NOT DESIGNATED FOR PUBLICATION

DREAU JARMA ON BEHALF OF DR. ANDREA LEIGH JARMA	*	**NO. 2009-CA-0817**
	*	**COURT OF APPEAL**
VERSUS	*	**FOURTH CIRCUIT**
GALE GELSTON AND ABC INSURANCE	*	**STATE OF LOUISIANA**

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2008-3923, DIVISION "I-14"
HONORABLE PIPER D. GRIFFIN, JUDGE
* * * * * *

JAMES F. MCKAY III
JUDGE

* * * * * *

(Court composed of Judge Charles R. Jones, Judge James F. McKay III, Judge Michael E. Kirby)

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AFFIRMED

Plaintiffs, Dreau Jarma and Simon Jarma, on behalf of Dr. Andrea L. Jarma (Dr. Jarma), their deceased daughter and sister, respectively, appeal the November 24, 2008 judgment granting an exception of prescription and the February 12, 2009 judgment granting an exception of *res judicata* in favor of defendant, Gale Gelston (Ms. Gelston). For the reasons set forth below, we affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On June 27, 2006, Dr. Jarma, a family practice physician at East Jefferson Hospital, became ill with severe jaundice and was sent home from work. Dr. Jarma died five days later on July 2, 2006.

On April 10, 2008, plaintiffs filed a wrongful death action against Ms. Gelston, Dr. Jarma's life partner. The petition alleges that Ms. Gelston took Dr. Jarma to the emergency room two days prior to her death, only after her condition was terminal, and Dr. Jarma's life could not be saved. The petition alleges that Ms. Gelston, an "assistant director of pathology" at Tulane Hospital, was negligent in failing to recognize that Dr. Jarma was in immediate need of medical treatment.

Ms. Gelston filed an exception of prescription, which was brought before the trial court on October 24, 2008. Judgment was rendered on November 24, 2008,

granting the exception of prescription. On November 7, 2008, prior to the rendition of judgment, plaintiffs filed an amended petition, alleging that Ms. Gelston "intentionally" failed to seek timely medical attention on behalf of Dr. Jarma. In response, Ms. Gelston filed an exception of *res judicata* on November 24, 2008, arguing that the amended petition reasserted the same issues which the trial court held to be prescribed. On January 16, 2009, plaintiffs filed a motion to convert the amended petition into a motion to reconsider argument on the exception of prescription. Plaintiffs' motion to reconsider the exception of prescription was set for hearing on February 20, 2009. It appears from the record that this motion was never heard by the trial court.

On January 23, 2009, plaintiffs filed a notice of devolutive appeal from the November 24, 2008 judgment granting the exception of prescription. The trial court signed the order for appeal on January 26, 2009. It does not appear that this appeal was ever lodged with this Court.

Ms. Gelston's exception of *res judicata* was brought before the trial court on January 23, 2009. As explained in the reasons for judgment, the trial court was inclined to grant the exception; however, the matter was taken under advisement due to the fact that the plaintiffs' amended petition/motion to reconsider had not been reviewed by the trial court. The exception of *res judicata* was granted on February 12, 2009. On April 17, 2009, plaintiffs filed a motion for devolutive appeal from the granting of the exception of *res judicata*.

DISCUSSION

On appeal, plaintiffs' statement of jurisdiction asserts that this appeal lies from both actions, i.e., the judgment granting the exception of prescription and the judgment granting the exception of *res judicata*. However, plaintiffs' only

assignment of error is that the trial court erred in finding that the matter had prescribed. Plaintiffs' brief fails to set forth any argument regarding the granting of the exception of *res judicata*. Likewise, Ms. Gelston's appellee brief does not address the exception of *res judicata*.

Uniform Rules-Courts of Appeal, Rule 1-3 provides that Louisiana courts of appeal "will review only issues which were submitted to the trial court and which are contained in specifications or assignments of error, unless the interest of justice clearly requires otherwise." Additionally, Uniform Rules-Courts of Appeal, Rule 2-12.4 requires that all specifications or assignments of error must be briefed. Rule 2-12.4 further states that "[t]he court may consider as abandoned any specification or assignment of error which has not been briefed." *See Norwest Bank v. Walker*, 2005-1068, p. 7 (La. App. 4 Cir. 5/24/06) 933 So.2d 222, 226. In the present case, because the granting of the exception of *res judicata* is not asserted as an assignment of error, or briefed, we do not consider it. Accordingly, our discussion is restricted to the exception of prescription.

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. *Katz v. Allstate Ins. Co*., 2004-1133, p. 2 (La. App. 4 Cir. 2/2/05), 917 So.2d 443, 444. 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. *Id.*

Delictual actions generally are subject to a liberative prescription of one year, which commences to run from the day injury or damage is sustained. La. C.C. art. 3492. Prescription begins to run when damage to the plaintiff has

manifested itself with sufficient certainty to support accrual of a cause of action. La. C.C. art. 3492; *Cameron Parish School Bd. v. Acands, Inc.*, 96-0895, p. 6-7 (La. 1/14/97), 687 So.2d 84, 88. Prescriptive statutes are strictly construed against prescription and in favor of the obligation sought to be enforced. *Lima v. Schmidt*, 595 So.2d 624, 629 (La. 1992).

When the face of the petition shows the prescriptive period has already elapsed, the plaintiff has the burden of establishing that suspension, interruption, or renunciation of prescription has occurred. *Ferguson v. Sugar*, 2005-0921, p. 20 (La. App. 4 Cir. 6/25/08), 988 So.2d 816, 830, *writ denied*, 2008-2179 (La. 12/12/08), 996 So.2d 1118. Here, the action appears to be prescribed on its face; the burden is on plaintiffs to prove the suspension or interruption of the prescriptive period.

Plaintiffs maintain that the doctrine of *contra non valentem* applies to suspend the commencement of prescription. Under the judicially created doctrine of *contra non valentem*, prescription is suspended (1) when there was some legal cause which prevented the courts or their officers from taking cognizance of or acting on the plaintiff's action; (2) when 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 this cause of action; and (4) where the cause of action is not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant. *Renfroe v. State ex rel. Dept. of Transp. and Development*, 2001-1646, p. 9 (La. 2/26/02), 809 So.2d 947, 953. The doctrine of *contra non valentem* applies only in exceptional circumstances, and must be strictly construed. *Id*. The doctrine does not exempt the plaintiff if the

plaintiff's ignorance is attributable to his own willfulness or neglect. A plaintiff will be deemed to know what he could by reasonable diligence have learned. *Id*., p. 10, 809 So.2d at 953.

A plaintiff bears the burden of proving one of the foregoing situations applies in order to defeat an exception of prescription on the basis of *contra non valentem*. *Maurice v Prudential Ins. Co*., 2002-0993, p. 7 (La. App. 4 Cir. 10/23/02), 831 So.2d 381, 386. In this appeal, plaintiffs argue that the fourth category of *contra non valentem*, commonly referred to as the discovery rule, is relevant. Specifically, plaintiffs argue that it was impossible to know the negligence of Ms. Gelston until a second autopsy was performed on August 13, 2007, and a confrontation between plaintiffs and Ms. Gelston in May, 2007, over the disposal of Dr. Jarma's property. We find no merit in this argument.

The record before us contains no autopsy report and no evidence regarding the alleged confrontation between plaintiffs and Ms. Gelston. Consequently, plaintiffs have set forth nothing to show that their cause of action against Ms. Gelston was not "reasonably knowable" at the time of Dr. Jarma's death. It is evident from the record that plaintiffs were aware of Ms. Gelston's actions, or inactions, at the time of Dr. Jarma's death. The fact that Ms. Gelston did not bring Dr. Jarma to the emergency room sooner, did not call 9-1-1, did not call an ambulance, did not call Dr. Jarma's treating physician, and did not call Dr. Jarma's family, as alleged in the petition, was known or should have been known by plaintiffs within the one-year prescriptive period. In sum, we find plaintiffs failed to carry their burden of proving that prescription was suspended.

CONCLUSION

Given the facts and circumstances of the present case, we find no error on the part of the trial court in sustaining the exception of prescription and implicitly rejecting plaintiffs' assertion of the discovery rule exception of *contra non valentem.* Thus, the judgment is affirmed.

AFFIRMED