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St. Charles Parish School Board v. GAF Corp.: Contra Non Valentem Applied to Nontort Prescription Statutes, and a Proposed Interpretation of La. R.S. 38:2189

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NOTE

St. Charles Parish School Board v. GAF Corp.: Contra Non Valentem Applied to Nontort Prescription Statutes, and a Proposed Interpretation of La. R.S. 38:2189

The discovery rule, under which prescription commences to run only when the claimant discovers his injuries, has only recently been applied in Louisiana.[1] The basis for the rule in the Louisiana jurisprudence is the *contra non valentem*[2] exception that was first expressly announced in *Corsey v. State Department of Corrections*.[3] The application of the discovery rule interrupts prescription during the period in which a cause of action is not known or reasonably knowable to an injured party.[4]

The application of the discovery rule by the Louisiana Supreme Court had been limited to tort claims such as medical malpractice,[5] asbestosis cases,[6] and trespass.[7] In *St. Charles Parish School Board v. GAF Corporation*,[8] however, the court used the discovery rule to interrupt prescription in a case not involving tort. In that case, the court overruled a plea of prescription filed by a general contractor in an owner's suit for defective construction of a school building. The contractor's peremptory exception of prescription was based on Louisiana Revised Statutes 38:2189 (section 2189),[9] which provides a five-year

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1. For examples of supreme court decisions referring to the discovery rule, see Griffin v. Kinberger, 507 So. 2d 821 (La. 1987); Maltby v. Gauthier, 506 So. 2d 1190 (La. 1987); St. Charles Parish School Board v. GAF Corp., 512 So. 2d 1165 (La. 1987); Hebert v. Doctors Memorial Hospital, 486 So. 2d 717 (La. 1986); and Crier v. Whitecloud, 486 So. 2d 713 (La. 1986).

2. *Contra non valentem* is a shortened form of the Latin phrase *contra non valentem agere non currit praescriptio*, translated as "prescription does not run against a party who is unable to act." Corsey v. State Dep't of Corrections, 375 So. 2d 1319, 1321 (La. 1979).

3. 375 So. 2d 1319 (La. 1979).

4. Id. at 1322.

5. See Griffin v. Kinberger, 507 So. 2d 821 (La. 1987); Hebert v. Doctors Memorial Hosp., 486 So. 2d 717 (La. 1986); Maltby v. Gauthier, 506 So. 2d 1190 (La. 1987); Crier v. Whitecloud, 486 So. 2d 713 (La. 1986).

6. Owens v. Martin, 449 So. 2d 448 (La. 1984).

7. Dean v. Hercules, Inc., 328 So. 2d 69 (La. 1976).

8. 512 So. 2d 1165 (La. 1987) (original hearing).

9. The statute provides:

> Any action against the contractor on the contract or on the bond, or against the contractor or the surety or both on the bond furnished by the contractor, all in connection with the construction, alteration, or repair of any public works let by the state or any of its agencies, boards or subdivisions shall prescribe 5

prescriptive period commencing from substantial completion or acceptance of the work, whichever occurs first, or from notice of default of the contractor. The statute applies to actions by the state or any of its agencies, boards, or subdivisions against a construction contractor or his surety. Though the owner filed suit over nine years after the school building was completed and accepted, the supreme court held that the claim was not barred, because the owner had not discovered the defect until the year the action was filed.

Much time often elapses between the defective construction of a building, bridge, or other project and the discovery of the defect. In some cases several years may elapse after the owner's acceptance before a latent defect becomes apparent.[10] During those years, any claim the owner might have under the architect's design contract or the builder's construction contract may prescribe.

GAF involved a similar sequence of events. The case is most noteworthy because it is the first clear application by the Louisiana Supreme Court of the discovery rule to a contract claim controlled by a special prescriptive statute.[11] Although the original opinion was withdrawn be-

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years from the substantial completion, as defined in R.S. 38:2241.1, or acceptance of such work, whichever occurs first, or of notice of default of the contractor unless otherwise limited in this Chapter.

La. R.S. 38:2189 (Supp. 1987).

10. A latent defect is defined in Black's Law Dictionary (5th ed. 1979) as a hidden or concealed defect that could not be discovered by reasonable and customary inspection. The Louisiana jurisprudence on the redhibitory action has defined a latent defect as a defect that is hidden or concealed from knowledge as well as from sight and which a reasonable customary inspection would not reveal. See Walker v. Travelers Indemnity Co., 289 So. 2d 864 (La. App. 4th Cir. 1974); Nida v. State Farm Fire & Cas. Co., 454 So. 2d 328 (La. App. 3rd Cir. 1984). An apparent defect is one which could be discovered by reasonable and customary inspection. There is nothing to indicate that the opinions and cases cited apply latent defect or apparent defect any differently than the dictionary definition would dictate. This discussion will use the terms latent defect and hidden defect interchangeably.

11. The only other reported decision by the Louisiana Supreme Court where it can be argued that the discovery rule was applied to a contract claim was Orleans Parish School Board v. Pittman Construction Co., 261 La. 665, 260 So. 2d 661 (1972). In that case a school board sued a contractor nine years after accepting the building for damages due to structural failures. The court was faced primarily with two issues: (1) whether La. R.S. 38:2189 should be applied retroactively to a claim based on a contract which was accepted prior to enactment of the statute, and (2) determining the relationship between La. Civ. Code arts. 2762 and 3545 (1870). On the first issue the court held that applying § 2189 retroactively would impair a vested, substantive right of the Board. Therefore, the statute would apply only prospectively. A large portion of the opinion deals with the second issue. Relying on French authorities, which had interpreted similar articles in the Code Napoleon, the court held that "[a]rt. 2762 incorporates the principle of [implied] warranty by the contractor in favor of the owner and fixes the period of its duration."

cause of a settlement between the parties before rehearing,[12] the *GAF* reasoning creates uncertainty about when prescriptive periods in other, similarly-worded statutes begin to run. This prospective uncertainty deserves further examination. Moreover, an alternate interpretation of section 2189 would give the same result as *GAF* and would avoid an extension of the tort doctrine of *contra non valentem* to contract claims.

THE CASE

The St. Charles Parish School Board awarded a general construction contract to Rittiner Engineering, Inc. for the construction of Destrehan High School. On August 5, 1975, the Board filed its acceptance of the high school in the local office of the recorder of mortgages, an act that apparently commenced the running of the prescriptive period under section 2189.

Id. at 667, 260 So. 2d at 666. Further, any action based on this implied warranty was subject to the ten-year limitation period provided by former art. 3545. The court decided "that the two articles establish two distinct and successive delays of ten years. The time for bringing the action . . . commences when . . . the vice is discovered." Id. at 678-79, 260 So. 2d at 666. On its face, this opinion appears to be an application of the discovery rule to the ten-year prescriptive period in former art. 3845. It appears, however, that the better argument is that the court was not applying the discovery rule to art. 3545. Instead, the court treated art. 2762 as a warranty period limiting the duration of liability for the architect or builder, and it is this period in which the "discovery" is pertinent. The court's determination that the discovery of the vice commenced the prescriptive period is analogous to the numerous statutory provisions which incorporate the discovery rule. For examples of such statutes see infra note 57. This analysis by the court was, in effect, invoking the discovery rule statutorily, based on the interrelation between arts. 2762 and 3545. It was apparently not an application of *contra non valentem*, which is a jurisprudential rather than statutory doctrine. This view of the *Pittman Construction* opinion is supported by the fact that the court, in dictum, said it would not apply the discovery rule to La. R.S. 38:2189. The court said that if § 2189 had been given retroactive effect, the school board's suit would have been barred by prescription based on that statute. Id. at 674, 260 So. 2d at 655. Since the court was aware that the structural failure was not discovered during the three year period then provided by § 2189, this statement is an implicit rejection of the application of the discovery rule to § 2189.

12. The court's original decision was vacated after the parties settled the case while awaiting rehearing. St. Charles Parish School Board v. GAF Corp., 512 So. 2d 1165, 1173 (La. 1987). In the settlement agreement, the contractor and its insurers paid the school board $90,000, but all parties to the settlement agreed to set aside $10,000 of that amount pending final resolution of the suit by the court. The $10,000 was to be paid to the Board if the court affirmed its original opinion, and if the court reversed its original decision the sum would be retained by the contractor. The court believed the amount set aside was not an exception to the settlement, and characterized the arrangement as a wager between the parties. The court concluded the settlement was full and final and dismissed the suit because there was no longer a case or controversy presented. The original opinion is useful, however, insofar as it provides insight into the future direction of the supreme court regarding the application of *contra non valentem* to nontort causes of action and the interpretation of § 2189.

Prior to the expiration of the three-year prescriptive period set out in section 2189,[13] the roof of the school began to leak. The Board initially attributed the periodic leaks to normal wear and tear, but in the fall of 1984 the Board hired a roofing consultant to investigate the cause of the leaks. The expert informed the Board that the roof was failing and in need of replacement, attributing the failure to improper design and installation of the roofing system. The Board filed suit on November 28, 1984, nine years after the acceptance of the building, and over six years after the prescriptive period provided in section 2189 had apparently run.

In its petition, the Board stated various causes of action against a number of defendants, including Rittiner, two architectural firms, two subcontractors, and the roofing material supplier, GAF Corporation. Rittiner filed an exception of prescription based on section 2189, maintaining that the petition was filed more than three years after the building was accepted by the Board; thus, the action was barred by prescription. The district court overruled the exception, holding that since the Board first learned of the cause of the roof leaks only a few months prior to filing of the Board's suit through the report of its roofing consultant,[14] prescription had not begun to run until then. The district court, in effect, applied the discovery rule to interrupt prescription of the Board's claim.

Rittiner's application to the fifth circuit court of appeal for supervisory writs was denied.[15] The court of appeal found a distinction, insofar

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13. The statute then in force was amended by 1975 La. Acts No. 250 § 1. Section 2 provided that the statute's provisions were applicable only to contracts entered into after the effective date of the Act, which was September 12, 1975. Hence, the three-year period in the original statute was applicable in this case rather than the five-year period in the statute as amended. Under the holding and facts of *GAF*, however, this distinction is irrelevant.

14. Transcript of Proceedings at 18, St. Charles Parish School Board v. GAF Corp., Twenty-Ninth Judicial District Court No. 28,236, October 9, 1985.

15. The opinion of the court of appeals reads:

> LSA-R.S. 38:2189 is a prescriptive statute, as opposed to a preemptive (sic) statute, and, as such, prescription against suits for apparent defects, under the terms of the statute, commences to run from the *date of registry of the acceptance*. Under C.C.P. (sic) 2762 and R.S. 9:2772, which are preemptive (sic) statutes, the board has ten years from the date of registry to *discover and sue for hidden defects*. Here the acceptance of the building was registered on August 6, 1975, and the original petition was filed on November 26, 1984. Therefore, although prescription on suits for apparent defects has run, the time to sue for hidden defects was still open at the time suit was filed. Whether the particular defects complained of in plaintiff's petition are apparent or hidden defects can best be determined in an evidentiary hearing on the merits.
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> Defendants will have adequate remedy by appeal from the trial court's con-

as prescription was concerned, between apparent and hidden defects, concluding that section 2189 applied only to cases in which the defect was apparent at the time the project was accepted,[16] and did not apply to suits for hidden defects; the applicable prescriptive period for those defects was ten years, as dictated by Louisiana Civil Code article 2762[17] and Louisiana Revised Statutes 9:2772.[18] The court then remanded the case for a determination of whether the defect in the Destrehan High School roof was hidden or apparent.

The supreme court granted supervisory writs.[19] The initial issue addressed by the court was whether section 2189 was prescriptive or peremptive.[20] Finding the statute to be prescriptive, the court applied *contra non valentem*.[21] Thus, prescription began to run on the Board's claim only when the cause of the leak was discovered.[22] The court then granted rehearing, but prior to the rehearing itself, the court learned that the parties had "settled" the lawsuit.[23] Deciding there was no longer a case or controversy, the court vacated its original judgment and dismissed the suit on grounds of mootness.[24]

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clusion as to whether the defects complained of are apparent or hidden.

St. Charles Parish School Board v. GAF Corp., No. 85-632 slip op. (La. App. 5th Cir. Jan. 12, 1987).

16. See supra note 10.

17. The article reads as follows:

> If a building, which an architect or other workman has undertaken to make by the job, should fall to ruin either in whole or in part, on account of the badness of the workmanship, the architect or undertaker shall bear the loss if the building falls to ruin in the course of ten years, if it be a stone or brick building, and of five years if it be built in wood or with frames filled with bricks.

La. Civ. Code art. 2762 (West 1952).

18. The statute reads in part as follows:

> A. No action, whether ex contractu, ex delicto, or otherwise, to recover on a contract or to recover damages shall be brought against any person performing or furnishing . . . the design, planning, supervision, inspection, or observation of construction or the construction of an improvement to immovable property:
>
> (1) More than ten years after the date of registry in the mortgage office of acceptance of the work by owner; or
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> (2) If no such acceptance is recorded within six months from the date the owner has occupied or taken possession of the improvement, in whole or in part, more than ten years after the improvement has been thus occupied by the owner . . . .

La. R.S. 9:2772 (Supp. 1987).

19. 481 So. 2d 1341 (La. 1986).

20. 512 So. 2d 1165, 1168 (La. 1987).

21. Id. at 1169.

22. Id.

23. Id. at 1170.

24. See supra note 12.

The applicability of the discovery rule to section 2189 remains unsettled. Absent the *GAF* decision, the statutory language compels the conclusion that the Board's action was untimely. It would seem that *contra non valentem* would not apply to a statute that provides a clear starting point for the running of prescription on contract claims, nor would it apply to these unexceptional facts.[25] Since the judgment subsequently was vacated on the grounds of mootness, however, the question arises: How much weight should the original *GAF* opinion be given?[26]

THE APPLICATION OF *Contra Non Valentem* in *GAF*

Background and Development of Contra Non Valentem

The maxim *contra non valentem agere nulla currit praescripto*[27] is an equitable device of common law origin.[28] Louisiana courts have adopted the doctrine and have applied it in a somewhat restricted manner.[29] Early cases applying the doctrine involved situations where a defendant had fraudulently concealed his wrongdoing, such as where a highway contractor covered up his defective work in a road so that the

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25. The Board had knowledge of recurring roof leaks over a period of several years prior to hiring the roofing consultant. The issue of the reasonableness of the Board's inaction was not addressed by the majority, but in his dissent Justice Watson stated, "The suggestion that a roof which leaked was not known to be defective strains the imagination." 512 So. 2d at 1170 (Watson, J., dissenting). In Jordan v. Employee Transfer Corp., 509 So. 2d 420, 423 (La. 1987), the court stated that the time when prescription begins to run depends on the reasonableness of a plaintiff's action or inaction. The reasonable diligence test is used to determine if *contra non valentem* should be applied given the facts of the particular case. See Cordova v. Hartford Accident & Indemnity Co., 387 So. 2d 574, 577 (La. 1980). That test could be used more extensively by the court to remain true to the proposition put forth in the Reporter's comment to La. Civ. Code art. 3467 that the doctrine of *contra non valentem* should be applied only in exceptional circumstances. The reasonable diligence analysis was not expressly undertaken by the court in *GAF*, and the facts of the case indicate that the court could have justified easily a decision that the Board failed the reasonable diligence test due to its inaction for such a long time.

26. One Louisiana court stated that the views expressed in a judgment vacated in a similar manner, where the parties settled the lawsuit while awaiting a rehearing, were entitled to careful consideration by lower courts, even though the case was not precedent. New Orleans Securities Co. v. City of New Orleans, 173 La. 1097, 1104, 139 So. 635, 638 (1932).

27. Prescription does not run against one who cannot act. See supra note 2.

28. Kennard v. Yazoo & M.V.R. Co., 190 So. 188 (La. App. 1st Cir. 1939), overruled, Flowers v. U.S. Fidelity & Guar. Co., 381 So. 2d 382 (La. 1980) (overruling several court of appeal decisions to the effect that La. Civ. Code art. 3520 provides for interruption of prescription by acknowledgment only on claims for liquidated amounts).

29. Id.

defects became apparent only after the prescriptive period had run,[30] or where a defendant bank conspired to remove goods from certain premises in order to deprive the plaintiff of his lessor's pledge.[31] Thus, the Louisiana jurisprudence has long recognized the inequity of allowing a party to prevent another through fraud or concealment from obtaining knowledge of a cause of action.

Early Louisiana jurisprudence developed three narrowly defined exceptions to the running of prescription. If a plaintiff could fit his action under one of the exceptions, prescription would not run. The three traditional exceptions were first listed in *Reynolds v. Batson*[32] and were summarized recently in *Plaquemines Parish Commission Council v. Delta Development Company*.[33] *Contra non valentem* will apply and prescription will not commence:

> (1) Where there was some legal cause which prevented the courts or their officers from acting or taking cognizance of the plaintiff's action; or
> (2) Where there was some condition or matter coupled with the contract or connected with the proceedings which prevented the creditor from suing or acting; and
> (3) Where the debtor himself has done some act effectively to prevent the creditor from availing himself of his cause of action.[34]

During the evolution of the Louisiana jurisprudence, a seed was planted that eventually grew into the fourth exception to the running of prescription, the discovery rule. The discovery rule evolved from Justice Albert Tate's opinion in *Corsey v. State Department of Corrections*.[35] Justice Tate stated that whenever a prospective plaintiff has no knowledge of a cause of action that could otherwise be maintained, and the plaintiff's ignorance of the cause of action is not attributable to his own willfulness or neglect, then the applicable prescriptive period will not commence to run until the plaintiff learns of his cause of action.[36] In

30. Hyman v. Hibernia Bank & Trust Co., 139 La. 411, 422, 71 So. 598, 602 (1916), citing First Mass. Turnpike Co. v. Field, 3 Mass. 201, 3 Am. Dec. 124 (1807).

31. Hyman v. Hibernia Bank & Trust Co., 139 La. 411, 71 So. 598 (1916).

32. 11 La. Ann. 729, 730-31 (1856).

33. 502 So. 2d 1034 (La. 1987).

34. Id. at 1054.

35. 375 So. 2d 1319 (La. 1979).

36. Justice Tate, writing for the majority, stated, "The modern jurisprudence also recognizes a fourth type of situation where contra non valentem applies and prescription does not run." Id. at 1322. This was the first express adoption of the discovery rule. In support of this position, he cited a string of ten cases decided between 1929 and 1978. Further analysis of the history of the discovery rule is beyond the scope of the present discussion. A recent discussion of the various applications and the present status of *contra*

the earlier-recognized exceptions, the plaintiff was prevented from enforcing an accrued cause of action by some reason external to his own will.[37] The more liberal discovery rule interrupts prescription even though no external factor prevents the plaintiff from enforcing his action.[38]

There was some question whether any of the *contra non valentem* exceptions survived the adoption in the 1982 revision of the Civil Code of article 3467, replacing old article 3521.[39] Article 3467 states, "Prescription runs against all persons unless exception is established by legislation."[40] It is arguable that the revision legislatively overruled the judicially created doctrine of *contra non valentem*. If the term "law" in repealed article 3521 includes both legislation and jurisprudence, then the change from "law" to "legislation" means that the jurisprudential exception is no longer recognized. According to the official comments accompanying the legislation, however, the new article reproduced the "substance" of repealed article 3521, and "[did] not change the law."[41] Despite the inference raised by the change in the language of article 3467, the *GAF* court cited another official Reporter's comment,[42] and *Plaquemines Parish Commission Council v. Delta Development Co.*[43] as authority that the legislature had not overruled the jurisprudential doctrine.[44]

The comment to Louisiana Civil Code article 3467, read together with *Corsey*, suggests that although the discovery rule remains viable,

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non valentem can be seen in Note, *Plaquemines Parish Commission Council v. Delta Development Co.*: Contra Non Valentem Applied to Fiduciaries, 48 La. L. Rev. 967 (1988).

37. 375 So. 2d at 1322.

38. The prerequisites to invoking the discovery rule are that the plaintiff must be ignorant of his cause of action and the ignorance must not attributable to his own willfulness or neglect. Id.

39. Repealed article 3521 provided:

> Prescription runs against all persons, unless they are included in some exception established by law.

La. Civ. Code art. 3521 (1870).

40. La. Civ. Code art. 3467.

41. La. Civ. Code art. 3467, comment (a).

42. The court cited La. Civ. Code art. 3467, comment (d), 512 So. 2d at 1168 n.4. That comment reads in full:

> Despite the clear language of Article 3521 of the Louisiana Civil Code of 1870, courts have, in exceptional circumstances, resorted to the maxim contra non valentem non currit praescripto. See Corsey v. State Department of Corrections, 375 So. 2d 1319 (La. 1979). This jurisprudence continues to be relevant.

43. 502 So. 2d 1034 (La. 1987).

44. 512 So. 2d at 1168 n.4.

it should be applied only in "exceptional circumstances."[45] However, as the exception has developed under the jurisprudence nearly every instance where a plaintiff is ignorant of his cause of action automatically qualifies as an exceptional circumstance unless his ignorance is willful or negligent.[46] This emphasis on the plaintiff's ignorance, without regard to the reasons behind that ignorance, could lead the court to apply *contra non valentem* in cases like *GAF* where the facts simply do not merit the label "exceptional circumstances."[47]

The Application of Contra Non Valentem *to Section 2189*

Until *GAF*, the discovery rule was limited to tort actions in which the injury complained of was not noticeable upon its infliction, but manifested itself over time.[48] When applied in non-tort cases like *GAF*, this extension of *contra non valentem* will inevitably generate uncertainty concerning the multitude of prescription statutes with wording similar to section 2189,[49] simply because the language used by the *Corsey* court

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45. "Exceptional circumstances" is an excerpt from the Reporter's comments to La. Civ. Code art. 3467. The full text of the comment is as follows:

> Despite the clear language of Article 3521 of the Louisiana Civil Code of 1870, courts have, in exceptional circumstances, resorted to the maxim *contra non valentem non currit praescriptio*. See Corsey v. State Dept. of Corrections, 375 So. 2d 1319 (La. 1979). This jurisprudence continues to be relevant.

La. Civ. Code art. 3467, comment (d).

46. The two requirements, that (a) exceptional circumstances exist and that (b) the plaintiff exercised due diligence, might be interrelated in the determination of when *contra non valentem* may be invoked to interrupt the running of prescription. See supra note 22.

47. See supra note 25.

48. Examples where discovery of injury or damage is delayed over time include negligent medical diagnosis, asbestosis, and absorption of airborne chemical waste by livestock. See supra notes 5 to 7. There is one example of an application of the discovery rule to a nontort cause of action. In West v. Gajdzik, 425 So. 2d 263 (La. App. 3d Cir.), writ denied, 428 So. 2d 475 (1983), the court relied partially on the discovery rule. The 57-year-old plaintiff had lost contact with her father when she was twelve. Twenty years before his death, her father had changed his name. Upon discovery of his death, she brought suit to be recognized as the sole forced heir and to annul the judgment of possession. The third circuit held that *contra non valentem* was applicable to her claim, and so prescription was interrupted until she learned of her father's death. In addition to the discovery rule, the court relied on the fact that the defendant had acted to impede the plaintiff's assertion of her cause of action. Although this was arguably an application of the discovery rule outside the area of torts, the factual situation supports the argument that the application should be limited to "exceptional circumstances." In denying certiorari, the Louisiana Supreme Court stated, "Result is correct." 428 So. 2d at 475.

49. See, e.g., La. Civ. Code art. 209(C) (proof of filiation); La. Civ. Code art. 2315.2 (wrongful death action); La. R.S. 9:5601 (1983) (crops, injury, destruction); La. R.S. 9:5621 (1983) (acts of succession representative); La. R.S. 9:5627 (1983) (building encroaching on public way); La. R.S. 9:5630 (1983) (actions by unrecognized successor

in describing the discovery rule and its application is very broad. Moreover, the *GAF* court applied *contra non valentem* even though the plaintiff's ignorance was attributable to its own failure to investigate the cause of the leaks.[50] The inherent risk of applying this contemporary exception to the rule of prescription is that, without some additional constraint, the exception could eventually consume the rule.

There are numerous Louisiana statutes similar to section 2189 that provide prescriptive periods and list a specific event or events that trigger the running of prescription.[51] The fact that these statutes cover a wide range of subjects exposes two problems of the original *GAF* opinion's application of the discovery rule outside of tort law. First, rather than allowing for a determination of whether exceptional circumstances exist based on the facts and equities of the case, the *GAF* court apparently called for a per se application of the discovery rule anytime there is an "unknowing" plaintiff before the court. Second, the broad language of the *GAF* court's original opinion would not allow a trial court much flexibility in cases that are governed by prescriptive statutes other than section 2189.

The *GAF* opinion implies that the application of the discovery rule is required regardless of the subject matter of the prescriptive statute or the social policies involved; there appears to be no room under its reasoning for the application of the discovery rule on a case-by-case basis. Under this interpretation, a trial court could not summarily dismiss a case on grounds of prescription if the plaintiff had merely alleged his own ignorance of the cause of action. The court would be forced to resolve the initial factual question of when the plaintiff first had knowl-

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against third persons); La. R.S. 9:5643 (1983) (proceeding to probate testament); La. R.S. 9:5628 (1983) (prescription against the state); La. R.S. 39:1126 (1968) (contesting; time limited [municipal bonds]); La. R.S. 45:262 (1982) (suits to set aside public service commission's orders); and La. R.S. 45:1099 (1982) (freight loss or damage).

50. There must be some negligence shown on the part of the unknowing plaintiff, or the exception will be applied. Corsey v. State Dep't of Corrections, 375 So. 2d 1319, 1322 (La. 1979). For the test applied to determine whether the plaintiff had sufficient notice, see Cartwright v. Chrysler Corp., 255 La. 598, 603, 232 So. 2d 285, 287 (La. 1970), where the supreme court stated:

> Whatever is notice enough to excite attention and put the owner on his guard and call for inquiry is tantamount to knowledge or notice of every thing to which inquiry may lead and such information or knowledge as ought to reasonably put the owner on inquiry is sufficient to start the running of prescription.

This language in *Cartwright* was refined in Jordan v. Employee Transfer Corp., 509 So. 2d 420 (La. 1987). The supreme court stated there the focus was properly on the reasonableness of the tort victim's action or inaction and "prescription will not begin to run at the earliest possible indication that a plaintiff may have suffered some wrong." Id. at 423.

51. For examples, see supra note 49.

edge of his action. Then there would have to be an inquiry into whether the ignorance was due to the plaintiff's own willfulness or neglect.[52]

This per se application would result in more costly pretrial discovery, followed by evidentiary hearings, merely to decide the threshold issues of when the plaintiff became aware of his cause of action and whether this ignorance was attributable to the plaintiff's negligence. The nature and amount of pretrial discovery could be extensive and costly in cases like *GAF*. Generally, the facts are stale in these cases. Witnesses can be difficult to locate, and the nature of these cases requires investigation and testimony by experts. The net effect would be to erode, if not to wash away altogether, the social benefits derived from prescriptive statutes.[53]

A better approach would be to allow a trial judge in nontort cases more flexibility in deciding whether the discovery rule should be applied in a particular case. The plaintiff should at least have the burden of persuading the judge that requisite exceptional circumstances exist, rather than being able to rely on the presumption that *GAF* seemingly creates.[54] Under this approach, the trial judge might consider the relative position of the parties and their abilities to bear the loss or damage underlying the suit.[55] Another criterion might be the social policies advanced by

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52. See supra note 47.

53. In reference to the limitation period for worker's compensation claims, the supreme court has stated:

> The purpose of the requirement that a suit be brought by the claimant within one year after the accident . . . is of a three fold nature; (1) to enable the employer to determine when his potential liability for an accident would cease; (2) as a matter of public policy to prevent suits based on stale claims where the evidence might be destroyed or difficult to produce; (3) to fix a statute of repose giving rise to a conclusive presumption of waiver of his claim on the part of an employee where he fails to bring his suit within the fixed period.

Nini v. Sanford Brothers, Inc., 276 So. 2d 262, 264 (La. 1973), quoting Harris v. Traders and General Ins. Co., 200 La. 445, 458, 8 So. 2d 289, 293 (1942). The supreme court has also said, "The fundamental purpose of prescription statutes is only to afford a defendant economic and psychological security if no claim is made timely, and to protect him from stale claims and from the loss of non-preservation of relevant proof." Giroir v. South Louisiana Medical Center, 475 So. 2d 1040, 1045 (La. 1985).

54. In Blanchard v. Reeves, 469 So. 2d 1165, 1167 (La. App. 5th Cir.), writ denied, 476 So. 2d 347 (1985), the court stated that where the plaintiff's cause of action had prescribed on the face of the petition, then the plaintiff bears the burden of proof in the hearing on the exception of prescription. Accord Trainer v. Aycock Welding Co., 421 So. 2d 416, 417 (La. App. 1st Cir. 1982).

55. This probably played a role in the courts' application of the discovery rule to medical malpractice cases. If this was the controlling factor for the court in *GAF*, however, the case might have had a different outcome. The plaintiff school board, as a governmental body, arguably occupied the position of the optimum loss-spreader.

the statute involved, and whether they are enhanced or retarded by applying the discovery rule. Finally, the length of the plaintiff's delay in comparison to the length of time afforded the plaintiff by the limitation period should be considered. Regardless of the factors relied on by the courts, a plaintiff's knowledge or ignorance alone should not be dispositive of whether *contra non valentem* applies. The importance of social policies underlying limitation periods might in some cases outweigh the equitable consideration of protecting the plaintiff from his ignorance.

Any application of *contra non valentem* to prescriptive statutes governing contractual claims carries a price. Adhering to the original *GAF* opinion and extending full application of the discovery rule to nontort cases would erode judicial efficiency and undermine the usefulness of prescription. The second alternative, using the discovery rule but requiring the plaintiff to prove "exceptional circumstances," would leave some unknowing plaintiffs without a remedy even though their lack of knowledge of a cause of action did not occur because of their fault. The Board in *GAF*, for example, could lose its action against Rittiner for the repair of the defective roof even if the Board could have been without fault in failing to discover its cause of action.[56] This harsh result is precisely what has led our courts to adopt the equitable doctrine of *contra non valentem*. On the other hand, the legislature presumably considered this potential injustice when it adopted the statute. The express use of the discovery rule in selected statutes,[57] but not in section 2189, implies that the legislature did not intend for the discovery rule to apply when prescription is based on section 2189.

Although a large part of the *GAF* opinion concerns whether the period in the statute is prescriptive or peremptive, that issue does not merit much attention. First, the single word title for the statute, provided by the legislature in the Act itself,[58] is "prescription." Also, the text of the statute describing the operation of the statute was the term "prescribe," not "perempt." Finally, unless the legislature's intent to create a peremptive statute is clear, the right in question usually must

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56. See supra note 47 for a discussion of the plaintiff's inaction in the face of the knowledge that the roof had leaked for several years prior to filing suit. This example is premised on the assumption that the *GAF* interpretation of La. R.S. 38:2189 as being applicable to actions arising out of latent defects has been adopted, but see infra text accompanying notes 58 to 76.

57. See, e.g., La. Civ. Code art. 2032 (prescription of action for annulment); La. Civ. Code art. 2546 (prescription of redhibitory action when seller in bad faith); La. Civ. Code art. 3493 (damage to immovable property; commencement and accrual of prescription); La. Civ. Code art. 189 (time limit for disavowal by husband); La. R.S. 9:5628 (1983 & Supp. 1988) (actions for medical malpractice).

58. 1962 La. Acts No. 15.

be created in the same statute which provides the period within which suit must be brought for it to have peremptive effect.[59]

The court did not address itself to the more basic question, namely, whether section 2189 even applied to the case before the court. Section 2189 should not apply to latent defect claims such as the one in *GAF*. Instead, the statute should be construed to provide a period of time within which to settle those disputes that arise during construction or that are ongoing at the time of acceptance of the facility.

A dearth of legislative history complicates interpretive efforts.[60] There are, however, several reasons for interpreting section 2189 to apply only to actions such as disputes over payment or change orders, or to apparent defects that were discovered during the construction or at the time of acceptance, and not to hidden defects. Reasons supporting this interpretation include the language used in section 2189, and prior opinions that interpreted the statute.

The original form of section 2189 read as follows:

> Any action against the contractor on the contract or on the bond, or against the contractor and/or surety on the bond furnished by the contractor, all in connection with the construction, alteration or repair of any public works let by the state or any of its agencies, boards or sub-divisions shall prescribe three years from the registry of acceptance of such work or notice of default of the contractor . . . .[61]

The relevant words and phrases for deciding whether the statute applies to latent defects are "bond," "notice of default," and "registry of acceptance."

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59. This canon of interpretation is known as the *Guillory* doctrine. See Guillory v. Avoyelles Ry. Co., 104 La. 11, 28 So. 899 (1900). For background and discussion of the *Guillory* doctrine, see Comment, Legal Rights and the Passage of Time, 41 La. L. Rev. 220, 229 (1980). The *GAF* court acknowledged this doctrine and stated:

> There is no indication that the Legislature intended La. R.S. 38:2189 as other than a prescriptive statute which (sic) is subject to the jurisprudential doctrine of *contra non valentem*. Moreover, there is no public policy reason [supporting peremptive effect]. . . . Finally, any doubt about the applicability of a prescriptive statute should be resolved in favor of maintaining the obligation [citations omitted].

512 So. 2d at 1169. Thus, the court concluded that the statute was prescriptive.

60. The legislative history was researched for the Acts which passed the original § 2189 (1962), as well as the revisions in 1975 and 1982. There are no records of committee meetings for the statutes enacted in 1962 and 1975. For the 1982 bill, the Senate Transportation, Highways, and Public Works Committee meeting minutes contain only a reading of the proposed bill and the vote approving it.

61. La. R.S. 38:2189 (1962).

The word "bond" is a shortened form of the term "performance bond."[62] Although it is true that the bond provided by the contractor does protect the owner against latent as well as apparent defects,[63] the more common connotation of the term "performance bond" is that such a bond is provided by the contractor to protect the owner from the risk that the contractor will become insolvent during the construction phase. If the word "bond" is viewed in this context, the statute appears to be addressed to the types of problems arising during construction that could lead to a default.

The legislature's use of "notice of default" as one of the events that triggers the running of prescription buttresses this view. The term "default" is normally used in relation to events occurring during the construction phase. The statute would apparently not apply to latent defects under the common usage of those terms, because latent defects arise after the construction is completed.

The final clue in the statute is the use of the phrase "registry of acceptance" as an event that triggers the running of prescription. The registry of acceptance is the date when the owner records his acceptance of the project in the public records. Unless the statute is given peremptive effect, the date of registering acceptance does not make sense as a commencement date for prescription of an action in damages for latent defects. As shown above,[64] and as the *GAF* court concluded, the statute has prescriptive, not peremptive operation. Since the legislature must have specified the commencement date for some reason, it follows that the legislature did not intend that the statute apply to latent defect cases. Instead, it must have intended that the limitation period apply only to those actions that had accrued at the time the building was accepted, and therefore are prescriptable.[65]

One source for finding the proper interpretation of section 2189 is earlier cases construing the statute. The first reported case interpreting the statute, written four years after the statute was enacted, was *Mar-*

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62. The "bond" referred to in § 2189 is the statutory performance bond required by La. R.S. 38:2216 (Supp. 1988). It states that the bond is "for the faithful performance of his duties," that is, to guarantee the fulfillment of the contractor's obligations under the building contract.

63. See, e.g., Justiss-Mears Oil Co. v. Pennington, 132 So. 2d 700 (La. App. 1st Cir. 1961); Jack v. Henry, 128 So. 2d 62 (La. App. 1st Cir. 1961).

64. See supra note 59 and accompanying text.

65. This was the analysis followed by Judge Lemmon in his dissent in Orleans Parish School Board v. Pittman Construction Co., 244 So. 2d 641, 646 (La. App. 4th Cir. 1971), reversed, 261 La. 665, 260 So. 2d 661 (1972). See supra note 31 and accompanying text.

quette Cement Manufacturing Company v. Normand.[66] The first circuit decided that the statute applied to materialmen, or, in modern terminology, material suppliers. Its relevance lies in the following excerpt: "Appellant argues the inapplicability of section 2189 on the theory that it applies only to actions brought by the owner or public body 'on the contract', that is[,] [actions] to resolve disputes concerning the quality or quantity of the work . . . . We agree with this argument."[67]

In the context of the construction contracting process, the phrase "resolve disputes" simply does not relate to latent defects, because during construction there are inevitably disagreements as to the meaning of various portions of the plans and specifications, even in the most carefully planned project. In a multimillion dollar project with a large number of subcontractors and material suppliers, these disagreements arise on a daily basis, and, at least initially, their resolution is the responsibility of the on-site personnel representing the owner, architect, engineer, general contractor, subcontractors, and material suppliers. The phrase "resolve disputes" is not applicable to the postconstruction phase when latent defects are discovered. Rather, it is applicable to disputes over such things as payment amounts, contract change-order work and payment for that work, and punchlist items, all of which arise during construction or at the time of acceptance. Therefore, the first reported case applying section 2189 read the statute as being applicable to apparent defects, not latent defects.

Orleans Parish School Board v. Pittman Construction Co.,[68] the second case which applied section 2189, was similar to *GAF* in that it involved a latent defect discovered long after acceptance. The primary issue before the court of appeal was retroactive application of the provisions of section 2189. Two of the judges on the three member panel believed the statute applied to the action for damages due to the latent defect in the structural members.

The author of the dissenting opinion, Judge Lemmon, believed that the statute should be interpreted in light of Civil Code article 2762,[69] which was the controlling law prior to the enactment of section 2189. Judge Lemmon stated:

I believe the majority erred in holding that LSA-R.S. 38:2189

66. 186 So. 2d 395 (La. App. 1st Cir. 1966).

67. Id. at 397.

68. 244 So. 2d 641 (La. App. 4th Cir. 1971), reversed, 261 La. 665, 260 So. 2d 661 (1972).

69. See supra note 17 for the text of La. Civ. Code art. 2762.

> is controlling in this case. While at first glance this provision seemingly is on point, it becomes apparent upon further analysis that the legislature could not have intended this statute to apply to the ten year warranty period of LSA-C.C. art. 2762, under which this action was brought . . . . I believe that the legislature . . . intended for it to only have application to actions which had accrued at the time the building was accepted, and therefore could be prescriptable.[70]

On appeal, the supreme court resolved the issue on constitutional rather than interpretive grounds.[71] Civil Code article 2752, held the court, created a substantive right; thus, 38:2189 could not operate retroactively to deprive someone of that right under the contract clause of the U.S. Constitution and provisions of the Louisiana Constitution.[72] But the court went on to discuss the interpretation of section 2189 and apparently concluded that it had no application to latent defects.[73]

In addition to *Marquette Cement* and *Pittman Construction*, the lower court opinion in *GAF* held section 2189 inapplicable to suits for latent defects.[74] In the fifth circuit's terms, section 2189 is applicable to "apparent defects," while Civil Code article 2762[75] and Louisiana Revised Statutes 9:2772[76] apply to "hidden defects." The court of appeal's application of the statute is in accord with the interpretation proposed here, that section 2189 was intended to apply only to actions that had accrued at the time the building was accepted.

CONCLUSION

While the discovery rule appears to be well-entrenched in the Louisiana jurisprudence in cases involving tort claims,[77] it has almost never been applied in cases involving nontort claims. The extension of the discovery rule to nontort claims generates great uncertainty in the law of prescription and potentially defeats the purpose of prescription. Therefore, the discovery rule should not apply to nontort cases.

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70. 244 So. 2d at 643, 646. Judge Lemmon, the author of that dissenting opinion, was also the author of the *GAF* majority opinion. There was no explanation offered in *GAF* for the apparent change in his interpretation of La. R.S. 38:2189.

71. Orleans Parish School Board v. Pittman Construction Co., 261 La. 665, 260 So. 2d 661 (La. 1972).

72. Id. at 680, 260 So. 2d at 667.

73. Id. at 681-82, 260 So. 2d at 667.

74. See supra note 15 for the text of the appellate court's decision.

75. See supra note 17 for the text of La. Civ. Code art. 2762.

76. See supra note 18 for the text of La. R.S. 9:2772.

77. See supra notes 5-7.

To avoid the creation of uncertainty and to preserve the purpose prescription serves, section 2189 should apply only to claims which have accrued at the time the work is accepted and therefore are prescriptable, but not to latent defect claims. This interpretation is supported by the wording of the statute and prior opinions.

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