NOT DESIGNATED FOR PUBLICATION

AUDREY WILLIAMS AND TRACY DOMINIC WILLIAMS	*	**NO. 2002-CA-1294**
	*	**COURT OF APPEAL**
VERSUS		
	*	**FOURTH CIRCUIT**
SOUTHERN TRANSPLANT SERVICE, INC., TERRY J. PICOU, ST. PAUL FIRE& MARINE INSURANCE COMPANY, ORLEANS PARISH CORONER'S OFFICE AND DR. FRANK MINYARD	*	**STATE OF LOUISIANA**
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2001-7073, DIVISION "G-11"
Honorable Robin M. Giarrusso, Judge
* * * * * *
Judge Terri F. Love
* * * * * *

(Court composed of Judge Steven R. Plotkin, Judge Miriam G. Waltzer, Judge Terri F. Love)

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AFFIRMED

The plaintiffs appeal the trial court's grant of an exception of prescription filed by defendants, Dr. Frank Minyard and his Office, the Orleans Parish Coroner's Office. The plaintiffs contend that prescription was suspended under the doctrine of *contra non valentem*. For the following reasons, we affirm the trial court's ruling.

FACTS AND PROCEDURAL HISTORY

Audrey Williams and Tracy Dominic Williams filed suit against Southern Transplant Services, Inc. (Southern); Terry Picou, managing partner of Southern; St. Paul Fire & Marine Insurance Company, Southern's insurer; Minyard; and his Office alleging that the defendants illegally harvested the organs of Tony Williams, their son and brother, respectively, who died on March 20, 1994, from a gunshot wound to the head. His body was taken to the Office where an autopsy was performed, and Southern harvested the organs. The plaintiffs did not learn of the organ removals until the summer of 1995 when a representative of Southern called to inform them that the organs had been harvested legally, and that knowledge of his

medical history was necessary. Plaintiffs aver that in July of 2000, they were contacted by an unidentified attorney who advised them that it was unlawful for Williams' organs to be removed without their consent. Plaintiffs filed the present suit on April 25, 2001.

Defendants, Minyard and his Office, filed the exception of prescription, arguing that prescription began to run, at the latest, in the summer of 1995 when the plaintiffs learned that Williams' organs had been harvested. After a hearing on November 9, 2001, the trial court rendered a written judgment on March 28, 2002, granting the exception.

LAW AND DISCUSSION

On appeal, the plaintiffs contend that the trial court erred when it granted the exception because prescription was suspended under the doctrine of *contra non valentem* until July of 2000 when they learned from the above mentioned attorney that Williams' organs were harvested illegally.

The burden of proof generally rests on a party pleading prescription as an affirmative defense. However, where a petition shows on its face that the asserted claim has prescribed, the plaintiff bears the burden of proving that prescription has been sufficiently interrupted or suspended so as to bring the action within the prescriptive period. Wilkes v. Carroll, 30,066 (La. App. 2 Cir. 12/10/97), 704 So.2d 938.

La. C.C. article 3492 provides that delictual actions are subject to a liberative prescriptive period of one year, which commences to run from the date the injury is sustained. In Plaquemines Parish Comm. Council v. Delta Dev. Co., Inc., 502 So.2d 1034 (La.1987), the Louisiana Supreme Court recognized four factual situations in which the doctrine of *contra non valentem* applies so as to prevent the running of liberative prescription:

> (1) where there was some legal cause which prevented the courts or their officers from taking cognizance of or acting on the plaintiff's action;
>
> (2) where there was some condition coupled with the contract or connected with the proceedings which prevented the creditor from suing or acting;
>
> (3) where the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action; or
>
> (4) where the cause of action is neither known nor reasonably knowable by the plaintiff even though plaintiff's ignorance is not induced by the defendant.

The doctrine of *contra non valentem* only applies in "exceptional circumstances." La. C.C. art. 3467, Official Revision Comment (d); State ex rel. Div. of Admin. v. McInnis Brothers Construction, Inc., 97-0742, p.3 (La.10/21/97), 701 So.2d 937, 940.

Prescription begins to run when the plaintiff has actual or constructive knowledge of the alleged tortious act. Mistich v. Cordis Mfg. Co., 607

So.2d 955, 956 (La.App. 4 Cir.1992). Constructive notice is found at the point at which a plaintiff has sufficient information to excite attention sufficient to prompt further inquiry and includes knowledge or notice of everything to which that inquiry might lead. Mistich, *supra*; Adams v. First Nat. Bank of Commerce, 94-0486, p.5 (La.App. 4 Cir. 9/29/94), 644 So.2d 219, 223.

Here, the plaintiffs argue that the third and fourth situations are applicable.

To trigger application of the third category of *contra non valentem*, a defendant's conduct must rise to the level of concealment, misrepresentation, fraud, or ill practices. Fontenot v. ABC Insurance Company, 95-1707, p.5 (La.6/7/96), 674 So.2d 960, 963.

With regard to the fourth category, when the Louisiana Supreme Court first officially recognized the category as one where *contra non valentem* applies, it specifically clarified that "[t]his principle will not exempt the plaintiff's claim from the running of prescription if his ignorance is attributable to his own willfulness or neglect; that is, a plaintiff will be deemed to know what he could by reasonable diligence have learned." Corsey v. State of Louisiana, Through the Department of Corrections, 375 So.2d 1319, 1322 (La.1979).

In the present case, the plaintiffs say they learned of the harvesting of Williams' organs in the summer of 1995 when they were contacted by a representative of Southern who told them that the harvesting was legal. The identity of this person is unknown. Picou has not been served, and the depositions of two women employed by the company have not established who made the telephone call. These women however did say that they were provided a script by Picou and that they did make phone calls attesting to the legality of the harvesting. They could not say if in fact they made this particular phone call. Discovery is ongoing. Nevertheless, regardless of the caller's identity, it is not disputed at this point that a call was in fact made.

When the call was made, the plaintiffs had constructive notice of the alleged tortious act. The call was sufficient to excite the plaintiffs' attention and prompt further inquiry, but the plaintiffs did nothing. They did not contact Minyard or his Office for further information nor did they seek legal counsel. Reasonable diligence required them to take some type of action after the telephone call, and prescription began to run in the summer of 1995.

The plaintiffs argue that the intentional misrepresentations of Southern prevented them from proceeding any further. However, the plaintiffs did not act reasonably in accepting the statements of an unknown

person.

More importantly, while plaintiffs argue that Southern and Picou attempted to mislead them, they have made no such allegations against Minyard or his Office. They have not alleged nor produced any evidence to suggest that Minyard or his Office participated or assisted in the allegedly misleading actions of Southern and Picou or that those actions should be imputed to Minyard or his Office. They cite no case law to support their theory that the intentional acts of Southern are imputable to Minyard and his Office. As a result, even if the plaintiff were able to prove suspension of prescription under *contra non valentem* as to Southern, Picou, and Southern's insurer, they have not shown that prescription was suspended as to Minyard and his Office.

CONCLUSION

For the above mentioned reasons, the trial court was correct when it concluded that prescription began to run in the summer of 1995. Plaintiffs' suit filed in April of 2001 is prescribed as to Minyard and his Office.

AFFIRMED