NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 1149

LAURIE JENKINS

VERSUS

LARRY G. STARNS

MAY 06 2011

Judgment Rendered: _____

* * * * * * *

APPEALED FROM THE TWENTY-FIRST JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF LIVINGSTON
STATE OF LOUISIANA
DOCKET NUMBER 121,879, DIVISION "C"

THE HONORABLE ROBERT H. MORRISON, III, JUDGE

* * * * * * *

Eric Fitzgerald Wright, Sr.
Baton Rouge, Louisiana

Attorney for Plaintiff/Appellee
Laurie Jenkins

Larry G. Starns
Denham Springs, Louisiana

Attorney for Defendant/Appellant
Larry G. Starns

BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

Whipple, J. concurs, with reasons assigned.

McClendon, J. dissents and assigns reasons.

McDONALD, J.

The matter before us is an appeal of a judgment rendered against an attorney for legal malpractice. Appellant, Larry G. Starns, contends that the district court was in error in denying his exception of prescription, by not finding that the filing of the lawsuit for malpractice by appellee, Laurie Jenkins, was untimely and that the suit had prescribed.

FACTS

Laurie Jenkins entered into an agreement with Chet Medlock to provide and erect a metal building on her property. The price of $25,000.00 was to be paid in three installments of $8,333.33. Issues arose as to the quality of work, and Jenkins withheld payment of the last installment. She also consulted an attorney, Larry G. Starns.

Starns wrote a letter to Medlock on Jenkins' behalf, apparently in response to some type of demand by Medlock for the final payment. The letter pointed out complaints Jenkins had with the building, and stated that any lawsuit filed by Medlock would be met with a demand for a reduction in the contract price based upon defects in the building. Thereafter, Medlock filed suit against Jenkins on November 28, 2006, and Jenkins was served with the suit on December 4, 2006. Starns was in contact with the attorney for Medlock and thought there was an informal agreement for an extension of time to file responsive pleadings. When no answer was filed, a preliminary default was obtained on December 20, 2006, and on January 3, 2007, Medlock confirmed the preliminary default. Jenkins was served with a copy of the judgment on January 16, 2007.

Upon being advised of the judgment by Jenkins, Starns filed a petition on her behalf to annul the judgment on January 25, 2007. Exceptions were filed by Medlock, which were sustained, and Jenkins' suit was dismissed in April 2007. Thereafter, Medlock filed a judgment debtor rule on Jenkins, which was served on

Starns. A minute entry confirms that the judgment debtor rule was heard on May 12, 2008, Starns was present, and it was continued until July 7, 2008. Also in May 2008, Starns requested reissuance of service on Medlock of the Petition to Annul Judgment.

Subsequently, Medlock filed a motion for summary judgment on the suit to annul the judgment, and after the hearing on same, attended by Starns on July 28, 2008, the trial court granted summary judgment and Jenkins' suit to annul the judgment was dismissed.

In August 2008, Medlock filed a petition for garnishment, which was served on Hancock Bank on October 1, 2008. Funds from Ms. Jenkins' account at Hancock Bank were seized to satisfy the garnishment. Upon discovery of the loss of funds, Ms. Jenkins consulted another attorney and filed suit for legal malpractice against Starns on November 5, 2008.

The trial on the legal malpractice suit was held on December 8, 2009, and the matter was taken under advisement. Written reasons for judgment were issued, and judgment was rendered against Starns in the amount of nine thousand, three hundred eleven dollars and four cents ($9,311.04) on December 9, 2009. This appeal followed.

DISCUSSION

As noted, Starns contends that Jenkins' suit had prescribed and should have been dismissed. The act of malpractice was allowing a preliminary default to be entered against his client and confirmed by judgment rendered January 3, 2007. Jenkins was served with notice of the judgment on January 16, 2007. It is Starns' position that Jenkins' suit prescribed on January 16, 2008, one year after she received notice of the judgment against her. He contends that the recent supreme court decision in *Naghi v. Brener,* 2008-2527 (La. 6/26/09), 17 So.3d 919,

confirms that the statute authorizing legal malpractice is peremptive, and therefore, may not be suspended or interrupted.

The district court gave particular attention to the *Naghi* decision in issuing written reasons for judgment, and stated:

> However, under any circumstances, Naghi did not deal with that portion of R.S. 9:5605, as to when the one year peremptive period commences. The statute still provides that the one year period commences either on the date of the act or omission or on the date on which the act or omission is discovered or should have been discovered. The three year period of peremption would apply regardless of the time the act or omission is discovered, if three years has elapsed between the date of the act or omission and the date a lawsuit is filed claiming same. In the present case, the petition was filed less than three years from the rendition of the initial default judgment, so the traditional, full three year period would not apply.
>
> As to the one year period of peremption, since the time of reasonable discovery of the malpractice still applies, the doctrine of *contra non valentem agere nulla currit praescriptio* would continue to apply; that is, prescription or peremption in this situation would not commence to run against a person if he would not reasonably have known of the occurrence of the alleged negligent act, or if the debtor has done something which would hinder or prevent the claimant from obtaining such knowledge.
>
> In the context of legal malpractice actions, our courts have adopted what is known as the "continuous representation rule" as an application of *contra non valentem.*
>
> Hendrick v. ABC Insurance Co., 2000-CC-2043, 787 So. 2d 283 (La. 5/15/01).
>
> Lima v. Schmidt, 595 So. 2d 624, (La. 1992).

We recognize that reliance on *Hendrick* seems to be misplaced because the decision in that case was reached by analyzing the law prior to the effective date of LSA-R.S. 9:5605. Also, in the matter before us, the district court allows *contra non valentem* to suspend the commencement of the prescriptive period during a period of time the attorney continues to represent the client and is attempting to correct his mistake. *Naghi* held that both the one-year and three-year time limits for bringing a legal malpractice claim were peremptive periods. Abundant jurisprudence supports the proposition that since a peremptive period may not be interrupted, renounced, or suspended, *contra non valentem* is not applicable in

peremption. Initially, this suggests that the trial court's decision is legally incorrect. However, on closer examination, we find that the trial court's decision is correct. We are not suspending the running of prescription, we are utilizing an equitable doctrine to suspend **commencement** of a prescriptive period, and we are interpreting the statute so as to achieve a result that conforms to the statute, the legislative intent in enacting it, and achieves a result that is legally correct and just.

Consideration of the issue of prescription as opposed to peremption has been debated frequently since the *Naghi* decision. The issue of the time limitation for bringing malpractice actions against professionals has generated considerable confusion in the legal community. See William E. Crawford, *Peremption and Legal Malpractice: Does Civil Code Article 2315 Create Rights Subject to Peremption?* Louisiana Bar Journal, Vol. 58, Number 1, page 24-25. Initially, we recognize that there is a difference between a peremptive statute and a peremptive period. Peremptive statutes are those that create the right of action as well as the time in which they may be brought. However, as noted by Professor Crawford, the right to bring a legal malpractice claim arises from La. C. C. art. 2315, and "is thus inherently not a peremptive right as set forth in art. 3458 of the Code."

Because peremptive statutes create the right, the date on which the peremptive period commences is established, and the right is extinguished at the termination of the peremptive period. For example, LSA-R.S. 48:27, establishing a thirty-day peremptive period for contesting the legality of a resolution adopted by the State Bond Commission under the Grant Anticipation Revenue Vehicle Act of 2002; or LSA-R.S. 51:1158.1 establishing a thirty-day peremptive period for contesting a resolution authorizing the issuance of bonds, with the thirty-day period commencing on the date the resolution is published in the appropriate newspaper.

Louisiana Revised Statutes 9:5605 is not a peremptive statute, although the legislature designated some of the time limits for bringing an action for damages against an attorney as peremptive. Louisiana Revised Statutes 9:5605 provides:

§5605 Actions for legal malpractice

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.

B. The provisions of this Section are remedial and apply to all causes of action without regard to the date when the alleged act, omission, or neglect occurred. However, with respect to any alleged act, omission, or neglect occurring prior to September 7, 1990, actions must, in all events, be filed in a court of competent jurisdiction and proper venue on or before September 7, 1993, without regard to the date of discovery of the alleged act, omission, or neglect. 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.

C. Notwithstanding any other law to the contrary, in all actions brought in this state against any attorney at law duly admitted to practice in this state, any partnership of such attorneys at law, or any professional law 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, the prescriptive and peremptive period shall be governed exclusively by this Section.

D. The provisions of this Section shall apply to all persons whether or not infirm or under disability of any kind and including minors and interdicts.

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.

Added by Acts 1990, No. 683, § 1. Amended by Acts 1992, No. 611, § 1.

§5605.1 Theft of client funds; prescription

A. Notwithstanding the provisions of R.S. 9:5605, prescription of a claim of theft or misappropriation of funds of a client by the client's attorney shall be interrupted by the filing of a complaint with the Office of Disciplinary Counsel, Louisiana Attorney Disciplinary Board, by the client alleging the theft or misappropriation of the funds of the client.

B. The record of the hearing of the Office of Disciplinary Counsel, Louisiana Attorney Disciplinary Board, held to review the claim of theft or misappropriation of the funds of the client may be admissible as evidence in the civil action brought to recover the stolen or misappropriated funds, and in such action, the court may award reasonable attorney fees to the client.

Added by Acts 2003, No. 1154, § 1.

Not only is the right to bring an action against an attorney whose negligence causes damage not created by either statute, but §5605.1 even interrupts the prescriptive period. More importantly, these statutes do not designate how to determine when the prescriptive period commences.

Although stated in the negative, i.e., "no action for damages...shall be brought," the statute provides that an action for damages against an attorney shall be 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. In the matter before us, the trial court found that Jenkins' "discovery" of the alleged malpractice occurred less than a year before suit was filed, therefore, it had not prescribed. It relied on the continuous representation rule to determine that the time in which Starns was attempting to correct the error that resulted in the judgment against Jenkins suspended the commencement of prescription. It is important to remember that in a peremptive statute, the statute creating the right defines when and how it is operative. Certain conditions or circumstances exist, and after their occurrence,

the prescriptive period is established. Once the prescriptive period commences, it may not be renounced, interrupted, or suspended. Whether one is aware of the circumstances, or the right to bring an action based on them, is not at issue. Ignorance of the law is no excuse. While that is also true in LSA-R.S. 9:5605 three years after the damage is incurred, in the matter before us it is not. What is at issue here, is when the period **commences.**

As noted by the supreme court in *Hendrick,* "[d]elictual actions are subject to a one year liberative prescription period that begins to run from the day the injury or damage is sustained. . . In the absence of an express warranty of result, a claim for legal malpractice is a delictual action subject to a liberative prescription of one year." Citations omitted. The supreme court noted, however, that the judiciary has long recognized the doctrine of *contra non valentem agree nulla currit praescripto,* which means prescription does not run against one unable to act. *Contra non valentem* heralds from Roman law and has been passed down to us through our civilian roots. *Hendrick,* 787 So.2d at 289. The supreme court extensively examined the doctrine in the context of legal malpractice. Noting finally,

> The attorney-client relationship is built on trust and the continuous representation rule as encompassed by *contra non valentem* seeks to protect clients who rely on that trust and fail to file legal malpractice suits against their attorneys within the appropriate prescriptive period. *Contra non valentem* does not suspend prescription when a litigant is perfectly able to bring his claim, but fails to do so. When a client does not innocently trust and rely upon his attorney, but rather actively questions his attorney's performance, the client may be denied the safe harbor of *contra non valentem* if equity and justice do not demand its application. We find that the principles of equity, justice, and fairness that underpin the doctrine of *contra non valentem* are absent in this case; therefore, we decline to mechanically apply the continuous representation rule as encompassed by *contra non valentem* in a vacuum to suspend prescription in this particular case.
> *Hendrick,* 787 So.2d at 293.

We recognize that *contra non valentem* has been used to suspend the commencement of liberative prescription, and that peremptive periods may not be suspended. However, we do not think that the principles of equity, justice, and fairness are not applicable to LSA-R.S. 9:5605. Even a cursory reading of the statute indicates the legislature's intent that justice be served. The statute is not governed by a liberative prescriptive period that must be suspended by the doctrine of *contra non valentem.* The action for damages must be filed by either of two dates, "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."

In *Naghi,* the date the prescriptive period began was established by the petition alleging the date on which the damages were sustained. The matter at issue was whether an amendment naming additional defendants related back to the filing of the original petition. Although the amendment would have related back under the test established in *Alexandria Mall*[1], the supreme court reversed the lower courts, and held that the prescriptive period established in LSA-R.S. 9:5605 could not be suspended. Since the commencement of the prescriptive period had been established, claims against defendants named over a year after that commencement were required to be dismissed in accordance with LSA-C.C. art. 3461, which states that peremption may not be renounced, suspended, or interrupted. The holding in that case was not only based on distinguishable facts, but the issue before the supreme court was entirely different. The supreme court has not directly addressed the issue before us, which is an examination of how and when the "discovery" of a malpractice claim is to be interpreted under LSA-R.S. 9:5605.

[1] *Ray v. Alexandria Mall,* 434 So.2d 1083 (La. 1983).

Generally, when analyzing the reasonable date of "discovery," prescription commences when a plaintiff obtains actual or constructive knowledge of facts indicating to a reasonable person that he or she is a victim of a tort. *Campo v. Correa,* 2001-2707 (La. 6/21/02), 828 So.2d 502, 510. The *Campo* court went on to explain:

> 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. Constructive knowledge is whatever notice is enough to excite attention and put the injured party on guard and call for inquiry. Such notice is tantamount to knowledge or notice of everything to which a reasonable inquiry may lead. Such information or knowledge as ought to reasonably put the alleged victim on inquiry is sufficient to start running of prescription. Nevertheless, a plaintiff's mere apprehension that something may be wrong is insufficient to commence the running of prescription unless the plaintiff knew or should have known through the exercise of reasonable diligence that his problem may have been caused by acts of malpractice. ... The ultimate issue is the *reasonableness* of the patient's action or inaction, in light of his education, intelligence, the severity of the symptoms, and the nature of the defendant's conduct. [Citations omitted].
> *Campo v. Correa,* 828 So.2d at 510-511.

We are considering here whether the "continuous representation rule" should govern our decision of whether the plaintiff's actions were reasonable. The supreme court discussed the continuous representation rule before holding that the "continuous treatment rule" would operate to suspend prescription in medical malpractice claims in *Carter v. Haygood,* 2004-0646 (La. 1/19/05), 892 So.2d 1261, 1271. The court stated:

> "[T]he continuous representation rule appropriately protects the integrity of the attorney-client relationship and affords the attorney an opportunity to remedy his error (or to establish that there has been no error), while simultaneously preventing the attorney from defeating the client's cause of action through delay." The rationale behind this rule is that "[a] plaintiff cannot justly be held to be 'sleeping upon his rights' when he is relying upon a honored fiduciary relationship." Indeed, to hold to the contrary "would require a client to hire a backup lawyer to continuously review the work of the primary lawyer." (contrary holding would allow attorney to defeat malpractice claim by using appeal process to continue relationship until prescription has run).

> This rule is especially apt in the context of "an ongoing, continuous, developing and dependent relationship between the client and attorney, with the latter seeking to rectify an alleged act of malpractice." [Citations omitted].

In the matter before us, the plaintiff was put on notice that attention and an inquiry was required when she received notice of the default judgment against her. She made an inquiry of the person she relied on to represent her legal interests. She was advised that a mistake had been made and that it would be rectified. Her legal counsel did attempt to have the judgment annulled, and he was not successful. The petition for damages was filed within a year of her suit to annul being dismissed. We believe her actions were reasonable under the circumstances. If we found that the inquiry made by the plaintiff in this case was not reasonable, we would be holding that, as a matter of law, a reasonable person cannot trust their attorney.

We consider the "discovery" in this case to be distinguishable from other jurisprudence wherein "discovery" is considered because of the nature of the relationship between the parties. The fiduciary duties imposed on an attorney are well-established in law. Also, the inquiry required by a party with an apprehension of something being legally wrong, must be addressed to an attorney. To require all potentially injured parties to consult an attorney other than the one who has already been chosen to represent their interests is very problematic as a practical matter and will possibly foster unnecessary litigation. We see nothing in the statute that demands this result.

Under the facts before us, Starns claimed that based on his communications with opposing counsel, he believed he had an informal extension of time within which to file pleadings. We can envision three possible scenarios. First, there was a misunderstanding, and when Starns brought the matter to the attention of opposing counsel, the default judgment was annulled through a cooperative effort.

Second, the opposing counsel did not agree to an annulment of the judgment, but after hearing the facts in the matter, the trial judge did, and the judgment was annulled for ill practice. Third, Starns knew that he had committed malpractice, but deliberately deceived his client with the intention of obtaining an unjust advantage, i.e., engaged in fraud as defined in Civil Code article 1953. In the first two scenarios, a requirement that the client engage an attorney and file an action prior to allowing Starns to attempt to rectify the alleged act of malpractice, serves no positive or useful purpose. It fosters unnecessary litigation and is a waste of the court's resources. In the third scenario, the legislature has designated that "the peremptive period provided in Subsection A shall not apply."[2] In none of the scenarios that we can envision based on these facts, is there any reason to consider a peremptive period that begins to run from the date of the alleged malpractice.

CONCLUSION

After careful review of the law and jurisprudence, we agree with the district court that under the facts of this case, the continuous representation rule operated to allow the attorney time to attempt to correct the alleged act of malpractice. We find that the continuous representation rule serves the interests of justice as discussed by the supreme court in *Hendrick,* and *Carter,* and can be used as an interpretive tool in analyzing when "discovery" commences the prescriptive period in LSA-R.S. 9:5605. Accordingly, the judgment is affirmed. Costs are assessed against the appellant, Larry G. Starns.

AFFIRMED.

[2] Regarding the necessity for pleading fraud, see *Trailer Outlet v. Dutel, Inc.* 2009-2139 (La. App. 1 Cir. 6/11/2010) (unpublished).

LAURIE JENKINS **STATE OF LOUISIANA**

COURT OF APPEAL

VERSUS

FIRST CIRCUIT

LARRY G. STARNS **NUMBER 2010 CA 1149**

Whipple, J. concurring.

I concur in the result reached by the authoring judge. As the author correctly notes, the record demonstrates that Starns committed malpractice in allowing a preliminary default against his client and the confirmation thereof. Clearly, these were acts of malpractice.

However, the record also shows that Starns committed subsequent acts of malpractice. Specifically, despite later representing that he would attempt to "take care of" or be able to set aside the default judgment, he failed to satisfy the judgment and was unsuccessful in defeating the creditor's motion for summary judgment, which resulted in the dismissal of his suit to annul the default judgment.

Thus, his initial acts of malpractice in allowing a judgment to be obtained against his client were compounded by his subsequent handling of the case, which additional acts of malpractice ultimately resulted in the seizure of his client's funds to satisfy the garnishment issued against her in connection with the original judgment.

Thus, I concur in the result reached in the main opinion, as the petition for damages at issue herein was brought within one year of his subsequent acts of malpractice.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 1149

LAURIE JENKINS

VERSUS

LARRY G. STARNS

****

McCLENDON, J., dissents and assigns reasons.

I cannot fault the majority for attempting to craft an equitable solution in this case. However, I must respectfully disagree, finding said opinion to be legally incorrect. The promulgation of laws is the function of the legislature, and where no ambiguity exists, those laws must be followed, even where the result is harsh.

The clear language of LSA-R.S. 9:5605A provides, in pertinent part:

> No action for damages against any attorney at law ... 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.

The legislature has expressly stated that both the one-year and three-year periods are peremptive periods. LSA-R.S. 9:5605B. See **Naghi v. Brener**, 08-2527 (La. 6/26/09), 17 So.3d 919. Thus, the statement by the majority that LSA-R.S. 9:5605 is not a peremptive statute contradicts the unambiguous language of the statute.

The legislature, in attempting to balance interests, has provided for two situations where the peremptive period does not expire one year from the date of the occurrence. First, the statute provides for commencement of the

peremptive period "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.**" (Emphasis added). Further, LSA-R.S. 9:5605E expressly provides that the peremptive period provided in Subsection A shall not apply in cases of fraud. Thus, while there may be discussion among scholars as to whether LSA-R.S. 9:5605 is a true peremptive statute, nevertheless, we cannot ignore the legislative mandate to apply the statute as peremptive.

As the majority correctly acknowledges, the act of malpractice in this case "was allowing a preliminary default to be entered against [Mr. Starns's] client and confirmed by judgment rendered January 3, 2007." Further, the latest act of malpractice alleged by Ms. Jenkins in her petition for damages occurred on April 16, 2007.[1] However, the majority finds that the one-year period did not commence until Mr. Starns's suit to annul the default judgment was dismissed for the second time on July 28, 2008. I disagree.

The facts herein clearly establish that Ms. Jenkins discovered the default judgment shortly after it was rendered. She was served with the notice of the default judgment against her in the principal amount of $8,333.33 on January 16, 2007. She testified that she knew there was a problem at that time. She called Mr. Starns and faxed to him a copy of the judgment. Mr. Starns testified that he told Ms. Jenkins that the judgment was a mistake on his part and that he would try to get it overturned. On January 23, 2007, he filed a petition on Ms. Jenkins's behalf to annul the January 3, 2007 judgment. Exceptions were filed and sustained, and the suit to annul was dismissed on April 16, 2007, after Mr. Starns failed to appear at the hearing. Mr. Starns continued to represent Ms. Jenkins, trying to get the judgment annulled a second time. The suit to annul the judgment was ultimately dismissed on July 28, 2008, and Ms. Jenkins's

[1] Only two acts of malpractice were alleged by Ms. Jenkins in her petition against Mr. Starns. The first was "the negligent act of failing to file a responsive pleading" in the original suit, which resulted in the confirmation of the default judgment. The second was that Mr. Starns "failed to act as a reasonable prudent attorney when he failed to appear and defend Petitioner at the April 16, 2007 court date."

wages were garnished in October 2008. Thereafter, Ms. Jenkins obtained new counsel and filed her petition for damages on November 5, 2008.

Clearly, under "the continuous representation rule" relied on by the majority and the trial court, Ms. Jenkins's action would not be prescribed. However, under the facts of this case, such an application of *contra non valentem* is improper.

The majority correctly recognized that the continuous representation rule is encompassed within the doctrine of *contra non valentum.* However, the majority's, as well as the trial court's, reliance on the case of **Hendrick v. ABC Ins. Co.**, 00-2043 (La. 5/15/01), 787 So.2d 283, for the application of the continuous representation rule, is misplaced. Although the majority distinguishes **Hendrick**, it nevertheless relies on it to reach its decision. The supreme court in **Hendrick** simply found the plaintiff's claim prescribed under the law in effect prior to the enactment of LSA-R.S. 9:5605.[2] **Hendrick**, 00-2403 at p. 9, 787 So.2d at 289. **Hendrick** did not answer the question of whether the continuous representation rule may be applied in cases of peremption where the client is fully aware that the act of malpractice has occurred, yet fails to file suit within one year of the date of discovery.

Of more significance to the case *sub judice* are the cases of **Reeder v. North**, 97-0239 (La. 10/21/97), 701 So.2d 1291, and **Naghi v. Brener**, 08-2527 (La. 6/26/09), 17 So.3d 919. In **Reeder**, the supreme court declined to allow the statutory period for filing a legal malpractice suit to be suspended by the continuous representation rule.[3] The court stated that as a suspension principle based on *contra non valentem,* the continuous representation rule cannot apply to peremptive periods, as peremptive periods, within the meaning of and in accordance with the Civil Code, may not be renounced, interrupted, or suspended. **Reeder**, 97-0239 at p. 12, 701 So.2d at 1298. Accordingly, nothing

---

[2] Louisiana Revised Statute 9:5605 was enacted in 1990 and amended in 1992 to provide a peremptive period for legal malpractice. The legal malpractice claim in **Hendrick** was filed in 1991 based on actions predating the statute's enactment.

[3] Although **Reeder** involved the three-year peremptive period of LSA-R.S. 9:5605, it is nevertheless instructive.

may interfere with the running of a peremptive period, and exceptions such as *contra non valentem* are not applicable. **Id.** The Louisiana Supreme Court reaffirmed this holding in **Naghi** and confirmed that both the one-year and three-year periods for filing a legal malpractice suit under LSA-R.S. 9:5605 are peremptive time periods. **Naghi**, 08-2527 at p. 11, 17 So.3d at 926. The majority also relies on the case of **Carter v. Haygood**, 04-0646 (La. 1/19/05), 892 So.2d 1261, in its discussion of the application of the continuous representation rule. However, **Carter** was a medical malpractice case and was decided prior to the **Naghi** decision.

In its reasoning, the majority finds that it would be unjust to find the continuous representation rule inapplicable, stating that otherwise "a reasonable person cannot trust their attorney." However, the majority's reasoning is flawed. In situations of fraud, where trust is misplaced, the peremptive period does not apply. LSA-R.S. 9:5605E. Further, where the client is aware of the malpractice, the client has one year to allow his or her attorney to correct the problem.[4]

Therefore, based on the clear wording of LSA-R.S. 9:5605, and the facts of this case, the trial court in this matter erred when it applied the continuous representation rule, thereby suspending the commencement of the one-year peremptive period. The one-year period set forth in LSA-R.S. 9:5605 has been designated peremptive by the legislature and is not subject to suspension. Further, because it is clear that the "act, omission, or neglect" was discovered by Ms. Jenkins on January 16, 2007, and because the only acts of malpractice asserted by Ms. Jenkins in her petition for damages occurred on or before April 16, 2007, this legal malpractice action filed on November 5, 2008, was untimely.[5] The majority seeks to apply a principle of suspension of prescription by labeling the continuous representation rule a "discovery rule" rather than an application

---

[4] This is presuming that the correction is made within three years from the date of the alleged act, omission, or neglect as provided in LSA-R.S. 9:5605A.

[5] This case is distinguished from one where the discovery of the act, omission, or neglect was hidden by the attorney such that the client did not know or had no way of knowing of the wrong, or where an attorney fraudulently lulls a client into believing a problem he has created can be fixed. The allegations of Ms. Jenkins's petition cannot be construed to allege fraud so that the peremptive periods are not applicable.

of *contra non valentem*. I cannot agree with this interpretation. Therefore, I respectfully dissent.