NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CA 1193

JESSICA KITCHENS, INDIVIDUALLY AND ON BEHALF OF HER MINOR DAUGHTER, ALEXIS LAING

VERSUS

NORTHSHORE REGIONAL MEDICAL CENTER AND SHERYL ROWLAND, MD

DATE OF JUDGMENT: FEB 14 2014

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 2011-16839, DIV. I, PARISH OF ST. TAMMANY
STATE OF LOUISIANA

HONORABLE REGINALD BADEAUX, JUDGE

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Richard L. Fewell, Jr. E. Dion Young West Monroe, Louisiana	Counsel for Plaintiff-Appellant Jessica Kitchens, Individually and on Behalf of Her Minor Daughter, Alexis Laing
Mark W. Verret Philip G. Smith Dax C. Foster Jeffrey E.McDonald Brett M.Bollinger Metairie, Louisiana	Counsel for Defendants-Appellees Northshore Regional Medical Center and Sheryl Rowland, MD
James D. Buddy Caldwell Attorney General J. Elliott Baker Irving H. Koch Covington, Louisiana	Intervenor - Appellee

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BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.

Higginbotham, J. Concurs. MKK

Disposition: MOTION TO DISMISS AND ALTERNATIVE MOTION TO STRIKE BRIEF DENIED; JUDGMENTAFFIRMED.

KUHN, J.,

Plaintiff-appellant, Jessica Kitchens, individually and on behalf of her minor daughter, Alexis Laing, appeals from a trial court judgment dismissing her suit for malpractice damages allegedly due to the hospital's failure to inform her of her infant daughter's hearing impairment after a newborn screening test. For the following reasons, we affirm the trial court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff's daughter, Alexis Laing, was born on December 13, 2006, at Northshore Regional Medical Center. Although hearing screenings performed on the baby on the same or next day showed further testing was required, plaintiff alleged she was not informed of these results and the need for follow-up appointments. In November 2009, testing showed the child had moderate to severe hearing loss in both ears. After filing a successful complaint with the Medical Review Panel on April 9, 2010, plaintiff filed suit against Northshore Regional Medical Center[1] on December 8, 2011, seeking damages due to defendant's alleged negligence, which plaintiff asserted caused her daughter to develop a severe communication disorder affecting her speech and language development and cognition.

Defendant filed an exception of prescription. To defeat the prescription exception, plaintiff contended she signed a blank hearing screening report that was later altered to reflect that the baby needed more hearing tests. The trial judge denied the prescription exception, stating that the suit was instituted after the three-year prescriptive period for malpractice actions, but if plaintiff could prove her inaction was due to concealment or fraud, her suit was not prescribed. Defendant

[1] Defendant Northshore Regional Medical Center in its responsive pleadings states that its proper name is Tenet 100 Medical Center Slidell, L.L.C., formerly Northshore Regional Medical Center, L.L.C. d/b/a NorthShore Regional Medical Center. Plaintiff also named Sheryl Rowland, MD, as a defendant. The matter was submitted to a Medical Review Panel, which found that Northshore was negligent but that Dr. Rowland was not negligent because she did not receive information from the hospital that the baby needed to be rescreened and she was not the baby's doctor after she was six weeks old. Additionally, James D. "Buddy" Caldwell, Attorney General for the State of Louisiana, was named as a defendant because plaintiff challenged the constitutionality of the medical malpractice cap on damages. Caldwell also intervened in the suit.

sought writs in this Court, which denied them on the showing made. Defendant then sought writs in the supreme court, which also denied them. ***Kitchens vs. Northshore Regional Medical Center***, 2012-0574 (La. App. 1st Cir. 9/10/12), writ denied, 2012-2120 (La. 11/16/12).

Defendant reurged its exception of prescription and an alternative motion for summary judgment, contending plaintiff's claims were prescribed on their face and she failed to offer any evidence to support the *contra non valentem* doctrine, her defense to the prescription exception. Defendant contended the *contra non valentem* necessary to interrupt prescription in this case must involve acts of fraud and misrepresentation intentionally committed by defendant designed to hinder, impede or prevent plaintiff from asserting her cause of action or lull her into a false security. Defendant asserted plaintiff could present no evidence demonstrating its alleged intentional deception of her.

On January 29, 2013, the court signed a judgment granting defendant's exception of prescription and its motion for summary judgment, dismissing plaintiff's claims with prejudice. Plaintiff then filed a motion for new trial, which the trial court denied. In its judgment, the trial court also granted defendant's motion for summary judgment and exception of prescription and dismissed plaintiff's claims with prejudice.

Plaintiff filed a motion for appeal of the January 29, 2013 judgment granting the exception of prescription and motion for summary judgment.

DISCUSSION

Defendant filed a motion to dismiss the appeal and an alternative motion to strike appellant's brief. It contends appellant seeks review of the denial of her motion for new trial, which is a nonappealable interlocutory judgment. Alternatively, it seeks to strike appellant's brief because it contends she did not address the merits of the case and declined to address the grant of the prescription exception and motion for summary judgment. Defendant also argues that plaintiff

failed to cite to the record to support any of her contentions and that it could not produce an appropriate brief.

The denial of a motion for new trial is an interlocutory and non-appealable judgment. However, an appeal of the denial of a motion for new trial should be considered as an appeal of the judgment on the merits when it is clear from appellant's brief that the appeal was intended to be on the merits. ***McKee v. Wal-Mart Stores, Inc.***, 2006-1672, p. 8 (La App. 1st Cir. 6/8/07), 964 So.2d 1008, 1013, writ denied, 2007-1655 (La. 10/26/07), 966 So.2d 583. Additionally, an appellate court can consider interlocutory judgments such as the denial of a motion for new trial as part of an unrestricted appeal of a final judgment. ***GE Commercial Finance Business Property Corp. v. Louisiana Hospital Center, L.L.C.***, 2010-1838, p. 6 fn.4 (La. App. 1st Cir. 6/10/11), 69 So.3d 649, 653 fn. 4.

In this case, the motion and order for appeal refer to the judgment granting the exception and alternative motion for summary judgment prior to the judgment on the motion for new trial. However, plaintiff's assignments of error concern matters discussed at the hearing on the motion for new trial. Yet, at that hearing, the judge allowed plaintiff's counsel to argue against the prescription exception as though it was the initial merits hearing on the exception because the judge held the earlier hearing without counsel present (due to a weather emergency) and under the mistaken impression that an opposition to the exception had not been filed. Thus, the motion for new trial hearing was akin to a hearing on the exception itself. Notably, the judgment following that hearing does not simply deny the motion for new trial but it also grants the prescription exception and the motion for summary judgment. Plaintiff's contentions on appeal relate to the merits of the prescription exception and to the denial of the motion for new trial. Therefore, defendant's motion to dismiss is denied.

Plaintiff's first assignment of error is the trial court's failure to grant her motion for new trial despite clear and convincing evidence showing her counsel

could not attend the hearing on the renewed exception of prescription and motion for summary judgment. However, as stated above, the judge gave plaintiff's counsel the opportunity to argue against the prescription exception at the hearing on the motion for new trial. Plaintiff's counsel did not indicate that he would offer or had discovered any additional evidence to oppose the exception. The judge on reconsidering the exception again found that plaintiff did not meet her burden of showing the suit was not prescribed. Therefore, this assignment of error has no merit.

Plaintiff's second assignment of error is the trial court's "factual determination regarding the substance of the petitioner's argument." At the hearing on the motion for new trial, the judge incorrectly stated that a year after the first prescription exception, he only had "the self-serving allegations of plaintiff that that is not her signature [on the hearing screening report] without anything to substantiate that." Plaintiff's counsel contends he was not arguing the signature was forged, but rather that her copy of the form she signed and the hospital's copy were not the same. Plaintiff's counsel alleged the results on the hospital's form showing plaintiff's daughter did not pass the hearing screening, which were omitted on the form plaintiff signed, constituted fraudulent conduct which concealed Northshore's negligence and thus suspended prescription under *contra non valentem*.

La. R.S. 9:5628 provides a maximum prescriptive period of three years from discovery of the malpractice to file suit. See ***Borel v. Young***, 2007-0419, p. 29 (La. 11/27/07), 989 So.2d 42, 69. La. R.S. 9:5628 states, in pertinent part:

> A. No action for damages for injury or death against any physician, chiropractor, nurse, licensed midwife practitioner, dentist, psychologist, optometrist, hospital or nursing home duly licensed under the laws of this state, or community blood center or tissue bank as defined in R.S. 40:1299.41(A), 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**.
>
> B. The provisions of this Section shall apply to all persons whether or not infirm or under disability of any kind and including minors and interdicts.
>
> (Emphasis added.)

This statute sets forth two prescriptive limits within which to bring a medical malpractice action, namely one year from the date of the alleged act or one year from the date of discovery. ***Lawrence v. Our Lady of the Lake Hospital***, 2010-0849, p. 5 (La. App. 1st Cir. 10/29/10), 48 So.3d 1281, 1285. La. R.S. 9:5628 corresponds with the basic one year prescriptive period for delictual actions provided in La. C.C. art. 3492 but it additionally embodies the discovery rule delineated as the fourth category of the jurisprudential doctrine of *contra non valentem* ("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"), with the single qualification that the discovery rule is expressly made inapplicable after three years from the act, omission or neglect. *See* ***Campo v. Correa***, 2001-2707, p. 9 (La. 6/21/02), 828 So.2d 502, 509. Both the one-year and three-year limitation periods of La. R.S. 9:5628 are prescriptive. ***Borel***, 2007-0419 at p. 29, 989 So.2d at p. 69; ***Lawrence***, 2010-0849 at p. 5, 48 So.3d at p. 1285.

Ordinarily, the exceptor bears the burden of proof at the trial of the peremptory exception. ***Lawrence***, at p. 5, 48 So.3d at 1285. If, however, the action is prescribed on its face, the plaintiff bears the burden of showing that the action has not prescribed ***Id***. On the trial of the prescription exception pleaded at or prior to the trial of the case, evidence may be introduced to support or controvert any of the objections pleaded, when the grounds thereof do not appear from the petition. La. C.C.P. art. 931.

If evidence is introduced at the trial on the peremptory exception of prescription, the trial court's findings are reviewed under the manifest error standard of review. ***TCC Contractors, Inc. v. Hospital Service District No. 3 of the Parish of Lafourche***, 2010-0685, 2010-0686, p.8 (La. App. 1st Cir. 12/8/10), 52 So.3d 1103, 1108. In cases involving no dispute regarding material facts, but only the determination of a legal issue, a reviewing court must apply the de novo standard of review, under which the trial court's legal conclusions are not entitled to deference. ***Id.***

The alleged malpractice due to defendant's failure to inform plaintiff of her daughter's hearing test results and to schedule a follow-up appointment occurred on December 13 and/or 14, 2006. Plaintiff learned of her daughter's hearing impairment in November, 2009, within the three year period for filing her claim, but she did not file her claim with the Medical Review Panel until April 9, 2010, which is beyond the three year period from the date of the alleged malpractice as set forth in La. R.S. 9:5628A.[2] Plaintiff's allegations in her petition show that she brought her medical malpractice suit more than three years after the date of the alleged medical malpractice. The *contra non valentem* exception to the prescription embodied in the discovery rule in La. R.S. 9:5628 is expressly made inapplicable after three years from the act, omission or neglect. Therefore, the trial court's consideration of plaintiff's failure to produce evidence of defendant's alleged fraud and misrepresentation intentionally committed by defendant designed to hinder, impede or prevent her from asserting her cause of action or lull her into a

[2] If a medical review panel is timely requested, La. R.S. 40:1299.47(A)(2)(a) provides that "[t]he filing of the request for a review of a claim shall **suspend** the time within which suit must be instituted ... until ninety days following notification ... to the claimant or his attorney of the issuance of the opinion by the medical review panel." (Emphasis added). Simply stated, the filing with the Patients Compensation Fund of a request for review of a medical malpractice claim by a medical review panel triggers the *suspension* of prescription specially provided by the Medical Malpractice Act.

Defendant attached to its memorandum in support of the exception an uncertified copy of the complaint plaintiff filed with the Medical Review Panel, which is stamped received on April 9, 2010. While this document was not introduced into evidence at the hearing and plaintiff's testimony did not establish the date she filed the complaint, in her memorandum in opposition to the exception, she asserted her complaint was filed "exactly 3 years, 3 months, and 27 days" from the date of the alleged negligence and, at the hearing, her counsel agreed with defense counsel's recitation of the dates, including the filing of the complaint.

false security is irrelevant. Plaintiff's suit is prescribed and the trial judge did not err in granting the exception of prescription. This assignment of error has no merit.

Lastly, we deny the alternative motion to strike plaintiff's appellate brief, finding defendant's contention that it failed to address the merits of the prescription exception has no merit for the reasons above.

CONCLUSION

For the reasons assigned, the motion to dismiss the appeal and alternative motion to strike are denied and the judgment of the trial court is affirmed. All costs of this appeal are assessed to plaintiff Jessica Kitchens, individually and on behalf of her minor daughter, Alexis Laing.

MOTION TO DISMISS AND ALTERNATIVE MOTION TO STRIKE BRIEF DENIED; JUDGMENT AFFIRMED.