NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2014 CA 0975

ASHLEY NICOLE FERRELL, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILDREN JAYDEN REY SANCHEZ AND BRODY ALLEN SANCHEZ

VERSUS

WAL-MART LOUISIANA, LLC AND JAMES STEWART

Judgment Rendered: DEC 2 3 2014

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On Appeal from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Trial Court No. C619278

Honorable Todd Hernandez, Judge Presiding

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BEFORE: WHIPPLE, C.J., McCLENDON, AND HIGGINBOTHAM, JJ.

HIGGINBOTHAM, J.

Plaintiff appeals the judgment of the district court which denied her motion for new trial and maintained the grant of defendant's peremptory exception raising the objection of prescription. For the following reasons, we affirm.

FACT AND PROCEDURAL HISTORY

According to the record, plaintiff, Ashley Nicole Ferrell, alleges that on August 23, 2011, while shopping at Wal-Mart on O'Neal Lane in Baton Rouge, Louisiana, she slipped and fell in water on the floor and sustained injuries. Initially, Ms. Ferrell filed suit individually and on behalf of her minor children against Wal-Mart Louisiana, L.L.C.[1] in the United States District Court for the Middle District of Louisiana on June 11, 2012. Subsequently, on February 19, 2013, Ms. Ferrell, individually and on behalf of her minor children, filed suit in the 19th Judicial District Court against Wal-Mart and added Wal-Mart employee, Mr. James Stewart, as a defendant. After filing suit in the 19th Judicial District Court, Ms. Ferrell filed a motion to voluntarily dismiss her suit in federal court on February 28, 2013. Despite Wal-Mart's objection to the dismissal, on April 22, 2014, the action was dismissed by the federal district court under Rule 41 of the Federal Rules of Civil Procedure, without prejudice.

Thereafter, Wal-Mart and Mr. Stewart (defendants), filed a peremptory exception raising the objection of prescription, contending that the suit filed on February 19, 2013, in state district court was filed more than one year after Ms. Ferrell's alleged slip and fall that occurred on August 23, 2011. The prescription exception was heard by the district court on September 9, 2013, after which the district court took the matter under advisement, and on November 25, 2013, judgment was signed granting defendants' peremptory exception raising the

[1] Ms. Ferrell named the defendant Wal-Mart Stores, Inc., but on each pleading thereafter, and in the suit filed in the 19th Judicial District Court, the defendant was referred to as Wal-Mart Louisiana, L.L.C.

objection of prescription and dismissing with prejudice Ms. Ferrell's suit against Wal-Mart and Mr. Stewart.

On December 5, 2013, Ms. Ferrell filed a motion for new trial. In a judgment signed on March 12, 2014, the district court denied Ms. Ferrell's motion for new trial and maintained defendants' exception of prescription and dismissed Ms. Ferrell's suit with prejudice. It is from this judgment that Ms. Ferrell appeals, asserting the following assignments of error: 1) the district court erred in finding that Ms. Ferrell's timely filed federal case didn't interrupt prescription as to her later-filed state-court case; and 2) the district court erred in dismissing Ms. Ferrell's case by failing to apply the doctrine of *contra non valentem.*

LAW AND ANALYSIS

I. Interruption of Prescription

Louisiana Civil Code article 3492 provides in pertinent part, "Delictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained." A district court's findings of fact on the issue of prescription are subject to the manifest error-clearly wrong standard of review. **London Towne Condominium Homeowner's Ass'n v. London Towne Co.**, 06-401 (La. 10/17/06), 939 So.2d 1227, 1231. Ms. Ferrell does not contest that her suit in state court was filed more than one year after her accident. However, Ms. Ferrell contends that her timely filed suit in federal court, which was pending at the time the state court suit was filed, but was subsequently dismissed, interrupted prescription at to the later filed state court suit. In response to Ms. Ferrell's position, the defendants cite La. Civ. Code art. 3463, which states:

> An interruption of prescription resulting from the filing of a suit in a competent court and in the proper venue or from service of process within the prescriptive period continues as long as the suit is pending. **Interruption is considered never to have occurred if the plaintiff** abandons, **voluntarily dismisses the action at any time either before the defendant has made any appearance of record or**

thereafter, or fails to prosecute the suit at the trial. (Emphasis added.)

When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written. La. Civ. Code art. 9. Ms. Ferrell voluntarily dismissed the suit in federal court, which is noted in the April 22, 2013 "Ruling and Order" issued by the federal court. Consequently, La. Civ. Code art. 3463 unambiguously provides that any interruption of prescription resulting from the first suit "is considered never to have occurred" as a result of Ms. Ferrell having voluntarily dismissed the first suit. Since interruption was deemed never to have occurred, the filing of the second suit, even before the dismissal of the first suit, was untimely as the second suit was filed more than a year after the alleged tortious conduct sued upon occurred. See **Sims v. American Ins. Co.**, 2012-0204 (La. 10/16/12), 101 So.3d 1, 6. Accordingly, we find no merit to this assignment of error.

II. Contra Non Valentem

In her second assignment of error, Ms. Ferrell contends that the district court erred in failing to apply the doctrine of *contra non valentem* and contends that that doctrine saves her case from prescribing against Wal-Mart and Stewart. In support of her contention, Ms. Ferrell argues that Wal-Mart concealed the existence and identity of the alleged tortfeasor, Mr. Stewart, until after the anniversary of her slip and fall. She argues that Wal-Mart did not produce the surveillance video timely despite her request. Further, Ms. Ferrell asserts that she was not aware of how the water got on the floor until she saw the video she received from Wal-Mart which, apparently showed a man carrying a mop without a bucket. Ms. Ferrell believes this man to be Mr. Stewart. According to Ms. Ferrell, she filed in federal court because she was not aware of Mr. Stewart, a Louisiana domiciled tortfeasor, at the

time she filed the federal suit, and the addition of Mr. Stewart eliminated the federal court's diversity jurisdiction.

The Louisiana Supreme Court has held that "[t]he doctrine [of *contra non valentem*] itself is based on the theory that when the claimant is not aware of the facts giving rise to his or her cause of action against the particular defendant, the running of prescription is for that reason suspended until the tort victim discovers or should have discovered the facts upon which his or her cause of action is based." **In re Medical Review Panel of Howard**, 573 So.2d 472, 474 (La. 1991). The Supreme Court recognized the four instances where *contra non valentem* can be applied to prevent the running of 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; and 4) where the cause of action is not known or reasonably knowable by the plaintiff, even though this ignorance is not induced by the defendant. These categories allow "the courts to weigh the 'equitable nature of the circumstances in each individual case' to determine whether prescription will be tolled." **Wells v. Zadeck**, 2011–1232 (La. 3/30/12), 89 So.3d 1145, 1150. The Supreme Court has cautioned that the doctrine only applies in exceptional circumstances. See **Marin v. Exxon Mobil Corporation**, 2009-2368 (La. 10/19/10), 48 So.3d 234, 245. Here, we need only attend to the third and fourth instances as Ms. Ferrell does not rely upon the first and second instances in her argument.

Initially, we note that Ms. Ferrell argues that *contra non valentem* applies to her case against Wal-Mart and Mr. Stewart. In a delictual action, prescription begins to run on the "day injury or damage is sustained." Clearly, Ms. Ferrell was

aware of her cause of action against Wal-Mart on the day her slip and fall occurred inside a Wal-Mart store. Her lack of knowledge about a possible additional defendant does not suspend the running of prescription against Wal-Mart. Therefore, we will address the doctrine of *contra non valentem* as it relates to Mr. Stewart.

Ms. Ferrell contends that Wal-Mart prevented her from filing suit against Mr. Stewart within one year of the accident because Wal-Mart intentionally withheld the surveillance video and the identity of Mr. Stewart until after the anniversary date of her slip and fall and therefore, the third category applies. The third category of *contra non valentem* prevents the running of prescription when the defendant has done some act effectually to lull the victim into inaction and prevent him from availing himself of his cause of action. **Marin**, 48 So.3d at 251-252.

Ms. Ferrell further contends that she knew nothing of Stewart's involvement in the fall until Wal-Mart produced the video. Therefore, Ms. Ferrell argues that the fourth category of *contra non valentem* applies. In the fourth category of *contra non valentem*, "the plaintiff must show not only that he did not know facts upon which to base his claim, but also that he did not have reason to know or discover such facts and that his lack of knowledge was not attributable to his own neglect." **Wilhike v. Polk**, 2008-0379 (La. App. 4 Cir. 11/19/08), 999 So.2d 83, 86.

After careful review of the record, we find the doctrine of *contra non valentem* does not apply in this case. Ms. Ferrell's attorney asserts that he requested the surveillance video from Wal-Mart on September 10, 2011, which was nearly a year before Wal-Mart sent the video. However, the letter sent by Ms. Ferrell's attorney on that date merely requested that the footage be preserved and did not request a copy of the video. Wal-Mart released its initial disclosure as

required by Federal Rule 26(a)(1), which contained the video on September 7, 2012, three months after suit was filed in federal court. There is nothing in the record to indicate that the disclosure was not timely. Further, the record reveals that Ms. Ferrell did not issue interrogatories to Wal-Mart until September 28, 2012, more than one year after the slip and fall. The interrogatories appear to be the first time Ms. Ferrell requested the identity of the man holding the mop.

The record clearly reveals that Wal-Mart did nothing to "lull the victim into inaction," and the fact that a Wal-Mart employee may have been responsible for the substance on the floor and the identity of that employee was "reasonably knowable" by the Ms. Ferrell within the prescriptive period. Therefore, neither category of *contra non valentem* applies, and the trial court correctly sustained defendants' peremptory exception raising the objection of prescription.

CONCLUSION

For the foregoing reasons, the judgment of the district court denying Ms. Ferrell's motion for new trial and maintaining Wal-Mart's and Mr. Stewart's peremptory exception raising the objection of prescription is affirmed. All costs of this appeal are assessed to plaintiff-appellant, Ashley N. Ferrell.

AFFIRMED.