

**NATHANIEL DOWL, JR.,  
INDIVIDUALLY AND AS  
ADMINISTRATOR OF THE  
SUCCESSION OF NATHANIEL  
DOWL, SR.**

**VERSUS**

**REDI CARE HOME HEALTH  
ASSOCIATION D/B/A REDI  
CARE/PRIMARY MEDICAL  
GROUP AND THE XYZ  
INSURANCE COMPANY,  
CONSOLIDATED WITH:**

**NATHANIEL DOWL, JR.**

**VERSUS**

**SCOTTSDALE INSURANCE  
COMPANY AND LOUISIANA  
PATIENTS' COMPENSATION  
FUND**

**\* NO. 2004-CA-1182  
\* COURT OF APPEAL  
\* FOURTH CIRCUIT  
\* STATE OF LOUISIANA  
\*  
\*  
\* \* \* \* \*  
CONSOLIDATED WITH:**

**NO. 2004-CA-1183**

**APPEAL FROM  
CIVIL DISTRICT COURT, ORLEANS PARISH  
NO. 2001-6899, DIVISION "A-5"  
Honorable Carolyn Gill-Jefferson, Judge**

**\* \* \* \* \***

**Judge Terri F. Love**

**\* \* \* \* \***

**(Court composed of Judge Terri F. Love, Judge Max N. Tobias Jr., Judge  
Leon A. Cannizzaro Jr.)**

**(ON APPLICATION FOR REHEARING)**

**Nathaniel Dowl, Jr.  
8633 Zimple Street  
New Orleans, LA 70118**

**IN PROPER PERSON, PLAINTIFF/APPELLANT**

Ernest L. O'Bannon  
David E. Walle  
Christopher M. G'sell  
BIENVENU, FOSTER, RYAN & O'BANNON  
1010 Common Street  
Suite 2200  
New Orleans, LA 701122401

**COUNSEL FOR SCOTTSDALE INSURANCE COMPANY**

James C. Young  
Heather M. Valliant  
Corinne A. Morrison  
CHAFFE, McCALL, PHILLIPS, TOLER & SARPY, L.L.P.  
1100 Poydras Street  
2300 Energy Centre  
New Orleans, LA 701632300

**COUNSEL FOR THE LOUISIANA PATIENT'S  
COMPENSATION  
FUND and THE LOUISIANA PATIENT'S COMPENSATION  
FUND  
OVERSIGHT BOARD**

**DISMISSAL ORDER VACATED;**

**AFFIRMED**

This litigation arises out of the death of Nathaniel Dowl, Sr. Specifically, this appeal involves whether Redi Care Home Health Association, Scottsdale Insurance Company, and the Louisiana Patient's Compensation Fund remain liable to Nathaniel Dowl, Jr., the decedent's son, for the death of his father, even though the parties executed a previous settlement. The trial court sustained an exception of *res judicata*. It is from this judgment that Mr. Dowl, Jr. appeals and for the reasons assigned below, we affirm.

### **FACTS AND PROCEDURAL HISTORY**

This matter was originally dismissed on appeal as premature because no written judgment had been signed denying the appellants motion for new trial. *Dowl v. Redi Care Home Health Ass'n*, 2004-1182 (La. App. 4 Cir. 12/22/04), ---So. 2d--- 2004 WL 3030184. We now vacate the dismissal and address the appeal on the merits, because a formal judgment denying the trial has been signed and a copy furnished to this court.

Nathaniel Dowl, Sr. died allegedly as a result of negligent home care provided by Redi Care Home Health Association ("Redi Care") and Dr. David Bass ("Dr. Bass"), a Veterans Administration Medical Center ("VA") doctor providing home health care assistance. As a result, Nathaniel Dowl, Jr. ("Mr. Dowl"), decedent's son, filed suit against Redi Care and XYZ

Insurance Group alleging negligence. Thereafter, Mr. Dowl discovered that Redi Care had sought debtor relief the U.S. Bankruptcy Code, which stayed the proceedings against them. Following this discovery, Mr. Dowl amended his petition adding Scottsdale Insurance Company (“Scottsdale”), Redi Care’s insurer, as a defendant. Shortly after amending his petition, Mr. Dowl fired his attorney and retained new counsel.

The parties agreed to submit the case to mediation. Mr. Dowl signed a settlement agreement on September 23, 2002. The agreement settled all rights Mr. Dowl possessed against Scottsdale and Redi Care for \$100,000.00. He also released all other parties, with the exception of any rights he might have against the VA. The agreement reads, in part:

I do hereby release and forever discharge Redi Care Home Health Association and Scottsdale Insurance Company, their officers, directors, agents, employees, subsidiaries, assignees, successors, adjusters, investigators, attorneys, and any and all other named or unnamed parties or insureds, and all other persons or entities without any limitation whatsoever, excepting the claims reserved hereinafter against the Department of Veterans Affairs . . . .

Immediately following the settlement, Mr. Dowl fired his counsel.

Accordingly, Silvestri & Massicot (“Silvestri”) intervened to ensure payment of their fees. Additionally, Silvestri filed a Final Motion and Order of Dismissal requesting dismissal of Mr. Dowl’s claims due to settlement,

and dismissal of their claim as an intervenor. The trial judge granted the motion and dismissed all claims with prejudice.

Almost two years after the dismissal, Mr. Dowl, *pro se* and with *in forma pauperis* status, filed another petition seeking judicial approval of the original settlement and additional payments from Scottsdale and the Louisiana Patient's Compensation Fund ("PCF") for negligently causing the death of his father. He later amended his petition, adding Dr. Bass, the treating physician from the VA, as a defendant. Scottsdale then filed exceptions including the peremptory exception of *res judicata*. The second action was transferred and consolidated with the original action.

At the April 4, 2004 hearing on the exceptions, the trial judge determined that the case did not involve a qualified health care provider and therefore, Mr. Dowl never possessed any claims against the PCF. Further, the trial court opined that federal court retained jurisdiction over the claim against Dr. Bass. In addition, the trial court reasoned that the settlement did not require judicial approval because there is no requirement that the court approve a settlement between "two adults involved in a lawsuit." The judge also revoked Mr. Dowl's *in forma pauperis* status due to his \$100,000.00 settlement. The trial court granted Scottsdale's exception of *res judicata*, and declared the remaining exception moot.

After the April hearing, but prior to the signing of the judgment, Mr. Dowl filed a motion to reopen testimony on April 23, 2004, which the court treated as a Motion for a New Trial. Mr. Dowl also filed a Motion to Annul the Judgment from the April hearing, but the trial judge denied it because it was improper to be handled as a summary proceeding. La C.C.P. art 2592. Prior to the June hearing on the Motion for New Trial, the judge also granted Mr. Dowl's Motion for Devolutive Appeal on May 20, 2004. On June 18, 2004, the trial judge denied the Motion for New Trial because Mr. Dowl failed to present any new evidence or show that the previous judgment was contrary to the law or evidence. The motion and order for appeal were premature, but according to La. C.C.P. Art. 2087(D) the signing of the judgment denying a new trial, contained in the record from the June hearing, corrected this defect. Mr. Dowl's appeal is now perfected and follows.

### **ASSIGNMENTS OF ERROR**

Mr. Dowl alleges many assignments of error, but they can be consolidated into three assertions. He alleges the trial court erred by: 1) finding that the second suit against Scottsdale is barred by *res judicata*; 2) refusing to grant him a new trial; and 3) rescinding his *in forma pauperis* status.

### **ASSIGNMENT OF ERROR #1**

First, we address the issue of *res judicata*. The trial court dismissed Mr. Dowl's claims against Scottsdale because of the settlement agreement. Mr. Dowl signed regarding the death of his father. We review the dismissal as to *res judicata* under the *de novo* standard because the exception raises a question of law. *State ex rel. Department of Social Services v. Baha Towers Ltd. Partnership*, 2004-0578, p. 3 (La. App. 4 Cir. 12/1/04), 891 So.2d 18, 20.

The doctrine of *res judicata*, contained in La. C.C.P. Art. 425, requires Mr. Dowl to bring all actions against certain parties for the negligent death of his father in one suit. Thus, Louisiana law provides that a final judgment that favors the plaintiff is conclusive as to "all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation." LSA-R.S. 13:4231 (1). Although Mr. Dowl's case presents no final judgment as to his negligence claims regarding his father's death, except for the dismissal with prejudice, the settlement agreement has the same preclusive effect as a judgment, pursuant to La. C.C. Art. 3078.

However, there are three exceptions to the preclusive effect of *res judicata*. These exceptions are:

- 1) When exceptional circumstances justify relief from the *res judicata* effect of the judgment;
- (2) When the judgment dismissed the first action

without prejudice; or,  
(3) When the judgment reserved the right of the plaintiff  
to bring another action.

LSA-R.S. 13:4232(A). However, none of the exceptions are applicable to this case. There are no exceptional circumstances. Mr. Dowl was adequately represented by counsel while negotiating the settlement. Additionally, the trial judge dismissed Mr. Dowl's first case, with prejudice, upon the signing of the settlement. Last, the settlement only reserved Mr. Dowl's possible rights against the VA.

The Louisiana Supreme Court has held that a compromise or settlement can form the basis of a *res judicata* claim. *Ortego v. State, Department of Transportation. and Development*, 96-1322 p. 7 (La. 2/25/97), 689 So.2d 1358, 1364. However, when applying *res judicata* to the settlement the Court stated the claiming party "must have been a party to the compromise, and the authority of the thing adjudged extends only to the matters those parties intended to settle." *Id.* at p. 7, 689 So. 2d at 1363. Likewise, Mr. Dowl's settlement released Scottsdale and all other parties from future liability, with the exception of rights reserved against the VA. This intent is clear and explicit in the settlement. Again, the settlement reads, in part:

I do hereby release and forever discharge Redi Care Home Health Association and Scottsdale Insurance Company, their officers, directors, agents,



employees, subsidiaries, assignees, successors, adjusters, investigators, attorneys, and any and all other named or unnamed parties or insureds, and all other persons or entities without any limitation whatsoever, excepting the claims reserved hereinafter against the Department of Veterans Affairs . . . .

Mr. Dowl signed this agreement, while represented by counsel, to settle his claims regarding his father's death. He intentionally reserved his possible rights against the VA. Additionally, Scottsdale was a party to the agreement. The second suit is an attempt to acquire additional settlement money all arising from the same "transaction or occurrence" as outlined in LSA-R.S. 13:4231.

Thus, Mr. Dowl's second suit against Scottsdale is barred by the doctrine of *res judicata*. We, therefore, affirm the decision of the trial court.

### **ASSIGNMENT OF ERROR #2**

Next, Mr. Dowl alleges the trial court erred by denying him a new trial against the PCF and Dr. Bass, as well as for seeking court approval of the original settlement. Pursuant to La. C.C.P. Art. 1973, a trial court has wide discretion when deciding to grant a new trial. Specifically, La. C.C.P. Art. 1972 provides for three instances when a new trial shall be granted.

The two circumstances possibly applicable to this case are:

- 1) When the verdict or judgment appears clearly contrary to the law and the evidence.
- 2) When the party has discovered, since the trial, evidence important to the cause, which he could not, with due diligence,

have obtained before or during the trial.

La. C.C.P. Art. 1972. Although, the trial court has this discretion, we must review the denial within the abuse of discretion standard. *West v. National Railroad Passenger Corporation*, 2003-1707, p. 6 (La. App. 4 Cir. 6/23/04), 879 So.2d 327, 332. Thus, we must determine if the trial court abused its discretion by finding that the original judgment was not contrary to the law or that there was no new evidence.

First, Mr. Dowl asserts rights against the PCF for the death of his father. However, in order for a health care provider to be covered by the PCF, the health care provider must be qualified under the Louisiana Medical Malpractice Act (“LMMA”), according to LSA-R.S. 40:1299.42. To become qualified the provider must:

- (1) Cause to be filed with the board proof of financial responsibility as provided by Subsection E of this Section.
- (2) Pay the surcharge assessed by this Part on all health care providers according to R.S. 40:1299.44.
- (3) For self-insureds, qualification shall be effective upon acceptance of proof of financial responsibility by and payment of the surcharge to the board. Qualification shall be effective for all others at the time the malpractice insurer accepts payment of the surcharge.

LSA-R.S. 40:1299.42(A). Redi Care, the health care provider insured by Scottsdale, is not a qualified health care provider under the LMMA because it has not complied with the requirements to become qualified. Additionally,

the VA does not qualify as a qualified health care provider under the LMMA. *Johns v. Agrawal*, 99-0499, 99-0500, p. 7 (La. App. 4 Cir. 11/17/99), 748 So.2d 514, 519. Therefore, Mr. Dowl does not have a proper claim against the PCF.

Next, Mr. Dowl alleges the trial court should have granted him a new trial on the basis of his rights against Dr. Bass, his father's attending physician from the VA. The trial court determined there was no evidence to require a new trial on this matter because, as a state court, it did not have jurisdiction over the claim against Dr. Bass.

According to the Federal Tort Claims Act, all claims against the VA or a physician working for the VA must be brought against the United States. 28 U.S.C. §§ 1346(b) and 2672. Additionally, 38 U.S.C. §7316(c) outlines the procedure requiring a suit against the VA to be filed in federal court. This Court has also recognized this requirement. *Johns*, p. 2, 748 So.2d at 516. We stated that the plaintiff's only cause of action against the VA was a claim "under the Federal Tort Claims Act in federal court." *Id.* (citation omitted). Accordingly, the trial court did not abuse its discretion in refusing to grant a new trial on this issue because it did not have jurisdiction over Mr. Dowl's claim against Dr. Bass.

Finally, Mr. Dowl seeks judicial approval of his original settlement.

Mr. Dowl asserts he is entitled to an unopposed court approval of the settlement because of an alleged untimely filing by the PCF. However, Mr. Dowl misinterprets the law. The statute he cites, LSA-R.S. 40:1299.44(C) (3), does not apply to the instant case. The statute provides that a party may object to a proposed settlement within twenty days of filing the petition. The statute is not applicable. The case *sub judice* does not involve the PCF or a settlement under the LMMA because there is no qualified health care provider made a party defendant on this case.

Accordingly, Mr. Dowl is essentially seeking court approval of a settlement between capable adults represented by counsel. Louisiana law does not provide an unfettered right to this approval. As such, it was not an abuse of discretion to deny a new trial on this issue.

We affirm the trial court's decision to deny Mr. Dowl's motion for a new trial.

### **ASSIGNMENT OF ERROR #3**

Lastly, Mr. Dowl claims the trial court erred in rescinding his *in forma pauperis* status. The trial court has great discretion when deciding to revoke pauper status. *Ainsworth v. Ainsworth*, 2003-1626, p. 2 (La. App. 4 Cir. 10/22/03), 860 So.2d 104, 108. Accordingly, on appeal, a revocation of pauper status is reviewed according to the abuse of discretion standard. *Id.*

at p. 4, 860 So. 2d at 109.

Even though Mr. Dowl initially began the appeal with *in forma pauperis* status, the trial court revoked his status on the motion of the PCF. The trial judge granted the revocation because of the \$100,000.00 settlement Mr. Dowl received, which he did not disclose when applying for *in forma pauperis* status. Mr. Dowl asserts that his status should not be revoked because he did not receive the entire \$100,000, as \$7,000 of the settlement went to the Department of Veteran's Affairs as a release of liens. Mr. Dowl also acknowledged paying his first attorney \$7,000 in fees. Assuming Mr. Dowl paid his attorney from the settlement, \$86,000 of the settlement remained.

This court previously upheld a revocation of pauper status where plaintiff was entitled to receive less money than Mr. Dowl. *See Ainsworth* at p. 4, 860 So. 2d at 109. Accordingly, we do not find the trial court abused its discretion because Mr. Dowl does not appear destitute such that proceeding *in forma pauperis* is warranted. As such, we affirm the decision of the trial court.

### **CONCLUSION**

For the foregoing reasons, we affirm the decisions of the trial court.

**AFFIRMED**

**DISMISSAL ORDER VACATED;**