IN RE: MEDICAL REVIEW PROCEEDINGS OF GEORGE D. MCINTIRE III

C/W

IN RE: MEDICAL REVIEW PANEL PROCEEDINGS OF GEORGE D. MCINTIRE, III

NO. 25-C-278 C/W 25-C-279

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPLICATION FOR SUPERVISORY REVIEW FROM THE
TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 860-103, DIVISION "E"
HONORABLE FRANK A. BRINDISI, JUDGE PRESIDING

July 30, 2025

E. ADRIAN ADAMS
JUDGE

Panel composed of Judges Susan M. Chehardy,
Stephen J. Windhorst, and E. Adrian Adams, Pro Tempore

WRITS DENIED

EAA
SMC
SJW

COUNSEL FOR DEFENDANT/RELATOR,
SUSAN C. FUZZARD, M. D.
C. William Bradley, Jr.
L. David Adams
Jada C. Doucet

COUNSEL FOR DEFENDANT/RELATOR,
ROBERT G. BROUSSE, M. D.
Shelly S. Howat

ADAMS, PRO TEMPORE, J.

In separate writ applications, defendants-relators, Robert G. Brousse, M.D., and Susan C. Fuzzard, M.D., seek supervisory review of the trial court's judgment overruling their peremptory exceptions of prescription, arguing that plaintiff, Mr. George D. McIntire, III, filed his complaint requesting a medical review panel too late.[1] We consolidated defendants' separate writ applications for review, as they raise the same issues and seek review of the same judgment. For the reasons that follow, we deny both writ applications.

Background

Mr. McIntire's medical review panel complaint stated that he had been experiencing a runny nose, swelling, bleeding, and numbness in his sinus area, as well as a bump on the side of his neck, after receiving radiation treatments in conjunction with the removal of squamous cell cancer from the tip of his nose in 2021. Although his dermatologist told him the cancer was gone in August of 2021, he continued having symptoms, which he then reported to his primary care physician (PCP). His PCP sent him for a CT scan, which was normal, so the PCP suggested seeing an ear, nose, and throat physician (ENT). Mr. McIntire sought medical care in early 2022 from Dr. Brousse, an ENT. Dr. Brousse ordered an MRI, which Mr. McIntire states came back normal. When his symptoms persisted and worsened, Mr. McIntire again saw Dr. Brousse, who ordered another MRI in June 2022. Dr. Brousse told Mr. McIntire that the MRI results, as read by Dr. Fuzzard, showed no problems with his sinus or ears. Dr. Brousse suggested that his symptoms may be related to his jaw.

[1] In this Court, as in the trial court, Dr. Brousse adopts the arguments set forth by Dr. Susan C. Fuzzard, the diagnostic radiologist who interpreted the June 2022 MRI. Dr. Fuzzard's writ application is 25-C-278; Dr. Brousse's writ application is 25-C-279.

In September 2022, Mr. McIntire saw another ENT, Dr. Paul Spring.[2] Dr. Spring immediately referred Mr. McIntire to Dr. Dumont. According to the "History of Present Illness" section of the progress note from the September 14, 2022 visit with Dr. Dumont, Mr. McIntire was referred by Dr. Spring "for potential infratemporal fossa mass. The patient was initially worked up for a left neck mass which is most likely vascular. No mass was found on MRI or CT of the neck." The "Assessments" section of the same progress note shows: "1. Mass in neck – R22.1 (Primary) 2. Trigeminal nerve disease – G50.9" and further states: "I reviewed the MRI and CT of the neck. There appears to be a mass just inferior to foramen rotundum in the infratemporal fossa although it is difficult to discern with a slice thickness on the MRI." Thus, Dr. Dumont ordered a new MRI.

Two days later, on September 16, 2022, Mr. McIntire went to his regular progress visit with his neurologist, Dr. Troy Beaucoudray, who was managing his lower back pain. The clinical notes from Mr. McIntire's September 16, 2022 visit with Dr. Troy Beaucoudray state: "He has reportedly been diagnosed with a brain tumor compressing the trigeminal nerve. He is recommended to continue under the care of his treating neurosurgeon and he is considering surgery to remove this."

Mr. McIntire disputes Dr. Beaucoudray's note. Mr. McIntire avers he did not know of the potential malpractice until September 28, 2022, when Dr. Spring and Dr. Dumont informed him that the special MRI scan performed on September 20, 2022, confirmed that he had a mass/tumor in his left maxillary sinus, as well as cranial nerve impingement.

On September 21, 2023, representing himself, Mr. McIntire filed a request to convene a Medical Review Panel, naming Dr. Brousse and Dr. Fuzzard as

[2] Mr. McIntire claims that Dr. Brousse suggested he see another ENT to get a second opinion.

defendants, asserting that they negligently failed to diagnose the mass in his left maxillary sinus.

Defendants each filed an exception of prescription in the trial court.[3] They argued Mr. McIntire was put on notice of the alleged malpractice more than a year before he sought to convene a medical review panel. Defendants contended they needed to prove only that Mr. McIntire had constructive knowledge, defined as having enough information to excite attention or curiosity, or to put a reasonable-minded person on guard to call for inquiry regarding possible malpractice. Defendants argued that because the complaint is prescribed on its face, the burden shifts to Mr. McIntire to prove by a preponderance of evidence that he did not have actual or constructive notice of the alleged malpractice until September 22, 2022 or later. They argued that Mr. McIntire failed to meet his burden of proving that he discovered the alleged malpractice less than a year before filing his claim, because medical records from September 14, 2022 and September 16, 2022, refer to his diagnosis of a "brain tumor."

After a hearing at which Mr. McIntire appeared via zoom and represented himself, the trial court overruled defendants' peremptory exceptions of prescription. Defendants now seek review of that ruling.

Law and Analysis

La. R.S. 9:5628(A) states that no medical malpractice claim shall be brought unless it is 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. The one-year prescriptive period begins when a plaintiff gains actual or constructive knowledge of facts indicating to a reasonable person that he is the victim of a tort. *In re: Medical Review Panel of Marts*, 23-347 (La. App. 5 Cir.

[3] In the trial court and in his supervisory writ application, Dr. Brousse adopted and incorporated the arguments of Dr. Fuzzard into his own pleadings.

3/27/24), 385 So.3d 359, 364. "Constructive knowledge" is whatever notice is enough to excite attention and put the injured person on guard and call for inquiry, which is tantamount to notice of everything to which a reasonable inquiry may lead. *Id.* 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. *Id.* at 364. A plaintiff is imputed with whatever knowledge a reasonable inquiry or investigation would reveal. *In re Med. Rev. Panel of Heath*, 21-1367 (La. 6/29/22), 345 So.3d 992, 996; *In re Posess*, 22-18 (La. App. 5 Cir. 9/28/22), 349 So.3d 1082, 1089. When a plaintiff has knowledge of facts strongly suggestive that the untoward condition or result may be the result of improper treatment, and there is no effort by the health care provider to mislead or cover up information that is available to the plaintiff through inquiry or professional medical or legal advice, the cause of action is reasonably knowable to the plaintiff. *Carter v. Haygood*, 04-646 (La. 1/19/05), 892 So.2d 1261, 1273.

When reviewing a peremptory exception of prescription, the applicable standard of review turns on whether evidence is introduced at the hearing on the exception. When an exception of prescription raises purely legal questions, appellate courts apply a de novo standard of review. *DeFelice v. Federated Nat'l Ins. Co.*, 18-374 (La. App. 5 Cir. 7/9/19), 279 So.3d 422, 426. If no evidence 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. *Mitchell v. Baton Rouge Orthopedic Clinic, L.L.C.*, 21-61 (La. 10/10/21), 333 So.3d 368, 373. In that case, the reviewing court is assessing whether the trial court was legally correct. *In re Med. Rev. Panel of Gerard Lindquist*, 18-444 (La. App. 5 Cir. 5/23/19), 274 So.3d 750, 754, *writ denied*, 19-1034 (La. 10/1/19), 280 So.3d 165.

When evidence is introduced at a hearing on prescription, the trial court's factual findings are reviewed under the manifest error or clearly wrong standard of

review. *Lomont v. Bennett*, 14-2483 (La. 6/30/15), 172 So.3d 620, 627, *cert. denied*, 577 U.S. 1139, 136 S.Ct. 1167, 194 L.Ed.2d 178 (2016); *In re Guidry*, 17-105 (La. App. 5 Cir. 8/30/17), 225 So.3d 1169, 1173. Under the manifest error standard, if the court's factual findings are reasonable in light of the record viewed in its entirety, the court of appeal may not reverse unless the findings are clearly wrong. *Burke v. Cohen*, 19-544 (La. App. 5 Cir. 5/28/20), 296 So.3d 1231, 1236. Even when evidence is introduced at the hearing, however, if there is no dispute as to the material facts, the reviewing court conducts a *de novo* review, giving no deference to the trial court's legal conclusions. *Mitchell*, 333 So.3d at 373.

The burden of proof generally lies with the party asserting prescription. *Woods v. Cousins*, 12-100 (La. App. 5 Cir. 10/16/12), 102 So.3d 977, 979, *writ denied*, 12-2452 (La. 1/11/13), 107 So.3d 617. But when the date of the alleged malpractice is more than a year before the date of plaintiff's request for a medical review panel, the claim is generally prescribed on its face, and the burden shifts to the plaintiff to show why the claim is not prescribed. *Id.*; *Mitchell*, 333 So.3d at 374. The statutes of prescription are strictly construed against prescription and in favor of maintaining claims. *Burke*, 296 So.3d at 1236.

Defendants argue that plaintiff's medical review panel complaint established that he had adequate information to excite attention and put him on guard to inquire about potential malpractice so as to start the running of prescription more than a year before the filing of his September 21, 2023 complaint. Defendants argue that plaintiff, of his own accord, sought a second opinion on September 12, 2022 with another ENT, Dr. Spring.[4] Defendants contend that plaintiff had enough information to excite his attention and put him on notice of the potential malpractice.

[4] *But see* footnote 2, *supra*.

During a September 14, 2022 evaluation in the Tulane Neurosurgery Clinic, Dr. Dumont's records state: "I reviewed the MRI and CT of the neck. There appears to be a mass just inferior to foramen rotundum …. I would like to get an MRI of the brain with stealth protocol[.]" Defendants contend the brain tumor was diagnosed on September 14, 2022, before the "special MRI" occurred on September 20, 2022 and plaintiff met with his doctors on September 28, 2022. Defendants further point out that plaintiff met with Dr. Beaucoudray on September 16, 2022, and the office note from that visit suggests that plaintiff reported "his specialists reviewed the imaging from his recent scans and was diagnosed with a brain tumor likely compressing the trigeminal nerve." As such, defendants argue, plaintiff knew of the failure to diagnose the tumor no later than September 16, 2022, more than a year before his medical review panel complaint was filed on September 21, 2023.

Plaintiff argued in his opposition to Dr. Fuzzard's and Dr. Brousse's exceptions that he was not made aware of the alleged malpractice until his visit with Dr. Dumont and Dr. Spring on September 28, 2022, following his Special MRI taken on September 20, 2022. He was informed on September 28th that the scan confirmed he had a tumor in his left maxillary sinus, as well as cranial nerve impingement. Before that time, plaintiff claims that no one told him that he had a brain tumor or that the June 2022 scan had been misread because it showed there was evidence of a tumor. Thus, until his meeting with Dr. Spring and Dr. Dumont on September 28, he had no reason to suspect that the June 2022 MRI had been misread and/or that he had been misdiagnosed. His understanding was that the June MRI was inconclusive and that he needed the more advanced, special MRI, which he had on September 20, 2022. Plaintiff claims that the doctor's notes from September 16, which indicated he reported that he had a brain tumor, are "simply incorrect." Plaintiff posits:

> Dr. Spring told Dr. Dumont or Dr. Dumont's staff that he thought Mr. McIntire had a brain tumor and needed surgery, and Dr. Dumont's staff incorrectly recorded this information as coming from Mr. McIntire when in fact it came from Dr. Spring as his name had parentheses (Spring) … as the source; Dr. Dumont or someone in his office may have likely passed the information on to Dr. Beaucoudray at Spectrum and, thus, the original error as to the source of the information was repeated in the Spectrum notes.

Plaintiff also submitted his own affidavit as evidence, to which defendants object as inadmissible hearsay. At the very least, plaintiff argues, this is a fact issue that should favor the denial of the exception of prescription, where the laws of prescription must be strictly construed in favor maintaining a cause of action.

In *Campo v. Correa*, 01-2707 (La. 6/27/02), 828 So.2d 502, the Louisiana Supreme Court explained that in a medical malpractice claim:

> A plaintiff's mere apprehension that something may be wrong is insufficient to commence the running of prescription unless the plaintiff knew or should have known through the exercise of reasonable diligence that his problem may have been caused by malpractice. Even if a malpractice victim is aware that an undesirable condition has developed after the medical treatment, prescription will not run as long as it was *reasonable* for the plaintiff to not recognize that the condition might be treatment related. *Griffin v. Kinberger*, 507 So.2d 821 (La. 1987). The ultimate issue is the *reasonableness* of the patient's action or inaction, in light of his education, intelligence, the severity of symptoms, and the nature of the defendant's conduct. *See Griffin*, 507 So.2d at 821.

Campo, 828 So.2d at 510-11 (emphasis in original).

The basis for Mr. McIntire's medical malpractice claims against Drs. Brousse and Fuzzard is his contention that these doctors misread the results of the MRI conducted in June 2022. His medical malpractice complaint alleges that his second ENT, Dr. Spring, recommended he see a head and neck surgeon, Dr. Dumont, who then ordered a "special MRI" done on September 20, 2022. On September 28, 2022, Mr. McIntire met with Dr. Dumont and Dr. Spring at Dr. Dumont's office. "It was during this visit I was informed that the scan confirmed I

had a mass / tumor in my left maxillary sinus as well as cranial nerve impingement." Mr. McIntire claims that if he "had known about the mass in June 2022, during my visit with Dr. Brousse and had the radiology report filed by Dr. Fuzzard noted the mass, my survival chances would have increased."

At the hearing in this matter, defendants introduced evidence of plaintiff's relevant medical records. As noted above, if there is no dispute as to the material facts, the reviewing court conducts a *de novo* review, giving no deference to the trial court's legal conclusions. *Mitchell*, 333 So.3d at 373. Here, however, a disputed issue of fact centers around the time that Mr. McIntire became aware of Dr. Fuzzard's and/or Brousse's potential malpractice for allegedly failing to properly read his June 2022 MRI. Because the parties introduced evidence at the hearing, and the parties disagree regarding the material facts, we apply a manifest error standard in reviewing the trial court's judgment.

Determinations as to whether *contra non valentem* applies to suspend prescription generally proceed on an individual, case-by-case basis. *Mitchell*, 333 So.3d at 374. Mr. McIntire had been experiencing adverse symptoms since 2021, after the removal of a squamous cell carcinoma from the tip of his nose, and before he saw Dr. Brousse for the first time. An "undesirable condition" did not develop after seeing Dr. Brousse; instead, the undesirable condition had begun much earlier, it persisted, and it worsened. *See Campo, supra*.

Generally, another physician need not notify the victim that malpractice may have occurred for prescription to begin to run, *Mitchell*, 333 So.3d at 381. Here, however, Mr. McIntire had no reason to suspect malpractice until he was told that the June 2022 scan ordered by Dr. Brousse and read by Dr. Fuzzard contained evidence of the mass. He asserts that this occurred on September 28, 2022, rendering his September 21, 2023 complaint timely.

Although the medical record for Dr. Beaucoudray, who was not treating Mr. McIntire's sinus issues but was treating his lumbar pain, refers to "recent scans" in Mr. McIntire's September 16, 2022 patient history, we find this evidence lacks specificity and is insufficient to establish Mr. McIntire's actual or constructive knowledge of potential malpractice on that date. Nothing in Dr. Dumont's September 14, 2022 progress note indicates that Dr. Dumont informed Mr. McIntire that the "potential mass" could be seen on the June 2022 MRI and/or the earlier CT.

Moreover, the references to "brain tumor" and "surgery" in the September 14, 2022 and September 16, 2022 medical records introduced at the hearing do not, in and of themselves, suggest that Mr. McIntire was the victim of a tort or that he had actual or constructive knowledge of wrongdoing. Mr. McIntire did not assert malpractice claims against Dr. Brousse and Dr. Fuzzard because he has a brain tumor—he had been experiencing symptoms for more than a year, having already seen a dermatologist, his PCP, and an ENT, who recommended that he see another ENT, which led to his appointments with Dr. Dumont, the neurosurgeon. He filed his claims against these defendants only after learning that they allegedly failed to diagnose his condition *in conjunction with his June 2022 MRI*. We give no credence to defendants' argument that "seeking a second opinion" by going to another ENT, under these facts, constituted constructive knowledge of potential wrongdoing.

Navigating the modern medical landscape often requires a patient to see multiple medical providers before a definitive diagnosis is reached. Doing so does not necessarily lay the groundwork for establishing a potential malpractice claim against earlier medical providers who may have failed to reach a diagnose, nor should our justice system require as much. "Indeed, the Louisiana Supreme Court has rejected the idea that prescription principles should be 'used to force a person

who believes he may have been damaged in some way to rush to file suit against all parties who might have caused that damage.'" *In re: Medical Review Panel for the Claim of the Estate of Earl Farragut*, 25-278 (La. App. 5 Cir. 5/25/23) (unpublished writ disposition) (quoting *Bailey v. Khoury*, 04-620 (La. 1/20/05), 891 So.2d 1268, 1285). Given Mr. McIntire's high school education, as well as the protracted nature and severity of his symptoms, we cannot say that he acted unreasonably in failing to recognize the potential claim for malpractice before September 28, 2022. *See Marts*, 385 So.3d at 364; *Campo*, 828 So.2d at 511.

As to defendants' objections to the trial court's admission of Mr. McIntire's affidavit into evidence, we note that at the hearing, Mr. McIntire, appearing *pro se*, asked the trial court if he could read his affidavit into the record. The trial court indicated that the affidavit would be admitted into evidence, and that Mr. McIntire was not required to read it. Where Mr. McIntire essentially was testifying on his own behalf, we disagree with defendant's characterization of the affidavit as "hearsay" and find no abuse of discretion in the trial court's decision to admit it into evidence.

Upon review, given the totality of evidence, we find no manifest error in the trial court's judgment overruling defendants' exceptions of prescription.

WRITS DENIED

FIFTH CIRCUIT
101 DERBIGNY STREET (70053)
POST OFFICE BOX 489
GRETNA, LOUISIANA 70054
www.fifthcircuit.org

(504) 376-1400
(504) 376-1498 FAX

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 **JULY 30, 2025** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

Curtis B. Pursell

CURTIS B. PURSELL
CLERK OF COURT

25-C-278
C/W 25-C-279

E-NOTIFIED
24TH JUDICIAL DISTRICT COURT (CLERK)
HONORABLE FRANK A. BRINDISI (DISTRICT JUDGE)
C. WILLIAM BRADLEY, JR. (RELATOR)
JADA C. DOUCET (RELATOR)
L. DAVID ADAMS (RELATOR)
SHELLY S. HOWAT (RELATOR)

MAILED
GEORGE D. MCINTIRE (RESPONDENT)
4120 NEWLANDS STREET
METAIRIE, LA 70002