

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 CA 0009

JASON DUCOTE  
VERSUS  
ANGIE MILLER, ET AL.

CONSOLIDATED WITH

NUMBER 2010 CA 0010

JENNIFER POE, WIFE OF AND JASON POE AND  
JILL RICHARDSON WIFE OF AND JACK RICHARDSON  
VERSUS  
ANGIE MILLER, WIFE OF AND KIRK MILLER

Judgment Rendered: June 11, 2010

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Appealed from the  
Twenty-Third Judicial District Court  
In and for the Parish of Ascension, Louisiana  
Trial Court Number 89,128 c/w 89,162

Honorable Alvin Turner, Jr., Judge

\*\*\*\*\*

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Angie Miller and Kirk Miller

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BEFORE: WHIPPLE, HUGHES, AND WELCH, JJ.

WELCH, J.

Plaintiffs, Jason and Jennifer Poe (Poes) appeal a judgment rendered in favor of defendants, Angie and Kirk Miller (Millers), dismissing this lawsuit with prejudice on the basis that plaintiffs failed to make an appearance. We reverse and remand.

### **BACKGROUND**

On May 8, 2008, the Poes, residents of Spanish Oaks Subdivision in Ascension Parish, filed this lawsuit against their neighbors, the Millers, seeking to prevent the Millers from constructing an alleged “spite fence.” The Poes claimed that the Millers failed to follow procedures set forth in subdivision restrictions and sought, in addition to injunctive relief preventing the construction of the fence, damages and attorney’s fees based on a provision of the subdivision restrictions giving each homeowner the right to bring a lawsuit and seek such damages. The Poes’ lawsuit was consolidated with a similar lawsuit brought by another neighbor challenging the construction of the fence.<sup>1</sup>

The Millers were ordered to appear in court on May 15, 2008, to show cause why injunctive relief should not issue. On that date, all of the parties agreed to submit the matter to arbitration, and the following stipulation was read into the court record:

Judge, I think we’ve reached an agreement as to a resolution of the matter before the court. Based on the court’s recommendation, the parties have agreed to enter into arbitration concerning the validity of the actions of the Homeowner’s Association and the various committees. The procedure that has been agreed upon is that the Miller side will select one arbitrator in accordance with the American Arbitration Association who will be a licensed attorney. The plaintiffs’ side will select another similar arbitrator and those two arbitrators will select a third arbitrator who is a licensed real estate agent in accordance with the bylaws.

The arbitration panel will be set within 30 days of today’s date. The fence which is at issue will not be worked on or further

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<sup>1</sup> The Ducote lawsuit was dismissed without prejudice on August 6, 2008.

constructed until arbitration has been had over this matter. The arbitrators will decide not only the merits but the costs, who pays the costs of the arbitration and all other things under the arbitration.

The record reflects that the trial court issued a scheduling order setting the matter for a bench trial on July 13, 2009, at 9:00 a.m. On July 13, 2009, two hearings were held before the trial court. The court minutes reflect the following:

This matter set on trial on the merits for this day now taken up.  
Attorney, Jack Dunn present on behalf of plaintiff Jennifer Poe, et al.  
This matter set on trial for this day was continued without date.  
Counsel stated everything was worked out.  
Later same day: Defendant Angie and Kirk Miller present in open court with attorney(s) O'Neil Parenton.  
Plaintiff, Jennifer Poe, et al not present or represented.  
Opening statement made by O'Neil Parenton. Counsel requested the preliminary injunction filed by plaintiff's (sic) be dismissed. Court grants the request. Court ordered the preliminary injunction filed by Jennifer Poe is dismissed with prejudice. Attorney O'Neil Parenton will prepare the judgment. Judgment to be signed when formal judgment is presented to the court.

The transcript for the hearing held on July 13, 2009, reflects that the Poes' attorney apprised the court that the neighborhood had quieted down, everyone was "back together again," and there was no one in court from the other side. The court asked the Poes' attorney, "So what's your pleasure?" The attorney responded that "we could just dismiss the matter or continue it without date, whatever best suits the needs of the court." The court responded "Let's continue it without date." The court then advised the attorney to file a motion to dismiss when he was positive all of the issues had been resolved, and requested something "official" saying that everyone was in agreement and the matter was dismissed, but acknowledged that for the present, the court would continue the matter without date, and the court then recessed. Later that day, the Millers' attorney appeared and stated that the trial had been set for 1:00 p.m. on July 13, 2009. The attorney stated that he was aware the Poes' attorney appeared in court that morning and informed the court that everything had been worked out, when in fact, nothing had been worked out. The attorney then asked the court to dismiss the lawsuit on the

basis that the Poes were not present in court. The court dismissed the lawsuit and ordered the Millers' attorney to prepare a judgment to that effect.

On August 28, 2009, the trial court signed a judgment dismissing the Poes' lawsuit with prejudice and ordering that Jason Poe bear all costs of the proceedings on the basis of the Poes' failure to make an appearance.<sup>2</sup> On September 1, 2009, the Poes filed a motion attacking the judgment, seeking a new trial, and requesting injunctive relief. On September 2, 2009, the trial court denied all relief requested by the Poes in their September 1, 2009 motion. The Poes filed a petition for a devolutive appeal of the August 28, 2009 judgment and the trial court's September 2, 2009 denial of their motion for a new trial.<sup>3</sup>

### DISCUSSION

In this appeal, the Poes contend, among other things, that the trial court erred in dismissing their lawsuit for their failure to appear at the 1:00 p.m. hearing when they appeared at the time the trial was scheduled, obtained an order continuing the matter without date, and were not notified of the hearing at which the judgment of dismissal was entered. We agree, and preterm discussion of all other assignments of error raised in this appeal.

Dismissal of a lawsuit is the harshest of remedies. The law favors and justice requires that an action be maintained whenever possible so that the aggrieved party has his day in court to which he is entitled. **Breaux v. Auto Zone, Inc.**, 2000-1534, p. 3 (La. App. 1<sup>st</sup> Cir. 12/15/00), 787 So.2d 322, 324, writ denied, 2001-0172 (La. 3/16/01), 787 So.2d 316. Louisiana Code of Civil Procedure

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<sup>2</sup> On this same date, the Poes filed an amended petition for injunctive relief and damages, asserting that the Millers proceeded with construction of the fence without submitting the matter to arbitration as agreed to in the stipulation.

<sup>3</sup> Prior to and after the filing of the petition for a devolutive appeal from the August 28, 2009 judgment, the Poes filed numerous pleadings in the trial court. As the trial court correctly observed, once this court's jurisdiction over the August 28, 2009 judgment dismissing the lawsuit with prejudice and the September 2, 2009 denial of the motion for a new trial from that judgment attached, the trial court was divested of jurisdiction to hear the Poes' additional motions for a new trial.

article 1672 permits a trial court to render a judgment dismissing a lawsuit upon application of any party when the plaintiff fails to appear on the day set for trial. A trial court's dismissal of a cause of action based upon the plaintiff's failure to appear for trial will not be reversed on appeal absent a showing that the trial court abused its discretion. **Taylor v. Johnson**, 45,000, p. 4 (La. App. 2<sup>nd</sup> Cir. 8/28/09), 18 So.3d 193, 196.

The record demonstrates that the trial was scheduled for July 13, 2009, at 9:00 a.m. The transcript and minutes clearly reflect that the Poes' attorney was present at the scheduled time; as the Millers were not present at that time, the attorney obtained an order from the court continuing the matter without date. However, without a motion or order to reset the matter for trial and without evidence that notice of the 1:00 p.m. hearing had been given to the Poes, the trial court dismissed the Poes' lawsuit with prejudice because they failed to re-appear when the Millers appeared for trial.<sup>4</sup> Under these circumstances, we find that the trial court clearly abused its discretion in dismissing the Poes' lawsuit, and we reverse the August 28, 2009 judgment of dismissal.

### **CONCLUSION**

For the foregoing reasons, the trial court's judgment dismissing the lawsuit with prejudice and assessing costs to Jason Poe is hereby reversed. The matter is remanded to the trial court for proceedings consistent with this opinion. All costs of this appeal are assessed to appellees, Angie and Kirk Miller.

### **REVERSED AND REMANDED.**

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<sup>4</sup> The Millers point out that on March 26, 2009, the trial court issued notice it was holding the scheduling order/bench trial pending payment so that the pleadings could be processed. They complain that it was the Poes' failure to pay court costs necessary to notice the parties which led to an error in the trial time. It is clear that the parties were aware that the trial had been set for July 13, 2009. We are asked to decide whether the trial court erred in dismissing a lawsuit with prejudice where the trial court continued the matter without date in open court after conducting a hearing at the scheduled time, and find that whether the Millers may have been mistaken as to the time of the hearing and the cause of that mistake bears no relevancy to the issue before us.