

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2017 CA 0602

JAMES E. SHIELDS, JR., CHRISTINE F. SHIELDS,  
JAMES E. SHIELDS, III, AND JOSEPH LUKE SHIELDS

VERSUS

ALVIN R. SAVOIE & ASSOCIATES, INC. D/B/A SAVOIE  
CONSRUCTION, INC., FOSTER-TAYLOR FIREPLACES, INC.,  
AMERICAN EMPIRE SURPLUS LINES INSURANCE COMPANY,  
THE TRAVLERS INDEMNITY COMPANY OF CONNECTICUT,  
ROSS SAVOIE, ROSS SAVOIE CONSTRUCTION, LLC,  
AMERICAN EMPIRE SURPLUS LINES INSURANCE COMPANY,  
AMERICA'S CHOICE 2-10 HOME BUYER'S WARRANTY,  
AND JKL INSURANCE COMPANY

**CONSOLIDATED WITH**

NO. 2017 CA 0603

ASI LLOYDS AS SUBROGEE OF  
JAMES AND CHRISTINE SHIELDS

VERSUS

SAVOIE CONSTRUCTION, INC.,  
SAVOIE CONSTRUCTION AND DEVELOPMENT, LLC,  
AND FOSTER-TAYLOR FIREPLACES, INC.

Judgment Rendered: NOV 01 2017

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On Appeal from the  
22nd Judicial District Court  
In and for the Parish of St. Tammany  
State of Louisiana  
Trial Court No. 2012-10392  
Consolidated With 2012-10262

Honorable Peter J. Garcia, Judge Presiding

TMH  
ahp  
GH

\* \* \* \* \*

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\* \* \* \* \*

BEFORE: HIGGINBOTHAM, HOLDRIDGE, AND PENZATO, JJ.

## HIGGINBOTHAM, J.

This is not the first time this consolidated matter has been before this court.<sup>1</sup> The ongoing litigation involves claims for damages arising out of a January 2011 residential fire that originated in an outdoor fireplace in a home that was constructed between 2005 and 2006, and then occupied by the homeowners in September 2006. In this appeal, the homeowners challenge the summary judgment dismissal, on the grounds of peremption, of additional defendants (and an insurer), who were involved with the alleged defective installation of the outdoor fireplace during the original construction of the home.<sup>2</sup>

### BACKGROUND

The homeowners, James E. Shields, Jr. and Christine F. Shields, along with their two sons, originally brought suit in January 2012, against the builder of their Slidell, Louisiana home, Alvin R. Savoie & Associates, Inc., d/b/a Savoie Construction. The homeowners also named the builder's insurer, American Empire Surplus Lines Insurance Company, the fireplace installer, Foster-Taylor Fireplaces, Inc., and the manufacturer of the fireplace, Lennox Hearth Products, LLC. In a second supplemental and amending petition filed with leave of court on June 15, 2016,<sup>3</sup> the homeowners named new defendants, J. Ross Savoie and Ross Savoie Construction LLC (collectively referred to as "Savoie"), and their commercial general liability insurer, American Empire Surplus Lines Insurance Company

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<sup>1</sup> For a detailed outline of the facts and procedural history in this contentious litigation, see **Shields v. Alvin R. Savoie & Associates, Inc.**, 2016-0825 c/w 2016-0826 (La. App. 1st Cir. 2/17/17), 214 So.3d 27, writ denied, 2017-0506 (La. 5/19/17), 220 So.3d 750 (hereafter referred to as **Shields I**), and **Shields v. Alvin R. Savoie & Associates, Inc.**, 2016-0827 c/w 2016-0828 (La. App. 1st Cir. 2/17/17), 217 So.3d 420 (hereafter referred to as **Shields II**).

<sup>2</sup> The homeowners' appeal of the insurer's summary judgment dismissal is the subject of a related consolidated appeal decided this same date. See **Shields v. Alvin R. Savoie & Associates, Inc.**, 2017-0604 c/w 2017-0605 (La. App. 1st Cir. \_\_\_/\_\_\_/17), --- So.3d --- (hereafter referred to as **Shields IV**).

<sup>3</sup> The homeowners first attempted to file the amended petition without leave of court on April 1, 2015.

(“American Empire”), contending that Savoie, as a subcontractor for the builder, along with Foster-Taylor Fireplaces, was responsible for negligently installing the defective outdoor fireplace during the original construction of the residence.

In the meantime, the homeowners were also in the process of appealing the summary judgment dismissal of their builder and its insurer, on the grounds that the homeowners’ claims for defective and negligent construction against the builder were barred by the exclusivity provisions of the Louisiana New Home Warranty Act (NHWA), and that those claims were statutorily preempted. On February 17, 2017, this court affirmed the dismissal of the homeowners’ NHWA claims against the builder and its insurer as preempted. See Shields I, 214 So.3d at 34-35, and Shields II, 217 So.3d at 421. The Supreme Court denied writs in Shields I on May 19, 2017.

While the first two appeals were pending, Savoie filed a motion for summary judgment on October 7, 2016. Savoie sought dismissal of the homeowners’ claims based on preemption pursuant to La. R.S. 9:2772,<sup>4</sup> which bars any claim for damage to property arising out of defective construction of an immovable, or improvement to immovable property, more than five years after the homeowner occupies the

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<sup>4</sup> Louisiana Revised Statute 9:2772 clearly provides a preemptive time period for claims arising under construction contracts. See Vicari v. Window World, Inc., 2014-870 (La. App. 5th Cir. 5/28/15), 171 So.3d 425, 434, writ denied, 2015-1269 (La. 9/25/15), 178 So.3d 570. The statute establishes a definite time period from which the preemptive period starts to run, which is not dependent on the discovery of the defect. Burkart v. Williamson, 2009-0294 (La. App. 1st Cir. 11/13/09), 29 So.3d 635, 639. The pertinent part of La. R.S. 9:2772, with emphasis added, states:

A. Except as otherwise provided in this Subsection, **no action . . . including . . . to recover damages**, or otherwise arising out of an engagement of . . . construction . . . or building immovable or movable property . . . , **shall be brought against any . . . person performing or furnishing . . . the construction of immovables, or improvement to immovable property**, including but not limited to a residential building contractor . . . :

\* \* \*

(1) . . . (b) . . . **more than five years after the improvement has been thus occupied by the owner.**

\* \* \*

B. (1) The **causes which are preempted** within the time described above **include any action:**

\* \* \*

(b) For **damage to property**, movable or immovable, **arising out of any such deficiency.**

home. Shortly thereafter, Savoie's insurer, American Empire, filed a motion for summary judgment arguing that by extension, since the homeowners had no valid claims against its insured, Savoie, then American Empire could have no liability by operation of law. The district court granted the motions for summary judgment, dismissing all of the homeowners' claims against Savoie and American Empire on the grounds of peremption. The district court also denied the homeowners' motion for new trial. The homeowners now appeal, urging this court to find error in the district court's failure to allow the homeowners' amended pleadings against joint tortfeasors to relate back to the date of filing the original petition. In short, the homeowners assign error to the district court's finding of peremption.

### DISCUSSION

In this case, the facts are not in dispute; therefore, the doctrine of manifest error does not apply. Rather, appellate review of questions of law is simply to determine whether the district court was legally correct. See Stewart v. Continental Cas. Co., Inc., 2011-0505 (La. App. 1st Cir. 11/9/11), 79 So.3d 1047, 1050, writ denied, 2011-2721 (La. 2/17/12), 82 So.3d 285. Furthermore, when determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the district court's determination of whether summary judgment is appropriate. **Temple v. Morgan**, 2015-1159 (La. App. 1st Cir. 6/3/16), 196 So.3d 71, 76, writ denied, 2016-1255 (La. 10/28/16), 208 So.3d 889.

On appeal, the homeowners contend that their June 2016 amended petition was timely filed against Savoie and American Empire because Savoie is solidarily liable with the builder for the defective installation of the outdoor fireplace when their home was constructed. The homeowners further maintain that the subsequent amendment of their suit to add Savoie and their insurer as defendants related back to the filing of the original petition filed against the builder in January 2012.

The applicable period for filing an action for damages against the subcontractor, Savoie, is governed by a preemptive period found in La. R.S. 9:2772, which allows five years after the homeowner occupies the house for filing suit.<sup>5</sup> The homeowners occupied their new home in September 2006. The dates of the amended pleadings filed ten years later reveal that the homeowners' damage claims against Savoie are clearly preempted, which means that their claims were completely extinguished. See La. Civ. Code art. 3458.<sup>6</sup> Nothing may interfere with the running of a preemptive period. **Stewart**, 79 So.3d at 1051.

The district court recognized that the homeowners' claims were preempted and assigned written reasons, which we conclude are based upon current jurisprudence and are well-founded. The district court succinctly stated:

Louisiana law is clear that, unlike prescription, nothing can interrupt or suspend preemption. [The homeowners] attempt to circumvent preemption by arguing that the amended petition should be allowed to relate back under [La. Code Civ. P. art.] 1153 to the filing of the original petition against other parties, which [the homeowners] claim are solidary obligors with [Savoie]. However, relation back under [La. Code Civ. P.] art. 1153 does not apply to preemption, as has been recognized by the Louisiana Supreme Court in [**Naghi v. Brener**, 2008-2527 (La. 6/26/09), 17 So.3d 919, 925], and by the Louisiana First Circuit Court of Appeal in [**Stewart**, 79 So.3d at 1053]. As explained by the Court in **Naghi**, the primary importance of [Article 1153] is the avoidance of *prescription*, which, unlike preemption, can be interrupted or suspended so that the cause of action still exists, whereas once preemption has occurred, the cause of action no longer exists.

[The homeowners'] attempts to distinguish **Naghi** and **Stewart** are ineffective. Both **Naghi** and **Stewart** establish that relation back under [Article 1153] does not apply to preemption . . . , because preemption destroys the cause of action itself, so that there is nothing to which an amended or supplemental pleading filed after the preemptive period has expired can relate back. . . . [T]he claim is destroyed and no relation back can revive the extinguished claim. As

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<sup>5</sup> As we previously held in **Shields I**, 214 So.3d at 35, preemption for all of the homeowners' claims against the builder that arose out of the construction of the home occurred much earlier than five years, pursuant to the NHTA's minimum required warranties set forth in La. R.S. 9:3144. However, for the purpose of these consolidated appeals, we accept the parties' assertion that the five-year preemptive period in La. R.S. 9:2772 applied as to the homeowners' claims against the subcontractor, Savoie. Thus, the latest possible date that preemption occurred is in September 2011, five years after the homeowners occupied their home.

<sup>6</sup> Article 3458 provides: "Preemption is a period of time fixed by law for the existence of a right. Unless timely exercised, the right is extinguished upon the expiration of the preemptive period."

[the homeowners] did not name [Savoie] as defendants until years after the termination of the preemptive period of all claims against them, those claims no longer exist.

The application of a commercial general liability policy is premised upon the insured becoming legally obligated to pay damages. See [Barnett v. Watkins, 2006-2442 (La. App. 1st Cir. 9/19/07), 970 So.2d 1028, 1037, writ denied, 2007-2066 (La. 12/14/07), 970 So.2d 537.] The scope of American Empire's liability extends only as far as the liability of alleged insureds [Savoie]. Therefore, because [the homeowners] cannot recover against [Savoie], they cannot recover against American Empire.

Having thoroughly reviewed the record and jurisprudence, we find no error in the district court's excellent analysis of the applicable law. Therefore, we hereby adopt and incorporate the district court's reasons as our own, and we agree with the district court's determination that Savoie and American Empire are entitled to summary judgment as a matter of law. The homeowners' claims against Savoie and their insurer no longer exist, because the expiration of the preemptive time period in 2011 extinguished the homeowners' cause of action. See La. Civ. Code art. 3458. Thus, there is nothing for the amended petition to relate back to under La. Code Civ. P. art. 1153.

### **CONCLUSION**

Accordingly, the judgments of the district court dismissing all of the homeowners' claims against Savoie as preempted are hereby affirmed. We likewise, in a separate decision issued this day, affirm the dismissal of the homeowners' claims against American Empire. All costs of these consolidated appeals are assessed against the homeowners, James E. Shields, Jr. and Christine F. Shields.

**AFFIRMED.**