NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 CA 2239

GLENN SHAW AND GLORIA SHAW

VERSUS

DR. GERARD MURTAGH AND
LOUISIANA MEDICAL MUTUAL INSURANCE COMPANY

Judgment Rendered: JAN 13 2011

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APPEALED FROM THE NINETEENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
DOCKET NUMBER 562,893, DIVISION E, SECTION "23"

THE HONORABLE WILLIAM A. MORVANT, JUDGE

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Company (LAMMICO)

BEFORE: PARRO, KUHN, AND McDONALD, JJ.

Parro, J., concurring with reasons. IN THE DENIAL OF THE WRIT
Kuhn, J. CONCURS AND JOINS IN THE CONCURRING REASONS ASSIGNED BY PARRO, J.

McDONALD, J.

This appeal presents issues regarding the prescriptive period in a medical malpractice action. Specifically, we are asked whether the plaintiffs' claims of malpractice which were allegedly initially committed during a knee replacement surgery performed on June 5, 2002, and also during allegedly unnecessary follow-up surgery, the last of which was in July 2003, had prescribed when the request for a medical review panel was submitted on November 29, 2005. We consider the effect of both the one-year and three-year prescriptive periods established in La. R.S. 9:5628 in the following opinion.

FACTS

On June 5, 2002, Dr. Gerard Murtagh performed total knee replacement surgery on Glenn Shaw, a long-time patient. Despite aggressive physical therapy, Shaw was unable to attain full extension of his leg and continued to be in pain following surgery. During therapy, the therapist could force the leg into full extension; however, Shaw could not maintain the extension and continued to walk with a limp. Two additional surgeries, arthroscopic debridement and lysis in September 2002 and a capsular release in July 2003, were performed in an attempt to alleviate the problem, but were unsuccessful. In September 2004, Dr. Murtagh suggested that after the first of the year, Shaw should consider having the knee hardware removed and replaced.

When Shaw attempted to schedule the follow-up appointment with Dr. Murtagh, he discovered that his employer had changed health insurance carriers and Dr. Murtagh was not on the new carrier's approved list. Shaw was given the name of another orthopedic surgeon in Baton Rouge, Dr. Thad Broussard, with whom he scheduled an appointment. Shaw was first seen by Dr. Broussard in July 2005. Shaw's initial appointment included an examination and review of records and x-rays. In a subsequent appointment, Dr. Broussard advised Shaw that the

knee hardware placed by Dr. Murtagh was the wrong size and improperly positioned. He told him that the only way to attain full leg extension was "to take out the existing knee and replace it." Dr. Broussard referred Shaw to a specialist in New Orleans, Dr. Richard Meyer. In January 2006, Dr. Meyer replaced the knee hardware, which allowed greater leg extension and decreased the pain. However, Shaw still has not achieved total leg extension.

On November 29, 2005, Shaw, in proper person, requested that a medical review panel be convened. The panel expired without rendering an opinion on November 13, 2007. On January 10, 2008, plaintiffs filed a malpractice suit naming Dr. Gerard Murtagh and LAMMICO, his professional liability insurer, as defendants. Defendants' answers allege that the claims against Dr. Murtagh had prescribed.

The district court considered whether the matter had prescribed at a hearing in September 2009. In addition to the briefs and arguments submitted by counsel, the court heard the testimony of Shaw and Dr. Murtagh. Considering the evidence and the law, the district court found that any claims that arose out of the knee replacement surgery on June 5, 2002, were prescribed. Plaintiffs contended, however, that the surgeries of 2002 and 2003 were unnecessary, and by implication, were separate acts of malpractice. Citing La. C.C.P. art. 934, plaintiffs contended that the law required that they have an opportunity to amend their petition to state a cause of action. The district court gave plaintiffs two weeks to amend their petition to allege these acts of malpractice. The court then reasoned that if it proceeded to trial on the later claims, and on appeal of the final judgment the prescription decision regarding the claims based on the June 2002 surgery was reversed, it would be necessary to have another trial on those claims. Therefore, judgment was rendered dismissing all claims against Dr. Gerard Murtagh for any alleged negligent acts related to the June 5, 2002 knee replacement surgery, and

that judgment was designated as final. The judgment also allowed plaintiffs to amend their petition for damages with regard to the remaining claims within 15 days of the signing of the judgment, and any further action in the district court on the matter was stayed pending a final ruling from a higher court on the viability of plaintiffs' claims for any negligence by Dr. Murtagh during the June 5, 2002 total knee replacement surgery. Plaintiffs timely appealed the judgment, which is the matter now before us.

LAW AND DISCUSSION

Plaintiffs assert that the district court erred for two reasons. First, the court erred in failing to recognize that the third category of *contra non valentem* suspended prescription during the period that the negligent healthcare provider continued to treat the plaintiff in an effort to "make it right." Also, the court erred in failing to find that prescription is interrupted under the continuing tort doctrine so long as the negligent healthcare provider continues to perform vain and useless procedures on the patient that (a) cause substantial pain, but (b) cannot possibly fix the problem.

Relying on *Carter v. Haygood,* 04-0646 (La. 1/19/05), 892 So.2d 1261-62, plaintiffs contend that Dr. Murtagh's continuous treatment of Shaw's knee suspended prescription at least until January 2005, when Shaw learned his new insurance carrier would not cover treatment by Dr. Murtagh. In the *Carter* case, the supreme court directly addressed the effect of continuing treatment on prescription. The court reviewed the applicable prescriptive statute, La. R.S. 9:5628, noting that "[a] straightforward reading of this statute clearly demonstrates the statute sets forth two prescriptive limits 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 a three-year limitation from the date of the alleged act, omission or neglect to bring such claims." *Carter,* 892 So.2d at 1268.

The supreme court went on to discuss *contra non valentem*, a Louisiana jurisprudential doctrine under which prescription may be suspended. After listing the four categories of situations that the court has recognized as tolling prescription, it stated that these categories thus allow courts to weigh the "equitable nature of the circumstances in each individual case." *Carter,* 892 So.2d at 1268. Although recognizing that the appellate courts had indicated that the third category of *contra non valentem* might toll prescription, the supreme court had declined to directly address the issue prior to the *Carter* case. See *In re Moses,* 00-2643 (La. 5/25/01), 788 So.2d 1173; *Wang v. Broussard,* 96-2719 (La. App. 1st Cir. 2/20/98), 708 So.2d 487, *writ denied,* 98-1166 (La. 6/19/98), 720 So.2d 1213. The third category provides for the suspension of prescription where the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action. *Carter,* 892 So.2d at 1268; *Plaquemines Parish Com'n Council v. Delta Development Co., Inc.,* 502 So.2d 1034, 1054-55 (La. 1987). The court noted that in certain circumstances, a doctor's continuing professional relationship might give rise to the suspension of prescription. See *Trainor v. Young,* 561 So.2d 722 (La. App. 2nd Cir.), *writs denied,* 567 So.2d 1124 and 1125 (La. 1990). This suspension of prescription by the continued existence of a professional relationship is based on the premise that the professional relationship is likely to hinder the patient's inclination to sue. *Id.*; *Carter,* 892 So.2d at 1269.

The supreme court examined an analogous rule, the "continuous representation rule," applied in the context of legal malpractice cases, which was already well-established jurisprudentially, and provided additional insights into the basis for the rule. Extending the jurisprudence of the "continuous representation rule" by analogy, the court held that the continuing treatment rule requires a plaintiff to establish "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." *Carter*, 892 So.2d at 1271.

Applying these criteria to the case before us, we find that the nature of the professional relationship between Shaw and Dr. Murtagh was clearly more than perfunctory, and thus, the first element of the criteria was established by the plaintiffs. The medical records of the Bone and Joint Clinic, with which Dr. Murtagh was associated, indicate that Shaw had begun treatment with Dr. Murtagh in the mid 80's for "trouble with right knee." A fractured patella required surgery in October 1991. Subsequently, he was in a serious automobile accident that caused further damage to the right knee and a triple whiplash in the neck area. Shaw testified that he trusted Dr. Murtagh and only sought treatment with another doctor because after January 2005, treatment by Dr. Murtagh was not covered by his insurance. He consulted Dr. Thad Broussard after being referred to him by Dr. Murtagh.

It is the remaining element of the continued treatment rule that is at issue here: the physician engages in conduct which served to prevent the patient from availing himself of his cause of action. Citing *Kirby v. Field,* 04-1898 (La. App. 1st Cir. 9/23/05), 923 So.2d 131, *writ denied*, 05-2467 (La. 3/24/06), 925 So.2d 1230, Dr. Murtagh argues that his conduct did not meet this criteria. He notes that the *Carter* court found that the third category of *contra non valentem* "encompasses situations where 'an innocent plaintiff has been lulled into a course of inaction in the enforcement of his right by 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.'" *Carter,* 892 So.2d at 1269. We agree that it *encompasses* those situations. The issue before us, however, is does it depend on such conduct.

Dr. Murtagh testified that the hardware placed in Shaw's knee was not the wrong size or positioned incorrectly. He noted that if Dr. Broussard had looked at x-rays taken in September 2004, he may have reached the conclusion that somehow that was how the bone cuts were made or perhaps that's how they were positioned, when actually it was cumulative effects of spasticity and abnormal gait pattern over the course of years. Dr. Murtagh testified that Shaw had cervical spondylosis, and because of that, he had a discoordinated effort of flexion and extension in his knee, and it was his opinion that the cause of Shaw's problems stemmed from that. He indicated that they were trying to remedy the problem with muscle relaxers and therapy. However, in his opinion, the actual components of the knee were properly positioned in the original surgery and subsequent surgeries, and performed exactly as he had hoped. His conduct does not appear to be a deliberate attempt to lull Shaw into inaction, or any malicious, self-serving attempt to deceive.

The trial court found that Dr. Murtagh's conduct did not trigger the third category of *contra non valentem.* It did not find any evidence of concealment, misrepresentation, fraud, or ill practice, which it thought to be necessary. We have reviewed supreme court cases finding prescription was not suspended and that the defendant's conduct "did not rise to the level of concealment, misrepresentation, fraud or ill practices necessary to trigger application of the doctrine of *contra non valentem,*" some of which were relied on by Dr. Murtagh. See *Fontenot v. ABC Ins. Co.*, 95-1707 (La. 6/7/96) 674 So.2d 960; *Taylor v. Giddens,* 618 So.2d 834 (La. 1993); *Rajnowski v. St. Patrick's Hosp.,* 564 So.2d 671 (La. 1990); *Whitnell v. Menville,* 540 So.2d 304 (La. 1989); *Gover v. Bridges,* 497 So.2d 1364 (La. 1986).

In the *Carter* case, the supreme court did directly examine the application of the third category of *contra non valentem* to medical malpractice and instituted the continuing treatment rule. We believe analysis of the physician's conduct and

whether it meets the second criteria of that rule requires a consideration of all of the facts, including whether the physician's conduct was intentional. We find that Dr. Murtagh's continuing treatment in the subsequent surgeries, which induces Shaw's trust in him and the belief that through his doctor's efforts he would regain full use of his knee, is sufficient conduct on the part of Dr. Murtagh to meet the criteria established in *Carter.*

We reach this conclusion after careful examination of the law and cases relevant to the issue. We note that one of the criteria as established by the *Carter* court, is "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." Conduct that "served to prevent" an action suggests that it has the effect of preventing an action, although it is not necessarily designed to do so. The exempletive conduct cited by the court was attempting to rectify an alleged act of malpractice. This is because it is the continued treatment, with assurances by the doctor or belief by the patient that the treating physician will eventually be able to alleviate the problem, that is one of the bases for the rule. It is not required that the doctor maliciously intend to deceive the patient.

We also note that as a practical matter, the doctor's "intention" is very resistant to proof. When a doctor assures a patient that further treatment will alleviate the problem, how is the patient, or a court, to determine whether the doctor sincerely believed the problem could be corrected or whether he was stalling to toll prescription?

A footnote in the *Carter* opinion mentions that the grant of the writ in *Gover v. Bridges,* supra, was to signal it would "continue to apply the long-established equitable principle that the *contra non* doctrine is, in part, a recognition that 'no one should be able to take advantage of his own wrongful act.'" The continued treatment rule is a *contra non* type of rule in that its foundation is in equity and it is

a modification or extension of the third category of *contra non valentem*. It is not, however, premised wholly on the above equitable principle. It is a modification, in that it is based on the relationship between doctor and patient, and the fact that the "special" relationship *may* "hinder the patient's inclination to sue." Further, the court recognized that as long as the patient remains in the physician's care, she could reasonably expect a correction of the diagnosis or tortious treatment. *Carter*, 892 So.2d at 1269.

We believe the most important principle to remember is that the suspension of prescription because of the continuing treatment rule is based in equity, and resolution of the issue depends on the "equitable nature of the circumstances in each individual case." *Carter*, 892 So.2d at 1268. Comparison with the facts of a different case and a court's determination under those facts may be informative, but they cannot be dispositive. We find under the facts of this case, the plaintiffs have met the criteria required to suspend the commencement of the one-year prescriptive period. Thus, the finding of the trial court that the continuous treatment rule did not apply is wrong. However, we also recognize that this does not resolve the issue of whether the claim had prescribed, because it is still necessary to address the issue of the three-year limitation on bringing a malpractice action.

Plaintiffs contend that since the supreme court held in *Borel v. Young*, 07-0419 (La. 11/27/07), 989 So.2d 42, on rehearing (La. 7/01/08), that the time limitation in medical malpractice actions established in La. R.S. 9:5628 is prescriptive rather than peremptive, "it is settled that the three-year time limitation is subject to both suspension and interruption." We disagree.

Initially, we note that the decision in *Borel* did not change the law regarding the nature of the time limitation for bringing claims for medical malpractice. Since 1986, when the supreme court decided *Hebert v. Doctors Memorial Hosp.*,

486 So.2d 717 (La. 1986), courts have recognized that La. R.S. 9:5628's time limitation is prescriptive, and not peremptive. However, we have found no cases wherein a court has allowed a suit to be maintained when it was filed three years after the date of alleged malpractice, including *Carter* and *Borel.*

We begin with the recognition that the laws of statutory construction require that laws on the same subject matter be interpreted in reference to each other. La. C.C. art. 13. Specifically, we note that "Louisiana Revised Statutes 9:5628 cannot be examined alone, but must be interpreted in conjunction with the provisions of the Medical Malpractice Act, codified in LSA-R.S. 40:1299.41 *et seq.*" *Borel,* 989 So.2d at 61. Louisiana Revised Statutes 40:1299.47(A)(2)(a) provides that the filing of the request for a review of a claim (by a medical review panel) shall suspend the time within which suit must be instituted. Peremption, by definition, cannot be suspended or interrupted. Therefore, the time limitation for filing suit described in La. R.S. 9:5628 cannot be "peremptive." This is not to say, however, that the legislature could not limit the time for filing a medical malpractice action to three years from the date of the alleged malpractice.

The continuous treatment rule is a judicially established rule that suspends the commencement of prescription that would otherwise prevent the right to bring an action more than one year from the date of an alleged tort, as is generally the case. Similar to the discovery rule embodied in La. R.S. 9:5628, it allows additional time if equity requires. However, the legislature, whose duty it is to set prescriptive periods, has made it clear that "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." La. R.S. 9:5628. In so doing, they have created a three-year time limitation that is nominally prescriptive, but acts as a peremptive period, as are actions of malpractice against other professionals. See La. R.S. 9:5604, 5605,

5606, 5607.[1] Thus, the three-year period cannot be interrupted or suspended other than by the medical review panel process. See *Randazzo v. State, Louisiana State University Health Sciences Center,* 03-1470 (La. App. 1 Cir. 5/14/04), 879 So.2d 741, writ denied, 04-1503 (La. 2/18/05), 894 So.2d 337.

The judiciary has interpreted this equitable prescriptive period of three years to also apply when a suit by a victim is not filed within a year of the alleged act of malpractice because of continuous treatment by the physician. In the matter before us, the alleged malpractice occurred June 5, 2002, and the request for a medical review panel was November 29, 2005, more than three years after the surgery. Since it was filed more than three years after the surgery, it had prescribed. Therefore, the judgment of the trial court dismissing the claims based on the June 5, 2002 surgery is affirmed.

AFFIRMED.

[1] We recognize the disagreement on the issue of prescription versus peremption in malpractice actions. In *Borel*, a majority of the supreme court found in the original opinion that La. R.S. 9:5628 is a peremptive statute. On rehearing, a plurality found the statute to be prescriptive with Justices Traylor and Knoll concurring in the result, but finding the statute to be peremptive.

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VERSUS

DR. GERARD MURTAGH AND LOUISIANA MEDICAL MUTUAL INSURANCE COMPANY

BEFORE: PARRO, KUHN, AND MCDONALD, JJ.

PARRO, J., concurring.

I agree with the result reached in this opinion, concurring because I see no reason to discuss the continuing treatment rule in this case. Ultimately, we decide that even if the rule were applicable, the district court correctly dismissed the claims based on the June 5, 2002 surgery, because the medical malpractice claim was not filed within the three-year period for filing such claims, as set forth in LSA-R.S. 9:5628(A), and the request for a medical review panel was filed after that three-year period, eliminating the suspension of prescription as to such three-year period.[1] See Borel v. Young, 07-0419 (La. 11/27/07), 989 So.2d 42 (on rehearing). Therefore, the discussion of the continuing treatment rule is unnecessary to this court's conclusion.

Moreover, this court should be reluctant to state that the physician's intent is irrelevant, since that conclusion has not been reached by the supreme court. Based on language in some of the cited cases, this statement may be an unwarranted expansion of the supreme court's analysis of the continuing treatment rule.

Therefore, I respectfully concur.

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[1] The continuing treatment rule is a *contra non valentem* type exception to prescription. In Borel, the Louisiana Supreme Court reaffirmed its prior holding that both the one-year and three-year periods set forth in LSA-R.S. 9:5628 are prescriptive, with the qualification that the *contra non valentem* type exception to prescription embodied in the discovery rule is expressly made inapplicable after three years from the act, omission, or neglect. Id. at 69.