ANTHONY SMITH, AS FATHER AND NATURAL TUTOR OF THE MINOR CHILD THERION WEST, AS WRONGFUL DEATH AND SURVIVAL BENIFICIARY OF FELICIA WEST, DECEASED	*	**NO. 2018-CA-1028**
	*	**COURT OF APPEAL**
	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
VERSUS	* * * * * * *	
TOURO INFIRMARY, ET AL		

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2016-02043, DIVISION "G-11"
Honorable Robin M. Giarrusso, Judge
* * * * * *

Judge Terri F. Love
* * * * * *

(Court composed of Chief Judge James F. McKay III, Judge Terri F. Love, Judge Dale N. Atkins)

ATKINS, J., CONCURS IN RESULT

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COUNSEL FOR DEFENDANTS/APPELLEES, STATE OF LOUISIANA THROUGH THE BOARD OF SUPERVISORS OF LSU AND AGRICULATURAL AND MECHANICAL COLLEGE ON BEHALF OF LSU HEALTH SCIENCES CENTER AT NEW ORLEANS, LSU HEALTH CARE SERVICES DIVISION, AND MEDICAL CENTER OF LOUISIANA AT NEW ORLEANS – UNIVERSITY HOSPITAL, CAROLINE BURTON, M.D., AND STEPHEN A. MORSE, M.D.

REVERSED AND REMANDED
May 8, 2019

This appeal arises from the death of a hospital patient and the resulting medical malpractice action, wherein the private healthcare defendants settled prior to trial. The remaining State health care defendants filed a motion for summary judgment contending that plaintiff could no longer prove the damages element of his claim because the settlement exhausted the $500,000.00 medical malpractice cap illuminated in La. R.S. 40:1231.2 and La. R.S. 40:1237.1. The trial court agreed, granted the motion for summary judgment, and dismissed all of the State health care defendants.

Plaintiff appeals, alleging that the cap on medical malpractice recovery was not intended to divest defendants of liability or a plaintiff's right to a trial on the merits. We find that one medical malpractice cap applies to singular acts of negligence resulting in a singular, indivisible injury. Further, employing the tenets of statutory interpretation and applying the reasoning of previous jurisprudence, we find that the medical malpractice cap is placed on the amount recoverable/judgment rendered as opposed to the amount of damages sustained or proven. Therefore, we find that medical malpractice plaintiffs are entitled to

proceed to a trial on the merits against the remaining defendants following a partial settlement that met the medical malpractice cap. The judgment of the trial court is reversed and the matter remanded for further proceedings consistent with this opinion.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In September 2012, Felicia West was approximately twenty-seven weeks pregnant and was admitted to Touro Infirmary after suffering a fall at her residence. Ms. West subsequently underwent an emergency Caesarean section, birthing Therion West. Ms. West was then transferred to the Intensive Care Unit, where she was diagnosed with thrombotic thrombocytopenic purpura ("TTP") by Dr. Milton Seiler. Dr. Seiler ordered treatment based on his diagnosis. On October 10, 2012, "Ms. West suffered a seizure which was later attributed to a large intracranial hemorrhage." She passed away following the seizure.[1]

Anthony Smith, the father and tutor of Therion West, filed a Complaint and Request for Formation of Medical Review Panel, alleging that Ms. West's death was caused by the negligence of Touro Infirmary; Milton Seiler, M.D.; Efrain Reisen, M.D.; Stephen Morris, M.D.; Caroline Burton, M.D.; and Janet Ross, M.D. The MRP found that all of the named defendants performed according to the applicable standard of care, with the exception of Dr. Seiler. The MRP determined that Dr. Seiler "deviated from the standard of care in his misdiagnosis and treatment of TTP," which "led to the ultimate demise of" Ms. West.

Following the MRP opinion, Mr. Smith filed a Petition for Damages against Touro Infirmary, Dr. Ross, Dr. Seiler, Dr. Burton, Dr. Reisin, Dr. Morse, the State

[1] A fact intensive review of Ms. West's treatment and death is not necessary for the issue on appeal.

of Louisiana through Board of Supervisors of Louisiana State University Agricultural and Mechanical College ("LSU"), and DaVita entity d/b/a DaVita New Orleans Uptown Dialysis based on the wrongful death of Ms. West. The First Supplemental and Amended Petition added Total Renal Care, Inc. as a subsidiary of DaVita. While the matter was pending, Dr. Ross, Dr. Seiler, Touro Infirmary, and Dr. Reisin were dismissed. Mr. Smith entered into a confidential settlement agreement with Touro Infirmary and Dr. Seiler.

After confecting the partial settlement, the State defendants (LSU, Dr. Burton, and Dr. Morse) filed a Motion for Summary Judgment contending that the settlement exhausted the State medical malpractice cap contained in La. R.S. 40:1237.1. The trial court agreed, granted the Motion for Summary Judgment, and dismissed all of the State defendants with prejudice, finding that only one medical malpractice cap existed. Mr. Smith's devolutive appeal followed.

SUMMARY JUDGMENT

"The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action." La. C.C.P. art. 966(A)(2). "The procedure is favored and shall be construed to accomplish these ends." *Id.* "[A] motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law." La. C.C.P. art. 966(A)(3).

The burden of proof on a motion for summary judgment begins with the mover. La. C.C.P. art. 966(D)(1). However, if the mover does not bear the burden of proof at trial and demonstrates "the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense," then the burden

shifts. *Id*. The adverse party must then "produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law." *Id.*

Appellate courts review the granting of a motion for summary judgment using the *de novo* standard of review. *Mason v. T & M Boat Rentals, LLC*, 13-1048, p. 3 (La. App. 4 Cir. 3/19/14), 137 So. 3d 741, 743. We utilize "the same criteria governing the trial court's consideration of whether summary judgment is appropriate." *Wilson v. Calamia Const. Co.*, 11-0639, p. 3 (La. App. 4 Cir. 9/28/11), 74 So. 3d 1198, 1200.

MEDICAL MALPRACTICE CAP

Mr. Smith appealed, contending that the trial court erred by granting the State defendants' Motion for Summary Judgment and effectually granting the State defendants a credit for Mr. Smith's partial settlement with private defendants.

The Louisiana Medical Malpractice Act ("LMMA") provides that "[t]he total amount recoverable for all malpractice claims for injuries to or death of a patient, exclusive of future medical care and related benefits as provided in R.S. 40:1231.3, shall not exceed five hundred thousand dollars plus interest and cost." La. R.S. 40:1231.2(B)(1). Likewise, the Medical Liability for State Services Act ("MLSSA") provides that

> no judgment shall be rendered and no settlement or compromise shall be entered into for the injury or death of any patient in any action or claim for an alleged act of malpractice in excess of five hundred thousand dollars plus interest and costs, exclusive of future medical care and related benefits valued in excess of such five hundred thousand dollars.

La. R.S. 40:1237.1(F).

This Court previously examined the *res nova*

> issue of whether plaintiffs in a medical malpractice action may recover damages up to the amount of two medical malpractice "caps" when their damages were caused both by the negligence of a health care provider qualified under the Medical Malpractice Act ("MMA"), LSA-R.S. 40:1299.40 et seq., and by a health care provider whose liability falls under the provisions of the Medical Liability for State Services Act ("MLSSA"), LSA-R.S. 40:1299.39.

Williams v. O'Neill, 99-2575, p. 1 (La. App. 4 Cir. 3/13/02), 813 So. 2d 548, 552. This Court stated that the issue involved "two competing policy considerations." *Id*., 99-2575, p. 8, 813 So. 2d at 555. The policies were enumerated as follows

> [f]irst, we are cognizant of the vast body of jurisprudence relative to the fact that Louisiana's medical malpractice acts "must be strictly construed because they grant immunities or advantages to special classes in derogation of the general rights available to tort victims." *Kelty v. Brumfield*, 93-1142, p. 9 (La.2/25/94), 633 So.2d 1210, 1216, and the cases cited therein. Second, we must acknowledge the fact that the legislature intended by its adoption of the medical malpractice acts to "impose significant limitations on the courts' power and authority to adjudicate medical negligence cases, viz., (1) a comprehensive $500,000 cap on damages; ... and (2) mandated medical review before trial." *Id*.

Id., 99-2575, p. 8, 813 So. 2d at 555-56. Ultimately, after attempting to discern the legislative intent, this Court found

> that the intent of the legislature when it adopted the MLSSA was to limit a medical malpractice plaintiff's recovery to a single $500,000 cap for a single act of medical malpractice by health care providers entitled to protection under the two Louisiana medical malpractice acts, even if the liability of some is controlled by the MMA and the liability of others is controlled by the MLSSA.

Id., 99-2575, p. 9, 813 So. 2d at 556.

However, the Supreme Court found that multiple caps can exist if there are multiple acts of negligence resulting in "separate and independent damages."

Batson v. S. Louisiana Med. Ctr., 99-0232, p. 11 (La. 11/19/99), 750 So. 2d 949, 957. The Court reasoned

> [w]e hold that the MLSSA does not foreclose the possibility of a plaintiff recovering more than one cap for multiple injuries resulting from multiple acts of malpractice. The MLSSA limits recovery to $500,000.00 for "*the injury*" for "*an* alleged *act* of malpractice." The use of the singular nouns "injury" and "act" denotes that the legislature did not intend to limit a plaintiff to one recovery for multiple *injuries* resulting from multiple *acts* of malpractice. The plain language of the Act gives no indication that a plaintiff should be limited to a single recovery of $500,000.00, irrespective of how many acts of malpractice are performed against him or her. The language of LSA–R.S. 40:1299.39(F) should be interpreted to indicate by inference that the total amount recoverable for each act of malpractice shall not exceed $500,000.00. To hold that a plaintiff can only recover one cap regardless of how many times he or she is the victim of malpractice would imply that when a person enters a hospital and is the victim of an initial act of malpractice, all other health care providers have free reign to commit any number of additional negligent acts with full immunity. Clearly, the legislature did not intend such an outrageous result.

Id.

Thus, generally one medical malpractice cap applies for an act of negligence resulting in an indivisible injury. Based on this, the State defendants contend that because one medical malpractice cap applies and the settlement with the LMMA defendants met the $500,000.00, then Mr. Smith is not entitled to a trial on the merits against them. In other words, the State defendants assert that they are entitled to a credit for Mr. Smith's partial settlement with the LMMA defendants.

However, rather than determining whether a credit is due, we find that the more important issue is discerning whether a medical malpractice plaintiff is precluded from proceeding to a trial on the merits against remaining MLSSA defendants when the LMMA defendants settled in excess of the cap prior to trial

dominates. While no jurisprudence examines the specific procedural posture before us, we find guidance in the reasoning and logic espoused in the following jurisprudential discussions based on the interpretation of the LMMA and MLSSA.

"The starting point for the interpretation of any statute is 'the language of the statute itself.'" *Miller v. LAMMICO*, 07-1352, p. 18 (La. 1/16/08), 973 So. 2d 693, 705 (quoting *Touchard v. Williams*, 617 So. 2d 885, 888 (La. 1993)). La. C.C. art. 2323(A) provides, in pertinent part, that "[i]n any action for damages where a person suffers injury, death, or loss, the degree or percentage of fault of all persons causing or contributing to the injury, death, or loss shall be determined . . . ." It is undisputed that medical malpractice actions are governed by the legal principles of comparative fault. *Miller*, 07-1352, p. 18, 973 So. 2d at 705. As the Supreme Court stated,

> [t]he fundamental purpose of Louisiana's comparative fault scheme is to ensure that each tortfeasor is responsible only for that portion of the damage he has caused. *Dumas*, 02-0563, p. 14, 828 So.2d 530, 538. Therefore, each tortfeasor is responsible for the damage he has caused, regardless of any potential for reduction under the Medical Malpractice Act. The percentage of the damages assigned to the tortfeasor by the fact finder is that specific portion of the total amount of damages that the fact finder determines the tortfeasor has caused, without regard to the statutory cap. Only when a Qualified Health Care Provider causes damage in excess of $500,000 does the Medical Malpractice Act damages cap apply. La. R.S. 40:1299.42(B)(1). Thus, in accordance with the purpose of the comparative fault scheme, a doctor who has committed malpractice is responsible for the damages he causes, and only after that amount exceeds the statutory damages cap will the victim's recovery be reduced as a result of the Medical Malpractice damages cap found in La. R.S. 40:1299.42(B)(1).
>
> Moreover, when comparative fault percentages are allocated to the verdict prior to application of the damages cap set forth in La. R.S. 40:1299.42(B)(1), there

> is no risk that a tortfeasor will be liable for damages in excess of those which the fact finder has determined the tortfeasor caused. *Cf. Hall v. Brookshire Brothers, Ltd.*, 02-2404, p. 21, 848 So.2d 559, 572 (pointing out that allocation of comparative fault prior to imposition of the Medical Malpractice Act damages cap creates no risk that the plaintiff will recover damages the jury found were caused by him or her).

Id., 07-1352, pp. 19-20, 973 So. 2d at 706-07 (footnotes omitted).

The Supreme Court also interpreted the statutes to conclude that the PCF was entitled "to a $100,000.00 previously paid settlement credit." *Hall v. Brookshire Bros., Ltd.*, 02-2404, p. 16 (La. 6/27/03), 848 So. 2d 559, 569. When examining whether to calculate comparative fault before or after applying the cap, the Court reasoned that just "[b]ecause a defendant is liable only for that damage caused by his or her fault, when a defendant stipulates to liability for fault, he or she does not thereby necessarily concede responsibility for 100% of the fault." *Id*., 02-2404, p. 12, 848 So. 2d at 567. The Court further expounded:

> Louisiana Civil Code article 2323 requires that the fault of every person responsible for a plaintiff's injuries be compared, whether or not they are parties, regardless of the legal theory of liability asserted. As we explained in *Dumas v. State, Department of Culture, Recreation & Tourism*, 2002-0563 (La.10/15/02), 828 So.2d 530, 537: "The comparative fault article, La. C.C. art. 2323, makes no exceptions for liability based on medical malpractice; on the contrary, it clearly applies to any claim asserted under any theory of liability, regardless of the basis of liability." Thus, in the trial against the Fund, wherein the plaintiff retains the burden of proving that the admitted malpractice caused damages in excess of $100,000.00, evidence that victim or third party fault caused any of the damages is clearly relevant and admissible. *Conner*, *supra*.
>
> While we are mindful that the Medical Malpractice Act, which substantially impedes the ability of an injured party to obtain full recovery of his or her damages, is in derogation of established rights and is to be strictly construed, *Sewell v. Doctors Hospital*, 600 So.2d 577,

> 578 (La.1992), in interpreting the language of a statute that is susceptible of different meanings we are obligated to apply and interpret the language of the statute in a manner which is consistent with logic and the presumed fair purpose and intention of the legislature in passing it. LSA–C.C. art. 10; *City of Pineville v. American Federation of State, County, and Municipal Employees, AFL–CIO, Local 3352*, 2000-1983 (La.6/29/01), 791 So.2d 609, 612. In this instance, our interpretation of the language of LSA-R.S. 40:1299.44(C)(5) is consistent with the overall purpose of the Act, which is to limit the liability of health care providers generally and thereby limit the skyrocketing costs of medical malpractice insurance. It is also consistent with specific provisions of the Act which make clear the legislature's intention to hold the Fund liable only for acts constituting medical malpractice. Louisiana Revised Statute 40:1299.41(I), for example, cautions that "[n]othing in this Part shall be construed to make the patient's compensation fund liable for any sums except for those arising from medical malpractice." Similarly and significantly, LSA-R.S. 40:1299.44(D)(2)(b)(x) authorizes the Fund to defend against claims due wholly or in part to the negligence of a non-covered health care provider or a product manufacturer, or both, regardless of whether a covered health care provider has settled and paid the statutory maximum. These provisions evidence an intent by the legislature that the Fund be able to limit its liability by demonstrating that the negligence or liability of another caused the plaintiff's damages. It is consistent with our interpretations of the statutory language in *Graham*, *supra*, and *Conner v. Stelly*, *supra*.
>
> Admittedly, this interpretation of the effect of the admission of liability under LSA-R.S. 40:1299.44(C)(5) reduces the benefit that inured to plaintiffs under our prior jurisprudence. Nevertheless, as we pointed out in *Graham*, the plaintiff still receives a significant benefit in that the fault of the qualified health care provider is admitted, as is causation of damages of at least $100,000.00 in value. *Graham*, 699 So.2d at 372.

Id., 02-2404, pp. 13-14, 848 So. 2d at 567-68 (footnotes omitted). The Court reiterated that the reasoning behind the cap on the amount recoverable was "to lower the cost of health care generally and thereby ensure the availability of safe and affordable health care to the public." *Id*., 02-2404, p. 16, 848 So. 2d at 569.

However, the Court stressed the importance of the difference between the amount recoverable and the damages sustained.

> The damages sustained by a medical malpractice victim are distinct from the amount that can be recovered for those damages. Legislative fiat cannot limit the extent to which a medical malpractice victim sustains damage. Legislation can only limit the amount that can be recovered for those damages.

Id., 02-2404, p. 18, 848 So. 2d at 571. "The amount that is to be paid to the victim of proven malpractice is not synonymous with the damages recoverable by that victim, which are, simply stated, the total damages assessed by the trier of fact." *Id*., 02-2404, p. 19, 848 So. 2d at 571.

Following *Hall*, the Supreme Court dictated that the reasoning of *Hall* applies even if the medical malpractice plaintiff bears no portion of fault. *Miller*, 07-1352, p. 1, 973 So. 2d at 696. The Supreme Court reiterated the importance of the reasoning in *Hall* by stating:

> we held that the proper application of La. Civ.Code article 2323 requires calculation of the damages owed and allocation of comparative fault before reduction of the damages award in accordance with the statutory damages cap set forth in La. R.S. 40:1299.42(B)(1). *Id*., p. 23, at 573. Reasoning that the rules of statutory interpretation mandate that the court consider the legislature's choice of language as deliberate, we found the legislature's decision to use "damages recoverable" in article 2323, instead of "amount recoverable" was deliberate. *Id*., p. 19, at 571. Had the legislature intended to limit allocation of comparative fault in cases covered by the Medical Malpractice Act to the "amount recoverable," it could have used language identical to that set forth in La. R.S. 40:1299.42(B)(1) when it introduced the comparative fault scheme into La. Civ.Code art. 2323 in 1979, or when article 2323 was subsequently amended in 1996.

Id., 07-1352, p. 15, 973 So. 2d at 703-04 (footnotes omitted). The Supreme Court found in *Miller*, that "the comparative fault percentages are allocated prior to

imposition of the Medical Malpractice Act damages cap, [and are] not limited to only those circumstances in which the plaintiff is comparatively at fault, but applies regardless of whether the plaintiff is assigned any portion of fault." *Id*., 07-1352, p. 9, 973 So. 2d at 700. The Court reasoned, "that principle requires allocation prior to imposing the damages cap because to allocate otherwise would enhance and amplify the reduction imposed upon the plaintiff." *Id*., 07-1352, p. 16, 973 So. 2d at 704.

The Louisiana Supreme Court addressed whether the Patient Compensation Fund ("PCF") was entitled to credits when a medical malpractice plaintiff entered into two settlements, but had a gross damage award of $412,500.00. *Thomas v. Ins. Corp. of Am.*, 93-1856 (La. 1994), 633 So. 2d 136, 137. The Court held that the PCF was entitled to credits equal to the two settlements ($140,000.00), thereby reducing the judgment by $140,000.00. *Id*., 93-1856, 633 So. 2d at 141.

Subsequently, this Court was tasked with determining what impact a during-trial settlement of an LMMA defendant would have on the remaining MLSSA defendants cast in judgment. *Douglas v. Children's Hosp.*, 10-0213 (La. App. 4 Cir. 8/19/10), 69 So. 3d 434. Following trial, the MLSSA defendants sought a credit for the amount of the LMMA defendant's settlement. *Douglas* upheld the singular medical malpractice cap. 10-0213, p. 63, 69 So. 3d at 469. However, this Court held that MLSSA defendants were not entitled to a post-judgment credit based on the amount of the LMMA defendant's settlement. *Douglas*, 10-0213, p. 65, 69 So. 3d at 470. Thus, the plaintiff was permitted to recover $500,000 from the State as well as retaining the amount from the settlement. This Court distinguished *Thomas* because the State was seeking a credit in *Douglas*, as opposed to the PCF in *Thomas*. *Id*. No further reasoning was provided.

As discussed above, the Supreme Court stressed, in *Hall* and *Miller*, the importance of the legislature's choice of utilizing the term "amount recoverable" in the LMMA as opposed to the words "damages sustained." While the MLSSA does not contain the exact language as the LMMA, the MLSSA states that "no judgment shall be rendered and no settlement or compromise shall be entered into . . . in excess of five hundred thousand dollars plus interest and costs." La. R.S. 40:1237.1(F). Notably, the MLSSA does not provide that no fault shall be allocated or verdict reached in excess of five hundred thousand dollars.

Combining the reasoning in previous jurisprudence with the basic tenets of statutory interpretation, we find that Mr. Smith is entitled to proceed to a trial on the merits against the remaining, non-settling defendants. To prevent a medical malpractice plaintiff from proceeding to a trial on the merits because some defendants settled and others did not would further amplify the reductions placed on the plaintiff by the cap. Moreover, permitting defendants to evade trial via summary judgment in this instance would also circumvent the entire comparative fault scheme. Furthermore, as stated in *Hall*, the legislative fiat may limit the amount recovered, but cannot limit the total damages assessed by the trier of fact. 02-2404, p. 18, 848 So. 2d at 571. Accordingly, we find that the trial court erred as a matter of law by granting the State defendants' Motion for Summary Judgment. We reverse the trial court's judgment and remand for further proceedings consistent with this opinion.

Having found that Mr. Smith is entitled to a trial on the merits, we pretermit further discussion as to whether the State defendants are entitled to a credit following a trial on the merits. We are prohibited from issuing advisory opinions "from which no practical results can follow." *Whitney Nat. Bank of New Orleans*

v. Poydras Ctr. Associates, 468 So. 2d 1246, 1248 (La. App. 4th Cir. 1985).

DECREE

For the above-mentioned reasons, we find that the trial court erred by granting the State defendants' Motion for Summary Judgment. Therefore, we reverse the judgment of the trial court and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED