NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CA 1132

MICHAEL WAYNE PRUDHOMME

VERSUS

ROSALIA TODD AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Judgment Rendered: December 22, 2010.

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On Appeal from the
19th Judicial District Court,
In and for the Parish of East Baton Rouge,
State of Louisiana
Trial Court No. 531,899

Honorable Curtis A. Calloway, Judge Presiding

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Dennis R. Whalen Baton Rouge, LA	Attorney for Plaintiff-Appellant, Michael Wayne Prudhomme
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BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

Welch J. concurs without reasons

CARTER, C. J.

This is an appeal of a judgment dismissing plaintiff's suit, without prejudice, due to his attorney's failure to comply with the trial court's pretrial scheduling orders. For the reasons that follow, we reverse the judgment and remand the matter for further proceedings.

FACTS

On May 2, 2005, Michael Wayne Prudhomme filed a petition for damages that he allegedly sustained in an automobile accident. State Farm Mutual Automobile Insurance Company ("State Farm-Liability") answered in its capacity as the liability insurer for the other driver, Rosalia Todd, and in its capacity as the uninsured/underinsured motorist ("State Farm-UM") carrier for Mr. Prudhomme.

As the case progressed, the trial court adopted a Case Management Schedule, signed by the attorneys for Mr. Prudhomme and State Farm-UM, ordering the parties to file their pretrial order by March 26, 2007. However, the pretrial order was never submitted and eventually, a second Case Management Schedule was signed by all attorneys of record and adopted by the trial court on July 24, 2008. In the second scheduling order, the parties agreed to new dates and were ordered to prepare and file a pretrial order by September 8, 2008. Once again, the pretrial order was not submitted as ordered.

On September 30, 2008, all attorneys of record attended a status conference. After the conference, the trial court issued an order that was filed in the record on October 8, 2008, but not signed until October 15, 2008, ordering Mr. Prudhomme's attorney to submit a pretrial order to the court by October 15, 2008. The trial court's order also declared that if a pretrial order was not submitted by October 14, 2008, the case would be dismissed without prejudice. When Mr. Prudhomme's attorney failed to submit the pretrial order by the deadline, State Farm-UM moved

the trial court for an entry of an order dismissing Mr. Prudhomme's case without prejudice.[1] The trial court signed State Farm-UM's *ex parte* motion and judgment of dismissal without prejudice on October 30, 2008. The record reflects that notice of the signing of the judgment of dismissal was not mailed to the attorneys of record until March 11, 2010. Mr. Prudhomme was granted a timely devolutive appeal from the judgment of dismissal on May 17, 2010.[2]

Mr. Prudhomme's sole assignment of error is that the trial court legally erred in dismissing his suit without a hearing.

LAW AND ANALYSIS

The central issue in this appeal is whether the trial court abused its discretion in dismissing Mr. Prudhomme's case due to his attorney's failure to abide by the court-approved scheduling order. The trial court has much discretion in imposing sanctions for a party's failure to comply with discovery and scheduling orders, and its ruling will not be reversed absent an abuse of that discretion. See **Benware v. Means**, 99-1410 (La. 1/19/00), 752 So.2d 841, 847; **Zavala v. St. Joe Brick Works, Inc.**, 04-0065 (La. App. 1 Cir. 12/17/04), 897 So.2d 703, 705; **Lirette v.**

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[1] On November 21, 2008, State Farm-Liability and Rosalia Todd also filed a motion to dismiss Mr. Prudhomme's suit due to his attorney's failure to abide by the trial court's scheduling orders. However, this particular motion and the trial court's ruling are not at issue in this appeal.

[2] A judgment of dismissal without prejudice is a final judgment and is therefore appealable. LSA-C.C.P. art. 2085; **Dusenbery, as Tutrix of Dusenberg v. McMoRan Exploration Co.**, 425 So.2d 249, 251 (La. App. 1 Cir. 1982). Notice of the signing of a final judgment is required in all contested cases, except as otherwise provided by law, and shall be mailed by the clerk of court to the counsel of record for each party. LSA-C.C.P. art. 1913A. It is well settled that appeal delays do not begin to run until proper notice is mailed by the clerk of court. **Voelkel v. State**, 95-0147 (La. App. 1 Cir. 10/6/95), 671 So.2d 478, 480, writ denied, 95-2676, 667 So.2d 523 (La. 1/12/96). See also **Mack v. Evans**, 33,823 (La. App. 2 Cir. 4/7/00), 756 So.2d 1270, 1271, writ denied, 00-1593 (La. 8/31/00), 766 So.2d 1281. The delay for taking a devolutive appeal does not begin to run until the expiration of the new trial delays. LSA-C.C.P. arts. 1974, 2087. Any actual knowledge of the signing of the judgment outside of the record and absent compliance with the mailing requirement is not sufficient to cause the new trial and appeal delays to commence. **Mack**, 756 So.2d at 1271. Thus, because the record in this case reveals that the judgment of dismissal was not mailed until March 11, 2010, Mr. Prudhomme's motion for appeal filed on April 15, 2010 and granted on May 17, 2010, is considered timely filed.

Babin Farm, Inc., 02-1402 (La. App. 1 Cir. 4/2/03), 843 So.2d 1141, 1143; **Moody v. Moody**, 622 So.2d 1376, 1381 (La. App. 1 Cir.), writs denied, 629 So.2d 1168 (La. 1993). Each case must be decided upon its own facts and circumstances. **Benware**, 752 So.2d at 847.

Our jurisprudence has clearly followed the established principle that dismissal is a "draconian" penalty that should be applied only in extreme circumstances. **Horton v. McCary**, 93-2315 (La. 4/11/94), 635 So.2d 199, 203. Specifically, we have held that in order to justify a dismissal of a plaintiff's suit, there must exist sufficient evidence in the record to establish that the plaintiff himself (and not only his attorney) acted with willful disobedience, bad faith, or fault. **In re Medical Review Panel**, 99-2088 (La. App. 1 Cir. 12/22/00), 775 So.2d 1214, 1218; **Hutchinson v. Westport Ins. Corp.**, 04-1592 (La. 11/8/04), 886 So.2d 438. Also, the record must show that the party was clearly aware that his noncompliance would result in the dismissal. See **Garza v. International Maintenance Corp.**, 97-317 (La. App. 3 Cir. 10/29/97), 702 So.2d 1021, 1024; **Davis v. Byrd Memorial Hospital**, 628 So.2d 1284, 1287 (La. App. 3 Cir. 1993), writ denied, 94-0072 (La. 3/11/94), 634 So.2d 396. Dismissal is generally reserved for those cases in which the client, as well as the attorney, is at fault. **Horton**, 635 So.2d at 203. Additionally, dismissal is a sanction of last resort only to be imposed after an opportunity to be heard has been afforded the litigant. **Hutchinson**, 886 So.2d at 440.

In this case, State Farm-UM and State Farm-Liability allege in their briefs that Mr. Prudhomme's attorney failed to provide pretrial inserts and file the pretrial order as ordered by the trial court. Mr. Prudhomme's attorney alleges in his brief that discovery was not complete and the trial court ordered the preparation of the pretrial order over his objection, but he offers no explanation as to why his

signature appears on the two Case Management Schedules that indicate his agreement with the various dates/orders set forth in the schedules. The record, however, contains nothing to indicate that the failure to provide pretrial inserts or file the pretrial order was in any way attributable to Mr. Prudhomme himself. In fact, the briefs indicate that the failure to follow the trial court's orders was the sole fault of Mr. Prudhomme's attorney, not the client, Mr. Prudhomme.

Considering the clarity of the jurisprudence on this specific issue and the complete lack of even an allegation of bad faith on the part of Mr. Prudhomme, such a harsh remedy of dismissal was not warranted under these facts. Furthermore, LSA-C.C.P. art 1551C clearly provides, in pertinent part, that "[i]f a party's attorney *fails to obey a pretrial order*, or to appear at the pretrial and scheduling conference, or is substantially unprepared to participate in the conference or fails to participate in good faith, the court, on its own motion or on the motion of a party, *after hearing*, may make such orders as are just, including orders provided in Article 1471(2), (3), and (4)."[3] (Emphasis added.) The record clearly reflects that the trial court's judgment of dismissal was rendered on the *ex parte* motion of State Farm-UM in accordance with the trial court's order issued pursuant to a status conference where only the attorneys of record were present. Consequently, a contradictory hearing was never held to determine whether the failure to provide pretrial inserts and file the pretrial order was in any way attributable to Mr. Prudhomme. Since there is no evidence that Mr. Prudhomme was aware of or participated in violating the trial court's scheduling orders, the trial court erred in dismissing Mr. Prudhomme's case.

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[3] Louisiana Code of Civil Procedure article 1471 provides sanctions for failure to comply with orders compelling discovery, including dismissal of the action. Thus, LSA-C.C.P. art. 1551C authorizes dismissal in appropriate cases of disregard for orders pertaining to pretrial procedure. See **Benware**, 752 So.2d at 846.

CONCLUSION

For these reasons, we reverse the October 30, 2008, judgment of dismissal and remand the matter for further proceedings consistent with this opinion. All costs of this appeal are assessed one-half to counsel for Mr. Prudhomme and one-half to appellees, State Farm-Liability and State Farm-UM. See **Zavala**, 897 So.2d at 705.

REVERSED AND REMANDED.