

NOT DESIGNATED FOR PUBLICATION

HARRY A. WITT * **NO. 2007-CA-0299**
VERSUS * **COURT OF APPEAL**
GASPER J. SCHIRO * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**

* * * * *

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2003-16401, DIVISION "N-4"
Honorable Ethel Simms Julien, Judge

* * * * *

Judge Dennis R. Bagneris, Sr.

* * * * *

(Court composed of Judge Charles R. Jones, Judge Dennis R. Bagneris, Sr., Judge Max N. Tobias, Jr., Judge David S. Gorbaty, and Judge Leon A. Cannizzaro, Jr.)
TOBIAS, J., CONCURS AND ASSIGNS REASONS
JONES, J., DISSENTS WITH REASONS
CANNIZZARO, J., DISSENTS AND ASSIGNS REASONS

Mark D. Plaisance
P. O. Box 709
Baker, LA 70704-0709
COUNSEL FOR PLAINTIFF/APPELLANT

Fernand F. Willoz, III
2812 Canal Street
Suite 200
New Orleans, LA 70119
COUNSEL FOR DEFENDANT/APPELLEE

DECEMBER 05, 2007

**JUDGMENT VACATED. MATTER REMANDED FOR FURTHER
PROCEEDINGS.**

Plaintiff, Harry A. Witt, appeals from a trial court judgment sustaining defendant's exception of peremption and dismissing his legal malpractice action with prejudice. For the following reasons, the judgment is vacated and the matter is remanded to the trial court for further proceedings.

FACTS AND PROCEDURAL HISTORY:

On October 13, 2003, plaintiff filed the present legal malpractice suit against Gasper A. Schiro. Specifically, the plaintiff's petition alleges, in pertinent part:

2.

On January 1, 1983, plaintiff herein...was involved in an automobile accident with Virginia Patorno wherein she struck the rear of the plaintiff's vehicle.

3.

This accident caused plaintiff...to suffer injuries and damages in the amount of Forty Four Thousand Nine Hundred Ninety Nine and 00/100 Dollars (\$44,991.17).

4.

In December of 1983, plaintiff herein, ... hired defendant ... an attorney in New Orleans, Louisiana, to handle this matter and file suit against Virginia Patorno.

5.

Due to a possible political conflict, defendant...involved another attorney by the name of Olga Kogos to file the suit.

6.

Defendant...never informed plaintiff...that there was a possible political conflict.

7.

The suit was filed in December 1983 at the Civil District Court for the Parish of Orleans, case number...

8.

From approximately August of 1994 until present, there has not been any progression of plaintiff's case.

9.

On many instances over the course of many years, defendant...led plaintiff...to believe that his case was close to settling.

10.

To date, plaintiff's...case has not been settled.

11.

A formal complaint was filed by plaintiff...with the Louisiana Attorney Disciplinary Board, case number..., for defendant's...failure to pursue plaintiff's case.

12.

Defendant...attempted to offer plaintiff...a personal settlement for his failure to pursue the case instead of advising Mr. Witt of his misconduct and advising him to seek counsel.

In response to these allegations, Mr. Schiro filed a peremptory exception arguing that plaintiff should have filed his malpractice lawsuit by January 31, 2003, one year from the date plaintiff filed his disciplinary board complaint. Thereafter, plaintiff filed an opposition to the exception arguing that Mr. Schiro's fraudulent acts prevented the application of the preemption periods governing legal malpractice cases as set out in La. R.S. 9:5605. In July of 2004, the trial court denied Mr. Schiro's exception of prescription. Mr. Schiro then filed his answer to the malpractice suit.

In August of 2005, plaintiff filed a motion for summary judgment in which he primarily argued that summary judgment was proper because both the

disciplinary board and the Supreme Court had determined that Mr. Schiro failed to represent plaintiff in a competent manner. In response to plaintiff's motion for summary judgment, Mr. Schiro filed a second peremptory exception, which re-urged his prior claim that plaintiff's petition is barred by the preemption periods under La. R.S. 9:5605. On November 2, 2006, the trial court granted Mr. Schiro's peremptory exception of preemption and dismissed plaintiff's suit with prejudice. Plaintiff now appeals this final judgment.

DISCUSSION:

On appeal, plaintiff argues that the trial court erred when it granted the exception of preemption without affording him a full evidentiary hearing on the allegations of fraud, which would have established an exception to the preemptive period set out in La. R.S. 9:5605.

La. R.S. 9:5605. Actions for legal malpractice.

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.

* * *

E. The preemptive period provided in Subsection A of this Section shall not apply in cases of fraud, as defined in Civil Code Article 1953.

La. C.C. Art. 1953. Fraud may result from misrepresentation or from silence.

Fraud is a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. Fraud may also result from silence or inaction.

The one and three-year periods for legal malpractice actions found in La. R.S. 9:5605 are preemptive periods. La. R.S. 9:5605. 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 preemptive rather than a prescriptive period. The longest period for instituting a legal malpractice claim is three years. The only codified statutory exception to the three-year preemptive period is a fraud claim brought under La. R.S. 9:5605(E). The existence of fraud is a question of fact. *Bingham v. Ryan Chevrolet-Subaru, Inc.*, 29,453, p.3 (La.App. 2d Cir. 4/2/97), 691 So.2d 817,819, citing *Recherche, Inc. v. Jewelry Jungle, Inc.*, 377 So.2d 1329 (La.App. 1st Cir.1979). When a fraud exception of La. R.S. 9:5605(E) is raised in a legal malpractice action, the trier of

fact must examine the underlying circumstances to determine if the evidence supports such a claim of fraud. See *Atkinson v. LeBlanc*, 03-365 (La. App. 5 Cir. 10/15/03) 860 So.2d 60.

In this case, it does not appear in this record that the parties were given the opportunity to have a full evidentiary hearing on the fraud issue. Therefore, the usual manifest error standard of review for factual findings is not appropriate under the peculiar posture of this record. Based on the foregoing, we vacate the judgment sustaining the defendant's exception and dismissing the action with prejudice, and we remand the matter to the trial court for an evidentiary hearing on the fraud issue.

JUDGMENT VACATED. MATTER REMANDED FOR FURTHER PROCEEDINGS.

