GLENN D. HEDGPETH, M.D.	*	**NO. 2002-CA-0105**
VERSUS	*	**COURT OF APPEAL**
TAMER ACIKALIN, M.D., PAPET ENTERPRISES, AN UNINCORPORATED ASSOCIATION, ADVANCECARE CLINICS, AMC A PROFESSIONAL MEDICAL CORPORATION	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 94-2211, DIVISION "B-15"
HONORABLE ROSEMARY LEDET, JUDGE
* * * * * *
JUDGE MICHAEL E. KIRBY
* * * * * *

(Court composed of Chief Judge William H. Byrnes III, Judge Charles R. Jones, Judge Michael E. Kirby)

ON MOTION TO DISMISS APPEAL

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On December 2, 1996 the Civil District Court signed a judgment sustaining defendant's Exception of Lack of Subject Matter Jurisdiction over plaintiff's claims regarding breach of fiduciary duty with respect to the AdvanceCare Clinics (AMC) Pension Plan and Trust. The Court found that these claims were preempted by the Employee Retirement Income Security Act (ERISA) and state court jurisdiction was not available over such claims, citing 29 U.S.C. Section 1132(e)(1). The Court further ordered the entire matter transferred to the United States District Court for the Eastern District of Louisiana. The notice of signing of judgment was mailed December 5, 1996.

On July 10, 2001 plaintiff Hedgpeth filed a "Petition and Motion For Removal Pursuant to Transfer Order of Civil District Court for the Parish of Orleans" in the United States District Court for the Eastern District of Louisiana. In it he referred to the Exception of Lack of Subject Matter

Jurisdiction and the December 2, 1996 Judgment thereon and averred he was constrained to petition and move for removal of the state court action by the aforementioned judgment of December 2, 1996. On July 31, 2001 the federal court remanded the matter to the Civil District Court because only defendants may remove actions to federal court under 28 U.S.C. Section 1441.

Thereafter, on October 1, 2001 plaintiff Hedgpeth filed a devolutive appeal and alternative application for supervisory writs as to the judgment of December 2, 1996. He gave notice of his intent to seek writs the same day. On January 25, 2002 the defendants/appellees moved to dismiss the appeal/writ application as untimely. We asked plaintiff/appellant for a response to the motion to dismiss which was received March 8, 2002.

We agree with defendants/appellees that this matter must be dismissed as untimely.

C.C.P. art. 2087 allows a devolutive appeal to be taken within sixty (60) days of the date of the mailing of the notice of signing of judgment. That time lapsed long before the filing of the devolutive appeal on October 1, 2001.

If we consider the appeal as an application for supervisory writ, it is likewise untimely. In 1996 Rules 4-2 and 4-3 of the Uniform rules of the Courts of Appeal provided:

> **Courts of Appeal Rule 4-2**
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> Rule 4-2. Notice of Intention
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> The party, or counsel of record, intending to apply to the Court of Appeal for a writ shall give to the judge whose ruling is complained of, and to the opposing parties or opposing counsel or record, notice of such intention; provided, however, that failure to give such notice shall not be, of itself, sufficient cause for dismissing the application, or recalling or rescinding the writ, or rule nisi.
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> **Courts of Appeal Rule 4-3**
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> Rule 4-3. Time to File; Extension of Time
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> When an application for writs is sought to review the actions of a trial court, the trial court shall fix a reasonable time within which the application shall be filed in the appellate court, not to exceed thirty days from the date of the ruling at issue. Upon proper showing, the trail court or the appellate court may extend the time for filing the application upon the filing of a motion for extension of return date by the applicant, filed within the original or an extended return date period. An application not filed in the appellate court within the time so fixed or extended shall not be considered, in the absence of a showing that the delay in filing was not due to the applicant's fault.

> The application for writs shall contain documentation or the return date and any extensions thereof; any application which does not contain this documentation may not be considered by the appellate court.

We note that pursuant to rule 4-2, as it then existed, mere failure to give a notice of intention to take writs was not sufficient reason to dismiss an application. However, we believe that rule 4-3 clearly contemplated the writ application being filed in the appellate court within thirty (30) days of the ruling at issue or within a timely filed extension thereof. Thus, the writ application should have been filed in this court within thirty (30) days of December 2, 1996. The notice of intention to apply for writs filed on October 1, 2001 simply is too late.

Plaintiff Hedgpeth's response to the motion to dismiss the appeal offers no evidence of any extension of the return day or any other reason that would either extend the time for taking writs or toll the running of such time. Likewise there is no such evidence or explanation with respect to the time for taking the appeal. Thus, we are constrained to dismiss the appeal/writ application as untimely.

APPEAL DISMISSED