IN RE: MEDICAL REVIEW PANEL OF WILHELMINA HERBERT	*	**NO. 2001-CA-2359**
	*	**COURT OF APPEAL**
VERSUS	*	**FOURTH CIRCUIT**
STATE OF LOUISIANA MEDICAL CENTER OF LOUISIANA AT NEW ORLEANS	*	**STATE OF LOUISIANA**
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2000-19596, DIVISION "G-11"
HONORABLE ROBIN M. GIARRUSSO, JUDGE
* * * * * *
JAMES F. MCKAY, III
JUDGE

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(Court composed of Chief Judge William H. Byrnes, III, Judge Steven R. Plotkin, Judge James F. McKay, III)

PLOTKIN, J., CONCURS WITH WRITTEN REASONS

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AFFIRMED

The plaintiff has appealed the trial court's granting of an exception of prescription filed by the defendants, the State of Louisiana, Louisiana State University Medical Center, Health Care Services Division, and the Rev. Avery C. Alexander Charity Campus. The plaintiff filed a request for a medical review panel pursuant to La. R.S. 40:1299.39 et seq. on October 3, 2000. She alleged that she received blood transfusions at the defendants' hospital in 1985 and was diagnosed with AIDS on October 21, 1999. She asserted claims in negligence and strict liability against the defendants in regard to the collection and screening of the blood. The defendants filed an exception of prescription arguing that the plaintiff's claims have prescribed under La. R.S. 9:5628.1.

The statute imposes a prescriptive period of one year from the date of discovery but also limits the filing of actions to three years from the date of the negligent act. The statute includes a grace period for those claims which arose prior to the enactment of the statute. Section B states that "with respect to any cause of action or other act, omission, or neglect occurring prior to July 1, 1997, actions against any healthcare provider as

defined in this Section, must, in all events, be filed in a forum of competent jurisdiction on or before July 1, 2000."

In the present case, the plaintiff filed her request for medical review panel on October 3, 2000, within one year of discovering that she had AIDS; however, more than three years had elapsed from the time she allegedly received the blood transfusions. Further, plaintiff did not file her action prior to July 1, 2000, the grace period established in the statute. Therefore, facially, it appears that the plaintiff's claims are prescribed.

Plaintiff argues, however, that her claims are not prescribed because the defendants intentionally concealed her medical records from her. Section E provides that "[t]he peremptive period provided in Subsection A of this Section shall not apply in cases of intentional fraud or willful concealment." Plaintiff contends that she attempted from December of 1999, to obtain her medical records from the defendants to no avail. She was not able to obtain the records until defense counsel provided them to her in April of 2002. The appellate record contains letters dated December 7, 1999, March 2, 2000, and September 26, 2000, from plaintiff's counsel to the defendants requesting the plaintiff's medical records. The hospital's medical records department responded to the correspondence on March 2, 2001, stating that the plaintiff's medical records could not be located but that

a search for the records would continue.

Plaintiff relies upon Kavanaugh v. Long, 29, 380 (La. App. 2 Cir. 8/20/97), 698 So.2d 730, in support of her argument that the defendants' intentional concealment of the medical records interrupted the running of prescription. In Kavanaugh, the court acknowledged that the third category of contra non valentem applies to medical malpractice cases. This category allows the interruption of prescription when the defendant does some intentional act to prevent the plaintiff from availing himself of his cause of action. The defendant physician in Kavanaugh had intentionally changed some medical records when he realized that he had operated on the wrong disc. The plaintiff did not learn that the defendant had operated on the wrong disc until more than three years after the surgery. The Court held that prescription began to run when the plaintiff learned that the defendant had operated on the wrong disc. The Court stated:

> Thus, in a medical malpractice case in which the health care provider intentionally conceals or withholds material information with which the patient could
>
> learn of the malpractice, the third category of contra non valentem applies to suspend the three-year prescriptive period of R.S. 9:5628, but only until the patient knew or should have known of the malpractice from other sources; at that point, the one-year prescriptive period of R.S. 9:5628 applies.
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> Kavanaugh, p.12, 698 So.2d at 738.

In the case at bar, the trial court apparently made a factual determination that the defendants did not intentionally conceal plaintiff's medical records. There is nothing in the record to suggest that the factual determination is manifestly erroneous. Letters were sent by plaintiff to the hospital but the hospital wrote back that it could not find the medical records. Such evidence indicates that any "concealment" was not intentional. Further, even if one were to assume that the defendants concealed the records from plaintiff, plaintiff knew or should have known in 1999, when she was diagnosed with AIDS, that the blood she received in 1985 was infected, if indeed the tainted blood could have been the only source of her exposure. Thus, the prescriptive period for her claims began to run in October of 1999.

The plaintiff argues in the alternative that the peremption provisions of La. R.S. 9:5628.1 are unconstitutional. The plaintiff did not initially allege the unconstitutionality of the statute in her request for a medical review panel. The plaintiff asserted the unconstitutionality of the statute in her answer to the defendants' petition to allot the case for discovery. The plaintiff requested service on the Attorney General for the State of Louisiana but there is nothing in the record to indicate that the Attorney General was served.

In Vallo v. Gayle Oil Co., 94-1238, p.2 (La. 11/30/94), 646 So.2d 859, 860, the Louisiana Supreme Court declined to the reach the issue of a statute's constitutionality "finding that the claim of unconstitutionality of the statute was not specifically pleaded in an appropriate pleading, the attorney general was not served a copy of the pleading and the record does not contain a transcript of a contradictory hearing." The Court stated that while the Attorney General is not an indispensable party, La. C.C.P. article 1880 requires that the Attorney General be served and be given an opportunity to be heard and to participate in a representative capacity. See also La. R.S. 49:257(B) and La. R.S. 13:4448. The Court noted that the Attorney General "must be served in declaratory judgment actions which seek a declaration of unconstitutionality of a statute. In all other proceedings, the attorney general should be served a copy of the pleading which contests the constitutionality of a statute." Vallo, p.8, 646 So.2d at 864.

In the present case, the plaintiff requested service on the Attorney General. However, there is nothing in the record to indicate that the Attorney General was served with a copy of the plaintiff's answer. Further, the record does not contain a transcript of a contradictory hearing. Thus, it is impossible to determine whether the Attorney General was notified of the suit and declined to participate. This Court is also unable to determine if the

trial court considered the issue of the constitutionality of the statute. Therefore, this issue is not in the proper posture for review by this Court.

Accordingly, the trial court's judgment granting defendants' exception of prescription is affirmed.

AFFIRMED