Court of Appeal
Fifth Circuit
State of Louisiana

15-CA-520

Olivia Bailey et al.
v.
Exxon Mobil Corp. et al.

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Betty Arcement, Virginia Dimarco, Mary Bradley Doris, Porter Edwards, Jr., Joan Haas Folse, Wynesta Gaston, Shirley Jackson, Hayes J. Lepine, Carla Simmons, Keion Walker, and Carol Walters,
Plaintiffs and Appellants

versus

OFS, Inc., et al.
Defendants and Appellees

On appeal from the 24th Judicial District Court, Parish of Jefferson
No. 670-803, Division J, Hon. Brady Fitzsimmons, Judge

This brief is filed on behalf of defendants-appellees Exxon Mobil Corporation, Exxon Mobil Oil Corporation, Humble Incorporated, ConocoPhillips Company, Chevron U.S.A. Inc., Texaco Inc., Union Oil Company of California, American Oil Company, BP Exploration & Production Inc., Marathon Oil Company, Shell Oil Company, Shell Offshore Inc., and SWEPI LP.

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Jurisdiction of the Court

The Court should dismiss this appeal on grounds of mootness because the plaintiffs-appellants have failed to articulate any practical benefit they would gain by reversal. In their appeal from a summary judgment dismissing their wrongful-death suits with prejudice, their only complaint is that the trial court failed to grant their own motions to voluntarily dismiss their wrongful-death suits with prejudice. So if they were to win their appeal, the result would be the same: dismissal with prejudice. Because any judgment of this Court on the merits of the appeal would have no practical effect on the parties' rights, this Court lacks appellate jurisdiction. *See Baxter v. Scott*, 2003-2013 p. 1 (La. 11/14/03), 860 So. 2d 535, 536 (courts should not decide abstract, hypothetical, or moot controversies); *State in Interest of C.W.*, 97-1229 p. 3 (La. App. 5 Cir. 4/13/98), 712 So. 2d 245, 246 (appellate courts will not render advisory opinions from which no practical results can follow).

If plaintiffs' appeal were not moot, this Court would have appellate jurisdiction under La. Const. art. V § 10(a) and La. Code Civ. P. arts. 2087 and 2088. The judgment dismissing the plaintiffs-appellants' suit was signed on April 10, 2015.[1] The judgment is final under La. Code Civ. P. art. 1915(A) because it dismisses the entire suit as to these plaintiffs. In addition, the trial court designated the judgment as final under La. Code Civ. P. art. 1915(B), expressly finding no just reason for delay.[2] Plaintiffs-appellants filed their motion for devolutive appeal on May 22, 2015, and the trial court granted the devolutive appeal on May 26, 2015, well within the delay under art. 2087 for a devolutive appeal.[3]

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[1] 3 R. 505–07.

[2] 3 R. 507.

[3] 3 R. 509–11.

Statement of the Case

This appeal is from a summary judgment dismissing wrongful-death claims by Betty Arcement and 10 other plaintiffs.[4] They are 11 of the numerous plaintiffs in a case titled *Olivia Bailey et al. v. Exxon Mobil Corporation et al.* filed in the 24th Judicial District Court, Jefferson Parish. In their original petition, filed more than six years ago (March 16, 2009), the *Bailey* plaintiffs alleged that their respective decedents had died from illnesses caused by exposure to naturally occurring radioactive material (NORM), and that the exposure was caused by the defendants' fault. Their original petition alleged both survival actions under La. Civ. Code art. 2315.1 and wrongful-death actions under La. Civ. Code art. 2315.2.

The decedents had already been named plaintiffs in another case alleging the same exposure. That case, styled *Warren Lester et al. v. Exxon Mobil Corporation et al.*, was then pending in Civil District Court in Orleans Parish, but has since been removed to the U.S. District Court for the Eastern District of Louisiana.[5] While the *Lester* case was still in Civil District Court, the *Bailey* plaintiffs made the tactical decision to split their causes of action, asserting their survival actions in *Lester* and their wrongful-death actions in *Bailey*.[6] Thus they amended their

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[4] Plaintiffs-appellants in this appeal are Betty Arcement (decedent Julien J. Arcement), Virginia Dimarco (decedent Leslie W. Mead), Mary Bradley Doris (decedent Andrew J. Doris), Porter Edwards, Jr. (decedent Porter Edwards), Joan Haas Folse (decedent Lloyd J. Folse), Wynesta Gaston (decedent Sherman Gaston), Shirley Jackson (decedent H.L. Jackson), Hayes J. Lepine (decedent Ruth L. Lepine), Carla Simmons (decedent Frank Morris), Keion Walker (decedent William Walker, Sr.), and Carol Walters (decedent Paris T. Dardar).

[5] The docket number in Civil District Court was 2002-19657. The current docket in the U.S. District Court is 14-CV-1824.

[6] Plaintiffs' tactical decision to split their causes of action was contrary to La. Code Civ. P. art. 425, which requires a plaintiff to "assert all causes of action arising out of the transaction or occurrence that is the subject matter of the litigation." *See also* La. Code Civ. P. art. 891(A) (petition must state "all causes of action arising out of, and of the material facts of, the transaction or occurrence that is the subject matter of the litigation …."). Their decision was also contrary to jurisprudence forbidding a plaintiff in a death case from splitting the survival and wrongful-death actions. *See Reed v. Warren*, 172 La. 1082, 1090–91, 136 So. 59, 62 (1931);

Footnote continued on next page.

petition in *Bailey* to drop their survival actions and to assert only wrongful-death actions.[7]

On December 3, 2013, after the *Bailey* suit had been pending for more than four and a half years, a group of defendants served discovery requests on plaintiffs.[8] These requests included requests for admissions that plaintiffs had no evidence to prove a causal link between their decedents' alleged exposure to NORM and their deaths.[9] In a January 2014 telephone conference, plaintiffs agreed to respond to the requests for admissions no later than January 10, 2014.[10]

January 10, 2014 came and went with no response to the defendants' requests for admissions. Six months later, the trial court issued a new order, giving plaintiffs until June 20, 2014 to respond to the requests for admissions.[11] June 20, 2014 came and went with still no response to defendants' requests for admissions. So on February 12, 2015, defendants filed a motion for summary judgment seeking dismissal of the claims of the 11 appellants and several other plaintiffs.[12] The trial court set the hearing of this motion for March 13, 2015.[13]

On March 5, 2015, eight days before the scheduled hearing, the 11 plaintiffs-appellants each filed a motion to voluntarily dismiss his or her claim with

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Footnote continued from previous page.
Morrison v. New Orleans Pub. Service, Inc., 415 F.2d 419, 424 (5th Cir. 1969) (applying Louisiana law); *Trahan v. Southern Pac. Co.*, 209 F. Supp. 334, 337 (W.D. La. 1962) (same). By splitting their causes of action between *Bailey* and *Lester*, plaintiffs took the chance that a final judgment in either case would be conclusive in the other. *See* La. Code Civ. P. art. 531.

[7] *See* 1 R. 109.

[8] *See* 2 R. 363 et seq. (copy of discovery requests attached to motion for summary judgment).

[9] *See* 2 R. 368–70, requests for admissions 9–24.

[10] 2 R. 340.

[11] 2 R. 341.

[12] 2 R. 343 et seq.

[13] 2 R. 352–53.

prejudice, with each party to bear its own costs.[14] The trial court summarily denied these motions. Plaintiffs-appellants also filed an opposition to the motion for summary judgment, but they offered no argument on the merits of the motion. The only argument raised in the opposition was that their motions for voluntary dismissal rendered the defendants' motion for summary judgment moot.[15]

On March 13, 2015, the trial court heard the defendants' motion for summary judgment. By this time, more than one year and three months had passed since service of the request for admissions (which plaintiffs never responded to), and nearly six years had passed since the filing of suit. At the hearing, the trial court gave both sides the opportunity to offer evidence. Defendants offered their still-unanswered request for admissions; plaintiffs-appellants offered nothing.[16] The trial court granted summary judgment, dismissing the 11 plaintiffs-appellants' claims with prejudice.[17] These plaintiffs have appealed.

Issues Presented for Review

1. The summary judgment appealed from dismisses the plaintiffs-appellants' claims with prejudice. The voluntary dismissals that plaintiffs-appellants seek in this appeal would likewise dismiss their claims with prejudice. Since any judgment by this Court on the merits of this appeal will have no practical effect on the parties' rights, is the appeal moot?

2. Plaintiffs-appellants allege that defendants' fault caused their decedents to be exposed to NORM, which in turn caused their deaths. But they admit that, after six years of litigation, they have no evidence to prove that exposure to NORM

[14] 3 R. 463–92 (motions for voluntary dismissal and orders denying motions).

[15] 3 R. 493–95.

[16] 3 R. 538.

[17] 3 R. 538 (hearing transcript); 3 R. 507–08 (written judgment).

caused their decedents' deaths. Was the trial court correct in granting summary judgment dismissing their wrongful-death claims?

3. Under La. Code Civ. P. art. 1671, a plaintiff may obtain a voluntary dismissal "upon his payment of all costs …." Plaintiffs-appellants here sought voluntary dismissal without paying all costs. Did the trial court abuse its discretion in denying their motions for voluntary dismissal?

Summary of the Argument

Plaintiffs can gain no practical benefit from this appeal. They complain of a judgment dismissing their claims with prejudice on a motion for summary judgment. But their only argument is that their claims should instead have been dismissed with prejudice on their own motions for voluntary dismissal. So whether they win or lose their appeal, the result will be the same: dismissal with prejudice. Their appeal is moot because any judgment by this Court will have no practical effect on the parties' rights. Accordingly, this appeal should be dismissed.

If the Court reaches the merits of the appeal, it should affirm the district court's summary judgment. By operation of La. Code Civ. P. art. 1467(A), plaintiffs-appellants admit that they cannot prove a causal connection between the defendants' conduct and their decedents' deaths. In their brief, plaintiffs-appellants fail to contest this point. Thus, their inability to prove causation is an undisputed fact, both in the trial court and this Court. This undisputed fact entitles the defendants to summary judgment dismissing the plaintiffs' claims.

The Court should also affirm denial of plaintiffs' motions for voluntary dismissal. Under La. Code Civ. P. art. 1671, a plaintiff is entitled to a voluntary dismissal only upon paying all costs. Plaintiffs here sought voluntary dismissal without paying the defendants' costs. Because plaintiffs failed to comply with art.

1671, the trial court acted within its discretion in refusing to grant voluntary dismissals.

Argument

1. This appeal is moot because any judgment by this Court would have no practical effect on the parties' rights.

The first issue before this Court is whether the plaintiffs' appeal should be entertained at all. The appeal should be dismissed as moot because the record and the plaintiffs' original brief establish that any judgment by this Court on the merits will have no practical effect on the parties' rights.

It is well settled that courts should not decide abstract, hypothetical, or moot controversies. *Baxter v. Scott*, 2003-2013 p. 1 (La. 11/14/03), 860 So. 2d 535, 536. It is equally well settled that an appellate court will not render an advisory opinion from which no practical result can follow. *State in Interest of C.W.*, 97-1229 p. 3 (La. App. 5 Cir. 4/13/98), 712 So. 2d 245, 246.

The judgment sought by plaintiffs in this appeal would have no practical effect on the parties' rights. As explained above, plaintiffs here originally brought both wrongful death and survival actions. *See* La. Civ. Code arts. 2315.1 and 2315.2 (providing respectively for these two death actions). They later amended their petition to delete the survival actions and to assert only wrongful-death actions. The judgment they complain of dismisses all of their claims asserted here, which each party to bear its own costs.[18] The judgments that plaintiffs argue should have been rendered would have dismissed their wrongful-death claims with prejudice with each party to bear its own costs.[19] What practical difference is there

[18] 3 R. 507.

[19] 3 R. 463–92 (motions and proposed orders of voluntary dismissal).

between the judgment rendered by the trial court and the judgment sought by the plaintiffs? None.

The appeal is pointless, and for that reason, it should be dismissed as moot.

2. If the Court reaches the merits of this appeal, it should affirm summary judgment.

A. When a plaintiff cannot prove an essential element of her case, the defendant is entitled to summary judgment.

This Court reviews a summary judgment de novo, under the same criteria that govern the district court's consideration of whether summary judgment is appropriate. *Schroeder v. Bd. of Supervisors of LSU*, 591 So. 2d 342, 345 (La. 1991). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions, together with any affidavits, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. Code Civ. P. art. 966(B)(2).

The mover has the initial burden of proving entitlement to summary judgment. But if the mover will not bear the burden of proof at trial on the matter before the court on the summary-judgment motion, the mover need not negate all essential elements of the adverse party's claim. Rather, the mover need only point out the absence of factual support for an essential element of the adverse party's claim. If the adverse party fails to produce factual support showing that she will be able to satisfy her evidentiary burden of proof at trial, then there is no genuine issue of material fact. La. Code Civ. P. art. 966(C)(2).

B. Plaintiffs admitted their inability to prove causation.

Under Louisiana law, a tort claim is determined under the duty-risk analysis. This analysis requires the plaintiff to establish five elements, the first of which is

that the defendant's substandard conduct was a cause-in-fact of the plaintiff's injuries. *Watters v. Dep't of Soc. Servs.*, 2008-0977 pp. 15–16 (La. App. 4 Cir. 6/17/09), 15 So. 3d 1128, 1142. Here, by failing to respond to defendants' requests for admissions, plaintiffs-appellants admitted that they cannot prove causation.

Under La. Code Civ. P. art. 1467(A), a party served with a request for admissions must serve a response within 15 days, or "within such shorter or longer time as the court may allow …." If the party fails to serve a timely response, "[t]he matter is admitted …." La. Code Civ. P. art. 1467(A).

On December 3, 2013, more than four and a half years after plaintiffs filed suit, the defendants served requests for admissions on plaintiffs asking them, in effect, to admit their inability to prove causation.[20] Originally, plaintiffs agreed to a deadline of January 10, 2014 to respond.[21] After plaintiffs disregarded that deadline, the trial court, on its own motion, gave them another deadline of June 20, 2014.[22] Plaintiffs not only failed to meet the extended June 20 deadline; they never made any attempt at all to respond to the requests for admissions.

By failing to respond to the requests for admissions, plaintiffs admitted the matters on which the admissions were requested. Each of them admitted "that [his or her] decedent's death was not due to alleged exposure to NORM" or to any "other hazardous and/or toxic materials."[23]

Moreover, plaintiffs admitted their inability to prove that their respective decedents suffered any injury caused by exposure to NORM or any other

[20] *See* 2 R. 368–70, requests for admissions 9–21.

[21] 2 R. 340.

[22] 2 R. 341.

[23] 2 R. 370, requests for admissions 20–21.

hazardous or toxic substance. Specifically, each of them admitted the following additional facts:

- No treating physician ever told any of them that his or her decedent had any physical injury caused by exposure to NORM.
- None of them can identify the amount, dose, or quantity of NORM or any other hazardous or toxic substance to which his or her decedent was allegedly exposed.
- None of them can identify the amount, dose, or quantity of NORM or any other hazardous or toxic substance to which his or her decedent was allegedly exposed at any specific location.
- No physician has told any of them that his or her decedent had an increased risk of contracting cancer or any non-cancer disease as a result of alleged exposure to NORM or to any other hazardous or toxic substance.
- None of them has any documentary evidence that his or her decedent was exposed to NORM or any other hazardous or toxic substance attributable to any Oil Company Defendants.[24]

Plaintiffs had nearly six years between the filing of suit and the rendition of summary judgment to develop evidence on causation. Their failure to do so warrants summary judgment dismissing their suit.

3. The trial court had discretion to deny plaintiffs' motions to dismiss.

Unable to refute defendants' entitlement to summary judgment, plaintiffs attempted a maneuver reminiscent of the old movie line, "You can't fire me. I quit."[25] They attempted to dodge summary judgment by filing last-minute motions for voluntary dismissal. The trial court was correct in denying these motions on procedural grounds because plaintiffs sought dismissal without paying all costs.

[24] 2 R. 368–69.

[25] *E.g. Hello, Dolly!* (Chenault Prod. and 20th Century Fox Film Corp. 1969).

Code of Civil Procedure art. 1671 allows a plaintiff to dismiss his or her own action, but only if the plaintiff pays all costs:

> 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.

La. Code Civ. P. art. 1671. This means that the plaintiff, not the defendant, is responsible for payment of all costs on a voluntary dismissal. *Hall Fin. Servs., Inc. v. Holloway*, 34,563 p. 2 (La. App. 2 Cir. 4/4/01), 785 So. 2d 107, 110.

On page 3 of their brief, plaintiffs argue that a trial court has no discretion to deny a plaintiff's motion to dismiss with prejudice. They ignore the requirement that they pay all costs. "[I]f an application to dismiss is made by a plaintiff after any appearance by the defendant, the plaintiff's right to dismissal is absolute only when he moves to dismiss with prejudice *and* provided all costs are paid." *Capitol Anesthesia Group, P.A. v. Watson*, 2005-1020 p. 6 (La. App. 3 Cir. 3/1/06), 923 So. 2d 881, 885 (emphasis by the court).[26]

Here, the plaintiffs sought to avoid payment of all costs by making each party bear its own costs.[27] This is both contrary to art. 1671 and unfair to defendants who, after litigating this case for nearly six years, were on the verge of obtaining summary judgment. As another Louisiana appellate court observed:

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[26] Neither of the cases cited in plaintiffs' argument mentions whether the moving plaintiff paid costs. *See Vardaman v. Baker Center, Inc.*, 96-0831 (La. App. 1 Cir. 2/14/97), 689 So. 2d 667; *DiBenedetto v. Noble Drilling Co.*, 2009-0073 (La. App. 4 Cir. 10/21/09), 23 So. 3d 400. In *DiBenedetto*, the plaintiff took the unusual step of moving to dismiss two defendants with prejudice on the same day he filed suit, before any defendant had appeared or incurred any costs. *DiBenedetto* p. 2, 23 So. 3d at 403. Hence, payment of costs was not an issue in *DiBenedetto*.

[27] *See* 3 R. 463–92 (motions and proposed orders for voluntary dismissal with "each party to bear its own costs.").

> If a plaintiff sees fit to voluntarily dismiss his suit before [the defendant's] defenses are heard, he must pay the costs. It would be inequitable to require the defendant to pay costs in a suit he did not ask to be filed and in which he did not lose any litigated issue.

Taylor v. Zeno, 595 So. 2d 1210, 1211 (La. App. 3 Cir. 1992). Plaintiffs' failure to pay all costs is a valid reason for the trial court's denial of voluntary dismissals.

4. So why are we here?

After the trial court denied plaintiffs' motions for voluntary dismissal and granted summary judgment, it signed a written judgment dismissing plaintiffs' claims and making each party responsible for its own costs—exactly the relief plaintiffs sought via voluntary dismissal. Since the final judgment gives plaintiffs the same relief they sought before summary judgment was rendered, the Court may be wondering why they appealed.

Frankly, defendants do not know the answer to this question. Defendants think that plaintiffs may be attempting to avoid the res judicata effect of dismissal with prejudice, so as to continue litigating their survival actions in *Lester*. If that is what plaintiffs are up to, their attempt is vain, because a dismissal with prejudice extinguishes all causes of action arising from the same transaction or occurrence that is the subject of the litigation. *See* La. R.S. 13:4231(2). And plaintiffs cannot avoid res judicata by splitting their causes of action, as they have done by asserting wrongful-death actions here and survival actions in *Lester*. *See* La. Code Civ. P. art. 531 (when a plaintiff brings more than one suit from the same transaction or occurrence, "the first final judgment rendered shall be conclusive of all."). But the issue of res judicata is not before this Court; that issue will be decided only if the plaintiffs vainly attempt to pursue these claims in another court.

Defendants—who did not bring this appeal—have responded to the appeal for two reasons. First, failure to respond would be disrespectful. Second, defendants want finality. In six years of litigating these claims, plaintiffs have identified no evidence to carry their burden of proving causation. So defendants undertook the effort and expense of positioning the case for summary judgment, bringing the motion for summary judgment, having the motion heard, and having it granted. They are here defending the trial court's rulings because the rulings are correct, and because the summary judgment finally gives defendants the relief they have been seeking for six years.

Conclusion

Plaintiffs have no cause to complain of the trial court's judgment. They themselves sought voluntary dismissal of their claims with prejudice, with each party to bear its own costs. The summary judgment they appeal from does exactly that. For this simple reason, their appeal should be dismissed as moot. Alternatively, if the Court reaches the merits, it should affirm the trial court's judgment.

Respectfully submitted:

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