

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

JGW

NUMBER 2018 CA 0363

GLEND A WELLS & O/B/O
REV. WILSON MARSHALL, SR.
(DECEASED FATHER)

JGW

VERSUS

HENRY T. DART, LEAD ATTORNEY
ATTORNEYS AT LAW, APC

Judgment Rendered: SEP 21 2018

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Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 2017-11422

Honorable Donald M. Fendlason, Judge Pro Tem

* * * * *

Glenda Wells
Grand Prairie, Texas

Pro Se Appellant
Plaintiff – Glenda Wells

Elliot M. Lonker
David S. Daly
New Orleans, Louisiana

Attorneys for Appellee
Defendant – Henry T. Dart

* * * * *

BEFORE: PETTIGREW, WELCH, AND CHUTZ, JJ.

WELCH, J.

The plaintiff, Glenda Wells, appeals a judgment sustaining a peremptory exception raising the objection of peremption and dismissing her petition for damages against the defendant, Henry T. Dart, Attorneys at Law, APC. We affirm the judgment of the trial court and issue this memorandum opinion in compliance with Uniform Rules—Courts of Appeal, Rule 2-16.1(B).

The underlying facts of this case are generally undisputed. On June 7, 2008, the plaintiff, individually and on behalf of her deceased father, Reverend Wilson Marshall, Sr., retained the defendant and another attorney, Michael McIntire, to represent her in a claim for damages for personal injuries and contamination of property against numerous oil companies and companies hired by the oil companies to clean oilfield equipment. The defendant also represented several of the plaintiff's family members in making the same claims. A lawsuit was initially filed by the plaintiff's original attorney, Stephen Rue, as part of a class action in Orleans Parish, but the class was not certified by the trial court. After the class was dismissed, individual claims were filed in the case entitled *Brittany Roache, et al. v. Alpha Technical Services, Inc., et al. (Exxon Mobil)*, No. 669-999, on the docket of the 24th Judicial District Court, Parish of Jefferson ("the underlying suit").¹ Mr. Rue started representing the plaintiff in 2001 and continued to represent her until 2008, when the plaintiff discharged Mr. Rue and retained the defendant and Mr. McIntire.

¹ In the underlying suit, the plaintiff alleged that beginning in 1958, certain landowners leased parts of their property for the purpose of conducting oil field pipe and equipment cleaning operations and that the oil field equipment was covered with radioactive scale. The plaintiff's property was adjacent to the property where the oil field pipes were being cleaned, and the plaintiff claimed that the cleaning operations created large quantities of radioactive dust, which became airborne, and contaminated the adjoining property, and exposed the plaintiff and her father to radioactive dust. The plaintiff also claimed that her father, who died in 1966, contracted cancer from the operations and that she sustained damages from the contamination, including emotional distress.

During the latter part of 2013, the plaintiff became dissatisfied with the defendant's representation. Around the beginning of October 2013, the plaintiff sent a complaint to the Louisiana Attorney Disciplinary Board, Office of the Disciplinary Counsel ("ODC") regarding the defendant's conduct in the underlying suit. In a follow-up letter dated December 12, 2013 to ODC regarding her complaint, the plaintiff stated that she felt that "the content[s] of this letter [(outlining the defendant's recent actions in the underlying case)] [wa]s not **mere** but **major** negligence on behalf of Mr. Dart" The plaintiff's complaint was not investigated further by ODC because it involved pending/active litigation.² In addition, in October 2013, the plaintiff contacted Erin Brockovich, an environmental activist,³ regarding the underlying suit. In an exchange of emails on October 18, 2013, between the plaintiff and an environmental investigator on behalf of Erin Brockovich, the plaintiff claimed that her attorneys were "mishandling" her case, that they were "possibly taking money under the table," and that she was "in the process of bring[ing] their 'dirty deeds' to the forefront," as she had lodged a complaint with ODC.

In November 2013, the defendant had a meeting with the plaintiff and her family members regarding their claims. One of the plaintiff's family members invited attorney C. Hunter King to attend the meeting. Thereafter, in December 2013, the plaintiff retained Mr. King as additional counsel to represent her and her father's interest in the underlying suit. In an email exchange between the plaintiff and the defendant at the beginning of May 2014, the plaintiff stated that she and her family decided to include Mr. King as their lawyer "because there ha[d] been

² We note that the plaintiff filed another complaint against the defendant with ODC in May 2016. In that complaint, the plaintiff stated that "[a]pproximately three years ago, I repeatedly filed complaints with [ODC] regarding the misconduct of my attorney[], Henry Dart" and that because of his "misconduct, [the plaintiff and her family] retained the services of C. Hunter King, attorney at law, to assist the Dart firm with [their] cases."

³ See www.brockovich.com

far too many ‘red flags’ and ‘dirty dealings’ with you” The defendant was not willing to work with Mr. King and refused to represent the plaintiff in the underlying suit with Mr. King. Therefore, by letter dated May 16, 2014, the defendant informed the plaintiff that he was withdrawing as her counsel of record and provided her with details regarding the status of her claims in the underlying suit.

Thereafter, in October 2015, the defendant sent a letter to all of his clients advising that he was withdrawing entirely from the underlying suit, and his motion to withdraw was granted in November 2015. Mr. McIntire continued to represent the plaintiff until he was discharged by her in April 2016, and Mr. King continued to represent the plaintiff until he withdrew in May 2016. Thereafter, the plaintiff retained attorney Doris McWhite Weston to represent her in the underlying suit.

During the course of the defendant’s representation of the plaintiff in the underlying suit and at the time the defendant withdrew from that suit, several settlement offers from the defendants in the underlying suit were made; however, the plaintiff rejected all offers made. At the time the plaintiff retained Ms. Weston to represent her, the defendants in the underlying suit had a pending motion for summary judgment on the issue of liability. The defendants’ motion for summary judgment was subsequently granted and the plaintiff’s claims in the underlying suit were dismissed with prejudice pursuant to a judgment signed on August 26, 2016.

On March 28, 2017, the plaintiff filed the instant lawsuit against the defendant seeking damages for various alleged acts of legal malpractice by the defendant, which occurred when he represented her between 2008 and 2015.⁴ The plaintiff essentially claimed that the defendant negligently represented her in the

⁴ The plaintiff originally filed suit against the defendant on October 14, 2016 in the 24th Judicial District Court, Parish of Jefferson. However, the defendant filed a declinatory exception raising the objection of improper venue. The objection was sustained and the plaintiff’s suit was dismissed without prejudice. Since the plaintiff’s original suit against the defendant was filed in an improper venue, that suit is irrelevant to the issue of peremption. See La. R.S. 9:5605(A).

underlying suit by failing to obtain information from her previous attorney, Mr. Rue, and medical records necessary for her case; failing to assist her with and provide discovery documents to the defendants in the underlying suit; failing to obtain survey/soil testing for radiation contamination on her property; failing to obtain an expert witness; abandoning her by filing a motion to withdraw; and failing to consult with her concerning a replacement attorney after the defendant's withdrawal. The plaintiff further alleged that as a result of the defendant's negligence, her case was dismissed with prejudice on August 26, 2016, and therefore, the plaintiff sought damages from the defendant.

In response, the defendant filed a peremptory exception raising the objection of preemption. The defendant contended that the plaintiff's claims against him were barred by the one-year preemptive period set forth in La. R.S. 9:5605, because the plaintiff knew or should have known of any allegedly negligent or insufficient representation by him well over one year before her suit was filed on March 28, 2017. In support of this contention, the defendant cites the plaintiff's October 2013 complaint to ODC and subsequent assertion to ODC that the defendant's representation of her was "not **mere** but **major** negligence," her December 2013 decision to retain C. Hunter King as additional counsel because she was dissatisfied with the defendant's representation, and her May 2014 email to the defendant wherein she claimed that there had been "far too many red flags" and "dirty dealings" with the defendant's representation.

After a hearing on October 19, 2017, the trial court rendered judgment sustaining the objection of preemption and dismissing the plaintiff's suit against the defendant. In oral reasons for judgment, the trial court found that the plaintiff's claims against the defendant were barred by the one-year preemptive period set forth in La. R.S. 9:5605 because the plaintiff was on notice of what she considered the defendant's negligent representation of her in 2013 when she complained to

ODC about his representation, which was over a year before the plaintiff filed suit on March 28, 2017. A judgment in accordance with the trial court's ruling was signed on November 27, 2017, and it is from this judgment that the plaintiff now appeals.

On appeal, the plaintiff argues that the trial court erred in sustaining the objection of peremption in accordance with La. R.S. 9:5605 because that statute was inapplicable since the defendant's actions constituted "illegal fraudulent misconduct and negligence." Therefore, she contends that her action against the defendant should have been governed by the one-year prescriptive period set forth in La. C.C. art. 3492, and that she filed her suit against the defendant within one year of her discovery of the defendant's conduct. We find no merit to her contention.

Louisiana Revised Statutes 9:5605 provides, 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.**

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. However, with respect to any alleged act, omission, or neglect occurring prior to September 7, 1990, actions must, in all events, be filed in a court of competent jurisdiction and proper venue on or before September 7, 1993, without regard to the date of discovery of the alleged act, omission, or neglect. **The one-year and three-year periods of limitation provided in Subsection A of this Section are preemptive periods** within the meaning of [Louisiana] Civil Code Article 3458 and, in accordance with [Louisiana] Civil Code Article 3461, may not be renounced, interrupted, or suspended.

* * *

E. The preemptive period provided in Subsection A of this Section shall not apply in cases of fraud, as defined in [Louisiana] Civil Code Article 1953.

(Emphasis added).

Louisiana Civil Code article 1953 defines fraud as “a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other.” In addition, “[f]raud may also result from silence or inaction.” *Id.* Allegations of fraud must be pled with particularity. La. C.C.P. art. 856.

Thus, under the clear wording of La. R.S. 9:5605(E) and La. C.C. art. 1953, any action consisting of a misrepresentation or suppression of the truth made with the intention either to obtain an unjust advantage for one party or cause a loss or inconvenience to the other will prohibit the application of the preemptive periods set forth therein. **Lomont v. Bennett**, 2014-2483 (La. 6/30/15), 172 So.3d 620, 628, cert. denied, ___ U.S. ___, 136 S.Ct. 1167, 194 L.Ed.2d 178 (2016). The fraud exception for acts of malpractice may be triggered by either a fraudulent act of malpractice by the attorney or a post-malpractice fraudulent concealment of the act. See Lomont, 172 So.3d at 627-628. In cases where fraud is established, a legal malpractice claim is governed by the one-year prescriptive period set forth in La. C.C. art. 3492, which “commences to run from the day injury or damage is sustained.” **Lomont**, 172 So.3d at 637.

The date of discovery from which a preemptive period or prescriptive period 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.” **Jenkins v. Starns**, 2011-1170 (La. 1/24/12), 85 So.3d 612, 620-622 (citing **Teague v. St. Paul Fire and Marine Ins. Co.**, 2007-1384 (La. 2/1/08), 974 So.2d 1266, 1275).

Based on our review of the record, we find no error in the trial court’s judgment sustaining the defendant’s objection of peremption and dismissing the plaintiff’s claims with prejudice. First and foremost, we note that there are no allegations of fraud (specific or general) set forth in the plaintiff’s petition. There is also no evidence in the record establishing that the defendant engaged in fraud, fraudulently concealed his alleged malpractice from the plaintiff, or otherwise misrepresented or suppressed the truth from the plaintiff with the intention of obtaining an unjust advantage over her or causing a loss or inconvenience to her. Rather, the plaintiff’s allegations of malpractice focus on how the defendant handled (or mishandled) her claims in the underlying suit. Thus, the fraud exception set forth in La. R.S. 9:5605(E) was not triggered and the plaintiff’s claims against the defendant were governed by the preemptive period set forth in La. R.S. 9:5605(A).

The preemptive period set forth in La. R.S. 9:5605 began to run when the plaintiff knew or should have known of the existence of facts that would have enabled her to state a cause of action for legal malpractice. See **Jenkins**, 85 So.3d at 620-621; **Teague**, 974 So.2d at 1275. The negligence complained of in the plaintiff’s petition was that the defendant failed to obtain information and medical records necessary for her case, failed to assist her with and provide discovery documents to the defendants in the underlying suit, failed to obtain survey/soil testing for radiation contamination on her property, failed to obtain an expert witness, abandoned her by filing a motion to withdraw, and failed to consult with her concerning a replacement attorney after the defendant’s withdrawal. Thus, the question before the trial court was the date upon which the plaintiff could

reasonably have discovered these alleged acts of malpractice so as to trigger the running of the peremptive period.

The trial court determined that the plaintiff had knowledge or notice of facts sufficient to state a cause of action against the defendant when she filed a complaint against the defendant with ODC in October 2013 and then specifically asserted to ODC that the defendant's conduct in her case constituted "**major** negligence." We agree with the trial court that these allegations by the plaintiff were sufficient to establish that by October of 2013, the plaintiff had constructive knowledge (if not actual knowledge) of facts that would have entitled her to bring suit against the defendant, and that this knowledge commenced the running of the one-year peremptive period. Therefore, the plaintiff's suit for legal malpractice filed on March 28, 2017 (well beyond one-year from October 2013) was untimely. Accordingly, the trial court properly sustained the defendant's peremptory exception raising the objection of preemption and dismissed the plaintiff's claims against the defendant.

For all of the above and foregoing reasons, the November 27, 2017 judgment of the trial court is affirmed. All costs of this appeal are assessed against the plaintiff/appellant, Glenda Wells.

AFFIRMED.