NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 CA 1421

DORIC AND FANNIE WILKIENSON

VERSUS

LOUISIANA FARM BUREAU MUTUAL INSURANCE COMPANY

Judgment Rendered: March 23, 2012

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Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Case No. 2008-16823

The Honorable William Crain, Judge Presiding

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BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

Hughes, J., dissents with reasons.

GAIDRY, J.

This is an appeal from the lower court's sustaining the defendant's/appellee's peremptory exception of prescription against the plaintiffs/appellants, Doric and Fannie Wilkienson. For the following reasons, we affirm the lower court.

FACTS AND PROCEDURAL HISTORY

The Wilkiensons' home in Slidell, La. suffered significant damage to the roof due to Hurricane Katrina. This damage resulted in substantial interior water damage to the home. The Wilkiensons filed a claim with their insurer, the appellee Louisiana Farm Bureau Mutual Insurance Company ("Farm Bureau"). The Wilkiensons felt that Farm Bureau's payment on their claim was insufficient to cover the damage they sustained, and they joined in a mass-joinder complaint filed in the United States District Court for the Eastern District of Louisiana on August 29, 2007. That mass joinder action is styled *Rafael & Dioigna Acevedo, et al v. AAA Insurance, et al*[1]. Although not a class action lawsuit, the action contained a large number of plaintiffs similarly situated as the Wilkiensons, who had brought individual lawsuits against their varied insurers for insufficient payments on claims related to damages sustained by Hurricane Katrina.

The *Acevedo* case was later dismissed due to it being improperly brought in federal court. As to Farm Bureau, the Eastern District was not a court of competent jurisdiction since no diversity existed between the opposing parties.[2] The Wilkiensons then filed a petition for damages against Farm Bureau on January 5, 2009. It must be noted here that Act 802 of the

[1] La. Eastern District civil docket number 07-cv-05199.
[2] The Wilkiensons are citizens of Louisiana and Farm Bureau is a Louisiana entity doing business solely in the State of Louisiana.

2006 Regular Session of the Louisiana Legislature allowed the filing of Hurricane Katrina-related claims for damages on or before August 30, 2007, effectively extending the regular prescriptive period to file such claims. The Wilkiensons filed their petition nearly eighteen months after the legislatively imposed prescriptive period had run.

Farm Bureau filed its peremptory exception of prescription on January 13, 2011. In response, the Wilkiensons argued that their prescriptive period had been extended by virtue of Article 596 of the Louisiana Code of Civil Procedure, specifically that:

> Liberative prescription on the claims arising out of the transactions or occurrences described in a petition brought on behalf of a class is suspended on the filing of the petition as to all members of the class as defined or described therein.

In other words, the Wilkiensons asserted that since there were pending class actions in Louisiana where the putative class members fit their description,[3] then prescription is suspended for them until one of three circumstances in Art. 596(A) occurs. The three circumstances are: (1) their signing of an exclusion form; (2) a redefinition of the putative class that would then exclude them from the class; or (3) dismissal of the class action. As the Wilkiensons allege that none of these conditions have occurred as to the class action suits, their prescriptive period to file suit against Farm Bureau is still suspended.

The 22nd Judicial District Court granted Farm Bureau's peremptory exception of prescription against the Wilkiensons on March 29, 2011 and dismissed the lawsuit with prejudice. The lower court's decision on the exception is the subject of the present appeal.

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[3] *Vinturella v. Louisiana Farm Bureau,* docket number 200-8340, and *State of Louisiana, et al. v. AAA Insurance, et al.,* also known as "The Road Home Suit," were removed to United States District Court for the Eastern District of Louisiana, docket number 07-5528.

STANDARD OF REVIEW

Generally, the trial court's factual findings on a peremptory exception raising the objection of prescription are reviewed on appeal under the manifest error-clearly wrong standard of review. *Gilmore v. Whited,* 2008-1808, p. 4 (La. App. 1 Cir. 3/31/09), 9 So.3d 296, 299. When prescription is raised by peremptory exception, with evidence being introduced at the hearing on the exception, the trial court's findings of fact on the issue of prescription are also subject to the manifest error-clearly wrong standard of review. *Ferguson v. Sugar,* 2005-0921 (La. App. 4 Cir. 6/25/08), 988 So.2d 816, 823.

DISCUSSION

When a petition is prescribed on its face, such as the appellants' petition which was filed almost two years after the legislative prescriptive period of Act 802 had run, the burden of proof shifts to the plaintiff to negate the presumption by establishing a suspension or interruption. *Taranto v. Louisiana Citizens Property Ins. Corp.,* 2010-0105, p. 5 (La. 3/15/2011), 62 So.3d 721. Prescription runs against all persons unless an exception is established by legislation. *Id.*, p. 6. If prescription is suspended, the period of suspension is not counted toward the accrual of prescription but the time that has previously run is counted. La.C.C. Art. 3472.

The appellants therefore had to present evidence to the trial court that some form of legislation exempted them from the normal counting of time for liberative prescription and suspended it for them. They use La.C.C.P. Art. 596 to support their claim that prescription was suspended for them. Although the appellants cite *Taranto* to show that Art. 596 does suspend prescription for parties fitting the definition of a putative class member, the

major difference between *Taranto* and this case is that the plaintiffs in *Taranto* never filed a petition of their own until after the trial court ruled on the motions to certify the class actions, unlike the appellants in this case. That action by the appellants takes this case out of the realm of *Taranto's* analysis.

The facts of this case follow more closely to those of *Lester v. Exxon Mobil Corp.*, 2009-1105 (La. App. 5 Cir. 6/29/10), 42 So.3d 1071, *writ denied*, 2010-2244 (La. 12/17/10), 51 So.3d 14, where wives of deceased oil field workers filed individual wrongful death lawsuits before there was a class certification for a class action lawsuit. The Fifth Circuit ruled that the filing of individual lawsuits opted the plaintiffs out of the class action, and thus, pendency of the class action did not serve to suspend prescription of the wrongful death action. *Id.*, p. 6. In the same way, the appellants' lawsuit in the United States District Court came before class certification in the *Vintrella* and Road Home cases. Applying *Lester,* the appellants' lawsuit improperly filed in the United States District Court is a showing of their intent not to be part of any class action, but rather to pursue their claim individually. Although the appellants never signed any "opt out" forms, their filing the petition serves the same purpose.

A similar circumstance occurred in *Katz v. Allstate Ins. Co.,* 2004-1133 (La. App. 4 Cir. 2/2/05), 917 So.2d 443, *writ denied*, 2005-0526 (La. 4/29/05), 901 So.2d 1069, where the plaintiff Katz filed an individual lawsuit instead of joining as a member of a class action involving the same hailstorm that damaged his property. Even though Katz's individual lawsuit was filed untimely, the Fourth Circuit held that Katz's action was still sufficient to opt him out of the class action and prevent him from taking advantage of the suspension of prescription. *Id.,* 447. It is therefore

irrelevant if the individual lawsuit is correctly filed; the mere act of filing the lawsuit is enough to opt out of a putative class.

CONCLUSION

We cannot ignore the jurisprudence when it is clearly established that the *filing* of an individual lawsuit is an effective opt out of a class action and prevents the plaintiff from taking advantage of Art. 596's suspension of prescription. It does not matter when the lawsuit is filed, in which forum it is filed, or even if it is correctly filed.

Class members of a class action often do not receive individual attention from counsel and do not recover damages in the magnitude they would with an individual action. Likewise, a plaintiff in an individual action cannot take advantage of a suspended prescriptive period afforded the members of a class action. It is therefore important for a plaintiff to carefully choose which course of action is best for him. The Wilkiensons chose to file an individual lawsuit. They cannot have the best of both worlds and reap the benefits of a suspended prescriptive period when their individual lawsuit has prescribed. Being able to do so would result in a legal sleight of hand where the plaintiff sues under one theory of law but then adopts another when the first no longer suits him. The defendant would then be unfairly disadvantaged in his preparation of a defense. As the lower court followed the reasoning of the *Katz* and *Lester* cases, we cannot say that the court was wrong in its decision to dismiss the appellants' petition with prejudice. We therefore affirm the ruling of the 22nd JDC.

DECREE

The 22nd Judicial District Court's granting of the peremptory exception of prescription for the appellee, Louisiana Farm Bureau Mutual Insurance Company, and against the appellants, Doric and Fannie

Wilkienson, is affirmed and the appellants' petition is dismissed with prejudice. Costs of this appeal are assessed to the appellants.

AFFIRMED.

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VERSUS

LOUISIANA FARM BUREAU MUTUAL INSURANCE COMPANY

HUGHES, J., dissenting.

I respectfully dissent from the majority decision to affirm, on the basis of liberative prescription, the trial court's dismissal of the plaintiffs' claim, because it is my opinion that the analysis of the U.S. Eastern District Court in **In re Katrina Canal Breaches Consolidated Litigation**, No. 05-4182, 2008 WL 2692674 (E.D. La. July 2, 2008) (adopting the holding expressed in **In re WorldCom Securities Litigation**, 496 F.3d 245 (2nd Cir. 2007) that the tolling of prescription required by **American Pipe & Construction Co. v. Utah**, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974), for members of a class on whose behalf a class action is filed, applies also to class members who file individual suits before class certification is resolved), produces the correct result in maintaining the actions of plaintiffs faced with the circumstances presented herein.[1]

[1] The Louisiana Supreme Court, recognizing that Louisiana's class action statute is largely derived from Federal Rule of Civil Procedure 23, has stated that reference to cases that interpret the federal class action statute is appropriate where there is a lack of Louisiana jurisprudence on a particular issue. **Banks v. New York Life Insurance Co.**, 98-0551 (La. 12/7/98), 722 So.2d 990, 994, cert. denied, 528 U.S. 1158, 120 S.Ct. 1168, 145 L.Ed.2d 1078 (2000).

The application of LSA-C.C.P. art. 596[2] is at issue in this case and provides in pertinent part:

> A. Liberative prescription on the claims arising out of the transactions or occurrences described in a petition brought on behalf of a class is suspended on the filing of the petition as to all members of the class as defined or described therein. Prescription which has been suspended as provided herein, begins to run again:
>
> (1) As to any person electing to be excluded from the class, thirty days from the submission of that person's election form;
>
> (2) As to any person excluded from the class pursuant to Article 592, thirty days after mailing or other delivery or publication of a notice to such person that the class has been restricted or otherwise redefined so as to exclude him; or
>
> (3) As to all members, thirty days after mailing or other delivery or publication of a notice to the class that the action has been dismissed, that the demand for class relief has been stricken pursuant to Article 592, or that the court has denied a motion to certify the class or has vacated a previous order certifying the class.
>
> B. The time periods in Subparagraphs (A)(2) and (3) of this Article commence upon the expiration of the delay for taking an appeal if there is no appeal, or when an appeal becomes final and definitive. The notice required by Subparagraphs (A)(2) and (3) of this Article shall contain a statement of the delay periods provided herein.

In **In re Katrina Canal Breaches Consolidated Litigation**, 2008 WL 2692674 (E.D. La. 2008) (unpublished), the district court judge declined to dismiss an individual plaintiff's case, filed *before* the certification issue in the class action suit in which he had been a putative plaintiff had been decided. Rather, the court found the class action suspended the running of prescription as to the putative plaintiff's individual suit, though filed early. The **In re Katrina** court recognized the federal basis for suspension of prescription by a class action suit, as stated by the Supreme Court in **American Pipe & Construction Co. v. Utah**, 414 U.S. 538 (1974), wherein it was held: "We are convinced that the rule most consistent with federal

[2] We quote herein Article 596, as amended by Acts 2010, No. 185, § 1, which added paragraph (B), and inserted "thirty days" in (A)(1); however, these amendments were declared by the legislature to be interpretive. See LSA-C.C.P. art. 596, 2010 Revision Comments.

class action procedure must be that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." The **In re Katrina** court further discussed **American Pipe**'s progeny: **Eisen v. Carlisle & Jacquelin**, 417 U.S. 156, 176 n. 13 (1974) (noting again that the filing of a class suit tolled the statute of limitations for class members who sought to intervene after the class certification motion was denied for failure to demonstrate numerosity); and, **Crown, Cork & Seal Co. v. Parker**, 462 U.S. 345 (1983) (wherein the Supreme Court remarked that **American Pipe** was not limited to intervenors, and relative to post-class certification filings, stated that the filing of a class action tolls the statute of limitations as to all asserted members of the class).

With respect to the issue before the **In re Katrina** court, the federal district court judge framed the issue before the court, as being whether the **American Pipe** tolling of prescription is applicable to suits filed after a case would be prescribed, but for a pending class action upon which a decision as to class certification had not been made. As to this issue, the **In re Katrina** court acknowledged that federal appellate court decisions were split on this issue; however, the court found the rationale expressed in **In re WorldCom Securities Litigation** persuasive and decided in accordance therewith, quoting the Second Circuit decision as follows: "This court has not yet faced the question whether the tolling required by **American Pipe** for members of a class on whose behalf a class action is filed applies also to class members who file individual suits before class certification is resolved . . . . We now conclude that it does." In so holding, the **In re Katrina** court reasoned:

> The theoretical basis on which **American Pipe** rests is the notion that class members are treated as parties to the class action "until and unless they received notice thereof and chose not to continue." . . . Because members of the asserted class are treated for limitations purposes as having instituted their own actions, at least so long as they continue to be members of the class, the limitations period does not run against them during that time. Once they cease to be members of the class-for instance, when they opt out or when the certification decision excludes them-the limitation period begins to run again on their claims.
>
> Nothing in the Supreme Court decisions described above suggests that the rule should be otherwise for a plaintiff who files an individual action before certification is resolved. To the contrary, the Supreme Court has repeatedly stated that "'the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.'" . . . We see no reason not to take this statement at face value.
>
> It would not undermine the purposes of statutes of limitations to give the benefit of tolling to all those who are asserted to be members of the class for as long as the class action purports to assert their claims. As the Supreme Court has repeatedly emphasized, the initiation of a class action puts the defendants on notice of the claims against them. *See, e.g.*, **American Pipe**, 414 U.S. at 554-55, 94 S.Ct. 756 (noting that the purposes of statutes of limitations "are satisfied when ... a named plaintiff who is found to be representative of a class commences a suit and thereby notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment"). A defendant is no less on notice when putative class members file individual suits before certification. The Supreme Court explained that "[c]lass members who do not file suit while the class action is pending cannot be accused of sleeping on their rights," **Crown**, 462 U.S. at 352, 103 S.Ct. 2392; the same is certainly true of class members who file individual suits before the court decides certification.

After a thorough review of the facts and procedural history presented in the instant matter, I would find the rationale expressed in **In re Katrina** and **In re WorldCom Securities Litigation** equally applicable herein,[3] and

[3] While the Fourth and Fifth Circuit appellate courts of this state have previously decided the issue herein under consideration to the contrary, I do not find those decisions persuasive and this court is not bound by the rulings in those cases. See **Lester v. Exxon Mobil Corporation**, 2009-1105 (La. App. 5 Cir. 6/29/10), 42 So.3d 1071, writ denied, 2010-2244 (La. 12/17/10), 51 So.3d 14, and **Katz v. Allstate Ins. Co.**, 2004-1133 (La. App. 4 Cir. 2/2/05), 917 So.2d 443, writ denied, 2005-0526 (La. 4/29/05), 901 So.2d 1069. We further note that the Louisiana Supreme Court, while not specifically ruling on the issue presented herein, interpreted a one-year contractual limitation on the filing of suit, in an insurance policy, as invoking the prescription laws of the state and therefore subject to statutory suspension of prescription principles, in

I would conclude that the running of prescription in the plaintiffs' suit was tolled by the filing of the federal class action in which he was a putative party. Further, I note that no intent was proven, as to the plaintiffs' filing of his individual state court action, on the part of the plaintiffs to "opt out" of the federal class action. To the contrary, the plaintiffs stated in their petition that prescription on this action had been tolled by the filing of federal class action **Acevedo v. AAA Insurance**, No. 07-5199 (E.D. La.), filed August 29, 2007. Also, in opposition to the exception of prescription filed by the defendant herein, the plaintiffs asserted that when it became obvious that there was a lack of diversity present in the federal class action suit, they filed the instant suit, and they opposed the defendant's contention that the subsequent filing of the individual suit in state court constituted an opting out of the class action.[4] Therefore, under the circumstances of the instant case, and in accordance with the views expressed in **In re Katrina** and **In re WorldCom Securities Litigation**, I would uphold the plaintiffs' suit and conclude that prescription was not been established.

Taranto v. Louisiana Citizens Property Insurance Corporation, 2010-0105 (La. 3/15/2011), 62 So.3d 721. The **Taranto** court then concluded that the filing of a lawsuit designated as a class action pursuant to LSA-C.C.P. art. 591, suspended prescription for all members of the putative class until the district court ruled on the motion to certify the class; the trial court dismissal of the case on the basis of prescription was reversed. See **Taranto**, 2010-0105 at p. 21, 62 So.3d at 735. The issue we decide in the instant case has not previously been decided by the Louisiana Supreme Court.

[4] Louisiana Code of Civil Procedure Article 592(B) directs that in a class action the judge shall forward to the members of the class the best notice practicable under the circumstances, which shall be given early enough that a delay provided for the class members to exercise an option to be excluded from the class will have expired before commencement of the trial on the merits of the common issues. The notice is required to inform a potential class member of his right to be excluded from the action "by submitting an election form," and the notice must state "the manner and time for exercising the election." See LSA-C.C.P. art. 592(B)(2)(b). Under Federal Rules of Civil Procedure, Rule 23, applicable to class actions, the notice directed to the class must inform a potential class member of his right to be excluded from the class if he "requests exclusion" and the notice must provide the "time and manner for requesting exclusion." See Fed. R. Civ. P. Rule 23(c)(2)(B)(v) and (vi). To opt out of a class action, a putative class member sends notice, so stating, to the clerk of court, as directed by the court in its notice to class members. See **Orleans Parish School Board v. U.S. Gypsum Co.**, 892 F.Supp. 794, 797 (E.D. La. 1995), affirmed, 114 F.3d 66 (5th Cir.), certiorari denied, 522 U.S. 995, 118 S.Ct. 557, 139 L.Ed.2d 399 (1997). In the instant case, there was no indication in the record on appeal as to what directions the federal district court, in the **Acevedo** class action, provided in its notice to the class members regarding how to opt out of the class, and there was no indication in the appellate record that the plaintiffs herein, in fact, opted out of the class in accordance with those directions. Therefore, I would ***not*** conclude that the filing of their state district court suit constituted an election to opt out of the federal class action.