DEVIN HENAGAN	*	**NO. 2004-CA-0425**
VERSUS	*	**COURT OF APPEAL**
LISA ANN LAMBERT HENAGAN MURLA GHNEIM, JIMMIE DALE HENAGAN, SR., BANK ONE (FORMERLY KNOWN AS FIRST NATIONAL BANK OF COMMERCE) AND GLENN DIAZ	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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APPEAL FROM
ST. BERNARD 34TH JUDICIAL DISTRICT COURT
NO. 100-068, DIVISION "C"
Honorable Wayne Cresap, Judge
* * * * * *
Judge Charles R. Jones
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(Court composed of Judge Charles R. Jones, Judge James F. McKay III, and Judge Roland L. Belsome)

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AFFIRMED

This appeal arises out of the granting of exceptions of prescription in favor of appellees, Bank One, NA and Glenn E. Diaz, by the district court. For the reasons assigned below, we affirm the judgment.

The appellant, Devin Henagan, was six years old in 1987 when his father, Jimmie D. Henagan, Jr., was killed in an accident. On September 23, 1998, a wrongful death action was instituted in the 34th Judicial District Court for the Parish of St. Bernard. Devin's mother, Lisa Henagan Murla, was appointed tutrix, and Jimmie D. Henagan, Sr., was appointed undertutor on behalf of Devin. Mr. Diaz represented Devin and Ms. Henagan in the legal proceedings.

A minor's settlement was obtained on behalf of Devin in the amount of $113,674.32, after deductions for attorney's fees and costs. On April 6, 1990, Mr. Diaz petitioned the court to have the settlement proceeds deposited into a bank account on behalf of Devin. In connection with Mr. Diaz's motion, the district court ordered that: 1) Mr. Diaz was authorized to

remit the settlement proceeds to Ms. Henagan as Natural Tutrix of Devin, with the funds to be deposited by Mr. Diaz directly to the First National Bank of St. Bernard (now Bank One) in a federally insured interest bearing account for the minor child; 2) Ms. Henagan was not required to post a bond or legal mortgage; and 3) Ms. Henagan was required to obtain permission and an Order from the Court before releasing any principal or interest of the minor's funds, and that the First National Bank of St. Bernard could not release any of the funds without further orders of the court.

The settlement proceeds were never deposited into the bank. Instead, on April 23, 1990, Mr. Diaz issued a check from his trust account to Ms. Henagan, as tutrix of Devin, in the amount of $113,674.32. Ms. Henagan presented the check for payment at the First National Bank of St. Bernard, and the check was cashed.

Devin reached the age of majority on September 25, 1999. On October 7, 2003, Devin filed a Petition for Damages against Ms. Henagan, Jimmie D. Henagan, Sr., Mr. Diaz, and Bank One (formerly operating as First National Bank of Commerce in St. Bernard Parish). Devin alleged that it was not until April 23, 2003, that he became aware that there had been a settlement in his favor as a result of the death of his father, and, at the same time, that the funds had been completely depleted.

Both Bank One and Mr. Diaz filed exceptions of prescription. On January 5, 2003, three days before the exceptions were heard, Devin filed a Supplemental and Amending Petition in which allegations of fraud were made against Mr. Diaz. On January 9, 2003, the district court denied Devin's Motion for Leave to Amend his Petition, and granted the exceptions of prescription in favor of Bank One and Mr. Diaz, dismissing both with prejudice. The district court failed to provide written reasons, and the record does not contain a transcript of the proceedings.

On appeal, Devin raises the following assignments of error: 1) the district court erred in sustaining the exceptions of prescription; 2) the district court erred in refusing to allow Devin the opportunity to amend his petition pursuant to La. C.C.P. art. 934; and 3) the district court erred in refusing to allow the introduction of Devin's affidavit.

Ordinarily, the party pleading the exception of prescription bears the burden of proof. Brown v. American National Property & Casualty Co., 98-2292 (La. App. 4 Cir. 10/28/98), 720 So.2d 1278, 1279. However, where the face of the petition reveals that prescription has run, the burden of proof shifts to the plaintiff to show that prescription has not run. Id. In the present action, the case against both Bank One and Mr. Diaz is clearly prescribed on the face of the petition.

The action against Bank One is based on the allegation that the bank improperly negotiated the settlement check in 1990. Specifically, Devin's original petition alleges that Bank One "…negotiated said check and made funds directly available to Ms. Henagan without limitation, which is contrary to statutory and fiduciary duties the bank owed to petitioner herein."

Bank One argues that improper payment of a check by a bank is subject to a one-year prescriptive period under La. R.S. 10:3-420. This statute provides that an instrument is converted when a bank makes payment with respect to the instrument to a person not entitled to enforce the instrument or receive payment. La. R.S. 10:3-420(f) further states that any such action prescribes in one year.

Bank One further submits that it has not been accused of fraud or concealment in this litigation, unlike the other defendants, and, as such, the petition is prescribed on its face. Devin, on the other hand, argues that prescription against Bank One has been interrupted pursuant to the doctrine of *contra non valentum.*

Contra non valentum agere nulla currit praescripto is a suspensive theory, meaning "prescription does not run against a party unable to act." Wimberly v. Gatch, 93-2361 (La.4/11/94), 635 So.2d 206, 211. Because of

the sometimes harsh consequences which result from the strict interpretation of prescription statutes, Louisiana courts have adopted *contra non valentum* as a jurisprudential exception to prescription. Bergeron v. Pan American Assur. Co., 98-2421 (La. App. 4 Cir. 4/7/99), 731 So. 2d 1037.

Under the doctrine of *contra non valentum*, prescription does not begin to run until a plaintiff either knew or should have known of a cause of action, even if that knowledge does not occur until long after the wrongful conduct at issue has occurred. Simmons v. Templeton, 97-2349, 98-0043 (La. App. 4 Cir. 11/10/98), 723 So.2d 1009, 1012. *Contra non valentum* therefore suspends the running of prescription during the period in which the cause of action was not known by or reasonably knowable by the plaintiff. Louisiana Plaque Corp. v. Chevron U.S.A. Inc., 93-1597 (La.App. 4 Cir. 5/26/94), 638 So.2d 354, 356.

Louisiana jurisprudence recognizes that *contra non valentum* is an exceptional remedy, which is in direct contradiction to the articles in the Civil Code and therefore should be strictly construed. Harsh v. Calogero, 615 So.2d 420, 422 (La.App. 4th Cir. 1993). The situations giving rise to application of the doctrine were described by our Supreme Court in Corsey v. State, Department of Corrections, 375 So.2d 1319 (La.1979), as: 1) where there was some legal cause which prevented the courts or their officers from

taking cognizance of or acting upon the plaintiff's action; 2) where there was some conditions coupled with the contract or connected with the proceedings which prevented the creditor from suing or acting; 3) where the debtor himself has done some act effectively to prevent the creditor from availing himself of his cause of action; and 4) where the cause of action is not known or reasonably knowable by plaintiff, even though his ignorance was not induced by defendant. See also, Wimberly v. Gatch, 93-2361 (La. 4/11/94), 635 So.2d 206.

Presumably it is the fourth category that applies to Bank One, since there has been no allegation that Bank One did anything to prevent Devin from asserting his cause of action. Under this theory, prescription does not begin to run until a plaintiff has a reasonable basis to pursue a claim against a specific defendant. Picard v. Vermillion Parish School Board, 00-1222 (La.App. 3 Cir. 4/4/01), 783 So.2d 590. In reference to the fourth category, the Louisiana Supreme Court specifically clarified that "[t]his principle will not exempt the plaintiff's claim from the running of prescription if his ignorance is attributable to his own willfulness or neglect; that is, a plaintiff will be deemed to know what he could by reasonable diligence have learned." Corsey, 375 So.2d at 1322.

Although *contra non valentum* is a legal principle, its application to

the facts of the case and a determination of whether or not the plaintiffs were indeed prevented from filing their claim under one of the four circumstances is an issue of fact. Picard *supra*. Therefore, the trial court's finding of fact on this issue is subject to the manifest error, clearly wrong standard of review. See Rosell v. ESCO, 549 So.2d 840 (La. 1989).

In the present case, we do not find that the district court committed manifest error in granting the exception of prescription in favor of Bank One. The information necessary to establish Devin's claims against the defendants in this case was "reasonably knowable" with any amount of due diligence. This information could have been obtained through Devin's family members or through a search of court records. The fact that Devin failed to inquire into the financial and legal outcome of his father's death for over sixteen years (three years after having reached the age of majority) is not sufficient to invoke the doctrine of *contra non valentum*.

Mr. Diaz's exception of prescription is asserted on the grounds that Devin's claim for legal malpractice is prescribed under La. R.S. 9:5605. The statute states:

> 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 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.

C. Notwithstanding any other law to the contrary, in all actions brought in this state against any attorney at law duly admitted to practice in this state, any partnership of such attorneys at law, or any professional law 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, the prescriptive and peremptive period shall be governed exclusively by this Section.

> D. The provisions of this Section shall apply to all persons whether or not infirm or under disability of any kind and including minors and interdicts.
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> E. The peremptive period provided in Subsection A of this Section shall not apply in cases of fraud, as defined in Civil Code Article 1953.

The legislature's enactment in 1990 of La. R.S. 9:5605 legislatively abrogated the applicability of any other prescriptive period for legal malpractice claims and provided that this is a peremptive rather than a prescriptive period. Although peremption has been referred to as a form of prescription, peremption may not be renounced, interrupted or suspended. The longest period for instituting a legal malpractice claim is three years. The only statutory exception to the three-year peremptive period is a fraud claim brought under La. R.S. 9:5605(E). Coffey v. Block, 99-1221 (La.App. 1 Cir. 6/23/00), 762 So.2d 1181; McCoy v. City of Monroe, 32,521 (La.App. 2 Cir.12/8/99), 747 So.2d 1234.

Devin admits that his lawsuit was filed more than three years from the date of the alleged negligent acts of Mr. Diaz. However, Devin argues that the one and three-year time limitations do not apply to this action because of the fraud exception in La. R.S. 9:5605(E). Pursuant to this argument, Devin maintains that the district court erred in granting the exception of prescription without affording him the opportunity to amend his petition in

order to set forth the fraud allegations.

Generally, the decision to allow amendment after an Answer has been filed is within the sound discretion of the trial court. Whitney National Bank v. Jeffers, 573 So.2d 1262 (La. App. 4th Cir. 1/17/91),; Heritage Worldwide, Inc. v. Jimmy Swaggart Ministries, 95-0484 (La.App. 1 Cir. 11/16/95), 665 So.2d 523, 527. La. C.C.P. art.934 directs that a judgment sustaining the peremptory exception shall permit amendment to the petition when the grounds of the objection may be removed by amendment.

The law takes a liberal approach toward allowing amended pleadings in order to promote the interests of justice. Reeder v. North, 97-0239 (La. 10/21/97), 701 So.2d 1291, 1299. However, the right to amend is not absolute. Amendment is not permitted when it would constitute a vain and useless act. Smith v. State Farm Insurance Companies, 03-1580 (La. App. 4 Cir. 3/3/04), 869 So. 2d 909. Thus, while the mandatory nature of the right to amend is clear and unambiguous, it is notably qualified by the restriction that the objections must be curable. Doe v. Entergy, 608 So.2d 684 (La. 4th Cir. 11/13/92).

In the instant suit, allowing Devin to amend his petition to allege fraud against Mr. Diaz would not have cured the objection. Even if this case does involve fraud, the legal malpractice action must still be brought within

one year from the date that the alleged act was discovered or should have been discovered. Dauterive Contractors, Inc. v. Landry and Watkins, 01-1112 (La.App. 3 Cir. 3/12/02), 811 So. 2d 1242. As with the prescription claim made by Bank One, the determination of the date of discovery invokes the doctrine of *contra non valentum.* For the reasons heretofore stated, we find that Devin failed to carry his burden to show that the doctrine of *contra non valentum* applies to the circumstances surrounding this case. For that reason, allowing amendment of the petition to allege fraud would be in vain. Accordingly, we find no error on the part of the district court in granting the exception of prescription in favor of Mr. Diaz or in denying Devin the right to amend his petition.

Finally, Devin argues that the district court erred in not allowing the introduction of his affidavit. Apparently, Devin attempted to use the affidavit to support his contention that he had not discovered the negligent acts until April of 2003. Devin maintains that the district court erred by objecting to the affidavit on its own motion without objection from any of the defendants. Devin has cited no legal authority in support of this argument.

The appeal record does not contain the transcript of the district court proceedings, and this Court has no way of knowing the basis for its

objection to the document. However, given the broad discretion of the district court in ruling on such evidentiary matters, we find no merit to this assignment of error.

Decree

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED