

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 1014

CALETHA BROWN

VERSUS

EDWIN A. BORDELON AND BORDELON'S SUPER SAVE, INC.



DATE OF JUDGMENT: FEB 10 2012

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
NUMBER 510,958, SEC. 8, PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE WILSON FIELDS, JUDGE

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Super Save, Inc.

BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

Disposition: AFFIRMED.

KUHN, J.

This appeal is taken from a district court judgment sustaining a peremptory exception raising an objection of prescription and dismissing the plaintiff's personal injury lawsuit, with prejudice. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In August 2002, plaintiff, Caletha Brown, went to the pharmacy at Bordelon's Super Save in Baton Rouge, Louisiana, to pick up a prescription for several spider bites she had suffered. She claims that, as she was returning to her car, she tripped over a protrusion in the surface of the parking lot and fell to the ground, thereby sustaining serious injuries to her left knee, breast, and side. On August 20, 2003, she fax filed a petition for damages, naming Bordelon's Super Save, Inc., and Edwin A. Bordelon as defendants; the next day, August 21, 2003, the signed, original petition was filed. In the petition, plaintiff alleged that the accident occurred on August 22, 2002.

Both defendants filed answers in which they generally denied the allegations of plaintiff's petition. Additionally, a peremptory exception raising the objection of prescription was filed in which it was alleged that the plaintiff's lawsuit was prescribed because her accident actually occurred on August 12, 2002. Thereafter, plaintiff filed a supplemental and amending petition in which she asserted that the accident occurred on August 20, 2002, rather than on August 22, 2002, as originally alleged.

Following a hearing, the district court sustained the exception of prescription and dismissed plaintiff's lawsuit, with prejudice, based on its finding that the accident occurred prior to August 20, 2002. Plaintiff now appeals, arguing in one assignment of error that the evidence was insufficient to establish that her lawsuit

was prescribed, because the evidence supporting the exception consisted of unreliable hearsay and was, moreover, contradictory.

LAW

In accordance with La. C.C. art. 3492, delictual actions are subject to a liberative prescription of one year, which commences to run from the day injury is sustained. Generally, the party raising the objection of prescription bears the burden of proof at the trial of the exception, unless prescription is evident on the face of the pleadings, in which case the burden shifts to the plaintiff to show that the action has not prescribed. See *Carter v. Haygood*, 04-0646 (La. 1/19/05), 892 So.2d 1261, 1267. At trial of the exception, evidence is admissible in support or contravention of the objection raised. See La. C.C.P. art. 931. When such evidence is introduced, the district court's findings of fact are reviewed on appeal under the manifest error-clearly wrong standard of review. Thus, if the findings are reasonable in light of the record reviewed in its entirety, an appellate court may not reverse even though convinced that, had it been sitting as the trier-of-fact, it would have weighed the evidence differently. *Carter*, 892 So.2d at 1267. The date on which prescription begins to run is a factual issue that must be determined by the trier-of-fact. *Trolly Corporation v. Boohaker*, 05-1595 (La. App. 1st Cir. 6/9/06), 938 So.2d 157, 159.

DISCUSSION

On appeal, plaintiff argues the evidence offered to establish that her accident occurred on August 12, 2002, was insufficient to support the objection of prescription because it consisted of inadmissible hearsay evidence that was unreliable and contradictory. She contends that, in contrast, she offered competent evidence that the accident occurred on August 20, 2002. Specifically, she refers to the affidavit of Herman Clark, who stated therein that he transported plaintiff to the

emergency room of Summit Hospital on the date of the accident, which was August 20, 2002. Further, plaintiff testified in her deposition that she sought treatment at Lane Memorial Hospital the day after her fall; hospital records reflect that she was treated at Lane Memorial Hospital on August 22, 2002. Finally, plaintiff contends that, while it is clear that the accident occurred on August 20, the jurisprudence requires that any doubt thereto must be resolved by overruling the objection of prescription.

In support of the exception of prescription, evidence was offered in the form of pharmacy records showing that plaintiff picked up prescriptions at Bordelon's Super Save on Monday, August 12, 2002, as well as on Tuesday, August 20, 2002. To establish that the accident occurred on the former date, deposition testimony was offered from one of plaintiff's physicians, Dr. Henry Dixon, that plaintiff complained to him at an office visit on August 19, 2002 (prior to picking up her prescriptions on August 20), that she was experiencing problems as a result of a fall she sustained at Bordelon's Super Save. Dr. Dixon's office notes, which were consistent with his deposition testimony, were also offered into evidence.

Additionally, emergency room records from plaintiff's August 22, 2002 visit to Lane Memorial Hospital were also offered as proof that the accident occurred on August 12 of that year. These records reflect that plaintiff sought treatment as a result of injuries she sustained in a fall at a pharmacy. Furthermore, the records state at one point that the accident occurred on August 12, 2002. In fact, plaintiff's name is signed at the bottom of the particular page including this information. It is indicated elsewhere in the records that the accident occurred on a Monday, which is consistent with it having occurred on Monday, August 12, 2002. In contrast, August 20, 2002, was a Tuesday.

Given the evidence presented, we find no merit in plaintiff's assertions that the district court was manifestly erroneous in concluding that the accident occurred on August 12, 2002. Plaintiff's argument that Dr. Dixon might have recorded the wrong date upon which she first reported her fall to him, since his records were susceptible of error, appears to consist of nothing more than mere speculation. Plaintiff also points out that the emergency room records from Lane Memorial Hospital, in addition to listing August 12 as the date of her accident, also indicate at another point that the accident occurred on August 11. On this basis, she argues these records are contradictory and should be disregarded. However, since the records were otherwise consistent with the accident occurring on Monday, August 12, the district court reasonably could have concluded that the inclusion of the August 11 date was merely inadvertent.

Moreover, with respect to plaintiff's contention that the evidence offered in support of the objection of prescription was hearsay, we note there is no indication in the record that any hearsay objection was ever raised to this evidence. The failure to object to the admission of hearsay evidence constitutes a waiver of the right to object to its admissibility.¹ See *Harrigan v. Freeman*, 498 So.2d 58, 61 (La. App. 1st Cir. 1986); see also La. C.E. art. 103(A)(1).

Based on our review, we are unable to say that the district court committed manifest error in finding that the accident occurred on August 12, 2002. This finding was reasonable in light of the record reviewed in its entirety. Thus, since plaintiff's lawsuit was not filed until August 20, 2003, more than one year after her

¹ In any event, it is not clear that the evidence in question constituted inadmissible hearsay. The pertinent portion of the medical records may have been admissible pursuant to La. C.E. art. 803(4) and La. R.S. 13:3714; the pharmacy records may have been admissible under La. C.E. art. 803(6).

accident and injury, it clearly was prescribed under La. C.C. art. 3492. The district court properly sustained the exception raising the objection of prescription and dismissed plaintiff's lawsuit in its entirety, with prejudice.

CONCLUSION

For the reasons given, the judgment of the district court is affirmed. Plaintiff is to pay all costs of this appeal.

AFFIRMED.