

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 CA 1914

BETTY CASBORN, wife of/and ADAM CASBORN

VERSUS

**WILLIAM CURRAN, M.D. and NORTHSORE
REGIONAL MEDICAL CENTER**

Judgment rendered: OCT 14 2010

**On Appeal from the 22nd Judicial District Court
Parish of St. Tammany, State of Louisiana
Number: 2008-13138; Division: E
The Honorable William J. Burris, Judge Presiding**

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Regional Medical Center**

BEFORE: GAIDRY, MCCLENDON, AND KLINE,¹ JJ

¹ Judge William F. Kline, Jr., retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

KLINE, J.

Plaintiffs Betty and Adam Casborn (hereinafter, Casborn) appeal a judgment rendered in the trial court sustaining an exception of prescription filed by defendant, NorthShore Regional Medical Center, L.L.C. d/b/a NorthShore Regional Medical Center (hereinafter, NorthShore). The issue in this medical malpractice case is whether plaintiffs' cause of action was prescribed because Casborn claimed in the complaint that suit was filed within one year from plaintiffs' date of discovery, but more than one year after the alleged negligent act. For the following reasons, we affirm the trial court judgment.

FACTS AND PROCEDURAL HISTORY

At 4:00 a.m. on Saturday, May 5, 2007, Mrs. Casborn presented to the NorthShore emergency room, because her tongue was swelling and she was having trouble breathing. Mrs. Casborn was examined by the staff physician, William Curran, M.D.,² who administered the medication Benadryl. An hour later, at about 5 a.m., Dr. Curran again examined Mrs. Casborn. She was given a sedative. Mrs. Casborn's tongue continued to swell, and she had more difficulty breathing. At 7:00 a.m. she was taken into surgery to have a mechanical ventilator inserted; the ventilator remained until May 18, 2007. Her hospital stay, however, lasted nearly a month, because she developed other complications, including pneumonia, anemia, and acute renal problems.

On May 23, 2008, Casborn filed a medical malpractice complaint alleging that Dr. Curran's failure to administer the proper medication in the face of an acute allergic reaction was a breach in the medical standard of care. Since the suit was filed more than one year after the date of the alleged negligence, Casborn contends that the prescriptive period did not begin to run until the ventilator was removed and Mrs. Casborn had regained her ability to speak. Casborn alleges in the petition

² Dr. Curran is a defendant in companion suit #2009CA1915.

that Mrs. Casborn did not discover the malpractice until a time frame of between May 24, 2007 and June 1, 2007, when she could ask questions. The petition includes the following allegation:

Between May 24, 2007 and June 1, 2007, as she regained her ability to speak, BETTY CASBORN inquired into the events which caused her tongue to swell and her loss of consciousness. At that time, she learned that the swelling in her tongue was caused by an acute allergic reaction to medication. Ms. CASBORN also learned, at that time, that a possible breach in the standard of care occurred, because she was not administered proper medication in the face of an allergic reaction, and because she was made to wait for approximately over two hours, or until she passed out from her inability to breathe, before she was intubated.

NorthShore filed an exception of prescription, alleging that the cause of action was prescribed on the face of the pleading since the alleged malpractice occurred on May 5, 2007, and the petition was not filed until May 23, 2008. The trial court ruled in NorthShore's favor; in its written reasons, the trial court found that Mrs. Casborn's claim arose from Dr. Curran's failure to recognize the emergency nature of her situation when she arrived at the hospital on May 5, 2007, and that she did not file a complaint until May 23, 2008, more than one year after she presented to the emergency room. The trial court stated that Mrs. Casborn's ventilator was removed on May 18, 2007, but that she claimed to not have had knowledge or "constructive notice" of the alleged negligence until the time period between May 24 and June 1, 2007. In its reasons, the trial court stated that pursuant to La. R.S. 9:5628 and **Stansbury v Accardo**, 03-2691 (La.App. 1 Cir. 10/29/04) 896 So.2d 1066, and **Campo v. Correa**, 01-2707 (La. 6/21/02), 828 So.2d 502, because prescription was evident on the face of the petition, the burden shifted to plaintiff to show the action had not prescribed. Judgment was rendered.

Casborn appealed alleging, in pertinent part, that the trial court erred in the following³:

- (1) In holding that she did not timely file her medical malpractice complaint, when she filed on May 23, 2008, which was less than a year from the time that she discovered an act of malpractice had occurred;
- (2) In determining that the Doctrine of Contra Non Valentem does not apply as the extent of her injuries rendered her unable to deduce that an act of malpractice had occurred;
- (3) In sustaining defendant's exception of prescription when all of the cited cases are distinguishable from the facts of this case.

DISCUSSION

Louisiana Revised Statutes 9:5628 A provides, in pertinent part, that no action for damages for injury or death arising out of patient care shall be brought unless filed within one year from the date of discovery of the alleged act. Prescription commences when a plaintiff obtains actual or constructive knowledge of facts indicating to a reasonable person that he or she is a victim of a tort. **Campo v. Correa**, 01-2707 pp. 11-12, 828 So.2d at 510. A prescriptive period will begin to run even if the injured party does not have actual knowledge of facts that would entitle him to bring a suit as long as there is constructive knowledge of same. **Id.** Constructive knowledge is notice sufficient enough to excite attention and put the injured party on guard and call for inquiry. **Id.** Prescription does not run against one who is ignorant of the facts upon which his cause of action is based, as long as such ignorance is not willful, negligent, or unreasonable. **Young v. Clement**, 367 So.2d 828, 830 (La. 1979). Thus, a petition should be found not to have prescribed on its face if it is brought within one year of the date of

³ Northshore filed a motion for sanctions and dismissal of appeal for plaintiffs repeated failure to abide by the deadlines established by this Court. The sanctions requested by Northshore do not appear to be warranted under this rule and are therefore, dismissed.

discovery of the facts alleged with particularity in the petition which show that the patient was unaware of malpractice prior to the alleged date of discovery, and the delay in filing suit was not due to willful, negligent, or unreasonable action of the patient. See **Campo**, 01-2707 at p. 9, 828 So.2d at 509. (Emphasis added.)

Here, the allegations in Casborn's petition do not allege with particularity why Mrs. Casborn was unaware of the malpractice prior to the date of the alleged discovery. Mrs. Casborn claims in her medical review complaint that she inquired about the cause of her condition as soon as she was able to do so. No testimony or evidence was presented at the hearing before the trial court. The trial court noted in its reasons that on May 5, 2007 Mrs. Casborn was placed on a ventilator where she remained until May 18, 2007, but that she did not file her complaint until May 23, 2008. The trial court further noted that "[I]f prescription is evident on the face of the petition, the burden shifts to plaintiff to show the action was not prescribed." Based upon the facts presented, the trial court granted the defendant's exception of prescription.

While we recognize that prescriptive statutes are strictly construed and are to be interpreted in favor of maintaining an action, we must conclude under the facts alleged in the medical review complaint that the matter is prescribed. See **Oil Insurance Limited v. Dow Chemical Company**, 07-0418, p. 5 (La.App. 1 Cir. 11/2/07), 977 So.2d 18, 21-22, *writ denied*, 07-2319 (La. 2/22/08), 976 So.2d 1284. Accordingly, the trial court judgment is affirmed.

DECREE

For the foregoing reasons, the judgment of the trial court is affirmed. The costs of this appeal are assessed to plaintiffs/appellants, Betty and Adam Casborn.

AFFIRMED