

**IN RE: MEDICAL REVIEW
PANEL OF WILHELMINA
HERBERT**

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NO. 2001-CA-2359

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COURT OF APPEAL

VERSUS

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FOURTH CIRCUIT

**STATE OF LOUISIANA
MEDICAL CENTER OF
LOUISIANA AT NEW
ORLEANS**

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STATE OF LOUISIANA

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PLOTKIN, J. CONCURS WITH WRITTEN REASONS:

Because the claims asserted by plaintiff, Wilhemina Herbert, in this medical malpractice claim are clearly barred by the provisions of LSA-R.S. 9:5628.1(B), I concur in the majority decision affirming the trial court judgment dismissing Ms. Herbert's claim against defendants, State of Louisiana, Louisiana State University Medical Center, Health Care Services Division, and the Reverend Avery C. Alexander Charity Campus.

LSA-R.S. 9:5628.1(B) clearly requires that all causes of action occurring prior to July 1, 1997 "must, in all events, be filed in a forum of competent jurisdiction on or before July 1, 2000." Ms. Herbert claims that her contraction of AIDS was caused by a blood transfusion she received at defendants' hospital sometime in the late 1980's; thus, before July 1, 1997. Although Mrs. Herbert was diagnosed with AIDS on October 21, 1999,

some nine months prior to the last date she could have filed her claim under LSA-R.S. 9:5628.1(B), July 1, 1997, the claim was not filed until after that date, on October 3, 2000. Thus, Ms. Herbert's claim was clearly prescribed.

I would note however my reluctance to hold that no circumstances exist whereby the prescriptive period for filing a medical malpractice claim could be suspended by the third category of contra non valentum where a hospital or other health-care provider fails to timely provide a claimant with requested medical records. Ms. Herbert claims that the defendants in this case had sole custody of her medical records, but failed to provide them within a reasonable period of time after she requested them. Although the hospital eventually informed Ms. Herbert's attorney that the records could not be located, they were eventually located and provided, after the filing of suit. In some circumstances, possession of the medical records would be necessary prior to the filing of a medical malpractice suit because the signature of an attorney on a petition acts as a "certification by him . . . that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact." La. C.C.P. art 863. The problem in this case is that Ms. Herbert's petition was filed prior to her receipt of the requested medical records, meaning that her attorney apparently did not consider them necessary for the performance of the necessary "reasonable inquiry." Therefore, in this case, I would agree with the panel's decision, even if Ms. Herbert's claims were not clearly barred by LSA-R.S. 9:5628.1.