

Judgment rendered September 1, 2021
Application for rehearing may be filed
within the delay allowed by Art. 2166,
La. C.C.P.

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ON REMAND

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No. 53,139-CA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

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IN RE: MEDICAL REVIEW
PANEL PROCEEDINGS FOR
THE CLAIM OF RHONDA
FERGUSON

Plaintiff-Appellant

versus

DR. JAMES G. HOWELL, DR.
MICHAEL BANDA AND WILLIS
KNIGHTON MEDICAL CENTER
D/B/A WILLIS KNIGHTON
BOSSIER HEALTH CENTER

Defendants-Appellees

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On Remand from the
Louisiana Supreme Court

Originally Appealed from the
Twenty-Sixth Judicial District Court for the
Parish of Bossier, Louisiana
Trial Court No. 157347

Honorable Robert Lane Pittard, Judge

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Before PITMAN, COX, and ROBINSON, JJ.

ROBINSON, J.

In this matter on remand from the Louisiana Supreme Court, this Court has been ordered to reconsider its previous ruling in light of *Kirt v. Metzinger*, 2019-1162 (La. 4/3/20), --- So.3d --- (2020), which interpreted La. R.S. 40:1231.8A(1)(e) to mean that a failure to timely pay a filing fee invalidates only the request to review a malpractice claim against the specific qualified healthcare provider for whom no fee was timely paid. Considering the foregoing as applied to the facts at hand, the trial court's granting of the exception of prescription is hereby REVERSED and this matter REMANDED for further proceedings.

FACTS AND PROCEDURAL HISTORY

The background in this matter was set forth in this Court's earlier opinion in *Medical Review Panel Proceedings for Claim of Ferguson v. Howell*, 53,139, pp. 1-4 (La. App. 2 Cir. 11/20/19), 284 So. 3d 1231,1232-3:

On November 2, 2016, Rhonda Ferguson underwent hernia repair surgery that was performed by Dr. James Howell. Dr. Michael Banda and surgical assistant Jacqueline Phelps assisted in the surgery. Two weeks later, Dr. Howell, with Phelps assisting, performed an incision and drainage surgical procedure on Ferguson. On November 21, Dr. Howell performed an exploratory laparotomy and small-bowel resection on Ferguson. Dr. Banda and Phelps assisted. All three surgeries took place at Willis-Knighton Bossier Health Center.¹

On October 31, 2017, Ferguson and her husband, Marshall Ferguson, mailed a request for the formation of a Medical Review Panel ("MRP") to the Division of Administration, which received the request on November 3, 2017. Named as defendants were Dr. Howell, Dr. Banda, Phelps, and Willis-Knighton Medical Center d/b/a Willis-Knighton Bossier Health Center. It was alleged that the medical malpractice occurred from November 2 to December 12, 2016. The request was forwarded to the Patient's Compensation Fund ("PCF").

On November 20, 2017, the PCF wrote to the Fergusons' attorney, Susan Hamm, that the request for an MRP had been

¹ Willis-Knighton is spelled without the hyphen in the request for the formation of a Medical Review Panel and in the case caption.

received. The request was given file number 2017-01195. The letter from the PCF notified Hamm that Willis-Knighton and Drs. Banda and Howell were qualified providers, but that the PCF was still verifying whether Phelps was a qualified provider. The letter further stated (all emphasis as in original):

In accordance with R.S. 40:1231.8(A)(1)(c) a filing fee of \$100 per qualified defendant **must be received by the [PCF] within 45 days of your receipt of this notice. Please remit full payment to the [PCF] in the amount of \$300.** This filing fee may only be waived upon receipt of an affidavit from a physician or a district court's in forma pauperis ruling as set forth in R.S. 40:1231.8(A)(1)(d). **Failure to comply shall render the request invalid and without effect as to all named health care providers including any previously qualified providers.** The request shall not suspend the time within which suit must be instituted.

Dr. Banda, Dr. Howell, and Willis-Knighton were given notice of Fergusons' request for an MRP on November 20, 2017.

On December 7, 2017, the PCF wrote to Hamm to acknowledge receipt of a \$300 money order as payment of the filing fees for Willis-Knighton, Dr. Howell, and Dr. Banda. The letter also instructed Hamm concerning the process for selecting a chairman for the MRP.

On January 5, 2018, the PCF notified Hamm that Phelps was also a qualified provider. The letter from the PCF stated (all emphasis as in original):

In accordance with R.S. 40:1231.8(A)(1)(c) a filing fee of \$100 per qualified defendant **must be received by the [PCF] within 45 days of your receipt of this notice. Please remit full payment to the [PCF] in the amount of \$100.** This filing fee may only be waived upon receipt of an affidavit from a physician or a district court's in forma pauperis ruling as set forth in R.S. 40:1231.8(A)(1)(d). **Failure to comply shall render the request invalid and without effect as to all named health care providers including any previously qualified providers.** The request shall not suspend the time within which suit must be instituted.

The PCF gave notice to Phelps of the Fergusons' request for an MRP on January 5, 2018.

The \$100 filing fee was not submitted. On March 5, 2018, the PCF wrote to Hamm that because of the failure to pay the

\$100 filing fee, the Fergusons' request for an MRP was considered invalid and without effect. A refund check for \$300 was sent to Hamm.

On March 9, 2018, the Fergusons mailed a second request for an MRP to the Division of Administration. This time, only Dr. Banda, Dr. Howell, and Willis-Knighton were named as defendants. The request was received by the Division of Administration on March 12, 2018.

On March 20, 2018, the PCF wrote to Hamm to acknowledge receipt of the request for an MRP. A new number of 2018-00236 was assigned to the file. Hamm was instructed to pay a filing fee of \$300. Other than the amount listed, the language in this letter concerning the filing fee and the penalty for not doing so was identical to what was in the prior letters from the PCF to Hamm acknowledging receipt of the request. In a letter to Hamm dated April 10, 2018, the PCF acknowledged receipt of the \$300 filing fee for the new request for an MRP.

In October of 2018, Dr. Banda, Dr. Howell, and Willis-Knighton filed exceptions of prescription in the district court against the Fergusons' medical malpractice claim.² They asserted that the first request for an MRP was invalid and without effect and that the second request for an MRP was filed more than one year after the alleged medical malpractice occurred.

Following a hearing on the exceptions, the district court granted the exceptions and dismissed the malpractice claim. The Fergusons have appealed.

In its November 20, 2019, opinion, this Court affirmed the trial court's judgment granting the exceptions and its dismissal of the Fergusons' malpractice claim, finding that the trial court was not manifestly erroneous in determining the claim was prescribed. The Court heavily relied on the Fourth Circuit's opinions in *Kirt v. Metzinger*, 2019-0180 (La. App. 4 Cir. 6/19/19), 274 So. 3d 1271, and *Medical Review Complaint by Downing*, 2018-1027 (La. App. 4 Cir. 5/8/19), 272 So. 3d 55, *writs denied*, 2019-00929 (La. 9/24/19), 278 So. 3d 979, 2019-00938 (La. 9/24/19), 279 So. 3d 936, 2019-00939 (La. 9/24/19), 278 So. 3d 979, 2019-00943 (La. 9/24/19), 279 So. 3d 936, which was also relied upon by the Court in *Kirt v. Metzinger*. In both cases, it was held that a medical malpractice claimant's

² La. R.S. 40:1231.8(B)(2)(a) allows defendants to file exceptions in court.

failure to pay the full filing fee invalidates the request as to all providers regardless of what correspondence from PCF indicates.

However, on November 25, 2019, a mere *five days* following the rendering of this Court's opinion in this case, the Louisiana Supreme Court granted a writ of certiorari in *Kirt v. Metzinger* to consider the proper interpretation and application of La. R.S. 40:1231.8A(1)(e) where a claimant fails to pay the filing fee for adding a defendant to a pending medical review panel proceeding. The Supreme Court rendered its decision on April 3, 2020, which reversed and remanded the Fourth Circuit's decision in that case. *Kirt v. Metzinger*, 2019-1162 (La. 4/3/20), --- So.3d --- (2020). It found that the lower courts' interpretation of La. R.S. 40:1231.8 was inconsistent with the statutory language and held that the failure to timely pay a filing fee invalidates only the request to review a medical malpractice claim against the specific qualified healthcare provider for whom no fee was timely made. *Id.*

The writ of certiorari was denied by the Louisiana Supreme Court approximately two months prior to the granting of the writ in *Kirt*.

The Fergusons filed a writ of certiorari with the Louisiana Supreme Court, which was granted on June 22, 2021, and the matter was remanded to this Court for reconsideration in light of the April 3, 2020 opinion in *Kirt*. *Id.*

DISCUSSION

A medical malpractice action must be filed “within one year from the date of the alleged act, omission, or neglect, or within one year from the date of discovery of the alleged act, omission, or neglect[.]” La. R.S. 9:5628(A).

Even a claim filed within one year of the date of discovery must still be filed within three years from the date of the alleged act, omission, or neglect. *Id.*

The filing of the request for a review of a medical malpractice claim shall suspend the time within which suit must be instituted. La. R.S.

40:1231.8(A)(2)(a). However, La. R.S. 40:1231.8(A)(1)(e) states:

Failure to comply with the provisions of Subparagraph (c) or (d) of this Paragraph within the specified forty-five day time frame in Subparagraph (c) of this Paragraph shall render the request for review of a malpractice claim invalid and without effect. Such an invalid request for review of a malpractice claim shall not suspend time within which suit must be instituted in Subparagraph (2)(a) of this Subsection.

Subparagraph (c) of La. R.S. 40:1231.8(A)(1) referenced above states:

A claimant shall have forty-five days from the date of receipt by the claimant of the confirmation of receipt of the request for review in accordance with Subparagraph (3)(a) of this Subsection to pay to the board a filing fee in the amount of one hundred dollars per named defendant qualified under this Part.

Subparagraph (d) is not applicable in this matter.

The Fergusons maintained that the PCF exceeded its authority and acted arbitrarily and capriciously when it returned the \$300 filing fee and notified them that their request for an MRP in file number 2017-01195 was invalid and without effect. They asserted that their claims were timely established against Dr. Banda, Dr. Howell, and Willis-Knighton when the PCF accepted the filing fee, and that the filing fee later required for Phelps that was not paid had no bearing on these claims.

This Court's previous opinion disagreed with the Fergusons' contentions, supporting the trial court's stance that the failure to pay the filing fee for Phelps rendered the entire request for review invalid and the time for instituting suit not suspended for all defendants. It relied on the Fourth Circuit's decisions in both the *Kirt* case and in *Medical Review*

Complaint by Downing, supra, which was also relied upon by the Court in *Kirt v. Metzinger*.

The Fourth Circuit in *Downing* determined that the trial court was not manifestly erroneous in finding that the claimant's request was invalid and without effect as to all (private) defendants, instead of only two of the five, when only \$300 was paid to the PCF; therefore, prescription was not suspended for all defendants. It further noted that the PCF lacks authority to determine which providers are covered by the payment of a partial filing fee.

In *Kirt v. Metzinger, supra*, the Fourth Circuit considered whether a request for an MRP can be perfected as to some, but not all, defendants when the filing fees are not paid in full. Relying on *Downing*, the Fourth Circuit determined that it could not.

The three defendants in *Kirt* were initially named in a request for the formation of an MRP made on September 23, 2011. On October 4, the PCF notified the Kirts that the three providers were qualified and that a filing fee of \$100 per defendant was due within 45 days. On October 17, the Kirts sent correspondence to the PCF seeking the addition of two other defendants, a named nurse and an unidentified nurse, and included a check for \$500 for filing fees. On October 31, the PCF wrote to the Kirts that their request was being returned because the full name of the unidentified nurse was not provided, but did acknowledge the \$500 filing fee payment. On November 17, the Kirts sent correspondence to the PCF stating that the name of that nurse remained unknown. They also requested that the anesthesia provider who employed the unidentified nurse be added as a defendant. On December 2, the PCF acknowledged receipt of the November 17 letter, confirmed the anesthesia provider was qualified, and noted that

verification of the identified nurse as a qualified provider was ongoing. On March 9, 2012, the Kirts wrote to the PCF that they had learned that Martin was the name of the unidentified nurse. On March 21, the PCF confirmed that both nurses were qualified providers and requested an additional payment of \$100 for the filing fee within 45 days. On May 17, the PCF wrote to the Kirts that because the \$100 fee had not been received, the request was invalid and without effect as to Martin.

A petition for damages was ultimately filed in the district court. After the three initial defendants were dismissed by summary judgment, exceptions of prescription were filed by the three remaining defendants, including Martin. The court granted the exceptions.

The Kirts argued on appeal that prescription had been suspended because the May 17 letter from the PCF showed that their request had been perfected against all defendants other than Martin. While the PCF correspondence seemed to indicate a position that an incomplete payment did not invalidate the *entire* request, the Fourth Circuit rejected the Kirts' argument, based on the conclusion in *Downing* that a claimant's failure to pay the full filing fee invalidates the request as to all providers regardless of what correspondence from PCF indicates. It held that an incomplete payment, only a partial payment, completely invalidates the entire request for review. The Court in *Downing* also emphasized that the PCF cannot designate which providers a partial filing fee applies to.

In *Kirt v. Metzinger*, the Louisiana Supreme Court analyzed in detail the proper interpretation and application of La. R.S. 40:1231.8A(1)(e) where a claimant fails to pay the filing fee for adding a defendant to a pending medical review panel proceeding, revisiting the facts in that case. Although

the filing of the request for review and the payment of the fee are inexorably joined, *Medical Review Panel of Davis v. Louisiana State Univ. Health Sciences Ctr.-Shreveport*, 41,273 (La. App. 2 Cir. 8/25/06), 939 So. 2d 539, writ denied, 2006-2343 (La. 12/8/06), 943 So. 2d 1092, the Louisiana Supreme Court found that the lower courts' interpretation of La. R.S. 40:1231.8 was inconsistent with the statutory language and legislative intent. It clarified La. R.S. 40:1231.8 to mean that failure to timely pay a filing fee invalidates *only* the request to review a medical malpractice claim against the *specific* qualified healthcare provider for whom no fee was timely made. In other words, an invalid request due to failure to pay a filing fee does not suspend the time within which suit must be instituted, but only as to that particular defendant.

The facts in the case at hand are strikingly similar to those in *Kirt*. The Fergusons paid \$300 in filing fees in conjunction with their initial request for an MRP, \$100 for three of the four defendants, who were confirmed qualified providers, but not paying any fee for the fourth defendant since it had not yet been determined whether she was a qualified provider. Following the Fergusons' failure to pay the remaining \$100 fee upon confirmation that the fourth defendant was a qualified provider, the PCF invalidated the entire request for an MRP as to **all** defendants and refunded the Fergusons \$300 payment. The Fergusons mailed a second request for an MRP naming only the original three qualified providers as defendants, which was processed by the PCF, but the district court ultimately granted the defendants' exceptions of prescription and dismissed the malpractice claim.

CONCLUSION

Analyzed in light of the Supreme Court's clarified interpretation of La. R.S. 40:1231.8 in *Kirt v. Metzinger*, it is clear that the Fergusons' failure to timely pay the additional \$100 filing fee after confirmation that Phelps was a qualified provider invalidates *only* the request to review a medical malpractice claim against Phelps, the *specific* qualified healthcare provider for whom no fee was timely made. Therefore, the Fergusons' request for a Medical Review Panel mailed on October 31, 2017, was valid and prescription was suspended as to the originally named qualified defendants – Dr. Banda, Dr. Howell, and Willis-Knighton. Thus, the second request for a Medical Review Panel was **not** prescribed on its face. Only the Fergusons' medical malpractice claim as to Phelps for which they failed to timely pay a filing fee was prescribed. Therefore, the trial court is REVERSED and this matter REMANDED for further proceedings. Each party is to bear their own costs.

REVERSED and REMANDED.