

Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **13th day of May, 2022** are as follows:

BY Genovese, J.:

2021-C-00954

*MEDICAL REVIEW PANEL FOR THE CLAIM OF RICHARD BUSH,
DECEASED, ET AL. PCF NO. 2018-01209* (Parish of St. Bernard)

REVERSED IN PART. AFFIRMED IN PART. REMANDED TO THE
TRIAL COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH
THIS OPINION. SEE OPINION.

SUPREME COURT OF LOUISIANA

No. 2021-C-00954

MEDICAL REVIEW PANEL FOR THE CLAIM OF RICHARD BUSH, DECEASED, ET AL. PCF NO. 2018-01209

On Writ of Certiorari to the Court of Appeal, Fourth Circuit, Parish of St. Bernard
Genovese, J.

This Court granted this writ application in order to determine (1) whether *contra non valentem* interrupted prescription in this medical malpractice wrongful death case; and, (2) whether the court of appeal erred in relying on documents that were not entered as evidence and were not part of the record. For the reasons that follow, we find that, while *contra non valentem* may interrupt prescription in a wrongful death claim in certain instances, it did not interrupt prescription in this case due to the fact that the court of appeal incorrectly considered documents that were not in evidence. For these reasons, we reverse the court of appeal’s ruling in part, affirm in part, and remand.

FACTS AND PROCEDURAL HISTORY

On November 21, 2017, Richard Bush presented to Saint Bernard Parish Hospital for depression and suicidal ideations. At the hospital, Dr. Miguel Aguilera treated and discharged him. Mr. Bush attempted re-admittance with the same complaints, but was refused re-admittance. Thereafter, Mr. Bush attempted suicide in the hospital bathroom. He was found alive and transported to University Hospital in New Orleans for treatment; however, he succumbed to his injuries from the suicide attempt and died on November 30, 2017. On November 19, 2018, his wife, Patricia Bush, on behalf of herself, her daughters, Madalyn Bush and Ashley Bush, and on behalf of the decedent, Richard Bush (plaintiffs herein), filed a formal pro se complaint with the Patient Compensation Fund (“PCF”) to convene a medical

review panel (“MRP”).¹ The complaint named Saint Bernard Parish Hospital Foundation Inc. d/b/a Ochsner Health System, Ochsner Medical Center and Dr. Aguilera (collectively, “SBPHF” or “defendants”) as defendants with the dates of the alleged malpractice occurring between November 21, 2017, and November 30, 2017.

With her complaint, Mrs. Bush included a filing fee of \$100. On December 4, 2018, the PCF notified her that she would need to submit another \$100 for the additional named defendant, and that failure to do so within 45 days would invalidate the complaint per La.R.S. 40:1231.8(A)(1). In the interim, SBPHF filed a petition to institute discovery in the Thirty-Fourth Judicial District Court. On January 22, 2019, Mrs. Bush received a second notification from the PCF advising her of the deficiency in her filing. However, she failed to timely remit the additional \$100; and on March 13, 2019, the PCF notified Mrs. Bush her complaint was without effect and that it would refund the \$100 that she submitted with the complaint.

On May 28, 2019, Mrs. Bush filed a second complaint with the PCF through counsel (collectively, the first and second PCF complaints are referred to as “plaintiffs’ initial PCF complaints”). The PCF acknowledged receipt of this complaint along with the requisite \$200 filing fees. On August 30, 2019, SBPHF filed an exception of prescription asserting that, as the alleged dates of malpractice were still between November 21, 2017, and November 30, 2017, the second complaint was prescribed on its face.² Notably, the two PCF complaints filed by

¹In pertinent part, La.R.S. 9:5628(A) provides that no medical malpractice action shall be brought unless filed within one year from the date of the alleged malpractice or within one year from the date of discovery of the alleged malpractice.

Additionally, La.R.S. 40:1231.8(A)(1)(a) requires that all medical malpractice claims be submitted to a medical review panel before a civil action may be instituted. The one-year prescriptive period for medical malpractice action is suspended during the pendency of medical review panel proceedings until 90 days after the claimant receives formal notice of the medical review panel’s opinion.

² Dr. Aguilera also filed a peremptory exception of prescription on September 23, 2019, adopting the arguments of SBPHF.

Mrs. Bush did not suggest any circumstances that delayed the discovery of any alleged malpractice.

On October 10, 2019, Mrs. Bush filed an opposition, arguing for the first time that *contra non valentem* barred the exception of prescription in this case. Specifically, she argued that until October 2018, she was unaware of an SBPHF internal policy requiring the hospital to admit suicidal patients. In conjunction with her opposition, on October 17, 2019, Mrs. Bush filed a supplemental PCF complaint (the “plaintiffs’ supplemental PCF complaint”) alleging that discovery of this internal policy was her first indication that SBPHF had committed malpractice. Prior to this discovery, she was not aware of any breach of the standard of care by SBPHF that might have contributed to her husband’s death. Mrs. Bush concluded that because of the delayed discovery of the potential malpractice, prescription did not begin to run until October 2018. Therefore, her second complaint filed on May 28, 2019 was timely. In support of this argument, Mrs. Bush relied on her copy of the October 17, 2019 supplemental PCF complaint and her own affidavit (executed on October 17, 2019) attesting to the delayed discovery.

A hearing on the exception of prescription was held on October 18, 2019. Defendants offered, filed, and introduced plaintiffs’ initial PCF complaints during the hearing. Plaintiffs presented Mrs. Bush’s affidavit and the supplemental and amended request for an MRP. **However, these documents were not offered, filed, or introduced into evidence at the hearing, and no testimony was presented by plaintiffs.** The trial court granted SBPHF’s exception of prescription as to the wrongful death claim.³

³ The trial court ruling also permitted additional discovery on the issue of whether *contra non valentem* applied to the survival action, and the court of appeal affirmed the trial court’s ruling. While this issue is nominally mentioned in defendants’ briefs to this Court, defendants present no argument on this issue. Accordingly, it is deemed abandoned. *State v. Jones*, 340 So.2d 563 (La.1976); *State v. Blanton*, 325 So.2d 586 (La.1976).

Mrs. Bush filed a motion for new trial, asserting that the trial court erred in dismissing the wrongful death claim, which the trial court denied. The trial court also designated its judgment granting SBPHF's exception of prescription as to the wrongful death action as final. Mrs. Bush devolutively appealed from the denial of her motion for new trial. The court of appeal converted the devolutive appeal from the motion for new trial to an appeal on the merits. *See Clotworthy v. Scaglione*, 11-1733, p. 3 (La.App. 4 Cir. 5/23/12), 95 So.3d 518, 520 (citing *Smith v. Hartford Acc. & Indem. Co.*, 254 La. 341, 223 So.2d 826, 828-29 (La.1969) ("We consider an appeal of the denial of a motion for new trial as an appeal of the judgment on the merits as well when, as here, it is clear from the appellant's brief that he intended to appeal the merits of the case.)) The court of appeal ultimately reversed the trial court's judgment regarding the exception of prescription for plaintiffs' wrongful death claims.⁴ *Med. Rev. Panel for Bush*, 20-0468 (La. App. 4 Cir. 6/2/21), 2021 WL 2217464.⁵ The court of appeal found, in pertinent part, that plaintiffs met their burden in asserting *contra non valentem*:

Unlike *Hotard* [*v. Banuchi*, 00-1364 (La. App. 5 Cir. 1/30/01), 784 So.2d 654], and *In re Guidry*[, 17-0105, (La. App. 5 Cir. 8/30/17), 225 So.3d 1169], where the fact-intensive reasonableness inquiry showed the plaintiffs' delay in discovering the alleged malpractice was unreasonable, in this case[,] Defendants failed to rebut Ms. Bush's attestation as to the date of discovery of the alleged malpractice. Similar to *Brooks* [*v. Meaux*, 18-0980 (La. App. 3 Cir. 6/12/19), 275 So.3d 41, writ denied, 19-01135 (La. 10/8/19), 280 So.3d 590], we conclude that the record before this court supports that it was reasonable for the Bush Family to not recognize that Defendants possibly committed malpractice until they discovered, by receiving the complete medical records, including the hospital's policy and procedures, that Defendants did not follow their own policies and procedures. Thus, the district court's finding[] that the alleged delay was reasonable as to the survival action[,], but "the reasonableness of delaying inquiry as to the [wrongful

⁴ The court of appeal also affirmed the trial court's ruling on the denial of the exceptions of prescription related to plaintiffs' survival action and remanded the matter back to the trial court.

⁵ Judge Belsome concurred in the result and assigned reasons, emphasizing that no statutory or jurisprudential rule precludes the full application of the doctrine of *contra non valentem* exception under qualifying circumstances in a wrongful death case.

death] was not proven to the Court's satisfaction,” is not supported by the record.

Bush, 20-0468, at pp. 20–21. **The court of appeal noted that it rendered judgment in favor of plaintiffs without reviewing the transcript from the original October 18, 2019 hearing on the exceptions of prescription.**⁶ In its opinion, the court of appeal further stated that Mrs. Bush’s affidavit and the amended medical malpractice complaint were offered, filed, and introduced into evidence. **However, a review of the trial transcript reveals that this did not occur.** Following the issuance of the court of appeal ruling, defendants filed writ applications in this Court.

SBPHF argues that *contra non valentem* should only apply in exceptional circumstances. *Specialized Loan Servicing, L.L.C. v. January*, 12-2668 (La. 6/28/13), 119 So.3d 582, 585. In *Campo v. Correa*, 01-2707 (La. 6/21/02) 828 So.2d 502, this Court determined that in order for *contra non valentem* to apply to a medical malpractice case, the plaintiff must present facts alleged with particularity to show the plaintiff was unaware of the malpractice prior to the alleged date of the discovery, and delay in filing suit was not due to willful, negligent, or unreasonable action/inaction. 01-2707, 828 So.2d at 509. Defendants note that plaintiffs alleged that a letter was submitted to the PCF supplementing the request for an MRP. However, defendants aver that this letter, never stamped “received” by the Division of Administration and never entered into evidence, is insufficient proof that the doctrine of *contra non valentem* would preserve plaintiffs’ claims and defeat the exceptions of prescription.

Plaintiffs argue that *contra non valentem* applies to wrongful death actions, and, specifically, that it applies here because the discovery of the malpractice did not occur until Mrs. Bush learned of the hospital’s required-admittance policy in

⁶*Bush*, 20-0468, p. 7, n.5 (La. App. 4 Cir. 6/2/21) (“A copy of the transcript of the district court’s October 18, 2019 hearing is not contained in the appellate record.”)

October 2018. Mrs. Bush counters that any argument as to insufficient evidence and/or evidence not properly submitted was not raised by SBPHF in either the trial court or court of appeal; therefore, it has been waived. *See Johnson v. State*, 02-2382, p. 4 (La. 5/20/03), 851 So.2d 918, 921 (“[w]e cannot consider contentions raised for the first time in this court which were not pleaded in the court below and which the district court has not addressed”).

DISCUSSION

When evidence is introduced at the hearing on an exception of prescription, the trial court’s findings of fact are subject to the manifest error standard of review. *In re Medical Review Panel of Hurst*, 16-0934, p. 4 (La. App. 4 Cir. 5/3/17), 220 So.3d 121, 125-126. Under the manifest error standard of review, jurisprudence provides that if the fact finder’s ruling is reasonable, in light of a review of the record in its entirety, the court of appeal may not reverse. *Stobart v. State, Dep’t of Trans. And Dev.*, 617 So.2d 880, 882-883 (La. 1993). When no evidence is introduced at a hearing on an exception of prescription, it is analyzed on the facts pled in the petition, which are accepted as true, and review of the judgment is limited to whether the trial court’s decision was correct legally. *Julia Street v. City of New Orleans*, 17-0940, p. 4 (La. App. 4 Cir. 5/2/18), 246 So.3d 847, 849.

The prescriptive period governing a wrongful death claim is one year from the date of death. La.C.C. art. 2315.2. This Court discussed the relevant prescriptive periods for wrongful death claims asserted in a medical malpractice action in *Taylor v. Giddens*, 618 So.2d 834, 836 (La. 1993), stating that La.R.S. 9:5628 provides the prescriptive period for survival actions, but does not provide the prescriptive period for wrongful death actions. However, the Court found that 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. *Id.* When a party has sufficient information to excite attention and put the injured party on guard and call

for inquiry, that person has the constructive knowledge necessary to start the running of prescription. *Campo*, 828 So.2d at 510-11. The death of Mr. Bush on November 30, 2017, following his suicide attempt in the hospital bathroom, was certainly sufficient to excite attention to begin the running of prescription in the wrongful death claim filed by plaintiffs.

In *Campo*, this Court described the determinative factors to be considered in analyzing whether the doctrine of *contra non valentem* should interrupt prescription in a medical malpractice action; namely:

- (1)[A] petition should not be found prescribed on its face if it is brought within one year of the date of discovery and facts alleged with particularity in the petition show that the patient was unaware of malpractice prior to the alleged date of discovery, and the delay in filing suit was not due to willful, negligent, or unreasonable action of the patient. *Campo*, 01-2707 (La. 6/21/02), 828 So.2d at 509; and,
- (2) The ultimate issue is the *reasonableness* of the patient's action or inaction, in light of his education, intelligence, the severity of the symptoms, and the nature of the defendant's conduct. *Id.* at 511 (emphasis in original).

Plaintiffs discussed the amended PCF complaint and the October 2019 affidavit during the hearing on the exceptions of prescription. **However, these were never entered into evidence at the trial on the exceptions of prescription.** It is reversible legal error for an appellate court to assume all exhibits were introduced into evidence. *See Denoux v. Vessel Mgmt. Servs., Inc.*, 07-2143 (La. 5/21/08), 983 So.2d 84, 88 (evidence not properly offered cannot be considered even if it were physically placed in the record). "Appellate courts are courts of record and may not review evidence that is not in the appellate record, or receive new evidence." *Id.* (citing La.C.C.P. art. 2164). In *Denoux*, this Court reviewed the record and determined plaintiffs therein failed to formally introduce evidence in support of their opposition to an exception of prescription. *Id.* Accordingly, this Court found the lower courts erred in relying on this evidence and, instead, considered the exception of prescription in light of facts alleged in the petition. *Id.* Plaintiffs make much of

the fact that the parties **discussed** the relevant documents—plaintiffs’ supplemental PCF complaint and the affidavit attesting to Mrs. Bush’s delayed discovery of the required-admittance policy—during the hearing on the exceptions and motion for a new trial. However, these documents, **while discussed, were not admitted into evidence**. Because these documents were not admitted into evidence, they can neither form nor support the basis of the court of appeal’s ruling.

Plaintiffs’ supplemental PCF complaint contained the allegations regarding the timing of Mrs. Bush’s knowledge of SBPHF’s policy mandating the admittance of those who present with suicidal ideations. However, because the original suit in this case was initiated by SBPHF as a petition to institute discovery, the October 17, 2019 supplemental PCF complaint is not in the record as a pleading in its own right. A court cannot consider these allegations in the same way it could a standard petition absent its formal introduction as evidence. *See In re Spurlock*, 18-0666, p. 4 (La.App. 5 Cir. 4/24/19), 271 So.3d 338, 341 (it was error to consider request for MRP attached to petition to institute discovery that was not properly introduced into evidence); *Bailey v. Loewe*, 19-0915, p. 4 (La.App. 1 Cir. 8/3/20), 310 So.3d 746, 748 (“no petition nor evidence to consider” where a request for an MRP was attached, but not properly introduced into evidence).

Because the amended PCF complaint and Mrs. Bush’s affidavit are not part of the record, all that may be considered by this Court are plaintiffs’ initial PCF complaints introduced as evidence by defendants at the hearing on their exceptions of prescription (filed on November 19, 2018 and May 28, 2019, respectively). As discussed above, an MRP must be convened before a civil action may be instituted. A request for medical panel review is not valid and effective until the requisite filing fee is paid. The filing fee for the request is “one hundred dollars per named defendant” who is a qualified health care provider La.R.S. 40:1231.8(A)(1)(c). There is no dispute that defendants—Dr. Aguilera and the hospital—were qualified

healthcare providers. The filing fee must be paid within 45 days from the mailing date of the “confirmation of receipt” of the request for review. La.R.S. 40:1231.8(A)(1)(c).⁷ If a claimant fails to timely pay \$100 per named, qualified defendant, the request for medical panel review is invalid and without effect. More importantly, the request filed does not suspend prescription if the claimant fails to pay the full filing fee. Furthermore, La.R.S. 40:1231.8(A)(1)(e) provides as follows:

Failure to comply with the provisions of Subparagraph (c) or (d) of this Paragraph within the specified forty-five day time frame in Subparagraph (c) of this Paragraph shall render the request for review of a malpractice claim invalid and without effect. Such an invalid request for review of a malpractice claim shall not suspend time within which suit must be instituted in Subparagraph 2(a) of this subsection.

Thus, although the court of appeal properly set forth the law as to the application of *contra non valentem* in medical malpractice wrongful death actions, it incorrectly considered documents that were not in evidence in determining that *contra non valentem* applied in this case. Without these documents, the record lacks evidence that prescription began running in October 2018 (i.e., after Mrs. Bush discovered the required-admittance policy) as opposed to November 30, 2017 (the date of Mr. Bush’s death following his November 21, 2017 suicide attempt in the hospital bathroom).

CONCLUSION

Mrs. Bush’s affidavit attesting to her delayed discovery of the required-admittance policy and the amended complaint are simply not part of the record. Without these documents being properly introduced into evidence, there is nothing in the record to support a finding of *contra non valentem*, which would interrupt prescription. Therefore, the second, valid MRP complaint is prescribed on its face,

⁷ This “confirmation of receipt” issued by the PCF must: (1) confirm the receipt of the request by certified mail; (2) advise whether the named defendants are qualified health care providers; (3) notify the person making the amount of the filing fee and when it is due; and, (4) warn the person making the claim that an untimely payment of the filing fee does not interrupt prescription, La.R.S. 40:1231.8(A)(3), and renders the entire claim invalid and without effect.

having been filed more than one year from the date of Mr. Bush's death on November 30, 2017.

DECREE

For the foregoing reasons, we reverse the court of appeal's ruling in part as to the exceptions of prescription filed by defendants in response to plaintiffs' wrongful death claim, and reinstate the trial court's grant of defendants' exception of prescription as to the plaintiffs' wrongful death claim; we affirm the court of appeal ruling in all other respects; and, we remand the matter to the trial court for further proceedings consistent with this opinion.