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Daniel A. Kramer

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An Uncertain Prescription—Medical Malpractice Actions in Louisiana

INTRODUCTION

Terry Warren died on October 12, 2000, as a result of heart problems while undergoing treatment.¹ Although Mr. Warren's widow and one daughter asserted wrongful death and survival actions against the treating physicians, the other daughter was not allowed to do so because the prescriptive period had expired by the time her claims were asserted.² According to the Louisiana Supreme Court, the general codal rules of interruption of prescription do not apply in medical malpractice actions.³ This interpretation allows for the possibility that a wrongful death claimant's action can prescribe before it ever accrues, even if the victim of malpractice timely files suit before his death, leaving the wrongful death plaintiff with no chance at a remedy.⁴

In 1975, the Louisiana Legislature passed what is commonly known as the Medical Malpractice Act in an effort to curtail rising medical costs and insurance rates.⁵ Louisiana Revised Statutes sections 40:1299.41–.49 set forth the procedure by which medical malpractice actions must be asserted.⁶ Louisiana Revised Statutes section 9:5628 governs the prescriptive period for such actions.⁷

Perceived conflicts between the Medical Malpractice Act and the Louisiana Civil Code challenge Louisiana courts, which have wrestled with the suspension of prescription provided by Louisiana Revised Statutes section 40:1299.47 and the interruption of prescription provided by the Civil Code.⁸ The challenges lie in

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1. Warren v. La. Med. Mut. Ins. Co., 21 So. 3d 186, 203 (La. 2009).

2. *Id.* at 203, 206–08.

3. Borel v. Young, 989 So. 2d 42, 67 (La. 2008).

4. Wrongful death and survival actions do not accrue until the death of the decedent. *See* Taylor v. Giddens, 618 So. 2d 834, 840 (La. 1993); discussion *infra* Part II.B.3.

5. Louisiana Revised Statutes sections 40:1299.41–.49 are commonly known under the name “the Medical Malpractice Act.” In addition, section 9:5628 is often included under the umbrella of “the Act.” The policies behind the Medical Malpractice Act were described in Kandy G. Webb, Comment, *Recent Medical Malpractice Legislation—A First Checkup*, 50 TUL. L. REV. 655, 666 (1976).

6. *See* Taylor, 618 So. 2d at 841.

7. LA. REV. STAT. ANN. § 9:5628 (2007).

8. *See, e.g.*, Hernandez v. Lafayette Bone & Joint Clinic, 467 So. 2d 113 (La. Ct. App. 3d. 1985), *overruled by* LeBreton v. Rabito, 714 So.2d 1226 (La. 1998); Taylor, 618 So. 2d 834; LeBreton, 714 So. 2d 1226; Borel, 989 So. 2d 42; Warren v. La. Med. Mut. Ins. Co., 21 So. 3d 186 (La. 2009).

determining (1) whether suspension of prescription provided in Louisiana Revised Statutes section 40:1229.47 should preempt the general rules of prescription found in the Louisiana Civil Code; (2) whether such preemption should extend to barring relation back of amended petitions; and (3) whether the prescriptive period for wrongful death claims is governed by Louisiana Revised Statutes section 9:5628 or Louisiana Civil Code article 3492.⁹

This Comment explores a line of cases, including *LeBreton v. Rabito*, *Borel v. Young*, and *Warren v. Louisiana Medical Mutual Insurance Co.*, and suggests an alternative interpretation that would lead to results more in line with the general rules of prescription set forth in the Louisiana Civil Code.¹⁰ Part I provides a background in this area of the law by reviewing pertinent statutes and principles of Louisiana procedure. Part II analyzes the reasoning of the cases in question and criticizes certain decisions.¹¹ It also contrasts application of current law with an alternative suggested by the analysis. Part III concludes the comment, briefly outlining suggestions designed to eliminate the unfair procedural bar created in *LeBreton*, *Borel*, and *Warren*. The judge-made barrier of uninterruptible prescription in medical malpractice cases is bad medicine for Louisiana's codal command, whereby the person at fault must repair the damage he has caused.¹²

I. BACKGROUND

A. *The Medical Malpractice Act*

The Louisiana Legislature passed the Medical Malpractice Act¹³ amid a trend of increasing numbers of medical malpractice claims

9. Compare *Taylor*, 618 So. 2d at 841 (holding that Louisiana Civil Code article 3492 governs the prescriptive period for wrongful death in medical malpractice actions), with *Warren*, 21 So. 3d at 207–08 (applying the prescriptive period set forth Louisiana Revised Statutes section 9:5628 to a claim of wrongful death arising in medical malpractice).

10. *LeBreton*, 714 So. 2d 1226; *Borel*, 989 So. 2d 42; *Warren*, 21 So. 3d 186.

11. The primary cases examined are *LeBreton v. Rabito*, 714 So. 2d 1226 (La. 1998); *Borel v. Young*, 989 So. 2d 42 (La. 2008); and *Warren v. La. Med. Mut. Ins. Co.*, 21 So. 3d 186 (2009).

12. LA. CIV. CODE ANN. art. 2315 (2010).

13. Louisiana Revised Statutes sections 40:1299.41–.49 are commonly known as the Medical Malpractice Act, but the discussion herein will be confined mostly to Act No. 808, 1975 La. Acts 1860 (enacting Louisiana Revised Statutes section 9:5628), and Act No. 817, 1975 La. Acts 1875 (enacting Louisiana Revised Statutes sections 40:1299.41–.49), which were enacted to slow the growth of rising medical costs. See E. Scott Hackenberg, Comment, *Puttering About in a Small Land: Louisiana Revised Statutes 9:5628*

and higher damages awards, which consequently led to higher malpractice insurance costs and higher medical costs for patients.¹⁴ The Act was a compromise between the public good, represented by lower medical costs and increased access to medical care, and the private harm of limiting actions in malpractice.¹⁵

Louisiana Revised Statutes section 40:1299.47 requires that all malpractice claims against qualified health care providers, other than those submitted for binding arbitration, must be reviewed by a medical review panel (MRP).¹⁶ The MRP procedure serves as an inexpensive way to filter out spurious medical malpractice claims.¹⁷ Louisiana Revised Statutes section 9:5628 provides a prescriptive period of one year from the date of the commission or discovery of the alleged malpractice on actions for damages against health care providers.¹⁸ However, “in all events such

and Judicial Responses to the Plight of the Medical Malpractice Victim, 50 LA. L. REV. 815, 815–16 (1990); see also Webb, *supra* note 5, at 666.

14. Webb, *supra* note 5, at 658–59.

15. Crier v. Whitecloud, 496 So. 2d 305, 308–9 (La. 1986) (citing Webb, *supra* note 5); Hackenberg, *supra* note 13, at 815–16; Marc S. Firestone, Comment, *Prescription—What You Don’t Know Can Hurt You—Louisiana Adheres to a Three Year Limit on the Discovery Rule*, 58 TUL. L. REV. 1547, 1553 n.40 (1984).

16. Louisiana Revised Statutes section 40:1299.47 provides: “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.” LA. REV. STAT. ANN. § 40:1299.47(A)(1)(a) (Supp. 2011). Louisiana Revised Statutes section 40:1299.42 provides the requirements for qualification under the Act, which include filing proof of financial responsibility with the Patient’s Compensation Fund Oversight Board and payment of a surcharge. LA. REV. STAT. ANN. §40:1299.42 (Supp. 2011).

17. Webb, *supra* note 5, at 681. Negative review panel findings do not bar subsequent court claims. *Id.*

18. Louisiana Revised Statutes section 9:5628 provides:

No action for damages for injury or death against any [listed health care provider], hospital or nursing home . . . 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.

LA. REV. STAT. ANN. § 9:5628(A) (2007). The three year “outside limit” is a codification of the “discovery doctrine,” known in Louisiana and civil law jurisdictions as *contra non valentem*, short for *contra non valentem agere nulla currit praescriptio*, which means “prescription does not run against a party unable to act.” Hebert v. Doctors Mem’l Hosp., 486 So. 2d 717, 721 n.7 (La. 1986). Despite the text of Louisiana Civil Code article 3467, “[p]rescription runs

claims shall be filed at the latest within a period of three years from the date of the alleged act, omission, or neglect.”¹⁹ The filing of a request for an MRP review of a claim suspends the time within which a suit must be instituted until 90 days after the plaintiff (or her attorney) receives notification of the issuance of the MRP’s opinion.²⁰

From the inception of the Medical Malpractice Act, courts and commentators debated whether the periods during which a claim arising from medical malpractice must be filed were prescriptive or peremptive.²¹ Eventually, the Louisiana Supreme Court held in *Hebert v. Doctors Memorial Hospital* that both the one-year and three-year periods were prescriptive in nature.²² The differences between the effects of prescription and peremption in medical malpractice suits, important in *Hebert*, were minimized by the holdings of *Borel* and *Warren*, which attributed one of the major effects of peremption to the Medical Malpractice Act—the holdings barred interruption of prescription.²³

against all persons unless exception is established by legislation[.]” Louisiana courts apply the doctrine to suspend prescription where a person is unable to act. *See, e.g.*, LA. CIV. CODE art. 3467 cmt. d (2011); *Corsey v. State Department of Corrections*, 375 So. 2d 1319 (La. 1979).

19. LA. REV. STAT. ANN. § 9:5628(A) (2007).

20. LA. REV. STAT. ANN. § 40:1299.47(A)(2)(a) (Supp. 2011). For purposes of brevity, the time at which notification of the issuance of the MRP’s opinion is received by the plaintiff or his attorney will be referred to throughout this Comment as “after the MRP opinion,” or by other similar language.

21. Hackenberg, *supra* note 13, at 819; *see, e.g.*, *Borel v. Young*, 989 So. 2d 42, 64 (La. 2008) (on rehearing, finding the period is prescriptive); *Borel*, 989 So. 2d at 51 (on original hearing) (“[W]e find [section 9:5628] establishes a peremptive time period.”); *Hebert*, 486 So. 2d at 724 (“[W]e conclude that [Louisiana Revised Statutes section 9:5628] is in both of its features . . . a prescription statute”); FRANK L. MARAIST & THOMAS C. GALLIGAN, JR., LOUISIANA TORT LAW 236 (1996) (“The statute contains both a one-year prescriptive period (including a codified discovery rule) and what seems to be a three-year peremptive period.”).

22. *See Hebert*, 486 So. 2d 717; *see also Warren v. La. Med. Mut. Ins. Co.*, 21 So. 3d 186, 205 (La. 2008) (expressing approval of the *Hebert* and *Borel* (rehearing) holdings that the periods are prescriptive).

23. This point was candidly expressed in a footnote in *Warren*, 21 So. 3d at 205 n.3. By refusing to apply interruption of prescription or relation back of an amended petition, the court caused the prescriptive period to resemble a peremptive period, which cannot be interrupted and has been found to forbid relation back. *See LA. CIV. CODE ANN. art. 3461* (2007) (“Peremption may not be renounced, interrupted, or suspended.”); *see also Naghi v. Brener*, 17 So. 3d 919, 925 (La. 2009) (plurality opinion written by Victory, J.) (forbidding relation back because of its interference with the operation of peremption and

B. Liberative Prescription and Peremption

Louisiana Civil Code articles 3445 through 3472 delineate the differences between liberative prescription and peremption.²⁴ Liberative prescription bars actions because of a plaintiff's inaction.²⁵ On the other hand, "[p]eremption is a period of time fixed by law for the existence of a right."²⁶ Unless the right is exercised before the end of the preemptive period, it is extinguished.²⁷ Although liberative prescription merely prevents enforcement of a right of action, peremption actually destroys the right.²⁸

While prescription can be interrupted or suspended, peremption may not.²⁹ The interruption of prescription is the wellspring from which the decisions in *LeBreton*, *Borel*, and *Warren* flow. The Louisiana Supreme Court decided all of these cases on the basis that the claims had prescribed because interruption was not applicable in the area of medical malpractice.³⁰

C. Interruption and Suspension of Prescription

When prescription is interrupted, the prescriptive "clock" starts over again after the interruption ends.³¹ For example, if a

the preemptive destruction of the right of action). The Louisiana Supreme Court later limited *Naghi* to its facts in *Scaglione v. Juneau*, 40 So. 3d 127 (La. 2010). In his 2010 article for the Louisiana Bar Journal, Professor Crawford colorfully referred to the "doctored-up" prescriptive nature of such statutes as section 9:5628: "Put lipstick on prescription and it is still prescription." William E. Crawford, *Peremption and Legal Malpractice: Does Civil Code Article 2315 Create Rights Subject to Peremption?*, 58 LA. B. J. 24, 25 n.5.

24. LA. CIV. CODE ANN. arts. 3445–72 (2007). While there are a number of differences, only those relevant to the issues discussed in this comment are set forth here.

25. LA. CIV. CODE ANN. art. 3447 (2007).

26. LA. CIV. CODE ANN. art. 3458 (2007).

27. *Id.*

28. *Id.* cmt. b (citing *Pounds v. Schori*, 377 So. 2d 1195, 1198 (La. 1979)).

29. Liberative prescription can be interrupted by filing suit or service of process, LA. CIV. CODE ANN. art. 3462 (2007), or by acknowledgment, LA. CIV. CODE ANN. art. 3464 (2007). Prescription can be suspended by statute. *See, e.g.*, LA. CIV. CODE ANN. art. 3469 (2007). Louisiana courts have also recognized the jurisprudential doctrine of *contra non valentem*, which suspends prescription. Peremption is not subject to suspension or interruption. LA. CIV. CODE ANN. art. 3461 (2007).

30. *See infra* Part II.A–B.

31. LA. CIV. CODE ANN. art. 3466 (2007) ("If prescription is interrupted, the time that has run is not counted. Prescription commences to run anew from the last day of interruption.").

prescriptive period of one year is interrupted on the 300th day, when the interruption terminates the prescriptive period remaining is 365 days. A common example of interruption occurs when a suit is filed in a court of competent jurisdiction and proper venue; it continues as long as the suit remains pending.³² The interruption of prescription is effective against all solidary obligors (and their successors) and in favor of “several parties [who] share a single cause of action.”³³

Louisiana Revised Statutes section 40:1299.47 provides that the running of prescription against all joint and solidary obligors, and joint tortfeasors, is *suspended* by the filing of a request for a review of a medical malpractice claim with the division of administration.³⁴ However, the effect of suspension of prescription differs from interruption in that the period of suspension is merely “not counted toward [the] accrual of prescription.”³⁵

When suspension of prescription ends, the clock does not start over; it begins to run again from where it paused.³⁶ In contrast with the example of interruption above, if a prescriptive period of one year is suspended on the 300th day, when the suspension is over the prescriptive period remaining is 65 days.

Liberative prescription, a product of Roman law, is grounded in the belief that it contributes to the stability of society by putting an end to litigation and reducing the uncertainty of the debtor.³⁷

32. LA. CIV. CODE ANN. arts. 3462 and 3463 (2007).

33. LA. CIV. CODE ANN. art. 1799 (2008) (interruption against one solidary obligor is effective against the other solidary obligors); *Williams v. Sewerage & Water Bd. of New Orleans*, 611 So. 2d 1383, 1390 (La. 1993) (where because a widow’s suit for compensation benefits interrupted prescription, and she shared a cause of action (wrongful death) with her children, the children were entitled to interruption of prescription). In the context of interruption of prescription, a cause of action is the “juridical facts which constitute the basis of the right.” *Benoit v. Allstate Ins. Co.*, 773 So. 2d 702, 706 (La. 2000); *see also Louviere v. Shell Oil Co.*, 440 So. 2d 93, 95 (La. 1983).

34. LA. REV. STAT. ANN. § 40:1299.47(A)(2)(a) (Supp. 2011). The suspension of prescription provided for in section 40:1299.47 continues until 90 days after notification to the claimant or his attorney of the MRP’s opinion, *id.* at (A)(2)(a), the claim is dismissed in accordance with the section, *id.* at (A)(2)(c), or the panel is dissolved in accordance with the section, *id.* at (B)(3).

35. LA. CIV. CODE ANN. art. 3472 (2007).

36. *See id.*

37. Patrick D. Gallagher, Jr., Comment, *Revision of the Civil Code Provisions on Liberative Prescription*, 60 TUL. L. REV. 379, 380 (1985). “Without [prescription] there would be no security in transactions, no stability in private estates, no peace among individuals, no order in the state.” 5 G. Baudry-Lacantinerie & Albert Tissier, *Traité Théorique Et Pratique De Droit Civil, Prescription*, in CIVIL LAW TRANSLATIONS 18, No. 29 (La. St. Law Inst. trans., 1972) (4th ed. 1924). Specifically, liberative prescription is based on a presumption of payment. *Id.* at 21, No. 32. Liberative prescription was meant to

The purpose of interruption of prescription is “to fix the rights of the parties at the time prescription is interrupted”³⁸ The purpose of suspension of prescription is to provide “a measure of equity” to a plaintiff who is prevented by law or circumstances from interrupting prescription.³⁹ This effect ensures that everyone has the same prescriptive period during which they can assert their rights.⁴⁰

Despite the public policy benefits of prescription, when a party amends his pleadings and does not enjoy the benefits of interruption or suspension of prescription, the “preference [of the law] for resolving disputes on their merits” will sometimes allow the “relation back” of the amendments.⁴¹

D. Relation Back of Amended Pleadings

Louisiana Code of Civil Procedure article 1153 controls the relation back of amended pleadings.⁴² Relation back allows the assertion of claims or defenses in an amended pleading that otherwise would have prescribed.⁴³ Generally, if a pleading is amended after the prescriptive period has run, it will relate back to the timely filing of the original pleading if “the action or defense asserted [by the amendment] arises out of the conduct, transaction,

protect a debtor from having to pay a debt twice due to loss of the evidence of payment; “prescription will substitute for the missing document.” *Id.* at 17, No. 27. “[A defendant] ought not to be called on to resist a claim when ‘evidence has been lost, memories have faded, and witnesses have disappeared.’” *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950) (quoting *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 349 (1944)).

38. *In re Noe*, 958 So. 2d 617, 632 (La. 2007). Once an obligor has acknowledged his debt or been sued (either of which interrupt prescription, *see* LA. CIV. CODE ANN. arts. 3463 & 3464 (2007)), there is no reason to think he will be “uncertain” with respect to his obligation, and such acknowledgment or suit provides the obligor with adequate notice to preserve any proofs he might have with respect to payment.

39. *See, e.g., Corsey v. State Dept. of Corrections*, 375 So. 2d 1319, 1321 (La. 1979) (recognizing the doctrine of *contra non valentem*); 1 MARCEL PLANIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL Part 2, at 594, No. 2698 (La. St. Law Inst. trans., 1959) (12th ed. 1939).

40. PLANIOL, *supra* note 39 at 594, No. 2698.

41. *See Krupski v. Costa Crociere S. p. A.*, 130 S.Ct. 2485, 2494 (2010).

42. LA. CODE CIV. PROC. ANN. art. 1153 (2005).

43. *See, e.g., Ray v. Alexandria Mall*, 434 So. 2d 1083, 1086 (La. 1983) (relation back removes the grounds for the peremptory exception of prescription); *Naghi v. Brener*, 17 So. 3d 919, 925 (La. 2009) (relation back avoids the operation of prescription).

or occurrence set forth . . . in the original pleading.”⁴⁴ The Louisiana Supreme Court interpreted the broad language of article 1153 in *Ray v. Alexandria Mall* and *Giroir v. South Louisiana Medical Center* and established criteria for adding or substituting defendants and plaintiffs.⁴⁵ The court recognized that article 1153 was modeled after Federal Rule of Civil Procedure 15(c), and that its “doctrinal commentaries and judicial interpretations are strongly persuasive as to the meaning and application of the Louisiana article.”⁴⁶ The United States Supreme Court recently found that the purpose of relation back is “to balance the interests of the defendant protected by the statute of limitations with the preference expressed in the Federal Rules of Civil Procedure in general, and Rule 15 in particular, for resolving disputes on their merits.”⁴⁷

The general rules of prescription and relation back, while acting to balance the interests of the public, defendants, and plaintiffs, seem somewhat academic in light of recent Louisiana medical malpractice jurisprudence. In the line of cases beginning

44. LA. CODE CIV. PROC. ANN. art. 1153 (2005).

45. Both cases created criteria founded on a balance between the preference for having suits decided on the basis of their merits as opposed to technical mistakes, and a desire to refrain from prejudicing the defense. *Ray*, 434 So. 2d at 1086–87 (establishing criteria for adding defendants); *Giroir v. South La. Med. Ctr.*, 475 So. 2d 1040, 1044 (La. 1985) (establishing criteria for adding plaintiffs). It is worthwhile to note in passing that the facts of *Giroir* sounded in medical malpractice, with the plaintiffs making wrongful death and survival claims.

Under the circumstances of this case, no essential protective purpose of the prescriptive statute is violated by permitting relation back of the post prescription amendment based on the same factual situation pleaded in the original timely petition. . . . The fundamental purpose of prescription statutes is only to afford a defendant economic and psychological security if no claim is made timely, and to protect him from stale claims and from the loss of non-preservation of relevant proof.

Girior, 475 So. 2d at 1045. Although the claims were rooted in medical malpractice, analysis of the prescriptive statutes in the case was not considered from within the context of Louisiana Revised Statutes sections 9:5628 and 40:1299.47. Therefore, the Court may have neglected to consider the prescriptive policy concerns which many courts and commentators have attributed to the statutes—namely that of reducing the cost of health care and medical malpractice insurance by limiting the period in which claims may be filed, and through the institution of an MRP “filter” for claims. *See, e.g.*, Webb, *supra* note 5, at 666; Firestone, *supra* note 15, at 1553 n.40. This policy concern is discussed *infra* Part II.B.3.

46. *Giroir*, 475 So. 2d at 1042 (citing *Ray*, 434 So. 2d at 1083).

47. *Krupski v. Costa Cociere S.p.A.*, 130 S.Ct. 2485, 2494 (2010). The Court also held that relation back under Rule 15 does not depend on the amending party’s timeliness in seeking to amend the pleading. *Id.* at 2490.

with *LeBreton v. Rabito*, the Louisiana Supreme Court held that the general rules of interruption of prescription (including relation back) do not apply in the area of medical malpractice.⁴⁸

II. ANALYSIS

This Part shows how the Louisiana Supreme Court's broad application of the *LeBreton* rule, which was intended to be limited in its application, creates unjust results. Unfortunately for those with certain wrongful death and survival claims, the court's refusal to apply interruption of prescription and relation back in medical malpractice actions means they may be unable to enforce their rights.

A. An Ounce of Prescription Is Worth a Pound of Cure—LeBreton Should Be Limited to its Facts

In *LeBreton*, the court held the general codal rules of interruption did not apply in an action arising in medical malpractice when suit had been filed before receipt of the MRP's opinion.⁴⁹ The court explained that the general codal rules of interruption of prescription conflicted with suspension provided in the Medical Malpractice Act.⁵⁰ The *Borel* court declined to limit *LeBreton* to its facts, extending it to a situation where suit was properly filed *after* receipt of the MRP's opinion.⁵¹

1. Only a Premature Suit Creates a Conflict

Diana LeBreton filed a wrongful death claim in district court against three doctors on August 18, 1992 (for their actions on August 18, 1991, alleged to have caused her father's death).⁵² On August 19, 1992, she filed a request for review of her claim by an MRP.⁵³ The doctors filed dilatory exceptions of prematurity, which were granted by the district court in July and August of 1993.⁵⁴

48. *Warren v. La. Med. Mut. Ins. Co.*, 21 So. 3d 186, 206–08 (2009).

49. *LeBreton v. Rabito*, 714 So. 2d 1226, 1230–31 (La. 1998).

50. *Id.* at 1227.

51. *See Borel v. Young*, 989 So. 2d 42, 67 (La. 2008).

52. *LeBreton*, 714 So. 2d at 1227.

53. *Id.*

54. *Id.* The basis of the dilatory exception of prematurity was that the suit was filed before notice of the MRP opinion was sent to the plaintiff. *See id.* at 1229–30. As a result, the suit was dismissed without prejudice. *Id.* The dilatory exception “retards the progress of the action,” but does not generally defeat it. LA. CODE CIV. PROC. ANN. art. 923 (2005). The effect of sustaining a dilatory

The MRP sent its finding of no medical malpractice to the plaintiff's attorneys on August 14, 1996.⁵⁵ Then, on February 3, 1997, the plaintiff again filed suit for wrongful death against the doctors.⁵⁶

The trial court used the reasoning supplied in *Hernandez v. Lafayette Bone & Joint Clinic*⁵⁷ to support a decision overruling the defendants' peremptory exceptions of prescription.⁵⁸ *Hernandez* contained facts similar to *LeBreton*.

In *Hernandez*, the alleged malpractice began on January 4, 1980, and remained undiscovered until March 16, 1981.⁵⁹ The plaintiff filed a medical malpractice lawsuit in district court on March 15, 1982, and requested an MRP on March 22, 1982.⁶⁰ A few months later, sustaining the defendants' dilatory exceptions of prematurity, the court dismissed the suit without prejudice, as required by Louisiana Revised Statutes section 40:1299.47.⁶¹ The MRP notified the plaintiff of its opinion on August 12, 1983.⁶² The plaintiff then filed a second suit against all defendants on December 16, 1983, which the trial court deemed prescribed.⁶³

It was undisputed that the first suit was filed timely.⁶⁴ The Third Circuit Court of Appeal applied Louisiana Civil Code article 3463 and its comment (b), finding that prescription had been interrupted continuously by the first suit and began to run anew upon the suit's dismissal, "unless something had happened in the meanwhile to again prevent the running of prescription."⁶⁵ But, the

exception of prematurity is dismissal without prejudice. LA. CODE CIV. PROC. ANN. art. 933 (2005); *see also id.* cmt. c.

55. *Id.* at 1227.

56. *Id.*

57. *Hernandez v. Lafayette Bone & Joint Clinic*, 467 So. 2d 113 (La. Ct. App. 3d 1985).

58. *LeBreton*, 714 So. 2d at 1227.

59. *Hernandez*, 467 So. 2d at 114.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 114–15. Article 3463 provides:

An interruption of prescription resulting from the filing of a suit in a competent court and in the proper venue or from service of process within the prescriptive period continues as long as the suit is pending. Interruption is considered never to have occurred if the plaintiff abandons, voluntarily dismisses the action at any time either before the defendant has made any appearance of record or thereafter, or fails to prosecute the suit at the trial.

court reasoned that something *did* happen to prevent the running of prescription—suspension of prescription triggered by the request for the MRP review.⁶⁶

By this method, the Third Circuit Court of Appeal applied suspension and interruption of prescription simultaneously.⁶⁷ This allowed a plaintiff who filed a premature medical malpractice suit to gain an additional year of prescription to file his suit anew, in addition to the suspension provided by the Medical Malpractice Act.⁶⁸

In *LeBreton*, the Louisiana Supreme Court noted that a patient must request and receive the opinion of an MRP before an action is commenced in a court of law.⁶⁹ Recognizing that section 40:1299.47 provides for the suspension of prescription during the MRP's review of the claim,⁷⁰ the court found that "the legislature by special provision for the inclusion of suspension excluded the applicability of interruption of prescription."⁷¹ Justice Knoll wrote for the majority: "[C]onsidering 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."⁷² The court further explained that its ruling served the judicial system by eliminating the advantage afforded to plaintiffs who fail to follow the proper medical malpractice litigation procedure.⁷³ It reversed the Fourth Circuit Court of Appeal's decision denying the doctors' peremptory exception of prescription.⁷⁴

Based on the structure and language of the opinion, the court's disapproval of an advantage given to prematurely filing plaintiffs

LA. CIV. CODE ANN. art. 3463 (2007). "[I]f an interruption results and the action is dismissed without prejudice, the period during which the action was pending does not count toward the accrual of prescription. The plaintiff then has the full prescriptive period within which to bring a new action." LA. CIV. CODE ANN. art. 3463 cmt. b (2007).

66. *Hernandez*, 467 So. 2d at 115.

67. *See LeBreton v. Rabito*, 714 So. 2d 1226, 1229 n.6 (La. 1998) ("Plaintiff has conceded that she can only defeat defendants' peremptory exception of prescription if she can simultaneously take advantage of interruption and suspension of prescription.").

68. *Id.* at 1230.

69. *Id.* (citing *Everett v. Goldman*, 359 So. 2d 1256 (La. 1978)).

70. *Id.*

71. *Id.*

72. *Id.* at 1231.

73. *Id.*

74. *Id.*

was only a secondary reason for its holding in *LeBreton*.⁷⁵ The primary reason was a perceived conflict between Louisiana Revised Statutes section 40:1299.47 and the general codal rules of prescription.⁷⁶

The court held that section 40:1299.47 only suspends the time within which a suit must be instituted when a request for review by an MRP is made.⁷⁷ The court reasoned that if Louisiana Civil Code articles 3466 and 3472 applied, then the suspension and prescription provisions of the Medical Malpractice Act would “be written out.”⁷⁸

The *LeBreton* court recognized that a request for review by an MRP and receipt of an opinion must be made and obtained *before* a claimant can properly file in a court of law.⁷⁹ Upon timely request for review by an MRP, Louisiana Revised Statutes section 40:1299.47 provides that prescription is *suspended* during the

75. The structure and language of the opinion point to the application of the rules of statutory construction as the primary basis for the holding and the dislike of unfair advantage to prematurely filing plaintiffs as secondary. An example of the language indicative of this assertion is, “[w]e further find that our ruling also serves the judicial system by eliminating an advantage which *Hernandez* granted to those litigants who failed to follow the proper procedural sequence in medical malpractice litigation.” *LeBreton*, 714 So. 2d at 1231. Assuming the truth of the previous assertion, it remains that a substantial proportion of the opinion was devoted to the development of the reasoning behind the secondary argument.

76. *LeBreton*, 714 So. 2d at 1229.

77. *Id.* at 1229–30.

78. *Id.* at 1230. Justice Knoll took the time to comment in a footnote, “[a]s regards the non-qualified health care provider and cases not involving medical malpractice, [Louisiana Civil Code article 3462], the general provision, provides for interruption of prescription.” *Id.* at 1231 n.7. This dictum is partially belied by Justice Knoll’s own reasoning. In cases of medical malpractice:

[t]he filing of a request for a 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.

LA. REV. STAT. ANN. § 40:1299.47(A)(2)(a) (2008) (emphasis added). If application of the general rules of prescription conflicts with the statute when applied to the qualified class of defendants, it should also conflict when applied to the other. The footnote’s assertion is only supported if the reason a conflict exists is the *necessity* of the MRP review of medical malpractice claims against the qualified health care provider. The lack of necessity of review for the non-qualified tortfeasor means suspension of prescription is not necessary, allowing the inference that interruption of prescription against them is appropriate. Justice Knoll’s dictum was implicitly followed in *Coleman v. Acromed Corp.*, 764 So. 2d 81 (La. Ct. App. 1999).

79. *LeBreton*, 714 So. 2d at 1230–31.

panel's review and until 90 days following the plaintiff's (or his attorney's) receipt of notification of the panel's opinion.⁸⁰ Allowing interruption of prescription by a premature suit before and during the panel's review would render the suspension of prescription provided by section 40:1299.47 ineffective, or at least subvert the purpose behind the Act by providing additional time to file.⁸¹

Louisiana Revised Statutes section 40:1299.47 contains a provision that was discussed only briefly in the *LeBreton* majority opinion, where the court stated that “[n]o action against a health care provider covered by this Part, or his insurer, may be commenced in any court before the claimant’s proposed complaint has been presented to a medical review panel established pursuant to this Section.”⁸² The statute forbids the suspension or interruption of prescription by filing a request for review with any “entity” other than the division of administration.⁸³ This provides a ready means for harmonizing the general rules of prescription with the Medical Malpractice Act. It is precisely the means favored by the *LeBreton* majority: a suit to enforce rights arising from medical malpractice in district court, filed before receipt of notification of an MRP’s opinion, does not interrupt prescription.⁸⁴

The proper way to begin asserting a medical malpractice claim is by a request for an MRP review with the division of administration, for which the plaintiff is provided with the “measure of equity” of suspension of prescription.⁸⁵ It makes no

80. *Id.* at 1230.

81. *See id.* This is an instance where Louisiana Revised Statutes section 9:5628 is considered as part of the Medical Malpractice Act.

Dissenting in *LeBreton*, Chief Justice Calogero wrote that the provisions of the statutes in question were not in conflict, “as both provisions can easily be harmonized with the result of each provision being given full effect.” *LeBreton*, 714 So. 2d at 1232 (Calogero, C.J., dissenting). Noting that section 40:1299.47 provides only a suspensive period, that article 3462 provides only for interruption of prescription, and neither contain ambiguous language about suspension or interruption of prescription, he opined that Louisiana Civil Code article 9 forbade further interpretation in search of the intent of the legislature. Chief Justice Calogero essentially favored the *Hernandez* interpretation of the statutes, which he wrote “clearly harmonizes the two provision[s] at issue[.]” *Id.* at 1233. He asserted that such a result was “mandated by the long-standing jurisprudential rule [that w]here there are two permissible interpretations of a prescriptive statute, the courts must adopt the one that favors maintaining rather than barring the action.” *Id.* (citing *Foster v. Breaux*, 270 So. 2d 526 (La. 1972)).

82. *Id.* at 1230; LA. REV. STAT. ANN. § 40:1299.47(B)(1)(a)(i) (2008).

83. LA. REV. STAT. ANN. § 40:1299.47(A)(2)(a) (2008).

84. *See LeBreton*, 714 So. 2d at 1230–31.

85. *Id.* at 1230.

sense to provide the plaintiff with a more effective “remedy” (interruption of prescription) when he has not properly begun to assert his claim than the “remedy” provided (suspension) when a claimant has proceeded according to the dictates of the statute.⁸⁶

2. *LeBreton Broadened: A New Prescription for Medical Malpractice*

In the *Borel* case, the plaintiffs timely requested an MRP review of their malpractice claim against a medical center and two doctors.⁸⁷ After receipt of the MRP’s opinion, the plaintiffs timely filed suit against only the medical center.⁸⁸ Later, plaintiffs filed similar claims in a separate lawsuit against the doctors, alleging solidary liability with the medical center.⁸⁹ The doctors argued the claims against them had prescribed.⁹⁰ In response, the plaintiffs argued that their suit against the medical center had interrupted prescription against the doctors.⁹¹

The *Borel* plurality relied primarily on *LeBreton*’s holding that, “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.”⁹² However, there is no such synergy when the plaintiff files suit *after* receiving notice of the MRP’s opinion, as in *Borel*.⁹³

A narrow view of *LeBreton* would bar interruption only on suits filed *before* receipt of the MRP opinion.⁹⁴ Nothing in *LeBreton* indicates that the general codal rules of prescription conflict with provisions of the Medical Malpractice Act *after* receipt of the MRP opinion. The broadest statement in *LeBreton* is: “[w]e . . . find[] that the specific statutory provision providing for the suspension of prescription in the context of medical malpractice should have been applied alone, not complementary to the more general codal article

86. The proper “remedy,” of course, being suspension of prescription. See LA. REV. STAT. ANN. § 40:1299.47(A)(2)(a) (2008).

87. *Borel v. Young*, 989 So. 2d 42, 45 (La. 2008).

88. *Id.*

89. *Id.* The lawsuits were eventually consolidated. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 67 (on rehearing) (quoting *LeBreton v. Rabito*, 714 So. 2d 1226, 1231 (La. 1998)).

93. *Id.* at 45 (on original hearing).

94. The narrow interpretation of *LeBreton* was expressed succinctly as “a medical malpractice suit, filed prior to the request for a medical review panel, does not interrupt prescription on a medical malpractice claim.” *Farve v. Jarrott*, 886 So. 2d 594, 596 (La. App. Ct. 2004).

which addresses interruption of prescription.”⁹⁵ This finding expressly envisions the *complementary* application of suspension and interruption of prescription; however, in the time period following notification of the MRP’s opinion, the claimant does not have the advantage of both suspension and interruption. After the notification, upon filing suit, the plaintiff enjoys *interruption only*.

For example, if a plaintiff filed suit on the day after he received notification of the medical board’s opinion, he would theoretically enjoy 89 more days of suspension of prescription—but to what effect? After filing suit, prescription is continuously interrupted.⁹⁶ The greater effect has subsumed the lesser with no complementary or synergistic effect. The 89 days will expire and prescription will remain under continuous interruption because of the pending lawsuit.⁹⁷

The *Borel* opinion acknowledged factual differences from *LeBreton* but declared, without further analysis (except for citing facts and analysis from *Richard v. Tenet Health Systems, Inc.*⁹⁸):

[O]ur holding in *LeBreton* clearly stands for the principle that medical malpractice claims are governed by the specific provisions of the Medical Malpractice Act regarding suspension of prescription, to the exclusion of the general codal articles on interruption of prescription.⁹⁹ That holding is broad enough to extend to the instant case.

95. *LeBreton*, 714 So. 2d at 1226.

96. See LA. CIV. CODE ANN. art. 3463 (2007).

97. See *id.* It must be stated, though, that should the suit be dismissed without prejudice for any reason before the expiration of the 90 day period of suspension, interruption of prescription should be ineffective, for the same reasons it was in *LeBreton*. See discussion *supra* Part II.A.1.

98. *Richard v. Tenet Health Systems, Inc.*, 871 So. 2d 671 (La. Ct. App. 2004). The *Richard* opinion briefly cited *LeBreton* in a footnote for the proposition that the general rules of prescription do not apply in cases governed by the Medical Malpractice Act. *Richard*, 871 So. 2d at 673, n.1. *Richard* presented virtually no analysis on the subject other than its citation to *LeBreton*. Furthermore, the facts of *Richard* are readily distinguishable from those of *Borel*. In *Richard*, an MRP considered complaints against one group of defendants, but not a second group. *Richard*, 871 So. 2d at 672–73. The plaintiff timely filed suit against the defendants the MRP had considered, and later requested an MRP to consider claims against the second group. *Id.* The court held that the suit against the first group did not interrupt prescription against the second group, against whom the request for an MRP was untimely made. *Id.* at 674. Essentially, the suit was premature with respect to the second group of defendants, putting the *Richard* facts within the scope of a narrow view of the *LeBreton* holding; therefore, even a broadened view of the *LeBreton* holding in *Richard* was not necessary to the decision and was obiter dictum.

99. *Borel*, 989 So. 2d at 67.

Justice Weimer did not explain why the holding was broad enough to extend to the facts of *Borel*. Perhaps the court should have provided reasons why the narrower view was impermissible, given the jurisprudential rule favoring maintaining an action in the face of a prescriptive statute with two permissible interpretations.¹⁰⁰ Because prescriptive periods are founded on public policy and in derogation of individuals' rights, they are *stricti juris* and "must come clearly under specific provisions of the law."¹⁰¹ Although the plurality did not extend prescription where none existed under the statute, it refused to apply interruption of prescription where the statute was silent about it. Thus, the above rule applies by analogy.

The Third Circuit Court of Appeal had similarly adhered to a broad interpretation of the *LeBreton* holding in its hearing of *Borel*.¹⁰² The court quoted language from *LeBreton*, omitting words indicating that the holding might be restricted to the facts of the case:

[B]y virtue of the legislative enactment calling for the necessity of a medical review panel prior to submission of the case to the district court, the legislature by special provision for the inclusion of suspension excluded the applicability of interruption of prescription. . . .

100. *Foster v. Breaux*, 270 So. 2d 526, 529 (La. 1972). It should be noted that a commentator criticized the rule as "dangerous because judges are resistant to changes in the law and tend to use [the] canon to preserve old laws at the expense of new ones, thus undermining legislative supremacy." Nadia N. San Miguel, Note, *Taylor v. Giddens: Louisiana Supreme Court Tailors Medical Malpractice Statute*, 39 LOY. L. REV. 699, 704-05 (1993-94). "As stated in former article 20 of the [Louisiana] Civil Code, '[t]he distinction of laws into odious laws and laws entitled to favor, with a view of narrowing or extending their construction, can not [sic] be made by those whose duty it is to interpret them.'" *Id.* at 705 (explaining that while former article 20 is no longer in effect, it is still authoritative as a corollary to legislative supremacy). Here, where the language of the statute itself was seen as clear and unambiguous (at least by Chief Justice Calogero, see *LeBreton*, 714 So. 2d at 1232 (Calogero, C.J., dissenting)), application of the rule in question, far from "narrowing or extending [its] construction," would merely preserve the statute as written, which contains no references to the barring of interruption of prescription except: "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." LA. REV. STAT. ANN. § 40:1299.47(A)(2)(a) (2008).

101. *Meyer v. Parish of Plaquemines*, 11 So. 2d 291, 296 (La. 1942) (refusing to extend prescription by analogy).

102. *Borel v. Young*, 947 So. 2d 824, 829 (La. Ct. App. 3d Cir. 2006), *aff'd*, 989 So. 2d 42 (La. 2007).

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.*¹⁰³

However, the passage from *LeBreton* actually begins: “*In the present case, by virtue of the legislative enactment . . .*”¹⁰⁴ The Third Circuit Court of Appeal provided no additional analysis or reasons why it thought the holding should be interpreted broadly.

The Louisiana Supreme Court’s *Borel* plurality opinion cited *Richard v. Tenet Health Systems, Inc.* for support of the broad view of *LeBreton*.¹⁰⁵ *Richard* cited “*LeBreton* and the cases following it” (neglecting to cite any specific cases) to support the broad view.¹⁰⁶ But, an extensive review of the cases following *LeBreton* and preceding *Borel* (both the Third Circuit Court of Appeal and Louisiana Supreme Court decisions) revealed no cases giving reasons for a broad interpretation of the *LeBreton* holding.¹⁰⁷ Only three cases appeared to follow such an interpretation: *Yen v. Avoyelles Parish Police Jury*,¹⁰⁸ *Borel* (Third Circuit Court of Appeal opinion), and *Borel* (Louisiana Supreme Court opinion). *Yen* was decided after *Borel* (Third Circuit) and was not cited in *Borel* (Louisiana Supreme Court).¹⁰⁹

103. *Id.* at 829–30.

104. *LeBreton v. Rabito*, 714 So. 2d 1226, 1230 (La. 1998) (emphasis added).

105. *Borel v. Young*, 989 So. 2d 42, 67–68 (La. 2008); *Richard v. Tenet Health Systems Inc.*, 871 So. 2d 671 (La. Ct. App. 2004).

106. *Richard*, 871 So. 2d at 673, n.1.

107. One case of note arose: *Yen v. Avoyelles Parish Police Jury*, 971 So. 2d 536, 539 (La. Ct. App. 2007), which cites the Third Circuit Court of Appeal’s hearing of *Borel* for the broadened *LeBreton* holding but provides no additional analysis or reasons. Other cases either referred to the *LeBreton* holding in the narrow sense, or in the broad sense but had facts similar to *LeBreton*, where the plaintiff had filed prematurely in a court of law and either never requested an MRP review or did so after filing in court. *See, e.g.*, *LaCoste v. Pendleton Methodist Hosp., L.L.C.*, 947 So. 2d 150 (La. Ct. App. 2006) (referring to the *LeBreton* holding in the narrow sense); *Metro. Dev. Ctr. v. Liner*, 891 So. 2d 62 (La. Ct. App. 2004) (referring broadly to the holding but with roughly the same pertinent facts as *LeBreton*). *Borel* (Third Circuit Court of Appeal and Supreme Court), *Yen*, and *Warren* appear to be the only cases which assert the broad interpretation of the *LeBreton* holding and have facts that make the holding necessary to reach the desired result; none explained reasons for the expansion of *LeBreton*.

108. 971 So. 2d 536 (La. Ct. App. 2007); *see also supra* note 107.

109. *Borel* (Third Circuit) was decided December 29, 2006 and *Yen* was decided December 5, 2007.

Concurring in the result of *Warren*, Justice Knoll discussed with seeming displeasure the broadening of the *LeBreton* holding, which she herself had authored: “The holding in *LeBreton* did not exclude the application of the general provisions on interruption of prescription in medical malpractice cases in other instances, just to the situation where the plaintiff sought to benefit by the simultaneous application of the interruption and suspension provisions.”¹¹⁰

When a suit is filed timely, after notification of an MRP’s opinion, there is no conflict between the general rules of interruption of prescription and Louisiana Revised Statutes section 40.1299.47. It is the simultaneous and complementary application of suspension and interruption of prescription that creates the conflict recognized in *LeBreton*. Lacking such a conflict, interruption of prescription is presumably permissible. The *Borel* plurality opinion provided no reasons or persuasive authority to support its broad interpretation of *LeBreton*. Given the rule favoring maintenance of actions when two permissible interpretations of prescriptive statutes exist, the adoption of the broad view of the *LeBreton* holding is questionable.¹¹¹ *Borel* gave Louisiana medical malpractice defendants a new prescription: an uninterruptible period designed to cure the ill of rising medical costs.

B. “Take two aspirin and call me in the morning”—the Louisiana Supreme Court Takes LeBreton Two Steps Further

Borel put a stop to interruption of prescription against solidary tortfeasors—suit filed against one tortfeasor will not interrupt prescription against another solidarily liable tortfeasor, such as an employer.¹¹² *Warren* went two steps further: it disallowed interruption in favor of plaintiffs who share the same cause of action and prevented relation back of amended pleadings.¹¹³ These are hard pills to swallow for some wrongful death and survival claimants.

110. *Warren v. La. Med. Mut. Ins. Co.*, 21 So. 3d 186, 218 (La. 2009) (Knoll, J., concurring in result).

111. “Under Louisiana jurisprudence, prescriptive statutes are strictly construed, and of two permissible constructions that is adopted which favors maintaining rather than barring the action.” *Foster v. Breaux*, 270 So. 2d 526, 529 (La. 1972).

112. See *Borel v. Young*, 989 So. 2d 42, 45, 67 (La. 2008).

113. *Warren*, So. 3d 186, 206–08 (La. 2009) (on rehearing).

1. Interruption of Prescription in Warren Would Not Have Created a Conflict

On October 13, 2000, Terry Warren passed away while under the care of “various health care providers.”¹¹⁴ After receiving the required MRP opinion, Pamela and Theresa Warren, Terry’s widow and daughter, timely filed suit against the defendants on November 25, 2002. Sarah Warren, Terry’s other daughter, was aware of the suit but chose not to join as a plaintiff.¹¹⁵ On July 6, 2004, the plaintiffs amended their petition, adding Sarah as a plaintiff with survival and wrongful death claims.¹¹⁶ The defendants filed a peremptory exception of prescription with respect to Sarah’s claims, arguing that her claims had prescribed.¹¹⁷ The defendants further argued that relation back was not proper because Sarah chose not to participate until she realized she might be called as a witness, and that the defendants would be prejudiced if a new plaintiff were added nearly three years after the request for an MRP’s opinion.¹¹⁸

On original hearing the court cited *Williams v. Sewerage & Water Board of New Orleans* for the principle that when several parties share the same cause of action, interruption of prescription in favor of one is effective in favor of the other.¹¹⁹ Applying this principle, the court found that prescription with respect to Sarah Warren’s survival action was interrupted when her mother and sister filed suit.¹²⁰

Writing for the plurality on rehearing, Justice Victory first applied the broad interpretation of the *LeBreton* holding, citing *Borel* and distinguishing *Williams*:

Williams was not a medical malpractice action. For had it been a medical malpractice action, *Borel* would dictate that the specific provisions of the Act apply to the exclusion of the general code articles on interruption of prescription against solidary obligors, just as the specific provisions of the Act regarding suspension of prescription applied to the

114. *Id.* at 203.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 188–89 (on original hearing).

120. *Id.* at 189 (on original hearing). The Court analyzed the prescription of the survival and wrongful death claims separately—the survival claim in an interruption of prescription framework and the wrongful death claim in a relation back framework. *See id.*

exclusion of the general code article on interruption of prescription against joint tortfeasors in *Borel*.¹²¹

Finding its original decision contrary to *Borel*, and rejecting *Williams*'s application in the area of medical malpractice, the plurality found Sarah Warren's survival claim had prescribed.¹²²

The *Warren* case is factually distinguishable from the *LeBreton* case. In *LeBreton*, the plaintiff filed her petition in court before requesting an MRP;¹²³ but in *Warren*, the plaintiffs filed after receiving the opinion of an MRP.¹²⁴ In short, the plaintiff's suit was premature in *LeBreton* but not in *Warren*. It is true that *Williams* was not a medical malpractice case.¹²⁵ However, the rules of interruption of prescription as applied therein create no conflict with the suspension of prescription provisions of the Medical Malpractice Act for the same reasons outlined above.¹²⁶ Because there is no conflict, there is no reason to prevent the operation of the general rules of prescription in a medical malpractice lawsuit where suit is timely filed and not premature.

Lacking such a conflict, there was no reason the court should have ignored the rule favoring the maintenance of actions in the face of ambiguous prescription statutes.¹²⁷ At least, the plurality gave no reason—nor did it provide any reasons in support of the broad interpretation of *LeBreton* other than its references to *Borel*.¹²⁸ Moreover, the plurality was not content to find only one claim prescribed. It continued to stretch *LeBreton* to hold that relation back is inapplicable in medical malpractice actions.¹²⁹

121. *Id.* at 207 (on rehearing).

122. *Id.*

123. *LeBreton v. Rabito*, 714 So. 2d 1226, 1227 (La. 1998).

124. *Warren*, 21 So. 3d at 203.

125. *Id.* at 207–08. *Williams v. Sewerage & Water Board of New Orleans* was a wrongful death and survival case alleging negligence outside the medical malpractice context. 611 So. 2d 1383, 1385–86 (La. 1993).

126. *Cf. supra* Part II.A.1–2.

127. *Foster v. Breaux*, 270 So. 2d 526, 529 (La. 1972).

128. *Warren*, 21 So. 3d at 206–07. Justice Knoll, concurring in result only with the *Borel* plurality opinion (on rehearing) wrote:

In its criticism of the majority opinion on original hearing, the plurality opinion now cites to the principles of *jurisprudence constante* in its refusal to overrule the *Hebert* holding as to the three-year provision. However, *jurisprudence constante* does not give the Court license to perpetuate error as we are bound under our Constitution and the Civil Code to uphold and abide by the law.

Borel v. Young, 989 So. 2d 42, 81 (La. 2008) (citing James L. Dennis, *Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent*, 54 LA. L. REV. 1, 10 (1993)).

129. *See Warren*, 21 So. 3d at 207.

2. Relation Back of Amended Petitions Creates No Conflict

The *Warren* plurality viewed relation back of an amended petition as a way to “directly avoid[] the application of prescription by allowing a claim which would have otherwise prescribed to proceed.”¹³⁰ Justice Victory perceived a conflict between relation back of the amended petition and the suspension provisions of the Medical Malpractice Act.¹³¹ However, if there is no conflict with respect to interruption of prescription and the Act, there should be no conflict with relation back if its purpose is to avoid the application of prescription.¹³²

Correct application of civil law principles leads to the conclusion that relation back should be allowed. The Civil Code contains the general rules of suspension and interruption of prescription.¹³³ Louisiana Revised Statutes sections 9:5628 and 40:1299.47 are special statutes acting as exceptions to the general rules found in the Civil Code.¹³⁴ Under civilian methodology, if a general statute grants a right limited by a special statute, the special statute should be interpreted restrictively.¹³⁵ This means the scope of the special statute providing the exception “may not be enlarged by analogy.”¹³⁶ The *Warren* plurality’s reliance on an analogy between interruption of prescription and relation back violates this principle.¹³⁷

A restrictive interpretation of the *LeBreton* holding removes the specter of conflict between the Medical Malpractice Act and the general rules of prescription when suit is filed after the MRP opinion is received. It is therefore difficult to imagine a conflict between the Medical Malpractice Act and the relation back effect of Louisiana Code of Civil Procedure article 1153—after all, the Act is silent with respect to amended petitions and relation back.¹³⁸ Justice Weimer explained, concurring in the original hearing:

130. *Id.*

131. *Id.*

132. *Cf. supra* Part II.A.

133. *See* discussion *supra* Part I.B–C.

134. *See Warren*, 21 So. 3d at 205; discussion *supra* Part II.A.

135. Olivier Moréteau, *An Introduction to Contamination*, 3 J.C.L.S. 9, 13 (2010). Here, the right granted is interruption of prescription under Louisiana Civil Code article 3462.

136. *Id.*

137. *See Warren*, 21 So. 3d at 207–08 (where the plurality applies its analogy between interruption of prescription and relation back).

138. *Warren*, 21 So. 3d at 197 (on original hearing, Weimer, J., concurring). The Act is also silent with respect to interruption of prescription, except for the following sentence: “Filing a request for review of a malpractice claim as required by this Section with any agency or entity other than the division of

[W]here there is no conflict between the general codal articles and the specific provisions of the Medical Malpractice Act, the various provisions should be read in conformity with each other. Thus, because the Medical Malpractice Act is silent as to the relation back of pleadings adding an additional claim and/or plaintiff, there is no bar to applying [Louisiana Code of Civil Procedure article] 1153 in this case.¹³⁹

Louisiana Code of Civil Procedure article 1153 “does not operate here simply to ‘get around medical malpractice prescription.’”¹⁴⁰ Justice Weimer noted that the purpose of prescriptive statutes was to provide economic and psychological security and protect against stale claims and losses due to lack of preservation of proof.¹⁴¹ “Not one of those goals is undermined by [relation back,]” he wrote.¹⁴² Justice Weimer also reasoned that the *Giroir* factors ensured the defendants knew or should have known about the claims within the prescriptive period and were not prejudiced in their defense.¹⁴³

The plurality was concerned that “the application of [Louisiana Code of Civil Procedure article 1153] ‘would potentially subject a health care provider to an indefinite period of prescription, . . . a result clearly at odds with the purpose of the [Act].’”¹⁴⁴ This is certainly a valid concern, but as Justice Weimer reasoned, the factors set forth in *Ray v. Alexandria Mall* and *Giroir v. South Louisiana Medical Center* protect this interest.¹⁴⁵ This is especially

administration shall not suspend or interrupt the running of prescription.” LA. REV. STAT. ANN. § 40:1299.47(A)(2)(a) (2008).

139. *Warren*, 21 So. 3d at 197 (on original hearing, Weimer, J., concurring).

140. *Id.* (apparently quoting Justice Victory’s dissenting opinion at 21 So. 3d at 198 (on original hearing)).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 207 (on rehearing, citing *Borel v. Young*, 989 So. 2d 42 (La. 2008)).

145. *Id.* at 197 (on original hearing, Weimer, J., concurring); see *Ray v. Alexandria Mall*, 434 So. 2d 1083, 1086–87 (La. 1983) (adding claims against new defendants); *Giroir v. S. La. Med. Ctr., Div. of Hosp.*, 475 So. 2d 1040, 1044 (La. 1985) (adding claims by new plaintiffs). The factors were designed to ensure defendants had adequate notice of claims and were not prejudiced in their defense. The *Giroir* factors are:

- (1) [T]he 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 the old plaintiffs are sufficiently related

true when considered in light of *Warren's* facts—the suit was filed after receipt of the MRP's opinion.¹⁴⁶ The original majority and concurring opinions agreed that Sarah Warren's wrongful death claim should relate back to the timely filing of the other plaintiffs' petition.¹⁴⁷ Chief Justice Calogero featured the four *Giroir* factors prominently in his analysis, finding all four factors satisfied.¹⁴⁸

The second *Giroir* factor is applied to ensure defendants have adequate notice of claims brought against them.¹⁴⁹ The MRP review warns the qualified health care provider of such claims.¹⁵⁰ After all, the nature of the review is to determine whether the qualified health care provider met the applicable standard of care.¹⁵¹ Implicit in the review is the idea that the qualified provider is aware that a party is likely to assert a claim of medical malpractice against him.

The value of this warning can be effectively expressed through an example. A medical malpractice claimant requests review of his claim by an MRP and then later timely files suit against both a non-qualified tortfeasor and a health care provider qualified under the Act.¹⁵² The qualified health care provider had earlier notice (through the medical review process) than the non-qualified tortfeasor. If the justification for relation back depends on the interest of defendants in having adequate notice of the claims against them, there is theoretically more reason to allow relation

so that the added or substituted party is not wholly new or unrelated;
(4) the defendant will not be prejudiced in preparing and conducting his defense.

Giroir, 475 So. 2d at 1044.

146. *Warren*, 21 So. 3d at 203 (on rehearing).

147. *Id.* at 187, 194, 197. Chief Justice Calogero wrote for the majority on original hearing; Justices Kimball and Weimer concurred.

148. *Id.* at 189–94 (Calogero, C.J., on original hearing). Only the second and third factors are discussed here.

149. *See id.* at 192–93.

150. In addition, the panel's review itself extends for an indefinite period. In *Warren*, the time between the request for review and receipt of the panel's opinion was just under one year. 21 So. 3d at 187. In *Borel v. Young*, the time period was approximately one year and five months. 989 So. 2d 42, 45 (La. 2008). In *LeBreton v. Rabito*, the time period was nearly four years. 714 So. 2d 1226, 1227 (La. 1998).

151. *See* LA. REV. STAT. ANN. § 40:1299.47(G) (2008).

152. Under *Borel*, interruption of prescription occurs with respect to the non-qualified tortfeasor but not the qualified health care provider. *See Borel*, 989 So. 2d at 67; *LeBreton*, 714 So. 2d at 1230, n.7.

back against the qualified health care provider than against the non-qualified tortfeasor.¹⁵³

On original hearing, the court found that the second factor was satisfied because the facts indicated the defendants had knowledge of the involvement of the new plaintiff at the time the original suit was filed.¹⁵⁴ Similarly, when a qualified health care provider has knowledge of possible survival and wrongful death plaintiffs, relation back should be allowed.

Sarah Warren, as a survival and wrongful death plaintiff, had a legal identity of interest with the original plaintiffs through operation of Louisiana Civil Code articles 2315.1 and 2315.2.¹⁵⁵ This point, which was not discussed by the court in the context of the third *Giroir* factor, is nonetheless important to the analysis of interruption of prescription. Requiring a close relationship and identity of interests with the original plaintiff ensures the purposes of the prescriptive statute with respect to defendants are not injured by allowing interruption of prescription in favor of the new plaintiff.¹⁵⁶ On rehearing, Justice Victory reasoned that relation back operated as a way to avoid prescription.¹⁵⁷ But, if the prerequisites for interruption of prescription are satisfied through notice and identity of interest, then prescription is not being avoided, but only “bridged” by notice and knowledge. Holding otherwise leads to the undesirable result that plaintiffs’ wrongful death and survival actions can prescribe before they ever accrue.¹⁵⁸

The analysis above shows that the interests of defendants are protected by application of the *Giroir* factors. However, the plurality opinion on rehearing found that relation back thwarted the

153. See *Krupski v. Costa Crociere S.p.A.*, 130 S.Ct. 2485, 2494 (2010) (“[T]he purpose of relation back[] [is] to balance the interests of the defendant protected by the statute of limitations with the preference expressed in . . . Rule 15 . . . for resolving disputes on their merits.”); *Ray v. Alexandria Mall*, 434 So. 2d 1083, 1085 n.5 (La. 1983) (referring to “fair notice” as a reason for allowing relation back and listing “notice of the institution of the action that he will not be prejudiced in maintaining a defense on the merits” as a factor in whether to allow relation back against new defendants); *Giroir v. S. La. Med. Ctr., Div. of Hosp.*, 475 So. 2d 1040, 1043 (La. 1985).

154. *Warren*, 21 So. 3d at 192 (on original hearing).

155. LA. CIV. CODE ANN. arts. 2315.1 (Survival action) and 2315.2 (Wrongful death action) (2010).

156. See *Allstate Ins. Co. v. Theriot*, 376 So. 2d 950, 954 (La. 1979) (“None of these basic prescriptive values are offended when a subsequent claimant, closely connected in relationship and interest to the original plaintiff, enters the timely-filed suit to assert a claim based upon the same factual occurrence as that initially pleaded.”).

157. *Warren*, 21 So. 3d at 207.

158. See *infra* Part II.B.3.

special prescriptive purposes of the Act.¹⁵⁹ A look at the purpose of the Medical Malpractice Act shows the error of this view.

3. Interruption and Relation Back Do Not Offend the Purpose of the Statute

The Medical Malpractice Act may differ in one respect from other prescriptive statutes—it was passed as a response to an urgent and specific need to stabilize medical costs.¹⁶⁰ At the time of its passage there was great concern in many states about the rising cost of malpractice insurance.¹⁶¹ An open-ended prescriptive period (such as provided through an unlimited discovery doctrine) increased the cost of insurance premiums because the policies were traditionally written on an “occurrence” basis.¹⁶² The term “occurrence” is a bit ambiguous. It means “the commission of an act, error or omission or the date of discovery thereof or the date of injury caused thereby.”¹⁶³ Open-ended discovery periods result in inaccurate rate setting because an occurrence under the policy might occur long after the year for which the rate was set.¹⁶⁴ This uncertainty required insurance companies to keep larger reserves, leading to higher rates, which in turn lead to higher overall medical costs.¹⁶⁵ Thus, the Act has a public purpose which may be stronger (or at least more specific) than that of other prescriptive statutes.

This public purpose is not harmed by allowing relation back or interruption of prescription. In order for relation back or interruption of prescription to operate, a suit must first be timely filed. Allowing interruption of prescription or relation back with respect to a previously filed claim does not create a new occurrence because the existence of an occurrence is independent of claims filed against the insured.¹⁶⁶ Therefore, the chain of uncertainty leading to higher medical costs is not aggravated by

159. *Warren*, 21 So. 3d at 207.

160. *Firestone*, *supra* note 15, at 1560.

161. *Id.*

162. *Id.* With an occurrences policy, the peril insured is the “occurrence,” or act of malpractice. *Hood v. Cotter*, 5 So. 3d 819, 826 (La. 2008). Once the occurrence happens, coverage attaches even though a claim has not been made. *Id.* But with a “claims made” policy, the peril insured is the making of the claim. *Id.*

163. *Anderson v. Ichinose*, 760 So. 2d 302, 305 (La. 1999).

164. *See Firestone*, *supra* note 15, at 1560.

165. *Id.*

166. *See Anderson*, 760 So. 2d at 305 (“Once the ‘occurrence’ takes place, coverage attaches even though the claim may not be made for some time thereafter.”).

allowing interruption of prescription or relation back, meaning the public interests behind the Act are not harmed.

LeBreton recognized *Taylor v. Giddens* as determining that the prescriptive period for wrongful death claims is not set forth in Louisiana Revised Statutes section 9:5628 but in Louisiana Civil Code article 3492.¹⁶⁷ The references by both Justice Victory in *Warren* and Justice Weimer in *Borel* to the “purpose of the [Act]” may have been misplaced.¹⁶⁸ Louisiana Revised Statutes sections 40:1299.41–.49 do not establish a prescriptive period; they govern the procedure by which medical malpractice claims must be asserted and provide for suspension of prescription during and shortly after an MRP’s deliberations.¹⁶⁹ Unless one includes section 9:5628 under the label of “the Act,”¹⁷⁰ which might be reasonable because both cover the same general subject matter, one cannot honestly say that the purpose of the Act was to “curtail lengthy periods for filing malpractice suits by limiting application of the discovery rule of *contra non valentem* to a maximum of three years.”¹⁷¹ Rather, the purpose of the act (applicable to

167. *LeBreton v. Rabito*, 714 So. 2d 1226, 1229 (La. 1998); see LA. CIV. CODE ANN. art. 3492 (2011) (“Delictual actions are subject to a liberative prescription of one year.”). In *Taylor v. Giddens*, Justice Ortique wrote:

The determination that the prescriptive period for wrongful death actions arising from acts of medical malpractice are not within the scope of [Louisiana Revised Statutes section 9:5628], does not alter the affect [sic] that the Medical Malpractice Act . . . has on wrongful death actions. The actions continue to be governed and procedurally controlled by the provisions of the Act. Rather, because [section] 9:5628 does not provide the prescriptive period for wrongful death actions, the commencement and running of its prescriptive period is controlled by the one year liberative period applicable to delictual actions, [Louisiana Civil Code article] 3492, and the action is available to the certain beneficiaries named in [Louisiana Civil Code article] 2315.2 (formerly named in [Louisiana Civil Code article] 2315).

Taylor v. Giddens, 618 So. 2d 834, 841 (La. 1993).

168. *Warren v. La. Med. Mut. Ins. Co.* 21 So. 3d 186, 207 (La. 2009) (quoting *Borel v. Young*, 989 So. 2d 42, 68 n.12 (alterations in original)). Also, in *LeBreton*, the Court was concerned with a plaintiff gaining an advantage by flaunting the MRP procedure. See *LeBreton*, 714 So. 2d at 1230. It seems obvious in that case that the purpose of section 40:1299.47 would have been subverted had the plaintiff been allowed to prevail but less so in *Borel* and *Warren* where the MRP procedure was properly followed.

169. See LA. REV. STAT. ANN. § 40:1299.47(A)(2)(a) (Supp. 2011).

170. The author notes that section 9:5628 was passed separately from sections 40:1299.41–.47. The former was passed under 1975 La. Acts, No. 808 whereas section 40:1299.47 was enacted under 1975 La Acts, No. 817. See LA. REV. STAT ANN. § 9:5628 (2007); LA. REV. STAT. ANN. § 40:1299.47 (Supp. 2011).

171. *Borel*, 989 So. 2d at 68 n.12.

prescription in wrongful death cases) was simply the purpose behind prescriptive statutes in general.¹⁷²

Nevertheless, the *Warren* case involved a wrongful death claim governed by the prescriptive period of Louisiana Civil Code article 3492.¹⁷³ Presumably, the purpose of article 3492 in relation to wrongful death claims is the same as it is for every other general delictual claim, since that is the subject matter of the article.¹⁷⁴ Because the relation back of general delictual claims under *Ray* and *Giroir* presumably does not offend the purpose of article 3492, it should not have been so held in *Warren*.

Application of *Warren* could lead to the unjust result of a right of action for wrongful death prescribing before it ever accrues.¹⁷⁵ An action for wrongful death does not arise until a victim dies.¹⁷⁶ Even if the victim timely files suit for his or her own damages and then dies after the three-year limit of Louisiana Revised Statutes section 9:5628, *Warren* seems to indicate that the spouse's or children's wrongful death claim will have already prescribed and any amendment adding such a claim will not be allowed to relate back.¹⁷⁷ This seems to be a type of injustice article 1153 was designed to prevent, and it is precisely the injustice the *Taylor v. Giddens* court contemplated when it wrote, "[s]uch a result is intolerable, as it discriminates among wrongful death tort claimants."¹⁷⁸

Perhaps unsatisfied with simply eliminating interruption of prescription and barring relation back of amended pleadings in the medical malpractice context, Justice Victory reiterated from *Borel* that "we find that any general codal article which conflicts with these provisions may not be applied to such actions in the absence of specific legislative authorization in the Act. The Act has no rules allowing relation back of pleadings for medical malpractice claims."¹⁷⁹ Here, a provision with no analogue in the Medical

172. See *supra* Part I.C.

173. *Warren*, 21 So. 3d at 203; *Taylor v. Giddens*, 618 So. 2d 834, 841 (La. 1993).

174. See LA. CIV. CODE. ANN. art. 3492 (2011). See *supra* Part I.C. for a discussion of the purpose of liberative prescription.

175. See *Taylor*, 618 So. 2d at 841; *Walls v. Am. Optical Corp.*, 740 So. 2d 1262, 1273–74 (La. 1999); see also Hackenberg, *supra* note 13, at 838–40.

176. *Walls*, 740 So. 2d at 1273.

177. See *Warren*, 21 So. 3d at 207–08.

178. *Taylor*, 618 So. 2d at 841 (referring to discrimination between those victims who die before the three-year limit of section 9:5628 and those who die after).

179. *Warren*, 21 So. 3d at 207.

Malpractice Act was held to be in conflict.¹⁸⁰ The extension of this logic makes it difficult to predict what other statutes are in conflict with the Act.¹⁸¹ For example, does *Warren* mean that acknowledgment of the obligation does not interrupt prescription?¹⁸² The Act appears silent with respect to acknowledgment of medical malpractice obligations, save possibly in the case of waiver of the requirement for an MRP, where suspension continues for 90 days past the dismissal of the panel.¹⁸³ Application of the *Warren* holding would seem to foreclose interruption by acknowledgment even when suspension of prescription ends 90 days after the panel issues its opinion.

Without adequate explanation or justification, *Warren* further expanded *LeBreton* to block both interruption of prescription with respect to a plaintiff sharing the same cause of action and relation back of an amendment to a timely filed petition. This is two steps past the already untenable position of *Borel*. Moreover, the application of what seems to be the incorrect statute to the wrongful death claim in *Warren* created uncertainty where none should exist.¹⁸⁴

C. What Are the Side Effects? A Comparative Analysis

The following hypothetical scenarios demonstrate the manner in which a narrow interpretation of *LeBreton* harmonizes the general rules of interruption of prescription with the suspension provisions of the Medical Malpractice Act, leading to just results. They also bring to light the unjust and presumably unintended consequences of the current broad view of *LeBreton*.

180. *Id.* The provision in question was Louisiana Code of Civil Procedure article 1153.

181. *See id.* at 209 (on rehearing, Johnson, J., dissenting).

182. "Prescription is interrupted when one acknowledges the right of the person against whom he had commenced to prescribe." LA. CIV. CODE. ANN. art. 3464 (2007). "Louisiana jurisprudence is settled that an acknowledgment interrupting *liberative* prescription may be oral or written, formal or informal, and express or tacit." *Id.* at cmt. e.

183. LA. REV. STAT. ANN. § 40:1299.47(A)(2)(c) (Supp. 2011).

184. Louisiana Revised Statutes section 9:5628 as opposed to Louisiana Civil Code article 3492. It should be noted that *Warren* has been seen to have implicitly overruled *Taylor*. Guy v. Brown, 67 So. 3d 704, 706 (La. Ct. App. 2011).

1. Suit Against Non-Qualified Tortfeasor Before MRP Reviews Claim Against Qualified Health Care Provider

Plaintiff Paul is injured in an auto accident caused by Tom and treated in a hospital where he believes he has suffered medical malpractice at the hands of qualified health care provider Dr. Quentin. Paul files suit against both Tom and Dr. Quentin, and later timely requests review of his claim against Dr. Quentin by an MRP.

Under a narrow interpretation of *LeBreton*, prescription against Tom is interrupted because the claim against him does not arise in malpractice.¹⁸⁵ However, prescription against Dr. Quentin is only suspended during the panel's review and for 90 days thereafter.¹⁸⁶ Interruption with respect to Dr. Quentin occurs only if Paul brings suit against him between the time notification of the panel's decision is received and the end of the prescriptive period.¹⁸⁷ Because interruption of prescription does not take place until after the MRP procedure, Paul receives no synergistic application of both suspension and interruption of prescription, which seemingly was the court's desired result in *LeBreton*.¹⁸⁸

Under the broad interpretation espoused in *Borel*, Paul cannot enjoy interruption of prescription or relation back against Dr. Quentin under any circumstance.¹⁸⁹ Even if the MRP reviewed claims against other solidary obligors qualified under the medical malpractice act (such as Dr. Quentin's employer), Paul will be unable to amend his timely filed petition against Dr. Quentin to include claims against Dr. Quentin's employer once the prescriptive period has run.¹⁹⁰ This result flies in the face of Louisiana Civil Code article 2315, which calls for those at fault to repair damages they have caused.¹⁹¹

185. See LA. CIV. CODE ANN. art. 3462 (2007).

186. See LA. REV. STAT. ANN. § 40:1299.47(A)(2)(a) (Supp. 2011); *LeBreton v. Rabito*, 714 So. 2d 1226, 1230–31 (La. 1998).

187. See discussion *supra* Part II.A.1–2.

188. See discussion *supra* Part II.A.1.

189. See *Borel v. Young*, 989 So. 2d 42, 67 (La. 2008); *Warren v. La. Med. Mut. Ins. Co.*, 21 So. 3d 186, 207–08 (La. 2009); see also discussion *supra* Parts II.A–B.

190. See discussion *supra* Part II.B.2.

191. LA. CIV. CODE ANN. art. 2315 (2010).

2. Suit Filed After MRP Procedure Is Complete

Here, Paul files a request for review of his medical malpractice claim against Dr. Quentin before filing suit against Dr. Quentin and Tom.

The narrow view of *LeBreton* would allow interruption of prescription against both Dr. Quentin and Tom because Paul waited until his claim against Dr. Quentin was mature.¹⁹² After Paul receives notification of the MRP's opinion, interruption of prescription should be allowed because the greater effect of interruption subsumes the lesser effect of suspension.¹⁹³ Furthermore, allowing interruption against Dr. Quentin is reasonable because he received earlier notice of the claim than Tom, against whom interruption is allowed.¹⁹⁴ Should Paul die as a result of the medical malpractice after the prescriptive period expires, Paul's son Paul Jr. will not be prevented from asserting wrongful death and survival claims against Dr. Quentin through operation of prescription.¹⁹⁵ This does not harm the state's interests in a limited discovery period because allowing interruption and relation back does not create uncertainty with respect to occurrences.¹⁹⁶

The broad view of *LeBreton* refuses to apply interruption of prescription against Dr. Quentin and in favor of Paul Jr. regardless of whether the suit against the doctor complied with the MRP requirement.¹⁹⁷ This is despite the lack of conflict in this situation between suspension of prescription provided in section 40:1299.47 and interruption provided in the Civil Code.¹⁹⁸ Should Paul die as a result of the medical malpractice after the prescriptive period has expired, Paul Jr. will be barred from asserting wrongful death and survival claims against Dr. Quentin because the claims prescribed before they accrued.¹⁹⁹

192. See LA. CIV. CODE ANN. art. 3462 (2007); see also discussion *supra* Part II.A.1.

193. See discussion *supra* Part II.A.1.

194. See discussion *supra* Part II.B.3. Dr. Quentin received earlier notice than Tom as a result of the MRP procedure, which occurred before the suit was filed. Interruption of prescription is allowed against the non-qualified tortfeasor. See *Coleman v. Acromed Corp.*, 764 So. 2d 81, 84 (La. Ct. App. 1999).

195. See discussion *supra* Part II.B.1–3.

196. See discussion *supra* Part II.B.3.

197. See *Borel v. Young*, 989 So. 2d 42, 67 (La. 2008); *Warren v. La. Med. Mut. Ins. Co.*, 21 So. 3d 186, 207–08 (La. 2009); see also discussion *supra* Parts II.A–B.

198. See discussion *supra* Part II.A.1.

199. See discussion *supra* Part II.B.2.

3. Suit Is Premature with Respect to One Qualified Health Care Provider but Not the Other

Here, Paul is treated by two qualified health care providers, Dr. Quentin and Dr. Quick. Paul was unconscious when Dr. Quick was operating on him and did not realize he was involved until later. Paul requested a review of his claim of malpractice against only Dr. Quentin by an MRP. After receiving notification of the panel's opinion, Paul timely files suit against Dr. Quentin and Dr. Quick (having learned of Dr. Quick's involvement). Dr. Quick files a dilatory exception of prematurity, arguing that because claims against him were not reviewed pursuant to section 40:1299.47, the action against him is premature. The court agrees, dismissing claims against Dr. Quick without prejudice.²⁰⁰ Unfortunately for Paul, the next day is the last day of the prescriptive period and he is unable to request an MRP to review his claims against Dr. Quick.²⁰¹

Here, the operation of the narrow and broad interpretations of *LeBreton* have the same effect with respect to Dr. Quick.²⁰² Suspension of prescription was in effect against Dr. Quick while the MRP reviewed claims against Dr. Quentin.²⁰³ However, suit against Dr. Quentin and Dr. Quick did not interrupt prescription against Dr. Quick. If it had, Paul would have had the benefit of both interruption and suspension of prescription against Dr. Quick, giving Paul and extra year to file suit after the MRP issued its opinion.²⁰⁴

The above scenarios demonstrate how the narrow view of *LeBreton* brings harmony to the interaction of the general rules of prescription and the Medical Malpractice Act. It also balances the interests of medical malpractice claimants, defendants, and the state.

200. See *LeBreton v. Rabito*, 714 So. 2d 1226, 1230 (La. 1998).

201. Paul would be able to make the request, but it would be fruitless because his claim has prescribed. If a request is made for an MRP review on a prescribed claim, the defendant can file a peremptory exception of prescription in any district court which must then dissolve the panel. LA. REV. STAT. ANN. § 40:1299.47(B)(2)(a)–(b) (Supp. 2011).

202. See discussion *supra* Part II.A.

203. See LA. REV. STAT. ANN. § 40:1299.47(A)(2)(a) (Supp. 2011).

204. See *LeBreton*, 714 So. 2d at 1229–30; see also discussion *supra* Part II.A.1.

III. CONCLUSION

The *LeBreton* holding, which in its narrowest application proscribes interruption of prescription only with respect to medical malpractice cases before the plaintiff is notified by the MRP of its opinion, has been expanded nearly past the point of recognition. Thanks to *Warren*, neither the general rules of prescription nor relation back of amended pleadings apply at any time during the adjudication of a medical malpractice case. The opinion may lead one to question whether *any* general codal rule of prescription applies.

A narrow interpretation of *LeBreton* is in order, limiting it to its facts. Until the barrier of uninterruptible prescription is removed, victims of medical malpractice may remain subject to the bitter pill of “uncertain prescription” applied in the *Borel* and *Warren* cases.

*Daniel A. Kramer**

* J.D./D.C.L., 2012, Paul M. Hebert Law Center, Louisiana State University.

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