NOT DESIGNATED FOR PUBLICATION

V.G.W.
(by J.)

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2016 CA 1569

MICHAEL COOPER

VERSUS

DR. ALLEN J. LACOUR AND DR. JEFFERY H. OPPENHEIMER

Judgment Rendered: DEC 2 9 2017

Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Docket Number 2009-14641

Honorable Reginald T. Badeaux, III, Judge Presiding

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Michael A. Cooper **Louisburg, NC**	**Plaintiff/Appellant,** ***pro se***
Conrad Meyer **Patrick R. Follette** **Metairie, LA**	**Counsel for Appellees,** **The Louisiana Patient's Compensation Fund and the Louisiana Patient's Compensation Fund Oversight Board**

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Chutz, J. concurs

BEFORE: WHIPPLE, C.J., McDONALD, AND CHUTZ, JJ.

McDonald, J. concurs
(by J.)

WHIPPLE, C.J.

In this appeal, plaintiff, Michael Cooper, challenges the trial court's judgment dismissing his suit as abandoned. For the following reasons, we maintain the appeal and affirm the judgment.

FACTS AND PROCEDURAL HISTORY

On August 6, 2009, plaintiff filed a petition for damages, naming as defendants Dr. Allen J. Lacour and Dr. Jeffery Oppenheimer[1] and alleging medical malpractice by these doctors in the diagnosis and treatment of his condition of hydrocephalus, which developed after surgical resection of a brain tumor in the fourth ventricle.[2] Dr. Oppenheimer answered the petition, generally denying the allegations and affirmatively pleading that he was a qualified health care provider pursuant to the provisions of the Louisiana Medical Malpractice Act (MMA), LSA-R.S. 40:1299.41 et seq., (redesignated as LSA-R.S. 40:1231.1 et seq., by H.C.R. No. 84 of 2015 Regular Session, eff. June 2, 2015) and, thus, that the total amount recoverable by plaintiff could not exceed $500,000.00 plus interest and costs, with the amount recoverable against Dr. Oppenheimer being limited to $100,000.00. According to the record on appeal, Dr. Oppenheimer later filed a petition for Chapter 7 bankruptcy on July 21, 2010.[3]

Meanwhile, Dr. Lacour filed a motion for summary judgment, contending that plaintiff could not meet his burden of proving that Dr. Lacour had breached the prevailing standard of care and, accordingly, seeking dismissal of plaintiff's claims against him. Counsel for plaintiff filed a response to the motion, stating

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[1]Dr. Oppenheimer's name is spelled both as "Jeffery" and "Jeffrey" in the record. However, we use the spelling as set forth in plaintiff's petition and in Dr. Oppenheimer's answer.

[2]A medical review panel had previously been convened and rendered an opinion that the evidence did not support a conclusion that either doctor failed to meet the applicable standard of care.

[3]Although plaintiff's father, Mr. Robert Cooper ("Mr. Cooper"), indicated at a hearing in the trial court below that plaintiff's claim against Dr. Oppenheimer for the $100,000.00 of personal liability under the MMA had been discharged in the bankruptcy proceedings, the record before us does not contain any judgments from the bankruptcy court.

that plaintiff had been "unable to uncover any factual basis to oppose the [m]otion" and, thus, further stating that plaintiff had "no opposition" thereto, unless Dr. Oppenheimer "establish[ed] a factual basis for denial of the [m]otion." Accordingly, by judgment signed October 11, 2011, the trial court granted Dr. Lacour's motion for summary judgment and dismissed plaintiff's claims against him.

During the course of the proceedings below, plaintiff changed counsel on a few occasions. Ultimately, on June 29, 2012, plaintiff's last counsel filed a motion to withdraw as counsel of record, which was granted on July 5, 2012, and plaintiff then began representing himself.

Thereafter, on November 9, 2012, counsel for the Louisiana Patient's Compensation Fund and the Louisiana Patient's Compensation Fund Oversight Board (collectively referred to as "the PCF") filed a "Motion to Enroll as Co-Counsel of Record." Although the PCF was not a party to the suit, the motion was granted by the trial court on November 13, 2012.

Approximately two and a half years later, on May 5, 2015, the PCF filed an "*Ex Parte* Motion to Dismiss due to Abandonment," averring that over three years had elapsed since the last step in the prosecution of the case and requesting that plaintiff's suit be dismissed. Specifically, the PCF contended that the last step in the prosecution or defense of the matter was the October 11, 2011 hearing on Dr. Lacour's motion for summary judgment and, thus, that the matter was abandoned by operation of law on October 11, 2014. By order dated May 11, 2015, in response to the motion, the trial court dismissed the suit as abandoned as of October 11, 2014.

After receiving notice of the order of dismissal, plaintiff appearing pro se filed a "Rule to Show Cause," seeking to have the May 11, 2015 order of dismissal vacated. In his rule, plaintiff contended that he and the PCF had engaged in

discovery on various dates through April 19, 2013, thereby interrupting the three-year period of abandonment.[4]

Following a hearing on plaintiff's Rule to Show Cause, the trial court rendered judgment dated May 10, 2016, dismissing plaintiff's suit as abandoned by operation of law. From this judgment, plaintiff has appealed,[5] asserting various alleged errors that he argues resulted in the erroneous dismissal of his suit.[6]

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[4]Where the plaintiff alleges that the defendant has taken a step in the defense of the suit within the previous three years, the proper procedural mechanism for the plaintiff to challenge an *ex parte* dismissal order is to rule the defendant into court to show cause why the *ex parte* dismissal should not be vacated. See LSA-C.C.P. art. 561(A)(4); Clark v. State Farm Mutual Automobile Insurance Company, 2000-3010 (La. 5/15/01), 785 So. 2d 779, 784.

[5]We note that notice of the judgment before us on appeal was mailed on May 11, 2016, and no motion for new trial was filed. Thus, the deadline for plaintiff to file a motion for devolutive appeal was July 19, 2016. However, while plaintiff fax-filed a motion for appeal on July 8, 2016, the original motion was file-stamped July 22, 2016, three days after the deadline for the filing of a devolutive appeal.

This court issued several orders in an attempt to ascertain the timeliness of the appeal, including a June 22, 2017 Interim Order, directing the trial court to conduct an evidentiary hearing to determine the date on which plaintiff's original motion for appeal was mailed to the district court and to forward its factual determination on this matter to this court.

The appellate record was thereafter supplemented with the trial court's determination that the date of mailing of the original motion for appeal was July 15, 2016. Thus, on August 10, 2017, this court maintained the appeal, but reserved the final determination as to the timeliness of the appeal to the panel to which the appeal was assigned.

Pursuant to LSA-R.S. 13:850(B) (prior to amendment by 2016 La. Acts, No. 109, effective August 1, 2016), the party filing any paper in a civil action by facsimile transmission must "forward" the original document within seven days, exclusive of legal holidays, together with any applicable fee and transmission fee. Considering the trial court's determination that plaintiff mailed the original motion to the district court on July 15, 2016, within the seven-day period set forth in the version of LSA-R.S. 13:850 applicable at the time, we conclude that the appeal is timely. See Hunter v. Morton's Seafood Restaurant & Catering, 2008-1667 (La. 3/17/09), 6 So. 3d 152, 156 ("to forward a document as required in La. R.S. 13:850(B), a litigant must only send the document").

[6]While it did not file a motion to strike plaintiff's brief, the PCF asserts in its brief that this court should not consider plaintiff's brief because plaintiff "continues to be represented by his father," who is not an attorney. We note that at the April 26, 2016 hearing below on plaintiff's Rule to Show Cause, plaintiff's father, Mr. Robert Cooper, sought to speak on plaintiff's behalf. He candidly acknowledged to the court that he was not an attorney licensed to practice law in Louisiana, and he did not provide the court with any other legal basis authorizing him to act on his son's behalf, but stated that he wished to speak on behalf of his son at his son's request. The trial court noted that it had reason to believe that plaintiff might be of limited ability to make his argument due to his medical treatment and further noted that plaintiff and Mr. Cooper had traveled from North Carolina for the hearing. Thus, the court allowed Mr. Cooper to speak on Michael's behalf.

However, with regard to the appeal, the motion for appeal, although unsigned, was filed by plaintiff, and while plaintiff's appellate brief does indicate plaintiff's name as appellant "through his father and legal representative, Robert W. Cooper," the brief appears to bear plaintiff's signature.

The PCF is correct that it is unlawful for a natural person who has not been first duly and regularly licensed and admitted to practice law by the Louisiana Supreme Court to engage in the practice of law in this state. LSA-R.S. 37:213(A)(1); Senior's Club ADHC v. State, Department of Health & Hospitals, (La. App. 1st. Cir. 12/22/16), 2016 WL 7439328 at *2 (unpublished). Louisiana Revised Statute 37:212 defines the "practice of law" to include, among other things,

DISCUSSION

Pursuant to LSA-C.C.P. art. 561(A)(1), an action (other than certain succession proceedings) 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. 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. Clark v. State Farm Mutual Automobile Insurance Company, 2000-3010 (La. 5/15/01), 785 So. 2d 779, 784. However, "on ex parte motion of any party or other interested person[7] by affidavit which provides that no step has been timely taken in the prosecution or defense of the action, the trial court shall

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"[i]n a representative capacity, the appearance as an advocate, or the drawing of papers, pleadings or documents, or the performance of any act in connection with pending or prospective proceedings before any court of record in this state." LSA-R.S. 37:212(A)(1).

Thus, Mr. Cooper would be prohibited from filing a brief on behalf of plaintiff. Nonetheless, as noted above, plaintiff's appellate brief appears in fact to have been signed by plaintiff.

[7]We note that the Third Circuit Court of Appeal has held that the PCF lacked standing to raise any exceptions, including the issue of abandonment raised therein (albeit through an exception rather than a motion therein), **once the liability of the health care provider is admitted to the fullest extent** by virtue of a court-approved settlement with a health care provider for its maximum liability. Romero v. Elias, 2007-806 (La. App. 3rd Cir. 12/19/07), 972 So. 2d 450, 453-454, writ denied, 2008-0171 (La. 3/24/08), 977 So. 2d 954. In reaching this conclusion, the Third Circuit cited with approval the Fourth Circuit's opinion in Kelty v. Brumfield, 534 So. 2d 1331, 1333-1334 (La. App. 4th Cir. 1988), writs denied, 536 So. 2d 1221, 1222 (La. 1989), wherein the Fourth Circuit held that the PCF could not raise an exception of prescription after the plaintiff had settled with a defendant health care provider for the health care provider's maximum liability. In so holding, the Fourth Circuit opined that the MMA does not contemplate the PCF as a party defendant and noted that the only requirement in order for the PCF to disburse its funds is a final judgment or a court-approved settlement (or final arbitration award) against the health care provider in excess of $100,000.00. The Fourth Circuit further reasoned that in those instances where the health care provider had settled for its maximum liability, liability is admitted and the PCF has the right only to contest the amount of damages and nothing more. As such, the Fourth Circuit concluded that the PCF was not given the status of "creditor or other person" within the meaning of LSA-C.C.P. art. 3453 (which affords creditors and other interested persons the right to raise the issue of prescription).

Following this rationale, as well as the Fifth Circuit's opinion in McGrath v. Excel Home Care, Inc., 2001-1270, 2001-1271 (La. App. 5th Cir. 3/26/02), 810 So. 2d 1283, writ denied, 2002-1344 (La. 11/27/02), 831 So. 2d 284, the Third Circuit in Romero concluded that the PCF lacked standing to raise any exceptions once the liability of the health care provider is admitted to the fullest extent. Romero, 972 So. 2d at 454.

However, the instant case is clearly distinguishable from the facts in Romero in that there has been no court-approved settlement against any health care provider. Additionally, we note that while the Third Circuit concluded that the PCF lacked standing to raise the issue of abandonment through an exception, it nonetheless addressed the issue of abandonment therein, in the interest of justice. Romero, 972 So. 2d at 454.

enter a formal order of dismissal as of the date of its abandonment." LSA-C.C.P. art. 561(A)(3).

Article 561 has been construed as imposing three requirements on a plaintiff. First, the plaintiff or the defendant must take some "step" toward the prosecution of his lawsuit. A "step" is the taking of formal action intended to hasten the suit toward judgment or the taking of a deposition with or without formal notice. Second, the step must be taken in the proceeding and, with the exception of formal discovery, must appear in the record of the suit. Third, the step must be taken within the legislatively prescribed time period by either party; sufficient action by either plaintiff or defendant will be deemed a step. Clark, 785 So. 2d at 784.

The jurisprudence has uniformly held that LSA-C.C.P. art. 561 is to be liberally construed in favor of maintaining a plaintiff's suit. Abandonment is not meant to dismiss actions on mere technicalities, but to dismiss actions which in fact clearly have been abandoned. Paternostro v. Falgoust, 2003-2214 (La. App. 1st Cir. 9/17/04), 897 So. 2d 19, 21, writ denied, 2004-2524 (La. 12/17/04), 888 So. 2d 870.

Plaintiff argued in support of his Rule to Show Cause below that during the three-year abandonment period, the PCF sent discovery requests to him and granted him additional time to produce responses and that he answered those discovery requests. Thus, plaintiff asserted that both his and the PCF's actions in engaging in discovery qualified as steps in the prosecution of his suit pursuant to LSA-C.C.P. art. 561(B). In rejecting this argument and, thus, denying plaintiff's request to set aside the order of dismissal, the trial court, in written reasons for judgment, noted that while plaintiff was correct that discovery does interrupt the prescriptive period for abandonment pursuant to LSA-C.C.P. art. 561(B), that provision applies to "parties" taking steps in the prosecution in the suit. Noting that the PCF was not named as a defendant and did not intervene in the suit, the

court found that the actions of a "non-party interloper that erroneously enrolls in any lawsuit" could have no effect on the laws of procedure and prescription in that suit. Accordingly, we must consider whether plaintiff's responses to discovery requests directed to him by the PCF were steps in the prosecution of his suit which interrupted the running of the three-year abandonment period.

Louisiana Code of Civil Procedure article 561(B) provides that "[a]ny 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 Paternostro, the plaintiff argued that his request for production of documents directed to a non-party was a step in the prosecution of his case that prevented abandonment. However, in finding that the plaintiff's discovery efforts had not acted to interrupt the abandonment period, this court noted that LSA-C.C.P. art. 561(B) applies only to formal discovery that is authorized by the Code of Civil Procedure **and** served on all parties. Paternostro, 897 So. 2d at 23. This court further determined that while the plain language of LSA-C.C.P. art. 1463 authorizes requests for production of documents to be directed to non-parties, the plaintiff therein had failed to serve the request for production on the defendant. Paternostro, 897 So. 2d at 23. Accordingly, because the plaintiff therein had not served the defendant with notice as required by LSA-C.C.P. art. 561(B) and did not file the requests for production of documents to non-parties into the record of the suit, this court concluded that the plaintiff failed to establish that his requests for production of documents directed to non-parties qualified as steps in the prosecution of his suit. Paternostro, 897 So. 2d at 23.

In the instant case, plaintiff has not asserted that he **propounded discovery requests upon a non-party** as a basis to have the order of dismissal set aside. Rather, as stated above, he asserted that he **responded to discovery requests**

propounded upon him by the PCF and that these discovery efforts acted to interrupt the abandonment period. However, as noted above, the PCF is not a party to this lawsuit. Plaintiff did not name the PCF as a defendant, and the PCF did not intervene in the suit. Thus, the first question to be answered in determining whether the PCF's actions in propounding discovery upon plaintiff and plaintiff's actions in responding to those discovery requests interrupted the abandonment period is whether a non-party's request for discovery directed to a party to a suit is "discovery as authorized by [the] Code [of Civil Procedure]" as contemplated by LSA-C.C.P. art. 561(B).

Regarding the scope of discovery authorized by the Louisiana Code of Civil Procedure, LSA-C.C.P. art. 1422 provides as follows:

> Unless otherwise limited by order of the court in accordance with this Chapter, **the scope of discovery is as set forth in this Article and in Articles 1423 through 1425.**
>
> **Parties** may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(Emphasis added).

The only reference in Articles 1423 through 1425 to a request for discovery by a person not a party to a suit is contained in LSA-C.C.P. art. 1424 and is limited to a request by a non-party to obtain a copy of a statement previously made by that non-party concerning the action or its subject matter. <u>See</u> LSA-C.C.P. art. 1424(B). Additionally, LSA-C.C.P. art. 1437 authorizes a **party** to take the testimony of **any person**, including a party, by deposition upon oral examination, and as discussed by this court in <u>Paternostro</u>, LSA-C.C.P. art. 1463 allows a **party**

to seek the production of documents and things from a **non-party**. However, these articles do not conversely authorize a **non-party** to take the testimony of or to seek the production of documents and things from a **party** to a suit.

Accordingly, we are constrained to conclude that any discovery in which plaintiff engaged with the PCF did not constitute "discovery as authorized by [the] Code [of Civil Procedure]" so as to interrupt the abandonment period as contemplated by LSA-C.C.P. art. 561(B). Thus, on the record before us, we find no error in the trial court's conclusion that this matter was abandoned by operation of law three years after the October 11, 2011 hearing and resulting judgment on Dr. Lacour's motion for summary judgment. Consequently, we affirm the trial court's May 10, 2016 judgment of dismissal.[8]

CONCLUSION

For the above and foregoing reasons, the May 10, 2016 judgment, dismissing plaintiff's case as abandoned by operation of law, is hereby affirmed. Costs of this appeal are assessed against Michael Cooper.

APPEAL MAINTAINED; JUDGMENT AFFIRMED.

[8]Notably, motions to withdraw or enroll as counsel of record during that three-year period are not considered formal steps before the court in the prosecution of the suit. Paternostro, 897 So. 2d at 22.