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Court of Appeal of Louisiana, Fourth Circuit.
In re Medical Review Panel Diana LEBRETON
v.

Felix O. RABITO, M.D., Patrick C. Breaux, M.D. and Thomas A. Krefft, M.D.
No. 94-CA-1440.

Feb. 23, 1995.

Patient's surviving daughter sued physicians for medical malpractice, alleging that physicians wrongfully withdrew life-sustaining procedures from patient, thereby causing his death. The Civil District Court, Parish of Orleans, No. 92-16874, Division "D", [Louis A. DiRosa, J.](#), sustained defendants' exception of no right of action. Plaintiff appealed. The Court of Appeal, [Schott, C.J.](#), held that: (1) statute that authorizes medical malpractice defendant against whom claim is pending before medical review panel to invoke jurisdiction of court to have claim dismissed if defense is based upon prescription or peremption does not apply to any defense other than one arising out of statute of limitations, and (2) plaintiff had right to bring wrongful death and survival action as patient's surviving child.

Reversed and rendered.

West Headnotes

[1] **Health 198H**  **806**

[198H](#) Health

[198HV](#) Malpractice, Negligence, or Breach of Duty

[198HV\(G\)](#) Actions and Proceedings

[198Hk806](#) k. Malpractice Panels in General. [Most Cited Cases](#)

(Formerly 299k17.5 Physicians and Surgeons)

"Perempted," as used in statute authorizing medical malpractice defendant against whom claim is pending before medical review panel to invoke jurisdiction of court to have claim dismissed if claim had prescribed or otherwise was perempted prior to being filed, includes no defense other than one arising out of statute of limitations. [LSA-R.S. 9:5628](#), [40:1299.47](#), subd. B(2).

[2] **Health 198H**  **914**

[198H](#) Health

[198HVI](#) Consent of Patient and Substituted Judgment

[198Hk913](#) Terminal Illness; Removal of Life Support

[198Hk914](#) k. In General; Right to Die. [Most Cited Cases](#)

(Formerly 299k43.1 Physicians and Surgeons)

Pleading 302  **228.12**

[302](#) Pleading

[302V](#) Demurrer or Exception

[302k228.8](#) Peremptory Exceptions

[302k228.12](#) k. No Right of Action. [Most Cited Cases](#)

Medical malpractice defendants' claim that they were authorized to withdraw life-sustaining procedures from patient by law and by patient's spouse was matter of defense to claim by patient's daughter that defendants wrongfully withdrew life-sustaining procedures thereby causing patient's death, but defendants could not urge that claim by means of exception of no right of action; daughter had right to assert wrongful death and survival action as patient's surviving child. [LSA-C.C.P. art. 927\(5\)](#); [LSA-C.C. arts. 2315.1, 2315.2](#).

***1246** [C. John Caskey](#), Baton Rouge, for plaintiff-appellant.
[Edward J. Rice, Jr.](#), [Arthur F. Hickham, Jr.](#), Adams and Reese, New Orleans, for defendants-appellees.

Before [SCHOTT](#), C.J., and [ARMSTRONG](#) and [MURRAY](#), JJ.

[SCHOTT](#), Chief Judge.

[1] Pursuant to [LSA-R.S. 40:1299.47](#), plaintiff, Diana Lebreton, filed a request for a review by a medical review panel of her malpractice claim against defendants, Drs. Rabito and Breaux. Invoking the provisions of § 1299.47(B)(2), defendants filed an exception asserting that plaintiff had no right of action under [C.C.P. art. 927\(5\)](#) to bring her claim against them. The trial court sustained the exception and dismissed her claim. The principal issue is whether the procedure set out in § 1299.47(B)(2) applies to any defense other than one arising out of the statute of limitations provided by [R.S. 9:5628](#). Holding that it does not, we reverse the judgment of the trial court.

Plaintiff is one of several adult children of Albert L. Lebreton, Jr., who died on August 20, 1991. She alleges that defendants caused his death by withdrawing tube feeding, hydration, and intravenous medication. In her petition requesting the medical review panel plaintiff alleged that the laws relative to medical malpractice, [R.S. 40:1299.41](#) et seq., are inapplicable to her cause of action which she alleges to be a wrongful death and survival action pursuant to [C.C. arts. 2315.1](#) and [2315.2](#). She further alleged that her medical review panel request was made "out of an abundance of caution" and "eventually" she will assert her wrongful death and survival actions.

[R.S. 40:1299.58.5](#) outlines the procedure for the withholding of life sustaining procedures from a patient with a terminal and irreversible condition who has not previously made a declaration in this regard. The statute provides that in such a case the declaration may be made by persons in a specific order of priority. Pertinent to this case the patient's spouse not judicially separated is ranked ahead of an adult child of the patient. Alleging that decedent's spouse had made the declaration authorizing the withdrawal of life sustaining procedures from him, defendants' filed an exception to plaintiff's claim objecting that she had no right of action to make the claim.

[R.S. 40:1299.47\(B\)\(2\)](#) provides as follows:

(2)(a) A health care provider, against whom a claim has been filed under the provisions of this Part, may raise any exception or defenses available pursuant to [R.S. 9:5628](#) in a court of competent jurisdiction and proper venue at any time without need for completion of the review process by the medical review panel.

(b) If the court finds that the claim had prescribed or otherwise was preempted prior to being filed, the panel, if established, shall be dissolved.

This section authorizes a defendant against whom a claim is pending before a

medical *1247 review panel to invoke the jurisdiction of the court to have the claim dismissed, but only if the defense is based upon prescription or peremption under [R.S. 9:5628](#). Defendants mistakenly construe the word "perempted" in § (B)(2)(b) to include any peremptory exception listed in [C.C.P. art. 927](#). Paragraph (a) limits invocation of judicial jurisdiction to defenses pursuant to [R.S. 9:5628](#). Thus the references in paragraph (b) are to three year peremption of [R.S. 9:5628](#) along with its one year prescription. For a discussion of the distinction between prescription and peremption see [Bunge Corp. v. GATX Corp., 557 So.2d 1376, 1379 \(La.1990\)](#), *reh. den.* (April 1990). Since defendants' exception did not raise a defense under [R.S. 9:5628](#) the trial court erred in sustaining it.

[2] For the benefit of a reviewing court we hasten to add that even if defendants' exception of no right of action could be filed under § (B)(2) it would have no merit. The exception of no right of action raises the objection that the plaintiff has no interest in the institution of the suit. [C.C.P. art. 927\(5\)](#); and [Masson v. Champion Insurance Company, 591 So.2d 399 \(La.App. 4th Cir.1991\)](#). Plaintiff alleges that defendants wrongfully withdrew life-sustaining procedures from her father thereby causing his death. She asserts a wrongful death and survival action against them which she has the right to bring under [C.C. arts. 2315.1](#) and [2315.2](#) as a surviving child of the deceased. Defendants' claim that they were authorized to withdraw life-sustaining procedures by law and by decedent's spouse is a matter of defense to plaintiff's claim, but it may not be urged by means of an exception of no right of action.

Accordingly, the judgment of the trial court sustaining defendants' exception and dismissing plaintiff's claims against them is reversed and set aside. All costs are assessed against defendants.

REVERSED AND RENDERED.

La.App. 4 Cir.,1995.
Lebreton v. Rabito
650 So.2d 1245, 94-1440 (La.App. 4 Cir. 2/23/95)

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