

**NOT DESIGNATED FOR PUBLICATION**

**SALLY CHAMPAGNE** \* **NO. 2003-CA-0625**  
**VERSUS** \* **COURT OF APPEAL**  
**STEPHEN F. BRINT, M.D., ET** \* **FOURTH CIRCUIT**  
**AL.** \* **STATE OF LOUISIANA**  
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APPEAL FROM  
CIVIL DISTRICT COURT, ORLEANS PARISH  
NO. 96-8741, DIVISION "D-16"  
Honorable Lloyd J. Medley, Judge

\* \* \* \* \*

**Judge Dennis R. Bagneris, Sr.**

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(Court composed of Judge Dennis R. Bagneris, Sr., Judge Michael E. Kirby,  
and Judge Edwin A. Lombard)

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**REVERSE  
D**

Plaintiff Sally Champagne appeals a trial court judgment, which dismissed her medical malpractice action against defendant Dr. Stephen F. Brint on an exception of prescription. For the following reasons, we reverse.

**FACTS**

The following statement of facts is taken from Plaintiff's petition.

In May 1988, Plaintiff consulted Dr. Brint for Radial Keratotomy ("RK") Eye Surgery in order to improve her eyesight. Plaintiff underwent the surgical procedures in August 1988, and November 1988. Plaintiff underwent a second set of surgeries on each eye and a second procedure was performed on her left eye sometime during the year 1989. Following the surgeries, Dr. Brint continued to treat Plaintiff's eyes with steroid drops, although her eyesight continued to worsen. As a result of her continuing problems with her vision, Plaintiff consulted Dr. Richard Bessent in April 1993. At this time, Dr. Bessent informed Plaintiff that she had cataracts on both eyes. Thereafter, Dr. Bessent sent Plaintiff to see Dr. Kastl at the Tulane Medical Center for an additional opinion. In November 1993, after obtaining Dr. Kastl's opinion, Dr. Bessent informed Plaintiff that her

cataracts were induced by the over application of steroids. Plaintiff alleges that the November 1993 consultation was the first time she was aware of the fact that she had a medical malpractice action against Dr. Brint.

## **PROCEDURAL HISTORY**

On September 27, 1994, Plaintiff filed a medical malpractice complaint against Dr. Brint with the Louisiana Patient's Compensation Fund. Thereafter, on May 31, 1996, Plaintiff filed this medical malpractice suit against Dr. Brint, alleging that Dr. Brint negligently performed the RK surgery and that he over prescribed steroidal eye drops during Plaintiff's follow-up treatment. On June 21, 1996, Dr. Brint filed an answer to Plaintiff's petition, which denied Plaintiff's assertions of malpractice. On October 16, 2001, Dr. Brint filed an exception of prescription. According to the exception, Plaintiff filed her complaint with the Fund on September 23, 1994, and that the alleged act of malpractice occurred on or before March 31, 1993. Further, Dr. Brint alleges in his exception that under La. R.S. 9:5628, Plaintiff was reasonably aware of the factual grounds for her claim, at the latest, on April 28, 1993, when she was informed by Dr. Bessent that she had developed cataracts in her eyes, such that her complaint against him was prescribed. On April 17, 2002, Plaintiff filed a memorandum, with exhibits, in opposition to Dr. Brint's exception of prescription.

On April 19, 2002, the trial court conducted a hearing on Dr. Britt's exception of prescription. At the conclusion of the hearing, the trial court found in favor of Dr. Britt and maintained the exception. On May 30, 2002, the trial court signed a judgment to that effect. Plaintiff now appeals this final judgment.

## **DISCUSSION**

The Louisiana Statute that states the prescriptive period for medical malpractice claims is La. R.S. 9:5628. That statute provides 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.

If a plaintiff's claims are not prescribed on the face of the petition, the burden is on the party raising the objection of prescription to prove the facts to support the objection. *Johnson v. Holden Springs, Inc.* 2001-1366, p.3 (La. App. 4 Cir. 2/27/02) 811 So.2d 1123, 1125. Conversely, if a claim is

prescribed on the face of the petition, the burden shifts to the plaintiff to prove a suspension or interruption of the prescriptive period. *Id.* At the trial of a peremptory exception, “evidence may be introduced to support or controvert any of the objections pleaded, when the grounds thereof do not appear from the petition.” La. Civ. Code art. 931. In the absence of evidence, the objection of prescription must be decided upon the facts alleged in the petition, and all allegations thereof are accepted as true. See *Our Lady of the Lake Hosp. v. Vanner*, 95-0754, p. 3 (La.App. 1 Cir. 12/15/95), 669 So.2d 463, 464, *cert denied*, 525 U.S. 818, 119 S.Ct. 57, 142 L.Ed.2d 45 (1998).

After a review of Plaintiff’s petition, we do not find the petition is prescribed on its face. The petition alleges, in pertinent part:

11.

That, after the surgery on the left eye failed to improve applicants vision, which in truth and in fact had begun to deteriorate, Dr. Brint cancelled the scheduled second surgery for the right eye for April 1990.

12.

That Dr. Brint continued to treat applicant conservatively, administering, providing and prescribing steroid drops for her eyes, and consistently telling her that she would improve gradually over time, and always that it would take a long period of time for her eyesight to improve.

13.

That the continued treatment and application of steroids by defendants was to effectively lull applicant into a false sense of well being as to the potential for recovery and was an active concealment of the reality of her circumstance, being that her eyesight was permanently damaged by the surgery and would never improve and that the misuse of steroids caused the development of cataracts, which caused impaired vision and required further corrective surgery.

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17.

That when the eyesight of applicant continued to worsen, she began to become concerned and ultimately sought out and obtained a second opinion from Dr. Richard Bessent, who informed her on the first visit, on or about April 1993 that she had cataracts on both eyes.

18.

That Dr. Bessent sent applicant to see Dr. Kastl, of Tulane Medical Center, in November of 1993, for an additional opinion and after obtaining the results of that consultation, Dr. Bessent informed applicant that she should never have had the surgery, that her eyes had been cut too many times and that the cataracts were induced by the over application of steroids. That, for the first time, applicant was informed by Dr. Bessent that the surgeries and resultant use of steroids were the cause of her problems with her eyes.

19.

That the only source of steroid use by petitioner throughout the course of her treatment was the defendants.

20.

That as a result of these consultations in November of 1993, applicant became aware for the first time of the medical

malpractice of the defendants.

Plaintiff alleges in the petition that she did not become aware of the fact that the cataracts were induced by the over application of steroids until November 1993. Plaintiff filed her medical malpractice complaint against Dr. Brint with the Louisiana Patient's Compensation Fund on September 27, 1994; therefore, on the face of her petition, the claim had not prescribed. Because the Plaintiff's claims are not prescribed on the face of the petition, the burden was on Dr. Brint to prove the facts to support the exception of prescription.

After a review of the record in this case, we are unable to find any evidence that was introduced at the hearing to support the exception of prescription. Although the transcript indicates that both the Plaintiff's and Dr. Bessent's depositions were discussed at the hearing, neither depositions were introduced as evidence in the record. Further, although the record before us contains a memorandum in opposition to the exception of prescription with exhibits, we may not consider exhibits filed in the record that were not filed in evidence. Thus, because we are not authorized to consider as part of the record exhibits attached to a memorandum in opposition of a peremptory exception, and as this memorandum and exhibits were not filed in evidence, they are not part of the record on appeal.

Accordingly, because the record at this time contains no evidence submitted by Dr. Brint to support his exception, we find that Dr. Brint failed to meet his burden of proof for the exception of prescription. For these reasons, we reverse the judgment of the trial court, which maintained Dr. Brint's exception of prescription.

**REVERSED**