

IN RE: MEDICAL REVIEW PANEL

NO. 21-C-622

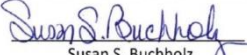
PROCEEDING OF KATHLEEN WELCH

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

FIFTH CIRCUIT COURT OF APPEAL
A TRUE COPY OF DOCUMENTS AS
SAME APPEARS IN OUR RECORDS


Susan S. Buchholz
First Deputy, Clerk of Court

November 18, 2021

Susan Buchholz
First Deputy Clerk

IN RE KATHLEEN AND CARROLL WELCH

APPLYING FOR SUPERVISORY WRIT FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT, PARISH OF JEFFERSON, STATE OF LOUISIANA, DIRECTED TO THE HONORABLE SCOTT U. SCHLEGEL, DIVISION "D", NUMBER 817-616

Panel composed of Judges Susan M. Chehardy,
Marc E. Johnson, and Stephen J. Windhorst

WRIT DENIED

Relators, Kathleen and Carroll Welch, seek review of the trial court's August 16, 2021 judgment granting the motion of respondent, Kenneth Williams, M.D., to enforce compliance with the Louisiana Medical Malpractice Act ("LMMA"). Finding no reason to disturb the trial court's ruling at this time, we deny the writ application.

The underlying matter in this case arises out of several claims of medical malpractice that allegedly occurred both before and after a statewide public health care emergency was declared by Governor Edwards pursuant to the Louisiana Health Emergency Powers Act ("LHEPA"), La. R.S. 29:760 *et seq.*¹ Both the LMMA (currently codified in La. R.S. 40:1231.1, *et seq.*), which governs claims against private qualified health care providers, and the LHEPA, which governs the standard of care for acts of malpractice by health care providers operating under a declared state of public health emergency, are at issue. This case is currently in the pre-suit, medical review panel stage.

¹ On March 11, 2020, Governor John Bell Edwards issued Proclamation Number 25 JBE 2020, stating: "Pursuant to the Louisiana Health Emergency Powers Act, La. R.S. 29:760, *et seq.*, a statewide public health emergency is declared to exist in the State of Louisiana as a result of the imminent threat posed to Louisiana citizens by COVID-19, which has created emergency conditions that threaten the lives and health of the State." The statewide public health emergency declared on March 11, 2020, remains in effect today.

Relators, Kathleen Welch and her husband, Carroll Welch, filed a request for a medical review panel, naming, among others, Dr. Kenneth Williams² as a defendant healthcare provider alleging he deviated from the standard of care in connection with medical treatment he provided to Kathleen between April 16, 2020, through May 6, 2020.³ Thereafter, the Patient’s Compensation Fund notified Mr. Lee H.R. Chawla that he was selected as attorney chairman of the panel that would review the Welches’ claims against Dr. Williams and the others.

After the Welches filed a petition to institute discovery in the district court, counsel for Dr. Williams notified Mr. Chawla that because the alleged acts of malpractice against Dr. Williams occurred during a state of public health emergency declared by Governor Edwards pursuant to LHEPA, the physician panelists must be instructed to assess the Welches’ allegations under the modified standard of care—“gross negligence or willful misconduct”—established by the statute. The LHEPA provides, in pertinent part:

During a state of public health emergency, any health care providers shall not 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.

La. R.S. 29:771(B)(2)(c).⁴

In response, counsel for the Welches objected to any such instruction on the basis that the modified standard of “gross negligence or willful misconduct” established by the LHEPA is not part of the LMMA, and neither the LHEPA nor LMMA provide for any application of the LHEPA to the medical review panel proceedings delineated in the LMMA. Specifically, counsel asserted that there is no provision within the LMMA that would authorize the application of a gross negligence or willful misconduct standard, and any such instruction would be in derogation of the LMMA and potentially provide a basis to strike the medical review panel’s opinion.

² The other named defendant healthcare providers include Bridgeport Healthcare LA, LLC, United Medical Physical Rehabilitation Hospitals (“UMRH”), and Dr. Michael Russo. Claimants later received confirmation from the Louisiana Patient’s Compensation Fund and Medical Review Panel that UMRH was not a qualified healthcare provider under the Louisiana Medical Malpractice Act and, thus, not entitled to review by a medical review panel. Claimants subsequently filed a separate lawsuit against UMRH. UMRH filed a peremptory exception of no cause of action on June 1, 2021, which addressed legal issues that are similar to those raised herein. On August 23, 2021, UMRH’s exception was sustained and the Welches’ claims against it were dismissed with prejudice. A judgment to this effect by Judge Rowan has not yet been signed.

³ It is undisputed that the medical care and/or services rendered to Kathleen by Dr. Williams occurred during a state of public health emergency.

⁴ Effective October 28, 2020, this subparagraph of the statute was amended as La. R.S. 29:771(B)(2)(c)(i) and provides that “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.” La. R.S. 29:771(B)(2)(c)(i), Act 2020, 2nd Ex.Sess., No. 30, § 1, eff. Oct. 28, 2020. The Act added La. R.S. 29:771(B)(2)(c)(ii) to include that during a state public health emergency declared to combat a contagious or infectious disease, no inpatient health care facility shall be liable to a member of the clergy for any civil damages related to or resulting from actual or alleged exposure when allowed access to the facility unless the health care facility failed to substantially comply with applicable procedures set forth by the Louisiana Department of Health.

Mr. Chawla advised Dr. Williams' counsel that his duties as attorney chairman, as well as the instructions given to the expert panelists, are set forth in the LMMA and that, in his opinion, he does not have "latitude" to deviate from the LMMA. "[He] would need a judge to order [him] to instruct the expert panelists differently."

Thereafter, Dr. Williams filed a petition for declaratory judgment and motion to enforce compliance with the LMMA, requesting the district court to issue an order declaring, as a matter of law, that the standard of care as set forth in the LHEPA, namely La. R.S. 29:771(B)(2)(c)(i), shall be applicable to the Welches' allegations of medical malpractice that took place after the March 11, 2020 declaration of public health emergency. Dr. Williams also requested that an order be issued directing the attorney chairman to instruct the medical panelists to assess the allegations of malpractice under a modified gross negligence standard of care applicable under the LHEPA.⁵

The Welches excepted to and answered Dr. Williams' petition and opposed his motion on the basis that the LMMA does not provide for the filing of a declaratory judgment action during the pendency of a medical review panel, which is a non-judicial proceeding, nor does the LMMA provide that the attorney chairman—who functions primarily as an administrator to set up the panel—instruct the physician panelists as to the applicable standard of care. According to the Welches, citing *Perritt v. Dona*, 02-2601 (La. 7/2/03), 849 So.2d 56, 65, it is within the sole purview of the physician panelists to determine the appropriate standard of care to be applied. Additionally, the Welches argued that health care providers should only be permitted to invoke the modified standard of care under the LEHPA as an affirmative defense of qualified immunity in answer to a petition after the medical review panel process is complete and a lawsuit has been filed.

In reply, Dr. Williams argued that La. R.S. 40:1231.8(C)(6) authorizes a party to petition the court to enforce the terms of the LMMA. Additionally, Dr. Williams asserted that a declaratory judgment is appropriate in this situation because there is a "conflicted issue of law, the parties are at odds," and the attorney chairperson is seeking the court's guidance.

The matter came for hearing on Dr. Williams' petition and motion on July 26, 2021. At the close of the hearing, the trial judge overruled the Welches' exceptions, but still denied Dr. Williams' petition for declaratory judgment. The Court granted Dr. Williams' motion to enforce compliance with the LMMA pursuant to La. R.S. 40:1231.8(C)(6). This judgment was reduced to writing in a judgment dated August 16, 2021, wherein the trial court ordered that the medical review panel attorney chairman:

'[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.'

⁵ Bridgepoint Healthcare LA, LLC, who allegedly provided medical care to Kathleen both before and after a state of public health emergency was declared, filed a memorandum in support of Dr. Williams' petition and motion.

In oral reasons, the trial judge explained its ruling by stating that the court does not have authority under the LMMA to intrude into a non-judicial proceeding and should not “insert itself into every single legal question that is raised at the time that it is at the panel [stage].”⁶ The court stated that “[c]learly the Court believes that a declaratory judgment from this Court is not appropriate because it is not this Court’s job to pronounce that standard of care, the Court finds that that is the duty of the panel, and the chairman certainly has a duty to provide legal advice and provide an answer to the medical review panel of what he or she believes that this standard of care is and what standard of care should be applied and certainly can and should consider the governor’s emergency order.” The trial court further stated:

Whether the panel finds that that’s applicable in this case is not the question this Court’s answering, I’m simply stating that, in accordance with the statute, attorney acting as chairman, (D)(5), 1231.8(D)(5), “The chairman of the panel shall advise the panel relative to any legal question involved in the review proceeding and shall prepare the opinion of the panel.” The question has been raised as to what proper standard of care should be applied and this Court will grant the Motion to Enforce Compliance with the Medical Malpractice Act and order the attorney 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.

In response to the question posed by counsel for the Welches—“[I]s the panel chair to instruct the panelist that 29:771 applies?”—the Court answered:

No, that’s not the Court’s ruling. The Court’s ruling is, if [the panelists] find it’s appropriate, [sic] can certainly deviate. I don’t believe it’s a deviation from the MMA to apply that standard of care if the panel and that attorney decide that it’s applicable in this case.

That attorney suggested that [he] cannot deviate and ... believe[s] it’s a deviation from the MMA to consider. This Court is saying I do not believe it is a deviation to consider [the Governor’s] orders and that case law to determine the appropriate standard of care. I’m not making a ruling on what that appropriate standard of care is or looks like. ... I’m ordering the ... chairman attorney to consider the case law, the governor’s order and determine whether or not he should be advising the panel on the application of the standard of care.

In their writ application, the Welches challenge that portion of the August 16, 2021 judgment granting Dr. Williams’ motion to enforce compliance with the

⁶ The trial court acknowledged that under the LMMA, there are two specific situations where a court can get involved during the pre-suit phase and that is “when there is an issue regarding a ‘no right of action’ or the question of prescription.”

LMMA on the basis that the trial court’s order “is in derogation of the LMMA and without statutory or jurisprudential support.” According to the Welches, it is solely the duty of the physician panelists to determine the applicable standard of care based on the evidence presented and whether defendant breached that standard. The Welches reiterate their argument made below that, pursuant to La. R.S. 40:1231.8(C)(2), the duty of the attorney chairman is limited to expediting the selection of other panel members, to convene the panel, and to expedite the panel’s review of the proposed complaint. The Welches also contend that while the attorney chairman “shall advise the panel relative to any legal question involved in the review proceeding and shall prepare the opinion of the panel,” it is not the duty of the attorney chairman “to advise the panel as to what standard of care applies.” The Welches argue that “[t]he LHEPA and its qualified immunity provision, La. R.S. 29:771(B)(2)(c), does not create a modified standard of care applicable to non-judicial proceedings when a public health care emergency is in effect.” The Welches submit that health care providers should only be permitted to invoke the qualified immunity provided by La. RS. 29:177(B)(2)(c)(i) as an affirmative defense in answer to a post-panel suit.

The Welches further contend that La. R.S. 29:771(B)(2)(c), as written, is ambiguous and susceptible to an overbroad interpretation that would lead to absurd consequences. Lastly, the Welches argue that La. R.S. 29:771(B)(2)(c) is unconstitutional with respect to medical malpractice cases because it violates the due process and adequate remedy provision of La. Const. art. 1, § 22. In short, if La. R.S. 29:771(B)(2)(c) is applied broadly to circumstances unrelated to a public health emergency, tort victims will be unconstitutionally denied their day in court.⁷

Discussion

Under the LMMA, the medical review panel “shall consist” of three health care providers and one attorney. La. R.S. 40:1231.8(C). The attorney shall act as chairman of the panel and in an “advisory capacity,” but shall have no vote. La. R.S. 40:1231.8(C)(2). The attorney panel member shall take an oath stating that “it is [his or her] *duty to advise the panel members concerning matters of law and procedure...*” La. R.S. 40:1231.8(5)(b). [Emphasis supplied.] Additionally, “[t]he [attorney] chairman *shall advise the panel relative to any legal question involved in the review proceeding ...*” La. R.S. 40:1231.8(D)(5). [Emphasis supplied.] The LMMA further provides that a party aggrieved by the “alleged failure or refusal” of a panel member “to perform according to the provisions of this Section may petition” the court “for an order directing that the parties comply with the medical review panel provisions of the medical malpractice act.” La. R.S. 20:1231.8(C)(6).

The panel, of which the attorney is a member, shall have the sole duty to determine whether or not the evidence supports the conclusion that the health care provider(s) acted or failed to act within the “appropriate standards of care.” La. R.S. 40:1231.8(G). After reviewing all of the evidence and after examination of the panel by counsel representing either party, the panel shall render its expert opinion as to whether the evidence does or does not support the conclusion that the

⁷ Dr. Williams filed a response to the Welches’ writ application re-urging the arguments he made in the trial court in support of his petition for declaratory judgment and motion to enforce compliance with the LMMA as outlined in detail above and set forth in his writ application filed in *In re: Medical Review Panel Proceeding of Kathleen Welch*, Case No. 21-C-624.

health care provider failed to comply “with the appropriate standard of care as charged in the complaint.” La. R.S. 40:1231.8(G)(1)-(2).⁸

Here, pursuant to La. R.S. 40:1231.8(C)(6), feeling aggrieved by Mr. Chawla’s refusal to perform his duties as attorney chairman, Dr. Williams petitioned the trial court to enforce Mr. Chawla’s compliance with the LMMA. The trial court granted Dr. Williams’ motion, and ordered Mr. Chawla to perform his statutory duty to advise the panel concerning the law regarding what standards of care may be applied to the Welches’ claims of medical malpractice considering Governor Edward’s executive order declaring a state of public health emergency and other applicable case law.⁹ We find no error in the trial court’s ruling.

For the foregoing reasons, and on the showing made, we find no reason to disturb the trial court’s determination at this time. This writ application is denied.

Gretna, Louisiana, this 18th day of November, 2021.

SMC
MEJ
SJW

⁸ La. R.S. 40:1231.8(G)(3) provides that the panel could alternatively decide that “there is a material issue of fact, not requiring expert opinion, bearing on liability for consideration by the court.” In their complaint, the Welches charge that Dr. Williams’ committed malpractice while caring for Kathleen between April 16, 2020 and May 6, 2020. We note that the alleged acts of malpractice committed by Dr. Williams occurred after Governor Edwards issued executive orders declaring a state of public health emergency pursuant to the Louisiana Health Emergency Powers Act, La. R.S. 29:760 *et seq.*, which declaration currently remains in effect.

⁹ *See Lejeune v. Steck*, 13-1017 (La. App. 5 Cir. 5/21/14), 138 So.3d 1280, *writ denied sub nom.*, *Daigle v. Steck*, 14-1408 (La. 10/3/14), wherein the same panel of this Court, applying the heightened standard of care set forth in La. R.S. 29:771(B)(2)(c) to the plaintiff’s claims of medical malpractice that occurred during a state of public health emergency declared in the wake of Hurricane Katrina, held the plaintiff was required to prove that Dr. Steck was grossly negligent or that his misconduct was willful. *Id.* at 1286. We also concluded that the specific provisions set forth in La. R.S. 29:771 relative to medical malpractice during a declared state of medical emergency prevail over the more general medical malpractice statutes. *Id.* at 1284. *See also Fletcher v. Select Specialty Hospital of New Orleans, Inc.*, 10-C-590 (La. App. 5 Cir. 7/30/10) (unpublished writ action), *writ denied*, 10-2000 (La. 11/5/10), 50 So.3d 808.

SUSAN M. CHEHARDY
CHIEF JUDGE

FREDERICKA H. WICKER
JUDE G. GRAVOIS
MARC E. JOHNSON
ROBERT A. CHAISSON
STEPHEN J. WINDHORST
HANS J. LILJEBERG
JOHN J. MOLAISSON, JR.

JUDGES



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NOTICE OF DISPOSITION CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE DISPOSITION IN THE FOREGOING MATTER HAS BEEN TRANSMITTED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 4-6** THIS DAY **11/18/2021** TO THE TRIAL JUDGE, THE TRIAL COURT CLERK OF COURT, AND AT LEAST ONE OF THE COUNSEL OF RECORD FOR EACH PARTY, AND TO EACH PARTY NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CURTIS B. PURSELL
CLERK OF COURT

21-C-622

E-NOTIFIED

24th Judicial District Court (Clerk)
Hon. Scott U. Schlegel (DISTRICT JUDGE)
Guice A. Giambrone, III (Respondent)
Raymond R. Egan, III (Respondent)

Jessica L. Ibert (Relator)
Benjamin J. Biller (Respondent)
Bert J. Miller (Respondent)
C. William Bradley, Jr. (Respondent)

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