STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2017 CA 1153 R

RONALD ANTHONY PEMBO, III

VERSUS

DANA MONTECINO PEMBO

CONSOLIDATED WITH

NO. 2017 CA 1154 R

DANA MONTECINO PEMBO

VERSUS

RONALD ANTHONY PEMBO, III

Judgment Rendered: JUN 28 2019

* * * * *

On Appeal from the
21st Judicial District Court
Parish of Tangipahoa, State of Louisiana
No. 2011-0002832 c/w 2011-0003114

The Honorable Jeffery T. Oglesbee, Judge Presiding

* * * * *

Jennifer C. Carter
New Orleans, Louisiana

Attorney for Appellant,
Dana Montecino Pembo

Nicole R. Dillon
Hammond, Louisiana

Attorney for Appellee,
Ronald Anthony Pembo, III

* * * * *

BEFORE: GUIDRY, CRAIN, AND LANIER, JJ.

CRAIN, J.

This is an appeal of a judgment that denied an exception of *res judicata*, ordered amendment of a Qualified Domestic Relations Order (QDRO) to correct an "error" that resulted in an overpayment to the former wife, ordered recalculation of the amount due the former wife based on the correction, and ordered repayment by the former wife of any overpayment. We vacate the judgment in part.

FACTS AND PROCEDURAL HISTORY

Ronald Anthony Pembo and Dana Montecino Pembo were married on November 20, 1993, divorced on October 24, 2012, and their community property regime was terminated retroactive to August 26, 2011. On June 11, 2014, the trial court signed a judgment partitioning the parties' community property, including Ronald's Dow Chemical Company Employee's 401(k) Savings Plan ("the Plan"). The judgment provided that after various specified offsets, Dana would receive $64,623.18 of the $201,797.62 community value of the Plan, and ordered segregation of the funds into an account in Dana's name pursuant to a QDRO to be prepared by Ronald's counsel. The QDRO, also signed June 11, 2014, assigned Dana $64,623.18 of the Plan's balance as of August 26, 2011, and specified that Dana "***will*** be entitled to any interest and investment earnings or losses attributable thereto for periods subsequent to the assignment date [August 26, 2011] until the date of total segregation of [Dana's] assigned share into separate account(s)." (Emphasis in original.) It is undisputed that funds from the Plan were distributed to Dana pursuant to the QDRO.

A year later, on July 1, 2015, Ronald filed a "Rule to Show Cause," seeking amendment of the partition judgment and QDRO to correct "error[s] in calculation." Ronald alleged the trial court's valuation of the community portion of the plan ($201,797.62) included interest and earnings made on the community

portion of the account since the date the community terminated; therefore, Ronald asserted, the QDRO should have provided Dana was *not* entitled to any additional amounts for interest and investment earnings after the assignment date. Additionally, Ronald alleged the trial court miscalculated the amount Dana should receive from the Plan based on an error in calculating the equalization payment Dana was owed. Ronald stated that as a result of these calculation errors, Dana received $105,862.28 from the Plan, while she should have received only $58,532.61. He asked that she be ordered to show cause why the judgment and QDRO should not be amended to correct the errors and why she should not be ordered to repay to the Plan the $47,329.67 she received in error.

In response, Dana filed an exception of *res judicata*, asserting any claims regarding the partitioned and disbursed funds were barred. She pointed out neither party timely filed a motion for new trial or appealed the partition judgment, and neither party objected to the QDRO Administration Office's interpretation of the QDRO prior to disbursement. She further argued Ronald sought more than mere correction of an error in calculation and the trial court lacked legal authority to make the requested substantive amendments.

After considering the parties' memoranda and the suit record, the trial court found that in rendering the partition judgment it clearly accepted Ronald's valuation of the Plan as of November 7, 2013, and the QDRO should be amended to reflect that assignment date. The trial court denied the exception of *res judicata*, determined the amounts Dana was entitled to receive from the Plan would be recalculated based on the corrected assignment date, and that Dana would be required to repay any funds received in excess of the recalculated amount. In all other respects, the Rule to Show Cause was denied. A judgment reflecting the ruling was signed April 24, 2017. On that same date, the trial court signed an

amended QDRO, replacing the provisions of the previous one, and designating the assignment date as November 7, 2013.

Dana filed the instant suspensive appeal, which this court previously dismissed for lack of jurisdiction because the judgment lacks appropriate decretal language and cannot be considered a final judgment. Thereafter, the Louisiana Supreme Court granted a writ of *certiorari* and remanded the appeal to this court "for briefing, argument, and full opinion on the exception of *res judicata*." *Pembo v. Pembo*, 17-1153, 17-1154, 2018WL1663141 (La. App. 1 Cir. 4/6/18), *writ granted*, 18-1390 (La. 12/3/18), 257 So. 3d 1257.

DISCUSSION

Res judicata bars re-litigation of all causes of action arising out of the same transaction and occurrence that were the subject of prior litigation between the same parties. *Oliver v. Orleans Parish School Bd.*, 14-0329 (La. 10/31/14), 156 So. 3d 596, 611, *cert. denied*, ___ U.S. ___, 135 S.Ct. 2315, 191 L.Ed.2d 979 (2015). The general principles of *res judicata* are codified in Louisiana Revised Statute 13:4231, which pertinently provides "a valid and final judgment is conclusive between the same parties." The principle of *res judicata* envisions a second suit; therefore, an exception of *res judicata* is not the proper procedural vehicle for challenging a proposed amendment to a judgment within the same suit. *See Family Worship Center Church, Inc. v. Solomon*, 17-0064 (La. App. 1 Cir. 6/21/18), 255 So. 3d 649, 658, *writ denied*, 18-1778 (La. 1/28/19), 263 So. 3d 427; *Quality Environmental Processes, Inc. v. IP Petroleum Company, Inc.*, 16-0230 (La. App. 1 Cir. 4/12/17), 219 So. 3d 349, 365, *writ denied*, 17-00915 (La. 10/9/17), 227 So. 3d 833. Nonetheless, Louisiana is a fact-pleading state that values substance over form and requires courts to look beyond the caption of pleadings in order to ascertain their substance and do substantial justice to the

parties. *In re Succession of Cannata*, 14-1546 (La. App. 1 Cir. 7/10/15), 180 So. 3d 355, 363 n.3, *writ denied*, 15-1686 (La. 10/30/15), 180 So. 3d 303. Therefore, we will consider whether the trial court properly rendered the April 24, 2017 judgment and amended the QDRO over Dana's objections to any substantive amendments.

Ronald maintains the trial court did not amend the partition judgment and did not err in amending the QDRO. He further argues the changes made to the QDRO were not substantive, and the corrections to its "phraseology only" were permissible to reflect the terms of the judgment on which it was based. In support of his argument, Ronald cites *Dodd v. Dodd*, 568 So. 2d 1134, 1138-39 (La. App. 5 Cir. 1990), in which the court determined a domestic relations order merely effectuates the final judgment of partition and does not determine the merits of the action, and is therefore an interlocutory order subject to amendment. We disagree.

In 2001, Louisiana Revised Statute 9:2801, entitled "Partition of community property and settlement of claims arising from matrimonial regimes and co-ownership of former community property," was amended to add part B, which provides:

> B. Those provisions of a domestic relations order or other judgment which partitions retirement or other deferred work benefits between former spouses shall be considered interlocutory until the domestic relations order has been granted "qualified" status from the plan administrator and/or until the judgment has been approved by the appropriate federal or state authority as being in compliance with applicable laws. Amendments to this interlocutory judgment to conform to the provisions of the plan shall be made with the consent of the parties or following a contradictory hearing by the court which granted the interlocutory judgment. The court issuing the domestic relations order or judgment shall maintain continuing jurisdiction over the subject matter and the parties until final resolution.

The QDRO signed June 11, 2014, partitions a 401(k) plan, which is a type of retirement account; therefore, the trial court's authority to amend the QDRO is governed by Section 9:2801B. *See* 26 USCA §401(k).

Our interpretation of the relevant statutory language is guided by well-established rules of statutory construction. Legislation is the solemn expression of the legislative will; thus, the interpretation of legislation is primarily the search for legislative intent. *In re Succession of Boyter*, 99-0761 (La. 1/7/00), 756 So. 2d 1122, 1128. The starting point for interpretation of any statute is the language of the statute itself, as the text of the law is the best evidence of legislative intent. *See* La. R.S. 1:4 and 24:177B(1); *Rando v. Anco Insulations, Inc.*, 08-1163, 08-1169 (La. 5/22/09), 16 So. 3d 1065, 1075.

All laws pertaining to the same subject matter must be interpreted *in pari materia,* or in reference to each other. *See* La. Civ. Code art. 13; *Pierce Foundations, Inc. v. Jaroy Construction, Inc.*, 15-0785 (La. 5/3/16), 190 So. 3d 298, 303. The legislature is presumed to act deliberately and to enact statutes in light of preceding statutes involving the same subject matter. *See* La. R.S. 24:177C; *Holly & Smith Architects, Inc. v. St. Helena Congregate Facility, Inc.*, 06-0582 (La. 11/29/06), 943 So. 2d 1037, 1045. Where possible, courts have a duty to adopt a construction of a statute that harmonizes and reconciles it with other provisions dealing with the same subject matter. *Holly & Smith Architects, Inc.*, 943 So. 2d at 1045; *Malus v. Adair Asset Mgmt., LLC*, 16-0610 (La. App. 1 Cir. 12/22/16), 209 So. 3d 1055, 1060.

Under the express provisions of Section 9:2801B, a judgment or domestic relations order partitioning retirement benefits is interlocutory and subject to amendment only until the order is granted "qualified" status by the plan administrator. *See Tate v. Tate*, 08-1968 (La. App. 1 Cir. 3/27/09), 9 So. 3d 1010, 1012. By specifically limiting the time period within which the judgment or order can be amended, the legislature has precluded amendment thereafter. *See* La. R.S. 9:2801B; *see also Stewart v. Stewart*, 15-153 (La. App. 3 Cir. 6/3/15), 166 So.

3d 448, 455 (holding a judgment portioning a LASERS account constituted a final judgment after being granted "qualified" status). The clear legislative intent is that once qualified, a QDRO has the same finality as a final judgment partitioning the retirement benefits.

It is undisputed the June 11, 2014 order was granted "qualified" status and the funds were disbursed to Dana from the Plan by the plan administrator. Consequently, under Section 9:2801B, the QDRO was no longer subject to amendment. It acquired the finality of a final judgment. *See* La. R.S. 9:2801B.

In general, Louisiana Code of Civil Procedure article 1951 authorizes the amendment of a final judgment "to alter the phraseology of the judgment, but not its substance." Thus, a final judgment may be amended where the resulting judgment neither takes from nor adds to the original judgment. *Villaume v. Villaume*, 363 So. 2d 448, 450 (La. 1978); *In re Succession of Cannata*, 180 So. 3d at 371. However, an amendment to a judgment that adds to, subtracts from, or in any way affects the substance of the judgment, is considered a substantive amendment. *In re Succession of Cannata*, 180 So. 3d at 371. Substantive amendments to judgments can be made only by consent of the parties or after a party has successfully litigated a timely application for new trial, an action for nullity, or a timely appeal. *Villaume,* 363 So. 2d at 451; *In re Succession of Cannata*, 180 So. 3d at 371.

Ronald contends the trial court's amendment to the QDRO was made only "to correct phraseology" to conform to the trial court's actual intentions and does not amount to a substantive change; therefore, he argues the amendment was authorized by Article 1951. We need not resolve whether Section 9:2801B, the specific legislation governing the partition of retirement benefits, precludes non-substantive amendments such as those authorized by Article 1951, because we find

the amendment here is substantive. The amendment changed the assignment date from August 26, 2011 to November 7, 2013, which alters the calculation for determining the amount Dana is entitled to receive from the Plan. A change in a judgment that alters the amount of relief a party is entitled to receive is a substantive change. *Terry v. Terry*, 612 So. 2d 808, 809 (La. App. 1 Cir. 1992). Thus, the amendment is not authorized by Article 1951.

CONCLUSION

The June 11, 2014 QDRO was qualified by the plan administrator and, pursuant to Section 9:2801B, was not thereafter subject to amendment. Consequently, we vacate the portions of the April 24, 2017 judgment of the trial court ordering amendment of the QDRO, recalculation of the amount Dana should receive from the Plan, and ordering Dana to repay any overpayment she received. The amended QDRO signed April 24, 2017, is also vacated. The exception of *res judicata* that Dana filed with this court while this appeal was pending is dismissed as moot. Costs of this appeal are assessed to Ronald Anthony Pembo III.

APRIL 24, 2017 JUDGMENT VACATED IN PART; APRIL 24, 2017 QDRO VACATED; EXCEPTION DISMISSED.