2014 WL 4746520 (La.App. 4 Cir.) (Appellate Brief)
Court of Appeal of Louisiana, Fourth Circuit.

Kathryn Allred HUME, Individually and On Behalf of the Estate of Her Late Husband, Delvin Louis Hume; David Louis Hume; Darren Ladd Hume; Wendee Hume Delano; and David Leonard Hume, Petitioners-Appellants,

v.

PRESTIGE CARE, L.L.C. d/b/a Ferncrest Manor Living Center; ABC Insurance Company; Riaz UL Haque, M.D. And Louisiana Medical Mutual Insurance Company, Defendants-Appellees.

Nos. 2014-CA-0844, 2014-CA-0845.
September 22, 2014.

A Civil Proceeding On Appeal from the Civil District Court for the Parish of Orleans
The Honorable Lloyd J. Medley, Jr., Judge, Div. "D"
Docket Number: 2010-08343 C/W 2012-10067
Civil Proceeding

Original Brief On Behalf of Petitioners-Appellants, Kathryn Allred Hume, et al

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JURISDICTION OF THE COURT

This is an appeal from a final and appealable judgment of the Civil District Court for the Parish of Orleans, State of Louisiana, 2012-10067 c/w 2010-08343 (Exhibit "B" and 10-8343 I R. 38-41). Jurisdiction is proper under Article 5, Sec. 10 of the Louisiana Constitution and under LSA-C.C.P., art. 2081.

The Exception of Prescription by Ferncrest was heard on March 14, 2014, before the Honorable Lloyd J. Medley, Jr., Judge, Division "D" of the Civil District Court for the Parish of Orleans (Exhibit "A" and 10-8343 II R.). On April 28, 2014, the District Court issued its written Judgment with Reasons for Judgment (Exhibit "B" and 10-8343 I R. 38-41).

The April 28, 2014 Judgment lacked decretal language dismissing Ferncrest with prejudice, nor did it designate under LSA-C.C.P. art. 1951 that this judgment pertaining to only one of three parties-defendant was final and appealable. Therefore, on May 23, 2014, the Humes filed a Motion by Petitioners With Consent to Amend Judgment (Exhibit "C" and 10-8343 I R. 42-44), requesting that the April 28, 2014 judgment in this matter be amended in order that the District Court designate said judgment as final and appealable by expressly determining that there was no just reason for delay. This order was granted on May 28, 2014.

On June 3, 2014, Ferncrest filed a Motion to Amend and Clarify Judgment (Exhibit "D" and 10-8343 I R. 56-59) in order that the April 28, 2014 judgment, as amended on May 28, 2014, be further amended to provide that Ferncrest be dismissed from this action with prejudice, which motion was granted by the District Court on June 9, 2014 (Exhibit "D" and 10-8343 I R. 59). Also on June 9, 2014, the District Court granted the Humes' Motion for a Devolutive Appeal, ***3** which was filed on June 6, 2014 (10-8343 I R. 60-64). On June 17, 2014, the Humes then filed a Supplemental Motion for a Devolutive Appeal (10-8343 I R. 93-97), along with a Motion to Rescind Previous Motion by Petitioners for a Devolutive Appeal (10-8343 I R. 86-92). The Supplemental Motion for a Devolutive Appeal was determined by the Court to be moot on June 19, 2014 (10-8343 I R. 93-97), and the Motion to Rescind Previous Motion by Petitioners for a Devolutive Appeal and Supplemental Motion for a Devolutive Appeal was granted on June 19, 2014 (10-8343 I R. 86-92).

It is from the June 9, 2014 final amended judgment (10-8343 I R. 59) that petitioners-appellants have taken this devolutive appeal. The fees for the appeal were paid by petitioners on July 1, 2014. The Record hereof was filed with the Fourth Circuit Court of Appeal, State of Louisiana, on August 11, 2014.

STATEMENT OF THE CASE

NATURE OF THE CASE

This appeal arises out of a request for a Medical Review Panel (MRP) (12-10067 R. 309-312) and subsequent original and amended petitions filed by the Humes (12-10067 I R. 1-30) against Prestige Care, L.L.C. d/b/a Ferncrest Manor Living Center (hereinafter "Ferncrest"), a licensed nursing home facility, relative to the late Mr. Hume's thirty-day *respite* admission which began on April 29, 2009, but was cut short when Mrs. Hume removed him from Ferncrest at approximately 9:40 a.m. on May 3, 2009 (12-10067 II. R. 180-188). Petitioners-appellants are the surviving family of the late Mr. Hume: his widow, Kathryn Allred Hume, and their four adult children. The defendant-appellee is Prestige Care, L.L.C., a for-profit company d/b/a Ferncrest Manor Living Center (hereinafter "Ferncrest"). [1]

***4** Mr. Hume was born on XX/XX/1935, in Crossett, Arkansas, but soon moved to Louisiana, residing here until his death on May 24, 2009. Mr. Hume married Kathryn Allred on January 15, 1959, and remained happily and devotedly married to her for over fifty years until his death. Mr. and Mrs. Hume raised four children, one of whom was adopted, and also parented nineteen foster children. Mr. Hume spent his work life as a carpenter, iron worker and pile driver. At all times material hereto, the late Mr. Hume had with a multitude of maladies and conditions that considerably complicated management of his health care: diabetes mellitis; hyponatremia; cardiovascular heart disease (quadruple bypass in 1994); bipolar disorder; dementia without behavior disturbance; anorexia (self-induced vomiting); iron deficiency anemia; a prosthetic right leg resulting from an above-the-knee amputation in 1999 due to peripheral vascular disease; a prosthetic right eye resulting from a work accident in 1961; a missing right fifth finger due to another work accident in the 1970s; and a missing left fifth toe, which was amputated in the 1990s due to diabetic neuropathy (12-10067 II R. 313-331).

On March 28, 2008, the late Mr. Hume fell while attempting to enter a Golden Corral Restaurant in Kenner, LA, where the non-code-compliant handicapped ramps leading to the front entrances had no landings at the top. Mr. Hume had a head injury from his fall and was later diagnosed with Post-Concussion Syndrome (PCS). Undersigned counsel filed suit relative to this 2008 slip and fail accident for Mr. and Mrs. Hume in the Civil District Court for the Parish of Orleans on March 26, 2009. This suit was given case No. 2009-3196 and was allocated to Division "K-5" (12-10067 I R. 145-149). Mr. Hume's survivors were recognized by the court as parties-plaintiff in their motion granted on August 11, 2010.

***5** At the time of his admission to Ferncrest on April 29, 2009, he was considered to be stable but fragile (12-10067 II R. 180-188). Mr. Hume was not admitted to Ferncrest for treatment of any health problems of his own, but rather for thirty days of respite care while Mrs. Hume, who was his primary caregiver, had corneal transplant surgery and recovered (*Id*). On May 2, 2009, Mrs. Hume found her husband lying on the floor of his room at Ferncrest after having apparently fallen out of his bed at an earlier undetermined time (*Id*).

On May 3, 2009, a Ferncrest staff nurse refused to give Mr. Hume his prescribed diabetic medication, Glucophage, on the basis (later shown to be in error) that Mr. Hume had not been prescribed that medication (*Id*). That same day, May 3, 2009, Mrs. Hume removed her husband from the facility (*Id*). She thought that taking her husband home to familiar surroundings would be best for him (*Id*). Her primary reason for taking this action was that Mr. Hume was complaining about being in the nursing home, but she was also concerned about his appearance, his fall from the bed and the mix-up in administering his diabetic medication, Glucophage (*Id*). When Mrs. Hume removed her husband from Ferncrest on May 3, 2009, at approximately 9:40 a.m., she was totally unaware of any issues related to Acute Renal Failure resulting from dehydration. Nothing that she had seen or heard at the nursing home would have put her on notice of these issues. Mrs. Hume did not know of and could not

have known of Ferncrest's failure to monitor and attend to Mr. Hume's urinary output and state of hydration. Dehydration is a mostly invisible condition.

Upon leaving Ferncrest, Mrs. Hume first took Mr. Hume to their church for prayer, then brought him to their home in Chalmette and tried to feed him potato soup for lunch (*Id*). At about 1:30 p.m., only after Mr. Hume refused to eat at home and seemed to be doing poorly, did Mrs. Hume call his personal physician, ***6** Dr. Alper, who advised her to bring Mr. Hume to the E.R. at Touro Infirmary (*Id*). Mr. Hume arrived at the Touro Infirmary E.R. at approximately 2:00 p.m., where he was met by Dr. Alper and admitted (*Id*). Mr. Hume was found by nephrologist Dr. Francisco C. Cruz, Jr., to be severely dehydrated per the Touro Infirmary records dated May 3, 2009 [dictated/transcribed on May 4, 2009] (12-10067 I R. 176-179). However, this information was not relayed to Mrs. Hume, and there is nothing of record stating otherwise, only argument and conjecture by Ferncrest.

While at Touro, Mr. Hume was also diagnosed with an intestinal blockage and with a nodule in one lung (*Id*). These two diagnoses were discussed with Mrs. Hume. The blockage was resolved via an NG (nasogastric) tube, and per Dr. Alper's advice, Mrs. Hume decided to forego further treatment of the nodule (based on Dr. Alper's opinion that Mr. Hume would not survive such treatment). At this point, Mrs. Hume decided to put Mr. Hume in home hospice care (12-10067 II R. 180-188). On May 12, 2009, Mr. Hume was discharged from Touro Infirmary to home hospice care with Serenity Hospice Services (*Id*) under a diagnosis of "Stomach Cancer" (12-10067 I R. 169-175). Per the review of Mr. Hume's Touro medical records by the Serenity Hospice Medical Director, Dr. Cherie M. Drez, Mr. Hume's hospice diagnosis was changed to "Failure to Thrive" [2] (*Id*). Mr. Hume died in his home on May 24, 2009 surrounded by his wife and children (12-10067 II R. 180-202). The Death Certificate, which listed Mr. Hume's causes of death as "Acute Renal Failure" and "Cardiovascular Heart Disease" was signed by Dr. Drez on June 2, 2009, certified on June 4, 2009, and received by Mrs. Hume by mail during the period of June 5-8, 2009 (12-10067 II R.203).

***7** ACTION OF THE LOWER COURT

The request for a Medical Review Panel was filed on May 19, 2010 (12-10067 II R. 309-310), with a revised request letter filed on May 21, 2010 (12-10067 II R. 311-312). On July 11, 2012, a duly-convened Medical Review Panel rendered a unanimous opinion which held that there was a deviation from the required standard of care Ferncrest in the following areas: [1] failure to timely notify a physician of a patient's change in condition; and [2] failure to notify the physician of the lack of urinary output for further orders and/or treatment (12-10067 I R. 165). The Panel further concluded that "the conduct complained of was a factor of the resultant damages" (emphasis supplied) (*Id*). Notification of this Opinion was sent via certified mail to all counsel by the Attorney Chairman on July 27, 2012, albeit the cover letter enclosed with the Opinion was dated July 24, 2012 (12-10067 I R. 164-166). Undersigned counsel for petitioners received this notification letter and opinion on July 30, 2012 (12-10067 I R. 167-168).

The Humes filed their initial Petition for Damages on October 24, 2012 (12-10067 I R. 1-30), and their First Supplemental and Amending Petition for Damages was filed with leave of court on April 5, 2013 (12-10067 I R. 108-120). Ferncrest peremptorily excepted (12-10067 I R. 58-60) to the Humes' Request for a Medical Review Panel, filed on May 19, 2010, arguing that the same was prescribed on its face, and that petitioners could not benefit from the "discovery rule" (12-10067 I R. 61-99), which the Medical Malpractice Act (LSA-R.S. 40:1299.41 *et seq.*) allows for the filing of a Request for a Medical Review Panel within one year from the date of the Humes' discovery of the alleged act, omission, or **neglect**. Ferncrest had additionally peremptorily excepted as to the timeliness of petitioners having filed their initial Petition for Damages on October 24, 2010 (12-10067 I R. 58-60), arguing without merit that the same was filed in excess of ***8** ninety (90) days after notification by the attorney chairman of the Medical Review Panel Opinion (12-10067 I R. 61-99). The Humes' initial Petition for Damages (12-10067 IR. 1-30) was timely-filed, within ninety days after undersigned counsel *received* the Attorney Chairman' notification letter on July 30, 2012, per LSA-R.S. 40:1299.47 A(2)(a) and its interpreting jurisprudence. This second prong of Ferncrest's peremptory exception was deemed "moot" by Ferncrest's counsel during oral argument before the District Court on March 14, 2014. (Exhibit "A" and 10-8343 II R.).

Following the filing of Ferncrest's Exception of Prescription, the Humes filed on April 5, 2013, with leave of court, a First Supplemental and Amending Petition for Damages (12-10067 1 R. 108-120) in order to clarify the sequence of events set forth in the original Petition, as well as when such events became known to the Humes.[3], [4] No new parties or causes of action were added in either amending petition. The Humes respectfully assert herein that Ferncrest's Exception of Prescription should not have been granted and thereby that the judgment of the District Court is manifestly erroneous for mixed reasons of both fact and law. Additionally, the District Court did not consider the Humes' First Supplemental and Amending Petition, filed with leave of court on April 5, 2013, despite this pleading serving to clarify when the Humes gained knowledge sufficient to support an accrual of prescription date.

DISPOSITION

The Exception of Prescription by Ferncrest was heard on March 14, 2014, ***9** before the Honorable Lloyd J. Medley, Jr., Judge, Division "D" of the Civil District Court for the Parish of Orleans (Exhibit "A" and 10-8343 II R.) and was granted on April 28, 2014, when the District Court issued its written Judgment with Reasons for Judgment (Exhibit "B" and 10-8343 I R. 38-41). This judgment was twice amended upon motion (Exhibits "C", "D", 10-8343 I R. 42-44 and 56-59) as detailed in the Jurisdiction section above, and it is from the final amended judgment dated June 9, 2014 (Exhibit "D" and 10-8343 I R. 56-59) that the Humes take this devolutive appeal. The District Court's Written Reasons failed to consider that the Humes had filed an amending petition.

ASSIGNMENT OF ERRORS BY THE DISTRICT COURT

1. The District Court committed substantial and prejudicial error and was clearly wrong by misinterpreting and failing to apply in this case the "discovery rule" principle of *contra non valentwn*, as set forth in LSA-R.S. 9:5628 (A) (4). In doing so, the District Court failed to consider the Humes' First Supplemental and Amending Petition.

2. The District Court significantly erred and was clearly wrong in granting the exception of prescription in favor of Ferncrest, based on the Court's finding and conclusion that the prescription accrual date in this medical malpractice action was May 3, 2009.

3. The District Court significantly erred and was clearly wrong in granting the exception of prescription in favor of Ferncrest, based on the Court's conclusion that the Humes sought legal advice in this matter within one year of the last date of Mr. Hume's treatment at Ferncrest on May 3, 2009.

ISSUES PRESENTED FOR REVIEW

1. Whether the District Court committed substantial and prejudicial error and was ***10** clearly wrong by misinterpreting and failing to apply in this case the "discovery rule" principle of *contra non valentum*, as set forth in LSA-R.S. 9:5628 (A) (4) and whether the Humes' amending petition was prescribed on its face.

2. Whether the District Court significantly erred and was clearly wrong in granting the exception of prescription in favor of Ferncrest, based on the Court's finding and conclusion that the prescription accrual date in this medical malpractice action was May 3, 2009.

3. Whether the District Court significantly erred and was clearly wrong in granting the exception of prescription in favor of Ferncrest, based on the Court's conclusion that the Humes sought legal advice in this matter within one year of the last date of Mr. Hume's treatment at Ferncrest on May 3, 2009.

STATEMENT OF FACTS

1. On May 3, 2009, at approximately 9:40 a.m., Mrs. Hume removed Mr. Hume from Ferncrest (12-10067 II R. 180-188). She brought him to their church for prayer, then home, where she got him settled and tried to feed him potato soup for lunch (*Id*). Several hours after removing Mr. Hume from Ferncrest and only after Mr. Hume refused to eat at home and seemed to be doing poorly, Mrs. Hume contacted Dr. Arnold Alper (Mr. Hume's cardiologist and primary care doctor), who recommended that she bring him to Touro Infirmary (*Id*).

2. There is no evidence whatsoever in the record that the Humes were informed by any physician or healthcare provider that Mr. Hume was suffering from Acute Renal Failure, likely secondary to dehydration, on May 3, 2009, or at any prior time. Their first indication of renal failure was Mr. Hume's death certificate, which was created on June 2, 2009, then certified and mailed on June 4, 2009. This document stated that the causes of Mr. Hume's death were 1. "Acute Renal Failure" and 2. "Cardiovascular Heart Disease" (12-10067 II R. 203). The second ***11** indication of Mr. Hume having renal failure was in the Touro Infirmary Discharge Summary, obtained by Mrs. Hume on July 2, 2009, via a personal visit to the Touro Infirmary Medical Records Department.[5] This document stated that Mr. Hume was found to be severely dehydrated upon admission (12-10067 I R. 176-179). None of the Humes had seen this document before July 2, 2009. The only diagnosis stated in the Touro Infirmary Discharge Summary to have been discussed with Mrs. Hume (the only family member present at that time) was a nodule found on one of Mr. Hume's lungs (12-10067 I R. 176-179). The record is void of evidence of any other physician or healthcare provider discussions with the Humes and of any indication that they knew or should have known of Ferncrest's acts and omissions tantamount to medical malpractice during the period between Mr. Hume's departure from Ferncrest on May 3, 2009 and his death on May 24, 2009.

3. Undersigned counsel were retained by Mr. and Mrs. Hume on March 25,2009, to represent them relative to a slip and fall accident which occurred at a Golden Corral Restaurant on March 28, 2008 (12-10067 II R. 180-188). They were verbally retained by Mrs. Hume and her children on May 18, 2010, to represent them in the present medical malpractice matter against Ferncrest, with contracts signed by Mrs. Hume and her children between May 22 and June 2, 2010 (*Id*).

SUMMARY OF ARGUMENT

The Humes' First Supplemental and Amending Petition, filed with leave of court on Aril 5, 2013, is not prescribed on its face. This pleading adds no claims or parties but does abundantly show that the Humes had no actual or constructive knowledge of the cause(s) of Mr. Hume's deteriorated condition and nothing about ***12** his dehydration or renal failure.

In the District Court's Reasons for Judgment, the Court stated:

The Court finds that plaintiffs were aware of Mr. Hume's injuries and had sufficient information to excite their curiosity, attention and to call for an inquiry when Mrs. Hume removed her husband from Ferncrest Manor on May 3, 2009. Mrs. Hume was her husband's caregiver for many years. She was immediately aware that his condition had changed, prompting her to call Mr. Hume's personal physician and then transferring him to Touro Infirmary by ambulance. (Exhibit "B" hereto and 10-8343 R. pp. 38-41).

Mrs. Hume's assessment of her husband's condition on May 3, 2009, when she removed him from Ferncrest, pertained to his complaints and unhappiness about being in the nursing home rather than at home, on his fall from the bed on May 2, 2009, and on a medication mix-up by Ferncrest staff (12-10067 II R. 180-188). Mrs. Hume wanted to take Mr. Hume home to familiar surroundings in order to prevent him from sustaining harm or injury (*Id*). Mrs. Hume realized that the level of care the Ferncrest staff provided was not as attentive and thorough as compared to the level of care she was able to provide for Mr. Hume in their home (*Id*). However, Mrs. Hume had no idea at that time and no way to know that Mr. Hume's care during his short stay at Ferncrest was haphazard in a way that caused her husband to become dehydrated and develop Acute Renal Failure. No reasonable person could have known that. Mrs. Hume's observations at Ferncrest were not related to urinary output and

dehydration and did not put her on notice of any medical malpractice. Mrs. Hume removed Mr. Hume from Ferncrest on the morning of May 3, 2009, out of concern for his general well-being, and despite the fact that this was a hardship on her. Mr. Hume was admitted to Fercrest for a thirty-day respite stay while Mrs. Hume underwent and recovered from corneal transplant surgery, and not due to any treatment of Mr. Hume's maladies or conditions (*Id*).

***13** In Ferncrest's Reply Memorandum (12-10067 II R. 231-363 at 232), Ferncrest states:

History and Physical report authored by Mr. Hume's physician, Dr. Arnold Alper, dated May 3, 2009, indicates that Mrs. Hume called him on May 2, 2009, after visiting her husband at Ferncrest and reported that he 'looked terrible' and that she 'did not feel he was getting his medicine properly and that he was nauseated and vomiting.' It is undisputed that Mr. Hume was urgently transported to Touro on the afternoon of May 3, 2009, just hours after Mrs. Hume removed him from Ferncrest.

The Humes respectfully dispute both of these statements made by Ferncrest; they are incorrect. The May 3, 2009 note by Dr. Alper states that he "received a call from the wife today" and the date of May 2, 2009 is *not* mentioned anywhere in his notes of May 3, 2009 (12-10067 II R. 330-331). Additionally, as explained above, it was not until approximately 1:00 p.m. on May 3, 2009 that Mrs. Hume called Dr. Alper to report that Mr. Hume was not doing well, whereby Dr. Alper told her to bring him to the Touro Infirmary E.R., where he would meet them (12-10067 II R. 180-188). Thus, Mr. Hume was not "urgently transported" from Ferncrest to Touro; there was a lapse of five hours from the time he left Ferncrest, was driven to his church and then taken home before he was transported to the time he arrived at Touro Infirmary's E.R. (*Id*).

The first indication to Mrs. Hume that Mr. Hume had become dehydrated at Ferncrest was the Touro Infirmary Discharge Summary (12-10067 I R. 176-179), which she personally obtained from Touro Infirmary on July 2, 2009. However she had no information relative to any acts and/or omissions by Ferncrest causing dehydration until the receipt and review of the Ferncrest records by her counsel on May 17, 2010, during the course of their handling of the only matter for which they had been retained, i.e. the 2008 slip and fall accident at the Golden Corral Restaurant in Kenner, LA (12-10067 II R. 180-188).

Ferncrest argued in its initial Memoranda that "Mr. Hume was examined by ***14** a nephrologist who advised Mrs. Hume *that day* [May 3, 2009] that Mr. Hume was suffering from Acute Renal Failure, likely secondary to dehydration" (12-10067 I R. 61-99 at 65, para. 3), and the District Court so held (Exhibit "B" and 10-8343 I R. 38-41 at 40-41). This statement was asserted as fact by Ferncrest in its Memo. However, Ferncrest's evidentiary support of record is glaringly absent. Ferncrest produced no medical records, affidavits, depositions, or any other evidence in support of this allegation.[6] The Humes each produced affidavits unequivocally stating that none of them had been informed of the diagnosis of "Acute Renal Failure, likely secondary to dehydration" at any time within one year of when the Humes' Medical Review Panel request was filed on May 19, 2010. Mr. Hume's death certificate, received by Mrs. Hume during June 5-8, 2009, listed "Acute Renal Failure" as the primary cause of death (12-10067 II R. 203), but there was no mention of dehydration.[7]

In its Reply Memorandum (12-10067 II R. 231-363 at 231), Ferncrest makes much of minor differences between the March 16, 2012 affidavit of Mrs. Hume prepared for the MRP (12-10067 II R. 296-298) and her April 11, 2013 affidavit submitted relative to the proceedings herein (12-10067 II R. 180-188), claiming that Mrs. Hume had changed her position. The March 16, 2012 affidavit (12-10067 II R. 296-298) was done on Mrs. Hume's knowledge *following* her review of Mr. Hume's death certificate (12-10067 II R. 203) received during June 5-8, 2009, and also her review of the Touro Infirmary Discharge Summary from Mr. Hume's May 3-12, 2009 admission (12-10067 I R. 176-179), which she obtained from Touro Infirmary on her own on July 2, 2009 (12-10067 I R. 176-179). The March 16, 2012 affidavit was inartfully constructed as to the sentences where she stated that certain information was documented in medical records ***15** dated May 3, 2009; however, this does not mean that she was in possession of that information on May 3, 2009. In fact, the April 11, 2013 affidavit (12-10067 II R. 180-188) was prepared with the emphasis on *when* Mrs. Hume obtained the information from the medical records and other documents.

The District Court further stated in its Reasons for Judgment: “Moreover, Plaintiffs sought legal advice within one year of the last date of treatment at Ferncrest” (Exhibit “B” and 10-8343 I R. 38-41). While it is true that attorneys Hearin and Robichaux represented the Humes prior to his death and within one year of the last date of treatment at Ferncrest, this legal representation had nothing to do with any events which occurred at Ferncrest and everything to do with Mr. Hume's 2008 slip and fall accident which occurred at a Golden Corral Restaurant in Kenner, LA (12-10067 II R. 180-188).

The District Court's Reasons for Judgment also stated the following:

A detailed and articulate complaint was drafted and filed with the Louisiana Division of Administration on May 19, 2010, and amended and filed on May 21, 2010, addressing all of the allegations against Ferncrest; specifically alleging that Ferncrest allowed Mr. Hume to become dehydrated and to enter into renal failure. Accordingly, the Court finds that Plaintiffs were sufficiently aware of the alleged damages associated with Mr. Hume's admission to Ferncrest. Therefore, Plaintiffs failure to bring this claim within one year of the May 3, 2009 discharge date renders this claim prescribed as a matter of law. (Exhibit “B”, also 10-8343 I R. pp. 38-41).

Mrs. Hume and her children respectfully submit that on May 19, 2010, at the time the “detailed and articulate complaint” referenced above was drafted and filed[8], they “were sufficiently aware of the alleged damages associated with Mr. Hume's admission to Ferncrest.” However, they were not aware of these damages prior to May 17, 2010, when the requested Ferncrest records were received and reviewed, and it is impossible to see how the District Court reached the conclusion ***16** that the Humes were aware of the same as of May 3, 2009, or how the prescription date of May 3, 2010 was determined. During the period of time between Mr. Hume's death on May 24, 2009, and the receipt and review of the medical records from Ferncrest on May 17, 2010, the Humes' attorneys were focused on the Humes' slip and fall case against the Golden Corral Restaurant, the only matter for which they had been retained. Therefore, discovery of the basis of the Humes' medical malpractice claim was on May 17, 2010, when undersigned counsel picked up and reviewed the Ferncrest medical records, then discussed their findings with Mrs. Hume (12-10067 II R. 180-188). The Humes' request letter for a Medical Review Panel (MRP) was promptly prepared and mail-filed on May 19, 2010 (12-10067 II R. 309-310), with a revised request letter filed on May 21, 2010 (12-10067 II R. 311-312).

The Humes steadfastly stand by their assertion that their discovery of the basis of their medical malpractice claim occurred on May 17, 2010 when the Ferncrest medical records were reviewed and revealed the acts and omissions by Ferncrest which led to Mr. Hume having become dehydrated. Interestingly, Ferncrest's Reply Memorandum states: “Ferncrest asserts that it was on that date [June 25, 2009, when Mrs. Hume notified her counsel via telephone of Mr. Hume's death] ... that plaintiffs first knew that they may have a cause of action related to Mr. Hume's death” (12-10067 II R. 231-363 at 232).

ARGUMENT

I. THE DISTRICT COURT COMMITTED SUBSTANTIAL AND PREJUDICIAL ERROR AND WAS CLEARLY WRONG BY MISINTERPRETING AND FAILING TO APPLY IN THIS CASE THE “DISCOVERY RULE” PRINCIPLE OF *CONTRA NON VALENTUM,* AS SET FORTH IN LSA-R.S. 9:5628 (A) (4). IN DOING SO, THE DISTRICT COURT FAILED TO CONSIDER THE HUMES' FIRST SUPPLEMENTAL AND AMENDING PETITION.

***17 STANDARDS OF REVIEW - MANIFEST ERROR/CLEARLY WRONG**

The manifest error standard of review applies to an appellate court's consideration of an exception of prescription.[9] We must bear in mind, however, that an appellate court must strictly construe the statutes against prescription and in favor of the extinguished claim.[10]

LSA-R.S. 9:5628 (A) states in pertinent part:

> No action for damages for injury or death against any physician, chiropractor, nurse, licensed midwife practitioner, dentist, psychologist, optometrist, hospital or nursing home duly licensed under the laws of this state, or community blood center or tissue bank as defined in R.S. 40:1299.41(A), 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**. (Emphasis supplied).

According to the concurring opinion by Justice Lemmon in *Guitreau v. Kucharchuk, M.D.,* [11] LSA-R.S. 9:5628 recognizes the doctrine of *contra non valentem* and allows the medical malpractice victim "one year from the date of discovery of the alleged act, omission, or **neglect**" to bring an action for damages. Under the doctrine of *contra non valentem,* as interpreted in *Corsey v. State of La. through the Dep't of Corrections* [12] , prescription does not run against a person when "the cause of action is not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant." Furthermore "in assessing whether an injured party possessed constructive knowledge sufficient to commence the running of prescription, this court's ultimate consideration is the reasonableness of the injured party's action or inaction in light of the surrounding ***18** circumstances". [13]

In *Carter v. Haygood, D.D.S.,* [14] the Louisiana Supreme Court observed and explained that prescriptive statutes are strictly construed against prescription and in favor of the obligation sought to be extinguished. Therefore, of two possible constructions, that which favors maintaining, as opposed to barring, an action should be adopted. [15]

In *Plaquemines Parish Com'n Council v. Delta Development Co., Inc.,* [16] the Louisiana Supreme Court recognized four instances where *contra non valentem* is applied to prevent the running of prescription with only the fourth instance being relevant here: (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. [17] This thus allows "the courts to weigh the 'equitable nature of the circumstances in each individual case' to determine whether prescription will be tolled." [18]

Contra non valentem in medical malpractice suits is embodied in LSA-R.S. 9:5628. In the case of *Perritt v. Dona,* [19] 02-2601 (La. 7/3/03), 849 So.2d 56, 66, Justice (now Chief Justice) Johnson cited *Campo v. Correa,* [20] as follows:

As we recognized in Campo v. Correa, 2001-2707 (La.6/21/02), 828 So.2d 502, 509: LSA-R.S. ANN. § 9:5628 not only corresponds with the basic one year prescriptive period for delictual actions provided in LSA-C.C. art. 3492, it embodies the discovery rule delineated as the fourth category of *contra non valentem,* that is with the "single qualification that the discovery rule is expressly made inapplicable after three years from the act, omission or **neglect**." [21]

***19** A straight forward reading of LSA-R.S. ANN. § 9:5628 clearly shows that the statute sets forth two prescriptive limits within which to bring a medical malpractice action, namely one year from the date of the alleged act or one year from the date of discovery with a three year limitation from the date of the alleged act, omission or **neglect** to bring such claims. *Hebert* thoroughly examined the legislative history of LSA-R.S. ANN. § 9:5628 and determined that it was clearly a "prescription statute with a qualification, that is, the contra non valentem type exception to prescription embodied in the discovery rule is expressly made inapplicable after three years from the act, omission or **neglect**." *Hebert, supra,* 486 So.2d at 724-25.

In a medical malpractice claim, mere apprehension that something might be wrong is insufficient to commence the running of prescription unless the plaintiff knew or should have known by the exercise of reasonable diligence that there was a possibility that his or her problem may have been caused by acts of malpractice [22] . In this case there was insufficient information available to petitioners and their counsel whereby they could connect the dots between the late Mr. Hume's 4 1/2 day stay at Ferncrest, his development of Acute Renal Failure secondary to dehydration and, ultimately, his death. Haphazard care (as indicated by the late Mr. Hume having been found lying on the floor of his room at Ferncrest Manor, by a singular act of a Ferncrest nurse failing to recognize that Mr. Hume's prescribed medications included Glucophage for his diabetic condition, and by the late Mr. Hume's poor appearance and state of unhappiness, as perceived by Mrs. Hume) does not equate to medical malpractice. In addition, none of these happenings had anything whatsoever to do with Mr. Hume's urinary output and his having become dehydrated.

Until well after Mr. Hume's demise, petitioners and their counsel knew nothing about the nursing home staffs failure to properly assess decedent's urinary output or their failure to notify the staff physician of the patient's change of status. ***20** The Certificate of Death, certified and issued on June 4, 2009, and received a few days later by Mrs. Hume, specified only that the late Mr. Hume died as a result of "Acute Renal Failure" and "Cardiovascular Heart Disease" (12-10067 II R. 203). At the time of the late Mr. Hume's death on May 24, 2009, petitioners had been informed (only a few hours beforehand) by the Serenity Hospice nurse that Mr. Hume was suffering from "failure to thrive" (12-10067 II R. 180-202). [23]

The first notice petitioners received about Mr. Hume having been dehydrated was when the Touro Infirmary discharge summary (12-10067 I R. 176-179) was reviewed by Mrs. Hume after she personally obtained the same via her appearance at the Touro Infirmary Medical Records Department on July 2, 2009. The first notice petitioners and their counsel received that haphazard care was a possible cause of Mr. Hume's dehydration and development of Acute Renal Failure came after counsel's receipt and review of the Ferncrest records on May 17, 2010. Two days later, on May 19, 2010, petitioners' counsel filed a Request for a Medical Review Panel (12-10067 II R. 309-310), with an amended request letter filed on May 21, 2010 (12-10067 II R. 311-312).

II. THE DISTRICT COURT SIGNIFICANTLY ERRED AND WAS CLEARLY WRONG IN GRANTING THE EXCEPTION OF PRESCRIPTION IN FAVOR OF FERNCREST, BASED ON THE COURT'S FINDING AND CONCLUSION THAT THE PRESCRIPTION ACCRUAL DATE IN THIS MEDICAL MALPRACTICE ACTION WAS MAY 3, 2009.

STANDARD OF REVIEW - MANIFEST ERROR/CLEARLY WRONG

The Humes respectfully submit that given Mr. Hume's multitude of serious physical and mental maladies and conditions, his known history of multiple hospital admissions and E.R. visits, his frail and guarded condition, as well as Mrs. Hume's caring and concerned response to decedent's appearance and ***21** perceived state of unhappiness, it is a quantum leap to suggest that she had knowledge, actual or constructive, that her husband had been the victim of medical malpractice at Ferncrest. Mrs. Hume is not a doctor or healthcare provider; she is an **elderly** woman with a tenth-grade education. Her recognition of negative aspects of the care the late Mr. Hume received while at Ferncrest does not equate with knowledge (or even suspicion) of dehydration resulting in Acute Renal Failure. Neither Mr. Hume's unhappiness, nor his fall from the bed, nor the medication mix-up could have resulted in dehydration and development of Acute Renal Failure.

The fact that a nephrologist, Dr. Francisco Cruz, wrote a note in the patient's chart at Touro Infirmary on May 3, 2009 (transcribed on May 4, 2009) (12-10067 II R. 327-328) about the late Mr. Hume having been diagnosed with "Acute Renal Failure, likely secondary to dehydration" in no way indicates that Mrs. Hume or her family members were told of this diagnosis at any point prior to their review of the medical records on July 2, 2009. There is no evidence in the record that Mrs. Hume was informed of this diagnosis at any time prior to May 19, 2009 (within one year of when the medical review panel request was filed on May 19, 2010).

The Touro Infirmary medical records (12-10067 I R. 176-179 and II R. 327-331) show that decedent had a lesion (nodule) in one lung (*Id*). Dr. Alper consulted with Mrs. Hume about possible treatments of this nodule, but she decided to forego further investigation based on Dr. Alper's assessment that Mr. Hume's cardiovascular problems would make surgery very dangerous (*Id*). This consult between Dr. Alper and Mrs. Hume is the only documentation of diagnostic information provided to Mrs. Hume, and it had absolutely nothing to do with Mr. Hume's dehydration or development of Acute Renal Failure.

***22** Via an addendum to the Touro Discharge Summary, dated May 12, 2009, Dr. Alper states "In addition to the above diagnoses, he [Mr. Hume] also had an intestinal obstruction or generalized ileus...Mr. Hume had an NG tube put down and [the blockage was] subsequently resolved" (12-10067 I R. 176-179). Additionally, on May 12, 2009, when Mr. Hume was discharged from Touro Infirmary to home hospice care with Serenity Hospice Services (*Id*), the transfer was done under a diagnosis of "Stomach Cancer" (12-10067 I R. 169-175). The next day, following the review of Mr. Hume's medical records by the Serenity Hospice Medical Director, Dr. Cherie M. Drez, Serenity's admit diagnosis was changed to "Failure to Thrive" (*Id*). All of these maladies and diagnoses served as complicating factors to be considered toward determining the reasonableness of Mrs. Hume's failure to see any causal effect between the haphazard care Mr. Hume received at Ferncrest and his condition and diagnoses while at Touro Infirmary and while under the care of Serenity Hospice prior to his death.

In its April 28, 2014 Judgment (Exhibit "B" and 10-8343 I R. 38-41 at 40), the Court cited the case of *Bailey v. Haynes,* [24] which had been cited by Ferncrest in its original Memorandum (12-10067 I R. 61-99 at 63). *Bailey* involves damages allegedly caused to an infant during a difficult delivery requiring the use of forceps [25] and the Court noted that the medical records contained progress notes stating that the physician had spoken to Bailey "at length" relative to the child's condition on more than one occasion. [26] The Court stated:

Considering the facts of this particular case, we cannot say that Bailey was reasonable in failing to bring her action within one year from Tyrell's birth. She understood the difficulty in her delivery of Tyrell and his critical condition immediately following the birth, which should have put Bailey on guard to question her medical treatment and that of Tyrell. In fact, Tyrell was hospitalized for fifteen days following his birth. Bailey's alleged cause of action and the facts ***23** surrounding Tyrell's medical condition were readily known by Bailey immediately after his birth or, at the least, shortly thereafter, and clearly more than one year prior to filing her complaint with the Patients' Compensation Fund. [27]

The *Bailey* case is easily distinguishable from the case at bar because not only do the medical records (and court record) specifically state that the damages sustained by the child were discussed with the child's mother on more than one occasion, but also there was a specific and easily identifiable event that caused the damages.

In Ferncrest's Reply Memorandum (12-10067 II R. 231-363 at 239), it cited the recent case of *Brown v. Ponchatoula Nursing Home, L.L.C.,* [28] and asserted that the Louisiana Court of Appeal, First Circuit, "[had] rejected the plaintiffs reliance on the discovery rule and affirmed the trial court's dismissal of a malpractice suit against a nursing home because the plaintiffs alleged claims had prescribed" and that "the court determined that the plaintiff was well aware of his mother's medical condition [caused by malpractice] based on evidence that he visited her frequently and discussed his mother's treatment with her caregivers" (*Id*). However, it is important to note that the *Brown* case, unlike the case at bar, involved visible, observable, immediately knowable damages. In *Brown,* the Court stated:

Plaintiff-appellant was well-aware of his mother's condition. He visited her frequently. He had discussed the problem of his mother's ulcer with her caregivers. Whatever he may have been told regarding the likely cause or prognosis, he cannot maintain that the injury was unknowable, or that he had not discovered it...As stated, the one year prescription period is the general rule. This rule applies when the damages are immediately apparent...Ms. Brown's damage-causing ulcer was "immediately knowable....In the months before her death, Mrs. Brown had lost approximately sixty (60) pounds...All of the conditions were readily apparent, particularly the bed sore that led to her death from sepsis. Therefore the discovery rule is not applicable in this case. [29]

***24** Similarly, *Alexander v. Amelia Manor Nursing Home, Inc.*,[30] also cited by Ferncrest in its Reply Memorandum (12-10067 II R. 231-363 at 238), involved a situation where the patient's conditions and damages allegedly caused by malpractice (bed sores) were readily apparent. For this reason, these cases are distinguishable from the facts of the case at bar since the late Mr. Hume's state of hydration and renal function were not visible or readily apparent to the Humes.

The case of *In Re Medical Review Proceedings of Ivon,*[31] also cited by Ferncrest in its Reply Memorandum (12-10067 II R. 231-363 at 234), is distinguishable from the case at bar because the nerve damage alleged in the malpractice claim resulted from a surgical procedure, with the surgical consent forms listing nerve damage as a possible complication. In the case at bar, there was no singular event, such as a surgery, which the Humes could have looked to as an indicator of the cause of the late Mr. Hume's dehydration, renal failure, and death.

In its Reply Memorandum, Ferncrest went on to argue that:
Plaintiffs' claim that "the reasons Mrs. Hume removed her husband from the facility on May 3, 2009, were not related to the failure of Ferncrest Manor to recognize his change of status, not related to the Ferncrest Manor's staff's failure to notify the staff physician of the change in status of the late Mr. Hume, and were not related in any way to Ferncrest Manor's scanty or non-existing charting of his urinary output" is ludicrous (12-10067 II R. 231-363 at 236).

To the contrary, the Humes respectfully submit that they were not in a position to know of Ferncrest's deficiencies until such time as the Ferncest medical records had been retrieved and reviewed as of May 17, 2010. Nothing observed by Mrs. Hume could have informed her of these issues. There was no autopsy performed on the late Mr. Hume following his demise. The Certificate of Death received by Mrs. Hume during June 5-8, 2009, states only that Mr. Hume's causes of death were (1) "Acute Renal Failure" and (2) "Cardiovascular Heart ***25** Disease" (12-10067 II R. 203), but contains no information provided as to the etiology of either cause. On the day of Mr. Hume's death, May 24, 2009, the Serenity Hospice nurse informed the family that Mr. Hume was dying as a result of his "failure to thrive," a diagnosis that had been changed in writing by the Serenity Hospice Staff Physician from "stomach cancer" on May 12-13,2009 (12-10067 I R. 169-175). There was no mention of dehydration or Acute Renal Failure in the Serenity Hospice records or paperwork, or in any discussions between the Serenity Hospice staff and the Humes. (Id).

The Ferncrest records revealed to the Humes' counsel, and to the three-physician Medical Review Panel, that the documentation and charting at the nursing home was "pretty scant" and "thinly documented" (12-10067 II R. 204-213 at 207). Panelist Dr. David W. Euans stated:

> Basically what we saw was notations in the toileting record that there were dry diapers for at least three days during the stay and no indication that the attending physician, Dr. Haque was notified of that change or of that condition. Basically that is something that I would hope that most if not all nursing homes would do *(Id).*

In support of the Humes' argument that the prescription accrual date in this case is not the last date of treatment, there is federal jurisprudence holding that constructive knowledge of malpractice was not obtained until a later date. For example, a Louisiana U.S. Fifth Circuit Court of Appeals wrongful death case under the Federal Tort Claims Act (FTCA)[32] held that the widow's cause of action did not accrue until she received the death certificate four days after her husband's death and stated:

Considering the allegations and evidence presented, and the government's [defendant's] failure to present any evidence disputing her allegations, we find that the district court clearly erred in finding that Waggoner knew of the cause of her husband's injury. Her claim did not accrue until she was "armed with the facts about the harm done," giving her knowledge, suspicion, or the ability to discover the ***26** cause. This could have occurred no earlier than January 8, 1998, when the death certificate first brought to her attention that her husband had heart disease.[33]

In a U.S. Western District Louisiana federal case under the FTCA, *Pleasant v. United States*, [34] the Court held that the husband's claim accrued with his receipt of his wife's medical records thirteen months after her death. The Court stated:

We feel that the explanation on the death certificate is inadequate to reveal a causal relationship between the doctors' actions and Mrs. Pleasant's death. The death certificate simply indicates, "cardiorespiratory arrest, aspiration pneumonia with ARDs, and disseminated intravascular coagulopathy." A reasonable person could not conclude from these words that the doctors' actions were potentially causally related to Mrs. Pleasant's death. Plaintiff's action did not accrue until mid-June, 1988, when he received the medical records. [35]

In the case of *Fanguy v. Lexington Ins. Co.*, [36] the Louisiana Court of Appeal, Fifth Circuit, stated that "where a petition reveals on its face that prescription has run, the burden shifts to the plaintiff to show that his action has not prescribed." [37] The Court also stated:

On the face of the [Fanguy] petition, the June 2008 claim was prescribed. As such, Ms. Fanguy bore the burden of showing that the claim was not prescribed. The record is void of any evidence introduced at the trial on the merits. Therefore, we must determine whether Ms. Fanguy's June 2008 claim is prescribed based upon the facts alleged in the petition. [38]

The Humes' First Supplemental and Amending Petition (12-10067 I R. 108-120) was filed with leave of court on April 5, 2013 (to be read in tandem with the Humes' original petition [12-10067 1R. 1-30] and their Medical Review Panel request letter [12-10067 II R. 309-310]) and is *not* prescribed on its face. The burden of proof thus rested on mover Ferncrest. [39] Whether the Humes or ***27** Ferncrest had the burden of proof, the Humes provided ample evidence at the hearing to show that their claim was not prescribed at the time of the Medical Review Panel request on May 19, 2010. Ferncrest provided no countervailing evidence, only argument and conjecture by its counsel. Where is Ferncres's countervailing evidence which would support the District Court's findings and conclusion regarding a prescription accrual date of May 3, 2009? This is a court of record and we respectfully submit that there is no such evidence of record herein.

III. THE DISTRICT COURT SIGNIFICANTLY ERRED AND WAS CLEARLY WRONG IN GRANTING THE EXCEPTION OF PRESCRIPTION IN FAVOR OF FERNCREST, BASED ON THE COURT'S CONCLUSION THAT THE HUMES SOUGHT LEGAL ADVICE IN THIS MATTER WITHIN ONE YEAR OF THE LAST DATE OF MR. HUME'S TREATMENT AT FERNCREST ON MAY 3, 2009.

STANDARD OF REVIEW - MANIFEST ERROR/CLEARLY WRONG

While it is true that Attorneys Hearin and Robichaux represented the Humes prior to Mr. Hume's death and within one year of the last date of treatment at Ferncrest, this legal representation had nothing to do with any events which occurred at Ferncrest and everything to do with a slip and fall accident which had occurred at a Golden Corral Restaurant in 2008 (12-10067 II R. 180-188). Counsel were retained by the Humes on March 25, 2009, to represent them on the 2008 slip and fall accident (Id). Undersigned counsel, Robert M. Hearin, Jr., was notified by phone on June 25, 2009, by Mrs. Hume of her husband's death more than a month previously. In that conversation, Mr. Hearin discussed with Mrs. Hume the possibility that Mr. Hume's death may have been related to the injuries he suffered in the 2008 slip and fall accident at the restaurant *(Id)*. There was no discussion about any suspicions of medical malpractice during that conversation on June 25, 2009, or at any time until the Ferncrest medical records received on May 17, 2010 ***28** were reviewed by counsel, together with the Touro Infirmary Discharge Summary (obtained by Mrs. Hume on July 2, 2009) and the Certificate of Death (received by Mrs. Hume on or about June 5-8, 2009).

Following this review of the Ferncrest medical records, attorneys Hearin and Robichaux discussed their findings with Mrs. Hume on May 18, 2010, during which conversation counsel were verbally retained by Mrs. Hume and her children on May

18, 2010 to represent them on this medical malpractice claim. Retainer contracts relative to this matter were signed by each member of the Humes on dates ranging from May 22, 2010 to June 2, 2010 (Id).

It is well established in Louisiana jurisprudence that the hiring of an attorney for one matter does not carry over to another matter. In the case of Delta *Equipment and Construction Co. v. Royal Indemnity Co.,* [40] the Louisiana Court of Appeal, First Circuit, stated:

The legal relationship of attorney and client is purely contractual and results only from the mutual agreement and understanding of the parties concerned. Such relationship is based only upon the clear and express agreement of the parties as to the nature of the work to be undertaken by the attorney and the compensation which the client agrees to pay therefor...The duty to defend or represent imposes upon a member of the legal profession grave responsibilities which he may accept or decline at his election and for whatever reasons he chooses. An obligation of such gravity and magnitude may not be involuntarily thrust upon an attorney-at-law by the unilateral election of a litigant to mail him legal documents without a prior understanding or agreement between the parties." [41]

Moreover, in the case of *Grand Isle Campsites, Inc. v. Cheek,* [42] the Louisiana Supreme Court stated:

The attorney-client relationship is contractual in nature and is based upon the express agreement of the parties as to the nature of work to be undertaken by the attorney. The agreement or consent of an attorney to perform work for a party on a particular matter or transaction does not create an attorney-client relationship as regards ***29** other business or affairs of the client. [43]

This is a court of record, and there is no evidence in the record of this case that supports the Court's findings and conclusion that the Humes had consulted an attorney regarding Ferncrest within one year of the last date of Mr. Hume's treatment at the nursing home. This medical malpractice claim was a completely separate matter from the 2008 slip and fall accident for which attorneys Hearin and Robichaux had been retained; it was an unrelated claim against an unrelated party.

CONCLUSION AND REQUEST FOR RELIEF

In the lower court, Ferncrest argued that the prescription accrual date in this matter is May 3, 2009, the date of Mr. Hume's last treatment by Ferncrest, or at the latest, May 12, 2009, when he was discharged from Touro Infirmary into home hospice care. Before, during, and after Mr. Hume's admission to Ferncrest, he suffered from a multitude of maladies and conditions that substantially complicated assessment of his physical and mental health and well-being. The Humes acted reasonably in discovering the acts and omissions that caused or substantially contributed to the injuries, damages, and death of Mr. Hume. At all times during the one-year period after Mr. Hume's last date of treatment at Ferncrest, the Humes assert that they had no actual or constructive knowledge of the harm caused by Ferncrest to Mr. Hume and noted by the Medical Review Panel's unanimous decision (12-10065 I. R. 165).

This is a court of record, and there is no evidence that supports either of the two prescription accrual dates advocated by Ferncrest, i.e. May 3, 2009 (as decided by the District Court), or at the latest, May 12, 2009. Argument of counsel does not equate with fact; making a statement numerous times does not cause it to become true. Mr. Hume was damaged, but the Humes did not know at any time ***30** within one year of their request for a Medical Review Panel on May 19, 2010, who, if anyone, caused the damage. Simply put, Ferncrest did not come forth with evidence of the Humes' knowledge regarding the harm done to Mr. Hume that led to his dehydration and development of renal failure.

Where is the countervailing evidence to the Hume family's affidavits that stated what they knew and when they knew it? In the First Supplemental and Amending Petition, para. VI-A (12-10067 1 R. 108-120), the Humes made it clear that until well after Mr. Hume died on May 24, 2009, they were without actual or constructive knowledge that Mr. Hume had developed Acute Renal Failure secondary to dehydration. Each of the Humes attested that they had no definitive knowledge of any causal relationship

between Ferncrest's acts or omissions and Mr. Hume's renal failure secondary to dehydration until their counsel's receipt of the Ferncrest records on May 17, 2010. However, the Humes do acknowledge two earlier dates that could be considered as the beginning of prescription accrual: 1) June 5-8, 2009, when Mrs. Hume received her husband's death certificate from Serenity Hospice; and 2) July 2, 2009, when Mrs. Hume personally requested and obtained the Touro Infirmary Discharge Summary for hospitalization on May 3-12, 2009. All three of these potential prescription accrual dates described above could serve as a prescription accrual date within the one-year period prior to the filing of the Humes' May 19, 2010 request for a Medical Review Panel.

The Humes respectfully urge this Court to reverse and remand for further proceedings the District Court's judgment granting Ferncrest's Exception of Prescription and dismissing Ferncrest with prejudice as a defendant, with costs to be borne by Ferncrest. The Humes acted reasonably and did nothing wrong in their loving care of their ailing husband and father. They respectfully conclude that Louisiana law and jurisprudence well supports their position in these respects.

Appendix not available.

Footnotes

1 Defendant, Riaz Ul Haque, M.D. and Louisiana Medical Mutual Insurance Company (LAMMICO) did not participate in the litigation relative to the exception of prescription.

2 "Geriatric Failure to Thrive" is defined by the *American Family Physician* as "a state of decline that is multifactorial and may be caused by chronic concurrent diseases and functional impairment. Manifestations of this condition include weight loss, decreased appetite, poor nutrition and inactivity". Russel G. Robertson, M.D. and Marcos Montagnini, M.D., Medical College of Wisconsin, Milwaukee, Wisconsin; *Am Fam Physician*, 2004 July 14; 70(2):343-350. See http://www.aafp.org/aft/2004/0715/p.343.html.

3 Prior to the hearing on Ferncrest's Exception of Prescription, the parties conjointly moved for and were granted the transfer and consolidation of the suit filed by petitioners-appellants (CDC No. 2012-10067) with the lower-numbered petition filed by Ferncrest to conduct discovery during the Medical Review Panel process (CDC No. 2010-08343).

4 The Humes later filed on November 7, 2013, with leave of court, a Second Supplemental and Amending Petition for Damages (12-10067 I R. 228-230) in order to correct a minor error in the First Supplemental and Amending Petition. In their initial Petition for Damages herein, petitioners correctly set forth, in paragraph VI(I) thereof, that the records of Touro Infirmary provided that Dr. Cruz's re-assessment of the late Mr. Hume's condition occurred on May 6, 2009, however in their First Supplemental and Amending Petition for Damages herein, petitioners incorrectly stated that Dr. Cruz's initial assessment of the late Mr. Hume was changed "the next day" [after May 3, 2009].

5 It should be noted that the Touro Infirmary Discharge Summary received by Mrs. Hume was printed for her on July 2, 2009, as evidenced by the following line which appears at the bottom of the printed page: "Page created: Thursday, July 2, 2009 11:44 A.M.".

6 Note: The May 3, 2009 Touro medical record was not transcribed until May 4, 2009.

7 The second-listed cause of death was "Cardiovascular Heart Disease".

8 The "detailed and articulate complaint" was prepared in such haste that the same included an error in which the date of Mr. Hume's removal from Ferncrest was stated to be May 5, 2009 instead of May 3, 2009, requiring that a corrected request letter be sent on May 21, 2009.

9 *Patin v. State of LA*, 11-290 (La. App. 3 Cir. 10/5/11), 74 So.3d 1234, 1237 *citing Strahan v. Sabine Ret. & Rehab. Ctr., Inc.*, 07-1607 (La. App. 3 Cir. 4/30/08), 981 So.2d 287.

10 *Id.* at 1237.

11 *Guitreau v. Kucharchuk. M.D.*, 1999-2570 (La. 5/16/00), 763 So.2d 575 (concurring opinion).

12 *Corsey v. State of La. through the Dep't of Corrections*, 375 So.2d 1319, 1322 (La.1979)

13 *Oracle Oil, L.L.C. v. EP1 Consultants*, 2011-0151 (La.App. 1 Cir. 9/14/11), 77 So.3d 64, 69.

14 *Carter v. Havgood. D.D.S*, 2004-0646 (La. 1/19/05), 892 So.2d 1261.

15 *Carter v. Haygood, D.D.S*, 2004-0646 (La. 1/19/05), 892 So.2d 1261, 1268 citing *Foster v. Breaux*, 263 La. 1112, 270 So.2d 526, 529 (1972) and *Knecht v. Board of Trustees for Colleges and Universities*, 525 So.2d 250, 251 (La.App. 1st Cir.), *writ denied*, 530 So.2d 87 (La. 1988)

16 *Plaquemines Parish Com'n Council v. Delta Development Co., Inc.*, 502 So.2d 1034 (La.1987).

17 *Id.* at 1054.

18 R.O.M. (Regina O. Matthews), Note, *Gover v. Bridges: Prescription - Applicability of Contra Non Valentem Doctrine to Medical Malpractice Actions,* 61 Tul. L. Rev. 1541, 1545, 1541.7.1 (1986-1987).

19 *Perritt v. Dona,* 02-2601 (La. 7/3/03), 849 So.2d 56, 66.

20 *Campo v. Correa,* 2001-2707 (La. 6/21/02), 828 So.2d 502,509

21 *Hebert,* 486 So.2d at 724 [*Hebert v. Doctors Memorial Hospital,* 85-2277 (La. 1986), 486 So.2d 717]; see also *Fontenot v. ABC Ins. Co.,* 95-1707 (La.6/7/96), 674 So.2d 960,963; *White v. West Carroll Hospital, Inc.,* 613 So.2d 150, 155 (La. 1992) (holding that LSA-R.S. ANN. § 9:5628 embodies *contra non valentem* in medical malpractice suits).

22 See *In re Medical Review Panel of Lafayette,* 03-457 (La.App. 5 Cir. 2003), 860 So. 2d 86 at 89; *LeCompte v. State-Department of Health and Human Resources-South Louisiana Medical Center,* 97-1878 (La.App. 1 Cir. 1998), 723 So. 2d 474. See also LSA-R.S. § 9:5628.

23 Note: On admission to Serenity Hospice care on May 12, 2009 following decedent's inpatient stay at Touro Infirmary, the Serenity staff physician had changed Mr. Hume's diagnosis from “stomach cancer” to “failure to thrive” (12-10067 I R. 169-175).

24 *Bailey v. Haynes,* 37, 038 (La. App. 2 Cir. 4/9/03), 843 So.2d 584.

25 *Id.* at 585.

26 *Id.* at 587.

27 *Id.* at 588.

28 *Brown v. Ponchatoula Nursing Home, L.L.C.,* 12-0817 (La.App 1 Cir. 3/6/13), 2013 La. App. LEXIS 417.

29 *Brown, Id.* at pg. 5-7.

30 *Alexander v. Amelia Manor Nursing Home, Inc.,* 05-948 (La. App. 3 Cir. 3/1/06), 924 So. 2d 409, 410-14.

31 *In Re Medical Review Proceedings of Ivon* 2001-1296 (La. App. 4 Cir. 3/13/02), 813 So.2d 532.

32 *Waggoner v. United States,* 95 Fed.Appx. 69, 2004 WL 838604 (C.A.5 (La)).

33 *Id.* at 72.

34 *Pleasant v. United States,* 95-1739 (W.D. LA 2/23/1996), 915 F. Supp. 826.

35 *Id.* at 828.

36 *Fanguy v. Lexington Ins. Co.,* 12-136, 11-1102 (La. App. 5 Cir. 11/13/12), 105 So.3d 848.

37 *Id.* at 853; See also *In Re Manus,* 10-82 (La. App. 5 Cir. 5/25/10), 40 So.3d 1128, 1129, *writ denied,* 10-1460 (La. 10/1/10), 45 So.3d 1099, *citing Bertoniere v. Jefferson Parish Hosp. Service Dist. No. 2,* 07-301 (La. App. 5 Cir. 10/30/07), 972 So.2d 328, 332.

38 *Fanguy* at 853.

39 In *Wyman v. Dupoe Construction,* 2009-0817 (La. 12/1/09), 24 So.3d 848, the Louisiana Supreme Court held that when an exception of prescription is sustained, the court should permit amendment of the pleadings if the new allegations which the plaintiff proposes raises the possibility that the claim is not prescribed, even if the ultimate outcome of the prescription issues, once the petition is amended, is uncertain. LSA-C.C.P. 934.

40 *Delta Equipment & Construction Co. v. Royal Indemnity Co.,* 186 So.2d 454 (La. App. 1 Cir. 1966).

41 *Id.* at 458 (La.App. 1 Cir. 1966). See also *SCB Diversified Mun. Portfolio v. Crews & Assoc.* 09-7251, 2012-WL-13708 (E.D. La. Jan. 4, 2012).

42 *Grand Isle Campsites, Inc. v. Cheek,* 262 So.2d 350 (La. 1972).

43 *Id.* at 359.