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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **2nd day of December, 2008**, are as follows:

BY CALOGERO, C.J.:

2007-CC-0492 PAMELA WARREN, THERESA RENE WARREN AND SARAH WARREN JIMENEZ v. LOUISIANA MEDICAL MUTUAL INSURANCE COMPANY, JEFFREY A. LAMP, M.D., ROBYN B. GERMANY, M.D., SANDRA MOODY, NP-C, AND FAMILY HEALTH OF LOUISIANA, INC.(Parish of E. Baton Rouge)
Accordingly, the decision of the court of appeal is affirmed.
AFFIRMED AND REMANDED.

KIMBALL, J., additionally concurs and assigns reasons.
VICTORY, J., dissents and assigns reasons.
TRAYLOR, J., dissents and assigns reasons.
KNOLL, J., dissents and assigns reasons.
WEIMER, J., additionally concurs and assigns reasons.

12/02/08

SUPREME COURT OF LOUISIANA

NO. 2007-CC-0492

PAMELA WARREN, THERESA RENE WARREN, AND SARAH WARREN JIMENEZ

VS.

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

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

CALOGERO, Chief Justice

Today we reaffirm our jurisprudence applying La. Code Civ. Proc. art. 1153 to the amendment of a timely filed petition, an amendment that adds a major child's wrongful death action arising from the death of her father, to find that the amendment relates back to the date of filing of the original petition for wrongful death and survival actions by the wife and another major child of the decedent against the defendant health care providers. *See Giroir v. South La. Med. Ctr., Div. of Hospitals*, 475 So.2d 1040 (La. 1985). Accordingly, for the reasons set forth below, we hold that the amendment adding the wrongful death action of Sarah Warren Jimenez relates back to the timely filing of the original petition filed by Sarah's mother, Pamela Warren, and her sister, Theresa Rene Warren. We further

find that Sarah was entitled to the benefit of the interruption of prescription on the survival action such that the amending petition adding her as a plaintiff to that cause of action was timely filed. *See Williams v. Sewerage & Water Bd. of New Orleans*, 611 So.2d 1383 (La. 1993). Therefore, the district court correctly denied the defendants' exception of prescription with regard to the amending petition adding Sarah's claims.

This case arises from the death of Terry Warren. He died on October 13, 2000, at Summit Hospital from complications of congestive heart failure and/or an acute myocardial infarction. On September 11, 2001, Pamela Warren, Mr. Warren's widow, and Theresa Warren, one of Mr. Warren's daughters, filed a request for a medical review panel to investigate their medical malpractice complaint against various health care providers, including Mr. Warren's treating physicians. The medical review panel issued its opinion on August 27, 2002. Pamela and Theresa then filed a petition on November 25, 2002, in the district court asserting survival and wrongful death actions under La. Civ. Code arts. 2315.1 and 2315.2. On July 6, 2004, plaintiffs Pamela and Theresa filed a First Supplemental and Amending Petition. This petition added survival and wrongful death causes of action for Sarah Warren Jimenez, the decedent's second daughter.

In response to the amended petition, the defendants filed an exception of prescription, arguing that Sarah's claims are prescribed on their face because she did not file her action within one year of the date of her father's death. The defendants pointed out that Sarah testified in deposition that she was aware of the

filing of the medical review complaint as well as the filing of the instant lawsuit by her mother and sister but chose, at that time, not to participate.[1] Under these facts, the defendants argued that Sarah's claims do not relate back to the original claims pursuant to *Giroir*. In addition, the defendants claimed they were severely prejudiced by the addition of another plaintiff in July 2004, nearly three years after the request for a medical review panel was made in September 2001, and nineteen months after the lawsuit was filed in November 2002.

The plaintiffs opposed the exception. In support, the plaintiffs urged the trial court to apply *Tureaud v. Acadiana Nursing Home*, 96-1262 (La.App. 3 Cir. 5/7/97), 696 So.2d 15, and *Phillips v. Francis*, 01-1105 (La.App. 3 Cir. 2/6/02), 817 So.2d 107. According to the plaintiffs, *Tureaud* and *Phillips* stand for the proposition that if proper party plaintiffs file their claim timely, that suit will interrupt prescription as to any other plaintiffs that have similar claims.

After a hearing, the district court overruled the defendants' exception of prescription. From this ruling, the defendants sought supervisory review. A five-judge panel of the court of appeal denied the writ, citing La. Code Civ. Proc. art. 1153 and *Giroir*. Upon application by the defendants, this court remanded the case

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[1] In her deposition, Sarah explained that her poor relationship with her mother, who has multiple sclerosis, was exacerbated by the death of her father and that she could not face the emotional ordeal of a lawsuit. According to Sarah, her mother abandoned the two daughters after the father's death, and they did not speak for over three years. She explained that, because she came to realize she could be subpoenaed to testify as a witness, i.e., become involved in the suit, she later decided to join the case as a party plaintiff.

to the court of appeal for briefing, argument and opinion. *Warren v. Louisiana Medical Mutual Insurance Company*, 06-1547 (La. 9/29/06), 938 So.2d 693.

On remand, a majority of the five-judge panel of the court of appeal again denied the writ application in an unpublished written decision, relying on the four guidelines identified by this court in *Giroir*. We again granted the defendants' writ application to consider the propriety of the court of appeal's ruling as well as the application of La. Code Civ. Proc. art. 1153 and *Giroir* to the facts of this case. *Warren v. Louisiana Medical Mutual Insurance Company*, 07-0492 (La.4/27/07), 955 So.2d 670.

DISCUSSION

We first turn to the survival action that Sarah seeks to join in as an additional plaintiff. A survival action, which compensates for the damages suffered by the victim from the time of injury to the moment of his death, and a wrongful death action, which compensates the beneficiaries for their own injuries which they suffer from the moment of the victim's death and thereafter, are separate causes of action. *See Walls v. American Optical Corp.*, 98-0455 p. 14, (La. 9/8/99), 740 So.2d 1262, 1273; *Taylor v. Giddens*, 618 So.2d 834, 840 (La. 1993). With regard to Sarah's addition as a plaintiff in the survival action, she shares in that cause of action with her sister and mother; therefore, prescription on that cause of action was interrupted when Sarah's sister and mother timely filed suit against the defendants. "'When several parties share a single cause of action ..., suit by one interrupts prescription as to all.'" *Williams v. Sewerage & Water Bd. of New*

Orleans, 611 So.2d 1383, 1390 (La. 1993), quoting *Louviere v. Shell Oil Co.*, 440 So.2d 93, 96 (La. 1983). "'[A]ll prescriptions affecting that cause of action are interrupted by the suit and remain continuously interrupted as long as the suit is pending.'" *Id.*, quoting *Louviere*, 440 So.2d at 98. Therefore, Sarah, like her mother and sister, was also entitled to the benefit of interruption of prescription on her survival claim against the defendants. The district court thus properly overruled the defendants' exception of prescription with regard to the amending petition adding Sarah as a plaintiff in the survival action.

We next turn to the issue of Sarah's wrongful death claim and whether the amending petition adding this claim relates back under La. Code Civ. Proc. art. 1153 to the date of the timely filing of her mother's and sister's survival and wrongful death claims. The analysis with regard to this cause of action begins with La Code Civ. Proc. art. 1153. That article provides:

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

In *Giroir*, this court examined the jurisprudence applying Federal Rule of Civil Procedure 15(c), upon which La. Code Civ. Proc. art. 1153 is based, and concluded that "[a]lthough the [federal] Rule refers to 'an amendment changing the party' it has properly been held to sanction relation back of amendments which add or drop parties, as well as those substituting new parties for those earlier joined." 475 So.2d at 1043 (collecting authorities). While acknowledging the "less

difficult" legal analysis for the relation back of amendments involving a change of capacity, this court nonetheless set forth factors to consider for the relation back of an amendment adding or changing plaintiffs. *Id.* at 1044. Relying on our prior case in *Ray v. Alexandria Mall*, 434 So.2d 1083 (La. 1983), regarding amended petitions adding or substituting defendants, we set forth these factors in *Giroir*: "[a]n amendment adding or substituting a plaintiff should be allowed to relate back if (1) the amended claim arises out of the same conduct, transaction, or occurrence set forth in the original pleading; (2) the defendant either knew or should have known of the existence and involvement of the new plaintiff; (3) the new and the old plaintiffs are sufficiently related 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.

In *Giroir*, the husband of the decedent filed suit against the defendants seeking survival damages as administrator of his wife's estate and wrongful death damages sustained by him. Ten days later, but after the prescriptive period had run, the husband sought to add the decedent's two major children in both the survival and wrongful death actions. The amending petition also sought to change the husband's capacity so that he appeared as an individual rather than as the administrator of his wife's estate. We found that these amending petitions adding the wrongful death claims of the major children related back to the filing of the husband's original petition. With regard to the major children's wrongful death and survival actions, we reasoned in pertinent part that the defendants knew or

should have known of the existence and involvement of the children, because (1) the facts in the original petition gave the defendants notice of, and did not negative, the reasonable possibility that a surviving child of a deceased fifty-five year-old married woman would be entitled to recover as a survivor or wrongful death beneficiary and might later assert a claim, and (2) the defendants had received actual notice that the decedent had children through the recorded visits of her family members, the recorded assistance of her daughter in transporting her, and the recorded psychiatric report evidencing her concern for her grandchildren. Additionally, the court reasoned that the defendants had not been prejudiced in preparing and conducting their defense, not only because the added actions arose out of the same transaction or occurrence and because they knew of and had record of the existence of the children, but also because the timing of the amendment was well before trial and the defendants thus had had ample time to prepare for trial. We reasoned that the defendants in *Giroir* had failed to show that they were in any way hurt or impaired in their ability to investigate, preserve evidence, and prepare defenses on both the liability and quantum issues.

Giroir has since been applied in various situations in the courts of appeal, with some courts finding that the added claims of a new plaintiff did relate back to the filing of the original petition and other courts finding to the contrary. The lower courts have not encountered problems in applying these precepts; consequently, we discern no need to reconsider *Giroir* today. However, we point out that the enumerated *Giroir* factors are guidelines to be considered under the

totality of the circumstances before an amendment adding a new plaintiff will be deemed to relate back pursuant to La. Code Civ. Proc. art. 1153.

Considering the *Giroir* factors in this case, we agree with the court of appeal that the amending petition adding Sarah's wrongful death claim satisfied the first guideline, because Sarah's claim arose out of the same conduct, transaction or occurrence set forth in the original petition – i.e., the alleged malpractice by the defendants that allegedly resulted in Mr. Warren's death. Likewise, the amending petition satisfies the third factor, because Sarah is sufficiently related to the original plaintiffs, her mother and sister. Indeed the parties agree that the amended claims of Sarah arise out of the same transaction or occurrence and that Sarah is not a wholly new or unrelated party. Therefore, the dispute in this case, as the court of appeal found, centers on the second and fourth factors identified in *Giroir*.

The defendants argue to this court that the plaintiffs did not satisfy their burden for relation-back of the amended claim under the *Giroir* criteria.[2] With regard to the second prong, they assert they had no actual knowledge of the existence of Sarah because she was not named in the medical review panel complaint. The only suggestion that Mr. Warren had other children was in the petition, which indicated that the initial plaintiff, Theresa Warren, was "**one** of the

[2] The defendants also argue the district court erroneously relied on *Phillips* and *Tureaud* for the proposition that the filing of a wrongful death claim by one sibling interrupted prescription as to the other sibling. However, they acknowledge that the court of appeal resolved the case based on *Giroir* and did not reach the question of whether the trial court erred in relying upon these cases. As did the court of appeal, we need not determine whether the district court actually relied on these cases in overruling the defendant's exception of prescription and, if so, whether that reliance was or was not correct.

surviving children." [emphasis added]. The defendants maintain Sarah was not by name identified as a daughter of the decedent until she was listed as a witness in the plaintiffs' answers to interrogatories on March 5, 2003. Relying on *Musgrove v. Glenwood Regional Medical Center*, 37-575 (La.App. 2 Cir. 9/26/03), 855 So.2d 984, the defendants claim they were not provided with enough information to reasonably establish that Sarah would in fact file a claim over three and a half years after the date of the alleged malpractice. In addition, the defendants point out, Theresa testified in June 2004 that Sarah was aware of the litigation but had no interest in pursuing a claim; thus, merely identifying Sarah as a witness, the defendants argue, did not give them adequate notice of her claim.

Moreover, the defendants argue that the court of appeal's position that the defendants' knowledge of the mere "possibility" of Sarah's claim conflicts with a prior decision of the First Circuit in *Duffie v. Southern Pacific Transportation Company*, 563 So.2d 933 (La. App. 1st Cir. 1990). In *Duffie*, the First Circuit concluded that it did "not believe that defendant must remain alert indefinitely to the possibility that a plaintiff might have a spouse or children, or both, who might at some future date bring a claim."

The defendants also assert that Sarah's claim is a separate cause of action from the claims asserted by her mother and sister. The defendants point out that Sarah's loss of consortium claims are distinguishable from those of her mother and sister in that she was a major at the time of her father's death and estranged from her family. The defendants note that there are significant factual differences

between the two daughters' relationships with their father, resulting in two potentially different loss of consortium claims. Although Sarah and Theresa are sisters and belong to the same category of plaintiffs, their wrongful death claims are not identical but distinct and separate, the defendants maintain.

Finally, the defendants argue that they are prejudiced by Sarah's late arrival to the litigation. They point out that the plaintiffs did not address or justify the extensive time delay between the filing of the medical review panel complaint, the original petition, and the amended petition, in their opposition to this exception. The defendants assert almost four years have passed since the alleged malpractice and three years since the medical review complaint was filed. In addition, they point out that Sarah made an intentional decision not to file her petition during this "lengthy" period of time.

Relying on *Giroir* and La. Code Civ. Pro. art. 1153, the plaintiffs maintain that Sarah's claim relates back to the timely filed original claims. The plaintiffs argue that the second *Giroir* factor was satisfied, because the defendants knew of Sarah's existence and involvement in the case, and thus they knew or should have known that she might file a claim. In support, the plaintiffs note that Sarah's name was listed as the informant on the death certificate and that the original petition was specifically crafted to note that Theresa was "one" of the decedent's surviving adult children, the clear implication being that there were potentially more similarly-situated plaintiffs. This notice, the plaintiffs argue, allowed the defendants an opportunity to prepare a defense to the possible claim.

As to the fourth factor, the plaintiffs argue that Sarah's wrongful death claim is identical to her mother's and sister's claims, and therefore, the defendants suffer no prejudice with the addition of Sarah's claims. The plaintiffs contend the passage of time between the filing of the original claims and the addition of Sarah's claim causes no prejudice to the defendants.

With regard to the second factor, we believe the "existence and involvement" of Sarah and her additional cause of action were sufficiently known or knowable to the defendants within the prescriptive period. The defendants were aware of the existence of Sarah Warren because she was named as the informant on the death certificate, and her address was provided thereon, and thus the defendants knew or should have known that she was a daughter of the decedent.[3] Additionally, the petition clearly states that Theresa was but "one" of the decedent's children; thus, the defendants were placed on notice that there existed other similarly-situated potential plaintiffs. As the court of appeal reasoned, although Sarah was not mentioned by name in the request for a medical review panel or in the petition for damages, paragraph five of the petition stated that Theresa was "**one** of the surviving children of Terry Warren") and, in that capacity, she was asserting both survival and wrongful death claims. Thus, the petition gave the defendants notice of, and did not negative, the reasonable possibility that

[3] According to her deposition, Sarah explained that her mother became distraught at the news of her father's death and was taken to the hospital's emergency room. Because her mother was in the emergency room and because Theresa was then still a minor, the hospital asked Sarah, who was 19 or 20 years old at the time, to sign various papers acknowledging her father's death. Sarah was thus named, and her address provided, as the "informant" on her father's death certificate.

another surviving child of Mr. Warren would be entitled to recover under La. Civ. Code arts. 2315.1 and 2315.2 and that she might later assert such claims. *See Giroir*, 475 So.2d at 1045. This information was certainly known or knowable by the defendants before the prescriptive period had run. And this information was confirmed when, in answers to interrogatories mailed to the defendants on March 5, 2003, approximately three and one-half months after the petition for damages was filed, Sarah was specifically identified as Terry Warren's daughter and a potential witness in the case. Thus, the defendants have known of Sarah's existence and involvement in the case, as an adult child of the decedent and a witness in the case, since the death of her father, and certainly since shortly after the filing of the original petition.

The defendants, and the dissenters in the court of appeal, make much of the fact that Sarah knew of the litigation but had chosen not to participate, and that it was only when she knew that she would be a witness in the case that she joined as a plaintiff asserting a share in the survival damages and her own wrongful death damages. Certainly, were we to consider the fact that Sarah knew of the litigation but did not want to get involved, Sarah would seem, at first glance, to not present a sympathetic portrait with regard to the prescription issue. Indeed, at least one state requires the plaintiffs to show that the delay in adding the party was not due to inexcusable neglect. *See Stansfied v. Douglas County*, 146 Wash.2d 116, 43 P.3d 498 (2002); *Beal for Marinez v. City of Seattle*, 134 Wash.2d 769, 954 P.2d 237 (1998). However, the Louisiana statute speaks only of adding a cause of action or

defense, which has been interpreted to include the addition of a plaintiff or defendant, and the subjective intent of the added party in asserting his or her claim has not been cited as a consideration for finding or not finding a relation back to the original petition. Instead, the statute and jurisprudence focus on whether the defendant knew or should have known of the involvement of the added plaintiff, and we conclude that the defendants in this case reasonably had such knowledge. Moreover, the deposition testimony of Sarah and her sister Theresa reveals that the death of their father had put the family into emotional turmoil, thereby explaining Sarah's reluctance to become involved in the litigation.

In addition to not adding a subjective element to the analysis, we also decline to read into the phrase "existence and involvement" a heightened degree of probability of asserting a claim in the future. The defendants would have us add as additional consideration whether there was a reasonable probability, or a certainty, that the identified plaintiff would in fact assert her claim. However, we distinguish *Musgrove v. Glenwood Regional Medical Center*, 37,575 (La.App. 2 Cir. 9/26/03), 855 So.2d 984, on its facts. That case involved a claim by an emergency room physician who filed suit against a hospital for damages sustained as a result of wrongful termination. Three years later, his wife, who was employed by the hospital as a respiratory therapist, filed a claim for loss of consortium. In finding the wife's claim did not relate back, the court of appeal explained that "[e]ven if the defendants have actual knowledge of other persons involved in the tort, there is no relation back unless the original petition gives reasonable notice that these

persons will have a claim." In the instant case, the added claims for Sarah are survival and wrongful death damages in a medical malpractice suit filed by her mother and her sister, the widow of the decedent and one of his children. Such claims from a surviving child would normally be expected and are much less attenuated then a claim for loss of consortium damages from a wife in a wrongful employment termination suit, which would not be as predictable. In other words, that a surviving child might eventually assert survival and wrongful death actions along with those asserted originally by her mother and sister is much more likely than a wife eventually seeking loss of consortium damages in a wrongful employment termination suit.

This brings us to the fourth factor, whether the defendants would be prejudiced in preparing and conducting their defense if Sarah is allowed to assert her wrongful death claim at this time. With regard to the survival action asserted by Sarah, the defendants cannot, and essentially do not, claim they would be prejudiced by preparing or conducting their defense as to this claim. Thus, the issue of prejudice to the defendants, as the court of appeal observed, relates solely to Sarah's wrongful death action. Notwithstanding that, from a prejudice standpoint, the passage of time between the filing of the original petition and the amending petition logically weighs in general against the relating back of the amendment, we agree with the lower court that there has been no showing of prejudice in this case. Sarah's claim for wrongful death is in large part the same as the original plaintiffs, her mother and sister, that is, she must still prove that the

defendants committed malpractice, that such malpractice caused her father's death, and that those actions caused her damages. Thus, the evidence necessary to defend against Sarah's claim of malpractice is the same evidence necessary to defend against the claim of the original plaintiffs.

While Sarah's quantum damages will surely be different from those of her mother and sister, the defendants have not shown with any particularity how the delay in this case actually prejudices them in preserving evidence and preparing for trial on the amended wrongful death claim with respect to quantum. Unlike in *Giroir*, a post-trial case, this case has not yet proceeded to trial, and the defendants have made only general allegations of prejudice to preparation of their defense. The deposition testimony of Sarah and her sister Theresa sets forth at length, and quite explicitly, the nature, good and bad, of Sarah's relationship with her family and her father. There is no reasonable indication from the record of the hearing on the exception of prescription that the defendants have been prevented or impaired in any way from discovering evidence regarding Sarah's relationship with her father and how his death affected her. Additionally, the fact that a wrongful death claim for Sarah might necessarily increase any quantum liability for the defendants, and thereby in a sense cause "prejudice" to the defendants, was an issue laid to rest in *Giroir*, wherein the wrongful death claims of the two adult children were allowed to relate back to the filing of their father's petition for damages. Accordingly, we conclude that the fourth *Giroir* factor was also satisfied in that the defendants would not be prejudiced in preparing and conducting their

defense by the relation back of the amended petition adding Sarah's wrongful death claim.

CONCLUSION

We find that Sarah was entitled to the interruption of prescription on the survival action and that the amending petition adding her as a plaintiff to that cause of action was timely; thus, the district court properly overruled the defendant's exception of prescription with regard to Sarah's survival claim. Further, we have considered the *Giroir* factors under the totality of the circumstances of this case, and, based on our examination, we find that the amended wrongful death claim arises out of the same conduct, transaction or occurrence set forth in the original pleading, the defendants either knew or should have known of the existence and involvement of Sarah, who is not a wholly new or unrelated party, and the defendants will not be prejudiced in preparing and conducting their defense to Sarah's claim. We conclude the district court properly permitted the amended petition adding Sarah's wrongful death claim to relate back to the original timely-filed petition under La. Code Civ. Proc. art. 1153. Accordingly, the decision of the court of appeal is affirmed.

AFFIRMED AND REMANDED

12/02/08

SUPREME COURT OF LOUISIANA

No. 2007-CC-0492

PAMELA WARREN, THERESA RENE WARREN, AND SARAH WARREN JIMENEZ
v.
LOUISIANA MEDICAL MUTUAL INSURANCE COMPANY, JEFFREY A. LAMP, M.D., ROBYN B. GERMANY, M.D., SANDRA MOODY, NP-C, AND FAMILY HEALTH OF LOUISIANA, INC.

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

KIMBALL, J. concurs

I concur in the majority's conclusion that Sarah's claim should relate back to the timely-filed Petition for Damages filed by her mother and sister. I write separately to address the concerns regarding the necessity of a "pleading mistake" or "pleading error" raised by the various dissents. Neither the plain language of La. C.C.P. art. 1153 nor the *Giroir* decision suggest that a pleading mistake is required for an amendment that adds a plaintiff to relate back. *Giroir v. S. La. Med. Center*, 475 So.2d 1040 (La. 1985).

At the time of the enactment of Article 1153, Federal Rule of Civil Procedure 15(c), upon which Article 1153 is based, *Giroir*, 475 So.2d at 1042, provided as follows:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or

> occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

F.R.C.P. 15(c) (1959). Similarly, the text of Article 1153 provides:

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

La. C.C.P. art. 1153 (2008). As evidenced by the text of the two provisions, the language of Article 1153 and F.R.C.P. 15(c) (1959) is substantially identical. Notably, neither makes any mention of a pleading mistake. In 1966, F.R.C.P. 15(c) was amended to add the following sentence after the above language:

> An amendment changing the party *against whom a claim is asserted* relates back if the *foregoing provision is satisfied* and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identify of the proper party, the action would have been brought against him.

F.R.C.P. 15(c) (1966) (emphasis added).[1] The amendment notes to the 1966 amendment state that F.R.C.P. 15(c) was "amplified to state more clearly" that an amendment adding or substituting parties would relate back. F.R.C.P. 15(c), Advisory Committee Notes, 1966 Amendment. This language suggests that the

[1]This version is identical the versions referenced by both the *Ray* and *Giroir* courts in their 1983 and 1985 decisions. *Ray v. Alexandria Mall*, 434 So.2d 1083, 1085 (La. 1983); *Giroir*, 475 So.2d at 1043.

original version of F.R.C.P. 15(c) (1959), upon which Article 1153 is based and to which Article 1153 is substantially identical, allowed the addition or substitution of parties, even though, like Article 1153, it did not expressly state that it did. This language alone appears sufficient to allow the relation back of an amendment adding a plaintiff. This conclusion is bolstered by the inclusion of the phrase "against whom a claim is asserted" in the second sentence of F.R.C.P. 15(c). This sentence specifically applies to defendants only, and, in so doing, requires that there be notice and a mistake concerning the identity of the proper party, in addition to satisfaction of the "foregoing provision." In my view, the addition or substitution of defendants is governed by both the first sentence (the "foregoing provision is satisfied") and the second sentence (referring to parties "against whom a claim is asserted" only).[2] However, courts analyze the addition of a defendant differently from the addition of

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[2]The current version of F.R.C.P. 15(c) provides:

> An amendment to a pleading relates back to the date of the original pleading when:
> (A) the law that provides the applicable statute of limitations allows relation back;
> (B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out--or attempted to be set out--in the original pleading; or
> (C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:
>
> > (i) received such notice of the action that it will not be prejudiced in defending on the merits; and
> > (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.
>
> F.R.C.P. 15(c) (2008).

a claim or plaintiff. The plain language of F.R.C.P. 15(c) (1966) suggests that this is the case, and a review of federal jurisprudence shows that a pleading mistake is not required for the addition or substitution of plaintiffs. *See, e.g., American Banker's Ins. Co. of Florida v. Colorado Flying Academy*, 93 F.R.D. 135 (D.Colo. 1982) (allowing relation back of amendment adding plaintiff where there was no pleading error); *Neufeld v. Neufeld*, 910 F.Supp. 977 (S.D.N.Y. 1996) (same); *Andujar v. Rogowski*, 113 F.R.D. 151 (S.D.N.Y. 1986) (same); *Stoppelman v. Owens*, 580 F.Supp. 944 (D.C.D.C. 1983) ("addition of parties after the statute of limitations has run is not significant when the amendment in 'no way alters the known facts and issues on which the action is based'"). Therefore, because Article 1153 is substantially identical to the original version of F.R.C.P. 15(c) (1966), and makes no mention of a pleading mistake requirement, a pleading mistake is not required for the addition or substitution of a plaintiff.

The *Giroir* decision, the validity of which is not questioned in this case, supports this conclusion. The *Ray* and *Giroir* courts applied the same version of F.R.C.P. 15(c) as was in force in 1966, as cited above. *See* F.R.C.P. 15(c) (1966); F.R.C.P. 15(c) (1983); F.R.C.P. 15(c) (1985). The *Ray* decision, regarding adding or substituting defendants, specifically requires a mistake concerning the identity of the proper party defendant for an amendment to relate back. *Ray*, 434 So.2d at 1086.[3]

[3]The *Ray* court provided the following four criteria for the relation back of an amendment that adds or substitutes a defendant: (1) the amended claim must arise out of the same transaction or occurrence set forth in the original pleading; (2) the purported substitute defendant must have received notice of the institution of the action such that he will not be prejudiced in maintaining a

The *Giroir* decision, on the other hand, specifically does not require a pleading mistake for the relation back of an amendment adding or substituting a plaintiff. *Giroir*, 475 So.2d at 1044.[4] Moreover, the *Giroir* court, looking to the same language as the *Ray* court, held that "[*e*]*ssentially* the same criteria established by *Ray v. Alexandria Mall* should be applied to determine whether an amended petition adding a plaintiff relates back." *Giroir*, 475 So.2d at 1044. The factors are similar or "essentially the same," but they are not identical. While the *Giroir* court modeled its factors for adding or substituting a plaintiff on those promulgated by the *Ray* court for adding or substituting a defendant, it chose not to duplicate them exactly. Specifically, the *Ray* pleading mistake requirement was omitted in the *Giroir* factors for adding or substituting a plaintiff.

For the foregoing reasons, it is my view that a pleading mistake is not required for an amendment adding or substituting a plaintiff to relate back to a timely pleading.

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defense on the merits; (3) the purported substitute defendant must know or should have known that *but for a mistake concerning the identity of the proper party defendant*, the action would have been brought against him; and (4) the purported substitute defendant must not be a wholly new or unrelated defendant, since this would be tantamount to assertion of a new cause of action which would have otherwise prescribed. *Ray*, 434 So.2d at 1086 (emphasis added).

[4]The *Giroir* court provided the following four criteria for the relation back of an amendment that adds or substitutes a plaintiff: (1) the amended claim must arise out of the same conduct, transaction, or occurrence set forth in the original pleading; (2) the defendant either must have known or should have known of the existence and involvement of the new plaintiff; (3) the new and the old plaintiffs must be sufficiently related so that the added or substituted party is not wholly new or unrelated; and (4) the defendant must not be prejudiced in preparing and conducting his defense. *Giroir*, 475 So.2d at 1044.

SUPREME COURT OF LOUISIANA

NO. 2007-CC-0492

PAMELA WARREN, THERESA RENE WARREN, AND SARAH WARREN JIMENEZ

VS.

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

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

VICTORY, J., dissenting.

I dissent from the majority opinion's application of ***Girior v. South La. Medical Center***, 475 So. 2d 1040 (La. 1985) to hold that an amended petition adding a new plaintiff nearly four years after that plaintiff's cause of action arose has not prescribed. La. C.C.P. art. 1153 provides that "[w]hen the action or defense asserted in the amended petition or answer arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of filing the original pleading." This Court has greatly expanded this codal provision to allow the relation back of not only new actions or defenses as allowed by La. C.C.P. art. 1153, but also new plaintiffs and defendants. ***Ray v. Alexandria Mall***, 434 So. 2d 1083 (La. 1983) (new defendants) and ***Girior***, *supra*

(new plaintiffs). Not only is that contrary to the express provisions of La. C.C.P. art. 1153, but as can be seen from the result in this case, the effect of applying La. C.C.P. 1153 to allow the addition of a new plaintiff amounts to a total end-run around prescription.

Although ***Girior*** purportedly relied on ***Ray***, which enunciated four factors for adding a substitute defendant, ***Girior*** actually went beyond the holding in ***Ray.*** ***Ray*** involved a timely filed suit against "Alexandria Mall" when the correct defendant was actually "Alexandria Mall, Ltd." Thus ***Ray*** addressed only "substituting" a defendant and required that the "purported substitute defendant must know or should have known that <u>but for a mistake concerning the identity of the proper party defendant</u>, the action would have been brought against him. (Emphasis added)." Further, ***Ray*** explained that La. C.C. P. Art. 1153 was based on Fed. R.C. P. 15(C), which only allows amendment adding a defendant if the added defendant knew or should have known that but for a pleading mistake concerning the identity of the proper party, the action would have been brought against him. ***Girior*** does not explicitly list a pleading mistake in its factors, but it did justify its holding by stating that "no essential protective purpose of the prescription statute [was] violated" by amendment in that case because prescriptive statutes are "designed to protect him against lack of notification of a formal claim within the prescriptive period, <u>not against pleading mistakes</u> that his opponent makes in filing the formal claim within the period." 475

So. 2d at 1045 (citing ***Allstate Ins. Co. v. Theriot***, 376 So. 2d 950, 954 (La. 1979), *rehearing denied* 1979; ***Nini v. Sanford Brothers, Inc.***, 276 So. 2d 262 (La. 1973); Tate, Amendment of Pleadings in Louisiana, 43 Tul. L. Rev. 211, 233 (1969); F. James, Civil Procedure Sec. 5.9 (1965); Comment, Developments in the Law: Statutes of Limitations, 63 Harv. L. Rev. 1177, 1185 (1950)). In my view, it is apparent that a pleading mistake is required in order to apply La. C.C.P. art. 1153, especially when so much emphasis has been placed on ***Ray*** and F. R C.P. 15, which clearly only allow an amendment to correct a pleading mistake. Furthermore, F.R.C.P. 15 only allows an amendment to relate back to the original pleading in certain circumstances when "the amendment changes the party or the naming of the party against whom a claim is asserted," it never provides for an amended pleading to relate back which adds a plaintiff. F.R.C.P. 15(C). It should also be noted that ***Girior*** has been the subject of much dispute by the court of appeals. *See* Maraist and Galligan, Louisiana Tort Law, §10.04[11].

Further, even if ***Girior*** could be interpreted not to require a pleading mistake, in my view, two of the four criteria in ***Girior*** were not met in this case, i.e., whether the defendant knew of the added plaintiff's "involvement"and whether the defendant would not be prejudiced in preparing and conducting his defense.

Finally, it must be remembered that "relation back" is really just another way of getting around prescription, in the same way that interruption and suspension are, thus La. C.C.P. art. 1153 should not be considered in a vacuum. That issue was

recognized in ***Ray***, which held in the fourth factor that the amendment must not add a wholly new and unrelated defendant, "since this would be tantamount to asserting a new cause of action which would have been otherwise prescribed." I question whether a "relation back" rule found in the Code of Civil Procedure can operate to get around medical malpractice prescription in this way. Further, if this were a newly added defendant, ***Ray*** would not allow it because it did not result from a pleading mistake. In addition, as to newly added defendants, the Court in ***Hebert v. Doctors Memorial Hospital***, 486 So. 2d (La. 1986) held that "Art. 1153 does not authorize the relation back of an amendment which merely adds a new defendant." 486 So. 2d at 718. In my view, La. C.C.P. art. 1153 was not intended to allow relation back to eliminate any prescription issues. For what would be the point of the medical malpractice prescriptive statute, La. R.S. 9:5628, if new plaintiffs could file new causes of action outside the time periods provided in La. R.S. 9:5628 by simply having their new claim related back to the timely filed claim under La. C.C.P. art. 1153?

Finally, this Court just held in ***Borel v. Young***, 07-419 (La. 7/1/08), ___ So. 2d ___ (on rehearing), 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." Thus, the majority's holding as to the survival action, that the general interruption of prescription rule that "[w]hen several parties share a single cause of action . . ., suit

by one interrupts prescription as to all" is clearly in violation of our express holding in ***Borel.*** Not only that, the majority's holding is based on ***Williams v. Sewerage & Water Bd. of New Orleans***, 611 So. 2d 1383 (La. 1993), which held that a tortfeasor and employer were solidarily liable such that interruption of prescription against one was effective against the other under La. C.C. art. 1799. ***Williams*** is not only inapplicable here, it is based on a general codal article on interruption of prescription, which we just held in ***Borel*** did not apply to medical malpractice claims. Lastly, for the same reasons we held in ***Borel*** that the general rules regarding interruption of prescription do not apply in medical malpractice cases, this general rule allowing relation back of pleadings to interrupt prescription, La. C.C.P. art. 1153, does not logically apply either.

For the reasons stated above, I respectfully dissent.

12/02/08

SUPREME COURT OF LOUISIANA

No. 2007-CC-0492

PAMELA WARREN, THERESA RENE WARREN, AND SARAH WARREN JIMENEZ

v.

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

On Writ of Certiorari to the Court of Appeal, First Circuit, Parish of East Baton Rouge

TRAYLOR, Justice, dissenting.

The majority opinion determines that the amendment of the instant petition relates back to the date upon which the original petition was filed, notwithstanding the fact that the amendment sought to add another plaintiff to the wrongful death/survival actions approximately nineteen months after the original filing. In reaching its conclusion, the majority refers to the "relation back" provisions of LA. CODE CIV. PROC. art. 1153, as well as referring to this Court's previous analysis of "relation back" principles in *Giroir v. South Louisiana Medical Center, Division of Hospitals*, 475 So.2d 1040 (La. 1985). While the aforementioned legislation and jurisprudence may be interpreted in such a way as to effectuate the outcome

ultimately reached by the majority, I disagree with the majority's interpretation given the facts of the case at hand. Furthermore, I respectfully suggest that we need to look more closely at the original *purpose* behind the law pertaining to the relation back of amendments.

The procedural article pertaining to the relation back of amendments is LA. CODE CIV. PROC. art. 1153, which provides:

> When the action or defense asserted in the amended petition or answer arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of filing the original pleading.[1]

Moreover, the *Giroir* Court analyzed the "relation back" principles and found:

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[1]This article was modeled upon the federal rules of procedure, specifically Federal Rule of Civil Procedure 15(c) which currently provides, in pertinent part:

> **(1)** ***When an Amendment Relates Back.*** An amendment to a pleading relates back to the date of the original pleading when:
>
> **(A)** the law that provides the applicable statute of limitations allows relation back;
>
> **(B)** the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out--or attempted to be set out--in the original pleading; or
>
> **(C)** the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:
>
> **(i)** received such notice of the action that it will not be prejudiced in defending on the merits; and
>
> **(ii)** knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

> Essentially the same criteria established by *Ray v. Alexandria Mall* should be applied to determine whether an amended petition adding a plaintiff relates back. While Rule 15(c) as phrased deals only with changing defendants, the Advisory Committee's Note of 1966 points out that its approach is also relevant to amendments substituting or adding plaintiffs: "... [T]he attitude taken in revised Rule 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs." The federal courts have held that it is clear that the considerations established in the rule were intended to apply to an amendment which substitutes or adds a plaintiff. Accordingly, an amendment adding or substituting a plaintiff should be allowed to relate back if (1) the amended claim arises out of the same conduct, transaction, or occurrence set forth in the original pleading; (2) the defendant either knew or should have known of the existence and involvement of the new plaintiff; (3) the new and the old plaintiffs are sufficiently related 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.[2]

At first blush, it appears as if the addition of Sarah Warren Jimenez ("Jimenez") would relate back to the original filing of the instant petition, as it can be argued that the aforementioned *Giroir* factors are met. However, I believe that the *Giroir* Court failed to explicitly address the implicit notion underlying the laws which provide for relation back of amendments.

Because we derived our procedural article from the federal rules, it is important to look at the origins of the federal "relation back" principles. The "relation back" principles developed as a way to ease the effects of statutes of limitation when mistakes had been made in the form of pleading, and the "relation back" laws were very narrowly tailored. Gradually, the law expanded to allow for the addition/change

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[2]*Giroir v. South Louisiana Medical Center, Division of Hospitals*, 475 So.2d 1040, 1044 (La. 1985)(citations omitted).

of defendants and plaintiffs; however, the underlying current of the law has remained the same. "Relation back" principles were designed to preserve one's opportunity to present a case, and have the case decided on its merits, as opposed to having the case dismissed on a technicality.

In the instant matter, there was no technical error of pleading, nor was a plaintiff "inadvertently" left out of the pending litigation. In this case, Jimenez was fully aware of the wrongful death/survival actions, yet she made a conscious decision to stay out of the litigation – until she changed her mind. "Relation back" principles should not be used to give an unfair advantage to a party who knowingly remains out of litigation, yet then has an opportunity to "wait and see" whether he/she wants to join in the action – and joins well after the applicable prescriptive periods have run.

Finally, I agree with Justice Victory in his dissent wherein he raises the conflict in the majority opinion here with our recent holding in *Borel v. Young*, 2007-0419 (La. 7/1/08), __ So.2d__ (on rehearing). On rehearing in *Borel*, a majority of this court held that medical malpractice claims are governed by the specific provisions of the Medical Malpractice Act regarding suspension of prescription, and not the general codal articles on the interruption of prescription. Consequently, the majority's application of the general interruption of prescription rules in this case conflicts with the holding in *Borel* on rehearing.[3]

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[3] I note parenthetically that I merely concurred in the result of the majority's opinion on rehearing in *Borel*, believing that the three-year time period of La. R.S. 9:5628 is peremptive, as found in the *Borel* original opinion.

Accordingly, because the majority opinion incorrectly found the amended petition to relate back to its original date of filing, I respectfully dissent.

12/02/08

SUPREME COURT OF LOUISIANA

No. 07-CC-0492

PAMELA WARREN, THERESA RENE WARREN, AND SARAH WARREN JIMENEZ

v.

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

KNOLL, Justice, dissenting

After carefully examining the facts of the present case, I find Jimenez's claim had prescribed. The record clearly demonstrates she made a conscious and informed decision not to join her mother and sibling in the medical malpractice petition for the alleged wrongful death of her father. Four years after the death of her father, when she learned that she would have to become involved in the suit as a witness, she then *arbitrarily* changed her mind and decided to join the case as a party plaintiff. The majority opinion now allows her to file her claim, defeating prescription through the use of the relation-back doctrine broadening the principles set forth in *Giroir v. South La. Medical Center*, 475 So.2d 1040 (La. 1985).

Under the circumstances of this case, not only is a relation-back analysis inappropriate, but further, the majority opinion today broadens the relation-back principles set forth in *Giroir* to now include arbitrary factors in allowing a relation-back amendment. Heretofore, the criteria of the *Giroir* jurisprudence was based on

the effect of non-prejudicial pleading mistakes. This departure from established jurisprudence is unwarranted in this case. In *Giroir*, the court explained that the fundamental purpose of prescription statutes is 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. *Giroir*, 475 So.2d at 1045. Prescriptive statutes seek to prevent prejudice to a defendant either by a delay in notification of the claim (the prejudice usually being the deprivation of an opportunity to perform a timely investigation of the claim) or by the loss of documents or witnesses which the defendant would have gathered or preserved if timely notified. *Findley v. City of Baton Rouge*, 570 So.2d 1168, 1170 (La. 1991); Tate, Amendment of Pleadings in Louisiana, 43 *Tul.L.Rev.* 211 (1969). Prescription statutes are designed to protect defendants against lack of notification of a formal claim within the prescriptive period, not against ***non-prejudicial*** pleading ***mistakes*** that their opponents make in filing the formal claim within the period. *Giroir*, 475 So.2d at 1045; *Findley*, 570 So.2d at 1170; Tate, *supra*; *Allstate Ins. Co. v. Theriot*, 376 So.2d 950, 954 (La. 1979); *Nini v. Sanford Brothers, Inc.*, 276 So.2d 262 (La. 1973). This well-established rule illustrates the flaw in the present case.

Prescription statutes protect defendants by barring rights not exercised within the prescriptive period. La. Civ. Code art. 3447. This protection is not intended, however, to extend to ***non-prejudicial*** pleading ***mistakes*** made by their opponents in filing the formal claim within the prescriptive period. *Giroir*, 475 So.2d at 1045;

Findley, 570 So.2d at 1170; *Tate*, *supra*; *Allstate*, 376 So.2d at 954. The relation-back principle announced in *Giroir* allows a plaintiff to revive his/her claim when that claim would otherwise be barred due to mistake or inadvertence in filing the formal claim within the prescriptive period, when ***no disadvantage*** will accrue to the opposing party. What the majority seeks to do in this case is to allow the revival of a knowingly renounced claim to the disadvantage of the opposing party. There is no mistake or inadvertence alleged in this case. Jimenez consciously decided not to participate in her family's claim during the prescriptive period and then, arbitrarily changed her mind.

The majority opinion sets forth an arbitrary precedence by giving more prescriptive rights to one who changes his/her mind about filing suit. One who chooses not to timely file suit and lets his/her cause of action prescribe cannot somehow preserve his/her cause of action under the relation-back doctrine announced in *Giroir*. The fact that the plaintiff's family filed timely does not give her a greater prescriptive right than others whose causes of action would be untimely.

The majority eviscerates the essential protective purpose of prescription by permitting the relation-back of the post-prescription amendment to the prejudice of the defendants. Although the record does demonstrate that the defendants had adequate notice of Jimenez's identity, the record also indicates that had the defendants sought out Jimenez and inquired whether she would be involved in the litigation for the first three-and-one-half years of these proceedings her answer would

have been unequivocally, "No." The defendants reasonably relied on her stated intention not to file a claim, and now, more than four years after the death of her father, are prejudiced in preparing their defense and timely investigation of her claim.

The majority's opinion allows a plaintiff, who made a conscious decision not to file timely, to use *Giroir* as a "back-up plan" in the event he/she later arbitrarily changes his/her mind and wishes to file a claim to the prejudice of the defendant. I find this conclusion in direct opposition to both *Giroir* and the well-established rules of prescription. For these reasons, I respectfully dissent from the majority opinion.

12/2/08

SUPREME COURT OF LOUISIANA

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On Writ of Certiorari to the Court of Appeal, First Circuit, Parish of East Baton Rouge

WEIMER, J., concurs in the result.

I write separately to point out that this case is distinguishable from the recent decision of this court in **Borel v. Young**, 07-0419 (La. 11/27/07), 989 So.2d 42, on reh'g, (7/1/08), 989 So.2d at 53-81. Factually, **Borel** presented the converse of the situation presented here. It involved an attempt to add a new and unrelated defendant who had not previously been sued to a pending medical malpractice suit. In this case, the defendants were all sued timely, consistent with the requirements of the Medical Malpractice Act, LSA-R.S. 40:1299.41, *et seq*. The issue presented here is not whether, as in **Borel**, a new defendant, not timely sued, can be brought into this proceeding, but whether the timely filed suit against the defendants can be amended to add the survival and wrongful death claims of a plaintiff who is the daughter and

sister of the original plaintiffs. The addition of related claims asserted by related plaintiffs to pending litigation is governed by LSA-C.C.P. art. 1153. Unlike the situation in **Borel**, where we were concerned with the interplay between the general articles on interruption of prescription found in the Louisiana Civil Code and the specific provisions of the Medical Malpractice Act with respect to suspension of prescription (which provisions, we noted, exist as an equalizer to litigants in situations where interruption of prescription is not available), the Medical Malpractice Act is silent with respect to the issue of relation back of pleadings. As acknowledged by this court in **Guitreau v. Kucharchuk**, 99-2570 (La. 5/16/00), 763 So.2d 575, 579, where 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 LSA-C.C.P. art. 1153 in this case.

Application of LSA-C.C.P. art. 1153 does not operate here simply to "get around medical malpractice prescription." The purpose of prescription statutes is to afford a defendant economic and psychological security if no claim is made timely, and to protect from stale claims and from the loss resulting from non-preservation of relevant proof. **Giroir v. South Louisiana Medical Center, Division of Hospitals**, 475 So.2d 1040, 1045 (La. 1985). Not one of those goals is undermined by the result

in the present case. In fact, amendment of the pleadings to include the survival claim of a major child of the decedent does not alter the defendants' liability whatsoever. The addition of the survival claim effects only the division *between the plaintiffs* of the proceeds of any judgment that might be rendered on liability. It does not affect defendants' notice of the existence of the claim or their proof. As to the wrongful death claim, a weighing of the **Giroir** factors reveals that the defendants knew or should have known of the existence of the claim within the prescriptive period, and that they will hardly be prejudiced in the preparation or conduct of their defense with regard to this claim, as the only additional evidence they will require will be that relating to the relationship between the plaintiff and decedent, which they have ample opportunity to discover.