Fifth Circuit Court of Appeal
State of Louisiana

No. 26-C-45 C/W 26-C-77

LOUIS B. MERHIGE

versus

PACIFIC LIFE INSURANCE COMPANY, BARNETT AND ASSOCIATES, LLC, JAMES BARNETT, AND ABC INSURANCE COMPANY

C/W

LOUIS B. MERHIGE

versus

PACIFIC LIFE INSURANCE COMPANY, BARNETT & ASSOCIATES, LLC AND JAMES BARNETT

ON APPLICATION FOR SUPERVISORY REVIEW FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 855-487, DIVISION "H"
HONORABLE DONALD L. FORET, JUDGE PRESIDING

April 28, 2026

SCOTT U. SCHLEGEL

JUDGE

Panel composed of Judges Susan M. Chehardy, Fredericka Homberg Wicker, Jude G. Gravois, Marc E. Johnson, Stephen J. Windhorst, John J. Molaison, Jr., Scott U. Schlegel, and Timothy S. Marcel

AFFIRMED IN PART; REVERSED IN PART; REMANDED

SUS
SMC
FHW
JGG
MEJ
SJW
JJM
TSM

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SCHLEGEL, J.

Relators/defendants, Barnett & Associates, LLC and James Barnett (collectively, "Barnett"), seek supervisory review of the trial court's December 22, 2025 judgment overruling Barnett's exceptions of no cause of action, peremption, and prescription, against respondent/plaintiff, Louis Merhige. Relator/co-defendant, Pacific Life Insurance Company ("Pacific Life"), also seeks supervisory review of the same judgment entered by the trial court on the same day as to its exceptions of peremption and prescription.[1]

For the reasons stated herein, we affirm the trial court's judgments denying the peremptory exception of no cause of action filed by Barnett and the exceptions of peremption filed by Barnett and Pacific Life. We, however, reverse the trial court's judgment denying the exceptions of prescription filed by Barnett and Pacific Life, and grant the exceptions of prescription.

I. *Factual and Procedural History*

A. *Factual Background*

In 2014, plaintiff, who was 77 years old at the time, a practicing lawyer and former traffic court judge, purchased a five-million-dollar, premium-financed index universal life insurance policy ("the policy") from Pacific Life, through his longtime friend and insurance agent, James Barnett. Plaintiff formed an insurance trust, the Louis Bernard Merhige Insurance Trust ("the trust"), which was named as the owner of the policy, with plaintiff as the named insured. Plaintiff's financial advisor, stockbroker, and longtime friend, Wilfred M. Kullman, Jr. ("Kullman"), was designated as the trustee of the trust.

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[1] The writ application filed by Pacific Life in 26-C-45 and the writ application filed by Barnett in 26-C-77, both seek review of the trial court's December 22, 2025 judgment, and were consolidated for judicial economy by order of April 17, 2026.

Based on the policy illustrations prepared by Pacific Life and loan illustrations prepared by Succession Capital Alliance ("Succession Capital"), plaintiff chose the policy at issue and financed the policy premiums with loans provided by First Insurance Funding Corporation ("First Insurance Funding"), a banking institution that provides loans to high-net-worth individuals, such as plaintiff, for the purchase of life insurance policies such as the one at issue in this case.[2] Pacific Life issued the policy to plaintiff and a policy delivery receipt was signed on October 14, 2014. In acquiring the policy, plaintiff and the trustee, Kullman: (1) signed all the required documents to obtain the policy and all the necessary financial loan documents to secure payment of the policy premiums; (2) confirmed that plaintiff had a net-worth of $10 million; and (3) confirmed that plaintiff had sufficient assets to pay for the premiums needed to insure him at his age for that amount of coverage.

Plaintiff borrowed $1 million to fund the policy's premium for the first year and $750,000 per year for six years to fund the remaining premiums. The premium finance loan had to be 100% collateralized (secured) by either the cash value of the policy or plaintiff's investments. Plaintiff was required to post additional collateral each year as the balance of the premium-financed loan increased. The balance continued to increase annually because all interest above $65,000 was deferred so that plaintiff would only have to pay $65,000 per year in interest payments. Plaintiff testified at the original hearing on September 30, 2024, that he was not aware that the premiums paid for the policy were being invested in the stock market until, in 2017, when he was first trying to sell the policy, he had "some long discussions" with Barnett. He testified that this coincided with a

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[2] Wintrust Life Finance ("Wintrust") later took over the premium finance loan.

dispute involving a trust beneficiary, Heather Gonzales, whom he believed had stolen money from him.

As discussed further below, plaintiff was aware of what he perceived to be a problem with the policy as early as October 20, 2014. He sent an email to Barnett on that date questioning why his income was affected because his securities were pledged for the loan on the policy, and he did not think that the policy would have an effect on his ability to draw income from his accounts.

Eventually, plaintiff became so dissatisfied that in 2024 he decided to sell the policy. On April 19, 2024, he had Barnett communicate with a prospective buyer that he would accept the company's offer. On May 2, 2024, the funds were transferred to plaintiff's account, thus completing the sale.

B. *Prior Proceedings*

1. *Summary*

On June 24, 2024, plaintiff filed the instant lawsuit against his insurance agent, Barnett, and the insurer, Pacific Life, for alleged acts, omissions, and neglect associated with the purchase of the policy. Plaintiff did not name any of the banking institutions (*i.e.*, Succession Capital, First Insurance Funding, or Wintrust) as defendants.

Barnett and Pacific Life filed exceptions of peremption alleging that all of plaintiff's claims against them were related to the sale of the policy in 2014, and as such, were perempted under La. R.S. 9:5606. Pacific Life also filed an exception of prescription, alleging that plaintiff's claims were prescribed under La. C.C. art. 3492. After a lengthy contradictory hearing on September 30, 2024, the trial court rendered judgment on October 3, 2024, sustaining Barnett's exception of peremption and Pacific Life's exception of peremption as to "acts, omissions, or neglect prior to June 24, 2021." The trial court also overruled the exceptions as to "acts, omission[s], and neglect occurring after June 24, 2021, and discovered

within one-year prior to June 24, 2024." Barnett and Pacific Life timely filed writ applications with this Court.

On July 16, 2025, this Court issued two decisions addressing defendants' exceptions. The first decision, *Merhige v. Pac. Life Ins. Co.*, 24-524 (La. App. 5 Cir. 7/16/25), 420 So.3d 204 ("*Merhige I – Barnett*"*)*, dealt primarily with the writ application filed by Barnett. The second decision, *Merhige v. Pac. Life Ins. Co.*, 24-520 (La. App. 5 Cir. 7/16/25), 420 So.3d 185 ("*Merhige I – Pacific Life*"), dealt primarily with the writ application filed by Pacific Life.

In these decisions, this Court determined that all of plaintiff's claims, as alleged, were perempted on the face of the petition. Therefore, the burden shifted to plaintiff to show that his claims were not perempted.

This Court analyzed the plaintiff's three claims, consisting of: (1) the conversion rider; (2) the sale of the policy, i.e., failing to pursue claims related to the sale of the policy in 2022; and (3) the wash loan. This Court found that the plaintiff's claims pursuant to the conversion rider and the failure to pursue the sale of the policy in 2022 were perempted under La. R.S. 9:5606. We denied the exceptions of peremption as to the wash loan.

2. *Claims under the conversion rider*

Specifically, as to plaintiff's first claim under the conversion rider, this Court recognized that the policy was issued to and received by plaintiff in 2014. Despite plaintiff's testimony that he did not read the policy or any of the financial documents related to the policy, this Court noted that plaintiff and trustee signed all the documents related to the policy. Furthermore, the policy and illustrations delivered to plaintiff included the conversion rider. This Court found that because plaintiff was presumed to know the contents of his insurance policy, which he received in October 2014 and included the conversion rider, plaintiff had until October 2015 to file his claims against Barnett and Pacific Life. This Court further

found that even assuming plaintiff was not aware of and did not discover the conversion rider until he received Pacific Life's letter dated August 10, 2022 explaining that the conversion rider had to be exercised prior to its expiration date of October 9, 2022, plaintiff had one year from the date of the letter to file his claims. Because plaintiff did not file his suit until June 24, 2024, plaintiff's conversion rider claims against Barnett and Pacific Life were untimely and perempted under La. R.S. 9:5606.

3. *Claims related to failure to pursue the sale of the policy in 2022*

As to plaintiff's second claim related to his failure to pursue the sale of the policy in 2022, this Court noted that plaintiff discussed selling the policy with Barnett after he was required to post approximately $30,000 in additional collateral in May 2022. Plaintiff also complained to Barnett about additional and increasing collateral requirements after he received the September 2022 renewal package. Plaintiff testified that Barnett stated he could sell the policy, which they discussed at length. Barnett testified that around October 2022, he and plaintiff also discussed the option of taking a wash loan to pay down some of his debt. Plaintiff decided at that time not to pursue selling the policy. As a result, this Court concluded that plaintiff had one year or until March 2024 at the latest, to file his claim against Barnett for failure to pursue the sale of the policy in 2022. Because plaintiff did not file his suit until June 24, 2024, plaintiff's claims against Barnett and Pacific Life for failure to sell the policy were untimely and perempted under La. R.S. 9:5606.

4. *Claims related to the wash loan*

Finally, this Court denied the exceptions of peremption as to the third category of claims related to the wash loan. In 2022, with interest rates continuing to rise and additional collateral demands ongoing, plaintiff wanted to "stop the bleeding." He questioned whether the financing arrangement could continue

without substantial additional capital and whether the structure of the policy itself remained workable. Rather than selling the policy, Barnett proposed adjustments within the existing framework, including an amendment to financing terms and ultimately a "wash loan" (a type of policy loan in which the insurer charges interest on the borrowed amount while crediting interest at a similar rate to the policy, so that the interest charged and credit largely offset each other). Barnett's advice was to borrow against the cash value of the Pacific Life policy, use those borrowed funds to pay down the balance on the Wintrust loan, and thereby reduce increasing calls for collateral. The loan was undertaken with the expectation that it would meaningfully ease Wintrust's collateral demands. Based on Barnett's advice, plaintiff requested a $2.5 million loan from Pacific Life on February 15, 2023. Pacific Life processed the loan on March 15, 2023, and paid the $2.5 million to Wintrust as authorized.

However, this Court found that the wash loan did not pay down the debt as both plaintiff and Barnett thought it would, and that this was not discovered until the September 2023 policy renewal documents were sent out, or at the latest via emails in October 2023. Thus, because plaintiff's suit was filed less than a year later in June 2024, the wash loan claims were not perempted.

Consequently, this Court concluded that plaintiff had only one remaining cause of action against Barnett and Pacific Life that was not perempted, namely, plaintiff's claim against Barnett concerning his advice regarding the wash loan and plaintiff's vicarious liability claim against Pacific Life as to Barnett's advice regarding the wash loan. *Merhige I – Barnett*, 420 So.3d at 219 n.14; *Merhige I – Pacific Life*, 420 So.3d at 203 n.15.

C. *Pending Writ Applications*

On May 22, 2025, plaintiff filed a motion for leave to amend his petition to add CMS/Succession Capital and the successor to First Insurance Funding as

additional defendants and to assert claims arising out of alleged, intentional misrepresentations made by all defendants. Following a hearing on June 27, 2025, the trial court granted plaintiff's motion for leave to amend. Plaintiff's first amended petition was filed on July 2, 2025, the same day that the trial court issued its ruling granting the motion for leave to amend.

On September 16, 2025, Barnett filed peremptory exceptions of no cause of action, prescription and peremption as to the first amended petition. On September 15, 2025, Pacific Life filed exceptions of peremption and prescription.

The hearing on defendants' exceptions began on October 15, 2025 and was continued to, and completed on, December 10, 2025. The trial court denied defendants' exceptions and rendered judgment on December 22, 2025. The trial court further found that "the claims asserted by Mr. Merhige relate back to the filing of the original Petition in this matter." No separate written reasons for judgment were issued, although the trial court included some reasons from the bench following the hearing.

Both Barnett and Pacific Life timely filed notices of intent to apply for supervisory writs.

II. *Law and Analysis*

A. *Prior Proceedings in this Court*

As discussed, all of plaintiff's previously asserted claims were dismissed except for claims dealing with the wash loan. Any claims by plaintiff related to fraud had not yet been filed when the defendants previously filed writs and thus were not considered by this Court. *See Merhige I – Barnett*, 420 So.3d at 209 n.5; *Merhige I – Pacific Life*, 420 So.3d at 191 n.5.

Following the filing of plaintiff's first amended petition asserting claims for intentional misrepresentation, Barnett filed exceptions of no cause of action, peremption, and prescription as to plaintiff's first amended petition. Pacific Life

filed exceptions of peremption and prescription, arguing that all but the policy loan claims asserted in the first amended petition were extinguished by the peremptive limits contained in La. R.S. 9:5606(A), or were independently prescribed by the one-year prescriptive period contained in La. C.C. art. 3492. Accordingly, we now address the newly filed claims asserted in the first amended petition.

B. *Exception of No Cause of Action*

Barnett argues that the first amended petition does not plead facts with the particularity required by La. C.C. art. 1953 to state a cause of action for fraud.

The peremptory exception of no cause of action is designed to test the legal sufficiency of the petition by determining whether the particular plaintiff is afforded a remedy in law based on the facts alleged in the pleading. *Welch v. United Med. Healthwest-New Orleans, L.L.C.*, 21-684 (La. App. 5 Cir. 8/24/22), 348 So.3d 216, 220. The exception is triable on the face of the petition and, for the purpose of determining the issues raised by the exception, the well-pleaded facts in the petition must be accepted as true. *Id*. The appellate court should conduct a *de novo* review because the exception raises a question of law and the trial court's decision is based only on the sufficiency of the petition. *Id*.

In deciding an exception of no cause of action, a court can consider only the petition, any amendments to the petition, and any documents attached to the petition. *Id.* at 221. The standard for granting an exception of no cause of action is not the likelihood that the plaintiff will prevail at trial; rather, it is whether, on the face of the petition, accepting all allegations as true, the petition states a valid cause of action for relief. *American Rebel Arms, L.L.C. v. New Orleans Hamburger & Seafood Co.*, 15-599 (La. App. 5 Cir. 2/24/16), 186 So.3d 1220, 1222.

The law governing the substance of plaintiff's fraud claims under La. C.C. art. 1953 is well established. Article 1953 provides that "[f]raud 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."

To establish a claim for fraud, the plaintiff must prove: (1) a misrepresentation, suppression, or omission of true information; (2) the intent to obtain an unjust advantage or to cause damage or inconvenience to the other party; and (3) the resulting error must relate to a circumstance substantially influencing the other party's contractual consent. *DA Exterminating Co. v. Discon*, 24-116 (La. App. 5 Cir. 10/30/24), 398 So.3d 1239, 1247. The specific intent to deceive is a necessary element of fraud; fraud cannot be predicated upon mistake or negligence. *Id*. Fraud must be pled with particularity. La. C.C.P. art. 856.

The first amended petition contains 208 separately numbered paragraphs. Paragraph 188 alleges:

> As set forth above and below, CMS/Succession Capital and Barnett intentionally misrepresented the anticipated performance of the policy and the expected death benefits with the intention to obtain an unjust advantage and to cause loss to Mr. Merhige's detriment in violation of PacLife's guidelines and any reasonable expectation of performance for the cash value of the Policy.

Paragraph 189 provides:

> PacLife knew or should have known that CMS/Succession Capital and Barnett made material intentional misrepresentations to Mr. Merhige as explained herein. Additionally, PacLife provided Mr. Merhige with illustrations that misrepresented the performance of the Policy.

Paragraph 203 provides in part:

> The defendants breached their duties to Mr. Merhige by
>
> (i) Misrepresenting intentionally the benefits and risks of the Policy;
>
> (ii) Misrepresenting intentionally the terms of the premium-finance loan used to pay the premiums of the Policy;
>
> (iii) Misrepresenting intentionally the terms and effects of the PacLife loan on the Policy, including the accumulated cash value and anticipated lapse of the Policy;

(iv) Providing false, misleading, contradictory, and incomplete illustrations to Mr. Merhige;

The pertinent inquiry is whether, when viewed in a light most favorable to the plaintiff, and with every doubt resolved in the plaintiff's favor, the petition states any valid cause of action for relief. *Bailey v. Pinnacle Polymers, LLC*, 24-490 (La. App. 5 Cir. 4/2/25), 412 So.3d 1063, 1071.

Applying these principles to the pending case, the allegations made in the petition are sufficient to state a cause of action against Barnett, assuming the alleged facts are true. Thus, the trial court correctly denied Barnett's exception of no cause of action.

C. *Exception of Peremption*

Barnett argues that the plaintiff's claims are perempted and that the trial court erred as a matter of law by determining that the relation back provisions of La. C.C. P. art. 1153 apply to this case. Barnett and Pacific Life further assert that plaintiff's claims are perempted under La. R.S. 9:5606. Specifically, Pacific Life argues that the fraud exception to peremption under La. R.S. 9:5606(C) applies only to the one-year peremptive period for bringing actions from the date the action was discovered or should have been discovered and not to the three-year peremptive period. Plaintiff responds that the peremption provisions in La. R.S. 9:5606 do not apply to fraud claims, and that the argument the first amended petition does not relate back to the original petition is inapposite.

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." *Lomont v. Bennett*, 14-2483 (La. 6/30/15), 172 So.3d 620, 626–27 (citing *Rando v. Anco Insulations, Inc.*, 08-1163 (La. 5/22/09), 16 So.3d 1065, 1082). Peremptive statutes are to be strictly construed against peremption and in favor of maintaining the claim. *Merhige I - Barnett*, 420 So.3d at 211; *Lamar Contractors, LLC v. SRF Grp.*

Consulting, LLC, 22-213 (La. App. 5 Cir. 2/1/23), 358 So.3d 907, 909, *writs denied*, 23-308 (La. 5/23/23), 360 So.3d 1260, and 23-305 (La. 5/23/23), 360 So.3d 1263. Of the possible constructions of a peremptive statute, the one that maintains the claim rather than the one that bars prosecution of the claim should be adopted. *Id*.

The applicable peremption statute is contained in La. R.S. 9:5606, entitled "Actions for professional insurance agent liability", and provides:

> A. No action for damages against any insurance agent, broker, solicitor, or other similar licensee under this state, whether based upon tort, or breach of contract, or otherwise, arising out of an engagement to provide insurance 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 shall apply to all persons whether or not infirm or under disability of any kind and including minors and interdicts.
>
> C. *The peremptive period provided in Subsection A of this Section shall not apply in cases of fraud, as defined in Civil Code Article 1953*.
>
> D. 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.

(Emphasis added.)

Relying upon our decision in *Boes Iron Works L.L.C. v. Galatas*, 07-336 (La. App. 5 Cir. 12/11/07), 974 So.2d 713, *writ denied*, 08-079 (La. 3/7/08), 977 So.2d 913, Barnett and Pacific Life argue that the fraud exception of La. R.S. 9:5606(C) does not apply to the three-year peremptive period of La. R.S. 9:5606(A). Instead, they argue that the fraud exception of La. R.S. 9:5606 is only a limited extension of the one-year peremptive period and does not indefinitely extend the peremptive period beyond the three-year limit.

Plaintiff responds that defendants' arguments are directly contrary to the more recent decision of the Louisiana Supreme Court in *Lomont v. Bennett*, *supra*, which interpreted identical peremptive language in the context of attorney malpractice.

We first note that the fraud exception to the peremptive language in La. R.S. 9:5606(C), involving insurance agents, contains language identical to La. R.S. 9:5605(E). The pertinent provisions of La. R.S. 9:5605, entitled "Actions for legal malpractice", provide:

> 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.
>
> . . .
>
> 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.)

As can be seen, both statutes provide exceptions to peremptive periods when the claim involves fraud. And both statutes refer to La. C.C. art. 1953, which as discussed above provides that "[f]raud 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."

In *Lomont v. Bennett*, 14-2483 (La. 6/30/15), 172 So.3d 620, the Louisiana Supreme Court conducted an extensive analysis of the peremptive period set forth

in La. R.S. 9:5605 in the context of alleged legal malpractice. The Court recognized the three peremptive periods set forth in La. R.S. 9:5605 as follows:

> 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.

Lomont, 172 So.3d at 636 (Emphasis in original). The court concluded that "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." *Lomont*, 172 So.3d at 637. Because the language in La. R.S. 9:5605(E) (involving legal malpractice) is identical to the language in La. R.S. 9:5606(C) (involving insurance agent liability), we find that the statutes should be interpreted the same way.

We recognize that our decision in *Boes*, *supra*, previously analyzed La. R.S. 9:5606, and held that the fraud exception of La. R.S. 9:5606(C) applied only to the one-year peremptive period, thereby leaving the three-year peremptive period in place. However, *Boes* was decided in 2007, prior to the Louisiana Supreme Court's decision in *Lomont* in 2015, prior to this Court's decision in 2015 in *Bourgeois v. Allstate Ins. Co.*, 15-451 (La. App. 5 Cir. 12/23/15), 182 So.3d 1177, 1181, and prior to this Court's decision in 2017 in *Cerullo v. Heisser*, 16-558 (La. App. 5 Cir. 2/8/17), 213 So.3d 1232, 1236.

In *Cerullo*, *supra*, a case involving the interpretation of La. R.S. 9:5606 (insurance agent liability), we found that the peremptive periods of La. R.S. 9:5606 did not apply to the plaintiff's fraud claims. The *Cerullo* case analyzed a previous

decision of this Court, *Shermohmad v. Ebrahimi*, 06-512 (La. App. 5 Cir. 10/31/06), 945 So.2d 119, 121, in which we held that "[h]owever, pursuant to La. R.S. 9:5606(C), the peremptive periods of La. R.S. 9:5606(A) shall not apply in cases of fraud." *Cerullo* was decided after *Lomont* and cited to *Lomont* for the proposition regarding the burden of proof on prescription. *Cerullo*, *supra* at 1235.

In *Bourgeois*, *supra*, this Court recognized that a plain reading of La. R.S. 9:5606(C) clearly shows that fraud is an exception to the peremptive periods set forth in La. R.S. 9:5606(A). Accordingly, to the extent *Boes* is inconsistent with *Lomont* and later Fifth Circuit decisions, we overrule it.

Therefore, we find that the one-year and three-year peremptory periods do not apply in cases of fraud due to the exception set forth in La. R.S. 9:5606(C).

Barnett also argues that plaintiff cannot rely on the relation back provisions of La. C.C.P. art. 1153 to save any of the perempted claims from prescription because perempted claims are extinguished by operation of law and there are no claims to which the fraud claim can relate back.

Based upon the above finding that claims for fraud are not subject to the peremptive period set forth in La. R.S. 9:5606, Barnett's argument regarding relation back is inapposite. Accordingly, Barnett and Pacific Life's exceptions of peremption were appropriately denied by the trial court.

D. *Exception of Prescription*

1. *Standard of Review*

Defendants next contend that even if plaintiff's fraud claims are not perempted, they remain subject to the one-year liberative prescription of La. C.C. art. 3492, and that prescription commenced upon delivery of the policy documents in 2014.

The trial court, however, denied defendants' exceptions of prescription and found the following as to plaintiff's fraud claims:

> Additionally, the plaintiff has established that the discovery of the alleged fraud occurred in September of 2024 and the amended petition was filed in July of 2025 within one year from the discovery of the alleged fraud. Thus, the Court finds that the claims of fraud are timely.

The standard of review of a trial court's ruling on a peremptory exception of prescription turns on whether evidence is introduced. *DeFelice v. Federated National Ins. Co.*, 18-374 (La. App. 5 Cir. 7/9/19), 279 So.3d 422, 426. When no evidence is introduced, appellate courts review judgments sustaining an exception of prescription *de novo*, accepting the facts alleged in the petition as true. *Perez v. Sholar*, 22-169 (La. App. 5 Cir. 12/14/22), 362 So.3d 874, 877, *writ denied,* 23-188 (La. 4/12/23), 359 So.3d 25. However, when evidence is introduced at a hearing on an exception of prescription, the trial court's findings of fact are reviewed under the manifest error standard. *Id.* Under the manifest error standard, if those factual 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. *Lomont*, 172 So.3d at 627.

Evidence was introduced at the hearing in this case and the trial court made factual findings that the discovery of the alleged fraud occurred in September of 2024. Consequently, we review the trial court's ruling using the manifest error standard.

As discussed above, the claims asserted by plaintiff in his original and amended petitions are delictual actions. La. C.C. art. 3492 provides that delictual actions are subject to a liberative prescription of one year, which runs from the date the injury or damage is sustained.[3] *Shermohmad v. Ebrahimi*, 945 So.2d at 122.

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[3] La. C.C. art. 3492 was repealed and replaced with La. C.C. art. 3493.1, which became effective on July 1, 2024. Article 3493.1 provides for a two year prescriptive period and is applied prospectively only. Thus, the one-year prescriptive period of Article 3492 is applicable to the pending case.

Prescription commences when a plaintiff obtains actual or constructive knowledge of facts indicating to a reasonable person that he or she is the victim of a tort. *DeFelice*, 279 So.3d at 426 (*citing Campo v. Correa*, 01-2707 (La. 6/21/02), 828 So.2d 502, 510). Constructive knowledge is "whatever notice is enough to excite attention and put the injured party on guard and call for inquiry." *Id*. It is well-settled that "prescription cannot run against a cause of action that has not accrued or while that cause of action cannot be exercised." *Id.* (*citing Bailey v. Khoury*, 04-0620 (La. 1/20/05), 891 So.2d 1268, 1275).

2. *Pacific Life's Arguments as to Law of the Case*

Pacific Life's writ seeks a declaration that this Court's prior ruling in *Merhige I* is the law of this case. Pacific Life argues that although this Court held that only one of plaintiff's allegations supported a timely cause of action against Pacific Life, the trial court "wiped the slate clean" and deemed timely every one of plaintiff's allegations, including causes of action this Court previously dismissed with prejudice. Pacific Life suggests that this Court should reverse the trial court's judgment to the extent it conflicts with this Court's prior ruling and Louisiana law.

We, however, do not interpret the trial court's judgment to mean that it resurrected claims that we have previously dismissed.

Both of our previous decisions included the following in Footnote 5:

> At the hearing, and in his brief to this court, plaintiff conceded that his claims concerning the original sale and issuance of the policy in 2014 as well as the early management of the policy are perempted under La. R.S. 9:5606, unless and until he can plead a fraud claim related to the same. Therefore, this part of the judgment is not before this court in this writ application.

Merhige I – Barnett, 420 So.3d at 209 n.5; *Merhige I – Pacific Life*, 420 So. 3d at 191 n.5. Thus, this Court's previous decisions did not adjudicate the timeliness or merits of a fraud claim, which had not been pled in the original petition. Pacific Life's arguments on this point as to law of the case are without merit.

3. *Whether Prescription is Evident on the Face of the First Amended Petition*

Ordinarily, the party urging prescription bears the burden of proving that the cause of action has prescribed. *DeFelice*, 279 So.3d at 426. If, however, prescription is evident on the face of the pleadings, the burden shifts to the plaintiff to show the action has not prescribed. *Id*. But when a plaintiff's petition does not contain specific dates for the conduct at issue, the petition is not prescribed on its face. *Cerullo*, 213 So.3d at 1235 (citing *Perret v. Louisiana Dept. of Public Safety and Corr.*, 01–2837 (La. App. 1 Cir. 9/27/02), 835 So.2d 602, 605). Prescriptive statutes are strictly construed against prescription and in favor of the obligation sought to be enforced. *Id*.

As discussed above, paragraphs 188, 189, and 203 of the first amended petition arguably assert claims of fraud. These paragraphs do not allege specific dates. Therefore, the burden of proof remains with defendants.

4. *New Allegations in the First Amended Petition*

Plaintiff's original petition was filed on June 24, 2024. His first amended petition asserting fraud was filed on July 2, 2025.

A review of the "new" allegations in the first amended petition indicate that the majority of the allegations arise from actions that occurred more than one year prior to June 24, 2024 and more than one year prior to July 2, 2025.

For example, Paragraph 188 alleges:

> As set forth above and below, CMS/Succession Capital and Barnett intentionally misrepresented the anticipated performance of the policy and the expected death benefits with the intention to obtain an unjust advantage and to cause loss to Mr. Merhige's detriment in violation of PacLife's guidelines and any reasonable expectation of performance for the cash value of the Policy.

Paragraph 189 alleges:

> PacLife knew or should have known that CMS/Succession Capital and Barnett made material intentional misrepresentations to

> Mr. Merhige as explained herein. Additionally, PacLife provided Mr. Merhige with illustrations that misrepresented the performance of the Policy.

The "anticipated performance of the policy" and the "performance of the policy" in these paragraphs, involve actions that occurred around the time of the issuance of the policy in 2014.

Paragraph 203 of the first amended petition contains eighteen subparts, as follows:

> The defendants breached their duties to Mr. Merhige by
> (i) Misrepresenting intentionally the benefits and risks of the Policy;
> (ii) Misrepresenting intentionally the terms of the premium-finance loan used to pay the premiums of the Policy;
> (iii) Misrepresenting intentionally the terms and effects of the PacLife loan on the Policy, including the accumulated cash value and anticipated lapse of the Policy;
> (iv) Providing false, misleading, contradictory, and incomplete illustrations to Mr. Merhige;
> (v) Failing to adequately provide or receive training before recommending index universal life policies;
> (vi) Failing to provide agents with accurate, complete information regarding indexed universal life policies;
> (vii) Failing to disclose the accurate nature of the Policy and the premium financing;
> (viii) Failing to convey that the offer of the PacLife policy was contingent upon "prepaid interest due at inception and each anniversary";
> (ix) recommending an unsuitable life insurance policy;
> (x) failing to fully disclose the cost and expenses associated with the Policy;
> (xi) failing to conduct sufficient underwriting before issuing the Policy;
> (xii) failing to follow underwriting procedures;
> (xiii) advising Mr. Merhige to secure additional premium financing loans and loans secured by the Policy benefits;
> (xiv) misrepresenting the value of the Policy to be paid to the beneficiaries;
> (xv) failing to monitor the Policy;
> (xvi) reassuring Mr. Merhige that the Policy was an appropriate investment and had not lost money;
> (xvii) failing to advise Mr. Merhige to surrender the Policy at a time when the premiums could have been refunded;
> (xviii) failing to advise Mr. Merhige to convert the Policy to an appropriate life insurance policy.

The allegations in paragraphs 203(i), (ii), (iv), (vii), (viii), (ix), (x), and (xiv) involve alleged misrepresentations or recommendations that occurred at or around the time plaintiff signed the application, illustration, and policy delivery receipt in 2014.

Similarly, the allegations in Paragraphs 203(v), (vi), (ix) involve failure to provide adequate training, failure to disclose the accurate nature of the policy and premium financing and recommending unsuitable life insurance policies. If such actions occurred, they occurred in 2014 when the policy was issued.

Paragraphs 203(xi) and (xii) involve failure to "conduct sufficient underwriting *before* issuing the Policy," and failure to "follow underwriting procedures." (Emphasis added). Any such actions occurred in 2014 at or before issuance of the policy.

Paragraph 203(xviii) concerns the expiration of the conversion rider, which this Court already ruled could not support a timely cause of action because plaintiff had one year from August 10, 2022 (the date plaintiff allegedly discovered or should have discovered this claim), or until August 10, 2023, to file this claim against Barnett and Pacific Life. *Merhige I – Barnett*, 420 So.3d at 213-14; *Merhige I – Pacific Life*, 420 So.3d at 198.

Paragraphs 203(xv), (xvi), and (xvii) do not allege fraud and appear to involve claims that were previously dismissed by this Court.

Finally, Paragraph 203(iii) and arguably Paragraph 203(xiii), relate to the wash loan, a claim that was not dismissed in *Merhige I*.

In short, most of the alleged breaches contained in Paragraph 203 concern actions that unquestionably took place at or around the time the policy was issued in 2014 and more than one year before the original petition was filed on June 24, 2024. In *Merhige I*, this Court held that plaintiff is presumed to know the contents of the insurance policy that he received on October 14, 2014. *Merhige I – Barnett*,

420 So.3d at 213; *Merhige I – Pacific Life*, 420 So.3d at 197. To the extent that the first amended petition alleges additional acts or omissions by the defendants related to issuance of the policy, we again find that plaintiff should have discovered these alleged acts or omissions when the policy was issued in 2014.

In *Merhige I – Barnett*, 420 So.3d at 210-11, we determined:

> It is well settled that it is an insured's obligation to read the policy when received, since the insured is deemed to know the contents of the policy. Id.; McKernan v. ABC Insurance Company, 21-859 (La. 11/23/21), 328 So.3d 69 (*per curiam*). A party who signs a document or written instrument is presumed to know its contents and cannot avoid its obligations by contending that he did not read or fully understand the contents of the document, or that the other party failed to explain it to him. Emile v. Regal Remodelers, L.L.C., 23-174 (La. App. 5 Cir. 1/31/24), 380 So.3d 696, 705; Aguillard v. Auction Management Corp., 04-2804 (La. 6/29/05), 908 So.2d 1, 17.
>
> An insured is on notice of any alleged claim or misrepresentation made regarding the sale of a policy, and the peremptive period begins to run, when the insured receives a copy of the policy. See Cerullo v. Heisser, 16-558 (La. App. 5 Cir. 2/8/17), 213 So.3d 1232, 1237; Shermohmad v. Ebrahimi, 06-512 (La. App. 5 Cir. 10/31/06), 945 So.2d 119, 122; Biggers v. Allstate Ins. Co., 04-282 (La. App. 5 Cir. 10/26/04), 886 So.2d 1179, 1181-1183; Bijeaux v. Broyles, 11-830 (La. App. 3 Cir. 2/8/12), 88 So.3d 523, 527, writ denied, 12-970 (La. 06/22/12), 91 So.3d 971; Chapital v. Harry Kelleher & Co., 13-1606 (La. App. 4 Cir. 06/04/14), 144 So.3d 75, 83.

Therefore, except as to the claims related to the wash loan, we implicitly found in *Merhige I* that plaintiff should have known of the claims asserted in the petition more than one year before June 24, 2024; the date the original suit was filed. Thus, we find that plaintiff's claims of fraud, arising from these same actions, which all occurred at or around the time the policy, are also prescribed.

Nevertheless, we will address plaintiff's contention that the full extent of defendants' fraud was not discovered, or discoverable, until after plaintiff filed suit. Plaintiff alleges that the suit enabled him to force defendants to provide the documents and information they had concealed from him before issuance, and during the life, of the policy through pretrial discovery. As to this argument, plaintiff submits that he discovered the fraud at the earliest in September 2024, following receipt of pretrial discovery from Pacific Life. The information that the

defendants allegedly concealed purports to show that Pacific Life's own guidelines prohibited issuing premium-financed indexed life insurance policies where interest was deferred. He argues this prohibition was never disclosed to him by any defendant. He also argues that notwithstanding Pacific Life's guidelines, Succession Capital and Barnett (both insurance agents for Pacific Life, contractually obligated to be aware of and comply with Pacific Life's guidelines) promised him directly and through their projections and illustrations that he would only have to pay $65,000 per year in interest on the premium-financing loan.

Plaintiff asserts that at the time the policy was issued, he was provided with an illustration with a Pacific Life logo showing the performance of the policy if interest was not deferred. Plaintiff argues that until Pacific Life produced discovery in this matter, he was under the impression that Pacific Life drafted this illustration. However, documents produced in September 2024 included an email from Tim Olsen at Pacific Life to Brian Whitmore at Succession Capital asking Succession Capital to draft the illustration with the Pacific Life logo, revealing for the first time that Succession Capital drafted irreconcilably conflicting illustrations; one showing interest above $65,000 being deferred and a second showing all interest being paid by plaintiff. Plaintiff argues that Pacific Life and Succession Capital jointly published advertising materials (provided to plaintiff by Barnett) that interest payments on financed insurance policies could be deferred without consequence, which is false.

Plaintiff contends that this evidence shows that Pacific Life publicly prohibited capitalized interest, while the financing structure implemented allowed interest above $65,000 to accrue, and that this internal conflict was not disclosed. Instead, the documents appeared routine and compliant, and as interest rates rose and collateral demands increased, Barnett repeatedly assured plaintiff that the strategy remained sound and that measures such as the wash loan would correct

any issues. Those assurances, imputed to Pacific Life, concealed rather than revealed the problem. According to plaintiff, it was not until the 2023 recalculation after the wash loan, when escalating collateral pressure forced the sale of the policy, that the conflict became clear.

Thus, plaintiff argues this shows that no one document would have been sufficient to place him on notice that, collectively, defendants, who were sophisticated players in the insurance investment market, had conspired together to sell him a complex investment strategy (masquerading as an insurance policy) for which he was not qualified, which he could not afford, and which was essentially doomed to fail. He argues that to have understood this, he would not only have had to have known what the contents of each of the various documents were, he would have had to have understood the financial implications of the interplay between those documents as well as documents he had never seen, something defendants actively conspired to hide from him.

Barnett responds that plaintiff's allegation as to the conflicting illustrations is false and points to Paragraph 53 of the first amended petition, which alleges in part: "Specifically, the PacLife Life Insurance Premium Financing illustration falsely indicates that no loan interest would be borrowed and that all lender loan interest would be paid out-of-pocket." The paragraph also contains an illustration. Barnett argues that the illustration was prepared by Pacific Life to ascertain whether, at an assumed loan interest, plaintiff met Pacific Life's underwriting guidelines for sufficient assets to pay the annual loan interest, which plaintiff did. Barnett further argues that plaintiff was never without sufficient funds, in either his investment accounts or his retirement accounts, to pay the yearly interest, had he so chosen to pay it rather than defer it. Further, the illustrations had nothing to do with the actual loan plaintiff obtained from First Insurance Funding and does not

constitute evidence of fraud. Defendants argue that even if a particular underwriting policy was not followed, it is not evidence of fraud.

In support of his argument, plaintiff cites the case of *C's Disc. Pharmacy, Inc. v. Pac. Ins. Co.*, 09-217 (La. App. 5 Cir. 1/26/10), 31 So.3d 1103, for the proposition that even when an insured receives a policy and is instructed to review it, constructive knowledge is not established as a matter of law when the coverage structure is complex and the alleged defect is not clearly communicated. Plaintiff argues that in *C's*, the Court emphasized that the issue is not whether the insured could have discovered the defect by scrutinizing the document, but whether, under the circumstances, he should have discovered it.

Plaintiff's reliance upon the *C's* decision is misplaced, however. Even if we had not made a finding in *Merhige I* and again here that plaintiff should have known of the alleged fraud when he received a copy of the policy, under the circumstances of this particular case, plaintiff's claims under fraud are still prescribed. Plaintiff, who is a lawyer and former judge, clearly knew that this policy was complex. And plaintiff's argument that the additional illustration he received during pretrial discovery, allegedly showing that Pacific Life did not follow its own underwriting guidelines, was the missing piece to the puzzle is not sufficient to show that a sophisticated buyer like plaintiff should not have discovered the alleged fraud more than one year prior to filing suit.

Constructive knowledge is "whatever notice is enough to excite attention and put the injured party on guard and call for inquiry." *DeFelice*, 279 So.3d at 426. Plaintiff received more than sufficient notice of any perceived problems with the policy throughout the nearly ten years that he had the policy to excite his attention and put him on guard and call for an inquiry. At the time he signed the policy, the premium-financing materials, the financing documents, and policy

illustrations illustrated the risks associated with premium-financed indexed life insurance policies where interest was deferred.

Additionally, plaintiff frequently complained about the policy while he held it. As early as October 20, 2014, a week after receiving the policy on October 14, 2014, he testified that he became aware of the problem created by providing his securities as collateral, and the effect this would have on his income, i.e., that his income would be "locked up." He acknowledged that he received a call from Kullman, the trustee of the trust, who advised that he [Kullman] did not understand the insurance device they were dealing with, which is very sophisticated, and that three CPAs had told Kullman that.

Plaintiff continued to raise concerns about the policy over the years. For example, in 2019, as pressure to post collateral persisted, plaintiff explored the possibility of selling the policy. He expressed dissatisfaction that the arrangement was not performing as promised and questioned whether it should be unwound. Barnett advised against a sale, explaining that the long-term projections supported the strategy and that exiting then would lock in losses unnecessarily.

In 2020, amid continued ballooning of the loan balance and calls for additional collateral, plaintiff again considered selling the policy and raised renewed concerns about the sustainability of the policy to him. Barnett again characterized the pressures as temporary and market-driven and advised that updated illustrations reflected eventual stabilization under long-term assumptions.

On October 9, 2021, plaintiff elected to defer making an interest payment due and otherwise payable under the note on that day. The Borrower's Election and Certification that he signed that day acknowledged that plaintiff had paid to Wintrust at least $65,000 of the interest payment due for the year and elected to defer the remaining interest payment due. Plaintiff testified that the "money they

were keeping from me was killing me," and "they were taking all my income," and that he was putting up $750,000 a year of stock.

By 2022, with interest rates continuing to rise and additional collateral demands ongoing, plaintiff wanted to "reduce the pain, the bleeding" and questioned whether the financing arrangement could continue without substantial additional capital and whether the structure of the policy itself remained workable. He discussed selling the policy with Barnett. Barnett testified that shortly after plaintiff received his September 2022 renewal package, plaintiff complained to him, and they discussed the additional and increasing collateral requirements.

Accordingly, we find that the trial court was manifestly erroneous in finding that plaintiff did not discover the alleged fraud until September 2024.

5. *Application of the Doctrine of Contra Non Valentem*

Finally, plaintiff argues in his oppositions to these consolidated writ applications that *contra non valentem* applies here. This issue, however, was not raised nor argued at the trial court and was mentioned only briefly at the end of plaintiff's oppositions to the writs. Thus, the suggestion by plaintiff that the trial court made a factual finding that the defendants concealed their alleged fraud is unfounded.

Appellate courts do not generally consider issues for the first time on appeal that were not raised with the trial court. *Ackels v. Buhler*, 23-490 (La. App. 5 Cir. 5/29/24), 390 So.3d 456, 462, *writ denied*, 24-872 (La. 10/23/24), 395 So.3d 251 (citing Uniform Rules–Courts of Appeal, Rule 1-3). But again, for completeness, we will consider plaintiff's argument.

The doctrine of *contra non valentem agere nulla currit praescriptio* ("prescription does not run against the party unable to act") is an exception to La. C.C. art. 3467, which states that prescription runs against all persons unless an exception is established by legislation. *In re Med. Rev. Panel of Gerard Lindquist*,

18-444 (La. App. 5 Cir. 5/23/19), 274 So.3d 750, 755, *writ denied,* 19-1034 (La. 10/1/19), 280 So.3d 165. The doctrine is an application of the long-established principle of law that one should not be able to take advantage of his own wrongful act. *Id.*

The Louisiana Supreme Court has recognized four circumstances in which *contra non valentem* prevents the running of prescription: (1) where there is some legal cause which prevented the court or its officers from taking cognizance of and acting on the plaintiff's actions; or (2) where there is some condition coupled with the contract or coupled with the proceedings which prevented the plaintiff from suing or acting; or (3) where the defendant has done some act effectually to prevent the plaintiff from availing himself of his cause of action; or (4) where the cause of action is not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant. *Id* at 755-56 (citing *Lomont*, 172 So.3d at 637).

It appears that plaintiff is arguing that the third category is at issue in the present case. The third category is implicated when (1) the defendant engages in conduct which rises to the level of concealment, misrepresentation, fraud or ill practice; (2) the defendant's actions effectually prevented the plaintiff from pursuing a cause of action; and (3) the plaintiff must have been reasonable in his or her inaction. *Anding o/b/o Anding v. Ferguson*, 54,575 (La. App. 2 Cir. 7/6/22), 342 So. 3d 1138, 1149 (citing *Carter v. Haygood*, 2004-0646 (La. 1/19/05), 892 So. 2d 1261, 1269).

In the present case, even assuming the record supports plaintiff's fraud allegations, plaintiff's argument that he was effectually prevented from availing himself of his cause of action until September 2024 when he received the illustrations during discovery is not reasonably supported by the testimony and evidence. As noted in detail above and in *Merhige I*, plaintiff began complaining

about problems he believed existed with the policy the week after he purchased it in 2014, and he continued to do so throughout the life of the policy. Other than stating that Barnett continued to assure him that the policy would work out and that he was "lulled" into not taking any action, plaintiff has not provided any evidence to prove that Barnett or Pacific took specific steps to conceal anything or prevent him from filing suit. Moreover, plaintiff's own opposition acknowledges that as late as May 2022, Barnett admitted in an email that he had "no idea" how the financing structure worked, a concession fundamentally inconsistent with his intentional concealment argument. Thus, we find that plaintiff's *contra non valentem* argument is without merit.

III. *Decree*

For the foregoing reasons, we affirm the trial court's judgment denying the exception of no cause of action filed by Barnett.

We further affirm the trial court's judgment denying the exceptions of peremption filed by Barnett and Pacific Life and find that the peremptive period set forth in La. R.S. 9:5606 does not apply in cases of fraud.

We reverse, however, the trial court's judgment denying the exception of prescription as to plaintiff's claims of fraud against Barnett and Pacific Life and dismiss these claims with prejudice.

We remand the matter for further proceedings consistent with this opinion and our opinions in *Merhige I* as to the remaining, outstanding claims related to the wash loan.

AFFIRMED IN PART; REVERSED IN PART; REMANDED

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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **APRIL 28, 2026** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

Curtis B. Pursell

CURTIS B. PURSELL
CLERK OF COURT

26-C-45
C/W 26-C-77

E-NOTIFIED

24TH JUDICIAL DISTRICT COURT (CLERK)
HONORABLE DONALD L. FORET (DISTRICT JUDGE)
DONALD G. CASSELS, III (RESPONDENT)
SAMANTHA P. GRIFFIN (RESPONDENT)
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