Judgment rendered June 26, 2019.
Application for rehearing may be filed
within the delay allowed by Art. 2166,
La. C.C.P.

No. 52,754-CA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

SHARON FOWLER, INDIVIDUALLY AND SHARON FOWLER ON BEHALF OF, AND AS NATURAL MOTHER AND TUTRIX OF HER MINOR CHILD HANK FOWLER — Plaintiff-Appellant

versus

EDDIE RAY MCKEEVER AND ANPAC LOUISIANA INSURANCE COMPANY — Defendants-Appellees

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Appealed from the
Fourth Judicial District Court for the
Parish of Ouachita, Louisiana
Trial Court No. 2014-0371

Honorable Alvin R. Sharp, Judge

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CHESTER A. BRADLEY, III
AND ASSOCIATES
By: Chester A. Bradley, III — Counsel for Appellant

OFFICE OF ANTHONY J. BRUSCATO
By: Anthony J. Bruscato

DAVENPORT, FILES & KELLY, L.L.P.
By: Mike C. Sanders
Justin A. Wooley
Grant M. Tolbird — Counsel for Appellees

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Before PITMAN, COX, and THOMPSON, JJ.

THOMPSON, J.

Plaintiff, Sharon Fowler, has appealed from the trial court's judgment denying her motion to vacate and set aside an order of dismissal that the court granted based upon its finding that Plaintiff's lawsuit was abandoned pursuant to La. C.C.P. art. 561. For the reasons set forth below, we reverse and remand for further proceedings.

FACTS/PROCEDURAL HISTORY

On February 5, 2014, Plaintiff, Sharon Fowler, filed suit, individually and on behalf of her minor son Hank, against Defendants, Eddie Ray McKeever and ANPAC Insurance Company, seeking damages arising out of an automobile collision. Plaintiff filed a motion of voluntary partial dismissal on March 14, 2014, after settlement of Hank's claims was reached by the parties, and an order of dismissal was signed by the trial court on March 19, 2014, leaving Sharon Fowler as the sole plaintiff.

Defendants filed an answer denying all of Plaintiff's allegations on May 30, 2014. On May 24, 2014, and November 5, 2014, Defendants propounded Interrogatories and Requests for Production of Documents to Plaintiff, including a request that she sign a Medicare/Medicaid release form authorizing the release of records to defense counsel and/or counsel's law firm. Plaintiff's responses were delayed, and defense counsel filed a motion to compel on January 21, 2015. At that point, Plaintiff provided her responses to Defendant, including the requested signed release form. On March 16, 2015, Defendants notified the court via letter that the discovery dispute had been temporarily resolved and asked the court to remove the hearing from the docket.

Plaintiff provided her responses to Defendant, including the signed release form, on March 31, 2015. On April 13, 2015, defense counsel sent Plaintiff a letter requesting that she sign an additional release form for her Medicare/Medicaid records. This form, identical to the one previously included in the "Request for Production of Documents" propounded in the initial discovery, sought authorization for the release of Plaintiff's Medicare/Medicaid records to a separate defendant, ANPAC, on a "Consent to Release" form generated and provided by ANPAC. On May 21, 2015, Plaintiff's attorney sent a cover letter and signed copy of the ANPAC release form to Defendants, satisfying the request.

Three years later, on May 21, 2018, Plaintiff's counsel filed a motion to fix the case for trial, and the court set a scheduling conference for June 27, 2018. On June 25, 2018, Defendants filed an *ex parte* motion to dismiss for abandonment, asserting that the last step in the prosecution of the matter occurred prior to the May 21, 2015 reply from opposing counsel. On June 26, 2018, the trial court signed an order dismissing the case as abandoned. On July 30, 2018, Plaintiff filed a motion to vacate and set aside the order of dismissal. Plaintiff's motion was denied by the trial court in a judgment signed on September 24, 2018.

Plaintiff has appealed from the September 24, 2018 judgment and Defendants have answered the appeal, seeking damages and attorney fees for frivolous appeal.

DISCUSSION

On appeal, Plaintiff argues that her May 21, 2015 letter and enclosed signed Medicare/Medicaid release, sent in response to a request by

Defendants supplementing their prior "Request for Production," constituted a discovery response, and, as such, was "formal discovery" and a step in the litigation preventing abandonment.

Defendants contend that the letters between the parties do not constitute "formal discovery" sufficient to interrupt abandonment. Defendants further urge that the mailing of documents purporting to be supplemental discovery to defense counsel (the receipt of which is not disputed), without a certificate filed in the record of such service, does not constitute a step in the prosecution of Plaintiff's action sufficient to interrupt the period of abandonment.

There are three requirements imposed by La. C.C.P. art. 561 to avoid abandonment: (1) a party must take some "step" in the prosecution of defense of the action; (2) the step must be taken in the proceeding, and, with the exception of formal discovery, must appear in the record of the suit; and (3) the step must be taken within three years of the last step taken by either party; sufficient action by either plaintiff or defendant will be deemed a step. *Louisiana Dept. of Transportation and Development v. Oilfield Heavy Haulers, L.L.C.*, 11-0912 (La. 12/06/11), 79 So. 3d 978; *Clark v. State Farm Mutual Automobile Insurance Co.*, 00-3010 (La. 05/15/01), 785 So. 2d 779; *D.W. Thomas & Son, Inc. v. Gregory*, 50,878 (La. App. 2 Cir. 11/23/16), 210 So. 3d 825; *Hudson v. Town & Country Nursing Center, LLC*, 49,581 (La. App. 2 Cir. 03/04/15), 162 So. 3d 632.

Abandonment is not a punitive concept; rather, it balances two competing policy considerations: (1) the desire to see every litigant have his day in court and not to lose the same by some technical carelessness or

unavoidable delay; and (2) the legislative purpose that suits, once filed, should not indefinitely linger, preserving stale claims from the normal extinguishing operation of prescription. *Id.*

Whether or not a step in the prosecution or defense of a case has been taken in the trial court for a period of three years for purposes of abandonment is a question of fact subject to a manifest error analysis on appeal. *Martin v. National City Mortgage Co.*, 52,371 (La. App. 2 Cir. 11/14/18), 261 So. 3d 144, *writ denied*, 18-2046 (La. 02/11/19), 263 So. 3d 435; *Allen v. Humphrey*, 51,311 (La. App. 2 Cir. 04/05/17), 218 So. 3d 256; *Wolf Plumbing, Inc., v. Matthews*, 47,822 (La. App. 2 Cir. 09/25/13), 124 So. 3d 494, *writs denied*, 13-2510, 13-2516 (La. 01/17/14), 130 So. 3d 949, 950. Whether a particular act, if proven, precludes abandonment, however, is a question of law that is reviewed by determining whether the trial court's decision was legally correct. *Martin, supra; D.W. Thomas & Son, Inc., supra*; *Wolf Plumbing, Inc., supra*.

The following is a timeline of activity in this case:

- May 24, 2014, and November 4, 2014: Defendants propounded "Interrogatories and Requests for Production of Documents" to Plaintiff, including in their discovery a request that she sign a Medicare/Medicaid release form authorizing the release of records to defense counsel and/or counsel's law firm.

- January 21, 2015: Defense counsel filed a motion to compel.

- March 16, 2015: Defendants notified the court via letter that the discovery dispute had been temporarily resolved and asked the court to remove the hearing from the docket.

- March 31, 2015: Plaintiff provided her responses to Defendant, including the initial signed release form.

- April 13, 2015: Defense counsel sent Plaintiff a letter requesting that she sign an additional release form for her Medicare/Medicaid records; this form, identical to the one previously included in the

"Request for Production of Documents" propounded in the initial discovery, sought authorization for the release of Plaintiff's Medicare/Medicaid records to the defendant ANPAC.

- April 23, 2015: Plaintiff sent a supplementary discovery response, which included copies of some medical expenses incurred.

- May 21, 2015: Plaintiff's attorney sent a cover letter and signed copy of the ANPAC Medicare/Medicaid release form to Defendants.

- On May 21, 2018, Plaintiff's counsel filed a motion to fix the case for trial, and the court set a scheduling conference for June 27, 2018.

- June 25, 2018: Defendants filed an *ex parte* motion to dismiss for abandonment.

- June 26, 2018: The trial court signed an order dismissing the case as abandoned.

- July 30, 2018: Plaintiff filed a motion to vacate and set aside the order of dismissal.

- September 24, 2018: Plaintiff's motion was denied by the trial court in a signed judgment.

We will first address Defendants' argument that Plaintiff's attorney's letter and release form do not constitute "formal discovery" authorized by La. C.C.P. art. 561.

In *Harrington v. Glenwood Regional Medical Center*, 36,556 (La. App. 2 Cir. 12/11/02), 833 So. 2d 1241, the plaintiffs, David and Becky Herrington,[1] filed suit against the defendants, Glenwood Regional Medical Center, Life Share Blood Centers, and the Attorney General of Louisiana, on July 30, 1998, alleging, *inter alia*, that David had been recently diagnosed with Hepatitis C, the cause of which was a blood transfusion he received during a hospitalization at Glenwood in 1978 or 1979. The record contained no further pleadings until September 6, 2001, when the plaintiffs filed

[1] The plaintiffs' last name is Herrington; however, in their initial petition, it was misspelled as "Harrington."

interrogatories propounded to the defendants. One of the defendants, Life Share, filed an *ex parte* motion to dismiss the suit as abandoned on November 13, 2001. The trial court entered a judgment of dismissal of the plaintiffs' claims, and the plaintiffs filed a motion to set aside the dismissal. In support of this motion, the plaintiffs asserted that, despite the action of official filings in the record, there had been activity between the parties showing that the plaintiffs did not intend to abandon their suit. Specifically, they relied on: (1) an August 19, 1998, letter from Life Share in which the defendant's attorney asked, *inter alia*, for the plaintiffs to sign a release of medical records; and (2) the signed release, which was mailed by the plaintiffs' attorney to Life Share's counsel on October 27, 1998. The trial court denied the plaintiffs' motion, and the plaintiffs appealed from the trial court's denial of their motion to set aside the dismissal of their action as abandoned under La. C.C.P. art. 561.

On appeal, the plaintiffs argued because there was less than three years between the date that their attorney mailed the signed medical release in compliance with Life Share's request (October 27, 1998), and the date that the plaintiffs propounded interrogatories to both defendants (September 6, 2001), the three-year period set forth in La. C.C.P. art. 561 did not elapse. The defendants contended that Life Share's request that David execute a medical release on August 19, 1998, was not formal discovery authorized by the Louisiana Code of Civil Procedure. This Court disagreed, finding that because the Code of Civil Procedure expressly provided for that type of discovery, a request properly made under La. C.C.P. art. 1465.1 (and its

response thereto) constitute formal discovery as authorized by the Code of Civil Procedure. *Harrington*, 833 So. 2d at 1243-44.[2]

In *Breaux v. Auto Zone, Inc.*, 00-1534 (La. App. 1 Cir. 12/15/00), 787 So. 2d 322, *writ denied*, 01-0172 (La. 03/16/01), 787 So. 2d 316, the issue before the First Circuit, which granted a writ application filed by defendant, was whether a letter, with attached medical reports, sent by plaintiffs' counsel in response to prior interrogatories propounded by defense counsel seeking copies of all medical reports, interrupted the abandonment period set forth in La. C.C.P. art. 561. The First Circuit found that the trial court did not err in denying the motion to dismiss for abandonment because the plaintiffs' attorney's letter, giving to the defense medical reports from the plaintiff's treating doctors as requested in interrogatories propounded by the defendant, was a ***supplemental response to discovery*** and therefore formal discovery under La. C.C.P. arts. 561 and 1474 sufficient to interrupt the time period for abandonment. *Id*. at 326.

In the instant case, as noted previously, in their original discovery request, Defendants, *inter alia*, asked Plaintiff to sign a Medicare/Medicaid release form authorizing the release of her medical and billing records to defense counsel. In the April 13, 2015, letter, Defendants ***supplemented their initial discovery request*** when they sent Plaintiff's attorney an

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[2] *Cf. Johnson v. American Bell Federal Credit Union*, 49,321 (La. App. 2 Cir. 10/01/14), 149 So. 3d 1267 (in which this Court held that a December 2009 letter from defendants' attorney to the plaintiff following up on the plaintiff's agreement during her deposition on November 9, 2009, to "look in her records and provide defendants with any other loan documents she possessed" in response to a subpoena duces tecum did not constitute a step in the defense of the action or a waiver of the abandonment period, but was simply a follow up to a previous request for loan documents); and, *Moore v. Eden Garden Nursing Center*, 37,362 (La. App. 2 Cir. 06/25/03), 850 So. 2d 998 (in which this Court held that a letter from defense counsel to plaintiffs requesting responses to interrogatories previously propounded and threatening to file a motion to compel did not constitute a specific discovery action or a waiver or abandonment).

ANPAC-generated form entitled "Consent to release" for Plaintiff to sign authorizing the release of her Medicare/Medicaid records directly to ANPAC. Therefore, Plaintiff's May 21, 2015 letter returning the requested signed ANPAC release was a ***supplemental discovery response*** and, as such, formal discovery under La. C.C.P. art. 561(B). The trial court erred in finding otherwise.

As for Defendants' assertion that, because Plaintiffs did not file a certificate of service in the record in this case as required by La. C.C.P. art. 1313, the letter and requested release form are insufficient to constitute service and interrupt abandonment, we note that the *Breaux* case discussed above is factually on point. Like Defendants in the case *sub judice*, in *Breaux, supra*, Auto Zone did not dispute that the Breauxs' attorney mailed the letter and medical reports to Auto Zone's counsel. As do Defendants in this case, Auto Zone argued that the Breauxs failed to file in the record a certificate of service. In *Breaux*, defense counsel did not dispute receiving the letter and medical reports; in the instant case, counsel for Defendants likewise admitted receipt of Plaintiff's attorney's letter and medical release form. Citing prior jurisprudence,[3] the First Circuit found that, under those circumstances, the plaintiffs' counsel's failure to file a certificate of service in the record notwithstanding, the letter, once mailed pursuant to La. C.C.P. art. 1313, constituted service authorized by law and therefore was sufficient to interrupt the abandonment period. As noted by the Louisiana Supreme Court in *Louisiana Dept. of Transportation and Development v. Oilfield*

[3] *Charpentier v. Goudeau*, 95-2357 (La. App. 4 Cir. 03/14/96), 671 So. 2d 981; *Brister v. Manville Forest Products*, 32,386 (La. App. 2 Cir. 12/15/99), 749 So. 2d 881.

Heavy Haulers, L.L.C., 79 So. 3d at 982, La. C.C.P. art. 1474 specifically provides that the service of written objections, notices, requests, affidavits, interrogatories, and answers to interrogatories "shall be considered a step in the prosecution or defense of an action for purposes of Article 561." *See also Padua v. Gray*, 08-0582 (La. 05/16/08), 980 So. 2d 699, 699 ("[A] discovery notice, service of which was complete upon mailing, was a step in the prosecution of the case which precluded a finding of abandonment. LSA-C.C.P. arts. 1313(A) and 1474(A) and (C)(4)"). Defendants' argument to the contrary in this case is without merit.[4]

CONCLUSION

For the reasons set forth above, the trial court's judgment is reversed, and this matter is remanded for further proceedings consistent with this opinion. Costs of this appeal are assessed to Defendants.

[4] Based upon our ruling in this case, we do not reach the issue raised by Defendants in their answer.