NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2017 CA 0724

IN RE: DAMIAN SKIPPER (D)

Judgment rendered December 21, 2017.

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Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. C652446
Honorable Todd Hernandez, Judge

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LINDA SKIPPER

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DEFENDANTS-APPELLEES
DR. ROBERT LIMBAUGH, DR. JAMES LINFORD, AND DR. DAVID MELTON

* * * * * *

BEFORE: GUIDRY, PETTIGREW, AND CRAIN, JJ.

Guidry, J. concurs in the result.

PETTIGREW, J.

This appeal arises from the dismissal of a medical malpractice claim for prescription during the medical review panel process. Finding that the claimant failed to carry her burden of proof on the exception, we affirm.

FACTS AND PROCEDURAL HISTORY

Linda Skipper requested the formation of a medical review panel in accordance with La. R.S. 40:1231.8 to review treatment provided to her now-deceased son, Damian Skipper, by Baton Rouge General Medical Center, Dr. Robert Limbaugh, Dr. James Linford, Dr. David Melton, Dr. Dillon Paul, nurse practitioner Catherine Talley, Dr. Joel Mosley, and Dr. Imran Faruqi. The alleged malpractice occurred between June 22-30, 2015, and the request for a medical review panel was filed more than a year later, on September 13, 2016.

The medical review panel request contained the following allegations regarding the medical treatment provided to Damian Skipper: On June 22, 2015, Damian Skipper, a "healthy 41 year old man," presented to the Emergency Department at Baton Rouge General Medical Center complaining of vomiting, bloody diarrhea, and crampy abdominal pain for the past four days. Mr. Skipper informed Dr. Melton that he believed his symptoms may have been caused by food poisoning. He was treated for hematochezia and epigastric pain and released the next day. Later in the day on June 23, 2015, Mr. Skipper returned to the Baton Rouge General Medical Center Emergency Department complaining that his symptoms had returned. He again related the onset of his symptoms to eating food prepared by his wife.[1] Mr. Skipper was diagnosed with gastroenteritis and discharged on June 24, 2015, with instructions to follow up with a gastroenterologist on July 5, 2015. Mr. Skipper was brought back to the Emergency Department on June 30, 2015, in cardiac arrest; he was unable to be resuscitated, and he died on that date. After Ms. Skipper was informed of her son's death, she contacted the East Baton Rouge Parish Coroner's Office to request the exhumation of her son's body, "to determine if there were toxins of any kind in Mr. Skipper's tissues," and on March 9, 2016, she was informed that the Coroner's Office would

[1] It is not clear from the record whether Mr. Skipper was in fact married, but that fact appears to have been disputed by his mother.

not take any action on her request at that time. The medical review panel letter does not state when Ms. Skipper was informed of her son's death, nor does it state when she requested exhumation of her son's body. Ms. Skipper alleged that the defendant health care providers were negligent in failing to perform toxicology examinations to determine if her son had been poisoned because of his statements regarding food poisoning, and this failure to properly diagnose and treat him led to his death.

Drs. Limbaugh, Linford, and Melton filed a peremptory exception of prescription as authorized by La. R.S. 40:1231.8(B)(2)(a).[2] In opposition to the exception, Ms. Skipper offered email correspondence between her attorney and Shane Evans, an East Baton Rouge Parish Coroner's Office employee. In a March 9, 2016 email to Mr. Evans, Ms. Skipper's attorney mentioned that Mr. Evans had asked her "some time ago" whether law enforcement had been contacted, and stated that an investigator had been called, but no action was taken. Mr. Evans' reply, also dated March 9, 2016, states: "At this point, based on the information you have provided, we will take no further action on this matter. If law enforcement develops additional information on this case, then as always, we will accept it." Mr. Evans' email goes on to state that the office would not oppose a family-funded exhumation and private autopsy if there was a judicial determination that Mr. Skipper's parents (rather than his alleged wife) are his legal next of kin. At the hearing on the exception, her attorney argued:

> It was not until later, which without going into the details of something that is actually pending right now, after receiving some information from the or (phonetic) - - from the East Baton Rouge Parish Coroner's Office saying that they did not believe there was sufficient information for them to take any further actions, it was not until several months after that that Mrs. Skipper was actually contacted unsolicitedly (phonetic) by another law enforcement agency; and, through her participation in an ongoing criminal investigation, that is when she received additional information that suggested to her that there was actually something else that could have been done by the doctors and the treat - - treating physicians in this case.
>
> And, with that, that is when she obtained constructive knowledge of a claim that could have been filed[.]

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[2] Under La. R.S. 40:1231.8(B)(2)(a), a health care provider may raise the exception of prescription under La. R.S. 9:5628(A) in a court of competent jurisdiction and proper venue at any time without need for completion of the review process by the medical review panel.

Other than the March 9, 2016 emails, Ms. Skipper offered no evidence to show when she discovered the alleged malpractice. She provided no evidence of what she learned that suggested to her that there may have been something more the defendant health care providers could have done or when she learned it. The trial court granted the defendants' exception and dismissed all claims against Drs. Limbaugh, Linford, and Melton with prejudice, and Ms. Skipper appealed.[3]

DISCUSSION

Ms. Skipper first argues on appeal that the trial court erred in determining that the petition was prescribed on its face and improperly shifting the burden of proof to her.

The prescriptive period for medical malpractice actions is set forth in La. R.S. 9:5628(A), which provides:

> No action for damages for injury or death against any physician ... duly licensed under the laws of this state ... 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.

This statute sets forth two prescriptive limits applicable to medical malpractice claims, namely, one year from the date of the alleged act or one year from the date of discovery with a three-year limitation from the date of the alleged act, omission, or neglect to bring such claims (if the negligence is not immediately apparent). **Verbois v. Taylor**, 15-0240, p. 5 (La.App. 1 Cir. 12/17/15), 185 So.3d 59, 62, writ denied, 16-0037 (La. 3/4/16), 188 So.3d 1062, citing **Campo v. Correa**, 01-2707, p. 9 (La. 6/21/02), 828 So.2d 502, 509.

Ordinarily, the exceptor bears the burden of proof at the trial of the peremptory exception; however, if the action is prescribed on its face, the plaintiff bears the burden of showing that the action has not prescribed. **Lawrence v. Our Lady of the Lake Hospital**, 10-0849, p. 5 (La.App. 1 Cir. 10/29/10), 48 So.3d 1281, 1285. On the trial of a peremptory exception pleaded at or prior to the trial of the case, evidence may be

[3] Peremptory exceptions of prescription were also filed by Baton Rouge General Medical Center and the State of Louisiana through LSU Health, but these exceptions are not part of this appeal.

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. The general rule regarding the exceptor's burden of proof is that a petition should not be found prescribed on its face if it is brought within one year of the date of discovery and facts alleged with particularity in the petition show that the patient was unaware of the 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 plaintiff. **Verbois**, 15-0240 at pp. 5-6, 185 So.3d at 62; **Campo**, 01-2707 at p. 9, 828 So.2d at 509.

However, when, as in the instant case, the plaintiff is met with an exception of prescription filed in the trial court during the pending medical panel review under the Medical Malpractice Act, the plaintiff is required to prove the defense of contra non valentem as allowed under La. R.S. 9:5628. **Verbois**, 15-0240 at p. 6, 185 So.3d at 62; **Lawrence**, 10-0849 at p. 6, 48 So.3d at 1285. See also **Holmes v. LSU/E.A. Conway Medical Center**, 43,662, p. 9 (La.App. 2 Cir. 10/22/08), 997 So.2d 605, 611-12 (Where alleged acts of malpractice occurred more than a year prior to the request for a medical review panel, the claimants had the burden of proof at an exception of prescription to establish evidence of their late discovery of the negligence, and absent any evidence submitted by the plaintiffs aside from a "vague assertion of discovery four months before the filing of the [Medical Review Panel] Letter," the exception of prescription must be sustained.). Because Ms. Skipper's request for a medical review panel was filed more than one year from the dates of the alleged malpractice, her argument that the trial court erred in shifting the burden of proof on the exception to her is incorrect.

Ms. Skipper next argues that the trial court erred in finding that she had actual or constructive knowledge of the malpractice more than a year before requesting the medical review panel. Prescription 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. Constructive knowledge is whatever notice is enough to excite attention and put the injured party on guard and call for inquiry. Such notice is tantamount to knowledge or notice of everything to which a reasonable inquiry may lead. **Campo**, 01-2707 at pp. 11-12, 828

So.2d at 510-11. Such information or knowledge as ought to reasonably put the alleged victim on inquiry is sufficient to start the running of prescription. **Campo**, 01-2707 at p. 12, 828 So.2d at 511.

A plaintiff's mere apprehension that something may be wrong is insufficient to commence prescription unless the plaintiff knew or should have known through the exercise of reasonable diligence that his problem may have been caused by acts of malpractice. **Campo**, 01-2707 at p. 12, 828 So.2d at 511. Even if a malpractice victim is aware that an undesirable condition has developed after medical treatment, such knowledge does not equate to knowledge of everything to which inquiry might lead. **Campo**, 01-2707 at p. 15, 828 So.2d at 512-513. Prescription will not run as long as it was reasonable for the plaintiff not to recognize that the condition might be treatment-related. **Campo**, 01-2707 at p. 12, 828 So.2d at 511. The ultimate issue is the reasonableness of the patient's action or inaction, in light of his education, intelligence, the severity of the symptoms, and the nature of the defendant's conduct. **Campo**, 01-2707 at p. 12, 828 So.2d at 511.

When prescription is raised by a peremptory exception, with evidence introduced at a hearing, the district court's finding of fact on the issue of prescription is subject to the manifest error standard of review. **Lawrence**, 10-0849 at p. 10, 48 So.3d at 1287-88.

Ms. Skipper correctly argues on appeal that the fact that her son died after medical treatment is not necessarily sufficient to put her on notice of possible malpractice and start the running of prescription. However, in response to the filing of a peremptory exception of prescription during the medical review panel process, where the request for a medical review panel was filed more than a year after the date of the alleged malpractice, Ms. Skipper had the burden of submitting evidence of her late discovery of facts that put her on notice of possible malpractice. **Holmes**, 43,662 at p. 9, 997 So.2d at 611. Ms. Skipper argues that she did not have constructive knowledge of possible malpractice until at least March 9, 2016, when her attorney was informed by the East Baton Rouge Parish Coroner's Office that no further action would be taken on the case. However, Ms. Skipper offered no evidence to show how the decision by the Coroner's Office not to take any action unless a family-funded exhumation was requested by the next of kin or unless there was some

information from law enforcement that an exhumation was necessary, was enough to excite her attention and put her on guard and call for inquiry. The vague references by her attorney in argument before the trial court to information received by Ms. Skipper at an unspecified time, through her participation with an unnamed law enforcement agency, in an unrelated criminal investigation, are likewise not sufficient to carry her burden of proving later discovery of the possible malpractice. See **Holmes**, 43,662 at pp. 6-10, 997 So.2d at 610-11. Because the burden was on Ms. Skipper to establish evidence of her late discovery of the malpractice, and Ms. Skipper made only vague assertions as to a delay in discovering facts that excited her attention, the trial court's finding that the claim was prescribed is not manifestly erroneous.

CONCLUSION

The judgment granting the defendant health care providers' peremptory exception of prescription is affirmed. Costs of this appeal are assessed to the plaintiff-appellant, Linda Skipper.

AFFIRMED.