

The Supreme Court of the State of Louisiana

JOHN GREENE AND SHEDONNA
HEATHMON, INDIVIDUALLY AND ON
BEHALF OF THEIR MINOR CHILD, PRINCE
GREENE

No. 2023-CC-00670

VS.

VERMILION PARISH HOSPITAL SERVICE
DISTRICT #2, D/B/A ABBEVILLE GENERAL
HOSPITAL, ET AL.

IN RE: Vermilion Parish Hospital Service District #2, d/b/a Abbeville General
Hospital - Applicant Plaintiff; Applying For Supervisory Writ, Parish of Vermilion,
15th Judicial District Court Number(s) 102106, Court of Appeal, Third Circuit,
Number(s) CW 22-00702;

September 19, 2023

Writ application granted. See per curiam.

WJC
JLW
SJC
JTG
JBM

Hughes, J., dissents.
Griffin, J., dissents.

Supreme Court of Louisiana
September 19, 2023


Chief Deputy Clerk of Court
For the Court

SUPREME COURT OF LOUISIANA

No. 2023-CC-00670

**JOHN GREENE AND SHEDONNA HEATHMON, INDIVIDUALLY AND
ON BEHALF OF THEIR MINOR CHILD, PRINCE GREENE**

VS.

**VERMILION PARISH HOSPITAL SERVICE DISTRICT #2, D/B/A
ABBEVILLE GENERAL HOSPITAL, ET AL.**

On Supervisory Writ to the 15th Judicial District Court, Parish of Vermilion

PER CURIAM

On July 19, 2016, plaintiffs filed the instant medical malpractice action against Vermilion Parish Hospital Service District No. 2 d/b/a Abbeville General Hospital (“Abbeville General”) and Dr. Trent J. Fogleman. Thereafter, Abbeville General moved for summary judgment. On February 16, 2018, the trial court signed a judgment denying the motion, and on March 1, 2018, the clerk mailed notice of judgment to the parties.

No further activity took place until February 6, 2021, when plaintiffs sent interrogatories and requests for admissions to Dr. Fogleman. Although plaintiffs’ certificate of service provided that “a copy of the [discovery] has been duly served upon all counsel of record by facsimile transmission this 6th day of February, 2021,” Abbeville General was never served. On June 1, 2021, Dr. Fogleman answered plaintiffs’ discovery and served his answers on all parties.

Abbeville General filed an ex parte motion to dismiss plaintiffs’ suit based on abandonment. The district court denied the motion, finding Dr. Fogleman’s answer to plaintiffs’ discovery “waived any issue of abandonment. . . .”

Abbeville General applied for supervisory review. The court of appeal denied writs with one judge dissenting. The dissenting judge explained “[t]o the extent Dr. Trent Fogleman’s June 1, 2021 responses to Plaintiffs’ discovery requests are argued

to have waived his right to assert abandonment, they cannot be said to waive the right of Relator's motion seeking dismissal of Plaintiffs' claims against Relator on the ground of abandonment under La. Code Civ. P. art. 561." Abbeville General now seeks review in this court.

Article 561(B) of the Louisiana Code of Civil Procedure provides:

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. [emphasis added]

It is undisputed that plaintiffs did not serve their discovery on Abbeville General as required by this article. Therefore, the requirements of the article have not been satisfied as to Abbeville General.

In denying the motion to dismiss, the district court found that Dr. Fogelman's answer to the discovery after the abandonment period had run served to waive abandonment. We have recognized "a defense-oriented exception, based on acknowledgment that applies when the defendant waives his right to assert abandonment by taking actions inconsistent with an intent to treat the case as abandoned." *Clark v. State Farm Mut. Auto. Ins. Co.*, 2000-3010 (La. 5/15/01), 785 So.2d 779, 785. However, it is obvious from our holding that the defendant which waives abandonment must be the same party which has taken the actions inconsistent to treat the action as abandoned. *See also Theriot v. State, Dept. of Transp. & Dev.*, 01-1420 (La. App. 1 Cir. 9/25/01), 809 So.2d 279, 283 (explaining that a waiver of the abandonment period by one defendant does not deprive another defendant of its right to assert its claim of abandonment). Any purported waiver of abandonment by Dr. Fogelman cannot act to deprive Abbeville General of its right to assert abandonment.¹

¹ The issue of whether Dr. Fogelman's actions amounted to a waiver of his right to assert abandonment is not before us, and we express no opinion on this question.

Finally, plaintiffs suggest the doctrine of contra non valentem applies. They contend the closure of their counsel's office during the pandemic and counsel's "brain fog" as a result of COVID prevented them from prosecuting the case.

Clark recognizes "a plaintiff-oriented exception, based on contra non valentem, applies when failure to prosecute is caused by circumstances beyond the plaintiff's control. . . ." *Clark*, 785 So.2d at 785. Plaintiffs have not demonstrated the failure to prosecute was caused by any factors beyond their control. While the pandemic-related disruptions occurred during part of the abandonment period, plaintiffs' counsel was obviously able to act by February 6, 2021, when he sent interrogatories to Dr. Fogelman. He could have easily protected plaintiffs' rights by ensuring this discovery was served on all parties as required by La. Code Civ. P. art. 561(B).

DECREE

For the reasons assigned, the writ is granted and made peremptory. The judgment of the district court is reversed. The motion is granted, and plaintiffs' claims against Vermilion Parish Hospital Service District No. 2 d/b/a Abbeville General Hospital are dismissed as abandoned.