

SUPREME COURT OF LOUISIANA

No. 97-CC-0742

STATE OF LOUISIANA, THROUGH THE DIVISION OF
ADMINISTRATION

Versus

MCINNIS BROTHERS CONSTRUCTION

LEMMON, J., Dissenting

In determining legislative intent, the majority relies upon two principal theories. First, the majority states that the Legislature set forth a specific event that governs the commencement of the five-year period for filing of suit by a state entity against a general contractor or its surety, noting that La. Rev. Stat. 38:2189 requires suit within five years of the substantial completion or acceptance of the work. Section 2189, which itself states the period is prescriptive, is no different from any other prescriptive statute. Virtually all prescriptive statutes state the specific event for the commencement of the period of prescription,¹ but that general commencement date in a true prescriptive statute is subject to application of the doctrine of contra non valentem in appropriate cases. I therefore conclude that the establishment of a specific event for the commencement of a period denominated prescriptive by the statute itself is not an indication of any legislative intent for a peremptive statute.

The other principal theory set forth by the majority is that if the commencement of the five-year period was suspended until the discovery of the defect in construction, then the five-year period would never be applicable in any case. The majority states that the Legislature could not have intended such an "act of futility."

¹The prescriptive period for delictual actions, for example, commences on "the day injury or damage" is sustained. La. Civ. Code art. 3492.

The majority overlooks the fact that the doctrine of contra non valentem applies only when the creditor knew or should have known of the existence of his cause of action. Section 2189 applies a five-year prescriptive period for defects in construction of which the state agency knew or should have known by inspection of the construction. It is only when the defect in construction is a latent defect which was not subject to discovery that the doctrine of contra non valentem applies. In such a case, the commencement of the prescriptive period is suspended until discovery, at which time the five-year prescriptive period of Section 2189 begins to run. Concededly, many or even most cases will involve latent defects, and the five-year prescriptive period will not apply in such cases, but this does not mean that the five-year prescriptive period will never apply.

Significantly, the Legislature could have expressed its intent for a preemptive period by such language "in all events such claims shall be filed at the latest within a period of"² five years of the specified event, or "in no event more than [five] years after the"³ event, or some such similar language. However, the Legislature did not do so in this case; rather, the Legislature specifically called this a prescriptive period rather than a preemptive period.

Finally, I see no compelling public policy reason (or any reason except powerful legislative lobby) for imposing preemptive periods on state entities in actions against contractors while private parties enjoy the advantages of prescriptive periods.

I therefore dissent from the judgment maintaining the exception of prescription or preemption.

²La. Rev. Stat. 9:5628.

³La. Rev. Stat. 9:2772, which denominates the period as preemptive.