NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 CA 1057

WES MICHAEL DIEZ

VERSUS

STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT

Judgment rendered: DEC 2 3 2009

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On Appeal from the 23rd Judicial District Court
Parish of Ascension, State of Louisiana
Case Number: 68756; Division: A
The Honorable Ralph Tureau, Judge Presiding

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BEFORE: DOWNING, GAIDRY AND McCLENDON, JJ.

DOWNING, J.

Wes Michael Diez appeals a judgment dismissing his petition on the grounds of abandonment. Diez claims that a court order appointing a curator for his disabled attorney and informal correspondence discussing the status of discovery constituted "steps" in the litigation that interrupted abandonment. Diez also claims that the court-appointed curator's inaction created a situation beyond his control, giving rise to *contra non valentum*. For the following reasons, the trial court judgment is affirmed.

BACKGROUND

On **February 10, 2000**, Diez crossed the white fog line on the right side of the roadway and ran his motorcycle into the ditch on the side of Hwy. 621 in Ascension Parish. Diez's attorney, George Waguespack, filed suit on his behalf against the State of Louisiana, Department of Transportation and Development, (DOTD), on **January 9, 2001**, claiming that the lack of a shoulder and the sharp drop-off from the edge of the asphalt pavement caused the accident. Coastal Bridge Company (Coastal Bridge) was added as a defendant on **February 6, 2001**. DOTD's last responses to interrogatories occurred on **December 28, 2004**. Other than a change of address by the DOTD attorney, the case laid dormant from **December 28, 2004**, until Diez's new counsel filed a motion for declaratory judgment on **April 18, 2008**.

Sometime in 2006, Diez's former attorney, Mr. Waguespack, was involved in an accident; his medical condition prompted the Louisiana Supreme Court to issue an order on January 31, 2007 entitled *In Re: George K. Waguespack*, transferring Mr. Waguespack to inactive status, and appointing a curator to handle his cases. The Order stated, in pertinent part:

> IT IS HEREBY ORDERED that Ricky Babin be and is hereby appointed Curator, per the request of the Office of Disciplinary Counsel, to inventory the files of GEORGE K. WAGUESPACK, and

to take such actions as seems indicated to protect the interests of his clients.

On **March 7, 2007**, Babin sent the following letter to Diez:

RE: Wes Michael Diez v. State of Louisiana, DOTD
Suit No. 68,756 "A," 23rd Judicial District Court
Parish of Ascension, State of Louisiana

Dear Mr. Diez,

This letter is to inform you that Mr. George Waguespack, your attorney with regard to the above referenced matter, has been placed on inactive disability status by the Louisiana Supreme Court. As such, Mr. Waguespack is unable to practice law at this time.

I have been appointed by the Court as Curator in Mr. Waguespack's proceedings, and have been ordered to advise you of this matter and advise you of your right to retain alternate counsel.

You have the right to retain other counsel to represent you in this matter, if you so choose.

Please be advised that it is imperative that you take immediate action to protect your interests, as critical deadlines may be approaching.

Should you have any questions, please feel free to contract me.

With kindest regards, I am.

Sincerely,
SHEETS, BABIN AND ASSOCIATES
Ricky L. Babin

New counsel enrolled to represent Diez on **April 16, 2008;** he moved for a declaratory judgment declaring that pursuant to LSA-C.C.P. art. 561 the suit was not abandoned. On May 1, 2008, the DOTD filed a motion to dismiss on the grounds of abandonment; both DOTD and Coastal Bridge filed memoranda in support of the motion to dismiss. The trial court denied the motion to dismiss, finding that from the record before him, there was no way to tell if Diez received notice that Mr. Waguespack was no longer pursuing his claim.

On June 3, 2008, the DOTD and Coastal Bridge filed a motion for new trial, producing "Exhibit A," the Louisiana Supreme Court Order placing Mr.

Waguespack on disability inactive status, and "Exhibit B," the letter Ricky Babin sent to Diez informing him of his attorney's disability.

The trial court granted the motion for new trial. On August 28, 2008, Diez, testifying pursuant to a subpoena, admitted he did receive Mr. Babin's letter. Ruling from the bench, the trial court denied Diez's motion for declaratory judgment and granted DOTD's motion to dismiss. The trial court's written reasons states that the rationale for his prior ruling was refuted based upon proof that Diez did receive notice that his attorney was no longer pursuing his claim, and that the lawsuit had been abandoned by operation of law.

Judgment was entered and Diez appeals, alleging that the trial court erred: (1) in denying his motion for declaratory judgment and in granting defendant's/appellee's motion for abandonment; and (2) in ruling that the letters between counsel scheduling a 10.1 Rule Conference and attempting to set up the deposition of lay and expert witnesses were not steps in the prosecution of the case.

STANDARD OF REVIEW

The issue in this appeal invokes a question of law. No facts are in dispute. The scope of appellate review for an issue of law is simply to determine whether the trial court's interpretative decision is legally correct. **Jackson v. Moock**, 08-1111, p. 4 (La. App. 1 Cir. 12/23/08), 4 So.3d 840, 843. An appellate court owes no deference to the legal conclusions of the trial court. **Id.**

LAW AND ANALYSIS

Abandonment is a device that the legislature adopted to put an end to the filing of a lawsuit in order to interrupt prescription and then let the suit linger perpetually over the head of a defendant. **Id.** The Louisiana Supreme Court has held that LSA-C.C.P. art 561 is self-executing; thus, abandonment occurs automatically upon the passage of three years without either party taking a step, and is effective without a court order. **Jackson**, 08-1111 at p. 5, 4 So.3d at 843.

The three legal requirements imposed by LSA-C.C.P. art. 561 are: (1) plaintiff must take some step toward the prosecution of the lawsuit; (2) the step must be taken in the proceeding and appear in the suit record; (3) the step must be taken within the prescribed time period from the last step taken by either party. **Clark v. State Farm Mutual Auto. Ins. Co.**, 00-3010, p. 6 (La. 5/15/01), 785 So.2d 779, 784. In this context, a "step" is defined as taking formal action before the court intended to hasten the suit toward judgment, or the taking of a deposition with or without formal notice. **Jackson**, 08-1111 at p. 5, 4 So.3d at 844.

There are two jurisprudential exceptions to the abandonment rule. The first is a plaintiff-oriented exception, based upon *contra non valentem* that applies when the failure to prosecute is caused by circumstances beyond the plaintiff's control. **Id**. The second exception is defense-oriented, based upon acknowledgment and applies when the defendant waives the right to assert abandonment by taking actions inconsistent with intent to treat the case as abandoned. **Id**. Additionally, any action or step taken to move the case toward judgment should be considered, because LSA-C.C.P. art. 561 should not be used to dismiss those cases in which the plaintiff has clearly demonstrated no intent to abandon the action. **Jackson**, 08-1111 at p. 6, 4 So.3d at 844.

Diez first argues that abandonment was interrupted by the Louisiana Supreme Court and the 23rd Judicial District Court's Order appointing a lawyer to conduct an inventory of Mr. Waguespack's files and to take action as appropriate to protect the client's interest. Diez claims that at that point he lost control of prosecuting his case. He argues that after receiving the letter he could contact Mr. Waguespack; he did not understand what "curator" meant; he did not receive his files for many months after he received the letter; and he could not find another lawyer to represent him.

Essentially, plaintiff is arguing *contra non valentem*, claiming that his failure to prosecute the case timely was caused by circumstances beyond his control: (1) his difficulty in contacting Mr. Waguespack, and (2) his difficulty in finding a replacement attorney.

The record before us, however, reflects that Diez received Mr. Babin's letter approximately ten months before his suit was abandoned by operation of law. Diez testified that he discussed the letter with his estranged wife and was aware of Mr. Waguespack's inactive status and what it meant. He also admitted that he understood that the letter advised him to take immediate action to protect his interest. Further, although Diez first testified that he could not remember when he hired his present counsel, he finally conceded that it was sometime in 2007. Abandonment did not accrue until December 28, 2007. Consequently, there is no evidence showing that circumstances beyond his control caused his failure to pursue the action. Accordingly, this argument is without merit.

Diez next argues, citing **Breaux v. AutoZone, Inc.**, 00-1534 (La.App. 1 Cir. 12/15/00), 787 So.2d 322, that various correspondence between his attorney and the defendants were "steps" in the prosecution. These correspondence were: (1) a letter dated December 15, 2005, from Mr. Waguespack to counsel for Coastal Bridge asking him to call and set up a conference to discuss discovery responses; (2) the response letter from Coastal Bridge dated January 4, 2006, indicating that Coastal Bridge had responded to all discovery in 2002; and (3) a letter dated November 13, 2006, from DOTD informing him that its answers to discovery were provided in October 2004 and requesting dates to schedule depositions for DOTD employees. Diez contends that these three letters, viewed as a whole, constitute a "step" in the prosecution.

It is well settled that the type of informal discussions or correspondence attempting to schedule depositions at issue is insufficient for purposes of

interrupting abandonment. *See* **Jackson**, 08-1111 at p. 8, 4 So.3d at 845. The correspondence in this case is clearly distinguishable from the correspondence discussed in **Breaux** where the letters contained supplementary discovery answers that did interrupt abandonment. Unlike the letters in **Breaux**, these letters are not supplementary discovery answers. Two of the letters, dated January 4, 2006 and November 13, 2006 respectively, are from each defendant merely referencing discovery matters that have long ago taken place and explaining that they are ready to have their employees deposed at Mr. Waguespack's convenience. The last letter, dated December 14, 2005, is from Mr. Waguespack requesting a date to schedule a 10.1 conference to discuss discovery responses. Thus, as explained in **Compensation Specialties, LLC v. New England Mutual Life Insurance Company**, 08-1549, p. 9, (La.App. 1 Cir. 2/13/09), 6 So.3d 275, 281, *writ denied*, 09-0575 (La. 4/24/09), 7 So.3d 200, *citing* **Jackson**, 4 So.3d at 844, and **Clark**, 785 So.2d at 790, these types of extrajudicial efforts, such as informal discussions and correspondence between the parties, have uniformly been considered insufficient to constitute a step for purposes of interrupting or waiving abandonment.

Diez next argues that the Louisiana Supreme Court Order placing Mr. Waguespack on inactive status and the 23rd Judicial District Court orders appointing Mr. Babin as curator are "steps" in the prosecution of his case.

We disagree. These orders do not command any action in this litigation. These order do nothing more than substitute a curator for the disabled attorney, which is more analogous to a substitution of counsel which the courts have decided is not a step in the prosecution. [1] **Theriot v. State, Dept. of Transp. & Dev.**, 01-1420, p. 3-4 (La.Cir. 1 Ct. 9/25/01), 809 So.2d 279, 282. This assignment of error is without merit.

[1] These referenced orders were docketed in Mr. Waguespack's disciplinary proceeding and did not appear in the present case until they were introduced as exhibits at the hearing.

Accordingly, we conclude that the trial court properly dismissed Diez's case as abandoned.

DECREE

Based on our above discussion, we affirm the trial court judgment. All costs of this appeal are to be paid by the plaintiff/appellant, Wes Michael Diez.

AFFIRMED