WILLIAM R. GOODING	NO. 15-CA-200
VERSUS	FIFTH CIRCUIT
ANNE F. MERRIGAN, ENCOMPASS INSURANCE COMPANY OF AMERICA, ABC INSURANCE COMPANY	COURT OF APPEAL STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 674-032, DIVISION "K"
HONORABLE ELLEN SHIRER KOVACH, JUDGE PRESIDING

NOVEMBER 19, 2015

ROBERT M. MURPHY
JUDGE

Panel composed of Judges Jude G. Gravois,
Marc E. Johnson, and Robert M. Murphy

JOHNSON, J., CONCURS WITH REASONS

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AFFIRMED

Plaintiff/appellant appeals trial court rulings in this personal injury case that granted defendants' motions *in limine* to exclude evidence, as well as defendants' motion for partial summary judgment on the issue of liability. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

On June 8, 2009, plaintiff, William R. Gooding ("Gooding"), filed a petition for damages that alleged he had been injured on August 13, 2008, when the passenger door of a car driven by defendant, Anne Merrigan ("Merrigan"), knocked plaintiff down in his driveway. Gooding[1] asserted that as a result of the fall, he sustained a fractured hip and other injuries. Merrigan[2] denied the allegations in Gooding's petition and further asserted that Gooding was injured as a result of his own negligence. As discovery proceeded in this matter, Merrigan and her insurer filed several motions *in limine* pertaining to Gooding's potential

[1] The record reflects that after the petition had been filed, William R. Gooding, Sr. passed away on June 9, 2009. Defendants thereafter consented to the substitution of Gooding's sons, William B. Gooding and Robert B. Gooding, as plaintiffs. For the purpose of this opinion, the substituted parties will be referred to as "plaintiff."

[2] On May 27, 2015, this Court dismissed Anne Merrigan as a defendant upon the motion of her insurer, Encompass Insurance Company of America ('Encompass"), who represented that she had passed away on December 6, 2011. For the purpose of this opinion, Merrigan and her insurer will be referred to as "defendants."

witnesses, as well as evidence he sought to introduce in a future jury trial on the merits. Two of these evidentiary rulings were reviewed by this Court on writs.[3]

On June 16, 2014, defendants filed a motion for summary judgment on the issue of liability, which the trial court granted following a hearing on August 6, 2014. Plaintiff was granted the instant devolutive appeal.

DISCUSSION

On appeal, plaintiff raises four assignments of error: 1) The trial court erred in granting defendants' motions *in limine* prohibiting any reference to plaintiff's medical records regarding how plaintiff said he was injured; 2) The trial court erred in striking plaintiff's statement, which was taken by a third party; 3) The trial court erred in ruling a videotape of a fall plaintiff sustained at Hollywood Casino on December 23, 2008 inadmissible; and 4) The trial court erred in granting defendants' summary judgment on the issue of liability.

Defendants first contend that several of the evidentiary issues raised on appeal are "law of the case" and therefore should not be reconsidered by this Court. Next, defendants argue that plaintiff's statement, which was contained within his medical records, and a second unsworn statement by plaintiff, were both properly excluded by the trial court as hearsay. Finally, defendants assert that the evidence deemed admissible by the trial court was insufficient to establish a genuine issue of material fact on the issue of liability, and therefore the trial court properly granted summary judgment in favor of defendants.

Law of the case

In *Pumphrey v. City of New Orleans*, 05-979 (La. 4/4/06), 925 So.2d 1202, the Louisiana Supreme Court[4] explained the judicial principle of "law of the case" as follows:

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[3] *Gooding v. Merrigan*, 13-253 (La. App. 5 Cir. 5/9/13)(unpublished writ disposition); *Gooding v. Merrigan*, 14-349 (La. App. 5 Cir. 5/30/14)(unpublished writ disposition).

> With regard to an appellate court, the 'law of the case' refers to a policy by which the court will not, on a subsequent appeal, reconsider prior rulings in the same case. This policy applies only against those who were parties to the case when the former appellate decision was rendered and who thus had their day in court. Among reasons assigned for application of the policy are: the avoidance of indefinite relitigation of the same issue; the desirability of consistency of the result in the same litigation; and the efficiency, and the essential fairness to both parties, of affording a single opportunity for the argument and decision of the matter at issue.
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> Nevertheless, the law-of-the-case principle is applied merely as a discretionary guide: Argument is barred where there is merely doubt as to the correctness of the former ruling, but not in cases of palpable former error or so mechanically as to accomplish manifest injustice.

Id. at 1207. As noted *infra*, evidentiary issues in this matter have twice come before this Court in writ applications. In *Gooding v. Merrigan*, 13-253 (La. App. 5 Cir. 5/9/13) (unpublished writ disposition), plaintiff challenged the trial court's February 7, 2013 order that granted defendants' motions *in limine* to exclude from evidence: "Hearsay Hospital Records"; the testimony of ambulance attendant Christopher Deist; and the "Unsworn Statement" of plaintiff "following the alleged accident in August 2008 and prior to his demise in 2009." In denying the writ, this Court held:

> We have carefully reviewed relator's [plaintiff's] writ application and find no legal error in the actions of the trial judge. The statement to the insurance adjuster was properly excluded as unsworn hearsay not subject to cross-examination. We further note that the ruling of the trial judge as to the medical records is that only those portions relating to liability for the accident are to be excluded. *Trascher v. Territo,* 11-2093 (La. 5/8/12), 89 So.3d 357; *see also Abadie* v. *Metropolitan Life Insurance Company,* 00-344 to 00-856 (La. App. 5 Cir. 4/11/01), 804 So.2d 4.

Gooding v. Merrigan, supra. Plaintiff did not seek review of this Court's ruling from the Louisiana Supreme Court.

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[4] Quoting *Day v. Campbell-Grosjean Roofing & Sheet Metal Corp.*, 260 La. 325, 256 So.2d 105, 107 (La. 1972).

On appeal, plaintiff's first two assigned errors are:

1. Whether the history of how this plaintiff was injured as recorded in certified medical records can be excluded as evidence, in this case.
2. Whether the recorded statement of an injured plaintiff taken by an adverse party, while the potential plaintiff was not represented by counsel, should be admitted into evidence, considering the plaintiff has died.

In these two assignments, plaintiff does, in fact, challenge the correctness of this Court's former ruling on the exact same evidentiary issues addressed on writs. This circumstance appears to be exactly on point with the type of re-litigation that the "law of the case" doctrine is designed to prevent. In any event, even though these two issues were previously considered and rejected by this Court on writs, on appeal we likewise find they lack merit.

Hospital records

Both at the trial court and in the writ to this Court, plaintiff previously argued that the version of the accident provided to ambulance personnel and treating doctors by him should have been admissible to show causation for the accident, and therefore liability on the part of defendants. The trial court found, and this Court agreed, that the portion of plaintiff's medical records, which purported to give a reason for his injuries, was hearsay. In so holding, we relied on the case of *Trascher v. Territo*, 11-2093 (La. 5/08/12), 89 So.3d 357:

> Hearsay is "a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted." La. C.E. art. 801C. Hearsay is inadmissible "except as otherwise provided by this Code or other legislation." La. C.E. art. 802. Hearsay is excluded because the value of the statement rests on the credibility of the out-of-court asserter who is not subject to cross-examination and other safeguards of reliability. *State v. Brown*, 562 So.2d 868, 877 (La. 1990); *State v. Martin*, 458 So.2d 454 (La. 1984). However, when an extrajudicial declaration or statement is offered for a purpose other than to establish the truth of the assertion, its evidentiary value is not dependent upon

> the credibility of the out-of-court asserter and the declaration or statement falls outside the scope of the hearsay exclusionary rule. *Id.*

Id. at 364.

Plaintiff now argues that his medical records, with the history of his injuries, should have been admitted under La. C.E. art. 803, sections (3) and (4).[5] While La. C.E. art. 803(3) could arguably apply because the statement in the medical records pertained to a physical condition, section (3) also specifically provides that, "A statement of memory or belief, however, is not admissible to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's testament." In this instance, plaintiff would use his statements to the treating physicians to prove that the accident was not his fault, a conclusion that relies solely on plaintiff's credibility. This meets the very definition of hearsay.[6] With respect to section (4) of La. C.E. art. 803, plaintiff's

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[5] La. C.E. Art. 803 provides in relevant part:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

...

(3) Then existing mental, emotional, or physical condition. — A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), offered to prove the declarant's then existing condition or his future action. A statement of memory or belief, however, is not admissible to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's testament.

(4) Statements for purposes of medical treatment and medical diagnosis in connections with treatment. — Statements made for purposes of medical treatment and medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to treatment or diagnosis in connection with treatment.

[6] In *Abadie* v. *Metropolitan Life Insurance Company*, 00-344 (La. App. 5 Cir. 4/11/01), 804 So.2d 4, we held that the plaintiff could not use medical records to attempt to establish facts not otherwise supported by the record:

> The medical histories are the only evidence which tends to show when and where Mr. Dufrene worked at Avondale, his job duties, and the circumstances of his employment. Even though admissible in evidence, it would be patently unfair to allow Mr. Dufrene to rely solely on those statements to satisfy his burden where cross examination by defendants is effectively denied. In *Holmes v. Caeser*, 528 So.2d 1391 (La. App. 4 Cir. 1988), the court held that where the only evidence that plaintiff was on the street car which was involved in an accident were statements he made to emergency room personnel contained in the hospital's record, plaintiff failed to carry his burden. The court noted that the plaintiff's statement constituted "double hearsay of the witness [the plaintiff] whose confrontation by defendant is more important than any other witness in the case." *Id.* at 1392. Similarly, in *Morris v. Players Lake Charles, Inc.* 99-1864 (La. App. 3 Cir. 4/5/00), 761 So.2d 27, *writ denied,* 00-1743 (La. 9/29/00), 770 So.2d 349, the Third Circuit concluded that the statement given by the plaintiff's husband to the physician as to the cause of plaintiff's injuries, standing alone, was insufficient to prove plaintiff's case. The court relied on Holmes in reaching its conclusion, but also noted that "the medical record provides at most prima facie evidence that the statements were made, not of the truth of the statements." *Morris v. Players Lake Charles, Inc., supra*, at 4, 761 So.2d at 29.

argument is that the medical records "with the history of his injuries" is admissible as a hearsay exception. However, the plain wording of the statute does not address a history of injury, only a "medical history." Even if we were to accept plaintiff's interpretation of section (4), any history of injury in the medical report would again be based on the credibility of plaintiff and his version of events, which amounts to hearsay. In this case, as in *Territo, supra*, there was no cross-examination of plaintiff,[7] and therefore we find that any details he may have given to medical providers about the accident, which are contained in his medical records, were properly excluded. We find this assignment to be without merit.

Plaintiff's Unsworn Statement To Defendant's Insurance Adjuster

At issue is the transcript of a recorded phone call from September 19, 2008, between plaintiff and an Encompass insurance adjuster. The admissibility of this evidence was also expressly addressed in *Gooding v. Merrigan*, 13-253, *supra*. As indicated above, this Court previously found that "[t]he statement to the insurance adjuster was properly excluded as unsworn hearsay not subject to cross-examination." *Id.* On appeal, plaintiff argues that "Gooding's unsworn recorded statement to the defendant insurance adjustor could be considered to have been a business record made in the ordinary course of business and therefore admissible as that hearsay exception." The record shows that plaintiff did not previously argue the business records exception, either in his brief opposing defendants' motion *in limine* to exclude the statement, nor during the January 25, 2013 argument on the motion. As articulated by the Louisiana Supreme Court in *Council of New Orleans v. Washington*, 09-1067 (La. 5/29/09), 9 So.3d 854, "[t]he well-settled

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Abadie, at page 5.

[7] Compare this result to cases such as *Renter v. Willis-Knighton Medical Ctr.*, 28,589 (La. App. 2 Cir. 8/23/96), 679 So.2d 603, in which it was demonstrated at trial that the plaintiff's medical history, as she herself communicated it to treating physicians, was contradicted by other evidence and may possibly have been false. In that case, however, the defendants had the opportunity to challenge the credibility of the plaintiff's claims of causation contained in her medical record, an opportunity not afforded to the defendants in the instant case.

jurisprudence of this court establishes that as a general matter, appellate courts will not consider issues raised for the first time, which are not pleaded in the court below and which the district court has not addressed." *Id.* at 856. Accordingly, while we could decline review of the assignment on this basis, as well as the law of the case doctrine, in our review of the merits of this claim, we specifically find no error in the trial court's ruling or in this Court's prior review.

In his fourth assignment of error, plaintiff claims that the trial court erred in granting defendants' motion for summary judgment on the issue of liability. However, this assignment of error has not been briefed. According to Rule 2-12.4 of the Uniform Rules-Courts of Appeal, all specifications or assignments of error must be briefed and the appellate court may consider as abandoned any specification or assignment of error that has not been briefed. *Silbernagel v. Silbernagel*, 06-879 (La. App. 5 Cir. 4/11/07), 958 So.2d 13. Even if considered, however, we still find this assignment to be without merit.

Appellate courts review the granting or denial of a motion for summary judgment *de novo* using the same standards applicable to the trial court's consideration of whether summary judgment is appropriate. *Suarez v. Mando*, 10-853 (La. App. 5 Cir. 3/29/10), 62 So.3d 131, 133, *writ denied*, 11-885 (La. 6/17/11), 63 So.3d 1036. A motion for summary judgment should be granted only if the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, admitted for purposes of the motion for summary judgment, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B)(2). A material fact is one that potentially insures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the lawsuit. *Hines v. Garrett*, 04-806 (La. 6/25/04), 876 So.2d 764, 765 (*per curiam*). A genuine issue is a "triable issue." *Jones v. Estate of*

Santiago, 03-1424 (La. 4/14/04), 870 So.2d 1002. If reasonable persons could disagree after considering the evidence, a genuine issue exists. However, if reasonable persons could reach only one conclusion on the state of the evidence, there is no need for a trial on that issue and summary judgment is appropriate. *Suarez, supra*. "In determining whether an issue is 'genuine,' courts cannot consider the merits, make credibility determinations, evaluate testimony or weigh evidence." *Haydel v. State Farm Insurance Company,* 05-0701 (La. App. 1 Cir. 3/24/06), 934 So.2d 726. The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of most civil actions and is favored in the law. La. C.C.P. art. 966(A)(2).

In *Samaha v. Rau*, 07-1726 (La. 2/26/08), 977 So.2d 880, the Louisiana Supreme Court explained the burden that the mover for a motion for summary judgment has to show that the other party lacks factual support for their position.

> The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to 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, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact.
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> This amendment, which closely parallels the language of *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), first places the burden of producing evidence at the hearing on the motion for summary judgment on the mover (normally the defendant), who can ordinarily meet that burden by submitting affidavits or by pointing out the lack of factual support for an essential element in the opponent's case. At that point, the party who bears the burden of persuasion at trial (usually the plaintiff) must come forth with evidence (affidavits or discovery responses) which demonstrates he or she will be able to meet the burden at trial. ... Once the motion for summary judgment has been properly supported by the moving

> party, the failure of the non-moving party to produce evidence of a material factual dispute mandates the granting of the motion. (Emphasis added; citation omitted)

(Citations omitted). *Id.* at 883.

With regard to the issue of liability, plaintiff acknowledges that there were no eyewitnesses to Merrigan's front passenger door allegedly striking him. It is also not disputed that neither Gooding nor Merrigan gave depositions in this case prior to passing away. As discussed above, the portion of the medical records that gives plaintiff's version of the accident, as well as the unsworn statement that plaintiff gave to an insurance adjuster, were both properly excluded as hearsay evidence by the trial court. Given that no admissible evidence can be produced by plaintiff to demonstrate that Merrigan was responsible for his injuries, we find that the trial court did not err in granting summary judgment on the issue of liability in favor of defendants.

Based upon our finding that the trial court did not err in granting summary judgment in favor of defendants on the issue of liability, we pretermit discussion of plaintiff's third assignment of error pertaining to the admissibility of a videotape that purports to show a second fall that plaintiff sustained months after the accident at issue. In finding that defendants bore no liability for the first accident, any potential evidence regarding damages is moot.

DECREE

For the foregoing reasons, we find that the trial court did not commit error in granting defendants' motion *in limine* to exclude evidence as well as the motion for summary judgment on the issue of liability. Therefore, we affirm the judgments of the trial court.

AFFIRMED

WILLIAM R. GOODING	NO. 15-CA-200
VERSUS	FIFTH CIRCUIT
ANNE F. MERRIGAN, ENCOMPASS INSURANCE COMPANY OF AMERICA, ABC INSURANCE COMPANY	COURT OF APPEAL STATE OF LOUISIANA

JOHNSON, J., CONCURS WITH REASONS

I concur with the majority in affirming the judgment of the trial court; however, I would apply the law of the case doctrine and would not again discuss the merits of the trial court's denials of Plaintiff's motions *in limine* regarding the admissibility of certain evidence. While I recognize that the law of the case doctrine is discretionary, I agree with the majority that this case "appears to be exactly on point with the type of re-litigation that the 'law of the case' doctrine is designed to prevent."

In previously considering the propriety of the trial court's denials of Plaintiff's motions *in limine* on supervisory writs, this Court carefully considered and analyzed the merits of the admissibility of the evidence at issue. As recognized by the majority, the law of the case doctrine is intended to avoid re-litigation of the same issue, promote consistency of result in the same litigation, and promote efficiency and fairness to both parties by affording a single opportunity for the argument and decision of the matter at issue. The refusal to apply the law of the case doctrine is generally limited to cases of palpable error or where application of the doctrine would result in injustice – neither of which apply in this case. *See Kenner Plumbing Supply, Inc. v. Rusich Detailing Inc.*, 14-922, 2015 La. App. LEXIS 1816, at *60 (La. App. 5 Cir. 9/23/15), where this Court applied law of the case after finding there was no palpable error or

manifest injustice in the trial court's denial of a motion *in limine* or this Court's writ disposition regarding the same evidentiary ruling challenged on appeal.

Additionally, to the extent Plaintiff argues a different ground on appeal for the admissibility of evidence than raised at the trial court level, he is precluded from doing so. *See Cormier v. Cushenberry*, 14-70 (La. App. 5 Cir. 7/30/14); 147 So.3d 256, 262. Therefore, I do not agree with the majority's decision to address any new grounds for the admissibility of the evidence that was not first presented to the trial court.

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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **Uniform Rules - Court of Appeal, Rule 2-20** THIS DAY **NOVEMBER 19, 2015** TO THE TRIAL JUDGE, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CHERYL Q. LANDRIEU
CLERK OF COURT

15-CA-200

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