

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 CA 1189

PAULA BOUTTE

VERSUS

MARK MEADOWS, M.D. AND OPHTHALMIC MUTUAL
INSURANCE COMPANY

Judgment Rendered: FEB 18 2014

On Appeal from
The 19th Judicial District Court,
In and for the Parish of East Baton Rouge,
State of Louisiana
Trial Court No. C565252
The Honorable Frank Foil, Judge Presiding

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BEFORE: WHIPPLE, C.J., WELCH, AND CRAIN, JJ.

Foil *Welch J. concurs with reasons.*

CRAIN, J.

The plaintiff appeals a declaratory judgment rendered in a medical malpractice suit. We hold that the certification of the judgment as final and appealable pursuant to Louisiana Code of Civil Procedure article 1915B(1) was improper and dismiss the appeal.

FACTS AND PROCEDURAL HISTORY

Paula Boutte filed this proceeding against Mark Meadows, M.D., and his insurer, Ophthalmic Mutual Insurance Company, based upon allegations that Dr. Meadows breached the standard of care by failing to properly diagnose, evaluate, and treat Boutte for laser assisted in situ keratomillus ("LASIK") eye surgery. Boutte's petition asserts that she sustained damages as a direct result of Dr. Meadows' negligence, including but not limited to physical pain and suffering, mental anguish, permanent physical disability and/or severe impairment of her vision, past and future medical expenses, and loss of income and earnings capacity.

Prior to trial, Boutte settled her claims against Dr. Meadows and Ophthalmic Mutual Insurance Company for \$100,000.00 plus interest. Pursuant to Louisiana Revised Statute 40:1299.44C, Boutte then filed a petition with the trial court seeking approval of the settlement and demanding payment of damages from the Patient's Compensation Fund ("PCF") in excess of the settlement amount.¹ After the PCF filed an answer to the petition for approval, the trial court held a hearing and entered a judgment approving the settlement and ordering that the matter proceed in accordance with the provisions of the Louisiana Revised Statutes 40:1299.41, *et seq.* ("Medical Malpractice Act"). Pursuant to a joint motion to dismiss, the trial court then entered an order recognizing that Dr. Meadows and Ophthalmic Mutual Insurance Company shall have no further liability to Boutte

¹ The "Louisiana Patient's Compensation Fund and the Louisiana Patient's Compensation Fund Oversight Board through the nominal defendant, Dr. Mar[k] Meadows," appeared as the parties of record and will be collectively referred to herein as the "PCF."

upon payment of the settlement amount and that Boutte was reserving her rights against the PCF. The order of dismissal also recognized that the liability of Dr. Meadows was admitted and established by payment of the \$100,000.00, which is in accord with Louisiana Revised Statute 40:1299.44C(5)(e).

In the absence of an agreement with the PCF as to the extent of its liability, the Medical Malpractice Act requires that Boutte's claim next proceed to a trial on the merits to determine what amount, if any, she is entitled to recover from the PCF in excess of the amount paid by Dr. Meadows and his insurer, subject to the \$500,000.00 statutory limit or "cap" of liability for certain damages set forth in the Medical Malpractice Act.² However, prior to trial, Boutte filed a "Petition for Declaratory Judgment" in this proceeding, alleging that she was "entitled to three statutory caps" in her claim for damages against the PCF because the three LASIK surgeries performed by Dr. Meadows on Boutte each constituted a different act of malpractice. Boutte requested that a "trial for a declaratory judgment be set and a judgment be rendered . . . declaring that under La. R.S. 40:1299.42(B) and Louisiana law, [Boutte] is entitled to three statutory caps for the multiple acts of negligence by Dr. Mark Meadows"

² Following a settlement between a claimant and a qualified health care provider or his insurer, the "trier of fact shall determine, at a subsequent trial . . . the amount of claimant's damages, if any, in excess of the amount already paid by the insurer of the health care provider or self-insured health care provider," and the trier of fact "shall determine the amount for which the fund is liable and render a finding and judgment accordingly." La. R.S. 40:1299.44C(5)(a). The "cap" is set forth in Subpart 40:1299.42B, which provides that the "total amount recoverable for all malpractice claims for injuries to or death of a patient, exclusive of future medical care and related benefits . . . shall not exceed five hundred thousand dollars plus interest and cost." La. R.S. 40:1299.42B(1). A qualified health care provider under this Part "is not liable for an amount in excess of one hundred thousand dollars plus interest . . . and costs . . . for all malpractice claims because of injuries to or death of any one patient." La. R.S. 40:1299.42B(2). Any amount due from a judgment or settlement that "is in excess of the total liability of all liable health care providers . . . shall be paid from the patient's compensation fund," subject to the total limit of liability set forth in Subpart 1299.42B(1). La. R.S. 40:1299.42B(3)(a) and (b).

The trial court assigned a two-day bench trial beginning on March 7, 2013, to adjudicate the petition for declaratory judgment, and a five-day jury trial beginning on July 8, 2013, for the merits of the damage claim against the PCF. At the bench trial, Boutte testified about her treatment with Dr. Meadows and her injuries and damages. When the trial court questioned Boutte's counsel about the relevance of her medical expenses to the declaratory judgment, her counsel clarified that the evidence was presented for the purpose of proving "different elements of damages related to each act." Boutte also presented testimony from her mother and one of her treating physicians, Dr. David Dragon, along with deposition testimony from Dr. David Mark (an expert retained by Boutte) and Dr. William Perez, a member of the medical review panel that reviewed the claim. Boutte also introduced documentary evidence that included the medical review panel opinion and volumes of medical records and expenses. Counsel for the PCF cross-examined Dr. Dragon but did not cross-examine Boutte or her mother, stating that the PCF "was going to reserve our questionings to [the] case in chief at trial." The PCF called no witnesses and did not introduce any documentary evidence.

After taking the matter under advisement, the trial court issued written reasons for judgment finding that the three operations performed by Dr. Meadows "were not separate and distinct unrelated acts of malpractice which would trigger three separate caps." A judgment was signed that denied the "motion for declaratory judgment" and declared that the "plaintiff is entitled to recover one cap." The judgment further provided that it was a "final judgment as contemplated by . . . Louisiana Code of Civil Procedure Article 1915B(1), there being no just reason for delay." Boutte filed a motion for devolutive appeal but incorrectly stated that she was appealing a judgment that "dismiss[ed] plaintiff's case." On appeal, Boutte asserts that the trial court erred when it "awarded only one cap."

However, before addressing the merits of the appeal, we must first determine whether this court has subject matter jurisdiction to review the judgment on appeal.

SUBJECT MATTER JURISDICTION FOR APPEAL

Appellate courts have the duty to examine subject matter jurisdiction *sua sponte*, even when the parties do not raise the issue. *State, Department of Transportation and Development v Henderson*, 09-2212 (La. App. 1 Cir. 5/7/10), 39 So. 3d 739, 741; *McGehee v. City/Parish of East Baton Rouge*, 00-1058 (La. App. 1 Cir. 9/12/01), 809 So. 2d 258, 260. This court's appellate jurisdiction extends to "final judgments." La. Code Civ. Pro. art. 2083; *Van ex rel. White v. Davis*, 00-0206 (La. App. 1 Cir. 2/16/01), 808 So. 2d 478, 483. A judgment that determines the merits in whole or in part is a final judgment. La. Code Civ. Pro. art. 1841. A declaratory judgment has the force and effect of a final judgment or decree and may be reviewed as other orders, judgments, and decrees. La. Code Civ. Pro. arts. 1871 and 1877. However, a judgment that only partially determines the merits of the action is a partial final judgment and is appealable only if authorized by Louisiana Code of Civil Procedure article 1915. *Rhodes v. Lewis*, 01-1989 (La. 5/14/02), 817 So. 2d 64, 66.

The principal claim pending in this proceeding is Boutte's demand against the PCF for an award of damages in excess of the amount of the settlement with Dr. Meadows and his insurer. The judgment at issue did not address the damage claim and, instead, was limited to a denial of the "motion for declaratory judgment" and a declaration that the "plaintiff is entitled to recover one cap." While the judgment adjudicated the claims contained in the petition for declaratory judgment, that petition set forth only a portion of the claims at issue in this matter. The judgment did not determine the merits of all of the claims pending in the case and, therefore, constitutes a partial judgment that is appealable only if authorized by Article 1915. *See Best Fishing, Inc. v. Rancatore*, 96-2254 (La. App. 1 Cir.

12/29/97), 706 So. 2d 161, 165 (judgment in the nature of a declaratory judgment was partial judgment where it resolved the issues presented by an amended petition but did not resolve the issues presented by the original petitory action petition); *Succession of Brantley*, 96-1307 (La. App. 1 Cir. 6/20/97), 697 So. 2d 16, 18 (declaratory judgment rendered in probate proceeding did not determine the merits of the case); *see also Eddy v. State Farm Fire and Casualty Company*, 09-0874, n.1 (La. App. 1 Cir. 12/23/09) 2009 WL 4983596 (unpublished opinion) (declaratory judgment determining plaintiff's rights under a stipulation in personal injury suit could be reviewed on appeal of subsequent final judgment that dismissed the case because the declaratory judgment did not resolve all outstanding issues, including the merits or value of the plaintiff's claims).

Whether a partial judgment is immediately appealable is determined by examining the requirements set forth in Article 1915. *Henderson*, 39 So. 3d at 741. Pursuant to Subpart A of Article 1915, a partial judgment is a final judgment if it:

- (1) Dismisses the suit as to less than all of the parties, defendants, third party plaintiffs, third party defendants, or intervenors.
- (2) Grants a motion for judgment on the pleadings, as provided by Articles 965, 968, and 969.
- (3) Grants a motion for summary judgment, as provided by Articles 966 through 969, but not including a summary judgment granted pursuant to Article 966(E).
- (4) Signs a judgment on either the principal or incidental demand, when the two have been tried separately, as provided by Article 1038.
- (5) Signs a judgment on the issue of liability when that issue has been tried separately by the court, or when, in a jury trial, the issue of liability has been tried before a jury and the issue of damages is to be tried before a different jury.
- (6) Imposes sanctions or disciplinary action pursuant to Article 191, 863, or 864 or Code of Evidence Article 510(G).

A partial judgment that fits within one of these enumerated categories is a final judgment subject to immediate appeal without the necessity of any designation of finality by the court. La. Code Civ. Pro. art. 1911. A partial judgment that is not included in one of these categories is not a final judgment unless it is properly designated as “final” by the court after an express determination that there is no just reason for delay. La. Code Civ. Pro. arts. 1911 and 1915B(1). Article 1915 attempts to strike a balance between the undesirability of piecemeal appeals and the need for making review available at a time that best serves the needs of the parties. *R.J. Messinger, Inc. v. Rosenblum*, 04–1664 (La. 3/2/05), 894 So.2d 1113, 1122; *Henderson*, 39 So. 3d at 741.

The judgment declaring that only one “cap” applies to Boutte’s claim against the PCF does not fall within any of the categories identified in Subpart A of Article 1915. The judgment did not dismiss the suit as to any party, nor did it grant a motion for judgment on the pleadings or a motion for summary judgment. The judgment also did not pertain to an incidental demand that was tried separately, as the petition for declaratory judgment was not an incidental demand. *See* La. Code Civ. Pro. art. 1031 (defining incidental demands as “reconvention, cross-claims, intervention, and the demand against third-parties”).³ The judgment likewise did not adjudicate the issue of liability and did not impose sanctions or disciplinary action.

Therefore, this court’s jurisdiction depends upon whether the judgment was properly designated as a final judgment pursuant to Subpart B(1) of Article 1915. *See* La. Code Civ. Pro. arts. 1911, 1915B(1), and 2083. The trial court gave no explicit reasons for its determination that no just reason for delay existed, so we review that determination on a *de novo* basis. *R.J. Messinger, Inc.*, 894 So. 2d at

³ The “Petition for Declaratory Judgment” was filed by Boutte in the existing proceeding and is more akin to an amended petition or, as characterized in the judgment, a motion. *See* La. Code Civ. Pro. arts. 961 and 1151.

1122; *Henderson*, 39 So. 3d at 741. In conducting this review, we consider the “overriding inquiry” of “whether there is no just reason for delay,” as well as the other non-exclusive criteria trial courts should use in making the determination of whether certification is appropriate, which include: (1) the relationship between the adjudicated and the unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; and (4) miscellaneous facts such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like. *R.J. Messinger, Inc.*, 894 So.2d at 1122–23; *Henderson*, 39 So. 3d at 741-742.

The adjudicated claim is limited to the number of medical malpractice caps that apply to Boutte’s action against the PCF; however, her claim for damages against the PCF was not adjudicated by the judgment. The PCF contests Boutte’s damage claim and denies that *any* sums are owed over and above the settlement amount.⁴ The significance of the number of available caps arises only if Boutte obtains a judgment on the merits in excess of five hundred thousand dollars plus interest and costs, exclusive of future medical care and related benefits. See La. R.S. 40:1299.42 and La. R.S. 40:1299.44. If she fails to obtain such a judgment, the applicability of multiple caps to her claim will be a moot issue, and any opinion from this court in that regard would be advisory in nature. Furthermore, a review of the judgment by this court at the present time would not shorten the time of the trial on the merits of the damage claim nor reduce the expense of the trial. Regardless of the outcome of the appeal, Boutte will still be required to prove the amount of her damages caused by the negligence of Dr. Meadows.

⁴ According to the parties’ briefs and oral arguments herein, the trial on the merits of the damage claim has not yet occurred.

The jurisprudence cited by the parties addressing the “multiple cap” issue further demonstrates the need for a judgment on the merits of the damage claim to support an appeal of the declaratory judgment rendered herein, as each of the cited cases considered whether multiple caps applied to a claim *after* a judgment had been rendered on the merits. *See Batson v. South Louisiana Medical Center*, 99-0232 (La. 11/19/99), 750 So. 2d 949, 953 (trial court awarded damages for multiple caps to the plaintiff); *Conerly v. State*, 97-0871 (La. 7/8/98), 714 So. 2d 709, 714-715 (trial court reduced its damage award for wrongful death and survival action to one cap); *Turner v. Massiah*, 94-2548 (La. 6/16/95), 656 So. 2d 636, 638 (trial court’s judgment on jury verdict awarded damages under two medical malpractice caps); *Singer v. Jarrott*, 08-1562 (La. App. 1 Cir. 7/29/09), 2009 WL 2252330 (unpublished opinion), *writs denied*, 09-2230, 09-2233 (La. 1/08/10), 24 So. 3d 873, 874 (trial court awarded damages under multiple caps).

Based upon our *de novo* review, we hold that the trial court erred in certifying the judgment as a final judgment pursuant to Article 1915B(1). Accordingly, this court lacks jurisdiction to consider the appeal. *See* La. Code of Civ. Pro. arts. 1911 and 2083; *Henderson*, 39 So. 3d at 742.

This court has the discretion to convert an appeal to an application for supervisory writs and rule on the merits of the application. *Stelluto v. Stelluto*, 05-0074 (La. 6/29/05), 914 So. 2d 34, 39. However, there are limitations on this grant of authority, as set forth in the jurisprudence. *Best Fishing, Inc.*, 706 So. 2d at 166. In *Herlitz Construction Company, Inc. v. Hotel Investors of New Iberia, Inc.*, 396 So.2d 878 (La. 1981), the Louisiana Supreme Court directed appellate courts to consider an application for supervisory writs under their supervisory jurisdiction, even though relief may be ultimately available to the applicant on appeal, when the trial court judgment was arguably incorrect, a reversal would terminate the

litigation (in whole or in part), and there was no dispute of fact to be resolved. *See also Best Fishing, Inc.*, 706 So. 2d at 166-167.

We decline to convert this matter to an application for supervisory writs. A reversal of the trial court's judgment would not terminate the litigation, in whole or in part, because the trial court has not determined what amount of damages, if any, Boutte is entitled to recover from the PCF. Therefore, the granting of a writ application will not terminate the litigation at this time, and the parties have an adequate remedy by review on appeal after a final judgment is rendered. *See Angelos v. Ruckstahl*, 12-0202 (La. App. 1 Cir. 9/21/12), 2012 WL 4335440 (unpublished opinion); *Texas Gas Exploration Corporation v. Lafourche Realty Company, Inc.*, 11-0520 (La. App. 1 Cir. 11/9/11), 79 So. 3d 1054, 1063, writ denied, 12-0360 (La. 4/9/12), 85 So. 3d 698.

CONCLUSION

Because the trial court improperly designated the partial judgment as a final judgment pursuant to Louisiana Code of Civil Procedure article 1915B(1), we dismiss the appeal for lack of appellate jurisdiction. All costs of the appeal are assessed to Boutte, and we remand this matter to the trial court for proceedings.

APPEAL DISMISSED AND CASE REMANDED.

PAULA BOUTTE

NO. 2013 CA 1189

VERSUS

FIRST CIRCUIT

MARK MEADOWS, M.D., ET AL .

COURT OF APPEAL

STATE OF LOUISIANA

WELCH, J., concurs.

JW

I concur in the opinion; however, I write separately to express my belief that the trial court clearly erred in applying a single statutory cap under the facts of this case.