SUPREME COURT OF LOUISIANA

NO. 95-CC-1456

JULIA McCARTHY, WIFE OF JAMES McCARTHY

versus

WILLIAM BERMAN, D.C.,
NATIONAL CHIROPRACTIC MUTUAL INSURANCE COMPANY,
AND ALLSTATE INSURANCE COMPANY

WATSON, Justice, dissenting.

Medical malpractice is a technical term which must be given its technical meaning. LSA-C.C. art. 2047. Only a health care provider can commit medical malpractice.

> "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 failures of prosthetic devices, implanted in or used on or in the person of a patient. La. R.S. 40:1299.41(A)(8).

Both the trial court and the court of appeal puzzled over the "Incidental Medical Malpractice Liability" provision. The provision states that it will "also pay," indicating that it is an additional type of coverage.

However, no medical malpractice coverage is provided. The stated coverage is taken away in the next sentence which denies medical malpractice coverage to anyone in the business or occupation of providing medical treatment; i.e., anyone who could be guilty of medical malpractice. The question becomes whether Allstate's policy can legally purport to provide a coverage which it does not in fact furnish to anyone.

Allstate contends that a school nurse or a first aid dispenser might qualify, but he or she would be: (1) in a nursing or medical occupation; or (2) in the occupation of dispensing medical supplies. The negligence of others, not health care providers, would not constitute medical malpractice.

Since Dr. Berman only had $100,000 in malpractice insurance and is not a qualified health care provider under Louisiana's Medical Malpractice Act, it is unlikely he intended to purchase a $2 million "customizer" business liability policy covering "Dr. William S. Berman DBA Berman Chiropractic" without medical malpractice coverage.

An insurer may certainly exclude medical malpractice coverage in a business liability policy. However, a company cannot purport to provide malpractice insurance by stating that there is coverage and nullify that coverage in the next sentence. Coverage cannot be bestowed with the right hand and taken with the left land. *Seals*

v. Morris, 423 So.2d 652 (La. App. 1st Cir. 1982), *writ granted on other grounds*, 433 So.2d 686.

Exclusions are exceptions to coverage. They cannot be so broad that they extinguish any possible claim.

> A provision susceptible of different meanings must be interpreted with a meaning that renders it effective and not with one that renders it ineffective. C.C. art. 2049.

Employers Mutual Co. v. Oppidan, 518 N.W.2d 33 (Minn. 1994), which enforced an identical policy provision, has not been cited as authority in any other case, and I do not find it persuasive.

The conflicting and contradictory language in Allstate's medical malpractice liability provision renders it ambiguous. *Credeur v. Luke*, 368 So.2d 1030 (La. 1979). The ambiguity requires that the contract be interpreted liberally in favor of coverage. *Id.*

In addition, Allstate may owe medical payments, and this obligation defeats summary judgment.

The majority finds clear and obvious that which the trial court and the court of appeal found puzzling and confusing. Since I agree with the courts below, I respectfully dissent.