NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

RHP (by jmm)

2013 CA 2213

PROFESSOR BRYAN LEWIS AND DOROTHY LEWIS

VERSUS

SOUTHERN UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE, THE BOARD OF SUPERVISORS FOR SOUTHERN UNIVERSITY, FORMER SYSTEM PRESIDENT LEON TARVER, CHANCELLOR EDWARD R. JACKSON AND DR. ROBERT MILLER

On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 546,981, Section 25
Honorable Wilson E. Fields, Judge Presiding

Bryan A. Lewis, Ph.D.
Dorothy Lewis
Tallahassee, FL

Pro Se
Plaintiffs-Appellants

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Defendants-Appellees
Southern University and Agricultural and Mechanical College, the Board of Supervisors for Southern University, Former System President Leon Tarver, Chancellor Edward R. Jackson and Dr. Robert Miller

BEFORE: PARRO, McDONALD, AND CRAIN, JJ.

Crain, J. concurs. (by jmm)

McDonald, J. concurs.

Judgment rendered DEC 30 2014

PARRO, J.

This appeal stems from an employment-related lawsuit brought by Professor Bryan Lewis and his wife, Dorothy, against Southern University Agricultural and Mechanical College (Southern), and five other defendants the Lewises assert have affiliation with Southern. Five years after the Lewises filed that suit, the district court dismissed it as having been abandoned. The Lewises responded to that judgment of abandonment with a motion to vacate the judgment; however, the district court denied that motion. The denial of that motion is the subject of the Lewises' appeal. While the appeal was pending, this court issued a show cause order raising the issue of whether the order denying the motion to vacate contained appropriate decretal language, and that show cause issue has been referred to this panel. For the reasons that follow, we find the show cause issue to be moot, and we affirm the district court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In September 2006, the Lewises, at the time represented by legal counsel, filed this suit against Southern, its Board of Supervisors, former System President Leon Tarver, Chancellor Edward R. Jackson, Dr. Robert Miller, and Dr. Oswald D'Auvergne.[1] The petition alleges that Southern removed Professor Lewis from his teaching duties without warning, starting with the spring semester of 2006, and that the defendants played various roles in that removal and in inflicting other injuries upon the Lewises.

Subsequently, legal counsel for the Lewises moved to withdraw from representing them in this suit, and the district court signed an order granting that motion on January 16, 2009. Later, on November 14, 2011, all the defendants except Dr. D'Auvergne filed a motion asking the district court to dismiss all of the Lewises' claims as having been abandoned because the plaintiffs did not take action or pursue the case. The district court granted that motion and signed a judgment on November 16, 2011, decreeing the Lewises' legal action abandoned and closed. Although LSA-C.C.P. art. 561(A)(3) requires that the sheriff serve on the parties notice of such an

[1] While Dr. D'Auvergne was named as a defendant in the body of the petition, he was not listed as a defendant in the caption of the petition.

order of dismissal on the grounds of abandonment, we find no documentation in the record that the sheriff did so here. On August 20, 2012, the Lewises, with no legal counsel enrolled, filed a motion to vacate that dismissal. In that motion, the Lewises stated that they had been unaware of the issuance of the judgment of dismissal "until February-March 201[2]."[2] The district court denied that motion to vacate by order signed January 29, 2013. Although LSA-C.C.P. art. 561(A)(4) requires that the clerk of court mail notice of such an order of denial to the parties, we find no documentation in the record that the clerk of court did so here. This appeal followed.

In this appeal, the Lewises ask that we overturn the district court's denial of their motion to vacate the judgment dismissing their claims. After the appeal was lodged, this court issued a rule to show cause order to the parties, directing them to brief whether the appeal should be dismissed for lack of jurisdiction because the order appealed from lacks the appropriate decretal language disposing of and/or dismissing the Lewises' claims. The parties have now briefed that issue, and a writ panel of this court has referred disposition of the rule to show cause to this panel.

DISCUSSION

Show Cause Order

At the outset, we take up the issue posed by the show cause order: whether the judgment appealed from lacks the appropriate decretal language that would constitute a final judgment on the Lewises' claims in their petition. Before we address that question, we first note that the motion to vacate that the Lewises filed August 20, 2012,

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[2] In the motion to vacate, the Lewises actually used the time reference "until February-March 2011." However, the year in that time reference apparently contained an inadvertent typographical error. It would not have been possible for the Lewises to know about the signing of the judgment of dismissal in February or March of 2011, as that time preceded the district court's signing the judgment. Additionally, in a later pleading, the Lewises did adjust this time reference to make it "February-March 2012."

In addition, we note that when a petition is dismissed for abandonment, the Code of Civil Procedure specifically provides that the delay for filing a motion to vacate a dismissal for abandonment, or appeal it, does not begin until proper notice of the judgment is served by the sheriff. LSA-C.C.P. art. 561(A)(3), (4), and (5). Here, the record reflects no service by the sheriff of the judgment signed November 16, 2011. The Code of Civil Procedure's general rule is that notice of judgment shall be mailed to the parties by the clerk of court. LSA-C.C.P. art. 1913. In addition, when there has been no compliance with that general requirement that the clerk of court mail the parties notice of the signing of a judgment, then a party's actual notice of the signing of the judgment outside the record does not suffice to start the delays for a motion for new trial and appeal. Prudhomme v. Todd, 10-1132, 2010 WL 5480319, at *1 n.2 (La. App. 1st Cir. 12/22/10). In this appeal, although the Lewises appear to have had actual notice of the signing of the judgment of dismissal, we believe the rule articulated in Prudhomme should apply here by analogy. Thus, based upon the record before us, the delay has never started here for a motion for new trial on, or an appeal of, the November 16, 2011, judgment. Therefore, the Lewises' appeal was filed timely.

was, in essence, a motion to set aside the dismissal, and similar to a motion for new trial. See LSA-C.C.P. art. 561, Comment—2003. As mentioned earlier, the district court denied that motion by the Lewises. The Lewises' present appeal states that it seeks to appeal the district court's denial of their motion to vacate.

Ordinarily, an order denying a motion for new trial is not an appealable judgment. Carpenter v. Hannan, 01-0467 (La. App. 1st Cir. 3/28/02), 818 So.2d 226, 228, writ denied, 02-1707 (La. 10/25/02), 827 So.2d 1153. Nonetheless, when an appellant mistakenly seeks to appeal an order denying a motion for new trial, our supreme court has stated that the appellate court is to treat that action as an appeal from the underlying judgment if the appellant's brief makes clear that he intended to appeal the merits of the case. Id. at 228-29. In this case, the Lewises' appellate brief does make clear that they intended to appeal the merits of their case. Therefore, we will treat this appeal as an appeal of the merits; which, in this case, is an appeal of the district court's judgment dismissing the Lewises' petition as abandoned.

The pending rule to show cause raised the issue of "whether or not this appeal should be dismissed as the January 29, 2013 judgment at issue lacks the appropriate decretal language . . . ." The fact that we will treat this appeal not as an appeal of the order issued by the district court on January 29, 2013, but rather as an appeal of the underlying judgment of abandonment signed November 16, 2011, makes moot the pending rule to show cause.

Abandonment

At the outset, we note the standards of review applicable to appellate courts when analyzing abandonment cases. First, "[w]hether or not a step in the prosecution of a case has been taken in the trial court for a period of three years is a question of fact subject to a manifest error analysis on appeal." Hutchison v. Seariver Mar., Inc., 09-0410 (La. App. 1st Cir. 9/11/09), 22 So.3d 989, 992, writ denied, 09-2216 (La. 12/18/09), 23 So.3d 946. Second, "whether a particular act, if proven, precludes abandonment is a question of law that we review by simply determining whether the trial court's decision was legally correct." Id.

Louisiana Code of Civil Procedure article 561(A)(1) provides that a legal 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."[3] Here, on November 14, 2011, a "motion and affidavit of abandonment" was filed by all but one of the defendants.[4] The defendants filing that motion asserted in it that the Lewises had taken no action in the case "since the filing of their initial complaint and Motion for Preliminary Injunction and the continuance of their Preliminary Injunction hearing on November 9, 2006." The motion included an affidavit by one of the defense counsel, which attested to the truth of the allegations of fact in the motion. The total amount of time stated in the affidavit amounted to a span of inaction of five years and five days.

Code of Civil Procedure article 561(A)(3) provides that upon the filing of an ex parte motion by a party, or affidavit by other interested person, stating that "no step has been timely taken 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." As mentioned earlier, on November 16, 2011, the district court signed such an order dismissing the Lewises' petition as abandoned.

In their first assignment of error, the Lewises argue that the district judge committed error when he "failed to give notice of any hearing regarding a dismissal of the case or indeed any information that our case was dismissed." However, the relevant provision of the Code of Civil Procedure, article 561(A)(3), specifically states that "[t]his provision shall be operative without formal order, but, on ex parte motion of any party or other interested person by affidavit . . . ." Thus, no legal requirement mandated that the district court provide the Lewises with notice of the court's review regarding dismissal for abandonment.

As for the Lewises' argument that the district court erred by not informing them that it had dismissed their case, that argument also misses the mark. Code of Civil Procedure article 561(A) does provide that the parties are to be served by the sheriff

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[3] The present action by the Lewises is not a succession proceeding.

[4] The only defendant who was not named as a participant in this motion was Dr. D'Auvergne.

with a formal order of dismissal as of the date of the action's abandonment; and, it further provides that such service starts the delay periods for a motion to set aside a dismissal and for an appeal. However, the Lewises have pointed to no legal authority stating that the absence of the required service invalidates the order, and we are aware of none. In sum, the Lewises' first assignment of error lacks merit.

The Lewises' second and third assignments of error repeat the contentions in their first assignment. Thus, those two assignments require no additional discussion.

The Lewises also argue in their brief that the district court should not have dismissed their suit because they were "in constant communications with Southern University regarding our lawsuit . . . ." In support of this argument, the Lewises assert that an attorney assisting them informally in this matter sent a settlement offer to an attorney for Southern University. In response, the opposing brief notes that our jurisprudence holds that informal negotiations do not constitute an action in prosecution of a claim that interrupts abandonment, citing Porter v. Progressive Specialty Ins. Co., 99-2542 (La. App. 1st Cir. 11/8/10), 771 So.2d 293. The Porter decision does stand for the proposition that settlement efforts do not constitute an action that would interrupt abandonment. Porter v. Progressive Specialty Ins. Co., 771 So.2d at 295. The Lewises point to nothing they specifically did, other than the settlement discussions; and, more importantly, point to nothing in the record before us that would constitute a step in the prosecution of their claim during the five year period in question. Thus, we find that this argument by the Lewises lacks support in the law.

The Lewises make the additional argument that their lack of action in prosecuting their case is due partly to the withdrawal of their former legal counsel, Nikki Essix-Manuel. The record shows that the district court signed an order on January 16, 2009, granting a motion by Ms. Essix-Manuel to withdraw as the Lewises' legal counsel. The U.S. Fifth Circuit Court of Appeals had occasion to address a somewhat similar argument in a case in which a former municipal employee had filed suit against the municipality, seeking damages in the wake of his failure to receive a pay raise. Bury v. McIntosh, 540 F.2d 835 (5th Cir. 1976). One of the arguments the plaintiff there made

was that he had not received a proper hearing on his complaint about his lack of a pay raise because of his attorney's poor performance. Id. at 836. The Fifth Circuit's analysis of that argument, in pertinent part, was this: "the merits or demerits of an attorney's representation in a civil action are not grounds for invalidating a verdict." Id. While we are not bound to follow that federal decision in this appeal, its reasoning is sound, and we find its statement applicable here. Thus, the merits or demerits of the representation provided by the Lewises' former attorney are not grounds for overturning the district court's dismissal.

The Lewises also contend that, after Ms. Essix-Manuel's withdrawal, some attorneys assisted them informally, but those attorneys failed to alert the Lewises that they needed to "engage the Court to maintain activeness of the case file." This is a novel argument, and one for which the Lewises cite no supporting legal authority. We are aware of no legal authority that supports the argument that the action, or inaction, of un-retained legal counsel is grounds for invalidating the dismissal of a lawsuit for abandonment. Thus, we are unpersuaded by this argument.

Further, the Lewises assert that their inaction here should not have caused their suit to become abandoned because they had "several conversations" with attorneys for Southern University, and that those attorneys also failed to alert them to the need to prosecute their claim to keep from abandoning it. An attorney has a legal obligation to provide competent professional advice to his or her own client. State Bar Articles of Incorporation, Art. 16, Rules of Prof. Conduct, Rule 1.1(a), LSA-R.S. foll. 37:222. A corollary related to that principle is that "an attorney does not owe a legal duty to his client's adversary when acting on his client's behalf." Scheffler v. Adams & Reese, LLP, 06-1774 (La. 2/22/07), 950 So.2d 641, 652. Thus, the Lewises' argument that their opponent's legal counsel owed some duty to provide the Lewises with legal advice reflects an incorrect appraisal of the rules governing the duties of legal counsel in our state, and lacks merit.

Finally, we must note that the Lewises' brief to this court includes some allegations in the nature of personal attacks on the professionalism of counsel for

Southern University. Rule 2-12.2(C) of the Uniform Rules of Louisiana Courts of Appeal mandates that the language used in an appellate brief "shall be courteous, free from vile, . . . or offensive expressions, and free from insulting, abusive, discourteous, or irrelevant matter or criticism of any person . . . ." We recognize that the Lewises are currently representing themselves in this appeal. In light of that, at this juncture, we simply caution the Lewises that personal attacks on opposing counsel in appellate briefs are prohibited, strongly recommend that the Lewises familiarize themselves with Rule 2-12.2(C), and follow it scrupulously in the future.

CONCLUSION

For the reasons set forth above, we affirm the judgment of the district court dismissing the Lewises' petition as abandoned. In addition, our dismissal makes moot the show cause order issued by this court on its own motion. All costs of this appeal are taxed to Bryan A. Lewis and Dorothy Lewis.

AFFIRMED.