NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2005 CA 0746

SAM COLLINS AND BARBARA COLLINS, INDIVIDUALLY AND AS REPRESENTATIVES FOR THEIR INTERDICTED SON, SHANE COLLINS; RICHARD JACKSON; NUTMEG INSURANCE COMPANY; AND TWIN CITY FIRE INSURANCE COMPANY

VERSUS

STAR INSURANCE COMPANY; FLEMING & HALL ADMINISTRATORS, INC.; BREAZEALE, SACHSE & WILSON, L.L.P.

Judgment Rendered: SEP 0 1 2006

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On Appeal from the 19th Judicial District Court
In and for the Parish of East Baton Rouge, State of Louisiana
Trial Court No. 518,259, Division "I"

Honorable R. Michael Caldwell, Judge Presiding

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BEFORE: PARRO, McDONALD, AND HUGHES, JJ.

HUGHES, J.

This appeal challenges the dismissal, on the basis of peremption, of claims for legal malpractice, arising out of tort suits for damages resulting from a vehicular collision. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

The vehicular collision giving rise to the tort suits at issue occurred on January 4, 2000, when an eighteen-wheeler owned by Mike's Trucking Company, Inc. (Mike's Trucking)[1] and driven by Dwight Daigle rear-ended a truck owned by Dixie Electric Membership Cooperative (DEMCO) and occupied by two DEMCO employees, Shane Collins and Richard Jackson. Mr. Collins and Mr. Jackson suffered serious injuries as a result of the accident.

At the time of the accident, Mike's Trucking had liability insurance through Star Insurance Company (Star) with a $1 million policy limit, which also provided for the payment of judicial interest and court costs. DEMCO had UM coverage through Nutmeg Insurance Company (Nutmeg) and Twin City Fire Insurance Company (Twin City), with aggregate policy limits of $20 million.

Tort actions were filed by Mr. Collins (along with his parents, Sam and Barbara Collins) and Mr. Jackson against the tortfeasors, Dwight Daigle, Mike's Trucking, and their insurer, Star, as well as against DEMCO's UM carriers, Nutmeg and Twin City. During the course of that litigation, Mr. Daigle, Mike's Trucking, and Star were provided legal representation by Breazeale, Sachse & Wilson, L.L.P. (BSW).

A tentative settlement agreement was reached between the tort

[1] The sole shareholders of Mike's Trucking were Michael and Dianne Chauffe.

plaintiffs and the tort defendants for Star's policy limits in the Fall of 2001, but was not finalized.[2] On the scheduled trial date in that case, January 22, 2002, and following allegations of a conflict of interest between BSW and the tort defendants, BSW withdrew as legal counsel in the case, and the trial was continued in order for the defendants to secure alternative representation. Thereafter, on March 24, 2003, a jury trial was commenced on the Collins tort claim and a judgment was rendered for damages in the amount of $16,555,000.00. It was stipulated that Mr. Jackson's damages were $1.2 million.

Prior to the March 2003 jury trial, Shane Collins (along with his parents, Sam and Barbara Collins) and Richard Jackson entered into a settlement agreement with DEMCO's UM carriers for $10 million and for $1.2 million, respectively. In August of 2003, plaintiffs also released Dwight Daigle and Mike's Trucking, in exchange for an assignment by those defendants to plaintiffs and the UM carriers of any claims Mr. Daigle and Mike's Trucking had against third parties for malpractice and/or bad faith failure to settle the claims.

The instant suit was thereafter filed on October 29, 2003 by: Sam and Barbara Collins, individually, and as representatives of their interdicted son, Shane Collins; Richard Jackson; Nutmeg; and Twin City. Named as defendants were: BSW, Star, and Star's administrator, Fleming & Hall Administrators, Inc. (Fleming).

In this suit, plaintiffs allege that BSW committed malpractice in its handling of the defense of the underlying tort action by continuing to represent the tortfeasors and Star despite a conflict of interest between these clients, failing to "aggressively" secure the release of the tortfeasors through

[2] Liability was not disputed; only the terms of the settlement agreement were in contention.

settlement and instead "haggling" over settlement terms, and by failing to keep the tortfeasors fully informed of the extent of the tort victims' injuries and "their willingness to settle for policy limits." Plaintiffs further allege that Star and Fleming violated their obligations of good faith and fair dealing in failing to settle the claims promptly, thus exposing the insured tortfeasors to an excess judgment. Star and Fleming were also alleged to have been in bad faith in failing to keep the insured tortfeasors apprised of the progress of the tort suits, in failing to adequately protect the interests of the insured tortfeasors, in failing to properly adjust and settle the claims, and in favoring their own interests over that of the insured tortfeasors. The defendants were alleged to be liable for penalties and attorney's fees under LSA-R.S. 22:658 and LSA-R.S. 22:1220, and for the amounts of the awards in the underlying tort actions, less the amounts previously paid by Star.

In its defense of the suit, BSW asserted exceptions of venue, peremption, prematurity, lack of procedural capacity, no right of action, no cause of action, and improper cumulation of actions.[3] Star asserted cross-claims against Fleming and BSW for failure to timely forward information concerning the progress of the case, the extent of plaintiffs' injuries, and details of settlement offers. Fleming asserted numerous exceptions and defenses to the action.[4]

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[3] The suit was originally filed in Iberville Parish but was later transferred by agreement of the parties to East Baton Rouge Parish, and the exception as to venue was withdrawn. The exceptions as to prematurity, lack of procedural capacity, and improper joinder were also resolved and withdrawn.

[4] Fleming's exceptions of no cause of action as to plaintiffs' claims under LSA-R.S. 22:658 and LSA-R.S. 22:1220 were sustained by the trial court and all claims arising out of those statutes were dismissed as to Fleming. Fleming's exception of no right of action as to Star's cross-claim that Star was a beneficiary of a stipulation pour autri in a contract between Fleming and Meadowbrook, Inc. was also sustained, dismissing that claim as to Fleming. Fleming's remaining exceptions as to other causes of action asserted against it were denied. These rulings have not been raised as an issue in the appeals currently before this court.

Following a hearing on BSW's exception of no cause of action, based on its claim of peremption, judgment was rendered by the trial court dismissing Star's cross-claim as to BSW.[5] Star appeals this judgment assigning as error the trial court ruling finding its action against BSW was perempted.

LAW & ANALYSIS

Star contends that the applicable peremptive period did not begin to run until judgment was rendered in the underlying tort action on March 27, 2003. Therefore Star claims that its assertion of a legal malpractice cross-claim against BSW was timely filed on March 22, 2004 in response to plaintiffs' October 29, 2003 suit against it for bad faith failure to settle the underlying tort claim.

The time limitation for filing a legal malpractice action is set forth in LSA-R.S. 9:5605(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.

[5] BSW's claim of peremption as to the plaintiffs' claims was also sustained by the trial court and the plaintiffs' demands as to BSW were dismissed. Plaintiffs have appealed that judgment to this court and our decision in that appeal is also rendered this date under Docket Number 2005 CA 0014.

Subsection B of this statute states that the one-year and three-year periods of limitation provided in Subsection A are *both* peremptive periods within the meaning of LSA-C.C. art. 3458. See also **Robin v. Allstate Ins. Co.**, 2002-689 (La. App. 3 Cir. 2/5/03), 844 So.2d 41, writ denied, 2003-1818 (La. 10/17/03), 855 So.2d 763; **Dauterive Contractors, Inc. v. Landry and Watkins**, 2001-1112 (La. App. 3 Cir. 3/13/02), 811 So.2d 1242; **Broussard v. F.A. Richard & Assocs., Inc.**, 98-1167 (La. App. 3 Cir. 3/17/99), 732 So.2d 578, writ denied, 99-1048 (La. 6/4/99), 744 So.2d 625. Subsection B of LSA-R.S. 9:5605 further states that in accordance with LSA-C.C. art. 3461, these peremptive periods cannot be renounced, interrupted, or suspended.

When a client's legal malpractice claim is, on its face, time-barred by the accrual of the LSA-R.S. 9:5605 peremptive period, the burden of proof shifts to the client to show the claim has not perempted. See **Waldrop v. Hurd**, 39,855 (La. App. 2 Cir. 6/29/05), 907 So.2d 890; **Seaux v. Doucet**, 96-854 (La. App. 3 Cir. 12/11/96), 685 So.2d 537.

The one-year time limitation set forth in LSA-R.S. 9:5605 commences to run when a claimant knew or should have known of the existence of facts that would have enabled him to state a cause of action for legal malpractice. **Paternostro v. LaRocca**, 2001-0333, p. 5 (La. App. 1 Cir. 3/28/02), 813 So.2d 630, 634. In determining when a claimant should have discovered a cause of action, the facts should be considered in light of a reasonable man standard. That is, a claimant who had knowledge of facts that would place a reasonable man on notice that malpractice may have been committed shall be held to have been subject to the commencement of peremption by virtue of such knowledge, even though he asserts a limited ability to comprehend and evaluate the facts. **Id.** The focus is on the appropriateness of the

claimant's actions or inactions. **Carroll v. Wolfe**, 98-1910, p. 6 (La. App. 1 Cir. 9/24/99), 754 So.2d 1038, 1041.

The peremptory period for malpractice can begin to run even when the client does not have *actual* knowledge of facts that would entitle him to bring a suit where there is *constructive* knowledge of same. Constructive knowledge is whatever notice is enough to excite attention and put an injured party on guard and call for inquiry. Such notice is tantamount to knowledge or notice of everything to which a reasonable inquiry may lead. Such information or knowledge as ought to reasonably put the alleged victim on inquiry is sufficient to start the running of the peremptive period. **Atlas Iron and Metal Co. v. Ashy**, 2005-458, p. 5 (La. App. 3 Cir. 1/4/06), 918 So.2d 1205, 1210, citing **Campo v. Correa**, 2001-2707, pp. 11-12 (La. 6/21/02), 828 So.2d 502, 510-11.

The question in this case then becomes, when did the clients have knowledge sufficient to excite the attention of a reasonable man, putting that party on guard and calling for inquiry as to whether malpractice may have been committed?

In ruling that Star's malpractice action was perempted prior to the filing of its cross-claim, the trial judge found as follows:

> I believe in a strict interpretation of statutes. And as I read the statute, it is as Mr. Roy stated; that no action may be brought if these periods have run, no matter how it is styled. And in this case though it is initially a cross claim, now a third party demand against [BSW] by their client, [Star], it is in fact and in truth a claim for malpractice against [BSW]. And it would be inconsistent of me to hold that Star's claim had not perempted after holding that Mike's Trucking and ... Mr. Daigle's ... had prescribed. As the Reeder case has indicated, it is possible that a claim can be perempted before the cause of action arises. Unfortunately, that's what has happened here in this case. When I read the statute dealing with claims against attorneys, that is a possible and permissible result. Perhaps the Act does need to be amended; but as it now reads, that's what it says, that if a claim isn't brought ... within one year from the date of

> knowledge of the facts -- and it's not knowledge [of] whether there's a malpractice claim, and it's not knowledge of whether somebody is going to bring a claim against you for which you might have a claim in indemnity or contribution -- it is in one year from the date of knowledge of the facts. And, clearly, [Star] had knowledge at the same time that Mike's Trucking and Mr. Daigle had knowledge, and the claim against [BSW] was perempted by that.

The factual findings of a trial court made in connection with a hearing on a claim of peremption are subject to the manifest error standard of review. If the findings are reasonable in light of the record reviewed in its entirety, an appellate court may not reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. **Perez v. Trahant**, 2000-2372, p. 7 (La. App. 1 Cir. 12/28/01), 806 So.2d 110, 116, writs denied, 2002-0847, 2002-0901 (La. 8/30/02), 823 So.2d 953.

After a thorough review of the record presented on appeal of this matter, we are unable to say that the trial court's factual findings on the issue of peremption are manifestly erroneous. The evidence introduced during the hearing held in this matter presents a reasonable basis for the findings of the trial court.

Star acknowledges that in December of 2001, during an on-site audit of Fleming's claim file in the underlying suit, it first became aware of previous settlement offers submitted by plaintiffs to BSW in letters dated October 8, 2001 and November 5, 2001. Also during that audit, Star became aware of an Independent Medical Examination of Shane Collins revealing the extensive nature of his injuries. The audit further revealed a letter dated October 10, 2001 from BSW recommending that a policy limit offer should be made. Further, Star obtained information on January 22, 2002 that BSW

was being accused of mishandling the settlement process by plaintiffs' counsel.

When the parties arrived for trial on January 22, 2002, plaintiffs' attorney presented a handwritten settlement proposal to the BSW's lead counsel. In that settlement proposal, Mike's Trucking and Dwight Daigle were being asked to assign their rights to plaintiffs against "third parties" who had allegedly mishandled settlement negotiations. BSW's lead counsel testified that he told his clients at the time the offer was received and was being reviewed that the reference to "third parties" meant himself and the BSW firm. This information was sufficient to excite the attention of a reasonable client that malpractice may have been committed and should have prompted Star to investigate that possibility. Further, Star hired new counsel immediately upon BSW's withdrawal, and this new counsel conferred with BSW as to the foregoing legal proceedings in January, 2002. Thus, Star had knowledge sufficient to trigger the running of the peremptive period more than one year prior to filing its action.

Star contends on appeal that it could not have brought an action against BSW until after an excess judgment had been rendered because there is no cause of action for a bad faith claim against an insurer without an excess judgment having been rendered. Star argues that its claim against BSW is under LSA-C.C. art. 3001,[6] and that as an "agent" BSW is responsible to Star as the "principal" for loss sustained as result of the failure in performance of BSW as Star's agent. However, we agree with the trial

[6] "The mandatary is bound to fulfill with prudence and diligence the mandate he has accepted. He is responsible to the principal for the loss that the principal sustains as a result of the mandatary's failure to perform." LSA-C.C. art. 3001.

court's assessment of this argument, that "no matter how it is styled" Star's claim against BSW is for malpractice.[7]

Although Star cites numerous cases involving bad faith failure to settle, in which no cause of action was found to exist against an insurer until an excess judgment had been rendered against the insured, a malpractice action against an attorney is governed exclusively by LSA-R.S. 9:5605. Under that statute, whether damage has actually been sustained is not the criteria for evaluating a claim of peremption; rather, it is the date on which the injured client has or should have knowledge of the act of malpractice that begins the running of the one-year peremptive period.

In **Reeder v. North**, 97-0239 (La. 10/21/97), 701 So.2d 1291, the supreme court specifically rejected prior jurisprudence holding that the peremptive period for malpractice does not begin to run until the facts ripen into a viable cause of action, noting that "[w]hile the terms of the legal malpractice statute of limitations statute may seem unfair in that a person's claim may be extinguished before he realizes the full extent of his damages, the enactment of such a statute of limitations is exclusively a legislative prerogative." **Id.** at 1296. The supreme court determined that the legislature was "particularly clear" in wording LSA-R.S. 9:5605 "so as to leave no doubt as to its intent." **Id.** at 1295.

This court in **Kennedy v. Macaluso**, 99-3016, pp. 5-6 (La. App. 1 Cir. 2/16/01), 791 So.2d 697, 700, writ denied, 2001-0691 (La. 5/4/01), 791 So.2d 655, citing **Reeder**, specifically rejected the proposition that under

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[7] Civil Code articles 2985 through 3032 provide the general law on representation and mandate. However, it is axiomatic that more specific statutes prevail over general laws. See **McPherson v. Foster**, 2003-2696, p. 1 (La. App. 1 Cir . 10/29/04), 889 So.2d 282, 295. Because LSA-R.S. 9:5605 by its terms applies to an "action for damages against any attorney ... whether based upon tort, or breach of contract, or otherwise, arising out of an engagement to provide legal services" and restricts the viability of such an action to the peremptive period specified therein, this specific law prevails over the more general laws on representation and mandate.

LSA-R.S. 9:5605 "appreciable harm" flowing from the attorney's negligent conduct is necessary to establish a cause of action upon which the client may sue, as provided in **Braud v. New England Ins. Co.**, 576 So.2d 466 (La. 1991). **Kennedy v. Macaluso** distinguished **Braud** by pointing out that it was decided prior to the enactment of LSA-R.S. 9:5605. **Kennedy v. Macaluso** holds that the one-year peremptive period of LSA-R.S. 9:5605 begins to run on the date a plaintiff knows or should know of an attorney's alleged wrongful conduct. **Kennedy v. Macaluso**, 791 So.2d at 700-01.

Because Star knew or should have known of the facts on which any malpractice action against BSW would have been based, no later than January 2002, when it asserted a cross-claim against BSW in March 2004, the action was perempted.[8] Consequently, we are unable to conclude that the trial court lacked a reasonable basis for finding that any malpractice action available to Star, arising out of BSW's representation in the tort action at issue, was perempted prior to the filing of their claim.

CONCLUSION

For the reasons cited herein, we affirm the judgment of the trial court dismissing the cross-claim of Star Insurance Company for indemnity based

[8] The testimony of BSW's lead counsel was uncontroverted that one cause for concern in completing the settlement from the defense standpoint was the fact that plaintiffs were asserting brain damage arising from the accident, yet no interdiction proceeding had been filed, and there was some question as to the plaintiff's capacity to contract a compromise. The record reflects that an interdiction proceeding was filed in the 21st Judicial District Court on November 27, 2001 as to Shane Collins, and that his parents were appointed as provisional curator and undercurator on December 27, 2001. However, evidence in the record reflects that plaintiffs' counsel had made a written demand that settlement documents be signed and full payment be tendered by Friday, December 21, 2001, but verbally agreed to an extension until Wednesday, December 26, 2001. BSW attorneys testified that the settlement documents were prepared and submitted to plaintiffs' counsel's office on December 26, 2001, but that plaintiffs' counsel would not return their phone calls on December 26, 2001 or thereafter. BSW attorneys further testified that on January 7, 2002, they appeared in the office of the trial judge on the tort action and solicited a telephone conference with plaintiffs' counsel, during which plaintiffs' counsel essentially refused to complete the settlement. The record further reflects that on January 17, 2002 the 21st Judicial District Court granted authority to Shane Collins' curator to enter into a settlement with Nutmeg and Twin City for $10 million.

on legal malpractice as to Breazeale, Sachse & Wilson, L.L.P. All costs of this appeal are assessed to Star Insurance Company.

AFFIRMED.