

CHRIS JOHN VARNEDOE

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NO. 2003-CA-0384

VERSUS

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COURT OF APPEAL

**RENDELL RUSSELL, NOBEL
INSURANCE COMPANY,
JOLENE OSTENDORF, AND
UNITED NATION INSURANCE
COMPANY**

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FOURTH CIRCUIT

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STATE OF LOUISIANA

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2002-11618, DIVISION "H-12"
Honorable Michael G. Bagneris, Judge

JUDGE

JOAN BERNARD ARMSTRONG

(Court composed of Judge Joan Bernard Armstrong, Judge Michael E. Kirby
and Judge Max N. Tobias Jr.)

**TOBIAS, J., CONCURS IN PART, DISSENTS IN PART, AND ASSIGNS
REASONS.**

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**REVERSED AND
REMANDED.**

Plaintiff-appellant, Chris John Varnedoe, filed a motion for devolutive appeal from the November 22, 2002 judgment of the Civil District Court, granting exceptions of prescription in favor of defendants-appellees, United National Insurance Company (United) and Nobel Insurance Company (Nobel). The lawsuit originated in the 19th Judicial District Court, but was transferred to the Civil District Court for the Parish of Orleans pursuant to the granting of an exception of venue in favor of United. Although appellant has appealed the granting of the exception of prescription, appellant's brief to this court addresses only the issue of the exception of venue from the 19th Judicial District Court.

STATEMENT OF FACTS AND PROCEDURAL HISTORY:

On December 15, 2000, appellant was operating his automobile on Interstate 10 in the Parish of Orleans when he was struck from the rear by two vehicles driven by defendants, Russell and Ostendorf. Nobel insured

the Russell vehicle and United insured the Ostendorf vehicle.

Appellant filed a petition for damages in the 19th Judicial District Court in East Baton Rouge Parish on December 7, 2001. Both United and Nobel were served on December 17, 2001. Thereafter, Nobel filed an answer to the petition and United filed a declinatory exception of improper venue, contending that venue was not proper in East Baton Rouge Parish. The exception of venue was granted in favor of United on May 22, 2002 and, even though Nobel answered the suit and did not except to venue, the entire matter was transferred to the Civil District Court. Appellant did not seek a new trial or an appeal from that judgment.

After transfer to the Civil District Court, Nobel and United filed exceptions of prescription, which were heard on November 22, 2002. The exceptions were based on the argument that the lawsuit was filed in a parish of improper venue, as evidenced by the granting of the exception of venue, and that the defendants were not served until more than one year after the accident. Appellees cited La. C.C. art. 3462, which provides:

Prescription is interrupted when the owner commences action against the possessor or when the obligee commences action against the obligor, in a Court of competent jurisdiction and venue. *If action is commenced in an incompetent Court, or in an improper venue, prescription is interrupted only as to a defendant served by process within the prescriptive period.*
(Emphasis added)

The lower court granted the exceptions of prescription and appellant's lawsuit was dismissed with prejudice. Appellant filed a devolutive appeal from the judgment granting the exceptions of prescription, but as previously stated, appellant's entire argument on appeal is directed to the granting of the exception of improper venue from the 19th Judicial District Court.

ASSIGNMENT OF ERROR:

In his sole assignment of error, appellant asserts that venue was proper in East Baton Rouge Parish and that the 19th Judicial District Court's granting of the exception of improper venue should be reversed. The legal basis for appellant's argument is that La. C.C.P. art 42(7) allows for a suit against a foreign insurer in the parish of East Baton Rouge. Appellant also cites Sims v. Cefolia, 2000-0030 (La.App. 4 Cir. 2/23/00), 755 So. 2d 358, in support of the premise that the plaintiff may sue a foreign insurer in East Baton Rouge Parish if the plaintiff so chooses.

In opposition to this appeal, Nobel submits that appellant's assignment of error is flawed and does not address the decision of the Civil District Court, which is the only lower court from which an appeal could be taken. Specifically, it is asserted by Nobel that the proper court of appeal to review the venue issue from East Baton Rouge Parish would have been the First Circuit Court of Appeal. It is further argued by Nobel that the delays

for appealing the issue of improper venue, even to the proper court of appeal, have passed and as such this appeal should be denied.

United joins in Nobel's argument and submits that the delays for appealing the May 22, 2002 judgment from the 19th Judicial District Court have long passed and that this appeal should be dismissed. In addition, United has filed an answer to this appeal, seeking damages against appellant for the filing of a frivolous appeal. Specifically, United asserts that there is no legitimate basis for the appeal and as such seeks an award of attorney's fees and costs for having to defend this appeal.

DISCUSSION:

Appellant has appealed the Civil District Court's granting of the exceptions of prescription, however, appellant's only assignment of error addresses the granting of the exception of improper venue from the 19th Judicial District Court. The failure of an appellant to present an assignment of error was discussed by the Louisiana Supreme Court in Georgia Gulf Corp. v. Board of Ethics for Public Employees, 96-1907 (La. 5/9/97), 694 So. 2d 173, 176, wherein it was established:

La. C.C.P. art. 2129 provides that an assignment of error is not necessary in any appeal. . . . Moreover, La. C.C.P. art. 2164 provides that an appellate court "shall render any judgment which is just, legal, and proper upon the record on appeal." As noted in the Official Revision Comments under Art. 2164, the appellate court has "complete freedom to do justice on the record irrespective of whether a particular legal

point or theory was made, argued, or passed on by the court below." In a similar vein, Uniform Rules of Louisiana Court of Appeal, Rule 1-3 provides that even in the absence of an assignment of errors, the appellate court can review such issues if the "interest of justice clearly requires....".

See also, Nicholas v. Allstate Ins. Co., 99-2522 (La. 8/31/00), 765 So. 2d

1017. Under the pronouncement cited herein above, this court has the right to consider the issue of prescription even though there was no assignment of error in that regard. Further, we do not find this ruling to be contrary to Rule 2-12.4 of the Local Rules of Court, which deems an assignment of error to be abandoned if not briefed by appellant. In our opinion, appellant indirectly briefed the prescription issue as it is intricately related to the issue of venue.

Our review of the record leads us to conclude that the trial court had no basis for considering the exception of prescription filed by Nobel. Notwithstanding the arguments of the parties, our review of the May 22, 2002 judgment issued by the judge of 19th Judicial District Court leads us to conclude that the judgment only applied to United. The judgment clearly states that the matter came for hearing "on declinatory exception of improper venue filed by exceptor, United National Insurance Company." Further, the judgment states:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Declinatory Exception of Improper Venue filed by exceptor, United National Insurance Company, be and

is hereby granted.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this matter be and is hereby transferred to the Civil District Court for the Parish of Orleans pursuant to Louisiana Code of Civil Procedure Articles 121 and 932.

Our conclusion that the judgment only transferred the matter insofar as it related to United is buttressed by the fact that Nobel never filed an exception of improper venue in 19th Judicial District Court. Rather, on February 2, 2002, Nobel answered the plaintiff's petition. Clearly Nobel waived any venue exception. Because the judgment necessarily only applied to United, the plaintiff had no reason to appeal the transfer of the case as it related to Nobel. Accordingly, the judgment granting Nobel's exception of prescription and dismissing all claims against Nobel with prejudice is reversed.

The next issue to be considered by this court is whether the Civil District Court erred in granting the exception of prescription filed by United. In this regard we note that United's exception of prescription was based on the premise that the lawsuit was filed in a parish of improper venue, as evidenced by the granting of the exception of venue by the trial judge of the 19th Judicial District Court. Appellant urges this court to reverse the judgment of the 19th Judicial District Court and transfer the case back to the 19th Judicial District Court. However, this court is without authority to do

so. The appellate court having authority to review the judgment of 19th Judicial District Court is the First Circuit. Yet, appellant failed to seek a timely appeal or review by supervisory writs in the First Circuit. Accordingly, it appears that the judgment is final as between appellant and United.

Nevertheless, in paragraph 9 of his petition for damages, appellant alleges that all the defendants are “liable in solido” for the damages he suffered in the collision. In Louisiana, a suit against one solitary obligor interrupts prescription as to other solitary obligors. Detillier v. Sullivan, 96-220, 96-274 (La.App. 5 Cir. 5/27/98), 714 So. 2d 244; Hayden v. Gittens, 97-0726 (La.App. 4 Cir. 12/10/97), 704 So. 2d 927. Thus, if United is solidarily liable with the other defendants, it would appear that prescription has not run if the other defendants were timely served. Clearly United is solidarily liable with Nobel, and although we are not free to re-examine the venue issue as it relates to United, we may consider the issue of whether venue was proper as to Nobel.

To review the granting of the exceptions of prescription, which in this instance, is based on a question of improper venue, we must consider a similar case decided by this court. In Hayden, plaintiff filed a lawsuit in his own domicile, St. Tammany Parish, for an automobile accident that occurred

on September 14, 1992 in Orleans Parish. Hayden sued Triple E Transport (Triple E), the owner of the other vehicle involved in the accident, Gittens, Triple E's employee, and the driver of the other vehicle, Hayden's UM insurer, as well as the insurers of Gittens and Triple E. Service of the petition was accomplished only as to one insurer on October 7, 1993, more than one year after the accident. Hayden motioned the court to have his suit transferred to Orleans Parish for consolidation with other suits filed there arising out of the same accident. Hayden's motion was granted and the matter was transferred on December 16, 1993. Triple E was served with the petition for the first time on February 17, 1995. Gittens was never served. After the transfer, Triple E and Gittens filed an exception of prescription claiming that, pursuant to La. C.C.P. art. 3462, prescription was not interrupted by the filing of the original lawsuit in an improper venue. The exception of prescription was granted and Hayden appealed that judgment. On appeal, this court held that the validity of the prescription exception hinged upon a determination of whether St. Tammany Parish was a proper venue and whether Triple E, Gittens, and Hayden's UM carrier were solidary obligors. Upon a finding that venue was proper in St. Tammany, we held that the case had not prescribed pursuant to article 3462.

In this case, as in Hayden, the issue of prescription hinges on a

determination of whether venue was proper in East Baton Rouge Parish. Appellant, in the present case, filed suit in East Baton Rouge Parish against the two defendant drivers, both domiciled in Orleans Parish, and their insurers, both foreign insurance companies authorized to do business in the State of Louisiana. La. C.C.P. art. 42(7) provides one of the general venue rules applicable to this case. It states: “The general rules of venue are that an action against: (7) A foreign or alien insurer shall be brought in the parish of East Baton Rouge.” Clearly, appellant chose to file his petition, which included two foreign insurance companies, in a parish of proper venue. Although proper venue was not exclusive to East Baton Rouge Parish in the present case, it was certainly permissible pursuant to La. C.C.P. art. 42(7).

Because East Baton Rouge Parish was a proper venue for appellant to have filed his lawsuit, and because Nobel waived venue by filing an answer, we find that the restriction on the interruption of prescription under La. C.C. art. 3462 does not apply to Nobel. Clearly, Nobel and United are solidary obligors, and because prescription was interrupted as to Nobel, it was also interrupted as to United.

Finally, United’s request for attorney’s fees is denied. Damages for a frivolous appeal are appropriate when it is clear that the appeal was taken solely for the purpose of delay or when it is evident that counsel does not

seriously advocate the position taken. West v. Collins, 94-0682 (La.App. 4 Cir. 12/28/94), 648 So. 2d 500; Succession of Lane, 95-0558 (La.App. 4 Cir. 9/28/95), 662 So. 2d 82. We do not find that these factors exist in the present case.

For the foregoing reasons, the judgment of the trial court granting the exceptions of prescription in favor of United and Nobel is reversed and this matter is remanded to the trial court for consideration of the merits.

**REVERSED AND
REMANDED.**