NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 CA 2054

QUESO GRANDE PRODUCTIONS, INC.

VERSUS

TRAVELERS INSURANCE COMPANY

Judgment Rendered: May 6, 2011

Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Docket Number 2007-14759

Honorable William J. Knight, Judge Presiding

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Albert J. Nichaud **Timothy P. Farrelly** **Metairie, LA**	**Counsel for Plaintiff/Appellant,** **Queso Grande Productions, Inc.**
Terrence C. McRea **Dallas, TX**	**Counsel for Defendant/Appellee,** **St. Paul Fire and Marine Ins. Co.**

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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

WHIPPLE, J.

Plaintiff, Queso Grande Productions, Inc. ("Queso Grande"), appeals a judgment dismissing its petition for damages filed against defendant, St. Paul Fire and Marine Insurance Company ("St. Paul") on the basis that prescription had run before this defendant was named and that the amended petition naming St. Paul did not relate back to plaintiff's timely filed petition against the original defendant, Travelers Insurance Company. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

On August 29, 2007, Queso Grande filed a petition for damages, naming as defendant Travelers Insurance Company. In its petition, Queso Grande contended that it had suffered business interruption and property damages to its business in Mandeville, Louisiana, as result of the destruction from Hurricane Katrina on August 29, 2005. Queso Grande further averred that Travelers Insurance Company had issued to Queso Grande a policy of insurance, covering among other things losses from property damage and business interruption. Travelers Insurance Company was served with a copy of the petition, but it did not file an answer.

Thereafter, on June 26, 2009, approximately one year and ten months after filing its original petition, Queso Grande filed an amended petition, naming St. Paul as defendant and asserting the same allegations against St. Paul that it had asserted in its original petition against Travelers Insurance Company, i.e., that St. Paul had issued it a policy of insurance covering its losses suffered as a result of Hurricane Katrina and was liable to Queso Grande for those losses. St. Paul responded by filing a peremptory exception of prescription, noting that it was not named as a defendant until almost two years after the original petition was filed and contending that the

amended petition did not relate back to the date of filing of the original petition, in that St. Paul is an entity unrelated to the original defendant, Travelers Insurance Company.

Following a hearing on the exception, the trial court agreed that St. Paul was a wholly new defendant unrelated to original defendant, Travelers Insurance Company. Thus, the court concluded that Queso Grande's amended petition did not relate back to the date of filing of the original petition and, consequently, that the exception of prescription was well founded. In accordance with its findings, the trial court rendered judgment dated June 15, 2010, maintaining the exception of prescription and dismissing Queso Grande's amended petition against St. Paul.

From this judgment, Queso Grande appeals, contending that the trial court erred in refusing to allow the amended petition to relate back to the filing of the original petition.

DISCUSSION

Louisiana Revised Statute 22:1894 (renumbered from LSA-R.S. 22:658.3 by Acts 2008, No. 415, § 1, effective January 1, 2009) sets forth the prescriptive period for insurance claims arising from hurricane activity and provides in pertinent part as follows:

> A. Notwithstanding any other provision of this Title to the contrary, any person or entity having a claim for damages pursuant to a homeowners' insurance policy, personal property insurance policy, tenant homeowners' insurance policy, condominium owners' insurance policy, or commercial property insurance policy, and resulting from Hurricane Katrina shall have through September 1, 2007, within which to file a claim with their insurer for damages, unless a greater time period to file such claim is otherwise provided by law or contract.

The commercial property insurance claim against St. Paul was not filed before the September 1, 2007 prescriptive period applicable herein, although

suit was timely filed against Travelers Insurance Company. Pursuant to LSA-C.C. art. 3462, prescription is interrupted by the commencement of suit against the obligor in a court of competent jurisdiction and venue. Furthermore, the interruption of prescription by suit against one solidary obligor is effective as to all solidary obligors. LSA-C.C. arts. 1799 & 3503; Renfroe v. State Dept. of Transportation and Development, 2001-1646 (La. 2/26/02), 809 So. 2d 947, 950.

Although Queso Grande averred in its amended petition that Travelers Insurance Company and St. Paul were liable to Queso Grande "jointly, severally and/or *in solido*," plaintiff has acknowledged that while it believed it was insured by "Travelers," it was in fact insured by St. Paul. Thus, because Travelers Insurance Company was not the insurer of Queso Grande, the original petition naming Travelers Insurance Company, albeit timely filed, did not interrupt prescription against St. Paul, and Queso Grande's suit against St. Paul is prescribed unless some other basis to support its timeliness exists. See Renfroe, 809 So. 2d at 950.

In that regard, Queso Grande asserted below and asserts on appeal that, pursuant to LSA-C.C.P. art. 1153, the untimely amended petition naming St. Paul as defendant relates back to the timely filed original petition against Travelers Insurance Company. Louisiana Code of Civil Procedure article 1153 provides that "[w]hen the action or defense asserted in the amended petition or answer 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 the date of filing the original pleading."

In Ray v. Alexandria Mall through St. Paul Property and Liability Insurance, 434 So. 2d 1083, 1086-1087 (La. 1983), the Louisiana Supreme Court established the following criteria for determining whether LSA-C.C.P.

art. 1153 allows an amendment which changes the identity of the party or parties sued to relate back to the date of filing of the original petition:

(1) The amended claim must arise out of the same transaction or occurrence set forth in the original petition;

(2) The purported substitute defendant must have received notice of the institution of the action such that he will not be prejudiced in maintaining a defense on the merits;

(3) The purported substitute defendant must know or should have known that but for a mistake concerning the identity of the proper party defendant, the action would have been brought against him; and

(4) The purported substitute defendant must not be a wholly new or unrelated defendant, since this would be tantamount to assertion of a new cause of action which would have otherwise prescribed.

In maintaining St. Paul's exception of prescription, the trial court found that the fourth Ray criterion was not met because St. Paul is a wholly new and unrelated defendant. We agree. In support of its exception, St. Paul submitted the affidavit of Linda Kolios, a regulatory and corporate governance specialist with The Travelers Companies, Inc. Kolios attested that The Travelers Companies, Inc. is the parent company of St. Paul, but that Travelers Insurance Company, the originally named defendant herein, is not a subsidiary of, and has no affiliation or relationship to, either The Travelers Companies, Inc. or St. Paul.[1]

Despite the similarity in names of St. Paul's parent company and the original named defendant, the evidence of record clearly establishes that St. Paul is in no way affiliated with Travelers Insurance Company. Because St.

[1]The record shows that Travelers Insurance Company, the original defendant, is affiliated with Metlife Insurance Company of Connecticut, rather than having any affiliation with The Travelers Companies, Inc.

Paul has no affiliation with or relationship to defendant Travelers Insurance Company, it is a "wholly new and unrelated defendant," and the trial court correctly concluded that the fourth Ray criterion is not met for relation back of the amended petition to the original timely petition against Travelers Insurance Company. See Renfroe, 809 So. 2d at 952-953.

Additionally, we find no merit to Queso Grande's argument on appeal that the second Ray criterion was met. Queso Grande asserts that St. Paul had notice of Queso Grande's "claim" because Queso Grande initially filed a claim through its insurance agent and was paid an "advance."[2] The Ray criterion regarding notice requires that the purported substitute defendant had received *notice of the institution of the lawsuit*. Thus, the mere fact that a claim may have initially been made through Queso Grande's insurance agent (and paid by its insurer) would not serve to put St. Paul on notice of the *institution of this lawsuit*. See Renfroe, 809 So. 2d at 951 (wherein the Supreme Court noted the clear language of Ray requiring *notice of the lawsuit* and thus rejected the plaintiff's argument that the notice requirement of Ray was met where the purported substitute defendant Jefferson Parish allegedly had notice of the *accident* because Jefferson Parish deputies had responded to the accident scene); see also Catalano v. GSB Theatres of Chalmette, Inc., 480 So. 2d 428, 430 (La. App. 4th Cir. 1985) (wherein the Fourth Circuit held that notice of a claim or demand letter does not constitute notice of the institution of an action as required by Ray).

In further support of its argument that the notice criterion of Ray was met herein, Queso Grande also asserts that because the Louisiana Secretary

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[2]Pretermitting the issue of whether payment by any entity would interrupt prescription, we note that although Queso Grande makes the argument on appeal that it had been paid an "advance" for its damages following Hurricane Katrina, there is no allegation in its petitions that **St. Paul** paid it any money with regard to these damages. Moreover, there is no evidence of record of such an "advance."

of State is the agent for service of process for both St. Paul and Travelers Insurance Company, St. Paul should have been put on notice of the lawsuit by virtue of the fact that the Secretary of State was served with the original petition as the agent for Travelers Insurance Company. In support of this contention that St. Paul had notice of the institution of this lawsuit because its agent for service of process (the Secretary of State) was served with the original petition, Queso Grande relies upon the Third Circuit opinion of Cohen v. Brookshire Brothers, Inc., 2001-1159 (La. App. 1st Cir. 6/5/02), 819 So. 2d 429, writ denied, 2002-1767 (La. 10/14/02), 827 So. 2d 423. In Cohen, one plaintiff was injured when she slipped and fell in a Super 1 Food Store. The plaintiffs named "Brookshire Brothers Inc./Super 1 Foods" as defendant in their original petition, but the correct defendant was actually "Brookshire Grocery Company." The plaintiffs subsequently amended their petition to properly name "Brookshire Grocery Company" as defendant. Cohen, 819 So. 2d at 430-431.

In analyzing the Ray criteria to determine whether the amended petition related back to the date of filing of the original petition, the Third Circuit found that the second Ray criterion (notice of the filing of the lawsuit) was met where both "Brookshire Brothers Inc." and "Brookshire Grocery Company" had the same agent for service of process and that agent had been served with the original petition. In reaching that conclusion, the court noted that the original petition clearly established that the plaintiffs intended to sue the owner-operator of the Super 1 Food Store on MacArthur Drive in Alexandria, Louisiana, which should have informed the agent for service that judicial relief was being sought from Brookshire Grocery Company. Thus, the court concluded that Brookshire Grocery Company

should have been put on notice of the lawsuit and had the opportunity to collect and preserve evidence. Cohen, 819 So. 2d at 433.

In the instant case, however, the Secretary of State was served with the original petition as the agent for service of process for Travelers Insurance Company, not St. Paul, and there was nothing alleged in the petition that could have alerted the Secretary of State that the correct insurer that Queso Grande should have sued was actually St. Paul. Accordingly, the analysis of Cohen is inapplicable herein. There is simply no evidence in the record that St. Paul received notice of the institution of this suit within the prescriptive period. See Renfroe, 809 So. 2d at 951.

Accordingly, the second and fourth criteria of Ray are not present herein. Queso Grande clearly intended to name Travelers Insurance Company as defendant in its original petition, and there is no evidence of record that St. Paul had notice of the suit as a result of service of the original petition upon the Secretary of State, as the agent for service of process for Travelers Insurance Company. Moreover, because Travelers Insurance Company and St. Paul are separate and distinct entities, notice to Travelers Insurance Company did not serve to provide notice to St. Paul. Rather, St. Paul is a wholly new and unrelated entity, such that the amended petition in this case is tantamount to the assertion of a new cause of action, which otherwise would have prescribed. Accordingly, we find no error in the trial court's ruling, maintaining St. Paul's exception of prescription.

CONCLUSION

For the above and foregoing reasons, the June 15, 2010 judgment, maintaining the exception of prescription and dismissing Queso Grande's amended petition against St. Paul Fire and Marine Insurance Company, is affirmed. Costs of this appeal are assessed against plaintiff, Queso Grande Productions, Inc.

AFFIRMED.