NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 2272

ELMO HUMPHREY, III

VERSUS

STATE OF LOUISIANA THROUGH DEPARTMENT OF CORRECTIONS AT ANGOLA CORRECTIONAL CENTER, DR. TOLIVER, DR. HAND, DR. TARVER, DR. WEIST AND WARDEN BURL CAIN

Judgment Rendered: JUN 18 2012

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On Appeal from the 20th Judicial District Court
In and for the Parish of West Feliciana, State of Louisiana
Docket No. 18,473

The Honorable William G. Carmichael, Judge Presiding

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BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

HUGHES, J.

This is an appeal of a partial summary judgment in favor of the plaintiff, finding prison medical personnel breached the applicable standard of care owed and failed to provide reasonable medical care. For the reasons that follow, we dismiss the appeal, *ex proprio motu*, and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

Elmo Humphrey, III, was incarcerated at Louisiana State Penitentiary, at Angola, Louisiana ("Angola"),[1] when he sought medical treatment at the prison clinic, on June 3, 1998, June 5, 1998, and June 8, 1998, complaining of hemorrhoid pain. He was prescribed topical medication (Dibucaine, a pain-relieving ointment, and Anusert, hydrocortisone suppositories) by the emergency medical technician ("EMT") on duty. He was also referred to see a clinic doctor (though the date of the appointment was not specified), and, on his third visit, the EMT provided him with a referral for an appointment to the "Surg. Clinic." On June 9, 1998 Mr. Humphrey was weak, dizzy, nauseous, unable to get out of bed, and complaining of scrotal pain and swelling. He was taken to the prison clinic and was examined by a medical doctor for the first time since his condition developed. The clinic doctor administered antibiotics and pain relievers, diagnosed necrosis of perineum tissue, tentatively diagnosed Fournier's gangrene, and ordered Mr.

[1] Mr. Humphrey was later released from prison, following a ruling of the United States Fifth Circuit Court of Appeals, reversing the district court's judgment, which had denied a writ of habeas corpus, and remanding the case to the district court with instructions to order the State of Louisiana to either try Mr. Humphrey again or release him from custody within ninety days of the date of the district court's order on remand. See **Humphrey v. Cain**, 138 F.3d 552, 553 (5th Cir. 1998), cert denied, 525 U.S. 935, 119 S.Ct. 348, 142 L.Ed.2d 287 (1998) (on rehearing *en banc*, with the Fifth Circuit finding that "the jury instructions [given to the jury in the defendant's aggravated rape trial] defining reasonable doubt lowered the State's burden of proof below the constitutional minimum"); **Humphrey v. Cain**, 120 F.3d 526 (5th Cir. 1997). See also **State v. Humphrey**, 544 So.2d 1188 (La. App. 5 Cir.), writ denied, 550 So.2d 627 (La. 1989).

Humphrey be transferred to Earl K. Long Medical Center ("EKLMC") in Baton Rouge for further evaluation and treatment.

At EKLMC the diagnosis of Fournier's gangrene was confirmed and found to be secondary to a perirectal abscess. Mr. Humphrey had to undergo multiple surgical procedures, which included: incision and wide debridement of the perineum including degloving of the penis and excision of the scrotum, on June 9, 1998; excision of tissue at the margins of buttock wounds, on June 15, 1998; implantation of testicles to the subcutaneous tissue of the thighs bilaterally and split-thickness skin graft to penile shaft and perineum, on June 25, 1998; and a split-thickness skin graft to the left buttock, on July 7, 1998.

Initially, Mr. Humphrey filed suit in the United States District Court for the Middle District of Louisiana, on June 2, 1999, but the suit was eventually dismissed for failure to state a valid claim of an unconstitutional denial of medical care; his supplemental state law claims were also dismissed, since no federal claim was left in the case. See **Humphrey v. Louisiana State Penitentiary**, 31 Fed.Appx. 833, 2002 WL 180429 (5th Cir. 2002).

Meanwhile, Mr. Humphrey had also filed suit in the 19th Judicial District Court, under Suit Number 472,024, which was later transferred to the 20th Judicial District Court, under Suit Number 18,473 (the suit appealed herein). Following protracted litigation (which resulted in the dismissal of all parties except the State of Louisiana, on March 17, 2009[2]), the plaintiff filed a motion for summary judgment on August 8, 2011, on the issues of

[2] The trial court also denied a motion for summary judgment filed by the State and made certain evidentiary rulings against the State, in its March 17, 2009 judgment, provoking an application for supervisory review to this court by the State, which was denied. See **Humphrey v. State**, 2009 CW 0365 (La. App. 1 Cir. 6/22/09) (unpublished).

liability and damages. After an October 5, 2011 hearing, judgment was rendered in favor of the plaintiff, in part, finding that "the Defendants failed to provide Mr. Humphrey with reasonable medical care and/or otherwise breached the applicable standard of care owed to Mr. Humphrey." The motion was denied, in part, as to "remaining issues, including medical causation, damages and/or quantum," which were "reserved for trial on the merits." A judgment was signed on October 17, 2011, in accordance with the trial court's ruling, and specified that, "after an express determination that there [was] no just reason for delay," the judgment was final for purposes of appeal, pursuant to LSA-C.C.P. art. 1915(B).

The State suspensively appealed the trial court's summary judgment, and on appeal asserts the trial court erred: (1) in granting Mr. Humphrey's motion for summary judgment when the counterveiling and contradictory evidence submitted by both parties in and of itself creates a genuine issue of material fact regarding the standard of medical care owed by Angola to the plaintiff in June of 1998; (2) in considering the testimony of plaintiff's expert Dr. Sander as the single piece of evidence to resolve the issue of whether the use of EMTs to address the non-emergent medical needs of the Angola prison population, in 1998, is considered reasonable medical care; (3) in finding that the utilization of EMTs to assess and treat Mr. Humphrey's hemorrhoid complaint in June of 1998 fell below the applicable standard of medical care owed to him; and (4) in finding that the State breached the applicable standard of medical care owed to the plaintiff in June of 1998.

Mr. Humphrey has filed an answer to the appeal, stating that the "evidence regarding the issue of medical causation, damages and/or quantum, it is respectfully represented by the[p]laintiff/[a]ppellee, is

uncontroverted and therefore ripe for decision" by this appellate court "on the record." The plaintiff/appellee asks this court to award damages in his favor.

LAW AND ANALYSIS

Appellate courts have the duty to examine subject matter jurisdiction *sua sponte*, even when the parties do not raise the issue. A partial summary judgment rendered pursuant to LSA-C.C.P. art. 966(E) may be immediately appealed during an ongoing litigation only if it has been properly designated as a final judgment by the trial court, pursuant to LSA-C.C.P. art. 1915(B). Although a trial court may designate a partial summary judgment as final under Article 1915(B), that designation is not determinative of this court's jurisdiction. We must ascertain whether this court has appellate jurisdiction to review the partial judgment appealed from. **Welch v. East Baton Rouge Parish Metropolitan Council**, 2010-1531 (La. App. 1 Cir. 3/25/11), 64 So.3d 244, 247-48 (citing **Motorola, Inc. v. Associated Indemnity Corporation**, 2002-0716 (La. App. 1 Cir. 4/30/03), 867 So.2d 715, 717, and **Van ex rel. White v. Davis**, 2000-0206 (La. App. 1 Cir. 2/16/01), 808 So.2d 478, 480). See also **Shapiro v. L & L Fetter, Inc.**, 2002-0933 (La. App. 1 Cir. 2/14/03), 845 So.2d 406, 409; **Doyle v. Mitsubishi Motor Sales of America, Inc.**, 99-0459 (La. App. 1 Cir. 3/31/00), 764 So.2d 1041, 1047, writ denied, 2000-1265 (La. 6/16/00), 765 So.2d 338 (holding that an appellate court is not bound by the trial judge's certification of the partial adjudication as final for the purpose of an immediate appeal).

A trial court should give explicit reasons on the record as to why there is no just reason for delay; mere conclusory statements do not suffice. See **Shapiro v. L & L Fetter, Inc.**, 845 So.2d at 410. Where explicit reasons

have not been provided by the trial court, as in the instant case,[3] an appellate court conducts a *de novo* review of the record for the purpose of determining the propriety of the designation as final for purposes of appeal. In conducting its review, the appellate court utilizes the same criteria used by a trial court, in determining the propriety of certification of a partial judgment as final. If the record does not disclose factors upon which a trial court could base a finding that there is "no just reason for delay," the appeal should be dismissed. See **Shapiro v. L & L Fetter, Inc.**, 845 So.2d at 410-11.

Factors to be considered include but are not limited to: (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in setoff against the judgment sought to be made final; and (5) miscellaneous facts such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense and the like. See **Shapiro v. L & L Fetter, Inc.**, 845 So.2d at 410 n.3 (citing **Van ex rel. White v. Davis**, 808 So.2d 483-84; **Berman v. De Chazel**, 98-81 (La. App. 5 Cir. 5/27/98), 717 So.2d 658, 660-61; **Banks v. State Farm Insurance Company**, 30,868 (La. App. 2 Cir. 3/5/98), 708 So.2d 523, 525).

Under Louisiana law, a final judgment is one that determines the merits of a controversy, in whole or in part, as stated in LSA-C.C.P. art. 1841. Although Article 1915 dispenses with finality, in the sense of

[3] On the issue of the finality of the judgment for purposes of appeal, the trial court, in this case, stated, at the hearing on the motion for summary judgment, only that "there is no reason for delay and this is a final judgment."

completion of the litigation, the judgment rendered must be sufficiently final so that it disposes of the claim or dispute, in regard to which the judgment is entered. Furthermore, in determining whether a partial judgment is a final one for the purpose of an immediate appeal, a court must always keep in mind the historic policies against piecemeal appeals. **Doyle v. Mitsubishi Motor Sales of America, Inc.**, 764 So.2d at 1047.

The partial summary judgment entered in this case is not a final judgment, because it does not determine the merits of the negligence claim in full, nor does it fully dispose of the negligence issues presented to the trial judge. In contrast, a judgment which determines liability, even though damages are not decided, is a final judgment because it resolves the liability issue. However, the judgment appealed from did not resolve the liability issue, which still must be determined at a trial on the merits, in light of the disputed issue of causation. Allowing an immediate appeal from a judgment finding a plaintiff has met some, but not all, of the elements of a negligence liability claim only serves to encourage piecemeal adjudication and appeals, causing delay and judicial inefficiency. See **Doyle v. Mitsubishi Motor Sales of America, Inc.**, 764 So.2d at 1047.

In the instant case, the trial court ruled that there was no genuine issue of material fact as to the standard of care owed to the plaintiff by the State and that the conduct of the State "fell below the applicable standard[;]" i.e., the trial court held that the State owed the plaintiff "reasonable medical care and failed to provide it." The trial court further stated, "I find that the State

[breached] the applicable standard of care."[4] The trial court explained that the partial summary judgment was granted "only as to the issue of the standard of care and that the conduct of the defendant failed to provide the standard of care," and further stated that the issues of "causation and damages" were left to be tried.

Because a defendant is liable for the damages of a plaintiff only if his substandard conduct was a cause-in-fact of the plaintiff's injuries (see **Perkins v. Entergy Corporation**, 2000-1372 (La. 3/23/01), 782 So.2d 606, 611), liability has not been definitively established in this case. The trial court ruled on only a portion of the elements of liability (i.e., the duty and breach elements) and did not determine that the State was a cause-in-fact of the plaintiff's injuries, and therefore liable to the plaintiff for his damages.

Thus, while the record supports the trial court's findings, we conclude the trial judge erred in certifying the judgment as final for the purpose of an immediate appeal under Article 1915. Because the partial judgment is not a final one, it may be revised at any time prior to rendition of the judgment adjudicating plaintiffs' negligence claim, as stated in LSA-C.C.P. art. 1915 (B)(2). Both sides may therefore present evidence on the issue of the State's fault, and any challenges to the correctness of the trial judge's liability

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[4] The standard of care imposed upon the Department of Public Safety and Corrections in providing for the medical needs of inmates is that those services be reasonable. **Robinson v. Stalder**, 98-0558 (La. App. 1 Cir. 4/1/99), 734 So.2d 810, 812; **Elsey v. Sheriff of the Parish of East Baton Rouge**, 435 So.2d 1104, 1106 (La. App. 1 Cir.), writ denied, 440 So.2d 762 (La. 1983); **Jacoby v. State**, 434 So.2d 570, 573 (La. App. 1 Cir.), writ denied, 441 So.2d 771 (La. 1983); **Brown v. State**, 392 So.2d 113, 115 (La. App. 1 Cir. 1980); **Moreau v. State Department of Corrections**, 333 So.2d 281, 284 (La. App. 1 Cir. 1976); **Dancer v. Department of Corrections**, 282 So.2d 730, 733 (La. App. 1 Cir. 1973). The statutory authority imposing the duty is found in LSA-R.S. 15:760, which provides that "[w]here large numbers of prisoners are confined the proper authorities in charge shall provide hospital quarters with necessary arrangement, conveniences, attendants, etc." See **Elsey v. Sheriff of the Parish of East Baton Rouge,** 435 So.2d at 1106. The duty to provide reasonable medical care for prisoners does not require the maintenance of a full hospital at the site of each prison in order to protect an inmate against every medical risk, but does encompass the risk that an inmate will become sick or be injured and require life-saving medical attention. **Elsey v. Sheriff of the Parish of East Baton Rouge,** 435 So.2d at 1106. The issue to be determined, in such a case, is whether the risk that the plaintiff/inmate would suffer harm because of the defendant's inadequate medical care was within the scope of the duty. See **Moreau v. State Department of Corrections**, 333 So.2d at 284.

determinations may be addressed by this court, following the adjudication, in a future appeal. See **Doyle v. Mitsubishi Motor Sales of America, Inc.**, 764 So.2d at 1047-48.

Accordingly, we find the judgment appealed was a non-appealable interlocutory judgment, dismiss this appeal *ex proprio motu*, and remand to the trial court for further proceedings consistent with the foregoing.[5]

CONCLUSION

For the reasons assigned herein, we dismiss this appeal *ex proprio motu* and remand to the trial court for further proceedings consistent with the foregoing. All costs of this appeal, in the amount of $3,943.00, are to be borne by the State of Louisiana, Department of Public Safety and Corrections, Louisiana State Penitentiary.

APPEAL DISMISSED; REMANDED.

[5] Having ruled on this basis, we pretermit ruling on the assignments of error raised by the appellant and the issues raised in the plaintiff/appellee's answer to this appeal.