

**JAMES C. SIZEMORE**

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**NO. 2018-CA-0826**

**VERSUS**

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**COURT OF APPEAL**

**REILLY-BENTON COMPANY,  
INC., ET AL**

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**FOURTH CIRCUIT**

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**STATE OF LOUISIANA**

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APPEAL FROM  
CIVIL DISTRICT COURT, ORLEANS PARISH  
NO. 2016-06452, DIVISION "C"  
Honorable Sidney H. Cates, Judge

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**Judge Rosemary Ledet**

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(Court composed of Judge Edwin A. Lombard, Judge Rosemary Ledet, Judge Tiffany G. Chase)

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**AFFIRMED**

**FEBRUARY 6, 2019**

This is a mesothelioma case. The narrow issue presented is whether the trial court abused its discretion in granting the plaintiff's motion to dismiss one of multiple defendants without prejudice, mooting the dismissed defendant's pending motion for summary judgment. Finding no abuse of discretion, we affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

In June 2016, James Sizemore,<sup>1</sup> a South Carolina resident, commenced this suit for damages against multiple defendants. Mr. Sizemore averred that he was diagnosed with mesothelioma due to his work-related exposure to asbestos from 1962 to 2009. During that period, he worked as a welder, pipefitter, and boilermaker at numerous industrial facilities, including shipyards, paper mills, and power plants. The facilities at which he worked were located in numerous states, including Louisiana and South Carolina. In July 2016, Mr. Sizemore filed a supplemental and amended petition adding Viking Pump, Inc. as a defendant.<sup>2</sup>

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<sup>1</sup> In June 2017, Mr. Sizemore died of mesothelioma. Thereafter, his four heirs substituted themselves as proper-party plaintiffs. For ease of discussion, we refer to the current plaintiffs in this opinion singularly as the plaintiff.

<sup>2</sup> In the petitions, the plaintiff named two categories of asbestos-related defendants: (i) asbestos miners, manufacturers, sellers, suppliers, and distributors; and (ii) employers premises owners,

Because Mr. Sizemore’s asbestos exposures from certain defendants occurred exclusively in other states, certain defendants moved for dismissal for lack of personal jurisdiction and certain defendants moved for dismissal based on *forum non conveniens*. In response, the plaintiff dismissed those defendants and filed a second suit in South Carolina state court in 2016 (the “South Carolina Case”). Viking was not one of the defendants who moved for dismissal based on lack of jurisdiction and *forum non conveniens*.

After answering the petition, Viking filed three motions for summary judgment. It filed its first motion in July 2017; it filed renewed motions in September 2017 and in April 2018. Viking’s trio of motions was based on lack of product identification. Citing *Lucas v. Hopeman Bros., Inc.*, 10-1037 (La. App. 4 Cir. 2/16/11), 60 So.3d 690, Viking contended that it was entitled to summary judgment because jobsite-only circumstantial evidence is insufficient to preclude summary judgment.<sup>3</sup>

On April 17, 2018, the plaintiff’s counsel emailed Viking’s counsel a proposed joint motion to dismiss without prejudice. According to Viking, it was given no notice that a week earlier, on April 9, 2018, the plaintiff amended his petition in the South Carolina Case to add Viking as a defendant. On April 23,

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and executive officers. Viking was added under the first category—asbestos miners, manufacturers, sellers, suppliers, and distributors.

<sup>3</sup> According to Viking, one of the co-defendants, Huntington Ingalls Inc. (Avondale Shipyard), filed a cross-claim against all the defendants, including Viking. On July 3, 2018, the trial court signed an order dismissing the plaintiff’s claims against Huntington Ingalls with prejudice and “thereby extinguishing all third party demands, and cross-claims brought by Defendant Huntington Ingalls,” which included a dismissal of the cross-claim against Viking.

2018, Viking filed an “Objection to Dismissal without Prejudice.”<sup>4</sup> In support, Viking characterized any forthcoming motion to dismiss without prejudice as “a veiled, eleventh hour attempt to transfer [the plaintiff’s] claims against Viking Pump to South Carolina and [thus] avoid a hearing on Viking Pump’s pending Motion for Summary Judgment.” Viking requested that its motion for summary judgment be granted and that the plaintiff’s claims against it be dismissed with prejudice.

In response, the plaintiff filed a “Reply to Viking Pump, Inc.’s Objection to Dismissal without Prejudice.” With its reply memorandum, the plaintiff filed a rule to show cause.<sup>5</sup> The trial court set the plaintiff’s rule to show cause for a hearing on July 6, 2018—the same date that Viking’s motion for summary judgment was set for hearing. In its reply memorandum, the plaintiff contended that a voluntary dismissal without prejudice of all his claims against Viking was proper and necessary.

On June 28, 2018, Viking filed an “Opposition to Plaintiff’s Motion to Dismiss without Prejudice.” At the July 6, 2018 hearing, the trial court granted the

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<sup>4</sup> At this point, the plaintiff had not filed with the trial court a motion to dismiss without prejudice.

<sup>5</sup> Although the plaintiff never filed a pleading labeled “Motion to Dismiss Without Prejudice,” the plaintiff’s “Reply to Defendant Viking Pump’s Objection to Dismissal Without Prejudice” was, in essence, a motion to dismiss without prejudice. *See Adams v. First Nat. Bank of Commerce*, 93-2346, 94-0486, p. 4 (La. App. 4 Cir. 9/29/94), 644 So.2d 219, 223 (observing that “courts look beyond mere headings and terminology used on or in pleadings to determine the circumstances and the true nature of the suit”).

plaintiff's motion to dismiss without prejudice and denied Viking's motion for summary judgment as moot. This appeal followed.<sup>6</sup>

## DISCUSSION

Viking contends, as it did in the trial court, that the plaintiff's motion to dismiss without prejudice should not have been granted for the following two reasons:<sup>7</sup> (i) the motion was untimely filed, given the trial court's scheduling order; and (ii) the purpose of the motion was to transfer the plaintiff's claims against Viking to the South Carolina Case and to avoid a hearing on Viking's pending summary judgment motion. An abuse of discretion standard applies in reviewing the trial court's ruling on both issues.<sup>8</sup> We separately address each issue.

### *Violation of Pre-Trial Scheduling Order*

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<sup>6</sup> The judgment granting the plaintiff's motion to dismiss Viking without prejudice is a final, appealable judgment. Cf. Frank L. Maraist, 1 LA. CIV. L. TREATISE, CIVIL PROCEDURE §10:3, n. 9 (2d ed. 2018) (observing that "[a] judgment of involuntary dismissal without prejudice is a final, appealable judgment" and citing *Dusenbery, as Tutrix of Dusenbery v. McMoRan Exploration Co.*, 425 So.2d 249 (La. App. 1st Cir. 1982); *Rapides Sav. & Loan Ass'n v. Lakeview Development Corp.*, 326 So.2d 511 (La. App. 3d Cir. 1976); *Lee v. Carruth*, 217 So.2d 718 (La. App. 3d Cir. 1969)); *Yamaha Motor Corp., U.S.A. v. Bonfanti Indus., Inc.*, 589 So.2d 575, 579, n. 7 (La. App. 1st Cir. 1991) (citing *Dusenbery, supra*) (observing that "[i]f a party voluntarily obtains a judgment of dismissal without prejudice there is no right to an appeal") (emphasis in original).

<sup>7</sup> On appeal, Viking assigns the following two errors:

1. Viking Pump respectfully asserts that it was entitled to summary judgment dismissing plaintiffs' claims with prejudice and that the Trial Court's decision to dismiss plaintiff's claims without prejudice after two years of litigation on the last hearing date before trial allowing plaintiff to avoid summary judgment in Louisiana and move their claims against Viking Pump to South Carolina was an abuse of discretion.
2. The Trial Court should have granted Viking Pump's Motion for Summary Judgment dismissing plaintiffs' claims with prejudice.

<sup>8</sup> See *McDuffie v. ACandS, Inc.*, 00-2779, pp. 4-6 (La. App. 4 Cir. 2/14/01), 781 So.2d 628, 632-33 (observing that an abuse of discretion standard applies in reviewing a trial court's decision regarding the modification of pre-trial scheduling orders); *Botanica Prop. Partners, L.L.C. v. Hodges Const. Co., Inc.*, 04-1086, p. 6 (La. App. 5 Cir. 2/15/05), 897 So.2d 756, 759 (observing that "[a] trial court has wide discretion to grant a dismissal without prejudice after the defendant has appeared, and its judgment will not be set aside absent a clear abuse of that discretion").

Addressing modifications of pre-trial scheduling orders, this court in

*McDuffie* observed as follows:

The matter of whether to modify the pre-trial order is solely within the discretion of the trial judge. Absent an abuse of discretion, the decision of the trial judge will be upheld. In deciding whether to modify a pretrial order, a trial court must be ever mindful of the fact that the objective of our legal system is to render justice between the litigants upon the merits of the controversy rather than to defeat justice upon the basis of technicalities.

00-2779, p. 3, 781 So.2d at 631. The jurisprudence also has observed that

“La.C.C.P. Art. 1551 authorizes the trial court to modify pre-trial orders to prevent ‘manifest injustice’” and that “La. C.C.P. Art. 1551 does not authorize severe limitation of a party’s rights for the technical, though justifiable, violation of a pre-trial order.” *Neff v. Rose*, 546 So.2d 480, 483 (La. App. 4th Cir. 1989).<sup>9</sup>

Viking points out that the plaintiff filed the motion to dismiss forty-five days late under the trial court’s scheduling order,<sup>10</sup> which provides as follows:

The Original of all motions, including discovery related motions, dispositive motions, exceptions, and *Daubert* motions shall be filed no later than 60 days prior to the rule date. The last rule date before trial is Friday, June 29, 2018.

Viking thus contends the motion should have been denied as untimely. The plaintiff counters that the trial court, despite being aware that the motion to dismiss was filed after the deadline in the scheduling order, found it had the discretion to

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<sup>9</sup> La. C.C.P. art. 1551(B) provides:

The court shall render an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel. Such order controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice.

<sup>10</sup> Viking further points out that the motion to dismiss (rule to show cause), filed on June 7, 2018, was untimely because it should have been filed no later than April 30, 2018. Viking still further points out that “[e]ven if the continued, last rule date of July 6, 2018 is used to calculate the motion due date as May 7, 2018, plaintiffs’ motion would still be 30 days late.”

grant the motion. At the hearing, Viking’s counsel informed the trial court that the plaintiff had filed the motion to dismiss forty-five days late. The trial court, nonetheless, found that it had the discretion to entertain the motion. We agree.

*Motion to Dismiss without Prejudice*

After the defendant has made an appearance, as here, a plaintiff’s right to dismiss rests within the sound discretion of the court. La. C.C.P. art. 1671, Comment (b).<sup>11</sup> Nonetheless, the jurisprudence has observed that La. C.C.P. art. 1671 does not grant a trial judge “unbridled discretion” and has recognized a rule that “a trial judge cannot dismiss a suit without prejudice if substantive rights acquired by the defendant would thereby be lost or if the dismissal would deprive the defendant of a just defense.” *Oliver v. Davis*, 95-1841, p. 4 (La. App. 1 Cir. 8/12/96), 679 So.2d 462, 464.<sup>12</sup> For the rule to apply, “[t]he rights affected by dismissal clearly must be substantive rights, not procedural rights of party litigants.” *Northshore Reg’l Med. Ctr. v. Par. of St. Tammany*, 96-0717, p. 5, n. 4 (La. App. 1 Cir. 12/20/96), 685 So.2d 614, 616 (citing *City of New Orleans v. New Orleans Canal, Inc.*, 173 So.2d 43, 45 (La. App. 4th Cir. 1965)). In determining whether the rule applies, “[e]ach case has to be examined on its particular facts.” *Sanders v. Travelers Ins. Co.*, 271 So.2d 298, 299 (La. App. 3d Cir. 1972);

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<sup>11</sup> La. C.C.P. art. 1671 provides as follows:

A judgment dismissing an action without prejudice shall be rendered upon application of the plaintiff and upon his payment of all costs, if the application is made prior to any appearance of record by the defendant. If the application is made after such appearance, the court may refuse to grant the judgment of dismissal except with prejudice.

<sup>12</sup> See also *Botanica*, 04-1086, p. 6, 897 So.2d at 759 (observing that “[a]n abuse of discretion has been found in dismissals without prejudice where the substantive rights of the defendant would be lost or where the defendant would be deprived of a just defense”); *Kennison v. BLR Constr. Cos., L.L.C.*, 07-743, p. 2 (La. App. 3 Cir. 12/5/07), 971 So.2d 1232, 1233-34 (same).

*Melancon v. Swift Agr. Chem. Corp.*, 289 So.2d 578, 580 (La. App. 3d Cir. 1974) (citing *Sanders, supra*).

One commentator has noted that “[t]he rule may be illusory, however, because rarely, if ever, will a dismissal without prejudice affect acquired rights or deprive the defendant of a defense. The decisions indicate that the court should refuse to dismiss without prejudice if such a dismissal may result in a significant loss of the defendant's efforts in defending the first suit.” Frank L. Maraist, 1 LA. CIVIL LAW TREATISE § 10:3 (2d ed. 2018). The decisions also indicate the following guidance in determining whether a dismissal without prejudice would constitute an abuse of discretion:

The injury which would thus be occasioned to the defendant must be of a character that deprives him or her of some substantive rights concerning defenses not available in a second suit or that may be endangered by the dismissal, and not the mere ordinary inconveniences of double litigation which in the eyes of the law would be compensated by costs. Moreover, the mere fact that the plaintiff intends to institute, or in fact institutes, another suit on the same cause of action is not a sufficient ground for a denial of his or her motion to discontinue an action.

27 C.J.S. *Dismissal and Nonsuit* § 27 (citing *Betz v. Hearin Tank Lines, Inc.*, 75 So.2d 356 (La. App. 1st Cir. 1954); and *Sanders, supra*).

The gist of Viking’s argument is that the trial court abused its discretion in granting the motion to dismiss rather than ruling on its summary judgment motion. Viking emphasizes that it has engaged in two years of extensive, expedited discovery and contends that it is entitled to a dismissal with prejudice on its summary judgment motion. The plaintiff counters that “all of Mr. Sizemore’s exposures to asbestos from Viking’s pumps occurred in South Carolina, where an action is pending against other defendants” and that the discovery that has been taken in this case may be used in the South Carolina Case. The plaintiff also



contends that judicial efficiency supports the trial court's ruling granting his motion.

Agreeing with the plaintiff, the trial court, at the hearing, questioned Viking's counsel whether the discovery that Viking had done in this case could be used in the South Carolina Case. Viking's counsel answered in the affirmative but argued that Viking was entitled to a dismissal with prejudice based on its motion for summary judgment. The trial court disagreed.

On appeal, Viking again contends that the trial court was required to grant its motion for summary judgment under La. C.C.P. art. 966 and that the trial court "had no discretion to disregard summary judgment in favor of dismissal without prejudice." We disagree. Contrary to Viking's contention, the trial court had the discretion to grant the motion to dismiss absent evidence that Viking would have been deprived a just defense or would have lost substantive rights. Viking failed to establish either.

Summarizing, given the discovery Viking has done in this case can be used in the South Carolina Case coupled with Viking's failure to establish that as a result of the dismissal it would be deprived of a just defense or lose substantive rights, we cannot conclude the trial court abused its wide discretion in granting the motion to dismiss without prejudice.<sup>13</sup>

### **DECREE**

For the foregoing reasons, the judgment of the trial court is affirmed.

**AFFIRMED**

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<sup>13</sup> Given our holding, we pretermitt consideration of the denial of Viking's motion for summary judgment as moot.