

LINETTE DEAN

*

NO. 2004-CA-0588

VERSUS

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COURT OF APPEAL

UNITED MEDICAL CENTER

*

FOURTH CIRCUIT

*

STATE OF LOUISIANA

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 99-271, DIVISION "N-8"
Honorable Ethel Simms Julien, Judge

CHARLES R. JONES
JUDGE

(Court composed of Judge Charles R. Jones, Judge Patricia Rivet Murray,
and Judge Dennis R. Bagneris Sr.)

MURRAY, J. CONCURS IN THE RESULT

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AFFIRMED

United Medical Center, appellant, seeks an appeal from a district court judgment which denied its exception of prescription, finding that the appellee, Linette Dean's wrongful death claim had not prescribed. We affirm.

Facts

This is a claim for medical malpractice in which Linette Dean seeks to recover for the wrongful death of her child, Donisha Dean, who died on August 24, 1994 at the United Medical Center (United) in New Orleans. Ms. Dean was 16 years old at the time of Donisha's birth and subsequent death. In November, 1995, Ms. Dean, with her sister's aid, sought the assistance of an attorney in obtaining medical records concerning Donisha's death. Prior to that point, the only record she had received from United was the infant's birth certificate.

Following the request, Ms. Dean was furnished with copies of a death certificate, autopsy report, and medical records, at which time a medical malpractice expert reviewed the records and recommended that a complaint

be filed with the appropriate agency.

Procedural History

Ms. Dean filed a medical malpractice complaint in January 1996, with the Patient's Compensation Fund and a Medical Review Panel convened on the matter on November 16, 1998. The panel determined that United had failed to comply with the standard of care since the infant was premature and no pediatrician was promptly notified of her birth.

On January 7, 1999, Ms. Dean commenced this action in the Civil District Court for the wrongful death of Donisha. United responded to the suit by filing an Exception of Prescription. The district court denied United's exception and concluded that Ms. Dean had "filed clearly within the three year period and has alleged that she was not advised of a cause of death of her child and therefore lacked knowledge."

Ms. Dean then moved for a partial summary judgment seeking a ruling that United was negligent and that her damages exceeded \$100,000 (the maximum amount United would be liable for under the Louisiana Malpractice Act, L.R.S. 40:1299.41 *et seq.*). While the motion for partial summary judgment was pending, the parties engaged in discussions and reached an agreement, which allowed, *inter alia*, United a right to appeal the denial of its Exception of Prescription. The parties subsequently moved for

an entry of a judgment consistent with the above agreement.

The partial summary judgment was rendered in favor of Ms. Dean, and pursuant to the agreement, United filed for an appeal in this Court, which was subsequently denied on April 17, 2002. United then sought writ relief in the Louisiana Supreme Court, which was also denied. While waiting for judgment of the Supreme Court's denial of United's writ application to become final, Ms. Dean sought to have the \$100,000 judgment paid by United. United then filed a Motion to Vacate Settlement Agreement in the district court, followed by a renewed Exception of Prescription. Ms. Dean opposed both motions and the district court ruled that the earlier settlement agreement should be set aside. Ms. Dean then filed a Motion to Set for Hearing concerning United's Renewed Exception for Prescription, along with her Motion for Summary Judgment.

On July 25, 2004, the district court issued an order granting United's Renewed Exception of Prescription and denied Ms. Dean's Motion for Summary Judgment. Ms. Dean then filed a Motion for a New Trial and requested written reasons for the district court's order, which granted United's Renewed Exception of Prescription. The district court reversed the earlier judgment, which granted United's Renewed Exception of Prescription and once again found that Ms. Dean's claim had not prescribed.

However, the district court refused to render a ruling concerning the earlier Motion for Summary Judgment until after a hearing on the matter.

A hearing was held on the Motion for Summary Judgment in which all parties agreed that United was liable for the negligent death of Donisha Dean, and that the case had a value in excess of \$100,000. The district court judge signed the judgment. United then filed an appeal to this Court citing several assignments of error.

Although United raises five issues on appeal and assignments of error in its brief, the errors and issues raised are simply restatements of the principal legal question presented, whether the district court erred in denying United's renewed exception of prescription thereby holding that Ms. Dean's malpractice/wrongful death claim was not prescribed.

Discussion

This Court, in Board of Com'rs, 2003-1949, WL 1948318, p. 6 (La. App. 4 Cir. 9/2/04), 881 So.2d 811, 815 discussed the appellate court's standard of review of a trial court's finding of facts supporting prescription as follows:

The standard of review of a trial court's finding of facts supporting prescription is that **the appellate court should not disturb the finding of the trial court unless it is clearly wrong.** In re Medical Review Proceedings of Ivon, 2001-1296 (La.App. 4 Cir.3/13/02), 813 So.2d 532.

In reviewing a peremptory exception of prescription, an appellate court will review the entire record to determine whether the trial court's finding of fact was manifestly erroneous. Morrison v. C.A. Guidry Produce, 03-307 (La.App. 3 Cir. 10/1/03), 856 So.2d 1222. Further, "the standard controlling review of a peremptory exception of prescription requires that this court strictly construe the statutes 'against prescription and in favor of the claim that is said to be extinguished.'" Security Ctr. Prot. Servs., Inc. v. All-Pro Security, Inc., 94-1317, 94-1378, p. 12 (La. App. 4 Cir. 2/23/95), 650 So.2d 1206, 1214 (quoting Louisiana Health Serv. v. Tarver, 635 So.2d 1090, 1098 (La.1994)). Hall v. Reber, 2003-1482 (La.App.3 Cir. 3/31/04), 870 So.2d 424.

After a careful review of the record, we find that the district court did not err in ruling that Ms. Dean's claim had not prescribed.

United relies upon the general prescriptive period contained in La. C.C. Article 3492, which provides that delictual actions are subject to a liberative prescription of one year; however, our jurisprudence recognizes that there are exceptions to the general legal principle that prescription runs against all persons. One such exception is contained in LA R.S. 9:5628 (A), which provides:

No action for damages for injury or death against any physician, chiropractor, nurse, licensed midwife practitioner, dentist, psychologist, optometrist, or hospital licensed under the laws of this state...as defined in R.S. 40:1299.41(A), whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be

brought unless filed within one year from the date of the alleged act, omission, or neglect, or within one year from the date of discovery of the alleged act, omission, or neglect; however, even as to claims filed within one year from the date of such discovery, in all events such claims shall be filed at the latest within a period of three years from the date of the alleged, act, omission, or neglect.

Another such exception is *contra non valentum*. *Contra non valentum agere nulla currit praescriptio* is a suspensive prescriptive theory, meaning "prescription does not run against a party unable to act." Wimberly v. Gatch, 93-2361, (La. 4/11/94), 635 So.2d 206, 211. Because of the sometimes harsh consequences which result from the strict interpretation of prescription statutes, Louisiana courts have adopted *contra non valentum* as a jurisprudential exception to prescription. Bergeron v. Pan American Assur. Co., 98-2421 (La. App. 4 Cir. 4/7/99), 731 So. 2d 1037.

Under the doctrine of *contra non valentum*, prescription does not begin to run until a plaintiff either knew or should have known of a cause of action, even if that knowledge does not occur until long after the wrongful conduct at issue has occurred. Simmons v. Templeton, 97- 2349, 98-0043 (La. App. 4 Cir. 11/10/98), 723 So.2d 1009, 1012. *Contra non valentum* therefore suspends the running of prescription during the period in which the cause of action was not known by or reasonably knowable by the plaintiff. La. Plaque Corp. v. Chevron U.S.A. Inc., 93-1597 (La. App. 4 Cir. 5/26/94),

638 So.2d 354, 356.

Louisiana jurisprudence recognizes that *contra non valentum* is an exceptional remedy, which is in direct contradiction to the articles in the Civil Code and therefore should be strictly construed. Harsh v. Calogero, 615 So.2d 420, 422 (La. App. 4 Cir. 1993). The situations giving rise to application of the doctrine were described by our Supreme Court in Corsey v. State Through Dept. of Corrections, 375 So.2d 1319 (La.1979), as: 1) where there was some legal cause which prevented the courts or their officers from taking cognizance of or acting upon the plaintiff's action; 2) where there was some conditions 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 effectively to prevent the creditor from availing himself of his cause of action; and 4) where the cause of action is not known or reasonably knowable by plaintiff, even though his ignorance was not induced by defendant. See also Wimberly v. Gatch, 93-2361 (La. 4/11/94), 635 So. 2d 206.

Under the fourth category of this theory, known as the “discovery rule,” prescription does not begin to run until a plaintiff has a reasonable basis to pursue a claim against a specific defendant. Picard v. Vermillion Parish School Bd., 00-1222 (La. App. 3 Cir. 4/4/01), 783 So. 2d 590. In

reference to the fourth category, the Louisiana Supreme Court 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, at 1322. Nevertheless, "*contra non valentum* is a legal principle, its application to the facts of the case and a determination of whether or not the plaintiffs were indeed prevented from filing their claim under one of the four circumstances is an issue of fact." Picard at 594 *citing* Rosell v. ESCO, 549 So.2d 840 (La. 1989).

In Taylor v. Giddens, 618 So.2d. 834 (La. 1993) the Supreme Court discussed the application of both La R.S. 9:5628(A) and *contra non valentum* in a medical malpractice case. In Taylor, the surviving husband and children of a cancer victim filed wrongful death and survival claims against the internist and the radiologist with the Commissioner of Insurance. The defendants filed peremptory exceptions of prescription, claiming that the actions had prescribed under both the one and three year time limitations set forth in La. R.S. 9:5628. The district court granted the physicians' exceptions of prescription. The Court of Appeal affirmed, holding that the language of La. R.S. 9:5628 "is unambiguous and provides no exception for wrongful death and/or survival actions brought beyond the statute's one year

and three year prescriptive periods, and that the doctrine of *contra non valentum* is not factually supported in this case, and nevertheless, could not extend the malpractice action beyond the three year prescriptive period.” *Id.* 839.

On writ of certiorari, the Supreme Court opined that “the reference in the statute [La. R.S. 9:5628] to actions for death seems to encompass all death actions, survival and wrongful death, having a genesis in medical malpractice.” *Id.* 840. However, “although survival and wrongful death actions arise from the same tort, they are separate and distinct”. *Id.* at 840.

The Court noted:

Each right arises at a different time and addresses itself to the recovery of damages for totally different injuries and losses. The **survival action** comes into existence simultaneously with the existence of the tort and is transmitted to [the] beneficiaries upon the victim's death and permits recovery only for the damages suffered by the victim from the time of injury to the moment of death...[o]n the other hand, the **wrongful death** action does not arise until the victim dies and it compensates the beneficiaries for their own injuries which they suffer from the moment of the victim's death and thereafter.

Taylor at 840 *citing* Guidry v. Theriot, 377 So.2d 319). Thus, wrongful death claims are not controlled by the prescriptive period in La. R.S 9:5628. Wrongful death claims are governed by one-year liberative prescription set

forth in La. C.C. 3492.

The Court concluded that even though the medical malpractice was not discovered immediately, the family's claims existed from the inception of the tortious conduct. Hence the medical malpractice claim itself "[was] dependent upon the victim having a viable malpractice claim on the date of death and must be filed within one year of the malpractice victim's death, [and] nevertheless, within the three year limit provided for under La. R.S. 9:5628." *Id.* 840. Because the Taylors did not file the medical malpractice claim and survival actions timely, prescription continued to run and their right to file their claims was lost.

The Court also found that the *discovery rule* under the doctrine of *contra non valentem* could not save the survival action from the prescriptive limitations set forth in the medical malpractice statute since the Taylors' suit was filed more than three years after the date of the malpractice.

In the instant suit, Donisha Dean died on August 24, 1994. The record indicates that Ms. Dean was not advised of the actual or probable causes of Donisha Dean's death by any of United's staff or any member of the Orleans Parish coroner's office. In addition, Ms. Dean had not received a death certificate, autopsy report or any medical records concerning the treatment of Donisha Dean until the records were requested by an attorney in

November 1995, some sixteen months after the child's death. The record reflects that Ms. Dean filed her complaint with the Patient's Compensation Fund in January 1996, a month or so after the expert reviewed the medical records.

For the reasons assigned herein, we agree with the district court that Ms. Dean's medical malpractice claim was filed timely since it was filed within the maximum three-year prescriptive period addressed in La. R.S. 9:5628.

We have determined that based on Taylor v. Giddens, the wrongful death claim is governed by a one-year liberative prescription set forth in La. C.C. 3492, rather than La. R.S. 9:5628. Considering the above facts and circumstances, which are unique to the case at bar, we find that while the wrongful death claim appears prescribed on its face, the "discovery rule" under the doctrine *of contra non valentum*, is applicable to suspend prescription. It is evident that the cause of action was not known or reasonably knowable by Ms. Dean until an independent expert advised her as such.

Therefore, we find that neither of Ms. Dean's claims for medical malpractice or wrongful death have prescribed. Ms. Dean's claims were timely filed once she discovered United's negligence through an expert's

examination of Donisha Dean's autopsy report and associated medical records.

DECREE

For the reasons assigned, we affirm the judgment of the district court which denied United Medical Center's Exception of Prescription, and we affirm the appeal at appellant's cost.

AFFIRMED