NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 1352

GWENDOLYN WILLIAMS, LARRY WILLIAMS AND LARRY WILLIAMS, JR.

VERSUS

ANDREA YVETTE DUNN AND JESSIE JAMES DUNN

Judgment Rendered: AUG 2 9 2007

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On Appeal from the 19th Judicial District Court
In and For the Parish of East Baton Rouge
Trial Court No. 531,344, Division "E23"

Honorable William A. Morvant, Judge Presiding

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Raymond L. Simmons Baton Rouge, LA	Counsel for Plaintiffs/Appellants Gwendolyn Williams, Larry Williams, and Larry Williams, Jr.
John N. Samaha Baton Rouge, LA	Counsel for Defendants/Appellees Andrea Yvette Dunn and Jessie James Dunn
Hansel M. Harlan Baton Rouge, LA	Counsel for Defendant/Appellee Option One Mortgage Corporation
Christine S. Goldberg Baton Rouge, LA	Counsel for Defendant/Appellee American General Finance, Inc.

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BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

Pettigrew, J. Concurs with the Results and Assigns Reasons

HUGHES, J.

This is an appeal from a summary judgment granted in favor of a defendant/mortgage company, sued by plaintiffs having a financial interest in immovable property, and whose son-in-law, the titled owner of the property, had granted a mortgage. Sanctions pursuant to LSA-C.C.P. art. 863 were awarded to the mortgage company against plaintiffs. Plaintiffs appealed. For the reasons that follow, we vacate the judgment in part.

FACTS AND PROCEDURAL HISTORY

Gwendolyn Williams, her husband, Larry Williams, and son, Larry Williams, Jr., filed a petition in the trial court on April 14, 2005, alleging that they had previously wanted to purchase a home in the name of the then-minor Larry Williams, Jr. with the proceeds of a personal injury settlement. Believing the title could not be placed in Larry Williams, Jr.'s name, because of his incapacity as a minor at the time, Mrs. Williams asked her married daughter, Andrea Yvette Dunn, to be the record owner of the property, with the understanding and agreement that the title would be transferred to Larry Williams, Jr. when he reached the age of majority. It was alleged that Andrea Yvette Dunn and her husband, Jessie James Dunn, signed an agreement "acknowledging the true ownership of this property."

Mr. and Mrs. Williams further alleged that thereafter Mrs. Dunn "or someone pretending to be [Mrs. Dunn], as she has privately denied this action, transferred the property into the name of her husband and defendant herein [Mr. Dunn], as his supposed separate property." It was alleged that Mr. Dunn then placed two mortgages on the property, one in favor of

American General Finance Incorporated (American General)[1] and another in favor of Option One Mortgage Corporation (Option One).

Mr. and Mrs. Williams petitioned the trial court to "cancel, set aside the alleged sale or donation of this property from [Mrs. Dunn] to her husband [Mr. Dunn]." Mr. and Mrs. Williams further requested that the mortgages placed on the property be canceled "on information and belief ... that the mortgage companies in question were or should have been put on notice of the spurious nature of this transaction [sic] by virtue of the facts and circumstances stated." In the alternative, Mr. and Mrs. Williams sought a money judgment against Mr. and Mrs. Dunn in the amount of the mortgages, along with the "interest being charged by the said mortgage companies." Mr. and Mrs. Dunn filed an answer on May 24, 2005, generally denying the allegations of the petition.

American General filed an answer on June 3, 2005, denying the chief allegations of plaintiffs' petition and raising these additional issues: the legal documents at issue were the best evidence of their contents, plaintiffs' claims were barred by the Public Records Doctrine, and the claim was moot as the mortgage granted by Mr. Dunn in favor of American General had been terminated and extinguished through payment in full of the underlying obligation.

Option One also filed an answer on June 17, 2005, denying the main allegations of the plaintiffs' petition and asserting the following affirmative defense:

> Plaintiffs' Petition is barred by the Doctrine of Unclean Hands. Assuming the allegations of the Petition to be true with regard to the private counterletters and secret agreements contained therein, Plaintiffs' scheme to invest a personal injury

[1] American General answered the suit and indicated its correct name was "American General Finance, Inc.," formerly known as "American General Financial Services of Louisiana, Inc."

> settlement in real property and conceal the true ownership of said property from the world - thus creating an illusion of a valid chain of title in the public records and inducing the reliance of third-parties -- prevent them now from disavowing that public record of ownership to the detriment of third-parties such as Option One.

Option One further alleged that Mrs. Dunn expressly acknowledged to counsel that she signed the act of donation transferring ownership of the property at issue to Mr. Dunn and denied that her signature thereon was a forgery. Option One also alleged that it had "conveyed this information to counsel for Plaintiffs" and requested that it be dismissed from the litigation because "absent any factual basis for his allegations of forgery, the law affords him no relief against Option One," and that plaintiffs' counsel "inexplicably and summarily refuse[d]" to dismiss the claim. Option One further asserted counter-claims, cross-claims, and third party claims against Mr. and Mrs. Williams, Larry Williams, Jr. (who had by then reached the age of majority), Mr. and Mrs. Dunn, "John Doe ... notary public," and "ABC Company ... the bond and/or insurance coverage for John Doe."

Thereafter, on November 9, 2005, Option One filed a "Motion For Summary Judgment and for Sanctions" seeking dismissal of the suit against it and seeking Article 863 sanctions, on the basis that the suit against it was grounded on "the demonstrably false allegation that the Donation Inter Vivos [to Mr. Dunn] [was] a forgery." Option One also stated that it had apprised counsel for plaintiffs of the fact "on several occasions - even providing him with an affidavit from the signatory in question wherein she acknowledge[d] the authenticity of her allegedly-forged signature," but without obtaining a dismissal of the suit.

Attached to Option One's motion for summary judgment and for sanctions, with an attached memorandum in support of the motion, were

copies of the following documents: (1) January 14, 2000 Act of Cash Sale to Mrs. Dunn of property located at 12212 Strauss Drive, Baton Rouge, Louisiana;[2] (2) June 7, 2002 Donation Inter Vivos from Mrs. Dunn to Mr. Dunn of the Strauss Drive property; (3) August 18, 2004 Mortgage by Mr. Dunn in favor of Option One in the amount of $65,450 on the property; (4) August 18, 2005 Affidavit of Mrs. Dunn verifying her knowing, free, and voluntary signature on the pertinent legal documents, which she identified as true copies; (5) October 10, 2005 Affidavit of William T. Adcock, stating that he was the notary public on the relevant donation and that he verified the identification through the valid driver's license of each signatory thereon and attached copies of the driver's licenses of Mr. and Mrs. Dunn, which he obtained at the time the donation was executed; (6) - (7) June 8, 2005 and August 26, 2005 Letters from Option One's counsel to plaintiffs' counsel stating that Mrs. Dunn had acknowledged her signature on the legal documents and pointing out the Article 863 consequences that would be sought if the suit were not dismissed; (8) September 9, 2005 Letter from plaintiffs' counsel to Option One's counsel acknowledging the prior correspondence and stating that he wanted to take the deposition of Mrs. Dunn prior to taking any further action in the case August 26, 2005; and (9) September 21, 2005 Letter from Option One declining plaintiffs' counsel's request for further "investigation."

The depositions of Mr. and Mrs. Dunn were taken on February 17, 2006 and made a part of the record at the hearing of the matter. In these depositions, Mr. and Mrs. Dunn acknowledged obtaining a loan from American General for $22,000 and placing a mortgage on the property; however, they asserted this was done at Mrs. Williams' request and that the

[2] Mr. Dunn also signed the act of sale as an "intervenor."

proceeds were divided equally between themselves and Mrs. Williams. The Dunns indicated that in conjunction with this transaction, Mrs. Dunn was required to donate the property to Mr. Dunn so that he could obtain the loan; Mrs. Dunn stated that she told Mrs. Williams about the transfer of the title to Mr. Dunn. According to the Dunns, an agreement existed between the parties that Mrs. Williams would pay the Dunns a proportionate share of the note payments due on the loan, but that she failed to consistently do so. Mr. Dunn testified that making the payment on the loan fell almost entirely on him and that it became a financial burden in addition to his other obligations. For this reason, Mr. Dunn testified that he obtained a "consolidation" loan in the principal amount of $65,450 from Option One, which paid off the American General loan, as well as other debts, and granting a mortgage in Option One's favor.

Following a February 27, 2006 hearing on Option One's motion, which neither plaintiffs nor their attorney attended, summary judgment was granted in Option One's favor, and $6,500 in attorney's fees were awarded pursuant to LSA-C.C.P. art. 863.

On appeal, plaintiffs/appellants assert that the trial court erred when it granted sanctions pursuant to Article 863 in conjunction with the summary judgment in Option One's favor.

LAW AND ANALYSIS

Louisiana Code of Civil Procedure Article 863 provides:

> A. Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address.

> B. Pleadings need not be verified or accompanied by affidavit or certificate, except as otherwise provided by law, but the signature of an attorney or party shall constitute a certification by him that he has read the pleading; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact; that it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
>
> C. If a pleading is not signed, it shall be stricken unless promptly signed after the omission is called to the attention of the pleader.
>
> D. If, upon motion of any party or upon its own motion, the court determines that a certification has been made in violation of the provisions of this Article, the court shall impose upon the person who made the certification or the represented party, or both, an appropriate sanction which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including a reasonable attorney's fee.
>
> E. A sanction authorized in Paragraph D shall be imposed only after a hearing at which any party or his counsel may present any evidence or argument relevant to the issue of imposition of the sanction.
>
> F. A sanction authorized in Paragraph D shall not be imposed with respect to an original petition which is filed within sixty days of an applicable prescriptive date and then voluntarily dismissed within ninety days after its filing or on the date of a hearing on the pleading, whichever is earlier.

The prerequisites for imposition of Article 863 sanctions were set forth by this court in **Sanchez v. Liberty Lloyds**, 95-0956, pp. 5-7 (La. App. 1 Cir. 4/4/96), 672 So.2d 268, 271-72, writ denied, 96-1123 (La. 6/7/96), 674 So.2d 972, as follows:

> Article 863 is derived from Rule 11 of the Federal Rules. Because there is limited jurisprudence interpreting and applying Article 863, the Federal decisions applying Rule 11 provide guidance to this court. Both Rule 11 and Article 863 apply to the signing of pleadings, motions and other papers, imposing upon attorneys and litigants affirmative duties as of the date a document is signed. The district court must determine if the individual, who has certified the document purported to be

violative, has complied with those affirmative duties. The standard of review by the appellate court has been referred to as the "abuse of discretion" standard. We conclude that this standard is nothing more or less than the "manifestly erroneous" or "clearly wrong" criteria used by the appellate courts in reviewing a trial court's factual findings. Once the trial court finds a violation of Article 863 and imposes sanctions, the determination of the type and/or the amount of the sanction is reviewed on appeal utilizing the "abuse of discretion" standard.

Thus, the obligation imposed upon litigants and their counsel who sign a pleading is to make an objectively reasonable inquiry into the facts and the law. Subjective good faith will not satisfy the duty of reasonable inquiry.

Among the factors to be considered in determining whether reasonable factual inquiry has been made are:

1) The time available to the signer for investigation;

2) The extent of the attorney's reliance on his client for the factual support for the document;

3) The feasibility of a prefiling investigation;

4) Whether the signing attorney accepted the case from another member of the bar or forwarding attorney;

5) The complexity of the factual and legal issues; and

6) The extent to which development of the factual circumstances underlying the claim requires discovery.

The factors for determining whether reasonable legal inquiry was made include:

1) The time available to the attorney to prepare the document;

2) The plausibility of the legal view contained in the document;

3) The pro se status of the litigant; and

4) The complexity of the legal and factual issues raised.

In order to impose sanctions, a trial court must first find that one of the affirmative duties imposed by article 863(B) has been violated. LSA-C.C.P. art. 863(D). The certification required by paragraph B of the article is, from a grammatical reading of the paragraph, a four-part certification, the violation of any part of which would fatally infect the entire certification. The first part of the certification is that an attorney has read the pleading. The second part is that to the best of the attorney's knowledge, information, and belief formed after reasonable inquiry, the pleading is well grounded in fact. Thirdly, the attorney must certify that the pleading is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. Fourth, and lastly, the attorney certifies that the pleading is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Article 863, similar to Rule 11, is not to be used simply because parties disagree as to the correct resolution of a matter in litigation. Rule 11's use is intended only for exceptional circumstances. In determining a violation of Article 863, the

> trial court should avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion or other paper was submitted. [Citations omitted.]

See also **Brown v. Sanders**, 2006-1171 (La. App. 1 Cir. 3/23/07), ___ So.2d____.

In the instant case, Option One asserted that sanctions were properly imposed because plaintiffs' counsel learned after filing the petition in this case that the allegations of fraud, regarding Mrs. Dunn's signature on the legal documents at issue, were incorrect, yet plaintiffs failed to dismiss the action as to Option One. Option One offered no evidence that plaintiffs did not believe in the allegations of fraud at the time they filed the petition in this case. Particularly, Option One failed to introduce any evidence on the issue of whether Mrs. Dunn told her mother, Mrs. Williams, that she did not sign the documents in question.

Option One rather argues that plaintiffs' belief in the allegations contained in the petition were not reasonable, and that plaintiffs should have conducted further investigations prior to filing suit, such as contacting the attorney/notary public who attested to Mrs. Dunn's signature on the act of donation. We find this argument unpersuasive, and note that the additional step suggested by Option One was not available to plaintiffs because the printed name of the notary public does not appear on the act of donation and his signature thereon is illegible. Option One offered no proof that plaintiffs were actually aware of the identity of the notary public in question.

Moreover, there is a complete absence in the record of evidence pertaining to the **Sanchez v. Liberty Lloyds** factors, which are required to be considered prior to the imposition of an Article 863 sanction, so that the trial court avoids "using the wisdom of hindsight" and tests the signer's

conduct by inquiring what was reasonable to believe at the time the pleading was submitted.

Although there is jurisprudence suggesting that the mandates of Article 863 would be breached if a party maintains a position that it no longer believes is legally valid (see **Telecable Associates, Inc. v. Louisiana Tax Commission**, 94-0499, p. 3 (La. App. 1 Cir. 11/9/95), 694 So.2d 279, 281, writ denied, 96-0483 (La. 4/19/96), 671 So.2d 927)), Option One failed to establish that plaintiffs no longer believed in the legal validity of the position taken in their petition until after plaintiffs had the opportunity to take the deposition of their daughter on February 17, 2006.[3] By this time the motions for summary judgment and for sanctions had been filed by Option One and the hearing was held only days later on February 27, 2006. After the deposition was taken, counsel for plaintiffs assured counsel for Option One that he would not oppose the motion for summary judgment.

Furthermore, we find that under the facts pled by plaintiffs, Option One arguably was a party required to be joined in this action under LSA-C.C.P. art. 641, which provides:

> A person shall be joined as a party in the action when either:
>
> (1) In his absence complete relief cannot be accorded among those already parties.
>
> (2) He claims an interest relating to the subject matter of the action and is so situated that the adjudication of the action in his absence may either:
>
> (a) As a practical matter, impair or impede his ability to protect that interest.
>
> (b) Leave any of the persons already parties subject to a substantial risk of incurring multiple or inconsistent obligations.

According to this court's opinion in **Stephenson v. Nations Credit Financial Services Corp.**, 98-1689, p. __ (La. App. 1 Cir. 9/24/99), 754

[3] Even though there was an earlier affidavit signed by plaintiffs' daughter authenticating certain mortgage documents and verifying her signature thereon, plaintiffs had no opportunity to cross-examine Mrs. Dunn on the statements made in this affidavit until her deposition was taken.

So.2d 1011, 1018, LSA-C.C.P. art. 641, as amended by 1995 La. Acts No. 662, § 1, requires that a person be joined as a party in an action when that party has an interest relating to the subject matter of the action and is so situated that the adjudication of the action in his absence may, as a practical matter, impair or impede his ability to protect that interest. Prior to its amendment, the party described in Article 641 was referred to as an indispensable party, and there could be no adjudication unless all indispensable parties were joined in the action.[4] While the latter provision no longer appears in Article 641, the article still makes mandatory the joinder of persons described in Article 641 as a party to the suit. **Id.**

Because, in this case, plaintiffs alleged fraud in the donation of the property at issue from their daughter, in whom they had placed the title, to her husband, Option One's mortgagor, Option One had an interest in whether their mortgagor had fraudulently obtained title to the property. If it had been established that Mr. Dunn fraudulently acquired the property on which he placed a mortgage in favor of Option One, Option One's mortgage might have been impaired; therefore plaintiffs could reasonably have named

[4] Nonjoinder of a party under LSA-C.C.P. arts. 641 and 64 may be noticed by either the trial court or the appellate court on its own motion. LSA-C.C.P. art. 927.

Option One as a defendant in accordance with Article 641.[5]

Under these particular facts and circumstances, we do not believe plaintiffs' actions in this suit rise to the level contemplated by Article 863 as sanctionable. The goal to be served by imposing sanctions is not wholesale fee shifting, but correction of litigation abuse. **Keaty v. Raspanti**, 2003-1080, p. 5 (La. App. 4 Cir. 2/4/04), 866 So.2d 1045, 1050, writs denied, 2004-0941, 2004-0947 (La. 6/18/04), 876 So.2d 806, 807; **Alombro v.**

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[5] Prior to 1984 La. Acts, No. 331, §1, LSA-C.C. art. 2236 provided: "The authentic act is full proof of the agreement contained in it, against the contracting parties and their heirs or assigns, ***unless it be declared and proved a forgery***." (Emphasis added.) Following the 1984 amendment and re-enactment of the codal articles on Obligations, the substance of former Article 2236 was carried forward into LSA-C.C. art. 1835, which provides: "An authentic act constitutes full proof of the agreement it contains, as against the parties, their heirs, and successors by universal or particular title." The official revision comments state that Article 1835 reproduces the substance of former Article 2236 and does not change the law. LSA-C.C. art. 1835, Comment (a). Comment (b) further provides, in pertinent part: "This Article eliminates the reference to forged acts found in [LSA-C.C. art.] 2236 (1870). A forged act is of course not authentic and can have no evidentiary effect." Because an authentic act must be "signed by each party who executed it" in accordance with LSA-C.C. art. 1833, the forged signature of a party by a third person fails to comply with the requirements of these articles and is therefore not an authentic act. (The purpose of authentic act requirements is to insure the validity of a signature on a document and that the person whose name appears thereon is the person who actually signed the document; the notary and witnesses attest to seeing the party sign the document. **Zamjahn v. Zamjahn**, 2002-871, p. ___ (La. App. 5 Cir. 1/28/03), 839 So.2d 309, 315, writ denied, 2003-0574 (La. 4/25/03), 842 So.2d 410.) Because ownership of immovable property can only be transferred by authentic act under LSA-C.C. art. 1839 (or orally where the property has been delivered and the seller acknowledges the transfer under oath), a purported contract of sale or act of donation is void as being in improper form (not an authentic act) where the transferor's signature is a forgery. This concept has been recently made express in LSA-C.C. art. 3339 (enacted by 2005 La. Acts, No. 169, § 1, effective July 1, 2006), which provides: "A matter of capacity or authority, the occurrence of a suspensive or a resolutory condition, the exercise of an option or right of first refusal, a tacit acceptance, a termination of rights that depends upon the occurrence of a condition, and a similar matter pertaining to rights and obligations evidenced by a recorded instrument ***are effective as to a third person although not evidenced of record***." (Emphasis added.) A mortgagee is such a third person. See **First National Bank of Ruston v. Mercer**, 448 So.2d 1369, 1376-79 (La. App. 2 Cir. 1984). The following is stated in Peter S. Title, 1 Louisiana Practice Series, "Louisiana Real Estate Transactions," § 8:16 (2d ed.) (citations omitted): The public records doctrine, important as it is, is essentially a negative doctrine. The doctrine does not create rights in the positive sense, but rather has the negative effect of denying the effectiveness of certain rights unless they are recorded. The fact that a document is recorded does not mean that it is valid or that the person with record title is in fact the owner. Civil Code Article 3341, effective January 1, 2006, similarly limits the effect of recordation: the recordation of an instrument does not create a presumption that the instrument is valid or genuine and does not create a presumption as to the capacity or status of the parties. However, the third person can instead rely on the "absence" from the public record of those interests that are required to be recorded. However, the public records doctrine also has a positive aspect. Additionally, the third person may rely upon the recitals of a recorded instrument made by the parties to the written instrument under both the rule proscribing parol evidence to prove the contents of an instrument involving real estate and the rule that "secret claims and equities" between the parties to the instrument cannot be invoked to the prejudice of third parties relying upon the public records. As a negative doctrine rather than a source of rights, the public records doctrine does not entitle third parties to rely on forged instruments, such as forged resolutions, on judgments obtained by fraudulent misrepresentations or based upon forged wills, or on documents signed by agents or representatives without authority.

Alfortish, 2002-1081, p. 10 (La. App. 5 Cir. 4/29/03), 845 So.2d 1162, 1170, writ denied, 2003-1947 (La. 10/31/03), 857 So.2d 486; **Lafourche Parish Council v. Breaux**, 2002-1565, p. 5 (La. App. 1 Cir. 5/9/03), 845 So.2d 645, 648; **Joyner v. Wear**, 27,631, p. 14 (La. App. 2 Cir. 12/6/95), 665 So.2d 634, 642, writs denied, 96-0040, 96-0042 (La. 2/28/96), 668 So.2d 370.

In the instant case, it was not shown that plaintiffs were without a reasonable and good faith belief in their pleadings, until further discovery brought to light previously unknown facts. We conclude that plaintiffs' failure to file additional pleadings in the ten-day period between this discovery and the hearing on the motions for summary judgment and for sanctions, particularly in light of their counsel's agreement not to oppose dismissal of the case on summary judgment, did not merit an Article 863 sanction.

Consequently, we must conclude that the trial court erred in finding that Option One proved that an Article 863 sanction was warranted in this case.

CONCLUSION

For the reasons assigned, the judgment of the trial court is vacated, in part, insofar as Gwendolyn Williams, Larry Williams, Larry Williams, Jr., and Raymond L. Simmons are ordered to pay to Option One Mortgage Corporation attorneys' fees in the amount of $6,500. All costs of this appeal are to be borne by Option One Mortgage Corporation.

JUDGMENT VACATED IN PART.

GWENDOLYN WILLIAMS, LARRY WILLIAMS AND LARRY WILLIAMS, JR.

VERSUS

ANDREA YVETTE DUNN AND JESSIE JAMES DUNN

NUMBER 2006 CA 1352

COURT OF APPEAL

FIRST CIRCUIT

STATE OF LOUISIANA

BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

PETTIGREW, J., CONCURS WITH THE RESULTS, AND ASSIGNS REASONS.

I concur with the results reached by the majority. I note from my review of the record that Mr. Simmons was not named as a target for sanctions under LSA-C.C.P. art. 863 either in the "Motion For Summary Judgment and for Sanctions" or in the rule to show cause for sanctions signed by the trial court. Due process requires that reasonable notice be given before sanctions are imposed for filing unfounded pleadings. **Lee v. Woodley**, 615 So.2d 349, 352 (La.App. 1 Cir.), writ denied, 618 So.2d 411 (La. 1993). See LSA-C.C.P. 863; U.S. Const. amend. XIV.

Further, after reviewing the evasive and contradictory testimony of Andrea Dunn's deposition, I cannot say there was sufficient evidence to prove the plaintiffs were aware of the falsity of their claim at the time they filed their original lawsuit.

I therefore concur with the results reached by the majority.