

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2016 CA 0734

J
TALM
SHERYL CUMMINGS, INDIVIDUALLY AND AS NATURAL
TUTRIX OF SHEDRICK CUMMINGS

VERSUS

WEST FELICIANA PARISH SCHOOL BOARD, WEST BATON
ROUGE PARISH SCHOOL BOARD, COREGIS INSURANCE
COMPANY, MAKSIN MANAGEMENT CORPORATION AND
NATIONAL UNION FIRE INSURANCE COMPANY OF
PITTSBURG, PENNSYLVANIA A/K/A AIG INSURANCE
COMPANY

DATE OF JUDGMENT: FEB 17 2017

ON APPEAL FROM THE TWENTIETH JUDICIAL DISTRICT COURT
NUMBER 19153, PARISH OF WEST FELICIANA
STATE OF LOUISIANA

HONORABLE KATHRYN E. JONES, JUDGE

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BEFORE: HIGGINBOTHAM, THERIOT AND CHUTZ, JJ.

Disposition: REVERSED AND REMANDED.

Theriot, J. concurs *MT*

CHUTZ, J.

Plaintiff-appellant, Shedrick Cummings, appeals a trial court judgment dismissing this suit on the grounds of abandonment pursuant to La. C.C.P. art. 561(A). For the following reasons, we reverse the judgment and remand for further proceedings.

PROCEDURAL AND FACTUAL BACKGROUND

On September 27, 2005, Sheryl Cummings filed this suit for damages, individually and as natural tutrix of Shedrick Cummings.¹ She alleged Shedrick sustained severe injuries rendering him an incomplete quadriplegic while playing in a football game held at West Feliciana High School Stadium. The school boards of West Feliciana Parish (WFPSB) and West Baton Rouge Parish were named as defendants in the suit. Several insurance companies, including defendant-appellee, National Union Fire Insurance Company of Pittsburgh, Pennsylvania a/k/a AIG Insurance Company (National Union), also were named as defendants. The claims against National Union were based on a policy of accident insurance allegedly providing \$1,000,000.00 in benefits. The petition alleged National Union was “arbitrary and capricious under the provisions of Louisiana law” and, therefore, liable for statutory penalties.

Following various proceedings, several defendants were dismissed upon plaintiffs’ motion. The claims against WFPSB eventually were severed from the insurance coverage/bad faith claims against National Union. A bench trial was held on the liability claims against WFPSB only. On July 13, 2009, the trial court rendered judgment dismissing all claims of Sheryl and Shedrick Cummings against WFPSB.²

On January 6, 2016, National Union filed an “*Ex Parte* Motion to Dismiss on Grounds of Abandonment,” alleging no steps had been taken in the prosecution

¹ The petition set forth Shedrick’s date of birth as March 30, 1990.

² After Shedrick reached the age of majority, he filed pleadings with the court in his own name.

or defense of this case by any party since May 2011, a period exceeding three years. The trial court signed an order on January 8, 2016, dismissing the suit in its entirety. Shedrick now appeals.

STANDARD OF REVIEW

The issue of whether a step in the prosecution of a case has been taken in the trial court for a period of three years is a factual question subject to manifest error review on appeal. *Windham v. Terrebonne Parish Consolidated Government*, 12-1964 (La. App. 1st Cir. 9/13/13), 187 So.3d 6, 9. However, whether a particular fact, if proven, precludes abandonment is a question of law that is reviewed simply by determining whether the trial court's decision was legally correct. *Windham*, 187 So.3d at 9. Thus, when the trial court's decision is based on an erroneous application of law, rather than on a valid exercise of discretion in the underlying factual determinations, the decision is not entitled to deference by the reviewing court and, instead, is subject to *de novo* review. *Tessier v. Pratt*, 08-1268 (La. App. 1st Cir. 2/13/09), 7 So.3d 768, 773.

ANALYSIS

On appeal, Shedrick argues “there was never a three (3) year gap in actions taken at the Trial Court level.” He specifically points out there was a scheduled status conference pending to fix this case for trial at the time the trial court signed the order of dismissal.³

³ The argument section of Shedrick’s appellate brief is exceptionally abbreviated, consisting of only a few sentences. It also fails to set forth the applicable standard of review and cites no supporting authorities. See Uniform Rules–Courts of Appeal, Rule 2–12.4(A)(9). Additionally, in violation of Rule 2–12.4(A)(7) & (9)(a), the brief merely cites pages 1-289 of the record *in globo* without making specific record references supporting Shedrick’s position. Based on the brief’s non-compliance with Rule 2–12.4, as well as the fact it was not timely filed in accordance with this court’s briefing schedule, National Union contends Shedrick “has abandoned all issues presented on appeal.”

Rule 2–12.4 does not provide for the dismissal of an appeal as a penalty for non-compliance. *Richardson v. North Oaks Hospital*, 11-1258 (La. App. 1st Cir. 2/13/12), 91 So.3d 361, 364. The sanction to be imposed for an untimely and/or non-conforming brief is left to the discretion of the appellate court. See Uniform Rules–Courts of Appeal, Rules 2–12.12 & 2–12.13; *Richardson*, 91 So.3d at 364. Moreover, appeals are favored in the law and should be maintained unless a legal ground for dismissal is clearly shown. *Richardson*, 91 So.3d at 364.

Issues of abandonment are governed by La. C.C.P. art. 561(A)(1), which states, in pertinent part: “An action ... is abandoned when the parties fail to take any step in its prosecution or defense in the trial court for a period of three years....” A party takes a “step” in the prosecution or defense of an action when he takes formal action before the court intended to hasten the matter to judgment, or when he takes a deposition with or without formal notice. *James v. Formosa Plastics Corporation of Louisiana*, 01-2056 (La. 4/3/02), 813 So.2d 335, 338.

The jurisprudence has construed Article 561 as imposing three legal requirements: (1) a party must take some “step” in the prosecution or defense of the case; (2) the step must be done in the trial court and, with the exception of formal discovery, on the record of the suit; and (3) the step must be taken within three years of the last step taken by either party. *James*, 813 So.2d at 338; *Compensation Specialties, L.L.C. v. New England Mutual Life Insurance Company*, 08-1549 (La. App. 1st Cir. 2/13/09), 6 So.3d 275, 279, writ denied, 09-0575 (La. 4/24/09), 7 So.3d 1200. Abandonment under Article 561 is self-executing; it occurs automatically upon the passage of three years without either party taking a step, and it is effective without a court order. *Clark v. State Farm Mutual Automobile Insurance Company*, 00-3010 (La. 5/15/01), 785 So.2d 779, 784; *Compensation Specialties, L.L.C.*, 6 So.3d at 279.

The jurisprudence further provides Article 561 is to be liberally construed in favor of maintaining a plaintiff’s suit. *Clark*, 785 So.2d at 785; *Hidalgo v. Catfish Queen Partnership in Commendam*, 06-1531 (La. App. 1st Cir. 5/4/07), 961 So.2d 434, 437. Because dismissal of a plaintiff’s lawsuit is the harshest of remedies, the general rule is that any reasonable doubt about abandonment should

In this case, Shedrick’s brief contains a bare bones argument that the trial court erred in dismissing this case as abandoned because he had taken action within the three-year period at issue. Considering the totality of the circumstances, we conclude the interests of justice do not favor dismissal of this appeal despite the deficiencies in the appellate brief.

be resolved in favor of allowing the prosecution of the claim and against dismissal. *Clark*, 785 So.2d at 787; *Hutchison v. Seariver Maritime, Inc.*, 09-0410 (La. App. 1st Cir. 9/11/09), 22 So.3d 989, 993, writ denied, 09-2216 (La. 12/18/09), 23 So.3d 946.

In the instant case, National Union argues the last step taken in the prosecution or defense of this case occurred on May 27, 2011, when plaintiffs filed an unopposed motion to dismiss one of the defendant insurers, Guarantee Trust Life Insurance Company (Guarantee Life), from this case. According to National Life, the record shows a period of non-activity for three years thereafter other than motions by Shedrick to set status conferences, which he later passed without date, and a motion by National Union to enroll additional counsel. National Union argues neither the motions to set status conferences nor the motion to enroll constituted steps precluding this case from being abandoned by operation of law on May 27, 2014.

Despite National Union's claims, our review of the record fails to reveal a three-year period without any activity following the May 27, 2011 motion to dismiss. Less than two years later, on February 11, 2013, Shedrick filed into the record a motion and order to set a status conference "to fix this matter for trial," and the trial court signed an order scheduling a status conference "for the purpose of setting this matter for trial." This court has previously held the filing in the record of a motion for a status conference for the purpose of setting a trial date constitutes a step in the prosecution of a case as contemplated by Article 561. *Compensation Specialties, L.L.C.* 6 So.3d at 280; see also *Dendy v. City National Bank*, 06-2436 (La. App. 1st Cir. 10/17/07), 977 So.2d 8, 13; *Hidalgo*, 961 So.2d at 438. Therefore, Shedrick took a step in the prosecution of this case within the three-year period at issue.

In its brief, National Union concedes a motion to set a status conference can be considered a step in the prosecution of a case. Nevertheless, it asserts Shedrick's February 11, 2013 motion to set a status conference failed to constitute such a step because the status conference was passed without date by Shedrick. Essentially, National Union contends any effect the motion to set a status conference had in hastening the case toward trial or judgment was "effectively nullified" by Shedrick passing the scheduled status conference without date.

We find no merit in National Union's contentions. Bearing in mind that Article 561 is to be liberally construed in favor of maintaining a plaintiff's suit, we conclude a step was completed upon Shedrick filing his motion in the record and obtaining the trial court order scheduling a status conference "for the purpose of setting this matter for trial." This action clearly had the effect of hastening this case toward trial or judgment. Moreover, this step occurred on February 11, 2013, which was within three years of the last undisputed step in the prosecution of this case, the motion to dismiss filed on May 27, 2011. The issue of what did or did not subsequently occur at the scheduled status conference – the status conference was passed without date when none of the parties appeared – does not alter the fact that a step occurred when Shedrick filed his motion on February 11, 2013. In *Hidalgo*, this court specifically held the fact that a valid step was taken by the filing of plaintiff's request for a scheduling conference was "in no way negated by the subsequent outcome" that no scheduling conference was actually held as a result of the request. *Hidalgo*, 961 So.2d at 439.

Moreover, at the time National Union filed its motion to dismiss on January 6, 2016, a status conference was scheduled to be held approximately three weeks later on January 27, 2016. The trial court had scheduled the status conference pursuant to a December 7, 2015 "Motion and Order to Reset for Status

Conference” filed by Shedrick for the purpose of setting this case for trial.⁴ The pending status conference belies National Union’s argument that this case had been abandoned.

CONCLUSION

For these reasons, the January 8, 2016 judgment of the trial court granting National Union’s *ex parte* motion and dismissing this suit as abandoned is hereby reversed and this case is remanded to the trial court for further proceedings. National Union is to pay all costs of this appeal.

REVERSED AND REMANDED.

⁴ In the intervening period between Shedrick’s February 11, 2013 motion to set status conference and his December 7, 2015 motion to reset status conference, Shedrick filed two other motions and orders to set status conference. One of the scheduled status conferences was continued upon the unopposed motion of National Union. When no party appeared on the date of the other scheduled status conference, the trial court continued the matter until January 27, 2016. When Shedrick subsequently filed his December 7, 2015 motion and order to reset status conference, the trial court signed a formal order setting the status conference for January 27, 2016.