

SUPREME COURT OF LOUISIANA

Ginger Bailey, et al. v. Dr. Gregory Khoury, et al.

891 So. 2d 1268 (La. 2005) · No. Nos. 2004-CC-0620, 2004-CC-0647, 2004-CC-0684 · Decided January 20, 2005

SUMMARY

The Louisiana Supreme Court considered when prescription begins for claims arising from prenatal injuries and birth defects allegedly caused by the mother's use of Depakote during pregnancy. The court held that prescription on both the mother's individual claim and her claim on behalf of her child commenced no earlier than the child's live birth, and affirmed the denial of the defendants' exceptions of prescription.

CASE DETAILS

COURT	Supreme Court of Louisiana
WRITING FOR THE COURT	Calogero, Chief Justice; Kimball, Justice; Victory, Justice; Knoll, Justice; Weimer, Justice
JURISDICTION	Louisiana
DECIDED	January 20, 2005
DOCKET	Nos. 2004-CC-0620, 2004-CC-0647, 2004-CC-0684
DISPOSITION	affirmed
PROCEDURAL POSTURE	Defendants sought supervisory review of lower-court denials of peremptory exceptions of prescription and a motion for summary judgment based on prescription in medical-malpractice and tort claims arising from prenatal injuries and birth defects.
STANDARD OF REVIEW	Review of peremptory exceptions of prescription and a prescription-based summary-judgment motion; defendants bore the burden of proving prescription unless the claims were prescribed on their face. Prescription statutes are strictly construed against prescription and in favor of the claim.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Dr. Gregory Khoury, et al., defendants v. Ginger Bailey, individually and as representative of Jada Nacaya Bailey, plaintiffs

TOPICS

medical malpractice

statute of limitations

negligence

statutory interpretation

civil procedure

PRACTICE AREAS

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QUESTIONS PRESENTED

1. Whether prescription on a child's claim for damages arising from prenatal injuries begins before live birth when the child's parent learns during pregnancy of the defects and their probable cause.
2. Whether prescription on the mother's individual claim for damages begins before the child's birth when the mother learns of the fetal defects and their probable cause.

HOLDINGS

1. A cause of action for damages arising from prenatal injuries does not accrue, and prescription does not commence, until the child is born alive.
2. On the record presented, prescription on the mother's individual claim did not commence before the child's birth because defendants failed to prove that the mother suffered actual and appreciable damages before birth sufficient to support accrual of her cause of action.

KEY QUOTATIONS

"Because La. Civ.Code art. 26 imposes an "implied condition" of live birth on an unborn child's right to be considered a "natural person," we find that a cause of action for damages arising from prenatal injuries does not accrue until the child's live birth." (1282-1283)

"Both knowledge and damages must be present for prescription to commence, and, as will be shown, the two factors work together in this case." (1284)

"We find that the defendants failed to carry their burden of proving that any damages suffered by Ms. Bailey prior to Jada's birth manifested themselves with sufficient certainty to support accrual of a cause of action." (1285-1286)

FACTUAL BACKGROUND

Ginger Bailey took Depakote during pregnancy after it was prescribed by health-care providers and dispensed by pharmacies. During the pregnancy, medical providers informed her that the fetus had birth defects probably caused by Depakote exposure. Jada Nacaya Bailey was born alive on March 20, 1998, with multiple defects, including spina bifida, hydrocephalus, and paralysis. Bailey filed medical-malpractice and tort claims on behalf of Jada and individually on March 17 and 19, 1999, respectively.

PROCEDURAL HISTORY

The district courts denied defendants' prescription exceptions. A three-judge court of appeal panel initially reversed and dismissed the claims, but the Louisiana Supreme Court vacated that decision because it was signed by only two judges and remanded for reargument before a five-judge panel. The five-judge panel denied writs

and affirmed the district-court rulings. The Louisiana Supreme Court granted and consolidated defendants' supervisory applications, affirmed the denial of the prescription exceptions, and remanded to the district court.

DISPOSITION

affirmed

REMAND INSTRUCTIONS

The decisions denying defendants' peremptory exceptions of prescription were affirmed, and the case was remanded to the district court.

CASES CITED

- Bailey v. Khoury, 840 So. 2d 582 (La. App. 4 Cir. 2002)
- Bailey v. Khoury, 845 So. 2d 1037 (La. 2003)
- Bailey v. Khoury, 868 So. 2d 821 (La. App. 4 Cir. 2004)
- Bailey v. Khoury, 872 So. 2d 1073 (La. 2004)
- Campo v. Correa, 828 So. 2d 502 (La. 2002)
- Hebert v. Doctors Memorial Hospital, 486 So. 2d 717 (La. 1986)
- Bouterie v. Crane, 616 So. 2d 657 (La. 1993)
- Wilkinson v. Wilkinson, 323 So. 2d 120 (La. 1975)
- Austin v. Abney Mills, Inc., 824 So. 2d 1137 (La. 2002)
- Branch v. Willis-Knighton Medical Center, 636 So. 2d 211 (La. 1994)
- Harvey v. Dixie Graphics, Inc., 593 So. 2d 351 (La. 1992)
- Cole v. Celotex Corp., 620 So. 2d 1154 (La. 1993)
- Jordan v. Employee Transfer Corp., 509 So. 2d 420 (La. 1987)
- Malek v. Yekani-Fard, 422 So. 2d 1151 (La. 1982)
- Danos v. St. Pierre, 402 So. 2d 633 (La. 1981)
- In re Medical Review Panel for the Claim of Derek Dede, 729 So. 2d 603 (La. App. 4 Cir. 1998)
- Wartelle v. Women's and Children's Hospital, 704 So. 2d 778 (La. 1997)
- Cooper v. Blanck, 39 So. 2d 352 (La. App. Orl. 1923)
- Falgout v. Dealers Truck Equipment Co., 748 So. 2d 399 (La. 1999)
- Wilson v. Kaiser Foundation Hospitals, 141 Cal. App. 3d 891, 190 Cal. Rptr. 649 (1983)
- Simmons v. Weisenthal, 29 Pa. D. & C.2d 54, 1962 WL 6989 (Pa. Com. Pl. 1962)
- Cosgrove v. Merrell Dow Pharmaceuticals, Inc., 788 P.2d 1293 (Idaho 1990)
- Elevating Boats, Inc. v. St. Bernard Parish, 795 So. 2d 1153 (La. 2001)
- Anthony Crane Rental, L.P. v. Fruge, 859 So. 2d 631 (La. 2003)

