KEARNEY LOUGHLIN AND TERRI LOUGHLIN	*	**NO. 2017-CA-0109**
	*	
VERSUS		**COURT OF APPEAL**
	*	
UNITED SERVICES AUTOMOBILE ASSOCIATION	*	**FOURTH CIRCUIT**
		STATE OF LOUISIANA

* * * * * * *

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2012-10478, DIVISION "E"
Honorable Clare Jupiter, Judge
* * * * * *
Judge Paula A. Brown
* * * * * *

(Court composed of Judge Rosemary Ledet, Judge Regina Bartholomew Woods, Judge Paula A. Brown)

LEDET,J., CONCURRING WITH REASONS.
BARTHOLOMEW-WOODS,J., CONCURS WITH REASONS

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AFFIRMED
12/20/2017

Appellants, Kearney Loughlin ("Mr. Loughlin") and Terri Loughlin ("Mrs. Loughlin"), seek review of the district court's April 5, 2016 judgment in favor of Appellee, United Service Automobile Association ("USAA"), dismissing, with prejudice, Appellants' "Petition for Nullity of Judgment."[1]

For reasons discussed below, we find the Petition is barred by prescription; furthermore, we find no abuse of discretion in the district court's denial of the Petition.

FACTUAL AND PROCEDURAL HISTORY

In 2005, Mr. Loughlin and members of his family filed suit against USAA, arising from property damage caused by Hurricane Katrina to a family home owned by Mr. Loughlin, his mother, and his sister. At the time of Hurricane Katrina, Mr. and Mrs. Loughlin, lived in an apartment in the home. Throughout the lawsuit, Mr. Loughlin was both a plaintiff and counsel of record. Additionally, for a period of time, Mrs. Loughlin was also a plaintiff and counsel of record.

During the litigation, the Loughlins were found in contempt of court by district court Judge Nadine Ramsey ("Judge Ramsey"). { "pageset": "Sa7The contempt judgment was based upon alleged misrepresentations regarding the service of certain documents that had been filed by USAA in the underlying lawsuit. The contempt judgment was appealed to this court and affirmed in *Talton v. USAA Casualty Ins. Co.,*06-1513, 07-1414, (La.App. 4 Cir. 3/19/08), 981 So.2d 696, *writ denied*, 08-0837 (La. 6/6/08), 983 So.2d 923 ("*Talton* ").[2] In *Talton*, the Loughlins

[1] Collectively, Mr. and Mrs. Loughlin will be referred to as "the Loughlins."

[2] The *Talton* case was overruled, in part on other grounds, by *Kelly v. State Farm Fire & Cas. Co.,* 14-1921 (La. 5/5/15), 169 So.3d 328.

argued that the district court erred in finding them in contempt and assessing them a fine of $1,000.00. Specifically, they argued the proper procedures, as outlined in La. C.C.P. art. 225, were not followed and asserted the district court had previously found them not in contempt of court.[3] This Court affirmed the district court's judgment, in part, and held:

> After reviewing **the trial court's judgment and the transcript attached thereto**, we find that the trial court found the Loughlins in direct contempt for the three misrepresentations. The burden of proof in a civil contempt proceeding is by a preponderance of the evidence and appellate review is the manifestly erroneous standard. *Lang v. Asten, Inc.,* 04–1665, p. 12 (La.App. 4 Cir. 3/30/05), 900 So.2d 1031, 1039. In accordance with La. C.C.P. art. 223, the trial court rendered a judgment that recited the facts constituting the contempt, adjudged the Loughlins guilty, and specified the punishment imposed. The trial court was not manifestly erroneous in its finding. However, in light of the direct contempt, La. R.S. 13:4611 proscribes a penalty less than that which the trial court imposed. Because the trial court assessed the maximum fine for constructive contempt, we will assess the maximum fine permitted for direct contempt: $200.00 each for a total of $400.00.

Talton, 06-1513, 07-1414 at pp. 26-27, 981 So.2d at 713-14 (footnote omitted) (emphasis added).

In 2008, USAA's trial attorney, Tim Schafer ("Mr. Schafer") filed a disciplinary complaint with the Office { "pageset": "S21 of Disciplinary Counsel ("ODC") against the Loughlins. The ODC brought formal charges against the Loughlins in 2011. As part of the proceeding, Judge Ramsey was deposed on November 9, 2011.[4] Ultimately, the ODC charges were dismissed.

{ "pageset": "Sa7 In November 2012, the Loughlins filed a "Petition for Nullity of Judgment".[5] They alleged they recently discovered evidence that the contempt

[3] La. C.C.P. art. 225 sets forth the procedures to be followed for constructive contempt of court.

[4] Excerpts of the deposition were admitted into evidence.

[5] Supplemental and Amending Petitions were also filed.

judgment was procured by fraud or ill practices.[6] Judge Ramsey was also deposed on December 17, 2014, in relation to the Petition.[7]

USAA filed peremptory exceptions of prescription, no cause of action, and no right of action, along with a motion for sanctions in response to the Loughlins' Petition. At the hearing on the exceptions, no evidence was introduced; and no testimony was presented. On May 20, 2013, the district court granted USAA's exceptions, but denied the motion for sanctions. The Loughlins sought review, and this Court in *Loughlin v. United Servs. Auto. Ass'n.,* 13-1285 (La.App. 4 Cir. 6/4/14), 144 So.3d 113*,* reversed and remanded for further proceedings.

On remand, a two-day bench trial was held on September 2 and 3, 2015. Mrs. Loughlin, Mr. Loughlin, Judge Ramsey, and Mr. Schafer testified.[8] The following evidence and testimony were adduced at trial:

Mrs. Loughlin

Mrs. Loughlin testified that the underlying suit was for damages against USAA for property damages suffered during Hurricane Katrina; she was a plaintiff and counsel of record in the suit. Mrs. Loughlin testified she was dismissed as a plaintiff in May 2006, and she purported she was no longer counsel of record as of June 23, 2006.

Mrs. Loughlin acknowledged she was served, on June 8, 2006, with two documents: a "Motion for Order (1) Prohibiting Plaintiffs from Contesting the

[6] In the Petition, the Loughlins alleged the following: 1) USAA circulated to the Loughlins a judgment for the contempt ruling that was different than the one the district court signed; 2) the judgment of contempt was rendered without a rule for contempt, without service of the rule for contempt, and without service for the motion for contempt; 3) the contempt hearing was held without the Loughlins or their counsel being present; 4) the basis for the contempt was based upon an alleged misrepresentation made by the Louglins that was never found by the district court; and 5) the contempt judgment was obtained by USAA's *ex parte* communication with the district judge.

[7] The deposition was admitted into evidence.

[8] Mr. Loughlin represented Appellants, and James Nieset, Jr., represented Appellee.

'Chuck Collins' Appraisal; (2) Finding Plaintiffs in Contempt of Court; and (3) Casting Plaintiffs for Expenses and Fees" and a "Memorandum in Opposition to Plaintiffs' Motion to Dismiss Without Prejudice."[9] She marked, on the documents, the date and time she received them.

Mrs. Loughlin recalled Mr. Loughlin was in court, on June 23, 2006, on a separate matter. He called and told her that when he had stopped by Judge Ramsey's courtroom to check on the things she was served with, he was told something was set for hearing that morning—June 23rd. Mrs. Loughlin explained to Mr. Loughlin she was never served with anything setting a hearing for that morning, and he responded that he would tell the court.

The June 23rd hearing was moved to June 29, 2006. Mrs. Loughlin testified that before the June 29th hearing, she reviewed the documents that had been served on her, and she noticed a June 23rd hearing date.

On June 29th, Mrs. Loughlin appeared at the hearing. The court addressed USAA's motion for contempt for failure of the Loughlins to appear at the June 23rd hearing. In open court, Judge Ramsey ruled in favor of USAA and denied USAA's motion for contempt, sanctions, and fees. The written judgment was signed on July 17, 2006.

On June 29, 2006, after the hearing, Judge Ramsey requested all the parties to return to her chambers. According to Mrs. Loughlin, Judge Ramsey examined the original documents and concluded that her staff had made a mistake by failing to fill in the correct order for the rule to show cause. Mrs. Loughlin testified Judge

[9] Hereinafter, these documents will be referred to as "Motion for Order" and "Memorandum in Opposition to Plaintiff's Motion to Dismiss"

Ramsey requested, at the meeting, the Loughlins get someone to represent them on further matters.

At trial, the parties stipulated that the order setting a hearing date for the rule to show cause on the Motion for Order was blank.[10] Additionally, Mrs. Loughlin testified the Memorandum in Opposition to Plaintiffs' Motion to Dismiss had an order setting a hearing date for June 23, 2006. Mrs. Loughlin explained, however, she did not notice it on June 8, 2006, because it was unusual for a memorandum to be set for a hearing.

On July 6, 2006, USAA filed a "Motion for Expedited Hearing/Status Conference" requesting the district court to hear several issues, including the contempt issue.[11] The hearing on the motion was set for August 4th, but moved to August 18, 2006. A letter sent by Mr. Schafer to Judge Ramsey's law clerks and copied to Mr. Loughlin, reflected the rescheduling of the August 4th date; it did not reference the contempt issue. Mrs. Loughlin further testified that the contempt motion had been denied by Judge Ramsey on July 17, 2006, and she was unaware a re-urged motion for contempt had been filed by USAA or raised by the court, *sua sponte*, after that date.

On August 18, 2006, Attorney Sharonda Williams ("Ms. Williams") appeared at the hearing, but the Louglins were not present. At the hearing, Judge Ramsey ruled on several issues requested in the motion for expedited hearing, including the contempt issue. The transcript of this hearing, which was introduced into evidence, only reflected Judge Ramsey's ruling. The transcript, provided in pertinent part:

[10] The hearing date had been mistakenly inserted in an order that was attached to an exhibit to the Motion for Order.

[11] This document was introduced into evidence at trial.

THE COURT:

> Regarding the motion for contempt filed by USAA, the Court finds the plaintiff [sic] in contempt and orders that they pay a fine of $1,000.00.
>
> I mean, I find it incredulous that two attorneys did not notice. When you look at the pleading - - I mean, there are short pages in between. The last page clearly shows that there were service instructions to them.
>
> . . . Mr. Loughlin first came in and told me that there was no service, and then Mrs. Loughlin came in and told me that there was service but there was a blank page there. And I thought something was very odd about that. I still can't prove that anything was done to change that page. But clearly, she did have notice. She knew enough to mark the date and time that the document was brought to her house. . . .

Mrs. Loughlin testified she and Mr. Loughlin reviewed the proposed judgment prepared by Mr. Schafer, and they had many objections to it. The first line of the proposed judgment indicated the contempt issue was brought by the district court's own motion. Mrs. Loughlin stated she was unaware Judge Ramsey had motioned for them to be held in contempt. Mrs. Loughlin objected to the reference that they were present at the August 18, 2006 hearing. Additionally, Mrs. Loughlin testified she objected to the inclusion of the language that Judge Ramsey found that they made misrepresentations. She explained the objection in an exchange during cross-examination which provided:

> Q: You do say, though, that the bold lines that scratch out the words 'the Court finds that misrepresentations of material fact regarding service of notice of hearing were made by Kearney L. Loughlin and Terri B. Loughlin.'
>
> A: Yes.
>
> Q: Okay, you scratched that out?
>
> A: Uh-huh.
>
> Q: Why did you do that?

A: Because Sharonda said she didn't find that we misrepresented anything.

Mr. Loughlin set forth their complaints to the proposed judgment in a letter to Mr. Schafer dated August 21, 2006.[12] Mr. Loughlin wrote in pertinent part:

> With respect to the contempt judgment, please remove from the first paragraph all reference to a motion for contempt brought either by the Court or by USAA. There was no such motion for contempt and no trial of a rule for contempt as required by La. Code Civ. Pro. art. 225. Nor was a rule to show cause setting a motion for contempt ever served. Moreover, there was never a rule to show cause stating "the facts alleged to constitute the contempt" as required by La. Code Civ. Pro. art. 225 (A).
>
> Please also remove the second paragraph the appearance of Sharonda Williams on behalf of the plaintiffs. Plaintiffs did not engage Ms. Williams nor anyone else to appear on their behalf regarding a trial for contempt for which there was no motion, no rule, and no service.
>
> Please remove the third paragraph of the proposed judgment. Again, there was no motion for contempt nor a rule for contempt. Accordingly, plaintiffs did not present any evidence. . . .
>
> . . . Ms. Williams informs me that the language 'the Court finds misrepresentations of material facts regarding service of notice of hearing were made by Kearney L. Loughlin and Terri B. Loughlin' do not reflect the findings of the Court and should be removed.

On September 12, 2006, a contempt judgment was signed by Judge Ramsey; and it provided in pertinent part:

> This matter was considered by the Court on its own motion and in connection with the motion of defendant, United Services Automobile Association, for an expedited hearing/status conference, which was deferred for hearing until the 18th day of August, 2006.
>
> . . . .
>
> The Court, considering the pleading, the representations made by Kearney L. Loughlin in open court on June 23, 2006, the evidence presented by both parties and the representations made by Kearney L. Loughlin during a hearing on June 29, 2006, the documents presented

[12] The letter was introduced into evidence.

> and representations made by Kearney L. Loughlin and Terri B. Loughlin at a conference in Chambers on June 29, 2006, and the evidence presented and arguments of counsel presented during the hearing on August 18, 2006, the Court finds that misrepresentations of material facts regarding service of notice of hearing were made by Kearney L. Loughlin and Terri B. Loughlin, and for the reasons orally assigned in open court on August 18, 2006, a transcribed copy of which is attached hereto and made a part hereof . . . .

At trial, a certificate of service which was submitted by Mr. Schafer along with the contempt judgment, dated August 23, 2006, was introduced into evidence. The certificate of service provided:

> I certify that on August 18, 2006, I faxed a copy of the foregoing proposed Judgment to Sharonda Williams, Attorney at Law, who appeared for the hearings on August 18, 2006. Ms. Williams has made no comment regarding the Judgment. By letter dated August 21, 2006 (a copy of the letter is attached), Kearney S. Loughlin objects to the wording of the Court's judgment finding him and his wife in contempt of court. USAA submits a response attached hereto.

Mrs. Loughlin testified the contempt judgment signed by Judge Ramsey differed from the proposed judgment that they reviewed, and the contempt judgment signed by Judge Ramsey was not presented to her or to Mr. Loughlin.

Mrs. Loughlin testified she discovered, from Judge Ramsey's December 2014 deposition, that Judge Ramsey read Mr. Schafer's *ex parte* memorandum—USAA's response memorandum referenced in the certificate of service—accusing the Loughlins of making misrepresentations to the court. Additionally, Mrs. Loughlin stated she discovered from the December 2014 deposition that Judge Ramsey threw away the memorandum and was unaware the memorandum had not been sent to the Loughlins. Mrs. Loughlin testified that she did not see the *ex parte* memorandum until discovery was ordered in the nullity case.

Mrs. Loughlin admitted she knew, before Judge Ramsey's deposition, that the language in the contempt judgment differed from the proposed judgment. However, Mrs. Loughlin explained she did not discover the language in the contempt judgment signed by Judge Ramsey was altered by Mr. Schafer until Judge Ramsey's November 2011 deposition.

At the conclusion of Mrs. Loughlin's testimony, USAA re-urged their exception arguing that the nullity action had prescribed. The district court denied the exception; and the trial proceeded.

Mr. Loughlin

Mr. Loughlin testified that following the August 18, 2006 hearing, Ms. Williams informed him or his wife, or both of them that Judge Ramsey found that the Loughlins had not made misrepresentations. He stated he objected, in his August 21, 2006 letter to Mr. Schafer, to the inclusion of this language in the contempt judgment. Mr. Loughlin acknowledged that the only difference between the proposed judgment and the contempt judgment Judge Ramsey signed was a reference to a copy of the August 18, 2006 transcript being attached and the attachment of the transcript.

Judge Ramsey

Judge Ramsey was called as a witness by USAA. Judge Ramsey testified as to her standard procedure for signing a judgment stating:

> It would come in, and the law clerk and my minute clerk would first check to make sure that the date is correct, that the hearing was on that date, that the appearances were correct. And the law clerk would check the substance of the judgment, and they would present it to me for signature. I would read it if it was something that was - -

> that I recall being incorrect, I would either have my law clerk call the other side - - all was submitted and tell them to make the correction. Or sometimes we would just prepare another judgment.

Judge Ramsey explained that if she needed to get a copy of the transcript of the proceeding to verify the judgment was correct, she would do so. Judge Ramsey testified she rarely held attorneys in contempt of court, so, she was certain, in this case, she followed her general procedure before signing the contempt judgment. Judge Ramsey identified her signature on the contempt judgment, and she acknowledged neither she nor her staff changed or modified the contempt judgment. When Judge Ramsey was asked, "[w]as it your intention on August 18, 2006 after this hearing to hold Kearney and Terri Loughlin in contempt of court?" she responded,"[y]es." On cross-examination, she explained she held the Loughlins in contempt of court because:

> [I] did not believe that you [Mr. Loughlin] and your wife had not been served. There were just too many drop-the-balls with the deputy not being able to find a return, with my staff making a mistake signing off on a memo instead of an Order. Even what you just presented me with, an April filing and I'm not signing it for a month, that just didn't happen. Generally, my motions were set within a month. . . .

Mr. Loughlin questioned Judge Ramsey about the language in the contempt judgment, "[t]his matter was considered by the Court on its own motion." Judge Ramsey did not deny it was brought by her own motion; instead, she responded she generally would issue a rule for contempt to the parties, but in this case, since the parties were present at the status conference, she dealt with it there. Judge Ramsey explained as follows:

> [G]enerally, a contempt motion would have been filed by the opponent. If I did a motion on my own, I would have sent out - - in this case - - I'm trying to remember back almost ten years now. But when they were there for the status conference, I would have brought them into chambers and talked to them, recognizing that they are two attorneys. I would have exercised some restraint about what I was

> going to say on the record. I could have done a contempt motion on my own if I still felt in speaking to them in the conference that they were not being truthful to me as a direct contempt. So it may not have been that I did a motion and set it again for hearing.

When questioned if the court brought a contempt motion on its own motion would it have to be served, Judge Ramsey responded, "[n]o. I could have done my own motion and ordered someone back in two hours, and it would not have been a service. It was on my own motion for contempt."

At trial, Judge Ramsey testified if the *ex parte* memorandum was signed and date-stamped and attached to the contempt judgment, she would not have thrown it away. During the December 2014 deposition, Judge Ramsey indicated she did not have a specific recollection of this memorandum, and she opined that if this document was attached to the contempt judgment she would have considered the document, and thrown it away because it was not part of the record. At trial, Judge Ramsey emphasized the only way she would have looked at, or received, the *ex parte* memorandum was if it was attached to the contempt judgment, date-stamped, and signed. The *ex parte* memorandum introduced into the evidence at trial did not indicate it was date-stamped and signed. Thus, the record does not reflect if Judge Ramsey considered USAA's *ex parte* memorandum.

Additionally, the record does not reflect if Judge Ramsey considered Mr. Loughlin's August 21, 2006 letter to Mr. Schafer in which he set forth specific objections to the proposed judgment. Judge Ramsey testified that even if she was unaware at the time she signed the contempt judgment the Loughlins disagreed with the language of the contempt judgment, "that doesn't make the judgment wrong. The transcript was there and I know what I wrote."

During the testimony of Judge Ramsey, the district court pointed out, on the record, that the certificate of service submitted with the contempt judgment to Judge Ramsey was signed and stamped a true copy and read, "Kearney [S.] Loughlin objects to the wording of the Court's judgment."[13]

Judge Ramsey, further, testified that the Loughlins' attorney, Ms. Williams, was present at the August 18, 2006 hearing and made no comment on the contempt judgment.

Mr. Schafer

Mr. Schafer testified he recalled Ms. Williams argued on the Loughlins' behalf at the August 18, 2006 hearing, and he sent Ms. Williams the proposed judgment. Mr. Schafer stated, upon receipt of Mr. Loughlin's August 21, 2006 letter, in which Mr. Loughlin objected to the language in the proposed judgment, he ordered the transcript of the August 18, 2006 hearing. Mr. Schafer testified when he submitted the contempt judgment to Judge Ramsey, on August 24, 2006, the transcript was not attached because it was not ready. The transcript was completed on August 25, 2006, as evidenced by the date it was certified by the court reporter.[14] Mr. Schafer testified, although he did not know whether Judge Ramsey read the transcript, she had plenty of time to do so as she did not sign the contempt judgment until September 12, 2006.

Mr. Schafer admitted his certificate of service attached to the contempt judgment was inaccurate because the revised contempt judgment was not sent to

[13] The contempt judgment and the certificate of service were stamped by the Orleans Parish Clerk of Court as "A True Copy." La. C.E. art. 904 provides: "When an original public document is deemed authentic without proof by extrinsic evidence as provided in Article 902(1), (2), or (3), a purported copy of the document also shall be deemed authentic when certified as true or correct by the custodian or other person authorized to make that certification, by certificate complying with Article 902(1), (2), or (3)."

[14] The trial on the merits in *Talton* began on August 28, 2006.

the Loughlins or their attorneys. He explained he did not believe it was necessary to send the revised contempt judgment to the Loughlins or their attorneys because there were no substantive changes; the only change was the attachment of the August 18, 2006 transcript and the language referencing the attachment.

At the conclusion of the testimony, USAA re-urged its exception of prescription. After taking the matter under advisement, in a judgment dated April 5, 2016, the district court dismissed the Petition with prejudice; the judgment was silent as to the prescription issue. On April 14, 2016, the Loughlins filed a Motion for New Trial which was denied by the district court on May 26, 2016.

This appeal followed.

DISCUSSION

Before we consider the merits of this case, we must first determine whether USAA's re-urged exception of prescription is properly before this court for consideration, and, if so, whether it has merit.

Prescription

In its brief to this court, USAA re-urges prescription as an alternative argument for affirming the district court's dismissal of the Petition. USAA contends the testimony and evidence presented at trial prove the Loughlins' claims have prescribed.

The Loughlins counter that USAA is precluded from raising prescription again, as it did not answer the appeal, and this court decided the issue in *Loughlin*. Alternatively, the Loughlins contend the district court, by not specifically addressing the issue, correctly ruled in their favor, and the record supports a denial of the exception.

Although USAA failed to answer the appeal, in *Bond v. Commercial Union Assurance Company,* 407 So.2d 401 (La. 1981), the Supreme Court held that the failure to answer an appeal does not preclude a party from raising an exception on appeal. In *Bond*, the plaintiffs filed a wrongful death and survival action against the defendants. The defendants filed several exceptions before trial, which were overruled by the district court. A unanimous jury verdict was returned in favor of the defendants, and the plaintiffs appealed. The appellate court reversed the trial court's judgment. The Louisiana Supreme Court granted certiorari and reviewed the appellate court's ruling. Plaintiffs argued that the defendants' exceptions should be considered abandoned because they did not appeal the overruled exceptions nor did they raise the issue by answering the appeal. The Supreme Court disagreed and held in pertinent part:

> [O]ur courts of appeal have held that the prevailing party at the trial level may raise his exceptions on appeal even if he has not sought the appeal nor answered the loser's appeal. The failure of the defendant to appeal or answer the plaintiff's appeal did not procedurally bar the court of appeal from considering the defendant's overruled exception. . . .

Bond, 407 So.2d at 405 (citing *State v. Placid Oil Co*., 274 So.2d 402 (La.App. 1 Cir. 1972)).

Additionally, prescription can be raised by a party for the first time on appeal. In *Robin E. Owens & Assocs., Inc. v. Booth*, 98-0613, pp. 4-5 (La.App. 4 Cir. 2/24/99), 729 So.2d 1096, 1098-99, this court explained:

> Prescription must be specially pleaded; courts may not supply a plea of prescription. La. C.C. art. 3452. Even though a debtor made no defenses at trial of the case, it is proper for the appellate court to consider peremptory exceptions such as a defense of prescription made for the first time in the appellate court where proof of the grounds for such exceptions appeared in the record. *Lewis Roy Motors, Inc.v. Pontier***,** 204 So.2d 423 (La.App. 3 Cir.1967). A plea of prescription may be filed in the court of appeal any time prior to

> final judgment but cannot be maintained unless the record discloses that the plea is well founded. *Duncan v. City of Pineville,* 192 So.2d 664 (La.App. 3 Cir.1966). . . .

See also, La. C.C.P. art. 2163; *Nelson v. Rite Aid Hdqtrs. Corp.*, 02-2042, p. 2 (La.App. 1 Cir. 6/27/03), 873 So.2d 16, 17.

Furthermore, the Loughlins erroneously suggest that review of the exception of prescription is precluded because this Court denied the exception in *Loughlin*. This Court in *Loughlin* did not rule on the merits of the exception but opined, "[b]ecause the claim is not prescribed on the face of the petition, and there is no evidence in the record to contradict the allegations, we find that the trial court erred in granting the exception of prescription." *Id*., 13-1285 at p. 7, 144 So.3d at 118. In *Landry v. Blaise, Inc*., 02-0822 (La.App. 4 Cir. 10/23/02), 829 So.2d 661, this Court addressed a similar issue. The plaintiff argued the defendant was precluded from re-urging for a second time an exception of prescription which was previously denied by the appellate court. This Court held that consideration of the exception was not precluded and explained in pertinent part:

> A peremptory exception may be urged at any time. LSA-C.C.P. art. 928. A party may re-urge a peremptory exception after a denial of the exception. *Teachers' Retirement System of Louisiana v. Louisiana State Employees' Retirement System,* 456 So.2d 594 (La. 1984), *Shorts v. Gambino,* 570 So.2d 209 (La.App. 5 Cir.1990), *Adam v. Great Lakes Dredge and Dock Company,* 273 So.2d 60, 61-62 (La.App. 4 Cir.1973), *G.B.F. v. Keys,* 29,006, pp. 2-3 (La.App. 2 Cir. 1/22/97); 687 So.2d 632, 634.
>
> Landry [the plaintiff] argues that the doctrine of law of the case prohibits this court from considering a second exception of prescription in the same case. The law of the case principle embodies the rule that an appellate court will not reconsider its own rulings of law in the same case. *Lejano v. Bandak,* 97-388, p. 23 (La.12/12/97); 705 So.2d 158, 170. This jurisprudential doctrine, as opposed to the statutory provision of *res judicata,* is discretionary. The doctrine is not applicable "in cases of palpable error or when, if the law of the case were applied, manifest injustice would occur." *Id.* (*citing Vincent v. Ray Brandt Dodge,* 94-291 (La.App. 5

> Cir. 3/1/95), 652 So.2d 84, 85, *writ denied[,]* 95-1247 (6/30/95), 657 So.2d 1034, *citing Landry v. Aetna Ins. Co.,* 442 So.2d 440 (La. 1983).)

Landry, 02-0822 at p. 3, 829 So.2d at 664. The *Landry* court found the plaintiff failed to present a basis for the court not to reconsider the exception of prescription. In *Loughlin*, *supra*, this Court did not review the merits of the exception of prescription because there was no evidence or testimony presented at the hearing on the exception; however, at the trial on remand, evidence was presented. Considering the applicable law, there is no basis for this Court to refuse to consider USAA's exception of prescription.

We find the issue of prescription is properly before this Court.

As noted by the Loughlins, the district court's judgment was silent as to the issue of prescription. "As the judgment is silent as to the plea of prescription presented to the lower court, it must be considered overruled." *Di Carlo v. Laundry & Dry Cleaning Serv.*, 178 La. 676, 683, 152 So. 327, 329 (1933)(citing *State v. Nephler*, 35 La. Ann. 365 (1883); *Soniat v. Whitmer*, 141 La. 235, 74 So. 916 (1917.)) Thus, we will treat the exception as overruled by the district court.

In this case, there is a mixture of questions of fact and law; evidence was introduced to support and controvert the ground of prescription. In *Davis v. NOLA Home Constr., L.L.C.*, 16-1274, pp. 6-8 (La.App. 4 Cir. 6/14/17), 222 So.3d 833, 840 (citing *Boes Iron Works, Inc. v. Gee Cee Grp., Inc.*, 16-0207, p. 8 (La.App. 4 Cir. 11/16/16), 206 So.3d 938, 946, *writ denied*, 17-0040 (La. 2/10/17), 216 So.3d 45), this Court explained, "[w]hen the issues presented on appeal involve fact questions or mixed questions of law and fact, the manifest error standard applies. . . ."

USAA had the burden to prove the Loughlins' suit for nullity had prescribed. The prescriptive period for an action to annul on the grounds of ill practice or fraud is one year from the date of discovery of the fraud or ill practice by a plaintiff. La. C.C.P. art. 2004. The one-year prescriptive period begins to run from the knowledge of facts, not their legal consequences. *Succession of Albritton*, 497 So.2d 10, 12 (La.App. 4 Cir. 1986). It is not necessary that a party have actual knowledge of the conditions as long as there is "constructive notice." *Cartwright v. Chrysler Corp.,* 255 La. 597, 603, 232 So.2d 285, 287 (1970). In *Marin v. Exxon Mobil Corp*., 09-2368, 09-2371, p. 15 (La. 10/19/10), 48 So.3d 234, 246, the court explained, "the ultimate issue in determining whether a plaintiff had constructive knowledge sufficient to commence a prescriptive period is the reasonableness of the plaintiff's action or inaction in light of his education, intelligence, and the nature of the defendant's conduct." Prescription runs from the date the party suffers actual or appreciable damage, even though the party may later come to a more precise realization of the full extent of their damage. *Steele v. Steele,* 98–693 p. 7 (La.App. 5 Cir. 3/10/99), 732 So.2d 546, 549-50.

Louisiana Civil Code Article 3467 provides, "[p]rescription runs against all persons unless exception is established by legislation." Louisiana jurisprudence recognizes the doctrine of *contra non valentem* as an exception to this rule; it is a means of suspending the running of prescription when the circumstances of a case fall within one of four categories. *See Marin,* 09-2368, 09-2371, pp. 13-14, 48 So.3d at 246. The Supreme Court admonishes the doctrine only applies in exceptional circumstances. *Id.* 09-2368, 09-2371 at p. 12, 48 So.3d at 245. Two of the four possible instances where *contra non valentem* can be applied to prevent the running of prescription may apply in this case: 1) where a party has done some

act effectually to prevent the other party from availing themselves of their cause of action; or 2) where the cause of action is neither known nor reasonably knowable by the plaintiff even though the plaintiff's ignorance is not induced by the defendant. *Id*. (citing *Plaquemines Parish Com'n Council v. Delta Development Co., Inc.,* 502 So.2d 1034 (La. 1987)).

The Loughlins contend that the contempt judgment was obtained by USAA's breach of Louisiana District Court Rule 9.5.[15] The Loughlins complain USAA violated Rule 9.5 and committed an ill practice when it failed to provide them with the contempt judgment submitted to and signed by Judge Ramsey. The Loughlins allege the contempt judgment presented to Judge Ramsey was substantively changed from the proposed judgment which they reviewed, and the contempt judgment signed by Judge Ramsey and the certificate of service were not sent to them or their attorneys. The Loughlins suggests that they "had the opportunity to test the truth of the allegations contained in USAA's judgment—by deposing Judge Ramsey" during the ODC case. The Loughlins explain they were unaware until Judge Ramsey's November 2011 deposition that the contempt judgment was altered by Mr. Schafer and not Judge Ramsey, and this lack of

[15] Louisiana District Court Rules - Rule 9.5 provides in part:

> (b) If presented later, the responsible attorney or the self-represented party shall circulate the proposed judgment, order, or ruling to counsel for all parties and to self-represented parties and allow at least five (5) working days for comment before presentation to the court. When submitted, the proposed judgment, order, or ruling shall be accompanied by a certificate stating: the date of mailing; the method of delivery of the document to other counsel of record and to self-represented parties; whether any opposition was received; and the nature of the opposition.

The Loughlins point out at the time the Judgment was submitted to Judge Ramsey that Rule 9.5. provided the word "must" instead of "shall."

knowledge deprived them of the opportunity to address the matter at the time the contempt judgment was issued.

Although the Loughlins assert that they only became aware that Mr. Schafer changed the contempt judgment and not Judge Ramsey until Judge Ramsey was deposed, we find the evidence and testimony presented at the trial supports the finding that the Loughlins' Petition prescribed, and the prescriptive period was not suspended by the doctrine of *contra non valentem.*

When the Loughlins sought review of the contempt judgment in the *Talton* case, they were aware the language in the proposed judgment circulated to them differed from the contempt judgment signed by Judge Ramsey. Additionally, the font and type set of the proposed judgment prepared by Mr. Schafer and reviewed by the Loughlins was the same as the contempt judgment signed by Judge Ramsey. Notably, the only change between the proposed judgment and the contempt judgment was the reference to the attachment of the copy of the August 18, 2006 transcript. Furthermore, the certificate of service that was signed by Mr. Schafer and submitted with the contempt judgment indicated the dispute between the parties over the language in the proposed judgment. Considering the Loughlins education, intelligence, and profession as attorneys, we find it was unreasonable for the Loughlins to have been unaware of possible Rule 9.5 violations. *See Marin* 09-2368, 09-2371, at p. 15, 48 So.3d at 246.

The Loughlins complain the contempt judgment was obtained by USAA's *ex parte* memorandum that was sent to Judge Ramsey. Although Mrs. Loughlin testified she discovered from the December 17, 2014 deposition that Judge Ramsey read Mr. Schafer's memorandum and threw it away, the evidence and testimony at trial was unclear whether Judge Ramsey reviewed this memorandum.

Nevertheless, the Loughlins contend they did not see this memorandum until they requested it in discovery during the nullity action. However, the certificate of service, which was attached to the contempt judgment when it was submitted to Judge Ramsey, specifically, referenced the memorandum. Thus, at the time the Loughlins filed their appeal in *Talton*, they knew or should have known a memorandum was submitted by USAA with the contempt judgment.

The Loughlins urge the contempt judgment prepared by USAA was an ill practice because it falsely stated, "[t]his matter was considered by the Court on its own motion." The Loughlins allege the truth as to this issue was only established by Judge Ramsey's testimony that she did not bring the motion. However, at trial, Judge Ramsey's testimony contradicted this assertion. Nevertheless, in the August 21, 2006 letter from Mr. Loughlin to Mr. Schafer, Mr. Loughlin complained, "please remove from the first paragraph all reference to a motion for contempt brought either by the Court . . . There was no such motion for contempt . . . ." As such, the Loughlins knew or should have known of this alleged claim in 2006.

Additionally, the Loughlins contend the contempt judgment was obtained by an ill practice or fraud when USAA included in the contempt judgment language that the Louglins made misrepresentations to Judge Ramsey. Testimony at trial by the Loughlins indicated Ms. Williams informed them, following the August 18, 2006 proceeding, that Judge Ramsey did not make such a finding. In the August 21, 2006 letter, Mr. Loughlin requested that portion of the proposed judgment be removed because Ms. Williams had informed them Judge Ramsey did not make that finding. Thus, the Loughlins knew or should have known of this alleged claim in 2006.

The Loughlins complain they were held in contempt *in absentia,* without notice, and without an opportunity to be heard, and Mrs. Loughlin was not a party to the litigation when Judge Ramsey held the Loughlins in contempt *in absentia.* The Loughlins were aware of these alleged claims when they were informed by Ms. Williams that Judge Ramsey held them in contempt of court after the August 18, 2006 proceeding. Mr. Loughlin complained about these issues in the August 21, 2006 letter to Mr. Schafer. Furthermore, the Loughlins alleged notice and service issues, although regarding constructive contempt instead of direct contempt, in the *Talton* case.

The record before this Court indicates the Loughlins knew or should have known of the claims in support of their Petition following the August 18, 2006 proceeding or at the latest in 2008; however, the Loughlins did not file their Petition until 2012, well after the one year prescriptive period.

Accordingly, pursuant to La. C.C.P. art. 2004, we find the Loughlins were barred from bringing the Petition.

Dismissal of Petition and Motion for New Trial

Now, addressing the merits of this case, we find the district court did not abuse its discretion by dismissing the Petition with prejudice.

The Loughlins challenge the Judgment on the basis the district court erred by dismissing the Petition with prejudice, by failing to find they proved the Judgment should be annulled, and by failing to grant the motion for new trial.

It is well settled law that a final judgment obtained by fraud or ill practices may be annulled. La. C.C.P. art. 2004. The party seeking the annulment of a judgment bears the burden of proof, and the standard of review of the trial court's ruling by the appellate court is abuse of discretion. *ASI Mgmt., L.L.C. v.*

Advantage Ford, Inc., 08-0255, p. 4 (La.App. 4 Cir. 11/19/08), 999 So.2d 66, 68. "The action for nullity based on fraud or ill practices is not intended as a substitute for an appeal or as a second chance to prove a claim which was previously denied for failure of proof. The purpose of the action is to prevent injustice which cannot be corrected through new trials and appeals." *Gladstone v. Am. Auto. Ass'n, Inc.,* 419 So.2d 1219, 1222 (La. 1982) (citing Project of Louisiana Code of Practice of 1825 at 97 (Official Reprint, 1938)).

Here, the basis of the Judgment—misrepresentations by the Loughlins—was raised and addressed on appeal in the *Talton* case. Thus, the trial on the Petition was not a *second chance* for the Loughlins to prove the Judgment was in error, but, rather, it was to prove that the Judgment was obtained by actionable fraud or ill practices.

In *Duckworth Properties, L.L.C. v. Williams*, 10-0244, p. 2 (La. App. 4 Cir. 11/24/10), 52 So.3d 287, 289, this Court set forth what must be proven by the party seeking to annul a judgment stating:

> [T]o determine whether a judgment has been obtained by actionable fraud or ill practices, it must be shown that: "(1) the circumstances under which the judgment was rendered showed the deprivation of legal rights of the litigant seeking relief, and (2) the enforcement of the judgment would have been unconscionable and inequitable." *Johnson v. Jones–Journet,* 320 So.2d 533, 537 (La. 1975). "[T]he article is not limited to cases of actual fraud or intentional wrongdoing"; however, it "is sufficiently broad to encompass" situations where:
>
> > a judgment is rendered through some improper practice or procedure which operates, even innocently, to deprive the party cast in judgment of some legal right, and where the enforcement of the judgment would be unconscionable and inequitable.

Kem Search, Inc. v. Sheffield, 434 So.2d 1067, 1070 (La.1983).

Likewise, this Court, in *Schiff v. Pollard*, 16-0801, p.12, (La. App. 4 Cir. 6/28/17) 222 So.3d at 867, 876 (quoting *Ward v. Pennington*, 523 So.2d 1286, 1289 (La. 1988)), held not every fraud or ill practice constitutes grounds to annul a judgment, but a causal relationship is required between the fraud or ill practice and the obtaining of the judgment. This Court explained, "'[A] logical interpretation of [La. C.C. P.] Article 2004 dictates that a judgment will not be annulled on account of fraud or ill practice in the course of a legal proceeding if the fraud or ill practice pertained to a matter irrelevant to the basis of the decision and the judgment therefore was not obtained by fraud or ill practice.'" *Id.*

In the case *sub judice*, the district court found the Loughlins failed to prove a causal connection between the alleged ill practices and fraud they complained of and the Judgment holding them in contempt. In written reasons, the district court concluded in pertinent part:

> The plaintiffs . . . can prevail by proving a causal connection between the actions they complain of, and the judgment holding them in contempt of court. La. C.C.P. art. 2004. The Loughlins have failed to carry their burden of proving by a preponderance of the evidence that the judgment signed by Judge Ramsey did not reflect her findings.

We find the record supports the district court's judgment.

At trial, Judge Ramsey never wavered on her Judgment. The district court noted, in its written reasons for judgment, that Judge Ramsey did not state the Judgment finding the Loughlins made misrepresentations to the court was in error or incorrect. When questioned by Mr. Loughlin, Judge Ramsey attested to the following:

> Q: The judgment of contempt in this case . . . that was to punish contemptuous behavior; right?
>
> . . . .

> A: Yes, because I do not believe that that you and your wife had not been served. There was just too many drop-the-balls with the deputy not being able to find a return, with my staff making a mistake signing off on a memo instead of an order. Even what you just presented me with, an April filing and I'm not signing it for a month that just didn't happen.

Judge Ramsey testified she signed the Judgment, and it was her intention, on August 18, 2006, to hold the Loughlins in contempt of court. Judge Ramsey insisted she would not have signed a judgment that did not reflect her ruling from the bench. She explained she rarely held attorneys in contempt of court, so, she was certain, in this case, she followed her general procedure before signing the Judgment. Judge Ramsey insisted even if she was unaware at the time she signed the Judgment the Loughlins disagreed with the language of the Judgment, "that doesn't make the judgment wrong. The transcript was there and I know what I wrote." Consequently, we find the district court did not abuse its discretion in dismissing the Petition.

Having found no abuse of discretion by the district court in its dismissal of the Petition, we, likewise, find the district court did not abuse its discretion in denying the motion for new trial.

Louisiana Code of Civil Procedure Article 1972 provides when a new trial shall be granted stating:

> 1) When the verdict or judgment appears clearly contrary to the law and the evidence.
>
> (2) When the party has discovered, since the trial, evidence important to the cause, which he could not, with due diligence, have obtained before or during the trial.

At the hearing on the motion for new trial, Mr. Loughlin re-urged his claims asserted at trial and argued in pertinent part:

> I filed a motion for new trial in this case because The Court rendered a judgment with reasons for judgment. And I read them, and I said. Well, with respect. Your Honor, I think you made a mistake because I think these reasons don't support the judgment, and there are other reasons that support a contrary judgment. . . .

As set forth above, the record indicates the Loughlins failed to prove a causal connection between the alleged ill practices and fraud they complained of and the Judgment holding them in contempt. Thus, the district court's denial of the motion for new trial was not clearly contrary to the law and evidence.

Additionally, no new evidence was presented by the Louglins at the hearing on the motion for new trial.

We find the district court did not err in denying the motion for new trial.

CONCLUSION

For the reasons set forth above, the district court's judgment is affirmed.

AFFIRMED