IN RE: MEDICAL : NUMBER: 541,397-B

REVIEW PANEL : FIRST JUDICIAL DISTRICT COURT

GERALD L. GARDNER : CADDO PARISH, LOUISIANA

 **REASONS FOR JUDGMENT**

The evidence adduced at the prescription hearing reveals the following: (1) Lt. Col. Gerald Gardner was a resident at the defendant nursing home between July 29, 2008 and January 7, 2009; (2) during this time frame, Lt. Gardner had an advanced stage of dementia; (3) Lt. Gardner was not interdicted such that the Gardner children, now plaintiffs, had a right of action, capacity or standing to assert any claim on behalf of their father against the nursing home; (4) Lt. Gardner died February 27, 2009; (5) within one year of Lt. Gardner’s death, on February 2, 2010, and pursuant to R.S. 40:1299.41 et seq, the plaintiffs filed a request for a medical review panel asserting survival and wrongful death actions against the defendant nursing home.

It is significant, and uncontested, that Lt. Gardner had dementia and that he was never interdicted. Therefore, it is reasonable to conclude that he was unable to know and assess the validity of any potential cause of action against the defendant nursing home. His children, now the claimants, had no legal right to file any such claim and that right accrued to them on the date of Lt. Gardner’s death, February 27, 2009. The suggestion by defense counsel that either Lt. Gardner should have known of malpractice or that the children should have known of the malpractice on January 7, 2009 while at the same time asserting that the nursing home “complied with the applicable standard of care with respect to the care and treatment provided to Mr. Gardner” is an odd and contradictory position to assert to this Court. Under the circumstances of this case and in light of the evidence presented at the November 14, 2011 prescription hearing, this Court concludes that prescription on either the wrongful death or the survival action did not commence to run until Lt. Gardner’s death on February 27, 2009; and as the claim with the Louisiana Patients’ Compensation Fund and request for medical review panel was filed February 2, 2010, the Court concludes that the claim is not prescribed. Alternatively, the jurisprudential doctrine of contra non valentem is applicable and, clearly, the Gardner children filed the claim less than one year after they reasonably discovered knowledge of the nature of the claim. For reasons assigned, the Court concludes the exception totally lacks merit and is therefore overruled.

Signed this 17th day of November, 2011 in Shreveport, Caddo Parish, Louisiana.

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SCOTT J. CRICHTON

DISTRICT JUDGE

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