

NOT DESIGNATED FOR PUBLICATON

STEVE DOUGLASS, INDIVIDUALLY AND
ON BEHALF OF HIS MINOR CHILD, ANNIE
MARIE DOUGLASS, AND THE MINOR
CHILDREN, ADAM RUBEN DOUGLASS
AND ANDY ALTON DOUGLASS; AND
KATHY DOUGLASS

NO. 02-CA-851

FIFTH CIRCUIT

COURT OF APPEAL

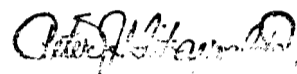
STATE OF LOUISIANA

VERSUS

ALTON OCHSNER MEDICAL
FOUNDATION; JOHN L. OCHSNER, M.D.;
TERRY D. KING, M.D.; AND THE
AMERICAN ASSOCIATION OF BLOOD
BANKS

**COURT OF APPEAL
FIFTH CIRCUIT**

FILED DEC 30 2002



ON APPEAL FROM THE 24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 487-599, DIVISION "B"
HONORABLE FREDERICKA WICKER, JUDGE PRESIDING

DECEMBER 30, 2002

**SOL GOTHARD
JUDGE**

Panel composed of Judges Edward A. Dufresne, Jr.,
Sol Gothard, and Walter J. Rothschild

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Blood Banks, Inc.)

AFFIRMED

 In this medical malpractice action defendants, Terry D. King, M.D., The American Association of Blood Banks, Inc., The Pediatric Clinic, Wilbur G. Beauregard, M.D., Alton R. Irwin, M.D., and J.P. Rosales, M.D. were dismissed from the suit on a grant of an exception of prescription. Plaintiffs appeal that ruling. For reasons that follow, we affirm.

The plaintiffs, Steve and Kathy Douglass, filed this action individually and on behalf of their minor children, Annie, Adam, and Andy for injuries sustained by Annie Douglass as a result of a blood transfusion performed at Ochsner Foundation Hospital on January 24, 1983. The petition alleges, and none of the parties dispute, that Annie underwent elective heart surgery on January 24, 1983 and contracted the Human Immunodeficiency Virus (HIV), which caused her to develop Acquired Immune Deficiency Syndrome (AIDS), through a blood transfusion performed in the course of the surgery. Annie, who was three-years-old at the time of the surgery, required five units of blood prior to the surgery and more afterward. In March 1993 she tested HIV positive. This action was filed as a result of that finding.

In March 1994, plaintiffs filed a petition for review with the Patients' Compensation Fund in which they named Alton Ochsner Medical Foundation Blood Bank, John L. Ochsner, M.D. and Alton Ochsner Medical Foundation as defendants. In a subsequent amending petition to the medical review panel filed in August 1994, plaintiffs added Annie's pediatric cardiologist, Dr. Terry King, and the American Association of Blood Banks, Inc. as defendants.

After a finding of no malpractice by the medical review panel, plaintiffs filed suit against all defendants in the Twenty-Fourth Judicial District Court in 1996. In a supplemental and amending petition, plaintiffs added the treating pediatricians, Wilbur G. Beauregard, M.D., Alton R. Irwin, M.D., and The Pediatric Clinic, as defendants.¹

The hospital and Dr. Ochsner were released from the action for malpractice on summary judgments. On appeal, this Court upheld those rulings and the Supreme Court denied writ applications of Certiorari and/or Review.² Subsequently, the remaining defendants filed exceptions of prescription, arguing they were added untimely and the only timely sued defendants were dismissed from the action. After a hearing on the merits, the trial court rendered judgment granting the exceptions and dismissing all remaining defendants from the action. It is from that judgment that plaintiffs appeal.

In brief to this Court, plaintiffs assign three errors. They assert the trial court erred in holding that the action against Dr. King prescribed irrespective of the discovery rule and/or the termination rule applicable to physician/patient relationships. Plaintiffs also maintain that the trial court erred in shifting the burden of proof to the plaintiffs when the complaint filed with the Medical Review

¹ It appears that these parties went before a separate medical review panel. However, that cannot be confirmed from the record before us.

² *Steve Douglass, Individually and on Behalf of his Minor Child, Annie Marie Douglass; and the Minor Children, Adam Ruben Douglass and Andy Anton Douglass; and Kathy Douglass v. Alton Ochsner Medical Foundation; John L. Ochsner, M.D.; Terry D. King, M.D.; and The American Association of Blood Banks, Inc.*, 00-1943 (La.App.5 Cir. 5/30/01); writ denied 01-1933 (La. 11/2/01).

Panel and the Petition for Damages filed with the District Court alleged continuous treatment by the defendant. Finally, plaintiffs argue the trial court erred in holding that the exceptions of all other defendants had prescribed on the basis of joint and solidary obligors.

The petitions filed by plaintiffs maintain that Annie received blood transfusions in 1983 and that they were informed on or about March 9, 1993 that Annie had contracted the HIV virus from the transfusions. The initial action against Dr. Ochsner and the hospital was filed within one year of the March 9, 1993 discovery date. However, allegations of malpractice against Dr. King were not made to the medical review panel until August 24, 1994. The allegations made against Dr. King in medical malpractice are that he consistently treated Annie since 1983 and was aware of her blood transfusions. Plaintiffs assert that Dr. King knew or should have known that her constant illnesses were due to the contraction of the HIV virus and should have tested her for the virus prior to March 1993. Plaintiffs further allege that Dr. King “failed to timely diagnose Annie as being infected with HIV thereby depriving plaintiffs of the opportunity to seek earlier treatment which would have prolonged her life and/or improved the quality of her life.”

The prescriptive period applicable for medical malpractice actions is set forth in LSA-R.S. 9:5628 as follows:

A. No action for damages for injury or death against any physician, chiropractor, nurse, licensed midwife practitioner, dentist, psychologist, optometrist, hospital or nursing home duly licensed under the laws of this state, or community blood center or tissue bank as defined in R.S. 40:1299.41(A), whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought unless 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; however, even as to claims filed within one year from the date of such discovery, in all events such claims shall be filed at the latest within a period of three years from the date of the alleged act, omission, or neglect.

B. The provisions of this Section shall apply to all persons whether or not infirm or under disability of any kind and including minors and interdicts.

C. The provisions of this Section shall apply to all healthcare providers listed herein or defined in R.S. 40:1299.41 regardless of whether the healthcare provider avails itself of the protections and provisions of R.S. 40:1299.41 et seq., by fulfilling the requirements necessary to qualify as listed in R.S. 40:1299.42 and 1299.44.

Ordinarily, the party pleading prescription bears the burden of proving the claim has prescribed. However, when it appears from the face of the petition that plaintiff's action has prescribed, the burden shifts to the plaintiff to demonstrate prescription was suspended or interrupted. *Lima v. Schmidt*, 595 So.2d 624 (La.1992).

Plaintiffs concede that the action was filed against Dr. King more than one year after the discovery that Annie was HIV positive as a result of the 1983 blood transfusions. However, they contend that the addition of the allegation that Dr. King consistently treated Annie overcomes the presumption that the action is prescribed on the face of the petition. Plaintiffs argue that the continuing treatment by Dr. King combined with a continued professional relationship could result in a suspension of prescription. In support of that argument, plaintiffs cite *Campo v. Correa*, 01-2707 (La.6/21/02), ___ So.2d ___. In *Campo* the Supreme Court held that the court erred in finding that a medical malpractice petition was prescribed on its face when, although the petition was filed more than one year after the date of the last act of the hospital and the doctor's last act upon which negligence was alleged, it was filed within one year of the alleged discovery date. We do not find the *Campo* case persuasive. In the case at bar, plaintiff did not file the action within one year from the last act of negligence, or within one year of discovery of the alleged malpractice. We find the trial court did not err in finding the petition prescribed on its face. Thus, the burden was properly placed on plaintiff to show why prescription was interrupted or suspended.

In an effort to defeat the exception of prescription, plaintiffs allege that, because Annie remained a patient of Dr. King after the March 1993 diagnosis, the cause of action for malpractice did not commence until the termination of the doctor/patient relationship. Plaintiff also suggests that the continuing tort doctrine should apply in this case.

A full discussion of the continuing tort doctrine and its relevance to medical malpractice actions can be found in *In Re Medical Review Panel, Claim of Moses*, 00-2643 (La. 5/25/01), 788 So.2d 1173. The *Moses* case contains a discussion of the "termination rule" evoked by plaintiffs in the instant case.

.....Under the termination rule, when the health care provider continues to treat the patient after making an error and failing to discover it, "the health care provider is deemed negligent both at the time of the malpractice and at all subsequent examinations; thus, the limitation period does not commence until the termination of the patient's relationship with the health care provider." Clay B. Tousey, Jr., Comment, An Analysis of State Legislative Responses to the Medical Malpractice Crisis, 1975 Duke 1417, 1431.
Moses, supra 788 So.2d at 1181.

In *Moses*, the plaintiff filed a medical malpractice action against a doctor who negligently left metal stitches in plaintiff's body after surgery in 1991. The stitches were discovered in July 1996 and surgically removed in September 1996. Suit was filed in July 1997. The trial court sustained an exception of prescription. That ruling was reversed by the appellate court when it found that prescription commenced on the date the stitches were removed. The appellate court used the continuing tort doctrine as the basis for delaying the commencement of prescription. In reversing the appellate court the Supreme Court found that the defendant doctor committed a single breach of duty by failing to remove the stitches and the discovery rule would apply to suspend the prescription under other circumstances. However, the three-year overall limitations of actions legislatively set in the medical malpractice act prevailed and the exception of prescription should have been sustained.

In any case, it is clear from *Moses* that, assuming plaintiffs' action has merit, Dr. King could be held negligent from the time of the blood transfusions until he ordered the test for HIV. The cause of action for medical malpractice states that Dr. King was negligent for failing to discover earlier that Annie's continuing medical problems were due to the exposure to the HIV virus. Plaintiffs assert that Dr. King should have suspected that Annie contracted the HIV virus in the blood transfusions, and taken the blood tests much sooner. The principal basis for the cause of action asserted against Dr. King is that he failed to take the necessary test to find the cause of Annie's excessive illnesses. Thus, once he took the test and discovered the problem, the continuing tort ended.

Since the action was filed against all remaining defendants over one year from the discovery of the alleged malpractice, the actions are prescribed. Further, since there are no timely sued defendants remaining in the suit, the actions filed against the remaining defendants cannot be found timely based on principles of solidary obligors. Accordingly, we find the trial court correctly sustained the exceptions of prescription and we affirm the judgment.

AFFIRMED



EDWARD A. DUFRESNE, JR.
CHIEF JUDGE

SOL GOTHARD
JAMES L. CANNELLA
THOMAS F. DALEY
MARION F. EDWARDS
SUSAN M. CHEHARDY
CLARENCE E. MCMANUS
WALTER J. ROTHSCHILD
JUDGES

Court of Appeal

FIFTH CIRCUIT
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CLERK OF COURT

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FIRST DEPUTY CLERK

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CERTIFICATE

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED OR DELIVERED THIS DAY DECEMBER 30, 2002 TO ALL COUNSEL OF RECORD AND TO ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

PETER J. FITZGERALD, JR.
CLERK OF COURT

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