NOT DESIGNATED FOR PUBLICATION

ROBERT SHIPLEY	*	**NO. 2003-CA-0040**
VERSUS	*	**COURT OF APPEAL**
MARTHA BOLAND, USAA INSURANCE COMPANY AND STATE FARM INSURANCE	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	

*** * * * * * ***

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2000-12417, DIVISION "H-12"
Honorable Michael G. Bagneris, Judge
* * * * * *
Judge Patricia Rivet Murray
* * * * * *

(Court composed of Judge Patricia Rivet Murray, Judge James F. McKay, III, Judge David S. Gorbaty)

Frank A. Bruno
807 Howard Avenue
New Orleans, LA 70113
COUNSEL FOR PLAINTIFF/APPELLANT

Matthew J. Ungarino
Emile A. Bagneris, III
David I. Bordelon
UNGARINO & ECKERT, LLC
3850 North Causeway Boulevard
1280 Lakeway Two .
Metairie, LA 70002
COUNSEL FOR DEFENDANT/APPELLEE
(WESTERN HERITAGE INSURANCE COMPANY)

AFFIRMED

Plaintiff, Robert Shipley, appeals the trial court's judgment maintaining an exception of prescription asserted by defendant, Western Heritage Insurance Company. For the reasons that follow, we affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On August 17, 1999, plaintiff/appellant, Robert Shipley, was involved in a three-car, rear-end collision. According to the accident report, the vehicle driven by Patricia Collier struck the vehicle driven by Martha Boland, which in turn struck Mr. Shipley's vehicle. Jeff Payne Motors was the owner of the vehicle driven by Mr. Shipley. Mr. Shipley was considering purchasing the vehicle at the time of the accident.

Before the one-year prescriptive period expired, Mr. Shipley settled with Ms. Collier and her insurer, Metropolitan Insurance, for the policy limits. Mr. Shipley then filed suit against Ms. Boland and her insurer, United States Automobile Association Insurance Company [USAA], and against his own personal uninsured motorist carrier, State Farm Mutual Automobile Association [State Farm]. Thereafter, Ms. Boland and USAA were granted a summary judgment on the issue of liability, and were

dismissed from the suit. State Farm remained a defendant.

In March of 2002, Mr. Shipley amended the original petition to name Western Heritage Insurance Company [Western Heritage] as an additional defendant. Western Heritage was the uninsured motorist carrier on the vehicle owned by Jeff Payne Motors and driven by Mr. Shipley. Western Heritage filed an exception of prescription, which was granted on October 25, 2002. From that judgment, Mr. Shipley takes this appeal.

ASSIGNMENT OF ERROR

Mr. Shipley's only assignment of error asserts that the trial court erred in granting the exception of prescription in favor of Western Heritage. In support of this assignment, the appellant submits that the law is unequivocal regarding the interruption of prescription against solidary obligors. Appellant cites La. C.C. art. 3503, which states, "When prescription is interrupted against a solidary obligor, the interruption is effective against all solidary obligors, and their successors."

Appellant argues that prescription in this case was interrupted when the original petition was filed against Ms. Boland, USAA, and State Farm. He contends that State Farm is an obligor under his personal UM coverage, and Western Heritage is an obligor under the UM coverage provided on the vehicle that he was driving at the time of the accident. The thrust of Mr.

Shipley's argument is that the two defendants are joint and solidary obligors, and the filing of suit against State Farm served to interrupt prescription against Western Heritage.

Appellant Shipley also contends that the jurisprudence relied on by Western Heritage, namely, Tallman v. Champion Insurance Company, 611 So. 2d 759 (La. App. 4th Cir. 1992), is contrary to the Civil Code articles that recognize differing relationships between solidary obligors. In Tallman, this court held that because the UM coverage on the "vehicle" was primary and the UM coverage on the "driver" was secondary, the defendants were not solidary obligors; therefore, interruption of prescription against one did not interrupt as to the other.

Mr. Shipley contends that the holding in Tallman is inconsistent with La. C.C. art 1798, which states, "an obligation may be solidary though for one of the obligors it is subject to a condition or term." He argues that, pursuant to article 1798, the fact that one obligor may be compelled to pay before another (a condition or term) does not negate the underlying character or nature of the solidary obligation between the two. According to this argument, both uninsured motorist policies serve the same purpose, that is, to compensate the insured victim in the event of an uninsured or underinsured tortfeasor. It is therefore asserted by Mr. Shipley that both

defendants provide “excess” coverage, and the fact that one must pay before the other is of no relevance in determining whether their obligations are solidary.

In the alternative, appellant asserts that the doctrine of contra non valentem should apply in this case. Specifically, Mr. Shipley submits that he made numerous attempts to contact Jeff Payne Motors, the owner of the vehicle that he was operating. Mr. Shipley suggests that these attempts were ignored, and it was not until the prescriptive period had passed that he discovered Western Heritage provided the uninsured motorist coverage on the vehicle.

The doctrine of contra non valentem is a judicially created doctrine which holds that “prescription does not run against a party unable to act.” James v. Formosa Plastics, 95-1794, p.5 (La. App. 1 Cir. 4/6/96), 672 So. 2d 319, 323. The doctrine applies when the debtor himself has done some act effectively to prevent the creditor from availing himself of his cause of action. Wimberly v. Gatch, 93-2361 (La. 4/11/94), 635 So. 2d 206, 211.

In the instant case, Mr. Shipley asserts that Jeff Payne Motors effectively hid its insurance carrier by ignoring correspondence and telephone calls until the time for suing the UM carrier had elapsed. Mr. Shipley therefore contends that the exception of prescription should have

been denied, and the trier of fact should have been given the opportunity to determine whether the doctrine of contra non valentem applies at a trial on the merits.

In opposition to this appeal, Western Heritage submits that no Louisiana case has held two separate UM carriers, with different insureds and different vehicles, solidarily liable. To the contrary, it points out that this court in Tallman specifically held that UM carriers are not solidary obligors.

Western Heritage further argues that the Tallman case is in line with the statutory provisions governing uninsured motorist coverage. In particular, it asserts that the UM carriers are not solidarily liable under La. R.S. 22:1406D(1)(aa), which provides the method for ranking, or stacking UM policies. Pursuant to La. R.S. 22:1406D(1)(aa) and La. R.S. 22:1406D (1)(bb), the UM coverage on the vehicle is statutorily required to be primary. Accordingly, Western Heritage contends that the obligations of the parties are not solidary because the driver's UM carrier will not be obligated to pay unless or until the primary UM carrier's limits are exhausted.

Finally, Western Heritage argues that the doctrine of contra non valentem, which is designed to protect one who is ignorant of the facts upon which his cause of action is based, does not apply in this case. Western

Heritage argues that in this situation, because Mr. Shipley was aware of the identity of the potential party and cause of action, but failed to follow up on this information, other than with correspondence and telephone calls, the doctrine is inapplicable.

DISCUSSION

The issue presented for our consideration is whether an accident victim's personal UM carrier is solidarily liable with the UM carrier on the vehicle that he was operating. We addressed this issue in Tallman, and held that the UM carriers were not solidary, and therefore, suit against one did not interrupt prescription against the other.

In Tallman, the plaintiff was operating a vehicle owned by National Car Rental Systems, Inc. [National], and was involved in an accident with an unknown tortfeasor. Suit was filed against the plaintiff's own UM carrier. More than two years after the accident, the plaintiff amended the original suit to name National, alleging that it provided UM coverage. In discussing the question of solidarity of the two UM carriers, we stated:

> On the date of the alleged accident, R.S. 22:1406(D)(1)(c)(i), provided that, with respect to bodily injury to an injured party while occupying a vehicle not owned by said injured party, the UM coverage on the vehicle in which the injured party was an occupant is primary. Thus, assuming the correctness of the plaintiff's allegation that he was injured while an occupant of the vehicle owned by National, the UM coverage of National would be the primary coverage and the plaintiff's UM carrier would be liable for the excess. The

> obligations are different and thus are not solidary. Guitreau v. State Farm Mutual Automobile Company, et al, 540 So.2d 1097 (La. App. 1 Cir.1989).

611 So. 2d at 761.

We further held in Tallman that the obligations of the primary and the excess carrier were not solidary, and that the filing of a lawsuit against the excess carrier (plaintiff's UM) did not interrupt prescription against the primary carrier (National's UM). The Tallman case is directly on point with the instant case, and accordingly, we adopt the same reasoning to find that Mr. Shipley's UM carrier and Western Heritage are not solidarily liable.

Finally, we are not persuaded by appellant's argument that the doctrine of contra non valentem should be applied in this case. In Wimberly, supra, at 211, the Louisiana Supreme Court explained that, generally, the doctrine of contra non valentem suspends prescription when the circumstances of the case fall into one of the following four categories:

1. Where there was some legal cause which prevented the courts or their officers from taking cognizance of or acting on the plaintiff's action;
2. Where there was some condition coupled with a contract or connected with the proceedings which prevented the creditor from suing or acting;
3. Where the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action; and
4. Where some cause of action is not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the

defendant.

Mr. Shipley asserts that this case falls into the third category. However, in our view, the mere fact that Jeff Payne Motors ignored requests for information regarding the name of its insurer does not equate to a situation in which Mr. Shipley was prevented from availing himself of his cause of action.

CONCLUSION

Following our holding in Tallman, we find that the two UM carriers, Western Heritage and State Farm, are not solidarily liable, and therefore, the original suit against State Farm did not interrupt prescription against Western Heritage. Accordingly, the trial court's granting of the exception of prescription is affirmed.

AFFIRMED