

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2012 CA 1378**

**BARRISTER GLOBAL SERVICES NETWORK, INC.**

**VERSUS**

  
**T. JAY SEALE, WILLIAM STEPHENS, SEALE & ROSS, APLC,  
AND JOSEPH D. ZOPOLSKY**

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**On Appeal from the 21st Judicial District Court  
Parish of Tangipahoa, Louisiana  
Docket No. 2010-0003925, Division "A"  
Honorable Wayne Ray Chutz, Judge Presiding**

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Defendants-Appellees  
T. Jay Seale, William Stephens,  
and Seale & Ross, APLC**

**BEFORE: PARRO, WELCH, AND DRAKE, JJ.**

**OCT 03 2013**

Judgment rendered \_\_\_\_\_

*Welch J. concurs and dissents with reasons.*

**PARRO, J.**

In this legal malpractice case, Barrister Global Services Network, Inc. (Barrister) appeals a judgment in favor of T. Jay Seale, William Stephens, and Seale & Ross, APLC (the defendants), finding that Barrister's claims against the defendants were preempted and dismissing the suit. For the following reasons, we affirm the judgment.

**FACTUAL AND PROCEDURAL BACKGROUND**

On September 28, 2010, Barrister filed suit against the defendants, alleging they had committed legal malpractice in the handling of Barrister's interests in the matter of McAfee, Inc. v. Agilysys, Inc., a case filed in civil district court in Dallas, Texas (the McAfee case). The petition described the following acts constituting legal malpractice:

- (a) Failing to properly analyze the presence or absence of insurance coverage for Barrister and providing erroneous legal counsel based upon said coverage analysis;
- (b) Negligent hiring, retention, and supervision by Seale & Ross Defendants of local counsel, Attorney Zopolsky, with respect to the handling of the McAfee case;
- (c) Billing Barrister for legal fees and costs that were unearned and/or excessive in nature;
- (d) Improper legal strategy and tactics; and
- (e) Any and all other acts or omissions that will be demonstrated at the time of trial.

In response to the petition, the defendants filed an exception raising the objection of prescription/peremption, alleging that the acts, errors, and omissions complained of in the petition occurred more than one year prior to the filing of the lawsuit and, as such, were preempted pursuant to LSA-R.S. 9:5605. The defendants' memorandum in support of its exception included the affidavit of T. Jay Seale, which identified certain letters, emails, and memoranda that were attached as exhibits. In a letter written to Barrister on August 21, 2008, Seale discussed all of the issues that were later raised in the petition, acknowledging the problems that had developed in the litigation, as well as the billing issues between Barrister and its attorneys. In addition, by March 30, 2009, Seale informed Barrister in an email that Travelers/St. Paul's was

likely to prevail on its motion for summary judgment, so Barrister should forego its insurance coverage and defense claims.

The exception was scheduled for hearing on August 29, 2011. Barrister filed no opposition to the exception, but on the morning of the hearing, filed a supplemental and amending petition including additional allegations, which are summarized as follows:

- (a) On advice of counsel, Barrister entered into a settlement agreement with McAfee for \$300,000 in June 2008.
- (b) During this same time period, Barrister agreed to sever and abate the claims between Agilysys, Inc. and Barrister to permit the issues between McAfee and Agilysys to proceed to judgment and/or appeal. This agreement was part of a settlement between Barrister and Agilysys in which Barrister agreed to pay Agilysys \$100,000, conditioned upon the McAfee/Agilysys claims being fully resolved on appeal.
- (c) On September 16, 2008, the court severed and abated Barrister's claims against Agilysys, pending final resolution of McAfee's claims on appeal or further orders of the trial court.
- (d) On February 9, 2011, Agilysys filed a motion to consolidate and reinstate its claims against Barrister in the McAfee case.
- (e) On July 26, 2011, McAfee and Agilysys filed a joint motion to dismiss their claims against each other with prejudice, with Agilysys reserving its rights to pursue its claims against Barrister.
- (f) Agilysys filed a cross claim against Barrister on July 26, 2011, seeking indemnification for any and all damages assessed against Agilysys by McAfee, plus attorney fees and court costs. The damages sought in this cross claim exceeded the \$100,000 previously tendered by Barrister to Agilysys.

At the hearing on the exception, the defendants contended that the correspondence between Seale and Barrister in August 2008 and March 2009 showed that Barrister knew then about all the problems with the McAfee case. Therefore, its lawsuit, which was filed in September 2010, more than a year after the complained-of acts had occurred and been discovered, was preempted. Additionally, the new claims asserted in the supplemental and amending petition involved the agreement entered into between Barrister and Agilysys in June 2008, which was conditioned on the McAfee/Agilysys claims being fully resolved on appeal. Therefore, Barrister knew at that

time that its \$100,000 settlement agreement with Agilysis might not be final. Barrister argued that its supplemental and amending petition raised new claims that had occurred in early 2011 when the settlement with Agilysis fell through and the defendants were still representing it. Therefore, the new allegations of events that had occurred since the petition was filed were timely. Also, since the supplemental and amending petition was filed within one year of Barrister's discovery of the reinstatement of claims against it by Agilysis, it related back to the filing date of the original petition.

The court noted that the settlement agreement entered into in June 2008 contained language indicating that it was conditional. Therefore, Barrister knew at that time that Agilysis might eventually re-assert its claims against Barrister. For that reason, the court sustained the exception and dismissed the lawsuit in a judgment signed September 16, 2011.<sup>1</sup> This appeal followed.

#### **APPLICABLE LAW**

Legal malpractice claims are governed by LSA-R.S. 9:5605, which states, in pertinent part:

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. ... The one-year and three-year periods of limitation provided in Subsection A of this Section are preemptive 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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<sup>1</sup> After this appeal was docketed, on November 19, 2012, this court remanded this matter for the limited purpose of having the trial court sign a valid written judgment that included appropriate decretal language, as required by LSA-C.C.P. art. 1918. A revised judgment was signed by the trial court on November 28, 2012, and the record was supplemented to include that judgment.

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. A prescriptive period will begin to run even if the injured party does not have actual knowledge of facts that would entitle him to bring a suit, as long as there is constructive knowledge of same. 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. Such information or knowledge as ought to reasonably put the alleged victim on inquiry is sufficient to start running of prescription. Id. at 510-11.

Ordinarily, the exceptor bears the burden of proof at the trial of the peremptory exception. Campo, 828 So.2d at 508. However, if prescription is evident on the face of the pleadings, the burden shifts to the plaintiff to show that the action has not prescribed. Id. The plaintiff's petition cannot be considered prescribed on its face if the plaintiff's pleadings make a *prima facie* showing that it was filed "within one year from the date of discovery" and "within a period of three years from the date of the alleged act, omission or neglect." Id. at 509. Specifically, the plaintiff must "allege facts with particularity which indicate that the injury and its causal relationship to the alleged misconduct were not apparent or discoverable until within the year before the suit was filed" in order to avoid the shifting of the burden of proof to the plaintiff. Id. at 509 n. 9; In re DeBram, 11-0280 (La. App. 1st Cir. 8/27/12), 102 So.3d 830, 836-37.

In Reeder v. North, 96-0165 (La. App. 5th Cir. 11/14/96), 683 So.2d 912, 916, reversed, 97-0239 (La. 10/21/97), 701 So.2d 1291, the court of appeal held that while the attorney-client relationship is in existence and the attorney is actively attempting to remedy the alleged malpractice until the judgment giving rise to the malpractice claim becomes definitive, a legal malpractice claim does not ripen into a cause of action and prescription or preemption does not begin to run. The Louisiana Supreme Court disagreed, holding the three-year period is preceptive. Reeder, 701 So.2d at 1298.

The plaintiff's claim was time-barred, because he did not file suit within three years from the date of the negligent act, even though he did not discover the basis for his claim until after the time period had expired. Reeder, 701 So.2d at 1296-97.

In Naghi v. Brener, 08-2527 (La. 6/26/09), 17 So.3d 919, 925-26, the supreme court dealt with the issue of whether an amended petition in a legal malpractice suit could relate back to the time of filing the original petition under LSA-C.C.P. art. 1153,<sup>2</sup> when the time period for filing suit is preemptive, rather than prescriptive. In discussing LSA-R.S. 9:5605, the court again stated that the statute clearly provides that the one-year and three-year time periods are preemptive. The court found that the relation back of a pleading would avoid the operation of a preemptive time period by allowing a pleading filed after the expiration of the period to relate back to the filing of an original and timely filed petition. Naghi, 17 So.3d at 925. Since nothing may interfere with the running of a preemptive period, the court held that an amended and supplemental petition cannot relate back to the original petition in a legal malpractice case. Naghi, 17 So.3d at 926.

### **ANALYSIS**

In this appeal, Barrister assigns as error the court's ruling on the exception of prescription/peremption with respect to all of its claims against the defendants. Admitting that certain claims asserted within its original petition may be time-barred, it asserts that its supplemental claims against the defendants were filed within one year of discovering them and within three years of when the alleged acts, omission, or neglect occurred. Thus, the supplemental claims are not preempted under the provisions of LSA-R.S. 9:5605. Barrister argues that the new claims in its supplemental and amending petition were not discovered until February 2011, when Agilysis filed a motion to consolidate and reinstate its claims against Barrister in the McAfee case.

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<sup>2</sup> Louisiana Code of Civil Procedure article 1153 provides:

When the action or defense asserted in the amended petition or answer arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of filing of the original pleading.

Therefore, the filing of its supplemental and amending petition on August 29, 2011, was within one year of the discovery of the acts giving rise to its claims. Barrister further contends that its supplemental and amending petition relates back to the filing of its original petition on September 28, 2010. Therefore, applying LSA-C.C.P. art. 1153, the supplemental and amending petition was filed within three years of the date of those acts, which occurred in June 2008.

We note first that all of the claims asserted in the original petition were clearly preempted. The evidence submitted in support of the defendants' exception shows that communication between Barrister and the defendants occurred during a meeting in August 2008 and covered all of the acts of alleged malpractice except for the failure to properly analyze the insurance coverage issue. Additionally, an email in March 2009 advised Barrister that the defendants' evaluation of the viability of Barrister's insurance claims was in error, and those claims were without merit under certain policy provisions. Therefore, by March 2009, Barrister knew about all the problems with the McAfee case that were asserted as malpractice claims in the original petition. Since the petition was not filed until September 2010, the filing was more than one year since the alleged acts, omissions, or neglect occurred and, as such, was preempted under LSA-R.S. 9:5605.

Furthermore, contrary to Barrister's arguments on appeal, its supplemental and amending pleading could not relate back to the original filing, as this would avoid the operation of the preemptive time period by allowing a pleading filed after the expiration of the period to relate back to the filing of an original and timely filed petition. See Naghi, 17 So.3d at 925. More importantly, since the original petition was not timely filed, there was nothing the supplemental and amending petition could relate back to.

Additionally, as the district court recognized, the settlement agreement between Barrister and Agilysis in June 2008 was, by its express terms, conditional. A conditional obligation is one dependent on an uncertain event. If the obligation may not be enforced until the uncertain event occurs, the condition is suspensive. LSA-C.C. art.

1767. In this case, the uncertain event in the settlement agreement was the eventual resolution of all claims between McAfee and Agilysis on appeal. Since those claims were not completely resolved on appeal, the settlement between Barrister and Agilysis was unenforceable, allowing Agilysis to reassert all of its claims against Barrister. This lack of finality should have been obvious to Barrister under a simple reading of the agreement when it was confected. Any negligence or misrepresentation by the defendants concerning that agreement or its finality occurred before or when it was signed in June 2008. Therefore, Barrister's claims in the supplemental and amending petition concerning its "newly discovered" exposure to additional damages were also preempted.

### **CONCLUSION**

For the above reasons, we affirm the November 28, 2012 final judgment of the district court. All costs of this appeal are assessed to Barrister.

**AFFIRMED.**



BARRISTER GLOBAL  
SERVICES NETWORK, INC.

NO. 2012 CA 1378

VERSUS

FIRST CIRCUIT

T. JAY SEALE, WILLIAM  
STEPHENS, SEALE & ROSS, APLC,  
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COURT OF APPEAL

STATE OF LOUISIANA

*JEW* WELCH, J., concurring in part and dissenting in part.

I agree with majority that the trial court properly dismissed the plaintiff's claims against the defendant based on preemption, *except* the plaintiff's claim that defendant "Bill[ed] Barrister for legal fees and costs that were unearned and/or excessive in nature." I believe that the trial court legally erred in dismissing that claim, which is not a claim of legal malpractice, but rather, is a fee dispute not subject to the preemptive periods set forth in La. R.S. 9:5605.<sup>1</sup>

Louisiana Revised Statute 9:5605 provides a one year/three year preemptive period for an action against an attorney arising out of an engagement to provide legal services. **Raspanti v. Raspanti**, 2007-295 (La. App. 5<sup>th</sup> Cir. 12/11/07), 977 So.2d 95, 98, writ denied, 2008-0096 (La. 3/7/08), 977 So.2d 906. "Read in its entirety, [La. R.S. 9:5605] reflects an intent to cover all actions for damages predicated on traditional legal malpractice, but not more." *Id.* Thus, the preemptive period does not apply to every action against every attorney under any theory whatsoever. *Id.*, citing Davis v. Parker, 58 F.3d 183 (5<sup>th</sup> Cir. 1995). Fee disputes have been held to be outside of the preemptive period of La. R.S.9:5605, as have duress and fraud. **Raspanti**, 977 So.2d at 98; see also Shreveport Credit Recovery, Inc. v. Modelist, 33,369 (La. App. 2<sup>nd</sup> Cir. 5/15/00), 760 So.2d 681, 685-686, writ denied, 2000-2159 (La. 10/27/00), 772 So.2d 125 (holding that a

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<sup>1</sup> Although the plaintiff's petition is captioned as an action for damages for legal malpractice, courts should look through the caption of pleadings in order to ascertain their substance and to do substantial justice to the parties. **Southeastern Louisiana University v. Cook**, 2012-0021 (La. App. 1<sup>st</sup> Cir. 9/21/12), 104 So.3d 124, 128-129; see also La. C.C.P. art. 865.

client's claim that he was overbilled for legal services was not a claim for legal malpractice within the intendment of La. R.S. 9:5605). Louisiana Revised Statute 9:5605, as passed by the legislature is entitled "Actions for Legal Malpractice" and should **not** be read so broadly to include within its coverage a contractual claim by a client pertaining to a bill for services that were not performed by the attorney. **Shreveport Credit Recovery, Inc.**, 760 So.2d at 686. Such billing disputes remain subject to the general prescriptive periods applicable to contractual claims, *i.e.*, La. C.C. art. 3499. **Shreveport Credit Recovery, Inc.**, 760 So.2d at 686.

Accordingly, the trial court erred in dismissing the plaintiff's claim that he was billed for legal fees and costs that were unearned or excessive. Thus, I respectfully concur in part and dissent in part.