10/16/01 "See News Release for any concurrences and/or dissents."

SUPREME COURT OF LOUISIANA

No. 00-C-3170

NELSON NADINE WILLIAMS

versus

JACKSON PARISH HOSPITAL

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,
SECOND CIRCUIT, PARISH OF JACKSON

VICTORY, J., DISSENTING[*]

When plaintiff applied for a writ of certiorari to this court on Nov. 20, 2000, the only error assigned was the failure of the court of appeal to hold La. R.S. 9:5628 unconstitutional. Plaintiff did not even suggest that this court overrule ***Boutte*** or that the holding of this court in ***Boutte*** was incorrect. As the majority opinion points out, we granted certiorari in this case for the sole purpose of examining the constitutionality of La. R.S. 9:5628. Nevertheless, the majority now overrules ***Boutte***, a decision unanimously adopted by seven Justices of this court only 17 months ago. I cannot agree with this action.

When we decided ***Boutte***, seven elected Justices of this Court considered virtually the same arguments now adopted by the majority in this case. After giving serious consideration to those arguments, we rejected them and overruled the court of appeal opinion in favor of the ***Boutte*** plaintiffs. Now the majority,

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[*] Retired Judge Robert L. Lobrano, assigned as Justice *Pro Tempore*, sitting for Associate Justice Harry T. Lemmon. Retired Judge Philip Ciaccio, assigned as Justice *Pro Tempore*, sitting for associate Justice Bernette J. Johnson.

composed of two elected Justices and two Justices sitting *pro tempore*, concludes that the Justice *pro tempore* who now writes for the majority of this Court was correct in the first place when he wrote the court of appeal decision in ***Boutte***. Taking a 180 degree turn, the Court reverses ***Boutte*** and endorses the very reasoning we so recently and unanimously rejected. I cannot endorse this kind of abrupt about face when no new arguments have been presented. Such judicial flip-flops do nothing for the integrity of our judicial system and are especially ill-advised when a newly elected Justice will be joining this Court shortly.

Plaintiff has pleaded a claim for damages she alleges occurred as a result of receiving a transfusion of a tainted blood product in a private hospital. There is no question that such a claim is a strict liability tort claim. We held in ***DeBattista v. Argonaut-Southwest Insurance Co.***, 403 So. 2d 26 (La. 1981) that a distributor of blood is strictly liable in tort. 403 So. 2d at 32. *See also* ***Shortess v. Touro Infirmary***, 520 So. 2d 389 (La. 1988). There is also no question that the transfusion was given as part of the patient care plaintiff received while in the defendant's hospital.

At all pertinent times La. R.S. 9:5628 provided a prescriptive period applicable to this case. An examination of the language of the statute demonstrates that it was intended to have wide application to any:

> . . . action for injury or death against any . . . hospital . . . whether based on **tort**, or breach of contract, **or otherwise**, **arising out of patient care** . . . [Emphasis added].

Since the malpractice action filed by plaintiff in this case is an **action for injury** against a **hospital** based on a species of **tort arising out of patient care**, this specialized malpractice prescriptive statute, rather than the general provision regarding

delicts, clearly controls in this case. We need go no further than the plain language of La. R.S. 9:5628.

In my view, the Court fell into error in ***Branch v. Willis-Knighton Medical Center***, 92-3086 (La. 4/28/94), 636 So. 2d 211 when it concluded that La. R.S. 9:5628 did not encompass strict liability tort cases involving defective blood received in a hospital in the course of patient care. La. R.S. 9:5628 should have been applied as written to cover such strict liability tort malpractice claims. In ***Branch*** the Court held that strict liability blood claims would not be considered as malpractice claims since La. R.S. 9: 5628 did not *specifically* mention strict liability or blood cases. Then Justice Dennis, writing for the majority, erroneously concluded that the legislature, because it did not expressly refer to blood or strict liability, must not have intended such cases to fall within the scope of this special malpractice prescription statute. In my view, that conclusion was strained at best and it is ***Branch*** that should be overruled.

In ***Boutte***, we found it unnecessary to overrule ***Branch*** because the legislature had already taken action that effectively accomplished that same end. In 1976, after the occurrence of the tort that formed the basis of the ***Branch*** claim, the legislature amended the definition of malpractice to expressly cover liability for defective blood products. The argument made in ***Branch,*** *i.e.,* that the legislature did not intend blood cases to fall within the ambit of malpractice, can no longer be made. The legislature, by bringing blood claims within the statutory definition of malpractice in 1976, ended all legitimate debate as to whether it intended strict liability blood claims arising after the amendment to be governed by La. R.S. 9:5628, the special malpractice prescription statute.

I do not agree that ***Boutte*** used the definition in the Medical Malpractice Act to ***expand*** the types of actions governed by La. R.S. 9:5628. The statute was already clear on its face. ***Boutte*** merely made it plain that any argument to the contrary advanced in ***Branch*** was undermined by the 1976 amendments to the MMA. Nor can I agree that the passage of LA. R.S. 9:5628.1 supports the result reached by the majority. When passed in 1999, La. R.S. 9:5628.1, an even broader malpractice prescription statute, did not replace or repeal La. R.S. 9:5628. It applies only to cases filed after its passage in 1999. La. R.S. 9:5628 is still fully applicable to this claim filed in 1997.

Finally, any difference in result in the application of La. R.S. 9:5628 to claims made under the public and private malpractice acts is the very issue that led us to grant this application. The defendant and the Attorney General for the State of Louisiana have made cogent and persuasive arguments that the public and private acts contain provisions that make them harmonious and resolve the issue of perceived disparate treatment of patients receiving transfusions in public and private hospitals. In any event, the fact that a faithful reading of La. R.S. 9:5628 may require us to address a further constitutional issue is not a valid reason to adopt a strained interpretation of the prescription statute or to overrule a precedent established by a recent and unanimous vote of this Court. Such result oriented decision making cannot make for good law.

Accordingly, I respectfully dissent.