

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2012 CA 0333



IN RE: MEDICAL REVIEW PANEL
FOR THE CLAIM OF
JOSEPH BURNS
AND
LETRICIA BURNS

Judgment Rendered: JAN 08 2013

Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 572,026

Honorable Todd W. Hernandez, Judge

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Plaintiff – Letricia Burns

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Attorneys for Appellees
Defendants – Kenneth Blue,
M.D., John Howe, M.D.,
LSU Mid City Clinic and
Earl K. Long Medical Center

BEFORE: PARRO, HUGHES AND WELCH, JJ.

WELCH, J.

Appellant, Letricia Burns, appeals a judgment sustaining a peremptory exception raising the objection of prescription filed by defendants Kenneth Blue, M.D., John Howe, M.D., LSU Mid City Clinic, and Earl K. Long Medical Center. We affirm.

BACKGROUND

On June 13, 2008, Joseph Burns and his daughter, Letricia Burns, filed a request to convene a medical review panel in the Division of Administration. Therein, they asserted that the State of Louisiana, through the LSU Healthcare Services Division d/b/a Earl K. Long Medical Center, LSU Mid City Clinic, Dr. Kenneth Blue, and Dr. John Howe had been negligent in their care and treatment of Mr. Burns, who had been diagnosed with stage 4 lung cancer in 2008. The Burnses acknowledged that Mr. Burns' cancer may have first appeared in July 2006 on a chest x-ray; however, they claimed that the defendants failed to take appropriate action, and as a consequence of the delay in diagnosing Mr. Burns' cancer, Mr. Burns' life expectancy had been significantly reduced. Mr. Burns died on September 18, 2008.

On October 21, 2008, Dr. Blue, Dr. Howe, LSU Mid City Clinic, and Earl K. Long Medical Center filed a peremptory exception raising the objection of prescription in the 19th Judicial District Court. The matter was assigned to Section 27, over which Judge Todd Hernandez presided, and assigned docket #572,026. In the exception, the defendants asserted that on July 12, 2006, Mr. Burns refused hospitalization to investigate a suspicious CT scan, and on July 24, 2006, Dr. Troy Dotson and Dr. Paul Failla, Mr. Burns' pulmonary physicians, notified him that he probably had lung cancer and that he needed further testing to confirm the diagnosis. However, the defendants claimed, Mr. Burns refused to return to the clinic for the recommended testing. Moreover, they asserted, on August 3, 2006,

Dr. John Stuart, Mr. Burns' internist, discussed the seriousness of the test results with him and admonished Mr. Burns to return to the pulmonary clinic for a follow-up. Defendants contended that Mr. Burns' cause of action arose in July 2006, and this lawsuit, filed nearly two years from that time, was prescribed on its face.

In opposition to the exception, Ms. Burns asserted that the doctors failed to schedule an appropriate diagnostic follow-up visit to confirm Mr. Burns' diagnosis and to begin treatment and that Dr. Blue, in particular, failed to determine that Mr. Burns' on-going right side chest, side, and shoulder pain were related to the lung cancer. She also denied that Mr. Burns was ever told he might have cancer. She urged that the Earl K. Long Medical Center had a continuing duty to treat Mr. Burns and had the opportunity to discuss the concerns reflected in the July 2006 pulmonary visit.

In support of the prescription exception, the defendants offered medical records and the affidavits of Dr. Failla, Dr. Dotson, Dr. John Howe, and Patricia Holmes, a nurse. In opposition thereto, Ms. Burns offered medical records, the affidavit of Dr. Leo Farmer, and excerpts of the depositions of Dr. Failla, Dr. Stuart, and Mr. Burns. In addition, Ms. Burns submitted an amended petition for damages filed on November 24, 2008, in which Drs. Dotson, Failla, and Stuart were added as defendants.

A hearing on the prescription exception was held on January 5, 2009. Judge Todd Hernandez issued written reasons signed on March 19, 2009, in which he found that plaintiffs' claim had prescribed. In his written reasons, Judge Hernandez found that the evidence showed the following: Mr. Burns was told in July 2006 that he had an abnormal chest x-ray and CT scan and was told he needed to be admitted for further testing but refused. Several weeks later, Mr. Burns was told by two doctors that he likely had lung cancer, was told to return in three weeks, was given a plan of care, and was told to make an appointment; however,

Mr. Burns failed to do so. In August 2006, Dr. Stuart discussed the seriousness of the chest x-ray with Mr. Burns. However, Mr. Burns failed to follow up on any of the doctors' warnings. In November 2006, Mr. Burns saw Dr. Howe and failed to mention the information the doctors had given him over the summer. From this evidence, Judge Hernandez concluded that Mr. Burns made a decision to ignore statements and warnings given to him that should have led him to believe that his health was compromised and chose not to take the needed steps to seek treatment or follow-up on the possible diagnosis he was given in July 2006. Judge Hernandez ruled that the prescriptive period began to run at that time (when the doctors warned Mr. Burns of his possible condition), and the malpractice claim, filed in 2008, had prescribed.

On April 20, 2009, Judge Hernandez signed a judgment sustaining the exception of prescription filed on behalf of defendants Dr. Blue, Dr. Howe, LSU Mid City Clinic, and Earl K. Long Medical Center and dismissing the pending Medical Review Panel proceeding with prejudice. Ms. Burns filed a motion for a new trial for argument only, in which she noted that the trial court dismissed the Medical Review Panel as to the named defendants, but did not dismiss the panel as to Drs. Travis, Failla, and Stuart, who had been added to the malpractice action prior to the hearing on the exception of prescription.

On July 10, 2009, Ms. Burns filed a motion to extend the Medical Review Panel, and an order was signed by Judge Hernandez extending the panel to January 18, 2010. A second motion to extend the Medical Review Panel was granted in December 2010, extending the Medical Review Panel to July 21, 2011.

On January 11, 2011, Drs. Dotson, Failla, and Stuart filed an exception of prescription. They asserted that Judge Hernandez's ruling that the case had prescribed against Mr. Burns' later treating physicians, Drs. Blue and Howe, was

equally applicable to the defendants, who treated Mr. Burns almost two years before the medical malpractice claim was filed.

On January 20, 2011, the Medical Review Panel met and rendered a decision finding that the standard of care was not breached in the treatment of Mr. Burns by the State of Louisiana or by Drs. Blue, Howe, Dotson, Failla, and Stuart. On January 26, 2011, Ms. Burns filed a petition for wrongful death and a survival action in the 19th Judicial District Court against the State of Louisiana, through the LSU Healthcare Services Division, d/b/a Earl K. Long Medical Center, and Drs. Blue, Howe, Dotson, Failla, and Stuart. The case was assigned to Division 24 of the 19th JDC, presided over by Judge Michael Caldwell and assigned docket #598,690.

On January 31, 2011, in the lawsuit pending before Judge Caldwell, Ms. Burns filed a motion to stay the proceedings in Judge Hernandez's court, including the hearing on the later-added defendants' exception of prescription. She asserted that the proceeding before Judge Hernandez, which was initiated by the defendants during the medical review panel stage of the claim to urge an exception of prescription, had ended, and therefore, the filing of her petition for damages allotted to Judge Caldwell superseded the proceedings before Judge Hernandez. In the proceedings pending before Judge Hernandez, Ms. Burns filed a motion to dismiss the prescription exception filed by the later-added physician defendants or to continue the hearing on the exception without date.

On March 28, 2011, Judge Hernandez granted Ms. Burns' motion to continue the proceedings pending the outcome of the April 11, 2011 hearing on the motion to stay that was pending before Judge Caldwell. Judge Hernandez denied Ms. Burns' motion to stay the proceedings in his court. On April 11, 2011, Judge Caldwell denied Ms. Burns' motion to stay the proceedings in Judge Hernandez's

court, concluding that he lacked authority to stay another district court judge from acting on a matter pending before that judge.

On May 2, 2011, Judge Hernandez signed a judgment denying Ms. Burns' motion for a new trial on the judgment granting the exception of prescription in favor of LSU Mid City Clinic, Earl K. Long Medical Center, and Drs. Blue and Howe. Ms. Burns filed a motion for a devolutive appeal of the judgment signed on May 2, 2011. In her brief, Ms. Burns contends that her petition for damages filed in the 19th JDC and randomly allotted to Judge Caldwell supersedes the proceeding allotted to Judge Hernandez and that all judgments signed by Judge Hernandez are moot. In her second assignment of error, Ms. Burns claims that in sustaining the prescription exception, Judge Hernandez essentially granted a summary judgment despite the existence of disputed facts. She asks this court to order the dismissal of all proceedings before Judge Hernandez or to reverse Judge Hernandez's prescription ruling.

DISCUSSION

A judgment denying a motion for a new trial is an interlocutory ruling that is not independently appealable in the absence of an appeal of the underlying judgment on the merits. **Nelson v. Teachers' Retirement System of Louisiana**, 2010-1190 (La. App. 1st Cir. 2/11/11), 57 So.3d 587, 589 n. 2. However, an appeal of a denial of a motion for a new trial will be considered as an appeal of the judgment on the merits, when it is clear from the appellant's brief that the appeal was intended to be on the merits. **Id.** As it is clear from her brief that Ms. Burns is appealing the merits of the judgment sustaining the originally-named defendants' exception of prescription, we consider her appeal as an appeal of that judgment.

In her first assignment of error, Ms. Burns contends that the judgment rendered by Judge Hernandez on the original defendants' prescription exception was rendered moot because the Medical Review Panel rendered its opinion and she

filed a petition for damages thereafter. She insists that the filing of the malpractice petition superseded the proceedings in Judge Hernandez's court and precluded Judge Hernandez from entering any rulings thereafter on the prescription exception. Ms. Burns argues that a lawsuit involving the same issues and parties cannot coexist in two different courts in the same judicial district, and therefore, the original proceeding and any judgments signed in connection therewith must be declared moot and dismissed with prejudice. She further contends that the judgment on the initial exception filed by the State and its doctors was never approved, submitted, or signed, until "after the fact," and therefore the judgment is "inchoate." We disagree.

Louisiana Revised Statute 40:1299.39.1(B)(2)(a) permits the State or a person against whom a malpractice claim has been filed to raise any exceptions in a court of competent jurisdiction and venue at any time without need for the completion of the review process by the medical review panel. The judgment sustaining the exception of prescription was signed by Judge Hernandez on April 20, 2009, **before** Ms. Burns filed her petition for damages in the 19th JDC that was allotted to Judge Caldwell's division. Judge Hernandez clearly had jurisdiction to entertain the prescription exception at that time, and we find that the filing of the petition for damages did not divest Judge Hernandez of jurisdiction to conclude the proceedings on that prescription exception. His delay in signing the judgment denying Ms. Burns' motion for a new trial from the judgment granting the exception of prescription merely had the effect of suspending the delay for appealing that judgment. Accordingly, we find no merit in Ms. Burns' first assignment of error.¹

¹ The only issue before this court at this time is whether the trial court erred in entering judgment sustaining the exception of prescription filed by the original defendants, and we express no opinion regarding the exception of prescription pending before Judge Hernandez that was filed by the subsequently added defendants.

In her second assignment of error, Ms. Burns contends that Judge Hernandez erred in granting the exception of prescription. Where, as here, evidence has been adduced on the exception of prescription, the trial court's findings of fact are governed by the manifest error-clearly wrong standard of review. **Carter v. Haygood**, 2004-0646 (La. 1/19/05), 892 So.2d 1261, 1267. Under that standard, if the findings of the court are reasonable in light of the record reviewed in its entirety, an appellate court may not reverse even if convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. **Id.**

After a thorough review of the evidence submitted on the prescription exception and the applicable law, we find that a reasonable factual basis exists for the trial court's finding that the malpractice lawsuit was prescribed. Therefore, we conclude that the trial court did not err in granting the exception of prescription filed on behalf of LSU Mid City Clinic, Earl K. Long Medical Center, Dr. Kenneth Blue, and Dr. John Howe.

CONCLUSION

For the foregoing reasons, the judgment sustaining the peremptory exception raising the objection of prescription in favor of defendants Kenneth Blue, M.D., John Howe, M.D., LSU Mid City Clinic, and Earl K. Long Medical Center is hereby affirmed. All costs of this appeal are assessed to appellant, Letricia Burns.

AFFIRMED.