STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2020 CA 0270

DAISY BRIDGES, INDIVUALLY AND ON BEHALF OF
ELZIE BRIDGES (D)

VERSUS

BATON ROUGE GENERAL MEDICAL CENTER

VBW
JEW
WRC by JEW

Judgment Rendered: DEC 30 2020

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket Number C614,800

Honorable Wilson Fields, Judge Presiding

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

WHIPPLE, C.J.

In this medical malpractice action, the intervenors, Louisiana Patient's Compensation Fund and Louisiana Patient's Compensation Fund Oversight Board (collectively, the PCF), appeal from a judgment rendered in accordance with a jury verdict that awarded survival and wrongful death damages to the plaintiff, Daisy Bridges, individually and on behalf of her deceased husband, Elzie Bridges. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

On July 31, 2012, Elzie Bridges presented to the emergency department of Baton Rouge General Medical Center-Bluebonnet (Baton Rouge General) with complaints of respiratory distress and weakness. Mr. Bridges was diagnosed with pneumonia and admitted into Baton Rouge General for treatment. At the time he entered the hospital, Mr. Bridges was sixty-eight and also suffered from dementia, heart arrhythmia, high blood pressure, diabetes, and kidney disease; he had received a kidney transplant in 1999. Despite these chronic preexisting conditions, prior to his hospitalization, Mr. Bridges could walk with a cane, bathe himself, dress himself, and assist his wife with cooking and cleaning. However, at the time he was admitted into Baton Rouge General with pneumonia, Mr. Bridges was experiencing extreme weakness and was unable to move himself. Given his immobility, the protocol of Baton Rouge General required that nursing staff turn or reposition Mr. Bridges every two hours in order to prevent pressure ulcers (i.e., decubitus ulcers, or bedsores). On August 12, 2012, a nurse discovered a sacral pressure ulcer on Mr. Bridges' lower back, which had a dimension of 7.2 by 6.5 cm. and was an open wound (a "Stage II" pressure ulcer).[1] By August 18, 2012, Mr. Bridges' pneumonia had greatly

[1]Pressure ulcers are described in four stages. At Stage I, redness is present at the site, but it is not an open wound. At Stage II, the skin at the area of pressure has broken open. At Stage III, the skin is open and the ulcer is deeper. At Stage IV, the ulcer has expanded through tissue and has reached muscle and bone.

improved, and he was discharged from Baton Rouge General to a long-term care facility for physical therapy and treatment of his pressure ulcer. Unfortunately, despite treatment at several healthcare facilities, Mr. Bridges' pressure ulcer worsened, expanded through his muscle down to his bone (a "Stage IV" pressure ulcer), and became infected. Mr. Bridges developed severe sepsis (i.e., life-threatening organ dysfunction and was unable to receive any further dialysis. Mr. Bridges passed away on December 13, 2012.

On July 29, 2013, Mr. Bridges' wife, Daisy Bridges, timely filed a medical review panel complaint for investigation into the care provided to Mr. Bridges by Baton Rouge General. On July 15, 2015, a medical review panel convened and concluded that Baton Rouge General deviated from the appropriate standard of care as there was no documentation that Mr. Bridges was turned every two hours. The panel further concluded that the pressure ulcer was a contributing factor to his death.

On August 26, 2015, Mrs. Bridges, individually and on behalf of Mr. Bridges, filed suit against Baton Rouge General alleging medical malpractice in accordance with the medical review panel opinion. Mrs. Bridges sought survival damages on behalf of Mr. Bridges and individual wrongful death damages.

Mrs. Bridges and Baton Rouge General ultimately settled. On November 28, 2017, Mrs. Bridges filed a petition for approval of settlement of her medical malpractice claims against Baton Rouge General. Mrs. Bridges asserted that she had agreed to settle with Baton Rouge General for a sum of $97,500.00 and wished to reserve her right to proceed against the PCF for damages in excess of $100,000.00, pursuant to LSA-R.S. 40:1231.4(C).[2]

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[2]Louisiana Revised Statutes 40:1299.44 was redesignated as LSA-R.S. 40:1231.4 by House Concurrent Resolution No. 84 of the 2015 Regular Session (eff. June 2, 2015), which authorized and directed the Louisiana State Law Institute to reorganize and recodify the "Miscellaneous Health Provisions" Chapter of Title 40 of the Louisiana Revised Statutes of 1950 and further provided that the Louisiana State Law Institute shall change any references to Sections, Chapters, Subchapters, Parts, and Subparts in the Titles of the Louisiana Revised Statutes of 1950 and the Codes as necessary to reflect the new Sections, Chapters, Subchapters, Parts, and Subparts resulting from 2015 H.C.R. No. 84. Accordingly, LSA-R.S. 40:1231.1-1231.10 was redesignated

On January 10, 2018, the PCF filed a motion for intervention and answer to Mrs. Bridges' petition for court approval of settlement. The PCF objected to the issuance of any payments to Mrs. Bridges from the PCF without the benefit of an adequate opportunity to conduct discovery, identify and retain expert witnesses, prepare a defense, and conduct a trial by jury in accordance with LSA-R.S. 40:1231.4(C)(5)(a). On February 21, 2018, the trial court signed a consent judgment approving the settlement between Mrs. Bridges and Baton Rouge General and retaining Baton Rouge General as a nominal defendant to the extent necessary to allow Mrs. Bridges to seek excess damages against the PCF.[3]

On May 13, 2019, the PCF filed a motion for partial summary judgment, seeking dismissal with prejudice of Mrs. Bridges' wrongful death claims averring that Mrs. Bridges would be unable to prove Mr. Bridges' death was caused by the medical malpractice of Baton Rouge General. Mrs. Bridges opposed the motion for partial summary judgment, arguing that Baton Rouge General's failure to reposition Mr. Bridges every two hours caused his sacral pressure ulcer and subsequent sepsis, which caused his death. On June 24, 2019, a hearing was held on the PCF's motion for partial summary judgment. The trial court denied the motion in an order signed on July 5, 2019.

Following a jury trial on August 6 through August 8, 2019, a jury found in favor of Mrs. Bridges and against the PCF, awarding her survival and wrongful death damages in the following amounts:

Elzie Bridges

Physical Pain and Suffering $87,500.00

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from SA-R.S. 40:1299.41-1299.49. We refer herein to the law's current designation and note that no substantive changes have been made to former LSA-R.S. 40:1299.44 since 2012 La. Acts, No. 802. See In re Tillman, 2015-1114 (La. 3/15/16), 187 So. 3d 445, 457, n.1.

[3]On January 11, 2018, the trial court signed a written judgment dismissing Baton Rouge General from the suit (to remain as a nominal defendant only). On February 27, 2018, the trial court granted Mrs. Bridges' motion for leave of court to file a supplemental and amending petition, adding Baton Rouge General as a nominal defendant and the PCF as a statutory intervenor.

Mental Pain and Suffering	$30,000.00
Loss of Enjoyment of Life	$0
Medical Expenses	$212,100.00

Daisy Bridges

Loss of Love and Affection	$30,000.00
Loss of Enjoyment of Life	$100,000.00
Mental Pain and Suffering	$250,000.00

On August 26, 2019, the trial court signed a judgment in conformity with the jury's verdict.[4]

On September 11, 2019, the PCF filed a motion for judgment notwithstanding the verdict, or alternatively, motion for new trial. On September 12, 2019, Mrs. Bridges filed a rule to tax costs, seeking to have the PCF taxed with all court costs, as well as the expert witness fees incurred by Mrs. Bridges. Following a hearing on November 4, 2019, the trial court denied the PCF's motion for judgment notwithstanding the verdict, or alternatively, motion for new trial, and granted Mrs. Bridges' motion to tax costs, ordering the PCF to pay Mrs. Bridges' costs as requested in a judgment signed on December 4, 2019.

The PCF now appeals, contending that: (1) the trial court should have allowed defense counsel to utilize all peremptory strikes during jury *voir dire*, or should have granted a mistrial; (2) Daisy Bridges, as a codal beneficiary, is only able to recover her virile share of the survivor damages; (3) the trial court should have prevented the admission of Baton Rouge General's internal investigation report at trial; (4) the trial court should not have admitted photographs of Mr. Bridges' wound; (5) medical expenses paid by Medicare should not have been awarded; (6) the trial court should have granted a new trial or mistrial when Dr. Errol Ozdalga's jury tampering was discovered; (7) the trial court should not have taxed costs for Dr. Ozdalga's

[4]The August 26, 2019 judgment awarded Mrs. Bridges a total of $609,600.00 plus legal interest from the date of judicial demand, the amount owed by the PCF after a $100,000.00 credit for payment made by Baton Rouge General.

testimony; and (8) the trial court should have granted summary judgment on medical causation prior to trial.

DISCUSSION
Evidentiary Challenges
(Assignments of Error Numbers Three and Four)

In its third and fourth assignments of error, the PCF contends that the trial court erred by allowing admission of certain evidence. If a trial court commits an evidentiary error that interdicts its fact-finding process, this court must conduct a *de novo* review. Thus, any alleged evidentiary errors must be addressed first on appeal, inasmuch as a finding of error may affect the applicable standard of review. Spann v. Gerry Lane Enterprises, Inc., 2016-0793 (La. App. 1st Cir. 8/24/18), 256 So. 3d 1016, 1022, writ denied, 2018-1584 (La. 12/3/18), 257 So. 3d 194, and writ denied, 2018-1649 (La. 12/17/18), 258 So. 3d 599. Accordingly, we first address the evidentiary challenges raised by the PCF in assignments of error three and four.

Baton Rouge General Incident Report

The PCF argues in its third assignment of error that the trial court erred by allowing the admission at trial of a Baton Rouge General document titled "Incident Information" (incident report).[5] The incident report contains information regarding Mr. Bridges' development of the sacral pressure ulcer and specifically notes that the nursing staff on the hospital floor where Mr. Bridges was being treated were "responsible for this pressure ulcer." The incident report also contains a notation that there was a lack of assessment and a "[l]ack of preventative care/turning/floating." Prior to trial, the PCF filed a motion *in limine* seeking to

[5]The PCF concedes that when Baton Rouge General turned over the incident report to Mrs. Bridges, it waived any privilege associated with the document. However, the PCF asserts the waiver was not binding on the PCF. Notably, Mrs. Bridges settled with Baton Rouge General for $97,500.00. Since the settlement in this case was for less than the full $100,000.00, the PCF's statutory liability for excess damages was not triggered, and the PCF is not precluded from contesting the liability of Baton Rouge General. See LSA-R.S. 40:1231.4(C)(5)(e); Russo v. Vasquez, 94-2407 (La. 1/17/95), 648 So. 2d 879, 884. Accordingly, we find the PCF has the right to contest Baton Rouge General's liability and therefore, the right to raise the admissibility of the incident report.

prevent admission of the incident report at trial.[6] The PCF also objected to the admission of the incident report at trial.

The PCF contends that the incident report was prepared by Baton Rouge General in anticipation of litigation and therefore, was inadmissible under LSA-C.C.P. art. 1424. The PCF also claims the incident report was privileged pursuant to LSA-C.E. art. 407.[7] Additionally, the PCF argues that the use of the document at trial, through the testimony of Robin Passman, R.N. (Nurse Passman), improperly allowed Mrs. Bridges to derive a medical causation opinion without the testimony of a medical expert doctor.

Nurse Passman testified as the corporate representative for Baton Rouge General during a 2016 deposition. At trial, Nurse Passman stated she reviewed Baton Rouge General's relevant policies and procedures prior to her deposition and agreed that Baton Rouge General had protocols in place to prevent pressure ulcers in patients identified as being at risk for developing pressure ulcers. Nurse Passman testified that Mr. Bridges was identified as being at risk and was supposed to be turned every two hours; however, Nurse Passman admitted that Mr. Bridges was not turned consistently, and she was unable to say, based on his medical records, that he was turned from the evening of August 6th to the evening of August 11th, 2012. Nurse Passman identified an Incident/Varying Reporting document, which she explained provides instructions on how to prepare incident reports. Nurse Passman also identified the incident report created for Mr. Bridges. Nurse Passman testified that incident reports are prepared pursuant to Baton Rouge General's policies and

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[6]The record does not contain a written ruling on the motion *in limine*.

[7]The PCF additionally argues that the incident report is privileged pursuant to LSA-C.E. art. 510(F)(2). However, the "Health care provider-patient privilege" established in LSA-C.E. art. 510 may only be claimed by the patient or his legal representative, or a health-care provider or its representative asserting the privilege "on behalf of the patient or deceased patient." LSA-C.E. art. 510(D). The PCF does not seek to assert the privilege on behalf of Mr. Bridges and thus, the privilege is not available to the PCF.

procedures and are part of the customary business of caring for patients at Baton Rouge General. Nurse Passman stated that Mr. Bridges' incident report noted that Baton Rouge General was responsible for Mr. Bridges' pressure ulcer.

The scope of discovery is set forth in LSA-C.C.P. art. 1422:

> Unless otherwise limited by order of the court in accordance with this Chapter, the scope of discovery is as set forth in this Article and in Articles 1423 through 1425.
>
> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The courts have uniformly held that the scope of discovery is broad and that privileges, which are in derogation of such broad exchange of facts, are to be strictly interpreted. Gauthreaux v. Frank, 95-1033 (La. 6/16/95), 656 So. 2d 634 *(per curiam)*; Smith v. Lincoln Gen'l Hosp., 605 So. 2d 1347, 1348 (La. 1992) *(per curiam)*.

Louisiana Code of Civil Procedure article 1424(A) provides, in pertinent part:

> The court shall not order the production or inspection of any writing, or electronically stored information, obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless satisfied that denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice.

The party seeking to avoid discovery of documents on the ground that they were prepared or obtained in anticipation of litigation or in preparation for trial bears the burden of proving that the exception applies. Ogea v. Jacobs, 344 So. 2d 953, 955 (La. 1977); Naik v. United Rentals, Inc., 50,193 (La. App. 2nd Cir. 11/18/15), 182 So. 3d 223, 226, writ denied, 2015-2272 (La. 2/5/16), 186 So. 3d 1168.

Louisiana Code of Evidence article 407 provides:

> In a civil case, when, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This Article does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, authority, knowledge, control, or feasibility of precautionary measures, or for attacking credibility.

Pursuant to LSA-R.S. 13:3715.3 (the peer review statute), and LSA-R.S. 44.7(D), (the public records law), records and proceedings of hospital committees are confidential, and are not subject to discovery or court subpoena. However, as noted by the Supreme Court in Smith v. Lincoln Gen. Hosp., 605 So. 2d 1347, 1348 (La. 1992) *(per curiam)*, these statutes do not provide hospitals with total immunity from discovery of any hospital committee record or proceeding:

> These provisions are intended to provide confidentiality to the records and proceedings of hospital committees, not to insulate from discovery certain facts merely because they have come under the review of any particular committee. Such an interpretation could cause any fact which a hospital chooses to unilaterally characterize as involving information relied upon by one of the sundry committees formed to regulate and operate the hospital to be barred from an opposing litigants discovery regardless of the nature of that information. Such could not have been the intent of the legislature, especially in light of broad scope given to discovery in general. La. C.C.P. art. 1422. Further, privileges, which are in derogation of such broad exchange of facts, are to be strictly interpreted.
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> Nevertheless, when a plaintiff seeks information relevant to his case that is not information regarding the action taken by a committee or its exchange of honest self-critical study but merely factual accountings of otherwise discoverable facts, such information is not protected by any privilege as it does not come within the scope of information entitled to that privilege.

As noted above, Nurse Passman testified that the incident report was prepared pursuant to the policies and procedures of Baton Rouge General. The incident report essentially details the basic facts of Mr. Bridges' pressure ulcer and notes that the nursing staff failed to follow the required protocols for preventing the pressure ulcer.

Thus, the PCF fails to meet its burden of establishing that the incident report, made pursuant to Baton Rouge General's customary business, was made in anticipation of litigation. Additionally, the incident report does not appear to contain evidence of subsequent remedial measures, as the report notes that the protocols already in place (i.e., turning or repositioning the patient) were simply not followed.

Moreover, the incident report is highly relevant to Mrs. Bridges' claims. The incident report is a factual accounting of the failure of Mr. Bridges' nursing staff to turn him every two hours as required by Baton Rouge General's policies and procedures. The incident report is otherwise discoverable through the testimony of the nurses and doctors who attended Mr. Bridges; accordingly, the incident report is not privileged under LSA-R.S. 13:3715.3 or LSA-R.S. 44.7.

We also reject the PCF's argument that the incident report was improperly used to prove medical causation through the testimony of Nurse Passman. Nurse Passman was certainly qualified to testify about the policies and protocols that nursing staff at Baton Rouge General were required to follow in order to prevent pressure ulcers. She was also qualified to testify regarding the apparent failure of Mr. Bridges' nurses to follow those protocols based on the incident report and his medical records. See e.g. Sepulvado v. Toledo Nursing Ctr., Inc., 2007-122 (La. App. 3rd Cir. 5/30/07), 958 So. 2d 135, 140, writ denied, 2007-1583 (La. 10/12/07), 965 So. 2d 406 (nurse was qualified to give an opinion as to whether there was a causal connection between a patient's falls at a nursing home and her injuries).

Photographs of Mr. Bridges' pressure ulcer

In its fourth assignment of error, the PCF argues that the trial court erred by denying its motion *in limine* and allowing admission of photographs of Mr. Bridges' pressure ulcer because the photographs were unduly prejudicial given the graphic and disturbing images. The PCF further contends that the photographs were not

probative because they were taken after the pressure ulcer was debrided (cut open to be cleaned) and were therefore misleading.

Before trial, the PCF filed a motion *in limine* to exclude the photographs on the basis that they were irrelevant and unduly prejudicial. Following a hearing, the trial court denied the motion in an order signed on April 29, 2019.

Relevant evidence is that which tends to make the existence of any fact of consequence in the action more or less probable than it would be without such evidence. LSA-C.E. art. 401. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time. LSA-C.E. art. 403. Photographs are generally admissible if they illustrate any fact, shed any light upon an issue in the case, or are relevant to describe the person, thing, or place depicted. Smith v. Juneau, 95-0724 (La. App. 4th Cir. 4/9/97), 692 So. 2d 1365, 1380. A trial court is granted broad discretion in determining the admissibility of evidence. Furthermore, courts are to resolve the admissibility of evidence in favor of receiving the evidence. Color Stone International Inc. v. Last Chance CDP, LLC, 2008-35 (La. App. 5th Cir. 5/27/08), 986 So. 2d 707, 715.

The photographs at issue were admitted into evidence during the testimony of the plaintiff's expert, Dr. Erroll Ozdalga, an internal medicine doctor specializing in hospital medicine. The first photograph, admitted into evidence as exhibit "P-7," was taken on August 20, 2012, eight days after Mr. Bridges' pressure ulcer was discovered. Dr. Ozdalga testified that the pressure ulcer was "a pretty moderate to large size bedsore." The second photograph, admitted into evidence as exhibit "P-8," was taken on September 24, 2012. Dr. Ozdalga explained that the pressure ulcer appeared to have worsened in the second photograph and had gotten significantly bigger and deeper.

This specific issue, namely, the admissibility of photographs of a pressure ulcer at various stages in a medical malpractice suit, was considered by the Fourth Circuit in Smith, 692 So. 2d at 1379-80. In Smith, the defendant hospital argued that the photographs of the plaintiff's pressure ulcer were inflammatory and complained that one photograph depicted the pressure ulcer after it was debrided, which was not what the pressure ulcer looked like at the hospital. The appellate court found no error in the trial court's determination that the probative value of the photographs outweighed any prejudicial effect, explaining that the photographs "depict[ed] plaintiff's injuries at various stages of development" and were "relevant to the issue of damages." Id. at 1380.

While the photographs of Mr. Bridges' pressure ulcer are unpleasant to view, we do not find them to be inflammatory. The photographs were relevant to show the progression of Mr. Bridges' pressure ulcer and the damages suffered by both him and Mrs. Bridges, who testified at trial that she was responsible for cleaning the pressure ulcer after Mr. Bridges was sent home on hospice care, and she found the task to be very upsetting. Therefore, we find that the trial court did not abuse its broad discretion by allowing admission of the photographs. Accordingly, we find these assignments of error lack merit.

Denial of Peremptory Challenge
(Assignment of Error Number One)

In its first assignment of error, the PCF asserts that the trial court erred by denying its peremptory challenge to remove Juror Number 288, Alfred Shelmire,[8] because the PCF had not exhausted its peremptory strikes.

On August 5, 2019, prior to bringing out the first panel of potential jurors for *voir dire*, the trial court noted for the record that the PCF and Mrs. Bridges had

[8]Mr. Shelmire was inadvertently referred to by the trial court as Juror Number 286, but the record indicates he was Juror Number 288.

agreed to no back strikes. During his questioning of the first panel of potential jurors, counsel for the PCF asked the entire panel if anyone had "experience with the death of an elderly person, either someone in [their] family or somebody that [they] were close to?" Several members of the panel (not including Mr. Shelmire) answered affirmatively, describing their experiences with the death of an elderly family member, including whether they were involved in the care of that elderly person. Counsel for the PCF then asked the following question:

> Now those of you who have had, I would call it an honor to take care of an elderly relative in any shape or form, if this case involved an elderly person, do you think your experience there would affect your ability to be fair and impartial in this case regarding the care of that person? Do you think it would be helpful in understanding the issues involved?

One potential juror responded to the question; Mr. Shelmire did not. Following questioning of the panel, both parties accepted Mr. Shelmire, and he was sworn in as a juror.

Thereafter, the trial court advised the parties that Mr. Shelmire wanted to speak to the trial court about a hardship; Mr. Shelmire was concerned he might be needed to care for his elderly mother during the trial. Counsel for the PCF asked that the trial court question Mr. Shelmire about his hardship because he did not mention that he was a caretaker to his mother during *voir dire*. The trial court then questioned Mr. Shelmire about his hardship, and he stated that he is one of his mother's caretakers, but that he has a brother who is her primary caretaker. Mr. Shelmire said that he never heard a question asked during *voir dire* whether anyone was a caretaker to an elderly person. The trial court allowed both parties to question Mr. Shelmire as well. Thereafter, the trial court found that Mr. Shelmire's hardship did not rise to the level of excusing him for cause. The PCF then challenged Mr. Shelmire for cause, which the trial court denied. The PCF then tried to peremptorily challenge Mr. Shelmire, but the trial court denied the request, explaining that Mr.

Shelmire had already been sworn in as a juror, and the parties had agreed to no back strikes. The PCF moved for a mistrial based on the trial court's denial of its peremptory challenge, which was denied by the trial court.

In Riddle v. Bickford, 2000-2408 (La. 5/15/01), 785 So. 2d 795, 803, the Supreme Court held that the practice of back-striking in civil cases is "not constitutionally or statutorily mandated. Instead, the right to back-strike in civil cases is left within the sound discretion of the trial judge, who ultimately has the responsibility for orderly conduct of the trial."

At the time the PCF attempted to exercise a peremptory challenge to Mr. Shelmire, he had already been accepted by both parties and sworn in as a juror. Therefore, when the PCF sought to remove Mr. Shelmire, it was attempting to back strike him.[9] The record before us does not indicate that the trial court abused its

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[9]The PCF argues that the trial court's examination of Mr. Shelmire as to his hardship request was completed pursuant to LSA-C.C.P. art. 1763, and thus, LSA-C.C.P. art. 1766 permitted the PCF to make a peremptory challenge to Mr. Shelmire. We reject this argument as lacking merit.

> Louisiana Code of Civil Procedure article 1763 provides:
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> A. The court shall examine *prospective jurors* as to their qualifications and may conduct such further examination as it deems appropriate.
>
> B. The parties or their attorneys shall individually conduct such examination of *prospective jurors* as each party deems necessary, but the court may control the scope of the examination to be conducted by the parties or their attorneys.
>
> (Emphasis added).
>
> Louisiana Code of Civil Procedure article 1766, provides, in pertinent part:
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> A. After a juror has been examined as provided in Article 1763, the court may excuse the juror and if the court does not do so, either party may challenge the juror for cause.
>
> B. If a juror has not been excused for cause, a peremptory challenge may be made by any party. The court shall alternate between the sides when making initial inquiry as to whether any party wishes to exercise a peremptory challenge to that juror.

Louisiana Code of Civil Procedure article 1763 specifically applies to the examination of "prospective jurors." At the time Mr. Shelmire was examined by the trial court in relation to his hardship request, he had already been sworn in as a juror. Thus, the PCF's peremptory challenge was an attempted back strike.

discretion by denying the PCF's request to back strike Mr. Shelmire. The PCF agreed prior to *voir dire* that there would be no back strikes. The trial court's questioning of Mr. Shelmire related to his hardship request, and he answered all questions posed to him. Mr. Shelmire did not recall being asked during *voir dire* if he was a caregiver to an elderly person. The record supports Mr. Shelmire's recollection; while some members of the jury panel volunteered information regarding their care of elderly individuals prior to their deaths, counsel for the PCF did not directly ask Mr. Shelmire or the panel as a whole whether they had ever cared for an elderly person. Accordingly, this assignment of error is without merit.

Mrs. Bridges' Right to Recover Survival Damages
(Assignment of Error Number Two)

In its second assignment of error, the PCF argues that Mrs. Bridges is only entitled to one quarter of the survival damages awarded by the jury because Mr. Bridges had three biological children.[10] The PCF filed an exception of no right of action raising this issue prior to trial, and it was denied by the trial court in an order signed on April 29, 2019.

In support of its argument, the PCF points to LSA-C.C. art. 2315.1, which sets forth who is entitled to pursue a survival action, and provides, in pertinent part:

> A. If a person who has been injured by an offense or quasi offense dies, the right to recover all damages for injury to that person, his property or otherwise, caused by the offense or quasi offense, shall survive for a period of one year from the death of the deceased in favor of:
>
> (1) The surviving spouse and child or children of the deceased, or either the spouse or the child or children.

The survival action comes into existence simultaneously with the existence of the tort and is transmitted to beneficiaries upon the victim's death and permits

[10]At trial, Mrs. Bridges testified that she and Mr. Bridges had eight children together; three were his biological children from another marriage, and five were her biological children.

recovery only for the damages suffered by the victim from the time of injury to the moment of death. Taylor v. Giddens, 618 So. 2d 834, 840 (La. 1993).

The PCF cites Gibbs v. Magnolia Living Ctr., Inc., 38,184 (La. App. 2nd Cir. 4/7/04), 870 So. 2d 1111, writ denied, 2004-1148 (La. 7/2/04), 877 So. 2d 146, in support of its argument that Mrs. Bridges is only entitled to one quarter of the survival damages. In Gibbs, the plaintiff filed a survival and wrongful death suit against a nursing home following the death of her mother, alleging that she was "a surviving child" of the decedent. In response, the nursing home filed a dilatory exception of lack of procedural capacity, arguing that the plaintiff failed to allege sufficient facts in her petition to establish her right to proceed in a representative capacity. Id. at 1113. The nursing home claimed that the plaintiff's petition left open the possibility that the decedent had a surviving spouse or other children for whom the plaintiff had no procedural capacity to bring the survival and wrongful death claims. Id. at 1114. The exception was overruled by the trial court, and the Second Circuit granted writs, framing the issue as "whether one member of the class of beneficiaries for the survival action has capacity to represent the class as a whole." Id. at 1115.

The Gibbs court turned to the Louisiana Civil Code articles governing joint obligations, specifically LSA-C.C. art. 1788, which provides, in part, that "[w]hen one obligor owes just one performance intended for the common benefit of different obligees, neither of whom is entitled to the whole performance, the obligation is joint for the obligees," and LSA-C.C. art. 1789, which states in part that "[w]hen a joint obligation is divisible...each joint obligee is entitled to receive...only his portion." Gibbs, 870 So. 2d at 1115. Based on this language, the court concluded:

> The delictual obligation of the tortfeasor to pay for the damages experienced by the victim before her death represents a single performance owed to all Article 2315.1 survival beneficiaries and is therefore a joint obligation for the obligees. Any judgment for the payment of money damages is a divisible obligation. La. C.C. art. 1815.

> Therefore, even assuming that there are other members of the beneficiary class under Article 2315.1, Gibbs would have procedural capacity to recover at least her portion of the survival action damages through this suit. The petition is not subject to ... exception of lack of procedural capacity because the alleged delictual obligation is joint and divisible for Gibbs who is at least "a member" of the beneficiary class.

Gibbs, 870 So. 2d at 1115. The court explained, however, that if the victim "was survived by other children or a spouse, or both, the possibility for the peremptory exception of nonjoinder remain[ed]." Id.

Mrs. Bridges argues Gibbs is distinguishable from the instant case because here, unlike in Gibbs, there has already been an award for survival damages, and the PCF is attempting to have it reduced. Mrs. Bridges contends that there exists no authority for such action and cites Giroir v. S. Louisiana Med. Ctr., 453 So. 2d 949, 952 (La. App. 1st Cir.), writ denied, 458 So. 2d 108 (La. 1984), writ granted, 458 So. 2d 109 (La. 1984), aff'd in part, rev'd in part, 475 So. 2d 1040 (La. 1985), and Booty v. Kentwood Manor Nursing Home, Inc., 483 So. 2d 634, 641 (La. App. 1st Cir. 1985), writ denied, 486 So. 2d 754 (La. 1986), wherein this court cited "[w]e know of no authority which states that when only one of the potential claimants is before the court ... that his award must be reduced proportionately by the amount that could have been claimed by other parties." Both Giroir and Booty involved attempts by defendants to reduce an award for survival damages based on the existence of potential claimants who were either not awarded damages or were not involved in the suit. See also Bunch v. Schilling Distrib. Inc., 589 So. 2d 502, 505 (La. App. 3rd Cir. 1991), writ denied, 592 So. 2d 1319 (La. 1992).

In Guilbeau v. Bayou Chateau Nursing Ctr., 2005-1131 (La. App. 3rd Cir. 5/17/06), 930 So. 2d 1167, 1172, writ denied, 2006-1496 (La. 10/13/06), 939 So. 2d 365, the PCF and a defendant nursing home argued that the survival damage award granted to the plaintiffs, four of the decedent's five children, should be reduced by one-fifth to reflect the virile share of the sibling who did not participate in the suit.

The Guilbeau court, citing LSA-C.C. arts. 1788 and 1789 and Gibbs, recognized that the four plaintiffs were only entitled to their virile share, but explained:

> The record does not indicate that the trial court failed to take into consideration that only four of Ms. Guilbeau's five children brought suit. Rather, the trial court was aware that Ms. Guilbeau had five children as each of them testified. Furthermore, in reasons for ruling, the trial court observed that "Plaintiffs, four of the children of Murdis Guilbeau, have instituted this action seeking general damages as survivors of Murdis Guilbeau for her pain and suffering from the time of injury until her death...." Neither does the quantum awarded in this regard necessarily signal that the trial court included the nonparticipating child's virile share in the award. In short, the record fails to establish that the trial court erred in fashioning its award for the survival action.

Guilbeau, 930 So. 2d at 1175. See also Randall v. Concordia Nursing Home, 2007-101 (La. App. 3rd Cir. 8/22/07), 965 So. 2d 559, 571-72, writ denied, 2007-2153 (La. 1/7/08), 973 So. 2d 726. Similarly, in Robinette v. Lafon Nursing Facility of the Holy Family, 2015-1363 (La. App. 4th Cir. 6/22/17), 223 So. 3d 68, 86-87, the Fourth Circuit, applying the analysis set forth in Guilbeau, refused to reduce a jury's award for survival damages in favor of three of the decedent's four children because the decedent's fourth child was not involved in the suit, and the jury was aware of his existence.

We agree with the approach taken by the Third and Fourth Circuits in Guilbeau and Robinette, which is consistent with our holdings in Giroir and Booty. Mrs. Bridges, as Mr. Bridges' surviving spouse, was entitled to bring a survival action pursuant to LSA-C.C. art. 2315.1. We agree Mrs. Bridges is entitled only to recover her virile share. However, as noted by the PCF, the jury was aware that Mr. Bridges had three biological children who were not part of the case before them. There is no evidence in the record to indicate that the jury failed to take this fact into consideration when it made its award. As such, we decline to reduce the jury's award for survival damages. This assignment of error also is without merit.

Application of the Collateral Source Rule
(Assignment of Error Number Five)

In its fifth assignment of error, the PCF argues that the trial court erred by denying its pre-trial peremptory exception raising the objection of no right of action and no cause of action and/or motion *in limine,* seeking to prevent Mrs. Bridges from recovering for medical expenses paid for by Medicare. The basis of the PCF's exceptions and motion *in limine* was that Medicare payments and write-offs in this case are not subject to the collateral source rule because Mr. Bridges did not pay premiums for his Medicare coverage, and the PCF was not the tortfeasor in this matter.

The collateral source rule provides that a tortfeasor may not benefit, and an injured plaintiff's tort recovery may not be reduced, because of monies the plaintiff receives from sources independent of the tortfeasor's procuration or contribution. Bozeman v. State, 2003-1016 (La. 7/2/04), 879 So. 2d 692, 698. Under the rule, payments received from an independent source are not deducted from the award a tort victim would otherwise receive from the tortfeasor, because the tortfeasor is not allowed to benefit from outside benefits provided to the tort victim. Id. The rule reflects the beliefs that the tortfeasor should not profit from the victim's prudence in obtaining insurance, or benefitting from other sources, and that reducing the amount the tortfeasor would have to pay hampers the deterrent effect of the law. Bellard v. American Central Ins. Co., 2007-1335 (La. 4/18/08), 980 So.2d 654, 668.

In determining whether the collateral source rule applies, two considerations govern: (1) whether applying the rule will further the major policy goal of tort deterrence; and (2) whether the victim, by having a collateral source available as a source of recovery, either paid for such benefit or suffered some diminution in his patrimony because the benefit was available, such that he is not reaping a windfall

or double recovery. Cutsinger v. Redfern, 2008-2607 (La. 5/22/09), 12 So. 3d 945, 953.

In Bozeman, the Supreme Court adopted a "benefit of the bargain" approach to consider whether Medicaid recipients could collect medical expenses written-off or contractually adjusted by Medicaid under the collateral source rule. Bozeman, 879 So. 3d at 703-05. The Bozeman court held that Medicaid write-offs were not recoverable under the collateral source rule, but that write-offs made pursuant to Medicare or private insurance benefits were recoverable:

> Care of the nation's poor is an admirable social policy. However, where the plaintiff pays no enrollment fee, has no wages deducted, and otherwise provides no consideration for the collateral source benefits he receives, we hold that the plaintiff is unable to recover the "write-off" amount. This position is consistent with the often-cited statement in *Gordon v. Forsyth County Hospital Authority, Inc.*, 409 F.Supp. 708 (M.D.N.C.1975), *affirmed in part and vacated in part*, 544 F.2d 748 (4th Cir.1976), that "(i)t would be unconscionable to permit the taxpayers to bear the expense of providing **free medical care** to a person and then allow that person to recover damages for medical expenses from a tort-feasor and pocket the windfall." (Emphasis added). After careful review, we conclude that Medicaid is a free medical service, and that no consideration is given by a patient to obtain Medicaid benefits. His patrimony is not diminished, and therefore, a plaintiff who is a Medicaid recipient is unable to recover the "write off" amounts. The operative words here are "free medical care," which, again, we hold is applicable to plaintiffs who receive Medicaid, not plaintiffs who receive Medicare or private insurance benefits.

Id. at 705. See also Johnson v. CLD, Inc., 50,094 (La. App. 2nd Cir. 9/30/15), 179 So. 3d 695, 706. Notably, the Bozeman court held that the plaintiffs could recover medical expenses actually paid by Medicaid. Id. at 705-06.

Medicare is the federal health insurance program for people who are sixty-five or older, people under sixty-five who are eligible based on a disability, and individuals diagnosed with "End-Stage Renal Disease" (ESRD). Medicare Part A covers inpatient hospital stays, care in a skilled nursing facility, hospice care, and some home health care. Medicare Part B covers certain doctors' services, outpatient care, medical supplies, and preventive services. Medicare Part A is funded by the

Hospital Insurance Trust Fund, which is funded primarily by payroll taxes paid by most employees, employers, and people who are self-employed. Medicare Part B services are paid from the Supplementary Medical Insurance trust fund, which is also maintained by the United States Treasury and funded primarily through general tax revenues and monthly premiums paid by individuals enrolled in Part B.[11]

Medicare Part A benefits are provided to most individuals without payment of a premium if they: (1) are 65 years of age or older, or; (2) have received social security or railroad retirement disability benefits for 25 months; or (3) have ESRD. 42 C.F.R. § 406.5. Individuals with ESRD are entitled to benefits under Medicare Part A and are eligible to enroll in Medicare Part B "subject to the deductible, premium, and coinsurance provisions" of Part B. 42 U.S.C. § 426-1.

Despite the Supreme Court's holding in Bozeman, the PCF asserts the collateral source rule should not have applied to Medicare payments or write-offs in this matter because Mr. Bridges' Medicare benefits were provided free of charge to him based on his kidney disease and/or disability.

As noted, pursuant to Bozeman, payments and write-offs made by Medicare are subject to the collateral source rule. Although the PCF argues Bozeman is distinguishable because Mr. Bridges received his Medicare coverage for free, there is no evidence in the record establishing this fact. The record does not contain the transcript of the April 15, 2019 hearing held on the PCF's exceptions and motion *in limine*, nor does the corresponding minute entry indicate what, if any, evidence was introduced at the hearing. Moreover, at trial, Mrs. Bridges testified that when she married Mr. Bridges in 1997, he was disabled or retired. Medical records jointly introduced into evidence at trial list Mr. Bridges' occupation as a retired truck driver.

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[11] See *What's Medicare?"*, Medicare.gov: The Official U.S. Government Site for Medicare, www.medicare.gov/what-medicare-covers/your-medicare-coverage-choices/whats-medicare (last accessed Nov. 22, 2020), and "*How is Medicare Funded?"*, Medicare.gov: The Official U.S. Government Site for Medicare, www.medicare.gov/about-us/how-is-medicare-funded (last accessed Nov. 22, 2020).

Therefore, Mr. Bridges presumably had wages deducted, which funded the Medicare program and may have paid premiums for his Medicare Part B coverage.

Moreover, even if the record contained evidence supporting the PCF's claim that Mr. Bridges did not provide some consideration for his Medicare benefits, we note that most of the medical bills contained in the record before us do not provide enough information for this court to determine what payments or adjustments were made by Medicare and what payments or adjustments were made by Mr. Bridges' private insurer.[12] While the medical bills indicate that Mr. Bridges had Medicare and private insurance coverage, the only medical bill that contains any detail about Medicare payments and adjustments is from Ochsner Medical Center Baton Rouge (Ochsner bill) and shows Medicare adjustments in the amount of $5,413.81 and payments of $315.70. Notably, the jury awarded only $212,100.00 of the $340,483.94 in medical expenses incurred for Mr. Bridges' treatment. Considering the jury's failure to award the full amount of medical expenses, a decision which may have been based at least in part on an observation that Mr. Bridges had Medicare and private insurance, we do not feel a reduction would be warranted even were we to find that the collateral source rule did not apply to the Medicare adjustments or payments set forth in the Ochsner bill. Accordingly, this assignment of error also lacks merit.

[12]In Bozeman, 879 So. 3d at 700, the Supreme Court explained that its analysis was not hindered by an evidentiary dispute because the parties had jointly introduced evidence of the collateral source payments at trial. See also Ketchum v. Roberts, 2012-1885 (La. App. 1st Cir. 5/29/14) 2014 WL 3510694, *15 (unpublished) (where this court increased an award for medical expenses because the subject medical bill did not specify whether an adjustment was a non-recoverable Medicaid write-off or an adjustment made by Medicare or the plaintiff's private insurer). Although the PCF was prohibited from introducing evidence at trial of payments or adjustments by Medicare in an effort to have those amounts discounted from Mrs. Bridges' damages based on the collateral source rule, such evidence could have been presented at the hearing on the PCF's exception and/or motion *in limine*, or proffered.

Jury Tampering
(Assignment of Error Number Six)

In its sixth assignment of error, the PCF contends that the trial court erred in denying its motion for a mistrial based on alleged jury tampering, which occurred when Dr. Ozdalga had an inappropriate conversation with a member of the jury during a recess in the trial. The PCF argues that the contact between Dr. Ozdalga and the juror was in violation of La. Sup. Ct. R. XLIV, which contains "Plain Jury Instructions" that instruct jurors to refrain from speaking with any of the parties, their attorneys, or witnesses. The PCF additionally argues that the contact was in violation of the trial court's sequestration order. The PCF asserts that the inappropriate contact created an appearance of impropriety and was a flagrant disregard of the trial court's instructions.

The opening jury instructions are not contained in the record. The trial court issued an order of sequestration prior to trial. However, the order did not apply to Dr. Ozdalga, Mrs. Bridges' expert witness, and the order was issued outside the presence of the jury. Prior to the break in Dr. Ozdalga's testimony, he was admonished by the trial court to refrain from discussing his testimony with anyone.

Following a break in Dr. Ozdalga's testimony, counsel for Mrs. Bridges informed the trial court that Juror Number 83, James Ammons, approached Dr. Ozdalga and the two had a conversation. Dr. Ozdalga was questioned by the trial court about the interaction. Dr. Ozdalga testified that Mr. Ammons approached him in the hallway and mentioned that his family owns property in San Jose, California, where Dr. Ozdalga lives. They also spoke briefly about professional football teams. Mr. Ammons stated that if Dr. Ozdalga was ever in the area, then perhaps the two could meet. Dr. Ozdalga testified that he did not discuss the case with Mr. Ammons and the two did not exchange contact information.

Mr. Ammons was also questioned by the trial court and counsel for both parties. Mr. Ammons stated that he spoke with Dr. Ozdalga about California and property values there. Mr. Ammons confirmed that he and Dr. Ozdalga did not exchange contact information. However, Mr. Ammons mentioned that he and Dr. Ozdalga are both professors and during their conversation, he told Dr. Ozdalga he did not have a business card on him at the time. Mr. Ammons testified he did not mention the conversation with Dr. Ozdalga to the other jurors and he did not believe the conversation with Dr. Ozdalga would influence his ability to serve as a fair and impartial juror. Mr. Ammons stated that none of the other jurors were present when he spoke to Dr. Ozdalga.

Thereafter, the PCF moved for a mistrial based on the interaction between Mr. Ammons and Dr. Ozdalga. The trial court denied the PCF's motion, but removed Mr. Ammons from the jury. The PCF raised this issue in its motion for new trial, which was denied in the judgment signed on December 4, 2019.

The PCF and Mrs. Bridges cite Gotch v. Scooby's ASAP Towing, LLC, 2019-0030 (La. 6/26/19), 285 So. 3d 459, 461, a Supreme Court opinion involving the failure of a jury to follow instructions. In Gotch, the Supreme Court considered whether the trial court abused its discretion by denying the plaintiff's motion for a mistrial based on evidence that the jurors violated their instructions by discussing the case prior to deliberations. The Supreme Court began its analysis by noting that a trial court is afforded vast discretion in determining whether to grant a mistrial, and a trial court's denial of a motion for mistrial will not be disturbed on appeal absent a showing of an abuse of that discretion. Id. at 460-63. The Supreme Court further explained that "[a]lthough misconduct of jurors may be a cause for granting a mistrial, the misconduct must be such that it is impossible to proceed to a proper judgment." Id. at 463. Drawing on its analysis of mistrials in the criminal context, the Supreme Court emphasized "a party seeking a mistrial must make a 'clear

showing of prejudice'" and that "'a mere possibility of prejudice is not sufficient.'" Id. (citing State v. Ducre, 2001-2778 (La. 9/13/02), 827 So. 2d 1120, 1120) (*per curiam*). In light of testimony from the jurors that they did not make a decision prior to hearing all the evidence, the Supreme Court found the trial court did not abuse its great discretion by denying the plaintiff's motion for mistrial. Id. at 463-64. However, as noted by the PCF, the opinion generated three dissenting opinions from Chief Justice Johnson, Justice Hughes, and Justice Genovese, who all found that the jury's misconduct prejudiced the plaintiff's case. Gotch, 285 So. 3d at 464-66 (Johnson, C.J., Hughes, J., and Genovese, J., dissenting).

In the instant case, the trial court found that no prejudice occurred because Mr. Ammons did not mention his conversation with Dr. Ozdalga to the other jurors. The record supports the trial court's findings. Both Dr. Ozdalga and Mr. Ammons testified the conversation between them did not involve the case, but was about California. Mr. Ammons testified that no other jurors witnessed the brief exchange and he did not mention his conversation with Dr. Ozdalga to other members of the jury. Furthermore, the trial court took immediate remedial action by removing Mr. Ammons from the jury. On the record before us, we find no abuse of discretion by the trial court in denying the PCF's motion for mistrial, as the PCF failed to demonstrate a clear showing of prejudice. Accordingly, this assignment of error is without merit.

Costs for Dr. Ozdalga's Testimony
(Assignment of Error Number Seven)

In its seventh assignment of error, the PCF contends that the trial court erred by awarding Mrs. Bridges costs in the amount of $17,014.58 for Dr. Ozdalga's expert testimony. The PCF argues that Mrs. Bridges failed to produce an affidavit or testimony at the hearing on the motion to tax costs in support of her request for costs related to Dr. Ozdalga's out-of-court work. The PCF asserts that Dr. Ozdalga's

lack of professionalism, including his out-of-court exchange with Mr. Ammons, should have been considered by the trial court in awarding costs for his testimony.

We note that the trial court's December 4, 2019 judgment awarding costs was rendered after the August 26, 2019 final judgment on the merits. When a judgment for costs is rendered after the final judgment on the merits, the costs judgment is a separate, final appealable judgment. Price v. City of Ponchatoula Police Dept., 2012-0727, 2012-0728 (La. App. 1st Cir. 12/21/12), 111 So. 3d 1053, 1055; Held v. Aubert, 2002-1486 (La. App. 1st Cir. 5/9/03), 845 So. 2d 625, 636.

In the instant matter, the trial court signed a final judgment on August 26, 2019, in conformity with the jury's verdict in favor of Mrs. Bridges and against the PCF, awarding damages. On September 11, 2019, the PCF filed a motion for judgment notwithstanding the verdict, or alternatively, motion for new trial. On September 12, 2019, Mrs. Bridges filed a rule to tax costs, seeking to have the PCF taxed with all courts costs, as well as the expert witness fees incurred by Mrs. Bridges. Following a hearing on November 4, 2019, the trial court denied the PCF's motion for judgment notwithstanding the verdict, or alternatively, motion for new trial and ordered the PCF to pay Mrs. Bridges' costs as requested. On December 4, 2019, the trial court signed a final judgment awarding Mrs. Bridges costs and denying the PCF's motion for judgment notwithstanding the verdict, or alternatively, motion for new trial.

On December 19, 2019, the PCF filed a motion for suspensive appeal. In the motion, the PCF stated, in pertinent part, the following:

1.

> After a jury trial from August 5 through August 8, 2019, Judgment was rendered in this matter on August 26, 2019, and the Notice of Judgment was mailed on August 30, 2019.

2.

> A Motion for New Trial/JNOV was thereafter filed on September 11, 2019 and heard on November 4, 2019. The Motion for New Trial/JNOV was denied on December 4, 2019. The mailing of notice of signing of judgment was done on December 11, 2019. See Exhibit A. Suspensive appeals are premature until the Court disposes of all timely filed motions for new trial or JNOVs per La. C.C.P. Art. 2123(C). The time delay to file a suspensive appeal is thirty days after the date of the mailing of the notice of the court's denial of the motion for new trial or JNOV per La. C.C.P. Art. 2123(A)(2). As such this suspensive appeal is timely.
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> ***
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> WHEREFORE, Mover, PCF prays that an order of appeal be granted allowing Mover to appeal the Judgment, suspensively, to the Court of Appeal, First Circuit, that a return date for said appeal be fixed by the Court, and that no bond nor any costs paid in advance by the PCF.

The order granting the PCF's motion for appeal, which appears to have been prepared by the PCF, provides, in pertinent part:

> IT IS ORDERED, ADJUDGED AND DECREED that Louisiana Patient's Compensation Fund and Louisiana Patient's Compensation Fund Oversight Board (hereinafter referred to as "PCF"), through nominal Defendant, Baton Rouge General Medical Center, be allowed to appeal the final Judgment, suspensively, to the Honorable Court of Appeal, First Circuit.

In Held, the trial court signed a written judgment in accordance with a jury verdict in favor of the plaintiffs, and against the defendant, on December 28, 2001. Id. at 628-29. Thereafter, the plaintiffs filed a motion to assess costs. The defendant then filed a motion for judgment notwithstanding the verdict, or alternatively, a motion for new trial. Following a hearing on March 11, 2002, the trial court rendered judgment on March 27, 2002, denying the defendant's motion for judgment notwithstanding the verdict, or alternatively, motion for new trial, and granting the plaintiffs' motion for costs. Id. at 629.

The defendant suspensively appealed, arguing in one of his assignments of error that he should not have been taxed with costs. Id. at 635-36. This court

determined that the March 27, 2002 judgment was not properly before this court, explaining:

> Initially, we note that the instant appeal taken by [defendant] was from the trial court's December 28, 2001 judgment on the merits of the case. The judgment wherein the court awarded $10,090.15 in costs against [defendant] was rendered on March 27, 2002. [Defendant] did not appeal this judgment, and the delays for same have passed. An appellant's failure to file a devolutive appeal timely is a jurisdictional defect, in that neither the court of appeal nor any other court has the jurisdictional power and authority to reverse, revise or modify a final judgment after the time for filing a devolutive appeal has elapsed. When an appellant fails to file a devolutive appeal from a final judgment timely, the judgment acquires the authority of the thing adjudged, and the court of appeal has no jurisdiction to alter that judgment. *Lay v. Stalder*, 99-0402, p. 5 (La. App. 1 Cir. 3/31/00), 757 So.2d 916, 919. Thus, the issue addressed by [defendant] in this assignment of error is not properly before this court on appeal...

Held, 845 So. 2d at 636.

Herein, the PCF's motion for suspensive appeal seeks review of the trial court's August 26, 2019 judgment, but does not address the separate December 4, 2019 judgment awarding costs. Accordingly, the propriety of the trial court's December 4, 2019 judgment raised by the PCF in this assignment of error is not properly before this court on appeal.

Denial of Motion for Partial Summary Judgment
(Assignment of Error Number Eight)

We note that generally, an appeal may not be taken from the trial court's denial of a motion for summary judgment. See LSA-C.C.P. art. 968. However, when an unrestricted appeal is taken from a final judgment, the appellant is entitled to seek review of all adverse interlocutory judgments prejudicial to him, in addition to the review of the final judgment. Lambert Gravel Co., Inc. v. Par. of W. Feliciana, 2015-1225 (La. App. 1st Cir. 9/20/16), 234 So. 3d 889, 896. The Supreme Court has recognized, however, that after a full trial on the merits, an appellate court should not restrict its fact review of the motion for summary judgment to the affidavits and other evidence submitted with the motion for summary judgment. Rather, the entire

record should be reviewed by the appellate court. Hopkins v. American Cyanamid Company, 95-1088 (La. 1/16/96), 666 So. 2d 615, 624.

The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action, except those disallowed by LSA-C.C.P. art. 969; the procedure is favored and shall be construed to accomplish these ends. LSA-C.C.P. art 966(A)(2). After an opportunity for adequate discovery, 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. LSA-C.C.P. art. 966(A)(3).

In ruling on a motion for summary judgment, the court's role is not to evaluate the weight of the evidence or to make a credibility determination, but instead to determine whether or not there is a genuine issue of material fact. Hines v. Garrett, 2004-0806 (La. 6/25/04), 876 So. 2d 764, 765 *(per curiam)*; Penn v. CarePoint Partners of Louisiana, L.L.C., 2014-1621 (La. App. 1st Cir. 7/30/15), 181 So. 3d 26, 30. A genuine issue is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, summary judgment is appropriate. Hines, 876 So. 2d at 765-66. A fact is "material" when its existence or nonexistence may be essential to plaintiff's cause of action under the applicable theory of recovery. Collins v. Franciscan Missionaries of Our Lady Health Sys., Inc., 2019-0577 (La. App. 1st Cir. 2/21/20), 298 So. 3d 191, 195, writ denied, 2020-00480 (La. 6/22/20), 297 So. 3d 773. Simply put, a "material" fact is one that would matter at a trial on the merits. Any doubt as to a dispute regarding a material issue of fact must be resolved against granting the motion and in favor of a trial on the merits. Id.

The burden of proof rests with the mover. LSA-C.C.P. art. 966(D)(1). Nevertheless, if the mover will not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment, the mover's burden on the

motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. The burden is on the adverse party to 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. LSA-C.C.P. art. 966(D)(1). Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. Succession of Hickman v. State Through Bd. of Supervisors of Louisiana State Univ. Agric. & Mech. Coll., 2016-1069 (La. App. 1st Cir. 4/12/17), 217 So. 3d 1240, 1244.

The motion for summary judgment at issue herein arises in the context of a suit for medical malpractice. To establish a claim for medical malpractice, a plaintiff must prove, by a preponderance of the evidence: (1) the standard of care applicable to the defendant; (2) the defendant breached that standard of care; and (3) there was a causal connection between the breach and the resulting injury. LSA-R.S. 9:2794; Schultz v. Guoth, 2010-0343 (La. 1/19/11), 57 So. 3d 1002, 1006.

Generally, expert testimony is required to establish the applicable standard of care and whether that standard was breached, except where the negligence is so obvious that a layperson can infer negligence without the guidance of expert testimony. Samaha v. Rau, 2007-1726 (La. 2/26/08), 977 So. 2d 880, 884; Pfiffner v. Correa, 94-0924, 94-0923, 94-0992 (La. 10/17/94), 643 So. 2d 1228, 1233. Additionally, expert medical evidence is typically required to establish a causal connection between the breach of the standard of care and the patient's injury. Pfiffner, 643 So. 2d at 1233-1234.

In support of its motion for partial summary judgment, the PCF offered deposition testimony of Dr. Adrian Landry, an internal medicine doctor retained by

the PCF, Dr. Antoinette Fields and Dr. Brian Gremillion, two members of the medical review panel that considered Mrs. Bridges' complaint, and Dr. Mark Kantrow, an internal medicine and palliative care doctor who treated Mr. Bridges. The PCF argued that based on the deposition testimony of these doctors, Mr. Bridges was already dying when he was admitted to Baton Rouge General and therefore, his pressure ulcer did not cause his death. Dr. Landry testified that Mr. Bridges had a consultation with a palliative care doctor, Dr. Mason, at Baton Rouge General on August 8, 2012, prior to the development of his pressure ulcer. Dr. Gremillion testified that the August 8, 2012 palliative care consultation suggested to him that Baton Rouge General hospital staff believed Mr. Bridges was seriously ill due to his co-morbidities[13] (i.e., serious medical conditions) and end-of-life care needed to be discussed with his family. Dr. Gremillion further testified that in his experience, when a palliative care consultation is recommended, doctors suspect that a patient has less than six months to live. Dr. Landry testified that the medical review panel opinion did not describe Mr. Bridges' pressure ulcer as a substantial factor in his death, but stated that it was only a contributing factor. Dr. Fields similarly testified that the medical review panel concluded that Mr. Bridges' pressure ulcer was a contributing factor to his death, but never determined that it was a substantial factor.[14]

Dr. Landry testified that Mr. Bridges' depression, diabetes, lack of function (i.e., debility), and kidney disease put him at high risk of developing a pressure ulcer and caused his pressure ulcer to worsen. Dr. Kantrow testified that as a person

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[13]Dr. Gremillion explained that Mr. Bridges' co-morbidities at the time were diabetes, hypertension, heart disease, kidney failure, and his treatment with immunosuppressant medications.

[14]The PCF noted that Dr. Fields stated during her deposition that the medical review panel never actually determined that Mr. Bridges was not turned every two hours, but found that if he was not repositioned every two hours, then it could have led to the development of a pressure ulcer.

develops complex medical illnesses, they stop eating, become immobile, and their albumin[15] drops, which can cause pressure ulcers.

The PCF also argued that Mr. Bridges' sepsis, the primary cause of his death, was not caused by his pressure ulcer. Dr. Landry explained that sepsis is defined as occurring when a patient has both systematic inflammatory response syndrome[16] and bacterium present in a blood culture. Dr. Landry testified that every blood culture taken from Mr. Bridges was negative for bacterium. Despite this fact, Mr. Bridges was diagnosed with sepsis on October 6, 2012. However, according to Dr. Landry, Mr. Bridges' pressure ulcer did not show signs of infection until October 11, 2012, after his sepsis diagnosis. Dr. Fields similarly stated that there was no clear evidence that Mr. Bridges' pressure ulcer was infected before he was diagnosed with sepsis.

Mrs. Bridges filed an opposition to the PCF's motion for partial summary judgment, arguing that Mr. Bridges' pressure ulcer was caused by Baton Rouge General's failure to turn him every two hours, which in turn caused him to become septic and die. Mrs. Bridges attached to her opposition a copy of the medical review panel opinion, deposition testimony of Dr. Gremillion and Dr. Fields, and Mr. Bridges' death certificate. Mrs. Bridges noted that Mr. Bridges' death certificate lists his immediate cause of death as from sepsis. Mrs. Bridges pointed out that the medical review panel found that Baton Rouge General breached the standard of care, and Mr. Bridges' pressure ulcer was a contributing cause of his death. Dr. Gremillion testified the most common cause of a sacral pressure ulcer is a patient lying on their back for too long. Dr. Gremillion determined that the most likely cause of Mr. Bridges' sepsis was his pressure ulcer. According to Dr. Gremillion,

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[15]Albumin is a protein produced by the liver; a low level of albumin indicates that a person is very nutritionally deficient.

[16]Systematic inflammatory response syndrome (SIRS) occurs when two of the following conditions are present: (1) fever; (2) elevated heartrate; (3) elevated respiratory rate; and (4) elevated white blood cell count.

Mr. Bridges' pressure ulcer was a "significant" factor in his death. Likewise, Dr. Fields testified the most likely cause of a sacral pressure ulcer is a patient being left on their back too long. Dr. Fields also stated she had no reason to disagree with the finding of Mr. Bridges' treating physicians that he died from sepsis caused by his sacral pressure ulcer.

At trial, Dr. Ozdalga testified that Mr. Bridges was "a pretty relatively high functioning man," and his preexisting illnesses were "reasonably being controlled" prior to his admission to Baton Rouge General for pneumonia. Dr. Ozdalga explained that the pneumonia impacted Mr. Bridges' central nervous system and caused him to suffer extreme weakness to the point where he was immobilized. Dr. Ozdalga testified that based on Mr. Bridges' condition before he contracted pneumonia, he believed Mr. Bridges could have recovered from the pneumonia. Dr. Ozdalga opined that Mr. Bridges' pressure ulcer was the result of him not being turned every two hours. Dr. Ozdalga also opined that once Mr. Bridges developed the pressure ulcer, "he was on a trajectory that he could not get better from." Considering the location of the pressure ulcer, directly above Mr. Bridges' buttocks, Dr. Ozdalga explained that Mr. Bridges' body was continually fighting off an infection. Dr. Ozdalga believed that Mr. Bridges' pressure ulcer "played a very significant role in his passing away."

After careful review of the entire record in its entirety, we find that there was sufficient evidence set forth by Mrs. Bridges to establish genuine issues of material fact regarding whether Baton Rouge General's breach in the standard of care caused Mr. Bridges' pressure ulcer, which in turn caused his death. As such, the trial court did not err in denying the PCF's motion for partial summary judgment. Accordingly, this assignment of error also lacks merit.

CONCLUSION

For the above and foregoing reasons, the trial court's August 26, 2019 judgment in favor of Daisy Bridges, Individually and on Behalf of Elzie Bridges, and against Louisiana Patient's Compensation Fund and Louisiana Patient's Compensation Fund Oversight Board, Statutory Intervenor on behalf of Nominal Defendant, Baton Rouge General Medical Center, is hereby affirmed. Costs of this appeal are assessed against the Louisiana Patient's Compensation Fund and Louisiana Patient's Compensation Fund Oversight Board.

AFFIRMED.