Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **20th day of October, 2023** are as follows:

BY Genovese, J.:

2023-C-00483 *MONICA SEBBLE ON BEHALF OF THE ESTATE OF VIVIAN LEE BROWN (D) VS. ST. LUKE'S #2, LLC D/B/A ST. LUKE LIVING CENTER; WOUND CARE ASSOCIATES, LLC; AND BRIDGEPOINT HEALTHCARE LA, LLC D/B/A BRIDGEPOINT CONTINUING CARE HOSPITAL C/W IN RE: MEDICAL REVIEW PANEL PROCEEDING OF VIVIAN LEE BROWN (D) (Parish of Orleans Civil)*

AFFIRMED. SEE OPINION.

Weimer, C.J., dissents and assigns reasons.
Crain, J., dissents for reasons assigned by Weimer, C.J. and McCallum, J.
McCallum, J., dissents and assigns reasons.

SUPREME COURT OF LOUISIANA

No. 2023-C-00483

MONICA SEBBLE ON BEHALF OF THE ESTATE OF VIVIAN LEE BROWN (D)

VS.

ST. LUKE'S #2, LLC D/B/A ST. LUKE LIVING CENTER; WOUND CARE ASSOCIATES, LLC; AND BRIDGEPOINT HEALTHCARE LA, LLC D/B/A BRIDGEPOINT CONTINUING CARE HOSPITAL

C/W

IN RE: MEDICAL REVIEW PANEL PROCEEDING OF VIVIAN LEE BROWN (D)

On Writ of Certiorari to the Court of Appeal, Fourth Circuit, Parish of Orleans Civil

GENOVESE, J.

This Court granted certiorari in this medical malpractice matter in order to consider whether the gross negligence standard of La.R.S. 29:771(B)(2)(c) is to be considered by a medical review panel when the medical treatment occurred during a declared state of public health emergency pursuant to La.R.S. 29:766(A). For the reasons that follow, we find that the trial court did not err in declaring that La.R.S. 29:771(B)(2)(c) shall not be considered or applied in medical review panel proceedings and, therefore, did not err in granting Plaintiff's motion for summary judgment. Likewise, the court of appeal did not err in its affirmation. Thus, we affirm.

FACTS AND PROCEDURAL HISTORY

On March 31, 2021, Plaintiff, Monica Sebble as Executrix of the Estate of Vivian Lee Brown ("Ms. Sebble"), instituted a medical review panel proceeding pursuant to La.R.S. 40:1231.1, *et seq.*, naming multiple Defendants, including Bridgepoint Healthcare LA, LLC d/b/a Bridgepoint Continuing Care Hospital

("Bridgepoint").[1] Relative to Bridgepoint, Ms. Sebble alleged it breached the standard of care in its treatment of Ms. Brown during her admission at Bridgepoint from June 17, 2020, to June 24, 2020, which ultimately caused her death. Ms. Brown's treatment at Bridgepoint occurred during a declared state of public health emergency.[2]

Ms. Sebble then filed a petition for declaratory judgment, seeking a declaration that the qualified immunity extended to health care providers during a declared state of public health emergency under the Louisiana Health Emergency Powers Act ("LHEPA")[3] should not be considered or applied in the medical review panel proceedings conducted pursuant to the Louisiana Medical Malpractice Act ("LMMA") in formulating the medical review panel's opinion as to whether the applicable standard of care was breached. Ms. Sebble further sought a declaration that the medical review panel may consider only the applicable medical standards of care without regard to legal standards or affirmative defenses, such as those set forth in La.R.S. 29:771, which may be raised after a petition for damages is filed, in making its statutorily required findings.

Bridgepoint answered and alleged that La.R.S. 29:771 is not an affirmative defense or qualified immunity statute; rather, it is a modified standard of liability applicable to health care providers from a negligence basis to a gross negligence

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[1] The other named health care providers included St. Luke's #2, LLC d/b/a St. Luke Living Center, and Wound Care Associates, LLC d/b/a MedCentris.

[2] On March 11, 2020, Governor John Bel Edwards declared a state of public health emergency in Louisiana in accordance with the LHEPA, and he extended the declaration through the period of the allegations of malpractice against Bridgepoint.

[3]La.R.S. 29:771(B)(2)(c), at the relevant time, provided: "During a state of public health emergency, any health care providers shall not be civilly liable for causing the death of, or injury to, any person or damage to any property except in the event of gross negligence or willful misconduct." Effective October 28, 2020, via La. Acts 2020, 2nd Ex. Sess., No. 30, § 1, the statute was re-designated as La.R.S. 29:771(B)(2)(c)(i) and was amended to read: "During a state of public health emergency, no health care provider shall be civilly liable for causing the death of, or injury to, any person or damage to any property except in the event of gross negligence or willful misconduct.

basis during a declared state of public health emergency. Bridgepoint alleged that the medical review panel must consider the gross negligence standard when addressing the rendition of health care during a declared state of public health emergency. Bridgepoint also filed a reconventional demand requesting a declaratory judgment confirming that the modified standard of gross negligence as set forth in the LHEPA is applicable for any medical treatment occurring during a declared state of public health emergency, and the medical review panel's opinion must take into consideration and analyze the allegations in accordance with the gross negligence standard.

Cross-motions for summary judgment relating to the competing requests for a declaratory judgment were then filed. The trial court rendered judgment in favor of Ms. Sebble declaring that La.R.S. 29:771(B)(2)(c) shall not be considered or applied in the medical review panel proceeding; therefore, it granted Ms. Sebble's motion for summary judgment and denied Bridgepoint's motion for summary judgment.

Bridgepoint appealed. The court of appeal affirmed. *Sebble on Behalf of the Estate of Brown v. St. Luke's #2, LLC*, 22-620 (La.App. 4 Cir. 3/6/23), 358 So.3d 1030.

Bridgepoint then filed a writ application with this Court, which was granted. *Sebble on Behalf of the Estate of Brown v. St. Luke's #2, LLC*, 23-483 (La. 6/21/23), 362 So.3d 413.

STANDARD OF REVIEW

The decision to grant or deny declaratory relief is left to the wide discretion of the trial court. *Westlawn Cemeteries, L.L.C. v. Louisiana Cemetery Bd.*, 21-1414, p. 11 (La. 3/25/22), 339 So.3d 548, 558. Although this decision is subject to an abuse of discretion standard of review, the judgment itself is still reviewed under the appropriate standard of review. *Id*. at 559. This Court reviews the granting of a

motion for summary judgment *de novo*, using the same criteria that govern the trial court's determination of whether summary judgment is appropriate. *Farrell v. Circle K Stores, Inc.*, 22-849, p. 2-3 (La. 3/17/23), 359 So.3d 467, 471.

APPLICABLE LAW

The issue presented in this case is whether the gross negligence standard of La.R.S. 29:771(B)(2)(c) is to be considered by a medical review panel when the medical treatment occurred during a declared state of public health emergency. This issue requires an examination of the LMMA and the LHEPA.

The starting point in the interpretation of any statute is the language of the statute itself. *Carollo v. Dep't of Trans. & Dev.*, 21-1670, p. 12 (La. 9/1/22), 346 So.3d 751, 759. Thus, "[w]hen a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature." La.Civ. Code art. 9. "When the wording of a Section is clear and free of ambiguity, the letter of it shall not be disregarded under the pretext of pursing its spirit." La.R.S. 1:4. "Words and phrases shall be read with their context and shall be construed according to the common and approved usage of the language." La.R.S. 1:3. However, "[w]hen the language of the law is susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law." La.Civ. Code art. 10. "When the words of a law are ambiguous, their meaning must be sought by examining the context in which they occur and the text of the law as a whole." La.Civ. Code art. 12.

Finally, "[i]n construing statutory language, it is presumed that the legislature enacts each statute with deliberation and with full knowledge of all existing laws on the same subject; therefore, legislative language will be interpreted on the assumption that the legislature was aware of existing statutes, the rules of statutory construction, and with knowledge of the effect of their acts and with a purpose in

view." *Carollo*, 346 So.3d at 760. "As a result, 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." *Id.* (citing La.Civ. Code art. 13). With these principles of statutory interpretation in mind, we examine the LMMA and the LHEPA.

THE LMMA

The LMMA was enacted in 1975. Notably, the LMMA provides qualified health care providers with a number of advantages in derogation of the general rights of tort victims. *McGlothlin v. Christus St. Patrick Hosp.*, 10-2775, p. 7 (La. 7/1/11), 65 So.3d 1218, 1225 (citing *Galloway v. Baton Rouge Gen. Hosp*., 602 So.2d 1003, 1005-06 (La.1992); *Everett v. Goldman*, 359 So.2d 1256, 1262-63 (La.1978)). Louisiana Revised Statutes 40:1231.8(A)(1)(a) provides that "[a]ll malpractice claims against health care providers covered by this Part, other than claims validly agreed for submission to a lawfully binding arbitration procedure, shall be reviewed by a medical review panel. . . ."

The *Everett* Court outlined the purpose behind this statutory scheme:

> Pretrial screening through a medical review panel is designed to weed out frivolous claims without the delay or expense of a court trial. It is thought that the use of such panels will encourage settlement because both parties will be given a preliminary view of the merits of the case. If a claim is found by the panel to be without merit it[,] is thought that the claimant will be likely to abandon his claim or agree to a nominal settlement. Moreover, a plaintiff who gains a favorable opinion from the panel may be able to negotiate a favorable settlement with his defendants, a procedure which also avoids much of the time and expense of a trial. Thus, to the extent that the use of medical review panels encourages settlement of suits before trial, litigation costs will probably be reduced. Because out of court settlements usually do not garner the publicity of jury verdicts[,] it is also hoped by proponents of the legislation that publicity concerning the award figure will be minimal and that this fact will gradually reduce awards granted by juries. Additionally[,] since jury awards are believed generally to be larger than settlements, the increase in prevalence of the latter should serve to reduce the overall payment of claims. Thus, litigation costs and actual awards are expected to be lessened by virtue of the employment of pre-suit medical review panels.

Everett, 359 So.2d at 1264 (citations omitted) (footnote omitted).

The Attorney Chairman

Per the LMMA, an attorney chairman may be agreed upon amongst the parties and serves in an administrative capacity to facilitate the selection of the medical review panel members, establish a schedule for the submission of evidence, and convene the medical review panel for an opinion on the medical treatment. La.R.S. 40:1231.8(C)(2). The oath taken by the attorney chairman delineated in La.R.S. 40:1231.8(C)(5)(b) provides, in pertinent part, that "it is my lawful duty to advise the panel members concerning matters of law and procedure and to serve as chairman." Louisiana Revised Statutes 40:1231.8(D)(5) sets forth that "[t]he chairman of the panel shall advise the panel relative to any legal question involved in the review proceeding and shall prepare the opinion of the panel. . . ." La.R.S. 40:1231.8(D)(5).

The Medical Review Panel

Louisiana Revised Statutes 40:1231.8(C) provides that "[t]he medical review panel shall consist of three health care providers who hold unlimited licenses to practice their profession in Louisiana and one attorney." Under the LMMA, the medical review panelists must be of "the same class and specialty of practice" as the defendant. La.R.S. 40:1231.8(C)(3)(j). The oath taken by the panelists as contained in La.R.S. 40:1231.8(C)(5)(a) provides, in pertinent part, that "it is my lawful duty to serve . . . and to render a decision in accordance with law and the evidence." "The panel shall have the sole duty to express its expert opinion as to whether or not the evidence supports the conclusion that the defendant or defendants acted or failed to act within the appropriate standards of care." La.R.S. 40:1231.8(G). After reviewing all evidence, the medical review panel shall render one or more of the following expert opinions, which shall be in writing and signed by the panelists, together with written reasons for their conclusions:

> (1) The evidence supports the conclusion that the defendant or defendants failed to comply with the appropriate standard of care as charged in the complaint.
>
> (2) The evidence does not support the conclusion that the defendant or defendants failed to meet the applicable standard of care as charged in the complaint.
>
> (3) That there is a material issue of fact, not requiring expert opinion, bearing on liability for consideration by the court.
>
> (4) When Paragraph (1) of this Subsection is answered in the affirmative, that the conduct complained of was or was not a factor of the resultant damages. If such conduct was a factor, whether the plaintiff suffered: (a) any disability and the extent and duration of the disability, and (b) any permanent impairment and the percentage of the impairment.

La.R.S. 40:1231.8(G)(1)-(4).

The medical review panel's expert opinion "shall be admissible as evidence in any action subsequently brought by the claimant in a court of law.]" La.R.S. 40:1231.8(H). However, "such expert opinion shall not be conclusive and either party shall have the right to call, at his cost, any member of the medical review panel as a witness." *Id.* "Nevertheless, as with any expert testimony or evidence, the medical review panel opinion is subject to review and contestation by an opposing viewpoint." *McGlothlin*, 65 So.3d at 1227 (citing *Samaha v. Rau,* 07-1726, p. 15 (La. 2/26/08), 977 So.2d 880, 890). "The opinion, therefore, can be used by either the patient or the qualified health care provider, and the jury, as trier of fact, is free to accept or reject any portion or all of the opinion." *Id.* (citing *Everett,* 359 So.2d at 1269).

THE LHEPA

In 2003, the legislature enacted a comprehensive revision of the Louisiana Homeland Security and Emergency Assistance and Disaster Act of 1993. This revised set of statutes was entitled the Louisiana Health Emergency Powers Act. La.R.S. 29:760 *et seq*. Pursuant to La.R.S. 29:766(A), "[a] state of public health emergency may be declared by executive order or proclamation of the governor,

following consultation with the public health authority, if he finds a public health emergency as defined in R.S. 29:762 has occurred or the threat thereof is imminent." Louisiana Revised Statutes 29:771(B)(2)(c), at the relevant time, provided: "During a state of public health emergency, any health care providers shall not be civilly liable for causing the death of, or injury to, any person or damage to any property except in the event of gross negligence or willful misconduct."

ANALYSIS

Strict Construction

It is well settled that the LMMA, a statute in derogation of victims, must be "strictly construed." *Khammash v. Clark*, 13-1564, p. 13 (La. 5/7/14) 145 So.3d 246, 256 (citing *Sewell v. Doctors Hosp*., 600 So.2d 577, 578 (La.1992)). "The primary limiting provisions available to private health care providers are the maximum amount of damages and the mandatory pre-suit review by a medical review panel, along with the special prescriptive and peremptive periods for malpractice actions." *Billeaudeau v. Opelousas General Hosp.*, 16-846, p. 11 (La. 10/19/16), 218 So.3d 513, 520 (quoting *Spradlin v. Acadia-St. Landry Med. Found.*, 98-1977, p. 6 (La. 2/29/00), 758 So.2d 116, 120).

Medical Standard of Care versus Legal Standard of Care

Both of the lower courts in this case distinguished between a medical standard of care and a legal standard of care and concluded that a medical review panel is only qualified to render an opinion based on the medical standard of care. We agree with their reasoning.

There is a distinction between a medical standard of care and a legal standard of care. The medical standard of care is a determination made by the medical review panel, *medical experts*, whose duty it is to apply their medical expertise and opine on whether the defendant health care provider failed to adhere to the appropriate medical standard. By contrast, the LHEPA sets forth a legal standard of care, which

is a determination left to the trier of fact, lay persons, who consider all of the evidence, including the medical review panel's opinion, in making a determination of whether the defendant health care provider's conduct was grossly negligent. In other words, a finding by a medical review panel that there was a breach in the standard of care is a "baseline" determination; the degree of that breach is a judicial determination by the trier of fact.

The medical expertise of a medical review panel was recognized by this Court in *McGlothlin*, 65 So.3d at 1226-27 (quoting *Samaha*, 977 So.2d at 890; *Galloway,* 602 So.2d at 1007), which opined that "the opinion of the medical review panel 'is admissible, expert medical evidence that may be used to support or oppose any subsequent medical malpractice suit.'" The *McGlothlin* Court, 65 So.3d at 1228-29 (footnote omitted), reasoned:

> La.Rev.Stat. § 40:1299.47(H) specifically provides: "Any report of the ***expert opinion*** reached by the medical review panel ***shall*** be admissible as evidence in any action brought by the claimant." Accordingly, under the plain language of this provision, a panel's expert opinion is and shall be admissible. What constitutes an expert opinion, however, is clearly and succinctly defined in the preceding statutory provision, La.Rev.Stat. § 40:1299.47(G), which states "the panel . . . ***shall*** render one or more of the following ***expert opinions*** ":
>
> . . . .
>
> Given the plain language of this provision, an expert opinion is one rendered on the issues of whether or not the evidence supports a finding of substandard medical care and whether and to what degree that substandard care contributed to the resultant damages. However, when there exists "a material issue of fact, not requiring an expert opinion, bearing on liability for consideration by the court," the statutory provision requires the opinion of the panel simply acknowledge the material issue and defer to the factfinder's consideration. In this way, the Legislature successfully retains the benefit of the panel members' education and training in the resolution of potentially complex medical issues, while preserving to the court and the jury their factfinding function.

Importantly, *McGlothlin* recognized the limitations of the medical review panel's considerations stating: "In performing [its] duty, the panel is *not permitted to render an opinion on any disputed issue of material fact that does not require*

their medical expertise." *Id*. at 1229 (emphasis added). The Court opined that because the medical review panel exceeded its statutory authority, its opinion was inadmissible. Additionally, after recognizing that a medical review panel is to render an expert medical opinion, the *McGlothlin* Court recognized the role of the fact finder stating: "Moreover, the resolution of whether the alleged malpractice constitutes negligence as well as the assessment of factual conflicts, including those involving the contradictory testimony of expert witnesses, falls within the province of the trier of fact." *Id.* at 1232 (citing *Martin v. East Jefferson General Hosp.,* 582 So.2d 1272, 1277-78 (La.1991)).

In sum, under the provisions of the LMMA, a medical review panel, a panel of medical experts, applies its medical knowledge to determine whether a health care provider adhered to the medical standard and if there was a breach thereof. The standard of care applied by a medical review panel in rendering their expert opinion is limited to their expertise relative to a medical standard of care, not a legal one. *McGlothlin*, 65 So.3d at 1229.

The fact that its opinion is indeed a medical standard of care is further supported by the LMMA's requirement that the medical review panel be comprised of health care providers within "the same class and specialty of practice" as the defendant health care provider. La.R.S. 40:1238.8(C)(3)(j). Thus, their consideration of the "appropriate" and "applicable" standards of care refers to the medical standard that they, as experts, know and apply as medical doctors in their respective fields of expertise. Their expert medical opinion is then admissible at trial along with other relevant evidence, and it is the trier of fact that determines whether the defendant health care provider was negligent or grossly negligent along with the other necessary elements for the imposition of civil liability.

In reaching this conclusion, we acknowledge that the attorney chairman has the responsibility to advise the panel members concerning matters of law. La.R.S.

40:1231.8(C)(5)(b). However, the attorney chairman may only advise it on the law within the statutory authority granted to the medical review panel by the LMMA. A gross negligence standard is not included within that authority.

Absence of Legislative Authority

Bridgepoint argues that in order for a medical review panel to correctly perform its function, it should first determine whether the standard of care was breached under the general negligence standard. It proposes that if the medical review panel finds that a breach occurred, the attorney chairperson would then advise the panelists as to the gross negligence standard found in the La.R.S. 29:771(B)(2)(c), at which time the panel would render a second opinion based upon this modified standard of care. However, there is no statutory authority for this proposed "two-step" process. Likewise, there is no statutory authority for an expansion of the duties of a medical review panel absent legislation. Bridgepoint's simple assertion that nothing in either statute prohibits a medical review panel from considering the gross negligence standard is unpersuasive, especially given the strict construction given to the LMMA. If a medical review panel is to engage in this "two-step" process and make a determination of gross negligence, the legislature must so provide.

A Medical Review Panel is not a Civil Proceeding

The LHEPA is a statute that, by its clear terms, applies in civil proceedings seeking to impose "civil[] liab[ility]." La.R.S. 29:771(B)(2)(c)(i). A medical review panel "is not an adjudicatory body." *Everett*, 359 So.2d at 1270. "The panel simply renders an expert opinion, and does not have the power to adjudicate the rights of any party." D*erouen v. Kolb*, 397 So.2d 791, 794-95 (La. 1981) ("[W]e reaffirm our decision in *Everett* and find the medical review panel is not a judge nor a jury, but merely a body of experts assembled to evaluate the plaintiff's claim and to provide the courts and the parties with an expert opinion."). *See also Perritt v. Dona*, 02-

2601, p. 16 (La. 7/2/03), 849 So.2d 56, 66 (wherein this Court distinguished between "a 'claim' pending before the medical review panel for review" and a "petition" filed in a civil case). Because medical review panels do not impose "civil[] liab[ility]," and the medical review process is not a civil proceeding, the LHEPA has no application in the medical review panel process.

If the legislature intended for the provisions of the LHEPA to be considered in medical review panel proceedings, which do not determine civil liability, it is for the legislature to so provide. The LHEPA was enacted many years after the LMMA. Had the legislature intended the LHEPA to apply at the medical review panel stage, it could have so provided. "A long line of jurisprudence holds that those who enact statutory provisions are presumed to act deliberately and with full knowledge of existing laws on the same subject, with awareness of court cases and well-established principles of statutory construction, with knowledge of the effect of their acts and a purpose in view. . . ." *Borel v. Young*, 07-419, p. 7 (La. 11/27/07), 989 So.2d 42, 48. Not only does the LHEPA not refer to the LMMA nor a medical review panel, it expressly addresses civil liability, which is not within a medical review panel's purview.

Lejeune v. Steck, 13-1017 (La.App. 5 Cir. 5/21/14), 138 So.3d 1280, *writ denied sub nom. Daigle v. Steck*, 14-1408 (La. 10/3/14), 149 So. 3d 800, and particularly the lack of an amendment to the statutes in response thereto, is discussed by the parties in this case as being relevant to our determination herein. However, *Lejeune* did not decide the applicability of the LHEPA at the medical review panel stage. The appellate court stated: "The Panel further said that the prevailing standard of care was that set forth in La. R.S. 29:771B(2)(c), and that there was no evidence of gross negligence or willful misconduct." *Id.* at 1282. However, the appellate court did not consider whether the medical review panel's consideration of the LHEPA was appropriate, and it made no ruling on this issue. *Lejeune*, an

appellate court decision, is not binding on this Court. It also is not persuasive on the issue presented by the case *sub judice*, as it did not address the propriety of the medical review panel considering the gross negligence standard.

Classification of the LHEPA as an Immunity Statute

Both parties argue the correctness of the appellate court's characterization of the LHEPA as an immunity statute. Bridgepoint argues that the LHEPA is not an immunity statute; rather, during a state of public health emergency, it modifies the standard for negligence in La.R.S. 9:2794 and must be based on the gross negligence or willful conduct of the health care provider. On the other hand, Ms. Sebble contends that the appellate court correctly determined that La.R.S. 29:771 is an immunity statute.

We agree with the appellate court's characterization of the LHEPA as an immunity statute. Such classification is consistent with the language of the statute itself. As noted by the appellate court:

> La[.] R.S. 29:771(B)(1) clearly delineates that "State immunity shall be determined in accordance with R.S. 29:735," whereas La[.] R.S. 29:771(B)(2) indicates that this statute pertains to private actors. After enumerating several different circumstances in which a heightened standard for liability would apply during a public health emergency, La[.] R.S. 29:771(B)(2)(e) provides in plain language that "[t]he immunities provided in this Subsection shall not apply to any private person . . . whose act or omission caused in whole or in part the public health emergency . . ."

Sebble on Behalf of Estate of Brown, 358 So.3d at 1044 (footnote omitted).

The Louisiana Attorney General has also interpreted the LHEPA as an immunity statute. The Attorney General's April 7, 2020 Memorandum specifically refers to La.R.S. 29:771(B)(2)(c) as an immunity statute and discusses the immunity provided therein.[4]

[4] The April 7, 2020 Memorandum states, in part: "Specifically, La. R.S. 29:771(B)(2)(c) provides immunity for health care providers acting during a public health care emergency for civil claims concerning the death of or injury to a person or damage to property, *except* in the event of gross negligence or willful misconduct."

This Court has not yet addressed the issue of the classification of the LHEPA as an immunity statute. We have recognized that "[w]hile tort immunity is not specifically enumerated as an affirmative defense in La. C.C.P. art. 1005,[5] it is well settled that the list therein in illustrative, not exclusive." *Walls v. Am. Optical Corp*., 98-455, p. 6 (La. 9/8/99) 740 So.2d 1262, 1267 (footnote omitted). Since statutory immunity is an affirmative defense, it may only be raised in an answer filed in a civil proceeding.[6] For this reason, it is procedurally improper to inject the affirmative defense of statutory immunity pursuant to the LHEPA into medical review panel proceedings. The affirmative defense may be raised by a health care provider in its answer at the conclusion of the medical review panel process if and when a subsequent civil proceeding ensues.

Additionally, the legislature itself has spoken and has enumerated the legal defenses available to a health care provider while a medical review panel proceeding is pending. Specifically, the LMMA allows health care providers in a medical review panel proceeding to raise only the two defenses listed therein: no right of action and prescription. La.R.S. 40:1231.8(B)(2)(a).[7] Nothing in the LMMA

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[5] Louisiana Code of Civil Procedure Article 1005 entitled "Affirmative defenses" provides:

> The answer shall set forth affirmatively negligence, or fault of the plaintiff and others, duress, error or mistake, estoppel, extinguishment of the obligation in any manner, failure of consideration, fraud, illegality, injury by fellow servant, and any other matter constituting an affirmative defense. If a party has mistakenly designated an affirmative defense as a peremptory exception or as an incidental demand, or a peremptory exception as an affirmative defense, and if justice so requires, the court, on such terms as it may prescribe, shall treat the pleading as if there had been a proper designation.

[6] *See also Brown v. Adair*, 02-2028, p. 5 (La. 4/9/03), 846 So.2d 687, 690 (a workers' compensation matter wherein this Court opined that "the tort immunity provided by the Act operates as an affirmative defense[.]"; *In re Welch v. United Med. Healthwest-New Orleans, L.L.C.*, 21-684, p. 6 (La.App. 5 Cir. 8/24/22), 348 So.3d 216, 221-22 ("We find that the tort immunity provided by Section 29:771(B)(2)(c) of LHEPA, 'mistakenly' pled by Appellees as a peremptory exception of no cause of action, is, in fact, an affirmative defense which the trial court considered properly pled, pursuant to La. C.C.P. art. 1005.").

[7] At the relevant time, La.R.S. 40:1231.8(B)(2)(a) provided:

> A health care provider, against whom a claim has been filed under the provisions of this Part, may raise peremptory exceptions of no right of action pursuant to Code of Civil Procedure Article 927(6) or any exception or defenses available pursuant

provides for the raising of the affirmative defense of immunity in the medical review proceeding stage.

CONCLUSION

For the reasons set forth above, this Court finds that the trial court did not err in declaring that La.R.S. 29:2771(B)(2)(c) shall not be considered or applied in medical review panel proceedings and, therefore, did not err in granting Plaintiff's motion for summary judgment. Likewise, the court of appeal did not err in its affirmation.

DECREE

The judgments of the lower courts are affirmed.

AFFIRMED.

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to R.S. 9:5628 in a court of competent jurisdiction and proper venue at any time without need for completion of the review process by the medical review panel.

The statute was subsequently amended to delete the reference to subsection (6) of La.Code Civ.P. art. 927.

SUPREME COURT OF LOUISIANA

No. 2023-C-00483

**MONICA SEBBLE ON BEHALF OF
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VS.

**ST. LUKE'S #2, LLC D/B/A ST. LUKE LIVING CENTER;
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CONTINUING CARE HOSPITAL**

C/W

**IN RE: MEDICAL REVIEW PANEL PROCEEDING OF
VIVIAN LEE BROWN (D)**

*On Writ of Certiorari to the Court of Appeal, Fourth Circuit,
Parish of Orleans*

WEIMER, C. J., dissenting.

Finding that the medical review panel must consider the gross negligence standard of care legislatively imposed during a state of public health emergency under the Louisiana Health Emergency Powers Act ("LHEPA"), I very respectfully dissent in a matter that I find to be close when considering the competing policy considerations.

I acknowledge the majority opinion articulated its position well. However, consistent with our civilian methodology, we begin-as we must-with the words of all of the relevant statutes. See La. R.S. 1:1, et seq.; La. R.S. 24:177(B)(1); La. C.C. art. 9, et seq.; see also **McCarthy v. Evolution Petroleum Corp.**, 14-2607, p. 9 (La. 10/14/15), 180 So. 3d 252, 258. All malpractice claims against health care providers qualified under the Louisiana Medical Malpractice Act ("LMMA") must be reviewed by a medical review panel prior to suit. See La. R.S. 40:1231.8(A)(1)(a) and

(B)(1)(a)(i); see also **Kirt v. Metzinger**, 19-1162, p. 6 (La. 4/3/20), 341 So. 3d 1211, 1215. The panel's "sole duty [is] to express its expert opinion as to whether or not the evidence supports the conclusion that the defendant or defendants acted or failed to act within the appropriate standards of care." La. R.S. 40:1231.8(G). In viewing the LMMA statutes in *globo*, it is fair to extrapolate that the panel process generally serves as a screening mechanism that encourages settlement because the parties are given a preliminary view of the merits of the case. E.g., **Galloway v. Baton Rouge General Hosp.**, 602 So. 2d 1003, 1006 (La. 1992); **Everett v. Goldman**, 359 So. 2d 1256, 1264 (La. 1978). Panel proceedings require an attorney chairman who operates in an administrative capacity. See La. R.S. 40:1231.8(C)(2). Importantly, the attorney chairman is required "to advise the panel members concerning matters of law and procedure." La. R.S. 40:1231.8(C)(5)(b). Moreover, the attorney chairman must "advise the panel relative to any legal question involved in the review proceeding." La. R.S. 40:1231.8(D)(5).

In a typical medical malpractice case, La. R.S. 9:2794(A) sets forth the plaintiff's burden of proof based on the *negligence* of the physician. Specifically, the plaintiff must prove "[t]he degree of knowledge or skill possessed or the degree of care ordinarily exercised by physicians ... licensed to practice in the state of Louisiana and actively practicing in a similar community or locale and under similar circumstances," that "the [physician] either lacked this degree of knowledge or skill or failed to use reasonable care and diligence, along with his[/her] best judgment in the application of that skill," and that "as a proximate result of this lack of knowledge or skill or the failure to exercise this degree of care the [patient] suffered injuries that would not otherwise have been incurred." La. R.S. 9:2794(A). Thus, in an ordinary malpractice case, the attorney chairperson would advise panel members regarding this

legal standard. However, during a declared state of public health emergency, this ordinary negligence standard is legislatively altered by the LHEPA. In this case, the governor's proclamation triggered application of La. R.S. 29:771(B)(2)(c)(i), which provides that "[d]uring a state of public health emergency, no health care provider shall be civilly liable for causing the death of, or injury to, any person or damage to any property except in the event of gross negligence or willful misconduct." Thus, for any medical malpractice claim arising during this time, the ordinary negligence standard in La. R.S. 9:2794 is no longer applicable, and the standard of care is modified from "negligence" to "gross negligence or willful misconduct" by operation of statutory law through the LHEPA.

The fact that the "gross negligence" standard for these particular medical malpractice cases is not directly encompassed within the LMMA is of no moment. Similar to La. R.S. 9:2794, the LHEPA must be read *in pari materia* with the provisions of the LMMA. Where two statutes address with the same subject matter, the statutes should be harmonized and reconciled if possible. See La. C.C. art. 13;[1] see also **Kirt**, 19-1162 at 6, 341 So. 3d at 1215. The medical review panel is already tasked with providing an expert opinion on allegations of negligence guided by the legal standard defined in La. R.S. 9:2794, which is not contained within the LMMA. During a state of public health emergency, the legal standard for negligence in La. R.S. 9:2794 is simply modified by the LHEPA from ordinary negligence to gross negligence (or willful conduct). The provisions of La. R.S. 9:2794 and the LMMA have long been interpreted *in pari materia*, and there is no reason to reach a different

[1] The fact that statutes do not specifically reference one another is irrelevant, based on La. C.C. art. 13. The only requirement is that the statutes address "the same subject matter." ***Id.*** It cannot be rationally argued that the statutes do not address the same subject matter-alleged medical malpractice.

result in cases involving La. R.S. 29:771(B)(2)(c). This statute creates no conflict with the provisions in the LMMA, and the relevant statutory provisions are easily harmonized.

While the majority distinguishes between the "medical standard of care" and the "legal standard of care," these concepts are essentially inseparable in medical review panel proceedings. The medical standard of care could be governed by an evaluation based on negligence, intentional act, or gross negligence. The medical standard of care cannot be evaluated in the abstract, but rather must be assessed based on a totality of the circumstances surrounding the providing of care.

The gross negligence standard set forth in La. R.S. 29:771(B)(2)(c) can be effectively applied by the medical review panel using the two-prong approach suggested by the defendants. Although there is no specific statutory authorization for this two-step process, it flows logically from the statutory system in place. In medical malpractice actions that implicate the LHEPA, the medical review panel should first consider the allegations under the ordinary negligence standard of care and then, if there is a breach of the ordinary standard of care, receive instruction from the attorney chairman on the law regarding the gross negligence standard applicable during a declared emergency. Under the second prong of this two-step analysis, the medical review panel would call on its expertise to determine whether the identified breach rises to the level of gross negligence. I recognize that determination of what constitutes "gross negligence" is challenging, but it is not impossible. Pursuant to La. R.S. 9:2794, medical review panels already consider the "legal standard" for civil liability based on ordinary negligence. While there is no statutory definition of gross

negligence, it is clearly distinct from intentional conduct.[2] The difference between gross negligence and "ordinary" negligence is generally one of degree.[3] See W. PAGE KEETON, ET AL., PROSSER & KEETON ON THE LAW OF TORTS, § 34, at 211 (5th ed. 1984); 65 C.J.S. Negligence, § 8(4)(a), at 539-40 (1966 & Supp. 1993).

As previously indicated, the sole purpose of the medical review panel is to provide the parties with an expert opinion on whether the health care provider breached the standard of care. See La. R.S. 40:1231.8(G). To render a reasonably informed opinion, the medical review panel must know the legal standard that applies to the standard of care determination. If the panel is not allowed to consider and apply the gross negligence standard, the entire medical review panel process is of limited value. Moreover, the panel's expert opinion is admissible as evidence at a subsequent trial. La. R.S. 40:1231.8(H). If the panel does not consider whether gross negligence exists, the panel opinion will be of limited value in subsequent litigation because the standard for a plaintiff to meet his or her burden of proof in the panel's opinion will be different from the standard required at trial.

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[2] The term "willful misconduct" steers disappointingly close, in my view, to "intentional" act which is not covered by the LMMA. When the terms "gross negligence" and "willful misconduct" are considered in the context of the other relevant provisions, it is obvious that on the continuum of misconduct, gross negligence and willful misconduct fall between "ordinary" negligence and intentional conduct.

[3] As stated in **Ambrose v. New Orleans Police Dep't Ambulance Service.**, 93-3099, 93-3110, 93-3112, pp. 5-6 (La. 7/5/94), 639 So. 2d 216, 219-20 (internal citations omitted):

> Gross negligence has been defined as the "want of even slight care and diligence" and the "want of that diligence which even careless men are accustomed to exercise." Gross negligence has also been termed the "entire absence of care" and the "utter disregard of the dictates of prudence, amounting to complete neglect of the rights of others." Additionally, gross negligence has been described as an "extreme departure from ordinary care or the want of even scant care." "There is often no clear distinction between such [willful, wanton, or reckless] conduct and 'gross' negligence, and the two have tended to merge and take on the same meaning." Gross negligence, therefore, has a well-defined legal meaning distinctly separate, and different, from ordinary negligence.

Unlike the majority, I do not consider La. R.S. 29:771 to be an immunity statute in strictest sense of the word. Rather, the statute modifies the standard for assessing liability for conduct during a publicly declared state of emergency.[4] The purpose of this "heightened burden of proof in Title 29 is to allow health care providers to provide medical care and treatment during a time of public health crisis without concerns of liability for a patient's poor outcome, unless the treatment decisions were grossly negligent, or the provider's misconduct was willful." **Whitehead v. Christus Health Cent. La.**, 21-764, p. 6 (La.App. 3 Cir. 6/8/22), 344 So. 3d 91, 95. The LHEPA reflects the legislative policy to ensure that health care providers continue the invaluable service of delivering health care to the public during an emergency. It encourages and incentivizes health care providers to remain behind during an emergency to care for those facing the emergency. The societal toll of the COVID-19 global pandemic at its initial peak and the disaster Hurricane Katrina impacted on our health care system remain a vivid and troubling memory. During these public health emergencies, hospitals and health care providers were overwhelmed with those desparate for medical services. Based on the enactment of La. R.S. 29:771, the legislature indicated that the circumstances under which a health

[4] Louisianians seem to have lived in a state of consecutively declared public emergencies, including a pandemic, floods, wildfires, and hurricanes that have visited our state recently. Additionally, the pace of social, geographic/ecological, and technological change seems to be accelerating rapidly. While it may be possible to identify the medical standard of care in isolated situations, the factual underpinnings of recent emergency declarations, and the disaster events themselves, have had significant impacts. In concert with other provisions governing physicians' conduct toward their patients, the language of the LHEPA appears to leave the standard intact and to accommodate the reality that the standard may not be met all the time during a declared state of emergency. The accommodation comes by way of amending the threshold for imposing legal liability-amending the manner of conduct required for liability to attach (negligent conduct of a greater magnitude or degree). Because there are some analogous situations, there will be situations in which the consequences of an emergency will factor into the consideration automatically and situations in which falling below the standard would be unreasonable if viewed in isolation. The legislature has decided that situations of declared public emergency require a broader accommodation and disincentivizing some hesitation of health care providers to remain behind to care for those harmed in the emergency.

care provider must work is a factor to consider when determining whether the standard of care was breached.[5]

The provisions of LHEPA apply to civil proceedings seeking to impose civil liability. La. R.S. 29:771(B)(2)(c)(i). The majority opinion finds the LHEPA has no application in the medical review panel process because medical review panels do not impose civil liability and are, thus, not a civil proceeding. I respectfully disagree. The medical review panel proceeding is clearly not a "criminal law proceeding," but is a "civil law proceeding" mandated by statutory law as a prerequisite to imposing civil liability. Compare, e.g., La. R.S. 14:8 (criminal conduct is defined as conduct "that produces criminal consequences") and La. C.Cr.P. art. 2 (the Code of Criminal Procedure addresses "criminal proceedings"), with, e.g., La. C.C.P. art. 421 (the Code of Civil Procedure addresses "civil action[s]", which are "demand[s] for the enforcement of "legal right[s]"). See also, e.g., 22 C.J.S. Criminal Law: Substantive Principles, § 1 (2003).[6] It is irrelevant that a medical review panel is not an adjudicatory body. The text of the law is the best evidence of the legislative intent. La. R.S. 24:177(B)(1). The language of La. R.S. 29:771(B)(2)(c) clearly provides the legal standard applicable in a medical malpractice claim during a public health emergency.

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[5] The findings of the medical review panel are not binding on the litigants. The medical review panel's expert opinion "shall not be conclusive and either party shall have the right to call, at his[/her] cost, any member of the medical review panel as a witness." La. R.S. 40:1231.8(H). It is subject to review and contestation by either the patient or the qualified health care provider. **McGlothlin v. Christus St. Patrick Hosp.**, 10-2775, p. 9 (La. 7/1/11), 65 So. 3d 1218, 1227 (citing **Samaha v. Rau**, 07-1726, p. 15 (La. 2/26/08), 977 So. 2d 880, 890). Thus, having the panel opine as to whether it believes that a breach in the standard of care rises to the level of gross negligence will not defeat the action, will not replace any legal determination reserved for the trier of fact, and will not otherwise prejudice a plaintiff.

[6] "A 'crime' has been defined as a wrong directly or indirectly affecting the public, to which the state has annexed certain punishments and penalties, and which it prosecutes in its own name in what is called a 'criminal proceeding.'" 22 C.J.S. Criminal Law: Substantive Principals, § 1. Civil proceedings are all other matters that are not criminal.

The legislature clearly intended that the medical review panel process applies to the LMMA, and this court should apply the text of the statute as written. While the policy reasons articulated by the parties are important and significant, and this statute may benefit from legislative clarification, this court's obligation is to apply statutes as they are currently written. After reading all of the relevant statutes *in pari materia*, the medical review panel's obligation is to provide an expert opinion based on the applicable gross negligence or willful misconduct standard set forth in La. R.S. 29:771(B)(2)(c). Therefore, I must very respectfully dissent.

SUPREME COURT OF LOUISIANA

No. 2023-C-00483

MONICA SEBBLE ON BEHALF OF THE ESTATE OF VIVIAN LEE BROWN (D)

VS.

ST. LUKE'S #2, LLC D/B/A ST. LUKE LIVING CENTER; WOUND CARE ASSOCIATES, LLC; AND BRIDGEPOINT HEALTHCARE LA, LLC D/B/A BRIDGEPOINT CONTINUING CARE HOSPITAL

C/W

IN RE: MEDICAL REVIEW PANEL PROCEEDING OF VIVIAN LEE BROWN (D)

On Writ of Certiorari to the Court of Appeal,
Fourth Circuit, Parish of Orleans Civil

McCALLUM, **J**., dissents and assigns reasons.

I respectfully disagree with the majority in finding that the provisions of La. R.S. 29:771 B (c)(1) are not applicable during the medical review panel stage of a medical malpractice action. The majority's decision essentially renders the statute meaningless and ignores the well-settled rule that "statutes pertaining to the same subject matter are to be read *in pari materia*." *Macro Companies, Inc. v. Dearybury Oil & Gas, Inc*., 21-00483, p. 2 (La. 6/29/21), 319 So. 3d 286, 287 (citation omitted); *see also*, La. C.C. art. 13: "Laws on the same subject matter must be interpreted in reference to each other.). Moreover, as this Court recently reiterated, and the majority acknowledges, the legislature is presumed to enact statutes deliberately and "with full knowledge of all existing laws on the same subject." *Carollo v. Dep't of Transp. & Dev*., 21-01670, p. 13 (La. 9/1/22), 346 So. 3d 751, 760. Thus, courts are to interpret a statute with the understanding "that the legislature was aware of existing statutes, the rules of statutory construction, and with knowledge of the effect

of their acts and with a purpose in view" so that the courts fulfill their duty "to adopt a construction [of a statute] which harmonizes and reconciles it with other provisions dealing with the same subject matter." *Id*.

Under the Louisiana Medical Malpractice Act (the "LMMA"), all malpractice claims must be reviewed by a medical review panel, whose "sole duty [is] to express its expert opinion as to whether or not the evidence supports the conclusion that the defendant or defendants acted or failed to act *within the appropriate standards of care.*" La. R.S. 40:1231.8 G. (Emphasis added). The panel is required to render "one or more of the following expert opinions. . . :"

> (1) The evidence supports the conclusion that the defendant or defendants failed to comply with the *appropriate standard of care* as charged in the complaint.
>
> (2) The evidence does not support the conclusion that the defendant or defendants failed to meet the *applicable standard of* care as charged in the complaint.
>
> (3) That there is a material issue of fact, not requiring expert opinion, bearing on liability for consideration by the court.

Id. (Emphasis added). The statute's reference to the "appropriate" and "applicable" "standards" of care signifies that there is more than one standard of care. Clearly, therefore, the panel must first determine the appropriate, applicable standard of care in each particular case.

The LMMA defines malpractice as "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. . . ." La. R.S. 40:1231.1 A (13). The "standard of care" is encompassed within the LMMA's definition of "tort," as follows:

> The standard of care required of every health care provider, except a hospital, in rendering professional services or health care to a patient, *shall be to exercise that*

> *degree of skill ordinarily employed,* under similar circumstances, by the members of his profession in good standing in the same community or locality, and to use reasonable care and diligence, along with his best judgment, in the application of his skill.

La. R.S. 40:1231.1 (22). (Emphasis added). Under this provision, the degree of a healthcare provider's skill is to be considered in view of the skill *ordinarily employed* by other like health care providers. *See Gibson v. Bossier City Gen. Hosp*., 594 So. 2d 1332, 1337 (La. App. 2 Cir. 1991) (citing La. R.S. 9:2794; *Martin v. East Jefferson General Hospital*, 582 So. 2d 1272 (La.1991)) ("In a medical malpractice action, plaintiff . . . must first establish by a preponderance of the evidence that the treatment fell below the ordinary standard of care expected in that medical specialty. . . .").

The Louisiana Health Emergency Powers Act, La. R.S. 29:760, *et seq*., (the "LHEPA"), on the other hand, employs a very different standard of review. At the time that this lawsuit was filed, the LHEPA provided, in pertinent part: "During a state of public health emergency, any health care providers shall not be civilly liable for causing the death of, or, injury to, any person or damage to any property except in the event of gross negligence or willful misconduct." La. R.S. 29:771 B (2)(c). As this Court has noted "gross negligence. . . has a well-defined legal meaning distinctly separate, and different, from ordinary negligence." *Ambrose v. New Orleans Police Dep't Ambulance Serv*., 93-3099, 93-3110, 93-3112, p. 8 (La. 7/5/94), 639 So. 2d 216, 220. The purpose of the LHEPA "is to allow health care providers to provide medical care and treatment during a time of public health crisis without concerns of liability for a patient's poor outcome, unless the treatment decisions were grossly negligent, or the provider's misconduct was willful." *Whitehead v. Christus Health Cent. Louisiana*, 21-764, p. 6 (La. App. 3 Cir. 6/8/22), 344 So. 3d 91, 95.

There can be no doubt that the Legislature's intent in enacting the LHEPA

was to establish a standard of care separate from that set forth in the LMMA in the event of a public health emergency. Thus, an "ordinary standard of care" of a physician in his specialty is employed in evaluating alleged malpractice occurring outside a state of a public health emergency. Conversely, where the alleged malpractice occurred during a public health emergency, a gross negligence/willful misconduct standard of care applies. It is imperative, therefore that the "appropriate" standard of care, as contemplated by the LMMA and, more specifically, La. R.S. 40:1231.8 G, be given to the medical review panel so that it can properly perform its duty to render an opinion. How would a medical review panel determine whether "[t]he evidence supports the conclusion that the defendant . . . failed to comply [or complied] *with the appropriate standard of care* as charged in the complaint" if the panel is not provided with the applicable standard of care?

Moreover, under La. R.S. 40:1231.8 H, the opinion of a medical review panel is "admissible as evidence in any action subsequently brought by the claimant in a court of law, but such expert opinion shall not be conclusive and either party shall have the right to call, at his cost, any member of the medical review panel as a witness." The panel's opinion can serve as evidence at a later medical malpractice proceeding. *See McGlothlin v. Christus St. Patrick Hosp.*, 10-2775, p. 9 (La. 7/1/11), 65 So. 3d 1218, 1226-27 (quoting *Samaha v. Rau*, 07-1726, p. 15 (La. 2/26/08), 977 So. 2d 880, 890) ("the opinion of the medical review panel 'is admissible, expert medical evidence that may be used to support or oppose any subsequent medical malpractice suit.'"). If a medical malpractice claim arises from actions during a state of a public health emergency and a medical review panel does not apply the LHEPA's standard of care – the applicable standard of care – and instead applies an ordinary negligence standard of care, its opinion in later proceedings will be useless.

Simply put, there can be only one standard of care applicable to a healthcare provider, whether it is considered during the medical review panel stage or at a later

proceeding. As to the latter, if a claim arose during a state of public health emergency, a plaintiff would be required to meet the gross negligence/willful misconduct burden of proof against a healthcare provider. A panel's opinion as to ordinary negligence would never satisfy that burden of proof.

As recently recognized by the court of appeal in *Garner v. Louisiana Med. Mut. Ins. Co*., 22-0778, p. 7 (La. App. 1 Cir. 3/29/23); 364 So. 3d 508, 512, "La. R.S. 29:771(B)(2)(c)(i) . . . provides a 'heightened burden of proof' against private health care providers during the event of a public health emergency. . . . As the more specific statute, La. R.S. 29:771 prevails over the more general malpractice statutes during a state of public health emergency and provides the heightened burden of proof); *see also*, *Whitehead,* 21-764, p. 5, 344 So. 3d at 95 ("the burden of proof set forth in La. R.S. 29:771 relative to medical malpractice during a declared state of medical emergency prevails over the more general medical malpractice statutes.") (quoting *Lejeune v. Steck,* 13-1017, p. 6 (La. App. 5 Cir. 5/21/14), 138 So. 3d 1280, 1284); *Morrow v. Louisiana Med. Mut. Ins. Co*., 22-1006, p. 5 (La .App. 1 Cir. 2/24/23), 361 So. 3d 986, 989.

Thus, because a heightened burden of proof will apply to an action falling within the scope of the LHEPA, a medical review panel's opinion based on the "degree of skill ordinarily employed" standard can have no bearing on whether there was gross negligence or willful misconduct on the part of a health care provider. Without employing the LHEPA's standard of care, which is the *actual* standard of care in the state of a public health emergency, the panel's opinion is meaningless and its admissibility clearly questionable. It follows, too, that a medical review panel proceeding working under an improper standard of care serves none of the purposes for which the LMMA was enacted. This Court observed in *Everett v. Goldman*, 359 So. 2d 1256, 1264 (La. 1978) (citation omitted) that:

> [p]retrial screening through a medical review panel is

> designed to weed out frivolous claims without the delay or expense of a court trial. It is thought that the use of such panels will encourage settlement because both parties will be given a preliminary view of the merits of the case. . . . If a claim is found by the panel to be without merit it is thought that the claimant will be likely to abandon his claim or agree to a nominal settlement.

(Citations omitted).

A medical review panel opinion that does not consider the appropriate standard of care provides no party with a "preliminary view of the merits of the case."

In my view, too, it is immaterial that the LHEPA is not found within the LMMA and contains no express reference to the LMMA.[1] First, as previously noted, "[a]ll laws pertaining to the same subject matter must be interpreted *in pari materia*. . . ." *Acurio v. Acurio*, 16-1395, pp. 4-5 (La. 5/3/17), 224 So. 3d 935, 938 (quoting *Pierce Foundations, Inc. v. Jaroy Construction, Inc*., 15-785, p. 7 (La. 5/3/16), 190 So. 3d 298, 303). Second, "where two statutes deal with the same subject matter, they should be harmonized if possible." *Pumphrey v. City of New Orleans*, 05-0979, p. 11 (La. 4/4/06), 925 So. 2d 1202, 1210. Third, "[w]hen a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written. . . ." La. C.C. art. 9. And, as this Court has stated that "the latest expression of legislative will is considered controlling. . . ." *Pumphrey*, 05-0979, p. 12, 925 So. 2d 1202. Finally, our jurisprudence indicates that

[1] Indeed, other statutes pertaining to medical malpractice claims are found outside Title 40, where the LMMA is found, yet still apply to medical malpractice actions. The standard of care that applies to physicians, for example, is found at La. R.S. 9:2794 (under Title V, entitled "of Quasi Contracts, and of Offenses and Quasi Offenses"). That statute sets forth a plaintiff's burden of proof against a physician, dentist, optometrist and chiropractic physician, including the "degree of knowledge or skill possessed or the degree of care ordinarily exercised" by those "practicing in a similar community . . . and under similar circumstances;" that the defendant "either lacked this degree of knowledge or skill or failed to use reasonable care and diligence, along with his best judgment in the application of that skill; and that "as a proximate result of this lack of knowledge or skill or the failure to exercise this degree of care the plaintiff suffered injuries that would not otherwise have been incurred." La. R.S. 9:2792 A (1-3).

"[f]undamental rules of statutory construction provide that a statute specifically directed to a matter at issue shall prevail over a statute more general in character when the two statutes deal with the same subject matter." *Whitehead*, 21-764, p. 5 344 So.3d at 94 (citing *Burge v. State*, 10-2229 (La. 2/11/11), 54 So.3d 1110).

Additionally, the LMMA requires the attorney-chairman of a medical review panel to "advise the panel relative to any legal question involved in the review proceeding and shall prepare the opinion of the panel. . . ." La. R.S. 40:1231.8 D (5). The chairman takes an oath acknowledging "the lawful duty to advise the panel members concerning matters of law and procedure. . . ." La. R.S. 40:1231.8 C (5)(b). Surely, this duty encompasses advising the panel that it must render an opinion in accordance with subpart G, as to whether "the evidence supports [or does not support] the conclusion that the defendant. . . failed to comply with the appropriate[/applicable] standard of care. . . ." The applicable standard of care is clearly a "matter[] of law and procedure" of which the chairman must inform the panel.

One recent case found no error in the trial court's judgment granting a physician's motion to enforce compliance with the LMMA and requesting an order that the chairman instruct the panelists to assess the claims under the standard of care of the LHEPA. In *In re Welch*, 21-622, p. 6 (La. App. 5 Cir. 11/18/21), --- So. 3d. ----, 2021 WL 5869131 (*unpub.*), *writ denied sub nom. In re Med. Review Panel Proceeding of Welch*, 21-01900 (La. 4/20/22); 336 So. 3d 451, the plaintiff raised the same arguments – that "the LHEPA is not part of the LMMA, and neither the LHEPA nor LMMA provide for any application of the LHEPA to the medical review panel proceedings delineated in the LMMA." *Id.*, p. 2, --- So. 3d ----, ----, 2021 WL 5869131 at *2. The trial court ruled that the chairman has "'the duty to provide legal advice to the panel and to advise them on what standards of care may be applied' and is ordered to 'consider the governor's order and any and all other case law that

he or she may be instructive on what standard of care to apply in this case.'" *Id*., p. 3, --- So. 3d ----, ----, 2021 WL 5869131 at *3.

In a companion case, *In re Welch*, 21-624, p. 4 (La. App. 5 Cir. 1/26/22), --- So. 3d ----, ----, 2022 WL 242683 at *5 (*unpub*.), *writ denied sub nom. In re Med. Review Panel Proceeding of Welch*, 22-00230 (La. 4/20/22), 336 So. 3d 894, the same panel of the court of appeal recognized that "La. R.S. 40:1231.8(G), clearly contemplates that different 'standards of care' may apply, [and that] the LMMA places the responsibility upon the attorney panel member for advising the panel members 'concerning matters of law' and regarding 'any legal question involved in the review proceeding'— which would include any applicable standards of care mandated by statute." The court of appeal found no error, however, only as to the trial court's judgment ordered that the chairman "*consider* the Governor's executive order declaring a public health emergency, as well as all instructive case law, when complying with his duty under the LMMA as attorney chairman to advise the physician panelists regarding the standards of care that may apply." *Id*. at *5-6. (Emphasis supplied).

In his concurring opinion, Judge Windhorst stated:

> . . . [W]hen the provisions of La. R.S. 29:771 B(2)(c)(i) apply, as in this case, the law requires that the panel determine whether the deviation from the appropriate *medical* standard of care was one of *gross negligence or willful misconduct*. The medical review panel cannot make the proper determination as required by this statute unless it is properly instructed by its attorney chairman that, in this case, because a "state of public health emergency" was declared by the Governor, the law requires that the panel determine whether the deviation from the appropriate medical standard constitutes gross negligence or willful misconduct.
>
> ***
>
> Thus, the panel makes <u>two separate determinations</u>: (1) the appropriate medical standard of care; and (2) whether that standard was breached. To make the second determination, the panel must be advised and understand

> the extent of the deviation from the appropriate standard of care which the evidence must show in this case. Specifically, the evidence must show that the failure to comply with the appropriate standard of care must amount to gross negligence or willful misconduct, rather than the ordinary finding of a failure to comply with the appropriate standard of care. The panel cannot be expected or assumed to know this unless it is advised of the law.

Id. at *6.

In his dissent, Judge Johnson stated:

> Because the medical review panel is solely responsible "to express its expert opinion as to whether or not the evidence supports the conclusion that the defendant or defendants acted or failed to act within the appropriate standards of care" and the panel has the right and duty to procure all necessary information, the trial court should be able to instruct the medical review panel on the correct standard of care. *See*, La. R.S. 40:1231.8(F) and (G). I find that the petition for declaratory judgment filed by Relator, Kenneth Williams, M.D., should have been granted, and the trial court should have ordered the attorney panel chairman to instruct the medical review panelists as to the applicable gross negligence standard of care under La. R.S. 29:771(B)(2)(c).

Id. at **1.

I agree with Judge Johnson and with the foregoing analysis of Judge Windhorst's concurrence.

Turning to the majority's distinction between a "medical standard of care" and a "legal standard of care," in my view, this distinction does not support a finding that the LHEPA does not apply to a medical review panel proceeding. Indeed, whether the panel evaluates a claim under the ordinary standard of care or the heightened gross negligence/willful misconduct standard, the panel is performing the same task; namely, determining whether the healthcare provider's conduct "failed to comply with the appropriate standard of care." Judge Windhorst recognized a distinction as well, but observed:

> The *medical* standard of care is wholly distinct from the *legal* standard or evidentiary showing which must be met in a medical malpractice case. In Perritt v. Dona, 02-2601

(La. 7/2/03) 849 So. 2d 56, the Louisiana Supreme Court stated:

> [T]he language of La. R.S. 40:1299.47 G suggests that it is the duty of the medical review panel to determine the appropriate standard of care based on the evidence presented and whether defendant breached that standard. . . .
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> An order by the trial court that the attorney chairman instruct the panel on the proper *legal* standard they must apply is not an intrusion into the panel's baseline determination of the appropriate *medical* standard. Such an instruction by the court, and then by the attorney chairman, would deal only with the legal standard (burden). Once instructed of the correct legal standard, the panel can then properly determine whether the defendant breached the appropriate medical standard of care, and if so, whether that breach amounted to gross negligence or willful misconduct.

Id. at *7. (Emphasis supplied). Of course, in any case, it will be the trier of fact who will make a determination as to whether there was a breach of the standard of care, whatever that standard of care may be.

Finally, "[e]xpert testimony is generally required to establish the applicable standard of care and whether that standard was breached, except where the negligence is so obvious that a lay person can infer negligence without the guidance of expert testimony." *Vanner v. Lakewood Quarters Ret. Cmty*., 12-1828, p. 6 (La. App. 1 Cir. 6/7/13), 120 So. 3d 752, 756 (citing *Pfiffner v. Corea*, 94-0924, pp. 9-10 (La.10/17/94), 643 So.2d 1228, 1234). The LMMA makes clear that a medical review panel's opinion is admissible as expert opinion. It is equally clear that "medical review panelists [are allowed] to testify on behalf of a party as paid experts." *Medine v. Roniger*, 03-3436, p. 7 (La. 7/2/04), 879 So. 2d 706, 712. The *Medine* Court explained that "allowing medical review panelists to testify at subsequent medical malpractice trials as expert witnesses assures the plaintiff of an expert in those cases where the panel has found that the defendant did violate the

appropriate standard of care." *Id*. p. 8, 879 So. 2d at 712.

Where the panel's opinion, however, employs an improper standard of care, the panelists' opinion would not be admissible and would not advance the purpose of the LMMA. This is particularly true considering that a panel's opinion may be "admissible as expert opinion evidence in a motion for summary judgment and may suffice to constitute a *prima facie* case that no issues of material fact exist, thus shifting the burden of proof to the plaintiff." *In re Med. Review Complaint by Downing*, 21-0698, p. 9 (La. App. 4 Cir. 5/26/22); 341 So. 3d 863, 870. *See also*, *Samaha*, 07-1726, p. 14, 977 So. 2d at 891 ("by law, the report of the expert opinion reached by the medical review panel is admissible as evidence in any action subsequently brought by the claimant in a court of law" which "undoubtedly includes a summary judgment proceeding in a medical malpractice lawsuit."). Where a plaintiff must show gross negligence/willful misconduct, an expert opinion on ordinary negligence can never be used to support or oppose a summary judgment motion.

The foregoing principles lead to one conclusion – that the legislature, with full knowledge of the LMMA, enacted the LHEPA to provide a separate standard of care for medical malpractice claims arising during a state of public health emergency. To have any meaning, the LHEPA - a more specific statute, which is also clear and unambiguous – must be applied during the panel review phase of a medical malpractice claim. Again, this Court has observed that "the language of LSA–R.S. 40:1299.47(G) suggests that it is the duty of the medical review panel to determine the appropriate standard of care based on the evidence presented and whether defendant breached that standard." *Perritt*, 02-2601, p. 13, 849 So. 2d at 65. The "appropriate standard of care" will, thus, vary depending on whether the alleged malpractice occurred during a state of public health emergency.

For the foregoing reasons, I respectfully dissent. I would reverse the trial

court's summary judgment in favor of the plaintiff and would enter summary judgment in favor of Bridgeport Healthcare LA., LLC.