

Supreme Court of Louisiana

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NEWS RELEASE #031

FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **29th day of June, 2022** are as follows:

BY Crain, J.:

2021-C-01367

IN RE: MEDICAL REVIEW PANEL OF MASON HEATH (Parish of Webster)

REVERSED AND REMANDED. SEE OPINION.

Weimer, C.J., dissents and assigns reasons.

Genovese, J., dissents and assigns reasons.

SUPREME COURT OF LOUISIANA

No. 2021-C-01367

IN RE: MEDICAL REVIEW PANEL OF MASON HEATH

On Writ of Certiorari to the Court of Appeal, Second Circuit, Parish of Webster

CRAIN, J.

In this medical malpractice case, plaintiffs challenge the lower courts’ ruling that their claim prescribed. Finding the complaint was filed within one year of discovery and within three years of the alleged acts of malpractice, we reverse and remand for further proceedings.¹

FACTS AND PROCEDURAL HISTORY

On August 14, 2018, plaintiffs, Isiah and Chrishanna Smith, filed a medical malpractice suit on behalf of their minor son, Mason Heath. Dr. Robert Russell, Minden Medical Center and staff, and Dr. Cristal Kirby were named defendants. The complaint alleged malpractice in connection with Mason’s circumcision performed by Dr. Russell at Minden Medical Center on August 18, 2015. Dr. Kirby subsequently treated Mason on September 2, 2015 and September 23, 2015.

The following facts are taken from the malpractice complaint: Chrishanna, a 19-year old, gave birth to Mason at Minden Medical Center on August 17, 2015. The next day, Dr. Russell performed Mason’s circumcision. Shortly after returning home from the hospital, plaintiffs noticed Mason “suffering from complications.”

Approximately one month later, Mason experienced “flair [sic] ups,” including “swelling of the penis, pain, and disfigurement.” Plaintiffs “inquired about the status of the healing circumcision at [Mason’s] first visit to the pediatrician,” Dr.

¹ Because no one challenges whether the complaint was filed within three years of the alleged acts of malpractice, our opinion focuses on the one-year prescriptive period from the date of discovery.

Kirby, and “were told he was healing appropriately.”² Three months post-birth, plaintiffs “notified Dr. Kirby that [Mason’s] penis was still irritated,” and Mason “was prescribed a cream to loosen the skin on his penis” to “remedy the irritation.”³ Plaintiffs “consistently applied the cream as prescribed; it provided temporary relief.” At Mason’s six-month appointment, plaintiffs were told “there were no abnormalities in the healing process and Mason was healing adequately.”⁴ They continued using the cream as prescribed.

Dr. Kirby relocated. Mason then began treating at Bienville Medical Center with Dr. Jason Wilson, another pediatrician.⁵ Plaintiffs allege “at this time, Mason was still experiencing complications with the circumcision site.” According to the complaint, Dr. Wilson examined the circumcision site and referred Mason to Willis-Knighton Medical Center-Pierremont.⁶ Mason was evaluated at Willis-Knighton on August 16, 2018,⁷ and “[i]t was at that time that [plaintiffs] were informed Mason would need surgery to repair the complications of the circumcision[,]” making it “clear the circumcision and post-surgery care were not administered correctly.”

Plaintiffs alleged the following breaches of the standard of care:

a) Failure to provide appropriate medical care and treatment;

² The complaint does not include the date of this visit. However, the medical records show the visit was on August 21, 2015. The progress note for that date is signed by a nurse practitioner, LeKidra Brown. Mason first saw Dr. Kirby at Minden Pediatrics on September 2, 2015.

³ The complaint states this visit was three months after Mason’s birth, but the medical records indicate it was on September 23, 2015, approximately one month after Mason’s birth.

⁴ The medical records show that Nurse Brown saw Mason at the six-month appointment on February 22, 2016.

⁵ The complaint refers to “Bienville Medical Center.” However, the medical records indicate the correct name is “Bienville Family Clinic.” The complaint does not allege the date of the first visit with Dr. Wilson; however, the medical records indicate it was April 11, 2016.

⁶ The complaint does not list the date of the referral, but the medical records indicate it was July 2, 2018, when Mason was seen by Cedric Willis, PA.

⁷ We note that August 16, 2018 was after the filing of the complaint; thus, that date is inaccurate. The Willis-Knighton medical records evidence a July 23, 2018 visit when Mason was seen by Dr. John Mata and a surgical recommendation was made.

- b) Failure to provide adequate care;
- c) Failure to properly administer medical treatment to [Mason];
- d) Failure to properly diagnose;
- e) Failure to adequately monitor [Mason's] condition; and
- f) Failure to provide reasonable medical services under the circumstances.

Dr. Russell and Minden Medical filed an exception of prescription, contending they only rendered care to Mason on August 18, 2015. Because the complaint was filed August 14, 2018, beyond the one-year limitation of Louisiana Revised Statutes 9:5628(A), they argued plaintiffs' claim is prescribed on the face of the pleadings. Moreover, they urged that plaintiffs continually observed problems with the circumcision site, which required prescription steroid cream, and these facts constitute discovery, triggering prescription more than one year before the August 2018 filing. At the hearing on the exception, Dr. Russell and Minden Medical introduced copies of the complaint, along with the medical records from Minden Medical, Minden Pediatrics, Bienville Family Clinic, and Willis-Knighton.

Dr. Kirby filed a separate exception of prescription. She asserted September 23, 2015 was her last contact with Mason; thus, the suit filed August 14, 2018 was prescribed on its face. Dr. Kirby argued the mother's complaints about the circumcision at the April 11, 2016 appointment with Dr. Wilson reflected sufficient knowledge of possible malpractice to start prescription, making the claim prescribed. Dr. Kirby attached to her exception a copy of the Patient Compensation Fund file, along with the records from Minden Pediatrics and Bienville Family Clinic.

The exception of Dr. Russell and Minden Medical was set for a hearing. At the hearing, Dr. Russell and Minden Medical introduced evidence. After denying a motion to continue, the trial court granted plaintiffs fifteen days to submit a brief in opposition and granted Dr. Russell and Minden Medical fifteen days to respond.

Plaintiffs offered no evidence at the hearing, but submitted a brief within the allotted time.

Dr. Kirby's exception was submitted on briefs.

The trial court granted both exceptions of prescription, stating:

A problem or condition that had not been alleviated and/or continued to persist for an eight-month period of time should, at the very least, have put Plaintiff[s] on notice that possible malpractice had been committed by Defendant[s]. Certainly, the follow-up treatment provided by the new provider for months after April 11, 2016, should have put Plaintiffs on notice. At best, very best, the evidence establishes that, pursuant to [La.] R.S. 9:5628 and "contra non" that prescription began to run on April 11, 2016. Plaintiffs did not file a malpractice claim until August 2018.

Plaintiffs appealed. The court of appeal affirmed. *In Re: Med. Review Panel of Mason Heath*, 54,020 (La. App. 2 Cir. 8/11/21), 326 So.3d 347. The court of appeal first addressed the trial court's finding that Dr. Kirby only treated Mason on September 2, 2015. In fact, Mason was also seen on September 23, 2015. The court of appeal found that error factual, not legal, and concluded that the trial court neither applied a wrong legal standard nor failed to make necessary factual determinations. Applying a manifest error standard of review, the court of appeal found prescription started, at the latest, on April 11, 2016, making plaintiffs' suit untimely. The court of appeal rejected plaintiffs' argument that discovery of possible malpractice on July 2, 2018 was reasonable, finding no evidence of plaintiffs' age, inexperience, lack of education, or degree of reliance on healthcare providers.

We granted certiorari. *In Re: Med. Review Panel of Mason Heath*, 21-1367 (La. 12/7/21), 328 So. 3d 409.

DISCUSSION

Louisiana Revised Statutes 9:5628(A) provides:

No action for damages for injury or death against any physician, chiropractor, nurse, licensed midwife practitioner, dentist, psychologist, optometrist, hospital, or nursing home duly licensed under the laws of this state, or community blood center or tissue bank as defined in R.S. 40:1231.1(A), 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.

Prescription begins “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.” *Campo v. Correa*, 01-2707, pp. 11-12 (La. 6/21/02), 828 So. 2d 502, 510. Constructive knowledge is “whatever notice is enough to excite attention and put the injured person on guard and call for inquiry.” *Id.* at 510-11. A plaintiff is then imputed with whatever knowledge a reasonable inquiry or investigation would reveal. *Id.*

The first act of alleged malpractice occurred on the circumcision date, August 18, 2015. The last act of alleged malpractice is on September 23, 2015. So, the one-year prescriptive period expired, at the earliest, on August 18, 2016, and, at the latest, on September 23, 2016. Suit was filed on August 14, 2018. Thus, the suit is prescribed unless it was reasonable for plaintiffs to be unaware of the malpractice until less than one year before August 14, 2018.

Who has the burden of proof?

The exceptor bears the burden of proof at trial of the peremptory exception of prescription. *Spott v. Otis Elevator Co.*, 601 So. 2d 1355, 1361 (La. 1992). However, if the action is prescribed on the face of the pleadings, the burden shifts to the plaintiff to show it is not prescribed. *Williams v. Sewerage & Water Bd. of New Orleans*, 611 So. 2d 1383, 1386 (La. 1993). A petition is not prescribed on its face if it is filed within one year of discovery and particularly alleged facts show the patient was unaware of malpractice before that date, so long as the filing delay was not willful, negligent, or unreasonable. *Campo*, 828 So. 2d at 509. Whether the complaint is prescribed on its face is purely a question of law, subject to *de novo*

review. *See Mitchell v. Baton Rouge Orthopedic Clinic, L.L.C.*, 21-00061 (La. 10/10/21), 333 So. 3d 368, 373.

To determine who bears the burden of proof, we must answer the following questions: 1) was the complaint filed within one year of the date of the alleged acts of malpractice? 2) if not, was the complaint filed within one year of the date of discovery of the alleged acts of malpractice? If plaintiffs rely upon discovery as the trigger of prescription, the following must be answered: 1) did plaintiffs allege with particularity they were unaware of the malpractice prior to the alleged date of discovery; and 2) was plaintiffs' delay in discovering the malpractice reasonable? The petition must state with particularity the act of alleged malpractice and the date it was discovered, and these questions must be answered solely upon the allegations of the complaint.

Paragraph nine (9) of the complaint describes Mason's first visit to Bienville Family Clinic and seeing a new pediatrician, Dr. Wilson. The medical record attached to the complaint establishes that that visit was on April 11, 2016. In the same paragraph, plaintiffs state, "At this time, Mason was still experiencing complications with the circumcision site. Upon examination of the circumcision site Dr. Wilson referred [plaintiffs] to Willis-Knighton Medical Center-Pierremont." This allegation does not allege with sufficient particularity that plaintiffs actually first discovered the malpractice when the referral was made and, thus, does not support extending the start of prescription to the date of discovery.

Paragraph ten (10) of the complaint states, "On or about August 16, 2018, [Mason] was presented to and evaluated at Willis-Knighton Medical Center-Pierremont.⁸ It was at that time that [plaintiffs] were informed [Mason] would need surgery to repair the complications of the circumcision. Thus, it is clear the

⁸ Again, this date is not correct. The medical records establish the surgery recommendation, thus the alleged discovery date, was made July 23, 2018.

circumcision and post-surgery care were not administered correctly.” This allegation evidences plaintiffs’ belief, at that time, that the circumcision and post-surgery care were not administered correctly. This allegation states with sufficient particularity the discovery of malpractice.

Next, we ask whether the complaint sufficiently alleges plaintiffs were unaware of the malpractice prior to this date of discovery. The only possible reference to plaintiffs’ awareness is the allegation in paragraph eight (8) that during Mason’s six-month visit, plaintiffs “were informed there were no abnormalities in the healing process and [Mason] was healing adequately.” The specific date of that visit is not in the complaint or the attachment. But, six months after Mason’s birth is early 2016. That is more than one year before of the date of the alleged discovery. Thus, this allegation requires us to infer that before, during, and after this visit and until July 23, 2018, plaintiffs remained unaware of any alleged acts of malpractice. *Campo* instructs that inferences cannot be relied upon. Facts must be alleged with *particularity* to avoid the burden of proof shifting from the mover to plaintiffs.

But, even if we accept the inference that plaintiffs were unaware of the possible malpractice until July 23, 2016, there are no factual allegations relative to the reasonableness of that delay. The mother’s age alone is not sufficient to justify the delay. We find the complaint prescribed on its face. The burden of proof on the exception of prescription rests with plaintiffs.

Did plaintiffs carry their burden of proof?

While review of whether the complaint is prescribed on its face is a question of law, subject to *de novo* review, when evidence is considered on the merits of an exception of prescription and factual determinations are made, a manifest error standard of review is applied. *See Mitchell*, 333 So. 3d at 373-74.

To avoid prescription, plaintiffs must prove they discovered the possible malpractice less than one year before suit was filed and the delay in discovery was

reasonable. Plaintiffs relied upon Mason’s medical records and argued his mother’s young age (19 years old) justified her lack of knowledge of possible malpractice. However, no direct evidence of inexperience, limited education, or reliance on healthcare providers was introduced. Her age alone is not enough. Nevertheless, our scrutiny of the record establishes that both plaintiffs’ investigation and their reliance upon Mason’s physicians were reasonable.⁹

Mason’s first pediatric visit was on August 21, 2015. There was no complaint regarding penile complications or irritants. The progress note indicates “Penis: normal general appearance, no lesions present, no discharge, normal development for age.”

Mason’s two-week wellness visit was on September 2, 2015. Again, no complaint was made regarding the circumcision site and normal progress was noted. Plaintiffs allege, without contradiction, that Dr. Kirby said Mason “was healing appropriately.”¹⁰

Mason’s one-month visit was on September 23, 2015. Plaintiffs asked that the circumcision site be checked. The progress note indicates “Penis: penile adhesions with [sic] skin bridging[.]” A topical cream was prescribed. There is no evidence that skin bridging, treated with a prescription cream, is not within a normal range of healing after a circumcision. Plaintiffs allege the cream “provided temporary relief.” The most that can be inferred is that a 30-day no-refill prescription, without a required follow-up visit, suggested the condition would

⁹ Generally, it is reasonable for patients to rely on their physicians’ assurances. *See Carter v. Haygood*, 04-0646, p. 19 (La. 1/19/05), 892 So. 2d 1261, 1273. Here, no evidence beyond the complaint and the medical records is needed to establish such assurances. Proof of plaintiffs’ “education, intelligence” or inexperience is unnecessary. *Campo*, 828 So. 2d at 511. Its absence is not dispositive of the case.

¹⁰ When uncontradicted, the allegations are accepted as true. *See relatedly McDaniels v. Allison*, 97-2572 (La. 4/9/98), 708 So. 2d 418 (“Where the allegations in the petition have not been contradicted in the hearing on the exception of prescription, a court must look to see whether the alleged facts, if accepted as true, are sufficient on their face to establish that the timely sued defendant and the untimely sued defendant are jointly liable.”)

resolve. The evidence presented is not sufficient under these circumstances to suggest plaintiffs were, or should have been, aware of possible malpractice on September 23, 2015.

Mason's two-month wellness visit was on October 19, 2015. His four-month wellness visit was on December 21, 2015. For this period, the medical record reflects a complaint of "check circ" and "check private area[,]." There is no mention of the penis, much less an abnormal finding. The "Genitourinary" note says: "denies decreased diaper wetting and decreased number of stools." The only medical concern listed is "poor weight gain infant and rash." Plaintiffs were instructed to "[r]eturn if symptoms worsen or persist." Thus, the medical record shows routine visits and no abnormal findings relative to the penis or the circumcision site.

Mason returned for a weight check on January 4, 2016. No observations are documented regarding the penile area. The next day, Mason returned for a follow-up appointment concerning his weight. "[F]ormula preparation and waking during the night for food" were discussed. Again, there is no mention of the penile area.

According to the records admitted and considered with the prescription exception, Mason's six-month wellness appointment was on February 22, 2016. The complaint alleges plaintiffs "were informed that there were no abnormalities in the healing process and Mason was healing adequately." The February 22, 2016 medical record makes no mention of Mason's penis. Thus, the documented medical visits for Mason's first six months do not suggest plaintiffs were, or should have been, aware of possible malpractice relative to his circumcision.

Mason saw a new pediatric healthcare provider at Bienville Family Clinic on April 11, 2016. The defendants argue prescription began then because the change in physician reflects suspicion sufficient to constitute discovery of possible malpractice. They cite *Davis v. Johnson*, 45,200 (La. App. 2 Cir. 5/5/10), 36 So. 3d 439 as support. In *Davis*, the court found that plaintiff seeking a second pediatric

opinion due to concerns over the appearance of her son's penis was constructive knowledge of possible malpractice. Here, the trial court found "the follow-up treatment provided by the new provider [Bienville Family Clinic] for months after April 11, 2016, should have put plaintiffs on notice." The record does not support this conclusion. Plaintiffs changed to Bienville Family Clinic because Dr. Kirby relocated. They had to engage a new doctor. Mason's visit to the Bienville Family Clinic on April 11, 2016 ("KidMed") was a wellness visit. There is no evidence plaintiffs scheduled that visit to seek a second opinion regarding Mason's circumcision. The April 11, 2016 visit does not establish actual or constructive notice of injury or possible malpractice. To conclude otherwise would impute knowledge to plaintiffs that even their doctors apparently did not possess.

The court of appeal referred to April 11, 2016 as the date "Dr. Wilson found a 'penile abnormality.'" *In Re: Med. Review Panel of Mason Heath*, 326 So. 3d at 350. However, the first documentation of a "penile abnormality" is July 2, 2018. The progress note signed on July 2, 2018 by Cedric Willis, P.A., reveals Mason is "a 2 year old male [patient][who] [was] presented by [his] mother," who stated the "penis swells recurrently" and that "the circumcision is not right when [patient] is not swollen." The assessment was "penile abnormality" with a referral "to urology." We agree that prescription began when plaintiffs learned of the "penile abnormality," but that was on July 2, 2018, not April 11, 2016.

Mason was then seen by Dr. John Mata at Willis-Knighton on July 23, 2018. Dr. Mata diagnosed a "penile skin bridge, meatal stenosis with lower urinary tract symptoms, dysuria, and occasional penile pain." His treatment plan included "outpatient lysis of adhesion and excision of skin bridge with meatotomy." Upon the record presented, we find the earliest plaintiffs were aware of possible malpractice is July 2, 2018, the date they were told, for the first time, that Mason's

circumcision condition was not normal healing. Plaintiffs filed suit on August 14, 2018.

The defendants argue the consent form signed before Mason's circumcision put plaintiffs on notice his condition post-circumcision was abnormal. The consent form describes risks associated with the circumcision procedure. However, it does not establish actual or constructive notice of possible malpractice.¹¹ That is particularly so where, as here, some physical insult, then healing, is expected from the nature of the procedure.

The defendants also rely on hospital discharge instructions that direct the parents to "call the baby's provider" when the baby has "a very red penis, excessive swelling, discharge from the penis that is heavy, has a greenish color, or lasts more than a week, [experiences] bleeding not stopped with gentle pressure, or [if the] baby [is] unable to urinate." That is what these parents did. Over the course of numerous visits, the record shows plaintiffs were repeatedly told there was no problem with the circumcision. The hospital discharge note cannot be used to impute knowledge of a problem to the parents when the condition was not viewed as a problem by Mason's treating physicians.

Through many months and several wellness visits, doctors either said nothing about Mason's penile area or informed plaintiffs there was no cause for concern. While plaintiffs noticed redness and swelling and were prescribed a steroid cream, those complaints and treatment did not inherently suggest possible malpractice. Rather, according to their doctors, the conditions were within a normal range of healing for a circumcision. Thus, the "damages were [not] immediately apparent." *Mitchell*, 333 So. 3d at 381 ("It is well-settled that the prescriptive period for a

¹¹ The fact that an injury is a disclosed risk of a procedure does not necessarily mean the injury either is or is not the result of malpractice. Regardless of the disclosed risk, a patient does not consent to malpractice.

medical malpractice cause of action arises upon the occurrence of the injury when the damages are immediately apparent.”). Even if plaintiffs had “apprehension” that something was wrong, prescription did not commence until they knew or should have known “*through the exercise of reasonable diligence*” that malpractice may have occurred. *Campo*, 828 So. 2d at 510-11(emphasis added). Here, plaintiffs were reasonably diligent. Professional medical advice uncovered no reason to suspect that malpractice occurred.

The referral to a urologist on July 2, 2018 resulted from plaintiffs’ reasonable diligence. That is the first date plaintiffs should have associated the penile problems with possible malpractice. *Griffin v. Kinberger* 507 So. 2d 821 (La.1987) (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 not to recognize that the condition might be treatment related.). From the evidence presented, before then, it was reasonable to not suspect malpractice.

Plaintiffs did not sleep on their rights. They persistently cared for their child by bringing him to wellness visits and asking questions to ensure the circumcision site was properly healing. Prior to July 2, 2018, the complications perceived by plaintiffs and the associated medical visits did not alert “a reasonable person” to the fact “that he or she was the victim of a tort.” *Campo*, 828 So. 2d at 510. Rather, medical professionals assuaged their concerns and a reasonable explanation of post-circumcision healing existed. Plaintiffs filed their complaint within one year of discovery and within three years of the alleged act, omission, or neglect, making their claim timely pursuant to Louisiana Revised Statutes 9:5628(A). We reverse the granting of the exception of prescription.

CONCLUSION

We reverse the lower court’s granting of the defendants’ exceptions of prescription and remand for further proceedings.

REVERSED AND REMANDED.

SUPREME COURT OF LOUISIANA

No. 2021-C-01367

IN RE: MEDICAL REVIEW PANEL OF MASON HEATH

*On Writ of Certiorari to the Court of Appeal, Second Circuit,
Parish of Webster*

WEIMER, C.J., dissenting.

For the following reasons, I respectfully dissent from the majority’s reversal of the trial court’s judgment that sustained the medical defendants’ exceptions raising the objection of prescription.

Based on the allegations in plaintiffs’ medical malpractice complaint, I agree that plaintiffs’ complaint was prescribed on its face and that plaintiffs had the burden of proving at the hearing on the exception that their claim had not prescribed prior to the filing of their complaint on August 18, 2018. Thus, plaintiffs were required to show that they did not obtain “actual or constructive knowledge of facts indicating to a reasonable person that he or she is the victim of a tort” prior to August 18, 2017. **Campo v. Correa**, 01-2707, pp. 11-12 (La. 6/21/02), 828 So.2d 502, 510.

The medical defendants in this action are Dr. Russell, Minden Medical Center and staff, and Dr. Kirby. Dr. Russell performed the procedure at Minden Medical Center on August 18, 2015, and the child was seen by Dr. Kirby of Minden Pediatrics, LLC on September 2 and 23, 2015. According to plaintiffs’ allegations, “after arriving home[,] the family began to notice Mason [was] suffering from complications.” Plaintiffs further alleged that prior to the child’s one-month visit, the child experienced “fl[are] ups,” including “swelling of the penis, pain, and disfigurement,” prompting the child’s mother to “inquire about the status of the healing circumcision” at the initial visit with Dr. Kirby. Plaintiffs were advised at

that time by Dr. Kirby that the child “was healing appropriately.” However, when the child was last seen by Dr. Kirby 21 days later, the child’s mother was “concerned about how [the] circumcision look[ed],” as the child’s “penis was still irritated.” Dr. Kirby’s examination revealed “penile adhesions with skin bridging[,]” and a topical cream was prescribed to be applied for 30 days. If plaintiffs were subsequently assured “that there were no abnormalities in the healing process and Mason was healing adequately,” that information would have come from someone at Minden Pediatrics other than Dr. Kirby.¹

According to plaintiffs’ pleadings, when the child began treating with a new pediatrician at Bienville Family Clinic on April 11, 2016, the near eight-month-old child “was still experiencing complications with the circumcision site.” Plaintiffs’ awareness of the child’s continuing complications are further evidenced by their subsequent complaint to a physician’s assistant at Bienville Family Clinic that the child’s “penis swells recurrently[,]” and that the “circumcision is not right when ... not swollen.”

Based on plaintiffs’ allegations and the evidence in the record, I do not believe that the trial court manifestly erred² in finding that plaintiffs failed to prove that they did not have sufficient notice “to excite attention and put” them “on guard and call for inquiry”³ as to the possibility of malpractice long before the child’s July 2, 2018 visit at which time plaintiffs were informed that the child had a “[p]enile

¹ Concerning plaintiffs’ argument regarding the child’s subsequent treatment with Nurse LeKidra Brown at Minden Pediatrics, noteworthy is the fact that plaintiffs’ complaint does not mention treatment by Nurse Brown and does not contain an assertion that Dr. Kirby was responsible for Nurse Brown’s actions. Furthermore, the account information relied on by plaintiffs in advancing an argument in this regard does not constitute sufficient evidence that Dr. Kirby was responsible for the actions and/or inactions of Nurse Brown.

² See **Lomont v. Bennett**, 14-2483, p. 8 (La. 6/30/15), 172 So.3d 620, 627.

³ See **Campo**, 01-2702 at 12, 828 So.2d at 510-11.

abnormality” and the child was referred to a urologist. Accordingly, I disagree with the majority’s finding that it was reasonable for plaintiffs to be unaware of the possible malpractice until they learned of the “penile abnormality” on July 2, 2018. Because I believe that the trial court properly found that plaintiffs’ claims had prescribed, I would affirm the trial court’s sustaining of the medical defendants’ exceptions of prescription. Accordingly, I respectfully dissent from the majority opinion in this matter.

SUPREME COURT OF LOUISIANA

No. 2021-C-01367

**IN RE: MEDICAL REVIEW PANEL OF MASON HEATH
ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND
CIRCUIT, PARISH OF WEBSTER**

GENOVESE, J., dissents for the following reasons:

This Court granted certiorari in this medical malpractice case to consider whether the lower courts erred in finding Plaintiffs' claims had prescribed. I respectfully dissent from the majority opinion finding that the medical malpractice complaint ("the complaint") was filed within one year of the discovery of the alleged acts of practice. For the following reasons, I would affirm the lower courts' judgments.

The first issue presented relates to the burden of proof on the exceptions of prescription. I agree with the conclusion of the majority that the burden of proof on the exception of prescription rests with Plaintiffs. However, I respectfully disagree with the majority's determination that Plaintiffs carried their burden of proving that they discovered the possible malpractice less than one year before suit was filed and that the delay in discovery was reasonable.

Relative to the date of discovery of the alleged malpractice, the majority finds that the earliest Plaintiffs were aware of possible malpractice was July 2, 2018, when they were informed of the "penile abnormality," and Mason Heath ("Mason") was referred to Willis Knighton Medical Center-Pierremont ("Willis Knighton"). I disagree. First, the allegations of the complaint itself clearly demonstrate Plaintiffs' *awareness* that shortly after arriving home from the hospital, they noticed complications with the surgical site, and that obvious flare-ups, including "swelling of the penis, pain, and disfigurement," were observed approximately one month later. Additional allegations demonstrating Plaintiffs' *awareness* are that they

inquired about the status of Mason's healing at his first visit to Dr. Kirby, and they notified Dr. Kirby that there was still irritation at the surgical site during Mason's visit three months post birth for which he was prescribed medication that provided only temporary relief. Finally, the complaint specifically alleges that Mason was still experiencing complications with the surgical site when he began treating at Bienville Family Clinic; thus, Plaintiffs were *aware* that the complications continued.

The medical records also provide evidence of Plaintiffs' awareness of possible medical malpractice prior to their alleged date of discovery. The medical records from Minden Medical Center establish that information was provided to Plaintiffs on possible risks and complications of the surgical procedure prior to and following its performance in the Consent for Circumcision of Newborn form, the discharge instructions, and the aftercare instructions. Moreover, the medical evidence documents that Plaintiffs expressed their concerns to Mason's health care providers beginning as early as September 23, 2015. The progress records from Minden Pediatrics, LLC show that on this visit to Dr. Kirby, Mason's mother, Chrishanna Smith ("Ms. Smith"), was "concerned about how [the] circumcision look[ed.]" The examination revealed "penile adhesions with skin bridging[.]" and a topical cream was prescribed. The medical records further indicate that Plaintiffs were aware that issues regarding the surgical site continued, and they voiced their concerns at Mason's subsequent treatment at Bienville Family Clinic, when he was seen "for evaluation of a swollen penis[.]" and Ms. Smith reported that Mason's "penis swells recurrently[.]" and that the "circumcision is not right when . . . not swollen[.]"

Based upon the evidence, I agree with the trial court that "[a] problem or condition that had not been alleviated and/or continued to persist for an eight-month period of time should, at the very least, have put Plaintiff[s] on notice that possible malpractice had been committed[.]" and "[c]ertainly, the follow-up treatment

provided by the new provider for months after April 11, 2016, should have put Plaintiffs on notice.” I further agree with the court of appeal that although Plaintiffs did not get confirmation of potential malpractice until Mason was referred to Willis Knighton, a definitive diagnosis is not required to begin the running of prescription.¹ In my view, the court of appeal did not err in concluding that the “facts strongly suggest that the [Plaintiffs] had enough information to excite inquiry, place them on guard, and call for inquiry as to whether malpractice had occurred” at least by April 11, 2016. *In Re: Med. Review Panel of Mason Heath*, 54,020, p. 10 (La.App. 2 Cir. 8/11/21), 326 So.3d 347, 353. Based on the allegations in the complaint and the medical evidence in the record, I find that Plaintiffs had sufficient information to put a reasonably minded person on guard to call for inquiry at least by April 11, 2016. Therefore, I respectfully disagree with the majority that Plaintiffs proved they discovered the possible malpractice less than one year before suit was filed.

As noted above, to avoid prescription, Plaintiffs must prove not only that that they discovered the possible malpractice less than one year before suit was filed, which I find they failed to do, but also that the delay in discovery was reasonable. Plaintiffs argue that their delay in filing suit was not unreasonable, and Ms. Smith, a 19-year-old, first-time mother, with limited education, relied on the advice of the health care providers. I agree with the majority that no evidence of inexperience, limited education, or reliance on healthcare providers was introduced,² and the age

¹ 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 which is available to the plaintiff through inquiry or professional medical or legal advice, then the cause of action is reasonably knowable to the plaintiff. Failure to act by a plaintiff for more than one year under these circumstances is not reasonable. *Abbott v. Louisiana State Univ. Med. Ctr.- Shreveport*, 35,693, p. 6 (La.App. 2 Cir. 2/27/02), 811 So.2d 1107, 1110-11, writ denied, 02-952 (La. 5/31/02), 817 So.2d 104.

² In brief to this Court, Plaintiffs assert that in addition to the allegation of Ms. Smith’s age in the complaint, in their memorandum in opposition to Dr. Kirby’s exception, they argued that the trial court should consider the reasonableness of their actions given their ages, education, and life experiences. The opposition further asserted that Ms. Smith was a first-time mother with limited education; therefore, her actions in relying on Dr. Kirby’s guidance were prudent under the circumstances. However, arguments and briefs of counsel are simply not evidence.

of the mother alone is insufficient. However, I disagree that the record establishes that Plaintiffs' investigation and their reliance on Mason's physicians were reasonable. As the court of appeal noted:

[C]ounsel for claimants introduced nothing at the hearing on the exceptions. Thus, there is no record evidence regarding their age, inexperience, lack of education, *or degree of reliance on healthcare providers*. The record does show that Ms. Smith signed a consent and received discharge instructions, the claimants noticed significant problems within one month, reported these to Dr. Kirby twice in September 2015, and again, to the new doctor, at Bienville Family Clinic in April 2016.

In Re: Med. Review Panel of Mason Heath, 54,020, pp. 12-13, 326 So.3d at 354 (emphasis added). Therefore, in addition to finding that Plaintiffs failed to prove that they discovered the possible malpractice less than one year before suit was filed, I alternatively and additionally find that they failed to prove that the delay in discovery was reasonable.

I further find error with the majority's finding that "the documented medical visits for Mason's first six months do not suggest [P]laintiffs were, or should have been, aware of possible malpractice relative to his circumcision." As stated above, the medical records document that as early as September 23, 2015, at Mason's one-month visit with Dr. Kirby, Ms. Smith expressed concern about the circumcision and penile adhesions with skin bridging was found, for which the topical cream was prescribed. Although the majority opines that from October 19, 2015, through December 21, 2015 (Mason's two-month and four-month visits), "[t]here is no mention of the penis, much less an abnormal finding[.]" they acknowledge the medical records for this period reflect a complaint of "check circ" and "check private area[.]" Additionally, the majority states that the medical record of February 22, 2016, makes no mention of Mason's penis; however, the complaint alleges that at Mason's six-month visit, Plaintiffs "were informed that there were no abnormalities in the healing process[.]" Mason "was healing adequately[.]" and they "continued to

use the cream as prescribed.” Therefore, according to the allegations, the surgical site was discussed, and the application of the prescribed medication continued. Thus, in my view, the evidence does suggest that Plaintiffs were, or should have been, aware of possible malpractice.

Although Plaintiffs emphasize that the change in Mason’s health care providers in April of 2016 was due to Dr. Kirby’s relocation, as opposed to their seeking a second opinion, the reason for the change is not determinative. What is relevant is that the medical records show that Mason was still experiencing complications when he treated at Bienville Family Clinic, which is germane to Plaintiffs’ actual or constructive notice of possible malpractice.

Finally, I agree with the majority that the assessment of penile abnormality was on July 2, 2018; however, I disagree that this was “the earliest [P]laintiffs were aware of possible malpractice[,]” since that is “the date they were told, for the first time, that Mason’s circumcision condition was not normal healing.” The law of prescription does not require that the patient be informed by a medical practitioner of possible malpractice before the commencement of the running of prescription. *Mitchell v. Baton Rouge Orthopedic Clinic*, 21-61, p. 18 (La. 10/10/21), 333 So.3d 368, 381.

Contrary to the majority opinion, I conclude that Plaintiffs failed to carry their burden of proving that they discovered the possible malpractice less than one year before suit was filed and that the delay in discovery was reasonable. I conclude the lower courts did not err in finding that by at least April 11, 2016, Plaintiffs had sufficient information to excite their attention and put them on guard as to potential malpractice; therefore, prescription began to run at least by that date. Pursuant to La.R.S. 9:5628(A), Plaintiffs had one year from this discovery date to file their complaint; however, the complaint was not filed until August 14, 2018, over a year

later. Therefore, Plaintiffs' medical malpractice complaint was untimely and had prescribed.

For the foregoing reasons, I respectfully dissent from the majority opinion in this case and would affirm the judgments of the lower courts sustaining the exceptions of prescription filed by Dr. Robert Russell, Minden Medical Center, and Dr. Cristal Kirby.