08/29/2008 "See News Release 054 for any Concurrences and/or Dissents."

SUPREME COURT OF LOUISIANA

No. 2007-C-0419

MINOS BOREL, SR., ET AL.

VERSUS

LAFAYETTE GENERAL MEDICAL CENTER

ON APPLICATION FOR REHEARING

CALOGERO, Chief Justice, CONCURS IN DENIAL OF REHEARING AND ASSIGNS REASONS:

I concur in the majority's denial of the plaintiffs' second application for rehearing because La. Sup. Ct. Rule IX, § 9, specifically provides as follows;

> When a case has been decided on rehearing, another application for rehearing will not be considered unless the applicant has not theretofore applied for and been granted a rehearing or unless the court, in deciding the case on rehearing, has expressly reserved to the unsuccessful party or parties the right to apply for another rehearing.

Thus, this court cannot consider another application for rehearing filed by a party who has previously been granted a rehearing, like the plaintiffs herein.

Nevertheless, I would reiterate my position in this case that the holding in *LeBreton v. Rabito*, 97-2221 (La. 7/8/98), 714 So. 2d 1226, should not be extended to the fact situation presented by this case, which is clearly distinguishable from *LeBreton*. Furthermore, I use this opportunity to reurge the position set forth in my dissent to the majority's decision on rehearing that, pursuant to La. Civ. Code art. 2324(C), prescription against the physicians was interrupted in this case by the timely filing of the plaintiffs' suit against the hospital, an alleged joint tortfeasor with the physicians.

The plaintiffs' second application for rehearing gives forceful reasons to support their request that this court reconsider its finding that their suit against the

physicians is barred by prescription. For example, in what is perhaps their strongest argument, the plaintiffs note that the majority's decision is based, at least in part, on the erroneous premise that "the Medical Malpractice Act prohibits the filing of a medical malpractice claim against a qualified health care provider prior to presenting the complaint to a medical review panel." *Borel v. Young* (on rehearing), 07-0419 (La. 7/1/08), p. 15, ___ So. 2d ___, ___. As the plaintiffs point out, two exceptions allow the filing of a medical malpractice claim prior to presentation of the complaint to a medical review panel: (1) when the defendant healthcare provider is not qualified under the Medical Malpractice Act, and (2) when a qualified healthcare provider has waived the medical review panel process. This court's holding in this case ultimately creates a limited class of cases in which the general codal articles relative to interruption of prescription do not apply, to the prejudice of the plaintiffs in that limited class of cases. Furthermore, this inequitable situation has been created, not by the will of the legislature, which has the authority to make policy decisions about when litigation should be time barred, but by this court. The resulting inequity creates a serious problem that should ordinarily prompt this court to reconsider its holding.

Additionally, the majority decision herein ignores the well-settled principle that provisions of the Medical Malpractice Act must be strictly construed because they grant immunities or advantages to special classes in derogation of the general rights available to tort victims. *Kelty v. Brumfield*, 93-1142 (La. 2/25/94), 633 So.2d 1210, 1216. It also ignores the fact that "prescriptive statutes must be strictly construed against prescription and in favor of the obligation sought to be extinguished, with the effect that, of two possible constructions, that which favors maintaining, as opposed to barring, an action should be adopted. *Lima v. Schmidt*, 595 So. 2d 624, 629 (La. 1992.

However, as I have already conceded, the current rules prohibit this court from considering this second application for rehearing from a party in whose favor rehearing was previously granted. That being the case, I would suggest, perhaps for prospective application, that the conference consider modifying La. Sup. Ct. Rule IX, § 9, to allow the filing of a second application for rehearing by a previously-successful applicant when, as here, the decision on rehearing is unfavorable to the applicant for reasons that have not previously been addressed by this court.