IN RE MEDICAL REVIEW PANEL OF MARIAH BENOIT * **NO. 2017-CA-0802**

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COURT OF APPEAL

*

FOURTH CIRCUIT

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STATE OF LOUISIANA

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2015-00558, DIVISION "C-10"
Honorable Sidney H. Cates, Judge
* * * * * *
Judge Paula A. Brown
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(Court composed of Judge Terri F. Love, Judge Edwin A. Lombard, Judge Paula A. Brown, Judge Tiffany G. Chase, Judge Dennis R. Bagneris, Sr., *Pro Tempore*)

LOVE, J., CONCURS IN PART; DISSENTS IN PART; AND ASSIGNS REASONS

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APPEAL CONVERTED TO WRIT APPLICATION; WRIT GRANTED; JUDGMENT REVERSED AND REMANDED

APRIL 11, 2018

This matter involves a medical malpractice action. Plaintiff/Appellant, Mariah Benoit ("Ms. Benoit"), appeals the district court's judgment which granted the exception of prescription filed on behalf of Defendants/Appellees, Leslie K. Greco, M.D. ("Dr. Greco") and Nikki Clary, PA ("PA Clary). For the reasons that follow, we reverse the judgment.

FACTUAL AND PROCEDURAL HISTORY

On November 13, 2014, Ms. Benoit filed a formal complaint, pursuant to La. R.S. 40:1231.8[1] to convene a Medical Review Panel ("MRP").[2] Ms. Benoit named Iberia Medical Center, Pediatric Group of Acadiana, Women's & Children's Hospital in Lafayette and Children's Hospital in New Orleans as defendants (the "Original Defendants"). Ms. Benoit alleged she sustained a "compression injury that developed into an open sore" when the Original Defendants placed splints/cast over her broken foot too tightly. The alleged malpractice occurred from November 27, 2013 through December 10, 2013.

On January 21, 2015, Children's Hospital filed a petition to institute discovery in Civil District Court for the Parish of Orleans.[3] Almost a year later, on January 15, 2016, Children's Hospital filed an unopposed motion to extend the life of the MRP. The parties noted in the motion that the MRP was set to expire on

[1] La. R.S. 40:1231.8 was formerly cited as La. R.S. 40:1299.47.

[2] The original MRP complaint named Keisha Benoit and Murray Benoit—the parents of the minor, Mariah Benoit—as claimants. However, this opinion references only Ms. Benoit as plaintiff herein, as Appellant's brief names only Ms. Benoit as the plaintiff/appellant.

[3] The matter was captioned "In Re Medical Panel of Mariah Benoit."

February 25, 2016, panel members had not met, and discovery was still on-going. The district court granted the motion, extending the life of the MRP until February 25, 2017.

Before the life of the MRP expired, on February 9, 2017, Ms. Benoit amended her MRP complaint to add Dr. Greco and PA Clary (collectively, "Defendants"), amongst others, as additional defendants to the pending complaint.[4] The amended complaint asserted that on November 27, 2013, Dr. Greco was the treating physician and PA Clary placed the cast on Plaintiff's leg too tightly, causing the injuries complained of.[5]

On April 4, 2017, Defendants filed an exception of prescription, arguing that on the face of the amended complaint, Ms. Benoit failed to timely convene a MRP against them within the three year prescriptive period pursuant to La. R.S. 9:5628(A). Defendants maintained that Ms. Benoit's amended complaint, which

[4] The amended complaint also named Paragon Contracting Services, Inc., Latricia Johnson, LPN, and Cymone Broussard, R.N. as additional defendants.

[5] Ms. Benoit's amended MRP complaint reads as follows:

> On November 27, 2013, Mariah Benoit attended the ER at Iberia Medical Center. Based on information and belief, Dr. Leslie K. Greco was the treating physician. Based on information and belief, she had a cast placed on her left leg by Nikki Clary, PA with the assistance of Latricia Johnson, LPN, and [sic] Cymone Broussard, R.N.
>
> Based on information and belief, Dr. Leslie K. Greco and Nikki Clary, PA were employed by Paragon Contracting Services, Inc. at the time of the incident. Latricia Johnson, LPN and Cymone Broussard, RN were employed by Iberia Medical Center.
>
> Based on information and belief, the application of the splint/cast was too tight on the left leg resulting in formation of a pressure ulcer over the left heel. There was also a failure to educated [sic] the parents about the signs to look out for in a non-verbal child such as (1) excessive crying which may be due to the cast being too tight, (2) burning or stinging caused by too much pressure on the skin, or (3) painful pressure areas or rubbing beneath the cast or (4) pressure sores caused by an incorrectly fitting cast.

was filed against Defendants more than three years after the date of the alleged malpractice, had prescribed and should be dismissed with prejudice.

Ms. Benoit, relying on *Borel v. Young*,[6] countered that the three-year time period for filing a medical malpractice action was prescriptive, rather than preemptive. Ms. Benoit maintained that her amended complaint against Defendants had not prescribed because Defendants were jointly and solidarily liable with Original Defendants who were named in the original, timely filed MRP complaint. Ms. Benoit further argued that, pursuant to La. R.S. 40:1231.8 (A)(2)(a), because the MRP had not rendered a decision on the merits at the time the amended MRP was filed, the prescriptive period had tolled.

After the argument of counsel, on August 4, 2017, the district court sustained Defendants' exception of prescription, reasoning that: "I think the law is clear. You've got to file [a request for a MRP], at the absolute latest, in three years." The written judgment of the district court dismissed Ms. Benoit's claims against Defendants with prejudice, and ordered the Louisiana Patient's Compensation Fund to dismiss Defendants from the pending medical review panel proceeding captioned *Mariah Benoit, et al. v. Iberia Medical Center, et al*., bearing file number 2014-01224.

Thereafter, Ms. Benoit filed a timely motion for a suspensive appeal.

SUBJECT MATTER JURISDICTION

Before we review the merits of Ms. Benoit's appeal, we must first address whether this case is properly before this Court. Appellate courts have a duty to determine, *sua sponte*, whether subject matter jurisdiction exists, even when the

[6] 2007-0419 (La. 11/27/07), 989 So.2d 42, *on reh'g*, (7/1/08), 989 So.2d 53-82. A more in depth analysis of *Borel* is discussed *infra.*

parties do not raise the issue. *Moon v. City of New Orleans*, 2015-1092, 2015-1093, p. 5 (La. App. 4 Cir. 3/16/16), 190 So.3d 422, 425. Appellate courts cannot consider the merits of an appeal unless our jurisdiction is properly invoked by a valid final judgment. *Bd. of Supervisors of Louisiana State Univ. v. Mid City Holdings, L.L.C.*, 2014-0506, p. 2 (La. App. 4 Cir. 10/15/14), 151 So.3d 908, 910. The prerequisites of a final judgment are discussed in *Tsegaye v. City of New Orleans*, 2015-0676, p. 3 (La. App. 4 Cir. 12/18/15), 183 So.3d 705, 710, as follows:

> For a judgment to be "a valid final judgment," it must contain "decretal language." *Mid City Holdings, L.L.C.*, 2014-0506, p. 2, 151 So.3d at 910. The absence of necessary decretal language means that the judgment is not final and appealable. *Id*., 2014-0506, p. 3, 151 So.3d at 910. Importantly, for the language of a judgment to be considered "decretal," it "must name the party in favor of whom the ruling is ordered, the party against whom the ruling is ordered, and the relief that is granted or denied.

La. C.C.P. art. 1918 provides that "[a] final judgment shall be identified as such by appropriate language." Established jurisprudence requires that a valid judgment be precise, definite and certain. *Input/Output Marine v. Greatbatch Techs, Inc.*, 2010-0477, p. 12 (La. App. 5 Cir. 10/29/10), 52 So.3d 909, 915. "The decree alone indicates the decision. The result decreed must be spelled out in lucid, unmistakable language. The quality of definiteness is essential to a proper judgment." *Input/Output Marine*, 2010-0477, p. 13, 52 So.3d at 916 (footnote and internal citations omitted).

In the present matter, the judgment lacks the requisite decretal language because it does not specifically name the party against whom the ruling is ordered. The judgment merely states that "plaintiffs' claim of malpractice against defendants is dismissed. . . . " The plaintiffs are not readily identifiable from the

judgment or from the case caption of the litigation filed in the district court. The judgment also creates ambiguity in identifying the defendants in whose favor the judgment was rendered as the underlying MRP complaint involves other defendants who were not parties to this exception. In the absence of said decretal language, the August 4, 2017 judgment cannot be considered a final, appealable judgment over which this Court can exercise its appellate jurisdiction. *Tsegaye*, 2015-0676, p. 3, 183 So.2d at 710.

Although we find Ms. Benoit is not entitled to appellate review as a matter of right, nonetheless, this Court has the authority to invoke our discretionary supervisory jurisdiction. *See Bd. of Supervisors*, 2014-506, pp. 2-3, 151 So.3d at 910. *See also* La. C.C.P. art. 2201.[7] Here, Ms. Benoit's motion for appeal was filed within thirty days of rendition of the judgment; thus, it was filed within the time period for the filing of an application for supervisory writs. Accordingly, this Court elects to exercise its discretionary jurisdiction and convert Ms. Benoit's appeal to a writ application, which we grant.

We now turn to address the merits of Ms. Benoit's claim.

STANDARD OF REVIEW

A judgment granting the peremptory exception of prescription is generally reviewed under the *de novo* standard of review because the exception raises a legal question. *Scott v. Zaheri*, 2014-0726, p. 8 (La. App. 4 Cir. 12/3/14), 157 So.3d 779, 785. In a case involving no dispute over material facts, but only the determination of a legal issue, such as the present matter, the *de novo* review standard is applied, under which the district court's legal conclusions are not

[7] La. C.C.P. art. 2201 states: "Supervisory writs may be applied for and granted in accordance with the constitution and rules of the supreme court and other courts exercising appellate jurisdiction."

entitled to deference. *Felix v. Safeway Ins. Co.*, 2015-0701, p. 6 (La. App. 4 Cir. 12/16/15), 183 So.3d 627, 632.

ASSIGNMENT OF ERROR

Ms. Benoit's sole assignment of error is whether the district court erred in sustaining Defendants' exception of prescription.

DISCUSSION

Ms. Benoit raises the same arguments here as she did in the district court: (1) that the three-year time period for filing a medical malpractice action as contemplated in La. R.S. 9:5628(A) is prescriptive, rather than preemptive; (2) that pursuant to La. R.S. 40:1231.8 (A)(2)(a), the prescriptive period was tolled because the MRP had not rendered a decision at the time the amended complaint was filed; (3) that the original MRP complaint, timely filed on November 13, 2014, interrupted prescription as to the joint and solidary Defendants added to the complaint by amendment on February 6, 2017.

In opposition, Defendants contend that the applicable statute in determining prescription in a medical malpractice action is governed by La. R.S. 9:5628(A), which imposes a strict deadline of three years in which to bring a medical malpractice claim, and no statutory or jurisprudential authority exists to suspend or interrupt prescription beyond the three-year period.

La. R.S. 9:5628(A) provides in pertinent part as follows:

> No action for damages for injury or death against any physician . . . 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.

Pertinent provisions of the Louisiana Medical Malpractice Act ("LMMA") applicable to consideration of claims before the MRP include the following:

> La. R.S. 40:1231.8 Medical review panel.
>
> A. (1)(a) All malpractice claims against health care providers covered by this Part, other than claims validly agreed for submission to a lawfully binding arbitration procedure, shall be reviewed by a medical review panel established as hereinafter provided for in this Section.
>
> * * *
>
> (2)(a) 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. (emphasis added)

The Supreme Court conclusively established in *LeBreton v. Rabito*, 1997-2221, p. 9 (La. 7/8/98), 714 So.2d 1226, 1230, that the LMMA applies to the exclusion of the general codal provisions found in our Louisiana Civil Code in determining the suspension or interruption of prescription in medical malpractice actions. In *LeBreton*, the decedent's daughter simultaneously filed a wrongful death claim against his physicians in Civil District Court and a complaint before the MRP. The physicians filed an exception of prematurity, alleging that the only viable action was before the MRP. The district court denied the physicians' prematurity exception and the appellate court denied writs, allowing the daughter's

district court action to continue. In granting the physicians' writ application, the Supreme Court noted that the filing of a medical malpractice claim with a medical review panel triggers the suspension of prescription as provided by the LMMA, rather than the interruption of the liberative prescriptive period provided in the Civil Code. *LeBreton*, 1997-2221 at p. 9, 714 So.2d at 1230. The Court reasoned as follows:

> [I]t is evident that the Louisiana Medical Malpractice Act took cognizance of the need to suspend prescription and fully protects plaintiffs who would otherwise suffer the detrimental effect of liberative prescription. Because the Medical Malpractice Act prohibits the filing of a medical malpractice claim against a qualified health care provider prior to panel review, the act specifies that the filing of a request for review before a panel suspends prescription. La. R.S. 40:[1231.8](A)(2)(a). Moreover, as provided by statute, the filing of the complaint prevents prescription from lapsing during the pendency of the review process and further suspends prescription from the time of filing until ninety-days following notification to the claimant or his attorney of the panel opinion. *Id*. After reviewing these special provisions, it is clear that the legislature has equitably provided for suspension to aid the plaintiff in the medical malpractice arena who is prevented by law from the outset from filing suit against the qualified health care provider.... Thus, considering the doctrinal underpinnings for the existence of the rules of suspension, it is evident that there is no need for the general rules of interruption of prescription to combine with suspension to synergistically benefit the plaintiff.

LeBreton, 1997-2221, p. 10, 714 So.2d at 1230-31.

In *Borel*, *supra*, the Supreme Court was faced with a similar issue when it considered whether a timely filed malpractice complaint against a hospital interrupted the three-year prescriptive period against an alleged joint tortfeasor/physician, where the plaintiffs filed suit more than three years after the acts of medical malpractice. The *Borel* plaintiffs filed a MRP complaint on August 14, 2000, against the hospital and the physician in connection with their decedent's death on May 23, 2000. They were notified of the MRP's decision on January 22, 2002. Within ninety days, on March 28, 2002, the *Borel* plaintiffs filed suit against

the hospital; however, they did not file suit against the physician. They waited until May 15, 2005 to file a separate lawsuit against the physician, contending that he was jointly, severally, and *in solido* liable with the hospital for the negligent care that resulted in the decedent's death.[8] The physician and his insurer filed an exception of prescription, which was sustained by the district court.

In applying the provisions of La. R.S. 40:1231.8(A)(2)(a) to the facts of *Borel*, the Court acknowledged that medical malpractice actions are governed by special legislation as codified in the LMMA; as such, the specific provisions of the LMMA regarding suspension of prescription apply to the exclusion of the general code articles on interruption of prescription. 2007-0419, p. 25, 989 So.2d at 67. Moreover, the Court recognized that the time period for filing a medical malpractice action is prescriptive, rather than preemptive.[9] *Id*., 2007-0419, pp. 28-29, 989 So.2d at 69. The *Borel* Court explained that during the pendency of the panel proceedings, prescription was suspended as to all joint and solidary obligors. Thus, the *Borel* plaintiffs had until ninety days after notice of the panel decision, plus the remainder of the one-year prescriptive period that was unused at the time the request for the MRP was filed, in which to timely file suit.[10] Because the *Borel* plaintiffs failed to file suit against the physician until after the expiration of these time periods, the Court found that the district court properly sustained the peremptory exception of prescription. *Id*., 2007-0419, p. 28, 989 So.2d at 69.

However, the facts of the present matter are distinguishable from *Borel*. Here, the medical review panel has not rendered a decision. Therefore,

[8] The lawsuits were ultimately consolidated by motion of the district court.
[9] In its initial review, the *Borel* Court found that La. R.S. 9:5628 established a preemptive time period. 2007-0419, p. 13, 989 So.2d at 51.
[10] The *Borel* plaintiffs had 282 days or until January 29, 2003 to bring the physician into the lawsuit. 2007-0419, p. 28, 989 So.2d at 69.

prescription is suspended, at a minimum, for a ninety-day period following notice, via certified mail, of the MRP decision pursuant to La. R.S. 40:1231.8(A)(2)(a), provided the newly added defendants—Dr. Greco and PA Clary—are considered joint and solidary obligors.

Defendants contend if this Court interprets La. R.S. 40:1231.8(A)(2)(a) to mean prescription is interrupted while a MRP decision is pending, allowing for an amendment of joint tortfeasors, which we do, Ms. Benoit failed to present any evidence at the hearing on the exception to prove that they were joint and solidary obligors with Original Defendants named in the original MRP complaint.

In *Younger v. Marshall Industries, Inc.*, 618 So.2d 866, 871 (La. 1993), the Supreme Court opined:

> When no evidence is presented at the hearing on the exception, the objection of prescription must be decided upon the facts alleged in the petition and the second supplemental petition, and all the allegations therein are accepted as true. *Tranum v. Hebert*, 581 So.2d 1023, 1026 (La. App. 1st Cir.), *writ denied*, 584 So.2d 1169 (1991). Where the allegations in the petition have not been controverted in the hearing on the exception, a court must look to see whether the alleged facts, if accepted as true, are sufficient on their face to establish that the timely sued defendant and the untimely sued defendants are solidarily liable. If so, then plaintiff has met his burden of proving an interruption of prescription based on solidary liability. *Pearson v. Hartford Accident & Indemnity Co.*, 281 So.2d 724 (La. 1973).

Upon examination of the original MRP complaint, Ms. Benoit requested that a MRP be convened for the follow reasons:

> [T]to render an expert opinion on the treatment and/or lack of treatment rendered by Iberia Medical Center, Pediatric Group of Acadiana, Women's Children's Hospital, Children's Hospital and/or its employees and/or others for whom it is responsible as of November 27, 2013. Of particular concern is the fact that Maria Benoit had splints/cast placed over a broken foot to [sic] tight to where it caused a compression injury that developed into an open sore.

In the amended MRP complaint, Ms. Benoit alleges that on November 27, 2013, during a visit in the emergency room at Iberia Medical Center, Dr. Greco, the treating physician, and PA Clary improperly treated her when PA Clary placed a cast too tightly on Ms. Benoit's leg, resulting in the formation of a sore.

On the face of the original complaint and the amended complaint, the alleged facts, if accepted as true, are sufficient to establish that the timely sued Original Defendants and the "untimely" sued Defendants are jointly and solidarily liable. Accordingly, based on our *de novo* review, Ms. Benoit met her burden of proving that prescription was suspended as to Defendants based on joint and solidary liability.

CONCLUSION

When we apply the provisions of La. R.S. 1231.8(A)(2)(a) to the facts of this case, we find that Ms. Benoit's amended complaint adding Defendants as joint and solidary obligors was timely filed. Accordingly, we reverse the judgment and remand this matter to the district court for further proceedings consistent with this opinion.

APPEAL CONVERTED TO WRIT APPLICATION; WRIT GRANTED; JUDGMENT REVERSED AND REMANDED