DONTA L. RIVERS, INDIVIDUALLY FOR AND ON BEHALF OF HIS MINOR SON, DONTA L. RIVERS, JR.	*	**NO. 2004-CA-0270**
	*	**COURT OF APPEAL**
	*	**FOURTH CIRCUIT**
VERSUS		
	*	**STATE OF LOUISIANA**
HOUSING AUTHORITY OF NEW ORLEANS AND/OR "ABC" COMPANY AND/OR "DEF" COMPANY AND/OR "GHI" COMPANY	*	
	*	
	*	
	* * * * * * *	

CONSOLIDATED WITH:	**CONSOLIDATED WITH:**
YAKISHA TRESHONE BROWN AS MOTHER AND NATURAL TUTRIX OF ANTOINE JOSEPH BROWN	**NO. 2004-CA-0271**
VERSUS	
HOUSING AUTHORITY OF NEW ORLEANS	

CONSOLIDATED WITH:	**CONSOLIDATED WITH:**
BRENDA JOSEPH, AS TUTRIX OF THE MINOR CHILD, KIWINE NELSON	**NO. 2004-CA-0272**
VERSUS	
HOUSING AUTHORITY OF NEW ORLEANS	

APPEAL FROM

CIVIL DISTRICT COURT, ORLEANS PARISH
NOS. 99-386 C/W 99-3314 C/W 99-10970, DIVISION "B-15"
HONORABLE ROSEMARY LEDET, JUDGE
* * * * * *

JAMES F. MCKAY III
JUDGE
* * * * * *

(Court composed of Judge Charles R. Jones, Judge James F. McKay III, Judge Roland L. Belsome)

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AFFIRMED

The appellant, the Housing Authority of New Orleans, appeals the judgment of the trial court rendering judgment in favor of the plaintiffs, Donata L. Rivers, individually and on behalf of his minor son, Donata Rivers, Jr., Yakisha Treshone Brown as mother and natural tutrix of Antoine Joseph Brown (Antoine Brown), Brenda Joseph, a tutrix of the minor child, Kiwine Nelson, Emeka Nelson and Antoine Joseph Zanders (Zanders). We affirm.

FACTS AND PROCEDURAL HISTORY

On December 20, 1998, Emeka Nelson and Zanders while residing at 3839 Gibson Street, Apartment E, in the St. Bernard Housing Development, died of carbon monoxide asphyxiation resulting from a clogged exhaust vent in the gas water heater. The exhaust vent was clogged with bird nesting debris. The trial court considered all of the evidence and awarded the children of the deceased the following monetary awards based on their wrongful death claims. Antoine Brown, the son of Zanders and adopted son

of Delores Pike was awarded $250,000,00. Donata Rivers Jr., son of Emeka Nelson and through his tutor Donata Rivers, Sr., (grandfather), was awarded $350,000.00. Kiwine Nelson is the offspring of both of the decedents and through her tutrix Brenda Nelson (grandmother) was awarded $700,000.00 for the loss of both parents.

HANO'S ASSIGNMENT OF ERRORS

The appellant New Orleans Housing Authority (HANO) asserts three assignments of error in this appeal.

In HANO's first assignment of error it asserts that the trial court applied the incorrect law in rendering its judgment against HANO and argues that as a public entity, HANO, is subject to the provisions of La. R.S. 9: 2800 and that the provisions of La. C.C.Art. 2695 are inapplicable. We find no merit to this argument.

Secondly, HANO asserts that the trial court failed to properly apportion fault among all parties involved and failed to take notice of the decedents' fault in causing their deaths. We disagree with this assertion.

Finally, HANO argues that the trial court erred in finding that filiation had been established between Antoine Brown and Zanders as the matter was

not timely instituted pursuant to La. C.C. art 209 , and pursuant to La. C.C. art. 2315 et seq. We disagree with this assertion.

CROSS APPELLANTS' ASSIGNMENTS OF ERROR

The cross appellants, plaintiff, submit for review two assignments of error.

First, that the trial court committed manifest error in awarding a disproportionately low award for the loss of love and affection of a minor child to a parent and in rejecting any amount for loss of parental support. Secondly, they assert that the trial court erred in failing to award damages based on the plaintiffs survival claims.

After a careful review of the law and applicable jurisprudence we find no error in the trial court's judgments. We find no merit to this assertion.

To reiterate, the amounts of the judgments were; Antoine Brown, the son of Zanders and adopted son of Delores Pike was awarded $250,000,00. Donata Rivers Jr., son of Emeka Nelson and through his tutor Donata Rivers, Sr., (grandfather), was awarded $350,000.00. Kiwine Nelson is the offspring of both of the decedents and through her tutrix Brenda Nelson (grandmother) was awarded $700,000.00 for the loss of both parents.

The trial court has great discretion when assessing damages. Youn v. Maritime Overseas Corp., 623 So.2d 1257 (La.1993). Each case is different, and the adequacy of the award should be determined by the facts or circumstances particular to the case under consideration. Id. Thus, the initial inquiry is whether the award for the particular injuries and their effects, under the particular circumstances, on the particular injured person is a clear abuse of the "much discretion" vested in the judge or jury. Id. 1260; Joseph v. City of New Orleans, 2002-1996 (La.App. 4 Cir. 3/5/03), 842 So.2d 420. In reviewing general damages, an appellate court is not to decide what it considers to be an appropriate award, but rather to review the exercise of discretion by the trier of fact. Id. Upon finding an abuse of discretion, the award can only be raised (lowered) to the highest (lowest) point, which is reasonably within the discretion of the trial court. Emerson v. Empire Fire and Marine Insurance Company, 393 So.2d 691 (La.1981), *citing* Coco v. Winston Industries, Incorporated, 341 So.2d 332 (La.1976).

Accordingly, we have reviewed the above awards for abuse of discretion and based on the specific facts and circumstances of this case we find no abuse of discretion. Concluding the trial court did not abuse its

discretion in awarding general damages for the wrongful death claims in the amount it considered fair and appropriate we cannot substitute our judgment for that of the trial court. As such we will not reverse or amend the trial courts' judgments.

In cross-appellants' second assignment of error they assert that the trial court committed manifest error in failing to award any recovery based on a survival action alleging that the decedents had pre-death pain and suffering. On issues of general damage awards for survival action claims we are constrained to review the trial court for abuse of discretion. In the instant matter, based on the record before us, we conclude that the trial court did not abuse its discretion in failing to award any general damages for the survival action claims.

In the trial court's reasons for judgment it states that, " Since there was no evidence the decedents suffered any injuries prior to their deaths, the court denies plaintiff's survival action claims."

Generally, survival damages are warranted if plaintiff presents any evidence ("a scintilla") of pain and suffering on the part of the decedent. Giammanchere v. Ernst, 1996-2458 (La.App. 4 Cir. 5/19/99), 742 So.2d

572.

The cross-appellants assert that the trial court was provided with proof that Emeka Nelson and Zanders sustained pre-death pain and suffering. They argue that there is uncontroverted testimony, specifically that of Bob Bartlett, who opined that it was more probable than not that that the decedents lived with carbon monoxide in the apartment at a minimum of 8 to 10 hours to a maximum of a day to a day and one-half. The list of effects and symptoms of carbon monoxide levels include frontal headaches, nausea, dizziness, collapse and ultimately death. The plaintiffs maintain that evidence showing that Zanders had collapsed in the hallway indicates that he was likely suffering form carbon monoxide poisoning; from this evidence it can be concluded that the decedents suffered pre-death pain and suffering. There was also evidence presented that death from carbon monoxide poisoning spans over several hours.

Despite the language used in Giammanchere, which would indicate that a "scintilla" of evidence is enough to award survival damages, the evidence given at trial was merely supposition and not objective evidence that warrant the disturbance of the judgment of the trial court pursuant to an

abuse of discretion standard. Therefore, we hold that there is no merit to plaintiffs' argument.

STANDARD OF REVIEW

In civil cases, the appropriate standard for appellate review of factual determinations is the manifest error-clearly wrong standard, which precludes the setting aside of a district court's finding of fact unless that finding is clearly wrong in light of the record reviewed in its entirety. Hall v. Folger Coffee Co., 2003-1734 (La. 4/14/04), 874 So.2d 90, 98, *citing* Cenac v. Public Access Water Rights Ass'n, 2002-2660, p. 9, (La.6/27/03), 851 So.2d 1006, 1023. Thus, a reviewing court may not merely decide if it would have found the facts of the case differently. Id. The reviewing court should affirm the district court where the district court judgment is not clearly wrong or manifestly erroneous. Id. at 9-10, 851 So.2d at 1023. However, in certain situations such as legal error a court may conduct a *de novo* review because of a prejudicial error of law as follows:

A legal error occurs when a trial court applies incorrect principles of law and such errors are prejudicial. Lasha v. Olin Corp., 625 So.2d 1002, 1006 (La.1993). When such a prejudicial error of law skews the trial court's

finding of a material issue of fact and causes it to pretermit other issues, the appellate court is required, if it can, to render judgment on the record by applying the correct law and determining essential material facts *de novo*. Id. When one or more trial court legal errors interdict the fact-finding process, the manifest error standard is no longer applicable, and if the record is otherwise complete, the appellate court should make its own independent *de novo* review of the record and determine a preponderance of the evidence. Becnel v. Becnel, 98-593 (La.App. 5 Cir. 3/25/99), 732 So.2d 589; Barriere Construction Co. v. Systems Contractors Corp., 99-2869, pp. 4-5 (La.App. 4 Cir. 5/17/00) 764 So.2d 127, 130.

Appellant's first assignment of error asserts that the trial court erred in misapplying the law specifically pertaining to the issue of liability as the trial court applied and based its judgment on the general negligence and strict liability standards of La. C.C. Art. 2695. Appellant avers that the trial court should have applied the provisions of La. R.S. 9:2800. Furthermore, appellant asserts that the trial court erred in finding HANO had actual or constructive notice of leaking water faucets or a blocked hot water heater vent in the absence of proof by a preponderance of the evidence.

La. C.C. Art. 2695, which defines lessor's liability for damages from vices and defects states:

> The lessor guarantees the lessee against all the vices and defects of the thing, which may prevent its being used even in case it should appear he knew nothing of the existence of such vices and defects, at the time the lease was made, and even if they have arisen since, provided they do not arise from the fault of the lessee; and if any loss should result to the lessee from the vices and defects, the lessor shall be bound to indemnify him for the same.

La. R.S. 9:8000 which defines the limitation of liability for public bodies is as follows:

> A. A public entity is responsible under Civil Code Article 2317 for damages caused by the condition of buildings within its care and custody.
>
> B. Where other constructions are placed upon state property by someone other than the state, and the right to keep the improvements on the property has expired, the state shall not be responsible for any damages caused thereby unless the state affirmatively takes control of and utilizes the improvement for the state's benefit and use.
>
> C. Except as provided for in Subsections A and B of this Section, no person shall have a cause of action based solely upon liability imposed under Civil Code Article 2317 against a public entity for damages caused by the condition of things within its care and custody unless the public entity had actual or constructive notice of the particular vice or defect which caused the damage prior to the occurrence, and the public entity has had a reasonable opportunity to remedy the defect and has failed to do so.
>
> D. Constructive notice shall mean the existence of facts which infer actual knowledge.
>
> E. A public entity that responds to or makes an examination or inspection of any public site or area in response to reports or complaints of a defective condition on property of which the entity has no ownership or control and that takes

> steps to forewarn or alert the public of such defective condition, such as erecting barricades or warning devices in or adjacent to an area, does not thereby gain custody, control, or garde of the area or assume a duty to prevent personal injury, wrongful death, property damage, or other loss as to render the public entity liable unless it is shown that the entity failed to notify the public entity which does have care and custody of the property of the defect within a reasonable length of time.
>
> F. A violation of the rules and regulations promulgated by a public entity is not negligence per se.
>
> G. (1) "Public entity" means and includes the state and any of its branches, departments, offices, agencies, boards, commissions, instrumentalities, officers, officials, employees, and political subdivisions and the departments, offices, agencies, boards, commissions, instrumentalities, officers, officials, and employees of such political subdivisions. Public entity also includes housing authorities, as defined in R.S. 40:384(15), and their commissioners and other officers and employees and sewerage and water boards and their employees, servants, agents, or subcontractors.
>
> (2) "Public site or area" means any publicly owned or common thing, or any privately owned property over which the public's access is not prohibited, limited, or restricted in some manner including those areas of unrestricted access such as streets, sidewalks, parks, or public squares.

We agree with HANO's assertion that La. R.S. 9:2800, rather than La. C.C. Art. 2695, is applicable to the issue at hand, as it fits the definition of a public entity pursuant to La. R.S. 9:2800 (G). After a *de novo* review of the record before us it is clear from the evidence presented at trial that HANO had both actual and constructive knowledge of the defect of the premises. Specifically, we refer to 9:2800 (D) and (E).

HANO argues that they had no notice of the defects in Emeka Nelson's apartment yet the record is replete with clear examples of problems with the entire plumbing system. The trial court in her reasons for judgment stated that there was "uncontroverted evidence that two water faucets in Ms. Nelson's apartment were continuously running hot water prior to plaintiffs' deaths. HANO adduced testimony that it did not have notice of the running water, but did not dispute that a stream of hot water with a flow rate of about 700 gallons a day was running from the faucet in the bathroom, coupled with the running water from the kitchen faucet, evidence shows that a total of 29 gallons of water per hour flowed from the two faucets for a period of six months to a year prior to plaintiffs' deaths."

A public entity may not ignore or fail to take reasonable and timely steps to discover apparent or obvious defects in things they own, possess, or operate and escape liability by relying on the notice requirement of La. R.S. 9:2800. Oxley v. Sabine River Authority, 94-1284 (La. App. 3 Cir. 10/19/95), 663 So.2d 497, 507. A municipal authority is deemed to have constructive notice of a defect, for purposes of determining liability, if the defect existed for such a period of time that by exercise of ordinary care and

diligence, the municipal authority must have known of its existence, and the municipal authority had a reasonable opportunity to guard the public from injury by remedy of the defect. Burnett v. Lewis, 2002-0020, 2002-1573, 2002-0021, 2002-00 (La. App. 4 Cir.2003), 852 So.2d 519, rehearing denied, writ denied 2003-22642003-2264 (La. 11/26/03), 860 So.2d 1134, writ denied 2003-2740 (La. 11/26/03), 860 So.2d 1141.

HANO argues that it was not given specific complaints from the tenant, Emika Nelson. HANO asserts that in accordance with federal regulations, that it performs inspections of all of the apartments that it manages on a fiscal year basis, rather than a calendar year basis. HANO's fiscal year begins October 1st of the current year, and lasts until September 30th of the following year. Prior to Emika Nelson and Zanders' deaths, HANO alleges that Ms. Nelson's apartment was last inspected on November 25, 1997. Thus, her apartment was due for the annual inspection no later than September 30, 1999. HANO claims that the inspection would include an inspection of the water faucets, the gas hot water heater and its ventilation system. HANO also asserts that either Ms. Nelson or Mr. Zanders submitted a work order request regarding leaking faucets or the hot water heater on

October 2, 1996; November 25, 1997; March 3, 1997; April 7, 1997 and February 2, 1998. HANO further alleges in a defense trial exhibit that no other problems were reported between February 2, 1998, and December 20, 1998, the date of the accident.

HANO's experts, Mr. Vanderbrook and Mr. Bartlett, testified that because the water heater was a gas-fired appliance, an adequate ventilation system was necessary. Both conceded that a clogged flue of a hot water heater was unreasonably dangerous. Both conceded that the inability to turn off the hot water faucet in the bathroom alone would cause the hot water heater to continuously operate. The leaky faucet, in connection with the blocked flue, would increase the production of carbon monoxide, which ultimately led to the deaths of Emika Nelson and Zanders. In conjunction with this expert testimony Lois Watson and Verna Mae West, both of whom are HANO employees who inspected said apartment, testified that the faucet and the vent pipe was in the same condition at the time of the inspection as at the time of the accident. Clearly, the defective condition of the hot water faucets in the bathroom and the kitchen, the holes in the vent pipe, and the presence of birds' nesting materials in the flue, created a deadly situation

and caused the deaths of both Emika Nelson and Zanders. Although, HANO would have us believe that it was solely the issue of the bird nesting in the vent pipe that was the main cause of the problem, it is clear from the record that it is only a contributing factor, minor to the leaking faucets and the deluge of water that was obviously leaking from this apartment. It begs the question, how could HANO not notice and seek to repair a problem where hot water was continuously leaking in the amount of 700 gallons of water, 29 gallons an hour for a period of over six months and claim that there was no notice of a problem or defect in the property? The reasonable answer is that it could not have ignored this massive leakage and to do so was inaction; HANO's inaction is unfathomable.

The error on the part of the trial court was that it determined that pursuant to La. C.C.Art. 2695, that HANO was strictly liable as opposed to finding constructive and actual notice pursuant to La. R.S. 9:2800 (D) and (E). Nevertheless, under a *de novo* standard of review we conclude from the facts found in evidence and after a careful review of all of the evidence and testimony, it can and is deduced that there was clear constructive notice and actual notice that this explosive problem existed and furthermore, that it was

a problem that was easily correctible. Therefore, we find that La. R.S. 9:2800 (D) and (E), is applicable to the instant mater and that HANO clearly had notice of the condition of 3839 Gibson Street, Apartment E.

Hence, we find no reason to reverse the trial court's judgment holding HANO liable for these two deaths.

A second prong to this assignment of error is the issue of comparative negligence. HANO asserts that the decedents had some comparative fault for their own deaths and that the trial court failed in not apportioning fault to A.O.Smith Co., the manufacturer of the hot water heater.

In reviewing comparative fault determination, the trier of fact is owed some deference in allocating fault because the finding of percentages of fault is also a factual determination. Clement v. Frey, 95-1119, p. 6-7 (La.1/16/96), 666 So.2d 607, 609-610 (citations omitted). Accordingly, the trier of fact's allocation of fault should only be disturbed on appeal when it is clearly wrong or manifestly erroneous. Only after making a determination that the trier of fact's apportionment of fault is clearly wrong can an appellate court disturb the award, and then only to the extent of lowering it or raising it to the highest or lowest point respectively which is reasonably

within the trial court's discretion. Id.

HANO argues that the decedents' failure to report a leaking hot water faucet was a contributing factor. They further note that in the lease agreement with HANO it was required that tenants report all problems and defects in the apartment. Also asserted is the fact that the vent pipe was corroded and covered with a disposable diaper. HANO expert Mr. Bartlett testified at trial that the corrosion was from the inside as well as the outside. As the trial court noted in its reasons for judgment

> "The Court finds it completely illogical that Ms. Nelson did not report the running water because there is enough evidence of other complaints and requests she made for maintenance prior to her death. Further, Emika Nelson's mother testified that both she and Emika called to report the running problem. Mr. Bartlett opined that the disposable diaper that was found wrapped around the vent pipe after the accident contributed to the corrosion; however, he testified the corrosion was from the inside as well as the outside in of the vent pipe. Even if the diaper contributed to the corrosion of the vent pipe, if the water heater had been properly vented and the water faucets were properly working, plaintiffs' deaths would not have occurred. Thus, defendants have failed, by a preponderance of evidence, to carry their burden establishing third party or victim fault pursuant to La. C.C. art. 2323".

We find no reason to overturn the factual determinations and reasoning of the trial court in its judgment that there was no fault on the part of the victims in this accident.

Appellant also asserts that the trial court erred in failing to find some comparative negligence on the hot water heater company A.O. Smith pursuant to La. R.S. 9: 2800.54 referencing manufacturer responsibility and burden of proof. The trial court in its reasons for judgment stated,

> "Defendant's attempt to shift liability to the alleged manufacturer of the hot water heater and/or to the decedent plaintiffs lack sufficient proof to sustain the application of comparative fault.
>
> According to the deposition testimony of Shelly Deppa, retained by plaintiffs to conduct a human factor analysis of the incident, the water heater should have contained a warning about the dangers of carbon monoxide exposure. However, that does not establish an independent cause of plaintiffs' death [sic.] for the reason that if the water heater was properly vented, the accident would never have occurred. The lack of properly vented water heater combined with its excessive use were the proximate causes of plaintiffs' death [sic.]

We disagree with the appellant's assertion and find no error in the trial court's judgment.

Finally, HANO asserts that the trial court erred in finding that filiation had been established between Antoine Brown and Zanders, as the matter was not timely instituted pursuant to La. C.C. art. 209, and pursuant to La. C.C. art. 2315 *et seq*. We disagree with this assertion.

In order to establish filiation, a child who does not enjoy legitimate filiation or who has not been filiated by the initiative of the parent by

legitimation or by acknowledgment under Article 203 must institute a proceeding under Article 209. Louisiana Civ.Code art. 209(B), as amended by 1984 Acts 810 provides the requirements for proof of filiation as follows:

A child not entitled to legitimate filiation nor filiated by the initiative of the parent by legitimation or by acknowledgment under Article 203 must prove filiation as to an alleged deceased parent by clear and convincing evidence in a civil proceeding instituted by the child or on his behalf within the time limit provided in this article.

La. Civ.Code art. 209(C) provides a limitation on the time for bringing a filiation action as follows:

> The proceeding required by this article must be brought within one year of the death of the alleged parent or within nineteen years of the child's birth, whichever first occurs. This time limitation shall run against all persons, including minors and interdicts. If the proceeding is not timely instituted, the child may not thereafter establish his filiation, except for the sole purpose of establishing the right to recover damages under Article 2315. A proceeding for that purpose may be brought within one year of the death of the alleged parent and may be cumulated with the action to recover damages.

Under Article 209(C), the general rule is that a child must bring an action for filiation within one year of reaching the age of majority. Thomas v. Sister of Charity of the Incarnate Word Shreveport, 97-1443, p. 3 (La.7/8/98), 713 So.2d 466, 467. However, if the child is a minor at the time of his/her alleged parent's death, the child must bring the action within

one year of the alleged parent's death, regardless of the child's age. Id. Thereafter, the child may not establish filiation after the occurrence of either of these events--one year from majority or one year from the death of the alleged parent. Id. However, Article 209(C) provides an exception as to when a filiation action may be brought for the sole purpose of establishing the right to recover damages under Article 2315. Id. at pp. 3-4, 713 So.2d at 467-8. Thus, the purpose of this exception appears to be to allow the child who is over the age of nineteen at the time of the alleged parent's death to bring a filiation action, but only for the purposes of establishing the right to recover survival or wrongful death damages and not for any other purpose such as recovering succession rights. Id. Importantly for the case at hand, Article 209(C) also provides that a petition for damages under La. Civ.Code art. 2315 and a petition for filiation may be filed in the same proceeding at the same time.

Thus, the focus is on what the plaintiff has included in his original petition, not what was omitted. Further, during this inquiry, this Court should be mindful of the general rule that "Every pleadings shall be so construed as to do substantial justice." La. C. C.P. art. 865; Katz v. Katz,

412 So.2d 1291, 1293 (La.1982). Harsh, technical rules of pleadings are not favored in Louisiana in order to arrive at the truth and avoid miscarriages of justice. La. C. C.P. art. 854; Budget Plan of Baton Rouge, Inc. v. Talbert, 276 So.2d 297, 302 (La.1973).

On March 18, 1999, the mother and natural tutrix, Yakisha Treshone Brown, filed the original petition for damages on behalf of her minor child Antoine Brown, asserting his rights to both a wrongful death claim pursuant to La. C.C. art. 2315.2 and a survival claim pursuant to La. C.C. art. 2315.1, for the death of his natural father Zanders. Although the defendants assert that there was never proof of filiation, we have gleaned from the record that filiation was established by clear and convincing evidence well prior to the death of Zanders and during the course of this trial.

In the voluntary act of surrender for adoption, Zanders was named as the natural father of Antoine Brown, which was filed on April 6, 1998. In the January 20, 1999 motion and order to declare parental rights terminated and declare children free and eligible for adoption Zanders was named as the father of Antoine Brown. On January 28, 1999, Juvenile Judge Ganucheau signed the order of termination of the parental rights of Zanders to his son

Antoine Brown, as the curator's, Linda Mitchell report was deemed satisfactory. On January 24, 2000, in the petition for agency adoption, Zanders was named as the father of Antoine Brown. The trial court rendered the final decree of adoption on April 19, 2000. Furthermore, in the case at bar, on May 24, 2001, the trial court signed a judgment recognizing attorney Jasper Pharr as the attorney for Delores Pike and substituting the adoptive mother, Delores Pike for the natural mother Yakesha Treshone Brown as the representative for the minor child Antoine Brown. The final decree of adoption was signed by the juvenile court on April 19, 2000, in which Zanders was named as the deceased father. Although many of these decisions were rendered posthumously, it is clear that there is a clear line of facts that establish that Zanders was indeed the natural father of this child.

Furthermore, the trial court in the instant matter entertained argument and evidence pertaining to the establishment of filiation between Antoine Brown and Zanders. The trial court, in the case *sub judice*, ruled that there was clear and convincing evidence presented to establish filiation. The trial court considered factors that were testified to by the adoptive mother Delores Pike. Ms. Pike testified that the child was born to Zanders and

Yakisha Treshone Brown on December 18, 1994. She further asserted that after Antoine Brown's birth, he lived with his parents and his paternal grandmother for a year. Furthermore, Antoine was placed by the Department of Social Services in her home on June 25, 1996. She further contended that Antoine Joseph visited his son about twice a week and brought money, clothing and took his son to the Little Zion Baptist Church to be baptized, and registered his birth in the records of the church. The autopsy report confirmed that Zanders had a tattoo on his arm that said "Lil Antoine".

Although, the trial court went through the motions of establishing filiation between Zanders and Antoine Brown, we conclude that it was superfluous for two reasons. First, as mentioned above, there is ample evidence in previous court decisions that referred to Zanders as the father of this child. It would be illogical to ignore the rulings of a lower court as if they were never rendered. What makes this case stand out from the other wrongful death/ survival action cases is that here we have a natural tutrix mother who files a timely original petition for damages on behalf of her minor child clearly showing that she intended to pursue wrongful death and

survival action claims on behalf of this child for the death of his father. In this original petition for damages all defendants were on notice of the nature of this child's claim.

In the recent Supreme Court decision in Reese v. State of Louisiana Department of Public Safety and Corrections, 2003-1615 (La. 2/20/04), 866 So.2d 244, the putative father died in prison. The putitive children filed timely a wrongful death action against the State. Subsequently, the children filed a supplemental petition seeking filiation. The trial court granted the State's exception of no right of action for failure to plead the filiation action within a year of the death, asserting that the supplemental petition cannot relate back to the original filing date. The Supreme Court reversed and remanded.

The judgment of the Louisiana Supreme Court in Reese is helpful in this instance, despite the factual scenarios being completely different. Here, the original petition identifies the decedent and alleged tort victim, Zanders, and identifies the plaintiff as Antoine Brown, a minor. Here we have a timely original petition for damages being filed where the paternity of the child is asserted by the very nature of the petition; a petition for wrongful

death and survival action for the death of the child's father. Therefore, we find that the holding in Reese, is clearly applicable to the case *sub judice*.

HANO further argues that based on a denied exception of no right of action that the trial court erred in finding filiation, pursuant to La. C.C. art. 203 , between Antoine Brown and Zanders. The trial court in its reasons for judgment states: "…that based on the evidence, the decedent, Antoine Zanders' acts informally acknowledging the minor Antoine as his son are sufficient to prove filiation pursuant to La. C.C. art. 203.

To reiterate, Delores Pike, adoptive parent of minor Antoine Brown, testified that he was born on December 18, 1994, from the union of Yakisha Treshone Brown and of the deceased Zanders. After the birth of Antoine Brown, Zanders brought the minor Antoine to live with his mother and then the four lived together for one year. On June 25, 1996 Antoine Brown was placed in her home by the Department of Social Services. Thereafter, Zanders would visit with his son about twice a week and bring either money or clothes, and would take him out into the city while supervised by her (Delores Pike). On May 25,1997, Zanders took his son, Antoine Brown, to Little Zion Baptist Church to be baptized, therefore registering his birth in

the records of the church. Delores Pike's testimony was uncontroverted.

There was additional evidence offered at trial in an effort to establish filiation, which included: The Times Picayune Obituary published December 27, 1998 in which the family acknowledged that Antoine Brown was the son of Zanders. Delores Pike additionally testified that during the wake and funeral services she and Antoine Brown were invited to sit with the family. She further testified that Zanders had a tattoo on his forearm, "Lil Antoine," evidencing he had a son.

It is clear that Zanders had informally acknowledged Antoine Brown both privately and publicly during his lifetime. There is no merit to the appellant's asserted exception of no right of action.

We find no merit to appellant's argument and affirm the judgment of the trial court finding that by clear and convincing evidence the filiation between Antoine Brown and his father Zanders was established.

Based on the above and foregoing reasons, we affirm the judgment of the trial court.

AFFIRMED