NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2017 CA 0629

JENNIFER RICKERSON, ROXANNE DIGGS, JOSEPH ROUNDS, DESARAY JOSEPH, JENISHA ROUNDS, AND THE ESTATE OF JOSEPH TRIGGS, INDIVIDUALLY AND ON BEHALF OF JOSEPH TRIGGS, DECEASED

VERSUS

AUDUBON HEALTH & REHABILITATION CENTER A/K/A COMMUNITY CARE CENTER OF THIBODAUX, LLC D/B/A AUDUBON HEALTH & REHAB AND AUDUBON HEALTH & REHABILITATION CENTER

Judgment Rendered: DEC 21 2017

Appealed from the
Seventeenth Judicial District Court
In and for the Parish of Lafourche, Louisiana
Docket Number C-128629

Honorable John E. LeBlanc, Judge Presiding

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BEFORE: WHIPPLE, C.J., McDONALD, AND CHUTZ, JJ.

McDonald, J. Concurs.

WHIPPLE, C.J.

In this medical malpractice case, plaintiffs appeal the trial court's judgment dismissing their claims as prescribed. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

At the time of his death on January 22, 2013, Joseph Triggs was a resident patient of Community Care Center of Thibodaux, LLC d/b/a Audubon Health & Rehabilitation Center (referred to hereinafter as "Audubon"). By letter dated August 8, 2013,[1] a medical malpractice complaint was filed with the Division of Administration, naming "Joseph Triggs (Deceased)" as claimant and Audubon as defendant. The complaint averred that despite notice that Mr. Triggs was having problems chewing and swallowing solid food, Audubon had negligently failed to alter his diet and/or continuously monitor his food intake, leading to his death when he choked on solid food. Thus, the complaint alleged that Audubon's treatment of Mr. Triggs was below the applicable standard of care and requested that a medical review panel be convened.[2]

Subsequently, another complaint, dated January 9, 2014, was filed with the Division of Administration, naming Dorothy and Hezekiah Triggs, Mr. Triggs's parents, as claimants and Audubon as defendant and similarly averring that Audubon's care and treatment of Mr. Triggs violated applicable medical standards and resulted in his death. Mr. Triggs's parents likewise requested that a medical review panel be convened.

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[1]While the complaint listing "Joseph Triggs (Deceased)" was dated August 8, 2013, the postage on the envelope sent certified mail contains a date of June 27, 2013. While this discrepancy was not mentioned or explained, a representative of the Patient's Compensation Fund testified that the filing date would be the date of mailing, June 27, 2013. We note, however, that plaintiffs contend that the complaint was filed on August 8, 2013.

[2]The complaint was filed by counsel for plaintiffs herein and indicates that a copy of the complaint was mailed to Jennifer Rickerson and Roxanne Diggs, although not naming them as claimants.

Thereafter, correspondence dated October 8, 2014 was sent to the Division of Administration, requesting that the original complaint listing "Joseph Triggs (Deceased)" as claimant be amended to add Jennifer Rickerson, Roxanne Diggs, Joseph Rounds, Desaray Joseph, and Jenisha Rounds (hereinafter collectively referred to as "Mr. Triggs's children"), as well as the Estate of Joseph Triggs, as claimants.

On August 20, 2015, the medical review panel issued its opinion, unanimously finding that Audubon had failed to meet the applicable standard of care in its care and treatment of Mr. Triggs. Approximately two and one-half months later, on November 5, 2015, Mr. Triggs's children and the Estate of Joseph Triggs filed a petition for damages in the trial court below, naming Audubon as defendant and alleging medical malpractice in the death of Mr. Triggs.

Audubon responded by filing various exceptions, including a peremptory exception raising the objection of prescription.[3] In support thereof, Audubon asserted that plaintiffs' petition was prescribed on its face given that it was filed on November 5, 2015, more than one year after the date of the alleged malpractice and Mr. Triggs's resulting death on January 22, 2013, thus placing the burden on plaintiffs to show that their claims were not prescribed. Audubon further averred that plaintiffs did not file a complaint of malpractice with the Division of Administration until October 8, 2014, more than one year after the alleged malpractice and Mr. Triggs's death, when they sent a letter to the Division of Administration requesting that the complaint of "Joseph Triggs (Deceased)" be amended to add them as claimants. According to Audubon, plaintiffs' October 8,

[3]Other exceptions filed by Audubon were a peremptory exception of no right of action and a dilatory exception of lack of procedural capacity, through which Audubon averred that the Estate of Joseph Triggs had no right to bring any claim for damages because Mr. Triggs was survived by several children and, thus, that pursuant to LSA-C.C. art. 2315.1, the children and surviving spouse were the only people who had any right of action to assert a survival action for damages. By judgment dated May 4, 2016, the trial court maintained those exceptions and dismissed all claims of the Estate of Joseph Triggs.

2014 letter requesting that the complaint of "Joseph Triggs (Deceased)" be amended to add them as additional claimants did not relate back to the earlier filing. Audubon further contended that prescription of plaintiffs' medical malpractice action was not suspended by the filing of a complaint of malpractice by "Joseph Triggs (Deceased)" because that claimant is not a party to this lawsuit. Thus, Audubon argued that plaintiffs could not meet their burden of showing that their claims were not prescribed where none of them had filed a claim for medical malpractice within one year of the malpractice, the discovery of the malpractice, or the death of Mr. Triggs, as required by LSA-R.S. 9:5628.

Following hearings on Audubon's exceptions, the trial court maintained Audubon's exception of prescription and dismissed the claims of Mr. Triggs's children. After the subsequent denial of their motion for new trial, Mr. Triggs's children filed the instant appeal, averring that the trial court erred in maintaining Audubon's exception of prescription and in denying their motion for new trial because the original complaint filed with the Division of Administration suspended prescription as to all those claiming damage as a result of Audubon's alleged medical malpractice.

DISCUSSION

The prescriptive period for actions based on medical malpractice is set forth in LSA-R.S. 9:5628(A), which requires such claims to be brought within one year of the alleged act, omission, or neglect, or within one year from the date of discovery. Additionally, even as to claims filed within one year of the discovery of the alleged malpractice, all such claims must be filed, at the latest, within three years from the date of the alleged act, omission, or neglect. See LSA-R.S. 9:5628(A).

However, pursuant to the Louisiana Medical Malpractice Act ("the MMA"), LSA-R.S. 40:1231.1, et seq.,[4] a party must first present his proposed complaint to a medical review panel for review prior to the filing of suit in district court. LSA-R.S. 40:1231.8(A)(1)(a); Warren v. Louisiana Medical Mutual Insurance Company, 2007-0492 (La. 6/26/09), 21 So. 3d 186, 204 (on rehearing). The prescriptive period for filing a lawsuit set forth in LSA-R.S. 9:5628(A) is suspended during the full time that a claim is pending before a medical review panel and for ninety days following notification to the claimant (or his/her attorney) of the panel's opinion. See LSA-R.S. 40:1231.8(A)(2)(a).

Because the petition for medical malpractice herein was filed more than one year after the alleged malpractice and resulting death of Mr. Triggs, the petition is timely only if prescription was suspended as to the plaintiffs' claims during the pendency of the proceedings before the medical review panel. Thus, the questions presented herein are: (1) whether the original complaint filed with the Division of Administration naming "Joseph Triggs (Deceased)" as claimant served to suspend the running of prescription in favor of all those claiming damage as a result of the alleged malpractice, including Mr. Triggs's children; or, alternatively, (2) whether the amended complaint adding Mr. Triggs's children and the Estate of Joseph Triggs as claimants, which was filed more than one year after the alleged malpractice, relates back to an earlier timely filed original complaint, thus resulting in a suspension of prescription as to the claims of Mr. Triggs's children.

In support of their contention that the filing of the original complaint naming

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[4]Pursuant to House Concurrent Resolution No. 84 of the 2015 Regular Session, Title 40 was recodified in its entirety and the MMA, formerly cited as LSA-R.S. 40:1299.41, et seq., was redesignated as LSA-R.S. 40:1231.1, et seq. Because no substantive changes have been made to the provisions of the MMA relevant herein, particularly the provision regarding suspension of prescription, since the time of the alleged malpractice in January 2013, we will refer to the statutes by their current designation. See In re Tillman, 2015-1114 (La. 3/15/16), 187 So. 3d 445, 446 n.1; Truxillo v. Thomas, 2016-0168 (La. App. 4th Cir. 8/31/16), 200 So. 3d 972, 974 n.3.

"Joseph Triggs (Deceased)" as claimant served to suspend the running of prescription in favor of all those claiming damage as a result of the alleged malpractice, Mr. Triggs's children rely on the Louisiana Fourth Circuit Court of Appeal's recent opinion in Truxillo v. Thomas, 2016-0168 (La. App. 4th Cir. 8/31/16), 200 So. 3d 972, which was handed down one day after the trial court's judgment herein maintaining Audubon's exception of prescription. In Truxillo, the daughter of a deceased patient timely filed a complaint with the Division of Administration, alleging medical malpractice and requesting that a medical review panel be convened. After the medical review panel rendered its opinion, the daughter then timely filed suit. Six days after suit was filed, but more than one year after the alleged malpractice, an amended petition was filed naming the deceased patient's son as an additional plaintiff. The defendant doctor filed an exception of prescription, contending that prescription as to the son's claims had not been suspended during the pendency of the medical review panel proceedings because the son had not been named as a claimant in the complaint of malpractice filed with the Division of Administration. The trial court maintained the exception and dismissed the son's claims. Truxillo, 200 So. 3d at 973-974.

On appeal, the Fourth Circuit reversed. While recognizing that the MMA requires a request for review by a medical review panel to contain the "names of the claimants," LSA-R.S. 40:1231.8(A)(1)(b)(iii), the court found "nothing in the [MMA] that requires that *all* parties who may potentially have a claim against a health care provider invoke a medical review panel proceeding." Truxillo, 200 So. 3d at 974. The court further stated as follows:

> To the contrary, the purpose of the MMA, together with the MMA's express provisions and our jurisprudence interpreting it, leave no doubt that a medical review panel request need not be invoked by each and every person who may ultimately have a claim in medical malpractice. To hold otherwise would allow for the filing of multiple medical review panels by separate claimants for the same claims. This could result in numerous and varied medical review panel decisions,

> which, in turn, could result in more than one applicable prescriptive period for initiating suit, an untenable result. As discussed more fully herein, we find that the suspension of the time period for filing suit, triggered by the filing of a medical review panel request, **accrues to the benefit of all persons who have claims arising out of the alleged medical malpractice, including those who did not participate in requesting the medical review panel.**

Truxillo, 200 So. 3d at 974 (emphasis added).

Further explaining its holding, the Fourth Circuit noted the definition of a "claimant" in the MMA, which means:

> [A] patient or representative or any person, including a decedent's estate, seeking or who has sought recovery of damages or future medical care and related benefits under this Part. *All persons claiming to have sustained damages as a result of injuries to or death of any one patient are considered a single claimant.*

LSA-R.S. 40: 1231.1(A)(4) (emphasis added). The court reasoned that "the explicit statement that *all* persons damaged by the alleged malpractice are considered a 'single claimant' clearly contemplates the filing of a single request for a medical review panel, with the intent that the rights of all potential plaintiffs are protected."[5] Truxillo, 200 So. 3d at 975.

However, to the contrary, this court in Parks v. Louisiana Guest House, Inc., 2013-2121, 2013-2122 (La. App. 1st Cir. 9/30/14), 155 So. 3d 609, 613, writ denied, 2014-2281 (La. 1/16/15), 157 So. 3d 1131, specifically held that the filing of a complaint of malpractice by a patient, who subsequently died during the pendency of the proceedings before the medical review panel, did not suspend the running of prescription as to the deceased patient's children, who were not named as claimants in the complaint filed with the Division of Administration. In affirming the trial court's judgment maintaining the defendant nursing home's exception of prescription, this court reasoned as follows:

> The plain language of [LSA-R.S.] 40:1299.47(A)(2)(a) [now cited as LSA-R.S. 40:1231.8(A)(2)(a)] prohibits this result. In pertinent part,

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[5]The Truxillo court further noted that under this definition, "any person" is considered a "claimant," not only those to whom the law affords a right of action. Truxillo, 200 So. 3d at 975.

> the statute expressly provides that the filing of a request for review of a malpractice claim "shall suspend the time within which suit must be instituted ... until ninety days following notification, by certified mail, ... ***to the claimant*** or his attorney of the issuance of the opinion by the medical review panel." (Emphasis added.) This language clearly indicates that only the person or persons who actually presented a "claim" for review are entitled to the suspension of prescription granted under [LSA-R.S.] 40:1299.47(A)(2)(a) [now cited as LSA-R.S. 40:1231.8(A)(2)(a)].
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> Furthermore, we observe that the legislature expressly provided that the filing of a request for review "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," thereby making the suspension of prescription invoked by the filing of the request effective against all other unnamed, potentially liable *defendants*. *See* [LSA-R.S.] 40:1299.47(A)(2)(a) [now cited as LSA-R.S. 40:1231.8(A)(2)(a)]. Yet, the legislature did not provide for a similar application of the statute to benefit all other unnamed potential *plaintiffs* or claimants. We will not expand the application of the statute to so provide when the legislature has not done so, particularly in light of its ability to do so.... Accordingly, [the patient's] request for review only served to suspend the running of prescription as to the claim that he filed and did not suspend the running of prescription in favor of the plaintiffs' claims.

Parks, 155 So. 3d at 613 (citation omitted).

While we recognize that the Fourth Circuit's opinion in Truxillo appears to be at odds with this court's earlier opinion in Parks, we are constrained to apply this court's holding in Parks, and, accordingly, we must conclude that the filing of the original complaint of malpractice naming "Joseph Triggs (Deceased)" did not serve to suspend the running of prescription as to the medical malpractice claims of Mr. Triggs's children. Accordingly, we turn next to the argument by Mr. Triggs's children that the subsequent filing of the amended complaint of malpractice (more than one year after Mr. Triggs's death) that added them as claimants related back to the timely filed original complaint.

In Warren, a nursing home resident died allegedly due to lack of proper care in the nursing home. The decedent's wife and one of his daughters timely filed a medical malpractice complaint while the decedent's other daughter consciously chose not to participate in the matter. After the medical review panel issued its opinion, the wife and daughter timely filed suit, alleging wrongful death and survival actions. Over one and one-half years later, and over three and one-half years after the alleged malpractice, the plaintiffs filed an amending petition adding the other daughter as a plaintiff. The defendant health care providers responded by filing an exception of prescription, arguing that her awareness of the medical review panel proceeding and the subsequent lawsuit did not allow relation back of her claims to the original petition and that they were prejudiced by the addition of a new plaintiff at that stage of the proceedings. Warren, 21 So. 3d at 203 (on rehearing).

While the Louisiana Supreme Court initially agreed with the lower courts that the amended petition adding the second daughter as a plaintiff related back to the timely filed original petition, on rehearing, the Court found that it had erred on original hearing and instead concluded that the newly added plaintiff's claims had prescribed. Warren, 21 So. 3d at 203 (on rehearing). In reaching this conclusion, the Court discussed its prior decisions in LeBreton v. Rabito, 97-2221 (La. 7/8/98), 714 So. 2d 1226, and Borel v. Young, 2007-0419 (La. 7/1/08), 989 So. 2d 42 (on rehearing), in which it had held that medical malpractice claims are governed by the specific provisions of the MMA regarding suspension of prescription to the exclusion of general codal articles on interruption of prescription. Warren, 21 So. 3d at 205-206 (on rehearing). Utilizing that same analysis, the Court concluded that the general codal article on relation back, LSA-C.C.P. art. 1153, could not be applied to medical malpractice claims governed by the MMA, reasoning as follows:

> Although [LSA-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 [LSA-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 [sic] plaintiff subsequent to the expiration of the three-year period provided for in [LSA-R.S.]-9:5628, and would read out of the statute the prescription and suspension period provisions by [LSA-R.S.] 9:5628 and [LSA-R.S.] 40:1299.47 [now cited as LSA-R.S. 40:1231.8]; therefore, LSA-C.C.P. art. 1153 may not be applied to the medical malpractice action under the reasoning of *LeBreton* and *Borel.*

Warren, 21 So. 3d at 207-208 (on rehearing) (emphasis added).

We recognize, as Mr. Triggs's children correctly note on appeal herein, that the matter before us involves a question of relation back of an amended medical malpractice complaint filed with the **Division of Administration**, rather than an amended petition filed in the **trial court**, as in Warren, and that the amended complaint at issue herein was filed **before** the medical review panel rendered its expert opinion and well within the three-year outer prescriptive period set forth in LSA-R.S. 9:5628, as opposed to the facts in Warren. Nonetheless, we note that the Court's holding in Warren, i.e., that any general codal article which conflicts with the specific provisions regarding prescription and suspension of prescription governing medical malpractice claims, LSA-R.S. 9:5628 and LSA-R.S. 40:1231.8, may not be applied to such actions in the absence of specific legislative authorization, provides a broad proscription to the application of the doctrine of relation back to medical malpractice claims.

Indeed, in Ferrara v. Starmed Staffing, LP, 2010-0589 (La. App. 4th Cir. 10/6/10), 50 So. 3d 861, 866, writ denied, 2010-2484 (La. 2/4/11), 57 So. 3d 311, the Fourth Circuit Court of Appeal applied the holding of Warren to pleadings filed with the Division of Administration at the medical review panel stage of the proceedings. In Ferrera, the patient filed a complaint against "Nurse Jane Doe," a fictitious defendant.[6] Later, more than one year after the alleged malpractice, she sought to substitute the actual name for the nurse against whom malpractice was alleged for the fictitious name used in the original complaint. Ferrera, 50 So. 3d at 863. Relying upon the pronouncements in Warren, the Fourth Circuit concluded that the doctrine of relation back could not be applied to allow an amended complaint filed with the Division of Administration to relate back to the filing of the original complaint.[7] Ferrera, 50 So. 3d at 866.

In the instant case, application of the doctrine of relation back to the amended complaint adding Mr. Triggs's children as claimants would permit the adding of plaintiffs subsequent to the one-year prescriptive period provided for in LSA-R.S. 9:5628, thereby avoiding the application of that special prescriptive statute and reading out the prescription and suspension period provisions set forth in LSA-R.S. 9:5628 and LSA-R.S. 40:1231.8(A)(2)(a). See Warren, 21 So. 3d at 207-208 (on rehearing). Thus, as instructed by the holding in Warren, we are constrained to conclude that the doctrine of relation back set forth in LSA-C.C.P. art. 1153 cannot be applied to allow the amended complaint adding Mr. Triggs'

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[6]Although the patient had also named the hospital in the medical malpractice complaint, the appellate court noted that because the patient had failed to file suit against the hospital after the medical review panel reached its decision, the hospital was no longer a party to the action. Thus, there could be no solidary liability with the hospital and no resulting suspension of prescription as to other alleged tortfeasors. Additionally, the court noted that the use of a fictitious name for an unknown defendant was insufficient to interrupt prescription. Ferrera, 50 So. 3d at 865-866.

[7]Nonetheless, the appellate court applied the doctrine of *contra non valentem* to conclude that prescription had been suspended and, thus, that the amended complaint was timely. Ferrera, 50 So. 3d at 866-867.

children as claimants, which was filed more than one year after the alleged malpractice, to relate back to the timely filing of any other complaint.[8] Accordingly, we find no error in the trial court's judgment maintaining Audubon's exception of prescription and denying the plaintiffs' motion for new trial.

CONCLUSION

For the above and foregoing reasons, the trial court's August 30, 2016 judgment, maintaining the exception raising the objection of prescription filed by Community Care Center of Thibodaux, LLC, d/b/a Audubon Health and Rehabilitation Center, and dismissing the petition filed by Jennifer Rickerson, Roxanne Diggs, Joseph Rounds, Desaray Joseph, and Jenisha Rounds, is affirmed. Costs of this appeal are assessed against Jennifer Rickerson, Roxanne Diggs, Joseph Rounds, Desaray Joseph, and Jenisha Rounds.

AFFIRMED.

[8]Because we conclude that under the directives of Warren, the doctrine of relation back cannot be applied to this medical malpractice action, we pretermit consideration of Audubon's argument that because Joseph Triggs's natural personality terminated at his death, LSA-C.C. art. 25, "Joseph Triggs (Deceased)" was not a person who could properly be named as claimant and, thus, the filing of the original complaint naming "Joseph Triggs (Deceased)" did not suspend prescription.