CYNTHIA AND CHARLES REED INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILDREN	*	**NO. 2001-CA-1015**
	*	**COURT OF APPEAL**
VERSUS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
MAYER FINKLESTEIN AND XYZ INSURANCE COMPANY	*	
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 93-14209, DIVISION "K-14"
HONORABLE LOUIS A. DIROSA, JUDGE PRO TEMPORE
* * * * * *
JUDGE MAX N. TOBIAS, JR.
* * * * * *

(COURT COMPOSED OF CHIEF JUDGE WILLIAM H. BYRNES, III, JUDGE PATRICIA RIVET MURRAY, AND JUDGE MAX N. TOBIAS, JR.)

BYRNES, J., DISSENTS WITH REASONS

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APPEAL CONVERTED TO A WRIT;
WRIT GRANTED; JUDGMENT AFFIRMED

Defendant/Appellant, Mayer Finklestein ("Finklestein"), appeals the trial court's denial of his motion to dismiss pursuant to La. C.C.P. art. 561 relative to abandonment.

On 27 August 1993, Cynthia and Charles Reed, individually and on behalf of their minor children (collectively, "the Reeds"), initiated the instant action to recover damages due to the alleged legal malpractice by Finklestein. Discovery ensued, and on 4 June 1997, the Reeds filed a motion for summary judgment. Apparently, the Reeds' motion was set for hearing in the wrong division of court; therefore, on 27 July 1997, the Reeds moved to reset their summary judgment in the proper division. The hearing of the motion was reset for 22 August 1997; however, the defendant filed a motion to continue the hearing on 13 August 1997, asking that the matter be reset to the court's next available rule date due to a conflict. Over the Reeds' objection, the hearing was rescheduled for 26 September 1997. Wendell Armant, the Reeds' attorney, was served with the motion to continue, as is evidenced by a sheriff's return. However, the record is

devoid of any evidence that a hearing on the motion for summary judgment ever took place.

Almost three years later, on 3 August 2000, David Bernberg filed a motion to enroll as counsel of record for the Reeds. Later, on 25 August 2000, the Reeds' new counsel filed a motion to set for trial on the merits. A trial date was set for 9 January 2001. Due to a conflict, on 13 October 2000, Finklestein moved to continue the trial. The court granted the motion to continue and reset the trial for 8 May 2001.

On 19 January 2001, defendant filed a motion to dismiss pursuant to La. C.C.P. art. 561, asserting that the Reeds' lawsuit should be dismissed as abandoned because none of the parties had taken any steps in the prosecution or defense of the matter from 29 July 1997 to 25 August 2000. The Reeds opposed the motion. Following a hearing, the trial court denied the motion to dismiss and rendered judgment on 12 March 2001. No reasons for judgment appear of record. Pursuant to a request by counsel for Finklestein, the judgment was designated as a final judgment and the court found no just reason for delay. Finklestein timely filed a petition for a devolutive appeal.

As a preliminary matter, we note that the denial of a Motion to Dismiss for Abandonment is not a final appealable judgment. Rather, it is

an interlocutory judgment because it determines a preliminary matter and not the merits of the action. As such, the judgment denying Finklestein's motion to dismiss is only appealable if it may cause irreparable injury. Clearly, the trial court's ruling will not cause Finklestein irreparable injury, since his alleged right to dismissal can be adequately reviewed at the time of an appeal from the final judgment which ultimately determines the merits of the case. *See* Vernor v. Drexel Homes, Inc., 311 So.2d 493 (La. App. 4 Cir. 1975). Nevertheless, the trial judge designated that its judgment was final and that there was no just reason for delay, and the Reeds have not objected to our review. We note that Finklestein did file his request for a devolutive appeal within the time delays allowed for the taking of a writ. We stated in Mangin v. Auter, 360 So. 2d 577 (La. App. 4th Cir. 1978), that when the overruling of an exception is arguably incorrect and a reversal will terminate the litigation, and when there is no dispute of fact to be resolved, judicial efficiency and fundamental fairness to the litigants dictates that the merits of the application for supervisory writs be decided in an attempt to avoid the waste of time and expense of a possibly useless future trial on the merits. The denial of a motion to dismiss for abandonment is sufficiently similar to the overruling of an exception for our reasoning in Mangin to apply to this matter. Therefore, instead of dismissing this appeal on jurisdictional

grounds, we exercise our broad supervisory powers and review the trial court's ruling. La. C.C.P. art. 2164. The record is already before us, and the interests of justice are best served by considering the matter now. Thus, we convert the appeal to an application for supervisory writs of review. We grant the supervisory writ in order to consider the matter at this time. Code of Civil Procedure article 561, entitled "Abandonment in trial and appellate court" provides, in pertinent part, as follows:

> A. (1) 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, unless it is a succession proceeding:
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> * * * *
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> (2) This provision shall be operative without formal order, but, on ex parte motion of any party or other interested person by affidavit which provides that no step has been taken for a period of three years in the prosecution or defense of the action, the trial court shall enter a formal order of dismissal as of the date of its abandonment. The order shall be served on the plaintiff pursuant to Article 1313 or 1314, and the plaintiff shall have thirty days from the date of service to move to set aside the dismissal.
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> B. Any formal discovery as authorized by this Code and served on all parties whether or not filed of record, including the taking of a deposition with or without formal notice, shall be deemed to be a step in the prosecution or defense of an action.

In his sole assignment of error, Finklestein claims that the trial court erred in finding that steps had been taken in the prosecution or defense of

this matter between 29 July 1997 and 25 August 2000, thus precluding a determination that this case had been abandoned.

Finklestein asserts that the Reeds' 29 July 1997 filing of their motion to reset the hearing on their motion for summary judgment was the last step taken in the prosecution or defense of this matter until the Reeds' 25 August 2000 motion to set this case for trial. Accordingly, he submits that the Reeds' suit had already been abandoned at the time they moved to have it set for trial.

Finklestein admits that he filed a motion to continue the 22 August 1997 hearing on the Reeds' motion for summary judgment on 13 August 1997, and that the hearing was reset for 26 September 1997. Citing Oliver v. Oliver, 95-1026 (La. App. 3 Cir. 3/27/96), 671 So. 2d 1081, Finklestein contends that a motion to continue a hearing is not a step in the prosecution or defense of a case. Nevertheless, he claims that even assuming arguendo that his motion to continue did constitute a step in the prosecution, there would still be a three-year period from 13 August 1997 to 25 August 2000 during which no steps were taken in the prosecution or defense of this matter.

In addition, Finklestein claims that the fact that the Reeds' motion for summary judgment was set on 26 September 1997 is of no moment because

the record is completely devoid of any evidence that the hearing ever took place. As a result, he submits that this court must disregard the September 1997 date.

Finally, citing Varnado v. Gentilly Medical Clinic for Women, 98-0264 (La. App. 4 Cir. 12/23/98), 728 So. 2d 479, Finklestein states that David Bernberg's 3 August 2000 motion to enroll as plaintiff's counsel of record cannot be viewed as a step in the prosecution of the suit. Consequently, he submits that the trial court committed error in denying his motion to dismiss for abandonment.

The Reeds do not challenge Finklestein's argument that a motion to enroll as counsel is not a step in the prosecution. They do assert, without citing any authority, that "[o]bviously, a motion to dismiss a case on the grounds of abandonment must be strictly construed and any ambiguities or any factual errors must be interpreted in favor of the party that will be prejudiced by the abandonment dismissal." In that light, the Reeds seem to suggest that the burden is on Finklestein to prove that no hearing took place on 26 September 1997, and that his mere suggestion to both the trial court and this court that no hearing took place, without any evidence, is insufficient.

The Reeds also claim that the original trial court record was misplaced

and that a duplicate record has been reconstructed, but that the duplicate record is incomplete and is missing certain documents. For example, all parties complain that the record lacks evidence that the motion to continue was served on counsel for the Reeds. Based on that reasoning, the Reeds suggest that minutes from a 26 September 1997 hearing may have existed and that Finklestein should have sought to obtain a transcript of the trial court's minutes from that date.

Finally, the Reeds argue that regardless of whether their motion for summary judgment was in fact heard on 26 September 1997, it was clearly the intent of Finklestein's counsel to have the matter heard on that date and thus that date should be considered as a step in the prosecution.

It is obvious that the Reeds wanted their motion for summary judgment heard for they opposed Finklestein's motion to continue. The trial court granted the motion to continue and reset the hearing for 26 September 1997. It is apparent that the intent of all parties was for the matter to proceed forward to a resolution of the issues presented in the motion for summary judgment. In the absence of anything in the record before us to show that the parties did not intend to proceed forward on 26 September 1997, we conclude that the motion to set for trial on the merits filed on 25 August 2000 was filed within three years of "any step" taken in prosecution

or defense of the case. The parties intended to hasten the suit to judgment. It is of no moment that the record before us fails to reflect what action if any the trial court took on 26 September 1997, for the intent of the parties as reflected by the record was to proceed on that date.

We do not find that Oliver v. Oliver, supra, supports Finklestein's position. In Oliver, the parties filed a *joint* motion to continue *without date* a motion for new trial. Implicit in the motion was that both parties intended that neither party wanted to hasten to judgment the issue of whether or not a new trial should be granted. In contrast, the case at bar manifests the clear intent of the parties to hasten to judgment the motion for summary judgment. The Reeds manifested their intent by filing the motion for summary judgment and opposing the continuation of the hearing date. Finklestein manifested his intent by filing the motion to continue to a date certain; the trial court set the date certain as 26 September 1997.

Article 561 is not to be used to dismiss cases where a party has clearly demonstrated that it does not intend to abandon the action. Article 561 is not designed to dismiss actions on mere technicalities, but is intended to dismiss only those actions that, in fact, have been abandoned. *See* Viesel v. Republic Ins. Co., 95-0244 (La. App. 4 Cir. 1995), 665 So. 2d 1221.

A step was taken in the prosecution or defense of this matter between

29 July 1997 and 25 August 2000, to-wit, the scheduling of the hearing on 26 September 1997. Accordingly, the trial court correctly denied Finklestein's motion to dismiss for abandonment, and we affirm the ruling of the trial court.

APPEAL CONVERTED TO A WRIT;
WRIT GRANTED; JUDGMENT AFFIRMED