

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CA 1656

ANGELA PIERCE

VERSUS

LISA TADLOCK AND THE FAMILY COUNSELING CENTER

Judgment Rendered: November 9, 2011.

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On Appeal from the
19th Judicial District Court,
In and for the Parish of East Baton Rouge,
State of Louisiana
Trial Court No. C584899

The Honorable Timothy E. Kelley, Judge Presiding

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* * * * *

BEFORE: CARTER, C.J., PARRO AND HIGGINBOTHAM, JJ.

CARTER, C. J.

This is an appeal of a judgment of the 19th Judicial District Court (JDC) that, among other things, sustained a peremptory exception raising the objection of prescription as to claims of Angela Pierce (in her individual capacity)¹ and Christopher King against several defendants referred to collectively as “the OCS defendants.”² The court determined that the petition adding the claims against the OCS defendants, which was filed December 23, 2008, was untimely as it was filed more than one year after June 19, 2007 — the date plaintiffs knew or should have known of the facts giving rise to the asserted causes of action.

FACTS AND PROCEDURAL HISTORY

This litigation concerns events surrounding OCS’s removal of Pierce’s minor children from her custody and the validation of complaints that Pierce’s minor children were sexually abused by King, whom Pierce married during the OCS defendants’ investigation into the complaints and has since divorced. This appeal involves numerous dates; thus, for ease of reference, an abbreviated chronology is set forth as follows:

¹ The judgment sustained the peremptory exception raising the objection of prescription only as to the claims brought by Pierce, individually, as opposed to Pierce in her capacity as the provisional tutrix of her minor children. It appears that the claims by Pierce in her capacity as the provisional tutrix of her minor children remain outstanding in the 19th JDC and are not addressed herein. Hereafter, references to claims by Pierce are to claims asserted by Pierce individually. Additionally, we have eliminated references to the children’s names in an effort to protect their identity.

² The OCS defendants include the Louisiana Department of Social Services, Office of Social Services, Office of Community Services (OCS); Kaaren Hebert in her official capacity as the Interim Assistant Secretary of OCS; Fran Nevers, individually, and in her official capacity as the District Manager of the Washington Parish OCS; Leslie Lyons, individually, and in her official capacity as a Child Welfare Specialist Supervisor of the Washington Parish OCS; and Justine Goebel, individually, and in her capacity as a Child Welfare Specialist 3 of the Washington Parish OCS .

Leslie Branch, individually and in her capacity as a Child Welfare Specialist of the Washington Parish OCS, was named as a defendant in this matter, but the appeal as to claims against Branch was severed after motions relating to Branch’s bankruptcy proceedings were filed. Therefore, Branch is not included among the OCS defendants referred to herein.

- June 19, 2007: As determined by the trial court, the date plaintiffs knew or should have known of their claim against the OCS defendants
- May 14, 2008: Pierce allegedly requests formation of a medical review panel to review her allegations against Lisa Tadlock and The Family Counseling Center.
- May 29, 2008: Pierce is informed that Lisa Tadlock and The Family Counseling Center are not covered by the Patient's Compensation Fund.
- August 21, 2008: Pierce files suit in the 22nd JDC against Lisa Tadlock and The Family Counseling Center.
- August 27, 2008: As calculated by plaintiffs, the date on which the ninety-day suspension of prescription under Louisiana Revised Statutes Annotated section 40:1299.47A(2)(a) terminates and prescription begins to toll again.
- December 23, 2008: Amended petition filed in the 22nd JDC adding King as plaintiff and naming the OCS defendants.

On August 21, 2008, the first petition in this matter was filed in the 22nd JDC by Pierce, individually and on behalf of her minor children, and named as defendants Lisa Tadlock (a licensed clinical social worker) and The Family Counseling Center (referred to collectively as "Tadlock"). The petition alleged that the defendants were healthcare providers, that there had been a breach of the appropriate standard of care, and that plaintiff had requested review by a medical review panel but was informed on May 29, 2008, that the defendants were not covered by the Patient's Compensation Fund.

The OCS defendants were named as defendants in the amended petition filed December 23, 2008, which also added King as a plaintiff. Plaintiffs sought damages against the OCS defendants under theories of liability, based on state and federal law, stemming from the OCS defendants' investigation and removal of the children. The 22nd JDC sustained a declinatory exception raising the objection of

improper venue, severed the claims against the OCS defendants, and ordered them transferred to the 19th JDC. *See* La. Rev. Stat. Ann. § 13:5104 (setting forth the venue for suit against OCS).

In the 19th JDC, the OCS defendants urged multiple objections to the amended petition, including the peremptory exception raising the objection of prescription. The OCS defendants contended that all claims against them by Pierce and King were made more than one year from the date of the actions alleged and were therefore prescribed. Pierce and King countered that most of the complained-of acts were alleged in the original petition filed August 21, 2008, against Tadlock, and that a timely-filed suit against one joint tortfeasor interrupts prescription as to all joint tortfeasors. In oral reasons, the trial judge found that by June 19, 2007, plaintiffs knew or should have known of the facts giving rise to the complained-of matters, and since the claims were not asserted against the OCS defendants within one year of that date, they were prescribed. Judgment was rendered sustaining the peremptory exception raising the objection of prescription. Plaintiffs now appeal.

DISCUSSION

Plaintiffs' causes of action against the OCS defendants are delictual in nature and therefore subject to a liberative prescription of one year, running from the day injury or damage is sustained. La. Civ. Code Ann. art. 3492. The party urging a peremptory exception raising the objection of prescription bears the burden of proof. *Cawley v. National Fire & Marine Ins. Co.*, 10-2095 (La. App. 1 Cir. 5/6/11), 65 So. 3d 235, 237. If, however, the action is prescribed on its face, the plaintiffs bear the burden of showing that the action has not prescribed. *Cawley*, 65 So. 3d at 237.

In this case, no evidence was introduced at the trial on the exception, and the relevant facts are not disputed. Based on those facts, the trial court determined that

plaintiffs knew or should have known of their claim against the OCS defendants by June 19, 2007. On appeal, plaintiffs do not dispute the trial court's determination but, rather, argue that the trial court erred in failing to consider the effect of the timely-filed original petition against Tadlock, a joint tortfeasor, on the prescriptive period.

The petition against Tadlock was filed by Pierce in the 22nd JDC on August 21, 2008, more than one year after the prescriptive period commenced on June 19, 2007 (as determined by the trial court). In that petition, Pierce alleged that the named defendants (Tadlock and The Family Counseling Center) were healthcare providers, that she had requested review of the claims by a medical review panel, and that she was informed on May 29, 2008, that the defendants were not covered by the Patient's Compensation Fund. Accordingly, Pierce alleged, prescription was suspended for an additional ninety days from the date she was so informed, or until Wednesday, August 27, 2008, pursuant to Louisiana Revised Statutes Annotated section 40:1299.47A(2)(a). Plaintiffs now contend that their amended petition was timely filed because pursuant to Louisiana Civil Code Annotated article 2324C, interruption of prescription against one joint tortfeasor interrupts is effective against all joint tortfeasors.

Even assuming that the OCS defendants and Tadlock are joint tortfeasors, plaintiffs' argument fails. The specific provisions of the Medical Malpractice Act regarding the suspension of prescription against joint tortfeasors apply to the exclusion of the general code article on interruption of prescription against joint tortfeasors — Article 2324C. *Borel v. Young*, 07-0419 (La. 11/27/07), 989 So. 2d 42, 68 (*on rehearing*). During the pendency of the medical review panel proceedings, prescription was suspended as to all joint tortfeasors, including but not limited to healthcare providers, both qualified and not qualified. La. Rev. Stat.

Ann. § 40:1299.47A(2)(a). Once Pierce was notified that Tadlock and The Family Counseling Center were not covered by the Patient's Compensation Fund, she had ninety days, plus the balance of the one-year prescriptive period that was unused at the time the request for a medical review panel was filed, to bring suit against the joint tortfeasors. *See Borel*, 989 So. 2d at 69. Because the specific provisions of the Medical Malpractice Act regarding the suspension of prescription against joint tortfeasors apply to the exclusion of the general code article on interruption of prescription against joint tortfeasors, plaintiffs cannot benefit from combining the suspension principles of Section 40:1299.47A(2)(a) and the interruption provision of Article 2324. Thus, the attempt to bring the OCS defendants into the lawsuit on December 23, 2008, came too late.

Similarly, we find no merit to the argument that Louisiana Code of Civil Procedure Annotated article 1153 applies to King's claims. Article 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." However, because medical malpractice actions are governed by the specific provisions of the Medical Malpractice Act regarding prescription, any general codal article that conflicts with those provisions may not be applied to such actions in the absence of specific legislative authorization in the Act. *Warren v. Louisiana Medical Mutual Ins. Co.*, 07-0492 (La. 12/2/08), 21 So. 3d 186, 207 (*plurality, on rehearing*). The Medical Malpractice Act contains no rules allowing relation back of pleadings for medical malpractice claims. *Warren*, 21 So. 3d at 207. Thus, Article 1153 is not applicable to actions brought under the Medical Malpractice Act. *See Warren*, 21 So. 3d at 207-08.

On appeal, Pierce and King contend they should be allowed the opportunity to amend their petition to remove the grounds of the objection of prescription, pursuant to Louisiana Code of Civil Procedure Annotated article 934, which provides:

When the grounds of the objection pleaded by the peremptory exception may be removed by amendment of the petition, the judgment sustaining the exception shall order such amendment within the delay allowed by the court. If the grounds of the objection raised through the exception cannot be so removed, or if the plaintiff fails to comply with the order to amend, the action, claim, demand, issue, or theory shall be dismissed.

Pierce and King contend that given the opportunity to amend their petition, they could specifically allege (1) that the OCS defendants and Tadlock were jointly liable; (2) that prescription was interrupted as to all defendants by the filing of a request for a medical review panel; (3) that amendment of the proceedings was pursuant to Louisiana Code of Civil Procedure Annotated article 1153 and any such amendment relates back to the date of the original petition; and (4) the addition of King as a plaintiff related back to the original petition.

Article 934 only requires that the plaintiff be granted an opportunity to amend when such an amendment would cure the objections raised in the exceptions. In other words, to successfully amend a petition, the plaintiff must be able to remove the impediment or objection. *Hooks v. Treasurer*, 06-0541 (La. App. 1 Cir. 5/4/07), 961 So. 2d 425, 432, *writ denied*, 07-1788 (La. 11/9/07), 967 So. 2d 507. As explained herein, allowing plaintiffs to amend the petition as set forth above would not remove the impediment or objection. Moreover, we note that with regard to objections of prescription, Article 934 has been interpreted to mean that where a plaintiff's cause of action is prescribed on its face, and the plaintiff has the opportunity but fails to offer any evidence at the hearing of a peremptory exception that his claim was filed timely, he has failed to adequately

establish that amendment of his petition might remove the grounds of the objection. *Thomas v. State Employees Group Benefits Program*, 05-0392 (La. App. 1 Cir. 3/24/06), 934 So. 2d 753, 759. Plaintiffs offered no evidence at the hearing in this matter.³ Therefore, they have failed to adequately establish that amendment of their petition might remove the grounds of the objection.

CONCLUSION

For the foregoing reasons, the judgment appealed from is affirmed. Costs are assessed to Angela Pierce and Christopher King.

AFFIRMED.

³ Pierce and King filed with this court a reply brief wherein they alleged, for the first time, that the acts complained of constituted a continuing tort. Uniform Rules – Courts of Appeal, Rule 2-12.6 provides, in pertinent part, that “[t]he appellant may file a reply brief, if he has timely filed an original brief, *but it shall be strictly confined to rebuttal of points urged in the appellee’s brief.*” (Emphasis added.) Additionally, as a general rule, this court cannot consider contentions raised for the first time on appeal that were not pleaded in the court below and that the trial court did not address. *See Jackson v. Home Depot, Inc.*, 04-1653 (La. App. 1 Cir. 6/10/05), 906 So. 2d 721, 725. Thus, we do not consider the merits of the continuing tort allegation herein, and further note that as Pierce and King failed to present any evidence of this to the trial court, they are not entitled to amend their petition to allege such pursuant to Article 934. *See Thomas*, 934 So. 2d at 759.