GLORIA JONES	*	**NO. 2018-CA-0107**
VERSUS	*	**COURT OF APPEAL**
AMERICAN HOME ASSURANCE COMPANY, ET AL	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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JENKINS, J. , CONCURS IN PART AND DISSENTS IN PART WITH REASONS

I concur in the majority's conclusion that the trial court did not abuse its discretion in awarding Ms. Jones reimbursement of one-half of the costs of deposition and trial transcripts that were used at trial to impeach witnesses, but were not introduced into evidence.

I dissent, however, from the majority's conclusion that the trial court did not err in awarding Ms. Jones legal interest from the date of judicial demand in the prior class action in which Ms. Jones was a putative class member, rather than the date of judicial demand in her individual action.

I find that the majority erroneously decides that this issue is analogous to the filing of an amended petition, which under La. C.C.P. art. 1153 "relates back" to the date of the filing of an original petition for purposes of interrupting prescription. The error in the majority's reasoning is that this matter involves two separate suits, the first of which was dismissed after the named plaintiff failed in certifying the putative class action.

In *Harrison v. Louisiana Highway Comm'n*, 202 La. 345, 11 So.2d 612 (1942), plaintiffs in ten consolidated suits sought compensation from the Louisiana Highway Commission for the alleged impairment of the value of their property

caused by the construction of a bridge. The suits were dismissed as of nonsuit.[1] Several years later, seven of the ten plaintiffs filed second suits and obtained judgments in their favor. The trial court allowed legal interest to accrue from the date of the filing of the original suits. *Harrison,* 11 So.2d at 615. On appeal, the Highway Commission argued that legal interest began accruing as of the date of filing of the original suits, which had been dismissed. The Supreme Court disagreed, holding that the date of judicial demand should be considered the date of filing of the second suits. The Court explained its reasoning:

> There is no good reason why the defendant should be condemned to pay interest for the period between the date of the filing of the original suits and the date on which those suits were dismissed because of the failure of the plaintiffs to prove the extent of their loss. The burden was upon the plaintiffs to sustain their demands with sufficient proof; hence the delay which resulted from their bringing their suits without having sufficient evidence to support them was due to the fault of the plaintiffs and not of the defendant. **The date on which these suits were brought successfully therefore must be taken as the date of judicial demand.**

Harrison, 11 So.2d at 615. (emphasis added). Under similar circumstances, lower Louisiana courts have awarded legal interest to the plaintiff only from the date of filing of the second, successfully concluded suit. *See Smith v. Holloway Sportswear, Inc.*, 97-698, p. 7 (La. App. 3 Cir. 12/17/97), 704 So.2d 420, 424 (legal interest should run from the date of filing of the second suit, which was the "first viable suit litigated to completion by plaintiff"); *Ard v. East Jefferson Gen. Hosp., Inc.*, 94-1001 (La. App. 5 Cir. 3/28/95), 654 So.2d 714, 715 ("[j]udicial interest accrues from the date the Ards' [second] tort suit was filed which resulted in a final judgment").

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[1] "Nonsuit" is a "term broadly applied to a variety of terminations of an action which do not adjudicate issues on the merits." BLACK'S LAW DICTIONARY 1058 (6th ed. 1990). The Louisiana Supreme Court views the dismissal of a suit without prejudice as "one akin to, and as having the same effect as . . . a judgment of nonsuit provided for under the old Code of Practice – it neither decides the merits, it does not prevent the bringing of the same cause of action in a new suit, and it cannot be pleaded as res judicata." *People of Living God v. Chantilly Corp*., 251 La. 943, 207 So.2d 752, 754 (1968).

Although *Harrison* was not a putative class action, I find that its reasoning and holding are controlling in this matter. Here, the named plaintiff in *Weems* filed her putative class action in 2006. Under La. C.C.P. art. 592(A)(1), Ms. Weems was required to file a motion for class certification within 90 days after service on all adverse parties, and the hearing on the motion to certify was required to be held "as soon as practicable." At the hearing on the motion to certify, Ms. Weems had the burden of proof to establish that all requirements of La. C.C.P. art. 591 had been satisfied. *See* La. C.C.P. art. 592(A)(3)(b). The trial court, however, did not deny Ms. Weems's motion for class certification until 2013, **seven years after the putative class action was filed**, upon a finding that Weems did not satisfy her burden of proof under La. C.C.P. art. 591. As in *Harrison*, the plaintiff in *Weems* was unsuccessful; only Ms. Jones's individual suit resulted in a favorable judgment. As in *Harrison*, Touro should not be required to pay legal interest for the period between the date of the filing of the original suit in July 2006, and the August 2013 date on which that putative class action was dismissed because of the failure of the plaintiff to certify a class.

I find that under *Harrison*, the date on which Ms. Jones filed her individual action, which was successfully concluded by a judgment in her favor, must be taken as the date of judicial demand. Ms. Jones, therefore, should be awarded legal interest beginning on January 14, 2014, the date of judicial demand in the instant suit, and not on the date of filing of the putative class action.

For these reasons, I respectfully concur in part and dissent in part.