

**NOT DESIGNATED FOR PUBLICATION**

<b>IVA M. WHITE AND/ON</b>	*	<b>NO. 2005-CA-0377</b>
<b>BEHALF OF TRENICA ANN</b>	*	<b>COURT OF APPEAL</b>
<b>WHITE</b>	*	<b>FOURTH CIRCUIT</b>
<b>VERSUS</b>	*	<b>STATE OF LOUISIANA</b>
<b>HOUSING AUTHORITY OF</b>	*	
<b>NEW ORLEANS, C.J. BROWN</b>	*	
<b>PROPERTY MANAGEMENT</b>	*	
<b>OF NEW ORLEANS AND</b>	*	
<b>SCOTTSDALE INSURANCE</b>	*	
<b>COMPANY</b>	*****	

APPEAL FROM  
CIVIL DISTRICT COURT, ORLEANS PARISH  
NO. 94-11480, DIVISION "A"  
Honorable Carolyn Gill-Jefferson, Judge  
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**Judge Terri F. Love**  
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(Court composed of Judge James F. McKay III, Judge Michael E. Kirby,  
Judge Terri F. Love)

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**JUDGMENT AMENDED, AND, AS AMENDED, AFFIRMED.**

Ms. Iva M. White (hereinafter “Ms. White”) individually and on behalf of Trenica Ann White, appeals the trial court’s dismissal of her action finding the parties had abandoned their claim. We affirm.

***FACTS AND PROCEDURAL HISTORY***

On July 20, 1994, Ms. White filed a Petition for Damages asserting Trenica Ann White suffered injuries on property owned by the Housing Authority of New Orleans (“HANO”). On November 22, 1996, Ms. White filed a Supplemental and Amending Petition and on December 10, 1999, she filed a Motion to Set for Trial. On June 25, 2004, HANO filed an *ex parte* Motion to Dismiss on the grounds of abandonment, premised on the fact that Ms. White failed to take any step in the prosecution or defense of the action in excess of three years (from November 22, 1996 through November 23, 1999). The trial court granted HANO’s *ex parte* motion and dismissed Ms. White’s case with prejudice. Subsequently, Ms. White filed a Motion to Vacate the Judgment of Dismissal and a hearing was held. The trial court denied the Motion to Vacate and ordered that the Judgment of Dismissal

remain in effect. It is from this judgment appellant filed a timely appeal.

### ***STANDARD OF REVIEW***

An appellate court can only reverse a facts finder's determination when: (1) it finds from the record that a reasonable factual basis does not exist for the finding of the trial court, and (2) it further determines that the record established the findings are manifestly erroneous. *Stobart v. State through Department of Transportation and Development*, 617 So. 2d 880, 883 (La. 1993). In applying this standard, the appellate court must not determine whether the trier of fact was right or wrong, but whether the fact finder's conclusion was a reasonable one. *Id.* at 880. If the fact finder's findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse, even if it would have weighed the evidence differently as the trier of fact. *Banks v. Industrial Roofing & Sheer Metal Works, Inc.*, 96-2840 (La. 7/01/97), 696 So. 2d 551.

### ***ASSIGNMENT OF ERROR***

In her sole assignment of error, Ms. White asserts the trial court erred in dismissing her case on the basis of abandonment because of a stay order, issued by the trial court on April 3, 1998 in another case, *Elaine Clark v. Housing Authority of New Orleans*, Civil District Court No. 95-9782 "E".

Ms. White asserts the *Clark* case stayed all cases involving HANO; therefore, operating to interrupt abandonment in her case. We find this assignment of error without merit.

Article 561 of the Louisiana Code of Civil Procedure provides, in pertinent part:

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...

(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 sheriff shall serve the order in the manner provided in Article 1314, shall execute a return pursuant to Article 1292.

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 *James Clark v. State Farm Mutual Automobile Insurance Co.*, 00-3010 (La. 5/15/01), 785 So.2d 779, 784, the Louisiana Supreme Court referenced the three steps stated in La. C.C.P. art. 561, which a plaintiff must take in order to avoid a finding of abandonment by the trial court. The first

requirement is that a plaintiff must take some step toward the prosecution of a lawsuit. The second requirement is that the step must be taken in the proceedings and appear in the record of the suit, unless the action is formal discovery. The third requirement is that the step must be taken within the legislatively prescribed time period from the last step taken by either the plaintiff or the defendant. La. C.C.P. art. 561

There are two well-established jurisprudential exceptions to the abandonment rule set forth in La. C.C.P. art. 561. The first exception is based on the concept of *contra non valentem*, and its application in situations where the plaintiff is prevented by circumstances beyond the plaintiff's control from prosecuting a case. The second exception is applicable when the defendant waives the right to assert abandonment by taking actions inconsistent with an intent to treat the case as abandoned. *Id.* at 785. Ms. White contends the first exception of *contra non valentem*, which contemplates events making it impossible for the litigant to act in his own behalf to take the requisite steps, is applicable in the case *sub judice*.

In support of her argument in the instant case, Ms. White relies upon the above referenced stay order in *Clark v. Housing Authority of New Orleans*, Civil District Court No. 95-9782 "E". However, the trial court did not issue an order staying every case involving HANO as a defendant. To

the contrary, the order only specified that the *Elaine Clark* matter was continued and would not be re-set until such time that there was a final resolution in a case entitled *Mona Lisa Dean v. Housing Authority of New Orleans*, Civil District Court No. 94-11530 “H-12”. Accordingly, we must reject Ms. White’s claim that the trial courts order prevented her from taking a step in the prosecution of the instant case.

In the case *sub judice*, the parties did not take any steps in the prosecution or defense of this action for the three-year period after November 22, 1996. The record does reflect that Ms. White filed motions to set the matter for trial on December 10, 1999, May 4, 2001, and May 4, 2004. However, because abandonment occurs by operation of law, any step taken after the three-year period has run is ineffective to prevent a Judgment of Dismissal from being granted. *Clark v. State Farm Mutual Automobile Insurance Co.*, 00-3010 (La. 5/15/01), 785 So.2d 779. Therefore, Ms. White’s action did not revive her cause of action. Furthermore, we conclude the stay order rendered in an unrelated case did not create a legal impediment to Ms. White’s prosecution of this action, making the exception of *contra non valentum* inapplicable.

### ***CONCLUSION***

We find Ms. White’s suit against HANO has been abandoned.

However, we note jurisprudence provides that a trial court is without authority to dismiss an action with prejudice for failure to prosecute.

*Commerce Funding Corp. v. Lewis Plumbing & Heating, Inc.*, 00-1883 (La. App. 4 Cir. 05/23/01), 788 So.2d 1203, 1204; *Morgan v. Hopkins*, 36,506 (La. App. 2 Cir. 10/23/02), 830 So. 2d 459, 462. Accordingly, by dismissing with prejudice, the trial court erred. We, therefore, amend the judgment to delete the words “with prejudice” and supplant “without prejudice.” In all other respects, the judgment is affirmed.

**JUDGMENT AMENDED, AND, AS AMENDED,  
AFFIRMED**