NOT DESIGNATED FOR PUBLICATION

PATRICIA E. CORCORAN, DATIVE TUTRIX OF RHIANNON VATH, ON BEHALF OF RHIANNON VATH	*	**NO. 2001-CA-0457**
	*	**COURT OF APPEAL**
	*	**FOURTH CIRCUIT**
VERSUS	*	**STATE OF LOUISIANA**
WENDELL H. GAUTHIER; SCOTT LABARRE; WILLIAM C. HARRISON, JR.; GAUTHIER, MURPHY, SHERMAN, MCCABE, AND CHEHARDY, A PARTNERSHIP; GAUTHIER & MURPHY; JAVIER N. ALONZO; PARETTI PONTIAC COMPANY, INC.; UNITED STATES FIDELITY & GUARANTY COMPANY; ET AL.	* * * * * * *	

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 96-12550, DIVISION "L"
Honorable Mickey P. Landry, Judge Pro Tempore
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Chief Judge William H. Byrnes, III, Judge Miriam G. Waltzer, and Judge Dennis R. Bagneris, Sr.)

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AFFIRMED

Patricia Cocoran, tutrix of Rhiannon Vath, appeals on behalf of Rhiannon Vath, the decision of the trial court sustaining the exceptions of, and granting summary judgment in favor of Wendell Gauthier, et al. We affirm.

Facts and Procedural History

The original suit arises out of an earlier representation by Gauthier, et al., of Rhiannon Vath and her mother Pamela. Two settlements were obtained during the representation by Gauthier. Both Pamela Vath and her minor daughter Rhiannon received a portion of each settlement offer. In total, after reduction of attorney fees and costs, Rhiannon received approximately $197,000.00 from both settlements. Pamela Vath petitioned the court for approval of both settlements as administrator of Rhiannon's estate, and the court approved and authorized both settlements. At some point after the settlements were approved and were received by Pamela she became addicted to drugs and wasted Rhiannon's assets.

During the course of seeking approval of the settlements of

Rhiannon's claims, Pamela Vath was never properly qualified as Rhiannon's tutrix. The papers drawn up for the first settlement with Rhiannon were defective in that they did not meet the requirements of law for tutorship. The Gauthier Law Firm apparently reviewed the documents but failed to correct any defects. The trial court judge that signed the papers did require correction of any defects in the papers granting the tutorship. At the time of the second settlement, the papers for the settlement on behalf of the minor were virtual copies of the original settlement papers and failed to correct the defects in establishing tutorship.

A lawsuit was filed against the appellees, Gauthier, et al., seeking damages resulting from the disbursement of her settlement money to a person not legally entitled to receive it and who later spent it. Rhiannon sought a reduction in the $120,000 fee she had paid to the firm as the 40% contingent fee agreed to in the contract for legal representation. The defendants/appellees filed peremptory exceptions of prescription and no cause of action as well as a motion for summary judgment. The trial court, on November 20, 2000, issued a judgment sustaining the exceptions and granting the motion for summary judgment, dismissing all claims against the appellees.

Discussion

The issues presented for review in this appeal present a single primary question. Whether the actions on which this appeal is based fall within the realm of the Louisiana statute addressing malpractice actions and the peremptive period provided by it.

Actions against attorneys, whether based on tort, breach of contract, or otherwise are controlled by La. R.S. 9:5605 which provides a one- or three-year preemptive period. La. R.S. 9:5605 provides that:

> A. No action for damages against any attorney at law duly admitted to practice in this state, any partnership of such attorneys at law, or any professional corporation, company, organization, association, enterprise, or other commercial business or professional combination authorized by the laws of this state to engage in the practice of law, whether based upon tort, or breach of contract, or otherwise, arising out of an engagement to provide legal services shall be brought unless filed in a court of competent jurisdiction and proper venue within one year from the date of the alleged act, omission, or neglect, or within one year from the date that the alleged act, omission, or neglect is discovered or should have been discovered; however, even as to
> actions filed within one year from the date of such discovery, in all events such actions shall be filed at the latest within three years from the date of the alleged act, omission, or neglect.
>
> B. The provisions of this Section are remedial and apply to all causes of action without regard to the date when the alleged act, omission, or neglect occurred. However, with respect to any alleged act, omission, or neglect occurring prior to September 7, 1990, actions must, in all events, be filed in a court of competent jurisdiction and proper venue on or before September 7, 1993, without regard to the date of discovery of the alleged act, omission, or neglect. The one-year and three-year periods of limitation provided in Subsection A of this Section are peremptive periods within the meaning of Civil

> Code Article 3458 and, in accordance with Civil Code Article 3461, may not be renounced, interrupted, or suspended.
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> C. Notwithstanding any other law to the contrary, in all actions brought in this state against any attorney at law duly admitted to practice in this state, any partnership of such attorneys at law, or any professional law corporation, company, organization, association, enterprise, or other commercial business or professional combination authorized by the laws of this state to engage in the practice of law, the prescriptive and peremptive period shall be governed exclusively by this Section.
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> D. The provisions of this Section shall apply to all persons whether or not infirm or under disability of any kind and including minors and interdicts.
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> E. The peremptive period provided in Subsection A of this Section shall not apply in cases of fraud, as defined in Civil Code Article 1953.

Delivery of the Rhiannon Vath's settlement money to Pamela Vath

The appellants argue that the delivery of Rhiannon's money to her mother, who had no legal right to receive it, was a breach of duty that was not "traditional" malpractice. Because it was not traditional malpractice, the appellants assert that it is not subject to the preemptive period established by La. R.S. 9:5605. The appellants present case law holding that application of La. R.S. 9:5605 is strictly construed and limited to situations arising out of "traditional legal malpractice." *Broussard v. F.A. Richard and Associates, Inc.*, 98-1167 (La. App. 3 Cir. 3/17/99), 732 So.2d 578, 582. The appellants provide a definition of traditional legal malpractice found in *Davis v. Parker*,

58 F.3d 183, 188 (1995), *citation omitted*. "Generally, legal malpractice claims are those bases of liability that are unique to and arise out of the rendition of legal services."

Reliance on the *Broussard* case however is misplaced, as the claims arose from breach of contract, rescission, and detrimental reliance, based upon a joint business venture and a contract transferring control of a business interest to one business partner. It was not based upon a contract to provide legal services. The disbursement of money to Pamela Vath, as administratrix of the minor Rhiannon Vath's estate, was a result of the settlement agreement reached in the execution of the contract between Mrs. Vath and her daughter Rhiannon and Gauthier, et al., to provide legal services. Because the disbursement of the money was a part of the legal representation by Gauthier, et al., it does fall within the preemptive period of La. R.S. 9:5605. The *Broussard* case is also factually distinct from the instant claim in that the application of R.S. 9:5605 was held only to apply to claims for legal malpractice brought by clients against their own attorneys.

Since the action in the *Broussard* case was brought by a party who was not a client of the attorney defendants, R.S. 9:5605 did not apply. In the present case, the action under review is clearly a direct result of the contract for legal representation between the Vaths and Gauthier, et al., and therefore

the peremptive period in R.S. 9:5605 was properly applied by the trial court. Attempts by the appellants to equate this as a simple obligation to deliver property to a person authorized to receive it are unpersuasive. Although this duty is not specific to the legal profession, it is an obligation which, within the context of a contract to present legal representation, falls within in purview of legal malpractice when applied to an attorney.

Recovery of the attorney fees charged to Rhiannon Vath

The appellants contend that the contingency fees applied to Rhiannon's settlement in this case are unreasonable when the lawyer commits malpractice in the course of representation. Although the appellants correctly assert that the court may inquire as to the reasonableness of attorneys' fees as a part of their inherent authority to regulate the practice of law, they fail to present any indication or support that a one-third contingency fee is unreasonable. The appellants claim that the recovery of the attorneys' fees in question is not an action for damages but rather for the recovery of money paid which was not due to the attorneys, therefore La. R.S. 9:5605 does not apply. As a result, a claim for the return of the entire fee is not preempted by La. R.S. 9:5605. According to the appellants, resolution of this matter hinges on the validity of the contract for legal services between Gauthier and Rhiannon. Since Mrs. Vath was not

Rhiannon's duly qualified tutrix, the appellants argue that the contract was not valid.

The agreement between Gauthier, et al., and Mrs. Vath and her minor daughter involved a contingency fee of one-third of the total recovery. This fee is reasonable and is the customary contingency fee charged for personal injury/wrongful death representation. The appellants also fail to make a convincing argument that the attorney fee paid to Gauthier, et al., was over billing and therefore money they were not due. The money paid to the attorneys was one third of the total settlement recovery by Mrs. Vath and Rhiannon. A claim that malpractice was committed does not, in and of itself, indicate that the payment of the one-third contingency was over billing. Appellants are asking for a return of the fees paid to the attorneys, based on the fact that they improperly distributed the money to Mrs. Vath who later spent the money on herself. This is clearly a request for return of the attorneys' fees as damages for the alleged negligent distribution of the settlement money to Mrs. Vath. As such, the request for the return of the fees is governed by La. R.S. 9:5605.

Existence of an engagement to provide legal services

The appellants argue that the agreement to provide legal services was limited to representation of Pamela Vath only, and not her minor daughter.

They claim that the preprinted standard form fee agreement does not explicitly refer to representation during tutorship proceedings. As a result of that omission, the scope of Mr. Gauthier's legal representation was limited to the action in tort. Yet the appellants agree that there is evidence in the record that there was an agreement that Mr. Gauthier pursue Rhiannon's tort claim. Because Mr. Gauthier's legal services with respect to the tutorship were not a part of the fee agreement, Rhiannon claims that Mr. Gauthier in effect volunteered his services in the matter of the tutorship. Therefore, La. R.S. 9:5605 has no application to the present matter.

This restriction on the obligations of attorney's to their clients under a representation agreement proposed by the appellants is unreasonably restrictive. The appellee urges that the agreement must be construed to apply to all services performed by the attorney for the purposes of that representation. It was foreseeable that to proceed in the personal injury/wrongful death action Mr. Gauthier would have to establish a tutorship for a minor client. The attorney must be allowed to take legal actions which would be required for the representation of his client in the matter constituting the agreement for legal representation. The mere fact that this particular service was not explicitly listed in the contract to provide legal services should not render it outside the scope of the attorney's

representation if it is essential to the performance of any legal action on behalf of that client.

Failure to Warn

The appellants rely heavily on the Louisiana Supreme Court case of *Bunge Corp. v. GATX Corp.*, 89-C-1645 (La. 3/12/90), 557 So.2d 1376, to support their proposition that Gauthier, et al., had a duty to inform Rhiannon that her funds were in danger due to her mother's drug use. The appellants contend that the failure to fulfill that duty to inform Rhiannon constituted fraud on the part of Gauthier, et al. The facts of the *Bunge* case are not relevant to the facts of the case sub judice. The *Bunge* case addressed whether a contractor has a duty to warn an owner whether the contractor becomes aware of a hazardous condition arising from the ordinary usage of his construction, which creates a danger of personal injury or property damage.

The appellee also argues that even in the *Bunge* case, the preemptive period would have applied where the hazard was reasonably discoverable through the owner's diligence. This is a restatement of the rule that fraud is not actionable in instances where it is not reasonable for the plaintiff not to have discovered the allegedly concealed information. *Johnson v. CHL Enterprises*, 115 F.Supp.2d 723, 730 (W.D. La. 2000), *In re Ford Motor Co.*

Bronco II Product Liability, 982 F.Supp. 388, 397 (E.D. La. 1997).

The appellees deny that they were aware that Mrs. Vath was indeed using Rhiannon's funds. At the very least they claim that Albertina Hansley, Pamela Vath's mother, was aware of Pamela's drug use and "guessed" that she was spending Rhiannon's funds. This knowledge prevents the maintenance of any claim for fraud and precludes the possibility of Gauthier, et al., suppressing the truth for the purpose of producing a misleading effect. The appellees emphasize the fact that the appellant is a minor, and warning her of her mother's actions would have been useless. The proper action would be to inform the appellant's relatives, who could then take action on her behalf. The record of this case however, clearly established that her relatives were already aware of Mrs. Vath's drug use and in fact were the ones who brought Mrs. Vath's drug use to the attention of the appellants' attorneys. There can be no breach of fiduciary duty to reveal information if that information is already known by those with the duty of acting on that information.

The appellants also cite *Schlesinger v. Herzog*, 95-1127, 95-1128 (La. App. 4 Cir. 4/3/96), 672 So.2d 701, as support for the proposition that Rhiannon's faith and confidence in her lawyer's safekeeping of her interests is reasonable. In deciding *Schlesinger*, however, this court placed great

emphasis on the length and nature of the relationship of the attorney in question and the clients faith and confidence based on that long term relationship. Additionally, in *Schlesinger* the issue was protection of the rights of a client over those of a non-client. In the instant case, both Mrs. Vath and Rhiannon were clients of Gauthier, et al.

Constitutionality of La. R.S . 9:5605

As to the issue of the constitutionality of the application of La. R.S. 9:5605, the issue is not properly before the appellate court since it was not pled nor addressed by the trial court.

Conclusion

The claims presented by Rhiannon Vath are subject to the preemptive period as established in La. R.S. 9:5605. Therefore, the trial court properly sustained the appellees'exceptions and the granting of summary judgment is affirmed.

AFFIRMED