NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2015 CA 0360

JOHN FILS & DEMITRIA FILS INDIVIDUALLY & ON BEHALF OF GENEVA FILS

VERSUS

ALLSTATE INSURANCE COMPANY, CHARLES T. GUIDRY, JENNIFER R. HAYES, MAYOLA CALAIS, STATE OF LOUISIANA THROUGH DEPARTMENT OF SOCIAL SERVICES AND/OR DEPARTMENT OF HEALTH & HOSPITALS AND/OR OFFICE OF COMMUNITY SERVICES & USAGENCIES CASUALTY INSURANCE COMPANY

VGW by
JEW by

Judgment Rendered: DEC 2 3 2015

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Docket Number C553321

Honorable Robert Downing, Judge Pro Tempore Presiding

****

Patrick Daniel **Houston, TX** **and** **David L. Bateman** **Baton Rouge, LA**	**Counsel for Plaintiff/2nd Appellant,** **Calvernia Reed, individually and** **on behalf of the minor child, Geneva** **Marie Fils**
James L. Hilburn **Beth Everett** **E. Wade Shows** **Baton Rouge, LA**	**Counsel for Defendant/1st Appellant,** **State of Louisiana through the Department** **of Social Services, Office of Community** **Services, now known as the Department** **of Children and Family Services**
Donald R. Smith **Baton Rouge, LA**	**Counsel for Defendant,** **Mayola Calais**

J. Elliott Baker	**Counsel for Intervenor,**
Irving H. Koch	**State of Louisiana through James D.**
Covington, LA	**"Buddy" Caldwell, Attorney General**

****

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

WHIPPLE, C.J.

In this appeal, plaintiff, Calvernia Reed, and defendant, the State of Louisiana, through the Department of Social Services, Office of Community Services, now known as the Department of Children and Family Services, ("the Department") challenge the trial court's October 20, 2014 ruling on a motion for partial summary judgment, which granted the motion in part, as to the applicability or effect of the provisions of LSA-R.S. 13:5102(A) herein. For the following reasons, we dismiss the appeal as it is taken from a partial judgment that is not immediately appealable under the provisions of LSA-C.C.P. art. 1915.

FACTS AND PROCEDURAL HISTORY

This lawsuit arises out of an automobile accident that occurred on March 22, 2006, involving Geneva Marie Fils, who was an infant at the time. Following Geneva's birth on January 2, 2006, the Department instituted legal proceedings, resulting in the Department being granted the legal custody of Geneva. The Department then placed Geneva in the foster care of defendant, Mayola Calais.

On March 22, 2006, Jennifer R. Hayes, with Calais's permission, was operating Calais's vehicle westbound on Louisiana Highway 724, with Calais and Geneva as passengers in the vehicle, when a vehicle driven by Charles T. Guidry travelling eastbound on Louisiana Highway 724 allegedly crossed the centerline and struck the Calais vehicle head on. As a result of the collision, Geneva, who purportedly was improperly restrained in her car seat at the time, sustained serious personal injuries, including a fractured

skull, an intracerebral hematoma, and a traumatic brain injury.[1]

On March 16, 2007, John Fils and Demitria Fils, Geneva's biological parents, filed suit, individually and on behalf the child, for damages, naming as defendants: Guidry and his alleged insurer, USAgencies Casualty Insurance Company; Hayes; Calais and her insurer, Allstate Insurance Company; and the Department. Although not named in the caption of the petition, Calvernia Reed, Geneva's maternal aunt, was named as a plaintiff in the body of the petition, in her capacity as "the current guardian of Geneva." In the petition, plaintiffs asserted claims for damages on behalf of Geneva and also for their own loss of consortium. In February 2011, following the death of Demitria Fils and upon being granted legal and physical custody and judicially appointed as Geneva's tutor, Reed was substituted as the proper party plaintiff in these proceedings.[2]

As noted in this court's opinion in the related appeal bearing docket number 2015 CA 0357, also handed down this date, during the pendency of these proceedings, the parties filed various motions for partial summary judgment, which rulings were designated by the trial court as final for purposes of immediate appeal, under LSA-C.C.P. art. 1915(B). Various appeals followed. At issue in this appeal is an October 20, 2014 judgment

---

[1]Geneva was placed in the back seat of the car in a front-facing position, in a car seat without the component car seat base and with the shoulder strap of the seat belt positioned across the carrier. Following the accident, Calais was issued a citation for a child restraint violation. See LSA-R.S. 32:295.

[2]Thereafter, by order dated July 3, 2012, the trial court approved the creation of the "Geneva Marie Fils Trust," which was made a plaintiff herein.

granting, in part, the Department's motion for partial summary judgment regarding the applicability of the definitional provisions of LSA-R.S. 13:5102(A) to the claims asserted herein.

Specifically, LSA-R.S. 13:5106(B)(1) provides for a $500,000.00 limitation on the total liability of the State of Louisiana or its political subdivisions in actions for personal injury, and LSA-R.S. 13:5106(B)(3)(c) provides for the payment of future medical expenses through the Future Medical Care Fund in suits against the State or a state agency, which protections and limitations were affirmatively pled by the Department in response to plaintiffs' claims. Apparently in an attempt to avoid the application of the provisions of LSA-R.S. 13:5106, plaintiffs amended their petition to allege that acts of negligence of the Department, Calais, and Hayes "constitute fault and/or negligence and/or gross negligence, as specifically contemplated by LSA-R.S. 13:5102(A)."

Louisiana Revised Statute 13:5102 is the definitional section for Title 13, Chapter 32, Part XV, entitled "Suits Against State, State Agencies, or Political Subdivisions," otherwise known as the "Louisiana Governmental Claims Act." LSA-R.S. 13:5101(A). Subsection (A) of LSA-R.S. 13:5102 defines "state agency" as follows:

> As used in this Part, **"state agency" means any** board, commission, **department**, agency, special district, authority, or other entity of the state **and, as used in R.S. 13:5106, any nonpublic, nonprofit** agency, **person**, firm, or corporation **which has qualified with the United States Internal Revenue Service for an exemption from federal income tax under Section 501(c)(3), (4), (7), (8), (10), or (19) of the Internal Revenue Code, and which, through contract with the state, provides services for the treatment, care, custody, control, or supervision of persons placed or referred to such agency, person, firm, or corporation by any agency or department of the state in connection with programs for treatment or services involving residential or day care for adults and children, foster care, rehabilitation, shelter, or counseling; however, the term "state agency" shall include such**

> **nonpublic, nonprofit agency, person, firm, or corporation only as it renders services to a person or persons on behalf of the state pursuant to a contract with the state. The term "state agency" shall not include a nonpublic, nonprofit agency, person, firm or corporation that commits a willful or wanton, or grossly negligent, act or omission.** A nonpublic, nonprofit agency, person, firm or corporation otherwise included under the provisions of this Subsection shall not be deemed a "state agency" for the purpose of prohibiting trial by jury under R.S. 13:5105, and a suit against such agency, person, firm or corporation may be tried by jury as provided by law. "State agency" does not include any political subdivision or any agency of a political subdivision.

(Emphasis added). Thus, in addition to defining "state agency" to include "any department," this statute also defines "state agency," for purposes of application of LSA-R.S. 13:5106 limiting liability, to include "non-public, non-profit" individuals who meet certain requirements and who provide foster care services for any agency or department of the State. However, such an individual is not included in the definition of "state agency" and, thus, not entitled to the protections granted to state agencies in LSA-R.S. 13:5106, where the individual "commits a willful or wanton, or grossly negligent, act or omission." LSA-R.S. 13:5102(A).

In response to plaintiffs' amended petition asserting liability based on gross negligence, the Department filed a motion for partial summary judgment in the instant matter, contending that LSA-R.S. 13:5102(A) "has no relation to the Department, the matter at hand, or on the limitation of [plaintiffs'] recovery in this action." The Department argued that the gross negligence provision in the definition of "state agency" (providing an exemption from the application of the damage cap and the requirements of the Future Medical Care Fund set forth in LSA-R.S. 13:5106(B)) applies only to non-public entities. Thus, the Department argued, because it is a public entity, the gross negligence exception set forth in LSA-R.S. 13:5102(A) has no application to the case herein.

In opposition to the Department's motion for partial summary judgment, plaintiffs contended that neither Calais nor Hayes meet the definition of a "state agency" set forth in LSA-R.S. 13:5102(A); that the Department stipulated to responsibility for all judgments taken against Calais; and, accordingly, that any corresponding limitation of liability afforded by LSA-R.S. 13:5106 does not apply to any of these defendants.[3]

The Department's motion for partial summary judgment regarding the applicability of LSA-R.S. 13:5102(A) was heard on July 14, 2014. By judgment dated October 20, 2014, the trial court granted, in part, the Department's motion for partial summary judgment as to "[p]laintiffs' claims for gross negligence as specifically contemplated by [LSA-R.S.] 13:5102(A) against [the Department] insofar as the claims relate to any direct acts of negligence committed by [the Department]," but denied the motion "as to [p]laintiffs' claims for gross negligence as specifically contemplated by [LSA-R.S.] 13:5102(A) against [the Department] insofar as the claims relate to claims for vicarious liability for such damages for which the [Department's] agents would be legally obligated should any such liability be found for acts within the course and scope of the placement of the minor child with the agent." The judgment was specifically designated as final for purposes of immediate appeal pursuant to LSA-C.C.P. art. 1915. From this judgment, both parties appeal.

[3]Additionally, with regard to any liability of the Department for its own negligence, plaintiffs argue on appeal that the Department committed direct acts of gross negligence resulting in the injuries to Geneva and that, as such, the Department is likewise excluded from the definition of "state agency" under the provisions of LSA-R.S. 13:5102(A). Thus, they contend that the Department is likewise not entitled to any protections or limitations of liability granted to "state agencies" in LSA-R.S. 13:5106 in light of its alleged direct acts of gross negligence.

DISCUSSION

At the outset, we must address whether the judgment before us is a partial judgment that is immediately appealable under LSA-C.C.P. art. 1915. 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, 2009-2212 (La. App. 1st Cir. 5/7/10), 39 So. 3d 739, 741. This court's appellate jurisdiction extends to "final judgments." LSA-C.C.P. art. 2083; Van ex rel. White v. Davis, 2000-0206 (La. App. 1st Cir. 2/16/01), 808 So. 2d 478, 483. A judgment that determines the merits in whole or in part is a final judgment. LSA-C.C.P. 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. LSA-C.C.P. arts. 1871 and 1877. However, a judgment that only partially determines the merits of an action is a partial final judgment and is appealable only if authorized by Code of Civil Procedure article 1915. Rhodes v. Lewis, 2001-1989 (La. 5/14/02), 817 So. 2d 64, 66.

The principal claims in these proceedings are claims for damages in tort stemming from the personal injuries suffered by Geneva. The judgment at issue does not address the merits of those damages claims, but, instead, is limited to a declaration as to the applicability of the provisions of LSA-R.S. 13:5102(A), in the event of an ultimate finding of liability on behalf of the Department, either for direct negligence or vicarious liability. The judgment does 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 Succession of Brantley, 96-1307 (La. App. 1st Cir. 6/20/97), 697 So. 2d 16, 18, and Boutte v. Meadows, 2013-1189, pp. 5-6 (La. App. 1st Cir. 2/18/14) (unpublished).

Whether a partial judgment is immediately appealable is determined by examining the requirements set forth in LSA-C.C.P. art. 1915. Henderson, 39 So. 3d at 741. Pursuant to LSA-C.C.P. art. 1915(A), 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 the enumerated categories contained in LSA-C.C.P. art. 1915A) is a final judgment subject to immediate appeal without the necessity of any designation of finality by the court. LSA-C.C.P. art. 1911(B).

However, a partial judgment that is not included in one of the enumerated 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. LSA-C.C.P. arts. 1911(B) and 1915(B)(1). Code of Civil Procedure 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, 2004-1664 (La. 3/2/05), 894 So. 2d 1113, 1122.

The October 20, 2014 judgment at issue herein, addressing the applicability of the definitions provided in LSA-R.S. 13:5102(A) as to any

potential future liability of the Department, does not fall within any of the categories identified in LSA-C.C.P. art. 1915(A). The judgment does not dismiss the suit as to any party, nor does it grant a motion for judgment on the pleadings, and also does not pertain to an incidental demand that was tried separately. The judgment likewise does not adjudicate the issue of liability and does not impose sanctions or disciplinary action. Moreover, while the judgment does grant, in part, a motion for partial summary judgment, it is a summary judgment under the provisions of LSA-C.C.P. art. 966(E), which authorizes the grant of a summary judgment "dispositive of a particular issue, theory of recovery, cause of action, or defense, in favor of one or more parties, even though the granting of the summary judgment does not dispose of the entire case as to that party or parties." Summary judgments granted pursuant to LSA-C.C.P. art. 966(E) are specifically excluded from the type of partial summary judgment that is immediately appealable under LSA-C.C.P. art. 1915(A) without the need for a designation of finality. See LSA-C.C.P. art. 1915(A)(3).

Because the October 20, 2014 judgment is not a final judgment for purposes of immediate appeal under the provisions of LSA-C.C.P. art. 1915(A), this court's jurisdiction then depends upon whether the judgment was properly designated as a final judgment pursuant to LSA-C.C.P. art. 1915(B)(1).[4] See LSA-C.C.P. arts. 1911(B) and 2083; Boutte, 2013-1189 at p. 4 (unpublished) (Trial court's judgment holding that only one "cap"

---

[4]Code of Civil Procedure article 1915(B)(1) provides as follows:

> When a court renders a partial judgment or partial summary judgment or sustains an exception in part, as to one or more but less than all of the claims, demands, issues, or theories against a party, whether in an original demand, reconventional demand, cross-claim, third-party claim, or intervention, the judgment shall not constitute a final judgment unless it is designated as a final judgment by the court after an express determination that there is no just reason for delay.

applied to plaintiff's medical malpractice claim against the Patient Compensation Fund did not fall within any of the categories of LSA-C.C.P. art. 1915(A)).

Although the judgment is designated as final and appealable pursuant to LSA-C.C.P. art. 1915, the trial court gave no explicit reasons for its determination that no just reason for delay existed. Accordingly, this court reviews that determination on a *de novo* basis. R.J. Messinger, Inc., 894 So. 2d at 1122. 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.

The adjudicated claim is limited to a determination regarding the definition of "state agency" set forth in LSA-R.S. 13:5102(A), as it applies to the limitation of liability provisions of LSA-R.S. 13:5106, which may become significant herein only upon a finding of liability (direct or vicarious) of the Department. However, no damage claims by plaintiffs against the Department, or any other defendants, were adjudicated by the judgment. A determination as to the applicability of any exemptions from the definition of "state agency" provided in LSA-R.S. 13:5102(A) has no legal effect or significance unless and until plaintiffs obtain a judgment on

the merits against the Department in excess of five hundred thousand dollars plus interest and costs, exclusive of future medical care and related benefits. If plaintiffs fail to obtain such a judgment, any restriction on the applicability of the damages cap set forth in LSA-R.S. 5106(B)(1) due to exemptions from the definition of "state agency" provided for in LSA-R.S. 13:5102(A) 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 instant appeal, plaintiffs would still be required to prove the amount of damages for which the Department is liable. Moreover, such a limitation of liability by the imposition of a damages cap is applied only *after* a judgment on the merits has been rendered. See generally Boutte, 2013-1189 at pp. 8-9, citing Batson v. South Louisiana Medical Center, 99-0232 (La. 11/19/99), 750 So. 2d 949, 953; Turner v. Massiah, 94-2548 (La. 6/16/95), 656 So. 2d 636, 638; Singer v. Jarrott, 2008-1562 – 2008-1571 (La. App. 1st Cir. 7/29/09) (unpublished), writ denied, 2009-2230, 2009-2233 (La. 1/8/10), 24 So. 3d 873, 874.

Similarly, any restriction on the applicability of the statutory requirement that future medical care and related benefits be paid from the Future Medical Care Fund pursuant to LSA-R.S. 13:5106(B)(3)(c) due to the definition of "state agency" contained in LSA-R.S. 13:5102(A) would require resolution only after a determination that Geneva is entitled to future medical care and that the Department is liable for such benefits.

Thus, based upon our *de novo* review, we hold that the trial court erred in certifying the October 20, 2014 judgment as a final and appealable judgment pursuant to Article 1915(B)(1). Accordingly, this court lacks

jurisdiction to consider the appeal. See LSA-C.C.P. arts. 1911 and 2083; Henderson, 39 So. 3d at 742.

Moreover, we decline to convert the appeal to an application for supervisory writs. This court has the discretion to convert an appeal to an application for supervisory writs and rule on the writ application. Stelluto v. Stelluto, 2005-0074 (La. 6/29/05), 914 So. 2d 34, 39. However, there are limitations on this authority. In Herlitz Construction Company, Inc. v. Hotel Investors of New Iberia, Inc., 396 So. 2d 878 (La. 1981)(*per curiam*), the Louisiana Supreme Court directed that appellate courts should consider an application for supervisory writs under their supervisory jurisdiction, even though relief may be ultimately available to the applicant on appeal, in circumstances where 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.

In the instant case, the criteria set forth in Herlitz are not met. Herein, a reversal of the trial court's judgment would not terminate the litigation, in whole or in part, because the trial court has not yet determined what amount of damages, if any, plaintiffs are entitled to recover from the Department (or from any other defendants). Therefore, the granting of a writ application will not terminate the litigation at this time.[5] Moreover, the parties have an adequate remedy by review on appeal after a final judgment is rendered.[6]

---

[5]Moreover, it appears that the parties did not file their notices of appeal within the thirty-day delay applicable to supervisory writs, contained in Uniform Rules—Courts of Appeal, Rule 4-3. Thus, we decline to exercise our discretion to convert the appeals to an application for supervisory writs on this basis also. See Wooley v. Amcare Health Plans of Louisiana, Inc., 2005-2025 (La. App. 1st Cir. 10/25/06), 944 So. 2d 668, 674 n.4; see also Stelluto v. Stelluto, 2005-0074 (La. 6/29/05), 914 So. 2d 34, 39 (noting that the decision to convert an appeal to an application for supervisory writs is within the discretion of the appellate courts).

[6]Additionally, we note that because the partial judgment is not a final one, it may be revised by the trial court at any time prior to rendition of judgment on the merits. See Davis, 808 So. 2d at 485.

See B outte, 2013-1189 at pp. 9-10 (unpublished), and Davis, 808 So. 2d at 485. Accordingly, we decline to exercise our supervisory jurisdiction to consider this matter as an application for supervisory writs.

CONCLUSION

For the above and foregoing reasons, we find that the October 20, 2014 partial summary judgment is non-appealable. Therefore, this appeal is dismissed *ex proprio motu*, for lack of appellate jurisdiction, and this matter is remanded to the trial court for further proceedings consistent with this opinion. Costs in the amount of $1,884.00 are assessed equally against plaintiff, Calvernia Reed, and defendant, the State of Louisiana through the Department of Social Services, Office of Community Services, now known as the Department of Children and Family Services.

APPEAL DISMISSED; REMANDED.