FOR IMMEDIATE NEWS RELEASE

NEWS RELEASE #041

FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **26th day of June, 2009**, are as follows:

BY VICTORY, J.:

2007-CC-0492 PAMELA WARREN, THERESA RENE WARREN AND SARAH WARREN JIMENEZ v. LOUISIANA MEDICAL MUTUAL INSURANCE COMPANY, JEFFREY A. LAMP, M.D., ROBYN B. GERMANY, M.D., SANDRA MOODY, NP-C, AND FAMILY HEALTH OF LOUISIANA, INC. (Parish of E. Baton Rouge)
ON REHEARING

Retired Judge Philip Ciaccio, assigned as Justice ad hoc, sitting for Justice Chet D. Traylor, now retired.

For the reasons expressed herein, the judgment of the court of appeal is reversed and the matter is remanded to the trial court to grant defendants' exception of prescription.
REVERSED AND REMANDED.

JOHNSON, J., dissents and assigns reasons.
KNOLL, J., concurs in the result and assigns reasons.
WEIMER, J., dissents and assigns reasons.
GUIDRY, J., concurs in the result.

06/26/09

SUPREME COURT OF LOUISIANA

NO. 2007-CC-0492

PAMELA WARREN, THERESA RENE WARREN, AND SARAH WARREN JIMENEZ

versus

LOUISIANA MEDICAL MUTUAL INSURANCE COMPANY, JEFFREY A. LAMP, M.D., ROBYN B. GERMANY, M.D., SANDRA MOODY, NP-C, AND FAMILY HEALTH OF LOUISIANA, INC.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST CIRCUIT, PARISH OF EAST BATON ROUGE

ON REHEARING

VICTORY, J.[*]

We granted an application for rehearing in this case to consider whether our holding on original hearing conflicts with our decision in ***Borel v. Young***, 07-0419 (La. 11/27/07), 989 So. 2d 42 (on rehearing). On original hearing, this Court held that an amended pleading adding a new plaintiff's wrongful death claim after the medical malpractice action prescribed related back to the timely filing of the original petition pursuant to La. C.C.P. art. 1153 and the analysis set forth in ***Giroir v. South La. Med. Ctr., Div. of Hospitals***, 475 So. 2d 1040 (La. 1985). Further, we held that the new plaintiff was entitled to the benefit of the interruption of prescription on her survival action such that the amended petition adding her as a plaintiff to that cause of action was timely filed under the reasoning of ***Williams v. Sewerage & Water Bd. of New Orleans***, 611 So. 2d 1383 (La. 1993). After reconsidering the record and the applicable law, we find that we erred on original hearing and now hold that the newly

[*]Retired Judge Philip Ciaccio, assigned as Justice *ad hoc*, sitting for Justice Chet D. Traylor, now retired.

added plaintiff's claims have prescribed under the provisions of the Medical Malpractice Act (the "Act"). We therefore vacate our decision on original hearing, reverse the judgment of the court of appeal, and order that the case be remanded to the district court to grant defendants' exception of prescription.

FACTS AND PROCEDURAL HISTORY

On October 10, 12, and 13, 2000, Terry Warren received medical treatment from various health care providers, and, on October 13, 2000, he died. Alleging that his death was caused by substandard medical care which led to a delay in diagnosing and treating a heart attack, on September 11, 2001, Pamela Warren and Theresa Rene Warren filed a medical malpractice complaint with the Louisiana Patient's Compensation Fund. Pamela and Theresa Warren are the wife and daughter of the decedent. At the time the PCF complaint was filed, the decedent's other daughter, Sarah Warren Jimenez ("Sarah"), was aware of the filing but consciously chose not to be involved in the matter.[**] On August 27, 2002, a medical review panel issued an opinion stating that there was no breach of the standard of care, and the opinion was received by counsel for plaintiffs on September 19, 2002. On November 25, 2002, Pamela Warren and Theresa Warren timely filed suit against defendants[1] in the Nineteenth Judicial District Court alleging wrongful death and survival actions. Again, Sarah chose not to join in the suit. On July 6, 2004, plaintiffs filed a First Supplemental and Amending petition adding Sarah as a plaintiff asserting survival and wrongful death claims.

Defendants filed an exception of prescription arguing that Sarah's claims had prescribed because she did not file her action within the time periods provided by the

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[**] Sarah was at the age of majority at the time the medical malpractice complaint was filed.

[1] The defendants are Louisiana Medical Mutual Insurance Company, Jeffrey A. Lamp, M.D., Robyn B. Germany, M.D., Sandra Moody, NP-C, and Family Health of Louisiana, Inc.

Act. Defendants asserted that Sarah testified in deposition that she was aware of the filing of the medical review complaint and the instant lawsuit but chose not to participate. However, after she became aware that she might be called by plaintiffs as a witness, she determined that she might as well be part of the lawsuit. Defendants argued that these facts did not allow the relation back of her claims to the original petition under ***Giroir*** and that they were prejudiced by the addition of a new plaintiff nearly three years after the request for a medical review panel and nineteen months after the lawsuit was filed.

The trial court overruled the defendants' exception of prescription and the court of appeal denied the defendants' writ, citing La. C.C.P. art. 1153 and ***Giroir***. ***Warren v. Louisiana Medical Mut. Ins. Co.***, 06-412 (La. App. 1 Cir. 5/18/06). This Court then remanded the case to the court of appeal for briefing, argument and opinion. ***Warren v. Louisiana Medical Mut. Ins. Co.***, 06-1547 (La. 9/29/06), 938 So. 2d 693. Again, the court of appeal denied the writ relying on ***Giroir***. ***Warren v. Louisiana Medical Mut. Ins. Co.***, 06-412 (La. App. 1 Cir. 2/9/07). This Court granted the defendants' writ application, ***Warren v. Louisiana Medical Mut. Ins. Co.***, 07-492 (La. 4/27/07), 955 So. 2d 670, and affirmed the judgment of the court of appeal. ***Warren v. Louisiana Medical Mut. Ins. Co.***, 07-0492 (La. 12/2/08), ___ So. 2d ___. On February 13, 2009, we granted the defendants' application for rehearing.

DISCUSSION

La. R.S. 9:5628(A) provides the time periods in which medical malpractice actions must be filed, as follows:

> A. No action for damages for injury or death against any physician, chiropractor, nurse, licensed midwife practitioner, dentist, psychologist, optometrist, hospital or nursing home duly licensed under the laws of this state, or community blood center or tissue bank as defined in R.S. 40:1299.41(A), whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought unless

> filed within one year from the date of the alleged act, omission, or neglect, or within one year from the date of discovery of the alleged act, omission, or neglect; however, even as to claims filed within one year from the date of such discovery, in all events such claims shall be filed at the latest within a period of three years from the date of the alleged act, omission, or neglect.

In order to file a medical malpractice action, a party must first present his proposed complaint to a medical review panel for review. La. R.S. 40:1299.47(B)(1)(a)(i). La. R.S. 40:1299.47(A)(2)(a) provides for the suspension of the period provided in La. R.S. 9:5628 during the time the complaint is pending before the medical review panel, as follows:

> The filing of the request for a review of a claim shall suspend the time within which suit must be instituted, in accordance with this Part, until ninety days following notification, by certified mail, as provided in Subsection J of this Section, to the claimant or his attorney of the issuance of the opinion by the medical review panel, in the case of those health care providers covered by this Part, or in the case of a health care provider against whom a claim has been filed under the provisions of this Part, but who has not qualified under this Part, until ninety days following notification by certified mail to the claimant or his attorney by the board that the health care provider is not covered by this Part. The filing of a request for review of a claim shall suspend the running of prescription against all joint and solidary obligors, and all joint tortfeasors, including but not limited to health care providers, both qualified and not qualified, to the same extent that prescription is suspended against the party or parties that are the subject of the request for review. . . .[2]

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[2]In ***LeBreton v. Rabito***, 97-2221 (La. 7/8/98), 714 So. 2d 1226, 1230-31, we explained this suspensive period as follows:

> Keeping in mind Plainiol's explanation for the underlying need for the principle of suspension, it is evident that the Louisiana Medical Malpractice Act took cognizance of the need to suspend prescription and fully protects plaintiffs who would otherwise suffer the detrimental effect of liberative prescription. Because the Medical Malpractice Act prohibits the filing of a medical malpractice claim against a qualified health care provider prior to panel review, the act specifies that the filing of a request for review before a panel suspends prescription. La.R.S. 40:1299.47(A)(2)(a). Moreover, as provided by statute, the filing of the complaint prevents prescription from lapsing during the pendency of the review process and further suspends prescription from the time of filing until ninety-days following notification to the claimant or his attorney of the panel opinion. ***Id***. After reviewing these special provisions, it is clear that the legislature has equitably provided for suspension to aid the plaintiff in the medical malpractice arena who is prevented by law from the outset from filing suit against the qualified health care provider. . . . Thus, considering the doctrinal underpinnings for the existence of the rules of suspension, it is evident that there is no need for the general rules of interruption of prescription to combine with

Recently, in ***Borel**, supra*, four members of this Court held that the three year time period in La. R.S. 9:5628 was prescriptive, rather than peremptive.[3] In so doing, we reaffirmed our prior holding in ***Hebert v. Doctors Memorial Hospital***, 486 So. 2d 717, 723-24 (La. 1986), which had held that the one and three year periods were prescriptive "with only the single qualification that the discovery rule is expressly made inapplicable after three years from the act, omission or neglect."

In ***Borel***, the plaintiffs timely filed a malpractice complaint with the Louisiana Patient's Compensation Fund against two doctors and a hospital, thereby satisfying the requirements of La. R.S. 40:1299.47(B)(1)(a)(i) that no action may be filed against a health care provider before a claimant's proposed complaint has been presented to a medical review panel. This timely request suspended prescription until ninety days following notification of the panel's issuance of an opinion against all parties named in the complaint and all joint and solidary obligors and all jointfeasors. La. R.S. 40:1299.47(A)(2)(a). Within 90 days of being notified of the panel's opinion, the plaintiffs filed suit in district court against the hospital, but not against the two doctors. After the three year period provided in La. R.S. 9:5628, plaintiffs attempted to amend their petition to add the doctors and their insurer, and when this failed, they filed a separate lawsuit against them which was later consolidated with the original suit. In response, the defendants filed an exception of prescription. Plaintiffs contested, arguing that La. C.C. art. 2324(C), providing that "[i]nterruption

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suspension to synergistically benefit the plaintiff.

[3]However, our further holding in ***Borel*** lessens the impact of this distinction. As explained in this opinion, by ruling that specific provisions of the Act applied to the exclusion of the general codal articles on interruption of prescription, ***Borel*** held that only the suspensive periods provided for in the Act can apply to suspend the prescriptive period of La. R.S. 9:5628. So, although the three year period is prescriptive, it is so only in a limited sense because the general codal articles allowing interruption or suspension of that prescriptive period do not apply.

of prescription against one joint tortfeasor is effective against all joint tortfeasors," applied such that their timely suit against the hospital interrupted prescription against the other joint tortfeasors. In ***Borel***, we disagreed and held that "the more specific provisions of the Medical Malpractice Act regarding suspension of prescription against joint tortfeasors apply to the exclusion of the general code article on interruption of prescription against joint tortfeasors, LSA-C.C. art. 2324(C)." ***Borel,*** *supra* at 69.

In reaching this conclusion, we relied on our earlier decision in ***LeBreton,*** *supra*. In ***LeBreton***, the plaintiffs filed their medical malpractice action in the district court before filing their request for review before a medical review panel as required by La. R.S. 40:1299.47(B)(1)(a)(i). The plaintiffs' district court suit was dismissed without prejudice as premature. Several years later, the medical review panel notified plaintiffs of its opinion, but plaintiffs did not file suit within 90 days as required by La. R.S. 40:1299.47(A)(2). Plaintiffs argued that its suit was not prescribed because the filing of suit in district court prior to filing the medical review panel complaint interrupted prescription under La. C.C. art. 3466 and 3472. Because prescription was interrupted at the time their medical review request was filed and because that filing suspended prescription until 90 days after being notified of the panel decision, plaintiffs argued that prescription began again at that time and they had one year after the expiration of the suspensive period of La. R.S. 40:1299.47(A)(2) in which to file suit. This Court disagreed, holding as follows:

> Actions for medical malpractice against certain health care providers, such as the defendants herein, are governed by special laws, Part XXIII of Chapter 5, Miscellaneous Health Provisions of La. R.S. 40:1299.41, *et seq.*, and La. R.S. 9:5628, which delineate the liberative prescription applicable to actions for medical malpractice under Title 40. It specifically provides, inter alia, that the filing of a medical malpractice claim with the board only suspends the time within which suit must be instituted in a district court. On the other hand, <u>if the general codal</u>

> articles of 3466 and 3472 apply . . . then the prescription and suspension provisions provided in the Medical Malpractice Act will be written out. Therein lies the conflict. If we let this ruling stand, we will condone and encourage the technique of unnecessarily prolonging malpractice litigation by a lesser standard. The party who improperly files a premature medical malpractice suit without first filing the claim with the board for a medical review panel, and whose suit is subsequently dismissed without prejudice, gains an additional year of prescription in addition to the suspended time provided by the Medical Malpractice Act, within which to file the suit anew.

714 So. 2d at 1229-30. Thus, we held that the general provisions on interruption of prescription found in La. C.C. art. 3462 could not be simultaneously applied with the specific provision on suspension of prescription contained in La. R.S. 40:1299.47(A)(2)(a) to defeat the defendants' exception of prescription.

In relying on ***LeBreton*** in ***Borel***, we held although ***LeBreton*** was presented in a different factual and procedural posture, the "holding in ***LeBreton*** clearly stands for the principle that medical malpractice claims are governed by the specific provisions of the Medical Malpractice Act regarding suspension of prescription to the exclusion of the general codal articles on interruption of prescription," and "that holding is broad enough to extend to the instant case." ***Borel**, supra* at 67. We noted in ***Borel*** that a contrary holding applying La. C.C. art. 2324(C) "would potentially subject a health care provider to an indefinite period of prescription, even after the claim has been evaluated by a medical review panel, a result clearly at odds with the purpose of the [Act], which ... was to curtail lengthy periods for filing malpractice suits . . ." ***Id.*** at 68, n. 12.

In reviewing our opinion on original hearing, we see that it is contrary to ***Borel*** in two respects. First, on original hearing this Court relied on ***Williams**, supra*, to hold that because Sarah shared her survival cause of action with her mother and sister, prescription on that cause of action was interrupted when Sarah's mother and sister timely filed suit. However, while ***Williams*** held that the general codal articles

on interruption of prescription, La. C.C. art. 3462,[4] 1799,[5] and 3503,[6] applied such that suit against one solidary obligor interrupted prescription against another solidary obligor, ***Williams*** was not a medical malpractice action. For had it been a medical malpractice action, ***Borel*** would dictate that the specific provisions of the Act apply to the exclusion of the general code articles on interruption of prescription against solidary obligors, just as the specific provisions of the Act regarding suspension of prescription applied to the exclusion of the general code article on interruption of prescription against joint tortfeasors under ***Borel***. Because the holding of ***Williams*** has no application in the medical malpractice area and its application in that area is contrary to ***Borel***, we erred in relying on ***Williams*** on original hearing to hold that Sarah's survival claim had not prescribed.

Secondly, our holding on original hearing that the amended pleading adding a new plaintiff after the expiration of the prescriptive period related back to the timely filing of the original petition pursuant to La. C.C.P. art. 1153 is contrary to ***Borel***, as well as to ***LeBreton***. La. C.C.P. art. 1153 provides that "[w]hen 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 pleading." ***LeBreton*** and ***Borel*** stand for the proposition that medical malpractice claims are governed by the specific provisions of the Medical Malpractice Act regarding suspension of prescription to the exclusion of the general codal articles on interruption of

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[4]La. C.C. art. 3462 provides that prescription is interrupted when the obligee commences an action against the obligor in a court of competent jurisdiction and venue.

[5]La. C.C. art. 1799 provides that the "interruption of prescription against one solidary obligor is effective against all solidary obligors, and their heirs."

[6]La. C.C. art. 3503 provides that "[w]hen prescription is interrupted against a solidary obligor, the interruption is effective against all solidary obligors and their successors."

prescription. These cases are equally applicable here. The expressed reasoning behind the holding in ***LeBreton*** was that if the general rules on interruption were to apply to a medical malpractice action, "then the prescription and suspension provisions provided in the Medical Malpractice Act will be written out," and "[t]herein lies the conflict." ***LeBreton**, supra* at 1230. Although La. C.C.P. art. 1153 does not "interrupt" prescription as did the general codal articles in ***LeBreton*** and ***Borel***, "relation back" of an untimely filed amended petition directly avoids the application of prescription by allowing a claim that would have otherwise prescribed to proceed. The effect of this interference is that if relation back is allowed, the "prescription and suspension provisions provided in the Medical Malpractice Act will be written out," which, as we recognized in ***LeBreton***, presents "a conflict." ***LeBreton**, supra* at 1230. Further, the application of La. C.C.P. art. 1153 "would potentially subject a health care provider to an indefinite period of prescription, . . . a result clearly at odds with the purpose of the [Act]." ***Borel**, supra* at 68, n.12. Because medical malpractice actions are governed by the specific provisions of the Act regarding prescription and suspension of prescription, under ***Borel***, we find that any general codal article which conflicts with these provisions may not be applied to such actions in the absence of specific legislative authorization in the Act. The Act has no rules allowing relation back of pleadings for medical malpractice claims. The application of Article 1153 would permit the adding of an plaintiff subsequent to the expiration of the three-year period provided for in La. R.S. 9:5628, and would read out of the statute the prescription and suspension period provisions by La. R.S. 9:5628 and La. R.S. 40:1299.47; therefore, La. C.C.P. art. 1153 may not be applied to the medical malpractice action under the reasoning of ***LeBreton*** and ***Borel***.[7]

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[7]This case is not governed by ***Guitreau v. Kucharchuk,***, 99-2570 (La. 5/16/00), 763 So. 2d 575, which specifically found that there was no conflict between La. R.S. 40:1299.47 and La. C.C.

CONCLUSION

We erred on original hearing allowing relation back of a pleading adding a plaintiff after the prescriptive period provided by the Act had run. Our prior jurisprudence holds that medical malpractice claims are governed exclusively by the specific provisions of the Act regarding prescription and suspension of prescription. For that reason, our holding on original hearing that a general codal article providing for interruption of prescription applied to defeat prescription on Sarah's survival claim under the Act was error. Further, because any general codal article which conflicts with the operation of prescription under the Act cannot be applied in a medical malpractice case, we erred in allowing a general codal article allowing relation back of a pleading to defeat prescription on Sarah's wrongful death claim under the Act.[8]

DECREE

For the reasons expressed herein, the judgment of the court of appeal is reversed and the matter is remanded to the trial court to grant defendants' exception of prescription.

REVERSED AND REMANDED.

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art. 3472, and thus applied art. 3472 to the medical malpractice action. La. C.C. art. 3472 simply provides that a period of suspension is not counted toward accrual of prescription and that prescription commences to run again upon the termination of the suspensive period. The Court in ***Guitreau*** applied those guidelines to the suspension of prescription provided for in La. R.S. 40:1299.47, and held that after the ninety-day period was completed, the plaintiffs were entitled to the period of time under La. R.S. 9:5628 that remained unused at the time the request for a medical review panel is filed. There was no conflict as the application of La. C.C. art. 3472 did nothing to interfere with prescription and suspension of prescription provided for under the Act.

[8]Because of our decision on these issues, any discussion of the issue of whether relation back of a pleading belatedly adding a plaintiff under La. C.C.P. art. 1153 is allowed in the absence of a pleading mistake would be dicta. However, we note that our opinion on original hearing addressing the requirements for adding a plaintiff under La. C.C.P. art. 1153 has been vacated.

06/26/09

SUPREME COURT OF LOUISIANA

No. 2007-CC-0492

PAMELA WARREN, THERESA RENE WARREN,
AND SARAH WARREN JIMENEZ

VERSUS

LOUISIANA MEDICAL MUTUAL INSURANCE
COMPANY, JEFFREY A. LAMP, M.D.,
ROBYN B. GERMANY, M.D., SANDRA MOODY, NP-C, AND
FAMILY HEALTH OF LOUISIANA, INC.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL
FIRST CIRCUIT, PARISH OF EAST BATON ROUGE

Johnson, Justice, dissents and assigns reasons.

I must respectfully dissent from the majority's opinion on rehearing. This Court granted defendants' application for rehearing to consider whether our opinion on original hearing conflicts with this Court's opinion in *Borel v. Young*, 07-C-0419 (La. 11/27/07), 989 So. 2d 42 (on reh'g). Because I find no conflict with our decision in *Borel*, I would reinstate our original judgment, affirming the decision of the court of appeal.

In our original opinion, we found that the Plaintiffs' amendment to their petition, filed almost four years after death, adding a major child's survival and wrongful death claims (Sarah Warren Jimenez), related back to the timely filing of the original petition. This Court applied La. C.C.P. art. 1153 and the factors set forth in *Giroir v. South La. Med. Ctr., Div. Of Hospitals*, 475 So. 2d 1040 (La. 1985) in finding that the amendment related back to the date of filing of the original petition for wrongful death and survival actions by the wife and another major child of the

decedent against the defendant health care providers.

In their application for rehearing, defendants argue that our original opinion is in conflict with *Borel,* and creates a different standard for late-added plaintiffs and late-added defendants.[1] Unlike this matter, *Borel* involved the plaintiffs' attempt to add a new and unrelated defendant to a pending medical malpractice suit. In this case, all defendants were timely sued. There is no concern in this case, unlike *Borel*, about any conflict between the general codal articles on interruption of prescription and the specific provisions of the Medical Malpractice Act relating to suspension of prescription. As the Plaintiffs have pointed out, the issue here is not about interrupting or suspending prescription. La. C.C.P. art. 1153 provides that "[w]hen the action or defense asserted in the amended petition or answer arises out of the conduct, transaction, or occurrence set forth in the original pleading, the amendment relates back to the date of filing the original petition." Thus, relation back is neither a suspension or an interruption of prescription, and when applied, it is as if the amended claim has been filed with the original petition.

While the majority acknowledges that the Medical Malpractice Act has no rules relative to relation back of pleadings, the majority still finds that the La. C.C.P. art. 1153 cannot be applied. The majority reasons that any general codal article which conflicts with the provisions of the Medical Malpractice Act cannot be applied to medical malpractice actions in the absence of specific legislative authorization in the Act.

Contrary to the majority's holding, I agree with the opinion expressed in Justice Weimer's concurring opinion on original hearing. Because the Medical Malpractice Act is silent with respect to the issue of relation back of pleadings, I find

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[1] Defendants also argue that even if there was no conflict with *Borel*, two of the *Giroir* factors are not met in this case.

that there is no conflict between the general codal articles and the specific provisions of the Medical Malpractice Act. Thus, these various provisions should be read in conformity with each other. *Guitreau v. Kucharchuk*, 99-2570 (La.5/16/00), 763 So.2d 575, 579. Therefore, I find no reason why La. C.C.P. art. 1153 should not be applied here.[2]

Because I find that this case is distinguishable from *Borel*, I find no conflict, and no reason to reverse our original opinion.[3]

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[2] I would also reaffirm our application of the *Giroir* factors in this matter

[3] I also disagree with the majority's holding that Sarah's survival claim is prescribed. As we held on original hearing, Sarah shares in this cause of action with her sister and mother; therefore, prescription on that cause of action was interrupted when Sarah's sister and mother timely filed suit against the defendants. I also note that allowing the amendment to add Sarah's survival claim will not affect the defendants' liability. The addition of this claim will merely affect the division of any judgment proceeds between the plaintiffs.

06/26/09

SUPREME COURT OF LOUISIANA

No. 07-CC-0492

PAMELA WARREN, THERESA RENE WARREN, AND SARAH WARREN JIMENEZ

v.

LOUISIANA MEDICAL MUTUAL INSURANCE COMPANY, JEFFREY A. LAMP, M.D., ROBYN B. GERMANY, M.D., SANDRA MOODY, NP-C, AND FAMILY HEALTH OF LOUISIANA, INC.

On Rehearing

KNOLL, Justice, concurring in the result

With all due respect, while I concur in the result reached by the majority dismissing plaintiffs' suit, I disagree with the majority's reliance upon the plurality opinion *Borel v. Young*, 07-0419 (La. 7/1/08), 989 So.2d 42, on rehearing, which has no precedential authority to support the holding that the three-year provision in La. Rev. Stat. §9:5628 is prescriptive, and its reaffirmation of *Hebert v. Doctors Memorial Hosp.*, 486 So.2d 717 (La. 1986).[1] For the following reasons, I find plaintiffs' action is perempted by the clear language of La. Rev. Stat. §9:5628, and write separately to reiterate my position on the issue of the peremptive nature of La. Rev. Stat. §9:5628's three-year provision, which issue remained unresolved in our jurisprudence in light of the lack of precedential authority of the plurality opinion on rehearing in *Borel*. My position as clearly and expressly reasoned in my concurrence in *Borel* on rehearing is dispositive of the issue raised in the present case. Given the importance of this issue of peremption and the majority's reliance on *Borel*, I find it necessary to once again address the plurality opinion and its flawed conclusion.

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[1]Prior to the majority's reliance on *Borel* as authority, this reaffirmation had no precedential value as *Borel* on rehearing was a plurality opinion.

The plurality opinion on rehearing in *Borel* concluded the 1987 amendments and reenactment of La. Rev. Stat. §9:5628 did not substantively change the law and reaffirmed *Hebert's* interpretation of the three-year provision as prescriptive, but found that under *LeBreton v. Rabito*, 97-2221(La. 7/8/98), 714 So.2d 1226, plaintiffs' action had prescribed. I concurred in the result only, finding the plaintiffs' action was perempted by the clear language of La. Rev. Stat. §9:5628, as stated by the majority on original hearing in *Borel* as well as for the reasons contained herein.

The seminal issue raised by the writ in *Borel* was whether the three-year time limitation contained in La. Rev. Stat. §9:5628 is prescriptive and, therefore, susceptible to interruption as the plaintiffs suggested, or peremptive.[2] The correct

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[2]As explained by the majority, the defendants in *Borel* filed a peremptory exception of prescription in respond to plaintiffs' suit, which was filed after the three-year period provided in La. Rev. Stat. §9:5628 had past. In the hearing on the exception, defendants argued plaintiffs' action was perempted. The district court agreed, granting defendants' exception and dismissing plaintiffs' claim against defendants with prejudice on the grounds of peremption. In its written reasons, the district court stated:

> The rules governing the time within which a medical malpractice action can be brought are clearly set forth in La. R.S. 9:5628(A), which provides in pertinent part:
>
> > No action for damages for injury or death against any physician . . . . whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought unless filed within one year from the date of the alleged act, omission or neglect or within one year from the date of discovery of the alleged act, omission or neglect; <u>however, even as to claims filed within one year from the date of such discovery, in all events such claims shall be filed at the latest within a period of three years from the date of the alleged act, omission or neglect.</u> (Emphasis added)
>
> La. R.S. 9:5628(A) means that in an action against a physician under the medical malpractice act, the plaintiff has one year from the alleged act, omission or neglect or one year from discovery of the alleged act, omission or neglect within which to bring an action. This one year period is, presumably, subject to all of the normal rules applied to suspension and interruption of prescription found elsewhere in the

disposition of the issue turned on well-established statutory interpretation as explained in the majority opinion on original hearing.

Considering the plain, explicit language of the statute, the obvious purpose behind the statute, and the readily apparent public policy, which mitigates against suspension, interruption, or renunciation of the time limit and in favor of certainty in terminating causes of action, as discussed in detail in the majority opinion on original hearing in *Borel* and in my concurrence on rehearing, I find La. Rev. Stat. §9:5628 establishes a three-year peremptive time period. Because plaintiff's action was brought over three years after the alleged act of malpractice, under La. Rev. Stat. §9:5628, her action is extinguished by peremption.

Moreover, despite the majority's reliance on *Borel*'s reaffirmation of *Hebert's* interpretation of the three-year provision as prescriptive, I am still strongly of the opinion that *Hebert* should be overruled. In *Hebert*, this Court held that La. Rev. Stat. §9:5628 is in both of its features a prescription statute. In reaching this

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law.

> But the second period of time that must be applied to all actions under the medical malpractice act is "peremptive" in nature and may not be interrupted or suspended. No action may be brought once three years have passed after the alleged act of malpractice under any circumstances.....
>
> * * *
>
> The plaintiffs filed suit on March 28, 2002 only against Lafayette General Medical Center. Plaintiffs did not file suit against Dr. Clinton Young and LAMMICO until March 21, 2005, far past three years from the date of the alleged act, omission or negligence and more than three years even after Mary Borel's demise. The plaintiffs assert that suit was filed after they learned that, as part of its defense, Lafayette General Medical Center plans to offer physician expert testimony to the effect that Dr. Clinton Young's treatment of Mary Borel fell below the standard of care required under the circumstances. Clearly, under these undisputed facts, any action against these defendants is "perempted" under the provisions of La. R.S. 9:5628(A).

conclusion, this Court looked to several indicators (structural considerations). First, the Court examined the title of 1975 La. Acts 808 enacting this provision, which stated that the purpose of the act is to establish a new section to provide for a "maximum prescriptive period" with regard to medical malpractice claims, as indicative of the Legislature's purpose in enacting the particular limitation periods. Second, the Court noted that peremption statutes generally create the right of action and stipulate the delay during which the right may be exercised, and the right of action at issue long preceded the enactment of La. Rev. Stat. §9:5628.[3] Third, the Court looked for the existence of a claim of a public law nature and a period of less than one year, and La. Rev. Stat. §9:5628 qualified on neither score. The Court did note that the defendant's strongest argument in support of peremption was that the language of the statute suggests that peremption is intended, an extinguishment of the right upon lapse of a period of time. The Court found, however, that not one case in the jurisprudence considering the distinction between prescription and peremption has accentuated the language used in a given statute as determinative of which was intended, and had the legislature meant it to be peremptive it could have so entitled that act rather than calling it "a prescriptive period." Notably, this reasoning conflicts with La. Civ. Code art. 9 and La. Rev. Stat. §§1:3 & 4 on the interpretation of laws. Also, the title to the 1975 Act stated the purpose of the act was to establish a new section to provide a maximum prescriptive period and abandonment with respect to

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[3]In this aspect, a commentator challenged the Court's reliance on the "time honored" *Guillory v. Avoyelles Railway Co.*, 104 La. 11, 28 So. 899 (1900), test which set forth two factors in determining the peremptive nature of a provision: (1) an unusually strong public interest that the right limited exist for only a short time; and (2) the statute in question both created a right of action and stipulated the delay during which it could be exercised. The same commentator asserted that the *Guillory* test should be discarded altogether as it was created in *obiter dicta* and arguably was based on mere coincidence. DONALD BARON WIENER, *Hebert v. Doctors Memorial Hospital: Three-Year Limit on Exercising Medical Malpractice Claims Held to Be Prescriptive*, 61 TUL.L.REV. 941, 947-48 (1987).

medical malpractice claims. The term abandonment seems indicative of extinguishment along the lines advanced by the defendant in *Hebert*. Further, "maximum prescriptive period" suggests the strictest limit available, *i.e.*, peremption, and the closest parallel to peremption in French law is called "strict prescription." Also, the Legislature did not officially adopt peremption into the code until 1982 and may have been hesitant to use the term when the statute was written.

Then, in 1987, within a year of the *Hebert* decision, the Legislature amended and reenacted La. Rev. Stat. §9:5628 in an act that dealt primarily with psychologists. The original version of 1987 La. Acts 915 did not contain any amendments to La. Rev. Stat. §9:5628. The amendments and reenactment first appear in the engrossed version of the bill, and the legislative history of the act reveals the amendments and reenactment were proposed by the House Committee on Health and Welfare to include psychologists in the list of enumerated persons against whom actions for damages arising out of patient care must be brought within the stated time limits and changed the language as to the three-year period from–"***;provided, however, that*** even as to claims filed within one year from the date of such discovery, in all events such claims ***must*** be filed at the latest within a period of three years from the date of the alleged act, omission, or neglect"– to read–"***;however***, even as to claims filed within one year from the date of such discovery, in all events such claims ***shall*** be filed at the latest within a period of three years from the date of the alleged act, omission, or neglect."

Based on my research, this Court, prior to our ruling on original hearing, had never addressed the effect of the amendments and the reenactment, even though this Court had continued to rely on *Hebert* and even in a footnote in *David v. Our Lady of the Lake Hosp., Inc.*, 02-2675 (La. 7/2/03), 849 So.2d 38, stated that the "three-

year limitation is prescriptive, not peremptive, citing *Hebert*, as reaffirmed in *State Bd. of Ethics v. Ourso*, 02-1978, p. 4 (La. 4/9/03), 842 So.2d 346, 349." *Ourso*, however, did not address the amendments or reenactment of La. Rev. Stat. §9:5628, but rather affirmed *Hebert's* analysis of the 1975 Act. Also, not relying on *Hebert*, this Court in *Spradlin v. Acadia-St. Landry Medical Foundation*, 98-1977, p. 6 (La. 2/29/00), 758 So.2d 116, 120, describes the time limitations contained in La. R.S. 9:5628 as "special prescriptive and peremptive periods for malpractice actions."

Yet, the plurality opinion on rehearing in *Borel* asserted that for more than twenty years this Court had consistently followed and endorsed the holding in *Hebert*, which formed *jurisprudence constante*. This assertion was misleading and in my view wrong because it did not take into consideration the holding in *Spradlin* that the three-year provision is peremptive and its effect on this so-called formation of *jurisprudence constante*. Most notably, this Court's reliance on, discussion of, or citing to *Hebert* or its three-year prescriptive period analysis has either been **in *obiter dicta* in cases where the three-year provision did not come into play and the discussion of which was not necessary to the resolution of the issues**, *Perritt v. Dona*, 02-2601, p. 15 (La. 7/2/03), 849 So.2d 56, 66 (medical malpractice case involving the propounding of interrogatories and exceptions of vagueness or no cause of action); *Campo v. Correa*, 01-2707, pp. 8-10 (La. 6/21/02), 828 So.2d 502, 508-09 (medical malpractice claim brought well within three years from the date of the act of malpractice; directly quoting *Hebert* in its interpretation of provision); *Bailey v. Khoury*, 04-0620, p. 8-9 (La. 1/20/05), 891 So.2d 1268, 1275 (malpractice suit filed within a year of child's birth, well within three years from the act of malpractice); *White v. West Carroll Hosp., Inc.*, 613 So.2d 150, 154-55 (La. 1992)(medical malpractice claim brought well within three years), **in the interpretation of non-**

LMMA provisions, *State Bd. of Ethics v. Ourso*, 02-1978, pp. 6-7 (La. 4/9/03), 842 So.2d 346, 350-51 (Campaign Finance Disclosure Act); *State Through Div. of Admin. v. McInnis Bros. Const.*, 97-0742, pp. 5-7 (La. 10/21/97), 701 So.2d 937, 941-42 (Public Works Act); *Segura v. Frank*, 93-1271, pp. 17-18 (La. 1/14/94), 630 So.2d 714, 726-27 (automobile accident involving uninsured motorists and the LIGA; relying on *Hebert*'s consideration of the nature of a "pending" lawsuit); *Naquin v. Lafayette City-Parish Consol. Government*, 06-2227, pp. 16-17 (La. 2/22/07), 950 So.2d 657, 668 (Local Government Fair Competition Act; distinction between peremption and prescriptive periods); *Exxon Pipeline Co. v. Louisiana Public Service Com'n*, 98-1737, p. 14, n. 10 (La. 3/2/99), 728 So.2d 855, 863, n. 10 (Public Service Commission; citing *Hebert* for the principle that Legislative purpose is one of the most significant factors in distinguishing peremptive and prescriptive statutes); *Reeder v. North*, 97-0239, p. 12 (La. 10/21/97), 701 So.2d 1291, 1298 (legal malpractice provision; citing *Hebert* as authority that contra non does not apply to peremption), **or in the application of the pre-1987 version of La. Rev. Stat. §9:5628**, *David v. Our Lady of the Lake Hosp., Inc.*, 02-2675, p. 1, n. 1(La. 7/2/03), 849 So.2d 38, 41, n. 1(1979 blood transfusion); *Whitnell v. Silverman*, 95-0112, p. 6 (La. 12/6/96), 686 So.2d 23, 27 (constitutionality of provision, 1986 malpractice suit); *Hillman v. Akins*, 93-0631, p. 5 (La. 1/14/94), 631 So.2d 1, 4 (all acts of malpractice at issue occurred in 1985 or 1986; cites *Hebert* as holding discovery rule category of contra non inapplicable to claims brought under La. R.S. 9:5628); *Taylor v. Giddens*, 618 So.2d 834, 842(La. 1993)(1986 malpractice claim arising out of alleged malpractice in 1982; citing *Hebert* in support of the position that the discovery rule is inapplicable to survival actions filed more than three years after malpractice); *Whitnell v. Menville*, 540 So.2d 304, 308 (La. 1989)(claim arising out

of treatment in 1980; suit filed 1986; distinguishes *Hebert*); *Crier v. Whitecloud*, 496 So.2d 305, 307-08 (La. 1986)(1983 malpractice suit);[4] *Crier v. Whitecloud*, 486 So.2d 713, 714 (La. 1986)(1983 malpractice suit; released on the same day as *Hebert*). Admittedly, *Spradlin* also contains dicta.

Commentators have been critical of the *Hebert* decision and have also interpreted this provision as peremptive. FRANK L. MARAIST & THOMAS C. GALLIGAN, JR., LOUISIANA TORT LAW §§ 10.05, 10.06, n.12 (2006 ed.); DONALD BARON WIENER, *Hebert v. Doctors Memorial Hospital: Three-Year Limit on Exercising Medical Malpractice Claims Held to Be Prescriptive*, 61 TUL.L.REV. 941 (1987). At the time of its release, commentators criticized the Court's decision to focus on structural arguments, while never explicitly addressing the policy concerns underlying La. Rev. Stat. §9:5628 and whether a peremptive interpretation was necessary to implement them. WIENER, *supra*, at 948. Policy, however, apparently was the decisive factor; yet, critics commented upon the Court's failure to discuss policy, which was argued left the impression that the Court's reasoning was based only on weighing several structural criteria, when in reality those tests were at most only tools for searching for the policy underlying the statute. *Id.* More disturbing to the critic, though, was the Court's refusal to be bound by the clear language of the statute, the disregard of which, on its face, was inconsistent with the method of statutory interpretation mandated by the Civil Code. *Id.* at 948-49. The criticism concludes:

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[4]Justice Lemmon was the author of the majority opinion in *Crier I* which held in accordance with *Hebert* on the issue of the three-year prescriptive period. However, by the rehearing merely months later, Justice Lemmon concurs in the majority opinion on the issue of constitutionality of the statutory provisions, but we see his break from the prescriptive school at this point. From then on, Justice Lemmon has treated the three-year provision as peremptive, a position he advances when he authored this Court's opinion in *Spradlin*.

> In drafting Revised Statute section 9:5628, the legislature specifically considered how far to subordinate private interests to those of society and described how the statute was to function. The legislature decided that, 'in all events,' medical malpractice actions would be extinguished after three years. When the legislature makes such an explicit policy judgment and chooses clear language to express it, the court may be abusing its discretion by ignoring that choice. In this case, the court's purported search to implement the policy behind the statute became, in effect, a review of the legislature's policy choice. The legislature did not sanction that authority by adopting the peremption conception in 198[2].

Id. at 949.

Moreover, prior to *Hebert*'s release, commentators perceived the three-year provision as peremptive, explaining:

> Statues of limitations specifically for malpractice suits have been shortened, where none existed they have been enacted, and the discovery rule has been sharply curtailed. The most common approach, instituted in nine states,[[5]] is reflected in the Louisiana provision. A fixed prescriptive period of short duration (1 year in Louisiana) begins to run upon discovery of injury. Superimposed upon this, however, is a peremptive period of three years from the date of the tort, after which the suit is barred regardless of when discovered.

KANDY G. WEBB, *Comment, Recent Medical Malpractice Legislation–A First Checkup*, 50 TUL.L.REV. 655, 673 (1976).

Although prior to *Hebert* there was no opinion by this Court on this precise issue, the appellate courts did address the issue. *Hebert* cited to two cases decided by this Court that had "treated § 9:5628 as prescriptive." 486 So.2d at 723. These cases were *Lott v. Haley*, 370 So.2d 521, 524 (La. 1979), which dealt directly with the retroactive application of La. Rev. Stat. §9:5628 to an act of malpractice occurring prior to its enactment, and *Chaney v. State of La. DHHR*, 432 So.2d 256, 258-59 (La. 1983), which did not address peremption, but found plaintiffs' cause of action brought in 1981 arising out of malpractice, which occurred in 1977, but was not

[5]Those states were California, Florida, Illinois, Iowa, Louisiana, Ohio, South Dakota, Maryland, Tennessee.

discovered until 1979, had prescribed. Interestingly, *Chaney* affirmed the holding of the First Circuit that found the action for malpractice which was discovered in 1979, but not filed in the courts until 1981, was perempted. *Chaney v. State of La. DHHR*, 423 So.2d 717, 717-18 (La. App. 1st Cir. 1982). Admittedly, this Court specifically found the court of appeal did not err in affirming the judgment of the trial court sustaining defendants' exception of prescription, but it did not reverse the court of appeal's finding that the matter was perempted.[6]

Hebert next asserted that the only appellate cases on this issue had decided that La. Rev. Stat. §9:5628 was a prescriptive statute or assumed it was so. The Court cited *Chalstrom v. Desselles*, 433 So.2d 866, 868 (La. App. 4th Cir.), *writ denied*, 438 So.2d 215 (La. 1983), which did find that the three-year provision established a simple prescription, and *Hernandez v. Lafayette Bone & Joint Clinic*, 467 So.2d 113, 114 (La. App. 3d Cir. 1985), which cited to *Chalstrom* as authority for that position.[7]

The *Hebert* court, however, did not address either *Blanchard v. Farmer*, 431 So.2d 42, 42-43 (La. App. 1st Cir.), *writ denied*, 438 So.2d 571 (La. 1983), in which the plaintiff's arguments describe the provision as the peremptive period provided by La. Rev. Stat. §9:5628, and the court found that under La. Rev. Stat. §9:5628, plaintiff's claim was "barred because it was not filed within three-years of the act of malpractice,"[8] or *Valentine v. Thomas*, 433 So.2d 289, 291 (La. App. 1st Cir.), *writ*

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[6]The Court did reverse the court of appeal's holding that plaintiffs' claims were perempted as to those claims arising from malpractice that occurred in 1978 and in 1979, and filed within three years of the malpractice and one year from discovery, finding the claims had not prescribed. *Chaney*, 432 So.2d at 259-60. Notably, the court of appeal did not address the claims arising from the malpractice in 1978 and 1979.

[7]The Court also cited *Billiot v. American Hosp. Supply Corp.*, 721 F.2d 512 (5th Cir. 1983), for the proposition that appellate cases, albeit federal appellate cases, "assumed" that the statute was prescriptive. *Hebert*, 486 So.2d at 723.

[8]The opinion stated that plaintiff "argues that the peremptive period provided by the statute does not begin to run until the discovery of the negligent act. This

denied, 440 So.2d 728 (La. 1983), which stated "Plaintiff did not discover the alleged act of malpractice until after the three year peremptory period provided in LSA–R.S. 9:5628 had passed; therefore, he was precluded from bringing an action for damages." While both *Blanchard* and *Valentine* primarily concern the applicability and constitutionality of the statute rather than an interpretation of its provisions, these cases, in conjunction with *Chaney*, indicate a trend in the First Circuit to treat the three-year provision as peremptive.

Interestingly, the First Circuit, in *Hebert v. Doctors Memorial Hosp.*, 477 So.2d 1227, 1230 (La. App. 1st Cir. 1985), found that the three-year provision did not come into play, so the Court did not need to consider the question of whether the three-year period was prescriptive or peremptive. In a footnote, the court stated, however, that the question had been addressed: the Fourth Circuit in *Chalstrom* held the provision prescriptive, but on the other hand, the First Circuit in *Blanchard* had stated, albeit in dicta, that the period was peremptive, indicating a potential split in the two circuits. *Id.* at 1230, n. 3. The appellate court did not address either *Valentine* or *Chaney* in the note, although it did state that the instant case graphically demonstrated an untoward result of holding the three-year period peremptive in that a plaintiff, who can take advantage of interruption of prescription, may be able to keep his claim alive much longer than the three-year limit imposed on the plaintiffs, who come under the discovery rule. *Id.* at 1230, n.3.

In *Grant v. Carroll*, 424 So.2d 389, 392 (La. App. 2d Cir. 1982), the court held that plaintiff's claim was prescribed by the passage of three years from the date of

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argument completely ignores the wording in the statute," and "plaintiff argues that application of this peremptive provision of L.S.A.–R.S. 9:5628 denies him access to the courts and, therefore, the statute is unconstitutional." *Blanchard*, 431 So.2d at 43. Notably, although the court found the action was barred, the keycite note includes the phrase by prescription, which is not included in the opinion.

malpractice, and in *Juneau v. Hartford Ins. Co.*, 458 So.2d 1011, 1013 (La. App. 3d Cir.), *writ denied*, 462 So.2d 198 (La. 1984), the court found the prescription applicable in medical malpractice cases was provided by La. R.S. 9:5628, but the case did not involve the three-year provision.

Thus, a split in the Circuits, particularly the First and Fourth, existed at the time *Hebert* was decided. Notwithstanding, this Court in *Hebert* did not address the split, nor was the distinction between peremption and prescription addressed by this Court in *Chaney,* even though the appellate court decision in that case clearly determined the action filed three years after the act of malpractice was perempted. Interestingly, prior to our opinion on original hearing in this case, the appellate courts were once again in conflict over the treatment of the three-year provision as either prescriptive or peremptive, as apparently were the holdings of this Court in light of *Spradlin*. *See LeBreton v. Rabito*, 94-1440 (La. App. 4 Cir. 2/23/95), 650 So.2d 1245, 1247 (holding the reference in La. Rev. Stat. §40:1299.47(B)(2)(b) "are to the three year peremption of R.S. 9:5628 along with its one year prescription"); *Pena v. Williams*, 03-0982, p. 4 (La. App. 4 Cir. 2/4/04), 867 So.2d 801, 804 (holding the three-year provision of La. Rev. Stat. §9:5628 is peremptive); *Borel v. Young*, 06-352, p. 5 (La. App. 3 Cir. 12/29/06), 947 So.2d 824, 827 (relying on *Hebert* in holding the three-year provision prescriptive in nature).

Furthermore, as discussed in the plurality opinion on rehearing in *Borel* and by the majority in the present case, La. Rev. Stat. §40:1299.47(A)(2)(a) provides that "[t]he filing of the request for a review of a [malpractice] claim shall suspend the time within which suit must be instituted, in accordance with this Part, until ninety days following notification, by certified mail,... of the issuance of the opinion" by the panel. However, the statute also provides that a health care provider "may raise any

exception or defenses available pursuant to R.S. 9:5628 in a court of competent jurisdiction and proper venue at any time without need for completion of the review process by the medical review panel," and "***[i]f the court finds that the claim had prescribed or otherwise was perempted*** prior to being filed, the panel, if established, shall be dissolved." La. Rev. Stat. §40:1299.47(B)(2)(a) and (b)(emphasis added). La. Rev. Stat. §9:5628 speaks to the time limitations within which a claim for malpractice must be brought. If, as *Hebert* and the plurality opinion in *Borel* and now the majority herein find, the time limits are prescriptive, then how could a court under La. Rev. Stat. §40:1299.47(B)(2)(b) find the matter was perempted? A reading of these provisions implies exceptions of both prescription and peremption arise from the provisions of La. Rev. Stat. §9:5628. Such reading would support the conclusion that the three-year provision is peremptive.

Significantly, the language "or otherwise was preempted" was added by 1984 La. Acts No. 435, §5. Pursuant to its statutory revision authority, the Louisiana State Law Institute substituted "perempted" for "preempted" in 1986. I reviewed the legislative history of 1984 La. Acts No. 435 that added the phrase "or otherwise was preempted" to La. Rev. Stat. §40:1299.47(B)(2)(b). At the time of the addition, present day La. Rev. Stat. §40:1299.47(B)(2)(a) and (b) were contained in the same subsection, (B)(2), and prior to the amendment provided:

> A health care provider, against whom a claim has been filed under the provisions of this Part, may raise the peremptory exception of prescription in court at any time, without need for completion of the review process by the medical review panel. If the court finds that the claim had prescribed prior to being filed, the panel, if established, shall be dissolved.

The amendment revised the provision as follows:

> A health care provider, against whom a claim has been filed under the provisions of this Part, may raise <u>any exception or defenses available pursuant to R.S. 9:5628 in a court of competent jurisdiction and proper</u>

> venue ~~the peremptory exception of prescription in court~~ at any time, without need for completion of the review process by the medical review panel. If the court finds that the claim had prescribed or otherwise was preempted prior to being filed, the panel, if established, shall be dissolved.

My review of the history does not provide an explanation for the revision, although I believe it is self-explanatory and supportive of the peremptive interpretation of the three-year provision. Nevertheless, my reading of the provisions of La. Rev. Stat. §40:1299.47 does not support the holding in *Hebert* or the plurality opinion on rehearing in *Borel* or the majority opinion in this case that the three-year provision is prescriptive.

The plurality opinion on rehearing in *Borel* also showed an abhorrence to overruling *Hebert*'s holding on the prescriptive nature of the three-year provision, but did not hesitate to effectively overrule *Hebert*'s holding on the interruption of prescription by the filing of suit against a solidary tortfeasor. To reach its conclusion, which does effectively overruled a portion of *Hebert*, the plurality opinion extended the holding in *LeBreton*, which found that malpractice plaintiffs, as a matter of law, could not benefit by the simultaneous application of the general provision on interruption of prescription found in La. Civ. Code art. 3462 with the specific provision on suspension of prescription contained in La. Rev. Stat. 40:1299.47(A)(2)(a), to the facts of this case. In its criticism of the majority opinion on original hearing in *Borel*, the plurality opinion on rehearing cited to the principles of *jurisprudence constante* in its refusal to overrule the *Hebert* holding as to the three-year provision. However, *jurisprudence constante* does not give the Court license to perpetuate error as we are bound under our Constitution and the Civil Code to uphold and abide by the law. James L. Dennis, *Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent*, 54 La.L.Rev. 1, 10 (1993-

1994). In my view, the affirmation of the holding in *Hebert* that the three-year provision was prescriptive was clearly a perpetuation of error as demonstrated by the reasons set forth in my concurrence, because such an interpretation does not uphold or abide by the clear and unambiguous law enacted by the Legislature. Therefore, I would overrule *Hebert* in its holding that the three-year provision of La. Rev. Stat. §9:5628 is prescriptive.

Finally, the majority again citing to *Borel* relies upon the holding in *LeBreton*, which I authored as organ for the Court. The issue before the *LeBreton* court was whether the simultaneous application of the interruption and suspension of prescription provisions in the medical malpractice setting was correct. The holding in *LeBreton* did not exclude the application of the general provisions on interruption of prescription in medical malpractice cases in other instances, just to the situation where the plaintiff sought to benefit by the **simultaneous** application of the interruption and suspension provisions. Neither in *Borel* nor in this case did the plaintiffs seek simultaneous application of the interruption and suspension provisions, and the holding in *LeBreton* does not support the conclusion reached in either the plurality or in the majority opinion in this case. Broadening the holding in *LeBreton* is further rendered unnecessary by a correct interpretation and application of the three-year peremptive period contained in La. Rev. Stat. §9:5628.

In conclusion, because peremption may be recognized by the court on its own motion, *see* La. Civ. Code art. 3460, I would dismiss plaintiff's action as perempted in accordance with the clear and unambiguous provisions of La. Rev. Stat. §9:5628.

06/26/09

SUPREME COURT OF LOUISIANA

No. 2007-CC-0492

PAMELA WARREN, THERESA RENE WARREN, AND SARAH WARREN JIMENEZ

v.

LOUISIANA MEDICAL MUTUAL INSURANCE COMPANY, JEFFREY A. LAMP, M.D., ROBYN B. GERMANY, M.D., SANDRA MOODY, NP-C, AND FAMILY HEALTH OF LOUISIANA, INC.

On Writ of Certiorari to the Court of Appeal, First Circuit, Parish of East Baton Rouge

WEIMER, J., dissenting

I respectfully dissent from the opinion on rehearing for the reasons stated in my concurrence following original hearing.