NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

JEW

NUMBER 2017 CA 0908

BRENT S. HONORE

VERSUS

BENJAMIN BROUILLETTE, CHARLES J. FULDA,
BROUILLETTE FIRM, APLC, AND ABC INSURANCE COMPANY

Judgment Rendered: DEC 21 2017

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Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 642,302

Honorable Janice Clark, Judge

* * * * * * *

E. Scott Hackenberg Baton Rouge, LA	Attorney for Appellant Plaintiff – Brent S. Honore
Connell L. Archey Keith J. Fernandez Baton Rouge, LA	Attorneys for Appellees Defendants – Benjamin Brouillette, Charles J. Fulda, IV, and Brouillette Firm, APLC

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BEFORE: McCLENDON, WELCH, AND THERIOT, JJ.

JMc McClendon, J. concurs and assigns reasons.

WELCH, J.

The plaintiff, Brent S. Honore, appeals a summary judgment granted in favor of the defendants, Benjamin Brouillette; Charles J. Fulda, IV; and Brouillette Law Firm, APLC (collectively "the Brouillette defendants"), determining that the legal malpractice claims asserted by Mr. Honore against the Brouillette defendants were perempted, and therefore, dismissed those claims. For the following reasons, we affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

The underlying facts in this case are generally not in dispute. Mr. Honore previously owned a house on False River, which was located at 10539 Island Road in Ventress, Louisiana. On July 11, 2011, Citimortgage, Inc. filed a petition for executory process against Honore to foreclose on the property. However, on February 20, 2012, before the property was sold at a judicial sale, Mr. Honore filed for bankruptcy, which then precluded the judicial sale of the property. In the bankruptcy proceedings, Mr. Honore represented to the bankruptcy court on two separate occasions that the property had a fair market value of $450,000 and a liquidation value of $405,000. The lender, Citimortgage, force-placed $600,000 of insurance on the property on March 26, 2013. Thereafter, on June 18, 2013, Mr. Honore applied for and subsequently obtained property insurance with Lexington Insurance Company ("Lexington"). On August 13, 2013, Lexington sent a notice of cancellation of insurance to Honore due to liability concerns and because the dwelling was over insured. Three days later, on August 16, 2013, the house and all of its contents were destroyed by a fire.

Mr. Honore filed a claim against Lexington for the loss from the fire. In response, Lexington, through its independent adjusting firm, assigned a team of independent adjusters and fire experts to investigate Mr. Honore's loss and to adjust the claim. During the investigation, the adjusters and consultants

determined that there were unanswered questions relating to the cause and origin of the fire, the occupancy of the house at the time of the fire, and other topics related and material to the loss. In accordance with the terms of the insurance policy, Lexington requested, by letter, that Mr. Honore submit to an examination under oath[1] and also advised him of his right to have an attorney present at the examination. Lexington also requested that Mr. Honore produce various documents related to the adjustment of his claim, such as an inventory of the damaged personal property.

Mr. Honore subsequently engaged the Brouillette defendants to represent him at the examination under oath and to assist with the processing of the insurance claim. However, Mr. Honore never participated in an examination under oath as required by the terms of the insurance policy and the personal property inventory was never submitted to Lexington; instead, on October 10, 2013, Mr. Honore commenced suit against Lexington in federal court.[2] Shortly thereafter, on January 22, 2014, Lexington filed a motion for summary judgment, seeking the dismissal of Mr. Honore's claims against it on the basis that coverage had been

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[1] The pertinent part of Mr. Honore's insurance policy with Lexington provides as follows:

> **B. Duties After Loss**
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> In case of a loss to covered property, we have no duty to provide coverage under this policy of the failure to comply with the following duties is prejudicial to us. The duties must be performed either by you, an "insured" seeking coverage, or a representative of either:
>
> * * *
>
> 7. As often as we reasonably require:
>
> * * *
>
> b. Provide us with records and documents we request and permit us to make copies; and
> c. Submit to an examination under oath, while not in the presence of another "insured" ....

[2] The Brouillette defendants contend that Mr. Honore refused to submit to the examination under oath and that he instructed them to file suit against Lexington in federal court. Mr. Honore contends that the Brouillette defendants advised him to file suit against Lexington rather than submit to an examination under oath. This disputed fact is not material to the issue of peremption presented by the motion for summary judgment on appeal herein.

voided because Mr. Honore failed to both submit to the examination under oath and produce the requested documents and records, as required by the terms of the insurance policy. A copy of Lexington's motion for summary judgment was forwarded to Mr. Honore on January 25, 2014.

Shortly thereafter, Mr. Honore retained Jonathan C. Augustine as additional counsel. On February 12, 2014, a motion to enroll Mr. Augustine as lead counsel was filed, which motion also requested extensions of all current deadlines. On February 13, 2014, the motion to enroll was granted; however, the motion to extend deadlines was denied. That same date, February 13, 2014, the Brouillette defendants filed an opposition to Lexington's motion for summary judgment on behalf of Mr. Honore. The opposition to Lexington's motion for summary judgment was filed one day late. On September 15, 2014, the judge presiding over the federal court proceedings granted Lexington's motion for summary judgment on the basis that Mr. Honore's failure to cooperate with Lexington was a material breach of the policy that precluded the suit against Lexington, and therefore, dismissed Mr. Honore's claims against Lexington with prejudice. Mr. Honore did not appeal the federal court's September 15, 2014 ruling.

One year later, on September 15, 2015, Mr. Honore filed a petition for damages against the Brouillette defendants, claiming that the Brouillette defendants were negligent in their representation of Mr. Honore with regard to his claim against Lexington and that because of their negligence, Mr. Honore was deprived of the property insurance proceeds ("the malpractice suit"). More specifically, Mr. Honore alleged that the Brouillette defendants were negligent in: (1) advising him that Lexington had accused him of insurance fraud; (2) recommending that he file a lawsuit rather than submit to the examination under oath and cooperate with the other portions of Lexington's investigation; (3) filing

his lawsuit against Lexington prematurely; and (4) failing to submit his personal property inventory to Lexington.

Following discovery, the Brouillette defendants filed a motion for summary judgment, maintaining that there was no genuine issue of material fact and that Mr. Honore's suit should be dismissed as perempted pursuant to La. R.S. 9:5605. Therein, the Brouillette defendants argued that the undisputed material facts established that Mr. Honore was aware of the acts giving rise to his negligence action more than one year prior to the filing of the malpractice action. After a hearing, the trial court determined the action was perempted and granted the Brouillette defendants' motion. On April 19, 2017, the trial court signed a judgment granting the motion for summary judgment and dismissing Mr. Honore's claims against the Brouillette defendants with prejudice. From this judgment, Mr. Honore has appealed.

LAW AND DISCUSSION

Summary Judgment

Appellate courts review summary judgments *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. **Hogg v. Chevron USA, Inc.**, 2009-2632 (La. 7/6/10), 45 So.3d 991, 996. A motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(A)(3). On a motion for summary judgment, the burden of proof remains with the mover. If the issue before the court is one on which the party bringing the motion will bear the burden of proof at trial, the burden of showing that there is no genuine issue of material fact is on the party bringing the motion. See La. C.C.P. art. 966(D)(1).

Although typically asserted through the procedural vehicle of the peremptory exception, the defense of peremption may also be raised by motion for summary judgment. See **Bardwell v. Faust**, 2006-1472 (La. App. 1st Cir. 5/4/07), 962 So.2d 13, 16-18, writ denied, 2007-1174 (La. 9/11/07), 964 So.2d 334; see also **Hogg**, 45 So.3d at 997. When peremption is raised by motion for summary judgment, the review is *de novo,* using the same criteria used by the district court in determining whether summary judgment is appropriate. See **Bardwell**, 962 So.2d at 16; **Hogg**, 45 So.3d at 997.

Peremption

Louisiana Revised Statutes 9:5605 governs the time period within which a claimant has to file an action for damages against an attorney for legal malpractice, and it provides, in relevant part that:

> 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 one-year and three-year periods of limitation provided in Subsection A of this Section are peremptive periods within the meaning of Civil Code Article 3458 and, in accordance with Civil Code Article 3461, may not be renounced, interrupted, or suspended.

A straightforward reading of this statute clearly shows that it sets forth two peremptive limits within which to bring a legal malpractice action; namely, one year from the date of the alleged act or one year from the date of discovery, with a three-year limitation from the date of the alleged act, omission, or neglect to bring such claims. **Teague v. St. Paul Fire and Marine Ins. Co.**, 2007-1384 (La.

2/1/08), 974 So.2d 1266, 1274. The discovery rule, which our jurisprudence delineates as the fourth category of *contra non valentem,* is an equitable pronouncement, which provides that statutes of limitation do not begin to run against a person whose cause of action is not reasonably known or discoverable by him, even though his ignorance is not induced by the defendant. *Id.* Thus, under the provisions of La. R.S. 9:5605, an action is not perempted if it is brought within one year of the date of discovery and the record shows that the claimant was reasonably unaware of malpractice prior to the date of discovery and his delay in filing suit was not due to his willful, negligent, or unreasonable action. **Teague**, 974 So.2d at 1275.

The "date of discovery" from which 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. Constructive knowledge has been defined by our courts as whatever notice is enough to excite attention and put the injured party on guard or call for inquiry. **Campo v. Correa**, 2001-2707 (La. 6/21/02), 828 So.2d 502, 510-511. Such notice is tantamount to knowledge or notice of everything to which a reasonable inquiry might lead, and such information or knowledge as ought to reasonably put the injured party on inquiry is sufficient to start the running of prescription. **Campo**, 828 So.2d at 511. Therefore, 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.

In this case, because peremption was raised through a motion for summary judgment rather than through the peremptory exception, the Brouillette defendants were required to prove, based solely on documentary evidence and without the

benefit of testimony at a hearing, that there was no genuine material factual issue in dispute regarding the date upon which Mr. Honore acquired actual or constructive knowledge of the alleged negligence of the Brouillette defendants sufficient to commence the running of peremption.

In the Brouillette defendants' motion for summary judgment, they maintained that Mr. Honore acquired actual or constructive knowledge of the alleged negligence of the Brouillette defendants more than one year prior to the filing of suit on September 15, 2015; more specifically, that he acquired knowledge in February 2014. Thus, the Brouillette defendants maintain that Mr. Honore's suit was perempted pursuant to La. R.S. 9:5605.

In support of their motion for summary judgment, the Brouillette defendants relied on the affidavit of Mr. Fulda (one of the Brouillette defendants) and the attachments thereto, as well as Mr. Honore's responses to interrogatories. Collectively, these documents establish that on January 22, 2014, Lexington filed a motion for summary judgment seeking the dismissal of the federal suit on the basis that Mr. Honore had refused to permit Lexington to take his examination under oath as required by the terms of the policy and that he had failed to produce certain documents and records related to the cause and origin of the fire or the value of the property that was allegedly damaged, which voided his coverage under the policy. Mr. Honore received a copy of the motion a couple of days after it was filed. Mr. Honore was aware of the significance of the motion, because in response to the motion, he executed two affidavits in an attempt to refute Lexington's contention that he failed to abide by the terms of the policy by refusing to cooperate with Lexington during its investigation. In addition, the evidence further established that Mr. Honore knew that the opposition to the motion for summary judgment was filed one day late and that filing an opposition late in federal court was "not good" because he had served on an advisory board for two federal judges. Based on this

knowledge, Mr. Honore became "concerned that Mr. Fulda was not qualified to handle the insurance claim" and therefore, he hired another attorney, Mr. Augustine, to represent him due to his concerns. Around February 12, 2014, Mr. Augustine enrolled as lead counsel for Mr. Honore in the federal suit against Lexington.

In opposition to the Brouillette defendants' motion for summary judgment on the basis of peremption, Mr. Honore maintained that he filed this suit within one year of his discovery of the Brouillette defendants' malpractice and the date when he incurred any appreciable harm. He essentially argues that peremption did not begin to run until his suit against Lexington was dismissed. In support of the opposition to the motion for summary judgment, Mr. Honore relies on his own affidavit, wherein he stated that when he retained Mr. Augustine, he had no knowledge that the Brouillette defendants had committed any act of negligence regarding his case against Lexington and that he did not discover that the Brouillette defendants were negligent in his suit against Lexington until he received a copy of the ruling dismissing his case. Mr. Honore also stated in his affidavit that following the dismissal of his case against Lexington on September 15, 2014, he consulted with an attorney who advised him that the Brouillette defendants had committed legal malpractice, which was the first time he had any knowledge of a claim or potential claim against the Brouillette defendants.

Based upon our *de novo* review of the motion for summary judgment and the supporting documents, we find that the Brouillette defendants met their burden of establishing that there was no genuine issue of material fact that Mr. Honore acquired actual or constructive knowledge of the alleged negligence or malpractice of the Brouillette defendants in February 2014. Mr. Honore specifically alleged in his petition that the Brouillette defendants were negligent in recommending that he file a lawsuit rather than submit to the examination under oath and cooperate with

the other portions of Lexington's investigation, filing his lawsuit against Lexington prematurely, and failing to submit his personal property inventory to Lexington. The undisputed material facts establish that by February 2014, Mr. Honore received a copy of the motion for summary judgment filed by Lexington, which sought the dismissal of Mr. Honore's claims against it on the basis that Mr. Honore had failed to both submit to the examination under oath and produce the requested documents and records, as required by the terms of the insurance policy. In addition, by February 2014, Mr. Honore was concerned that Mr. Fulda and/or the Brouillette defendants were not qualified to handle the federal suit and therefore, retained Mr. Augustine as lead counsel.

While Mr. Honore focuses on the statement in his affidavit that he did not have knowledge that the Brouillette defendants had committed malpractice until he was advised of such by an attorney after the dismissal of his suit against Lexington, this statement is insufficient to create an issue of fact as to when Mr. Honore obtained actual or constructive knowledge of the alleged negligence or malpractice. The law does not require that a plaintiff be informed of possible malpractice by an attorney before peremption begins to run; rather, the issue to be determined is what the plaintiff knew or should have known and when. See **Miralda v. Gonzalez**, 2014-0888 (La. App. 4th Cir. 2/4/15), 160 So.3d 998, 1014. The documents establish that by February 2014, Mr. Honore knew of the problem with his suit in federal court against Lexington, *i.e.*, that it was filed too early because he had not submitted to an examination under oath and that the documentation requested by Lexington had not been submitted, and Mr. Honore was concerned about Mr. Fulda's ability to handle his claim. Thus, in February 2014, Mr. Honore acquired knowledge of his claim sufficient to commence the running of peremption, and his suit against the Brouillette defendants, filed more than one year later (September 15, 2015), is perempted under La. R.S. 9:5605. As

such, the trial court properly granted the Brouillette defendants' motion for summary judgment on the basis of peremption and dismissed Mr. Honore's claims against the Brouillette defendants.

CONCLUSION

For all of the above and foregoing reasons, the April 19, 2017 judgment of the trial court is affirmed. All costs of this appeal are assessed to the plaintiff, Brent S. Honore.

AFFIRMED.

STATE OF LOUISIANA

COURT OF APPEAL

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BRENT S. HONORE

VERSUS

BENJAMIN BROUILLETTE, CHARLES J. FULDA, BROUILLETTE FIRM, APLC, AND ABC INSURANCE COMPANY

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McClendon, J., concurring.

Louisiana Revised Statutes 9:5605 provides that "[n]o action for damages against any attorney at law ... 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." Under the clear wording of the statute, the peremptive period under the malpractice act begins to run from the date the purported negligent acts are discovered or should have been discovered. There appears to be no requirement of appreciable damage before the period begins to run.

Plaintiff was on constructive notice that a negligent act or omission had occurred when he received a copy of Lexington's motion for summary judgment in January 2014. The fact that his damages were not sustained until the motion for summary judgment was granted is immaterial in light of the clear statutory language.

While I am cognizant of the quandary this creates for the plaintiff in having the peremptive period begin to run before the damages are sustained, this court has previously addressed the problem. Specifically, in **Augman v. Colwart**, 03-0869 (La.App. 1 Cir. 2/23/04), 874 So.2d 191, 194, this court, in overruling an objection of prematurity in a legal malpractice case, stated:

> If the plaintiff in a legal malpractice claim cannot urge the suspension of peremption of his cause of action, or that his cause of action does not "ripen" and the peremptive period does not begin until a definitive judgment in the original litigation, then it seems obvious that the defendant may not urge prematurity as a defense on the same grounds.

Other courts have handled this dilemma by staying a prematurely filed legal malpractice action until such time as the damages are sustained. See **Dwyer v. Binegar**, 11-1782 (La.App. 4 Cir. 5/23/12), 95 So.3d 565.

Additionally, I recognize that a plaintiff may be required to take opposing views in the original litigation and the malpractice action, but such is required by the clear wording of the statute. This problem was pointed out by Justice Johnson in her dissents in **Reeder v. North**, 97-0239 (La. 10/21/97), 701 So.2d 1291, 1300 and **Jenkins v. Starns**, 11-1170 (La. 1/24/12), 85 So.3d 612, 629, wherein she stated: "[I]f a client is required to file suit against his attorney while the suit is being litigated and before a judgment is definitive, the client is placed in the untenable position of asserting that a judgment is both valid and invalid."

However, in light of the clear wording of LSA-R.S. 9:5605, I agree with the result reached by the majority.