NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 CA 1518

EUGENE BARBER, ET AL.

VERSUS

EMPLOYERS INSURANCE COMPANY OF WAUSAU

CONSOLIDATED WITH

2012 CA 1519

SYLVESTER GRIGSBY

VERSUS

EMPLOYERS INSURANCE COMPANY OF WAUSAU, ET AL.

On Appeal from the 20th Judicial District Court
Parish of East Feliciana, Louisiana
Docket Nos. 39,290 and 41,369
Honorable William G. Carmichael, Judge Presiding

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BEFORE: PARRO, WELCH, AND KLINE,[1] JJ.

Judgment rendered MAY 31 2013

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[1] **Judge William F. Kline, Jr., retired, is serving as judge ad hoc by special appointment of the Louisiana Supreme Court.**

PARRO, J.

Sylvester Grigsby[2] appeals a judgment dismissing with prejudice his claims against an insurer, on the basis that they were prescribed. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On September 9, 2008, suit was filed by or on behalf of seventy-five former employees of Central Wood Preserving, Inc. (Central Wood) against Employers Insurance Company of Wausau (Employers), which insured Central Wood and its executive officers. These employees alleged that, while employed by Central Wood between 1950 and 1976, they were exposed to toxic materials, such as creosote, asbestos, and silica, and suffered various illnesses as a result of this exposure.[3] Some plaintiffs also alleged that they had suffered hearing loss as a result of their working conditions. On August 24, 2011, Sylvester Grigsby filed this suit against Central Wood and its insurer, Employers,[4] alleging that while employed at Central Wood from 1973 through 1976, he was exposed to hazardous levels of industrial noise, causing him to suffer hearing loss. On March 15, 2012, the court granted a motion filed by Employers and transferred and consolidated Grigsby's suit with the Barber suit.

Employers answered Grigsby's petition and filed an exception raising the objection of prescription. It claimed Grigsby's petition showed on its face that his claims were prescribed, as he had not worked at Central Wood since 1976 and did not file suit until 2011. Grigsby argued that he did not know that his gradual hearing loss was caused by exposure to hazardous noise levels at work until he was diagnosed by an audiologist on December 7, 2010. Therefore, he urged that the doctrine of *contra non valentem* applied to suspend the running

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[2] In his petition, Grigsby identified himself as "Sylvester Grigsby"; however, at various points in the record and in briefs to this court, his name is spelled "Grisby."

[3] Details of this lawsuit are more particularly described in Barber v. Employers Ins. Co. of Wausau, 11-0357 (La. App. 1st Cir. 6/28/12), 97 So.3d 454.

[4] Grigsby also named as a defendant Louisiana Concrete Products, Inc., for whom he worked from 1981 to 1984.

of prescription on his claim until that date. After a hearing on the exception on June 11, 2012, the court sustained the exception and dismissed Grigsby's claim against Employers. A judgment to this effect was signed June 27, 2012.

In this appeal, Grigsby claims that he had no knowledge that he had hearing loss related to his occupational exposure to noise until shortly before he filed suit in 2011. Relying on the doctrine of *contra non valentem*, he contends prescription was suspended until he acquired that knowledge, and the court's failure to apply that doctrine was clear error. He further argues that because the application of *contra non valentem* is a fact-intensive inquiry, this issue should be deferred until after discovery has been completed or referred to trial on the merits.

APPLICABLE LAW

A claim for personal injury, such as hearing loss, is a delictual action subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained. See LSA-C.C. art. 3492. The objection of prescription may be raised by a peremptory exception. See LSA-C.C.P. art. 927(A)(1). At the trial of a peremptory exception, evidence may be introduced to support or controvert any of the objections pleaded, when the grounds thereof do not appear from the petition. LSA-C.C.P. art. 931. Ordinarily, the party pleading prescription bears the burden of proving the right to bring the claim has prescribed. However, when the face of the petition reveals that the plaintiff's right has prescribed, the burden shifts to the plaintiff to demonstrate prescription was interrupted or suspended. Taylor v. Babin, 08-2063 (La. App. 1st Cir. 5/8/09), 13 So.3d 633, 642, writ denied, 09-1285 (La. 9/25/09), 18 So.3d 76.

The doctrine of *contra non valentem* is a Louisiana jurisprudential doctrine under which prescription may be suspended. Jenkins v. Starns, 11-1170 (La. 1/24/12), 85 So.3d 612, 623. The Louisiana Supreme Court has recognized four instances where *contra non valentem* applies to prevent the

running of prescription: (1) where there was some legal cause which prevented the courts or their officers from taking cognizance of or acting on the plaintiff's action; (2) where there was some condition coupled with the contract or connected with the proceedings which prevented the creditor from suing or acting; (3) where the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action; and (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. Id. This fourth instance is commonly known as the discovery rule.

The discovery rule is based on the theory that when the claimant is not aware of the facts giving rise to his or her cause of action against the particular defendant, the running of prescription is for that reason suspended until the tort victim discovers or should have discovered the facts upon which his or her cause of action is based. Doe v. Delta Women's Clinic of Baton Rouge, 09-1776 (La. App. 1st Cir. 4/30/10), 37 So.3d 1076, 1080, writ denied, 10-1238 (La. 9/17/10), 45 So.3d 1055. Prescription commences when a plaintiff obtains actual or constructive knowledge of facts indicating to a reasonable person that he or she is the victim of a tort. Campo v. Correa, 01-2707 (La. 6/21/02), 828 So.2d 502, 510. Constructive knowledge is whatever notice is enough to excite attention and put the injured party on guard and call for inquiry. Such notice is tantamount to knowledge or notice of everything to which a reasonable inquiry may lead. Medical Review Panel Proceeding of Williams v. Lewis, 08-2223 (La. App. 1st Cir. 5/13/09), 17 So.3d 26, 29. Mere apprehension that something might be wrong does not make delay in filing suit unreasonable, nor does knowledge that one has a disease. Barber v. Employers Ins. Co. of Wausau, 11-0357 (La. App. 1st Cir. 6/28/12), 97 So.3d 454, 465.

A trial court's findings of fact on the issue of prescription are subject to the manifest error/clearly wrong standard of review. London Towne Condo. Homeowner's Ass'n v. London Towne Co., 06-0401 (La. 10/17/06), 939 So.2d

1227, 1231. Pursuant to this standard, a factual finding cannot be set aside unless the appellate court finds that it is manifestly erroneous or clearly wrong. Smith v. Louisiana Dept. of Corrections, 93-1305 (La. 2/28/94), 633 So.2d 129, 132; Stobart v. State through Dept. of Transp. and Dev., 617 So.2d 880, 882 (La. 1993). An appellate court should not re-weigh the evidence or substitute its own factual findings. Pinsonneault v. Merchants & Farmers Bank & Trust Co., 01-2217 (La. 4/3/02), 816 So.2d 270, 278-79.

APPLICATION OF LAW TO FACTS

Grigsby's petition alleged that, while employed at Central Wood from 1973 through 1976, he was exposed to hazardous levels of industrial noise, causing him to suffer hearing loss. This suit was not filed until August 2011, approximately 35 years after the last date on which the injury or damage from that exposure could have occurred. Since the face of the petition revealed that Grigsby's cause of action against Employers' insured had prescribed, he had the burden to demonstrate prescription was interrupted or suspended.

In support of his claim that he did not discover that he had hearing loss related to his decades-earlier employment, Grigsby submitted an audiologist's report from his evaluation on December 7, 2010. That report concluded that he had a moderate to moderately-severe, high frequency, sensorineural hearing loss bilaterally, but also showed that he had essentially normal hearing sensitivity at lower frequencies. The report does not state anything about the possible cause of this partial hearing loss. Grigsby claims that until that diagnosis, he was not aware that he had a hearing loss affecting only a portion of his hearing spectrum, or that such a condition is commonly associated with noise exposure. He contends he filed suit within one year of making the discovery that he suffered from noise-induced hearing loss.

However, the audiologist's report also stated that Grigsby "had complaints of bilateral hearing loss which he has noticed for about the last 12 years." This statement belies his argument that he was unaware of his hearing

loss until diagnosed in December 2010. A person becomes aware of a hearing loss when he realizes that, although he is able to hear some sounds, there are other sounds that are audible to other persons, but not to him. Based on the history given to the audiologist, Grigsby knew for at least twelve years that he had a partial hearing loss that affected his ability to discern certain sounds. This knowledge was sufficient to put a reasonable person on notice that further inquiry was necessary concerning the possible cause of his condition. It is common knowledge that hearing can be damaged by exposure to loud noises.[5] Grigsby must have suspected that his hearing loss might be attributable to the noise level in his former working environment. It was simply unreasonable for Grigsby to live with this condition for over twelve years without doing anything about it until his attorney sent him to an audiologist for tests.

Based on the evidence presented in connection with the exception, we conclude that Grigsby failed to prove that he only discovered his hearing loss in 2010 or that he was not put on notice long before 2010 that his condition might be connected to noise exposure at the various facilities where he had worked. The audiologist's report, while establishing his current hearing loss, also showed that he had discovered the condition years earlier. Thus, he failed to carry his burden of proof that prescription was interrupted by his inability to discover a possible connection between his hearing loss and his working environment. Therefore, the district court did not err in sustaining the exception of prescription and dismissing his claims.[6]

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[5] In Sellers v. Lykes Bros. Steamship Co., 94-1107 (La. App. 4th Cir. 12/28/94), 648 So.2d 496, 498, the court observed that "common sense" should have informed the plaintiff that his hearing may have been damaged by the noise in the engine rooms of the ships where he had worked some twenty years earlier. The court cited with approval the district court's reasons for judgment, which stated, "He did not need a doctor to tell him in 1993 that noise exposure causes hearing loss." Id.

[6] With respect to Grigsby's contention that this issue should be deferred until after discovery has been completed or referred to trial on the merits, we note that he did not seek an extension of time in the district court. Therefore, this court cannot delay the finality of the judgment.

CONCLUSION

Based on the above reasons, the June 27, 2012 judgment is affirmed. All costs of this appeal are assessed to Sylvester Grigsby.

AFFIRMED.