Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **10th day of December, 2021** are as follows:

BY McCallum, J.:

2021-C-00061 ***CHERYL AND MICHAEL MITCHELL VS. BATON ROUGE ORTHOPEDIC CLINIC, L.L.C. AND ROBERT W. EASTON, M.D. (PARISH OF EAST BATON ROUGE)***

AFFIRMED; SEE OPINION.

Hughes, J., dissents for the reasons assigned by Griffin, J.
Crichton, J., dissents for the reasons assigned by Griffin, J.
Griffin, J., dissents and assigns reasons.

SUPREME COURT OF LOUISIANA

No. 2021-C-0061

CHERYL AND MICHAEL MITCHELL

VS.

BATON ROUGE ORTHOPEDIC CLINIC, L.L.C. AND ROBERT W. EASTON, M.D.

On Writ of Certiorari to the First Circuit Court of Appeal, Parish of East Baton Rouge

McCALLUM, Justice.

Under certain circumstances, a physician's continuing professional relationship with a patient may give rise to the suspension of the prescriptive period for a medical malpractice action against the physician. *Carter v. Haygood*, 2004-0646, p. 12 (La. 1/19/05), 892 So. 2d 1261, 1269. A professional relationship alone, however, is insufficient to suspend prescription and "no Louisiana case has held that prescription can be extended solely, or primarily, because of [a] continued relationship." *Id.*, p. 13, 892 So. 2d at 1269 (citation omitted). It is the continuing *treatment* of a patient within the context of that professional relationship that may trigger the suspension of the prescriptive period.

We granted certiorari to examine these principles and to determine whether the continuing treatment rule, a variant of the *contra non valentem* doctrine, suspended prescription under the facts of this medical malpractice case. The trial court, finding the continuing treatment rule to be inapplicable, granted the defendants' peremptory exception of prescription and dismissed plaintiffs' suit. The court of appeal affirmed.

We recognize the significance of the patient – physician relationship, and the desire for the continuity of that relationship. However, in this particular case, there is no question the plaintiffs, Cheryl and Michael Mitchell, knew of the alleged act

of malpractice within a day of its occurrence. It is equally certain that suit was not filed against the treating physician, Dr. Robert Easton, within a year of the alleged malpractice. To the contrary, suit was filed a year and nine months after the act and approximately six months after Mrs. Mitchell's last appointment with Dr. Easton. The sole issue, therefore, is whether prescription was suspended during this time period pursuant to the continuing treatment rule.

We have reviewed the record and find that it supports the lower courts' determinations that Mrs. Mitchell did not receive any specific care from Dr. Easton designed to correct or otherwise treat the injury related to the alleged act of malpractice. Even had Mrs. Mitchell received continuing treatment of her injury, we do not find Dr. Easton's statements regarding her questionable prognosis to fall within the scope of the continuing treatment rule. Accordingly, under the specific circumstances of this case, we find that the continuing treatment exception of *contra non valentem* did not apply to suspend prescription in this case, and we affirm the judgments below.

FACTUAL AND PROCEDURAL BACKGROUND

On August 11, 2015, Dr. Robert Easton performed a left total hip arthroplasty (hip replacement surgery) on Mrs. Mitchell, who had dislocated her hip. Shortly thereafter, Mrs. Mitchell re-dislocated her hip and Dr. Easton performed a revision surgery on August 23, 2015. While Mrs. Mitchell was in the recovery room, Dr. Easton observed that she had "foot drop," a condition he described as a patient's inability, following hip replacement surgery, to "pull [her] foot up towards [her] face." Foot drop has a number of causes and, to determine the precise cause in Mrs. Mitchell's case, Dr. Easton performed a second surgery that same day. During the surgery, he discovered that Mrs. Mitchell's sciatic nerve had been lacerated.

Dr. Easton advised Mrs. Mitchell's family of the situation and consulted with Dr. Rasheed Ahmad, a hand surgeon who handles nerve repairs for Dr. Easton's

medical group. Dr. Ahmad performed an end-to-end anastomosis to repair the nerve, which, as Dr. Easton testified, is the only course of treatment for an acute lacerated nerve.

The following day, August 24, 2015, Dr. Easton advised Mrs. Mitchell that she had foot drop as a result of the nerve injury and that Dr. Ahmad had repaired the nerve. Dr. Easton gave Mrs. Mitchell a prognosis for the foot drop; namely, that "it would take time, and there is a possibility it could recover, there is a possibility it might not recover, but most of the time at a year mark, whatever function you have, that is kind of what you are left with." After an end-to-end anastomosis, "you just have to wait and see." Dr. Easton further advised Mrs. Mitchell that "time would tell how much, if any, function and sensory perception she would get back."

Mrs. Mitchell was discharged from the hospital to an inpatient rehabilitation facility where she remained until September 10, 2015.[1] She continued to be seen by Dr. Easton thereafter until November 15, 2016. Although Dr. Easton's chart note from that date reflects that Mrs. Mitchell was to "follow up … routinely for the hip in another several months," Mrs. Mitchell did not return to see Dr. Easton.

During the time that Dr. Easton saw Mrs. Mitchell following her several surgeries, he monitored the status of her hip replacement and checked to determine whether she had any improvement of the drop foot condition and the overall function of her left leg. Unfortunately, Mrs. Mitchell's foot drop never improved and she was left with sciatic nerve palsy.

On May 26, 2017, Mrs. Mitchell and her husband, Michael Mitchell, filed the instant medical malpractice lawsuit against Dr. Easton, his employer, the Baton Rouge Orthopaedic Clinic, L.L.C., and their insurers, Physician Assurance SPC as part of Y-Bridge Insurance Company and Baton Rouge Orthopaedic Clinic

[1] Mrs. Mitchell had another revision surgery on September 30, 2015 after another fall at home from which she re-dislocated her left hip.

Segregated Portfolio Company as part of Y-Bridge Insurance SPC (collectively, "defendants").[2] In response, the defendants filed a peremptory exception of prescription, which the trial court granted, dismissing the action against the defendants. The court of appeal affirmed, reasoning that, although Mrs. Mitchell continued to treat with Dr. Easton for more than a year after the alleged act of malpractice, that treatment was unrelated to the alleged act of malpractice. *Mitchell v. Baton Rouge Orthopaedic Clinic, L.L.C.*, 19-0939 (La. App. 1 Cir. 12/17/20), 316 So.3d 1107 (Holdridge, J., dissenting). The appellate court further agreed with the trial court that the physician had engaged in no conduct, fraudulent or otherwise, that lured the plaintiffs into delaying the filing of this action.

LAW AND DISCUSSION

Standard of review

Plaintiffs maintain that the court of appeal improperly employed a manifest error standard of review. Urging this Court to review this matter *de novo*, the plaintiffs assert the trial court's judgment is "riddled with legal error" which was compounded by the court's "resolution of a factual issue regarding Dr. Easton's conduct after the malpractice occurred." Conversely, the defendants submit the manifest error-clearly wrong standard as the appropriate standard of review.

Our jurisprudence reflects that the standard of review of a judgment pertaining to an exception of prescription turns on whether evidence is introduced at the hearing of the exception. Louisiana Code of Civil Procedure article 931 expressly allows "evidence [to] be introduced to support or controvert [a peremptory exception] pleaded, when the grounds thereof do not appear from the petition." If no evidence

[2] The plaintiffs initially filed a request for a medical review proceeding with the Division of Administration on April 26, 2017. However, because neither Dr. Easton nor the Baton Rouge Orthopaedic Clinic are "qualified health care providers" under the Louisiana Medical Malpractice Act, LSA–R.S. 40:1299.41 *et seq.*, there was no requirement that the plaintiffs' claims be submitted to a medical review panel prior to filing suit in the trial court. *See Alexander v. Shaw-Halder*, 11-1136, p. 9 (La. App. 5 Cir. 5/8/12), 95 So.3d 1100, 1105.

is submitted at the hearing, the exception "must be decided upon the facts alleged in the petition with all of the allegations accepted as true." *Lomont v. Bennett*, 14-2483, p. 8 (La. 6/30/15), 172 So. 3d 620, 627. In that case, the reviewing court is simply assessing whether the trial court was legally correct in its finding. *In re Med. Rev. Panel of Gerard Lindquist*, 18-444, p. 4 (La. App. 5 Cir. 5/23/19), 274 So. 3d 750, 754, *writ denied*, 2019-01034 (La. 10/1/19), 280 So. 3d 165.

When evidence is introduced at the hearing, a court need not accept the allegations of the petition as true, and the lower court decisions are to be reviewed under a manifest error-clearly wrong standard of review. *Lomont,* p. 8, 172 So. 3d at 627; *See also*, *Carter*, 04-0646, p. 9, 892 So. 2d at 1267; *Newton v. St. Tammany Fire Dist. No. 12,* 20-0797 (La. App. 1 Cir. 2/19/21), 318 So. 3d 206, 210. A caveat to this rule is that, even when evidence is introduced, when there is no dispute regarding material facts, the reviewing court is to apply a *de novo* standard of review, and give no deference to the trial court's legal conclusions. *See Damond v. Marullo*, 19-0675, p. 5 (La. App. 1 Cir. 6/22/20), 307 So. 3d 234, 240, *writ denied sub nom. Damond v. Marullo*, 20-01243 (La. 3/23/21), 312 So. 3d 1104; *Wells Fargo Fin. Louisiana, Inc. v. Galloway*, 17-0413, p. 8 (La. App. 4 Cir. 11/15/17), 231 So. 3d 793, 800.

In the instant matter, evidence, both testimonial and documentary, was introduced into the record at the hearing on the exception of prescription. The record clearly demonstrates that the issues in this case are not purely legal. Factual determinations were required by the trial court with respect to whether Mrs. Mitchell received care from Dr. Easton following the alleged act of malpractice sufficient to fall within the continuing treatment rule, and whether Dr. Easton's conduct was of a nature for which the continuing treatment rule applies. Accordingly, we apply a manifest error-clearly wrong standard of review.

Prescription, contra non valentem and the continuing treatment doctrine

The prescriptive period for a claim of medical malpractice is governed by La. R.S. 9:5628 which provides, in pertinent part, as follows:

> No action for damages for injury or death against any physician . . . duly licensed under the laws of this state . . . 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.

The burden of proving prescription ordinarily lies with the party raising the exception; however, when prescription is evident from the face of the petition, the burden shifts to the plaintiff to show the action has not prescribed. *Hogg v. Chevron USA, Inc.*, 09-2632, p. 7 (La. 7/6/10), 45 So. 3d 991, 998; *Lindquist*, 18-444, p. 3, 274 So. 3d at 754.

Here, the face of the petition shows that it was not filed within a year of the alleged act of malpractice. Thus, the plaintiffs had the burden of proving their action had not prescribed. Though they have never disputed that they knew of the sciatic nerve injury on the date it occurred, they maintain that prescription was suspended on their claims under the doctrine of *contra non valentem.*

Contra non valentem, a jurisprudentially-created exception to prescription, adopted to "soften the harshness of prescriptive statutes," generally "means that prescription does not run against a person who could not bring his suit." *Carter*, 04-0646, p. 11, 892 So. 2d at 1268. Determinations as to whether *contra non valentem* applies to suspend prescription generally proceed on an individual, case-by-case basis. *State v. All Prop. & Cas. Ins. Carriers Authorized & Licensed To Do Bus. In State*, 06-2030, p. 19 n.13 (La. 8/25/06), 937 So. 2d 313, 327.

Louisiana law recognizes four categories of *contra non valentem* that operate to prevent the running of prescription:

> (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 the 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; and (4) where the cause of action is not known or reasonably knowable by the plaintiff, even though this ignorance is not induced by the defendant.

Carter, 04-0646, pp. 11-12, 892 So. 2d at 1268. It is the third category that is at issue in this case, and it "encompass[es] situations where an innocent plaintiff has been lulled into a course of inaction in the enforcement of his right by reason of some concealment or fraudulent conduct on the part of the defendant, or because of his failure to perform some legal duty whereby plaintiff has been kept in ignorance of his rights." *Id.*, p. 12, 892 So. 2d at 1269.

Prior to the decision of *Fontenot v. ABC Ins. Co.*, 95-1707 (La. 6/7/96), 674 So. 2d 960, this Court had never "expressly declare[d] that the third category of *contra non valentem* applies to medical malpractice cases to suspend or interrupt prescription." *Taylor v. Giddens*, 618 So. 2d 834, 842 (La. 1993). *Fontenot* is the first case to apply the third category to a medical malpractice case.

The plaintiff in *Fontenot* suffered nerve damage during spinal surgery when a drill bit slipped, an injury immediately disclosed to the plaintiff and her husband. During subsequent office visits, the physician advised that her condition was temporary and would resolve over time.

The *Fontenot* Court addressed the third category of *contra non valentem* and held that it applies when a physician "himself has done some act effectually to prevent the victim from availing himself of his cause of action for medical malpractice," reiterating the rule that, "[t]o trigger application of the third category,

a physician's conduct must rise to the level of concealment, misrepresentation, fraud or ill practices." *Id.*, p. 5, 674 So. 2d at 963, citing *Rajnowski v. St. Patrick's Hosp.*, 564 So. 2d 671, 676 (La. 1990). Under the facts presented, the Court found that prescription had not been suspended. First, the physician disclosed the injury when it occurred. Second, while the physician made "reassurances that [the plaintiff's] condition would resolve over time" this "[did] not reach the level of fraud or a breach of duty to disclose." *Id.*, p. 7, 674 So. 2d 960, 964

Thereafter, until the *Carter* decision, this Court considered but declined to directly address the issue of whether a physician's continued treatment of a patient could suspend the prescriptive period. *In re Med. Rev. Panel for Claim of Moses*, 00-2643, p. 11 (La. 5/25/01), 788 So. 2d 1173, 1180; *See also Carter*, 04-0646, p. 12, 892 So. 2d at 1269. The continuing treatment rule was then adopted in *Carter*.

Carter involved a medical malpractice suit against a dentist following his extraction of half of the plaintiff's teeth and the placement of improperly fitted permanent partial dentures. The plaintiff's suit was filed more than a year after the alleged act of malpractice but eleven months after she had last seen the dentist who, at that time, refused to see her again. Analogizing the situation to the established "continuous representation rule" by which prescription is suspended during an attorney's representation of a client, the *Carter* Court noted that suspension of prescription is "based on the premise that the professional relationship is likely to hinder the patient's inclination to sue." *Id.* The Court also noted that the continuity of the special patient-physician relationship "offers the possibility of correction of the injury and thus may postpone the running of prescription." *Id.*, p. 13, 892 So.2d at 1269. Accordingly, so long as a patient remained in the physician's care, "she could reasonably expect a correction of the diagnosis or tortious treatment." *Id.*

The *Carter* Court then enunciated the "continuing treatment rule," which requires that a plaintiff demonstrate the following:

> . . . the existence of (1) a continuing treatment relationship with the physician, which is more than perfunctory, during which (2) the physician engaged in conduct which served to prevent the patient from availing herself of her cause of action, such as attempting to rectify an alleged act of malpractice.

Id., p. 16, 892 So. 2d at 1271. Under this rule, prescription will run against a plaintiff who has knowledge that her condition may be related to a physician's improper treatment "only if there is no effort by the physician to mislead or cover up information available to the plaintiff through inquiry or professional medical or legal advice during the continuing treatment." *Id.*, p. 19, 892 So. 2d at 1273.

The *Carter* Court found that both factors of the continuing treatment rule were met. First, there existed a continuous relationship between the plaintiff and the dentist. Second, the dentist's conduct following the alleged malpractice effectively prevented the plaintiff from pursuing her claim. In addition to his repeated assurances to "hang in there" and that he would "get it right," throughout the plaintiff's treatment, the dentist attempted to remedy the issues directly related to the initial malpractice. *Id.* The Court thus rejected the dentist's attempt "to use plaintiff's compliance with his request to allow him the chance to fix her problem against her to claim prescription" and found the plaintiff's reliance on his repeated assurances and continued efforts to correct the problems to be reasonable. *Id.*, p. 20, 892 So. 2d at 1273.

Cases addressing the continuing treatment rule have focused on the conduct of the physician in determining whether *contra non valentem* applies to suspend prescription, and, more particularly, whether that conduct involved concealment, misrepresentation, fraud or ill practices.[3] Although the inquiry is necessarily fact-

[3] We are mindful that the continuing treatment rule also requires that the treatment relationship between the patient and the physician be more than perfunctory, which we discuss *infra*. This is rarely the decisive factor in this inquiry.

intensive, our jurisprudence is relatively consistent with respect to the types of conduct for which the continuing treatment rule will apply to suspend prescription.

In *Wilkerson v. Dunham*, 16-1056 (La. App. 4 Cir. 5/3/17), 218 So. 3d 743, *writ denied*, 17-0932 (La. 9/29/17), 227 So. 3d 287, for example, the plaintiff underwent three bunion surgeries over a two-year period. She continued to experience pain in the foot and, because her treating podiatrist was unavailable, began seeing another podiatrist, who advised that the first podiatrist had shaved off too much bone. Three years later, he confirmed this fact, at which time, the plaintiff returned for a consultation with the first podiatrist who recommended that she undergo corrective surgery by an orthopedic surgeon.

The plaintiff then filed suit, claiming that the continuing treatment rule applied to suspend the prescriptive period. In addition to an ongoing doctor-patient relationship, the plaintiff asserted that the podiatrist's reassurances that her pain was a normal, known complication prevented her from timely filing her claim. The *Wilkerson* court first found that the plaintiff's treatment with the podiatrist ended and a new treatment relationship began when she started seeing the new podiatrist. Although the court did not address the plaintiff's return to the first podiatrist for a consultation, implicit in its decision was that this did not constitute continuing treatment. The court likewise found that "beyond a few assurances that [the plaintiff's] pain from the surgeries was a normal complication that would abate with time, there is no indication in the record [the podiatrist] engaged in conduct that prevented [the plaintiff] from bringing a claim against him." *Id.*, p. 9, 218 So. 3d at 749.

Another recent consideration of the continuing treatment rule was made by the Fifth Circuit in *Lindquist*, a medical malpractice case brought against a surgeon who mistakenly left a metal object at the site of the plaintiff's spine surgery. Although x-rays taken two days after revealed the object, the plaintiff was not

informed of this fact at that time, nor at any of his follow-up appointments with the surgeon for the ensuing four months.[4] After learning of the object three and a half years later, he filed his claim.

While the Fifth Circuit noted that the plaintiff did not have an ongoing relationship with the surgeon beyond the four months of follow-up care, its discussion of whether the surgeon's failure to disclose the presence of the metal object rose to the level of concealment, misrepresentation, fraud or ill practices which prevented the plaintiff from timely filing a claim is important. Noting that La. C.C. art. 1953 defines fraud as "a misrepresentation or suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other," which "may also result from silence or inaction,"[5] the court concluded that the surgeon's failure to disclose the metal object was a fraudulent act. *Id*., p. 14, 274 So. 3d at 761. Thus, prescription was found to be suspended.

Notably, the *Lindquist* court observed that, "[w]here a plaintiff has actual knowledge of the malpractice, the Court is unlikely to find the physician's conduct rose to the level of fraud." *Id*., p. 9, 274 So. 3d at 758. This concept is exemplified by a number of cases, including *In re Jenkins*, 06-0566 (La. App. 4 Cir. 11/15/06), 945 So. 2d 814. In *Jenkins*, the plaintiff suffered blood loss and a hematoma when an IV needle was removed from his arm following surgery. He also claimed to have suffered soreness in his arm when a technician had difficulty withdrawing blood pre-operatively. The plaintiff filed suit two years later, claiming that prescription was suspended under the third category of *contra non valentem*. He maintained that a nurse's failure to record the IV incident in his records amounted to concealment.

[4] The surgeon was aware of the presence of the metal object as he made reference to it in his progress notes.

[5] This definition of "fraud" is found in Book III, Title IV (Conventional Obligations or Contracts), Chapter 4 (Vices of Consent), Section 2 (Fraud).

Noting that the plaintiff was aware of each incident immediately after it occurred, the court rejected his argument and found no act that prevented the plaintiff from "availing himself of his cause of action." *Id.*, p. 6, 945 So. 2d at 818.

Application of the continuing treatment rule was also rejected in *Jimerson v. Majors*, 51,097 (La. App. 2 Cir. 1/11/17), 211 So. 3d 655. *Jimerson* involved a claim against an obstetrician who allegedly committed malpractice by performing a hysterectomy on a twenty-four year old woman. The plaintiff had been a long-term patient of the physician, and she continued to see him for fourteen months following the surgery. After another physician advised that her that it was malpractice to perform a hysterectomy on someone as young as she, the plaintiff filed her claim. The claim was filed more than two years after the surgery, but within a year of her last visit with the physician. The Second Circuit noted that, for years prior to the hysterectomy, the physician had discussed the possibility of a hysterectomy, and recommended that she obtain a second opinion. The court found no evidence that the physician's conduct in any way prevented the plaintiff availing herself of her cause of action. *See also Nichols v. Patwardhan*, 48,170, p. 8 (La. App. 2 Cir. 6/26/13), 120 So. 3d 322, 327 (where treatment with a physician following an alleged act of malpractice "cannot possibly be considered 'more than perfunctory,' and does not show that [the physician] was trying to rectify the alleged malpractice," the continuing treatment rule does not apply); *Adams v. O'Connell*, 06-0139, p. 8 (La. App. 4 Cir. 3/28/07), 955 So. 2d 722, 727 (where physician was "not accused of repeatedly assuring [the plaintiff] that she would get better if she continued treatment under his care," *contra non valentem* did not suspend prescription); *McCauley v. Stubbs*, 17-933, p. 8 (La. App. 3 Cir. 4/25/18), 245 So. 3d 41, 47 (absent "proof of fraud, misrepresentation or intentional concealment on [the physician's] part, prescription could not be suspended").

A physician's conduct was found to have suspended prescription under the continued treatment rule in *In re Noe*, 04-0760 (La. App. 4 Cir. 8/3/05), 916 So. 2d 1138, 1143, *writ granted sub nom. In re Med. Rev. Panel Proc. of Noe*, 05-2275 (La. 4/17/06), 926 So. 2d 497, *and aff'd in part, rev'd in part*, 05-2275 (La. 5/22/07), 958 So. 2d 617. The plaintiff in *Noe* received a Celestone injection in her right buttock for sinus congestion, which resulted in nerve damage, producing pain and atrophy of the muscle. The plaintiff filed suit twenty-one months later against the physician who ordered the injection and the nurse who administered it. While the claims asserted against the nurse were found to be prescribed, those against the physician were not. This finding was based on the physician's reassurances to the plaintiff that she had an allergic reaction to the injection, that her condition would resolve in time and that her participation in an exercise program would build muscle in the buttock. The Court held that the physician's "actions led [the plaintiff] to delay discovery of a cause of action based upon his continued treatment and attempts to remedy her injury;" thus, her "continued treatment . . . [fell] squarely within the confines of the third exception of contra non valentum [sic]. . . ." *Id.*, p. 8, 916 So. 2d at 1143.

As these cases illustrate, in order for the continuing treatment rule to suspend a prescriptive period, there must be a showing that the physician provided continued treatment to the patient that is related to the alleged act of malpractice and that is more than perfunctory. Furthermore, there must be a showing that the physician's subsequent conduct classifies as behavior designed to prevent the plaintiff from asserting a claim, whether it be in the form of concealment, misrepresentation, fraud or ill practices.

Analysis

At the core of the plaintiffs' argument is their contention that "it is the continuing relationship with the physician, not continuous treatments, that satisfies the first prong of the *Carter* test." We disagree. Our case law expressly holds

otherwise, and we decline to expand the continuing treatment rule enunciated in *Carter* to encompass the continuing patient-physician relationship in the absence of continuing treatment.[6] The continuing treatment rule, as *Carter* and its progeny reflect, clearly contemplates *treatment* of a patient directly related to the injury caused by the alleged malpractice. As we previously noted, "no Louisiana case has held that prescription can be extended solely, or primarily, because of [a] continued relationship." *Carter*, 04-0646, p. 13, 892 So. 2d at 1269.

We now turn to whether the plaintiffs established the elements of the continuing treatment rule in this case. While there is no doubt that Mrs. Mitchell continued to see Dr. Easton following the alleged act of malpractice, we agree with the lower courts that Dr. Easton was not treating her sciatic nerve injury, a necessary component of the rule. Indeed, the record reflects that the only actual treatment for

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[6] Other jurisdictions that have considered this issue have likewise rejected the argument that a patient-physician relationship, alone, suspends a statute of limitations. *See*, *e.g*., *Venditti v. St. Catherine of Siena Med. Ctr*., 98 A.D.3d 1035, 950 N.Y.S.2d 759, 762 (2012)("A mere continuation of a general doctor-patient relationship does not qualify as a course of treatment for purposes of the statutory toll,"); *Locklear v. Lanuti*, 176 N.C. App. 380, 385, 626 S.E.2d 711, 715 (2006)("To take advantage of the 'continuing course of treatment' doctrine, plaintiff must show the existence of a continuing relationship with [her] physician, and ... that [she] received subsequent treatment from that physician. Mere continuity of the general physician-patient relationship is insufficient to permit one to take advantage of the continuing course of treatment doctrine. Subsequent treatment must consist of either an affirmative act or an omission, [which] must be related to the original act, omission, or failure which gave rise to the cause of action. However, plaintiff is not entitled to the benefits of the 'continuing course of treatment' doctrine if during the course of the treatment plaintiff knew or should have known of his or her injuries."); *Liffengren v. Bendt*, 2000 S.D. 91, ¶ 15, 612 N.W.2d 629, 632 ("Continuous treatment is not held to be synonymous with the continuing patient-physician relationship . . . The continuing treatment doctrine should be applied only 'when the professional's involvement after the alleged malpractice is for the performance of the same or related services and is not merely continuity of a general professional relationship. . . .' Continuous treatment involves more than a physician-patient relationship."); *Raynor v. Kyser*, 338 Ark. 366, 372, 993 S.W.2d 913, 916 (1999)(" In both cases where we have applied the continuous treatment theory to toll the statute, the patient has received active, ongoing medical care and attention beyond the time of a specific negligent act or series of acts—that is, something more than the mere continuation of the physician-patient relationship."); *Farley v. Goode*, 219 Va. 969, 979, 252 S.E.2d 594, 600 (1979)("by 'continuous treatment' we do not mean mere continuity of a general physician-patient relationship; we mean diagnosis and treatment 'for the same or related illnesses or injuries, continuing after the alleged acts of malpractice. . . .'").

the severance of a sciatic nerve is an end-to-end anastomosis, the surgery Dr. Ahmad performed.

Following the August 23, 2015 surgeries, Mrs. Mitchell saw Dr. Easton on September 1, 2015 and, after again re-dislocating her hip, she underwent another revision surgery on September 30, 2015. She then had office visits with Dr. Easton for each of the remaining three months of 2015, and in 2016, she saw him twice in March, once in April and once in May. In 2016, Mrs. Mitchell saw Dr. Easton once in October and once in November. This course of care is consistent with what Dr. Easton described as the standard, routine follow-up care of all of his patients who have undergone hip replacements. Dr. Easton explained that he sees these patients at regular intervals following surgery – at two and six weeks, and at three months. If they continue to have issues, he sees them at six months, nine months and a year. He then sees his patients every two years for monitoring because hip replacements only last fifteen to twenty years.[7]

Dr. Easton does not dispute that, during his regular follow-up care, he also checked to determine whether any feeling, sensory or motion function had returned to Mrs. Mitchell's left leg. The sciatic nerve evaluations, however, did not advance any medical care for her and were simply to gauge her progress. As such, they were not of a nature for which the continuing treatment rule was intended, which, as *Carter* made clear, requires treatment which is more than perfunctory. Although our

[7] A review of Dr. Easton's records reflect that some of Mrs. Mitchell's visits were prompted by, or involved, other issues. On March 29, 2016, for example, Mrs. Mitchell presented with a new complaint of swelling and numbness in her right foot, and right foot drop, complaints she continued to voice at her April, May and October, 2016 appointments. At her April appointment, Mrs. Mitchell reported having had another fall at home a few days prior. While Mrs. Mitchell had x-rays taken at her May, 2016 appointment, she was not otherwise examined because "she had to leave and she could not stay for her appointment." The chart note from her last appointment on November 15, 2016 reflects that Mrs. Mitchell "was doing okay with [the left hip revision]" and was "here today because she had a fall recently at home" from which she developed some swelling and slight pain in her left ankle.

jurisprudence does not define the term "perfunctory," Webster's New Collegiate Dictionary (1979) defines the term as "characterized as routine."[8]

There was no treatment beyond the repair of Mrs. Mitchell's acute severed nerve shortly after the injury to it. For the continuing treatment rule to apply and to trigger the suspension of the prescriptive period, it is axiomatic that there be actual treatment that is "continuing." Absent continuing treatment, the suspension of prescription would be based on the patient-physician *relationship*, a principle we have already rejected. To hold otherwise would negate the necessity of proving both elements of the *Carter* test – that the continuing treatment was more than perfunctory and, more importantly, that the physician's conduct prevent the patient from asserting her claim.

Under the particular circumstances of this case, we find that the singular treatment for Mrs. Mitchell's nerve injury was finite and Dr. Easton's follow-up care thereafter was, indeed, routine and perfunctory.[9]

We now turn to the second prong of the continuing treatment rule, namely, whether Dr. Easton engaged in conduct which served to prevent the plaintiffs from availing themselves of their cause of action. There is little dispute that, at the time of the injury, Dr. Easton advised the plaintiffs that it would take time to determine whether Mrs. Mitchell's sciatic nerve would regenerate and restore function to her leg. As Dr. Easton testified, some patients with nerve injuries regain function over time, while others do not, and the full extent of a patient's recovery will not be known until around the "year mark."

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[8] "Dictionaries are a valuable source for determining the 'common and approved usage' of words." *Gregor v. Argenot Great Cent. Ins. Co.*, 02-1138, p. 8 (La. 5/20/03), 851 So. 2d 959, 964.

[9] Nor are we persuaded by the plaintiffs' suggestion that the lower courts erred in failing to find Dr. Easton's "yearlong monitoring of [Mrs.] Mitchell's sciatic nerve injury" to be "sufficient proof of a continuing relationship," despite the fact that "[m]edical monitoring has long been recognized [by Louisiana law]. . . as an element of damages." Medical monitoring claims seek "to recover the quantifiable costs of periodic medical examinations necessary to detect the onset of physical harm." *Bourgeois v. A.P. Green Indus., Inc.*, 97-3188, p. 5 (La. 7/8/98), 716 So. 2d 355, 358. Medical monitoring is clearly inapplicable to this case.

The plaintiffs' testimony and that of their witnesses (Mrs. Mitchell's daughter and son-in-law) was largely consistent with Dr. Easton's testimony. All agreed that Dr. Easton repeatedly advised that it could take a year or longer before the full results of the surgery would be certain.[10] No one testified that Dr. Easton guaranteed any results, including that the nerve would eventually restore function to Mrs. Mitchell's leg. All indicated that Dr. Easton repeatedly encouraged them to be patient, to not give up hope or to "wait a year." Mrs. Mitchell clarified that Dr. Easton did not advise her to wait a year to sue him, but rather to "give this surgery a year, and let it heal, and then see what happens."

Plaintiffs note that *Carter* did not expressly hold that the physician's conduct rose to a level of fraud, misrepresentation or intentional conduct, implying that they were not required to make such a showing on Dr. Easton's part. They take the position, however, that the record otherwise supports a finding that Dr. Easton's conduct "was sufficient to defeat his patient's inclination to sue for more than a year." They further argue that Dr. Easton breached the physician's "duty to speak," which, they contend, amounts to misrepresentation or fraud.[11] In support of this argument, they maintain that, although Dr. Easton disclosed that the sciatic nerve had been severed immediately after the second surgery, he did not specifically advise them that *he* had severed the nerve and thus, he concealed, "cover[ed] up" or withheld that information from them, "information [that would be] vital to any reasonable person assessing whether or not to assert a cause of action." They point

[10] The defendants pointed out inconsistencies in the testimony Mrs. Mitchell gave at trial and that given in her deposition as to whether she had conversations with Dr. Easton about her prognosis and whether she had an early subjective belief that she would not recover use of her leg. These inconsistencies are not material for purposes of this opinion.

[11] It has been recognized that "[w]hen a physician breaches her duty to disclose information to a patient, it can rise to the level of fraudulent concealment." *Braud v. Cenac*, 03-1696, p. 4 (La. App. 3 Cir. 7/14/04), 879 So. 2d 896, 901.

out that, until the hearing on the prescription exception, Dr. Easton evaded the question of whether he severed Mrs. Mitchell's sciatic nerve.[12]

The plaintiffs further contend that Dr. Easton withheld "extremely relevant information about the prospect of [Mrs. Mitchell's] recovery," basing this argument on Dr. Rashad's deposition testimony that, in his opinion, the prognosis for the nerve's regeneration was "poor." Their position is that Dr. Easton knew or should have known that the probability of function returning to her leg were "slim to none."

We find no merit to these assertions. As our jurisprudence reflects, the law of prescription does not require that the patient be informed by a medical practitioner of possible malpractice before the prescriptive period begins to run. *Jimerson*, 51,097, p. 4, 211 So. 3d at 655; *Med. Rev. Panel Proceeding of Williams v. Lewis*, 08-2223, p. 7 (La. App. 1 Cir. 5/13/09), 17 So. 3d 26, 30; *Gore v. Snider*, 590 So. 2d 677, 680 (La. App. 3 Cir. 1991). It is also well-settled that the prescriptive period for a medical malpractice cause of action arises upon the occurrence of the injury when the damages are immediately apparent. *In re Smithson*, 2007-2262, p. 4 (La. App. 1 Cir. 6/6/08), 991 So. 2d 1075, 1078, citing *Baldini v. East Jefferson Gen. Hosp.*, 07-0489 (La. App. 5th Cir.1/22/08), 976 So. 2d 746, 749.

Plaintiffs were directly informed by Dr. Easton that Mrs. Mitchell's nerve had been severed and it was clear to all that Mrs. Mitchell's damages were immediately apparent. Dr. Easton's failure to specifically admit that he was the one who severed Mrs. Mitchell's nerve did not prevent the plaintiffs from availing themselves of their cause of action, particularly given that he was the only surgeon who performed the

[12] During his deposition, Dr. Easton testified that he did not know how Mrs. Mitchell's nerve had become lacerated, while at the hearing on the exception, he admitted responsibility for the injury. We have reviewed those portions of Dr. Easton's deposition that are in the record and note that Dr. Easton was never asked whether he caused the nerve injury. He was simply questioned as to whether he knew how the nerve had been severed and his responses are not problematic. Had Dr. Easton "known" what caused the sciatic nerve injury, he would likely have been aware of it when it occurred and, logically, the second surgery – to discover the source of Mrs. Mitchell's foot drop – would have been unnecessary. Indeed, as Dr. Easton further testified, if he had seen the laceration of the nerve, he "would have fixed it right then and there."

revision. Furthermore, Dr. Easton was candid as to the fact of the injury, and his failure to admit fault at the time does not constitute fraud, misrepresentation, concealment or ill practices.

We likewise do not find that Dr. Easton's caution that it could take a year or more to determine the final results of the nerve repair prevented the plaintiffs from asserting their claims, as contemplated by *Carter*, or rise to a level of concealment, misrepresentation, fraud, or ill practices.[13] A "doctor's reassurance that a patient's condition could resolve over time does not necessarily reach the level of fraud or breach of duty to disclose." *Ainsworth v. Bulloch*, 32,536, p. 3 (La. App. 2 Cir. 12/22/99), 749 So. 2d 886, 889; *See also*, *Fontenot v. ABC Ins. Co.*, 95-1707, p. 7 674 So. 2d at 964; *Braud v. Cenac*, 03-1696, p. 5, 879 So. 2d at 901 ("a physician's reassurances to a patient that her condition will alleviate itself over time does not automatically rise to the level necessary to invoke the relevant category of contra non valentem.").

There is no claim in this matter that Dr. Easton assured the plaintiffs that Mrs. Mitchell's condition would resolve over time. He merely advised that it would take time to determine whether the nerve repair was successful. None of the statements made by Dr. Easton to the plaintiffs rise to the level of concealment, misrepresentation, fraud or ill practices, as this Court contemplated in *Fontenot* and by subsequent case law.

We are not persuaded by the argument that the plaintiffs may not have filed suit had Mrs. Mitchell's nerve repair been successful, as the dissent in this case suggests. The dissent expressed the view that prescription "did not commence to run until the termination of their professional relationship on November 15, 2016." It argued that, to hold otherwise, "would also result in the filing of more medical

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[13] Dr. Ahmad, too, agreed, that he "wouldn't expect a nerve repair to do anything for a long time."

malpractice cases wherein the plaintiff is legally obligated to file suit against her doctor even though she would not have sued had her condition been rectified after a period of time."

While this point is well taken, it is hypothetical conjecture and focuses on the damages element of a medical malpractice case, rather than the act of malpractice, as the trigger of the prescriptive period. The ultimate resulting damages from an act of malpractice do not determine when a cause of action accrues and whether prescription commences to run. As this Court stated in *Bailey v. Khoury*, 04-0620, p. 10 (La. 1/20/05), 891 So. 2d 1268, 1276, quoting *Harvey v. Dixie Graphics, Inc.*, 593 So. 2d 351, 354 (La. 1992):

> . . . there is no requirement that the quantum of damages be certain or that they be fully incurred, or incurred in some particular quantum, before the plaintiff has a right of action. Thus, in cases in which a plaintiff has suffered some but not all of his damages, prescription runs from the date on which he first suffered actual and appreciable damage, even though he may thereafter come to a more precise realization of the damages he has already incurred or incur further damage as a result of the completed tortious act.

Similarly, as our jurisprudence indicates,

> . . . "in order for the prescriptive period to commence, the plaintiff must be able to state a cause of action—both a wrongful act and resultant damages.". . . "Ignorance of the probable extent of injuries materially differs from ignorance of actionable harm, which delays commencement of prescription.". . . "The running of the prescriptive period is triggered when a plaintiff obtains actual or constructive knowledge of facts indicating to a reasonable person that he or she is the victim of a tort."

In re Hume, 14-0844, p. 7 (La. App. 4 Cir. 4/1/15), 165 So. 3d 233, 239 (citations omitted). *See also*, *LaGrange v. Schumpert Med. Ctr.*, 33,541, p. 4 (La. App. 2 Cir. 6/21/00), 765 So. 2d 473, 477; *Dufriend v. Tumminello*, 590 So. 2d 1354, 1356 (La. App. 5 Cir. 1991).

There is no question that Mrs. Mitchell lost function in her leg immediately upon the severance of her sciatic nerve. Her damages, therefore, began to accrue on that date. Even had the anastomosis ultimately been successful and Mrs. Mitchell regained complete nerve and leg function, she still would have had a potential claim for damages for the period of time from the injury, when she lost function of her leg, until the time that it was restored. That she may not have filed a claim for malpractice if she had physically recovered is not pertinent to the question of whether prescription was suspended in this case.

Dr. Easton committed no acts of concealment, fraud or misrepresentation that hindered the plaintiffs from asserting their claims. Accordingly, we find no manifest error in the lower courts' determinations that the plaintiffs' action has prescribed.

CONCLUSION

For the reasons set forth above, we find that, under the particular circumstances of this case, prescription was not suspended by the *contra non valentem* doctrine. We therefore affirm the judgment of the court of appeal granting the defendants' exception of prescription.

AFFIRMED

SUPREME COURT OF LOUISIANA

No. 2021-C-00061

CHERYL AND MICHAEL MITCHELL

VS.

BATON ROUGE ORTHOPEDIC CLINIC, L.L.C. AND ROBERT W. EASTON, M.D.

On Writ of Certiorari to the 1st Circuit Court of Appeal, Parish of East Baton Rouge

GRIFFIN, J., dissents and assigns reasons.

I respectfully dissent. As observed by Judge Holdridge in his dissenting opinion, the instant medical malpractice suit is timely because "the continuing treatment rule applies in this case to suspend the running of prescription on Mrs. Mitchell's cause of action against Dr. Easton until such as time as Dr. Easton's treatment and monitoring of Mrs. Mitchell ended on November 15, 2016." *Mitchell v. Baton Rouge Orthopedic Clinic, L.L.C.,* 19-0939 (La. App. 1 Cir. 12/17/20), 316 So. 3d 1107, 1114 (Holdridge, J., dissenting).

The continuing treatment rule applies to medical malpractice claims when the plaintiff establishes: (1) a continuing treatment relationship with a physician, which is more than perfunctory in nature, during which (2) the physician engaged in conduct which served to prevent the plaintiff from availing herself of her cause of action, such as attempting to rectify an alleged act of malpractice. *See Carter v. Haygood*, 04-0646 (La. 1/19/05), 892 So. 2d 1261, 1271.

The first element of *Carter* was satisfied as it is undisputed that Dr. Easton continued to monitor the sciatic nerve injury and its progress while simultaneously treating Mrs. Mitchell for her hip condition. He testified that he "was monitoring to see if she had any feeling or motion." *Mitchell*, 19-0939, 316 So.3d at 1114 (Holdridge, J., dissenting). The majority opinion finds that this progress monitoring

did not "advance any medical care for her;" however, it ignores that this was the *only* available treatment for such injury. This contention is supported by Dr. Easton himself when he stated on the record that "[t]here is really nothing to do with the sciatic nerve injury other than see how she was doing and everything else." *Id.* If positive results were shown at any point during Dr. Easton's continued monitoring, his rectifying of the injury that he caused would have been deemed a success.

The second element of *Carter* was satisfied when Dr. Easton advised Mrs. Mitchell and her family that there was a possibility of recovery from the injury he caused within one year. The physician-patient relationship is one that is largely based on trust. Patients entrust their physical wellbeing and lives into the hands of their physicians. Moreover, patients and their families rely upon the fact the physician is both well-versed and well-equipped to handle the injuries or illnesses they are diagnosed with. Dr. Easton not only encouraged Mrs. Mitchell to "wait and see" but also provided the same encouragement to her daughter and son-in-law. As Judge Holdridge found, these actions "served to effectively prevent Mrs. Mitchell from pursing a lawsuit against" Dr. Easton. *Id.*, 19-0939, 316 So.3d at 1114-15 (Holdridge, J., dissenting).

Dr. Easton's continued progress monitoring coupled with his assurance of a possible recovery within a one-year timeframe ultimately hindered Mrs. Mitchell from filing a claim soon after he injured her sciatic nerve. Therefore, both elements of *Carter* are met and prescription was suspended in this matter until November 16, 2015. As a matter of policy, the result reached in the majority opinion will only serve to increase the amount of medical malpractice litigation that could have otherwise been resolved during the course of continuing treatment.