NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CA 1315

FLOYD DONLEY, SR.

VERSUS

HUDSON'S SALVAGE, LLC

Judgment Rendered: December 22, 2010

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Appealed from the
21st Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
Case No. 2009-0004174

The Honorable Bruce C. Bennett, Judge Presiding

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Floyd Donley, Jr. **Amite, Louisiana**	**Plaintiff/Appellant** ***Pro Se***
Jeffery Paul Robert **Baton Rouge, Louisiana**	**Counsel for Defendants/Appellees** **Hudson's Salvage, LLC, Linda Cox, Elaine Hingle, Alan Spallinger, Lois Peltier, and Jerry Holifield**

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BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

GAIDRY, J.

A patron of a discount store appeals a judgment sustaining a peremptory exception of prescription and dismissing his claims against the store and certain employees for personal injury, false arrest and imprisonment, defamation, malicious prosecution, and violation of his civil rights. For the following reasons, we affirm the judgment in part, reverse it in part, and remand this matter for further proceedings.

FACTS AND PROCEDURAL HISTORY

The plaintiff, Floyd Donley, Sr., was an occasional customer of the Dirt Cheap Store owned and operated by the defendant, Hudson's Salvage, LLC (Hudson's), in Amite City, Louisiana. Over the course of several weeks prior to September 24, 2008, plaintiff purportedly contacted the store's management in Hattiesburg, Mississippi to report what he considered to be unsafe products, conditions, and practices at the Amite City store.[1]

On September 24, 2008, plaintiff entered the store for the acknowledged purpose of photographing the purported "safety violations" and unsafe conditions. Employees of the store objected to plaintiff's actions and demanded that he leave. While in an area near the checkout counter, plaintiff encountered Elaine Hingle, the store manager, who complained that plaintiff pushed or struck her in the chest with his fists after the employees confronted him. According to plaintiff, his path of exit from the store was impeded by Ms. Hingle and a security guard, Alan Spallinger, who were acting under directions from Linda Cox, the Hudson's district manager. Plaintiff then fell or collapsed, purportedly due to a "panic attack" and "heart

[1] Plaintiff, by his own account, is a retired public and private safety inspector and instructor who is "well qualified to document and seek correction of the many [s]afety hazards that existed and continue to exist at . . . [the] Dirt Cheap Store." His professed motive in contacting the store's management and in entering the store on the date of the incident at issue was to champion "the [p]ublic['s] right to be in a safe and sanitary shopping environment."

trauma" induced by his being "confined" and "falsely imprisoned" by Ms. Hingle and Mr. Spallinger.

Store employees telephoned the Amite City Police Department and an ambulance was also dispatched to the store, based upon the reported injuries to plaintiff and Ms. Hingle. Plaintiff was eventually charged with battery of Ms. Hingle.[2] According to plaintiff, he was tried and convicted on December 3, 2008 in Amite City Court on the battery charge, but the conviction was reversed and the charge dismissed by the 21st Judicial District Court for the Parish of Tangipahoa on September 24, 2009.

On December 1, 2009, plaintiff filed a *pro se* petition against Hudson's, Ms. Cox, Ms. Hingle, and Mr. Spallinger, as well as Lois Peltier and Jerry Hollifield, two Hudson's managerial employees in its Hattiesburg, Mississippi headquarters office, and an unidentified, pseudonymous employee who allegedly videotaped the incident. He alleged that after he contacted the headquarters office in Hattiesburg by telephone and e-mail regarding the purported "safety violations," the Hattiesburg managerial employees "dispatched" Mr. Spallinger to "instigate a situation" with him, knowing that he would visit the store on September 24, 2008. Plaintiff further alleged that as the result of his "illegal confinement," detention, and false imprisonment on that date by the Amite store employees, acting under the direction of the Hattiesburg managerial employees, his civil rights were violated and he suffered "physical and mental injuries," including a "panic attack," "heart trauma" (also described as "a possible heart attack"),

[2] According to plaintiff's brief, he was acquitted in Amite City Court of battery upon Mr. Spallinger. There is some suggestion in plaintiff's petition that he may also have been charged with disturbing the peace, but the exact nature of any such charge and its disposition cannot be ascertained from the record.

"aggravations of previous afflictions," stress, and consequential reduction of his life expectancy by six years.[3]

Plaintiff also alleged in his petition, among other things, that Ms. Cox refused to intervene to "stop the police brutality" of the Amite City Police Department officers after their arrival at the store to investigate the disturbance; that "by its actions and/or inactions," through its employees, Hudson's contributed to the institution of the criminal proceeding for battery against him in Amite City Court; that Ms. Hingle falsely accused him of battery, leading to his prosecution; that Ms. Cox, Ms. Hingle, and Mr. Spallinger lied under oath at the trial of December 3, 2008, resulting in his conviction in Amite City Court; and that Ms. Cox, Ms. Hingle, and Mr. Spallinger "wrote false narrative reports" on December 8, 2008, five days after the trial, "with the intent to defame [p]laintiff."

The defendants filed peremptory exceptions of prescription, contending that, on the face of plaintiff's petition, his various causes of action were prescribed as of the date of the petition's filing. Defendants' exceptions were heard on February 19, 2010. Following argument and plaintiff's proffer of multiple documents to which the defendants objected, the trial court sustained the exceptions. The trial court's judgment dismissing plaintiff's causes of action with prejudice was signed the same day.[4]

Plaintiff now appeals.

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[3] According to his petition, plaintiff was 80 years old at the time of the incident at issue.

[4] The trial court designated its judgment as a final judgment for purposes of appeal, stating that it found no just reasons for delay, pursuant to La. C.C.P. art. 1915(B). Its certification, however, was unnecessary, as the judgment dismissed all of plaintiff's claims and causes of action, and was not a partial final judgment, but a full and final judgment, appealable without the need for certification. *See* La. C.C.P. arts. 1841, 1911, and 2083(A).

DISCUSSION

Delictual actions are generally subject to a liberative prescription of one year, running from the day injury or damage is sustained. La. C.C. art. 3492. A prescriptive period will begin to run even if the injured party does not have *actual* knowledge of facts that would entitle him to bring a suit as long as there is *constructive* knowledge of same. *Campo v. Correa*, 01-2707, p. 12 (La. 6/21/02), 828 So.2d 502, 510. (Emphasis supplied.)

At the hearing of a peremptory exception (except one raising the objection of no cause of action), "evidence may be introduced to support or controvert any of the objections pleaded, when the grounds thereof do not appear from the petition." La. C.C.P. art. 931. The defendants presented no evidence at the hearing on their exceptions, but instead argued that plaintiff's claims were prescribed on the face of his petition, which was filed on December 1, 2009, well over a year after the incident of September 24, 2008. Plaintiff sought to introduce into evidence a file folder containing numerous documents, but the defendants objected, and the trial court allowed a proffer of the documents *in globo*. Based upon our review of the proffered documents, we agree with the defendants that all of the documents are inadmissible on the grounds of hearsay, lack of proper authentication, or irrelevance.

In light of the foregoing, we will determine the merits of plaintiff's appeal based upon the allegations of his petition. Generally, in the absence of evidence, the objection of prescription must be decided upon the facts alleged in the petition, and those alleged facts are accepted as true. *Thomas v. State Employees Group Benefits Program*, 05-0392, p. 7 (La. App. 1st Cir. 3/24/06), 934 So.2d 753, 758. The latter principle applies only to properly-pleaded material allegations of fact, as opposed to allegations deficient in

material detail, conclusory factual allegations, or allegations of law. *Kirby v. Field*, 04-1898, p. 6 (La. App. 1st Cir. 9/23/05), 923 So.2d 131, 135, *writ denied*, 05-2467 (La. 3/24/06), 925 So.2d 1230.

The Malicious Prosecution Claim

An action for malicious prosecution of a criminal proceeding requires the following elements: (1) the commencement or continuance of an original criminal proceeding; (2) its legal causation by the present defendant against the plaintiff, who was the defendant in the criminal proceeding; (3) the *bona fide* termination of the criminal proceeding in favor of the present plaintiff; (4) the absence of probable cause for the criminal proceeding; (5) malice; and (6) damage to the plaintiff, conforming to legal standards. *Miller v. E. Baton Rouge Parish Sheriff's Dep't*, 511 So.2d 446, 452 (La. 1987). Prescription on a cause of action for malicious prosecution does not begin to run until the underlying prosecution is dismissed. *Murray v. Town of Mansura*, 06-355, p. 7 (La. App. 3rd Cir. 9/27/06), 940 So.2d 832, 838, *writ denied*, 06-2949 (La. 2/16/07), 949 So.2d 419, *cert. denied*, 552 U.S. 915, 128 S.Ct. 270, 169 L.Ed.2d 197 (2007).

Given the allegations of plaintiff's petition, particularly his affirmative allegation that "[t]he 21st Judicial [District] Court in Amite and the District Attorney dismissed the unfounded and unmerited charge proffered by Ms. Hingle on Sept[ember] 24, 2009," prescription on his cause of action for malicious prosecution did not begin to run until the latter date. His petition, filed on December 1, 2009, was therefore timely as to that cause of action, and the trial court erred in sustaining the defendants' exceptions in that regard and dismissing that cause of action.

The Defamation Claim

The allegations of plaintiff's petition sufficiently state a cause of action for defamation against the defendants, Ms. Cox, Ms. Hingle, and Mr. Spallinger, as well as their employer, Hudson's, based upon the alleged false testimony given at the trial in Amite City Court on December 3, 2008, and the alleged false narrative reports of December 8, 2008. As plaintiff's petition was filed within a year of the alleged defamatory statements, plaintiff's cause of action for defamation based upon those statements was not prescribed, and the trial court also erred in dismissing that cause of action.

Suspension of Prescription on Other Claims

A claim for false arrest and imprisonment is legally distinct and separate from a claim for malicious prosecution. *Murray*, 06-355 at pp. 7-8, 940 So.2d at 838-39. Unlike a malicious prosecution claim, a claim for false arrest and imprisonment arises the day the false arrest and imprisonment occurs, and is subject to the one-year prescriptive period generally applicable to delictual claims. *Id.*, 06-355 at p. 7, 940 So.2d at 838.

On the face of his petition, plaintiff's delictual causes of action for false arrest and imprisonment, physical and mental injury, and violation of his civil rights arising from the incident of September 24, 2008 are prescribed. When a cause of action is prescribed on its face, the burden is upon the plaintiff to show that the running of prescription was suspended or interrupted in some manner. *Jonise v. Bologna Bros.*, 01-3230, p. 6 (La. 6/21/02), 820 So.2d 460, 464. Thus, the burden of proof shifted to plaintiff to establish that his causes of action for false arrest and imprisonment, physical and mental injury, and violation of his civil rights were not prescribed. *Thomas*, 05-0392 at pp. 6-7, 934 So.2d at 758.

In his appellate brief, plaintiff contends that Hudson's and its employees somehow fraudulently concealed the fact that their actions, rather than those of the investigating police officers, caused his alleged injuries and damages.[5] He also seems to claim in his petition and appellate brief that he suffered a lapse in memory of those events of September 24, 2008 that occurred prior to his arrival at the emergency room of the hospital following the incident. In his petition, however, he alleges that his memory of "many of the incidents" returned upon "receiving a video and documents signed by Ms[.] Cox and Ms[.] Hingle . . . in August 2009." He contends that these circumstances justify a tolling of prescription, thereby implicitly invoking the doctrine of *contra non valentem*.

Contra non valentem non currit praescriptio is a Louisiana jurisprudential doctrine under which prescription may be suspended. *Carter v. Haygood*, 04-0646, p.11 (La. 1/19/05), 892 So.2d 1261, 1268. Because the doctrine is of equitable origin, it only applies in exceptional circumstances. *See Renfroe v. State ex rel. Dep't of Transp. & Dev.*, 01-1646, p. 9 (La. 2/26/02), 809 So.2d 947, 953. There are four recognized categories of this doctrine: (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 the contract or connected with the proceedings which prevented the creditor from suing or acting; (3) where the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of

[5] In his appellate brief, plaintiff states that he filed "suit against the [Amite City Police Department] [o]fficers on September 22, 2009, two days shy of prescription." He claims that he did not know until after that suit was filed that his injuries and damages may have been caused by the defendants' actions. Elsewhere in his brief, however, plaintiff concedes that he "first suspected that he might have a claim against Hudson [*sic*] during the testimony of Elaine Hingle and [Mr.] Spallinger at [the] [c]ity [c]ourt trial on 12/03/08."

action; and (4) where the cause of action is not known or reasonably knowable by the plaintiff, even though this ignorance is not induced by the defendant. *Carter*, 04-0646 at pp. 11-12, 892 So.2d at 1268.

Given the facts of the present action, as recited in plaintiff's petition, the first and second categories of the *contra non valentem* doctrine are not relevant for our purposes. The third listed category encompasses situations where an innocent plaintiff has been lulled into a course of inaction in the enforcement of his right by some concealment or fraudulent conduct on the part of the defendant. *Carter*, 04-0646 at p. 12, 892 So.2d at 1269. The fourth category, commonly known as the "discovery rule," is an equitable pronouncement that statutes of limitation do not begin to run against a person whose cause of action is not reasonably known or discoverable by him, even though his ignorance is not induced by the defendant. *Teague v. St. Paul Fire & Marine Ins. Co.*, 07-1384, pp. 11-12 (La. 2/1/08), 974 So.2d 1266, 1274. In his brief, plaintiff expressly argues the applicability of "fraudulent concealment" and the "discovery rule" in his favor.

As the party asserting the benefit of *contra non valentem*, plaintiff bore the burden of proof of its requisite elements and applicability. *See Peak Performance Physical Therapy & Fitness, LLC v. Hibernia Corp.*, 07-2206, p. 8 (La. App. 1st Cir. 6/6/08), 992 So.2d 527, 531, *writ denied*, 08-1478 (La. 10/3/08), 992 So.2d 1018. In his petition and appellate brief, plaintiff claims that Hudson's and its employees somehow deliberately concealed the events of September 24, 2008 from him and "intentionally created" impediments to his ability to discover their alleged fault in causing his injuries. However, no competent evidence supporting his contentions was presented at the hearing, nor does his petition or any document within the proffer provide material factual support of those contentions. Plaintiff

did not testify at the hearing, but simply presented argument. In short, plaintiff failed to prove that he was prevented from reasonably knowing or discovering, or that he could not have known or discovered, the facts supporting his claims against Hudson's and the other named defendants prior to September 24, 2009, and that his ignorance in that regard was attributable to the defendants' actions. Similarly, there are no material allegations in the petition, and no competent evidence in the record, that plaintiff was unable to reasonably know or learn of his alleged causes of action against the defendants, based upon legal incompetency or a medical condition that prevented discovery of the relevant facts, within a year of the incident.

Louisiana Code of Civil Procedure Article 934 provides as follows:

> When the grounds of the objection pleaded by the peremptory exception may be removed by amendment of the petition, the judgment sustaining the exception shall order such amendment within the delay allowed by the court. If the grounds of the objection raised through the exception cannot be so removed, or if plaintiff fails to comply with the order to amend, the action, claim, demand, issue, or theory shall be dismissed.

In the context of an objection of prescription, the jurisprudence has interpreted the foregoing provision to mean that where a plaintiff's cause of action is prescribed on its face, and the plaintiff has the opportunity but fails to offer any evidence at the hearing of a peremptory exception that his claim was filed timely, he has failed to adequately establish that amendment of his petition might remove the grounds of the objection. *Thomas*, 05-0392 at p. 9, 934 So.2d at 759. *See also Whitnell v. Menville*, 540 So.2d 304, 309 (La. 1989). Plaintiff failed to offer any competent legal evidence at the hearing. Thus, he was not entitled to amend his petition after the exceptions were

sustained, and those causes of action other than malicious prosecution and defamation were properly dismissed.

DECREE

The judgment of the trial court sustaining the peremptory exceptions of the defendants, Hudson's Salvage, LLC, Linda Cox, Elaine Hingle, Alan Spallinger, Lois Peltier, and Jerry Holifield, and dismissing the claims of the plaintiff-appellant, Floyd Donley, Sr., is reversed in part as to the plaintiff-appellant's claims for malicious prosecution and defamation, and affirmed in all other respects. This matter is remanded to the trial court for further proceedings. The costs of this appeal are assessed in equal proportions of one-half to the plaintiff-appellant and one-half to the defendants-appellees.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.