

**PAUL O.  
SCHWARZENBERGER, M.D.  
AND CLINICAL ONCOLOGY  
RESEARCH ASSOCIATES,  
L.L.C.**

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**NO. 2018-C-0480  
COURT OF APPEAL  
FOURTH CIRCUIT  
STATE OF LOUISIANA**

**LOUISIANA STATE  
UNIVERSITY HEALTH  
SCIENCES CENTER-NEW  
ORLEANS AND THE LSU  
BOARD OF SUPERVISORS**

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APPLICATION FOR WRITS DIRECTED TO  
CIVIL DISTRICT COURT, ORLEANS PARISH  
NO. 2009-07311, DIVISION "D"  
Honorable Nakisha Ervin-Knott, JUDGE

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**JUDGE SANDRA CABRINA JENKINS**

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(Court composed of Chief Judge James F. McKay, III,  
Judge Rosemary Ledet, Judge Sandra Cabrina Jenkins)

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**WRIT GRANTED; JUDGMENT REVERSED**

**OCTOBER 3, 2018**

Relators, Paul O. Schwarzenberger, M.D. and Clinical Oncology Research Associates, LLC (“CORA”), seek review of the trial court’s May 22, 2018 judgment granting a motion for partial new trial filed by respondents/plaintiffs in reconvention, Louisiana State University Health Sciences Center-New Orleans and the LSU Board of Supervisors (collectively, “LSU”). The May 22, 2018 judgment withdrew a November 16, 2017 interlocutory judgment wherein the trial court previously granted relators’ motion for partial summary judgment dismissing LSU’s claims against relators relating to the Amgen clinical trial. For the reasons that follow, we grant relators’ writ, reverse the trial court’s May 22, 2018 judgment granting the motion for partial new trial, and reinstate the November 16, 2017 judgment granting relators’ motion for partial summary judgment.

### **FACTS AND PROCEDURAL HISTORY**

In 2002, LSU entered into clinical research agreements with two pharmaceutical companies, Amgen and GlaxoSmithKline (“GSK”), to conduct clinical trials of potential new treatments for cancer patients. Through these

separate contracts both pharmaceutical companies agreed to pay LSU for the costs incurred for hosting the trials, including the direct clinical expenses, overhead, and the salaries and benefits of the LSU employees. At that time in 2002, Dr. Schwarzenberger was employed by LSU as a professor in the oncology department, and he served as the principal investigator for the Amgen and GSK clinical trials.

In 2004, Dr. Schwarzenberger relinquished his full-time, tenured position at LSU and took a part-time associate professor position. At that time, LSU and the pharmaceutical sponsors of the clinical trials sought to have the patients in the trials transferred out of the LSU system to another venue. In May 2004, Dr. Schwarzenberger formed CORA as an entity for him to continue the clinical trials. Subsequently, the pharmaceutical companies, LSU, and CORA entered into transfer and assignment agreements whereby CORA assumed all responsibilities for the clinical trials and residual funds from those trials would transfer to CORA. Dr. Schwarzenberger's employment at LSU ended in 2006.

On July 15, 2009, Dr. Schwarzenberger and CORA filed a petition for writ of mandamus, declaratory relief and damages against LSU for breach of contract alleging that LSU failed to transfer the funds from the Amgen and GSK clinical trials. On February 16, 2011, LSU filed an answer and a reconventional demand alleging that Dr. Schwarzenberger willfully mismanaged the financial matters associated with the Amgen and GSK clinical trials in breach of his employment agreement with LSU.

On October 18, 2016, the trial court granted summary judgment in favor of LSU dismissing all the claims asserted by Dr. Schwarzenberger and CORA with prejudice. On appeal, this Court affirmed. *Schwarzenberger v. Louisiana State Univ. Health Sciences Center New Orleans*, 2017-0024 (La. App. 4 Cir. 8/24/17), 226 So.3d 1200. Thereafter, only LSU's claims in reconvention remained.

On September 29, 2017, relators filed a motion for partial summary judgment seeking dismissal of all claims related to the Amgen clinical trial. Following a hearing, the trial court granted the motion for partial summary judgment and dismissed LSU's claims relating to the Amgen clinical trial. LSU sought supervisory review of the trial court's November 16, 2017 judgment on the motion for partial summary judgment; this Court denied the writ, noting that "relator has adequate remedy on appeal." *Schwarzenberger v. Louisiana State Univ. Health Sciences Center New Orleans*, unpub., 2017-0969 (La. App. 4 Cir. 12/1/17).

In January 2018, LSU's claims against relators relating to the GSK clinical trial proceeded to a bench trial. Following a three day trial, the trial court rendered judgment in favor of LSU and awarded damages. The trial court's March 1, 2018 judgment and reasons for judgment adjudicated all remaining claims in the suit. In its written reasons for judgment regarding the GSK trial, the trial court found that Dr. Schwarzenberger breached his contractual and fiduciary obligations to LSU through fraud and self-dealing by using CORA to enter a "side contract" with GSK and mismanaging the GSK study.

On March 12, 2018, LSU filed a motion for partial new trial. LSU argued that based on the evidence at the GSK trial, the trial court should “reconsider its interlocutory order dismissing LSU’s Amgen claims in light of the findings in its Reasons for Judgment [in the GSK trial]” and requested a new trial regarding damages and attorneys’ fees.

After a hearing on May 11, 2018, the trial court rendered judgment granting LSU’s motion for partial new trial and withdrawing the November 16, 2017 judgment granting relators’ motion for partial summary judgment and dismissing LSU’s claims relating to the Amgen clinical trial.<sup>1</sup> Relators timely noticed their intent to seek supervisory review.

## **DISCUSSION**

The appellate court reviews a ruling on a motion for new trial under an abuse of discretion standard. *Washington v. Landry’s Seafood House New Orleans, Inc.*, 2014-0128, 2014-0530, p. 8 (La. App. 4 Cir. 11/19/14), 154 So.3d 677, 682.

Upon review, we find the motion for partial new trial procedurally improper for seeking review of the November 16, 2017 judgment granting the motion for partial summary judgment. In light of applicable law, we find the trial court erred in granting LSU’s motion for partial new trial and withdrawing the November 16, 2017 interlocutory judgment granting relators’ motion for partial summary judgment.

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<sup>1</sup> The May 22, 2018 judgment on the motion for new trial does not specify any relief granted relating to LSU’s request for additional damages and attorney’s fees.

In *Magallanes v. Norfolk Southern Ry. Co.*, 09-0605, p. 3 (La. App. 4 Cir. 10/14/09), 23 So.3d 985, 988, this Court recognized, “[w]e have previously held that the motion for new trial pursuant to La. C.C.P. art. 1974 applies only to *final* judgments.” (citing *Carter v. Rhea*, 01-0234, p. 4 (La. App. 4 Cir. 4/25/01), 785 So.2d 1022, 1025. La. C.C.P. art. 1974 reads:

The delay for applying a new trial shall be seven days, exclusive of legal holidays. The delay for applying for a new trial commences to run on the day after the clerk has mailed, or the sheriff has served, the notice of judgment as required by Article 1913.

“La. C.C.P. art. 1913 pertains only to final judgments.” *Magallanes*, 09-0605, p. 4, 23 So.3d at 988. La. C.C.P. art. 1914 pertains to the notice for interlocutory judgments.

In this case, the November 16, 2017 judgment granting relators’ motion for partial summary judgment and dismissing LSU’s claims relating to the Amgen clinical trial was an interlocutory judgment. *See* La. C.C.P. art. 1915(B)(1) (“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.”). Absent an express designation of the judgment as final in accordance with La. C.C.P. art. 1915(B)(1), a partial summary judgment is an interlocutory judgment that is not subject to an immediate appeal. Moreover, “an interlocutory judgment is not

subject to a motion for new trial.” *Johno v. Doe*, 16-0200, p. 5 (La. App. 4 Cir. 8/17/16), 198 So.3d 1216, 1218. “The proper procedural vehicle to seek review of an interlocutory judgment that is not immediately appealable is an application for supervisory writ.” *Id.*; see *Carter*, 01-0234, p. 5, 785 So.2d at 1025. As stated previously, LSU sought supervisory review of the trial court’s November 16, 2017 judgment within the 30-day time period for filing an application for supervisory writs pursuant to Rule 4-3, Uniform Rules—Courts of Appeal; and that writ was denied by this Court. *Schwarzenberger, supra*.

Thereafter, pursuant to La. C.C.P. art. 1915(B)(2), the November 16, 2017 judgment was subject to revision by the trial court “at any time prior to rendition of the judgment adjudicating all the claims and the rights and liabilities of the parties.” See *Riley v. Maison Orleans II, Inc.*, 01-0498, p. 15 (La. App. 4 Cir. 9/25/02), 829 So.2d 479, 490 (“[T]he trial judge had the discretion to change the substance of that interlocutory ruling at any time prior to rendering of the final judgment.”). However, once the trial court renders a final, appealable judgment adjudicating all the remaining claims, a prior interlocutory judgment is only subject to review through an appeal of the final judgment. See *Joseph v. Wasserman*, 16-0528, p. 5 (La. App. 4 Cir. 12/7/16), 206 So.3d 970, 973 (citing *People of the Living God v. Chantilly Corp.*, 251 La. 943, 947, 207 So.2d 752, 753 (1968)); *Louisiana High School Athletics Ass’n, Inc. v. State*, 12-1471, p. 26 (La. 1/29/13), 107 So.3d 583, 603. “When an unrestricted appeal is taken from a final judgment, the appellant is entitled to seek review of all adverse interlocutory

rulings prejudicial to him, in addition to the review of the final judgment.” *Favrot v. Favrot*, 10-0986, p. 2, n. 1 (La. App. 4 Cir. 2/9/11), 68 So.3d 1099, 1102 (quoting Roger A. Stetter, *Louisiana Civil Appellate Procedure*, § 3:32 (2010-2011 ed.).

At the hearing on the motion for partial new trial, the trial court correctly stated that the November 16, 2017 judgment was not a final judgment and, thus, at the time it was rendered, “the procedural device of a motion for new trial was not available.” However, the trial court incorrectly reasoned that LSU was entitled to file a motion for partial new trial of the prior interlocutory judgment after the rendition of the final judgment on March 1, 2018. The motion for new trial pursuant to La. C.C.P. art. 1974 applies only to the claims adjudicated in the final judgment rendered on March 1, 2018. That final judgment does not incorporate all prior interlocutory judgments for the purposes of seeking a motion for new trial. As stated above, a party seeking relief from an adverse interlocutory judgment rendered prior to the final judgment may seek appellate review in an unrestricted appeal from the final judgment. Thus, LSU is entitled to seek review of the November 16, 2017 interlocutory judgment in an appeal from the March 1, 2018 final judgment.

### **CONCLUSION**

For the reasons stated above, we find the trial court erred in granting LSU’s motion for partial new trial and withdrawing the November 16, 2017 judgment granting relators’ motion for partial summary judgment. Accordingly, we grant



relators' writ, we reverse the trial court's May 22, 2018 judgment, and we reinstate the November 16, 2017 judgment granting relators' motion for partial summary judgment and dismissing LSU's claims relating to the Amgen clinical trials.

**WRIT GRANTED; JUDGMENT REVERSED**