

**MICHAEL J. GEGG, D/B/A  
JCM CONSTRUCTION  
COMPANY**

\*

**NO. 2006-CA-1135**

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**COURT OF APPEAL**

**VERSUS**

\*

**FOURTH CIRCUIT**

**THE ORLEANS PARISH  
SCHOOL BOARD,**

\*

**STATE OF LOUISIANA**

**ROSENBERG & ENDOM, LLP, \* \* \* \* \*  
POLLOCK, ROSENBERG &  
ENDOM, LLP, POLLOCK,  
ROSENBERG, ENDOM &  
REISS, LLP, POLLOCK,  
ROSENBERG, RITTENBERG  
& ENDOM, ROBERT  
ROSENBERG, LARRY  
BECNEL, GEORGE REISS  
AND THE XYZ INSURANCE  
COMPANIES**

**APPEAL FROM  
CIVIL DISTRICT COURT, ORLEANS PARISH  
NO. 2004-16290, DIVISION "A-5"  
Honorable Carolyn Gill-Jefferson, Judge**

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

**Judge Charles R. Jones**

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

(Court composed of Judge Charles R. Jones, Judge Patricia Rivet Murray,  
and Judge Michael E. Kirby)

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COUNSEL FOR DEFENDANTS/APPELLEES

**AFFIRMED**

Michael J. Gegg d/b/a JCM Construction Co. (hereinafter referred to as “JCM”), appeals a judgment from the Civil District Court for the Parish of Orleans dated March 15, 2006, which granted exceptions of prescription and no cause of action in favor of the following appellees: (1) Rosenberg & Endom LLP, (2) Pollock, Rosenberg and Endom, LLP, (3) Pollock, Rosenberg, Endom & Reiss, LLP, (4) Pollock, Rosenberg, Rittenberg & Endom, (5) Robert Rosenberg, (6) Larry Becnel, and (7) George Reiss (hereinafter collectively referred to as the “Attorney Defendants”).

**Procedural History and Facts**

This appeal concerns the latest of several cases filed in Civil District Court between JCM and the Attorney Defendants. In total, there have been four suits that were filed in Civil District Court involving these parties. These suits arise out of common facts. In 1989, the Orleans Parish School Board (hereinafter referred to as “OPSB”) advertised for bid proposals, pursuant to the Louisiana Public Contracts Law, LSA-R.S. 38:2181 et seq., for the relocation of two portable classroom buildings from Karr Junior High School to Harte Elementary School. JCM

was the successful bidder on the project.

JCM began work on the project in February of 1990. The project was substantially completed by early August of 1990. However, on August 9, 1990, three juveniles broke into the classrooms and started a fire. The fire completely destroyed the two portable buildings. The OPSB subsequently refused to pay JCM the remainder of the money due under the contract.

As a result of not being paid, JCM sued the OPSB on June 4, 1991. The OPSB in turn sued JCM, as well as JCM's surety and general liability insurer for the value of the destroyed portable buildings on July 14, 1991. Subsequently, a third suit was filed by JCM's surety—Integon Indemnity Company—against JCM and the OPSB in 1999. These three (3) suits were eventually consolidated.

With regard to the claims existing between JCM and the OPSB, the OPSB ultimately dismissed its claims against JCM—pursuant to a settlement—on September 10, 2001. Thereafter, the district court ruled in JCM's favor on its claims against the OPSB. The OPSB sought appellate review of this judgment, but the decision of the district court was affirmed. The OPSB then filed a writ of certiorari and/or review with the Louisiana Supreme Court; however, the writ was denied.

The fourth and latest suit was filed in November of 2004, when JCM

sued the OPSB and the Attorney Defendants alleging malicious prosecution and abuse of rights. The Attorney Defendants filed exceptions of no cause of action and prescription, which were granted by the district court. JCM subsequently filed the instant appeal.

### **Assignments of Error**

JCM asserts that the district court erred in the following respects:

- 1) Finding that JCM's claims against the Attorney Defendants for malicious prosecution, acts beyond the scope of their authority and abuse of rights, were prescribed; and
- 2) Finding that JCM's petition failed to state a cause of action for malicious prosecution and/or action beyond the scope of their authority and/or abuse of rights against the Attorney Defendants.

### **Discussion**

We will first discuss whether JCM's claims against the Attorney Defendants had prescribed because such a finding would render a discussion of the second assignment of error moot.

In *In re Matranga*, 06-0604 (La.App. 4 Cir. 12/20/06), 948 So.2d 261, we set forth the standard of review on a peremptory exception of prescription:

[i]n reviewing a peremptory exception of prescription, an appellate court will review the entire record to determine whether the trial court's finding of fact was manifestly erroneous. *Davis v. Hibernia National Bank*, 98-1164 (La.App. 4 Cir. 2/24/99), 732 So.2d 61. When evidence is received on the trial of the peremptory exception, the factual conclusions of the trial court are reviewed by the appellate court under the manifest error-clearly wrong standard as articulated in *Stobart v. State Through Dept. of Transp. and Development*, 617 So.2d 880 (La.1993).

Further, “the standard controlling review of a peremptory exception of prescription requires that this court strictly construe the statutes ‘against prescription and in favor of the claim that is said to be extinguished.’” *Security Ctr. Prot. Servs., Inc. v. All-Pro Security, Inc.*, 94-1317, 94-1318 (La.App. 4 Cir. 2/23/95), 650 So.2d 1206, 1214 (quoting *Louisiana Health Service v. Tarver*, 93-2449 (La.4/11/94), 635 So.2d 1090, 1098).

When an exception of prescription is filed, ordinarily, the burden of proof is on the party pleading prescription. However, if prescription is evident on the face of the pleadings, as it is in the instant case, the burden shifts to the plaintiff to show the action has not prescribed. *Spott v. Otis Elevator Company*, 601 So.2d 1355 (La.1992); *Eastin v. Entergy Corp.*, 03-1030 (La.2/6/04), 865 So.2d 49.”

*In re Matranga*, 06-0604, pp. 3-4 (La.App. 4 Cir. 12/20/06), 948 So.2d 261, 264

(citing *Katz v. Allstate Ins. Co.*, 04-1133, (La.App. 4 Cir. 2/2/05), 917 So.2d 443)).

A claim for malicious prosecution is subject to a liberative prescriptive period of one year. La. C.C. Art. 3492. The liberative prescriptive period for a malicious prosecution claim does not begin to run until the underlying prosecution is dismissed. *Murray v. Town of Mansura*, 06-355, p. 7 (La.App. 3 Cir. 9/27/06), 940 So.2d 832, 838 (citing *Manuel v. Deshotels*, 160 La. 652, 107 So. 478 (1926)). See *Ortiz v. Barriffe*, 523 So.2d 896, 898 (La. App. 4 Cir. 1988).

The OPSB's claims against JCM were dismissed with prejudice on September 10, 2001, as a result of a settlement that JCM and the OPSB entered. Pursuant to the terms of the Motion to Dismiss, the OPSB reserved "all rights, defenses, and responses previously asserted in or on its defensive behalf in opposition to any allegations of legal fault asserted against it" by JCM in any of the cases comprising the aforementioned consolidated litigation. The district court subsequently rendered judgment in favor of JCM on November 9, 2001, on the remaining claims in the consolidated litigation. The OPSB filed an appeal with this Court, and filed a writ of certiorari and/or review with the Louisiana Supreme Court, but to no avail.

Thereafter, JCM filed suit for malicious prosecution against the Attorney Defendants on November 15, 2004. JCM avers that its claims were

filed timely because the Louisiana Supreme Court denied reconsideration of the OPSB's writ of certiorari and/or review on June 18, 2004. Hence, JCM contends its suit was timely filed within less than a year from the date of the Supreme Court's denial.

We note that JCM has not set forth any law in support of its position that a claim for malicious prosecution commences against a *defendant* and/or a *defendant's attorney* where said defendant seeks appellate review of a decision in favor of the plaintiff. Clearly, the judgment rendered against the OPSB was handed down after the OPSB had settled and dismissed its claims against JCM. Therefore, the OPSB was no longer involved in the consolidated litigation as a party plaintiff.

The OPSB's taking of an appeal was done in a defensive manner. The OPSB was justified to file an appeal, especially considering that the entity reserved its right to do so as a part of its settlement with JCM. The lodging of said appeal was not done in a manner to further prosecute a claim against JCM. Therefore, we find that the underlying prosecution of this case was terminated on September 10, 2001. JCM's claim for malicious prosecution had prescribed by the time he filed his petition in November of 2004. Thus, based on our review of the record, we find that this assignment of error is without merit.

Lastly, having determined that this matter has prescribed, we pretermite discussion of whether JCM's petition stated a cause of action.

**Decree**

For the foregoing reasons, the judgment of the district court is affirmed.

**AFFIRMED**