NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CA 0059

JOANN SIMS AND BRENT SIMS

VERSUS

THE AMERICAN INSURANCE COMPANY, ASSOCIATED INDEMNITY CORPORATION, TRAVELERS CASUALTY AND SURETY COMPANY, JOE BRISTOL, HENRY BELL, MORTIMER CURRIER, GERARD DAIGRE, AND THEOPHILE ROZASA

Judgment Rendered: December 21, 2011

Appealed from the
Eighteenth Judicial District Court
In and for the Parish of Iberville, Louisiana
Docket Number 68301

Honorable J. Robin Free, Judge Presiding
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David M. Bienvenu, Jr. **Lexi Hollinga** **John M. Parker, Jr.** **Baton Rouge, LA**	**Counsel for Defendants/Appellees,** **Jan Achord, Arthur J. Borg, Marvin M. Cox, Mortimer Currier, Gerard W. Daigre, Malcolm McNabb, & Theophile Rozas**
F. Charles Marionneaux **F. Barry Marionneaux** **Ryan N. Ours** **Plaquemine, LA**	**Counsel for Defendants/Appellees,** **The American Insurance Company and Travelers Casualty and Surety Company**

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BEFORE: WHIPPLE, PARRO, KUHN, GUIDRY, AND WELCH, JJ.

Parro, J., dissents for the reasons assigned by Judge Guidry.
Guidry, J. dissents and assigns reasons

WHIPPLE, J.

Plaintiffs appeal the trial court's judgment, maintaining the exception of prescription filed by various defendants. For the following reasons, we reverse and remand.

FACTS AND PROCEDURAL HISTORY

On August 22, 2008, John Sims and his wife Jo Ann[1] filed suit in the Eighteenth Judicial District Court (a proceeding which will be referred to herein as "Sims I"), naming as defendants: The Dow Chemical Company ("Dow Chemical"), his former employer; Larry D. Adcock, Mortimer Currier, Gerard W. Daigre, Charlie Melancon, and Theophile Rozas, alleged former executive officers of Dow Chemical; and The American Insurance Company, Associated Indemnity Corporation, The Home Insurance Company, and Travelers Casualty and Surety Company, the insurers of Dow Chemical and its executive officers. The Simses averred that while in the course and scope of his employment at the Dow Chemical facility in Plaquemine, Louisiana, between 1969 and 2000, Mr. Sims was occupationally exposed to harmful quantities of vinyl chloride, which ultimately resulted in him developing Grade IV Glioblastoma, a form of brain cancer.[2] They further averred that Mr. Sims was never properly informed of the harmful nature and extent of his exposure or of measures to avoid such exposure, that the Dow executive officers were negligent in their duties to provide him with a safe workplace and in their personal responsibility for his safety, and that Dow Chemical and its executive

[1]Mrs. Sims's first name is spelled differently in various pleadings and documents in this appellate record. Herein, we refer to her as "Jo Ann," in accordance with the spelling of her name in the latest petition.

[2]According to the Simses' petition, Mr. Sims was diagnosed with "terminal Glioblastoma Multiforme" in March of 2008; thus, suit was filed within one year of his diagnosis.

officers were guilty of intentional misconduct in causing his overexposure to vinyl chloride and his resulting brain cancer. Thus, he and his wife sought damages for his medical expenses, disability, physical and mental pain and suffering, fear of future complications and death, and loss of enjoyment of life as well as for Mrs. Sims's loss of consortium.

Sims I was then removed to the United States District Court for the Middle District of Louisiana by several defendants on the basis of diversity jurisdiction under 28 U.S.C. § 1332(a). On October 1, 2008, Mr. Sims died, and by order dated November 4, 2008, the federal district court substituted his wife and his son, Brent Sims, as parties plaintiff.

Thereafter, by order dated August 25, 2009, the federal district court in Sims I ordered that the Simses' claims against The American Insurance Company, The Associated Indemnity Corporation, The Home Insurance Company, and The Travelers Casualty and Surety Company, all in their capacity as the liability insurers of Dow Chemical's purported executive officers and employees, were dismissed without prejudice. However, the order further provided that the Simses' claims against these insurers in their capacity as the liability insurers of Dow Chemical were reserved to the Simses. The order was silent as to the Sims's claims against the executive-officer defendants named in the petition.

Mrs. Sims and Brent Sims then filed the instant suit for damages (which we refer to herein as Sims II) in the Eighteenth Judicial District Court on October 7, 2009, more than one year after Mr. Sims's death, but

while Sims I was still pending in federal court.[3] In their original and amended petitions in Sims II, they again named as defendants Currier, Daigre, Melancon, and Rozas, alleged executive officers of Dow Chemical at the time of Sims's employment; and The American Insurance Company, Associated Indemnity Corporation, The Home Insurance Company, and Travelers Casualty and Surety Company, as the insurers of Dow Chemical[4] and its executive officers. Also named as defendants in Sims II were Joe Bristol, Henry Bell, Jan Achord, Wilmer Ballentine, Arthur Bourg, Marvin Cox, James Campbell, and Malcolm McNabb, all in their capacity as alleged former executive officers of Dow Chemical. In this suit, the Simses again alleged that Dow's executive officers intentionally or, alternatively, negligently breached duties owed to Mr. Sims, including the duty to provide him with a reasonably safe workplace and that their breach of those duties directly caused Mr. Sims's brain cancer and resulting death. Accordingly, Mrs. Sims and Brent Sims asserted a survival action, seeking damages for Mr. Sims's past medical expenses, past disability, past physical and mental

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[3]The record before us also contains two pages, the first and the last, of the 106-page petition, which were faxed to the clerk of court for the 18th Judicial District Court on October 2, 2009. Pursuant to LSA-R.S. 13:850, a party may file with the court by facsimile transmission any paper in a civil action and must then within 5 days of the facsimile transmission, forward the original signed document and applicable fees to the clerk of court.

Thus, in order for a fax-filed pleading to have any force or effect, the original signed document must be filed with the clerk of court, along with the applicable fees, within 5 days of receipt of the fax-filed transmission. Dunn v. City of Baton Rouge, 2007-1169 (La. App. 1st Cir. 2/8/08), 984 So. 2d 129, 131. Moreover, if the subsequent physically filed petition differs from the copy which was filed by fax, it cannot be considered to be the original document. Thus, failure to physically file the original document as mandated by LSA-R.S. 13:850(B) results in the facsimile transmission having no effect, and it will not interrupt prescription. Dunn, 984 So. 2d at 131.

The record herein contains a fax-filed pleading of only the first and last pages of a total of 106 pages, while the physically filed petition contains all 106 pages. However, we note that whether we consider the petition as having been filed on October 2, 2009, or October 7, 2009, both pleadings were filed more than one year after Mr. Sims's death, but while Sims I was still pending in federal court. Thus, resolution of any question regarding the effect of any differences between the October 2, 2009 fax filing and the October 7, 2009 physical filing is not dispositive of the prescription issue presented herein.

[4]Notably, however, Dow Chemical was not named as a defendant in Sims II.

pain and suffering, and past loss of enjoyment of life, and wrongful death claims, seeking damages for loss of companionship, love, moral support, guidance, consortium and affection; mental anguish; extreme grief; distress; and funeral expenses. Finally, the Simses sought punitive damages as a result of Mr. Sims's exposure to carcinogenic chemicals at Dow Chemical's Plaquemine facility.

After filing the instant suit in the Eighteenth Judicial District Court, a "Stipulation and Notice of Dismissal with Prejudice" was filed with the federal district court in Sims I on January 22, 2010, wherein plaintiffs, Jo Ann Sims and Brent Sims, "stipulate[d] to a dismissal of this action only, with prejudice, reserving all rights as to persons not made party to this action, with all parties to bear their own costs."[5] The Notice of Dismissal further provided that the phrase "this action only" referred to "the claims against the defendants in the capacities they presently occupy in the action pending before the Court."

In response to the January 22, 2010 Notice of Dismissal in Sims I, defendants Achord, Bourg, Cox, Currier, Daigre, McNabb, Rozas, The American Insurance Company, Associated Indemnity Corporation, and Travelers Casualty and Surety Company filed an exception of prescription in the proceedings in Sims II.[6] In support of the exception of prescription, these defendants contended that: (1) the applicable prescriptive period for the actions of Mrs. Sims and Brent Sims is one year, as set forth in LSA-C.C. art. 2315.1; (2) Mr. Sims died on October 1, 2008; (3) the petition in

[5]Pursuant to Rule 41(a)(1)(A)(ii) of the Federal Rules of Civil Procedure, the plaintiff may dismiss an action without a court order by filing a stipulation of dismissal signed by all parties who have appeared.

[6]These defendants also filed exceptions of res judicata and vagueness, which are not before this court on appeal.

Sims II was partially fax-filed on October 2, 2009[7], more than one year after Mr. Sims's death; and (4) pursuant to LSA-C.C. art. 3463, the voluntary dismissal with prejudice of Sims I by Mrs. Sims and Brent Sims prevented Sims I from interrupting prescription for the action asserted in Sims II herein. Additionally, at the hearing on the exceptions below, defense counsel further argued that, with regard to Achord, Bourg, Cox, and McNabb, who were not named as defendants in Sims I, but who were instead sued for the first time in Sims II, the Simses' voluntary dismissal of Sims I with prejudice constituted an adjudication of their claims in favor of those defendants, thereby destroying any alleged solidarity between the Sims I defendants and the newly named Sims II defendants. Thus, defense counsel argued on this alternative basis also that the Simses' claims against Achord, Bourg, Cox, and McNabb were prescribed.

Following the hearing, the trial court rendered judgment, maintaining the exception of prescription and dismissing with prejudice the Simses' claims against all the defendants who filed the exception. From this judgment, the Simses appeal, contending in their sole assignment of error that the trial court erred in maintaining the exception of prescription related to the survival action asserted by Mrs. Sims and Brent Sims because a timely filed suit and service (Sims I) had interrupted prescription at the time this suit (Sims II) was filed.

DISCUSSION

A survival action, which may be brought by the surviving spouse and child of the deceased to recover all damages for injury suffered by the deceased as the result of an offense or quasi offense, survives for a period of

[7]See footnote 3, supra.

one year from the death of the deceased.[8] LSA-C.C. art. 2315.1(A)(1). In the instant case, Mr. Sims died on October 1, 2008, and the original petition was filed more than one year after his death. Thus, the Simses' petition asserting a survival action for the damages suffered by John Sims was prescribed on the face of the pleading.

Ordinarily, the party filing an exception of prescription has the burden of proof at the trial of the exception; however, if prescription is evident on the face of the pleadings, the burden shifts to the plaintiffs to show that the action has not prescribed. Campo v. Correa, 2001-2707 (La. 6/21/02), 828 So. 2d 502, 508. Thus, Mrs. Sims and Brent Sims had the burden of establishing that the survival action asserted by them was not prescribed.

In an attempt to show that their survival action was not prescribed, the Simses pointed out to the district court that they had previously timely filed Sims I and that at the time they filed Sims II (i.e., the instant action), Sims I was still pending in the federal district court and, thus, served to interrupt prescription. However, at the hearing on the exception, the defendant-exceptors introduced into evidence the January 22, 2010 Notice of Dismissal filed by Mrs. Sims and Brent Sims in Sims I, wherein the parties stipulated to a dismissal with prejudice of Sims I.

Louisiana Civil Code article 3462 states, in pertinent part, that "[p]rescription is interrupted when ... the obligee commences action against the obligor, in a court of competent jurisdiction and venue." However, LSA-C.C. art. 3463 further provides that "[a]n interruption of prescription resulting from the filing of a suit in a competent court and in the proper

[8]Mrs. Sims and Brent Sims concede in their appellate brief that any **wrongful death** action they had asserted herein pursuant to LSA-C.C. art. 2315.2 for their damages caused by Mr. Sims's death was prescribed at the time this suit was filed. Thus, the only issue before this court is whether the trial court correctly determined that the **survival** action asserted by them was also prescribed.

venue ... continues as long as the suit is pending," but that "[i]nterruption is considered **never to have occurred** if the plaintiff ... voluntarily dismisses the action at any time either before the defendant has made any appearance of record or thereafter." (Emphasis added).

In Johnson v. City of Baton Rouge through Baton Rouge Police Department, 2009-1112 (La. App. 1st Cir. 12/23/09), 30 So. 3d 809, 811, and Williams v. Shaw Group, Inc., 2009-0301 (La. App. 1st Cir. 9/11/09), 21 So. 3d 992, 995, this court held that the language of LSA-C.C. art. 3463, providing that any interruption of prescription resulting from the filing of a suit "is considered never to have occurred" where the plaintiff voluntarily dismisses that suit, is clear and unambiguous and, thus, that the filing of a second suit, even before the voluntary dismissal of the first suit, is untimely if filed beyond the applicable prescriptive period. Accordingly, pursuant to the holdings of Johnson and Williams, if the Simses had in fact voluntarily dismissed Sims I, albeit after the filing of Sims II, interruption of prescription "is considered never to have occurred," and the filing of Sims II more than one year after John Sims's death would seemingly be untimely. Johnson, 30 So. 3d at 811; Williams, 21 So. 3d at 995.

However, because we agree with the Simses that the January 22, 2010 Notice of Dismissal **with prejudice** in Sims I was not a "voluntary dismissal" on their part as contemplated by LSA-C.C. art. 3463, we conclude that the provisions of LSA-C.C. art. 3463, regarding the effect of the voluntary dismissal of a timely filed suit as it relates to the interruption of prescription, do not apply herein. Accordingly, this court's decisions in Johnson and Williams are factually distinguishable and, thus, not controlling.

Rather, we find that the applicable and controlling jurisprudence herein is this court's opinion in Pierce v. Foster Wheeler Constructors, Inc., 2004-0333 (La. App. 1st Cir. 2/16/05), 906 So. 2d 605, 610, writ denied, 2005-0567 (La. 4/29/05), 901 So. 2d 1071. In Pierce, the parties had entered into a compromise or settlement in a previously filed workers' compensation proceeding and had then filed a joint motion to dismiss, resulting in an order of dismissal of the workers' compensation matter. In the related personal injury matter, this court determined that the joint motion to dismiss on the basis of settlement in the workers' compensation matter did not constitute a "voluntary dismissal by plaintiff" pursuant to LSA-C.C. art. 3463 because a transaction or compromise has **the force and effect of a final judgment on the merits**. Thus, this court determined that the plaintiff did not dismiss the workers' compensation matter as contemplated by LSA-C.C. art. 3463, but that it was resolved by the transaction or compromise. Pierce, 906 So. 2d at 609-610.

Similarly, in Sims I, Mrs. Sims and Brent Sims filed a Notice of Dismissal with the federal court in accordance with Rule 41(a)(1) of the Federal Rules of Civil Procedure, stipulating that the matter was being dismissed **with prejudice**. Pursuant to Rule 41(a)(1), a plaintiff has a right to seek dismissal of his action without a court order by filing a stipulation of dismissal signed by all parties who have appeared. Fed. R. Civ. P. 41(a)(1); Exxon Corporation v. Maryland Casualty Company, 599 F.2d 659, 661 (5th Cir. 1979). However, federal jurisprudence provides that such a stipulation of dismissal **with prejudice** generally constitutes a final judgment on the merits (subject to certain exceptions such as claims for declaratory judgment). Kaspar Wire Works, Inc. v. Leco Engineering and Machine, Inc., 575 F.2d 530, 534-535, 539-540 (5th Cir. 1978); Intermedics, Inc. v.

Ventritex, Inc., 775 F. Supp. 1258, 1262 (N.D. Cal. 1991). Thus, as with the joint motion and order of dismissal based on compromise in Pierce, because the January 22, 2010 Notice of Dismissal with prejudice had the effect of a final judgment on the merits, it does not constitute a "voluntary dismissal" within the meaning of LSA-C.C. art. 3463. See Pierce, 906 So. 2d at 609. Accordingly, the normal rules of interruption of prescription apply pursuant to LSA-C.C. arts. 3462 and 3466. See Pierce, 906 So. 2d at 906; Jones v. Department of Transportation and Development, State of Louisiana, 94-1908 (La. App. 1st Cir. 6/30/95), 659 So. 2d 818, 819-820.

Prescription is interrupted by the commencement of suit against the obligor in a court of competent jurisdiction and venue. LSA-C.C. art. 3462. That interruption of prescription continues as long as the suit is pending. LSA-C.C. art. 3463. Moreover, if prescription is interrupted, the time that has run is not counted, and prescription begins to run anew from the last day of interruption. LSA-C.C. art. 3466. Thus, applying the normal rules of interruption of prescription set forth in LSA-C.C. arts. 3462, 3463 and 3466, because Sims I was timely filed, prescription was interrupted and the time while it was pending is not counted. Furthermore, because Sims I was still pending at the time Sims II was filed, prescription remained interrupted. Thus, Sims II could not be considered as being untimely filed pursuant to LSA-C.C. arts. 3462, 3463 and 3466.

Nonetheless, as stated above, defendants further argued in support of their exception of prescription that Sims II was prescribed as to newly named defendants Achord, Bourg, Cox, and McNabb, in that the dismissal with prejudice of Sims I established the lack of solidarity between Sims I defendants and these newly named defendants in Sims II. Specifically, defendants argue that where one tortfeasor is timely sued and a second,

alleged joint or solidary tortfeasor is subsequently sued beyond the prescriptive period, prescription is deemed never to have been interrupted for the subsequently sued tortfeasor if the first-sued tortfeasor is dismissed or found not liable. The defendants note that Achord, Bourg, Cox and McNabb were not named as defendants in the timely filed Sims I suit, but rather were first named as defendants in Sims II, which was filed more than one year after Mr. Sims's death. They further assert that because the Simses dismissed with prejudice the claims asserted against the defendants in Sims I, no joint or solidary obligation could exist between those defendants in Sims I and the newly named defendants in Sims II. Thus, they contend that the timely filing of Sims I did not interrupt prescription as to the Simses' claims against Achord, Bourg, Cox and McNabb, and, accordingly, the Simses' claims against these newly named defendants were properly dismissed as prescribed.

The interruption of prescription by suit against one solidary obligor is effective as to all solidary obligors. LSA-C.C. arts. 1799 and 3503; Renfroe v. State Department of Transportation and Development, 2001-1646 (La. 2/26/02), 809 So. 2d 947, 950. The same principle is applicable to joint tortfeasors. LSA-C.C. art. 2324(C); Renfroe, 809 So. 2d at 950. However, a suit timely filed against one defendant does not interrupt prescription as against other defendants not timely sued, where the timely sued defendant is ultimately found not liable to plaintiffs, since no joint or solidary obligation would exist. Renfroe, 809 So. 2d at 950.

As stated above, in Sims I, the Simses named as defendants Dow Chemical, certain former executive officers of Dow Chemical, and the alleged insurers of Dow Chemical and its executive officers. Moreover, the record contains a January 22, 2010 Notice of Dismissal, whereby the

Simses' action in Sims I was dismissed **with prejudice**, but reserving all rights to the Simses as to persons not made a party to the action in Sims I. Notably, however, the Notice of Dismissal was signed by counsel for the Simses, counsel for Dow Chemical, and counsel for the various insurers named as defendants, but was not signed by counsel for the executive officers named in Sims I.

As stated above, Rule 41(a)(1)(A)(ii) of the Federal Rules of Civil Procedure **requires** all parties who have appeared to sign a stipulation of dismissal in order for the plaintiff to obtain dismissal without a court order. However, on the record before us, we cannot determine whether the executive officer defendants named in Sims I had appeared, thus requiring their stipulation and acquiescence in the Notice of Dismissal, or whether in fact those executive-officer defendants had never appeared. Thus, on the record before us, it is unclear what effect, if any, the January 22, 2010 Notice of Dismissal had on the Simses' claims against the executive-officer defendants named in Sims I. Accordingly, we cannot conclude on the record before us whether the Simses' claims against the newly named executive officer defendants are prescribed on the basis of lack of solidarity with the previously named defendants in Sims I.[9]

The court of appeal shall render any judgment which is just, legal and proper upon the record on appeal. LSA-C.C.P. art. 2164; Harris v. State, Department of Transportation and Development, 2007-1566 (La. App. 1st Cir. 11/10/08), 997 So. 2d 849, 871, writ denied, 2008-2886 (La. 2/6/09), 999 So. 2d 785. Accordingly, given the timing in which this argument was first raised below and the uncertainty presented by the record as to the

[9]We again note that this alternative argument on prescription regarding lack of solidarity was presented by defense counsel for the first time at the hearing on the exception, thus limiting the Simses' ability to fully respond to this argument.

correct disposition of this issue, we must conclude that a resolution on appeal of the prescription issue on this basis would not be just or proper.

Therefore, considering the foregoing and the record as a whole, we must reverse the trial court's judgment maintaining the exception of prescription.

CONCLUSION

For the above and foregoing reasons, the August 31, 2010 judgment of the trial court, maintaining the exception of prescription filed by defendants Achord, Bourg, Cox, Currier, Daigre, McNabb, Rozas, The American Insurance Company, Associated Indemnity Corporation, and Travelers Casualty and Surety Company and dismissing with prejudice the Simses' claims against those defendants, is reversed. This matter is remanded for further proceedings consistent with the views expressed herein. Costs of this appeal are assessed against defendants-exceptors, Achord, Bourg, Cox, Currier, Daigre, McNabb, Rozas, The American Insurance Company, Associated Indemnity Corporation, and Travelers Casualty and Surety Company.

REVERSED AND REMANDED.

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GUIDRY, J., dissents and assigns reasons.

GUIDRY, J., dissenting.

I respectfully disagree with the majority opinion in this case. After filing Sims II with the Eighteenth Judicial District Court, plaintiffs filed a "Stipulation and Notice of Dismissal with Prejudice" with the federal district court, dismissing Sims I. This constituted a voluntary dismissal under La. C.C. art. 3463. Pursuant to this article, any interruption of prescription resulting from plaintiffs filing of Sims I "**is considered never to have occurred**" as a result of plaintiffs having "at any time" voluntarily dismissed Sims I; therefore, there was no interruption of prescription for the action asserted in Sims II.

In Johnson v. City of Baton Rouge through Baton Rouge Police Department, 09-1112, p (La. App. 1st Cir. 12/23/09), 30 So. 3d 809, 811, and Williams v. Shaw Group, Inc., 2009-0301 (La. App. 1st Cir. 9/11/09), 21 So. 3d 992, 994, this court held that language of La. C.C. art. 3463, providing that any interruption of prescription resulting from the filing of a suit "is considered never to have occurred" where the plaintiff voluntarily dismisses that suit, is clear and unambiguous and, thus, the filing of a second suit, even before the voluntary

dismissal of the first suit, is untimely if filed beyond the applicable prescriptive period. Accordingly, pursuant to the holdings of Johnson and Williams, because the plaintiffs did in fact voluntarily dismiss Sims I, albeit after the filing of Sims II, interruption of prescription "is considered never to have occurred," and the filing of Sims II more than one year after John Sim's death is clearly untimely. See Johnson, 30 So. 3d at 811; Williams, 21 So. 3d at 944.

The majority opinion mistakenly holds that the applicable and controlling jurisprudence herein is Pierce v. Foster Wheeler Constructors, Inc., 04-0333, p. 2 (La. App. 1st Cir. 2/16/05), 906 So. 2d 605, writ denied, 05-0567 (La. 4/29/05), 901 So. 2d 1071. However, the distinction made by the majority between a dismissal with prejudice and a dismissal without prejudice is without merit.

The majority mischaracterizes the reasoning of the Pierce opinion by focusing solely on an isolated statement in the opinion observing that according to La. C.C. art. 3078, a transaction or compromise has "a force equal to the authority of things adjudged." See Pierce, 04-0333 at 7, 906 So. 2d at 609-10. The majority then goes on to assert that the dismissal of Sims I had a similar effect of rendering the matter "a thing adjudged," because under Fed. R. Civ. P. 41(a) (1) "a stipulation of dismissal with prejudice generally constitutes a final judgment on the merits."

However, the reasoning of the court in Pierce was not as narrowly focused as the majority would represent herein. Instead, the court in Pierce found merit in the assertion that because all of the issues in the worker's compensation case were *resolved* by the compromise at the time the action was dismissed, the dismissal could not be considered voluntary for the purpose of applying La. C.C. art. 3463. See Pierce, 04-333 at 8, 906 So. 2d at 610 ("Rather, we conclude that Pierce did not dismiss the action, but resolved it by the transaction or compromise. The

dismissal that was entered into the record simply cleaned up the record and disposed of any incidental matters, thereby allowing it to be closed."). To support this assertion, this court then went on to cite the declaration in La. C.C. art. 3078 that a transaction or compromise has the effect of a thing adjudged. Clearly, in the instant matter, none of the issues involved in the case were resolved at the time the plaintiffs dismissed Sims I, and thus, the holding of Pierce is not applicable to a determination of whether the plaintiffs' dismissal of Sims I was voluntary.

Although Sims I was dismissed "with prejudice," the effect of the voluntariness of the dismissal does not change. The only effect of a dismissal with prejudice, as opposed to one without prejudice, is the finality of the judgment for *res judicata* purposes as between the parties to the lawsuit. See La. C.C.P. art. 1673. It has no bearing on whether the dismissal is "voluntary" within the meaning of La. C.C. art. 3463. See Adams v. Dupree, 94-2353, p. 6 (La. App. 4th Cir. 10/12/95), 663 So. 2d 433, 436. If the legislature wanted to distinguish voluntary dismissals with prejudice from those without prejudice, for the purpose of La. C.C. art. 3463, it was within its prerogative to do so. We should not be reading such a distinction into the law.

Accordingly, an interruption of prescription did not occur because Sims I was voluntarily dismissed by the plaintiffs before the defendants made an appearance. Thus, the trial court did not err in maintaining the exception of prescription related to the survival action asserted by Mrs. Sims and Brent Sims, because Sims I did not serve to interrupt prescription at the time that Sims II was filed. Therefore, I respectfully dissent from the majority opinion.