NOT DESIGNATED FOR PUBLICATION

MARY JANE FISHER	*	**NO. 2000-CA-1541**
VERSUS	*	**COURT OF APPEAL**
CHRISTIAN HEALTH MINISTRIES, D/B/A	*	**FOURTH CIRCUIT**
SOUTHERN BAPTIST HOSPITAL, DR. JOHN R.	*	**STATE OF LOUISIANA**
COOK, AND DR. CHARLES C. SMITH, III	*	
	*	
CONSOLIDATED WITH:	* * * * * * *	**CONSOLIDATED WITH:**
MARY JANE FISHER		**NO. 2000-CA-1542**
VERSUS		
CHRISTIAN HEALTH MINISTRIES, D/B/A SOUTHERN BAPTIST HOSPITAL, ET AL.		

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NOS. 94-15736 C/W 96-305, DIVISION "I-7"
HONORABLE TERRI F. LOVE, JUDGE
* * * * * *
JUDGE MAX N. TOBIAS, JR.
* * * * * *

(Court composed of Judge Steven R. Plotkin, Judge Michael E. Kirby, Judge Max N. Tobias, Jr.)

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AFFIRMED

Mary Jane Fisher ("Mary Jane"), as curatrix for Carolyn Fisher ("Carolyn"), devolutively appeals the 5 April 2000 judgment of the trial court in favor of the defendants, John Cook, M.D. and Charles Smith, M.D., as well as their respective insurers, Louisiana Medical Mutual Insurance Company and American Continental Insurance Company (collectively, "defendants") on the issue of prescription. The trial court granted the defendants' exception of prescription as to the loss of consortium claim of

Carolyn, asserted through her sister and curatrix, Mary Jane.

This matter was originally commenced as a medical malpractice action filed by Mary Jane alleging that the defendant physicians either misdiagnosed or failed to timely treat her condition of pulmonary fibrosis, resulting in significant disability and decreased life expectancy. Nearly four years after filing her petition, and after this matter had proceeded through the medical review panel stage, Mary Jane filed a supplemental and amending petition adding as defendants the insurers of Drs. Cook and Smith, and casting herself in the additional plaintiff role as the curatrix for her sister, Carolyn, asserting a loss of consortium claim on behalf of Carolyn. The trial court maintained defendants' exception of prescription stating in its reasons for judgment that the claim "does not relate back to the original petition based on the test set forth by the Court in Giroir v. South Louisiana Medical Center, 475 So.2d 1040 (La. 1985)." The sole assignment of error raised by Mary Jane on appeal is the trial judge erred in granting the exception of prescription.

For the following reasons, we affirm.

No question exists that, unless the consortium claim relates back to

the date of the filing of the original petition, it is prescribed. La. C.C. arts. 3492 and 3468. With respect to the relation back of a claim, the Louisiana Code of Civil Procedure, art. 1153, provides:

> When the action or defense asserted in the amended petition or answer arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of filing the original petition.

The leading case on the application of article 1153 is *Giroir v. South Louisiana Medical Center, supra,* referenced by the trial court in its reasons for judgment. In *Giroir*, the Louisiana Supreme Court established a four-part test for determining whether an amended petition adding a new plaintiff relates back:

> (1) the amended claim arises out of the same conduct, transaction, or occurrence set forth in the original pleading;
> (2) the defendant either knew or should have known of the existence and involvement of the new plaintiff;
> (3) the new and the old plaintiffs are sufficiently related so that the added or substituted party is not wholly new or unrelated;
> (4) the defendant will not be prejudiced in preparing and conducting his defense.

Id. at 1044.

In the matter before us, it is undisputed that factors (1) and (3) of the *Giroir* test are satisfied. In addressing *Giroir* factor (2), Mary Jane argues that Drs. Cook and Smith, and by association their insurers, knew or should

have known of the existence and involvement of her interdicted sister, Carolyn. In support of her position, Mary Jane maintains that the defendants had actual notice of her role as caretaker of Carolyn. Indeed, Carolyn is so dependent on the plaintiff that she apparently slept on a cot in the room with Mary Jane during her hospitalizations under the care of the defendant physicians. Mary Jane's argument to this effect is supported by hospital records confirming Carolyn's observable disability, her reliance on plaintiff, and her presence in plaintiff's hospital room. The defendants do not deny this. However, the defendants do assert that there was no evidence properly admitted before the trial court to prove that point. Although attached to a memorandum filed with the court, the records upon which Mary Jane relies were not introduced into evidence at the trial of the exception of prescription.

Mary Jane attached to her brief on appeal, as well as to her opposition memorandum in the court below, documents on which she relies in showing that the defendant physicians had actual and early notice of the existence of Carolyn and Carolyn's obvious reliance on Mary Jane. However, we cannot consider exhibits that were neither offered nor introduced into evidence in the trial court. We must render judgment based on the record on appeal. La.C.C.P. art. 2164. We may not consider exhibits filed in the record if

those exhibits were not also admitted into evidence, unless we are otherwise authorized by law to do so (as in summary judgment procedure). *Sutton Steel & Supply, Inc. v. Bellsouth Mobility,* 2000-511, 2000-898, (La. App. 3 Cir. 12/13/00), 776 So.2d 589, *writ denied,* 2001-0152 (La. 3/16/01), __ So.2d __, 2001 WL 298009.

The hearing of a peremptory exception pled prior to the trial of the case requires the introduction of evidence to support or controvert it. La. C.C.P. art. 931. Thus, the transcript of that hearing and any included exhibits are essential to our review. The transcript of the 31 March 2000 hearing on the exception of prescription is not included in the record on appeal. Without that transcript and associated exhibits, we are unable to ascertain the evidence, if any, actually before the trial court. It is an appellant's responsibility to assure that the record on appeal is complete. *Hanley v. Hanley*, 381 So.2d 963, 965 (La. App. 4 Cir. 1980), *writ denied*, 383 So.2d 783 (La. 1980). See also, *Mouton v. ARMCO, Inc.*, 431 So.2d 776 (La. App. 3 Cir. 1982). Because of this inadequacy of the record on appeal, we are required to presume that the trial court's ruling and judgment were consistent with the evidence before it. *Id.* In oral argument, counsel for the plaintiff requested that we remand so that the record might be supplemented to allow formal introduction of Mary Jane's affidavit and

hospital records. Although an appellate court has the power to remand either for a new trial or for introduction of evidence, such must be exercised sparingly, as doing otherwise would put the district court at risk of retrying every case brought before it. *Gulf Coast Bank and Trust Co. v. Eckert*, 95-156 (La. App. 5 Cir. 1995), 656 So.2d 1081. For that reason, we decline to remand.

Thus, we find that Mary Jane, as curatrix of Carolyn, has failed to meet the second requirement of the Giroir test in asserting her claim for loss of consortium.

In addressing Giroir factor (4), Mary Jane maintains that the defendants are subjected to no actual prejudice as a result of the amending of her petition to include a loss of consortium claim on behalf of Carolyn. She maintains, in part, that Carolyn's limited mental capacity significantly simplifies the issue of consortium and requires no additional witnesses, thereby reducing any prejudicial effect on the defendants. Defendants maintain, in part, that the length of the delay is sufficient to be conclusive evidence of prejudice. The passage of time, in fact, is a factor weighing against the relation back of the amended claim. *Phillips v. Palumbo*, 94-1323, 94-1324 (La. App. 4 Cir. 1994), 648 So.2d 40. In *Phillips*, we considered the passage of time as creating prejudice because the only notice

that the defendants had of the consortium claim was a vague reference in the plaintiff's petition. In the case at bar, there was no reference whatsoever in Mary Jane's petition to any loss of consortium, even in the most general terms, to Carolyn or to Mary Jane's status as Carolyn's curatrix. On further review of the record, we note that the time between the original and amending petitions was a period of nearly four years. Moreover, before the suit was filed in the trial court the case was reviewed by a medical review panel. Immediately after the filing of the supplemental and amending petition asserting the loss of consortium claim, a pre-trial scheduling conference was scheduled. It is apparent that prior to the filing of Carolyn's consortium claim the matter had been the subject of extensive discovery and pre-trial preparation.

Thus, we find that Mary Jane's claim for loss of consortium, brought in her capacity as curatrix for her disabled sister, fails to meet the fourth requirement of the *Giroir* test.

Accordingly, we find that there is no evidence before us to support a conclusion that the trial court erred in holding that Carolyn's loss of consortium claim had prescribed.

AFFIRMED