STATE OF LOUISIANA
COURT OF APPEAL, THIRD CIRCUIT

04-1235

SUSAN ARRINGTON, ETC.

VERSUS

ER PHYSICIANS GROUP, APMC, ET AL.

****

APPEAL FROM THE
FOURTEENTH JUDICIAL DISTRICT COURT
PARISH OF CALCASIEU, NO. 97-4329
HONORABLE J. DAVID PAINTER, DISTRICT JUDGE

****

ELIZABETH A. PICKETT
JUDGE

****

Court composed of Sylvia R. Cooks, Oswald A. Decuir,Elizabeth A. Pickett, Billy Howard Ezell, and James T. Genovese, Judges.

REVERSED AND REMANDED.

Cooks, Judge, dissents with written reasons.
Decuir, Judge, dissents for reasons assigned by Cooks, Judge.
Ezell, Judge, concurs with written reasons.
Genovese, Judge, concurs in the result.

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PICKETT, Judge.

HISTORY

This case was previously before the court. *Arrington v. ER Physicians Group, APMC*, 04-1235 (La.App. 3 Cir. 3/9/05), 897 So.2d 911. The sole issue raised in that appeal was the same issue raised in its companion case, *Taylor v. Clement*, 04-1069 (La.App. 3 Cir. 3/9/05), 897 So.2d 909. At that time, we applied to the Supreme Court of Louisiana for instructions on the following question of law arising in both proceedings:

> Considering the devaluation of the dollar in the thirty years since the passage of the medical malpractice act is such that the $500,000.00 limit imposed in 1975 is now, according to competent evidence, worth only $160,000.00, and considering that Section 22 of Article I of the Louisiana Constitution of 1974 provides Louisiana citizens with an "adequate remedy" under our law, is the limitation on recovery for general damages of $500,000.00 imposed by the Louisiana Medical Malpractice Act, La.R.S. 40:1299.41, et seq., still considered constitutional?

Taylor, 897 So.2d at 911.

The Louisiana Supreme Court denied our request for certification. *Arrington v. ER Physicians Group, APMC*, 05-1059 (La. 6/17/05), 904 So.2d 708, *Taylor v. Clement*, 05-1057 (La. 6/17/05), 904 So.2d 708, and remanded the cases so that we could consider the plaintiffs' appeals.

APPEAL

The plaintiffs herein, Susan, Joelle and Laura Arrington, appeal a judgment of the trial court denying their motion for summary judgment seeking to have the limitations on recovery for damages imposed by the Louisiana Medical Malpractice Act, La.R.S. 40:1299.41, et seq, declared unconstitutional and granting the motion

for summary judgment filed by the defendant, GALEN-MED, INC. , upholding the constitutionally of the limitation on recovery or "cap" provisions of the act.

FACTS

The proceedings which led up to this appeal are detailed by the trial judge in his written reasons for judgment:

> On October 28, 1994, WILLIAM ARRINGTON died at the LAKE AREA MEDICAL CENTER.
>
> On June 23, 1997, plaintiff filed an instant lawsuit alleging DR. RICHARD SAMUDIA, ER PHYSICIANS GROUP, A.P.M.C., GALEN-MED., INC., d/b/a LAKE AREA MEDICAL CENTER, and related entities were all liable for the death of WILLIAM ARRINGTON. This lawsuit was filed after a Medical Review Panel had rendered an opinion adverse to DR. SAMUDIA in accordance with Section 40:1299.47 of the Louisiana Medical Malpractice Act (La. R.S. 40:1299.41, *et seq*[])].
>
> On June 16, 1999, this court approved the settlement of the plaintiff's claim against DR. SAMUDIA for $100,000.00 pursuant to the MMA which limited DR. SAMUDIA's liability to $100,000.00. [Section 40: 1299.42(B)]. Additionally, under Section 40:1299.44(C), the payment of $100,000.00 on behalf of DR. SAMUDIA resulted in an admission of the liability of DR. SAMUDIA.
>
> On August 15, 2000, this court approved the settlement of the plaintiff's claim with the LOUISIANA PATIENT'S COMPENSATION FUND OVERSIGHT BOARD for the sum of $500,000.00, paid from the LOUISIANA PATIENT'S COMPENSATION FUND, pursuant to the Louisiana Medical Malpractice Act. The $500,000.00 sum represented $390,000.00 principal plus $90,000.00 legal interest, plus $20,000.00 expenses. In consideration of the payment of $500,000.00, the plaintiffs fully released DR. SAMUDIA, THE LOUISIANA PATIENT'S COMPENSATION FUND, THE LOUISIANA PATIENT'S COMPENSATION FUND OVERSIGHT BOARD and EVANSTON INSURANCE COMPANY, and all related parties. The plaintiffs specifically reserved all rights and causes of action against defendant, GALEN-MED, INC. D/b/a, LAKE AREA MEDICAL CENTER, while reserving its non-medical malpractice cause of action against E.R. PHYSICIAN'S GROUP and ST. PAUL FIRE AND MARINE INSURANCE COMPANY.

> Plaintiff seeks to have the limitation of liability provided at Section 40:1299.4 2(B) declared unconstitutional and recover their damages without limitation from GALEN-MED, INC. GALEN-MED, INC. seeks to have its' [sic] liability limited to amounts paid by others.

The trial judge, after considering the issues raised by the plaintiffs, the counter-arguments of the defendants, and the law and jurisprudence, and even though finding the plaintiffs lacked an adequate remedy, upheld the constitutionality of "the cap" and issued judgment accordingly. This appeal followed.

LAW AND DISCUSSION

The sole issue raised in this appeal is the same issue raised in *Taylor v. Clement*, 04-1069 (La.App. 3 Cir. 3/9/05), 897 So.2d 909, *certification denied*, 05-1057 (La. 6/17/05), 904 So.2d 708, also decided this day, *Taylor v. Clement*, 04-1069 (La.App. 3 Cir. 8/__/06), ___ So.2d ___, i.e., the constitutionality of the Louisiana Medical Malpractice Act, La.R.S. 40:1299.41, et seq.

LAW AND DISCUSSION

As we undertake our consideration of the issue, we are reminded of the thoughts of one of our most revered civilian scholars, the late Justice Albert Tate, Jr., upon whom C. A. Marvin relied in a recent law review article:

> Our basically civilian tradition has been partly overlaid and replaced by Anglo-American common law. . . .
>
> Today, despite the renewed importance of the civilian sources of our substantive law, there is little support in the Louisiana bench and bar for the civilian theory that the role of the judges is to decide cases only, leaving doctrinal development to the scholarly writers. . . .
>
> The Louisiana judge, like his common-law brother, is a law-announcer as well as a case-decider. . . .
>
> As with the common-law judge, he views himself not merely as a technician but also as a scholar, law-maker and exponent of doctrine.

> However, as with a modern day civilian judge, he is essentially more free than his common law counterpart from the mechanical effects of "binding" precedent; he has the freedom to return, independent of intervening judicial precedents, to the initial legislative concepts and use creative analogies and constructs based upon them; or, in the absence of legislation expressly intended to apply, he is free to devise socially just and sound rules to regulate the unprovided-for case.
>
> Justice Tate noted that even in other states, a judge is less bound by precedent when deciding an issue of constitutional, rather than jurisdictional or statutory, law.

C. A. Marvin, *Dissents in Louisiana: Civility Among Civilians?*, 58 La.L.Rev. 975, 977 (1998) (footnote omitted) (alteration in original).

In his Written Reasons For Judgment, the learned trial judge stated:

> In 1975 the Louisiana Legislature enacted the Medical Malpractice Act in an effort to combat the rising costs of health care in this state. In part, the Act was designed to increase the likelihood that health care providers would carry malpractice insurance by regulating the total damage recovery of malpractice victims, thereby reducing insurance premiums. ***Butler v. Flint Goodrich Hospital,*** 607 So.2d 517 (La. 1992), cert. denied, sub nom., **Butler v. Medley,** 508 U.S. 909, 113 S.Ct.., 2338, 124 L.Ed2d 249, (1993); ***Williams v. Kushner,*** 549, So.2d 294, 307-308 (La.1989) (Dixon, C.J., dissenting); ***Everett v. Goldman,*** 359 So.2d 1256, 1263, (La.1978).
>
> . . . .
>
> The Louisiana Medical Malpractice Act severely limits the right of injured patients. In order to qualify for the Act, a patient must first go through a Medical Review Panel rather than go directly to the courts. After going through this process, they must then file a claim in the courts. The original Medical Malpractice Act as interpreted by the court provided liability once the qualified health care provider had settled with plaintiffs. The court has eroded that one benefit given to the plaintiffs by The Medical Malpractice Act by requiring that liability now be proven again as to third party fault and fault of a sole defendant. ***Conner v. Stelly,*** La. Supreme Court [sic] 807 So.2d 827.
>
> These new requirements above were not contemplated in the Act which was part of the "quid pro quo" given to the plaintiffs for the diminution in value of their claims. These were done under the guise of the medical malpractice "crisis" in order to make premiums reasonable

> and affordable for health care providers. The erosion of the only benefits to the plaintiff's "liability" being admitted against The Fund once the health care provider had settled with the patient and the fact that the "cap" amount of *$500,000.00* which was created in 1975 is now eroded to approximately *$160,000.00* in today's dollar value. [*We note that the August 15, 2003, affidavit of Dr. Michael M. Kurth, Professor of Economics at McNeese State University, Plaintiffs' Exhibit 6, states that $500,000.00 in 1975 dollars was equivalent to only $146,435.00 at the time of his affidavit.*] This means that the Act is no longer giving the equal "quid pro quo" to the plaintiff and has eroded their rights to the point where they have none.
>
> . . . .
>
> At the time of the enactment of legislation, perhaps even eleven years ago at the time of the ***Butler*** decision, the balance was imperfect. Now it is not just imperfect, there is no balance at all to a legitimately injured plaintiff who gave away their right to go after health care providers for the full amount of their injuries over $500,000.00. The balance has been weighed heavily in favor of the health care providers, their insurers, and The Patient's Compensation Fund by the two-thirds erosion in "the dollar" from 1975 to date which limits the value of the claim to one-third if its value in 1975, thereby violating the equal protection laws guaranteed by The Louisiana Constitution. Art. 1, Sec. 3 of the 1974 Louisiana Constitution.

The Louisiana Supreme Court has stated that the Louisiana Medical Malpractice Act must be strictly construed because it grants advantages to special classes in derogation of some rights available to tort victims. In *Kelty v. Brumfield*, 93-1142, pp. 8-9 (La. 2/25/94), 633 So.2d 1210, 1216, the supreme court explained:

> [I]t should be noted that the MMA, and the MLSSA, were enacted to provide for a different adjustment of the conflicts of interests between private (MMA) and public (MLSSA) health care providers and their patient-claimants than was made previously by general tort law. As part of their sweeping changes, the laws impose significant limitations on the courts' power and authority to adjudicate medical negligence cases, viz., (1) a comprehensive $500,000 cap on damages; La.R.S. 40:1299.42B, 1299.39F; and (2) mandated medical review before trial. *Id.* 1299.47, 1299.39.1. See *Everett v. Goldman*, 359 So.2d 1256 (La.1978); for discussion of the Indiana law upon which the MMA and MLSSA were modelled [sic], see Kinney, Gronfein, & Gannon, Indiana's Medical Malpractice Act: Results of a Three-Year Study, 24 Ind.L.Rev. 1277

(1991). In the absence of any challenge to these legislative limits upon the courts' constitutional jurisdiction, we assume without deciding their validity for purposes of the present case.

Further, the MMA and the MLSSA must be strictly construed because they grant immunities or advantages to special classes in derogation of the general rights available to tort victims. *Galloway v. Baton Rouge Gen. Hosp.*, 602 So.2d 1003 (La.1992)*; Head v. Erath Gen. Hosp.*, 458 So.2d 579 (La.App. 3d Cir.1984); *Williams v. St. Paul Ins. Co.*, 419 So.2d 1302 (La.App. 4th Cir.1982). See also, *Touchard v. Williams*, 617 So.2d 885 (La.1993); *Rodriguez v. La. Med. Mut. Ins. Co.*, 618 So.2d 390 (La.1993); *Monteville v. Terrebonne Par. Con. Gov.*, 567 So.2d 1097 (La.1990); *Keelen v. State Dept. of Culture and Rec.*, 463 So.2d 1287 (La.1985). Moreover, because the cap on damages imposed by each act harshly impacts the most severely injured victims, mitigating benefits or advantages provided for them by the laws must be liberally construed, and any disparity of treatment between such claimants by either law will be given careful scrutiny; in the absence of a showing that the classification substantially furthers an important state interest, it shall be stricken or reformed as a denial of the equal protection of the laws. See *Williams v. Kushner*, 549 So.2d 294 (La.1989).

In *Twenty-First Judicial District Court v. State, Through Guste*, 563 So.2d 1185, 1188-89 (La.App. 1 Cir.), *writs denied*, 568 So.2d 1082, 568 So.2d 1088 (La.1990) the court explained the law applicable to the attack of the constitutionality of a statute as follows:

In *Board of Directors of Louisiana Recovery District v. All Taxpayers, Property Owners, and Citizens of State of Louisiana*, 529 So.2d 384, 387-388 (La.1988) appears the following:

1. A person attacking the constitutionality of a statute of public purpose must show clearly the constitutional aim to deny the Legislature the power to enact the legislation.

The legislative power of the state is vested in the Legislature. La.Const.1974, Art. III, § 1. Except as expressly provided by the constitution, no other branch of government, nor any persons holding office in one of them, may exercise the legislative power. La.Const.1974, Art. II, §§ 1 and 2. Furthermore, it is a general principle of judicial interpretation that, unlike the federal constitution,

> a state constitution's provisions are not grants of power but instead are limitations on the otherwise plenary power of the people of a state exercised through its Legislature. In its exercise of the entire legislative power of the state, the Legislature may enact any legislation that the state constitution does not prohibit. Thus, to hold legislation invalid under the constitution, it is necessary to rely on some particular constitutional provision that limits the power of the Legislature to enact such a statute. . . . ("Except as limited by the constitution its power is plenary"); *Swift v. State*, 342 So.2d 191, 194 (La.1977) ("Unlike Congress, our State Legislature has all powers of legislation not specifically denied it by the Louisiana Constitution").
>
> Unless the fundamental rights, privileges and immunities of a person are involved, there is a strong presumption that the Legislature in adopting a statute has acted within its constitutional powers. . . . The presumption is especially forceful in the case of statutes enacted to promote a public purpose, [. . . .]. . . . The party attacking such a statute has the burden of showing clearly that the legislation is invalid or unconstitutional, and any doubt as to the legislation's constitutionality must be resolved in its favor. . . . In an attack upon a legislative act as falling within an exception to the Legislature's otherwise plenary power, it is not enough to show that the constitutionality is fairly debatable, but, rather, it must be shown clearly and convincingly that it was the constitutional aim to deny the Legislature the power to enact the statute.
> (Some citations omitted)

A review of the record shows that the plaintiffs in the matter before us carried their burden of proving that the cap contained in the Louisiana Medical Malpractice Act violates La.Const. art. 1, § 22, which assures our citizens of an adequate remedy under the law for injury to their persons.

In *Vanderhoff v. Beary*, 03-0912, p. 3 (La.App. 4 Cir. 8/20/03), 853 So.2d 752, 754, *writ denied*, 03-2895 (La. 1/9/04), 862 So.2d 987, our colleagues of the fourth circuit noted that:

> There are two statutory schemes that deal with medical malpractice actions in Louisiana. One is [the Louisiana Medical Malpractice Act,] the MMA, and the other is the Medical Liability for State Services Act (the "MLSSA"), La. R.S. 40:1299.39. The MLSSA applies to medical malpractice by a "state health care provider". La. R.S. 40:1299.39(A). The MMA applies to medical malpractice by health care providers to which the MLSSA is not applicable. La. R.S. 40:1299.41(A).

Both of these acts contain the same cap provision. Further, in *Engles v. City of New Orleans*, 03-692, p. 16 (La.App. 4 Cir. 2/25/04), 872 So.2d 1166, 1178, *writs denied*, 04-1432 (La. 9/24/04), 882 So.2d 1141, 04-2654 (La. 1/7/05), 891 So.2d 697, the fourth circuit stated:

> In *Conerly v. State*, 97-0871 (La.7/8/98), 714 So.2d 709, the Louisiana Supreme Court found that under La. R.S. 40:1299.39(B) of the Malpractice Liability for State Services Act ("MLSSA"), it was the legislature's intent that a claimant should not recover more than that which would be allowed under the same circumstances under the Medical Malpractice Act ("MMA"). La. R.S. 40:1299.39(F) and La. R.S. 13:5106 contain similar language.

In the case sub judice, the plaintiffs argue that the Louisiana Medical Malpractice Act cap provision violates a number of provisions of the Louisiana Constitution of 1974: (1) the "due process" and "adequate remedy" provisions of La.Const. art. 1, § 22; (2) the "separation of powers" provision of La.Const. art. 2, § 2; (3) the provisions of La.Const. art. 3, §§ 2 and 12, in that it is a "special law" granting privileges and immunities and changes the method of collecting debts and enforcing judgments; and (4) the provisions of La.Const. art. 5, § 16, in that no amendment to the constitution was ever adopted changing the original jurisdiction of

the district courts. Inasmuch as we find merit to the plaintiffs' "adequate remedy" argument, we pretermit discussion of all other arguments.

Louisiana Constitution Article 1, § 22 provides as follows: "All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights."

The decedent in the case sub judice, Billy Arrington, was born on May 5, 1951. He died on October 28, 1994, at the age of forty-three. Mr. Arrington left behind a wife and two minor children whose lives were severely impacted by his untimely death. The Arrington household's income went from $29,137.00 in 1993 to $9,344.00 in 1995. In 1993, Mr. Arrington earned $20,089.27, working in the dairy department of a Lake Charles supermarket. In the four years before his death, he also sold insurance on a part-time basis. During those four years, his average income from his insurance business was $1,367.00 per year. Thus, not even considering the probability of yearly increases in income, Mr. Arrington's death represented an economic loss to his family of over $470,000.00. *All damages, including economic loss, are included in the cap imposed by the MAA and the MLSSA.*

The trial judge found that *because of the depreciation of the dollar,* the $500,000.00 cap imposed in 1975 is worth only about $160,000.00 today. That conclusion is supported by the evidence. *The defendant argues that the passage of time, the devaluation of the dollar, and other relevant economic factors are irrelevant in determining whether an adequate remedy in law exists. We disagree.* As we noted earlier, Dr. Kurth, in his affidavit, valued the 1975 cap at only $146,435.00 in today's

dollars. Using those values one can calculate that in order to grant today's plaintiff the same relief the legislature granted to plaintiffs in 1975, the cap would have to be raised to $1,562,500.00 using the $160,000.00 value and $1,707,242.00 using Dr. Kurth's value. In either case, we find the current $500,000.00 cap fails to provide an adequate remedy to today's severely injured plaintiffs and thus, is unconstitutional under the provisions of La.Const. art. 1, § 22.

This court does not stand alone in finding the state's cap on medical malpractice damages unconstitutional. As the trial judge pointed out in his reasons for judgment, courts in other states have take similar stances:

> Other states . . . . [finding medical malpractice caps unconstitutional] are: Texas, ***Lucas v. United States,*** 757 S.W.2d 687 Tex. 1988), ***Rose vs. Doctors Hospital,*** 801 S.W.2d 841 (Tex. 1990); Alabama, ***Moore v. Mobile Infirmary Association,*** 592 So.2d 156 (A1a. 1991); New Hampshire, ***Brannigan v. Usitalo,*** 134 N.H. 50, 587 A.2d 1232 (1991); Ohio, ***Morris v. Savoy,*** 61 Ohio St.3d 684, 576 N.E..2d 765 (1991); Florida, ***Smith v. Department of Insurance,*** 506 So.2d 1080 (Fla. 1987).

See also, In Re Knowles v. U.S., 544 N.W.2d 183 (S.D. 1996). In *Knowles* the court commented:

> Initially, we note that many courts have invalidated limitations on damages based on their respective state constitutions. *Moore v. Mobile Infirmary Ass'n*, 592 So.2d 156, 158 (Ala.1991) (*citing Smith v. Dep't. of Ins.*, 507 So.2d 1080 (Fla.1987) (invalidating a damages cap on personal injury awards); *Wright v. Central Du Page Hosp. Ass'n*, 63 Ill.2d 313, 347 N.E.2d 736 (1976); *Brannigan v. Usitalo*, 134 N.H. 50, 587 A.2d 1232 (N.H.1991); *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (N.H.1980); *Arneson v. Olson*, 270 N.W.2d 125 (N.D.1978); *Morris v. Savoy*, 61 Ohio St.3d 684, 576 N.E.2d 765 (1991); *Lucas v. United States*, 757 S.W.2d 687 (Tex.1988); *Condemarin v. Univ. Hosp.*, 775 P.2d 348 (Utah 1989); *Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 771 P.2d 711 (1989) (amended by 780 P.2d 260 (Wash.1989)) (invalidating a damages cap on all personal injury actions)).

Knowles, 544 N.W.2d at 186.

Most recently, *see Ferdon v. Wisconson Patients Compensation Fund*, 2005 WI 125, 284 Wis.2d 573, 701 N.W.2d 440.

Accordingly for the reasons stated above, the judgment of the trial court is reversed and set aside. Judgment is entered in favor of the plaintiffs, Susan, Joelle and Laura Arrington, granting their motion for summary judgment and finding the $500,000.00 cap on medical malpractice damages unconstitutional as failing to provide the plaintiffs an "adequate remedy" as guaranteed under the provisions of La.Const. art. 1, § 22. The case is remanded to the trial court for the consideration of what constitutes adequate damages in this case. All costs of this appeal are assessed against defendant, Galen-Med, Inc.

REVERSED AND REMANDED.