

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2005 CA 1807

CHARLES BRISTER

VERSUS


FOUNTAIN POWERBOATS, INC. AND JIM KESSLER  
d/b/a FOUNTAIN POWERBOATS OF LOUISIANA

**Judgment rendered December 28, 2006.**

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Appealed from the  
21st Judicial District Court  
in and for the Parish of Tangipahoa, Louisiana  
Trial Court No. 9802275  
Honorable Wayne Ray Chutz, Judge

\* \* \* \* \*




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AND JIM KESSLER d/b/a  
FOUNTAIN POWERBOATS OF  
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**BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.**

## **PETTIGREW, J.**

This litigation arises out of a claim by plaintiff who sought redhibition and rescission following his purchase of a powerboat from defendant in 1995. On the scheduled trial date, the plaintiff adamantly refused to appear citing negotiations regarding his business. The trial court granted the defendants' motion for involuntary dismissal and dismissed this matter without prejudice. Following the subsequent grant by the trial court of plaintiff's motion for a new trial, defendants ultimately appeal.

### **FACTS**

On July 15, 1998, Charles Brister, plaintiff herein, filed a Petition for Redhibition and Damages against Fountain Powerboats, Inc. and Jim Kessler, d/b/a Fountain Powerboats of Louisiana (collectively, "defendants"). Mr. Brister sought damages arising out of his purchase of a thirty-eight (38') foot Fountain Powerboat on or about February 2, 1997, for \$195,071.00. Mr. Brister alleged that defendants agreed to supply a new thirty-eight (38') foot Fountain Powerboat together with new parts and accessories with the exception of two (2) engines to be supplied by Mr. Brister.

In January 1998, Mr. Brister alleged that he contacted defendant Kessler, d/b/a Fountain Powerboats of Louisiana, to ascertain where an annual inspection of the boat's powertrains could be made. In addition, Mr. Brister inquired about having the boat repaired as one of the powertrains would no longer operate in reverse.

Mr. Brister further alleged that during the inspection and repair of the vessel, he was advised by the service center that the transmissions that defendants installed on the vessel were not new, and were in fact used transmissions. Mr. Brister claimed that one transmission was approximately three (3) years old, while the other transmission was more than four (4) years old. It was the contention of Mr. Brister that the sale of the boat with used transmissions constituted fraud and was a redhibitory defect that entitled him to rescind the sale.

### **ACTION OF THE TRIAL COURT**

Following a hearing in open court on February 1, 2000, the trial court signed a judgment on April 6, 2000, granting defendants' motion for involuntary dismissal and

dismissing Mr. Brister's suit without prejudice due to his failure to appear at trial. The trial court further cast Mr. Brister with all taxable costs.

On April 7, 2000, Mr. Brister filed a Motion for New Trial. Following a hearing on June 19, 2000, the trial court granted Mr. Brister's motion, and further ordered that in the event Mr. Brister proceeded with a new trial, he would be obligated to pay all costs incurred in transporting the defendants' representatives to Louisiana and housing them in connection with the previous trial scheduled for February 1, 2000, or at the time of the new trial, whichever amount was greater. In addition, Mr. Brister was ordered to pay all court costs incurred at the time of the previous trial on February 1, 2000. Mr. Brister was further ordered to pay reasonable attorney fees incurred by Fountain Powerboats, Inc. as a result of their attorney having to appear for the pre-trial conference on January 31, 2000, and on the morning of trial on February 1, 2000. A judgment to this effect was later signed on July 27, 2000.

A new trial was held in this matter on April 4, 2001. At the conclusion of the bench trial, both sides were given an opportunity to submit post-trial memoranda. For written reasons assigned, the trial court concluded that while Mr. Brister frequently put his boat in the repair shop, the reasons for this were, in the court's opinion, unrelated "to the [defendants'] failure to properly set up the boat or on account of the inclusion [by defendants] of 'used' transmissions." Through a judgment signed on September 11, 2002, the trial court awarded Mr. Brister damages and attorney fees of \$21,920.00. In addition, Fountain Powerboats, Inc. was directed to pay court costs of \$1,662.55, and Mr. Brister was ordered to pay \$5,060.98 pursuant to previous orders of the court.

On September 20, 2002, Mr. Brister again filed a Motion for New Trial wherein he alleged that the September 11, 2002 judgment was "clearly contrary to the law and the evidence." Mr. Brister contended that the trial court erred when it included attorney fees incurred by the continuance of the first trial in its calculation of costs and failed to award him damages for the loss of use of his boat. Following a hearing on December 16, 2002, the trial court took the matter under advisement. The trial court subsequently granted a

new trial, limited to argument only, with respect to the issue of damages related to the loss of use of Mr. Brister's boat. A judgment to this effect was signed on April 14, 2003.

After hearing arguments with respect to the issue of quantum of damages, Mr. Brister's motion for a new trial was denied. A final judgment was signed on April 20, 2005. Defendants thereafter filed for a suspensive and devolutive appeal from the judgment of April 20, 2005.

### **ISSUES ON APPEAL**

In connection with their appeal in this matter, defendants present the following issues for review and consideration by this court:

- 1) Whether the trial court articulated a valid reason for the granting of a new trial; and
- 2) Whether plaintiff's suit had prescribed pursuant to La. Civ. Code art. 3463 after plaintiff failed to prosecute the suit on the day of trial and was dismissed pursuant to La. Code Civ. P. art. 1672.

### **LAW AND ANALYSIS**

#### **Propriety of New Trial**

The first issue presented by defendants for consideration by this court is whether the trial court articulated a valid reason for its grant of a new trial. Louisiana Code of Civil Procedure article 1971 provides that "[a] new trial may be granted upon contradictory motion of any party or by the court on its own motion." Pursuant to La. Code Civ. P. art. 1972 (1), the grant of a new trial is mandatory "[w]hen the verdict or judgment appears clearly contrary to the law and the evidence." A new trial may be granted for good grounds in any case. La. Code Civ. P. art. 1973. The law is clear that the granting or denying of a motion for new trial rests within the wide discretion of the trial court, and the trial court is afforded much discretion in determining whether to grant a motion for new trial. Its decision will not be disturbed on appeal absent an abuse of that discretion. **Diez v. Schwegmann Giant Supermarkets, Inc.**, 97-0034, p. 9 (La. App. 1 Cir. 2/20/98), 709 So.2d 243, 248.

In their brief to this court, defendants assert that the trial court abused its discretion in granting Mr. Brister's Motion for New Trial because Mr. Brister categorically

refused to appear on the date of his scheduled trial. Defendants argue that had the trial court elected to deny Mr. Brister's Motion for a New Trial, there could be no "miscarriage of justice" as Mr. Brister intentionally chose not to attend the trial.

In support of this assertion, defendants cite **Hebert v. C.F. Bean Corp.**, 00-1029 (La. App. 4 Cir. 4/25/01), 785 So.2d 1029, a case in which an injured offshore worker failed to appear at trial, which resulted in the trial court's subsequent dismissal of his lawsuit without prejudice. The plaintiff in **Hebert** thereafter filed a Motion for New Trial, and admitted that he intentionally failed to appear under the belief that he would be granted an automatic continuance. The motion was denied by the trial court, and the plaintiff appealed citing his lack of education and sophistication. The appellate court affirmed the trial court's decision not to grant a new trial, finding no "miscarriage of justice" that would warrant a new trial. **Id.** at 3, 785 So.2d at 1031. The court in **Hebert** further noted that a trial court judge has inherent power to take whatever reasonable actions are necessary to maintain control of his docket. **Id.**

Defendants further rely on **Burris v. Wal-Mart Stores, Inc.**, 94-0921 (La. App. 1 Cir. 3/3/95), 652 So.2d 558, writ denied, 95-0858 (La. 5/12/95), 654 So.2d 352, citing that the trial court herein failed to articulate a reason for its discretionary grant of Mr. Brister's motion for new trial. In **Burris**, defendant Wal-Mart appealed after a trial court granted plaintiff's motion for new trial subsequent to a jury's verdict in favor of Wal-Mart. Wal-Mart argued in one of its assignments of error that the trial court departed from proper judicial procedure and erred in its discretionary grant of the plaintiff's motion for new trial because the trial court's findings failed to provide a "good ground therefor" in accordance with La. Code Civ. P. art. 1973. This court stated in its opinion in **Burris**:

Nowhere in this statement can we glean that the trial judge felt that a miscarriage of justice would occur if a new trial was not granted. We do not say that it is necessary that the magical words "miscarriage of justice" must always be stated in order for the granting of a new trial on discretionary grounds to pass appellate review. However, we do feel that it is necessary for the trial judge to state an articulable reason or reasons as to why he is exercising his discretionary powers.

**Id.** at 7, 652 So.2d at 561-62.

This court thus concluded that the original trial judge had abused his discretion in granting the plaintiff a new trial following a jury verdict in favor of Wal-Mart, and accordingly reversed.

In their brief to this court, defendants concede that, unlike the facts presented in **Burris**, Mr. Brister does not seek a new trial as a result of an unfavorable jury verdict. Nevertheless, defendants argue that it was incumbent upon the trial court in the instant case to articulate a valid reason for exercising its discretionary power in granting the motion for new trial.

This court, in its opinion in **Burris**, opined:

[T]he discretionary power to grant a new trial must be exercised with considerable caution, for a successful litigant is entitled to the benefits of a favorable jury verdict. **Engolia v. Allain**, 625 So.2d 723, 729 (La. App. 1 Cir. 1993). The fact that a determination on a motion for new trial involves judicial discretion does not imply that the trial court can freely interfere with any verdict with which it disagrees. **Gibson v. Bossier City General Hospital**, 594 So.2d 1332, 1336 (La. App. 2 Cir. 1991).

**Id.** at 6, 652 So.2d at 561.

Upon review of the transcript of the June 19, 2000 hearing on Mr. Brister's motion for new trial, we note the following colloquy:

THE COURT:

[T]he intent of this court was to . . . render some sanction against [Mr. Brister] for not being here and those sanctions were going to be whatever the costs were associated, if there was another trial, those costs of [Fountain's] witnesses coming from North Carolina, or wherever they came from and I don't know how expansive it was, I don't know if I even covered [defense counsel's] fees for coming here or not, I don't remember. But in any event, that is what my intent was. That is why I especially . . . said without prejudice.

Then the issue became I guess later as to whether or not a dismissal without prejudice, whether that constitutes prejudice or not because if it has in fact prescribed, and prescription attaches, then even though I am saying without prejudice it becomes a dismissal with prejudice because now it has prescribed.

It was not my intention to dismiss with prejudice his claim. But it was my intention to tell him that I think when you have a matter set, you need to come to court. And if you didn't come to court, then I don't think the other party should suffer any cost, you are going to be bound to pay all of the costs that are associated with any retrial or rehearing of this matter.

The dilemma that I have now from what you are telling me is, if I do not grant the new trial, [counsel for Mr. Brister], that is tantamount to a dismissal with prejudice.

[COUNSEL FOR MR. BRISTER]:

That's correct.

THE COURT:

Even though it may take another procedural maneuver or two or an exception if you refile it, then it would be followed I presume by a peremptory exception of prescription.

[COUNSEL FOR MR. BRISTER]:

Which would be well-founded.

THE COURT:

So – all right. I am inclined to grant the new trial.

...

THE COURT:

I am going to grant the motion for new trial.

While this court may not necessarily agree with the reasons provided by the trial court, we conclude that the trial court did in fact articulate its reasons for exercising its discretionary power in granting the motion for new trial. This assignment is without merit.

### **Prescription**

The second issue that defendants present for consideration by this court is whether the plaintiff's suit had prescribed pursuant to La. Civ. Code art. 3463 when it was involuntarily dismissed due to plaintiff's failure to appear at trial. In support of this issue, defendants rely upon La. Civ. Code art. 3463 for the proposition that an interruption of prescription resulting from the timely filing of a suit in a court of competent jurisdiction and venue "is considered never to have occurred if the plaintiff" subsequently fails to prosecute the suit at trial.

Defendants further cite **Howes v. Doucet**, 531 So.2d 1151 (La. App. 4 Cir. 1988) and **McCallon v. Travelers Insurance Company**, 302 So.2d 676 (La. App. 3 Cir. 1974). In both **Howes** and **McCallon**, the plaintiffs failed to attend their respective

trials, which resulted in the involuntary dismissal of their cases. Plaintiffs in those matters both subsequently refiled their respective lawsuits some days later and were met with defenses of prescription. On appeal, the fourth and third circuits affirmed the rulings of the trial courts, which held that the plaintiffs' failure to appear at trial constituted a failure to prosecute that, did not interrupt the tolling of prescription. Defendants here argue that once it has been determined that the plaintiff failed to prosecute his claim, the automatic result mandated by the language of La. Civ. Code art. 3463 is that an interruption of prescription never occurred. We disagree.

Despite the fact that the trial court granted the defendants' motion for an Involuntary Judgment of Dismissal, the interruption of prescription resulting from the filing of the suit remained viable until the judgment became final. Prior to that time, Mr. Brister filed a timely motion for new trial that was granted by the trial court. Prescription continued to be interrupted, thus, Mr. Brister's suit was not prescribed. This assignment is without merit.

#### **DECREE**

For the above and foregoing reasons, the judgment of the trial court is hereby affirmed. All costs incurred in connection with this appeal shall be assessed against defendants, Fountain Powerboats, Inc. and Jim Kessler, d/b/a Fountain Powerboats of Louisiana.

**AFFIRMED.**