SUPREME COURT OF LOUISIANA

No. 99-C-0232

DEBORAH BATSON, EULA MAE BATSON, AND BILLY BATSON

Versus

SOUTH LOUISIANA MEDICAL CENTER AND STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF HEALTH AND HUMAN RESOURCES

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST CIRCUIT, PARISH OF EAST BATON ROUGE

VICTORY, Justice, dissenting,

I am astonished that the majority simply ignores one of the essential issues in this case.

Following our analysis in Conerly, *infra*, the First Circuit Court of Appeal, in this case, relied upon the following language in the Malpractice Liability for State Services Act (MLSSA) to conclude that recovery under the Medical Malpractice Act (MMA) must be considered in resolving this case:

> D. (1) Whenever in the same circumstances, but not more than to the same extent, that a patient would, under the private law, including the Louisiana Civil Code, which is applicable only to private persons among themselves alone, be allowed a recovery, due to malpractice, from a private person not employed by nor acting on behalf of a public entity, a patient, his representative properly acting for him, or his after-death representative shall have a right to recover, from the state, losses including the death of said patient, but only to the degree and within the limits allowed by, and subject to the terms and conditions of, this section of public law....

La. R.S. 40:1299.39. Only fifteen months ago, in Conerly v. State, 97-0871 (La. 7/8/98), 714 So. 2d 709, Justice Kimball, writing for the majority of this court, stated,

> Additionally, the 1988 amendments added a section which clarified the legislature's intent that a claimant suing under the MLSSA recover only "not more than" to the same extent as one suing under the private law....Thus, according to this section [section D of the MLSSA], it was the legislature's intent that a claimant suing under the MLSSA should not recover more than a claimant suing under the private act when the same circumstances are presented. The Medical Malpractice Act (MMA) provides that the "total amount recoverable" for "all malpractice claims" for injuries to or death of a patient, exclusive of future medical care and related benefits, shall not exceed $500,000 plus interest and cost. La. R.S. 40:1299.42(B)(1). This provision has been interpreted by Louisiana appellate courts and one federal district court to limit all claims, including those for survival action and wrongful death, by all plaintiffs to $500,000. [citations omitted] Both parties acknowledged that the existing jurisprudence seems to uniformly hold there is but one cap allowed under the MMA. We express no opinion on whether these courts' and the parties' interpretations of the MMA is correct, however, and merely note that La. R.S. 40:1299.39(D) provides that a party be able to recover under the "public act" "not more than to the same extent" that he would be able to recover under the private act.

Id. at 713-14 (emphasis added). Even though the facts in Conerly are different, it is the analysis that is important. Just as La. R.S. 1299.39(D) required this court in Conerly to examine the

MMA, we are now required to e xamine the MMA to determine whether more than one cap is allowed under the MMA[1] and therefore, the MLSSA.

The majority opinion and the concurring opinion of the Chief Justice clearly miss this holding in Conerly, i.e, the MLSSA states a claimant cannot recover any more than he would be able to recover under the MMA. The majority opinion does not even address this issue and the Chief Justice, concurring, states that "[t]he facts and the law in this case do not compel us to address the Medical Malpractice Act, which limits liability for private health care providers, before we address the malpractice act that limits liability for state health care providers." This statement clearly contradicts the holding in Conerly. How can we possibly determine if the claimant is not recovering more under the MLSSA than the MMA if we do not determine the claimant's recovery under the MMA under the same circumstances?

Justice Lemmon's concurring opinion recognizes this holding in Conerly. In footnote 2, his opinion states that the MMA "is applicable to the decision in this case because a malpractice victim cannot recover more under the public act [MLSSA] than a victim suing under the private act [MMA] in similar circumstances [citing Conerly]." However, his opinion gives only a superficial review of the MMA, stating that the MMA does not address whether the limitation applies to two separate acts of malpractice, by different tortfeasors, resulting in two separate injuries. Despite the clear language in the MMA, and without any real analysis, he concludes that the MMA does not restrict the claimant to one cap under the circumstances of this case.

In my view, we are compelled to address and resolve whether the MMA would allow for more than one cap under the circumstances presented here. Since the majority fails to address this issue, I respectfully dissent.

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[1]The MMA, on this issue, reads as follows:

> B. (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. [emphasis added]

La. R.S. 40:1299.42.