NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2008 CA 1088

JOHN DOE

VERSUS

THE ROMAN CATHOLIC DIOCESE OF LAFAYETTE, LOUISIANA AND THE REDEMPTORIST/NEW ORLEANS VICE PROVINCE, THE ROMAN CATHOLIC CHURCH OF THE ARCHDIOCESE OF NEW ORLEANS AND FATHER JOSEPH PELLETIERI

Judgment rendered December 23, 2008.

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Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. 505,361
Honorable R. Michael Caldwell, Judge

* * * * * *

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BEFORE: PETTIGREW, McDONALD, AND HUGHES, JJ.

PETTIGREW, J.

This is an action to recover damages stemming from plaintiff's dissociated memories of childhood sexual abuse allegedly perpetrated by a Roman Catholic priest approximately forty years ago. Defendants filed exceptions raising the objection of prescription that were, following a hearing, maintained by the trial court. Plaintiff thereafter appealed, and we hereby affirm.

FACTS

Plaintiff, "John Doe"[1] contends that beginning in 2002, amid a wave of media reports regarding sexual improprieties and abuse of children by clergy of the Roman Catholic Church, he began to have vague memories through dreams and periodic thoughts of being seated in a dimly lit room in which a strange hypnotic voice emanated from a record player. Mr. Doe claims that initially he had no direct recall of specific acts, the location of the room in question, or who if anyone was in the room with him. He contends that these non-specific, intrusive memories of being hypnotized made him uncomfortable and left him feeling "conflicted."

Mr. Doe, a resident of Chicago since 1985, alleges that on or about April 2, 2002, he telephoned a hotline established by the Roman Catholic Archdiocese of Chicago ("Archdiocese of Chicago") to report incidents involving members of the clergy. Mr. Doe spoke with a Ralph Bonaccorsi and inquired whether these ill-defined, "uncomfortable" memories he was experiencing merited further investigation. At the time he telephoned the hot line, Mr. Doe claimed that he could recall only someone by the name of "Father Joe" at Notre Dame High School in Crowley, Louisiana, and a strange, hypnotic situation in a room. Mr. Bonaccorsi advised that additional inquiries would be made. Officials of the Archdiocese of Chicago ultimately determined that Father Joseph Pellettieri, a Roman Catholic priest of the Redemptorist order ("the Redemptorists"), had worked as a priest at

[1] Although the plaintiff is identified by name in sealed court documents, the trial court's judgment, and appellate briefs, we deem it appropriate to refer to plaintiff as "John Doe," the alias he designated in his petition.

Immaculate Heart of Mary Catholic Church and served as principal of Notre Dame Catholic High School in Crowley, Louisiana.[2]

Through subsequent discovery, Mr. Doe learned that based upon his allegations, the Redemptorists suspended Father Pellettieri from his ministry and sent him to Southdown Institute, a treatment facility in Toronto, Canada, where priests and religious personnel are sent for evaluation.

Thereafter, Mr. Doe, accompanied by his longtime friends, attorney Steve Wilson and his wife Kathy, met with the Vice Provincial of the Redemptorists, Father Thomas Picton, at his Baton Rouge office, in June 2002. Mr. Doe claimed that at the meeting Father Picton advised him Father Pellettieri had apologized, been removed from his office, and desired Mr. Doe seek counseling to obtain healing.[3] According to Mr. Doe, Father Picton also expressed a desire that Mr. Doe obtain the help needed to experience full healing, and said that the Redemptorists would pay for Mr. Doe to undergo counseling in Chicago where he resides. Mr. Doe was allegedly advised by Father Picton that it would be necessary for him to obtain legal representation in order to conclude or settle the matter.[4]

Mr. Doe denied there was a discussion of inappropriate behavior with Father Pellettieri during his meeting with Father Picton. When Mr. Doe allegedly expressed a desire to learn what had happened to him, Father Picton suggested that Mr. Doe write to Father Pellettieri through him. In his testimony at the evidentiary hearing, Mr. Doe stated

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[2] At the hearing in this matter, the Diocese stipulated that based upon its investigation, Father Pellettieri served as principal of Notre Dame High School during the 1971-72 school term.

[3] At the hearing in this matter, Mr. Wilson corroborated the fact that in their meeting with Father Picton, Mr. Wilson, his wife, and Mr. Doe were advised Father Pellettieri had apologized, been removed from office, and wanted Mr. Doe to "get help." Mr. Wilson further testified that he was not implying there was "any specific admission of specific wrongdoing."

[4] In his deposition Father Picton recalled in his "pastoral meeting" with Mr. Doe and the Wilsons, he sought to "apologize for anything that may have happened that [Mr. Doe] found harmful." Father Picton stated he advised Mr. Doe the Redemptorists would be happy to pay for counseling as he "always [does] when there has been somebody who feels they have been abused." Father Picton further recalled telling Mr. Doe the Redemptorists would be willing to consider providing Mr. Doe with things he thought he might need over and above counseling; however Father Picton advised it was not his practice "to make exchanges of money with people . . . alleging sexual abuse unless they are represented by a lawyer." Father Picton admitted he encouraged Mr. Doe to obtain a lawyer.

that he had no memory of any sexual encounters between himself and Father Pellettieri until late July 2002.

Numerous Chicago-area psychologists were contacted in an effort to enroll Mr. Doe in an acceptable therapeutic relationship. This counseling therapy was paid for by the Redemptorists, though it is alleged that payments were often delayed. The parties evidently continued to discuss the potential for pre-litigation resolution, and it is further alleged that the Redemptorists sought to "be in a position to put together a proposal to assist."

Mr. Doe filed suit on March 10, 2003, against the Roman Catholic Diocese of Lafayette ("the Diocese"), the Roman Catholic Archdiocese of New Orleans ("the Archdiocese")[5], Father Joseph Pellettieri ("Father Pellettieri"), and The Redemptorist/New Orleans Vice Province ("the Redemptorists") in order to interrupt prescription. In his petition, Mr. Doe alleged that during the years of approximately 1965 through 1968, he came into contact with Father Pellettieri while assisting his father with his job duties at Notre Dame High School.[6] It is also alleged that during this period, Mr. Doe was a minor between the ages 11 and 14, and Father Pellettieri specifically invited and requested that the then minor Mr. Doe meet with him on numerous occasions in his office at Notre Dame High School.[7] In the course of said meetings, Mr. Doe alleged Father Pellettieri utilized hypnosis and post-hypnotic suggestion to engage in or have Mr. Doe engage in inappropriate sexual behavior with him and/or others.

While claiming not to have full recall of the wrongdoing by defendants, Mr. Doe further alleged his life was tragically altered and damaged by the predatory sexual conduct of Father Pellettieri. Mr. Doe asserted within a short time of the inappropriate

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[5] The Roman Catholic Church of the Archdiocese of New Orleans, defendant herein, was dismissed without prejudice upon motion of plaintiff, John Doe, on May 4, 2006.

[6] Through Mr. Doe's testimony at the evidentiary hearing, it was revealed that Father Pellettieri was the principal at Notre Dame High School where Mr. Doe's father worked as a janitor.

[7] Mr. Doe alleged in his original petition that the abuse occurred in Father Pellettieri's office at Notre Dame High School during the years 1965-68 when Mr. Doe was a minor between the ages 11 and 14. It was stipulated at the evidentiary hearing that Father Pellettieri was principal at Notre Dame High School for one year during the 1971-72 school term. At this time, Mr. Doe would have been seventeen years of age.

predatory sexual contact, he developed a great deal of anger and self-protectiveness that resulted in his commitment to the Louisiana State Hospital at Pineville, Louisiana, on two occasions.

In response to this suit, peremptory exceptions raising the objection of prescription were asserted on the basis that the allegations contained in Mr. Doe's petition revealed that prescription had run. Mr. Doe urged he was rendered incapable of knowing of the sexually predatory acts or actions of Father Pellettieri prior to the summer of 2002, and even to the present time, due to the intentional and calculated use by Father Pellettieri of the influence of hypnosis and/or post-hypnotic suggestion. In addition, Mr. Doe contended he suffered from a psychological condition referred to as dissociative amnesia that inhibited his articulable awareness that he had experienced sexual abuse that was legally actionable.

Prior to the hearing on the exception, counsel for Father Pellettieri filed a motion seeking to bifurcate the trial of the exception into two components. Only in the event Mr. Doe was successful in establishing the timeliness of his suit, would the court proceed with the more intensive second component, i.e., a **Daubert/Foret**[8] evaluation of the expert testimony provided by Drs. Yohanna, Simon, and Piper and the scientific validity of the theory of repressed memory.

ACTION OF THE TRIAL COURT

On October 30, 2007, the trial court held an evidentiary hearing wherein the parties presented evidence and Mr. Doe was afforded the opportunity to present his case with respect to the issue of prescription. At the outset of the hearing, the trial court deferred ruling on the motion to bifurcate and on various motions in limine. At the close of Mr. Doe's case, the defendants jointly moved for an involuntary dismissal of Mr. Doe's

[8] The United States Supreme Court in **Daubert v. Merrell-Dow Pharmaceuticals, Inc.**, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), set forth the criteria for determining the reliability of expert scientific testimony. The Louisiana Supreme Court adopted the **Daubert** analysis in **State v. Foret**, 628 So.2d 1116, 1121 (La. 1993).

claims and contended that Mr. Doe had failed to meet his burden of proving that his facially prescribed claims remained viable.

On November 29, 2007, the trial court rendered its judgment sustaining the exception as to prescription and granting the motion for involuntary dismissal. Mr. Doe thereafter filed the instant appeal.

ERRORS PRESENTED ON APPEAL

In his appeal from the trial court's judgment, Mr. Doe assigns the following alleged errors for review and consideration by this court:

1. The trial court erred when it granted defendants' exception of prescription and motion for involuntary dismissal because plaintiff/appellant filed his lawsuit within one year of reasonably appreciating that he had a viable legal claim in tort against an identifiable tortfeasor; and

2. The trial court erred when it looked to **Babineaux v. State of Louisiana through the DOTD**, 927 So.2d 1121 (La. App. 1 Cir. 2005) to find the standard in deciding when prescription begins to run in a sexual case because **Babineaux** reflects the *contra non valentem* standard used in a very old line of cases that are *not* sexual abuse cases, and Louisiana courts have traditionally, in deciding prescription, looked to additional facts in sexual abuse cases to determine whether plaintiffs were initially kept for reasons external to their own will from reasonably knowing facts that would lead them to discovery of a legally viable claim.

STANDARD OF PROOF

Ordinarily, the exceptor bears the burden of proof at the trial of a peremptory exception. **Campo v. Correa**, 01-2707, p. 7 (La. 6/21/02), 828 So.2d 502, 508. However, if prescription is evident on the face of the pleadings, the burden shifts to the plaintiff to show the action has not prescribed. **Williams v. Sewerage & Water Bd. Of New Orleans**, 611 So.2d 1383, 1386 (La. 1993). The date on which prescription begins to run is a factual issue to be determined by the trier of fact. We review that determination under the clearly wrong standard. **Webb v. Blue Cross Blue Shield of Louisiana**, 97-0681, p. 6 (La. App. 1 Cir. 4/8/98), 711 So.2d 788, 792. If evidence is introduced at the hearing on the peremptory exception objecting to prescription, the district court's findings of fact are reviewed under the manifest error-clearly wrong standard of review. **Stobart v. State, Through DOTD**, 617 So.2d 880, 882 (La. 1993).

If the findings are reasonable in light of the record reviewed in its entirety, an appellate court may not reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. **Id.** at 882-83.

LAW AND ANALYSIS

In connection with his appeal in this matter, Mr. Doe has set forth two assignments of error. As part of his initial assignment of error, Mr. Doe alleges that the trial court erred in granting the peremptory exception raising the objection of prescription as "he filed his lawsuit within one year of reasonably appreciating that he had a viable legal claim in tort against an identifiable tortfeasor." The second assignment of error put forth by Mr. Doe is that the trial court's decision to apply the traditional *contra non valentem* standard followed in cases such as **Babineaux v. State of Louisiana**, 2004-2649 (La. App. 1 Cir. 12/22/05), 927 So.2d 1121, was improper as Mr. Doe contends that with respect to sexual abuse cases, Louisiana courts have looked to additional facts when deciding issues of prescription.

Liberative prescription runs against all persons unless exception is established by legislation. La. Civ. Code art. 3467. It runs against all persons and incompetents, including minors and interdicts, unless exception is established by legislation. La. Civ. Code art. 3468. The one year liberative prescriptive period for delictual actions begins to run from the date the injury or damage is sustained. La. Civ. Code art. 3492. Prescription statutes, like all others, are strictly construed against prescription and in favor of the obligation sought to be extinguished; thus, of two possible constructions, that which favors maintaining, as opposed to barring, an action should be adopted. **Carter v. Haygood**, 04-0646, p. 10 (La. 1/19/05), 892 So.2d 1261, 1268.

When a petition reveals on its face that prescription has run, the plaintiff has the burden of showing why the claim is not prescribed. **Bouterie v. Crane**, 616 So.2d 657, 660 (La. 1993). The plaintiff has three theories upon which he may rely to establish prescription has not run: suspension, interruption, or renunciation. **Wimberly v. Gatch**, 93-2361 (La. 4/11/94), 635 So.2d 206, 211. In the instant case, Mr. Doe relies on the suspensive theory of *contra non valentem agere nulla currit praescriptio*, which is

translated to mean "prescription does not run against a party unable to act." **Doe v. Roman Catholic Church**, 94-1476, p. 3 (La. App. 3 Cir. 5/3/95), 656 So.2d 5, 7.

The courts created the doctrine of *contra non valentem*, as an exception to the general rules of prescription. **Hillman v. Akins**, 631 So.2d 1, 4 (La. 1994). Moreover, it is an equitable doctrine of Roman origin, with roots in both civil and common law, and is notably at odds with the public policy favoring certainty underlying the doctrine of prescription. See La. Civ. Code art. 3467, **Carter**, 04-0646 at 11, 892 So.2d at 1268. The principles of equity and justice which form the mainstay of the doctrine, however, demand that under certain circumstances, prescription be suspended because plaintiff was effectually prevented from enforcing his rights for reasons external to his own will. **Wimberly**, 93-2361, 635 So.2d at 211. Prescription begins to run when a plaintiff has "actual or constructive knowledge of facts indicating to a reasonable person that he or she is the victim of a tort." **Bailey v. Khoury**, 04-0620, p. 11 (La.1/20/05), 891 So.2d 1268, 1276.

Generally, the doctrine of *contra non valentem* suspends prescription where the circumstances of the case fall into one of the following four categories:

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 a 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 action; and

4. Where some cause of action is not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant.

Wimberly, 93-2361, 635 So.2d at 211.

The first two categories of the doctrine are not relevant to this case and, therefore, are not further discussed. The third category applies to cases where defendant engages in conduct which prevents the plaintiff from availing himself of his judicial remedies. **Plaquemines Parish Commission Council v. Delta Development Company, Inc.**, 502 So.2d 1034, 1055 (La. 1987). The cause of action accrued, but plaintiff was

prevented from enforcing it by some reason external to his own will. **Corsey v. State, through Department of Corrections**, 375 So.2d 1319, 1321 (La. 1979).

Modern jurisprudence also recognizes a fourth type of situation where *contra non valentem* applies so that prescription does not run: Where the cause of action is not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant. (This principle will not exempt the plaintiff's claim from the running of prescription if his ignorance is attributable to his own willfulness or neglect; that is, a plaintiff will be deemed to know what he could by reasonable diligence have learned. **Cartwright v. Chrysler Corporation**, 255 La. 597, 232 So.2d 285, 287 (1970); **Summerall v. St. Paul Fire & Marine Ins. Co.**, 366 So.2d 213, 214 (La. App. 2 Cir. 1978).) **Corsey v. State**, 375 So.2d at 1322. This fourth category, commonly known as the discovery rule, provides that prescription commences on the date the injured party discovers or should have discovered the facts upon which his cause of action is based. **Wimberly**, 93-2361, 635 So.2d at 211.

In the instant case, Mr. Doe relied upon the discovery rule found in the fourth category of *contra non valentem* that prevents prescription from running against one who is ignorant of the facts upon which his cause of action is based. Mr. Doe contended that the reasonable cause of his ignorance was dissociative amnesia or repressed memory, which kept him from remembering anything about what had transpired until sometime in 2002.

In support of their motion for an involuntary dismissal pursuant to La. Code Civ. Pro. Art. 1672B, defendants relied on essentially two arguments. The first argument put forth by defendants was that Mr. Doe failed to establish the date or dates upon which the incident or instances complained of actually took place. The trial court observed:

> It's [defendants'] position that under *contra non valentem* there is only a suspension of prescription, not an interruption. . . . And if there is a suspension, then all involved would need to know when the event happened so as to start the tolling of prescription, when the plaintiff forgot or repressed, or disassociated memory so as to start the time for the running of the suspension, and when the plaintiff, again, remembered the incident to restart the tolling of prescription. It's the defendants' position that the plaintiff has not proved any of these dates and, therefore, failed in their [sic] burden of proof.

The defendants' second basis for their motion for an involuntary dismissal was that Mr. Doe had not proved his case. With respect to this issue, the trial court stated "it's defendants' contentions that the plaintiff's evidence showed that he recovered his memory sufficient to incite inquiry or . . . to get the engine running more than a year before the suit was filed."

The trial court further opined:

> Mr. [Doe] testified that his first recollections of sexual abuse came in late July or early August of 2002. But his first memory of "something" taking place, or some sort of abuse . . . is a "couple of months" before he called the hotline in Chicago. It's [Mr. Doe's] testimony that he can't recall when he first called that hotline.
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> Defendants have established . . . that by April 3 of 2002 there was sufficient information for the Chicago hotline people to contact the Diocese of Lafayette. So we know that the first contact with the hotline was sometime before April 3.
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> . . . .
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> . . . As far as when [the alleged incidents of abuse] happened, I think the psychiatric testimony established that this was a traumatic event to Mr. [Doe]; that he did disassociate his memory or did disassociate from the event, repress his memory of the event. Whether that's valid or not, I don't need to get into; but I certainly understand why he couldn't say when it happened. We do know it was before [Mr. Doe] went to the Central Louisiana State Hospital in October of 1972. The defendants have offered evidence to show it was probably sometime during the school year of 1971, '72. That's about as close as we can get.
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> As far as when he forgot, again, I think that's impossible for Mr. [Doe] to know or to say. Dr. Simon said it was sometime surrounding the time of the abuse. But there was no evidence to establish that Mr. [Doe] forgot the incident contemporaneously with it happening. So some time must have run on the question of prescription after it happened.
>
> The crucial question, of course, as I pointed out, is when was it remembered. Mr. [Doe] testified repeatedly that it was a couple of months before he called the hotline. Again, we don't have any precise evidence of when he first called the hotline. We do know it was by at least April 3 of 2002. The suit was filed March 10 of 2003. So to be timely the recollection would have had to have occurred to Mr. [Doe] less than twenty-four days before April 3rd of 2002. And as noted, it is a suspension of prescription; so they would have had twenty-four days available for him to have forgotten the incidents after they happened and then remember them before calling the hotline.
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> One of the few consistencies in Mr. [Doe's] testimony – and I don't, by saying that, mean to imply he was in any way deliberately inconsistent – but it was clear Mr. [Doe] has had a very difficult life, a number of traumas in his life and this certainly one [sic] of them. But, anyway, one of the few

consistencies was that he remembered that "something took place" . . . that that something was "not appropriate," . . . a couple of months before he called the hotline. It's plaintiff's argument that those memories were not of sexual abuse and were not sufficient to restart the tolling of prescription, that that only started in July or August of 2002.

. . . .

Mr. [Doe] testified that a couple of months before calling the hotline he felt the need to call because of a T.V. spot that referred to any encounter with a priest that was in Mr. [Doe's] words "odd or weird," or "not appropriate." And when he called his only memory was of being hypnotized or the dim lights and the record player, and so forth. But as [Mr. Doe] testified . . . he felt that that hypnosis was some sort of abuse and that "something took place." Now, these recollections that something not appropriate took place were certainly enough to incite curiosity, excite attention or put a reasonable person on guard to call for inquiry.

As the court in **Alexander** [**v. Fulco**, 39,293, pp. 8-9 (La. App. 2 Cir. 2/25/05), 895 So.2d 668, 674] noted, because the burden of proof has been shifted to them it was critical for the plaintiffs to establish that they did not possess information sufficient to incite curiosity, excite attention, or put a reasonable person on guard to call for inquiry more than one year before this lawsuit was filed. And by Mr. [Doe's] own testimony he had information sufficient to incite curiosity and to call for inquiry when he called the Chicago hotline. That's obviously why he called it. He further testified that he had sufficient memories of something happening with Father Joe a couple of months before calling; but he refrained from calling because, as he said . . . he didn't want anyone to know what he was going through.

And that, of course, is similar to the cases discussed in the **Doe v. Doe**[, 95-0006 (La. App. 1 Cir. 10/6/95), 671 So.2d 466] decision where they talk about plaintiffs who justifiably felt fear and embarrassment, as well as confusion about assigning responsibility and a natural hesitancy to confront the authority figures who abused them. But as the court in **Doe** noted, in those cases the courts nevertheless held that [the plaintiffs] retained sufficient mental and psychological capacity to file suit, and it was not a basis for application of *contra non valentem.*

So it is, unfortunately, for Mr. [Doe] my finding that without even getting to the issues of when the incident or incidents happened and when he forgot them and whether or not repressed memories or dissociative amnesia is a valid condition, and whether or not it would apply in this case, that Mr. [Doe] had sufficient information to incite curiosity and to call for inquiry more than one year before March 10 of 2003. Therefore, he has failed to carry his burden of proof that prescription was suspended until sometime after that date. And, accordingly, his claim had prescribed when his suit was filed on March 10, 2003.

So I am granting the motion for involuntary dismissal filed by the defendants. I'm sustaining the exception of prescription and dismissing the plaintiff's claim, and each party is to bear their own costs.

Since, obviously, the cost issue will come up and will be argued in the court of appeal, I'm going to note that my prime reason for sharing the costs is that from all of the information available defendants know something transpired between Father Pellettieri and Mr. [Doe] that was not

> right; and they should have made some reparation for Mr. [Doe]. And I know that they have at least paid for some of his counseling. I don't know what part of it. But they have vigorously and at some times viciously fought this litigation throughout, and I think the very least that [the defendants] can do is to bear their own costs.

Following a thorough review of the record herein, we agree that the doctrine of *contra non valentem* does not apply to the facts of this case. We are therefore constrained to affirm the trial court's judgment granting defendants' motion for involuntary dismissal and maintain its judgment as to the peremptory exception.

DECREE

For the above and foregoing reasons the judgment of the trial court is hereby affirmed. Costs of this appeal are assessed one half to plaintiff-appellant and one half to defendants-appellees.

AFFIRMED.