NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CA 0811

JAMES NEESE AND NORMA NEESE

VERSUS

EAST BATON ROUGE MEDICAL CENTER, LLC D/B/A OCHSNER MEDICAL CENTER - BATON ROUGE

Judgment Rendered: MAR 30 2012

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Docket Number 590225

Honorable William A. Morvant, Judge Presiding

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BEFORE: WHIPPLE, KUHN, GUIDRY, PETTIGREW, AND McCLENDON, JJ.

Guidry, J. dissents and assigns reasons.
Kuhn, J dissents AND ASSIGNS REASONS

WHIPPLE, J.

This matter is before us on appeal from a judgment of the Nineteenth Judicial District Court in East Baton Rouge Parish, granting defendant's exception of prematurity and dismissing the plaintiffs' suit without prejudice. For the following reasons, we reverse and remand. We also deny defendant's exception of res judicata, which was filed in this court.

PROCEDURAL HISTORY

According to the petition filed on May 3, 2010, on January 9, 2008, plaintiff, Mrs. Norma Neese, was hospitalized as a patient at East Baton Rouge Medical Center, LLC D/B/A Ochsner Medical Center-Baton Rouge ("Ochsner") for treatment of her medical problems, including elevated enzymes and symptoms of nausea, vomiting, and gastroenteritis. While undergoing treatment, Mrs. Neese became confused and complained of dizziness after having been administered Reglan and an intravenous sedative medication. Mrs. Neese's husband, James Neese, informed nurses that Mrs. Neese refused to stay in bed; however, no further action was taken by the medical staff to secure Mrs. Neese or to inform her physicians of her condition. Thereafter, in the early morning of January 10, 2008, Mrs. Neese attempted to get out of bed to use the restroom, fell, and sustained a fracture to her right hip. According to the petition, Mrs. Neese remembers "hollering" for what felt like a long period of time before anyone came to her assistance.

On January 8, 2009, the Neeses filed their first suit in the Nineteenth Judicial District Court, bearing docket number 574,075, claiming Ochsner's care was substandard. Therein, plaintiffs alleged that Ochsner failed to properly monitor or supervise Mrs. Neese and failed to restrain her while she

lay in a sedated manner. As a result of Ochsner's alleged negligence and substandard care, plaintiffs sought damages for severe pain and suffering, disability and impairment of bodily functions, and emotional distress and humiliation. On January 8, 2009, the same day the suit was initially filed in the district court, plaintiffs also filed a claim with the Louisiana Patient's Compensation Fund ("the PCF") and requested the empaneling of a medical review panel.

On April 15, 2009, Ochsner filed an Exception of Prematurity in the district court suit pursuant to LSA-R.S. 40:1299.47(B)(1)(a)(i), contending that the January 8, 2009 suit should be dismissed until a medical review panel could review and render an opinion on the claim.

Meanwhile, as for the petition for empanelment of a medical review panel, because the Louisiana Patient's Compensation Fund Oversight Board had not been notified by the parties of the selection of the attorney chairman, the Board sent notice to plaintiffs' counsel on October 12, 2009, advising that "an attorney chairperson **must** be **appointed** by agreement of all parties or through the striking process" and that the failure to appoint the attorney chairperson for the medical review panel would result in the dismissal of the claim after one year from its filing date. On February 1, 2010, after no further action was taken, the PCF advised the parties that it had "**closed the ... matter**" due to the failure to appoint a chairman "**within the one year timeframe which ended on 1/8/2010**" (emphasis in original) and that the "parties shall be deemed to have waived the use of" a medical review panel. The PCF also informed Mrs. Neese that the request for a medical review panel suspended prescription for the filing of suit for an additional ninety days after the dismissal of plaintiffs' claim.

Thereafter, following an April 5, 2010 hearing on Ochsner's pending exception of prematurity in the suit in district court, the district court granted the exception and dismissed that suit, without prejudice, to proceed before the medical review panel.[1]

On May 3, 2010, plaintiffs filed a second suit, the instant matter bearing docket No. 590225, in the Nineteenth Judicial District Court.[2] In response, Ochsner filed exceptions of prematurity and prescription. In support of the exception of prematurity, Ochsner contended that the Louisiana Medical Malpractice Act, LSA-R.S. 40:1299.41 et seq., requires that any claim against a qualified health care provider must first be presented to a medical review panel and that the panel render an opinion before any other action is filed. Thus, Ochsner argued that because no medical review panel had been formed and no opinion had yet been rendered by such a panel, the instant suit, like the previous suit, was premature. Moreover, Ochsner asserted that its filing of the exception of prematurity in the initial lawsuit was "conclusive proof" that it did not intend to waive review by a panel and that plaintiffs accordingly were required by law to file another claim with the PCF, rather than another suit in district court, after the PCF's dismissal of plaintiffs' initial claim.

With regard to its exception of prescription, Ochsner contended that when the PCF notified plaintiffs on February 1, 2010, that their claim was being dismissed for failure to appoint an attorney chairman, prescription

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[1]The written judgment granting the exception was not signed until May 4, 2010. However, while the judgment does not so indicate, counsel for Ochsner acknowledged in a memorandum filed below that the district court had in fact rendered judgment in open court at the April 5, 2010 hearing, granting its exception of prematurity.

[2]In the instant petition, in addition to alleging that Ochsner failed to properly monitor and supervise Mrs. Neese in her confused state, plaintiffs further alleged that Ochsner personnel failed to notify Mrs. Neese's treating physicians of her condition.

began to run again and plaintiffs did not thereafter timely file a new claim with the PCF. Furthermore, Ochsner contended that the filing of a new civil action in district court did not interrupt prescription where plaintiffs' claims had never been reviewed by a medical review panel. Accordingly, Ochsner contended that plaintiffs' medical malpractice claims had prescribed.

On September 22, 2010, the district court signed a judgment overruling the exception of prescription, but sustaining the exception of prematurity, "without prejudice, to proceed before the Medical Review Panel." Plaintiffs then filed the instant appeal, contending the district court erred in dismissing their properly filed suit. Specifically, plaintiffs contend that the district court erred in that Ochsner cannot have a medical malpractice suit dismissed where, as here, the suit was timely filed after the medical review panel was waived because an attorney chairman was not appointed within one year of filing the complaint and request for a panel. Ochsner filed an answer to the appeal, contending that the district court erred as a matter of law in overruling Ochsner's exception of prescription and, thus, that the September 10, 2010 judgment should be amended to dismiss plaintiffs' claims with prejudice. Additionally, Ochsner filed in this court an exception of res judicata, contending that the May 4, 2010 dismissal without prejudice of the Neeses' initial suit (docket number 574,075) as premature extinguished all causes of action against Ochsner regarding Mrs. Neese's care and, thus, bars this suit.

DISCUSSION

An exception of prematurity raises the issue of whether a plaintiff has fulfilled a prerequisite condition prior to filing his suit such that the question is presented as to whether his cause of action yet exists. LSA-C.C.P. art.

926(A)(1); Girouard v. State, Through Department of Education, 96-1076 (La. App. 1st Cir. 5/9/97), 694 So. 2d 1153, 1155. The party raising the exception of prematurity has the burden of proving that an administrative remedy is available and that the plaintiff failed to submit his claim for review before the administrative tribunal prior to filing suit. Girouard, 694 So. 2d at 1155. Once the exceptor has shown that an administrative remedy exists or is required, the burden shifts to the plaintiff to prove that he has exhausted his administrative remedies or that the administrative remedies available to him are irreparably inadequate. Girouard, 694 So. 2d at 1155.

As set forth in LSA-R.S. 40:1299.47(A)(1)(a), "All malpractice claims against health care providers covered by this Part, other than claims validly agreed for submission to a lawfully binding arbitration procedure, shall be reviewed by a medical review panel established as hereinafter provided for in this Section." Further, LSA-R.S. 40:1299.47(B)(1)(a)(i) provides that "No action against a healthcare provider ... 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."

Ochsner contends that the instant suit, like the prior suit, is premature, until the matter is submitted to a medical review panel. Plaintiffs, however, counter that the instant suit was proper and timely, in that plaintiffs filed the instant suit after a timely and proper filing of the claim with the PCF. Noting that the medical malpractice statutory scheme contains waiver provisions, plaintiffs argue that the failure to appoint the required members after filing for the panel constitutes a waiver by both parties of the rights to such review pursuant to LSA-R.S. 40:1299.47(A)(2)(c) which provides:

> [T]he parties shall notify the board of the name and address of the attorney chairman. If the board has not received notice of the appointment of an attorney chairman within nine months from the date the request for review of the claim was filed, then the board shall send notice to the parties by certified or registered mail that the claim will be dismissed in ninety days unless an attorney chairman is appointed within one year from the date the request for review of the claim was filed. If the board has not received notice of the appointment of an attorney chairman within one year from the date the request for review of the claim was filed, then the board shall promptly send notice to the parties by certified or registered mail that the claim has been dismissed for failure to appoint an attorney chairman and the parties shall be deemed to have waived the use of the medical review panel. (Emphasis added.)

Plaintiffs note that as opposed to the requirement in LSA-R.S. 40:1299.47(B)(1)(a)(i) that the claimant alone must file the initial complaint and request for a review panel, the statutory language of LSA-R.S. 40:1299.47(A)(2)(c) reflects that both parties are thereafter charged with the appointment of the attorney chairman, either through mutual agreement or through the specified strike process. On review, and considering these provisions, we find merit to plaintiffs' arguments.

After the parties herein failed to appoint an attorney chairperson within nine months of the filing of the complaint, they were notified by the PCF of the statutory requirements and advised of the applicable time limit "[i]f continued pursuit of the panel request [was] desired." However, apparently neither party attempted to appoint an attorney chairman. Thus, pursuant to LSA-R.S. 40:1299.47(A)(2)(c), the request for a panel to review the claim was dismissed and the parties were properly deemed to have waived the medical review panel. Estate of Nicks v. Patient's Compensation Fund Oversight Board, 2005-1624 (La. App. 1st Cir. 6/21/06), 939 So. 2d 391. As recognized in the concurring opinion in Estate of Nicks, which we find applicable herein, "[T]he only effect of the dismissal of the claim for

the failure to appoint an attorney chairman within one year from the date the request for review was filed is that the parties-both the plaintiff and the defendants-are deemed to have waived the use of the medical review panel." Estate of Nicks, 939 So. 2d at 401. Thus, on the record before us, we find that the exception of prematurity was improperly sustained in the instant suit.

We also reject Ochsner's contention that the filing of the exceptions in the earlier district court proceedings evidenced its intent to maintain its right to a medical review panel and that the proper procedure for plaintiffs after notice of the dismissal of the complaint was to file another complaint, as opposed to filing suit in district court. Ochsner's argument that the filing of the exceptions somehow maintained or fulfilled its right to review by a medical panel is specifically rebutted by the statutory language of LSA-R.S. 40:1299.47(A)(2)(c), which indicates that the procedural requirements for perfecting such review through the appointment of the attorney chairman now burdens both parties. Thus, Ochsner may not neglect its concurrent statutory duty and yet claim that its statutory right remains by merely relying on its filing in the district court and failing to avail itself of the statutory provisions for perfecting such right in the administrative remedy that was made available to it.

Ochsner's argument that the proper action for plaintiffs after dismissal of the complaint was to file another complaint is also rebutted by LSA-R.S. 40:1299.47(A)(2)(c), which provides that, "The filing of a request for a medical review panel shall suspend the time within which suit must be filed until ninety days after the claim has been dismissed in accordance with this Section." Thus, given the clear statutory language, the appropriate step after

dismissal, under this section dealing with failure to appoint the attorney chair, was to file suit. Therefore, plaintiffs took the appropriate step in timely filing suit on May 3, 2010, within the period of prescription.

ANSWER TO APPEAL

As set forth above, in its answer to the appeal, Ochsner contends that the district court erred as a matter of law in overruling its exception of prescription. In support of its exception of prescription, Ochsner contends that the filing of the initial civil action in district court was premature and, thus, did not interrupt prescription against Ochsner. Nonetheless, Ochsner acknowledges that the simultaneously filed claim with the PCF did suspend prescription. See LSA-R.S. 40:1299.47(A)(2)(a). Ochsner then argues that when the PCF notified plaintiffs on February 1, 2010, that their claim was being dismissed for failure to appoint an attorney chairman, prescription began to run again, and plaintiffs had 92 days remaining within which to interrupt prescription by filing a new complaint with the PCF.[3]

Furthermore, according to Ochsner, since plaintiffs' claims had never been reviewed by a medical review panel and, thus, no panel had ever rendered an opinion, prescription was not interrupted or suspended by the filing of the present suit (which Ochsner contends was also premature) 91 days after the PCF's letter dismissing plaintiffs' claim. Accordingly, because plaintiffs did not timely file a new complaint with the PCF (but, rather, chose to file another premature lawsuit in district court), Ochsner contends that plaintiffs' medical malpractice claims had prescribed on May

[3]This 92-day period represents the 2 days remaining on the original one-year prescriptive period, as set forth in LSA-R.S. 9:5628(A), when the request for a medical review panel was filed, plus the additional 90-day suspension provided in LSA-R.S. 40:1299.47(A)(2)(c) following the PCF's dismissal of a claim for failure to timely appoint an attorney chairman.

4, 2010. Thus, Ochsner contends on appeal that the September 10, 2010 judgment should be amended to dismiss plaintiffs' claims **with** prejudice because plaintiffs' claims against Ochsner have prescribed.

For the reasons set forth above, we have concluded that the instant suit was not premature. Rather, the parties were properly deemed to have waived the medical review panel, Estate of Nicks, 939 So. 2d at 401 (Welch, J. concurring), and the next appropriate step was for plaintiffs to file suit in district court within the remaining 92 days of the applicable prescriptive period. See LSA-R.S. 9:5628 & LSA-R.S. 40:1299.47(A)(2)(c). Because the instant suit was filed within that remaining 92 days, plaintiffs' claims are not prescribed. Thus, we reject Ochsner's argument that prescription was not interrupted by the filing of the instant suit. Therefore, defendants' answer to the appeal, seeking reversal of the overruling of its exception of prescription, is denied.

EXCEPTION OF RES JUDICATA

On the morning of oral argument of this matter, Ochsner filed an exception of res judicata with this court, contending that the dismissal without prejudice of the Neeses' initial suit (docket number 574,075) as premature "extinguished all causes of action arising out of Ochsner's ... care of [Norma] Neese and bars this subsequent action on those causes of action." Thus, Ochsner contends, this court should affirm the district court's dismissal of the instant suit, but amend the judgment to dismiss with prejudice, on the basis of res judicata.

Res Judicata does not bar a subsequent action when the judgment in the first action dismissed the suit without prejudice. LSA-R.S. 13:4232(A)(2); Chaisson v. Central Crane Service, 2010-0112 (La. App. 1st

Cir. 7/29/10), 44 So. 3d 883, 887 n.5. Because the judgment in the initial suit dismissed the Neeses' action **without prejudice** on the basis of prematurity, that judgment cannot serve to bar this subsequent suit. Thus, the exception of res judicata filed by Ochsner in this court is denied.

CONCLUSION

For the above and foregoing reasons, the judgment sustaining Ochsner's exception of prematurity and dismissing, without prejudice, the claims asserted by plaintiffs is hereby reversed. We also deny Ochsner's answer to appeal, deny its exception of res judicata filed with this court, and remand this matter for further proceedings consistent with the views expressed herein. Costs of this appeal are assessed against Ochsner.

REVERSED AND REMANDED; ANSWER TO APPEAL DENIED; EXCEPTION OF RES JUDICATA DENIED.

NOT DESIGNATED FOR PUBLICATION

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COURT OF APPEAL

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JAMES NEESE AND NORMA NEESE

VERSUS

EAST BATON ROUGE MEDICAL CENTER, LLC D/B/A OCHSNER MEDICAL CENTER- BATON ROUGE

GUIDRY, J., dissents and assigns reasons.

GUIDRY, J., dissenting.

I disagree with the majority's conclusion that the lawsuit filed by plaintiffs, James and Norma Neese, on May 3, 2010, is not premature. Louisiana Revised Statute 40:1299.47A(2)(c), read *in pari materia* with the Louisiana Medical Malpractice act and the Code of Civil Procedure, sets forth a rebuttable presumption that the parties have waived the use of a medical review panel. Based on my review of the record, the actions of the parties in this case sufficiently rebut the presumption that their use of the medical review panel was waived. Accordingly, I would affirm the trial court's judgment sustaining Ochsner's exception of prematurity and dismissing, without prejudice, the claims asserted by plaintiffs.

JAMES NEESE AND NORMA NEESE

VERSUS

EAST BATON ROUGE MEDICAL CENTER, LLC D/B/A OCHSNER MEDICAL CENTER-BATON ROUGE

FIRST CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

NO. 2011 CA 0811

KUHN, J., dissenting.

I disagree with the majority's conclusion that the lawsuit filed by plaintiffs, James and Norma Neese, on May 3, 2010, is not premature. Thus, I would affirm the trial court and dismiss the Neeses' claims without prejudice to proceed before a medical review panel.

Initially, I note that La. R.S. 40:1299.47A(2)(c) requires that if the Louisiana Patient's Compensation Oversight Board (the Board) has not received notice of the appointment of an attorney chairman within one year from the date the request for review of the claim was filed, "then the [B]oard shall promptly send notice to the parties by certified or registered mail that the claim has been dismissed for failure to appoint an attorney chairman and the parties shall be deemed to have waived the use of the medical review panel." Although the record establishes that an attorney chairman was not timely appointed, there is nothing to establish that defendant, East Baton Rouge Medical Center, LLC d/b/a Ochsner Medical Center-Baton Rouge (Ochsner) was ever notified by certified or registered mail that the Neeses' claims, filed on January 8, 2009, had been dismissed for failure to appoint an attorney chairman. Thus, on the showing made, there is nothing to establish

that use of the medical review panel was ever waived by Ochsner. Having failed to establish that Ochsner's received the requisite mandatory notice by certified or registered mail, Ochsner simply cannot be "deemed" to have waived the use of the medical review panel pursuant to La. R.S. 40:1299.47A(2)(c).

More importantly, the reading of La. R.S. 40:1299.47A(2)(c) undertaken by the majority misinterprets the obvious intent of the statute. Isolating the provisions, rather than reading them *in pari materia* with the Louisiana Medical Malpractice Act and the general rules of procedure set forth in the Code of Civil Procedure, the majority fails to read La. R.S. 40:1299.47A(2)(c) mindful that it is the plaintiff who has the obligation to move a case forward or suffer abandonment of the lawsuit. The defendant has no such reciprocal obligation. Clearly, in using the language "the parties shall be deemed to have waived use of the medical review panel," the legislature intended to create a rebuttal presumption vis-à-vis the defendant who has no duty to advance the lawsuit. Thus, in order for the presumption to apply, a plaintiff must prove that the defendant obstructed progress of the panel. Because there is no such evidence in this record—indeed, defendant has vigilantly maintained its rights through the filing of exceptions of prematurity in both lawsuits—the presumption simply does not apply. Accordingly, I dissent.