SUPREME COURT

STATE OF LOUISIANA

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NO. 01-C-1519

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LOUIS COLEMAN, INDIVIDUALLY AND AS
FATHER OF LOUIS FRANK COLEMAN

*Plaintiff/Respondent*

VERSUS

DR. RICHARD DENO, DR. IVAN SHERMAN
AND JOELLEN SMITH HOSPITAL

*Defendants/Applicants*

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ON WRIT OF REVIEW TO THE COURT OF APPEAL,
FOR THE FOURTH CIRCUIT STATE OF LOUISIANA
NUMBER 99-CA-2998

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# AMICUS BRIEF SUBMITTED BY THE AMERICAN MEDICAL ASSOCIATION, THE LOUISIANA STATE MEDICAL SOCIETY AND THE ACADIA, CADDO, CALCASIEU, EAST BATON ROUGE, IBERVILLE, JEFFERSON, LAFAYETTE, ORLEANS, RAPIDES, ST. BERNARD AND ST. MARTIN PARISH MEDICAL SOCIETIES

ROBERT G. PUGH, JR.
LA. Bar Roll No. 10896
Of the Law Firm of
PUGH, PUGH & PUGH, L.L.P.
Suite 2100, 333 Texas Street
Shreveport, LA 71101-5302
(318) 227-2270

AMY WATERS PHILLIPS
LA. Bar Roll No. 21812
6767 Perkins Road
Baton Rouge, Louisiana 70808
(225) 763-8500

ATTORNEYS FOR THE *AMICUS CURIAE*

## INTEREST OF AMICI

The American Medical Association [“AMA”], an Illinois non-profit corporation, is an association of approximately 300,000 physicians who practice throughout the United states. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health, and these still remain its core purposes. Its members practice in all fields of medical specialization, and it is the largest medical society in the United States.

The Louisiana State Medical Society is an incorporated nonprofit professional medical association with a membership comprising more than 6,500 individual physicians and surgeons licensed to practice medicine in the State of Louisiana. The Society and its member physicians were instrumental in the enactment of the Louisiana Medical Malpractice Act [the “Malpractice Act”] and are intimately familiar with the conditions justifying its enactment, the purpose for which the Malpractice Act was enacted, and the effect the various provisions of the Malpractice Act have had on the availability and cost of professional liability insurance for physicians in Louisiana, and the availability and cost of medical services in this State.

The various Parish Medical Societies appearing as amici are composed of over 4,000 members and are incorporated nonprofit professional association whose members practice medicine in their respective parishes.

## STATEMENT OF THE CASE

This brief adopts the statement of the case in the brief of the applicants.

## ISSUES

The applications for writ of certiorari filed by defendant, Dr. Richard Deno, and statutory intervenor, the Louisiana Patients’ Compensation Fund, list a myriad of errors in the majority opinion rendered by the Fourth Circuit Court of Appeal.. Coleman v. Deno, 99-2998 (La.App. 4 Cir. 4/25/01), 787 So.2d 446. This brief concentrates on the following three issues:

(1) Whether the Fourth Circuit Court of Appeal improperly created a cause of action for the intentional tort of patient dumping;

(2) Whether, if the tort of patient dumping exists, the Fourth Circuit erred by calling such a tort intentional and excluding the tort from the provisions of the Malpractice Act;

(3) Whether this case is an improper and inappropriate vehicle for creating the tort of patient dumping.

## ARGUMENT

### I. THE FOURTH CIRCUIT COURT OF APPEALS IMPROPERLY CREATED A CAUSE OF ACTION FOR THE INTENTIONAL TORT OF PATIENT DUMPING.

In two brief sentences the Fourth Circuit has created a new species of intentional tort, a claim against a physician for patient dumping. 787 So.2d at 463. The Court cited no precedents from Louisiana, the federal courts, or other state jurisdictions for such a radically new cause of action. Moreover, the Court set forth no elements for such a cause of action and no defenses against such a cause of action.

Creation of such a cause of action is particularly improper because both the federal and state governmental institutions charged with making laws and creating causes of action (the United States Congress and the Louisiana Legislature) have specifically determined not to allow a private cause of action against physicians for improper transfer of patients.

The federal statute, EMTALA (formerly COBRA), does provide for civil penalties against a physician who negligently transfers a patient or who does not meet the physician's on-call responsibilities. 42 U.S.C. § 1395dd(d)(1)(B) & (C). A hospital which violates the Act is subject to civil penalties, as well as a civil action by an individual who suffers personal harm as a result of the hospital's violation of the statute. 42 U.S.C. § 1395dd(d)(1)(A) & (2)(A).

Numerous federal circuit court decisions have considered this issue and held that this statute does not create a private cause of action against physicians. See, e.g., Eberhardt v. City of Los Angeles, 62 F.3d 1253, 1255-57 (9th Cir. 1995); King v. Ahrens, 16 F.3d 265, 270-71 (8th Cir. 1994); Delaney v. Cade, 986 F.2d 387, 393-94 (10th Cir. 1993); Baber v. Hospital Corp. of America, 977 F.2d

872, 876-78 (4th Cir. 1992); Gatewood v. Washington Health Care Corp., 933 F.2d 1037, 1040 n. 1 (D.C. Cir. 1991). Federal and state courts in Louisiana have reached the same conclusion. See, e.g., Patterson v. Hamrick, 889 F. Supp. 913, 915 (E.D. La. 1995); McDougal v.Branch, 95-1377 (La.App. 1 Cir. 4/4/96), 672 So.2d 398, 400 n. 3, writ denied, 96-1129 (La. 6/7/96, 674 So.2d 973).[1]

In Baber the Fourth Circuit reviewed the legislative history of the statute at length and concluded that Congress intentionally limited patients to suits against hospitals. The Court rejected the plaintiff's argument that a private cause of action against physicians would strengthen enforcement of EMTALA, commenting "While this may be true, it is not our role to rewrite legislation passed by Congress." 977 F.2d at 878. Similarly, in King the Eighth Circuit stated:

> A cause of action may be implied in a statute if Congress intended to create a private remedy but did not expressly do so. In this instance, however, Congress expressly created a private remedy which by its plain language is limited to a cause of action against the hospital. The statute itself gives no indication that Congress intended to create any remedy not expressly stated therein.

16 F.3d at 271.

The parallel Louisiana statutory provisions are found in La. R.S. 40:2113.4-6, which require that emergency services be available to all persons regardless of inability to pay or coverage by private, Medicare, Medicaid, or other insurance. "Emergency services" are defined as services "available in the emergency room and surgical units in order to sustain the persons' [sic] life and prevent disablement until the person is in condition to be able to travel to another appropriate facility without undue risk of serious harm to the person." La. R.S.

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[1] This Court noted in Spradlin v. Acadia-St. Landry Medical Foundation, 98-1977 (La. 2/29/00), 758 So.2d 116, 119, that Congress "created a private cause of action against hospitals in EMTALA." Id. at 119 (emphasis supplied).

40:2113.4.

Like Congress, the Louisiana Legislature chose not to create a private cause of action against physicians under this statute. As this Court concluded in Spradlin v. Acadia-St. Landry Medical Foundation, 98-1977 (La. 2/29/00), 758 So.2d 116, "the Louisiana 'anti-dumping' statute contains no express private cause of action." Id. at 121. Dissenting in the instant case, Judge Plotkin stated:

> [T]he very wording of Louisiana's Anti-Patient Dumping Statute indicates that it was never intended to be applied to physicians.
>
> Moreover, my research indicates that no Louisiana court has ever applied Louisiana's Anti-Patient Dumping Statute to a physician."
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> * * * *
>
> In fact, none of the cases cited by the majority in which Louisiana courts considered the application of the Louisiana Anti-Patient Dumping Statute can reasonably be interpreted to allow a cause of action under LSA-R.S. 40:2113.4through 40:2113.6 against an individual physician.

787 S.2d at 491 (Plotkin, J., dissenting).

In its majority opinion the Fourth Circuit admitted that neither EMTALA nor the Louisiana "anti-dumping" statute contains an express private right of action against physicians. 787 So.2d at 461, 462. Nevertheless, without citation of applicable precedent or legislative history, the Fourth Circuit has created such a cause of action out of whole cloth, providing as its sole justification: "We find no express state law that excludes recovery under La. C.C. art. 2315, general tort law, or La. R.S. 40:2113.4 - 40:2113.6 against physicians for the intentional tort of patient dumping." 787 So.2d at 463. In other words, the Court found that a cause of action exists because a cause of action has not been expressly prohibited by statute.

Such reasoning is fallacious for at least two independent reasons. First, causes of action must be created pursuant to a constitutional provision or statute.[2]

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[2] As Judge Plotkin observed in his dissent:

> The only real question in this case–as in any case–is whether the statutory scheme adopted by the Louisiana legislature, taken as a whole, allows recovery under the particular set of facts. A finding that no express state law excludes recovery under particular provisions is disingenuous because it ignores the

The Louisiana Civil Code begins by stating: "The sources of law are legislation and custom." La. Civil Code art. 1. In this instance, there was no legislation. A new cause of action for "patient dumping" cannot be justified by custom, as "[c]ustom results from practice repeated for a long time and generally accepted as having acquired the force of law." La. Civil Code art. 3.

Second, both Congress and the Louisiana Legislature have addressed the problem of "patient dumping" by enacting very specific and limited statutes, with precise and specific remedies. Neither legislative body chose to create a private cause of action against physicians. For an appellate court to do so is improper and unjustified. "It is axiomatic that in Louisiana, courts must begin every legal analysis by examining primary sources of law: the state's Constitution, codes, and statutes." Prytania Park Hotel v. General Star Indemnity Co., 179 F.3d 169, 175 (5th Cir. 1999). The Prytania decision calls jurisprudence, even jurisprudence constante, only "a secondary law source in Louisiana." Id. In this case, there is not even any jurisprudence supporting creation of a private right of action for patient dumping.

There is no justification for creating such an intentional tort for patient dumping. If a physician makes an improper decision to transfer an unstable patient to another hospital, then the plaintiff has a cause of action--for medical malpractice. Such a decision is reviewable under the same mechanism (a medical review panel action followed by a lawsuit for damages) as is involved if a physician makes an improper decision to take a patient to surgery, to transfer a patient from the Intensive Care Unit to a regular room, to transfer a patient to a nursing home or rehabilitation

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pertinent question.

787 So.2d at 490 (Plotkin, J., dissenting)..

facility, or to discharge a patient home who needs a longer hospital stay.

An intentional tort for patient dumping would have a dramatic chilling effect on the practice of medicine in this state. Any physician electing to transfer a patient to another hospital or to discharge a patient from the emergency room following evaluation would be at risk for an intentional tort action, with unlimited liability and damages in excess of current individual coverage levels.[3] If this decision is upheld, it will be more difficult for physicians to practice medicine in the State of Louisiana, to purchase adequate insurance coverage, and to provide reasonably priced health care to the citizens of the State of Louisiana. Such a decision would provide a powerful incentive for physicians to retain emergency patients in rural or small hospitals with limited facilities rather than transferring them to tertiary care centers where they have access to better care from more specialists with additional facilities at all hours of the day and night.[4] Physicians may fear that medically indicated transfers could later be challenged as improperly motivated by the patient's status. Thus, this new cause of action would interfere with the physician's all important clinical judgment in weighing the factors necessary to retain, release, or transfer a patient who may fall within one of the categories of a potential claimant.

As Judge Plotkin notes in his dissent, a logical reason why the "patient dumping" statutes do not provide for a private cause of action against the physician involves the absence of financial incentive for the physician to transfer:

> [I]ndividual physicians working in a hospital have nothing to lose by providing medical treatment to a patient who lacks the financial resources to pay for treatment. The physician is paid regardless of whether the patient pays for treatment; it is the hospital that has incentive to refuse treatment to patients lacking insurance, not the individual physician.

787 So.2d at 491 (Plotkin, J., dissenting). However, creation of such an intentional

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[3] Professor William E . Crawford notes in his treatise on Tort Law that liability policies have exclusionary clauses for liability for an intentional harm. 12 La. Civil Law Treatise Tort Law § 12.5 at 178 (2000).

[4] For an example of the problems which can result from a negligent failure to transfer, see Gladney v. Sneed, 32,107 (La.App. 2 Cir. 8/18/99), 742 So.2d 642.

tort for patient dumping creates an incredibly strong incentive for physicians not to transfer a patient even if the patient would medically benefit from transfer to a facility better equipped to handle the medical problems involved. After all, what physician would want to risk the specter of financial ruin and personal bankruptcy because of a $4,200,000 personal judgment?

## II. IF THE TORT OF PATIENT DUMPING EXISTS, THE FOURTH CIRCUIT ERRED BY DETERMINING THAT SUCH A TORT IS "INTENTIONAL" AND EXCLUDING THE TORT FROM THE PROVISIONS OF THE MEDICAL MALPRACTICE ACT.

The Fourth Circuit has not only chosen to create a new private cause of action for "patient dumping;" the Court has also determined that this is an intentional tort not subject to the principles of negligence and the provisions of the Malpractice Act, La R.S. 40:1299.41 et seq. [the "Malpractice Act"]. Assuming arguendo that such a cause of action exists (despite the complete absence of legislative and jurisprudential authority), clearly the action would fall within the ambit of the Malpractice Act.

The Fourth Circuit cited no precedent concerning why a "patient dumping" allegation should be considered an intentional tort. The majority opinion did cite one case for the proposition that "[i]ntentional tort allegations constitute causes of action not governed by the Medical Malpractice Act." 787 So.2d at 462, citing Richardson v. Advanced Cardiovascular Systems, Inc., 865 F. Supp. 1210 (E.D. La. 1994). A close examination of that case shows that there the Court concluded that the "plaintiffs have attempted to escape the clear dictates of the Medical Malpractice Act by masking their allegations under the guise of an intentional tort. The Court finds little difficulty in piercing the veil and refusing to be swayed by semantic manipulations. 865 F. Supp. at 1218. The Court noted that "outrageous conduct" is required for an intentional tort. Id. As discussed in Part III of this brief, no such "outrageous conduct" has occurred here; instead, Dr. Deno used his best judgment in arriving at a decision that Mr. Coleman's arm would be better cared for at a tertiary hospital.

"In general, any conduct by a health care provider complained of by a

patient is properly within the scope of the Medical Malpractice At if it can reasonably be said that it comes within the definitions therein, even though there are alternative theories of liability. Bolden v. Dunaway, 97 1425 (La.App. 1 Cir. 12/28/98), 727 So.2d 597, 600; accord, Dominick v. Rehabilitation Hospital of New Orleans, 97-2310 (La.App. 4 Cir. 4/15/98); 714 So.2d 739, 740; Sonnier v. Opelousas General Hospital, 95-1560 (La.App. 3 Cir. 5/8/96); 688 So.2d 1040, 1042. The Malpractice Act defines "malpractice"[5] as follows:

> "Malpractice" means any unintentional tort or any breach of contract based on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient, including failure to render services timely and the handling of a patient, including loading and unloading of a patient, and also includes all legal responsibility of a health care provider arising from defects in blood, tissue, transplants, drugs and medicines, or from defects in or failure of prosthetic devices, implanted in or used on or in the person of a patient.

La. R.S. 40:1299.41(8). A "tort" is defined as "any breach of duty or any negligent

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[5] This Court has described "malpractice" as follows:

> The term "malpractice" has its roots (and relevance) in differentiating professionals from nonprofessionals for purposes of applying certain statutory limitations on tort liability. Health care providers are said to "practice" their profession, and their negligence in providing such professional services is called malpractice.

Spradlin v. Acadia-St. Landry Medical Foundation, 98-1977 (La. 2/29/00), 758 So.2d 116, 119.

act or omission proximately causing injury or damage to another." La. R.S. 40:1299.41(7). "Health care" is defined as "any act, or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement. La. R.S. 40:1299.41(9). Without question, all of these are broad definitions intended to bring an extremely wide ambit of causes of action within the purview of the Medical Malpractice Act.

The Fourth Circuit's decision ignores this Court's recognition that treatment decisions should be judged by negligence concepts rather than as an intentional tort. Several years ago this Court rejected the historical concept that failing to obtain informed consent was a battery, and instead concluded that this should constitute a negligence action based on breach of the doctor's duty to provide the patient with material information concerning the medical procedure. Lugenbuhl v. Dowling, 96-1575 (La. 10/10/97), 701 So.2d 447, 453.

Louisiana courts have repeatedly concluded that cases involving a failure to treat a patient fall within the Malpractice Act. For example, the First Circuit has held that a decision by a physician to eschew performing surgery for financial reasons was not an intentional tort but instead a cause of action for medical malpractice. Bolden v. Dunaway, 97 1425 (La.App. 1 Cir. 12/28/98), 727 So.2d 597, 600. The Court concluded, "Clearly, the legislature did not intend for applicability of the Medical Malpractice Act to depend on the motives of the doctors, be it greed or philanthropy, at the time of the alleged wrongful acts." Id. at 601. The Second Circuit has concluded that withdrawal of life-sustaining care for a patient over the family's objection was not an intentional tort, but instead fell within the Malpractice Act. Causey v. St. Francis Medical Center, 30,732 (La.App. 2 Cir. 8/26/98), 719 So.2d 1072, 1076. The First Circuit has held that releasing a patient from the Emergency Room without following hospital guidelines to consult the pediatric on-call team should be judged by the state version of the Malpractice Act. Armand v. State, Department of Health & Human Resources, 97 2958 (La.App. 1

Cir. 2/23/99), 729 So.2d 1085, 1089-90. The Fourth Circuit determined that a plaintiff's intentional tort claim for false imprisonment filed against a physician and hospital was included under the Malpractice Act as it involved a health care provider's responsibilities in determining to confine a patient for treatment under Louisiana's mental health law. Prisk v. Palazzo, 95-1475 (La.App. 4 Cir. 1/19/96), 668 So.2d 415, 417-18. Judge Plotkin summarizes the uniformity of Louisiana jurisprudence regarding treatment decisions in his dissent: "Neither Mr. Coleman nor the majority has cited any cases in which a failure to treat was found to constitute an intentional tort, nor have I been able to find any." 787 So.2d at 493 (Plotkin, J., dissenting).

The Fourth Circuit's conclusion that a "decision not to treat" is judged as an intentional tort could have implications far beyond the emergency context. Is a decision not to perform surgery because the patient cannot pay an intentional tort? Is a decision not to utilize expensive testing or treatment an intentional tort? Is a decision to terminate the physician/patient relationship for financial reasons an intentional tort? Is a physician's decision in an office setting to recommend that a patient obtain free care at a state clinic rather than expensive care in the physician's office an intentional tort? All of these, like the decision Dr. Deno made in this case, are situations involving (a) treatment related decisions (b) involving assessment of the patient's condition, and (c) requiring expert medical evidence concerning the standard of care. They thus fall within the scope of the Medical Malpractice Act using the test cited by this Court in Sewell v. Doctors Hospital, 600 So.2d 577, 579 n. 3 (La. 1992).

Cases where the courts have concluded that claims are excluded by the Malpractice Act involve torts by health care providers which did not entail the exercise of clinical judgment. These include such matters as (1) strict liability for defective furniture,[6] (2) mishandling of a package,[7] (3) misrepresentation of drug test

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[6] Sewell v. Doctor's Hospital, 600 So.2d 577 (La. 1982).

[7] Hebert v. Federal Express Corp., 98-2684 (La.App. 4 Cir. 5/21/97), 695

results not obtained for treatment purposes,[8] (4) defamation of a non-patient,[9] (5) slip and fall,[10] (6) clerical failures,[11] (7) assault by a patient,[12] and (8) sexual misconduct.[13] These situations are clearly distinguishable from situations in which a physician screens a patient, performs an evaluation, reaches a provisional diagnosis, and concludes that transfer is appropriate. The claim in this case arises directly from treatment of the patient and a judgment decision concerning the appropriate method for securing the best medical care for the patient in an expeditious fashion.

## II. THIS CASE CONSTITUTES AN IMPROPER AND INAPPROPRIATE VEHICLE FOR CREATING THE TORT OF PATIENT DUMPING.

Creating the new intentional tort of patient dumping was improper and

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So.2d 528, writ denied, 97-1662 (La. 10/10/97), 703 So.2d 606.

[8] Price v. Bossier City, 96-2408 (La. 5/20/97), 693 So.2d 1169.

[9] St. Amant v. Mack, 538 So.2d 657 (La.App. 1 Cir. 1989).

[10] Head v. Erath General Hospital, Inc., 458 So.2d 579 (La.App. 3 Cir. 1984), writ denied, 462 So.2d 650 (La. 1988); Stapler v. Alton Ochsner Medical Foundation, 525 So.2d 1182 (La.App. 5 Cir. 1988).

[11] Garnica v. Louisiana State University Medical, 99-0113 (La.App. 4 Cir. 9/8/99), 744 So.2d 156, writ denied, 99-2859 (La. 12/17/99), 751 So.2d 879.

[12] Hutchinson v. Patel, 93-2156 (La. 5/23/94), 637 So.2d 405; Klingman v. Green, 616 So.2d 762 (La.App. 1Cir. 1993).

[13] Jure v. Raviotta, 612 So.2d 225 (La.App. 4 Cir. 1992).

inappropriate in this case for several reasons.

First, no such cause of action was pled. The Fourth Circuit correctly concluded that the original Petition contained no allegations of improper transfer because of absence of funds or insurance. 787 So.2d at 460. After noting that the First Supplemental and Amended Petition for Damages did contain references to violations of COBRA (now EMTALA), the Fourth Circuit readily admitted that such allegations do "not state a cause of action against Dr. Deno for patient dumping under the federal law because EMTALA only applies to hospitals and not physicians." 787 So.2d at 461.[14]

The Fourth Circuit concluded, however, that the allegations set forth a cause of action for patient dumping under Louisiana law. 787 So.2d at 463. The plaintiff cited no Louisiana statute as a basis for such a cause of action, and the paragraphs in the First Supplemental and Amended Petition for Damages referenced by the Fourth Circuit asserted the defendants "were negligent per se" and did not mention any intentional tort.[15] Nowhere in the pleadings or at the trial did the plaintiff ever contend that he had been the victim of an intentional tort. "An issue not raised in pleadings or in a motion for summary judgment in the Court below cannot be raised for the first time on appeal." Nixon v. K&B, Inc., 93-20555 (La.App. 4 Cir. 1/19/95), 649 So.2d 1087, 1089; accord, Segura v. Frank, 630 So.2d 714, 725 (La. 1994); Succession of Hogan, 95-1409 (La.App. 4 Cir. 12/28/95), 666 So.2d 684, 686.

Even if the plaintiff had pled an intentional tort, no such theory was tried or argued before the jury. As the majority opinion admits,

> On the second day of trial Dr. Deno filed peremptory exceptions of no cause of action and/or prescription on plaintiff's COBRA/EMTALA anti-dumping claim and a motion in limine for an order precluding any reference to

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[14] In actuality, this statement constitutes yet another error in the majority opinion. The requirements of EMTALA do apply to physicians; however, EMTALA does not create a private cause of action against physicians for damages. See 42 U.S.C. § 1395dd(d)(1)(B) & (C).

[15] Neither the Petition nor the First Supplemental and Amended Petition for Damages ever invoke the Louisiana anti-dumping statutes, La. R.S. 40:2113.4-6. Like EMTALA, these state statutory provisions do not provide for a private cause of action against physicians for damages.

> COBRA/EMTALA's anti-dumping provision, or race or socioeconomic status. The trial court granted Dr. Deno's exception of no cause of action.

787 So.2d at 456-57. Given that the plaintiff could not argue an anti-dumping claim, there is no way that the jury could have found liability against Dr. Deno for patient dumping. Given that this theory was neither argued nor tried, there does not exist evidence in the record for a finding that Dr. Deno committed this brand-new intentional tort of patient dumping.

Indeed, the review of the evidence by the Fourth Circuit shows that no one could reasonably conclude that patient dumping occurred in this case. The Fourth Circuit summarized the evidence as follows:

> Dr. Deno felt that the patient could receive better treatment at Charity Hospital of New Orleans ("Charity"), which had superior and more immediately available health care services for treatment of plaintiff's left arm while JoEllen Smith Hospital did not have the full laboratory facilities available at Charity. Dr. Deno called the resident in charge of Charity's Accident Room, and the resident accepted plaintiff for immediate admission to the emergency room.
>
> Dr. Deno determined that the plaintiff was stable and could transport himself to Charity. Dr. Deno instructed the plaintiff to go directly to Charity. He was given a copy of his laboratory results and discharged from JoEllen Smith Hospital at about 10:00 p.m.

787 So.2d at 454-55. Thus, the Court found that Dr. Deno (1) determined where the patient could receive "better" treatment based on "superior and more immediately available services" in the middle of the night, (2) ensured that the person in charge of the Emergency Room at the receiving tertiary care facility knew about the patient and his condition and accepted him for transfer, (3) instructed the patient to go to Charity Hospital of New Orleans ["Charity"] "directly," and (4) gave the patient the medical information obtained by Dr. Deno so that such information would be available at the receiving hospital. The Fourth Circuit's summation makes one expect that Dr. Deno would be commended on his decision-making, rather than be forced to pay $4.2 million for such decisions. Even if one concludes that Dr. Deno's reasoning and thought processes were incorrect, what Dr. Deno did was make (a) treatment related decisions (b) involving assessment of the patient's condition, and (c) requiring expert medical evidence concerning the standard of care. Such decisions are appropriately judged pursuant to the standards, procedures, and damage limitations of the Medical Malpractice Act. See Sewell v. Doctors Hospital, 600 So.2d 577, 579 n. 3 (La. 1992).

Although the Fourth Circuit found that Dr. Deno was liable for patient dumping, which the Court termed an intentional tort, the majority decision cited "no record evidence to support this finding, but simply makes a conclusory statement to that effect." 787 So.2d at 489 (Plotkin, J., dissenting). The conclusory statement is as follows: "The 'patient dumping' cause of action refers to an intentional tort where Dr. Deno directed plaintiff's transfer to Charity for lack of finances or insurance although it conflicted with JoEllen Smith Hospital's written policy." 787 So.2d at 463. Such a statement is rife with errors. First, the plaintiff never presented an intentional tort claim. Second, the majority opinion cited no evidence that Dr. Deno made the transfer "for lack of finances or insurance." Indeed, the majority opinion specifically found that: "Dr. Deno felt that the patient could receive better treatment at Charity of New Orleans ("Charity"), which had superior and more immediately available health care services for treatment of plaintiff's left arm while JoEllen Smith Hospital did not have the full laboratory facilities available at Charity." 787 So.2d at 455.[16] Why Dr. Deno would have any personal bias as to which hospital treated Mr. Coleman is never stated; indeed, Dr. Deno actually worked at both Charity and JoEllen Smith Hospitals. 787 So.2d at 489 (Plotkin, J., dissenting). Third, the majority opinion cited no evidence that the decisions made by Dr. Deno conflicted with the written policy. Fourth, the written policy in question was not introduced into evidence at trial and was not adopted until seven months after Mr. Coleman was seen by Dr. Deno.

In upholding the jury's finding of negligence (while determining that the conduct involved actually constituted an intentional tort), the majority opinion cited one area of substandard conduct--Dr. Deno did not "provide immediate antibiotic treatment" for Mr. Coleman. 787 So.2d at 470. The evidence presented showed that Dr. Deno did not

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[16] Judge Plotkin notes: "[N]o one can or does contest Dr. Deno's statement that CHNO was the best facility in the area to treat Mr. Coleman's illness.

prescribe antibiotics because he wanted the physicians at Charity to have the opportunity to get a "clean" blood culture without the results being contaminated by the presence of antibiotics in the blood. Dr. Deno's decision to let antibiotics be prescribed at Charity would allow the physicians caring for the patient to determine the appropriate antibiotic therapy. Dr. Deno had already contacted the chief resident in the Charity Emergency Room about Mr. Coleman. Given that Mr. Coleman could get to Charity in ten minutes, any delay by Dr. Deno in antibiotic treatment was inconsequential. As the majority opinion noted:

> Plaintiff was not septic when he arrived at Charity, and blood cultures initially done at Charity revealed that the plaintiff had no indication of any ongoing sepsis or bacteria in his blood. The physicians also agreed that if antibiotics were begun at JoEllen Smith Hospital, the drugs would have destroyed or tainted the blood cultures done at Charity.

787 So.2d at 446. Evidence also showed that the plaintiff lost his arm because of a compartment syndrome, and the treating surgeon at Charity testified that the compartment syndrome did not begun until after Mr. Coleman had been admitted to Charity. 787 So.2d at 470. Once again, even if Dr. Deno's decision-making was incorrect, what Dr. Deno did was make (a) treatment related decisions (b) involving assessment of the patient's condition, and (c) requiring expert medical evidence concerning the standard of care, all of which are matters to be reviewed under the auspices of the Medical Malpractice Act, not as an intentional tort. See Sewell v. Doctors Hospital, 600 So.2d 577, 579 n. 3 (La. 1992).

## CONCLUSION

There exists no statutory or jurisprudential basis for creation of a cause of action for the intentional tort of patient dumping. Even if such a cause of action should exist, it should exist within the confines of professional negligence and the Medical Malpractice Act rather than as an intentional tort. Creation of such a tort under the facts as presented in this case is manifestly inappropriate.

All of the above and foregoing is thus respectfully submitted.

ROBERT G. PUGH, JR.
LA. Bar Roll No. 10896
Of the Law Firm of
PUGH, PUGH & PUGH, L.L.P.
Suite 2100, 333 Texas Street
Shreveport, LA 71101-5302
(318) 227-2270

AMY WATERS PHILLIPS
LA. Bar Roll No. 21812
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