

**NOT DESIGNATED FOR PUBLICATION**

**WILBERT W. LAFLAIR AND  
JEAN J. LAFLAIR**

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**NO. 2004-CA-0753**

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**COURT OF APPEAL**

**VERSUS**

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**FOURTH CIRCUIT**

**WESTPORT INSURANCE  
COMPANY, DAVID K. BUIE,  
DARRYL J. CARIMI AND THE  
CARIMI LAW FIRM**

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**STATE OF LOUISIANA**

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**APPEAL FROM  
CIVIL DISTRICT COURT, ORLEANS PARISH  
NO. 2000-19678, DIVISION "C-6"  
Honorable Roland L. Belsome, Judge**

**\* \* \* \* \***

**Judge Dennis R. Bagneris, Sr.**

**\* \* \* \* \***

(Court composed of Judge Charles R. Jones, Judge Patricia Rivet Murray,  
and Judge Dennis R. Bagneris, Sr.)

Jennifer Matte  
631 St. Charles Avenue  
New Orleans, LA 70130

**COUNSEL FOR PLAINTIFF/APPELLANT**

Bennett H. H. Biever  
Gus A. Fritchie, III  
IRWIN FRITCHIE URQUHART & MOORE LLC  
400 Poydras Street  
Suite 2700

New Orleans, LA 70130

**COUNSEL FOR DEFENDANT/APPELLEE**

**OCTOBER 13,**

**2004**

**REVERSED AND REMANDED**

This appeal arises out of the dismissal of a legal malpractice action pursuant to a Motion for Summary Judgment/Exception of Peremption. For the reasons that follow, we reverse and remand.

This legal malpractice action arose out of two separate legal matters in which plaintiff/appellant, Wilbert L. LaFlair was represented by defendant/appellee, David K. Buie, an attorney with the Carimi Law Firm (hereinafter “the firm”). In November of 1998, Mr. Buie agreed to represent Mr. LaFlair in a worker’s compensation appeal and in a federal tort suit arising out of the same job-related accident that allegedly occurred on April 15, 1997.

After the worker’s compensation action was dismissed for failure to pay appeal costs and the federal tort suit was dismissed on a Motion for Summary Judgment, Mr. LaFlair filed the present legal malpractice action against Mr. Buie, Darryl Carimi, the firm, and Westport Insurance Company. The action also asserted a loss of consortium claim on behalf of Mr. LaFlair’s wife, Jean L. LaFlair.

Attorney Arthur J. Brewster initially represented Mr. LaFlair in his worker's compensation claim. Following a trial before the Office of Worker's Compensation (the "OWC"), a judgment was rendered on October 30, 1998, decreeing that Mr. LaFlair had forfeited his rights to worker's compensation benefits due to false statements made for the purpose of obtaining benefits. By letter dated November 6, 1998, Mr. Brewster notified Mr. LaFlair of the appeal deadlines and that he was withdrawing as counsel of record because he determined that an appeal was futile.

On November 16, 1998, Mr. LaFlair filed his worker's compensation appeal in proper person. On November 20, 1998, the OWC advised Mr. LaFlair of the estimated appeal costs and the deadline in which to pay them. The deadline for payment of the appeal costs was twenty days after Mr. LaFlair's receipt of notice on November 23, 1998, or December 13, 1998. The appeal costs were not paid.

In November of 1998, Mr. Buie agreed to represent Mr. LaFlair. The record before the OWC shows that Mr. Buie enrolled as counsel of record on December 9, 1998. Mr. Buie appeared with Mr. LaFlair before the OWC on January 8, 1999, on a Rule for failure to pay appeal costs. After determining that Mr. Buie had enrolled as counsel of record prior to the date that the appeal costs were due, the OWC judge declared Mr. LaFlair's appeal to be

abandoned.

The ruling of the OWC, dismissing Mr. LaFlair's appeal, was made from the bench in the presence of Mr. LaFlair and Mr. Buie. Mr. LaFlair maintains that after the dismissal of his worker's compensation appeal, he was told by Mr. Buie not to worry, that he still had other avenues and he would take care of it. Mr. LaFlair argues in this appeal that he was not aware of any cause of action against Mr. Buie until he later met with Mr. Buie at his law office on December 28, 1999.

On August 3, 1998, prior to retaining Mr. Buie, MR. LaFlair filed a pro se petition with the 24<sup>th</sup> Judicial District Court for the Parish of Jefferson related to the same work-related injury. As defendants, Mr. LaFlair named Mundy Contractors, his employer, and Witco Corporation, the owner of the plant where he worked, alleging the mishandling of chemicals. On September 8, 1998, the case was removed to the United States District Court for the Eastern District of Louisiana based on diversity jurisdiction.

On February 2, 1999, Mr. Buie participated in a preliminary conference in the federal tort suit on behalf of Mr. LaFlair. In February and March of 1999, Mundy and Witco filed a Motion to Dismiss, arguing that Mr. LaFlair's exclusive remedy was in worker's compensation. Mr. Buie officially enrolled as counsel of record in the federal court action on April 6,

1999. On April 14, 1999 the motions were granted and Mr. LaFlair's case was dismissed. The court noted in the judgment that the motions were unopposed. Mr. LaFlair contends that the motions to dismiss were granted because Mr. Buie failed to engage in discovery and failed to file an opposition to the motions. On April 26, 1999, Mr. Buie filed a Motion for Rehearing and/or New Trial. On May 26, 1999, the rehearing was denied. Mr. LaFlair maintains that following the dismissal of his federal court action, Mr. Buie advised him on numerous occasions not to worry, that Mr. Buie was pursuing other avenues.

On December 28, 1999, Mr. LaFlair and his wife appeared at Mr. Buie's law office to discuss the two lawsuits. The LaFlairs maintain that it was at this meeting they first learned that the cases were over. In January of 2000, Mr. LaFlair retrieved his file from the firm and filed a Complaint with the Louisiana State Bar Association. This legal malpractice action was filed on December 22, 2000. On January 16, 2004, the district court granted the Motion for Summary Judgment/Exception of Peremption, dismissing Mr. LaFlair's action. In Reasons for Judgment, the district court stated:

The Court is convinced from the evidence presented that plaintiffs knew on January 8, 1999 that the costs of appeal in the Worker's Compensation matter were not paid and that the appeal was dismissed for that reason. Further, plaintiffs knew by the end of April 1999 that the Motion for Summary Judgment had been

unopposed and that the Motion was granted and the [federal court] suit dismissed. Plaintiffs did not file this legal malpractice action until December 22, 2000, well over one year from the dates of the alleged malpractice.

Mr. LaFlair presents two assignments of error in this appeal. First, that the district court erred in granting summary judgment when genuine issues of material fact exist. Second, that the district court erred in not finding that Mr. LaFlair's action was brought within one year from the date of discovery of the alleged legal malpractice pursuant to La. R.S. 9:5605.

The statute provides in pertinent part:

A. No actions for damages against any attorney...whether based upon tort, or breach of contract, or otherwise,...shall be brought unless filed...within one year from the date of the alleged act, omission, or neglect, or within one year from the date 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.

Mr. LaFlair maintains that the district court failed to address the discovery rule encompassed in the statute. Specifically, it is argued that Mr. LaFlair and his wife demonstrated to the court that they did not discover Mr. Buie and/or the firm's neglect until the meeting on December 28, 1999.

Mr. LaFlair submitted four affidavits to the district court in opposition

to the Motion for Summary Judgment/Exception of Peremption, as follows:

Affidavit of Wilbert W. LaFlair. LaFlair stated in his affidavit

that: 1) he believed Buie would pay the appeal costs in the worker's compensation case; 2) he was assured by Buie that Buie was continuing to pursue other avenues even after the worker's compensation case was dismissed; 3) Buie failed to file an opposition in the federal tort claim, resulting in its dismissal; 4) he was assured by Buie that Buie was pursuing other avenues even after the dismissal of the federal action; 5) he was informed for the first time at the December 28, 1999 meeting that Buie and/or the firm was no longer working on his cases.

Affidavit of Jean LaFlair. Mrs. LaFlair stated in her affidavit

that: 1) she attempted unsuccessfully to contact Buie throughout 1999 to ascertain the status of her husband's cases; 2) she was shocked to find out at the December 28, 1999 meeting that the attorneys "let them [the cases] go."

Affidavit of Henry A. Stafford, Jr. (Stafford was LaFlair's

supervisor at Mundy.) Stafford stated in his affidavit that: 1) he presented Buie with sufficient information to support

LaFlair's contention in the federal court lawsuit that LaFlair was not a statutory employee of Witco; 2) he was present with the LaFlairs at the December 28, 1999 meeting when he learned for the first time that both of LaFlair's cases were gone; 3) in conversations with Buie, he was informed that Buie was continuing to work on LaFlair's cases.

Affidavit of Frank M. Buck, Jr. (Buck purports to be an attorney who has qualified as a legal malpractice expert). Mr. Buck stated in his affidavit that: 1) after reading Buie's deposition, he opined that Buie failed to adhere to the standard of care required to properly represent LaFlair in both the worker's compensation action and in the federal tort action; 2) LaFlair had a reasonable belief that Buie and/or the firm was continuing to represent him.

### Law and Analysis

In a legal malpractice case, prescription commences to run when a claimant knew or should have known of the existence of facts that would have enabled him to state a cause of action for legal malpractice. Olivier v. Poirier, 563 So.2d 1227 (La. App. 1 Cir. 1990). The standard imposed in the case of Griffin v. Kinberger, 507 So.2d 821 (La.1987) is that of a reasonable



man. That standard is designed to establish a rule that any plaintiff who had knowledge of facts that would place a reasonable man on notice that malpractice may have been committed shall be held to have been subject to the commencement of prescription by virtue of such knowledge even though he asserts a limited ability to comprehend and evaluate the facts. Taussig v. Leithead, 96-960 (La. App. 3 Cir. 2/19/97), 689 So.2d 680. The focus is on the appropriateness of the claimant's actions or inactions. Ledbetter v. Wheeler, 31-357 (La. App. 2 Cir. 12/9/98), 722 So.2d 382. Thus, any plaintiff who is aware of facts that would place a reasonable person on notice that malpractice may have been committed shall be held subject to commencement of prescription by virtue of such knowledge. Turnbull v. Thensted, 99-0025 (La. App. 4 Cir. 3/1/00), 757 So.2d 145.

In the present case, the district court granted the Motion for Summary Judgment based on a finding that the case had prescribed. Appellate courts review the granting of summary judgment de novo under the same criteria governing the trial court's consideration of whether summary judgment is appropriate. Reynolds v. Select Properties, Ltd., 93- 1480 (La.4/11/94), 634 So.2d 1180, 1182. The summary judgment procedure is designed to secure the just, speedy and inexpensive determination of actions. Two Feathers Enterprises v. First National Bank of Commerce, 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 those ends. La. C.C.P. art. 966 A(2). A summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to a material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art 966. If the court finds that a genuine issue of material fact exists, summary judgment must be rejected. Oakley v. Thebault, 96-0937 (La. App. 4 Cir. 11/18/96), 684 So.2d 488, 490. The burden does not shift to the party opposing the summary judgment until the moving party first presents a prima facie case that no genuine issues of material fact exist. Id. At that point, the party opposing the motion must "make a showing sufficient to establish existence of proof of an element essential to his claim, action, or defense and on which he will bear the burden of proof at trial." La. C.C.P. art. 966(C).

Based on our thorough review of the record, we conclude that a material question of fact remains, sufficient to defeat the Motion for Summary Judgment. Specifically, Mr. LaFlair asserts that he did not discover that his cases were abandoned until his meeting with Mr. Buie on December 28, 1999, less than one year prior to filing this action. We find that the evidence presented by Mr. Buie, in the form of four affidavits, is

sufficient to support his contention and to raise a question of material fact. Accordingly, we find that the district court erred in granting the Motion for Summary Judgment.

Decree

For the foregoing reasons, we reverse the judgment of the district court and remand for further proceedings in accordance with this ruling.

**REVERSED AND REMANDED**