

**IN RE: MEDICAL REVIEW
PANEL PROCEEDINGS FOR
THE CLAIM OF ROBIN
WALLACE**

VERSUS

**TULANE UNIVERSITY
HOSPITAL AND CLINIC**

*** NO. 2001-CA-0949
* COURT OF APPEAL
* FOURTH CIRCUIT
* STATE OF LOUISIANA**

**APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2000-5544, DIVISION "J"
Honorable Nadine M. Ramsey, Judge**

**Joan Bernard Armstrong
Judge**

(Court composed of Judge Joan Bernard Armstrong, Judge Steven R. Plotkin
and Judge Terri F. Love)

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AFFIRMED.

This is a medical malpractice action. The trial court maintained an exception of prescription and dismissed the plaintiff's claim. The plaintiff appeals. We affirm.

Plaintiff Robin Wallace, a Tulane University student, underwent knee surgery on August 25, 1998. The surgery was performed by non-defendant Dr. Michael Brunet at Tulane University Hospital Center. There is no allegation that the surgery was performed negligently. However, the next day, Tulane physical therapist Timothy Burnell, while performing physical Therapy on Ms. Wallace, bent the knee to a 90 degree angle, and there was a loud popping noise. Ms. Wallace's knee did not recover as expected and she underwent extensive courses of physical therapy without full recovery of the knee. She alleges that Tulane's physical therapist, Mr. Burnell, negligently injured her knee during the August 26, 1998 physical therapy session. She brought the present medical malpractice claim against Mr. Burnell and

Tulane on April 7, 2000.

Mr. Burnell and Tulane filed an exception of prescription on the ground that Ms. Wallace's claim was brought more than one-year after the August 26, 1998 allegedly negligent physical therapy session. Ms. Wallace argues that, until October 1999, when Dr. Brunet expressly told her that Mr. Burnell had damaged her knee, prescription was tolled due to her lack of knowledge of the alleged physical therapy malpractice.

At the time of the August 26, 1998 physical therapy, Ms. Wallace heard "a loud crack or snap, as if something broke" when Mr. Burnell flexed her knee. Prior to her discharge from the hospital, she told Dr. Brunet about that sound and said that she believed that something had gone wrong with the physical therapy.

Because her knee was not recovering as expected, and because of her concern about that lack of recovery, Ms. Wallace went to see two orthopedists in her home town of Mobile, Alabama in October, 1998. She told one of those doctors, Dr Morwessel, of the popping sound made when Mr. Burnell flexed her knee and she also said that she was not satisfied with her treatment at Tulane. She told the other Mobile orthopedist, Dr. Robert

Setzler, about the loud pop when Mr. Burnell flexed her knee and she also said that she believed something had gone wrong with the physical therapy on August 26, 1998.

Prescription begins to run on an action for medical malpractice when the plaintiff has knowledge of facts strongly suggestive that the untoward condition or result may be the result of improper treatment. E.g., In re Dede, 98-2248 (La. App. 4 Cir. 12/02/98), 729 So.2d 603, 606. It is not necessary that a lawyer or doctor tell the plaintiff that he or she has a medical malpractice claim before prescription begins to run. Id. If a defendant engages in fraud or deliberate concealment of the facts, that may toll prescription, but a defendant's mere neglect or misstatement will not. Id. at 607. See Also In re Morgan, 98-1001 (La. App 4 Cir, 12/16/98), 727 So.2d 536; In re Aron, 96-2665 (La. App. 4 Cir. 5/21/97), 695 So.2d 553; In re Milton, 593 So.2d 795 (La. App. 4th Cir. 1992).

In the present case, the trial court found that Ms. Wallace, by her own testimony, had sufficient information to excite inquiry, and begin the running of prescription, on August 26, 1998 or, alternatively, by October 1998 at the latest. We agree. Ms. Wallace suspected at the outset that Mr.

Burnell had done something wrong when he flexed her knee and she heard the loud popping sound. By October 1998, with her knee not recovering as expected, she told her doctors in Mobile that she believed something had gone wrong with the physical therapy on August 26, 1998 and that she was not satisfied with her care at Tulane. At that point, based upon her own testimony, she definitely suspected physical therapy malpractice, and she still had about ten months to bring a claim timely, but failed to do so.

Lastly, Ms. Wallace complains that the trial court decided the exception of prescription based upon deposition testimony rather than a trial with live testimony. If that was error (which we do not decide) then, in the present case, it was harmless error because the trial court based its decision upon Ms. Wallace's own deposition testimony and her doctors' records of their own statements. The trial court did not discredit Ms. Wallace's testimony, or credit the testimony of others, but, instead, accepted what Ms. Wallace said and (correctly) maintained the exception of prescription based upon Ms. Wallace's rendition of the facts.

For the foregoing reasons, we affirm the judgment of the trial court.

AFFIRMED.