MAY 16, 2000

SUPREME COURT OF LOUISIANA

No. 99-C-2570

BEN GUITREAU

Versus

ANDREW KUCHARCHUK, M.D.

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

JOHNSON, Justice*

Plaintiff, Ben Guitreau, filed a medical malpractice action, claiming that the surgery performed on his knee by defendant, Dr. Andrew Kucharchuk, fell below the acceptable standard of care for orthopedic surgeons. In *LeBreton v. Rabito*, 97-2221 (La. 7/8/98), 714 So.2d 1226, "we save[d] for another day the question of whether the medical malpractice victim gets any period of time that remains unused at the time of the filing of the request for the medical review panel when the ninety-day period of suspension after the decision of the medical review panel is completed." *LeBreton*, 714 So.2d 1229 n. 5. The First Circuit Court of Appeal has answered the question in the affirmative, and we granted this writ of certiorari to determine the accuracy of that court's decision. We affirm the court of appeal's decision and hold that when the ninety-day period of suspension after the decision of the medical review panel is completed, plaintiffs in medical malpractice actions are entitled to count the period of time, under LSA-R.S. 9:5628, that remains unused at the time the request for a medical review panel is filed. We also hold that the court of appeal did not err in finding that prescription commenced on November 23, 1992 and that plaintiff's action had not prescribed. Accordingly, we affirm the court of appeal's decision and remand this matter to the trial court.

FACTS AND PROCEDURAL HISTORY

On August 11, 1992, plaintiff, Ben Guitreau, underwent orthopedic surgery on his left knee. The surgery was performed by Dr. Andrew Kucharchuk. After surgery, plaintiff attended physical therapy and

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*Victory, J., not on panel. See Rule IV, Part 2, § 3.

remained under Dr. Kucharchuk's care. Plaintiff testified that Dr. Kucharchuk informed him that he was doing well and never indicated that there was anything wrong. However, plaintiff alleges that, following the surgery, his knee continued to swell, and his condition worsened.

Because plaintiff's knee remained swollen, his employer became concerned that he was unable to return to work and referred him to the company physician, Dr. John Fraiche. Dr. Fraiche examined plaintiff and then referred him to Dr. Brian Griffith, an orthopedic surgeon. On October 30, 1992, plaintiff was examined by Dr. Griffith. Plaintiff presented Dr. Griffith with a copy of the videotape of the surgery performed by Dr. Kucharchuk. On November 2, 1992, Dr. Griffith's notes reflect that the "tape was inconclusive as to how much of [the damage] was removed or how completely." The doctor also noted that plaintiff had "significant damage" to his knee. Plaintiff visited Dr. Griffith again on December 16, 1992. From that visit, Dr. Griffith noted that he "talked with [plaintiff] about his alternatives." Plaintiff testified that he became aware of the need for additional surgeries around "the end of November or early December."

Plaintiff testified that, on the suggestion of his cousin, he decided to consult an attorney. On November 23, 1992, plaintiff visited an attorney and signed a medical authorization form. He was informed by the attorney that an independent orthopedic surgeon would review his medical records.

On August 2, 1993, plaintiff filed a claim with a medical review panel. The panel rendered an opinion in plaintiff's favor on March 10, 1995, and plaintiff received the opinion on March 14, 1995. On May 19, 1995, plaintiff filed a petition for damages in the Twenty-first Judicial District Court, alleging Dr. Kucharchak's conduct in performing the surgery fell below the acceptable standard of care for orthopedic surgeons. Plaintiff further alleged that the surgery failed to correct his knee problems and caused additional damage to his knee.

On August 25, 1995, plaintiff filed a First Supplemental and Amending Petition, naming Southeastern Orthopedics, Inc. as an additional defendant. Plaintiff alleged that Southeastern Orthopedics was a professional medical corporation established by Dr. Kucharchak and that Dr. Kucharchak was in the course and scope of his employment with the corporation at the time of the alleged malpractice. Neither defendant was served with plaintiff's original or supplemental petition until September 15, 1995.

Both defendants filed a declinatory exception of improper venue, asserting that Dr. Kucharchuk was a resident and domiciliary of East Baton Rouge Parish and that his medical office was located in East

Baton Rouge Parish. Defendants further alleged that plaintiff's surgery was performed at the Medical Center of Baton Rouge which is also located in East Baton Rouge Parish. Furthermore, Southeastern Orthopedics, Inc. was a Louisiana Corporation with its registered office in East Baton Rouge Parish. Following a hearing, the trial court maintained the exception and transferred the case to the Nineteenth Judicial District Court.

After the case was transferred, defendants filed a peremptory exception of prescription, alleging that prescription commenced on August 11, 1992, the date of plaintiff's surgery. Defendants also alleged that plaintiff filed suit in an improper venue and did not serve defendants until September 15, 1995. The trial court maintained the exception, finding that plaintiff's action had prescribed. The trial court specifically found that plaintiff had sufficient information to make a claim for malpractice as of November 2, 1992, the date Dr. Griffith viewed the videotape and noted in plaintiff's records that Dr. Kucharchak had performed plaintiff's surgery incorrectly. The trial court allowed plaintiff the benefit of the unused prescriptive period when plaintiff requested the medical review panel and concluded that plaintiff's suit was prescribed by three days when Dr. Kucharchak was served on September 15, 1995 because plaintiff had received notice of the panel's decision on March 14, 1995.

Plaintiff appealed to the First Circuit Court of Appeal which reversed the trial court's ruling. *Guitreau v. Kucharchuk*, 97-0169 (La.App. 1 Cir. 2/20/98) (Unpublished). After conducting a *de novo* review of the record, the appellate court found that the petition was not prescribed on its face and that defendants failed to meet their burden of proving that the action had prescribed because they failed to prove when plaintiff discovered his medical malpractice claim. The court of appeal concluded that prescription commenced on November 23, 1992, the date upon which plaintiff discovered his malpractice claim and consulted an attorney and allowed plaintiff the benefit of the unused prescriptive period when the medical review panel was instituted on August 2, 1993. The court found that prescription ran from November 23, 1992 until the claim was presented to the medical review panel on August 2, 1993, and at that point, the prescriptive period was suspended until ninety days following March 14, 1995, the date plaintiff received the medical review panel's opinion.

Defendants filed an application for certiorari with this court, urging the court to reinstate the trial court judgment. Defendants later filed a supplement to the writ application in light of this court's decision

in *LeBreton*. This court granted the writ and remanded the case to the First Circuit Court of Appeal for a decision concerning the question left open in footnote 5 of the *LeBreton* case, that is, whether the medical malpractice victim is allowed to count any period of time that remains unused at the time of the filing of the request for the medical review panel when the ninety-day period of suspension after the decision of the panel is complete. *Guitreau v. Kucharchuk*, 98-0756 (La. 11/6/98), 726 So.2d 915.

On remand, the court of appeal concluded that a patient is entitled to the remaining days of the prescriptive period that are unused prior to filing a claim with the medical review panel. The appellate court again concluded that plaintiff's suit was timely because prescription did not commence until November 23, 1992. *Guitreau v. Kucharchuk*, 97-0169 (La.App. 1 Cir. 7/29/99), 740 So.2d 232.

Once again, defendants filed an application for certiorari with this court. By order dated November 24, 1999, we granted their writ application. *Guitreau v. Kucharchuk*, 99-2570 (La. 11/24/99), ___ So.2d ___.

DISCUSSION

In their first assignment of error, defendants argue that the court of appeal erred in ruling that plaintiff's petition, which was not served within ninety days after plaintiff received the medical review panel's decision, was timely.

LSA-R.S. 9:5628 provides that all actions against physicians arising out of patient care must be filed within one year from the date of the alleged act or within one year from the date of the discovery of the act. The Medical Malpractice Act provides, in pertinent part:

> The filing of the request for a review of a claim shall suspend the time within which suit must be instituted . . . until ninety days following notification, by certified mail . . . to the claimant or his attorney of the issuance of the opinion by the medical review panel. . ..

LSA-R.S. 40:1299.47(A)(2)(a). Article 3472 of the Louisiana Civil Code provides:

> The period of suspension is not counted toward accrual of prescription. Prescription commences to run again upon the termination of the period of suspension.

The explicit language of LSA-R.S. 40:1299.47(A)(2)(a) provides that the time for filing a suit is suspended during the pendency of the determination by the medical review panel until ninety days following notification of the panel's decision by certified mail. LSA-C.C. art. 3472 makes it clear that the period of

suspension is not counted. In *LeBreton*, we noted:

> Suspension of prescription constitutes a temporary halt to its running. One doctrinal source aptly describes suspension as a period of time in which prescription slumbers. Prescription is suspended for as long as the cause of suspension continues. After the cause for the suspension ends, the prescriptive time begins running and the "time which precede[d] the suspension is added to the time which follows it to compose the necessary period; only the period of the suspension is deducted."

LeBreton at 1229, citing G. Baudier-Lacantinerie & A. Tissier, TRAITE THEORIQUE ET PRATIQUE DE DROIT CIVIL, Nos. 415, 368, 389 (4th ed. 1924), reprinted in 5 CIVIL LAW TRANSLATIONS at 15 (La. St. Law Inst. Trans. 1972).

Where two statutes deal with the same subject matter, they should be harmonized if possible; however, if there is a conflict, the statute specifically directed to the matter at issue must prevail. *State ex rel. Bickman v. Dees*, 367 So.2d 283 (La. 1978). There is no conflict between LSA-R.S. 40:1299.47 and LSA-C.C. art. 3472. Thus, the two provisions must be read in conformity with each other.

When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature. LSA-C.C. art. 9. The words of a law must be given their generally prevailing meaning. LSA-C.C. art. 11.

LSA-R.S. 40:1299.47 specifically provides that the time for which a suit must be filed is suspended by the filing of a request with the medical review panel. LSA-C.C. art. 3472 makes it clear that the time during which prescription is suspended "*is not counted toward the accrual of prescription*." (Emphasis added). Because the word "suspend" was not specifically defined by the legislature, we must give it its "generally prevailing meaning." Black's Law Dictionary defines "suspend" as follows:

> To interrupt; to cause to cease for a time; to postpone; to stay, delay, or hinder; to discontinue temporarily, but with an expectation or purpose of resumption.

BLACK'S LAW DICTIONARY 1446 (6TH ED. 1990). The Webster's Dictionary definition of "suspend" is as follows:

> To cause to stop temporarily; to set aside or make temporarily inoperative, to defer to a later time on specified conditions; to cease operation temporarily.

WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1189 (1990).

Accordingly, we hold that, when the ninety-day period of suspension after the decision of the medical review panel is completed, plaintiffs in medical malpractice actions are entitled to the period of time, under LSA-R.S. 9:5628, that remains unused at the time the request for a medical review panel is filed. Once a medical malpractice claim is submitted to the medical review panel, the prescriptive period is temporarily discontinued. Prescription commences to run again ninety days after the plaintiff has received notice of the panel's decision. That is, when the ninety day period expires, the period of suspension terminates and prescription commences to run again. Once prescription begins to run again, counting begins at the point at which the suspension period originally began.

Having decided that issue, we must now resolve the question of when prescription began to toll this plaintiff's claim. In other assignments of error, defendants assert that, even if this court agrees that plaintiff is entitled to the unused prescription time, plaintiff's petition has prescribed. Defendants further argue that the court of appeal erred in reversing the trial court's determination that plaintiff had sufficient notice of his cause of action as of November 2, 1992.

In *Jordan v. Employee Transfer Corp.*, 509 So. 2d 420 (La. 1987), we defined the kind of notice that will start the running of prescription. The one-year prescriptive period for a medical malpractice action will not begin to run at the earliest possible indication that a patient may have suffered some wrong. *Jordan*, 509 So. 2d at 423. Prescription should not be used to force a person who believes he may have been damaged in some way to rush to file suit against every person who might have caused his damage. *Id.* Mere notice of a wrongful act will not suffice to commence the running of the prescriptive period. Rather, in order for the prescriptive period to commence, the plaintiff must be able to state a cause of action — both a wrongful act and resultant damages, *Gasen v. East Jefferson General Hosp.*, 96-590 (La.App. 5 Cir. 12/30/96), 687 So.2d 120; *writ denied*, 97-0738 (La. 5/1/97), 693 So.2d 735, citing *Rayne State Bank and Trust Co. v. National Union Fire Ins. Co.*, 483 So.2d 987 (La. 1986). Ignorance of the probable extent of injuries materially differs from ignorance of actionable harm, which delays commencement of prescription. *Gasen, supra*.

In the instant case, plaintiff filed his complaint with the medical review panel on August 2, 1993, alleging damages as a result of surgery performed on August 11, 1992. In the petition, plaintiff asserted that the alleged malpractice occurred on August 11, 1992. However, the petition did not specifically

identify the date which the alleged malpractice was discovered. The trial court found, as a matter of fact, that plaintiff had sufficient information to incite curiosity as to the cause of his problems as of November 2, 1992. The court of appeal reversed the trial court's ruling, finding that the first indication in the record that plaintiff knew of the doctor's conduct was November 23, 1992.

The record does not support the trial court's conclusion that plaintiff had sufficient information to file a claim on November 2, 1992. According to Dr. Griffith's notes, he reviewed plaintiff's x-rays on November 2, 1992 and noted that plaintiff had "significant damage" to his knee. However, the medical records do not reflect when or if Dr. Griffith suggested to plaintiff that his condition was the result of negligent treatment. It was not until December 16, 1992 that the doctor "talked with [plaintiff] about his alternatives." Again, it is unclear whether the doctor shared any suspicions with plaintiff regarding Dr. Kucharchuk's care. Plaintiff's testimony was consistent with the doctor's notes in that plaintiff testified that he became aware that he needed additional surgeries "around the end of November or early December." Plaintiff did not testify that he consulted an attorney because of any particular knowledge of wrongdoing. He testified, without contradiction, that he decided to consult an attorney "just to be safe." The record does not reflect that plaintiff had notice of any actionable harm on November 2, 1992. Therefore, we affirm the court of appeal's ruling that plaintiff discovered that he had a cause of action on November 23, 1992, when he consulted with an attorney.

We hold that prescription commenced on November 23, 1992 and ran until August 2, 1993, the date the claim was presented to the medical review panel. At that point, 252 days had elapsed. Prescription was suspended from August 2, 1993, until March 14, 1994, the date plaintiff received notice of the panel's decision. Prescription was then suspended from March 15, 1994 until June 12, 1994, the date the ninety-day suspension period expired. On June 13, 1994, prescription began to run again and continued to run until September 15, 1994, the date Dr. Kucharchuk was served with the petition. An additional ninety-five days elapsed between June 13, 1994 and September 15, 1994.

The total prescriptive time that elapsed from November 23, 1992 to September 15, 1994 was 347 days. Therefore, the claim had not prescribed because plaintiff had an additional eighteen (18) days to file his action.

Defendants also argue that the court of appeal erred in failing to apply the manifest error standard

of review to the trial court's factual findings. A trial court's finding of fact may not be reversed absent manifest error or unless clearly wrong. *Stobart v. State of Louisiana, through Department of Transportation and Development*, 92-1328 (La. 4/12/93), 617 So. 2d 880. The reviewing court must do more than just simply review the record for some evidence which supports or controverts the trial court's findings; it must instead review the record in its entirety to determine whether the trial court's finding was clearly wrong or manifestly erroneous. *Stobart* at 882. As stated above, the record does not support the trial court's conclusion that plaintiff "had sufficient information to incite curiosity as to the cause of his discomfort" on November 2, 1992. Thus, even applying the manifest error standard of review, we find that the trial court's finding that prescription commenced on November 2, 1992 is clearly wrong.

CONCLUSION

We hold that when the ninety-day period of suspension after the decision of the medical review panel is completed, plaintiffs in medical malpractice actions are entitled to the period of time that remains unused at the time the request for a medical review panel is filed. We also hold that the court of appeal did not err in finding that prescription commenced on November 23, 1992 and that plaintiff's action had not prescribed. Accordingly, we affirm the court of appeal's decision and remand this matter to the trial court.

AFFIRMED AND REMANDED.