

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 CA 1175

LINDA M. JACKSON

VERSUS

CYRIAC T. LUKE AND
WESTSIDE CENTER FOR WOMEN

Judgment Rendered: May 4, 2007

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 526,761

Honorable William A. Morvant, Judge

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Cyriac T. Luke, M.D.,
and Westside Center for
Women

BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

WELCH, J.

In this medical malpractice suit, the plaintiff, Linda M. Jackson, appeals a trial court judgment in favor of the defendants, Cyriac T. Luke and Westside Center for Women, which sustained the defendants' peremptory exception raising the objection of prescription and dismissed the plaintiff's suit with prejudice. Finding no manifest error in the judgment of the trial court, we affirm.

FACTUAL AND PROCEDURAL HISTORY

On October 18, 1999, Ms. Jackson underwent a total abdominal hysterectomy (removal of the uterus) and a bilateral salpingo-oophorectomy (removal of both the ovaries and the fallopian tubes). Dr. Cyriac T. Luke, an obstetrician-gynecologist, performed the surgical procedure on Ms. Jackson at River West Medical Center in Plaquemine, Louisiana. Following the surgery, Ms. Jackson had several post-operative office visits with Dr. Luke wherein she complained of abdominal pain and swelling, pain and bleeding at the incision site, difficulty with bowel movements, shortness of breath, hot flashes, back pain, and pain with urination. Dr. Luke advised Ms. Jackson to seek treatment with Dr. David N. Hastings, a urologist.¹

On March 22, 2000, Ms. Jackson saw Dr. Hastings, and he ordered urinalysis and urine "culture and sensitivity" tests which came back "negative." Dr. Hastings recommended that an IVP and a pelvic ultrasound be performed on Ms. Jackson. On March 29, 2000, the IVP and pelvic ultrasound were performed and Dr. Carl W. Scherer, III, a radiologist, reported to Dr. Hastings that "[n]o significant findings were noted" on the IVP, and the pelvic ultrasound showed "[p]ost surgical changes of hysterectomy" and "[e]ssentially normal appearance of the ovaries and bladder."

Dr. Hastings sent a letter dated March 29, 2000, to Dr. Luke informing him

¹ Dr. Luke also referred Ms. Jackson to Dr. Falgoust, an internist, for her complaint of "shortness of breath."

that the pelvic ultrasound showed “status post hysterectomy, with normal ovaries,” and that he had “advised Ms. Jackson of ... her negative IVP, and her pelvic ultrasound findings.” Dr. Hastings further reported to Dr. Luke that Ms. Jackson “was surprised with [his] verbal report” because “she was under the understanding that her ovaries had been removed with her uterus,” and that he had “told [Ms. Jackson] that she should confirm ... whether she did or did not have an oophorectomy,” since Dr. Scherer had seen “‘normal ovaries’ on [the] pelvic ultrasound.”

After Dr. Luke received the ultrasound report and letter from Dr. Hastings, Dr. Luke called Dr. Scherer and discussed with him that he had performed a hysterectomy and a bilateral salpingo-oophorectomy on Ms. Jackson. Thereafter, an “addendum” to the March 29, 2000 ultrasound report was prepared by Dr. Scherer on April 4, 2000, clarifying that what Dr. Scherer originally thought to be ovaries were instead “bowel loops.”² Dr. Hasting’s medical records do not reflect that he received this addendum or that he further discussed the results of the pelvic ultrasound with Ms. Jackson after the April 4, 2000 addendum.

Over the next year and a half, Ms. Jackson occasionally sought medical treatment with Dr. Luke. After having pelvic pain again in October 2001, Dr. Luke recommended that Ms. Jackson undergo exploratory laparotomy or “[s]urgery for possible removal of ovarian tissue/scar tissue,” and he also discussed with Ms. Jackson the possibility that she had “residual ovarian syndrome.”³ Thereafter, Ms. Jackson never returned to Dr. Luke for further medical treatment, and Dr. Luke never performed the recommended exploratory surgery.

² Although this addendum is not contained in the record before us, Dr. Luke testified in his deposition that there was an addendum to the March 29, 2000 ultrasound report and further, read verbatim the addendum into the record.

³ Dr. Luke explained in his deposition testimony that “residual ovarian syndrome” occurs when microscopic ovarian cells remain in the body after the ovary is removed and those cells multiply or grow to form cysts.

On June 24, 2002, Ms. Jackson filed a petition to impanel a medical review panel with the Division of Administration. In this petition, Ms. Jackson alleged that on October 18, 1999, she became a patient at River West Medical Center for the purpose of having a hysterectomy and was under the care of Dr. Luke; that “[a] year after her hysterectomy, [she] was seen by a Dr. David N. Hastings for complications she experienced following her surgery;” that Dr. Hastings had a pelvic ultrasound performed on her “which revealed that she had not undergone a total hysterectomy as [Dr. Luke had] assessed.” Ms. Jackson further alleged that after her office visit with Dr. Hastings, Dr. Luke continuously assured her that Dr. Hastings findings were incorrect and alleged that Dr. Luke was liable to her for “physical and mental injuries” for his failure to perform a complete hysterectomy. This complaint was dismissed on September 20, 2004.⁴

The plaintiff then instituted these proceedings on November 23, 2004 by filing a petition for damages, setting forth essentially the same allegations as her complaint with the Division of Administration, except with regard to the discovery of the alleged malpractice, she alleged that “[l]ater it was revealed to [her] that she had not undergone a total hysterectomy, which led to several subsequent complications.” The defendants filed an answer to the petition, essentially denying the allegations of the plaintiff’s petition, and a peremptory exception raising the objection of prescription.

On March 6, 2006, the trial court rendered judgment sustaining the defendants’ exception and dismissing the plaintiff’s suit, with prejudice. A written judgment in conformity with the trial court’s ruling was signed on March 31, 2006. It is from this judgment that the plaintiff has appealed, assigning as error the trial court’s ruling on the defendants’ exception.

⁴ Although this dismissal is not contained in the record of these proceedings, both parties admit that the complaint before the medical review panel was dismissed on September 20, 2004, due to the failure of the parties to appoint an attorney chairperson for the medical review panel within the time allowed by law. See La. R.S. 40:1299.47(A)(2)(c).

STANDARD OF REVIEW

Louisiana Code of Civil Procedure article 931 provides that evidence may be introduced in support of the peremptory exception, including the objection of prescription, when the grounds do not appear on the face of the pleadings. If evidence is introduced in support of the peremptory exception raising the objection of prescription, the trial court's factual findings are reviewed under the manifest error-clearly wrong standard of review. **Carter v. Haygood**, 2004-0646, p. 9 (La. 1/19/05), 892 So.2d 1261, 1267. If the findings are reasonable in light of the record reviewed in its entirety, an appellate court may not reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. *Id.*

LAW AND DISCUSSION

The prescriptive period for medical malpractice claims is set forth in La. R.S. 9:5628(A), which provides:

No action for damages for injury or death against any physician ... 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.

A straightforward reading of La. R.S. 9:5628(A) clearly shows that it sets forth two prescriptive periods within which to bring a medical malpractice action, namely, one year from the date of the alleged act, omission, or neglect, or one year from the date of discovery with a three year limitation from the date of the alleged act, omission, or neglect to bring such claims. **Campo v. Correa**, 2001-2707, p. 9 (La. 6/21/02), 828 So.2d 502, 509.

In this case, the alleged act of malpractice occurred on October 18, 1999, and Ms. Jackson did not file her original complaint with the Division of

Administration until June 24, 2002, well more than one year after the date of the alleged act. Thus, the sole issue presented by the defendants' exception is whether or not Ms. Jackson brought her action for malpractice within one year from the date she discovered the alleged act, omission, or neglect.

Ordinarily, the exceptor bears the burden of proof at the trial of the peremptory exception. **Campo**, 2001-2707 at p. 7, 828 So.2d at 508. However, if prescription is evident on the face of the pleadings, the burden shifts to the plaintiff to show that the action has not prescribed. *Id.* The plaintiff's petition cannot be considered prescribed on its face if the plaintiff's pleadings make a *prima facie* showing that "it was filed within one year from the date of discovery" and "within a period of three years from the date of the alleged act, omission or neglect." **Campo**, 2001-2707 at p. 10, 828 So.2d at 509. Specifically, the plaintiff must "allege facts with particularity which indicate that the injury and its causal relationship to the alleged misconduct were not apparent or discoverable until within the year before the suit was filed" in order to avoid the shifting of the burden of proof to her. **Campo**, 2001-2707 at p. 10 n.9, 828 So.2d at 509 n.9.

Ms. Jackson's claim filed with the Division of Administration in June 2002 alleged that "[a] year after her hysterectomy" (*i.e.*, in October 2000) Dr. Hastings made her aware that "that she had not undergone a total hysterectomy" and that the "defendant continuously assured her that Dr. Hastings findings were incorrect." In Ms. Jackson's petition for damages filed in the trial court, she alleged that "[l]ater it was revealed to [her] that she had not undergone a total hysterectomy."

We find that these broad statements do not assert with particularity facts sufficient to establish a *prima facie* showing that plaintiff's claim was filed within one year from the date of discovery of the alleged act, omission, or neglect, and therefore, we conclude that Ms. Jackson's petition was prescribed on its face. Accordingly, the burden of proof rested with Ms. Jackson to establish that her

action against Dr. Luke was not prescribed. **Campo**, 2001-2707 at p. 10, 828 So.2d at 509.

The discovery exception found in La. R.S. 9:5628(A) is a codification of the discovery doctrine of *contra non valentem*. **In Re Medical Review Panel for Claim of Moses**, 2000-2643, p. 8 (La. 5/25/01), 788 So.2d 1173, 1178. Under the discovery doctrine, prescription does not begin to accrue until the plaintiff should have discovered he had a reasonable basis for pursuing a claim against the defendant. **Moses**, 2000-2643 at p. 8 n.10, 788 So.2d at 1178 n.10. Likewise, the prescriptive period for a medical malpractice claim begins to run even if the injured party does not have actual knowledge of the facts that would entitle him to bring a suit, as long as there is constructive knowledge of same. **Campo**, 2001-2707 at p. 12, 828 So.2d at 510. Constructive knowledge is notice sufficient enough to excite attention and put the injured party on guard and call for inquiry. **Campo**, 2001-2707 at p. 12, 828 So.2d at 510-511. Such notice is tantamount to knowledge or notice of everything to which a reasonable inquiry may lead. Such information or knowledge as ought to reasonably put the alleged victim on inquiry is sufficient to start the running of prescription. Nevertheless, a plaintiff's mere apprehension that something may be wrong is insufficient to commence the running of prescription unless the plaintiff knew or should have known through the exercise of reasonable diligence that his problem may have been caused by acts of malpractice. **Campo**, 2001-2707 at p. 12, 828 So.2d at 511. Even if a malpractice victim is aware that an undesirable condition has developed after the medical treatment, prescription will not run as long as it was *reasonable* for the plaintiff not to recognize that the condition might be treatment related. **Campo**, 2001-2707 at p. 12, 828 So.2d at 511. The ultimate issue is the *reasonableness* of the patient's action or inaction, in light of his education, intelligence, the severity of the symptoms, and the nature of the defendant's conduct. **Campo**, 2001-2707 at p. 12,

828 So.2d at 511. Whether a plaintiff had constructive knowledge of the existence of a medical malpractice cause of action must be decided based on the particular facts of the case. **Stansbury v. Accardo**, 2003-2691, 2003-2692, p. 7 (La. App. 1st Cir. 10/29/04), 896 So.2d 1066, 1070, writ denied, 2004-2898 (La. 2/4/05), 893 So.2d. 881.

The post-operative report from Ms. Jackson's surgery at River West Medical Center indicates that a total abdominal hysterectomy and a bilateral salpingo-oophorectomy was performed on October 18, 1999. The pathology report issued in conjunction with the surgery confirms that a uterus, fallopian tubes, and ovaries were removed and sent for examination.

After Ms. Jackson's surgery, Dr. Luke saw Ms. Jackson in his office for post-operative office visits on October 25, November 1, November 3, and November 29, 1999, and January 5, 2000, wherein she complained of shortness of breath, pain and bleeding at the incision site, and abdominal pain. On January 5, 2000, Ms. Jackson also complained of pain with urination and back pain. After this exam, Dr. Luke referred her to Dr. Hastings because he was concerned she was having frequent urinary tract infection symptoms. After Dr. Luke received the ultrasound report and letter from Dr. Hastings dated March 29, 2000, Dr. Luke called Dr. Scherer and discussed with him that he had performed a hysterectomy and a bilateral salpingo-oophorectomy on Ms. Jackson. Thereafter, on April 4, 2000, Dr. Scherer issued the addendum to the report. Dr. Hastings' medical records do not reflect that he received this addendum or that he further discussed the results of the pelvic ultrasound with Ms. Jackson after the April 4, 2000 addendum was issued.

Dr. Luke testified that he did not discuss the ultrasound or the addendum with Ms. Jackson, although on April 27, 2000, a nurse from his office spoke to Ms. Jackson, and Ms. Jackson indicated that she had seen Dr. Hastings and that his

findings were all negative. After Ms. Jackson's visit with Dr. Hastings in March 2000, Dr. Luke did not see Ms. Jackson in his office until seven months later on October 25, 2000. Thereafter, Ms. Jackson missed previously scheduled appointments with Dr. Luke on February 7, 2001 and August 9, 2001. Ms. Jackson went to Dr. Luke for an annual examination on October 16, 2001, wherein she was again suffering from pelvic pain. On this date and on October 29, 2001, Dr. Luke discussed with Ms. Jackson the exploratory laparotomy and the possibility that she had residual ovarian syndrome.

According to Ms. Jackson's affidavit, on October 18, 1999, she underwent surgery for the purpose of having a total hysterectomy, and that it was later revealed to her that she had not undergone a total hysterectomy. She stated that after the March 29, 2000 ultrasound, which had suggested that her ovaries were intact, Dr. Luke received an addendum report, which suggested that the original report was incorrect. She alleged that on April 4, 2000, Dr. Luke contacted her and advised her that the March 29, 2000 ultrasound was incorrect and that her ovaries had been removed as the result of the October 1999 surgery. She further alleged that she relied upon Dr. Luke's assertion, and that she believed his assertion to be true until October 2001, when Dr. Luke rescheduled her "for surgery to correct the previous surgery."

After reviewing the evidence, the trial court found Ms. Jackson's procedure was performed on October 18, 1999, that on March 29, 2000, Ms. Jackson was advised by Dr. Hastings that she had not had a complete hysterectomy, and that Dr. Luke had not done anything to mislead or prevent Ms. Jackson from pursuing legal recourse. Therefore, the trial court concluded that Ms. Jackson's suit had prescribed. Based on our review of the record, we cannot say that the trial court's conclusion in this regard is manifestly erroneous.

Following the surgery performed by Dr. Luke on October 18, 1999, Ms.

Jackson sought medical treatment from other sources. On March 29, 2000, Dr. Hastings specifically informed Ms. Jackson of the results of the pelvic ultrasound, which indicated that she still had normal ovaries, and Dr. Hastings specifically noted in his March 29, 2000 letter to Dr. Luke that Ms. Jackson was “surprised” by this information because she thought her ovaries had been removed. Thus, the record supports the trial court’s determination that as of March 29, 2000, Ms. Jackson was reasonably alerted that she may have been the victim of malpractice committed by Dr. Luke, and therefore, the institution of proceedings more than one year later, in June 2002, was untimely.

Therefore, after reviewing the evidence and the applicable law, we find no manifest error in the judgment of the trial court, and we hereby affirm the March 31, 2006 judgment of the trial court.

CONCLUSION

For the above and foregoing reasons, the March 31, 2006 judgment of the trial court sustaining the peremptory exception raising the objection of prescription filed by Cyriac T. Luke and Westside Center for Women, and dismissing Linda M. Jackson’s suit is hereby affirmed.

All costs of this appeal are assessed to the plaintiff/appellant, Linda M. Jackson.

AFFIRMED.