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Recent Developments: Louisiana Medical Malpractice Law

*Natalie J. Dekaris**

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I. INTRODUCTION

Medical malpractice remains one of the most heavily litigated areas of the law in Louisiana.¹ One of the biggest developments seen in the field over the past few years is the Louisiana Supreme Court's recent decision in *Oliver v. Magnolia Clinic*, reaffirming the constitutionality of the State's statutory cap on damages in medical malpractice cases.² This Article discusses the holding of *Oliver* and also explores recent developments in Louisiana medical malpractice law related to prescription, expert witnesses and summary judgment, damages, informed consent, medical review panels, the standard of care, and the Patient's Compensation Fund (PCF).

II. *OLIVER V. MAGNOLIA CLINIC* AND THE LOUISIANA SUPREME COURT'S UPHOLDING OF THE CAP

Louisiana's cap on damages for medical malpractice actions is set forth in the Medical Malpractice Act (MMA) at Louisiana Revised Statutes section 40:1299.42.³ Louisiana's cap was adopted

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1. As of November 9, 2013, a Westlaw search of (MEDICAL HOSPITAL DOCTOR PHYSICIAN SURGEON NURS! /s MALPRACTICE) in the database "LA (State & Fed.);" for all dates after January 1, 2011 reveals 595 reported cases.

2. *Oliver v. Magnolia Clinic*, 85 So. 3d 39 (La. 2012). *See also* Arrington v. ER Physician Grp., Inc., 110 So. 3d 193 (La. Ct. App. 3d 2013), *cert. denied*, 111 So. 3d 1011 (La. 2013); Taylor v. Clement, 110 So. 3d 199 (La. Ct. App. 3d 2013), *cert. denied*, 111 So. 3d 1011 (La. 2013).

3. Louisiana Revised Statutes section 40:1299.42(B) provides, in pertinent part: "(1) The total amount recoverable for all malpractice claims for injuries to or death of a patient, exclusive of future medical care and related benefits as provided in R.S. 40:1299.43, shall not exceed five hundred thousand dollars plus interest and cost." LA. REV. STAT. ANN. § 40:1299.42(B).

in 1975 “and remains relatively unchanged since its inception.”⁴ Over the years, Louisiana’s cap has faced several constitutional challenges.⁵ The Louisiana Supreme Court undertook one such challenge in the recent case *Oliver v. Magnolia Clinic*.⁶

In *Oliver*, the plaintiffs alleged that a nurse practitioner failed to correctly and timely diagnose a child’s neuroblastoma, resulting in serious injuries.⁷ At trial, a jury found that the defendant was negligent and awarded damages of approximately \$10 million.⁸ The plaintiffs requested a declaration that the MMA’s cap on damages was unconstitutional, which the trial court denied.⁹ On appeal, the *Oliver* plaintiffs argued that the cap: (1) deprived victims of their right to an adequate remedy at law and (2) violated the Equal Protection Clause by arbitrarily and capriciously discriminating on the basis of physical condition.¹⁰ On remand from the Louisiana Supreme Court, the Third Circuit Court of Appeal agreed with the plaintiffs, reversed the trial court, and declared the cap unconstitutional.¹¹ After granting writs, the Louisiana Supreme Court reversed the Third Circuit and reinstated the holding of the trial court.¹²

In reaching this conclusion, the Court relied on its 1992 holding in *Butler v. Flint Goodridge Hospital of Dillard University*, when it last addressed the constitutionality of the cap.¹³ The Court explained that the right of malpractice victims to sue for damages was not a fundamental constitutional right, and therefore the State was required only to demonstrate a legitimate state objective that would

4. Bradley R. Belsome, *Cap Conundrum*, PHYSICIAN INSURER, Fourth Quarter 2012, at 22 n.2, available at http://www.piaa.us/docs/PI/PI_4th_2012.pdf [<http://perma.cc/V8AD-U8TB>] (archived Mar. 11, 2014) (“The act was amended in 1984 to remove future medical care and related benefits from being within its coverage.” (citing LA. REV. STAT. ANN. § 40:1299.43)).

5. See, e.g., *Butler v. Flint Goodridge Hosp. of Dillard Univ.*, 607 So. 2d 517 (La. 1992).

6. *Oliver*, 85 So. 3d 39.

7. *Id.* at 41.

8. *Id.* (awarding \$6 million in general damages, \$629,728.24 in past medical expenses, \$3,358,828 in future medical expenses, and \$33,000 to the patient’s father and \$200,000 to the patient’s mother for loss of consortium).

9. *Id.* at 42.

10. *Id.* at 43.

11. *Oliver v. Magnolia Clinic*, 71 So. 3d 1170 (La. Ct. App. 3d 2011). Three judges dissented, opining that the cap was constitutional under the Louisiana Supreme Court’s holding in *Butler v. Flint Goodridge Hospital of Dillard University*, 607 So. 2d 517 (La. 1992).

12. *Oliver*, 85 So. 3d at 50.

13. 607 So. 2d 517.

be furthered by the discrimination.¹⁴ The *Oliver* Court then explained why the cap furthered a legitimate state objective:

This “*quid pro quo*” acknowledged in *Butler* is just as constitutionally sound today as it was when we addressed it in 1992 insofar as the same objective exists now as at the time of the legislation’s inception in 1975; i.e., the legislature acted to combat the rising insurance premiums in an inherently risky industry in order to avoid a healthcare crisis in this state. Both now and then, malpractice claims exceeding the cap’s monetary limit would effectively increase the probability that health care providers would not have medical malpractice insurance sufficient to pay for these uncapped damages. The result would be an underfunded, perhaps insolvent system of recovery for malpractice victims. Any discrimination resulting from the cap, while unfortunate, substantially furthers a legitimate state interest, making the “imperfect balance” “reasonable.”¹⁵

In upholding the cap, the Court emphasized that it only possessed the authority to review whether the cap violated the constitution—“any other perceived infirmity,” such as the *Oliver* plaintiffs’ argument that the cap prevented injured victims from ever being made whole, “is to be addressed by the legislature.”¹⁶

Soon after handing down its opinion in *Oliver*, on April 12, 2013, the Louisiana Supreme Court denied all writ applications in the consolidated cases of *Arrington v. Galen-Med* and *Taylor v. Clement*, two other Third Circuit cases involving the alleged unconstitutionality of the cap.¹⁷ In light of these writ denials, the Supreme Court will likely not entertain challenges to the constitutionality of the cap in the near future.

III. PRESCRIPTION

Another heavily litigated area of Louisiana medical malpractice law is prescription, which presents a unique set of challenges. Louisiana Revised Statutes section 9:5628 provides the prescriptive period applicable to medical malpractice actions.¹⁸ Under the

14. *Oliver*, 85 So. 3d at 44–45.

15. *Id.* at 45 (citations omitted).

16. *Id.* at 46.

17. See *Arrington v. ER Physician Grp., Inc.*, 110 So. 3d 193 (La. Ct. App. 3d 2013); *Taylor v. Clement*, 110 So. 3d 199 (La. Ct. App. 3d 2013).

18. That statute provides in relevant part:

No action for damages for injury or death against any physician . . . whether based upon tort, or breach of contract, or otherwise, arising out

Louisiana Supreme Court's interpretation of Louisiana Revised Statutes section 9:5628, medical malpractice actions are subject to both a traditional one-year prescriptive period and a separate, unique three-year prescriptive period.¹⁹ The three-year prescriptive period is notable because it is not subject to interruption under *contra non valentem*'s discovery rule.²⁰ Also unique to medical malpractice actions is the fact that only a complaint filed with the PCF will serve to suspend prescription.²¹ These distinct rules render issues of prescription common in medical malpractice cases, including issues related to the commencement, suspension, and interruption of prescription.

The Fifth Circuit addressed the issue of commencement of prescription in *Dingler v. Heart Clinic of Louisiana*.²² There, the Court held that the patient, who suffered a heart attack the same day that he was sent home from the hospital after stress tests, had sufficient information to begin the running of prescription on his claim that the healthcare provider failed to properly diagnose his condition and admit him to the hospital immediately.²³ The court refused to adopt the plaintiff's argument that it was not until after he obtained a second opinion as to the advisability of his returning to employment, necessitating another stress test and inevitably highlighting the disparity in the way the stress tests were administered, that he was alerted to the possibility that the former test was not properly done.²⁴

Similarly, in *Davidson v. Glenwood Resolution Authority, Inc.*,²⁵ a plaintiff was deemed to have constructive notice that the metal

of patient care shall be brought unless filed within one year from the date of the alleged act, omission, or neglect, or within one year from the date of discovery of the alleged act, omission, or neglect; however, even as to claims filed within one year from the date of such discovery, in all events such claims shall be filed at the latest within a period of three years from the date of the alleged act, omission, or neglect.

LA. REV. STAT. ANN. § 9:5628 (2008).

19. See, e.g., *Borel v. Young*, 989 So. 2d 42, 48 (La. 2007).

20. *Id.* at 69 (“We therefore reaffirm our holding in *Hebert* that both the one-year and three-year periods set forth in LSA-R.S. 9:5628 are prescriptive [not preemptive], with the qualification that the *contra non valentem* type exception to prescription embodied in the discovery rule is expressly made inapplicable after three years from the act, omission, or neglect.”).

21. See *Bush v. Nat'l Health Care of Leesville*, 939 So. 2d 1216 (La. 2006); *LeBreton v. Rabito*, 714 So. 2d 1226 (La. 1998).

22. 113 So. 3d 269 (La. Ct. App. 5th 2013).

23. *Id.* at 270.

24. *Id.*

25. 108 So. 3d 345 (La. Ct. App. 2d 2013).

object in his abdominal cavity was likely related to the surgery performed by the defendant–physician.²⁶ The court dismissed the patient’s argument that he did not learn that he had a claim against the doctor until specifically informed that the piece of metal was from the retractor used during the surgery.²⁷ The surgery occurred on April 6, 2006, and the evidence established that as early as July 12, 2006, the plaintiff

could feel a ‘square corner’ in his abdomen and knew that there was something that should not be there. He saw . . . his primary physician, but the test ordered by [the physician] did not find anything. On August 15, 2006, a CT scan taken after an automobile accident revealed the presence of the metal object.²⁸

The ER physician at that time indicated that he advised the plaintiff to follow up with his physician about the metal object.²⁹ The radiologist who first noted the presence of the metal object on the CT scan also contacted the surgeon, who in turn made several attempts to contact the plaintiff.³⁰ Then, in September 2006 another physician noted the presence of the metal object on an x-ray but informed the plaintiff that he believed that it was probably the plaintiff’s penile implant.³¹ However, the Second Circuit noted that, at that time, the plaintiff knew that his penile implant had been removed.³²

A key holding regarding suspension of prescription in medical malpractice cases can be found in the Supreme Court’s recent decision in *Turner v. Willis Knighton Medical Center*.³³ There, the Court held that the dismissal, rather than *notification* of dismissal, of a proposed complaint of malpractice for failure to appoint an attorney–chairman begins the running of the 90-day grace period in which prescription is suspended.³⁴ In *Turner*, the PCF complaint was filed August 20, 2009.³⁵ On May 24, 2010, the PCF sent the claimant a “nine month letter” warning of impending dismissal per the MMA’s requirement that an attorney–chairperson be appointed

26. *Id.* at 351.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. 108 So. 3d 60 (La. 2012).

34. *Id.* at 67.

35. *Id.* at 61.

within one year of filing the complaint.³⁶ The MMA further provides that this “nine month letter” must be sent to the claimant 90 days in advance of dismissal.³⁷ Then, on August 25, 2010, the PCF sent the claimant a letter advising that the complaint was dismissed.³⁸ The claimant thereafter filed suit on November 23, 2010—within 90 days of the PCF’s letter notifying the claimant of the dismissal but more than 90 days from the one-year anniversary of the filing of the PCF complaint.³⁹ The trial court sustained the defendant’s exception of prescription, but the Second Circuit reversed.⁴⁰ The Supreme Court reinstated the trial court’s judgment, holding that, by operation of law, dismissal occurs one year from the date that the request for medical review panel is filed.⁴¹

However, the Supreme Court in *Turner* also recognized that there may be instances where 90 days from the date of the “nine month letter” is a longer period than one year from the date of the PCF complaint (i.e., when the PCF does not timely send the “nine month letter”), and there may be instances where 90 days from the date of a timely sent “nine month letter” will be shorter than the one-year period (i.e., where those months include months with 31 days).⁴² The Court determined that “in the few instances where the one year period and the [90] days from nine months period are different and one would maintain the action, that interpretation must be followed.”⁴³

In the recent case of *In re Robinson*,⁴⁴ the Second Circuit also addressed suspension of prescription by holding that filing a request for a medical review panel with the PCF will not suspend the running of prescription.⁴⁵ Rather, the Division of Administration is the proper entity with which to file a request for a medical panel review.⁴⁶ Filing in any other venue is invalid and without effect.⁴⁷

In addition, according to the Supreme Court’s recent pronouncement in *Milbert v. Answering Bureau, Inc.*,⁴⁸ if a non-healthcare provider is a joint tortfeasor with a healthcare provider,

36. *Id.* See LA. REV. STAT. ANN. § 40:1299.47(A)(2)(c) (2008).

37. § 40:1299.47(A)(2)(c).

38. *Turner*, 108 So. 3d at 64.

39. *Id.* at 62.

40. *Id.*

41. *Id.* at 67.

42. *Id.* at 65.

43. *Id.*

44. *In re Robinson*, No. 47,380, 2013 WL 163735 (La. Ct. App. 2d Jan. 16, 2013).

45. *Id.*

46. *Id.* at *6.

47. *Id.*

48. 120 So. 3d 678 (La. 2013).

the provision of the MMA that suspends the running of prescription against a healthcare provider during the pendency of a timely filed medical review panel complaint will be applied to suspend the running of prescription on the claim against the non-healthcare provider.⁴⁹

Issues related to interruption of prescription have also developed over the past few years. In *Santiago v. Tulane University Hospital & Clinic*, an amended petition and supplemental PCF complaint filed more than three years after the alleged malpractice were deemed not to relate back to the time of the filing of the original complaint.⁵⁰ Also, the catch-all provision of the amended petition, incorporating by reference all allegations contained in the original petition, precluded the amended petition from superseding the original petition; thus, the original petition interrupted prescription despite the fact that the amended petition withdrew the sole claim of the original petition.⁵¹

In *Santiago*, the plaintiff timely filed a medical malpractice complaint against a physician, a hospital, and an unidentified x-ray technician, alleging that she was dropped or improperly restrained during postoperative testing while still under general anesthesia.⁵² The panel found no breach of the standard of care, and the patient filed a post-panel lawsuit.⁵³ More than three years after the alleged malpractice, the patient amended her lawsuit to add new physicians, new radiologist technologists, and nurses.⁵⁴ Significantly, the amended petition alleged that the newly added technologists and nurses were directly responsible for the plaintiff's fall, rather than the original defendant-physician.⁵⁵ The amended pleading also set forth completely new negligence allegations against the original defendant-physician, alleging that he was at fault for failing to diagnose and report her fracture, failing to prevent further harm, and falsifying operative and x-ray reports.⁵⁶

All of the named physicians then filed an exception of peremption,⁵⁷ arguing that all claims against the original defendant-physician should be dismissed because the original PCF complaint and petition against him could not suspend prescription where no

49. *Id.* at 690. See LA. REV. STAT. ANN. § 40:1299.47(A)(2)(a) (2008).

50. 115 So. 3d 675 (La. Ct. App. 2d 2013).

51. *Id.* at 686–87.

52. *Id.* at 678.

53. *Id.* at 678–79.

54. *Id.* at 679.

55. *Id.*

56. *Id.*

57. The Court noted that the pleading should have been styled as an exception of prescription. *Id.*

specific allegations were lodged against him (apparently due to the retroactive superseding effect that the amended petition arguably had).⁵⁸ The newly added physicians also sought dismissal because they were not named as defendants until more than three years after the alleged malpractice.⁵⁹ The trial court granted the exception and dismissed all claims contained in all petitions.⁶⁰ On appeal, the Fourth Circuit found that all claims filed in the amended and supplemental petition were prescribed as a matter of law because the relation-back principles of Louisiana Code of Civil Procedure article 1153 do not interrupt prescription in medical malpractice cases.⁶¹ The court relied on *Borel v. Young*,⁶² reasoning that only the more specific provisions of the MMA apply to the exclusion of the more general provisions on suspension and interruption of prescription.⁶³

As for the original claim against the *Santiago* plaintiff's original defendant-physician, the Fourth Circuit concluded that the catch-all language of the amended petition, incorporating by reference all the allegations contained in the original petition, constituted a pronouncement of the plaintiff's intent to preserve the allegations against the physician.⁶⁴ This reasoning was in spite of the fact that the only allegation against the physician in the original petition was responsibility for the fall, and the amended petition deleted all references to the physician's responsibility for the fall.⁶⁵ The Fourth Circuit found that dismissal of the plaintiff's original claim against the original physician would have been proper as superseded by the plain language of the amended petition but for the amended petition's catch-all provision.⁶⁶ It therefore found that the trial court erred in dismissing the original fall-related claim against the original defendant-physician.⁶⁷

Lastly, the Third Circuit recently held in *In re Rideaux*⁶⁸ that when there are two defendants named in a PCF complaint, the claimant must pay the \$100 filing fee per named defendant to interrupt prescription or the filing is invalid, even if one defendant is later voluntarily dismissed.⁶⁹ In that case, a claimant filed a

58. *Id.*

59. *Id.* at 680.

60. *Id.*

61. *Id.* at 684.

62. *Borel v. Young*, 989 So. 2d 42 (La. 2007).

63. *Santiago*, 115 So. 3d at 680-82.

64. *Id.* at 686-87.

65. *Id.* at 686.

66. *Id.* at 686-87.

67. *Id.*

68. No. 12-1096, 2013 WL 811628 (La. Ct. App. 3d Mar. 6, 2013).

69. See LA. REV. STAT. ANN. § 40:1299.47(A)(1)(c) (2008).

proposed complaint of malpractice against two defendants but submitted only one \$100 filing fee.⁷⁰ The PCF immediately notified the plaintiff that she had 45 days to submit the correct payment (\$200) or the original filing would be invalid.⁷¹ The plaintiff failed to submit the additional filing fee.⁷² One year later, the plaintiff notified the PCF of her desire to dismiss the claim against one of the defendants, and the PCF rescinded its notice of insufficiency of the filing fee.⁷³ However, the trial court granted the remaining defendant's subsequent exception of prescription, and the Third Circuit affirmed.⁷⁴ The appellate court reasoned that the language of the statute regarding filing fees is clear: A filing fee of \$100 per named defendant must be paid within 45 days.⁷⁵ Because the plaintiff did not pay the correct filing fee prior to the 45-day deadline, the initial claim was deemed invalid and insusceptible of interrupting prescription.⁷⁶

IV. EXPERT WITNESSES AND SUMMARY JUDGMENT

Expert testimony is almost always necessary for a plaintiff to meet his burden in a medical malpractice case.⁷⁷ For this reason, the filing of a "no expert motion for summary judgment" by a defendant–healthcare provider is all but inevitable in cases where a plaintiff has neglected to retain a qualified expert. Therefore, issues related to expert witnesses, especially in the context of a motion for summary judgment, are a pivotal area of medical malpractice law.

The Louisiana Supreme Court recently issued a key holding in this area of the law in the case of *Benjamin v. Zeichner*.⁷⁸ There, the Court determined that the plaintiffs' expert did not meet the expert witness qualifications set forth in Louisiana Revised Statutes section 9:2794(D) and entered a directed verdict for the defense.⁷⁹ Louisiana Revised Statutes section 9:2794 lists four mandatory requirements for experts: They must (1) be practicing medicine at the time of testimony or at the time the claim arose; (2) have knowledge of the standard of care; (3) be qualified based on training and experience;

70. *Rideaux*, 2013 WL 811628, at *1.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at *2.

76. *Id.* at *3.

77. See *Samaha v. Rau*, 977 So. 2d 880 (La. 2008). *But see Pfiffner v. Correa*, 643 So. 2d 1228 (La. 1994).

78. 113 So. 3d 197 (La. 2013).

79. *Id.* at 205.

and (4) be either licensed to practice medicine at the time of trial or a graduate of an accredited medical school.⁸⁰

The expert in *Benjamin v. Zeichner* had given up his licenses to practice medicine in Alabama and Louisiana prior to trial.⁸¹ Defendants argued that because he was not licensed to practice in any jurisdiction in the United States at the time of trial and despite the fact that he was licensed and practicing at the time of the alleged negligence, the Tulane Medical School graduate was nevertheless unqualified because there was no competent evidence to prove that he met the requirement of section 9:2794(D)(1)(d), i.e., that he graduated from an “accredited medical school.”⁸² There was no question that the expert was a 1958 graduate of Tulane Medical School, but the trial court found no admissible evidence that Tulane was “accredited” by the American Medical Association’s Liaison Committee on Medical Education in 1958.⁸³ The plaintiffs attempted to introduce a faxed letter from Tulane as to its 1958 status, but the court ruled that the letter and its attachment were inadmissible hearsay.⁸⁴

The Third Circuit reversed, reasoning that although the expert had relinquished his medical licenses prior to trial, he had begun reviewing the evidence in the case before having done so.⁸⁵ The Third Circuit further noted that the expert’s affidavit was signed in 2004, years before he relinquished his licenses.⁸⁶ The Supreme Court granted writs and acknowledged that of the four mandatory requirements of section 9:2794(D)(1), it was undisputed that the expert met the first three, i.e., he was practicing at the time of the claim, had knowledge of the standard of care, and was qualified based on training and experience.⁸⁷ The issue was whether the plaintiffs proved that the expert was either licensed to practice medicine at the time of trial or was a graduate of an accredited medical school in satisfaction of Louisiana Revised Statutes section 9:2794(D)(1)(d).⁸⁸ The Supreme Court found that the evidence did not conclusively establish that Tulane was accredited at the time of trial and that the court could not “assume accreditation” based solely

80. LA. REV. STAT. ANN. § 9:2794 (2009).

81. *Benjamin*, 113 So. 3d at 200.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 200–01.

86. *Id.* at 201–03.

87. *Id.*

88. *Id.*

on the fact that the expert was licensed to practice in Louisiana in 1959.⁸⁹ The Supreme Court reinstated the directed verdict.⁹⁰

In *Albers v. Vina Family Medicine Clinic*,⁹¹ the Fourth Circuit held that an expert affidavit filed in opposition to a no-expert motion for summary judgment was insufficient to create a genuine issue of material fact.⁹² Plaintiffs alleged that the defendant–physician prescribed narcotic medication to the decedent at two pain clinics, allegedly causing her addiction to pain medication and ultimately her death.⁹³ Plaintiffs filed a PCF complaint in June 2006; however, no evidence was ever submitted to the panel and that proceeding expired in three years.⁹⁴ Plaintiffs thereafter filed a post-panel petition in July 2009.⁹⁵ The defendant “filed an exception of prescription which the trial court denied on *contra non valentem* grounds due to Hurricane Katrina and its devastating effects.”⁹⁶ At the hearing on the exception, counsel for the plaintiffs advised the court that all records from the clinics where the decedent allegedly received her medication were lost in Hurricane Katrina “and that the only records he had to prove his case were certain Medicaid prescription records.”⁹⁷

The defendant later propounded written discovery seeking the identity of any expert witnesses.⁹⁸ After receiving no response, the defendant filed a no-expert motion for summary judgment.⁹⁹ The motion was filed more than 7 years after the decedent’s death and 17 months after the hearing on the exception of prescription.¹⁰⁰ The court granted the plaintiffs a continuance and reset the motion for hearing four months after it was filed.¹⁰¹ Two days before the hearing, the plaintiffs filed an opposition memorandum and attached the affidavit of a specialist in medical toxicology.¹⁰² The affidavit stated that the expert relied on the Recipient Data Sheet from the Louisiana Department of Health and Hospitals, Bureau of Health Services Financing, Medicaid Management Information Services, the death certificate, an autopsy protocol, an unverified letter from

89. *Id.* at 204.

90. *Id.* at 204–05.

91. 116 So. 3d 940 (La. Ct. App. 4th 2013).

92. *Id.* at 943.

93. *Id.* at 941.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 942.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

the Louisiana Department of Health and Hospitals providing the defendant's physician identification number and identifying the defendant as a prescribing provider of the decedent, and an affidavit from the decedent's children.¹⁰³ The plaintiffs contended that these documents established that the decedent filled multiple prescriptions for narcotic medication, that some of these prescriptions were filled under the defendant's physician identification number, and that the decedent filled prescriptions or attempted to fill prescriptions allegedly written by the defendant on several dates over a seven-month period.¹⁰⁴ They further argued that the autopsy protocol showed massive amounts of drugs in the decedent's body and that the death certificate showed that she died secondary to multiple drug ingestion.¹⁰⁵

The trial court considered the untimely opposition but ultimately found that the plaintiffs failed to present expert testimony sufficient to support a breach of the standard of care.¹⁰⁶ The Fourth Circuit affirmed, finding that the expert affidavit merely stated conclusions regarding the medication allegedly prescribed but failed to establish that the defendant was the physician who actually prescribed the medication or that several prescriptions allegedly written by him were enough to establish a breach in the standard of care.¹⁰⁷ The appellate court further noted that the expert affidavit failed to establish that the prescriptions allegedly prescribed by the defendant caused or contributed to the decedent's death.¹⁰⁸ The Supreme Court denied writs.¹⁰⁹

In *Robin v. Hebert*,¹¹⁰ the Third Circuit held that determining whether a defendant inappropriately prescribed Xanax and clinically caused the patient's death are complex medical issues that require expert evidence.¹¹¹ The court disregarded the plaintiffs' argument that they should be allowed to prove the applicable standard by relying on the product labeling for Xanax and granted summary judgment in favor of the physician.¹¹² The Third Circuit affirmed.¹¹³

103. *Id.* at 943.

104. *Id.*

105. *Id.*

106. *Id.* at 943–44.

107. *Id.* at 944.

108. *Id.*

109. *Albers v. Vina Family Med. Clinic*, 123 So. 3d 1211 (La. 2013).

110. No. 12–147, 2013 WL 1809821 (La. Ct. App. 3d May 1, 2013).

111. *Id.* at *6–8.

112. *Id.* at *6.

113. *Id.* at *8.

In *Jackson v. Suazo-Vasquez*,¹¹⁴ the trial court rejected an affidavit of a nursing expert that was submitted in opposition to a no-expert motion for summary judgment.¹¹⁵ Plaintiff filed a claim against a physician and a dialysis center alleging that they breached the standard of care when they failed to send his mother to the hospital after she received dialysis and experienced an episode of high blood pressure.¹¹⁶ Shortly after leaving the dialysis center, the patient became nonresponsive and eventually died.¹¹⁷ The medical review panel found for the defendants, who thereafter filed a motion for summary judgment in the post-panel proceeding.¹¹⁸ In opposition, the plaintiff submitted the expert affidavit of a nurse.¹¹⁹ The court found the affidavit insufficient to refute the panel opinion because the nurse could not address the fault of the defendant—nephrologist or the issue of whether the alleged malpractice caused the patient’s death.¹²⁰ The court granted summary judgment, and the First Circuit affirmed.¹²¹

V. DAMAGES AND LOST CHANCE

Another critical issue in medical malpractice cases is the question of what type of damages are recoverable by the injured plaintiff. A frequently litigated issue in this area is the “lost chance” theory of recovery. Because medical malpractice cases often involve difficult questions of causation, years ago plaintiffs began urging courts to define the victim’s injury as a loss of a *chance* of survival (or recovery) in cases that posed significant cause-in-fact barriers. Louisiana courts have largely embraced this creative theory of recovery.

Under a lost chance theory, the plaintiff need not prove that the patient would have survived or recovered but for the defendant’s malpractice; however, the plaintiff must establish by a preponderance of the evidence that he or she had a chance of survival and that this chance was lost due to the defendant’s negligence.¹²² The Supreme Court has emphasized that in such cases, the fact-finder must focus on the lost chance as a distinct,

114. 116 So. 3d 773 (La. Ct. App. 1st 2013).

115. *Id.* at 778.

116. *Id.* at 774–75.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 777–79.

121. *Id.*

122. *Hebert v. Parker*, 796 So. 2d 19, 27 (La. Ct. App. 4th 2001). *See also* *Snia v. Med. Ctr. of New Orleans*, 637 So. 2d 1290, 1292 (La. Ct. App. 4th 1994).

compensable injury and value the lost chance as a lump sum award based on all the evidence in the record, as is done for any other item of general damages.¹²³ “The lost chance of survival in professional malpractice cases has a value in and of itself that is different from the value of a wrongful death or survival claim.”¹²⁴

In one recent decision addressing the lost chance theory, the Second Circuit held that a plaintiff may not recover wrongful death damages *and* damages for loss of a chance of survival.¹²⁵ The court held that in cases where it is questionable to what extent the defendant’s negligence contributed to the death, a plaintiff must prove the patient had more than a 50% chance of survival in order to recover wrongful death damages.¹²⁶

In *Coody v. Barraza*, a jury awarded \$250,000 for loss of a chance of survival for a seven-month delay in diagnosing recurrent ovarian cancer, despite the fact that only one out of five experts testified that the defendant breached the standard of care.¹²⁷ The patient died before trial but had previously stated that she was “devastated, sick and scared” after finding out about the misdiagnosis and that she had lost faith in her doctors.¹²⁸ She also suffered four years of deterioration and three years of chemotherapy before her death.¹²⁹ The patient was survived by three children and a husband of 47 years, with whom she had close relationships.¹³⁰ The Second Circuit affirmed the trial court’s award, finding a reasonable factual basis to determine that the defendant’s breach caused a loss of chance of a better outcome or longer survival based on evidence that 10% of recurrent ovarian cancer patients experience a second remission.¹³¹ The court deemed irrelevant the fact that there was no proof that the patient fell into that 10% or that she would have been cured of her cancer with an earlier diagnosis.¹³²

Another issue of damages in medical malpractice cases is that of future medical expenses. Under the MMA, in all malpractice claims that proceed to trial, the jury is given a special interrogatory asking whether the plaintiff is in need of future medical care and related

123. *Smith v. State, Dept. of Health & Hosps.*, 676 So. 2d 543, 547 (La. 1996).

124. *Id.* at 548.

125. *Bolton v. Willis-Knighton Med. Ctr.*, No. 47,923–CA, 2013 WL 1748543 (La. Ct. App. 2d Apr. 4, 2013).

126. *Id.* at *18–19.

127. 111 So. 3d 485, 493 (La. Ct. App. 2d 2013).

128. *Id.* at 488–89.

129. *Id.*

130. *Id.*

131. *Id.* at 490–92.

132. *Id.*

benefits and the amount thereof.¹³³ Under the MMA, “future” medical expenses are actually defined as all medical expenses and are not subject to the cap.¹³⁴ In one recent decision, the Fourth Circuit held that future medical expenses need not be established by expert physician testimony.¹³⁵ A plaintiff may establish future medical expenses through the testimony of an expert in vocational rehabilitation counseling and life care planning, paired with testimony of a forensic accountant to calculate the present value of the medical expenses.¹³⁶

VI. INFORMED CONSENT

In addition to the typical negligence medical malpractice claim, Louisiana law also recognizes a cause of action for a physician’s failure to adequately disclose the risks and hazards involved in the medical care to be provided, also known as the failure to obtain informed consent.¹³⁷ The informed consent doctrine is based on the principle that “every human being of adult years and sound mind has a right to determine what shall be done to his or her own body”,¹³⁸ therefore, when circumstances permit,

a patient should be told the nature of the pertinent ailment or condition, the general nature of the proposed treatment or procedure, the risks involved in the proposed treatment or procedure, the prospects of success, the risks of failing to undergo any treatment or procedure at all, and the risks of any alternate methods of treatment.¹³⁹

133. See LA. REV. STAT. ANN. § 40:1299.43 (2008).

134. *Id.*

135. *Cooper v. Bouchard Transp.*, Nos. 2012–CA–0868, 2012–CA–0869, 2012–CA–0870, 2012–CA–0871, 2013 WL 1247707 (La. Ct. App. 4th Mar. 27, 2013).

136. *Id.*

137. See LA. REV. STAT. ANN. § 40:1299.39.5(D) (2012) (“In a suit against a physician or other health care provider involving a health care liability or medical malpractice claim which is based on the failure of the physician or other health care provider to disclose or adequately to disclose the risks and hazards involved in the medical care or surgical procedure rendered by the physician or other health care provider, the only theory on which recovery may be obtained is that of negligence in failing to disclose the risks or hazards that could have influenced a reasonable person in making a decision to give or withhold consent.”).

138. *Snider v. La. Med. Mut. Ins. Co.*, 130 So. 3d 922, 930 (La. 2013).

139. *Id.* (citing *Hondroulis v. Schuhmacher*, 553 So. 2d 398, 411 (La. 1988) (on rehearing)).

In a lack of informed consent case, the plaintiff must prove:

- (1) The existence of a material risk unknown to the patient;
- (2) A failure to disclose a risk on the part of the physician;
- (3) That the disclosure of the risk would have led a reasonable patient in the patient's position to reject the medical procedure or choose another course of treatment;
- and
- (4) Injury.¹⁴⁰

These jurisprudential principles have been codified in Louisiana's Uniform Consent Law, which provides three approaches under which a healthcare provider may obtain informed consent.¹⁴¹ First, a healthcare provider may provide a written consent form that explains the risks of the procedure and requires the patient's written consent.¹⁴² Second, a healthcare provider may deliver the same information and obtain the patient's consent orally or by a method "other than" a writing.¹⁴³ Third, a healthcare provider may provide one of various "lists" created by the Medical Disclosure Panel, an entity within the Department of Health and Hospitals, which is responsible for determining "which risks and hazards related to medical care and surgical procedures must be disclosed by a physician or other health care provider to a patient or person authorized to consent for a patient and establish the general form and substance of such disclosure."¹⁴⁴ If a healthcare provider utilizes the lists prepared by the Medical Disclosure Panel in the manner set forth under the Uniform Consent Law, the patient's signature will create a rebuttable presumption that valid consent was given.¹⁴⁵

The Uniform Consent Law was revised in 2012.¹⁴⁶ The new version of the law contains various revisions, most of which relate to the administrative reorganization of the Medical Disclosure Panel. Other relevant revisions include deleting the phrase "handwritten consent" from former Louisiana Revised Statutes section

140. *Id.* (citing *Brandt v. Engle*, 791 So. 2d 614, 618 (La. 2001)).

141. For a more in-depth discussion of the operation of the three approaches, see *Snider*, 130 So. 3d at 931–32.

142. *See* LA. REV. STAT. ANN § 40:1299.39.5(A) (2012).

143. *See id.* § 40:1299.39.5(C).

144. *See id.* § 40:1299.39.6.

145. *Id.* § 40:1299.39.6(O)(1)(a).

146. Previously, the Uniform Consent Law was found in former Louisiana Revised Statutes section 40:1299.40, which was repealed and reenacted as Louisiana Revised Statutes sections 40:1299.39.5, 40:1299.39.6, and 40:1299.39.7 by Act No. 759, § 2, 2012 La. Acts 3086–3100. The new statute was effective June 12, 2012.

40:1299.40(A)(1) and replacing it with “the voluntary permission of a patient, through signature, marking, or affirmative action through electronic means pursuant to R.S. 40:1299.40.1.”¹⁴⁷

The Fourth Circuit recently held that in an informed consent case, a plaintiff may not introduce the testimony of a defendant’s former patients regarding whether the physician informed or failed to inform them of the risks involved in the particular procedure at issue to establish evidence of habit.¹⁴⁸ Such testimony is inadmissible character evidence of other similar acts.¹⁴⁹ However, if the doctor testifies about what he or she told “each and every one” of his or her patients, a former patient may provide rebuttal evidence.¹⁵⁰

Under the recent holding of *Roberts v. Marx*,¹⁵¹ a surgeon is not required to disclose his or her own possible impairments to obtain informed consent.¹⁵² In *Roberts*, one week after undergoing a retinal detachment repair surgery, a surgeon performed a vasectomy that resulted in complications.¹⁵³ The patient alleged that the surgeon violated informed consent law by failing to inform him of the risks associated with the surgeon’s possible impairment.¹⁵⁴ The medical review panel found that the surgeon had no obligation to disclose his recent eye surgery to the plaintiff.¹⁵⁵ The trial court later granted the surgeon’s motion for summary judgment, and the Second Circuit affirmed, reasoning that a doctor’s duty of disclosure to a patient includes only those risks that are material and this was not a material risk.¹⁵⁶ Significantly, the surgeon’s eye doctor indicated that the surgeon could return to work.¹⁵⁷ Moreover, the surgeon’s slight deficiency in eyesight affected only one eye, and the plaintiff failed to present expert evidence regarding any effect on the surgeon’s vision when aided by the surgical magnification instrument.¹⁵⁸

In *Snider v. Louisiana Medical Mutual Insurance Co.*, the Supreme Court reinstated the trial court’s verdict and overruled the Third Circuit’s finding that a signed consent form was insufficient to constitute informed consent.¹⁵⁹ In that case, the plaintiff, who had a

147. § 40:1299.39.5(A).

148. *Joseph v. Williams*, 105 So. 3d 207, 219–20 (La. Ct. App. 4th 2012).

149. *Id.* at 219.

150. *Id.* at 220–21.

151. 109 So. 3d 462 (La. Ct. App. 2d 2013).

152. *Id.*

153. *Id.* at 463.

154. *Id.* at 463–64.

155. *Id.* at 464.

156. *Id.* at 465–67.

157. *Id.* at 464.

158. *Id.* at 467.

159. 130 So. 3d 922 (La. 2013).

personal and family history of heart trouble, filed suit against a physician for implanting a pacemaker under allegedly emergent conditions that was later determined to be unnecessary.¹⁶⁰ The physician told the then 26-year-old patient, who was suffering from chest pain and a low pulse rate, that he could not be transferred to another hospital to see his regular cardiologist because the placement of the pacemaker was an emergency.¹⁶¹ The medical review panel found that the physician breached the standard of care because he rushed the decision for implantation.¹⁶² However, at trial, the jury found in favor of the defendant–physician despite expert testimony that the plaintiff’s condition was neither critical nor emergent.¹⁶³

The Third Circuit reversed, finding that the *Snider* plaintiff did not give informed consent for the procedure because the consent form failed to disclose the risks of the patient’s medical conditions (including the effects of his current medications), the reasonable therapeutic alternatives and the risks associated with those alternatives, and the plaintiff’s immediate condition that necessitated the emergent procedure, all of which were critical to his decision-making process.¹⁶⁴ Specifically, the Third Circuit held that the physician’s failure to comply with all of the requirements of former Louisiana Revised Statutes section 40:1299.40(E)(3)(a),¹⁶⁵ which required disclosure of risks and hazards identified by the Louisiana Medical Disclosure Panel, constituted a lack of informed consent as a matter of law.¹⁶⁶ Significantly, the portions of the consent form labeled for this information were left blank.¹⁶⁷

The Louisiana Supreme Court granted writs, reversed the Third Circuit, and reinstated the trial court’s verdict.¹⁶⁸ The Court first noted that the court of appeal was misguided in focusing only on subsection (E) of former Louisiana Revised Statutes section 40:1299.40, which enumerated only one method of obtaining

160. *Snider v. La. Med. Mut. Ins. Co.*, 129 So. 3d 61, 62–63 (La. Ct. App. 3d 2013).

161. *Id.* at 62.

162. *Id.* at 63.

163. *Id.*

164. *Id.* at 68–69.

165. The substance of former Louisiana Revised Statutes section 40:1299.40(E)(3)(a) now appears in Louisiana Revised Statutes section 40:1299.39.6(B)(1).

166. *Snider*, 129 So. 3d at 68.

167. *Id.*

168. *Snider v. La. Med. Mut. Ins. Co.*, 130 So. 3d 922, 939 (La. 2013).

informed consent.¹⁶⁹ It noted that the jury instructions given by the district court judge

corresponded more with an evaluation of compliance with the requirements of Subsections (A) or (C) (which require that the physician or health care provider advise the patient of the nature and purpose of the procedure and the known risks associated with the procedure of death, brain damage, quadriplegia, paraplegia, the loss or loss of function of any organ or limb, and/or of disfiguring scars).¹⁷⁰

Therefore, according to the Supreme Court, the Third Circuit's focus should have been on the jury's findings of fact regarding what the physician actually told the patient, not on what the informed consent form disclosed pursuant to subsection (E).¹⁷¹ The Court held that a manifest error standard of review was appropriate for that question, giving great deference to the jury's findings.¹⁷² Under this standard, the Court held that there was ample evidence based on the testimony at trial to support the jury's findings.¹⁷³

VII. MEDICAL REVIEW PANELS

Another common source of litigation in Louisiana medical malpractice law is the MMA's requirement that plaintiffs submit their claims to a medical review panel before suit may be filed.¹⁷⁴ The medical review panel is charged with rendering an expert opinion as to whether the evidence supports the conclusion that the defendant or defendants acted or failed to act within the appropriate standards of care.¹⁷⁵ After reviewing all evidence, the panel must render one or more of the following expert opinions 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

169. *Id.* at 937–38. Again, the substance of former Louisiana Revised Statutes section 40:1299.40(E)(3)(a) now appears in Louisiana Revised Statutes section 40:1299.39.6(B)(1).

170. *Snider*, 130 So. 3d at 937–38. The substance of former Louisiana Revised Statutes section 40:1299.40(A)(1) now appears in Louisiana Revised Statutes section 40:1299.39.5(A); the substance of former Louisiana Revised Statutes section 40:1299.40(C) now appears in Louisiana Revised Statutes section 40:1299.39.5(C).

171. *Snider*, 130 So. 3d at 938.

172. *Id.*

173. *Id.* at 937–38.

174. *See* LA. REV. STAT. ANN. § 40:1299.47(B) (2008).

175. *See id.* § 40:1299.47(G).

defendants failed to meet the applicable standard of care as charged in the complaint; (3) there is a material issue of fact, not requiring expert opinion, bearing on liability for consideration by the court.¹⁷⁶ If the panel decides that the defendant or defendants breached the standard of care, then the panel must decide whether the conduct complained of was a factor of the resultant damages and, if so, whether the plaintiff suffered: (1) any disability and the extent and duration of the disability and (2) any permanent impairment and the percentage of the impairment.¹⁷⁷

Each medical review panelist is required to take an oath that he or she will perform the duties without partiality or favoritism.¹⁷⁸ The MMA also requires panelists to disclose in writing prior to the panel hearing any employment relationship or financial relationship with the parties or their attorneys.¹⁷⁹ Finally, the MMA provides that any report of the expert opinion reached by the medical review panel shall be admissible as evidence in any post-panel lawsuit.¹⁸⁰

In *Fanguy v. Lexington Insurance Co.*,¹⁸¹ the Louisiana Supreme Court recently held that a medical review panel member's failure to disclose a conflict of interest invalidated the panel opinion, but the Court ordered a new panel proceeding rather than simply excluding the panel opinion and testimony of the panel physicians.¹⁸² In that case, neither the defendant-physician nor the panelist disclosed the fact that they were officers of the same medical corporation.¹⁸³ The panel found in favor of the defendant-physician, and at trial, the plaintiff moved to exclude the panel opinion as well as the testimony of all three panelists.¹⁸⁴ The trial court granted the motion to exclude the offending panelist's testimony but denied the motion to exclude the panel opinion or testimony of the two other panel members.¹⁸⁵ The Fifth Circuit Court of Appeal granted writs and excluded the panel opinion and testimony of all three panelists, reasoning that the entire panel was tainted.¹⁸⁶ In a per curiam opinion, the Supreme Court affirmed in part and reversed in part,

176. *See id.* § 40:1299.47(G)(1), (2), (3).

177. *See id.* § 40:1299.47(G)(4).

178. *See id.* § 40:1299.47(C)(5).

179. *See id.* § 40:1299.47(C)(7).

180. *See id.* § 40:1299.47(H).

181. 110 So. 3d 127 (La. 2014).

182. *Id.* at 128.

183. *Id.* at 127.

184. *Id.* at 128.

185. *Id.*

186. *Id.*

remanding the matter to the district court pending a new panel proceeding.¹⁸⁷ The Court reasoned:

While we are unable to say the lower courts committed error in finding that the undisclosed financial relationship between Dr. Carriere and Dr. Graham presented the appearance of impropriety, which vitiated Dr. Carriere's oath of impartiality and thereby tainted the MRP [medical review panel] proceedings, we believe that justice would best be served by ordering the re-constitution of the MRP with different physician members and allowing that new panel to deliberate and issue an opinion on the issues presented in this case.¹⁸⁸

VIII. STANDARD OF CARE

Pivotal to almost every medical malpractice case is a determination of the standard of care applicable to a healthcare provider. Pursuant to Louisiana Revised Statutes section 9:2794(A), a plaintiff bears the burden of proving (1) the standard of care applicable to the healthcare provider, (2) whether the healthcare provider breached that standard of care, and (3) whether any breach of the standard of care by the healthcare provider proximately caused the plaintiff to suffer injuries that would not otherwise have been incurred.¹⁸⁹

In *Schilling v. Aurich*,¹⁹⁰ the Third Circuit found that the trial court erred in granting a motion for judgment notwithstanding the verdict where a jury found a breach of the standard of care by a psychologist who conducted only a phone interview with a patient, rather than a face-to-face examination, prior to issuing a physician's emergency certificate.¹⁹¹ The defendant-psychologist in *Schilling* had a long-standing physician-patient relationship with the plaintiff and was familiar with her history.¹⁹² The plaintiff was involuntarily committed to psychiatric care by the defendant on the day of her 17-year-old son's funeral at which her husband removed his wedding band, placed it on their deceased son's hand, and announced to the plaintiff that their marriage was over.¹⁹³ At the insistence of the

187. *Id.*

188. *Id.*

189. *See* *Richoux v. Tulane Med. Ctr.*, 617 So. 2d 13 (La. Ct. App. 4th 1993); *Lee v. Wall*, 726 So. 2d 1044 (La. Ct. App. 2d 1999).

190. 91 So. 3d 580 (La. Ct. App. 3d 2012).

191. *Id.* at 583. *See* LA. REV. STAT. ANN. § 28:53 (2001).

192. *Schilling*, 91 So. 3d at 584.

193. *Id.* at 581.

plaintiff's friends and family, the defendant executed a physician's emergency certificate without first conducting a face-to-face examination.¹⁹⁴ The psychologist testified that he did speak with the plaintiff on the evening of her commitment via telephone, during which she indicated that she wanted to go "home" with her son, was "done with everything," and was going to crash her car or take pills.¹⁹⁵ However, an expert psychologist and member of the medical review panel testified that Louisiana Revised Statutes section 28:53(B)(1)'s requirement of an "actual" examination requires an in-person examination before a person can be involuntarily committed.¹⁹⁶ He further testified that it was a breach of the standard of care to conduct a phone interview rather than an in-person examination.¹⁹⁷

In another recent decision, the Fourth Circuit found that there was no reasonable basis for a medical review panel opinion on which the trial court relied and reversed the judgment in favor of the defendant–healthcare provider.¹⁹⁸

Recent decisions have also spoken to the standard of care that is applicable to hospitals. One recent case noted that hospitals are held to a national standard of care; the locality rule does not apply.¹⁹⁹ In another recent case, the Fourth Circuit held that a hospital may be liable for negligence independent of any negligence of its employees when the governing board of the hospital fails to select its employees with reasonable care, furnish the hospital with reasonably adequate supplies, equipment, and facilities for use in the treatment and diagnosis of its patients, or provide adequate procedure for maintaining the safety of its grounds and buildings.²⁰⁰

194. *Id.*

195. *Id.* at 588.

196. *Id.* at 586.

197. *Id.*

198. *In re Brown*, No. 2011-CA-1824, 2013 WL 633101 (La. Ct. App. 4th Feb. 20, 2013). There, a paraplegic patient brought a claim against a hospital's rehab unit alleging that a nursing assistant breached the standard of care by transferring her from a wheelchair to a bed without using a slide board, causing the patient to fall and fracture her tibia. *Id.* at *1. The trial court found no breach of the standard of care based on the medical review panel opinion that a slide board is not necessary when transferring with the assistance of another person. *Id.* at *4. The Fourth Circuit reversed, finding no reasonable basis for the panel opinion. *Id.* at *4–5. The medical record indicated that a slide board should have been used when transferring the patient to and from the bed, and three experts likewise testified that a slide board should have been used. *Id.* at *5. The appellate court awarded \$65,000 in general damages. *Id.* at *6.

199. *Richardson v. Christus Schumpert Health Sys.*, 110 So. 3d 264 (La. Ct. App. 2d 2013).

200. *Papania v State ex rel.*, 108 So. 3d 256 (La. Ct. App. 4th 2013). In this case, the hospital was liable for two system failures. *Id.* at 260–61. First, the

IX. THE PATIENT'S COMPENSATION FUND

Another complex issue that often faces medical malpractice litigants is the involvement of the PCF, which may become a party to the litigation once there has been a judgment of liability or a settlement. Under the MMA, a plaintiff's damages in excess of \$100,000 may be recovered from the PCF, but any such damages may not exceed \$500,000. Further, once a healthcare provider has admitted liability up to the statutory maximum of \$100,000, the PCF cannot contest liability when there is a binding settlement for \$100,000 by the healthcare provider, either before or after trial.²⁰¹ At that point, the only remaining issue is the damages, if any, owed by the PCF.²⁰² However, the court must approve the settlement, and the PCF must be given notice and an opportunity to object to the settlement.²⁰³

In one recent decision, the court held that a medical malpractice claimant seeking excess damages from the PCF was subject to the notice requirements set forth in Louisiana Revised Statutes section 40:1299.44(C). If the claimant fails to provide the required notice via service of a copy of the Petition for Approval ten days before its filing, the claimant does not have a cause of action against the PCF for excess damages.²⁰⁴

Another recent decision recognized that the PCF cannot stop future medical expense payments without a court order, despite a change in the plaintiff's circumstances.²⁰⁵ In that case, a child who suffered a stroke in utero was awarded future medical expenses.²⁰⁶ In conjunction with that award, the trial court ordered the PCF to make quarterly advanced payments of custodial care expenses to a trust in the child's name for 24-hour care, accessible by his mother

hospital did not follow its procedure to have a detailed summary of the patient's admission history dictated and transcribed until two weeks after the patient's death. *Id.* at 260. As a result, the detailed admission summary was unavailable for a subsequent physician's review on the patient's next presentation to the emergency department. *Id.* The second system failure occurred where the more informal summary of the patient's treatment, which was given to the patient's family at the time of discharge, contained incorrect information, including test results. *Id.* at 261.

201. *See* Pendleton v. Barrett, 675 So. 2d 720, 725 (La. 1996).

202. *Id.*

203. LA. REV. STAT. ANN. § 40:1299.44 (2008).

204. Howard v. Mamou Health Res., No. 12-820, 2013 WL 811676 (La. Ct. App. 3d Mar. 6, 2013).

205. Watkins v. Lake Charles Mem. Hosp., 114 So. 3d 503 (La. Ct. App. 3d 2013).

206. *Id.* at 505.

who was providing care for him.²⁰⁷ Years later, the PCF learned that the child, now a grown man, was married and no longer living with his mother.²⁰⁸ The PCF discontinued payments and requested an Independent Medical Examination.²⁰⁹ The trial court held, and the Third Circuit affirmed, that a change in the claimant's condition did not allow the PCF to make a unilateral decision to cease payments.²¹⁰ The PCF was required to first obtain a ruling modifying the prior judgment before discontinuing the payments.²¹¹

In *Buras v. Deloach, et al.*, the PCF's exceptions of no cause and no right of action to a Petition for Settlement Approval with reservation of rights against the PCF were held to be properly overruled where the plaintiffs' allegations of improper prescription of narcotic medication without proper treatment and counseling unquestionably articulated a valid cause of action in medical malpractice.²¹² The PCF urged the court to pierce the allegations of the petition and craft an unpled intentional tort arising from a purported criminal enterprise with quid pro quo business transactions rather than actual medical treatment.²¹³ The Fourth Circuit strictly applied the *Coleman v. Deno*²¹⁴ factors and refused to accept the PCF's arguments.²¹⁵

The Fourth Circuit also found that the PCF's exception of prematurity to the Petition for Settlement Approval was properly overruled because, despite the fact that the defendant-healthcare providers did not file an answer within ten days of the filing of the settlement petition, the answer had been filed by the time the trial court approved the settlement.²¹⁶

The Fourth Circuit also found that the trial court did not err in refusing to include the plaintiffs' collateral voluntary dismissal of two non-settling healthcare providers in the settlement-approval judgment.²¹⁷ "[T]here is no statutory provision that requires a judgment approving a settlement agreement with one healthcare

207. *Id.*

208. *Id.*

209. *Id.* at 505–06.

210. *Id.* at 510–11.

211. *Id.*

212. *Buras v. Deloach*, No. 2012-CA-1511, slip op. at 2 (La. Ct. App. 4th Apr. 19, 2013) (appellate court opinion denying supervisory writ application).

213. *Id.*

214. *Id.* slip op. at 7–8. *See Coleman v. Deno*, 813 So. 2d 303 (La. 2002).

215. *Buras*, No. 2012-CA-1511, slip op. at 2.

216. *Id.* slip op. at 9–10.

217. *Id.* slip op. at 11.

provider to include information about collateral agreements with other providers in the judgment.”²¹⁸

218. *Id.* This matter was brought to the Fourth Circuit on appeal and alternative application for supervisory writs. The Fourth Circuit granted the defendant’s motion to dismiss appeal, granted the writ to the docket, and after oral argument, denied the writ with written reasons.