

IN RE: MEDICAL REVIEW PANEL
PROCEEDINGS FOR THE CLAIM OF
HECTOR L. ALONSO

NO. 17-CA-230

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 764-555, DIVISION "D"
HONORABLE SCOTT U. SCHLEGEL, JUDGE PRESIDING

December 13, 2017

ROBERT M. MURPHY
JUDGE

Panel composed of Judges Marc E. Johnson,
Robert M. Murphy, and Hans J. Liljeberg

AFFIRMED

RMM

MEJ

HJL

PLAINTIFF/APPELLANT,
HECTOR L. ALONSO AND MARIA D. ALONSO
Hector L. Alonso
In Proper Person

COUNSEL FOR DEFENDANT/APPELLEE,
D'CHEL CLARK THIBODE, RN AND MICHELLE KRAJCE, RN
Peter E. Sperling
James P. Waldron

COUNSEL FOR DEFENDANT/APPELLEE,
KIMBERLY BURKE, CRNA
C. William Bradley, Jr.
Benjamin J. Biller

MURPHY, J.

Hector Alonso, in proper person, appeals the trial court's November 7, 2016, judgment sustaining the peremptory exceptions of prescription filed by defendants, D'Chel Clark Thibode, R.N., Michelle Krajce, R.N., and Kimberly C. Burke, CRNA, and dismissing, with prejudice, Mr. Alonso's medical malpractice complaint filed with the Louisiana Patient's Compensation Fund. For the following reasons, we find that defendants' exceptions were properly sustained and affirm the trial court's judgment.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On July 14, 2016, Mr. Alonso filed a request for medical review panel with the Louisiana Patient's Compensation Fund (hereinafter "LPCF") alleging that defendants committed medical malpractice during his April 29, 2011 cataract surgery performed by Dr. Shehab Ebrahim at Tulane-Lakeside Hospital.¹ In his panel request, Mr. Alonso averred that he awoke from anesthesia during surgery in excruciating pain and implored the medical staff to stop the surgery to no avail. According to Mr. Alonso, he was forcefully held down, tape was placed over his mouth restricting his ability to breathe, and the surgery continued. He claimed that defendants herein held him down and fought him, causing one of his teeth to dislodge, which he apparently swallowed. When surgery was completed, Mr. Alonso claimed he was taken to radiology for X-rays from which it was later confirmed that the dislodged tooth had settled in his stomach. Mr. Alonso alleged

¹ The record reflects that on March 30, 2012, Mr. Alonso filed a complaint with the LPCF, as well as a petition for damages in the trial court, naming as defendants, University Healthcare System, L.C. d/b/a Tulane-Lakeside Hospital and Dr. Shehab Ebrahim. The medical review panel issued its decision on August 28, 2014 finding there was no breach of the standard of care. Subsequently, on January 21, 2016, Mr. Alonso's petition for damages was dismissed, without prejudice, in connection with the trial court's granting of an exception of prematurity in favor of Tulane-Lakeside and Dr. Ebrahim. The trial court's judgment was thereafter affirmed in *Alonso v. Tulane Univ. Med. Ctr.*, 16-420 (La. App. 5 Cir. 12/7/16), 215 So.3d 355, *writ denied*, 17-0184 (La. 3/24/17), 216 So.3d 816.

that defendants failed to properly treat him, to use proper procedures, to take adequate measures to insure his safety, restricted his liberty, and committed an assault and battery upon his person.

In response to Mr. Alonso's request for medical review panel, on September 8, 2016 defendants, Nurse Thibode and Nurse Krajce, filed a petition to institute discovery in the medical review panel proceeding. *See* La. R.S. 40:1299.47. Shortly thereafter, Nurse Thibode and Nurse Krajce filed an exception of prescription in the medical review panel discovery suit seeking dismissal of the medical review panel proceedings on the basis that, pursuant to the time periods set forth by La. R.S. 9:5628(A), Mr. Alonso's July 14, 2016 panel request, filed more than one year after the alleged acts of malpractice, was prescribed on its face.² Defendant, CRNA Burke, filed an identical exception in the same proceeding. In support of their respective exceptions, defendants attached two exhibits: (1) a copy of Mr. Alonso's July 14, 2016 complaint with the LPCF made the subject of the instant appeal, and (2) the prior January 21, 2016 judgment rendered in Mr. Alonso's medical malpractice action against Tulane-Lakeside and Dr. Ebrahim. In opposition, Mr. Alonso submitted numerous exhibits, including letters from the LPCF confirming that each defendant is a qualified health care provider.

Defendants' exceptions came for hearing on November 7, 2016. The exhibits attached to defendants' exceptions were submitted on the record and offered into evidence. Mr. Alonso, appearing in proper person, submitted evidence establishing defendants as qualified health care providers, and introduced an October 7, 2016 letter directed to Mr. John Tarlton Olivier, Clerk of Louisiana Supreme Court, from Susan Gremillion, Medical Malpractice Compliance Director for the LPCF, advising that the parties had not been able to agree on the selection

² La. R.S. 40:1299.47(B)(2)(a) allows for a qualified health-care provider to raise an exception during the pendency of the medical review panel proceeding.

of a chairman for the panel and requesting that a list of attorney names be submitted to the LPCF in order that the selection process could timely be completed. Mr. Alonso submitted no further evidence.

At the close of the hearing, the trial judge issued an oral ruling sustaining defendants' exceptions stating the following, in pertinent part:

Pursuant to Louisiana Revised Statute 9:5628(A), [the] prescriptive period for medical malpractice is within one year from the date of the discovery, but no greater than three years from the date of the event, alleged act, omission and neglect.

Pursuant to the exhibits offered by all parties, the Court considering the Louisiana Compensation Fund's letters, the date of the alleged offense was . . . April 29, 2011. The matter is prescribed. The Exception is granted.

The Exception of Prescription, again, is granted. It is clearly outside the one year from the date of the alleged malpractice. And clearly, even if you use a discovery date, which no evidence was presented to this Court, but if discovery was after April 29th, it is still far past the three-year period as well.

Judgment sustaining defendants' exceptions and dismissing Mr. Alonso's request for medical review panel, with prejudice, was signed on November 7, 2016. It is from this judgment that Mr. Alonso brings the instant appeal.

ASSIGNMENT OF ERROR

Mr. Alonso alleges the trial court erred in sustaining defendants' exceptions of prescription on the basis that the filing of his original request for medical review panel against Tulane-Lakeside Hospital and Dr. Shehab Ebrahim, alleged tortfeasors, interrupted or suspended his malpractice claims against Nurses Thibode and Krajce and CRNA Burke.³ Further, Mr. Alonso argues that it was not

³ Although the subject complaint filed by Mr. Alonso with the LPCF on July 14, 2016 is styled "Amended Complaint," "RE: Hector Alonso v. M.D. Shehsb [sic] A. Ebrahim, Dr. Anne Panaggio McConville, University Healthcare System d/b/a Tulane Nuiversity [sic] Hospital and Clinic, Tulane Lakeside Hospital of LA, Chavis Kimberly, CRNA, Kracje [sic] Michelle G. RN, Clarrthibode [sic] O'Chel [sic], Scrub," the record reflects that the original medical review panel had previously issued its opinion in the matter against Dr. Ebrahim and Tulane in August 2014. In short, there was no pending complaint with the LPCF for Mr. Alonso to amend.

until July 14, 2016 that he “discovered” he had not included Nurses Thibode and Krajce and CRNA Burke as defendants in his original panel request.

STANDARD OF REVIEW

The Louisiana Supreme Court in *London Towne Condominiums Homeowners’ Ass’n v. London Towne Co.*, 06-401, p. 4 (La. 10/17/06), 939 So.2d 1227, 1231, noted that: “When prescription is raised by peremptory exception, with evidence being introduced at the hearing on the exception, the trial court’s findings of fact on the issue of prescription are subject to the manifest error-clearly wrong standard of review.” *Id.*, 06-401 at p. 4, 939 So.2d at 1231; *Carter v. Haygood*, 04-0646, p. 9 (La. 1/19/05), 892 So.2d 1261, 1267. Under the manifest error standard of review, a factual finding cannot be set aside unless the appellate court finds that it is manifestly erroneous or clearly wrong. *Smith v. Louisiana Dept. of Corrections*, 93-1305 (La. 2/28/94), 633 So.2d 129, 132; *Stobart v. State through Dept. of Transp. and Development*, 617 So.2d 880, 882. In order to reverse a fact finder’s determination of fact, an appellate court must review the record in its entirety and find (1) that a reasonable factual basis does not exist for the finding, and (2) that the record establishes that the fact finder is clearly wrong or manifestly erroneous. *Id.* The appellate court must not re-weigh the evidence or substitute its own factual findings because it would have decided the case differently. *Id.*; *Pinsonneault v. Merchants & Farmers Bank & Trust Co.*, 01-2217, p. 11 (La. 4/3/02), 816 So.2d 270, 278-79.

LAW AND DISCUSSION

Prescription in medical malpractice actions is governed by the provisions of La. R.S. 9:5628, which 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 on 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 supplied.]

The Louisiana Supreme Court has noted that La. R.S. 9:5628 sets forth more than one prescriptive period, because it “initially . . . coincides with La. C.C. art. 3942’s basic one year prescriptive period for delictual actions, coupled with the ‘discovery’ exception of [Louisiana’s] jurisprudential doctrine of *contra non valentem*.” *Bailey v. Khoury*, 04-0620, 04-0647, 04-0648, p. 16 (La. 1/20/05), 891 So.2d 1268, 1275, quoting *Campo v. Correa*, 01-2707, p. 8 (La. 6/21/02), 828 So.2d 502, 508 and *Hebert v. Doctors Memorial Hospital*, 486 So.2d 717, 723 (La. 1986). In short, La. R.S. 9:5628 sets forth two prescriptive periods 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, “with the qualification that the *contra non valentum* type exception to prescription embodied in the discovery rule is expressly made inapplicable after three years from the act, omission or neglect.” *Borel v. Young*, 07-0419, p. 53 (La. 7/1/08), 989 So.2d 42, 69; *Campo*, 01-2707 at p. 16, 828 So.2d at 509, quoting *Hebert*, 486 So.2d at 724-725.

Generally, prescription statutes are strictly construed against prescription and in favor of the claim sought to be extinguished by it. *Bailey*, 04-0620, 04-0647, 04-0648 at p. 16, 891 So.2d at 1275. Ordinarily, the movant bears the burden of proof on trial of the peremptory exception, including the objection of prescription. *SS v. State ex rel. Dept. of Social Services*, 02-831, p. 7 (La. 12/4/02),

831 So.2d 926, 931. It is only where a petition reveals on its face that prescription has run that the burden shifts to the plaintiff to show that his action has not prescribed. *Id.* See also *Campo*, 01-2707 at p. 7, 828 So.2d at 508.

Mr. Alonso's medical malpractice action is prescribed on the face of his complaint. The complaint was filed with the LPCF on July 14, 2016, and alleged that the medical malpractice by defendants occurred on April 29, 2011. Thus, the burden shifted to Mr. Alonso to show that his action was not prescribed. We find that Mr. Alonso failed to carry his burden.

On appeal, Mr. Alonso contends that the timely filing of his request for medical review panel on March 30, 2012 against Tulane-Lakeside and Dr. Ebrahim, whom he alleged were "jointly and *in solido*" liable with Nurses Thibode and Krajce and CRNA Burke, interrupted or suspended his claims against defendants for 90 days⁴ following notification of the panel's issuance of its opinion on August 28, 2014.⁵ Additionally, Mr. Alonso contends that his belated "discovery" on July 14, 2016, that defendants herein had been omitted from his

⁴ La. R.S. 40:1299.47(A)(2)(a) provides, in pertinent part:

The filing of the request for a review of a claim shall suspend the time within suit must be instituted, in accordance with this Part, until ninety days following notification, by certified mail, as provided in Subjection J of this Section, to the claimant or his attorney of the issuance of the opinion by the medical review panel, in the case of those health care providers covered by this Part, or in the case of a health care provider against whom a claim has been filed under the provisions of this Part, but who has not been qualified under this Part, until ninety days following notification by certified mail to the claimant or his attorney by the board that the health care provider is not covered by this Part. The filing of a request for review of a claim shall suspend the running of prescription against all joint and solidary obligors, and all joint tortfeasors, including but not limited to health care providers, both qualified and not qualified, to the same extent that prescription is suspended against the party or parties that are subject of the request for review.

⁵ Other than the judgment rendered in the prior case against Dr. Ebrahim and Tulane-Lakeside Hospital dismissing Mr. Alonso's medical malpractice claims against them in connection with an exception of prematurity, which judgment was introduced into evidence by defendants at the hearing on the exception, the record on appeal is devoid of any evidence or documentation relative to Mr. Alonso's suit or his complaint filed with the Louisiana Patient Compensation Fund against Dr. Ebrahim and Tulane-Lakeside Hospital for the alleged malpractice that occurred on April 29, 2011 during this eye surgery.

original panel request, gave him three additional years to file a request for medical review panel against them. According to Mr. Alonso's calculations, prescription against defendants herein does not run until November 28, 2018, and thus, the July 14, 2016 filing of the instant LPCF panel request was timely. We disagree and find that Mr. Alonso's calculations and application of La. R.S. 9:5628 are misplaced.

The record reflects that Nurses Thibode and Krajce and CRNA Burke were present during Mr. Alonso's eye surgery on April 29, 2011. By all accounts, defendants' relationship to Mr. Alonso began and ended that same day. Applying La. R.S. 9:5268(A), he had until April 29, 2012, to institute an action against defendants for their alleged malpractice. The fact that Mr. Alonso erroneously or mistakenly omitted defendants' names from his original panel request does not constitute a basis for applying the doctrine of *contra non valentum*. Even if the doctrine did apply, which application is not supported by any evidence or documentation contained in the record on appeal, pursuant to the express language set forth in La. R.S. 9:5628(A), Mr. Alonso's claims against defendants prescribed *at the latest* on April 29, 2014, three years from the date of the alleged act, omission or neglect.⁶ Mr. Alonso's request for medical review panel filed on July 14, 2016, *five years* after the alleged act, omission or neglect, is clearly too late and barred by prescription. *See Borel*, 07-0419 at p. 53, 989 So.2d at 69. *See also Richard v. Tenet Health Systems, Inc.*, 03-1933 (La. App. 4 Cir. 4/14/04), 871 So.2d 671.

⁶ Though La. R.S. 40:1299.47(A)(2)(a) provides for a 90-day period following notification of the medical review panel's decision within which to bring suit against alleged joint tortfeasors, in this case, Mr. Alonso's claims against Nurses Thibode and Krajce and CRNA Burke had already prescribed because the three-year limitation on prescription for medical malpractice actions set forth in La. R.S. 9:5628(A) had elapsed.

For the foregoing reasons, we agree with the trial court judgment sustaining defendants' peremptory exceptions of prescription and finding that all of Mr. Alonso's claims against Nurses Thidode and Krajce and CRNA Burke are outside the one and three-year prescriptive periods pursuant to the dictates of La.R.S. 9:5628(A). Accordingly, we affirm the trial court's judgment dismissing Mr. Alonso's claims, with prejudice, against D'Chel Clark Thibode, R.N., Michelle Krajce, R.N., and Kimberly C. Burke, CRNA.

AFFIRMED

SUSAN M. CHEHARDY
CHIEF JUDGE

FREDERICKA H. WICKER
JUDE G. GRAVOIS
MARC E. JOHNSON
ROBERT A. CHAISSON
ROBERT M. MURPHY
STEPHEN J. WINDHORST
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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **DECEMBER 13, 2017** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CHERYL Q. LANDRIEU
CLERK OF COURT

17-CA-230

E-NOTIFIED

24TH JUDICIAL DISTRICT COURT (CLERK)
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