JULIE CLAVO	*	**NO. 2018-CA-0727**
VERSUS	*	
		COURT OF APPEAL
FARA INSURANCE SERVICE AND LSU HEALTHCARE MEDICAL CENTER OF NEW ORLEANS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

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APPEAL FROM
THE OFFICE OF WORKERS' COMPENSATION
NO. 17-07959, DISTRICT "08"
HONORABLE Catrice Johnson-Reid, The Office of Workers' Compensation
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Judge Paula A. Brown

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(Court composed of Judge Terri F. Love, Judge Daniel L. Dysart, Judge Paula A. Brown)

Julie Clavo
4643 Lancelot Drive
New Orleans, LA 70127

PRO SE APPELLANT

Jeff Landry
Attorney General
Bailey Adams Juhas
Assistant Attorney General
Louisiana Department of Justice
Litigation Division
1450 Poydras Street, Suite 900
New Orleans, LA 70112

COUNSEL FOR DEFENDANT/APPELLEE

AFFIRMED
1/30/2019

This matter arises out of a dispute over the payment of workers' compensation benefits. Appellant/employee, Julie Clavo, filed a claim for compensation benefits on December 14, 2017 (the "2017 Claim") arising out of an April 3, 2008 work-related accident. Appellee/employer, State of Louisiana, through the Board of Supervisors for Louisiana State University Agricultural and Mechanical College, Medical Center of Louisiana at New Orleans ("MCLNO"), filed a peremptory exception of prescription. Ms. Clavo appeals the Office of Workers' Compensation (the "OWC") May 30, 2018 judgment, which granted MCLNO's exception of prescription and dismissed Ms. Clavo's 2017 Claim with prejudice. For the reasons that follow, we affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

Ms. Clavo was employed as a phlebotomist supervisor with MCLNO. She filed a first report of injury form alleging that on or about April 3, 2008, she slipped and fell on a wet stairway, injuring her back, leg, and neck. Ms. Clavo retained Hugh E. McNeely ("Mr. McNeely") to represent her in a claim for workers' compensation benefits (the "Original Claim"). On or around February 11, 2011, Mr. McNeely and counsel for MCLNO represented to the OWC that the

parties had reached a compromise and filed a motion to voluntarily dismiss Ms. Clavo's Original Claim.

On March 28, 2012, Ms. Clavo, now represented by Attorney Deidre Peterson, again filed a claim for compensation benefits arising out of the same April 3, 2008 accident (the "2012 Claim"). The OWC held a trial on the 2012 Claim on July 30, 2012. At the conclusion of Ms. Clavo's case in chief, MCLNO filed a motion for involuntary dismissal pursuant to La. C.C.P. art. 1672.[1] On August 13, 2012, the OWC granted MCLNO's motion for involuntary dismissal and dismissed Ms. Clavo's 2012 Claim with prejudice.

Ms. Clavo filed a complaint with the Office of Disciplinary Counsel ("ODC") against Mr. McNeely on November 27, 2013, alleging, in part, that he had failed to communicate with her and had improperly dismissed her Original Claim without her consent. On December 14, 2017, the Louisiana Supreme Court found that Mr. McNeely should be sanctioned for misconduct in connection with his representation of Ms. Clavo.

On December 14, 2017, Ms. Clavo, through Attorney Peterson, filed the 2017 Claim, again seeking compensation benefits for the April 3, 2008 accident. In addition to asserting that no benefits had been paid, Ms. Clavo alleged the disputed claim arose because Mr. McNeely and the MCLNO attorney had "made

[1] La. C.C.P. art. 1672(B) provides:

> In an action tried by the court without a jury, after the plaintiff has completed the presentation of his evidence, any party, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal of the action as to him on the ground that upon the facts and law, the plaintiff has shown no right to relief. The court may then determine the facts and render judgment against the plaintiff and in favor of the moving party or may decline to render any judgment until the close of all the evidence.

intentional misrepresentations of a fictitious settlement agreement" and committed fraud by voluntarily dismissing her Original Claim.

On March 13, 2018, MCLNO filed an exception of prescription, exception of res judicata, and motion for sanctions in response to the 2017 Claim. MCLNO submitted an affidavit in support of the exception of prescription from its claims adjuster attesting that the last indemnity payment made to Ms. Clavo was on November 20, 2012, and the last medical payment submitted on her behalf was paid on November 6, 2013. On May 30, 2018, the OWC judge sustained MCLNO's exception of prescription and dismissed Ms. Clavo's 2017 Claim with prejudice.

This appeal followed.

LAW AND DISCUSSION

Ms. Clavo raises two assignments of error: that the OWC judge erred in granting MCLNO's exception of prescription; and that she was denied constitutional due process. We will address each of the assigned errors in turn.

Prescription

A timely workers' compensation claim must be brought within (1) one year after the date of the accident; (2) within one year or three years of the last indemnity payment, dependent upon the category of indemnity payment; (3) within one year of the date of manifestation; however, (4) in all cases, claims must be filed no more than three years from the date of the accident. *See* La. R.S. 23:1209(A).[2] La. R.S. 23:1209(C) provides, in pertinent part, that all claims for

[2] La. R.S. 23:1209 provides, in pertinent part:

> A. (1) In case of personal injury, including death resulting therefrom, all claims for payments shall be forever barred unless within one year after the accident or

medical benefits are barred unless "within one year after the accident or death the parties have agreed upon the payments to be made. . . . Where such payments have been made, this limitation shall not take effect until the expiration of three years from the time of making the last payment of medical benefits."

"Prescription is a purely factual determination. Thus, the standard of review on an exception to prescription is manifest error." *Bell v. Glaser,* 2008-0279, p. 4 (La. App. 4 Cir. 7/1/09), 16 So.3d 514, 516. In general, the burden of proof rests with the party asserting the exception of prescription; however, in the event the claim is prescribed on its face, that burden shifts to the plaintiff to negate that presumption of prescription by putting forth evidence of a suspension or interruption. *Taranto v. Louisiana Citizens Property Ins. Corp.*, 2010-0105, p. 5 (La. 3/15/11), 62 So.3d 721, 726 (citations omitted).

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death the parties have agreed upon the payments to be made under this Chapter, or unless within one year after the accident a formal claim has been filed as provided in Subsection B of this Section and in this Chapter.

(2) Where such payments have been made in any case, the limitation shall not take effect until the expiration of one year from the time of making the last payment, except that in cases of benefits payable pursuant to R.S. 23:1221(3) this limitation shall not take effect until three years from the time of making the last payment of benefits pursuant to R.S. 23:1221(1), (2), (3), or (4).

(3) When the injury does not result at the time of or develop immediately after the accident, the limitation shall not take effect until expiration of one year from the time the injury develops, but in all such cases the claim for payment shall be forever barred unless the proceedings have been begun within three years from the date of the accident.

(4) However, in all cases described in Paragraph (3) of this Subsection, where the proceedings have begun after two years from the date of the work accident but within three years from the date of the work accident, the employee may be entitled to temporary total disability benefits for a period not to exceed six months and the payment of such temporary total disability benefits in accordance with this Paragraph only shall not operate to toll or interrupt prescription as to any other benefit as provided in R.S. 23:1221.

In the case *sub judice*, MCLNO argues that the OWC judge properly sustained its exception of prescription because Ms. Clavo failed to present any evidence that she filed the 2017 Claim within three years from the time of the last payment of indemnity benefits or medical benefits. Ms. Clavo does not contest that she brought her 2017 Claim after the statutory time delays outlined in La. R.S. 23:1209(A) and (C) had expired. Rather, she argues the doctrine of *contra non valentem* suspended the prescriptive periods as to her 2017 Claim because Mr. McNeely and MCLNO's attorney wrongfully dismissed her Original Claim without her consent.

Contra non valentem is a well-settled Louisiana jurisprudential equitable doctrine created as an exception to the general rules of prescription. *See Wimberly v. Gatch*, 1993-2361 (La. 4/11/94), 635 So.2d 206, 211 (citations omitted). The doctrine acknowledges that under certain circumstances, "[t]he principles of equity and justice . . . demand that prescription be suspended because plaintiff was effectually prevented from enforcing [her] rights for reasons external to [her] own free will." *Id.* Our courts have recognized four categories in which the doctrine of *contra non valentum* doctrine applies to suspend prescription:

> 1. Where there was some legal cause which prevented the courts or their officers from taking cognizance of or acting on the plaintiff's action;
>
> 2. Where there was some condition coupled with a contract or connected with the proceedings which prevented the creditor from suing or acting;
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> 3. Where the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action; and
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> 4. Where some cause of action is not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant.

See Henderson v. SNL Distribution Services, Inc., 2011-1638, p. 6 (La. App. 4 Cir. 4/11/12), 89 So.3d 417, 421 (citations omitted).

Upon review of the facts of this case, Ms. Clavo has failed to satisfy any of the four categories to successfully invoke the doctrine of *contra non valentem*. Specifically, we find no evidence to show that Ms. Clavo's 2017 Claim was not known or reasonably knowable to Ms. Clavo. Indeed, the record supports the opposite conclusion.

The evidence reveals that Ms. Clavo was aware in 2012 and 2013 that her Original Claim had been subject to a voluntary dismissal by Mr. McNeely. As a result of that dismissal, Ms. Clavo retained Attorney Peterson as counsel who, in turn, filed the 2012 Claim. Ms. Clavo participated in the July 30, 2012 trial of the 2012 Claim, which was dismissed with prejudice on August 13, 2012, when the OWC judge granted MCLNO's motion for involuntary dismissal. The record contains no documentation that Ms. Clavo appealed the August 2012 judgment. Moreover, on November 27, 2013, Ms. Clavo filed her attorney disciplinary complaint against Mr. McNeely emphasizing, as an ethical violation, his dismissal of her Original Claim without her consent.

Hence, Ms. Clavo had knowledge of her 2017 Claim such that it could have been timely brought within the statutory prescriptive periods after MCLNO made the last payments of indemnity and medical benefits in November 2012 and November 2013, respectively. Thus, the doctrine of *contra non valentem* does not apply to suspend prescription in this case.

Due Process

Ms. Clavo next argues the OWC judge committed constitutional error in dismissing her 2017 Claim in that she was wrongfully deprived of "life, liberty, or property" without due process of law as afforded by the Louisiana Constitution. She alleges that attorneys for MCLNO wrongfully acted in concert with Mr. McNeely to deprive her of her right to assert a claim for workers' compensation benefits and the OWC judges improperly relied on fraudulent conduct in rendering their judgments.

We initially note the issue of constitutional violations was not raised before the OWC. Established jurisprudence provides that, in general, issues not argued before the trial court for decision will not be considered for the first time on appeal, unless the interest of justice clearly requires otherwise. *See Hurst v. Department of Police*, 2014-0119, p. 6 (La. App. 4 Cir. 7/23/14), 146 So.3d 857, 860-61; *see also* Uniform Rules, Courts of Appeal, Rule 1-3.[3] Nevertheless, even if this Court were to apply "the interest of justice" standard to review this alleged error, we find no evidence in the record to show Ms. Clavo was wrongfully deprived of due process. The record before us makes clear that the OWC provided Ms. Clavo with the requisite due process protections afforded parties asserting claims under the Louisiana Workers' Compensation Act. This assignment of error is without merit.

CONCLUSION

[3] Uniform Rules, Courts of Appeal, Rule 1-3 provides, in pertinent part, that "[t]he Courts of Appeal will review only issues which were submitted to the trial court and which are contained in specifications or assignments of error, unless the interest of justice clearly requires otherwise.

The doctrine of *contra non valentem* does not apply to suspend prescription for Ms. Clavo's 2017 Claim; thus, we find no manifest error in the OWC's judgment that granted MCLNO's peremptory exception of prescription. Accordingly, the judgment of the OWC is affirmed.

AFFIRMED