LEROY R. FARVE	*	**NO. 2004-C-1424**
VERSUS	*	**COURT OF APPEAL**
DAVID M. JARROT, M.D.	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

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ON APPLICATION FOR WRITS DIRECTED TO
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 95-10669, DIVISION "M"
Honorable Paula A. Brown, Judge Pro Tempore
* * * * * *
CHIEF JUDGE JOAN BERNARD ARMSTRONG
* * * * * *

(Court composed of Chief Judge Joan Bernard Armstrong, Judge Michael E. Kirby and Judge Max N. Tobias Jr.)

TOBIAS, J., CONCURS AND ASSIGNS REASONS.

L. KEVIN COLEMAN
LAW OFFICE OF L. KEVIN COLEMAN, APLC
2635 DE SOTO STREET
NEW ORLEANS, LA 70119

-AND-

MICHELLE D. ROBERT
SUITE 312
839 SAINT CHARLES AVENUE
NEW ORLEANS, LA 70130-3715

COUNSEL FOR PLAINTIFF/RESPONDENT

BRUCE A. CRANNER
ANN MARIE LEBLANC
JAMES WALDRON
FRILOT, PARTRIDGE, KOHNKE & CLEMENTS, L.C.
3600 ENERGY CENTRE
1100 POYDRAS STREET

NEW ORLEANS, LA 70163-3600

COUNSEL FOR INTERVENOR/RELATOR

WRIT GRANTED; RULING OF TRIAL COURT REVERSED; CASE DISMISSED.

The Louisiana Patient's Compensation Fund and Oversight Board (PCF) seeks supervisory review of the lower court judgment overruling its exception of prescription.

Dr. David Jarrott performed several surgical procedures on the plaintiff's back, the last one on February 15, 1993. Thereafter, the plaintiff consulted a new physician, who operated on him on July 19, 1994**,** and, according to Mr. Farve's petition, "[a]s a result of the comparatively excellent result [he] received from the single surgery performed by [the new physician], [plaintiff] became suspicious of the numerous surgeries performed by . . . Dr. Jarrott, and for the first time had notice that malpractice may have been involved."

On July 19, 1995, the plaintiff filed this medical malpractice suit against Dr. Jarrott, but withheld service of the petition. On February 19, 1996, the plaintiff filed a request for a medical review panel.

On January 30, 1997, Dr. Jarrott filed a separate suit seeking judgment declaring the plaintiff's cause of action prescribed. The trial court heard

arguments on the issue and deferred its ruling to the merits.

On January 24, 1997, Dr. Jarrott answered the plaintiff's petition.

On August 28, 1997, the medical review panel rendered its opinion.

On September 2, 2000, plaintiff settled with Dr. Jarrott, reserving his right to proceed against the PCF.

On January 31, 2001, the PCF answered the Petition for Approval of Settlement.

On March 29, 2004, the PCF filed an exception of prescription on the basis that under the Medical Malpractice Act (La. R.S. 40:1299.41, *et seq.*), a premature lawsuit does not interrupt prescription, *LeBreton v. Rabito*, 97-2221 (La. 7/8/98), 714 So.2d 1226, and, consequently, the plaintiff's request for review panel was untimely pursuant to La. R.S. 9:5628.

On July 20, 2004, the trial court overruled the exception of prescription. This timely application followed.

The PCF argues the trial court erred in overruling the exception because it refused to apply retroactively the ruling in *LeBreton v. Rabito,* which holds that a medical malpractice suit, filed prior to the request for a medical review panel, does not interrupt prescription on a medical malpractice claim.

In *LeBreton* within one year of the death of her father, Ms. LeBreton

filed a suit in medical malpractice in district court against Drs. Rabito, Breaux, and Krefft. Within one year of her father's death, Ms. LeBreton also filed a request with the PCF for a medical review panel. The doctors interposed dilatory exceptions of prematurity to the suit; and on July 20, 1993, the trial court granted the exceptions and dismissed the suit without prejudice. The medical review panel issued its opinion on August 12, 1996. On February 3, 1997, approximately five months after the plaintiff's attorney was notified of the panel's findings, the plaintiff filed suit for wrongful death. Relying on *Hernandez v. Lafayette Bone and Joint Clinic,* 467 So.2d 113 (La. App. 3 Cir. 1985), the trial court denied the exception of prescription. Ultimately the Louisiana Supreme Court reversed, overruling *Hernandez.* The *Hernandez* case had approved the simultaneous application of interruption and suspension of prescription in a medical malpractice setting, but the Supreme Court in *LeBreton* concluded that the specific statutory provision for suspension in the context of medical malpractice is not complementary to the more general provision on interruption of prescription found in La. C.C. art. 3462. Thus, the *LeBreton* court found that although the plaintiff's claim was suspended from the date she filed her request for a medical review panel until the expiration of the 90-day suspensive period provided by La. R.S.

40:1299.47(A)(2)(a), her wrongful death action was clearly prescribed by the time she filed suit.

The plaintiff/respondent argues that to grant the exception would result in manifest injustice because the retroactive application of *LeBreton* would divest him of a pre-existing right. In support he cites the circuit courts' pre-*LeBreton* history of determining that a malpractice action commenced without prior submission to a medical review panel does not prevent the filing of suit in district court from interrupting prescription, *Dufrene v. Duncan,* 371 So.2d 1215 (La.App. 4 Cir.1979); that a health care provider who, like Dr. Jarrott, fails to file an exception of prematurity in a suit brought in district court waived his right to review of the claim before the medical review panel, *Barraza v. Scheppegrell*, 525 So.2d 1187 (La.App. 5 Cir.1988); that a malpractice claim may be brought in district court without filing with the medical review panel if the health care provider, as Dr. Jarrott in this case, fails to contest it through an exception of prematurity, *Cracco v. Barras,* 517 So.2d 1256 (La.App. 4 Cir.1987); that a health care provider's exceptions of lack of subject matter jurisdiction and improper venue were properly denied even though the claim was not filed before the medical review panel before suit was filed in district court, *Vincent v. Romagosa*, 390 So.2d 270 (La.App.3 Cir.1980); and that the filing

of suit in district court interrupted prescription, even though the suit was dismissed on an exception of prematurity due to an arbitration agreement entered into by the parties, *Garrity v. Cazayoux*, 430 So.2d 1138 (La.App. 1 Cir.1983).

The plaintiff/respondent points out that he initially filed his suit for damages timely, i.e., within one year of the surgery that allegedly alerted him to Dr. Jarrott's alleged malpractice. Furthermore, he argues that Dr. Jarrott's action in filing an answer to the suit, instead of an exception of prematurity, precludes the assertion of an exception of prescription. This court disagrees. See *Wesco v. Columbia Lakeland Medical Center*, 2000-2232 (La. App. 4 Cir. 11/14/01), 801 So.2d 1187. The PCF is a "statutory intervenor" and as such takes the proceedings as it finds them. La. C.C.P. art. 1094; *Williams v. Kushner*, 449 So.2d 455 (La.1984).

In this case, the plaintiff's request for a medical review panel was not filed until February 19, 1996, more than three years after the last surgery performed by Dr. Jarrott, and more than two years after the surgery which he alleges put him on notice of Dr. Jarrott's alleged malpractice. Filing a request for a medical review panel after one year from the date of the action has no effect because prescription cannot be suspended after it has run. *Geiger v. St. of La. Dept. Health and Hosp.*, 2001-2206 (La. 4/12/02), 815

So.2d 80. Thus, application of the *LeBreton* rational to the facts of this case requires granting the exception of prescription.

Concerning the retroactive application of *LeBreton* to this case, in *Sherman v. Touro Infirmary Hospital,* 2000-1365 (La. App. 4 Cir. 10/30/02), 832 So.2d 334, *writ den.* 2002-2897 (La. 2/7/03), 836 So.2d 102, this Court rejected the argument that *LeBreton* changed the law such that retroactive application would divest a party of a constitutionally protected interest, and opined that *LeBreton* did not make new law but merely interpreted an unchanged statute. Because the decision simply declares what the law means, and has always meant, there is no change in the law and no issue of retroactive application. Furthermore, any question concerning the equities of applying *LeBreton* is answered by *LeBreton* itself; the Supreme Court, while overruling *Hernandez, supra,* applied its decision in *LeBreton* to the plaintiff therein and dismissed her action with prejudice.

Therefore, we grant the writ, reverse the trial court ruling and dismiss the suit as prescribed.

WRIT GRANTED; RULING OF TRIAL COURT REVERSED; CASE DISMISSED.