NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 CA 1729

MAMIE B. BELL & HER HUSBAND, EARL BELL

VERSUS

MILTON KRISTI & STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Judgment Rendered: March 26, 2008

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Docket Number 500,657

Honorable William Morvant, Judge Presiding

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Otha Curtis Nelson, Sr. **Baton Rouge, LA**	**Counsel for Plaintiffs/Appellants,** **Mamie Bell and Earl Bell**
Sandra Rester **Baton Rouge, LA**	**Counsel for Defendants/Appellees,** **Kristi Milton and State Farm** **Mutual Automobile Insurance Co.**

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BEFORE: WHIPPLE, GUIDRY AND HUGHES, JJ.

Guidry, J. concurs.

WHIPPLE, J.

This is an appeal from a March 7, 2007 judgment of the Nineteenth Judicial District Court in East Baton Rouge Parish, granting involuntary dismissal of plaintiffs' suit with prejudice, and from a May 10, 2007 judgment denying plaintiffs' motion for new trial, and from a May 15, 2007 judgment denying plaintiffs' motion for reconsideration of the application for new trial. On October 18, 2002, plaintiffs, Mamie Bell and Earl Bell, filed suit for damages against defendants, Kristi Milton[1] and State Farm Mutual Automobile Insurance Company ("State Farm"), plaintiffs' uninsured/underinsured motorist carrier, as a result of injuries sustained by Mrs. Bell when her vehicle was struck by a vehicle driven by Milton.

No service was effected upon Milton, and the matter proceeded to trial against State Farm on January 10, 2005. At the close of plaintiffs' case, State Farm moved for involuntary dismissal on the grounds that no evidence was presented to establish that the Milton vehicle was uninsured. By judgment dated January 19, 2005, the trial court granted the motion, dismissing plaintiffs' suit, and plaintiffs appealed that judgment of dismissal to this court. On appeal, this court set aside the trial court's judgment of dismissal and remanded for further proceedings to allow plaintiffs to submit evidence of Milton's uninsured/underinsured status. Bell v. Kristi, 2005-1500 (La. App. 1st Cir. 6/9/06), 938 So. 2d 745, 748.

On remand to the trial court, a pretrial conference was held on November 16, 2006, and counsel for plaintiffs and State Farm were both present. The record reflects that at the pretrial conference, the matter was set for a bench trial at 9:30 a.m. on February 27, 2007, as a second setting, and

[1]While the petition actually names "Milton Kristi" as a defendant, it appears from the record that this defendant's true name is "Kristi Milton." We refer to this defendant herein as "Milton."

also at 9:30 a.m. on June 14, 2007, as a first setting. The record further reflects that on November 16, 2006, notice that the matter had been set for trial on February 27, 2007 at 9:30 a.m. was given to counsel for the parties.

On February 27, 2007, neither plaintiffs nor their counsel appeared at trial. Thus, upon motion by State Farm for involuntary dismissal, the trial court signed a judgment dated March 7, 2007, dismissing plaintiffs' suit with prejudice. Plaintiffs' motion for new trial was subsequently denied. A motion for reconsideration of plaintiffs' motion for new trial was likewise denied. From these judgments, plaintiffs appeal.

Louisiana Code of Civil Procedure article 1672(A) provides that a judgment dismissing an action shall be rendered, upon the application of any party, when the plaintiff fails to appear on the day set for trial. In such case, the trial court shall determine whether the judgment of dismissal shall be with or without prejudice. The trial court's dismissal of a cause of action based upon the plaintiff's failure to appear for trial will not be reversed on appeal absent a showing that the trial court abused its discretion. England v. Baird, 99-2093 (La. App. 1st Cir. 11/3/00), 772 So. 2d 905, 907.

The record before us demonstrates that plaintiffs' counsel received notice of the February 27, 2007 trial date as a second setting. In addition to being present at the pretrial conference when the trial date was set, plaintiffs' counsel also signed the Pre-trial Conference Form (the pretrial order) on that date, which set forth the date of the scheduled trial as a second setting. Additionally, the record contains a notice of trial submitted by the judge's judicial assistant, confirming that plaintiffs' counsel and defendant's counsel were notified of the trial date. Thus, we find no merit to any assertion by plaintiffs that they did not receive notice, through their attorney, of the trial date.

Additionally, we conclude that the fact that this matter was set for trial on February 27, 2007 as a "second setting" did not in any way relieve plaintiffs or their counsel from their duty to appear for trial. A "second setting" is a scheduling tool utilized by some district courts to avoid the downtime that can result when a case settles shortly before its scheduled trial date. Thus, a "second setting" will take the place of the "first setting" case if the "first setting" case settles prior to the trial date. Rock v. ATPIC Trucking Co., Inc., 98-1420 (La. App. 1st Cir. 6/25/99), 739 So. 2d 874, 876 n.1.

As provided in the pretrial order signed by the trial court and by plaintiffs' counsel herein at the November 16, 2006 pretrial conference, it is the responsibility of counsel to contact the court three weeks prior to the second setting to determine if the case set on the docket ahead of the case at issue is still pending. If, at three weeks prior to the date of the second setting, the case set as the first setting is still pending, then "counsel may notify the [c]ourt, **in writing**, that they waive their second setting in favor of the first setting for this case." (Emphasis added). If, however, the first setting is no longer pending, the case set as the second setting becomes a first setting, and the parties "will be expected to go to trial on that date."

In the instant case, the parties do not dispute that the case originally scheduled as the "first setting" settled on February 6, 2007, twenty-one days prior to the February 27, 2007 trial date. Accordingly, the instant case became the first setting for trial on February 27, 2007, and plaintiffs were "expected to go to trial on that date." Moreover, there is no obligation on opposing counsel to notify the opponent of the trial date. Rock, 739 So. 2d at 878. Thus, we reject any suggestion by plaintiffs that opposing counsel should have notified plaintiffs' counsel that the original first setting had

settled and that the instant case had, therefore, become the first setting for February 27, 2007.

Additionally, even if the first setting had still been pending twenty-one days prior to the trial date, plaintiffs' counsel did not notify the trial court, in writing, that plaintiffs wished to waive their second setting trial date in favor of the first setting trial date for this case, as required by the pretrial order signed by the trial court and by counsel for the parties. Thus, regardless of whether the instant matter was the "first setting" or the "second setting" on the scheduled trial date, plaintiffs had not taken the necessary steps to relieve themselves of their obligation to appear for trial on February 27, 2007. Accordingly, the trial court's ruling involuntarily dismissing plaintiffs' suit due to their failure to appear at trial will not be disturbed on appeal.

Furthermore, with regard to the trial court's decision to dismiss plaintiffs' suit with prejudice, we find no abuse of the trial court's discretion, given the clear notice to plaintiffs' counsel and the chronology of procedural events in this case. See Malter v. McKinney, 310 So. 2d 696, 698 (La. App. 1st Cir. 1975).

Considering the foregoing, and in accordance with Uniform Rules—Courts of Appeal, Rule 2-16.1(B), the March 7, 2007 judgment granting involuntary dismissal of plaintiffs' suit with prejudice; the May 10, 2007 judgment denying plaintiffs' motion for new trial; and the May 15, 2007

order denying plaintiffs' motion for reconsideration of the application for new trial are affirmed. Costs of this appeal are assessed against plaintiffs, Mamie and Earl Bell.

AFFIRMED.