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IN RE MEDICAL REVIEW PANEL OF MARIAH BENOIT	*	**NO. 2017-CA-0802**
	*	**COURT OF APPEAL**
	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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LOVE, J., CONCURS IN PART; DISSENTS IN PART; AND ASSIGNS REASONS

I concur with the majority's decision to convert the present appeal to an application for supervisory review. However, I respectfully dissent from the majority's finding that prescription was suspended as to Ms. Benoit's amended MRP complaint.

The case *sub judice* centers around the interpretation of La. R.S. 40:1231.8(A)(2)(a) in conjunction with La. R.S. 9:5628(A). "The function of statutory interpretation and the construction given to legislative acts rests with the judicial branch of the government." *M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 07-2371, p. 12 (La. 7/1/08), 998 So.2d 16, 26, *amended on reh'g* (09/19/08). "[T]he paramount consideration in statutory interpretation is ascertainment of the legislative intent and the reason or reasons which prompted the Legislature to enact the law." *Id*., 07-2371, p. 13, 998 So. 2d at 27.

"When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature." La. C.C. art. 9. "When the language of the law is susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law."

La. C.C. art. 10. "The words of a law must be given their generally prevailing meaning," whereas "[w]ords of art and technical terms must be given their technical meaning when the law involves a technical matter." La. C.C. art. 11. "When the words of a law are ambiguous, their meaning must be sought by examining the context in which they occur and the text of the law as a whole." La. C.C. art. 12. "Laws on the same subject matter must be interpreted in reference to each other."

"The starting point in the interpretation of any statute is the language of the statute itself." *Id.*, 07-2371, p. 13, 998 So. 2d at 27. La. C.C. art. 13. §5628 provides that:

> 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. 40:1231.1(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**. (Emphasis added).

§1231.8(A)(2)(a) states:

> 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.** Filing a request for review of a malpractice claim as required by this Section with any agency or entity other than the division of administration shall not suspend or interrupt the running of prescription. All requests for review of a malpractice claim identifying additional health care providers shall also be filed with the division of administration. (Emphasis added).

La. R.S. 40:1231.8(A)(2)(a) provides that prescription is suspended as to joint and solidary obligors for a minimum of 90 days following notice of the MRP decision. The majority interprets this to mean that prescription is suspended as to joint and solidary obligors, as to the MRP claims and lawsuits, until at least 90 days after notice of the MRP decision. Thus, because there is not yet an MRP decision in the present matter, unlike *Borel*, the majority finds that the prescriptive period has not tolled.

However, I interpret La. R.S. 40:1231.8(A)(2)(a) as the suspension of prescription regarding the filing of an actual lawsuit once the MRP renders a decision. *See Ferrara v. Starmed Staffing, LP*, 10-0589, p. 3 (La. App. 4 Cir. 10/6/10), 50 So. 3d 861, 864 ("The filing of a request for review of a claim suspends the running of prescription against all joint and solidary obligors . . . to the same extent that prescription is suspended against the party or parties that are the subject of the request for review."). *See also Correro v. Caldwell*, 49,778 (La. App. 2 Cir. 6/3/15), 166 So. 3d 442 ("Thus, the filing of a claim with the MRP suspends prescription with regard to unnamed joint tortfeasors to the same extent as to those named in the request for review.").

Firstly, §1231.8(A)(2)(a) provides that the filing of a **claim** suspends the prescriptive period for filing a **suit**. The Louisiana Legislature utilized the different terms for a reason. The "claim" refers to the complaint that goes before a MRP. A "suit" refers to the petition filed in the trial court after the MRP renders a

decision. A medical malpractice plaintiff is required to file the MRP claim prior to filing a lawsuit in a trial court. If prescription was not suspended by the filing of the claim, then prescription would likely be tolled once the MRP issues a decision, precluding the plaintiff from filing a lawsuit. The Legislature included this phrase to protect the rights of the medical malpractice plaintiffs who are prevented from exercising their rights to file a lawsuit in the trial court. If the Legislature wanted to allow for the extended filing of claims, especially past the three-year limit contained in §5628(A), then §1231.8(A)(2)(a), the statute could provide that prescription was suspended for filing a suit or other claims. This interpretation does not detract from protecting the plaintiff because the plaintiff could file a MRP complaint against all interested parties within the confines of the three-year requirement contained in §5628(A).[1]

Secondly, §1231.8(A)(2)(a) provides that prescription is suspended as to joint and solidary obligors "to the same extent that prescription is suspended against the party or parties that are the subject to the request for review." The Legislature carefully worded this phrase to protect the plaintiff's rights against joint and solidary obligors, but limited the protection to the same as the parties already included in the MRP claims. "To the same extent" connotes that prescription is suspended as to joint and solidary obligors as to the period "within which suit must be instituted." Meaning, prescription is suspended as to joint and solidary obligors in regards to the filing of a lawsuit following the MRP decision. To find otherwise nullifies the need for the phrase "within which suit must be instituted."

Thirdly, interpreting §1231.8(A)(2)(a) for the premise that a MRP claim can be indefinitely amended pending the final MRP decision invalidates the three-year time period for the filing of medical malpractice claims contained in §5628(A).

[1] §5628(A) is also subject to the application of *contra non valentum*.

The alleged medical malpractice in this matter occurred from the end of November 2013, through the first part of December 2013. The formal MRP complaint was filed on November 13, 2014. The amended MRP complaint was filed on February 9, 2017, which was over three years past the dates of the alleged malpractice. Interpreting §1231.8(A)(2)(a) as the majority does eviscerates §5628(A).

Also, the Louisiana Supreme Court previously held that La. C.C.P. art. 1153 could not be applied to Louisiana medical malpractice actions because the "relation back" theory would permit adding parties "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." *Warren v. Louisiana Med. Mut. Ins. Co.*, 07-0492, p. 4 (La. 12/2/08), 21 So. 3d 186, 207-08, *on reh'g* (06/26/09). The Court also stated that permitting La. C.C.P. art. 1153 to apply could "'potentially subject a health care provider to an indefinite period of prescription, . . . a result clearly at odds with the purpose of the [Act].'" *Id*. 07-0492, p. 4, 21 So. 3d at 207, quoting *Borel*, 07-0419, p. 27, 989 So. 2d at 68, n. 12. The same occurs here with the majority's interpretation of §1231.8(A)(2)(a).

Further, this Court has already addressed an attempt to circumvent the three-year prescriptive period contained in §5628(A). In *Santiago v. Tulane Univ. Hosp. & Clinic*, 12-1095, p. 6 (La. App. 4 Cir. 4/24/13), 115 So. 3d 675, 680, this Court examined a matter wherein the medical malpractice plaintiff filed a supplemental PCF complaint after the initial MRP decision was rendered. The plaintiff raised claims that she attempted to raise in a second supplemental and amending petition at the trial court level. *Id*. The plaintiff's supplemental PCF complaint and second amended petition were filed more than three years after the alleged acts of medical malpractice. *Id*., 12-1095, p. 9, 115 So. 3d at 681. As a result, this Court found that "[b]ecause no PCF complaint was filed against these doctors within three

years, prescription has now tolled." *Id.*, 12-1095, p. 20, 115 So. 3d at 688.

Given the above, my interpretation gives meaning to the specific words chosen by the Legislature and does not interfere with the medical malpractice prescriptive periods as contained in §5628(A). La. R.S. 40:1231.8(A)(2)(a) suspends prescription as to joint and solidary obligors as it relates to the filing of the lawsuit after the MRP renders a decision. It does not serve to extend the three-year limitations of §5628.

Lastly, the majority also distinguishes *Borel v. Young*, 07-0419 (La. 11/27/07), 989 So. 2d 42, on reh'g (07/01/08), and finds that Ms. Benoit's amended claim is not prescribed. I find that the facts and principles elucidated in *Borel* are indistinguishable. In *Borel*, the plaintiffs attempted to amend their petition to include additional doctors and their insurer, but the trial court denied the request. 07-0419, p. 3, 989 So. 2d at 55. The plaintiffs then filed a separate suit against those defendants, which was consolidated with the pending suit. *Id*. One of the newly added doctors filed an exception of prescription, as the lawsuit was filed more than three years from the date of the alleged malpractice and three years from the filing of the initial suit. *Id*. Plaintiffs contended that the second suit was timely because the initial suit interrupted prescription because the defendants were joint tortfeasors. *Id.*, 07-0419, p. 23, 989 So. 2d at 65. The Louisiana Supreme Court found that the claims against the defendants in the second suit were prescribed even though the defendants were joint and solidary obligors. *Id.*, 07-0419, p. 28, 989 So. 2d at 69. The Court 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." 07-0419, p. 29, 989 So. 2d at 69.

Although *Borel* dealt with an amended petition and a second lawsuit, the legal principles remain applicable here. The initial malpractice complaint here is

likened to the initial *Borel* suit, whereas the amended malpractice complaint here is likened to the second suit in *Borel*.

Accordingly, I would convert the appeal to an application for supervisory review and deny the writ.