

**IN RE: MEDICAL REVIEW  
PANEL FOR THE CLAIM OF  
GENE BARBIER**

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**NO. 2004-CA-1026**

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**COURT OF APPEAL**

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**FOURTH CIRCUIT**

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**STATE OF LOUISIANA**

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APPEAL FROM  
CIVIL DISTRICT COURT, ORLEANS PARISH  
NO. 2003-1169, DIVISION "G-11"  
Honorable Robin M. Giarrusso, Judge

\* \* \* \* \*

**CHIEF JUDGE JOAN BERNARD ARMSTRONG**

\* \* \* \* \*

(Court composed of Chief Judge Joan Bernard Armstrong, Judge Charles R. Jones and Judge Michael E. Kirby)

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**AFFIRMED.**

In this medical malpractice action, the plaintiff, Gene Barbier, appeals from the trial court judgment granting an Exception of Prescription in favor of one of the defendants, Dr. Michelle Brumfield. For the reasons assigned below, we affirm.

From August 30, 1994, through March 23, 2001, Barbier received approximately thirty-three lumbar epidural steroid injections in connection with a history of longstanding back pain. Dr. Brumfield administered eleven of the injections from September 7, 1994, until September 26, 2000.

On December 4, 2002, Barbier filed a medical malpractice complaint against Dr. Brumfield and two other anesthesiologists who also administered some of the injections. Barbier's complaint alleged that the injections caused him to develop a debilitating and potentially fatal condition known as arachnoiditis.

On January 24, 2003, Dr. Brumfield filed a Petition for Discovery in the Civil District Court for the Parish of Orleans. Thereafter, Dr. Brumfield filed a Peremptory Exception of Prescription, arguing that the complaint against her prescribed under the prescriptive period set forth in La. R.S. 9:5628(A). On April 2, 2004, the matter came before the trial court and was submitted on briefs. Judgment was rendered on April 13, 2004, granting the exception and dismissing Barbier's claim against Dr. Brumfield with

prejudice.

On appeal, Barbier argues that the thirty-three injections, including ten administered by Dr. Brumfield, constituted a continuing tort and as long as his claim was filed within one year of his discovery of the malpractice and within three years of the last act of malpractice, then his claim has not prescribed.

Louisiana's prescriptive statute for medical malpractice cases, La. R.S. 9:5628, 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 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.

The Louisiana Supreme Court has described La. R.S. 9:5628 as a "tripartite prescription provision." In re Medical Review Panel for Claim of Moses, 00-2643, pp. 7-8 (La.5/25/01), 788 So.2d 1173, 1178-79. First, a

one-year prescription period is the general rule, which applies to all types of medical malpractice actions. Under this general rule, such actions prescribe one year from the date of the alleged act, omission or neglect. This rule applies when the damages are immediately apparent. Second, in cases involving damages that are not immediately apparent, a discovery exception to the general rule is codified. Under this discovery rule, such actions prescribe one year from the date of discovery of the alleged act, omission, or neglect. Third, an overall limitation is placed on cases otherwise falling within the discovery rule. That overall limitation provides that "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." La. R.S. 9:5628.

The discovery exception found in La. R.S. 9:5628(A) is a codification of the discovery doctrine of *contra non valentem*. Under the discovery doctrine, prescription does not begin to accrue until the plaintiff should have discovered he had a reasonable basis for pursuing a claim against the defendant. Moses, at p. 8, 788 So.2d at 1178. Likewise, the prescriptive period for a medical malpractice claim begins to run in the absence of actual knowledge so long as he has constructive knowledge of the facts giving rise to his claim. Campo v. Correa, 01-2707 p. 12 (La. 6/21/02), 828 So.2d 502, 510. Constructive knowledge is notice sufficient enough to excite attention

and put the injured party on guard and call for inquiry. Constructive knowledge is tantamount to knowledge or notice of everything to which a reasonable inquiry may lead. Such information or knowledge as ought to reasonably put the alleged victim on inquiry is sufficient to start the running of prescription. 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 at p. 12, 828 So.2d 510-511. As a necessary corollary of these principles, the question of whether a plaintiff had constructive knowledge of the existence of a medical malpractice cause of action at a particular time must be decided based on the particular facts of the case. See Wang v. Broussard, 96-2719 (La. App. 1 Cir. 2/20/98), 708 So.2d 487, 491.

Generally, the party pleading prescription bears the burden of proving the claim has prescribed, but when a claim has prescribed on its face, the burden shifts to the claimant to demonstrate prescription was suspended or interrupted. Moses at p. 6, 788 So.2d at 1177-1178. Initially, therefore, our task is to determine whether Barbier's medical malpractice complaint shows on its face that his claim has prescribed. As this court explained in Cadogan v. McClanahan, 03-0603 p. 6 (La. App. 4 Cir. 11/2/03), 861 So. 2d 250, 254, "a petition should not be found prescribed on its face if it is brought within

one year from the date of discovery and the facts alleged with particularity in the petition show that the patient was unaware of 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 patient.”

In the present case, Barbier’s medical malpractice complaint was filed on December 4, 2002. Paragraph 4 of the complaint sets forth the following pertinent facts: Dr. Willie Joseph administered injections from August 30, 1994 though November 15, 2000. Dr. Brumfield administered injections from September 7, 1994 through September 26, 2000. Dr. Larry Nelson administered one injection on March 23, 2001. Clearly, the request for a medical review panel was filed more than one year from the date of the last injection of the type administered by Dr. Brumfield. Barbier thus bears the burden of showing, with some particularity, that he discovered the alleged malpractice no earlier than December 4, 2001. However, a thorough reading of Barbier’s complaint reveals no mention of the date of discovery.

Because the claim is *prima facie* prescribed, the burden of proof was on Barbier at the hearing on the exception to demonstrate that the special discovery rule embodied in La. R.S. 9:5628 (A) operated to suspend the one-year prescriptive period. The evidence of record does not show the date when Barbier allegedly discovered the alleged medical malpractice. Barbier

did not testify at the hearing, nor did he offer his deposition. He presented no evidence to show how and when he might have had a reasonable basis for pursuing a medical malpractice action. Other than a general unsworn statement set forth in Barbier's memorandum in opposition to the exception, the record is devoid of any evidence on this issue.

Based on the record before us, we are required to conclude that Barbier did not meet his burden of proof by presenting evidence establishing that he filed this action within one year of the time he discovered or should have discovered the grounds for the alleged malpractice. Accordingly, we find no error on the part of the trial court in granting the Exception of Prescription in favor of Dr. Brumfield.

For the foregoing reasons, the judgment sustaining Dr. Brumfield's Exception of Prescription is hereby affirmed.

**AFFIRMED.**