**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2016 CW 1266R

BRADFORD EDWARDS AND TIA EDWARDS,
AS NATURAL TUTORS OF B. E., A MINOR

VERSUS

ALBERTSON'S, LLC & JOHN AND/OR JANE DOE I-II

**Judgment rendered** DEC 06 2017

* * * * * *

On Remand from the
Louisiana Supreme Court
On Supervisory Writ from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. 633,400
Honorable Janice Clark, Judge

* * * * * *

JOHN S. WILLIAMS
NEW ORLEANS, LA
AND
WENDELL T. LOCKE
PLANTATION, FLORIDA

ATTORNEYS FOR
PLAINTIFFS-RESPONDENTS
BRADFORD EDWARDS AND
TIA EDWARDS, AS NATURAL TUTORS
OF B. E., A MINOR

JOHN P. WOLFF, III
CHAD A. SULLIVAN
SYDNEE D. MENOU
BATON ROUGE, LA

ATTORNEYS FOR
DEFENDANT-RELATOR
ALBERTSON'S, LLC

* * * * * *

**BEFORE: WHIPPLE, C.J., PETTIGREW, McDONALD, HOLDRIDGE, AND PENZATO, JJ.**

McDonald, J. dissents for the reasons assigned by Judge Penzato.

Penzato, J dissents with reasons

Holdridge, J concurs and assigns Reasons

**PETTIGREW, J.**

This matter, which originated with a writ application to this court that was denied, is now back before us on remand from the Louisiana Supreme Court to reconsider and issue an opinion. The defendant and relator herein, Albertson's, LLC ("Albertson's"), challenges the trial court's denial of its motion for summary judgment in which Albertson's argued that plaintiffs' suit against it has prescribed. For the reasons that follow, we deny Albertson's writ application.

**FACTS AND PROCEDURAL HISTORY**

On September 10, 2014,[1] plaintiffs, Bradford Edwards and Tia Edwards, as parents and natural tutors of B. E., their minor autistic son who is nonverbal, filed suit for damages their son allegedly sustained after Albertson's erroneously filled and dispensed an extended-release form of the drug Dextroamphetamine (Dexedrine), instead of the prescribed immediate-release form of the same drug, in August 2013.

In December 2012, Dr. Brian Despinasse II, the minor's pediatrician, prescribed Dexedrine 10 mg immediate-release tablets for the Edwardses' minor child, to be taken twice a day; once in the morning and once at noon. The Edwardses had the prescription at issue filled on January 25, 2013, at Albertson's in Baton Rouge. Seven months later, in August 2013, the school nurse informed Mrs. Edwards that the drug listed on the medication release form for her son on file at the school differed from the extended-release form of the medicine in the Albertson's vial containing the minor's medication, of which she was in possession. Apparently, Albertson's had been dispensing the extended-release form of the drug rather than the immediate-release form of the drug for several months. Mrs. Edwards immediately notified Albertson's of its mistake concerning the form of the drug. Albertson's thereafter advised her that it would "have to make a claim." An Albertson's pharmacist then dispensed the correct immediate-release form to Mrs. Edwards.

[1] The original petition was originally fax-filed. Plaintiffs filed a hard copy of their petition for damages on September 15, 2014.

On or about September 9, 2013, Albertson's again erroneously dispensed the extended-release form of the drug. However, before leaving the store, Mrs. Edwards noticed the pharmacy error. Albertson's corrected the mistake and sent Mrs. Edwards home with the correct form. Mrs. Edwards, however, was again advised that Albertson's was "opening a claim" and would be sending her paperwork regarding the incident.

On or about October 2, 2013, Mrs. Edwards received Albertson's paperwork concerning her claim. She noticed that the paperwork included a medical authorization form for her son's records. This medical authorization form prompted her to begin researching the difference between the extended-release dosage and the immediate-release dosage of the drug. Mrs. Edwards represents that while conducting her research, she learned for the first time that the extended-release dosage of the drug could potentially cause her son to experience toxic levels of the medication. She also became aware that these toxic levels of the medication could cause many of the symptoms that her son had already been experiencing, including uncontrollable muscle spasticity and twitches, insomnia, dry mouth, gastrointestinal issues, and unsteadiness. Mrs. Edwards maintains this was the first time she became aware that the extended-release form of the medication could be the cause of those symptoms.

Believing their minor son had suffered toxic levels of the medication erroneously dispensed by Albertson's, the Edwardses filed the instant lawsuit. In response to the suit, Albertson's filed a motion for summary judgment, arguing that the Edwardses' cause of action had prescribed, since it was filed more than one year after Mrs. Edwards had actual knowledge that Albertson's had filled and dispensed an extended-release form rather than the immediate-release form of her son's medication. After hearing arguments on the motion on September 19, 2016, the trial court denied Albertson's motion, finding "that the facts here are not sufficient to excite attention, put the injured party on notice or on guard to begin a reasonable inquiry." Albertson's thereafter sought supervisory review from this court. On January 6, 2017, this court denied Albertson's writ application. Albertson's subsequently sought review from the Louisiana Supreme Court, again seeking dismissal of the lawsuit on the grounds that it has prescribed. The supreme court granted

Albertson's writ application and remanded the matter to us for reconsideration and an opinion.

**APPLICABLE LAW**

Although typically asserted through the procedural vehicle of the peremptory exception, the defense of prescription may also be raised by motion for summary judgment. **Doe v. Jones**, 2002-2581, p. 4 (La. App. 1 Cir. 9/26/03), 857 So.2d 555, 557. When prescription is raised by motion for summary judgment, review is again *de novo*, using the same criteria used by the district court in determining whether summary judgment is appropriate. **Hogg v. Chevron USA, Inc.**, 2009-2632, p. 6 (La. 7/6/10), 45 So.3d 991, 997.

**Summary Judgment**

Appellate courts review summary judgments *de novo,* using the same criteria that govern the trial court's determination of whether summary judgment is appropriate, which includes whether there is a genuine issue of material fact and whether the mover is entitled to judgment as a matter of law. **Holt v. Torino**, 2012-1579, p. 4 (La. App. 1 Cir. 4/26/13), 117 So.3d 182, 185, writ denied, 2013-1161 (La. 8/30/13), 120 So.3d 267.

The burden is on the mover for summary judgment to show that no genuine issue of material fact exists. However, if the moving party will not bear the burden of proof on the issue at trial and points out that there is an absence of factual support for one or more elements essential to the adverse party's claim, action or defense, then the non-moving party must produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is entitled to judgment as a matter of law. La. Code Civ. P. art. 966(D)(1). If the opponent of the motion fails to do so, there is no genuine issue of material fact and summary judgment will be granted. **Sanchez v. Georgia Gulf Corporation**, 2002-1617, p. 8 (La. App. 1 Cir. 8/13/03), 853 So.2d 697, 703. Moreover, as noted in La. Code Civ. P. art. 967(B), the opposing party cannot rest on the mere allegations or denial of his pleadings, but his response, by affidavits, depositions, or answers to interrogatories, must set forth specific facts showing there is a genuine issue for trial.

**Prescription**

Louisiana Civil Code Article 3492 provides that delictual actions are subject to a liberative prescription of one year, which commences to run from the day injury or damage is sustained. **Raborn v. Albea**, 2013-0633, pp. 6-7 (La. App. 1 Cir. 4/16/14), 144 So.3d 1066, 1070-1071, writ denied, 2014-1239 (La. 9/26/14), 149 So.3d 264. Ordinarily, the party pleading prescription bears the burden of proving the claim has prescribed. **Hogg**, 2009-2632 at 7, 45 So.3d at 998. However, if a petition has prescribed on its face, the burden shifts to the plaintiff to show that the action has not prescribed. **Wheat v. Nievar**, 2007-0680, p. 4 (La. App. 1 Cir. 2/8/08), 984 So.2d 773, 775. Generally, prescription statutes are strictly construed against prescription and in favor of the claim sought to be extinguished by it. **Bailey v. Khoury**, 2004-0620, p. 9 (La. 1/20/05), 891 So.2d 1268, 1275.

Prescription commences when a plaintiff obtains actual or constructive knowledge of facts indicating to a reasonable person that he or she is the victim of a delictual action wherein injury or damage was sustained. Constructive knowledge is whatever notice is enough to excite attention and put the injured party on guard to call for inquiry. Such notice is tantamount to knowledge or notice of everything to which a reasonable inquiry may lead. A plaintiff's mere apprehension that something may be wrong is insufficient to commence the running of prescription unless the plaintiff knew or should have known through the exercise of reasonable diligence that his problem may have been caused by acts of negligence. **Campo v. Correa**, 2001-2707, p. 12 (La. 6/21/02), 828 So.2d 502, 510-511. Even if a tort victim is aware that an undesirable condition has developed, prescription will not run as long as it was *reasonable* for the plaintiff not to recognize that the condition might be treatment related. The ultimate issue is the *reasonableness* of the individual's action or inaction. **Griffin v. Kinberger**, 507 So.2d 821, 823-824 n.2 (La. 1987).

## DISCUSSION/ANALYSIS

As mover on summary judgment, Albertson's had the burden of demonstrating that no genuine issue of material fact existed regarding the untimeliness of the Edwardses' petition. However, because the Edwardses' petition, fax-filed on September 10, 2014, with a hard copy following on September 15, 2014, was prescribed on its face, Albertson's burden shifted to the Edwardses to show that their action was not prescribed.

Relying on Mrs. Edwards' deposition testimony, Albertson's argues that the one-year prescriptive period began to run in August 2013, when Mrs. Edwards learned from the school nurse that the drug listed on the medication release form at the school was for the immediate-release form, and differed from the extended-release form in the Albertson's vial containing the minor's medication. Albertson's claims that the Edwardses knew at this time that it had been dispensing the wrong form of the drug for several months. Further, Albertson's submits the Edwardses conceded, in answer to interrogatory No. 13, that as of August 2013, they had knowledge that an alleged dispensing error occurred and the minor child had taken the erroneously dispensed form of the medication for several months.

Albertson's relies on **Leboeuf v. Kmart Corporation**, 2010 WL 3719900 (W.D. La. 9/15/2010), a case it contends supports reversal of the trial court's decision in this matter. In **Leboeuf**, the plaintiff brought suit against Kmart as the result of an erroneously filled prescription. Plaintiff obtained the medication on October 20, 2008, ingested the medication, and subsequently suffered side effects for which she sought medical treatment. She returned to the pharmacy on November 1, 2008, and informed it that she received the wrong medication. In response, the pharmacist filled out an incident report. Plaintiff did not file suit until December 23, 2009. In response, Kmart filed a motion for summary judgment, which the trial court granted. In finding that plaintiff's action was prescribed, the trial court noted that the pharmacist's testimony and the incident report established that plaintiff possessed at least constructive notice of the pharmacy's negligence before visiting the Kmart pharmacy on November 1, 2008, to

inform it of the incorrectly filled prescription. The trial court held that knowledge of the dispensing error and the immediate side effects of taking the erroneous dosage was sufficient to put plaintiff on notice that she had a viable claim.

Also, in **Fisher v. Walgreens Louisiana Corp., Inc.**, 99-475 (La. App. 5 Cir. 10/13/99), 746 So.2d 161, the plaintiff obtained a prescription for a topical hand cream from Walgreens on January 9, 1997. She testified that she had previously used this medication, but that upon use of the subject prescription, she noticed a difference in the side effects. Plaintiff testified in her deposition that she suspected the prescription she received was incorrect on January 9, 1997, because when she applied the hand cream that evening, she screamed, noting red spots breaking out on her hand and said she should "get up and go and check this cream out." **Fisher**, 99-475 at 4, 746 So.2d at 162. She did not file suit however, until January 12, 1998. The court found that plaintiff's action was prescribed because she had knowledge that she may have been given the incorrect cream on January 9, 1997, and that she sustained damage from the use of the cream at that time.

The Edwardses maintain the **Fisher** and **Leboeuf** cases are significantly distinguishable from the facts of this case. They acknowledge that they, similar to the plaintiffs in **Fisher** and **Leboeuf**, were aware that the pharmacy had dispensed the incorrect form of their son's medication earlier than one year before filing suit, but claim that, unlike the plaintiffs in **Fisher** and **Leboeuf**, their son did not display negative side effects or symptoms immediately upon taking the medication. The Edwardses maintain that they were completely unaware that their son's health symptoms were in any way related to ingesting the extended-release medication instead of the prescribed immediate-release form of the same medication. And, it was not until Albertson's paperwork of October 2, 2013, requesting medical release forms that they were incited to investigate further what, if any, potential injurious effects their son might have suffered as a result of Albertson's dispensing error.

The Edwardses assert that this research revealed for the first time that their son's twitches, uncontrollable muscle spasticity, unsteadiness, insomnia, dry mouth, and

gastrointestinal issues were potentially related to ingesting the wrong dosage of the medication and that their child was exposed to toxic levels of Dexedrine. They filed suit within one year of acquiring such knowledge from their research in October 2013, and maintain their suit was timely filed and summary judgment was properly denied by the trial court. We agree.

We find **Fisher** and **Leboeuf** distinguishable on the material facts of this case. They are not controlling. We also find the Edwardses have sufficiently met their burden of proving there were material issues of fact as to when prescription actually began to run on their claim. The trial court was left with several options, all of which had material issues of fact in dispute. Therefore, we cannot say the trial court erred in denying Albertson's motion for summary judgment.

## CONCLUSION

For the foregoing reasons, we deny Albertson's writ application and remand this matter to the trial court for further proceedings consistent with this opinion.

**WRIT DENIED.**

GH BJP

**HOLDRIDGE, J., concurs.**

I respectfully concur. In this motion for summary judgment, the main issue is the knowledge (actual or constructive) which the plaintiffs had and the reasonableness of their actions. Specifically, prescription commences when a plaintiff obtains actual or constructive knowledge of facts indicating to a reasonable person that he is the victim of a tort. **Guillot v. Doughty**, 2013-1348 (La. App. 1 Cir. 3/21/14), 142 So.3d 1034, writ denied, 2014-0824 (La. 6/13/14). 140 So.3d 1192. When the plaintiffs are unaware of the facts giving rise to their cause of action against a particular defendant, the running of prescription is suspended, for that reason, until the tort victim discovers, or should have discovered, the facts upon which their cause of action is based. **Id.** Constructive knowledge is whatever notice is enough to excite the attention and put the injured person on guard and call for inquiry.[1] **Campo v. Correa**, 2001-2707 (La. 6/21/02), 828 So.2d 502, 511. The ultimate issue in determining constructive knowledge is the reasonableness of the plaintiff's action or inaction, in light of their education, intelligence, the severity of the symptoms, and the nature of the defendant's conduct. **Id.**

It has long been held by this court that a motion for summary judgment is rarely appropriate for a determination based on subjective facts, such as intent, motive, malice, **knowledge**, or good faith. *See* **Baldwin v. Board of Sup'rs for**

[1] "Such information or knowledge as ought to reasonably put the alleged victim on inquiry is sufficient to start running of prescription." **Id.**

**University of Louisiana System**, 2006-0961 (La. App. 1 Cir. 5/4/07), 961 So.2d 418, 422; **Bilbo for Basnaw v. Shelter Insurance Co.**, 96-1476 (La. App. 1 Cir. 7/30/97), 698 So.2d 691, 694, writ denied, 97-2198 (La. 11/21/97), 703 So.2d 1312; **Meyer & Associates, Inc. v. Coushatta Tribe of Louisiana**, 2014-1109 (La. App. 3 Cir. 1/27/16), 185 So.3d 222, 242, writ denied, 2016-00369 (La. 4/22/16), 191 So.3d 1048 (emphasis added). Similarly, it has long been held that issues requiring the determination of reasonableness of acts and conduct of parties under all facts and circumstances of the case cannot ordinarily be disposed of by summary judgment. *See* **Monroe Surgical Hospital, LLC v. St. Francis Medical Center, Inc.**, 49,600 (La. App. 2 Cir. 8/21/14), 147 So.3d 1234, 1247, writ denied, 2014-1991 (La. 11/21/14), 160 So.3d 975; **Bladwin**, *supra*; **Granda v. State Farm Mutual Insurance Co.**, 2004-1722 (La. App. 1 Cir. 2/10/06), 935 So.2d 703, 707, writ denied, 2006-0589 (La. 5/5/06), 927 So.2d 326.

In this motion for summary judgment, this court is called upon to make a *de novo* review of the evidence submitted to determine the reasonableness of the actions of the parents of an autistic, non-verbal minor child who was given the wrong medication by the defendant. Without making any credibility determinations and without weighing any of the evidence,[2] it is impossible for this court to find that there are no genuine issues of material fact and that the defendant is entitled to a judgment as a matter of law. What knowledge the parents obtained, what symptoms the minor child exhibited, what symptoms of the minor child were caused by the improper dosage of the medication, when would a reasonable person in the parents' position have taken action, and how should the parents' knowledge and reasonableness be viewed in light of the previous medical problems the minor

---

[2] The law is well settled that the trial court cannot make credibility determinations, evaluate testimony, or weigh conflicting evidence in making its decision whether to grant or deny a motion for summary judgment. **Fonseca v. City Air of Louisiana, LLC**, 2015-1848 (La. App. 1 Cir. 6/3/16), 196 So.3d 82, 89.

child had are all questions which go to the knowledge and reasonableness of the parents' actions and are improper for a determination in a summary judgment proceeding. Therefore, I concur that the defendant's motion for summary judgment should be denied.[3]

[3] Questions of knowledge and reasonableness may be raised in a properly filed peremptory exception raising the objection of prescription, wherein the trial court can weigh the evidence and make credibility determinations. *See* La. C.C.P. art. 927(1), **Campo**, supra.

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2016 CW 1266R**

**BRADFORD EDWARDS AND TIA EDWARDS,**
**AS NATURAL TUTORS OF BLAINE EDWARDS, A MINOR**

**VERSUS**

**ALBERTSON'S, LLC**

**PENZATO, J., dissents, and assigns reasons.**

I respectfully dissent from the majority opinion in the matter for the following reasons.

Tia Edwards, the child's mother, holds a master's degree. Her deposition established that in August of 2013 plaintiffs learned from the school nurse that there was an error in connection with the child's medication. Mrs. Edwards confirmed that prior to September 9, 2013, she was contacted by defendant's representative who indicated that defendant had made a mistake in filling the prescription and that a claim was being opened. Mrs. Edwards also confirmed by way of deposition that there were things that physically occurred with the child that had not occurred prior to him taking the medication. This information, especially in the hands of a parent who has admittedly taken an active role in providing information to teachers concerning her son's underlying condition, constituted notice enough to excite attention and put the plaintiffs on guard to call for inquiry prior to September 9, 2013. *See Campo v. Correa*, 2001-2707 (La. 6/21/02), 828 So. 2d 502, 510–11.

Accordingly, I would grant the writ and reverse the ruling of the trial court denying Albertson's motion for summary judgment.