospital permitted her to drive. Ms. St. Blanc-Champagne's vehicle struck a motorcycle driven by Carl Perry and Mr. Perry was injured. Mr. Perry filed a lawsuit naming Ms. St. Blanc-Champagne seeking damages for his injuries. He amended the lawsuit to add Dr. Labat and the hospital alleging that Ms. St. Blanc-Champagne was prematurely discharged while still under the influence of drugs administered in the ER and that Ms. St. Blanc-Champagne's intoxicated state, along with the negligence of Dr. Labat and the hospital in permitting her to drive, were the proximate cause of his injuries. Dr. Labat and the hospital filed Exceptions of Prematurity and the District Court sustained the exceptions. The Fifth Circuit reversed.

The Fifth Circuit, citing the Louisiana Supreme Court in *Hutchinson v. Patel,* 637 So. 2d 414 (La. 1994), recognized that the Louisiana Medical Malpractice Act only applied to non-patient claims under the limited circumstance when claim arise from injuries to or the death of a patient. But, in this case, there was nothing in the record to suggest that Ms. St. Blanc-Champagne was injured in the automobile accident, and in fact she asserted in various documents filed in the lawsuit related to a discovery issue that she was not asserting a personal injury claim and her health was not at issue. The court said absent any indication that the patient, Ms. St. Blanc-Champagne, sustained injuries, it could not find that Mr. Perry's non-patient claims against the ER physician and the hospital arose from injuries to the patient. The court ruled that in accordance with *Hutchinson,* Mr. Perry's claims were not governed by the Act and the non-patient plaintiff was not required to present his claims against the health care providers to a medical review panel.

Pleading Requirement under Act

In *Coulon v. Endurance Risk Partners, Inc.*, 221 So. 3d 809 (La. 3/14/2017), the Louisiana Supreme Court reversed the granting of an Exception of Prematurity in a case concerning whether a medical review panel complaint that only contained a brief description of the malpractice asserted was broad enough and sufficient to encompass more detailed allegations in the post-panel Petition for Damages. In this case, Darrin Coulon developed an infection after shoulder surgery performed at West Bank Surgery

Center by Dr. Mark Juneau. Mr. Coulon filed a complaint with the PCF and with respect to the surgery center asserted that it failed to develop, maintain, and enforce proper policies and procedures to prevent surgical infections and it was responsible under the theory of *respondeat superior* for the actions of its employees acting within the course and scope of their employment. A medical review panel found the evidence did not support the conclusion that the surgery center failed to meet the applicable standard of care as charged in the complaint and said there was nothing in the records presented to indicate that the surgery center and/or its employees deviated from the standard of care and the center's personnel properly monitored the patient and followed all physician orders in an appropriate and timely fashion. The panel also said that there was no evidence to indicate that the facility failed to maintain proper procedures to prevent surgical infections.

Mr. Coulon filed a post-panel Petition for Damages. As to the surgery center, he asserted that it failed to train and supervise the nurse who treated him. Because the allegations of failure to train and supervise the nurses at the surgery center were not contained in the malpractice complaint, the surgery center filed an Exception of Prematurity. The District Court granted the Exception and dismissed the claims relating to failure to supervise and train without prejudice as premature. The Court of Appeal denied the plaintiff's writ application. The Supreme Court granted the plaintiff's writ application and reversed.

The Supreme Court noted that the Malpractice Act only requires that a complaint contain a brief description of the alleged malpractice as to each named defendant health care provider. The Supreme Court found that the brief description in the complaint as to the surgery center was broad enough to encompass the claims of failure to train and supervise the nurses that treated Mr. Coulon. The Court said the complaint alleged the direct liability of the surgery center in failing to develop, maintain and enforce proper policies and procedures to prevent surgical infections, as well as vicarious liability under *respondeat superior* for the actions of its employees. The Supreme Court concluded that the allegation that the surgery center did not enforce proper policies and procedures to prevent surgical infections encompassed the allegation that the surgery center did not adequately train and supervise the nurses who treated Mr. Coulon. The Petition for Damages in this case survived the Exception of Prematurity even though it contained more specific allegations than those contained in the medical malpractice complaint.

Prescription

Prescription – Multiple Panels

In *Correro v. Ferrer,* 216 So. 3d 794 (La. 10/28/2016) the Louisiana Supreme Court in a *Per Curiam* Opinion reversed the Second Circuit on an Exception of Prescription in a case where the plaintiff waited more than 90 days from receipt of a medical review panel opinion to file a lawsuit against the health care providers that were the subject of that opinion. The issue as framed by the Supreme Court was whether a timely filed amendment to a medical review panel complaint can be converted to a new complaint by the Department of Administration that would end suspension of prescription on the initial complaint causing the plaintiff's claims against the first named health care providers to prescribe while the second complaint was still pending against alleged joint and solidary obligors. The Supreme Court found that strict construction required in this circumstance where an administrative decision directly affected the tolling period to the detriment of the plaintiff's tort rights, prescription on plaintiff's claims remained suspended as to all joint and solidary obligors while the second panel proceeding was still pending.

In this case, Carolyn Correro underwent left hip surgery performed by Dr. Jose Ferrer at Glenwood Regional Medical Center on August 23, 2011. Before Dr. Ferrer began the left hip surgery, he made an incision in Ms. Correro's right hip and realized the error a few minutes later, and then proceeded with the left hip surgery. Ms. Correro filed a PCF complaint against Dr. Ferrer and Glenwood on April 12, 2012. Dr. Ferrer waived the panel proceeding on August 12, 2013, and he was dismissed ninety days later. The panel rendered an opinion finding that Glenwood deviated from the standard of care and that opinion was received by claimant on January 3, 2014.

During the above panel proceeding, Glenwood revealed that Bernie Caldwell, the physician assistant, and Cathy Greer, the CRNA, were also involved in the surgery and they were not Glenwood employees. Correro amended the complaint to add these two parties, but they were not included in the panel opinion as to Glenwood and the claim against Greer. The Division of Administration assigned a new number and the claims against these newly added health care providers proceeded as a new (second) request for a medical review panel. Caldwell and Greer filed Exceptions of Prescription, which were granted by the District Court. On Appeal, the decision was reversed on the basis that the filing of the original panel proceeding against Glenwood and Dr. Ferrer suspended prescription as to the alleged joint and solidary obligors, Greer and Caldwell, and when the initial panel request had been made against them, the panel had not yet decided the claim against Glenwood.

Correro did not file a lawsuit against Glenwood and Ferrer until August 27, 2014, after the panel was concluded as to the claims against Caldwell and Greer. In response to this lawsuit, Glenwood and Dr. Ferrer filed Exceptions of Prescription. Correro

opposed the Exceptions arguing, like she did on the Exceptions filed by Caldwell and Greer, that the filing of the claims against Caldwell and Greer suspended prescription as to the joint and solidary obligors, Glenwood and Dr. Ferrer. This time, the argument was not successful and the District Court granted Glenwood's and Dr. Ferrer's Exceptions.

The Second Circuit affirmed and noted that based on the Act, upon receipt of the panel opinion as to Glenwood, Correro only had ninety days plus whatever remained in the original prescriptive period to file a timely lawsuit against Glenwood and Dr. Ferrer, and she did not. Her claim as to Glenwood and Dr. Ferrer was prescribed. Unlike the Supreme Court, the Second Circuit was not swayed that there was a pending second medical review panel proceeding against purported joint and solidary obligors with those health care provider.

The Supreme Court noted that as it found in *In Re Tillman*, 187 So. 3d 445 (La. 2016), administrative agencies cannot adopt rules that shorten the prescriptive period. The court noted that when the plaintiff timely amended the administrative complaint to include Caldwell and Greer, the first panel proceeding was still pending and, according to statutory law and jurisprudence, prescription of the claims against all joint and solidary obligors, even unnamed ones, was suspended. The court said the amendment to add Caldwell and Greer merely continued the suspension commenced with the initial complaint. The court noted it was the administrative decision of the Division of Administration to convert the timely filed amendment to a new complaint that resulted in the shortening of the suspensive period, and in turn the prescriptive period, was contrary to the holding in *Tillman*. The Supreme Court reversed the granting of the Exception of Prescription as to Dr. Ferrer and Glenwood.

Nurse Claiming Lack of Knowledge and Continuing Tort

In *Jimerson v.Majors,* 219 So.3d 651 (La. App. 3nd Cir. 1/11/17), the Second Circuit affirmed an Exception of Prescription and rejected the plaintiff's arguments on the discovery rule and continuing tort. In this case, the plaintiff, Kimberly Jimerson, had a hysterectomy performed by Dr. Jake Majors on August 18, 2008. After the surgery, Ms. Jimerson developed complications, including bladder issues, and she continued to treat with Dr. Majors until October 13, 2009.

Ms. Jimerson saw many specialist to determine the cause of her problems. On November 10, 2009, Ms. Jimerson saw Dr. Joseph Pineda who purportedly informed her that it was negligent for Dr. Majors to perform a hysterectomy on a 24 year-old woman. On September 2, 2010, Ms. Jimerson filed a complaint against Dr. Majors requesting a medical review panel. The panel issued an opinion that Dr. Majors properly obtained informed consent for the hysterectomy and he did not deviate from the standard of care. Ms. Jimerson subsequently filed a Petition for Damages and Dr.

Majors filed an Exception of Prescription. The District Court granted the Exception and dismissed Ms. Jimerson's claim with prejudice. The Second Circuit affirmed.

Ms. Jimerson argued that the discovery rule suspended prescription because she purportedly did not discovery the alleged malpractice until she was informed by Dr. Pineda in November 2009 that it was negligent for Dr. Majors to perform the hysterectomy on her. The Second Circuit noted the Petition for Damages was prescribed on its face since it was filed over two years after the hysterectomy at issue and the plaintiff had the burden to show prescription was suspended because she lacked actual or constructive knowledge of the alleged malpractice. The court also noted that Ms. Jimerson was a registered nurse by profession and she worked in a labor and delivery unit during the time surrounding the hysterectomy. Further, following her surgery, her symptoms continued to be severe and she claims she was advised by several physicians that she was suffering from post-surgery complications. The Second Circuit said a reasonable person with Ms. Jimerson's education and intelligence would have been put on notice long before Dr. Pineda's office visit that there may be a problem with Dr. Major's care.

The court also noted that Ms. Jimerson made 24 visits to other specialists from August 2008 to June 2009. She also testified that three weeks after the hysterectomy she was told by a urologist that her current condition was due to a complication from the hysterectomy surgery. The court was also skeptical of the hearsay statement from Ms. Jimerson about Dr. Pineda's statement concerning Dr. Majors' fault since she did not produce any testimony from Dr. Pineda nor did his medical record contain the alleged statement she relied upon. The Second Circuit found that Ms. Jimerson did not prove the discovery rule was applicable.

Ms. Jimerson also argued that he continuing tort doctrine applied because she continued to be treated by Dr. Majors until October 13, 2009, and she filed her complaint on September 2, 2010, within one year from the date of the last treatment. The court noted for the continuing tort doctrine to apply the physician must engage in conduct that served to prevent the patient from availing herself of her cause of action. The Second Circuit said the evidence presented did not show that Dr. Majors took any steps to prevent Ms. Jimerson from seeking a second opinion or any conduct that served to prevent her from availing herself of her cause of action. The Second Circuit said Dr. Majors actually encouraged Ms. Jimerson to seek the opinions of other physicians and specialist. The court also noted that as a registered nurse Ms. Jimerson had ample access to medical knowledge above and beyond the average woman. The Second Circuit also found that the continuing tort doctrine did not apply to suspend prescription.

Amendment Allowed to Shift Burden

In *Breland v. Willis-Knighton Medical Center,* 212 So. 3d 724 (La. App. 2nd Cir. 2/15/2017), the Second Circuit Court of Appeal reversed the granting of an Exception of Prescription and remanded the case to the District Court to permit the plaintiff the opportunity to amend her Petition to assert the date of discovery, thus shifting the burden to the defendant. In this case, Ray David Breland suffered a medical condition that caused the ammonia levels in his body to rise and he required a minimum of 30 cc of Lactulose to be given 3 times per day to control his ammonia levels. Mr. Breland was admitted to Willis-Knighton North on July 27, 2014, with severe abdominal pain. Karla Breland, Mr. Breland's wife, a registered nurse, informed the ER nurse and the ER physician of the need for Lactulose, but Ms. Breland did not receive the medication. Mr. Breland was admitted to the hospital from the ER and again Mrs. Breland continued to inform the floor nurses and doctors of Mr. Breland's need for Lactulose, but he did not receive the medication until July 29, 2014, at 3:00 a.m. Later in the day on July 29, Mr. Breland went into a coma and his ammonia level was 1,036 umol/L. He continued to get Lactulose rectally to bring down his ammonia level, but he passed away on July 31, 2014.

In mid-Fall of 2014, Mrs. Breland sought an attorney to request her husband's medical records. On July 29, 2015, Mrs. Breland filed a lawsuit and on August 12, 2015, she filed a request for a medical review panel. Defendants filed and Exception of Prescription. Mrs. Breland's counsel requested leave to amend the petition, which was denied. The District Court granted the Exception of Prescription and the Second Circuti reversed.

It is not clear from the opinion whether the Exception of Prescription was filed as to the lawsuit or the panel proceeding, but the trial court felt that that as a nurse Mrs. Breland would know there would be a problem if the Lactulose was not administered to Mr. Breland and Mrs. Breland would be put on notice of her claim at that time. The Second Circuit's decision centered on the request to amend to assert the date of discovery. In this regard, the court noted that the District Court stated the Petition was very detailed and it did not see that an amendment could overcome the Exception of Prescription. The Second Circuit noted that allowing the amendment to the Petition to include the discovery date would raise some possibility that the claim had not prescribed and thus the court was required by Louisiana Code of Civil Procedure article 934 to allow the opportunity to amend.

The Second Circuit did not reach the merits of the Exception of Prescription and thus on remand, the Exception could be raised again. This decision could provide a plaintiff the ability to get a second opportunity to avoid prescription by requesting that she be allowed to amend the Petition to assert the discovery date. This also could cure a prescription that is prescribed on its face where the burden is on the plaintiff to prove a suspension or interruption of prescription, resulting in a shift in the burden to the defendant to prove that the claim is prescribed.

Contrast this decision to *In re Medical Review Panel of Hurst,* 220 So. 2d 121 (La. App. 4th Cir. 5/3/2017), where the Fourth Circuit Court of Appeal affirmed an Exception of Prescription in a medical malpractice case filed on July 13, 2015, by a *pro se* plaintiff based on a May 21, 2013, visit to a physician. The malpractice complaint alleged the discovery date was January 1, 2015, within one year from the date the complaint was filed, and arguably it was not prescribed on its face. The complaint set forth no facts alleged with particularity to show that Mr. Hurst was unaware of the malpractice prior to the alleged malpractice. The Fourth Circuit found the medical malpractice complaint was prescribed on its face in spite of the statement "date of discovery January 1, 2015," and shifted the burden to Mr. Hurst to show that his action was not prescribed. The court found Mr. Hurst failed to satisfy his burden of proving when he discovered his malpractice claim. The Fourth Circuit affirmed the District Court because the malpractice complaint was filed more than one year after the date of the alleged malpractice.

Continuing Treatment Doesn't Continue to Last Visit

In *Wilkerson v. Dunham,* 218 So. 3d 743 (La. App. 4th Cir. 5/3/2017), the Fourth Circuit affirmed an Exception of Prescription rejecting plaintiff's claims that the continuing treatment exception and discovery rule exception applied. In this case, Kelli Wilkerson filed a medical malpractice claim against Dr. Denardo Dunham on October 23, 2014. Dr. Dunham performed a bunionectomy surgery on July 11, 2008, a second surgery on April 7, 2009, and a third and final surgery on June 4, 2010. Ms. Wilkerson saw Dr. Dunham in follow up on November 22, 2010, then she began treatment with three different physicians for continued pain in her foot. On July 29, 2011, she was told by Dr. Vigee that excess bone had been removed from her foot. Ms. Wilkerson saw Dr. Dunham one final time on June 10, 2014, requesting a referral when she could not find another physician to treat her.

Ms. Wilkerson argued that the continuing treatment exception applied and since she continued to treat with Dr. Dunham until June 10, 2014, her October 23, 2014, complaint was timely. The Fourth Circuit rejected this argument and found Ms. Wilkerson's treatment with Dr. Dunham did not continue past November 2010, her second to last appointment. The court said the record did not indicate that her relationship with Dr. Dunham was continuous for the purpose of the exception and her ongoing relationship did not continue past November of 2010, even though the last time she saw Dr. Dunham was on June 10, 2014. She did not see Dr. Dunham from November 22, 2010 to June 10, 2014, and the June 2014 visit was for a referral. The court also rejected Ms. Wilkerson's argument that the discovery rule suspended prescription noting that she received knowledge of excess removal of bone at least as of July 29, 2011, but she did not file her complaint until October 23, 2014, over three years later.

Failure to Pay PCF filing Fee Not Reason to Apply *Contra Non*

In *In Re Guidry,* ---- So. 3d ---- (La. App. 5th Cir. 8/30/2017), the Fifth Circuit affirmed an Exception of Prescription related to a wrongful death claim where the claim was filed more than one year from the date of death. In this case, the claimants timely filed a claim for malpractice related to the death of her husband and father within one year from death, but that complaint was invalid and without effect for failure to pay the filing fee. The Exception of Prescription related to a second complaint that was later filed.

In connection with the second complaint, the plaintiff argued that it wasn't until an autopsy had been completed and medical records were reviewed by a nurse that she was able to discovery the actual cause of death. The court rejected this argument and said the plaintiff did not show any extraordinary circumstances to invoke the exception of *contra non valentum* to suspend or interrupt the prescriptive period to file the wrongful death claim. The court noted it was significant that the first complaint, which was timely filed, did not mention any inability to discover the alleged malpractice.

The court said the failure to pay the required filing fee was not a reason to apply the extraordinary exception of *contra non valentum.* The opinion also suggested that with regard to a wrongful death claim prescription begins to run on the date of death, and there was a dissent criticizing this statement; but, the opinion relied more on the fact that the first timely filed complaint was invalid and without effect for failure to pay the PCF filing fee. The majority referenced the first complaint in its reasons for finding the wrongful death claim had prescribed. The trial court denied an Exception of Prescription related to the survival claim, but that was not before the court and it was not discussed in the opinion.

Summary Judgment

Expert Affidavit Failed to Set Forth Proper Factual Foundation on Causation

In *Baez v. Hospital Service District No. 3 of Allen Parish,* 216 So. 3d 98 (La. App.3rd Cir. 4/5/2017), the Third Circuit affirmed summary judgment where the plaintiff produced an expert affidavit in response to the Motion for Summary Judgment, but the expert failed to set forth a proper factual foundation in regards to causation. In this case, the patient was a resident of San Antonio who was visiting a casino in Allen Parish when he became ill. He presented to the ER of Allen Parish Hospital multiple tests were performed and he was treated. There was an issue about whether the patient was discharged or not. But, the patient got on a bus back to his hometown of San Antonio and died before he arrived. No autopsy was performed and the cause of death was not clear.

The panel found an issue of fact, but did not address causation. In a post-panel lawsuit, the defendants filed a Motion for Summary Judgment based on the lack of expert testimony to prove the plaintiff's medical malpractice claim. In response, the plaintiff produced an expert affidavit that set forth several areas where the defendants deviated from the standard of care. In one sentence, the expert made a conclusory statement that had the defendants not deviated from the standard of care, the patient would have been treated for heart failure and likely survived. The District Court granted the Exceptions and the Third Circuit affirmed.

The Third Circuit said that while the plaintiff's expert asserted deviations from the standard of care, she never specifically related how those deviations caused the patient's death. There was also factual evidence that the patient wanted to leave the hospital in spite of concern for his health. The Third Circuit found in spite of the expert affidavit, there was no expert evidence that the death was caused by a violation from the standard of care by the defendants and affirmed summary judgment.

There was also an issue in *Baez* about whether under the new summary judgment rules a party opposing a Motion for Summary Judgment can file a Surreply in response to the mover's reply to opposition to the Motion. The Third Circuit found that Louisiana Code of Civil Procedure article 966 does not provide for the filing of a Surreply memorandum. Article 966 only allows for a Motion for Summary Judgment with evidence, an opposition to the Motion with evidence and a Reply by the mover. No additional evidence is permitted with the Reply. The plaintiff in this case attempted to file a second affidavit with the Surreply and the Third Circuit said that second affidavit was also not permitted because Article 966 does not even permit any additional evidence with the mover's Reply. Thus, the mover must offer all evidence in support of the Motion for Summary Judgment with the motion and the party opposing the Motion must offer all evidence in opposition to the Motion with the Opposition and no additional evidence is permitted.

In contrast, see *Hoston v. Richland Parish Hospital Service District 1-B,* 218 So. 3d 236 (La. App. 2nd Cir. 4/5/2017) where the Second Circuit reversed summary judgment finding, among other things, that even if the expert's statement on causation in his affidavit was insufficient, his affidavit, along with all of the other medical records, create an issue of material fact regarding causation. In this case, the patient presented to the ER after a fight where he was hit in the head with a steel pipe approximately 4 times. A CT scan was performed and there was an issue about whether the results were reported before the patient was discharged. The radiology report was transmitted to the hospital 23 minutes after the discharge, but the ER physician believed he may have received a call from the radiologist before the patient was discharged providing him with the interpretation of the CT scan. The radiologist interpretation of the CT was no obvious acute intracranial brain injury, although the report noted pneumocephalus with several droplets of air along the right side of the cranial vault. Three days later the patient returned to the hospital and a CT scan of the head revealed a skull fracture, subdural hematomas and extensive pneumocephalus. The patient went into a coma and died two months later. The autopsy listed the cause of death as pneumonia complicating head injury.

The claims against the hospital were reviewed by a medical review panel that found no deviation from the standard of care. In a post-panel lawsuit, the hospital filed a Motion for Summary Judgment related to its negligence. The plaintiff opposed with an affidavit from an expert that listed multiple deviations by the hospital and said "some or all of these deviations . . . increased Mr. Coward's risk of harm or substantially contributed to his demise on 8/9/11 within reasonable medical certainty." The hospital argued this statement on causation was conclusory. The Trial Court agreed and granted a partial Motion for Summary Judgment with respect to the direct negligence claims against the hospital, but kept the hospital in the lawsuit with respect to any potential finding of vicarious liability for the ER physician.

The Second Circuit reversed. With regard to the issue of causation, the court noted that the death certificate listed the injury that the patient was being treated for as a complicating factor in his death and all medical records for the treatment following the ER visit involved later effects of the injury he suffered. The court said it was obvious to a lay person that there may be some causal connection between the death and the treatment the patient received from the hospital and ER physician. Thus, the Second Circuit said even if the expert's statement on causation were insufficient, his affidavit, along with all other medical records created a genuine issue of material fact regarding causation precluding summary judgment.

Expert Needed for Lack of Informed Consent

In *Green v. Buell,* 215 So. 3d 715 (La. App. 4th Cir. 4/5/2017), the Fourth Circuit Court of Appeal affirmed summary judgment in a case alleging medical malpractice and lack of informed consent where the plaintiff failed to offer an expert in opposition to the Motion. This case involved a kidney transplant where the transplanted kidney died. The donor and the recipient filed medical malpractice claims against the physicians who performed the transplant asserting claims of medical malpractice and lack of informed consent. A medical review panel found in favor of the physicians. In a post-panel lawsuit, the physicians filed a Motion for Summary Judgment on the grounds that the plaintiff lacked expert testimony necessary to support the allegations and offered the panel opinion, discovery confirming plaintiff had no expert and numerous consent forms signed by the plaintiff. In opposition, the plaintiff attached affidavits and multiple printout from medical information websites. The court noted that in a lack of informed consent case the Louisiana Supreme Court in *Hondroulis v. Schuhmacher,* 553 So.2d 398 (La. 1988) held that to establish that there was the non-disclosure of a material risk some expert testimony is necessary to establish this aspect of materiality because only a physician or other qualified expert is capable of judgment what risks exists and the likelihood of occurrence. In this case, the plaintiff offered no expert and the Second Circuit affirmed summary judgment.

Summary Judgment Procedure and Evidence

In *Raborn v. Albea,* 221 So. 3d 104 (La. App. 1st Cir. 5/11/17) the First Circuit affirmed summary judgment in a case were a number of documents the plaintiff offered in opposition to the Motion were excluded because they were not allowed under the new summary judgment rules and the untimeliness of the filing of the documents. In this case, the court noted that Louisiana Code of Civil Procedure article 966(A)(4) now provides that the only documents that may be filed in support of or in opposition to a motion for summary judgment are pleadings, memorandum, affidavits, depositions, answers to interrogatories, certified medical records, written stipulations and admissions. The comments provide that this is an "exclusive" list of documents that may be offered in support of or in opposition to a Motion for Summary Judgment. The plaintiff in this case attempted to offer exhibits that were not included in the exclusive list, included excerpts from medical records and a narrative of the defendant doctor. The First Circuit said these documents were properly excluded upon the timely objection to the admission of the documents since they were not permitted by Article 966. The court also specifically addressed excerpts of medical records and found since the excerpts were not certified as required by law they were properly excluded. In an attempt to correct the excerpt problem, the plaintiff attempted to file a Surreply with a certified copy of the medical record six days before the hearing. The court rejected the Surreply because such is not permitted by article 966 and because it was untimely as it was not filed fifteen days prior to the hearing as mandated by the statute.

In *Henry v. Weishaupt,* 221 So. 3d 299 (La. App. 5th Cir. 5/31/2017), the Fifth Circuit affirmed summary judgment where the plaintiff failed to offer expert evidence that the defendants deviated from the standard of care in the transfer of a patient resulting in spinal cord injuries. The plaintiff made several arguments why summary judgment was not proper, including that the motion was premature since the motion was heard before the deadline to exchange expert reports. The court rejected this argument noting that there is no requirement that defendant wait until all discovery deadlines have passed before filing a motion for summary judgment. The court also noted the plaintiff did not ask for an extension to submit an expert report.

The plaintiff in this case also suggested that the defendant offered no evidence that the standard of care had been met. The court rejected this argument and noted that the defendant was not required to present evidence that he did not cause the plaintiff's injuries because the party not bearing the burden of proof at trial is only required to point out an absence of factual support for an element of the plaintiff's claim, and the failure of the non-moving party to produce evidence of a material factual dispute mandates that the granting of the motion. In this case, the court said given the lack of evidentiary support for the plaintiff's claims, there was no genuine issue of material fact that the defendant was entitled to judgment as a matter of law.

Not Charted, Not Done

In *Royal on behalf of Mott v. Blanch,* 222 So. 3d 823 (La. App. 4th Cir. 6/14/2017), the Fourth Circuit Court of Appeal affirmed a judgment in favor of the hospital following a bench trial based on evidence that an ER physician performed a pulse oximetry test on a patient even though he failed to chart it in the medical record. In this case, the patient presented to the ER and there was no nurse at the triage desk. The ER physician performed the triage assessment himself, but he failed to document in any medical record that a pulse oximetry test was performed during triage and he failed to document the results of the test. The patient was discharged and died the next day from a pulmonary embolism. The plaintiff contended that if pulse oximetry testing had been done it would have improved the patient's chance of survival and health care providers were bound by the Nexium "not charged, not done."

A medical review panel found the hospital failed to comply with the standard of care because there was no record of a pulse oximetry reading in the medical record and this testing should have been performed by the hospital and if not by the hospital, it should have been ordered ER physician. As to the ER physician, the panel said there was no documentation on the chart, the patient's respiratory rate was not addressed adequately and he did not request a pulse oximetry reading. The panel also found the patient's chances of survival would have been improved had a PE been diagnosed or suspected during the ER visit.

The plaintiffs settled with the ER physician and the PCF, and case proceeded to a bench trial as to the hospital. At trial, the ER physician testified that there was a machine in triage that tested blood pressure, pulse, temperature and oxygen saturation and he used the machine to perform this testing on the patient during triage. He said the patient's oxygen saturation level was not contained in the hospital record because he did not have access to the computer at the triage desk. But, he said there was no doubt in his mind that he tested her oxygen saturation level and the level would have been greater than 95% because had it been less he would have ordered an atrial blood gas test, and he did not. Based on the result of the pulse oximetry test, he only ordered a blood count, chemistry count and chest x-ray. The patient was administered breathing treatment and antibiotics and was discharged the same day in good condition to follow up with her primary doctor in two days.

The ER physician said "not charted, not done" is associated with billing, admonishing health care providers to document the treatment and testing they perform, but it is not standard of care. He said whether the test is done is the standard of care, not the charting of it. In this case, he testified he forgot to write down the pulse oximetry reading. The ER physician also testified that in his opinion, the patient did not have a PE when he was treating her at the hospital the day before she died. Based on the autopsy, he further testified the PE was an acute event that would not have been detectable at the time of his treatment the day before.

One of the panelist also testified at trial that had he known the pulse oximetry was performed by the ER doctor, that would have changed his opinion as to the liability of the hospital and he would find no deviation. He also testified that "not charted, not done" is a term doctors use as a teaching tool for the premise that if something is not recorded, people are going to assume that you didn't do it. He said it is not the standard of care, but is associated with billing.

The plaintiff did offer an expert who testified by proffer after an objection was sustained that "not charted, not done" is the standard of care to which health care providers adhere.

After the bench trial, the court rendered judgment dismissing the plaintiff's claim with prejudice, and specifically said that the plaintiff failed to show that the hospital owed a duty to perform and document the pulse oximetry testing on arrival.

The Fourth Circuit affirmed finding no manifest error. As to "not charted, not done," the court said it found no reported case that equated the phrase "not charted, not done" with the standard of care, and none of the experts testified at the trial that it was the standard of care for a health care provider. The court did not consider the proffered testimony of the plaintiff's expert on this issue because the exclusion of that testimony was not an assignment of error. The court also said "we decline to interpret the absence of the doctor's lapse in documentation of testing as absolutely conclusive that the testing was not done." On October 27, 2017, the Supreme Court denied writs.

DAMAGES

Standard of Review of Damage Awards

In *Thibodeaux v. Donnel, M.D.,* 219 So. 3d 274 (La. 1/20/2017), the Louisiana Supreme Court reversed the First Circuit on the amount of damages and found that because the court of appeal found manifest error in the jury's factual findings, it should have conducted a *de novo* review of damages. The Supreme Court remanded the case back to the First Circuit to consider its decision under principals set forth in *Mart v. Hill,* 505 So. 2d 1120 (La. 1987).

This was a case filed against Dr. James Donnel related to a failed bladder repair performed during hysterectomy surgery. Following the failed bladder repair the patient was diagnosed with painful bladder syndrome that resulted in diminished bladder capacity, which was permanent. A medical malpractice complaint was filed, but the panel expired before a decision was rendered.

The case was tried to a jury that found Dr. Donnel breached the applicable standard of care and that the patient was injured as a result of the breach. With respect to damages, the jury only awarded medical expenses in the amount of $60,000. On appeal, the First Circuit found that because the jury found the plaintiff suffered some injuries casually related to the failed bladder repair, the jury abused its discretion in failing award the plaintiff some amount of general damages. The First Circuit found that $50,000 was the lowest amount reasonably within the jury's discretion and consistent with the special damages awarded. The First Circuit also found the appropriate loss of consortium awards to be $15,000 to Mr. Thibodeaux and $5,000 to Gabrielle Thibodeaux (daughter) for the patient's inability to accompany them in recreational activities they previously enjoyed and that the Thibodeaux's sex life had been impacted both quantitatively and qualitatively. The Supreme Court granted the plaintiffs' writ application and reversed the First Circuit, but remanded the case back to the court of appeal to reconsider its awards under the principles set forth in *Mart.*

The Supreme Court in its original opinion noted that its decision in *Coco v. Winston Industries Inc.*, 341 So. 2d 332 (La. 1976) provided that before a court of appeal can disturb an award made by a trial court the record must clearly reveal that the trier of fact abused its discretion in making its award. Then, only after making that finding, the appellate court can disturb the award only to the extent of lowering it (or raising it) to the lowest (or highest) point which is reasonable within the discretion afforded that court. It is never appropriate for the court of appeal having found the trial court has abused its discretion to simply decide what it considers an appropriate award on the basis of the evidence. Several years later in *Mart*, the Supreme Court made it clear that the *Coco* rule did not apply to every appellate court review of a damage award, and the highest/lowest principle did not apply when a reviewing court disturbs a jury's factual finding related to causation. Instead, as articulated in *Mart*, the proper standard where an appellate court disturbs the trier of fact's causation finding is the

manifest error/clearly wrong standard. After finding manifest error, the reviewing court performs a *de novo* review of damages unbound by the limitations of *Coco.*

The Supreme Court found that the First Circuit's actions in disturbing and adjusting the jury's findings make clear that they actually found manifest error and should have performed a *de novo* review of damages as articulated in *Mart*, unbound by the highest/lowest limitations of *Coco.* The Supreme Court said the First Circuit erred by limiting its award to the lowest amount reasonably within the jury's discretion and consistent with the special damages award pursuant to *Coco.* The Supreme Court said an entirely *de novo* review under *Mart* was required, rather than a limited damages review under *Coco.* The Supreme Court remanded the case back to the First Circuit to perform a *de novo* review of damages under the principles outlined in *Mart*.

On remand, the First Circuit said in *Thibodeaux v. Donnell, M.D.*, 220 So. 3d 862 (La. App. 1st Cir. 4/27/2017) that:

> "There is no mechanical rule for determining general damages *de novo*; the facts and circumstances of each case control. *Butcher v. City of Monroe,* 31,932 (La. App. 2 Cir. 5/5/99), 737 So. 2d 189, 196, *writ denied*, 99-1608 (La. 9/17/99), 747 So. 2d 566. Considering the particular facts and circumstances of this case, we award $60,000 in general damages to Kimberly Thibodeaux; $20,000 in loss of consortium damages to Todd Thibodeaux; and, $7,500 in loss of consortium damages to Gabrielle Thibodeaux."

The Supreme Court again granted the plaintiff's writ application and rendered a *Per Curiam* opinion on October 27, 2017, amended the Judgment and affirmed as amended. The Supreme Court noted on remand that the First Circuit increased Kimberly Thibodeaux's general damages from $50,000 to $60,000, increased Todd Thibodeaux's loss of consortium damages from $15,000 to $20,000, and increased Gabriella Thibodeaux's loss of consortium damages from $5,000 to $7,500. The court said in reviewing the facts, the reviewing court should examine whether the present award is greatly disproportionate to past awards for similar injuries, though prior awards are only a guide.

With those standards in mind, the Supreme Court said it reviewed the record to analyze the particular facts and circumstances surrouning the injuries incurred by the plaintiff and how those injuries specifically affected her, her husband and her daughter. The Supreme Court found the First Circuit abused its discretion in the damages awarded on remand. The Court said after reviewing comparable awards in similar cases to determine the lowest amount that could have been reasonably awarded, it amended the awards to increase the award of general damages to Kimberly Thibodeaux to $150,000, increase the award of loss of consortium damages to Todd Thibodeaux to $50,000 and increase the award of loss of consortium damages to Gabrielle Thibodeaux to $25,000.

Damages in Lost Chance of Better Outcome

In *Burchfield v. Wright,* --- So. 3d --- (La. App. 2nd Cir. 6/28/2017), the Second Circuit reversed a jury verdict of $680,000 reduced to $400,000 pursuant to the Malpractice Act in a loss of a chance case, and awarded medical expenses and lost wages, in addition to $400,000 in general damages. The Second Circuit said the trial court erred in finding that damages for loss of a chance were general in nature subject to the $500,000 statutory cap on damages, precluding the patient from also receiving awards for past medical expenses, future medical expenses and lost wages. The Second Circuit awarded $400,000 in general damages, including past and future pain and suffering as well as loss of consortium, $692,850.64 in past medical bills, lost wages in the amount of $493,020 and a determination that the plaintiff was entitled to future medicals to be awarded pursuant to the Act.

In this case, the surgeon failed to read an EKG and chest x-ray that were in the chart prior to performing gallbladder surgery. The EKG was not normal and the chest x-ray showed congestive heart failure, a condition the patient was not previously aware. The surgery was performed without any immediate complications, but after almost 32 hours, the patient presented to the ER with an acute myocardial infarction and respiratory failure, as well as worsening pulmonary edema, congestive heart failure and bilateral pleural effusions. Because the damage to his heart was too great, he was not a candidate for heart bypass surgery and required a heart transplant, which he received and had a satisfactory recovery. As a result of his medical problems, he is disabled from his profession as a heavy equipment operator and he will have a much shortened lifespan.

A medical review panel concluded that the surgeon breached the standard of care by failing to review the pre-operative testing he had ordered, and the gallbladder surgery was not an emergency. The panel said the chest x-ray report warranted postponing the surgery until cardiology was consulted. The panel also said the failure to review the chest x-ray report and consult cardiology was a factor of the resultant damages.

A post panel lawsuit was filed. Prior to trial, the surgeon settled for $100,000, and the case was tried against the PCF. The jury determined there were no damages caused by the breach in the standard of care, but the breach caused the patient a lost chance of a better outcome and awarded a lump sum of $680,000 in damages for the lost chance. The Trial Court reduced the award to $400,000 pursuant to the cap on damages and rendered judgment. The plaintiff appealed.

The Second Circuit said the jury reached inconsistent answers on the verdict form because the jury found there was no damages caused by the breach in the standard of care, but the breach caused the patient a lost chance of a better outcome. On *de novo* review, the Second Circuit said the verdict was flawed as a matter of law, leading to the confusing lump sum awarded by the jury and eventually modified by the trial judge. The Second Circuit said that in reducing the jury's verdict award, the Burchfields were precluded for recovering special damages for past medical bills, future medical bills and lost wages. The Second Circuit felt the plaintiffs were not completely compensated for the damages proved at trial directly attributed to the lost chance and awarded additional damages above the cap on damages for medical bills and lost wages, in addition to a determination that the patient was entitled to future medical for a total damage award of $1,585,870.64, plus future medical.

The Patient's Compensation Fund filed a Writ Application with the Louisiana Supreme Court and it has sparked a number of amicus curiae briefs in support of the writ. One of the issues involves the award of lost wages in addition to and outside the cap on damages. Damages for lost wages are not specifically excluded from the cap on damages as medical expenses and thus damages for lost wages should be included within the cap on damages. The Second Circuit's decision in this case awarded lost wages in addition to the general damages that were capped at $500,000.