NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2005 CA 2126

RDD

ALISON TERREBONNE

VERSUS

PROGRESSIVE INSURANCE COMPANY

Judgment rendered: November 3, 2006

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On Appeal from the 17th Judicial District Court
Parish of Lafourche, State of Louisiana
Suit Number 95281; Division "A"
The Honorable John E. LeBlanc, Judge Presiding

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Leslie J. Clement, Jr. **Thibodaux, LA**	**Counsel for Plaintiff/Appellee** **Alison Terrebonne**
Robert M. Louque, Jr. **Thibodaux, LA**	**Counsel for Defendant/Appellant** **Chabert Insurance Agency**

Pettigrew, J. concurs

BEFORE: PETTIGREW, DOWNING AND HUGHES, JJ.

Hughes, J. concurs.

DOWNING, J.

Alison Alario Terrebonne (Terrebonne) filed suit against Progressive Insurance Company (Progressive), after her shrimp boat sank and it refused to pay her claim. Terrebonne added her agent, Chabert Insurance Agency (Chabert) as a defendant, claiming that it failed to place adequate coverage on her vessel. After a trial on the merits, the trial court dismissed Chabert's exceptions and rendered judgment in favor of Terrebonne. From that judgment Chabert appealed. For the following reasons we affirm.

BACKGROUND

On June 19, 2001 Terrebonne[1] signed an application at Chabert's to obtain insurance on her recently purchased 30' Lafitte skiff shrimp boat. The application indicated that the vessel would be used for pleasure purposes. A Chabert employee completed the application on the computer, and Terrebonne signed the last page. Interim coverage in the amount of $20,000.00 was placed with Progressive. This policy, however, was cancelled after an investigation disclosed that the applicant's fiancé, Orand Terrebonne, had numerous driving violations. Two months later Progressive reissued the identical policy but charged higher premiums. The policy period ran from August 28, 2001 to August 28, 2002. The policy excluded coverage for vessels used for commercial purposes. Terrebonne received a copy of this policy but claimed not to have read it.

On May 11, 2002 the vessel sank while being used for the commercial purpose of trawling for shrimp. Terrebonne filed a claim with Progressive. In a letter dated May 23, 2002, the adjuster informed Terrebonne that coverage might be excluded because of the "commercial use" exclusion in the policy. Terrebonne claimed that this was the first time she was aware of

[1] This document was signed "Alison Alario" because her marriage to Mr. Terrebonne had yet not taken place.

the policy exclusion. Progressive still salvaged the vessel and evaluated the damage. The adjuster determined that damages to the vessel were well in excess of the policy limits. In a letter dated June 19, 2002, Progressive informed Terrebonne it was denying the claim due to the exclusion.

Terrebonne filed suit against Progressive on December 17, 2002. On May 16, 2003 Chabert was added as a defendant. The amending petition stated that in the event it was determined that Progressive did not provide coverage, then, in the alternative, Chabert was liable for: (1) failing to advise an unsophisticated purchaser of the type of policy required; (2) failing to procure appropriate coverage on the vessel and; (3) causing Terrebonne to rely, to her detriment, upon the belief that her vessel was properly insured.

On November 19, 2004 Progressive was dismissed from the lawsuit by settlement. On March 11, 2005 Chabert filed exceptions of no cause of action, preemption, and prescription. The trial court deferred ruling on these exceptions until trial that was held June 1, 2005. Following the trial the court dismissed Chabert's exceptions and rendered judgment in favor of Terrebonne and against Chabert in the amount of $20,000.00, with legal interest from the date the original petition was filed, December 17, 2002. Chabert appealed alleging the following assignments of error:

ASSIGNMENTS OF ERROR

> 1. The trial court erred in denying Chabert's peremptory exceptions of no cause of action[2], peremption, and prescription because the application signed by plaintiff clearly stated she was purchasing insurance for the "pleasure use" of the boat at issue.
>
> 2. The trial court erred in finding that Chabert acquired the wrong insurance, as there is sufficient evidence to support the fact that Alison intended to purchase insurance for the pleasure use of her vessel.

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[2] The no cause of action exception was not addressed in appellant's brief. It is therefore, deemed abandoned pursuant to Uniform Rules-Courts of Appeal Rule 2-12.4.

3. In the event Chabert is found to be liable to plaintiff, the trial court erred in refusing plaintiff's recovery by the salvage value of the vessel at issue because Alison failed to mitigate her damages.

4. In the event Chabert is found to be liable to plaintiff, the trial court erred in awarding judicial interest from the date of original demand because Chabert was not a party in the original suit and that suit did not include any causes of action for the negligent actions of an insurance agent.

PRESCRIPTION/PEREMPTION EXCEPTIONS

In Chabert's first assignment of error, citing La. R.S. 9:5606(D), it argues that except in cases of fraud, the time limitations for filing suit are peremptive and may not be renounced, interrupted, or suspended pursuant to LSA-C.C. art. 3458 and LSA-C.C. art. 3461. And since Terrebonne did not establish fraud the commencement of prescription began to run no later than two weeks after June 19, 2001, the date she received the initial policy. In the alternative, Chabert argues that even if the date to be used is two weeks after the second policy was received, August 28, 2001, without fraud, the suit against Chabert was still filed untimely.

Louisiana Revised Statute 9:5606 provides in pertinent part:

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 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.

* * *

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.

The original suit against Progressive was filed December 17, 2002; Chabert was added as a defendant on May 9, 2003. The policy sued upon was issued on August 28, 2001, and Progressive denied coverage on June 19, 2002. Since this suit was filed over one year after Chabert's alleged act, omission or neglect, the critical issue is when did Terrebonne discover or should have discovered Chabert's alleged act, omission, or neglect.

In summary, Chabert maintains that Terrebonne had a duty to read the policy so the prescription date begins on the date she received the policy. Terrebonne testified that she was unaware that the vessel was not properly insured until Progressive refused to pay the claim.

It is undisputed that a Chabert employee filled out the application and that Terrebonne signed only the final signature page. Terrebonne claims that she did not see the other pages of the application; they do not contain her initials or any other indication that she saw them. Terrebonne testified that she did not read the other pages of the application because she trusted the agency. Terrebonne testified that she went to Chabert in the first place because she knew other people who insured their shrimp boats with that agency. These boats were being used for commercial purposes.

The trial court did not err in finding that Terrebonne was unaware that the policy did not cover the vessel while used for commercial purposes. The vessel's designation of for "pleasure use" only is not readily apparent. This specification is in a small box on the second page along with other statistical information such as serial numbers, hull material, and motor size.

Further, Terrebonne testified that she did not read the policy and did not realize that the boat was not properly insured. She testified that she went to Chabert to buy insurance on a Lafitte skiff shrimp boat. She maintained that the Chabert employee who took her application was aware that the vessel was going to be used to commercially trawl for shrimp.

In ***Louisiana Home Builders Assn. Self-Insurers' Fund v. Adjustco, Inc.***, 633 So.2d 630, 635 (La.App. 1 Cir. 1993), the court discussed instances where the insured was justified in failing to read a policy. This court ruled that the insured could rely on the agent's expertise when the insured has a close trusting relationship with the agent and when the agent was being paid for that expertise. ***Id.*** Here, Terrebonne testified that she relied on her agent's expertise in just this manner.

Accordingly, we conclude that it was not manifestly erroneous for the trial court to credit Terrebonne's testimony in this regard. Therefore, the trial court did not err in concluding that the date Terrebonne discovered or should have discovered Chabert's act, omission or neglect, was when she received the letter from Progressive denying her claim. Therefore, the trial court did not err in ruling that the pleading was timely because Terrebonne filed within one year of discovering the neglect and within three years of the incident. Thus, this assignment of error is without merit.

COMMERCIAL USE OR PLEASURE USE

In its second assignment of error, Chabert argues that the trial court erred in finding that the wrong policy was issued for the Terrebonne vessel. Chabert contends that there was sufficient evidence to show that Terrebonne asked for a policy to insure a pleasure vessel and did not want to pay for a more costly commercial policy.

Be that as it may, the trial court ruled in favor of Terrebonne and the record supports that this ruling was not manifestly erroneous. First, Terrebonne testified that she told the agent that she bought the vessel for a commercial use. Second, a Chabert employee testified that she was aware that the vessel was going to be used to trawl for shrimp commercially. She also testified that her employer, Philip Chabert, told her to use the term "for pleasure purposes" on the application. This employee further testified that Philip Chabert said that Progressive refused to insure vessels used for commercial purposes and that he wanted the business. Third, Philip Chabert testified that he had lived on the bayou for many years and had insured numerous Lafitte skiffs in his twenty-nine years in the insurance business. Terrebonne's expert, P.E. Gilligan, testified that in his experience Lafitte skiffs are shrimp boats and are always used for trawling for shrimp commercially.

As discussed in ***Cusimano v. St. Paul Fire and Marine Ins.* Co.**, 405 So.2d 1382, 1385, (La.App. 1 Cir. 1981), an insurance agent who undertakes to procure coverage for a client owes an obligation to use reasonable diligence in obtaining the requested insurance and has a duty to notify the client promptly if it has failed to do so. Under the particular circumstances of this case, we conclude that it was not manifestly erroneous for the trial court to conclude that Terrebonne relied on Chabert's expertise in the insurance trade to obtain the correct coverage on her Lafitte skiff shrimp boat. Thus, this assignment of error is without merit.

FAILURE TO MITIGATE DAMAGES

Chabert argues that trial court erred in not reducing the award amount by the vessel's salvage value. Citing ***Robertson v. Geophysical Service, Inc.***, 469 So.2d 22, 24 (La.App. 1 Cir. 1985), Chabert contends that

Terrebonne was negligent when she failed to flush the engine to preserve it. It maintains that this failure to mitigate damages should bar recovery or at least cause the award to be reduced by the salvage value.

We disagree. Cade LeBouef, Progressive's adjuster, testified that the damage far exceeded the policy limits; he estimated the damage to be well over policy limits without counting the engine damage. Thus, the record supports a conclusion that the engine not being properly "pickled and preserved" made no difference in the claim as the damage exceeded the policy limits. Therefore, this assignment of error is without merit.

JUDICIAL INTEREST AWARD

In Chabert's final assignment of error, it argues that the trial court erred in awarding judicial interest originating back to the date suit was filed against Progressive and before it was added as a party defendant. Chabert claims that since the factors set forth in ***Ray v. Alexandria Mall***, 434 So.2d 1083 (La. 1983), do not fit this lawsuit, the court erred in awarding interest back to the original demand. Specifically, Chabert argues that LSA-C.C.P. art. 1153 does not authorize the relation back of a wholly new defendant with wholly new causes of actions; the tortious acts alleged against it are entirely different than those alleged against Progressive in the original suit.

In ***Cole v. Celotex Corp.***, 599 So.2d 1058, 1082 (La. 1992), the court stated that LSA-C.C.P. art. 1153, which ordinarily is applied to interrupt prescription, also applies to pre-judgment interest. LSA-C.C.P. art. 1153 provides that when the action asserted in the amended petition arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to date of the original petition. In ***Mehta v. Baton Rouge Oil Co.,*** 99-1773, p. 5 (La.App. 1 Cir. 9/22/00), 768 So.2d 243, 246, *citing* ***Gunter v. Plauche***, 439 So.2d 437, 441

(La. 1983), the court stated that the amendment related back if the transaction or occurrence giving rise to the object of the suit remains unchanged by the amendment, even if the defendants' wrongs differ, so long as the facts of the transaction which created both duties are similar enough to support a relation back of the amending petition.

In pertinent part, the ***Ray v. Alexanderia Mall***, 434 So.2d at 1087, factors are: (1) the amended claim must arise out of the same transaction and occurrence as set for the in the original petition; (2) the new defendant must have received notice of the original action so that he will not be prejudiced in maintaining a defense; (3) the new defendant must know or should have known that but for a mistake the action would have been brought against him and; (4) the wholly new defendant must not be a new or unrelated defendant, since this would be tantamount to a new cause of action which would otherwise have prescribed. ***Id.***

Here, although the theories of recovery against Progressive and Chabert differ, the alleged breach of duties is based upon the same transaction and occurrence. Chabert knew that Terrebonne sued Progressive for failing to pay the claim. Chabert was also aware that as the agent placing coverage it would in all likelihood also be named in the lawsuit. We conclude that the facts of the transaction creating both duties are similar enough to support the petition to relate back. Therefore, we conclude that the trial court did not err in awarding judicial interest from the date the original suit was filed. Thus, this assignment of error is without merit.

DECREE

For the above reasons, the judgment of the trial court is affirmed. The cost of this appeal is assessed against Chabert Insurance Agency.

AFFIRMED