

STEPHEN M. ROSIERE * **NO. 2002-CA-0128**
VERSUS * **COURT OF APPEAL**
CITY OF NEW ORLEANS * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2000-9911, DIVISION "D"
HONORABLE LLOYD J. MEDLEY, JUDGE

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JAMES F. MCKAY III
JUDGE

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(Court composed of Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray, Judge James F. McKay III)

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REVERSED AND REMANDED

The defendant, the City of New Orleans, appeals the judgment of the trial court granting the plaintiff's, Stephen M. Rosiere, motion for summary judgment and awarding plaintiff \$175,000 for attorney fee reimbursement pursuant to La. R.S. 42:1442.

This matter stems from Officer Stephen M. Rosiere's indictment for the second-degree murder of Gerard Glover on September 22, 1983. Officer Rosiere argued that the act was in the course and scope of his employment. On November 21, 1986, he was acquitted on these charges. On May 19, 1988, the Grand Jury for the United States Eastern District indicted him for a violation of 18 U.S.C. 242 for Deprivation of Civil Rights; he was subsequently acquitted of this charge on August 11, 1988. Throughout all of the legal proceeding spanning through two separate trials, one completed on November 21, 1986, and the second completed on August 11, 1988, Officer Rosiere hired Authur Lemann as his attorney of record with fees in the sum

of \$175,000.

On June 29, 2000, Officer Rosiere filed suit against the City of New Orleans for reimbursement of attorney fees and costs he had incurred as a result of his defense of the state and federal charges. The trial court granted Officer Rosiere's motion for summary judgment and awarded him reimbursement fees in the sum of \$175,000 plus costs. The appellant argues to this Court that the trial court improvidently granted the summary judgment in favor of the plaintiff arguing that there are genuine issues of material fact in question, which would preclude a granting of summary judgment. The City also raises the peremptory exception of prescription for the first time before this Court.

In determining whether summary judgment is appropriate, appellate courts review the evidence de novo. Reynolds v. Select Properties, Ltd., 93-1480 (La.4/11/94), 634 So.2d 1180. The summary judgment procedure is designed to secure the just, speedy and inexpensive determination of actions. Two Feathers Enterprises v. First National Bank, 98-0465 (La.App.4.Cir.10/14/98), 720 So.2d 398, 400. This procedure is now favored and shall be construed to accomplish these ends. La. C.C.P. art. 966(A)(2). This standard of review requires the appellate court to look to the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, to show that there is no genuine issue as to a material fact, and that the mover is entitled to a judgment as a matter of law. La. C.C.P. art. 966(B). A fact is material if it is essential to a plaintiff's cause of action under the applicable theory of recovery and without which plaintiff could not prevail. Generally, material facts are those that potentially insure or preclude recovery, affect the litigant's ultimate success, or determine the outcome of a legal dispute. Coates v. Anco Insulations, Inc., 2000-1331 (La.App. 4 Cir. 3/21/01), 786 So.2d 749, *citing* Prado v. Sloman Neptun Schiffahrts, A.G., 611 So.2d 691, 699 (La.App. 4 Cir.1992). Although the summary judgment procedure is now favored, the burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of

proof at trial, there is no genuine issue of material fact. La. C.C.P. art. 966 C (2). Thus, the initial inquiry in determining the merits of a motion for summary judgment is whether the movant made a prima facie showing that the motion should be granted. Having reviewed the documents filed with the writ application and applying the above standards to the facts of this case, we find that summary judgment is improper in the case sub judice.

Addressing the issue of legal fee reimbursement, under La. R. S. 42:1442, an officer may be entitled to a reimbursement for the legal expenses, only after he had been acquitted of the aforementioned charges. The plaintiff has adequately established that he has in fact been acquitted of the various charges brought against him by both the State and the Federal Government, but in the instant matter there are questions as to the dollar amount that he may be entitled to and the time limitation in which he has to pursue such a reimbursement.

The only supportive evidence presented to the trial court concerning attorney's fees is the affidavit of Mr. Arthur Lemann which states that he received \$75,000 from Mr. Rosiere, yet, the trial court awarded \$175,000 to the plaintiff in reimbursement. Furthermore, Mr. Rosiere acknowledges that there was a balance of zero as of August 1, 1990. The affidavits submitted by the plaintiff establish that there are clearly issues of material fact regarding various essential matters including what amount of attorney's fees did the plaintiff actually pay to Mr. Lemann, if any, and what amount of fees did Mr. Lemann actually charge the plaintiff. Furthermore, it is not clear

from the record or the evidence submitted at the trial as to the amount of reimbursement due to Mr. Rosiere, if any. Therefore, only a trial with proper testimony and evidence can resolve this issue. Clearly, the trial court erred in granting the plaintiff's motion for summary judgment.

The City of New Orleans also specifically files an exception of prescription for the first time in this Court.

Prescription is a peremptory exception, which may be raised by the parties at any time prior to the submission of case at either the trial or appellate court level. In re Ponchatalawa, Inc., App. 1 Cir.1983, 428 So.2d 993. Remand for trial of exception of prescription, filed for first time in Court of Appeal, was appropriate, considering conflicting evidence and lack of any trial court ruling on the issue. Carmouche v. City of Marksville, 94-122 (La.App. 3 Cir. 10/5/94), 643 So.2d 392. While a party may raise the exception of prescription for the first time on appeal, under these circumstances the plaintiff has the right to have the appeal remanded to the trial court for purpose of having the trial court adjudicate the issue of prescription; the appellate court is without discretion in the matter of remand, upon plaintiff's demand for adjudication of that issue. Blanchard v. Southern Pacific Transp. Co., 93 1155 (La.App. 1 Cir. 4/8/94), 635 So.2d 742. Prescription must be specially pleaded; courts may not supply a plea of

prescription. La. C.C. art. 3452. A plea of prescription may be filed in the court of appeal any time prior to final judgment but cannot be maintained unless the record discloses that the plea is well founded. Duncan v. City of Pineville, 192 So.2d 664 (La.App. 3 Cir.1966).

The City's exception asserts that, the plaintiff's claim for reimbursement of attorneys' fees is subject to a three-year prescriptive period. They also assert that under liberative prescription for a personal action the matter has also prescribed. Therefore, it avers that under any theory of prescription the matter has prescribed. The plaintiff in response to defendant's assertions argues that the issue of prescription is not properly before this Court.

Louisiana Code of Civil Procedure article 2163 allows a peremptory exception raising the objection of prescription to be raised for the first time in the appellate court. Blanchard v. Southern Pacific Transportation Company, 93-1155 (La.App. 1 Cir. 4/8/94), 635 So.2d 742. La.C.C.P.

article 2163 provides as follows:

The appellate court may consider the peremptory exception filed for the first time in that court, if pleaded prior to a submission of the case for a decision, and if proof of the ground of the exception appears of record.

If the ground for the peremptory exception pleaded in the appellate court is prescription, the plaintiff may demand that the case be remanded to the trial court for trial of the exception.

This article affords the plaintiff the right to have the appeal remanded to the trial court for the purpose of having the trial court adjudicate the issue of prescription. Blanchard v. Southern Pacific Transportation Company, *supra*.

We agree that in the absence of a trial court ruling on the issue of prescription and the conflicting and insufficient factual support for this Court to make an adequate review of the exception, justice would be best served by a remand of the matter for consideration of the exception of prescription by the trial court. Carmouche v. City of Marksville, *Supra*.

While we find that on the face of the petition, the issue of prescription is properly before this Court, the record is insufficient for this Court to make a determination on this issue.

Therefore, for purposes of fundamental fairness and elucidation of facts concerning this exception of prescription, we remand the matter to the trial court for a hearing on the defendant's exception of prescription.

Furthermore, applying the above standards to the facts of this case, we reverse the trial court's granting of the plaintiff's motion for summary judgment and remand the matter for further proceedings.

REVERSED AD REMANDED