NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2017 CA 0996

RAY PERISO

VERSUS

BAN VU

Judgment Rendered: MAR 02 2018

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Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Case No. 2011-14078

The Honorable Reginald T. Badeaux, Judge Presiding

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Jamie Frazier

* * * * * * * *

BEFORE: McCLENDON, WELCH, AND THERIOT, JJ.

THERIOT, J.

This appeal arises from a final judgment of the Twenty-Second Judicial District Court, sustaining the exception of peremption on behalf of the appellees, Jamie Frazier and Frazier Insurance Agency, Inc. (Frazier Insurance), and against the appellant, Ban Vu. For the reasons stated herein, we affirm the judgment of the trial court.

FACTS AND PROCEDURAL HISTORY

The instant case is the third appeal in a matter, which began as a suit in tort filed by Ray Periso after he fell at least fifteen (15) feet to the ground on April 28, 2011, when a balcony railing collapsed at the property located at 861 Ashville Drive, Slidell, Louisiana (the rental property). Mr. Vu filed a third party demand against Southern Fidelity Insurance Company (SFIC), Frazier Insurance, and Mr. Frazier on April 24, 2012. Mr. Vu alleged that SFIC issued a policy of insurance identified as LSD 0026081 01 07 (the insurance policy) through agent Mr. Frazier and Frazier Insurance, effective August 18, 2010 to August 18, 2011, that provided insurance coverage for the rental property he owned located at 859-865 Ashville Drive, Slidell, Louisiana.

In the first appeal, this Court affirmed the summary judgment dismissing SFIC. Mr. Vu had alleged in his third party demand that SFIC had negligently failed to provide liability coverage on the rental property as Mr. Vu had requested, or failed to notify him that it had not obtained the requested coverage, even though it was allegedly indicated to him that personal liability coverage was provided. This Court found that the insurance policy relied upon by Mr. Vu did not provide personal liability coverage, See *Periso v. Vu*, 2013-1601 (La. App. 1 Cir. 7/17/14), 2014WL3535342 (unpublished).

Following this Court's ruling in the first appeal, Mr. Frazier and Frazier Insurance filed a peremptory exception raising the objection of peremption, asserting that the claims of Mr. Vu were perempted by the one (1) and three (3) year preemptive periods of La. R.S. 9:5606. The memorandum in support of the exception had several exhibits attached. The trial court signed a judgment on December 23, 2015, sustaining the exception and dismissing Mr. Vu's claims with prejudice.[1]

Mr. Vu filed a second appeal, assigning as error the trial court's sustaining the peremptory exception. In that appeal, this Court found that despite numerous exhibits being attached to pretrial memoranda, none were introduced at the hearing on the exception to support the contention by Mr. Frazier and Frazier Insurance that Mr. Vu's claims were perempted, specifically stating:

> As no evidence was introduced at the hearing on this exception, we must accept the allegations of Vu's third party demand as true. The third party demand was filed on April 24, 2012. Vu alleged that "on or before June 2010," he conveyed to Frazier that he needed an agent to procure all necessary insurance on his properties, including 859-865 Ashville Drive, Slidell, Louisiana, for personal and property protection. Vu also alleged that he conveyed that "he had to have an agent who would properly advise him as to needed coverage, and explain the content of the policies he was purchasing." Vu alleged that he did obtain insurance from Frazier, effective August 18, 2010 through August 18, 2011 for those properties. *Periso v. Vu*, 2016-0665 (La. App. 1 Cir. 12/22/16), 2016WL7407397, at 3 (unpublished).

The third party demand also stated that "[Mr. Vu] specifically requested that both dwelling and personal liability insurance coverage be placed on the property located at 859-865 Ashville Dr., Slidell, Louisiana." Based on the specific allegations in the third party demand, this Court concluded that Mr. Vu's claims against Mr. Frazier and Frazier Insurance

[1] The judgment also declared an alternative motion for summary judgment filed by Mr. Frazier and Frazier Insurance as moot. Mr. Frazier and Frazier Insurance have not re-urged the motion for summary judgment in the instant case.

were not perempted on the face of the third party demand, reversed the judgment of the trial court on the exception, and remanded for further proceedings.

Following this Court's ruling in the second appeal, Mr. Frazier and Frazier Insurance filed another peremptory exception of peremption on January 13, 2017. The memorandum in support again raised La. R.S. 9:5606 as the basis for the exception and had several exhibits attached. The majority of these exhibits were previously attached to the prior exception. At the hearing, the trial court admitted the exhibits into evidence. The trial court signed a judgment on March 9, 2017, sustaining the exception of peremption and dismissing Mr. Vu's claims against Mr. Frazier and Frazier Insurance with prejudice. The trial court further designated the judgment as final and appealable. See La. C.C.P. art. 1915(B). Mr. Vu has appealed this judgment.

ASSIGNMENT OF ERROR

Mr. Vu's sole assignment of error is whether the trial court was manifestly erroneous when it failed to weigh evidence and concluded that the peremptive period began when Mr. Vu was "put on notice," or received his last renewal, as to the evidence adduced at hearing showed there was an ultimate issue as to whether Mr. Vu was misled into believing he had liability insurance.

STANDARD OF REVIEW

The objection of peremption is raised by the peremptory exception. La. C.C.P. art. 927(A)(2). Ordinarily, the exceptor bears the burden of proof at the trial of the peremptory exception. However, if peremption is evident on the face of the pleadings, the burden shifts to the plaintiff to show the action has not perempted. *Satterfield & Pontikes Construction, Inc. v.*

Breazeale Sachse & Wilson, LLP, 2015-1355 (La. App. 1 Cir. 1/10/17), 212 So.3d 554, 558, writ denied, 2017-0268 (La. 3/31/17), 217 So.3d 363.

At a hearing on a peremptory exception of peremption pleaded prior to trial, evidence may be introduced to support or controvert the exception. La. C.C.P. art. 931. If evidence is introduced at the hearing, the district court's findings of fact are reviewed under the manifest error-clearly wrong standard of review. *Satterfield*, 212 So.3d at 558. Accordingly, if those findings are reasonable in light of the record reviewed in its entirety, an appellate court cannot reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. *Id.*

DISCUSSION

Louisiana Revised Statutes, 9:5606 states, in pertinent part:

> A. No action for damages against any insurance agent, broker, solicitor, or other similar licensee under this state, whether based upon tort, or breach of contract, or otherwise, arising out of an engagement to provide insurance 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.
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> . . .
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> D. The one-year and three-year periods of limitation provided in Subsection A of this Section are peremptive periods within the meaning of Civil Code Article 3458 and, in accordance with Civil Code Article 3461, may not be renounced, interrupted, or suspended.

According to La. R.S. 9:5606, Mr. Vu was required to file his third party claim within a year from the date of the alleged "bad act" or within one year from the date that the "bad act" is discovered or should have been discovered. Mr. Vu's third party claim against Mr. Frazier and Frazier

Insurance is that they failed to secure liability insurance for the rental property or had failed to notify him that they had not done so.

The law-of-the-case doctrine embodies the principle that an appellate court generally does not revisit its own rulings of law on a subsequent appeal in the same case. *State ex rel. Div. of Admin., Office of Risk Management v. National Union Fire Inc. Co. of Louisiana*, 2013-0375 (La. App. 1 Cir. 1/8/14), 146 So.3d 556, 562. Based on our decision in the first appeal, the insurance policy provided by SFIC did not provide liability coverage, and it is undisputed as law of the case that Mr. Frazier and Frazier Insurance failed to secure liability insurance for the rental property owned by Mr. Vu.

The insurance policy was admitted into evidence at the hearing, and it indicated that it had been issued on June 21, 2010. Mr. Vu's deposition was also admitted into evidence at the hearing. He testified that in June of 2007, when asked by agent of Frazier Insurance Tom Klechak what kind of insurance he wanted to buy, Mr. Vu told him "to cover everything." However, Mr. Vu could not recall Mr. Klechak confirming with him that he would receive coverage for everything he had requested. Frazier Insurance's original provider was Louisiana Citizens Property Insurance Corporation (LCPIC). In June of 2009, Frazier changed to SFIC as its provider. Mr. Vu recalled the change in providers happening after doing business with Frazier Insurance for two years.

Although aware of the changeover, Mr. Vu testified he was unaware if any of his previous insurance policies with LCPIC were discontinued when SFIC took over. Further, he acknowledged that the endorsements on the declarations page of the insurance policy at issue only reflected dwelling coverage, but no other kind of coverage. Mr. Vu testified that after Mr. Periso's accident, he was informed by Mr. Klechak that he did not have

liability insurance, and prior to that time, he had assumed that he had liability coverage.[2]

The "date of discovery" from which peremption begins to run is the date on which a reasonable person in the position of the plaintiff has, or should have, either actual or constructive knowledge of the damage, the delict, and the relationship between them sufficient to indicate to a reasonable person that he or she is the victim of a tort and to state a cause of action against the defendant. *Satterfield*, 212 So.3d at 559.

Mr. Vu claims he was not aware of his lack of liability coverage until his discussion with Mr. Klechak on May 23, 2011. However, all of his insurance policies, going back to 2007 when he was insured by LCPIC, do not show an endorsement for liability coverage. In Mr. Klechak's affidavit, which was admitted as evidence, Mr. Klechak stated that on August 14, 2007, Mr. Vu signed an insurance application for coverage of 880 Ashville Drive, but did not request personal liability coverage. Mr. Vu later asked for the rental property to be included in the application, and the addition of the rental property became effective February 20, 2008. Mr. Vu acknowledged his signature on these applications in his deposition.

Based on the evidence presented at the hearing, Mr. Vu applied for dwelling but not liability coverage on the rental property, which became effective in February of 2008. As no requests to modify the policy to add liability coverage were ever made, Mr. Vu had constructive knowledge that his policy lacked such coverage four years before filing his third party

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[2] Mr. Vu had referred to a page on the insurance policy that contained the words "COVERAGES FOR WHICH PREMIUM WAS PAID: Coverage L-Personal Liability." He had indicated this language, coupled with endorsement exclusions, caused him to assume he had liability coverage. However, in the first appeal, we found that language was part of a summary of coverage which in no way modified his actual coverage. Our conclusion was that this was not an ambiguity in the policy which created a genuine issue of material fact, and accordingly the granting of the motion for summary judgment was affirmed. See *Periso*, 2013-1601, p. 5-7.

demand. By the time of their filing in April 24, 2012, Mr. Vu's third party claims were perempted under the three-year period of La. R.S. 9:5606.

Mr. Vu also introduced into evidence his own affidavit. He claims in his brief that the trial court failed to consider this new evidence, as the trial court stated, "I don't think there's any reason to argue it again, because my mind is made up on [the peremption] issue." After reviewing Mr. Vu's affidavit, we find it does not refute our finding that the third party claim was perempted. The affidavit is silent as to when Mr. Vu filled out the application for insurance; therefore, our conclusion that he had constructive knowledge of the insurance policy not containing liability coverage on February 20, 2008 is not affected by it.

Lastly, Mr. Vu asserts in his brief that Mr. Fazier and Frazier Insurance should not have been allowed to file a second exception of peremption, citing *Herrera v. Beatrice Gallegos & USAgencies Cas. Ins.*, 2013-0204 (La. App. 5 Cir. 10/9/13), 128 So.3d 306, 308 for the proposition that when the issue of peremption is intertwined closely with the factual issues of a case, it is proper to reserve the issue for trial rather than ruling on it summarily. We disagree with Mr. Vu's interpretation.

In the second appeal, we reversed and remanded the issue because the evidence on the peremptory exception was *never introduced* at the trial court. *Herrera* was reversed and remanded by the Fifth Circuit for the same reasons we reversed and remanded the trial court's judgment in the second appeal: the trial court considered evidence that was not properly introduced at the trial level. *Id.*

A peremptory exception may be pleaded at any stage of the proceeding in the trial court prior to submission of the case for decision. La. C.C.P. art. 928(B). There is also a second *Herrera* appeal, where the Fifth

Circuit found it permissible to re-urge a peremptory exception after the first judgment had been reversed and remanded. See *Herrera v. Beatrice Gallegos & USAgencies, Cas. Ins.*, 2014-0935 (La. App. 5 Cir. 10/28/15), 178 So.3d 164, 167.

DECREE

The judgment of the Twenty-Second Judicial District Court, sustaining the peremptory exception of peremption filed by the appellees Jamie Frazier and Frazier Insurance Agency, Inc. and dismissing, with prejudice, the third-party demand by the appellant, Ban Vu, is affirmed. All costs of this appeal are assessed to the appellant, Ban Vu.

AFFIRMED.