

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2021 CA 0421



HAILEY E. SMITH, INDIVIDUALLY AND ON BEHALF OF HER MINOR  
SON, KEMMY L. DWYER

VERSUS

CORPORAL ALLEN BASS AND THE LOUISIANA NATIONAL GUARD  
YOUTH CHALLENGE FOUNDATION, INC.

Judgment Rendered: DEC 22 2021

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Appealed from the 18th Judicial District Court  
In and for the Parish of Iberville  
State of Louisiana  
Case No. 75994

The Honorable J. Kevin Kimball, Judge Presiding

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Louisiana through the Department of  
Military Affairs

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**BEFORE: LANIER, WOLFE, AND BURRIS,<sup>1</sup> JJ.**

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<sup>1</sup> The Honorable William J. Burris, retired, is serving *pro tempore* by special appointment of the Louisiana Supreme Court.

**LANIER, J.**

The plaintiffs, Hailey E. Smith and Kemmy L. Dwyer <sup>2</sup>, appeal the February 3, 2021 denial of their motion for a new trial, ordered by the Eighteenth Judicial District Court in favor of the defendants, Corporal Allen Bass and the State of Louisiana through the Department of Military Affairs (collectively the State). For the reasons set forth below, we affirm the district court's denial of the motion for new trial. We also amend the district court's dismissal based on abandonment, and affirm as amended.

### **FACTS AND PROCEDURAL HISTORY**

Ms. Smith filed a petition for damages on June 6, 2016, in which she alleged that on June 9, 2015, her minor son Kemmy, while attending the Louisiana National Guard Youth Challenge Program, was intentionally injured by Cpl. Bass. Ms. Smith further alleged that Cpl. Bass and the Youth Challenge Program were under the direct supervision and employment of the Louisiana National Guard Youth Challenge Foundation, Inc. (the Foundation), and that the Foundation negligently hired Cpl. Bass. Ms. Smith claimed that the Foundation and Cpl. Bass were liable for Kemmy's injuries.

On July 18, 2016, Ms. Smith amended her petition for damages to substitute the Foundation with Major General Glenn H. Curtis, Adjutant General of the "Louisiana Military Department." The State filed a declinatory exception of insufficiency of service of process and an answer to the amended petition on September 27, 2016. On October 5, 2016, Ms. Smith filed a motion for leave to file a second amended petition to correct "Louisiana Military Department" to the proper name of "Department of Military Affairs." The motion was granted on

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<sup>2</sup> Kemmy has reached the age of majority since the time the original petition was filed.

October 19, 2016. On September 22, 2017, the State filed an *ex-parte* motion to substitute proper party plaintiff, alleging that Kemmy had attained the age of majority.

On December 23, 2020, the State filed a motion for dismissal on the grounds of abandonment. Attached to the motion was the affidavit of Gary Williams II, counsel for the State, who attested that he had reviewed the record and found that there had been no action in the prosecution or defense of the instant matter since September 18, 2017, when the district court signed the State's motion to substitute proper party plaintiff. On January 6, 2021, the district court signed an order dismissing the plaintiffs' claims with prejudice due to abandonment.

On January 19, 2021, the plaintiffs filed a motion for new trial, challenging the district court's order of dismissal. Attached to the motions were exhibits showing emails, spanning from August 21, 2017 to December 17, 2020, sent between the parties' counsels. The emails demonstrate efforts to settle the case, but no settlement was ever reached. On February 3, 2021, the district court denied the motion, with a notation that there were "[n]o newly discovered facts." The plaintiffs now appeal.

## **DISCUSSION**

The plaintiffs' sole assignment of error is that the district court erred in denying the motion for new trial. The applicable standard of review in ruling on a motion for new trial is whether the trial court abused its discretion. *Campbell v. Tork, Inc.*, 2003-1341 (La. 2/20/04), 870 So.2d 968, 971. The denial of a motion for new trial is generally a non-appealable interlocutory judgment. However, an appellate court may consider interlocutory judgments as part of an unrestricted appeal from a final judgment. *Brehm v. Amacker*, 2015-1531 (La. App. 1 Cir. 12/7/17), 236 So.3d 621, 629. To determine whether the trial court abused its

discretion in denying the plaintiffs' motion for new trial, we will examine the underlying dismissal for abandonment.

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. La. C. C. P. art. 561. Louisiana Code of Civil Procedure article 561 provides that abandonment is self-executing; it occurs automatically upon the passing of three years without a step being taken by either party and is effective without court order. *Pittman v. Flanagan*, 2018-1566 (La. App. 1 Cir. 4/17/19), 2019 WL 1648954 at \*2 (unpublished), writ denied, 2019-00801 (La. 9/17/19), 279 So.3d 379. Abandonment is not meant to dismiss actions on mere technicalities but to dismiss actions which in fact clearly have been abandoned. *Id.*

To prevent abandonment, La. C. C. P. art. 561 imposes three requirements on plaintiffs. First, plaintiffs must take some "step" towards prosecution of their lawsuit. A "step" is a formal action before the court that is intended to hasten the suit towards judgment, or is the taking of formal discovery. Second, the "step" must be taken in the court where the suit is pending, and except for formal discovery, must appear in the suit record. Third, the "step" must be taken within the legislatively prescribed time period. *Brown v. Kidney and Hypertension Associates, L.L.P.*, 2008-0919 (La. App. 1 Cir. 1/12/09), 5 So.3d 258, 266.

In the instant case, the State alleges that no step in the prosecution or defense of the case had been taken since September 18, 2017, when the district court signed the order substituting Kemmy as a proper party plaintiff. Subsequent to that order, the record shows: a request for written notice filed by Cpl. Bass on September 20, 2018; a certificate of service filed on the same date; and four motions to substitute counsel filed by the State on September 27, 2018, February 4, 2019, August 5, 2019, June 29, 2020. None of those filings qualify as a "step" to hasten the instant case toward judgment, nor are they requests for discovery. See

*Paternoistro v. Falgoust*, 2003-2214 (La. App. 1 Cir. 9/17/04), 897 So.2d 19, 22, writ denied, 2004-2524 (La. 12/17/04), 888 So.2d 870.

Additionally, the emails attached as exhibits to the plaintiffs' motion for new trial do not qualify as a forward step in the prosecution of the case. Emails are not formal actions, as would be pleadings or formal discovery requests. The emails simply display discussions between the parties pertaining to settlement efforts. They do not constitute newly discovered facts or evidence that would warrant a new trial, as the plaintiffs were well aware of these emails long before filing the motion for new trial.

The State's motion for dismissal on the grounds of abandonment was filed on December 22, 2020, more than three years after the order to substitute Kemmy as a proper party plaintiff was signed by the district court. Likewise, the plaintiffs failed to meet any of the requirements provided in La. C.C.P. art. 561 to prevent abandonment; as such, we find the district court did not abuse its discretion in ruling that there were no newly discovered facts to warrant a new trial. The district court's denial of the plaintiff's motion for new trial is affirmed.

On review of this matter, we note that the district court's order of dismissal of the plaintiff's claims due to abandonment was with prejudice. However, a dismissal of an action on the grounds of abandonment may only be made "without prejudice." *Pittman*, 2019 WL 1648954 at \*4, citing *Burgess, Inc. v. Par. Of St. Tammany*, 2017-0153 (La. App. 1 Cir. 10/25/17), 233 So.3d 58, 62, n.1, writ denied, 2017-2179 (La. 2/23/18), 237 So.3d 515. Therefore, the dismissal of the plaintiffs' claims pursuant to La. C.C.P art. 561 on grounds of abandonment should have been "without prejudice." Accordingly, we amend the judgment dismissing the plaintiffs' claims to delete the words "with prejudice" and to substitute the words "without prejudice." See *Pittman*, 2019 WL 1648954 at \*4.

## **DECREE**

The Eighteenth Judicial District Court's February 3, 2021 denial of the motion for new trial filed by the plaintiffs, Hailey E. Smith and Kemmy L. Dwyer, is affirmed. The January 6, 2021 order dismissing the plaintiff's claims "with prejudice" due to abandonment is amended to dismiss the plaintiff's claims without prejudice, and is affirmed as amended. All costs of this appeal are assessed to Hailey E. Smith and Kemmy L. Dwyer.

**DENIAL OF NEW TRIAL AFFIRMED; DISMISSAL BASED ON  
ABANDONMENT AMENDED, AND AFFIRMED AS AMENDED.**