Editor's note: opinion released April 25, 2000

SUPREME COURT OF LOUISIANA

No. 99-C-2610

JULES ETIENNE, SR.

VERSUS

NATIONAL AUTOMOTIVE INSURANCE COMPANY, ET AL.

CALOGERO, Chief Justice, Dissents

The majority opinion holds that the plaintiff's vicarious liability claim against the Morrow law firm was eliminated when the plaintiff allowed that claim to prescribe after dismissing Sebastien and her insurer from the law suit with prejudice. I disagree. I believe that the timely suit against American Indemnity interrupted the running of prescription against the Morrow law firm; therefore, both the majority and the court of appeal have erroneously dismissed the plaintiff's claim against American Indemnity and the Morrow law firm. Notwithstanding my view, this court, at the very least, should remand the case for a determination as to whether American Indemnity is the insurer for the law firm's vicarious liability under this policy or any other policy issued by American Indemnity to the law firm.

In the instant case, the plaintiff initially filed suit against the defendant Sebastien and her liability carrier. During discovery conducted within the one-year prescriptive period, the plaintiff requested that the law firm produce insurance policies issued to the law firm purporting to cover Sebastien. After the law firm produced a policy issued by American Indemnity, the plaintiff, still within the one-year time period, amended his original pleading to name American Indemnity as a defendant, asserting that the company was an insurer of Sebastien. After the one-year period had run, the plaintiff settled with Sebastien and her liability insurer, but reserved his rights against American Indemnity. Prior to trial, the parties became aware that counsel for each had

different policies issued by American Indemnity: a personal policy issued to the law firm's senior partner and a commercial lines policy issued to the law firm. In a *joint* motion for continuance, the attorneys for the plaintiff and American Indemnity acknowledged the existence of the different policies and indicated that a coverage question had arisen upon this discovery. Thereafter, the plaintiff again amended his petition to name the law firm as a defendant in its capacity as the employer of Sebastien, alleging that the law firm was vicariously liable for its employee's negligence while in the course and scope of her employment.

If American Indemnity is the insurer for the Morrow law firm's vicarious liability in this accident, then the timely suit against American Indemnity, the Morrow law firm's solidary obligor, interrupted the running of prescription as to the law firm, regardless of the pleaded basis for American Indemnity's liability exposure. An insurer and his insured are obligors in solido. *See Ray v. Alexandria Mall*, 434 So. 2d 1083, 1083 n. 1 (La. 1983).[1] The interruption of prescription against one solidary obligor is effective against all solidary obligors. La. Civ. Code arts. 1799 and 3503. As we stated in *Langlinais v. Guillotte*, 407 So. 2d 1215 (La. 1981):

> [I]t is well settled that under [former] La. Civ. Code art. 2097 [now La. Civ. Code art. 1799], since an insurer and its insured are solidary obligors, suit timely filed against the insurer interrupts the running of prescription against the insured.

407 So. 2d at 1218-19 n. 2 (citations omitted).

After finding that Sebastien was excluded as an "insured" under the commercial lines policy in the record, the majority passes over the question whether the commercial lines policy issued by American Indemnity to the law firm covers the law firm's vicarious liability for its employee's negligent operation of an otherwise

---

[1]In *Ray*, this court observed that "[u]nder Louisiana law, an insured and his liability insurer are solidarily liable, and suit against one solidary obligor interrupts prescription as to all, even if they are not named in the original complaint." 434 So. 2d at 1083 n. 1.

"covered auto." Although Sebastien herself may have been excluded as an "insured" under the language of the commercial auto policy in Section II(A)(1)(b)(2), Sebastien's vehicle was a "covered auto" for purposes of liability coverage under Item 2 (Schedule of Coverages and Covered Autos) and Section I(A). American Indemnity in Section II(A) has contracted to "pay all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies, caused by an 'accident' and resulting from the ownership, maintenance or use of a covered 'auto.'" The law firm is certainly an "insured" under the policy, and Sebastien's vehicle was a "covered auto" that was being used in the course and scope of her employment with the law firm. Section II(B)(4) of the policy contains an exclusion for bodily injury to the "employee" acting in the course and scope of her employment, but it does not exclude coverage for bodily injury to a third party "where the 'insured' may be liable as an employer or in any other capacity." These provisions, and their inherent ambiguity, lead me to conclude that the policy provides coverage for the law firm's vicarious liability for this accident. Because American Indemnity, as the law firm's insurer, is an obligor in solido with the Morrow law firm for this accident, the plaintiff's timely petition against American Indemnity interrupted prescription as to its insured, the law firm.[2]

At any rate, there has been no factual determination by the lower courts as to whether American Indemnity is the insurer for the law firm's vicarious liability for this accident under this or any other policy issued by American Indemnity to the law firm. The burden of proof is usually on the party pleading prescription; however, if on the face of the petition it appears that prescription has run, then the burden shifts to the

[2]The majority makes no determination as to whether American Indemnity and the Morrow law firm, solidary obligors as insurer and insured, were also solidarily obligated with the law firm's employee, Sebastien, because all three were "obliged to the same thing," i.e., total reparation for the plaintiff's injuries. *See Sampay v. Morton Salt Co.*, 395 So. 2d 326, 328 (La. 1981).

plaintiff to show that a suspension or interruption of the prescriptive period. *Younger v. Marshall Industries, Inc.*, 618 So. 2d 866, 869 (La. 1993). If the plaintiff's basis for claiming interruption of prescription is solidary liability between two or more parties, then the plaintiff bears the burden of proving that solidary relationship. *Id.* Here, the issue of whether American Indemnity and the law firm are solidary obligors has not yet been tried. The plaintiff was apparently never required to prove that the commercial lines policy covered the law firm's vicarious liability exposure for this accident during which a "covered auto" was involved. Nor was the plaintiff given an opportunity to amend the pleadings and introduce a general liability policy issued by American Indemnity to the law firm, assuming such a policy exists. That the plaintiff may have initially sued American Indemnity ostensibly as the employee's direct insurer does not preclude the plaintiff from amending his suit to assert the actual insured for whom American Indemnity stands in under this policy or any other applicable policy.

Lastly, the appellate court correctly observed that the plaintiff was required to join both American Indemnity and its insured, the law firm, because none of the conditions set forth in the recently amended Direct Action Statute were present in this case. *See* La. Rev. Stat. 22:655. However, the plaintiff did properly amend his original pleading and join the Morrow law firm prior to trial. The trial court specifically found that "the plaintiff's addition of Morrow, Morrow, Ryan and Bassett as a named defendant was timely and proper."

For the reasons noted above, I would conclude that prescription was interrupted when the amended petition was filed naming the law firm as a defendant. Alternatively, pretermitting for the time being the prescription issue, we ought to remand the case for a determination on the issue of whether American Indemnity and the law firm are solidary obligors.