Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **10th day of December, 2021** are as follows:

BY Crichton, J.:

2021-CC-00011 ***TERESA KELLEHER VS. UNIVERSITY MEDICAL CENTER MANAGEMENT CORPORATION D/B/A UNIVERSITY MEDICAL CENTER NEW ORLEANS (PARISH OF ORLEANS CIVIL)***

AFFIRMED. REMANDED. SEE OPINION.

Genovese, J., additionally concurs and assigns reasons.

SUPREME COURT OF LOUISIANA

No. 2021-CC-00011

TERESA KELLEHER

VS.

UNIVERSITY MEDICAL CENTER MANAGEMENT CORPORATION D/B/A UNIVERSITY MEDICAL CENTER NEW ORLEANS

ON SUPERVISORY WRIT TO THE ORLEANS CIVIL DISTRICT COURT, PARISH OF ORLEANS CIVIL

CRICHTON, J.

We granted the writ in this case to consider whether the allegations of malpractice in this petition are "treatment related" within the scope of the Louisiana Medical Malpractice Act ("MMA" or "Act"), La. R.S. 40:1231, *et seq.*, or whether they are "administrative" decisions outside the scope of the Act. For the reasons that follow, we cannot reach this question, as plaintiff Theresa Kelleher ("plaintiff") does not qualify as a "patient" of defendant University Medical Center Management Corporation d/b/a University Medical Center New Orleans ("UMC") under the definitions in the Act. We therefore affirm the trial court's denial of the dilatory exception of prematurity and remand the matter for further proceedings.

BACKGROUND

According to the allegations and evidence,[1] in late 2018, plaintiff began to experience pain in her thoracic spine. Plaintiff was ultimately found to have an abscess in her thoracic spine with positive marrow infiltration around the T2 and T3 vertebrae. A December 7, 2019 bone biopsy confirmed acute and chronic osteomyelitis, *i.e.*, a bone infection. Plaintiff alleges she was neurologically intact and ambulatory at that time.

[1] Evidence may be introduced to support or controvert allegations of the petition during a hearing on a dilatory exception. La. C.Civ.P. art. 930.

On December 19, 2018, plaintiff's treating orthopedic surgeon, Dr. Felipe Ramirez, noted the existence of "positive marrow infiltration" along the T2 and T3 vertebrae, with a "concern for osteomyelitis." Dr. Ramirez noted the following in his patient records:

> I think this needs to be treated. I am going to refer her to Dr. Figueroa at LSU to start empiric treatment per his expertise. I directly spoke with him over the phone and briefed him about the case. He agrees with prompt treatment with IV antibiotics and will arrange follow up [at] UMC with his LSU infectious disease colleagues.

Dr. Julio Figueroa, whom plaintiff alleges is an infectious disease specialist, is affiliated with LSU-Health Sciences Center-New Orleans.

Plaintiff alleges she was told that UMC would be contacting her to schedule an appointment for treatment at its Infectious Disease ("ID") Clinic. As she stated in an affidavit submitted in conjunction with proceedings on the dilatory exception, having not heard from anyone for several days, she called UMC to inquire about her appointment status and was told to "be patient" because "it was Christmastime."

On January 3, 2019, plaintiff was transported by ambulance to Touro Infirmary with lower extremity paralysis. Her osteomyelitis had progressed to the point that she lost neurological function of her lower extremity and required an ambulance to take her from her home to Touro. Despite treatment at Touro, plaintiff was rendered paraplegic due to the progressed osteomyelitis.

While at Touro, on January 8, 2019, plaintiff received a call from UMC notifying her that her appointment at the ID Clinic had been scheduled for January 14, 2019. The reasons that UMC did not previously schedule plaintiff with the ID Clinic are not apparent from the record. January 8 is also the first date on which plaintiff appears in UMC's records. Those records indicate that Betty Charles, R.N., of the ID Clinic, "received an inbasket staff message request from Dr. Nanfro for the next available appointment." Nurse Charles documented that Ms. Kelleher was presently in the hospital at Touro, that she reported she was in the hospital for "strep

infection of spinal cord and I can't walk," and she did not know when she would be discharged.

In August 2019, plaintiff filed a medical malpractice complaint against UMC, Dr. Figueroa, and the State of Louisiana through the Board of Supervisors of the Louisiana State University and Agricultural and Mechanical College and LSU Health Sciences Center-New Orleans ("LSU"). Two months later, plaintiff filed suit in district court against Dr. Figueroa and UMC for, *inter alia*, "failing to properly train administrative personnel to schedule appointments [and] failing to arrange for the promised prompt appointment for [plaintiff]." Defendants responded with dilatory exceptions of prematurity asserting the claims are not solely "administrative," and are therefore covered by the Act and must be submitted to a medical review panel. The trial court, without giving reasons, granted Dr. Figueroa's and LSU's exception, but denied UMC's exception. The Court of Appeal, Fourth Circuit, denied UMC's writ application.

DISCUSSION

The dilatory exception of prematurity provided for in La. C.C.P. art. 926(1) questions whether the cause of action has matured to the point where it is ripe for judicial determination. *DuPuy v. NMC Operating Co., L.L.C.*, 15-1754, p.3 (La. 3/15/16), 187 So. 3d 436, 438. A medical malpractice claim against a qualified health care provider is subject to dismissal on a timely exception of prematurity if such claim has not first been reviewed by a pre-suit medical review panel. La. R.S. 40:1231.8. *See also Dupuy*, 2015-1754, p.4, 187 So. 3d at 438. In such situations, an exception of prematurity neither challenges nor attempts to defeat any of the elements of the plaintiff's cause of action but instead asserts that the plaintiff has failed to take some preliminary step necessary to make the controversy ripe for judicial involvement. *Id*. The burden of proving prematurity is on the moving party, in this case UMC, which, in a medical malpractice case, must show that it is entitled

to a medical review panel because the allegations fall within the scope of the Act. *Dupuy*, 2015-1754, p.4, 187 So. 3d at 439. Whether a claim sounds in medical malpractice is a question of law reviewed *de novo*. *Thomas v. Regional Health Sys. of Acadiana*, 2019-0507 (La. 1/29/20), -- So. 3d --, 2020 WL 500019.

UMC argues that the question presented in its exception is whether plaintiff's allegations sound in "malpractice" or "administrative negligence." However, this bypasses a more fundamental point: the nature of the relationship between UMC and plaintiff.[2] Under the Act, "malpractice" means "any unintentional tort or any breach of contract based on health care or professional services rendered, or which should have been rendered, by a health care provider, ***to a patient***, including failure to render services timely. . . ." La. R.S. 40:1231.1(13) (emphasis added). In light of this statutory mandate, this Court has explained that a prerequisite of a medical malpractice case is the existence of a physician-patient relationship. *Hutchinson v. Patel*, 93-2156 (La. 5/23/94), 637 So. 2d 415, 421 ("[A]pparent in the Act's definitions of 'patient,' 'tort,' 'health care,' and 'malpractice' [is] the legislature's recognition of the traditional rule of law allowing recovery for medical malpractice only where a physician-patient relationship exists as the result of an express or implied contract and where the physician breaches either the contract or his or her professional duty ***to the patient***.") (emphasis in original). *See also Green v. Walker*, 910 F.2d 291, 293 (5th Cir. 1990) (emphasis added) (Politz, J.) ("It is a long-established principle of law that liability for malpractice is dependent on the existence of a physician-patient relationship."); Barry A. Lindahl, 3 Modern Tort Law: Liab. & Litig. § 24:3 (2d ed., June 2021) ("The relationship of physician and patient must be established as a prerequisite to a medical malpractice action.").

[2] Plaintiff alleges her claims sound in "administrative negligence," but courts look beyond the title of an allegation to whether the conduct on which the claim is based fits within the definition of "malpractice" under the Act. *See*, *e.g.*, *Thomas*, 19-0507, p.11, 2020 WL 500019.

Cognizant of this background, we turn first, as we must, to the language of the statute itself. When a statute is clear and unambiguous and its application does not lead to absurd consequences, the provision must be applied as written with no further interpretation made in search of the legislature's intent. La. Civ. Code art. 9; La. R.S. 1:4. *See generally Thomas*, 19-0507, p.4, -- So. 3d --. A "patient" is defined in the Act as a "natural person . . . who receives or should have received health care from a licensed health care provider, under contract, expressed or implied." La. R.S. 40:1231.1(A)(15). Taking each element of this definition one at a time, it is clear plaintiff is a "natural person," and the core of her allegation against UMC is that she "should have received health care" from UMC. However, based on the record before us, we cannot find plaintiff was "under contract, expressed or implied" with UMC during the relevant time period—*i.e.*, the period in which she alleges she "should have received" health care.

The Medical Malpractice Act does not define "contract" in La. R.S. 40:1231.1. We therefore turn to the general definition in the Civil Code,[3] which provides: "A contract is an agreement by two or more parties whereby obligations are created, modified, or extinguished." C.C. art. 1906. Contracts are "formed by the consent of the parties established through offer and acceptance." C.C. art. 1927. In the context of the Medical Malpractice Act, the Court has explained only that "a physician-patient relationship exists as the result of an express or implied contract" and "patients expressly or impliedly contract with health care providers for the rendering of health care or professional services, whereas non-patients do not." *Hutchinson*, 637 So. 2d at 426. *See also Delcambre v. Blood Systems, Inc.*, 04-0561,

[3] *See generally* Civil Code art. 13 ("Laws on the same subject matter must be interpreted in reference to each other."); *M.J. Farms, Ltd. v. Exxon Mobil Corp*., 2007-2371 (La. 7/1/08), 998 So. 2d 16, 27, *amended on reh'g* (9/19/08) ("It is [] well settled under our rules of statutory construction, where it is possible, courts have a duty in the interpretation of a statute to adopt a construction which harmonizes and reconciles it with other provisions dealing with the same subject matter.").

p.7-8 (La. 1/19/05), 893 So. 2d 23, 28 (recovery under the Act "is allowed only where a physician-patient relationship exists as the result of an express or implied contract and where the physician, or health care provider, breaches his contractual or professional duty to the patient").

Neither the allegations of plaintiff's petition, nor any evidence offered in the course of the hearing on the exception, establishes consent on the part of UMC to form a doctor-patient relationship with plaintiff, as required to establish the existence of an implied contract. Plaintiff's osteomyelitis led to paralysis before her name even appeared in the UMC system. She never spoke to a doctor on the phone, never took medicine at the direction of UMC, was never scheduled for an appointment at UMC, never visited UMC for an appointment or otherwise, and never received any type of care or treatment from UMC. Further, there is no evidence her treating physician Dr. Ramirez spoke to a doctor at UMC, only that he spoke to Dr. Figueroa about speaking to someone else at UMC. Thus, even taking plaintiff's allegations as true that there was an "offer" by plaintiff to UMC to schedule an appointment, there is no indicia, in the form of either allegations or evidence, that UMC knowingly "accepted" such offer sufficient to form a contract.[4] *See*, *e.g.*, Richard J. Kohlman, "Existence of Physician and Patient Relationship," 46 Am. Jur. Proof of Facts 2d 373 (Sept. 2021) ("A physician has no legal obligation to accept as a patient anyone who seeks his services, in the absence of a statute or a contract providing otherwise. When the physician accepts the patient or undertakes to treat him, and the patient

[4] In her affidavit, plaintiff states: "I never treated with Dr. Figueroa or anyone at UMC until after I became paralyzed." In her briefing to this Court, plaintiff reiterated that she was never a patient of UMC stating, *inter alia*: "Ms. Kelleher was not a patient of UMC"; "Ms. Kelleher was neither a patient nor assessed by anyone at UMC at any time before becoming paralyzed."; "Prior to becoming paralyzed, Ms. Kelleher was not a patient of UMC. She had no professional doctor/patient relationship with any UMC doctor, nurse, or other healthcare professional. This fact is undisputed."

In contrast, in UMC's supplemental reply brief in the trial court in support of its exception, UMC stated that the "only evidence" of a referral in UMC's records came "on or around January 8, 2019." UMC further stated that plaintiff offered "no evidence that UMC actually received a referral."

accepts the services of the doctor, the relationship of physician and patient is created.").[5]

In the absence of allegations or evidentiary support to establish the formation of a contract, express or implied, the Court concludes that plaintiff was not a "patient" of UMC for purposes of the Medical Malpractice Act.[6]

CONCLUSION

For the foregoing reasons, we affirm the decision of the trial court and find this matter does not satisfy the prerequisites for a hearing by a medical review panel. We therefore remand the matter to the district court for further proceedings.

AFFIRMED, REMANDED.

[5] UMC argues plaintiff alleged in her petition that UMC did not arrange a "promised and agreed prompt appointment" and therefore she has alleged herself to be a patient of UMC. However, the only evidence related to this statement is plaintiff's affidavit statement that she telephoned UMC and was told to "be patient" as "it was Christmastime." We do not find this call, which UMC never returned before plaintiff's injury, sufficient to establish UMC's consent to accept her as a patient.

[6] We expressly decline to decide whether plaintiff will be able to prove UMC's liability in tort. *See*, *e.g.*, *Hutchinson v. Patel*, 93-2156 (La. 5/23/94), 637 So. 2d 415, 427 (observing that there is a difference between an implied contractual relationship between a physician and a patient and the imposition of a duty of care with regard to a non-patient).

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Genovese, J., additionally concurs and assigns the following reasons.

I concur that Plaintiff was not a patient; thus, this cannot be a medical malpractice action. I write separately to additionally state that I find a failure to schedule a medical appointment constitutes administrative negligence as opposed to medical malpractice. *See, e.g., Scio v. Univ. Medical Ctr. Mgmt. Corp.*, 19-1319 (La. 10/21/19), 280 So.3d 1135.