

IN RE: RALPH GUIDRY (D)

NO. 17-CA-105

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT  
PARISH OF JEFFERSON, STATE OF LOUISIANA  
NO. 760-561, DIVISION "D"  
HONORABLE SCOTT U. SCHLEGEL, JUDGE PRESIDING

August 30, 2017

**ROBERT M. MURPHY**  
**JUDGE**

Panel composed of Judges Robert M. Murphy,  
Stephen J. Windhorst, and Hans J. Liljeberg

**AFFIRMED**

**RMM**

**SJW**

**DISSENTS WITH REASONS**

**HJL**

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## **MURPHY, J.**

Plaintiffs have appealed the trial court's judgment granting the defendants' exceptions of prescription regarding their claim for wrongful death in this medical malpractice case. For the reasons that follow, we affirm the judgment of the trial court.

### **FACTS AND PROCEDURAL HISTORY**

Plaintiffs are the surviving wife and adult children of decedent Ralph Guidry. Mr. Guidry, who was seventy-seven years old at the time of his death, suffered from vascular dementia. In 2014, he had become increasingly difficult to care for and moved into an assisted living facility. While in that facility, he exhibited inappropriate sexual behavior and was aggressive with the staff and other residents. After punching a female resident in the face, Mr. Guidry was admitted to Oceans Behavioral Hospital of Gretna ("Oceans") on October 19, 2014. While in Oceans, he was under the care of Dr. Kaleem Arshad and Dr. Koa Tran. He was placed on various psychotropic medications in an attempt to decrease his aggressiveness and inappropriate behavior. During the early morning hours of November 4, 2014, Mr. Guidry was found on the floor of his room. He was assisted to the bathroom to be cleaned. While in the bathroom, he became unresponsive. Despite aggressive attempts at resuscitation, Mr. Guidry died.

An autopsy<sup>1</sup> dated November 5, 2014 diagnosed Mr. Guidry with bilateral pulmonary emboli with deep vein thrombosis. Mr. Guidry's death certificate, which was issued on February 9, 2015, listed Mr. Guidry's cause of death as "bilateral pulmonary emboli with deep leg vein thrombosis."

On October 22, 2015, well within one year of decedent's death, plaintiffs filed a claim with the Division of Administration against Oceans and Drs. Arshad

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<sup>1</sup> An autopsy was not required by law following Mr. Guidry's death. It appears that the autopsy was performed at the request of Mr. Guidry's family.

and Tran, requesting that a Medical Review Panel be formed to review the care rendered to Mr. Guidry. The claim alleged that the dates of medical malpractice were from October 19, 2014 through November 4, 2014. The claim alleged that interventions were not implemented to reduce the risk of fall for Mr. Guidry and that he had suffered more than one fall and was injured. The claim alleged that Mr. Guidry was administered medications that were ordered by Drs. Arshad and Tran and that Mr. Guidry was sedated and physically restrained in a Geri-chair. The claim further alleged: “Mr. Guidry’s confinement coupled with the chemical rendered him immobile and at increased risk for a venous thrombus embolus. Mr. Guidry’s venous thrombus embolus risk was not properly identified nor were any interventions prescribed to reduce the risk of venous thrombus embolus.” The claim additionally alleged: “As a result of the breaches in the standard of care by defendants, Ralph Guidry fell and became injured and was subsequently locked into a chair and given significant doses of sedating medications causing him to develop a venous thrombus and embolus that progressed to a Pulmonary Embolus.” The claim stated that as a result of the improper treatment, Mr. Guidry suffered emotional distress, anxiety, loss of enjoyment of life, scarring, medical expenses, and premature death. The claim stated that defendants are liable to plaintiffs for the loss of consortium of their spouse and father and for mental anguish and anxiety experienced as a result of Mr. Guidry’s unexpected death.

In a certified letter dated October 28, 2015, the Medical Malpractice Compliance Director of the Division of Administration informed plaintiffs’ attorney that pursuant to La. R.S. 40:1231.8(A)(1)(c) “a filing fee of \$100 per qualified defendant must be received by the Patient’s Compensation Fund within 45 days of the postmark of this notice without exception.” The letter went on to state: “Please remit full payment to the Patient’s Compensation Fund in the amount of \$300.00.” The letter further stated that the fee may only be waived

upon receipt of an affidavit from a physician or a district Court's *in forma pauperis* ruling. Finally, the letter stated: "Failure to comply shall render the request invalid and without effect and shall not suspend the time within which suit must be instituted." By certified letter dated December 18, 2015, the Medical Malpractice Compliance Director of the Division of Administration informed plaintiffs' attorney that it had not received the filing fee, that he had failed to comply within the time allowed, and that the claim previously filed was invalid and without effect.

On December 22, 2015, more than one year after the decedent's death, plaintiffs filed a claim with the Division of Administration against Oceans and Drs. Arshad and Tran, requesting that a Medical Review Panel be formed to review the care rendered to Mr. Guidry. In this claim, plaintiffs state that after reviewing the autopsy, Mrs. Guidry believed that Mr. Guidry died of natural causes. The claim explains that a few weeks after Mr. Guidry's death, Mrs. Guidry obtained an incomplete copy of Mr. Guidry's medical record from Oceans and arranged for this record to be reviewed by a nurse. The nurse informed her that the record was incomplete. A certified complete copy of the records was received on June 22, 2015. The claim states that Mrs. Guidry met with her attorney and the nurse on August 25, 2015 when she was informed for the first time that Mr. Guidry's death "was due to improper medical treatment and that his death was not a natural progression of Alzheimer's disease." The same allegations made in the October 22, 2015 claim regarding improper treatment by Oceans and Drs. Arshad and Tran are repeated in this claim. This claim alleged that the defendants are liable for the survival claim of Mr. Guidry and the wrongful death claims of the plaintiffs.

On May 5, 2016, a Petition to Institute Discovery was filed in the 24<sup>th</sup> Judicial District Court by Drs. Arshad and Tran requesting that this matter be allotted to facilitate the provisions of the medical review panel proceeding. This

request was granted. On that same date, Dr. Arshad and Tran filed an Exception of Prescription stating that the October 19, 2015 claim was without effect and that the December 22, 2015 claim was prescribed on its face since it was filed more than a year after Mr. Guidry's death. On June 27, 2015, Oceans filed an Exception of Prescription arguing that despite constructive knowledge, plaintiffs did not file their claim within one year of the alleged malpractice and the claim should be dismissed.

Plaintiffs opposed the exceptions of prescriptions, arguing that Mrs. Guidry did not suspect malpractice until a nurse deciphered the medical records. Plaintiffs contend that prescription did not begin to run until the date of discovery of the malpractice. Plaintiffs contend that because the claim was filed within one year of the date of discovery of the malpractice, the claim filed on December 22, 2015 was not untimely.

Following a hearing on the motions, the trial court overruled the exceptions of prescription with respect to the survival claim. The trial judge asked for further memoranda on the issue of whether the wrongful death claims were barred by the one-year prescriptive period starting from the date of Mr. Guidry's death. The trial judge then rendered judgment sustaining the exceptions of prescription regarding the wrongful death claims. Plaintiffs seek review of the judgment sustaining the exceptions of prescription with respect to the wrongful death claims.<sup>2</sup>

## **LAW AND DISCUSSION**

Prescription is a peremptory exception which is provided for in Louisiana Code Civil Procedure article 927. Evidence may be introduced in support of or contravention of the exception if the grounds are not apparent from the petition. La. C. C.P. art. 931. When evidence is introduced at the hearing on the exception

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<sup>2</sup> This appeal pertains solely to the judgment sustaining the exceptions of prescription with respect to the wrongful death claims.

of prescription, an appellate court reviews the ruling on the exception under the manifest error standard of review. London Towne Condo. Homeowner's Ass'n v. London Towne Co., 06-401 (La.10/17/06), 939 So.2d 1227, 1231. When no evidence is introduced, the appellate court "simply determines whether the trial court's finding was legally correct." Dugas v. Bayou Teche Water Works, 10-1211 (La. App. 3 Cir. 4/6/11), 61 So.3d 826, 830. Generally, the burden of proof lies on the party pleading the exception of prescription. Id. However, if it is apparent from the face of the pleadings that action is prescribed, the burden shifts to the plaintiff to show that the action has not prescribed. Id.

The prescriptive period governing medical malpractice claims, codified in La. R.S. 9:5628(A), provides in pertinent part:

No action for damages for injury or death against any physician . . . hospital or nursing home duly licensed under the laws of this state . . . 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.

In a medical malpractice case in which the patient of the alleged malpractice dies, the damage resulting from the alleged malpractice, i.e., the patient's death, is immediately apparent. Carter v. Ochsner Clinic Found., 07-889, (La. App. 5 Cir. 03/11/08), 978 So.2d 562, 566, writ denied, 08-0936 (La. 08/29/08), 989 So.2d 99. The Louisiana Supreme Court discussed the application of the one-year prescriptive period with respect to damages that are immediately apparent in In re Medical Review Panel for Claim of Moses, 00-2643, (La. 5/25/01), 788 So.2d 1173, 1178 stating:

[A] one-year prescription period (which parallels the general tort period) is the general rule, which applies to all types of medical malpractice actions. Under this general rule, such actions prescribe

one year from the date of the alleged act, omission or neglect. This rule applies when the damages are immediately apparent.

The Louisiana Supreme Court earlier had discussed the prescriptive period for a wrongful death claim asserted in a medical malpractice action in Taylor v.

Giddens, 618 So.2d 834, 836 (La.1993) stating:

[Louisiana Revised Statutes] 9:5628 provides the prescriptive period for survival actions but does not provide the prescriptive period for wrongful death actions . . . The commencement and running of the prescriptive period for the wrongful death action is controlled by the one year liberative period applicable to delictual actions...

Delictual actions have a prescriptive period of one year which begins to run from the date the injury or damage is sustained. La. C.C. art. 3492. The Taylor court further explained that although the survival action and wrongful death claim both arise from a common tort, survival and wrongful death actions are separate and distinct. Taylor, 618 So.2d at 840. The wrongful death action, which compensates the beneficiaries for their own injuries suffered from the moment of the victim's death, does not arise until the victim dies. Id. The Court held that the prescriptive period for wrongful death claims arising from acts of medical malpractice is not controlled by the prescriptive period provided for in La. R.S. 9:5268(A). Id. at 841. The Taylor court concluded that the wrongful death prescriptive period begins to run on the date of the victim's death because that is the date that the claimants are injured. Id.

On appeal, plaintiffs argue that the trial court erred in refusing to apply the doctrine of *contra non valentem* to this wrongful death claim.

The doctrine of *contra non valentem* applies as an exception to the statutory prescriptive period where a plaintiff is unable to exercise his cause of action when it accrues. The Supreme Court has recognized four instances where *contra non valentem* can apply: (1) where there was some legal cause which prevented the courts or their officers from taking cognizance of or acting on the plaintiff's



actions; (2) where there was some condition coupled with a 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; or (4) where some cause of action is not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant. Wimberly v. Gatch, 93-2361 (La. 4/11/94), 635 So.2d 206, 211. The doctrine of *contra non valentem* only applies in “exceptional circumstances.” Specialized Loan Servicing, L.L.C. v. January, 12-2668 (La. 06/28/13), 119 So.3d 582, 585; La. C.C. art. 3467, Official Revision Comment (d).

This court has held that when the victim of an alleged act of medical malpractice dies, the damage resulting from the alleged malpractice, i.e., the victim’s death, is immediately apparent. Carter, supra. The Supreme Court explained in Taylor, supra, that a wrongful death claim is not the same as a malpractice claim and wrongful death claims are not necessarily dependent on the presence of a viable malpractice claim. Taylor, 618 So.2d at 841. In a wrongful death action based on medical malpractice, the date of the malpractice victim’s death determines when the prescriptive period commences running, since the date of death is the date the claimants are injured. Id.

Plaintiffs argue that the fourth category of *contra non valentem* applies to suspend prescription in this case because plaintiffs did not know and could not have known of the malpractice action at the time of Mr. Guidry’s death. They contend that their wrongful death claim was not readily apparent at the time of Mr. Guidry’s death. They argue that the evidence presented at the hearing on the exceptions of prescription showed that it was not until the autopsy and complete medical records were reviewed by a nurse that they were able to discover the actual cause of death.

The evidence in this case indicates that the plaintiffs knew the date Mr. Guidry died and that they immediately requested that an autopsy be performed on Mr. Guidry. A comparison of the two complaints filed by plaintiffs with the Division of Administration indicates that the primary difference is that the second complaint contains several paragraphs regarding discovery of the alleged malpractice. It is significant that the first claim, which was timely filed, makes no mention of any inability to discover the alleged malpractice. A review of the first complaint indicates that claimants had discovered the alleged malpractice, i.e., the failure to properly treat Mr. Guidry led to the development of emboli that caused his death.

In the instant case, the wrongful death prescriptive period began to run on November 4, 2014, the date of Mr. Guidry's death. Plaintiffs' claim filed on December 22, 2015 is prescribed because it was not filed within one year of Mr. Guidry's death. Plaintiffs have not shown any extraordinary circumstances to invoke the exception of *contra non valentem* to suspend or interrupt the prescriptive period to file their wrongful death claims. The failure to pay the required filing fee is not a reason to apply the extraordinary exception of *contra non valentem*. Based on the reasoning set forth in Taylor, supra, and given the facts and circumstances of this case, we find that the trial court did not manifestly err in sustaining defendants' exceptions of prescription regarding plaintiffs' wrongful death claims.

## **CONCLUSION**

For the foregoing reasons, the trial court's judgment sustaining defendants' exceptions of prescription in favor of Dr. Kaleem Arshad, Dr. Koa Tran, and Oceans Behavioral Hospital of Greater New Orleans, and dismissing the wrongful death claims of Christopher Guidry, individually, Louis Guidry, individually,

Michael Guidry, individually, Danielle Fotenot, individually, and Patricia Guidry, individually, is affirmed.

**AFFIRMED**

## LILJEBERG, J., DISSENTS WITH REASONS

I respectfully dissent from the majority's decision to affirm the trial court's judgment which granted, in part, defendants' exceptions of prescription and dismissed plaintiffs' wrongful death claims.<sup>1</sup> I believe the trial court erred as a matter of law when it determined the Louisiana Supreme Court's decision in *Taylor v. Giddens*, 92-3054 (La. 5/24/93), 618 So.2d 834, and subsequent appellate decisions, supported its finding that the discovery rule does not apply to wrongful death actions. I further believe the majority erred when it conducted a *de novo* review of the facts relevant to the application of the discovery rule, rather than deferring to the trial court's factual findings on this issue. The same facts apply to both the survival and wrongful death actions. The trial court found the date of discovery of the alleged medical malpractice was in late January 2015 for the survival action. Yet, the majority states the date of discovery of the alleged medical malpractice is November 4, 2014, the date of death, for the wrongful death action. For these reasons and those discussed more fully below, I believe the trial court's judgment dismissing plaintiffs' wrongful death claims should be reversed.

The assignment of error raised by plaintiffs on appeal is whether the trial court misapplied the law when it determined the discovery rule, the fourth prong under the doctrine of *contra non valentum*, does not apply to wrongful death actions involving medical malpractice. I disagree with the majority's decision not to address this assignment of error in its opinion, and therefore, provide some additional discussion regarding the background and relevant facts relating to this issue.

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<sup>1</sup> Plaintiffs filed both survival and wrongful death actions. The exceptions of prescription filed by defendants sought dismissal of both causes of action. The trial court denied defendants' exceptions of prescription with respect to plaintiffs' survival action claims based on its application of the discovery rule. Therefore, the survival actions remain pending before the medical review panel.

According to testimony and the certified copy of the autopsy report entered into evidence during the hearing on the exceptions, the anatomical autopsy was completed on November 5, 2014. However, the entire autopsy report was not completed on that date because blood and vitreous specimens were obtained and sent for screening. The autopsy report contains five scientific and toxicology reports, three dated December 5, 2014, one dated December 19, 2014, and a toxicology report dated December 24, 2014. Testimony presented at the hearing indicated the coroner did not issue the autopsy report until January 6, 2015. Plaintiffs received a copy of the autopsy report on January 27th or 28th, 2015, which revealed for the first time that their family member, Ralph Guidry, died as a result of a pulmonary embolism.

Following the hearing, the trial court found the discovery rule suspended accrual of the prescriptive periods for the survival actions based on its factual finding that the earliest time plaintiffs knew or should have known of the medical malpractice allegedly causing Mr. Guidry's death was when they received the autopsy report in January 2015, over two months after the date of death on November 4, 2014. The trial court specifically found as follows:

**THE COURT:**

Based upon the only evidence presented to this Court, the Court is going to liberally apply the prescriptive period and maintain the cause of action for survival action, and the Court will utilize the autopsy report to show that the earliest time that the survival action could have – could have or should have been known is sometime in January. If somebody wants to give me the specific date.

**MR. TOWNSLEY:**

January 6<sup>th</sup> is when it was completed, and January 29<sup>th</sup> is when it was

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THE COURT:

So sometime in January they got the autopsy report which started the ball rolling of whether or not you, again, based upon a liberal interpretation of prescription, the Court will find that December is clearly within that one year of that as the earliest date, not the actual date of death.

The trial court then asked the parties to file additional briefs regarding whether a wrongful death claim is barred by a strict one year period from the date of death:

THE COURT:

However, the cause of action related to the wrongful death action, I want a legal - - using that - - clearly if I'm using the January date, then it survives if you win on the argument that something else should apply versus one year.

Therefore, the trial court recognized that if the discovery rule applied to the wrongful death actions, they would be timely based on its factual finding that the first time plaintiffs should have known of the alleged medical malpractice causing the death was in January 2015.

On September 7, 2016, the trial court provided a ruling from the bench as to whether the wrongful death actions were prescribed. The trial court determined that when applying *contra non valentum* to a wrongful death action, "the cases implicitly have done away with the argument that the discovery rule is one of the facts for the Court to consider." Therefore, while applying the discovery rule to the survival action, the trial court rejected plaintiffs' argument that the same rule and facts should serve to delay commencement of the prescriptive period for their wrongful death actions. The trial court declared the wrongful death claims untimely because plaintiffs failed to file them within one year after the date of death.

The trial court's decision creates a situation where even when the facts establish a plaintiff does not know or should not know at the time of death of the alleged tort causing the death (in this case medical malpractice), the wrongful death prescriptive period still begins to run. This decision allows a scenario where a wrongful death action could prescribe before plaintiff has notice of facts sufficient to incite curiosity or attention that a cause of action exists. Though wrongful death actions are distinct from survival and underlying medical malpractice actions, a wrongful death action does not arise without the existence of an underlying tort of medical malpractice.<sup>2</sup> As discussed more fully below, I believe it is improper to reach a legal conclusion which creates a segment of plaintiffs who may lose their wrongful death claims before they know or should know of the tort creating the existence of the claim. Furthermore, I believe it is important to directly address this legal issue to prevent any additional confusion regarding the application of the discovery rule to wrongful death claims in the future.

It is well-established that the doctrine of *contra non valentem* creates a jurisprudential exception to the running of *prescriptive* periods. *Richards v. Choice Hotels Int'l, Inc.*, 13-973 (La. App. 5 Cir. 5/21/14), 142 So.3d 249, 252. La.C.C. art. 2315.2 contains language indicating the time limitation for a wrongful death claim is a prescriptive period: "The right of action granted by this Article *prescribes* one year from the date of death of the deceased." [Emphasis added.] The Louisiana Supreme Court also recognizes the prescriptive nature of the time limitation to file a wrongful death action. *Taylor*, 618 So.2d at 841.

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<sup>2</sup> La. C.C. art. 2315.2 provides "[i]f a person dies *due to the fault of another*, suit may be brought by the following persons . . ."[Emphasis added.] Furthermore, in *Taylor*, *supra*, the Louisiana Supreme Court recognized a wrongful death action has its genesis in an act of malpractice, and that wrongful death and survival actions arise from a "common tort." 618 So.2d at 840.

Despite the trial court's findings, I have not located any cases expressly declaring the *contra non valentem* discovery doctrine no longer applies to wrongful death claims. To the contrary, in *Hotard v. Banuchi*, 00-1364 (La. App. 5 Cir. 1/30/01), 784 So.2d 654, 655, this Court explicitly recognized the application of the discovery rule to wrongful death actions:

Medical malpractice claims must be brought within one year from the alleged malpractice or within one year of the discovery of the malpractice. La. R.S. 9:5628. ***Claims for wrongful death must be brought within one year of the date of death or discovery of the negligence which caused the death.*** La. C.C. art. 3492. [Emphasis added.]<sup>3</sup>

The trial court started its analysis with the Louisiana Supreme Court's finding in *Taylor, supra*, that the prescriptive period for a wrongful death action runs from the date of death. It is important to recognize the context within which the Supreme Court rendered this decision. First, the factual scenario facing the *Taylor* court was completely opposite from the scenario facing this Court. In *Taylor* the plaintiff knew of the alleged medical malpractice years prior to the date of death, whereas in the present matter the trial court has determined plaintiffs could not have known of the alleged malpractice until they received the autopsy report. Because of this factual difference, it is important to note that the *Taylor* court was not faced with the issue of whether the discovery rule applies to a wrongful death action.

The *Taylor* court's analysis arose from a factual situation where the plaintiff knew three years *prior* to his wife's death that her doctor failed to diagnose her

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<sup>3</sup> Plaintiffs also cite to a list of cases where courts have applied the discovery rule to wrongful death actions arising from both general tort law and medical malpractice: *Brown v. Department of Health and Human Resources*, 498 So.2d 785 (La. App. 4 Cir. 1986), *writ denied*, 500 So.2d 430 (La. 1987); *Quibodeaux v. Medical Center of Southwest Louisiana*, 97-204 (La. App. 3 Cir. 3/11/98), 707 So.2d 1380, *writ denied*, 98-926 (La. 5/15/98), 719 So.2d 465; *In re Medical Review Panel of Howard*, 573 So.2d 472 (La. 1991); *Dean v. United Medical Center*, No. 2004-CA-588 (La. App. 4 Cir. 2004); *Guillot v. Daimlerchrysler Corp.*, 08-1485 (La. App. 4 Cir. 9/24/10), 50 So.3d 173, *writ denied*, 11-321 (La. 3/2/11), 58 So.3d 461; *Leslie v. Shell Chemical LP*, 2013 U.S. Dist. LEXIS 120215 (E.D. La. 2013); *Watkins v. Exxon Mobil Corp.*, 12-477 (La. App. 4 Cir. 5/29/13), 117 So.3d 548, *aff'd on appeal*, 13-1545 (La. 5/7/14), 145 So.3d 237; *McClendon v. State*, 357 So.2d 1218. (La. App. 1 Cir. 1978).



with cancer of the esophagus. 618 So.2d at 838. The *Taylor* court considered a split in the circuits as to whether the medical malpractice prescriptive period set forth in La. R.S. 9:5628 applied to wrongful death actions, as well as survival actions. *Id.* at 839-40. This presented the Louisiana Supreme Court with the dilemma of whether the prescriptive period for the wrongful death cause of action must begin to run from the date the plaintiffs' learned of the medical malpractice and therefore, potentially prescribe even before the patient died. *Id.* at 841.

Because of this, the Louisiana Supreme Court explained that with respect to the applicable prescriptive period, wrongful death actions must be treated differently than survival and medical malpractice actions, and determined that even when the plaintiff knows of the alleged act or omission constituting medical malpractice *prior* to death, the prescriptive period for the wrongful death claim did not begin to run until the date of death. *Id.* The *Taylor* court determined the date of discovery of the medical malpractice was inconsequential when the plaintiff had knowledge of the alleged malpractice prior to death. However, I do not believe it would reach the same conclusion if faced with the present matter where the plaintiffs are not aware of the alleged malpractice until after the date of death.

In reaching its decision, the *Taylor* court noted that its decision avoided the creation of a segment of plaintiffs who would lose their right to pursue wrongful death actions before they even came into existence:

This statutory construction and interpretation satisfies the State's interest in protecting the family unit which is at the core of the wrongful death statute. Comment, *Wrongful Death in Louisiana: Too Often A "Cause" Without A "Right,"* 41 La.L.Rev. 954 (1981). It also prevents the loss of the wrongful death action to a certain class of victims (claimants), an action which was given to all wrongful death victims (claimants) by Acts of 1884, No. 71, and which have been considered since 1884 as a compensable injury and a vested property right. See LSA-C.C. arts. 2315, 2315.2; *Guidry v. Theriot, supra*; 39 La.L.Rev. 1239, *supra* at 1241; 58 Tul.L.Rev. 1547, *supra* 1248. Cf. *Crier v. Whitecloud, on reh'g, supra*, [when an injury occurs which

gives the injured party a cause of action, that cause of action becomes a vested property right which is protected by the guarantee of the due process clause; when a person does not file suit within the prescriptive period, the person has no cause of action and no vested property right]. Additionally, this construction prevents the aura of unconstitutional restriction of access to the courts to a certain class of wrongful death claimants and equally protects the claimant's property interest by insuring they have a period in which to bring their cause of action after it accrues. LSA-Const. Art. I, § 3, Art. I, § 22. See generally *Crier v. Whitecloud, on reh'g, supra*; *Everett v. Goldman*, 359 So. 2d 1256 (La. 1978); *Valentine v. Thomas*, 433 So. 2d 289, 292 (La. App. 1st Cir. 1983) ["Equal protection of the law means that state laws must affect alike all persons similarly situated."], *writ den.*, 440 So. 2d 728 (La. 1983).

Just as the *Taylor* court was concerned about creating a faction of plaintiffs whose wrongful death actions would prescribe before death occurred, I believe this Court must also be mindful of providing a vague legal analysis which could serve to create a faction of plaintiffs whose wrongful death prescriptive period commences and ends before they could or should know medical malpractice caused their family member's death.

As noted above, the majority did not directly address the trial court's erroneous legal conclusions. Instead, the majority cites to language from this Court's decision in *Carter v. Ochsner Clinic Foundation*, 07-889 (La. App. 5 Cir. 3/11/08), 978 So.2d 562, 566, *writ denied*, 08-0936 (La. 8/29/08), noting that when a patient dies as a result of medical malpractice, the damage, i.e. the patient's death, is immediately apparent.<sup>4</sup> The majority then cites to the Louisiana Supreme Court's decision in *In Re Medical Review Panel for Claim of Moses*, 00-2643 (La. 5/25/01), 788 So.2d 1173, for the principle that when damages are immediately apparent, the actions prescribe one year from the date of the "alleged act, omission

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<sup>4</sup> The trial court also relied heavily on the *Carter* decision for its conclusion that the discovery rule does not apply to wrongful death actions. The *Carter* court made no such statement. Rather, this Court based its decision on its finding the plaintiff "presented no evidence to support a suspension or interruption of the one year prescriptive period that began on the date of death." *Id.* at 566. Furthermore, the facts in *Carter* involved a plaintiff who died as a result of internal bleeding after a doctor improperly inserted a catheter during dialysis. These facts are much more extreme and obvious than the current situation involving an elderly man who collapsed and died for unknown reasons.

or neglect.” The majority also notes that the *Taylor* court concluded that the wrongful death prescriptive period runs from the date of death because that is the date the claimants are injured. The majority’s position on the discovery rule is unclear to me. On the one hand, the majority seems to indicate in its analysis that because the death, the damages resulting from the alleged medical malpractice is immediately apparent, the prescriptive period for a wrongful death action must always commence at the date of death. However, at the end of the opinion, the majority appeared to entertain and reject plaintiffs’ discovery rule arguments after conducting its own analysis of the facts.

I believe the analysis provided in the majority opinion is incomplete because in order for a prescriptive period to commence, the plaintiff must have more than knowledge that damage or a death occurred. The Louisiana Supreme Court, as well as this Court, recognize that prescriptive periods do not commence until the plaintiff knows or should know of three things: the damage, ***the tort, and the relationship between them***. *Bailey v. Khoury*, 04-620 (La. 1/20/05), 891 So.2d 1268, 1275-76; *Encalade v. Coast Quality Constr. Corp.*, 00-925 (La. App. 5 Cir. 10/31/00), 772 So.2d 244, 247, *writ denied*, 00-3229 (La. 1/26/01), 782 So.2d 634. Determination of when prescription commences under the discovery rule depends on two primary factors: (1) the date on which the plaintiff gained actual or constructive knowledge of facts indicating to a reasonable person that he or she is the victim of a tort; and (2) the date on which the “tortious act actually produces damage.” *Bailey*, 891 So.2d at 1284.

Therefore, in addition to knowledge of the damages, plaintiff must also have sufficient knowledge or notice that a tort or negligence occurred. Prescription does not begin to run at the first indication that the plaintiff may have suffered harm, but rather it begins to run when a plaintiff has a reasonable basis to pursue a claim

against a specific defendant. *Jordan v. Employee Transfer Corp.*, 509 So.2d 420, 424 (La.1987).

In *Taylor*, the prescriptive period for the wrongful death action ran from the date of death because the plaintiffs already had knowledge of the alleged act of malpractice. In the present matter, after conducting a hearing and reviewing the evidence and testimony, the trial court determined plaintiffs could not have known of the alleged medical malpractice until over two months after the date of death. In many instances, it is easy to discern the cause of death is the alleged medical malpractice. However, this is not always the case. I believe that failing to account for those factual situations where the alleged medical malpractice causing the death is not immediately apparent essentially creates a type of preemptive period for wrongful death claims. I do not believe this is the result the *Taylor* court intended when it stated the prescriptive period runs from the date of death. Just as the *Taylor* court found it necessary to avoid creating a class of claimants who could lose their wrongful death claims prior to the decedent's death, I also believe it is improper for courts to imply or establish that a plaintiff must always know that medical malpractice caused the death. Therefore, I believe the majority should have recognized in its analysis that when a plaintiff does not and could not know of the alleged medical malpractice at the time of death, the discovery rule can serve to suspend the commencement of the prescriptive period.

Finally, I believe the majority erred by conducting its own independent analysis of the evidence and disregarding the trial court's factual finding that plaintiffs could not have known of the alleged malpractice until they received the completed autopsy report. Although *contra non valentum* is a legal principle, its application to the facts of the case and a determination of whether the plaintiffs were prevented from filing their claim under one of the four circumstances is an

issue of fact. *Amoco Prod. Co. v. Texaco, Inc.*, 02-240 (La. App. 3 Cir. 1/29/03), 838 So.2d 821, 829-830, *writ denied*, 03-1102, 03-1104 (La. 6/6/03), 845 So.2d 1096. Therefore, the trial court's finding of fact on this issue is subject to the manifest error, clearly wrong standard of review. *Id.*

The same evidence, facts and circumstances apply to both the wrongful death and survival actions. Again, the survival and wrongful death actions are interrelated to the extent they both arise from the same negligence or fault, which is the medical malpractice. I believe the majority overlooked the trial court's factual findings regarding when plaintiffs first should have known of the alleged medical malpractice, and instead determined the evidence establishes plaintiffs had facts sufficient to notify them of the existence of the alleged medical malpractice at the time of death. It is contradictory to have two different factual findings as to when sufficient knowledge existed to commence the prescriptive period for each cause of action. I believe if the majority agrees that the discovery rule can apply to plaintiffs' wrongful death actions, then it should have deferred to the trial court's factual findings on this issue unless manifestly erroneous.

The evidence indicates that this matter involved an elderly person who collapsed and died for reasons unknown to plaintiffs until the release of the autopsy report. In conducting its own independent review of the evidence, the majority concluded that because plaintiffs immediately requested an autopsy after the death and subsequently failed to mention their alleged inability to discover the alleged malpractice in their first claim filed with the medical review panel, they knew of the alleged medical malpractice on the date of death. I do not believe these facts are sufficient to disregard the trial court's factual findings relevant to the application of the discovery rule.

SUSAN M. CHEHARDY  
CHIEF JUDGE

FREDERICKA H. WICKER  
JUDE G. GRAVOIS  
MARC E. JOHNSON  
ROBERT A. CHAISSON  
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**NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY**

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **AUGUST 30, 2017** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CHERYL Q. LANDRIEU  
CLERK OF COURT

**17-CA-105**

**E-NOTIFIED**

24TH JUDICIAL DISTRICT COURT (CLERK)

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