

Judgment rendered December 19, 2001.  
Application for rehearing may be filed  
within the delay allowed by Art. 2166,  
La. C.C.P.

No. 35,492-CW

COURT OF APPEAL  
SECOND CIRCUIT  
STATE OF LOUISIANA

\* \* \* \* \*

MARYLIN R. DUMAS, LEROY DUMAS,  
RUSSELL DUMAS & GLORIA DUMAS

Plaintiffs-Respondents

Versus

STATE OF LOUISIANA, THROUGH THE  
DEPARTMENT OF CULTURE, RECREATION &  
TOURISM and THE DEPARTMENT OF  
TRANSPORTATION & DEVELOPMENT

Defendants-Applicants

\* \* \* \* \*

On Application for Writs from the  
Fourth Judicial District Court for the  
Parish of Morehouse, Louisiana  
Trial Court No. 97-257

Honorable Sharon Marchman, Judge

\* \* \* \* \*

RICHARD A. BAILLY  
VICTORIA REED MURRY  
Assistant Attorney Generals

Counsel for  
Applicants

DIMOS, BROWN, ERSKINE & BURKETT  
By: Donald R. Brown

Counsel for  
Respondents

WILLIAM F. PAGE, JR.

\* \* \* \* \*

Before NORRIS, BROWN and CARAWAY, JJ.

CARAWAY, J., dissents with reasons to follow.

**BROWN, J.,**

This is a wrongful death case against the State of Louisiana as a result of an accident allegedly due to a defective road. The trial court struck the state's amended answer asserting medical malpractice as the cause of the death and seeking an apportionment of fault and damages against the medical provider. We granted the state's writ application to review the effect of the 1996 amendments concerning comparative fault on the jurisprudential rule that the original tortfeasor is liable for subsequent malpractice. We now affirm the trial court's ruling.

**Facts**

George Dumas, age 61, was injured on April 22, 1996, on a camping trip at Chemin-a-Haut State Park near Bastrop, Louisiana. He was thrown from a bicycle after allegedly hitting a pothole on a park road. Dumas, who received a large laceration to his right forehead and scalp, was taken to Morehouse General Hospital where he received medical treatment for his wounds. Dumas died six to seven hours later.

Dumas's wife and three adult children filed a petition for damages against the State of Louisiana through the Department of Culture, Recreation & Tourism and the Department of Transportation and Development alleging that: the state maintained and controlled the park roads; the pothole created an unreasonable risk of injury; the state had actual and constructive knowledge of the pothole; and, the state failed to repair or warn of the defect. The state answered the petition denying responsibility and alleged the fault of decedent, George Dumas.

The particular issue now before the court arose when the state filed an amended answer to its petition alleging that the cause of Dumas's death was

in fact medical malpractice on the part of the anesthesiologist at Morehouse General. Dumas allegedly died after he aspirated the contents of his stomach following a routine surgical procedure to repair the scalp laceration. The state “affirmatively plead[ed]” the “fault of third parties in the medical treatment of George Dumas . . . as the cause of the death . . . for which the state is not jointly liable.” It further asserted as an affirmative defense “the applicability of Louisiana’s law of comparative fault, particularly the law of joint and divisible liability as enunciated in Louisiana Civil Code Articles 2323 A & B, and 2324 B.”

Plaintiffs responded to the amended answer by filing a motion to strike on grounds that the allegations added therein are immaterial, irrelevant and insufficient. Specifically, plaintiffs argued that the state was attempting to introduce factual allegations and evidence of subsequent medical malpractice in violation of the jurisprudential rules that, as a matter of policy, the original tortfeasor is fully liable for subsequent malpractice as set forth in *Weber v. Charity Hospital of Louisiana at New Orleans*, 475 So.2d 1047 (La. 1985); and *Lambert v. U.S.F. & G. Co.*, 629 So.2d 328 (La. 1993).

The trial court granted the motion to strike stating that the amendments to Civil Code Articles 2323 and 2324 did not legislatively overrule *Weber* and its progeny. We granted the state’s writ application to review the matter.

### **Discussion**

In 1977 the legislature amended article 2323 to impose a comparative fault regime. Thereafter in 1985, the supreme court decided *Weber, supra*. The jurisprudential rule handed down in *Weber* is clear. When a tort victim

takes reasonable steps to obtain medical treatment, the original tortfeasor may be liable for subsequent medical malpractice.

In *Weber*, an automobile accident victim sustained further injury when she contracted hepatitis as a result of a tainted blood transfusion during surgical treatment for her injuries. The victim sued the driver of the automobile for the damages caused by the blood transfusion as well as the accident. The supreme court stated that an original tortfeasor may be held liable not only for the injuries he directly causes, but also for the tort victim's additional suffering caused by inappropriate medical treatment. Under a duty risk analysis, "[t]he original tortfeasor's responsibility may extend to the risk involved in the human fallibility of physicians, surgeons, nurses, and hospital staff which is inherent to the necessity of seeking medical treatment." *Id.* at 1050.

The court went on to hold that the driver's liability was solidary with the hospital and the company that supplied the tainted blood, even though the liability of the hospital and blood supply company was imposed only for those damages resulting from the transfusion and not the automobile accident. It is the coextensiveness of the obligations for the same debt, and not the source of liability, which determines the solidarity of the obligation. *Weber, supra* at 1051, citing *Narcise v. Illinois Central Gulf Railroad*, 427 So.2d 1192 (La. 1983).

After the 1987 statutory amendment to Civil Code Article 2324(B), limiting solidary liability to a 50% cap, the supreme court decided *Lambert, supra*. The court in *Lambert* held that the 1987 statutory amendment to Civil Code Article 2324 reducing solidarity among solidary obligors only to the

extent necessary for the injured party to recover 50% of his recoverable damages *did not* change the rule of *Weber* that the original tortfeasor may be liable not only for injuries he directly causes, but for additional injuries due to bad medical treatment. The court rejected the original tortfeasor's argument that the 1987 amendment changed his liability such that he was solidarily liable only to the extent necessary to insure that the victim received 50% of his recoverable damages, and therefore, it was necessary for the trial court to apportion fault among the solidary tortfeasors. The court stated that the original tortfeasor was liable for 100% of the victim's damages because he was the legal cause of 100% of the victim's harm and the amendment to article 2324 did not change this result. The imposition of solidary liability between the original tortfeasor and the subsequently treating health care providers permits the original tortfeasor to seek contribution from the health care providers. In that action, the apportionment of fault is necessary.

*Lambert, supra* at 329.

La. Civil Code Articles 2323(A)&(B) and 2324(B) were amended in 1996, effective April 16, 1996, just six days prior to the accident at issue in this case. The state alleges that the amendments overrule the holdings of *Weber* and *Lambert*.

#### Art. 2323. Comparative Fault

(A) In any action for damages where a person suffers injury, death, or loss, the degree or percentage of fault of all persons causing or contributing to the injury, death, or loss shall be determined, regardless of whether the person is a party to the action or a non-party, and regardless of the person's insolvency, ability to pay, immunity by statute, including by not limited to the provisions of R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable. If a person suffers injury, death, or loss as a result partly of his own negligence and partly as a result of the fault of another person or persons, the amount of damages recoverable shall be reduced in proportion to the

degree or percentage of negligence attributable to the person suffering the injury, death, or loss.

(B) The provisions of Paragraph A *shall apply* to any claim for recovery of damages for injury, death, or loss asserted under any law or legal doctrine or theory of liability, *regardless of the basis of liability*. (Emphasis added).

Art. 2324. Liability as solidary or joint and divisible obligation

(B) If liability is not solidary pursuant to Paragraph A (intentional or willful act), then liability for damages caused by two or more persons shall be joint and divisible obligations. A joint tortfeasor shall not be liable for more than his degree of fault and shall not be solidarily liable with any other person for damages attributable to the fault of such other person, including the person suffering injury, death, or loss, regardless of such other person's insolvency, ability to pay, degree of fault, immunity by statute or otherwise, including but not limited to immunity provided in R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable.

The state contends that the amendments to these two articles have eliminated solidary liability in negligence cases (but not intentional tort cases) and done away with the action for contribution, even though La. Civil Code Articles 1804 and 1805 provide for contribution among solidary obligations arising from offenses and quasi-offenses by making the solidary co-obligors a third party defendants. Indeed, the language of article 2323 appears to require a determination of the percentage of fault of all joint tortfeasors in any action for damages and article 2324 states that the liability of joint tortfeasors shall not be solidary.<sup>1</sup>

---

<sup>1</sup>The state cites *Steptoe v. Lallie Kemp Hospital*, 93-1359 (La. 03/21/94), 634 So.2d 331, for the proposition that it should be allowed to present evidence of the damages caused by medical malpractice. In that case, Justice Watson, in *dicta*, stated that the medical malpractice defendants could have been entitled to a proportionate reduction of the damages rather than being held solidarily liable had they pleaded and proved that the causative fault for the damages was the original automobile accident defendants. These facts are, of course, precisely the reverse of the instant situation. The duty-risk analysis in that case is not analogous to the instant case in which the original tortfeasor is claiming that the damage was caused by the subsequent medical malpractice.

*Weber* was decided after the enactment of comparative fault. *Lambert* was decided after the 1987 amendments reducing solidary liability.

We find that the 1996 amendments to articles 2323 and 2324 do not change the rule of *Weber* and *Lambert*. When the duty breached by a tortfeasor includes the risk that a plaintiff's injuries might be worsened by subsequent medical treatment, the tortfeasor is liable for 100% of the damages. This rule is based upon legal cause. When a tort victim takes reasonable steps to secure medical treatment, the original tortfeasor may also be liable for subsequent medical malpractice. That a tort victim will seek medical care when injured and thus, be subject to further risk and damages is foreseeable and easily associated with the original injury. This is not a

---

The state also cites *Wallmuth v. Rapides Parish School Board*, 01-0042 (La. App. 3<sup>rd</sup> Cir. 05/16/01), \_\_\_ So.2d \_\_\_, 2001 WL 515329, writ granted, 01-1779, 01-1780 (La. 10/12/01), 2001 WL 1240375, for the proposition that *Weber* and *Lambert's* holding that the original tortfeasor is liable for 100% of the recoverable damages because he was the legal cause of 100% of the injuries, is no longer the law under Civil Code Article 2324. The court stated that the nonintentional tortfeasor is liable only for his own share of the fault, and accordingly reduced the defendant's liability to 70% of the plaintiff's damages. The state also cites language from two other cases, *Keith v. U.S. F.&G. Co.*, 96-2075 (La. 05/09/97), 694 So.2d 180, wherein the court stated that the 1996 amendments to articles 2323 and 2324 were procedural and that it is "the task of the factfinder to allocate shares of negligence," and *Hall v. Zen-Noh Grain Corporation*, 00-1376 (La. App. 5<sup>th</sup> Cir. 12/13/00), 777 So.2d 523, wherein the Fifth Circuit stated that the 1996 amendment to article 2324 eliminated solidary liability for intentional and willful acts.

divisible obligation.<sup>2</sup> There is no additional percentage of fault by the medical care provider to quantify.

### Conclusion

For these reasons, we affirm the ruling of the trial court granting the motion to strike filed by plaintiffs. Our ruling does not prohibit the state from filing a third-party demand for contribution from the appropriate parties as authorized by Louisiana Civil Code Articles 1804 and 1805.

**AFFIRMED.**

---

<sup>2</sup>Recently, the First Circuit considered this question in *Knabel ex rel. Knabel v. Lewis*, 00-1464 (La. App. 1<sup>st</sup> Cir. 09/28/01), \_\_\_ So.2d \_\_\_, 2001 WL 1144126 (not yet released for publication). Ms. Knabel was injured when Lewis backed his 18-wheeler truck into a car in which she was a passenger. At trial, Lewis's insurer, Canal Insurance Co. alleged that Ms. Knabel's health care providers were negligent when giving Ms. Knabel injections in her hip and that their negligence increased Ms. Knabel's damages. Canal Insurance objected to a charge instructing the jury that "defendants are liable for injuries they directly caused to the plaintiff, but are also liable for the plaintiff's additional damages caused by inappropriate treatment by a doctor, nurse or hospital staff member who treats injuries directly caused by the defendants."

The *Knabel* court distinguished the actions of "joint tortfeasors," which requires the quantification of each tortfeasor's fault, from the facts in *Knabel*. Citing *Weber, supra*, the First Circuit held that Canal Insurance was 100% liable for Ms. Knabel's injuries because the duty of an original tortfeasor not to injure a victim includes the risk that inappropriate treatment by medical professionals may result in worsening of the injury caused by the tortfeasor. There is no additional percentage of fault by another to quantify since the original tortfeasor is 100% at fault. The court concluded that it was not error to charge the jury concerning Canal Insurance's liability for any negligent acts by Ms. Knabel's health care providers in their treatment of Ms. Knabel for injuries she sustained as a result of this accident.