NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2014 CA 1555

LINDA ROSENBERG-KENNETT

VERSUS

CITY OF BOGALUSA

Judgment Rendered: APR 24 2015

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On Appeal from the
22nd Judicial District Court
In and for the Parish of Washington
State of Louisiana
Trial Court No. 102,140

Honorable William J. Knight, Judge Presiding

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BEFORE: WHIPPLE, C.J., McCLENDON, AND HIGGINBOTHAM, JJ.

HIGGINBOTHAM, J.

Defendant challenges the trial court's denial of its motion for summary judgment regarding prescription, grant of plaintiff's motion for summary judgment regarding liability, and judgment on the merits regarding costs.[1]

FACTUAL AND PROCEDURAL HISTORY

In March 2009, shortly after her father passed away, Ms. Linda Rosenberg-Kennett requested that the City of Bogalusa Water Department turn the water off at the former home of her deceased father located at 841 Avenue B, in Bogalusa, Louisiana. Around that time, the City of Bogalusa sent out an employee to turn the water valve off. Prior to January 22, 2010, the temperature in Bogalusa dropped well below freezing causing the pipes in the home to burst. As a result of the pipes freezing and bursting, the home sustained water damage. No one was living in the home at that time; however, a couple of days later Ms. Rosenberg-Kennett discovered the problem. It was later determined that initially the City of Bogalusa had not turned off the water. After repeated requests from Ms. Rosenberg-Kennett, on February 1, 2010, the City of Bogalusa turned off the water valve.

On January 31, 2011, Ms. Rosenberg-Kennett filed suit against the City of Bogalusa seeking damages resulting from the pipes bursting. In her petition, she contends that the damages were solely caused by the negligent act of the City of Bogalusa in failing to properly turn the water off at the home.

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[1] A judgment that does not determine the merits, but only determines preliminary matters in the course of the action, is an interlocutory judgment, which is appealable only when expressly provided by law. La. Code Civ. P. arts. 1841 & 2083(C). However, when, as in this case, an unrestricted appeal is taken from a final judgment, the appellant is entitled to seek review of all adverse interlocutory judgments rendered in the same case, in addition to the review of the final judgment. **Welch v. East Baton Rouge Parish Metropolitan Council**, 2010-1531 (La. App. 1 Cir. 3/25/11), 64 So.3d 244, 247 n. 2.

Subsequently, the City of Bogalusa filed a motion for summary judgment based on prescription, contending that Ms. Rosenberg-Kennett's claims prescribed prior to her filing her petition for damages. This motion was dismissed by the trial court. Ms. Rosenberg-Kennett then filed a motion for partial summary judgment seeking partial summary judgment as to the issue of liability. The trial court granted summary judgment in her favor, finding that the City of Bogalusa was liable for the damages sustained by Ms. Rosenberg-Kennett.

The matter then proceeded to trial on the issue of damages. After completion of the trial, judgment was signed ordering the City of Bogalusa to pay to Ms. Rosenberg-Kennett the sum of $50,618.95, plus court costs and expert witness fees, and denying the City of Bogalusa's claim that Ms. Rosenberg-Kennett failed to mitigate her damages.

The City of Bogalusa appealed, urging the following assignments of error:

1) The trial court erred in denying its motion for summary judgment based on prescription.
2) The trial court erred in granting Ms. Rosenberg-Kennett's motion for summary judgment on the issue of liability.
3) The trial court erred in awarding Ms. Rosenberg-Kennett damages exceeding the value of the home.
4) The trial court erred in failing to find that Ms. Rosenberg-Kennett did not mitigate her damages.

LAW AND ANALYSIS

Summary Judgment

Appellate courts review summary judgments de novo, using the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. **Schroeder v. Board of Supervisors of Louisiana State**

University, 591 So.2d 342, 345 (La. 1991). A court must grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, admitted for purposes of the motion for summary judgment, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law." La. Code Civ. P. art. 966(B)(2). The summary judgment procedure, which is designed to secure the just, speedy, and inexpensive determination of civil actions, is now favored in our law. La. Code Civ. P. 966(A)(2). Pursuant to that procedure:

> The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact.

La. Code Civ. P. art. 966(C)(2). As this court has explained, a "genuine issue" is a "triable issue," or one as to which reasonable persons could disagree. **Champagne v. Ward**, 2003-3211 (La. 1/19/05), 893 So.2d 773, 777. A "material fact" is a fact whose existence or non-existence is essential to a cause of action under the applicable theory of recovery. **Id.**

The Louisiana Supreme Court has held that an appellate court should not restrict its fact review to affidavits and pleadings in support of the motion for motion for summary judgment where the denial of the motion for summary judgment is appealed after the matter has been fully tried. **Hopkins v. American Cyanamid Company**, 95-1088 (La. 1/16/96), 666 So.2d 615, 617. In so ruling, the Supreme Court explained as follows:

> [O]nce a case is fully tried, the affidavits and other limited evidence presented with a motion for summary judgment – later denied by the district court – are of little or no value. Appellate courts should not rule on appeal after a full merits trial on the strength alone of affidavits in support of a motion for summary judgment that was not sustained in the district court. In such cases, appellate courts should review the **entire record.** [Emphasis added.]

Hopkins, 666 So.2d at 624.

This matter came before the trial court on a motion for summary judgment on liability and a trial on the merits on damages. As such, and in light of the pronouncements in **Hopkins**, we conclude that any review at this juncture of the denial of the City of Bogalusa's motion for summary judgment should likewise be based on the entire record. See **Hopkins**, 666 So.2d at 624.

Prescription

A party generally must assert a delictual claim within one year from the date the injury or damage is sustained. La. Civ. Code art. 3492. When it is not obvious from the face of the petition that the claim is prescribed, the burden rests on the defendant or party pleading prescription. See **Milbert v. Answering Bureau, Inc.**, 13-0022 (La. 6/28/13), 120 So.3d 678, 684. Although typically asserted through the procedural vehicle of the peremptory exception, the defense of prescription may also be raised by motion for summary judgment. **Doe v. Jones**, 2002-2581 (La. App. 1 Cir. 9/26/03), 857 So.2d 555, 557; **Lasseigne v. Earl K. Long Hospital**, 316 So.2d 761, 762 (La. App. 1 Cir. 1975). When prescription is raised by a motion for summary judgment, review is de novo, using the same criteria used by the trial court in determining whether summary judgment is appropriate. **Doe**, 857 So.2d at 557-58.

The City of Bogalusa asserted in its motion for summary judgment that Ms. Rosenberg-Kennett's claims had prescribed pursuant to the one-year liberative

prescription of La. Civ. Code arts. 3492 and 3493.[2] The City of Bogalusa argued that Ms. Rosenberg-Kennett acknowledged that she acquired knowledge of the pipes bursting "some days later" after the freeze in January 2010 and then made multiple requests to the City of Bogalusa to turn off the water, thereby acquiring the knowledge of the water damage more than one year before she filed suit on January 31, 2011.

Ms. Rosenberg-Kennett opposed the motion. She did not dispute that she discovered the damages before January 31, 2010, but instead argued that the water continued to flow from the pipes and cause damage until the water was finally turned off by the City of Bogalusa on February 1, 2010, and the City of Bogalusa's failure to act constituted a continuing tort.

The record does not indicate the exact date that Ms. Rosenberg-Kennett discovered the water damage, but as pointed out by the City of Bogalusa, Ms. Rosenberg-Kennett admitted that she acquired knowledge of the alleged damage in question "some days later" after the pipes burst in January of 2010, and long enough prior to February 1, 2010 that she had time to make "multiple requests" for the City of Bogalusa to come and shut the water valve off.

During trial, Ms. Rosenberg-Kennett introduced the report of her expert, Mr. Tony R. Clark, which stated that Ms. Rosenberg-Kennett reported that a

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[2] Louisiana Civil Code art. 3492 provides:

> Delictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained. It does not run against minors or interdicts in actions involving permanent disability and brought pursuant to the Louisiana Products Liability Act or state law governing product liability actions in effect at the time of the injury or damage.

Louisiana Civil Code art. 3493 provides:

> When damage is caused to immovable property, the one year prescription commences to run from the day the owner of the immovable acquired, or should have acquired, knowledge of the damage.

residential property that she owned was water damaged on or about January 22, 2010. Further, the report notes that an overnight low of twenty-one degrees was recorded on January 11, 2010 and the temperature fell below freezing for several days during that period.

Considering that Ms. Rosenberg-Kennett does not dispute that she discovered the water damage before January 31, 2010, and the evidence regarding when the freeze took place and her subsequent multiple requests to the City, we find that the City of Bogalusa proved that Ms. Rosenberg-Kennett discovered the damages prior to one year before filing her petition for damages against the City of Bogalusa. Therefore, we must determine whether the actions of the City of Bogalusa constituted a continuing tort.

Prescription begins to run when it is determined that damage was sustained. **Landry v. Blaise Inc.**, 2002-0822 (La. App. 4 Cir. 10/23/02), 829 So.2d 661, 664. Damage is sustained for the purposes of prescription when it has manifested itself with sufficient certainty to support the accrual of a cause of action. **Landry**, 892 So.2d at 664-65. Where a claimant has suffered some but not all of his damages, prescription runs from the day on which he suffered actual and appreciable damages even though he may thereafter realize more precise damages. **Harvey v. Dixie Graphics, Inc.**, 593 So.2d 351, 354 (La. 1992). Thus, even where there are ongoing damages, prescription does not run from each incident of damages; rather, it runs from the day that actual and appreciable damages were noticed or suffered by the claimant.

The theory of continuing tort has its roots in property damage cases and requires that the operating cause of the injury be a continuous one which results in continuous damage. **Crump v. Sabine River Authority**, 98-2326 (La. 6/29/99), 737 So.2d 720, 726. Where the cause of injury is a continuous one

giving rise to successive damages, prescription does not begin to run until the conduct causing the damage is abated. **South Central Bell Telephone Co. v. Texaco, Inc.**, 418 So.2d 531, 533 (La. 1982). As noted by the supreme court in **Crump**, 737 So.2d at 726, and quoting from A.N. Yiannopoulos's treatise on Louisiana predial servitudes:

> [A] distinction is made between continuous and discontinuous causes of injury and resulting damage. When the operating cause of the injury is 'not a continuous one of daily occurrence,' there is a multiplicity of causes of action and of corresponding prescriptive periods. Prescription is completed as to each injury, and the action is barred upon the lapse of one year from the date in which the plaintiff acquired, or should have acquired, knowledge of the damage....[This is to be distinguished from the situation where] the 'operating cause of the injury is a continuous one, giving rise to successive damages from day to day ....' [Citations omitted.]

Our review of the record indicates that Ms. Rosenberg-Kennett had first-hand knowledge of the actual and appreciable damage prior to January 31, 2010. Ms. Rosenberg-Kennett testified that when she first went to the property after being notified of the water, she saw a "gusher outside the bathroom window" and when she went inside the home she saw "[w]ater coming from everywhere" including the ceilings and the water faucets and connections. She stated that she saw the cabinetry "destroyed." This evidence was certainly sufficient for Ms. Rosenberg-Kennett to have "acquired knowledge of the damage" on the day she went to the property.

The action of the City of Bogalusa is not in the nature of a continuing tort. Ms. Rosenberg-Kennett's cause of action against the City of Bogalusa began to run when she first discovered actual and appreciable damages due to the water pipes bursting, not when the water was turned off by the City. The City of Bogalusa's alleged failure to turn the water valve off was a single operating cause of the damages. The continuous flow of water was simply the continuing ill effect

of the original wrongful act. See **Crump**, 737 So.2d at 729. As Ms. Rosenberg-Kennett did not file suit within one year of noticing actual and appreciable damages, and the action of the City of Bogalusa did not constitute a continuing tort, her cause of action against the City of Bogalusa has prescribed.[3]

CONCLUSION

For the foregoing reasons, the August 3, 2012 judgment of the trial court denying the City of Bogalusa's motion for summary judgment is reversed and summary judgment is hereby granted in favor of the City of Bogalusa, dismissing Ms. Rosenberg-Kennett's claims against it with prejudice. Further, the September 27, 2013 judgment granting Ms. Rosenberg-Kennett's motion for partial summary judgment as to liability and the October 8, 2013 judgment awarding damages are vacated. All costs of the appeal are assessed to Ms. Rosenberg-Kennett.

AUGUST 3, 2012 JUDGMENT REVERSED; SEPTEMBER 27, 2013 AND OCTOBER 8, 2013 JUDGMENTS VACATED; AND RENDERED.

[3] Having found that Ms. Rosenberg-Kennett's case has prescribed, we need not address the City of Bogalusa's remaining assignments of error.