NOT DESIGNATED FOR PUBLICATION

WARREN A. GOLDSTEIN, A PROFESSIONAL LAW CORPORATION	*	**NO. 2002-CA-0779**
CORPORATION	*	**COURT OF APPEAL**
VERSUS	*	**FOURTH CIRCUIT**
CON G. DEMMAS	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 99-20372, DIVISION "F-10"
Honorable Yada Magee, Judge
* * * * * *
Judge David S. Gorbaty
* * * * * *
(Court composed of Chief Judge William H. Byrnes III, Judge Dennis R. Bagneris, Sr., Judge David S. Gorbaty)

Warren A. Goldstein
WARREN A. GOLDSTEIN, APLC
822 Perdido Street
Suite 208 Factors Row
New Orleans, LA 70112
IN PROPER PERSON, PLAINTIFF/APPELLEE

William E. Wright, Jr.
Judy L. Burnthorn
DEUTSCH, KERRIGAN & STILES
755 Magazine Street
New Orleans, LA 70130

- and-

Jacques F. Bezou
BEZOU & MATTHEWS
534 East Boston Street
Covington, LA 70434
COUNSEL FOR PLAINTIFF/APPELLEE

James A. McPherson
Mary E. Schillesci
McPHERSON & SCHILLESCI
9128 Quince Street
New Orleans, LA 70118
COUNSEL FOR DEFENDANT/APPELLANT

AFFIRMED

In this appeal, defendant contends that the trial court erred when it granted plaintiff's motion for partial summary judgment. Plaintiff answered the appeal seeking damages for a frivolous appeal. For the reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY

Warren A. Goldstein, A Professional Law Corporation filed suit against Con G. Demmas on December 20, 1999 to recover over $400,000.00 of legal fees allegedly owed by Demmas. In response, Demmas filed Exceptions of No Cause of Action, No Right of Action, and Prescription, which were denied. Demmas subsequently filed an Answer and Reconventional Demand. The Answer asserted three defenses: (1) Demmas

owed no fees because of Goldstein's alleged malpractice in the Venture proceeding, one of the many matters Goldstein had handled for Demmas; (2) Goldstein's claim for legal fees and expenses after December 20, 1996 had prescribed; and (3) Goldstein was not authorized to perform legal services on Demmas's behalf after December 1996. Demmas's reconventional demand sought damages for Goldstein's alleged malpractice. Specifically, Demmas alleged that Goldstein convinced him that he, Goldstein, had a valid legal theory of a claim by Demmas's company, The Venture International Group, against the City of New Orleans and others, and that he, Goldstein, possessed certain documents that would support this claim. Relying upon these representations, Demmas allowed Goldstein to file suits ("the Venture lawsuits").

According to Demmas, Goldstein collected legal fees from Demmas during the pendency of the Venture lawsuits until Demmas learned on or about February 8, 1998 that Goldstein did not have the supporting evidence he had claimed to have in connection with the lawsuits. The Venture lawsuits were consolidated and dismissed on an Exception of Prescription. Demmas appealed to this court. Subsequently, Demmas's new counsel, James A. McPherson and Mary E. Schillesci, after allegedly learning that Goldstein had never produced any evidence in support of his legal theories,

filed a Motion to Dismiss Appeal, stating that the "underlying case, although not known by appellant at the time the suit was filed, is without merit." On April 30, 2001, the appeal was dismissed for the appellant's failure to file a brief.

In the instant case, the trial court granted Goldstein's Motion in Limine to Exclude Evidence of Defenses and For Partial Summary Judgment, striking Demmas's affirmative defenses relating to prescription and malpractice, as well as his defense that all legal services after December 1996 were unauthorized. The trial court further held that its granting of a partial summary judgment was a final judgment under the provisions of La. C.C.P. art. 1915 B(1). Demmas subsequently filed this appeal. Goldstein answered the appeal, asking that sanctions be imposed against Demmas for the filing of a frivolous appeal.

DISCUSSION

Demmas contends that the trial court erred when it granted Goldstein's motion and struck the defenses raised by Demmas in his Answer. He argues that the defenses barred by the trial court are factors that should be considered in determining the reasonableness of Goldstein's attorney's fees. Further, Demmas asserts that clearly identified contested issues of fact precluded the granting of the motion for partial summary

judgment.

Appellate courts review summary judgments *de novo*, using the same criteria applied by trial courts to determine whether summary judgment is appropriate. *Guy v. McKnight*, 99-2284 (La.App. 4 Cir. 2/16/00), 753 So.2d 955, 957, *writ denied*, 2000-0841 (La. 6/16/00), 764 So.2d 963; *Reynolds v. Select Properties, Ltd.*, 93-1480 (La. 4/11/94), 634 So.2d 1180, 1182.

Summary judgment is properly granted only if the pleadings and evidence show that there is no genuine issue of material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. Art. 966 (C). Article 966 has recently been amended; the burden of proof remains with the mover to show that no genuine issue of material fact exists. Now, however, once the mover has made a prima facie showing that the motion should be granted, the burden shifts to the non-moving party to present evidence demonstrating that material factual issues remain. Once the motion for summary judgment has been properly supported by the moving party, the failure of the non-moving party to present evidence of a material factual dispute mandates the granting of the motion. See *Hayes v. Autin*, 96-287 (La. App. 3 Cir. 12/26/96), 685 So.2d 691. We must review the summary judgment with reference to the substantive law applicable to the case. To affirm summary judgment, we must find that reasonable minds would

inevitably conclude that the mover is entitled to judgment as a matter of the applicable law on the facts before the court. *Washington v. State, Dept. of Transp. & Development*, 95-14 (La. App. 3 Cir. 7/5/95), 663 So.2d 47.

Demmas asserts that any legal fees owed to Goldstein prior to December 20, 1996 prescribed prior to the filing of suit on December 20, 1999. Demmas further argues that there are genuine issues of material fact as to the time when Goldstein was unable to work and whether or not any of the fees allegedly owed by Demmas are for work done prior to December 20, 1996.

An action for the recovery of compensation for services rendered, including professional fees, is subject to a liberative prescription of three years. La. C.C. art. 3494. However, the three-year prescriptive period does not begin to run until an attorney's representation of his client ceases. *Brod Bagert v. D'Hemecourt*, 95-1036 (La. App. 5 Cir. 3/26/96), 672 So.2d 998. Goldstein represented Demmas at least until April/ May 1998, when, according to Demmas, he told Goldstein not to do any more work on the Venture lawsuits. Goldstein filed suit one and a half years later, well within the prescriptive period. Further, the record reveals that Demmas gave Goldstein a check dated December 30, 1997 in the amount of $50,000.00 as a partial payment. Although the check was never presented for payment,

prescription on the balance owed by Demmas was interrupted on that day by this tender of payment, because it constituted an acknowledgement. As a matter of law, no part of Goldstein's claim for fees and expenses prescribed. Accordingly, prescription may not be used as a defense against the claim.

Demmas argues that there are genuine issues of material fact as to Goldstein's authority to perform legal work for him after December 1996. Demmas claims that he repeatedly told Goldstein that he should not take any further action in the Venture lawsuits. After Demmas hired the firm of Breazeale, Sachse, & Wilson to work on the case, Demmas alleges that he told Goldstein in April/ May of 1998 not to do any more work. As part of his opposition to Goldstein's motion, Demmas offered the affidavit of his secretary, Mary Pittman, who stated that she heard Demmas tell Goldstein to stop working on the Venture case on June 15, 1998. Demmas also submitted the unsigned memorandum of Glen Magnuson, his employee, dated July 16, 1998, which advised Goldstein to take no further action in the Venture litigation, citing concerns for Goldstein's health.

The evidence relied upon by Demmas does not support his contention that Goldstein was unauthorized to perform work for him after December 1996. Rather, it illustrates that Demmas authorized Goldstein to perform work for him for years after that date. By his own admission, Demmas did

not tell Goldstein to stop working on the Venture litigation until 1998 at the earliest. As such, we find that no genuine issue of material fact exists as to whether Goldstein was authorized to perform work for Demmas after December 1996.

Demmas asserts that he owes no legal fees because of Goldstein's alleged malpractice in the Venture proceeding. He argues that whether Goldstein committed malpractice in performing work for Demmas is relevant for the court to determine what fees are reasonable, notwithstanding the fact that Demmas's claim in reconvention for malpractice against Goldstein has been ruled to have prescribed.

To prove a claim for legal malpractice, a plaintiff must prove: (1) there was an attorney-client relationship; (2) the attorney was negligent; and (3) that negligence caused plaintiff some loss. *Couture v. Guillory*, 97-2796 (La.App. 4 Cir. 4/15/98), 713 So.2d 528, quoting *Scott v. Thomas*, 543 So.2d 494 (La.App. 4 Cir.2/16/89). In an action for legal malpractice, the plaintiff must show that the attorney failed to exercise that degree of care, skill and diligence that is exercised by prudent practicing attorneys in his locality; however, he is not required to exercise perfect judgment in every instance. *Nelson v. Waldrup*, 565 So.2d 1078 (La.App. 4 Cir. 7/31/90); *Ramp v. St. Paul Fire & Marine Ins. Co.*, 263 La. 774, 269 So.2d 239 (1972); *Jenkins v.*

St. Paul Fire & Marine Ins. Co., 422 So.2d 1109 (La.1982); *Spellman v. Bizal*, 99-0723 (La. App. 4 Cir. 3/1/01), 755 So.2d 1013.

Demmas did not establish the degree of care that Goldstein should have exercised. He presented no expert testimony to support his claim that Goldstein breached the standard of care, nor did he prove any obvious negligence by Goldstein. Further, Demmas did not provide proof of any loss or damages that he suffered as a result of the alleged malpractice. Since Demmas failed to present any evidence of a material factual dispute as to this issue, the granting of the motion for summary judgment was mandated.

La. C.C.P. art. 2164 permits the award of damages to the appellee for the filing of a frivolous appeal. However, we do not find that there is any basis to conclude that Demmas's appeal was frivolous. As such, we decline to award damages to Goldstein as sought in his answer to the appeal.

CONCLUSION

No genuine issues of material fact exist. Accordingly, for the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED