NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2008 CA 1645

JERRY BICKHAM, ELLA BICKHAM, CANDACE LAJOCE BICKHAM, AND JYRA THELMELIA BICKHAM

VERSUS

LOUISIANA EMERGENCY MEDICAL CONSULTANTS; INPHYNET d/b/a INPHYNET MEDICAL MANAGEMENT/MED PARTNERS; RIVERSIDE MEDICAL CENTER; JAMES KERRY, M.D.; AND XYZ, ABC, AND DEF INSURANCE COMPANIES

Judgment Rendered: March 27, 2009

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Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of Washington
State of Louisiana
Suit Number 81,912

Honorable Raymond Childress, Presiding

KUHN, J CONCURS IN ***** DISSENTS IN PART AND ASSIGNS REASONS

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BEFORE: KUHN, GUIDRY, AND GAIDRY, JJ.

GUIDRY, J.

Defendants, Louisiana Emergency Medical Consultants (LEMC), InPhyNet d/b/a InPhyNet Medical Management/Med Partners (InPhyNet), James Kerry,[1] M.D., and Basem Yacoub, M.D. appeal from a judgment of the trial court denying their motion for summary judgment and granting summary judgment in favor of plaintiffs, Jerry Bickham, Ella Bickham, Candace Bickham, and Jyra Bickham. For the reasons that follow, we affirm in part and reverse in part.

FACTS AND PROCEDURAL HISTORY

On November 30, 1997, Jerry Bickham was injured in an automobile accident and was taken to the emergency room at Riverside Medical Center (Riverside). While at Riverside, Bickham was evaluated and treated by Dr. Basem Yacoub. Bickham was subsequently transferred, at his request, to East Jefferson General Hospital (EJGH) for treatment. While at EJGH, Bickham suffered a spinal cord compression while being moved to change his bed linens, which resulted in Bickham being rendered a quadriplegic.

Thereafter, Bickham filed a malpractice claim with the State of Louisiana, Division of Administration against several health care providers for their negligent evaluation and treatment of him. While this claim was pending before the medical review panel, Bickham filed a petition for damages against Riverside, InPhyNet, LEMC, Dr. Kerry, and Dr. Yacoub. In his petition, Bickham asserted that Dr. Yacoub was not a qualified health care provider covered by the provisions of the Medical Malpractice Act, La. R.S. 40:1299.41, et seq., and detailed causes of action against the other defendants for their negligent credentialing, monitoring, and supervision of Dr. Yacoub, as well as for their vicarious liability.[2]

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[1] Bickham's petition was amended to reflect that the defendant's name is Bruce Kerry, M.D.

[2] The claims for negligent monitoring/supervision and negligent credentialing were previously determined by this court to fall outside the definition of medical malpractice. Bickham v. InPhyNet, Inc., 03-1897 (La. App. 1st Cir. 9/24/04), 899 So. 2d 15, writ denied, 04-2638 (La. 12/17/04), 888 So. 2d 876.

On October 2, 2006, InPhyNet, LEMC, Dr. Kerry and Dr. Yacoub filed a motion for summary judgment requesting that the court dismiss Bickham's claims against them because Bickham had exhausted the statutory maximum recovery against all Patients' Compensation Fund (PCF) defendants. The next day, Bickham filed a motion for partial summary judgment seeking a declaration that Dr. Yacoub was not a qualified health care provider under the Medical Malpractice Act at the time of the alleged malpractice.

Following a hearing on these motions, the trial court rendered judgment granting Bickham's motion for partial summary judgment, concluding that Dr. Yacoub was not a qualified health care provider under the Medical Malpractice Act on November 30, 1997. Based on this determination, the trial court denied the motion for summary judgment filed by InPhyNet, LEMC, Dr. Kerry, and Dr. Yacoub.

InPhyNet, LEMC and Dr. Yacoub now appeal from this judgment, asserting that the trial court erred in granting Bickham's motion for partial summary judgment respecting the PCF qualification of Dr. Yacoub and erred in denying summary judgment to InPhyNet, LEMC, and Dr. Yacoub.[3]

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[3] The judgment from which the defendants appeal was designated by trial court as a final judgment for purposes of appeal and included an express determination, with reasons, that there was no just reason for delay. However, Bickham filed a motion to dismiss with this court as to the defendants' appeal of the trial court's granting of partial summary judgment in favor of Bickham, as well their appeal from the trial court's denial of their motion for summary judgment. A previous panel of this court denied Bickham's motion to dismiss, citing Board of Supervisors of Louisiana State University v. Louisiana Agriculture Finance Authority, 07-0107 (La. App. 1st Cir. 2/8/08), 984 So. 2d 72, which reiterated the principle that when an appeal is taken from the granting of a motion for summary judgment, it is also appropriate to review the denial of a cross-motion for summary judgment when the issues are identical. However, the issue of the propriety of defendants' appeal from the granting of the motion for partial summary judgment was not addressed by this court.

From our review of the record, we do not find that the trial court abused its discretion in certifying the judgment as final for purposes of appeal. See Machen v. Bivens, 04-0396, p. 3 (La. App. 1st Cir. 2/11/05), 906 So. 2d 468, 470-471.

DISCUSSION

On appeal, summary judgments are reviewed *de novo*, using the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. Lieux v. Mitchell, 06-0382, p. 9 (La. App. 1st Cir. 12/28/06), 951 So. 2d 307, 314. The motion should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine as to material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B); Independent Fire Insurance Company v. Sunbeam Corporation, 99-2181, p. 7 (La. 2/29/01), 755 So. 2d 226, 230-231.

The burden of proof on a motion for summary judgment is on the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to provide factual evidence sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. La. C.C.P. art. 966(C)(2).

A genuine issue is a triable issue. More precisely, an issue is genuine if reasonable persons could disagree. If on the state of the evidence, reasonable persons could reach only one conclusion, there is no need for a trial on that issue. In determining whether an issue is genuine, courts cannot consider the merits, make credibility determinations, evaluate testimony, or weigh evidence. Smith v. Our Lady of the Lake Hospital, Inc., 93-2512, p. 27 (La. 7/5/94), 639 So. 2d 730, 751. A fact is material when its existence or nonexistence may be essential to

plaintiff's cause of action under the applicable theory of recovery. Facts are material if they potentially insure or preclude recovery, affect a litigant's ultimate success, or determine the outcome of the legal dispute. Smith, 93-2512, 639 So. 2d at 751. Because it is the applicable substantive law that determines materiality, whether or not a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. Charlet v. Legislature of the State of Louisiana, 97-0212, p. 7 (La. App. 1st Cir. 6/29/98), 713 So. 2d 1199, 1203, writs denied, 98-2023, 98-2026 (La. 11/13/98), 730 So. 2d 934.

The Medical Malpractice Act limits the liability of health care providers who qualify by maintaining specified malpractice insurance and by paying a surcharge to the PCF. A qualified health care provider is liable for malpractice only to the extent provided in the Act; namely, a qualified health care provider has no liability for any amount in excess of $100,000.00, plus interest. La. R.S. 40:1299.41(B)(2); Sewell v. Doctors Hospital, 600 So. 2d 577 (La. 1992). The defendant health care provider bears the burden of proving that it comes within the protections afforded by the Act. See Bennett v. Krupkin, 00-0023, p. 7 (La. App. 1st Cir. 3/28/02), 814 So. 2d 681, 685-686, writ denied, 02-1208 (La. 6/21/02), 819 So. 2d 338; Remet v. Martin, 97-0895, p. (La. App. 4th Cir. 12/10/97), 705 So. 2d 1132, 1134.

Louisiana Revised Statutes 40:1299.42[4] sets forth the requirements for a health care provider to qualify for the protections and benefits of the Act as follows:

> A. To be qualified under the provisions of this Part, a health care provider shall:
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> (1) Cause to be filed with the board proof of financial responsibility as provided in Subsection E of this Section.

[4] All statutory references in this opinion refer to the versions applicable at the time the alleged malpractice occurred on November 30, 1997.

(2) Pay the surcharge assessed by this Part on all health care providers according to La. R.S. 40:1299.44.

(3) For self-insureds qualification shall be effective upon acceptance of proof of financial responsibility by and payment of the surcharge to the board. Qualification shall be effective for all others at the time the malpractice insurer accepts payment of the surcharge.

The requirement of proof of financial responsibility is further explained in La. R.S. 40:1299.42(E)(1), which states in pertinent part:

> Financial responsibility of a health care provider under this Section may be established only by filing with the board proof that the health care provider is insured by a policy of malpractice liability insurance in the amount of at least one hundred thousand dollars per claim with qualification under this Section taking effect and following the same form as the policy of malpractice liability insurance of the health care provider, or in the event the health care provider is self-insured, proof of financial responsibility by depositing with the board one hundred twenty-five thousand dollars in money or represented by irrevocable letters of credit, federally insured certificates of deposit, bonds, securities, cash values of insurance, or any other security approved by the board.

In the instant case, Bickham's motion for partial summary judgment attacks the qualification of Dr. Yacoub as a health care provider entitled to the benefits of the Medical Malpractice Act and asks the trial court to declare that Dr. Yacoub is not a qualified health care provider. Likewise, InPhyNet, LEMC and Dr. Yacoub assert in their motion for summary judgment that Bickham has already recovered the statutory maximum from other qualified health care providers and because Dr. Yacoub, as a qualified health care provider, no longer has any actual liability, InPhyNet and LEMC cannot be held vicariously liable and accordingly, they should all be dismissed. Because InPhyNet, LEMC, and Dr. Yacoub bear the burden of proving that they come within the protections of the Act, in order to succeed on their motion for summary judgment and to defeat Bickham's motion for partial summary judgment, the defendants had to come forward with evidence establishing that they would be able to satisfy their evidentiary burden of proof at trial on the issue of Dr. Yacoub's status as a qualified health care provider. See La.

C.C.P. art. 966(C)(2) and (E). In support of their contention that Dr. Yacoub is a qualified health care provider, the defendants offered a certificate of enrollment issued by the PCF which purports to cover Dr. Yacoub for the date of the alleged malpractice. The certificate of enrollment is issued to Team Health, Inc., d/b/a Team Health Group (Team Health) and states that Dr. Yacoub is covered under the certificate as an additional insured for the enrollment period of August 1, 1997, through August 1, 1998, while performing services for Team Health Group. Such evidence is considered prima facie proof that the provider is a qualified health care provider under the Medical Malpractice Act. See Hidalgo v. Wilson Certified Express, Inc., 94-1322, p. 5 (La. App. 1st Cir. 5/14/96), 676 So. 2d 114, 117; Roberson v. Arcadia Healthcare Center, Inc., 37,761, p. (La. App. 2nd Cir. 7/9/03), 850 So. 2d 1059, 1065-1066; Remet v. Martin, 98-2751 (La. App. 4th Cir. 3/31/99), 737 So. 2d 124; Goins v. Texas State Optical, Inc., 463 So. 2d 743 (La. App. 4th Cir. 1985); see also LAC 37:III.515.[5]

However, Bickham offered evidence showing that at the time of the alleged malpractice, Dr. Yacoub was working at Riverside as an emergency room physician on an independent contractor basis for LEMC. According to the deposition of Riverside's CEO, John Walker, during the time of the alleged malpractice, Riverside had a contract with LEMC to staff its emergency room and Team Health as a group did not provide emergency room services to Riverside.

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[5] LAC 37:III.515 states:

> A. Upon receipt and approval of a completed application and payment of the applicable surcharge by or on behalf of the applicant health care provider, the executive director shall issue and deliver to the health care provider a certificate of enrollment with the fund, identifying the enrolled health care provider and specifying the effective date and term of such enrollment.
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> B. Duplicate or additional certificates of enrollment shall be made available by the executive director to and upon the request of an enrolled health care provider or his or its attorney, or professional liability insurance underwriter when such certification is required to evidence enrollment with the fund in connection with an actual or proposed malpractice claim against the health care provider.

Accordingly, we find that though the enrollment certificate submitted by the defendants would generally be prima facie evidence of Dr. Yacoub's enrollment with the PCF as a qualified health care provider, the evidence submitted by Bickham creates a genuine issue of material fact as to whether Dr. Yacoub is a qualified health care provider by virtue of Team Health's enrollment.[6] As such, summary judgment in favor of either party is inappropriate.

CONCLUSION

For the foregoing reasons, the portion of the trial court's judgment denying summary judgment to the defendants is affirmed. The portion of the trial court's judgment granting partial summary judgment in favor of the plaintiffs, Jerry Bickham, Ella Bickham, Candace Bickham, and Jyra Bickham, is reversed. This matter is remanded to the trial court for further proceedings.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

[6] We note the record contains evidence that Team Health paid a surcharge to the PCF based on an average number of annual visits for its covered facilities. Additionally, there is a certificate of insurance that was submitted to the PCF evidencing underlying malpractice liability insurance and listing as insureds Team Health, InPhyNet, LEMC, EMSA Louisiana, Inc., with an attached list of physicians. However, if Team Health does not have a relation to Dr. Yacoub that would support inclusion of Dr. Yacoub under Team Health's qualification with the PCF, i.e., employment, then reference to the list of physicians and Dr. Yacoub's addition to that list subsequent to the alleged malpractice in this case are irrelevant.

JERRY BICKHAM, ELLA BICKHAM CANDACE LAJOCE BICKHAM, AND JYRA THELMELIA BICKHAM	**FIRST CIRCUIT**
VERSUS	**COURT OF APPEAL**
LOUISIANA EMERGENCY MEDICAL CONSULTANTS; INPHYNET D/B/A INPHYNET MEDICAL MANAGEMENT/ MED PARTNERS; RIVERSIDE MEDICAL CENTER; JAMES KERRY, M.D.; AND XYZ, ABC, AND DEF INSURANCE COMPANIES	**STATE OF LOUISIANA**
	NO. 2008 CA 1645

KUHN, J., dissenting.

I do not believe that resolution of the issue of whether Louisiana Emergency Medical Consultants (LEMC), InPhyNet Medical Management, Inc. (InPhyNet), and Dr. Yacoub are qualified health care providers under the Louisiana Medical Malpractice Act (MMA) is a question to be resolved by the trier of fact. The record contains a *prima facie* showing that these defendants are qualified health care providers. The Bickhams' responsive showing neither creates a genuine issue of material fact nor establishes as a matter of law that LEMC, InPhyNet, and Dr. Yacoub are not qualified to participate in the Patients' Compensation Fund (PCF). Thus, because the Bickhams failed to point out an absence of factual support for the defendants' claim that they are qualified health care providers, I concur in the majority's reversal of the trial court's grant of the summary judgment filed by the Bickhams. But because the record demonstrates that the Bickhams have exhausted their right of recovery under the MMA, I believe defendants' motion for partial summary judgment, dismissing LEMC, InPhyNet, and Dr. Yacoub from this litigation, should have been granted.

As noted by the majority, defendants offered a certificate of enrollment issued by the PCF that showed LEMC, InPhyNet, and Dr. Yacoub are qualified health care providers on the date of the alleged malpractice, thereby sustaining

their burden of proving entitlement to dismissal from the lawsuit. According to that certificate, the complete name of the provider is "Team Health Group, Inc./[InPhyNet][,] EMSA Louisiana, Inc. and [LEMC] and Physicians as per schedule attached." The Bickhams responded to that showing with the deposition testimony of the CEO of Riverside Medical Center (RMC), who stated that RMC had a contract with LEMC to staff its emergency room physicians. 08-1645 at p. 8. From this, the majority concludes a genuine issue of material fact as to whether Dr. Yacoub is a qualified health care provider by virtue of Team Health's enrollment exists. But this issue is resolved by the record because the certificate was *expressly* issued in the name of LEMC and InPhyNet. And the evidence overwhelming establishes that Dr. Yacoub was a physician who worked for LEMC on the date of the alleged malpractice.

Although Dr. Yacoub's name did not appear on the schedule of physicians set forth in the certificate of insurance issued by the PCF on July 25, 1997, a certificate of enrollment was issued by the PCF in favor of, among others, LEMC. That on January 28, 1998, in the effort to include additional physicians under the schedule of physicians covered by the certificate of enrollment (including Dr. Yacoub) the providers' Account Manager, Annie Lopez, referenced only those two providers listed on the first line of the certificate of enrollment is of no moment because the letter clearly states the St. Paul Fire & Marine Insurance (St. Paul) policy number which identifies all the providers covered under the PCF certificate.

The majority correctly observes that the record contains evidence the providers identified on the PCF certificate of enrollment paid a surcharge based on an average number of annual visits for its covered facilities. See 08-1645 at p. 9 n.6. And the deposition testimony of PCF representative, Lorraine LeBlanc, established that the amount of surcharge the providers covered under the St. Paul

policy were charged was not necessarily affected by the inclusion of additional physicians to the schedule since it was based on the annual visits. Thus, with Lopez's addition of Dr. Yacoub to the schedule of physicians, defendants established that Dr. Yacoub was a qualified health care provider under the MMA at the time of the alleged malpractice. See La. R.S. 40:1299.42. Because LEMC, InPhyNet, and Dr. Yacoub have established they are qualified providers and the Bickhams have failed to counter that showing, I concur in the result reached by the majority, which reverses the trial court's grant of summary judgment in favor of the Bickhams.

But I disagree with the majority's affirmance of the trial court's denial of the defendants' partial motion for summary judgment, seeking dismissal from this lawsuit. When the damage sustained by a party claiming entitlement to damages under MMA cannot be apportioned between multiple tortfeasors because the damage is indivisible, the claim is not severable. It is only if the damage or injury can be divided into two or more parts, with each part caused by a separate defendant, that each part constitutes, in effect, a separate injury under La. R.S. 40:1299.42B(1). See ***Maraist v. Alton Ochsner Med. Foundation***, 2000-0404, pp. 5-8 (La. App. 1st Cir. 4/4/01),808 So.2d 566, 568-70, ***writ denied***, 2001-2031 (La. 11/2/01), 800 So.2d 882; see also ***Turner v. Massiah***, 94-2548, p. 7 (La.6/16/95), 656 So.2d 636, 640. The record establishes that Mr. Bickham suffered one indivisible injury: quadriplegia. Thus, only one statutory cap applies to the Bickhams' recovery. Under the MMA, the liability of a qualified health care provider is limited to $100,000 for a medical malpractice victim's injury or death, and any damages in excess of $100,000 may be recovered from the PCF but cannot exceed $500,000. ***Bijou v. Alton Ochsner Med. Foundation***, 95-3074 (La. 9/5/96), 679 So.2d 893, 896. The record establishes that the Bickhams have

already recovered $800,000 in the settlement of related medical malpractice claims. Thus, they have exhausted the statutory cap.

Because LEMC, InPhyNet, and Dr. Yacoub are qualified health care providers under the MMA; the defendants have established that Mr. Bickham suffered but one injury; and the Bickhams have recovered the maximum amount permitted under the MMA, defendants are entitled to partial summary judgment, dismissing them from this lawsuit. Accordingly, I dissent from that portion of the majority's decision that affirms the trial court's denial of partial summary judgment in favor of LEMC, InPhyNet, and Dr. Yacoub.