Paper delivered by Franklin D. Beahm
to the Louisiana State Bar Association
Medical Malpractice Litigation Seminar
held on November 15, 2002
in New Orleans, Louisiana

Medical Review Panels: A Word to the Wise

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I. Introduction to Medical Review Panels in Louisiana

A. Statutory Definitions

1. Patient

A. La. R.S. 40:1299.41 A(3).

B. Derouen v. State ex Rel. Dept. of Health can Hospitals, App. 3 Cir. 1999, 98-1201 (La. App. 3 Cir. 2/3/99), 736 So.2d 890. Plaintiff who alleged a blood sample was drawn for purpose of performing testing for HIV was a "patient" who was receiving "health care" for purposes of Malpractice Liability.

2. Malpractice

A. La. R.S. 40:1299.41 A(4)

B. Physician Standard of Care

LeBlanc v. Barry, 2001 La. App. 3rd Cir. Lexis 383. The Court held in order for a Plaintiff to satisfy his burden of proof in a malpractice action based on the negligence of a physician, the plaintiff must prove:

(1) the applicable standard of care,

(2) the breach of the standard and

(3) the substandard care caused an injury the plaintiff otherwise would not have suffered.

The test to determine the causal connection between the doctor's negligence and the injury is whether the plaintiff proved through medical testimony it is more probable than not the injuries were caused by the substandard of care.

3. Health Care

A. Health care - La. R.S. 40:1299.41 A(6)

B. Patin v. The Administrators of the Tulane Educational Fund, 770 So.2d 816 (La. 4th Cir. 2000). As with all limiting laws, the Medical Malpractice Act is strictly construed against coverage. In this instance, the Court held the transfer of blood from Touro Infirmary to Tulane did not fall within the Malpractice Act because there was no health care provider patient relationship between Touro Infirmary and Plaintiff. The Court rejected Touro's argument which asserted the plaintiff's claim fell within the Malpractice Act of the State of Louisiana as it had an implicit contract with Mr. Patin because Tulane sought blood from Touro on behalf of Mr. Patin.

C. George vs. Our Lady of Lourdes Regional Medical Center, Inc., 774 So.2d 350 (La. App. 3rd Cir. 2000). Plaintiff fell down the steps of the mobile unit after donating blood. The 3rd Circuit Court of Appeal held the plaintiff's claim did not fall within the medical malpractice act stated:

> To constitute malpractice, health care or professional services must be rendered to a patient. *Citations omitted*. Ms. George's sole remedy against Medical Center is based on the general law of negligence and not on the special tort of malpractice. George 774 So.2d at 356.

4. Qualified Health Care Provider

A. La. R.S. 40:1299.42A

B. Jones v. Crow, App. 1 Cir. 1993, 633 So.2d 247. To qualify under Medical Malpractice Act, health care provider must file type of proof of financial responsibility described in the statute and pay the Patient's Compensation Fund surcharge levied on the provider; for self-insureds, qualification under the Act is effective upon acceptance of proof of financial responsibility and receipt of payment of surcharge; for health care providers other than self-insured, qualification is effective at the time that the malpractice insurer accepts payment of the surcharge.

II. Burden of Proof in Malpractice Cases

A. La. R.S. 9:2794

B. LeBlanc v. St. Paul Fire and Marine Ins. Co., 3 Cir. 2000, 99-2008 (La. App. 3 Cir. 9/6/00), 772 So.2d 133. Plaintiffs in medical malpractice actions must establish their claim by a preponderance of the evidence.

C. Malpractice Must be Proximate Cause of Injury

Williams v. Dauterive Hospital, 771 So.2d 763 (La. 3rd Cir. 2000). In Williams a patient was taken to the hospital after he fell off the back of pick up truck and hit his head on the concrete pavement. The Court held the emergency room physician's breach of the standard of care was not the proximate cause or result of the patient's injury and subsequent death as the ER physician's failure to timely intervene would not have affected the management or the outcome of the patient's situation as no operation was going to save the patient's life.

III. Filing of a Medical Malpractice Claim

A. Administrative Review

1. La. R.S. 40:1299.47A(1)

2. Bolden v. Dunaway, App. 1 Cir. 1998, 727 So.2d 597. All claims against health care providers for malpractice must first go through the Medical Malpractice Act procedure, regardless of whether the claimant is a patient or a non-patient.

B. Qualified Healthcare Provider Status

1. Maintaining Status

A. La. R.S. 40:1299.45A(1)

B. Jones v. Crow, App. 1 Cir. 1993, 633 So.2d 247. As long as health care provider remains qualified under the Act, health care provider and his insurer are liable for malpractice only to the extent provided for in the act.

C. Death of Physician

Prior to his death, a physician was insured through a commercial carrier and was a qualified member of the Patient's Compensation Fund. Upon his death, as was the usual procedure, a portion of the underlying carrier's premium and the PFC surcharge was refunded to the estate of the decedent. Plaintiff then contended the deceased physician was no longer a qualified health care provided and was not accorded the protections of LSA-R.S. 40:1299.41 et seq. The First Circuit Court of Appeal in Dunn v. Bryant, 701 So. 2d 696 (La. 1st Cir. 1997), found the decedent, Dr. Bryant, and his estate were protected by the Patient's Compensation Fund under LSA-R.S. 40:1299.41 et. seq.

2. Establishing Status

A. La. R.S. 40:1299.42E(1)

B. St. Paul v. Eusea, App. 1 Cir. 2000, 775 So.2d 32. A physician can become a "qualified health care provider" whose liability for malpractice is limited to $100,000, even if the physician fails to file as proof of financial responsibility every policy of malpractice insurance covering the provider.

C. Goins v. Texas State Optical, Inc., App. 4 Cir. 1985, 463 So.2d 743. Certificates of enrollment from Commissioner of Insurance certifying enrollment under Medical Malpractice Act were prima facie evidence of their contents, and it was up to plaintiffs in medical malpractice suit to rebut this evidence of defendants' qualification as health care providers under Act which entitled defendants to medical review panel determination prior to filing of lawsuit against them.

3. Miscellaneous Jurisprudence

A. Insurance and PCF Coverages Coextensive

The Physician had a claims made policy and paid a PCF surcharge over the time during which medical malpractice occurred, but had let the policy lapse and did not pay the PCF surcharge for the time during which the claim was actually made. The First Circuit held the provision of a claims made policy requiring a claim be made within the policy period was without effect if it reduces the prescriptive period against the

insurer to less than a year and, therefore, the policy period was extended by operation of law thereby extending the PCF coverage and allowing the doctor to be considered qualified. Bennett v. Krupkin, App. 1 Cir. 2002.

B. Failure to Disclose Proper Procedures Actually Performed by Physician

Tucker v. Lain, App. 4 Cir. 2001, 799 So.2d 1041. In a medical malpractice action involving alleged negligence in the delivery of a child, the physician/defendant, a self insured physician who paid surcharges to the PCF was qualified even though she failed to disclose to the PCF she delivered babies rather than merely practicing gynecology (thereby allowing her to pay a lower surcharge to the PCF.)

C. Collection of an Improper Surcharge

In Ginn v. Women's Hospital Foundation, App. 1 Cir. 2002, Plaintiff claimed she contracted Hepatitis C from a 1983 transfusion. The defendant/hospital had a claims made policy with St. Paul from 1975 through 1986 and paid the PCF surcharge. From 1986 to 2000, the hospital had an occurrence policy with "Louisiana Hospital Association Trust Fund" (LHA) with a certificate of "Prior Acts" coverage retroactive to 1976. The fund asserted there was no PCF coverage for the 1983 transfusion because the St. Paul policy did not provide tail coverage and the LHA policy, although providing the prior acts coverage, was reported to the Fund as an occurrence policy. LHA only remitted a surcharge for an occurrence policy and not for the prior acts coverage. The Court held the PCF did provide coverage for the transfusion and noted if an insurer fails to remit the appropriate surcharge, the Fund is authorized to assess a penalty against the insurer and to collect attorney's fees, but there is no provision in the act authorizing the Fund to terminate or restrict the insured health care provider's qualification if an improper surcharge is collected.

C. Request for Medical Review Panel

1. Must be filed with the Division of Administration

A. La. R.S. 40:1299.47A(2)(a).

B. Jurisprudence

1) The patient initially filed her medical malpractice claim under the "public" malpractice act, La. R.S. 40:1299.39 et seq. After notification from the agency that administered the act the physician was a qualified provider under the "private" malpractice act, La. R.S. 40:1299.41 et seq., she waited 16 months before filing her claim with the correct agency. The physician filed a rule to dissolve the medical review panel in district court, contending the claim had prescribed. The court held the patient would be afforded the suspension of prescription under the public act, even though the physician was a qualified provider under the private act. The patient's claim under the public act was timely. The liberative prescriptive period was suspended pursuant to La. R.S. 40:1299.39A(2)(a) until 60 days after the patient received notice the provider was not qualified under the public act. At that point, she had eight months to toll prescription again by filing her claim under the correct act. Her claim under the private act, filed 16 months later, was untimely. Bordelon v. Kaplan, App. 3 Cir. 1997, 692 So.2d 581.

2) As La. R.S. 40:1299.47(A)(2)(a) provides a claim is deemed filed on the date it is received by the PCF, when a medical malpractice claim is sent either to the PCF or to the Division of Administration, prescription is suspended. Patty v. Christis Health Northern Louisiana, App. 2 Cir. 2001, 794 So.2d 124 as well as Holmes v. Lee, App. 2 Cir. 2001, 795 So.2d 1232.

2. Time Deemed Filed - La. R.S. 40:1299.47A(2)(b)

3. Waiver of Medical Review Panel

A. La. R.S. 40:1299.47B(1)(c)

B. Barraza v. Scheppegrell, App. 5 Cir. 1988, 525 So.2d 1187. Health care provider who fails to file exception of prematurity prior to filing answer waives right to review of malpractice

claims by medical review panel.

D. Prematurity of Suit Prior to Medical Review Panel

1. La. R.S. 40:1299.47B(1)(a)(i)

2. Jurisprudence - See Section VIIG

IV. Selection of the Medical Review Panel

A. Attorney Chairman

1. Joint Selection - La. R.S. 40:1299.47C

2. Strike List

A. La. R.S. 40:1299.47C

B. Kimmons v. Sherman, App. 1 Cir. 2000, 771 So.2d 665. By requesting list of attorneys' names within 90 days of receiving notice from PCF that plaintiffs were required to appoint attorney chairman for medical review panel, plaintiffs in medical malpractice action prevented dismissal of claim for failure to appoint attorney chairman.

B. Health Care Providers

1. Plaintiff's Nominee - La. R.S. 40:1299.47C(3)(a)

2. Defendant's Nominee - La. R.S. 40:1299.47C(3)(b)

3. Third Nominee - La. R.S. 40:1299.47C(3)(d)

4. Multiple Plaintiffs or Defendants - La. R.S. 40:1299.47C(3)(f)(iii)

5. Failure of Plaintiff or Defendant to Nominate

   A. Warning by Attorney Chairman - La. R.S. 40:1299.47C(3)(c)

   B. Nomination by Attorney Chairman - La. R.S. 40:1299.47C(3)(d)

6. Failure of Two Healthcare Provider Panelists to Nominate Third Member - La. R.S. 40:1299.47C(3)(e)

7. Qualifications of Physician Nominees - La. R.S. 40:1299.47C(3)(f)(i)

8. Excusing Panel Members from Service - La. R.S. 40:1299.47C(3)(f)(iv)

9. Who can be a panelist based on Defendants

   A. La. R.S. 40:1299.47C(3)(f)(v)

   B. Jurisprudence

      1. In re Medical Review Panel for Claim of White, App. 4 Cir. 1995, 655 So.2d 803. Where there are multiple defendants who include hospital, patients may name physician from one of specialties of defendant physicians, but are not required to do so.

      2. Francis v. Mowad, App. 5 Cir. 1988, 523 So.2d 863 Plaintiffs alleged Defendant/Podiatrist was negligent in treating her for a foot condition and a medical review proceeding was instituted. Plaintiffs nominated an orthopedic surgeon as a member of the medical review panel. The Defendant objected to the orthopedic surgeon on the grounds orthopedic surgery is not within the same class and specialty of practice as podiatry. The Court of Appeal agreed with the trial judge's decision an orthopedic surgeon is not from the same class and specialty of practice as a podiatrist, as required by La. R.S. 40:1299.47 (C)(3)(f)(v).

C. Conflict of Interest by Panel Member

1. La. R.S. 40:1299.47C(7)

2. Jurisprudence

A. Whitt v. McBride, App. 3 Cir. 1995, 651 So.2d 427. Member of medical review panel does not have to be viewed as similar to judge so any potential bias, conflict of interest, or appearance of impropriety requires removal; panel is merely body of experts assembled to evaluate and render opinion on claim, and such opinion is not binding on litigants.

B. Landry v. Martinez, App. 3 Cir. 1982, 415 So.2d 965. Doctor could not sit as medical review panelist where one of his partners had served as medical consultant to the medical malpractice claimant and would probably continue to do so.

V. Duties of The Members of the Medical Review Panel

A. Attorney Chairman

1. General Duties - La. R.S. 40:1299.47 C(1)(b)(2).

2. Specific Duties

A. Advise Panel Members on Legal Issues - La. R.S. 40:1299.47D(5)

B. Send Copy of Panel Opinion to All Parties - La. R.S. 40:1299.47J

C. Oath of Office - La. R.S. 40:1299.47C(5)

B. Nominated Members

1. Oath of Office - La. R.S. 40:1299.47C(5)

2. Determination of Fault

A. La. R.S. 40:1299.47G

B. Maxwell v. Soileau, App. 2 Cir. 1990, 561 So.2d 1378. The sole duty of the medical review panel is to express its expert opinion, no findings made by the panel as to damages, and the findings of the panel are not binding on the litigants.

3. Possible Panel Opinions - La. R.S. 40:1299.47G

4. Written Opinion - McCallister v. Zeichner, App. 3 Cir. 1995, 664 So.2d 848. Under statute, medical review panel must render opinion "with written reasons," and opinion is not complete without such reasons and panel has not fulfilled its statutory duty.

VI. Life of Medical Review Panel

A. One Year From Appointment of Attorney Chairman - La. R.S. 40:1299.47B(1)(b)

B. 180 Days from Appointment of Final Panel Member - La. R.S. 40:1299.47G

C. 90 Days After Notification of All Parties of Dissolution or after Court-Ordered Extension

1. La. R.S. 40:1299.47B(3)

2. LeBlanc v. Lakeside Hospital, App. 5 Cir. 1999, 732 So.2d 576. Medical review panel automatically dissolves upon the expiration of any court-ordered extension.

D. Extending the Life of the Medical Review Panel

1. La. R.S. 40:1299.47B(1)(b)

2. In re Medical Review Panel ex rel. Chiasson, App. 5 Cir. 1999, 749 So.2d 796. Trial court acted within its discretion in determining that hospital did not show cause for extending life of medical review panel in medical malpractice action as no explanation for panel's delay in ruling was provided, and no hearing was requested.

VII. Prescription Associated with Medical Review Panels

A. Interruption of Prescription During Panel Proceedings

1. Statutory Law - La. R.S. 40:1299.47A(2)(a)

2. Jurisprudence

A. Guitreau v. Kucharchuk, 763 So.575 (La. 2000). The Court

held when the ninety-day period of suspension after the decision of the medical review panel is completed, plaintiffs in medical malpractice actions are entitled to the period of time, under LSA-R.S. 9:5628, which remains unused at the time the request for a medical review panel is filed. Once a medical malpractice claim is submitted to the medical review panel, the prescriptive period is temporarily discontinued. Prescription then commences to run again ninety days after the plaintiff has received notice of the panel's decision. Thus, when the ninety day period expires, the period of suspension terminates and prescription commences to run again; once prescription begins to run again, counting begins at the point at which the suspension period originally began.

B. Baum v. Nash, 97-233 (La. App. 3 Cir. 10/8/97); 702 So. 2d 765. Filing a claim for a medical review panel suspends prescription as to non-named solidary obligors "to the same extent that it is suspended for those named in the request by the panel."

C. Commencement of the medical review panel proceedings will serve to suspend prescription. However, a written inquiry as to the status of a health care provider under the PCF, even if it includes allegations and conclusions of malpractice by the healthcare provider for whom the qualification information is being sought, will not, in and of itself, serve to suspend prescription. (See In re Medical Review Panel Leday 96-2540 (La. App. 1 Cir. 11/7/97) 707 So. 2d 1267, writ granted, cause remanded by 97-3068 (La. 2/13/98)l 706 So.2d 985, reh. denied 97-3068 (La. 3/27/98); 716 So.2d 369, which stated, because the letter did not "request for review of a claim" under LSA-R.S. 40:1299.39.1 or LSA-R.S. 40:1299.47, same did not serve to suspend prescription.)

B. Failure of Panel to Render a Decision and Prescription

1. 180 Day Rule - La. R.S. 40:1299.47 K

2. Bankston v. Alexandria Neurosurgical Clinic, App. 3 Cir. 1991, 583 So.2d 1148 Medical review panel’s failure to render formal opinion did not deprive district court and Court of Appeal of jurisdiction over medical malpractice claim, where panel had been dissolved without necessity of obtaining court order of dissolution upon its failure to issue written opinion within extension of time granted for rendering of opinion; once panel was dissolved, no procedural bar prevented patient from filing suit in district court, and it was incumbent upon patient to file suit to preserve her rights as dissolution of panel

affected suspension of prescription with respect to defendants.

3. One Year Rule Takes Precedence - Metrejean v. Long, App. 3 Cir. 1999, 732 So.2d 1240. Once 12-month period expires for medical review panel to render expert opinion, patient may file suit, even if the 180-day period for rendering opinion after selection of last panel member happens to extend beyond the one-year period.

C. Panel Renders a Late Decision -180 Day Rule - La. R.S. 40:1299.47L

D. Filing with Wrong State Agency - Bordelon v. Kaplan, App. 3 Cir. 1997, 692 So.2d 581. Filing of medical malpractice claim in the wrong or improper agency suspends, rather than interrupts, liberative prescriptive period, and at termination of period of suspension, prescription commences to run again.

E. Prescription in Hepatitis C Cases

1. Ginn v. Woman's Hospital Foundation, Inc., 770 So.2d 428 (LA. 2000). This is a Hepatitis C case following a blood transfusion in February of 1976. The blood transfusion occurred prior to the amendment to the Medical Malpractice Act which specifically included defects in blood which occurred on August 5, 1976. Therefore, at the time the plaintiff's injury occurred, she acquired a cause of action in strict tort liability under Civil Code Article 2315, which is a vested property right protected by the guarantee of due process. Therefore, the Court held legislation enacted afer the acquisition of such a vested property right cannot be retroactively applied so as to divest plaintiff of her cause of action in this matter.

2. In Williams v. Jackson parish Hospital, La. 2001, 798 So.2d 921, the Louisiana Supreme Court, apparently overruling their recent decision in Boutte, held pre-1982 claims in strict liability arising out of a defective blood transfusion are not traditional medical malpractice claims and, therefore, not governed by the Medical Malpractice Prescription Statute (La. R.S. 9:5628), but were governed by the General Tort Prescriptive Statute (La. C.C. Art. 3492.) .

F. PCF's Right to Raise Prescription - If a qualified healthcare defendant pays less than $100,000.00, the PCF may raise an exception of prescription, but the PCF cannot raise the issue of prescription if the defendant pays more than $100,000.00. McGrath v. Scel Home Care, Inc., App. 5 Cir. 2002. See also, Miller v. Southern Baptist Hospital, La. 2001, 806 So.2d 10.

G. Premature Suit DOES NOT Interrupt Prescription

1. The Louisiana Supreme Court in LeBreton v. Rabito, 97-C.C. - 2221 (La. 7/8/98) overruled the case of Hernandez v. Lafayette Bone and Joint Clinic, 467 So. 2d 113 (La. 3rd Cir. 1985) in holding:

> [T]he specific statutory provision providing for the suspension of prescription in a context of medical malpractice should have been applied alone, not complimentary to the more general codal articles which addresses interruption of prescription.

After discussing the purpose behind liberative prescription, the Court contrasted the general Civil Code Articles of Prescription dealing with interruption as compared to the Medical Malpractice Act for qualified health care providers which suspends the running of prescription during the pendency of medical review panel proceedings. The Court, believing the statutes were in conflict, and in order to "harmonize" the law, held special rules (here the Medical Malpractice Act) will always outweigh the general rules otherwise the special legislative provisions will be canceled out by the application of general laws. In such a conflict, the Court goes on to point out the purpose behind suspension of liberative prescription, is to accord plaintiffs an equal playing field during the pendency of the Medical Review Panel Proceedings.

2. In Schulingcamp v. Ochsner Clinic, App. 5 Cir. 2002, the plaintiff filed suit, then entered a consent judgment dismissing one of the defendants without prejudice because the claim was premature, but keeping other defendants in the suit. A medical review panel was not filed against the dismissed defendant until 8 years later. The plaintiff argued the pending suit against the other defendants interrupted prescription against the dismissed defendant. Citing Lebreton v. Rabito for the proposition it was inappropriate to apply La. C.C. Art. 3463 (which interrupts prescription as long as the suit remained against the remaining obligors), the Court held the claim against the dismissed defendant was prescribed. The Court noted the later, more specific statute, the Medical Malpractice Act, applies and, because the plaintiff did not file the malpractice claim within one year, the claim was prescribed.

3. In Wesco v. Columbia Lakeland Medical Center, App. 4 Cir., 801 So.2d 1187, the plaintiff filed a premature suit and a Medical Review Panel Claim which was dismissed after two years for failure of the

plaintiff to select an attorney chairman. The defendant then had the suit dismissed as premature. When the plaintiff filed a second PFC claim within one year of the dismissal of the suit, but not within one year of the first PCF claim, the defendant filed an Exception of Prescription. The Court held the premature suit did not suspend prescription and the plaintiff's claim was prescribed.

H. Wrongful Death Claim and Suspension of Prescription - Brown v. Our Lady of the Lake, App. 1 Cir., 803 So.2d 1135. A mother and son filed a Medical Review Panel Complaint alleging treatment the mother received was negligent, but the mother died during the pendency of the Medical Review Panel and the complaint was not amended to allege the mother's death. Within ninety days of the Panel Opinion, but more than one year after the mother's death, the son filed a wrongful death and survival action. The Court held the wrongful death claim was prescribed as it was not filed within one year of the death and the Medical Review Panel proceeding did not suspend prescription on the wrongful death claim because no notice of the death was given.

I. Burden of Proof Regarding Prescription

In Campo v. Correa, 2001-2707 (La. 6/21/02), the Louisiana Supreme Court held a medical malpractice petition should not be found to be prescribed on its face if: it is brought within one year of the date of discovery; the facts alleged with particularity in the petition show the patient was unaware of malpractice prior to the alleged date of discovery; and the delay in filing suit was not due to willful, negligent, or unreasonable action of the patient. Therefore, as long as the plaintiff asserts the malpractice was not discovered until less than one year prior to filing the petition, the defendant retains the burden of showing the claim is prescribed.

J. Participating in Medical Review Panel of a Prescribed Action

In Tuazon v. Eisenhardt, 725 So.2d 553 (La. 5th Cir. 1998), the Court held to the long standing rule of solidary obligations interrupting prescription as to other solidary obligors finding, once prescription is accrued, it cannot be interrupted. Finding the original complaint filed on June 29, 1995, was beyond the date of prescription, the court concluded the proceedings did not serve to suspend the tolling of the prescriptive period as same was untimely. Regardless of the fact the hospital chose to proceed through the medical review panel proceedings, its choice did not serve to suspend the running of prescription.

K. Constructive Knowledge

In Harold v. Martinez, 715 So.2d 660 (La. 2nd Cir. 1998), the Court of Appeal indicated the only necessary ingredient to begin the running of prescription is "constructive knowledge." It is not required an attorney or another health care provider inform the possibility of a malpractice action before prescription begins to run.

L. Amending Date of Alleged Malpractice and Prescription

In In Re: Medical Review Panel of David Wempren, 726 So.2d 477 (La. 5th Cir. 1999), Plaintiff's counsel filed a request for medical review panel within one year of the complained of event. However, in the complaint, the wrong date was set forth as to when the offending event occurred. More than a year after the event in question, plaintiff's counsel amended the original complaint and the hospital filed an exception of prescription which was denied by the trial court. The trial court and the Fifth Circuit Court of appeal relied upon Louisiana Civil Code of Procedure Article 1153 to find adequate and timely notice to the named defendants of the event in question and the amending petition related back to the original filing of the complaint for medical review panel proceedings. Accordingly, the court affirmed the denial of the exception of prescription.

M. Contra Non Valentum

Collum v. E.A. Conway Medical Center, 763 So.2d 808 (La. App. 2nd Cir 2000). Plaintiff argued her claim fell under the third category of *contra non valentem* because her ignorance of a potential cause of action was in some way "induced" by the defendants when they allegedly neglected to inform her of their actions. The Court rejected plaintiff's argument citing the Louisiana Supreme Court has specifically limited application of this third category to instances where a physician's conduct rose "to the level of concealment, misrepresentation, fraud or ill practices."

Plaintiff also argued the three year prescriptive period should be interrupted because the alleged malpractice falls under the "continuing tort" doctrine. The Court of Appeal rejected plaintiff's argument in citing prescription runs on a continuing tort from the "cessation of the wrongful conduct that causes of damages where the cause of injury is a continuous one given rise to the successive damages," Collum So.2d at 815 In Crump v. Sabine River Authority, 737 So.2d 720 (La. 1999). The Court clarified stating a continual tort is occasioned by unlawful acts, not "the continuation of the ill effects of an original, wrongful act." Id at 728. In this instance, the Court found plaintiff was merely suffering the continuation ill effects of the original act same is not a continuing tort.

VIII. Submission of Evidence to Medical Review Panel

A. Written Evidence - La. R.S. 40:1299.47D(1)

B. Other Attachments to Submission of Evidence - La. R.S. 40:1299.47D(2)

C. Requirements of Claims for a Medical Review Panel - La. R.S. 40:1299.39 E(2)

IX. Potpourri

A. Convening of Panel - La. R.S. 40:1299.47E

B. Additional Information Requested by Panel - La. R.S. 40:1299.47F.

C. Costs of the Medical Review Panel

1. Attorney Chairman - La. R.S. 40:1299.47I(1)(b)

2. Physician Members - La. R.S. 40:1299.47I(1)(a)

3. Who pays for the Panel

A. If the Defendant Wins - La. R.S. 40:1299.47I(2)(a)

B. If the Claimant Wins - La. R.S. 40:1299.47I(2)(b)

C. If There is a Material Issue of Fact - La. R.S. 40:1299.47I(3)

D. Admission of Panel Opinion in Subsequent Lawsuit - La. R.S. 40:1299.47H

E. Accrual of Legal Interest - La. R.S. 40:1299.47M

F. Limitation of Recovery by Qualified Health Care Providers - La. R.S. 40:1299.42B(2)

G. Settlement with Claimant Demanding Additional Money from PCF - La. R.S. 40:1299.44C

H. When the Medical Malpractice Act Applies

1. Intentional Torts - Fuentes v. Doctors Hospital of Jefferson, 4 Cir.

2001, 802 So.2d 865. Patient's claims against an ultrasound technician in a hospital who took inappropriate sexual liberties with the patient following the performance of an ultrasound was an intentional tort which is not covered under the Medical Malpractice Act. The patient's claim against the hospital for negligent hiring was not covered as it did not involve patient care. Only the claims against the hospital stating the presence of a third person during the examination were required fell under the Medical Malpractice Act.

2. Test to Determine Coverage under Medical Malpractice Act

The Louisiana Supreme Court, in overruling the 4th Circuit's holding patient dumping allegations against a physician were not governed by the Medical Malpractice Act, uses the following factors to determine whether allegations fall under the Medical Malpractice Act:

1. Whether the wrong was treatment related;
2. Whether expert evidence is needed to determine if the standard of care was breached;
3. Whether the act or omission involved assessing the patient's condition;
4. Whether the incident occurred in the context of a physician/patient relationship; and whether it was within the scope of activities the hospital was licensed to perform; and
5. Whether the injury would not have occurred if the patient had not sought treatment.

3. Nursing Home Coverage Under the MMA - In Pender v. Natchitoches Parish Hospital, App. 3 Cir. 2001, a nursing home patient, left unrestrained in a wheelchair, fell and died after she struck her head. The Court held the nursing home Residents' Bill of Rights creates a cause of action for violations of nursing home residents' rights, the enforcement of which does not require adherence to the Medical Malpractice Act. Furthermore, the Court noted the petition was not rooted in medical malpractice as the fall from a wheelchair was not related to any specific treatment and did not meet the criteria set forth in Coleman v. Deno for determining a claim falls under the MMA.

4. Withdrawal of Life Support - In Causey v. St. Francis Medical Center, 719 So.2d 1072 (2nd Cir. 1998), the decision to discontinue life support procedures on a comatose patient whose family objected to the discontinuation was found to be an issue falling under the medical

malpractice act, and the matter must be submitted to a medical review panel before suit may be filed. After the family refused to grant permission to withdraw life support, the physician turned to the hospital's Morals and Ethics Board which agreed with the withdrawal. The Morals and Ethics Board is covered under the Medical Malpractice Act as it is a board of the hospital.

5. LeJeune Claims - Trahan v. McManus, 728 So.2d 1273 (La. 1999). Plaintiffs were the parents of a decedent attempting to recover 2315.6 damages for mental anguish and emotional distress resulting from their son's injury and death. The two issues before the Louisiana Supreme Court were whether the claim fell within the medical malpractice act and whether "by-stander damages" (also known as Lejuene damages) are recoverable when the event at issue was an act or omission by a health care provider the Lousiana Supreme Court held:

> The fact damages recoverable under article 2315.6 are limited to mental anguish damages and to specifically required facts and circumstances does not serve to remove article 2315.6 claims from the applicability of the Medical Malpractice Act, as long as the mental anguish arises from the injury to or death of a patient caused by the negligence of a qualified health care provider. Id. at 1277.

The Louisiana Supreme Court reiterated tort damage for medical malpractice falls under article 2315, et seq., and it is not the quality of the claimant, but the context within which the claim arises through medical care and treatment provided to a patient. The medical malpractice act does not create a cause of action for negligent medical care as same is created under article 2315, et seq. The Medical Malpractice Act only provides the procedural mechanism for the presentation of such claims. The Louisiana Supreme Court in this case states:

> The requirements of Article 2315.6, when read together, suggest a need for temporal proximity between the tortious event, the victim's observable harm and the plaintiff's mental distress arising from and an awareness of the harm caused by the event. Id. at 1279.

6. EMTALA Claims - Spradlin v. Acadia-St. Landry Medical Foundation, 758 So.2d 116 (La. 2000). The Supreme Court held EMTALA claims

must also be submitted for review to a medical review panel and explained although the courts have construed EMTALA as creating a federal cause of action separate and distinct from, and not duplicative of, state malpractice cause of action, medical malpractice claims and "dumping" claims often overlap. Since EMTALA only preempts state law to the extent state law "directly conflicts" with federal law, the only issue is whether imposing a mandatory pre-suit medical review panel requirement "directly conflicts" with EMTALA. As dual compliance was not physically impossible, there was no actual conflict. Also, state law "actually conflicts" with federal law "where state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." Plaintiffs in this matter, demanded damages under EMTALA based on defendant's alleged breach of its duty to properly stabilize or to appropriately transfer Mrs. Spradlin; if plaintiffs prove a violation of the requirements of EMTALA (which does not distinguish between intentional and unintentional conduct), they will be entitled to recover the appropriate damages.

The facts recited in plaintiffs' petition do not state a claim under EMTALA based on failure to perform a medical screening examination (or based on disparate treatment in that examination, as opposed to pay patients); therefore, whether there was any negligence in the diagnosis and treatment by the emergency room doctor prior to the decision to transfer is a matter to be addressed in the separate medical malpractice action.

Plaintiffs also alleged in this action conduct by defendant's employees fell below the professional standard of care and constituted medical malpractice. The Court held this claim must be submitted first to a medical review panel before plaintiffs can file the claim in district court. It recognized that requiring separate suits based on related claims growing out of the same transaction or occurrence appears to be judicially inefficient and may produce inconsistent results; however, the court in the EMTALA action (which must be filed within two years) may consider whether it is appropriate under the particular facts and circumstances to grant a motion to stay the action, while urging expeditious action in the medical review panel proceeding. Thus plaintiffs were entitled to recover damages on both claims, whether in one or two trials, despite the fact the law requires exhaustion of an administrative remedy in one action which is not applicable to the other.

I. Federal Nursing Home Regulation Do Not Give Rise to a Cause of Action

In Satterwhite v. Reilly, App. 2 Cir. 2002, *817 So. 2d 407*, the Court held federal regulations establishing requirements for a nursing home to participate in Medicare and Medicaid and which provide a nursing home director is responsible for "implementation of resident care policies" and "the coordination of medical care in the facility" do not impose a tort duty on a nursing home's director, do not grant a private cause of action against a medical director, and do not establish a standard of care for the medical director. Furthermore, the Court held the regulations do not establish a standard of care for a treating physician.

J. Multiple Recoveries

In Conerly, et al. v. State of Louisiana, et al., 714 So.2d 709 (La. 7/8/98) the Louisiana Supreme Court held wrongful death and survival actions are governed under the provisions of Medical Liability for State Services Act (MLSSA) - LSA-R.S. 40:1299.39. Because this statute reduces claimants' rights, any ambiguities of the statute must be strictly construed. Ruiz v. Oniate 97-2412 (La. 5/19/98); 713 So.2d 442. Nevertheless, the Court will only strictly construe laws in the absence of definite legislative intent to be accomplished by the specific statute in question. If the law is clear and unambiguous no further interpretation should be applied in the absence of absurd consequences. Reflecting on the legislative intent from the enactment, and through its many revisions, the Court found the legislature was attempting to reconcile MLSSA (LSA - R.S. 40:1299.39) with the Medical Malpractice Act (LSA-R.S. 40:1299.40., et seq. - i.e. the private practitioners) the latter of which only allows the recovery in the total amount of $100,000 against a doctor and a $400,000 limit from the PCF for injuries to or death of a patient. More particularly, LSA-R.S. 40:1299.39(D) 97-0871 (La. 7/8/98); 714 So.2d 709 states a party may recover under the public act to the same extent as one may recover under the private act. The Court noted the purpose behind the enactment of MLSSA was to insure an adequate supply of physicians and other professionals to provide healthcare services on behalf of the state and to make an attempt to protect the "public fisc" by limiting the liability of the state to $500,000. In concluding, the Court ruled in a claim involving malpractice against the state which causes a death of a patient, a plaintiff may bring both a survival action and a wrongful death claim, but is only allowed to recover a maximum sum of $500,000 combined.

K. Liability of the Patient's Compensation Fund

1. Bankruptcy of Defendant's Insurance Company

Ceasar v. Barry, 772 So.2d 331 (La. App. 3rd Cir. 2000). This case is an out shoot of the bankruptcy liquidation of Physicians National Risk Retention Group. After being placed in receivership, plaintiffs and Physicians National Risk Retention Group entered into the

settlement agreement for the underlying $100,000.00. The settlement was approved by the bankruptcy court. The district court approved the settlement and liability was triggered under LSA-R.S. 40:1299.44. The insurer being in liquidation however, plaintiff only received the pro rata distribution of the insurer's assets which was estimated to be approximately 30% (i.e. $30,000.00). The fund perfected this appeal arguing the liability was not triggered insofar as plaintiff's did not actually receive $100,000. Relying on the 4th Circuit Court of Appeals opinion in Morgan vs. United Medical Corporation of New Orleans, 697 So.2d 307 (La. 4th Cir. 1997), the 3rd Circuit stated:

> [P]laintiff should not be penalized by the bankruptcy of the insurer of a negligent health care provider and hold the continuing settlement obligation to pay $100,000, rather than the actual payment of $100,000, is sufficient to trigger the statutory admission of liability under LSA R.S. 1299.44(C)(5). Ceasar,772 So.2d at 35.

The mere agreement by the insurer to pay $100,000 regardless of its receipt by the patient is efficient to trigger statutory liability. The Court found the plaintiff should not bear their burden of establishing liability against the Patient's Compensation Fund because the underlying carrier is bankrupt.

2. PCF Cannot Create an Issue of Fact

Perkins v. Coastal Emergency Medical Services, 2001 La. App. 3rd Cir. Lexis 160. In the instant medical malpractice action, Plaintiffs received the underlying $100,000 statutory maximum triggering liability against the fund, and moved for summary judgment for the balance of $400,000 from the Patient's Compensation Fund. Summary judgment was granted by the trial court and the Patient's Compensation Fund perfected this appeal. The Court of Appeal held the malpractice victim is clearly entitled to the statutory limit of $500,000, summary judgment is appropriate to "eliminate the need for unnecessary litigation and promote judicial economy." The Court stated:

> "The PCF cannot create an issue of material fact by introducing the affidavit of the malpracticing physician recanting his admission of liability and substituting for that admission a scenario removing any causative relationship

between his fault and the harm suffered."

The Court granted the plaintiff' s Motion for Summary Judgment noting plaintiff had proved damages in excess of $500,000 for the death of a wife of seventeen years and the PCF had failed to establish the existence of a genuine issue of material fact.

3. Settlement Terminates Issue of Liability as to the PCF

Judalet v. Kusalavage, 762 So.2d 1128 (La. App. 3rd Cir. 2000) This case involves a premature rupture of a mother's amniotic sac resulting in premature birth of a child and the child's acquisition of a bacterial infection with permanent complications Dr. Kusalavage tendered $100,000 in settlement under LSA R.S. 40:1299. 41 et seq. The plaintiff moved for summary judgment for the balance of the $500.000 cap against the Patient's Compensation Fund. In opposition to the plaintiff's motion for summary judgment, the Patient' s Compensation Fund argued through expert testimony the fetus was not born prematurely. The trial court rendered a judgment in favor of plaintiff holding the fetus prematurity was a component part of the doctor's admission of liability.

The PCF then contended Dr. Kusalavage admitted only to the artificial rupturing of the membranes, not to the permanent infirmities resulting from her premature birth. Calling the PCF's argument "feeble," the 3rd Circuit confirmed the district court's summary judgment in favor of plaintiff stating it was extremely improbable a physician would pay $100,000 merely for the premature birth of a fetus absent any implications. The Court also pointed out treating physicians of the infant testified harm had resulted from the premature birth and extensive medical problems flowing therefrom included respiratory failure, Streptococcus Sepsis, intra ventricular hemorrhages, seizure disorder, ventriculus shunt surgeries, brain damage, global development delays, and life long physical and cognitive disabilities.

The Court instructed once a malpractice victim settles with a health care provider or its insurer for $ 100,000, the liability of the health care provider has been admitted or established. Settlement for a health care provider's maximum liability of $ 100,000 activates liability of the PCF and precludes it from contesting the health care provider's liability. La.R.S. 40:1299.42(B)(3). Thus, liability is admitted and settlement terminates the issue of liability in relation to

the PCF as payment by one health care provider of the maximum amount of his liability statutorily establishes the plaintiff is a victim of the health care provider's malpractice. Once payment by one health care provider has triggered the statutory admission of liability, the Fund cannot contest the admission. The only issue between the victim and the Fund thereafter is the amount of damages sustained by the victim as a result of the admitted malpractice. The Court here found there were no genuine issues of material facts on issues of causation and damages flowing from the admitted malpractice.