NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 CW 0412R

PAMELA WARREN AND THERESA RENE WARREN

VERSUS

LOUISIANA MEDICAL MUTUAL INSURANCE COMPANY, JEFFREY A. LAMP, M.D., ROBYN B. GERMANY, M.D., SANDRA MOODY, NP-C, AND FAMILY HEALTH OF LOUISIANA, INC.

Judgment Rendered: February 9, 2007

On Remand from the
Louisiana Supreme Court
In and for the Parish of East Baton Rouge, Louisiana
Docket Number 501,839

Honorable Donald R. Johnson, Judge Presiding

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JMM **BEFORE: WHIPPLE, PARRO, GAIDRY, McDONALD AND WELCH, JJ.**

McDonald, J. dissents and assigns reasons.
Welch J. dissents for reasons assigned by McDonald. J and assigns reasons.

WHIPPLE, J.

This matter is before us on remand from the Louisiana Supreme Court. The issue presented in this writ application is whether the wrongful death and survival claims for damages of a daughter of the decedent asserted by amended petition filed approximately nineteen months after the filing of the original petition by the decedent's wife and other daughter relate back to the filing of that original petition. Having concluded that her claims do relate back to the filing of the original petition and, thus, that the trial court properly denied defendants' exception raising the objection of prescription, we again deny the writ application.

FACTS AND PROCEDURAL HISTORY

Terry Warren received medical treatment from defendants from October 10 until October 13, 2000, the date of his death.[1] On September 11, 2001, Terry Warren's widow, Pamela Warren, and his daughter Theresa Warren filed a request that a medical review panel be convened to investigate the alleged substandard medical care rendered to Terry Warren by the health care defendants. The medical review panel issued its written opinion on August 27, 2002, and thereafter, on November 25, 2002, Pamela and Theresa Warren filed a petition for damages in the district court.[2]

Subsequently, on July 6, 2004, slightly more than one year and seven months after the filing of the original petition, plaintiffs filed a first supplemental and amending petition, adding Terry Warren's other daughter, Sarah Warren Jimenez, as an additional plaintiff.

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[1]Named as defendants are Dr. Jeffrey Lamp, Dr. Robyn Germany, Sandra Moody, Family Health of Louisiana, Inc., and Louisiana Medical Mutual Insurance Company.

[2]While a copy of the medical review panel opinion is not a part of the record on appeal, defendants averred in their answer that the medical review panel unanimously found that the care rendered by defendants was not substandard.

Defendants then filed a peremptory exception raising the objection of prescription as to the claims of Jimenez, contending that her wrongful death and survival claims for damages were prescribed on the face of the supplemental and amending petition and that Jimenez could not meet her burden to show that her claims related back to the filing of the original petition.

At the February 6, 2006 hearing on the exception, the trial court denied the exception. As stated above, defendants then filed an application for supervisory writs, challenging the trial court's denial of their exception, and this court denied the writ application on May 18, 2006. Warren v. Louisiana Medical Mutual Insurance Company, 2006 CW 0412 (La. App. 1st Cir. 5/18/06)(unpublished writ). Thereafter, on September 29, 2006, the Louisiana Supreme Court granted defendants' application for supervisory writs and remanded the matter to this court for briefing, argument and opinion. Warren v. Louisiana Medical Mutual Insurance Company, 2006-1547 (La. 9/29/06), 938 So. 2d 693.

DISCUSSION

Defendants assert that the trial court erred in denying their exception of prescription because Jimenez, who consciously chose not to participate in the lawsuit until after prescription had accrued, failed to meet her burden of proof under LSA-C.C.P. art. 1153 and Giroir v. South Louisiana Medical Center, 475 So. 2d 1040 (La. 1985), for her claim to "relate back" to the filing of the original petition. Additionally, defendants contend that the trial court committed legal error to the extent that it denied the exception of prescription on the basis of two Third Circuit Court of Appeal decisions, which held that the filing of a medical malpractice wrongful death claim by a parent or sibling interrupted prescription as to a child or other siblings.[3]

Louisiana Revised Statute 9:5628 provides that the prescriptive period for a medical malpractice complaint is 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.[4] The party pleading prescription bears the burden of proof. However, when the cause of action is prescribed on the face of the petition, the plaintiff bears the burden of rebutting the plea of prescription. Campo v. Correa, 2001-2707 (La. 6/21/02), 828 So. 2d 502, 508.

Louisiana Code of Civil Procedure article 1153, governing the relating back of an amended petition, provides as follows:

> When the action or defense asserted in the amended petition or answer arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of filing the original pleading.

In Giroir, the Louisiana Supreme Court held that an amendment adding or substituting a plaintiff should be allowed to relate back to the original petition if: (1) the amended claim arises out of the same conduct, transaction or occurrence set forth in the original pleading; (2) the defendant either knew or should have known of the existence and involvement of the new plaintiff; (3) the new and old plaintiffs are sufficiently related so that the added or substituted party is not wholly new or unrelated; and (4) the defendant will not be prejudiced in preparing and conducting his defense.

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[3]See Phillips v. Francis, 2001-1105 (La. App. 3rd Cir. 2/6/02), 817 So. 2d 107, and Tureaud v. Acadiana Nursing Home, 96-1262 (La. App. 3rd Cir. 5/7/97), 696 So. 2d 15.

[4]Louisiana Revised Statute 9:5628 further provides that even as to claims filed within one year of the date of such discovery, in all events such claims shall be filed, at the latest, within three years from the date of the alleged act, omission or neglect.

Giroir, 475 So. 2d at 1044. Moreover, this court has held that the relation back theory also applies to claims governed by a peremptive period. Southside Civic Association, Inc. v. Warrington, 93-0890 (La. App. 1st Cir. 4/8/94), 635 So. 2d 721, 724, writ denied, 94-1219 (La. 7/1/94), 639 So. 2d 1168. Because Jimenez's claims were prescribed on the face of the amending petition, she bore the burden of establishing that her claims were not prescribed because they related back to the filing of the original petition filed by her mother and sister.

In Giroir, the Court held that the claims of two major children related back to the surviving spouse's survival and wrongful death actions for damages against several physicians and South Louisiana Medical Center. In so holding, the Court observed that the children's wrongful death and survival actions stemmed from the same conduct, transaction or occurrence set forth in the original pleading, i.e., the medical malpractice and resulting death of the children's mother. Moreover, the Court noted that the defendants knew or should have known of the existence and involvement of the children; the original and new plaintiffs, as parent and children, had close familial and legal relationships and, thus, were sufficiently related; and the defendants were not prejudiced by the amendment in preparing and conducting their defense. Giroir, 475 So. 2d at 1045.

In the instant case, Jimenez has clearly met the first and third criteria of Giroir. Her claims arise out of the same conduct, transaction or occurrence set forth in the original petition, i.e., the defendant's alleged medical malpractice causing the death of Mr. Warren, and the new and old plaintiffs, as siblings and parent and child, are sufficiently related so that Jimenez is not a wholly new or unrelated plaintiff. See Giroir, 475 So. 2d at 1045; cf. Delmore v. Hebert, 99-2061 (La. App. 1st Cir. 9/22/00), 768 So. 2d

251, 255 (where this court held that a niece, who was a direct victim of the tort, was not "sufficiently related" under the second Giroir factor).

With regard to the second Giroir factor, whether defendants knew or should have known of the existence and involvement of the new plaintiff, we likewise conclude that this factor was also met. Initially, we note that Sarah Warren was listed on Mr. Warren's death certificate as the informant. Moreover, although Sarah Warren Jimenez was not mentioned by name in the request for a medical review panel or in the petition filed below, paragraph five of the petition stated that Theresa Warren was "**one** of the surviving children of Terry Warren" (emphasis added) and that, in that capacity, she was asserting both survival and wrongful death claims. Thus, the petition gave defendants notice of, and did not negate, the reasonable possibility that another surviving child of Mr. Warren would be entitled to recover under LSA-C.C. arts. 2315.1 and 2315.2 and might later assert a claim. See Giroir, 475 So. 2d at 1045. Additionally, in answers to interrogatories mailed to defendants on March 5, 2003, approximately three and one-half months after the petition for damages was filed, Sarah Warren was specifically identified as Terry Warren's daughter and a potential witness in the case. Thus, defendants knew of Jimenez's existence shortly after the filing of the original petition.

Thus, we turn to the fourth Giroir factor, whether the defendants will be prejudiced in preparing and conducting their defense. With regard to the survival action asserted by Jimenez, at oral argument, the defendants specifically acknowledged that they would not be prejudiced in preparing or conducting their defense as to this claim. Thus, the issue of prejudice, if any, relates solely to her wrongful death action. While it is true that this court has held that the passage of time between the filing of the original petition and the amending petition **generally** weighs against the relating back of the amendment, Baton Rouge Association of School Employees, Local 100 Service Employees International Union, AFL-CIO v. East Baton Rouge Parish School Board, 98-0526 (La. App. 1st Cir. 4/1/99), 729 So. 2d 1154, 1157, writ denied, 99-1278 (La. 7/2/99), 747 So. 2d 19, we find no manifest error in the trial court's implicit finding that no prejudice existed herein. At the outset, we note that Jimenez presents the same claims as the original plaintiffs, and, as stated above, she was identified as a potential witness shortly after the original petition was filed. Moreover, the evidence necessary to defend against her claim of malpractice is the same evidence necessary to defend against such a claim by the original defendants. Accordingly, we conclude that the fourth Giroir factor was also satisfied in that defendants would not be prejudiced in preparing and conducting their defense by the relation back of the amended petition adding Jimenez as a plaintiff. [5]

Additionally, we note that prior First Circuit Court of Appeal opinions that relied on the passage of time between the filing of the amending and original petitions as the basis for affirming findings of no relation back are factually distinguishable from the instant case. In Bogue Lusa Waterworks District v. The Louisiana Department of Environmental Quality, 2004-0061

[5]In their writ application, defendants contend that Jimenez's claim should not be allowed to relate back to the filing of the original petition because she deliberately made the decision not to participate in the litigation at the outset. We observe that her motives in not joining in the suit initially are wholly irrelevant to the legal issues before us. Moreover, we find no merit to the argument by defendants that Giroir somehow mandates rejection of her claims on this basis. It is clear from the record that, initially, there were family issues that caused Jimenez to be hesitant to join with her mother in filing suit, namely her estrangement from her mother that was exacerbated by her father's death and events following his death. Moreover, the evidence established that although Jimenez and her father had begun to resolve their past conflicts prior to any of his health problems, Jimenez was extremely distraught about her father's death and their past estrangement and short reconciliation prior to his death and initially felt that participating in the lawsuit would be too emotionally taxing.

(La. App. 1st Cir. 12/17/04), 897 So. 2d 726, 727, an environmental organization filed a petition contesting the issuance of permits for a natural gas-fired electrical power plant. The organization attempted to file a supplemental and amending petition approximately two years after filing the original petition to add two individual members as plaintiffs. In affirming the trial court's denial of leave to file the amending petition, this court stated that the passage of time would prejudice the defendant in preparing and conducting its defense. Bogue Lusa Waterworks District, 897 So. 2d at 729-731.

In Baton Rouge Association of School Employees, Local 100 Service Employees International Union, AFL-CIO, female employees and their union sued the school board, alleging gender discrimination in budget cuts. The original petition was amended several times to add additional plaintiffs. When a fifth amending petition was filed almost three years after the original petition to add an additional plaintiff and over two years after the denial of class certification, the school board filed an exception of prescription, which was maintained by the trial court. In affirming the trial court's judgment, this court noted that the Supreme Court in Giroir did not place any time limits on the relation back of an amended petition, but that "at some point the passage of time becomes a factor." Baton Rouge Association of School Employees, Local 100 Service Employees International Union, AFL-CIO, 729 So. 2d at 1156-157.

In Duffie v. Southern Pacific Transportation Company, 563 So. 2d 933, 934 (La. App. 1st Cir. 1990), the mother of a minor decedent timely brought survival and wrongful death actions. Thereafter, approximately eleven months after the mother filed her petition and more than twenty-three months after the date of the accident, the decedent's father filed a petition of intervention, seeking to join his wrongful death claim and survival action with the mother's original petition. Although finding that Giroir was not applicable to a petition for intervention, this court nonetheless noted that the second Giroir factor, whether the defendant knew or should have known of the existence and involvement of the new plaintiff, a non-custodial father, was not met. Duffie, 563 So. 2d at 935.

However, we note that neither Bogue Lusa Waterworks District nor Baton Rouge Association of School Employees, Local 100 Service Employees International Union, AFL-CIO involved a family member being added as a plaintiff in survival and wrongful death actions as in Giroir. Moreover, Duffie, which involved the intervention by a non-custodial father, is clearly distinguishable from the present case.

Accordingly, because the claims of Jimenez are the same as that of her mother and sister and arise out of the same conduct, transaction or occurrence; because defendants knew or should have known of the existence and involvement of Jimenez; because of the close familial and legal relationship between Jimenez and the original plaintiffs, her mother and sister; and because of the lack of prejudice to defendants in defending actions identical to those brought by Jimenez's sister and mother, we find no error in the trial court's decision permitting the amended petition to relate back to the filing of the original petition.

Because we have concluded that, applying Giroir, 475 So. 2d 1040, and LSA-C.C.P. art. 1153 to the facts presented herein, the trial court properly permitted the amended petition to relate back to the timely filing of the original petition, we pretermit discussion of whether the trial court relied on the Third Circuit cases of Phillips v. Francis, 2001-1105 (La. App. 3rd Cir. 2/6/02), 817 So. 2d 107, and Tureaud v. Acadiana Nursing Home, 96-

1262 (La. App. 3rd Cir. 5/7/97), 696 So. 2d 15, in rendering its ruling and whether such reliance would have constituted legal error.

CONCLUSION

For the above and foregoing reasons, defendants' application for supervisory writs seeking review of the trial court's denial of their exception of prescription as to the claims of Sarah Warren Jimenez is denied at defendants' costs.

WRIT DENIED.

JMM

PAMELA WARREN AND THERESA RENE WARREN

VERSUS

LOUISIANA MEDICAL MUTUAL INSURANCE COMPANY, ET AL.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2005 CW 0412R

McDONALD, J. DISSENTING:

I disagree with the majority in this matter and respectfully dissent. Louisiana Code of Civil Procedure article 1153 provides the basis for the idea of an amending petition "relating back" to the date of filing of the original. However, this article provides as follows:

> When the action or defense asserted in the amended petition or answer arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of filing the original pleading.

This article does not refer to parties, but to claims or actions. Louisiana Civil Code article 2324 provides that interruption of prescription against one joint tortfeasor is effective against all joint tortfeasors. Thus, the addition of additional defendants in a suit will relate back to the date of the original if the defendants are joint tortfeasors. However, there is no legislative pronouncement involving the addition of plaintiffs with the idea of "relating back." This concept is a jurisprudential creation. In *Giroir v. South Louisiana Medical Center*, 475 So.2d 1040 (La. 1985), the supreme court established four criteria that must be satisfied in order to allow for the addition of plaintiffs to an original timely filed petition. As the majority has adeptly indicated, Jimenez has met the first and third criteria. I agree. However, the majority also concludes that the other two criteria have been met. Here I must disagree.

The second criterion is whether the defendant knew or should have known of the existence and **involvement** of the new plaintiff. The majority correctly notes that Sarah Warren (Jimenez) was listed on the decedent's death certificate as the informant. And while her name was not mentioned in the original petition or the request to convene a medical review panel, the petition does indicate that Theresa Warren is one of the decedent's surviving children. This might indicate that there were other surviving children of the decedent. While this might satisfy the knowledge of the existence of the new plaintiff, it does not address the issue of "involvement" by the new plaintiff. The supreme court utilized the terms "existence and involvement". Thus, both must be satisfied. The *Giroir* court does not define the term "involvement." However, a fair interpretation would be that the defendant knew of the existence of the new plaintiff and this new plaintiff had some prior involvement in the case such that the defendant would be on notice that a claim might be forthcoming.

In *Musgrove v. Glenwood Regional Medical Center*, 37,575 (La. App. 2 Cir. 9/26/03) 855 So.2d 984, 987, the second circuit stated that "[e]ven if the defendants have actual knowledge of other persons involved in the tort, there is no relation back unless the original petition gives reasonable notice that these persons will have a claim." In that case an emergency room physician filed a petition against the hospital for damages allegedly sustained when he was terminated from his employment. His wife was employed at the same hospital as a respiratory therapist, had married the physician while she was employed by the hospital, gave birth to their child at the defendant hospital, and their pediatrician was on the hospital's board of directors. An amended petition was filed three years after the original petition claiming a loss of consortium by the wife. While there is absolutely no question that the hospital knew of the existence of the wife, the second circuit held that her claim did not relate back and was prescribed. The *Musgrove* court quotes *Giroir* as follows:

> "facts in the original petition gave defendants notice of, and did not negative, the reasonable possibility that a surviving child of the deceased 55 year old married woman would be entitled to recover as a survivor or wrongful death beneficiary." 475 So.2d 1045. In the instant case, there is simply no such notice. Even if the defendants have actual knowledge of other persons involved in the tort, there is no relation back unless the original petition gives reasonable notice that these persons will have a claim.

Musgrove, 27,575, 855 So.2d at 987.

The facts at issue before us today are even more compelling than those in *Musgrove*. Not only is there no notice to the defendant that she might have a claim, the existence of Ms. Jimenez is much less evident and apparent. The legislature amended the Medical Malpractice Act in 2003[1] to establish certain minimum requirements for claims made in the convening of a medical review panel. Among those the names of the claimants is now required. (La. R.S. 40:1299.47A(1)(b)(iii)). By being named as a claimant in the complaint or request for review, the claimant now has "involvement" in the action and the defendant has notice of this involvement.

The majority has also concluded that the fourth factor has also been satisfied. While there is no disagreement that the defendant will not be prejudiced by the new plaintiff joining in the survival action, this is not true of the wrongful death action. The majority correctly concludes that the new plaintiff presents the same claims as the original plaintiffs. However, this is not the measure of what should or should not be allowed to relate back. If it were, the court in *Scott v. Haley*, 632 So.2d 793 (La. App. 1 Cir. 1993)

[1] Acts of the Legislature 2003, No. 484

would have been wrong. In that case, the original plaintiffs amended the petition to add an additional cause of action, not an additional plaintiff. The majority suggests that since the claim is the same as that asserted by the original plaintiffs it should relate back. This argument is contrary to the decision in *Haley*. *Haley* does, however, comply with the provisions of art. 1153. Additionally, the majority ignores the fact that in the wrongful death claim her evidence will most assuredly be different than that presented by her sister and mother. By waiting almost four years to file her claim, the plaintiff has certainly prejudiced the defendant in properly and adequately asserting a defense.

Therefore, because the defendant had no knowledge or expectation of any involvement of the additional petitioner in the suit and the prejudice to the defendant in allowing the "relating back," I do not believe either the second or fourth prong of *Giroir* has been satisfied. For these reasons I respectfully dissent from the majority view.

PAMELA WARREN AND THERESA RENE WARREN	**NUMBER 2006 CA 0412R**
VERSUS	**FIRST CIRCUIT**
LOUISIANA MEDICAL MUTUAL INSURANCE COMPANY, JEFFREY A. LAMP, M.D., ROBYN B. GERMAIN, M.D., SANDRA MOODY, NP-C, AND FAMILY HEALTH OF LOUISIAN OF LOUISIANA, INC.	**COURT OF APPEAL**
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WELCH, J., DISSENTING.

JEW

I respectfully dissent for the reasons assigned by Judge McDonald. I also write separately to address the reasons why I believe the new plaintiff, Jimenez, does not meet the second criteria set forth in **Giroir**.

The record is clear that Jimenez knewn of the litigation since its inception. Further, Jimenez made a considered decision not to involve herself in the lawsuit. Almost four years after the claims were pending, Jimenez reconsidered her decision and filed as a new party plaintiff.

The second criteria as set forth in **Giroir** for a petition to relate back to the original filing requires: "the defendant either knew or should have know of the existence and involvement of the new plaintiff."

I believe the record bears out that the defendants had adequate notice of the new plaintiff's identity. However, if the defendants would have sought out Jimenez and inquired whether she would be involved in the litigation for the first three-and-one-half years of these proceedings, the record indicates that plaintiff's answer would have been "NO."

According, under these particular facts, I do not believe the new plaintiff has satisfied the second criteria of **Giroir** and the claim should not relate back.