

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2005 CA 2007

JACQUELINE DELIBERTO

VERSUS

STATE OF LOUISIANA, THROUGH DEPT. OF TRANSPORTATION
AND DEVELOPMENT, ET AL.

Judgment Rendered: September 15, 2006

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 489,954

The Honorable Janice Clark, Judge

Mark M. Gonzalez
Arthel J. Scheuermann
New Orleans, LA

Attorneys for
Plaintiff – Appellant
Jacqueline Deliberto

Kelly E. Balfour
Baton Rouge, LA

Attorney for
Defendant – Appellee
Progressive Security
Insurance Company

Charles C. Foti, Jr., Attorney General
Thomas A. Lane, Asst. Attorney General
Baton Rouge, LA

Attorneys for
Defendant – Appellee
State of Louisiana,
DOTD

BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

WELCH, J.

Appellant, Jacqueline Deliberto, challenges the involuntary dismissal of her suit against her uninsured/underinsured motorist insurance carrier (UM carrier), Progressive Security Insurance Company (Progressive). For the reasons that follow, we reverse and remand this matter to the trial court for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

On March 25, 2001, Ms. Deliberto was involved in an automobile accident in Baton Rouge, Louisiana, when the vehicle she was driving was struck by a vehicle driven by Brenda Burrell. On November 20, 2001, Ms. Deliberto filed suit in the Nineteenth Judicial District Court for the Parish of East Baton Rouge against Ms. Burrell, the Louisiana Department of Transportation and Development (DOTD), and United National Insurance Company (United), Ms. Burrell's automobile liability insurance carrier. In the petition, Ms. Deliberto requested that all defendants be served at the addresses provided. The service returns are not in the record; however, Ms. Deliberto acknowledges that Ms. Burrell was never served with the petition despite the request for service.

On November 15, 2004, more than three years after the date of the accident, Ms. Deliberto amended her petition to add Progressive as a defendant in its capacity as her UM carrier. As she did with the original petition, Ms. Deliberto requested service on all defendants, including Ms. Burrell. Again, however, Ms. Burrell apparently was not served.

In response to the amended petition, Progressive filed a peremptory exception pleading the objection of prescription. In its memorandum in support of the exception, Progressive argued that prescription had never been interrupted as to it, because it was not solidarily liable to Ms. Deliberto with any of the original defendants; thus, Ms. Deliberto's amended petition, which named Progressive as a defendant for the first time more than three years after the accident, was not timely

filed. After a hearing, the trial court ruled in open court that the claim against Progressive was prescribed. A written judgment involuntarily dismissing Ms. Deliberto's claim against Progressive with prejudice was signed on June 21, 2005.¹ It is from this judgment that Ms. Deliberto appeals.

DISCUSSION

Liberative prescription is a mode of barring of actions as a result of inaction for a period of time. La. C.C. art. 3447. An action against a UM carrier is subject to the two-year liberative prescriptive period provided by La. R.S. 9:5629, which states:

Actions for the recovery of damages sustained in motor vehicle accidents brought pursuant to uninsured motorist provisions in motor vehicle insurance policies are prescribed by two years reckoning from the date of the accident in which the damage was sustained.

Prescription is interrupted by the filing of suit in a court of competent jurisdiction. La. C.C. art. 3462. The interruption of prescription against one solidary obligor is effective against all solidary obligors. La. C.C. arts. 1799 and 3503. An interruption of prescription resulting from the filing of a suit in a competent court continues as long as the suit is pending. La. C.C. art. 3463.

Because Progressive was not named as a defendant until the amended petition was filed more than three years after the accident, Ms. Deliberto's claim against Progressive is prescribed on its face. However, the record is clear that Ms. Burrell, the alleged tortfeasor, was timely sued in a competent court. Furthermore, despite Progressive's assertions to the contrary in the trial court, it is well settled that Progressive, as Ms. Deliberto's UM carrier, is solidarily liable with Ms. Burrell for the damages sustained by Ms. Deliberto in the accident. See Rizer v.

¹ On the same day that Ms. Deliberto's claim against Progressive was dismissed in open court, the trial court also dismissed Ms. Deliberto's claim against DOTD. However, the written judgment in the record only refers to the claim against Progressive. In her brief to this court, Ms. Deliberto states that she expects a judgment concerning DOTD will be signed and appealed in due course. No such judgment is presently before this court; therefore, this court will address only those claims against Progressive.

American Surety and Fidelity Insurance Company, 95-1200 (La. 3/8/96), 669 So.2d 387, 389; **Hoefly v. Government Employees Insurance Company**, 418 So.2d 575, 578-79 (La. 1982). Therefore, the timely suit filed against Ms. Burrell operated to interrupt prescription against Progressive as a solidary obligor.

In its brief to this court, Progressive appears to acknowledge that it is solidarily liable with Ms. Burrell and that suit against Ms. Burrell interrupted prescription against Progressive. Nevertheless, Progressive contends that the suit against it has prescribed because Ms. Burrell has never been served with a petition in this matter. In support of this argument, Progressive relies on La. C.C.P. art. 1201C, which provides:

Service of the citation shall be requested on all named defendants within ninety days of commencement of the action. When a supplemental or amended petition is filed naming any additional defendant, service of citation shall be requested within ninety days of its filing. The defendant may expressly waive the requirements of this Paragraph by any written waiver.

By its terms, the article clearly requires only that the request for service be made within the ninety-day period, not that service be perfected in that time period. Because each of her petitions specifically requested that service be made on Ms. Burrell and the other defendants, Ms. Deliberto has complied with the requirements of this article. Moreover, Progressive has not cited, nor is this court aware of, any jurisprudence or statutory authority to support the contention that the tortfeasor must actually be served before prescription will be interrupted against a solidary obligor.² Therefore, we find that the trial court erred in involuntarily dismissing Ms. Deliberto's suit against Progressive on the ground that it had prescribed.

² It is true that La. C.C. art. 3462 provides that prescription is interrupted only as to a defendant served by process within the prescriptive period when the action is commenced in an incompetent court or in an improper venue. However, the Nineteenth Judicial District Court is clearly a court of competent jurisdiction, and there have been no allegations that the suit was filed in an improper venue. Therefore, we find no merit in Progressive's argument.

DECREE

For the reasons assigned above, we hereby reverse the judgment of the trial court and remand this matter to the trial court for further proceedings. All costs of this appeal are assessed to defendant, Progressive Security Insurance Company.

REVERSED AND REMANDED.