

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 CA 1117

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PHYLLIS J. BROWN

VERSUS

**THUC BAO THI TRAN
AND
GEICO GENERAL INSURANCE COMPANY**

Judgment Rendered: December 23, 2009

On Appeal from the 21st Judicial District Court
In and For the Parish of Tangipahoa
Trial Court No. 2008-002886, Division "H"

Honorable Zorraine M. Waguespack, Judge Presiding

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Thuc Bao Thi Tran and
Geico General Insurance Company

BEFORE: WHIPPLE, HUGHES, AND WELCH, JJ.

HUGHES, J.

This is an appeal from a judgment of the 21st Judicial District Court that sustained a peremptory exception raising the objection of prescription and dismissed appellant's claims. For the following reasons, we reverse and remand for further proceedings.

FACTS

This case originally arose out of an automobile accident that occurred on September 7, 2007. On September 5, 2008 Ms. Phyllis J. Brown faxed a petition for damages to the Tangipahoa Parish Clerk of Court, alleging that defendants, Thuc Bao Thi Tran (Tran) and Geico General Insurance Company (Geico) were liable to her for damages she suffered as a result of the accident. The original petition, however, was not received by the clerk and "stamped in" until September 18, 2008. As a result, defendants filed an exception raising the objection of prescription. After a hearing, judgment was rendered and signed on November 10, 2008, granting the objection of prescription and dismissing Ms. Brown's claims with prejudice. Ms. Brown filed for a new trial and then filed an appeal, assigning as error the granting of the exception.

LAW AND ANALYSIS

The Louisiana Civil Code provides a one-year prescriptive period for delictual actions. LSA-C.C. art. 3492. Normally, the exceptor bears the burden of proof regarding his exception; however, if the exception of prescription is raised and prescription is evident on the face of the pleadings, the burden shifts to the plaintiff to show suspension, interruption, or renunciation. **SS v. State ex. rel. Dept. of Social Services**, 2002-0831, pp. 6-7 (La. 12/4/02), 831 So.2d 926, 931 (*citing Lima v. Schmidt*, 595 So.2d 624, 628 (La. 1992)).

The accident upon which Ms. Brown sued occurred on September 7, 2007. The suit was time-stamped as filed by the clerk of court on September 18, 2008. As such, the action appears to have prescribed and the burden shifted to Ms. Brown to show suspension, interruption, or renunciation of the prescriptive period. Ms. Brown makes two arguments against the prescription of the suit:

- 1) that Governor Jindal issued an executive order suspending the prescriptive period; and
- 2) that the suit was faxed to the clerk of court on September 5, 2008.

EXECUTIVE ORDER

Following Hurricane Gustav, Governor Jindal issued Executive Order No. BJ 08-92¹ pursuant to his authority under LSA-R.S. 29:724,² which provided, in pertinent part, that:

SECTION 1: All deadlines in legal, administrative, and regulatory proceedings, including liberative prescriptive and preemptive periods in all courts, administrative agencies, and boards are hereby **suspended** until Friday, September 12, 2008, including, but not limited to, any such deadlines set for in the following:

- A. Louisiana Civil Code;
- B. Louisiana Code of Civil Procedure;
- C. R.S. Title 9, Civil Code Ancillaries;
- D. R.S. Title 13, Courts and Judicial Procedure;
- E. R.S. Title 18, Chapter 11, Election Campaign Finance;

¹ We note that in the prior unpublished case of *Carmena v. East Baton Rouge Sheriff's Department*, 2007 CA 0300, (unpublished), *writ denied*, 2008-0567 (La. 5/2/08), 979 So.2d 1286, we interpreted Governor Blanco's Executive Orders KBB-2005-32, KBB-2005-48, and KBB-2005-67, which also suspended the prescriptive periods. However, we note that those executive orders were later ratified by Act 6 of the 2005 1st Extraordinary Session of the legislature under LSA-R.S. 9:5821, and LSA-R.S. 9:5822 which "approved, ratified, and confirmed" the executive orders, but also added an exception to the suspension by ending all suspensions on January 3, 2006. Specifically, it limited the prescriptive suspensions so that "any right, claim, or action which would have expired during the time period of August 26, 2005, through January 3, 2006, shall lapse on January 4, 2006." The legislature has made no such exception to the governor's executive orders in this case.

² Louisiana Revised Statutes 29:724, in pertinent part, states that:

- A. The governor is responsible for meeting the dangers to the state and people presented by emergencies or disasters, and in order to effectuate the provision of this Chapter, the governor may issue executive orders, proclamations, and regulations and amend or rescind them. Executive orders, proclamations, and regulations so issued shall have the full force and effect of law.

- F. R.S. Title 23, Chapter 10, Worker's Compensation;
- G. R.S. Title 40, Chapter 5 Part XXI-A, Malpractice Liability for State Services;
- H. R.S. Title 40, Chapter 5, Part XXIII, Medical Malpractice; and
- I. R.S. Title 49, Chapter 13, Administrative Procedure.

SECTION 2: This Order is effective upon signature and shall apply retroactively from Friday, August 29, 2008, through Friday, September 12, 2008, unless amended, modified, terminated, or rescinded by the governor, or terminated by operation of law prior to such time. (Emphasis added.)

Louisiana Civil Code article 3472 provides that “[t]he period of suspension is not counted toward accrual of prescription. Prescription commences to run again upon the termination of the period of suspension.”

Therefore, the executive order had the effect of *suspending* (not extending) the accrual of the prescriptive period of Ms. Brown's suit from August 29, 2008 until September 12, 2008. As of August 29, 2008, there were 10 days left in the one-year prescriptive period. On September 13, 2008 the clock began again and Ms. Brown's case would have then prescribed on September 23, 2008. Since Ms. Brown's petition was filed on September 18, 2008 it had not yet prescribed. This assignment of error has merit. Because we have found merit in this argument, we pretermitted discussion of the remaining assignment of error.

CONCLUSION

The judgment of the district court that granted the peremptory exception raising the objection of prescription is reversed and this case is remanded for further proceedings. All costs of this appeal are assessed against appellees.

REVERSED AND REMANDED.