04/12/02 "See News Release 030 for any concurrences and/or dissents."

SUPREME COURT OF LOUISIANA

No. 01-CC-2206

BENNETT GEIGER AND PEGGY PENDARVIS, INDIVIDUALLY AND ON BEHALF OF THEIR MINOR DAUGHTER, SUZANNE NICOLE PENDARVIS

versus

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF HEALTH AND HOSPITAL AND EARL K. LONG MEDICAL CENTER

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST CIRCUIT, PARISH OF EAST BATON ROUGE

CALOGERO, Chief Justice, concurring in part, dissenting in part

I agree with the majority that this case should be remanded to the trial court for a hearing on whether the plaintiffs' claim has prescribed from the date of discovery of the act of alleged malpractice. But, I disagree with two outset determinations in the opinion. First, I believe LeBreton v. Rabito, 97-2221 (La. 7/8/98), 714 So.2d 1226, should be overruled rather than followed. Second, I feel the plaintiffs' argument that suit against the "solidarily liable" product manufacturer interrupted prescription as to the medical malpractice defendants is still alive in this court.

As to the issue in LeBreton, I believe that filing a medical malpractice suit in the trial court prior to submission of the case to a medical review panel should interrupt prescription. Louisiana Civil Code article 3462 provides for interruption of prescription when an action is commenced in a court of competent jurisdiction and venue. While La. Rev. Stat. 20:1299.47(A)(2)(a) provides for suspension of prescription when a request for a medical review panel is made, that statute does not conflict with La. Civ. Code art. 3462. Both provisions of law can be applied together in compliance with the long standing rule that where two statutes deal with the same

subject matter, they should be harmonized if possible. *See* State ex rel. Bickman v. Dees, 367 So.2d 283 (La. 1978); Esteve v. Allstate Ins. Co., 351 So.2d 117 (La. 1977). Thus, in my view, the rule in LeBreton should be overruled and in this case, plaintiffs' July 14, 1993 medical malpractice suit should have interrupted prescription.

Second, I believe that plaintiffs argument that suit against the "solidarily liable" product manufacturer interrupted prescription as to the medical malpractice defendants is still alive in this court. The majority disagreed, finding instead that the products liability case itself was prescribed because it was filed on the 366th day. I cannot entirely fault the majority for not considering the issue, especially in light of the fact that plaintiffs' counsel seemed to concede, at oral argument, that the products liability suit was untimely filed. But, I ultimately disagree with the majority's failure to address the claim.

First, neither of the lower courts found the products liability suit was untimely filed. Second, the "concession" of plaintiffs' counsel in oral argument, as I recall, was simply a concession for the purpose of argument. Third, plaintiffs specifically argued in their briefs that "the *timely* filed products liability suit served as a valid interruption of prescription." Fourth, the law seems to indicate that the products liability action filed on the 366th day was timely.

While delictual actions ordinarily have a one year prescriptive period, Louisiana Civil Code article 3492 provides for suspension of prescription for these plaintiffs. That statute states that the liberative prescription for delictual actions "does not run against minors ... in actions involving permanent disability and brought pursuant to the Louisiana Products Liability Act or state law governing product liability actions in effect at the time of the injury or damage."

Here, the petition (1) alleged that the injured party was a minor child, (2) alleged

that the minor had sustained "possible brain damage", and (3) stated a cause of action under the Louisiana Products Liability Act. For purposes of prescription, the facts pleaded in petition are to be assumed true and hence, the products liability action was not prescribed on its face. Our Lady of the Lake Hospital v. Vanner, 95-0754, p. 3 (La.App. 1 Cir. 12/15/95), 669 So.2d 463, 464. Thus, in my view, plaintiff's contention that the products liability suit interrupted prescription as to the medical malpractice claim is still alive in this court although I cannot fault the majority for not considering the issue in light of the apparent "concessions" at oral argument.