No. _____

In The

Supreme Court of the United States

MICHELLE MYER-BENNETT,

Petitioner,

v.

TRACY RAY LOMONT,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Louisiana

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Accepted statutory interpretation requires provisos or exceptions to general legislative rules to be strictly construed to maintain the general rule's effect; those seeking the benefit of exceptions must prove their entitlement under the circumstances.

Louisiana Revised Statutes § 9:5605.E is Louisiana's statutory "fraud exception" to § 9:5605's general 3-year peremptive (repose) period limiting legal malpractice claims. Under the exception, a plaintiff is excused from the 3-year period if her lawyer fraudulently prevented her from bringing the claim timely.

Below, Petitioner Michelle Myer-Bennett was sued for legal malpractice by Respondent Tracy Lomont. The trial judge dismissed Lomont's claim as time-barred after an evidentiary hearing in which he found no evidence of fraud. Only Lomont introduced evidence at that hearing; Myer-Bennett introduced none. By all appearances, the trial judge found that Lomont did not carry the burden of showing she was entitled to the benefit of the "fraud exception."

The questions presented are:

1. Whether Fourteenth Amendment Procedural Due Process permits courts to ignore the rules of statutory interpretation requiring parties seeking to benefit from an exception to a statutory rule to prove entitlement to the exception.

QUESTIONS PRESENTED – Continued

2. Whether Fourteenth Amendment Procedural Due Process permits the Supreme Court of Louisiana to create a rule of law in § 9:5605.E "fraud exception" cases, excusing plaintiffs from proving entitlement to the exception and re-assigning that burden to defendants, who must now prove an absence of fraud to have § 9:5605's limitations periods applied.

3. Whether under this Court's reasoning in *Manley v. Georgia*, a rule may validly be created in which allegations alone give rise to a presumption of fraud, which a defendant must rebut before a statutory limitations period applies to dismiss facially time-barred claims made against her.

As it announced the new burden re-assignment rule, the Supreme Court of Louisiana held that "it is the total absence of evidence in the record which compels our decision [that Petitioner committed fraud]."

Also presented for review is:

4. Whether Fourteenth Amendment Procedural Due Process permits the Supreme Court of Louisiana to use its newly-articulated "fraud exception" burden rule to factually find that Petitioner committed fraud, without ever allowing her to carry a burden she didn't even bear in the trial court below.

PARTIES TO THE PROCEEDINGS

Petitioner Michelle Myer-Bennett was the Defendant and Appellee below.

Respondent Tracy Ray Lomont was the Plaintiff and Appellant below.

XYZ Insurance Company was a placeholder named as a defendant below, as the plaintiff anticipated that defendant Myer-Bennett was covered by a policy of liability insurance. She was not, and XYZ Insurance Company was never replaced with a real party in interest. Accordingly, XYZ Insurance is not a real company or individual, and therefore cannot be a party in interest.

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PETITION FOR A WRIT OF CERTIORARI

Michelle Myer-Bennett respectfully petitions for a writ of certiorari, seeking this Honorable Court's review of the Supreme Court of Louisiana's opinion.

OPINIONS BELOW

The Supreme Court of Louisiana's opinion and decree is reported at 172 So.3d 620; it is reprinted in the Appendix (App.) at 1a-40a along with the unreported rehearing denial. App. 62a. The court of appeal's opinion and decree, reported at 164 So.3d 843, is reprinted at App. 41a-55a. The trial court's unreported judgment and reasons are reprinted at App. 56a-61a.

JURISDICTION

On June 30, 2015, the Supreme Court of Louisiana released its opinion and decree. App. 1a-40a. On August 28, 2015, the Supreme Court of Louisiana denied Michelle Myer-Bennett's ("Myer-Bennett") rehearing request. App. 62a.

Review by way of the writ of certiorari 28 U.S.C. § 1257(a) is proper under the circumstances, which include a normally non-final remand order. App. 40a. Myer-Bennett files this Petition to challenge an aspect of the judgment which is final and reviewable under § 1257(a) because it not only denies her the

ability to meaningfully defend herself against legal malpractice allegations, it completely alters the landscape of professional liability time bars in Louisiana, across a variety of industries.

Here, the Supreme Court of Louisiana re-assigned a burden, which in the district court was the plaintiff's, to the defendant. A few pages after the burden re-assignment, the court reasoned "it is the total absence of evidence in the record which compels our decision." App. 28a. Based on the unsurprising lack of evidence to support the burden of proof *she never faced below*, the court declared Myer-Bennett a fraud and remanded "for further proceedings." App. 40a. All of this took place before Myer-Bennett was even required to file an answer, before she could conduct discovery, and without ever allowing her to meet the newly-announced (and unconstitutional) burden.

The Fourteenth Amendment Procedural Due Process denial described warrants this Court's grant of certiorari; it not only creates an unconstitutional *de facto* law of the case for Myer-Bennett, it creates a new and unworkable rule of law in Louisiana which will affect professional liability across multiple disciplines.

The unconstitutional burden re-assignment was made by the Supreme Court of Louisiana: not the trial or appeal court. Myer-Bennett's only opportunity to challenge the judgment was in a request for

rehearing, which she served on Louisiana's attorney general. Rehearing was denied. App. 62a.

28 U.S.C. § 2403(b) may apply and this Petition should be served accordingly.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

Louisiana Revised Statutes § 9:5605 provides:

> 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.

INTRODUCTION

Petitioner Michelle Myer-Bennett ("Myer-Bennett") is a Louisiana lawyer who has been ruled a fraud by the Supreme Court of Louisiana. The ruling is the first of its kind and turns entirely on an unconstitutional re-assignment of an important burden from the plaintiff to Myer-Bennett. Because the re-assignment of the burden took place so late, Myer-Bennett could not defend herself. To date, she has done nothing but point out that the plaintiff's allegations were time-barred; she has neither introduced evidence nor filed an answer. Not only has the Supreme Court of Louisiana's ruling denied her Procedural Due Process under the Fourteenth Amendment, the holding will dictate that identical provisions in similar statutes across a variety of professions in Louisiana are unconstitutionally applied.

Proceedings below. Myer-Bennett was sued for malpractice by her client, Respondent Tracy Lomont ("Lomont"). But Lomont filed her suit too late under La. Rev. Stat. § 9:5605, a statute of repose

(peremption in Louisiana's civil law) which sets an outside limit of 3 years from the lawyer's mistake. Myer-Bennett sought dismissal of Lomont's claim as time-barred, and the trial judge held an evidentiary hearing to determine whether Lomont was entitled to the only exception to the 3-year period: fraud. Under Louisiana law, the 3-year period does not apply in cases where a lawyer fraudulently prevents their client from suing them for malpractice. La. Rev. Stat. § 9:5605.E. After deposing Myer-Bennett, Lomont introduced evidence and called witnesses at the hearing. Myer-Bennett offered none. After considering Lomont's evidence, the trial judge found she was not entitled to the fraud finding she sought; though he found plenty of negligence, he saw no intent on Myer-Bennett's part to defraud Lomont. He dismissed Lomont's malpractice claim as time-barred under § 9:5605's 3-year peremptive (repose) period. The ruling was affirmed; the court of appeal held that the trial judge was not required to blindly accept Lomont's fraud allegations as true where she had offered evidence at the hearing. The panel also refused to disturb the trial judge's appreciation of the live testimony he took.

Section 9:5605: a rule and an exception. Section 9:5605.E is an exception to the general limitations periods for malpractice claims. In this case alone, the Supreme Court of Louisiana described it as "fraud exception" over 20 times.[1] The court also

[1] App. 5a, 6a, 10a, 12a, 13a, 15a, 21a, 29a, 30a, 31a, 32a, 33a.

echoed its earlier descriptions of § 9:5605.E as Louisiana's legislative restoration of the equitable *contra non valentem* exception to limitations periods. App. 14a, *citing Borel v. Young*, 989 So.2d 42 (La. 2007), *on reh'g*, 989 So.2d 61, n.3 (La. 2008).

As the party seeking to benefit from a proviso or exception to the general rule, Lomont should have had to prove § 9:5605.E fraud, not Myer-Bennett. *Republic of Iraq v. Beaty*, 556 U.S. 848, 129 S.Ct. 2183, 173 L.Ed.2d 1193 (2009); *United States v. Dickson*, 40 U.S. 141, 10 L.Ed. 689 (1841).

Section 9:5605's "new rule." On certiorari review, the Supreme Court of Louisiana ruled that allegations of fraud alone (App. 10a) were enough to re-assign the burden to Myer-Bennett (App. 10a-11a), who would be required to prove she did not defraud Lomont in order to have the 3-year peremption period applied. The court wrote "[i]t is the total absence of evidence in the record which compels our decision." App. 28a. Regarding fraud, the court found "there is no other plausible explanation for Ms. Myer-Bennett's actions other than she intended to defraud Ms. Lomont." App. 28a.

Review is warranted. Procedural Due Process, guaranteed by the Fourteenth Amendment to the United States Constitution, prohibits this type of burden flip. This Court's rulings have declared statutes **facially unconstitutional** when they allow proof of one fact to shift a burden or create a presumption as to proof of another fact. *Manley v. State of Georgia*,

279 U.S. 1, 6, 49 S.Ct. 215, 73 L.Ed. 575 (1929) (declaring statute allowing proof of a fact to create the presumption of fraud facially unconstitutional). By even greater justification, the Supreme Court of Louisiana's application of § 9:5605.E, that merely *pleading* fraud creates a presumption a defendant will be required to rebut to have late-filed malpractice allegations dismissed, violates her right to Procedural Due Process. Here, there is a violation because Myer-Bennett was denied a fair opportunity to even carry her burden, particularly as it has done here – at the exception level, even before she could file an answer. See William J. Rich, MODERN CONSTITUTIONAL LAW § 22:14 (3d ed. West 2014).

Far from an intellectual quibble, the burden re-assignment will be immediately applicable to identical "fraud exceptions" in professional liability limitations statutes affecting not just attorneys, but also accountants, insurance agents, surveyors, interior designers, architects, real estate developers home inspectors, and engineers.

Certiorari should be granted. This Court should review and reverse the ruling below because it depends entirely upon the burden re-assignment which unconstitutionally deprived Myer-Bennett of Procedural Due Process otherwise guaranteed by the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Rule 14.1(g)(i) Specification. Because the unconstitutional burden re-allocation did not take place until the Supreme Court of Louisiana ruled (App. 10a-11a), Myer-Bennett raised the as-applied constitutionality issue for the first time in her July 20, 2015 request for rehearing (denied at App. 62a). She gave notice of the challenge to her state's attorney general, which satisfied Louisiana law. La. Rev. Stat. §§ 13:4448 and 49:257.C.

Stage of the proceedings. Up for review is a judgment featuring the Supreme Court of Louisiana's factual finding of fraud for the first time on its certiorari review. The judgment could not have been made without a last minute, unconstitutional burden shift from plaintiff to defendant, followed by a fraud finding the court explained was compelled by "the total absence of evidence in the record." App. 28a. The matter has been remanded "for further proceedings" (App. 40a), and a defendant who has yet to even file an answer but has already been branded a fraud by her state's highest court will seek to meaningfully defend herself against facially time-barred malpractice allegations.

Lomont and Myer-Bennett. *Lomont v. Myer-Bennett* is a state court legal malpractice case in which divorce lawyer Myer-Bennett forgot to record client Lomont's September 2008 marital property settlement in the public records. App. 2a. In February 2009, Lomont's ex-husband's creditor was able to

record a judgment against Lomont's house. App. 2a. The house would have been outside the creditor's reach had the settlement been recorded. In December 2010, Lomont discovered the failure to record (and resulting lien) and Myer-Bennett agreed to fix her mistake. App. 2a-4a. Louisiana ethical rules prohibit that sort of curative work, and Myer-Bennett had to withdraw based on the unwaivable conflict of interest. App. 3a-4a.

Lomont's time-barred malpractice claim. In July 2012, Lomont sued Myer-Bennett for legal malpractice. App. 5a. In October 2012, Myer-Bennett filed an exception[2] and sought dismissal under Louisiana's legal malpractice time limitations statute, La. Rev. Stat. § 9:5605. App. 5a. The basis for the exception was that under every applicable period (which were peremptive, the civilian "statute of repose") in Louisiana, Lomont's claims were made too late. App. 5a.

In response to the exception, Lomont's attorney conducted discovery and deposed Myer-Bennett in February 2013. Myer-Bennett agreed to continue the hearing on the exception and Lomont's attorney amended her petition in August 2013 to include

[2] The Louisiana peremptory exception is a dispositive filing similar to a demurrer or a motion to dismiss. Its focus is whether there exists a legal right to recovery on the face of the pleadings. In most situations, it is filed before an answer, and if successful, no answer need be filed. If the exception is overruled (the equivalent of motion denial), the excepting defendant is ordered to file an answer to the factual allegations.

bare-bones fraud allegations – proving that Myer-Bennett fraudulently kept her from timely suing was the only way Lomont could escape her time-barred malpractice claim.[3]

In November 2013, Myer-Bennett re-urged and supplemented her exception and the matter was set for a December 2013 hearing. In lieu of the December hearing, the trial judge had the parties conference in his chambers and he allowed Lomont to amend again to properly allege fraud. The exception hearing was continued until January 2014.

In December 2013, counsel for Myer-Bennett wrote Lomont's counsel explaining the particularity with which Lomont had to plead fraud for Myer-Bennett to defend or file another exception. Later that month, Lomont amended her petition for the second time, now including a litany of troubling fraud allegations.

The hearing. The January 2014 hearing was Lomont's chance to show this was a case of fraud such that her late-filed malpractice claim should not be dismissed. App. 6a. Though she introduced none of Myer-Bennett's deposition testimony, Lomont introduced 4 exhibits, she testified and her attorney subpoenaed and examined Myer-Bennett. App. 6a. Myer-Bennett offered no evidence and called no

[3] La. Rev. Stat. § 9:5605.E provides that the statutes of repose (Louisiana peremptive periods) "shall not apply in cases of fraud."

witnesses. A little over a week later, the judge issued a written ruling, sustaining the exception and dismissing Lomont's claim as untimely. App. 56a-61a. The ruling was based on the judge's appreciation of the evidence and testimony Lomont offered, and he found no evidence of fraudulent intent. App. 60a-61a.

Lomont's appeal. The district court's ruling on the exception was affirmed on Lomont's by-right appeal. App. 41a-55a. The appeal court found that the trial judge was not required to accept Lomont's fraud allegations as true where she introduced evidence at the exception hearing. App. 52a-53a. Constrained by the manifest error standard of review, the appeal court's opinion and decree concluded:

> The trial court specifically found that Defendant did not have the requisite intent for fraud. Our review of the record does not show that this finding was manifestly erroneous. Defendant testified that she admitted her mistake in failing to file the partition agreement to Ms. Lomont in December 2010. Defendant further stated that she offered to help Ms. Lomont in getting the lien removed and everything she did was in an effort to "fix the problem" she had created. When findings are based on determinations regarding the credibility of witnesses, great deference is given to the trier of fact because only the fact finder is cognizant of the variations in demeanor and tone of voice that bears so heavily on the listener's understanding and belief in what is said. *Arguello v. Brand*

> *Energy Solutions, LLC*, 13-990 (La. App. 5 Cir. 5/21/14); 142 So.3d 254, 255. While some of Defendant's representations to Ms. Lomont regarding the method by which the lien could have been removed may have been grossly negligent, we cannot say the trial court was manifestly erroneous in finding Defendant's conduct was not fraudulent.

App. 54a-55a.

Supreme Court of Louisiana. The Supreme Court of Louisiana granted Lomont's application for writ of certiorari in February 2015, briefing and oral argument took place in April and May 2015, respectively. In June 2015, the court released its opinion, reversing and remanding. App. 1a-40a.

In analyzing whether the § 9:5605.E "fraud exception" could have excused Lomont's late-filed malpractice claim, the Supreme Court of Louisiana created a new rule when it held that Lomont's fraud allegations alone[4] (App. 10a) meant "Ms. Myer-Bennett

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[4] In the same paragraph, though, the court recited the Louisiana truism that "when evidence is introduced, the court is not bound to accept plaintiff's allegations as true. See *Denoux v. Vessel Management Services, Inc*., 07-2143 (La. 5/21/08), 983 So. 2d 84, 88; *Younger v. Marshall Industries, Inc*., 618 So. 2d 866, 87 1 (La. 1993); *Ansardi v. Louisiana Citizens Property Ins*., 11-1717 (La. App. 4 Cir. 3/1/13), 111 So. 3d 460, 472, *writ denied*, 13-0697 (La. 5/17/13), 118 So. 3d 380." App. 11a. Each court in this dispute has recognized that Lomont introduced evidence at the exception hearing. App. 6a (supreme court), 52a-53a (appeal court), 60a-61a (trial court).

was required to prove La. R.S. 9:5605(E) is not applicable." App. 11a.

The court disregarded the trial judge's factual finding that there was no evidence of fraud (and that Myer-Bennett just might not be a good lawyer)[5] after he conducted an evidentiary hearing. In declaring that Myer-Bennett had defrauded Lomont, the court explained that "[i]t is the total absence of evidence in the record which compels our decision." App. 28a. The court reversed, concluding that "there is no other plausible explanation for Ms. Myer-Bennett's actions

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[5] The trial judge held:

> While Ms. Lomont argues that this was all an effort to trick her into allowing the preemptive (*sic*) period to pass, this Court finds that this was not the case. Instead, this Court is inclined to believe that Ms. Myer-Bennett was honestly trying to fix a mistake that she had caused. As a result, this Court cannot find that her actions amounted to fraud, because Ms. Myer-Bennett did not have the requisite intent of Civil Code Article 1953. Though this Court does not find a legal basis for the contention that Ms. Myer-Bennett committed fraud in the wake of her malpractice, this Court does find that Ms. Myer-Bennett's actions may have amounted to another instance of malpractice. Particularly, in the wake of Louisiana's unyielding public records doctrine, it seems professionally irresponsible that an attorney (even a primarily domestic attorney) would suggest to a client that there would be a viable cause of action against Citibank or Mr. Lomont. Ms. Myer-Bennett may not have intended to defraud Ms. Lamont, but her legal advice appears to have been unsound in this situation.

App. 60a-61a.

other than she intended to defraud Ms. Lomont by lulling her into inaction." App. 28a. The matter has been remanded "for further proceedings." App. 41a.

Myer-Bennett, post-ruling. Myer-Bennett timely requested rehearing,[6] which was denied on August 28, 2015. App. 62a. She also requested the Supreme Court of Louisiana issue a stay of the proceedings below while she prepared this Petition; the request was denied, as was her identical request from the new trial judge.[7]

Now adorned with the Supreme Court of Louisiana's "fraud" designation, Myer-Bennett must now defend herself against facially time-barred malpractice allegations, all because she did not produce evidence at a hearing in which the burden was on Lomont to show she may file late under the "fraud exception."

Myer-Bennett appreciates *Lomont v. Myer-Bennett*'s importance; rightly or wrongly, the Supreme Court of Louisiana answered several unresolved issues concerning Louisiana's § 9:5605. Because this Petition concerns only two issues, both of which turn

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[6] On July 20, 2015, Myer-Bennett notified its state attorney general of her as-applied constitutionality challenge regarding § 9:5605.E, which is required under La. Rev. Stat. §§ 13:4448 and 49:257.C.

[7] Judge Pitre, who dismissed Lomont's claims as time-barred after conducting the "fraud exception" evidentiary hearing, has since retired.

on the Louisiana high court's unconstitutional burden re-assignment and fraud determination at the certiorari review stage, Myer-Bennett does not recite each of the non-challenged findings and holdings in the ruling being challenged.

REASONS FOR GRANTING THE PETITION

By judicially re-assigning the § 9:5605.E burden(s) to defendants (to prove the absence of fraud), the Louisiana Supreme Court has created an entirely new rule of law for Louisiana's limitations periods for professional liability. That new rule of law affects more than Myer-Bennett. It affects more than lawyers, too.

Not only does the new rule contravene normal statutory interpretation, it will alter the way professional liability claims and insurance are handled in Louisiana going forward.

Myer-Bennett's questions suggest more than an academic or episodic problem. *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74, 75 S.Ct. 614, 616, 99 L.Ed. 897 (1955). Although this Court has long avoided review of constitutional questions before an absolute need for resolution, *Clinton v. Jones*, 520 U.S. 681, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997), that avoidance does not mean the Court must deny certiorari petitions merely because they raise novel constitutional questions. *Id.* at 690.

The burden re-assignment is more than error, it is special and important and the retooled "fraud exception" burden juxtaposition will soon affect a variety of professions. Each time the re-assigned § 9:5605.E burden on the "fraud exception" is placed on a defendant seeking dismissal of untimely claims, Procedural Due Process will have been meaningfully denied. No principled reason exists why this issue should be required to percolate in Louisiana's courts; before this matter, Louisiana's Supreme Court denied writs on the § 9:5605.E "fraud exception" issue 4 times in a row. Neither Myer-Bennett nor Louisiana business should be required to wait for the Supreme Court of Louisiana's refinement of its position.

Certiorari should be granted.

I. The unconstitutional aspect of the judgment.

Under Louisiana's general 3-year peremption (repose) statute, Lomont filed her malpractice claim against Myer-Bennett too late. The only way she could maintain her claim against her former lawyer is by relying on the statutory "fraud exception" in § 9:5605.E. Traditional statutory interpretation and decisional law from this Court dictates that Lomont should have borne the burden of showing entitlement to the benefits of the "fraud exception." The trial judge appreciated this burden.

But the Supreme Court of Louisiana announced a new rule of law in this case. After *Lomont v. Myer-Bennett*, the plaintiffs seeking the "fraud exception"

benefit will not bear the burden of showing they are entitled to do so. Rather, a defendant who moves to dismiss malpractice claims will not just have to show that they are facially time-barred, they will also have to show they **did not defraud their client**.

The burden re-assignment is unusual to our legal system. As applied in this case, § 9:5605.E denied Myer-Bennett Procedural Due Process. Several identical "fraud exceptions" are written into professional liability limitations period statutes in Louisiana; courts frequently borrow from interpretations of analogous provisions and those statutes (affecting a variety of professions) will be immediately subject to the Supreme Court of Louisiana's unconstitutional burden re-assignment.

II. Exceptions or provisos to general rules are strictly construed; those seeking the benefit of an exception/proviso bear the burden of showing entitlement.

The rule regarding utilization of exceptions to statutory rules is as universal as it is time-tested:

> But it is incumbent on the plaintiff, if he would excuse himself from [the general rule], to bring himself fully and fairly within the proviso which was made for his benefit.

Huidekoper's Lessee v. Douglass, 7 U.S. 1, 30, 2 L.Ed. 347 (1805). Provisos carve special exceptions only out of the enacting clause; and "those who set up any such exception, must establish it as being within the

words as well as within the reasons thereof." *United States v. Dickson*, 40 U.S. 141, 165, 10 L.Ed. 689 (1841). "The general office of a proviso is to except something from the enacting clause, or to qualify and restrain its generality." *Republic of Iraq v. Beaty*, 556 U.S. 848, 858, 129 S.Ct. 2183, 2190, 173 L.Ed.2d 1193 (2009), *citing United States v. Morrow*, 266 U.S. 531, 534, 45 S.Ct. 173, 174, 69 L.Ed. 425 (1925).

Louisiana law permits no deviation from the basic principle that statutes limiting the application of a general rule are exceptions that must be strictly construed to give full effect to the legislative intent of the general rule. *Cambridge Corner Corp. v. Menard*, 525 So.2d 527, 530 (La. 1988) ("who contends that he comes within an exception to a general rule established by a statute, must prove it"). "The existence of an exception in a statute clarifies the intent that the statute should apply in all cases not excepted." *State ex rel. Murtagh v. Dep't of City Civil Serv.*, 42 So.2d 65, 73 (La. 1949) ("But the exception is also subject to the rule of strict construction, that is, any doubt will be resolved in favor of the general provision and against the exception, and anyone claiming to be relieved from the statute's operation must establish that he comes within the exception.").

The Supreme Court of Louisiana has created a rule which starkly opposes the rules above, which for centuries have operated to ensure Procedural Due Process.

III. Section 9:5605 is the rule of law in Louisiana; lawyers cannot be sued for malpractice after its peremptive (repose) periods have run.

In Louisiana, the rule of law is that lawyers may not be sued for negligence if 3 years have passed since the complained of mistake. La. Rev. Stat. § 9:5605.A. The 3-year period is considered peremptive (Louisiana's civilian statute of repose); it may not be interrupted or suspended, even based on fairness principles. The Supreme Court of Louisiana has dutifully applied the statute as written, even acknowledging the rule's harshness. *Jenkins v. Starns*, 85 So.3d 612, 625 (La. 2012) ("Legislature was aware of the pitfalls in this statute but decided, within its prerogative, to put a three-year absolute limit on a person's right to sue for legal malpractice, just as it would be within its prerogative to not allow legal malpractice actions at all.").

IV. Section 9:5605.E is the "fraud exception" to Louisiana's malpractice time bar statute.

Only one exception exists to § 9:5605's 3-year peremptive period: § 9:5605.E, which reads: "[T]he peremptive period provided in Subsection A of this Section shall not apply in cases of fraud, as defined in Civil Code Article 1953."

Every court interpreting § 9:5605.E declares it an exception to the general (3-year peremption) rule. Here, the Supreme Court of Louisiana referred to

§ 9:5605.E as the fraud "exception" some 20 times[8] in its opinion, the court of appeal 9 times,[9] and the trial judge characterized § 9:5605.E as an "exception" to Louisiana's lawyer malpractice limitations periods 6 times[10] in his written reasons for dismissing Ms. Lomont's late-filed malpractice claim.

In the opinion below, the Supreme Court of Louisiana also cited its earlier opinions, describing § 9:5605.E as an equitable *contra non valentem* exception to limitations periods:

> Presumably, by exempting claims of fraud, the legislature intended to restore the third category of *contra non valentem* so as to prevent a potential defendant from benefitting from the effects of peremption by intentionally concealing his or her wrongdoing.

App. 14a-15a. The "fraud exception" acts to restrain the operation of the 3-year period; by all accounts, it is an exception to the general rule. Its interpretation and utilization should be governed by the normal principles regarding provisos or exceptions to statutory laws.

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[8] App. 5a, 6a, 10a, 12a, 13a, 15a, 21a, 29a, 30a, 31a, 32a, 33a.

[9] App. 43a, 48a, 50a, 52a, 53a.

[10] App. 58a, 59a, 60a.

V. The Supreme Court of Louisiana denied Myer-Bennett Procedural Due Process when it assigned her a burden which should have been borne by Lomont, who sought the benefit of the "fraud exception."

The Supreme Court of Louisiana did not apply the "fraud exception" in § 9:5605.E to require Lomont to bear the expected burden of showing why her facially perempted claims should be allowed. Rather, it announced something new.

As applied below, § 9:5605.E creates a *de jure* "presumption of fraud" that fails to give defendants like Myer-Bennett a fair opportunity to repel it, particularly as it has done here, at the exception (demurrer, pre-answer motion to dismiss) stage, even before she could file an answer. See William J. Rich, MODERN CONSTITUTIONAL LAW § 22:14 (3d ed. West 2014).

The re-assignment of the "fraud exception" burden, which requires defendants to prove the absence of fraud, violates the Due Process Clause of the Fourteenth Amendment of the Constitution. *Id.* It denies protections required under the Due Process Clause "when there is a possible issue about how the law applies to a specific person." Erwin Chemerinsky, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, p. 604 (5th ed. Wolters Kluwer 2015).

The implications of the burden shift are not just a matter of academic debate; they are constitutional

mandates which cannot be swept away by the Louisiana high court's appreciation of what Louisiana procedure was, is, or should be. See Chemerinsky, pp. 605-606, *citing Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541, 105 S.Ct. 1487 (1985).

In the ruling challenged in this Petition, a state court announced a presumption of lawyer fraud conditioned only upon a plaintiff's ability to amend her petition to make **allegations**. This presumption cannot be squared with the procedural Due Process protected by this Court's prior rulings. See *Manley v. State of Georgia*, 279 U.S. 1, 6, 49 S.Ct. 215, 73 L.Ed. 575 (1929). In *Manley*, this Court facially invalidated a statute that allowed proof of a fact (a bank's insolvency) to give rise to a presumption of fraud.

Lomont v. Myer-Bennett went a step further. Its application of § 9:5605.E creates a presumption of lawyer fraud that does not require proof of any *facts* at all to operate. As applied, mere *allegations* of fraud give rise to this judicially-created § 9:5605.E presumption. As the *Lomont* court held, "Ms. Myer-Bennett was required to prove La. R.S. 9:5605(E) is not applicable." App. 11a. "Ms. Myer-Bennett necessarily had the burden of proving she did not commit fraud as alleged by Ms. Lomont." App. 16a.

Under the new post-*Lomont* rule of law, the "fraud exception" **will be available** to plaintiffs who seek to file facially time-barred claims **unless** defendants carry a burden of proving the *absence of fraud*. Procedural Due Process will not permit this bad

result. The promise of similar future results should be avoided by review on certiorari.

VI. More than Myer-Bennett, and more than just lawyers, will be affected by this ruling.

The following statutes provide similar periods for suing professionals in Louisiana:

-La. Rev. Stat. § 9:5604 (accountants);

-La. Rev. Stat. § 9:5606 (insurance agents);

-La. Rev. Stat. § 9:5607 (engineers, surveyors, interior designers, architects, real estate developers) and

-La. Rev. Stat. § 9:5608 (home inspectors).

Each statute has an **identical** "fraud provision" to that found in § 9:5605.E. Courts in Louisiana routinely analogize between these various statutes, *Reeder v. North*, 701 So.2d 1291 (La. 1997), and the unconstitutional rule of law *Lomont* creates will immediately apply in interpreting those statutes.

The *Lomont* ruling's practical consequences make the burden re-assignment a special and important issue. First, the *Lomont* ruling enables the plaintiff's bar to sidestep strict limitations periods by doing nothing more than making fraud allegations alongside professional negligence allegations. Second, the insurance bar will be affected when fraud-based allegations appear in every one of these claims; most

professional liability policies specifically exclude coverage for intentional acts.

The problems created by the *Lomont* rule of law on burden re-assignment have far-reaching consequences; these will be felt by a broad swath of Louisiana's professional community. Not just lawyers; and not just Myer-Bennett.

The issue is worth the Court's review on certiorari.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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November 24, 2015

SUPREME COURT OF LOUISIANA

NO. 2014-C-2483

TRACY RAY LOMONT

VERSUS

MICHELLE MYER-BENNETT AND XYZ INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIFTH CIRCUIT, PARISH OF JEFFERSON

JOHNSON, Chief Justice

In this legal malpractice case, defendant, Michelle Myer-Bennett, filed a peremptory exception of peremption asserting plaintiff, Tracy Ray Lomont, filed her malpractice claim beyond the three-year peremptive period set forth in La. R.S. 9:5605. Ms. Lomont opposed the exception, arguing the peremptive period should not apply because Ms. Myer-Bennett engaged in fraudulent behavior which prevents application of the peremptive period pursuant to La. R.S. 9:5605(E). The district court sustained the exception of peremption and the court of appeal affirmed. We granted Ms. Lomont's writ application to determine the correctness of the lower courts' rulings.

FACTS AND PROCEDURAL HISTORY

Ms. Myer-Bennett was hired by Ms. Lomont to represent her in a divorce and related domestic matters, which included partitioning the community

property. Ms. Lomont and her ex-husband, John Lomont, agreed to a partial partition of the community property whereby Ms. Lomont was provided full ownership of the family home in Jefferson Parish, and Mr. Lomont was provided full ownership of his business. Ms. Myer-Bennett drafted a written agreement to this effect entitled "Partial Lomont." The agreement was executed by the parties on September 8, 2008, but Ms. Myer-Bennett failed to record it in the mortgage and conveyance records in Jefferson Parish.

On February 4, 2009, Citibank obtained a default judgment against John Lomont in the amount of $26,052.17 on a delinquent account. On February 20, 2009, Citibank recorded the judgment in the mortgage records in Jefferson Parish as a lien against the home.

In September 2010, Ms. Lomont attempted to refinance the mortgage on the home and learned from the bank that the settlement agreement, giving her full ownership of the home, was never recorded in the mortgage and conveyance records. Ms. Lomont contacted Ms. Myer-Bennett to advise her of the problem. According to Ms. Myer-Bennett, because it was her standard practice to record such documents, she initially believed Ms. Lomont was given inaccurate information by the bank. However, upon investigation, Ms. Myer-Bennett discovered that she had not recorded the agreement. Ms. Myer-Bennett recorded the agreement the next day, September 30, 2010.

In December 2010, Ms. Lomont was notified that her application to refinance the loan was denied because of Citibank's lien on the property. Ms. Lomont again contacted Ms. Myer-Bennett. Prior to this time, neither Ms. Lomont nor Ms. Myer-Bennett was aware of the Citibank lien. According to Ms. Myer-Bennett, once she became aware of the Citibank lien she discussed with Ms. Lomont the fact she had committed malpractice and gave Ms. Lomont several options to proceed, including hiring another lawyer to sue her for malpractice or allowing Ms. Myer-Bennett to file suit against John Lomont and/or Citibank to have the lien removed. Ms. Myer-Bennett asserts Ms. Lomont chose not to pursue a malpractice action, but wanted defendant to fix the problem. Ms. Lomont denied Ms. Myer-Bennett ever notified her she had committed malpractice. Similarly, Ms. Lomont denied being advised she could obtain other counsel and sue Ms. Myer-Bennett for malpractice. Ms. Lomont asserts Ms. Myer-Bennett never mentioned malpractice in December 2010, but simply advised she would have the Citibank lien removed from the property by filing lawsuits against John Lomont and Citibank. Ms. Lomont further asserts she was asked to come to Ms. Myer-Bennett's office to sign the pleadings against Citibank and John Lomont, which she did on June 20, 2011. Ms. Myer-Bennett also enlisted her help in an effort to serve John Lomont with the lawsuit. Ms. Lomont alleges she repeatedly called Ms. Myer-Bennett to inquire about the status of the lawsuits and was assured the lawsuits were actively being pursued and the lien would be removed in due course.

Ms. Myer-Bennett admits no lawsuits were ever filed against John Lomont and/or Citibank. Ms. Myer-Bennett admits a draft lawsuit was prepared, which was reviewed by Ms. Lomont, but she denies Ms. Lomont signed the lawsuit or verification because it was not complete. Ms. Myer-Bennett could not produce a copy of the drafted lawsuit in response to a subpoena duces tecum from Ms. Lomont, nor did she submit a copy of the lawsuit into evidence. Ms. Myer-Bennett testified she did not file the lawsuit because she discovered in March 2012 she had an unwaivable conflict of interest and could no longer represent Ms. Lomont in an effort to have the lien removed. Ms. Myer-Bennett met with Ms. Lomont and advised her of the conflict and memorialized this conversation in an April 12, 2012, letter to Ms. Lomont stating:

> As we discussed, on or about December 2010, you and John executed a Partition Agreement wherein he assumed any liabilities associated with his business. Unfortunately, however, I did not file the Partition Agreement with the Mortgage Office, and it needed to be filed with the Mortgage Office in order for it to have an effect on third parties (i.e., people other than you and John).
>
> As a result of my failure to file the Partition Agreement with the Mortgage Office, a credit card company was able to obtain a lien against your property. *I would love to represent you in an effort to get the lien removed, but I have an unwaivable conflict of interest that prohibits me from doing so. Therefore, I*

> *urge you to obtain independent counsel to assist you in that regard.* (Emphasis added).

Ms. Myer-Bennett provided Ms. Lomont with a list of suggested attorneys who could assist her with having the lien removed. Ms. Lomont subsequently met with one of the suggested attorneys, Debra Kesler, on June 28, 2012, who advised her the sole cause of action available was a malpractice suit against Ms. Myer-Bennett. Ms. Lomont testified she was "shocked" to learn of the malpractice because she had been led to believe the lien could be successfully removed by filing a lawsuit.

Ms. Lomont filed this malpractice action against Ms. Myer-Bennett on July 12, 2012, alleging her attorney committed legal malpractice by failing to record the community property settlement which gave her full ownership of the home, thus allowing a third-party creditor to file a lien against her home for her ex-husband's debt. Ms. Myer-Bennett filed an exception of peremption asserting more than three years had passed since the date of the alleged act, omission, or neglect upon which Ms. Lomont's claims were based and, thus, Ms. Lomont's claims were perempted under La. R.S. 9:5605. Ms. Lomont filed a supplemental and amending petition alleging defendant acted fraudulently in misrepresenting and/or suppressing the truth regarding the malpractice she committed. Ms. Lomont further alleged because of defendant's fraudulent acts, her claim fell under the exception set forth in La. R.S. 9:5605(E) and was not perempted. In a second supplemental and amending

petition, Ms. Lomont detailed the alleged specific fraudulent acts.[1]

An evidentiary hearing was held on Ms. Myer-Bennett's exception of peremption. The parties submitted evidence and the district court heard testimony from Ms. Myer-Bennett and Ms. Lomont. Following the hearing, the district court sustained the exception. Relying on a recent Fifth Circuit case, *Garner v. Lizana*, 13-427 (La App. 5 Cir. 12/30/13), 131 So. 3d 1105, *writ denied*, 14-0208 (La. 4/4/14), 135 So. 3d 1183, the court first held post-malpractice acts could be considered in determining whether the fraud exception in La. R.S. 9:5605(E) should be applied. However, the court specifically found Ms. Myer-Bennett's actions after the discovery of her malpractice did not amount to fraud. Based on the evidence, the district court found defendant was "honestly trying to fix a mistake that she had caused" and, thus, did not have the requisite intent to commit fraud.

On appeal, Ms. Lomont contended the allegations of fraud in her petition should be accepted as true and were sufficient to prevent application of the three-year peremptive period in La. R.S. 9:5605(A). Ms. Lomont also argued the district court erred in

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[1] Our review of the petitions in the record confirm Ms. Lomont particularly alleged the circumstances constituting Ms. Myer-Bennett's fraud, thus satisfying the requirement of La. C.C.P. art. 856. That article states, in pertinent part: "In pleading fraud or mistake, the circumstances constituting fraud or mistake shall be alleged with particularity."

failing to find defendant's conduct constituted fraud. The court of appeal affirmed.[2] Because evidence was presented at the hearing on the exception of peremption, the court of appeal held the presumption that the allegations in Ms. Lomont's petition were true did not apply.[3] The court further found no manifest error in the district court's ruling. The court explained:

> Defendant testified that she admitted her mistake in failing to file the partition agreement to Ms. Lomont in December 2010. Defendant further stated that she offered to help Ms. Lomont in getting the lien removed and everything she did was in an effort to "fix the problem" she had created. When findings are based on determinations regarding the credibility of witnesses, great deference is given to the trier of fact because only the fact finder is cognizant of the variations in demeanor and tone of voice that bears so heavily on the listener's understanding and belief in what is said. While some of Defendant's representations to Ms. Lomont regarding the method by which the lien could have been removed may have been grossly negligent, we cannot say the trial court was manifestly erroneous in finding Defendant's conduct was not fraudulent.[4]

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[2] *Lomont v. Myer-Bennett*, 14-351 (La. App. 5 Cir. 10/29/14), ___ So. 3d ___.

[3] *Lomont*, at *10.

[4] *Lomont*, at *11-12.

Ms. Lomont filed a writ application with this Court which we granted.[5]

DISCUSSION

The time limits to file a legal malpractice action are set forth in La. R.S. 9:5605, which provides in pertinent part:

> 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**

[5] *Lomont v. Myer-Bennett*, 14-2483 (La. 2/27/15), 159 So. 3d 1062.

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.

* * *

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.**

(Emphasis added). In this case there is no dispute the act of malpractice was Ms. Myer-Bennett's failure to record the settlement agreement in the public records prior to February 20, 2009, the date the Citibank lien was recorded against Ms. Lomont's property. Thus, under the clear wording of La. R.S. 9:5605(A) and (B), Ms. Lomont's suit, filed on July 12, 2012, more than three years after the act of malpractice, would be

perempted. Here, however, Ms. Lomont has asserted the peremptive period is not applicable based on the fraud exception set forth in La. R.S. 9:5605(E).

The objection of peremption is raised by the peremptory exception. La. C.C.P. art. 927(A)(2). "Peremption has been likened to prescription; namely, it is prescription that is not subject to interruption or suspension." *Rando v. Anco Insulations, Inc.*, 08-1163 (La. 5/22/09), 16 So. 3d 1065, 1082. Thus, the rules governing the burden of proof as to prescription also apply to peremption. *Id.* Ordinarily, the exceptor bears the burden of proof at the trial of the peremptory exception. *Id.* But, if prescription is evident on the face of the pleadings, the burden shifts to the plaintiff to show the action has not prescribed. *Id.* Ms. Lomont's *First Supplemental and Amended Petition for Damages for Legal Malpractice* affirmatively alleges her petition for damages was not time-barred under La. R.S. 9:5605(A) because defendant committed fraud and thus the action falls under the fraud exception of La. R.S. 9:5605(E). Additionally, Ms. Lomont filed a *Second Amended and Supplemental Petition for Damages for Legal Malpractice* which affirmatively set forth detailed factual allegations of fraud and asserted that defendant's fraudulent actions rendered the peremptive period in La. R.S. 9:5605(A) inapplicable. Based on these allegations, it appears plaintiff made a *prima facie* showing that her claims were timely filed, leaving the burden of proving peremption with the defendant.

At a hearing on a peremptory exception of prescription pleaded prior to trial, evidence may be introduced to support or controvert the exception. La. C.C.P. art. 931. In the absence of evidence, an exception of peremption must be decided upon the facts alleged in the petition with all of the allegations accepted as true. *Cichirillo v. Avondale Industries, Inc.*, 04-2894 (La. 11/29/05), 917 So. 2d 424, 428. However, when evidence is introduced, the court is not bound to accept plaintiff's allegations as true. *See Denoux v. Vessel Management Services, Inc.*, 07-2143 (La. 5/21/08), 983 So. 2d 84, 88; *Younger v. Marshall Industries, Inc.*, 618 So. 2d 866, 871 (La. 1993); *Ansardi v. Louisiana Citizens Property Ins.*, 11-1717 (La. App. 4 Cir. 3/1/13), 111 So. 3d 460, 472, *writ denied*, 13-0697 (La. 5/17/13), 118 So. 3d 380. If evidence is introduced at the hearing on the peremptory exception of peremption, the district court's findings of fact are reviewed under the manifest error-clearly wrong standard of review. *Rando*, 16 So. 3d at 1082. If those findings are reasonable in light of the record reviewed in its entirety, an appellate court cannot reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. *Id.*

To satisfy her burden of proving Ms. Lomont's claim is perempted, Ms. Myer-Bennett was required to prove La. R.S. 9:5605(E) is not applicable. We begin our analysis mindful that "peremptive statutes are strictly construed against peremption and in favor of the claim. Of the possible constructions, the

one that maintains enforcement of the claim or action, rather than the one that bars enforcement should be adopted." *Id.* at 1083.

Meaning of Fraud under La. R.S. 9:5605(E)

To determine the applicability of La. R.S. 9:5605(E), we must decide whether Ms. Myer-Bennett's actions amounted to fraud pursuant to La. C.C. art. 1953, thus invoking the fraud exception in Subsection (E). However, before we can make that specific determination, we must first consider whether post-malpractice fraudulent concealment can constitute fraud as contemplated by La. R.S. 9:5605(E), or whether the act of malpractice itself must be fraudulent to apply the exception in La. R.S. 9:5605(E). Because resolution of this particular issue involves the correct interpretation of a statute, it is a question of law, and reviewed by this court under a de novo standard of review. *Red Stick Studio Dev., L.L.C. v. State ex rel. Dep't of Econ. Dev.*, 10-0193 (La. 1/19/11), 56 So. 3d 181, 187. After our review, we "render judgment on the record, without deference to the legal conclusions of the tribunals below. This court is the ultimate arbiter of the meaning of the laws of this state." *Id.* (quoting *Holly & Smith Architects, Inc. v. St. Helena Congregate Facility, Inc.*, 06-0582 (La. 11/29/06), 943 So. 2d 1037, 1045).

The district and appellate courts' rulings that post-malpractice fraudulent acts of concealment can bar application of the three-year peremptive period

under the fraud exception in La. R.S. 9:5605(E) were based on the appellate court's earlier decision in *Garner v. Lizana*, *supra.* In *Garner*, the court acknowledged Subsection (E) had been interpreted by many appellate courts to apply only to the act of malpractice itself, not to allegations of fraudulent concealment of the malpractice. 131 So. 3d at 1111. However, noting the absence of an opinion from this court on the issue, the *Garner* court factually distinguished these other appellate cases. *Id.* at 1111-12. The court found the particular allegations in Garner's petition regarding concealment of malpractice fell under the fraud exception set forth in La. R.S. 9:5605(E). *Id.* at 1113.

Other than *Garner*, our courts of appeal have largely rejected the idea that the concealment of legal malpractice constitutes fraud under La. R.S. 9:5605(E), instead holding the fraud exception applicable only in cases where the fraudulent act itself constitutes the malpractice. *See, e.g.*, *Carriere v. Bodenheimer, Jones, Szwak & Winchell, L.L.P.*, 47,186 (La. App. 2 Cir. 8/22/12), 120 So. 3d 281; *Broadscape.com, Inc. v. Matthews*, 07-0545 (La. App. 4 Cir. 3/5/08), 980 So. 2d 140; *Brumfield v. McElwee*, 07-0548 (La. App. 4 Cir. 1/16/08), 976 So. 2d 234; *Smith v. Slattery*, 38,693 (La. App. 2 Cir. 6/23/04), 877 So. 2d 244, writ denied, 04-1860 (La. 10/29/04), 885 So. 2d 592; *Atkinson v. LeBlanc*, 03-365 (La. App. 5 Cir. 10/15/03), 860 So. 2d 60. However, we find no valid basis to support and uphold this jurisprudential rule. Although each case must be judged on its particular

facts to determine whether the attorney's actions are sufficient to invoke La. R.S. 9:5605(E), to the extent these cases hold an attorney's post-malpractice actions consisting of fraudulent concealment cannot amount to fraud within the meaning of Subsection (E), they are overruled.

The language of La. R.S. 9:5605(E) excepts the peremptive period "in cases of fraud, as defined by La. C.C. art. 1953," with no additional restrictions or limitations. La. C.C. art 1953 defines fraud as "a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other." Thus, under the clear wording of the statute and the Code article, **any** action consisting of "a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other" will prohibit application of the peremptive period. Concealment of malpractice to avoid a malpractice claim conforms to this definition. It would be absurd to interpret the statute to exclude fraudulent concealment of the malpractice. There is no support for an interpretation that would allow attorneys to engage in concealment of malpractice until the three-year peremptive period has expired. As this court noted in *Borel v. Young*, albeit in dictum, "[p]resumably, by exempting claims of fraud, the legislature intended to restore the third category of contra non valentem **so as to prevent a potential defendant from benefitting from the effects of**

peremption by intentionally concealing his or her wrongdoing." 07-0419 (La. 11/27/07), 989 So. 2d 42, *on reh'g*, (7/1/08), 989 So. 2d at 61 n. 3 (emphasis added). The basic rule governing statutory interpretation is stated in Louisiana Civil Code article 9: "When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature." Applying the clear and unambiguous language of the statute, we hold allegations of misrepresentation, suppression or concealment of malpractice can constitute fraud within the meaning of La. R.S. 9:5605(E). Thus, the lower courts correctly considered Ms. Lomont's allegations of post-malpractice concealment in determining whether the fraud exception in La. R.S. 9:5605(E) should be applied.

Factual Finding of Fraud

We now examine whether Ms. Myer-Bennett's conduct constituted fraud. Fraud is defined as "a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other" and can result from silence or inaction. La. C.C. art. 1953. To find fraud from silence, there must be a duty to speak. *Greene v. Gulf Coast Bank*, 593 So. 2d 630, 632 (La. 1992). "Louisiana law recognizes that the refusal to speak, in the face of an obligation to do so, is not merely unfair but

is fraudulent." *Bunge Corporation v. GATX Corporation*, 557 So. 2d 1376, 1383 (La. 1990). There are two elements necessary to prove legal fraud: an intent to defraud and a resulting damage. *Anderson v. Moreno's Air Conditioning, Inc.*, 14-27 (La. App. 3 Cir. 6/4/14) 140 So. 3d 841, 852, *writ denied*, 14-1392 (La. 10/3/14), 149 So. 3d 800; *Shields v. Parish of Jefferson*, 13-481 (La. App. 5 Cir. 12/27/13), 131 So. 3d 1048, 1052; *Mooers v. Sosa*, 01-286 (La. App. 5 Cir. 9/25/01), 798 So. 2d 200, 207; *Williamson v. Haynes Best Western of Alexandria*, 95-1725 (La. App. 4 Cir. 1/29/97), 688 So. 2d 1201, 1239, *writ denied*, 97-1145 (La. 6/20/97), 695 So. 2d 1355; *First Downtown Dev. v. Cimochowski*, 613 So. 2d 671, 677 (La. App. 2 Cir. 1993), *writ denied*, 615 So. 2d 340 (La. 1993). Fraud need only be proven by a preponderance of the evidence and may be established by circumstantial evidence. La. C.C. art. 1957; *Shelton v. Standard/700 Associates*, 01-0587 (La. 10/16/01), 798 So. 2d 60, 64. Circumstantial evidence, including highly suspicious facts and circumstances, may be considered in determining whether fraud has been committed. *See Sun Drilling Products Corp. v. Rayborn*, 00-1884 (La. App. 4 Cir. 10/3/01), 798 So. 2d 1141, 1153, *writ denied*, 01-2939 (La. 1/25/02), 807 So. 2d 840; *Williamson*, 688 So. 2d at 1239; Comment (b), La. C.C. art. 1957.

Because Ms. Myer-Bennett had the burden of proving Ms. Lomont's claim is perempted, Ms. Myer-Bennett necessarily had the burden of proving she did not commit fraud as alleged by Ms. Lomont. At the evidentiary hearing on the exception of peremption,

the district court heard testimony from Ms. Myer-Bennett and Ms. Lomont. Ms. Myer-Bennett's relevant testimony is summarized below:

- Ms. Myer-Bennett has been a practicing attorney since 1994.
- Ms. Myer-Bennett has known Ms. Lomont since childhood. And, Ms. Lomont has worked as an assistant for Ms. Myer-Bennett's dentist for twenty-five years, so they have maintained a casual friendship.
- Ms. Lomont called her in September 2010 advising she was trying to refinance her home but the finance company could not find the community property partition in the mortgage and conveyance records. Ms. Myer-Bennett assured Ms. Lomont it was filed because that is her standard operating procedure. However, when Ms. Myer-Bennett looked at her records, she realized she had not filed it.
- Ms. Myer-Bennett admitted she committed malpractice by not recording the community property settlement agreement in a timely fashion.
- Ms. Myer-Bennett testified she first realized she committed malpractice after the September 2010 call from Ms. Lomont when she checked her records and realized the community property settlement was not filed. She did not discuss malpractice with Ms. Lomont at that time because no one was aware of the lien, so Ms. Myer-Bennett did

not think the failure to file the agreement had any negative effect.

- Ms. Lomont called her in December 2010 and advised the finance company found a lien on the property. During this conversation Ms. Myer-Bennett did discuss malpractice because an issue now existed. Ms. Myer-Bennett admitted to Ms. Lomont it was her fault and she committed malpractice. Ms. Myer-Bennett told Ms. Lomont she had several options – hire another attorney and sue Ms. Myer-Bennett for malpractice; and/or sue John Lomont for indemnification; or allow Ms. Myer-Bennett to negotiate with Citibank. Ms. Myer-Bennett basically wanted to "fix the problem she had caused."

- Ms. Lomont immediately responded she did not want to sue for malpractice and she did not want to hire another attorney; Ms. Lomont wanted her to fix the problem. Ms. Myer-Bennett did not follow-up this conversation with a written letter to Ms. Lomont confirming she was advised about the malpractice and her right to obtain another lawyer.

- Ms. Myer-Bennett sent an internal email to herself on December 9, 2010, which she claims documents this conversation. The email was sent from Ms. Myer-Bennett to "greedymyer@yahoo.com," an account Ms. Myer-Bennett keeps for billing purposes. Ms. Myer-Bennett testified whenever she does work on a case, she sends herself an email to this particular Yahoo account

so she can keep track of the work for billing purposes.[6]

- Ms. Myer-Bennett proceeded to try to "fix the problem." She first tried to negotiate with Citibank. She exchanged emails with Citibank's attorney and they discussed settlement on the phone several times. Citibank also requested a hardship statement and financial statement from Ms. Lomont. Although Citibank seemed receptive for a while, they were never able to reach a settlement. After negotiation with Citibank failed, the Lomonts contemplated bankruptcy and met with a bankruptcy lawyer, but they decided not to pursue that course of action.
- Ms. Myer-Bennett next planned to file suit against John Lomont based on the indemnification provision in the community property settlement agreement. She prepared a draft of a lawsuit, and had several conversations with Ms. Lomont about the lawsuit. At one point it appeared John Lomont was going to accept service and consent to the judgment.
- Ms. Myer-Bennett did not remember calling Ms. Lomont or asking her law clerk, Megan, to call

[6] A copy of the email was admitted into evidence. A dispute has arisen in this court regarding whether some of the email content was added at a later date. The issue was not raised in the district court. Ms. Lomont was not copied on the original email and there was no testimony or computer forensic evidence submitted at the hearing regarding the validity of the contents of the email. Thus, we decline to directly address this argument because no findings were made by the lower courts.

Ms. Lomont into the office to sign the lawsuit. She did recall Ms. Lomont coming to her office and showing Ms. Lomont the draft of a lawsuit. However, the lawsuit was not complete and she never asked Ms. Lomont to sign an affidavit or verification because her practice is not to have clients sign a verification until the lawsuit is complete and she gets full approval.

- Ms. Myer-Bennett never told Ms. Lomont she had filed the lawsuit against John Lomont or Citibank.
- When questioned why her office sought information about John Lomont's address for service when suit was never filed, Ms. Myer-Bennett testified service on John Lomont was an "ongoing thing." Ms. Myer-Bennett explained she first needed an address in general for the lawsuit because there was some discrepancy about which address to use. She further explained John Lomont had agreed to accept service at one point and he did not want to be served. Although there was a lot of "back and forth," they were unable to get John Lomont to commit to do that.
- Ms. Myer-Bennett never sent a letter to Ms. Lomont advising her of the status of that proposed lawsuit.
- Ms. Myer-Bennett was unable to produce a copy of the draft lawsuit.
- Ms. Myer-Bennett did not file the lawsuit because she met with her ex-husband, attorney Jeff Bennett, for advice on how to proceed and was advised by him that she could not pursue the

matter because she had a non-waivable conflict of interest.

- Ms. Myer-Bennett testified she was not aware she had a conflict of interest in continuing to represent Ms. Lomont until she spoke with Jeff Bennett.
- In March 2012, following her meeting with Jeff Bennett, Ms. Myer-Bennett either called or texted Ms. Lomont about the conflict and asked her to come to the office to discuss the issue. There was no mention of malpractice at this meeting because Ms. Lomont had made clear in December 2010 she did not want to pursue a legal malpractice action.
- Following this meeting, Ms. Myer-Bennett sent a letter to Ms. Lomont dated April 2, 2012, confirming the conversation.
- Ms. Myer-Bennett included with the letter a list of attorneys who could help Ms. Lomont "get the lien removed."
- The April 2, 2012, letter was the only document Ms. Myer-Bennett ever wrote to Ms. Lomont. All other communication was via telephone or text messaging.
- In response to questions regarding the validity of any lawsuit against Mr. Lomont or Citibank, Ms. Myer-Bennett still believed at the time of the hearing a lawsuit against Mr. Lomont would be successful. It would require obtaining a judgment against Mr. Lomont and Mr. Lomont paying off the amount of the lien. She did not think the lien could be removed solely by suing Citibank. She

did not tell Ms. Lomont she had no claim against Citibank because she was not sure at the time.

Ms. Lomont's relevant testimony at the evidentiary hearing is summarized below:

- Ms. Lomont discovered the lien on her property on December 9, 2010, when she was advised by the bank that her refinance loan could not be approved because of the lien.
- Ms. Lomont spoke with Ms. Myer-Bennett about the lien, but denies Ms. Myer-Bennett stated she committed malpractice.
- Ms. Myer-Bennett never advised Ms. Lomont of her rights regarding a legal malpractice claim against Ms. Myer-Bennett.
- Ms. Myer-Bennett advised she did not timely file the settlement agreement and would try to get the lien removed. Ms. Myer-Bennett said it was something she could take care of and Ms. Lomont had no reason to doubt it.
- Ms. Myer-Bennett called her to come to the office on June 20, 2011, at which time she advised Ms. Lomont she had drawn up a lawsuit against John Lomont and Citibank. The purpose of that meeting was for Ms. Lomont to sign the lawsuit.
- Ms. Lomont communicated back and forth with Ms. Myer-Bennett's law clerk, Megan, about service on John Lomont. Ms. Lomont was told they were having trouble serving John Lomont and they were looking into hiring a private detective to obtain service.

- Ms. Lomont received the April 2, 2012, letter from Ms. Myer-Bennett with an attached list of attorneys. This is the only letter she has ever received from Ms. Myer-Bennett.
- Ms. Lomont met with one of the suggested attorneys, Debra Kesler, on June 28, 2012. At that time, Ms. Lomont learned that a lawsuit was never filed against John Lomont or Citibank. Prior to that time she believed Ms. Myer-Bennett had filed the lawsuits and was proceeding to remove the lien.
- Ms. Lomont further learned from Ms. Kesler the judgment could not be removed by a lawsuit against John Lomont and Citibank, and the only course of action was a malpractice lawsuit against Ms. Myer-Bennett. This was the first time Ms. Lomont had any idea she had a claim against Ms. Myer-Bennett and she was "shocked."

After considering the testimony and other evidence, the district court found Ms. Myer-Bennett's actions did not amount to fraud. The court reasoned:

> In her testimony, Ms. Myer-Bennett stated that as soon as she realized she had made a mistake, she advised Ms. Lomont that she could retain an attorney to sue her. She also advised her that she could try to remove the lien by suing Citibank and Mr. Lomont. While Ms. Lomont argues that this was all an effort to trick her into allowing the peremptive period to pass, this court finds that this was not the case. Instead, this court

> is inclined to believe that Ms. Myer-Bennett was honestly trying to fix a mistake that she had caused. As a result, this court cannot find that her actions amounted to fraud, because Ms. Myer-Bennett did not have the requisite intent of Civil Code Article 1953.

We are cognizant our review of the district court's finding on this issue is subject to the manifest error standard of review. *Rando*, 16 So. 3d at 1082; *see also Lovell v. Blazer Boats Inc.*, 11-1666 (La. App. 1 Cir. 10/24/12), 104 So. 3d 549, 558; *Joyner v. Liprie,* 44,852 (La. App. 2 Cir. 1/29/10), 33 So. 3d 242, 253, *writ denied*, 10-0723 (La. 9/17/10), 45 So. 3d 1043. As a reviewing court, we cannot merely review the record for some evidence that supports the lower court's findings. *Read v. Willwoods Cmty.*, 14-1475, *3 (La. 3/17/15), ___ So. 3d ___; *Stobart v. State through Dept. of Transp. and Development*, 617 So. 2d 880, 882 (La. 1993). Rather, we must review the entire record and determine whether the district court's finding was clearly wrong or manifestly erroneous. *Id.* Under the manifest error standard, in order to reverse a trial court's determination of a fact, an appellate court must review the record in its entirety and (1) find that a reasonable factual basis does not exist for the finding, and (2) further determine that the record establishes that the fact finder is clearly wrong or manifestly erroneous. *Bonin v. Ferrellgas*, 03-3024 (La. 7/2/04), 877 So. 2d 89, 94-95; *Stobart,* 617 So. 2d at 882.

Much of the testimony of Ms. Myer-Bennett and Ms. Lomont is contradictory. We recognize credibility determinations are within the district court's discretion and should not be disturbed upon review where conflict exists in the testimony absent a determination that the district court abused its discretion. *Folse v. Folse*, 98-1976 (La. 6/29/99), 738 So. 2d 1040, 1048-49; *Stobart*, 617 So. 2d at 882. However, "where documents or objective evidence so contradict the witness's story, or the story itself is so internally inconsistent or implausible on its face, that a reasonable factfinder would not credit the witness's story, the court of appeal may find manifest error or clear wrongness *even in a finding purportedly based upon a credibility determination*." *Stobart*, 617 So. 2d at 882 (emphasis added). Thus, although we are required to operate under a high standard of review, we are not "required to rubberstamp with approval any and all factual determinations by the trial court." A. Tate, "*Manifest Error*" – *Further observations on appellate review of facts in Louisiana civil cases*, 22 La. L.Rev. 605, 611 (1962). Our review of the entire record compels us to conclude no reasonable factual basis exists on which the district court could have concluded Ms. Myer-Bennett's actions were not fraudulent. We find Ms. Myer-Bennett's story so implausible that it was clearly wrong for the district court to give it credit.

An attorney has an affirmative duty under Rule 1.4 of the Rules of Professional Conduct to "keep his client reasonably informed about the status of the

matter" and "give the client sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which there [sic] are to be pursued." The record is devoid of proof that Ms. Myer-Bennett fulfilled her "duty to speak" under Rule 1.4. Ms. Myer-Bennett worked as an attorney for more than fifteen years at the time of the malpractice. To accept Ms. Myer-Bennett's story, we would first have to believe an attorney with considerable legal experience would admit to the client she committed malpractice, advise the client of her right to obtain independent counsel to pursue a malpractice claim, and accept the client's decision not to pursue a malpractice claim without confirming any of these details in writing or providing written documentation to her file. Moreover, fifteen months passed between Ms. Myer-Bennett's realization she committed malpractice and when Ms. Myer-Bennett discontinued her representation of Ms. Lomont. Ms. Myer-Bennett claims she worked during this period of time to "fix the problem," yet she failed to produce any evidence of this alleged work. Notably, this alleged work included extended negotiations and dealings with counsel for Citibank, but Ms. Myer-Bennett did not produce any letters or other documents as evidence of these negotiations. Ms. Myer-Bennett would also have us believe she worked on drafting a lawsuit against John Lomont over this course of time, encountering repeated issues relative to service of process on Mr. Lomont, yet Ms. Myer-Bennett could not produce a copy of the draft lawsuit, nor does the record contain documentation of the

service complications. Thus, although Ms. Myer-Bennett attempts to justify her actions and continued representation of Ms. Lomont by claiming a lawsuit against John Lomont could "fix the problem" and claiming she worked on fixing the problem during the time she continued to represent Ms. Lomont because Ms. Lomont chose not to pursue a legal malpractice claim, there is a complete lack of evidence to support any of her claims. The only documentation Ms. Myer-Bennett submitted was a single email sent to herself on December 9, 2010, purportedly confirming a conversation wherein Ms. Lomont was advised of the malpractice and declined to pursue a malpractice action. We find this email entirely self-serving. The email admittedly was sent by Ms. Myer-Bennett only to herself, with no confirmation of the alleged conversation was sent to Ms. Lomont or documented in her file. Although the purpose of sending the email to herself was purportedly to document work done on the file, Ms. Myer-Bennett produced no evidence of other emails to herself documenting any work done on behalf of Ms. Lomont. The fact that this is the only written documentation of her actions is self-serving and suspect.

Finally, we find it incredible that Ms. Myer-Bennett would claim she was completely unaware of the conflict of interest during these fifteen months but, conveniently, learned of the unwaivable conflict shortly after the three-year peremptive period had expired. Ms. Myer-Bennett then took immediate steps to advise Ms. Lomont *in writing* of the unwaivable

conflict, suggest a list of attorneys as independent counsel, and discontinue representation.

Specific intent to deceive is a necessary element of fraud, and fraud cannot be based on mistake or negligence, regardless how great. *Sanga v. Perdomo*, 14-609, *6 (La. App. 5 Cir. 12/30/14), ___ So. 3d ___; *Terrebonne Concrete, LLC v. CEC Enterprises, LLC*, 11-0072 (La. App. 1 Cir. 8/17/11), 76 So. 3d 502, 509, *writ denied*, 11-2021 (La. 11/18/11) 75 So. 3d 464. In considering fraud, we focus on Ms. Myer-Bennett's conduct and consider whether her misrepresentations were deliberate and "knowing" and whether evidence of the misrepresentations was concealed. *See, e.g.*, *Stutts v. Melton,* 13-0557 (La. 10/15/13), 130 So. 3d 808, 814 (wherein this court affirmed a finding of fraud as defined by La. C.C. art. 1953 against the builder of a house who made a knowing misrepresentation that the roof was free from defects, and then covered up evidence of the defect). *See also Ducote v. Perry's Auto World, Inc.*, 98-1972 (La. App. 1 Cir. 11/5/99), 745 So. 2d 229, 231 (wherein the court affirmed a finding of fraud under La. C.C. art. 1953 against a car dealership where the dealer had knowledge of a defective carburetor, but told the buyer the car was "in good working condition"). Considering the facts and circumstances of this case, there is no other plausible explanation for Ms. Myer-Bennett's actions other than she intended to defraud Ms. Lomont by lulling her into inaction. It is the total absence of evidence in the record which compels our decision. Under the facts of this case, we do not find

Ms. Myer-Bennett satisfied her burden of proof by her self-serving testimony alone. Ms. Myer-Bennett deliberately hid the truth regarding her ability to have the Citibank lien removed by giving Ms. Lomont assurances that lawsuits were filed and proceeding. Ms. Myer-Bennett waited until the peremptive period for legal malpractice had presumably expired before disclosing the unwaivable conflict of interest and discontinuing her representation of Ms. Lomont. To her detriment, unaware she should have pursued a legal malpractice claim against Ms. Myer-Bennett, Ms. Lomont believed lawsuits against John Lomont and/or Citibank were filed and would successfully remove the lien. Ms. Myer-Bennett's actions demonstrate her intent to deceive Ms. Lomont thereby gaining an advantage by avoiding a malpractice suit. Thus, Ms. Myer-Bennett's actions fit squarely within the definition of fraud in La. C.C. art. 1953.

Time Limitation in Legal Malpractice cases when La. R.S. 9:5605(E) Applies

Having established Ms. Myer-Bennett committed fraud within the meaning of La. R.S. 9:5605(E), we must still determine whether Ms. Lomont's suit was timely filed. La. R.S. 9:5605(E) instructs in cases of fraud "the peremptive period provided in Subsection A of this Section shall not apply." Most of our appellate courts have held the fraud exception in Subsection (E) applies only to the three-year peremptive period, and legal malpractice plaintiffs are still required to file suit within one year of discovery of the

fraud under Subsection (A). *See, e.g.*, *Zeno v. Alex*, 11-1240 (La. App. 3 Cir. 4/4/12), 89 So. 3d 1223, 1226 ("Subsection (E) of the statute provides that the three-year peremptive period of Subsection (A) does not apply in cases of fraud, but the one-year peremptive period, from the date of the discovery of the fraud, does apply."); *Orea v. Bryant*, 43,229 (La. App. 2 Cir. 4/2/08), 979 So. 2d 687, 690 ("There is not a hard and fast three-year limit on bringing the action for fraud, but there is a requirement that the action for fraud be brought within one year of discovery of the allegedly fraudulent acts."); *Granger v. Middleton*, 06-1351 (La. App. 3 Cir. 2/7/07), 948 So. 2d 1272, 1275, *writ denied*, 07-0506 (La. 4/27/07) 955 So. 2d 692 ("La. R.S. 9:5605(E) lifts the three year peremptive period, giving the claimant one year from the date of the discovery of the actions which allegedly constituted malpractice."); *Dauterive Contractors, Inc. v. Landry and Watkins*, 01-1112 (La. App. 3 Cir. 3/13/02), 811 So. 2d 1242, 1251 ("In cases of fraud, the 'peremptive period' referenced in La. R.S. 9:5605(E) refers to the three-year peremptive period only. Therefore, if fraud is proven, the three-year peremptive period will be inapplicable. The presence of fraud notwithstanding, however, the one-year peremptive period is always applicable, and the malpractice action must still be brought within one year of the alleged act or within one year from the date that the alleged act is discovered or should have been discovered."); *Broussard v. Toce*, 99-555 (La. App. 3 Cir. 10/13/99), 746 So. 2d 659, 662 ("Subsection E of La. R.S. 9:5605 carves out an exception for the three-year

peremptive period only"). Yet, at least one court had held "because both the one and three year limitations of La. R.S. 9:5605(A) are peremptive, the fraud exception of La. R.S. 9:5605(E) is applicable to both." *Coffey v. Block*, 99-1221 (La. App. 1 Cir. 6/23/00), 762 So. 2d 1181, 1187, *writ denied*, 00-2226 (La. 10/27/00).

In some cases, the reasoning behind applying the fraud exception solely to the three-year peremptive period appears to be linked to the 1992 amendment to La. R.S. 9:5605. La. R.S. 9:5605 was originally enacted in 1990 "to provide for liberative prescription and for peremption of actions" against attorneys. *See* 1990 La. Acts 683, § 1. Legislative history demonstrates the purpose of the statute was to provide a one-year prescriptive and three-year peremptive period for legal malpractice claims. *See* Minutes, Civil Law and Procedure Committee, May 29, 1990 (H.B. 1338); Minutes, Senate Committee on Judiciary A, June 26, 1990 (H.B. 1338). The original legislative bill did not include a fraud exception, but during senate committee debate the proposed bill was amended to "state that in the case of fraud, the peremptive period would not apply." *See* Minutes, Senate Committee on Judiciary A, June 26, 1990 (H.B. 1338). Thus, when the fraud exception was added it was only applicable to the three-year period because only the three-year period was peremptive.

However the legislature amended La. R.S. 9:5605 in 1992 to provide, among other things, that both the one-year and three-year periods of limitation in Subsection (A) of the statute are peremptive periods.

The provision providing the fraud exception was not changed or amended, and continued to provide the "peremptive period provided in Subsection (A) of this Section shall not apply in cases of fraud." Because the legislature amended the statute to provide more than one peremptive period, but did not change the word "period" in Subsection (E) to "periods," some appellate courts have interpreted the statute to mean the fraud exception is still only applicable to the original three-year peremptive period. *See Granger*, 948 So. 2d at 1275 (citing *Dauterive Contractors*); *Dauterive Contractors*, 811 So. 2d at 1251; *see also Huffman v. Goodman*, 34,361 (La. App. 2 Cir. 4/4/01), 784 So. 2d 718, 727 (addressing the same issue relative to La. R.S. 9:5606, governing actions against insurance agents); George Denègre, Jr. and Shannon S. Holtzman, *Professional Malpractice Peremption: Clarified Through Adversity*, 59 La. B.J. 176 (2011). We do not find this reasoning persuasive.

Although we agree when La. R.S. 9:5605(E) is applied the legal malpractice claim must be brought within one year of discovery of the fraud, we find it improper to apply the "one-year from discovery" limitation period in Subsection (A). This court has previously recognized La. R.S. 9:5605 provides three peremptive periods: (1) a one-year peremptive period from the date of the act, neglect, or omission; (2) a one-year peremptive period from the date of discovering the act, neglect, or omission; (3) and a three-year peremptive period from the date of the act, neglect, or omission when the malpractice is discovered after

the date of the act, neglect, or omission. *Jenkins v. Starns*, 11-1170 (La. 1/24/12), 85 So. 3d 612, 626. Because all of the time periods in La. R.S. 9:5605 are peremptive in nature, the clear wording of Subsection (E) mandates that none of the time periods in the statute can be applied to legal malpractice claims once fraud had been established. After de novo review we interpret the statute to provide that once fraud is established, **no** peremptive period set forth in the statute is applicable.

Having eliminated application of all of the limitation periods in La. R.S. 9:5605, we find it is proper to revert to the limitation period in effect prior to enactment of La. R.S. 9:5605. Our holding in *Bunge*, *supra*, supports this conclusion. In *Bunge*, this court applied the fraud exception contained in La. R.S. 9:2772(H), the statute setting forth the peremptive period for suits against contractors. 557 So. 2d at 1385. Having found the fraud exception applicable, we stated, "[i]f a cause of action is not perempted by the statute, it will be subject to ordinary principles of prescription." *Id.* This court then applied the ordinary one-year prescriptive period in La. C.C. art. 3492. *Id.* at 1385-86.

Before the enactment of La. R.S. 9:5605, an action for legal malpractice was generally considered a delictual action governed by the one-year prescription

of La. C.C. art. 3492.[7] In *Braud v. New England Insurance Co.*, 576 So. 2d 466, 468 (La.1991), this court explained:

> 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. La. C.C. Art. 3492 (1983); This prescription commences to run from the day injury or damage is sustained. La. C.C. art. 3492. But there are countervailing factors that may serve to suspend or delay the commencement of prescription. For example, during the attorney's continuous representation of the client regarding the specific subject matter in which the alleged wrongful act or omission occurred, prescription will be suspended. (Internal citations removed).

Thus, we hold in cases where fraud is established pursuant to La. R.S. 9:5605(E), a legal malpractice claim is governed by the one-year prescriptive period set forth in La. C.C. art. 3492.

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[7] La. C.C. art. 3492 provides: "Delictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained. It does not run against minors or interdicts in actions involving permanent disability and brought pursuant to the Louisiana Products Liability Act or state law governing product liability actions in effect at the time of the injury or damage."

Application of the Prescriptive Period

Although La. C.C. art. 3467 provides that "prescription runs against all persons unless exception is established by legislation," this court has applied the jurisprudential doctrine of *contra non valentem* as an exception to this statutory rule. *Fontenot v. ABC Ins. Co.*, 95-1707 (La. 6/7/96), 674 So. 2d 960, 963. We have recognized four factual situations in which contra non valentem prevents the running of liberative prescription:

> (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 the 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; or
>
> (4) where the cause of action is neither known nor reasonably knowable by the plaintiff even though plaintiff's ignorance is not induced by the defendant.

Id. We have already found Ms. Myer-Bennett's actions were undertaken with the intent to lull Ms. Lomont into inaction and prevent her from asserting a legal malpractice claim. Ms. Lomont's delay in bringing this action was a direct result of the fraud

committed by Ms. Myer-Bennett, rather than her own willfulness or negligence. Thus, we find the third category of contra non valentem applicable. Application of this category of contra non valentem is partly an application of "the long-established principle of law that one should not be able to take advantage of his own wrongful act." *See Nathan v. Carter*, 372 So. 2d 560, 562 (La. 1979); *see also Corsey v. State, through Dept. Of Corrections*, 375 So. 2d 1319, 1324 (La. 1979); *Hyman v. Hibernia Bank & Trust Co.*, 139 La. 411, 417-18, 71 So. 598, 600 (La. 1916). Moreover, because Ms. Lomont's legal malpractice action is now governed by a prescriptive period, rather than peremptive period, application of the third category of contra non valentem is also warranted because of the continuous representation rule. In *Jenkins,* this court explained:

> This Court has held the third application of contra non valentem encompasses what is known at common law as the "continuous representation rule." The continuous representation rule recognizes a person seeking professional assistance has a right to repose confidence in the professional's ability and good faith, and realistically cannot be expected to question and assess the techniques employed or the manner in which services are rendered. The continuous representation rule also protects the integrity of the attorney-client relationship and affords an attorney an opportunity to remedy an error while, at the same time, prevents the attorney from

> defeating the client's claim through pleading statute of limitations.

85 So. 3d at 623 (internal citations removed). In *Jenkins*, we overruled the court of appeal's application of the continuous representation rule to suspend the commencement of the one-year period under La. R.S. 9:5605, but we tangentially recognized application of the continuous representation rule in fraudulent concealment cases. We explained that "[w]hile the majority [of the court of appeal] concluded it would be unjust to find the continuous representation rule inapplicable because that would mean 'a reasonable person cannot trust their attorney,' Judge McClendon [in dissent] found the majority's reasoning flawed because in situations of fraud, where trust is misplaced, the peremptive period does not apply." *Id.* at 618. We referenced Judge McClendon's dissent, wherein she distinguished the case from one involving fraudulent concealment:

> 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 the attorney fraudulently lulls a client into believing a problem he has created can be fixed. The allegations of Ms. Jenkins's [sic] petition cannot be construed to allege fraud so that the peremptive periods are not applicable.

Id.

Having determined prescription was suspended, we now consider when prescription began to run against Ms. Lomont. This court has held that the "date of discovery" from which prescription/peremption begins to run is the "date on which a reasonable man in the position of the plaintiff has, or should have, either actual or constructive knowledge of the damage, the delict, and the relationship between them sufficient to indicate to a reasonable person he is the victim of a tort and to state a cause of action against the defendant." *Jenkins*, 85 So. 3d at 621-22 (citing *Teague v. St. Paul Fire and Marine Ins. Co.*, 07-1384 (La. 2/1/08), 974 So. 2d 1266, 1275). Although Ms. Lomont became aware of the Citibank lien on December 9, 2010, the record establishes Ms. Myer-Bennett effectively hid her malpractice by convincing Ms. Lomont the problem could be fixed and she was working to remove the lien. Thus, although aware of an undesirable result arising out of Ms. Myer-Bennett's representation, Ms. Lomont did not recognize the result was due to malpractice and could not be "fixed" by Ms. Myer-Bennett. We also find it reasonable that Ms. Lomont, a lay person with a long personal relationship with Ms. Myer-Bennett, was lulled into trusting Ms. Myer-Bennett's assertions. Ms. Lomont asserted she did not discover the fraud until she met with Ms. Kesler on June 28, 2012, when she first learned the lawsuits had not been filed and could not remove the lien, and that she had a claim against Ms. Myer-Bennett for malpractice. Ms. Lomont's assertions are buttressed by the fact she filed a legal malpractice lawsuit against Ms. Myer-Bennett only

two weeks after meeting with Ms. Kesler, contrary to Ms. Myer-Bennett's claims that Ms. Lomont did not want to pursue such an action against her.

Thus, we find the one-year prescriptive period began to run on June 28, 2012, the day Ms. Lomont became aware of the deception and learned she had a malpractice action against Ms. Myer-Bennett. Because Ms. Lomont's lawsuit was filed July 12, 2012, within one year of June 28, 2012, her suit was timely filed and the lower courts erred in sustaining defendant's exception of peremption.

CONCLUSION

Based on the facts of this case, we find defendant committed fraud within the meaning of La. R.S. 9:5605(E). Thus, the peremptive periods contained in La. R.S. 9:5605 are not applicable and plaintiff's legal malpractice claim is governed by the one-year prescriptive period in La. C.C. art. 3492. Further, the facts of this case support an application of the doctrine of contra non valentem. Because we find plaintiff filed suit within one year of discovering defendant's malpractice, we hold the lower courts erred in sustaining defendant's exception of peremption.

DECREE

Reversed and remanded for further proceedings.

GUIDRY, J., concurs.

TRACY RAY LOMONT	NO. 14-CA-351
VERSUS	FIFTH CIRCUIT
MICHELLE MYER-BENNETT AND XYZ INSURANCE COMPANY	COURT OF APPEAL STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH
JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 716-976, DIVISION "G"
HONORABLE ROBERT A. PITRE, JR.,
JUDGE PRESIDING

October 29, 2014

MARC E. JOHNSON
JUDGE

Panel composed of Judges Susan M. Chehardy,
Fredericka Homberg Wicker, and Marc E. Johnson

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AFFIRMED

In this legal malpractice action, Plaintiff appeals the trial court's sustaining of Defendant's exception of peremption. For the reasons that follow, we affirm.

FACTS & PROCEDURAL HISTORY

Plaintiff, Tracy Lomont, filed a petition for damages against Defendant, Michelle Myer-Bennett, on July 12, 2012 alleging that Defendant committed legal malpractice in her representation of Ms. Lomont in a domestic matter. In particular, Ms. Lomont claimed that Defendant failed to record a community property settlement, which gave her the family home, in the mortgage and conveyance records. As a result, a third-party creditor, Citibank, was able to file a lien against the family home for a $26,052.17 judgment, plus interest and attorney's fees, which it obtained against Ms. Lomont's ex-husband, John Lomont.

Defendant subsequently filed an exception of peremption on the basis that more than three years had passed since the date of the alleged act, omission, or neglect upon which Ms. Lomont's claims were based and, thus, Ms. Lomont's claims were perempted under La. R.S. 9:5605. Specifically, Defendant asserted the malpractice occurred on or before February 20, 2009, when Citibank filed its lien against the family home. Since Ms. Lomont's lawsuit was filed in July 2012, Defendant maintained it was filed outside the three-year peremptive period.

In response to Defendant's exception of peremption, Ms. Lomont filed a supplemental and

amending petition and alleged that Defendant acted fraudulently in misrepresenting and/or suppressing the truth regarding the malpractice she committed in failing to timely record the community property settlement agreement in the mortgage and conveyance records. Ms. Lomont further alleged that because of Defendant's fraudulent acts, her claim fell under the exception set forth in La. R.S. 9:5605(E) and was not perempted. In a second supplemental and amending petition, Ms. Lomont listed specific fraudulent acts Defendant allegedly committed, including Defendant's failure to tell Ms. Lomont that she committed malpractice, assuring Ms. Lomont in December 2010 that she would file a lawsuit against Citibank and John Lomont to have the lien removed, repeatedly assuring Ms. Lomont that the lawsuit against Citibank and John Lomont was proceeding, and waiting until the peremptive period for legal malpractice had passed before disclosing an unwaivable conflict of interest she had in pursuing any case against Citibank and John Lomont. Ms. Lomont reiterated that Defendant's fraudulent acts rendered the peremptive period in La. R.S. 9:5605 inapplicable.

A hearing was subsequently held on the exception of peremption. During the hearing, both Defendant and Ms. Lomont testified. Defendant testified that she has been a licensed attorney since 1994. She stated that she and Ms. Lomont have known each other since they were children, having lived in the same neighborhood when they were younger. Defendant

explained that she and Ms. Lomont developed a friendship at Defendant's dentist office, where Defendant has been going for the past 25 years and where Ms. Lomont works as a dental assistant.

Defendant stated that Ms. Lomont retained her professional services in connection with Ms. Lomont's divorce from John Lomont. In connection with the divorce, Defendant prepared a community property settlement wherein Ms. Lomont received the family home and the accompanying debts and John Lomont received the business and the accompanying debts. Ms. Lomont and John Lomont signed the community property settlement on September 8, 2008. However, unknown to all parties at the time, Defendant failed to record the settlement in the mortgage and conveyance records.

In September 2010, Ms. Lomont tried to refinance her house, the family home, when she learned from the finance company that the community property partition settlement had not been recorded in the mortgage and conveyance records. Ms. Lomont immediately contacted Defendant who, upon further investigation, discovered that she had failed to record the community property settlement, contrary to her standard operating procedure. Upon learning of her mistake, Defendant recorded the community property settlement in the mortgage and conveyance records the next day, September 30, 2010. At the time the settlement was recorded, the existence of Citibank's lien was unknown to the parties.

Thereafter, in December 2010, Ms. Lomont learned of Citibank's lien through the finance company, who would not give her a loan because of the lien. Ms. Lomont again contacted Defendant and advised her of the problem. According to Defendant, she admitted to Ms. Lomont during that conversation that she had committed malpractice. Defendant explained that she offered Ms. Lomont several options: (1) Ms. Lomont could sue her for malpractice; (2) Ms. Lomont could sue John Lomont for indemnification; (3) Ms. Lomont could let Defendant sue John Lomont and try to get a judgment against him "to fix things;" and/or (4) Ms. Lomont could allow Defendant to negotiate with Citibank.

Defendant testified that Ms. Lomont immediately stated that she did not want to sue Defendant. Defendant further testified that Ms. Lomont did not want another attorney, but rather wanted Defendant to fix the problem. Defendant offered into evidence a copy of an email she sent to herself on December 9, 2010, wherein she documented the telephone conference with Ms. Lomont.[1] In the email, Defendant noted that she told Ms. Lomont about the malpractice and advised her to get new counsel, but that Ms. Lomont did not want new counsel. Defendant admitted that

[1] Defendant explained that the email she sent was to a Yahoo account she keeps for billing purposes. She explained that anytime she does anything, she sends herself an email to this particular Yahoo account so she can keep track of what she does on a daily basis.

she did not send any documentation to Ms. Lomont confirming their conversation.

Ms. Lomont contradicted this testimony and stated that Defendant never told her that she committed malpractice or that she could sue Defendant for malpractice. Ms. Lomont further denied ever telling Defendant that she did not want to sue her for malpractice.

Defendant proceeded to testify that she first tried to negotiate with Citibank, but those negotiations failed. Next, Defendant prepared to file suit against John Lomont for indemnification. She drafted a lawsuit, which she showed to Ms. Lomont in June 2011.[2] Ms. Lomont testified that she believed the lawsuit had been filed; however, the parties stipulated that Defendant never filed a lawsuit against John Lomont or Citibank.

At some point, Defendant learned she had an unwaivable conflict of interest and could not represent Ms. Lomont in a lawsuit to remedy the lien problem. On April 2, 2012, Defendant sent Ms. Lomont a letter in which she admitted that she failed to record the community property settlement and that, as a result of her failure, a third party was able to obtain a lien against Ms. Lomont's property. Defendant indicated that she would like to represent

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[2] Defendant was unable to produce a copy of the lawsuit draft during the hearing.

Ms. Lomont in an effort to remove the lien, but she had an unwaivable conflict of interest that prohibited her from doing so. In the letter, Defendant urged Ms. Lomont to obtain independent counsel to further assist her. Defendant testified that she provided Ms. Lomont with a list of attorneys who could help her. Ms. Lomont explained that she did not learn until she later consulted with one of these attorneys that her only remedy with regards to the lien was a legal malpractice action against Defendant.

At the conclusion of the hearing, Ms. Lomont argued that Defendant's actions after learning she had committed malpractice constituted fraud and, therefore, the three-year peremptive period under La. R.S. 9:5605 did not apply. The trial court disagreed and sustained Defendant's exception of peremption. In its judgment, the trial court specifically found that Defendant's actions after the discovery of her malpractice did not amount to fraud. The trial court stated that it believed Defendant was "honestly trying to fix a mistake that she had caused" and, thus, did not have the requisite intent to commit fraud.

ISSUES

On appeal, Ms. Lomont contends the trial court erred in failing to find that the allegations of fraud in her petition were sufficient to prevent the three-year peremptive period of La. R.S. 9:5605(A) from applying. Ms. Lomont also argues the trial court erred in

failing to find Defendant's post-malpractice conduct constituted fraud for purposes of the exception to three-year peremptive period set forth in La. R.S. 9:5606(E) [sic].

LAW & ANALYSIS

A party who raises an exception of peremption ordinarily bears the burden of proof at trial on the exception. *Schonekas, Winsberg, Evans & McGoey, L.L.C. v. Cashman*, 11-449 (La. App. 5 Cir. 12/28/11); 83 So.3d 154, 158. However, when peremption is evident on the face of the petition, the burden is on the plaintiff to prove that his action is not perempted. *Id.*

At a hearing on a peremptory exception pleaded prior to trial of the case, evidence may be introduced to support or controvert any of the objections pleaded when the grounds for the exception are not apparent from the face of the petition. La. C.C.P. art. 931. If evidence is introduced at the hearing on an exception of peremption, the trial court's factual conclusions are evaluated under the manifest error standard of review. *Cashman*, *supra.* If the trial court's findings are reasonable in light of the record viewed in its entirety, an appellate court may not reverse, even if it is convinced that it would have weighed the evidence differently. *Id.*

The time limitations for filing a legal malpractice claim are set forth in La. R.S. 9:5605(A), which provides in relevant part:

> No action for damages against any attorney at law duly admitted to practice in this state . . . arising out of an engagement to provide legal services shall be brought unless filed . . . 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.

These one and three-year periods under La. R.S. 9:5605 are peremptive, not prescriptive. *Garner v. Lizana*, 13-427 (La. App. 5 Cir. 12/30/13); 131 So.3d 1105, 1109, *writ denied*, 14-208 (La. 4/4/14); 135 So.3d 1183. Peremption is a period of time fixed by law for the existence of a right and, unless the right is timely exercised, the right is extinguished upon the expiration of the peremptive period. La. C.C. art. 3458; *Garner*, *supra.* Nothing may interfere with the running of a peremptive period; it may not be interrupted, suspended or renounced. La. C.C. art. 3461; *Jenkins v. Starns*, 11-1170 (La. 1/24/12); 85 So.3d 612, 627. Not even continuous representation can interfere with the running of the peremptive period. *Id.* at 627-28.

Under La. R.S. 9:5605(A), Ms. Lomont had three years from the date of the alleged malpractice to file suit against Defendant. The alleged malpractice

occurred when Defendant failed to record a community property settlement in the mortgage and conveyance records before a third-party creditor filed a lien against property conveyed in the community property settlement. Citibank filed its lien in February 2009. Thus, Ms. Lomont had until February 2012 to file a legal malpractice action against Defendant. Ms. Lomont did not file the present lawsuit until July 2012, five months after the three-year peremptive period. However, Ms. Lomont's petition contains specific allegations of post-malpractice fraud allegedly committed by Defendant.

Under La. R.S. 9:5605(E), the one and three-year peremptive periods in Subsection (A) "shall not apply in cases of fraud, as defined in Civil Code Article 1953." Louisiana Civil Code Article 1953 defines fraud as "a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other." In *Garner v. Lizana*, *supra*, this Court held that post-malpractice fraudulent acts could bar the application of the three-year peremptive period under the fraud exception of La. R.S. 9:5606(E) [sic].

In *Garner*, Ms. Garner retained attorney Bruce Lizana to represent her in a medical malpractice action against a health care provider who provided post-operative care to her after an April 2004 surgery. In April 2005, Mr. Lizana filed a medical malpractice lawsuit in the district court, which was later dismissed on the basis of prematurity because the

lawsuit was filed prior to a request for review of Ms. Garner's claim before a medical review panel. In May 2006, two weeks prior to the dismissal of the lawsuit, Mr. Lizana filed a request for review of Ms. Garner's claims by a medical review panel, which ultimately found in Ms. Garner's favor in November 2008. In January 2009, Mr. Lizana filed a new petition for damages in the district court, which was dismissed in October 2009 on an exception of prescription because the lawsuit was not filed within one year of the medical malpractice or discovery of the alleged malpractice.

Within one year of the dismissal of her lawsuit, in September 2010, Ms. Garner filed a legal malpractice action against Mr. Lizana for his negligent handling of her medical malpractice case that resulted in the dismissal of her claims as untimely. Ms. Garner alleged in her petition that Mr. Lizana fraudulently withheld information from her; specifically, Ms. Garner alleged that Mr. Lizana consistently reported to her that her case was proceeding properly after the case had been dismissed and continued to mislead her into believing that her case was still viable even though it had been dismissed.

Although Ms. Garner's legal malpractice action was filed more than two years after the three-year peremptive period of La. R.S. 9:5605(A), this Court determined that the specific allegations of fraud in the petition, e.g. Mr. Lizana intentionally misled her regarding the status of her case, were sufficient to

prevent the application of the peremptive period under the fraud exception of La. R.S. 9:5605(E).

In the present case, Ms. Lomont argues the trial court failed to follow *Garner* because it failed to recognize that the three-year peremptive period of La. R.S. 9:5605(A) did not apply because the allegations of fraud in her petition, which should have been presumed to be true for purposes of the hearing on the exception of peremption, fell within the fraud exception of La. R.S. 9:5605(E). Ms. Lomont essentially argues that the trial court should have relied solely on the allegations of fraud in her petition to defeat Defendant's exception of peremption and should have ignored the evidence presented at the hearing on the exception of peremption.

First, we note that Defendant, as mover of the exception, bore the burden of proving Ms. Lomont's claim was perempted because Ms. Lomont's petition was not prescribed on its face since the specific allegations of fraud contained in the petition, if true, would except her claim from the peremptive period in La. R.S. 9:5605(A). Unlike *Garner*, Defendant in this case presented evidence at the hearing on the exception of peremption to show that her conduct was not fraudulent, which required the trial court to evaluate the evidence presented to determine whether the fraud exception of La. R.S. 9:5605(E) applied.

Ms. Lomont argues the trial court erred in not accepting the allegations of fraud in her petition as true. Allegations in a petition are presumed true for

purposes of a hearing on an exception of peremption only when no evidence is presented at the hearing on the exception. *Carriere v. Bodenheimer, Jones, Szwak, & Winchell, L.L.P.*, 47,186 (La. App. 2 Cir. 8/22/12); 120 So.3d 281, 284. Here, unlike *Garner*, evidence was presented at the hearing on the exception of peremption; namely, the testimonies of Ms. Lomont and Defendant and various documents. Therefore, the presumption that the allegations in Ms. Lomont's petition were true, did not apply.[3]

And, contrary to Ms. Lomont's arguments, the trial court did follow *Garner*. In its judgment, the trial court expressly recognized *Garner* and its holding that an attorney's post-malpractice behavior may invoke the fraud exception of Subsection (E). The trial court then considered the evidence presented at the hearing on the exception of peremption and determined Defendant's post-malpractice conduct did not amount to fraud and, thus, the fraud exception set forth in Subsection (E) did not apply to bar the three-year peremptive period of Subsection (A). This factual

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[3] *Garner v. Lizana*, 13-427 (La. App. 5 Cir. 12/30/13); 131 So.3d 1105, *writ denied*, 14-208 (La. 4/4/14); 135 So.3d 1183, does not stand for the proposition that mere allegations of fraud in a petition are sufficient to defeat the three-year peremptive period of La. R.S. 9:5605(A). In *Garner*, the defendant bore the burden of proving his exception of peremption; however, he offered nothing into evidence at the hearing on the exception. As such, the allegations of the plaintiff's petition were presumed true. Taken as true, this Court determined that the plaintiff's allegations of fraud were sufficient to invoke the fraud exception of La. R.S. 9:5605(E) so as to defeat an exception of peremption.

conclusion is subject to a manifest error standard of review. *See Benton v. Clay*, 48,245 (La. App. 2 Cir. 8/7/13); 123 So.3d 212, 219 ("The trial court's findings with respect to a claim of fraud are subject to the manifest error standard of review.")

As stated above, fraud is defined as a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one part or to cause a loss or inconvenience to the other. La. C.C. art. 1953. Fraud may also result from silence or inaction; however, mere silence or inaction without fraudulent intent does not constitute fraud. *Id.*; *Terrebone Concrete, LLC v. CEC Enterprises, LLC*, 11-72 (La. App. 1 Cir. 8/17/11); 76 So.3d 502, 509, *writ denied*, 11-2021 (La. 11/18/11); 75 So.3d 464. The intent to deceive is a necessary and inherent element of fraud. *Id.* Fraud cannot be predicated upon mistake or negligence, no matter how gross. *Id.*

The trial court specifically found that Defendant did not have the requisite intent for fraud. Our review of the record does not show that this finding was manifestly erroneous. Defendant testified that she admitted her mistake in failing to file the partition agreement to Ms. Lomont in December 2010. Defendant further stated that she offered to help Ms. Lomont in getting the lien removed and everything she did was in an effort to "fix the problem" she had created. When findings are based on determinations regarding the credibility of witnesses, great deference is given to the trier of fact because only the fact finder is cognizant of the variations in demeanor and tone of

voice that bears so heavily on the listener's understanding and belief in what is said. *Arguello v. Brand Energy Solutions, LLC*, 13-990 (La. App. 5 Cir. 5/21/14); 142 So.3d 254, 255. While some of Defendant's representations to Ms. Lomont regarding the method by which the lien could have been removed may have been grossly negligent, we cannot say the trial court was manifestly erroneous in finding Defendant's conduct was not fraudulent.

DECREE

For the foregoing reasons, we affirm the judgment of the trial court sustaining Defendant's exception of peremption, dismissing Ms. Lomont's claims with prejudice. Ms. Lomont is to bear the costs of this appeal.

AFFIRMED

TWENTY FOURTH JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON

STATE OF LOUISIANA

NO: 716-976 **DIVISION "G"**

TRACY RAY LOMONT

VERSUS

MICHELLE MYER-BENNETT AND XYZ INSURANCE COMPANY

FILED: JAN 24 2014

JUDGMENT

Set before this Court on the 16th day of January, 2014, was a Peremptory Exception of Peremption and Motion for Sanctions filed on behalf of Defendant Michelle Myer-Bennett.

Present:

Frank W. Lagarde, Jr., on behalf of Plaintiff Tracy Rae Lomont

Andrew T. Lilly and Jeffrey Bennett, on behalf of Defendant Michelle Myer-Bennett

This case involves legal malpractice committed by Defendant Michelle Myer-Bennett while representing Plaintiff Tracy Lomont in her divorce proceedings. More specifically, Ms. Myer-Bennett failed to record the community property settlement reached between Ms. Lomont and her former husband. As a result, Citibank was able to obtain a judgment

against Ms. Lomont's ex-husband which bears against the property that Ms. Lomont was to receive in the Partial Partition agreement.

In Louisiana, actions for legal malpractice are governed by R.S. 9:5605. The statute provides, " . . . [I]n all events, such actions shall be filed at the latest within three years from the date of the alleged act, omission, or neglect." Additionally, Subsection E of the statute also states, "The preemptive period . . . shall not apply in cases of fraud, as defined in Civil Code Article 1953."

Ms. Myer-Bennett asserts in her Exception that Ms. Lomont's Petition for Damages for Legal Malpractice is time-barred, because the petition was filed after the three-year preemptive period for legal malpractice actions had expired. Ms. Lomont argues that the petition was timely filed because the three-year preemptive period does not apply in cases of fraud, and fraud was committed by Ms. Myer-Bennett.

The Partial Partition of Community Property Settlement between Ms. Lomont and her former husband was executed and signed on September 8, 2008. The judgment obtained by Citibank was recorded on February 20, 2009. If Ms. Myer-Bennett had recorded the Partial Partition at any time prior to the Citibank judgment being recorded, Ms. Lomont's home could not have been encumbered by the judgment. Therefore, the most recent instance of Ms. Myer-Bennett's malpractice was the final moment

before the Citibank judgment was recorded on February, 20, 2009. As a result, the time period for peremption pursuant to R.S. 9:5605 began to run on February 20, 2009, and the three-year period expired on February 20, 2012. Ms. Lamont's Petition for Damages for Legal Malpractice was not filed until July 12, 2012, outside of that three-year period.

The only situation in which this claim would not be peremptied is if this Court were to find that this case involved fraud as defined in Louisiana Civil Code Article 1953. Article 1953 provides:

> Fraud is a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. Fraud may also result from silence or inaction.

Ms. Lomont argues that the fraud exception in 9:5605(E) applies to misrepresentation and suppression of the truth occurring subsequent to the acts of malpractice. Particularly, Ms. Lomont asserts in her Second Supplemental and Amending Petition that Ms. Myer-Bennett committed fraud by:

> Telling and assuring Tracy R. Lomont, on December 9, 2010, that even though defendant had not timely filed the *Partition Agreement*, that she would have the lien removed by filing a lawsuit against the judgment creditor, Citibank, and plaintiff's ex-husband, John Lomont. Neither at this time, nor at any time, did defendant, Michelle

> Myer-Bennett disclose to Tracy R. Lomont that she had committed legal malpractice . . . At no time did Michelle Myer-Bennett ever inform Tracy Lomont that she had done anything improper in connection with her representation of Tracy R. Lomont . . . Michelle Myer-Bennett was covering up her own negligence with fraudulent misrepresentations and suppressions of the truth, all in an effort to surpass the time limitations in which plaintiff could have filed a legal malpractice suit.

Before making a determination of whether Ms. Myer-Bennett's post-malpractice actions amounted to fraud pursuant to Civil Code Article 1953, it is first necessary to decide whether post-malpractice actions qualify for the fraud exception in 9:5605(E).

In *Atkinson v. LeBlanc*, 03-365 (La. App. 5 Cir. 10/15/03); 860 So. 2d 60, the Louisiana Fifth Circuit Court of appeal held that fraudulent conduct committed after an act or omission of legal malpractice does not invoke the fraud exception of 9:5605(E). The court noted, "The jurisprudence applying this article in cases of legal malpractice apply it in cases where it was the fraudulent act itself that constituted the malpractice, not as herein alleged, fraud in the actions taken after the legal malpractice has occurred." *Atkinson*, 860 So. 2d at 65. Ms. Myer-Bennett cites *Atkinson* to support her contention that the fraud exception should not figure into this Court's analysis. More specifically, since the act of malpractice (the untimely filing of the Partial Partition) was not

fraudulent on its face, then anything Ms. Myer-Bennett may have said or done after the fact is irrelevant.

However, the more recent Fifth Circuit case of *Garner v. Lizana*, 13-427 (La. App. 5 Cir. 12/30/13); 2013 WL 6843472, distinguishes itself from *Atkinson* and calls this analysis into question. In *Garner*, the Court found that a lawyer's post-malpractice behavior can invoke the fraud exception of 9:5605(E). In particular, the lawyer had "consistently reported to [the client] that her case was proceeding properly, when in fact the case had been dismissed . . . [These actions] fall under the fraud exception set forth in La. R.S. 9:5605(E)." *Garner*, at 6.

In light of the *Garner* decision, this Court finds it appropriate to consider the nature of Ms. Myer-Bennett's actions after the discovery that she had not timely filed the Partial Partition. In her testimony, Ms. Myer-Bennett stated that as soon as she realized she had made a mistake, she advised Ms. Lomont that she could retain an attorney to sue her. She also advised her that she could try to remove the lien by suing Citibank and Mr. Lomont. While Ms. Lomont argues that this was all an effort to trick her into allowing the preemptive period to pass, this Court finds that this was not the case. Instead, this Court is inclined to believe that Ms. Myer-Bennett was honestly trying to fix a mistake that she had caused. As a result, this Court cannot find that her actions amounted to fraud, because Ms. Myer-Bennett did

not have the requisite intent of Civil Code Article 1953.

Though this Court does not find a legal basis for the contention that Ms. Myer-Bennett committed fraud in the wake of her malpractice, this Court does find that Ms. Myer-Bennett [sic] actions may have amounted to another instance of malpractice. Particularly, in the wake of Louisiana's unyielding public records doctrine, it seems professionally irresponsible that an attorney (even a primarily domestic attorney) would suggest to a client that there would be a viable cause of action against Citibank or Mr. Lomont. Ms. Myer-Bennett may not have intended to defraud Ms. Lomont, but her legal advice appears to have been unsound in this situation.

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Exception of Peremption be maintained.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Motion for Sanctions be denied.

JUDGMENT READ, RENDERED AND SIGNED:

Gretna, LA, this 24 **day of** January **, 2014.**

/s/ Robert A. Pitre, Jr.
JUDGE ROBERT A. PITRE, JR.

Supreme Court of Louisiana

FOR IMMEDIATE NEWS RELEASE — NEWS RELEASE #42

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the ***28th day of August, 2015***, the following action was taken by the Supreme Court of Louisiana in the case(s) listed below:

***REHEARING(S) DENIED*:**

2014-C-2483 TRACY RAY LOMONT v. MICHELLE MYER-BENNETT AND XYZ INSURANCE COMPANY (Parish of Jefferson)