

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2009 CA 1336

JACQUELINE M. BRIGGS, INDIVIDUALLY AND ON BEHALF OF THE
MINOR CHILD, J'KYRA BRIGGS, AND JOYCE BRIGGS

VERSUS

STACY B. AUSTIN AND ALLSTATE INSURANCE CO.

Judgment Rendered: February 12, 2010

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 563,570

Honorable Curtis A. Calloway, Judge

Jermaine D. Williams
Lafayette, LA

Attorney for
Plaintiffs – Appellants
Jacqueline M. Briggs, et al.

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Baton Rouge, LA

Attorney for
Defendant – Appellee
Allstate Insurance Co.

BEFORE: WHIPPLE, HUGHES, AND WELCH, JJ.

Hughes, J., dissents.

WELCH, J.

Plaintiffs, Jacqueline Briggs, individually and on behalf of her minor child, and Joyce Briggs, appeal a judgment granting a peremptory exception raising the objection of prescription filed by defendant, Allstate Insurance Company. We affirm and issue this memorandum opinion in accordance with Uniform Rules-Courts of Appeal, Rule 2-16.1B.

BACKGROUND

On January 29, 2008, plaintiffs filed a petition by facsimile transmission with the 19th Judicial District Court for the Parish of East Baton Rouge. Therein, they sought to recover damages from Allstate allegedly arising from an automobile accident occurring on January 30, 2007. The original petition was filed into the record on April 14, 2008, more than two months after the facsimile transmission was received by the East Baton Rouge Parish Clerk's Office and more than one year after the date of the accident.

Allstate filed a peremptory exception raising the objection of prescription, asserting that the lawsuit, filed more than one year after the date of the accident, was prescribed on its face. Allstate also urged that the facsimile filing did not interrupt La. C.C. art. 3492's one-year prescriptive period applicable to delictual actions because plaintiffs failed to comply with La. R.S. 13:850. Louisiana Revised Statutes 13:850 authorizes the filing of papers in a civil action by facsimile transmission. However, it provides that for such a filing to have any force or effect, the party filing the document must forward to the clerk of court, within five days after the court has received the facsimile transmission, the original signed document, the applicable filing fee, if any, and a transmission fee. La. R.S. 13:850(A), (B), and (C).

In response, plaintiffs urged that the requirements of La. R.S. 13:850 had been met because the original petition, copies thereof, and filing fees had been

mailed to the East Baton Rouge Parish Clerk of Court on January 29, 2008, the same day on which their facsimile filing was received by the clerk. At the hearing on the exception, plaintiffs offered affidavits of their attorney and his secretary who attested that the original petition, copies of the petition, and filing fees had been mailed to the East Baton Rouge Parish Clerk's Office on January 29, 2008, the same day the facsimile filing was received by the clerk's office. In her affidavit, Patricia Thompson attested that on January 29, 2008, she deposited in the United States Mail, postage prepaid and properly addressed to the East Baton Rouge Parish Clerk's Office, the original petition and filing fees in the Briggs' lawsuit. Plaintiffs' attorney attested in his affidavit that he instructed his secretary to mail the original petition, copies, and filing fees to the clerk's office and was informed by his secretary that the documents had been mailed. Lastly, plaintiffs introduced a copy of a cover letter dated January 29, 2008, addressed to the clerk's office, in which their attorney stated that the original and three copies of the petition for damages were enclosed and requested that the defendant be served.

The trial court granted the peremptory exception of prescription and dismissed this lawsuit, concluding that the evidence submitted by plaintiffs was insufficient to satisfy their burden of proving that the requisite documents and fees had been forwarded within five days of the facsimile transmission. This appeal followed.

DISCUSSION

Louisiana Revised Statutes 13:850 provides, in pertinent part, as follows:

A. Any paper in a civil action may be filed with the court by facsimile transmission. . . . Filing shall be deemed complete at the time that the facsimile transmission is received and a receipt of the transmission has been transmitted to the sender by the clerk of court. The facsimile when filed has the same force and effect as the original.

B. Within five days, exclusive of legal holidays, after the clerk of court has received the transmission, the party filing the document shall forward to the clerk:

- (1) The original signed document.
- (2) The applicable fee, if any.
- (3) A transmission fee of five dollars.

C. If the party fails to comply with the requirements of Subsection B, the facsimile filing shall have no force or effect.

On appeal, plaintiffs contend that they demonstrated they forwarded the original petition and applicable filing fee in compliance with La. R.S. 13:850 and the jurisprudence interpreting that provision, and therefore, the trial court erred in granting the exception of prescription. In support of this claim, they rely on the case of **Hunter v. Morton's Seafood Restaurant & Catering**, 2008-1667 (La. 3/17/09), 6 So.3d 152. In that case, the supreme court was asked to decide whether La. R.S. 13:850 required that the petition, copies, and filing fees be sent to the clerk's office within the five-day period or whether it required that the documents be received by the clerk's office within the five-day delay. The court interpreted the term "forward" in La. R.S. 13:850(B) to require only that the litigant "send" a document toward its place of destination. The court further held that the date when the original document and fees had been forwarded to the clerk's office is a fact to be proved by the sender, who must establish, by a preponderance of the evidence, that the original document and required fees have been forwarded to the clerk's office in the time set forth in the statute. **Hunter**, 2008-1667 at pp. 6-7, 6 So.3d at 156.

In **Hunter**, it was undisputed that the original petition and required fees were received by the clerk's office on the sixth legal day after the facsimile transmission of the petition. However, the trial court had not made a factual finding whether the plaintiff forwarded the original document and fees within the five legal days required by La. R.S. 13:850(B). Accordingly, the court remanded the case to allow the plaintiff to present proof, through affidavits or other

documents, such as proof of mailing, of the date on which the original petition and required fees had been forwarded to the clerk's office.

Plaintiffs contend that they met their burden of proof and therefore under the dictates of **Hunter**, this court must remand for further litigation. We disagree. **Hunter** presented an entirely different factual scenario: because there was undisputed evidence in that case that the clerk's office actually received the original petition, filing fees, and facsimile fees on the sixth legal day after the facsimile filing, the only question was the date on which those documents had been sent to the clerk's office. In this case, the clerk's office received the original petition on April 14, 2008, over two months after the facsimile pleading had been filed. Even accepting plaintiffs' affidavits as true, there is no evidence of record to show that the filing fees were timely forwarded prior to that date or that the facsimile filing fees were ever submitted. Thus, unlike the situation in **Hunter**, the trial court in this case did make a factual determination on the issue of timeliness and concluded that the affidavits submitted by plaintiffs failed to satisfy their burden of proving that the original petition, filing fees, and transmission fees had been sent to the clerk's office within La. R.S. 13:850's five-day delay. Given the absence of proof, such as a postal service proof of mailing, that the petition had been timely forwarded and the lack of evidence to document that a check or some other form of payment had been written and timely forwarded to cover the cost of the filing fees or fax transmission fee on or around January 29, 2008, we find no error in the trial court's determination that plaintiffs failed to meet their burden of proof. Therefore, the trial court correctly concluded that the facsimile filing did not interrupt the one-year prescriptive period applicable to delictual actions. Because the original petition was filed outside the one-year prescriptive period, the trial court properly granted the peremptory exception of prescription.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court maintaining the peremptory exception of prescription. All costs of this appeal are assessed to appellants, Jacqueline Briggs, individually and on behalf of the minor child, and Joyce Briggs.

AFFIRMED.