MEDICAL MALPRACTICE UPDATE
AND ISSUES RELATED TO THE
LOUISIANA HEALTH EMERGENCY POWERS ACT

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Health Emergency Powers Act (LHEPA)

According to the Louisiana Health Emergency Powers Act, Louisiana Revised Statutes 29:771 (2)(c):

> "During a state of public health emergency, no health care provider shall be civilly liable for causing the death of, or injury to, any person or damage to any property except in the event of gross negligence or willful misconduct."

"Health care provider" is defined in the Act to include a clinic, person, corporation, facility or institution which provides health care or professional services by a physician, dentist, registered or licensed practical nurse, pharmacist, optometrist, podiatrist, chiropractor, physical therapist, psychologist, or psychiatrist, and any officer, employee, or agent thereof acting in the course and scope of his service or employment.

On March 11, 2020, in Proclamation Number 25 JBE 2020, the Governor of the state of Louisiana declared a statewide public health emergency existed in the State of Louisiana because of COVID-19 pursuant to the Louisiana Health Emergency Powers Act. The COVID public health emergency order was renewed multiple times. The public health emergency expired on March 16, 2022, when the Governor did not renew the emergency declaration.

Public Health Emergency during Hurricane Katrina

During the state of public health emergency declared during Hurricane Katrina in 2005, the Louisiana Fifth Circuit Court of Appeal in *Lejeune v. Steck,* 138 So. 3d 1280 (La. App. 5th Cir. 2014) applied Louisiana Revised Statutes 29:771 to a case involving a physician that allegedly left a sponge in a patient during a surgical procedure performed during the state of public health emergency due to the hurricane. The plaintiff in that case asserted that that the Act was inapplicable because her operation was in no way related to Hurricane Katrina. The Fifth Circuit said Louisiana Revised Statutes 29:771 does not provide for a limited set of health care providers, nor does it limit its application to only those medical personnel rendering emergency assistance voluntarily due to the emergency in the area. The court said the burden of proof set forth in Louisiana Revised Statutes 29:771 relative to medical malpractice during a declared state of

medical emergency prevails over the more general medical malpractice statute. According to *Lejeune,* to prevail in the medical malpractice action that occurs during a state of public health emergency, the plaintiff is required to present evidence of gross negligence or willful misconduct to prevail.

LHEPA and Medical Malpractice Act

In two decisions in *In Re: Medical Review Proceedings of Welch*, the Louisiana Fifth Circuit Court of Appeal addressed how the provisions of the Louisiana Health Emergency Powers Act affect medical review panels formed pursuant to the Louisiana Medical Malpractice Act.

In *In re Medical Review Panel Proceeding of Welch,* 2021 WL 5869131 (La. App. 5th Cir. 11/18/21), the Louisiana Fifth Circuit Court of Appeal considered whether the medical review panel should assess allegations of medical malpractice during a state of public health emergency under the "modified standard of care, gross negligence or willful misconduct," established by the Louisiana Health Emergency Powers Act (LHEPA).

In this case, the patient filed a medical malpractice claim against Dr. Kenneth Williams in connection with medical treatment he provided on April 16, 2020, through May 6, 2020. A chairperson was selected and prior to the panel considering the evidence, Dr. Williams filed a Motion to Enforce Compliance with the Louisiana Medical Malpractice Act and a Petition for Declaratory Judgment seeking a ruling that the chairperson must instruct the panel to consider the allegations under a modified standard of care, gross negligence or willful misconduct, under the LHEPA. The trial court denied the Petition for Declaratory Relief, but granted the Motion to Enforce Compliance with the Louisiana Medical Malpractice Act and said the attorney chairperson:

> "[H]as the duty to provide legal advice to the panel and to advise them on what standards of care may be applied and is ordered to consider the governor's order and any and all other case law that he or she may be instructive on what standard of care to apply in this case."

The patient filed a Writ with the Louisiana Fifth Circuit Court of Appeal on the granting of the Motion to Enforce Compliance with the LMMA. The Fifth Circuit held that the granting of the physician's Motion was warranted and denied the writ in a detailed opinion. The Fifth Circuit noted that the LMMA provides that the chairperson shall advise the panel relative to any legal question involved in the review proceeding. The Fifth Circuit said the trial court ordered the chairperson to perform his statutory duty to advise the panel concerning the law regarding what standard of care may be applied to the patient's claims of medical malpractice considering the executive order declaring a state of public health emergency and other applicable case law. The Fifth Circuit found no error in that ruling and no reason to disturb the trial court's determination.

Dr. Williams also sought writs on the denial of his Petition for Declaratory Judgment and the trial court failing to order the chairperson to instruct the medical review panel that a gross negligence standard should be applied to the medical

malpractice claim. The Fifth Circuit denied the writ in *In Re Welch,* 2022 WL 242683 (La. App. 5th Cir. 1/26/2022) and said:

> "If the trial court were to order [the chairperson] to instruct the panel that the heightened standard of care in LHEPA must be applied by the panel in considering the alleged malpractice of Dr. Williams, this would be tantamount to the trial court interjecting itself into a non-judicial proceeding and issuing a declaratory judgment, which we have already determined the trial court does not have the authority to do under the LMMA."

The Fifth Circuit also found no reason to disturb this ruling time.

Dr. Williams filed a Writ Application with the Louisiana Supreme Court, which was also denied. Justices Weimer, Hughes and Griffin would have granted the Writ Application. Justice Hughes said the following about his vote to grant the Writ Application in *In Re: Medical Review Panel Proceeding of Welch,* 336 So. 3d 451 (La. 4/20/2022):

> "I would grant the writ to address the constitutionality of La. R.S. 29:771(B)(2)(c)(i), which the lower courts did not. It is absurd to change the standard of care for every medical malpractice case even though the case may have nothing to do with the reasons an emergency was declared. The statute may obviously be overbroad in its application."

Exception of Prematurity and LHEPA

In *Whitehead v. Christus Health Central Louisiana*, 344 So. 3d 91 (La. App. 3rd Cir. 6/8/2022), the Louisiana Third Circuit Court of Appeal affirmed the granting of defendants' Exceptions of Prematurity related to the *res nova* issue of whether a medical malpractice claim against a qualified health care provider must still go through a medical review panel in accordance with the Louisiana Medical Malpractice Act when a public health emergency has been declared under the Louisiana Health Emergency Powers Act. In this case, the plaintiffs filed both a claim with the Division of Administration and a lawsuit against health care providers related to the treatment of one-year-old Caffrey Whitehead beginning on March 11, 2020. In the lawsuit, the defendant health care providers filed Exceptions of Prematurity.

In response to the Exceptions, the plaintiffs argued they had asserted gross negligence and willful misconduct against the providers, which were governed by Title 29, making the Medical Malpractice Act in Title 40 inapplicable so the claims did not have to proceed first to a medical review panel. The Third Circuit did not agree noting that while the State Medical Malpractice Act excludes claims of gross negligence in certain situations against state health care providers, the defendants in this case were private health care providers not governed by the State Medical Malpractice Act. The Third Circuit said "malpractice" in the Medical Malpractice Act was defined as "any unintentional tort" and claims for gross negligence are covered under that definition.

The Third Circuit said any claims alleged by the Whiteheads other than intentional acts must first be presented to a medical review panel. The court went on to

discuss the definition of intentional tort that requires a person to either consciously desire the physical result of his act or knows that the result is substantially certain to follow from his conduct. The Third Circuit found no allegation against any of the defendants that they actively desired or knew the results of their actions would result in harm to the patient and found no allegation of an intentional tort. The court said the allegations all sound in negligence and must first be presented to a medical review panel.

In *McDowell v. Garden Court Healthcare, LLC*, 345 So. 3d 506 (La. App. 2nd Cir. 8/10/2022), the Louisiana Second Circuit Court of Appeal also affirmed an Exception of Prematurity and similarly found that claims of gross negligence and willful misconduct fell within the purview of the Medical Malpractice Act. In *McDowell*, the plaintiff argued that defendants' actions were intentional and could not be reviewed by a medical review panel. The trial court did not agree and said regardless of putting the gross negligence language in the Petition and the argument that it was intentional, "if you take it overall, the whole – the whole thing" it sounds of malpractice. The trial court granted the defendant's Exception of Prematurity.

The Second Circuit affirmed the trial court and said although the Medical Malpractice Act does not specifically encompass "gross negligence," it does not exclude the term from its scope. The Second Circuit went through the *Colman* factors and found the acts alleged satisfied those factors. The Second Circuit further said the mere fact that the plaintiff labeled the alleged acts as "gross negligence" and "willful misconduct" is not determinative of whether the alleged conduct falls under the Medical Malpractice Act. The court said whether the alleged conduct was in fact gross negligence or willful misconduct was not before them and the review was limited to the issue of whether the action was premature. The Second Circuit concluded that the claims fell within the purview of the Act and affirmed the granting of the Exception of Prematurity.

In *Hebert v. LAMMICO*, 2022 WL 14722516 (La. App. 3rd Cir. 10/26/2022), the Louisiana Third Circuit Court of appeal affirmed an Exception of Prematurity and found the claims of gross negligence and willful misconduct were the type of "unintentional" tort described in the Act and they were not removed from the definitions of the Act by the passage of the Louisiana Health Emergency Powers Act. The court further said the allegations that the health care provider made "willful, deliberate and intentional choices" that led to the patient's injuries were insufficient to state a claim for an intentional tort outside the provisions of the Act.

The Third Circuit followed its prior *Whitehead* decision and noted the plaintiff's position was plainly rejected in *Whitehead.* The Third Circuit also referenced the *McDowell* decision from the Second Circuit. The court said both *Whitehead* and *McDowell* undermined the plaintiffs' argument regarding their claims of gross negligence and willful misconduct. The court maintained the reasoning of those cases and found plaintiffs' claims of gross negligence and/or wrongful misconduct fall within the type of treatment-related "unintentional tort" described in the Act and must proceed to a medical review panel.

The Third Circuit also addressed the claim that the plaintiffs were asserting intentional torts that are outside the scope of the Act. Upon review of the plaintiffs'

Petition, the Third Circuit said the Petition did not allege any specific facts pertaining to intentional acts required to satisfy the definition of intentional tort. The court said the conduct complained of was treatment related, like *Whitehead*. The plaintiffs did not allege specific facts to demonstrate that the defendant health care provider consciously desired the physical result of the acts alleged or knew that the result was substantially certain to follow from the conduct. The court noted the plaintiffs in this case characterized "choices" as intentional, but did not include any allegation regarding defendants' intent, desire or knowledge as to outcome required for the definition of intentional tort.

Motion for Summary Judgment and LHEPA

In *Lathon v. Leslie Lakes Retirement Center,* 2022 WL 4360956 (La. App. 2nd Cir. 9/21/2022), the Louisiana Second Circuit Court of Appeal granted summary judgment and found the LHEPA applied in a slip and fall case and thus the plaintiffs could not recover without proving gross negligence. In this case, the plaintiff slipped and fell on the premises of Leslie Lakes Retirement Center because she stepped in Kook-Aid spilled by defendant's employee. The plaintiff and Leslie Lakes both tiled Motions for Summary Judgment on liability. The trial court found LHEPA was applicable, but denied Leslie Lake's Motion for Summary Judgment. The trial court also denied the plaintiff's Motion for Summary Judgment.

The Second Circuit granted writ applications and reversed the denial of Leslie Lake's Motion for Summary Judgment, but affirmed the denial of plaintiff's Motion for Summary Judgment. The court said a public health emergency was in effect at the time of the fall and the defendant was a health care provider under the terms of LHEPA.

The plaintiff argued that LHEPA did not apply because the claim was a premise liability claim and not a medical malpractice claim. The Second Circuit rejected this argument and said:

> "The statute's express extension of immunity to property damage claims demonstrates that the legislative purpose of the statute reaches far beyond medical malpractice. The purpose of the statute is thus to alleviate the liability burden on health care providers during public health emergencies, such as the COVID 19 pandemic, which dangerously overburdened the healthcare system.":

The Second Circuit also noted that when the employee spilled the Kook Aid, she was engaged delivering food to patients' rooms because they were confined there for COVID safety reasons. The court said the trial court was correct in finding LHEPA was applicable, "even though the consequences in this case may be harsh."

The Second Circuit found the plaintiff failed to carry her burden of introducing prima facie evidence of each and every element of gross negligence. Only the security camera video was in evidence and the court said no reasonable factfinder could conclude that the video constituted prima facie proof of gross negligence. The Second Circuit found no genuine issue of material fact and granted Leslie Lake's Motion for Summary Judgment on liability and denied plaintiff's Motion for Summary Judgment.

RECENT DEVELOPMENTS

Redacted Panel Opinion Admissible

In *Kelly v. University Health*, 333 So. 3d 1233 (La. 3/15/2022), the Louisiana Supreme Court reversed the court of appeal that excluded the panel opinion in its entirety and prevented the medical review panel members from testifying at trial. In a *Per Curiam* opinion, the court said:

> "The judgment of the court of appeal is reversed insofar as it excludes the opinion of the medical review panel in its entirety. The district court is directed to redact those portions of the opinion in which the panel exceeded its statutory authority under La. R.S. 40:1231.8(G). Subject to these redactions, the remainder of the opinion is admissible. *See McGlothlin v. Christus St. Patrick Hospital,* 10-2775 (La. 7/1/11), 65 So. 3d 1218.
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> We also reverse the portion of the court of appeal's opinion excluding the testimony of the medical review panel members. The members can testify to any issues within the scope of their expertise."

Filing Fee Must be Sent to DOA under State Act

In *Waters v. Lam*, 334 So. 3d 757 (La. 3/22/2022), the Louisiana Supreme Court sustained a Peremptory Exception of Prescription and dismissed a state malpractice claim when the claimant submitted the filing fee to the PCF instead of the Division of Administration (DOA) as required by the State Medical Malpractice Act. In this case, the claimant filed a request for review with the DOA on September 28, 2020, for alleged malpractice against Dr. Jonathan Lam and LSU Health Sciences Center that occurred on September 29, 2019. In a letter dated October 9, 2020, the DOA advised the claimant that she had 45 days from receipt of the letter to pay a filing fee to the DOA in the amount of $100. The claimant did not submit the filing fee to the DOA, but on November 9, 2020, the claimant sent the $100 filing fee to the PCF. On February 2, 2021, the DOA sent a letter to the claimant advising that its office had not received the filing fee and it would be closing its file. The claimant filed a lawsuit against defendants. In response, defendants filed an Exception of Prescription because her request for review filed with the DOA was invalid and without effect because she failed to pay the required filing fee and this filing did not suspend prescription. The district court denied the Exception and the court of appeal denied defendants' Writ Application.

The Louisiana Supreme Court granted supervisory writs and in a *Per Curiam* opinion reversed the district court, granted the Exception of Prescription and dismissed the lawsuit with prejudice. The claimant conceded she did not submit her filing fee to the DOA within 45 days as required by the statute. However, she argued she did submit her filing fee to the PCF with the 45 day period. The Supreme Court said the claimant failed to perfect her request for review because she failed to pay the required filing fee to the DOA within the specified period. By operation of Louisiana Revised

Statutes 40:1237.2(A)(1)(c), her filing was invalid and without effect and did not serve to suspend the prescriptive period.

Wet Floor Signs Reasonable Care in Slip & Fall

In *Planchard v. New Hotel Monteleone, LLC*, 332 So. 3d 623 (La. 12/10/21), the Louisiana Supreme Court granted summary judgment in a slip and fall case against a hotel finding that the placement of four wet floor signs in an area recently mopped was reasonable care sufficient to defeat the claim where the plaintiff saw the wet floor signs, but did not recognize them as caution signs. In this case, the plaintiff slipped on a foreign substance on a marble floor in the hotel lobby and fell. There was surveillance video of the fall that showed a hotel employee dry mopping the lobby area at 8:36 p.m., approximately three minutes before the fall. Two wet floor signs were placed in the area. At 8:37 p.m., approximately one minute before the fall, two more wet floor signs were added to the area and the employee continued to drop mop the area. Plaintiff was seen falling at 8:38 p.m. In addition to the surveillance video, the defendant supported its Motion for Summary Judgment with the deposition testimony of the plaintiff who testified she had to walk around the signs because there was no other path to the door. The plaintiff had to walk to the side of the sign to get to the door. The plaintiff did not dispute she saw the signs, but asserted she thought they were chalkboard and did not read them.

The defendant filed a Motion for Summary Judgment based on the surveillance video and the plaintiff's deposition testimony. The district court denied summary judgment concluding there were questions of fact concerning the reasonableness on the part of the defendant because of the visibility of the signs. The court of appeal denied the defendant's writ application. The Louisiana Supreme Court granted certiorari, reversed the district court and granted summary judgment dismissing plaintiff's lawsuit with prejudice.

The Supreme Court applied Louisiana Revised Statutes 9:2800.6, which sets forth the burden of proof for negligence against merchants, but it interpreted the element of reasonable care in that statute to arrive at its decision. The court said the surveillance video, as well as plaintiff's deposition testimony, proved defendant exercised reasonable care in placing wet floor caution signs in the area. The signs were made of wood and contained the words "CAUTION WET FLOOR" and a pictogram of a falling figure surrounded by a triangle containing the word CAUTION. The court said the plaintiff's claim that she did not recognize the signs as caution signs was a product of her own inattentiveness and not the result of defendant's failure to use reasonable care. The court said under these circumstances, the undisputed evidence established plaintiff saw the warning signs in the area prior to her fall, defeating her claim.

Exclusion of Expert Opinion Consequential Error

In *Labauve v. LAMMICO,* 347 So. 3d 724 (La. 4/13/2022), the Louisiana Supreme Court found the erroneous exclusion of a treating orthopedic surgeon's opinion on causation was consequential error and was not harmless, warranting remand for a new trial as the appropriate remedy for the error. The litigation arose from a medical malpractice lawsuit alleging Dr. Daryl Elias committed malpractice during delivery of a baby causing a separated right shoulder and a broken clavicle. The plaintiff alleged that the child suffered permanent injury when the five nerve roots of her brachial plexus were completely or partially avulsed from the spinal cord, causing loss of the use of her right arm.

The defendant retained Dr. Michele Grimm, an expert in biomedical engineering and brachial plexus injury mechanics, to testify that the child's injuries could have been caused by maternal forces during the delivery. The plaintiff retained Dr. Scott Kozin, the child's treating orthopedic surgeon, to testify that the child's injuries were caused by the force applied by Dr. Elias and not maternal forces of labor. At a pre-trial hearing, the trial court excluded Dr. Kozin's testimony as to the cause of the child's nerve injury on the basis that he was not qualified to testify as to the standard of care of an obstetrician and any testimony by him in this regard would be prejudicial.

The case proceeded to a jury trial. The jury returned a verdict in favor of Dr. Elias finding that the treatment he provided to the child did not fall below the applicable standard of care for an obstetrician gynecologist. On appeal, in a divided opinion, a majority of the court of appeal found the trial court erred in excluding the testimony of Dr. Kozin and the trial court also erred in allowing the testimony of Dr. Grimm. The court of appeal found a combination of these errors prejudiced the jury and the court conducted a *de novo* review of the record. Based on this review, the court of appeal concluded the evidence established that Dr. Elias breached the standard of care by applying excessive force during the child's delivery and rendered judgment in favor of plaintiff and against Dr. Elias. The Louisiana Supreme Court granted certiorari to review the correctness of the court of appeal's determination.

The Supreme Court noted that the district court has wide discretion in determining whether to allow a witness to testify as an expert and its judgment will not be disturbed unless it is clearly wrong, but that discretion is not absolute. The Supreme Court recognized that although Dr. Kozin was not qualified to give an opinion on the standard of care applicable to an obstetrician as Dr. Elias, he could testify as to the cause of the child's injury and that the force applied by Dr. Elias during delivery led to the child's injury. Thus, the Supreme Court found that Dr. Kozin was qualified to testify as to causation and the district court erred in excluding his testimony.

The Supreme Court also analyzed the district court's decision to permit Dr. Grimm's testimony on causation and it did not find any error in that decision.

The Supreme Court addressed the remedy for the trial court's error in excluding the testimony of Dr. Kozin. Defendant argued that Dr. Kozin's testimony on causation was duplicative of other experts the plaintiff called at trial to testify about causation. The

defendant also argued that since the jury found no deviation on the part of Dr. Elias, the exclusion of Dr. Kozin' testimony on causation was harmless.

The Supreme Court said because Dr. Kozin was the child's treating orthopedic surgeon, the jury may have placed greater weight on that testimony because his position gave him unique insight into the nature and cause of the child's injury. The court also said Dr. Kozin's testimony on the cause of the child's injury was an importation factual foundation in the plaintiff's theory that the child's injury could not have occurred absent a breach of the standard of care by Dr. Elias, which the jury could have used when evaluating standard of care. The court concluded that the exclusion of Dr. Kozin's testimony was consequential error. However, the Supreme Court found the court of appeal abused its discretion in conducting a *de novo* review of the record, rather than remanding the case for a new trial. Although neither party requested a new trial, the court found the miscarriage of justice may only be remedied through a new trial.

Medical Malpractice Act: PREMATURITY

Patient not Medical Center's "Patient" under Act

In *Kelleher v. University Medical Center New Orleans*, 332 So. 3d 654 (La. 12/10/2021), the Louisiana Supreme Court denied an Exception of Prematurity and found that the plaintiff did not qualify as a "patient" under the Act. In this case, the plaintiff asserted a claim against UMC for the failure to timely schedule an appointment for treatment at an infectious disease clinic that allegedly resulted in the plaintiff being rendered a paraplegic due to the progression of osteomyelitis.

In this case, the plaintiff was seen by Dr. Felipe Ramirez on December 19, 2018, who noted the existence of positive marrow infiltration with a concern for osteomyelitis. Dr. Ramirez referred the plaintiff to Dr. Fiquerora at UMC. Dr. Ramirez spoke with Dr. Fiquerora who agreed to see the plaintiff and treat her promptly with IV antibiotics and follow up with UMC infectious disease. The plaintiff was told that UMC would be contacting her to schedule an appointment with its infectious disease clinic. When the plaintiff did not hear from anyone at UMC for several days she called to inquire about her appointment and she was told to be patient because it was Christmastime. On January 4, 2019, the plaintiff was transported to Touro Infirmary with lower extremity paralysis as her osteomyelitis had progressed to the point she lost neurological function in her lower extremities. While at Touro, on January 8, 2019, the plaintiff was called by UMC to notify her that an appointment had been scheduled with the infectious disease clinic for January 14, 2019.

The plaintiff filed a lawsuit in district court against UMC asserting it failed to properly train administrative personnel to schedule appointments and failed to arrange for the promised prompt appointment. UMC filed an Exception of Prematurity, which was denied by the trial court. The Louisiana Fourth Circuit Court of Appeal denied UMC's Writ Application. The Louisiana Supreme Court granted UMC's Writ Application

to initially consider whether the allegations were "treatment related" or whether they were "administrative" decision outside the scope of the Act. However, the court did not reach that question since it decided that the plaintiff did not qualify as a "patient" of UMC under the definitions of the Act.

The Supreme Court looked at the nature of the relationship between UMC and the plaintiff and noted that a prerequisite of a medical malpractice case is the existence of a physician-patient relationship. "Patient" is defined in the Act as a person "who receives or should have received health care from a licensed health care provider, under contract, express or implied." The Supreme Court said it could not find that the plaintiff was "under contract, expressed or implied" with UMC during the period which she should have received health care. The court noted that neither the allegations in the Petition nor the evidence offered at the hearing established consent on the part of UMC to form a doctor-patient relationship with the plaintiff. Plaintiff's osteomyelitis led to paralysis before her name even appeared in UMC's system. In the absence of allegations or evidentiary support to establish the formation of a contract, expressed or implied, the court concluded that the plaintiff was not a "patient" of UMC for the purpose of the Medical Malpractice Act. The court affirmed the decision of the trial court that denied UMC's Exception of Prematurity.

Fall Climbing Onto Exam Table Not Within Scope of Act

In *Phoenix v. Beary,* 2021 WL 4771685 (La. App. 4th Cir. 10/13/2021), *writ denied,* 331 So. 3d 326 (La. 1/19/2022), the Louisiana Fourth Circuit Court of Appeal found a patient's fall while climbing onto an examination table using the stepstool attached to the table was not within the scope of the Act. In this case, the patient was at a medical office for a gastrointestinal examination and consultation. When the patient arrived at the office, she was instructed to climb onto the examination table using a stepstool attached to the table. As the patient was attempting to climb onto the table, she fell backwards off of the stepstool and fractured her leg. The patient filed a Petition for Damages against the physician claiming the cause of her injuries was negligence in failing to keep her safe from injury, failing to inquire if the plaintiff required assistance, failing to provide handrails, failing to have support staff assist plaintiff and failing to train staff to assist patients onto examination tables. The physician filed an Exception of Prematurity asserting the claims arose from medical malpractice and should have been submitted to a medical review panel before filing the lawsuit. The trial court denied the Exception and the Fourth Circuit affirmed.

The Fourth Circuit said that not every tort that occurs in the medical field is subject to the Act. The court analyzed the claims under the *Coleman* factors. The court said the injury was not treatment related. Even though the patient was in the examination room, treatment had not begun. Further, the stepstool was not a necessary tool needed for the treatment of gastrointestinal issues. The court said there was no evidence expert medical testimony would be required to determine the standard of care. The court said the Petition did not assert the stool was a necessary

assessment tool or necessary for the assessment of gastrointestinal problems. The court said overwhelmingly, when applying the *Coleman* factors, they were not satisfied. The court concluded that the trial court did not err in denying the Exception of Prematurity.

Fall Off Gurney Within Scope of Act

In *Jackson v. Willis-Knighton Health System*, 337 So. 2d 625 (La. App. 2nd Cir. 4/13/2022), the Louisiana Second Circuit Court of Appeal found that a fall off a gurney while being transported to a hospital room was within the scope of the Act. In this case, the patient filed a Petition for Medical Malpractice against the hospital and alleged he was dumped or allowed to fall off of a gurney or stretcher while he was a patient being transported to a hospital room. The hospital filed an Exception of Prematurity in response to the Petition because the complaint had not been reviewed by a medical review panel before being filed in district court. The trial court granted the Exception and the Second Circuit affirmed.

The court noted that "malpractice" is defined in the Act to include "handling of a patient, including loading and unloading of a patient." The court noted the patient was being transported on a stretcher or gurney by hospital staff from the ER to a hospital bed following treatment after it was determined he was stable enough to be moved to a room. The court said the transport was treatment related. The court also said expert testimony may be required to explain protocols for transporting a patient. The decision to transport the patient on a gurney to a hospital room without or without restraints also involved assessment of the patient's condition. The transport of the patient to a hospital room from the ER is within the scope of activities a hospital is licensed to perform. The court affirmed the judgment granting the Exception of Prescription.

Also, in *Webb v. Acadian Ambulance,* 2022 WL 1599994 (La. App. 1st Cir. 5/20/2022), the Louisiana First Circuit Court of Appeal granted a hospital's writ application finding the trial court erred in denying the hospital's Exception of Prematurity related to a claim involving restraining a patient to transfer him to another facility and said:

"The Louisiana Medical Malpractice Act's definition of malpractice includes claims related to "the handling of a patient, including loading and unloading of a patient." La. R.S. 40:1231.1A(13). The claims of the plaintiff, Murphy Webb, of being injured by the personnel of the defendant, Our Lady of the Lake Hospital, Inc., while restraining him in order to transfer him from one medical facility to another sounded in medical malpractice and must be presented to a medical review panel before suit is filed. See La. R.S. 40:1231.8A(1)."

Corporation Failed to Establish Entitlement to Review

In *Aziz v. Burnell*, 330 So. 3d 695 (La. App. 3rd Cir. 11/02/2021), the Louisiana Third Circuit Court of Appeal found that a corporation was not entitled to review of a patient's claim by a medical review panel because it failed to present evidence that its employee's conduct would be considered medical malpractice as opposed to ordinary negligence. In this case, a medical malpractice action was initially filed against Michael Burnell, M.D. individually. The claims against Dr. Burnell were reviewed by a medical review panel. The plaintiff filed a post-panel lawsuit and ultimately added Dr. Burnell's medical corporation and asserted claims against the medical corporation. The medical corporation filed an Exception of Prematurity because the claims against it had not been reviewed by a medical review panel. The trial court denied the Exception and the Third Circuit affirmed.

The Third Circuit noted the medical corporation offered three exhibits into evidence in support of the Exception, the medical review panel request, Dr. Burnell's certificate of enrollment and the medical corporation's certificate of enrollment. The court said that based on the evidence, the medical corporation was a qualified health care provider at the time of the alleged malpractice. The court also noted that there was no doubt that Dr. Burnell was also a qualified health care provider and the claims against him had already been reviewed by a medical review panel. However, the court said the medical corporation failed to satisfy its burden of proving that the alleged medical corporation employee related conduct would be considered medical malpractice as opposed to ordinary negligence as it offered no evidence of such. Absent evidence submitted by the medical corporation establishing entitlement to review by a medical review panel, the court found no error in the trial court's denial of its Exception of Prematurity.

PRESCRIPTION

Discovery Rule

In *In Re: Medical Review Panel of Mason Heath*, 345 So. 3d 992 (La. 6/29/2022), the Louisiana Supreme Court reversed the Second Circuit Court of Appeal and found a malpractice claim filed over two years and ten months from the date of treatment was not prescribed because the claim was filed within one year of the date of discovery.

In this case, Dr. Robert Russell performed a circumcision on Mason Heath at Minden Medical Center on August 18, 2015. The claimants asserted that the child had complications from the circumcision site and he saw his pediatrician, Dr. Cristal Kirby, at Minden Pediatrics in September 2015, for the complications. Dr. Kirby prescribed a mild steroid cream to apply twice a day for 30 days. The complaint asserted the cream was applied, but it only provided temporary relief. Dr. Kirby last saw the child on September 23, 2015. Thereafter, the child continued to be seen at Minden Pediatrics by a nurse practitioner and in December 2015, the NP was asked to check his private area and the NP advised the mother to continue applying the cream.

The child switched pediatricians and on April 11, 2016, he began receiving treatment at Bienville Family Clinic. At that time, the complaint asserted he was still experiencing complications from the circumcision site. On a later visit to Bienville Family Clinic on July 2, 2018, the mom reported the child's penis swells recurrently and the circumcision was not right. Dr. Jason Wilson examined the site and he referred the child to a provider in Shreveport. The child was seen by a doctor in Shreveport on July 23, 2018, and he was diagnosed with penile skin bridging, meatal stenosis with lower urinary tract symptoms, dysuria and occasional penile pain. Outpatient surgery was recommended.

The claimants filed a PCF complaint on August 14, 2018, and complained of the circumcision performed by Dr. Russell at Minden Medical Center and the post-circumcision care of Dr. Kirby. The NP and Minden Pediatrics were not named in the complaint. Dr. Russell, Minden Medical Center and Dr. Kirby filed Exceptions of Prescription. Dr. Russell offered evidence that the only time he saw Mason Heath was on August 18, 2015. Dr. Kirby offered evidence that her last contact with Mason Health was September 23, 2015. Both providers asserted that by the time the complaint was filed against them on August 14, 2018, it had prescribed. The claimants filed an opposition to the Exceptions, but did not offer any additional evidence to oppose prescription. The trial court granted the Exceptions of Prescription and found there was sufficient information to constitute discovery in April 2016, when Mason Heath switched providers and he continued to suffer problems from the circumcision. The Second Circuit affirmed.

The Louisiana Supreme Court granted the claimants' Writ Application and reversed the Second Circuit. The Supreme Court noted the first alleged act of

malpractice occurred on August 18, 2015, when the circumcision was performed and the last act of alleged malpractice was September 23, 2015, when Dr. Kirby last saw Mason Heath. Thus, the complaint filed on August 14, 2018, was prescribed, unless it was reasonable for the claimants to be unaware of the malpractice until less than one year before August 14, 2018.

The Louisiana Supreme Court found the complaint was prescribed on the face of the complaint. The court said even if it were to accept the inference that claimants were unaware of the possible malpractice until July 23, 2016, there was no factual allegations relative to the reasonableness of that delay. The court said the mother's age alone was not sufficient to justify the delay.

The Supreme Court further found the claimants carried their burden of proof. The plaintiffs relied on the medical record and Mason's mother's age (19 years old) to justify their lack of knowledge. There was no direct evidence of inexperience, limited education or reliance on health care providers in evidence and the Supreme Court said age alone was not enough. However, the court found based on the record, the earliest the claimants were aware of the alleged malpractice was July 2, 2018, because that was the first documented penile abnormality. Prior to July 2, 2018, doctors either said nothing about Mason's penile area or informed the claimants there was no concern.

Court Can't Consider Evidence not Offered

In *Medical Review Panel for Bush,* 339 So. 2d 1118 (La. 5/13/2022), the Louisiana Supreme Court found the court of appeal should not have relied on documents that were not entered into evidence and were not part of the record in finding that *contra non valentem* interrupted prescription. In this case, the Supreme Court reversed the court of appeal's ruling and reinstated the trial court's grant of defendants' Exception of Prescription.

In this case, the patient presented to St. Bernard Parish Hospital for depression and suicidal ideations and he was treated and discharged. The patient attempted re-admittance with the same complaints, but was refused re-admittance. The patient attempted suicide in the hospital's bathroom. He was found alive, but later succumbed to his injuries from his suicide attempt and died on November 30, 2017.

On November 30, 2018, the family of the patient filed a complaint with the PCF with dates of malpractice November 21, 2017 to November 30, 2017. However, the claimant failed to remit the required filing fee and this initial complaint was deemed invalid and without effect. On May 28, 2019, the claimant filed a second complaint with the PCF asserting the same allegations as the first. In response, the defendant filed an Exception of Prescription asserting that the second complaint was prescribed on its face. The complaint did not suggest any circumstances that delayed the discovery of any alleged malpractice. In opposition to the Exception of Prescription, the claimant asserted for the first time that *contra non valentem* interrupted prescription because it was not until October 2018 that she became aware of an internal policy requiring the

hospital to admit suicidal patients. The claimant also filed a supplemental complaint alleging the discovery of this internal policy was her first indication that the hospital committed malpractice and included her own affidavit attesting to the delayed discovery. Although these documents were discussed at the hearing on the Exception of Prescription, the documents were not offered, filed or introduced into evidence at the hearing and no testimony was presented by the claimant. The trial court granted the Exception of Prescription as to the wrongful death claim.

The court of appeal reversed the trial court and found the claimant had met her burden of asserting *contra non valentem.* The court of appeal stated the claimant's affidavit and amended malpractice complaint were offered, filed and introduced into evidence, but a review of the trial court transcript revealed that did not occur.

The Louisiana Supreme Court noted that the prescriptive period for a wrongful death claim is one year from the date of death. The patient died on November 30, 2017. The Supreme Court said because the supplemental complaint and the claimant's affidavit were not part of the record, all that may be considered was the initial complaint that had been introduced into evidence at the hearing by the defendant. The Supreme Court said that although the court of appeal properly set forth the law as to the application of *contra non valentem* in a medical malpractice wrongful death action, it incorrectly considered documents that were not in evidence in determining that *contra non valentem* applied in this case. Without these documents, the record lacked evidence that prescription began to run in October 2018, as opposed to November 30, 2017. The Supreme Court held that the complaint was prescribed on its face, having been filed more than one year from the date of death on November 30, 2017. The Supreme Court reversed the court of appeal and reinstated the trial court's grant of defendant's Exception of Prescription.

Continuing Tort

In *Mitchell v. Baton Rouge Orthopedic Clinic, LLC*, 333 So. 3d 368 (La. 12/10/2021), the Louisiana Supreme Court affirmed an Exception of Prescription finding the continuing treatment rule did not apply to suspend prescription.

In this case, Dr. Easton performed left total hip arthroplasty on Mrs. Mitchell on August 11, 2015. Shortly thereafter, Mrs. Mitchell re-dislocated her hip and Dr. Easton performed a revision of left total hip arthroplasty on August 23, 2015. While in recovery, Dr. Easton observed that Mrs. Mitchell had "foot drop." Dr. Easton performed a second surgery on August 23, 2015, and during the surgery he discovered that the patient's sciatic nerve had been lacerated. Dr. Easton advised Mrs. Mitchell's family of the situation and he consulted another physician who repaired the nerve. After the surgery, Dr. Easton advised the patient of the sciatic nerve injury and subsequent repair.

Dr. Easton told the patient that it will take time for the nerve to heal and there was a possibility the nerve could recover or it might not recover. He further said most of the time after a year whatever function you have is what you are left with. Dr. Easton

said he did not tell the patient her sciatic nerve would regenerate, her left foot drop would completely resolve, she would be better in a year or in a year her left foot would be back to normal. Mrs. Mitchell continued to see Dr. Easton in follow up for her hip surgery and he continued to monitor the sciatic nerve injury to determine if the patient had any feeling or motion, but he was not treating the patient for the nerve injury because there is no treatment for that injury.

The patient filed a medical malpractice claim on May 26, 2017. In response, Dr. Easton filed an Exception of Prescription because the complaint was filed more than one year from date of the alleged malpractice on August 23, 2015, and more than one year from the date of discovery of the alleged malpractice. The trial court granted the Exception and found the continuous treatment rule did not apply because it was clear Dr. Easton was providing treatment for the patient's hip, he was not treating the sciatic nerve at all and there was no evidence that Dr. Easton attempted to prevent the patient from availing her of her cause of action. The court noted it was not contested that Dr. Easton immediately disclosed the sciatic nerve injury after the surgery and he never told the patient that the sciatic nerve would actually take a year to heal. The First Circuit in a 3-2 decision affirmed.

The Louisiana Supreme Court granted the plaintiff's Writ Application to determine whether the continuing treatment rule suspended prescription under the facts of this case. Finding the continuing treatment rule did not suspend prescription, the court said a professional relationship alone is insufficient to suspend prescription under the continuing treatment rule. It is the continuing treatment of a patient within the context of a professional relationship that operates to suspend prescription under the continuing treatment rule. The court said the continuing treatment rule requires a plaintiff to establish the existence of (1) a continuing treatment relationship with the physician, which his more than perfunctory, during which (2) the physician engaged in conduct which served to prevent the patient from availing herself of her cause of action, such as attempting to rectify the alleged act of malpractice.

The Louisiana Supreme Court declined to expand the continuing treatment rule to encompass the continuing patient-physician relationship in the absence of continuing treatment. The continuing treatment rule clearly contemplates treatment of a patient directly related to the injury caused by the alleged malpractice. The court noted no Louisiana case has held that prescription can be extended solely because of a continued relationship alone.

In this case, there was no question that the plaintiff knew of the alleged act of malpractice within a day of its occurrence and a lawsuit was not filed on within a year of the alleged malpractice.

The Supreme Court said that the patient did not receive any specific care from Dr. Easton designed to correct or otherwise treat the injury related to alleged malpractice. The court said while there was no doubt the patient continued to see Dr.

Easton following the alleged act of malpractice, he was not treating her sciatic nerve injury, a necessary component of the continuing treatment rule. According to the record, the only treatment for the severance of the sciatic nerve was the surgery to repair the severed sciatic nerve performed on August 23, 2015. The continuing treatment rule requires treatment that is more than perfunctory, which the court said is defined as "routine." Under the facts of this case, the patient received a singular treatment for her nerve injury (surgery to repair it) and Dr. Easton's follow-up care thereafter was routine and perfunctory.

The court also found that Dr. Easton committed no act of concealment, fraud or misrepresentation that hindered the plaintiff from asserting her claim. There was no question that the patient lost function in her leg immediately upon the severance of her sciatic nerve. The court did not find that Dr. Easton's statement that it could take a year or more to determine the final results of the nerve repair prevented the plaintiff from asserting her claim or rose to the level of concealment, misrepresentation, fraud or ill practices.

The Supreme Court found no manifest error in the lower courts' determination that the plaintiff's claim had prescribed as prescription was not suspended by the continuing treatment rule. The court affirmed the judgment of the First Circuit granting the Exception of Prescription.

Summary Judgment

No Discretion to Extend 15 Day Deadline to Oppose MSJ

In *Auricchio v. Harrison,* 332 So. 3d 660 (La. 12/10/2021), the Louisiana Supreme Court held that in the absence of consent by the parties, a trial court has no discretion to extend Louisiana Code of Civil Procedure article 966(B)(2)'s fifteen day deadline for filing an opposition to a Motion for Summary Judgment. In this case, the plaintiff filed a Motion for Summary Judgment on March 3, 2020. The Motion was set for hearing on July 31, 2020. On July 20, 2020, the defendant filed a Motion to continue the hearing and alternative a motion to file evidence after the fifteen day deadline because counsel had some difficulties with COVID-19. Ten days before the hearing the defendant also filed an opposition to the Motion for Summary Judgment. The plaintiff opposed both the continuance and leave to file the late opposition.

The trial court denied the continuance, but allowed the late opposition. The Motion for Summary Judgment was heard on July 31, 2020, and it was denied finding the late-filed opposition raised genuine issues of material fact. The plaintiff filed a writ with the court of appeal, which was denied. The Louisiana Supreme Court granted the plaintiff's writ to determine the proper interpretation of Louisiana Code of Civil Procedure article 966(B)(2), which says "any opposition to the motion and all documents in support of the opposition shall be filed . . not less than fifteen days prior to the hearing on the motion."

The Louisiana Supreme Court noted that in 2015 Article 966(B) was amended and subpart (2) required an opposition to be filed no later than fifteen days before the hearing. Prior to the amendment, the language in the statute was interpreted to permit an opposition to be filed after the statutory delay. But, the court found the amendment did not allow the trial court discretion to consider a late-filed opposition. The word "shall" in the amendment is mandatory and excludes the possibility of being optional or subject to discretion. The court said by removing the discretionary language and replacing it with mandatory language the legislature intended to change the law to eliminate the previously afforded discretion.

In this case, the Louisiana Supreme Court said the defendant missed to deadline to file her opposition. The court noted that while the trial court could have considered equitable concerns and continued the hearing for "good cause" under Article 966(C)(2), all discretion to consider the late-filed opposition was eliminated when the continuance was denied. The court remanded the case back to the trial court to rule on plaintiff's Motion for Summary Judgment without considering the late-filed opposition.

Co-Defendant May Appeal Summary Judgment

In *Amedee v. Aimbridge Hospitality,* 2022 WL 12338929 (La. 10/21/2022), the Louisiana Supreme Court found that a defendant who pleads an affirmative defense of comparative fault may appeal a summary judgment dismissing a co-defendant, even absent an appeal by the plaintiff. The court framed this specific procedural issue as: "where multiple defendants are named in a lawsuit and one is dismissed by a summary judgment motion, may another defendant appeal that dismissal if the plaintiff failed to similarly appeal? The court answered in the affirmative and reversed the court of appeal that found absent an appeal by a plaintiff, a defendant has no right to appeal the dismissal of a co-defendant on summary judgment.

Continuing Hearing on MSJ Requires Sufficient Reason

In *Payne v. St. Bernard Parish Hospital Service District,* 2021 WL 5629897 (La. App. 4th Cir. 12/1/2021), the Louisiana Fourth Circuit Court of Appeal affirmed summary judgment when the plaintiff failed to offer any expert testimony to support her medical malpractice claim and failed to offer sufficient reasons to justify the need for a continuance to conduct further discovery and retain an expert. In this case, a medical review panel rendered a unanimous opinion that no malpractice occurred. The plaintiff filed a post-panel Petition for Damages. The defendant hospital filed a Motion for Summary Judgment based on the lack of a medical expert to establish that malpractice occurred. In opposition, the plaintiff asserted that malpractice was obvious and an expert was not required. Further, the plaintiff also asserted summary judgment was premature as discovery was not complete. The trial court granted the Motion for Summary Judgment and dismissed the lawsuit. On appeal, the Fourth Circuit affirmed.

The Fourth Circuit found the plaintiff was required to retain an expert to support her malpractice claim as the matter did not involve an obvious careless act. The focus of the opinion was on whether the trial court abused its discretion in failing to grant the plaintiff more time to conduct discovery. The plaintiff claimed that COVID-19 was a barrier to conducting discovery, but the Fourth Circuit said the plaintiff failed to explain how it was a barrier, especially as the opportunity to conduct written or virtual discovery existed. The plaintiff also requested an extension of time to depose the medical review panelist. The Fourth Circuit said deposing the medical review panelist would not resolve the issue that the plaintiff lacked a medical expert to establish that the hospital deviated from the standard of care. The court said the plaintiff was not owed any latitude because of the pandemic because she had not shown what steps she took to conduct discovery pre-pandemic and during the pandemic up to the time the Motion for Summary Judgment was filed. The court also said the failure to identify her own expert and the reliance on deposing the panelist, who are adverse to plaintiff's position, did not provide a sound reason for permitting additional time to conduct discovery.

Issue of Fact as to Causation Defeats MSJ

In *Mapes v. State Through Board of Supervisors of Louisiana State University,* 2022 WL 612191 (La. App. 4th Cir. 3/2/2022), *writ denied*, 2022 WL 1769041 (La. 6/1/2022), the Louisiana Fourth Circuit Court of Appeal reversed summary judgment finding that the panel opinion finding a breach but no causation failed to establish the plaintiff could not prove causation. In this case, the panel found that a nurse's failure to verbally report a lab result to the physician was a deviation from the standard of care, but it was unlikely that a verbal report would have changed the patient's outcome. The panel also found a physician deviated from the standard of care by not checking the lab report and repeating the lab work, but it was unlikely that this breach would have changed the outcome. The plaintiff filed a post-panel lawsuit. The hospital and all other defendants filed Motions for Summary Judgment based on the panel opinion since the plaintiff would be unable to prove that the breach of the standard of care was the proximate cause of the patient's death. The trial court granted the hospital's Motion for Summary Judgment. On appeal, the Fourth Circuit reversed.

The Fourth Circuit said the panel opinion did not establish the absence of factual support for the element of causation. The opinion stated "it is unlikely a verbal report would have changed the patient's outcome." The court said this language was inconclusive as to causation as the opinion indicated a verbal report quite possibly could have changed the result. The court said the panel opinion failed to demonstrate the plaintiff lacked evidence of a causal relationship between the breach and the patient's death thus the burden of proof was not shifted to the plaintiff based on the findings of the medical review panel. The Fourth Circuit said the plaintiff had sufficiently established the existence of a genuine issue of material fact that precluded summary judgment.