NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2013 CA 0681

MICHAEL LOUIS MORGAN, SR.

VERSUS

DIANA D. MORGAN

Judgment Rendered: DEC 27 2013

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Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 1999-12661

Honorable Mary C. Devereux, Judge

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Mark Alan Jolissaint Slidell, LA	Attorney for Appellee Plaintiff – Michael Louis Morgan, Sr.
Gary J. Williams Slidell, LA	Attorney for Appellant Defendant – Diana D. Morgan

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BEFORE: WHIPPLE, C.J., WELCH, AND CRAIN, JJ.

WELCH, J.

Diana D. Morgan appeals a trial court judgment sustaining a peremptory exception raising the objections of prescription/peremption, no cause of action, and *res judicata* and dismissing her petition for a supplemental partition of pension benefits. We reverse and remand for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

Michael Morgan and Diana Morgan were married to each other in 1980 and had four children during their marriage. On June 28, 1999, Michael Morgan filed a petition for divorce and the parties were subsequently divorced on October 4, 2001.[1] On April 29, 2004, Michael Morgan filed a petition to partition community property pursuant to the provisions of La. R.S. 9:2801, and thereafter, both parties filed detailed descriptive lists of community assets listing the retirement benefits of both parties as community assets. Thereafter, on December 5, 2008, the parties entered into a stipulated judgment of partition of community property, which provided that "[t]he employment pension plans of both parties, Diana Morgan's Louisiana Teachers Retirement System [("TRSL")] entitlement and Michael Morgan's Lockheed Martin Aerospace Pension Plan entitlement, shall be divided by means of qualified domestic relations orders [("QDROs")] according to Simms [sic] Formula guidelines."[2]

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[1] For additional background information, see **Morgan v. Morgan**, 2005-1593 (La. App. 1st Cir. 6/21/06) (unpublished opinion).

[2] **Sims v. Sims**, 358 So.2d 919 (La. 1978), is the seminal case in Louisiana establishing the method of valuation and division of the "community" interest in a spouse's pension plan. The **Sims** formula, 358 So.2d at 924, calculates a non-employee spouse's interest in the employee spouse's employment benefit plan at the time the community property regime is terminated as the annuity or benefit multiplied by ½ multiplied by a fraction (the numerator of which is the portion of the pension or benefit attributable to creditable service during the existence of the community and the denominator of which is the pension or benefit attributable to total creditable service).

On March 24, 2011,[3] a judgment to partition employment retirement benefits administered by TRSL (the "division order"[4]) was signed, which stated that pursuant to the December 5, 2008 consent judgment, Michael Morgan obtained an ownership interest in all funds and benefits that may become payable by TRSL to Diana Morgan, her survivors, or her beneficiaries. To complete the partition of these funds or benefits, the parties stipulated and agreed that during the marriage, Diana Morgan was employed as a teacher by the St. Tammany Parish School Board and was a member of TRSL, and that as a result, her employment/retirement benefits accruing in conjunction with her employment were community property, including but not limited to, interest in funds or benefits that may become payable by TRSL as a result of her membership. Additionally, it was agreed by the parties and ordered by the court that Michael Morgan was entitled to receive a percentage of any funds or benefits, which was to be calculated as "[o]ne half (1/2) of a fraction, the numerator of which is the portion of the lump sum refund of accumulated contributions or of the benefit which is attributable to the years of service credit earned or purchased by Diana Morgan during the existence of the aforesaid community property regime, to-wit, from November 22, 1980 until October 4, 2001[5], and the denominator of which is the total lump sum or benefit."[6]

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[3] This judgment was an amended judgment, which by agreement of the parties, superseded the original August 4, 2010 judgment to partition employment retirement benefits administered by TRSL. Essentially, the amended judgment modified the provision relating to whom the benefits would be payable in the event Michael Morgan predeceased Diana Morgan.

[4] TRSL does not accept QDROs; instead, the parties submit division orders in compliance with the laws, rules, and regulations governing TRSL. See La. R.S. 11:291(D).

[5] On December 3, 2012, this judgment was amended to provide the correct termination date of the parties' community, which was June 28, 1999 rather than October 4, 2001. This correction was apparently made after Diana Morgan filed a petition seeking such relief.

[6] This provision essentially provided for Michael Morgan to receive his **Sims** portion of the community interest in Diana Morgan's benefits. See footnote 2.

On September 20, 2012, Diana Morgan filed a petition for supplemental partition of pension asserting that the judgment and division order partitioning her retirement benefits were incomplete and erroneous.[7] Essentially, she noted that while the division order provided that Michael Morgan was "entitled to receive a percentage of *any funds or benefits* that may become payable by it to Diana D. Morgan," she "subsequently was forced to take disability retirement, but has been unable to receive her disability benefits because the language of the [division order] did not differentiate disability benefits from retirement benefits." Accordingly, she sought to have the TRSL division order supplemented or clarified to provide that Michael Morgan was entitled to receive only his percentage portion of Diana Morgan's retirement benefits, reserving unto her the right to receive her disability benefits.[8]

In response, Michael Morgan filed an answer; a peremptory exception raising the objections of prescription/peremption, no cause of action, and *res judicata*; and a declinatory exception raising the objection of lack of subject matter jurisdiction. A hearing on the exceptions was held on December 3, 2012. Thereafter, by judgment signed on January 11, 2013, the trial court sustained the peremptory exceptions and dismissed Diana Morgan's petition for supplemental

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[7] This petition also sought to correct the date that the parties' community was terminated. See footnote 5.

[8] See **Bordes v. Bordes**, 98-1004 (La. 4/13/99), 730 So.2d 443, 448 (while under **Sims**, 358 So.2d at 922, a spouse's right to receive retirement benefits is, to the extent attributable to employment during the community, an asset of the community, disability benefits payable by a retirement plan after the termination of the community are more akin to compensation for lost earnings due to serious injury or illness, are the separate property of the employee spouse (La. C.C. art. 2344), and therefore, the other spouse is not entitled to share in those benefits); and **Anzalone v. Anzalone**, 2007-1905 (La. App. 1st Cir. 11/18/08), 25 So.3d 836, 841, writ granted and judgment reversed in part on other grounds, 2008-2981, 2008-2988 (La. 4/13/09), 6 So.3d 754, 755 (disability benefits received during the community, as compensation for lost earnings, is a community asset, and the other spouse is entitled to one-half of those benefits until such time as the community is terminated).

partition.[9] From this judgment, Diana Morgan has appealed assigning error to the trial court's ruling sustaining the exceptions and dismissing her petition.[10]

LAW AND DISCUSSION

No Cause of Action and Prescription/Peremption

Michael Morgan's peremptory exception raising the objections of prescription/peremption and no cause of action is premised on his contention that Diana Morgan's petition seeks to nullify portions of the previous judgments of partition. We have carefully reviewed the allegations set forth in Diana Morgan's petition for supplemental partition and simply cannot conclude that her pleading seeks the nullification or amendment of any part of the previous judgments of partition (other than to correct the termination date of the parties' community). Instead, based on our review, we find that the relief requested is the supplemental classification and partition of her disability benefits, which she asserts was not addressed by the previous partition judgment or division order and are her separate property, or the declaration or clarification that her disability benefits are her separate property.

Accepting the allegations of fact set forth in Diana Morgan's petition for supplemental partition as true, we conclude that Diana Morgan has stated a cause of action for supplemental partition and/or declaratory judgment regarding her disability benefits.[11] See La. C.C. art. 1380; La. C.C.P. art. 1871; **Edwards v.**

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[9] The trial court's judgment is silent with respect to the declinatory exception raising the objection of lack of subject matter jurisdiction. Silence in a judgment as to any issue that was placed before the court is deemed a rejection of that demand or issue. **Hayes v. Louisiana State Penitentiary**, 2006-0553 (La. App. 1st Cir. 8/15/07), 970 So.2d 547, 554 n. 9, writ denied, 2007-2258 (La. 1/25/08), 973 So.2d 758. Therefore, the objection of lack of subject matter jurisdiction is deemed to have been overruled. See La. C.C. P. arts. 2 and 1871; and La. Const. art. V, § 16(A).

[10] We hereby grant Michael Morgan's motion to supplement his appellate brief with the citations of several code of evidence articles, which he contends support his argument in his original appellate brief.

[11] See **Ramey v. DeCaire**, 2003-1299 (La. 3/19/04), 869 So.2d 114, 118-119 (in determining whether a petition states a cause of action, all well-pleaded facts are accepted as true and in

Edwards, 35,953, 35,954 (La. App. 2nd Cir. 5/8/02), 817 So.2d 414, 416 (the omission of a thing belonging to the community from a partition is grounds for a supplemental partition); **Hare v. Hodgins**, 567 So.2d 670, 671-672 (La. App. 5th Cir. 1990), affirmed in part, reversed in part on other grounds, 586 So.2d 118 (La. 1991) (where there is no transfer of rights in a partition document, an asset remains owned in indivision by the parties and any party may seek a partition of the asset by petition for supplemental partition); and **Anzalone v. Anzalone**, 2007-1905 (La. App. 1st Cir. 11/18/08), 25 So.3d 836, 837-841, writ granted and judgment reversed in part on other grounds, 2008-2981, 2008-2988 (La. 4/13/09), 6 So.3d 754, 755 (where previous judgments partitioning assets were silent as to former judge's disability benefits, action regarding the determination of spouse's entitlement to such benefits could be brought).

Since we have determined that Diana Morgan's action is an action for supplemental partition or declaratory judgment, we also conclude that her action is not prescribed or perempted. See **Terrebonne v. Theriot**, 94-1632 (La. App. 1st Cir. 6/23/95), 657 So.2d 1358, 1362 (since former spouses remain co-owners of property not partitioned, a claim of liberative prescription cannot be maintained in a subsequent suit for partition); **Hare**, 567 So.2d at 671-672 (the action for the supplemental partition of an asset does not prescribe, when no rights regarding that asset were transferred by a previous partition); **Gaylord Container/Temple Inland Corp. v. Dunaway**, 2009-2058 (La. App. 1st Cir. 5/7/10), 38 So.3d 1083, 1085 (the right to seek declaratory judgment does not itself prescribe; however, the nature of the basic underlying action determines the appropriate prescriptive period). Accordingly, we conclude that the trial court erred in sustaining the

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reviewing the judgment of the trial court relating to the objection of no cause of action, appellate courts conduct a *de novo* review because the exception raises a question of law and the trial court's decision is based solely on the sufficiency of the petition).

objections of no cause of action and prescription/peremption filed by Michael Morgan in response to Diana Morgan's supplemental petition to partition pension.

Res Judicata

With regard to the peremptory exception raising the objection of *res judicata*, Michael Morgan contends that the disability benefits, which Diana Morgan is attempting to partition or to have classified as or determined to be her separate property, were already partitioned pursuant to the consent judgment signed by the trial court on December 5, 2008. Michael Morgan claims that since Diana Morgan is seeking to partition property that has already been partitioned by a final judgment, her cause of action is barred by *res judicata.*

Louisiana Revised Statutes 13:4231 provides the general principles regarding *res judicata*, as follows:

> Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:
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> (1) If the judgment is in favor of the plaintiff, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment.
>
> (2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action.
>
> (3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

Additionally, the exceptions to *res judicata* are found in La. R.S. 13:4232, which provides that "in an action for partition of community property and settlement of claims between spouses under [La.] R.S. R.S. 9:2801, the judgment has the effect of *res judicata* only as to causes of action actually adjudicated." La. R.S. 13:4232(B).

While *res judicata* is ordinarily premised on a final judgment on the merits, it also applies where there is a transaction or settlement of a disputed or compromised matter that has been entered into by the parties. **Ortego v. State, Department of Transportation and Development**, 96-1322 (La. 2/25/97), 689 So.2d 1358, 1363. Thus, a valid compromise may form the basis of a plea of *res judicata*. *Id.* at 1364. An agreement entered into by the parties for the explicit purpose of settling their community property partition suit is a transaction or compromise. **Terral v. Terral**, 2010-0170 (La. App. 1st Cir. 6/11/10), 40 So.3d 503, 506; see also La. C.C. art. 3071; and **Junca v. Junca**, 98-1723 (La. App. 1st Cir. 12/28/99), 747 So.2d 767, 771, writ denied, 2000-1120 (La. 6/21/00), 763 So.2d 601.

A compromise precludes the parties from bringing a subsequent action based upon the matter that was compromised. La. C.C. art. 3080. However, a compromise settles only those differences that the parties clearly intended to settle, including the necessary consequences of what they express. La. C.C. art. 3076.

The burden of proving the facts essential to sustaining the objection of *res judicata* is on the party pleading the objection. **Landry v. Town of Livingston Police Department**, 2010-0673 (La. App. 1st Cir. 12/22/10), 54 So.3d 772, 776. If any doubt exists as to the application of *res judicata*, the objection must be overruled and the lawsuit maintained. *Id.* When an objection of *res judicata* is raised before the case is submitted and evidence is received on the objection, the standard of review on appeal is manifest error. *Id.*

Thus, in this case, Michael Morgan had the burden of proving that the parties clearly intended that Diana Morgan's disability benefits be included in the December 5, 2008 consent judgment partitioning their community property. See La. C.C. art. 3076.

Among other benefits, TRSL provides its members "Retirement benefits" (La. R.S. 11:761) and "Disability retirement" (La. R.S. 11:778). In Michael Morgan's petition to partition community property, he asserted that the parties had been unable to agree on a partition of community property or on the settlement of the claims between them arising from the community, that he was entitled to a judicial partition of community property, and requested that the parties file their respective sworn detailed descriptive lists and traversals within the delays set by the court in accordance with La. R. S. 9:2801. The sworn detailed descriptive list of assets and liabilities filed by Diana Morgan did not list or mention any benefits that she had from TRSL. The sworn detailed descriptive list of community debts and assets filed by Michael Morgan listed "Retirement benefits" as an asset in Diana Morgan's possession with an "Unknown" value. The amending and supplemental sworn detailed descriptive list of community debts and assets filed by Michael Morgan again listed "Retirement benefits" as an asset in Diana Morgan's possession, and provided that its "present value [is] unknown [and is] to be divided according to SIMS[.[12]]" In the amending and supplemental sworn detailed descriptive list and traversal filed by Diana Morgan, she disagreed with and traversed Michael Morgan's descriptive list and value of her "Employment and/or Retirement Benefits" and stated that such benefits were "to be divided according to law."

As previously noted, the December 5, 2008 consent judgment of partition of community property provided that "[t]he employment pension plans of both parties, Diana Morgan's [TRSL] entitlement and Michael Morgan's Lockheed Martin Aerospace Pension Plan entitlement, shall be divided by means of a [QDRO] according to Simms [*sic*] Formula guidelines." The division order issued

[12] See footnote 2.

in furtherance of partitioning this asset[13], directed to TRSL, provided that, pursuant to the December 5, 2008 consent judgment, Michael Morgan "obtained an ownership interest in all funds and benefits that may become payable by [TRSL] to the defendant, Diana D. Morgan, her survivors or her beneficiaries" and that as a result of Diana Morgan's membership in TRSL during the marriage, "her employment/retirement benefits accruing in conjunction with her employment, are community property, including, but not limited to, interest in funds or benefits that may become payable by TRSL as a result of her membership." Additionally, this division order provided that Michael Morgan was entitled to "receive a percentage of any funds or benefits" and set forth the manner in which his percentage was to be calculated.

Michael Morgan testified that, at the time of the parties' divorce, he was aware of Diana Morgan's medical condition and disability issues[14] and that he was concerned about what benefits he might receive in conjunction with Diana Morgan's retirement in settling the community. However, he admitted that he never discussed with Diana Morgan whether or not her disability benefits were specifically included in the consent judgment of partition or division order issued in furtherance of partitioning her TRSL benefits. He also admitted that he never discussed with Diana Morgan whether her disability benefits were her separate property.

Diana Morgan's testimony revealed that she was not receiving disability benefits at the time of the community property settlement. Her testimony confirmed that she and Michael Morgan never discussed her disability benefits during the community property settlement negotiations or whether they were

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[13] See footnote 4.

[14] The testimony established that Diana Morgan had a stroke in 1994, one week after the birth of her fourth child with Michael Morgan, and thereafter, she became confined to a wheelchair. See also **Morgan**, 2005-1593 at p.5.

included in her retirement that was to be partitioned. Diana Morgan testified that she never thought her disability benefits or her right to receive her disability benefits were included in the consent judgment of partition or division order in furtherance of partitioning her retirement. She testified that had she known that her disability benefits would be included in the consent judgment of partition and subject to the division order, she would have never signed those judgments or orders. Diana Morgan also testified that she never intended to transfer to Michael Morgan any portion of her disability benefits and that she only intended to transfer to him his lawful portion of her regular retirement benefits.

Although Michael Morgan contends that the language used in the division order—"any funds or benefits"—is broad enough to encompass both regular retirement benefits and disability retirement benefits, we note that the December 5, 2008 consent judgment of partition simply provides that Diana Morgan's TRSL "entitlement... shall be divided" according to the **Sims** formula. The **Sims** formula is used to classify the portion of an employee spouse's employment benefit plan that is attributable to the community, and thus community property. While under **Sims**, 358 So.2d at 922, Diana Morgan's retirement benefits would, to the extent attributable to her employment during the community, be community property, her disability benefits may not be community property. See **Bordes v. Bordes**, 98-1004 (La. 4/13/99), 730 So.2d 443, 448 (while a spouses' right to receive retirement benefits is, to the extent attributable to employment during the community, an asset of the community, disability benefits payable by a retirement plan after the termination of the community are more akin to compensation for lost earnings due to serious injury or illness, are the separate property of the employee spouse (La. C.C. art. 2344), and therefore, the other spouse is not entitled to share in those benefits); and **Anzalone**, 25 So.3d at 841 (disability benefits received during the community, as compensation for lost earnings, is a community asset,

and the other spouse is entitled to one-half of those benefits until such time as the community is terminated). Additionally, the pleadings leading up to the December 5, 2008 consent judgment refer to "retirement benefits," and the evidence established that the parties never discussed Diana Morgan's "disability retirement" benefits when negotiating the community property settlement.

Therefore, based on our review of the record, we find that the trial court manifestly erred in determining that Michael Morgan carried his burden of proving that that he and Diana Morgan *clearly* intended that Diana Morgan's disability benefits would be included in the December 5, 2008 consent judgment partitioning the community property. Accordingly, we conclude that the trial court erred in sustaining the peremptory exception raising the objection of *res judicata.*

CONCLUSION

For all of the above and foregoing reasons, the January 11, 2013 judgment of the trial court, sustaining the peremptory exception raising the objections of prescription/peremption, no cause of action, and *res judicata* and dismissing Diana Morgan's petition for a supplemental partition of pension benefits, is reversed. All costs of this appeal are assessed to the plaintiff/appellee, Michael Louis Morgan.

MOTION TO SUPPLEMENT APPELLATE BRIEF GRANTED; JUDGMENT REVERSED.