



**ADAMS AND REESE LLP**

701 Poydras Street  
4500 One Shell Square  
New Orleans, LA 70139

**COUNSEL FOR APPELLEE**

**AFFIRMED**

This appeal arises from a medical malpractice action, which was dismissed, on an Exception of Prescription. For the reasons assigned below, we affirm.

**FACTS AND PROCEDURAL HISTORY**

On June 11, 2001, plaintiff/appellant, Stephanie Noe (Mrs. Noe), sought treatment from Dr. Michael Hill for sinus congestion. Dr. Hill ordered an injection of Celestone, a steroid; and, his nurse, Deborah Hahn, administered the injection. Mrs. Noe testified that the injection was extremely painful because it caused a jolt of pain down her leg, which was different from past steroid injections. She further stated, "I didn't feel any medication at all. Usually, with that type of steroid shot, it gets real warm and it burns as it's going in. I didn't feel that at all." Mrs. Noe testified that within one week, a reddish-purple knot developed at the site of the injection. One month after the injection, Mrs. Noe experienced an increase in pain and

atrophy of the buttock muscle.

On August 6, 2001, Mrs. Noe returned to Dr. Hill because of persistent pain and discoloration in the injection area. Dr. Hill advised her that the muscle reacted badly to the shot and it would resolve in time. Mrs. Noe continued to treat with Dr. Hill for the injury. On March 7, 2002, Mrs. Noe informed Dr. Wharton, an associate of Dr. Hill's, that she thought she suffered sciatic nerve damage as a result of the injection. Ten months after the injection, on April 3, 2002, due to Mrs. Noe's increasing symptoms, Dr. Hill referred Mrs. Noe to a neurologist and ordered a nerve conduction study (EMG) and an MRI. In May of 2002, the tests revealed an injury to the sciatic and inferior gluteal nerve on her right side.

On March 12, 2003, Mrs. Noe filed a Complaint with the Louisiana Patients' Compensation Fund Oversight Board, alleging medical malpractice against Dr. Hill, IMG Healthcare Network (IMG), and an unidentified member of the staff of IMG who administered the injection. In her complaint, Mrs. Noe asserted she learned for the first time in April 2002 that the injection was the cause of her continuing back, buttock, and leg pain.

On May 21, 2003, Dr. Hill filed a Petition to Allot a Docket Number for purposes of discovery and for the filing of exceptions. In October 2003, Mrs. Noe amended her complaint to name Nurse Deborah Hahn (Nurse

Hahn) as an additional party defendant, asserting that Nurse Hahn was the IMG staff member who administered the injection.

Dr. Hill, IMG, and Nurse Hahn filed an Exception of Prescription and, as stipulated by the parties, the trial court reviewed documentary evidence in lieu of live testimony. The trial court granted the Exception of Prescription. This timely appeal followed.

### ANALYSIS

Mrs. Noe alleges that the trial court erred by: 1) finding that her medical malpractice action was prescribed, and 2) failing to allow her to amend her claim to assert separate causes of action for negligent or intentional misdiagnosis, continuing treatment, and breach of duty to refer her to a specialist.

### EXCEPTION OF PRESCRIPTION AND CONTRA NON VALENTEM:

Mrs. Noe argues that she had no knowledge, actual or constructive, that she suffered an injury resulting from the injection until she was diagnosed with nerve damage in May of 2002. Mrs. Noe alleges, in August 2001, Dr. Hill diagnosed her problem as an allergic reaction to Celestone and placed her on a one-year program of exercise in order to build the muscle in her buttock. Mrs. Noe maintains that she continued to believe and rely on the explanation provided by Dr. Hill, until he made a referral to a

neurologist in April of 2002.

Pursuant to La. R.S. 9:5628, a medical malpractice action shall be brought within one year from the date of the alleged act, omission, or neglect, or within one year from the date of the discovery of the alleged act, omission, or neglect; however, in all events, such claims shall be filed at least within a period of three years from the date of the alleged act, omission, or neglect. The standard for discovery within the one-year period is the same reasonableness standard as the fourth category of *contra non valentem*. *Cadogan v. McClanahan*, 2003-0603 (La. App. 4 Cir. 11/12/03), 861 So.2d 250, 254. Jurisprudence regards reasonableness as the key to determining discovery of an injury in a La. R.S. 9:5628 action. *Id.* at 256. This court recognized that “[c]onstructive knowledge is whatever notice is enough to excite attention and put the injured party on guard and call for inquiry.” *Id.*

In this case, Mrs. Noe claims prescription did not begin to run until May 2002, when her MRI revealed sciatic and inferior gluteal nerve damage. However, Mrs. Noe’s actions connote her constructive knowledge that the injection was the cause of her problem. The injection produced complications, as opposed to previous steroid injections, and she immediately questioned its accuracy. Specifically, Mrs. Noe suffered lingering pain and had no feeling of the medication entering her system. In

fact, this prompted her to discuss the pain with her husband, a registered nurse, a few days after the injection. He informed her that the injection was incorrectly located. Lastly, Mrs. Noe told Dr. Wharton, on March 7, 2002, that she suspected sciatic nerve damage as a result of the injection.

Accordingly, the record demonstrates that Mrs. Noe had reason to believe the injection caused her medical problems. She had, at minimum, constructive knowledge that the Celestone injection caused her injury within the one-year prescriptive period.

Despite statutory time limits, prescription does not run against a person who is unable to act. The doctrine of *contra non valentem* interrupts or suspends prescription in four general situations: 1) where there was some legal cause which prevented the courts or their officers from taking cognizance of or acting in the plaintiff's action; 2) where there was some condition coupled with the contract or connected with the proceedings which prevented the creditor from suing or action; 3) where the debtor (*doctor*) himself has done some act effectually to prevent the creditor (*patient*) from availing himself of his cause of action; or 4) where the cause of action is neither known nor reasonably knowable by the plaintiff (*patient*) even though plaintiff's ignorance is not induced by the defendant (*doctor*).

*Corsey v. State, Through Dep't of Corr.*, 375 So.2d 1319 (La. 1979). Only

the third and fourth exceptions of *contra non valentem* are applicable in this case.

In *Fontenot v. ABC Ins. Co.*, 95-1707 (La. 6/7/96), 674 So.2d 960, 963, the Louisiana Supreme Court reaffirmed that the third category of *contra non valentem* applies when the health care provider has done some act effectually to prevent the victim from availing himself of his cause of action for medical malpractice. To trigger application of the third category, a physician's conduct must rise to the level of concealment, misrepresentation, fraud, or ill practices. *Rajnowski v. St. Patrick's Hosp., et al.*, 564 So.2d 671, 676 (La. 1990).

In *Gover v. Bridges*, 497 So.2d 1364, 1369 (La. 1986), the Louisiana Supreme Court held that a mistake did not equate with fraud, deceit, or misrepresentation. The doctor in *Gover* misrepresented facts regarding a deceased patient's procedures to her daughter. However, the Court held that the doctor's actions to try and save the patient's life overwhelmingly outweighed the misstatement to the daughter and that his misstatements did not "effectually prevent" her from discovering the malpractice action. *Grover*, 497 So.2d at 1369. Thus, the Court found no concealment, fraud, or ill practices.

Similarly, Mrs. Noe alleges that prescription did not begin to run

because of Dr. Hill's assurances to her that her condition was a result of an allergic reaction that would resolve over time. She maintains that these assurances misled her, causing her a delay in discovering that the injection resulted in damage. However, like *Gover*, the fact that Dr. Hill treated Mrs. Noe for an allergic reaction is not enough to reach the level of fraud, concealment, or ill practices. In fact, when Dr. Hill realized that his treatment was not working, he referred Mrs. Noe to a specialist. Thus, after reviewing the record, we find that Dr. Hill's conduct did not rise to the level of concealment, misrepresentation, fraud, or ill practices that would invoke the third exception of the *contra non valentem* doctrine.

The record also fails to support the application of the fourth category of *contra non valentem*. Under the fourth category, prescription does not begin to run until the plaintiff possesses sufficient facts and has a reasonable basis for filing suit against a certain defendant. *Chaney v. State of La., Through the Dep't of Health and Human Resources*, 432 So.2d 256 (La. 1983).

In *Campo v. Correa*, 01-2707 (La. 6/21/02). 828 So.2d 502, 510, the Supreme Court stated that “[p]rescription commences when a plaintiff obtains actual or constructive knowledge of facts indicating to a reasonable person that he or she is the victim of a tort.” Prescription will run if the



plaintiff has constructive knowledge of the facts that would entitle the plaintiff to bring suit, even if the plaintiff does not have actual knowledge of those facts. The Supreme Court has defined “constructive knowledge” to mean “whatever notice is enough to excite attention and put the injured party on guard and call for inquiry.” *Campo*, 828 So.2d at 510-511. Additionally, the notice is tantamount to knowledge of everything to which the inquiry might lead. *Campo*, 828 So.2d 510. Information or knowledge “as ought to reasonably put the alleged victim on inquiry is sufficient to start the running of prescription.” *Campo*, 828 So.2d at 511.

In *Campo*, the Louisiana Supreme Court held that a plaintiff’s “education, intelligence, and severity of symptoms” are used to determine the reasonableness of the “plaintiff’s action or inaction.” *Id.* The patient in *Campo* believed his symptoms were common risks to his surgery and did not think his doctor made any mistakes. *Campo*, 828 So.2d at 512. The Court held the malpractice action did not prescribe because these facts contributed to not filing his malpractice action until after the one-year period. *Campo*, 828 So.2d at 514.

Unlike the patient in *Campo*, Mrs. Noe suffered severe unexpected symptoms from an injection she repeatedly received in the past. She did not think of her injuries as a common risk of the Celestone injection.

Additionally, Mrs. Noe suspected inaccuracy, as to the injection, because her husband, a registered nurse, told her it was in the wrong location.

Additionally, Mrs. Noe received numerous Celestone injections without suffering from muscle atrophy. From the examination of these facts, it was not reasonable for Mrs. Noe to file after the one-year prescriptive period.

Thus, *Campo* does not dictate the use of the *contra non valentem* in this case.

In *Renfroe v State, Through Dep't of Transp. and Dev.*, 01-1646 (La. 2/26/02), 809 So.2d 947, 953, the Supreme Court stated that the plaintiff in an action will be deemed to know what could have been learned through reasonable diligence. Moreover, even though the plaintiff may be ignorant of, or misunderstand, the extent or duration of his or her injuries, the plaintiff may still have the requisite knowledge to commence prescription. See *Fontenot*, 674 So.2d at 964, where the Supreme Court stated: “[i]gnorance or misunderstanding of the probable extent or duration of injuries materially differs from ignorance of actionable harm which delays commencement of prescription.”

In *Fontenot*, the Supreme Court found constructive knowledge of a causal connection because the patient wrote on a form that she suffered nerve damage from her surgery. *Fontenot*, 674 So.2d at 964. This fact kept

the patient from utilizing *contra non valentem* and avoiding the one year prescriptive period. Like the *Fontenot* patient, Mrs. Noe told Dr. Wharton, in March 2002, that she had sciatic nerve damage as a result of the injection. Again, this fact dictates that Mrs. Noe had constructive knowledge of her malpractice action and *contra non valentem* does not apply.

Lastly, the Second Circuit Court, in *Harlan v. Roberts*, 565 So.2d 482, 486 (La. App. 2 Cir. 1990), stated that:

The focus is on the reasonableness of the inaction by plaintiff. The rule is whether the cause of action was known or reasonably 'knowable' by plaintiff. Prescription does not run only as long as it is reasonable for plaintiff not to recognize that the condition may be related to the treatment. When a plaintiff has knowledge of facts strongly suggestive that the untoward condition or result may be the result of improper treatment and there is no effort by the health care providers to mislead or cover up information which is available to plaintiff through inquiry or professional medical or legal advice, then the facts and cause of action are reasonably knowable to plaintiff.

See also *In Re Morgan*, 98-1001 (La. App. 4 Cir. 12/16/98), 727 So.2d 536.

The evidence in the instant case reveals that Mrs. Noe knew immediately that she had complications from the injection; her husband, a registered nurse, informed her within days that the injection was given in the wrong location; and she knew within a month that she suffered atrophy of her buttock muscle. Additionally, the record shows she told Dr. Wharton,

Dr. Hill's associate, that she thought the injection damaged her sciatic nerve. Under these circumstances, it was reasonable for the trial court to conclude that Mrs. Noe knew of a possible cause of action more than one year before she filed her medical malpractice claim. Clearly, Mrs. Noe knew she had an injury and she knew the injury was related to the injection. We find that to be sufficient knowledge to commence the running of the prescriptive period. The fact that she did not know the extent or duration of her injury was not sufficient to interrupt or suspend prescription. Accordingly, we find no manifest error on the part of the trial court in determining that Mrs. Noe's action had prescribed.

AMENDMENT OF PLEADINGS:

Mrs. Noe further argues that the trial court committed legal error in failing to allow amendment of her complaint to state separate causes of action for negligent or intentional misdiagnosis, continuing treatment, and failure to make a proper referral to an appropriate specialist. In support of this contention, Mrs. Noe maintains that she asserted sufficient allegations before the trial court to support one or more of these separate causes of action and she, therefore, should have been allowed to amend her complaint.

We find no merit in this assignment of error. We first note that Mrs. Noe never made a request of the trial court, either orally or by written

motion, to amend her complaint. Moreover, based on the factual record in this case, we have concluded that Mrs. Noe had constructive knowledge of her cause of action more than one year prior to the filing of her claim. Mrs. Noe has failed to present any new factual allegations that would demonstrate the possibility that her claim has not prescribed. After careful review of the record and Mrs. Noe's arguments to this court, we find that the need for an amendment to the petition has not been demonstrated.

### CONCLUSION

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

**AFFIRMED**