NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2017 CA 1500

JOHN HOOGACKER AND WENDY HOOGACKER

VERSUS

CHARLES M. HUGHES, JR., BRIAN F. TRAINOR, TALLEY, ANTHONY & HUGHES, MONTALBANO & TRAINOR, ABC, MNO, XYZ INSURANCE COMPANIES

Judgment Rendered: JUL 10 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. 2015-11683

The Honorable Martin E. Coady, Judge Presiding

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Robert J. Stamps New Orleans, Louisiana	Counsel for Plaintiffs/Appellants John and Wendy Hoogacker
Gus A. Fritchie, III McDonald G. Provosty New Orleans, Louisiana	Counsel for Defendants/Appellees Charles M. Hughes, Jr. and Talley, Anthony, Hughes & Knight, L.L.C. and Brian F. Trainor and Montalbano & Trainor, L.L.C.

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BEFORE: McCLENDON, WELCH, AND THERIOT, JJ.

McClendon concurs.

THERIOT, J.

The appellants, John and Wendy Hoogacker, appeal the judgment of the Twenty-Second Judicial District Court sustaining a peremptory exception of peremption filed by the appellees, Charles M. Hughes, Jr. and Talley, Anthony, Hughes, and Knight, LLC (collectively Hughes), and Brian F. Trainor and Montalbano and Trainor, LLC (collectively Trainor). For the following reasons, we vacate the trial court's judgment as to the issue of peremption, and otherwise affirm.

FACTS AND PROCEDURAL HISTORY

John Hoogacker was involved in an automobile accident in Orleans Parish on January 10, 2012, near Lake Pontchartrain, where a tractor trailer truck struck his vehicle. The following day, Mr. Hoogacker retained Hughes to represent him on his claim against the truck driver involved in the accident and the truck's owner. Hughes filed suit on behalf of Mr. Hoogacker in St. Tammany Parish on April 27, 2012 (the underlying lawsuit).[1] With Mr. Hoogacker's knowledge and consent, Hughes brought Trainor into the underlying lawsuit as co-counsel and to retain accident reconstruction experts.

On April 3, 2014, Hughes, Trainor, and Mr. Hoogacker attended a mediation in Baton Rouge. It was during this mediation that Mr. Hoogacker first discovered that Hughes had previously represented the truck's insurance carrier on several occasions. Mr. Hoogacker alleged he was pressured by Hughes at the mediation to sign a settlement agreement and that Hughes informed him that he would not have received an award for damages in St. Tammany Parish as favorable as he would have received in Orleans Parish, had the underlying suit been filed there.

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[1] *John Hoogacker v. Raynor Express Corporation, d/b/a Raynor Worldwide Corporation, et al.*, No. 2012-12378, Division "C," Twenty-Second Judicial District Court.

Mr. Hoogacker refused to honor the settlement agreement on May 1, 2014. Hughes and Trainor then filed motions to withdraw from representation of Mr. Hoogacker. Hughes and Trainor filed a motion to enforce the settlement agreement on May 23, 2014. On July 16, 2014, Mr. Hoogacker, represented by new counsel, consented to going forward with the original settlement agreed upon and signed an agreement to hold Hughes and Trainor harmless and release them from all past and future claims he may have regarding their representation of him.

The Hoogackers filed the instant petition for damages on April 28, 2015, in which they alleged Hughes and Trainor "conspired to commit fraud" with the truck's insurance carrier by not disclosing Hughes's former representation of the insurance carrier to Mr. Hoogacker until April 3, 2014, and by inadequately representing Mr. Hoogacker in the underlying lawsuit. The Hoogackers also claimed that Hughes filed the underlying suit in the wrong venue arguing that Orleans Parish was the only proper venue.

Hughes and Trainor filed a declinatory exception of inefficiency of service of process and peremptory exceptions of no right of action, *res judicata*, and peremption on March 1, 2016. In a judgment signed May 9, 2017, the trial court decreed that the exception of inefficiency of service of process had been withdrawn, denied the exceptions of no right of action and *res judicata*, and granted the exception of peremption. The Hoogackers' claims against Hughes and Trainor were dismissed with prejudice. The Hoogackers appealed the aforementioned judgment.

ASSIGNMENTS OF ERROR

The Hoogackers raise the following assignments of error:

1. The trial court erred in refusing to consider that Hughes and Trainor represented the defendant insurance company at the same time that they agreed to and in fact did represent Mr. Hoogacker. Mr. Hughes

never disclosed that fact to Mr. Hoogacker, as those acts are violations of La. C.C. arts. 1953, 1948, 1954-59, 1964, La. C.C.P. arts. 863, 865, La. R.S. 9:5606(E)[2], and the Louisiana Rules of Professional Conduct, Rules 1.7, 1.8, 1.10, 1.18, and 8.4.

2. The trial court erred in refusing to consider that the venue for this legal malpractice action was proper in Orleans Parish under the Louisiana Supreme Court's judgment in *Chambers v. LeBlanc*, 598 So.2d 337 (La. 1992), which the Louisiana Fourth Circuit Court of Appeal confirmed in *Johnson v. Tschirn*, 94-0085 (La. App. 4 Cir. 2/25/14), 635 So.2d 254, writ denied, 94-1543 (La. 9/23/94).

3. The trial court erred in refusing to consider that any action for peremption is barred and void when the facts at issue are fraud committed by Hughes and Trainor in the legal malpractice case, as those acts are violations of La. C.C. arts. 1953, 1948, 1954-1959, 1964, La. C.C.P. arts. 863, 865, and La. R.S. 9:5606(E), and as such cannot be and is not perempted.

STANDARD OF REVIEW

In the absence of evidence, an exception of peremption must be decided upon the facts alleged in the petition with all the allegations accepted as true. However, when evidence is introduced, the court is not bound to accept the plaintiff's allegations as true. *Lomont v. Bennett*, 2014-2483 (La. 6/30/15), 172 So.3d 620, 627, cert. denied, 84 U.S. 3324, 136 S.Ct. 1167, 194 L.Ed.2d 178, (2016). Although Hughes and Trainor attached exhibits to their memoranda in support of the exceptions, the exhibits were not introduced into evidence at the hearing. We shall therefore review this appeal based on the face of the pleadings, accepting all of the Hoogackers' allegations as true.

DISCUSSION

The Hoogackers' first two assignments of error address the merits of their legal malpractice claim (including allegations of fraud and misrepresentation purportedly committed by Hughes and Trainor) and

[2] The reference to La. R.S. 9:5606(E) was apparently made in error, as that statute concerns actions for professional insurance agent liability, and the statute does not contain a paragraph (E). The Hoogackers most likely meant to reference La. R.S. 9:5605(E), which concerns the preemptive period for actions of legal malpractice.

whether the 22nd JDC was the proper venue for the underlying lawsuit. Because those issues were not addressed by the trial court, we do not address those issues on appeal.[3] See *Edmond v. Cherokee Ins. Co.*, 2014-1509 (La. App. 1 Cir. 4/24/15), 170 So.3d 1029, 1039. Therefore, assignments of error one and two lack merit.

The Hoogackers' petition does not expressly allege legal malpractice against Hughes and Trainor, but the petition does specifically plead fraud and misrepresentation on the part of Hughes and Trainor. Furthermore, all parties, including the trial court, have litigated the claim as legal malpractice through fraud with no objections raised. Thus, we likewise treat the claim in the Hoogackers' petition as legal malpractice.

Louisiana Revised Statutes 9:5605 governs the prescriptive and preemptive periods for a legal malpractice claim, as follows:

> 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.
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> E. The peremptive period provided in Subsection A of this Section shall not apply in cases of fraud, as defined in Civil Code Article 1953.

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[3] The Hoogackers did not file an opposition to the exceptions raised by Hughes and Trainor. At the hearing on the exceptions, the parties mentioned in open court that an exception of improper venue was filed by Hughes and Trainor in Orleans Parish, in an identical lawsuit. That exception was granted in December of 2015, dismissing the lawsuit filed in Orleans Parish, and Mr. Hoogacker was ordered by the Orleans Parish trial court to proceed with the lawsuit in St. Tammany Parish.

The 22nd JDC in St. Tammany Parish is a court of competent jurisdiction and proper venue in which to bring the legal malpractice lawsuit. The petition reflects that Mr. Hughes, Mr. Trainor, and their respective law firms are all domiciled in either Mandeville, Louisiana or Covington, Louisiana, within St. Tammany Parish. An action shall be brought against an individual domiciled in Louisiana in the parish of his domicile. La. C.C.P. art 42(1).

The malpractice lawsuit must be brought within a year of the alleged malpractice, or within a year of the discovery of the alleged malpractice, and in all events, such actions shall be filed at the latest within three years from the date of the alleged malpractice. See La. R.S. 9:5605(A). The petition reflects a discovery date of April 3, 2014, when it was revealed to Mr. Hoogacker for the first time that the Hughes law firm had previously represented the insurance carrier of the truck involved in the car accident. The Hoogackers filed the petition alleging legal malpractice on April 28, 2015, over one year from the date of the discovery of the alleged malpractice, but within three years.

Subsection (E) of La. R.S. 9:5605 states that the peremptive period of Subsection (A) shall not apply to cases of fraud as defined in La. C.C. art. 1953. The referenced definition of fraud is "a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. Fraud may also result from silence or inaction." La. C.C. art. 1953. In this matter, the allegations in the petition are sufficient to allege fraud pursuant to La. C.C. art. 1953. See *Lomont*, 172 So.3d at 628.

Because the Hoogackers alleged fraud in the petition, La. R.S. 9:5605(E) would apply to the peremptive period. *Lomont* held that when La.

R.S. 9:5605(E) applies, the peremptive periods in La. R.S. 9:5605(A) are inapplicable. *Id.* at 638; See *Coffey v. Block*, 1999-1221 (La. App. 1 Cir. 6/23/00), 762 So.2d 1181, 1187, writ denied, 2000-2226 (La. 10/27/00), 772 So.2d 651. However, *Lomont* concluded that peremptive periods notwithstanding, the ordinary rules of prescription would still apply. Following *Braud v. New England Insurance Co.*, 576 So.2d 466, 468 (La. 1991), *Lomont* held that in cases where fraud is established pursuant to La. R.S. 9:5605(E), a legal malpractice claim is governed by the one-year *prescriptive* period set forth in La. C.C. art. 3492. *Id.* at 637.[4]

We find the trial court legally erred in not applying La. R.S. 9:5605(E) to the facts of the case. Therefore, we must vacate the judgment of the trial court as to the peremption issue.

DECREE

The judgment of the Twenty-Second Judicial District Court, insofar as it dismisses the claims of the appellants, John and Wendy Hoogacker, on the ground of peremption, is vacated. The remainder of the judgment is affirmed. Costs of this appeal are to be divided equally among the appellants, John and Wendy Hoogacker, and the appellees, Charles M. Hughes, Jr., Talley, Anthony, Hughes, and Knight, LLC, Brian F. Trainor, and Montalbano and Trainor, LLC.

VACATED IN PART AND AFFIRMED IN PART.

[4] We cannot supply the exception of prescription on our own motion, as it must be specially pleaded. La. C.C.P. art. 927(B).