

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2009 CA 1895**

**DELTA AMERICAN CORPORATION AND LIBERTY MUTUAL  
INSURANCE COMPANY**

**VERSUS**

**RELIANT TECHNOLOGIES, INC., TRINITY UNIVERSAL INSURANCE  
COMPANIES, ASHLAND CHEMICAL COMPANY a/k/a ASHLAND OIL,  
INC., ABC FIBERGLASS TANK MANUFACTURER AND XYZ  
INSURANCE COMPANY**

**Consolidated With**

**2009 CA 1896**

**DELTA AMERICAN CORPORATION**

**VERSUS**

**RELIANT TECHNOLOGIES, INC., TRINITY UNIVERSAL INSURANCE  
COMPANIES, ASHLAND CHEMICAL COMPANY a/k/a ASHLAND OIL,  
INC., ABC FIBERGLASS TANK MANUFACTURER AND XYZ  
INSURANCE COMPANY**

**Judgment rendered: MAY 11 2010**

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**On Appeal from the Nineteenth Judicial District Court  
Parish of East Baton Rouge, State of Louisiana  
Suit Numbers: 461318 c/w 461513; Division: N (27)  
The Honorable Todd W. Hernandez, Judge Presiding**

**\*\*\*\*\***

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**Ashland Chemical Company**

**BEFORE: DOWNING, GAIDRY AND McCLENDON, JJ.**

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## **DOWNING, J.**

Plaintiff/appellant, Delta American Corporation (hereinafter Delta, appeals a trial court judgment that dismissed its claims against Reliant Technologies, Inc. (hereinafter Reliant), pursuant to the abandonment statute LSA-C.C.P. art. 561. For the following reasons, we reverse the trial court judgment.

### **PERTINENT FACTS AND PROCEDURAL HISTORY**

On June 16, 1999, Delta instituted suit against Reliant and Ashland Chemical Company, a/k/a Ashland Oil, Inc. (hereinafter Ashland) after a tank Delta purchased from Reliant collapsed, spilling sodium hydroxide supplied by Ashland, onto the Delta location.<sup>1</sup>

Delta's insurer, Liberty Mutual Insurance Company, filed a subrogation action against Reliant, its insurer, Trinity Universal Insurance Co., and also named Ashland as a defendant, on June 10, 1999.<sup>2</sup> Liberty Mutual and Trinity placed their respective "pollution exclusion clause" exceptions at issue. The cases were consolidated for trial purposes only on August 20, 1999.

The insurers were dismissed under the pollution exclusion clauses in their respective policies; on April 12, 2000, Reliant appealed the dismissal of Trinity; On April 19, 2000, Delta also appealed Trinity's dismissal. On December 18, 2000, the appeals were dismissed by this court, which concluded that the judgment was a non-appealable partial judgment. No writs were taken from this decision.

The case proceeded forward without either insurance company participating as parties. The following pertinent documents appear in the record.

<b>April 19, 2002</b>	Requests for interrogatories and requests for production propounded by Delta to Reliant;
<b>May 1, 2002</b>	Service was perfected on Reliant for this request;
<b>April 23, 2002</b>	Requests for interrogatories and requests for production propounded by Liberty to Ashland;

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<sup>1</sup> The matter was assigned to Div. A of the 19<sup>th</sup> Judicial District Court (docket #461513).

<sup>2</sup> That matter was assigned to Div. N of the 19<sup>th</sup> Judicial District Court (docket #461318).

**April 29, 2002** Service was perfected on Ashland for this request;  
**March 9, 2005** Motion to Compel filed by Delta to Ashland;<sup>3</sup>  
**March 15, 2005** Service was perfected on Ashland for this request;  
**March 9, 2005** Notice sent to Melinda Leonard on behalf of Reliant;  
 Notice sent to Bradley Myers on behalf of Ashland;  
**March 7, 2008** Request for interrogatories and propounded by Delta to Reliant;  
**March 25, 2008** Service was perfected;  
**April 30, 2008** Reliant filed *ex parte* motion to dismiss alleging abandonment;  
**Jan. 26, 2009** The matter was heard by the trial court;  
**March 17, 2009** Judgment was rendered dismissing Reliant;  
**April 14, 2009** Judgment was signed;

From that judgment, Delta appeals alleging that the trial court erred in failing to recognize formal steps taken by filing in the record and obtaining service of discovery, as governed by LSA-C.C.P. art. 561.

#### DISCUSSION

In this case, Delta asserts that there was no three year gap that would cause its action against Reliant to be abandoned. Reliant argues, however, that the action was **abandoned as to them**, since no action was taken involving Reliant between April 2002 and April 2008, a period of more than three years.

Abandonment actions are governed by Louisiana Code of Civil Procedure article 561(A)(1), which provides that an 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. Article 561 is self-executing; it occurs automatically upon the passing of three years without either party taking a step, and it is effective without a court order. **Compensation Specialties, L.L.C. v. New England Mutual Life Insurance Company**, 08-1549R, p. 5 (La.App. 1 Cir. 2/13/09), 6 So.3d 275, 279, *writ denied* 09-0575 (La. 4/24/09), 7 So.3d 1200. Article 561 imposes three

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<sup>3</sup> These documents appear in the supplemental record. Reliant acknowledges that they were filed in the record, and there is no dispute on this issue.

requirements on plaintiffs. First, plaintiffs must take some “step” towards prosecution of their lawsuit. In this context, a “step” is defined as taking formal action before the court that is 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 of the last step taken by either party. **Clark v. State Farm Mutual Automobile Insurance Company**, 00-3010, pp. 5-6 (La. 5/15/01), 785 So.2d 779, 784.

Reliant argues, citing **James v. Formosa Plastics Corporation of Louisiana**, 01-2056 (La. 4/3/02), 813 So.2d 335, that since it was not served with the propounded discovery to Ashland or the motion to compel said discovery, Delta’s action against Reliant was not being pursued in the trial court. At the hearing on the motion to dismiss, Reliant said that **James** answered the question about whether action against one co-defendant interrupts as to another, and it asserts that the answer is no. Reliant further stated that the policy behind that was to protect the unnoticed defendant. (Emphasis added.)

We disagree. Reliant is misconstruing the **James** holding. The Court ruled in **James** that steps taken in the appellate court do not count as steps taken in the district court to preclude abandonment as required by the statute. **James**, 01-2056, at p. 6, 813 So.2d at 339. Moreover, the discovery Delta propounded to Ashland was filed into the record. Also, Delta’s motion to compel Ashland to answer the discovery was also filed into the record. Thus, as Delta explained at the hearing, the focus is not directed to whether a party received notice; the focus is whether a step was taken in the prosecution of the lawsuit by any party.

It is well settled that when any party to a lawsuit takes formal action in the trial court, it is effective as to all parties. **Delta Development Company, Inc. v.**

**Jurgens**, 456 So.2d 145, 146 (La. 1984). The court in **Delta Development** concluded that the abandonment period was interrupted as to all co-defendants when only one defendant had been served with interrogatories that had been filed into the record. *See Id.*

Abandonment is not meant to dismiss actions on mere technicalities, but to dismiss actions that in fact clearly have been abandoned; article 561 is to be liberally construed in favor of maintaining a plaintiff's suit. **Clark v. State Farm**, 00-3010, p. 9, 785 So.2d at 786.

We therefore conclude that Delta's motion to compel Ashland to answer its previously propounded discovery on March 9, 2005 was a "step" in the prosecution that appeared in the record, which adequately gave notice to the co-defendants that the lawsuit has not been abandoned. Accordingly, since we have concluded that the trial court erred in ruling that Delta's claims against Reliant were abandoned for non-prosecution the judgment dismissing Delta on grounds of abandonment is hereby reversed.

#### **DECREE**

Based on the foregoing, the judgment of the trial court dismissing Delta American Corporation's claims against Reliant Technologies is reversed. The costs of this appeal are assessed to defendant/appellee, Reliant Technologies, Inc.

**REVERSED**