NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2004 CA 2761

DR. WILLIE JOHN JOSEPH, III, DR. MICHELLE T. BRUMFIELD AND ST. MARY ANESTHESIA ASSOCIATES, INC.

VERSUS

HOSPITAL SERVICE DISTRICT NO. 2 OF THE PARISH OF ST. MARY, STATE OF LOUISIANA, OUR LADY OF THE LAKE HOSPITAL, INC., MELVIN BOURGEOIS, M.D., JAMES BROUSSARD, JOHN GUARISCO, SHARON HOWELL, Y. GEORGE RAMIREZ, CLIFFORD M. BROUSSARD, NATIONAL UNION FIRE INSURANCE COMPANY OF LOUISIANA, AND LOUISIANA HOSPITAL ASSOCIATION MALPRACTICE AND GENERAL LIABILITY TRUST

Judgment rendered OCT 25 2006

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Appealed from the
16th Judicial District Court
in and for the Parish of St. Mary, Louisiana
Trial Court No. 111,233
Honorable Paul J. deMahy, Judge

Kuntz, J. concurs
Guidry, J. concurs

* * * * * *

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* * * * * *

BEFORE: KUHN, GUIDRY, AND PETTIGREW, JJ.

PETTIGREW, J.

In this case, National Union Fire Insurance Company of Louisiana ("National Union") appeals from an adverse summary judgment rendered against it on the third-party demands/cross claims filed against it for indemnity coverage and defense costs by defendants, Hospital Service District No. 2 of the Parish of St. Mary, State of Louisiana, d/b/a Lakewood ("Hospital District"); its former administrator, Clifford Broussard ("Broussard"); and certain members of its board of commissioners: Melvin Bourgeois, M.D., James Broussard, John Guarisco, Sharon Howell, and Y. George Ramirez ("commissioners"). National Union also challenges the trial court's granting of the Hospital District's motion for summary judgment dismissing National Union's reconventional and/or third-party claim against the Hospital District for full defense and indemnity.

The litigation between these parties is long and complex, involving numerous trials, appeals, and supervisory writ applications.[1] The instant suit alleges, among other things, that on December 13, 1990, St. Mary Anesthesia Associates, Inc. ("St. Mary Anesthesia") and the Hospital District entered into an anesthesia service contract. St. Mary Anesthesia agreed to provide anesthesia and other services on a 24-hour/7-day a week basis at Lakewood Hospital, and the Hospital District agreed that St. Mary Anesthesia would have the exclusive right to provide anesthesia services, with said contract being automatically renewed annually unless terminated by St. Mary Anesthesia or for cause, as limited and described in the contract.

It was further alleged that the contract expressed the intent of the parties to stipulate a benefit to Dr. Willie Joseph, III ("Dr. Joseph"), and Dr. Michelle T. Brumfield ("Dr. Brumfield"), in effect making them third-party beneficiaries to the contract dated

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[1] See **Joseph v. Hospital Service Dist. No. 2 of Parish of St. Mary**, 2004-0781 (La. App. 1 Cir. 8/3/05), 923 So.2d 27, rev'd, 2005-2364 (La. 10/17/06), ___ So.2d ___; **Joseph v. Hospital Service Dist. No. 2 of Parish of St. Mary**, 2002 CW 1638 (La. App. 1 Cir. 5/5/03); **St. Mary Anesthesia Associates, Inc. v. Hospital Service Dist. No. 2 of Parish of St. Mary**, 2001-2852 (La. App. 1 Cir. 12/20/02), 836 So.2d 379, writ denied, 2003-0220 (La. 3/28/03), 840 So.2d 577; **Joseph v. Hospital Service Dist. No. 2 of Parish of St. Mary**, 2001 CW 2369 (La. App. 1 Cir. 1/28/02); **Joseph v. Hospital Service Dist. No. 2 of Parish of St. Mary**, 2001-1951 (La. App. 1 Cir. 12/28/01), 805 So.2d 400, writ denied, 2002-0322 (La. 4/19/02), 813 So.2d 1083; **Joseph v. Hospital Service Dist. No. 2 of Parish of St. Mary**, 2001-1952 (La. App. 1 Cir. 12/28/01), 805 So.2d 413; **Joseph v. Hospital Service Dist. No. 2 of Parish of St. Mary**, 2001 CW 0984 (La. App. 1 Cir. 5/29/01).

December 13, 1990, between St. Mary Anesthesia and the Hospital District – this being commonly known in Louisiana as a stipulation "pour autrui".

Defendants filed exceptions raising the objection of no right of action as to the claims of Dr. Joseph and Dr. Brumfield as third-party beneficiaries. The trial court granted the exceptions, dismissing the claims by Dr. Joseph and Dr. Brumfield with prejudice. On appeal, we reversed the trial court's judgment, concluding that the contract dated December 13, 1990, between St. Mary Anesthesia and the Hospital District intended Dr. Joseph and Dr. Brumfield to be third-party beneficiaries. **Joseph v. Hospital Service Dist. No. 2 of Parish of St. Mary**, 2004-0781 (La. App. 1 Cir. 8/3/05), 923 So.2d 27, rev'd, 2005-2364 (La. 10/17/06), ___ So.2d ___.

During this time, the Hospital District and the commissioners filed a third-party petition against National Union, claiming that the lawsuit filed by plaintiffs (Dr. Joseph, Dr. Brumfield, and St. Mary Anesthesia) alleged damages for breach of contract and that National Union had in full force and effect a policy of insurance that afforded insurance coverage for the claims made by the plaintiffs, including the cost of defending the suit. This petition was later amended to allege an arbitrary and capricious claim against National Union.

Broussard also filed a third-party claim against National Union, claiming that National Union had in full force and effect a policy that afforded him coverage for the claims for damages made by the plaintiffs, including costs of defending the suit. Broussard further alleged damages and penalties for National Union's arbitrary and capricious conduct and bad faith dealing.

National Union answered the third-party demands by the Hospital District, the commissioners, and Broussard, raising the defenses of *res judicata*, accord and satisfaction, and compromise and settlement. National Union further challenged the third-party claims, alleging that the third-party plaintiffs had no cause or right of action.

National Union subsequently filed a reconventional third-party demand and/or cross claim against the Hospital District. Citing a "Receipt and Release With Indemnity" signed by the Hospital District and Broussard on June 16, 2003, National Union claimed it was

entitled to full defense and indemnity by the Hospital District for any and all claims asserted against National Union in this litigation.

Ultimately, defendants moved for summary judgments on their third-party demands against National Union. The defendants further moved for summary judgment against National Union on the reconventional third-party demand and/or cross claim filed on behalf of National Union seeking indemnity from the Hospital District. On August 10, 2004, the trial court signed a judgment in favor of defendants.[2]

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[2] The August 10, 2004 judgment provides, in pertinent part, as follows:

> [T]he court, considering the law and evidence to be in favor of the movers, Hospital Service District No. 2 of the Parish of St. Mary, Melvin Bourgeois, M.D., James Broussard, John Guarisco, Sharon Howell and Y. George Ramirez, and Clifford M. Broussard and enters the following judgment.
>
> IT IS ORDERED, ADJUDGED AND DECREED that the Motion for Summary Judgment on the Third Party Petition filed herein on behalf of Hospital Service District No. 2 of the Parish of St. Mary, Melvin Bourgeois, M.D., James Broussard, John Guarisco, Sharon Howell and Y. George Ramirez, and Clifford M. Broussard against National Union, be and the same is hereby granted in part, and denied in part.
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> IT IS FURTHER ORDERED ADJUDGED AND DECREED that there be judgment in favor of Hospital Service District No. 2 of the Parish of St. Mary, Melvin Bourgeois, M.D., James Broussard, John Guarisco, Sharon Howell and Y. George Ramirez, and Clifford M. Broussard, and against National Union Fire Insurance Company of Louisiana declaring that the policy of insurance described as a Directors and Officers Insurance and Company Reimbursement Policy bearing policy number 860-51-36 affords liability coverage in favor of Hospital Service District No. 2 of the Parish of St. Mary, Melvin Bourgeois, M.D., James Broussard, John Guarisco, Sharon Howell and Y. George Ramirez, and Clifford M. Broussard, for the claims alleged on behalf of plaintiffs herein.
>
> IT IS FURTHER ORDERED ADJUDGED AND DECREED that National Union pay for the reasonable and necessary defense costs incurred by Clifford M. Broussard and Hospital Service District No. 2 of the Parish of St. Mary, Melvin Bourgeois, M.D., James Broussard, John Guarsico, Sharon Howell and Y. George Ramirez in the defense of the main demand of plaintiffs and pursuant to the terms and conditions of the National Union policy.
>
> IT IS FURTHER ORDERED ADJUDGED AND DECREED that Clifford M. Broussard be awarded the sum of $30,792.59 for attorney fees incurred to date for the defense of the main demand and that Hospital Service District No. 2 of the Parish of St. Mary, Melvin Bourgeois, M.D., James Broussard, John Guarsico, Sharon Howell and Y. George Ramirez be awarded a total sum of $24,562.50 incurred by them for the defense of the main demand.
>
> IT IS FURTHER ORDERED ADJUDGED AND DECREED that attorney fees incurred by Third Party Plaintiffs in prosecuting their third party demands or incurred to obtain coverage are not awarded or recoverable herein, and that any recovery shall be limited to the reasonable and necessary amount incurred for the defense of the plaintiffs' main demand.
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> IT IS FURTHER ORDERED ADJUDGED AND DECREED that National Union Fire Insurance Company's Motion for Reconsideration and for New Trial is denied.
>
> IT IS FURTHER ORDERED ADJUDGED AND DECREED that Cross Defendants' Motion for Summary Judgment on Reconventional Third Party Demand and/or Cross Claim filed by Hospital Service District No. 2 for the Parish of St. Mary seeking a dismissal of the Reconventional Third Party Demand and/or Cross Claim against it by National Union for indemnity pursuant to the terms of the release agreement is hereby granted dismissing the Reconventional Third Party Demand and/or Cross Claim by National Union against Hospital Service District No. 2 for the Parish of St. Mary for indemnity.

It is from this judgment that National Union now appeals, assigning the following specifications of error:

1. The trial judge erred by granting Appellees' motion for summary judgment on their third-party demands and cross claims against National Union for coverage because the release executed between National Union and the Appellees released those claims and the release and dismissals have *res judicata* effect.

2. The trial court erred by granting Hospital Service District's motion for summary judgment dismissing National Union's third-party demand and cross claim against HSD for indemnity.

3. The granting of the Appellees' motions for summary judgment was erroneous because National Union's policy is a claims made policy and excludes claims made outside the policy period.

4. The trial judge was in error for granting Appellees' motions for summary judgment on their third-party demand because National Union's policy excludes coverage, in whole or in part, for the claims asserted by Plaintiffs against Appellees.

APPEALABILITY OF JUDGMENT

Before we may proceed to the merits of this appeal, we must first determine if the trial court properly designated the judgment as final pursuant to La. Code Civ. P. art. 1915(B). The trial court's designation is not determinative of this court's jurisdiction. **Van ex. rel. White v. Davis**, 2000-0206, p. 2 (La. App. 1 Cir. 2/16/01), 808 So.2d 478, 480. In order to assist the appellate court in its review of designated final judgments, the trial court should give explicit reasons, either oral or written, for its determination that there is no just reason for delay. However, if the trial court fails to do so, an appellate court cannot summarily dismiss the appeal. For purposes of judicial efficiency and economy, the proper standard of review for an order designating a judgment as final for appeal

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IT IS FURTHER ORDERED ADJUDGED AND DECREED that the summary judgments of Hospital Service District No. 2 for the Parish of St. Mary and Clifford M. Broussard be and the same are hereby DENIED as to the claim for penalties, which movers claim to be entitled by virtue of La. R.S. 22:658 and La. R.S. 22:1220, as the Court determines that National Union presented a good faith defense to the claims of Third Party Plaintiffs.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that National Union Fire Insurance Company of Louisiana is cast with all costs of this proceeding.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that this judgment be deemed a final appealable judgment under L.C.C.P. Article 1915(B), as the court determines that there is no just reason for delay of an appeal, because the Court's ruling is dispositive of the coverage issues pertaining to National Union and other rulings of this Court are currently pending on appeal before the First Circuit Court of Appeal.

purposes when accompanied by explicit reasons is whether the trial court abused its discretion. **R.J. Messinger, Inc. v. Rosenblum**, 2004-1664, p. 13 (La. 3/2/05), 894 So.2d 1113, 1122.

In the instant case, the trial court gave the following reasons for designating the judgment as final: "[T]here is no just reason for delay of an appeal, because the Court's ruling is dispositive of the coverage issues pertaining to National Union and other rulings of this Court are currently pending on appeal before the First Circuit of Appeal." Thus, the trial court gave "explicit reasons" why there was no just reason for delay. After a thorough review of the record, we find no abuse of discretion by the trial court in designating the August 10, 2004 judgment as final and appealable. Therefore, the designation is proper, and our jurisdiction has been properly invoked.

Further, insofar as the August 10, 2004 judgment dismisses all of National Union's third-party/cross claims against the Hospital District, it would be a final judgment as to National Union's third-party claims and, under La. Code Civ. P. art. 1915(A), would be a final appealable judgment without the designation by the trial court.

SUMMARY JUDGMENT

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine issue of material fact. **Johnson v. Evan Hall Sugar Co-op., Inc.**, 2001-2956, p. 3 (La. App. 1 Cir. 12/30/02), 836 So.2d 484, 486. Summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that mover is entitled to judgment as a matter of law. La. Code Civ. P. art. 966(B). Summary judgment is favored and is designed to secure the just, speedy, and inexpensive determination of every action. La. Code Civ. P. art. 966(A)(2); **Thomas v. Fina Oil and Chemical Co.**, 2002-0338, pp. 4-5 (La. App. 1 Cir. 2/14/03), 845 So.2d 498, 501-502.

On a motion for summary judgment, the burden of proof is on the mover. If, however, the mover will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the mover's burden on the motion does

not require that all essential elements of the adverse party's claim, action, or defense be negated. Instead, the mover must 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, the adverse party must produce factual evidence sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. If the adverse party fails to meet this burden, there is no genuine issue of material fact, and the mover is entitled to summary judgment. La. Code Civ. P. art. 966(C)(2); **Robles v. Exxonmobile**, 2002-0854, p. 4 (La. App. 1 Cir. 3/28/03), 844 So.2d 339, 341.

Summary judgments are reviewed on appeal *de novo*. An appellate court thus asks the same questions as does the trial court in determining whether summary judgment is appropriate: whether there is any genuine issue of material fact, and whether the mover is entitled to judgment as a matter of law. **Ernest v. Petroleum Service Corp.**, 2002-2482, p. 3 (La. App. 1 Cir. 11/19/03), 868 So.2d 96, 97, writ denied, 2003-3439 (La. 2/20/04), 866 So.2d 830.

In **Smith v. Our Lady of the Lake Hosp., Inc.**, 93-2512, p. 27 (La. 7/5/94), 639 So.2d 730, 751, the Louisiana Supreme Court set forth the following parameters for determining whether an issue is genuine or a fact is material.

> A "genuine issue" is a "triable issue." More precisely, "[a]n 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. Summary judgment is the means for disposing of such meretricious disputes." In determining whether an issue is "genuine," courts cannot consider the merits, make credibility determinations, evaluate testimony or weigh evidence. "Formal allegations without substance should be closely scrutinized to determine if they truly do reveal genuine issues of fact."
>
> A fact is "material" when its existence or nonexistence may be essential to plaintiff's cause of action under the applicable theory of recovery. "[F]acts are material if they potentially insure or preclude recovery, affect a litigant's ultimate success, or determine the outcome of the legal dispute." Simply put, a "material" fact is one that would matter on the trial on the merits. Any doubt as to a dispute regarding a material issue of fact must be resolved against granting the motion and in favor of a trial on the merits. [Citations omitted.]

Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law

applicable to this case. **Foreman v. Danos and Curole Marine Contractors, Inc.**, 97-2038, p. 7 (La. App. 1 Cir. 9/25/98), 722 So.2d 1, 4, writ denied, 98-2703 (La. 12/18/98), 734 So.2d 637. Thus, we now turn to a discussion of the applicable law.

ASSIGNMENTS OF ERROR NOS. 1 & 2

The issues presented in the first two assignments of error concern the proper interpretation and applicability to the facts of this case of the June 16, 2003, "Receipt and Release With Indemnity" signed by the parties in favor of National Union. There is no dispute between the parties that this is a valid release and was executed by the Hospital District and Broussard. The dispute in this case is whether the plaintiffs' claims against defendants for damages based upon the breach of the December 13, 1990 contract between St. Mary Anesthesia and the Hospital District is contemplated in the receipt and release. Said contract was allegedly terminated by a letter from Broussard dated November 1, 2000.

Following this action, much litigation ensued. On November 16, 2000, Dr. Joseph, Dr. Brumfield, and St. Mary Anesthesia filed a petition against the Hospital District and Broussard seeking injunctive relief for violating open meetings law, mandamus, declaratory judgment, judgment voiding board action, and protective order in Docket No. 106767 (hereinafter referred to as the "Joseph lawsuit"). On July 13, 2001, St. Mary Anesthesia filed a petition for declaratory judgment against the Hospital District seeking to have the provisions of the Enhanced Ability to Compete Act of La. R.S. 46:1071, 1072, and 1073 declared unconstitutional in Docket No. 107891 (hereinafter referred to as the "SMAA lawsuit"). On August 6, 2001, the Hospital District and Broussard filed a petition for declaratory judgment for enforcement of insurance policy and for damages, fees, penalties, indemnity, and other relief against National Union in Docket No. 108001 (hereinafter referred to as the "National Union lawsuit").

To resolve the issues asserted in the National Union lawsuit, the Hospital District and Broussard, for consideration paid, executed the June 16, 2003 "Receipt and Release With Indemnity" in favor of National Union. Said receipt and release specifically makes reference to the Joseph lawsuit, the SMAA lawsuit, and the National Union lawsuit.

National Union contends this is the fourth lawsuit arising out of the underlying dispute over the wrongful breach of contract between St. Mary Anesthesia and the Hospital District. Even though the present lawsuit is the first lawsuit filed against National Union by the plaintiffs, National Union notes that it had been previously named as a defendant in the National Union lawsuit filed by the Hospital District and Broussard, which sought to recover defense costs and indemnity from National Union for claims arising out of the Joseph lawsuit and the SMAA lawsuit. National Union further contends that all the lawsuits arise out of and directly relate to the termination of the December 13, 1990 contract.

National Union further contends that in June 2003, based upon the above referenced release, National Union reached a settlement with the Hospital District and Broussard regarding any claims or disputes for any insurance coverage that arises out of or relates to fact circumstances and claims to the then pending lawsuits; i.e., the Joseph lawsuit, the SMAA lawsuit, and the National Union lawsuit. National Union contends the release required the Hospital District to indemnify National Union on any subsequently made claims. After the plaintiffs filed the present lawsuit in August 2003, the Hospital District, the commissioners, and Broussard filed third-party demands against National Union, seeking coverage under the National Union policy for defense and indemnity against the plaintiffs' claims. National Union answered the above claims and filed a cross claim, seeking indemnity from the Hospital District.

On appeal, National Union asserts that the terms and conditions of the National Union policy and the June 16, 2003 "Receipt and Release With Indemnity" establishes the trial court erred by concluding that the National Union policy provided coverage in connection with the present lawsuit.

Defendants argue that National Union was named as a defendant by them in the previous lawsuit known as the National Union lawsuit, wherein they sought costs of defending the Joseph lawsuit from National Union. They further argue that the statement of facts and argument in brief by National Union are inaccurate. Although objected to by National Union, as may be seen by a review of the record, the Hospital District's motion

for summary judgment was supported by a statement of undisputed facts. In this statement of undisputed facts, they refer to Exhibit K, which was attached. Exhibit K, which is addressed later herein, was correspondence between counsel dated June 3, 2003 and June 4, 2003, negotiating part of the terms of the receipt and release with indemnity agreement. This statement of undisputed facts and Exhibit K were referred to in the affidavit of John Guarisco, Chairman of the Hospital District, supporting the motion for summary judgment by the Hospital District. The defendants contend that during the negotiation of the settlement of the National Union lawsuit and prior to the execution of the release, National Union submitted a proposed release. The language thereof was rejected by defendants. The alleged reason for the rejection was outlined and allegedly memorialized by a letter from defendant's counsel to National Union's counsel, dated June 3, 2003. Defendants contend the rejected draft contained language that was much too broad.

Normally, if no evidence is introduced that the release was mistakenly signed or that the parties to the agreement did not fully understand the nature of the rights being released, extrinsic evidence is inadmissible to explain or to contradict the terms of the compromise agreement. **Trahan v. Coca-Cola Bottling Co. United, Inc.**, 2004-0100, p. 15 (La. 3/2/05), 894 So.2d 1096, 1107. Although this court has concerns about the trial court considering this correspondence between attorneys to interpret the receipt and release with indemnity executed between the parties, it was apparent from the record that the trial court did in fact consider this correspondence in making its decisions on this case.

The June 16, 2003 "Receipt and Release With Indemnity" provides, in part, as follows:

> 2. Release by Hospital District: In consideration of the amount described above, Hospital District and Broussard hereby waive, release, and discharge any and all actions, causes of action, claims, defenses, demands, lawsuits, proceedings and rights that Hospital District and Broussard have or could have alleged, made and asserted against National Union, AIG, their officers, directors, employees, agents, representatives, divisions, subsidiaries, parent corporations, related corporations and affiliates, predecessor and successor corporations, and any other natural or juridical person (collectively the "Release Parties") for subrogation, indemnification, contribution, reimbursement and any and every other relief of any type allowed by or available under any applicable law concerning or arising out of

the Joseph Lawsuit and the SMAA Lawsuit, and/or in connection with or in any manner relating to the National Union Policy. Hospital District and Broussard specifically discharge and release National Union, AIG, their officers, directors, employees, agents, representatives, divisions, subsidiaries, parent corporations, related corporations and affiliates, predecessor and successor corporations, and any other natural or juridical person of and from any and all actions, claims, causes of action, demands, interests and rights which have been or could have been brought or asserted by or on behalf of Hospital District and Broussard to seek or recover for: any amounts paid, due or incurred by or on behalf of Hospital District and/or Broussard for attorney's fees, defense costs, expert fees, court costs, fees, salaries and any other expenses or amounts of any and every kind paid, due or owed in connection with the Joseph Lawsuit, the SMAA Lawsuit, or in any other lawsuit or proceeding; any amount paid, due or owing by Hospital District and/or Broussard relating to any judgment, compromise and/or settlement of any and all actions, claims, causes of action, demands, lawsuits and rights which were brought by or on behalf of Dr. Joseph, Dr. Brumfield, and/or St. Mary Anesthesia Associates; and, any statutory penalties, attorney's fees and any other relief of any and every kind allowed by or available under any other law against National Union, AIG, their officers, directors, employees, agents, representatives, divisions, subsidiaries, parent corporations, related corporations and affiliates, predecessor and successor corporations, and any other natural or juridical person.

. . . .

6. Indemnity: In further consideration of said payment Hospital District, shall defend, protect, indemnify and hold harmless National Union and the Released Parties from any and every claim or demand, loss and expense of every kind, which may ever be asserted by them for their own account or by anyone else in any way arising out of or in connection with the damages or claims asserted in the National Union Lawsuit, including but not limited to any claim or demand by the LHAMGLT; and, National Union and the Released Parties shall be entitled to plead this obligation and this release in defense of any such claim. [Emphasis added.]

The review of the record does reflect that during the negotiation of the above receipt and release with indemnity, the Hospital District's attorney requested a change in some of the language of the agreement, which is reflected by his letter dated June 3, 2003. The letter, in part, reads as follows.

Dear Counsel:

I have received and reviewed your draft of the Receipt and Release With Indemnity and find the terms and conditions to be acceptable with the following exception:

1. Page 2, Section 2, line 21, the phrase "or could have brought" must be deleted. I do not know what "could have been brought" - - I only know what *was brought* . The claim asserted on behalf of the District was brought against National Union for coverage of what Dr. Joseph, et al. actually brought. The compromise of the District's claim cannot be expanded to include the unknown and unknowable.

The change recommended by the Hospital District was made by National Union, on page 2, section 2, line 21 of said receipt and release with indemnity, to read as follows:

> ...claims, causes of action, demands, lawsuits and rights which were brought by or on behalf of Dr. Joseph, Dr. Brumfield, and/or St. Mary Anesthesia Associates; ...

Defendants contend the release pertains to all claims defendants made against National Union under its policy, as well as all claims defendants could have asserted against National Union under its policy, but only with respect to the actual claims asserted in the Joseph lawsuit or in the SMAA lawsuit. Defendants further assert that the breach of contract claims by Dr. Joseph, Dr. Brumfield, and St. Mary Anesthesia were not actually made in these suits.

When a receipt and release agreement is executed as a compromise to settle a disputed claim, it becomes the law as between the parties and should be interpreted according to the parties' intent as evidenced by the contract's language and the circumstances surrounding the settlement. See La. Civ. Code art. 1983; **Kinney v. Blue Bayou Water Park**, 2000-0364, p. 4 (La. App. 1 Cir. 3/28/01), 808 So.2d 530, 533. The interpretation of a contract is the determination of the common intent of the parties. La. Civ. Code art. 2045. When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent. La. Civ. Code art. 2046. The words of a contract must be given their generally prevailing meaning. La. Civ. Code art. 2047; **Frankel v. Exxon Mobil Corp.**, 2004-1236, pp. 7-8 (La. App. 1 Cir. 8/10/05), 923 So.2d 55, 64. Each provision in a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole. La. Civ. Code art. 2050. Moreover, in the case of doubt that cannot be otherwise resolved, a provision in a contract must be interpreted against the party who furnished its text. La. Civ. Code art. 2056.

A compromise instrument is governed by the same general rules of construction that are applicable to contracts. **Ortego v. State, Dept. of Transp. and Development**, 96-1322, p. 7 (La. 2/25/97), 689 So.2d 1358, 1363. Because a compromise extends only to those matters the parties intended to settle, the scope of the

transaction cannot be extended by implication. La. Civ. Code art. 3073. In applying this rule of construction, courts are guided by the general principle that the instrument must be considered as a whole and in light of attending events and circumstances. **Trahan**, 2004-0100 at 15, 894 So.2d at 1107.

In the case at hand, it is the language concerning all "claims, causes of actions, demands, lawsuits and rights which were brought on behalf of Dr. Joseph, Dr. Brumfield, and/or St. Mary Anesthesia" that is at issue. The release specifically refers to "any and every other relief of any type allowed by or available under any applicable law concerning or arising out of the Joseph Lawsuit and the SMAA Lawsuit, and/or in connection with or in any manner relating to the National Union Policy." We must therefore look to those lawsuits to determine which claims, cause of action, demands, lawsuits, and rights were brought by and on behalf of Dr. Joseph, Dr. Brumfield, and/or St. Mary Anesthesia.

The case before us now involves damages for breach of the December 13, 1990 contract between St. Mary Anesthesia and the Hospital District. After thoroughly reviewing the pleadings in the Joseph lawsuit, the SMAA lawsuit, and the National Union lawsuit, we note that by second supplemental and amending petition filed May 29, 2001, in the Joseph lawsuit, Dr. Joseph, Dr. Brumfield, and St. Mary Anesthesia added the commissioners as defendants, along with Our Lady of the Lake Hospital, and added additional causes of action to assert claims for damages for breach of contract, negligence, and/or intentional interference of contract resulting in pecuniary and nonpecuniary damages. This second supplemental and amending petition was ultimately ruled to be an improper cumulation of actions and was stricken from the record. **Joseph v. Hospital Service Dist. No. 2 of Parish of St. Mary**, 2001-1952 (La. App. 1 Cir. 12/28/01), 805 So.2d 413. Even though the second supplemental and amending petition was stricken, that does not change the fact that a claim for breach of contract and damages associated with the December 13, 1990 contract was previously asserted against the Hospital District, Broussard, and the commissioners. This previously asserted breach of contract claim arises out of the same facts and actions of the contract dated December 13, 1990, which is at issue in the present case.

Assuming for the sake of argument that the Hospital District and Broussard only intended to release those claims actually raised, there is no factual question that the breach of contract claim in this suit was actually raised and asserted (although not successfully) in the Joseph lawsuit. For these reasons, the "Receipt and Release With Indemnity" executed by the Hospital District and Broussard in favor of National Union clearly included the claims for breach of contract raised by Dr. Joseph, Dr. Brumfield, and St. Mary Anesthesia in this case. Therefore, the trial court's judgment in favor of the Hospital District and Broussard and against National Union in this case must be reversed. The contract between the parties is the law between the parties.

It should be noted that only the Hospital District and Broussard executed the release in favor of National Union. This receipt and release was confected out of the National Union lawsuit. The commissioners were not parties to that lawsuit and were not parties to the June 16, 2003 "Receipt and Release With Indemnity."

Nonetheless, National Union argues that the June 16, 2003 release is *res judicata* and thus bars all claims that arise out of the conduct and operative facts that formed the basis for the claims described in the release, including the claims of the commissioners. National Union contends the central inquiry is not whether the second action is based on the same cause of action, but whether the second action asserts a cause of action that arises out of the transaction or occurrence that was the subject matter of the first action. National Union further contends the present litigation involves the same cause of action because it involves the same "material fact which is the basis of the right claimed," i.e., the termination of the December 13, 1990 contract between St. Mary Anesthesia and the Hospital District. National Union maintains that these same facts are at issue in both the prior litigation and the present lawsuit and that the present lawsuit clearly "arises out of the same conduct as the prior litigation and therefore involves the same cause of action." Moreover, National Union asserts, the object demanded is the same; i.e., coverage, defense, and indemnity for the claims arising from the termination of the December 13, 1990 contract. National Union further contends the parties are also the same. Noting that the Hospital District can only act through its board, National Union argues that the

Hospital District, the commissioners, and Broussard are the same for the purpose of release and *res judicata*.

The doctrine of *res judicata* has been codified in La. R.S. 13:4231 and provides as follows:

> Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:
>
> (1) If the judgment is in favor of the plaintiff, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment.
>
> (2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action.
>
> (3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

Under La. R.S. 13:4231, *res judicata* bars relitigation of a subject matter arising from the same transaction or occurrence as a previous suit. Thus, the chief inquiry is whether the second action asserts a cause of action that arises out of the transaction or occurrence that was the subject matter of the first action. **Mandalay Oil & Gas, L.L.C. v. Energy Development Corp.**, 2001-0993, p. 9 (La. App. 1 Cir. 8/4/04), 880 So.2d 129, 135, writ denied, 2004-2426 (La. 1/28/05), 893 So.2d 72. Furthermore, the doctrine of *res judicata* is not discretionary and mandates the effect to be given to final judgments. **Leon v. Moore**, 98-1792, p. 5 (La. App. 1 Cir. 4/1/99), 731 So.2d 502, 505, writ denied, 99-1294 (La. 7/2/99), 747 So.2d 20. The doctrine, however, cannot be invoked unless all its essential elements are present. It is strictly construed, and any doubt concerning its applicability is to be resolved against the party raising the objection. **Five N Company, L.L.C. v. Stewart**, 2002-0181, p. 15 (La. App. 1 Cir. 7/2/03), 850 So.2d 51, 60-61.

Louisiana Revised Stattues 13:4231 embraces broad usage of the phrase *res judicata* to include both claim preclusion and issue preclusion. **Mandalay Oil & Gas,**

L.L.C., 2001-0993 at 9, 880 So.2d at 135. Thus, *res judicata* used in the broad sense has two different aspects: (1) foreclosure of relitigating matters that have never been litigated but should have been advanced in the earlier suit; and (2) foreclosure of relitigating matters that have been previously litigated and decided. **Five N Company, L.L.C.**, 2002-0181 at 15, 850 So.2d at 61.

Under claim preclusion, a *res judicata* judgment on the merits precludes the parties from relitigating matters that were or could have been raised in that action. *Id.* The doctrine of *res judicata* precludes subsequent litigation when all of the following are satisfied: (1) the judgment is valid; (2) the judgment is final; (3) the parties in the two matters are the same; (4) the cause or causes of action asserted in the second suit existed at the time of the final judgment in the first litigation; and (5) the cause or causes of action asserted in the second suit arose out of the transaction or occurrence that was the subject matter of the first litigation. **Smith v. State, Dept. of Transp. & Development**, 2004-1317, p. 22 (La. 3/11/05), 899 So.2d 516, 529-530.

Under issue preclusion or collateral estoppel, however, once a court decides an issue of fact or law necessary to its judgment, that decision precludes relitigation of the same issue in a different cause of action between the same parties. **Five N Company, L.L.C.**, 2002-0181 at 15, 850 So.2d at 61. The three requirements for issue preclusion are: (1) a valid and final judgment; (2) identity of the parties; and (3) an issue that has been actually litigated and determined if its determination was essential to the prior judgment. **Sanchez v. Georgia Gulf Corp.**, 2002-1617, p. 14 (La. App. 1 Cir. 8/13/03), 853 So.2d 697, 706.[3]

In the instant case, the commissioners were added as additional defendants in the Joseph lawsuit by a second supplemental and amending petition filed by Dr. Joseph, Dr.

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[3] In **Five N Company, L.L.C.**, 2002-0181 at 16, 850 So.2d at 61, this court reasoned that La. R.S. 13:4231 requires identity of the parties to preclude a subsequent suit, defining "identity" as follows:

> There exists an identity of parties whenever the same parties, their successors, or others appear so long as they share the same "quality" as parties. Identity of parties is satisfied when a privy of one of the parties is involved. In its broadest sense, "privity" is the mutual or successive relationship to the same right of property, or such an identification in interest of one person with another as to represent the same legal right. In connection with the doctrine of res judicata, a "privy" is "one who, after the commencement of the action, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, purchase or assignment." [Citations omitted.]

Brumfield, and St. Mary Anesthesia on May 29, 2001, alleging damages for breach of contract. As mentioned previously herein, the claim for damages for breach of contract was ultimately stricken from the suit by this court because it was an improper cumulation of actions. The commissioners did not join in and were not parties to the National Union lawsuit. The commissioners were not parties to, nor did they sign, the "Receipt and Release With Indemnity" dated June 16, 2003, in favor of National Union. Both *res judicata* and issue preclusion require identity of parties or the privy of one of the parties involved. The release executed by the Hospital District and Broussard is *res judicata* as to their claims against National Union, but it cannot be *res judicata* as to the claims of the commissioners in that there was no identity of parties by the commissioners, nor is there privity. *Res judicata* does not apply to the commissioners, but does apply to the Hospital District and Broussard. That portion of the judgment denying National Union's *res judicata* defense against the Hospital District and Broussard is reversed.

In assignment of error number two, National Union contends the receipt and release with indemnity executed by the Hospital District and Broussard on June 16, 2003, requires the Hospital District to indemnify National Union from any claim that may be asserted by them or by anyone else in any way arising out of or in connection with the damages or claims asserted in the National Union lawsuit.

Paragraph six of said receipt and release with indemnity provides, as follows:

> 6. Indemnity: In further consideration of said payment, Hospital District, shall defend, protect, indemnify and hold harmless National Union and the Released Parties from any and every claim or demand, loss and expense of every kind, which may ever be asserted by them for their own account or by anyone else in any way arising out of or in connection with the damages or claims asserted in the National Union lawsuit, including but not limited to any claim or demand by the LHAMGLT; and National Union and the Released Parties shall be entitled to plead this obligation and this release in defense of any such claim.

"Released parties," as mentioned in paragraph six of the receipt and release with indemnity, is further defined in paragraph two of said receipt and release with indemnity. Paragraph two, in part, provides that the released parties are "National Union, AIG, their officers, directors, employees, agents, representatives, divisions, subsidiaries, parent

corporations, related corporations and affiliates, predecessor and successor corporations, and any other natural or juridical person."

In this paragraph, the Hospital District has committed itself to defend, protect, and indemnify and hold harmless National Union from any and every claim or demand, loss and expense of every kind, whichever may be asserted by them for their own account or by anyone else in any way arising out of or in connection with the damages or claims asserted in the National Union lawsuit. In the National Union lawsuit, the Hospital District and Broussard sought a judgment declaring that the National Union policy provided coverage for the underlying claim, which was a claim set forth in the Joseph lawsuit. A review of the petition in the National Union lawsuit reveals that the Hospital District and Broussard alleged that the Joseph plaintiffs had asserted a breach of contract claim against them, which is reflected by the plaintiffs' amendment of the Joseph lawsuit on May 29, 2001, to assert the breach of contract claim. Based upon an examination of the pleadings of the various lawsuits and the pertinent release language, the commissioners' present claim against National Union for coverage of reimbursement of defense costs falls within the scope of the indemnity language of the receipt and release with indemnity agreement as being a claim "by anyone else" that arises out of or "in connection with the damages or claims asserted in the National Union lawsuit." Therefore, it was legal error for the trial court to grant a judgment in favor of the Hospital District, dismissing National Union's third-party demand for indemnity against them; and this part of the trial court's judgment is reversed.

ASSIGNMENT OF ERROR NO. 3

In assignment of error number three, National Union contends the motion for summary judgment was erroneously granted by the trial court because National Union's policy is a claims made policy and excludes claims made outside the policy. Basically, National Union argues that its policy limits coverage to the claims that are first made against the insured and reported to the insurer during the policy period.

The National Union policy provides, in part, as follows:

15. Clause 7. "NOTICE/CLAIM REPORTING PROVISIONS"

. . . .

(a) The Insureds shall, as a condition precedent to the obligations of the Insurer under this policy, give written notice to the Insurer of any Claim made against an Insured as soon as practicable and either:

(1) anytime during the Policy Year or during the Discovery Period (if applicable); or
(2) within 30 days after the end of the Policy Year or the Discovery Period (if applicable), as long as such Claim is reported no later than 30 days after the date such Claim was first made against an Insured.

(b) If written notice of a Claim has been given to the Insurer pursuant to Clause 7(a) above, then any Claim which is subsequently made against the Insureds and reported to the Insurer alleging, arising out of, based upon or attributable to the facts alleged in the Claim for which such notice has been given, or alleging any Wrongful Act which is the same as or related to any Wrongful Act alleged in the Claim of which such notice has been given, shall be considered made at the time such notice was given.

(c) If during the Policy Period or during the Discovery Period (if applicable) the Insureds shall become aware of any circumstances which may reasonably be expected to give rise to a Claim being made against the Insureds and shall give written notice to the Insurer of the circumstances and the reasons for anticipating such a Claim, with full particulars as to dates, persons and entities involved, then any Claim which is subsequently made against the Insureds and reported to the Insurer alleging, arising out of, based upon or attributable to such circumstances or alleging any Wrongful Act which is the same as or related to any Wrongful Act alleged or contained in such circumstances, shall be considered made at the time such notice of such circumstances was given.

Under a claims made policy, coverage is effective only if the negligent harm is discovered and reported within the policy term. **Hedgepeth v. Guerin**, 96-1044, p. 6 (La. App. 1 Cir. 3/27/97), 691 So.2d 1355, 1359, writ denied, 97-1377 (La. 9/26/97), 701 So.2d 983. In **Newpark Resources, Inc. v. Marsh & McLennan of Louisiana, Inc.**, 96-0935, p. 6 (La. App. 1 Cir. 2/14/97), 691 So.2d 208, 211-212, writ denied, 97-0691 (La. 4/25/97), 692 So.2d 1094, this court explained claims made policies as follows:

> Under claims made policies, the mere fact that an insured loss-causing event occurs during the policy period is not sufficient to trigger insurance coverage of the loss. Such policies also typically require the insured to give prompt notice to the insurer of any claims asserted against the insured, as well as of any occurrences that have caused or will potentially cause an insured loss. The notice requirements in claims made policies allow the insurer to "close its books" on a policy at its expiration and thus to attain a level of predictability unattainable under standard occurrence policies. [Citation omitted.]

This court further explained that a claim cannot be discovered twice, stating: "Here, the issue is discovery and notice of a loss that triggers coverage. The claim could not be discovered twice. Once the potential loss was discovered ..., it could not then be discovered again ...." **Newpark Resources, Inc.**, 96-0935 at 9, 691 So.2d at 213.

It is apparent from a reading of the National Union policy that it is a claims made policy. As such, if the claims of Dr. Joseph, Dr. Brumfield, and St. Mary Anesthesia against the Hospital District in the present lawsuit and the third-party demand by the Hospital District, Broussard, and the commissioners against National Union arise out of, or are based upon, or are attributable to a previously reported claim or circumstance, or any wrongful act that is the same or related to any wrongful act previously reported, they are considered made at the time the first notice of claim or circumstance is made. If the claim was not made during the policy period, it is not covered unless it arises out of, is based upon, or is attributable to a claim previously timely reported under the policy.

At the hearing of the motion for reconsideration or rehearing on the previous summary judgment motions, the trial court provided the following oral reasons for his decision:

> All right. On the Motion for Summary Judgment, with regard to what was released by the Hospital District, paragraph 2 of the release which provides the actual agreement to release says, "that the Hospital District and Broussard specifically discharge and release National Union and et cetera," covering everybody that could possibly be associated with National Union, "from any and all actions, et cetera, which have been or could have been brought or asserted by or on behalf of the Hospital District and Broussard to seek to recover, whatever, due or owed in connection with the ***Joseph*** lawsuit, SMAA lawsuit and any other lawsuit or proceeding, or any amount due or owing by the Hospital District or Broussard relating to any judgment, et cetera, which were brought on behalf of Dr. Joseph, Brumfield, and St. Mary Anesthesia."
>
> At the time this release was entered, the Hospital District did not and could not have brought or asserted to seek recovery for what they may have owed to Dr. Joseph and Brumfield for breach [of] contract because that claim had not been made. Therefore, the claim that Brumfield and Joseph and St. Mary Anesthesia are now making in this lawsuit were not released by the Hospital District through this release. And, this is a claim that arises out of a claim or that was made during the policy period, therefore, I will maintain my original ruling on the Motion for Summary Judgment.

After a thorough review of the record, we agree with the trial court that the claims made in this particular proceeding arose out of a claim that was made during the policy period. However, we disagree with the legal conclusion of the trial court, for the reasons previously enumerated herein, that the claims presently being made by Dr. Joseph, Dr. Brumfield, and St. Mary Anesthesia against the Hospital District, Broussard, and the commissioners were not released in the "Receipt and Release With Indemnity" executed by the Hospital District and Broussard on June 16, 2003.

ASSIGNMENT OF ERROR NO. 4

In its final assignment of error, National Union contends that the trial court committed error by granting the motion for summary judgment filed by the Hospital District, Broussard, and the commissioners on the third-party demand, because National Union's policy excludes coverage in whole or in part for the claims asserted by plaintiffs against the Hospital District, Broussard, and the commissioners. Due to our previous finding that the trial court was in error in granting summary judgment in favor of the Hospital District and Broussard on the third-party demand against National Union because of the June 16, 2003 "Receipt and Release With Indemnity," this issue is moot as to the Hospital District and Broussard and will be pretermitted. After a thorough review of the record and considering our previous finding that the release did not act as *res judicata* to the commissioners' claims against National Union, we will sustain the trial court's granting summary judgment in favor of the commissioners against National Union. As to the commissioners, the coverage issues are not moot, and we will address them.

National Union raises five separate arguments as to the coverage issues as to the commissioners. These are: a) the National Union policy does not cover contractual liability; b) National Union's policy is excess over the policy provided by Louisiana Hospital Association Malpractice and General Liability Trust (LHAMGLT); c) intentional acts are not covered; (d) National Union's policy does not cover emotional injuries, bodily injuries, personal injuries, or defamation; and e) alternatively, if this is a new claim, the self-insured retention must be satisfied.

When determining these issues we must be mindful of certain policy decisions and legal interpretations that have been set down by the Louisiana Supreme Court. These are:

> 1. When determining whether or not a policy affords coverage for an incident, it is the burden of the insured to prove the incident falls within the policy's terms.
>
> 2. It is the burden of the insurer to prove any exclusionary language.
>
> 3. Any policy ambiguities must be construed in favor of the insured, to effect, not deny coverage.

Doerr v. Mobil Oil Corp., 2000-0947, p. 5 (La. 12/19/00), 774 So.2d 119, 124.

Mindful of these provisions, we address National Union's arguments. National Union contends that their policy does not cover contractual liability and, alternatively, if it does, then such contractual liability is excluded in Endorsement No. 9. There does not seem to be any dispute that the commissioners fall within the definition of insureds under the terms of the policy of National Union, which policy specifically provides, in "Definitions," paragraph 2(c), ""Insured(s)," or "Director(s)," or "Officer(s)" means any past, present, or future duly elected or appointed Directors or Officers of the company. Coverage will automatically apply to all new directors or officers after the inception date of this policy."

National Union relies upon the definition of wrongful acts in Endorsement No. 8 of the policy, which provides, in part, as follows:

> (f) "Wrongful acts" means:
>
> (1) with respect to individual insureds, any breach of duty, neglect, error, misstatement, misleading statement, omission or act by such individual insureds in his/her respective capacities as such, or any matter claimed against such Individual Insured solely by reason of his/her status as individual insureds of the Organization;
>
> (2) with respect to the Organization under Coverage C, any breach of duty, neglect, error, misstatement, misleading statement, omission or act by or on behalf of the Organization;
>
> (3) with respect to service of an Outside Entity, any matter claimed against such individual insureds arising out of such insured serving as a director, trustee, trustee emeritus or governor of an Outside Entity in such capacity, but only if such service is at the specific written request or direction of the Organization;

(4) with respect to both the individual insureds and the organization and subject to paragraphs 1, 2, 3 above, "wrongful act" shall specifically include:

(a) Employment Practices Claims;
(b) Non-employment Discrimination;
(c) violation of the Sherman Antitrust Act or similar federal, state or local statutes or rules;
(d) libel, slander, defamation or publication or utterance in violation of an individual's right of privacy;
(e) wrongful entry or eviction or other invasion of the right of occupancy;
(f) false arrest or wrongful detention;
(g) plagiarism; and
(h) infringement of copyright or trademark or unauthorized use of title.

As mentioned above, any ambiguity must be construed in favor of the insured, to effect, not deny coverage. "Wrongful act" in National Union's policy definition includes any breach of duty. Duties are created by many different types of situations. Duties can be created by negligent acts, intentional acts, federal/state statutes, parish ordinances, and or by conventional agreement by contracts between parties. Any "breach of duty" does not exclude breach of contract. Therefore, National Union's argument that their policy does not include claims for breach of contract is without merit.

Alternatively, National Union argues that its policy specifically excludes breach of contract; in particular, under Endorsement No. 9 of its policy, which provides, in part, as follows:

> 4 (L) Any claim alleging, arising out of, based upon or attributable to any actual or alleged contractual liability of any Insured under any express or implied contract or agreement: provided, however, that this exclusion shall not apply to Employment Practices Claims and hospital practice, privileges, credentialling (sic), or peer review matters.

The exclusion itself states it shall not apply to employment practices claims and hospital practice, privileges, credentialing or peer review matters. Let us remember that this whole suit is brought by the plaintiffs, Dr. Joseph, Dr. Brumfield, and St. Mary Anesthesia who were privileged, credentialed, and authorized to practice medicine and provide medical services at the Hospital District. A fair reading of the allegations they have made in the various pleadings in this suit deals with employment practice claims, hospital practice, privileges, credentialing, and peer review matters; and therefore, their

claims are not excluded from coverage under Endorsement No. 9, paragraph 4(L). National Union's argument on this point is without merit.

National Union also contends its policy is excess over the policy provided by Louisiana Hospital Association Malpractice and General Liability Trust ("LHAMGLT policy"). After review of the record we note that the original summary judgment hearing was held on May 21, 2004; and then, based upon National Union's motion for reconsideration, another hearing was held June 25, 2004. The record on appeal contains a transcript of the June 25, 2004 hearing, but not the hearing of May 21, 2004. We are mindful of the jurisprudential rule that the appellant is charged with the responsibility of completeness of the record for review. Thus, the inadequacy of the record before us is imputable to National Union. See **Carter v. Barber Bros. Contracting Co., Inc.**, 623 So.2d 8, 10 (La. App. 1 Cir.), writ denied, 629 So.2d 1180 (La. 1993). Further, if an inadequate appellate record is transmitted, the appellate court must presume that the trial court's ruling is correct. **Succession of Populus**, 95-1469, p. 4 (La. App. 1 Cir. 2/23/96), 668 So.2d 747, 749.

On May 11, 2004, National Union filed a memorandum in opposition to the Hospital District's motion for summary judgment with eighteen exhibits. One of these exhibits was a copy of the LHAMGLT policy. It must be presumed the trial court considered the arguments raised by National Union, but rejected them since the trial court ruled against them and found coverage under National Union's policy. The named insured in the LHAMGLT policy is the Hospital District. The commissioners are not named as named insureds. As to the individual members of the Board of Commissioners, art. VI, coverage agreement § 6.2, paragraph E lists all persons protected under the LHAMGLT policy. Said provision specifically protects the Lakewood Medical Center as a participant and Clifford M. Broussard as Lakewood's CEO. It does not provide protection to the members of Lakewood's governing board. In short, this provision clearly places the individual members of the hospital's Board of Commissioners outside the scope of the LHAMGLT policy regardless of the specific allegations of the petition at issue.

Article VI § 6.2, paragraph A1 of the LHAMGLT policy specifically provides that subject to all limitations and conditions in the LHAMGLT policy, the trust will pay certain sums on behalf of the participant, which the participant shall be legally obligated to pay as damages arising out of an "occurrence" during the coverage period. "Occurrence" is defined under art. VI § 6.2, paragraph H.1(i) of the LHAMGLT policy and means, subject to other limitations set forth in the definition, "an accident ... which results in bodily injury ... neither expected nor intended from the standpoint of the Participant." "Bodily injury" is defined under paragraph H.1(b) of the same section and means "physical or mental harm, sickness[,] pain and suffering, disease or permanent injury sustained by any person which occurs during the coverage period, including death resulting therefrom." A fair reading of the LHAMGLT policy indicates that the commissioners are not insureds under said policy, nor are the facts as alleged by the plaintiffs in the underlying suit an "occurrence" as defined in said policy. Therefore, National Union's argument on this point is without merit.

National Union also argues that the National Union policy does not cover intentional acts. As previously indicated, paragraph f of Endorsement No. 8 in the National Union policy defines, in part, "wrongful acts" to include "any breach of duty." Intentional acts may fall within that definition. Further, paragraph 6(f)(4) of Endorsement No. 8 states, "Wrongful act" shall specifically include: "(a) Employment Practices Claims; (b) Non-Employment Discrimination; (c) violation of a Sherman Antitrust or similar federal, state, or local statutes or rules; (d) libel, slander, defamation, or publication or utterance in violation of individual's right of privacy; (e) wrongful entry or eviction or other invasion of the right of occupancy; (f) false arrest or wrongful detention; (g) plagiarism; and (h) infringement of copyright or trademark or unauthorized use of title." Many of these acts described in paragraph 6(f)(4) are intentional acts. For these reasons, National Union's argument on this issue has no merit.

National Union urges in the alternative that if plaintiffs' claims are a new claim, the self-insured retention must be paid before the payment of any loss under the National Union policy. The retention is $10,000.00, as per Endorsement No. 8, "Declarations," paragraph two, item 4B, which states as follows:

B. Judgments, Settlements, and Defense Costs (Coverage C and all other indemnifiable loss)

$10,000.00 for loss arising from claims alleging the same wrongful act or related acts (waivable under a clause six in certain circumstances)

In the National Union policy, paragraph 14, clause six, "Retention Clause," it defines the retention clause, as follows:

> The insurer shall only be liable for the amount of Loss arising from a Claim which is in excess of the Retention amount stated in item 4(B) of the Declarations, such Retention amount to be borne by the Organization and shall remain uninsured, with regard to all Loss for which the Organization has indemnified or is permitted or required to indemnify the individual insureds ("indemnifiable Loss") and Loss under coverage C. A single Retention amount shall apply to Loss arising from all Claims alleging the same Wrongful Act or Related Wrongful Acts.

As noted in said paragraph a single retention amount shall apply to loss arising from all claims alleging the same wrongful act or related wrongful acts.

Again, we do not have the benefit of the transcript of the May 21, 2004 hearing. However, for the purposes of this review, we do have the benefit of the receipt and release with indemnity dated June 16, 2003, executed by the Hospital District and Broussard in favor of National Union. We have already held herein that the claims made in this particular proceeding arose out of a claim that was made during the policy period and was part of the claims of the previous Joseph lawsuit, SMAA lawsuit, and National lawsuit. At the time of the receipt and release, National Union paid the Hospital District and Broussard $94,500.00. It is apparent National Union either credited themselves or deducted from the amount they were willing to pay to the Hospital District and Broussard the retention amount of $10,000.00 prior to the payment of the $94,500.00. For these reasons, National Union's argument on this point is without merit.

National Union also contends its policy excludes any claims that seek the recovery of damages for bodily injury, sickness, disease, death or emotional distress on the part of any person, or damage to or destruction of any tangible property, including the loss of use thereof, or for injury from oral or written publication of libel or slander or of other defamatory or disparaging material or of material that violates a person's right of privacy.

National Union relies upon exclusion m contained in section four of the National Union policy. This exclusion provides, as follows:

> m. for bodily injury, sickness, disease, death or emotional distress of any person, or damage to or destruction of any tangible property, including the loss of use thereof, or for injury from oral or written publication of a libel or slander or of other defamatory or disparaging material or of material that violates a person's right of privacy;

However, we note that since this case was orally argued to this court, the Louisiana Supreme Court handed down a decision in **Joseph v. Hospital Service District No. 2 of Parish of St. Mary**, 2005-2364 (La. 10/17/06), ___ So.2d ___, reversing this court and reinstating the trial court's decision that Dr. Joseph and Dr. Brumfield, individually, had no right of action to bring the instant suit for breach of contract, because they were not third-party beneficiaries of that contract. In view of this decision, the issue of mental anguish, distress, and nonpecuniary damages for Dr. Joseph and Dr. Brumfield is no longer before this court. Further, the only remaining plaintiff, St. Mary Anesthesia, cannot properly be awarded damages for mental anguish. **Warwick Apartments Baton Rouge v. State Through Dept. of Transp. and Development**, 93-0162 (La. App. 1 Cir. 3/11/94), 633 So.2d 895; **Hogan Exploration, Inc. v. Monroe Engineering Associates, Inc.**, 430 So.2d 696 (La. App. 1 Cir. 1983). We also note that St. Mary Anesthesia seeks damages only for past and future lost earnings; and after a fair reading of the original petition, there is no claim for damages resulting from libel or slander at issue in this appeal.

For these reasons, the argument by National Union concerning exclusion m is moot in this case and shall be pretermitted.

With regard to the award of attorney fees for defense of the main demand against National Union, the trial court combined the amount awarded to the commissioners with the amount awarded to the Hospital District. Thus, we must remand the matter to the trial court for a determination of an appropriate award of attorney fees to be paid to the commissioners.

CONCLUSION

For the above foregoing reasons, the trial court's judgment dated August 10, 2004, is altered in the following respects:

Insofar as the trial court rendered judgment in favor of the Hospital District and Broussard, in part, on their third-party petition against National Union, that portion of the judgment is reversed.

Insofar as the trial court rendered judgment in favor of the Hospital District and Broussard and against National Union, declaring that the National Union policy affords liability coverage in favor of the Hospital District and Broussard, that portion of the judgment is hereby reversed.

Insofar as the judgment of the trial court orders National Union to pay for the reasonable and necessary defense costs incurred by the Hospital District and Broussard in defense of the main demand of plaintiffs and pursuant to the terms and conditions of the National Union policy, that portion of the judgment is hereby reversed.

Insofar as the trial court's judgment awarded Broussard the sum of $30,792.59 for attorney fees incurred for the defense of the main demand against National Union, that portion of the judgment is hereby reversed.

Insofar as the trial court's judgment awarded the Hospital District costs for defending the main demand against National Union, that portion of the judgment is hereby reversed.

Insofar as the trial court's judgment granted judgment in favor of the commissioners for attorney fees incurred for the defense of the main demand against National Union, that portion of the judgment is hereby affirmed, but the matter is remanded to the trial court for a determination of an appropriate amount for said award.

Insofar as the trial court rendered judgment in favor of the Hospital District, dismissing National Union's third-party demand and/or cross claim by National Union for indemnity pursuant to the release agreement, that portion of the judgment is hereby reversed.

Insofar as the trial court rendered judgment assessing all court costs against National Union, that portion of the judgment is hereby reversed and this matter is remanded for the limited purpose of further consideration of costs by the trial court, in light of the judgment rendered by this court.

In all other respects, the trial court's judgment is affirmed. Costs of this appeal are assessed against Hospital Service District No. 2, Broussard, and National Union in the amount of $757.14 each.

REVERSED IN PART, AFFIRMED IN PART, AND REMANDED.