MAY 16, 2000

SUPREME COURT OF LOUISIANA

No. 99-C-2570

BEN GUITREAU

Versus

ANDREW KUCHARCHUK, M.D.

LEMMON, J., Concurring

Upon further consideration, I am changing my position taken in my concurring opinion in LeBreton v. Rabito, 97-2221 (La. 7/8/98), 714 So. 2d 1226, a decision that did not reach the issue taken in the present case. I accordingly concur in the conclusions reached by the majority on the two major issues.

The Ninety-Day Period

La. Rev. Stat. 40:1299.47A(2)(a) provides that the filing of a request for a medical review panel "shall suspend the time within which suit must be instituted," obviously meaning the one-year prescriptive period under La. Rev. Stat. 9:5628. (emphasis added). Section 1299.47A(2)(a) further provides that the one-year prescriptive period is suspended "until ninety days following notification . . . of the issuance of the opinion by the medical review panel." Since a prescriptive period, once suspended, "commences to run again upon the termination of the period of suspension" under La. Civ. Code art. 3472, Section 1299.47A(2)(a) in unambiguous language suspends the one-year prescriptive period for medical malpractice actions from the date of filing of the panel request until ninety days after notice of the panel decision, after which the unaccrued portion of the one-year prescriptive period

commences to run again under Article 3472.[1]

Thus, a medical malpractice victim who files a panel request on the last date of the prescriptive period has ninety days from the notice of the panel decision to file an action in district court, whereas a victim who filed the request earlier in the one-year prescriptive period has ninety days plus the unaccrued portion of the one-year prescriptive period, whatever that portion may be.

It is significant that the Legislature used the term "suspension," which is a term of art in the Civil Code. If the Legislature had intended for the malpractice victim to have only ninety days from notice of the panel decision, the statute could have provided for filing in the district court within the unaccrued portion of the prescriptive period, but in no event less than ninety days. Or if the Legislature had intended for the victim not to have both ninety days and the unaccrued portion of the prescriptive period, the statute could have provided for ninety days or the unaccrued portion of the period, whichever is longer. The Legislature did neither. Rather, the Legislature expressly provided for suspension of the prescriptive period during the entire time the matter is before the panel until ninety days after the panel decision, and Article 3472 thereafter controls the commencement of the unaccrued portion of the prescriptive

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[1]In LeBreton, I wrote that the one-year prescriptive period was no longer applicable once the decision of the medical review panel was rendered, at which time the ninety-day period in La. Rev. Stat. 40:1299.47A(2)(a) became applicable. I now realize that I mistakenly reached this position on a theory similar to the merger-bar theory of the res judicata provisions of La. Rev. Stat. 13:4231. I erroneously viewed the cause of action asserted before the medical review panel as becoming merged with the panel decision, making the one-year prescriptive period no longer applicable and triggering the onset of res judicata unless an action was filed in district court within ninety days of notice of the decision (just as a judgment of the district court becomes res judicata if no appeal is filed within the delay for a devolutive appeal). The error in my theory was that a panel decision is not the equivalent of a district court judgment (into which, once rendered, the cause of action becomes merged). A panel decision has no preclusive value, but has only evidentiary value when the cause of action is subsequently presented to the district court under its original jurisdiction.

period.

Contra Non Valentem

La. Rev. Stat. 9:5628 recognizes the doctrine of c

ontra non valentem and allows the medical malpractice victim "one year from the date of discovery of the alleged act, omission, or neglect" to bring an action for damages. Under the doctrine of contra non valentem, as interpreted in Corsey v. State of La. through the Dep't of Corrections, 375 So. 2d 1319, 1322 (La. 1979), prescription does not run against a person when "the cause of action is not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant."

In the present case, plaintiff did not reasonably know immediately after the alleged malpractice on August 11, 1992 that he had a cause of action against the doctor. Therefore, prescription did not begin to run on that date. The critical issue is the determination of the date that the one-year prescriptive period began to run, a determination necessary for the calculation of the amount of unaccrued prescription when plaintiff filed his request for a medical review panel on August 2, 1993.

The determination of the beginning of the prescriptive period in a contra non valentem case, when the tort victim is not aware of his or her cause of action immediately upon the commission of the tort, has presented difficult problems. This court in Jordan v. Employee Transfer Corp., 509 So. 2d 420 (La. 1987), refined the inquiry to focus on the reasonableness of the plaintiff's action or inaction. Quoting Griffin v. Kinberger, 507 So. 2d 821, 823 (La. 1987), a medical malpractice case, this court in Jordan stated that "prescription does not run as long as it was reasonable for

the victim not to recognize that the condition may be related to the treatment."[2]

In the present case, plaintiff was released by the defendant doctor in October 1992 to return to light duty, but was referred by his employer's company doctor to a second surgeon because he could not return to work. On November 2, 1992, the second surgeon reviewed the videotape of the August 1992 surgery and advised plaintiff, insofar as this record shows, only that he needed additional surgery. However, as the court of appeal noted, the record does not establish that plaintiff was unreasonable in failing to recognize that the need for second surgery was the result of improper medical treatment during or after the first surgery until the second surgeon informed plaintiff of his conclusions on December 16, 1992, or, at the earliest, when plaintiff on November 23, 1992 consulted an attorney who requested the second surgeon's examination records.

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[2]In Jordan, this court characterized as an incomplete definition of the kind of notice necessary to begin the running of prescription the following language in Cartwright v. Chrysler Corp., 255 La. 597, 232 So. 2d 285, 287 (1970):

> Whatever is notice enough to excite attention and put the owner on his guard and call for inquiry is tantamount to knowledge or notice of every thing to which inquiry may lead and such information or knowledge as ought to reasonably put the owner on inquiry is sufficient to start the running of prescription. (footnote omitted).