

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2012 CA 1123

FRED HENRY SMITH

VERSUS

**FRANZ L. ZIBILICH AND
XYZ INSURANCE COMPANY**

MSY.

Judgment Rendered: February 15, 2013

**Appealed from the
18th Judicial District Court
In and for the Parish of Pointe Coupee
State of Louisiana
Case No. 35193**

The Honorable James J. Best, Judge Presiding

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Continental Casualty Company**

BEFORE: GUIDRY, CRAIN, AND THERIOT, JJ.

Guidry, J. Concur.
Crain, Concur

THERIOT, J.

This is an appeal from the Eighteenth Judicial District Court's judgment sustaining exceptions of no right of action and peremption and granting an alternative motion for summary judgment in favor of the Appellees, Franz L. Zibilich and Continental Casualty Company ("Continental"),¹ and against the Appellant, Fred Henry Smith, dismissing the Appellant's claims with prejudice. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

Fred Smith and Leotha Kimble Smith were legally divorced on October 16, 1990, in the 18th JDC in Pointe Coupee Parish.² Mr. Smith later filed a petition to partition the community property in the same parish on September 25, 1991.³ At the time these proceedings were filed, Mr. Smith was represented by attorneys Joseph M. Thibaut and Joseph W. Cole, who also represented Mr. Smith through most of the litigation in these matters. Over the course of time, Mr. Smith terminated Thibaut's and Cole's representation and subsequently hired Mr. Franz Zibilich as his attorney. While Mr. Smith has averred that he hired Mr. Zibilich for all his legal matters, Mr. Zibilich claimed that he was retained by Smith for one specific purpose.⁴

Mr. Zibilich was retained by Mr. Smith on September 17, 1997. Mr. Zibilich claims he is primarily a criminal defense attorney and advertises

¹ At the time of the filing of his petition, Mr. Fred Henry Smith was not aware of the name of Mr. Zibilich's insurer, and initially named the insurer "XYZ Insurance Company." As such, the court did not rule in favor of Continental by name. Also, the trial court's judgment signed on June 9, 2010 only ruled in favor of Mr. Zibilich. Continental subsequently joined in the appeal and filed its own briefs.

² Docket number 253011.

³ Docket number 26542.

⁴ No employment contract between Mr. Smith and Mr. Zibilich exists in the record; however, Mr. Smith testified on June 17, 2008 as follows in his deposition: "[A]t the time [James Dewey] made mention that I needed a criminal lawyer, he said, because Judge Marionneaux is going to put you in jail for money you are not showing up with." James Dewey was retained as Mr. Smith's attorney at the time of the conversation Mr. Smith referenced.

himself as such. He claims his specialization was known by Mr. Smith when he was retained. Mr. Zibilich appeared for Mr. Smith on October 13, 1997 on a civil contempt hearing against Mr. Smith and successfully moved to continue the hearing to November 20, 1997. The civil contempt stemmed from an alleged violation by Mr. Smith regarding a court order enjoining both Mr. and Mrs. Smith from disposing, alienating, or otherwise encumbering any assets from the community of acquets and gains until they could be partitioned. Mrs. Smith accused Mr. Smith of withdrawing funds from various accounts to conceal the money from her and the court. In particular was one Merrill Lynch account. On the November 20, 1997 court date, both Mr. and Mrs. Smith were ordered by the court to "not touch the money in the Merrill Lynch account for any reason including transferring to another account."

Mrs. Smith filed another rule for contempt against Mr. Smith on October 23, 1998, claiming that he had withdrawn \$94,671.81 from an Oryx retirement account, which was part of the community, in contravention of a court order not to do so, previous to the order regarding the Merrill Lynch account. On December 3, 1998, Mr. Smith was ordered by the court to pay to Mrs. Smith \$70,482 that was determined to be due to her from the Merrill Lynch account on or before December 18, 1998.

On October 29, 1999, Mrs. Smith filed another motion for contempt against Mr. Smith, alleging he had never transferred to her any funds from the Merrill Lynch account as the court had ordered. The contempt hearing was scheduled for December 14, 1999. While Mr. Smith was present for that hearing, his attorney Mr. Zibilich was inexplicably absent. Mrs. Smith presented as evidence of Mr. Smith's contempt a letter from Merrill Lynch's legal department stating they were unable to transfer any funds to her

because Mr. Smith had refused to give them authorization to do so. Mr. Smith presented no evidence or testimony in his defense. The court then ordered Mr. Smith to serve sixty (60) days in jail, or purge his jail sentence by paying to Mrs. Smith the full sum that was owed her. After spending approximately nine (9) days in jail, Mr. Smith transferred to Mrs. Smith \$70,482 from the Merrill Lynch account and was released from jail.

Mr. Smith filed a damages petition for legal malpractice against Mr. Zibilich on November 16, 2000. Mr. Smith claims in the petition that Mr. Zibilich was retained to represent him in the community property litigation, although Mr. Zibilich disputes this. Mr. Smith's petition speaks at length of events befalling him that occurred before Mr. Zibilich was retained, but does allege that Mr. Zibilich failed to inform him of court dates, failed to present a proper case to the court on his behalf, and failed to attend court on his behalf, all of which resulted in his incarceration and liability for various subsequent monetary damages. In his brief, Mr. Smith is more succinct in his complaint against Mr. Zibilich, alleging only Mr. Zibilich's absence in court on December 14, 1999 as the cause of his damages. The brief does not address any other acts or omissions of legal malpractice on the part of Mr. Zibilich.

Mr. Smith moved for preliminary default on Mr. Zibilich on February 20, 2001, and a default judgment was entered against Mr. Zibilich on May 15, 2001. Mr. Zibilich filed a motion for new trial on July 30, 2001 on grounds that the default judgment was an absolute nullity. Although the order granting the morion for new trial is missing from the record, one was evidently granted because after about four years of apparent inactivity, Mr. Smith's filed an amended petition to name Continental as a defendant. Litigation in the matter progressed at times rather slowly until Mr. Zibilich

filed exceptions raising the objections of no right of action and peremption, and in the alternative, a motion for summary judgment against Mr. Smith on December 29, 2009. Continental adopted the exceptions. The court granted the exceptions filed by Mr. Zibilich and dismissed Mr. Smith's petition with prejudice on June 9, 2010. Mr. Smith's motion for new trial was denied on December 28, 2011, and the trial court's judgment was timely appealed on February 1, 2012.

ASSIGNMENTS OF ERROR

Mr. Smith assigns three assignments of error, the first being the trial court erred by sustaining the exception of no right of action, the second being the trial court erred by sustaining the exception of peremption, and the third being the trial court erred by granting Mr. Zibilich's motion for summary judgment and dismissing Mr. Smith's suit with prejudice.

STANDARD OF REVIEW

A judgment granting a peremptory exception is generally reviewed *de novo*, because the exception raises a legal question. *Metairie III v. Poche' Const., Inc.*, 2010-0353, p. 3 (La. App. 4 Cir. 9/29/10), 49 So.3d 446, 449, writ denied, 2010-2436 (La. 9/16/11), 69 So.3d 1138. However, when exceptions of prescription or peremption have evidence introduced at a hearing, the trial court's finding of fact on the issue is subject to the manifest error standard of review. *Southern Ins. Co. v. Metal Depot*, 2010-1899 (La. App. 1 Cir. 6/10/11), 70 So.3d 922, 925, writ denied, 2011-1763 (La. 10/14/11), 74 So.3d 215. The appellate court standard of review of summary judgment is also *de novo*. *Brunet v. Fullmer*, 2000-0644, p. 3 (La.

App. 4 Cir. 1/10/01), 777 So.2d 1240, 1241; see also *Adams v. Arceneaux*, 2000-1440 (La. App. 1 Cir. 6/22/01), 809 So.2d 190, 193-194.

DISCUSSION

The case before us is a suit for legal malpractice. In Mr. Smith's brief, the sole act or omission of which he complains is Mr. Zibilich's failure to appear in court on his behalf on December 14, 1999, and he attributes the adverse ruling and his incarceration to Mr. Zibilich's absence on that day. If Mr. Smith had any other complaints against Mr. Zibilich, they were not briefed, and according to Rule 2-12.4 of the Uniform Rules of the Louisiana Courts of Appeal, we consider them to be abandoned.

Louisiana Revised Statutes, Title 9, section 5605 provides the limitations on when an action for legal malpractice can be filed. The action must be filed "within one year from the date of the alleged act, omission, or neglect, or within one year from the date the alleged act, omission, or neglect is discovered or should have been discovered." There is no question from the record that Mr. Smith was present in court on December 14, 1999, and Mr. Zibilich was not. Mr. Smith was present in court when the adverse ruling was handed down, and clearly he was made aware of it at that moment. By the aforementioned clause in La. R.S. 9:5605, Mr. Smith would have had to file his petition by December 14, 2000, which he did. The statute further provides "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." See *Straub v. Richardson*, 2011-1689 (La. App. 1 Cir. 5/2/12), 92 So.3d 548, 553, *writ denied*, 2012-1212 (La. 9/21/12), 98 So.3d 341.

In order for La. R.S. 9:5605 to apply, there must be an attorney-client relationship. *Broussard v. F.A. Richard & Associates, Inc.*, 1998-1167 (La. App. 3 Cir. 3/17/99), 732 So.2d 578, 585, *writ denied*, 1999-1048 (La. 6/4/99), 744 So.2d 625. The record shows Mr. Zibilich was retained by Mr. Smith on or about September 17, 1997. Any legal services that Mr. Smith received prior to that time were not done by Mr. Zibilich or any other attorney or staff in his employ, so he cannot be liable for any detrimental legal services rendered to Mr. Smith prior to that date, even though Mr. Smith has named none in his brief. Since Mr. Smith filed his petition for malpractice on November 16, 2000, any acts or omissions by Zibilich done on Mr. Smith's behalf prior to November 16, 1997 would be preempted. Again the only act Mr. Smith complains of specifically is Zibilich's absence from court on Dec. 14, 1999, which fits within the preemptive window.

Was Mr. Zibilich's failure to appear on Mr. Smith's behalf the proximate cause of the adverse ruling and imprisonment? Mr. Smith was found to be in contempt of court for failing to obey the court's orders to "not touch" funds from the Merrill Lynch account on November 20, 1997 and to pay to Mrs. Smith that portion of the funds that was due to her on December 3, 1998. Mr. Smith failed to make the ordered payment to Mrs. Smith, and nowhere in Mr. Smith's petition or brief does he allege that Mr. Zibilich advised, counseled, or instructed him to not make that payment. Mr. Smith neither alleges that Mr. Zibilich interfered in some way with the account to prevent him from paying the money to Mrs. Smith. The Merrill Lynch letter submitted to the court by Mrs. Smith shows that Mr. Smith refused to give authorization to transfer the funds. Mr. Smith never alleged that his refusal was done on the advice of Mr. Zibilich. The record shows that the failure to

transfer the funds due to Mrs. Smith was solely due to the acts or omissions of Mr. Smith, not Mr. Zibilich.

Mr. Smith has not shown any acts or omissions by Mr. Zibilich that would have attributed to his non-compliance with the court order, and he has failed to show how Mr. Zibilich's absence from court on December 14, 1999 was the proximate cause of his being held in contempt, when the record shows he was found in contempt for his own refusal to pay the funds that were due to Mrs. Smith. We can find no genuine issue of material fact in Mr. Smith's legal malpractice claim.

CONCLUSION

We adopt the findings of the trial court in their entirety. Mr. Smith's actions occurring before Mr. Zibilich was retained cannot be attributed to him. While Mr. Zibilich's absence from court on December 14, 1999 is not preempted, any negligent acts or omissions by Mr. Zibilich in the scope of his attorney-client relationship with Mr. Smith are preempted by La. R.S. 9:5605. Mr. Smith's damages are a direct result of his own acts or failure to act, and were not proximately caused by Mr. Zibilich.

DECREE

The judgment of the 18th JDC in favor of the Appellees, Franz L. Zibilich and Continental Casualty Company, is affirmed, dismissing with prejudice the petition for damages filed by the Appellant, Fred Henry Smith. Costs of this appeal are assessed to the Appellant.

AFFIRMED.