

GINGER BAILEY, ET AL.

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NO. 2002-C-0049

VERSUS

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COURT OF APPEAL

**DR. GREGORY KHOURY, ET
AL.**

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FOURTH CIRCUIT

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STATE OF LOUISIANA

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CONSOLIDATED WITH:

CONSOLIDATED WITH:

GINGER BAILEY, ET AL.

NO. 2002-C-0236

VERSUS

**DR. GREGORY KHOURY, ET
AL.**

ON APPLICATION FOR WRITS DIRECTED TO
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 99-11412, DIVISION "M"
HONORABLE C. HUNTER KING, JUDGE

**JAMES F. MCKAY III
JUDGE**

(Court composed of Chief Judge Joan Bernard Armstrong, Judge James F. McKay III, Judge David S. Gorbaty, Judge Edwin A. Lombard, Judge Moon Landrieu Pro Tempore)

(ON REMAND FROM THE SUPREME COURT)

ARMSTRONG, C. J., DISSENTS

LANDRIEU, JUDGE PRO TEMPORE, CONCURS WITH REASONS

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WRITS DENIED; JUDGMENTS

AFFIRMED

In August of 1997, Ginger Bailey learned that she was pregnant. A

nurse at the New Orleans Mental Health Center advised Ms. Bailey to discontinue all medications and to contact her obstetrician. On September 25, 1997, Dr. Grundmeyer, an obstetrician, confirmed that Ms. Bailey was pregnant and advised her that her unborn child would likely have birth defects. An ultrasound on October 28, 1997 confirmed his opinion that the unborn child had birth defects. Later in Ms. Bailey's pregnancy, Dr. Khoury ordered her to resume taking the Depakote drug. On March 20, 1998, Jada Bailey was born with spina bifida. Jada received medical treatment from Dr. Thomas at Children's Hospital of New Orleans, who informed Ms. Bailey that Jada's condition had been caused by her use of the drug Depakote during her pregnancy. Ms. Bailey filed her medical malpractice claims, individually and on behalf of her minor child, Jada Nacaya Bailey, on March 16, 1999.

Several defendants, Dr. Gregory Khoury, Dr. Robert Ancira, and Walgreen Louisiana Co., Inc., in these medical malpractice cases filed exceptions of prescription, which the trial courts denied. These defendants then applied to this Court for supervisory writs. Two of the three judges on the panel agreed with the defendants' position while one judge dissented.

However, this Court failed to direct that the case be reargued before a five-judge panel as required by La. Const. Art V, § 8 (B). The Supreme Court then vacated and set aside the judgment of this Court, and remanded the case for reargument before a five-judge panel.

The issue before this Court is whether the trial courts erred in denying the defendants', Dr. Gregory Khoury, Dr. Robert Ancira and Walgreen Louisiana Co., Inc., exceptions of prescription.

When does prescription begin to run in an action brought by or on behalf of a plaintiff seeking recovery for prenatal injuries? Is it from the moment that the injurious conduct occurs, the moment the parent has knowledge of the potential damages, or is it from moment of the child's subsequent birth? If we look to Louisiana Civil Code Article 26, the answer appears to be from the moment of the child's birth. If the child had not been born alive, procedurally it would have been considered never to have existed. However, the child's parents would be able to bring an action arising from the child's wrongful death.

According to Louisiana law, there are two kinds of persons: natural and juridical. *See* La. Civ. Code art. 24. "Natural personality commences

from the moment of live birth and terminates at death.” La. Civ. Code art. 25. “All natural persons enjoy general legal capacity to have rights and duties.” La. Civ. Code art. 27. Louisiana Civil Code Article 26 goes on to say: “An unborn child shall be considered as a natural person for whatever relates to its interests from the moment of conception. If the child is born dead, it shall be considered never to have existed as a person, except for purposes of actions resulting from its wrongful death.” Furthermore, “our jurisprudence has recognized that the fetus can acquire a cause of action in utero contemporaneous with its tortious injury. However, the cause of action can be pursued only if the fetus is subsequently born alive.” Wartelle v. Women’s and Children’s Hospital, Inc, 97-0744 (La. 12/2/97), 704 So.2d 778.

Jada Nacaya Bailey is a natural person. Therefore, she enjoys the general legal capacity to have rights and duties. Although Jada has been considered a natural person from the moment of her conception and was able to acquire a cause of action while she was in utero, she would not be able to pursue this action until she was born. Logic, therefore, dictates that any cause of action that may be brought on her behalf for injuries she suffered in

utero would not prescribe until one year from the date of her birth.

For the above and foregoing reasons, these writs are denied and the trial courts' judgments are affirmed.

WRITS DENIED; JUDGMENTS AFFIRMED