SUPREME COURT OF LOUISIANA

No. 95-C-1707

JOSEPH B. FONTENOT AND EARLENE S. FONTENOT

Versus

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,

JOHNSON, Justice

W ician exhibited conduct which ed *contra non valentem* o uspend the running or accrual of prescriptio The c or misrepresent facts to prevent p e eriod, and affirmed the trial court's sustaining of the defendants' P of Prescription. For the reasons stated below, we affirm the lower courts' decisions.

T ctice action which plaintiffs, Joseph B. enot s ,

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* he United States Court of Appeals for the Fifth Circuit, there was n " under Rule IV, Part 2, § 3. Panel included Chief Justice Calogero and

problems. After performing a series of tests on Mrs. Fontenot, Dr. Trahan found that Mrs. Fontenot had spinal abnormalities and referred her to Dr. Thomas V. Bertuccini, a neurosurgeon. During an office visit in January, 1990, Dr. Bertuccini informed Mrs. Fontenot that the tests performed by Dr. Trahan indicated that she suffered from a subtotal block at L4-5 and spinal stenosis. Dr. Bertuccini informed Mrs. Fontenot that surgery was necessary to remedy her condition. On a subsequent office visit, Mrs. Fontenot assented to the surgery.

On February 12, 1990, Dr. Bertuccini performed spinal surgery on Mrs. Fontenot, during which he performed a laminectomy at L4-5 and foraminotomies at L3-4 and L4-5 bilaterally. Dr. Bertuccini used a power drill to cut through tissue and bone near Mrs. Fontenot's spinal cord. During this procedure, the drill bit being used by Dr. Bertuccini slipped. As a result of the slipping of the drill, Dr. Bertuccini nicked Mrs. Fontenot's dura, which is the tough, fibrous membrane forming the outer envelope of the brain and spinal cord. In their Petition for Damages, plaintiffs alleged that as a result of Dr. Bertuccini's nicking Mrs. Fontenot's dura, she suffered leakage of the cerebrospinal fluid, which caused severe, permanent damage to the L-5 sensory nerve root and individual sensory nerve rootlets, resulting in chronic and severe pain in her left leg and rectum, severe bowel incontinence, and a recurring inability to urinate, which required the daily implanting of a catheter for approximately five months.

According to Mr. Fontenot's deposition, shortly after the surgery and while Mrs. Fontenot was being brought to the recovery room, Dr. Bertuccini informed him that the drill had slipped, and that he had to make repairs but everything would be alright. In Mrs. Fontenot's deposition, she stated that she had no recollection of Dr. Bertuccini informing her that the drill had slipped. Mrs. Fontenot did indicate however, that during her hospitalization, subsequent to the surgery, she experienced numbness in her

l ring this time,

r. Luis deAraujo, Dr. Bertuccini's partn

h ed by a damaged nerve. Also, during subsequent follow-up visits, Dr.

ertucci

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r. deAraujo one time after Dr. Bertuccini's move, July 29, 1991. D

d enot that she consider undergoing a sympathectomy.

Fontenot stated that she did not ask the reason for this

that it was intended to stop her pain. She sought a second opinion regarding th

s ution (Ochsner). At Ochsner, Mrs. Fontenot

ompleted a "Personal Hi

p ith nerve damage

- my doctor referred me to a v

M ent a sympathectomy at Lafayette General. At Lafayette

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-- History Assessment," which was dated November, 19, 1991. On thi

form, Fontenot and completed by a nurse who questioned

prior s

nerve damage --

her surgical history included "nerve damage from disc surgery." Also posed in thi

f hospitalization?" Mrs.

The thectomy did not eliminate Mrs. Fontenot's pain, and in October

1992, he saw Dr. Michael Carey, a neurosurgeon at LSU Medical Center. Mrs

F hy she was having so many problems, and he told her she

had nerve damage as a result of the surgery performed by Dr. Bertuccini.

On February 4, 1993, plaintiffs filed suit against Dr. Bertuccini and his insurer. The defendants filed an Exception of Prescription, which was granted by the trial court. Finding that Mrs. Fontenot acquired actual knowledge of her injuries and the cause thereof more than one year prior to the filing of the petition, and discounting application of any of the grounds for suspending or interrupting prescription, the court of appeal affirmed the trial court's decision.[2]

LAW AND DISCUSSION

Prescription runs against all persons unless exception is established by legislation. La. C.C. art. 3467. Contra non valentem is an exception to this express statutory provision. *See Taylor v. Giddens, 618 So. 2d 834, 841 (La. 1993); Rajnowski v. St. Patrick's Hospital, et al, 564 So. 2d 671, 673 (La. 1990).* Contra non valentem is a judicially-created exception to the general rule of prescription based on the civilian doctrine of *contra non valentem agere nulla currit praescriptio. Rajnowski at 674.* The doctrine suspends the running of prescription in four situations:

> (1) Where there was some legal cause which prevented the courts or their officers from taking cognizance of or acting on the plaintiff's action;
> (2) Where there was some condition coupled with a contract or connected with the proceedings which prevented the creditor from suing or acting;
> (3) Where the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action;
> (4) Where the cause of action is not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant. *Rajnowski at 674.*

La. R.S. 9:5698, which establishes the time for filing medical malpractice actions, provides as follows:

"No action for damages for injury or death against any physician,

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[2] 94-1276 (La. App. 3rd Cir. 4/5/95), 651 So.2d 992.

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of this state, whether based upon tort, or breach of contract, o
o arising out of patient care shall be brought unless filed within
ne year
one year from the date of discovery of the alleged act, omission, o
neglect; claims filed within one year from the date
such discovery, in all events such claims shall be filed at the lates
within date of the alleged act, omission

Contra valentem in medical malpractice suits has been embodied in La. R.S 9:5628. White v. West Carroll Hospital, Inc., 613 So.2d 150, 155 (La. 1992).

category contra non valentem applies to medical malpractice cases. *Giddens at 841.* d

ategory to facts in medical malp *See Taylor v. Giddens, 618 So.2d 834 La. 1993); Rajnowski v. St. Patrick's*

1 and *e, 540 So.2d 304 (La. 1989).*

the category of contra non valentem does apply to medical malpractice action under .S. 9:5628, the court will determine whether its application has bee triggered under the facts and circumstances of the present case.

he third category of contra non valentem appl

h he victim from availing himself of his

e *Taylor v. Giddens at 841.* r

of the third category, a physician's conduct must rise to the level o conce misrepresentation, fraud or ill practices. Th evidence i

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that Dr. Bertuccini told him he would make repairs be alright. Mrs. Fontenot denies any recollection that Dr. Bertuccini informed her of

this fact, but the evidence nevertheless reveals that subsequent to the surgery and while Mrs. Fontenot was still hospitalized, Dr. deAaujo, Dr. Bertuccini's partner, informed her that the numbness in her leg and rectal area may have been caused by a damaged nerve. These facts discredit plaintiffs' allegations of fraud, concealment, misrepresentation, or a breach of duty to disclose on the part of Dr. Bertuccini. Moreover, the court finds that these facts fail to support a finding that Dr. Bertuccini did some act which prevented plaintiffs from availing themselves of a cause of action.

Plaintiffs also allege that prescription did not begin to run until October, 1992 because Dr. Bertuccini made reassurances to Mrs. Fontenot that her condition was temporary and would resolve over time. She maintains that such misstatements and reassurances misled her and caused her to misunderstand the nature of her medical condition. This court has previously examined misrepresentations, misstatements and reassurances as they apply to the third category of contra non valentem. In *Gover v. Bridges, supra,* the defendant, Dr. Ronze McIntyre Bridges, made misstatements of fact in a letter he wrote to plaintiff regarding the circumstances surrounding the death of plaintiff's mother while she was hospitalized. Plaintiff alleged that she trusted Dr. Bridges and his letter reassured her. *Gover at 1368.* Plaintiff further alleged that the misstatements contained in the letter prevented them from filing their medical malpractice action earlier. *Id.* This court held that the none of the errors or misstatements in the letter effectually prevented plaintiffs from availing themselves of their cause of action. The court found that the kind of reassurance given by the doctor to plaintiff did not reach the level of either fraud or breach of duty to disclose. *Id.* The court noted that although the deceased mother's charts were available, plaintiffs failed to request them. The court also considered the fact that Mrs. Smith, one of the

who was employed in a clerical capacity at the Veterans Administratio Hospital, was neither ignorant nor unintelligent. __. Thus, irrespective of fals statemen and reassurances made by Dr. Bridges, this court found that Dr. Bridges conduct t reach the level of fraud or a breach of duty to disclose, whic prevented plaintiff, Mrs. Smith, from learning of her cause of action.

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Shortly after the surgery, Dr. Bertuccini's partner, Dr. deAraujo, informe

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reover, *Gover v. Bridges,* .

ontenot's condition would resolve over time do not reach the level

o was neither unintelligent nor ignorant.

earned a certificate at Spencer Business College, and had previously worked i secr positions for over twenty years before retiring. Finally, Dr. Bertuccin stopp treating Mrs. Fontenot in June, 1991, when he moved to another state T ntinuing duty ceased as of this date, or on uly 29, 1991 when Mrs. Fontenot had her last visit with Dr. deA

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T support application of the fourth category of contra non

ntem. e

plaintiff knows sufficient facts and has a reasonable basis for filing suit against a certain defendant. *Chaney v. State of Louisiana, through the Dept. of Health and Human Resources.*[3] The evidence in the instant case reveals that Mrs. Fontenot filled out forms on July 7, 1991 and November 19, 1991, in which she wrote that she suffered nerve damage from disc surgery. This information indicates that as of these dates, Mrs. Fontenot had knowledge of her injury from the surgery, as well as the causal connection. Therefore, plaintiffs were aware of sufficient information to incite their inquiry. Plaintiffs' contention that Dr. Bertuccini's failure to inform them that Mrs. Fontenot's condition was permanent versus temporary is of no consequence. Ignorance or misunderstanding of the probable extent or duration of injuries materially differs from ignorance of actionable harm which delays commencement of prescription.[4]

Prescription does not run against one who is ignorant of facts upon which his cause of action is based as long as such ignorance is not willful, negligent or unreasonable. *White v. West Carroll Hospital, Inc.* at 155. The court finds that the causation between surgery and injuries was reasonably knowable in excess of one year prior to plaintiffs' filing of the instant suit against Dr. Bertuccini. Even if this court were to find that plaintiffs were unaware of facts which support a medical malpractice cause of action prior to October, 1992, the court would further find that such lack of knowledge was negligent and unreasonable under the facts and circumstances of this case.

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[3] 432 So. 256 (La. 1983).

[4] *Knippers v. Lambard*, 620 So.2d 1368 (La. App. 2nd Cir. 1993), *writ denied*, 629 So.2d 1169 (La. 1993), citing *Percy v. State, E. A. Conway Memorial Hospital*, 478 So.2d 570 (La. App. 2nd Cir. 1985).

See also Dufriend v. Tumminello, 590 So.2d 1354 (La. App. 5th Cir. 1991), *writ denied*, 592 So.2d 1335 (La. 1992).

F affirm the judgment of the trial court, as affirmed y the court of appeal, sustaining the defendants' Peremptory Exceptio

AFFIRMED