NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 CA 0046

KEVIN T. MIKESELL

VERSUS

ANGELA WILT COX and ABC INSURANCE COMPANY

Judgment Rendered: JUN 0 6 2014

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On Appeal from the Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
No. 2012-12677

Honorable Martin E. Coady, Judge Presiding

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BEFORE: PETTIGREW, McDONALD, AND McCLENDON, JJ.

McCLENDON, J.

The plaintiff appeals the judgment of the trial court that dismissed his legal malpractice action against the defendant based on the granting of a peremptory exception raising the objection of peremption. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

This matter arises out of Angela Wilt Cox's representation of Kevin T. Mikesell in two separate, but related, family law matters. The first of these was the matter entitled, "Arlette S. Mikesell v. Kevin T. Mikesell" (the Arlette case), Docket Number 2005-14098, of the 22nd Judicial District Court for the Parish of St. Tammany, and involved issues of child support and visitation of his minor child with his ex-wife. The second was the matter entitled, "Kevin T. Mikesell v. Kristina Binney" (the Binney case), Docket Number 2010-17524, of the 22nd Judicial District Court for the Parish of St. Tammany, and involved issues of child support and visitation of his minor child with his ex-girlfriend. After Ms. Cox began representing Mr. Mikesell, issues of child support payments to be owed by Mr. Mikesell arose in both suits. Conferences were held before hearing officers and recommendations submitted by the hearing officers in both cases. Objections to the recommendations were filed in both matters by all parties, and hearings in each were scheduled for April 12, 2011. At the hearings, Mr. Mikesell agreed to a stipulated judgment in the Arlette suit and to a consent judgment in the Binney matter. The Consent Judgment was signed on May 10, 2011, and the Stipulated Judgment was signed on May 17, 2011.

Shortly after the April 12, 2011 hearing, Mr. Mikesell sent an email to Ms. Cox complaining about "errors" in the child support obligations in the proposed stipulated and consent judgments. Ms. Cox responded to Mr. Mikesell's email and explained the court's calculations. She also discussed that the stipulated and consent judgments were compromises and noted that Mr. Mikesell was happy with the outcome when he left the hearing. However, Mr. Mikesell's complaints continued, and in an April 26, 2011 email to Mr. Mikesell, Ms. Cox

again explained the calculations and discussed comments made by Mr. Mikesell regarding her representation.[1] She also advised Mr. Mikesell that she would forward the judgment in the Arlette matter to opposing counsel and, in the Binney matter, prepare a draft of a motion for new trial, as he requested, with instructions for him as to where to file it, but that she would be withdrawing as his counsel in both matters. On April 29, 2011, Mr. Mikesell acknowledged and responded to the April 26, 2011 email in a lengthy email to Ms. Cox. Thereafter, on May 17, 2011, Ms. Cox formally withdrew from both cases.

On May 14, 2012, Mr. Mikesell filed a Petition for Damages for Legal Malpractice against Ms. Cox.[2] Among the allegations in his petition, Mr. Mikesell asserted:

> On or about May 20, 2011, following defendant Cox's withdrawal from the matter, Plaintiff herein became aware of errors and deficiencies in the Stipulated Judgment negotiated by the defendant on his behalf regarding the amount of support owed to both Arlette S. Mikesell and Kristina Binney. ... Only after defendant Angela Wilt Cox withdrew from his cases did Plaintiff herein realize that she had no intention of correcting the errors contained within the Stipulated Judgment.

In response, Ms. Cox filed an Exception of Peremption or in the Alternative, Motion for Summary Judgment, contending that any legal malpractice claims asserted by Mr. Mikesell were perempted as a matter of law under LSA-R.S. 9:5605. The matter proceeded to a hearing before the trial court on April 10, 2013, at which time argument and documentary evidence were presented, and after which the matter was taken under advisement.[3] On April 23, 2013, the district court issued Reasons for Judgment, granting the exception.

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[1] In her email, Ms. Cox specifically addressed complaints by Mr. Mikesell concerning the hearing including that Ms. Cox allowed erroneous calculations to become judgments, was unprepared for the hearing, was handling too many cases that day, and was charging him too much.

[2] Mr. Mikesell asserts that the petition was actually fax filed on May 10, 2012, but the record fails to include evidence that the requirements of LSA-R.S. 13:850, regarding fax filings, were met. Furthermore, under the facts of this case, it does not matter whether the lawsuit was filed on May 10, 2012, or May 14, 2012.

[3] Mr. Mikesell participated in the hearing in proper person.

A judgment was signed on May 15, 2013, granting the peremption exception and dismissing all of Mr. Mikesell's claims against Ms. Cox, with prejudice.[4]

After his motion for new trial was denied, Mr. Mikesell appealed, contending that because he did not have knowledge of facts that would entitle him to bring suit until after Ms. Cox withdrew and until the trial court issued notice of judgment on the merits on July 13, 2012, the trial court erred in granting the exception.

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.**, 10-0353 (La.App. 4 Cir. 9/29/10), 49 So.3d 446, 449, writ denied, 10-2436 (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**, 10-1899 (La.App. 1 Cir. 6/10/11), 70 So.3d 922, 925, writ denied, 11-1763 (La. 10/14/11), 74 So.3d 215. Thus, if the trial court's findings are reasonable in light of the record reviewed in its entirety, an appellate court may not reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. **Stobart v. State through Dept. of Transp. and Dev.**, 617 So.2d 880, 882-83 (La. 1993).

DISCUSSION

Peremption is a period of time fixed by law for the existence of a right. The right is extinguished upon the expiration of the peremptive period. LSA-C.C. art. 3458. When the peremptive period has run, the cause of action itself is extinguished unless timely exercised. **State Through Div. of Admin. v. McInnis Bros. Const.**, 97-0742 (La. 10/21/97), 701 So.2d 937, 939.

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[4] The court also determined that it did not have to address Ms. Cox's alternative motion for summary judgment, as the matter was dismissed.

Peremption may not be renounced, interrupted, or suspended. LSA-C.C. art. 3461.

Peremption is considered a peremptory exception. LSA-C.C.P. art. 927A. Ordinarily, the exceptor bears the burden of proof at the trial of the peremptory exception. **Carter v. Haygood**, 04-0646 (La. 1/19/05), 892 So.2d 1261, 1267. Peremption has been likened to prescription; namely, it is prescription that is not subject to interruption or suspension. **Straub v. Richardson**, 11-1689 (La.App. 1 Cir. 5/2/12), 92 So.3d 548, 552, writ denied, 12-1212 (La. 9/21/12), 98 So.3d 341, cert. denied, ___ U.S. ___, 133 S.Ct. 1805, 185 L.Ed.2d 811 (2013). As such, the rules governing the burden of proof as to prescription apply to peremption. **Id**.

Louisiana Revised Statutes 9:5605 provides the peremptive period to initiate an action for legal malpractice, in pertinent part, as follows:

> 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.

Thus, the applicable time limitations on legal malpractice actions are 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, or, at the latest, within three years from the date of the alleged act, omission, or neglect. LSA-R.S. 9:5605A. In other words, the latest one can file a legal malpractice action is three years from the date of the alleged act of malpractice, or one year from the date of discovery of the alleged act of malpractice, whichever occurs first. **Straub**, 92 So.3d at 553.

The "date of discovery" from which prescription or peremption begins to run is the date on which a reasonable man in the position of the plaintiff has, or should have, either actual or constructive knowledge of the damage, the delict, and the relationship between them sufficient to indicate to a reasonable person he is the victim of a tort and to state a cause of action against the defendant. **Teague v. St. Paul Fire and Marine Ins. Co.**, 07-1384 (La. 2/1/08), 974 So.2d 1266, 1275. See also **Campo v. Correa**, 01-2707 (La. 6/21/02), 828 So.2d 502, 510-11. Put more simply, the date of discovery is the date the negligence was discovered or should have been discovered by a reasonable person in the plaintiff's position. **Teague**, 974 So.2d at 1275.[5]

The principles applicable in the computation of time under the discovery rule, although prescriptive in nature, apply to the computation of time under the discovery rule of the preemptive period for legal malpractice. See **Teague**, 974 So.2d at 1276. Accordingly, peremption begins to run in legal malpractice cases when a claimant knew or should have known of the existence of facts that would have enabled him to state a cause of action for legal malpractice. **Teague**, 974 So.2d at 1276.

The standard imposed is that of a reasonable man - any plaintiff who had knowledge of facts that would place a reasonable man on notice that malpractice may have been committed shall be held to have been subject to the commencement of prescription by virtue of such knowledge even though he asserts a limited ability to comprehend and evaluate the facts. **Straub**, 92 So.3d at 553. The focus is on the appropriateness of the claimant's actions or inactions, and therefore, the inquiry becomes when would a reasonable man have been on notice that malpractice may have been committed. **Id.**

In this matter, Mr. Mikesell argues that he was unaware of sufficient facts to put him on notice of Ms. Cox's potential legal malpractice until he received notice of the judgment on July 13, 2011. He claims that until Ms. Cox withdrew

[5] We recognize that in **Teague** the court found that the plaintiff's claim was not perempted. However, we find that case to be distinguishable, as Mr. Mikesell had actual knowledge of the alleged wrongful acts.

her representation and until the court's ruling, he remained convinced by Ms. Cox that the court made the errors that could be corrected. Therefore, he asserts that he was not on notice of his claim until the court signed the judgment on May 10, 2011, or when he received the judgment on July 13, 2011. Thus, he asserts, his suit was timely.

In its written reasons, the trial court stated:

> A review of plaintiff's Petition, as well as the pleadings and exhibits attached, supports that any legal malpractice claim that plaintiff may have possessed against defendant was perempted under La. R.S. 9:5605 before he filed the instant law suit. Based on all the facts set out above, plaintiff had actual knowledge of the complaints forming the basis of his suit in April 2011, as evidenced by the emails and other communications between the parties in which plaintiff complained about defendant's legal representation. Thus, this Court finds that any legal malpractice claim against defendant had to be filed by the end of April, 2012, at the latest. The suit was filed on May 14, 2012, and therefore the "Exception of Peremption" is granted.

The trial court concluded that Mr. Mikesell had sufficient knowledge of the alleged acts of malpractice by Ms. Cox for more than one year prior to the filing of his petition as evidenced by various emails. Based on our review of the record in this matter, we are satisfied that a reasonable factual basis exists for the trial court's findings in this regard. The evidence is overwhelmingly in support of the trial court's conclusion, and the trial court did not err in granting Ms. Cox's exception raising the objection of peremption and dismissing Mr. Mikesell's claim with prejudice.

CONCLUSION

For the above and foregoing reasons, we affirm the May 15, 2013 judgment of the trial court. Costs of this appeal are assessed against Kevin T. Mikesell.

AFFIRMED.