

GRACE WONG * **NO. 2005-CA-1483**
VERSUS * **COURT OF APPEAL**
MITCHELL J. HOFFMAN, * **FOURTH CIRCUIT**
HILLARY HURST LANDRY, * **STATE OF LOUISIANA**
AND LOWE, STEIN, *
HOFFMAN, ALLWEISS &
HAUVER, L.L.P. * * * * *

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2003-1728, DIVISION "A-5"
Honorable Carolyn Gill-Jefferson, Judge
* * * * *
JUDGE PATRICIA RIVET MURRAY
* * * * *

(Court composed of Chief Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray, Judge James F. McKay, III, Judge Michael E. Kirby, Judge Max N. Tobias, Jr.)

ARMSTRONG, C. J., DISSENTS WITH REASONS

MCKAY, J., DISSENTS FOR THE REASONS ASSIGNED BY C. J. ARMSTRONG

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REVERSED AND REMANDED

The plaintiff, Grace Wong, appeals a series of district court judgments, which together resulted in the trial court's dismissal, with prejudice, of Ms. Wong's legal malpractice suit. For the following reasons, we reverse the trial court's initial judgment, which held that Ms. Wong's suit was preempted pursuant to La. R.S. 9:5606, and also granted defendants' exception of no cause of action. In view of this disposition, we do not reach the remaining issues.

FACTS AND PROCEEDINGS BELOW

Ms. Wong filed suit February 5, 2003, against Mitchell Hoffman and Hillary Landry, two attorneys who had represented her in her divorce and child custody /child support proceedings; their law firm, Lowe, Stein, Hoffman, Allweiss & Harver, L.L.P.; and their professional liability insurer, Underwriters at Lloyd's. In her petition, plaintiff described with particularity four specific instances in which the defendants' representation of her allegedly had deviated below the standard of care for attorneys practicing within the community. According to the petition, the first of these instances occurred in the summer of 2000 during the plaintiff's first meeting with Mr. Hoffman when he advised her to agree to joint

custody of her children;¹ the second occurred during a two-day hearing on June 29 and July 31, 2001 when Mr. Hoffman failed to object to the testimony of a particular expert witness who had served as a mediator in the case; the third occurred on February 14, 2002, when Ms. Landry appeared in court on Ms. Wong's behalf without Ms. Wong's knowledge and entered into a consent judgment without authority from Ms. Wong;² and the fourth occurred on April 4, 2002 during the taking of Ms. Wong's deposition by her ex-husband's counsel, when Mr. Hoffman failed to object to certain questions as being barred by the attorney/client privilege. As a result of these four incidents and "any and all other such acts of negligence as will be shown at ... trial," Ms. Wong alleged she had suffered damages including loss of earnings, employment and economic opportunities; attorneys fees and court costs; and severe mental anguish, suffering and inconvenience.

In response to Ms. Wong's petition, defendants filed an answer asserting affirmative defenses, an exception of peremption and an exception of failure to state a cause of action. By the exception of peremption, defendants urged that plaintiff's claims were barred on the face of the petition because they were not filed within the applicable time periods set forth by La. R.S. 9:5605. By the exception of no cause of action, defendants argued that Ms. Wong had failed to state a cause of action with regard to the April 4, 2002 deposition because she had not alleged that any damage was caused her by her attorney's failure to raise the

¹ Ms. Wong alleged that this advice constituted malpractice in view of Mr. Hoffman's knowledge that Ms. Wong's then husband had been physically abusive to her and that Ms. Wong desired to relocate with her children.

² Ms. Wong alleged that when she was initially informed by Ms. Landry, an associate of Mr. Hoffman who was assisting him in the representation of Ms. Wong, that a hearing on child custody, visitation and support issues had been scheduled for February 14, 2002, she had informed Ms. Landry that she would not be able to be in court on that date, and Ms. Landry had agreed to seek a postponement of the hearing. Ms. Wong further alleged that her counsel had never informed her that, due to her husband's opposition to the postponement, the hearing was to held as

objection of privilege. After a hearing, the trial court granted the exceptions in open court on November 7, 2003, and signed a judgment to that effect on November 21, 2003, dismissing the plaintiff's claims with prejudice. In that judgment, however, the trial court also granted plaintiff leave to file an amended petition for the sole purpose of challenging the constitutionality of La. R.S. 9:5605, the legal malpractice peremption statute. Plaintiff filed her amended petition, and also appealed the November 21, 2003 judgment, but her appeal was dismissed on the grounds that the judgment was not final.

In response to Ms. Wong's amended petition, the defendants filed exceptions of res judicata and failure to state a cause of action. By the exception of res judicata, defendants argued that to the extent plaintiff had attempted to re-urge her original allegations of malpractice in her amended petition, her claims were precluded. The defendants' exception of no cause of action was directed to plaintiff's allegations regarding the unconstitutionality of La. R.S. 9:5605. The plaintiff opposed these exceptions, and the defendants additionally filed a motion to strike certain exhibits and affidavits attached to the plaintiff's opposition memorandum.³ On January 4, 2005, the trial court rendered judgment granting the exception of res judicata and the motion to strike, but denying the exception of no cause of action as to the constitutional challenge.

Defendants then filed a motion for summary judgment seeking a declaration that the statute was constitutional. In defense of this motion, plaintiff's counsel noticed the deposition of Judge Dennis Bagneris, who had been a state senator

scheduled. Finally, plaintiff alleged that, unbeknownst to her, Ms. Landry had appeared at the February 14 hearing on behalf of Ms. Wong and had entered into a consent judgment without Ms. Wong's knowledge or authorization.
³ The defendants moved to strike certain documents that formed part of the legislative history of La. R.S. 9:5606 and two affidavits of third parties regarding the purported intent of the legislature in enacting the statute. The movers argued that the affidavits were inadmissible hearsay, and that the other exhibits were inadmissible because the

during the time La. R.S. 9:5605 was adopted, seeking to question him as to his perception of the Legislature's mental processes in enacting the statute. The defendants filed a motion to quash the taking of the deposition, which motion the trial court granted by judgment dated May 2, 2005.

On June 3, 2005, the trial court heard the defendants' motion for summary judgment. On June 13, 2005, the trial court granted summary judgment upholding the constitutionality of La. R.S. 9:5605 and dismissing with prejudice plaintiff's remaining claims.

Ms. Wong now appeals, arguing that the trial court's initial judgment dismissing her legal malpractice claims on the basis of peremption and/or the failure to state a cause of action is erroneous. Additionally, Ms. Wong raises three assignments of error related to the dismissal of her constitutional challenge of the legal malpractice peremption statute: (1) that the trial court erred by granting the motion to strike the affidavits she offered in opposition to defendants' exception of no cause of action; (2) that the trial court erred by quashing the deposition of Judge Bagneris; and (3) that the trial court erred by granting summary judgment upholding the statute's constitutionality. We first address the issue of whether Ms. Wong's legal malpractice allegations are preempted.

EXCEPTION OF PEREMPTION

On appeal, Ms. Wong makes two arguments challenging the trial court's granting of the exception of peremption. First, she argues that the trial court erred procedurally because Louisiana law does not recognize a preemptory exception of peremption. Specifically, plaintiff contends that La. C.C.P. art. 927, which denotes

separation of powers restrictions imposed by the United States and Louisiana Constitutions prohibited the court from re-evaluating information relied upon by the Louisiana Legislature in enacting the statute.

the peremptory exceptions, does not include an exception of peremption. Plaintiff additionally notes that this court has held that the proper procedural device for raising the issue of peremption is an exception of no cause of action. See *International River Center v. Henry C. Beck Co.*, 95-1396, p.2 (La. App. 4 Cir. 4/10/96, 672 So.2d 1160, 1161; *Azar-O'Bannon v. Azar*, 00-0101, p.4 (La. App. 4 Cir. 9/27/00), 770 So. 2d 458, 461.

Addressing this argument, we note that Louisiana appellate courts have taken three different approaches with regard to the proper means of raising the issue of peremption: (1) The issue may be raised by means of an exception of no cause of action. (See, e.g.: *International River Center v. Henry C. Beck, Co.*, *supra*; *Azar-O'Bannon v. Azar*, *supra*); (2) The issue may be raised by means of an exception of prescription. (See, e.g.: *Poree v. Elite Elevator Services, Inc.*, 94-2575 (La. App. 4 Cir. 11/16/95), 665 So.2d 133; *Saia v. Asher*, 01-1038, p.4 (La. App. 1 Cir. 7/10/02), 825 So. 2d 1257, 1259 n.5); and (3) Because La. C.C.P. art. 927 specifically states that the objections which may be raised through the peremptory exception “include but are not limited to” those listed in the article, peremption may be raised as a peremptory exception in its own right. (See, e.g.: *Dautrive Contractors, Inc. v. Landry and Watkins*, 01-1112, pp. 7-8 (La. App. 3 Cir. 3/13/02), 811 So.2d 1242, 1248-49).

Generally, however, the decision as to which procedural vehicle is used to raise the issue of peremption has only one relevant consequence: it determines whether or not evidence may be introduced to support or controvert the exception, as is permitted in the case of an exception of prescription but is prohibited in the case of an exception of no cause of action, which must be decided on the face of the petition. See, e.g.: *Perez v. Trahant*, 00-2372, pp.5-7 (La. App. 1 Cir.

12/28/01), 806 So.2d 110, 115-116. In the instant case, however, as no evidence was submitted at the hearing on the exception of peremption, we need not decide whether the trial court was correct in considering the exception as one of peremption rather than as an exception of no cause of action or prescription.

Turning to the merits of the exception, Ms. Wong contends that her claims were timely filed pursuant to La. R.S. 9:5605, and that the trial court erred by finding them to be perempted.

La. R.S. 9:5605 provides, in pertinent part:

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 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 preemptive period shall be governed exclusively by this Section.

The plaintiff's petition alleged four separate acts constituting malpractice, the first of which occurred in the summer of 2000 and the last of which occurred in April of 2002. The petition was filed on February 5, 2003. According to the statute, a legal malpractice claim is preempted if not filed within one year of the alleged act of malpractice or within one year of the date the alleged act was discovered or should have been discovered, but if the date of discovery is used, the suit must be filed within three years of the alleged act. Under Louisiana law, the appropriate standard to determine whether a plaintiff "knew or should have known of the existence of facts that would have enabled him to state a cause of action for legal malpractice" is that of a reasonable man. *Turnbull v. Thensted*, 99-0025, p.8 (La. App 4 Cir. 3/1/00), 757 So.2d 145, 150 (citing *Griffin v. Kinberger*, 507 So.2d 821 (La. 1987)). Therefore, the pertinent inquiry is to determine when Ms. Wong possessed knowledge sufficient to place a reasonable lay person on notice that legal malpractice had occurred.

In her appellate brief and in her counsel's argument at the hearing on the exception, Ms. Wong conceded that she possessed knowledge sufficient to state a malpractice claim on February 17, 2002, when she learned three days after the fact that Ms. Landry had entered into a consent judgment on her behalf without her knowledge or permission. Ms. Wong's petition was filed within a year of this date, and within three years of the first alleged incident of malpractice, which occurred during the summer of 2000 at the plaintiff's first contact with Mr. Hoffman.

Nevertheless, at the hearing on the exception, the defendants argued that Ms. Wong's entire petition was preempted because, according to the "continuing representation" rule, her claim could not be broken up into four distinct acts of malpractice, but instead must be treated as one entity during the entire time her former attorneys represented her. The transcript of the hearing clearly shows that the trial court agreed with this argument. Therefore, at the conclusion of the hearing, the trial judge reasoned that because of the "continuum of representation," she was dismissing the plaintiff's entire petition based upon Ms. Wong's failure to file her claim within one year of "the original representation of this beginning in October of 2000."

We agree with Ms. Wong that the trial court erred by dismissing her petition as preempted. As noted above, because the petition was filed within a year of the third and fourth alleged incidents of malpractice, on the face of the petition, those claims were timely filed within the terms of the statute. Moreover, we find that the trial court's reliance upon the continuing representation principle to support the dismissal of those claims was legal error. In *Reeder v. North*, 97-0239, pp. 6-7 (La. 10/21/97), 701 So.2d 1291, 1295-96, the Louisiana Supreme Court held that the preemptive periods set forth in La. R.S. 9:5605 cannot be suspended during the defendant attorney's "continuing representation" of the plaintiff. The Supreme Court reasoned that, unlike a prescriptive period, a preemptive period cannot be suspended or interrupted. Therefore, while continuing representation may be asserted by the plaintiff to defeat an exception of prescription, it is not applicable to defeat an exception of preemption.

Despite *Reeder*, however, the defendants herein argued, and the trial court accepted, that their continuing representation of Ms. Wong *supported* their

exception of peremption by mandating that the trial court consider Ms. Wong's petition as alleging one continuous act of malpractice rather than four distinct ones. In support of this argument, which they reiterate in this court, the defendants cite *Taussig v. Leithead*, 96-0960 (La. App. 3 Cir. 2/19/97), 689 So.2d 680. We find defendants' reliance upon *Taussig* to be misplaced. As *Taussig* was decided before *Reeder*, the Third Circuit's opinion, to the extent that it relied upon the continuing representation rule to find that there was only one tort (that of negligent representation) for purposes of peremption, has no precedential or persuasive value. Moreover, *Taussig* is factually distinguishable from the instant case. In *Taussig*, the plaintiff filed her malpractice suit on September 1, 1993, thirteen years after the attorney's representation of her (from 1977 to 1980) had ended. However, the suit was filed within a special window period noted in La. R.S. 9:5605 (B); the statute specifically provides that if the plaintiff's lawsuit is filed prior to September 7, 1993, the three-year peremption period is not applicable. 96-960, p.3, 689 So.2d at 683. In deciding that the plaintiff's suit was nevertheless barred by the one-year preemptive period, the Third Circuit in *Taussig* affirmed the trial court's factual finding that the latest date upon which plaintiff reasonably should have discovered her attorney's negligence was in 1980, thirteen years prior to filing suit. 96-960, p. 8, 689 So.2d at 685.

Considering its facts, we find that the *Taussig* decision has no relevance to the instant case, in which Ms. Wong filed suit within three years of her first contact with the defendant attorneys and within one year of the occurrence of the third and fourth acts of malpractice alleged by her. We also note that the interpretation of *Taussig* the defendants urge us to accept would lead to absurd results. Under that interpretation, which we find is contrary to *Reeder*, a plaintiff's entire legal

malpractice suit would be barred if it was not filed within one or three years, respectively, of the first time plaintiff's counsel acted in a way that could be interpreted as negligence. Such a rule would negate the right of a client who believes his counsel has been negligent to forgive one or more potential or arguable acts of malpractice, but then decide to file suit later when the attorney does something more egregious that the client is not willing to forgive.

In the instant case, wherein the plaintiff has alleged defendants committed four distinct acts of malpractice, the dates of occurrence of which are specified in the petition, we conclude that in view of *Reeder*, each separate act of malpractice must be considered to be a separate cause of action with its own one-year and three-year preemptive period. Having thus determined that Ms. Wong's third and fourth alleged claims of malpractice are not preempted from the face of the petition, we must consider whether the trial court also erred by dismissing her first and second claims, which occurred more than one but less than three years prior to the date she filed suit. Regarding those allegations, Ms. Wong argues she did not discover that her attorneys' actions potentially constituted malpractice until sometime after the occurrence of the fourth incident on April 4, 2002, at which point she became so distressed about the defendants' representation of her that she consulted another attorney, who then advised her concerning her malpractice claims. Therefore, with regard to each of the first two alleged acts of malpractice, we must determine whether Ms. Wong's knowledge comported with that of a reasonable lay person faced with the same circumstances. See *Turnbull v. Thensted*, *supra*.

Ms. Wong's first allegation is that Mr. Hoffman advised her to agree to joint custody of her children (which was provided for in the consent judgment between

Ms. Wong and her spouse dated October 6, 2000), despite his knowing that Ms. Wong's spouse had physically abused her and that Ms. Wong wanted to relocate to another state with her children. The defendants argue that Ms. Wong should have known at the time she entered into the joint custody agreement that her attorney's advice to do so fell below the standard of care. We disagree. While Ms. Wong may have been uncomfortable or uneasy about consenting to joint custody, we cannot conclude that a reasonable lay person would have realized at that time that her attorney's advice to do so might be considered malpractice. As joint custody is clearly preferred in the law, it is not reasonable to expect a non-lawyer to recognize what circumstances would likely merit an exception to the general rule. We therefore find that Ms. Wong's suit, which was filed within a year of her consultation with the new attorney and within three years of the entering of the consent judgment, was timely with respect to this alleged act of malpractice.

The second act of malpractice alleged by Ms. Wong is her attorney's failure, during the hearing on her request to relocate with her children, to object to the testimony of an expert witness on the basis that the expert had previously served as a court-appointed mediator in the case. This hearing took place in the summer of 2001. Again, Ms. Wong contends she was not aware that Mr. Hoffman's failure to raise this particular objection⁴ could potentially constitute malpractice until she was so informed by her new attorney in April, 2002. The defendants argue, however, that Ms. Wong possessed sufficient knowledge to put her on notice that Mr. Hoffman's conduct could be considered malpractice on August 25, 2001, when the district court rendered judgment denying Ms. Wong's request to relocate.

⁴ Mr. Hoffman did object to the witness's testimony, albeit solely on the ground that the witness was not qualified under *Daubert*.

We disagree. It is ludicrous to suggest that a reasonable lay person would know the import of an attorney's failure to raise a particular legal objection. We also reject defendants' suggestion that the mere fact that the trial court ruled against Ms. Wong on her motion to relocate should have raised an inference in her mind that her attorney was negligent. Therefore, we conclude that Ms. Wong's suit was also timely filed with respect to her second allegation of malpractice.

Accordingly, we find that the trial court erred by dismissing the plaintiff's petition on the basis of preemption.

EXCEPTION OF FAILURE TO STATE A CAUSE OF ACTION

Defendants filed an exception of no cause of action as to the plaintiff's fourth alleged claim of malpractice, arguing that the plaintiff had neglected to assert that she was damaged by her attorney's alleged negligence in failing to object to certain questions posed to her at her deposition. Although the trial court's written judgment of November 21, 2003 reflects that this exception was granted, nothing else in the record indicates that the trial court actually considered this exception separately from the exception of preemption (which plaintiff argued should properly be treated by the trial court as an exception of no cause of action). On appeal, Ms. Wong raises as her first assignment of error the trial court's granting of the "Peremptory Exceptions of Preemption and/or No Cause of Action on November 21, 2003." However, she fails to brief the issue of the granting of the exception of no cause of action, again indicating that this assignment of error instead refers to the exception of no cause of action merely as an alternative means

of raising the issue of peremption. In view of the appellant's failure to brief this issue, we consider it as abandoned ⁵

CONCLUSION

Accordingly, for the reasons stated, we reverse the trial court's judgment granting the exception of peremption and dismissing plaintiff's suit, and we remand the matter to that court for further proceedings consistent with this opinion.⁶

REVERSED AND REMANDED

⁵ See Rule 2-12.4, Uniform Rules—Courts of Appeal.

⁶ In view of this disposition, we decline to consider appellant's remaining assignments of error.

